CITATION: Gentles v. Intelligarde International Incorporated, 2010 ONCA 797
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COURT OF APPEAL FOR ONTARIO

Rosenberg, Armstrong and Juriansz JJ.A.

BETWEEN

Rallion Gentles and Joseph Francis

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

Intelligarde International Incorporated,
Toronto Community Housing Corporation, Jason Collins,
Jamie Barnes and Shari Malazdrewicz

Defendants (Respondents/
Appellants by way of cross-appeal)

David Gomes, for the appellants/respondents by way of cross-appeal

Andrew Evangelista for the respondents/appellants by way of cross-appeal Intelligarde International Incorporated, Jason Collins, Jamie Barnes & Shari Malazdrewicz

Doug Smith for the appellant by cross-appeal, Toronto Community Housing Corporation

Heard: June 9, 2010

On appeal from the judgment of Justice G. D. Lane of the Superior Court of Justice dated March 16, 2006, with reasons reported at (2006) 146 A.C.W.S. (3d) 894 (S.C.); on cross-appeal from the costs order of Justice Mary A. Sanderson dated November 2, 2009, with reasons reported at [2009] O.J. No. 4871 (S.C.).

Juriansz J.A.:

[1] Two young men, Rallion Gentles and Joseph Francis were arrested on private property by Jason Collins and Jamie Barnes, two security guards employed by the security firm Intelligarde International Incorporated. After a trial before a jury, the trial judge found that the security guards had reasonable and probable grounds to arrest them. Gentles and Francis appeal from that finding. I would allow their appeal.

[2] The costs judge decided not to award the successful parties at trial any costs. The respondents cross-appeal from that decision. I would dismiss the cross-appeal.

THE MAIN APPEAL

Overview

[3] Gentles lived with his mother at 200 Sherbourne Street, a social housing complex in Toronto managed by Toronto Community Housing Corporation ("Toronto Housing"). As Gentles was returning home with Francis, his cousin, at about 11 p.m. on June 14, 2001, they were arrested by Collins and Barnes. Intelligarde, Collins and Barnes' employer, provides security for the housing complex pursuant to a contract with Toronto Housing.

[4] The appellants brought an action for assault and battery, false arrest and imprisonment by Collins and Barnes, negligence and breaches of the *Tenant Protection Act, 1997,* S.O. 1997, c. 24 by Intelligarde and Toronto Housing, and a breach of the *Occupiers Liability Act*, R.S.O. 1990, c. O.2 by Toronto Housing.

[5] After a lengthy jury trial, the trial judge allowed the respondents' motions for judgment based on his understanding of the jury's answers and dismissed the action entirely.

[6] On appeal, the appellants attack only the trial judge's decision to dismiss their action for false arrest and assault and imprisonment against Collins, Barnes and Intelligarde which is vicariously liable for their acts. I refer to these respondents as the Intelligarde respondents.

[7] The appeal turns on whether Collins and Barnes had reasonable and probable grounds to arrest Gentles and Francis under the *Trespass to Property Act*, R.S.O. 1990, c. T.21 ("TPA"). I find the trial judge erred in deciding the question based on the findings of fact of the jury. I would allow the appeal and enter judgment for the appellants.

[8] After the trial, the trial judge retired. The Senior Regional Judge appointed Sanderson J. to deal with the outstanding issue of costs. Despite the respondents' success at trial, she declined to award them any costs. All the respondents cross-appeal from her costs decision. The cross-appeal of the Intelligarde respondents fails as the appeal against them is allowed. I would dismiss the cross-appeal of Toronto Housing.

Facts

[9] The facts are set out in the jury's answers to the questions put to them. Before turning to those, it is useful to consider the appellants' version and the security guards'

version of what happened. The trial judge summarized the appellants' version at para. 4 of his reasons:

> The plaintiffs' evidence was that they were going to Mr. Gentles' home, an apartment in 200 Sherbourne, which he shared with his mother. They parked Mr. Gentles' truck behind 39 Pembroke, walked to that street and south to the entrance to the courtyard. On turning into the courtyard, they were immediately and aggressively confronted by the guards as to what they had been doing behind 39 Pembroke, and Mr. Gentles explained that they had permission to park there and were returning home and that he was a tenant of apartment 301. The plaintiffs said that Mr. Collins pressed them on what they were doing behind 39 Pembroke and became enraged when Mr. Gentles queried what business it was of his, so much so that he called on his radio for backup. Mr. Gentles, himself a security guard at the time, understood the significance of the call: more guards and the police would be coming. He then stated that he would move to the sidewalk and await the arrival of the other guards. When he attempted to do so, Mr. Collins jumped him from behind, got him down and banged his face into the pavement several times. Other guards arrived and handcuffed the plaintiffs and they sat on the ground in custody until the police arrived and took charge. The police ascertained that Mr. Gentles was a tenant and released the plaintiffs. No charges were laid against anyone.

[10] The trial judge summarized the security guards' version at para. 5:

> The defendants' evidence was that they observed the plaintiffs emerging from the laneway and heading towards the courtyard. Because of the reputation of the lot behind 39 Pembroke, they were interested in the plaintiffs, whom they did not recognize as tenants. Mr. Collins spoke to them and Mr. Gentles responded, using vulgar language and refusing to give any information. The request and the response were repeated a couple of times and Mr. Collins said that if they did not live on the property, they would have to leave. Mr. Collins described Mr. Gentles as taking up a fighting stance with fists clenched and raised. He said he called for backup

> and told Mr. Gentles that if they did not leave they would be arrested for trespass. They did not move to leave and so Mr. Collins reached out and touched Mr. Gentles on the shoulder to arrest him. Mr. Gentles' response was to punch or shove Mr. Collins hard on the shoulder, so that he was driven back a couple of steps. He then went at Mr. Gentles and got him in a headlock, which he maintained, albeit with much difficulty, until the backup arrived and handcuffed Mr. Gentles. In the meantime, Mr. Barnes told Mr. Francis to stay out of it and went to help Mr. Collins. When he saw Mr. Gentles in the headlock, Mr. Francis went to help his cousin by pulling Messrs. Collins and Barnes off him. Mr. Barnes then turned back to Mr. Francis and held him until the backup arrived. When he saw the new officers arrive, Mr. Francis lay down on the ground.
>
> Messrs. Collins and Barnes denied that the plaintiffs had ever said that they were tenants in the whole course of this episode.

[11] As can be seen, in both versions the security guards took the initiative to approach Gentles and Francis and question them. In Gentles and Francis' version, Gentles identified himself as a resident at the outset, but he told the security guards they had no right to ask questions about what they were doing in the laneway from which they were emerging after parking there. Collins and Barnes testified that Gentles never identified himself in the whole course of the episode. Both sides agree the security guards called for backup. After the call for backup was made, the appellants say that Gentles offered to wait on the sidewalk. The security guards deny this happened. The security guards testified that they warned Gentles and Francis "that if they did not live on the property, they would have to leave". They add that when Gentles and Francis made no move to leave, Collins arrested Gentles by touching him on the shoulder. Gentles agrees he was

arrested, but says that Collins jumped on him. Both sides agree there was a physical struggle but blame the other side for initiating it.

[12] The trial judge put 39 questions to the jury. The first section, "Factual Issues Re Arrest", contained 19 questions. The second section had three questions about "Issues Re Excessive Use of Force". The third section addressed any "Negligence" of Intelligarde and Toronto Housing and the final section dealt with "Damages".

[13] Upon receiving the jury's answers, all parties moved for judgment. The trial judge granted the motions of the respondents and dismissed the appellants' action entirely. This appeal is taken only from the trial judge's dismissal of the appellants' action for false arrest, assault and imprisonment against the Intelligarde respondents. The appellants have not appealed from the dismissal of their action for negligence against Toronto Housing and Intelligarde.

[14] Because of the narrowness of the appeal, only the first 22 questions, which dealt with the events of June 14, 2001, and questions 31 to 35 that deal with general and aggravated damages need be reviewed. The remaining questions are not directly relevant to the appeal.

[15] Several of the jury's answers to the questions appear puzzling and inconsistent. As well, in answering several questions, the jury could not seem to choose between the competing versions of the events and so purported to apply the burden of proof. The trial

judge, however, did not seek clarification of the jury's answers and no party requested that he do so.

[16] The trial judge reserved to himself the application of the question of mixed fact and law, whether the security guards had reasonable and probable grounds to arrest the appellants. Consequently, that question was not put to the jury.

[17] The questions and jury answers relevant to the appeal are:

> **A. Factual Issues re Arrest**
>
> 1. Upon encountering the plaintiffs in the courtyard, did Collins take steps to determine if they were trespassing?
>
> A. Yes based on the "Burden of Proof"
>
> 2. If your answer to question 1 was "yes", specify the steps taken by Collins to determine if the plaintiffs were trespassing.
>
> A. According to Collins and Barnes' testimony they did try to ask if they "live here" and testified that the response was "we don't have to tell you anything".
>
> 3. Was Gentles belligerent and/or vulgar in his answers to Collins' questions?
>
> A. Yes
>
> 4. Did Gentles act in a physically intimidating manner towards Collins or Barnes prior to his arrest?
>
> A. Yes. Collins COULD have interpreted Gentles' actions as physically intimidating. No to Barnes.
>
> 5. Did Gentles advise Collins or Barnes that he would wait on the sidewalk after the call for back-up was made?
>
> A. No, based on "Burden of Proof".

