*813 Thomas v Commissioner of Police of the Metropolis

Court of Appeal

28 November 1996

[1997] 2 W.L.R. 593

[1997] Q.B. 813

Sir Richard Scott V.-C., Evans and Saville L.JJ.

1996 Ocst. 28, 29; Nov. 28

Evidence—Conviction as evidence in civil proceedings—Spent conviction—Credibility of parties in civil proceedings—Whether evidence of spent convictions admissible when relevant to credit—Rehabilitation of Offenders Act 1974 (c. 53), ss. 4(1), 7(3)

The plaintiff was arrested by two police officers and charged with threatening behaviour, but was acquitted. He brought an action against the police for damages for assault, damage to property, false imprisonment and malicious prosecution, claiming that the arresting officers had subjected him to abusive and racist remarks, brutally manhandled him and arrested him without lawful cause. The officers denied that they had behaved improperly or used excessive force in effecting the arrest. The trial judge was asked, in the absence of the jury, to determine whether two previous convictions of the plaintiff, one for unlawful wounding and one for criminal damage, both of which were spent for the purposes of section 4(1) of the Rehabilitation of Offenders Act 1974,[1] could be put to him in cross-examination. In the exercise of his discretion under section 7(3) of the Act of 1974, the judge ruled that the credibility of the respective parties was of paramount importance, and that, since the plaintiff gave the impression of being a man of complete probity, justice could not be done except by admitting evidence of the two spent convictions. *814 The judge directed the jury that the convictions went only to credit and not to propensity. The jury found for the plaintiff on his claims for assault and damage to property but against him on his claims for false imprisonment and malicious prosecution.

On the plaintiff's appeal against the judge's ruling and his application for a new trial:—

Held:

(1) (Sir Richard Scott V.-C. dissenting) that the discretion to admit evidence of spent convictions under section 7(3) of the Rehabilitation of Offenders Act 1974was broad and subject to the overriding requirement that justice should be done; that in the context of civil proceedings justice required the court to preserve a fair balance between the interests of the parties; that where previous convictions were relevant to credit, the interests of justice required that evidence of such convictions, even if spent, should be admitted before the jury; that in deciding whether to admit such evidence the degree of relevance had to be balanced against the prejudice occasioned by admission and the judge had to be satisfied that the parties would not have a fair trial or that a witness's credit could not fairly be assessed if the evidence were to be excluded; and that, in the circumstances, it could not be said that the judge had not validly exercised his discretion under section 7(3) (post, pp. 830D-E, 832B-C, 833F-H, 834F-G, 835C-D).

(2) Dismissing the appeal, that since the jury's knowledge of the spent convictions had made no difference to the result and no miscarriage of justice had been thereby occasioned, no new trial would be ordered (post, pp. 827A-B, 834D-E).

Per Sir Richard Scott V.-C.It is difficult to regard the power to admit or to refuse to admit spent convictions into evidence as constituting a discretionary power in the normal sense. If the judicial authority is not satisfied that "justice cannot be done" except by admitting the convictions, there is no power to admit them. If the judicial authority is so satisfied, in reality there would be no option

but to admit them (post, p. 819C-D).

Decision of Sir Michael Davies sitting as a judge of the Queen's Bench Division affirmed.

The following cases are referred to in the judgments:

Clifford v. Clifford [1961] 1 W.L.R. 1274; [1961] 3 All E.R. 231

Dickinson v. Yates (unreported), 19 June 1986; Court of Appeal (Civil Division) Transcript No. 554 of 1986, C.A..

Director of Public Prosecutions v. P. [1991] 2 A.C. 447; [1991] 3 W.L.R. 161; [1991] 3 All E.R. 337, H.L.(E.).

Reg. v. Nye (1982) 75 Cr.App.R. 247, C.A..

Reynolds v. Phoenix Assurance Co. Ltd. [1978] 2 Lloyd's Rep. 22, C.A..

The following additional cases were cited in argument:

Kirk v. Laine Theatre Arts [1995] 1 C.L.Y. 1712

Morris v. Johnson Matthey & Co. Ltd. (1967) 112 S.J. 32, C.A..

O'Brien v. Martin (unreported), 2 April 1996, James Goudie Q.C.

Reg. v. Selvey [1970] A.C. 304; [1968] 2 W.L.R. 1494; [1968] 2 All E.R. 497, H.L.(E.).

Appeal from Sir Michael Davies sitting as a judge of the Queen's Bench Division.

By a notice of appeal dated 4 April 1994 the plaintiff, Gabriel Thomas, appealed from the order of Sir Michael Davies, sitting as a judge of the ****815*** Queen's Bench Division on 8 March 1995, whereby, during the hearing of the plaintiff's action for damages for assault, damage to property, false imprisonment and malicious prosecution against the defendant, the Commissioner of Police of the Metropolis, he determined in the absence of the jury that the plaintiff could be cross-examined as to two previous convictions, both of which were spent for the purposes of the Rehabilitation of Offenders Act 1974.

The plaintiff applied for an order that the verdict of the jury in his favour in respect of his claim for assault and damage to property and their award of damages of £36,401 in respect thereof and their verdict for the defendant in respect of the claim for false imprisonment and malicious prosecution be set aside, that a new trial be held on the issue of liability and damage and that the defendant pay all the costs of the trial below and the appeal. The grounds of the appeal were (1) that the trial judge erred in law in ruling that the defendant was entitled to cross-examine the plaintiff on certain previous convictions which were spent convictions under the Act of 1974 at the date of the trial; and (2) that the award by the jury of general damages of £15,815 was manifestly inadequate and impossible to reconcile with their award of special damages of £16,185.

The facts are stated in the judgment of Sir Richard Scott V.-C.

Lord Gifford Q.C. and *Paul Kishore* for the plaintiff. The clear intendment of the Rehabilitation of Offenders Act 1974 is that people who have been convicted of offences a long time ago but had over many years been of good behaviour and character should be entitled to have their past crimes forgotten about. Section 7(3) of the Act creates an exception but the words of the subsection "justice cannot be done in the case except" mean that there must be special circumstances requiring the

admission of the evidence as being necessary for justice to be done. [Reference was made to Dickinson v. Yates (unreported), 19 June 1986; Court of Appeal (Civil Division) Transcript No. 554 of 1986.] Thus, a previous conviction or the facts giving rise to it may be admissible only to show system or as similar facts.

Depriving the defendant of the opportunity to cross-examine as to credit cannot without more amount to a situation in which "justice cannot be done." The trial judge based his decision on the fact that the plaintiff had given the impression that he was a man of blameless character. But it is the purpose of the Act to protect such a plaintiff: see *Reg. v. Nye (1982) 75 Cr.App.R. 247*, 250. [Reference was also made to *Reg. v. Selvey [1970] A.C. 304*; Director of Public Prosecutions v. P. [1991] 2 A.C. 447; *Clifford v. Clifford [1961] 1 W.L.R. 1274*; *Reynolds v. Phoenix Assurance Co. Ltd. [1978] 2 Lloyd's Rep. 22*; Kirk v. Laine Theatre Arts [1995] 1 C.L.Y. 1712 and O'Brien v. Martin (unreported), 2 April 1996.]

On the award of damages, see Morris v. Johnson Mathey & Co. Ltd. (1967) S.J. 32.

