A NEW VIEW OF BARDELL v. PICKWICK

MR. JUSTICE RIDDELL
Judge of the Supreme Court of Ontario.

THIS is perhaps the most celebrated of Common Law cases, not from any element of legal principle involved, but solely from the literary skill of the Reporter. It was a simple action in the Court of Common Pleas of Case in *Assumpsit*, the cause of action being Breach of Promise of Marriage; but the Reporter was Dickens —not John Dickens, Senior Registrar of the High Court of Chancery, against the accuracy of whose reports much has been and more could be said, but Charles Dickens, "the best and most rapid Reporter ever known" as he says himself. But then he was a Parliamentary Reporter in whom no one looks for accuracy. In no instance has the principle been better exemplified "No defence, abuse the plaintiff's attorneys"— not at the trial, indeed, but before the public.

It is not intended in this article to review the case at length or in detail. The object in view is to examine into the justice of the animadversions express and implied upon the plaintiff's attorneys, Messrs. Dodson and Fogg of Freeman's Court, Cornhill, against whom, solely by reason of the statements concerning them by this Reporter, there has been for many years a strong public sentiment amounting almost to execration.

Every fair-minded person will cast from his mind any impression derived from the vituperation of the defendant. Every litigant detests the solicitors on the other side; not even the most magnanimous can bring himself to believe that they are not at the bottom of the litigation, either advising and putting up the plaintiff to advance an unjust claim or inducing the defendant to resist a claim wholly just! [1]

Accordingly, when Samuel Pickwick received the courteous letter from Dodson and Fogg informing him that on the instructions

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attorneys, Dodson & Fogg.....a vile attempt to extort money." So far as appears, Pickwick had never heard of them before; but it was inevitable that when they issued a writ against him they should become in his mind a pair of scoundrels, "vile conspirators". He did not stay to think that Parliament had more than four centuries previously in the reign of the good King Henry of Lancaster, in 1402, prescribed by solemn statute that "all attorneys shall be good and virtuous and of good Fame" (*qi sont bons & vertuouses & de bone fame.*) These attorneys were aiming at his pocket, and that was enough. The kind of man the defendant was plainly appears by his "abhorrence of the cold-blooded villainy" of counsel for the plaintiff courteously saluting his own counsel, Serjeant Snubbin.

Nor should any dependence be placed upon the seeming slurs of Mr. Perker of Gray's Inn, attorney for the defendant. He had at first declined to join in his client's characterization of Dodson and Fogg as "great scoundrels", but when he was trying to persuade him to act like a reasonable man and get out of gaol, he fell in with Pickwick's whim and called the attorneys (at least by implication) "a couple of rascals," and suggested that they might soon "be led into some piece of knavery." That was said in coaxing an obstinate wrong-headed man: and he said in the same conversation that he could not say that even with Mrs. Bardell's letter there was anything to justify a charge of conspiracy.

He had characterized them as "very smart fellows, very smart fellows indeed", and later as "capital fellows with excellent ideas of effect"; his clerk, Mr. Lowton, said that they were "capital men of business", and at the very end of the matter, when his client was loading the attorneys with opprobrious and offensive epithets, "mean, rascally, pettifogging robbers," Perker never ceased to expostulate and continued to call them "my dear sirs." One cannot of course build much on this "façon de parler." Perker called every one "My dear sir," whether he was Wardle or Jingle, Pickwick or Fogg.

Neither should too much dependence be placed on Mrs. Bardell's *ex post facto* statements in her letter to Perker that "the business was, from the very first, fomented, encouraged and brought about

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would advise suit, and would not charge her any fees unless the action was successful? Attorneys and solicitors must take the facts as they are disclosed to them by their clients, unless they are obviously untrue. In the present case there can be no doubt that the plaintiff believed that Pickwick had offered her marriage. She does not to the very end suggest any other belief, and no bad faith is attributed to her even by the Reporter. That her friends had the same belief is obvious both from their conversation and from their evidence at the trial. His friends were rather more than suspicious at the time; Tupman, Winkle and Snodgrass "coughed slightly and looked dubiously at each other," evidently suspecting Pickwick and incredulous of his innocence. When the letter announcing action was received, Wardle hoped that the action was only a vile attempt to extort money, but said so "with a short dry cough," and thought Pickwick a "sly dog." Tupman saw the plaintiff "certainly....reclining in his arms," and Winkle noticed that his "friend was soothing her anguish"; even the ever-faithful Samuel Weller thought "the hemperor" "a rum feller.....makin' up to that there Mrs. Bardell....always the vay with these here old 'uns hows'ever, as is such steady goers to look at."

