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Presenter Paper

Assault and False Imprisonment by the State

The Queensland Court of Appeal's decision that the arrest of a Palm Island resident was unlawful explains the state of mind required by the arresting officer for an arrest to be lawful.

Discussion Includes

- How important is the right to liberty in Australian society?
- What are the elements of a lawful arrest?
- How does the law protect the right to liberty through the torts of assault, battery, and false imprisonment?
- Who bears the onus the proof, and how should one plead a case against the State?
- Can findings of a trial judge as to the reliability or credibility of a witness be overturned?
- How can the State commit false imprisonment in a person's home?
- Will damages for assault, battery, and false imprisonment be personal injury damages, and limited by the civil liability legislation?

***Abstract**: the Queensland Court of Appeal's decision that the arrest of a Palm Island resident was unlawful explains the state of mind required by the arresting officer for an arrest to be lawful, applies the principles which determine when trial judges' conclusions that evidence is unreliable may be overturned and assist with the calculation of damages for torts such as assault and false imprisonment. The decision is a timely insistence that restrictions on the powers of agents of the state are not technicalities but go to the heart of our fundamental rights.*

An Indigenous Person's Home is their Castle: it's official

Introduction

Palm Island is a tropical island off the cost of Townsville, North Queensland. On 19 November 2004, a 36 year old Aboriginal man, known as Cameron Doomadgee, died in police custody there [paragraph [6] of the reasons of the Court of Appeal]. A week later, the results of his autopsy were read to a large public gathering, indicating the possibility that Mr. Doomadgee had been punched and killed by police officers.[1] A riot ensued. The police station, police barracks and housing and the courthouse were burned and damaged.

Mr. David Bulsey had addressed the crowd prior to the riot. Along with a number of other residents of Palm Island, Mr. Bulsey was arrested the following morning. Mr. Bulsey was charged with unlawful assembly. The charge was later withdrawn and replaced with riotous assembly and destruction of a building. He was discharged after it was accepted that he had no case to answer in respect of the charge, during a lengthy committal hearing, in July 2005.

The legal waves arising from the devastating events of November 2004 on Pal Island continue to circle outwards, some 11 years later.

On 6 October 2015, in *Bulsey and Lenoy v State of* Queensland [2015] QCA 187, the Queensland Court of Appeal constituted by Fraser JA and Atkinson and McMeekin JJ. upheld an appeal against the dismissal of a civil action brought by Mr. Bulsey and his partner, Ms. Yvette Lenoy, for damages for the events associated with Mr. Bulsey's arrest.

The decision of the Court of Appeal re-asserts the importance of common law doctrines relevant to the law of arrest. In doing so, their Honours also set out important principles relevant to the relationship between claims for damages for personal injuries and claims for non-personal injuries where the torts committed are the absolute torts such as wrongful arrest, false imprisonment and assault.

The decision also provides a useful application of the principles in *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 as to when the findings of a trial judge rejecting the evidence of a witness may be set aside.

The Events as they Happened

Fraser JA [1] set out the traumatic events as they emerged uncontroversially from the evidence. Early in the morning of 27 November 2004, police officers, including six armed members of the Special Emergency Response Team ("the SERT") forcibly entered the house in which Mr. Bulsey, Ms. Lenoy and their children resided.

The SERT officers shouted commands at Ms. Lenoy and entered the bedroom in which Mr. Bulsey was still asleep. They took him from his bed; placed him on the floor; handcuffed him; and dragged him out into the street.

[1] In 2006, the Coroner concluded that Mr Doomadgee had died as a consequence of punches from the arresting officer. A few months later, the Director of Public Prosecutions announced that no charges would be laid. This decision was overturned by a review conducted by Sir Laurence Street of the Supreme Court of NSW. This led to a Supreme Court trial in Townsville in which the Senior Sergeant was found not guilty of manslaughter and assault.

Mr. Bulsey was taken to Townsville; held in custody and questioned; taken before a magistrate, two days later, on 29 November; charged with unlawful assembly; and remanded in custody. As mentioned, the charge was withdrawn and replaced by charges of riotous assembly and destruction of a building. During the committal proceedings, the Crown acknowledged that it did not have a case and Mr. Bulsey was discharged.

The Action

Mr. Bulsey [2] sued for damages for trespass to the person (assault, battery and false imprisonment) and malicious prosecution (although the latter claim was discontinued, late in the trial). Ms. Lenoy sued for damages for assault and false imprisonment.

