Judgment 18/2009 Ogier v Paint – Magistrate's Court – 8 April 2009

Parish Constable – action in tort – removal of abandoned vehicle from car park – action by owner of the vehicle, arising from damage to the vehicle – functions of Parish Constables considered – whether it was wrong in law for a public official to be sued in a private capacity – Court held that it is wrong to ask the Court to create immunity where none exists in law – held that there is no legal impediment preventing the Plaintiff from taking action against the person he holds responsible for causing the damage – defences raised by the Defendant – held that he had acted in good faith but that he had not established that the vehicle presented an imminent danger or that the manner in which the vehicle was moved was reasonable – judgment for the Plaintiff in the reduced sum of £200, being the maximum value of the vehicle, rather than the cost of the repairs – no order for costs

IN THE GUERNSEY MAGISTRATE'S COURT
[PETTY DEBTS]

Between **Steve OGIER** **Plaintiff**

-v-

Barry J E PAINT **Defendant**

Date of hearing: 27th February 2009
Judgment handed down: 8th April 2009

Before: Cherry McMillen, Assistant-Magistrate

Advocate for the Plaintiff: In person
Advocate for the Defendant: M G A Dunster

Case referred to:

Cope v Sharpe (No.2) C.A. 1912 1 K.B. 496

1. The matter before the Court is a Petty Debt Summons issued by the Plaintiff, Mr Steve Ogier, in the sum of £750. The Defendant is Mr Barry J E Paint. Except where set out below, the burden in this matter is on the Plaintiff, to satisfy the Court that his claim is made out either in its entirety or in part, to the requisite standard, namely on the balance of probabilities.

2. The background to this matter is that the Plaintiff is the owner of vehicle number 19797 which is a Ford minibus of some age and which has been adapted, either by the Plaintiff or someone else, by the removal of the majority of the seats therein.

3. In or about August or September 2008, the Plaintiff was apparently required to remove the aforesaid vehicle from where he had parked it in a field, I believe in the Parish of Castel. He told me that he had been required to remove the vehicle by the Environment Department from the field and he had then decided to park it in a road or area of land which was adjacent to the Cobo Car Park, which is part of, or at least adjacent to La Banque du Longport.

4. I am told, and it is not disputed, that the vehicle was legally parked. I am told, and it is not disputed, that the vehicle was properly insured. Mr Ogier says that he parked the vehicle some ten days or so before the 15th of September 2008 and that further he had stored a number of tyres in the vehicle which he regarded as being of some value and in addition to the tyres (as is obvious from the photographs which have been shown to me), there were a number of wooden pallets in the vehicle, which the Plaintiff said he had used to deter others from breaking into the vehicle and stealing the tyres from inside it.

5. The Defendant is the Junior Constable of the Parish of Castel. It was in that capacity that he attended the Cobo Car Park and surrounding area on the early evening of the 15th September 2008. The Defendant gave evidence that he attended that area at the behest of and under the instruction of the Senior Constable for the Castel Parish, Mr C G Workman. The Defendant told me that, his instructions were to firstly remove a specific vehicle which had been categorised as abandoned and illegally parked in a car parking space which had been delineated for the disabled and was situated adjacent to the Chequers Supermarket. That is not the vehicle that is the subject of this Summons.

6. Secondly, the Defendant told me that he was also under instruction from the Senior Constable "*to move any other vehicle"* that he *"thought was a danger to the general public"*. It was therefore in his capacity as Junior Constable to the Parish of the Castel that the Defendant decided that the Ford vehicle belonging to the Plaintiff containing the tyres and wooden pallets should be moved. The Defendant told me that his concern was that the vehicle was a *"fire hazard"*. He said in evidence that he was aware of and believed that there had been threats to burn cars in the Cobo Car Park and the surrounding area and he had concluded that this vehicle which belonged to the Plaintiff, (although at that time he did not know who the owner of the vehicle was), *"was a great danger to public safety and private property"*.

