SUPREME COURT OF QUEENSLAND

CITATION:	*Coffey v The State of Queensland & ors* [2012] QSC 186
PARTIES:	**JOHN LAWRENCE COFFEY** (Plaintiff) v **THE STATE OF QUEENSLAND** (First Defendant) **POLICE OFFICER RON MIENTJES REG NO. 5677** (Second Defendant) **POLICE OFFICER DAVID McKENZIE** (Third Defendant)
FILE NO/S:	493 of 2007
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	22 June 2012
DELIVERED AT:	Cairns
HEARING DATE:	13 – 16 February 2012 & 2 – 3 April 2012
JUDGE:	Henry J
ORDER:	**1. Judgment for the Plaintiff in respect of the claim of battery as against the First Defendant in the amount of $28,000 (excluding interest), being $8,000 general damages, $12,000 exemplary damages and $8,000 aggravated damages.** **2. I reserve determination of interest.** **3. The balance of the Claim is dismissed.** **4. I will hear the parties as to interest and costs on a date to be fixed.**
CATCHWORDS:	TORTS – ASSAULT AND BATTERY – where plaintiff was serving a period of imprisonment in a corrective services facility – where police had the power to collect a DNA sample without consent – where Corrective Services Officers at the direction of police took the plaintiff to ground – where plaintiff sustained a gash above the eye, was rendered unconscious and suffered some hyperventilation and anxiety when he came to – where a number of hairs were taken from the plaintiff's head whilst unconscious – whether the level of force used was authorised by the statute empowering police

to collect DNA samples without consent

TORTS – BREACH OF DUTY OF CARE – where plaintiff claims the second defendant and his agents had a duty of care to ensure the safety and welfare of the plaintiff, to inform him of his rights and to comply with the law – where it is alleged the duty was breached in a number of ways, including by allowing the plaintiff to be assaulted and battered – where the acts or omissions said to amount to this were not pleaded

TORTS – MALICIOUS PROSECUTION – where plaintiff was charged with failing to follow a requirement for his refusal to provide a DNA sample – where charge was dismissed following a summary trial – where the Queensland Police Service appealed the result – where that appeal was unsuccessful – whether the prosecution was without reasonable and probable cause – whether the third defendant acted maliciously

Civil Liability Act 2003 (Qld) (Reprint 2A), ss 4, 52.
Corrective Services Act 1998 (Qld), s 44.
Personal Injuries Proceedings Act 2002 (Qld) (Reprint 0A), ss 6, 50.
Police Powers and Responsibilities Act 2000 (Qld) ("PPRA") (Reprint 1B), Ch 8, Pt 4.
Police Service Administration Act 1990 (Qld), s 10.5.

Coleman v Greenland, Donaldson, Powers etc & The State of Queensland [2004] QSC 037.
Davis v Gell (1924) 35 CLR 275.
Giller v Procopets [2008] VSCA 236.
Howard v Jarvis (1958) 98 CLR 177.
Moses v State of New South Wales (No 3) [2010] NSWDC 243.
R v Deputy Governor of Parkhurst Prison; Ex parte Hague [1992] 1 AC 58.
Schmidt v Argent & Ors [2003] QCA 507.
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118.
Weir & Anor v Tomkinson [2001] WASCA 77.
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130.

COUNSEL: Plaintiff self-represented
K Philipson for the respondents

SOLICITORS: Plaintiff self-represented
Crown Law for the respondents

[1] On 5 March 2001 the plaintiff, Mr Coffey, then an inmate of Lotus Glen Correctional Centre,[1] was injured when a DNA sampling team forced him to the ground in order to take a hair sample from him ("the incident").

[2] Mr Coffey makes a claim for breach of duty of care, breach of statutory duty of care, assault, battery, false imprisonment and malicious prosecution.

[3] Mr Coffey did not pursue the claim for false imprisonment at trial, describing it as an "artefact from the past".[2]

[4] The claims for breach of duty of care, breach of statutory duty of care and assault and battery arise from the incident and its surrounding circumstances. The claim for malicious prosecution arises from the unsuccessful prosecution of Mr Coffey for allegedly contravening a requirement by police that he provide a DNA sample by using a mouth swab in the immediate prelude to the incident.

Legislative provisions regarding DNA procedures

[5] Before considering the facts of this ill-fated exercise in procuring a DNA sample it is useful to first consider the legislative background to the process. The statutory provisions then dealing with DNA sampling are contained in the *Police Powers and Responsibilities Act 2000* (Qld) ("PPRA") (reprint 1B), Chapter 8, Part 4, "DNA Procedures".

[6] Section 296 identifies one of the primary purposes of Part 4 as:

> "(a) to authorise particular police officers, doctors and nurses to take a hair sample or a mouth swab ("DNA sample") from another person for use for DNA analysis…"

[7] As to who may take DNA samples, s 297 relevantly provides:

> **"Who may take DNA samples**
> **297. (1)** It is lawful for each of the following persons ("DNA sampler") to take a DNA sample from a person for DNA analysis under this part –
>
> (a) police officer authorised under subsection (3) to take DNA samples;
>
> …
>
> **(3)** The commissioner may authorise a police officer to take DNA samples."

[8] Sections 298 and 299 deal with where and how DNA samples can be taken. They relevantly provide:

> **"Where DNA samples may be taken**
> **298.** A DNA sampler may take a DNA sample from a person at a location in any of the following places that provides reasonable privacy for the person-
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> …
>
> (c) a prison or a detention centre; …
>
> **How DNA samples may be taken**

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1 Mr Coffey opened that he was serving four years imprisonment suspended after one year for the offence of grievous bodily harm, T1-56 L5.

2 T6-36, L40-L42.

299. (1) A DNA sampler may take a DNA sample from a person only-

(a) by requiring the person to use a mouth swab; or

(b) by collecting form the person hair, including roots of the hair."

[9] Division 3 of Part 4 was headed "Division 3 – Taking DNA samples with consent". The sections within it, ss 300-304, all relate to procedures for taking a DNA sample from a person who is consenting to the process and are obviously calculated at diminishing the risk of subsequent dispute as to whether informed consent has been given.

[10] The provisions of Division 3 relevantly include:

"**Informed consent needed for taking DNA sample**

300. (1) A police officer may ask a person to consent to the taking of a DNA sample from the person for DNA analysis.

(2) The police officer must ensure the person is given a reasonable opportunity to give an informed consent to the taking of the DNA sample.

(3) Before a DNA sampler takes the sample, a police officer must-

(a) be reasonably satisfied the person is not under the influence of liquor or a drug; and

(b) ensure the person has given an informed consent to the taking of the sample.

Explanation to be given before asking for consent

303. (1) To enable a person to give an informed consent, a police officer must explain the following –

(a) why it is proposed to take a DNA sample from the person;

(b) how the DNA sample may be taken and where it may be taken from;

(c) that the person may refuse to consent to the taking of the DNA sample;

(d) that, if the person consents, a DNA sampler will take the DNA sample;

(e) that the person may withdraw consent at any time before the DNA sample is taken or while the sample is being taken;

…

(h) that, if the person refuses to consent, the person may be required under division 4 to provide a DNA sample. …"

[11] In contrast to Division 3, Division 4 of Part 4 is headed "Division 4 – Taking DNA samples without consent" (emphasis added). Its sections, ss 304-312, deal with the obtaining of DNA samples from persons at various stages of interaction with the criminal justice system.

