



Whitelaw Twining
BARRISTERS & SOLICITORS

Wrongful Imprisonment and the Loss Prevention Officer

Prepared by: Michael R. Tinker and Lindsay E.W. Barrett
June 2004

Introduction

The tort of wrongful imprisonment is an intentional tort. Unlike negligence, it involves the actor desiring to produce the consequences that follow from an act. Wrongful imprisonment involves the intentional confinement of another person within fixed boundaries. Restraint may be accomplished by direct force or by the threat of force to which the plaintiff submits. A plaintiff who reasonably thinks that force may be used is imprisoned if he decides to submit and not risk violence. At law, there is no requirement for physical contact for a court to find that a plaintiff was wrongfully imprisoned. The mere threat of imprisonment will be sufficient. Once it has been proven that a plaintiff was imprisoned, the onus shifts to the defendant to prove that the imprisonment was justified.

Power To Arrest

The justification for a private citizen imprisoning another private citizen is found within the provisions of the Criminal Code, R.S.C. 1985, c. C-46. Section 494 of the Criminal Code states as follows:

ARREST WITHOUT WARRANT BY ANY PERSON

- 494.(1) Any one may arrest without warrant
- (a) a person whom he finds committing an indictable offence; or
 - (b) a person who, on reasonable grounds, he believes
 - (i) has committed a criminal offence, and
 - (ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.
- (2) Any one who is
- (a) the owner or a person in lawful possession of property, or
 - (b) a person authorized by the owner or by a person in lawful possession of property,
- may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.
- (3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

Further, section 25 of the Code provides that:

PROTECTION OF PERSONS ACTING UNDER AUTHORITY

- 25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law
- (a) as a private person,

... is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

These provisions provide a complete defence to the charge of false imprisonment if a person has *actual* knowledge that the detainee committed an indictable offence. Furthermore, the relevant case law states that an individual is justified in detaining another individual who he *believes*, on reasonable and probable grounds, has committed a criminal offence in most jurisdictions, save and except British Columbia and Alberta. If the circumstances are such that it appears a loss prevention officer did not objectively have reasonable and probable grounds before arresting the detainee, he or she will face civil liability for false imprisonment. In British Columbia and Alberta the courts have recently added an additional and onerous burden. The defendant must prove that an indictable offence was actually committed. Further and in all jurisdictions, Section 25 requires that an officer use only as much force as necessary under the circumstances to effect an arrest.

Case Law

What constitutes “detention”

In *Sinclair v. Governor and Co. of Adventurers of England Trading into Hudson’s Bay* [2003] B.C.J. No. 1656 (B.C.P.C.) the plaintiff brought an action for damages resulting from an alleged arbitrary and unlawful arrest, imprisonment and detention. The plaintiff had attended the defendant’s store with her infant in a stroller which she had purchased from a different department store a few months earlier. She did not realize the store had not removed the anti-theft device from the stroller. The device triggered the Bay’s alarm and the plaintiff was stopped by an employee who asked to inspect the stroller. After finding the anti-theft device, the plaintiff was asked whether she had a receipt for the stroller and was escorted to the cash desk so that the device could be removed. A friend accompanying the plaintiff objected to the employee taking the stroller with the plaintiff’s baby in it. The device was removed and the plaintiff left the store.

The plaintiff commenced an action for damages on the basis that she felt embarrassed and distressed that the employee took her baby. The action was dismissed. The court found it was reasonable to stop the plaintiff once the alarm had been triggered. The employee, at that point, was entitled to an explanation. It was also reasonable for the employee to search for the hidden anti-theft device and to do so in an area that was not disruptive to other customers. There was no justification for the plaintiff’s belief that she had been detained or that the employee was taking away her baby.

Reasonable grounds for detention

In *White v. T. Eaton Co.* (1995), B.C.J. No. 838, Vancouver Registry No. C935789 (S.C.), Aff’d (1996), B.C.J. No. 2555 (C.A.) the plaintiff was restrained and searched as she left an Eatons store after a short shopping trip. The central issue at trial was whether her detention was reasonable, i.e. whether the security personnel had an honest belief in the facts which constituted grounds for restraining and searching the plaintiff. The plaintiff had been observed by security entering a store change room with two items of clothing. She later exited the change room without the clothes in hand. Shortly thereafter, security personnel had been approached by a sales clerk, holding two empty hangers, and who advised that she believed that the plaintiff had taken the clothes.

