IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE READING COUNTY COURT
(HIS HONOUR JUDGE HOLDEN)

CCRTF 95/1224/C

Royal Courts of Justice
Strand
London WC2

Friday, 11 October 1996

B e f o r e:

LORD JUSTICE BELDAM
LORD JUSTICE WARD
LORD JUSTICE SCHIEMANN

- - - - - -

THEO PALOMARES

Plaintiff/Respondent

- v -

THE CHIEF CONSTABLE OF THAMES VALLEY POLICE

Defendant/Appellant

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
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MR. GEORGE ALLIOTT (Instructed by Messrs Barlow Lyde & Gilbert, London, EC3A 7NJ) appeared on behalf of the Appellant
MR. JONATHAN WATT-PRINGLE (Instructed by Messrs Iliffes Booth Bennett, Middlesex, UB8 1LQ) appeared on behalf of the Respondent

J U D G M E N T
(As approved by the Court)

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LORD JUSTICE BELDAM: The appellant, the Chief Constable of Thames Valley Police Authority, appeals from the judgment of His Honour Judge Holden and a jury in the Reading County Court on 6th July 1995 awarding the respondent, Mr Palomares, damages for false imprisonment and malicious prosecution amounting in all to £55,200 and interest on that sum.

The Facts

Although the action was tried in July 1995, the events from which the claim arose occurred on 7th August 1989. On that day two officers of the appellant's force, WPC Squibb and PC Bissessar, were patrolling Reading town centre. At about 12.30 pm they saw in Friar Street a brown Mercedes van parked near the junction with Union Street and about three metres out from the kerbside. The vehicle was unattended and was causing obstruction to traffic. WPC Squibb started to issue a fixed penalty notice, but while she was writing out the notice the respondent, to whom I shall refer as the plaintiff, arrived on the scene and said he was the driver of the van. He was told that he was being issued with a fixed penalty notice and he said: "It's all right. My company will pay." But then he got into the vehicle and started to move it and continued to drive off although WPC Squibb told him not to. She was standing with PC Bissessar in front of the vehicle on the offside noting down details of the vehicle. The plaintiff drove past, she said, closely missing her and PC Bissessar. He then parked about five to six metres away, got out of the van but subsequently returned, pushed past WPC Squibb and got into the van. He then became abusive and said:

> "You fucking police are all the same. Police are slime. You are all fucking corrupt and bent".

WPC Squibb warned him that if he continued swearing she would arrest him. He continued to swear, told PC Bissessar to stick his head up his arse, adding: "You've got a fucking attitude problem." WPC Squibb then arrested him for disorderly conduct under section 5 of the Public Order Act 1986. According to the police officers, he continued to be abusive and insulting. PC Bissessar told him to get out of the van and, as he did not, opened the driver's door, removed the ignition keys and took hold of the plaintiff's right arm. There ensued a fracas or struggle in which PC Bissessar's helmet came off and WPC Squibb was pushed against the side of the vehicle and, according to her, she sustained

bruising to her head and shoulder. The plaintiff claimed that all he was doing at this time was seeking to get from the cab of his vehicle an anti-asthmatic inhaler to take with him to the police station in case he became distressed there. Assistance was summoned by the two police officers and he was taken to the police station. He arrived in the custody office at Reading Police Station at 12.45 pm. The police station was busy, but details were taken from him by 12.55 pm. He was told he was being detained to be interviewed and he asked to make a call to his employers, United Parcel Services, which he did just after 1.00 pm. At about 1.10 pm the custody officer, Inspector Matthews, authorised his detention. At 2.10 pm the inspector was relieved by Sergeant Turnbull. Shortly after 4 pm the plaintiff was charged by PC Bissessar with four offences: assaulting WPC Squibb and occasioning her actual bodily harm; using threatening, abusive and insulting words and behaviour whereby WPC Squibb and PC Bissessar were likely to believe that immediate unlawful violence would be used contrary to section 4 of the Public Order Act, 1986; assaulting PC Bissessar contrary to section 51(1) of the Police Act 1964; and resisting WPC Squibb in the execution of her duty under the same section.

After his release from custody the plaintiff remained at the police station to give his version of the events at his own request. He was interviewed by PC Penny shortly before 5 pm and made a long statement in which he admitted that he had used swear words, admitted that he had been warned that he would be arrested if he used foul language again but denied the extent of his disorderly behaviour. The police officers had said that he had used the words: "You can stick your head up your arse". His version was: "I might as well stick my head up my arse for all the good it does."

He admitted he was then arrested and cautioned and was told why he was being arrested. He then described the actions of PC Bissessar, taking hold of his arm when he was in the cab of his vehicle. He said he had emphasised to the officers he was not going anywhere or to run off and said the struggle ensued when he wanted to get his inhaler from his vehicle. He also said:

> "I felt sorry for the girl because I mean she was sort of getting the full brunt of it all. I mean you can't stop 20 stone trying to get hold [of] an inhaler, but I wanted to make sure I had it on me so that if I was taken down to the police station it was with me."

Later he said:

> "I wanted to make sure I had it on me and that's where the ruckus started."

But, he said, it was through his obsession to get into his van that the ruckus began. He did not know whether WPC Squibb got hurt or not, but added: "I feel sorry for the girl and it was all through Harry the Hindu there, I mean, getting hold of me arm in the first place."

Later he said that he just had to make a rush for the inhaler and that was where it had all got out of hand. Finally he again said he was sorry for the girl police officer because she did not really want the situation to arise, but he thought it was heavy-handed of PC Bissessar. Finally, he added:

> "I just hope that, sort of, the girl is alright. I mean, this is, no woman should take that sort of, you know. I know it's their job and everything but I don't go around, it's not my policy to go around upsetting anyone, least of all women. I mean, police women especially and that's really, you know, all I've got to say."

