19.10.76

In the Grand Court of the Cayman Islands

Holden at George Town, Grand Cayman

Plaint 86 of 1976

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| Between | Karl Brandon | Plaintiff |
| And | James Shaw | Defendant |

Seymour Panton for the defendant

The plaintiff in person

August 23, 24, 25, 26, 27, 30, 31, 1976

Parnell, J. :

On the 31st August, the claim of the plaintiff was dismissed with costs. Judgment was entered for the defendant. The plaintiff was also ordered to pay the costs of the Crown up to August 17, when he filed a notice of discontinuance against the Attorney General. I promised to give a detailed examination of the evidence and reasons for dismissing the plaintiff's action. This I now do.

A practising attorney sues a judge

The plaintiff is a practising attorney in the Cayman Islands. The defendant is the acting Stipendiary Magistrate of the Cayman Islands and is styled the "Judge of the Cayman Islands" by the local statute. The claim is based on an incident in Court on the 27th February, 1976. The defendant was presiding over an affiliation proceeding. The Cayman Islands Law gives the Stipendiary Magistrate power to hear and determine a complaint touching affiliation. And in the proceeding, the plaintiff appeared as attorney for the defendant.

The spectacle of an attorney personally suing a judge as a result of a judicial act, has not been seen. At any rate, I know of no reported English or Commonwealth case. In 1895, an attempt was made to sue three judges of the Supreme Court of Trinidad and Tobago for damages for acts done by them in the course of judicial proceedings. This case is well known to students of English Constitutional Law. The action failed on the ground that:

> " No action lies for acts done or words spoken by a Judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. "
>
> See Anderson v. Gorrie [1895] 1 Q.B. 668; Thomas and Bellots' Cases in Constitutional Law, 7th. Edit. p. 170.

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The plaintiff must have been aware of the general principles applicable to judicial acts when he launched his proceedings on the 25th May, 1976. And yet, in his initial move, he had a slight stumble. Although what the defendant is alleged to have done occurred during the course of a judicial proceeding, the Attorney General was also sued on the ground:

> " that the defendant Magistrate was an officer of the Crown directly appointed by the Crown and was at all material times paid in respect of his duties as an officer of the Crown. "

It seems that a subsequent reflection together with further research brought results. The Statute Law of Cayman prohibits an action against the Crown arising out of the discharge of responsibilities of a judicial nature or in connection with the execution of judicial process. As a result, on the 17th August, 1976, the plaintiff filed a notice of discontinuance against the Attorney General. But he continued with his action against the Magistrate.

What is the complaint?

The plaintiff in his opening address outlined what he was going to prove. The defendant had taken personal dislike of him and was spiteful. Public ridicule in Court by the Magistrate had caused him pain and anguish. He gave an impressive history of 40 years standing, first as a solicitor for about ten years and thereafter as a Barrister-at-Law of Lincoln's Inn. He made reference to his legal and judicial service in Jamaica and his continuous practice in the Cayman Islands since 1963. And in his evidence, he referred to his "very successful advocacy" in the Courts of the Cayman Islands. During cross-examination, he dismissed any show of modesty and said in answer to Mr. Panton:

> " I adjudge myself to be the most experienced lawyer in the Cayman Islands. The other lawyers have not got that experience. They may be more experienced than I in Chamber work. "

Defendant gave order to Police officer to eject plaintiff

The plaintiff's version of what took place on the 27th February, may be stated briefly as follows:

A young lady by the name of Darlene Thomas has a child by one Hector Reid. At a previous hearing, the defendant ordered Reid to pay Thomas a certain sum weekly for the maintenance of the child. But Reid fell in arrears and was brought to Court to answer a disobedience summons. At this hearing, the plaintiff appeared for Reid. When the matter was called up, the

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plaintiff informed the Magistrate that Thomas had given away the child to foster parents and that for weeks the child was being supported by the foster parents. An offer by Reid to pay the foster parents what was due and owing, under the affiliation order, was refused. The plaintiff in his narrative mentioned this:

> " I said further that the mother was living in a room with a man and that there was no room for the baby. "

Darlene Thomas is a single woman. A single woman living with a single man may give rise to certain comments. But if the single woman happens to share her room with a married man, a different situation may develop. If the wife of the man should know about the rendezvous, there could be trouble ahead.

In his evidence in chief, the plaintiff did not mention that the "man" with whom Thomas was living was the husband of his client; that he was handling a divorce petition for his client in which Thomas would be cited as the "woman named," and that he (the plaintiff) had paid an early morning visit to the room of Thomas along with his client and a third person.

According to the plaintiff, when he mentioned that Thomas was living with a man in a room, the defendant went "berserk" and shouted loudly at him and said "sit down." The order may not have been obeyed immediately and so the defendant called the woman Police Constable Sylvia Lowe to "put Mr. Brandon out the Court or eject him from the Court Room." The plaintiff then watched the movements of the constable; she came within an arm's length and then he said:

> " I will go voluntarily as the order has been given. "

He then left the Court room leaving his client behind. Said the plaintiff:

> " he lost his case and was ordered to pay the arrears. "

This, however, is not the correct picture after the plaintiff left. The case against Reid was not determined on February 27. The summons was adjourned to March 11 and Reid was told to inform his attorney of the date. Under cross-examination the plaintiff confirmed this:

> " I now recall that my client did come to my office and explained that the case had been fixed for a later date. "

The plaintiff did not appear for Reid on March 11. He said he had many reasons for not going to Court and one reason was that he wanted a refresher fee. What the defendant did on February 27, by ordering the Constable to put

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the plaintiff out of Court forms the ground for the plaintiff's claim for general and special damages.

In a lengthy statement of claim marked with more argument and comment than with clarity and conciseness, the following particulars are extracted:

(1) The Stipendiary Magistrate on the 27th day of February, 1976, "while the plaintiff was then engaged on his feet addressing the bench on behalf of his client, without reasonable and probable case, maliciously ordered a constable to eject him from the precincts of the court room."

