ACTIONS AGAINST POLICE

LEGAL AID CONFERENCE 2012

Peter O'Brien, Solicitor, O'Brien Solicitors

Adrian Canceri, Barrister, 15 Wardell Chambers

1. This paper is focused on actions which may be brought against police officers (and the State vicariously):

   (i) following the successful defence and acquittal of clients in relation to criminal charges, where the lawfulness of police conduct was raised and determined by a finding against police, or

   (ii) in circumstances where charges are dismissed prior to hearing and where the conduct of police upon arrest and detention may have been unlawful, and or the prosecution malicious.

Trespass to the person

2. Where the arrest is wrongful, your client may have grounds to found an action against police for trespass to their person. Interference, however slight, with a person's elementary civil right to security of his person and self - determination in relation to his own body, constitutes trespass of a person[1].

3. The three types of trespass to the person are:

   (a) Unlawful imprisonment (false or wrongful imprisonment);

   (b) Battery; and

   (c) Assault.

Unlawful imprisonment

4. Unlawful imprisonment involves a wrongful, intentional act of a person causing total restraint on the liberty of another person, for whatever period of time, by either actively causing the person's confinement or preventing that person from leaving the place that he or she is located.

5. Unlawful imprisonment is a tort of strict liability. Liability turns on an intention to detain. Good faith is not a defence[2]. The only defence to a claim of false imprisonment is that the imprisonment was pursuant to a lawful authority.

   As Kirby J states in *Ruddock v Taylor* (2005) 222 CLR 612 at [140] (in dissent, but not as to this):

   > *"Wrongful imprisonment is a tort of strict liability. Lack of fault, in the sense of absence of faith is irrelevant to the existence of the wrong. This is because the focus of this civil wrong is on the vindication of liberty and wrongdoing on the part of the defendant. A plantiff who proves that his or her imprisonment was caused by the defendant therefore*

1 Clerk & Lindsell on Torts p.677

2 *Ruddick v Taylor* [2003] NSWCA 262 at [4]

has a prima facie case. At common law it is the defendant who must then show lawful justification for his or her actions" (footnotes omitted)

6. Once a claim of unlawful imprisonment is made, the onus is on the defendant to establish lawful authority. The executive, represented by the state, must establish that the police officers acted pursuant to a common law or statutory power. The power of arrest or detention must be lawfully exercised for valid justification to arise. So in cases where the plaintiff asserts unlawful imprisonment, it is for the defendant to show on the civil standard, applying the *Briginshaw v Briginshaw* test, that the imprisonment was lawful.

7. An arrest is unlawful unless it is either conducted pursuant to a statutory authority or pursuant to a common law power of arrest.

Breaches of bail – power to arrest

8. Police have a power to arrest for an alleged breach of bail (s.50 *Bail Act*). However police may be liable for an unlawful imprisonment consequent to a wrongful arrest where:

   (a) a person is arrested in relation to bail conditions that have previously been varied, and the purported breach is for conditions which are no longer in force;

   (b) bail has been dispensed with and your client is arrested for a breach of bail; or

   (c) a breach of bail charge is laid when the matter has been finalised prior to the alleged breach, and therefore no bail conditions exist.

9. The Public Interest Advocacy Centre are presently engaged in an interesting class action in the New South Wales Supreme Court. It involves a group of plaintiffs who have been purportedly wrongly arrested and unlawfully detained by police purporting to use powers to arrest for breaches of bail conditions in circumstances where it has been subsequently determined that the plaintiffs were either not on bail at all at the time of the arrest of there had been a variation in their bail conditions such that there was no breach of bail at the time of the arrest. All members of the class action are children who were dealt with on an alleged breach of bail by the Children's Court of New South Wales.

10. So, the group members comprise persons who were:

   (a) Detained by a member of the NSW Police Force for only a breach of bail condition/s

   (b) The alleged breach of bail condition/s relates to an allege offence/s which were being prosecuted in the Children's Court of New South Wales; and

   (c) At the time of the detention were not being subject to the bail condition/s which were alleged to have been breached.

11. In each instance, the plaintiffs asserted that they were no longer on bail but the police had erroneously believed that they were still on bail and breached their conditions or alternatively, the conditions of bail had been varied or deleted. It is alleged that the police officers formed this erroneous belief based on incorrect information contained on the NSW Police Force's computerised operational policing system (COPS).

12. The claim is one for damages for the wrongful arrest, subsequent unlawful imprisonment and for consequent assaults and battery committed by the arresting police officers.

13. *Konneh v State of NSW* [2011] NSWSC 1170 is an interlocutory judgment of Hoeben J. It dealt with an application by the State to strike out portions of the statement of claim by the plaintiffs. The relevant and challenged portions of the statement of claim were as follows:

> "No reasonable grounds for arrest
> 18. At all relevant times when the plaintiff and group members were detained …:
>
> (a)senior police officers … were aware that the information on COPS as to bail conditions:
> - was unreliable;
> - often inaccurate;
> - was information the reliability which did not provide a reasonable basis of assuming the accurate bail status of the person whose details were purported to be recorded in COPS;
>
> (b)The NSW Police Force (including those who obtained the plaintiff …) were aware or ought to have been aware that the information on bail conditions:
> - Was unreliable;
> - often inaccurate;
> - was information the reliability which did not provide a reasonable basis of assuming the accurate bail status of the person whose details were purported to be recorded in COPS;
>
> (c) Despite the matters pleaded in … (a) or (b), those who arrested the plaintiff ... did not (and were not required by NSW Police Force) to confirm the bail information on COPS with information on the prosecutor's file, on the Court file or on Justice Link or make appropriate inquiries prior to arresting a person for alleged breach of their bail conditions.
> …"

14. The defendant submitted that these paragraphs of the statement of claim were irrelevant to the plaintiff's claim and therefore embarrassing and should be struck out.

15. The submissions of the defendant depended upon s.50(1) of the *Bail Act* 1978 which provides:

> s.50 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, or
> (b) …

16. The defendant submitted, by reference to cases of *George v Rockett* (1990) 170 CLR 104 and *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 All ER 129, the relevant belief was the belief of the Police Officer, the belief of which was formed on reasonable grounds. It was submitted that whether or not the belief is formed on reasonable grounds can only be determined by inquiries to what that particular police officer knew – a subjective and objective inquiry. A subjective inquiry because the reference to the belief of the police officer and an objective inquiry because reference to "reasonable grounds".

17. The defendant submitted that paragraph 18(a) of the SOC was irrelevant because it didn't aver a connection between the knowledge of senior police and arresting police officers. If the rationale behind the paragraph was that because senior police knew about the problems with COPS then all police ought to have known that needed to be stated in the statement of claim and also whether that knowledge was actual or constructive in nature.

18. It was also submitted by the defendant that paragraph 18(b) did not raise a relevant issue because the correct inquiry was into the arresting police officer's state of mind. Whether or

not information available in COPS provided a reasonable basis for the belief. This was not answered by asking whether or not as a matter of fact the COPS database could be relied upon to provide accurate information.

19. The plaintiff argued that paragraph 18(a) raised the issues of institutional knowledge within New South Wales Police Force that the COPS system was unreliable with respect to bail information. Institutionalised knowledge could render the grounds upon which the police officer relied to arrest the plaintiff unreasonable because it was well known that the information on COPS was unreliable. Alternatively, widespread knowledge within the police force was relevant, the plaintiff claimed, to exemplary damages.

20. A further argument put by the plaintiff was that s.50(1) of the *Bail Act* did not apply to a plaintiff who was not on bail because it had been dispensed with or the matter finalised, as such bail was no longer ongoing. This reading of the *Bail Act* makes it a precondition to the operation of s.50(1) that a person was released on bail, that precondition had not been met and therefore the police had no legal justification for arresting the plaintiff.

21. Alternatively, it was argued that if the arresting police did have knowledge that the COPS bail information was unreliable, then this meant that their belief could not reach the necessary objective standards required by s.50(1).

22. Ultimately, Hoeben J determined that paragraphs 18(a) and (b) and the impugned parts of 18(c) be struck out with leave to replead the issues contained with more particularity. The Court found that if the purpose of paragraph 18(a) was to allege institutional knowledge it needed to be pleaded. In relation to 18(b) if it was to be pleaded that 50(1) of the *Bail Act* had no application then it should be pleaded that way.

23. It is an interesting decision because it asserts that there is widespread understanding in the New South Wales Police Force that, at least at the time circa mid 2010 when the plaintiffs were arrested, that the COPS system was unreliable insofar as it failed to record bail conditions reliably. This may reflect your own personal experience in relation to your dealings with the information contained in COPS entries.

24. It seems peculiar to me that in this age of computerised technology, we still rely on prosecutors and magistrates' handwritten notations on files that are then entered on a computer by data entry staff in the police stations or in court registries. So long as that system continues, even with some advances on how Court results are broadcast, for example via Justice Link and Law Link, there will continue to be anomalies caused by ordinary human frailty because of the need for people to re-enter data by interpreting the annotations - in the form of scribble - on Court files and prosecutor's papers.

