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*Feb. 10, 11, 12
Apr. 9

JAMES KIRKPATRICK, DOUGLAS FRASER and VICTOR DAWSON (*defendants*) ....APPELLANTS;

AND

JOSEPH LAMENT, Jr., by his next friend Joseph Lament, Sr. (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Action for injuries received during course of arrest—Whether evidence supported jury's finding that excessive force used—Corroboration of evidence required by s. 15 of The Evidence Act, R.S.O. 1960, c.125.

The plaintiff, a mentally incompetent person so found, brought an action by his next friend for damages which he received when the defendants K and F, constables on the St. Catharines police force, acting on instructions of the defendant D, the sergeant thereof, arrested the plaintiff and brought him in to the police station at St. Catharines. The action was dismissed at trial. On appeal, the Court of Appeal allowed the appeal and directed a new trial. In answers to questions submitted by the trial judge the jury held that the defendant K used excessive force but that the excessive force did not cause the plaintiff's injuries. In

*PRESENT: Cartwright, Fauteux, Martland, Judson and Spence JJ.

the judgment of the Court of Appeal the second answer was regarded as perverse. The Court of Appeal also held that the trial was defective in that the trial judge did not explain to the jury what "corroborated" meant, or what was "material evidence", or the application of s.15 of the Ontario *Evidence Act*, R.S.O. 1960, c.125, to the evidence of the defendants.

Held (Cartwright J. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Fauteux, Martland, Judson and Spence JJ.: By implication the jury in its answers found that there was no excessive force until K had brought the plaintiff within the second set of doors of the police station. Their answer that there was excessive force from that latter point to the sergeant's desk was one unsupported by the evidence.

As to the issue with respect to corroboration, it was true that the trial judge did not define "corroboration" or, at any rate, did not give dictionary definitions for that word. He did, however, read to the jury s.15 of *The Evidence Act* and in his remarks there were references which dealt with the test of Hodgins J.A. in *McGregor v. Curry*, (1914), 31 O.L.R. 261, that the evidence tends to prove that the evidence relied on is true or probably true in some material particular. In addition, the trial judge gave to the jury specific examples of evidence which he deemed capable of corroboration if the jury believed such items of evidence and gave to them the probative effect which he suggested they were capable of having.

Priestman v. Colangelo et al., [1959] S.C.R. 615, referred to.

Per Cartwright J., *dissenting*: From the medical evidence read with the answers of the jury it appeared that the plaintiff's injury resulted from some or all of a series of acts of the defendant K some of which were tortious and some justified. In these circumstances, the trial judge should have told the jury that it was for the defendant to satisfy them that, on the balance of probabilities, the injury to the plaintiff was not caused or contributed to by those of the defendant's actions which were wrongful. The failure to give such direction was a sufficient ground for upholding the order of the Court of Appeal that there should be a new trial at all events as to the defendant K.

APPEAL from a judgment of the Court of Appeal for Ontario, allowing an appeal from a judgment of Fraser J. Appeal allowed and judgment at trial restored, Cartwright J. dissenting.

J. R. Barr, Q.C., and *H. J. Daniel*, for the defendants, appellants.

J. J. Robinette, Q.C., and *A. Maloney, Q.C.*, for the plaintiff, respondent.

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CARTWRIGHT J. (*dissenting*):—The facts out of which this action arises and the course of the proceedings in the Courts below are set out in the reasons of my brother Spence.

I have reached the conclusion that we ought not to interfere with the decision of the Court of Appeal in so far as it directs a new trial of the action against Kirkpatrick.

I am unable to agree that we should set aside the answer made by the jury to question 4. It is only in unusual circumstances that a second appellate court will set aside a finding of fact made by a jury and adopted in the unanimous judgment of the first appellate court. It is not without significance that the suggestion that the finding should be set aside appears to have been made for the first time in the course of the opening argument of counsel for the appellants in this Court.

There is no difficulty in stating the rule by which the Court should be guided. It is succinctly stated by Duff C.J. giving the unanimous judgment of the Court in *McCannell v. McLean*[1], at p. 343:

> The principle has been laid down in many judgments of this Court to this effect, that the verdict of a jury will not be set aside as against the weight of evidence unless it is so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it. That is the principle on which this Court has acted for at least thirty years to my personal knowledge and it has been stated with varying terminology in judgments reported and unreported.