(2) The illegal interference with counsel's rights had the effect of causing the plaintiff, "humiliation, embarrassment and much financial loss."

(3) The particular conduct, hostility and action by the defendant without reasonable and probable cause, is a culmination of a "series of provocative, hostile and malicious conduct."

The plaintiff has claimed for damages and prayed for an injunction to restrain the defendant from unlawfully prohibiting and interrupting the licence to practise as an attorney-at-law in all the Courts of the Cayman Islands.

Giving general particulars of what he has suffered, the plaintiff has maintained that clients have since deserted him and gone to other lawyers, that the publicity has been disastrous to him financially and his reputation has suffered immeasurably:

" as a result of what happened in Mr. Shaw's Court. "

Not one deserted client, however, was called to support the plaintiff's assertion of adverse publicity of the incident of February 27 and of defection to another attorney as a result. In due course I shall refer to an attempt to secure the support of a former client on the question of damages. But the potential witness (Mr. Sherrel Whittaker) found himself in the opposite camp and, like Aeneas before Queen Dido, he had an interesting story to relate.

The plaintiff in his evidence in chief mentioned that the defendant went "berserk" before he gave the order to have him ejected. But since a judge is required to keep a calm composure and to listen to both sides before giving a decision, there was a gap in his evidence, when he suggested that

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the judge temporarily went mad with fury when he was told that Thomas was living with a man in a room. No reason was suggested why this "judicial frenzy" should have emerged at the point it did or why it should have emerged at all. It was the cross-examination of the plaintiff which gave some light as to what in fact did happen. The plaintiff alone gave evidence in support of his case. The defence called **four** witnesses as to the incident in Court. The suggestion to the plaintiff that he was guilty of "wilful interruption and misbehaviour" was vehemently rejected. That it was as a result of his own misbehaviour and conduct why the order was given for his removal from the Court, was equally rejected.

<u>How is the action framed and and how is it proved?</u>

The Stipendiary Magistrate is required to attend the Petty Sessions Court and when sitting alone, he has all the powers and authority of any two or more justices associated and sitting together. See Secs. 4(1) and 4(2) of Cap. 76, Judicature (Stipendiary Magistrate) Law. By an amendment of Cap. 76 aforesaid, that is, by Law 20/1968, the Stipendiary Magistrate is constituted the "Judge of the Cayman Islands" and is empowered to preside in the Grand Court and:

> " shall have and exercise all the jurisdiction of the said Court in addition to the jurisdiction conferred by law on the Stipendiary Magistrate. "
>
> See Sec. 5 of Cap. 76.

When he sits in the Grand Court, the only limitation of the exercise of jurisdiction placed on him is that he shall not hear an appeal from a decision of his given while he was performing any of the jurisdiction of Stipendiary Magistrate nor shall he try on indictment, any criminal case in which he has been concerned in the committal proceedings.

The Stipendiary Magistrate, therefore, exercises the power and authority of, and enjoys the privileges and immunities conferred on, any two or more justices sitting in Petty Sessions. And when he presides over the Grand Court, his power, authority, privileges and immunities are similar to those exercised and enjoyed by a Judge of the Superior Court.

The Justices of the Peace Jurisdiction Law (Cap. 78), has made provision to protect Justices from vexatious proceedings. Section 66 provides as follows:

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> " In every action hereafter to be brought against any Justice for any act done by him in the execution of his duty as such Justice, it shall be expressly alleged in the statement of claim that such act was done maliciously and without reasonably and probable cause; and if, at the trial of any such action, the plaintiff fails to prove such allegation, judgment shall be entered, or a verdict shall be given, for the defendant. "

Provision is also made where an action is based on facts alleging that the justice has:

> " no jurisdiction or in which he has **exceeded** his jurisdiction. "

Mr. Brandon in his closing address and in answer to the Court, said that in so far as the law is concerned he is basing his case on the proposition "that the defendant was acting outside his jurisdiction or he exceeded his authority in the way he handled the incident and that a tort (trespass to the person) had been committed."

The wording of sec. 66, shows that the Law is referring to the tort of trespass to the person i.e. false imprisonment or assault. It also shows that a distinction is being drawn between an act done in the course of a judicial proceeding wherein a Justice has jurisdiction and an act done outside of a judicial proceeding, i.e. granting of a warrant of arrest or warrant to search wherein the Justice but for his malice and the absence of reasonable and probable cause would have been protected. In the first instance, the Justice is protected from a civil action where during the course of a judicial proceeding in a Court over which he has jurisdiction, he does an act or makes some order the basis of the action. Even if what is done within jurisdiction and in the course of a judicial proceeding is erroneous or irregular, the Justice would be protected. In the second instance, where the Justice is not acting in a judicial proceeding but nevertheless within his jurisdiction and he does an act maliciously and without reasonable and probable cause, he is liable to be sued for any damage sustained by a person as a result. In such a case, a burden is on the plaintiff to allege and prove on a balance of probabilities malice and the absence of reasonable and probable cause.

The distinction may be illustrated by the local case of Panton v. Robinson (1961), 4 W.I.R. 155. In that case, the Stipendiary Magistrate in his capacity as Magistrate issued three warrants for the arrest of the

plaintiff. The informations were sworn to by the Chief of Police. The Magistrate had some interest in the prosecution and displayed a certain amount of toughness towards the plaintiff when he appeared in court with regard to bail and the fixture of a trial date. No offence known to the law was disclosed in any of the informations which the Stipendiary Magistrate drafted himself. The three warrants were signed and issued outside of Court. The charges were dismissed by an acting Stipendiary Magistrate named to try the case. A dismissal of the plaintiff's claim for false imprisonment by the Grand Court, (Herdules, J. Ag.) was reversed by the Federal Supreme Court on the grounds that:

(1) The defendant magistrate was not acting as judge when he issued the three warrants but as magistrate albeit within his jurisdiction;

(2) There was evidence of malice and the absence of reasonable and probable cause which the trial judge did not consider.

