

Gaykamangu v Northern Territory of Australia [2016] NTSC 26

PARTIES: DEON GAYKAMANGU
v
NORTHERN TERRITORY OF AUSTRALIA

FILE NO: 113 of 2015 (21553259)

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION

DELIVERED: 19 May 2016

HEARING DATES: 19 April 2016

JUDGMENT OF: MASTER LUPPINO

CATCHWORDS:

Application for leave to join police officers to enable a claim in the nature of punitive damages – Meaning of “punitive damages” - Discretion to grant leave is at large – Onus – Requirement to demonstrate an evidentiary basis for an award of punitive damages – Assessment of evidence to determine the existence of an evidentiary basis.

Police Administration Act, ss 127A, 128, 148B, 148C and 148F;
Alcohol Protection Orders Act, ss 5, 23.
Liquor Act, s 101U.

Lackersteen v Jones & Ors (1988) 92 FLR 6;
Uren v John Fairfax and Sons Pty Ltd (1965) 117 CLR 118;

Lamb v Cotogno (1987) 164 CLR 1;
Daniels v NTA [2007] NTSC 65;
Mather & O'Connell v NTA [2008] NTSC 1;
Majindi v NTA & Ors [2012] NTSC 25;
Helton v Allen (1940) 63 CLR 691;
Mole v Prior [2016] NTCA 2;
Fernando v Commonwealth & Anor (2014) 315 ALR 547.

Sappideen C and Vines P, *Fleming's The law of Torts*, 10th ed, Thomson Reuters, 2011

REPRESENTATION:

Counsel:

Plaintiff:	Mr Bellach
Defendant:	Mr Anderson

Solicitors:

Plaintiff:	Pipers Barristers and Solicitors
Defendant & Police Officers:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Lup1602
Number of pages:	18

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

Gaykamangu v Northern Territory of Australia
[2016] NTSC 26

BETWEEN:

DEON GAYKAMANGU
Plaintiff

v

**NORTHERN TERRITORY OF
AUSTRALIA**
Defendant

No. 113 of 2015 (21553259)

CORAM: MASTER LUPPINO

REASONS

(Delivered 19 May 2016)

- [1] On 28 August 2015 a police patrol attended at the Woolworths supermarket in the Darwin CBD in response to a report that a large group of intoxicated aboriginal people were creating a disturbance.
- [2] On arrival at the scene the police officers, Constables Carthew and Slater, observed a large group of aboriginal people shouting and yelling. The plaintiff was seen to be part of that group and was seen to be carrying a wine cask. The group began to disperse after police arrival. The plaintiff was seen to turn away and dispose of the cask when he saw the police.

- [3] The officers approached the plaintiff. They noticed that he was very intoxicated. The police officers then searched the plaintiff's backpack and found two bladders of cask wine, one was full and the other had been partly consumed. The bladders were then confiscated.
- [4] The officers then took the plaintiff into protective custody pursuant to section 128 of the *Police Administration Act* ("the PAA"). While Constable Carthew was escorting the plaintiff to the police van, the plaintiff tried to pull away and then he struck Constable Carthew. Constable Slater then took the plaintiff to the van and he informed him that he was then under arrest for assaulting police. He asked the plaintiff for his name, which the plaintiff gave, and after conducting enquiries, Constable Slater ascertained that the plaintiff was the subject of an Alcohol Protection Order.¹
- [5] The plaintiff was conveyed to a police station and the police officers completed the appropriate paperwork consisting of a Statement of Facts, the Statutory Declarations of both officers and a document known as 'Bail Considerations'.
- [6] The Statement of Facts was then submitted to Senior Constable Firth. His evidence is that he works in the Judicial Operation Section and his role is to review a Statement of Facts and to then determine whether, and what, charges should be laid. There is no evidence that he had regard to, or was required to have regard to, the Bail Considerations document or the officers'

¹ Pursuant to ss 5 and 23 of the *Alcohol Protection Orders Act 2013* a person the subject of such an order is prohibited from inter alia possessing or consuming alcohol.

Statutory Declarations for the purpose of determining charges. The effect of this evidence, which was not challenged, is that the internal Northern Territory Police procedure therefore is that he is required to determine charges based only on the Statement of Facts.