6. Did Gentles identify himself to Collins and Barnes as a resident of 200 Sherbourne at any time prior to the arrest?

A. Yes

7. Prior to Collins arresting Gentles, did Collins advise Gentles and Francis that they would have to leave the property or be arrested for trespass if they did not live there?

A. Yes

8. Did Collins have an honest belief that Gentles was guilty of trespass prior to arresting him?

A. Yes.

9. If your answer to question 8 was "yes", then please state the basis for Collins' belief.

A. Collins may have been pre-occupied enough to "miss" the statement from Gentles stating that he "lived here".

10. If your answer to question 8 was "no", then please provide particulars of your reasons for so finding.

A. N/A

11. Did Collins touch Gentles on the shoulder while advising him that he was under arrest?

A. Yes.

12. Did Gentles punch or strike Collins prior to Collins jumping on Gentles?

A. Yes. The "punch or strike" may not have been intentional but rather a reflex reaction of invasion of personal space.

13. If the answer to question 12 was yes, did Collins act in self-defence in grappling with Gentles?

A. Yes with possible misinterpretation of Gentles' reaction.

14. Was the arrest of Gentles a reasonable course of action in all of the circumstances?

A. No

15. If your answer to question 14 was “no”, then please provide particulars of your reasons for so finding.

A. We feel that Gentles did identify himself as a resident but some other circumstances justified this as a reasonable course of action.

16. Did Francis hit or strike Barnes or Collins or attempt to pull Collins off Gentles before Barnes advised Francis that he was under arrest?

A. Yes. We feel that Francis attempted to pull Collins off of Gentles and in the process Barnes interpreted this as a hit or strike.

17. Did Barnes hold an honest belief that Francis was guilty of assault prior to arresting him?

A. Yes.

18. If your answer to question 17 was “yes”, on what was this belief based?

A. See Q. 16 for explanation.

19. If your answer to question 17 was “no”, then please provide particulars of your reasons for so finding.

A. N/A

B. Issues re Excessive Use of Force

20. Assuming that the arrests of Gentles and Francis were based on reasonable and probable grounds, then was excessive or unreasonable force used at the time of the arrest:

a. of Gentles - No

b. of Francis - No

21. If your answers to either 20a or 20b were "yes" then please provide complete particulars of the excessive or unreasonable force used:

a. By Collins - N/A

b. By Barnes - N/A

22. If your answer to question 13 was that Collins did act in self-defence, did he use excessive force in so doing?

A. No, based on evidence provided
"Burden of proof" again

....

D. Damages

D.1 General Damages

32. Regardless of your answers to all other questions, at what amount, if any, do you assess the general damages of Gentles for his injuries, economic, physical, or psychological?

A. $5000

33. Regardless of your answers to all other questions, at what amount, if any, do you assess the general damages of Francis?

A. $500

D.2 Assuming that the arrest was not based on reasonable and probable grounds

Aggravated Damages

34. Should any amount of aggravated damages be awarded to Gentles against Collins? Barnes? Intelligarde? Or Toronto Housing? If your answer is 'yes' as to any defendant, state clearly and fully the conduct of that defendant justifying such an award.

> A. Yes to Collins – he would have been unjustified in starting the arrest process. Barnes should have not intervened, BUT he was backing up his partner. $50,000. Barnes – no. Intelligarde – no. Toronto Housing – no.
>
> 35. Should any amount of aggravated damages be awarded to Francis against Collins? Barnes? Intelligarde? Or Toronto Housing? If your answer is 'yes' as to any defendant, state clearly and fully the conduct of that defendant justifying such an award.
>
> A. Yes, Barnes should not have intervened and thus would not have had to deal with Mr. Francis. $1000.00. Barnes only. Collins – No, Intelligarde – No, Toronto Housing – No.

[18] The entire list of questions put to the jury is set out in a schedule to these reasons. Based on these questions and answers, the trial judge concluded the security guards had reasonable and probable grounds to arrest Gentles and Francis.

The Trial Judge's Reasons

[19] The trial judge noted at para. 13 of his reasons that "once the plaintiffs have proved the arrest, the onus shifts to the defendant to establish, to the civil standard, that he had reasonable and probable cause to believe, and did believe, that an offence was being committed."

[20] In understanding the jury's findings of fact, the trial judge started with the jury's response to question 8, that Collins had an honest belief that Gentles was trespassing prior to arresting him. The trial judge recognized that, in answering question 6, the jury had found that Gentles identified himself to the security guards as a resident of 200

Sherbourne prior to the arrest. The trial judge resolved this apparent inconsistency by referring to the jury's answer to question 9, that "Collins may have been pre-occupied enough to 'miss' the statement from Gentles stating that he 'lived here'". While the trial judge describes this part of the jury's answer as speculation on their part, he did not dismiss it as such but went on to treat it as a finding of fact in his analysis.

[21] The trial judge took the view of the evidence that the only possible "preoccupation" that could have distracted Collins was Gentles' "attack" on him. The trial judge referred to Collins' testimony at para. 16 saying, "Mr. Collins' testimony was clear: he learned that Mr. Gentles was a tenant only much later." Thus, the trial judge reconciled the jury's answers to questions 6 and 8 by surmising that Gentles must have identified himself as a resident during the physical struggle when Collins would have been understandably "preoccupied" with subduing Gentles.

[22] The trial judge recognized the obvious problem with this reconciliation of questions 6 and 8. The physical struggle that took place after the arrest could not have been the preoccupation that caused Collins to miss a statement that was made before the arrest. The problem arises because the jury found as a fact that Gentles had identified himself as a resident of 200 Sherbourne prior to the arrest and it was undisputed that the physical struggle took place after the arrest.

[23] The trial judge attempted to resolve this inconsistency by proceeding to reason that the jury must have "viewed the arrest as occurring when Mr. Gentles was subdued, rather

than when he was first touched." He then concluded that "[i]f, as I think is the logical way to reconcile these answers, Mr. Gentles only said [he was a tenant] in the course of the struggle, it was then too late to affect the lawfulness of the original arrest".

[24] All of the trial judge's subsequent analysis is based on his understanding that the jury's finding of fact was that Gentles identified himself as a resident only during the struggle that took place after the arrest.

[25] The trial judge rejected the appellants' counsel's argument that there could never be a lawful arrest of a tenant under the TPA. He then turned his attention to whether the security guards had reasonable and probable grounds to arrest Gentles and Francis. He stated that there were subjective and objective aspects to this question. The security guards had to subjectively believe Gentles and Francis were trespassing, and the objective circumstances had to be "such that a reasonable person in the position of the defendant would believe that the plaintiffs had committed the offence".

[26] The trial judge observed that the subjective element of "reasonable and probable grounds" to arrest Gentles was established. The jury had found in answering question 8 that Collins honestly believed that Gentles was a trespasser before he arrested him.

[27] As for the objective element, the trial judge explained that the jury had largely accepted the guards' version of what had happened. He concluded that the security guards' version "clearly" established the objective element required. In one paragraph he

summed up the circumstances that, in his view, established reasonable and probable grounds:

> 19. If matters transpired as the guards described them, there was clearly reasonable and probable cause for believing that the plaintiffs were trespassing. The jury's answers largely accepted the guards' evidence as to these events. The answers establish that the guards approached two persons, unknown to them, whose reaction to being questioned was a vulgar and totally uninformative refusal to answer. On being pressed to respond there was more vulgarity and one, the plaintiff Gentles, adopted an aggressive stance. Upon being warned that if they did not live there, they would have to leave or be arrested for trespass, they did not leave.

[28] The trial judge continued on to set out his understanding of some of the jury's answers and how they demonstrated that the jury preferred the guards' testimony over the appellants'. However, in the rest of his decision, he does not set out any additional circumstances that support the existence of an objectively reasonable belief that Gentles and Francis were trespassers.

[29] The trial judge revisited the jury's finding that Gentles had identified himself as a resident and reiterated why that statement was not a circumstance that Collins could or should have considered. At para. 20, the trial judge repeated his analysis of questions 6, 8, and 9 and went on to assert that the jury "rejected the evidence that Mr. Gentles stated at the beginning that he lived there". He repeated his conclusion that Gentles identified himself as a resident only after the physical struggle started. According to the trial judge, after the physical struggle had started, Collins could reasonably dismiss Gentles' statement that he was a resident as a mere stratagem. The trial judge added that Collins

did not hear Gentles' statement that he was a resident, and in any event, the statement was made too late to affect the lawfulness of the earlier arrest.

[30] The trial judge carried on to find that the jury's answers to questions 14 and 15 bolstered the view he took of the facts. Question 14[1] was put to the jury, he explained, because of the Supreme Court's reasons in *R. v. Asante-Mensah*, [2003] 2 S.C.R. 3. In *Asante-Mensah*, Binnie J. speaking for the unanimous court indicated at para. 74 that, in the context of the TPA, the question whether the force used to arrest was reasonable "may have to have regard not only to what force is necessary to accomplish the arrest, but also to whether a forcible arrest was in all the circumstances a reasonable course of action in the first place." Thus, question 14 was relevant only if reasonable and probable grounds to arrest existed.