It could be that as a result of these considerations, Mr. Panton for the defendant served notice of his intention to argue and did argue as a prelimanry point that the action should be dismissed because the claim as outlined "does not disclose a reasonable cause of action."

The argument of Mr. Panton, attractive as it sounded, was not entertained. That course could have been adopted somewhere along the line by either the Court of Appeal or the House of Lords when Mr. Rondel was fighting a battle to make a barrister who appeared for him in a criminal case liable in negligence in respect of conduct and management of his cause in court. Both the Court of Appeal and the House of Lords listened to a hopeless and unmeritorious case, in view of the important points of law which had arisen on the appellant's case. But the Master in Chambers and Lawton J. (as he then was) were not so patient and generous. Lord Pearce puts the matter in sympathetic and simple language:

> "the reason, however, why so unmeritorious and hopeless a case has been allowed a hearing in this House was that it raised questions of general importance. On these your Lordships have had the advantage of a thorough, fair and lucid exposition by counsel on both sides. "
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> See Rondell v. Worsley /1967/ 3 W.L.R. 1666 at p. 1699 H.

The issues raised in the plaintiff's case are of general importance and the claim, even if unmeritorious, did deserve a hearing in Court in a community as small as the Cayman Islands and involving, as it does, two parties who have a significant part to play in the administration of justice, And further, the statement of claim has expressly alleged an act done by the defendant:

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" maliciously and without reasonable and probable cause. "

How did the plaintiff attempt to prove malice?

During his opening address, Mr. Brandon told the Court in answer to a question that he would be relying on incidents in Court to prove malice. That a judge's rebuke of an attorney during the hearing of a case; a ruling against his submissions, an exemplary sentence on his client or something done or said by the judge which could be regarded as prejudicial to the cause of the attorney, may be regarded as evidence of personal "malice" against the attorney concerned is a proposition which, on the face of it, is novel, and frightening. However, that is the platform on which the "act done maliciously" as required by sec. 66 of the Law aforementioned is placed. I now proceed to examine the plaintiff's evidence on "the incidents in Court" and his cross-examination of the defendant on them. The plaintiff said that he was not in Court in February 1975, when the defendant was welcomed by the bar on his assuming duties as Stipendiary Magistrate. But he did go into his Chambers sometime after and offered the support of the bar. The Magistrate being faced with his first big criminal case in which the question of bail was relevant, the plaintiff said that he voluntarily offered him his assistance. Clippings from the English Press in relation to a case then before the Court in England were given to the Magistrate and when additional clippings were obtained, he the plaintiff journeyed to the home of the Magistrate to deliver them. At each delivery, the conduct of the magistrate indicated that he was grateful for the interest shown and the assistance offered. But shortly after, a surprise was in store. According to the plaintiff, the following incidents took place:

Incident No. 1

The plaintiff was appearing in a petty sessions case, when the defendant who was presiding remarked that he (the plaintiff) was "talking foolishness and garbage." Such unforensic language was not expected from the mouth of one who had been helped by the plaintiff. However, the plaintiff ascribed this outburst as a result of "bad mood caused by someone else." After all, the judge is a human being and his mood is subject to variations like that of anyone of Her Majesty's subjects in Cayman not so highly placed.

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Incident No. 2

About a week after the first incident, another one took place. This time the plaintiff was appearing for a young boy charged with a breach of the Regulations designed to keep the Cayman Airways runway safe. On Guy Fawkes Day (November 5, 1975), the presence of a cow on the runway caused a delay in the landing of an aircraft and the plaintiff's client was charged. What took place in Court between the plaintiff and the defendant formed the subject of an interesting story in the "Caymanian Compass" of February 5, 1976. The headline reads:

" Judge and lawyer clash over the boy and the cow. "

The photographs of the actors in this court room drama, appear in the press story. The complaint of the plaintiff is to the effect that the defendant during this drama:

> " referred to my conduct unnecessarily as less than what he expected of a man of 39 years experience. "

A report of the incident was made to the Deputy Governor of the Cayman Islands by the plaintiff but he did not get any "satisfaction," and so "I decided to await an opportunity to bring the matter to court."

These are the only two incidents related by the plaintiff in his evidence in chief. But certain suggestions to the defendant in cross-examination, indicated that more instances of "malice" were to be demonstrated.

With regard to incident No. 2 (above mentioned), the young boy was acquitted at the end of the trial. And the plaintiff is reported to have told the defendant:

> " You have got to listen to me for a week, even if I am talking stupidness. "

The acquittal of the young boy could be regarded as evidence that the defendant was not showing "malice" against the boy's attorney during the breezy passage between bench and bar. And the remarks of the plaintiff to the effect that the judge would have to demonstrate the patience of Job even to the point where judicial hours are unnecessarily consumed could be regarded as evidence of the strain and pain which the judge had to endure with the plaintiff in action.

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Other instances of malice suggested
in cross-examination

(1) When the defendant assumed duties as Stipendiary Magistrate, the plaintiff was under suspension as a practising attorney. He had been convicted in the Grand Court for interfering with a potential witness in a court case. His conviction was subsequently set aside by the Court of Appeal of Jamaica. The cross-examination of the defendant on this aspect of the case, was as follows:

" Q. Were you aware of my conviction before the jury?

A. Yes and I was aware that it was under appeal.

Q. Did the fact of my suspension cause you to entertain any adverse notion about me as a lawyer?

A. Yes, it did because the suspension was a direct result of your conviction.

Q. I suggest to you that you maintained the same notion even after the appeal was heard?

A. Yes, I did.

Q. Did you try a civil action in which I was plaintiff while I was under suspension?

A. Yes, I did. It was a motor car negligence action.

Q. Would you say that my case was fairly tried?

A. Yes. "

And during further cross-examination the defendant said this:

" I must confess that the adverse notion I formed when I heard of your conviction before a jury went as to your whole character. "

(The witness then volunteered that he had read a transcript of a tape recording reported to have been made unknown to Mr. Brandon when he was alleged to have been "interfering" with the witness).