25. For what its worth, my view is, and has been some time prior to, the PIAC action that in circumstances where a person has had their bail dispensed with or in circumstances where the matter for which they were on bail has been concluded in Court, so that there is no bail at all, s.50(1) of the *Bail Act* does not apply. It is clear in my view, especially given the need to strictly interpret provisions associated with the liberty and penalisation of a person, that s.50(1) requires as a precondition, before police can take action, a person must be a person who has been released, and therefore is on bail. The police officer's belief on reasonable grounds goes to their belief that the person has failed to comply with or about fail to comply with their bail undertaking. Where a person is not on bail, s.50(1) does not give police any power to arrest, regardless of their belief. In my view it follows that a wrongful arrest and unlawful imprisonment action is open in such circumstances.

26. The case of *Konneh* raises this argument squarely and is due to be heard, I expect, sometime in 2012.

LEPRA Power to arrest

27. In instances where the arrest and subsequent detention of the defendant was unlawful, it will ordinarily follow that the consequential conduct by police was without power, including the use of force against and detention of your client, giving rise to a claim against police. This may include:

(a) where police did not have power to arrest without warrant pursuant to s.99 (3) of the *Law Enforcement Powers and Responsibilities Act (2001) ("LEPRA")*;

(b) where the use of force by police purporting to exercise their powers to arrest and detain was excessive.

28. Section 99 of LEPRA confers statutory powers on police to arrest without warrant. The provisions of s.99 of LEPRA are as follows:

> *"**99 Power of police officers to arrest without warrant***
>
> *(1) A police officer may, without a warrant, arrest a person if:*
>
> *(a) the person is in the act of committing an offence under any Act or statutory instrument, or*
> *(b) the person has just committed any such offence, or*
> *(c) the person has committed a serious indictable offence for which the person has not been tried.*
>
> *(2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.*
> *(3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:*
>
> *(a) to ensure the appearance of the person before a court in respect of the offence,*
> *(b) to prevent a repetition or continuation of the offence or the commission of another offence,*
> *(c) to prevent the concealment, loss or destruction of evidence relating to the offence,*
> *(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,*
> *(e) to prevent the fabrication of evidence in respect of the offence,*
> *(f) to preserve the safety or welfare of the person.*
>
> *(4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law."*

29. Section 99 of LEPRA both reflects and enlarges the common law principles of arrest, as did its predecessor s.352 *Crimes Act 1900 (NSW)*[3].

30. Section 4 of LEPRA imports the common law powers of the police to deal with breaches of the peace:

> *"**4 Relationship to common law and other matters***

[3] *Lippel v Haines* (1989) 18 NSWLR 620 at 635

(1) Unless this Act otherwise provides expressly or by implication, this Act does not limit:

(a) the functions, obligations and liabilities that a police officer has as a constable at common law, or

(b) the functions that a police officer may lawfully exercise, whether under an Act or any other law as an individual (otherwise than as a police officer) including, for example, powers for protecting property.

(2) Without limiting subsection (1) and subject to section 9, nothing in this Act affects the powers conferred by the common law on police officers to deal with breaches of the peace."

31. There is no power to arrest (either under statute or at common law) for the purposes of questioning[4] or for the sole purpose of investigation[5].

32. So the only common law basis for an arrest which is not incorporated within s.99 of LEPRA is the common law power to arrest or restrain during an occurring or imminent breach of the peace. A breach of the peace occurs where *"harm is done or is likely to be done to a person or in his presence to his property or where a person is in fear of being so harmed through an assault, affray, riot, unlawful assembly or other disturbance"*[6]. A person using a common law power to arrest, including a police officer, must reasonably anticipate an imminent breach of the peace. It must be a real and not a remote possibility[7].

33. *Hage-Ali v State of NSW* [2009] NSWDC 266 (14 October 2099) provides a good example of a case where the provisions of s.99 LEPRA were not observed.

34. Ms Iktim Al Hage-Ali was named 2006 Young Australian of the Year for New South Wales. She was named Young Australian of the Year on the 30th November 2006. On the 14th December 2006 she relinquished her title. She did that because it was being publicised that on the 22nd November 2006 she had been arrested in the course of a police anti-drugs operation. So according to the Daily Telegraph she descended from being a heroine to "the centre of a cocaine scandal" .

35. Ms Hage-Ali was arrested for the supply of cocaine by police. She was detained upon arrest for a period of 3 ½ hours and then released without charge. She was never charged in relation to either supply or possession of drugs.

36. Ms Hage-Ali sued the State asserting that her arrest was unlawful and so too was her subsequent detention. She alleged that:

(a) There was no basis to arrest her for any offence;
(b) Once arrested she was improperly questioned for a collateral purpose, namely to gain information about a drug ring;
(c) Once arrested she was subjected to threats, ridicule and intimidation;
(d) It was a wrongful imprisonment because it was consequential on an unlawful arrest or because the purpose of the imprisonment was for the collateral purpose of investigation.

37. Ms Hage-Ali had been an infrequent user of cocaine between 2004 until mid-2006. In late 2006 she restarted an association with an old school friend, Mr B who was a supplier of cocaine and she became a frequent customer and regular user.

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4 *R v Bathgate* (1944) 46 SR(NSW) 281
5 *Zarvinos v NSW* (2004) 62 NSWLR 58 at [37]
6 *R v Howell* [1982] QB 416
7 *Piddington v Bates* [1961] 1 WLR 162

38. A strike force set up by the Middle Eastern Organised Crime Squad investigating drug supply around the area in which Hage-Ali lived had honed in on the wheeling and dealings of a Mr B. The officers in the strike force conducted a briefing earlier in the day of the arrest of Ms Hage-Ali. During the briefing, a written order was given that certain people including Ms Hage-Ali were to be arrested. Notwithstanding this order, the arresting police officers contended that they had exercised the power of arrest in accordance with s.99(3) of LEPRA.

39. Evidence given during the hearing of the matter before Elkaim SC DCJ revealed that once Hage-Ali was at the Police Station in custody, she was prevailed upon to speak about her association with Mr B and did so in a fairly lengthy ERISP interview. The evidence of the Police was to the effect that although there might have been some disquiet about her being a social supplier to friends and associates, she was a small fish who may assist them in the gathering of evidence against a larger fish in the form of Mr B or his associates.

40. Elkaim quoted the judgment of Deane J in *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528:

> *"The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. That being so, it is the plain duty of any such officer to satisfy himself that he is acting with the authority of the law in any case where, in the name of the Commonwealth, he directs that a person be taken and held in custody. The lawfulness of any such administrative direction, or of actions taken pursuant to it, may be challenged in the courts by the person affected: by application for a writ of habeas corpus where it is available or by reliance upon the constitutionally entrenched right to seek in this court an injunction against an officer of the Commonwealth. It cannot be too strongly stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land. They represent a bulwark against tyranny. They provide the general context of the present case."*

41. Elkaim also referred to the Attorney General Second Reading Speech in relation to the LEPRA Bill wherein he told the Parliament:

> *The provisions of Pt 8 [LEPRA] reflect that arrest is a measure that is to be exercised only when necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purposes, such as preventing the continuance of the offence. …"*

42. Given the evidence of the written direction to arrest issued at the briefing of Police prior to the arrest of Hage-Ali and others, and the unlikelihood that the Police in attendance and those who were tasked with the performance of the orders would defy the orders of superior officers, Elkaim DCJ found that the arresting police did not independently turn their mind to the provisions of s.99(3) of LEPRA. Section 99(3) provides importantly that a "*police officer must not arrest a person … unless the police officer suspects …*" meaning that the police officer themselves in effecting an arrest needs to have formed a view of the necessity to do so in the circumstances as presented by the suspect against the backdrop of a written direction to arrest at the operation briefing. It was clear in this case that the arresting police gave no individual consideration to the justification for the arrest.

43. Elkaim found that in any event there were no reasonable grounds to suspect that any of the purposes in s.99(3) needed to be achieved. Accordingly, the arrest of Ms Hage-Ali was not proved to have been lawful and she was successful in her case. The defendant had failed to discharge the onus of demonstrating that the arrest was lawful.

44. The State argued that Hage-Ali was not entitled to compensatory damages because of s.54 of the *Civil Liability Act* ('CLA') which provides as follows:

> *"**54 Criminals not to be awarded damages***
> *(1) A court is not to award damages in respect of liability to which this Part applies if the court is satisfied that:*
> *(a) the death of, or the injury or damage to, the person that is the subject of the proceedings occurred at the time of, or following, conduct of that person that, on the balance of probabilities, constitutes a serious offence, and*
> *(b) that conduct contributed materially to the death, injury or damage or to the risk of death, injury or damage.*
> *(2) This section does not apply to an award of damages against a defendant if the conduct of the defendant that caused the death, injury or damage concerned constitutes an offence (whether or not a serious offence).*
> ***Note:** Sections 52 and 53 can apply to prevent or limit recovery of damages even though the defendant's conduct constitutes an offence.*
> *(3) A "serious offence" is an offence punishable by imprisonment for 6 months or more.*
> *(4) This section does not affect the operation of the Felons (Civil Proceedings) Act 1981 .*
> *(5) This section operates whether or not a person whose conduct is alleged to constitute an offence has been, will be or is capable of being proceeded against or convicted of any offence concerned."*

45. Elkaim DCJ rejected this argument finding that it cannot be that every act after someone has committed a serious offence can be caught by the words "following …". The fact that Hage-Ali had sourced and used cocaine in days prior to and effectively leading to the arrest, did not mean that the damage followed that conduct. Nor could it be said that the use of the cocaine on previous days contributed materially to the damages caused by her arrest.