Later in the judgment, at p. 345, Duff C.J. points out that the application of the rule to the facts of a particular case will often involve "a question of not a little nicety" and concludes the passage with the observation: "it belongs, moreover, to a class of questions in the determination of which judges will naturally differ, and, as everyone knows, such differences of opinion do frequently appear."

Nothing would be gained by my reviewing in detail the evidence bearing on the matters raised in question 4. It appears to me that it would have justified the jury in find-

[1] [1937] S.C.R. 341.

ing that the transition from reasonably necessary force to force that was unreasonable occurred at a point in time somewhat earlier than that at which their answer fixed it. Their finding that it was reasonable up to a certain point is no more sacrosanct than their finding that it was unreasonable thereafter.

If the answer to question 4 stands, as in my opinion it should, it is obvious that the respondent would be entitled to, at least, nominal damages against Kirkpatrick and to this extent the judgment given at the trial would be erroneous. However, this alone would not justify the granting of a new trial; the proper course would be for this Court to fix the amount of damages and consider what order as to costs would be appropriate.

A more serious question arises in regard to the answer given by the jury to question 5(*a*), that the excessive force did not cause the blood clot which accounts for the plantiff's present condition.

The plaintiff's action was framed as one for damages for assault. The defence pleaded was a denial of the assault and a plea that the defendant Kirkpatrick arrested the plaintiff, that he had reasonable grounds to believe that the plaintiff was guilty of an offence, that the plaintiff endeavoured to escape and that Kirkpatrick used no more force than was necessary to effect the arrest and prevent the plaintiff's escape.

It was established in evidence that during the period of a few minutes between the time when Kirkpatrick placed the plaintiff under arrest and the time when the latter collapsed in the police station Kirkpatrick, on several occasions, applied such force to the person of the plaintiff as would constitute an assault unless it was justified.

The medical evidence taken as a whole leads to the irresistible inference that it was what occurred in that period of a few minutes which directly caused the plaintiff's injury.

The result of this medical evidence read with the answers of the jury is that the plaintiff's injury was caused by a

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closely connected series of acts of force exerted by Kirkpatrick some of which were justified and some of which were not. It may well be that the learned trial judge was not called upon to anticipate this result but when it appeared from the answers of the jury it was, in my opinion, essential that he should have directed the jury to re-consider their answer to question 5(*a*) and given them a further direction as to the incidence of the burden of proof.

Up to this point the learned trial judge had instructed the jury that the onus was on the plaintiff to establish not only that one or more of the defendants assaulted him but also that the assault was the cause of his injury. No doubt this was a correct direction as to where the burden lay on the state of the pleadings. The question is, however, what was the necessary direction when it appeared that the plaintiff's injury resulted from some or all of a series of acts of the defendant Kirkpatrick some of which were tortious and some justified. After a consideration of the arguments of counsel and of the authorities on which they relied I have reached the conclusion that the learned trial judge should have told the jury that in these circumstances it was for the defendant to satisfy them that, on the balance of probabilities, the injury to the plaintiff was not caused or contributed to by those of the defendant's actions which were wrongful.

I do not think this is an undue extension of the principle on which *Cook v. Lewis*[1] was decided. To adapt the words of Rand J., at p. 832, to the facts of this case, Kirkpatrick by commingling wrongful acts with justifiable conduct has, in effect, destroyed the victim's power of proof.

It is not for us to weigh the evidence, but, in my opinion, the medical evidence taken as a whole would have warranted the jury in finding that the violence inflicted on the plaintiff which was nearest in point of time to his collapse, and which they have found to be wrongful, was a contributing cause of that collapse. On this vital issue the plaintiff was entitled to the verdict of a properly instructed jury.

[1] [1951] S.C.R. 830.

The failure to give the direction which I have indicated should have been given is, in my opinion, a sufficient ground for upholding the order of the Court of Appeal that there should be a new trial at all events as to the defendant Kirkpatrick and I would dismiss his appeal.

