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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PORTSMOUTH COUNTY COURT
(HIS HONOUR JUDGE GRIFFITHS)

Royal Courts of Justice.

Thursday, 6th June 1991.

Before:

LORD JUSTICE NEILL

LORD JUSTICE BALCOMBE

LORD JUSTICE BINGHAM

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CAROLE ANN MOORES (Plaintiff) Respondent

v.

WAYNE RORY GREEN (Defendant) Appellant

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(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2)

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MR. PAUL McCORMICK (instructed by Messrs. Anderton & Co. of Portsmouth) appeared on behalf of the (Plaintiff) Respondent.

MR. RICHARD LISSACK (instructed by Messrs. Eric Robinson & Co.) appeared on behalf of the (Defendant) Appellant.

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J U D G M E N T

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LORD JUSTICE NEILL: I will ask Lord Justice Balcombe to give the first judgment.

LORD JUSTICE BALCOMBE: We have before us applications by the defendant for leave to appeal and, if granted, an extension of time for appealing and, if we grant those applications, that we should hear the appeal itself. I propose to deal with all three matters together as they were so dealt with in argument before us.

The appeal which is sought is from an order of His Honour Judge Griffiths sitting in the Portsmouth County Court on 6th November 1990 whereby he refused to set aside a judgment which he had previously given in favour of the plaintiff for damages in the sum of £12,500 for her rape by the defendant and to order a re-hearing of the case. From the figure that I have mentioned it will be appreciated that there had been a consent by the parties to extend the monetary jurisdiction of the County Court. The defendant had made the application for a re-hearing on the ground that, since the judgment at the trial, further evidence had become available.

The plaintiff is aged 29 years. She is divorced with a five-year old child. She met the defendant in a nightclub in Portsmouth at the end of 1988. It is common ground that shortly thereafter a sexual relationship developed between them. The defendant is a man of 35. He had served in the navy, was a boxer of some repute, and is now employed as a doorman at a nightclub.

The plaintiff's case is that her relationship with the defendant ended in October 1989. She then commenced a relationship with a man called Tony Powell. This, she said, ended early in 1990. She said that the defendant would not

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accept the end of their relationship, pestered her and that the rape took place at her house on the morning of 23rd March 1990. Early in June 1990 she applied to the County Court for an injunction to restrain the defendant from molesting her. In her affidavit in support of that application, sworn on 20th June 1990, she said this:

> "9. On 23 March 1990 at approximately 10 a.m. the Respondent" - i.e. the defendant - "was outside my front door, knocking the door, ringing the doorbell persistently. I did not answer the door but I had a telephone call from a friend who remarked about the noise and asked me why I was not answering the door. I explained that it was the Respondent and that I was afraid to answer the door.
> 10. As I had to collect my daughter from play school at 11.45 a.m., at 11.30 a.m. I had no alternative but to go downstairs and deal with the Respondent. I opened the door and asked the Respondent to stop his harassment and leave, instead of which he pushed his way in and as the Respondent is 6 ft 2 inches tall and an ex-boxer, I was unsuccessful in my attempts to prevent him from entering the property."

She said that that was when he raped her. Apart from the fact that the height of the respondent is said to be less than that which the plaintiff there said, that was her account of what happened on the morning of 23rd March at that stage.

Shortly afterwards, on 25th June, the original particulars of claim were put in signed by counsel, paragraph 2 of which says:

> "On 23rd May 1990 at approximately 10 a.m. at the said address the Defendant indecently assaulted then raped the Plaintiff."

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The month "May" is quite obviously a typing error for March. Nothing turns on that, and, in view of the fact that by her affidavit only a few days earlier the plaintiff had given the time span of 10.00 a.m. to 11.30 a.m., I think that nothing turns on the fact that at that stage the rape was said to have taken place at 10.00 a.m.

Amended particulars of claim were then put in. They are to be found on page 135 of our bundle. In the new paragraph 2 of the particulars of claim "May" is again put in error for "March", and that paragraph reads:

> "On the 23rd May 1990 between 10 a.m. and 12 noon at the said address the Defendant indecently assaulted then raped the Plaintiff."

