

MILLER v SOTIROPOULOS

SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

5 MASON P, MEAGHER and POWELL JJA

18 August 1997, 18 August 1997

[1997] NSWCA 204

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Tort — Trespass to person — Defendant alleges provocation — Whether a defence — Defence alleges self-defence — Onus of establishing — Excessive force — Opportunity to retreat — Relevance of

15 **Powell JA** This is an appeal from a judgment delivered, and verdict found, on
20 September 1996 by Holt DCJ in the District Court in Sydney in proceedings
which had been brought by the Respondent against the State of New South Wales
("the State") and the Appellant seeking damages in respect of an incident which
had occurred at the Plumptre High School ("the School") on 28 August 1987. In
20 that incident, the Respondent had been struck on the jaw by the Appellant, the
Respondent's jaw being broken. The claim made by the Respondent against the
State was that it had been negligent in its supervision of the pupils at the School
at the relevant time, while the claim made by the Respondent against the
Appellant was that the Respondent was guilty of assault and battery.

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28 August 1987 was a rainy day at Plumptre, so that, when it came to the
luncheon break, the pupils at the School were assigned to various places within
the school buildings for the purpose of their taking the luncheon break. It was
during the period of the luncheon break when the incident in question occurred.

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It would appear that, during the early part of the luncheon break, there had
been an incident involving the Appellant and a younger boy at the School. As a
result of that incident, the Respondent, together with a Robert Hakim, went to the
place where the Appellant was sitting with some other friends, and that, after
apparently exchanging words with the Appellant, Robert Hakim then essayed
35 what was described in the evidence as "a karate kick" in the direction of the
Appellant's head - whether by accident or design the kick went over the
Appellant's head.

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The exchange between Robert Hakim and the Appellant having been
witnessed by one, or both, of the two teachers who were then supervising the
group of students in that particular area, a Mr Lett, the senior of those two
teachers, moved to where Robert Hakim and the Appellant then were and started
to move Robert Hakim from the scene. As Robert Hakim was being removed by
Mr Lett, the Respondent turned and started to move away from the place where
the Appellant was then sitting.

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It would seem that, either immediately prior to the Respondent turning away,
or after he had turned away, there was some interchange of words between the
Appellant and the Respondent, the suggestion in the evidence being that the
Respondent made some comment about the Appellant's mother to which the
Appellant then responded.

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In the statement which he wrote later on the day in question, the Appellant
wrote as follows (AB 257):

“lunch time Adam Capri was calling me a scum, so I hit him soft in the ribs so someone got Robert Harkin (sic) to come up to me & do something & so he rub my hair & then I told him to piss off & then he went to kick me in the head & so John was standing there being smart so I said shut up wog or I will punch
5 you in the head & he said you can try it so I got up and said come on & and so he pushed into me and then I hit him.”

A not dissimilar version of the events in question was given by another pupil, Robyn Hyde, who, in a statement made a few days later, recorded (AB 252):

“Keith was sitting in the math, science area when Robert and John walked in
10 and went up to Keith and started hitting him and saying things. Keith just took it and John was laughing and Keith got angry and jumped up and then hit John. John’s mouth cracked and blood starting coming out of his mouth and then Mr Birwick (sic) came and grabbed John and Keith. John was swearing at Keith and he was trying to hit Keith and then Mr Birwick took them to the office.”

15 The version of the events given by the Appellant at the trial did not differ markedly from that which was in his statement. However, the following passages in the Transcript of the Appellant’s evidence in chief might be noted (AB 161-163):

“DUPREE: Q. Did you say anything to Mr Sotiropoulos at about this time?

20 A. When I saw him laughing?

Q. Yes?

A. Yeah.

HIS HONOUR: Q. You saw him laughing, is that what you’re saying?

