Majindi v The Northern Territory of Australia, Miller and Fitzell [2012] NTSC 25

PARTIES:	MAJINDI, Marcellus v THE NORTHERN TERRITORY OF AUSTRALIA and MILLER, Wayne and FITZELL, Adam
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	62 of 2010 (21020110)
DELIVERED:	12 April 2012
HEARING DATES:	27, 28 and 29 February and 1 March 2012
JUDGMENT OF:	MILDREN J

CATCHWORDS:

EVIDENCE — Estoppel – whether evidence of previous acquittal is admissible

POLICE — Excessive force — Assault and battery — Damages — Aggravated and exemplary — Relevant considerations

PRACTICE AND PROCEDURE – Pleading rules – Whether reliance on s 19 of *Personal Injuries (Liabilities and Damages) Act* needed to be pleaded

TORT – Trespass to the person – False imprisonment, unlawful arrest and assault and battery — Damages — Aggravated and exemplary — Relevant considerations

TORT – Trespass to the person—False imprisonment, unlawful arrest and assault and battery —Police Administration Act s 128 – Protective custody – Reasonable grounds

Personal Injuries (Liabilities and Damages) Act, s19
Police Administration Act, s128
Supreme Court Rules O13.02 and 13.07

Blatch v Archer (1774) 1 Cowp. 63; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *George v Rockett* (1990) 170 CLR 104; *Lackersteen v Jones*(1988) 92 FLR 6; *Majindi v Balchin* [2011] NTSC 40; *New South Wales v Koumdjiev* [2005] 63 NSWLR 353; applied.

Cameron v James [1945] VLR 113; *Carter v Walker* [2010] VSCA 340; distinguished.

De La Espriella-Velasco v The Queen (2006) 197 FLR 125; *Helsham v Blackwood* (1851) 138 ER 412; *Helton v Allen* (1940) 63 CLR 691; *Re application of Hanratty* (1984) 14A Crim R 36; followed.

Adams v Kennedy & Ors (2000) 49 NSWLR 78; *State of New South Wales v Williamson* [2011] NSWCA 183; referred.

REPRESENTATION:

Counsel:

Plaintiff:	Mr G. Newton
Defendant:	Mr S. McLeod

Solicitors:

Plaintiff:	North Australian Aboriginal Justice Agency
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
Number of pages:	42

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Majindi v The Northern Territory of Australia, Miller and Fitzell [2012] NTSC 25
No. 62 of 2011 (21020110)

BETWEEN:

MARCELLUS MAJINDI
Plaintiff

AND:

THE NORTHERN TERRITORY OF AUSTRALIA
First Defendant

AND:

WAYNE MILLER
Second Defendant

AND:

ADAM FITZELL
Third Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 12 April 2012)

[1] This is an action for damages for assault and battery, unlawful arrest and false imprisonment brought by the plaintiff against the defendants Miller and Fitzell who are and were at all relevant times members of the Northern Territory Police Force. The claim against the Northern Territory is based upon a claim that it is vicariously liable for the torts allegedly committed by

Messrs Miller and Fitzell pursuant to s 148C of the *Police Administration Act*.

[2] The plaintiff is an Aboriginal man, born on 29 September 1978, and therefore 31 years of age at the time of the events which occurred on 20 April 2010. The plaintiff apparently speaks little English, and gave his evidence through an interpreter in the Murrinh-patha language. According to the defendants Miller and Fitzell, the plaintiff did understand them when they spoke to him. There was evidence tendered at the trial of conversations and CCT footage of what happened in the cells later that evening which clearly demonstrates that the plaintiff has a basic understanding of conversational English. However, I accept that the plaintiff did need an interpreter when giving his evidence in Court. He displayed no real understanding of most of the questions put to him in English, and relied on the interpreter throughout. It was not submitted that the plaintiff tried to hide behind the interpreter when giving his evidence.

The discussion outside of the Kurringal Flats

[3] At some time prior to the middle of the day on Tuesday 30 April 2010, the plaintiff and his partner, Lonita Alimankinni, arrived in Darwin from Nguiu, Bathurst Island, where they both lived, in order to visit relatives. They spent most of the day in the Parap area. At some time that day, the plaintiff and Lonita began drinking from a 600ml bottle which they filled with Moselle about four times. Late in the afternoon, they left Parap and walked

to Fannie Bay. On the way they met up with another person, a relative of Lonita's, whose name was Bonita. On the way to Kurringal Flats, the plaintiff's evidence was that he and Lonita had an argument, about buying a drink "at the shop", by which I take him to mean the Fannie Bay Supermarket.

[4] At 5.40pm the police received a telephone call from a person, probably Lonita, to the effect that the plaintiff "is getting drunk and getting silly" and "wants to bash (her) up". The phone call was apparently made from a public telephone box at the Fannie Bay shops, and the caller said she would wait at the phone box for police to attend. The other information conveyed by the caller was that she was sober, that she wanted the plaintiff to be taken to the Watchhouse, that the plaintiff was 'heading towards Kurringal Flats', and a description was given as to what the plaintiff was wearing.

[5] At 5.47pm this information was conveyed by radio to Senior Constable Miller who was on duty with Constable Fitzell in a marked caged van. The police went to the Fannie Bay shops, but saw no-one there fitting the complainant's description. They then drove past the Kurringal Flats and were waved down by the complainant, stopped, and walked back to the complainant and had a conversation with her. This is consistent with the plaintiff's evidence. Constable Fitzell gave similar evidence.

[6] The evidence of the plaintiff is that he heard Lonita say to the police, "He needs to rest, take him." He denied interrupting this conversation. His

evidence was that he was told to move away from the area, and that if he stayed, he would be arrested. He said, "Okay", and then walked across Dick Ward Drive, through the BP Service Station on the opposite side, and then down the footpath on Ross Smith Avenue heading back in the direction of Parap.

[7] According to Constable Miller, the complainant told him that the plaintiff had hit her, that he had been drinking all afternoon and had been starting fights with other people. As he was speaking to Lonita, the plaintiff "came over and was interrupting her, and abusing her for speaking to us, and saying things like "that's not true." He told the plaintiff to step aside whilst he spoke to the complainant "because I wanted to get her side of the story first, and then I would get his." Whilst he continued to speak to Lonita, he saw the plaintiff cross the road towards the BP Service Station. In cross-examination, he said that the plaintiff was being abusive towards Lonita because he was saying things like, "I didn't do anything wrong", "You've got the wrong person" and "She is not telling the truth." He further elaborated on this by saying that the plaintiff called the police '"pricks" and said "she's full of shit," and "things like that."

[8] The events which subsequently occurred at the Watchhouse, to which I will come, resulted in a charge being laid against the plaintiff for assaulting police. Constable Miller gave evidence at the hearing before the Court of Summary Jurisdiction (CSJ) concerning the episode outside Kurringal Flats. He was reminded of his previous evidence, and confirmed that this was the

first time he had mentioned that the plaintiff called the police "pricks." It was put that this was a recent invention. It was not mentioned in his evidence in chief.