46. Another point raised by the Court in rejecting the s.54 CLA contention was that it could be argued that the damages claimed are not personal injury damages per *State of New South Wales v Ibbett* (2005) 65 NSWLR 168 wherein at paragraph 21 it says:

> *"21. The concept of "personal injury" is reasonably well established in Australian legal practice. It has rarely, if ever, been used to refer to harm to reputation, deprivation of liberty, or to injured feelings such as outrage, humiliation, indignity and insult or to mental suffering, such as grief, anxiety and distress, not involving a recognised psychological condition."*

47. Having then determined that the plaintiff was entitled to damages, the Court needed to determine whether or not the damages should be assessed under the CLA (effectively limiting and placing a cap on damages) which would be the case unless the findings on the evidence brought the case within the exception of s.3B(a) of the CLA. This would mean that there would need to be a finding that the wrongful arrest was "*an intentional act that is done with intent to cause injury …*".

48. Obviously the act of arrest was an intentional act. The question was whether it was done with "*intent to cause injury*". Elkaim DCJ found that it must have been done with an intention to cause injury because an intention to wrongfully arrest must carry with it the intention to effect the natural consequences of an arrest. Those consequences will include the damages which inevitably flow from a wrongful arrest. Elkaim DCJ was therefore of the view that CLA damages regime does not apply to unlawful imprisonment cases and the case fell within the exclusion provided by s.3B(a).

49. Hage-Ali sought general damages and economic loss as well as aggravated and exemplary damages. She claimed that not only was she wrongfully arrested but she was subject to deliberate harassment and humiliation.

50. Elkaim DCJ was of the view that there was a fundamental problem with Hage-Ali's contention that she had been wronged by the actions of the New South Wales Police Force with the result that she suffered greatly and over an extended period beyond the amelioration of her arrest and subsequent detention because she had lost her award of Young Australian of the Year and had to leave her job with the Attorney-General's Department and move abroad. This difficulty was that she was a regular user of an illegal substance and conducted herself in a manner which gave police grounds to conclude that she was a supplier of drugs, even from a low scale. The finding that police should not have arrested her was not an exculpation of her conduct. There was difficulty in attaching the publicity to the wrongful arrest as it was as much attached to the assertion that she was a cocaine user.

51. To give some indication of the level of damages that might be applicable Elkaim referred to the case of *Coyle v The State of New South Wales* [2006] NSWCA 95 (discussed in detail below) where a person who had been wrongfully arrested and detained for some hours received on appeal, compensatory damages of $10,000. At paragraph 99 Tobais JA gave a concise description of a wrongfully arrested person might endure:

> *"It is difficult to imagine, for a person who is otherwise generally a law abiding citizen, a more humiliating experience or a greater shock to one's equilibrium than being forcefully deprived of one's liberty for even a relatively short period of time in circumstances which are entirely unjustified. This is all the more so where that curtailment of liberty is accompanied, as in the present case, by the detained person being handcuffed and marched through a crowd of onlookers and then incarcerated in a police paddy wagon, locked in a cell at the police station and fingerprinted and photographed as a criminal. Not surprisingly, the whole experience must have been both humiliating and highly embarrassing."*

52. In light of Ms Hage-Ali's conduct as a cocaine user – (not affecting her right not to be arrested unlawfully) - and accepting the distress, humiliation and upset caused to her, compensatory damages were assessed at $7,000. Elkaim DCJ was not satisfied that there was any economic loss as a result of the wrongful arrest.

53. In assessing aggravated and exemplary damages, Elkaim stated:

> *"If the starting point is that arrest is an action of last resort then I think it must follow that making an arrest in disregard of this fundamental principle will be an indication of the wrongfulness of the conduct (attracting exemplary damages) and the resulting need for some extra damages to reflect the harm to the plaintiff (aggravated damages). On this basis I intend to allow one sum for both heads of damages."*

54. In doing so, he took into account the plaintiff's conduct which brought her to the attention of police and gave them grounds for suspecting that she may be involved in the supply of cocaine and said:

> *"Were it not for the fact that the wrongful arrest was a contravention of a person's most basic rights I do not think the facts would have given rise to aggravated or exemplary damages. Taking both sides of the argument into account I assess aggravated and exemplary damages, in total, at $7,500."*

55. After interest was allowed, over the period of time between the event and judgment, the total damages were $18,705. An order was made that the plaintiff's costs be paid for by the defendant.

56. *Houda v New South Wales* [2005] NSWSC 1053 is another interesting unlawful imprisonment case arising from an unjustified arrest. It was also a case where a malicious prosecution was commenced and maintained.

57. The plaintiff, Mr Adam Houda, solicitor, arrived at the Burwood Local Court on 25 August 2000 to represent a client in a hearing listed that day. When he was there and waiting for his client to arrive, he was speaking to another client named Ayoub who was a client of his but not in respect of any matter listed that day. As he was speaking to Ayoub, a police officer by the name of Constable Bergamin came over to them and said to Ayoub that he was going to be arrested after Court . Mr Houda moved away from the conversation after hearing that as he did not wish to be involved in that particular matter.

58. Mr Houda was then approached by Constable Bergamin who asked him if he was Ayoub's lawyer. Mr Houda replied that he was in relation to other matters. Bergamin then said that she wanted to charge him, and started describing the charges. Mr Houda replied to the effect *"you can do as you please but I'll give you a friendly tip, be careful how you approach this person as he is quite dangerous. I have spoken to Dr Roberts about him and that is what he tells me. Just be careful. If you approach him gently, maybe you will be able to get what you want out of him much more easily. Just be nice to him.*".

59. Whilst he was engaged in the conversation with Constable Bergamin, a police officer by the name of Constable Lance Stebbing came over to Mr Houda and pointed to him saying, *"Now you, you treat this officer with respect*".

60. Mr Houda replied, "*I am speaking to the officer with the utmost respect, so would you please mind your own business*". Stebbing then walked towards him, pointed towards a staircase and loudly said "*Fuck off*". Mr Houda responded, "*Well, this is a person talking to me about respect. That is very respectful officer. How dare you swear at me in front of all of these people*". Stebbing kept walking towards him and pushed him with his right hand on the chest. This caused Mr Houda to stumble back responding, "*What the hell are you doing, you idiot*". Stebbing moved towards him saying "*Get out of my personal space. Get out of my personal space*". Houda responded "*Where do you want me to go you idiot. I have a wall behind me. I am waiting for my client. I have a job to do here. Where do you want me to go? Where do you want me to go?*" Stebbing repeated "*Get out of my personal space*" and pushed Houda in the chest with his right hand. By this stage, Mr Houda was with his back to the wall and could not go anywhere. Stebbing continued to move towards Mr Houda saying "*Get out of my personal space*". Mr Houda raised his hands and as Stebbing came forward he came into contact with Mr Houda's hands.

61. At this point Stebbing then told him he was under arrest for assaulting a police officer and he, along with two other officers, grabbed him and arrested him. Mr Houda said "*Look I'm a solicitor. I'm not going to run away. Why are you grabbing me like this?"* One of the police officers replied "*You are a prisoner now pork chop that is the way we have to detain you*". Mr Houda then asked if he could take names and addresses of witnesses. The request was denied. He was marched down the stairs of the Burwood Local Court out through the foyer, down the street, around the corner to the police station.

62. The account above was that of Mr Houda as given in evidence in the Supreme Court, supported by a number of witnesses. The police account was at sharp variance – Stebbing alleged being pushed by Houda and offensive language being used by Mr Houda. To the extent of any inconsistency, the Court preferred the evidence of Mr Houda.

63. During the journey to the police station, the clients for whom he was acting that day were arriving in Court and saw Mr Houda being marched forcibly in the custody of police into the police station where he was detained. Mr Houda was detained for approximately 1 hour before being charged for assaulting a police officer in the execution of his duties. The

prosecution was maintained for a period of 6 months before being withdrawn prior to hearing.

64. After dealing with all the evidence, Cooper AJ in the Supreme Court was comfortably satisfied on the balance of probabilities that in prosecuting Mr Houda for assaulting him, Constable Stebbing well knew that the offence had not been committed and he was motivated to prosecute solely out of spite or ill will towards Mr Houda because Mr Houda had stood up to his unjustified, menacing and rude conduct. It was clear that the charge laid by way of field court attendance notice had been terminated in favour of the plaintiff.

65. Accordingly, the of case of malicious prosecution had been established. Further, Cooper AJ was comfortably satisfied on the balance of probabilities that Constable Stebbing, along with the assistance of other police officers, had no probable cause for arresting or imprisoning Mr Houda.

66. In relation to damages, Justice Cooper was satisfied that Mr Houda had sustained anger, severe embarrassment and considerable concern over his future as a solicitor, a belief based on reasonable grounds that his reputation had been damaged, the fear that the incident would crop up in the future and be used against him, and a stinging sense of injustice in the way in which he was so badly treated.