[12] The provisions of Division 4 relevantly include:

"**Purpose of div 4**

305. This division states the circumstances in which a person may be required to provide a DNA sample for DNA analysis. …

Taking DNA sample from prisoner

> **311. (1)** This section applies to a prisoner who is serving a term of imprisonment for an indictable offence.
> **(2)** A DNA sampler may, in accordance with an arrangement between the commissioner and the general manager of the prison –
> (a) enter the prison where the person is held; and
> (b) detain the prisoner and take the prisoner to an appropriate place in the prison for the purpose of taking a DNA sample for DNA analysis from the prisoner; and
> (c) take the DNA sample from the prisoner.
> **(3)** A correctional officer under the *Corrective Services Act* 1988 may be present when the DNA sample is taken…"

[13] Mr Coffey submits the power to obtain a DNA sample without consent under Division 4 cannot be validly exercised unless the police first attempt to comply in full with the requirements of Division 3, in respect of obtaining a DNA sample with consent. He submits this follows from ss 300 and 303(1)(h) which are both in Division 3. His submission is incorrect.

[14] The clear meaning of s 300 is that a police officer "may" ask a person to consent to the taking of a DNA sample and must ensure the person so asked is given a reasonable opportunity to give an informed consent and must ensure, before the taking of a sample, that the person has given an informed consent. It is clear from the use of the word "may"[3] in s 300(1) that the section does not oblige police to first ask a person to consent to the taking of a DNA sample and then comply with the procedure for that process before using any powers they may have to obtain a sample without consent.

[15] As to s 303(1)(h) it requires the police to indicate that if a person refuses to consent that the power in Division 4 may be exercised. However, that requirement is merely one of the matters the police must explain for the purpose of enabling a person to give an informed consent. It does not make the process of attempting an informed consent in Division 3 a prerequisite to the exercise of the power to compulsorily obtain DNA samples conferred by Division 4. The reasons of Fitzsimon M in *McKenzie v Coffey,*[4] the case in which Mr Coffey was unsuccessfully prosecuted in connection with the incident, suggests his Honour may erroneously have held a contrary view (likely explaining Mr Coffey's persistence with his submission). That view cannot bind this Court. In any event it was not essential to the learned Magistrate's decision in acquitting Mr Coffey and was not a view favoured by White DCJ[5] in rejecting the prosecution's appeal against Mr Fitzsimon's decision.

[16] As to the amount of force which can be used, s 314 relevantly provides:

> "**Help with DNA sampling**
> **314. (1)** This section applies to a DNA sampler who is taking a DNA sample from a person.
>
> **(2)** If help is needed to take the DNA sample, the DNA sampler may ask other persons to give reasonably necessary help.

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3 See, s 32CA *Acts Interpretation Act 1954* (Qld).
4 Ex 7.
5 Ex 8.

> **(3)** It is lawful for a DNA sampler and a person helping the DNA sampler to use reasonably necessary force for taking a DNA sample."

[17] Further s 375 more generally provides:

> "**Power to use force – exercise of certain powers**
>
> **375.** It is lawful for a police officer exercising or attempting to exercise a power under this or any other Act in relation to a thing, and anyone helping the police officer, to use reasonably necessary force to exercise the power."

[18] These latter provisions appear to leave no doubt that such force as is reasonably necessary can be used in order to exercise a power existing under the Act to obtain a DNA sample by collecting hair.

The incident

[19] The Queensland Police Service established the Prison Sampling Team ("PST") for the purpose of collecting DNA samples from prisoners. The second defendant, Senior Sergeant Mientjes, was a member of that team.

[20] The incident with which this case is concerned was preceded by an initial encounter between Mr Coffey and the PST four days earlier. It set the tone for what was to follow.

[21] On 1 March 2001 members of the PST visited Lotus Glen to collect samples from prisoners, including Mr Coffey. Mr Coffey was instructed to go to C-Block. When he arrived he encountered a member of the PST, Senior Constable Iselin, who at that time was known by her maiden name, Aerin. On that day her role was to greet the prisoners before they were taken into the room in which samples were being taken.

[22] Mr Coffey's recollection of his encounter with Senior Constable Iselin was that he ran into a young girl who he described as "dancing around with a – with a book in her hand".[6] It seems uncontroversial that this was a copy of the *PPRA*. Mr Coffey gave evidence that Senior Constable Iselin dropped her identification badge and he picked it up for her.[7] He also asked to be given the book containing the *PPRA* legislation but his request was refused.

[23] Senior Constable Iselin's version differs from that given by Mr Coffey. Her evidence was that she identified herself to Mr Coffey and asked him whether he was aware that he was to provide a DNA sample. She explained to him that legislation had been passed the previous year that allowed a sample to be taken from prisoners serving terms of imprisonment for indictable offences.[8] Mr Coffey was such a prisoner.

[24] Senior Constable Iselin gave evidence that at that stage, Mr Coffey attempted to take her identification from her and in the process it dropped to the ground. She told Mr Coffey that he was not to touch her property.[9]

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6 T1-71, L19-L22. Mr Coffey later suggested he said "prancing" not "dancing": T2-63, L50-L51.
7 T1-71, L25-L27.
8 T4-57, L28-L31.
9 T4-57, L56-L57.

[25] Senior Constable Iselin then opened up her book containing the *PPRA* and showed Mr Coffey ss 311 and 314. Her evidence was that Mr Coffey unsuccessfully attempted to take the copy of the book of legislation from her.[10]

[26] It appears it was decided best to speak to Mr Coffey in the sampling room.[11] There was a video recording made of the conversation between the members of the PST and Mr Coffey once inside.[12]

[27] The video recording shows Mr Coffey was sitting on a chair. He was not handcuffed, although there were two Correctional Services Officers behind him. A police officer told Mr Coffey "I now require you to supply a DNA sample by using a mouth swab as directed by Sergeant Smith". Mr Coffey deflected that and further directions and questions by the officer with various procedural requests and complaints such as requesting the presence of the official visitor, requesting a copy of the video tape which was being made and requesting the names in writing of all persons present. From time to time he would assert he did not understand what was being said. It is obvious he did understand what was being said and was simply adopting delaying tactics because he did not trust the police, did not want to give them what they wanted and wanted to delay so as make his own enquiries in the hope of challenging their right to take a DNA sample from him.

[28] The officer repeated the requirement that Mr Coffey provide a DNA sample by using a mouth swab and explained the way in which he should rub it around his mouth. The officer subsequently asked, "Are you going to supply us with a DNA sample?" Mr Coffey replied, "No I want to discuss having an official visitor". He was warned if he did not use a mouth swab, a hair sample would be taken and force could be used to obtain it. Mr Coffey's consent was still not forthcoming and he was given 48 hours to consider complying with the "requirement" to give a DNA sample.

[29] As it transpired, the PST did not attempt to deal further with Mr Coffey for four days. In the meantime he sought legal advice from a solicitor, Ms Ybarlucea. He also spoke to an employee of Lotus Glen, Mr Bethel.

[30] On 5 March, Mr Coffey recalls he was speaking to a fellow inmate near a wing access area known as "the lock". A Corrective Services officer "banged" on a window and indicated for Mr Coffey to come in.[13]

[31] He was asked whether he would give a DNA sample to which he replied he had "just come to talk".[14] Mr Coffey gave evidence he was grabbed and his hands were placed behind his back.[15] He says there was some jostling and then once he stood still his head was smashed into a Perspex window before he was handcuffed.[16] The defendants deny this use of force.

[32] Two Corrective Services officers escorted Mr Coffey in handcuffs into the officers' mess. The obvious inference is that subsequent to Mr Coffey's uncooperative

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10 T4-58, L9-L10.
11 See, T4-58, L14.
12 Ex 1A.
13 T1-74, L33-L36.
14 T1-74, L38.
15 T1-74, L39.
16 T1-74, L40-L41; T1-76, L55-L56; T1-77, L5.

conduct four days earlier the PST anticipated force may have to be used on Mr Coffey to obtain a DNA sample and had communicated with prison officials in such a way as to cause them to decide to restrain him with handcuffs, presumably in case of resistance.

