POLICE POWERS AND CITIZENS' RIGHTS

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One of our greatest Jurists, Michael Kirby said *"the protection of our liberties does not ultimately depend on Parliaments or even the Courts, it depends on the love of the people for liberty."*

INTRODUCTION

1. As Justice Kearney of the Northern Territory Supreme Court observed:

   "It is a basic obligation of a police officer to be fully aware of limitations on his power to arrest, since the citizens' right to personal liberty under the law is "the most elementary and important of all common law rights"".[2]

2. As His Honour observed, a citizen's right to personal liberty is at the cornerstone of all common law rights. Deane J in *Donaldson v Broomby* (1992) 60 FLR 124; 40 ALR 525; 50 Crim R 160 said:

   "Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny".

3. This paper seeks to address the importance of citizens' rights in the context of police powers.

LAW ENFORCEMENT (POWERS AND RESPOSNIBILITIES) ACT 2002 (LEPRA)

4. Section 99 of LEPRA is set out below:[3]

   "(1) A police officer may, without a warrant, arrest a person if:

   (a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and

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2 *R v Grimley* (1994) 121 FLR 236, NT, Kearney J (at 253)
3 See *Law Enforcement (Powers and Responsibilities) Amendment (Arrest without warrant Act 2013)* which came into effect from 16 December 2013

(b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons:

(i) to stop the person committing or repeating the offence or committing another offence,

(ii) to stop the person fleeing from a police officer or from the location of the offence,

(iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,

(iv) to ensure that the person appears before a court in relation to the offence,

(v) to obtain property in the possession of the person that is connected with the offence,

(vi) to preserve evidence of the offence or prevent the fabrication of evidence,

(vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,

(viii) to protect the safety or welfare of any person (including the person arrested),

(ix) because of the nature and seriousness of the offence.

(2) A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.

(3) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.

***Note:** The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer--see section 105.*

(4) A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other purpose authorised by that Part.

(5) This section does not authorise a person to be arrested for an offence for which the person has already been tried.

(6) For the purposes of this section, property is connected with an offence if it is connected with the offence within the meaning of Part 5".

5. Section 99 empowers a police officer to arrest a person upon reasonable suspicion of having committed any offence and not just a serious indictable offence.[4] A police officer also has the power to arrest or directly to do so by another officer but only if the officer giving the direction is lawfully entitled to arrest the person without warrant.[5]

6. A police officer can discontinue an arrest notwithstanding an obligation to take the arrested person before an authorised officer to be dealt with according to law.[6]

7. In order for there to be a lawful arrest the following must apply:

    - A reasonable suspicion that the person is committing or has committed an offence for the purpose of commencing proceedings;

    - That the police officer must be *"satisfied that an arrest is reasonably necessary"* for one of the purposes listed in s.99(1)(b);

    - A police officer must set out information in LEPRA Part 15 unless it is not reasonably practicable;

    - A police officer must only use force that is reasonable.

REASONABLE SUSPICION

8. In *R v Rondo* [2001] NSWCCA 540 at (53) Smart AJ defined *"reasonable suspicion"* as that:

    - Involving less than a reasonable belief that more than a possibility;

    - One that is not arbitrary. There needs to be a factual basis for the suspicion. It could be based on hearsay material which may be inadmissible in evidence but have at least some probative value;

    - The police officer's state of mind is relevant as to stopping the person or making the arrest. Did the information in objective terms provide reasonable grounds to the suspicion.

9. In *Shalhoub v The State of New South Wales* [2017] NSWDC 363, Taylor SC DCJ at [18] stated:

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4 Section 99(1)(a) LEPRA
5 Section 99(2) LEPRA
6 Section 105 LEPRA

"The state of mind required by s 99(1) of LEPRA is suspicion, "a state of conjecture or surmise where proof is lacking, or a positive feeling of actual apprehension or mistrust, amounting to a 'slight opinion, but without sufficient evidence'" (State of NSW v Smith [2017] NSWCA 194 at [78], George v Rockett [1990] HCA 26; (1990) 170 CLR 104 at 115)."

10. A case that illustrates these requirements is that of *Shalhoub v The State of New South Wales* [2017] NSWDC 363. In this case, Andrew Shalhoub was 19 years of age and not known to Police. He and a friend, Mustapha Neffati, attended a gathering in a home located in a col-de-sac in southern west Sydney on the evening of Sunday 7 June 2015. At 2am on the Monday morning, a public holiday, Mr Neffati contacted his brother, Wassim Neffati, with a request to come and collect him and Mr Shalhoub. When Wassim Neffati arrived, Mustapha and Mr Shalhoub got into the car and as they commenced the return journey, Mr Shalhoub sat in the rear. As they proceeded from the col-de-sac onto Davies Road at about 2:20am, the police activated flashing lights and Mr Wassim Neffati pulled over. Soon thereafter, Mr Shalhoub, Wassim and Mustapha Neffati were instructed by Police to put their hands out of the car. Mr Shalhoub was then pulled from the car, taken to the ground and struck several times, including those to head while he laid faced down on the ground. He was handcuffed, searched and eventually informed he was under arrest.

11. Mr Shalhoub was informed of his arrest at about 2:40am purportedly for stalking a police officer. The police subsequently realized that Mr Shalhoub could not have been involved in any stalking, he nevertheless remained under arrest and at 3:05am was taken to Bankstown Police Station. He participated in a record of interview. The police investigation was one of *"resist arrest".* Mr Shalhoub was not charged with any office and was released from police custody later that morning at about 7:40am. He sued police for assault and battery and unlawful imprisonment.

12. At about 2am, Wassim Neffati was awoken to collect his brother and Mr Shalhoub. He unwittingly proceeded behind the private vehicle driven by an off duty female police officer who had just left Revesby Police Station. Senior Constable Troy Skinner and Matthew Poulton also left Revesby Police Station together at the end of their shift at about the same time. They saw the grey Lexus driven by Wassim Neffati make a U-turn and proceed behind the provide vehicle known by them to be driven by the female police officer. These vehicles proceeded in a direct route to Davies Road where each car turned right to the south once the traffic lights turned green. Officers Skinner and Poulton formed the view that the Lexus was following and stalking the private vehicle driven by the off duty female officer and telephoned the police station to report the suspected stalking.

13. At a point approximately 3kms from the police station, the private vehicle took an exit from Davies Road onto Clancy Street. Officer Skinner saw a car on Clancy Street and assumed that it was the private vehicle containing the female off duty officer that had taken the exit. The Lexus did not follow but

continued a further 7kms on Davies Road, Alfords Point Road and then New Illawarra Road, which Alfords Point Road became and proceeded to the col-de-sac off Davies Road. Officers Skinner and Poulton discussed the fact that the Lexus had stopped travelling behind the private vehicle. They gave information to assist the responding on duty police officers to locate the grey Lexus but thereafter had no further involvement in the incident.

14. Senior Constable Skinner and Matthew Poulton gave evidence. Their evidence was to the effect that the grey Lexus ceased to be behind the private police vehicle driven by the off-duty police officer. In such circumstances, His Honour held there was no longer a reasonable basis for the Officers to suspect the grey Lexus had been *"following"* the private car *"about".* His Honour further found that he was no satisfied that at any time officers Skinner and Poulton suspected that the occupant of the grey Lexus was following the private car *"with the intention of causing fear"* of harm (s.13(3) *Crimes DPV Act*.)