Jonathan Loades for the defendant. In a civil case where credit is in issue "justice cannot be done" if one party can give an impression of himself that is inaccurate. Therefore past convictions, even if spent for the purposes of the Act of 1974, should be admitted if they go to credit.

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The judge gave the jury a proper direction by saying that the convictions went only to credit, and not to propensity. The fact that the admission of the spent convictions was not unduly prejudicial is shown by the fact that the effect of the jury hearing of the previous convictions did not prevent them from preferring the plaintiff's evidence to that of the arresting officer on the issues of assault and damage to property.

Lord Gifford Q.C. replied.

Cur. adv. vult.

28 November. The following judgments were handed down

Sir Richard Scott V.-C.

This appeal raises two issues. One is a point of general interest concerning the Rehabilitation of Offenders Act 1974. The other is a point regarding quantum of damages.

The appellant, Mr. Thomas, was plaintiff in the court below. The respondent, defendant below, is the Commissioner of Police of the Metropolis. The litigation arises out of an incident that took place at about 2 a.m. on 28 May 1990. The plaintiff, a limbo dancer of considerable reputation, had been giving a charity performance at a telethon arranged by London Weekend Television at the London Arena in the Docklands. After the performance, Mr. Thomas left the London Arena via the stage door entrance. A security guard was on duty at the door. It appears to be common ground that, immediately before Mr. Thomas left the premises, an altercation of sorts had taken place between him and the security guard. Nothing turns on the content of the altercation, but in the street outside the stage door when Mr. Thomas emerged were two police officers. They arrested Mr. Thomas. They say that he was swearing, making a lot of noise and, in short, making a nuisance of himself. They say that he pushed one of the officers in the chest and told him to "fuck off." They therefore arrested him for threatening behaviour. Mr. Thomas has throughout denied this version of the incident. He says that, on leaving the London Arena, he was forcefully confronted by the two officers and made the object of abusive and racist remarks. He was, he says, brutally manhandled by the officers in the course of the arrest, an arrest for which, he says, there was no reasonable or lawful cause.

The police deny that they used excessive force in effecting the arrest. They say that Mr. Thomas was struggling violently while they were endeavouring to arrest him and that they had to use some degree of force to achieve their purpose. It is common ground that Mr. Thomas was taken by the police to Limehouse Police Station where he was detained in police custody until being released on police bail at 9.20 a.m. the same morning. At the police station Mr. Thomas was charged with the offence of threatening behaviour. He was tried on this charge on 27 November 1990 at Thames Magistrates' Court. He was acquitted.

On 23 March 1993 Mr. Thomas commenced proceedings in the High Court against the commissioner. He claimed damages for assault, for damage to his property occasioned by the assault, for false

imprisonment and for malicious prosecution. Exemplary damages were claimed.

The false imprisonment claim was based on the allegation that the police had had no lawful occasion to arrest him and that his detention ***817** subsequent to the arrest was consequently unlawful. The malicious prosecution case was based on allegations that the officers deliberately made false statements in support of the threatening behaviour charge. As for the assault and damage to property case, it was not in dispute that in the course of the arrest Mr. Thomas had sustained physical injuries and damage to his clothing. He had been medically examined in the police station following his arrest and the medical reports made that clear. The first issue on the assault and damage to property case was whether the police had had any lawful occasion to arrest him. If they had not, the assault case would be bound to succeed as, also, would the false imprisonment case. But if the police had had lawful occasion to arrest Mr. Thomas, in which event the false imprisonment case would fail, Mr. Thomas would still be entitled to succeed on his assault claim if the police, in arresting him, had employed a degree of force that was in all the circumstances excessive.

Mr. Thomas's action against the commissioner came for trial before Sir Michael Davies and a jury in February 1995. It was a case in which the credibility of Mr. Thomas on the one hand and the two police officers on the other hand would be crucial. Mr. Thomas's wife had been a witness to most of the scene outside the London Arena stage door. She gave evidence corroborating Mr. Thomas's version of the incident. It might have been expected that one side or the other would have called the security guard, but neither did so. So the issue as to what had actually happened in the early morning of 28 May 1990 outside the stage door was bound to involve a conflict of evidence between Mr. Thomas, supported by his wife, and the two police officers.

Mr. Thomas gave evidence-in-chief. His wife had not yet given evidence. At the conclusion of his evidence-in-chief and before cross-examination began, the question was raised with the judge, in the absence of the jury, whether two previous convictions which Mr. Thomas had had could be put to him in cross-examination. On 13 October 1980 Mr. Thomas had been convicted in the Crown Court at Canterbury for the offence of unlawful wounding and sentenced to 18 months' imprisonment suspended for two years. and on 18 October 1983 at Margate Magistrates' Court he had been convicted of criminal damage, fined £50 and ordered to pay £24.71 compensation.

The question whether these convictions could be put to Mr. Thomas in cross-examination required consideration to be given to the relevant provisions of the Rehabilitation of Offenders Act 1974. The main purpose of the Act was "to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years:" see the long title. Section 1 of the Act introduced the concept of a "spent" conviction. On the expiration of a specified period of years after conviction, the "rehabilitation period," the conviction would, provided it had not led to an "excluded" sentence and provided the offender had not during the rehabilitation period received an "excluded" sentence on any subsequent conviction, be treated as "spent." Neither of Mr. Thomas's sentences had been an "excluded" sentence: see section 5(1) of the Act. The rehabilitation period applicable to the unlawful wounding conviction was 10 years. So the conviction had become spent on 13 October 1990. The rehabilitation period applicable to ***818** the criminal damage conviction was five years. So that conviction had become spent on 18 October 1988.

Section 4(1) of the Act sets out the effect of a conviction becoming "spent." It provides:

> "Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and (b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto."

I draw attention to the breadth of the words "for all purposes in law" and "notwithstanding the

provisions of any other enactment or rule of law to the contrary."

It is clear from section 4(1) that, unless the case could be brought within either section 7 or section 8 of the Act, Mr. Thomas's spent convictions could not be put to him in cross-examination. Section 8 relates to defamation actions and has nothing to do with this case. Section 7 sets out a number of limitations to section 4(1). Nothing turns on subsection (1) of section 7. Subsection (2) provides:

> "Nothing in section 4(1) above shall affect the determination of any issue, or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to circumstances ancillary thereto—(a) in any criminal proceedings before a court in Great Britain (including any appeal or reference in a criminal matter); ... (f) in any proceedings in which he is a party or a witness, provided that ... he consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 4(1)."

Subsection (3), however, is the critical provision for present purposes. It provides:

> "If at any stage in any proceedings before a judicial authority in Great Britain (not being proceedings to which, by virtue of any of paragraphs (a) to (e) of subsection (2) above or of any order for the time being in force under subsection (4) below, section 4(1) above has no application, or proceedings to which section 8 below applies) the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the ***819** case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions."

