SUPREME COURT OF QUEENSLAND

CITATION:	*Walker v State of Queensland* [2020] QCA 137
PARTIES:	**RICHARD SCOTT WALKER** (applicant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 10449 of 2019 DC No 1153 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 29 August 2019 (Koppenol DCJ)
DELIVERED ON:	23 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	17 March 2020
JUDGES:	Sofronoff P and Morrison and Philippides JJA
ORDERS:	**Grant leave to appeal, allow the appeal, set aside orders 1 and 2 of the orders made on 29 August 2019 and, instead, order that:** **(a) There be judgment for the plaintiff on his claim for damages for false imprisonment;** **(b) There be judgment for the defendant on all other claims;** **(c) The proceeding be remitted to the District Court for an assessment of damages by a judge other than the trial judge;** **(d) The costs of the trial before Koppenol DCJ be reserved; and** **(e) The respondent pay the applicant's costs of the appeal.**
CATCHWORDS:	TORTS – INTERFERENCE WITH THE PERSON – FALSE IMPRISONMENT – where the applicant drove out of a service station and then made a U-turn – where he was then intercepted by two police officers in a police car – where the officers told him that he had been stopped because he had performed a burn-out – where the applicant denied that he had done this but accepted that he had lost traction for a moment – where the applicant told one of the officers that his

father was in the nearby hospital in a critical state and that he was anxious to get back there – where the applicant was detained so that one of the officers could serve documents upon him – where the applicant commenced proceedings in the District Court against the State of Queensland – where a jury found for the defendant on the claims of false imprisonment and malicious prosecution – where the applicant now appeals only against the dismissal of his claim for damages for false imprisonment – whether the applicant is entitled to judgment on his claim

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – TRIAL – MODE OF TRIAL – JURY – where the jury was asked to consider whether the defendant had established a defence that the law did not provide – where the actual issue raised on the pleadings was never considered by the jury, namely whether the applicant had been restrained "to impound a motor vehicle" and, if so, whether he had been restrained only "for the time reasonably necessary" – whether the verdict of the jury was one that no reasonable jury could reach

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION – DIRECTIONS – where the applicant submitted at trial that the jury should be directed that the power conferred by s 75(1)(b) of the *Police Powers and Responsibilities Act* 2000 (Qld) did not authorise the officer to detain him in order to serve documents upon him – where counsel submitted that the jury should be directed that there was no statutory requirement for documents to be served personally and his Honour agreed to give that direction – where the learned trial judge and both counsel proceeded upon the footing that personal service of the Impounding Notice would justify detaining the applicant – whether directions to the jury were "legally incorrect" – whether questions posed to the jury were "legally incorrect" – whether the result of the giving of incorrect directions and posing incorrect questions was a miscarriage of justice

Police Service Administration Act 1990 (Qld), s 4.9
Police Powers and Responsibilities Act 2000 (Qld), s 71, s 74, s 75, s 77, s 78, s 79A, s 79C, s 112

Coco v The Queen (1994) 179 CLR 427; [1994] HCA 15, cited
Hocking v Bell (1945) 71 CLR 430; [1945] HCA 16, cited

COUNSEL: A I O'Brien for the applicant
D M Favell for the respondent

SOLICITORS: Robinson Locke Litigation Lawyers for the applicant
Crown Law for the respondent

[1] **SOFRONOFF P:** On 10 September 2014, Mr Richard Walker, who is the applicant and who was the plaintiff below, went to visit his father at a Sunshine Coast hospital. Mr Walker met his father and saw that he was severely ill. He was told that a palliative care team was to meet with the applicant at 10 am that morning. It was just after 9.30 am and Mr Walker was in a distressed state. He decided to settle himself by going to a nearby service station to buy a packet of cigarettes. He drove to a 7-Eleven petrol station on Nicklin Way at Kawana, made his purchase, and then drove out of the service station onto Nicklin Way to a suitable place to make a U-turn where he turned to go back to the hospital. He was then intercepted by two police officers in a police car. They were Senior Constable Ahrens and Constable Brett. These officers told Mr Walker that he had been stopped because he had performed a burn-out. Mr Walker denied that he had done this but accepted that he had lost traction for a moment. He told Senior Constable Ahrens that his father was in the nearby hospital in a critical state and that he was anxious to get back there. Senior Constable Ahrens made a phone call and confirmed that that was true.