The trial judge, after a lengthy delay between the end of the trial and delivery of judgment, dismissed the claims. (The trial was heard over seven days between March and July 2012. Further submissions were made at the request of the trial judge in late January 2013. Judgment was delivered on 20 February 2015 but reasons were not published until 2 March 2015. As the Court of Appeal stated [59], this delay of nearly three years from when the evidence of the last witness was given until the provision of reasons was both regrettable and extraordinary.)

The Case presented for Lawfulness of the Arrest

As the Court of Appeal pointed out [4], citing *Trobridge v Hardy* (1955) 94 CLR 147, 152, the actions taken by the police officers were unlawful and actionable unless authorized or excused by law. As Fullagar J. had said, "The mere interference with [a person's] liberty or person constituted prima facie a grave infringement of the most elementary and important of all common rights".

A fortiori, if it took place, or at least commenced, in the person's own home after police had barged forcibly through the front door.

One may infer that the presence of numerous SERT officers suggested that, at the time, senior police were continuing to rely on powers presumed to exist pursuant to an emergency declaration made under the *Public Safety Preservation Act 1986* ("the PSPA"), the previous day, at a time when it was believed that the riot was in full swing. The drawing of the inference is supported by the fact that the PSPA is referred to as a source of power in the State's pleadings.

By the commencement of the trial, however, it appears to have been realized that quiet had reigned on Palm Island since early the previous evening and that "riot act" powers were unlikely to support the dragging of a citizen from his bed.

The State of Queensland [5], therefore, relied solely on the orthodox power for arrest as reproduced in s. 198(2) *Police Powers and Responsibilities Act 2000* ("the PPRA") and derivative powers to use force in s. 376(1) PPRA. Section 198(2) of the PPRA provided it was "lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed … an indictable offence" (emphasis added).

The extraordinary aspect of this case was the basis on which the State of Queensland submitted, successfully, at first instance, and on appeal, that the PPRA requirements had been satisfied. The State argued that, and the trial judge upheld, that one police officer (who might be thousands of miles away) could form the requisite state of mind (reasonable suspicion that an offence had been committed) and that another police officer, who had no knowledge, suspicion or belief about any offence having been committed, could carry out the physical arrest.
As mentioned, the trial judge accepted that proposition [7].

In slightly more detail [6], Queensland's case was that s. 198(2) PPRA authorized the arrest of Mr. Bulsey because the detective who decided that he would be arrested, by placing his name on a list with others, the previous evening, Detective Miles, reasonably suspected that Mr. Bulsey had committed an indictable offence. However, Detective Miles did not leave Townsville and the SERT officers who were present on the occasion of the arrest gave no evidence of any suspicion, reasonable or otherwise, held by them.

No arrest by remote control: the common law (and the statute) requires the arresting officer to hold the reasonable suspicion

Justice Fraser [12] - [13] elaborated the common law of arrest by reference to *Alderson v Booth* [1969] 2 QB 216 at 220. The essential requirements of arrest involve communication of an intention to make an arrest and a sufficient act of arrest or submission by the arrestee. These requirements precluded arrest by a superior officer remote from the scene of the arrest by means of ordering an underling to carry out the physical aspect of the arrest.

It followed [14] that s. 198(2) PPRA did extend the common law power of arrest without warrant by permitting an arrest for the purposes of questioning a person about an offence. However, it did so in a way which, in words taken from *Williams v The Queen* (1986) 161 CLR 278, 300, "reflected the common law requirement that "the *arresting officer* must have satisfied himself at the time of the arrest that there are reasonable grounds for suspecting the guilt of the person arrested".

The evidence did not disclose that any SERT officer who asserted control over Mr. Bulsey (and Ms. Lenoy) held any relevant state of mind.

As Justice Fraser noted [15], the House of Lords confirmed in *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286 ("O'Hara") that, although an arresting officer may, in appropriate cases, form the necessary reasonable suspicion upon the basis of information supplied by another police officer, the suspicion must be held by the arresting officer. It is not sufficient that it is held by a superior officer who ordered the arrest.

The important rationale for such requirements is also spelled out in *O'Hara*, namely, that they ensure that the arresting officer is held accountable.

The statutory context of s. 198(2) prohibits delegation of the suspicion

The State of Queensland tried a number of bases to distinguish s. 198(2) PPRA from other statutory adoptions of common law principles concerning the power to arrest. The Court [10] pointed out that these arguments had not been pleaded or advanced at first instance.

Each was, with meticulous care, rejected by Justice Fraser in His Honour's reasons with the agreement and assent of his judicial colleagues.