> "The plaintiff was in the Courthouse in his capacity as a solicitor awaiting clients when, without any lawful justification, he was arrested in front of some 40 – 50 members of the public, including other police officers. In their presence he was forcibly taken to the staircase, down the staircase to the ground level and out into the street and paraded through the street, in view of members of the public, including his own clients over a distance in excess of 100 metres. He was then taken into the police station and held there for approximately an hour."
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> "The humiliation and embarrassment which would have been caused to a solicitor in these circumstances would have been most intense. The feelings of anger and injustice suffered would be very high."
>
> "… He had to report the matter to the Law Society. He had to tell members of his family and watch the distress that that news caused them."

67. Justice Cooper took into account the fact that the charge itself carried a maximum of 5 years imprisonment and was of such gravity that if established it may have caused him to lose his status as a solicitor of the Supreme Court. That dangled over his head for a period of approximately 6 months. During that time he had to face clients, courts, police officers and family members. The Court concluded that the impact on his wellbeing was quite devastating. There was no vindication by any apology, and he was compelled to embark upon the civil suite litigation to establish that his treatment was unlawful.

68. The Court awarded compensatory damages in the sum of $100,000. Aggravated damages in an additional sum of $20,000 were also awarded because of the way in which the unlawful imprisonment and malicious prosecution case had been conducted with its totally unjustified persistence in alleging misconduct on behalf of the plaintiff.

69. In relation to exemplary damages, the court considered the case of *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 where Brennan J said:

> "As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In *Merest v Harvey* (1814) 128 ER 761, substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, Gibbs CJ saying: 'I wish to know, in a

case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?'"

70. The Court concluded that the conduct of Constable Stebbing was properly described as high handed conduct in contumelious disregard for the Mr Houda's rights. Accordingly exemplary damages were awarded in the sum of $25,000.

71. Accordingly, judgment was entered in favour of Mr Houda in the sum of $145,000. Costs were awarded in his favour by separate judgement.

Battery & Assault

72. Cases involving an unlawful imprisonment by police will often coincide with the commission of an assault or battery. As Campbell JA stated in *States of New South Wales v Williamson* [2011] NSWCA 183:

> *"One minor matter, not affecting questions of construction of the legislation, is that the judge, and to some extent the submissions on appeal, spoke as though unlawful arrest was itself a tort. That is not strictly correct. A lawful arrest can provide the legal justification for what would otherwise be the tort of false imprisonment. If reasonable force is used in the course of effecting a lawful arrest, that can provide a legal justification for what would otherwise be an assault or battery. However, unlawful arrest is not a tort separate to assault, battery and false imprisonment."*

73. The tort of battery is constituted by the intentional act of a person directly causing harmful or offensive physical contact with the person of another. The relevant intention is the intention to make contact with the body of the plaintiff not to do the plaintiff an injury.

74. An assault consists of an intentional overt act which creates in another person an apprehension of imminent, harmful or offensive physical contact.

75. The two torts of battery and assault are usually committed in close succession, but they are clearly separate torts.

76. Section 231 of LEPRA provides for the lawful application of reasonable force to effect an arrest or prevent an escape:

> *"**231 Use of force in making an arrest***
>
> *A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest."*

77. Section 231 of LEPRA reflects the common law[8]. The New South Wales Court of Appeal has accepted three decisions reflecting the common law principles concerning the lawful use of force during an arrest[9]:

    (a) The police officer may use whatever force as is reasonably necessary to effect the arrest, or put another way, force which is necessary in the circumstances of the arrest[10];

    (b) It is the duty of the police officer to ensure that the person to be arrested does not commit any further crime or escape, and so the likelihood that the person would do

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8 *Pringle v Everingham* [2006] NSWCA 195 at [67]

9 *Woodley v Boyd* [2001] NSWCA35 (2 March 2001)

10 Wiltshire v Barrett [1966] 1 QB 312

so unless prevented is relevant to the matter of what is reasonable in the circumstances[11]; and

(c) In evaluating the police conduct, the matter must be judged by reference to the pressure of the events in the agony of the moment, not by reference to hindsight. It is unfair to sit back in the comparatively calm and leisurely atmosphere of the Courtroom and make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances[12].

78. LEPRA at s.201 provides safeguards to be applied in the exercise of powers by police under the Police Powers legislation. They include the use of the power to search or arrest the person. Section 201 of LEPRA provides:

> "**201 Supplying police officer's details and giving warnings**
> *(1) A police officer must provide the person subject to the exercise of a power referred to in subsection (3) with the following:*
> *(a) evidence that the police officer is a police officer (unless the police officer is in uniform),*
> *(b) the name of the police officer and his or her place of duty,*
> *(c) the reason for the exercise of the power.*
> *(2) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)):*
> *(a) if it is practicable to do so, before or at the time of exercising the power, or*
> *(b) if it is not practicable to do so before or at that time, as soon as is reasonably practicable after exercising the power.*
> *(2A) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (g), (i) or (j) before exercising the power, except as otherwise provided by subsection (2B).*
> *(2B) If a police officer is exercising a power to give a direction to a person (as referred to in subsection (3) (i)) by giving the direction to a group of 2 or more persons, the police officer must comply with subsection (1) in relation to the power:*
> *(a) if it is practicable to do so, before or at the time of exercising the power, or*
> *(b) if it is not practicable to do so, as soon as is reasonably practicable after exercising the power.*
> *(2C) If a police officer exercises a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person the subject of the request or direction with:*
> *(a) a warning that the person is required by law to comply with the request or direction (unless the person has already complied or is in the process of complying), and*
> *(b) if the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply by the person is an offence, a warning that the failure to comply with the request or direction is an offence.*
> *(3) This section applies to the exercise of the following powers (whether or not conferred by or under this Act):*
> *(a) a power to search or arrest a person,*
> *(b) a power to search a vehicle, vessel or aircraft,*
> *(c) a power to enter premises (not being a public place),*
> *(d) a power to search premises (not being a public place),*
> *(e) a power to seize any property,*
> *(f) a power to stop or detain a person (other than a power to detain a person under Part 16) or a vehicle, vessel or aircraft,*
> *(g) a power to request a person to disclose his or her identity or the identity of another person,*
> *(h) a power to establish a crime scene at premises (not being a public place),*
> *(i) a power to give a direction to a person,*

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11 Lindley v Rutter [1981] QB 128

12 *McIntosh v Webster* (1980) 43 FLR 112

(j) a power under section 21A to request a person to open his or her mouth or shake or move his or her hair,
(k) a power under section 26 to request a person to submit to a frisk search or to produce a dangerous implement or metallic object..."

79. The failure by police to comply with section 201 of LEPRA may render an arrest or search or an exercise of other police powers improper or unlawful. It might also cause the police officer to be acting outside of the execution of their duties which is required as an element of many offences against police, (for example, assaulting a police officer or resisting a police officer during an arrest per s.58 *Crimes Act*).

80. Failure to comply with the safeguards under s.201 may also render the subsequent or consequential events post-arrest inadmissible pursuant to the court's discretion to exclude the evidence pursuant to s.138 of the Evidence Act. But it does not necessarily follow that a failure to comply with s.201 renders all subsequent police action unlawful.

The tort of malicious prosecution

81. The elements of the tort of malicious prosecution were most recently addressed by six members of the High Court in *A v New South Wales*[13]. The following elements need to be established:

(i) That proceedings of the kind to which the tort applies (generally criminal proceedings) were initiated against the plaintiff by the defendant;

(ii) That the proceedings terminated in favour of the plaintiff;

(iii) That the defendant, in initiating or maintaining the proceedings acted maliciously; and

(iv) That the defendant acted without reasonable and probable cause[14].

82. The Court of Appeal of New South Wales in *State of New South Wales v Landini* [2010] NSWCA 157 (9 July 2010) added a further element to the list of elements identified by the High Court in *A v New South Wales*, being proof of damage[15].

83. The first two of the above elements are rarely in issue. Nevertheless, as pointed out by the High Court in *A v New South Wales*, the identification of the appropriate defendant in a case of malicious prosecution is not always straightforward. The High Court referred to JG Fleming *The Law of Torts* (9th ed, 1998), at p 676 where the author said "*To incur liability, the defendant must play an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion*".

84. If a prosecution relies on facts solely within a complainant's knowledge, the complainant could be sued for malicious prosecution, as opposed to suing the person who commences the prosecution. The test is whether a complainant "in substance procured the

[13] (2007) 230 CLR 500
[14] *A v NSW* at p 502-503
[15] Per McFarlan JA at [19] citing *Davis v Gell* (1924) 35 CLR 275 at 284, 285 per Isaacs ACJ and *Smith v Commonwealth Life Assurance Society Limited* (1935) 35 SR (NSW) 552 at 557 per Jordan CJ.

prosecution": *Martin v Watson*[16]. In *Martin v Watson*, the police officer to whom the complaint was made had no way of testing the truthfulness of the accusation.

85. As a practical matter, an action for malicious prosecution is unlikely to be brought against a complainant who will not have the financial means to satisfy a judgment in favour of the plaintiff. However, in cases where a prosecution solely depends on the truthfulness of a complainant and the complainant is proven to have made a false allegation, it would be forensically much easier to establish the third and fourth elements identified by the High Court in *A v New South Wales*. A case against an actual complainant upon whose evidence a prosecution is based is obviously more attractive if the complainant is likely to be able to satisfy a judgment.

