Actions Against Police

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I INTRODUCTION

1. In accordance with the principles established by the United Nations, the recognition of inherent dignity and of the equal and inalienable rights of all humans has been proclaimed as the foundation of freedom, justice, and peace.

2. Australia's obligations under Article 9 of the International Covenant on Civil and Political Rights, ratified by Australia in 1980, are as follows:

> **Article 9**
>
> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
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> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement.
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[1]

3. Intentional torts, to the extent they are covered in this paper, provide remedy to those who have suffered loss of a fundamental right at the hands of the state or institutions.

II TRESPASS TO THE PERSON

4. The tort of 'trespass' is '*actionable per se',* meaning a plaintiff does not need to prove they have suffered damage or loss because of the defendant's actions. However, if the plaintiff can prove the elements of trespass but cannot prove any damage or loss, the plaintiff would likely be awarded nominal damages by the court. In contrast, negligence for example, is an '*action on the case'*. This carries damage as the core of action. In the latter scenario, a plaintiff must prove a defendant's act or omission had caused some loss or damage to succeed.

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[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

5. In Australian law, it is the directness of the defendant's actions, not the intention to cause damage, which sufficiently amounts to a trespass against the person.

III BATTERY

6. Colloquially, a 'battery' is sometimes described as an 'assault.' However, there is a distinction between the two torts: an assault simply creates an imminent fear of unlawful contact and does not require physical contact, whereas a battery requires the application of physical contact. It must therefore be noted that the torts of 'battery' and 'assault' are often present together as conduct complained of constitutes both an assault and a battery.

7. 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 cause the plaintiff an injury.

8. The elements of a battery are as follows:

    a. An intentional or negligent act by the defendant;

    b. That immediately or directly caused physical contact with the plaintiff and;

    c. Such contact was offensive, in that it was likely to cause injury or affront.

9. To better understand the definition of 'battery', we can look at the Victorian case of *Carter v Walker* (2010) 32 VR. In this case, two police officers responded to a phone call regarding a domestic dispute between Donald Walker and his girlfriend. A physical altercation ensued involving Donald Walker, the police officers, and his mother who lived in an adjoining unit. As a result, both Donald Walker and his mother were injured, with the mother sustaining a dislocated shoulder. Donald's brother Marcus Walker (the third plaintiff) arrived on the scene, saw his injured brother and mother and suffered from shock.

10. The Supreme Court of Victoria ruled that the third plaintiff Mr Walker had not been directly harmed by the actions of the defendants, being the officers, nor did he have any physical contact with them. Nonetheless, the case itself holds a rather useful summary of the definition of what can constitute a 'battery':

> "…it is desirable to state what we understand the law with respect to battery otherwise to be in Australia:
>
> (1) it is a species of trespass to the person;
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> (2) it is a so-called "intentional" tort, but care needs to be taken in considering the intention which is relevant;
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> (3) as a starting point, it involves the defendant doing an act which causes physical contact with the plaintiff;
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> (4) the act must be voluntary, that is, directed by the defendant's conscious mind;
>
> (5) contrary to the submission for Marcus Walker, the act must have a direct rather than a consequential impact upon the plaintiff (of this, more later);
>
> (6) it does not require that the defendant intend the plaintiff any harm, or that the plaintiff suffer harm in fact. It is actionable per se;

(7) if the act is voluntary, and the defendant "meant to do it" in the sense of meaning to contact the plaintiff, it will be relevantly intentional;

(8) it may be that an act should also be considered intentional if it is substantially certain that the act will result in contact with the plaintiff; and perhaps also if the act is reckless with respect to contact with the plaintiff. That may be the conceptual justification for the decisions in James v Campbell and Ball v Axtens ;

(9) battery may be contrasted, historically, with two other forms of action: (1) action on the case; and (2) negligent trespass to the person (an early instance of which was Leame v Bray). A feature of the former was that it accommodated consequential rather than direct interference by the defendant upon the plaintiff. A feature of the latter was that it maintained the requirement of directness, but that it accommodated negligent rather than intentional acts in the sense that the defendant's act, though intended, was careless with respect to contact with the plaintiff;

(10) in England, it appears that what used to be called negligent trespass is now wholly subsumed within the tort of negligence. It matters not that the interference is direct: Letang v Cooper. The law in Australia has diverged at that point: Williams v Milotin . But the divergence is not complete. Road traffic accident claims are a special category of case; and

(11) once battery is established, immediate harm and consequential damage are compensable. The boundary of entitlement is set by the conception of "natural and probable consequence" (or "result"). That appears to be a common control mechanism for intentional torts. See, for instance, Palmer Bruyn & Parker Pty Ltd v Parsons , a case of alleged injurious falsehood. The same limiting conception was referred to by Spigelman CJ in TCN Channel Nine Pty Ltd v Anning (a case of trespass to land) and by his Honour in Nationwide News Pty Ltd v Naidu (a case pleaded in negligence and in the Wilkinson tort). It is not a test of reasonable foreseeability, even though the two tests might yield the same result in some, or even many, cases. (citations omitted)[2]"

11. In relation to the doubt expressed in the matter of intention, Leeming JA said in *Croucher v Cachia*,[3] that:

> I should say that the doubt expressed in the proposition in *Carter v Walker* is sourced from the equivocation in F Trindade et al, The Law of Torts in Australia (4th ed, 2007, Oxford University Press) at 41 – 43. Much of the doubt there expressed derives from the view of Professor Fleming that battery is reserved for intentional conduct. As I have already indicated, that view is not sound, at least as a matter of Australian law: binding authority holds that a reckless or even a negligent defendant may be found to have committed battery.[4]

12. So although battery is an intentional tort, a battery may also occur when the defendant is negligent. It was in those circumstances that a unanimous High Court said in *Williams v Milotin* (1957) 97 CLR 465 at 474 that "[i]it happens in this case that the actual facts will or may fulfil the requirements of each cause of action" (i.e., battery and negligence).[5]

13. The onus is on the plaintiff to prove that there has been some offensive physical contact by the defendant, or that offensive physical contact has occurred from some other source as a result of the actions of the defendant. Therefore, the plaintiff bears that onus to the standar laid down in *Briginshaw v Briginshaw* ('*Briginshaw'*) [1938] HCA 34.[6]

14. In actions against the Police, there are two main ways in which a battery is brought about. The first, is that an arrest on the whole was unlawful and therefore any subsequent battery which would otherwise be lawful is no longer lawful. The

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[2] CARTER and Another v WALKER and Another (2010) 32 VR 1, [215].

[3] [2016] NSWCA 132.

[4] Croucher v Cachia [2016] NSWCA 132, [84].

[5] *Williams v Milotin* (1957) 97 CLR 465, [474].

[6] *Briginshaw v Briginshaw* ('*Briginshaw'*) [1938] HCA 34.

second is where an officer goes above and beyond the lawful application of physical force as a police officer. This is often called excessive force and even if the arrest itself was perfectly legal, the force used could constitute a battery.

15. In circumstances where a battery is alleged in the context of the excessive use of force by police, the onus is on the defendant to establish justification for the use of force on the balance of probabilities to the *Briginshaw* standard.[7]

16. The following comments from *New South Wales v Koumdjiev* [2005] NSWCA 247 at [61] are noted:

> In my opinion, it was open to the primary judge to find that the plaintiff was subjected to excessive force, even if the arrest had otherwise been lawful; and in particular, to find that the plaintiff was struck by the baton. I accept that this finding required application of the Briginshaw standard, but having regard to the injuries caused to the plaintiff, in particular a bruise consistent with being struck by a baton, and to the circumstance that one would not expect the two constables to have had great difficulty in subduing the plaintiff, and having regard to the primary judges' reason for not fully accepting their evidence, the findings he made were open.[8]

17. Similarly, if consent is raised, it is for the defendant to establish that the plaintiff consented to the contact.[9]

18. Once offensive physical contact has been established, the onus then shifts to the defendant to prove an absence of intent or negligence. Where a plaintiff was struck by a rock thrown by the defendant it was 'for the defendant who threw it to prove an absence of intent and negligence on his part'.[10]

A *EXAMPLES OF THE APPLICATION OF THE TORT OF BATTERY*

19. *Coffey v Queensland* [2012] QCA 368

19.1. When a prisoner was required to provide a DNA mouth swab sample, he refused and requested the opportunity to obtain legal advice. The police conducting the sampling requested corrective services to lay him down. However, he was then man-handled to the ground in such a way that his head was driven into the floor, knocking him unconscious and causing a gash above one eye. Hair samples were also taken from his head while he was unconscious. Battery was made out against corrective services officers and a police officer.

19.2. The trial judge found the appellant's actions were not violent or threatening, and he offered no passive resistance. At the highest, he tried to stay upright to avoid injury. What was done to him was "an ineptly executed and unsafe method of taking [him] to ground and from the outset exceeded the force that was reasonably necessary".

19.3. The Court observed that exemplary damages should be used to mark the Court's "strong disapproval" of the actions constituting the battery. The trial judge accepted that the officers had not meant to injure the appellant, but their combined application of force was intended and continuing. The impact of the appellant's head on the ground and the injury and unconsciousness caused by it were a foreseeable risk. The trial judge said:

> That in a room containing multiple police and Corrective Services Officers a handcuffed prisoner who did not behave violently could not be guided safely to lay on the floor speaks for itself. The exercise was carried out in a hurried, ill-

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[7] Ibid.

[8] *New South Wales v Koumdjiev* [2005] NSWCA 247, [61].

[9] *Secretary, Department of Health and community services v JWB* (Marion's case) [1992] HCA 15; 175 CLR 218 at 310-311; *Dean v Phung* [2012] NSECA 223, [59]-[60].

[10] *McHale v Watson* [1964] HCA 64; 111 CLR 284 at [9].

prepared and excessively forceful way without any proper regard for the safety of Mr Coffey. It warrants strong disapproval.[11]

20. *Australian Capital Territory v Crowley [2012] ACTCA 52*

20.1. *Australian Capital Territory v Crowley* helped establish the principle that police officers do not hold a duty of care to individuals, but rather the community. The more appropriate compensation for actions which may ordinarily fall under negligence, would be in intentional torts if applicable.

20.2. Jonathan Crowley was shot in the neck by a Senior Constable in the Australian Federal Police Force. Crowley was mentally ill at the time of shooting and was erratic and aggressive with police. The bullet shattered Mr Crowley's spinal column, leaving him a quadriplegic. Crowley sued both the AFP officer, another officer who fired capsicum spray and the Commonwealth of Australia. He also sued the ACT for the negligent acts and omissions of the ACT Mental Health Service. Mr Crowley was awarded $8m in damages at first instance.

20.3. The ACT and the Police appealed against the judgement, challenging the trial judge's finding that it owed Mr Crowley a duty of care, that it was in breach of such duty and that breach caused Mr Crowley injury. The ACT Court of Appeal allowed the appeal, finding in favour of the ACT, and the Police. First the court found that there was no duty of care owed to Mr Crowley by the police. The police obligation was to the public at large including the public that was clearly at risk from Mr Crowley's aggressive behaviour. The Court of Appeal also found there was no negligence by the mental health service. Although the health service had conducted an assessment the night before they were not in a doctor/patient relationship as they were not providing treatment to Mr Crowley.

21. *New South Wales v McMaster* [2015] NSWCA 228.

21.1. The plaintiff was the victim of a police shooting. Note that to the extent the claims were pleaded in negligence they were unsuccessful, as it was held that the police owed no duty of care to the plaintiff.

21.2. The trial judge did hold that the State was liable to McMaster as Constable Fanning's action in discharging his firearm and wounding the Plaintiff constituted a battery. The State did not challenge that the nature of the conduct involved in the shooting was a battery. However, it contended the legal principles and policy considerations determining the absence of a duty of care by police applied to protect it from liability of the intentional actions of police officers performed in the course of carrying out their policing duties.

21.3. The State contended that it would be incongruous if the position with respect to actions brought in negligence and actions brought in battery were different, and that the reasoning in *Crowley* applied, to the question of whether police officers should be liable to individual members of the public for conduct that would, were it not in the course of their duties, constitute battery. First, it submitted that the imposition of liability for battery, in circumstances in which the discharge of the officer's public duties required the commission of the battery, would be incoherent with the duties of a police officer, to which further reference is made below. Secondly, the State submitted that police officers should be excused from liability for batteries committed by them whilst preventing a breach of the peace, provided the police officer held an honest belief on reasonable grounds that the force was necessary to prevent the breach of peace.

