ACTIONS AGAINST POLICE

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1. This talk is focused on actions which may be brought against police officers (and the State vicariously) following the successful defence and acquittal of clients in relation to criminal charges, where the lawfulness of police conduct was raised and determined by a finding against police.

2. Instances where an action for false imprisonment, arrest and battery, or malicious prosecution may be considered include:

    - Alleged breaches of bail:

        - where a person is arrested in relation to bail conditions that have previously been varied, and the purported breach is for conditions which are no longer in force;

        - where bail has been dispensed with and your client is arrested for a breach of bail;

        - where a breach of bail charge is laid when the matter has been finalised prior to the alleged breach, and therefore no bail conditions exist;

    - Arrest and detention of defendants – where a Magistrate has made a determination, based on the facts presented in evidence that the arrest and subsequent detention of the defendant was unlawful, and the consequential conduct by police was without power, including the use of force against and detention of your client. This may include:

        - where police did not have power to arrest without warrant pursuant to s.99 (3) of the *Law Enforcement Powers and Responsibilities Act (2001) ("LEPRA")*;

        - where the use of force by police purporting to exercise their powers to arrest and detain was excessive.

Trespass to the person

3. In cases such as these, your client may have grounds to found an action against police for trespass to their person. Interference, however slight, with a person's elementary civil right to security of his person and self - determination in relation to his own body, constitutes trespass of a person[1].

4. The three types of trespass to the person are:

    (a) Wrongful or false imprisonment;

    (b) Battery; and

    (c) Assault.

[1] Clerk & Lindsell on Torts p.677

Wrongful or false imprisonment

5. False imprisonment involves a wrongful, intentional act of a person causing total restraint on the validity of another person, for whatever period of time, by either actively causing the person's confinement or preventing that person from leaving the place that he or she is located.

6. False imprisonment is a tort of strict liability. Liability turns on an intention to detain. Good faith is not a defence[2]. The only defence to a claim of false imprisonment is that the imprisonment was pursuant to a lawful authority.

7. Once a claim of false imprisonment is made, the onus is on the defendant to establish lawful authority. The executive arm of government is in no special position: it must establish that the police officers acted pursuant to a common law or statutory power. The power of arrest or detention must be lawfully exercised for valid justification to arise. So in cases where the plaintiff asserts unlawful imprisonment, it is for the defendant to show on the civil standard, applying the Briginshaw v Briginshaw test, that the imprisonment was lawful.

8. Lawful authority for an arrest and detention may be found at common law or pursuant to a statutory power of arrest. An arrest is unlawful unless it is either conducted pursuant to a statutory authority or pursuant to a common law power of arrest.

9. Section 99 of LEPRA confers statutory powers on police to arrest without warrant. The provisions of s.99 of LEPRA are as follows:

> *"**99 Power of police officers to arrest without warrant***
>
> *(1) A police officer may, without a warrant, arrest a person if:*
>
> > *(a) the person is in the act of committing an offence under any Act or statutory instrument, or*
> >
> > *(b) the person has just committed any such offence, or*
> >
> > *(c) the person has committed a serious indictable offence for which the person has not been tried.*
>
> *(2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.*
>
> *(3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:*
>
> > *(a) to ensure the appearance of the person before a court in respect of the offence,*
> >
> > *(b) to prevent a repetition or continuation of the offence or the commission of another offence,*
> >
> > *(c) to prevent the concealment, loss or destruction of evidence relating to the offence,*

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2 *Ruddick v Taylor* [2003] NSWCA 262 at [4]

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

(4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law."

10. Section 99 of LEPRA both reflects and enlarges the common law principles of arrest, as did its predecessor s.352 *Crimes Act 1900 (NSW)*[3].

11. Section 4 of LEPRA imports the common law powers of the police to deal with breaches of the police:

"4 Relationship to common law and other matters

(1) Unless this Act otherwise provides expressly or by implication, this Act does not limit:

(a) the functions, obligations and liabilities that a police officer has as a constable at common law, or

(b) the functions that a police officer may lawfully exercise, whether under an Act or any other law as an individual (otherwise than as a police officer) including, for example, powers for protecting property.