86. To constitute malice, the dominant purpose in bringing the proceedings must be a purpose other than the proper invocation of the criminal law[17]. The improper purpose must be the sole or dominant purpose actuating the prosecutor[18]. Examples of *other* purposes include: to stop a civil action brought by an accused against a prosecutor[19], or a case involving 'personal animus'. There are undoubtedly more examples of improper purposes. The difficulty lies in proving the improper purpose.

87. In relation to the element of acting without reasonable and probable cause, the High Court in *A v New South Wales* said:

> *There are three critical points. First, it is the negative proposition that must be established: more probably than not the defendant prosecutor acted without reasonable and probable cause. Secondly, that proposition may be established in either or both of two ways: the defendant prosecutor did not "honestly believe" the case that was instituted or maintained, or the defendant prosecutor had no sufficient basis for such an honest belief. The third point is that the critical question presented by this element of the tort is: what does the plaintiff demonstrate about what the defendant prosecutor made of the material that he or she had available when deciding whether to prosecute or maintain the prosecution? That is, when the plaintiff asserts that the defendant acted without reasonable and probable cause, what exactly is the content of that assertion?*[20]

88. Where a prosecutor is also the person upon whose evidence the allegation in a charge is based, as in the case of, for example, resisting an officer in the execution of his or her duty where the officer allegedly resisted is also the prosecutor, it is suggested that an absence of reasonable and probable cause would readily be established if, for example, the police officer's evidence about the plaintiff resisting is shown to be false.

89. The case of *Coyle v State of NSW* [2006] NSWCA 95 provides a good case study for this type of matter in practice. Mr Coyle accompanied his wife to Westfield Shopping Centre at Blacktown in the early evening. His wife went shopping and he met some friends at the Blacktown Workers Club. After consuming 5 or so beers, he went to the Blacktown Railway Station for the purpose of boarding a train and travelling back home.

90. As he attempted to board the train he was confronted by a police officer named Senior Constable Harold Smith who was in a company of Senior Constable Crispian Jelley. An altercation occurred. As a consequence Mr Coyle was forcibly detained, handcuffed and taken back to Bankstown Police Station in a paddy wagon.

91. He was placed in a holding cell, finger printed, photographed and questioned by another police officer. Some 2½ hours later, having been charged with assaulting Constable Smith,

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[16] [1996] AC 74 at 89
[17] *A v New South Wales* at 531 citing *Gibbs v Rea* [1998] AC 786 at 804
[18] *A v New South Wales* at 531 citing *Trowbridge v Hardy* (1955) 94 CLR 147 at 162 per Kitto J
[19] As in *Springett v London and South-Western Bank* (1885) 1 TLR 611)
[20] at [77], p 527

resisting Constable Smith, using offensive language and behaving in an offensive manner, he was released without bail.

92. The charges were heard in the Blacktown Local Court and ultimately he was acquitted of all charges.

93. Subsequently, he initiated proceedings in the Parramatta District Court alleging that when he was lawfully attempting to board the train, he was assaulted, wrongfully arrested, falsely imprisoned and maliciously prosecuted by Smith and Jelley.

94. Delaney DCJ found, contrary to the evidence of Smith, that Smith had assaulted Coyle rather than the other way around and that Smith and Jelley had wrongfully arrested and falsely imprisoned Coyle. However, the Judge was not satisfied on the balance of probabilities that the claimant had established an absence of reasonable and probable cause or actual malice with respect to the laying and prosecution of the charges and therefore dismissing the claim for malicious prosecution.

95. Delaney DCJ delivered verdict and judgment for Mr Coyle in the sum of $61,000.

96. Coyle sought leave to appeal in the Supreme Court of Court of Appeal against Delaney DCJ's finding that the claim for malicious prosecution had not been established and for the failure to award compensatory damages with respect to the torts of false imprisonment and wrongful arrest.

97. Delaney DCJ made findings that he didn't accept the evidence of Smith to be accurate or truthful and that where there was a conflict between his evidence and that of Mr Coyle he accepted Mr Coyle's. Ultimately, Delaney DCJ found Constable Smith to be an unsatisfactory witness. Smith was evasive and would prevaricate. He continued to make self-serving statements and "*in my opinion ought not be accepted as an accurate or honest witness*".

98. After considering the evidence Delaney DCJ concluded that he was satisfied that when Mr Coyle was arrested the police could not have had any reasonable suspicion that he committed an offence.

99. On appeal, Coyle claimed that once the primary judge had found that Smith had assaulted him, and that he had not used offensive language or assaulted police as Smith had testified, it was an inescapable conclusion that the prosecution of the charges for which Smith was the informant was based on false evidence. Given that the charges being laid and maintained were known by Smith to be false, it followed that the prosecution was therefore inherently malicious.

100. The evidence given in the Local Court proceedings was identical to that in the District Court civil case proceedings. It also accorded to the fact sheet created by Smith and with his statements.

101. On appeal the Court noted that Delaney DCJ had found that Smith was not only an unsatisfactory witness insofar as he was evasive and would prevaricate but also that he was neither an honest nor a truthful witness.

102. The Court on appeal distinguished between cases in which the evidence of a party is not accepted and where there was an affirmative finding that the party had deliberately lied.[21] The High Court in *Kuligowski v Metrobus* (2004) 220 CLR 363 at 385 said in general, disbelief in a witness' evidence does not establish the contrary.

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[21] *Smith v New South Wales Bar Association* [1992] HCA 36

103. The Court considered that the decision of Lord Denning in *Glinski v McIver* [1962] AC 726:

> *"The issue then appears simple. If [the prosecutor based the charge on his own evidence] was speaking the truth, there was good cause for the prosecution. If he was lying, there was no cause for it … If he honestly believed that the facts were as he stated then, even though they turned out to be mistaken belief, he would have reasonable and probable cause to prosecute: If he had no such honest belief and was consciously putting forward a false case, he would, of course, have no cause to prosecute. In such cases, the judge might properly put to the jury the question: Did he honestly believe in the guilt of the accused? Or, as I prefer: Did he honestly believe in the case he put forward? As that is the core of the matter."*

104. In *A v State of New South Wales* [2005] NSWCA 292, Beazley JA (with whom Mason P and Pearlman AJA agreed) said:

> *"… that in a case where the prosecution is based upon the prosecutor's own evidence, an absence of honest belief in the case being advanced would be evidence of absence of reasonable and probable cause."*

105. Applied in this case, Delaney DCJ had found that Smith was neither truthful nor honest and consequently must have rejected his untruthful and false his evidence in chief as to what had occurred when the claimant was detained. Logically and inevitably, such a finding must lead to the conclusion that the fact sheet must also have been false and false to his knowledge.

106. Consequently, the primary judge had erred in failing to find, on the balance of probabilities, that there was an absence of reasonable and probable cause. Given that there was an absence of reasonable and probable cause, it must equally follow that in pressing the charges against the claimant was motivated by malice. This finding led, inevitably, to further findings that Smith lacked an honest belief in the justification before preferring the charges against the claimant.

107. Accordingly the Court of Appeal found that Delaney DCJ had erred in failing to find the tort of malicious prosecution established.

108. Coyle was entitled to damages for malicious prosecution. Apart from being humiliated, he was subjected to the inconvenience of having to attend Court on a number of occasions and was fearful that he might end up with a criminal record and possibly a jail sentence because of the alleged assault. The inconvenience and disturbance to the claimant's life as well as the stress constituted by the fear of conviction justified an award not only in non-economic loss but also an award in compensatory damages. The latter was assessed in the order of $5,000.

109. In respect of the malicious prosecution, the Court of Appeal did consider this worthy of the Court's denunciation by way of exemplary damages. These were ordered in the sum of $5,000.

110. Delaney DCJ had erred in not awarding compensatory damages for the wrongful arrest and unlawful imprisonment. Because the deprivation of liberty was for a period of nearly 2 ½ hours, the compensatory damages for such a short period should be little more than nominal. The Court of Appeal said:

> *"It is difficult to imagine, for a person who was otherwise a generally law abiding citizen, a more humiliating experience or a great shock to one's equilibrium than being forcefully deprived of one's liberty for even a relatively short period of time in circumstances which are entirely unjustified. This is more the so where that curtailment of liberty is accompanied, as in the present case, by the detained person being handcuffed and marched through a crowd of onlookers and then incarcerated in a police paddy wagon, locked in a cell at the police station and finger printed and photographed as a criminal. Not surprisingly, the whole experience must have been both humiliating and highly embarrassing."*

"Accordingly, and notwithstanding the relatively short period of time that the Claimant was forced to undergo deprivation of his liberty in the circumstances referred to, he is entitled to be properly compensated in respect of what must have been a most terrifying and unforgettable experience. I would assess compensatory damages in respect of the causes of action, wrongful arrest and false imprisonment in the sum of $10,000.

111. It followed that the claimant was entitled to the sum of $20,000 in addition to the $61,000 which the primary judge had awarded him, bringing to a total sum in the verdict of $81,000. The State was ordered to pay Coyle's costs.

Is the District or Supreme Court in civil proceedings bound by the Magistrate's findings?