21.4. The court at [32] noted:

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[11] Coffey v The State of Queensland & ors [2012] QSC 186, [103].

This submission rested on a formulation of the duties, powers and functions of police officers which, in the State's contention, in summary, are as follows:

(1) Police officers in New South Wales have all of the "*duties and powers of a constable at common law, and also any other duties and powers conferred on them by statute*"

(2) Officers have common law duties to investigate and prevent crime and to prevent or assist in preventing disturbances or breaches of the peace

(3) Officers are entitled to use such force as is reasonably necessary to prevent a breach of the peace

(4) *LEPRA,* s 230 also provides statutory protection to a police officer exercising police functions. That section provides:

> 230 Use of force generally by police officers.
>
> It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function."

(5) In evaluating the reasonableness of the use of force, "the matter must be judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight"

(6) A breach of the peace occurs when an act "either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done". It is likely that this definition is not exhaustive. (citations omitted).[12]

5. The Court did not accept that the actions of police were protected on the basis of, or by analogy to, the principles stated in *Crowley*, finding that the legislature, by the enactment of section 230, has spoken as to the circumstances in which a police officer's actions in exercising a function under *Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)*, or under any other Act or law, are lawful.

6. The Court however concluded that the police officer was acting in self-defence under section 52 of the *Civil Liability Act* 2005 (NSW), as the plaintiff has approached police holding a rod. Before concluding on the question of self-defence, it should be noted that a question was raised in the course of the hearing, albeit somewhat in passing, as to whether there is any difference between the test for self-defence at common law and that provided by section 52. The immediate answer to that question is that section 3A(1) of the *Civil Liability Act* provides that 'a provision of the Act that gives protection from civil liability does not limit protection from liability given by another provision or by another Act or law'.[13] Accordingly, the common law of self-defence remains, just as does, for example, the protection afforded to police officers by section 230 of *Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)* for the tort of battery. The Court also held that the defence of necessity was open and available to the police in the circumstances.

7. In relation to whether the police officers' actions were lawful pursuant to *section* 230 of *Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)* the Court said: *'*The legislature has expressly made lawful what would or may otherwise be contrary to law, whether criminal or civil. Relevantly for present purposes, section 230 makes lawful action that would otherwise constitute a battery. If the police officer's conduct satisfied the terms of section 230, there was no battery.*'*[14]

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[12] *New South Wales v McMaster* [2015] NSWCA 228, [32].

[13] *Civil Liability Act* 2005 (NSW), s3A(1).

[14] *New South Wales v McMaster* [2015] NSWCA 228, [230].

8. This construction of section 230 reflects the policy which underlies policing, policing powers and, for that matter, the rationale for the common law operational immunity. The Court observed that a police officer's duties are owed to the public at large and must be discharged even though there is a risk of injury to a suspect or even to an innocent bystander. The discharge of those duties must not be constrained by fear of liability.[15]

9. It is also relevant to bear in mind that although in a particular case self-defence may be available in response to an allegation of battery, or a charge of assault, 'the existence of a right of self-defence cannot be determined until after the fact': *Taikato* at 463. If police were constrained by a justification of their actions by reference to self-defence, policing duties would become so circumscribed as to be rendered ineffective in a significant way.[16]

10. The Court held that the police officers' actions were reasonably necessary and therefore lawful within the meaning of *section* 230. Lawful authorisation provides a complete defence to actions in trespass.[17]

22. Brighton v Traino [2019] NSWCA 168

22.1. The plaintiff was a patron in a bar in Cronulla with her male companion. The licensee asked his friend, Mr Richardson, to exclude the plaintiff's male companion. A scuffle occurred on the footpath. Mr Richardson was moving backwards towards the plaintiff; she raised her hands and held the back of his shirt. Richardson turned around and punched her in the face fracturing her jaw. The plaintiff sued in battery claiming damages, including for psychiatric injury. At trial the judge upheld the defence that Richardson had acted in self-defence under section 52 of the Civil Liability Act and was therefore protected from liability.[18]

22.2. The punch was deliberate and constituted an intentional act, a battery and an intentional tort within the meaning of section 3B of the *Civil Liability Act* 'an intentional act that is done by the person within intent to cause injury ...'.[19]

22.3. Section 3B(1)(a) provides one set of circumstances in which provisions of the *Civil Liability Act* do not apply. The non-applicable provisions are identified as 'the whole Act except ... Part 7 (Self-defence and recovery by criminals) ...'.[20] Part 7, Div 1, includes ss 52 and 53. Thus s 52, excluding civil liability for acts in self-defence, is engaged.

22.4. The criminal defence in Part 11, Division 3 of the *Crimes Act 1900* (NSW) may operate in circumstances where the defendant is responding to conduct which is "lawful". Section 52(1) of the *Civil Liability Act* requires that the conduct to which a defendant is responding be "unlawful" (to this extent the Court departed from McMaster above). The question was then whether the plaintiff's action in grabbing Richardson's back was unlawful. The court found:

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[15] *New South Wales v McMaster* [2015] NSWCA 228, [231].

[16] *New South Wales v McMaster* [2015] NSWCA 228, [232]

[17] *Halliday v Nevill* [1988] HCA 80; 155 CLR 1; *Coco v R* [1994] HCA 15; 179 CLR 427. [233]

[18] *Civil Liability Act (2005) NSW.*

[19] *Civil Liability Act (2005) NSW, s3B*.

[20] *Civil Liability Act (2005) NSW, s3B(1)(a)*.

A man throwing himself into a brawl and stepping back fast cannot be heard to complain of an affront to his personal integrity if he backs into a person who takes reasonable steps to stop him. The circumstances may not closely resemble the "ordinary conduct of daily life", but the solicitude of the law for the physical integrity of the individual will be muted in such a situation. What constitutes unacceptable conduct "must be considered in the context of the incident in dispute." The plaintiff's conduct was not unlawful. (citations omitted) [21]

22.5. The plaintiff was entitled to damages assessed according to general law principles, without regard to the constraints imposed by Part 2 of the *Civil Liability Act*. The Court accepted that the plaintiff had suffered chronic PTSD with co-morbid depression and anxiety connected with the event and her injury. General damages were assessed at $90,000 to $110,000. Aggravated damages were awarded because, although the purpose of an award of aggravated damages is compensatory, it is impossible to disregard the objective circumstances surrounding the act causing harm. The action was violent, deliberate and undertaken in circumstances where Mr Richardson must have known that he was striking a young woman of no malicious intent or physical ability to harm him, inexcusable. It was considered inappropriate to award exemplary damages as Richardson had been charged and convicted with recklessly causing grievous bodily harm and had consequently lost his job and security license. Ultimately, the plaintiff was awarded $187,734 as against Richardson.

22.6. For cases involving security guards, see *Smith v Cheeky Monkeys Restaurant* [2009] NSWDC 257, where a patron was kicked in the head by a security guard after the patron attempted to intervene and assist a friend who was being removed from the premises (respondent vicariously liable due to lack of training); *Zorom Enterprises Pty Ltd v Zabow* [2007] NSWCA 106, which involved an unprovoked attack by a security guard on patron outside a hotel and involved issues of vicarious liability*; And Wormald v Caftor Pty Ltd* [2012] ACTSC 97 where a patron was removed from a bar, excessive force was applied, and the patron was battered by bouncers.

23. *Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316*:

23.1. Sergeant Fede, whilst on duty came across the respondent, Wally Gray, behaving bizarrely. After making inquiries, she decided to apprehend him under section 22 of the *Mental Health Act 2007* (NSW) ('MHA'), on the grounds that he appeared to be mentally ill or mentally disturbed. He was taken to a mental health facility for the purposes of assessment. After being informed that he was to be kept for further observations and asked to take some sedatives to relax, Mr Gray ran towards the exit, shoulder-charging Ms Fede as he did so. While being subdued and handcuffed by other officers, he lunged towards Ms Fede biting her right inner thigh through her pants and causing a substantial wound which left her leg scarred.

23.2. Mr Gray pleaded guilty to a number of offences in relation to the events including assault police and was sentenced to three months' imprisonment. He wrote a "letter of contrition" to Ms Fede, admitting that he was on drugs at the time of his actions.

23.3. Ms Fede commenced proceedings in the District Court seeking damages for battery. The primary judge stated:

"*I therefore find on the balance of probabilities that at the time the Defendant bit the right thigh of the Plaintiff he was suffering a mental illness — namely he was psychotic — and unable to form or make a reasonable decision to intentionally cause injury to the Plaintiff. I therefore find, consistent with authority (see for example McHale v Watson [1966] HCA 13)*

[21] *Brighton v Traino [2019] NSWCA 168, [43].*

that at the time the Defendant inflicted the bite wound upon the Plaintiff's thigh, he was not acting either intentionally or negligently."[22]

23.4. The NSW Court of Appeal upheld the appeal finding that the conduct, regardless of the reason for doing so, was intentional.

23.5. Basten JA said at [198]:

> *"In the context of the present case, the language of intention is satisfied by a conclusion that the general intention to bite was not involuntary. It may have been motivated by the delusion that Mr Gray thought himself in physical danger if he remained in the hospital and was seeking to escape. That delusion did not, however, render his biting either involuntary or in the nature of an inevitable accident. Accordingly, the authority, limited as it is, applicable in Australia, does not allow the finding of the trial judge to exclude liability in the tort of battery. The appeal with respect to liability should therefore be upheld."*[23]

23.6. The Court was split as to the applicability of the *Civil Liability Act 2005 (NSW)* with respect to damages. McColl JA found that the defendant acted intentionally with an intent to injure, so that section 3B(1)(a) excluded the operation of the *Civil Liability Act 2005 (NSW)*. Basten JA that found although the biting was intentional in the sense of being a voluntary act, the first limb of the provision was satisfied, because the defendant did not understand the nature or quality of his act, defendant did not "intentionally cause injury to the plaintiff." There being no basis to reject that finding, the second limb of section 3B(1)(a) was not satisfied and the assessment of damages should therefore have been governed by Part 2 of the Civil Liability Act. Meagher J agreed with Basten JA and so no damages could have been awarded for non-economic loss unless the severity of the loss was at least 15% of a most extreme case. There was no finding to that effect, so pursuant to section 16 of the Civil Liability Act, no amount should have been allowed for non-economic loss. $5,000 was awarded for out-of-pocket expenses.

IV ASSAULT

24. The tort of assault involves the making of a threat of force or violence to another person so as to cause that person to believe that the threat will be carried out. It is not necessary that physical contact occurs.

25. The elements of assault are as follows:

    1. A threat of force or violence made by the defendant to the plaintiff;
    2. An accompanying intention on the defendant's part to cause the plaintiff to fear that such threat would be immediately carried out; and
    3. The threat in fact caused the plaintiff to believe on reasonable grounds that the threat would be carried out.[24]

26. As previously noted, in many cases the conduct of the defendant is referred to as 'assault and battery' and the two torts are often present together. Furthermore, where physical contact occurs which constitutes as a battery, the term 'assault'

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[22] *Fede v Gray by his tutor New South Wales Trustee and Guardian* (District Court (NSW), 15 December 2017, unrep), [32].

[23] *Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316, [198].*

[24] See *Phillips v R* (1971) 45 ALJR 467; *ACN 087528774 (formerly Connex Trains Melbourne Pty Ltd) v Chetcuti* [2008] VSCA 274; Halsbury's Laws of Australia, 415-355.

is sometimes used to describe the conduct involved (which can lead to confusion). Consistent with that usage, in a criminal context, battery has come to be described as 'assault'.[25]

27. In *Phillips v R* (1971) 45 ALJR 467, Barwick CJ noted that at common law

> *"(…) assault necessarily involves the apprehension of injury or the instillation of fear or fright. It does not necessarily involve physical contact with the person assaulted: nor is such physical contact, if it occurs, an element of the assault."*[26]

28. The onus is on the plaintiff to establish the elements of assault on the balance of probabilities to the *Briginshaw* standard.[27]

A *EXAMPLES OF THE APPLICATION OF THE TORT OF ASSAULT*

29. Owlstara v State of New South Wales [2020] NSWCA 217

29.1. Ms Owlstara was driving her unregistered motor vehicle when police activated their lights and sirens behind her. Owlstara continued driving at a low speed for 3 kilometres before pulling into the garage of her semi-rural property. The constable who was following her pulled up to the garage and ran in after her with his firearm raised. The incident was captured on the dashboard camera the constable was depicted with the gun raised and pointed at Owlstara's chest. The constable arrested, handcuffed her, and took her to the police station where she was held for 6 hours before release.