When the matter came on for trial in the autumn of 1990 the plaintiff gave oral evidence-in-chief, and I read now from the judge's note of her oral evidence starting at the foot of page 321 of our bundle:

> "About 10 am doorbell rang. I saw Defendant. I knew he'd seen me. I went upstairs to the bedroom. I did not want to see him. I could see if he'd gone from bedroom. He rang doorbell continuously. I made a phone call. He rang doorbell for 20 minutes to 1/2 hour solidly. I telephoned friend, Margaret Walker, to arrange for Julia to be picked up if Defendant still outside. She could hear doorbell ringing. I looked out several times. His car there. He shouted: 'I know you're in there - open the door'. I didn't. As time went on, I felt I had to pick Julia up - 11.45. I'd said to Margaret Walker, 'If I'm not there, would you pick Julia up?' I felt I ought to do it. My responsibility. Around 11.30 I got more angry than

anything. I decided I was not going to be a prisoner. I decided to confront the Defendant at the door, slam the door and say I was going to pick Julia up and thats it. I opened door."

Then she says that he forced his way in and she gave details of the rape which she says then took place. A little later, on the same page, she says:

"It was not long. It lasted 5 - 10 minutes."

Then, after other details, she says:

"Then he just left. I went out immediately afterwards to collect my daughter. I went to Margaret Walker. Julia was there. I picked her up and took her home."

At that stage she did not contact the police, but I do not think anything turns on this. It was only subsequently when she discovered that she was pregnant that she made a complaint.

Under cross-examination by the defendant's counsel she said this:

"I finished my association with Tony Powell early in the new year. I've had two black boyfriends: the Defendant and Tony Powell. I did have sex with Tony Powell. The last time was early in the new year ... I used him [Tony Powell] because I was frightened of the Defendant. I thought if he knew I was seeing someone else he would leave me alone."

The judge gave a very careful judgment on 12th September 1990. He gave himself a very careful direction as to the burden of proof in a civil case for rape, and I think I can do no better than to take that as it is set out on page 12 of the defendant's skeleton argument before us, because that does summarise it very well:

"From the judgment of the Court of Appeal in Miles v. Cain,

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14 December 1989 (unreported), the following principles can be deduced:

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1. The Burden and standard of proof are the normal civil ones.
2. The approach cited by Lord Denning in Bater v. Bater [1951] P 35, 37 that 'in proportion as the crime is enormous, so ought the proof to be clear' applies.

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3. Within the civil standard there may be degrees of probability, and what was required here was a degree of probability 'commensurate with the occasion'.

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4. Evidence of inconsistent conduct undermines credibility whilst evidence of consistent conduct adds nothing.
5. It is very dangerous to find for the Plaintiff in the absence of corroboration in a case such as this."

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As I say, the judge directed himself impeccably. He said that essentially the case involved issues of fact and not of law, and "the credibility of the parties and their witnesses lay at the heart of the case." He then summed up his view of the plaintiff as follows:

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> "She impressed me as a credible and honest and sincere witness who was at pains not to exaggerate her evidence. I have, as I have already said, been careful to caution myself against being gullible; against accepting her evidence too readily. I will deal with my specific findings on the various matters in due course, but, in general terms, I found her to be a reliable and satisfactory witness who was not shaken to any significant extent in cross examiantion, and in no material respect that I can recall, was her evidence shown to be false or significantly inaccurate."

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I have to say he formed a much less favourable view of the defendant.

Then on page 191 he set out in some detail the plaintiff's account of the rape incident (there were other less serious matters of harassment of which the plaintiff was complaining in the course of this action) and he effectively summarised the plaintiff's account of the events as I have read them from the notes of her evidence-in-chief. At page 195 of the bundle he said this:

> "Having, I believe, examined the evidence fairly and clearly, I find myself convinced that the Plaintiff is telling me the truth about this incident [the rape]. I am quite sure that she has not made it all up as was suggested to her."

So he gave judgment in the sum of £12,500. He broke it down as to £7,500 for the rape and the surrounding circumstances and £5,000 for the pregnancy and the termination of the pregnancy.

The case attracted some publicity in the local paper. The report was seen by one Tracey Powell, the wife of Tony Powell. She made contact with the defendant's solicitors and showed to them an itemised telephone account. This shows that on 23rd March 1990, the date in question, two telephone calls were made from her home (and it is common ground that they were made by Tony Powell) to the plaintiff, one at 10.26 lasting for 19 minutes and one at 11.26 lasting for 11 minutes and 48 seconds. That was the substance of the ground for the application to the judge for a new trial.