15. Senior Constable Hurney assisted Officers Muir and Dunn when they were removing Mr Shalhoub from the vehicle. He heard a police officer say *"get out, get out of the car".* It was his intention to arrest the occupants of the car. Officer Muir handcuffed Mr Shalhoub. His evidence was to the effect that the handcuffing of Mr Shalhoub was an immediate response once the vehicle had stropped and the other police arrived. His evidence was "*they (occupants of the grey Lexus) were following an off duty police officer who had just left the police station"*. His Honour held that Officer Hurney did not act on a direction. He may have had reasonable grounds to suspect an offence on the basis of the radio information but he gave no evidence of his suspicion. His role was to assist in the arrest of Mr Shalhoub.

16. Constable Dunn was informed that an off duty police officer was being followed home. He travelled with Officer Love and Leading Senior Constable Jennifer Casey to the scene with lights and sirens on. At the scene where the Lexus had been stopped on Davies Road, Officer Love said *"get them all out of the car".* Officer Dunn confused Officer Hurney. His Honour found that Officer Dunn was involved in striking Mr Shalhoub as he attempted to have Mr Shalhoub handcuffed.

17. An issue that arose was the basis upon which Officer Dunn suspected on reasonable grounds that Mr Shalhoub had committed the offence of stalking with intent (under s.99(1)(a)) or he was directed to arrest (under s.99(2). His Honour found that information from another police officer may be sufficient to produce in the arresting officer the suspicion on reasonable grounds required under s.99(1) of LEPRA. The information that Officer Dunn received by police radio was *"cars to start making their way to Revesby. An off duty police officer is being followed home."* His Honour found that this information constituted reasonable grounds and to suspect that the off duty female police officer was being followed. His Honour further held that receipt of information comprising an abbreviated description of a type of offence, together with a call to respond, is a sufficient basis for reasonable suspicion of that offence.

However, His Honour went onto find that Officer Dunn did not give evidence of holding any belief or suspicion that the occupants of the Lexus was stalking or had the requisite intent. Moreover, Officer Dunn testified that while he got Mr Shalhoub out of the car, because he was told to do so, he had no *"intention in his own mind"* as what he would do once Mr Shalhoub was out of the car. Therefore, the conduct of Dunn was, according to him, acting under the direction of another police officer under s.99(2).

18. Officers Hurney and Dunn accepted that the word *"arrest"* was not spoken until sometime after Mr Shalhoub had been handcuffed. The intention of Officer Dunn was found by His Honour to be confined to getting Mr Shalhoub out of the car. There was no intention of what he would do once that occurred. That is, there was no intention to arrest as he had not been given any direction to an arrest. At the time of getting Mr Shalhoub out of the car, Officer Dunn did not consider the matters in s.99(1) of LEPRA, nor did Officer Dunn have a basis to arrest Mr Shalhoub for resisting his direction to get out of the car because he gave no evidence of this. Therefore, His Honour found that Officer Dunn did not have a reasonable suspicion and the satisfaction so as to satisfy, respectively s.99(1)(a) and (b) of LEPRA when he was silent on the matter.

19. Officer Muir, like Officer Dunn, gave no evidence of what he believed or suspected. Officer Muir was held to have been acting under a direction to remove Mr Shalhoub from the car by Officer Love. His Honour referred to Officer's Dunn recollection of what was said by Officer Love. His Honour did not accept that the direction from Officer Love embraced getting Mr Shalhoub onto the ground.

20. Officer Love gave evidence of removing the front seat passenger from the vehicle with the intention of placing him under arrest and that passenger was handcuffed. Officer Love gave no evidence about the direction that was heard by Officers Muir and Dunn. He was no asked specifically about it.

21. His Honour held that neither Officers Muir and Dunn were directed to arrest Mr Shalhoub and none of them suspected on reasonable grounds that Mr Shalhoub had committed an offence.

22. In *Lule v State of New South Wales* [2018] NSWCA 125, the NSW Court of Appeal upheld an appeal from the dismissal of an action by Mr Lule claiming damages for unlawful arrest, false imprisonment and assault. The Appellant was arrested by an Officer of the NSW Police Force following a break and enter that occurred in an apartment nearby. The victim had provided a possible description of the Offender to Constable Thomas and her partner had pointed out a person (in fact Mr Lule) who was seated in the rear of a car driving past the victim's apartment block and said *"that car has driven past several times, that is him in the car"*. The Police attended a nearby apartment and saw Mr Lule in the room and formed the view that he matched the description and arrested him, handcuffed and transported in a caged police vehicle to a local police Station where he was strip searched and confined to

a police cell. The arrest was at 6:25pm and he was not released until 8:45pm that night.

23. The Court constituted by Beazley P, McFarlan JA and Barrett JA granted leave to appeal, set aside the orders of Cowdroy ADCJ and entered judgment for Mr Lule in the sum of $30,000 plus costs. The Court held that the only possible reasonable ground for suspicion that Mr Lule committed the offence, was the victim's description of the offender as the victim's partner had only seen the offender from behind when he was running away. Whilst a witness's description of an offender, without more, may constitute reasonable grounds for a suspicion that a person who matches that description is an offender, the sufficiency of such a description and whether further inquiries are necessary before the required level of satisfaction can be reasonably obtained depends on the particular circumstance of the case. The issue of reasonable grounds is to be "*judged against what was known or reasonably capable of being known at the time".* In view of the generality and uncertainty of the victim's description of the offender, the police officer should have asked those present at Mr Lule's arrest, where he had been at the time when the offence was committed.

24. The Court also held that for an arrest to be lawful pursuant to s.99 of LEPRA, both paragraphs (a) and (b) of subsection (1) need to be satisfied. As paragraph (a) (reasonable grounds for suspicion) was not satisfied, Mr Lule's arrest was unlawful.

COMMENCEMENT OF PROCEEDINGS

25. There are a number of well known judgments as to the common law. In *Bales v Parmeter* (1935) (SR) NSW 182 Jordan CJ observed *"the statute, like the common law, authorises him only to take the person so arrested before a justice to be dealt with according to law, and to do so without delay and by the most reasonable direct route…"*

26. The High Court in *Williams v R* (1986) 161 CLR 278, held that an arrest for an offence must be for the purpose of commencing proceedings and that there is no power to arrest a person merely for the purposes of investigation or questioning.

27. In *Zaravinos v State of New South Wales* [2004] NSWCA 320,[7] Mr Zaravinos was requested to attend Penrith Police Station for an interview. He complied with this request and upon arrival at the police station was arrested. Mr Zaravinos' arrest was held to be unlawful because it was done for the purpose of investigating and questioning and in a *"high-handed"* manner, without properly considering a court attendance notice.[8]

28. The *NSW Court of Appeal in Robinson v The State of New South Wales* [2018] NSWCA 321, held that an arrest under s.99 must be for the purpose of

[7] The author acted for Mr Zaravinos.
[8] See also *R v Dungay* [2001] NSWCCA 443

commencing criminal proceedings. In *Robinson*, the Appellant attended a Sydney Police Station in response to attempt to contact him. As soon as he arrived, he was arrested without warrant for breach of an apprehended violence order. he participated in a record of interview and was released without charge at 6:18pm following the conclusion of the interview. Taylor DCJ dismissed the Appellant's claim for damages for wrongful arrest and false imprisonment on the basis that he accepted the arresting officer's evidence that a decision whether to charge the Appellant depended upon on what he said in the interview and that at the time of the arrest, he had not decided to charge him. The issue on appeal was whether the arrest of the Appellant was lawful, under s.99 LEPRA. McColl and Basten JJA, Emmett JA dissenting allowed the appeal and held:

- LEPRA S.99 must be construed in this context, including general law principles concerning the scope and purpose of arrest; [34]-[35]; [1232].