(2) Without limiting subsection (1) and subject to section 9, nothing in this Act affects the powers conferred by the common law on police officers to deal with breaches of the peace."

12. There is no power to arrest (either under statute or at common law) for the purposes of questioning[4] or for the sole purpose of investigation[5].

13. So the only common law basis for an arrest which is not incorporated within s.99 of LEPRA is the common law power to arrest or restrain during an occurring or imminent breach of the peace. A breach of the peace occurs where *"harm is done or is likely to be done to a person or in his presence to his property or where a person is in fear of being so harmed through an assault, affray, riot, unlawful assembly or other disturbance"*[6]. A person using a common law power to arrest, including a police officer, must reasonably anticipate an imminent breach of the peace. It must be a real and not a remote possibility[7].

Battery & Assault

14. Cases involving an unlawful imprisonment by police will often coincide with the commission of an assault or battery.

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3 *Lippel v Haines* (1989) 18 NSWLR 620 at 635
4 *R v Bathgate* (1944) 46 SR(NSW) 281
5 *Zarvinos v NSW* (2004) 62 NSWLR 58 at [37]
6 *R v Howell* [1982] QB 416
7 *Piddington v Bates* [1961] 1 WLR 162

15. The tort of battery is constituted by the intentional act of a person directly causing harmful or offensive physical contact with the person of another. The relevant intention is the intention to make contact with the body of the plaintiff not to do the plaintiff an injury.

16. An assault consists of an intentional overt act which creates in another person an apprehension of imminent, harmful or offensive physical contact.

17. The two torts of battery and assault are usually committed in close succession, but they are clearly separate torts. These torts relate to the apprehension of unlawful force in the mind of the plaintiff or the use of unlawful force against the plaintiff.

18. Section 231 of LEPRA provides for the lawful application of reasonable force to effect an arrest or prevent an escape:

> *"**231 Use of force in making an arrest***
>
> *A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest."*

19. Section 231 of LEPRA reflects the common law[8]. The New South Wales Court of Appeal has accepted three decisions reflecting the common law principles concerning the lawful use of force during an arrest[9]:

(a) The police officer may use whatever force as is reasonably necessary to effect the arrest, or put another way, force which is necessary in the circumstances of the arrest[10];

(b) It is the duty of the police officer to ensure that the person to be arrested does not commit any further crime or escape, and so the likelihood that the person would do so unless prevented is relevant to the matter of what is reasonable in the circumstances[11]; and

(c) In evaluating the police conduct, the matter must be judged by reference to the pressure of the events in the agony of the moment, not by reference to hindsight. It is unfair to sit back in the comparatively calm and leisurely atmosphere of the Courtroom and make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances[12].

20. LEPRA at s.201 provides safeguards to be applied in the exercise of powers by police under the Police Powers legislation. They include the use of the power to search or arrest the person. Section 201 of LEPRA provides:

> "**201 Supplying police officer's details and giving warnings**
>
> *(1) A police officer must provide the person subject to the exercise of a power referred to in subsection (3) with the following:*
>
> *(a) evidence that the police officer is a police officer (unless the police officer is in uniform),*

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8 *Pringle v Everingham* [2006] NSWCA 195 at [67]
9 *Woodley v Boyd* [2001] NSWCA35 (2 March 2001)
10 Wiltshire v Barrett [1966] 1 QB 312
11 Lindley v Rutter [1981] QB 128
12 *McIntosh v Webster* (1980) 43 FLR 112

(b) the name of the police officer and his or her place of duty,

(c) the reason for the exercise of the power.

(2) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)):

(a) if it is practicable to do so, before or at the time of exercising the power, or

(b) if it is not practicable to do so before or at that time, as soon as is reasonably practicable after exercising the power.

(2A) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (g), (i) or (j) before exercising the power, except as otherwise provided by subsection (2B).

(2B) If a police officer is exercising a power to give a direction to a person (as referred to in subsection (3) (i)) by giving the direction to a group of 2 or more persons, the police officer must comply with subsection (1) in relation to the power:

(a) if it is practicable to do so, before or at the time of exercising the power, or

(b) if it is not practicable to do so, as soon as is reasonably practicable after exercising the power.