The significance of these telephone calls was really three-fold. First, their timing, and in particular the call at 11.26 which lasted for 11 minutes 48 seconds and so ended at

approximately 11.38. I have already referred to the timings given by the plaintiff in her evidence when she said that she went to her front door at 11.30 because she wanted to pick up her daughter from school.

The second important fact is that the telephone call was made to her by Tony Powell, with whom she had told the judge she had ceased to have a relationship in January of that year. Thirdly, it was Tony Powell about whom the plaintiff had said that the defendant would leave her alone if he knew that she was seeing him. In those circumstances an application was made by the defendant under Order 37, rule 1, of the County Court Rules 1981 for a re-hearing on the basis of this new evidence.

It was common ground before the judge, and was accepted before us, that the test the judge had to apply in deciding whether or not to order a re-hearing on the grounds of this new evidence was that which this court applies in deciding whether or not to allow further evidence on an appeal. The relevant authority is the case of Ladd v. Marshall [1954] 1 W.L.R. 1489, the test being that laid down by Lord Justice Denning at page 1491 where he says:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

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The learned judge was satisfied that the first and third conditions were fulfilled, namely that the evidence of the two telephone calls made by Tony Powell to the plaintiff at her home on the morning of 23rd March 1990 could not have been obtained with reasonable diligence for use at the trial. He was also satisfied that the evidence was such that it could presumably be believed in that it was apparently credible since it consisted to a large degree of an itemised bill from British Telecom. There probably was very little argument on that last point.

Before us Mr. McCormick for the plaintiff has sought to re-open the question whether the evidence could have been obtained by due diligence and has put in a respondent's notice seeking to argue that point. I am quite unable to see how the defendant's solicitors could be expected to have discovered the existence of the telephone calls, since even the plaintiff herself, when she gave evidence on the application for a new trial and admitted that they were made, said that she had forgotten all about them. I am satisfied - and I do not think that it is a point which need trouble this court at any length - that this evidence, even with all diligence, could not reasonably have been obtained. The judge was right on that. I am also satisfied that it was credible.

The reason the judge gave for refusing to set aside his previous judgment and to order a re-hearing was that the evidence would probably not have an important influence on the result of the case if there was a re-hearing. In fairness to the judge, it is right that I should go to that part of his judgment on the application where he deals with this aspect of the matter. He says (bundle, page 263):

"I now turn to deal with the second condition, namely,

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that the evidence, if given, would probably have had an important influence on the result of the case, although not necessarily a decisive influence."

He then deals with a submission which was made before him, as it was before us, that some words of Lord Justice Ormrod in Crook v. Derbyshire [1961] 1 W.L.R. 1360 lightened the burden of the test as laid down by Lord Justice Denning in Ladd v. Marshall. For my part I am content to accept that the test in Ladd v. Marshall is the correct one which we should apply. Then he goes on to deal with the substance of the evidence, and says this at the top of page 265:

"In order to make a proper assessment of this" - that is the new evidence - "it is necessary to look at some of the evidence that was given in the case. When the Plaintiff told me that her relationship with Mr. Powell came to an end in January 1990 I remember quite clearly that this was said in the context of a sexual relationship. She never said, and was never asked, whether telephone contact continued between them thereafter. That fact that she continued to be in contact with Mr. Powell by telephone does not raise an inference that they were continuing to have an affair. It is just as consistent with the Plaintiff's evidence in her affidavit that Mr. Powell continued to maintain a friendly interest in her. There is no other evidence to support the inference that the affair was continuing. There is no evidence of any contact other than by telephone and no affidavit from Mr. Powell repudiating the Plaintiff's evidence."

I pause there to interpolate that an attempt was made rather late in the day to introduce a statement signed by Mr.

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Powell. There is some dispute as to how much of that was properly before the judge. In any event, he clearly relied on it not at all, and I do not propose to do so either. He goes on:

"The contention that Mr. Powell could be responsible for the pregnancy conflicts with the unchallenged evidence given by the Plaintiff in the trial that Mr. Powell had had a vasectomy. If this were not so, I would have expected Mrs. Powell to be in a position to say so."

