[2012] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES' CIVIL APPEAL NO 19/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**CARLSON JONES By Next Friend JOSEPH JONES**	**APPELLANT**
AND	**BEVIN MONTAGUE**	**RESPONDENT**

Debayo Adedipe and Paul Nembhard instructed by Clarke, Nembhard & Co for the appellant

Miss Tamara Green instructed by Cecil July & Co for the respondent

3, 4 May and 29 June 2012

PANTON P

[1] I have read in draft the judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing further to add.

DUKHARAN JA

[2] I too have read in draft the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[3] On 20 April 2006, two boys, the appellant, Carlson Jones, and the respondent Bevin Montague, had a fight over a bicycle. This was in Parottee in the parish of Saint Elizabeth. Both received injuries as a result of the altercation. By August 2007, Mr Jones had developed a large keloid formation on his neck at the site of the injury. He, by his father and next friend, filed a plaint, claiming damages against Mr Montague, in the Resident Magistrate's Court for that parish. Mr Montague filed a counterclaim. The claim and counterclaim both concerned the injuries received during the fight and were tried together.

[4] On 21 July 2011, the learned Resident Magistrate gave judgment for Mr Montague on the claim. She found that Mr Jones had not proved his injuries. In respect of the counterclaim, she decided that Mr Jones had not stated a defence to Mr Montague's counterclaim. Accordingly, she gave judgment to Mr Montague. She awarded him damages of $151,670.00.

[5] Mr Jones has appealed against the judgment. He contends that the learned Resident Magistrate erred in her reasoning concerning the injuries, which he received and erred in finding that he, having not stated a defence to the counterclaim, had, thereby, admitted the contents of the counterclaim. The first issue, arising from the appeal, is whether the learned Resident Magistrate correctly interpreted the evidence in respect of Mr Jones' injuries. The second issue is whether Mr Jones' failure to state a

defence, in the circumstances of the instant case, obliged the learned Resident Magistrate to give judgment for the Mr Montague on the counterclaim.

The grounds of appeal

[6] The original ground of appeal, filed on behalf of Mr Jones, was that "[t]he decision goes against the weight of the evidence". Six supplemental grounds were filed and were argued by Mr Adedipe, with the permission of the court. They are:

> "1. The learned Resident Magistrate erred in law in dismissing the Plaintiff's claim, on the ground that the Plaintiff had not proved his case, for the following reasons, inter alia:
>
> i) on the admission of the Defendant he had pleaded guilty in the children's court to injuring the Plaintiff with a stone
>
> ii) This admission was confirmed by the Court record (exhibit) 4
>
> iii) the unchallenged medical evidence was that the Plaintiff suffered a 1 inch laceration to the left cheek (requiring sutures) and a long abrasion to the [left] side of his neck.
>
> iv) the learned Resident Magistrate rejected the defendant's evidence that he only hit the Plaintiff with a stone and did not have or use a knife
>
> 2. The learned Resident Magistrate ought to have found that the Plaintiff suffered the laceration and abrasion as a result of the wrongful actions of the defendant.
>
> 3. The learned Resident Magistrate erred in finding that the keloid formation was not as a result of the injury (abrasion) suffered by the Plaintiff.

4. The learned Resident Magistrate erred in failing to award the Plaintiff damages [for] pain and suffering and loss of amenities and the anticipated cost of removing the keloid.

5. The learned Resident Magistrate erred in law in failing to admit the certificate of conviction in evidence as proof against the defendant having regard to the fact that his conviction on a plea of guilty amounts to an admission.

6. The learned Resident Magistrate erred in law in entering judgment against the Plaintiff on the counterclaim on the basis that no defence having been stated in answer to the counterclaim meant that the Plaintiff had admitted the counterclaim."

Those grounds may be conveniently considered in the context of the issues which have been identified above. It is first necessary, however, to briefly outline the relevant evidence.