112. A defendant in civil proceedings may seek to argue in their defence that the police conduct was lawful notwithstanding the judgement and findings by the learned Magistrate. This may be met in some instances by a plea of issue estoppel in reply. This essentially means arguing that the issue has already been determined in other proceedings.

113. The question of whether the doctrine of issue estoppel applies in civil proceedings regarding the findings of fact by a Magistrate in the Local Court having heard the criminal matter is unsettled.

114. In *Blair v Curran*[22], Dixon J said:

"A judicial determination directly involving an issue of fact or law discloses once and for all the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppels covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is a money sum to be recovered, or the doing of an act be commanded or be restrained, or that rights be declared. The distinction between res judicata and issue estoppels is that in the first, the very right or course of action claimed or put in suit has, in the formal proceedings, passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied, the existence of which is a matter necessarily decided by the prior judgment, decree or order.

Nothing but what is legally indispensible to the conclusion is thus finally closed or precluded. In matters of fact, the issue estoppel is confined to those ultimate facts from which the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a claim or right, which in point of law depends upon a number of ingredients or ultimate facts, the absence of any one of which would be enough to defeat the claim, the estoppels covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppels confined to the final legal conclusion expressed in the judgment, decree or order … the judicial determination concludes not merely as to the point decided but as to the matter which it was necessary to decide, and was actually decided as the groundwork of the decision itself, although not then directly the point of issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is to necessarily assert that the former decision was erroneous."

In the phraseology of Lord Shaw, "a fact fundamental to the decision arrived at" in the former proceedings and "the legal quality of the fact" must be taken as finally and conclusively established (Hoystead v Commissioner of Taxation). But matters of law or fact which are subsidiary or collateral are not covered by the estoppel. Findings, however deliberate and formal, which concern only evidentiary facts and not ultimate facts forming the very title to rights give rise to no preclusion. Decisions upon matters of law which amount to no more than steps in a process of reasoning tending to establish or support the proposition upon which the rights depend do not estop the parties if the same matters of law arise in subsequent litigation.

The difficulty in the actual application of these conceptions is to distinguish the matters fundamental or cardinal to the prior decision or judgment, decree or order or necessarily involved in it as its legal

[22] (1939) 62 CLR 464

justification or foundation from matters which even though actually raised and decided as being in the circumstances of the case the determining considerations, yet are not in point of law the essential foundation or groundwork of the judgment, decree or order. ..."

115. In *Moussa v NSW*[23], Ms Moussa alleged that she was wrongfully imprisoned and maliciously prosecuted without reasonable and probable cause by officers of the New South Wales Police Service. In this case, Harrison AsJ dealt with the authorities relating to issue estoppel in circumstances where a District Court judge, on appeal, quashed convictions of the Local Court and made certain findings in relation to a cost application in awarding costs to the appellant.

116. The District Court judge awarded costs on the basis that the prosecutor had (pursuant to s.70 of the *Crimes (Appeal and Review) Act,* unreasonably failed to investigate, or to investigate properly, any relevant matter that the prosecutor was or ought to have reasonably been aware of, that suggested that the appellant in the circumstances, might not be guilty or that the proceedings should not have been brought.

117. Harrison ASJ was of the view that the findings by the District Court judge in relation to costs, having earlier quashed the convictions, were unlikely to establish an issue estoppel, notwithstanding that they covered the subject area of whether there was reasonable and probable cause in relation to the prosecution. Harrison ASJ, however, found that Ms Moussa was still arguably entitled to raise an issue estoppel on the basis that the costs order followed findings from the earlier decision quashing the convictions, and so do not solely relate to the matters determined on costs.

118. The potential impediments to the application of issue estoppel include the different standard of proof in civil proceedings and also the difference in identity between the parties in civil and criminal proceedings. In the Local court, the police prosecutor and the party bringing the summary prosecution is the informant, whereas the party sued in civil proceedings is the State of New South Wales, on the basis that the state is vicariously liable for the acts of the individual police officers, including the informant. In the circumstances of this case, Harrison AsJ was of the view that although an issue estoppel was unlikely, it could not be said to be hopeless. Consequently, leave to amend the reply arguing issue estoppel was permitted.

Damages for trespass to the person and malicious prosecution

119. Kirby J discussed the common law's approach to general damages in *Ruddock v Taylor* (2005) 222 CLR at [140] in the following terms:

"The principal function of the tort is to provide a remedy for "injury to liberty" (Trindade and Cane, The Law of Torts in Australia, 3rd ed (1999) at 302). It is not, as such, to signify fault on the part of the defendant. Damages are awarded to vindicate personal liberty, rather than as compensation for loss per se (Balkin and Davis, Law of Torts, 3rd ed(2004) at 62 [3.37]. Contrast the tort of negligence, where damages are awarded to compensate for loss or damage.)."

120. Damages in tort are intended to put a plaintiff, so far as money can, in a position that he or she would have been in had it not have been for the tort committed[24]. The main exception to this principle is a case in which exemplary damages are awarded, since exemplary damages are designed to punish and deter.

[23] [2010] NSWSC 528

[24] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *Haines v Bendall* (1991) 172 CLR 60 at 63 per Mason CJ, Dawson, Toohey and Gaudron JJ

121. An important issue to address in assessing damages for torts coming under the banner of trespass to person is to ask whether the provisions of the *Civil Liability Act* 2002 (NSW) (CLA) apply. Section 3B(1)(a) of the CLA provides:

> **3B Civil liability excluded from Act**
>
> (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
>
> (a) civil liability of a person in respect of an **intentional act that is done by the person with intent to cause injury or death** or that is sexual assault or other sexual misconduct committed by the person-the whole Act except:
>
> (i) section 15B and section 18 (1) (in its application to damages for any loss of the kind referred to in section 18 (1) (c)), and
>
> (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death, and
>
> (iii) Part 2A (Special provisions for offenders in custody),

122. According to s. 3B(1)(a) of the CLA, the damages provisions in the CLA will not apply in respect of an intentional act that is done with *intent to cause injury or death*. The learned author of the *Annotated Civil Liability Act 2002 (NSW)* (1st ed, 2004) at p 8, comments that the Act does not apply in relation to intentional torts such as trespass to the person, an assault[25] or false imprisonment because these torts do not require proof of an intent to cause injury or death.

123. Claims which are captured by the CLA will have their damages assessed and capped in accordance with certain provisions of it. For example, the assessment of damages for non-economic loss (general damages, i.e. for pain and suffering) is governed by s. 16 of the CLA. The maximum amount that may be awarded for non-economic loss is currently $500,500. Damages for non-economic loss are worked out by establishing the severity of the plaintiff's non-economic loss as a proportion of a most extreme case. A case involving quadriplegia is normally the benchmark for a most extreme case[26]. If the severity of a plaintiff's non-economic loss is less than 15% of a most extreme case, the plaintiff is not entitled to an award for this head of damage.

124. Provided the threshold is met (i.e. 15% of a most extreme case), damages for non-economic loss are calculated by reference to the table in s. 16. A plaintiff who is assessed to be 15% of a most extreme case is entitled to 1% of the statutory maximum $500,500 (i.e. $5,005).

125. There are other sections of the CLA that affect the assessment of other heads of damage, such as damages for past or future economic loss and damages for gratuitous attendant care services. These heads of damage are seldom awarded in relation to those causes of action falling under the banner of trespass to person.

126. The case of *State of New South Wales v Willaimson* has been granted leave[27] to be heard in the High Court this month. As discussed below in the costs section of this paper, it is a very significant case set to determine whether or not intentional torts such as unlawful imprisonment, assault and battery will come into the damages and costs capping provisions of the CLA.

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[25] Often used interchangeably with battery, though assault and battery are distinct torts.
[26] e.g. as in the case of *Southgate v Waterford* (1990) 21 NSWLR 427)
[27] *State of NSW v Williamson* S416/2011

127. In an action for malicious prosecution, compensatory damages are for the injury to a plaintiff's reputation, injury to his or her feelings, that is for the indignity, humiliation and disgrace caused by the fact of the criminal proceedings being brought. Financial loss can also be claimed, for example, as a result of a plaintiff being dismissed from his or her employment and the expenses incurred in defeating the prosecution[28].

128. Compensatory damages in an action for false imprisonment *"… are generally awarded not for a pecuniary loss but for a loss of dignity, mental suffering, disgrace and humiliation*"[29]. Nevertheless, pecuniary loss in some cases of false imprisonment might be quite substantial where, for example, a person is receiving a good salary and the extent of the detention is quite lengthy or the detention results in a person losing his or her job.

129. An assault or battery is likely to have a physical or psychological impact on a person. Compensatory damages would cover these types of harm, in addition to covering the injury to a person's feelings.

130. Aggravated damages are:

> *"given by way of compensation for injury to the plaintiff, though frequently intangible, resulting from the circumstances and manner of the defendant's wrongdoing."*[30]

131. Being compensatory in nature, aggravated damages are awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like[31].