[31] In question 14 the jury found that the arrest of Gentles was "not a reasonable course of action in all of the circumstances". However, in apparent contradiction, the jury's answer to question 15 was, "We feel that Gentles did identify himself as a resident but some other circumstances justified this as a reasonable course of action." The trial judge took the view that the jury's answer to question 14 modified their answer to question 15. While the jury had not indicated what circumstances they had in mind in their answer to question 15, the trial judge went on to find that "[t]he justifying circumstances, as found by the jury in other answers, include that Mr. Collins did not

[1] The parties agree that when the trial judge referred to question 13 in para. 22 of his reasons, he intended to refer to question 14.

hear any such statement, the aggressive and non-responsive attitude of Mr. Gentles, the punch/strike in response and that Mr. Collins acted in self-defence in grappling with Gentles."

[32] On this reasoning, the trial judge concluded that the Intelligarde respondents had "established the existence of reasonable and probable cause to initiate the arrest and to continue it by subduing the resistance of Mr. Gentles with no more force than was reasonably necessary."

[33] As for the arrest of Francis, the trial judge found that "Mr. Barnes warned Mr. Francis to stay out of the fight" but Francis intervened and assaulted Barnes. The trial judge referred to Francis' own testimony that when "he went to aid Mr. Gentles, his first physical contact was with Mr. Barnes, whose arm he grabbed in the effort to pull him off Mr. Gentles." This, the trial judge said, was "certainly" an assault and provided Barnes with reasonable and probable grounds to arrest Francis.

[34] The trial judge stated that the jury had found that Collins acted in self-defence and neither Collins nor Francis used excessive force.

[35] Finally, the trial judge concluded that, since there were reasonable grounds for the arrest and since no excessive force was used, there was no basis for allowing any damages to Gentles. The jury's finding in answering question 31 — that there had been interference with Gentles' reasonable enjoyment of his right to occupy his mother's rental unit — did not matter because the respondents had not committed any tort "which could

give rise to a duty on the landlord to take any active step to remedy the position in which the tenant found himself. What is alleged is not an active interference with the tenancy, such as an illegal entry, but a failure to act in a situation which gave rise to no legal duty to act."

[36] After observing that the jury found that there was no negligence and no breach of the *Occupiers Liability Act*, the trial judge dismissed the appellants' action against all of the respondents in its entirety.

Issues on the main appeal

[37] The ultimate question, the one that the appeal turns on, is the question the trial judge reserved to himself: Based on the jury's findings of fact, did the security guards have reasonable and probable grounds to arrest the appellants?

[38] The appellants submit that the trial judge failed to determine that question on the facts found by the jury. They submit that he arrived at an incorrect view of the facts by misapplying the burden of proof, disregarding the findings of the jury, and exceeding his role by finding facts himself. The Intelligarde respondents adopt the trial judge's view of the facts but rely on a broader set of circumstances to assert that the security guards had reasonable and probable grounds to arrest the appellants

[39] If it is found that the security guards did have reasonable and probable grounds to arrest the appellants, a further question would arise by virtue of *Asante-Mensah*: Was it

reasonable for them to exercise their power to arrest in all of the circumstances of the case?

[40] Finally, I consider whether the Intelligarde respondents can rely on the power of arrest in s. 494(1)(a) of the *Criminal Code* to justify the appellants' arrest for assault.

[41] I find it convenient to deal with the issues in the following order:

> i. On the basis of the view of the facts adopted by the trial judge, did the security guards have reasonable and probable grounds to arrest the appellants?
>
> ii. On the circumstances asserted by the Intelligarde respondents, did the security guards have reasonable and probable grounds to arrest the appellants?
>
> iii. Did the trial judge adopt an incorrect view of the facts by misapplying the burden of proof, disregarding the findings of the jury, and exceeding his role by finding facts himself? If so, on the correct view of the facts did the security guards have reasonable and probable grounds to arrest the appellants?
>
> iv. Can the Intelligarde respondents rely on the power to arrest for assault to justify the appellants' arrest?

[42] As I will explain later, there is no need to address the question whether it was reasonable for the guards to exercise their power to arrest in all of the circumstances of the case.

Analysis

[43] As mentioned earlier, the jury's answers to the questions appear puzzling and inconsistent. Both sides, though, considered the jury's answers favoured their case and moved for judgment. Neither side requested that the judge put additional or clarifying

questions to the jury. There is no appeal from the trial judge's failure to seek clarification of the jury's answers on his motion. Nor is there any appeal from the trial judge's original formulation of the questions. This appeal must be decided on the same basis as the motions of the parties before the trial judge had to be decided. That is on the basis of the jury's answers to the questions put to them.

Standard of Review

[44] I make two observations about the standard of review.

[45] In reserving to himself the question whether there were reasonable and probable grounds to arrest, the trial judge relied on this court's judgment in *Liorti v. Andrews*, (1974) 2 O.R. (2d) 130 (C.A.). That decision makes clear that despite the court's reservation of such a question, all factual disputes must be resolved by the jury. The standard of correctness applies to the trial judge's application of the law in deciding the reserved question of mixed fact and law.

[46] The standard of correctness also applies to the review of the judge's exercise of his proper function. If, as the appellant submits, the trial judge went beyond the scope of his role of applying the law to the facts found by the jury, that would amount to a legal error and this court may intervene.

The Statutory Context

[47] The statutory context for this case is the TPA. The application of ss. 2 and 9(1) concern us:

SECTION 2

Trespass an offence

2. (1) Every person who is not acting under a right or authority conferred by law and who,

(a) without the express permission of the occupier, the proof of which rests on the defendant,

(i) enters on premises when entry is prohibited under this Act, or

(ii) engages in an activity on premises when the activity is prohibited under this Act; or

(b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier,

is guilty of an offence and on conviction is liable to a fine of not more than $2,000.

Colour of right as a defence

(2) It is a defence to a charge under subsection (1) in respect of premises that is land that the person charged reasonably believed that he or she had title to or an interest in the land that entitled him or her to do the act complained of.

SECTION 9

Arrest without warrant on premises

9. (1) A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2.

[48] Section 2 makes it an offence to do one of the acts the section sets out. As can be seen, s. 9(1) gives a security guard, who is a person authorized by the occupier, the power

to arrest without a warrant a person "he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2."

Does the TPA apply?

[49] The appellants argued before the trial judge and on appeal that a resident could not be arrested under the TPA as s. 2 does not apply to a person acting under a right or authority conferred by law. The trial judge rejected the argument in short order, as do I. The appellants' argument focuses on the application of s. 2, but the power of arrest is set out in s. 9. Section 9 empowers a person authorized by the occupier to arrest without a warrant any person he or she has reasonable and probable grounds to believe is on the premises in contravention of s. 2.

The power to arrest under the TPA

[50] In order to rely on s. 9 of the TPA, the security guards needed reasonable and probable grounds to believe that Gentles and Francis were on the premises in contravention of s. 2. This means that Collins and Barnes had to have had objectively reasonable beliefs in two things.

[51] First, they had to have grounds to believe s. 2 applied to Gentles and Francis. They had to reasonably believe that Gentles and Francis were not on the premises under "a right or authority conferred by law", that is, that they were not residents or guests of residents. This requirement is apparent from the opening words of s. 2.

[52] Second, they had to have grounds to believe that Gentles and Francis had done at least one of three things listed in s. 2(1)(a) or s. 2(1)(b). That is, they had to reasonably believe that Gentles and Francis,

> (i) had entered on the premises where entry was prohibited contrary to s. 2(1)(a)(i), or
>
> (ii) were engaging in a prohibited activity on the premises contrary to s. 2(1)(a)(ii), or
>
> (iii) had failed to leave the premises immediately after being directed to do so by the security guards contrary to s. 2(1)(b).

[53] Whether Collins and Barnes had reasonable grounds to believe Gentles and Francis were on the premises in contravention of s. 2(1)(a) is not an issue in this case. The Intelligarde respondents have never taken the position that entry was prohibited to the premises or that Gentles and Francis were engaged in an activity on the premises which was prohibited by the TPA. Questions about these matters were not even put to the jury.

[54] It is s. 2(1)(b) that must be considered. Before the security guards could reasonably believe that s. 2(1)(b) applied, they had to have a reasonable basis for believing that Gentles and Francis were not residents or guests of residents. The excepting words of the opening of s. 2(1) make clear that a resident and his guest do not contravene s. 2 by failing to leave premises after being directed to do so. The first question, whether Collins and Barnes had reasonable grounds to believe that Gentles and Francis were not residents or guests of residents, is pivotal. The trial judge recognized

this because he based his analysis on whether there was "reasonable and probable cause" for believing that Gentles and Francis were trespassing.

i) Adopting the trial judge's view of the facts, did Collins and Barnes have reasonable and probable grounds to arrest Gentles and Francis?

[55] When it is recognized that Collins and Barnes had to have reasonable and probable grounds to believe that Gentles and Francis were trespassing, the case becomes straightforward. This recognition makes it possible to decide the case on the view of the facts that the trial judge adopted. On his view of the facts, I conclude that the security guards lacked reasonable grounds to make the arrest.