If my view had been shared by the other members of the Court it would have been necessary to consider whether the appeal should be allowed as to Dawson and Fraser and what order should be made as to costs, but as the decision of the majority is that the appeal of all three defendants succeeds I do not pursue these questions.

The judgment of Fauteux, Martland, Judson and Spence JJ. was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on June 6, 1963, which allowed an appeal from the judgment of Fraser J. at trial, pronounced on February 8, 1962, upon the jury's answers to questions as set out hereunder.

The learned trial judge dismissed the action and the Court of Appeal directed a new trial.

The action was one for damages for injuries received by the plaintiff on July 29, 1960, when the defendants Kirkpatrick and Fraser, constables on the St. Catharines police force, acting on instructions of the defendant Dawson, the sergeant thereof, arrested the plaintiff and brought him in to the police station at St. Catharines.

The learned judge, in his charge to the jury, submitted to the jury certain questions, those questions and the jury's answers thereto are as follows:

1. At the time of the plaintiff's arrest:
   (a) Was there a smell of alcohol on his breath? Answer: "Yes".
   (b) Did he admit he had been drinking? Answer: "Yes".
   (c) Was his speech thick? Answer: "Yes".
   (d) Did he have difficulty in getting his driver's licence from his wallet? Answer: "Yes".
   (e) Were his eyes glassy or bloodshot? Answer: "Yes".
   (f) Was he unsteady on his feet? Answer: "Yes".
2. At the time of the arrest were the facts such as to create a reasonable suspicion in the mind of a reasonable man that Lament had the care and control of his automobile while his ability was impaired? Answer: "Yes".

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3. Did the defendants, or any of them, use more force than was necessary to effect an arrest and keep the plaintiff in custody? Answer: "Yes".

4. If your answer to question 3 is "yes", of what did such excessive force consist? Give full particulars of when, where and by whom such force was used. Answer: "The excessive force consisted of the continued headlock, from when they (Kirkpatrick & Lament) entered the second set of doors to the counter, after they entered the main lobby. (By whom)—By Constable Kirkpatrick."

5. (a) If your answer to question 3 is "yes", did the excessive force cause the blood clot which accounts for the plaintiff's present condition? Answer: "No".

   (b) If your answer to question 5(a) is "yes", by what defendant or defendants was such force used? Not answered.

   (c) If your answer to question 3 is "yes" and your answer to question 5(a) is "yes", which act or acts of excessive force caused the blood clot in the plaintiff's brain? Not answered.

6. Regardless of your answer to any of the preceding questions, at what amount do you assess the plaintiff's damages resulting from the blood clot in the plaintiff's brain which formed on July 29th, 1960?

   "Out-of-pocket ..... $ 7,529.79
   Derived from Ford employment until now 4,003.50
   Future income at 2,000 per year for 28 years expectancy 56,000.00
   25 years of incapacity and care .....32,500.00."

7. If your answer to question 3 is "yes", at what amount do you assess the plaintiff's damages, excluding all damages resulting from the blood clot which formed in the plaintiff's brain. And the answer to that is—appears to be nil, in brackets.

Upon the presentation of the appeal in this Court, many issues were argued very ably by counsel for the appellants and the respondents. I am of the opinion, however, that the appeal may be disposed of by considering only a very few issues.

In the judgment of the Court of Appeal, the jury's answer to question 5(*a*), *supra*, was regarded as perverse, as it will be seen that that is an answer which held that the excessive force found by the jury in their answer to question 4, did not cause the plaintiff's injuries. Upon the argument here, counsel for the appellants (defendants) took the position that there was no evidence upon which the jury could come to their answer to question 4. After careful consideration, I have come to the conclusion that I agree with that contention. There was evidence and, as I shall show hereafter,

evidence sufficiently corroborated to support the jury's answers to questions 1 and 2. The jury's answer to question 4, *supra*, implies a holding that no excessive force was used until the defendant Kirkpatrick and the plaintiff entered the second set of doors in the police station. In the evidence it is recounted that the plaintiff, when apparently impaired and in the control of an automobile vehicle, first resisted arrest on Church Street in St. Catharines, and then at the corner of Church and James Streets in that city attempted to leap from the moving police car, requiring the defendant Kirkpatrick to grasp him firmly by the right arm and then pull him pack into the automobile by the use of a headlock. Constable Fraser arrived to assist only by lifting the plaintiff's feet back into the car. The evidence further shows that the plaintiff, upon Constable Kirkpatrick stopping at the police station and leaving the car by the left door to walk around the back of the car, opened the right hand door and attempted to escape. He was again grasped by Constable Kirkpatrick who again put a headlock on the plaintiff and forced him to enter, still held by a headlock, through the front door of the police station, along a short corridor and through the second door into the main front office of the police station. During the whole of this, the plaintiff was still held in a headlock.