He was given a notice to appear at Reading and Sonning Magistrates Court on 4th September 1989.

The plaintiff eventually appeared at Reading Magistrates Court on 10th January 1990 to answer the offences with which he had been charged with the variation that the Crown Prosecution Service who had then taken over the handling of the proceedings had substituted for the offence under section 47 of the Offences Against The Persons Act a charge of assaulting WPC Squibb in the execution of her duty and had substituted an offence under section 5 of the Public Order Act for the offence under section 4 in the original offences charged. In the meantime, after the plaintiff had made the telephone call from the police station to his employer UPS, because, of course, he was in the process of making deliveries

for them - he said that when he reported for work the next day he was suspended. A disciplinary hearing was then held into the events of 7th August.

On 12th September 1989 UPS dismissed him for gross misconduct for unruly behaviour in a public place bringing the company's name into disrepute. Apparently he accepted the company's decision and did not pursue the appeal procedure in the company's disciplinary manual. He accepted his dismissal.

On 10th January 1990, after hearing evidence from the two police officers, the Reading Magistrates decided that there was no case for the plaintiff to answer and dismissed the four charges. The proceedings thus having ended in his favour, the plaintiff launched proceedings claiming damages from the appellant authority, including aggravated and exemplary damages for malicious prosecution and false imprisonment. He originally claimed that he had lost a total of 176 weeks earnings amounting to a net loss of £23,000. This was subsequently increased to £31,000 and was claimed as special damages. In the event we were told the claim for loss of earnings as special damages of £31,000 was abandoned.

In opening the plaintiff's case to the jury Mr Watt-Pringle told them that in the most general way they had to decide whether they believed Mr Palomares' account of what took place between the two police officers and himself or whether they believed the two police officers. More specifically, he said, they would have to decide whether the plaintiff was arrested for disorderly conduct by WPC Squibb or for the more serious offence of threatening behaviour. They were also told that they would have to decide whether he was told at the time of his arrest the reason for it. Secondly, the jury would have to decide what took place immediately following the arrest. If they decided that the plaintiff's arrest was unlawful, then he had been assaulted.

Next, the jury were told they must decide whether he was kept in the police station, locked in his cell

for longer than was necessary. Could he have been charged sooner or was he detained for 3 hours 20 minutes longer than he need have been? Finally they had to decide whether he had been maliciously prosecuted. On this issue the question they had to determine was whether the police officers honestly believed that the plaintiff was guilty of the offences for which he was charged or did they put forward evidence in support of these charges which they knew to be untrue? Finally, if they decided in the plaintiff's favour, they would have to decide the proper compensation. They were also invited to award exemplary damages and aggravated damages.

It seemed to His Honour Judge Holden and to counsel that the task of the jury might be simplified if the issues of fact the jury had to determine were reduced to four questions which would enable the judge to rule whether in law the plaintiff had established his case. The four questions were:

> "Has the Defendant satisfied you that:-
>
> (1) Before his arrest
>
> > (a) Mr Palomares used the words alleged by WPC Squibb and PC Bissessar;
> >
> > and
> >
> > (b) these words were heard by person(s) likely to be caused harassment, alarm or distress thereby?
>
> (2) WPC Squibb told Mr Palomares at the time of his arrest that she was arresting him for disorderly conduct?
>
> Has the Defendant satisfied you that:-
>
> (3) Mr Palomares was charged as soon as reasonably practicable?
>
> Has the Plaintiff satisfied you that:-
>
> (4) Pc Bissessar and WPC Squibb did not honestly believe that he was guilty of the four offences for which he was prosecuted?"

As is so frequently the case, the agreement of the four questions to simplify the jury's task turned out to

be a mirage.

In the course of the plaintiff's evidence in chief, the jury were invited to listen to the tape recording of the plaintiff's interview. In that interview, as I have already indicated, he made a number of material statements which were capable of amounting to admissions or at least corroborating the account given by WPC Squibb about what had happened. He adopted the account of events in that tape recording saying:

> "That's exactly how it was."

The judge and counsel seemed to have taken the view that the result of the case would be completely decided by the jury determining which account of the events in Friar Street they accepted. Counsel for the parties concentrated on the credibility of their respective witnesses. This appears to have led the judge also to consider that in reality the case turned entirely on whether the jury believed the account given by the police officers or believed the plaintiff's account. It seems hardly to have crossed the minds of the judge and counsel that the jury might believe the police officers on some issues and the plaintiff on others. In the result, the judge began his summing up by saying that the issues were very clear cut and that it was not a complicated case. He told them that he was not really going to say anything about the law because they were asked to reach certain conclusions of fact and he referred to the four questions which he told the jury related to the lawfulness of the arrest, the lawfulness of the detention and the question whether or not there was a malicious prosecution. He directed them correctly about the standard of proof in civil cases and where the burden of proving particular facts in the four questions lay. He said:

> "All that this court requires you to do is to put your minds to the evidence to formulate answers to the questions, answers to the questions which are absolutely a matter of fact. One thing which I certainly agree with both counsel on is quite obvious, is it not? It is absolutely a matter of fact, is it not, who is to be believed, bearing in mind what I have

> said in relation to the standard of proof."