- *"arrest"* is used to identify that deprivation of liberty which is a precursor to the commencement of criminal proceedings against the person arrested, justified as necessary for the enforcement of the criminal law. The power to arrest must be exercised for the purposes of bringing the person arrested before a justice as soon as reasonably practicable: [46]; [95]; [136]; [154].

- Neither the text nor the context of the statute suggests an intention to depart from these general law constraints. They are embedded in the language of s.99 and expressly preserved by LEPRA, s.4: [35]; [44]; [132]-[134]. As no decision of whether to charge the Appellant had been made at the time of arrest, the arrest was not for the purpose of commencing the criminal process; accordingly, it was unlawful [128]-[129]; [194].

ARREST REASONABLY NECESSARY TO PREVENT AN OFFENCE

29. An arrest *"reasonably necessary"* is concerned with the satisfaction of the police officer, whether the police officer is satisfied that the arrest is *"reasonably necessary"* or "*reasonably appropriate and adapted"* to stop the repetition of the offence. In this context *"reasonable"* does not amount to an objective test, *"it is not what the Judge thought but what the officer thought was reasonably necessary in the circumstances"* See *State of NSW v Randall* [2017] NSWCA 88 at [38]; *Thomas v Mowbray* [2007] HCA 33; *Mulholland v Australian Electoral Commission* [2004] HCA 41; (2004) 220 CLT 181 at 199-200, where Gleeson CJ observed that *"necessary"* meant not *"essential or indispensable"* but "*reasonably appropriate and adapted."*

30. A case that illustrates whether an arrest was *"reasonably necessary"* is *Zaravinos v NSW* [2004] NSWCA 320.[9] The Appellant was contacted to attend the Penrith Police Station and when he did so he was immediately

[9] The author acted for Mr Zaravinos

arrest. The purpose of the arrest was for investigation and questioning and was carried out in a *"high-handed*" manner without giving proper consideration to a court attendance notice. This conduct on the part of police was described as *"heavy-handed and officious use of arbitrary power."* Bryson JA (with whom Santow JA and Adams agreed) said at [24];

"Even if on the face of things an arrest is permitted by s.352(2) in the sense that a Constable in truth suspects the person arrested of having committed an offence, and there is a reasonable cause for the Constable so to suspect, there must be more; there must be more; there must be an exercise of the discretion alluded to by the word "may" and it must be an effectual exercise. Literal fulfillment of subs.352(2)(a) is not enough." [10]

31. At [37]:

"In the present case the burden of proof that the arrest and detention were lawful fell on the Defendants under the defence of justification which was attributed to them. Even if the circumstances mentioned in sub-sections 352(2)(a) exist, the lawfulness of the arrest of Mr Zaravinos are examinable, and the arrests were not lawful unless each decision to arrest was made in good faith and for all purposes for which the power to arrest exist, that is, the purposes of bringing the person arrested before a Justice and conducting a prosecution, and not for some extraneous purpose. Arresting a person for the purpose of questioning him and investigating the circumstances of the suspected offence or of any other offence is arrest for an extraneous purpose. It is even more clearly an extraneous to arrest a person as a piece of unnecessary highhanded and humiliating behaviour in circumstances in which arrest is not reasonably necessary for the effective conduct of a prosecution. The availability of information and summonses as an alternative course and the considerations favouring and adverse to taking that alternative course, are relevant where the validity of the exercise of the power to arrest is in question."

32. In *Fleet v District Court of NSW* (1999) NSWCA 363, The NSW Court of Appeal stated:

"There have been many judicial statements about the inappropriateness of resort to the power of arrest (by warrant or otherwise) when the issue and service of a summons would suffice adequately (O'Brien v Brabner (1885) 49 JP 227, R v Thompson [1909] 2 KB 614 at 617, Dumbrell v Roberts [1944] 1 All ER 326 at 332, Chung v Elder (1991) 31 FCR 43). Some are in a legal context that differs from the present. (Section 352 of the Crimes Act 1900 is different in some respects from legal regime in the Australian Capital Territory considered in Donaldson). Nevertheless, it remains appropriate that those vested with extraordinary powers of arrest should be reminded of the need to consider whether they should be exercised in a particular case. The arrest in this case seems to have an element of the arbitrary about it, which brings to

[10] This case concerns the repealed s.352(2) *Crimes Act* 1900 (NSW)

mind the tyranny Deane J warned against. Such cases are harmful to the free society we all want to preserve."

33. In *DPP v Carr* (2002) 127 A Crim R 151, Mr Carr was arrested for offensive language towards Police. It was a minor summary offence. He was well known to police and they of course knew his name and address. A court attendance notice would have been effective in bringing him To Court. Smart AJ sat at [159]:

    "This Court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded."

34. In *Hage-Ali v State of New South Wales* [2009] NSWDC 266,[11] the Plaintiff, a young member of the Lebanese community, was arrested with three others as part of a police operation in respect of the supply of cocaine. There was evidence that she had purchased small amounts of cocaine from a supplier. After she was arrested, and as a result of significant threats against her, she nominated her drug supplier and agreed to co-operate in their investigation. At the police station, she was interviewed and provided a statement to police. After police obtained her agreement to give evidence against her supplier, she was released without charge.

35. One of the features of the police conduct, was taking her down to the cells and placing her in a position adjacent to a cell where one of the other male persons were situated. Threats were made by police to the effect that is she did not co-operate then she would be put in cell with the other male offenders. Police were also aware that she had been a recent recipient of a major community award from the Prime Minister of Australia and worked for the Attorney Generals Department in NSW. Police threatened her that is she did not co-operate they would ensure that *"your name will be splashed on all the newspapers."* She assisted police and after being released, police made good their threat about ensuring her name was publicised to the media.

36. Elkaim DCJ[12] was not satisfied that the arrest was justified by s.99(3). His reasons were:

[11] Greg Walsh acted for the Plaintiff
[12] Now Justice Elkaim of the ACT Supreme Court

"(a) I do not accept that [the arresting officers] gave individual consideration to the justification for the arrest against the background of [written operational orders] and the plain direction from [a senior officer]…

(b) There was no consideration of matters personal to the Plaintiff as opposed to a general conclusion to this effect: if she has been supplying drugs then there must be a risk of flight, reoffending or destruction of evidence…

(c) In any event there were not reasonable grounds to suspect any of the purposes in s.99(3) needed to be achieved."

37. His Honour said (at para 202):

"There must be, in my view, a deliberate addressing of the purposes in s.99(3) by the police officer concerning the particular person to be arrested. This is not to say that a 'ticking off of a checklist' exercise must be undertaken but rather that the facts personal to the person to be arrested must be considered.

38. The Plaintiff also submitted that her arrest was for a collateral purpose, namely to obtain evidence against her supplier. However, His Honour held (at para 213):

"Although there is a strong flavour of the arrest being made for the purpose of obtaining evidence against Mr B I do not think there is enough evidence to make a positive finding to this effect."

39. In *Shalhoub v State of* NSW [2017] NSW DC 363, Taylor DCJ at [65] said:

"No explanation was proffered as to why the officers gave no evidence about the necessity for arrest. Since this question concerned an officer's thoughts, only the officer could give relevant evidence. That Officer Love, for example, intended to arrest the front-seated passenger does not, by itself, persuade me that he was "satisfied that the arrest [was] reasonably necessary", less still that it was reasonably necessary for one of the reasons specified in s 99(1)(b) of LEPRA".

40. His Honour at [66] found that:

"no officer gave evidence of a belief that an arrest was reasonably necessary to prevent the continuation, repetition or commission of any offence. The State referred to a repetition of stalking, but as the off-duty female police officer was long gone, the possibility of a continuation of stalking her would be fanciful and was not submitted. No other person who might be stalked was identified."