The evidence

[7] The matter came on for trial before the learned Resident Magistrate on 10 March 2010. After an extended trial, during which, evidence was given by both parties, each young man (as they had by then become) testified as to how he said the incident occurred, as to the injuries which he received during the altercation, and how he came to receive them.

[8] The relevant evidence before the learned Resident Magistrate was that, arising from the altercation between the boys, Mr Jones, then 14 years old, received injuries to his face and neck. The respondent, Mr Montague, then 17 years old, had swelling,

tenderness and two small abrasions on his left upper back, a mildly swollen left thumb, and a swollen, black and blue area on his right upper chest wall.

[9] According to Mr Jones, Mr Montague had attacked him and was hitting him when he used a fan belt to defend himself and ward off Mr Montague. He testified that he used the fan belt to hit Mr Montague. According to him, Mr Montague took out a knife and, in fear, he ran off. He said that Mr Montague chased him and cut him on the neck with the knife. His evidence at page 8 of the record was, "He used the knife to cut me on the left side of my neck". He said that he ran off again but Mr Montague threw a stone and hit him on the face, also causing a cut. His words were (again on page 8), "He then flung a stone hitting me on my jaw". Mr Jones denied being the aggressor in the fight. He pointed to the places on his body where he had received the injuries. The learned Resident Magistrate noted the keloid formation at the site on his neck.

[10] Mr Montague testified that Mr Jones had taken his, Mr Montague's, bicycle, without permission. He said that he had retrieved his bicycle from Mr Jones and was riding away when Mr Jones used a fan belt to hit him on his back. He said that he turned to ask Mr Jones why he had done that and Mr Jones hit him on the chest. The bicycle fell and Mr Jones attacked him with the fan belt again. He held up his hand and the fan belt hit him on his thumb. On his account, one of Mr Jones' friends was then, holding him to allow Mr Jones to administer the blows. He eventually got away but saw Mr Jones coming toward him with the fan belt. He said that he threw a stone at Mr Jones but did not know if it hit him. He, thereafter, went home. Mr Jones and his

father visited Mr Montague's home, later that evening, and spoke with his grandmother. He denied using a knife during the altercation.

[11] Both boys received medical treatment and each one made a report to the police. The police prosecuted them, separately, in the Children's Court for the parish of Saint Elizabeth. Mr Montague was prosecuted on an information which charged him with unlawful wounding. He pleaded guilty and was ordered to pay $20,000.00 toward Mr Jones' medical expenses. The charge against Mr Jones was, apparently, withdrawn. Nothing turns on that withdrawal.

The decision in respect of Mr Jones' injuries

[12] In her reasons for judgment, the learned Resident Magistrate rejected Mr Montague's evidence that he did not have, and did not use, a knife during the incident. It is implicit in her finding that she accepted that he did use a knife to injure Mr Jones. She, however, also rejected Mr Jones' evidence that Mr Montague used a knife to cut him on the neck. The relevant portion of her findings of fact is recorded at page 68 of the record:

> "I did not accept that the plaintiff was cut on the neck with a knife. **This injury being claimed was found based on the medical report to have been an abrasion.** The defendant's evidence on this aspect is that he had pleaded guilty to hitting the plaintiff with a stone only and denied using a knife at all. I did not accept this aspect of the defendant's evidence." (Emphasis supplied)

[13] The learned Resident Magistrate resolved this apparent contradiction, in respect of the knife, by finding that Mr Jones had not proved that the injury to his neck had

been inflicted by a knife. She relied on the medical report, referred to in the above quotation, and found that because the injury to the neck was an abrasion, it had not been caused by a knife. She said at page 69 of the record:

> "…it is the plaintiff who must prove that the defendant is liable. The plaintiff asked the court to infer that the queloid [sic] formation seen by Dr. Hyera one year later was the disfiguring result of an injury by the hand of the Defendant. Inferences can only be drawn from proven facts. The underlying facts upon which the court should rely to draw this inference have not been proven. **The court cannot infer in the circumstances that there was a knife wound on the plaintiff's neck as the medical certificate tendered by the plaintiff does not support such an inference it clearly indicates that there was an abrasion on the plaintiff's neck which did not require sutures**. In any event, there was no indication in the said medical certificate that the abrasion one year before was the case [cause?] of development of the queloid [sic] formation seen by Dr Hyera." (Emphasis supplied)

It will also be observed from that quotation, that the learned Resident Magistrate found that there was no evidence that the keloid formation was as a result of the injury which Mr Jones received to his neck during the incident.