7. After the Defendant had arranged for the removal of the abandoned vehicle from the disabled car parking place, as referred to above, he authorised and supervised, the removal of the Plaintiff's vehicle. The Defendant utilised the services of a friend who gave him voluntary assistance by providing and driving his own tractor in the removal of the two vehicles that I have referred to, including the Plaintiff's vehicle. The tractor driver was as I have said, a friend of the defendant and not an employee or authorised representative of the Parish. He was however, used by the Defendant with the full knowledge and permission of the Senior Constable of the Parish and I was told that he had previously assisted the Parish Constables without any difficulty.

8. During the course of the moving of the Plaintiff's vehicle from its parking place, damage was caused to it and I have been shown photographs of the damage primarily to the front part of the vehicle, including parts of the bumper which appear to have been pulled away from the vehicle.

9. The Plaintiff submits that the Defendant was the person who caused his vehicle to become damaged in firstly deciding that it should be moved away from where he had lawfully parked the same and secondly in the manner in which he arranged for its removal, thereby causing damage to it.

10. The Defendant firstly submits that the Plaintiff has sued the wrong person and he is not the legal entity who should have been sued but rather that the Plaintiff should have sued the *"Constables and Douzaine of the Castel"* upon whose behalf the Defendant was acting.

11. If I concur with the Defendant's submission in this regard, then that would be the conclusion of the matter at least in relation to this Defendant because such a conclusion would lead to the dismissal of the Plaintiff's case against this Defendant.

12. However, if I do not concur with that submission, the Defendant secondly submits that I should find that his interference with the Plaintiff's property was reasonable, thereby affording him a defence to the action and further, that he had taken all reasonable steps to ensure that the vehicle was not damaged.

13. It is therefore necessary to deal first of all with the issue as to whether the Plaintiff is entitled to commence proceedings against the Defendant in person. As I said, if I concur with the Defendant's submissions in this regard that would be the conclusion of these proceedings.

14. I am satisfied that on the 15th September 2008 the Defendant attended the Cobo Car Park and the surrounding area thereto in his capacity as the Junior Constable for the Parish of Castel. I am satisfied that he was acting under instructions from the Senior Constable. Advocate Dunster for the Defendant submits that if I find that those are the circumstances then, "*It would be a dangerous precedent if elected officials (individually) could be 'picked off' for simply carrying out their legal duties".*

15. During the hearing of this matter the Plaintiff was invited by the Defendant to apply to amend the summons to amend the identity of the Defendant from Mr. Paint (in person) to show the Defendant as "The Constables and Douzaine of the Castel". Advocate Dunster indicated to the Court that he had instructions, I believe, from the Constables and Douzaine of the Castel not to oppose such an amendment. The Plaintiff was given some time to consider what action he wished to take in this regard and having been given time he decided that he wished to proceed against the Defendant in person, saying "*that it was the Defendant who had on his own initiative moved his vehicle"* and that he wanted the action against Mr. Paint in person to continue.

16. Advocate Dunster submits that as Mr. Paint was acting in his capacity as the (junior) Constable of the Parish he should have immunity from being summonsed in such actions.

17. Advocate Dunster was not able to direct me to any legal basis for his submission in that he was unable to support it by reference to customary law, case law or statute. Advocate Dunster referred this Court to, "The Government and Law of Guernsey" by Dr Darryl Ogier, which states, *"the parishes' executive officers are the two Parish Constables. Historically they had police functions, making criminal investigations and supervising strangers".*

18. The Parish Constables no longer have police functions in relation to criminal investigations etc. but I accept the description in Dr Ogier's book that they are the executive arm of the Douzaine of the Parish and act therefore on the instruction of the Douzaine. They are elected officials and give up large amounts of their time for the good of the parish in which they live. In that regard, Advocate Dunster urged me to grant immunity to the Parish Constables. He stated in terms that if I did not do so, it would be a matter of some public importance because it would act as a deterrent in future to people putting themselves forward to stand in such a role if they could be sued in a personal capacity for acts that they undertook in the course of the work they carried out as Junior or Senior Constable of the Parish. Advocate Dunster went so far as to say that if I concluded that the Defendant could be sued in his personal capacity then, "*The entire parochial administrative system would be under threat",*

19. It was of note that the only matter that was before this Court was the summons that the Plaintiff, Mr. Ogier had issued against the Defendant, Mr. Paint. The Defendant had decided for whatever reason not to issue his own proceedings against the Constables and the Douzaine of the Parish of Castel, which would have had the effect of joining them as the equivalent of a third party to these proceedings, and would have allowed him to claim in turn, that they were liable to him for the acts that he had carried out on their instruction or behest.