[9] Constable Miller also gave evidence that he made notes of the conversation he had with Lonita whilst talking with her, and later at the Watchhouse. The notes record only that Lonita "stated that [the plaintiff] had been humbugging her and wanted him locked up because he was drunk." There is no mention in the notes of anything said by the plaintiff at all, and nothing in the notes about any complaint that the plaintiff had hit Lonita, nor about starting fights with other people.

[10] The evidence in chief of Constable Fitzell was that "the complainant told Miller that the male [the plaintiff] was drunk and being silly." Fitzell was standing near to Miller listening to the conversation, and this was the extent of the complaint so far as he could remember, although he did say that she wanted the police to take the plaintiff away. Later in cross-examination he said he could no longer recall *anything* of what was said, even though the affidavit which was tendered as his evidence in chief was sworn only a few weeks previously.

[11] Both officers gave evidence in chief as to the state of the plaintiff's sobriety. Miller's evidence in chief was that the plaintiff was quite intoxicated. He recalled that the plaintiff's eyes were bloodshot, "showing very little white," that "he smelled of alcohol, that as he walked along the

path he was weaving from side to side rather than walking in a straight line, that he was not coherent in his speech and that, as I asked him to move away, he was staring through me and not seeming to comprehend what I was saying," and that he formed the view "that he was severely affected by alcohol."

[12] In cross-examination, he was asked if he thought Lonita was highly intoxicated. He said, "She was intoxicated. I wouldn't say highly," and "She wasn't to the extent of taking her into custody." He agreed that his evidence in the CSJ was that "the complainant at the time was highly intoxicated herself." When this was put to him, he said, "Well, all right, she was highly intoxicated," but less intoxicated than the plaintiff. Subsequently he changed his evidence, accepting that the plaintiff was less intoxicated than Lonita. Realising that he had previously said that she was not sufficiently intoxicated to be taken into protective custody, he then sought to explain this away by giving evidence that because Lonita had somewhere else to go, there was no need to take her into protective custody.

[13] The evidence in chief of Fitzell was that "the three people showed definite signs of intoxication. I could smell alcohol on them and they looked to be unsteady on their feet." In cross-examination he said that although he could smell alcohol on the group of three people, he could not say that it came from the plaintiff. He said the plaintiff had bloodshot eyes, but that was all he could say about the plaintiff's state of sobriety. He conceded that this

was not enough to decide whether to place the plaintiff in protective custody.

[14] Miller also conceded that at the time the plaintiff left the Kurringal Flats, he had made no decision to apprehend him. He said that the plaintiff was only a "candidate" for that course of action, and had the plaintiff not avoided the police by going away, he would not have been taken into protective custody. He was asked in cross-examination:

> "But subject to catching him, had you decided to take him into protective custody when you first saw him? – Well, no.
> Isn't it the case that you needed to assess him further? – Well, that's right and that would have been done in the Watchhouse.
> All right, but you needed to assess him to find out whether he was seriously affected by alcohol – Correct? – And like I said, that would have been done at the Watchhouse."

[15] I find that at this stage neither constable had decided to take the plaintiff into protective custody, and that the reason for that was because neither of them, at that stage, considered that they had reasonable grounds to believe that the plaintiff was "intoxicated by alcohol," in terms of s 128(1) of the *Police Administration Act*. As to how intoxicated the plaintiff actually was, the evidence of the plaintiff was that he was "not very drunk.....only half shot.....I was not very drunk because I could walk straight and I could control myself." He did not depart from this in cross-examination. I will return to this topic later.

The police pursue the plaintiff

[16] After the police had finished speaking with Lonita, a decision was made to pursue the plaintiff. The reason given for this was not at all satisfactory. Miller denied that he had told the plaintiff to leave the area. His evidence was that all he had asked him to do was to step away from the complainant whilst he finished talking to her. I prefer the evidence of the plaintiff, who I thought was an honest witness. In assessing the plaintiff's credibility I have borne in mind that assessing his truthfulness as a witness by reference to his body language is difficult because of his different cultural background. Similarly, judging his demeanour from the tone of the interpreter's answers is impossible. Nevertheless it is part of my task to make an assessment of his reliability and truthfulness notwithstanding that he has given his evidence in a language which is foreign to me. Nevertheless, he was able to answer all questions fluently in his own language and that is a factor that I have taken into account. I also have taken into account that there did not appear to have been any difficulties in communication between the witness and the interpreter.[1] In any event, the police had no power to detain the plaintiff at this stage, even on their own evidence. He was perfectly free to leave the area. Miller's evidence was that he wanted to speak to the plaintiff about the allegation of assault made by the complainant. After speaking with the complainant, he arranged to meet her at an address in Kurringal Flats which she gave him, and she would wait there for them to

[1] *De La Espriella-Velasco v The Queen* (2006) 197 FLR 125 at [56] – [59]; [366].

return and take a formal statement from her. He said that they returned to the vehicle and drove down Ross Smith Avenue attempting to locate him.

[17] I do not accept Miller's evidence that Lonita made a complaint that she had been assaulted by the plaintiff. If such a complaint had been made, I would have expected to find it in his notes. It is not supported by the evidence of Fitzell. The plaintiff gave no evidence of hearing such a complaint. Lonita was not called to give evidence by either party. In arriving at this conclusion I have not overlooked the evidence to which I will later refer, that the plaintiff protested at the Watchhouse that the police "had the wrong person." It is quite likely that the plaintiff knew before the police arrived that Lonita had accused him of assaulting her, even before she rang for the police.

[18] Miller's evidence in the CSJ was that he saw the plaintiff "*walk* across the road." In cross-examination he said that the plaintiff *walked off* right down the – Ross Smith Avenue." In his affidavit Ext D1 he said that he saw the plaintiff "start *jogging down* Ross Smith Avenue, so we drove in his direction." Later in cross-examination he said that 'because he *ran away* from us, he had to be apprehended." Yet, the evidence of Miller was that after he had finished speaking with Lonita, he and Fitzell got into the police wagon, did a U turn and then drove down Ross Smith Avenue when he saw the plaintiff climb over a fence into the yard of a residence on a corner block. Miller stated in his affidavit:

> "We drove around the corner and could hear dogs barking and the sounds of him climbing over fences as we drove along the street. We drove to the end of the street and could not see or hear him, so we got out of the vehicle. Fitzell gave chase while I went back, got into the vehicle, did a U turn and drove down the road in the direction Fitzell had gone. By the time I did this I lost sight of both the plaintiff and Fitzell. I drove along the street looking for them and then, in my rear view mirror, I saw a resident from one of the houses waving me back. I did another U turn and drove back towards the resident. They (sic) told me "that the Aboriginal man and my partner were in his back yard."

He then parked the vehicle, and as he walked into the front gate, he saw Fitzell coming out from the back yard escorting the plaintiff by holding his upper arm. The plaintiff's hands were behind his back in hand cuffs.