[33] Events in the officer's mess were video recorded.

[34] Senior Constable Mientjes introduced himself to Mr Coffey and asked him whether he understood that he was there to supply a DNA sample. Mr Coffey replied that he had "no comment". Soon after, Senior Constable Mientjes "required" Mr Coffey to supply a DNA sample using a mouth swab as directed by Constable Smith. He was asked whether he would comply with the "requirement" and his answer was again "no comment". When asked whether he had a reasonable excuse for not complying with the "requirement" Mr Coffey said that he did and was then asked what his reasonable excuse was. His response is difficult to make out. Various interpretations put forward at trial were "I don't believe it's a legal thing", "no comment" and "I don't know what you mean". I find he most likely said words to the effect of "I have no comment to make". In any event little turns on this, as it is clear the response did not represent any change in his position that he was not willing to supply a DNA sample.

[35] Senior Constable Mientjes explained to Mr Coffey in an emphatic tone that if he refused to use a mouth swab force may be used to obtain a hair sample but that merely provoked a response of "no comment" from Mr Coffey. Mr Coffey was then told that a hair sample would be taken from his body and that he was required to allow Sergeant Smith to collect the samples.

[36] Sergeant Smith (as he then was) then told Mr Coffey he was going to collect some hair samples from Mr Coffey's body. This resulted in Mr Coffey attempting an obviously diversionary response about various requests of his not being met, including a request that the general manager supply him with an authorisation of the PST's presence in the prison.

[37] As Mr Coffey was saying this, Sergeant Smith, who already had latex gloves on, appeared to put down the piece of paper he was reading from, as if preparing to do something. Two other Corrective Services Officers then moved in closer to Mr Coffey as he continued to speak. These were additional to the two Corrective Services Officers already standing either side of him holding his arms, which were still handcuffed behind his back.

[38] Sergeant Smith then said, apparently to the Corrective Services Officers gathered near Mr Coffey, "Right. I'll just get you to lie him down on the ground. Just down there." At that point the two nearby Corrective Services Officers moved closer, one bringing his hand up onto Mr Coffey's right shoulder from behind and the other grabbing Mr Coffey's left shoulder from the side. At the same time the officers who had been holding each of Mr Coffey's arms also appeared to apply firmer pressure. The force used appeared to be moving Mr Coffey slightly forwards and his upper body slightly downwards.

[39] This was already underway when Sergeant Smith said, "Lay on the ground thanks Mr Coffey". Such a request was not made of Mr Coffey earlier. Nor was any request made earlier for him to permit hair samples to be taken from him in a more dignified way, such as telling him to sit down on a chair or lay down on a bunk

while hair samples were taken from him. By the time of Sergeant Smith's belated request Mr Coffey was already being forcefully manhandled. With the downwards and forward pressure already being applied to him and with his hands handcuffed behind him it is difficult to see how Mr Coffey could at this point have complied safely with this request.

[40] The defendants submitted he was "resisting" at this point but it appears he was merely staggering a little as if trying to remain upright against the forwards and downwards pressure against the rear of his upper body which, if succumbed to, may have resulted in him falling unprotected, face forwards to the ground. That risk was a real one. There was no one positioned in front of him to prevent him falling unprotected forwards. Nor was the force being applied so as to gently lower or guide him to ground. There was no indication in the video recording of overt resistance beyond trying to avoid falling over as a result of the pressure being exerted. There was no flailing about or physically aggressive movement.

[41] There was thereafter increased pressure applied to his upper rear shoulders and one of the Corrective Services officers grabbed Mr Coffey's right leg and raised it up behind him so that it was higher than Mr Coffey's head. With one leg taken from underneath him, Mr Coffey began to go down to the floor at a generally 45 degree angle. Another Corrective Services officer took hold of Mr Coffey's left knee and Mr Coffey's upper body tipped downwards, driving his unprotected head face first into the hard floor. This caused a gash above his left eye and apparently rendered him unconscious.

[42] The whole of these events, from the end of Constable's Smith instruction to the officers to lie Mr Coffey down on the ground to the impact of Mr Coffey's face into the ground, only took about six seconds. The unnecessarily hurried mix and method of force adopted by the four men, executed without material forewarning to the handcuffed Mr Coffey, exhibited no sign of any planning or co-ordination directed at ensuring Mr Coffey was taken to ground safely. In the event there was such a plan then it was either ill conceived or botched in its execution.

[43] It appears from the video recording that the PST members and the Corrective Services officers did not immediately realise Mr Coffey was injured, although none exhibited any particular concern for his welfare in the immediate aftermath of his head obviously having struck the floor very hard. With three Corrective Services officers holding Mr Coffey on the ground, Sergeant Smith took four sets of hair samples from his head.

[44] Mr Coffey's head and shoulders were then lifted from the floor and a gash above his left eyebrow and the blood from it became visible. His eyes fluttered open briefly before he started moaning. The Corrective Services officers and PST members placed Mr Coffey in the recovery position while he continued to moan and move around. During this Senior Sergeant Mientjes placed his foot against Mr Coffey's leg.

The state of the pleadings

[45] It is difficult to discern the relevance to the claim of some of the matters pleaded in Mr Coffey's Fourth Amended Statement of Claim ("Statement of Claim") upon which this matter went to trial. Many of those matters relate to Mr Coffey's perception of police procedural requirements, which may be understandably

important as matters of principle to Mr Coffey, but which have limited relevance in grounding a cause of action. The structure and content of the Statement of Claim also makes it difficult to clearly articulate in these reasons the foundation for some aspects of the causes of action advanced.

[46] The elusiveness of the Statement of Claim may in part be a product of the history of this matter involving Mr Coffey's effort to secure a jury trial by attempting to plead his case without it being characterised as a personal injury damages claim. Despite his best efforts that attempt was unsuccessful,[17] which is unsurprising given his key and obviously most compelling cause for complaint in this case is the incident in which he was injured.

Assault and Battery

[47] The case advanced by Mr Coffey discloses four possible acts of battery, namely: violently pushing Mr Coffey's head face first into the Perspex window in the lock; taking him to ground in the officers' mess; the removal of hairs from his head; and Senior Sergeant Mientjes touching his legs in the aftermath.

The lock incident

[48] The defendants deny that Mr Coffey's head was smashed, as Mr Coffey described it in evidence,[18] into a Perspex window. Their only witness able to give evidence on this matter was Mr Boundy, who was one of the Corrective Services officers present in the lock. He says no such incident occurred. However, he was exposed as having inaccurately described key aspects of the incident on 5 March in a statement made shortly after it. Most significantly, he stated Mr Coffey was thrashing his head around purposely hitting his head on the floor.[19] That is such a patently incorrect assertion that I am unable to accept any uncorroborated aspect of his evidence as reliable.

[49] Nonetheless, it falls to Mr Coffey, the only other witness to this alleged incident, to prove the incident did occur. His evidence that it occurred is completely at odds with what is apparent on the video recording of his entry moments later into the mess. His demeanour is not that of a person whose head was just smashed or pushed into a Perspex window. There is no sign at all that he is dazed or in pain from recent force to the head.

[50] Even more at odds with his account is his failure to make any complaint about what is supposed to have just happened when he was escorted in. It is obvious that by nature Mr Coffey is particularly assertive about his rights and in insisting on compliance with what he perceives to be correct process. There is no sign in the video recording that he was left subdued or silent by the situation he was in. He was assertive from the outset, saying in the initial exchanges:

> "I want everyone to state their names…
> Can you please state if you are a police officer?...
> Can I please have your name and number in writing?...
> I'll get it off you now please…
> I want legal representation…"

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17 See, *Coffey v State of Queensland & Ors* [2010] QCA 291.
18 T1-74 L 42.
19 Ex 18, p 139.