[2] Senior Constable Ahrens told Mr Walker that he would be issued with an infringement notice charging him with a "hooning" offence and that his car would be impounded for 90 days. Mr Walker said that he wanted to go because he was in a hurry to get back to the hospital to be with his father. Senior Constable Ahrens told him that he could not leave. Mr Walker offered to leave his car keys so that the car could be impounded but the offer was refused and he was required to remain. At one point, Senior Constable Ahrens said words to the effect of, "If you attempt to go, you will be arrested". Mr Walker's brother arrived and again Mr Walker asked if he could go back to the hospital with his brother and again he was required to remain.

[3] Between approximately 10.45 am and 11 am, Senior Constable Ahrens gave Mr Walker the promised traffic infringement notice. The notice stated that the offence was committed at 1000 hours. Constable Ahrens also gave Mr Walker an "Impounding Notice". This notice stated that the "impoundment period commences at 1000 am on the 10th day of September 2014".

[4] Senior Constable Ahrens gave Mr Walker two more documents. The first of these was a "Towing Authority for Impounding Motor Vehicles". This document was stated to have been issued by virtue of Chapter 4 s 77(4)(b) of the *Police Powers and Responsibilities Act* 2000 (Qld). It was addressed "TO THE TOW TRUCK DRIVER". There followed the tow truck driver's name and contact details together with particulars of the towed car. The "start time and date" of the impoundment was said to be "10-11am". The tow truck driver and Senior Constable Ahrens signed the paper. The final document was a "Field Property Receipt" which stated that the property described within it had been taken into possession at "1000 am" on that day. There followed a description of Mr Walker's car, the place where the car was seized and the time of issue of the receipt which was, again, "1000 am". Mr Walker was referred to as the "Person from whom or occupier of place from where property is taken (if known)".

[5] As a result, Mr Walker was detained until the tow truck arrived and removed the car.

[6] Mr Walker contested the charge and a Magistrate found him not guilty. Mr Walker then commenced proceedings in the District Court against the State of Queensland for damages for false imprisonment and for malicious prosecution. A jury found for the defendant on both claims and judgment was entered accordingly. Mr Walker now appeals only against the dismissal of his claim for damages for false imprisonment.

[7] By his Statement of Claim, Mr Walker alleged that police stopped his car at "approximately 9.59 am". He alleged that "approximately between 10.00 am and 10.15 am" he had the conversation with the police officers during which the allegation of hooning was made and Mr Walker gave his response and explained his circumstances. He alleged that during these 15 minutes the two officers decided to issue the infringement notice to Mr Walker and to impound his car. Mr Walker alleged that in the next five minutes, that is by 10.20 am, Senior Constable Ahrens informed him that the car would be impounded. Mr Walker alleged that, between 10.20 am and 10.45 am, he repeatedly asked to be allowed to leave but Senior Constable Ahrens told him that he could not go. Mr Walker alleged that between 11.00 am and noon he repeatedly asked to be allowed to leave and was told he had to remain. He alleged that at about noon his car had been secured on the tow truck, he had given the driver his car keys and, finally, Senior Constable Ahrens finally allowed him to go.

[8] Mr Walker alleged that from about 10 am until noon Senior Constable Ahrens unlawfully detained him and thereby falsely imprisoned him.

[9] The defendant did not admit that Mr Walker made the alleged requests between 10.20 am and 10.45 am but otherwise admitted these allegations. In particular, the defendant admitted that "the effect of the interaction" was that Mr Walker had to remain "until the tow truck operator had arrived, the Car had been put on the tow truck and the necessary documents had been completed". The defendant alleged that Mr Walker had been allowed to leave by no later than 11.19 am when the car had been placed onto the tow truck, its keys given to its driver, "the impounding documents" had been given to Mr Walker and the tow truck had left.

[10] Apart from the contest about the period of detention, the defendant's substantive defence was as follows:

> "19B. As to paragraph 43 of the SOC, the defendant denies the allegations contained therein and believes them to be untrue because it was reasonably necessary (under s 75(1)(b) and s 75(1)(f) of the PPRA) to insist on the plaintiff remaining at the Roadside because:
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> a. it was mandatory (by virtue of s 78(7) of the PPRA, s 16.7 of the Traffic Manual and s 4.9(3) of the PSA Act), for Officer Ahrens to 'as soon as reasonably practical' personally serve the Impounding Notice on the plaintiff;
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> b. the plaintiff ordinarily resided in Brisbane meaning that from a practical perspective the only time to personally serve the plaintiff with the Impounding Notice was whilst he was at the scene;

c. it was mandatory (by virtue of s 16.7 of the Traffic Manual and s.4.9(3) of the PSA Act) for Officer Ahrens to serve on both the plaintiff and the tow truck operator a copy of the Towing Authority;

d. in order to complete the Towing Authority, Officer Ahrens needed the tow truck operator to provide his details and sign the document. For that reason, a copy could not be given to the plaintiff prior to the tow truck operator arriving at the scene;

e. it was mandatory (by virtue of s 16.7 of the Traffic Manual and s 4.9(3) of the PSA Act) for Officer Ahrens to serve on the plaintiff a copy of the Field Property Receipt;

f. it was (and is) Officer Ahren's (*sic*) usual practice to provide to an alleged offender all of the impounding documents referred to above at the same time and whilst he or she is at the Roadside because from a practical perspective that is the best time to serve the documents as required.

19C. The defendant denies paragraph 44 of the SOC and believes it to be untrue because:

a. it was for the reasons pleaded in the paragraph 19B above, reasonably necessary for the plaintiff to remain at the Roadside until the tow truck operator had arrived, the Car had been put on the tow truck and all documents required to be completed and served on the plaintiff had been attended to;

b. in light of sub-paragraph (a) above, the plaintiff was not falsely imprisoned."

[11] Before considering the parties' submissions on this appeal, it is necessary to understand the operation of the applicable statutory provisions.

[12] Section 74(1) of the *Police Powers and Responsibilities Act* 2000 (Qld) provides that a police officer may impound a motor vehicle if the driver is charged with having committed "a type 1 vehicle related offence in relation to the motor vehicle". Relevantly, a "type 1 vehicle related offence" is an offence against the *Transport Operations (Road Use Management) Act* 1995 (Qld) involving "wilfully driving a motor vehicle in a way that makes unnecessary smoke or noise". Section 71 provides that a person is taken to be charged with an offence when an infringement notice is served on the person.

[13] Section 75 confers powers upon police officers. The powers include a power to stop the vehicle if it is driving (s 75(1)(a)) and a power to require the driver of the motor vehicle to remain at the place where it is stopped for the time reasonably necessary (s 75(1)(b)). Those two powers may be exercised before or after the motor vehicle is impounded (s 75(4)).

[14] Section 75(2A) empowers a police officer to arrange for the motor vehicle to be moved to a holding yard. Section 75(1)(c) empowers a police officer to direct the

person who has the key to the motor vehicle to give it to a police officer. Section 77(2) empowers a police officer who has arranged to move the motor vehicle to a holding yard to sign a towing authority. Under s 77(3) the driver of a tow truck towing the impounded motor vehicle under such a towing authority must tow it to a particular yard as directed or to the driver's usual holding yard.

[15] Every unauthorised detention by one person of another person is a trespass and constitutes the tort of unlawful imprisonment. A statute can authorise detention so that it is not tortious. Statutory authority to engage in conduct that would otherwise be tortious must be conferred in unmistakeable and unambiguous language.[1] Moreover, when, for the detection, prevention or prosecution of crime, the legislature confers upon a constable a power that curtails the rights of others, it is to be expected that the legislature has intended that curtailment to extend no further than the express authorisation.[2]

[16] The powers conferred upon police officers by s 75 are intrusive and in several respects they impinge upon a person's liberty. Without the authority of s 75, some of the acts referred to would be wrongful. The power to impound itself involves a serious intrusion with a person's freedom to possess personal property without interference from anybody else. It excuses trespass to property. The power to "require" the driver of a motor vehicle to "remain at the place where [the vehicle] is stopped" is an interference with a person's personal liberty. The introductory words of s 75 limit the exercise of these powers by prescribing the *only* purpose for which they may be employed: to impound a motor vehicle. No other purpose is authorised by the Act.

[17] Section 78 provides for notice to be given that a vehicle has been impounded. Section 78(2)(a) provides that "[a]s soon as reasonably practicable, a police officer must give a written notice in the approved form (***impounding notice***) of the impounding … [to] the driver of the motor vehicle". Section 78(7) provides that the notice "must be given personally to the driver". The notice must contain specified information about the period for which the vehicle has been impounded and how the owner might recover the vehicle. The notice is important because succeeding provisions of the Act confer rights and impose liabilities that depend for their exercise upon the owner knowing relevant information about the impoundment contained in the notice. The requirement for a notice of this kind is explicable by the fact that the sequestration by a police officer of private property constitutes an impingement on the right of possession of the owner of property. There should be, and the legislature has provided, formal and direct notification of that intrusion to the owner. Section 78(2) requires that the notice be given to the driver and, if the driver is not the owner or is not the only owner, the notice must also be given to the owner or any other owner of the vehicle. In the case of both the driver, who may be present at the impoundment, and the owner, who may not be present, the statutory form of notice must be given by "a police officer" and it must be given "as soon as is reasonably practicable".