Again, there is much to indicate legal liability in any aspect of the case. While there can be no doubt that Mrs. Bardell thought Pickwick had proposed to her, it is said that Pickwick had no such intention, that there was no *consensus ad idem*, and therefore there was no contract. This is a partial view of the facts. The law is clear that, whatever a man's real intention may be, if he so conducts himself that the other person would reasonably believe that he means to assert something and that he meant that the other person should act on the assertion, and another does so believe and act, the man is legally in the same position as though he had actually made the assertion.

Pickwick apparently did not intend to propose marriage, but his conduct was at least equivocal. The plaintiff's child was got out of the way by Pickwick. He was obviously embarrassed, he asked Mrs. Bardell if it was a much greater expense to keep two people than to keep one, and behaved in such a way that any woman in

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continues his tenancy and goes off himself to Eatanswill. No attorney would be justified in advising against an action with such facts available. It is made a crime in these attorneys that they agreed not to charge any fees except in case of success. Sam Weller gave evidence at the trial that Mrs. Bardell and her friends had said that they were "to charge nothin' at all for costs, unless they got 'em out of Mr. Pickwick." It was on "speculation."

But Weller who as the Reporter boasts was not simply desirous of stating "the truth, the whole truth, and nothing but the truth" but of "doing Messrs. Dodson and Fogg's case as much harm as he conveniently could", adds to what he was really told. All that was said was said by Mrs. Cluppins. "Won't Mr. Dodson and Fogg be wild if the plaintiff shouldn't get it when they do it on speculation?" It is Weller himself who puts the gloss on this language; "the other kind and gen'rous people o' the some perfession as sets people by the ears, free gratis for nothin, and sets their clerks to work to find out little disputes among their neighbours and acquaintance as wants settlin' by means of lawsuits." There is no semblance of evidence that Dodson and Fogg did anything of the kind, *but* they had sued Sam's master. Yet, even if the attorneys agreed not to charge Mrs. Bardell anything, this was in no way improper in law or in ethics. It is the pride of the profession of law that no person, however poor, is ever prevented from pressing an honest claim from want of means. Scores of actions have been and scores more will be brought for impecunious clients by solicitors who can have no possible hope of payment, or even for out-of-pocket disbursements, unless they are successful and so get their costs out of the defendant. As I write this, I find in a Toronto paper a letter from a practitioner of high standing, in which he speaks of an action carried on to judgment by a solicitor for a plaintiff "without a dollar because the woman had not a dollar to give him.....His costs amounted to $1,000 and he felt that he could not afford to pay out any more money." No one would think of finding fault with that solicitor. If that was the real bargain, it was enforceable at law; the *cognovit* of Mrs. Bardell was fraudulent and could be attacked, as could the judgment against her which was based upon it and under which she was imprisoned. Such conduct would be plain dishonesty and wholly

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they succeeded in the action, in which case they had the right to take a *cognovit* and sign judgment on it; for, as Chief Baron Pollock said, they guaranteed the solvency of the suit and not that of the defendant. [4]

It would not be astonishing if the attorneys "encouraged" the plaintiff. Everyone who has practised law can tell of clients losing heart and hope and requiring encouragement; if that were a crime, few would escape. It is always the person who is trying to keep the plaintiff out of his legal rights who is indignant at the lawyer "encouraging" the plaintiff. Much is said about "sharp practice." Lowten says: "sharp practice theirs—capital men of business, Dodson and Fogg, Sir." Pickwick "admits the sharp practice of Dodson and Fogg"; Lowten again says: "the sharpest practitioners I ever knew," and Perker chimes in, "Sharp? There's no knowing where to have them:" and the Reporter complains of "the plaintiff having all the advantages derivable not only from the force of circumstances but from the sharp practice of Dodson and Fogg to boot." What does this mean, or does it mean anything?