[14] Neither Dr Lewis, the doctor who originally treated Mr Jones for his injuries, nor Dr Hyera, who examined him, for the purposes of assessing the cost of removing the keloid, gave evidence in the matter. There was no medical evidence before the learned Resident Magistrate concerning whether the injury to the neck could have been caused by a knife.

[15] Because of her finding, the learned Resident Magistrate ruled that Mr Jones had failed to prove liability in his claim for damages for assault and battery. Accordingly, she found that Mr Montague should have judgement on the claim.

[16] It is my view that the learned Resident Magistrate erred in finding as she did. It is my opinion that she rejected the direct evidence of Mr Jones, that he was cut on the neck with a knife, because of her finding, based on, apparently, her experience, that an abrasion could not have been the result of injury by a knife. Such a rejection would have required, preferably, expert medical evidence, of which there was none. Neither was there any other evidence on which the learned Resident Magistrate could have come to that view.

[17] The learned Resident Magistrate also erred in finding that there was no evidence that the keloid formation was as a result of the injury received during the altercation. Not only could it be inferred from Mr Jones' evidence, when he pointed to the spot as being the place where he was cut, but the medical report from Dr Hyera, which report was an exhibit, stated that the doctor found that Mr Jones had "developed a Queloid [sic] to the left side of the neck **as a result of a cut he sustained on the 20/4/06**" (emphasis supplied). Again, there was no evidence contradicting those assertions.

[18] On those bases, the learned Resident Magistrate ought not to have found that Mr Jones had not proved his claim. In making this finding, I find that the learned Resident Magistrate misdirected herself on the point. For that reason, the dictum in **Industrial Chemical Co (Ja) Ltd v Owen Ellis** (1986) 23 JLR 35, that an appellate

court should not set aside a finding of fact by a judge at first instance, simply because it would have come to a different conclusion, is not applicable.

[19] There is another reason for finding that the learned Resident Magistrate erred in so finding. It seems from the learned Resident Magistrate's reasoning on the issue, although, admittedly she did not so state, that she was of the view that Mr Jones had not associated the injury to the appropriate cause. She seemed to be of the view, because the injury to Mr Jones' face required sutures but the injury to the neck was an abrasion, which did not need sutures, that the injury by the knife was to the face and not the neck and that it was the stone which caused the injury to the neck. She, however, felt obliged to hold Mr Jones strictly to his pleading that Mr Montague had used "a stone to hit him on the left side of his cheek and a knife to cut him on the left side of his neck".

[20] Although I have already expressed the view that she was wrong to reject Mr Jones' direct evidence, in that regard, and to prefer her assumptions, arising from the medical certificate, I also find that the learned Resident Magistrate would have erred, if it were her finding that Mr Jones had failed to prove his claim, because he had proved the injuries the wrong way around. The Resident Magistrate's Court is not a court of pleading (see **Wallace v Whyte** (1961) 3 WIR 521 at page 523 G). The learned Resident Magistrate was not constrained in the way she, apparently, thought that she was. To give judgment for Mr Montague, despite finding that he had caused Mr Jones' injuries would not have been a just result to the claim.

