POL00004058





[HOUSE OF LORDS]

HUNTER . . . . . APPELLANT

AND

CHIEF CONSTABLE OF THE WEST MIDLANDS POLICE AND OTHERS . . . . . RESPONDENTS

[On appeal from MCILKENNY *v.* CHIEF CONSTABLE OF THE WEST MIDLANDS]

1981 Oct. 19, 20, 21; Nov. 19

Lord Diplock, Lord Russell of Killowen, Lord Keith of Kinkel, Lord Roskill and Lord Brandon of Oakbrook

*Practice—Pleadings—Striking out—Judge's decision on voir dire that no assaults by police prior to confessions—Actions for same alleged assaults against police after murder convictions —Whether abuse of process of court—Whether fresh evidence admissible—R.S.C., Ord.* 18, *r.* 19 (1)

After bomb explosions in two Birmingham public houses on November 21, 1974, had killed 21 people and injured 161 others, the appellant and four others, Irish Republican supporters, were arrested by the Lancashire police and taken to Morecambe Police Station. On November 22, members of the Birmingham police interviewed the five men, and one of them made a signed statement. They were then taken to a Birmingham police station, where a sixth man was also taken after his arrest at 10.30 p.m. that night. On November 23, at the Birmingham police station, three more of the men made signed statements and the two others made oral confessions regarding their parts in planting the bombs that had caused the explosions. On November 24, all six men were photographed, and the photograph of one man showed a mark that might have been a bruise under the right eye. On Monday, November 25, the six men appeared before a magistrates' court, and, although three of them complained to the solicitors assigned to them of assaults by the police, no marks were noticed on their faces save in the case of the man with the black eye, which he said had been caused by a fall. After formal evidence, the six men were remanded in custody and taken to Winson Green Prison. When, three days later, on November 28, they again appeared at the magistrates' court, their faces showed injuries that indicated they had been seriously assaulted. They were again remanded in custody, and first the prison governor and then the Home Office held an inquiry as to how their injuries had been sustained. At the trial of the six men on 21 charges of murder, their counsel objected to the admission in evidence of their statements, which were an essential part of the prosecution case, on the ground that they had been induced by violence and threats by the police. After an eight day "trial within a trial" (voir dire) in the absence of the jury, during which the police officers and the six men gave evidence, Bridge J. held that the prosecution had discharged the burden of proving beyond reasonable doubt that the men had not been assaulted by the police and that the statements had been voluntary and should be admitted in evidence. The trial then continued before the jury, and the six men again alleged that

POL00004058



their statements had been induced by violence by the police. Bridge J. warned the jury that, if their allegations were, or might reasonably be, true, the statements were worthless. The jury convicted all six, and Bridge J. sentenced them to imprisonment for life. Leave to appeal was refused by the Court of Appeal (Criminal Division) on March 30, 1976. The six men issued writs against the chief constables of the West Midlands and the Lancashire police and also against the Home Office claiming damages against the police for injuries caused by assaults, which were the same allegations as had been made before Bridge J. at the voir dire and trial, and also against the Home Office in respect of assaults by prison officers and prisoners while they had been in Winson Green Prison. They relied, inter alia, on new medico-forensic evidence as to the photographs taken on November 24, which were said to reveal that some injuries had been sustained prior to that date, and statements from the three prison officers that the six men had been bruised and injured on their arrival at the prison. The chief constables applied for the statements of claim against them to be struck out under R.S.C., Ord. 18, r. 19[1] and under the inherent jurisdiction of the court. Cantley J. dismissed the applications, but the Court of Appeal allowed an appeal by the chief constables and ordered that the statements of claim be struck out.

On appeal by the plaintiff by leave of the House of Lords:—

*Held*, dismissing the appeal, that where a final decision had been made by a criminal court of competent jurisdiction it was a general rule of public policy that the use of a civil action to initiate a collateral attack on that decision was an abuse of the process of the court; and that such fresh evidence as the plaintiff sought to adduce in his civil action fell far short of satisfying the test to be applied in considering whether an exception to that general rule of public policy should be made, which, in the case of a collateral attack in a court of co-ordinate jurisdiction, was whether the fresh evidence entirely changed the aspect of the case (post, pp. 541H—542F, 544A–B, 545A, D—546A).

*Stephenson* v. *Garnett* [1898] 1 Q.B. 677, C.A.; *Reichel* v. *Magrath* (1889) 14 App.Cas. 665, H.L.(E.) and *Phosphate Sewage Co. Ltd.* v. *Molleson* (1879) 4 App.Cas. 801, H.L.(Sc.) applied.

*Ladd* v. *Marshall* [1954] 1 W.L.R. 1489, C.A. considered.

*Per curiam.* It would be best if the use of the description "issue estoppel" were restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies (post, pp. 540H—541A).

Decision of the Court of Appeal [1980] Q.B. 283; [1980] 2 W.L.R. 689; [1980] 2 All E.R. 227 affirmed.

The following cases are referred to in the opinion of Lord Diplock:

*Hollington* v. *F. Hewthorn & Co. Ltd.* [1943] K.B. 587; [1943] 2 All E.R. 35, C.A.

*Ladd* v. *Marshall* [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A.

[1] R.S.C., Ord. 18, r. 19: "(1) The court may . . . order to be struck out . . . any pleading or the indorsement of any writ . . . on the ground that—(*a*) it discloses no reasonable cause of action . . . or (*b*) it is scandalous, frivolous or vexatious; or . . . (*d*) it is otherwise an abuse of the process of the court; and may order the action to be . . . dismissed . . ."

POL00004058



*Mills* v. *Cooper* [1967] 2 Q.B. 459; [1967] 2 W.L.R. 1343; [1967] 2 All E.R. 100, D.C.

*Phosphate Sewage Co. Ltd.* v. *Molleson* (1879) 4 App.Cas. 801, H.L.(Sc).