For example, His Honour stated [16] that any differences between the office of a constable under the common law and the powers and functions of a Queensland police officer under the PPRA have no bearing on the conclusion that the arresting officer must hold the reasonable suspicion. To interpret s. 198(2) PPRA in the way suggested by Queensland would have the effect of elevating an order by a superior officer to have the same effect as an arrest warrant in circumstances where none of the statutory protections of personal liberty associated with the issue of an arrest warrant (a sworn application and a decision by a justice set out in ss.203 - 205 PPRA) were applicable.

An argument seeking to apply by analogy certain decisions from Western Australia was rejected [17] on the basis that the legislation on which those decisions were based contained express provision for delegation of the performance of certain powers to another police officer. Unlike the legislation in Western Australia, the Court found that there was no express power to delegate in the PPRA. As the Court said, "such an important and far reaching power of delegation could not be constructed by a haphazard and unlikely implication of [the kind argued by the State of Queensland]"

The State also sought to distinguish s. 198(2) PPRA by reliance on the contents of ss. 3.2 and 7.1 of a different Act, the *Police Service Administration Act 1990*. The Court held that these sections do not influence the meaning of s. 198(2) PPRA being only directed to clarify chains of command in certain operational situations. Justice Fraser [19] held that such provisions could be invoked in internal disciplinary proceedings against the officer but were not open to allow an otherwise unauthorized arrest to be rendered lawful.

The use of force was unlawful

Having rejected all of the State's attempts to turn lead into gold and water into wine, the Court of Appeal concluded [46] – [47] that the State of Queensland had failed to prove the lawfulness of the arrest and the associated use of force against Mr. Bulsey. Since the onus was, and was accepted, to be on the State, Mr. Bulsey had proved his claims in respect of the torts of assault, battery and false imprisonment.

(Concomitant to the finding that the arrest was unlawful, it followed that the derivative authority in s. 376(1) to use reasonable force was also not available.)

Ms. Bulsey, however, had further obstacles to overcome because the trial judge had (after praising her) rejected her evidence as unreliable.

Overturning the trial judge's finding as to unreliability

In relation to Ms Lenoy, the trial judge accepted [54] that her evidence was honest, and His Honour was "impressed by her dignity, her obvious concern for her family and the way she conducted herself". He accepted her evidence that she offered to open the front door but, that before she could do this, the police forced it open.

His Honour, the trial judge rejected the rest of her evidence and, in particular, focused [54] on the fact that in her statement of claim, she alleged the police officers pointed guns "at her" whereas in her oral evidence [50], Ms. Lenoy referred to guns being pointed "around the place". His Honour said [54] that Ms. Bulsey's recollection was not reliable and was, unconsciously, a product of reconstruction. His Honour relied on the fact that Ms. Lenoy was, at the time, seven months pregnant and that events happened quickly and that she was frightened, upset and crying.

Ms. Bulsey's appeal required consideration of the principles concerning when a judge's findings on credibility can be set aside on appeal. In *Fox v Percy* (2003) 214 CLR 118, the High Court placed emphasis on the advantages of a trial judge over an appellate court but allowed for intervention in circumstances where evidence was incontrovertible or where the decision was glaringly improbable or contrary to compelling inferences.

In the earlier case of *Devries v Australian National Railways Commission* (1993) 177 CLR 472, the High Court had referred to palpable misuse of a trial judge's advantage. Ms. Bulsey, understandably, argued that a delay of nearly three years is not a great use of a trial judge's advantage. The Court of Appeal, although it commented that the delay in delivering judgment was indeed extraordinary, eschewed deciding Ms. Bulsey's appeal on the basis of the effects of delay. Rather, Their Honours chose to analyse Ms. Lenoy's evidence and the trial judge's reasons for rejecting it against other evidence that was either accepted or admitted. On this consideration of the merits of His Honour's reasoning, Justice Fraser found [70] that the trial judge's reasons for impugning the reliability of Ms Lenoy's evidence were not persuasive.

His Honour summarized [69] that the rejected evidence was, nonetheless, accepted as having been given honestly; it was consistent with the evidence of Mr. Bulsey which was accepted by the trial judge; it was consistent with the evidence of the police officers including the SERT officers which the trial judge also accepted; it was consistent with admissions made by Queensland; it was not challenged in cross-examination; it was not contradicted by any evidence; and it was not objectively incredible or improbable.