The statutory criterion prescribed by subsection (3) for the admission into evidence of spent convictions is that the judicial authority must be "satisfied ... that justice *cannot* be done in the case *except* " (emphasis added) by admitting the spent convictions into evidence. This language expresses a very stringent criterion. If the criterion is satisfied, the judicial authority has power to admit, "may admit," the spent convictions. It is difficult, however, to construct a case in which the criterion has been satisfied but in which the judge could properly decide not to exercise his power to admit the spent convictions. Accordingly, although expressed in terms of a discretionary power, I find it difficult to regard the judicial authority's power to admit or to refuse to admit spent convictions into evidence as constituting a discretionary power in the normal sense. If the judicial authority is not satisfied that "justice cannot be done" except by admitting the convictions, there is no power to admit them. If the judicial authority is so satisfied it seems to me that, in reality, there would be no option but to admit them.

I return to the narrative of the present case. Sir Michael Davies heard submissions as to whether or not the spent convictions should be admitted into evidence. In the course of these submissions he was told that Mr. Thomas had pleaded guilty to the unlawful wounding charge and that the unlawful wounding had arisen out of a domestic dispute between Mr. Thomas and his wife. What, if any, detail was given to the judge regarding the criminal damage charge is not disclosed by the papers before us.

On 27 February 1995 the judge gave an interlocutory judgment with his ruling on the issue. He ruled that the plaintiff could be cross-examined on the two convictions. He gave the reasons for his ruling in the following passage from his judgment:

> "Now, as I have indicated, in this particular case the plaintiff claims damages against the police, as in Dickinson v. Yates (unreported), 19 June 1986; Court of Appeal (Civil Division) Transcript No. 554 of 1986, for assault and wrongful arrest, false imprisonment and malicious prosecution, and it is quite plain that his credibility is crucial to his case. There is other evidence which the court will hear from his wife, who saw something if not everything of what the plaintiff alleges to have happened, and there is medical evidence. But the plaintiff's evidence is—and I repeat the word—crucial. In the witness box, as Lord Gifford has pointed out, he has certainly not been asked any question to elicit the

> answer, 'I am a man of perfectly good character, I am a man of no previous convictions.' Of course, he would not be asked such a question because that would have been inviting an answer which would either let in his convictions or would have been totally misleading if he had given the answer I have ***820*** suggested. One must not overlook—and I have listened carefully to his evidence and watched him give his evidence—that he does give the impression—and this is something I can say in giving this ruling because of the effect it makes on me at this stage and so it may have an effect on a jury, although I would not, of course, say this to the jury—or did until this matter was mentioned, of being a man quiet spoken, apparently sincere, well educated and generally in every way an upright citizen. Now, that is a matter of his credit, and it does seem to me that, if these convictions are not admitted, the jury will be left in the situation in which they may have what in the result is an impression of him and his reliability and credibility which may not be totally accurate and fair. I remind myself once again that the very existence of the Rehabilitation of Offenders Act 1974 means that on occasions, unless the court finds circumstances to say otherwise, an inaccurate picture may be presented. But the loophole—if that is not an unfair word—has been deliberately left by specific provision by the legislature, and I repeat those words, 'justice cannot be done in the case except by admitting [the] evidence.' I have, in what is not an easy point to decide, the clear feeling that justice would not be done by refusing to admit these convictions. Of course, the jury will have to be told, and I certainly shall tell them later, that it would be totally wrong because of those previous convictions if they involved, as on the face of it they did, some form of violence that it follows that he used violence on this occasion, which of course is what the defendants are in effect asserting. Also, of course, the jury will have in mind that those convictions are spent—they will be told that—and they were in any event a good many years ago. But, in the end, the court, as Dickinson v. Yates made clear, is left with a discretion. The usual principles apply. The court must look at the provisions of the law— I have done—and it must look carefully at the facts and any possibility of injustice in either event. But this is somewhat different from a criminal case because, of course, the plaintiff is a plaintiff, he is not a defendant, and he is bringing this case. I do not think any great assistance, if any at all, is to be obtained from the much older Act, the Criminal Evidence Act 1898, or of criminal proceedings and the rules and practices there in general. I have done my best to apply my mind to the relevant factors and in the circumstances the court's ruling is that the defendants may cross-examine the plaintiff on these two convictions."

The judge had been referred to a footnote in Clayton & Tomlinson on Civil Actions Against the Police, 2nd ed. (1992), in which reference had been made to Dickinson v. Yates. Following the judge's ruling on 27 February 1995 Lord Gifford, counsel for Mr. Thomas both here and below, procured transcripts of the Court of Appeal judgments in Dickinson v. Yates and invited the judge to reconsider his ruling in the light of those judgments. The judge, having done so, gave a short supplemental judgment on 28 February in which he confirmed his ruling of the previous day. He repeated the reasons for his ruling. He said:

> "in a sentence there is the overall impression, made upon me at any rate, of the plaintiff appearing to be a man of complete probity and ***821*** high standing. Second, his case does involve matters in which his credit is of paramount importance."

The consequence of the judge's ruling was that the two convictions were put to Mr. Thomas in cross-examination. He admitted them. Nothing more than that was made of them in cross-examination. No mention at all was made of them in the final submissions made to the jury by counsel for the commissioner. Lord Gifford, in his final submissions to the jury, invited the jury to disregard them.

The judge, in his summing up to the jury on 6 and 7 March, said about the convictions:

> "Fourthly, there is the question of the plaintiff's two previous convictions. This is rather important, members of the jury, if you will allow me to say so. In October 1980, for unlawful wounding, he was sentenced to 18 months' imprisonment which was suspended for two years, and he was ordered to pay some costs. Now, on the face of it, that is quite an important offence and the fact that he was sentenced to imprisonment is

> a matter which demonstrates that, although there were obviously, if I may say so in fairness to him, mitigating circumstances because the sentence was suspended. In October 1983 at Margate Magistrates' Court for criminal damage he was fined £50. Members of the jury, because those convictions happened a good many years ago and were not of the gravest kind, the defendant's counsel was not entitled to ask him about them without the leave of the court. It was so that I could decide that matter, and I promised I would tell you why you left court, that you were asked earlier in the case to leave court. I ruled, applying the guidelines which are given for judges in these matters, that, in the interests of justice, it was right that you should know about those two convictions, because otherwise the total picture of Mr. Thomas, if I may say so, on all the rest of the evidence we have had, he appears to have led a perfectly respectable and law abiding life, you would not have heard the full picture. But now you have heard, which I did not know at that time, the plaintiff's explanation of those offences. The unlawful wounding, he says, was in effect part of a domestic dispute with his wife, although he admitted he had wounded her and pleaded guilty. The other offence of damage was in connection with a broken glass. Now, you are entitled to bear those convictions in mind according to how seriously you consider they weigh, when considering what lawyers call the plaintiff's credit. That is whether he is believable or not. Ask yourselves: 'Does that make any difference, now we have seen and heard him in the witness box over quite a long period of time, as to whether we believe him, that those years ago, in the circumstances he has described, he had these convictions?' If you do not think it makes any difference, ignore them. If you think it makes some difference, give them some weight. But what is absolutely vital is that not only should you not overestimate their importance, but that you must not fall into the trap of saying he was violent on certainly the first of those two occasions and the other offence involves causing damage, and therefore he is likely to have been violent this time. That would ***822** be totally unjust and totally unfair and I know you will not do it because the fact that he misbehaved those years ago does not mean he misbehaved on this occasion. It goes to credit only."