[19] From this account, it does not seem possible that he actually saw the plaintiff again, after the plaintiff began to walk down Ross Smith Avenue, until he says he saw him jump a fence on the corner residence.

[20] The plaintiff denied climbing any fences. His account was that he walked along the footpath of Ross Smith Avenue. "As I was walking I noticed a tap in the garden of one of the houses. I entered the garden and filled up my empty bottle of Coke with water. I then went out of the garden, turned left, and continued walking down the road. After a bit I looked behind me and saw the police following me in the van. The van drove up behind me. The police officer in the passenger side called out words to the effect 'stop.' I said words to the effect, ' you told me I am go'.....The police officer from the passenger side got out of the van and started to move towards me. I started to move away from him. The officer then moved forward and grabbed me roughly." He was then handcuffed. In cross-examination he

denied jogging or running at any time, or climbing into a yard of a residence, apart from the time he walked in to fill up his Coke bottle. He denied being handcuffed in a yard. He maintained that this occurred on the road.

[21] The account given by Fitzell in his affidavit, Ext D2 is as follows:

> "We went back to the vehicle and drove down Ross Smith Avenue, looking for him. We stopped and I got out of the vehicle and looked over a fence, a resident in this yard has called to me and asked whether we were looking for an Aboriginal man. I confirmed that we were and he told us an Aboriginal man had just ran through his yard, and pointed in the direction he was travelling.
>
> We continued driving along Ross Smith Avenue and then turned down the next street in the direction the resident had pointed, and then turned into another street and pulled up. We both got out of the vehicle to look for the plaintiff. As we did that, I saw the plaintiff hiding in the bushes of a yard on the corner behind us. He saw me looking at him and then ran off back along the road we had driven down.
>
> I pursued him down the road on foot, while Wayne went to the vehicle. I saw the plaintiff run into another yard and I went in after him. I ran around the side of the house and located him under a large overhanging tree in the corner of the yard."

It was at this location that Fitzell said the appellant was apprehended and handcuffed.

[22] A difficulty with this account is that none of the first seven streets on the left side of Ross Smith Avenue from the BP Service Station have any side streets. They all end in Playford Street, which runs parallel with Ross Smith Avenue. The eighth street, Freer Street, does have a side street, but Freer Street is a long way down Ross Smith Avenue, opposite Parap Primary

School. Neither police officer gave evidence as to which streets they drove down. It is possible that the yard where Fitzell approached the plaintiff was in one of the side streets running off Ross Smith Avenue. If so, this would account for the need for the first U turn that Miller claims to have made. No cross-examination was directed towards clarifying the precise streets involved. However that may be, each of these side streets are long enough to have a number of houses in them and it seems improbable that the plaintiff could have jumped all of the fences until he got to a residence on the corner of Playford Street.

[23] Fitzell's account was clarified in cross-examination. He claimed that the street they turned down was the first street along Ross Smith Avenue, which he could not recall the name of, and then they drove down the end of that street to a T intersection, and turned right into that road, stopped and got out. From this account, according to the street directory, the police went down Parsons Street and turned right into Playford Street. However, this is not a T intersection as it is not possible to turn left at that point. The bushes he described were said to be on council land between the road and the property he saw the plaintiff "run into" via an open gate. In cross-examination he conceded that he did not actually see the plaintiff run into the yard. Fitzell agreed that at no stage that day did he see the plaintiff "run" at all.

[24] The resident, who Miller claims to have spoken to, who must have been living in the house the yard of which the plaintiff allegedly ran into, was not

called as a witness by the defendants. No-one actually saw the plaintiff climb any fences except Miller. Fitzell gave no evidence of hearing anyone climb over fences.

[25] Miller's evidence in the CSJ was not consistent with the account he gave to me in several respects. First he claimed to have seen the plaintiff jumping fences. Secondly, he said that as they went to the end of the street, he saw the plaintiff "run across in front of us, across the road. That was down towards the racetrack." He claimed that after they parked the vehicle, they "started conducting patrols on foot. My partner has then seen and pointed out to me that the defendant had run back in the direction he'd just come from which I'd also noticed."

[26] No such evidence was given before me. When the plaintiff was put in the back of the police vehicle Miller said that the plaintiff had "a number of small cuts on his face which I assumed had been due to him running through backyards and jumping fences, going through bushes and whatnot, trying to avoid us." The issue of these facial cuts was cross-examined upon by the plaintiff's counsel, to which I will return shortly, as it is also relevant to another issue relating to a cut on the plaintiff's right eyebrow which assumed some importance. Suffice it is to say that I am not satisfied that the apprehension took place in a yard of a property in this side-street. The accounts given by both police officers were less than satisfactory. Even allowing for the passage of time between the events and the trial, and the difficulty they may have had recalling these events accurately, and bearing

in mind that apprehensions of this sort appear to be common place, there are too many discrepancies in the accounts given for me to place much reliance upon them. It is not clear to me why the police thought it necessary to pursue the plaintiff. They must have had in mind speaking to him about the allegation of assault, even though I am not persuaded that Lonita made any allegation of assault to them. I would have expected Miller to have made a note of that allegation, if it had been made. Miller sought to explain the absence of such a note because of the alleged interruptions of the discussion with Lonita, but this was unconvincing. Clearly the discussion continued after the plaintiff left the area of the Kurringal Flats, and there was no reason why he could not have noted it then. In addition, Fitzell gave no evidence of hearing any such allegation. Nevertheless Miller was aware that an allegation of assault had been conveyed by radio. It is possible that he wished to speak to the plaintiff generally concerning the allegations. But of course the plaintiff was not obliged to answer any questions. He was not under arrest at this stage. He thought he was told to leave, and he left. Absent a lawful arrest, he was perfectly entitled to leave in any event. Miller's evidence was that he pursued the plaintiff because he ran away from the police. This was not a sufficient reason to pursue the plaintiff.

[27] A second possibility is that the police may have had in mind taking the plaintiff into custody under s 128(1) of the *Police Administration Act*. I think this is unlikely if Miller thought he was only "a candidate." I find that

the reason for pursuing the plaintiff was to speak to him about the alleged assault. I will return to this subject later.

The plaintiff is taken into custody by Fitzell

[28] Fitzell's account is that he ran after the plaintiff and located him in the backyard of a residence standing underneath a tree. He did not speak to the plaintiff to ascertain whether he was intoxicated or not. He told the plaintiff to lie on the ground, face down. The plaintiff complied. He then bent down on one knee, put his other knee in the back of the plaintiff's shoulder, brought both hands behind the plaintiff's back and handcuffed him. The plaintiff did not resist. After this, he assisted the plaintiff to stand, then escorted him to the back of the police van, and put him into the van. In his evidence in chief, he could not recall if the handcuffs were removed before or after the plaintiff was placed in the van.

[29] Miller did not witness the apprehension. He first saw the plaintiff again when Fitzell was escorting the plaintiff from the backyard.