[51] Against that background it is inconceivable he would not have proffered a complaint about the alleged assault in the lock had it occurred. It is true that the men who escorted him in remained next to him, each holding one of his arms. But he was not afraid to speak ill of them. Later in the conversation he specifically referred to them saying, "Can you get these guerrillas off my arms?" He went on to say he wanted their names, referring to them as, "these guys who are assaulting me", in an obvious reference to the fact they were holding his arms. If he were prepared to complain about that he obviously would also have complained about an earlier assault by them in the lock.

[52] I find Mr Coffey has not established on the balance of probabilities that he was assaulted in the lock as alleged by him.

Taking to ground in the mess

[53] Mr Coffey pleads, "using excessive force that cannot be justified, excused or authorised by law, defendant Mientjes and his agents threw the Plaintiff violently onto the floor".[20] While the word "threw" does not quite encapsulate the combination of force which forced Mr Coffey to ground in the incident there can be no doubt of the application of force of which he complains. It was video recorded and has already been described in these reasons.

[54] Mr Coffey contends the police should first have sought his consent to the taking of a DNA sample and that therefore no application of force had yet been authorised. I have already rejected his argument that the requirements of Division 3 of Chapter 8, Part 4 of the PPRA must be complied with before a sample can be taken without consent under Division 4. I note as a matter of caution that even if my interpretation is in part incorrect and a police officer is required to follow the procedure relating to informed consent if the officer embarks upon the course of seeking informed consent, that would be of no assistance to Mr Coffey here. That is because on the evidence the police officers were at the highest simply seeking Mr Coffey's cooperation, not his consent.

[55] The police were obviously proceeding to use their power in Division 4 pursuant to s 311 to take a DNA sample, namely hair, from Mr Coffey without his consent. They were authorised by s 314(2) to enlist the help of others to give reasonably necessary help. More importantly they and any person so helping were authorised by s 314(3) to use reasonably necessary force for taking the sample.

[56] However, those who applied force to Mr Coffey in the incident plainly did so without his consent, and the defendants did not purport to discharge their onus of proving any consent.[21] Prima facie, their application of force constituted a battery.[22] The only issue of substance is whether the application of force was reasonably necessary to take the sample and was thus authorised by law.

[57] Counsel for the respondents contended the level of force applied was reasonable in circumstances where Mr Coffey was belligerent and difficult to handle. It is evident

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[20] Statement of Claim, 15(iv).

[21] Lack of consent not being an element of the tort of battery to be proved by the plaintiff, per *Marion's Case* (1992) 175 CLR 218 at 310-311.

[22] At common law, setting to one side the issues of consent or authorisation, a threatened application of force is an assault and an actual application of force is a battery. Compare s 245 of the *Criminal Code 1899 (Qld)* ("the Code") which incorporates both concepts in defining assault.

that Mr Coffey was uncooperative in the oral exchanges that unfolded between police and Mr Coffey on 1 and more relevantly 5 March. However, Mr Coffey at no stage threatened any physical misbehaviour.

[58] I accept that Constable Iselin did feel physically threatened to some extent by Mr Coffey on 1 March, although I do not attribute this to any actual intent on Mr Coffey's part to frighten her. It seems likely she was unnerved that Mr Coffey reached towards her identification and her copy of the legislation, actions he probably regarded as innocuous. It is likely that event, when coupled with Mr Coffey's lack of co-operation in the ensuing conversation on 1 March, resulted in the police and or prison officials anticipating a need to be ready to deal with some potential physical resistance to the sampling process by Mr Coffey when the PST returned. Presumably that was why the Corrective Services Officers handcuffed him in advance.[23] However, these factors alone did not necessitate the level of force used.

[59] There was also some suggestion that Mr Coffey was *"passively resisting"* when he was being spoken to prior to being taken to the floor.[24] I reject this evidence on the basis the video recording of his movements once in the mess shows all he was doing was occasionally shifting his weight from side to side and on one occasion twisting his upper body. His actions were not violent or threatening. There was no passive resistance.

[60] I likewise reject the submission that Mr Coffey's attempts to stay upright once force was being applied amounted to resistance[25] justifying the force used. Support for this submission was said to be found in Mr Coffey's examination-in-chief[26] where he said:

> "There's – There's the first section that is – is basically me trying to stay upright, and the second section is – is where I'm actually picked up and – and my head forced into the floor."[27] (emphasis added)

[61] In truth this statement indicates no more than Mr Coffey was attempting to stay upright to avoid injury. His actions were entirely consistent with finding himself unexpectedly being pushed to the ground by four men and not wanting to succumb to the risk of a hard fall forwards. It is significant, as earlier discussed, that Mr Coffey was only asked to lie down after he was already being subjected to forward and downward pressure and had no freedom of control of his body. It is little wonder that he did not succumb to being pushed frontwards and downwards without having any capacity to protect the front of his body and his head from colliding forcefully into the ground and without any indication that those manhandling him were going to provide such protection.

[62] The defendants argued the injury to Mr Coffey was the product of a chain of events that did not involve excessive force. They conceded the manner in which he was taken to ground may have been clumsy, and possibly even negligent, but that it did not amount to a battery.[28]

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23 Which the defendants submit was authorised under s 44 of the *Corrective Services Act 1998* (Qld).
24 T5-5, L25-L28.
25 T6-7, L56 – T6-8, L3.
26 T6-10, L6-L11.
27 T2-15, L7-L10.
28 T6-1, L12-L14.

[63] I hesitate to assume it was even necessary to take Mr Coffey to ground for the purpose of taking the sample, at least not without attempting a more dignified position such as having him sit in a chair or lay on a bunk or even just stand still while the sample was taken. Such positions would also be less prone to result in a contaminated sample, in contrast to taking hairs from a head on a floor. However, some allowance must be made for the context that this event was occurring in a jail, in respect of a prisoner and I will accept it was reasonably necessary to position Mr Coffey laying on the floor to reduce the extent of any physical risk he could pose if he became unexpectedly violent during the sampling. To that end I also accept it would have been reasonably necessary for the two Corrective Services Officers who had been holding his arms to continue some precautionary light hold on him as he moved under the force of his own bodily movements from the upright position to laying down, again, in case he became unexpectedly violent. I accept, not without some hesitation, that this came within the bounds of what would have been reasonably necessary to safeguard the safety of the employees of the first defendant involved in this exercise. But that did not remove the need for some care to also be exercised in respect of Mr Coffey's safety and it did not entitle the use of any greater force.

[64] It was not reasonably necessary for four men, with no material warning to Mr Coffey, to jointly apply force to him, pushing him forwards and downwards, taking his legs out from under him and toppling his upper body downwards unprotected and thus causing his head to impact into the hard floor. It was an ineptly executed and unsafe method of taking Mr Coffey to ground and from the outset exceeded the force that was reasonably necessary. There might arguably be situations where, as an event unfolds, it becomes reasonably necessary for some mild application of force to be increased to a significant degree, for instance if the subject flails about or is physically aggressive, but as I have already found, this was not such a situation.

[65] The force used was not authorised at law.

[66] As to the intention of the officers who applied the force, it appears clear on the authorities that for the plaintiff to prove battery it is sufficient to prove an intention to do the act that results in the battery and not necessary to prove an intention to cause injury.[29] The application of force constituting the battery here was deliberate. I accept the officers involved did not intend to cause injury, however, it is irrelevant to liability that they did not intend that the end result of their combined application of force would be the forceful impact of Mr Coffey's head into the ground and consequent injury.