29.2. The trial judge found that the arrest was reasonably necessary for the purposes renumerated in section 99(3) of the *Law Enforcement (Powers & Responsibilities) Act* 2002 (NSW) and therefore there the arrest was legal and all subsequent claims for battery were dismissed. In relation to the firearm being pointed at Owlstara, the trial judge concluded that this power fell within the officer's legal scope under section 230 of the *Law Enforcement (Powers & Responsibilities) Act* 2002 (NSW).

29.3. On appeal Basten JA, Meagher JA and Emmett AJA unanimously upheld the appeal, finding that the arrest was unlawful, the batteries were made out and that the assault, by way of the pointing of the firearm, was made out.

29.4. At the trial, the constable told the Court he thought that Owlstara was holding a knife when she first exited the vehicle, which later he realised were her keys. This evidence wasn't accepted on appeal as it was not corroborated by contemporaneous evidence. *"In the absence of that finding there was no basis in the evidence for concluding that the pointing of his firearm at the appellant was reasonably necessary for the exercise of whatever function the constable was seeking to perform (cf. Law Enforcement (Powers & Responsibilities) Act 2002 (NSW), section 230)." [80] per Meagher JA*

29.5. In terms of damages, the primary judge assessed damages at $170,000, including a sum of $90,000 for aggravation of her pre-existing PTSD condition and further treatment. The Court of Appeal found that the size of the award for aggravation of PTSD and future treatment expenses could not be justified.[28] Meagher JA, with agreement from the other judges, set out

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[25] *Director of Public Prosecutions v JWH* (unreported, NSWSC, 17 October 1997); *Crimes Act 1900* (ACT) *section* 26; *Crimes Act 1900* (NSW) *section* 61; *Criminal Code* (NT) *section* 188; *Criminal Code* (Qld) *section* 335; *Criminal Law Consolidation Act 1935* (SA) *section* 20; *Criminal Code* (Tas) *section* 184; *Criminal Code* (WA) *section* 313.

[26] *Phillips v R* (1971) 45 ALJR 467, [472].

[27] See *New South Wales v Koumdjiev*.

[28] *Owlstara v State of New South Wales* [2020] NSWCA 217, [100].

the damages as aggravated damages at $60,000, future treatment costs at $5000, and exemplary damages at $50,000, totalling $115,000 in total.[29]

30. New South Wales v Ibbett (2006) 231 ALR 485

30.1. Mrs Ibett was an elderly woman who lived with her son. The son had significant difficulties with drugs and with the criminal justice system. A plain clothed police officer was on the lookout for her son and, in the middle of the night, upon seeing him drive into the garage of the home, determined he would enter the home and arrest him. Police had no proper basis for the arrest, nor for entry onto the property. The commotion between police and the son awoke Mrs Ibbett who walked from her room to see the uniformed policeman pointing his gun at her son and then at her.

30.2. The trial judge entered a verdict and judgment for the trespass by police in the sum of $50,000 and for the assault by the police officer in the sum of $25,000. The award of $25,000 for the assault included $15,000 as general damages and what his Honour said was an award "*of modest proportions*" of exemplary damages of $10,000. The award of $50,000 for trespass comprised general damages of $10,000 to recognise "the offence and indignity to [Mrs Ibbett's] rights caused by the unlawful entry", aggravated damages of $20,000 and exemplary damages of $20,000.[30]

30.3. The High Court was asked to review the formulation of the damages by the State, in particular the award of exemplary damages. The High Court upheld the award of damages citing as apt the words of Priestley JA when delivering the principal reasons in *Adams v Kennedy* [2000] NSWCA 152:

> "*That figure [of exemplary damages] should indicate my view that the conduct of the [police officer] defendants was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen*."[31]

V FALSE IMPRISONMENT

31. The tort of false imprisonment involves the unlawful deprivation of a person's liberty by another person or other persons. If a plaintiff can establish that his or her liberty has been taken away then the cause of action will be made out, unless the defendant can show that the imprisonment was lawfully justified.

32. Although wrongful arrest is at times referred to as a distinct tort, it is a species of false imprisonment. An arrest necessitates confinement or restraint, which can be an element of unlawful imprisonment.

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

34. As Kirby J stated in *Ruddock v Taylor* (in dissent, but not as to this issue):

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[29] *Owlstara v State of New South Wales* [2020] NSWCA 217, [101].

[30] State of NSW v Ibbett [2005] NSWCA 445.

[31] *Adams v Kennedy* [2000] NSWCA 152, [36] as quoted in *Owlstara v State of New South Wales* [2020] NSWCA 217, [51].

"Wrongful imprisonment is a tort of strict liability. Lack of fault, in the sense of absence of faith is irrelevant to the existence of the wrong. This is because the focus of this civil wrong is on the vindication of liberty and wrongdoing on the part of the defendant. A plaintiff who proves that his or her imprisonment was caused by the defendant therefore has a prima facie case. At common law, it is the defendant who must then show lawful justification for his or her actions."[32]

35. The elements of false imprisonment are as follows:

    1. The defendant intentionally caused the total restraint of the plaintiff's liberty; and

    2. The restraint of the plaintiff's liberty was not lawfully justified.[33]

36. The plaintiff is required to prove the fact, or occurrence, of imprisonment or restraint.[34] The plaintiff bears this onus on the balance of probabilities to the *Briginshaw* standard. In *Nye v New South Wales* [2003] NSWSC 1212, O'Keefe J noted at [9]:

    "The onus of proving each of the elements of the torts of wrongful arrest and false imprisonment and of malicious prosecution lies on the plaintiff. Some of those elements involve proof of a negative. This is usually more difficult than proof of a positive element, but the negative may be established by inference. The standard of proof is the civil standard, namely proof on a balance of probabilities. In applying this standard, the nature and seriousness of the allegation to be proved must be borne in mind."[35]

37. In *Trobridge v Hardy,*[36] Fullagar J noted that the *"mere interference with the plaintiff's person and liberty constituted* prima facie *a grave infringement of the most elementary and important of all common-law rights"*.[37]

38. The plaintiff must show a 'total restraint' on the plaintiff's movement.[38] This means that the plaintiff must not have the freedom to move.[39] Where a person is arrested and taken into custody by police there will not be any issue in this regard.

39. In other situations, there may be argument as to whether the plaintiff was given some option by which his or her liberty might have been preserved. The restraint "*must be actual rather than potential"* and "*must be upon a person's liberty to come and go and must be against his or her will"*[40]. The fact that the plaintiff is not aware of a restraint on him or her or not physically able to exercise his or her freedom does not mean that false imprisonment cannot be made out.[41] In *Nye v New South Wales,* O'Keefe J referred to 'wrongful arrest and false imprisonment' as follows:

    "The total restraint of movement of a person or his detention by preventing him from exercising his freedom of motion and locomotion against his will and without lawful authority, is the other cause of action on which the plaintiff has sued. To constitute such tort, it is not necessary that there be actual force involved and an arrest which initiates the detention may be

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[32] *Ruddock v Taylor* (2005) 222 CLR 612**,** [140]

[33] See *Nye v New South Wales* [2003] NSWSC 1212; *Trobridge v Hardy* [1955] HCA 68; 94 CLR 147 at 152; *Darcy v New South Wales* [2011] NSWCA 413 at [141]-[146] per Whealy JA; Halsbury's Laws of Australia, 415-395.

[34] *Cubillo v Commonwealth* [2001] FCA 1213, [262].

[35] *Nye v New South Wales* [2003] NSWSC 1212, [9].

[36] [1955] HCA 68.

[37] *Trobridge v Hardy* [1955] HCA 68, [152].

[38] *South Australia v Lampard-Trevorrow* [2010] SASC 56, [282]-[283]; *Darcy v New South Wales* [2011] NSWCA 413, [144].

[39] *Nye v New South Wales* [2003] NSWSC 1212.

[40] *Darcy v New South Wales* [2011] NSWCA 413, [144].

[41] *South Australia v Lampard-Trevorrow* [2010] SASC 56, [289].

effected without the application of any force or violence, but nonetheless attract damages if the other elements of the tort are made out. Where there is some force used, for example by handcuffing of the person arrested and detained, that will reflect in the damages awarded if the arrest and detention are effected without lawful justification."[42]

40. A false imprisonment begins from the moment the plaintiff has been detained. It has been suggested that the imprisonment ends at the time that a plaintiff is released from custody and does not extend to time spent on bail where bail has been granted by a court. In *Calabro v Western Australia*,[43] it was held that any complaint in relation to bail should be made in the context of malicious prosecution proceedings, as the constraint to the plaintiff's freedom arose from judicial order. By inference, the situation may be different where a plaintiff was granted 'police bail', although issues may still arise as to whether there was "*total"* deprivation of liberty in those circumstances.

41. Once the fact of imprisonment has been proved, the onus then shifts to the defendant to show that such imprisonment/ restraint was justified or lawful.[44] Justification must be specifically pleaded by the defendant in the defence.[45]

42. In relation to police torts, the executive, represented by the state, 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* test, that the imprisonment was lawful.

43. In most cases involving allegations of misconduct against police, the false imprisonment alleged initially arises out of a wrongful arrest. However, a false imprisonment may also be made out where plaintiff is lawfully arrested but his or her continued detention ceases to become lawfully justified at some later stage.[46] For example in *Sadler and Victoria v Madigan*, the plaintiff was initially lawfully detained at a police station but then detained *"beyond a reasonable time".*[47]

44. Where a debtor was arrested after the defendant's solicitors had procured the issue of an arrest warrant knowingly in breach of bankruptcy legislation, the primary judge non-suited the plaintiff on the basis that the claim amounted to a challenge to the decision of a magistrate and was thus covered by judicial immunity.[48] However, on appeal it was held that a claim of false imprisonment was available. A claim for trespass to the person did not lie. However, a claim in respect of the trespass to the person by the arresting officers could have been made as a claim for malicious prosecution against the defendant's solicitors in bringing proceedings to procure the warrant.[49]

45. Where a prisoner breached prison rules, necessitating an order of segregation, an action for false imprisonment could not be made out.[50]

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[42] *Nye v New South Wales* [2003] NSWSC 1212, [28].

[43] [2012] WASC 418.

[44] TD v New South Wales [2010] NSWSC 368 at [49]; Zaravinos v New South Wales [2004] NSWCA 320; Ruddock v Taylor [2005] HCA 48; 222 CLR 612 at [97] per Gleeson CJ, Gummow, Hayne and Heydon JJ; Cubillo v Commonwealth [2000] FCA 1084 at [1150]; Darcy v New South Wales [2011] NSWCA 413 at [143] per Whealy JA.

[45] Zaravinos v New South Wales [2004] NSWCA 320, [12].

[46] *Zaravinos v New South Wales* [2004] NSWCA 320.

[47] *Sadler and Victoria v Madigan* [1998] VSCA 53, [42].

[48] *Raynor v Jenkins* (1901) 3 WALR 53.

[49] *Raynor v Jenkins* (1901) 3 WALR 53.

[50] *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58,[163]

46. However, where a plaintiff with mental health issues was to be detained pursuant to court order in a hospital, placement of the plaintiff in a prison hospital amounted to a false imprisonment.[51] In order to justify the detention, the defendant was required to demonstrate that the terms of the order that was made had been complied with.[52]

47. Where a plaintiff is lawfully arrested however is placed in more restrictive detention that necessitated by legislation, a claim for false imprisonment can be made out on the basis of residual liberty.[53]

48. In *Majindi v Northern Territory* [2012] NTSC 25, the defendant sought to justify the arrest of an Aboriginal man on the basis that the plaintiff was taken into protective custody because he was intoxicated, which was defined (at the time of the incident) as "*seriously affected by alcohol*". In the Supreme Court of the Northern Territory, Mildren J equated that definition with being "*very drunk*" and found that the arrest and detention of the plaintiff was not justified. The police officers involved did not have reasonable suspicion that the plaintiff was seriously affected by alcohol. The relevant legislation in the Northern Territory has since been amended to define a person as being intoxicated if "*the person's speech, balance, coordination or behaviour appears to be noticeably impaired and it is reasonable in the circumstances to believe the impairment results from the consumption or use of alcohol or a drug"*. It would therefore seem to be the case that any person who is "*noticeably impaired"* (to any extent), could justifiably be arrested and taken into custody in the Northern Territory.