[30] The plaintiff's account was that the apprehending officer, who I accept was Fitzell, grabbed him roughly, twisted his wrist behind his back, then pushed him to the ground onto his chest. Fitzell then pressed one knee onto his back, and with his other hand pushed his head into the ground. Whilst on the ground he turned his head and complained about Fitzell being too rough. He was then handcuffed. He then says that he saw Fitzell remove his baton and jabbed him once to the side of the face in the area of the right eyebrow,

causing it to bleed. He then saw the other officer, who must have been Miller, alight from the driver's side of the van. He came up to where he was lying on the ground. Both officers then grabbed him by the trousers, dragged him to the van, twisted his legs and threw him into the cage at the back of the van. The plaintiff said he complained to the police, saying that he would report this to his lawyer, and asked for a dressing to prevent bleeding. The police did not reply.

[31] Fitzell denied striking the plaintiff with his baton. His evidence was that during the course of the apprehension he did not remove his baton at any time. He admitted that after the plaintiff was placed in the van he took his baton out of its holster because it was not sitting properly in its holster. He believes it may have become dislodged whilst running after the plaintiff. He said that before he got into the vehicle, he pushed the extended baton down onto the road to properly close it by engaging the pin, and then put it back into his holster.

[32] Miller's evidence was that he saw Fitzell continuously from the moment he saw Fitzell escorting the plaintiff back from the yard until Fitzell got into the police vehicle, apart from a short period of time when he spoke to the resident to see if he wished to make a complaint about trespassing. At this stage his back was turned away from Fitzell for perhaps a little less than a minute. He said that at no stage did he see Fitzell's baton removed from its holster. He was cross-examined about the process of retracting the baton:

"And did you have a baton on that day? – I did we all carry them.

And they extend, as I understand it. Is that right? – That's correct, yes.

And is there a catch that has to be .....? No. You have to bang it on the ground to – if this is what you're asking – to extend it or retract it, what are you asking?

Well, both? – Well, extend it, you've just got to flick it.

Allright? – To bring it back in, you've got to give it a good whack on the ground so it has to be quite a loud noise on the ground.

And you didn't hear a whack? – I didn't hear anything at all.

And when you say you whacked it on the ground, has it got to be hard ground or can you do it on.....? – It does.

You can't do it on grass or anything? – No.

.....if that had occurred prior to leaving, that's something you would have heard? – That's correct, yes."

[33] Fitzell was cross-examined about the baton. At the time he removed it, he said that Miller was on the other side of the police vehicle, but did not know exactly where he was standing. He agreed that the baton had to be "bashed on a hard surface to close." He said "it would have been on the road next to the police car" just before he got in on the passenger side of the van. He said the vehicle was parked on the road "and there was enough room for me to walk on the road to get in the passenger side of the vehicle." Miller, however, said he had performed a U turn and parked the vehicle on the verge. If Miller is right, Fitzell's account as to where he was when he retracted the baton cannot be right.

[34] Fitzell was cross-examined about whether he had previously had any problems with his baton. He said, not that he could recall. He was asked how he fixed the problem:

> "How did you fix it? – There's a pin inside the baton and all it takes is for you to push down on that pin on a hard surface and it splays these two little needles out which hold the bottom of the baton up inside itself.
>
> And, what, you fixed it that day and you've never had a problem since? – Yes, that is correct.
>
> And it just happens to be by sheer coincidence that the one and only time you ever had a technical problem with a baton is the same day he accuses you of hitting him in the eye with the baton? – Well, as I said, it's not – I can't recall if I had that problem beforehand."

[35] As to the cut above the eyebrow, Fitzell said that he did see the cut. The first time he noticed it was when he was on the ground. He did not notice it at Kurringal Flats. He said it was "a tiny cut:"

> "Was it a fresh cut? – It wasn't bleeding but it looked like it had been opened. It could have been an injury that had re-opened....
>
> Did you notice any blood on his face? ... No, I didn't notice any blood."

[36] Fitzell said that the cut was obvious. He agreed that he had previously given evidence with CSJ that the cut was on the plaintiff's nose, but he maintained that that was incorrect and it was "a cut on his face."

[37] Miller's evidence was that he saw the cut and also some old scratches on the plaintiff's face when he was speaking to him briefly outside Kurringal Flats. At that stage he was only a metre away from him. Miller was cross-examined about that at some length. It was put to him that in the CSJ

he was specifically asked whether he saw a cut to his eyebrow when the plaintiff was removed from the backyard:

> "And you said he had some cuts and scratches on his face? – That's correct.
>
> That included – did that include a cut to the eyebrow? – It could have. I said he had a number of small cuts and lacerations on his face. I assume that they'd come from when he'd jumped on fences and ran through yards."

[38] It was put that his evidence that he saw a cut on his eyebrow at the Kurringal Flats was recent invention. I do not accept Miller's evidence on this issue.

[39] Miller also claimed to have seen old scratches on the plaintiff's face at the Kurringal Flats scene, and fresh cuts after the plaintiff was arrested. I do not accept his evidence on that subject either. Fitzell was cross-examined about whether he saw any scratches on the plaintiff's face at any time after the apprehension:

> "You didn't see any scratches on his face? – Like there was old scratches. There wasn't anything fresh"

He was asked if he had ever mentioned seeing scratches before. He said he thought he mentioned scratches in the CSJ. He was given an opportunity over an adjournment to refresh his memory by reading the transcript of his evidence. After Court resumed, he agreed that no mention was made of scratches. Subsequently the following exchange occurred:

> "These scratches – today you said they were old scratches, is that right? – Well I said they were scratches and I .....

No. I want to suggest that before we just had this break you twice used the expression old scratches in your evidence? – Yeah.

Well were they old scratches? – If I said they were old scratches they might have been old scratches.

Sir, it's your evidence. I want to suggest to you that on two occasions just prior to us breaking, in addition to this cut on the eyebrow, you also twice used the expression that you saw old scratches on his face. Now do you recall using that expression or not? - I recall using scratches. I can't recall using old scratches. And I referred to the paragraph in my affidavit with scratches.

So what, you don't remember – this is what I suggest you said about half an hour ago. I asked you, the only injury that you saw – I withdraw that, I suggest that after I asked you some questions about this cut on the eye, I said – my question was: 'Was that the only injury you saw? – Yes, there were old scratches, nothing fresh. Not anything fresh.' Do you remember saying that? – No, I don't remember saying it.

And then I suggest that I put it to you that you made no mention of scratches before paragraph 18 in your affidavit. And they you said: 'There were old scratches on his face.' Do you remember saying that? – No, I don't remember saying it, but –

Well if you take it from me, and there hasn't been an objection from my friend, that you twice used the expression that there were old scratches on his face. Is that - ? – I am not taking it – you said if you take it from me. I'm not taking it from you, I'm just saying that I can't recall saying it.

Well I want you to assume that you did say that on two occasions about half an hour ago, okay? – Okay.

Why did you use the expression old scratches? – I don't know.