- [7] After he considered the Statement of Facts Senior Constable Firth decided to charge the plaintiff with the offences of breaching an Alcohol Protection Order, resisting police and assaulting police occasioning harm. Police bail was then refused and following an unsuccessful bail review, the plaintiff remained in custody continuously until his matter was finally heard in the Court of Summary Jurisdiction (“CSJ”) on 21 October 2015.
- [8] On that date the plaintiff pleaded not guilty to the charges of resist arrest and assault police. The CSJ found that the police did not have sufficient basis to take the plaintiff into protective custody pursuant to section 128 of the PAA and accordingly found that the police were not acting in the execution of their duty. Consequently the charges of resist police and assault police were dismissed. The plaintiff then pleaded guilty to two charges of breaching an Alcohol Protection Order. The CSJ recorded a conviction and discharged the plaintiff without further penalty for both of those offences. An appeal against the dismissal of the resist and assault police charges was lodged but was withdrawn before it was heard.
- [9] By Writ and Statement of Claim filed in these proceedings on 27 October 2015 the plaintiff claimed damages against the Territory for false

imprisonment, assault, battery and malicious prosecution as a result of the actions of Constables Carthew and Slater. The Statement of Claim also sought damages in the nature of punitive damages for the purposes of section 148F(2)(b) of the PAA.

[10] The reference to “*in the nature of punitive damages*” in section 148F(2)(b) of the PAA refers to damages otherwise known as exemplary damages. The punitive element of exemplary damages is the feature that distinguishes them from general damages. There are essentially three types of damages in play in the current proceedings. The first is general damages which are compensatory in nature and, as the name implies, are designed to compensate a claimant. Secondly, additional damages can be awarded where there are aggravating circumstances, such as the manner and motive of the tortfeasor’s actions, and where the plaintiff’s sense of damage is justifiably heightened to a degree greater than that allowed for in general damages. These damages, known as aggravated damages, are still compensatory in nature.² The third type of damages are punitive or exemplary damages. These damages are awarded in appropriate cases and go beyond compensation. They are separate and distinct to aggravated damages.³ An award of punitive damages is designed to punish the tortfeasor for his behaviour and to deter similar behaviour in the future.

² *Lackersteen v Jones & Ors* (1988) 92 FLR 6 at para 110.

³ *Uren v John Fairfax and Sons Pty Ltd* (1965) 117 CLR 118; *Lamb v Cotogno* (1987) 164 CLR 1; *Lackersteen v Jones & Ors* (1988) 92 FLR 6.

[11] As to the basis for an entitlement of punitive damages, the test is set out in *Lamb v Cotogno*.⁴ In that case the High Court said that where police act with conscious and contumelious disregard of a person's rights, an award of punitive damages can be made to punish for that conduct, to deter future instances of that conduct and to mark the court's condemnation of that conduct.

[12] The Territory is vicariously liable for general damages for any tort committed by a police officer,⁵ but not in respect of any claim in the nature of punitive damages.⁶ The plaintiff may only claim punitive damages against the officers personally and that requires the joinder of those officers as defendants. The plaintiff requires the leave of the Court to make a claim for damages in the nature of punitive damages before the police officers can be joined.⁷

[13] By summons filed contemporaneously with the Writ, the plaintiff sought the leave required by section 148F(2)(b) of the PAA so as to enable joinder of Constables Carthew and Slater. A proposed amended Statement of Claim formed part of that application. That sought to claim general damages, aggravated damages and exemplary damages.

[14] Subsequently, by further summons filed 15 March 2016 the plaintiff also sought leave so as to enable joinder of Senior Constable Firth as a

⁴ (1987) 164 CLR 1.

⁵ Section 148C(1) of the PAA.

⁶ Section 148C(3) of the PAA.

⁷ Section 148F(2) of the PAA.

defendant. Another draft Amended Statement of Claim formed part of the documents in support of that application. The second draft Amended Statement of Claim subsumes the first. It alleges false imprisonment, assault, battery and malicious prosecution against Constable Carthew, Constable Slater and Senior Constable Firth. It sets out separate particulars in respect of the involvement of Senior Constable Firth.