In the civil action, the Magistrate refused to view the motor car involved in the accident. Mr. Brandon who appeared for himself made the application. The action of Mr. Brandon was dismissed and his credibility, as a witness did not find favour with the defendant. The viewing of a place or object by a judge before judgment or during the trial of a cause, is within the exercise of his discretion. And the making of comments, however strong, on the credibility of any witness is part of his functions as judge.

When a person hastily comes to a conclusion adverse to the character of another, that of itself is not evidence of malice. In haste, the Psalmist

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said:

" All men are liars " (See Psalms 116 v. 11)

And in St. Paul's epistle to Titus he reported what a prophet said:

" the Cretians are always liars, evil beasts, slow bellies. "
(See Titus 1, v. 12)

But all these conclusions - hastily conceived as they may show - do not provide evidence of malice against mankind or the inhabitants of Crete. An allowance must be given to human judgment erroneously made but honestly held.

(2) The plaintiff suggested that the defendant resents a submission of "no case" when he makes one at the end of a prosecution's case and that premature conclusions are formed merely because he appears as attorney.

I must record part of the cross-examination.

Q. " I suggest that when I appear for a client before you, my client is punished because I am the attorney?

A. Your clients are more frequently convicted because of your incompetence but other than that, I do not agree that there was any prejudice because of any feeling I may have towards you. I try to lean the other way.

Q. I suggest that in cases in which I appear as counsel, you make up your mind from the outset?

A. This is wholly incorrect? "

(3) The plaintiff is said to have told the defendant that he was a collector of poems and good literature. During the trial before me, a demonstration of poetry recital was given by the plaintiff during his closing address. With gusto, he recited a poem by the German author Johann Schiller. The words:

" the fallen enemy may rise again. "

rang out in a packed and sedate court room.

On the 30th May, 1975, the plaintiff addressed a copy of a "treasured literature" to the defendant. The composition is referring to a "truly great lawyer." What his virtues are, his attainments and worth form the subject of comment. The plaintiff claims that he got this piece of commentary from his headmaster at Jamaica College when he was about seventeen years old. He handed a copy of his headmaster's commentary to the defendant in his Chambers. But although it was accepted, the defendant was not pleased with the gift. In fact he was offended. Part of the cross-examination speaks for itself.

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Q. " Why were you offended?

A. I thought it was questionable conduct on the part of a lawyer of your experience; I was convinced that you were talking about yourself. I thought it was a form of self-advertisement."

Although it was not pressed, it was hinted that this piece of evidence could be regarded as evidence of malice despite the fact that it was evidence of goodwill and fellowship on the part of the plaintiff.

(4) It was suggested to the defendant that whenever the Police brought criminal proceedings involving assault and he (the plaintiff) appeared for the defence, any attempt by the defendant to file a cross-complaint would be thwarted once it was found out that the cross-complaint was typed in the plaintiff's office or advised by him.

(5) It was also suggested that the defendant would strike out a case in which the plaintiff is engaged on a civil return day in circumstances where a default judgment could have been entered if the plaintiff's client was present and that an opportunity in similar circumstances would have been afforded other attorneys to enter judgment on another day.

All these suggestions were rejected by the defendant. However, in rounding off his lengthy, argumentative and warm cross-examination on malice, he put this question:

Q. " Am I right that even before you knew me, as a result of what your predecessor told you, you formed an unfavourable impression about my general integrity?

A. Yes, I did. "

If a summary of the plaintiff's case is to be made up to the point before the defence opened, then a piece of evidence which emerged during the careful and lengthy cross-examination by Mr. Panton of the plaintiff should be noted. The defence suggested that noise and laughter echoed in the court room when Darlene Thomas told the defendant about the "early morning visit" paid to her room by the plaintiff, his client and another person: that being incensed the plaintiff made a lot of noise in his attempt to prevent Thomas ~~outlying~~ outlining her story and that an order was given to him to sit down.

Q. " Was an order given to you to sit?

A. An order was given for me to sit and I said I had not finished addressing him. I was then about to sit when the Magistrate ordered the Woman Constable to put me out the Court Room.

Q. Is it correct that you were told about three to four times to take your seat?

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A. " Not true. "

If the plaintiff did not promptly obey the order of the judge to take his seat in a situation where the judge himself thought it fit to intervene and give the order, was the plaintiff in contempt? If yes - was it competent for the judge to give the order complained of to the Police Constable instead of resorting to the criminal procedure relevant to contempt? And a question put to the witness Craddock Ebanks, a member of the Cayman Islands Legislature for 23 years, fits in well at this stage. Mr. Ebanks was an eyewitness to the incident of the 27th February and the plaintiff cross-examined him.

Q. " I suggest to you that at that time, I told the judge that I could not sit down because I was not finished saying what I had to say in my submission?

A. Regardless of your statement you still refused to sit down. "

What is the power of the Stipendiary Magistrate to deal with misbehaviour in Court?

In a cricket match, it is the umpire who is in charge of the game. In a football match, it is the refree; in a debating society, it is the person in the chair. Someone must take charge in order to prevent disorder, regulate the proceedings and manage the cause or purpose in question according to the known or accepted rules. And in a court, it is the judge who is in charge. He has been trained to assume his high office. The public expects him, and it is his duty, to see among other things that the advocates behave themselves, that they keep to the rules laid down by law and that public time is not wasted by anyone engaged in any proceedings before him. Lord Denning in Jones v. National Coal Board [1957] 2 A.E.R. 155, has something to say about this aspect of the judge's functions.