[67] A question as to liability might arise in some cases where the battery is constituted by a joint application of force, which exceeds force authorised by law, but where there is an issue as to whether the individual players deliberately applied force in conjunction with each other and whether in turn the joint application of excessive force was intentional. However, it is unnecessary to resolve such a question here for each of the officers applied force deliberately and in an on going way to Mr Coffey in obvious awareness that their force was being applied jointly.

[68] In all of the circumstances I find that the level of force was unreasonable and that Mr Coffey has proved his civil claim of battery.

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[29] See for example, *Wilson v Pringle* [1987] QB 237 at 249, *Cowell v Corrective Services Commission of NSW* (1988) 13 NSWLR 714 at 743.

[69] It was not disputed, and paragraph 5A(b) of the Fourth Further Amended Defence of the Defendants effectively admits, that in the event of such a finding the first defendant, the State, is vicariously liable for Mr Coffey's battery by the Corrective Services Officers. However, there is no evidence that Senior Constable Mientjes was either physically involved in the battery or that he directed the Corrective Services Officers' application of force to occur. Indeed, it was Sergeant Smith who asked the Corrective Services Officers to lay Mr Coffey on the ground. Senior Constable Mientjes is not liable for the battery.

Removal of hairs

[70] Mr Coffey claims that the removal of an excessive number of hairs from his head constituted an assault. It is uncontroversial that the removal of hairs was an application of force. Likewise, it is uncontroversial that Sergeant Smith was authorised to take some hairs.

[71] However, Mr Coffey submits that the number of hairs that could be removed was no more than 12, a number which comes from ex 11, a document dealing with DNA sampling titled "Department of Corrective Services Procedure – Safety and Security".[30] While it is not in dispute that DNA can be extracted from a single strand hair sample, it may reasonably be inferred departmental officials regarded 12 as an appropriate figure to cater for the possibility that some strands might be inadequate for the purpose. However this document appears to be a Department of Corrective Services procedural document. It does not on its face appear to be evidence of the content of the "arrangement between the commissioner and the general manager" referred to s 311(2) of the PPRA.

[72] There is no evidence proving the taking of more than 12 hairs is precluded. Also, the PPRA does not define how many strands constitute a sample. However, the power to take a sample from a prisoner conferred by s 311(2) must be read in light of the purpose of the exercise, namely the purpose of DNA analysis. If the number of hairs taken exceeds what is reasonably necessary by way of a sample for the purpose of DNA analysis then there arises the possibility that the sampler has used force that exceeds s 314(3)'s authorisation "to use reasonably necessary force for taking a DNA sample". Whether the application of force used exceeds what is necessary for taking a DNA sample is to be assessed as a matter of fact and given the difficulty in numerical precision when removing hairs there ought be considerable latitude afforded to the sampler in that assessment.

[73] Sergeant Smith gave evidence he took four lots of hairs, as is apparent from the video recording, on the basis that he considered some in the first two batches were not viable because they were brittle or without roots.[31] The video recording shows his method of removal was solely using his gloved hands rather than tweezers. Mr Coffey emphasises reference to tweezers in a DNA hair sample kit referred to in the Commissioner's Circular No. 2/2001.[32] When it was put to Sergeant Smith that it would have been logical to have tweezers in his kit his response included, "Well, if they're offering resistance you don't want to be putting tweezers anywhere near

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30 Appendix A, p 1 and Appendix B, p 2. Also see ex 12, p 3 which states approximately ten hairs are required.

31 T5-5, L39-L40.

32 Ex 12, p 16.

anyone. That's probably why we wouldn't have tweezers, I would imagine."[33] Mr Coffey was lying stationary on the ground at the time the hair sample was taken and his hair-laden scalp was a fixed target. It would have been appropriate to use tweezers.

[74] Sergeant Smith said he was looking for 10 to 20 viable hairs but could not recall how many he took.[34] The sample (presumably minus the strand(s) used for actual DNA analysis) was tendered in the trial, becoming ex 17. Looking at the hairs clustered as a group within the clipseal bag is inadequate to allow an assessment of them. I have removed and inspected them. The exhibit contains 239 strands of hair. Mr Coffey had long hair and it possible some of the hair samples broke, giving rise to a now greater number of individual pieces of hair than was actually taken, but the samples do not appear so fragile or brittle that this would have occurred in any significant proportion. However, even allowing for that aspect and the latitude earlier mentioned it is obvious that the number of hairs taken must have far exceeded what was necessary for taking a DNA sample.

[75] It is was likely not perceived by officer Smith that any harm would be done by erring upwards in the volume of hair taken and I accept he was not acting with an intention to cause personal injury. However, the taking of such a large volume of hairs from Mr Coffey's head for the purpose of taking a DNA sample involved application of force to his person that went beyond what was reasonably necessary to take a DNA sample. It thus exceeded the force authorised by law. Mr Coffey has proved this application of force constituted battery.

[76] Sergeant Smith is not a defendant in the proceeding however the first defendant is vicariously liable for this battery, as is effectively admitted by it in paragraph 5A(b) of the Fourth Further Amended Defence of the defendants.

Senior Sergeant Mientjes touching of Mr Coffey's leg

[77] The Statement of Claim alleges Senior Constable Mientjes and his agents kicked and stood on Mr Coffey as he lay bleeding on the floor.

[78] The video recording demonstrates this is an obvious exaggeration. There was no kicking of Mr Coffey on the floor. In the phase soon after he went to ground and the DNA sample was being taken, a phase when those present did not seem to appreciate he was unconscious and bleeding, the Corrective Services Officers were holding him in position on the floor. Their conduct does not meet the description of force complained of.

[79] At a later stage, Mr Coffey seemed to be coming to and began hyperventilating and moving his legs away from the recovery position he was put in by those tending to him. Senior Constable Mientjes approached, obviously intending to assist on the periphery, and stood with his foot propped at a generally 45 degree angle to Mr Coffey's leg. He re-positioned his foot in that way several times as Mr Coffee moved about, obviously trying to provide a barrier to Mr Coffey's leg moving outwards away from the recovery position those tending to him were trying to put him in. Such contact as there was did not involve an application of force to the extent that it could meet the pleaded description of a kick or of standing on Mr

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33 T 5-20, L15

34 T5-5, L50.

Coffey's leg. The conduct pleaded has not been proved in respect of this aspect of the claim.

Damages for battery

General damages for battery

[80] Mr Coffey has established the first defendant only is liable for battery, both in the incident when Mr Coffey was taken forcibly to ground and in the actual taking of the hair samples.

[81] His claim in respect of battery is expressed as a claim for exemplary and aggravated damages. It does not expressly refer to general damages although parts of the Statement of Claim do. No point was taken about this; properly so in light of the position taken by the defendants in the interlocutory appeal which preceded this trial and the Court of Appeal's decision therein.[35] The defendants advanced closing submissions on the basis Mr Coffey's claim was, inter alia, for general damages. I approach the matter on the basis general damages are claimed.

[82] General damages include damages for pain and suffering, loss of amenities of life, loss of expectation of life and disfigurement.[36] The only damages available for Mr Coffey are those for pain and suffering. There is no doubt the battery occasioned foreseeable injury and the gash above the eyebrow was the obvious physical manifestation of that.