- [15] The proposed Amended Statement of Claim pleads a claim for exemplary damages in respect of the initial arrest based on the allegation that Constables Carthew and Slater did not have the requisite grounds to take the plaintiff into protective custody and therefore, by doing so, they thereby unlawfully imprisoned him and assaulted him. The particulars allege that the conduct of those officers was high-handed, unwarranted, manifestly excessive and showed contumelious disregard for the rights of the plaintiff.
- [16] The particulars for the claim for malicious prosecution allege as malice, that the prosecution was brought for an improper purpose, specifically “... *attempting to justify the false imprisonment and assault and battery of the Plaintiff by the arresting officers and the informant.*” Senior Constable Firth is the person defined as the ‘informant’ in the document. The draft Amended Statement of Claim then alleges that in prosecuting the plaintiff the three officers acted without reasonable and proper cause. The particulars plead that the three officers did not have reasonable grounds to suspect that any of the circumstances authorising the protective custody were satisfied and

therefore the police officers could not be said to be acting in the execution of their duty. Acting in execution of duty is an element of both offences.

[17] Relying on the circumstances summarised in the preceding paragraph and additionally that Senior Constable Firth lodged an appeal against the dismissal of the charges, the Claim is then made for aggravated damages. A claim for exemplary damages for malicious prosecution is then separately set out. The particulars of that are firstly, the three officers maintained the prosecution knowing that the charges could not be made out, secondly that the conduct of the three officers was high-handed, unwarranted, manifestly excessive and showed contumelious disregard for the rights of the plaintiff, and thirdly, that the three officers persisted with a “*groundless*” prosecution for over 2 months while the plaintiff remained in custody. There was a separate particular in respect of Senior Constable Firth, namely that he appealed the dismissal of the charges in the CSJ and that the appeal was lodged “*without merit*”.

[18] Both summonses were heard by me on Tuesday, 19 April 2016. At the commencement of the hearing, Mr Bellach for the plaintiff advised that the part of the claim and the application against Senior Constable Firth flowing from the allegation that he appealed the decision of the CSJ was withdrawn.

[19] Relevant sections of the PAA are now set out.

127A Intoxicated person

For this Division, a person is *intoxicated* if:

- (a) the person's speech, balance, coordination or behaviour appears to be noticeably impaired; and
- (b) it is reasonable in the circumstances to believe the impairment results from the consumption or use of alcohol or a drug.

128 Circumstances in which a person may be apprehended

(1) A member may, without warrant, apprehend a person and take the person into custody if the member has reasonable grounds for believing:

- (a) the person is intoxicated; and
- (b) the person is in a public place or trespassing on private property; and
- (c) because of the person's intoxication, the person:
 - (i) is unable to adequately care for himself or herself and it is not practicable at that time for the person to be cared for by someone else; or
 - (ii) may cause harm to himself or herself or someone else; or
 - (iii) may intimidate, alarm or cause substantial annoyance to people; or
 - (iv) is likely to commit an offence.

(2)-(6) Omitted

148B Protection of members from civil liability

- (1) This section applies to a person who is or has been a member.
- (2) The person is not civilly liable for an act done or omitted to be done by the person in good faith in the performance or purported performance of duties as a member.

148C Territory's vicarious liability

- (1) The Territory is vicariously liable for a tort committed by a member in the performance or purported performance of duties as a member in the same way as an employer is liable for a tort committed by an employee of the employer in the course of the employee's employment.

- (2) However, subsection (1) does not apply if, under the Act under which the duties were performed or purportedly performed, the Territory does not incur civil liability for the tort.
- (3) In addition, the Territory's vicarious liability for a tort committed by a member does not extend to a liability to pay damages in the nature of punitive damages.