[56] The trial judge set out the circumstances on which he based his conclusion, that there were reasonable and probable grounds, in para. 19 of his reasons. He interpreted the jury's answers to confirm the essentials of the security guards' version of events. For the reader's ease, I set out para. 19 again:

> If matters transpired as the guards described them, there was clearly reasonable and probable cause for believing that the plaintiffs were trespassing. The jury's answers largely accepted the guards' evidence as to these events. The answers establish that the guards approached two persons, unknown to them, whose reaction to being questioned was a vulgar and totally uninformative refusal to answer. On being pressed to respond there was more vulgarity and one, the plaintiff Gentles, adopted an aggressive stance. Upon being warned that if they did not live there, they would have to leave or be arrested for trespass, they did not leave.

[57] As Intelligarde respondents' counsel emphasized repeatedly, all of the circumstances must be considered together. However, each circumstance's relative

contribution to the constellation of circumstances can be discussed only individually. I discuss each circumstance on which the trial judge relied while keeping in mind their cumulative effect.

[58] The appellants, who were walking to Gentles' apartment in 200 Sherbourne at about 11 p.m., were unknown to the security guards. While the guards knew many of the residents, the housing complex was so large that — as their counsel on appeal recognized — the guards did not know all of the tenants, nor were they expected to. The fact that Collins and Barnes did not recognize Gentles and Francis has no logical connection to whether or not they were residents. Collins and Barnes needed some reason to believe that Gentles and Francis were trespassers rather than residents they did not recognize.

[59] The security guards took the initiative to approach the two appellants. As the trial judge states in para. 3, "The security guards were in the courtyard and spoke to the [appellants] as they passed." It is uncontested that Gentles and Francis were merely walking towards Gentles' apartment building, a building with a locked front door. As the trial judge puts it in the passage above, the appellants were "questioned". The jury's answer to question 2 indicates that Collins and Barnes asked Gentles and Francis if they "live here". Gentles and Francis' response to being questioned was, as the trial judge put it, "a vulgar and totally uninformative refusal to answer." Collins testified that Gentles responded by saying "FU, we do not have to tell you f'ing anything."

[60] Vulgarity aside, the statement that Collins attributed to Gentles is an accurate statement of the law. Gentles and Francis were not required by the TPA or any other legal principle to respond to the question whether they lived there. The Intelligarde respondents' counsel concedes, as he must, that while security guards have the right to ask questions, tenants have the right to refuse to answer them. Since that is so, the refusal of an individual not recognized by security guards to identify himself as a resident provides no reason to think that he is on the premises in contravention of s. 2 of the TPA.

[61] Moreover, that a person's refusal to answer is expressed in a belligerent and vulgar manner does not provide a basis for reasonably believing he is not a resident. The use of vulgarity adds nothing to the analysis. Collins and Barnes had no reasonable basis to believe that a trespasser was more likely to use vulgar language than a resident. Gentles and Francis' vulgar and belligerent manner does not provide any reason to believe they were not residents.

[62] The next circumstance is that, rather than respecting the young men's right to refuse to answer their questions, the security guards, as the trial judge put it, "pressed" them to respond. The further response they received was more vulgarity and the adoption of an aggressive stance.

[63] It is difficult to appreciate the logic that there is reason to believe an individual is likely to be a trespasser because, after initially refusing to answer questions, he maintains that position when "pressed" to answer. The tacit assumption seems to be that residents

who stand on their rights and refuse to answer will eventually relent when "pressed" to do so. Such an assumption is not grounded in reason. Additional rounds of questions and refusals add nothing to the legal principle that individuals can stand on their rights and refuse to answer the questions of security guards.

[64] Nor can the escalation of vulgarity and aggressiveness attributed to Gentles and Francis contribute to the required reasonable grounds. It seems to me that the one thing the security guards did have a reasonable basis to believe, having encountered vulgarity and belligerence upon first "questioning" the appellants, was that they would encounter more vulgarity and belligerence if they persisted in pressing for answers.

[65] Gentles and Francis may have been uncooperative, vulgar and belligerent. However, the security guards required some objective basis to believe that Gentles and Francis were uncooperative, vulgar and belligerent trespassers rather than uncooperative, vulgar and belligerent residents.

[66] Perhaps the most important circumstance to the analysis is the jury's finding in answering question 7. Collins and Barnes warned Gentles and Francis that "they would have to leave the property or be arrested for trespass if they did not live there". Gentles and Francis, after being given this warning, made no move to leave the premises.

[67] Gentles and Francis' failure to leave the premises after being given this direction would not prompt a reasonable person to believe they were not residents. Collins told Gentles and Francis they would have to leave or be arrested for trespass *if they did not*

live there. Their failure to leave after being given this direction could logically be taken to be an indication that they did live there. In fact, the form of the direction could be taken to show that Collins did not know whether Gentles and Francis were residents. In my view, this "direction" to leave the premises amounts to nothing more than another request that Gentles and Francis enlighten the security guards as to whether they were residents.

[68] Even if Gentles and Francis had been given an unequivocal direction to leave, that circumstance would not provide reasonable grounds to believe they were on the premises in contravention of s. 2 of the TPA. As I explained above, the excepting words of the opening of s. 2 (1) make clear that residents do not commit an offence by refusing to leave the premises if directed to do so. Collins and Barnes needed to show circumstances, other than the appellants' failure to leave, to establish a reasonable basis for believing Gentles and Francis were not on the premises "under a right or authority conferred by law". It is bootstrapping logic to regard their failure to leave as providing the grounds to be able to give them an effective direction to leave.

[69] The entire constellation of circumstances recited by the trial judge boils down to the fact that Collins and Barnes, not recognizing Gentles and Francis as residents, tried to find out whether they were residents. When Gentles and Francis frustrated their efforts, the security guards arrested them under s. 9 of the TPA.

[70] The trial judge never explained the logic that led him to conclude "[i]f matters transpired as the guards described them, there was clearly reasonable and probable cause for believing that the [appellants] were trespassing."

[71] The trial judge never explained why the circumstances, as he viewed them, provided the security guards with reasonable and probable grounds for thinking that Gentles and Francis were any more likely to be trespassers than residents. He simply stated his conclusion. However, he made comments both in his reasons and in his exchanges with counsel that seemed to indicate that he could not understand why Gentles and Francis would refuse to cooperate with the security guards and that he attached weight to their resort to vulgarity in their refusal to answer. The trial judge went so far as to suggest that Gentles should have taken the initiative to show his identification or a key to the building even though he was not asked to. However, as the law is that residents can refuse to respond to their questions, there is no logical basis on which the guards could believe that persons who do not take the initiative to offer identification are likely to be trespassers.

[72] The trial judge did not apply the law correctly to the facts as he viewed them. He failed to recognize that s. 9 provides no assistance to a security guard attempting to determine if a person is or is not a resident. Security guards have no power to arrest under s. 9 until and unless they acquire reasonable grounds for believing the person is on the premises in contravention of s. 2. He failed to factor into his analysis that security guards cannot direct a person to leave the premises as contemplated by s. 2 unless they

first know, or at least have reasonable and probable grounds to believe, that the person is trespassing.

[73] I conclude that, even if the circumstances are taken to be as the trial judge viewed them, he erred in deciding the question that he reserved to himself. Collins and Barnes had no basis, let alone a reasonable one, to believe that Gentles and Francis were trespassing. The trial judge erred by failing to conclude that the security guards lacked reasonable and probable grounds to arrest Gentles and Francis under the TPA.

ii) Do the additional circumstances relied on by the Intelligarde respondents establish reasonable and probable grounds?

[74] On appeal, the Intelligarde respondents put forward a broader list of circumstances they rely on to establish the existence of reasonable and probable grounds. Counsel for these respondents relied on the following circumstances:

i. The high crime rate of the area in general;

ii. The laneway from which the appellants were exiting when first spotted;

iii. That the appellants were unknown to Collins and Barnes;

iv. The attempts by Collins to determine if the appellants were trespassing when first encountered;

v. The refusal of the appellants to answer questions when initially encountered;

vi. The vulgar and/or belligerent response of the appellants to the attempts to determine if they were trespassing;

vii. The physically intimidating manner Gentles acted towards Collins;

viii. The physical strength and size of Gentles;

ix. The failure of Gentles to disengage from a confrontation;

x. The punch by Gentles; and

xi. That Collins and Barnes were acting as they were trained to.

[75] This list overlaps extensively with the circumstances considered by the trial judge. I need not repeat my observations about those relied on by the trial judge. Several others can be excluded quickly, as they can provide no possible support for the existence of reasonable and probable grounds.

[76] The punch by Gentles may be excluded from consideration. It took place after the arrest and cannot be used to rationalize the arrest.

[77] Gentles' physical strength and size has no bearing on the reasonableness of a belief that he was a trespasser. Gentles' physical characteristics may have affected Collins' feelings during the confrontation and they may be potential relevant to issues of self-defence and excessive force. However, as residents come in different shapes and sizes, Gentles' physical strength and size provided no possible basis to think he was on the premises in contravention of s. 2 of the TPA.

[78] The high crime rate of the area in general and the laneway from which Gentles and Francis were emerging warrant further discussion.