20. Advocate Dunster submitted that if I concluded that the Defendant could be sued as a private individual, albeit at the time of the action complained about he had been acting in his role as Junior Constable, this would mean that in future there would be a "*multiplicity of litigation*" because of the necessity of issuing further actions in the Magistrate's Court. Currently there is not the equivalent of third party proceedings in the Magistrate's Court - the manner in which they have been dealt with to date is by the Defendant in one action issuing his own summons against the Defendant he says should be held responsible and the Magistrate's Court would then hear both summonses simultaneously.

21. On behalf of the Defendant, Advocate Dunster urged me to find that it was wrong in law and in principle for a public official to be sued in a private capacity. He referred me to the fact, which I accept that previously when a Plaintiff had cause to complain about the actions of an employee or a representative of the Parish then usually an action would be commenced against the Parish and the Douzaine of the relevant Parish.

22. If I concur with the Defendant's submissions in this regard it would mean presumably that all such similarly elected public officials would be granted immunity from being sued or actioned in their personal capacity as a consequence of actions that they may have undertaken whilst acting on behalf of the Parish(as in this case) for whom they are elected.

23. It is not part of the function of a Court to grant immunity to elected officials where none has been afforded by any legislation. It is for this Court to apply the law as it currently exists. For whatever reason the Plaintiff has chosen to sue the Defendant in person. Whether that is for right or for wrong reasons that is a matter for the Plaintiff.

24. If it is felt that public or elected officials should have immunity from such actions when acting in that capacity, then it is a matter for the States of Deliberation to grant that immunity but it is wrong to ask this Court to create immunity where none exists in law. It is the function of a Court to apply the law as it currently exists and not as others believe it should be.

25. The Plaintiff has sued the person who authorised and supervised the removal of his vehicle during which the vehicle was damaged and in those circumstances I am satisfied that the Plaintiff is entitled to commence an action against the Defendant in person. I find that there is no current legal impediment that prevents the Plaintiff from taking such an action against the person whom he holds responsible for causing damage to his vehicle, and there is nothing that I can identify in any legal jurisprudence to prevent him from doing so.

26. I now turn to the facts of the case.

27. At the beginning of this Judgment I indicated that the burden is on the Plaintiff on the balance of probabilities to satisfy the Court that the entirety or part of his claim is made out. In this case the Defendant, without the Plaintiff's knowledge or permission, attempted to move the Plaintiff's vehicle and as such committed a trespass to the Plaintiff's goods. In those circumstances I am satisfied the burden transfers to the Defendant to satisfy that the Court on the balance of probabilities, that the trespass to the Plaintiff's goods was reasonably necessary.

28. I have found the following facts in accordance with the evidence I have heard and to the requisite standard, namely on the balance of probabilities:-

    1. The Ford Transit vehicle 19797 was owned and registered to the Plaintiff, Steve Ogier.

    2. The vehicle had been parked in the same parking space for a period of approximately but in any event no more than two weeks prior to the 15th September 2008.

    3. The vehicle was lawfully parked in a designated parking space.

    4. The vehicle contained a number of tyres and wooden pallets.

5. No notice was given to the Plaintiff by any person that the vehicle should be removed.

6. No attempt was made by the Defendant to ascertain the owner of the vehicle.

7. When the vehicle was moved damage was caused to it.

29. In his submissions Advocate Dunster has referred me to the case of Cope v Sharp (No.2) 1911 C.A., which dealt with the issue of the ability of a Defendant to rely upon a defence of reasonable interference with the property of another.