After saying that the accounts of the police officers, on the one hand, and the plaintiff on the other were diametrically opposed, he reminded the jury of the events before the plaintiff's arrest as related by WPC Squibb and PC Bissessar. He then reminded the jury of the plaintiff's evidence as to what was said during that period and his explanation. He told the jury that there was really little dispute about the question in the second part, that is 1(b) of question 1, and that it would not cause them a great deal of difficulty. Passing to what happened after the arrest, he dealt in a very perfunctory way with the plaintiff's trying to get at his inhaler and that the police officers had said that he had been playing to the crowd, concluding:

> "A matter of fact: a matter for you to consider."

Next he passed to the lawfulness of the detention and summarised the evidence of Sergeant Turnbull (now Inspector Turnbull). He said:

> "It is entirely a matter for you but is it unreasonable to realise or to accept the fact that enquiries do have to be made about a person's identity? It would seem to me a matter for you to be quite sensible that one ought to sort out the question of identities before there is any question of charging or even releasing. Checks do have to be made. Well, it is a matter for you. You have got the timing. Does it sound a reasonable period? That is what it comes to. Was it too long? Something for you to consider ..."

Finally he came to the fourth question of malicious prosecution. He said:

> "I am not going to say anything about that. You will appreciate, of course, that your considerations there are going to be substantially affected by the view you take of the evidence in relation to what I have said about the lawfulness of the arrest and I think it has been put very sensibly. The plaintiff's case is that these two officers fabricated this evidence that they were acting without a proper motive, improper motives, to cover their tracks for whatever reason and again it is an aspect, a matter essentially of credibility, the view you take of the people you have heard, the officers on the one hand and the plaintiff on the other."

In due course, after the judge had given them a majority direction, the jury returned their answers. They said that the defendant had satisfied them that before his arrest the plaintiff had used the words

alleged by WPC Squibb and PC Bissessar and that the words were heard by persons likely to be caused harassment, alarm or distress. They had also been satisfied that WPC Squibb told the plaintiff at the time of his arrest that she was arresting him for disorderly conduct.

They concluded that the defendant had not satisfied them that the plaintiff had been charged as soon as was reasonably practicable and finally, in answer to question 4, that the plaintiff had satisfied them that PC Bissessar and WPC Squibb did not honestly believe that he was guilty of the four offences for which he was prosecuted. There were, of course, differences between the offences with which he was charged originally and those which were dismissed by the Magistrates, but for the purpose of question 4, it was apparently accepted that the relevant offences were those with which he had originally been charged.

After the jury had delivered the answers to the questions, extensive discussion ensued between the judge and counsel as to the effect of these answers. Mr Alliott, who appeared for the defendant authority, considered that some clarification was required and the judge agreed saying:

> "I mean this is illogical, you see."

So the jury were summoned back and the judge took the foreman through the answers to the questions. After reminding the jury of their answers to questions 1 and 2, he said:

> "But that on the face of it appears to be somewhat inconsistent with your findings in relation to 4. Do you see that? Because it reads to me as if you support the Chief Constable in relation to what happened in Friar Street, the circumstances of the arrest, but having done so you take the view that this was a malicious prosecution and I find that very difficult to follow. And I am wondering quite frankly, if instead of 'Yes' in answer to the first question (A) and (B) and in relation to 4, it should have been 'No' or vice versa. Do you see what I mean?"

He then invited the jury to retire to consider what the position was and one of their number, recorded apparently incorrectly as the foreman, said,

> "Sir, can I say something?"

The judge said: "Yes" and the juryman said:

> "We decided there was probably an offence committed but not four offences. So it is not as serious as we originally thought, so is the way we have done it now still viable?"

Receiving that answer, Judge Holden felt it was essential to have further discussion with counsel and to consider with them whether the answers to the questions were in fact reconcilable. The judge decided that further clarification was necessary because on the face of the statement by the foreman the jury had decided that one of the offences was made out but had not declared which and the jury were therefore invited to reconsider their answer as follows:

> "Will you please identify which of the charges on page 8 and 9 of the small bundle WPC Squibb and PC Bissessar did not honestly believe Mr Palomares was guilty of. I will repeat that" [said the judge] "because it is important that you get it, I am sure you will do, please identify which of the charges and of course you will understand we are talking about the four charges rather than for me to read them out again, if you simply look at those pages 8 and 9 that will remind you - did the two officers that are primarily concerned in the case, Squibb and Bissessar, [he is the sergeant] did not honestly believe Mr Palomares, the plaintiff here, was guilty of."

In answer to that question, the foreman later announced:

> "On the four charges, on all of them, we have got no charges against all four of them."

Judge Holden:

> "No charges, yes;" were justified effectively. Is this what you are saying?"

Foreman:

> "Yes."

Judge Holden:

"Do not let me tell you what to say. You explain exactly what you mean."

Foreman:

"There is no belief that charges should be charged there."

Judge Holden:

"None of them?"

Foreman:

"None of them."

Judge Holden:

"No reasonable belief in relation to all charges?"

Foreman:

"No."

Although it is not recorded in the transcript as having been said by the foreman of the jury, Mr Alliott referred immediately afterwards to the way that the answer had been given by the foreman:

"No reasonable belief as regards any of the charges is what I have noted down",

Certainly the judge appears to have repeated to the juryman:

"No reasonable belief?"

And Mr Watt-Pringle did not dispute then that was the epithet used by the foreman of the jury.