132. How does one therefore calculate aggravated damages? If aggravated damages are compensatory in nature, will a double counting of damages result? In *New South Wales v Riley*[32] Hodgson JA came up with an approach to assessing aggravated damages that is designed to avoid double counting. The approach is found in the following part of his Honour's judgment (at 528 and 529):

> *"131 In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt damages neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified."*
>
> *...*
>
> *133 This means that, if a court has awarded damages for hurt feelings as part of ordinary compensatory damages, the award of aggravated damages must only be for the difference justified by this approach, that is, an award of so much as is necessary to bring the damages up to the upper end of the available range. The approach also means, I think, that aggravated damages can be a matter of degree: the worse the defendant's conduct, the further from the centre of the range and towards the upper limit of the range the court may be justified in going.*

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[28] *McDonald v Coles Myer Limited* (1995) ATR 81 – 361 cited in *Houda v The State of New South Wales* [2005] NSWSC 1053 (unreported, 25 October 2005)

[29] *Myer Stores Limited v Soo* [1991] 2 VR 597 at 603 per Murphy J cited in *Williamson v State of New South Wales* [2010] NSWSC 229 (unreported, 30 March 2010)

[30] *Uren v John Fairfax & Sons Pty Limited* [1966] 117 CLR 118 at 129 – 130 per Taylor J cited in *New South Wales v Ibbett* (2006) 229 CLR 638

[31] *Lamb v Cotogno* (1987) 164 CLR 1 at 8

[32] (2003) 57 NSWLR 496

133. Exemplary damages are awarded "to 'punish and deter' the wrongdoer, though in many cases the same set of circumstances might well justify either an award of exemplary or aggravated damages."[33] It is necessary to assess the heads of compensatory damages, including aggravated damages, before determining whether a further award should be made by way of exemplary damages[34].

134. Are aggravated and exemplary damages available in a case where the direct physical interference to the plaintiff has been caused by the negligence or carelessness of the defendant? A plaintiff may generally bring an action in trespass where there has been direct physical interference to the plaintiff brought about by the negligence or carelessness of the defendant[35]. It is suggested that an action framed in this way would not be captured by s. 3B(1)(a) of the CLA with the result being that s. 21 of the CLA will apply. Section 21 of the CLA provides:

> *In an action for the award of personal injury damages where the act or omission that caused the injury or death was* ***negligence****, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.*

135. Damages for false imprisonment cannot be computed on the basis that there is an applicable daily rate. A substantial portion of the final award must be given for 'the initial shock of being arrested'.[36] As the term of imprisonment extends, its effect upon the person diminishes.

136. Cornelia Rau accepted $2.4 million in damages from the Commonwealth.[37] If calculated on a daily basis she received $8000 per day for 300 days spent in detention.[38]The Commonwealth also reportedly paid $25,000 compensation to a French tourist wrongly held in Villawood detention centre for four days, this would be approximately $6,250 per day. Vivian Solon, a disabled woman wrongly deported to the Philippines and left there for four years had her claim mediated by Sir Anthony Mason AC. The matter was settled for an undisclosed sum. However, her lawyers made it clear that she was seeking damages in the order of $10 million.[39]

137. In *Spautz v Butterworth,*[40] the Court of Appeal increased an award of $5,600 to $75,000 for 56 days of imprisonment, of which seven days where in solitary confinement for an arrest on the basis of an invalid warrant.

138. In *Vignoli v Sydney Harbour Casino*[41] $30,000 was awarded for wrongful imprisonment and included 2% for suffering arising from a statement published in the Sydney Morning Herald from the defendant expressing their wish to defend its action to imprison him. In *Nye v State of New South Wales*[42] the plaintiff was awarded $25,000 for a period of detention from the day of arrest until his appearance before the local court the following day.

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[33] *Uren v John Fairfax & Sons Pty Limited* and *New South Wales v Ibbett*
[34] *New South Wales v Ibbett* at 647
[35] *Williams v Milotin* (1957) 97 CLR 465; *Australian Torts Reporter*, vol 2, CCH Australia Limited, at [46 – 740]
[36] *Hsu v Commissioners of Police of the Metropolis* [1998] QB 498 at 515.
[37] Sydney Morning Herald, 19 February 2008, page 2; see also the Research Brief dated 31 March 2005 by the Commonwealth's Department of Parliamentary Services titles '*The detention of Cornelia Rau: legal issues"*
[38] Research Brief, *Ibid,* at page 22, ABC Radio transcript AM, 15 February 2005.
[39] Settlement here for deported Solon' 6 December 2006, www.lawyersweekly.com.au).
[40] (1996) 41 NSWLR 1.
[41] [1999] NSWSC 1113.
[42] [2003] NSWSC 1212; (2004) Aust Torts Reports 81-725.

139. In *State of New South Wales v Zaravinos*[43] an appeal was dismissed and an award of $25,000 was upheld for detention by police for 3 hours. However, an award of $25,000 for ten hours of detention by police was found to be 'close to or at the top of the range' in *State of New South Wales v Delly.*[44]

140. In *Coleman v Watson & Shaw,*[45] the plaintiff received $20,000 ordinary compensatory damages plus interest for the short time he spent in custody before attending court and receiving bail. In *Photi v Target Australia*[46] the plaintiff was publicly arrested by store security officers and received minor injuries, no items were ever found on her and she was never charged. A high award was given for compensatory damages including aggravated damages for wrongful arrest and false imprisonment and defamation as well as aggravated compensatory damages for assault and punitive damages other than defamation totalling $85,000.

141. In *McDonald v Coles Myer*[47] the plaintiff was arrested by a store security guard on suspicion of obtaining financial advantage by deception, the charges were dismissed. The Court of Appeal increased the award of damages from $12,500 because the defendant continued to maintain she was guilty and cross examined her accordingly. The plaintiff received $27,000 ordinary compensatory damages.

142. In *NSW v Coleman*[48] the plaintiff was arrested without warrant and detained for 2.5 hours. He produced evidence that he suffered mild PTSD and the arrest exacerbated his teeth grinding problem. The Court of Appeal found that although general damages of $28,000 plus interest was very high it was not outside the permissible range. A serial litigant, know to police was detained for just under three hours and taken for a psychiatric assessment was awarded $15,000 compensatory damages. [49]

143. In *NSW v Riley*[50] a man who police suspected was mentally disturbed was arrested after discharging a firearm. He was handcuffed and put in the back of a police wagon where he was thrown from side to side. The false imprisonment ended after a doctor caused police to release him. Once he was released he had to hitchhike home. The plaintiffs wrists where injured due to the overly tight handcuffs. He was awarded $213,393.42 compensatory and exemplary damages for negligence causing personal injury, false imprisonment and assault and trespass to property.

144. In *Ruddock v Taylor*[51] the plaintiff, a convicted sex offender had his visa wrongly cancelled twice leading him to be taken to a detention centre, where much of the conditions were worse than in jail. This exacerbated many of the physical and mental conditions he was already suffering. He was awarded $50,000 compensatory damages for the first false imprisonment, $60,000 for the second false imprisonment as well as $1,500 for past and future medicals.

145. In *NSW v Bryant*[52] the police handcuffed the plaintiff with sufficient force to break his wrist. He was also thrown on the road and had a gun pointed at him. He had a risk of developed osteoarthritis due to the injury sustained. He was placed in custody for a short period of time, although the exact period is unknown. He was awarded $56,000 ordinary

[43] [2003] NSWCA 320; (2004) 62 NSWLR 58.
[44] [2007] NSWCA 303 at 77.
[45] [2007] QSC 343.
[46] [2007] NSWDC 265.
[47] [1995] Aust Torts Reports 62,682 (81-361).
[48] [2003] NSWCA 183.
[49] *Bhattacharya v NSW* [2003] NSWSC 261.
[50] [2003] NSWCA 208.
[51] (DCNSW) CA:(2003) 58 NSWLR 269.
[52] [2005] NSWCA 393.

compensatory damages and economic loss, $50,000 exemplary damages and $25,000 loss of future earnings because of his wrist injury.

Limitation periods

146. The application of the *Limitation Act* 1969 (NSW) in the context of an action for assault and false imprisonment was recently considered by the Court of Appeal of New South Wales in *State of New South Wales v Steven Charles Radford*[53]. The plaintiff (respondent in the Court of Appeal) alleged that on 15 December 1999 he was assaulted and falsely imprisoned by a number of police officers who had attended his residence in order to execute a lawful search warrant. On 14 December 2005 (i.e. one day short of six years after his arrest) the respondent commenced proceedings in the District Court alleging assault and false imprisonment. The particulars of loss and damage in the statement of claim identified physical injuries suffered by the plaintiff as well as psychiatric disabilities. No claim was then made for aggravated or exemplary damages.

147. The plaintiff filed a second amended statement of claim. In response, the State filed a motion seeking to strike out or dismiss the pleading on the ground that it was statute barred by s. 18(2) of the *Limitation Act*. The plaintiff filed another amended statement of claim on 26 April 2007, which was met by an amended motion to strike out. The plaintiff filed yet another amended statement of claim on 2 June 2008. Then on 26 June 2009, the plaintiff filed a motion seeking leave to file a further amended statement of claim (i.e. a fourth amended statement of claim).

148. The proposed fourth amended statement of claim abandoned any claim to compensatory damages. Unspecified aggravated and exemplary damages were claimed for assault and false imprisonment. In relation to the plaintiff's attempt to file a fourth amended statement of claim, the Court of Appeal observed that it was "*clear enough that the 4th ASC omitted the claim for damages for physical injuries in an attempt to overcome the difficulty that s. 18(2) of the Limitation Act imposes a three year limitation period for a cause of action founded on breach of duty for damages for personal injury*".