148F How police tort claim is made

- (1) Except as provided in this Division, a person cannot in any legal proceeding make a police tort claim against a member but may instead make the claim against the Territory.
- (2) A person who makes a police tort claim against the Territory in any legal proceeding may join the member who allegedly committed the tort as a party to the proceeding only if:
 - (a) the Territory denies it would be vicariously liable for the alleged tort if it were established the member had committed the tort; or
 - (b) the court grants leave for the claim to include a claim for damages in the nature of punitive damages.
- (3) Omitted
- (4) If a person seeks to join a member under subsection (2) as a party to a legal proceeding:
 - (a) the person is not required to file a new originating process but may instead amend the existing originating process;
 - (b) the court must make the orders it considers appropriate to enable the existing originating process to be amended; and
 - (c) section 162 does not prevent the making of a claim in the amended originating process for damages against the member for the alleged tort if the amendment is made within 2 months after the Territory denies it would be vicariously liable for the alleged tort if it were established the member had committed the tort.
- (5) If the court grants leave for the claim to include a claim for damages in the nature of punitive damages, the existing originating process must be amended within 2 months after the date the court grants the leave.

[20] The authorities of this Court dealing with the question of leave⁸ hold that the discretion is at large but that leave should not be granted unless there are proper and adequate grounds. Some demonstrable basis for an award in the nature of punitive damages must be shown and evidence of that basis must be provided to the Court. In addition I add that the onus to do so is on the applicant, the plaintiff in this case. The mere fact that the Territory and the police officers deny the allegation is not a basis for refusing leave. It is neither necessary nor appropriate for the Court to decide the merits of the plaintiff's claim for the purpose of determining the question of leave. It suffices if a prima facie case is made out namely, if there is evidence which, if accepted, would establish each of the pre-requisites for a successful claim. In the current case that includes the entitlement to damages in the nature of punitive damages. For that purpose the evidence should be taken at its highest in favour of the plaintiff, as well as in respect of inferences that may be drawn from available facts.

[21] The plaintiff's claim derives from the allegation that the arrest by Constables Carthew and Slater was unlawful as the requirements of section 128 of the PAA had not been made out. This was effectively the finding of the CSJ but that does not raise an estoppel in the current proceedings.⁹ The plaintiff submits there was no reasonable basis for Constable Slater to believe that the plaintiff would cause the "*substantial annoyance*" referred

⁸ *Daniels v NTA* [2007] NTSC 65 and *Mather & O'Connell v NTA* [2008] NTSC 1.

⁹ See *Majindi v NTA & Ors* [2012] NTSC 25 at para 60 and *Helton v Allen* (1940) 63 CLR 691 at 710.

to in sub-paragraph (iii) of that subsection. However in his evidence before the CSJ, Constable Slater also relied on the likelihood of further offending.¹⁰ Constable Carthew relied primarily on the ground in sub-paragraph (iv) of that subsection, namely the likelihood of further offending. However there is again some overlap as Constable Carthew said in his evidence in the hearing in the CSJ that he also relied on the substantial annoyance ground.¹¹

[22] In the hearing in the CSJ the evidence was that the offence for the purposes of section 128(1)(c)(iv) of the PAA was the purchase of alcohol. However it is clear that Constable Carthew meant acquiring the alcohol and then committing the offence of consuming the alcohol in regulated place contrary to section 101U(1) of the *Liquor Act*.¹²

[23] As to punitive damages, in respect of the false imprisonment claim against all three police officers, the claimed entitlement is argued on the basis that the absence of a reasonable and proper basis to justify the apprehension rendered it a conscious and contumelious disregard of the plaintiff's rights. This it was argued, was because the police officers knew or ought to have known that they could not lawfully arrest the plaintiff and the hastiness of the police officers' actions in arresting the plaintiff without ensuring there was a lawful basis was high-handed, unwarranted and arbitrary, presumably meaning that this amounts to a conscious and contumelious disregard of the plaintiff's rights.

¹⁰ Page 26 of Annexure B to the affidavit of Rachael May Gleeson made 31 March 2016.

¹¹ Page 18 of Annexure B to the affidavit of Rachael May Gleeson made 31 March 2016.

¹² Pages 16-18 of Annexure B to the affidavit of Rachael May Gleeson made 31 March 2016.