With respect to the learned judge, that really was not the point at issue. The point was: Was the plaintiff candid when she said her relationship with Mr. Powell ended in January 1990 and in not mentioning the telephone conversations on the morning in question? He goes on to deal with that:

"The Plaintiff explains her failure to mention the telephone calls by saying she was not asked about them and they did not come into her mind when she was giving evidence. Both my recollection and my note confirms that the Plaintiff was not asked either by her own Counsel or in cross examination whether she had received any telephone calls on the morning of the rape or who those telephone calls were from. I bear in mind that the Plaintiff swore an affidavit on the 20th June 1990 in connection with injunction proceedings."

Then he proceeds to quote the passage which I have already read from paragraph 9 of that affidavit. He goes on to say:

"In the light of this it is perhaps surprising that Counsel for the Plaintiff did not ask her about this in examination in chief. It is even more surprising that Counsel for the Defendant did not cross examine her about this."

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As I understand it, the telephone call she was referring to in that affidavit was with Margaret Walker, although it is fair to say that that was <u>to</u> Margaret Walker and not <u>from</u> Margaret Walker. Then he goes on:

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> "In these circumstances it seems to me that the only fair conclusion is that the Plaintiff was not concealing this from the Court but was simply not asked about it. If it was anyone's fault it was the fault of Counsel."

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It seems to me that Mr. Lissack was justified in the criticism he made of this part of the judgment that the judge was not really directing his mind to the question to which he should have been directing his mind, namely, again quoting from <u>Ladd v. Marshall</u>, "Was this evidence which might probably have an important influence on the result of the case if given?"

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This evidence had not yet been given. Nor had the plaintiff been asked for her explanation of it in cross-examination. To say, as he did, that the only fair conclusion was that the plaintiff was not concealing the conversations from the court, and if it was anyone's fault it was the fault of counsel, seems to be to be making assumptions and to be trying to exculpate the plaintiff in a way which was premature at that stage. If the evidence had been given, the judge would have had the opportunity of making up his mind whether the plaintiff's explanation was one which he found satisfactory. He then goes on to the next point:

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> "I now turn to deal with the point made about her failure to ask Mr. Powell to come to her assistance when he telephoned and the Defendant was outside. I do not find this to be a particularly compelling point. According to the Plaintiff's evidence at the trial which I accepted,

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> this sort of thing had happened on many occasions before. On no previous occasion had the Plaintiff been physically harmed let alone raped. On previous occasions she had simply sat it out until the Defendant had got fed up and gone. I do not think she could possibly have anticipated that things were likely to be different on this occasion."

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It seems to me that, on the same grounds, Mr. Lissack's criticism of this was also justified. What the judge was doing was trying to explain in advance what the answers might have been to questions, which clearly would have been legitimate questions, being put to the plaintiff had the existence of these telephone calls been known to the judge at the hearing. Then he goes on:

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> "I now turn to deal with the point that the Plaintiff is alleged to have said that she opened the door at 11.30 when the fresh evidence shows she was on the telephone at that time. The Plaintiff answers this by saying that she has never claimed to remember exactly the time that she opened the door. I have checked my note and she is right. What she said to me was: 'At about 11.30', It seems to me quite unreasonable to expect the Plaintiff to remember the precise time this event occurred. The fact that the incident occurred shortly after 11.48" - there the judge was in error; he misrepresented the duration of the call and the time it ended - "rather than at 11.30 does not seem to me to be of great importance. Nor, when one examines the evidence, is the point about leaving at 11.40 to pick up Julia a strong point. All these times were approximate and it would be unjust to expect anything else."

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But again I remind myself that the judge was really answering

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for himself the questions which the plaintiff would have been expected to answer if the evidence had been before the court at the time. Then he goes on:

> "I have reminded myself as to what the Petitioner said in evidence about what happened after the rape. My note reads as follows: 'I went out immediately afterwards to collect my daughter. I went to Margaret Walker's. Julia was there. I picked her up and took her home.' Thus it is clear from the Plaintiff's evidence that Playschool had ended by the time she arrived as Margaret Walker had already picked up Julia. This was evidence that I found acceptable at the time and still find acceptable. Thus, in my view, it is perfectly possible and indeed probable that the Plaintiff opened the door shortly after putting the phone down at 11.48. The rape occurred lasting some five to ten minutes (as she told me at the trial) and she then left immediately to collect Julia who had been collected by Margaret Walker at 11.45 and taken to Margaret Walker's home."