Having received these answers, counsel then addressed the jury on the issue of damages and the judge summed-up that issue to them. He dealt very generally with the three types of damages: compensatory,

aggravated and exemplary, but made only a passing reference to the claim that the plaintiff had said that he had lost his job as a result of the incident. He gave no guidance to the jury on the question whether the plaintiff's dismissal for unruly conduct bringing his employer's name into disrepute could properly be regarded as a consequence of his prosecution. The jury had found that he had behaved in a way which justified WPC Squibb warning him and arresting him for disorderly behaviour. The plaintiff had originally said that it was the police who informed his employers that he had been arrested but in fact he had done so himself and had to do so because he was engaged on deliveries at the time. Although it was not before the jury, there is a note of the disciplinary hearing in summary form from which it is clear that the plaintiff had given an account similar to that in his interview with the police in which he admitted using some degree of force to try to get his inhaler.

The jury then delivered their verdict on damages awarding the plaintiff £55,200. It was made up in this way: for compensatory damages generally, £15,000; for wrongful detention, £200; for loss of employment, £30,000; for aggravated damages, £2,000 and for exemplary damages, £8,000.

In this appeal Mr Alliott has raised a number of arguments. Principally he contends that the jury's answers to the questions 1 and 2 on the one hand and question 4 on the other were inconsistent having regard to the way in which the case had been presented to the jury by both counsel and by the judge. Further he contends that in the interview which the plaintiff gave at his own request after he had been charged, the plaintiff admitted facts which amounted in law to the offence of assault on WPC Squibb, and obstructing her in the course of her duties.

He complains that the jury were never directed upon the question whether, assuming insulting words and behaviour were used, as they had found, WPC Squibb was likely to believe that unlawful violence would be used. Unlawful violence had been used. The jury had found that the words alleged by WPC Squibb and PC Bissessar had been used and that they were heard by persons likely to be caused

harassment, alarm and distress and Mr Alliott argues had the jury been properly and fully directed it is most unlikely that they could have produced the answers to the questions left to them which they did. Further it is clear that when the jury answered the additional questions in the terms they did, and as he said, using the words: "No reasonable belief", they appeared to be applying the wrong test. The plaintiff had to prove a lack of honest belief and whilst the jury may have felt that it was not reasonable for the officers to believe that the four offences had been committed, they could still have honestly believed that they had been.

Mr Alliott also argued that the jury's award was excessive. Leaving aside the sum of £30,000 in respect of loss of the plaintiff's employment, an award of £15,000 general damages in the circumstances, £2,000 in respect of aggravated damages and £8,000 in respect of exemplary damages was wholly excessive. He asked the court to give guidance whether the time had now come in cases brought against police authorities for wrongful arrest, false imprisonment and malicious prosecution for the jury to be able to receive assistance from counsel and the judge about the respective value of awards in personal injury actions and to be directed to have regard to such awards in deciding what damages to award in such actions. The need for such guidance, having regard to the size of some awards and to this award, was just as great as in the case of defamation. In such cases, in John v MGN [1996] 2 AER 35 the Master of the Rolls, Lord Bingham, had stated that the time had come to permit reference to comparable awards in personal injury cases, so counsel should also be able to do so in actions for wrongful arrest, false imprisonment and malicious prosecution, and the jury were entitled, similarly, to receive such assistance.

In the present case, the award of £30,000 in respect of loss of the plaintiff's employment should be set aside. The judge had failed to direct the jury at all on the necessary legal connection between loss of employment and malicious prosecution and in particular whether the actions of the plaintiff's employers were a consequence of the disorderly conduct and would have resulted in his loss of

employment in any event.

Regrettably he submitted, if the appeal was allowed, the court should order the case to be retried in its entirety. For the plaintiff Mr Watt-Pringle argued that the decision of the jury could not be overturned. The answers to questions 1 and 2 and to question 4 were not irreconcilable; the jury had obviously taken the view that although the plaintiff had been guilty of disorderly conduct and had committed an offence against section 5 of the Public Order Act that the two officers had, in effect, in colloquial terms, thrown the book at him or painted the lily when they had no honest belief that the other offences had been committed. The judge was right to leave the case to the jury on the basis that everything turned on whom they believed. It was unnecessary for the judge to give the jury any other guidance. There was no proper basis for inferring that the jury had applied the wrong test when answering the supplemental question.

As to the issue of damages, the claim for £30,000 for loss of his job as special damage had been withdrawn, but in making their award of general damages the jury had themselves fixed on the figure of £30,000 and had specified that it was in respect of his loss of employment. They were entitled to make such an award on the basis of the plaintiff's evidence that he had lost his employment and no direction on the causal relationship between loss of the employment and the malicious prosecution was necessary.

In my judgment this appeal succeeds. Before deciding on the questions to be left to the jury and the nature and the extent of the directions to be given to the jury by the judge in the summing-up, judges and counsel in cases brought for the tort of malicious prosecution would do well to study the speeches in the case of Glinski v McIver [1962] AC 726. At p. 742 Viscount Simonds said:

> "My Lords, such difficulty as there is in the correct statement and application of the law as to want of reasonable and probable cause, arises from the fact that, while it is for the judge to determine (whether as fact or law) whether there was such want, it is for the jury to determine

> any disputed facts which are relevant to that determination, and this difficulty is reflected in the controversy in this case before your Lordships and in the Court of Appeal whether the second question was correctly left to the jury: "Did the respondent honestly believe ..." and so on."

At p. 743 he said:

> "Let me here interpolate an important principle in this branch of the law. Since the case of Sutton v Johnstone, [1785] 1 Term Rep 493, and no doubt earlier, it has been a rule rigidly observed in theory if not in practice that, though from want of probable cause malice may be and often is inferred, even from the most express malice, want of probable cause, of which honest belief is an ingredient, is not to be inferred. I think that the importance of observing this rule cannot be exaggerated, for it is just at this stage that a jury inflamed by its own finding of malice may proceed almost automatically to a finding of want of honest belief. It is, of course, possible that the same facts may justify both findings. But it behoves the judge to be double careful not to leave the question of honest belief to the jury unless there is affirmative evidence of the want of it. That is a matter of great importance in the present case."