A *EXAMPLES OF CASES FOR FALSE IMPRISONMENT*

49. *New South Wales v Robinson [2019] HCA 46.*

    49.1. Robinson attended a police station in response to attempts by police to contact him. Upon attending the station, he was immediately arrested, without warrant, for breach of an AVO, interviewed and then released without charge after his interview. Proceedings commenced against the State for false imprisonment and upheld on appeal in the High Court of Australia.

    49.2. By majority (per Bell, Gageler, Gordon and Edelman JJ), The High Court held that the arresting constable had no intention, at the time of arrest, of bringing Robinson before an authorised officer to be dealt with according to law. As such, the arresting officer did not have the power to arrest Robinson without warrant pursuant to s99 of the *Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)* ("*LEPRA*"), and so the arrest was unlawful. As was succinctly put by the majority:

> *"To comply with the requirement in s 99(3) [of LERPA] immediately upon arrest, a police officer must at the time of arrest have an intention to take the person, as soon as is reasonably practicable, before an authorised officer to be dealt with according to law to answer a charge for that offence. If there is no intention to comply with the requirement in s 99(3), the arrest is unlawful. And a requirement for the police officer to have an intention to bring a person before an authorised officer means, as a matter of substance, a requirement to have an intention to charge that person."*[54]

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[51] *New South Wales v TD* [2013] NSWCA 32.

[52] *New South Wales v TD* [2013] NSWCA 32, [54].

[53] SU v Commonwealth of Australia and anor; BS v Commonwealth of Australia and anor [2016] NSWSC 8.

57 *New South Wales v Robinson* (2019) 374 ALR 687, [109] (Bell, Gageler, Gordon and Edelman JJ) [emphasis added].

49.3. Accordingly, the State could not provide lawful justification for the deprivation of Robinson's liberty during the arrest. The State's defence to the false imprisonment action on that basis would fail.

50. *SU v Commonwealth of Australia and Anor; BS v Commonwealth of Australia and Anor* [2016] NSWSC 8:

50.1. SU and BS were 16 and 14 respectively from Indonesia, caught on a people smuggling boat to Australia and transported to Darwin Children's Immigration Detention Centre. They were then transported to Sydney where they were taken to Surry Hills Police Station and arrested and charged with the crime of aggravated people smuggling, 10 hours after leaving the immigration centre. Police then detained the pair at Surry Hills Police Station before being taken to a bail hearing at Central Local Court. The reason the children were dealt with as adults was due to highly inaccurate wrist x-ray techniques which informed the AFP that the children were over 18. The pair were refused bail at 2:30pm and transported to Silverwater correctional centre complex in Sydney's west.

50.2. The Plaintiffs argued that the arrest was wrongful up until the point where bail was refused as judicial immunity prevailed. As the offence was a Commonwealth offence under the *Migration Act 1958*, the *Crimes Act 1914* (Cth) governed the procedure. Under that Act, an arrest may only be carried out if a summons would not be adequate to ensure the appearance of the person before a court.[55] The Plaintiffs submitted they were already in immigration detention and there was no risk of them not appearing before a court.

50.3. During the hearing of the false imprisonment claim, the main argument of the Commonwealth was that the plaintiffs hadn't suffered a deprivation of liberty (a necessary element of false imprisonment). SU and BS were already lawfully detained under s 189 of the Migration Act 1958, therefore they had no liberty to deprive. The Commonwealth claimed that the lawful immigration detention created an "umbrella of legality", under which the wrongful criminal detention of SU and BS created no legal liability.

50.4. The Plaintiffs relied on a previously unrecognised legal concept – residual liberty. Residual liberty states that even though a person may be otherwise lawfully detained, they still enjoy those civil liberties that are not taken away. One's liberty does not wholly disappear when a person is first detained. In Hamill J's words, the concept of residual liberty is the "rejection of the alternative view, arising from a simple age, that liberty is all or nothing". New, harsher forms of detention cannot be imposed simply because an individual is already detained: detention within detention must always be justified.

50.5. The court stated at [47]:

> What is clear is that the incarceration of the plaintiffs in the cells at the Sydney Police Centre was a direct result of the decision to (unlawfully) arrest them. It is not to the point that a police station is one of the places where a person might lawfully be held in immigration detention pursuant to s 5 of the Migration Act. The plaintiffs were not detained in the cells at the Sydney Police Centre as a result of being in immigration detention. They were there to be arrested, charged and dealt with as remand prisoners. In this respect, the legal nature of their detention was different. One of the residual liberties that the plaintiffs enjoyed was the right to be dealt with according to the law. This included the right not to be arrested contrary to the provisions in s 3W. Nothing in the Migration Act alters the requirements for a lawful arrest.[56]

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[55] *Crimes Act 1914* (Cth), s3W(1)(b)(i).

[56] *SU v Commonwealth of Australia and anor; BS v Commonwealth of Australia and anor* [2016] NSWSC 8, [47].

50.6. The court held that the arrest was unlawful and that the pair was wrongfully imprisoned for 4 hours and 15 minutes, from the point they arrived at Surry Hills Police station for processing, to the point where bail was refused by the Magistrate.[57]

51. Attalla v State of NSW [2018] NSWDC 190:

51.1. Mr Attalla was sitting on a stone wall in front of a church in Bourke Street, Darlinghurst, texting on his mobile phone when he was confronted by three police officers. After a short conversation, a police officer announced that she reasonably suspected Mr Attalla of being in possession of prohibited drugs and proposed that he be searched. When Mr Attalla refused to submit, he was told that he was under arrest for hindering police in the execution of their duty. As she laid hands on him, another police vehicle arrived. Further police officers alighted from that vehicle and imposed a wrist lock on Mr Attalla, handcuffed him and conducted a search by the roadside. No drugs were found. He was then directed to get into the rear cage of a police wagon and was taken to Kings Cross Police Station. There he was subjected to a "strip search", which involved him, at the command of the two police officers; removing his pants and underpants; lifting his genitalia to allow inspection of the area underneath; and squatting while naked. Mr Attalla was thereafter given a Court Attendance Notice for hindering police in the execution of their duty and allowed to leave the police station. The court proceedings were ultimately dismissed.

51.2. Mr Attalla sued the State of New South Wales for wrongful arrest, and assault and battery by the police officers.

51.3. The State conceded that the strip search and the detention after the roadside search were unlawful. The issues at trial were:

(1) Did the police officer, prior to her announcement of a proposed search, suspect on reasonable grounds that Mr Attalla was in possession of a prohibited drug, so to permit them to search Mr Attalla?

(2) Did the police officer suspect on reasonable grounds that Mr Attalla had hindered police in the execution of their duty to conduct the search?

(3) Was the police officer satisfied that Mr Attalla's arrest was reasonably necessary to prevent a continuation of the offence of hindering?

(4) Was the application of a wrist lock, handcuffing and conducting a search of Mr Attalla lawfully justified.

(5) What is the appropriate level of damages, including any aggravated or exemplary damages?[58]

51.4. His Honour P Taylor SC DCJ held there were no reasonable grounds for the officer to suspect Mr Attalla possessed prohibited drugs, and therefore she had no lawful justification to search him.[59] His Honour rejected the submission raised by the police officer that her reasonable grounds of suspicion were primarily formed since Mr Attalla was located in Bourke Street, Darlinghurst, which she stated was renowned for its, '…prostitution, solicitation, street offences, [and] drug crime'.[60]

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[57] *SU v Commonwealth of Australia and anor; BS v Commonwealth of Australia and anor* [2016] NSWSC 8, [49-53].

[58] *Attalla v State of NSW* [2018] NSWDC 190, [7].

[59] *Attalla v State of NSW* [2018] NSWDC 190, [43].

[60] *Attalla v State of NSW* [2018] NSWDC 190, [27].

51.5. Additionally, His Honour noted that the female police officer was not lawfully entitled to search Mr Attalla, who was entitled to resist the unlawful request.[61] In light of that, His Honour held that as the search was deemed unlawful, Mr Attalla was entitled to resist the unlawful assault and therefore, was not hindering the police in the execution of their lawful duty.

51.6. In assessing the reasonable grounds for suspecting an offence, it is worthwhile to note also Taylor SC DCJ's commentary on what constitutes a 'reasonable belief.' His Honour held that despite Mr Attalla's resistance to a search, which was the basis of the police officer's suspicion or belief that he had committed an offence of hindering police, that suspicion was only reasonably based if the entitlement to search exists or is reasonably believed to exist. His Honour found that there was no entitlement to search Mr Attalla, because there was no reasonable basis for a suspicion of possessing unlawful drugs.[62]

51.7. The Court concluded that there was no legal justification for the force used by police on Mr Attalla, and the search constituted an assault and battery, of which there was no evidence to satisfy the section 99 or 21 requirements under *Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)*. Therefore, Mr Attalla was entitled to compensation for the assault suffered.

51.8. It is useful to consider Taylor SC DCJ's breakdown and analysis of the award of damages to Mr Attalla, where he stated, 'The tort of false imprisonment is a tort of strict liability focussed on the "*vindication of liberty and reparation to the victim*" rather than any wrongdoing on the part of the defendant' (emphasis in original)[63]. His Honour's judgment highlights that damages for the tort compensate not only for the loss of liberty, but also for the loss of dignity and reputation and stated:

> Thus, damages are assessed by reference to the duration of the deprivation of liberty and for the hurt or injury to feelings such as by the "*injury, mental suffering, disgrace and humiliation suffered as a result of the false imprisonment*".[64] There is not "*some kind of applicable daily rate*".[65] A substantial proportion of the ultimate award is for the "*initial shock of being arrested*". (emphasis in original).[66]

51.9. His Honour stated that damages for false imprisonment are to reflect the "*disgrace and humiliation*" of an arrest, though this is also a factor of aggravation, and as such, care must be taken to not 'double count an item of damage' where categories of damages are not self-contained.

51.10. In evaluating the appropriate sum, the court awarded damages totalling $110,000 on the following basis:[67]

Head of Damage	**General**	**Aggravated**	**Exemplary**

[61] *Attalla v State of NSW* [2018] NSWDC 190, [46].

[62] *Attalla v State of NSW* [2018] NSWDC 190, [52].

[63] *New South Wales v Smith* [2017] NSWCA 194 at [153] as quoted in *Attalla v State of NSW* [2018] NSWDC 190, [71].

[64] Trindade and Cane, The Law of Torts in Australia, 3rd Edition, OUP (1999) at 302, *Goldie* at [14], *Smith* at [154] as quoted in *Attalla v State of NSW* [2018] NSWDC 190, [71].

[65] *Ruddock v Taylor* (2003) 58 NSWLR 269 at [49] as quoted in *Attalla v State of NSW* [2018] NSWDC 190, [72].

[66] *Ruddock* at [49], *Thompson; Hsu v Cmr of Police of the Metropolis* [1998] QB 498 at 515. as quoted in *Attalla v State of NSW* [2018] NSWDC 190, [72].

[67] *Attalla v State of NSW* [2018] NSWDC 190, [127].

Assaults/Batteries on Bourke St	$7,000	$3,000	
Wrongful Arrest/False Imprisonment (from arrest)	$15,000	$10,000	
False Imprisonment (after arrest)	$10,000		
Assault/Strip Search	$20,000	$10,000	
Combined Exemplary damages			$35,000
Total = $110,000	$52,000	$23,000	$35,000

52. *Jamal v State of New South Wales* [2020] NSWDC 377:

52.1. The plaintiff had history with his church and was ultimately banned from the premises by the priest. The Plaintiff was involved in an altercation three days prior where police attended, but no further action was taken. Three days later, an officer reviewed the event in the Police computer system and rang the complainant to gain follow up details. The officer then believed that the Plaintiff has entered enclosed lands unlawfully. The Police officers knocked on the Plaintiff's door around 2:10pm and arrested him for trespass. Upon his arrest, the Plaintiff told the officers that no-one had told him he was banned from the premises. He was taken to a police station and interviewed and processed and at 10:10pm, he was asked to sit in the foyer. The Plaintiff told the court he was told if he left, he would be charged with 'a serious offence' and as such he waited in the foyer until approximately 12:15am when he was told he was free to leave.

52.2. In relation to the lawfulness of the arrest, the defendant argued that the imprisonment was justified pursuant to section 99 of the *Law Enforcement (Powers & Responsibilities) Act 2002*. While the Court considered the arrest to be lawful for the purposes of section 99(1), the trial judge they found that the arrest was conducted for the purposes of investigation not to charge the Plaintiff and place him before the courts. As such, the Court found the arrest was unlawful and as such the Plaintiff was falsely imprisoned from the time the officers arrived at his house to the time he was released from custody. The Court found that the period after the Plaintiff was released into the foyer was not to be held as false imprisonment.