(2C) If a police officer exercises a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person the subject of the request or direction with:

(a) a warning that the person is required by law to comply with the request or direction (unless the person has already complied or is in the process of complying), and

(b) if the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply by the person is an offence, a warning that the failure to comply with the request or direction is an offence.

(3) This section applies to the exercise of the following powers (whether or not conferred by or under this Act):

(a) a power to search or arrest a person,

(b) a power to search a vehicle, vessel or aircraft,

(c) a power to enter premises (not being a public place),

(d) a power to search premises (not being a public place),

(e) a power to seize any property,

(f) a power to stop or detain a person (other than a power to detain a person under Part 16) or a vehicle, vessel or aircraft,

(g) a power to request a person to disclose his or her identity or the identity of another person,

(h) a power to establish a crime scene at premises (not being a public place),

(i) a power to give a direction to a person,

(j) a power under section 21A to request a person to open his or her mouth or shake or move his or her hair,

(k) a power under section 26 to request a person to submit to a frisk search or to produce a dangerous implement or metallic object..."

21. Section 201 of LEPRA may render the outset of an arrest or search or an exercise of other police powers improper or unlawful. It might also cause the police officer to be acting outside of the execution of their duties as required as an element of many offences against police, (for example, assaulting a police officer or resisting a police officer during an arrest per s.58 *Crimes Act*).

22. Failure to comply with the safeguards under s.201 may also render the subsequent or consequential events post-arrest inadmissible pursuant to the court's discretion to exclude the evidence pursuant to s.138 of the Evidence Act. But it does not necessarily follow that a failure to comply with s.201 renders all subsequent police action unlawful.

The tort of malicious prosecution

23. The elements of the tort of malicious prosecution were most recently addressed by six members of the High Court in *A v New South Wales*[13]. The following elements need to be established:

    (i) That proceedings of the kind to which the tort applies (generally criminal proceedings) were initiated against the plaintiff by the defendant;

    (ii) That the proceedings terminated in favour of the plaintiff;

    (iii) That the defendant, in initiating or maintaining the proceedings acted maliciously; and

    (iv) That the defendant acted without reasonable and probable cause[14].

24. The Court of Appeal of New South Wales in *State of New South Wales v Landini* [2010] NSWCA 157 (9 July 2010) added a further element to the list of elements identified by the High Court in *A v New South Wales*, being proof of damage[15].

25. The first two of the above elements are rarely in issue. Nevertheless, as pointed out by the High Court in *A v New South Wales*, the identification of the appropriate defendant in a case of malicious prosecution is not always straightforward. The High Court referred to JG Fleming *The Law of Torts* (9th ed, 1998), at p 676 where the author said "To incur liability, the defendant must play an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion".

26. If a prosecution relies on facts solely within a complainant's knowledge, the complainant could be sued for malicious prosecution, as opposed to suing the person who commences the prosecution. The test is whether a complainant "in substance procured the prosecution": *Martin v Watson*[16]. In *Martin v Watson*, the police officer to whom the complaint was made had no way of testing the truthfulness of the accusation.

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[13] (2007) 230 CLR 500
[14] *A v NSW* at p 502-503
[15] Per McFarlan JA at [19] citing *Davis v Gell* (1924) 35 CLR 275 at 284, 285 per Isaacs ACJ and *Smith v Commonwealth Life Assurance Society Limited* (1935) 35 SR (NSW) 552 at 557 per Jordan CJ.
[16] [1996] AC 74 at 89

27. As a practical matter, an action for malicious prosecution is unlikely to be brought against a complainant who will not have the financial means to satisfy a judgment in favour of the plaintiff. However, in cases where a prosecution solely depends on the truthfulness of a complainant and the complainant is proven to have made a false allegation, it would be forensically much easier to establish the third and fourth elements identified by the High Court in *A v New South Wales*. A case against an actual complainant upon whose evidence a prosecution is based is obviously more attractive if the complainant is likely to be able to satisfy a judgment.