The judge mentioned the convictions again when instructing the jury on quantum of damages. He said:

> "I should have said earlier, when dealing with conduct, that of course the character of the plaintiff is something that you are also entitled to take into account, and here you may think that there is nothing you should take into account in regard to the plaintiff's character. He did not misbehave except in the way that is alleged in the facts of the incident itself. He is not somebody who goes around continually making false complaints against the police, or taunting the police or anything of that sort, inviting conduct on the part of the police on which he can subsequently sue, and, if you may think that those convictions really—they are not relied on by the defence for this purpose—may be ignored when you are considering the question of compensation, you should do so."

There are several other passages in the judge's summing up which I will mention later in connection with the quantum of damages issue.

Following discussion between the judge and counsel the questions to be put to the jury were agreed upon. There were four questions on liability. On these, the jury found for Mr. Thomas on his claim for assault and on his claim for damage to property. They must, therefore, have accepted his evidence in preference to that of the police officers as to the extent of force and violence used in arresting him. On the claims for false imprisonment and malicious prosecution, the jury found for the commissioner. They must, therefore, have accepted the evidence of the police officers that Mr. Thomas appeared to them to be behaving in a threatening manner outside the stage door of the London Arena and that in making the statements that led to Mr. Thomas's prosecution they believed in the truth of what they were saying.

The questions for the jury on quantum of damages in respect of the assault and damage to property claims were the following: "1. On the claim for damages for assault, how much do you award: (a) for loss of earnings? (b) For pain and suffering? (c) Do you award exemplary damages? If so, how much? ... 3. On the claim for damage to property how much do you award?"

On the assault claim the jury awarded Mr. Thomas £15,815 general damages and £16,185 special damages. On the damage to property claim, the jury awarded Mr. Thomas £310. The total, with interest of £4,091, amounted to £36,401. So, on 8 March 1995, the judge ordered that judgment in that sum be entered for Mr. Thomas. The awarded sum was, however, less than the amount of a sum that had been paid into court. The consequence was that Mr. Thomas obtained an order for costs up to 3 February 1995 but had to pay, or allow to be set off, the commissioner's costs from 3 February 1995.

Mr. Thomas's notice of appeal seeks an order for a new trial both on liability and on damages. The grounds of appeal are (i) that the judge erred in law in allowing Mr. Thomas to be cross-examined on his spent ***823** convictions and (ii) that the general damages award of £15,815 was manifestly inadequate and/or impossible to reconcile with the special damages award of £16,185.

The most important question to be decided is, obviously, whether or not a new trial should be ordered. There are two hurdles Mr. Thomas must surmount. First, this court must be persuaded that the judge erred in law in ruling that the spent convictions could be put to Mr. Thomas. Second, the court must be of the opinion that "some substantial wrong or miscarriage has been thereby occasioned:" R.S.C., Ord. 59, r. 11(2).

As to the spent convictions issue, the starting point, in my judgment, should be the purpose of the Act of 1974 and the language of section 7(3). The Act was intended to allow persons convicted of the less serious offences to become, after a suitable period of time, rehabilitated. It was intended to allow the stain of the conviction to be wiped from the record. The language of section 7(3) is entirely consistent with that purpose. A spent convention is not to be allowed into evidence unless the judge is "satisfied ... that justice cannot be done" otherwise. A spent conviction and the circumstances surrounding it might show some propensity of the relevant individual to do, or omit to do, some act the commission or omission of which by the individual was an issue in the case. The spent conviction and the circumstances surrounding it might cast light on an aspect of the individual's character, e.g. dishonesty, that was of relevance to an issue in the case. In the present case, however, the convictions that were allowed in showed neither any relevant propensity on Mr. Thomas's part (the judge expressly directed the jury in his summing up to that effect), nor any relevant aspect of character such as dishonesty or a record of having lied on oath. The reason why the offences were allowed in by the judge was, as appears from both his rulings, that Mr. Thomas appeared to be well spoken and respectable and the judge seems to have thought that that appearance was, in view of the convictions, a possible misrepresentation. I am of the clear opinion that that cannot be enough to satisfy the statutory criterion. Mr. Thomas's convictions and their circumstances were not suggested to be probative of any issue in the case. They were not suggested to be relevant to his credibility in the sense that they showed him to be a man who had previously lied in giving sworn testimony or to be a man who has dishonest tendencies. In what sense then could it be said that the convictions were relevant to credit? I do not see what answer could be given unless it be said that the status of an individual is relevant to his credit and that a person who has suffered a spent conviction in the past is not entitled to present himself as a respectable upright citizen. This is an answer which I would have no hesitation in rejecting. If Mr. Thomas's case had been tried before a judge alone I cannot believe that any judge would have placed weight on these spent convictions when deciding whether to believe Mr. Thomas or to believe the police officers. If a judge would not have done so, how could it be said that "justice cannot be done" unless the spent convictions were admitted? Moreover, if it were right to admit these spent convictions in order to correct Mr. Thomas's presentation of himself as a respectable upright citizen, would it have been any different if Mr. Thomas had had spent convictions for, say, sexual offences, or offences of cruelty to ***824** animals? I have chosen an example of spent convictions with no conceivable probative value in respect of any issue in the present case. How would spent convictions for sexual offences or offences of cruelty to animals assist on the issue of credibility? Would the offenders be less likely to be telling the truth in cases concerning allegations of assault by the police than persons who had not been so convicted? If, as I think, the answer must be "No," there would, as it seems to me, be no basis on which the section 7(3) test could be satisfied. So, too, with Mr. Thomas's spent convictions.

The answer can, in my judgment, be no different in a case being heard by a jury than in a case being heard by a judge. If a judge would not himself attribute weight to spent convictions, he is not, in my judgment, entitled to allow the jury to be told about them. The section 7(3) test could not, in my judgment, have been satisfied.

In his 27 February ruling the judge expressly disavowed any reliance on the practice in criminal cases. He was right to do so. None the less I have an uneasy suspicion that the approach adopted by

the judge in the present case may have had its origin in the approach that would have been adopted in a criminal case. Section 7(1) excludes criminal cases from the effect of section 4(1).Section 1(f) of the Criminal Evidence Act 1898 prevents a defendant being asked, or if asked being required to answer, any questions about his previous conviction unless:

> "(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; ..."

Sub-paragraph (i) of section 1(f) of the Act of 1898 allows previous convictions to be put to a defendant if they have probative value in the case. For the purposes of section 7(3) of the Act of 1974, the probative value of spent convictions might well satisfy a judge that justice could not be done unless they were allowed in. Sub-paragraph (ii) of section 1(f) allows previous convictions to be put to an accused if he has endeavoured to establish his good character either by calling witnesses himself or by giving evidence himself to that effect or by cross-examining the prosecution witnesses. If a party in a civil action did these things, it might well be that the section 7(3) test would be satisfied. Sir Michael Davies seems to have had this in mind when, in his 27 February ruling, he commented that Mr. Thomas had not in his examination-in-chief been asked any question to elicit an answer establishing his good character or the absence of previous convictions. Immediately after those comments the judge went on to refer to the "impression" given by Mr. Thomas "of being a man quiet spoken, apparently sincere, well educated and generally in every way an upright citizen" and to express the fear that this impression might have an effect on the jury and, bearing in mind the spent convictions, might be "an impression of him and his reliability and credibility which ***825** may not be totally accurate and fair." These passages in the judge's ruling may have owed something to remarks made in the Court of Appeal judgment in *Reg. v. Nye (1982) 75 Cr.App.R. 247*, a case with which this very experienced judge would certainly have been familiar. The court was giving guidance as to the manner in which criminal courts should deal with spent convictions. Talbot J. said, at pp. 250-251:

> "it is entirely a question for the discretion of the judge. It may well be that the past spent conviction ... happened when the defendant being tried was a juvenile, for instance for stealing apples, a conviction of many years before. In those circumstances quite plainly a trial judge would rule that such a person ought to be permitted to present himself as a man of good character. At the other end of the scale, if a defendant is a man who has been convicted ... of some offence of violence, and his conviction has only just been spent, and the offence for which he is then standing trial involves some violence, then it would be plain ... that a trial judge would rule that it would not be right for such a person to present himself as a man of good character. The essence of this matter is that the jury must not be misled and no lie must be told to them about this matter. The exercise of the discretion of the trial judge in the cases which fall between the two extremes referred to must be carried out having regard to the Act of 1974 and to *Practice Direction (Crime: Spent Convictions) [1975] 1 W.L.R. 1065*. It should be exercised, so far as it can be, favourably towards the accused person."

Sub-paragraph (ii) of section 1(f) also allows a defendant's previous convictions to be put to him if the defendant is attacking the character of prosecution witnesses. But the judge has a discretion to exclude such evidence even though admissible under section 1(f).

There is no doubt but that the present case involves, necessarily, a serious attack on the characters of the police officers involved in the incident. The police officers are alleged to have assaulted Mr. Thomas, to have subjected him to racial abuse, to have lied in their police statements, to have given false evidence in the magistrates court. If the present case had been a criminal case with Mr. Thomas the defendant, section 1(f)(ii) would, subject to the trial judge's discretion to exclude, have permitted Mr. Thomas's spent convictions to be put to him on credit. and it may be that the judge, for much the same reasons as those given by Sir Michael Davies, would not have exercised his discretion to exclude the evidence.

But the approach established in criminal cases is not, in my judgment, an appropriate approach in

civil cases. In civil cases, unlike criminal cases, section 4(1) applies. Section 4(1), subject to the section 7(1) exceptions, is intended to allow an individual whose convictions are spent, "to present himself as a man of good character:" Talbot J. in *Reg. v. Nye*, at p. 250. It cannot, in my judgment, be a sufficient reason for holding the section 7(3) test to be satisfied that the individual is so presenting himself. In a civil case in which spent convictions have no probative value on any issue in the case and do not provide any rational support for a suggestion that the individual might not be telling, or might not have told, the truth on one or other issue in the case, the fact that the individual's evidence or ***826** the nature of the case sued on involves imputations on the character of the other party or other witnesses in the case does not, in my judgment, justify admitting the spent convictions into evidence. That fact does not meet the test that "justice cannot be done ... except" by admitting the evidence.

In my judgment, for the reasons I have given, the judge's ruling whereby the spent convictions were allowed to be put to Mr. Thomas was based on an error in law. There were, in my judgment, no circumstances in the case which could have enabled the judge to be satisfied that justice could not be done unless the spent convictions were admitted. On this point, in my judgment, the appeal is entitled to succeed.

The next question is whether there should be a new trial. In my judgment, there should not. I have not formed the opinion, necessary if a new trial is to be ordered, that the jury's knowledge of these two spent convictions has occasioned any substantial wrong or miscarriage of justice. There are a number of factors to be taken into account. (i) Apart from simply putting the two spent convictions to Mr. Thomas, counsel for the commissioner made nothing of them. He did not suggest to the jury that they reduced Mr. Thomas's credibility. (ii) The judge, in his summing up told the jury that they were "entitled to bear those convictions in mind according to how seriously you consider they weigh, when considering what lawyers call the plaintiff's credit. That is whether he is believable or not." The judge went on: "Ask yourselves: 'Does that make any difference ...?' If you do not think it makes any difference, ignore them. If you think it makes some difference, give them some weight." But he then emphasised that it was "absolutely vital" that the jury should not overestimate the importance of the convictions. He warned the jury that the convictions did not make it more likely that Mr. Thomas had been violent on this occasion. To think otherwise would, he said, "be totally unjust and totally unfair." The convictions, he said, went "to credit only." (iii) The jury, in the event, preferred Mr. Thomas's evidence to the evidence of the police officers on the assault issue. This was the issue on which, more than on any other, there was a direct conflict of evidence. Mr. Thomas's credit did not suffer from the jury's knowledge of the spent convictions. (iv) On the false imprisonment case the jury must have accepted that, from the police officers' point of view, they had reasonable grounds for making the arrest. and on the malicious prosecution case, they must have believed the police officers' evidence that they had made their police statements bona fide believing the contents to be true and without any unlawful intentions towards Mr. Thomas. In neither of these respects was Mr. Thomas's evidence or his credibility necessarily of critical importance. (v) Finally, I have, I hope, already made clear in this judgment my own view of the irrelevance of the two spent convictions on any issue arising in the case or on the credibility of the evidence Mr. Thomas had given or might give in the case. This view seems to me to be a matter of common sense. I do not see why I should attribute to the jury a view of the importance of the convictions that differs in any substantial way from my own.

Saville L.J., in the course of argument, pointed out the Morton's Fork on which Lord Gifford's arguments were impaled. If the convictions were ***827** of no more than trivial relevance to the issue of credibility, there is no reason to suppose that the jury gave them any real weight. If, on the other hand, the convictions were of real relevance, then the judge was right to let them in.

For the reasons I have given, I do not believe that the admission into evidence of these spent convictions made any difference to the result of the case. I think the judge was wrong to let them in but am not persuaded that any substantial wrong or miscarriage of justice was thereby occasioned. I would refuse the request for a new trial.

I turn now to the narrow issue of damages. Lord Gifford's submissions on this issue were as follows. (i) Mr. Thomas's evidence at the trial was that the injuries he had sustained in the assault had prevented him from continuing to perform as a limbo dancer. Limbo dancing was not simply a pastime that gave him great satisfaction and enjoyment, but was one from which he was able to earn substantial sums of money. In a schedule of special damages that was submitted to the jury Mr. Thomas estimated that over 1988 and 1989 his average yearly earnings from limbo dancing were £4,560. £4,560 per annum would be £3,420 per annum net of tax. Calculated at a rate of £3,420 per annum special damages to compensate Mr. Thomas for the loss of limbo dancing earnings over the