In the Cayman Islands, the Legislature has given the Stipendiary Magistrate, ample power to deal with misconduct or misbehaviour in Court. Law 15/1965 makes provision for:

(a) wilfully insulting the Stipendiary Magistrate, a witness or a legal practitioner in court; or

(b) wilfully interrupting the proceedings of the court or otherwise misbehaving in court.

If (a) or (b) does occur in court - and it is the judge who is the judge of the situation - he may:

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(i) " by warrant under his hand commit the offender for any period not exceeding seven days to prison; or

(ii) "impose upon the offender a fine not exceeding Ten Pounds for any offence. "

But the section continues to say this:

> " The provisions of this subsection shall be in addition to and not in derogation from any jurisdiction or powers possessed by any such court. "

In the enabling section, the Stipendiary Magistrate is also given specific power to order any member of the Cayman Islands Police to take the offender into custody, until the rising of the Court. The presiding judge is given wide powers to deal with any given situation as in his discretion, he may determine.

It is a well known rule in construing an enabling power:

> " that if the Legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for the purpose of carrying out the purpose in view. "
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> See Craies on Statute Law, 4th Edit. pp. 229-230.

It was on this principle that the Privy Council decided the case of Doyle v. Falconer, (1886) 4 Moore P.C. (N.S.) 208. In that case the Legislative Assembly of Dominica was constituted by Royal Proclamation. No special power was given to the Assembly to punish members for contempt. It was argued however that a power to punish for contempt was implied in the power to constitute an assembly. But this argument was rejected.

> " It is necessary to distinguish between a power to punish for a contempt and a power to remove any obstruction offered to the deliberations of a legislative body, which last power is necessary for self-preservation ..... The right to remove for self-security is one thing, the right to inflict punishment is another. "
>
> See Craies on Statute Law, 4th Edit, at p. 230.

It seems to me that if specific power was granted to the Legislature to punish members for contempt the implied power to remove the "obstruction" - if it was capable of being removed - was also granted where it was not considered expedient or necessary to inflict any punishment on the offender. An unruly member could be removed from the chamber by the order of the Speaker. If this were not possible, how could the business of the day be transacted?

On the plaintiff's own case which I have tried to outline, he failed

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at the end of it to prove what he attempted to do. And on the law, his own case showed that it was a hopeless expedition and an ill-advised move on his part to launch his action. However, I now examine the contention of the defence. And simply put it is this: The plaintiff refused to obey an order of the Court to take his seat when he was obstructing the proceedings with loud noise and constant interruptions. The order for him to take his seat with a warning of the consequences if not complied with, was given about three to four times. When he refused to obey and displayed defiance, the order to remove him from the court was given the Police Constable. Four witnesses as to the incident gave evidence for the defence.

Defence outlines its side of the story

The defendant is a Canadian citizen. He is a graduate of the University of British Columbia and was called to the British Columbia Bar in 1956, and was also admitted as a solicitor. In 1968, he was named a Magistrate in British Columbia. That post is now designated "Provincial Court Judge." He still holds that position but is on special leave for two years with the approval of his government in order to assume the position of acting Stipendiary Magistrate for the Cayman Islands. This position he has held since February 1975. According to the defendant, he enjoys a good working relationship with the Bar of the Caymah Islands. His opinion of the plaintiff, however, has no encomiastic flavour and he spoke forcefully on the point. The opening shot was put thus:

Q. " What is the general behaviour of the plaintiff when he appears before you?

A. In my opinion, as a counsel, he is incompetent and his conduct is disgraceful. I hate to say it. "

Q. When he appears before you and you make a ruling against him, what is his general reaction?

A. He is quick to talk about an appeal.

Q. What is his general attitude towards you on the Bench?

A. Contemptuous - not in the general legal sense. Mr. Brandon is quick to refer to his years of experience at the bar as if that was proof of his superior ability and knowledge. "

The defendant said that a primary tactical move of Mr. Brandon is to seek a confrontation with the Bench in the hope that an error may be committed. And keeping him within strict legal bounds only serves to spawn a lengthy and arduous cross-examination not for the purpose of pursuing the interest of his client but for the purpose of creating an impression and with an eye on the

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gallery. As a result, greater latitude is granted to Mr. Brandon than is allowed other members of the Bar. If this is the position, then it appears that the Bar of the Cayman Islands may be divided into two divisions, namely, Mr. Brandon enjoying certain privileges in court which are peculiar to himself on the one hand and the other members who are amenable to the usual judicial restraint, on the other.

The general opinion of the defendant touching the conduct of Mr. Brandon in court and the method he has devised to deal with it, find support from Mr. Algernon Smith, Acting Deputy Director of Public Prosecutions, Jamaica, who was acting as Legal Assistant Cayman Islands in February 1976. Mr. Smith served as Clerk of the Courts for three months and as Acting Legal Assistant for five months. Mr. Smith described the plaintiff in this way:

> " Mr. Brandon defends his clients vigorously; he is over sensitive in that regard, and whenever he is challenged as to his knowledge of law or as to his propriety of the conduct of his defence, he tends to become somewhat intemperate and he resists anyone trying to point out any mistake or any improper conduct. The 'anyone' would cover the learned judge or the opposing counsel. "

And dealing with the relationship between the Bench and the Bar in so far as the defendant is concerned, Mr. Smith said that there was not that rapport between the plaintiff and defendant as should exist between Judge and Counsel. This question was put to Mr. Smith by Mr. Panton:

Q: " Notwithstanding the lack of rapport would you say that the judge has often bent backwards for Mr. Brandon?

A: I think I can accurately answer the question in this form. Without any reservation, the judge in fact bent backwards on many occasions to accommodate Mr. Brandon. "

At the end of the cross-examination of Mr. Smith on the third day, Mr. Brandon addressed the witness as follows:

> " Thank you Mr. Smith for being so honourable. "

The demeanour of Mr. Smith in the box impressed Mr. Brandon as it impressed me. This "honourable witness" destroyed any suggestion or allegation that the Magistrate haboured any "malice" against the plaintiff as counsel. And the witness supports the contention of the defendant to the effect that Mr. Brandon is a difficult attorney to handle and as a result, "special latitude" has to be fashioned and accorded in order to accommodate the special peculiarities" which he demonstrates in court. And Mr. Smith also supported the defendant in relating what happened in court on the 27th February.