At p. 753 Lord Radcliffe said:

> "The whole point of the present appeal, as I see it, is whether there was any evidence capable of supporting their second finding that on September 29, 1955 (which is agreed to be the relevant date), the respondent did not honestly believe that the appellant was guilty of the offence of conspiracy to defraud. For, if there was no such evidence, then no question ought to have been put to them on this issue and the learned trial judge, instead of concluding, as I think that he must have, that their answer required him to hold that there was an absence of reasonable and probable cause moving the respondent, should have considered independently whether there was such reasonable and probable cause for the action that the respondent took. Had he done so, I agree with the view taken by the Court of Appeal that the correct answer should have been that there was such cause.
>
> The action for malicious prosecution is by now a well-trodden path. I take it to be settled law that if the defendant can be shown to have initiated the prosecution without himself holding an honest belief in the truth of the charge (I must, of course, refine on this phrase later) he cannot be said to have acted upon reasonable and probable cause. The connection between the two ideas is not very close at first sight for one would suppose that there might well exist reasonable and probable cause in the objective sense, what one might call a good case, irrespective of the state of the prosecutor's own mind or his personal attitude towards the validity of the case. The answer is, I think, that the ultimate question is not so much whether there is reasonable or probable cause in fact as whether the prosecutor, in launching his charge, was motivated by what presented itself to him as a reasonable and probable cause. Hence, if he did not believe that there was one, he must have been in the wrong.
>
> On the other hand, I take it to be equally well settled that mere belief in the truth of his charge does not protect an unsuccessful prosecutor, given, of course, malice, if the circumstances before him would not have led "an ordinarily prudent and cautious man" to conclude that the person charged was probably guilty of the offence."

At p. 758 Lord Denning said:

> "My Lord, in Hicks v Faulkner 8 QB 167 Hawkins J. put forward a definition of "reasonable and probable cause" which later received the approval of this House. He defined it as an "honest belief in the guilty of the accused" and proceeded to detail its constituent elements. The definition was appropriate enough there. It was, I suspect, tailor-made to fit the measurements of that exceptional case. It may fit other outsize measurements too. But experience has shown that it does not fit the ordinary run of cases. It is a mistake to treat it as a touchstone. It cannot serve as a substitute for the rule of law which says that, in order to succeed in an action for malicious prosecution, the plaintiff must prove to the satisfaction of the judge that, at the time when the charge was made, there was an absence of reasonable and probable cause for the prosecution. Let me give some of the reasons which show how careful the judge must be before he put to the jury the question: "Did the defendant honestly believe that the accused was guilty?""

Lord Devlin too drew attention to the danger that a jury might be misled by a question in the form left to them in that case in which the word "guilty" was used without qualification. At page 767 he said:

> "The defendant at the trial is usually pressed, as he was in the present case, to declare that he no longer believes that the plaintiff was guilty. Where, as here, the defence was not called on at the criminal trial, and the only new factor for the defendant to weight is the trial judge's ruling that there was no case to go to the jury, or no case on which it would be safe for them to convict, the jury in the civil case may ask themselves whether that would be enough to cause an honest man to change his belief. They may not appreciate, unless they are carefully directed in the summing-up that there is a substantial difference between a case that warrants the making of a charge and one that survives the test of cross-examination with sufficient strength left in it to require consideration by a jury which is concerned only with guilt beyond reasonable doubt."

In the circumstances of this case it is helpful to refer to a further passage from Lord Denning's judgment. At page 760 Lord Denning drew attention to the fact that the circumstances of cases of malicious prosecution differ markedly and he gave four instances or types of case. The first type were those cases where the facts and information known to the prosecutor are not in doubt. Next he turned to the second type of case and said:

> "Secondly, there are some cases where the prosecutor is personally involved, so much so that his own evidence is the very basis of the case for the prosecution: and it is flatly contradicted by the evidence of the accused. The issue then appears simple. If he was speaking the truth, there was good cause for the prosecution. If he was lying, there was

> no cause for it. In these cases he has to face the fact that his evidence has not been accepted at the criminal trial: for the accused man has been acquitted. But this does not mean that there was no reasonable or probable cause for prosecution. It depends on his state of mind when he launched the charge. If he honestly believed that the facts were as he stated, then, even though it turned out to be a mistaken belief, he would have reasonable and probable cause to prosecute: but if he had no such honest belief and was consciously putting forward a false case, he would, of course, have no cause to prosecute: see Venafra v. Johnson; Hinton v Heather. In such cases the judge may properly put to the jury the question: Did he honestly believe in the guilt of the accused? or, as I would prefer: Did he honestly believe in the case he put forward? for that is the core of the matter: see Hicks v. Faulkner; Tempest v. Snowdon."

He then passed to the third type of case. The relationship of honest belief in the guilt of the accused and the question whether there was reasonable and probable cause for a prosecution has caused difficulty for years. The first question is a question for the jury and the second has traditionally been reserved for the judge, but as is clear from the passages in the judgments to which I have referred, whether an inference that no honest belief in the guilt of the accused can properly be drawn may depend upon the surrounding facts and whether there is reasonable and probable cause to believe that the accused has committed the offence. Equally, however, if there is no honest belief in the guilt of the accused it does not follow, as Lord Denning pointed out, that there may not have been reasonable and probable cause and the effect of the jury's findings on the question left to them: "Did the prosecutor honestly believe in the guilt of the accused", may of course be a relevant factor in determining whether, in the circumstances of the particular case, there was reasonable and probable cause.