52.3. The trial judge declined to make an award of either exemplary damage nor aggravated damages and made findings in relation to compensatory damages only at the value of $7000 plus interest.

53. *Cowan v State of NSW [2021] NSWCDC 31*:

53.1. The plaintiff was an eight-year-old Aboriginal boy of the Bundjalung people. He was outside his aunt's house in the company of family and friends. He found himself in the company of two officers who put him in to the back of a police caged vehicle and drove him to an address on the same street, into the care of his mother. The plaintiff submitted the false imprisonment lasted 10 minutes, the defendant stating it was only two minutes.

53.2. Police stated they were acting in good faith under section 6 of the *Police Act 1990 (NSW)*. Section 6 states:

> ***"6 Mission and functions of NSW Police Force***
>
> *…. (2) The NSW Police Force has the following functions—*
>
> *(a) to provide police services for New South Wales,*
>
> *…. (3) In this section—*

police services includes—

(a) services by way of prevention and detection of crime, and

(b) the protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way, and (…)"

53.3. The matter was ultimately settled between the parties and approved by Judge Levy in the NSW District Court as the Plaintiff was a minor at the time of the settlement.

53.4. The court approved the plaintiff's award of $38,000 in damages.

54. State of NSW v Le [2017] NSWCA 290:

54.1. Mr Le had been stopped by Transport police at a railway station and was asked to produce his travel card. The travel card had an endorsement as a pensioner. He was then asked to produce his pensioner card. Having done that, he was then asked for photograph identification. Mr Le argued about his obligation to do that but provided his details. The police officer then said, "All right, well, you're going to have to wait here while we confirm who you are." Mr Le asked to leave so that he could catch is train. The police officer replied, "… u*ntil we finish, you're not leaving*." Mr Le asked, *"Am I under arrest?"* The officer then replied, *"No, you're not, you are being detained."* Mr Le asked, *"What for?"* And the officer replied, *"To confirm that this is you and that this card isn't stolen."* He was then told, after a short passage of time, that he was free to go.

54.2. It was obviously the case that Mr Le was non-consensually detained. The question for the Court was whether or not there was an exercise of power to detain requiring justification.

54.3. The Court considered statements of principle, such as that expressed by the High Court in *Prior v Mole:*

"Personal liberty is 'the most elementary and important of all Common Law rights.' Critical to its preservation is that the 'circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and reasonably ascertainable".[68]

54.4. And, also, the statements of McColl JA who, in the *State of New South Wales v Smith* said: 'Because the law places a high value on personal liberty, a statute which authorises the detention of a person must be strictly construed'.[69]

54.5. The Court, ultimately, determined that 'the steps taken by the officer to direct the production of evidence demonstrating entitlement to the concession train ticket carries with it the implied power to detain the person whilst those steps are undertaken'.[70] Having determined that the statute justified the very short period of detention of Mr Le, the Court of Appeal allowed the appeal against the awarding of damages for Mr Le for unlawful imprisonment. However, the Court went on to consider the applicability of *the Civil Liability Act 2002* (NSW). In the District Court, the trial judge had calculated damages outside of the restrictions imposed by the *Civil Liability Act.* However, the Court of Appeal when on to say: "There was no doubt that the temporary detention of the Respondent was an intentional act; on the other hand, there was an open question as to whether the conduct of the officer in directing the Respondent not to leave until the officer had the opportunity of checking the Respondent's personal information over the radio was done "*with intent to injure*".

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[68] *Prior v Mole* [2017] HCA 10, [22].

[69] [2017] NSWCA 194, [103].

[70] *State of NSW v Le* [2017] NSWCA 290, [19].

54.6. Because s3B(1)(a) excludes the operation of most of the *Civil Liability Act,* that is, of any liability "*in respect of an intentional act that is done by the person with intent to cause injury (…)*" the Court of Appeal called into question, in unlawful imprisonment cases, whether or not an unlawful imprisonment case, usually prosecuted as an intentional tort and considered as a prosecution of an action which is actionable, per se, might be nonetheless come within the limitations imposed by the *Civil Liability Act* because, although the imprisonment might be an intentional act, it might not be done with the intention to injure.

54.7. The impact of this would be extraordinary. It would mean that people who are unlawfully imprisoned would need to show that their injuries were 15% of the most extreme case before they could demonstrate any damages flowing from the imprisonment. Most unlawful imprisonments do not involve the significant type of injuries that might be considered 15% of the most extreme case. This case represents a concerning development in relation to the prosecution of unlawful imprisonment cases, as the damages might be relatively meagre, notwithstanding that deprivation of liberty is something which is extremely important and should be properly compensated so to avoid the capricious and arbitrary arm of the executive infringing upon on the civil liberties of the individual.

*55. State of NSW V Smith (*2017) NSWCA 19:

55.1. A complaint was made in relation to some damage to a motor vehicle by the estranged wife of Mr Smith. Upon receiving the complaint, police attended at Mr Smith's home and requested his presence at the front door of his house. The police then arrested him and took him to the police station, later releasing him on a Court Attendance Notice for allegedly damaging property. Mr Smith was detained for a total of 3 hours and 40 minutes before his release. Mr Smith was convicted of the offence.

55.2. Smith commenced proceedings against New South Wales claiming damages for wrongful arrest and false imprisonment. He sought compensation to recognise the offence and indignity to his rights caused by his unlawful arrest and imprisonment. The trial judge considered that Mr Smith had been imprisoned for a period of about three and a half hours and awarded damages for the resulting loss of liberty whilst imprisoned, humiliation, embarrassment, loss of dignity, harm to reputation, anxiety, emotional distress and mental anguish, feelings of being intimidated and coerced by police and awarded the sum of $20,000 in general damages, including an element for aggravated damages, and an amount for exemplary damages in that the event represented a contumelious disregard of Mr Smith's rights, and judgment was entered in the sum of $39,858. The State appealed on the basis that the arrest was not unlawful and that the damages awarded by the primary judge were excessive, notably that exemplary damages ought not to have been awarded because the facts of contumeliousness were not supported by evidence.

55.3. In the Court of Appeal, McColl J, with whom Leeming JA and Sackville AJA agreed, said:

> *"It is of "critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual, should be strictly confined, plainly stated and*

readily ascertainable".[71] *Arrests should be reserved for circumstances in which it is clearly necessary. It is inappropriate to resort to the power of arrest when the issue and service of a summons would suffice adequately.*[72]

(…)

An arrest without warrant is not lawful unless effected in good faith and for the purposes contemplated by the statute. The tort of false imprisonment requires proof by the Plaintiff of the restraint imposed by the Defendant which amounts to imprisonment. Upon proof of such imprisonment, the Defendant, to escape liability, needs to establish legal justification."[73]

55.4. The Court concluded that the arresting officer did not hold the requisite suspicion on reasonable grounds that it was necessary for the purposes of section 99 of *Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)*.

55.5. Because the arresting officer made the decision to arrest Mr Smith before he attended at Mrs Smith's home, therefore, he did not undertake the risk assessment of Mrs Smith that was part of the process of determining whether, in cases of domestic violence, he should have been arrested. Further, section 202 of *Law Enforcement (Powers & Responsibilities) Act 2002 (NSW)* had not been complied with as the officer did not notify the plaintiff of the reason for his arrest, (noting that the Court cited the incorrect section as being "201" in the judgement).

55.6. Section 202 provides as follows:

"202 Police officers to provide information when exercising powers

(1) A police officer who exercises a power to which this Part applies must provide the following to the person subject to the exercise of the power:

(a) evidence that the police officer is a police officer (unless the police officer is in uniform),

(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 this section:

(a) as soon as it is reasonably practicable to do so, or

(b) in the case of a direction, requirement or request to a single person—before giving or making the direction, requirement or request."

55.7. McColl J said:

"To elaborate on the point, Gleeson JA, in the NSW v Abed,[74] *the reasons given must be sufficiently precise as to make it clear to a person being arrested why the arrest is taking place which, in turn, requires the arrestor to notify the arrested person, at least in general terms, of the alleged offence or charge for which the arrest is being made. The reason will not suffice if the arrested person could not know, in any meaningful way, the charge which was likely to be laid. Identification of conduct will often be sufficient. (citation added)."*[75]

55.8. The Court of Appeal did, however, uphold State of New South Wales appeal insofar as it related to exemplary damages. The Court applied the remarks of Sackville AJA in the *State of New South Wales v Zreika*[76] where it was said:

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[71] *Donaldson v Broomby* (at 126) referred to with approval in *Prior v Mole* [2017] HCA 10; (2017) 91 ALJR 441 (at [22]) per Gageler J as quoted in *State of NSW V Smith (*2017) NSWCA 19, [102].

[72] *State of NSW V Smith (*2017) NSWCA 19, [102].

[73] *State of NSW V Smith (*2017) NSWCA 19, [106].

[74] (2014) 246 ACrim R 549.

[75] *State of NSW v Smith (*2017) NSWCA 19, [146].

[76] *State of New South Wales v Zreika* [2012] NSWCA 37, [61]-[62].

"Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: NSW v Ibbett; NSW v Landini, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:

> *'should indicate … that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses … do not happen."*

Ibbett, at 653 [51], citing Adams v Kennedy (2000) 49 NSWLR 78, at 87, per Priestley JA.[77]

9. The Court of Appeal determined that Mr Smith had not established that the arresting officer's ignorance in relation to the application of the laws of arrest constituted a conscious wrongdoing in contumelious disregard of his rights, nor that it was the product of a police training issue, as opposed to it being the product of ordinary human fallibility.

VI TRESSPASS TO PROPERTY

56. Also note the recent decision of *Roy v O'Neill* (2020) 385 ALR 187. A domestic violence order (DVO) was issued by the local court in the Northern Territory against Ms Roy. The purpose of the order was to protect her partner, Mr Johnson, when she had consumed alcohol. In April 2018, as part of 'proactive policing strategy' which involved compliance checks for those subject to DVO's, the police attended Ms Roy's premises to check on Mr Johnson's welfare. Ms Roy answered the door intoxicated and the police required her to take a breath test which returned a positive reading. Proceedings were brought against Ms Roy for breach of the DVO.

56.1. The Local Court found that the police officers had no statutory power to enter private property and therefore there was no basis for their request for a breath test. As such, the evidence was excluded, and Ms Roy was found not guilty.

56.2. An appeal to the Supreme Court of the Northern Territory by way of single justice was dismissed. Mildren AJ found that the police had no implied licence to enter private property for the "mere purpose of investigating whether a breach of the law has occurred".

56.3. The police appealed to the Court of Appeal of the Supreme Court of the Northern Territory (Southwood and Kelly JJ and Riley AJ). Their Honours accepted that the police had a dual purpose in entering the curtilage of the premises, being to determine whether the terms of the DVO were being honoured and to check on the well-being of the protected person under the DVO. Their Honours allowed the appeal, finding that the police had an implied licence to enter the curtilage of the property because the purposes involved lawful communication with the occupier and did not involve an interference with the occupier's possession or injury to the person or property of either occupier.[78]

56.4. Ms Roy appealed the matter to the High Court of Australia, where the matter was dismissed which the justices split 3-2. Kiefel CJ, Keane and Edelmann JJ dismissed the appeal, with Bell and Gageler JJ dissenting.

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[77] *State of New South Wales v Zreika* [2012] NSWCA 37, [61]– [62]) per Sackville AJA (Macfarlan and Whealy JJA agreeing) as quoted in *State of NSW V Smith (*2017) NSWCA 19, [167].

[78] *O'Neill v Roy* (2019) 345 FLR 29; [2019] NTCA 8.

56.5. Kiefel J stated:

> The police officers had an implied licence as a matter of law to undertake such enquiries and observations of Ms Roy as were necessary to ascertain whether the DVO had been breached and an offence committed. Such enquiries and observations were a non-coercive aspect of police business which involved no adverse effect on any person and no interference with the occupier's possession. Therefore, when the police officer entered the premises, he was not a trespasser.[79]

56.6. Bell and Gageler JJ dissenting:

> *"A police officer has an implied licence to enter premises to communicate with the occupier but, at common law, does not have an implied licence to enter premises to coerce the occupier. The application of the implied licence to the conduct of police officers would lose touch with the informing conception of the relationship between the citizen and the state if the implied licence were to become entangled in notions of mixed or contingent purposes. Therefore, a police officer exceeds the limits of the implied licence if he or she had any conditional or unconditional intention of coercing the occupier to do anything."*[80]

VII MALICIOUS PROSECUTION

57. Malicious prosecution is a cause of action arising out of the bringing of legal proceedings by one person against another where those proceedings are brought without reasonable and probable cause and with malice. As can be seen below, the legal concept of 'malice' extends beyond the notions of bias and antipathy that the word 'malice' connotes in its ordinary usage.