I suggest you were trying to convey that they were somehow scratches that he'd – you formed the view that he incurred some earlier time, days or hours or whatever before, correct? – I can't answer. I don't know, I can't answer it.

But why would you use the expression old scratches? It must mean that, mustn't it? – I don't know.

You see, what I suggest is you said that, you made it up on the spot and you had a think about it and you don't want to stick with old

scratches anymore, you just want scratches. That's the truth, isn't it? – No, it's not. Because I can't recall saying old scratches, so.

So you honestly cannot remember half an hour ago that you twice said that he had old scratches? – I can't remember saying old scratches, no. I do remember referring to that he did have scratches on his face but I can't remember using the old term scratches.

Were they old? Were they old scratches? – Well I don't know.

And if you did say that they were old scratches, you can't give us any reason as to why you would have? – No."

[40] This remarkable change in Fitzell's evidence significantly undermined his credibility. Whether the scratches were old or new would give some credence to the assertion that the plaintiff had jumped over fences to evade the police, and I think Fitzell realised this and was trying to avoid his slip that the scratches were old ones. Later, in the Watchhouse, whilst in a holding cell, the plaintiff complained about his treatment by the police. The Watchhouse is fitted with cameras which also recorded sound. The sound quality is poor, but some things said were clear:

"Plaintiff	-	(shouting) Wrong person (unclear) you mob bash me up..... (unclear) report you mob.
Miller	-	That's from jumping fences.
Fitzell	-	You shouldn't have been jumping fences and running through bushes, you wouldn't have got cut by them sticks.
Plaintiff	-	I'm Marcellus Majindi. I'm wrong person.
Fitzell	-	Why if your wrong person, why did you run from police?
Plaintiff	-	Well I'm wrong person.
Miller	-	Why did you run?
Plaintiff	-	How come you mob just fucking bash me up?

Fitzell or Miller -Yeah, yeah, whatever."

At this point the plaintiff walks out of the cell towards the Watchhouse counter, and the following is said:

"Plaintiff - I'll report you.

Miller - Who did it? Empty your pockets.

Plaintiff - You mob two now (pointing at Fitzell).

Fitzell or Miller -Yeah, yeah whatever."

By this time the plaintiff is standing at the counter.

"Majindi - I'll report you. Money claim.

How come you mob bash me up here (pointing to his eyebrow).

Fitzell - [unclear].....bashed you up. You were jumping fences. How come I've got no marks on me?"

Then followed the spitting incident which I will come to later.

[41] Fitzell was cross-examined about this footage after it had been played to him in Court:

> "MR NEWTON: Now did you recognise your own voice at one point after Mr Majindi said: 'You mob bashed me up.' 'Report you mob.' And then Officer Miller says: 'That's from jumping fences.' I suggest at a point then you said: 'You shouldn't have been jumping fences and running through bushes, you wouldn't have got cut by them sticks?' – Yes.
>
> Correct? That's you? – Yes.
>
> And see, what you were suggesting at that point was some explanation as to how Mr Majindi could have got some recent injuries other than being assaulted, correct? – No, they were the facts at the time. He ran. I wasn't trying to make light of any incident that may or may not have occurred.

> But what you were suggesting to him was an explanation from recent injuries on his face, correct? – Yes.
>
> What you were saying is look, if you've got injuries, you shouldn't have been jumping fences and running through bushes, ie, you must have got them recently doing that, correct? – Yes.
>
> And you see, that's why when you said twice 'old scratches' it twigged in your head that you'd said the wrong thing. And that's why you conveniently forgot it 10 minutes later, correct? – No.
>
> And I'll give you one more chance. Can you give us any explanation as to why you used the expression 'old scratches' twice? – No, I can't.
>
> Because what you were doing back at the police station was suggesting that any injuries he had on his face he got recently potentially from running through bushes and jumping fences, correct? – Yes.
>
> Because you knew he had a cut on his eye then, didn't you? – Yeah, I must have known."

[42] I am satisfied that there were no fresh cuts on the plaintiff's face, apart from the cut to the eyebrow, and I so find.

[43] No evidence was led by the defendants from the resident who the police allegedly spoke to at the residence where the plaintiff was allegedly apprehended. No explanation was given for not calling this person as a witness. The defendant Northern Territory of Australia knew that the plaintiff was asserting that he was apprehended in a street when his affidavit was filed and served in late April 2011.[2] The police officers were not joined as defendants until June 2011, but they were not separately represented. Evidence from the alleged resident would clearly have supported the defendants' case. It would not have been consistent with the plaintiff's case

[2] See paragraphs 9 to 12 of Ext P2.

to attempt to find the alleged resident, whom in any event was not identified. Even the exact street and property concerned was vague in the defendants' affidavits. The defendants could have carried out investigations to see if this person could have been located. As Lord Mansfield famously said in *Blatch v Archer*;[3]

> "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and the power of the other to have contradicted."

Was the apprehension lawful?

[44] The apprehension of the plaintiff, the handcuffing of him, and placing him in the police van, and taking him to the Watchhouse and holding him in a cell is prima facie evidence of an assault and battery, deprivation of liberty and false imprisonment, unless justified by law. The only justification relied upon by the defendants is that the plaintiff was lawfully apprehended and held in protective custody under s 128 of the *Police Administration Act*. No other justification is pleaded in the Amended Defence, and neither Miller nor Fitzell sought to justify it on any other basis. However, I note that Miller in his affidavit said:[4]

> "I also recall that I told the plaintiff that he was under arrest for assaulting the complainant, and that if she gave us a statement we would take him to the Watchhouse and charge him with assault."

Miller, in cross-examination, backed away from this, and tried to explain it away as being "out of sinc," maintaining only the latter part of that

[3] (1774) 1 Cowp. 63 at 65; 98 ER 969 at 970.
[4] Ext D1 para 22.

paragraph. It was an unconvincing explanation which reflected poorly on his credit as a witness.

[45] Section 128(1) of the *Police Administration Act*, (which has since been substantially amended) provided at the relevant time as follows:

> "(1) Where a member has reasonable grounds for believing that a person is intoxicated with alcohol or a drug and that that person is in a public place or trespassing on private property the member may, without warrant, apprehend and take that person into custody.
>
> (2) For the purposes of carrying out his duties under subsection (1), a member may, without warrant, enter upon private property.
>
> (3) A member of the Police Force who takes a person into custody under subsection (1) may:
>
> (a) search or cause to be searched that person; and
>
> (b) remove or cause to be removed from that person for safe keeping, until the person is released from custody, any money or valuables that are found on or about that person and any item on or about that person that is likely to cause harm to that person or any other person or that could be used by that person or any other person to cause harm to himself or another."
>
> (4) For the purposes of subsection (3), the person of a woman shall not be searched except by a woman.
>
> (5) All money or valuables taken from a person under subsection (3) shall be recorded in a register kept for that purpose and shall be returned to that person on receipt of a signature or other mark made by that person in the register.
>
> (6) A member may use the force that is reasonably necessary to exercise a power under this section."