*Reg.* v. *Humphrys* [1977] A.C. 1; [1976] 2 W.L.R. 857; [1976] 2 All E.R. 497, H.L.(E.).

*Reg.* v. *Watson (Campbell)* [1980] 1 W.L.R. 991; [1980] 2 All E.R. 293, C.A.

*Reichel* v. *Magrath* (1889) 14 App.Cas. 665, H.L.(E.).

*Stephenson* v. *Garnett* [1898] 1 Q.B. 677, C.A.

The following additional cases were cited in argument:

*Caine* v. *Palace Steam Shipping Co.* [1907] 1 K.B. 670, C.A.; [1907] A.C. 386, H.L.(E.).

*Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 3)* [1970] Ch. 506; [1969] 3 W.L.R. 991; [1969] 3 All E.R. 897.

*Chokolingo* v. *Attorney-General of Trinidad and Tobago* [1981] 1 W.L.R. 106; [1981] 1 All E.R. 244, P.C.

*Flower* v. *Lloyd* (1879) 10 Ch.D. 327, C.A.

*Gleeson* v. *J. Wippell & Co. Ltd.* [1977] 1 W.L.R. 510; [1977] 3 All E.R. 54.

*Macdougall* v. *Knight* (1890) 25 Q.B.D. 1, C.A.

*Public Prosecutor* v. *Yuvaraj* [1970] A.C. 913; [1970] 2 W.L.R. 226, P.C.

*Saif Ali* v. *Sydney Mitchell & Co.* [1980] A.C. 198; [1978] 3 W.L.R. 849; [1978] 3 All E.R. 1033, H.L.(E.).

*Stupple* v. *Royal Insurance Co. Ltd.* [1971] 1 Q.B. 50; [1970] 3 W.L.R. 217; [1970] 3 All E.R. 230, C.A.

INTERLOCUTORY APPEAL from the Court of Appeal.

This was an appeal by Robert Gerard Hunter by leave of the House of Lords from the decision of the Court of Appeal (Lord Denning M.R., Goff L.J. and Sir George Baker) on January 17, 1980, allowing an appeal by the first and second defendants, the Chief Constable of the West Midlands Police and the Chief Constable of the Lancashire Police, from an order of Cantley J. on November 22, 1978. By his order, Cantley J. dismissed applications by the first and second defendants for the plaintiff's statement of claim against them to be struck out under R.S.C., Ord. 18, r. 19 and under the inherent jurisdiction of the court. The third defendant to the plaintiff's action was the Home Office. The second defendant was joined as appellant with the first defendant during the appeal to the Court of Appeal, which also involved actions by five other plaintiffs.

The Court of Appeal refused the plaintiff leave to appeal from their decision, but on July 3, 1980, the Appeal Committee of the House of Lords (Lord Diplock, Viscount Dilhorne and Lord Russell of Killowen) allowed a petition by him for leave.

The facts are set out in the opinion of Lord Diplock; see also *per* Lord Denning M.R. [1980] Q.B. 283, 312–316.

*David Turner-Samuels Q.C.* and *Stephen Sedley* for the plaintiff.

[LORD DIPLOCK. Two issues arise: issue estoppel and abuse of the

POL00004058



process of the court. It would help their Lordships if the plaintiff dealt with abuse of the process of the court first.]

*Phosphate Sewage Co. Ltd.* v. *Molleson* (1879) 4 App.Cas. 801; *Reichel* v. *Magrath* (1889) 14 App.Cas. 665 (which was a judgment in rem) and *Macdougall* v. *Knight* (1890) 25 Q.B.D. 1 show that in each case where a subsequent action has been stayed as an abuse of the process of the court there has been something more than a mere issue that has arisen in previous proceedings. *Stephenson* v. *Garnett* [1898] 1 Q.B. 677 would today be regarded as a case of issue estoppel. If there is an issue estoppel, it would also be an abuse of the process of the court to seek to raise the issue again in subsequent proceedings. It is important to determine whether there is an issue estoppel. If it were an abuse of process merely to relitigate in civil proceedings an issue decided in criminal proceedings, *Caine* v. *Palace Steam Shipping Co.* [1907] 1 K.B. 670; [1907] A.C. 386 would have been decided differently.

Abuse of process would arise in a case where issue estoppel had been found not to exist only in a case in which the action was shown to be unavoidably doomed to fail: see *per* Sir Robert Megarry V.-C. in *Gleeson* v. *J. Wippell & Co. Ltd.* [1977] 1 W.L.R. 510. The mere fact that the issue was substantially the same as that previously litigated was not such as, on the facts of that case, to cause Megarry V.-C. to think that, despite the plaintiff having an uphill task, it would be an abuse of the process of the court for her to litigate it: see also *Remmington* v. *Scoles* ([1897] 2 Ch. 1). If it is prima facie an abuse of process to litigate a second time what has been litigated previously, what quality or quantity of fresh evidence will cause the new proceedings not to be an abuse? Five levels have to be considered: (i) (the lowest) new, believable evidence material to the outcome ("new" meaning evidence that was not called, irrespective of its availability); (ii) (higher) new, believable evidence likely to have had a substantial material effect on the outcome; (iii) evidence capable of being believed, for the previous non-use of which a reasonable explanation exists; (iv) the same grounds as that on which evidence would be admitted in the Criminal Division of the Court of Appeal on an appeal; (v) some higher-category ground than the last-mentioned: fraud, etc.