58. 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*.[81] The following elements must be established:

    1. Proceedings of the kind to which the tort applies were initiated or maintained against the plaintiff by the defendant;
    2. The proceedings terminated in favour of the plaintiff;
    3. The defendant acted without reasonable and probable cause; and
    4. The defendant, in initiating or maintaining the proceedings acted maliciously.[82]

59. It has been suggested that there is a fifth element, namely 'damage'. However, damage has not been identified as a discrete element in the two most recent High Court authorities. On that basis, damage is arguably not an element of the tort. Having said that, few practical difficulties are likely to arise as it is difficult to conceive a case where a person subjected to a malicious prosecution would not suffer damage and prove such damage merely by virtue of the bringing and/or maintaining of the proceedings themselves. Arguably the correct position was eloquently described in *Clavel v*

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[79] *Roy v O'Neill* (2020) 385 ALR 187, [18-19].

[80] *Roy v O'Neill* (2020) 385 ALR 187, [37], [38], [40].

[81] (2007) 233 ALR 584.

[82] *A v State of NSW* (2007) 233 ALR 584, [1].

Savage[83] by Rothman J, who noted: 'It seems, on the authorities, that proof of damage is an element of collateral abuse of process, but in malicious prosecution damage is presumed'.[84]

60. The plaintiff must prove the elements of malicious prosecution on the balance of probabilities to the *Briginshaw* standard

61. 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*.[85] 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.

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

A *EXAMPLES OF THE APPLICATION OF THE TORT OF MALICIOUS PROSECUTION*

63. *Wood v State of NSW* [2019] NSWCA 313:

    63.1. In 2008 Gordon Wood was convicted of the murder of Caroline Byrne. He served a number of years in prison before the NSW Criminal Court of Appeal (McClellan CJ, Latham J and Rothman J) acquitted him on the murder charge in 2012. The Court found that the verdict had been unreasonable. At the forefront of the decision was trenchant criticism of the Crown Prosecutor and the Crown's crucial expert witness.

    63.2. McClellan CJ stated of the prosecutor:

> *"On several occasions the prosecutor offered his own opinion as to how a person committing suicide would act. This included saying to the jury that "People that commit suicide generally don't argue for an hour beforehand." There was no evidence in the trial to support this opinion. He also spoke of the phenomenon of people who commit suicide leaving messages to others prior to their death. These submissions were contrary to the evidence of the only relevant expert in the trial, Prof Goldney, that people certainly do not always exhibit depressive symptoms prior to a suicide attempt. The prosecutor's remark should not have been made. It was a serious breach of the prosecutor's duty to put the Crown case fairly before the jury."*[86]

    63.3. In relation to the evidence of an eyewitness (Doherty) who saw a woman crying with a man near the scene where the deceased was found:

> *"The evidence of Doherty was plain. There was nothing to suggest that the state of the woman who Doherty observed was a consequence of her being harangued and desperately wanting out of the relationship. The submission by the prosecutor*

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[83] [2013] NSWSC 775.

[84] *Clavel v Savage* [2013] NSWSC 775, [41].

[85] (2007) 233 ALR 584.

[86] *Wood v R* [2012] NSWCCA 21, [631].

misrepresented the evidence and I am satisfied the prosecutor breached his obligation of fairness and detachment: Liristis at [94]. He was "fighting for a conviction": Gonzales v The Queen [2007] NSWCCA 321; 178 A Crim R 232 at [100] citing Roulston at 654. This was a serious breach of the prosecutor's obligation."[87]

63.4. The plaintiff brought proceedings in the NSW Supreme Court for damages on the basis of malicious prosecution. He argued that the proceedings had been maintained without reasonable and probable cause and that the prosecution had been brought "with malice for an ulterior purpose". The plaintiff identified three prosecutors, namely the lead detective, the expert witness and the actual Crown Prosecutor. The Supreme Court found in favour of the defendants, with the claim of malicious prosecution not being made out.

63.5. The Supreme Court, per Fullerton J, agreed with the plaintiff's contention that, from an objective point of view, the trial had been initiated and maintained without reasonable or probable cause. However, the Court found that the element of malice was not sufficiently made out, Fullerton J stating:

"*As a matter of law, malice will not be made out simply by evidence that reveals that a prosecutor is blind to his or her failings of judgment, or by a prosecutor failing to appreciate that he or she acted contrary to their ethical obligations, even to the extent that the impact of such failures is eloquent of a breach of professional standards or professional misconduct and productive of unfairness in the conduct of a trial for that reason*."[88]

63.6. Central to the Crown case had been the expert witnesses' evidence that the deceased must have been thrown from the cliff to land where her body had been located. However, the theory and conclusion had been fundamentally flawed and left open the reasonable possibility of suicide. After an exhaustive analysis, Fullerton J concluded that neither the lead detective (at 579) nor the expert witness (at [573]) could properly be categorised as "prosecutors". In relation to the lead detective, Fullerton J stated:

"*I am not persuaded that by taking the administrative and legal steps on receipt of Mr Tedeschi's advice two years after submitting the Sufficiency of Evidence Report in order to ensure that the criminal proceedings were initiated without further delay (again, to emphasise, with the express approval of Senior Command) that Det Insp Jacob should be regarded as a prosecutor in the action the plaintiff brings for malicious prosecution."*[89]

63.7. The Plaintiff then appealed the decision of the Supreme Court to the NSW Court of Appeal, with Gleeson JA, Payne JA and Simpson AJA dismissing the appeal, upholding the decision of the lower court.

64. *Young v Royal Society for the Prevention of Cruelty to Animals New South Wales* [2020] NSWCA 360:

64.1. Mr Young was charged by the RSPCA with five offences under *the Prevention of Cruelty to Animals Act 1979* (NSW) in relation to his treatment of a horse. He was found guilty of all offences in the Local Court. Mr Young appealed to the District Court where the judge, without making any findings in relation to the charges, proceeded to deal with the application of s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). Section 32 provided that where it appears to a Magistrate that a defendant, who is not a mentally ill person, is suffering from a mental condition for which treatment is available in a mental health facility, and that it would be more appropriate to deal with the defendant in accordance with Part 3 of the *Mental Health Act* than otherwise in accordance with law, the magistrate may make orders that the charges be dismissed and the defendant discharged on condition of

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[87] *Wood v R* [2012] NSWCCA 21, [631], [649].

[88] *Wood v State of New South Wales* [2018] NSWSC 1247, [1337].

[89] Wood v State of New South Wales [2018] NSWSC 1247, [579]

attendance on a person specified for assessment and/or treatment of the condition. Mr Young subsequently brought an action against the Respondents in the District Court for malicious prosecution. The primary judge in the District Court summarily dismissed the proceedings on the basis that the prosecution had not been terminated in Mr Young's favour. Mr Young applied to the Supreme Court to have that summary dismissal set aside, and the matter was removed to the Court of Appeal.

64.2. The Court of Appeal (Leeming JA, Emmett AJA, Preston CJ of LEC) held that the orders for summary dismissal be set aside.

64.3. The words of section 32(4) of the Mental Health Act – that the making of orders under that section "does not constitute a finding that the charges against the defendant are proven or otherwise" – do not deprive a plaintiff of a finding that the proceedings have been terminated favourably to him or her.[90]

64.4. The element of the tort of malicious prosecution requiring that the proceedings in question be terminated favourably to the plaintiff reflects the concern of the law with the consistency of judicial determinations: [75]. Favourable termination accordingly means not that there has been an acquittal, but that the proceedings have been terminated without a conviction, eliminating the risk of diverse determinations by different courts on the same facts between the same parties.[91] Accordingly, the proceedings in question, when terminated by an order under s 32 of the Mental Health Act, were terminated favourably to Mr Young.

64.5. Where the District Court is asked to distinguish or depart from a reasoned judgment of the Supreme Court, in respect of which an appeal has been dismissed by the Court of Appeal, this should be a powerful consideration against a summary dismissal.[92]

65. *Sahade & Anor v Bischoff & Anor* [2015] NSWCA 418:

65.1. Sahade, Smith and the Bischoffs were neighbours in Point Piper, Sydney. Following an "unedifying brawl"[93] between the parties in the common courtyard and driveway of their property, Mrs Bischoff called the Rose Bay Police Station for assistance. After reviewing CCTV and obtaining statements from the Bischoffs, the police arrested Sahade and Smith, ultimately charging them with four assault offences. All charges were either withdrawn or dismissed in the Local Court. The Bischoffs gave evidence at the criminal proceedings.

65.2. Subsequently, Sahade and Smith commenced action against the Bischoffs in malicious prosecution, alleging that the Bischoffs had instigated the assault charges by knowingly providing police with false and misleading statements regarding the brawl. They further alleged that the Bischoffs had maintained the charges by reiterating these statements in their evidence at court. In partial aid of their argument, Sahade and Smith pointed to CCTV footage of the incident that supposedly contradicted the version of events described by the Bischoffs in their statements to police.[94]

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[90] *Young v Royal Society for the Prevention of Cruelty to Animals New South Wales* [2020] NSWCA 360, [42]-[45].

[91] *Young v Royal Society for the Prevention of Cruelty to Animals New South Wales* [2020] NSWCA 360, [47] and [76].

[92] *Young v Royal Society for the Prevention of Cruelty to Animals New South Wales* [2020] NSWCA 360, [39].

[93] *Sahade v Bischoff* [2015] NSWCA 418, [1] (Basten JA)

[94] See *Sahade v Bischoff* [2015] NSWCA 418, [122].

65.3. In response, the Bischoffs denied liability on the grounds that, for the purposes of the tort, they did not constitute 'prosecutors' of the charges brought by the police. Further, they denied that they had instigated the charges against Sahade and Smith maliciously and without reasonable and probable cause.

65.4. The Bischoffs' argument was accepted by the primary judge, and the claim failed. Sahade and Smith appealed to the Court of Appeal.

65.5. In the lead judgement, Gleeson JA (Basten JA and Beech-Jones J agreeing)[95] upheld the primary judge's finding that the Bischoffs were not 'prosecutors' for the purposes of the tort, as they had neither instigated nor maintained the prosecution of Sahade and Smith.[96] Given the failure of these limbs of the tort, questions of malice and reasonable and probable cause were not necessary to consider.[97]

65.6. In his reasoning, Gleeson JA emphasised that identification of the appropriate defendant in malicious prosecution actions "is not always straightforward";[98] for liability to attach under the tort, the defendant must have played "an active role" in the conduct of proceedings by "setting them in motion".[99] His Honour distinguished Sahade and Smith's case from those where malicious police complaints formed the sole evidence of the facts on which a charge was laid, where that such facts were "solely within the complainant's knowledge [eg. where the complainant was the sole witness],[100] and that as a practical matter the [charging] police officer…could not have exercised independent discretion" in commencing the proceedings.[101]

65.7. In those "simple" cases, the complainant had "in substance procured the prosecution"[102] by actively misleading the "actual prosecutors" (i.e. the police) to exercise their discretion to commence charges.[103] This renders the malicious complainant as "vicariously responsible" for the proceedings, and so could qualify as prosecutors for the purposes of the tort without establishing liability against the police themselves.[104]

65.8. In contrast, Sahade and Smith's case fell into a separate category of more "complex" cases, where the police or other actual prosecutors were in receipt of evidence from a multitude of sources, and so exercised the discretion to charge on the basis of this multiplicity of evidence.[105]

65.9. Gleeson JA pointed to the availability of the CCTV of the incident as a means by which the police could assess the truthfulness of the Bischoffs' statements prior to laying charges. Such additional evidence allowed the police to not

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[95] *Sahade v Bischoff* [2015] NSWCA 418, [1], [203].

[96] See generally *Sahade v Bischoff* [2015] NSWCA 418, [164].

[97] *Sahade v Bischoff* [2015] NSWCA 418, [164].

[98] *Sahade v Bischoff* [2015] NSWCA 418, [113], citing *A v New South Wales* (2007) 230 CLR 500, [34].

[99] *Sahade v Bischoff* [2015] NSWCA 418, [113], citing *A v New South Wales* (2007) 230 CLR 500, [34].