In the present case counsel and the judge seem to have thought that this case could properly be left to the jury upon the basis described by Lord Denning that there was a flat contradiction between the evidence of WPC Squibb and PC Bissessar on the one hand and the evidence of the plaintiff. This, however, was far from the true position. Once the plaintiff had said that the account he had given in the interview, held at his own request when he had been released from custody, was true, there was a good deal of common ground with the evidence given by the police officers. Much was made by Mr Watt-Pringle in his conventional attack on the credibility of the police officers of whether they had

compiled their statements together and in collaboration as if there was something improper in their doing so.

In this case it seems to me that the adversarial system served rather to obscure than to elicit the true issues of the jury. It was not, in my view, a case which could be left to the jury on the simplistic basis of who was telling the truth and the judge was wrong when he summed up to tell them that everything depended upon who was to be believed.

What then were the issues of fact which remained for the jury's determination? The plaintiff had admitted that he swore and had been warned by WPC Squibb and that he used an offensive expression, though in a different context, after the warning. He admitted that he had been told why he had been arrested and that he was being arrested. The question for the jury was: "Was his language within section 5 of the Public Order Act abusive or insulting and was his behaviour disorderly? Was it within the hearing and sight of persons likely to be caused alarm or distress?" On this second issue, as I have said, the judge seems to have thought there was really very little dispute that it was. The significance of this issue is obvious: "Was the arrest of the plaintiff lawful?", and if it was, the officers were then, in fact, acting in the execution of their duty. It was not in dispute that the plaintiff moved his vehicle after he had been told by the officers not to do so. It was suggested that he did not do so in the way described by WPC Squibb, but this issue was only of peripheral importance to the question whether the officers could honestly believe in the charges which were subsequently preferred.

As to the mode of arrest, there was again little dispute. The plaintiff admitted he was in the cab of his lorry. PC Bissessar took the keys from the ignition and put his hand on the plaintiff's arm to indicate to him he was under arrest. This, the plaintiff resented. As to the subsequent struggle or ruckus, as the plaintiff described it, in which he admitted that WPC Squibb "got the brunt of it" and "should not have had to suffer it", and in which the plaintiff admitted that he did not have to get his inhaler at that time

and that he only wanted it to make sure that he had it in case he had an attack in the police station, he clearly admitted that he was trying to get back into his van. In the struggle which ensued WPC Squibb said she had been thrown against the side of the van and had suffered bruising. The only basis for a suggestion that she had not suffered bruising, which in law would amount to actual bodily harm, was that no police surgeon had been summoned to the police station. It was, in my view, a very thin basis for saying that she was lying when she said that she had suffered bruising. Thus, as the plaintiff at the time had said, he was complaining of PC Bissessar being, as he described it, heavy-handed and, in my view, the circumstances did require a very careful consideration of the evidence and direction to the jury with the issues clearly identified for them. They were not directed how they should approach question 4 if they answered questions 1 and 2 in the defendant's favour, as they did. There was no attempt by the judge to identify the facts which were not in dispute or to direct the jury that it was their duty as far as possible to reconcile the two accounts to arrive at the underlying facts and not to approach the case on the basis that one or other of the witnesses was lying. As is clear from Viscount Simonds' speech to which I have referred, although the issue whether there was reasonable and probable cause for the prosecution is relevant to the question the jury had to decide whether the two police officers honestly believed in the guilt of the plaintiff, it seems likely from the exchange which occurred after the jury had answered the supplemental question that they were taking the view that it was not reasonable to believe that the four additional offences had been committed. But if the two police officers were, in fact, acting in the execution of their duty and PC Bissessar had not used unnecessary force in placing his hand on the plaintiff to make it clear he was under arrest the ingredients of the two offences under section 51 of the Police Act 1964 could well have been established; similarly, unless they took the view that because no police surgeon was called WPC Squibb was lying about her bruising, an offence of assault occasioning actual bodily harm could have been made out. The only question on the remaining charge under section 4 of the Public Order Act was whether any person was likely from the abusive and insulting words and behaviour to have believed that unlawful violence was likely to be used and whether the plaintiff intended that it should be. Even if

the jury were satisfied that the two police officers did not honestly believe this, that charge was not persisted in and had been abandoned by the time the case came before the Magistrates whose somewhat incomprehensible decision that there was no case to answer on any of the four charges was beside the point.

At the present time all courts are under great pressure. It must often be the case that police constables involved in a situation similar to the situation faced by WPC Squibb and PC Bissessar honestly believe that charges are justified in the circumstances as they appear to them, although ultimately different or less serious charges are preferred before the Court. If it is to be contended that in preferring charges police officers in these circumstances have acted with malice it is obvious that the jury must be scrupulously and carefully directed if injustice is not to be done.
For example, in the present case the jury clearly decided in effect that the plaintiff had been lawfully arrested. From the officers' point of view a determined and sustained effort by the plaintiff to get back into his van, whatever reason he may have given for it, was capable of seeming to them an effort to resist arrest or to obstruct them in their duty. The jury were never directed on the real issues they had to decide and the observations which came from the jury certainly suggested, as I have said, that they may well have approached this matter on the wrong basis.

In these circumstances I am satisfied that the decision of the jury cannot stand. There were, in my view, such serious omissions from the judge's summing-up and directions to the jury that this defendant was deprived of a reasonable prospect of a verdict in his favour on question 4. A substantial wrong or miscarriage has occurred.