[21] Miss Green, on behalf of Mr Montague, resisted the appeal and sought to convince us that we should not disturb the decision of the learned Resident Magistrate. She submitted that on the evidence Mr Jones could not have received the cut to his cheek the way he said he did. On her submission, the learned Resident Magistrate was entitled to find that Mr Jones had not proved his case on a balance of probabilities and the learned Resident Magistrate was entitled to rely, as she did, on the case of **Rhesa Shipping Co SA v Edmunds and Another, The Popi M** [1985] 2 All ER 712 and particularly the dictum of Lord Brandon of Oakbrook at pages 718 B – C, where he said:

> "The first reason is one which I have already sought to emphasise as being of great importance, namely that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take."

[22] It is my view that the learned Resident Magistrate had sufficient evidence and had made findings concerning Mr Montague's actions that she should have found in favour of Mr Jones on the claim, rather than opting for the view that he had not proved his claim. I, respectfully, disagree with Miss Green on this point. Before turning to the issue of the counterclaim, I wish to briefly address an aspect of the learned Resident Magistrate's judgment, which also affected her findings in respect of the injury inflicted on Mr Jones.

The refusal to consider the plea of guilty

[23] In her judgment, the learned Resident Magistrate considered the evidence that Mr Montague had pleaded guilty in the Children's Court. She recounted his evidence that he had pleaded guilty to injuring Mr Jones with a stone, not with a knife. The record of the proceedings in the Children's Court was also admitted in evidence as an exhibit during the trial. Although it had been so admitted, the learned Resident Magistrate, in her judgment, deliberated on the question of the admissibility of the certificate of conviction.

[24] She referred to the decision of **Hollington v F. Hewthorn & Co Ltd** [1943] 2 All ER 35 and the fact that that decision had been approved by this court in **Causwell v Clacken** SCCA No 28/2008 (delivered 24 October 2008). **Hollington v Hewthorn** stipulates that "a certificate of conviction cannot be tendered in evidence in [subsequent] civil proceedings" (see headnote). My reading of **Causwell v Clacken** does not bring me to the same conclusion which was reached by the learned Resident Magistrate. It seems to me that this court had much hesitance about the validity of the decision in **Hollington v Hewthorn**. I, however, need not dilate on that difference of opinion. I find that the **Hollington v Hewthorn** principle is not applicable to this case because of the evidence that Mr Montague pleaded guilty to the offence of wounding Mr Jones.

[25] Where there is a plea of guilty, evidence of that confession, is admissible in subsequent civil proceedings. This was expressly accepted in **Hollington v**

Hewthorn. Lord Goddard who gave the judgment of the court in that case, said as much, at page 42 E of the report. He said:

> "Proof by a witness present at the trial of the confession is admissible, because **an admission can always be given in evidence against the party who made it**. In the present case, had the defendant before the magistrates pleaded guilty, or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial." (Emphasis supplied)

[26] That passage was cited, with approval, by Morris LJ, in **Dummer v Brown and Another** [1953] 1 All ER 1158 at page 1165 G. Morris LJ, in applying the principle to the case, then being considered, said at page 1165 H – 1166 A:

> "It seems to me, therefore, that, once the learned judge was satisfied by the evidence before him, he had satisfactory proof that the second defendant had made an admission of negligence [a plea of guilty to dangerous driving], and that that admission was such as to entitle the plaintiff to judgment [on a claim for damages under the Fatal Accidents Act arising out of the same incident]."

[27] It is my view, therefore, based on those authorities, that the learned Resident Magistrate was wrong in finding that the fact that Mr Montague had pleaded guilty in the Children's Court, was inadmissible in evidence before her. That finding assisted her in arriving at her ruling that Mr Jones had not proved his case. I have already sought to demonstrate that her ruling, concerning the latter point, was also incorrect. Having found that Mr Jones is entitled to judgment on the claim, the matter of damages must now be considered.