The Court also held [70] that a reason given by the trial judge (her pregnancy) had no apparent bearing upon the reliability of Ms. Bulsey's evidence and that there had been no suggestion that her health or pregnancy had any bearing on the accuracy of her memory.

Accordingly, the Court held [71] that an examination of the record compelled acceptance of the appellants' argument that the trial judge's finding that Ms Lenoy's evidence was unreliable should be set aside and replaced by a finding that her evidence was reliable and should be accepted.

Justice Fraser concluded that the *Fox v Percy* phrase that the trial judge's finding on reliability was "contrary to compelling inferences" was applicable in this case.

Was Ms. Bulsey falsely imprisoned?

It remained an issue on the appeal whether Ms. Bulsey's evidence, even when accepted in full, made out torts of false imprisonment or assault.

Ms. Bulsey gave evidence [49] – [53] that, shortly before 6 am, she had heard a noise coming from outside. She was the only person in the house who was awake. She saw people in black wearing black helmets with a mask or goggles covering their eyes, carrying rifles. Ms. Bulsey said she was frightened. Some of the men went around the house and some of them came up onto the verandah.

Someone shouted to her to get away from the door. She said to wait a minute and that she would open the door. She was told again to get away from the door. As she put her hand on the door knob to open it, it flew open. She heard a big cracking noise and a lot of shouting.

About five armed men in black and two other police officers, one of whom she knew, entered the house. Ms. Bulsey was upset and screaming. When she asked the men what they were doing, she was told to shut up. She was asked: "Where's the suspect?" Two men ran into the kitchen waving their guns around.

When she looked outside, there were people at windows with guns. Ms. Bulsey was told repeatedly to shut up or she would be arrested. She was asked to point out where Mr. Bulsey was. She was told to sit on the couch. She was told to get on the floor and lie down. She protested that, because she was 7 months pregnant, she couldn't lie down. She was told again to sit on the couch and shut up. She was made to sit on the couch. One of them was beside her. She said that she couldn't move. She was told to stay in one place.

Ms. Bulsey was in shock; crying and shaking. Her children were crying and shaking.

She saw Mr. Bulsey being dragged out with a towel around him and his hands behind his back.

The State of Queensland argued [73] – [74] that this evidence, when accepted, did not make out any deprivation of liberty. The submissions supported the trial judge's finding that the evidence did not support a finding that Ms. Bulsey "submitted to the directions of the police".

The Court of Appeal came to a different conclusion [74]. The inference from the evidence was that Ms Lenoy's will was entirely overborne and she felt compelled to obey the police officers' commands and requirements. This was in fact precisely what was intended, as confirmed by the SERT Operative who gave evidence that standard procedure was adopted that morning to "shock and awe" and its adoption was likely to ensure that those in the house were in fact "shocked, frightened". Justice Fraser found [75] that Ms. Lenoy was made a "frightened and shocked prisoner in her own home" and as there was no lawful justification for that, Queensland was liable for the tort of false imprisonment.

Whilst the evidence in relation to the assault on Ms Lenoy was not so clear cut (it was described as "debatable" [76]), when considered with the SERT standard procedure to point a firearm at any occupant in the house entered, there was no basis for a positive finding that the guns were not pointed "at her" . However, whether or not this assault was established, in the Court's opinion [77], it would have had no bearing on the quantum of damages recoverable by Ms Lenoy. This is because the damages are for the conduct of the police which bore upon the nature, seriousness and impact upon Ms Lenoy of her false imprisonment.

Personal injury claims do not preclude general damages for other harms

Notwithstanding that the trial judge had dismissed the claims, his Honour went on to assess damages 78] – [79].

His Honour found that Mr. Bulsey had suffered from a chronic adjustment order as a consequence of his arrest and immediate imprisonment in Townsville. On the basis of the medical evidence on which this finding was made, His Honour found a 5% psychiatric impairment pursuant to the *Civil Liability Act 2003* ("the CLA").

His Honour assessed, in addition to the damages for the psychiatric impairment ($5,000 as required by the scale applying under the CLA), some $75,000 damages being $35,000 in respect to the alleged assault and battery involved in the physical aspects of his arrest and $45,000 for the alleged false imprisonment for the two day period up until Mr. Bulsey's remand by the Magistrates Court.

Ms. Lenoy was found [80] by the trial judge not to have suffered any personal injury attributable to the events of that day but her non-personal injury damages were assessed notionally at $30,000.

The State of Queensland raised on appeal [81] –[82] an argument rejected by the trial judge that the claim for personal injuries (as regulated by the scale pursuant to s. 62(1) CLA) precluded any award for any damages suffered on account of factors not involving personal injury.