28. To constitute malice, the dominant purpose in bringing the proceedings must be a purpose other than the proper invocation of the criminal law[17]. The improper purpose must be the sole or dominant purpose actuating the prosecutor[18]. Examples of *other* purposes include: to stop a civil action brought by an accused against a prosecutor[19], or a case involving 'personal animus'. There are undoubtedly more examples of improper purposes. The difficulty lies in proving the improper purpose.

29. In relation to the element of acting without reasonable and probable cause, the High Court in *A v New South Wales* said:

> *There are three critical points. First, it is the negative proposition that must be established: more probably than not the defendant prosecutor acted without reasonable and probable cause. Secondly, that proposition may be established in either or both of two ways: the defendant prosecutor did not "honestly believe" the case that was instituted or maintained, or the defendant prosecutor had no sufficient basis for such an honest belief. The third point is that the critical question presented by this element of the tort is: what does the plaintiff demonstrate about what the defendant prosecutor made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution? That is, when the plaintiff asserts that the defendant acted without reasonable and probable cause, what exactly is the content of that assertion?*[20]

30. Where a prosecutor is also the person upon whose evidence the allegation in a charge is based, as in the case of, for example, resisting an officer in the execution of his or her duty where the officer allegedly resisted is also the prosecutor, it is suggested that an absence of reasonable and probable cause would readily be established if, for example, the police officer's evidence about the plaintiff resisting is shown to be false.

Is the District or Supreme Court in civil proceedings bound by the Magistrate's findings?

31. A defendant in civil proceedings may seek to argue in their defence that the police conduct was lawful notwithstanding the judgement and findings by the learned Magistrate. This may be met in some instances by a plea of issue estoppel in reply. This essentially means arguing that the issue has already been determined in other proceedings.

32. The question of whether the doctrine of issue estoppel applies in civil proceedings regarding the findings of fact by a Magistrate in the Local Court having heard the criminal matter is unsettled.

33. In *Blair v Curran*[21], Dixon J said:

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[17] *A v New South Wales* at 531 citing *Gibbs v Rea* [1998] AC 786 at 804
[18] *A v New South Wales* at 531 citing *Trowbridge v Hardy* (1955) 94 CLR 147 at 162 per Kitto J
[19] As in *Springett v London and South-Western Bank* (1885) 1 TLR 611)
[20] at [77], p 527
[21] (1939) 62 CLR 464

"A judicial determination directly involving an issue of fact or law discloses once and for all the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppels covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is a money sum to be recovered, or the doing of an act be commanded or be restrained, or that rights be declared. The distinction between res judicata and issue estoppels is that in the first, the very right or course of action claimed or put in suit has, in the formal proceedings, passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied, the existence of which is a matter necessarily decided by the prior judgment, decree or order.

Nothing but what is legally indispensible to the conclusion is thus finally closed or precluded. In matters of fact, the issue estoppel is confined to those ultimate facts from which the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a claim or right, which in point of law depends upon a number of ingredients or ultimate facts, the absence of any one of which would be enough to defeat the claim, the estoppels covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppels confined to the final legal conclusion expressed in the judgment, decree or order … the judicial determination concludes not merely as to the point decided but as to the matter which it was necessary to decide, and was actually decided as the groundwork of the decision itself, although not then directly the point of issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is to necessarily assert that the former decision was erroneous."

In the phraseology of Lord Shaw, "a fact fundamental to the decision arrived at" in the former proceedings and "the legal quality of the fact" must be taken as finally and conclusively established (Hoystead v Commissioner of Taxation). But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.

The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision or judgment, decree or order or necessarily involved in it as its legal justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment, decree or order. ..."

34. In Moussa v NSW[22], Ms Moussa alleged that she was wrongfully imprisoned and maliciously prosecuted without reasonable and probable cause by officers of the New South Wales Police Service. In this case, Harrison AsJ dealt with the authorities relating to issue estoppel in circumstances where a District Court judge, on appeal, quashed convictions of the Local Court and made certain findings in relation to a cost application in awarding costs to the appellant.

35. The District Court judge awarded costs on the basis that the prosecutor had (pursuant to s.70 of the *Crimes (Appeal and Review) Act),* unreasonably failed to investigate, or to

[22] [2010] NSWSC 528

investigate properly, any relevant matter that the prosecutor was or ought to have reasonably been aware of, that suggested that the appellant in the circumstances, might not be guilty or that the proceedings should not have been brought.