[83] However Mr Coffey advanced little evidence to demonstrate exactly what pain and suffering he experienced. This is presumably because of his long-held stance, driven by his desire for a jury trial, that his matter was not a personal injury proceeding. When prompted to give some detail about his injury caused by the battery, Mr Coffey said when he awoke he was covered in blood and was "pretty sore"[37] although he then said that "it didn't seem all that important to me at the time as I – I really just wanted to get out of that room".[38]

[84] The video recording informs my view of the injuries suffered. It shows Mr Coffey did receive a gash above his eyebrow and was rendered unconscious. In the aftermath it appears he may have suffered some anxiety resulting in hyperventilation.

[85] Twenty-four hours later Mr Coffey was released from medical care and it must be inferred, as Mr Coffey lead no evidence to the contrary, that his pain and suffering had ended by that time.

[86] The defendants, who acknowledge the general damages in this matter fall to be determined unconstrained by legislative limit, submitted that in the circumstances the most that could be awarded would be $5,000.[39]

[87] I will award damages only for the pain and suffering I considered proved, namely, a gash to the head and a resulting sore head and brief period of unconsciousness.

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35 [2010] QCA 291.
36 *Civil Liability Act 2003* (Qld) s 51.
37 T2-16, L54.
38 T2-16, L54-L56. This is a reference to the medical observation cell in which he was being held.
39 T2-26, L13-L14.

[88] There is little clear pattern in the authorities in respect of quantum in respect of injuries of this minor nature, although I have regard to an array of them.[40]

[89] In all of the circumstances $7,500 should be awarded for general damages occasioned by this battery.

[90] As to the pain and suffering occasioned by the battery relating to the taking of the hair samples Mr Coffey was unconscious when the hairs were removed. There is no positive evidence of any physical injury or pain. Such very limited pain and suffering as may in these circumstances be inferred can only support, as the Defendants submitted, "an extremely modest award of about $500".[41]

[91] In all of the circumstances $500 should be awarded for general damages occasioned by this battery.

[92] Thus the total general damages for battery should in total be $8,000.

Exemplary and aggravated damages for battery

[93] Mr Coffey also claims exemplary damages and aggravated damages.[42] Mr Coffey, in line with his longstanding view that this was an appropriate matter to be heard by a jury, intended quantum to be determined by a jury.[43]

[94] The defendants submitted awards for exemplary and aggravated damages were not available.

[95] The initial Claim in this matter was filed on 31 October 2007. As at that time the *Civil Liability Act 2003* (Qld) Reprint 2A provided:

> **"52 Exemplary, punitive or aggravated damages can not be awarded**
> (1) A court can not award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages.
> (2) Subsection (1) does not apply to a claim for personal injury damages if the act that caused the personal injury was—
> (a) an unlawful intentional act done with intent to cause personal injury; or
> (b) an unlawful sexual assault or other unlawful sexual misconduct."

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40 For instance see *Coleman v Greenland, Donaldson, Powers etc & The State of Queensland* [2004] QSC 037 ($4,500 in respect of some bruising to his wrists caused by handcuffs); *Whitbread v Rail Corporation New South Wales* [2011] NSWCA 130 ($5,000 for one plaintiff who was lunged at, contacted at the throat and had his shirt torn and $7,000 for the other plaintiff who had a bleeding lip caused by two or three blows to the face); *Moses v State of New South Wales (No 3)* [2010] NSWDC 243 ($10,000 for slight injuries caused when plaintiff thrown to ground and held there by at least three police officers); and *Weir & Anor v Tomkinson* [2001] WASCA 77 ($5,000 for "physical hurt" and anger after the plaintiff's motor cycle was pulled over causing him to hit the concrete floor). Also see for example, *Giller v Procopets* [2008] VSCA 236 where on appeal the awards made in respect of five assaults were all increased. For one assault, where there was bruising and lacerations to the lower right arm and some restricted painful movement of the right shoulder lasting for one month, the award of $1,000 was increased to $5,000. For another, a deep cut inside the mouth and a severely bruised and swollen lip lasting for over one week was awarded $4,000 on appeal (increased from $500).

41 T 6-26, L26.

42 Statement of Claim, [19].

43 Ibid, [19], (ix).

[96] If this section applied in the present matter the claims for aggravated and exemplary damages would be precluded in that, as I have already observed, neither battery was done with intent to cause personal injury. However, s 52 does not appear to apply because the same Act also provided:

> "**4 Application of Act**
>
> …
>
> (4) The following provisions apply in relation to a breach of duty happening on or after the day this Act receives assent—
>
> • chapter 2, part 4
>
> • sections 52, 54, 56, 57, 58, 59, 60, 72."

[97] That is, s 52 does not apply because the breach of duty happened in 2001, well before the Act was passed and assented to (on 9 April 2003).

[98] However in support of their argument that exemplary and aggravated damages cannot be awarded the defendants relied upon the *Personal Injuries Proceedings Act 2002* (Qld) Reprint 0A, which they submitted applied retrospectively.[44] That Act, which did not exist as at the date of the battery on 5 March 2001, provided for a similar preclusion of exemplary and aggravated damages to that quoted above:

> **"50 Awards of exemplary, punitive or aggravated damages**
>
> (1) A court can not award exemplary, punitive or aggravated damages in relation to a claim.
>
> (2) Subsection (1) does not apply in relation to a claim if the act causing the personal injury on which the claim is based is—
>
> (a) an intentional act done with intent to cause personal injury; or
>
> (b) a sexual assault or other sexual misconduct.
>
> (3) In this section—
>
> "act" includes omission."

[99] However, the defendants' assertion of that section's retrospective application is incorrect in the light of ss 2 and 6 of that Act:

> **"2 Commencement**
>
> This Act is taken to have commenced on 18 June 2002.
>
> **6 Application of Act**
>
> (1) Section 58 applies in relation to all personal injury arising out of an incident whether happening before or on or after 18 June 2002.
>
> (2) The other provisions of this Act apply in relation to all personal injury arising out of an incident happening on or after 18 June 2002.
>
> …"

[100] It follows the *Personal Injuries Proceedings Act 2002* (Qld) does not preclude the awarding of exemplary or aggravated damages in this case either.

[101] The defendants plead reliance upon the *Police Service Administration Act 1990* (Qld) to avoid vicarious liability for punitive damages on the part of the first defendant "for a tort committed by its servants, agents and/or employees in the execution of their duty". Section 10.5 of that Act provides:

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44 T6-28, L33.

> **"Liability for tort generally**
> 10.5(1) The Crown is liable for a tort committed by any officer, staff member, recruit or volunteer, acting, or purporting to act, in the execution of duty as an officer, a staff member, recruit or volunteer, in like manner as an employer is liable for tort committed by the employer's servant in the course of employment.
> (1A) The Crown is to be treated for all purposes as a joint tortfeasor with the officer, staff member, recruit or volunteer who committed the tort.
> (2) In no case does the Crown's liability for a tort committed by any officer, staff member, recruit or volunteer extend to a liability to pay damages in the nature of punitive damages.
> …
> (6) In this section—
> "volunteer" means a person appointed by the commissioner to perform duties for the service on an unpaid voluntary basis on conditions decided by the commissioner." (emphasis added)

[102] Exemplary damages are punitive damages and accordingly s 10.5 excludes the availability of an exemplary damages award against the State[45] in respect of the battery by removal of hair on the part of Sergeant Smith, he being a police officer. What though of the actions of the Corrective Services Officers giving rise to the battery in the incident when Mr Coffey was taken to ground? They were not volunteers or recruits within the meaning of s 10.5 so the State derives no assistance from that provision in respect of that battery. The defendant did not cite any other law that would preclude the awarding of exemplary and aggravated damages in respect of that battery.