The argument became of great importance in the light of the Court of Appeal's upholding the appeal on liability.

Justice Fraser found that the relevant phrases in the CLA were clearly defined to distinguish between those matters such as pain and suffering and loss of amenities of life, traditionally regarded as constituting personal injury [91] and other forms of loss such as harm to reputation, deprivation of liberty, or injured feelings such as outrage, humiliation or indignity and forms of mental suffering such as grief or anxiety not amounting to a recognized psychological condition [85].

His Honour also pointed out that the effects of the State's argument would be odd [101]. A serious assault and battery and false imprisonment that resulted in psychological harm would be severely regulated by the CLA and result in minimal damages while a less serious outrage which produced no recognized illness would, being unregulated, sound more generously in damages.

The reasonableness of the damages awarded

It is doubtful that the law of arrest should ever have been challenged in the way it was by the arguments of the State as upheld by the learned trial judge. The Court of Appeal's clarification of the law in this regard provides an important check on unaccountable exercise of power by the agents of the state.

The clarification of the power to award damages for torts such as false imprisonment and wrongful arrest, which may also result in psychological sequelae, is also an important contribution to the law as it involves relationships between government and the citizen.

However, the Court of Appeal's judgment on the appeal against the quantum award of the judge at first instance provides the greatest moral impact of the whole case.

Had Mr. Bulsey and Ms Lenoy been successful at first instance, the trial judge would have awarded damages of $80,000 and $30,000 respectively. The Court of Appeal found these amounts manifestly inadequate [108].

The Court of Appeal substituted $165,000 for Mr. Bulsey. This comprised damages (including aggravated damages) of $60,000 for the torts during the wrongful arrest; damages (including aggravated damages) of $100,000 for false imprisonment after the wrongful arrest (ending at the time when Mr. Bulsey was taken before a magistrate) and general damages of $5,000 for personal injury as assessed by the trial judge [110].

Ms. Lenoy was awarded $70,000 for assault and false imprisonment [113]. Interest was to be agreed on both amounts.

Justice Fraser said [108]:

> "The very great seriousness of the wrong is demonstrated by the evidence of the police witnesses and the evidence of [Mr. Bulsey] … as well as the consistent evidence of [Ms. Lenoy]: on the morning after serious damage had been done to public buildings by persons other than [Mr. Bulsey], and in circumstances where [Mr. Bulsey] was grieving for the death of a close friend who had died in police custody, he was awoken early in the morning by the invasion of a large group of armed police into and around his house, he was manhandled from his bed onto the floor, he was handcuffed, dragged out of his home where his children and his shocked and frightened partner, who was seven months pregnant, were present, he was taken from the place where he lived, he was transported to the mainland, he was imprisoned, he was questioned by police as a suspect in relation to extensively publicized and notorious offences in which he had played no part, and he was held in custody for more than two full days before being remanded by a magistrate."

Justice Atkinson stated [118] – [119]:

> "… the treatment of [Mr. Bulsey and Ms. Lenoy] breached their most fundamental right, the right of personal liberty … [They] were not treated as one might expect in a civilized society governed by the rule of law …"

Justice McMeekin stated [121] that " some substantial amount is warranted" because it was not a "failure to comply with some technicality in the law". His Honour observed that "insistence on compliance with the pre-conditions that the law imposes is not to insist on a technicality of little moment".

His Honour also observed [125] that the "quite startling feature of this case when compared to other decisions is not so much the period of the unlawful imprisonment but the manner in which the appellants were treated"

His Honour concluded [127]:

> "This was not a case of human fallibility. A deliberate decision was made to make a dawn raid on a citizen's home by armed, masked men and to treat those found within as one would dangerous criminals with no regard whatever for their dignity or rights. The imprisonment continued for days. The hurt was great."

Conclusion

It may be argued that it is irrelevant to the significance of this case that both Mr. Bulsey and Ms. Lenoy are Indigenous persons or that they are residents of Palm Island, a beautiful location with its own long and sorry history. Such an argument would, however, deny the long experience of Indigenous persons under colonialism.

The case is, indeed, significant for the fact that, despite a delay of over a decade, the principles protecting fundamental rights were applied to compensate two Indigenous people who suffered grievously at the hands of the State's police force.
It might also be argued that both the long delay and the fact that the State had to be forced by an appellate court to compensate these two people for the wrongs inflicted upon them by the State is, itself, an indictment of the way in which public administration takes place in a post-colonial society.

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25 January 2016