As a matter of logic, (1) the characteristics necessary for the admission of the uncalled evidence should be lower than those necessary for the breaking of an estoppel; otherwise in practice there would be no difference between an estoppel case and one where there was no estoppel. (2) This not being an appeal, and having no legal effect in relation to the voir dire, or, for that matter, to the verdict, the characteristics for the admission of uncalled evidence are not required to be the same as in the case of seeking to call uncalled evidence on an appeal. (3) In the absence of estoppel, and as against a person who was not a party to the earlier proceedings, so that no question of bis vexari arises, the abuse, if there be an abuse, must be the bringing of proceedings that cannot succeed. As to whether the plaintiff should have appealed against Bridge J.'s decision, this is not an attack on Bridge J.'s decision. It is not a *Saif Ali* case [*Saif Ali* v. *Sydney Mitchell & Co.* [1980] A.C. 198], because the

POL00004058



issue at trial would not be as to whether Bridge J.'s decision was right or wrong.

This is not a case of bis vexari. Logically to undo the abuse of process alleged here it is sufficient to show that uncalled evidence exists to support the plaintiff's claim which is capable of belief and which, if believed, will result in the claim succeeding. (The plaintiff limits this submission to new and uncalled evidence, even if it was available and could have been called with reasonable diligence.) Section 23 (1) of the Criminal Appeal Act 1968 sets out the substantive provisions regarding the admission of fresh evidence on appeal. The notes in *Archbold Criminal Pleading Evidence & Practice*, 40th ed. (1979), para. 889 are a correct summary of the law. Cantley J. applied the correct test. [Reference was made to *Flower* v. *Lloyd* (1879) 10 Ch.D. 327 and *Phosphate Sewage Co. Ltd.* v. *Molleson*, 4 App.Cas. 801, 814, *per* Earl Cairns L.C.]

As to the criteria that the court should have in mind in considering whether to strike out the plaintiff's action, the court ought, first, to consider whether there is in the fresh proceedings a collateral attack on a final decision of another court of competent jurisdiction. This raises two issues: whether it is a collateral attack on that decision, and whether that decision was a final decision. The only relief that could be obtained in these proceedings is damages. That is not an attack on a decision. Nor was Bridge J.'s decision a final decision; it was open to attack in more ways than one. For example, in the course of the proceedings before the jury, the plaintiff would have been entitled to adduce evidence which, if accepted by the jury, would have been at variance with the judge's decision. It was not, therefore, a final and conclusive decision on the merits so far as that issue was concerned. Nothing is really final in the course of criminal proceedings; the judge himself may change his mind: *Reg.* v. *Watson* (*Campbell*) [1980] 1 W.L.R. 991 and see *Reg.* v. *Angeli* [1979] 1 W.L.R. 26. The verdict of the jury speaks only on the issue of guilt or no. It was open to the jury to find, and one knows not whether it was their finding, that, although there had been assaults (and, indeed, that but for the assaults there would have been no confession), there had been the confession and the confession was true. The plaintiff accepts that the summing up of Bridge J. on this issue was very strong and that there was no other evidence. In coming to the question of whether the confession was true or false, whether it was voluntary was clearly a factor, and it might be an important factor, but it was not *the* factor, or the only factor. Finding that the confession was not voluntary would not necessarily have led to an acquittal. One cannot say as a matter of certainty, which is what matters, that the jury held that none of the assaults had taken place at all. It cannot be said as a matter of law that the jury could have convicted only if they agreed with Bridge J.'s view that the confession, if there had been any violence, was worthless. That cannot be said as a matter of logic, either.

It is not an abuse of process to litigate something that might or might not have been decided by the jury, even if it is more probable than not that they so decided. It cannot be said here that Bridge J.'s direction was so overbearing that the jury must have accepted it. In the circumstances of the case, it would have been logical for the jury to say that someone

POL00004058



who might appear tough and trained, although subjected to the abuse and violence alleged, would nevertheless not make a confession that was not true. [Reference was made to *Reg.* v. *Humphrys* [1977] A.C. 1.]

The court should have in mind whether the two sets of proceedings are between the same parties, or their privies.

The court is entitled to have in mind whether the evidence that it is now sought to adduce was available at the time, and whether it was a deliberate choice not to call it. So far as the prison officers are concerned, there clearly was a decision that they should not be called. There was a deliberate choice by or on behalf of the plaintiff not to have this issue raised at the trial. This was not evidence that could have been produced to the Court of Appeal, because it would have been available with reasonable diligence.

The court should also have in mind the plaintiff's chances of success in this action. Where a plaintiff is shown to have no chance of success, it is an abuse of process for him to raise the issue. Where he has a chance of success, he should be entitled to litigate although the chance may not be very great. The question is whether he has some merit or no merit (see *Gleeson* v. *J. Wippell & Co. Ltd.* [1977] 1 W.L.R. 510).

As to the cogency of the proposed evidence here, Dr. Paul's evidence is capable of belief.

On the basis of these criteria, it was open to Cantley J. to come to his decision, the discretion being his.

As to the relationship of estoppel to abuse of process, if there is an estoppel here, it must be on the basis that a party is not entitled to make, as against another party, an assertion of fact, or an assertion of the legal consequences of facts, previously put forward in a criminal case: compare *per* Lord Diplock in *Mills* v. *Cooper* [1967] 2 Q.B. 459, 468. The defendant should apply at an early stage to have the action struck out. The grounds on which the action would be struck out are that there is a clear-cut defence, so that it cannot succeed, or that the points in question cannot be asserted by reason of the estoppel resulting from the earlier proceedings. If the court holds that such estoppel does arise, it will strike the action out as an abuse of process if the matter was plain; otherwise it would go to trial. [Reference was made to *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No. 3)* [1970] Ch. 506.]