From the first or outer doorway to the police station, a 4-foot corridor led 5 feet 6 inches to a second set of doors then a space of 21 feet intervened between the second set of doors and the sergeant's desk surrounded by a counter which stood in the lobby of the police station.

On this warm, summer evening both sets of doors stood open. There is no evidence that Constable Kirkpatrick knew how far behind him was Constable Fraser who followed in the plaintiff's car. The plaintiff had twice tried to escape and there is not the slightest reason why Kirkpatrick should not have thought that if he should have loosened his grip on the plaintiff as he crossed the room the plaintiff would not again try to escape. If the force applied outside the police station was not excessive, and the jury have

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found it was not in their answers, then the application of the same force up to the moment Kirkpatrick let the plaintiff go and he stood up was no more excessive.

There is, therefore, no evidence of any change in the circumstances which would make the application of exactly the same degree of force during the few seconds it took to traverse the space between the second set of doors and the sergeant's desk excessive. I am, therefore, of the opinion that the jury having found that there was no excessive force until the passing through that second set of doors by the plaintiff and the defendant Kirkpatrick their answer that there was excessive force from that latter point to the sergeant's desk is one unsupported by the evidence. It must be remembered that in deciding whether, in any particular case, a police officer had used more force than it is reasonably necessary to prevent an escape by flight within the meaning of s. 25 of the *Criminal Code*, general statements as to the duty to take care to avoid injuries to others derived from negligence cases must be accepted with reservation and only upon giving full weight to the fact that the act complained of is one done under statutory powers and in pursuance of a statutory duty: Locke J. in *Priestman v. Colangelo et al.*[1], at p. 622. Cartwright and Martland JJ. dissented in view of the fact that the persons injured were not the persons whom the police sought to apprehend, a circumstance not applicable to the present case.

McLennan J.A., in giving reasons in the Court of Appeal, held that the trial was defective in that the learned trial judge did not explain to the jury what "corroborated" meant, or what was "material evidence", or the application of the section to the evidence of the defendants. The corroboration referred to is required by s. 15 of the Ontario *Evidence Act*, R.S.O. 1960, c. 125, which reads as follows:

> In an action by or against a mentally incompetent person so found, or a patient in a mental hospital, or a person who from unsoundness of mind is incapable of giving evidence, an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence, unless such evidence is corroborated by some other material evidence.

[1] [1959] S.C.R. 615.

The learned trial judge, at the commencement of the trial, had found as a fact that the plaintiff was a mentally incompetent person. Requirement of corroboration in a court action was considered by this Court in *Smallman v. Moore*[1]. There, the Court considered the corroboration required by what are now ss. 13 and 14 of the Ontario *Evidence Act, i.e.*, the section applicable to actions by or against the heirs, next-of-kin, executors, administrators or assigns, of a deceased person. In the latter case, the relevant provision reads:

> . . . an opposite or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

It will, therefore, be seen that the two sections, 14 and 15, are in *para materia.*

Kellock J. gave a judgment dissenting for other reasons but on the issue of corroboration his judgment was adopted by the majority. In the course of that judgment, he quoted from various authorities including *McGregor v. Curry*[2], where Hodgins J.A. said:

> As the statute has been construed in the cases upon the subject, corroborative evidence is not required as to every fact necessary to enable the opposite party to recover. It is enough if sufficient relevant facts and circumstances appear, which tend to prove that the evidence relied on for recovery is true, or probably true, in some material particular . . . . But the respondent's whole testimony, both in proof of his claim and in disproof of the defence, is the *evidence* upon which he recovers. Applying the cases referred to, if *any* part of that whole evidence is corroborated the statute is satisfied. This appears to follow as a proper conclusion.