149. The primary judge granted the plaintiff leave to file a further amended statement of claim and dismissed the State's motion. The primary judge identified two issues requiring resolution. The first was whether a claim for exemplary and aggravated damages amounted to a cause of action falling within section 18A of the *Limitation Act*. If it did, the relief sought in the proposed amended statement of claim would have been barred by s. 18A(2) at the time the proceedings were commenced and no order could be made under section 65(2)(c) of the *Civil Procedure Act* 2005 (NSW) to add new causes of action. The second issued concerned whether the State would sustain prejudice if leave were granted, in the event that the claim was not captured by s. 18A of the *Limitation Act.*

150. The Court determined that leave to appeal should be granted and the appeal allowed because the primary judge had erred in not addressing a significant argument that was put to him as to why the plaintiff was not entitled to rely on s. 65(2)(c) of the *Civil Procedure Act* to add a cause of action founded on false imprisonment. It was therefore not necessary for the Court to decide whether the limitation period applicable to the plaintiff's false imprisonment cause of action was three years (s. 18A(2) of the *Limitation Act*) or six years (s. 14(1)(b) of the *Limitation Act*). Nevertheless, the Court expressed an "opinion" on this issue.

151. The critical issue for the Court was whether the plaintiff's claim based on the alleged assault was a cause of action "*for damages for personal injury*". The Court referred to the definition of "*personal injury*" in s. 11(1) of the *Limitation Act*. "*Personal injury*" is defined by

[53] [2010] NSWCA 276 (unreported, 28 October 2010)

s. 11(1) to include "*any impairment of the physical or mental condition of a person*". The Court held that the action based on assault in which the plaintiff claimed aggravated damages for injury to feelings is properly characterised as an action "*for damages for personal injury*". It was the Court's opinion that the allegations of emotional upset, anxiety, distress and humiliation by virtue of the alleged assault (and the unlawful imprisonment) characterised the claim as one for damages for impairment of the plaintiff's mental condition. Since the definition of "*personal injury*" in s. 11(1) of the *Limitation Act* included "*any impairment of the physical or mental condition of a person*", it was said that the plaintiff's claim was for damages for personal injury.

152. Importantly, the Court said that it "may" be that an action in assault seeking only exemplary damages (assuming that a claim can be brought for exemplary damages independently of any claim for compensatory damages) is not a cause of action for the purposes of s. 18A of the *Limitation Act*. This is because exemplary damages do not compensate the plaintiff for any injury he or she may have sustained. They are designed to punish and deter the defendant.

153. Exemplary damages are assessed after compensatory and aggravated damages have been assessed. This is no doubt because an award of exemplary damages cannot be made unless a court first determines that the award of aggravated damages is insufficient to punish and deter[54]. If aggravated and compensatory damages are not claimed, it would be difficult to conceive of a case in which exemplary damages should not be awarded where a court concludes that a defendant's conduct shows a conscious and contumelious disregard for a plaintiff's rights.

154. Missing the three year limitation period provided for by section 18A(2) of the *Limitation Act* may not be the death knell for an action for trespass to the person where only exemplary damages are claimed.

Costs

155. In *Jayson Williamson v State of New South Wales*[55], the State contended that the plaintiff's action in the District Court for assault, unlawful arrest and false imprisonment was regulated by the cost capping provisions of s. 338 of the *Legal Profession Act* 2004. Section 338 caps costs at 20% of the amount recovered or $10,000, whichever is greater, if the amount recovered on a claim for *personal injury damages* does not exceed $100,000. The plaintiff filed a summons in the Supreme Court seeking a declaration that the costs in his District Court proceedings were not regulated by s. 338. The plaintiff had previously settled his case on the basis that the State pay his costs as agreed or assessed. The amount of the settlement was not disclosed in the decision of Hall J, but the settlement amount was obviously $100,000 or less and the State must have taken issue with the plaintiff's bill of costs.

156. Section 337(1) of the *Legal Profession Act* defines "plaintiff" as a person who makes or is entitled to make a claim for personal injury damages. The section also provides that "personal injury damages" has the same meaning as in Part 2 of the *Civil Liability Act* 2002. Section 11 of the CLA defines "personal injury damages" as damages that relate to the death of or injury to a person. The same section defines "injury" as including, inter alia, an impairment of a person's physical or mental condition. Section 11A of the CLA provides that Part 2 applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of Part 2 by s. 3B. Part 2 relates to the awarding of damages.

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[54] *State of New South Wales v Stephen Charles Radford* at [126] and H Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002), at [1.7.6]

[55] [2010] NSWSC 229 (unreported, 30 March 2010)

157. Hall J reasoned that the plaintiff's allegations of assault constituted intentional acts that fell within s. 3B(1)(a) of the CLA and that "damages" in a case of this type are not "personal injury damages" to which Part 2 applies. The costs capping provisions therefore did not apply to the allegations of assault.

158. In relation to the causes of action for false imprisonment and unlawful arrest, his Honour said that these claims were not, in their nature, claims for personal injury. His Honour noted that a claim of false imprisonment is actionable, per se, without proof of damage[56]. His Honour said that the fact that the plaintiff claimed damages for loss of dignity, mental suffering etc did not thereby convert the proceedings in respect of the tort of false imprisonment into a claim for person injury.

159. The decision in *Williamson v State of New South Wales* does not sit too well with the Court of Appeal's decision in *State of New South Wales v Stephen Charles Radford*. In the latter case it was held that a claim for emotional upset and anxiety, distress and humiliation by virtue of an assault and unlawful imprisonment was a claim for damages for impairment of the plaintiff's mental condition, with the consequence that the claim was properly characterised as one for damages for personal injury[57].

160. The case of *Williamson* has been granted special leave to be heard on 15 August 2012 in the High Court. I am reliably informed that the eminent silk, Brett Walker SC, has been briefed, along with another senior counsel for the respondent Williamson in the appeal by the State.

161. The importance of the appeal is significant. If the State is successful in their argument that a claim in unlawful imprisonment can be dealt with as if it were a claim in damages for personal injury, thereby bringing it into the purview of the *Civil Liability Act* for costs and damages the consequences in the manner and dealings of these type of proceedings will be heavily impacted.

162. These matters are usually fought very hard by the State yet in many instances, the damages are small or moderate. The costs associated with agitating the matter involving damages occasioned by an unlawful imprisonment could well be prohibitive. This may especially be the case where the imprisonment is for a short period, say for example a wrongful arrest followed by a brief period in custody prior to being bailed and released. In these cases the costs can be significant and the damages nominal.

163. As Campbell JA said in *State of NSW v Williamson* [2011] NSWCA 183 at para [29]:

> *"I recognise that it is difficult to see why the mischief at which the **Civil Liability Act** was principally aimed required there to be a cap on costs for claims for assault. Claims for assault are not a type of litigation that fits a fairly common pattern (in the way many negligence claims that result in a judgment for less than $100,000 are), with the consequence that the actual costs of many assault claims would significantly exceed the statutory cap. The objective of lessening the cost of insurance premiums would not be achieved by capping costs in them, because insurance for intentional torts like assault is usually unprocurable. Limiting the costs in actions seeking damages for deliberately inflicted bodily harm, might deter plaintiffs from bringing such claims. There is no clear reason of policy why people who inflict such harm should receive favourable treatment concerning costs. However, it is the words of the statute that are the starting point in statutory construction. While those words are to be construed in their context (which includes the objective of the legislation in question), clear words in the statute will prevail. Admittedly, I am puzzled about why Parliament would want to restrict the costs recoverable in assault actions. Nevertheless, I incline to the view that the words of the statute are sufficiently clear and it is not possible to identify a purpose that can restrict the meaning of the words of the statute."*

[56] citing *Watson v Marshall & Cade* (1971) 124 CLR 621
[57] at [116]

Tips for setting up your client's action against police

164. The following are some ideas to keep in mind when you've formed the view that your client may have an action against police:

(i) For an unlawful imprisonment claim, custody management records are extremely useful – the record constitutes objective evidence of your client's time in custody and includes their state of health and wellbeing;

(ii) In matters where your client is arrested, detained and brought before a Court and is released by a Magistrate, make a contemporaneous note of the time of the order for release, and the actual release of the client. It is also helpful to note the time for the record, such that the time of the order for release is transcribed;

(iii) Obtain a transcript of the decision and proceedings in relation to your client's case for use in determining the nature and course of civil proceedings;

(iv) In circumstances where you have formed the view that not only might your client be acquitted, but also that they may have subsequent action against police, it is helpful if you seek findings from the Magistrate in relation to the propriety and lawfulness of certain actions by police, for example arrest – such findings often assist in possible settlement of subsequent civil proceedings, or an issue estoppel may be raised in reply to a defence.

(v) A contemporaneous statement from your client about the circumstances of their arrest and detention and the impact that it has had on them and their livelihood can be useful in assessing damages;

(vi) Obviously preserve the brief of evidence and any objective evidence such as CCTV footage, DVDs of ERSIPS;

(vii) Advise your client of the limitation period – generally three years.

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