A. Yeah.

25 DUPREE: Q. Can you recall what it was that you said?

A. Shut up or something to that effect, I can’t recall precise words.

Q. You recall saying anything further to him?

A. No-

30 Q. Don’t be embarrassed?

A. -not at this moment, sorry.

Q. Do you recall Mr Sotiropoulos saying anything to you?

A. Like after a few seconds, like I said, I can’t remember what was said, all I do remember is that he said ‘Come on’ I said ‘Come on’.

35 HIS HONOUR: Q. Wait a minute, the plaintiff said what?

A. ‘Come on’.

Q. Yes?

A. I said the same thing back.

DUPREE: Q. Do you recall anything further being said?

40 A. No.

Q. When this exchange of come on was complete, did you see the plaintiff do anything?

A. I walked over to him, he walked over to me.

HIS HONOUR: Q. Just one moment, ‘I walked over to the plaintiff’ you know
45 who we mean by the plaintiff?

A. Yep.

Q. Yes?

A. Like he walked to me, I walked to him,

DUPREE: Q. Do you recall who moved first?

50 A. No I don’t.

Q. And then what happened?

A. We stood very close to each other, it would have been approximately 10 to 15 centimetres apart.

Q. Did anything then happen?

A. Yeah.

5 Q. What was that?

A. John put his shoulder into me, which made me lose balance.

HIS HONOUR: Q. Put his shoulder, when you say put his shoulder into me, which part of you?

A. It would have been my shoulder.

10 PINKOS: Indicates the right shoulder your Honour.

WITNESS: I can't remember which shoulder.

DUPREE: And then what happened? You told his Honour you lost balance, can you describe what happened in that action?

15 A. I just went back a foot, back down on a foot, like didn't fall down on the ground or anything, it just made me lose balance off both feet. I went back one foot and that's when I came back around with a punch.

HIS HONOUR: Q. You say you punched him, yeah?

A. Yes.

20 Q. With what hand, where?

A. Right hand and to the face.

DUPREE: Q. Do you recall what part of the face?

A. No - the jaw, the jaw area.

25 Q. When Mr Sotiropoulos put his shoulder into your body, what was in your mind at that time?

A. To me it would have been he started it and self defence-

Q. How did you feel at the time, when he - at the moment he's putting his shoulder into your body, what were you feeling?

30 OBJECTION (PINKOS). WITNESS NOT ALLOWED TO FINISH ANSWER.

HIS HONOUR: Q. Yes, all right, did you want - had you finished your answer, you say when he put his shoulder into me, I thought he started it?

35 A. Yep, then I lost balance and just common instinct and self defence I - that's when I came back up with the punch.

DUPREE: Q. What I'm asking you, if you could listen to my question, when the shoulder - at the time the shoulder was coming towards you and when it connected with you, what were you feeling?

40 A. My temper was high because of what had happened, the incident with Robert Hakim.

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DUPREE: Q. You said to his Honour that you were in self defence?

A. Yes.

45 Q. Do you recall telling his Honour that before the Court rose earlier today?

A. Yes.

Q. Why did you feel in were in self defence?

A. To me a shove is just as good as a punch or anything else along the lines of starting a fight.

50 HIS HONOUR: Q. As (sic) shove is as good as a punch?

A. Yep."

Before turning to examine the question whether either, or both, of the State or the Appellant was to be held liable to the Respondent in respect of the injury which he (the Respondent) had sustained in this incident, Holt DCJ rehearsed the evidence which had been given on behalf of the parties, albeit, at that stage, without making any specific findings of fact.

Having done so, Holt DCJ turned to consider the claim which had been made against the State, at the conclusion of which part of his Judgment his Honour recorded his view that the staff at the School had taken all such steps as, in the circumstances, ought reasonably to have been taken by them in order to prevent injury to the pupils, and indicated that, for that reason, he proposed to enter Judgment for the State against the Respondent.