30. The Defendant gave evidence that on the 15th September 2008 his main concern was the presentation of the Plaintiff's vehicle containing tyres and wooden pallets which had led him to conclude that it was a potential fire hazard. The Defendant said that he was concerned about the combustible combination of the wooden pallets and rubber tyres inside the vehicle.

31. In evidence, the Defendant referred to the fact that prior to the 15th September 2008 he had been aware of threats that cars would be burned or *"torched*" if they had been perceived by those making the threats as abandoned, in the Cobo Car Park. The Defendant described that, whilst the vehicle was in a designated car parking space, it was within a very short distance of a residential property and was also close to other vehicles and boats in a nearby boat park and as a consequence he deemed the vehicle to be *"a great danger".* The Defendant told me that as a consequence of coming to this conclusion *"I decided to move it to another location where it would not be so much a danger".*

32. Advocate Dunster submits that there are three questions that I should address in considering whether the Defendant can rely upon a defence of reasonable interference with the Plaintiff's vehicle and they are as follows:-

1. <u>Was the Defendant acting in good faith?</u>

(a) I have already stated that I am satisfied that the actions that the Defendant took on the evening of the 15th September 2008 arose from him acting in his capacity as Junior Constable of the Parish of Castel. Having heard the Defendant's evidence I am satisfied without doubt that he is a man of honour and integrity and I have no hesitation in finding that on the evening of 15th September 2008, the Defendant acted in good faith. I have no doubt that his intention was to act in the best interests of the parishioners of the Parish of Castel.

2. <u>The second question then to be addressed is whether the Defendant's actions were reasonably necessary?</u>

a. I refer to the Judgment in the case of Cope v Sharp (No. 2) C.A 1911. I refer firstly to the head note which states "*it is a good defence in law if there being a real and imminent danger, the means taken by the tenant to avert it were reasonably necessary in the sense that they were the acts*

which in all the circumstances of the case a reasonable man would do to meet such a real danger"

b. Kennedy L.J. stated at p506, "*I agree in holding that an interference with the property or the person of another, which otherwise would certainly constitute an actionable trespass, cannot be justified by mere proof on the part of the alleged trespasser of his good intention and of his belief in the existence of a danger which he sought by his act of interference to avert, but which in fact did not exist at all"* and at p 510 when referring to the case before him *" that a reasonable necessity for the Defendant's actions did exist, must, I think, mean that there was, at the time that the Defendant acted, a danger to the property of the Defendant's master, so far imminent that any reasonable person in the circumstances of the Defendant would act reasonably in thinking it was necessary to adopt the method for the preservation of the property in jeopardy which the Defendant adopted"*,

c. Buckley L.K. stated at p504 of that judgment "*The test, I think, is whether there was such real and imminent danger to his property as that he was entitled to act and whether his acts were reasonably necessary in the sense of acts which a reasonable man would properly do to meet a real danger"*

d. Therefore in this matter I have determined that the test I have to apply is whether at the time when the Defendant decided that the Plaintiff's van ought to be moved was that action reasonably necessary at that time. The test in my view is an objective one.

e. In this case the Defendant was aware that the vehicle had been parked in the same car park space for some days prior to the 15th September 2008. However, the Defendant did not categorise the vehicle as abandoned. When asked, the Defendant told me that he believed that abandoned vehicles were in effect vehicles that had been parked and left for a period of some months and not just days. This vehicle had only been parked for a maximum of some 14 days or so prior to the 15th September 2008. There is some issue between the Plaintiff and the Defendant as to how many days it had been parked but there is not so much difference between the evidence of the Plaintiff or of the Defendant to make the exact number of days relevant to the decision that I have to make.

f. The Defendant accepted that he had made no attempt to ascertain who the owner of the vehicle was. He said that in terms it was not possible to make such enquiries of the Police, because for apparent Data Protection reasons they had previously refused to provide the Parish Constables with information as to ownership of other vehicles.