period from, say, 1 June 1990, i.e. a few days after the assault, to the end of February 1995, i.e. a few days before the award, would be £16,245. In the event, the jury awarded £16,185 special damages. There were no special damage items other than loss of limbo dancing earnings that could have justified this sum. Accordingly, the inference is justified that the jury accepted Mr. Thomas's evidence that his injuries had prevented him over the period in question from continuing to earn fees for limbo dancing. (ii) Mr. Thomas's evidence was that his incapacity, caused by his injuries, to earn fees for limbo dancing would continue beyond the date of the trial. It would have been perverse for the jury to have accepted his evidence of his incapacity to continue limbo dancing in the period up to the date of trial, but to have judged him capable of limbo dancing thereafter. (iii) The evidence of the medical expert, Mr. Britton, called on behalf of Mr. Thomas, was that the particular injury inflicted in the course of the assault that had produced the limbo dancing incapacity was incurable. The final sentence of his report dated 25 October 1993 said: "At best his recovery will take many months, and he may be left with permanent loss of flexibility within these tissues"—i.e. Mr. Thomas's back—"which will reduce the possibility of return to full-time dancing." Mr. Thomas was born on 25 August 1957, was 37 years old at the time of the assault and gave evidence that but for the assault he could have continued professional limbo dancing until he was 50 years of age. (iv) Accordingly, based on the jury's award of special damages, the jury ought to have included in their general damages award an element reflecting Mr. Thomas's future loss of limbo dancing earnings. This item of loss should have been calculated at the same rate, £3,420 per annum, multiplied by a suitable factor. In his summing up the judge suggested that if the jury were of opinion that Mr. Thomas had a sound claim for loss of future earnings, a multiplier of 10 might be appropriate. Thus calculated, the general damages should have included a sum of £27,350 ***828*** for loss of future earnings. (v) In addition, general damages should have included a sum for pain and suffering and for the sense of deprivation Mr. Thomas would feel in being unable to continue the limbo dancing which had up to the time of the assault given him such pleasure. £20,000 was suggested as a suitable figure. (vi) Accordingly, the general damages award of £15,815 was, it was submitted, grossly inadequate.

Lord Gifford had two supplemental points. He submitted that the judge's direction had not adequately dealt with the loss suffered by Mr. Thomas in being deprived of the pleasure of limbo dancing. He submitted also that the judge had erred in law in not requiring the jury to make separate awards for (i) future loss of earnings and (ii) pain and suffering and loss of amenity. There is nothing, in my judgment, in this last point. The questions that the jury were to be invited to answer were agreed between counsel and the judge. The agreed questions did not require the separate awards now contended for. The judge directed the jury on the basis of the agreed questions. It is not open to Lord Gifford now to complain that one of the agreed questions ought to have been subdivided. As to the loss of amenity point, there is, in my judgment, nothing in that either. The judge directed the jury that they were entitled to include in the award of damages an item to reflect Mr. Thomas's loss of the enjoyment of limbo dancing if they found that he had been so deprived.

The main point at issue, however, is whether Mr. Thomas can impugn the general damages award on the ground that the amount was grossly inadequate to reflect his loss of future earnings and pain and suffering. It is important on this point to repeat that the jury were not invited to give separate awards. The £15,815 was a comprehensive award. One of the consequences of a jury trial is that the jury, unlike a judge, do not give reasons for their decisions. Mr. Thomas, having chosen a jury trial at which to prosecute his causes of action, must put up with that consequence. In his summing up the judge put clearly before the jury that Mr. Thomas was making a claim for loss of future earnings. He put to the jury the suggestion that 10 might be a suitable multiplier. He told the jury to "face the fact that the plaintiff's case is that he has suffered these very substantial past, and will suffer these more substantial future, loss of earnings and should be compensated." But he went on to remind the jury that "the defendants say this is a very exaggerated claim; he is entitled, if we are liable at all, to something for loss of earnings for a limited period of time; but he is certainly not entitled to anything in the future either in respect of his limbo dancing or his employment as a teacher." So the issue of loss of future earnings was put fairly and squarely to the jury.

Moreover the plaintiff's schedule of special damages contained a claim for "future loss of earnings" in which a 10-year multiplier was applied to an annual earnings figure of £12,147. It may have been confusing to the jury to find "future loss of earnings" dealt with in a special damages schedule, but it is clear that they were fully apprised of the extent of Mr. Thomas's loss of earnings claim. It is to be borne in mind also that the defendant's counter-schedule of special damage averred that "after 28 November 1991 at the latest the plaintiff would have been able to resume fully his work as a dancer." So there was an issue between the ***829*** parties, which the jury had to resolve, as to the length of the period in respect of which Mr. Thomas was entitled to recover lost limbo dancing earnings. The judge

put the issue to the jury unambiguously. He said: "The issue is for how long would he have been unable to work ..."

In my judgment, there being no fault in the judge's summing up on damages, this is not a case in which this court would be justified in interfering with the jury's damages award. First, although the inference that the special damages of £16,185 must have reflected loss of limbo dancing earnings up to the date of trial is a possible one, it is not necessarily right. Mr. Thomas was claiming also damages to reflect his alleged loss of earnings as a teacher. This was a relatively weak claim but was left by the judge to the jury. It is simply not possible to know whether some, and if so what, part of the £16,185 was attributable to the teaching claim. and it is equally impossible to know what, if any, part of the £15,815 general damages was attributable to loss of future earnings, as a limbo dancer or as a teacher, or to pain and suffering, or loss of amenity. I do not accept that the only, or even that the most likely, inference to be drawn from the general damages and special damages figures is that the jury made an error of law or were in some way perverse. It follows that in my judgment this appeal should be dismissed.

Evans L.J.

Until 1974 there was little restriction, if any, on the right to cross-examine a witness in civil proceedings as to his or her previous convictions. It was commonly accepted that such convictions could affect the creditworthiness of the witness, even when, as was often the case, the convictions themselves and the circumstances which gave rise to them had no direct relevance to any issue before the court. Sometimes the convictions were so insignificant or so obviously irrelevant, even to credit, that the questioner was discouraged, perhaps by a formal ruling but usually by some other expression of disapproval by the judge. and in a jury trial, the judge would be reluctant to exclude evidence which a reasonable jury could take into account when deciding where the truth lay. So the scope for judicial intervention was limited.

The common law position was stated by Cairns J. in *Clifford v. Clifford [1961] 1 W.L.R. 1274*, 1276:

> "The range of permissible cross-examination as to credit is, however, a very wide one. It has never, I think, been doubted that a conviction for any offence could be put to a witness by way of cross-examination as to credit, even though the offence was not one of dishonesty."

The Act of 1974 introduced the concept of spent convictions. Depending on the gravity of the offence and the length of sentence imposed for it, after a certain period of up to 10 years a defendant who is not further convicted becomes a rehabilitated person, and by section 4(1) the offence is expunged for all purposes from his record. No reference may be made to it, whether in or out of court, subject to the provisions of the Act. As Lord Denning M.R. said in *Reynolds v. Phoenix Assurance Co. Ltd. [1978] 2 Lloyd's Rep. 22*, 24: "The man has to be treated as though he had never been convicted at all.... If he is asked whether he has been convicted, he need not answer. He can say 'No.' "

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Section 4(1), however, is expressly made subject to section 7(3). The judicial authority, meaning (here) the trial judge, has a discretionary power to allow the previous convictions of a party to be adduced in evidence when the interests of justice so require. In *Reynolds v. Phoenix Assurance Co. Ltd.* the spent conviction was relevant or potentially relevant (depending on the trial judge's findings as to "materiality" for insurance purposes) to a liability issue in the case. In Dickinson v. Yates, 19 June 1986 the Court of Appeal upheld the judge's ruling which excluded the evidence in a case where, if the evidence had been given, it could not have been regarded as relevant to any issue in the case and would have been admitted solely in relation to credit. I respectfully agree with Nourse L.J. that section 7(3) has imposed a further (statutory) requirement in addition to the common law test, which he defined as "materiality."