And stated the principle as follows, at p. 301:

> However that may be, the section here does not say that every fact necessary to be proved to establish a cause of action must be corroborated by evidence other than that of the interested party but that the evidence of the interested party itself is to be corroborated by *some other material evidence*. I do not think that the word "matter" in the section is to be taken as synonymous with every fact required to be proved in establishing a cause of action and it has never, as far as I am aware, been so construed.

[1] [1948] S.C.R. 295.
[2] (1914), 31 O.L.R. 261.

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Applying that standard to the corroboration required by the statute, I must, with respect, differ with the learned judge in the Court of Appeal. It is true that the learned trial judge did not define "corroboration" or, at any rate, did not give dictionary definitions for that word. He did, however, read to the jury the section of the statute and said:

> Speaking particularly and not technically, it must be some evidence corroborating the defendants' testimony on some material point, and one of the defendants in this case, as there are three parties to the action, the evidence of each requires corroboration, and one of them cannot corroborate the evidence of the other or others.

And further:

> . . . you may, if you see fit, regard that as some corroboration of the. . . *making the defendant's story seem more probable* . . .

And further:

> . . . as a corroborative fact or circumstance *bearing on the probability or otherwise* of the defendant Kirkpatrick's evidence being true.

(The italicizing is my own.)

It will be seen that although those references do not include an exact definition of "corroboration", they do deal with the test of Hodgins J.A. that the evidence tends to prove that the evidence relied on is true or probably true in some material particular.

In addition, the learned trial judge gave to the jury five specific examples of evidence which he deemed capable of corroboration if the jury believed such items of evidence and gave to them the probative effect which he suggested they were capable of having. Counsel for the respondent here took the position that some of those items of evidence could not, in law, be corroboration. The first group of items of evidence given by the learned trial judge, that by the witnesses indicating that the plaintiff had some alcoholic beverages in the day, counsel objects to on the ground that it was completely equivocal in relation to the issue of whether there was reasonable and probable cause for the arrest. I do not find it equivocal. It is one of the factors which bear on the reasonableness of the belief of the defendant Kirkpatrick that the plaintiff should have been

placed under arrest, and in addition it supplies an element of probability that the plaintiff should have engaged in such foolish attempts to escape from custody as his attempt to leap from the moving car and to escape from Constable Kirkpatrick outside the police station.

The third piece of evidence cited by the learned trial judge as possible corroboration was the bruise on the upper arm of the plaintiff. This was suggested as corroborating the evidence of the defendant Kirkpatrick that he had grasped that arm as the plaintiff attempted to leap from the moving police cruiser. The objection is that there is no evidence as to whether the plaintiff's arm had been bruised previously.

Miss Orshinsky described the bruises which she observed when the plaintiff was brought into the hospital as follows:

> From its appearance, there were 4 small bruises fairly close together, on the inner aspect. On the inner aspect of his left arm above the elbow.
>
> Q. And would those bruises be consistent with a man reaching out and grabbing his left upper arm with his right hand? A. Very consistent.

Those marks, in my view, are so typical of the injury which would have been caused by the grabbing as testified to by the defendant Kirkpatrick that the objection goes more to the weight of the evidence than to the admissibility thereof.

The fifth group of items of corroboration which counsel for the respondent objected to as being inadmissible was the evidence of one Lyle Staff as to the very short time that lapsed between the time he saw the police cruiser on James street and the time he went into the police station. This evidence was adduced by the defendants in a denial of an alleged assault which had occurred subsequent to the plaintiff having fallen to the floor in the police station. For the reason which I shall outline hereafter, it is quite irrelevant to the issues in the present appeal.

Counsel for the respondent submitted that inadmissible evidence was permitted at the trial and that such inadmissible evidence went strongly to corroborate the evidence of

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the police officers and to contradict the evidence of four employees of the post office who swore that they had observed some of the events when standing in an open window some 100 to 150 feet away from the police station. No ruling was made on this subject in the Court of Appeal although McLennan J.A. said:

> A perusal of much of the evidence clearly indicates either ill-advised attempts to introduce inadmissible evidence or captious subjections to admissible evidence.