36. Harrison AsJ was of the view that the findings by the District Court judge in relation to costs, having earlier quashed the convictions, were unlikely to establish an issue estoppel, notwithstanding that they covered the subject area of whether there was reasonable and probable cause in relation to the prosecution. Harrison AsJ, however, found that Ms Moussa was still arguably entitled to raise an issue estoppel on the basis that the costs order followed findings from the earlier decision quashing the convictions, and so do not solely relate to the matters determined on costs.

37. The potential impediments to the application of issue estoppel include the different standard of proof in civil proceedings and also the difference in identity between the parties in civil and criminal proceedings. In the Local court, the police prosecutor and the party bringing the summary prosecution is the informant, whereas the party sued in civil proceedings is the State of New South Wales, on the basis that the state is vicariously liable for the acts of the individual police officers, including the informant. In the circumstances of this case, Harrison AsJ was of the view that although an issue estoppel was unlikely, it could not be said to be hopeless. Consequently, leave to amend the reply arguing issue estoppel was permitted.

Damages for malicious prosecution and trespass to the person

38. Damages in tort are intended to put a plaintiff, so far as money can, in a position that he or she would have been in had it not have been for the tort committed[23]. The main exception to this principle is a case in which exemplary damages are awarded, since exemplary damages are designed to punish and deter.

39. An important issue to address in assessing damages for torts coming under the banner of trespass to person is to ask whether the provisions of the *Civil Liability Act* 2002 (NSW) (CLA) apply. Section 3B(1)(a) of the CLA provides:

> **3B Civil liability excluded from Act**
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> (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
>
> (a) civil liability of a person in respect of an **intentional act that is done by the person with intent to cause injury or death** or that is sexual assault or other sexual misconduct committed by the person-the whole Act except:
>
> (i) section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)), and
>
> (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death, and
>
> (iii) Part 2A (Special provisions for offenders in custody),

40. According to s. 3B(1)(a) of the CLA, the damages provisions in the CLA will not apply in respect of an intentional act that is done with *intent to cause injury or death*. The learned author of the *Annotated Civil Liability Act 2002 (NSW)* (1st ed, 2004) at p 8, comments that the Act does not apply in relation to intentional torts such as trespass to the person, but

[23] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *Haines v Bendall* (1991) 172 CLR 60 at 63 per Mason CJ, Dawson, Toohey and Gaudron JJ

probably not an assault[24] or false imprisonment because these torts do not require proof of an intent to cause injury or death.

41. Claims which are captured by the CLA will have their damages assessed in accordance with certain provisions of it. For example, the assessment of damages for non-economic loss (general damages, i.e. for pain and suffering) is governed by s. 16 of the CLA. The maximum amount that may be awarded for non-economic loss is currently $500,500. Damages for non-economic loss are worked out by establishing the severity of the plaintiff's non-economic loss as a proportion of a most extreme case. A case involving quadriplegia is normally the benchmark for a most extreme case[25]. If the severity of a plaintiff's non-economic loss is less than 15% of a most extreme case, the plaintiff is not entitled to an award for this head of damage.

42. Provided the threshold is met (i.e. 15% of a most extreme case), damages for non-economic loss are calculated by reference to the table in s. 16. A plaintiff who is assessed to be 15% of a most extreme case is entitled to 1% of the statutory maximum $500,500 (i.e. $5,005).

43. There are other sections of the CLA that affect the assessment of other heads of damage, such as damages for past or future economic loss and damages for gratuitous attendant care services. These heads of damage are seldom awarded in relation to those causes of action falling under the banner of trespass to person.

44. In an action for malicious prosecution, compensatory damages are for the injury to a plaintiff's reputation, injury to his or her feelings, that is for the indignity, humiliation and disgrace caused by the fact of the criminal proceedings being brought. Financial loss can also be claimed, for example, as a result of a plaintiff being dismissed from his or her employment and the expenses incurred in defeating the prosecution[26].