41. The case of *Hage-Ali v State of New South Wales* [2009] NSWDC 266, gives rise to police approaching arrest on the basis of stereotypes about offences or offenders. One particular area that relates to domestic violence offenders, in

the context of directions by for instance, a local area commander to arrest all suspects for domestic violence offences.[13]

42. A person who is arrested is entitled to know as soon as is reasonably practicable, why they are being arrested. Any police officer who arrests a person but fails to give the true reason for the arrest is liable for false imprisonment. See *Christie v Leachinsky* [1947] UKHL 2; [1947] AC 573, 587; *State of NSW v McCarthy* [2015] NSWCA 153 at [78]; ss.201 and 202 LEPRA.

43. A person is entitled to know why they being arrested so they can be put in a position to be able to give an explanation of any misunderstanding or to call attention to others for whom they may have been mistaken or give some other exculpatory reason. *State of NSW v Delly* [2007] NSWCA 303; (2007) 70 NSWLR 125 at [9]; [2007] NSWCA 33 at [9]; *Johnstone v State of NSW* [2010] NSWCA 70; (2010) 202 A Crim R 422 at [43].

44. Sections 201 and 202 of LEPRA, require a police officer as soon as reasonably practicable, after exercising a power to stop, search, arrest or direct a person to provide to the person the officer's name, place of duty and reason for the arrest.[14] Taylor DCJ held that no explanation was given by any of the officer's to Mr Shalhoub as to why they did not identify themselves or provide a reason for the arrest of him or his removal from the car. His Honour further held there was no evidence that investigation took place, at least no information was sought from the occupant about how long they had been in the car. LEPRA does not allow detention for the purpose of investigation unless there is first a lawful arrest. *Zaravinos v State of NSW* (2004) 62 NSWLR 58; [2004] NSWCA 320 at [37], where the Court of Appeal said:

    "The arrests were not lawful unless each decision to arrest was made in good faith and for the purposes for which the power to arrest exists, that is, the purposes of bringing the person arrested before a Justice and conducting a prosecution, and not for some extraneous purpose. Arresting a person for the purpose of questioning him and investigating the circumstance of the suspected offence or of any other offence is arrest for an extraneous purpose.

    It is even more clearly an extraneous purpose to arrest a person as a piece of unnecessary highhanded and humiliating behaviour in circumstances in which arrest is not reasonably necessary for the effective conduct of a prosecution. The availability of information and summons as an alternative course, and the considerations favouring and adverse to taking that alternative course, are relevant where the validity of the exercise of the power to arrest is in question.

45. Taylor DCJ observed at [86] that during a struggle, it may not be reasonably practicable to provide the information required under s.202 of LEPRA, *John Edward Thornton v State of New South Wales* [2017 NSWCA 248 at [36].

[13] See the Excellent Paper by Jane Sanders, Principal Solicitor, The Shopfront Youth Legal Centre, November 2018, Police Powers and Arrest and Detention
[14] *Shalhoub v State of NSW* [2017] NSWDC 363

Even though Mr Shalhoub was handcuffed, the s.202 information was still not given and he was thereafter searched and left for as much as 30 minutes before being given the statutory information. His Honour held there was no reason why the police when they stopped the car for not telling the occupants the reason for them being stopped and being directed to get out of the car.

46. Another issue that arose was whether a failure to provide as soon as reasonably practicable a reason for the arrest could retrospectively render prior conduct unlawful (that is, conduct before the earliest reasonably practicable time for provision of the information). In *State of NSW v McCarthy* [2015] NSWCA 153 at [78] 78 and [79], it was found that *"the lawfulness of that exercise is not expressed to be contingent on the subsequent provision of information*" that such a construction of s.202(1)(c) and 202(2) ought not be adopted as it would render *"the lawfulness of the conduct of the police officers uncertain."*

REASONABLE FORCE

47. In *State of NSW v McMaster*; *State of New South Wales v Karakizos*; *State of New South Wales v McMaster* [2015] NSWCA 228[15] the Court of Appeal heard an appeal from Mahony DCJ in which His Honour awarded damages to Justin McMaster in the sum of $512,450 and to his mother Georgia and sister Kayla Karakizos in the respective sums of $89,910 and $132,420.

48. On 26 September 2011 at about 12:35am, Justin McMaster was shot in the abdomen by a NSW Police Officer, Constable John Fanning. Present at the scene was his mother Georgia and sister Kayla. Another police officer, Constable Natasha Kleinman was also present. The shooting occurred when police had been called to attend a home invasion involving a brutal physical assault on Georgia and a serious assault on Kayla who had a knife held to her throat and was sexually assault. Georgia's youngest son, an infant, also had a knife held to his throat. The intruders were demanding money.

49. Justin and his de-facto partner Jasmin Potts, Georgia and Kayla lived at 4 Holmes Street. Jasmin was inside the granny flat attached to the residence at the time of the invasion. She telephoned 000 and reported the invasion. Constable Fanning and Kleiman who were on duty reported to a police radio message as to the incident. The information was that the intruders had a knife.

50. Police arrived in Holmes Street and parked between house number 6 and 8. Kayla saw the police van and ran towards it. Georgia had been hiding in the house next door. She ran down the street after Kayla. The two police officers spoke to Georgia and Kayla outside 6 Holmes Street. Justin emerged from number 4 and ran down the road carrying a curtain rod which he had grabbed from inside the granny flat. It was made out of aluminium and was 1.5 long and 1-2 inches in diameter.

[15] The author acted for Justin McMaster and his sister Kayla Karakizos.

51. Constable Fanning shot Justin as Justin approached the group. The shooting was no more than 2 minutes after Constable Fanning had arrived at the scene.

52. Justin, Georgia and Kayla brought proceedings against the State under the *Civil Liability Act* 2002 (NSW). Justin alleged the shooting by Constable Fanning constituted an assault and battery and trespass to the person. Georgia and Kayla brought proceedings against the State under the *Law Reform (Miscellaneous Provisions) Act* 1944 (NSW), s.4, claiming they had suffered severe nervous shock and depressive illness and associated sequelae as a consequence of being present when Justin was shot.

53. Mahony DCJ found that the State was liable to Justin on the basis that Constable Fanning had committed a deliberate assault and battery and trespass to this person. His Honour rejected the State's defence of self-defence. Georgia and Kayla also succeeded in their claims.

54. Taylor DCJ made a number of factual findings which is set out in the Court of Appeal judgment at [13] (1-28).

55. The Court of Appeal constituted by Beazley P (McColl and Meagher JJA agreeing) pronounced a number of important findings in the appeal:

    (1) Police officers exercising force in the course of their duties are not excused from liability for battery by reason of an honest belief based on reasonable grounds that the force used was necessary to prevent a breach of the peace. The existence of any such common law principle is not supported by authority. [36]-[39].

    Australian Capital Territory v Crowley [2012] ACTCA 52; 273 FLR 370; State of NSW v Tyszyk [2008] NSWCA 107; State of New South Wales v Spearpoint [2009] NSWCA 233.

    (2) The trial judge was in error in his findings as to the location of the police officers and Georgia and Kayla when Justin was shot and in finding that Justin was not running towards either of the officers at that time. His Honour should have found that Justin was 2-3m away from Constable Kleinman when he was shot. [112]; [121]-[127]; [349]-[351]; [353].