The court held that the security personnel had an honest belief in the facts which, viewed objectively, constituted reasonable and probable grounds to believe the plaintiff had taken the goods in question. In support of its decision, the court cited the case of *Cook v. Halliday* (1987), B.C.J. No. 570, March 13, 1987, Victoria Registry No. 85/1455:

The test to be applied is whether or not the defendants had reasonable and probable grounds to believe the plaintiffs had stolen the suits. If so, then they were justified in the arrest and detention of the plaintiff until the police arrived, ...

The arrest having been admitted, the burden of justifying it lies on the defendants.

In *Parlby v. Northern Drugs Ltd.* (1997), B.C.J. No. 2688, Prince Rupert Registry No. 8917, October 17, 1997 (S.C.), the court did not require that the defendants establish that the plaintiff had actually committed a theft. The plaintiff had purchased two chocolate bars and had been overcharged. He was directed to a cashier at the rear of the store to obtain repayment of the excess amount. The cashier refunded the entire purchase. The plaintiff returned to the front of the store and ate one of the chocolate bars while inside the store. As he left the premises, he was arrested for shoplifting and detained in the stock room. At issue was whether the officer had justification to make the arrest. Although the court was not satisfied that the plaintiff had stolen chocolate bars from the store, the defendant had demonstrated justification for the arrest of the plaintiff and the action was dismissed.

In *Parlee (Guardian ad litem of) v. Port of Call Holdings Ltd.* [2000] B.C.J. No. 698 (S.C.), a 13 year old boy went shopping with his mother, step-father and older brother. He was returning a chocolate milk product to the dairy cooler and was observed by store employees to be acting in a manner that aroused their suspicion when he placed it back in the cooler. One of the employees asked another to check the carton of milk product that he had seen the boy place back in the dairy cooler. The second employee noticed that the product was unsealed, opened, and that some of the contents had been removed. The boy was subsequently stopped, detained, and questioned.

An action was commenced in Small Claims Court for wrongful arrest. The court held that the employees had reasonable and probable grounds to believe that the boy was committing an offence and therefore dismissed the action.

The case was appealed to the Supreme Court of British Columbia. On Appeal, the court held that it was not enough that an arresting individual have reasonable and probable grounds that an indictable offence had been committed. There had to have actually been an offence committed in addition to reasonable grounds indicating the particular individual was responsible. The court went on to cite the case of *Sears Canada Inc. v. Smart* (1987), 36 D.L.R. (4th) 756, a decision of the Newfoundland Court of Appeal in which the court stated:

...at common law, an arrest by a private person could only be justified if the arresting person could establish that a crime was committed and that there were "reasonable grounds of suspicion" that the person arrested had committed that crime. In more modern terms, "reasonable grounds of suspicion" may be translated as "reasonable and probable cause for his belief".

Following this authority, the court in *Parlee* set out that a private person who arrests an individual must satisfy the court on a balance of probabilities:

- (a) that someone committed an indictable offence, and
- (b) that the private person affecting the arrest had reasonable grounds for believing and did believe the person arrested had committed that indictable offence.

The court was satisfied that there was sufficient evidence before the trial judge upon which he could be satisfied on a balance of probabilities that someone committed the indictable offence of theft. However, it was also found that in this case, the plaintiff had been detained for the purposes of investigation. The person who detained the plaintiff had testified that he had stopped the plaintiff because he was *investigating* the matter. In allowing the plaintiff's appeal, the court cited extensive authority for the proposition that an arrest only for the purposes of investigation is unlawful.

The *Parlee* decision was recently followed by the Alberta Provincial Court in *Hildebrand v. Freson Market Ltd. (c.o.b. IGA Drumheller)*, [2004] A.J. No. 107. The plaintiff went to the defendant's IGA store to purchase food for his employer's restaurant. He was observed by the store manager

shopping in an aisle of the store where condoms were displayed. After paying for purchased items, then in bags, the plaintiff proceeded to the back of the store and entered a washroom available to customers. He then exited the washroom and proceeded out the store's exit.

Observing the plaintiff exit the washroom with bags in hand aroused the manager's suspicion. He immediately checked the washroom and determined that neither the toilet nor the sink had been used. This caused him to check the garbage container where he found an empty condom package on the top of the trash. The facts were such that the court accepted a theft had recently occurred. However, it was the manager's evidence at trial that he approached the plaintiff outside the store to *investigate* the theft.