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## What really transpired on February 27?

The 27th February was the return day for summonses touching affiliation and maintenance. And one summons issued to Hector Reid and returnable on the said day at the instance of Darlene Thomas, alleged an arrears of $65 under an order directing a payment to her of $5 weekly for the maintenance of a child. When the case was called on the complainant Thomas and the respondent Reid answered. The plaintiff announced that he was appearing for Reid. Taking a strong stand, the plaintiff said that the respondent Reid did not owe the arrears because the complainant Thomas had placed the child, with some party with a view to adoption and further that Thomas was living with a married man and that he the plaintiff "knew all about it."

## Thomas allowed to speak

Given an opportunity to speak, Thomas denied that she had given away the child for adoption. She then launched into "a thrilled and rapid account" describing the conduct of Mr. Brandon. One early morning, Mr. Brandon paid a visit to her home. He was accompanied with other persons. Peeping in her room was part of the mission. But the exercise was not without its own incident. A companion who was in her room retaliated. Mr. Brandon received a "beating" in the process and in his bid to escape from the scene, he lost a shoe. It appears that the "visit" was designed to get evidence to support a divorce petition of Mr. Brandon's client. The "companion" in the room of Thomas was believed to have been the husband of the client. There is no doubt that the mission of Mr. Brandon, at a time when perhaps it was unwise to peep or to interrupt, was bristled with danger. And relating the incident in court would provoke merriment and tittering. This is exactly what happened. But it also had another effect. Mr. Brandon became angry and started to shout that what was being said by Thomas was a pack of lies, was malicious and that no one could talk about him like that.

Mr. Ebanks was very descriptive of the scene.

> " It seemed that Mr. Brandon's tongue was tied in the middle with three loose ends .... In talking his tongue was pretty hard to follow. "

The court room was in uproar; the laughter was strong and sustained. It was now the duty of the magistrate to act. He told both Thomas and Mr. Brandon to sit down. The former obeyed but the latter did not. What he did was this: he sat for a brief second and was on his feet again muttering, talking

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and interrupting. The order was given about four to five times, according to the defendant but Mr. Brandon "became noisier and noisier." He was told that if he continued to interrupt, he would be removed. But this had no effect. The order was then given to the Constable to remove Mr. Brandon from the Court. The Woman Constable moved towards the direction where he was. But he gathered his papers and said:

" My business is finished here, I am going anyway. "

Silence was restored after he left. The summons was adjourned to March 11 and Reid was advised to inform Mr. Brandon of the date.

Mr. Smith, Mr. Craddock Ebanks and woman Constable Lowe who witnessed the scene all gave evidence supporting the substance of the defendant's description of what in fact did take place. When leaving the Court Room, Mr. Brandon threatened to report the matter to the Governor. As a result, Miss Lowe and Mr. Ebanks made a note of what each had seen and heard. Miss Lowe prepared herself in case, the Commissioner of Police should call upon her for a report. Mr. Ebanks prepared himself to report in his capacity as a legislator if his assistance was required. The credit of these witnesses was not shaken in cross-examination. The more they were cross-examined, the more they drove nails into the feeble outline of the plaintiff's fabric of what took place. On the facts, therefore, the evidence was overwhelming, and I so find, that the plaintiff was guilty of "wilful interruption or misbehaviour" in Court and that the defendant had ample authority to make the order which is the subject of litigation. And the plaintiff is fortunate that he was not cited for contempt and punished. There was no defence to his unbecoming conduct and he could not expect the defendant to continue his "leaning back posture" to accommodate his mood and tantrum on the occasion.. When he indirectly aired his early morning detection of Thomas' involvement with his client, he was inviting the humorous episode of his own encounter in the mission of detection. Perhaps he did not envisage the retort of Thomas in the way it was done. But he asked for it and he has no one to blame but himself. If the presiding judge could have ordered a jail term of seven days for his conduct, how can it be seriously argued that he, in mercy, could not have taken steps to remove the "obstruction" thereby obviating the necessity of sending an attorney to jail?

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That the greater includes the less may be said to be an elementary principle taught to youngsters in the nursery. It can, however, be called to use even in the serious atmosphere of a court of law. Indeed, Mr. Brandon himself in an answer to the Court while giving evidence conceded the 'elementary principle' above stated. This is part of this evidence:

> " I am well versed with the statute laws of Cayman. Power is given to the Magistrate to deal with disorder in court. "
>
> Q: " Do you think that if statutory power is given to a person to do something, he has the power to do what is reasonable to carry out what he is entitled to do?
>
> A: The judge would have power to eject anyone whom he thinks is disorderly. A lawyer is in a different category. "

Why a lawyer should be differently treated if he is "disorderly" or "contemptuous" is not clear. He is not a sacred cow nor does he enjoy greater privileges and immunities in the area of good behaviour and in the demonstration of respect for a Court than what a lesser mortal from Bodden Town enjoys. If the facts are tested from the point of view of the plaintiff or from the angle of the defence, the result would be the same, namely, the claim ought to be dismissed with judgment for the defendant.

In view of the conclusion on the facts, I do not think it is necessary to examine in detail the modern cases dealing with the immunity of judge, counsel or a party from a suit which arises out of a judicial proceeding. But I shall take this opportunity to restate certain propositions which have been established.