- [24] In respect of malicious prosecution, and in respect of Constables Carthew and Slater, the claim is made on a similar basis as for the claim of false imprisonment, namely the absence of a factual basis justifying the initial apprehension.
- [25] In the case of Senior Constable Firth the basis is that he only relied on the Statement of Facts to decide to lay the charges. It was submitted that the Statement of Facts contained insufficient information to demonstrate that the police officers had validly arrested the plaintiff as the Statement of Facts did not show a basis for the officers' belief justifying the apprehension. The plaintiff alleges that as a result Senior Constable Firth should not have charged the offences of resist police and assault police without further enquiry and it was unreasonable to lay those charges.
- [26] In respect of the claim for against Senior Constable Firth, Mr Anderson for the defendant and the three police officers, argued that if the officer was required to make further enquiry, the most that he was obliged to do was to refer to the Statutory Declarations. However, Senior Constable Firth's uncontradicted evidence is that his task was to decide on charges based only on the Statement of Facts. If that is the case then not only was he entitled to, but he was obliged to, rely only of the Statement of Facts. Any shortfall of necessary detail still apparent thereafter would remain a matter relevant to the claims against the defendant and Constables Carthew and Slater. If, contrary to my view, it was incumbent on Senior Constable Firth to make further enquiries, then I agree with Mr Anderson that he would not need to

enquire beyond consideration of the Statutory Declarations of the two police officers. Based on the contents of those Statutory Declarations, had Senior Constable Firth considered them, then I am satisfied that he would still have laid the charges. Again, any shortfall of necessary detail still apparent thereafter would remain a matter relevant to the claims against the defendant and Constables Carthew and Slater. Either way I am of the view that there is no evidence to support the allegation improper purpose in respect of Senior Constable Firth as pleaded in the plaintiff's proposed Amended Statement of Claim, whether directly or inferentially.

[27] The plaintiff's complaint in respect of Senior Constable Firth seems to be more about the internal Northern Territory Police procedure for laying charges. As a basis for a claim personally against the officer concerned, as opposed to the defendant, that is misconstrued. That cannot be a basis for joinder to claim punitive damages against Senior Constable Firth given that was the process he was duty bound to follow. Senior Constable Firth's compliance with his duty cannot amount to malice for the purposes of a claim for malicious prosecution against him personally.

[28] I am not satisfied that there is a prima facie case of malicious prosecution in respect of the conduct of Senior Constable Firth. For largely the same reasons, no evidentiary basis has been demonstrated to show that an award of punitive damages could be made against Senior Constable Firth. Leave to join him is therefore refused.

[29] That leaves the proposed claims against Constables Carthew and Slater. As to the claim for malicious prosecution, Mr Anderson argued that two of the four elements of that tort¹³ were problematic for the plaintiff. These are the elements of firstly, an absence of reasonable and probable cause to lay the charges and, secondly, the existence of malice.

[30] As to the first element, and by way of challenge to the plaintiff's submission that the officers had no proper basis to take the plaintiff into protective custody, Mr Anderson relied on the decision in *Mole v Prior*¹⁴ ("*Mole v Prior*"), a decision of the Court of Appeal delivered after the hearing in the CSJ. He argued that based on that authority there was sufficient basis for the officers to have taken the plaintiff into protective custody and that establishes the appropriateness of the charges that were laid. *Mole v Prior* was concerned more with the effect of Police General Orders and the exclusion of evidence based on impropriety. However in its decision the Court of Appeal acknowledged that a police officer's experience could be relied on when assessing the criteria in section 128 of the PAA in deciding whether to take a person into protective custody. That is something which may lead to a conclusion different to that reached by the CSJ if that were to be heard now.

[31] The effect of *Mole v Prior* in the current context is I think that the defendant now has a better basis for its defence of the plaintiff's claims than at the

¹³ See Sappideen C and Vines P, *Fleming's The law of Torts*, 10th ed, Thomson Reuters, 2011
¹⁴ [2016] NTCA 2.

time of the hearing in the CSJ. However, my task in determining whether leave should be granted is to assess if evidence exists to support the claim, not to determine how the trial Judge will assess the strength of that evidence or, whether it will be accepted at all in preference to other evidence or, what weight it might be given. Whether *Mole v Prior* changes the approach to be taken in assessing the factors for a protective custody apprehension is not currently a matter for me. As I have to take the plaintiff's case at its highest, I assume findings and drawing of inferences favourable to the plaintiff on the available facts. Hence, although I accept that the approach in *Mole v Prior* may well mean that there will be a finding on the hearing of these proceedings that a protective custody apprehension was justified, an evidentiary basis still exists for that element of the tort of malicious prosecution against Constables Carthew and Slater.