As to public policy, see *Saif Ali* v. *Sydney Mitchell & Co.* [1980] A.C. 198. There is a clear distinction between *Saif Ali* and the present case. In *Saif Ali*, it would have been an issue in the fresh proceedings (indeed, the matter would have had to be expressly or impliedly pleaded) that the decision of the original court was wrong. It would then have had to be expressly or impliedly pleaded (see *per* Lord Diplock, at p. 223) that the reasons why the court was wrong were such and such. It cannot be contrary to public policy merely to seek to assert facts in civil proceedings that have arisen in earlier criminal proceedings and that must have been decided by the jury in the earlier proceedings in a contrary sense. [Reference was made to the Civil Evidence Act 1968, s. 11 (1).] It would be highly illogical if a verdict in criminal proceedings which presents absolute certainty as to its content should merely be admissible in evidence and

POL00004058



should merely be taken to establish that the accused had committed the offence unless the contrary was proved but that some fact which arose and was a necessary basis for the conviction could nevertheless be raised to an estoppel. [Reference was made to the Fifteenth Report of the Law Reform Committee (1967) (Cmnd. 3391).] If public policy had dictated that in criminal proceedings a party could not attack that finding collaterally, not only would *Hollington* v. *F. Hewthorn & Co. Ltd.* [1943] K.B. 587 have had to be decided differently but the committee's report would have been different. Section 11 (1) of the Act of 1968 shows that merely to have a collateral attack is not regarded by Parliament as contrary to public policy. [Reference was made to *Public Prosecutor* v. *Yuvaraj* [1970] A.C. 913 and *Stupple* v. *Royal Insurance Co. Ltd.* [1971] 1 Q.B. 50.] The circumstances in which it would be an abuse are the section 13 circumstances and nothing else. The mere fact of collateral attack does not amount to abuse. In the absence of estoppel, there cannot in the present case be an abuse.

[*Hugh Carlisle Q.C.* appeared at the request of the House to inform it on behalf of the Home Office as to the position regarding the plaintiff's claim against the Home Office.]

*Turner-Samuels Q.C.*, continuing, referred to *Chokolingo* v. *Attorney-General of Trinidad and Tobago* [1981] 1 W.L.R. 106. Accordingly, there are no grounds on which the court could properly strike out the relevant parts of the plaintiff's statement of claim in this case unless there was an estoppel of some kind.

*Sedley* following. On the question of abuse of process, (1) it is not the entire picture to say that the " verbals " were the only evidence against the plaintiff. Although without the confessions there could not have been a conviction, they were by no means the totality of the evidence against the accused. This is important with regard to the question of whether the jury concluded that there had been an assault. The jury's verdict cannot conclude the matter regarding assault. (2) There is the prison officers' evidence. (3) As to whether estoppel is simply a narrower version of abuse of process, the plaintiff would not dissent from the suggestion that it is a species of the genus abuse, but he would dissent from the view that abuse encompasses the whole of estoppel and more besides. (4) As to whether there is an abuse of process here, abuse of process is simply the vehicle by which an action that is incapable of succeeding because of estoppel may be stopped in limine. One cannot say that there is no estoppel and then resort to abuse of process on the same facts. (5) As to admissibility, and whether the plaintiff's conviction or any part of the criminal proceedings is admissible at all for the purpose of striking out his civil proceedings, the law is such that the conviction not only as a thing in itself but as part of the entire criminal proceedings cannot be looked at as evidence on which to found an application to strike out. The reason for this is that *Hollington* v. *F. Hewthorn & Co. Ltd.* [1943] K.B. 587 (which is enshrined in the Civil Evidence Act 1968) holds all such matter to be irrelevant. (6) As to whether the motives of the plaintiffs have been to upset the convictions rather than recover damages, four different legal aid area committees, on the advice of different

POL00004058



counsel, must have accepted that these were genuine claims for damages, as must Cantley J. A

*Michael Turner Q.C.* and *Patrick Twigg* for the first and second defendants were not called on.

October 21. LORD DIPLOCK informed the parties that their Lordships were satisfied that the plaintiff's statement of claim ought to be struck out as an abuse of the process of the court, for reasons to be given later. B

Their Lordships took time for consideration.

November 19. LORD DIPLOCK. My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power. C D

The matter comes before your Lordships by way of an interlocutory appeal in a civil action in the High Court in which the appellant (" Hunter ") seeks damages for assaults causing him physical injuries which he alleges were inflicted upon him by police officers while he was in their custody between November 22 and 25, 1974. The respondent chief constables, who are the first and second defendants to the action, are sued under section 48 of the Police Act 1964 as vicariously liable for the tortious acts of the individual police officers (whom I shall call collectively " the police ") who were members of the West Midlands and Lancashire police forces respectively. E

The Home Office is a third defendant to the action as vicariously liable in damages for other assaults causing him additional physical injuries which Hunter alleges were inflicted upon him by prison officers at Winson Green Prison between November 25 and 27, 1974, while he was detained there on remand. Your Lordships are not, however, concerned directly with these later injuries in respect of which the civil action against the Home Office is still continuing. The only question with which your Lordships are concerned is whether Hunter's action *against the police* ought to be struck out as an abuse of the process of the court. Cantley J., before whom the application to strike out was made, declined to do so. On appeal from his refusal, the Court of Appeal (Lord Denning M.R., Goff L.J. and Sir George Baker) were unanimously of opinion that the action was an abuse of the process of the court and that the statement of claim against the first and second defendants ought to be struck out. F G H

Hunter is one of six murderers (" the Birmingham Bombers "), members or supporters of the I.R.A., who were responsible for planting and exploding two bombs in public houses in the centre of Birmingham on

POL00004058



November 21, 1974; as a result 21 people were killed and eight score of other innocent victims injured. For a detailed account of what happened in relation to Hunter and the other Birmingham Bombers after the holocaust until the launching of this action by Hunter and similar actions by those others in November 1977, reference should be made to the judgment of Lord Denning M.R. [1980] Q.B. 283, 312–316. To paraphrase it would only be to spoil it, to improve upon it I should find impossible. So I shall limit myself to as brief a summary as possible of those salient features in the Master of the Rolls's account to which I find it necessary to refer in order to explain my own reasons for dismissing this appeal.