    Abalos v Australian Postal Commission [1990] HCA 47; 171 CLR 167

    (3) The trial judge was in error in finding that Justin did not pose a direct threat to Constable Kleinman when he was shot. This followed from the circumstance that Justin was running towards Constable Kleinman, holding a metal rod and yelling and it was not clear that Constable Kleinman was able to defend herself with her Taser. Further, the trial

judge ought to have found that Constable Fanning acted in order to defend Constable Kleinman and that he subjectively believed that his actions were necessary. [127]-[131]; [140]-[143]; [352].

(4) *At common law, the defence of self-defence in the civil context is made out if the defendant subjectively believed, on reasonable grounds, that what he did was necessary for the protection of himself or another. The proportionality of the defendant's response to the harm threatened is a factor to be taken into account in the application of that test but is not inherently determinative. In light of the facts as they ought to have been found, the defence of self-defence at common law was made out. [166]-[167]; [170]; [174]-[175]; [180]-[184]; [361]-[365].*

Underhill v Sherwell [1997] NSWCA 325; Zecevic v Director of Public Prosecutions (Vic) [1987] HCA 26; 162 CLR 645; Watkins v State of Victoria [2010] VSCA 138; 27 VR 543; Miller v Sotiropoulos [1997] NSWCA 204; George v Rockett [1990] HCA 26; 170 CLR 10; Lean v R (1993) 66 A Crim R 296.

(5) *Justin was acting unlawfully by committing an assault in contravention of the Crimes Act 1900 (NSW), s 61 at the time he was shot. Responsibility for that assault was not precluded by the operation of s 418 as he was not acting to prevent any particular attack. It followed that the State made out the defence of self-defence pursuant to s 52 of the Civil Liability Act. [190]-[199].*

R v Knight (1988) 35 A Crim R 314; Vallance v The Queen [1961] HCA 42; 108 CLR 56; Blackwell v The Queen [2011] NSWCA 93; 81 NSWLR 119; Macpherson v Brown (1975) 12 SASR 184; Pemble v The Queen [1971] HCA 20; 124 CLR 107; Taikato v The Queen [1996] HCA 28; 186 CLR 454.

(6) *"Unlawful" as it appears in s 52 of the Civil Liability Act extends to conduct which is purely tortious such that the section may apply as a defence to liability for actions done in self-defence against the commission of a tort. Justin was at least negligent as to the commission of a civil assault when he was shot and s 52 therefore applies on that additional basis. [200]-[209].*

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; 239 CLR 27; SAS Trustee Corporation v Woolard [2014] NSWCA 75; Barton v Armstrong [1969] 2 NSWR 451; Venning v Chin (1974) 10 SASR 299; Stanley v Powell [1891] 1 QB 86; McHale v Watson [1964] HCA 64; 111 CLR 384; Macpherson v Brown (1975) 12 SASR 184.

(7) *The defence of necessity requires that there be a situation of immediate danger and the actions taken, as viewed at the time they were taken, were reasonably necessary. It is not an answer to the defence that, in the event, the actions were not necessary. The circumstances of the shooting, this defence was made out. [214]-[225].*

Dehn v Attorney-General [1988] NZHC 418; (1988) 2 NZLR 564; Rigby v Chief Constable of Northamptonshire [1985] 1 WLR 1242; Esso Petroleum Co Ltd v Southport Corporation [1956] AC 218; Southwark London Borough Council v Williams [1971] Ch 734; Cope v Sharpe (No 2) [1912] 1 KB 496; State of NSW v Riley [2003] NSWCA 208; 57 NSWLR 496.

(8) *The phrase "act, neglect or default", as it appears in the Law Reform (Miscellaneous Provisions) Act 1944, s 4 is not limited to cases in which the wrongful act was negligent, such that the section may apply in any case in which a wrongful act gives rise to civil liability. However, as in this case there was no wrongful act, no liability to Georgia or Kayla arose. [234]-[249].*

Gifford v Strang Patrick [2003] HCA 33; 214 CLR 269; Chester v Waverley Corporation [1939] HCA 25; 62 CLR 1; Bourhill v Young [1942] UKHL 5; [1943] AC 92; Scala v Mammolitti [1965] HCA 63; 114 CLR 153.

(9) *The cause of action at common law for which Georgia and Kayla contended was not pleaded below and raised legal and factual questions which were not explored at trial. It followed that leave should be refused to rely upon the notices of contention. Further, there was no authority that clearly demonstrated the independent existence of the cause of action. [256]-[265]; [273]-[274].*

Johnson v The Commonwealth [1927] NSWStRp 9; (1927) 27 SR (NSW) 133; Vairy v Wyong Shire Council [2005] HCA 62; 223 CLR 422; State of New South Wales v Spearpoint [2009] NSWCA 233; Modbury Triangle Shopping Centre v Anzil [2000] HCA 61; 205 CLR 254; University of Wollongong v Metwally (No 2) [1985] HCA 28; 60 ALR 68; Coulton v Holcombe [1986] HCA 33; 162 CLR 1; Multicon Engineering Pty Ltd v Federal Airports Corporation (1997) 47 NSWLR 631; Bibby Financial Services Australia Pty Ltd Sharma [2014] NSWCA 37; Wilkinson v Downton [1897] 2 QB 57; Jaensch v Coffey [1984] HCA 52; 155 CLR 549; Magill v Magill [2006] HCA 51; 226 CLR 551; Nationwide News v Naidu [2007] NSWCA 377; Monis v The Queen; Droudis v The Queen [2013] HCA 4; 249 CLR 92.

(10) The trial judge was not in error in the awards of general damages or damages for loss of earning capacity he made to Justin. However, particularly as the shooting occurred without intent to do wrong and in the heat of a particularly difficult moment, his Honour erred in awarding aggravated and exemplary damages. [285]-[288]; [296]; [303]; [309].

56. Section ss.230, 231 LEPRA, requires police to use reasonable force in effecting an arrest. The case of *Shalhoub v State of NSW*, illustrates the unreasonableness of force by police.

57. At the time Mr Shalhoub was removed from the car and thrown face down on the ground, Officer Dunn struck him on the head on a number of occasions. He described what he did as follows, *"I probably did about five or six hammer strikes to his shoulder as a distractionary technique to try and pull his right arm out from under him as I'm doing these hammer strikes. As we are all in a struggle, a few of these hammer strikes missed and hit him on the side of the head."*

58. At [93] Taylor DCJ observed that a hammer strike is a forceful, downward motion extending the arm to strike someone with the bottom of the fist. Officer Dunn said he did not intend to hit Mr Shalhoub on the side of the head. He subsequently noticed that Mr Shalhoub had blood on his mouth and swelling on the right side of his face. He wasn't prepared to concede that this occurred as a result of the hammer strikes.

59. Officer Dunn then gave evidence *"I don't know where I hit him."* he could not say *"whether it was below or above his right ear."* He tried to suggest that the facial marks on Mr Shalhoub may have been when he hit the ground.

60. The interview that was conducted by police and the contemporaneous photographs, clearly show that Mr Shalhoub had readily observable facial and head injuries. There was no evidence from any other Officer of striking Mr Shalhoub in the head. Taylor DCJ made a finding that Officer Dunn repeatedly struck Mr Shalhoub on the head and face to cause the injuries to him.