[46] In *Majindi v Balchin*[5] Southwood J held that "intoxicated" means seriously affected apparently by alcohol or a drug, that a person is seriously affected by alcohol if his or her physical and mental faculties are seriously impaired in the conduct of ordinary affairs or acts of daily life; and that the ordinary connotation of "intoxicated" under s 128 means that the person is very drunk. No criticism was directed at this passage of his Honour's reasons, and I see no reason not to apply it.

[47] In this case, the evidence is clear that at no time up to the moment the plaintiff was handcuffed, did either Miller of Fitzell believe on reasonable grounds (or at all) that the plaintiff was sufficiently intoxicated to warrant his apprehension under s 128(1) of the Act. Furthermore, any belief they may have held that he had been drinking was not sufficient for either of them to have reasonable grounds for believing that the plaintiff was very drunk. Indeed, the footage taken at the Watchhouse provides strong evidence that the plaintiff was not heavily intoxicated. He was able to get out of the police van unassisted and walk normally through the sally port. Miller suggested that the plaintiff bumped into a door as he entered the Watchhouse, but that does not appear on the CCTV footage. Fitzell gave no evidence of it. I reject Miller's evidence. As I have said before, Miller's evidence was unconvincing. Furthermore his demeanour in the witness box did nothing to enhance his credibility as a witness. He was argumentative

[5] [2011] NTSC 40 at [9].

and non-responsive to counsel during cross-examination. I formed a very poor impression of him as a witness of truth and reliability.

[48] I accept that the test to be applied is, as Mr McLeod submitted, that stated by the High Court in *George v Rockett*, where the Court said: [6]

> "When a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."

Later in the judgment, after discussing the difference between suspicion and belief, the Court said: [7]

> "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of mind may, depending on the circumstances, leave something to surmise or conjecture."

[49] In this case, the burden of proving on the balance of probabilities that either constable held such a belief on reasonable grounds rested on the defendants. Not only did they not discharge that burden, but I am positively satisfied that no such belief ever existed. The reason for apprehending the plaintiff was because they wanted to speak to him about the alleged assault and on this own case he ran away from them and they pursued him. The apprehension under s 128 was a mere pretence. They had no basis to arrest

[6] (1990) 170 CLR 104 at 112.
[7] at p116.

him, as they well knew. That this was the reason for the apprehension becomes clear from what happened next. After placing the plaintiff in the back of the van, the plaintiff was taken to the Kurringal Flats where the police attempted to locate Lonita. They went to the unit where they believed she would be found in order to take a statement from her. When they arrived at the unit, Miller's evidence is that the occupant said that Lonita was not there, and that she was not welcome there because she causes problems. They then drove around the area for a short time, but could not locate Lonita. It was only then that they conveyed the plaintiff to the Watchhouse. Why they did not release the plaintiff then can only be explained as an attempt to cover up a wrongful arrest. Fitzell gave no evidence about going to Kurringal Flats to find Lonita after the apprehension and was not cross-examined about that. In cross-examination he was asked:

> "You see, your view is that he was not obliged to leave the scene, correct? The first scene? – Well, he wasn't – we hadn't directed our attention onto him yet, so he wasn't in our custody, therefore he was free to leave.
>
> He was free to leave was he? – Yeah.
>
> Well why did you chase him? – Well we needed to speak to him after we got the complaint off the initial complainant."

[50] Subsequently at the Watchhouse, the recorded conversation indicates that both police were asserting that the plaintiff had run away from them and jumping fences, and both asked, "why did you run from the police?" My overall impression is that the police inferred that the plaintiff must have

been guilty of something, otherwise why run away, and this was the cause of the apprehension.

[51] I find that the apprehension of the plaintiff, his subsequent handcuffing and imprisonment in the police van and at the Watchhouse was unlawful.

Did Fitzell strike the plaintiff with his baton?

[52] The burden of proving this issue is on the plaintiff on the balance of probabilities, in accordance with the factors to be taken into account referred to by Dixon J (as he then was) in *Briginshaw v Briginshaw*.[8] As to that, I have the plaintiff's evidence that he was struck with the baton, which caused a cut over his right eyebrow. As noted above, I thought the plaintiff was a truthful and honest witness who was not shaken in cross-examination. The evidence is clear that he complained at the Watchhouse of being "bashed up," pointing to the right side of his face in the general direction of this right eyebrow. There is also evidence that he had a cut over his right eyebrow from both Miller and Fitzell, which Fitzell first saw when he apprehended him. Fitzell admits that he did in fact remove his baton, albeit after the apprehension. The fact that it was removed at all is explicable, but the coincidence of this happening on the one occasion when an allegation of being struck by the baton is made, cannot be overlooked.

[53] Next there is the evidence of Senior Auxiliary Shervill who was present at the Watchhouse. It will be necessary to deal with his evidence in more

[8] (1938) 60 CLR 336 at 361-363.

detail later, but after the spitting incident, the evidence was that he cleaned the spittle from off the Watchhouse counter. According to this witness, the plaintiff did not have a cut to his eyebrow at all. He claimed that the cut was to the plaintiff's nose. I think that Shervill is wrong about that. In his affidavit, Ext D3, he said that there was "no blood on the reception bench." In cross-examination he said he recalled seeing something consistent with blood where the plaintiff's head had been placed down on the counter during the pat-down search, which happened immediately after the conversation in the Watchhouse to which I have previously referred. However, the plaintiff's evidence in cross-examination was that the reason for spitting was because he had been bleeding from the inside of his lip. Shervill's evidence about seeing something consistent with blood is therefore neutral, if the plaintiff's account is to be believed. I doubt if a small cut to the eyebrow would still be bleeding by this time. Miller's notes indicate that the plaintiff was taken into police custody at 1820hrs and the CAD notes indicate that he was in the Watchhouse by 1844hrs. Miller's notes indicate that the spitting incident occurred at 1840hrs. I am not satisfied that the cut was still bleeding (if it ever was) by this time.

[54] I also must take into account Fitzell's evidence that he did not strike the plaintiff with his baton. As Dixon J said in *Briginshaw v Briginshaw*,[9]

> "The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the nature and consequences flowing from a particular finding are considerations

[9] (1938) 60 CLR 336 at 362.

which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal."

[55] On the other hand I have rejected the evidence of Miller and Fitzell concerning the circumstances of and location of the apprehension. I have mentioned that both Miller and Fitzell were witnesses who were unreliable, Fitzell less so than Miller, but that does not mean that I have rejected the whole of their evidence. But on these important issues I have preferred the evidence of the plaintiff.

[56] The result is that I find on the balance of probabilities that Fitzell did strike the plaintiff with his baton, despite the absence of any proven motive for doing so, and the seriousness of this allegation, and the consequences of this finding so far as both police officers are concerned.

