CITATION: *Von Kanel-Brancher v Cooke* [2003] NTMC 051

PARTIES:	JOCELYNE VON KANEL-BRANCHER
	v
	DOUG COOKE
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	Small Claims
FILE NO(s):	20304205
DELIVERED ON:	30 September 2003
DELIVERED AT:	Darwin
HEARING DATE(s):	17 September
DECISION OF:	JENNY BLOKLAND SM

CATCHWORDS:

Evidence – Burden of Proof – criminal act alleged – circumstantial case –

Briginshaw v Briginshaw (1938) 60 CLR 336
Willcox v Sing (1985) 2 QLD R 66;
Shaun v Wolf (1999) 163 ALR 205;
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170

REPRESENTATION:

Plaintiff:	Self
Defendant:	Self

Judgment category classification:	B
Judgment ID number:	[2003] NTMC 051
Number of paragraphs:	12

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20304205

[2003] NTMC 051

BETWEEN:

JOCELYNE VON KANEL-BRANCHER
Plaintiff

AND:

DOUG COOKE
Defendant

REASONS FOR DECISION

(Delivered 30 September 2003)

Ms BLOKLAND SM:

Introduction

1. This claim alleges the defendant intentionally scratched the plaintiff's car door causing damage that cost $ 656.80 to repair. The defendant denies the claim and has filed a counterclaim alleging assault and harassment. The plaintiff's claim is unusual in the small claims jurisdiction. Although the claim concerns trespass to goods, it alleges the commission of a criminal offence (criminal damage) resting largely on circumstantial evidence.

Evidence

2. On 6 February 2003 the plaintiff, (who is a research scientist by profession but currently looks after her young daughter), parked her car, (a metallic RAV 4) at the Nightcliff (*Woolworths*) Shopping Centre. She had just dropped her daughter off at a swimming lesson. As she parked her car she noticed that there was a systemic mistake in the public car parking that day,

forcing all of the cars in her row to park quite closely to each other on one side. She parked as best she could next to a car that turned out to belong to the defendant. She said in evidence there was enough room on either side to open the car doors. Her car was on the white line on the defendant's side.

3. Her evidence was that as she sat in her car having a cigarette she heard a screeching sound. She said it sounded metallic and became louder and reverberating. She thought there may be some-one scratching with a trolley. She then saw a person's arms on the left, some shoulder movement and came to a belief, realisation or conclusion that somebody was scratching her car.

4. She said she was shocked and went straight to the defendant who was sitting in his car. She confronted him and she alleges he said something like:

> "Did you see your parking, your parking style? "

The plaintiff stated the she said she was "on the white line" and that in shock she stated

> "you did that deliberately".

The plaintiff alleges the woman sitting in the passenger side said words to the effect of

> "I am a lawyer – I can sue you for defamation".

The plaintiff says neither the defendant, nor the passenger, (who turns out to be the defendant's wife) would come and look at the scratch. The defendant's wife told the plaintiff something to the effect that she would need to provide two quotes. The plaintiff told the defendant and his wife she would need their details. The defendant did in fact giver here their phone numbers and relevant personal details that were tendered to the court. The plaintiff reported the matter to the police as she believed there deliberate damage was perpetrated on her car by the defendant. She also relayed to the court that the defendant had said something about the fact that his keys may

have come into contact with her car accidentally. The plaintiff obtained three quotes for repairs as she believed was suggested by the defendant's wife. On contacting the defendant and his wife, there was a refusal to deal with her or engage in discussion about the matter.

5. In cross-examination she agreed she was very angry. She did not accept that the car could have been scratched prior to the day in question. (It had last been painted in November 2002). She agreed there was a boy pushing trolleys in the car park but did not agree the screeching sound came from him. She denied being abusive or aggressive.

6. Both the defendant and his wife, Mrs Robyn Cook gave evidence. The defendant denied scratching the car and certainly denied doing anything deliberately to the plaintiff's car. He also said the plaintiff banged on his windscreen, was abusive and he couldn't initially work out what she was talking about. Mrs Cook gave evidence broadly supportive of her husband. Both say the plaintiff was so agitated they couldn't get a word in.