g. The Defendant told me that he had not left any note on the vehicle asking the owner of the vehicle to contact him because leaving notes on other vehicles in the past had been to no effect because, for whatever

reason, notes often went missing from the windscreens of cars when they had been left there by the Constables.

h. The Defendant told me that he had previous expertise in the issue of fires in that he had undertaken a fire fighting course in the Merchant Navy *"many years ago"* and had been familiar with fire safety issues from his previous occupation in the Merchant Navy and in other employment, and when he saw the vehicle on the 15th September 2008 he decided that it had to be moved because the nature of the contents of the vehicle meant that it was a danger, because of where it was parked and its apparent close proximity to a residential property, other vehicles and to an area where boats were parked. The Defendant did not consider calling out a representative of the Fire Brigade to assist him in making an assessment of the imminent danger that the vehicle and its contents presented.

i. It is of relevance to the decision that I have to make that the Defendant was aware of the existence of this vehicle in this parking space for some days prior to the 15th September 2008. As part of his duties as Junior Constable the Defendant had been noting the vehicles that had been parked in and around this area and therefore knew that this vehicle had been parked there for some time. He was also aware of threats made by others (anonymous in that they were not named) that he had heard of both through the local paper I believe some days or so previously, but also by various people reporting the same to him in his role as Junior Constable, saying that it would be *"best to torch"* vehicles that had been left or abandoned in the particular area. It was therefore the combination of the content of this vehicle along with those threats that led the Defendant to conclude that the vehicle was a fire hazard and could be a target for vandals who might carry out those threats.

j. It was this thinking that led to the Defendant authorising and supervising the moving of the van on the 15th September 2008. The question that I have to consider is whether the Defendant has satisfied me on the balance of probabilities that at the time he decided to authorise the moving of the vehicle and indeed immediately then did move the Plaintiff's vehicle, was there an imminent danger that a reasonable man would, in such circumstances, consider it necessary to act in the manner that the Defendant did so act.

k. I cannot find in this case that there was a real and imminent danger that the Plaintiff's vehicle was a fire hazard. I am satisfied that the Defendant genuinely believed that the vehicle was a fire hazard but the vehicle had been parked where it had been for some two weeks and no such action had been taken in that time. The vehicle was legally parked and the reality is that the Defendant did not have sufficient expertise to conclude that the presentation of the vehicle was such that there was an imminent danger at that time, on the evening of the 15th September 2008. No attempt was made to identify the owner of the vehicle or make contact with him. No message was left on the vehicle. No notice was placed in the local newspaper. No message was passed out over the local radio. It

was a decision made quickly and I am satisfied that the immediate availability of the tractor driver and the tractor influenced the Defendant's decision making and that he did not give himself sufficient time to consider all of the issues involved.

l. Whilst I accept that the Defendant had some previous knowledge in relation to fire hazards and had some historical involvement in relation to matters regarding fire, I am not satisfied that his expertise was such that he was justified in making the decision that he did on the 15th September 2008, without the expert back up from an assessment by a representative of the Fire Brigade or someone with such relevant expertise.

m. I am satisfied that because of heightened tension in that area the Defendant was genuinely concerned but I do not find that his decision to move the vehicle was reasonably necessary at that time on that date. Putting it simply I cannot be satisfied that the vehicle presented an imminent danger at the time the defendant made his decision that the vehicle should be moved.

3. Was the manner in which the act was carried out, reasonable?

a. Even if I am wrong in relation to the decision that I have reached to the second question above, I am satisfied that the manner in which the Defendant moved the Plaintiff's vehicle was not reasonable.

b. In this case the Defendant arranged for a friend with a tractor to remove the vehicle.

c. I am told that the Plaintiff had left the steering lock on in his vehicle and as such the vehicle could not be towed by the use of a rope. Therefore, the vehicle was placed on the hydraulic forks of the tractor and had to be dragged along the ground. The Plaintiff, who coincidentally came by at the very time his vehicle was being dragged by the tractor, saw the vehicle *"falling off the forks"*.