[100] See generally *Sahade v Bischoff* [2015] NSWCA 418, [138], citing *State of New South Wales v Abed* [2014] NSWCA 419.

[101] *Sahade v Bischoff* [2015] NSWCA 418, [113], citing *A v New South Wales* (2007) 230 CLR 500; *Martin v Watson* [1996] AC 74.

[102] *Sahade v Bischoff* [2015] NSWCA 418, [113], citing *A v New South Wales* (2007) 230 CLR 500; *Martin v Watson* [1996] AC 74

[103] *Sahade v Bischoff* [2015] NSWCA 418, [114], citing *Commonwealth Life Assurance Society Ltd v Brain* [1935] 53 CLR 343, 379 (Dixon J).

[104] *Sahade v Bischoff* [2015] NSWCA 418, [114]-[115], citing *Commonwealth Life Assurance Society Ltd v Brain* [1935] 53 CLR 343, 379 (Dixon J); *Johnston v Australia & New Zealand Banking Group Ltd* [2006] NSWCA 218, [39]-[40] (Basten JA).

[105] *Sahade v Bischoff* [2015] NSWCA 418, [117].

only test the truthfulness of the statements,[106] but permitted the police to form their "own independent judgement as to what occurred", which formed the basis of their discretion to lay charges against Sahade and Smith.[107] Such an independent basis for the police's discretion to charge meant that one could not claim that the Bischoffs had "instigated" the proceedings via using the police as mere vessels through which to lay the charges.

65.10. Further, Gleeson JA noted that, to argue that the Bischoffs' had "maintained" the prosecution through repeating their statements in the Local Court required Sahade and Smith to demonstrate that the Bischoffs' had given evidence which they knew was false.[108] His Honour was not satisfied that the CCTV footage demonstrated that the Bischoffs' statements were objectively false, nor that the fact that certain parts of the Bischoffs' statements were unreliable rendered them false[109]. It could therefore not be said that the Bischoffs had maintained the prosecution via their statements in court, and so the primary judge's findings were maintained.

VIII MISFEASANCE IN PUBLIC OFFICE

66. Misfeasance in public office is a well-established tort particularly useful in the practice of suits against the police.

67. The elements of the tort as established in *Northern Territory v Mengel* 185 (CLR) 307 are:

    a. An invalid or unauthorised act or omission;

    b. Done knowingly or maliciously;

    c. By a public officer;

    d. In the purported discharge of their public duty;

    e. Causing loss or harm to the Plaintiff. [110]

68. The purpose of the misfeasance in public office is to ensure that a person injured by an intentional knowing misuse of public power will have an effective means of redress.

69. A person is not a public officer merely because they are a public employee. A public officer is someone who by virtue of the particular position they hold, is entitled to exercise executive powers in the public interest. Police officers have been clearly defined to be categorised as public officers.[111] Likewise have prison officers and senior investigators at anti-corruption bodies.[112] Prosecutors, however, have been found by a Victorian Court to not be public officers for the purpose of such tort.[113]

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[106] *Sahade v Bischoff* [2015] NSWCA 418, [138].

[107] *Sahade v Bischoff* [2015] NSWCA 418, [139].

[108] *Sahade v Bischoff* [2015] NSWCA 418, [142].

[109] See *Sahade v Bischoff* [2015] NSWCA 418, [136], [142]-[162].

[110] *Northern Territory v Mengel* (1995) 185 CLR 307.

[111] *Farrington v Thomson* [1959] ALR 695.

[112] *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1991] 3 WLR 340); *Obeid v Lockley* [2018] NSWCA 71.

[113] See *Cannon v Tahche* [2002] VSCA 84.

70. It is essential to the tort that the purposed exercise of power by the public officer be invalid. This can occur in a few ways including where there is no power to be exercise, or the power has miscarried in a way which would warrant judicial review and the setting aside of the administrative action.

71. The element of fault in the tort is based on the state of mind of the public officer. Fault can be established by showing that the officer acted maliciously or with actual knowledge of their lack of power to carry out that action. It has been suggested that knowledge of lack of power includes acting with reckless indifference as to the availability of power and the likely injury.

72. Merely negligent of unintentional acts or omissions by an officer have been found to be insufficient to found the tort.

73. Misfeasance in public office is an *action on the case* and therefore requires proof of damage to succeed. Damage is not limited to adverse effects on the plaintiff's person or property. It also includes some disadvantage or loss which the plaintiff would not, or might not, have suffered if the power had been validly exercised.

A *EXAMPLES OF THE APPLICATION OF THE TORT OF MISFEASANCE IN PUBLIC OFFICE*

74. *Ea v Diaconu [2020]* NSWCA 127:

74.1. The plaintiff appeared in court to be prosecuted for crimes related to conducting a business of sexual servitude and trafficking foreign sex workers. The defendant, an officer of the Australian Federal Police gave evidence at his trial. After her cross-examination, Ms Diaconu sat in the public gallery. The plaintiff alleged that the defendant was laughing, shaking her head, rolling her eyes and grinning in response to answers given by the plaintiff while he was on the stand. The Plaintiff alleges that the defendant was attempting to influence the courts outcome through misconduct,

74.2. The plaintiff commenced proceedings against the Commonwealth and the AFP officer. The trial judge held that the proceedings should be summarily dismissed as the plaintiff had not demonstrated that the defendant was performing a public power or duty during her behaviour in the gallery. The plaintiff appealed the summary dismissal.

74.3. In the Court of Appeal, White JA held that:

> *"(…) the respondent's alleged misbehaviour in court was not done in the exercise of any authority conferred on her, but was arguably the exercise of a de facto power, that is, a capacity she had, by virtue of her office, to influence the jury by her reactions to submissions and evidence."*[114]

74.4. The case significant for a few reasons. The Supreme Court acknowledged that the scope of misfeasance in a public office is unsettled. The state of play is unclear, and it's high time that the law attempts to clear some dust. Additionally, the judgement demonstrated a willingness from the higher courts to take seriously the various iterations in which public officials wield power.

74.5. The Court of Appeal remitted the matter back to trial for hearing.

IX ACTIONS AGAINST PRISON AUTHORITIES

[114] *Ea v Diaconu [2020]* NSWCA 127, [76].

76. The criminal conduct of a third party does not generally impose a duty of care on another to protect an individual from harm.[115] However, the special vulnerability of prisoners and their almost complete reliance on prison authorities for safety and protection gives rise to an exception to this rule. Mason P said of this relationship in *State of New South Wales v Napier* [2002] NSWCA 402:

> *"The control vested in a prison authority is the basis of a special relationship which extends to a duty to take reasonable care to prevent harm stemming from the unlawful activities of third parties."*[116]

77. This dependence on prison authorities is saliently demonstrated in the case of *NSW v Budjoso* [2005] HCA 76. The plaintiff was convicted of sexual offences and was placed in a low security area of Silverwater prison. Prison staff were warned of an impending attack on the plaintiff and failed to take reasonable steps to mitigate the risk of harm, leaving the plaintiff without adequate supervision. The plaintiff's skull was fractured by other prisoners. Here, the High Court said that the lack of proper supervision can constitute a breach of the duty of care and knowledge of the risk of injury to the plaintiff is a relevant consideration in determining whether the duty has been met:

> "[A] *prison authority, as with any other authority, is under no greater duty to take reasonable care. But the content of the duty in relation to a prison and its inmates is obviously different from what it is in the general law abiding community … In a prison, the prison authority is charged with the custody and care of person involuntarily held there. Violence is, to a lesser or greater degree, often on the cards. No one except the prison authority can protect a target from the violence of other inmates. Many of the people in prisons are there precisely because they present a danger, often a physical danger, to the community. It is also notorious that without close supervision some of the prisoners would do grave physical injury to other prisoners (emphasis added*)."[117]

78. Notwithstanding the special duty of care owed by prison authorities to prisoners recognised in common law, legislative reform has substantially limited redress for negligence or abuse experienced by prisoners in NSW.

79. The NSW Government amended the *Civil Liability Act 2002* (NSW) to make it significantly more difficult for offenders in custody to receive an award of damages. This added to existing provisions which delimited the availability of damages for "criminals".[118]

80. These special provisions for offenders in custody of Part 2A of the *Civil Liability Act 2002* (NSW) raises the initial threshold for the award of damages. Instead of usual 15% threshold in the most extreme cases, any injury suffered by an offender in custody must at a minimum meet a 15% threshold to be eligible for an award of damages.[119]

81. Damages for economic and non-economic loss are also capped by to weekly payments and are to be assessed by reference to the modest provisions of the *Workers Compensation Act 1987* (NSW).

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[115] *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

[116] *State of New South Wales v Napier* [2002] NSWCA 402 [75].

[117] *NSW v Budjoso* [2005] HCA 76 [44].

[118] *Civil Liability Act 2002* (NSW) s 54.

[119] *Civil Liability Act 2002* (NSW) s 26C.

A *Examples of Actions Against Prison Authorities*

82. *Watt v New South Wales* [2018] NSWSC 1926:

82.1. The plaintiff was on remand at the Metropolitan Remand and Reception Centre, Silverwater when he was seriously injured by a convicted inmate who resided in the same pod. The assailant, Mr O'Hara, concealed a sandwich press in a pillowcase and struck the plaintiff repeatedly over the head, causing brain damage. This attack was the third in a sequence of altercations between Mr O'Hara and the plaintiff throughout the day. In the altercation chronologically before, the plaintiff had placed Mr O'Hara in a chokehold.

82.2. The plaintiff sought damages claiming the prison authority had breached its duty of care by placing a convicted inmate with known violent tendencies amongst remandees. The Court considered extensively the duty of care of prison authorities to prisoners and the application of provisions of the *Civil Liability Act 2002* (NSW) to the awarding of damages for offenders in custody.

82.3. The State acknowledged it owed a duty of care to the plaintiff but that it was limited by the fact that the Metropolitan Remand and Reception Centre was a public authority and thus functions required to be performed by it are limited by the financial and other resources reasonably available to perform those functions, and generally not open to challenge by plaintiffs.[120]

82.4. In relation to the general principles set out in section 5B of the *Civil Liability Act 2002* (NSW) the plaintiff identified the foreseeable risk of harm as the suffering of physical harm, consequential injury, loss and damage of being assaulted by another inmate whilst remand.[121] The plaintiff bears the onus to prove on the balance of probabilities that his injury could have been avoided by some reasonably practical alternative available to the State.[122]

82.5. Garling J held that placing a remandee with convicted inmates did not itself constitute a breach of the duty of care but that placing a remandee with Mr O'Hara in particular, in light of his violent custodial record, did. The State had actual knowledge of the risk posed by Mr O'Hara, or at least should have had actual knowledge for the purposes of section 5B(1)(a) of the *Civil Liability Act 2002* (NSW) and thus owed a duty of care to the plaintiff to reasonably protect him from harm. As the State tendered no evidence regarding the financial and other resources available to the prison authority it was not considered.

82.6. Additionally, the State raised three defences to avoid an attribution of liability: first they claimed there was no causal link between injury sustained by the plaintiff and any breach of duty; second that section 54 of the *Civil Liability Act 2002* (NSW) excluded the plaintiff from recovering damages; and third that the plaintiff was contributorily negligent through his previous interactions with Mr O'Hara.

82.7. The State contested whether it's negligence was a necessary condition for the occurrence of the plaintiff's injuries in accordance with section 5D of the *Civil Liability Act 2002* (NSW). The Court found no issue with the chain of causation reasoning that if Mr O'Hara's violent history had been taken into account by

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[120] *Civil Liability Act 2002* (NSW) ss 41-42.

[121] *Civil Liability Act 2002* (NSW) s 5B.

[122] *Civil Liability Act 2002* (NSW) s 5E.

Corrections staff he would not have been placed with remandees and therefore would not give rise to the conditions necessary to facilitate the plaintiff's injury.