So there is the judge going once again through the same exercise of trying to see whether the evidence can be effectively explained away before it was in fact given. He concludes:

> "It seems to me that I ought to judge the potential importance of this fresh evidence against the evidence as a whole. There were many other issues in the trial which, as I found in my judgment, had a great bearing on my view as to the credibility of the parties. I need not go into those issues now they are fully set out in my judgment. Suffice it to say that I found the evidence on those other issues to be compelling and confirming of the credibility

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of the Plaintiff and undermining the credibility of the Defendant. The rape tied in with many other acts of harassment and, as I found, formed part of a pattern all confirming the overwhelming probability that the Plaintiff was right when she says she was raped by the Defendant. Having regard to this and to the other matters that I have mentioned in this judgment, I have come to the conclusion that it is most unlikely that this fresh evidence would, if given, have had an important influence on the result of the case. Accordingly, I dismiss the Defendant's application."

As I have said, it seems to me that what the judge was doing was trying to conduct a trial on the paper evidence before him and not addressing his mind to the test in Ladd v. Marshall: would the evidence - that is, the evidence of the phone calls - at the particular times at which they were made and with the particular person with whom they were made probably have a important influence on the result of the case, though not necessarily decisive? In the context of the timing, of the identity of the person who made the telephone calls, of the evidence the plaintiff had given as to her relationship with that person, I find it impossible to say that they might not have had an important bearing on the result of the case, particularly bearing in mind the unusual nature of the case, namely a civil action for rape, and the matters to which I have already referred as to the law to be applied in such a case. It seems to me that the judge was so affected by his prior estimation of the plaintiff that he was unable to make a proper appreciation of the possible importance of this new evidence if it were given. In a case where everything turned on the credibility of the plaintiff, the new evidence raised matters

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which, putting it at its lowest, seems to me to raise questions about which the plaintiff should give oral evidence in answer.

In my judgment, therefore, this is a case where we should give leave to appeal. Mr. McCormick very properly did not seek to raise any substantive point upon the delay in giving notice of appeal, for which an adequate explanation was given, and it appears to raise no prejudice to the plaintiff other than the normal prejudice of having to have a re-hearing. For the reasons already given we should also allow the appeal.

Accordingly, I would allow this appeal, set aside the order below and order a re-hearing of this case before another judge in the Portsmouth County Court.

LORD JUSTICE BINGHAM: I agree. The administration of justice in this country rests on the principle that the parties to any legal proceeding, whether civil or criminal, should present the whole of their case to the court of trial at first instance and that that court's decision should, subject to appeal, be final in all save exceptional circumstances. The reasons for this rule are obvious. Almost all litigation ends with at least one dissatisfied party. If it were open to a dissatisfied party to re-open on the merits a matter which had been the subject of decision at first instance on a second, third or umpteenth occasion there would be no end to litigation. But the principle is not absolute. The Court of Appeal has power to order a re-trial, and the County Court has the power, to which my Lord has already referred, under Order 37, rule 1(1), of the County Court Rules. One of the grounds upon which a re-trial may be sought is that new evidence has come to light, not called in the court below, which the parties seek leave to adduce at a new trial. Where such an application is made, the principles to be

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applied are very familiar and are classically summarised in the well known case of Ladd v. Marshall. Those principles are very restrictive and difficult to satisfy, and deliberately so because they reflect the principle of finality to which I have already referred.

In this case the judge held that the defendant had satisfied the first Ladd v. Marshall test of due diligence. That conclusion has been challenged in argument, but it was in my judgment plainly correct. The judge also held that the third Ladd v. Marshall test, that the evidence should be apparently credible, was satisfied, and with that conclusion also I agree. The evidence that the telephone calls were made to the plaintiff's house at the times and of the durations alleged appears to be almost incontrovertible.