"Sharp practice" means taking advantage of the rules of practice to embarrass an opponent, to put him to unnecessary costs, to hide behind technicality, to do anything to prevent a fair trial by tampering with witnesses or keeping witnesses away—in a word to take an unfair advantage by rules of practice or otherwise. There is not the very slightest evidence of anything of the kind. The writ was issued regularly; proper notice of it was sent; when the defendant did not name a solicitor, he was personally served; the witnesses subpoenaed were in no way tampered with. Counsel for the defendant did not dispute the substantial accuracy of their evidence, the strongest evidence against him was given by his own friends, and what can be more childish than his complaint of the intention of the attorneys "to seek to criminate me upon the testimony of my own friends"? Perker said (as any man of ordinary reason or fairness would say) that of course they would do so, "he knew they would." No solicitor who did his duty by his client would fail to subpoena such important witnesses who had seen the defendant in the delicate situation. There was no sending by *them* of an agent clandestinely and behind the back of the lawyer on the other side to try and find out what the other side was doing, as was done by Pickwick when he sent Sam to "ascertain how Mrs. Bardell herself seems disposed towards me." Perker "drew him-

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such evidence was attempted, and nothing was attempted to be proved at the trial but what undoubtedly took place.

If either side is to be charged with sharp practice, is it not the side which deliberately chose the course to call no witnesses, but trust to counsel's eloquence to throw dust in the eyes of the judge and throw itself upon the jury? Is it any wonder that experienced counsel like Serjeant Snubbin, when he heard the course proposed to be followed, smiled, "rocked his leg with increased violence and . . . coughed dubiously"? It is quite plain that he had no confidence in his case, nor had Perker. And yet there has never, so far as I know, been any reflection upon the course taken by Perker; all the blame is thrown on Dodson and Fogg. The trial was carefully prepared for, every legitimate means of impressing the jury with the merits of the plaintiff's case was thought out. Perker bore witness to the excellent ideas of effect, and admitted "Capital fellows those, Dodson and Fogg." No one can say that all this was not in the direct line of their plain duty to their client. They retained the best man they could. It may be that Serjeant Snubbin was at the very top of his profession, and that he was said to lead the Court by the nose. He certainly conducted the defence with skill.[5] "He did the best he could for Mr. Pickwick," but Serjeant Buzfuz was a first class man to entrust with a plaintiff's brief-at-the trial, and his junior, Mr. Skimpkin, also showed capacity as a Nisi Prius counsel. The case was fairly fought, there was no sharp practice, the facts detailed by the witness were not disputed, the judge's charge was unexceptionable, the jury was a special jury, Pickwick's own lawyer did not believe in his case, and the result was inevitable.

Of course those who are taken to law for the first time may be allowed to labour under some temporary irritation and anxiety, but Pickwick had had a run for his money; the jury had decided against him as they on their oaths thought right and just, and one might have expected something like sportsmanlike spirit from him. But the childishness which saw in Serjeant Buzfuz's courteous greeting to his brother Snubbin nothing but abhorrent and "cold-blooded" villainy did not desert him; "speechless with indignation" —at what?—he determined not to pay a farthing of damages or costs.

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wishes of others, his perfect conviction of his own infallibility, and his intolerance of resistance to his *fiat*.

Of course, the plain duty of Dodson and Fogg was to compel payment of the damages, and it was equally their plain duty to compel payment of their costs by Pickwick. The defendant had no goods exigible under a *Fieri Facias*, no crops to seize under a *Levari Facias*, no lands to seize under an *Elegit*; attachment of debts was not yet allowed by law; nothing remained but to attach the defendant's person. He, of course, must needs talk of them being "vile enough to avail themselves of. . . . . legal process against" him. What did he suppose they or any other attorneys would do?

There has been much popular condemnation of Dodson and Fogg for imprisoning Pickwick. No one ever complains of the attorneys retained by Lord De la Zouche sending to a debtors' prison at York Castle the Reverend Smirk Mudflint and Barnabas Bloodsuck, Jr. It all depends upon whose ox is gored.