[18] Nothing in the provision requires that the notice be given to anybody at the place or time at which impoundment takes place. Neither the driver nor the owner need to be present. The driver might have been injured and taken to hospital or, for any

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1 *Coco v The Queen* (1994) 179 CLR 427 at 435-436 per Mason CJ, Brennan, Gaudron and McHugh JJ.

2 *Coco*, *supra*, at 436-437, citing *Morris v Beardmore* [1981] AC 446 at 463.

reason, might be in no state to receive a notice. The owner may be a corporation. Nor need the giver of the notice be the particular police officer who has impounded the vehicle. All that is required is that the notice be given by "a police officer". The personal service demanded by s 78(7) emphasises the importance of this notification of an interference with the right to possession of property and the requirement that the person giving the notice be a police officer ensures a formality of the process.

[19] Consistently with the statutory requirement for written notice to ameliorate the intrusion into private rights, including the rights of an owner who might not be the one who has committed the relevant offence that justified impoundment, the notice must be given "as soon as reasonably practicable". The expression "reasonably practicable" obliges the officer who was responsible for the taking of the property to act as promptly as circumstances reasonably allow. However, both the notice and the promptness of service that the provision obliges is for the benefit of the driver and owner and not for the benefit of the police officer. Moreover, it is a notice that has to be given only after there has been an impoundment.

[20] The provisions raise for inquiry what is meant by "impoundment". The term is not defined in the Act and must take its meaning from how the word is used in the legislation. The effect of the provisions is that an impoundment of a vehicle changes the status of that vehicle because upon impoundment statutory powers are enlivened by which police officers can deal with the thing itself, the motor vehicle, and the owner's powers over his or her property are correspondingly curtailed. Thus, a police officer may arrange for an *impounded* vehicle to be towed: s 77(1). Under s 77(3), a duty is imposed upon a tow truck driver to tow the *impounded* vehicle to a place. Section 79A confers an immediate right upon "an eligible person" to seek the release of the vehicle from its impoundment. Section 79C confers the same right upon the owner. Section 112 imposes a liability upon the driver of the vehicle to pay the costs of removing and keeping the impounded vehicle.

[21] By force of the impoundment, therefore, the owner of the vehicle loses the right to possession of the vehicle for the period of the impoundment and may incur the liabilities imposed by Chapter 4, Part 6 of the Act. Correlatively, the police officer who effects the impoundment gains powers to deal with the property. It is that transfer of the power of dealing with the thing that is the impoundment.

[22] The statute does not designate the moment at which, or the act by which, impoundment takes place. However, the provisions of the Act demonstrate that impoundment is taken to have been effected when the right to deal with the vehicle passes from the driver, or the other person then in lawful possession, to the police officer who is effecting the impoundment. That will happen, in most cases, if the driver is present, when a police officer tells the driver that the motor vehicle has been impounded. It may happen earlier if a decision has been made to impound and if a police officer has done an act in exercise of powers arising upon impoundment. In this case, impoundment was effective when Senior Constable Ahrens told Mr Walker that his car was being impounded.

[23] One thing is clear. In order to effectuate an impoundment, it is not necessary to give the written notice required by s 78(2) because, by the time that notice must be

given, the impounding notified by such service has taken place. The notice constitutes notification of a past event.