## Five essential ingredients in the judicial process

In a judicial proceeding, there are certain actors which may be found at work. Each is a privileged participant in the sense that what is said or done by anyone of these actors may not form the basis of a suit in court. In the case of Rondel v. Worsley, which I have already mentioned, mention was made of the general immunity from suit accorded to these actors. Lord Pearce in his usual style puts the point very clearly:

> " The five essential ingredients of the judicial process at the trial are the parties, the witness, the judge, the juror and the advocate. If all those are functioning at their best, only very hard coincidences of fate can cause a miscarriage of justice. If one of them is not at his best the functioning of the others tends to correct the balance ..... All those essential ingredients are, under the law as it now stands, wholly protected in what they say and do (save that counsel is answerable to professional discipline for misbehaviour).
>
> See [1967] 3 W.L.R. 1666 at p. 1710 E-G.

If these "essential ingredients" are protected, it follows that one cannot sue the other for anything said or done during the judicial proceeding. The protection is accorded as a matter of public policy. In the case of the judge, it is in the public interest that his action, words, order or judgment should not be liable to be called in question by way of a civil action against him. And in the case of the attorney, he would be unable to give his best consideration to the case he undertakes, and to assist the court with honesty and courage if the threat of a civil action should hang over his head like the sword of Damocles. Another quotation from Rondel v. Worsley may not be out of order:

> " It is all part and parcel of the long-established general policy that judges, witnesses and counsel must be immune from actions arising out of their conduct during the course of litigation in the public interest. "
>
> See Lord Upjohn at p. 1722 B.

Certain cases briefly discussed

In Garhett v. Ferrand, /1824-34/ All E.R. Rep. 244, the defendant was one of the coroners for the county palatine of Lancaster. The plaintiff entered the room where the defendant was about to hold an inquest. The defendant requested the plaintiff to leave the room and on his refusing to do so, the plaintiff was removed on the direction of the defendant. The plaintiff brought an action of trespass against the coroner but he lost. The basis for the dismissal was put by Lord Tenterden, C.J. as follows:

> " This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own case as for the sake of the public, and for the advancement of justice that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be. "
>
> See p. 246 of the report above.

This passage was cited and approved by Lord Denning, M.R. in Sirros v. Moore, /1974/ 3 A.E.R. 776 at p. 782.

In the case of Garnett v. Ferrand supra, the Chief Justice, used certain words, the force of which has the same strength to-day as when they were uttered nearly 150 years ago:

> " It is not to be supposed beforehand that those who are selected for the administration of justice will make ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment so long as they act within the bounds of their jurisdiction. "
>
> See p. 246 B-C.

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In Calder v. Halket, /1835-42/ All E.R. Rep. 306, an action against a provincial magistrate in India was brought by a British subject. The action claimed damages for assault and false imprisonment. A riot occurred and the magistrate held an inquiry and took the depositions of the wounded and some of the alleged eye-witnesses. A directive was issued by the magistrate for the arrest of the plaintiff. As the law then stood, the magistrate had no authority to order the arrest of a British subject unless a complaint was made by a native and it was admitted or proved that no native had made any complaint against the plaintiff. It was not shown that the defendant knew that the plaintiff was a British subject. The plaintiff succeeded before the Supreme Court but lost on an appeal. On a further appeal to the Privy Council, the appeal was dismissed. One of the grounds on which the appeal was dismissed was stated as follows by Parke, B. who gave the judgment of the Privy Council:

> " it is well settled that a judge of a court of record in England, with limited jurisdiction, or a justice of the peace acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge which he ought to have availed himself, of that which constitutes the defect of jurisdiction. "
>
> See pp. 309-310 of the report.

In the two cases discussed above, it was held by the Court, in the first, that the coroner, like a judge, has the power of exclusion from the court of any person where the interest of justice so requires. Acting judicially and within his jurisdiction would, therefore, bar an action against him. In the second case, the judge acted outside of jurisdiction but honestly believing that he was within it. There being no evidence to the contrary as to his knowledge, the action could not succeed.

It is true that the cases cited above were decided before the enactment of the 1848 Act which made justices of the peace liable for acts done, within their jurisdiction, if done maliciously and without reasonable and probable cause. But the modern trend as shown in the case of Sirros v. Moore (cited above), is to dismiss the former difference between the judicial immunity enjoyed between judges of superior courts on the one hand and those of inferior courts on the other. And there is good reason for it. The judge dressed in his resplendent robes sitting in the Grand Court is

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required to dispense the same standard of justice as that which is expected of the Stipendiary Magistrate browsing in the lowland. The ordinary citizen has a vested interest in the fairness displayed by each of them, the protection offered them and the state of the administration of justice as generated by them. A blow directed against the honest and courageous exercise of judicial authority by one would cause, like the blow directed against the Trojan Horse, reverberations below and all over the object. And this would militate against the public interest.

Certain evidence tendered to affect the credit of the plaintiff

I do not think it would be right for me to overlook certain matters disclosed in evidence which point to the credit of Mr. Brandon. I shall refer to two in particular.

(1): Where an action is to be brought against an officer of the court who is acting in pursuance of any law relating to the court, such action must be commenced within

> " three calendar months after the act, and not afterwards or otherwise. "

And notice in writing of such action and the reason for it, is to be given to the defendant at least one calendar month before the commencement of the action. Section 35 of the Judicature (Administration of Justice) Law (Cap. 74) governs the position. If the plaintiff's claim is caught by the section, it means that the notice of the action should have reached the defendant on or before April 25, 1976. But as April 25 was a Sunday it should have reached him not later than April 26. On April 24, 1976, the plaintiff wrote a letter to the defendant informing him of the intention to file an action against him. This letter, according to the plaintiff, was posted by him by ordinary mail on the said date. The defendant swore that he did not receive the letter until May 11 at 4:55 p.m. The letter box of the defendant at the Post Office was opened by him at noon on the same date; the box was empty. It was when a later visit was paid at 4:55 p.m. the letter was found. A period of 17 days had elapsed between the posting of the letter, containing the notice to file action and the receipt by the defendant who cleared his box regularly himself. The postmark on the envelope is not clear.