In the present case, the judge ruled that evidence of previous convictions could be admitted. The question is whether that was a proper exercise of the discretion given to him by section 7(3).

One begins with the Act. Section 7(3) is expressed as a qualification to the general rule of exclusion in section 4(1), and its terms demonstrate that the evidence must be excluded unless the judicial authority, i.e. the trial judge, is "satisfied . . . that justice cannot be done . . . except by admitting [it]." So there is a strong presumption against permitting cross-examination or admitting the evidence, but

the section also emphasises that the discretion is a broad one. The judge may take into account "any considerations which appear to [him] to be relevant" and the overriding requirement is that justice shall be done. In the context of civil proceedings, this means taking account of the interests of both parties, and justice requires that there shall be a fair trial between them.

This marks a clear distinction from criminal cases, where the interests of the defendant tend to be pre-eminent. But it is in criminal cases that the concepts of relevance and admissibility of such evidence have been most often considered. Those authorities are now the subject of the Law Commission's meticulous and scholarly consultation paper, Evidence in Criminal Proceedings: Previous Misconduct by a Defendant (1996) (Consultation Paper No. 141). Certain features of them should be noticed for the purposes of this appeal.

The criminal authorities

First, evidence of previous convictions may sometimes, although rarely, be admissible as relevant, i.e. logically probative of an issue in the particular case. This test of relevance is satisfied in the "similar facts" cases, most recently Director of Public Prosecutions v. P. [1991] 2 A.C. 447. Relevance in this sense is a question of law, but the House of Lords also affirmed that the evidence may nevertheless be excluded by the trial judge, if its probative force is outweighed by its potential for prejudice to the defendant. The reason why the limits of admissibility were narrowly drawn was explained by Lord Devlin in his Hamlyn Lecture, *Trial by Jury* (1956), p. 114 in this way:

> "Similarly, a knowledge of the accused's previous convictions might often help in determining whether or not he had committed the crime, ***831*** but because with a jury the prejudice created might outweigh its value, the evidence, again except for limited purposes, is not allowed."

This is one example of the judicial function in a jury trial. Lord Devlin continued:

> "so the judge determines relevancy by admitting categories of evidence according to the principles settled by precedent and admitting particular pieces of evidence according to his own judgment. In both cases the law is at work in the task of limitation and definition by the drawing of general and particular lines."

Secondly, cross-examination of the defendant, if he gives evidence, is restricted by the well known provisions of section 1(f) of the Criminal Evidence Act 1898, but it is clear that when cross-examination is allowed previous convictions may be referred to which are not relevant to any issue in the case, i.e. not logically probative in the sense referred to above. The underlying principle is that they may be taken into account by the jury when considering the creditworthiness of the defendant or, as it is sometimes put, they are regarded as "relevant to credit," meaning that the jury can properly take them into account in deciding whether to believe the defendant when he gives evidence.

The assessment of credit is not exclusively a logical process. Juries invariably are directed to use their "knowledge of human nature" when deciding whether a witness is telling the truth, and the law not only permits but requires them to form their subjective though collective view, taking such account of demeanour, motive, consistency and other characteristics of the person they have seen giving evidence as they think fit. In this broad sense, certain matters can be described as "relevant to credit," but this is something different from relevance meaning logically probative of an issue.

Thirdly, the distinction is made between the defendant's *credibility* , which is said to be supported by evidence of previous good character and damaged by evidence of past convictions, and his *propensity* towards the kind of conduct which is charged against him. This may be negatived by evidence of good character but clearly it is enhanced if the previous convictions include any which the jury could regard as establishing such propensity, even where they are not admissible under the narrower confines of the "similar facts" rule. When dishonesty is alleged, proof of previous dishonesty on an unrelated occasion could be regarded as such. This provides another degree of meaning for "relevant," because a previous conviction which tends to establish "propensity" could well be taken into account by a jury whether assessing credibility or guilt, although the jury is directed not to do so as regards guilt unless the evidence is "logically probative" within the similar fact rule. It is when such

evidence is admissible under that rule or when the previous convictions might properly be put to the defendant in cross-examination, which could be given disproportionate weight by the jury as regards relevance or propensity, that the judge is most likely to exercise his power to exclude it or them on grounds of undue prejudice to the defendant. ***832** *Civil cases*

Though it is necessary to allow for the fact that in criminal cases the circumstances are different, nevertheless in my judgment these authorities are relevant to the exercise of the judge's discretion in civil cases to permit the introduction of past "spent" convictions under section 7(3).

Lord Gifford's first submission is that there is no scope for exercising the power except when the previous conviction or the circumstances relating to it are relevant to an issue in the case, meaning as I understand it "relevant" within the terms of the similar fact rule. This would exclude past convictions which are relevant, if at all, only to credit, and also those which might show "propensity" without themselves being logically probative of any issue in the case. I would reject this submission. Given that previous convictions can sometimes be "relevant to credit" then it follows, in my judgment, that in such cases the interests of justice must require that such evidence should be admitted before the jury, rather than withheld from it, when credit is in issue. Moreover, a past conviction for dishonesty could be said to be directly relevant to credit, a fortiori if the conviction was for giving perjured evidence in court.

His second submission is, in effect, that the evidence must be excluded unless it is "relevant," not merely to credit, but in the broader of the two senses referred to above. This is equivalent to saying that the past conviction must show some degree of propensity towards the kind of conduct which is in issue in the instant case. Here, he submits, a conviction for domestic violence has no relevance, in that sense of the word, to the question whether the plaintiff was abusive or offered violence to the police. Moreover, since the plaintiff pleaded guilty to the previous charge, it has no relevance to his creditworthiness either.

In my judgment, it would be wrong to restrict the scope of the judge's discretion under section 7(3) except by reference to the words of the statute—the interests of justice—and equally wrong to limit the facts which he may properly take into account—any considerations which appear to him to be relevant. The criminal authorities are useful because they have formulated a number of concepts which it may be helpful for him to identify and give such weight to as he considers appropriate in the circumstances of the particular case. But he should equally bear in mind, in my judgment, that the concepts are not independent of each other and they may often overlap. For example, the more "relevant" the previous conviction is, the more likely it is to be prejudicial to the party giving evidence, because some degree of propensity will be shown in addition to any damage caused to his credibility as a witness. The fact is that any previous conviction is likely to be prejudicial to the party or witness to whom it is put, unless it is so obviously trivial and irrelevant that it must be disregarded by a reasonable jury (e.g. a minor motoring offence). These fail the test of relevance however it is formulated, and the need to exclude them probably will not arise, because only an over enthusiastic cross-examiner would seek to rely upon them in any event.

Furthermore, when the question is whether the party is telling the truth on a central issue in the case, then his creditworthiness is bound up with the decision on that issue itself. In the present case, the jury had to decide whether the plaintiff's or the police officers' version of alleged ***833** assault was correct, and this required them to decide whose evidence to accept.

Section 7(3) therefore calls, in my view, for a single exercise of judgment by the trial judge, and it follows that this court cannot interfere unless, in accordance with general principles, the judge misdirected himself as to the test he should apply or his decision was obviously wrong. Here, there was no misdirection and Sir Michael Davies reconsidered his ruling after being referred to Dickinson v. Yates, 19 June 1986. Can it be said that his ruling was obviously wrong?