Damages

[28] Mr Adedipe, in respect of the issue of damages, submitted that the medical evidence, tendered on behalf of Mr Jones, was unchallenged. The injuries were a one-inch laceration to the left cheek (near to the mouth) and a long abrasion to the left side of the neck. He was treated at the emergency department of the Black River Hospital. The laceration was cleaned and sutured. There is no mention of any special treatment of the abrasion but Mr Jones was treated with Tetanus Toxoid and Amoxil antibiotics and was sent home. The keloid formation later developed. The cost of removing that was $35,000.00. A bill for that expense was admitted in evidence. It should be noted that the original estimate for the procedure was $20,000.00 and that was the reason given for that sum having been paid in the Children's Court. A sum of $15,000.00 is therefore outstanding for that medical procedure.

[29] For general damages, Mr Adedipe referred to the case of **Grey v deSouza** 3 Khan 232. In that case, Ms Grey suffered cuts on her lip and face with swelling. She had stitches to the lip and her resultant disability was that she was unable to eat for five days. The award of $7,000.00 for general damages, made on 6 June 1989 is now worth approximately $259,000.00, when the March 2012 Consumer Price Index of 181.2 is applied.

[30] Whereas Ms Grey, in that case, suffered a loss of amenity, in that she was unable to eat for five days, there is no evidence of either pain or suffering or any loss of amenities, other than the keloid formation, incurred by Mr Jones. I would therefore

award him less than the figure which would have been awarded today to Ms Grey. An appropriate figure would be $150,000.00 for general damages. This would be in addition to the sum of $15,000.00 which would be due in respect of special damages.

[31] I now turn to the issue of the counterclaim.

The decision in respect of the counterclaim

[32] As was mentioned above, the learned Resident Magistrate ruled that, as no defence to the counter-claim had been stated orally, as is required by section 184 of the Judicature (Resident Magistrates) Act, Mr Montague was entitled to judgment on the counterclaim. No assessment of the question of liability on the counterclaim, based on the evidence elicited, was, therefore, pursued. The ruling of the learned Resident Magistrate is at page 70 of the record. She said:

> "I adopt the submissions of counsel Ms Green on this issue. She submitted that the failure to state/file a defence to the counterclaim was not a mere technicality, but was a breach of a rule. Having so failed then the court considered the allegations made in the counterclaim to have been admitted to as facts. Accordingly, on the counterclaim, judgment is entered for the plaintiff [sic]."

[33] The learned Resident Magistrate, thereafter, awarded damages to Mr Montague, on the counterclaim. This was in the sum of $150,000.00. She relied on the decision of **Augustus Bennett v Moore's Transport Services Ltd** CL 1989/B 197 (delivered 1 May 1992), in arriving at that figure.

[34] Mr Adedipe submitted that the learned Resident Magistrate was in error in approaching the matter in that way. He conceded that a defence ought to have been stated and that one was not stated. He argued, however, that as the claim and counterclaim had been tried together, both being in respect of the injuries received in the incident, and with each party having been examined and cross-examined on the issues, relevant to the counterclaim, it would have been clear to the learned Resident Magistrate, what the defence was. Learned counsel pointed to what, he said, was evidence that the learned Resident Magistrate had recognised that fact. This was at the beginning of her written judgment, when she stated, "Facts found upon hearing both claim and counterclaim together:" (underlining as in original).

[35] On learned counsel's submission, the obligation to have the defence stated did not rest solely on Mr Jones and his counsel but also on the learned Resident Magistrate and counsel for Mr Montague. Mr Adedipe argued that because it was clear what issues had been joined between the parties, the requirement seemed to have been overlooked by all concerned. As a result, at paragraph 30 of his written submissions, he said:

> "By proceeding with the trial of the Claim and counterclaim together without a defence to the counterclaim having been stated and without objection the Defendant must be taken to have waived the requirement. In any event the defendant suffered absolutely no prejudice having regard to the issues that were clearly delineated."

Learned counsel cited, among others, the cases of **Brown v Clarke** (1990) 27 JLR 363 and **Brown and Others v The Resident Magistrate, St Catherine and Another** (1995) 32 JLR 117 in support of his submissions.