82.8. Section 54 of the *Civil Liability Act 2002* (NSW) was raised by the State to prevent the plaintiff from recovering damages:

> *54 Criminals not to be awarded damages*
>
> *(1) A court is not to award damages in respect of liability to which this Part applies if the court is satisfied that:*
>
> *(a) the death of, or the injury or damage to, the person that is the subject of the proceedings occurred at the time of, or following, conduct of that person that, on the balance of probabilities, constitutes a serious offence, and*
>
> *(b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage*
>
> *(2) This section does not apply to an award of damages against a defendant if the conduct of the defendant that caused the death, injury or damage concerned constitutes an offence (whether or not a serious offence).*

82.9. This section essentially precludes prisoners who suffer injury through negligence of prison authorities if their conduct constitutes an offence with a penalty of 6 months or more and that conduct contributed materially to their injury. To determine this Garling J set out three guiding principles:

(a) That there was criminal conduct on the part of the plaintiff which constituted a serious offence;
(b) The plaintiff's injury occurred at the time of the criminal conduct in (a) or following the criminal conduct in (a); and
(c) That the conduct contributed materially to the injury.[123]

82.10. The State argued that the plaintiff's previous altercation with Mr O'Hara, where he put him in a chokehold, constituted a serious offence and contributed materially to the injury sustained. This argument was rejected on two grounds. First, the Court found that at all material times the plaintiff was acting in self-defence ad second that the former incidents did not satisfy the temporal constraint contained in section 54(1)(a). Garling J said:

> *"Section 54(1)(a) contains a temporal constraint with respect to the injury to the plaintiff. It must occur at the time of the serious offence – which did not happen here – or else 'following' the serious offence … The purpose of the legislation generally was to preclude criminals, or those engaged in criminal conduct, from making claims for personal injury sustained in the course of the commission of a serious offence. The word 'following' means a time which has close temporal connection to the conduct constituting the serious offence."*[124]

82.11. The State's claim of contributory negligence was also rejected by the Court. It was submitted that the plaintiff contributed to his injuries by his failure to inform the prison authority of any concerns for his safety and from his failure to request protective or segregated custody. The plaintiff argued that it was unreasonable to request being moved into protective or segregated custody due to the ill effects of isolation and his capability to defend himself against Mr O'Hara in prior confrontations. This was accepted by the Court.

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[123] *Watt v New South Wales* [2018] NSWSC 1926 [202].

[124] *Watt v New South Wales* [2018] NSWSC 1926 [256], [260].

82.12. Both parties accepted that any award for damages for the plaintiff would be subject to Part 2A of the *Civil Liability Act 2002* (NSW). This provides special provisions for an award of damages for personal injuries of offenders in custody as defined in section 26B. For offenders in custody an initial threshold of 15% impairment is to be established before any damages can be awarded.[125] It was conceded by the State that the plaintiff's traumatic brain injury met this threshold.

82.13. Under the special provisions for offenders in custody an award for damages for non-economic loss is restricted under section 26I of the *Civil Liability Act 2002* (NSW) to the maximum amount a worker would be entitled to under Part 3 of the *Workers Compensation Act 1987* (NSW) and are capped by monthly instalments. The parties agreed that under section 66 of the *Workers Compensation Act 1987* (NSW) that the plaintiff would be entitled to $71 500 in damages for non-economic loss based on the medical evidence. The plaintiff was also entitled to damages for pain and suffering and was awarded $30 000 under the now repealed section 67 of the *Workers Compensation Act 1987* (NSW).

82.14. The plaintiff was also entitled to damages for economic loss up to the age of 65.[126] Any assessment of past or future economic loss is limited by the special provisions for offenders in custody, namely section 26E of the *Civil Liability Act 2002* (NSW):

> *"26E Damages for past or future loss of earnings*
> *(1) This section applies to an award for damages:*
> *(a) for past economic loss due to loss of earnings or the deprivation or impairment of earning capacity, or*
> *(b) for future economic loss due to the deprivation or impairment of earning capacity.*
> *(2) In awarding damages, the court is to disregard the amount (if any) by which the injured or deceased offender's net weekly earning would (but for the injury or death) have exceeded the amount of weekly payments of compensation under section 35 of the Works Compensation Act 1987 (even though that maximum amount under that section is a maximum gross earnings amount)*
> *(3) The maximum amount of weekly payments of compensation under section 35 of the Worker Compensation Act 1987 for a future period is to be the amount that the court considers likely to be the amount for that period having regard to the operation of Division 6 (Indexation of amounts of benefits) of Part 3 of that Act."*

82.15. Essentially this provision limits damages for past economic loss for offenders in custody to weekly payments capped at $1000. Future economic loss is also capped to weekly payments and is not to include any potential earning capacity passed the age of 65. The Court is also required to reduce future economic loss by 15% to account for any possible adversities which would have otherwise affect the plaintiff's earning capacity.

82.16. It was determined that the plaintiff was entitled to $725 per week for past economic loss from the date of the incident to the date of the judgment. Future economic loss was to be calculated between parties for the plaintiff for the period of 14 years. The plaintiff was also awarded out of pocket expenses totalling $62 677.76.

83. *Jiao v State of New South Wales* [2010] NSWSC 172:

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[125] *Civil Liability Act 2002* (NSW) s 26C.

[126] *Civil Liability Act 2002* (NSW) s 26F; *Workers Compensation Act 1987* (NSW) s 35.

83.1. The plaintiff, Mr Jiao, was on remand at the Metropolitan Remand and Reception Centre at Silverwater. He was in the visiting area when another inmate stabbed him in the eye with what was most likely a sharpened paddle pop stick. The plaintiff sought to recover damages for his injury.

83.2. The duty of care of the prison authority for the plaintiff was not disputed. The State also conceded that the risk of injury by one prisoner on another in the visiting area was foreseeable. The main issue for the Court's consideration was whether the injury could have been avoided by some reasonably practical alternative course of conduct. The provisions of the *Civil Liability Act 2002* (NSW) basically reflect the principles articulated in *Wyong Shire Council v Shirt* [1980] 146 CLR 40 where it was held:

> "*The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.*
>
> *(…) a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable.*"[127]

83.3. The plaintiff submitted that the supervisory measures in place did not adequately ameliorate the risk of harm posed by other prisoners in the visitation area. Evidence was tendered regarding the poor coverage of CCTV cameras and the practice of deploying roving officers to monitor prisoners during visits. It was submitted that this constituted a breach of the duty of care in light of clause 99(1) of the *Crimes (Administration of Sentences) Regulation 2001* which stipulates that visitation must take place 'within sight of a correctional officer'; the plaintiff was not at the time of the attack. The plaintiff proposed the alternative of 'box visits', that is the installation of individual cubicles or booths and the cessation of open visits where each inmate could not be effectively supervised.

83.4. Hislop J held this to be impractical and not a reasonable practical alternative course of pursuant to the principles outlined in common law and section 5B of the *Civil Liability Act 2002* (NSW), saying:

> *"(…) it has not been established that the proposed change to box visits was a reasonably practical alternative having regard to the need to balance the benefits in relation to the control and good management of the goal with the limited risk of injury, the improbability that injury, if inflicted, would be of a serious nature, the cost of implementing the change and the social utility of the activity that created the risk of harm"*[128]

84. *GEO Group Australia Pty Ltd v O'Connor* [2019] NSWCA 323

84.1. The plaintiff, Mr O'Connor, was an inmate at the privately run Parklea Corrections Centre and during this time was convicted of sexual offences. Other inmates became of aware of these convictions and planned to exact some vigilante justice. Learning of these plans a trusted inmate, referred to as AB, alerted prison staff. Parklea corrections officers investigated the report and interviewed the plaintiff asking him whether he felt threatened or in danger. They also increased surveillance of him. Materially, however, they did not

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[127] *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47-8. See also *Civil Liability Act 2002* (NSW) ss 5B-5E.

[128] *Jiao v State of New South Wales* [2010] NSWSC 172.

disclose the fact that he'd been subject to direct threats. Subsequently, the plaintiff was ambushed in a hallway by other inmates who blocked CCTV coverage by opening adjacent cell doors. They bashed him with a sandwich press causing significant injury.

84.2. There were two significant issues on appeal: first whether the *Crimes (Administration of Sentences) Act 1993* (NSW) empowered the General Manager of Parklea Corrections Centre to segregate the plaintiff.

84.3. The segregation or protective custody of prisoners is permissible to protect personal safety, maintain the security of the correctional centre and to preserve good order and discipline within a correctional centre.[129] GEO Group Pty Ltd argued that the information provided by AB was insufficient to satisfy any of the above purposes and thus they could not lawfully place the plaintiff into protective or segregated custody. The Court of Appeal rejected this argument saying:

> *"GEO submitted that because the only suggested threat was against a single inmate the good order and discipline of Parklea was not threatened. That submission is untenable. An assault by one or more inmates against another inmate is plainly contrary to good order and discipline within a prison. Those administering prisons are required to exercise reasonable care to prevent such assaults. Such an assault is inimical to the maintenance of good order and discipline. Plainly, there was a power to segregate."*[130]

84.4. The second issue for the Court of Appeal's consideration was the application of section 5C of the *Civil Liability Act 2002* (NSW) which reads:

> *"5C In proceedings relating to liability for negligence*
>
> *(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and*
>
> *(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and*
>
> *(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk."*

84.5. On this basis GEO submitted that the scope of the duty of care had to be assessed not exclusively by reference to the assault of the plaintiff, but against the background of the multitude of risks that could possibly crystallise in response to second-hand information. The court partially agreed with GEO. Section 5C does require the consideration of whether the burden of taking the precaution of segregation and transfer, if required for the plaintiff, would mean that similar steps would be required in the case of other overheard threats that would place an unreasonable burden on the management of Parklea and other correctional facilities.

84.6. Indeed, even though 'a prison authority is under no greater duty to take reasonable care'[131] the fact that GEO had identified the plaintiff as at risk of harm, as evident by the short interview with him and increased

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[129] *Crimes (Administration of Sentences) Act 1993* (NSW) s 10.

[130] *GEO Group Australia Pty Ltd v O'Connor* [2019] NSWCA 323 [62].

[131] *GEO Group Australia Pty Ltd v O'Connor* [2019] NSWCA 323 citing *New South Wales v Budjoso* [2005] HCA 76 [44].

monitoring, they should have in the circumstances reasonably foreseen the plaintiff's injury and taken appropriate action to avoid it. The Court of Appeal ultimately determined that section 5C was not really at issue given that Parklea's own operating manual laid down protocols for the segregation of prisoners deemed at risk and thus found GEO liable for the plaintiff's injuries. Damages were to be determined in separate proceedings.

85. *Lewis v Australian Capital Territory* [2020] HCA 26:

85.1. Also note the interesting High Court judgment regarding false imprisonment in the above case. The appellant, Mr Lewis, was sentenced to 12 months periodic imprisonment for assault after he smashed a glass over another man's head. The appellant failed on four occasions to attend detention as required and the issue was brought before the ACT Sentence Administration Board of Inquiry. The appellant did not attend his hearing before the Board resulting in the cancelling of his periodic detention. The appellant was arrested and imprisoned full time as required by statute. In separate proceedings Lewis challenged the Board's decision on grounds of procedural fairness and sued the ACT for false imprisonment for the 82 days he was gaoled full-time.

85.2. At issue in the High Court was whether the appellant could recover substantial damages for the tort of false imprisonment simply to vindicate his rights notwithstanding any actual suffered loss; and whether he could recover damages substantial damages for the adverse consequences suffered from the same imprisonment if that imprisonment had occurred lawfully.

85.3. The High Court upheld the decision of the primary judge who decided that the appellant's imprisonment was unlawful because he was denied procedural fairness but he was not entitled to substantial damages to compensate for the wrongful act of the Board or its consequences because it was inevitable given his breaches of periodic detention. The appellant was awarded $1 nominal damages in recognition of the unlawful deprivation of liberty but also in recognition of the inevitability of his detention as required by statute.

85.4. The idea of an independent species of 'vindicatory damages' or substantial damages merely for the infringement of a right, and not for other purposes including to rectify a wrongful act or compensate for loss, was held by the High Court as 'drawing no support from the authorities and is insupportable as a matter of principle'.[132]

[132] *Lewis v Australian Capital Territory* [2020] HCA 26 [2].

O'BRIEN CRIMINAL & CIVIL SOLICITOR'S TIPS FOR SETTING UP YOUR CLIENT'S ACTION AGAINST POLICE

1. 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 evidence of your client's time and treatment 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 to 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) Obviously preserve the brief of evidence and any objective evidence such as CCTV footage, DVDs of ERISPS;

    (vi) Advise your client of the limitation period – generally six years, unless accompanied by a personal injury claim (three years).

2. When taking instructions for general damages, seek detailed statements from the client and potential witnesses going to their personal history, his or her background and any relevant pre-existing conditions or beliefs or fears. Unlike the usual practice of taking statements based on the facts, the history should be as detailed as possible, describing the Plaintiff's feelings and all the sensations experienced. Medical and psychological evidence should also be sought and any economic loss should be explored in detail and supported by documents.

Peter O'Brien

Corrie Goodhand

(With thanks to Ms Sarah Gore)