Accordingly, I would set aside the decision of the jury. I would add that on the submission on the issue of damage I have no doubt that there was no proper legal basis for the jury's award of £30,000 in respect of the loss of the plaintiff's employment. Equally, the jury were given no guidance about the

legal relationship between that loss and the wrong complained of.

This court was as appalled as Mr Alliott at the prospect of this matter returning for a retrial and we explored in argument the possibility that only some of the issues or questions should be remitted for retrial but in the result concluded that it would be unsatisfactory to do so. Accordingly, I would set aside the decision of the jury and the judgment based upon it and order that this matter be retried.

Before concluding this judgment I would revert to Mr Alliott's request that the court should give guidance whether the time has now come in cases of wrongful arrest, false imprisonment and malicious prosecution for counsel to be allowed and for the judge to refer to conventional awards in personal injury cases as a guide to the jury, at least to the scale of general damages which they should contemplate for these wrongs.

The impetus for the change of practice in defamation cases is clearly set out by the Master of the Rolls in his judgment in John v MGN Limited. Whether it is right that compensatory damages in wrongful arrest and malicious prosecution cases are today being awarded which are out of proportion to any wrong suffered is not readily apparent from the award in the present case or from any cases reliably reported to which our attention has been drawn. The court understands that there are cases waiting to be heard in another division of this court in which the question may arise and, for my part, I consider it more desirable that authoritative guidance should be given in such cases rather than in the present case in which for the reasons which I have ventured to state we are remitting the case for a retrial. By the time of such retrial authoritative guidance may well be available. I would therefore decline the invitation to give the guidance suggested.

LORD JUSTICE WARD: I agree, as my Lord has shown, there was unfortunately much muddled thinking in the court below. I have some sympathy for this predicament because the elements of the

tort of malicious prosecution are not easy to separate. If the defendant was liable at all he was liable for instituting through his servant, the two police officers, the prosecution of the plaintiff for one or more of the offences charged. The burden is on the plaintiff to show that each of those prosecutions were launched without reasonable and probable cause. There would be no reasonable and probable cause for it if the officers did not believe that there was a proper case to lay before the Court. The plaintiff must also prove that the prosecution was launched maliciously for some wrongful or improper motive, that is to say the desire to use the legal process for some other than its legally and appropriate purpose.

It is, however, necessary to distinguish between honesty of belief and honesty of motive. Absence of genuine belief in the accusation made may be and usually is sufficient evidence of malice, but malice is in general never evidence of want of reasonable cause because a prosecution may be inspired by malice and yet have a genuine belief that there are good grounds for laying the charges.

Lord Denning put it this way in Glinski v McIver [1962] AC 726 at 762:

> "It must always be remembered that, if a charge is genuine, the mere fact that the prosecutor has made an unfair use of it will not take away his protection. It may show malice, but it does not raise any inference of a belief that there was no reasonable or probable cause: see Turner v. Ambler" [(1847) 10 Q.B. 252, 261] "by Lord Denman C.J."

The passage in the judgment of Lord Denman reads:

> "The unfair use made of the charge may prove malice, as the jury held that it did, but does not raise any inference of a belief that there was no reasonable or probable cause; for the contrary belief is perfectly consistent with malice. "

If therefore in any case the charges are totally concocted, which of course is likely to be something very different from simply whether or not the officers sat down together and wrote their statements together, then proof of that concoction is clearly relevant to any absence of honest belief in guilt.

If, on the other hand, and I express no view at all whether she did so or not, the woman police officer in this case embellished otherwise truthful evidence by, for example, saying that she recollected the plaintiff's referring to PC Bissessar as `Harry the Hindu' when truly she had no recollection of the use of those words and took them from her reading of the plaintiff's statement, then careful direction needs to be given to assist the jury to decide whether this shows absence of honest belief in the appropriateness of the prosecution for what did, in fact, happen or whether it goes only to her motivation to go to improper lengths to secure the conviction which the actual events may have truly justified.

For the reasons given by my Lord the jury had inadequate assistance from the learned judge in this case in the respects he has enumerated and with which I agree. I therefore agree with his conclusion that this case must unfortunately be returned for further rehearing. I add, however, my horror at the prospects of a retrial so long after the event and I earnestly hope that both parties will take stock of their respective positions in the light of our judgments.

LORD JUSTICE SCHIEMANN: I agree with the course proposed by my Lords.

LORD JUSTICE BELDAM: Yes, Mr Alliott?

MR ALLIOTT: My Lords, insofar as the costs of the trial below are concerned, it seems to me that they ought to be in the cause. I do not know if my learned friend -----

MR WATT-PRINGLE: I would accept that, my Lord.

LORD JUSTICE BELDAM: Yes, I appreciate that, if the parties are agreed.

MR WATT-PRINGLE: I agree to in the cause of the retrial, my Lord.

MR ALLIOTT: Yes.

LORD JUSTICE BELDAM: That is another matter. That is why I hesitated.

MR WATT-PRINGLE: I see.

LORD JUSTICE SCHIEMANN: That is what you meant too, is it not?

MR ALLIOTT: Yes, my Lords. I think that must be so.

LORD JUSTICE SCHIEMANN: As it followed the ultimate event.

MR ALLIOTT: Indeed. Insofar as the costs of the appeal are concerned, as you may be aware, Mr Palomares is legally assisted and in those circumstances I have made an application against the Legal Aid Board or central funds for the respondent's costs.

LORD JUSTICE BELDAM: On what basis - because we have sent the case back for retrial?

MR ALLIOTT: My Lord, yes, because I have been successful in this court insofar as a retrial is concerned and that was resisted by the respondent. So insofar as the appeal is concerned, it is my submission that I have been successful.