[79] The area was one that the Intelligarde security guards considered challenging in terms of security. In their testimony, they described how, in the alleyways behind and around the parking garage and even right in the stairwells, they would find people engaged in sexual activities. In the back area they would find people with crack pipes smoking crack. Given the security guards' concerns and the fact that they did not recognize the young men emerging from the laneway, it is perhaps understandable that the guards would want to watch them. The guards went further and questioned them, as they could. Nothing prevents security guards from asking anyone on the premises questions. The guards must be taken to understand, however, that Gentles and Francis did not have to respond to their questions.

[80] In considering the high crime nature of the area and the laneway specifically, it must not be forgotten that the constellation of circumstances also includes the fact that Gentles and Francis were simply walking toward a building one needed a key to enter. As well, while illicit activities took place in the laneway, the laneway was also used by residents. In fact, Gentles had just parked his vehicle there. As already noted, the Intelligarde respondents do not suggest there was any reason to suspect that Gentles and Francis were or had been engaged in any illicit activity. They do not, and cannot, suggest that it was reasonable to believe anyone emerging from the laneway and walking toward the building was necessarily a trespasser.

[81] While the high crime area and the laneway from which the appellants were emerging may have prompted the security guards' to keep watch over Gentles and

Francis, the additional facts I just mentioned make it clear that the laneway and high crime area could not have given the security guards reasonable and probable grounds to arrest them.

[82] As for the Intelligarde respondents' submission that Gentles failed to disengage from the confrontation, I make three points.

[83] First, no legal principle was cited for the proposition that Gentles was required to disengage. He was going home when stopped, "questioned" and "pressed" to respond by the security guards. It seems to me that this submission signals a failure to grasp that Gentles and Francis did not have to respond to questions by security guards. Absent reasonable grounds to believe Gentles and Francis were trespassers, it was the security guards who had to disengage from the confrontation.

[84] Second, there is no reason to think that a resident is more likely than a trespasser to disengage from a confrontation that security guards have initiated by submitting the person to "questioning" and have continued by "pressing" them to respond. Gentles' failure to disengage has no logical bearing on the question of whether he was a resident or a trespasser.

[85] The third point relates to the findings of the jury and not the trial judge's version of the facts. I discuss, in the next section of these reasons, why the trial judge was wrong to explain away the jury's unequivocal finding that Gentles identified himself as a

resident prior to the arrest. As Gentles identified himself prior to the arrest, it cannot be said that he refused to disengage from the confrontation.

[86] I turn then to the oral submission that the fact that Collins and Barnes were acting as they were trained to was a factor supporting the existence of reasonable and probable grounds. This submission lacks a factual foundation since there was no specific jury finding on the point. However, I deal with it at some length to fully address the Intelligarde respondents' arguments.

[87] The security guards' training could conceivably be relevant to assessing their subjective belief that they have grounds to arrest. Subjective belief in the existence of grounds to arrest is not an issue here. We are concerned in this case with whether the security guards had the required objective grounds.

[88] The required objective grounds bear no necessary relationship to training in itself. Certainly, proper training may assist security guards in determining whether they have the necessary objective grounds. Improper training may lead security guards to believe they have grounds when, objectively, they do not. The content of the training must be considered.

[89] In advancing the argument, counsel referred the court to Barnes' testimony. Barnes was cross-examined extensively as to why, upon seeing two young men they did not recognize, the security guards did not simply continue to watch them for a moment or two to see if they had a key to enter the locked building they were walking towards. The

suggestion put to Barnes in cross-examination was that, if Gentles and Francis used a key to enter the building, the guards could be satisfied that they were not trespassers. Barnes responded by indicating that continuing to watch individuals to see if they could gain access to the property was not what they were trained to do. That response led to the following exchange:

> Q. Okay. So your training wasn't to watch and see what would unfold but to act immediately more or less?
>
> A. Yes.
>
> Q. Now, you'll agree with me that that might tend to provoke or contribute to situations occurring that may not otherwise?
>
> A. I'm sorry. Can you repeat that?
>
> Q. That instead of -- if your training is not to watch and see what happens but to act before seeing what happens, that can contribute to situations occurring that might not otherwise and conflicts that might not occur otherwise?
>
> A. I see it as a preventive measure.
>
> Q. But you can see how it could easily lead to a confrontation or an incident that might not have occurred otherwise?
>
> A. I'm still -- I'm not exactly sure how to answer your question. I mean if we approach somebody politely and address them in a professional manner, I don't see how that could provoke a fight.
>
> Q. All right. Seems to me that one of three things -- maybe there's more -- but one of three things could have happened if you just watched for a moment instead of acting on that night. One, they might have continued through to Sherbourne and left the property, yes?
>
> A. Yes.

> Q. Two, they could have produced a key and entered one of these doors, yes?
>
> A. Yes.
>
> Q. Or, three, they could have thrown a rock at the building or done something improper or illegal, yes?
>
> A. Yes.
>
> Q. Okay. All right. And you chose to approach -- you and Mr. Collins chose to approach because of your concern about possibility number 3, yes?
>
> A. Yes.
>
> Q. Okay. And you didn't factor in or see whether number one or two was what was going to happen?
>
> A. At the time we didn't think to, no.
>
> Q. No. And because you were trained, quite frankly, and that's what you've said, you acted according to your training?
>
> A. Yes.
>
> Q. Okay. This wasn't you and Mr. Collins acting out of your own whim. This was -- you were acting as you were told to act?
>
> A. Yes.
>
> Q. And that's true pretty well of everything that happened that night?
>
> A. Yes.

[90] The sort of training described in this passage does not support the required objective grounds to arrest. Rather, if this exchange accurately described the guards' training, it suggests that the guards were trained to make an arrest without adequately considering whether they had reasonable and probable grounds to believe individuals

were on the premises in contravention of s. 2. Reliance on such training does not assist the security guards' submission that they acted on reasonable and probable grounds. The Intelligarde respondents did not refer the court to evidence of any other training.

[91] Considered altogether, the additional circumstances relied on by the Intelligarde respondents do not add anything to the analysis. At the end of the analysis, we are left with nothing more than suspicious security guards and the appellants' vulgar and belligerent refusal to answer questions or to offer identification. It was the Intelligarde respondents' position from the inception of the case that this was enough. In their statement of defence, they pleaded:

> As a result of the Plaintiffs' failure to identify themselves or to provide any information as to their residency at the property, the Defendants, Jason Collins and Jamie Barnes believed on reasonable and probable grounds that the Plaintiffs were trespassing on the property. Jason Collins directed that they leave the property, failing which they would be detained. This was in accordance with the standard practice of Intelligarde International Incorporated and in accordance with the [TPA].

[92] Their position was flawed from the beginning. These basic facts considered in the constellation of circumstances relied on do not provide an objectively reasonable basis for believing that Gentles and Francis were trespassers rather than residents.

[93] Given this conclusion, it is strictly unnecessary to consider whether the trial judge proceeded on a correct view of the facts. However, I do so to stress that in a jury trial the trial judge is bound by the jury's findings and to resolve issues that were strenuously contested and fully argued.

iii) Did the trial judge proceed on a correct view of the facts as found by the jury?

[94] In this section I explain the several reasons why I regard the trial judge proceeded on an incorrect view of the facts found by the jury. The jury's answers, when understood and applied correctly, add irresistible force to the conclusion that the security guards lacked reasonable and probable grounds to arrest in this case.

The Jury's Inability to Answer Questions

[95] The jury resorted to the "burden of proof" in several of their answers. The trial judge weighed these answers against the appellants. The jury should not have been concerned with the burden of proof in answering the individual questions of specific fact put to them. In fact, the trial judge told them that in regard to question 4. Early in their deliberations they had queried how they should apply the burden of proof in answering question 4. In response, the trial judge told them that the burden of proof "does not apply to every fact that witnesses state and other witnesses contradict. It's not an issue of burden of proof [when] you are choosing what fact or what evidence to accept."

[96] Nevertheless, the jury seems to have kept in mind the trial judge's earlier general instructions, which he never withdrew. In his initial charge he told the jury "[t]he burden of proof is, in short, the burden of satisfying you by a greater weight of evidence of whatever proposition it is that must be shown in order for the party with the burden of proof to win the case." He also told them the "burden of proof" applies where the evidence is "absolutely even in your mind". Finally, he told the jury that the burden of

proof lay generally upon the appellants, except on the issue of self-defence. Significantly, the trial judge did not tell the jury that once the appellants established they had been arrested without warrant, the burden of proof shifted to the respondents to prove that the warrantless arrest was lawful.

[97] Considering all of the instructions given, I am satisfied that, where the jury resorted to the burden of proof, namely in answering questions 1, 5, 22, and 27, the jury considered the evidence in support of and counter to the proposition posed by the question to be equally balanced. In other words, they were unable to choose between the competing versions and make the disputed finding of fact called for by the question.

[98] In hindsight, the jury should have been told that if they were unable to find a fact, they should simply say so. Without this option the jury's resort to the burden of proof was an expression they were unable to choose between the competing versions. The trial judge should have recognized that where the jury invoked the burden of proof they did not find either version was established as a fact.

[99] A related matter is that the jury showed diffidence in responding to a number of questions. In some of their responses the jury recounted testimony without indicating they accepted it. In other responses they speculated what "could" or "may" have been the case. Here, too, the jury stopped short of making findings of fact. As will be seen, the trial judge treated some of the jury's speculation as fact.