The question raised by section 7(3) has to be answered by the judge although it is not a matter of law; nor can it be answered by logic or by any process of reasoning alone. A negative answer would be required, in my judgment, where the previous conviction was so obviously irrelevant both to the issues in the case and to the moral standing of the witness that a reasonable jury could not properly take it into account when deciding whether to believe him or not. But the interests of justice are synonymous with a search for the truth, and the judge has to recognise that a reasonable jury may take a wide range of factors into account when deciding which witnesses to believe and therefore where the truth lies. It is also his responsibility, in my judgment, to consider whether the likely significance of the fact of a previous conviction in the jury's eyes is such that they may be unfairly

prejudiced against the witness in question, when deciding whether to accept his evidence or not. The adverb "unfairly" is a necessary qualification, because some prejudice is inevitable except in cases of total and obvious irrelevance where, as stated above, the evidence should be excluded in any event. When relevance and prejudice coexist, then the judge can carry out a similar though not identical balancing exercise to that which is required in "similar facts" (criminal) cases by virtue of Director of Public Prosecutions v. P. [1991] 2 A.C. 447; he can decide whether the potential prejudice to one party outweighs the prima facie right of the other party to introduce evidence of previous convictions, even if they are "relevant" only to credit, meaning that they could influence the decision of a reasonable jury whether to accept a witness's evidence, or not.

In summary, some degree of relevance, including relevance to credit, is a sine qua non requirement for admitting the evidence. If it has any relevance, then it has some potential for prejudice. The degree of relevance can be weighed against the amount of prejudice, and other factors may be taken into account. The judge must be satisfied that the parties will not have a fair trial, or that a witness's credit cannot be fairly assessed, unless the evidence is admitted. The statutory exclusion does not apply if, in his view, the interests of justice otherwise dictate.

In the present case the more serious of the convictions was of marginal relevance, even to credit, but of limited prejudice also; hence the dilemma to which Saville L.J. refers. Sir Michael Davies decided that it was necessary in the interests of justice that the jury should have a full picture of the plaintiff and his past history, not limited by his deemed good character under section 4(1) of the Act. It cannot be said, in my judgment, that that was not a valid exercise of his discretion under section 7(3).

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Two footnotes. First, section 7(3) implies that the judicial authority is separate from the tribunal of fact, which is factually correct when as here the section 7(3) decision is taken by a judge and the evidence then admitted, if it is admitted, before a jury. If the judge is himself the tribunal of fact then, if he rules that the evidence should not be admitted, he has to put it out of his mind and decide the case without reference to it. This is never an easy exercise, and in my judgment a considerable responsibility rests upon counsel not to seek leave to refer to previous convictions except in a case where it is clearly arguable that they should be admitted under section 7(3). It would be wrong even to make an application which had no realistic prospect of success.

Secondly, the Law Commission's paper contains details of research which was carried out using mock juries in order to assess the effects of admitting this kind of evidence in criminal cases. One factor which emerged was that knowledge of a previous conviction for a sexual offence was disproportionately likely to prejudice the jury against the defendant, regardless of the nature of the offence for which he was standing trial. This could mean that in a civil case where section 7(3) applies and there is no issue of a sexual nature the judge would more readily recognise that the potential for prejudice outweighed any "relevance to credit" which such a conviction might otherwise have. But by the same token, if the previous sexual misconduct was potentially relevant, then although the prejudice would be greater the judge might decide that justice could not be done between the parties unless the evidence was admitted.

For these reasons I would dismiss the appeal on liability. I also agree entirely with Sir Richard Scott V.-C.'s reasons for refusing a new trial, even if the cross-examination on previous convictions was wrongly permitted, and for not interfering with the award of damages.

I, too, would dismiss the appeal.

Saville L.J.

It seems to me that Lord Gifford's argument finds itself impaled upon the horns of a dilemma, from which there is only one escape route. Lord Gifford's basic submission is that the judge was wrong to admit the evidence of the spent convictions on the issue of credibility, since the judge was wrong to conclude that justice could not otherwise be done within the meaning of section 7 of the Act of 1974. To my mind that submission can only be correct if the evidence of the spent convictions had so little relevance to the issue of credibility that its exclusion from the trial could not properly have made any material difference to the outcome. If the evidence could properly have made a material difference, then it seems to me self-evident that justice indicates that it should not be excluded. Lord Gifford's second main submission was that this court should order a new trial, since there was a real prospect that the jury were influenced by the evidence of the spent convictions in their assessment of the credibility of his client.

On the face of it, therefore, Lord Gifford's argument seems to contain two inconsistent assertions, one that the evidence could have made no material difference and so should have been excluded; and the other that it might well have made a material difference so that there should be a new trial. In my view the only escape route from this would be if it could ***835** be shown not only that the evidence could not properly have made a material difference, but also that the jury might well have unreasonably or perversely thought it did. In his reply it seemed to me that Lord Gifford did in the end seek to make this submission.

There is, however, nothing to suggest that the jury acted in this way. The judge's direction to the jury on this evidence was, in my judgment, impeccable; in particular he warned them in no uncertain terms not to treat the evidence as going to propensity but merely, if they thought it of assistance, as something to take into account when assessing the weight to give to the plaintiff's evidence. Furthermore, the fact that the jury decided in favour of the plaintiff on the issue of assault, where his credibility as opposed to that of the police officers was all important, seems to me to indicate that the jury accepted his evidence. The fact that the jury did not find in favour of the plaintiff on the issues of false imprisonment and malicious prosecution does not, in my judgment, take the matter any further, since there are many aspects of these claims which did not depend on the veracity of the plaintiff.

It is possible that I might myself have excluded the evidence on the grounds that it had little or no relevance to the credibility of the plaintiff, but, since I accept that others could reasonably hold the opposite view, it seems to me that it would be wrong to substitute this possible view for that held by the judge who had the advantage, which I do not, of actually conducting the trial and thus of being able better to judge what justice required to be done. In these circumstances, I am not persuaded that there has been any miscarriage of justice and I would, accordingly, dismiss the appeal on this point.

As to damages I also agree that the appeal should be dismissed. Lord Gifford's argument depends on one vital premise, namely that the jury must have awarded loss of earnings up to the date of trial. To seek to demonstrate this, Lord Gifford submitted that if one takes the plaintiff's final figures for loss of earnings as a limbo dancer, but excludes his claimed uplift of 50 per cent. on past figures, if one also excludes any recovery for the claim for loss of earnings as a teacher and if one then takes the period of loss up to the date of trial, the arithmetical result comes quite close to the amount awarded by the jury as special damages.

I am quite unpersuaded that this is more than speculation. It seems to me that there are a variety of ways in which the jury could properly have reached the amount they awarded, e.g. by taking a shorter period and by awarding something for loss of teaching income or by way of uplift on past earnings. Thus to my mind Lord Gifford fails to demonstrate that the jury must have erred as he suggested they did.

Representation

Solicitors: Harris & Co.; Solicitor, Metropolitan Police.

Appeal dismissed with costs, not to be enforced without leave of court. Legal aid taxation. (S. W.)

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1. Rehabilitation of Offenders Act 1974, s. 4(1): see post, p. 818A-C. S. 7(3): see post, pp. 818G-819A.