7. Both say the personal details (by way of the driver's licence) were given to the plaintiff to help them get out of the situation. Mrs Cooke gave evidence saying she asked the plaintiff for quotes for similar reasons (to get her away from their car).

8. I have no doubt the plaintiff believes the defendant scratched her car. She agrees she did not actually see it but relies on circumstantial matters that the court must assess. The approach must be to consider these circumstantial facts and inferences together. Those facts and inferences focussing on the plaintiff's case are:

    - The scratching sound she heard
    - The fact the plaintiff could not be seen through tinted windows

- Seeing a man's (the defendant's) torso moving past or getting into the next car.

- The words spoken to the defendant to the effect that there was something wrong with the plaintiff's parking.

- The handing over of the license or personal details by the defendant.

- The request for quotes by the defendant's wife.

- The plaintiff's observation that the scratching was not present prior to this incident.

- Some reference by the defendant that without being aware of it he could have accidentally scratched the car.

When considered cumulatively, these facts point to an inference consistent with the plaintiff's claim, however the facts and circumstances militating against the plaintiff's case must also be considered. They include:

- The evidence of the defendant and his wife that there was noise coming from trolleys being pushed around in the area at the relevant time.

- The explanation given on why the defendant spoke about the plaintiff's parking style and possible unintentional scratching: (that is, the defendant trying to think of an explanation for the plaintiff as to how it could have happened).

- The reason given for the license details being handed over was to end a nasty altercation

- The request for quotes came from the defendant's wife who had not seen any incident said she did this because the plaintiff was so irate and she wanted to end the confrontation.

- The plaintiff cannot in any event positively rule out scratching from another source.

- The defendant gave evidence denying he scratched the car suggesting he gave consideration to whether he may have unintentionally scratched it, but discounted that.

Burden of Proof in Civil Cases where Criminal Act alleged

9. It's necessary to decide this matter with reference to and consideration of appropriate onus and standard. The plaintiff bears the onus to the standard of balance of probabilities. When a criminal act is alleged, it is still the civil standard, however, in assessing the evidence, the nature and consequences of the fact or facts to be proved must be considered. The relevant law is stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336 by Dixon J at 361 – 362.

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality... Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently at the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences floating from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when for instance, the issue is on which of two dates on admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done including grave moral delinquency."

In *Willcox v Sing* (1985) 2 Qd R66 the Supreme Court of Queensland did not over-rule a trial judge who told a jury not to *lightly find* against a doctor because of the adverse consequences that would flow as a result of a finding of negligence. Justice Merkel in *Shaun v Wolf* (1999) 163 ALR 205 similarly found that the court should *not lightly* make a finding on the balance of probabilities that certain persons were not Aboriginal as the consequence of such a finding would be to invalidate their office after an ATSIC election. The High Court confirmed *Briginshaw* in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 in the context of fraud stating (at 170-171):

> "The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or urgent or strict proof is necessary where so serious a matter as fraud is to be found. Statements to that effect should not, however be understood or directed to that standard of proof. Rather, they should be understood merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on balance of probabilities, a party to civil litigation has been guilty of such conduct."

10. Applying these principles to this case, I must consider that a finding against the defendant would effectively mean I have found him to have committed a criminal offence. I should not do that lightly bearing in mind the consequences to reputation. Although I accept the plaintiff genuinely believes in her case, the circumstantial evidence is not strong enough to convince me to the relevant standard. This is especially because the alleged act is denied on oath and the improbability of a person in the ordinary course of events intentionally scratching a nearby car while on a regular shopping trip. I therefore dismiss the claim.

The Counter- claim

11. The defendant counter-claims for damages for assault. I have no doubt the plaintiff was agitated and emotional at the time of the confrontation but I do not consider there was any act or threat that directly placed Mr Cooke in reasonable apprehension of an imminent physical interference. In relation to the alleged harassment, once again, even if the plaintiff was slightly agitated on the phone to the defendant and his wife, in the context of chasing up promised quotes and associated matters, I do not see that any cause of action has been made out.

12. I therefore dismiss the counterclaim.

Orders

1. The plaintiff's claim is dismissed.

2. The defendant's counter-claim is dismissed

Dated this 30th day of September 2003.

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MS JENNY BLOKLAND
STIPENDIARY MAGISTRATE