[24] The defendant also pleaded reliance upon certain provisions of the Queensland Police Traffic Manual (Issue 23) dated 27 June 2014 and so it is necessary to consider them. Section 4.9 of the *Police Service Administration Act* 1990 (Qld) empowers the Commissioner of the Queensland Police Service to give, or to cause to be issued, such directions as she considers necessary or convenient for the efficient and proper functioning of the police service. Section 4.9(3) obliges police officers to comply in all respects with such a direction. The Manual is a direction under the Act. Section 16.7 of the Manual provides, relevantly:

> "Where a motor vehicle is to be impounded under s. 74A of the *Police Powers and Responsibilities Act*, the impounding officer should commence a proceeding by notice to appear or, where justified, arrest. Where applicable, an infringement notice is not to be served to commence a proceeding for a s. 74A impoundment. This will provide for the most efficient process should the motor vehicle be forfeited to the State.
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> The preferred action by investigating officers in relation to type 1 vehicle related offences is the impoundment of the motor vehicle in a holding yard unless exceptional circumstances exist, see s. 16.3: 'Alternatives to impounding motor vehicles (immobilising powers)' of this chapter.
>
> PROCEDURE
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> Where a motor vehicle is to be impounded under ss. 74(1): 'Impounding motor vehicles for first type 1 vehicle related offence' or 74A: 'Impounding motor vehicles for second or subsequent type 1 vehicle related offence' of the *Police Powers and Responsibilities Act* because of a type 1 vehicle related offence, the impounding officer is to:
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> (i) where applicable, issue an infringement notice, notice to appear or arrest the person for the offence;
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> (ii) complete a QP 157: 'Impounding Notice (Vehicle related offence)' and serve a copy of the form personally on the driver.
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> A copy is to be either personally served or posted via normal postal methods to all owners as soon as reasonably practical see s 16.9: 'Service of impounding notices and immobilising notices' of this chapter;
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> (iii) fully and accurately complete a QP 0907: 'Towing authority for impounded vehicles' and serve a copy of the QP 0907 on the:
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> (a) driver of the impounded vehicle; and
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> (b) tow truck operator;

(iv) direct the driver of a tow truck to tow the impounded vehicle to a particular holding yard (see s. 77: 'Police officer may authorise tow' of the Police Powers and Responsibilities Act);

(v) complete a QPB32A: 'Field Property Receipt' and issue to the driver of the impounded vehicle;

(vi) prior to termination of their shift."

[25] It can be seen that this section explains the terms of the *Police Powers and Responsibilities Act* that concern impoundment and create procedures for police officers to follow when exercising powers under the Act. The requirement to serve the Towing Authority upon the driver does not have a statutory basis in the Act but the Manual's directive must be obeyed and, as a consequence, that document must be served upon the driver. The service of that document will always happen after an impoundment has been effected. That is because s 77, which confers the power upon a police officer to sign such an authority, operates in respect of an "impounded motor vehicle". The power to require a person to remain may, by force of s 75(4), be exercised after the motor vehicle has been impounded, but it still remains that the power can only be used "to impound". Service of a document that the Manual requires to be served personally, but which the Act does not require to be served in order to effectuate an impoundment, cannot justify the exercise of the limited power of detention conferred by s 75(1)(b). Nor can any requirement in the Manual to serve the Impoundment Notice.

[26] The Manual cannot, and does not purport to, expand the statutory power of detention. The Manual does not, and cannot, furnish an excuse for any police officer to detain anyone if that excuse cannot be found in the Act. The sole power to require the driver of a motor vehicle to remain, in the context of this case, is to be found in s 75(1)(b) and that power is strictly limited.

[27] It is now possible to consider the issues raised by this appeal.

[28] The applicant contends:

(a) The verdict of the jury was one that no reasonable jury could reach;

(b) The directions to the jury were "legally incorrect";

(c) The questions posed to the jury were "legally incorrect"; and

(d) The result of the giving of incorrect directions and posing incorrect questions was a miscarriage of justice.

[29] Each of these contentions is correct.

[30] At the trial, the applicant, as the plaintiff, submitted to the learned trial judge that the jury should be directed that the power conferred by s 75(1)(b) of the Act did not authorise Senior Constable Ahrens to detain Mr Walker in order to serve documents upon him. Accordingly, the applicant's counsel invited the learned trial judge to put to the jury the following question:

> "Has the defendant proven that for the purpose of impounding Mr Walker's vehicle, Officer Ahrens required the plaintiff to remain at the roadside for the time reasonably necessary?"

[31] Counsel submitted that the jury should be directed that there was no statutory requirement for the towing authority or field property receipt to be served personally and his Honour agreed to give that direction. The learned trial judge and both counsel proceeded upon the footing that personal service of the impoundment notice would justify detaining Mr Walker at the scene to allow time for service upon him. That was incorrect.

[32] The direction sought by the respondent's counsel was asked for in these terms:

> "I agree, but at the end of the day it really hinges on 75(1)(b) and we'll say that that is quite a broad power to keep him there for the time that is reasonably necessary. We say it was reasonably necessary to give all these documents and do it all at the same time, because that's how these things are done. So it will be a question of how broad that is."