The real issue between the parties today has concerned the second Ladd v. Marshall test, that the evidence would probably have an important influence on the result of the case although it need not be decisive. It is often very hard for the Court of Appeal to know whether that test is met or not. It is, I think, even harder to be sure when the application is made under Order 37, rule 1 of the County Court Rules because it is made to a judge who may, as here, have reached a firm, clear and careful decision and who then has to try and decide what influence the new evidence might have had had it been called. That is, I repeat, a very, very difficult task, and it is no easier where the judge's original decision is as thoughtful and as comprehensive as the judgment in this case. Nonetheless we have to consider, on this application and appeal, whether the learned judge erred in concluding that this evidence would not probably have had an important influence on the result of the case. I

conclude that he did err.

The plaintiff gave a clear and coherent account of her movements, with approximate timings and reasons for knowing what she did and roughly when she did it. The defendant challenged that account. His case was that on 23rd March, when the most important incident on which the case hinges occurred, he was never at the plaintiff's house at all. That was a very difficult case to present. There was very little material for his counsel to cross-examine on. All he could do was challenge the plaintiff's account and rely on the judge's acceptance of his own account.

It seems to me that the new evidence which it is now sought to adduce is potentially important for two main reasons. The first is this. The picture presented to the judge was of the plaintiff besieged in her house for one and a half hours by her persistent ex-boyfriend, the defendant, until she eventually became a little desperate and determined to leave the house whether the defendant was there or not to go and pick up her child from school. The new evidence potentially presents a rather different picture of the plaintiff chatting to another boyfriend on the telephone for long periods of time during this same period.

The second reason is this. The new evidence potentially affects the plaintiff's account of her movements. On her account in evidence she left the house to go and fetch her child from school. The new evidence suggests that she continued to chat with Mr. Powell on the telephone until five or six minutes before the due time for picking up her child. The issue does not turn on the precise recollection of timings to the nearest minute or few minutes, but does, I think, go to the general

coherence of the plaintiff's account, and that is something on which the new evidence may well have a bearing.

I accordingly conclude for these reasons as well as those given by my Lord that leave to appeal should be given, the appeal allowed and a fresh trial ordered before another judge. In a criminal case, where the same principle of finality applies, I think that this course would on similar facts be followed. I do, however, wish to make two things entirely clear. (1) I regard this case as quite exceptional. I concur in this order because I think that justice demands it and not because I consider that there should be any relaxation of the principle of finality or the principles enunciated in Ladd v. Marshall. (2) I should not be understood as indicating that the defendant is likely to succeed at a fresh trial. His Honour Judge Griffiths in the court below was very much impressed by the plaintiff and very little impressed by the defendant. At a further trial the trial judge may, despite this fresh evidence, form the same impressions. I have no view on the relative credibility of the parties, which will be entirely at large before the judge who tries the case.

I would simply add this. I am for my part by no means unmindful of the strain which a fresh trial will inevitably impose on the plaintiff. That is something of which Mr. McCormick has very rightly reminded us and it is an important factor, reinforcing the principle of finality. This is, however, a very serious case for the defendant as well as the plaintiff, and in the present circumstances I think the defendant would be justifiably aggrieved if he were not able to deploy this new evidence before the trial judge, for whatever it proves to be worth in the event.

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LORD JUSTICE NEILL: I agree. Mr. McCormick, counsel for Mrs. Moores, has rightly reminded us that it is in the public interest that there should be finality in legal proceedings and that a fresh hearing under Order 37, rule 1, of the County Court Rules should only be granted in exceptional circumstances and on solid grounds. It is for that reason that the three tests set out in Ladd v. Marshall [1954] 1 W.L.R. 1489 have to be satisfied before a new trial is allowed by the Court of Appeal. I am satisfied that the facts of this case are exceptional and, for the reasons already given by my Lords, that this is a case where this exceptional step should be allowed.

In conclusion I would wish to echo the words of Lord Justice Bingham that this decision should in no way be taken to be a relaxation of the rules in Ladd v. Marshall, and I too would add the caution that nothing that we are saying should be taken to prejudge the result of any fresh hearing. There are many matters to be considered by the judge at that fresh hearing, including, for the reasons which have been given, the fresh evidence to which our attention has been drawn.

For these reasons I too would allow the application and would allow the appeal.

(Order: Application and appealed allowed; costs here and below to be at discretion of trial judge; legal aid taxation of both parties' costs; application for leave to appeal to the House of Lords refused).