The spitting incident – a preliminary question

[57] The plaintiff was charged in the CSJ with assaulting Miller in the execution of his duty by spitting in his face, contrary to s 189A of the Criminal Code. This is an indictable offence triable summarily. The informant was not Miller, but one Vivien Lynette Balchin. Following a contested hearing, the plaintiff was found guilty. He appealed his conviction to the Supreme Court. Southwood J allowed the appeal, the verdict of guilty was quashed, and a verdict of not guilty was entered. The reasons for allowing appeal were that the prosecution had not proved beyond reasonable doubt that there were reasonable grounds for believing that the plaintiff was seriously affected by alcohol when the plaintiff was apprehended, and had therefore

not proved that Miller was acting in the execution of his duty at the time the alleged assault took place.

[58] The defendant Miller has, in these proceedings, filed a counterclaim for the alleged assault and battery arising out of the same incident for which the appellant was acquitted. The plaintiff in his defence to the counterclaim pleads that by reason of his acquittal and the findings of Southwood J (and also of the Magistrate who heard the charge in the CSJ) the defendants are estopped from asserting that the plaintiff was lawfully apprehended for protective custody. (The same issue was raised in the reply to the defendant's defence)

[59] In view of my findings, it is unnecessary for me to decide this issue, but as the matter has been fully argued, I consider that I should deal with it, albeit briefly, as it was raised as a preliminary question as to the admissibility of the evidence concerning this issue, and by consent, I received the evidence de bene esse.

[60] In my opinion there is no estoppel in this case, whether the estoppel is characterised as res judicata estoppel or issue estoppel. Whilst a conviction can operate as an estoppel in civil proceedings, an acquittal does not operate to prevent proof of the charge which had been laid,[10] and is not admissible as an evidentiary fact.[11] I therefore find that evidence relating to the

[10] *Helsham v Blackwood* (1851) 138 ER 412; *Helton v Allen* (1940) 63 CLR 691 at 710; *Re application of Hanratty* (1984) 14A Crim R 36 at 45.
[11] *Helton v Allen* (1940) 63 CLR 691 at 710.

previous findings concerning the issue in question is inadmissible to prove whether or not the plaintiff was lawfully apprehended. As to whether or not the plaintiff assaulted Miller, the evidence of the plaintiff's acquittal is inadmissible and the defendants are not estopped by the decision of Southwood J.

[61] I was referred by Mr Newton to the decision of the Victorian Full Court in *Cameron v James*,[12] but that was a case where the Court held that despite the fact that the charge was dismissed by the Court of Petty Sessions, the proceedings ended in favour of the police officer who brought the charge and who could therefore rely on the proceedings in answer to a civil case for false imprisonment and malicious prosecution. That case is distinguishable from the present. *Carter v Walker*,[13] to which I was also referred, was a case where the estoppel was said to have arisen from a plea of guilty, not an acquittal, and is also distinguishable.

[62] The defendants have not pleaded estoppel, and therefore that question does not arise on the defendant's case.

The spitting incident – did the plaintiff assault Miller?

[63] Immediately before the plaintiff was taken out of the holding cell, Senior Auxiliary Shervill was standing at the counter, leaning on it. Police Auxiliary Masters was sitting opposite him, behind the counter. The

[12] [1945] VLR 113.
[13] [2010] VSCA 340.

reception counter is L-shaped. Fitzell was standing around on the right side of the counter, leaning on it. Miller went to the cell, and opened it. The plaintiff walked out, with Miller behind and to one side. Fitzell started to move towards the plaintiff. Shervill turned side on facing the plaintiff. Whilst this is happening, part of the conversation previously referred to, was taking place between the plaintiff and the police officers. Fitzell told the plaintiff to empty his pockets. The plaintiff stood in front of the counter facing Auxiliary Masters with his arms on the counter. Shervill then moved behind the plaintiff and conducted a pat-down search. Miller turned away to close the cell door. After closing the door, Miller started to walk back towards the plaintiff, and Fitzell walked behind the plaintiff, saying "How come I've got no marks on me." At this point, the plaintiff, who is standing upright has his head turned towards Miller, who has almost stopped walking towards the plaintiff, and is about two metres away near the counter, spat in Miller's direction.

[64] In order to establish his counterclaim, Miller needs to prove that the plaintiff's action in spitting in his direction was intentional, ie that the plaintiff's action was voluntary, and that he intended to spit on Miller. It is not in contention that Miller was spat upon. Miller's evidence is that the spittle, which was "quite a spray landed on most of my face, including my lips, although not in my mouth." The plaintiff claimed that he spat down on the floor, and had not spat at Miller. Having viewed the CCTV footage, and considered the evidence that spittle was sprayed onto the reception counter,

I think it is clear that the plaintiff did spit at Miller, that he did so out of anger and frustration at his unlawful arrest and false imprisonment, and I reject the plaintiff's evidence in this issue. I am satisfied that the plaintiff deliberately spat at Miller, and I so find. A possible defence of self defence was abandoned by the plaintiff's counsel at trial.

The spitting incident – did Miller and Fitzell assault the plaintiff?

[65] Immediately after the spitting incident, Miller, Fitzell and Shervill all pounced on the plaintiff. The plaintiff's arms were pulled behind his back and his head was forced down onto the counter, although not with any significant force. Considerable force was used by Miller and Fitzell to restrain the plaintiff who cried out in pain. Shervill forced his head down, but denied hurting the plaintiff. The CCTV footage does not support a conclusion that Shervill caused any significant discomfort to the plaintiff. Miller employed what he described as a "rear compression hold" to secure "pain compliance" and as soon as he heard the plaintiff howl, he released it to stop his screaming. So far as this went, I do not find that excessive force was used by any of the officers.

[66] An issue also arose as to whether or not Miller punched the plaintiff in the head with a closed fist before applying the "rear compression hold." The plaintiff claimed Miller punched him to the right side of the head. Miller admitted that he swung his arm at the plaintiff's head in an attempt to redirect his head away from himself. He denied actually making contact

with the plaintiff. His evidence was that he used a closed fist at the start of his swing, but opened his hand before it came into contact, not with the plaintiff, but someone else's arm which deflected his hand away. Miller gave an explanation that he was using a martial arts technique. By closing his hand into a fist, it hardens part of the palm of the hand, and therefore causes less damage to the hand on contact. In cross-examination Miller agreed that he had admitted to the CSJ that he in fact redirected the plaintiff's face away with an open hand, but he asserted before me that, having since seen the CCTV footage, he now believes he actually missed the plaintiff's head. Miller conceded that when he withdrew his arm, he had it in a closed fist again, "because it just gets you ready if you need to do another swipe." Shervill's evidence was that at this time he was pushing down on the plaintiff's head onto the reception bench, and he recalled Miller "drove his palm towards the plaintiff's face....I recall that Miller's hand brushed over mine as I was holding the plaintiff's head." I reject this evidence. The CCTV footage shows that Shervill was not in a position to see whether Miller had opened the palm of this hand, and that Miller's hand went underneath Shervill's hand. The whole incident was so quick, and Shervill was concentrating on what he was doing, he could not possibly have seen an open palm. Having watched the CCTV footage myself several times, I am not convinced by Miller's explanation. I am satisfied that Miller deliberately punched the plaintiff to the side of the head quite forcibly. This was not a justified use of force.