45. Compensatory damages in an action for false imprisonment "… are generally awarded not for a pecuniary loss but for a loss of dignity, mental suffering, disgrace and humiliation"[27]. Nevertheless, pecuniary loss in some cases of false imprisonment might be quite substantial where, for example, a person is receiving a good salary and the extent of the detention is quite lengthy or the detention results in a person losing his or her job.

46. An assault or battery is likely to have a physical or psychological impact on a person. Compensatory damages would cover these types of harm, in addition to covering the injury to a person's feelings.

47. Aggravated damages are:

> *"given by way of compensation for injury to the plaintiff, though frequently intangible, resulting from the circumstances and manner of the defendant's wrongdoing."*[28]

48. Being compensatory in nature, aggravated damages are awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like[29].

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[24] Often used interchangeably with battery, though assault and battery are distinct torts.
[25] e.g. as in the case of *Southgate v Waterford* (1990) 21 NSWLR 427)
[26] *McDonald v Coles Myer Limited* (1995) ATR 81 – 361 cited in *Houda v The State of New South Wales* [2005] NSWSC 1053 (unreported, 25 October 2005)
[27] *Myer Stores Limited v Soo* [1991] 2 VR 597 at 603 per Murphy J cited in *Williamson v State of New South Wales* [2010] NSWSC 229 (unreported, 30 March 2010)
[28] *Uren v John Fairfax & Sons Pty Limited* [1966] 117 CLR 118 at 129 – 130 per Taylor J cited in *New South Wales v Ibbett* (2006) 229 CLR 638

49. How does one therefore calculate aggravated damages? If aggravated damages are compensatory in nature, will a double counting of damages result? In *New South Wales v Riley*[30] Hodgson JA came up with an approach to assessing aggravated damages that is designed to avoid double counting. The approach is found in the following part of his Honour's judgment (at 528 and 529):

> *131 In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt damages neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.*
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> *...*
>
> *133 This means that, if a court has awarded damages for hurt feelings as part of ordinary compensatory damages, the award of aggravated damages must only be for the difference justified by this approach, that is, an award of so much as is necessary to bring the damages up to the upper end of the available range. The approach also means, I think, that aggravated damages can be a matter of degree: the worse the defendant's conduct, the further from the centre of the range and towards the upper limit of the range the court may be justified in going.*

50. Exemplary damages are awarded "to 'punish and deter' the wrongdoer, though in many cases the same set of circumstances might well justify either an award of exemplary or aggravated damages."[31] It is necessary to assess the heads of compensatory damages, including aggravated damages, before determining whether a further award should be made by way of exemplary damages[32].

51. Are aggravated and exemplary damages available in a case where the direct physical interference to the plaintiff has been caused by the negligence or carelessness of the defendant? A plaintiff may generally bring an action in trespass where there has been direct physical interference to the plaintiff brought about by the negligence or carelessness of the defendant[33]. It is suggested that an action framed in this way would not be captured by s. 3B(1)(a) of the CLA with the result being that s. 21 of the CLA will apply. Section 21 of the CLA provides:

> *In an action for the award of personal injury damages where the act or omission that caused the injury or death was **negligence**, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.*

Limitation periods

52. The application of the *Limitation Act* 1969 (NSW) in the context of an action for assault and false imprisonment was recently considered by the Court of Appeal of New South Wales in

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[29] *Lamb v Cotogno* (1987) 164 CLR 1 at 8
[30] (2003) 57 NSWLR 496
[31] *Uren v John Fairfax & Sons Pty Limited* and *New South Wales v Ibbett*
[32] *New South Wales v Ibbett* at 647
[33] *Williams v Milotin* (1957) 97 CLR 465; *Australian Torts Reporter*, vol 2, CCH Australia Limited, at [46 – 740]

State of New South Wales v Steven Charles Radford[34]. The plaintiff (respondent in the Court of Appeal) alleged that on 15 December 1999 he was assaulted and falsely imprisoned by a number of police officers who had attended his residence in order to execute a lawful search warrant. On 14 December 2005 (i.e. one day short of six years after his arrest) the respondent commenced proceedings in the District Court alleging assault and false imprisonment. The particulars of loss and damage in the statement of claim identified physical injuries suffered by the plaintiff as well as psychiatric disabilities. No claim was then made for aggravated or exemplary damages.