[100] The fact the jury was unable to answer some of the questions left the court and the parties without the findings of facts elicited by those questions. Nevertheless, the parties moved for judgment instead of asking the trial judge to put additional questions to the jury to clarify its responses. The result is that the parties had to advance their positions on those facts the jury did find. Where the jury was unable to answer a question, the parties could not rely on a matter in evidence as a fact in meeting their respective burdens of proof. If the claimed matter was crucial to the position of a party but had not been found to be a fact, the party might fail on that issue.

[101] This result impacts mainly the respondents. That is because there was no dispute that the arrest of the appellants was warrantless. The appellants did not need to rely on the findings of the jury to meet their burden of proof. The main issue at the trial was whether the respondents met the burden of proof on them to establish they had reasonable and probable grounds to arrest the appellants. The inability of the jury to find facts has a greater impact on the respondents because, in order to meet their burden of proof, they required the findings of fact to be made in their favour.

[102] Consider question 1 as an example:

> 1. Upon encountering the plaintiffs in the courtyard, did Collins take steps to determine if they were trespassing?

[103] The question seeks to resolve the conflicting versions of what happened when the security guards first encountered the appellants as they emerged from the laneway after parking there. Gentles testified that the security guards approached them and said, “You

guys are trespassing. What were you guys doing back there?" According to Gentles, he explained that he was a resident of 200 Sherbourne, but the guards continued to press them on what they had been doing in the laneway. Collins testified in chief that he first said "something to the regards of, Hey, were you guys hanging out back there?" After being reminded by his counsel that he could not recall his exact words he testified that he had said "something to the effect of why were they hanging out back there or were they hanging out back there." He went on to explain that he spoke to them "—because it's a bit of an odd area. I wanted them—to let them know that it's part of our patrol route, and another reason would be to let them know it's a high crime area, and another reason was just to ask them—you know, let them know we patrol this area and try and get them to identify themselves as being residents or not." Under cross-examination, Collins said he gave the appellants the opportunity to identify themselves several times. Barnes testified that Collins repeatedly asked the appellants if they lived there and what they were doing on the property, and that the appellants refused to answer. Barnes made no mention about asking the appellants what they were doing in the laneway.

[104] The jury's answer to question 1 was "Yes based on the 'Burden of Proof'". The jury's resort to the burden of proof indicates that they could not decide whom to believe. In other words, they were unable to decide whether Collins took steps to determine if the appellants were trespassing. By answering "Yes" the jury applied the burden of proof in accordance with what they had been told initially—that the burden lay generally upon the appellants, except on the issue of self-defence. They apparently understood the trial

judge's later instruction they should not be concerned with the burden of proof was limited to question 4, the context in which it was given.

[105] The proper allocation of the burden of proof is a matter of law, and the trial judge should have corrected the jury's attempt to apply it. He should have understood that the jury was unable to choose between Gentles' testimony that the security guards accosted the appellants as trespassers immediately upon seeing them and the security guards' testimony that they gave the appellants the opportunity to identify themselves at the outset.

[106] When the jury's answer to question 1 is approached in this way, the jury's answer to the related question 2 becomes understandable. Question 2 and the answer were as follows:

> 2. If your answer to question 1 was "yes", specify the steps taken by Collins to determine if the plaintiffs were trespassing.
>
> A. According to Collins and Barnes' testimony they did try to ask if they "live here" and testified that the response was "we don't have to tell you anything".

[107] The jury's recitation of testimony in answering question 2 studiously refrains from finding any fact. That is because in answering question 1 the jury did not accept the version of events given by Collins and Barnes but purported to apply the burden of proof. The jury's answers to questions 1 and 2 make clear that the testimony of neither side was

found to be a fact. This undermined the respondents' position more than it did the appellants'.

[108] The lack of a finding of fact on this matter means that the appellants could not rely on their testimony that the security guards immediately accosted them as trespassers. The appellants' position, though, was not detrimentally affected. They did not need that testimony to establish they had been arrested without warrant. Further, as a matter of law they did not need to respond to requests they identify themselves as residents, even if those requests were made.

[109] On the other hand, the respondents were left to argue that they met the burden of proving they had reasonable and probable grounds without being able to rely on a finding of fact that they had taken steps to determine whether the appellants were trespassers.

[110] Instead of recognizing that there were no findings of fact in the jury's responses to several questions, the trial judge struggled to compensate for the dearth of facts and ended up engaging in fact-finding himself. In doing so, he exceeded his role as the presiding judge in a trial by jury. All disputed facts had to be found by the jury.

The trial judge engaged in fact-finding to fill gaps in the jury's answers

[111] Apart from the jury's inability to answer some questions, the entire set of questions put to the jury was poorly formulated. The questions, even when clearly answered, left gaps in understanding what occurred during the incident. As discussed in

the preceding section, the parties had to advance their positions relying only on the facts found by the jury despite any gap in understanding exactly what occurred.

[112] As an example, I discuss a gap in understanding what happened that was especially important to the trial judge's analysis. The jury's findings of fact do not explain how Collins could honestly believe Gentles was a trespasser (question 8) when Gentles identified himself as a resident before the arrest (question 6). To fill this gap, the trial judge found a number of facts.

[113] The trial judge recognized that the jury's comment in answering question 9, that Collins may have been preoccupied enough to miss Gentles' statement that he was a resident, was speculation. He explicitly identified this comment as speculation. Speculation falls short of a finding of fact. The trial judge should have disregarded the comment as speculation and given full effect to the jury's unequivocal finding that Gentles identified himself as a resident prior to the arrest. Instead, the trial judge treated the jury's speculation as a finding of fact in his analysis and used it as a springboard to find further facts.

[114] The trial judge engaged in speculation himself by surmising that the jury might have thought Gentles was arrested at the end of the physical struggle, when Gentles was subdued. This was impermissible. He went on to find that Gentles identified himself as a resident only during the physical struggle that took place after the arrest.

[115] It was the trial judge's duty to provide the jury with the necessary instructions to understand and properly answer the questions he put to them. If the answers returned caused him to believe that the jury did not have a proper understanding of the legal framework for the answers, it was his duty to provide further instructions and to seek clarifying answers. Once the trial judge was satisfied that he could proceed to entertain the motions for judgment on the jury's answers, he was bound to decide those motions on the basis of those answers. He was wrong to embark on his own process of fact-finding.

[116] The trial judge used his finding of fact that Gentles did not identify himself as a resident until the physical struggle as the foundation for additional findings of fact. Several times he stated as a fact that Collins did not hear Gentles' statement. There was no jury finding to that effect. The jury's finding that Collins honestly believed Gentles was a trespasser is equally compatible with Collins hearing the statement but not believing it.

[117] What's more, the trial judge's finding of fact that Gentles did not identify himself as a resident until the physical struggle was unsupported by the record. Both Collins and Barnes testified that the statement was not made at any time during the incident. They testified that they learned Gentles was a resident only after the police arrived. On the other hand, both Gentles and Francis testified that Gentles made the statement at the outset of the encounter. These were the only two versions between which the jury had to choose. Counsel suggested that Collins' testimony allowed for the possibility that he did not catch everything Gentles said during the physical struggle. Still, some evidence was

necessary that Gentles made the statement during the struggle. There was none. The only evidence about the timing of the statement was that it was made earlier. The trial judge's finding that it was made later had no basis in the evidence.

[118] The trial judge went on to attribute his finding of fact to the jury. He stated that the jury "rejected the evidence that Mr. Gentles stated at the beginning that he lived there". The question put to the jury, on a record in which the only evidence was the Gentles made the statement at the beginning, was whether Gentles made his statement "prior to the arrest". The jury gave a clear answer to the question put to them. The basis on which the trial judge was able to say that the jury rejected Gentles' testimony that he made the statement at the beginning is not apparent to me.

[119] In deciding the motions for judgment, the trial judge should have accepted as facts that Gentles identified himself as a resident prior to the arrest and that Collins had an honest belief that Gentles was a trespasser. The first of these facts was pertinent to the objective component of reasonable grounds for the arrest. The second was relevant only to the subjective component. The motions had to be decided accordingly.

[120] The trial judge also erred in his attempt to resolve the inconsistency between the jury's answers to questions 14 and 15. In answering question 14, the jury said that "no", the arrest of Gentles was not a reasonable course of action. Then, in answering question 15 the jury said "We feel that Gentles did identify himself as a resident but some other circumstances justified this as a reasonable course of action."

[121] The trial judge resolved the obvious inconsistency between these two answers by reasoning that the jury had "modified" their answer to question 14, effectively from "no" to "yes". The jury's answers to these two questions are simply inconsistent. The trial judge should have recognized this instead of preferring one answer over the other. Fortunately, the jury's inconsistent answers to these two questions do not affect this appeal. As noted earlier, these questions were included to determine whether, assuming there were reasonable and probable grounds to arrest, the arrest was a reasonable course of action in the first place. Since there were no reasonable and probable grounds, the answers to these two questions are irrelevant and it is not necessary to resolve the inconsistency between them.