After the spitting incident

[67] Thereafter, the search was completed. The plaintiff was told he was under arrest for assault. Shervill removed the rope belt holding up the plaintiff's pants, which fell down to his ankles. He was not wearing underwear. He was then frogmarched into a cell. He was released from protective custody at about midnight, and then formally charged with assaulting Miller. Bail was refused. The plaintiff complains that he was humiliated by being exposed in front of a female police officer; that he was "chucked" in the cell and "then [they] chucked in my shorts after me." The CCTV footage shows that he was wearing his shorts around his ankles when placed into the cell, and his backside was exposed. I have no doubt that the plaintiff was humiliated, but his shorts were not "chucked in" after him, as he claimed.

Damages on the plaintiff's claim

[68] The plaintiff is entitled to an award of damages for the trespass to the person, which includes the initial arrest, the blow to the head with the baton, being handcuffed and unlawfully searched before being placed in the paddy wagon and taken via the Kurringal Flats to the Watchhouse, and there held in custody, and unlawfully searched before being struck again by Miller after the spitting incident. All in all, he was falsely imprisoned from 1820 hours until midnight, or 5 hours and 40 minutes. No damages are claimed for personal injury damages.

[69] The plaintiff also seeks an award of aggravated damages and as well, exemplary damages. After the conclusion of the hearing I reserved my decision. Before delivering judgment, it came to my notice that a claim for aggravated or exemplary damages might not be open. Through my associate, I drew to the attention of counsel an article by Professor Handford in the Australian Law Journal[14] which suggested that such damages may not be awarded because of the operation of s 19 of *Personal Injuries (Liabilities and Damages) Act*, and I sought written submissions. The defendants' counsel now submits that s 19 precludes such an award. Counsel for the plaintiff submits otherwise.

[70] One of the matters raised by Mr Newton is that the defendants are precluded from relying on s 19 because it was not pleaded. I agree with Mr Newton that the defendants, if they intended to rely on s 19, were required by this Court's pleading rules, to plead it.[15] No application has been made to amend the defendants' Defence to plead s 19. Had such an application been made in all probability there would have been costs consequences if I allowed the amendment because the matter was not raised when the plaintiff sought to amend the Statement of Claim to join Miller and Fitzell as defendants. The matter is therefore not properly before me. Even if I had allowed the Defence to be further amended, it is far from clear that s 19 applies to the circumstances of this case. By s 4, the Act only applies to claim for damages for personal injuries. The claim for false imprisonment is not for

[14] "Intention, negligence and the Civil Liability Acts" (2012) 86 ALJ 100.
[15] See SC Rules, order O13.02(1) (b), and 13.07(1) (a)(b).

personal injury as such. Damages are awarded for the insult and humiliation involved, not for any injury to the person as that is commonly understood. Aggravated and exemplary damages can be awarded in a wide variety of cases – including cases where damages for personal injuries arising out of negligence are claimed: see Luntz, Assessment of Damages for Personal Injuries and Death, 4th Edn, pp 71-72. The Court of Appeal of New South Wales recently held that the equivalent provision in that state did not preclude an award of aggravated or exemplary wrongful arrest, assault and damages for false imprisonment; see *State of New South Wales v Williamson*.[16]

[71] So far as the defendant Miller is concerned, he is fully responsible with the defendant Fitzell for the false imprisonment of the plaintiff, but he is not responsible for assault and battery of the plaintiff by Fitzell who not only used the baton, but handcuffed the plaintiff and illegally searched him. The cause of action, so far as it refers to the circumstances of the manner of the apprehension by Fitzell, is pleaded against Fitzell only. Similarly, the circumstances of the battery by Miller when he punched the plaintiff to the head is pleaded only against Miller. It is clear that damages will need to reflect the different responsibilities of both defendants.

[72] In my opinion, the plaintiff is entitled to an award of aggravated damages against both Miller and Fitzell. Aggravated damages are part of the plaintiff's compensatory damages for the excessive insult and humiliation of

[16] [2011] NSWCA 183. Special leave to appeal to the High Court was granted in December 2011.

being unlawfully imprisoned, assaulted and battered. In *Lackersteen v Jones*[17], Asche CJ observed that the limits for aggravated damages should not go beyond a proper solatium for the injured feelings and insults the plaintiff has suffered. In *New South Wales v Koumdjiev*[18] it was observed that they should go no more than is appropriate to bring compensatory damages to the high end of the available range of compensatory damages.

[73] Bearing these factors in mind, I award to the plaintiff the sum of $35,000 against the defendant Miller, plus an additional $15,000 aggravated damages, and a further $5,000 for the battery. I award against the defendant Fitzell the sum of $35,000 and an additional $15,000 in aggravated damages, and a further sum of $10,000 for the battery, wrongful search and handcuffing.

[74] In my opinion the plaintiff is entitled to an award of exemplary damages. The wrongful arrest and false imprisonment was high handed and a contumelious disregard of the plaintiff's rights. There needs to be an amount to punish and deter, and to bring home to the officers concerned and to their superiors responsible for overseeing the police force "that police officers must be trained and disciplined so that abuses of the kind which happened in the present case do not happen."[19] I award the sum of $40,000 by way of exemplary damages against both Miller and Fitzell.

---

[17] (1988) 92 FLR 6 at 42.
[18] [2005] 63 NSWLR 353 at 368 para [65].
[19] *Adams v Kennedy & Ors* (2000) 49 NSWLR 78 at 87 para [36].

Damages on the counterclaim

[75] The evidence is that Miller wiped his face with a towelette. There is no evidence he needed to seek any treatment. He does not appear on the CCTV footage to be upset. Nevertheless I accept that he felt humiliated to some degree. On his own evidence it was not the first time he had been spat upon, although it was the first time as a police officer. The plaintiff was clearly very annoyed at his unlawful detention. I think he spat on Miller deliberately as an act of defiance. Although self-defence was pleaded, it was abandoned by Mr Newton, but Miller provoked the assault by the unlawful arrest. There will be an award in Miller's favour in the sum of $3,000.

Orders

[76] I make the following orders:

(1) Judgment for the plaintiff against the defendants for $90,000.

(2) Judgment for the plaintiff against Miller and the Northern Territory of Australia for $5,000.

(3) Judgment for the plaintiff against Fitzell and the Northern Territory of Australia for $10,000.

(4) Judgment for Miller against the plaintiff for $3,000.

[77] In ordering judgment against the Northern Territory I note that by the defendants' amended defence the Northern Territory admits that it is vicariously liable for the acts and omissions of the defendants Miller and Fitzell in the course and within the scope of their duty. No submission was made that I should find that they acted outside the course and scope of their duty.

[78] I will hear the parties as to costs.