61. The other feature of whether reasonable force was used, was the search conducted by Officer Dunn. Officer Dunn, in conducting the search felt Mr Shalhoub's private area. He patted him down and said to him *"what's inside there?"* Mr Shalhoub said *"its my penis".* Officer Dunn said *"mate what's there".* Mr Shalhoub said *"it's my penis".* He goes *"come one mate"* and then *"he flopped my – he undone my button, pulled my pants down and he started taking my penis out and grabbed it and I started screaming at him and then he stopped it."*

62. Mustapha Nefatti gave evidence and heard Mr Shalhoub say to Officer Dunn *"what are you doing? Why are you touching me there, because I looked over and they were touching him – in his private area while searching him."*

63. The evidence went on for some length. Taylor DCJ made a finding that Mr Shalhoub's evidence complaining about the search and being *"touched in his private area"* was supported by Mustapha Neffati. It was also supported by Officer Dunn. His Honour accepted Mr Shalhoub was searched about his groin area, his belt was removed and the top button of his jeans was undone and Officer Dunn squeezed his penis whilst *"scrunching his pockets"* and also grabbed his penis when covered by his underpants.

PERIOD OF DETENTION

64. In *Shalhoub v State of NSW,* Mr Shalhoub and the other occupants of the Lexus was stopped and removed from the car at about 2:20am. The police records show that Mr Shalhoub was arrested at David Road Barden Ridge at 2:40am or 2:50am on the basis he was "*stalking/intimidating an off duty police officer."* After investigating the contents of Wassim Neffati's mobile phone, police concluded that Mustapha Neffati and Mr Shalhoub were not in the car at the time that the car appeared to be following the off duty female police officer. Mustapha Neffati was released but Inspector York decided that Mr Shalhoub (along with Wassim Neffati) should be taken to Bankstown Police Station perhaps in connection with investigation of *"resist arrest."* At 3:05am, Mr Shalhoub was placed in a police van and conveyed to Bankstown Police Station. He arrived at 3:25am and took part in a police interview from 5:46am to 6:08am and was released without charge at 7:40am.

65. Taylor DCJ found that the arrest and detention of Mr Shalhoub was unlawful. His Honour specifically made this finding *"Mr Shalhoub was entitled to resist, forcefully, the unlawful arrest and assaults but if the arrest for stalking was lawful, contrary to my several findings, then Mr Shalhoub was not entitled to resist an arrest."*

66. The only evidence of resistance, on the part of Mr Shalhoub, was that whilst in the car he grabbed the seatbelt and on Officer Dunn's account, swearing and refusing to get out at about 2:20am. There is no other suggestion that he was aggressive towards police. The alleged failure to present his arms for handcuffing and his verbal abuse must be viewed in the context where he brought to ground by police and was being hit around the head and face by Officer Dunn and Officer Hurney. This occurred 40 minutes before he was taken to Bankstown Police Station during which period there was no resistance. There was no evidence of Mr Shalhoub being told prior to his arrival at Bankstown Police Station anything about *"resist arrest"* let alone his continued detention was for this arrest. There was also no evidence of any officer being satisfied that a reason in s.99(1)(b) rendered continued confinement reasonably necessary. By 3:05am when the suspected offence of stalking had evaporated, there was no indication of any resistance by Mr Shalhoub and no suggestion that a repetition of resistance was the reason why arrest was seen as reasonably necessary.

67. His Honour made a finding that there was no basis to continue Mr Shalhoub arrest after 3:05am by which time the police were aware that he was not in the Lexus at the suspected time it was following the off duty police officer.

BAIL ACT 2013

68. Section 77 *Bail Act* 2013 is as follows:

77 Actions that may be taken to enforce bail requirements

(1) A police officer who believes, on reasonable grounds, that a person has failed to comply with, or is about to fail to comply with, a bail acknowledgment or a bail condition, may:

(a) decide to take no action in respect of the failure or threatened failure, or

(b) issue a warning to the person, or

*(c) issue a notice to the person (an **"application notice"**) that requires the person to appear before a court or authorised justice, or*

(d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or

(e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or

(f) apply to an authorised justice for a warrant to arrest the person.

(2) However, if a police officer arrests a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, the police officer may decide to discontinue the arrest and release the person (with or without issuing a warning or notice).

(3) The following matters are to be considered by a police officer in deciding whether to take action, and what action to take (but do not limit the matters that can be considered):

(a) the relative seriousness or triviality of the failure or threatened failure,

(b) whether the person has a reasonable excuse for the failure or threatened failure,

(c) the personal attributes and circumstances of the person, to the extent known to the police officer,

(d) whether an alternative course of action to arrest is appropriate in the circumstances.

(4) An authorised justice may, on application by a police officer under this section, issue a warrant to apprehend a person granted bail and bring the person before a court or authorised justice.

(5) If a warrant for the arrest of a person is issued under this Act or any other Act or law, a police officer must, despite subsection (1), deal with the person in accordance with the warrant.

Note : *Section 101 of the Law Enforcement (Powers and Responsibilities) Act 2002 gives power to a police officer to arrest a person in accordance with a warrant.*

(6) The regulations may make further provision for application notices.

69. An important case in respect of s.77 *Bail Act* is *DPP (NSW) v GW* [2018] NSWSC 50. In this case Rothman J considered an appeal by the DPP from a decision of a Children's Court Magistrate dismissing proceeding against the defendant, who is a 14 year old aboriginal girl on bail with curfew conditions.

70. The defendant was observed walking in the street and a police officer identified her and that she was in breach of her bail conditions. She ran away. A key issue was that the police officer gave evidence that there was no alternative to arresting her in respect of the breach of bail.

71. The Children's Court Magistrate held that the arrest was unlawful because the arresting officer had not considered any alternatives and evidence was excluded under s.138 *Evidence Act.* The charges were dismissed. Rothman J decisively held that the failure to consider alternatives to arrest will not mean that the arrest is unlawful. His Honour said:

"It is not every case of a failure to consider all of the options available for a breach of bail that would render an arrest or chase improper. The circumstances of that situation must be considered.

Where, as here, the defendant flees arguably even before the chase commences, there may be insufficient time to consider the other options available under s 77 of the Bail Act. If there were insufficient time in an urgent situation, it could not be said to be improper for a police officer not to consider every other option. An example may suffice.

Let us assume bail is granted on conditions which include a restriction on the presence of an accused within a specified distance of her or his spouse's residence. Let us further assume, that a police officer, knowing of the conditions of bail, observes the accused in the front yard of the accused's spouse's residence. The failure to consider the options available other than

arrest may be wholly appropriate because of the perceived urgency. There is no blanket rule.

The reasons of the learned Magistrate did not disclose conclusions of fact from which one can assume or determine that the conduct of failing to consider options other than arrest was an impropriety. Nor do the reasons disclose whether the Constable had sufficient time to consider other options. The judgment of her Honour in NT v R is not a prescription that should be applied to every situation of arrest, without regard to the circumstances that led to a failure to consider other options.

Nothing in the foregoing should be taken to condone or to encourage the arrest or continued detention of young persons and, in particular, young persons of Aboriginal descent. It is a blight on society that, despite the findings of the Royal Commission into Aboriginal Deaths in Custody and since those findings have been published, there has been an increasing rate of incarceration of persons of Aboriginal descent.

The experience of those involved in this area is that positive, therapeutic steps, such as those undertaken in Redfern under the guidance of Inspector Freudenstein, have a far greater effect on the incidence of criminal conduct and the incarceration of Aboriginal persons than continued arrest of such persons and their continued involvement in the cycle of criminality associated with custody. Further, culturally appropriate steps are more effective in achieving a positive outcome.

Lastly, it is necessary, given the foregoing comments, for the Court to reinforce the comments (usually made in the context of a bail application) that it is inappropriate for the powers of arrest to be used for minor offences, where the defendant's name and address are known and there is no risk of the defendant fleeing. Further, in particular, the provisions of s 8 of the Children (Criminal Proceedings) Act 1987 (NSW) emphasise the inappropriateness of treating the arrest of a young person as the first and primary option, even though arrest may "technically" be permitted."