53. The plaintiff filed a second amended statement of claim. In response, the State filed a motion seeking to strike out or dismiss the pleading on the ground that it was statute barred by s. 18(2) of the *Limitation Act*. The plaintiff filed another amended statement of claim on 26 April 2007, which was met by an amended motion to strike out. The plaintiff filed yet another amended statement of claim on 2 June 2008. Then on 26 June 2009, the plaintiff filed a motion seeking leave to file a further amended statement of claim (i.e. a fourth amended statement of claim).

54. The proposed fourth amended statement of claim abandoned any claim to compensatory damages. Unspecified aggravated and exemplary damages were claimed for assault and false imprisonment. In relation to the plaintiff's attempt to file a fourth amended statement of claim, the Court of Appeal observed that it was "clear enough that the 4th ASC omitted the claim for damages for physical injuries in an attempt to overcome the difficulty that s. 18(2) of the *Limitation Act* imposes a three year limitation period for a cause of action founded on breach of duty for damages for personal injury".

55. The primary judge granted the plaintiff leave to file a further amended statement of claim and dismissed the State's motion. The primary judge identified two issues requiring resolution. The first was whether a claim for exemplary and aggravated damages amounted to a cause of action falling within section 18A of the *Limitation Act*. If it did, the relief sought in the proposed amended statement of claim would have been barred by s. 18A(2) at the time the proceedings were commenced and no order could be made under section 65(2)(c) of the *Civil Procedure Act* 2005 (NSW) to add new causes of action. The second issued concerned whether the State would sustain prejudice if leave were granted, in the event that the claim was not captured by s. 18A of the *Limitation Act.*

56. The Court determined that leave to appeal should be granted and the appeal allowed because the primary judge had erred in not addressing a significant argument that was put to him as to why the plaintiff was not entitled to rely on s. 65(2)(c) of the *Civil Procedure Act* to add a cause of action founded on false imprisonment. It was therefore not necessary for the Court to decide whether the limitation period applicable to the plaintiff's false imprisonment cause of action was three years (s. 18A(2) of the *Limitation Act*) or six years (s. 14(1)(b) of the *Limitation Act*). Nevertheless, the Court expressed an "opinion" on this issue.

57. The critical issue for the Court was whether the plaintiff's claim based on the alleged assault was a cause of action "*for damages for personal injury*". The Court referred to the definition of "*personal injury*" in s. 11(1) of the *Limitation Act*. "*Personal injury*" is defined by s. 11(1) to include "*any impairment of the physical or mental condition of a person*". The Court held that the action based on assault in which the plaintiff claimed aggravated damages for injury to feelings is properly characterised as an action "*for damages for personal injury*". It was the Court's opinion that the allegations of emotional upset, anxiety, distress and humiliation by virtue of the alleged assault (and the unlawful imprisonment) characterised the claim as one for damages for impairment of the plaintiff's mental condition. Since the definition of "*personal injury*" in s. 11(1) of the *Limitation Act* included

[34] [2010] NSWCA 276 (unreported, 28 October 2010)

"*any impairment of the physical or mental condition of a person*", it was said that the plaintiff's claim was for damages for personal injury.

58. Importantly, the Court said that it "may" be that an action in assault seeking only exemplary damages (assuming that a claim can be brought for exemplary damages independently of any claim for compensatory damages) is not a cause of action for the purposes of s. 18A of the *Limitation Act*. This is because exemplary damages do not compensate the plaintiff for any injury he or she may have sustained. They are designed to punish and deter the defendant.

59. Exemplary damages are assessed after compensatory and aggravated damages have been assessed. This is no doubt because an award of exemplary damages cannot be made unless a court first determines that the award of aggravated damages is insufficient to punish and deter[35]. If aggravated and compensatory damages are not claimed, it would be difficult to conceive of a case in which exemplary damages should not be awarded where a court concludes that a defendant's conduct shows a conscious and contumelious disregard for a plaintiff's rights.

60. Missing the three year limitation period provided for by section 18A(2) of the *Limitation Act* may not be the death knell for an action for trespass to the person where only exemplary damages are claimed.