The plaintiff was effectively detained. However no physical contact was made. Upon searching his bags, it was determined that the Plaintiff was not the thief. The plaintiff had cooperated with the search which had been conducted in public outside the front door of the store premises. Because this detention was only for the purpose of investigating a proven theft of merchandise, and it had not been established that there were reasonable grounds for believing the plaintiff had actually committed the theft, the detention was deemed unlawful and the defendant was found liable for wrongful imprisonment and arrest.

These decisions require that a private person effecting an arrest have reasonable grounds for believing, and in fact did believe, that the person arrested had committed the indictable offence. Further they suggest a further onus must be met, namely, that on a balance of probabilities, evidence exist that *someone* actually committed an indictable offence. Finally, it is clear that the court views detaining an individual for the purposes of investigation as unlawful and will result in liability for wrongful imprisonment.

Avoiding Wrongful Imprisonment Situations

Loss prevention officers must realize that based on the foregoing authorities, not only must they prove on a balance of probabilities that it was reasonable for them to believe that an individual committed an offence, they may also be required to show on a balance of probabilities that an offence did in fact occur. Based on the *Parlee* and *Hildebrand* decisions, it may no longer be sufficient to simply show that it was reasonable to believe an offence had occurred.

In summary, a loss prevention officer should ask him/herself the following questions:

1. whether he can satisfy a court that it is more likely than not that an indictable offence was committed; and
2. whether he can satisfy a court that more likely than not he had reasonable grounds for believing, and in fact did believe, the person detained had committed that offence.

What constitutes reasonable force?

Pursuant to section 25 of the Criminal Code, an arresting individual must use only as much force as is necessary under the circumstances. The amount of force employed during the course of an arrest must be reasonable and in proportion to the necessity of the situation. It is a question of fact that will be determined by the court on the basis of all the circumstances of the case. Once an arrest has been completed successfully, no further force should be employed other than what may be necessary for the purposes of detention and administration. Pursuant to section 25 of the Criminal Code, an arrested individual must always be delivered promptly to a police officer.

Damages

In false imprisonment cases, no actual loss is required as a prerequisite to recovery of damages. There are three different types of damages available in wrongful imprisonment cases: compensatory damages, aggravated damages and punitive or exemplary damages.

Compensatory damages are meant to reimburse a victim of wrongdoing for any loss suffered, both pecuniary and non-pecuniary. In wrongful imprisonment cases involving shoplifters being detained by loss prevention officers, compensatory damages are generally quite low. Recent Canadian cases have assessed compensatory damages in a range of \$500.00 to \$5,000.00 generally, with a high range of \$10,000.00 to \$15,000.00 in some rare cases.

With respect to aggravated damages (which are also compensatory in nature), awards are made only in cases where a defendant's conduct has been particularly high handed or oppressive, therefore increasing the plaintiff's humiliation and anxiety. For such an award, there must be a finding that a defendant was motivated by actual malice, which increased injury to the plaintiff by increasing his mental distress and humiliation.

Punitive damages, unlike general and aggravated damages, are not compensatory in nature. Punitive damages aim to punish a defendant. They may be awarded only where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence. The conduct of the defendant must be harsh, vindictive, reprehensible or malicious. It must be so extreme in its nature that by any reasonable standard it is deserving of full condemnation and punishment.

Investigating False Imprisonment Claims

When investigating a false imprisonment claim, one should consider whether or not there is sufficient evidence to prove, on a balance of probabilities, that an indictable offence was in fact committed and whether it was reasonable for the loss prevention officer to believe that the arrested individual was the person who committed the offence. Further, a loss prevention officer must never detain an individual simply for the purpose of investigation as it is unlawful.

Any claim for aggravated or punitive damages must be pled in the Statement of Claim. However, in the event a claim is being investigated prior to the commencement of an action, one should be alive to the possibility of aggravated or punitive damages. A thorough investigation into what exactly was said and done by a loss prevention officer is crucial. Although damages are generally low in false imprisonment cases, if a loss prevention officer physically detained a plaintiff and did so maliciously or high-handedly, the defendant will have exposure to an assessment of aggravated or punitive damages.

**Michael R. Tinker and Lindsay E.W. Barrett are associates with Whitelaw Twining
2400 – 200 Granville Street
Vancouver, British Columbia V6C 1S4
(604) 682-5466**