Davids and Goliath:

Konneh v State of New South Wales

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When Musa Konneh launched a class action against his mistaken arrest by police for breach of bail he opened the door for other disadvantaged young people to do the same, but only if they can be found.

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Many young people mistakenly arrested by police will be eligible for compensation for false imprisonment, arrest and battery as a result of a NSW Supreme Court decision that newly construes the power of arrest in the *Bail Act 1978* (NSW). Others, including adults who are not part of the *Konneh v State of New South Wales (No. 3)* [2013] NSWSC 1424 (*Konneh*) class action (but who were arrested for breach of bail when not in fact on bail) may also be able to rely on the judgment in claiming damages for false imprisonment.

As a lawyer may be negligent if they fail to advise a client that they have a cause of action before the limitation period expires, the case presents particular challenges for solicitors who have acted for people falsely arrested in similar circumstances. It obliges them to inform their clients of the possibility of pursing damages for wrongful arrest – a difficult task when many of those concerned are likely to be difficult to contact, socially and economically disadvantaged and with little awareness of their rights under the law.

Background

Mr Konneh is a 21-year-old man who came to Australia from Sierra Leone aged 15. He was 18 when he was arrested by NSW Police in August 2010 (at his home in the western suburbs of Sydney) based on an erroneous belief he was in breach of bail. In fact, he was not on bail at all and his charges had been dismissed under the *Young Offenders Act 1997* (NSW) four days previously. He was held overnight before being released by the Children's Court and alleges that during his detention he was handcuffed and strip searched.

BAIL ACT 1978

Arrest for absconding or breaching condition

(1) Where a police officer believes on reasonable grounds that a person who has been released on bail has, while at liberty on bail, failed to comply with, or is, while at liberty on bail, about to fail to comply with, the person's bail undertaking or an agreement entered into by the person pursuant to a bail condition:

(a) a police officer may arrest the person without warrant and take the person as soon as practicable before a court ...

In 2011, following the introduction in the Supreme Court of a comprehensive class actions procedure similar to the regime that has operated in the Federal Court of Australia since 1992, Mr Konneh commenced a class action against the State of NSW on his own behalf and on behalf of other young people who had been arrested by NSW Police for a breach of bail in circumstances where they were either not on bail at all, or were not subject to the particular bail condition police believed they had breached.

He sought damages for false imprisonment, assault and battery, and aggravated and exemplary damages. He alleged there were problems with NSW Police's Computerised Operational Policing System or COPS database that meant the information on it was unreliable and often inaccurate, and this was known by, or ought to have been known by, the arresting officers.

The State, in its defence of Mr Kon-

neh's claim, relied solely on the statutory defence in s.50(1)(a) of the *Bail Act* which permits police to arrest based on a belief held "on reasonable grounds" (see box). The statutory defence contemplates that there may be circumstances where the belief of the arresting officer is incorrect, but that this will not necessarily invalidate arrest. This is not surprising, given the difficult and contested circumstances in which arrests may take place. However, a question which arose in Mr Konneh's case, and for many of the other class members, was whether the defence could apply where the arresting officer made a mistake about whether the person was on bail at all.

The decision in Konneh

In *Konneh*, Garling J decided s.50(1)(a) of the *Bail Act* was capable of applying as a statutory defence to a claim of false imprisonment only if the person arrested was in fact on bail at the time of arrest.[1] It was common ground that Mr Konneh was not on bail. Likewise, his Honour determined s.50(1)(a) could not provide a defence against the claims of any of the class members who, like Mr Konneh, were not on bail at the time of arrest. Therefore, NSW police had no lawful excuse under s.50(1)(a) for mistakenly arresting Mr Konneh and the other young people in the class action who were not on bail. The State, which is vicariously liable for the acts of those officers, is liable to pay damages to Mr Konneh and those other young people.[2]

For a second group of young people – those who were arrested where a police officer had made a mistake regarding the conditions of their bail – the class action will continue. The court found the defence under the *Bail Act* potentially applies to this second class, however it remains to be shown by the State that the police officers' mistakes were made "on reasonable grounds" in every case.