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On May 27, 1976, the day after action was filed, the plaintiff posted to the defendant a copy of the "Notice" which he had already sent on ~~May~~ April 24. This time, however, he sent the copy by registered mail. The plaintiff claims that he sent both the "Notice" of ~~May~~ April 24 and "the copy" on May 27 as a courtesy move on his part and not as fulfilling an obligation required by law. He said further that great delay in the delivery of letters is sometimes experienced at the post office. On the other hand, the defendant said that he never experienced such a long period before in receiving a letter posted locally. Whether or not the plaintiff was required to comply with the statutory requirement is not relevant. What he consciously did in so far as it disclosed his state of mind and demonstrated his reliability as a witness, is relevant. I find the plaintiff's explanation on this issue most unsatisfactory. He is labouring under a serious lapse when he maintained that he posted the letter on the very day it was written.

(2) The plaintiff in his action has claimed $10,000 as special damages. This item he subsequently abandoned. He was unable to produce one witness to support his contention that the publicity given to the incident in Court adversely affected his practice and caused clients to defect to other legal practitioners. It was suggested by Mr. Panton in the cross-examination of the plaintiff that he attempted to fabricate evidence that he suffered damages as a result of the incident of February 27. Such a serious suggestion to a practising attorney could only be put if there was good ground to do so. And two bits of evidence were relied on. Firstly, it was proved by the defence - and it was not controverted - that the local press did not carry any report of what took place in Court. It was only after action was filed that the local press started to make any mention of the incident. And this would be in line with the evidence of the plaintiff that he was waiting for an opportunity to bring an action against the defendant in view of the hostility, malice and spite previously demonstrated by the magistrate against him in court. Secondly, a witness Sherrel Whittaker gave evidence and described in detail supported with documents a conversation with the plaintiff

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indicating:

(a) That the plaintiff wanted to "recruit" him as a witness to say that he Whittaker defected to another attorney when the incident in court was made known;

(b) that the plaintiff wanted him to swear that the "loss" suffered as a result of the defection was $500;

(c) that the palintiff wanted about four other "recruits" to support the loss of clientele at the trial;

(d) that he (Whittaker) made a report to his own Attorney (Mr. Gill) and to the police what the plaintiff wanted him to do;

(e) that he gave a statement to the Police in the presence of a Justice of the Peace, Mr. William Wood concerning the suggestion of the plaintiff.

Two of the documents which Mr. Whittaker handed to the Police and which the plaintiff admitted to be in his handwriting are as follows:

(1) " trial

Friday

20th August

Incident in Court took place 27 Feb. 1976 "

(2) " Middle of February I spoke with Mr. 'B'

Offence - end of February. In March went to my lawyer who has since been retained.

$500.00. "

Mr. Whittaker said he knew nothing about the incident in Court until Mr. Brandon told him about it. He said further that he had no dealing with Mr. Brandon in which a fee of $500 or any other sum was owed to him as an attorney. On the other hand, Mr. Brandon under cross-examination said that Mr. Whittaker consulted him about a divorce petition and that the fee which he charged Mr, Whittaker, was $500. Having heard that the witness Whittaker had deserted him for another attorney, he the plaintiff invited the witness to his office to discuss the matter although the letter of invitation in his own handwriting stated clearly:

> " I have a personal private matter I wish to discuss with you. It has nothing to do with your divorce at all - it is something quite different. "

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The first trial date of the present action was August 20. This may be the explanation of that date on document (1) above-mentioned. The witness was to remember the date when he should come to court and also the date of the incident resulting in his transferring his allegiance to some other attorney practising in Grand Cayman.

The plaintiff's explanation of his contact with Mr. Whittaker and the interpretation to be put on certain documents in his handwriting which he sent or gave to Mr. Whittaker is unsatisfactory. He admitted that he caused a subpoena to be prepared for Whittaker in the present action but later found that he was not required; and further he admitted that at no time did he obtain a statement from Whittaker as a potential witness to support his cause. I find that the witness Whittaker gave a true account of what the plaintiff wanted him to do and that a brazen and improper attempt was made to put untruthful evidence before the Court in order to support the item of special damages. The reason for the abandonment of special damages by the plaintiff at a late stage needs no explanation.

General comments

Mr. Shaw in his evidence and in answer to the Court was prepared to disbar the plaintiff in the sense that he was not going to try any case in which Mr. Brandon was engaged as attorney. On August 31, I gave reasons why such a move would be unwise and untenable. I need not repeat them. My general reasons for dismissing the action are hereby incorporated in this judgment.

This case shows the crying need for effective action to be taken with the help of legislation if necessary to control and discipline an attorney in the Cayman Islands. That an attorney is free to call a witness to support a cause criminal or civil when no written statement has been taken from the prospective witness is something dangerous and is inimical to good practice. And that a person may be approached with a view to his giving false evidence without any sanction whatever against the originator, is a blow against what the fair administration of justice demands.

When both branches of the legal profession were fused in Jamaica by legislation, certain standards of professional etiquette and professional conduct as compiled by the General Legal Council were adopted. They were

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published in the Jamaica Gazette Extraordinary of January 6, 1972. These "canons" serve as a reminder to an attorney and assist the public in evaluating an attorney's work and merit in the claim that the latter is an officer of the Court and plays a significant role in the administration of justice.

The plaintiff has made history to a certain extent in suing the judge before whom he practised but this is not the kind of publicity which an attorney should seek. He said he was unable to secure the services of counsel from Jamaica to represent him but his ill-luck has not brought about any miscarriage of justice. The warmth and energy which he demonstrated throughout the trial in presenting his case was met with a certain amount of reciprocity in defending it. Mr. Panton displayed ability, courage, competence and assurance in meeting the claim. He made the task of the Court comparatively easy in arriving at its conclusion.

U. N. Parnell
Senior Puisne Judge, Jamaica
(exercising jurisdiction in the Grand Court between August 23 to 31, 1976)

October 19, 1976