Hunter and four other of the Birmingham Bombers were arrested on the night of November 21, 1974, at Heysham where they were en route to Belfast. They remained in custody of the police initially at Morecambe and subsequently at Birmingham until the morning of November 25 when they were brought before the magistrate and committed by him to Winson Green Prison on remand until their next appearance before him on November 27. Photographs of all six Birmingham Bombers, including one of Hunter, were taken before the men left the police station at Birmingham. No facial injury to Hunter was apparent on inspection of these photographs, at any rate by an uninstructed eye; nor (except for a black eye in the case of one defendant which, it was accepted, had been caused accidentally) was any facial injury to any of the Birmingham Bombers observed by any of the many keen observers who were present when they appeared in court on the morning of November 25, or by the duty solicitors who were allotted to them on that occasion and who interviewed them in their cells. On their appearance in court on November 27, however, it was apparent to even the most casual glance that all six men including Hunter had sustained severe and painful facial injuries. It is not disputed, and was not disputed at their trial for murder, that by this time there were present on other parts of their bodies also physical injuries which could not have been self-inflicted; but, for reasons which will become apparent later in connection with Hunter's claim that "fresh evidence" has become available since the date of his conviction on August 15, 1975, on 21 counts of murder, it is only facial injuries that call for specific mention here.

The trial of all six Birmingham Bombers for murder took place jointly before Bridge J. and a jury. The principal evidence against each one of them consisted of confessions made to the police either in writing or in the case of Hunter orally only. Against some, but not against Hunter, there was forensic evidence of faint traces of nitroglycerine being perceptible on their hands or clothing and against the five of them, including Hunter, who were arrested at Heysham there was evidence of conduct after the time at which the bombs must have been planted that, in the absence of any other credible explanation, was capable of arousing suspicion that they had some knowledge of the plot. But all this amounted to suspicion only; unless the confessions were admissible and, if admitted, were accepted by the jury in the case of each defendant as being true then no reasonable jury could be satisfied that the prosecution's case against that defendant was proved beyond a reasonable doubt and it would be their duty to acquit him.

If it were voluntary, Hunter's oral confession, like the confessions of each of his co-defendants, bore the ring of truth; as the jury must have

POL00004058



found when they convicted him. (That they must also have rejected his denial that he ever made it is not germane to the only matters that fall to be decided by your Lordships in this appeal.) So it became of crucial importance to Hunter and to each of the defendants to obtain a ruling from the judge on a voir dire that the confessions were not voluntary and so prevent their being admitted in evidence. This they set out to do by claiming in the "trial within a trial" before the learned judge in the absence of the jury that the confessions were forced out of them by the infliction of severe physical violence on them by the police and by threats of calamitous consequences of what would happen to them or to their families if they did not make confessions of their guilt in the terms that the police demanded of them. The physical injuries in respect of which Hunter claims damages in the present civil action for assaults by the police are identical with those of which he gave evidence at the trial within a trial as having been inflicted upon him by the police in order to extract from him a confession.

At the trial within a trial the issue which Bridge J. had to determine was whether the prosecution had satisfied him beyond reasonable doubt that the confessions were voluntary; and that involved his being satisfied to this high standard of proof that in the case of each defendant there had been no assault upon him by the police before or in the course of obtaining his confession. Assaults upon any of the defendants by prison officers at Winson Green Prison after the confessions had been made could not affect admissibility; but the fact that all the defendants had unquestionably been subject to severe physical violence by the time of their second appearance in the magistrates' court on November 27, 1974, provided an added complication to the investigation of the issue that the judge had to determine on the voir dire.

So it is not surprising that the trial within a trial lasted eight days. Each of the police officers who it was claimed had participated in or was present at any of the alleged assaults gave evidence; so did each of the defendants; in addition other witnesses were called and the photographs of the defendants taken on November 24, 1974, to which I have referred were put in evidence. At the conclusion of this evidence the judge ruled that each of the confessions was admissible. Unusually, but very helpfully for the purpose of the instant appeal to your Lordships' House, he gave full and detailed reasons for his ruling. He made it clear that he accepted the evidence of the police as establishing beyond all reasonable doubt that there had been no physical violence or threats by them to the defendants and that in his opinion the evidence taken as a whole showed that there had been what he described as "gross perjury" on the part of each of the defendants.

The confessions were accordingly admitted and the trial resumed. The same allegations as to physical violence and threats by the police that had been made on the voir dire were repeated before the jury as relevant to the weight which they should attach to the confessions and the whole ground was gone over again in evidence given before them. In the course of what I can only describe as a model and meticulous summing up, of which no criticism has been made by counsel for Hunter in the instant appeal, Bridge J. gave to the jury a firm direction that if they inclined to the view

POL00004058



that the account by any defendant of the circumstances in which his confession was obtained might be true, they should reject the confession as worthless and acquit the defendant, since the other evidence against each of them did no more than raise suspicion and was insufficient to satisfy the burden of proof beyond reasonable doubt that lay upon the prosecution.

Despite this direction the jury convicted Hunter and each of the other Birmingham Bombers on 21 counts of murder. The defendants appealed to the Criminal Division of the Court of Appeal against the convictions. No complaint about the judge's ruling on the voir dire that the confessions were admissible was made in this appeal on behalf of any of the defendants and their appeals were dismissed on March 30, 1976.

To complete the history of the matter it may be added in parenthesis that later in 1976, 14 prison officers from Winson Green Prison were tried before Swanwick J. and a jury on charges of assaulting the Birmingham Bombers. All 14 made unsworn statements from the dock, each denying that he himself was implicated in any violence inflicted on the Birmingham Bombers between November 25 and 27, 1974; and all 14 were acquitted. In the instant civil action by Hunter, however, it is admitted by the Home Office that *some* violence was inflicted upon him by prison officers employed at Winson Green. For this the Home Office accepts civil liability in damages but puts Hunter to proof of the extent and severity of the resulting injuries.