[103] Exemplary damages are intended to punish a defendant for contumelious disregard of a plaintiff's rights and also act as a deterrent.[46] They should mark this court's strong disapproval of the actions of the Corrective Services Officers constituting the battery associated with taking Mr Coffey to ground for which the State is liable. I bear firmly in mind that there was no intention to do injury to Mr Coffey. However, the finding of battery reflects a finding that the officers deliberately applied force to Mr Coffey. The hard impact of his head into the ground and the injury and unconsciousness caused by that was an obviously foreseeable risk of the officers handling Mr Coffey as they did. That in a room containing multiple police and Corrective Services Officers a handcuffed prisoner who did not behave violently could not be guided safely to lay on the floor speaks for itself. The exercise was carried out in a hurried, ill-prepared and excessively forceful way without any proper regard for the safety of Mr Coffey. It warrants strong disapproval.

[104] I award $12,000 exemplary damages for that battery.

[105] The purpose of aggravated damages is to compensate a successful plaintiff for injury to his dignity or feelings caused by the defendant's reprehensible conduct.[47]

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45 See *Schmidt v Argent and Ors* [2003] QCA 507

46 *Schmidt v Argent & Ors* [2003] QCA 507 citing *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471.

47 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

[106] Dealing firstly with an appropriate award for aggravated damages in respect of the battery in taking Mr Coffey to ground, I bear in mind Mr Coffey had been uncooperative in his dealings with the PST. His expectations of dignity cannot be regarded as being as high as they would be were he not a prisoner but on the other hand that status placed him in a vulnerable, largely powerless position. His disinclination to co-operate was plainly no justification for the completely overwhelming use of power inflicted upon him and does not significantly temper the need for an award sufficient to restore his dignity. There has been no evidence to suggest any apology was communicated to Mr Coffey for his mistreatment and no admission made in this proceeding such as to diminish or appease the affront caused to him.

[107] I award $7,500 aggravated damages for that battery.

[108] In respect of the battery involving the hair removal, an event for which Mr Coffey was unconscious, it ought attract only a modest award for aggravated damages.

[109] I award $500 aggravated damages for that battery.

[110] Thus the total aggravated damages awarded will be $8000.

Interest

[111] No material argument was advanced in respect of interest on the various potential awards relating to battery. The topic is not without room for argument. Exemplary damages are not compensatory in nature and interest is not ordinarily payable in respect of them. Before I finally determine what interest ought be awarded the parties should have an opportunity to be heard.

Breach of Duty of Care/ Breach of Statutory Duty of Care

[112] Mr Coffey's claim includes a claim for breach of duty of care and breach of statutory duty of care.

[113] The problems with Mr Coffey's pleading are most acute here. His statement of claim alleges the State, Senior Constable Mientjes and his agents "had a common law and statutory duty of care to ensure the safety and welfare of the Plaintiff and the duty to inform the Plaintiff of his rights and the duty to comply with the law".[48]

[114] It is not apparent how the so-called "duty to inform the Plaintiff of his rights and the duty to comply with the law" forms part of an actionable common law or statutory duty of care relied upon in this case. Nor is the common law or statutory duty of care relied upon readily apparent from the pleadings. The case has not been pleaded as a negligence case. For instance, there has been no express pleading of in what respect the defendants ought reasonably to have foreseen that some conduct of theirs may be likely to cause loss or damage to the plaintiff. As to the statutory duty of care the pleadings refer to a mixture of statutory provisions without any clear indication which of them is said to confer a cause of action and how it does so.

[115] The sections of the PPRA pleaded in apparent support of this aspect of the claim are as follows:[49]

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48 Statement of Claim, [7].

49 Ibid.

7 Act does not affect constable's common law powers etc

300 Informed consent needed for taking of DNA sample

301 Special requirements for obtaining consent from persons with impaired capacity

303 Explanation to be given before asking for consent

304 Explanation and consent to be recorded

305 Purpose of Div 4

391 Safeguards for directions or requirements

394 Supplying police officer's details

[116] It is not apparent how any of these provisions are here alleged to confer a civil cause of action. Section 7 merely preserves the common law powers of police. Sections 300 to 305 relate to the DNA sampling process and as already explained I reject Mr Coffey's interpretation those provisions were breached because he was not given the reasonable opportunity to consent to the taking of a DNA sample under Division 3 before the police exercised power under Division 4. Section 391 requires police in giving a direction to or making a requirement of a person under the Act to give that person a reasonable opportunity to comply. Taking a DNA sample is not a long process. It requires no substantial time for the person being sampled to ready himself or herself for the process. Mr Coffey had ample opportunity on 1 and the 5 March to co-operate in providing a DNA sample. However, in any event the exercise of the police power to take a DNA sample pursuant to s 311(2)(c) did not first involve the making of a requirement or giving of a direction under the Act.[50] Finally s 394 relates to police in certain circumstances producing their identity card for inspection. It is unnecessary to decide whether this section had to be complied with or even was complied with by police in this case. Mr Coffey well understood they were police and in the context of this case the means of their identification has no identified connection with an actionable breach of duty of care.

[117] The sections of the *Corrective Services Act 1998 (Qld)*[51] pleaded in apparent support of this aspect of the claim are as follows:

13 Functions of chief executive concerning prisons and community corrections centres

14 General manager responsible for prison

17 General manager's rules

36 Prisoner to be informed of entitlements and duties

[118] It is not apparent how any of these provisions are said to confer a civil cause of action. Section 14 affirms the general manager's responsibility for the safe welfare and custody of prisoners. However, the fact Mr Coffey was in a class of persons the

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50 This explains why Mr Coffey was later acquitted of contravening a requirement under the PPRA.

51 Reprint 4E.

general manager had a responsibility to protect does not remove the need for parliament to have conferred some cause of action connected with that responsibility if a breach of statutory care is relied upon.[52] Prison authorities are also bound by a well-established common law duty to exercise reasonable care for the safety of prisoners during their detention in custody,[53] however the case was not pleaded or conducted on the basis those in charge of the prison were in breach of a duty owed to Mr Coffey. The pleading of the other sections may be connected with Mr Coffey's complaint that there was inadequate promulgation of information to inmates about the DNA sampling process, however it is unnecessary to make findings about that aspect because, again, it is a procedural complaint with no identified connection with an actionable breach of duty of care.

[119] The sections of the *Criminal Code 1899* (Qld) pleaded in apparent support of this aspect of the claim are as follows:

> 7 Principal offenders
>
> 8 Offences committed in prosecution of common purpose
>
> 9 Mode of execution immaterial
>
> 10 Accessories after the fact
>
> 22(1) Ignorance of the law – bona fide claim of right
>
> 245 Definition of assault
>
> 283 Excessive force
>
> 390 Things capable of being stolen
>
> 391 Definition of stealing
>
> 409 Definition of robbery
>
> 411 Punishment of robbery
>
> 414 Demanding property with menaces with intent to steal

[120] It is sufficient to indicate that no discernible argument has been advanced as to how these provisions confer a civil cause of action for breach of a statutory duty of care.

[121] As to the material facts relied upon in support of the ill-defined breach of duty relied upon the statement of claim pleads under the heading "Particulars of Breach of Duty":

> "…the first and second Defendants and his "agents" did not perform their duty including that they
> (i) failed to inform the Plaintiff of his rights;
> (ii) failed to provide the Plaintiff with a support person;
> (iii) misinformed the Plaintiff;

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52 *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58.

53 *Howard v Jarvis* (1958) 98 CLR 177.