Holt DCJ then fumed to the claim against the Appellant. When he did so, he noted, first, that the tort of trespass to the person (whether assault, or assault and battery) requires that the relevant act be intentional, and then continued (AB 303):

“... On the evidence I find the punch by Miller to the plaintiff’s face was intentional. Miller gave evidence that he lost his balance after the plaintiff put his shoulder into him and then in “common instinct” and in self-defence he came back with a punch. In my view the plaintiff has established the tort of battery against the second defendant subject to the issue of self defence.”

Then having referred to a short passage in Fleming on Torts (7 Ed 76-77) as to “self defence” his Honour continued:

“Mere provocation is no defence to assault. The force used must not exceed what reasonably appears to be necessary to beat off the attack. Fleming... notes it is no longer imperatively required that the person assailed must avail himself of all safe means of retreat before applying lethal force: this is merely one element in judging the reasonableness of his conduct.

On the evidence I accept that Miller was sitting against the wall when Hakim tried to kick him. I do not accept the evidence of the plaintiff that he had not seen Miller before the punch was thrown. This is inconsistent with his statement dated 15 October 1987. I accept the evidence of Robyn Hyde a witness independent of the plaintiff and the second defendant that Hakim and the plaintiff came up to Miller and Hakim went to kick Miller in the head and was then spoken to by Mr Lett elsewhere in the room. Thereafter, the plaintiff walked away and Miller jumped up and went to the plaintiff; who turned around and Miller then struck him.

Robin Hyde said in her evidence in chief there was no contact between Miller and the plaintiff before the plaintiff was struck by Miller. Under cross-examination she said she did not see the plaintiff shoulder Miller and she did not know if it happened because Miller was in the way.”

Then, after referring to other evidence, his Honour continued:

“In all it seems to me that the plaintiff provoked Miller at least in the fashion suggested by Robin Hyde and after Miller stood up. I accept they both moved towards each other. I accept the second defendant and his witnesses (sic) account that the plaintiff shoved or pushed Miller causing him partially to lose his balance. Provocation as I have said is no defence to assault. The issue is whether force used exceeded what reasonably appears to be necessary to beat off the attack. In my view to deliver the blow he did upon Miller (sic) exceeded what was necessary to beat off the attack. Further, Miller had the alternative of retreating. There is no suggestion in the evidence that he could not.

Accordingly I find the defence of self-defence not made out and find a verdict for the plaintiff against the second defendant.”

From the verdict found by Holt DCJ in favour of the Respondent the Appellant has appealed raising a number of grounds of appeal.

5 The principal grounds of appeal which have been advanced by Mr J E Maconachie QC, who appears with Mr C Dowd for the Appellant, are that the principles which Holt DCJ applied in determining whether there had been a battery, and also whether “the defence” of self-defence had been made out, were erroneous. In particular, it has been submitted that, when dealing with the
10 question whether the Appellant’s action was excessive, his Honour erred in applying what was described as an objective test, rather than, as was submitted is the correct test, a subjective test. Further, it was submitted that the Respondent bore the onus of disposing, rather than that the Appellant bore the onus of establishing, that his action as not excessive.

15 To support these submissions Mr Maconachie has placed great stress on the following passages in the joint judgment of Wilson, Dawson and Toohey JJ, in *Zecevic v The Director of Public Prosecutions (Victoria)* ((1987) 162 CLR 645) where their Honours say (at 657):

“Although self-defence is still commonly referred to as a defence the ultimate
20 onus of proof with respect to self-defence does not rest on the accused. Since *Woolmington v The Director of Public Prosecutions* ([1935] AC 462), it has been clearly established that once the evidence discloses that the fatal act was done in self-defence a burden falls upon the prosecution to disprove that fact, that is to say to prove beyond reasonable doubt that the fatal act was not done in
25 self-defence.”