If any attorney is to be blamed for deceit, it must be Perker. He is said to have told Pickwick that the only way to get Mrs. Bardell from the Fleet was that he should pay "into the hands of these Freeman's Court sharks" the costs of *Bardell v. Pickwick*, "both of plaintiff and defendant." Of course that was not true. What should be paid to release Mrs. Bardell was the amount of the judgment against her, including costs, and that would be the plaintiff's costs, "Solicitor and Client" in *Bardwell v Pickwick* with the added costs in *Dodson et al. v. Bardell.* The defendant's costs in *Bardell v. Pickwick* could not enter into the calculation at all. If Perker did say anything of the kind, he was dishonestly trying to get his own costs paid; and that, it is probable, no one will charge him with.

Unless there is a mistake, Dodson and Fogg accepted "the taxed costs £133-6-4" in full, and that would be a generous concession. However, they continued to be with Pickwick and Pickwick's admirers "a well-matched pair of mean, rascally, pettifogging robbers." And how many admirers has the inimitable Pickwick, obstinate, wrong-headed, prejudiced, overbearing, inconsiderate Old Fireworks as he was? Because he loved his fellow-men, the real sin of Dodson and Fogg is that they did not.

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or proceeding which may, or may not, lead to one, each client conceives a natural dislike for his opponent's attorney or solicitor. If the plaintiff succeeds, he hates the defendant's attorney for putting him (the said plaintiff) to so much expense, and causing him so much vexation and danger; and, when he comes to settle with his own attorney, there is not a little heart-burning in looking at his bill of costs, however reasonable. If the plaintiff fails, of course it is through the ignorance and unskilfulness of his attorney or solicitor, and he hates almost equally his own and his opponent's attorney!—Precisely so is it with a successful or unsuccessful defendant. In fact, an attorney or solicitor is almost always obliged to be acting adversely to some one of whom he at once makes an enemy; for an attorney's weapons must necessarily be pointed almost invariably at our pockets! He is necessarily, also, called into action in cases when all the worst passions of our nature—our hatred and revenge, and our self-interest—are set in motion.

(2). This letter was not produced, and we cannot say what was its precise language, —probably Perker paraphrased it—no such phraseology was within the powers intellectual or literary of Martha Bardell. She never got higher than "do these things on speculation." The same terminology is used by her friend Mrs. Cluppins, which Sam Weller transforms into "does these sorts of things on spec." We must take Perker's word for it that this letter was brought to his office before he "held any communication with Mrs. Bardell": but one would like to know how the letter came to be written at all. Perhaps Mr. Lowten could have given some clue.

No court would think of accepting Perker's version of the contents of this letter, and no valid reason is given for its non-production even to Pickwick.

(3). If the treatment by "old Fogg" of the defendant Ramsey in the action Buttman v. Ramsey is truly reported, it was a scoundrelly dishonest action—but was it not a "guy" by Mr. Weeks intended to gull the visitors and quite understood by the other three clerks? Everyone knows the story of Frank Lockwood, horrifying Bench and Bar in the United States by telling of his taking the "best alibi that was offered."

(4). In re Stretton (1845) 14 Meeson & Welsby's Reports, 806.

(5). I am permitted to copy here some remarks written by one of our Supreme Court Judges who had, when at the Bar, a very large counsel practice:—

> I have no sympathy with the current notion that Sergeant Snubbin was hopelessly outclassed by Buzfuz, great Counsel as Buzfuz was; I have carried too many Briefs for the Defendant not to appreciate Snubbin's position; he had to sit and watch for holes in the plaintiff's case, to admit what he knew could be proved (thereby diminishing the effect on the jury), to avoid pitfalls, to let well enough and ill enough alone—see what happened to his junior, the unhappy Phunky; of course, he was "a very young man...only called the other day...not been at the Bar eight years yet" when he did not sit down when Sergeant Snubbin winked at him but continued to cross-examine the too-willing Winkle. It had been determined in advance not to call witnesses for the defence, and it is hard to see what the Sergeant could have done which he did not do. *Crede experto* the lot of defendant's counsel in such cases is not a happy one.

It is incomprehensible by me how barristers at least, whatever may be said of laymen, can look upon Serjeant Buzfuz as a burlesque. His name is no doubt intended for humour—perhaps Serjeant John Bernard Bosanquet who was made a judge just before the trial of Bardell v. Pickwick is hinted at, as Mr. Justice Gazelee gave the suggestion for the name of the Judge.

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