(iv) allowed the Plaintiff to be subjected to an unlawful process;
(v) allowed the Plaintiff to be assaulted;
(vi) allowed the Plaintiff to be battered;
(vii) failed to properly identify themselves."[54]

[122] The acts or omissions that are said to amount to "allowing" the plaintiff to be assaulted and battered are not pleaded. It might be the allegation implies reliance on some knowledge aforethought on the part of the first and second defendants that assault or battery was going to occur. If so, there is no evidence of that. As to the other allegations, Mr Coffey has failed to show how these matters, even if they did occur, represent a breach of any common law or statutory duty of care. A substantial amount of Mr Coffey's cross-examination of witnesses was concerned with these issues. They are entirely academic procedural complaints unconnected with any breach of a duty of care towards Mr Coffey.

[123] The claim for breach of statutory and common law duty has not been proved and should be dismissed.

Malicious Prosecution

[124] Mr Coffey alleges that the third defendant, Mr McKenzie, maliciously prosecuted him. This relates to the fact that Mr McKenzie, who at that time was a Detective Sergeant attached to the Corrective Services Investigation Unit, investigated and charged Mr Coffey for failing to comply with a requirement, namely the requirement to give a DNA sample by using a mouth swab given on 5 March. When the Mareeba Magistrates Court subsequently dismissed that charge the decision was appealed unsuccessfully in the District Court.

[125] In order to successfully raise malicious prosecution Mr Coffey must show the following:

"(1) The defendant must be the prosecutor.
(2) The prosecution must have been groundless.
(3) It must have produced damage.
(4) It must have terminated favourably to the plaintiff, so far as such termination was possible.
(5) It must have been without reasonable and probable cause.
(6) It must have been malicious."[55]

Facts

[126] Mr McKenzie attended Lotus Glen on 3 April 2001 in the course of a number of investigations, one of which concerned Mr Coffey. At 10:05am, Mr McKenzie saw Mr Coffey. Mr Coffey's recollection is that when he walked into the room Mr McKenzie said to him "*you were handcuffed prior to entering the room... and that meant that you're trouble before you got there.*"[56] Mr McKenzie denies this.[57] He says he simply asked Mr Coffey whether he wished to do a formal record of interview. Mr Coffey declined so Mr McKenzie arranged to see him again later in the day.

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54 Statement of Claim, [8].
55 *Davis v Gell* (1924) 35 CLR 275 at 282.
56 T2-22, L12-L16.
57 T3-89, L9.

[127] At 2:40pm Mr McKenzie returned and issued Mr Coffey with a notice to appear.

[128] Although there was some disagreement about whether it occurred at the first or second meeting, it would seem to be common ground that at some point Mr Coffey made a complaint about the incident of 5 March.[58] This complaint was then formalised through the completion of the appropriate QPS form. Normally, the person making the complaint completes this form, however, because Mr Coffey did not feel able to do so Mr McKenzie filled it out on his behalf.[59]

[129] Mr Coffey took issue with the words used on the complaint form, suggesting they were not his own. Mr McKenzie denied that strongly, giving evidence that he was very careful to use Mr Coffey's words because it was unusual for a police officer to fill out the complaint form.[60] As Mr McKenzie pointed out, the words used on the complaint form are consistent with how Mr Coffey generally expressed himself.[61] In any event, little turns on this given the wording of the complaint does not appear to misrepresent Mr Coffey's position.

[130] It would seem the usual process involved in a police prosecution then took place. A brief of evidence was prepared and disclosed to Mr Coffey's legal representatives. This brief was tendered in the present proceeding by Mr Coffey. He identified a number of aspects that he considered erroneous and telling of malicious prosecution.

[131] Mr Coffey took issue with many of the statements in the brief on the basis they were unsigned and some were deficient in their purported outline of the conversation that occurred in the officers' mess on 5 March. Similarly, Mr Coffey highlighted the fact the brief of evidence only included an edited version of the tape recording.

[132] Mr Coffey defended the charge and it was dismissed before any evidence was lead after defence counsel successfully argued the offence charged was not an offence provided for under the PPRA because the requirement allegedly not complied with was not a requirement under the PPRA. The QPS then appealed this result but were unsuccessful.

Was Mr Coffey maliciously prosecuted?

[133] Mr Coffey's difficulties lie with the final two elements of malicious prosecution. That is, he has not shown the prosecution of him was without reasonable and probable cause and he has not shown it was malicious.

[134] When Mr McKenzie decided to charge Mr Coffey he believed he had reasonable and probable cause. He had watched the tape and saw Mr Coffey decline to comply with something that prima facie, could be considered to be a requirement made in connection with the exercise of power under the PPRA. Furthermore, Mr McKenzie consulted with a police prosecutor, Senior Constable Ede, about the charge, a process that apparently reinforced Mr McKenzie's reasonable but mistaken understanding of the relevant legal provisions.[62]

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58 See, e.g., T2-22, L33-L34 (Mr Coffey); T-3-88, L14-L15 (Mr McKenzie).
59 T2-22, L39-L43.
60 T3-91, L16-L21.
61 T3-91, L26-L29, L41-L42.
62 T3-47, L36-L41.

[135] That background also makes it impossible, in the absence of some positive evidence of malice, to draw an inference of malice.

[136] The brief of evidence, no part of which was tendered in the prosecution of Mr Coffey discloses no evidence of malice. Those aspects highlighted by Mr Coffey have reasonable explanations.

[137] The police regularly provide unsigned statements to the defence and only produce signed originals at committal proceedings.

[138] As to the omissions in some statements of parts of the conversation, they are readily explicable as the combined result of the fact the conversation in places was indistinguishable and the police officers were attempting to include only that which they viewed as relevant. Furthermore, even if those police officers were motivated by malice, Mr Coffey only accuses Mr McKenzie of malicious prosecution. He has lead no evidence showing Mr McKenzie encouraged inaccurate statements to be provided for some malicious reason, or at all.

[139] Finally, it is difficult to impute malicious intent on the basis the video recording provided was edited. It is uncontroversial that only that part of the tape, which was relevant to the charge, would be produced and, in addition, the tape was clearly marked with the word "edited".

[140] In relation to the decision to the appeal the Magistrate's decision, Mr McKenzie gave evidence that the decision to appeal was based on advice received from Police Prosecutions and the Office of the Director of Public Prosecutions.[63]

[141] At times, it appeared that Mr Coffey's position was the dismissal of the charge and the lodging of the ultimately unsuccessful appeal were the strongest proof that he was maliciously prosecuted. This cannot be correct. Every day people are arrested for charges which are ultimately dismissed. There are regularly appeals of these decisions which are likewise dismissed. It does not follow that there is necessarily malice on the part of those advancing such cases.

[142] Overall, I do not accept Mr McKenzie's actions were motivated by any of the improper purposes advanced by Mr Coffey. Specifically, the evidence does not show that the charge was prosecuted to avoid amendment of current police practice, deter other prisoners from asking that their rights were respected, deter other prisoners from asserting their rights to DNA samplers, avoid and or delay the Criminal Justice Commission investigation, further punish Mr Coffey for requiring his alleged rights be respected or delay the determination of this matter coming before a court.

[143] Rather, I find Mr McKenzie's actions were based on an erroneous understanding of the law which was held by him and members of Police Prosecutions. This falls far short of malicious prosecution and this aspect of Mr Coffey's claim must be dismissed.

False imprisonment

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63 T4-45, L19-L25.

[144] The false imprisonment aspect of the claim was not pursued in evidence or submissions by Mr Coffey at trial. It is sufficient to find formally that it has not been established.

[145] That aspect of the claim must be dismissed.

Orders

[146] My orders are:

1. Judgment for the Plaintiff in respect of the claim of battery as against the First Defendant in the amount of $28,000 (excluding interest), being $8,000 general damages, $12,000 exemplary damages and $8,000 aggravated damages.

2. I reserve determination of interest.

3. The balance of the Claim is dismissed.

4. I will hear the parties as to interest and costs on a date to be fixed.