72. A police officer in exercising a discretion to arrest for breach of bail, ought to consider those matters referred to in sub-section 77(3).[16]

CITIZEN'S ARREST

73. Section 100 of LEPRA refers to a person other than a police officer who may arrest a person to stop the circumstances are:

    a) the person is in the act of committing an offence under any Act or statutory instrument, or

[16] *R v Paris* [2001] NSWCCA 83

(b) the person has just committed any such offence, or

(c) the person has committed a serious indictable offence for which the person has not been tried.

74. It is important that a citizen who arrests must have witnessed the offence or satisfied that the offence has been committed (*Brown v G J Coles* (1985) 59 ALR 455).

75. The citizen also has a common law power to arrest for breach of the peace, *Albert v Lavin* [1982] AC 546 at 565. In *Albert v Lavin* at [565] Lord Diplock said:

"Every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take responsible steps to make the person who is breaking, or is threatening to break the peace refrain from doing so and those reasonable steps in appropriate cases will include detaining him against his will."

76. An interesting point is that even though a person maybe the subject of a citizen's arrest, the person arrested is still entitled to know the reason why they have been arrested. See *Christie v Leachinsky* [1947] 1 All ER 567.

77. Police is NSW have a common law power to arrest for breach of the peace, *DPP v Armstrong* [2010] NSWSC 885, *Poidevin v Semaan* [2013] NSWCA 334.

MALICIOUS PROSECUTION

78. In order to succeed in action for damages for malicious prosecution, a plaintiff must prove:

i. That the prosecution was initiated by the defendant;

ii. That the prosecution terminated favorably to the plaintiff;

iii. That the defendant acted with malice in bringing or maintaining the prosecution; and

iv. That the prosecution was brought or maintained without reasonable and probable cause.[17]

[17] See *A v State of New South Wales* (2007) 230 CLR 500 at [1]. Greg Walsh acted for A in this matter

79. In *A v State of New South Wales*, A was charged with two alleged offences of sexual assault upon his stepsons. He was a civilian employed by the NSW Police Department.

80. There was evidence that the youngest complainant had been influenced by the older complainant, to maintain an allegation against his step-father. Greg Walsh represented A in the criminal proceedings which were heard at the Campbelltown Local Court. The police officer, Detective Floros spoke to Mr Walsh and in doing so in effect stated that *"A would not have been charged if he'd not been an employee of the Police Department…"*

81. In the course of the criminal proceedings, the younger complainant admitted in cross-examination by Mr Walsh, that he had been given access to his older brother's statement by police and FACS officers and there had been discussion about the allegations made by the older brother in the presence of and involving the younger complainant. The prosecutor was also present. The charges were dismissed by the Magistrate.

82. A, instituted proceedings in the District Court seeking damages for malicious prosecution. The action was heard by Cooper DCJ. Mr Walsh had to withdraw from the proceedings as he was a material witness and actually gave evidence in those proceedings. the plaintiff, A, was successful and awarded damages. The State of NSW appealed. The Court of Appeal unanimously upheld the appeal and leave was sought to appeal to the High Court in behalf of A which was granted. In a unanimous judgment, A's appeal was upheld.

Initiation of the prosecution by the defendant

83. In *A v State of New South Wales* at [34]:

"the identification of the appropriate defendant in a case of malicious prosecution is not always straightforward. 'to incur liability the defendant must play an active role in the conduct of the proceedings as by instigating or setting them in motion, citing Fleming, The Law of Torts 9th Ed at 676."

84. In the course of the judgment, the High Court referred to *Martin v Watson* [1996] AC 74. In that case, a woman complained that a neighbour indecently exposed herself to her whilst standing on a ladder in his garden. She complained to police and the information was laid against the neighbour by the police. In the Magistrate's Court the Prosecution offered no evidence and the charge was dismissed. It was held by The House of Lords that as the facts and circumstances of the alleged offence was soley within the complainant's knowledge and the police officer could not have exercised an independent

discretion, the complainant could be sued for malicious prosecution as she had *"in substance procured the prosecution"* and the police officer had no way of testing the truthfulness of the accusation.

85. Dixon J in *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343 at 379 said:

"It is clear that no responsibility is incurred by one who confines himself to bringing before some proper authority information which he does not disbelieve, even although in the hope that a prosecution will be instituted, if it is actually instituted as the result of an independent discretion on the part of that authority… But, if the discretion is misled by false information, or is otherwise practiced upon in order to procure the laying of the charge, those thus brought about the prosecution are responsible…The rule appears to be that those who counsel and persuade the actual prosecutor to institute proceedings or procure him to do so by dishonestly prejudicing his judgment are vicariously responsible for the proceedings. if the actual prosecutor acts maliciously and without reasonable and probable cause, those who aid and abet him in going so are joint wrongdoers with him."

86. In *State of New South Wales v Abed* [2014] NSWCA 419 Gleeson JA (Bathurst CJ and McFarlane JA agreeing) said at [185]:

"claims for malicious prosecution are commonly brought against the prosecutor and sometimes against additional defendants. Nonetheless, it is not a necessary condition for the effective pursuit of an action for malicious prosecution that the actual prosecutor himself or herself was party to the wrongdoing: Johnston v Australia and New Zealand Banking Group Ltd [2006] NSWCA 218 at [39] – [40] (Basten JA; Giles and Santow JJA agreeing). As noted by Batsen JA, the authorities for this proposition include Commonwealth Life Assurance Ltd v Brain [1935] HCA 30; 53 CLR 434 at 379 and 381-382 (Dixon J)."

Favourable termination of the prosecution

87. An essential element is that the plaintiff must establish the prosecution against him/her ended in his favour. A conviction would demonstrate reasonable and probable cause for any prosecution. However, this does not require the Plaintiff to prove an acquittal on merits. In *Beckett v New South Wales* [2013] HCA 17, the Court referred to *Commonwealth Life Assurance Society Ltd v Smith* [1938] 59 CLR 527, requiring the Plaintiff to prove his or innocence at the trial of the civil action where the prosecution was terminated by the entry of a nolle prosequi by the Attorney General. At [5] and [6] the Court said as follows:

"The second element of the tort is a requirement of the policy. Differing accounts of the rationale for the requirement are found in the early cases. It is said that a person should not be permitted to alleged that a pending proceeding is 'unjust' and that the possibility of a conflict in judicial decisions should not be allowed. The rationales for the rule evince the concern of the law with the consistency of judicial determinations, a concern that is distinct from proof of actual innocence or guilt, a plaintiff who is wrongfully convicted of an offence cannot maintain an action for malicious prosecution notwithstanding that he or she may possess irrefutable proof of innocence.

The requirement that the prosecution has terminated avoids the possibility of conflict in the decisions of the court trying the criminal charge and the court trying the civil action. Any termination that does not result in conviction is favourable to the plaintiff for the purposes of the civil action. Prosecutions may terminate in the number of ways without verdict, the Magistrate may not commit for trial, the Director may not find a bill of indictment, the Director may direct that no further proceedings be taken after a bill has been found, or the Attorney General may enter a nolle prosequi. The plaintiff has no control over the termination of the proceedings in any of these ways and in those circumstances, it would be unjust to deprive him or her of the ability to recover for the tort. As professor Salmond explained it:

"what the plaintiff requires for his action is not a judicial determination of his innocence, but merely the absence of any judicial determination of his guilt."[18]

88. In *Beckett,* the Court observed:

"19. The appellant was arrested by members of the New South Wales Police Force and charged with a number of offences against her husband. She was committed to stand trial in the Supreme Court of New South Wales. A bill of indictment charging the appellant with nine counts was found and she was arraigned upon it. The eight count was preferred ex officio. At the conclusion of the verdicts of guilty on counts 1, 2, 3, 4, 6, 7 and 9, and on the alternative charge to the offence charged in count 5. A verdict of not guilty was returned respecting the offence charged in count 8.