The statement of claim in the present civil action alleging against the police the identical assaults that had been canvassed for eight days before Bridge J. on the voir dire and again before the jury on Hunter's trial for murder was delivered in January 1978. Prompt steps were taken by the police to have the statement of claim against them struck out and the action against them stayed or dismissed under R.S.C., Ord. 18, r. 19 or else under the inherent jurisdiction of the court, on the grounds, inter alia, that it was an abuse of the process of the court.

The summons claiming this relief in the instant case together with summonses claiming similar relief in parallel actions in which the other five Birmingham Bombers were plaintiffs came on for hearing before Cantley J. in November 1978.

At that hearing there were put in evidence statements from prison officers that had not been used although they had been made available to plaintiffs at their trial for murder and a report from an expert, Dr. Paul, upon inferences which he felt able to draw from the photographs of the plaintiffs taken on November 24, 1974, and used at the murder trial, to which reference has already been made. It would appear that in the argument on the summonses counsel for the police sought in the first place to persuade that learned judge that what had happened at the murder trial gave rise to an estoppel per rem judicatam of a kind which in recent years it had been found convenient to describe as "issue estoppel." The fact that even if what had happened did not create as against the plaintiff in favour of the police what could be strictly classified as "issue estoppel" it nevertheless made the initiation of the present civil action against the police an abuse of the process of the court took second place in counsel's argument both chronologically and in plenitude of citation of authority.

POL00004058



Cantley J. in a fully reasoned judgment dismissed the summonses both on the narrow ground that there was no " issue estoppel " in the strict sense of that term and on the broader ground that he ought not to dismiss the action as an abuse of the process of the court if, in the light of evidence that was not called at the murder trial, even though it had been available then, but which the plaintiffs intended to adduce in the civil action, it was " reasonably conceivable that another tribunal acting judicially might accept at least part of the plaintiff's case "; and this he, hesitantly, thought was " reasonably conceivable " if the expert evidence of Dr. Paul (which could have been available to the plaintiffs at the murder trial if they had chosen to call it) were admitted at the hearing of the civil action.

Much the same course was taken in the argument in the Court of Appeal upon the appeal by the police against the dismissal of the summonses. The hearing there took 12 days and involved the citation of 77 authorities including a number of American decisions. All three members of the court were of opinion that Cantley J. was wrong on the broader ground; he had applied the wrong tests as to the previous availability and the degree of cogency of evidence, unadduced at the murder trial but proposed to be adduced in the civil action, that the plaintiffs would need in order to prevent its being an abuse of the process of the court for them to initiate civil proceedings to mount a collateral attack upon the finding of Bridge J. at the murder trial that they had *not* been assaulted by the police.

Lord Denning M.R. and Sir George Baker were also in favour of extending the description " issue estoppel " to cover the particular example of abuse of process of the court presented by the instant case—a question to which much of the judgment of Lord Denning is addressed. Goff L.J., on the other hand, expressed his own view, which had been shared by Cantley J., that such extension would involve a misuse of that expression. But if what Hunter is seeking to do in initiating this civil action is an abuse of the process of the court, as I understand all your Lordships are satisfied that it is, the question whether it also qualifies to bear the label " issue estoppel " is a matter not of substance but of semantics. Counsel for the appellant was therefore invited to address this House first upon the broader question of abuse of process and to deal in particular with the reasoning contained in the judgment of Goff L.J. who dealt with the matter more closely than the other members of the court and bases his decision solely on that ground. In the result, counsel for the appellant, Hunter, who argued the case with their accustomed ability and diligence, were quite unable to persuade any of us that there was any error in the reasoning of Goff L.J. in what proved to be the last judgment that he prepared before his much lamented and untimely death. In the result it became unnecessary to call on counsel for the police. So the debate upon semantics did not take place. It could not possibly affect the outcome of the appeal or justify the public expense that would have been involved in prolonging the hearing any further.

Nevertheless it is my own view, which I understand is shared by all your Lordships, that it would be best, in order to avoid confusion, if the use of the description " issue estoppel " in *English law, at any rate* (it does

POL00004058



not appear to have been adopted in the United States), were restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies, of which the characteristics are stated in a judgment of my own in *Mills* v. *Cooper* [1967] 2 Q.B. 459, 468–469 that was adopted and approved by this House in *Reg.* v. *Humphrys* [1977] A.C. 1, the case in which it was also held that "issue estoppel" had no place in English criminal law.

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

The proper method of attacking the decision by Bridge J. in the murder trial that Hunter was not assaulted by the police before his oral confession was obtained would have been to make the contention that the judge's ruling that the confession was admissible had been erroneous a ground of his appeal against his conviction to the Criminal Division of the Court of Appeal. This Hunter did not do. Had he or any of his fellow murderers done so, application could have been made on that appeal to tender to the court as "fresh evidence" all material upon which Hunter would now seek to rely in his civil action against the police for damages for assault, if it were allowed to continue. But since, quite apart from the tenuous character of such evidence, it is not now seriously disputed that it was available to the defendants at the time of the murder trial itself and could have been adduced then had those who were acting for him or any of the other Birmingham Bombers at the trial thought that to do so would help their case, any application for its admission on the appeal to the Court of Appeal (Criminal Division) would have been doomed to failure.

It would call for a degree of credulity too extreme to be expected even from judicial members of your Lordships' House to fail to recognise that the dominant purpose of this action, and the parallel actions brought by the other Birmingham Bombers so far as they are brought against the police, has not been to recover damages but is brought in an endeavour to establish, long after the event when memories have faded and witnesses other than the Birmingham Bombers themselves may be difficult to trace, that the confessions on the evidence on which they were convicted were induced by police violence, with a view to putting pressure on the Home Secretary to release them from the life sentences that they are otherwise likely to continue to serve for many years to come. A significant indication that the recovery of monetary damages is not the principal object of the civil action may be discerned in the manner in which the action has been conducted as against the Home Office. Despite the fact that ever since August 1979, when the Home Office amended their defence by admitting liability for assaults by the prison officers, Hunter has been in a position to obtain judgment against the Home Office on liability and proceed to an assessment of damages, no step has yet been taken on his behalf to do so.