Costs

61. In *Jayson Williamson v State of New South Wales*[36], the State contended that the plaintiff's action in the District Court for assault, unlawful arrest and false imprisonment was regulated by the cost capping provisions of s. 338 of the *Legal Profession Act* 2004. Section 338 caps costs at 20% of the amount recovered or $10,000, whichever is greater, if the amount recovered on a claim for *personal injury damages* does not exceed $100,000. The plaintiff filed a summons in the Supreme Court seeking a declaration that the costs in his District Court proceedings were not regulated by s. 338. The plaintiff had previously settled his case on the basis that the State pay his costs as agreed or assessed. The amount of the settlement was not disclosed in the decision of Hall J, but the settlement amount was obviously $100,000 or less and the State must have taken issue with the plaintiff's bill of costs.

62. Section 337(1) of the *Legal Profession Act* defines "plaintiff" as a person who makes or is entitled to make a claim for personal injury damages. The section also provides that "personal injury damages" has the same meaning as in Part 2 of the *Civil Liability Act* 2002. Section 11 of the CLA defines "personal injury damages" as damages that relate to the death of or injury to a person. The same section defines "injury" as including, inter alia, an impairment of a person's physical or mental condition. Section 11A of the CLA provides that Part 2 applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of Part 2 by s. 3B. Part 2 relates to the awarding of damages.

63. Hall J reasoned that the plaintiff's allegations of assault constituted intentional acts that fell within s. 3B(1)(a) of the CLA and that "damages" in a case of this type are not "personal injury damages" to which Part 2 applies. The costs capping provisions therefore did not apply to the allegations of assault.

64. In relation to the causes of action for false imprisonment and unlawful arrest, his Honour said that these claims were not, in their nature, claims for personal injury. His Honour

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[35] *State of New South Wales v Stephen Charles Radford* at [126] and H Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002), at [1.7.6]

[36] [2010] NSWSC 229 (unreported, 30 March 2010)

noted that a claim of false imprisonment is actionable, per se, without proof of damage[37]. His Honour said that the fact that the plaintiff claimed damages for loss of dignity, mental suffering etc did not thereby convert the proceedings in respect of the tort of false imprisonment into a claim for person injury.

65. The decision in *Williamson v State of New South Wales* does not sit too well with the Court of Appeal's decision in *State of New South Wales v Stephen Charles Radford*. In the latter case it was held that a claim for emotional upset and anxiety, distress and humiliation by virtue of an assault and unlawful imprisonment was a claim for damages for impairment of the plaintiff's mental condition, with the consequence that the claim was properly characterised as one for damages for personal injury[38]. It appears that the Court of Appeal in *Radford* was not taken to the decision in *Williamson*.

Tips for setting up your client's action against police

66. The following are some ideas to keep in mind when you've formed the view that your client may have an action against police:

(i) For an unlawful imprisonment claim, custody management records are extremely useful – the record constitutes objective evidence of your client's time in custody and includes their state of health and wellbeing;

(ii) In matters where your client is arrested, detained and brought before a Court and is released by a Magistrate, make a contemporaneous note of the time of the order for release, and the actual release of the client. It is also helpful to note the time for the record, such that the time of the order for release is transcribed;

(iii) Obtain a transcript of the decision and proceedings in relation to your client's case for use in determining the nature and course of civil proceedings;

(iv) In circumstances where you have formed the view that not only might your client be acquitted, but also that they may have subsequent action against police, it is helpful if you seek findings from the Magistrate in relation to the propriety and lawfulness of certain actions by police, for example arrest – such findings often assist in possible settlement of subsequent civil proceedings, or an issue estoppel may be raised in reply to a defence.

(v) A contemporaneous statement from your client about the circumstances of their arrest and detention and the impact that it has had on them and their livelihood can be useful in assessing damages;

(vi) Obviously preserve the brief of evidence and any objective evidence such as CCTV footage, DVDs of ERSIPS.

(vii) Advise your client of the limitation period.

Peter O'Brien, Solicitor

Adrian Canceri, Barrister

[37] citing *Watson v Marshall & Cade* (1971) 124 CLR 621
[38] at [116]