d. The Plaintiff described how he witnessed the tractor driver stop and attempt to pick up the vehicle again by the use of the hydraulic forks and place the vehicle back onto the tractor and he described the manner in which the hydraulic forks had picked up the vehicle meant that the bodywork and the front grille of the vehicle were ripped and damaged. As the Plaintiff said in evidence "*tractor hooks are not designed for that"*

e. The damage caused to the vehicle by the hydraulic forks of the tractor is obvious from the photographs that I have been shown.

f. The Defendant stated that if the vehicle had not been "*so rotten*", the method of removal would have worked.

g. The Defendant's arrangements for the removal of the Plaintiff's vehicle were not satisfactory. When asked why the services of this particular gentleman with his tractor had been used I was told there was a cost factor involved in that the tractor driver had offered his services free. The tractor driver "*had done it before, with no complaints and for nothing"*.

h. The difficulty is that in order to move this vehicle with its locked front wheels inevitably meant that damage would be caused by trying to lift it unto the hydraulic forks of the tractor. The Defendant should have given consideration to the use of a professional road recovery vehicle service. In making the decision to move the vehicle, the Defendant had to exercise reasonable care in the moving of the vehicle in the state that it presented and this vehicle presented a particular difficulty that neither the Defendant nor the tractor driver had apparent sufficient expertise to cope with.

33. In the circumstances that I have outlined above I find in favour of the Plaintiff.

34. I now turn to the issue of quantum of damages.

35. In this regard the burden is on the Plaintiff to satisfy me as to the value of his claim.

36. The Plaintiff seeks £750. Both he and the Defendant appear to accept that the value of the damage to the Plaintiff's vehicle exceeded the value of the van itself. The Plaintiff therefore seeks the sum of £750 which he says represents the value of the van. In this regard I refer to his letter addressed to the Defendant dated 21st October 2008 "*The cost of repairing this damage would be well over one thousand pounds. Since the van is worth £750, it is a write off"* – hence the claim before me for £750.00.

37. In evidence the Plaintiff produced copies of auctions of various vehicles from the eBay auction site. The Defendant had not been given the opportunity to consider them in advance and objected to them on the basis they were not for similar vehicles in that the vehicles being auctioned on the eBay site were vehicles from the UK which had M.O.T certificates and Advocate Dunster submitted that the Plaintiff could not satisfy the Court that the same applied to this vehicle. I concur with Advocate Dunster. The production of copies of auctions from the eBay web site did not assist me in determining the value of this vehicle. The Defendant had included a valuation of the vehicle in the bundle before the Court, however, that valuation was not agreed by the Plaintiff and the author of the valuation report was not available to give evidence and I have not therefore relied on its contents.

38. The Plaintiff gave evidence that the vehicle had cost him a "*couple of hundred pounds* "when he had purchased it but he thought it was worth more now because of work he had carried out on it.

39. The Plaintiff has been unable to satisfy me on the balance of probabilities that the damaged vehicle was worth £750. He says he cannot obtain a current valuation because the vehicle is of an age where no one will provide him with a valuation. That

may be the case but nevertheless it remains his responsibility to support his monetary claim and he has not done so. In all the circumstances I am not prepared to find that the vehicle was worth more than the original sum the Plaintiff had paid for the vehicle namely the sum of £200.

40. On the 28th October 2008 the Senior Constable wrote to the Plaintiff and offered him that sum of money in settlement of his claim albeit on the basis that the Parish would then take steps to dispose of the vehicle. That offer was rejected by the Plaintiff and within a week the Plaintiff issued a petty debt summons to be heard before this Court. I have no doubt that the Plaintiff's judgment in this matter was clouded by the fact that he had been arrested immediately subsequent to this incident because he and the Defendant had made allegations about the behaviour of the other. That is not something this Court can concern itself with.

41. I am in no doubt the Plaintiff should have accepted the offer made by the Senior Constable.

42. In those circumstances I intend to enter Judgment against the Defendant in the sum of £200 only but I do not order that the Defendant pay the costs of this action, which will be borne by the Plaintiff alone.

Assistant Magistrate Cherry McMillen
Dated this 8th day of April 2009