My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising that no

POL00004058



reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A. L. Smith L.J. in *Stephenson* v. *Garnett* [1898] 1 Q.B. 677, 680–681 and the speech of Lord Halsbury L.C. in *Reichel* v. *Magrath* (1889) 14 App.Cas. 665, 668 which are cited by Goff L.J. in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A. L. Smith L.J.:

> "... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court."

The passage from Lord Halsbury's speech deserves repetition here in full:

> "... I think it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again."

In the instant case the relevant final decision by a competent court in which the identical question sought to be raised has been already decided is the ruling of Bridge J., on the voir dire in the murder trial, that Hunter's confession was admissible. Initially his ruling may have been provisional in the limited sense that up to the time that the jury brought in their verdict he had power to reconsider it in the light of any further evidence that might emerge when the whole question of the circumstances in which the confession was obtained was gone into again before the jury on the question of the weight to be attached to it: *Reg.* v. *Watson* (*Campbell*) [1980] 1 W.L.R. 991. But his ruling became final when the trial ended with the return of the jury's verdict of guilty and the pronouncement by the judge of the mandatory sentence of life imprisonment. Bridge J. thereupon became functus officio. His ruling that the confession was not obtained by the use of violence by the police, as Hunter had alleged, could thereafter only be upset upon appeal to the Court of Appeal (Criminal Division).

The fact that the whole matter of the circumstances in which the confession was obtained was gone into a second time before the jury and that the jury, in view of the judge's direction to them, must clearly also have been satisfied beyond reasonable doubt that Hunter's account of the assaults upon him by the police was a fabrication does not affect the finality of the judge's ruling, though it would exacerbate the public scandal to the administration of justice that would be involved if Hunter, by changing the form of the proceedings to a civil action, were to be permitted to set up in that action the same case that must have been decided against him not only once but twice, even though technically it was only the first of those decisions that eventually qualified as the final decision against him by a competent court upon the very question that he seeks now to raise.

My Lords, this is the first case to be reported in which the final decision against which it is sought to initiate a collateral attack by means of a civil action has been a final decision reached by a court of criminal jurisdiction.

POL00004058



This raises a possible complication that the onus of proof of facts that lies upon the prosecution in criminal proceedings is higher than that required of parties to civil proceedings who seek in those proceedings to prove facts on which they rely. Thus a decision in a criminal case upon a particular question *in favour* of a defendant, whether by way of acquittal or a ruling on a voir dire, is not inconsistent with the fact that the decision would have been *against* him if all that were required were the civil standard of proof on the balance of probabilities. This is why acquittals were not made admissible in evidence in civil actions by the Civil Evidence Act 1968. In contrast to this a decision on a particular question *against* a defendant in a criminal case, such as Bridge J.'s ruling on the voir dire in the murder trial, is reached upon the higher criminal standard of proof beyond all reasonable doubt and is wholly inconsistent with any possibility that the decision would *not* have been *against* him if the same question had fallen to be decided in civil proceedings instead of criminal. That is why convictions were made admissible in evidence in civil proceedings by the Act of 1968.

That Act and *Hollington* v. *F. Hewthorn & Co. Ltd.* [1943] K.B. 587, which sections 11 and 13 of the Act were passed to overrule, call for some examination at this point. Despite the eminence of those who constituted the members of the Court of Appeal that decided it (Lord Greene M.R., Goddard and du Parcq L.JJ.) that case is generally considered to have been wrongly decided, even in the context of running-down cases brought before the Law Reform (Contributory Negligence) Act 1945 was passed and contributory negligence ceased to be a complete defence; for that is what *Hollington* v. *Hewthorn* was about. The judgment of the court delivered by Goddard L.J. concentrates on the great variety of additional issues that would arise in a civil action for damages for negligent driving but which it would not have been necessary to decide in a prosecution for a traffic offence based on the same incident, and on the consequence that it would still be necessary to call in the civil action all the witnesses whose evidence had previously been given in a successful prosecution of the defendant, or a driver for whose tortious acts he was vicariously liable, for careless or dangerous driving, even if evidence of that conviction were admitted. So no question arose in *Hollington* v. *Hewthorn* of raising in a civil action the identical question that had already been decided in a criminal court of competent jurisdiction, and the case does not purport to be an authority on that matter.

The occasion for the reference of the decision in *Hollington* v. *Hewthorn* that evidence of criminal convictions was not admissible in civil actions to the Lord Chancellor's Law Reform Committee was a notorious libel case in which despite a defence of justification a criminal who had been convicted of serious offences was awarded damages by a jury in a civil action against a newspaper for stating that he had committed the identical offences of which he had been found guilty upon his trial. So here, unlike the case of *Hollington* v. *Hewthorn,* the civil action did raise the identical question that had already been decided against the plaintiff by a competent court; yet under the rule in *Hollington* v. *Hewthorn* even the fact of his conviction was inadmissible in evidence on the plea of justification in the civil action. This is the mischief, in the initiation of civil proceedings in

POL00004058



a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been reached by a competent court of criminal jurisdiction, that section 13 of the Act of 1968 was designed to cure. It is to be observed that it makes the conviction not merely prima facie evidence of the plaintiff's guilt but conclusive evidence. The provisions of section 13 are thus consistent with and give statutory recognition to the public policy of prohibiting the use of civil actions to initiate a collateral attack on a final decision *against the intending plaintiff* which has been made by a criminal court of competent jurisdiction.