LORD JUSTICE WARD: But in a sense only upon the basis that we disagree with the course of action that you both agreed should be adopted. You are to that extent the author of your own misfortune, are you not?

MR ALLIOTT: My Lords, I can see that point, but ultimately, notwithstanding counsel, the failing identified is in relation to the trial judge.

LORD JUSTICE BELDAM: The position really is this, as my Lord has said, there was an agreed course which this trial took in the sense that the judge was encouraged to leave the matter to the jury on the basis of it all turned on who was believed and in the result the jury were then not given the assistance which, as I tried to indicate, they ought to have had and that, as I have said, resulted in the injustice. But why should not the costs of this appeal, either be no order as to costs or costs in the cause, as it were? You see, we could only make an order against the Law Society on the basis that we would otherwise have made an order against the plaintiff.

MR ALLIOTT: My Lords, of course. I jump the gun by going straight to the Law Society rather than -----

LORD JUSTICE BELDAM: I understood that, but that is why I was merely explaining why it seemed to me that in the circumstances of this case it might be - although you have been successful in seeking an order for a retrial, what was the position of the plaintiff? I mean, he was almost bound, was he not, to resist an order for a retrial? He would be as appalled as you were at the prospect.

MR ALLIOTT: My Lord, yes, but he lost.

LORD JUSTICE SCHIEMANN: He took the perfectly fair point, drawing our attention to various cases, that you had not taken below some of the points that have appealed to this court and indeed the essential points and in those circumstances you are really quite lucky that we allowed the points to be taken, is the way he would put it.

MR ALLIOTT: My Lords, the points only really arise after the verdicts are delivered. In terms of the nature of the question to be put to the jury -----

LORD JUSTICE BELDAM: Yes.

MR ALLIOTT: I take your Lordships' point and do not defer from it, but in relation to the balance it would be my submission that they arise following the verdicts and an analysis of the position that the parties were left in.

LORD JUSTICE SCHIEMANN: It all arose from that question really.

MR ALLIOTT: I cannot deny that, my Lord.

LORD JUSTICE WARD: The first requisite for our making an order against the Law Society is that we have the right to make an order against him.

MR ALLIOTT: My Lord, yes, I jumped the gun. My application is for an order for costs against the respondent and -----

LORD JUSTICE BELDAM: Not to be enforced - that would be the orders we would make.

MR ALLIOTT: In the standard terms, my Lords, yes, sorry.

LORD JUSTICE BELDAM: What if at the rehearing he succeeds?

MR ALLIOTT: He will get his costs of the first trial and the second trial.

LORD JUSTICE BELDAM: But why should he be, as it were, out of pocket for the costs of this appeal which -----

MR ALLIOTT: Because he, my Lord, could have said yes. There has obviously been a hiatus in terms of the summing-up, I am concerned for this matter going for a retrial and there would have been no need for this appeal over the course of three days.

LORD JUSTICE BELDAM: You say it is really wrongly resisted, this appeal; it was so obvious a matter that Mr Watt-Pringle is not justified in seeking to support it.

MR ALLIOTT: My Lord, I do not go that far. What I do say is the day has gone my way and costs should follow the event. It may be perfectly reasonable for him to have resisted it, but that is a value judgment. This court is seized of these matters often.

LORD JUSTICE BELDAM: Of course the costs are entirely within our discretion and the fact that the day went your way is only really a pre-condition to your being able to ask us to exercise it.

MR ALLIOTT: My Lord, it would be my submission that if my first application is not attractive then all costs should be in the cause.

LORD JUSTICE BELDAM: Yes.

MR WATT-PRINGLE: My Lord, I would submit that that is the appropriate costs order to make. The costs of the first hearing and of this appeal should be in the cause of the retrial.

LORD JUSTICE BELDAM: Yes. I think I did mention just in the course of discussion the possibility that there should be no order for costs of the appeal on the basis that perhaps each party contributed to the necessity for the appeal. You did not actually address me on that. I know your principal submission is that the costs should be yours against the Law Society or alternatively in the cause, but what would you say, have you any further submission?

MR ALLIOTT: No.

LORD JUSTICE BELDAM: Would you wish to make any further submission?

MR WATT-PRINGLE: I would only add this, my Lord, that with deference, the plaintiff's case was put on the basis, which was a reasonable basis, and that was acceded to by the defendant and approved by the judge, and the plaintiff was not unconscientious in the way that his case was put at trial, and so I would ask that the costs awarded, that we both appear to be agreed as appropriate, should be made by this court.

LORD JUSTICE WARD: Even if you lose at the end of the day and have to pay the whole whack.

MR WATT-PRINGLE: My Lord, he does have the protection of Legal Aid to that extent. I would also ask for Legal Aid taxation.

LORD JUSTICE BELDAM: Of course.

MR WATT-PRINGLE: In respect of the appeal costs.

LORD JUSTICE BELDAM: We make no order for the costs of the appeal. The costs below will follow the event since there will be costs in the cause and there will be an order for Legal Aid taxation of the plaintiff's costs.

MR WATT-PRINGLE: Of the appeal, my Lord?

LORD JUSTICE BELDAM: Of the appeal. You have already had an order for costs below.

MR WATT-PRINGLE: Yes.

LORD JUSTICE BELDAM: For taxation.

MR WATT-PRINGLE: Yes.

Order: decision of the jury and the judgment based upon it set aside; order that the matter be retried; no order for the costs of the appeal; the costs below will follow the event since there will be costs in the cause; order for Legal Aid taxation of the plaintiff's costs.