The evidence to which particular objection may be made may be summarized as follows. The various employees swore that they witnessed a police officer throw the plaintiff down on the floor of the police station so forcefully that at the very considerable distance away from the scene at which they stood they could hear and hear plainly the thud of the plaintiff's head on the floor. However, neither the admitting nurse, who saw the plaintiff when he arrived at the hospital, nor Dr. Dolan, the neurosurgeon who examined the plaintiff very carefully before operating on July 31st, found any trace of bump or bruises on the plaintiff's scalp. The defendants introduced as further evidence to contradict the evidence of the postal employees, *inter alia,* the evidence given by a Sgt. Gayder that he had caused another officer to stand in that same open window in the post office with his back to the window and then he, Gayder, had struck the floor of the police station with a hammer with blows of increasing force and yet it was only on the 15th and 16th blows that the listening officer indicated he could hear any sound, and that those blows had then become so forceful that he, Gayder, feared that he would break the floor. There is much, of course, to be said against that kind of evidence. It is absolutely impossible to duplicate all the elements affecting audibility on the night in question. But it would seem that that objection goes more to the weight of the evidence than to the admissibility and the learned trial judge, in his charge, said:

> Now, in connection with that incident, you have had some evidence of demonstration with the hammer performed by two of the—or test, rather, made by the police as to whether the sound could be heard across

the street. It was admitted, but I suggest to you—that evidence was permitted, but I suggest to you that you should scrutinize quite carefully any evidence of that kind made by interested parties, without independent control, and a matter such as the loudness of a sound, or the amount of strength used, or the strength of a smell, are all things which are difficult to measure, and to define with any exactness, and you have the evidence before you of that, for what it is worth but you should scrutinize it very closely for that reason.

I am of the opinion that there is a more convincing answer to this objection. That evidence went to contradict the evidence of the postal employees as to hearing the thud of the plaintiff's head when they alleged he was thrown to the floor. On all of the evidence, the plaintiff suffered his injuries when he stood erect in front of the sergeant's desk after Constable Kirkpatrick had released his headlock and then the plaintiff's eyes rolled and he slumped down. This all occurred prior to the alleged throwing of the plaintiff to the floor and, therefore, this evidence was quite irrelevant upon the issue of whether alleged excessive force caused the injury. It was said that these postal employees had also witnessed the events which occurred outside the police station before the headlock was put on the plaintiff by Constable Kirkpatrick. I have reviewed the evidence *in extenso* and quote resumes of those witnesses' evidence given in the respondent's factum:

William Fyfe—heard tires squealing down the street, heard Lament say "Let me go—I will go in by myself". Kirkpatrick had Lament in headlock. Kirkpatrick and Lament were going in through the door of the police station and Kirkpatrick took Lament and threw him to the counter of the police station.

James Andrews—they heard a man shout and holler. They ran to the window and saw Kirkpatrick bringing Lament in with a headlock around his neck . . .

Edward Makse—. . . they looked out the window and saw Kirkpatrick take Lament in with a headlock. He was about the front steps of the police station by then . . .

Harry Stevens—he saw Kirkpatrick holding Lament in a secure headlock. Lament appeared to be complaining about the headlock. He did not see Lament resist Kirkpatrick.

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Therefore, not one of these four persons saw the alleged attempt to escape by Lament outside the police station. Their observations all commenced after that, and therefore, their evidence cannot contradict the evidence of Kirkpatrick on the subject of the alleged escape and the contradiction of their evidence by the alleged inadmissible evidence in reference to the hammer test is irrelevant.

Having come to the conclusion that it was not open to the jury upon the evidence to answer questions 3 and 4 in the fashion which they did answer when they must have concluded that no excessive force was used up to the time the defendant Kirkpatrick brought the plaintiff within the second set of doors, then I am of the opinion that the action should have been dismissed as the trial judge did dismiss it.

Therefore, I would allow the appeal with costs both here and in the Court of Appeal, and restore the judgment at trial.

Appeal allowed, judgment at trial restored with costs, CARTWRIGHT J. *dissenting.*

Solicitors for the defendants, appellants: Fleming, Harris, Kerwin, Barr & Hildebrand, St. Catharines.

Solicitors for the plaintiff, respondent: Maloney & Hess, Toronto.