The decision in *Konneh* reaffirms that the right to personal liberty "is the most elementary and important of all common law rights".[3] Further, the court applied the long-established principle of statutory interpretation that courts will not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless this is manifested by unambiguous language.[4] Justice Garling also cited the comments of Deane J in *Clelland v The Queen* (1982) 151 CLR 1 that: "It is of critical importance to the existence and protection of personal liberty under the law, that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed."[5]

Trespasses to the person, if proven, are compensable without proof of actual injury. The principal heads of damage in false imprisonment include injury to liberty and injury to feelings, including the indignity, disgrace and humiliation experienced[6] Accordingly, a court assessing damages for false imprisonment is likely to take into account the duration of the detention, what occurred during the detention and factors such as the person's age. While no assessment of Mr Konneh's damages has yet been made, Mr Konneh alleges he was strip searched and handcuffed. Other class members for whom Mr Konneh's solicitors acted were aged just 13 or 14; one 14-year-old not on bail was arrested three times in 15 days. Further, some were handcuffed, and almost all were strip searched, as it appears this is a common (though not legislatively mandated) practice for children arrested by police and given into the custody of Juvenile Justice NSW. Such experiences are likely to be reflected in any sum ultimately awarded to a class member.

Significantly, for legal practitioners in the field of intentional torts, the decision in *Konneh* is of wide import and may be relied on by others not included as class members. The judgment is authority for the general proposition that a pre-condition to the exercise of the statutory power to arrest found in s.50(1)(a) of the *Bail Act* is that the individual to be arrested must be on bail.[7] The construction of the section by Garling J does not depend on any other personal characteristic of a potential plaintiff; it is a decision that can clearly be applied beyond the particular circumstances of the class members, to adults and others arrested purportedly under s.50(1)(a) when not on bail.

Responsibilities of class lawyers to class members

One of the central challenges with respect to the proceedings brought by Mr Konneh is the difficulty of identifying and locating class members who may now have a clear right to compensation. The Federal Court of Australia has emphasised that lawyers for the representative plaintiff in a class action owe a fiduciary duty to the class members, even where those lawyers have not been retained by all of the class members, for example, *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168;[8] *King v AG Australia Holdings Ltd* (2002) 121 FCR 480[9] and *McMullin v ICI Australia Operations Pty Ltd* [1997] FCA 1426. Further, Wilcox J writing extrajudicially has commented that the representative party's solicitors have a "responsibility towards group members; especially unidentified group members from whom instructions cannot be obtained".[10]

Interlocutory processes such as "opt out" are provided for within class actions procedures in the Supreme and Federal Courts, the principal purpose of which is to "ensure that group members can make an informed decision concerning their rights".[11] The court may order that notice be given to class members of particular events or stages of the proceedings.[12] This often occurs by way of newspaper advertisements informing the public at large they may have rights affected by the class action but the class action regime does not specify how such notices must be given. Questions of cost and effectiveness are relevant. The court will consider all circumstances and will be assisted by the parties when determining the appropriate means of informing class members. Ultimately, in any class action, there comes a time by which class members must come forward to make a claim or be shut out.

Class actions in Australia are perhaps most commonly brought for the benefit of investors or consumers arising from alleged improper conduct by companies. Such victims may be able to be identified from company documents. Many are likely to read newspapers in which court-approved notices may be published.

However, the nature of the claims and the class members within the *Konneh* proceedings are quite different because of their youth and because it is true to say (at least of those known to Mr Konneh's solicitors) they are socially and economically disadvantaged; one third are indigenous; most are from non-English speaking backgrounds. These class members are not consumers, and the absence of contractual or investor documentation makes it more difficult to identify them. Such young people are highly unlikely to have any real awareness of their legal rights or of police powers that would enable them to understand they may have a cause of action. They may be unaware of the present proceedings. These are challenging circumstances for the representative plaintiff's solicitors, who must seek to protect the interests of young persons who may now be eligible for compensa-

NEED TO KNOW

Wrongful arrest

- **Section 50(1) of the *Bail Act 1978* is a statutory defence to a claim of false imprisonment only if the person arrested was actually on bail at the time of arrest.**
- **Practitioners who act for clients whose arrest was unlawful may be obliged to inform them of any potential class actions for false imprisonment.**
- **A lawyer's duty of care to inform clients of claims may extend to circumstances where they are acting for a person in relation to another matter at the time of the wrongful arrest.**

tion but who are not their clients and who are presently unknown to them.

The lawyer's responsibility to advise clients of potential claims

There are questions about the extent of an obligation, if any, on a lawyer who acted in criminal proceedings for a person who was unlawfully arrested. Basic to a lawyer's obligation to their client is an implied promise in the retainer that the lawyer will exercise reasonable care and skill in performing their services for the client. A lawyer's duty to advise the client cannot be strictly or artificially constrained to the central aims of the retainer, unless there is an express limitation in the retainer.[13]

A lawyer who fails to advise a client that they may have a valuable cause of action before the limitation period expires may be negligent.[14] Further, the lawyer's duty of care may in some cases require them to take positive steps beyond the task specifically agreed on with the client, for example, where those steps are necessary to avoid a real and foreseeable risk of economic loss being sustained by the client arising from a failure by the lawyer to advise them.[15]

"Other class members for whom Mr Konneh's solicitors acted were aged just 13 or 14; one 14-year-old not on bail was arrested three times in 15 days."