20. In October 1991, the appellant was sentenced to a term of imprisonment of twelve years and three months with a non-parole period of ten years and three months. She appealed unsuccessfully against her convictions and sentence to the New South Wales Court of Criminal Appeal.

[18] See *Davis v Gell* (1924) 35 CLR 275

21. In 2001, the appellant petitioned the Governor seeking a review of her convictions. The Attorney General referred the application to the Court of Criminal Appeal. The Court of Criminal Appeal remitted the determination of a number of factual questions to Acting Judge Davidson. Following the delivery of Davidson ADCJ's findings on 17 August 2005, the Court of Criminal Appeal allowed the appeal in relation to counts 1, 2, 5, 6, 7 and 9 and quashed each conviction. The Court entered a verdict of acquittal on count 9. A new trial was ordered on counts 1, 2, 5, 6 and 7. The appellant's appeal against her convictions for the offences charged in counts 3 and 4 was dismissed.

22. On 22 September 2005, the director directed that there be no further proceedings against the appellant on the outstanding charges that were the subject of the Court of Criminal Appeal's order for a new trial. On 26 September 2005, a document communicating the director's determination was forwarded to the Registry of the Court of Criminal Appeal."

89. Therefore, there is no need to distinguish a prosecution terminated by entry of a nolle prosequi by the Attorney General or a direction by the DPP under the statutory power (s.7 *Director of Public Prosecutions Act* 1986) from other termination of prosecution short of acquittal.[19]

Malice

90. In *A v New South Wales*, the High Court at [91] said:

"91. What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law – an "illegitimate or oblique motive". That improper purpose must be the sole or dominant purpose actuating the prosecutor.

92 Purposes held to be capable of constituting malice (other than spite or ill will) have included to punish the defendant and to stop a civil action brought by the accused against the prosecutor. But because there is no limit to the kinds of other purposes that may move one person to prosecute another, malice can be defined only by a negative proposition: a purpose other than a proper purpose. And as with absence of reasonable and probable cause, to attempt to identify exhaustively when the processes of the criminal law may be properly invoked (beyond the general proposition that they should be invoked with reasonable and probable cause) would direct attention away from what it is that the plaintiff has to prove in order to establish malice in the action for malicious prosecution – a purpose other than a proper purpose."

[19] The High Court held that *Davis v Gell* should not be followed.

91. The essential approach as to the element of malice, is that *"its an element that focuses upon the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law."*

92. The dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law. In *A v New South Wales* at [41] the Court said:

"…where a prosecutor has no personal interest in the matter, and no personal knowledge of the parties or the alleged events, and is performing a public duty, the organizational setting in which a decision to prosecute is taken could be of factual importance in deciding the issue of malice."

93. The Court went on to say at [42]:

"In the case of a private prosecution, it may be easier to prove that a prosecutor was acting for a purpose other than the purpose of carrying the law into effect than in a case of a prosecution instituted in a bureaucratic setting where the prosecutor's decision is subject to layers of scrutiny and to potential view."

94. In *State of New South Wales v Abed* [2014] NSWCA 419, Gleeson JA (Bathurst CJ and McFarlan JA agreeing) said:

"Examples of an improper person includes spite or ill will to punish the defendant and to stop a civil action brought by the accused against the prosecutor. However, the joint judgment in A v New South Wales emphasized at [92], it is not [possible to identify exhaustively when the processes of the criminal law may be improperly invoked. What the plaintiff has to prove, in order to establish malice in an action for malicious prosecution is a purpose other than a proper purpose: A v New South Wales [92].

Prosecution brought or maintained without reasonable and probable cause

95. The plaintiff in an action for malicious prosecution must establish a negative from the absence of reasonable and probable cause. This often can be a difficult requirement. The High Court in *A v New South Wales* acknowledged these difficulties at [60]-[61].

96. It is frequently the case that absence of reasonable and probable cause is to be proved by inference. The Court said:

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

97. Absence of reasonable and probable cause contains both subjective and objective elements. In *A v New South Wales*, the Court said:

"In cases where the prosecutor acted on material provided by third parties, a relevant question in an action for malicious prosecution will be whether the prosecutor is shown not to have honestly concluded that the material was such as to warrant setting the process of the criminal law in motion… In deciding the subjective question, the various checks and balances for which the processes of the criminal law are important. In particular, if the prosecutor was shown to be of the view that the charge would likely fail at committal, would likely be abandoned by the Director of Public Prosecutions, if or when that officer became involved in the prosecution, absence of reasonable and probable cause would be demonstrated. But unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for the prosecution, or to have formed that view on a sufficient basis, the element of absence of reasonable and probable cause is not established."

98. The Court referred to the objective nature of reasonable and probable cause as referred to:

"83… The objective element of the absence of reasonable and probable cause is thus sometimes couched in terms of the 'ordinary prudent and cautious man, placed in the position of the accuser', or explained by reference to 'evidence that persons of reasonably sound judgment would regard as sufficient for launching a prosecution'. Or, as Griffiths CJ put it in Crowley v Lisson (1905) 2 CLR 744 at 754, the question can be said to be 'whether a reasonable man might draw the inference, from the facts known to him, that the accused person was guilty."

99. The Court at [87] observed *"the objective sufficiency of the material considered by the prosecutor must be assessed "in light of all of the facts of the particular case."*

Damages

100. The plaintiff in an action for malicious prosecution must also prove damage. In *Zreika v New South Wales* [2012] NSWCA 37, Sackville AJA (with whom Macfarlan and Whealy JJA agreed) observed:

"A plaintiff who succeeds in an action for malicious prosecution will not necessarily receive either aggravated or exemplary damages. Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are award to punish and deter the wrongdoer: Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; 117 CLR 118 at 129-130, per Taylor J, cited with approval in New South Wales v Ibbett [2006] HCA 57; 229 CLR 638 at 646-647 [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award for exemplary damages is based on the conduct of the defendant: NSW v Ibbett at [34]: Gray v Motor Accidents Commission [1998] HCA 70; 196 CLR 1 at 7[15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: NSW v Ibbett at 647 [33] [34].

61. 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."*
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> *Ibbett at 653 [51] citing Adams v Kennedy [2000] NSWCA 152; (2000) 49 NSWLR 78 at 87 per Priestley JA.*

63. In a frequently cited passage, Brennan J in XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd [1985] HCA 12; 155 CLR 448 at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary

damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless, in NSW v Ibbett at 647 [34] the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said at [35] that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once."

CONCLUSION

101. All citizens of this wonderful country, are entitled to natural justice which invokes procedural fairness in law. Those rights include the right to a fair trial, due process, the right to seek or address, or a legal remedy, the rights of participation in a civil society and politics such as freedom of association, the right to assemble, the right to petition, the right of self-defense and the right to vote.

102. As a roman citizen, one could either be free (libertas) or servile (servitus), but such citizens all had rights.

103. In 1689, the English Parliament adopted an English Bill of Rights. This was in part adopted by the Virginia Declaration of Rights in 1776. This formed the model for the US Bill of Rights (1789).

104. In a modern society, as Michael Kirby so eloquently observed, *"the protection of our liberties does not ultimately depend on the Parliaments or even the Courts, it depends on the love of the people for liberty."*

105. I suggest ladies and gentlemen that you never give up your love for liberty.