[36] I accept Mr Adedipe's submissions as being valid. Firstly, it seems to me that the requirement to have a defence stated is not an obligation, which falls, initially, on the defendant. Section 184 of the Judicature (Resident Magistrates) Act seems to place the burden on the Resident Magistrate to require the defendant to state his defence to the plaintiff's claim. It states:

> "On the day [for the hearing] named in the summons, the plaintiff shall appear, and thereupon **the defendant shall be required** to answer by stating shortly his defence to such plaint; and on answer being so made in Court, the Magistrate shall proceed in a summary way to try the cause, and shall give judgment without further pleading, or formal joinder of issue." (Emphasis supplied)

The use of the term "shall be required", speaks to an actor other than the defendant. The actor in those circumstances, by virtue of the authority of the office, would be the Resident Magistrate.

[37] In **Brown v Clarke**, Carey JA appreciated that the obligation lay on the Resident Magistrate. He said, in respect of the section 184 requirement:

> "One of the first observations we would make is that on the record, **there is a failure to note the defence** of the party which is the required practice in the Resident Magistrate's Court. The law requires it and we would strongly **recommend that Resident Magistrates should adhere to the rules** of practice in that court." (Emphasis supplied - see page 364 D)

In that case, despite the failure to state its defence before the learned Resident Magistrate, this court found in favour of the defendant. That finding was, however, due

to a failure by the claimant to have included, in her claim, an allegation as was required by the relevant statute.

[38] Once the Resident Magistrate requires that the defence be stated, the obligation to satisfy the requirements of section 184 will then shift to the defendant. Should the defendant fail to state his defence, or an adequate defence, when so required, then it is, that the Resident Magistrate may adjudicate that there should be judgment for the plaintiff.

[39] Mr Adedipe's submission that the duty to ensure that a defence is stated, lies on counsel for both sides as well as on the Resident Magistrate, is supported by the judgment of Duffus P in the case of **Stone and Montego Omnibus Co v Graham** (1967) 10 JLR 120. After addressing the requirement for the defendant to state his case, Duffus P said, at page 123 G - H:

> "There is also a duty on the legal representative for the plaintiff to insist on the defence being stated adequately and there is a duty on the magistrate to see that it is so stated."

[40] I also agree with Mr Adedipe because, I find that, in the instant case, the particulars of claim having been filed and a defence and counterclaim having been stated, the issues which had been joined should have been and were, in fact, clear to both parties and to the court. The failure to state the defence to the counterclaim was, therefore, not prejudicial to either Mr Montague or to the court. It would have been clear, to all concerned, what Mr Jones' defence to the counterclaim was. He stated his position, not only in his particulars of claim for his plaint, but also in his evidence.

[41] For those reasons, I find that the learned Resident Magistrate erred in failing to consider Mr Jones' evidence and erred in giving judgment on the counterclaim, because of his failure to, formally, state a defence.

[42] As a result of approaching the matter in this way, the learned Resident Magistrate did not consider the evidence in the context of the counterclaim. This court must, therefore, in order to resolve the matter, make findings of its own. It must base those findings on the evidence on the record and on the findings of the learned Resident Magistrate.

[43] In this regard, the first point to be observed is that an appeal to this court is by way of rehearing (rule 1.16 (1) of the Court of Appeal Rules). On that basis, it has the authority to draw its own inferences from facts proved or admitted. This was the ruling in **Mersey Docks & Harbour Board v Procter** [1923] AC 253. Viscount Cave LC outlined, at page 258, the duty of the appellate court in circumstances such as these. He said:

> "The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. **In such a case it is the duty of the Court of Appeal to make up its own mind**, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly." (Emphasis supplied)

That quotation was approved by Viscount Simonds in **Benmax v Austin Motor Co Ltd** [1955] 1 All ER 326, at page 327 E.