[122] Another example of the trial judge's fact-finding is his finding that Francis committed an assault on Barnes. If the question of whether Francis assaulted Barnes was important to the Intelligarde respondents' case, they should have ensured that the question was put to the jury. I will have more to say about the trial judge's error in making this finding later in discussing the lawfulness of the arrest of Francis.

[123] As well, the gaps in the facts elicited by the questions worked to the appellants' disadvantage in the trial judge's assessment of their credibility. For example, the trial judge made much of the fact that the jury did not believe Gentles' testimony that he was not belligerent or vulgar. In fact both sides had accused the other of being vulgar and belligerent and both sides denied being vulgar, but the jury was only asked if the appellants had been. The jury's rejection of Gentles' testimony on this matter cannot be

taken to indicate the jury preferred the credibility of the security guards, when the jury's view of the security guards' denial they had been vulgar was not even sought.

[124] As well, it is my view that the trial judge did not follow a consistent approach to the questions in which the jury refrained from answering and instead speculated about what "could" be the case. He treated as a fact the jury's speculation that Collins may have been preoccupied and so missed Gentles' statement that he was a resident. On the other hand, he did not take into account the jury's speculation that Gentles' "punch or strike" may not have been intentional but a reflex reaction to the invasion of personal space. Despite this comment, he stated that the jury found that Gentles reacted by punching or striking Collins, "as Collins had testified". In his reasons, the trial judge described the "punch or strike" as an "attack". The characterization was his and not the jury's.

Conclusion

[125] When all the errors discussed above are considered, it is apparent that the view of the facts taken by the trial judge was incorrect and unjustifiably favoured the Intelligarde respondents. Had he taken the correct view of the jury's answers, he would have had no doubt that there were no reasonable and probable grounds to make an arrest under the TPA.

[126] The natural result of this conclusion is that Gentles and Francis were subjected to false arrest and assault and are entitled to have judgment entered in their favour. The

Intelligarde respondents sought to avoid this result by alluding to a new issue in their written submissions requested by the court after the hearing of the appeal.

iv) Can the Intelligarde respondents rely on the power to arrest for assault to justify the appellants' arrest?

[127] In their written submissions filed after the appeal, the Intelligarde respondents submitted that the use of force to arrest Gentles and Francis did not occur pursuant to the TPA, but in response to Gentles' assault on Collins. This submission is an ill-considered attempt to deflect the focus from the unlawfulness of the original arrest.

[128] The use of force cannot transform an unlawful arrest into a lawful one. If the original arrest was unlawful, the action to impose it by force was also unlawful.

[129] The Intelligarde respondents' written submission can only be read as an attempt to justify the use of force by relying on the power of arrest in s. 494(1)(a) of the *Criminal Code* (the so-called citizen's arrest power). It implies that Gentles and Francis were not arrested for a breach of the TPA but for assaulting the security guards. The trial judge implied the same thing in regard to Francis. Without mentioning the power of arrest for assault, the trial judge found that "there was reasonable and probable cause for arresting Mr. Francis after his assault upon Mr. Barnes." The trial judge must be taken to have realized that the TPA does not provide the power to arrest a person for assault. However, the *Code* power of arrest was not available in this case.

[130] The power of arrest for assault under the *Code* is not available to justify the arrest of Gentles. In his case, the Intelligarde respondents, in their pleadings, relied only on

their power to arrest under the TPA. The case proceeded and was decided on that basis. Counsel for the Intelligarde respondents was clear in his oral submissions that, throughout the trial, the judge and the parties all took the view that the arrest took place when Collins touched Gentles on the shoulder and said "you are under arrest". Written submissions after the hearing of the appeal is too late to raise the power to arrest Gentles for assault.

[131] In any event, the facts found by the jury could not support a finding that the guards could have arrested either Gentles or Francis pursuant to the *Criminal Code*. Section 494(1)(a) allows "any one", i.e. not just a peace officer, to arrest without warrant a person whom he finds committing an indictable offence. It is not enough that reasonable and probable grounds exist to believe that the person is committing an indictable offence. It must be established that the person arrested was actually committing the indictable offence.

[132] In this case there is no finding by the jury that Gentles was committing an indictable offence when he was subdued by the security guards. Gentles was entitled to resist the unlawful arrest as long as the force he used was not intended to cause grievous bodily harm and was no more than necessary to defend himself: *R. v. Plummer* (2006), 83 O.R. (3d) 528 (C.A.) at paras. 48-49. The jury was not asked to and did not make a finding of fact that Gentles used any more force than that.

[133] Certainly the jury answers about Gentles' reaction to the unlawful arrest fall short of establishing, on a balance of probabilities, that Gentles committed an assault. Placing the words in quotes, the jury said that "[t]he 'punch or strike' may not have been intentional but rather a reflex reaction of invasion of personal space." Consequently, subduing Gentles for resisting the unlawful arrest could not be a valid exercise of the power of arrest under s. 494(1)(a) of the *Code*. Rather, the use of force to attempt to implement an unlawful arrest will generally constitute a further assault on the person arrested: *Plummer* at para. 49.

[134] An additional comment is necessary about Francis. The Intelligarde respondents' statement of defence does not expressly plead the power of arrest under the *Criminal Code*. However, read extremely generously, it may be taken to allege that Francis was arrested for assault. The jury, though, was not asked whether Francis committed an assault. It was asked only whether Barnes honestly believed that Francis was guilty of assault prior to arresting him. I have already explained that the trial judge strayed beyond his role when he found as a fact that Francis assaulted Barnes. Without a finding of fact that Francis was actually committing an assault, the Intelligarde respondents cannot establish that he could have been arrested employing the *Criminal Code* power. That is enough to dispose of this issue.

[135] However, even if the issue had been a live one, it would have been necessary to instruct the jury about the possible application of s. 27 of the *Criminal Code*. Section 27 justifies the use of force reasonably necessary to prevent the commission of an offence

likely to cause immediate and serious injury to a person. In taking on the role of fact-finder, the trial judge did not consider the evidence that Gentles testified that he could not breathe and that he lost consciousness while being held in a headlock by Collins. On the record, it would have been open to the jury to find that Francis did not commit an assault on Collins, but rather was seeking to prevent what could reasonably be perceived as an assault on Gentles that was likely to cause him serious injury. The findings of fact that the jury did make are not sufficient to establish that Barnes could have arrested Francis using the *Code* power of arrest.

[136] The fact that these issues were so poorly fleshed out at trial reveals that the *Criminal Code* power of arrest was not a live issue. In their objections to the trial judge's instructions to the jury, the Intelligarde respondents did not take the position that the jury should be asked to find as a fact that either Gentles or Francis committed an assault.

[137] The security guards' failure to establish they had reasonable and probable grounds to arrest Gentles and Francis leads to the conclusion that Gentles and Francis were falsely arrested.

v) Conclusion

[138] The appellants are entitled to have judgment entered in their favour. I would reach that conclusion on any view of the evidence in this case. As I explained earlier, even their view of the contested facts would not have given the Intelligarde respondents the necessary reasonable and probable grounds to arrest Gentles and Francis.

Damages

[139] In their answers to questions 32 to 35, the jury assessed Gentles' general damages at $5,000, and awarded him $50,000 in aggravated damages against Collins only. The jury indicated that the basis of the aggravated damages was that Collins "would have been unjustified in starting the arrest process". The jury assessed Francis' general damages at $500 and awarded him $1,000 in aggravated damages as against Barnes only because he "should not have intervened and thus would not have had to deal with Mr. Francis."

THE CROSS-APPEAL

[140] As noted, the trial judge retired and the issue of costs was assigned to Sanderson J., who declined to award any costs to the respondents despite their success at trial. The respondents sought costs totalling $498,421.56 on a substantial indemnity basis, or alternatively, $336,290.77 on a partial indemnity basis.

[141] The cross-appeal of the Intelligarde respondents is moot. At trial, no personal claim was advanced against the respondent Shari Malazdrewicz, one of the Intelligarde security guards who responded to Collins' call for backup. At trial, no relief was claimed against her and she was not separately represented. Just the cross-appeal of Toronto Housing needs be determined. The appellants did not appeal from the dismissal of the action against Toronto Housing.

[142] The only issue on the cross-appeal is whether Sanderson J. erred by exercising her discretion to decline to award costs to Toronto Housing.

[143] Sanderson J. set out an ample basis for exercising her discretion to decline to award the successful parties their costs of the trial. She exercised her discretion after taking into account the nature of the facts alleged, access to justice, the public interest in the issues and the manner in which the respondents conducted the litigation.

[144] Sanderson J. stressed the nature of the allegations that, in her mind, raised the "legitimate controversy" regarding the scope of an occupier's arrest power in light of the concerns the Supreme Court had expressed in *Asante-Mensah*.

[145] She relied on decisions of this court that "access to justice" is one of the factors to be considered in awarding costs: *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.) and *Euteneier v. Lee* (2005), 204 O.A.C. 287 (C.A.). In *Euteneier*, this court held that no costs should be awarded against an appellant in a case involving serious allegations against the police that ultimately failed at trial. Sanderson J. quoted the following excerpt of *Euteneier* at para. 29 of her reasons:

> [I]t was reasonable for the respondent to attempt to hold the appellants responsible for their conduct. The fact that she was ultimately unsuccessful in her action and on the appeals therefrom does not diminish the gravity of her treatment by the police while she was in custody, or its implications for the public at large. This case raised complex issues of general public importance involving the duties, obligations and requisite standard of care owed by the police to persons whose liberty is constrained in a police lock-up facility. Thus, notwithstanding the respondent's personal pecuniary interest

> in the outcome of this case, the public interest was also engaged in these proceedings.