[32] As to the element of malice, as I am satisfied that there is an evidentiary basis to establish an improper purpose and a finding by the trial Judge that the officers did not believe they were entitled to make a protective custody arrest could follow, that would also be a sufficient evidentiary basis for a finding of malice and that the officers acted with conscious and contumelious disregard the plaintiff's rights. Again as I have to take the plaintiff's case at its highest, I assume findings favourable to the plaintiff if there is evidence which can support those findings. The availability of alternative findings cannot change whether an evidentiary basis exists.

[33] In relation to the tort of false imprisonment, assault and battery the plaintiff's case depends on whether the protective custody apprehension was lawful. Of the requirements in section 128 of the PAA the only issue appears to be whether the respective police officers had reasonable grounds for believing that, because of the plaintiff's state of intoxication at the time, he would have either caused "*substantial annoyance*" or was likely to commit an offence.

[34] Mr Bellach argues that there was nothing in what the police officers observed to connect the plaintiff with the group of intoxicated aboriginals who were seen yelling and shouting on police arrival. That overlooks much relevant evidence, and sufficient evidence in my view, to justify a finding that the plaintiff was part of that group.¹⁵ Clearly the group of aboriginals which the police officers referred to were the group which resulted in the police call out. That group was intoxicated. The plaintiff was also intoxicated. The evidence is also clear that the plaintiff was in the same general area as the other aboriginals and the plaintiff was also seen to turn away when he observed the police. He also quickly discarded the wine cask which he was seen to be carrying when first observed by the police officers. Mr Anderson also relies on *Mole v Prior* and I note that also now provides a basis which would enable the defendant to show that further offending by

¹⁵ Pages 15, 19, 24-27, 33 of Annexure B to the affidavit of Rachael May Gleeson made 31 March 2016.

the plaintiff, specifically consuming alcohol in a regulated place, was possible or likely.¹⁶

[35] Again, the possibility of alternative findings is not currently determinative. There is evidence which can lead to a favourable finding for the plaintiff in respect of two of the limbs of section 128(2)(c) of the PAA and from that the trial judge may find also that, as pleaded, the police officers knew, or ought to have known, that their protective custody arrest of the plaintiff was not justified. From there a finding that the police officer's actions were a conscious and contumelious disregard of the plaintiff's rights could follow. That therefore means that the evidentiary basis has been satisfied.

[36] Mr Anderson also relied on *Fernando v Commonwealth & Anor.*¹⁷ In that case an arrest was made pursuant to one section of an Act but instead a different section of the same Act authorised the arrest. Notwithstanding that the arrest under the section relied on was unlawful, the Full Court of the Federal Court determined that the illegal arrest was irrelevant in an action for false imprisonment as the plaintiff in that case could have been lawfully arrested in any case. Applied to the current case, the argument is that even if the plaintiff had not been properly taken into protective custody, the arrest was justified shortly thereafter by reason of firstly the resisting and assaulting police and secondly, by reason that the plaintiff was in breach of the Alcohol Protection Order.

¹⁶ [2016] NTCA 2 at para 70
¹⁷ (2014) 315 ALR 547.

[37] What this argument however overlooks is that without a valid protective custody apprehension the police were not acting in the execution of the duty and that is an essential element in respect of both offences. Secondly, in respect of the breach of the Alcohol Protection Order, absent a lawful arrest, there exists the possibility of a discretionary exclusion of the evidence. It is inappropriate for me to attempt to determine, for prima facie case purposes, whether and how the discretion to exclude evidence will be exercised.

[38] Therefore I conclude that there is an evidentiary basis by which damages in the nature of punitive damages may be awarded in respect of all claims made against Constables Carthew and Slater and I therefore give the requisite leave.

[39] I will hear the parties as to ancillary orders and applications, noting that the amendment of the Writ and the filing and service of an Amended Statement of Claim is to occur within two months of today.¹⁸

¹⁸ See section 148F(4) and (5) of the PAA.