[33] That submission misconstrues the statute. The power to detain cannot be exercised to serve a police officer's convenience.

[34] The respondent's counsel argued to the jury upon the common assumption that Mr Walker's detention until he had been served with the impoundment notice was justified. As he put it:

> "… there's really no leeway in regard to the impoundment notice. You've got to hand it to them. You can't post it to them. You can't fax or email. And you've got to do it when all this is taking place. It's not tracking down later and attend to it then."

[35] This was incorrect. There is no statutory requirement for the impoundment notice to be served at the place of impoundment. The only requirement is that the notice must be served as soon as reasonably practicable.

[36] Then, after submitting that it was reasonable and practical for Senior Constable Ahrens to wish to give all of the documents associated with the impoundment to Mr Walker while he was present, he submitted:

> "He did it in the ordinary way, in a logical way, in a way that followed standard process, on his evidence. The legislation places a discretion in the hands of officers such as Officer Ahrens, and when they follow that procedure, then it's appropriate that it be left alone."

[37] The first sentence of that passage may be correct but it is irrelevant. The second sentence misconstrues the legislation.

[38] His Honour summed up to the jury and, in the course of that summing up, said:

> "So question 10:
>
> > *Has the defendant proven that Officer Ahrens required the plaintiff to remain at the roadside for the time reasonably necessary?*
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> If you thought, "Well, yes, he was held for an hour. We understand the circumstances. We think that was reasonably necessary". If you found that, no damages. It is only if you said, "No, the plaintiff –

> rather, the defendant has not proven that Ahrens required the officer – required the plaintiff to remain at the roadside for the time reasonably necessary", in other words, he was held for a time more than he should have been held, that you get to the question of damages."

[39] Later, after reciting the text of s 75(1)(b) to the jury, his Honour said:

> "So that is the law, and it uses the word may, and that gives the police officer a discretion. It does not say must:
>
> > *A police officer may require the driver to remain there for the time reasonably necessary.*"

[40] Later, his Honour commented that the defendant's case was that "the time taken was reasonably necessary because it was beneficial, to everyone's benefit, that the three documents be given to the plaintiff simultaneously …".

[41] Then, later his Honour said:

> "Under the section of the Police Powers and Responsibilities Act that you have, 75(1)(b), when a car is impounded, the officer may require the driver to remain for the time reasonably necessary. See, the section does not say – does not say that shall – makes no provision for the time other than giving the police officer the discretion as to what time is reasonably necessary. It does not condition that statement in any other way, rather than giving or reposing in the police [officer] the discretion to – to keep the person at the roadside for the time that is reasonably necessary. Now, that time that is reasonably necessary, of course, is one of the points in contest in this case.
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> Then the – Mr Favell made the submission that it was to everyone's benefit that the driver would get the three documents simultaneously, when the car was on the tow truck, because otherwise the tow truck may not arrive or the car may become – may be damaged while it is being placed on the truck, then there may be arguments afterwards about who was responsible for the damage or what was the state of the car before it was placed on the tow truck."

[42] Finally, in concluding his directions, his Honour said:

> "If you reach the stage, ladies and gentlemen, where you felt that the false imprisonment claim had not been made out, you would, obviously, award no damages and you would be – you would answer the question, question 10:
>
> > *Has the defendant proven that Officer Ahrens required the plaintiff to remain at the roadside for the time reasonably necessary?*
>
> You would say yes."

[43] Those directions contain serious errors of law.

[44] The passage quoted in paragraph [38] above misstates the question for the jury and misstates it in a fundamental respect. The question as put to the jury by the learned trial judge omits the vital words "for the purpose of impounding the plaintiff's vehicle". Consistently with that omission, the direction that followed incorrectly directed the jury to regard it as their task to determine whether, irrespective whether or not detention was required to effect impoundment, as a matter of mere practicality it was reasonable of Senior Constable Ahrens to require Mr Walker to remain.

[45] The error was compounded again in the directions quoted at paragraph [39] above.

[46] The error was made worse by giving the direction quoted in paragraph [41] above which contains two errors. By that direction the jury was given to understand that whether or not the period of restraint was reasonably necessary was a matter for the police officer's own judgment. In addition, the jury was directed that mere convenience could justify a restraint under s 75(1)(b).