(at 661-662):

“The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if
30 the jury is left in reasonable doubt about the matter then he is entitled to an acquittal. Stated in that form the question is one of general application and is not limited to cases of homicide

(at 662-663):

“When upon the evidence the question of self-defence arises, the trial judge
35 should in his charge to the jury place the question in its factual setting, identifying those considerations which may assist the jury to reach its conclusion. In attempting to identify those considerations in any abstract manner here, there is a danger of appearing to elevate matters of evidence to rules of law. For example, it will in many cases be appropriate for a jury to be told that, in
40 determining whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds, it should consider whether the force used by the accused was proportionate to the threat offered. However, the whole of the circumstances should be considered, of which the degree of force used may be only part. There is no rule which dictates
45 the use which the jury must make of the evidence and the ultimate question is for it alone. The trial judge should also offer such assistance by way of comment as is called for in the particular case. No doubt it will often also be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner and without undue nicety, giving proper weight to the
50 predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection.

There is, however, one situation which requires particular mention. It should, we think, be regarded as raising only evidentiary matters to be considered in arriving at an answer to the ultimate question, although in the code States it is treated as raising matters of law: see s272 of the Criminal Code 1899 (Q); s249
5 of the Criminal Code 1913 (WA); s47 of the Criminal Code 1924 (Tas). Where an accused person raising a plea of self-defence was the original aggressor and induced or provoked the assault against which he claims the right to defend himself, it will be for the jury to consider whether the original aggression had
10 ceased so as to have enabled the accused to form a belief upon reasonable grounds, that his actions were necessary in self-defence. For this purpose, it will be relevant to consider the extent to which the accused declined further conflict and quit the use of force or retreated from it, these being matters which may bear upon the nature of the occasion and the use which the accused made of it. Indeed,
15 even in circumstances in which the accused was not the original aggressor, retreat in the face of a threat of violence before resort to force may be relevant to the belief of the accused or the reasonableness of the grounds upon which the accused based his belief. There is, however, no longer any rule that the accused must have retreated as far as possible before attempting to defend himself. It is a
20 circumstance to be considered with all the others in determining whether the accused believed upon reasonable grounds that what he did was necessary in self-defence."

Mr Maconachie sought to derive from these passages two basic principles:

1 that the relevant question is not whether or not the act taken by, in this case
25 the Appellant, was one which was reasonable in all circumstances, but whether or not the Appellant believed upon reasonable grounds that the action he took was necessary in self-defence; and

2 that it is no longer the law that, in a civil action in which he is charged with assault and battery, the defendant bears the onus of establishing, according to
30 whatever be the appropriate test, that he acted in self-defence.

Although I am prepared to accept that, whenever a question of self-defence arises in a criminal prosecution or in a civil action the test of self defence to be applied is the same, and is that described by Wilson, Dawson and Toohey JJ in the passages from their joint Judgment in *Zecevic v Director of Public*
35 *Prosecutions (Victoria)* (supra) to which I have earlier referred, and although I accept that, in a criminal prosecution, in which such a question arises, the Crown bears the onus of establishing that the accused's actions did not satisfy that test, I do not accept that the law as to the onus of proof in a civil action is now to be regarded as that for which Mr Maconachie has contended; on the contrary, it is
40 my view that the law in this respect remains as it was, that is, that self-defence is a matter of justification which must be specially pleaded and the onus of establishing which lies on the person pleading it.

In addition to the principal grounds of appeal to which I have earlier referred, Mr Maconachie sought also to submit that Holt DCJ erred in giving weight to the
45 Appellant's failure to "retreat" in the face of the Respondent's "attack".

Let it be accepted that the modern law is that the question of whether or not a means of escape is open is not determinative of the matter, it still remains the fact that, if there be a means of escape open to a defendant, that is a material
50 maker. That that is so is made clear by the passage from the joint Judgment of Wilson, Dawson and Toohey JJ in *Zecevic v Director of Public Prosecutions (Victoria)* (supra) which I have set out above, to which might be added the

following passage in the judgment of Owen J in *Fontin v Katapodis* ((1962) 108 CLR 117, 186) to which passage Mr Maconachie directed our attention in his Written Submissions:

5 “It is true that the fact that a means of escape was open to a person who claims to be defending himself against attack is not a decisive factor in considering whether he has acted reasonably (*Reg. v Howe* (1958) 100 CLR 448) and the weight to be attached to such a circumstance will necessarily vary according to the circumstances. In the present case his Honour thought that the fact of a means of escape was open was a very material matter and in my opinion he was right
10 in taking that view.”