Much will depend on the scope of the retainer. However, generally it appears that where a lawyer acts for a person who was arrested for breach of bail when they were not on bail (or were not on the bail condition they were arrested for allegedly breaching) and:

☐ the client tells the lawyer, or the lawyer becomes aware of, the circumstances of the arrest;

☐ the lawyer does not advise the client that they may have a valuable claim for damages for false imprisonment; and

☐ the person does not make the claim within the limitation period;

that person is likely to have a claim for damages against their lawyer for the lost opportunity to sue the State of NSW.

Subject to the exact terms of the retainer, the duty to advise extends to a lawyer who is acting for a person in relation to another matter at the time of their wrongful arrest, or even afterwards. (If the retainer had been terminated at the time of the wrongful arrest, it is not expected that the lawyer would have any duty to their former client.) The information given to the lawyer does not have to set off alarm bells; rather, the duty to advise is triggered when the lawyer is made aware of sufficient information relating to the circumstances of the arrest for a reasonably competent solicitor to be alerted to the fact that a valuable cause of action may be available.[16] It does not matter that the lawyer did not understand at the time that the cause of action was available. The test is whether a lawyer exercising reasonable care and skill would reasonably foresee an event likely to cause loss to the client and bring it to their attention.[17]

Having regard to those principles, and to the fact that the decision in *Konneh* may be relied on by not only those young persons included as class members in the proceedings, but also adults and others arrested in similar factual circumstances, it is evident that criminal practitioners who act for clients in circumstances where it is or was reasonably apparent that the arrest of the client was unlawful, may have a continuing obligation to advise those clients of any potential claim in false imprisonment, and a continuing potential liability in negligence if that advice is not given. Various steps may need to be taken to address the continuing obligation, including a review of relevant previous files to identify present or former clients in such a situation, so that they can be contacted and advised accordingly.

A challenge of any class action – adequately identifying and informing the class of the proceedings and their rights in respect of them – is heightened by the circumstances in *Konneh*. There are some possibilities for overcoming the difficulty. The defendant, for example, may be in a position to assist in identifying such persons and some individual officers or prosecutors within NSW Police might know or have records of particular arrests that could be within the circumstances of the action. The Children's Court may also have relevant information but there could be legal constraints affecting disclosures by it. Further, solicitors who acted for class members in their criminal proceedings before the Children's Court, and who are aware of the legal and ethical obligations described above, may also identify potential members. But, without the assistance of those stakeholders, it could ultimately be impossible for the plaintiff's solicitors to identify all or even most of the class members. The decision in *Konneh* has created a problem that is highly unusual in class actions – an effective determination of liability of the State of NSW to a substantial part of the class, who will now be entitled to compensation – if only they can be found in time. ☐

ENDNOTES

1. *Koneh v State of New South Wales (No. 3)* [2013] NSWSC 1424 at [63]-[64].
2. It is to be noted that the equivalent power of arrest in s.77(3) in the *Bail Act 2013*, which is not yet in force, is substantially different.
3. *Trowbridge v Hardy* (1955) 94 CLR 14, per Fullagar J at [152].
4. Al-*Kateb v Godwin* (2004) 219 CLR 562 per Gleeson CJ at [577].
5. *Clelland v The Queen* (1982) 151 CLR 1 at [26].
6. *Spautz v Butterworth* (1996) 41 NSWLR 1 at [14].
7. *Bail Act 1978* (NSW) at [63].
8. *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [57].
9. *King v AG Australia Holdings Ltd* (2002) 121 FCR 480 at [27].
10. "Challenges for applicant representatives", paper presented to Australian Plaintiff Lawyers Association national conference, 21-23 October 1999.
11. See *King v GIO Australia Holdings Ltd* [2001] FCA 270 per Sackville, Hely and Stone JJ at [15].
12. Section 175 of the *Civil Procedure Act 2005*.
13. *Astley v Austrust* (1999) 197 CLR 1 at [47].
14. *Roberts v Cashman* [2000] NSWSC 770 (*Roberts v Cashman*).
15. *Hawkins v Clayton* (1988) 164 CLR 539.
16. Above n.14 at [59]-[62].
17. *AJH Lawyers Pty Ltd v Hamo* [2010] VSC 225 at [34]. ☐