[47] The power of restraint is a power whose exercise is strictly limited as an aid to impoundment and not as an aid to serve documents in a way that is most convenient for the police officer serving them. Consequently, that it may be convenient and practical, and that it may save time and trouble for police to require a driver to remain so that documents can be served, the power conferred by s 75(1)(b) cannot be used for that purpose. Second, whether or not the period of restraint was "reasonably necessary" to effect an impoundment is a matter of objective fact and does not vary according to the subjective judgment of the police officer concerned.

[48] Finally, the references to Question 10 quoted in paragraphs [38] and [42] once more misquotes it in a way that dissociates the restraint from the sole legal criterion that could justify it, its purpose as being in aid of impounding.

[49] None of these misdirections were the subject of any application for redirections and, as has been seen, the applicant's counsel himself proceeded upon the incorrect legal assumption that Mr Walker could have been held at the scene for the purpose of serving him with the impoundment notice.

[50] The failure to object to these erroneous directions does not matter in this case because their effect has been that the jury was never directed to consider the actual issues in the case and, as a result, there has been no trial of the issues between the parties. The jury was asked to consider whether the defendant had established a defence that the law did not provide. The actual issue raised on the pleadings was never considered by the jury, namely whether Mr Walker had been restrained "to impound a motor vehicle" and, if so, whether he had been restrained only "for the time reasonably necessary". The trial has not been a trial conducted according to law and, as a result, there has been a miscarriage of justice.

[51] As Dixon J said in *Hocking v Bell*,[3] where a jury's verdict is vitiated by a material misdirection, a new trial is to be granted *ex debito justitiae*.

[52] The applicant submitted that, in the event that leave is granted and the appeal is allowed, this Court should enter judgment in favour of the applicant. The

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3 (1945) 71 CLR 430 at 499; see also *Balenzuela v De Gail* (1959) 101 CLR 226 at 236 per Dixon CJ and 243-244 per Windeyer J.

respondent made no submission to the contrary and, for the reasons that follow, that course should be followed.

[53] In its Defence, the respondent admitted that Senior Constable Ahrens detained Mr Walker for a period from 10.00 am until 11.19 am and the applicant ultimately accepted that that was correct. The respondent admitted that after Senior Constable Ahrens told Mr Walker that his car was to be impounded, Mr Walker was detained solely for the purpose of serving the bundle of documents upon him and for no other purpose. That detention commenced at 10.20 am. The respondent's Defence to the claim for false imprisonment relied entirely upon the following pleaded allegations:

(a) The requirement to remain was justified because s 78(7) of the Act and s 16.7 of the Manual required Senior Constable Ahrens "to 'as soon as reasonably practical' personally serve the Impounding Notice on the plaintiff": paragraph 19B a.

(b) The plaintiff lived in Brisbane so "from a practical perspective the only time to personally serve the plaintiff" was at the scene: paragraph 19B b.

(c) It was "mandatory (by virtue of s 16.7 of the Traffic Manual …) for Officer Ahrens" to serve the Towing Authority upon Mr Walker and in order to complete that document. "Officer Ahrens needed the tow truck operator to provide his details and sign the document" and that could not be done before he arrived: paragraphs 19B c. and d.

(d) It was "mandatory (by virtue of s 16.7 of the Traffic Manual …) for Officer Ahrens to serve on the plaintiff a copy of the Field Property Receipt": paragraph 19B e.

(e) It was Officer Ahrens' "usual practice" to serve all these documents together at the scene because "from a practical perspective that is the best time to serve documents as required": paragraph 19B f.

[54] For the reasons that have been given, as a matter of law none of these pleas are capable of furnishing a defence to the claim of false imprisonment. It follows that the applicant is entitled to judgment on his claim.

[55] I would grant leave to appeal, allow the appeal, set aside orders 1 and 2 of the orders made on 29 August 2019 and, instead, order that:

(a) There be judgment for the plaintiff on his claim for damages for false imprisonment;

(b) There be judgment for the defendant on all other claims;

(c) The proceeding be remitted to the District Court for an assessment of damages by a judge other than the trial judge;

(d) The costs of the trial before Koppenol DCJ be reserved; and

(e) The respondent pay the applicant's costs of the appeal.

[56] **MORRISON JA:** I have read the reasons of Sofronoff P and agree with those reasons and the orders his Honour proposes.

[57] **PHILIPPIDES JA:** I agree with the reasons of Sofronoff P and the orders his Honour proposes.