Section 13 is to be contrasted with section 11. Although section 11 is not in express terms confined to convictions of *defendants* to civil actions or persons for whose tortious acts defendants are vicariously liable, this must in practice inevitably be the case. It is the plaintiff who will want to rely upon a conviction of the defendant or a person for whose tortious acts he is vicariously liable, for a criminal offence which also constitutes the tort for which the plaintiff sues. It is scarcely possible to conceive of a civil action in which a plaintiff could assist his cause by relying upon his own conviction for a criminal offence. So section 11 is not dealing with the use of civil actions by plaintiffs to initiate collateral attacks upon final decisions against them which have been made by a criminal court of competent jurisdiction; and the public policy that treats the use of civil actions for this purpose as an abuse of the process of the court is not involved.

Section 11 makes the conviction prima facie evidence that the person convicted did commit the offence of which he was found guilty; but does not make it conclusive evidence; the defendant is permitted by the statute to prove the contrary if he can. The section covers a wide variety of circumstances; the relevant conviction may be of someone who has not been made a defendant to the civil action and the actual defendant may have had no opportunity of determining what evidence should be called on the occasion of the criminal trial; the conviction, particularly of a traffic offence, may have been entered upon a plea of guilty accompanied by a written explanation in mitigation; fresh evidence, not called on the occasion of his conviction, may have been obtained by the defendant's insurers who were not responsible for the conduct of his defence in the criminal trial, or may only have become available to the defendant himself since the criminal trial. This wide variety of circumstances in which section 11 may be applicable includes some in which justice would require that no fetters should be imposed upon the means by which a defendant may rebut the statutory presumption that a person committed the offence of which he has been convicted by a court of competent jurisdiction. In particular I respectfully find myself unable to agree with Lord Denning M.R. that the only way in which a defendant can do so is by showing that the conviction was obtained by fraud or collusion, or by adducing fresh evidence (which he could not have obtained by reasonable diligence before) which is conclusive of his innocence. The burden of proof of "the contrary" that lies upon a defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probabilities; although in the face of a conviction after a full hearing this is likely to be an uphill task.

POL00004058



There remains to be considered the circumstances in which the existence at the commencement of the civil action of "fresh evidence" obtained since the criminal trial and the probative weight of such evidence justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court.

I can deal with this very shortly, for I find myself in full agreement with the judgment of Goff L.J. He points out that on this aspect of the case Hunter and the other Birmingham Bombers fail in limine because the so-called "fresh evidence" on which they seek to rely in the civil action was available at the trial or could by reasonable diligence have been obtained then. He examines also the two suggested tests as to the character of fresh evidence which would justify departing from the general policy by permitting the plaintiff to challenge a previous final decision against him by a court of competent jurisdiction, and he adopts as the proper test that laid down by Earl Cairns L.C. in *Phosphate Sewage Co. Ltd.* v. *Molleson* (1879) 4 App.Cas. 801, 814, namely that the new evidence must be such as "entirely changes the aspect of the case." This is perhaps a little stronger than that suggested by Denning L.J. in *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489, 1491 as justifying the reception of fresh evidence by the Court of Appeal in a civil action, viz., that the evidence ". . . would probably have an important influence on the result of the case, though it need not be decisive; . . ."

The latter test, however, is applicable where the proper course to upset the decision of a court of first instance is being taken, that is to say, by appealing to a court with jurisdiction to hear appeals from the first-instance court and whose procedure, like that of the Court of Appeal (Civil Division), is by way of a rehearing. I agree with Goff L.J. that in the case of collateral attack in a court of coordinate jurisdiction the more rigorous test laid down by Earl Cairns is appropriate.

I need not repeat Goff L.J.'s critical examination of the "fresh evidence" which Hunter sought to adduce in his civil action for assault. It fell far short of satisfying either test.

I would dismiss this appeal.

LORD RUSSELL OF KILLOWEN. My Lords, I concur with the speech of my noble and learned friend, Lord Diplock, and therefore would dismiss this appeal.

LORD KEITH OF KINKEL. My Lords, I agree entirely with the speech of my noble and learned friend, Lord Diplock, which I have had the benefit of reading in draft, and would accordingly dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. For the reasons therein contained I am clearly of the opinion that to allow this action to proceed would indeed be an abuse of the process of the court. I therefore agree that this appeal fails and should be dismissed.

POL00004058



LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Diplock. I agree with it and would dismiss the appeal accordingly.

*Appeal dismissed.*
*Appellant's costs in House of Lords to be taxed in accordance with provisions of Schedule 2 to Legal Aid Act 1974.*
*Costs of first and second respondents in House of Lords to be paid out of legal aid fund pursuant to section 13 of Act of 1974, such order to be suspended for four weeks to enable The Law Society to give notice of objection if thought fit.*

Solicitors: *Saunders & Co. for Geffens, Walsall; Barlow, Lyde & Gilbert; Chief Executive and Clerk, Lancashire County Council.*

M. G.

---

[HOUSE OF LORDS]

LAVIN . . . . . RESPONDENT

AND

ALBERT . . . . . APPELLANT

[On appeal from ALBERT *v.* LAVIN]

1980 Nov. 17; 27 — Donaldson L.J. and Hodgson J.

1981 Nov. 18; Dec. 3 — Lord Diplock, Lord Simon of Glaisdale, Lord Keith of Kinkel, Lord Scarman and Lord Roskill

*Crime—Breach of peace—Power to restrain—Police officer restraining defendant from committing breach of peace—Defendant assaulting police officer to prevent detention—Defendant disbelieving identity of police officer—Whether relevant—Citizen's rights*

The defendant, in an attempt to board a bus, pushed past a number of people standing in a bus queue. Several of them objected, and a police constable in plain clothes, fearing a breach of the peace, sought to prevent the defendant from boarding the bus. A struggle took place, and the constable pulled the defendant away from the queue. He then told the defendant that he was a police officer and that, if he did not stop struggling, he would arrest him. The defendant, who did not believe that the constable was a police officer, hit him five or six times. In respect of those blows he was arrested and