[146] Finally, she found the respondents were at least as much responsible for the protracted litigation. According to Sanderson J. "[t]heir strategy throughout was to object at every turn. They repeatedly made objections and slowed the pace of the trial." Toronto Housing, while separately represented at trial, generally followed the lead of Intelligarde and supported the various positions adopted by the Intelligarde respondents.

[147] These are all matters that Sanderson J. could consider and weigh in exercising her discretion. The cross appellant has failed to show she committed any error of principle. There is no basis for appellate intervention with Sanderson J.'s discretion.

DISPOSITION

[148] I would allow the appeal, set aside the judgment pronounced by the trial judge and enter judgment in favour of the appellants against the Intelligarde respondents for false arrest and assault and award them the damages assessed by the jury.

[149] It follows that Gentles and Francis are entitled to their costs of the trial. I would remit the question of the trial costs to Sanderson J. or, if she is unavailable, to another judge of the Superior Court designated by the Regional Senior Judge.

[150] I would dismiss the cross-appeal.

[151] I would fix the costs of the appeal in favour of Gentles and Francis on a partial indemnity scale in the amount of $20,000.00 inclusive of disbursements and taxes payable jointly and severally by Intelligarde, Collins and Barnes.

[152] I would fix the costs of the cross-appeal in favour of Gentles and Francis on a partial indemnity scale in the amount of $7,500.00 inclusive of disbursements and taxes payable jointly and severally by all respondents.

"R.G. Juriansz J.A."
"I agree M. Rosenberg J.A."
"I agree R.P. Armstrong J.A."

RELEASED: November 26, 2010

Schedule A

A. Factual Issues re Arrest

1. Upon encountering the plaintiffs in the courtyard, did Collins take steps to determine if they were trespassing?

A. Yes based on the "Burden of Proof"

2. If your answer to question 1 was "yes", specify the steps taken by Collins to determine if the plaintiffs were trespassing.

A. According to Collins and Barnes' testimony they did try to ask if they "live here" and testified that the response was "we don't have to tell you anything".

3. Was Gentles belligerent and/or vulgar in his answers to Collins' questions?

A. Yes

4. Did Gentles act in a physically intimidating manner towards Collins or Barnes prior to his arrest?

A. Yes. Collins COULD have interpreted Gentles' actions as physically intimidating. No to Barnes.

5. Did Gentles advise Collins or Barnes that he would wait on the sidewalk after the call for back-up was made?

A. No, based on "Burden of Proof".

6. Did Gentles identify himself to Collins and Barnes as a resident of 200 Sherbourne at any time prior to the arrest?

A. Yes

7. Prior to Collins arresting Gentles, did Collins advise Gentles and Francis that they would have to leave the property or be arrested for trespass if they did not live there?

A. Yes

8. Did Collins have an honest belief that Gentles was guilty of trespass prior to arresting him?

A. Yes.

9. If your answer to question 8 was “yes”, then please state the basis for Collins’ belief.

A. Collins may have been pre-occupied enough to “miss” the statement from Gentles stating that he “lived here”.

10. If your answer to question 8 was “no”, then please provide particulars of your reasons for so finding.

A. N/A

11. Did Collins touch Gentles on the shoulder while advising him that he was under arrest?

A. Yes.

12. Did Gentles punch or strike Collins prior to Collins jumping on Gentles?

A. Yes. The “punch or strike” may not have been intentional but rather a reflex reaction of invasion of personal space.

13. If the answer to question 12 was yes, did Collins act in self-defence in grappling with Gentles?

A. Yes with possible misinterpretation of Gentles’ reaction.

14. Was the arrest of Gentles a reasonable course of action in all of the circumstances?

A. No

15. If your answer to question 14 was “no”, then please provide particulars of your reasons for so finding.

A. We feel that Gentles did identify himself as a resident but some other circumstances justified this as a reasonable course of action.

16. Did Francis hit or strike Barnes or Collins or attempt to pull Collins off Gentles before Barnes advised Francis that he was under arrest?

A. Yes. We feel that Francis attempted to pull Collins off of Gentles and in the process Barnes interpreted this as a hit or strike.

17. Did Barnes hold an honest belief that Francis was guilty of assault prior to arresting him?

A. Yes.

18. If your answer to question 17 was "yes", on what was this belief based?

A. See Q. 16 for explanation.

19. If your answer to question 17 was "no", then please provide particulars of your reasons for so finding.

A. N/A

B. Issues re Excessive Use of Force

20. Assuming that the arrests of Gentles and Francis were based on reasonable and probable grounds, then was excessive or unreasonable force used at the time of the arrest:

a. of Gentles - No

b. of Francis - No

21. If your answers to either 20a or 20b were "yes" then please provide complete particulars of the excessive or unreasonable force used:

c. By Collins - N/A

d. By Barnes - N/A

22. If your answer to question 13 was that Collins did act in self-defence, did he use excessive force in so doing?

A. No, based on evidence provided
"Burden of proof" again

C. Negligence

23. Was there any negligence on the part of the defendant, Intelligarde, which proximately caused or contributed to the injuries of the plaintiffs?

A. No

24. If your answer to question 23 is "yes", then state fully and clearly in what such negligence consisted.

A. N/A

25. Was there any negligence on the part of Toronto Housing which proximately caused or contributed to the injuries of the plaintiffs?

A. No

26. If your answer to question 25 is "yes", then state fully and clearly in what such negligence consisted.

A. N/A

Alleged Events of July 8 and September 4, 2001

27. Did Collins intentionally harass or intimidate Gentles
-on July 8 2001?
- On September 4, 2001?

A. No. No. "Burden of Proof".

Other Legislation
Occupiers Liability Act

28. Did the defendant Toronto Housing, in making or administering its security arrangements for 200 Sherbourne, take such care as was reasonable, in all of the circumstances, to see that the plaintiffs were reasonably safe while on the premises?

A. Yes.

29. If your answer to Q. 28 is no, please state in what respect(s) Toronto Housing failed to take reasonable care.

A. N/A

30. Did any such failure proximately cause or contribute to the injuries of the plaintiffs? If yes, give particulars.

A. N/A

Tenant Protection Act

31. Did the defendant Toronto Housing, or the security firm Intelligarde acting on its behalf, substantially interfere with Gentles' reasonable enjoyment of his right to occupy and enjoy his mother's rental unit? If yes, give particulars.

A. Yes. The property manager SHOULD have forwarded the security report to Toronto Housing. The property manager is an employee of Toronto Housing and should have followed up with Gentles.

D. Damages

D.1 General Damages

32. Regardless of your answers to all other questions, at what amount, if any, do you assess the general damages of Gentles for his injuries, economic, physical, or psychological?

B. $5000

33. Regardless of your answers to all other questions, at what amount, if any, do you assess the general damages of Francis?

B. $500

D.2 ASSUMING THAT THE ARREST WAS NOT BASED ON REASONABLE AND PROBABLE GROUNDS

Aggravated Damages

34. Should any amount of aggravated damages be awarded to Gentles against Collins? Barnes? Intelligarde? Or Toronto Housing? If your answer is 'yes' as to any defendant, state clearly and fully the conduct of that defendant justifying such an award.

B. Yes to Collins – he would have been unjustified in starting the arrest process. Barnes should have not intervened, BUT he was backing up his partner. $50,000. Barnes – no. Intelligarde – no. Toronto Housing – no.

35. Should any amount of aggravated damages be awarded to Francis against Collins? Barnes? Intelligarde? Or Toronto Housing? If your answer is 'yes' as to any defendant, state clearly and fully the conduct of that defendant justifying such an award.

B. Yes, Barnes should not have intervened and thus would not have had to deal with Mr. Francis. $1000.00. Barnes only. Collins – No, Intelligarde – No, Toronto Housing – No.

Punitive Damages

36. Should any amount of punitive damages be awarded to Gentles against Collins? Barnes? Intelligarde? Or Toronto Housing? If your answer is 'yes' as to any defendant, state clearly and fully the conduct of that defendant justifying such an award.

A. No

37. Should any amount of punitive damages be awarded to Francis against Collins? Barnes? Intelligarde? Or Toronto Housing? If your answer is 'yes' as to any defendant, state clearly and fully the conduct of that defendant justifying such an award.

A. No

D.3 ASSUMING THAT THE ARREST WAS BASED ON REASONABLE AND PROBABLE GROUNDS AND THAT THERE WAS A USE OF EXCESSIVE FORCE

38. If you answered question 20a "yes" then should any amount for Punitive Damages be awarded to Gentles against Collins? Barnes? Intelligarde? Or Toronto Housing? If your answer is 'yes' as to any defendant, state clearly and fully the conduct of that defendant justifying such an award.

A. No

39. If you answered question 20b "yes" then should any amount for Punitive Damages be awarded to Francis against Collins? Barnes? Intelligarde? Or Toronto Housing? If your answer is 'yes' as to any defendant, state clearly and fully the conduct of that defendant justifying such an award.

A. No