It seems to me that Holt DCJ did not misdirect himself in the way in which he approached the question of self-defence.

15 It is, I think, clear enough that the evidence discloses no statement on the part of the Appellant to the effect, nor did his Honour make any finding to the effect, that the Appellant, at the relevant time, believed reasonably, and on reasonable grounds, that the action which he took was reasonably necessary in order to repel what was alleged to have been the “attack” made upon him. The encounter between the Appellant and the Respondent involved no more than a minor tussle.
20 The Appellant was obviously in a high temper and his reaction to the minor tussle for which he was as responsible as was the Respondent in my view far exceeded what was a justified means of retaliation.

Two further grounds of appeal advanced by Mr Maconachie might be noted, albeit but briefly.

25 First, it has been submitted that Holt DCJ failed to determine two issues which had been raised by the pleadings, those issues being: -

1 the issue of *volenti non fit injuria*, that is, that, by his conduct, the Respondent voluntarily assumed the risk of being injured in the encounter which, so it was said, he provoked; and

30 2 the issue of *ex turpi causa non oritur actio*, that is, the Appellant’s action was but part of a course of conduct which commenced with Robert Hakim’s assault on the Appellant, to which conduct, so it was submitted, the Respondent was privy, and which conduct so it was submitted constituted the common law offence of affray.

35 Even if it could be said that his Honour did not deal expressly with these two defences, neither of which gains any weight by being couched in Latin tags, it is, in any event of no moment, as, in my view, neither is made out on the facts. Thus:
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40 1 even if the Respondent be regarded as having provoked the encounter, it was, as I have previously indicated, no more than a minor tussle, which did not invite what was, in my view, the Appellant’s over-reaction;

2 even if the Respondent be regarded as having been privy to Robert Hakim’s assault on the Appellant, that assault did not, nor did the Respondent’s later conduct, constitute an affray.

45 Finally, it is said that Holt DCJ failed to give adequate reasons for the conclusion to which he had come. While it may be that another judge might have approached the matter in a different fashion and examined the evidence in a more detailed way and expressed his reasons for the conclusion to which he had come in a more extended form than did his Honour, it seems to me that his Honour has
50 adequately exposed the reasoning which he adopted in coming towards the conclusion which he did and I would reject this ground of appeal.

In all the circumstances it seems to me that the appeal should be dismissed and I so propose.

5 **Mason P** On the question of whether Zecevic's case has altered the earlier common law that the defendant bears the onus of pleading and proving a case of self-defence in a civil claim I am of a view, similar to that of Powell JA that the old law remains. But even if the onus were reversed I think that on the facts as found by the trial judge this was clearly a case where he was entitled to find that there was an unreasonable response on the part of the Appellant to the situation that was presented to him.

10 The only other comment I wish to make relates to the so called volenti defence. It is far from clear to me that para7 of the grounds of defence raise it, but, assuming that it does, this case is quite distinguishable from that of Bain v Altoft ((1967) Qd R 32) to which the Court was taken by Mr Maconachie. There the plaintiff effectively invited the fight and called upon his opponent to engage in a
15 fist fight, the plaintiff ultimately coming off second best in that fight. By contrast the present case is one in which the finding of self-defence having been rejected there was no basis upon which it could be said that the Respondent in effect called upon the Appellant to have a fight in which physical force be exchanged.
20 Subject only to the first comment, which I think supplements that of Powell JA's reasons, I agree with his Honour's reasoning and with the orders he proposes.

Meagher JA I also do so. It seems to me that a minor push cannot possibly justify a lethal punch in reply and that really disposes of the case. I agree with what the other two judges had to say.

25 **Mason P** The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed with costs.

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