[44] Viscount Simonds opined that the appellate court should not lightly differ from the finding of a trial judge. He went on to say, however, that where the appellate court is of the view that the trial judge drew an incorrect inference from undisputed facts, it should form its own opinion as to the correct inference to be drawn (see page 328 C).

[45] On this issue, the reasoning in the case of **Watt (or Thomas) v Thomas** [1947] 1 All ER 582, is also instructive. In that case, Lord Thankerton, in outlining the duty of an appellate court in regard to the decision of a judge, sitting without a jury, on a question of fact (when there is no misdirection), stated three principles at page 587 of the report:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and **the matter will then become at large for the appellate court**." (Emphasis supplied)

[46] From that quotation, it would seem, by logical extension, that this court is entitled to make, and should make its own findings of fact where the judge at first instance, has failed to make findings of fact on a particular issue. That principle is subject to the *proviso* that the disadvantage in not having seen and heard the witnesses will not hamper that process.

[47] In the instant case, the learned Resident Magistrate, in my view, seemed to have accepted that Mr Montague was armed with a knife during the altercation, and that he in fact used the knife to injure Mr Jones. It is on that basis that I have concluded that Mr Jones should have had judgment on the claim. That being the case, I find that, had the learned Resident Magistrate considered the evidence in the context of the counterclaim, she would have found that Mr Montague was the aggressor in the incident.

[48] I take that point a step further and say that the learned Resident Magistrate would have found that Mr Jones should have been believed when he said that he used the fan belt to ward off Mr Montague. His testimony in this regard is at page 8 of the record:

> "- Bevin Montague kept on hitting me in the face and body.
> - I chucked him off, he still come and attack me again.
> - A friend of mine threw a fan belt giving me to defend myself.
> - I took the fan belt and I defend I defend [sic] myself by hitting defendant with it.
> - Defendant then went to right pocket, shoved his hand in his right pocket, took out a knife. On seeing that I took off running to his friend's house, the gate was locked. I turned around facing defendant with the knife coming

> across my [sic] left side of my neck. He used the knife to cut me on the left side of neck. I shoved him off and ran. He then flung a stone hitting me on my jaw. [Witness shows scars] I was running and he used the stone to hit me."

[49] On that reasoning, I find that, had she given judgment for Mr Jones on the claim, the learned Resident Magistrate would have also given him judgment on the counterclaim. I would, therefore, also reverse her decision in respect of the counterclaim and give judgment for Mr Jones thereon.

Conclusion

[50] Having rejected Mr Montague's evidence that he did not have or use a knife in relation to Mr Jones, the learned Resident Magistrate was in error in deciding that, because she did not believe that Mr Jones was cut with a knife on the neck, it meant that he had not proved his claim. The learned Resident Magistrate also erred in rejecting the evidence of Mr Montague's plea of guilty in the Children's Court in respect of Mr Jones' injury.

[51] Finally, the learned Resident Magistrate erred in finding that Mr Jones had not stated his defence and therefore his evidence in respect of the counterclaim ought not to have been considered. The particulars of claim and Mr Jones' evidence in respect of his case would have made it clear what was his defence to the counterclaim. In any event, it was for the learned Resident Magistrate to require the defence to be stated and she did not so require it.

[52] For those reasons, I would quash the judgment of the learned Resident Magistrate on both the claim and the counterclaim. I would instead give judgment for the appellant on both the claim and the counterclaim, and I would award damages for the appellant on the claim, as follows:

General Damages	$150,000.00
Special Damages	$ 15,000.00

Costs to the appellant in the sum of $15,000.00.

PANTON P

ORDER

Appeal allowed. Judgment of the learned Resident Magistrate on both the claim and the counterclaim set aside. Judgment entered for the appellant on both the claim and the counterclaim with costs to be agreed or taxed. Damages for the appellant on the claim, as follows:

General Damages	$150,000.00
Special Damages	$ 15,000.00

Costs of the appeal to the appellant in the sum of $15,000.00.