SUPREME COURT OF QUEENSLAND

CITATION:	*Bulsey & Anor v State of Queensland* [2015] QCA 187
PARTIES:	**DAVID JOHN BULSEY** (first appellant) **YVETTE FAITH LENOY** (second appellant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 2831 of 2015 SC No 829 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville – Unreported, 20 February 2015
DELIVERED ON:	6 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2015
JUDGES:	Fraser JA and Atkinson and McMeekin JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow each appellant's appeal with costs.** **2. Set aside the orders and judgments in the trial division.** **3. Order that judgment be entered for the first appellant against the respondent in the sum of $165,000 plus interest in an amount to be agreed between the first appellant and the respondent or, in default of agreement, in an amount assessed by the Court.** **4. Order that judgment be entered for the second appellant against the respondent in the sum of $70,000 plus interest in an amount to be agreed between the second appellant and the respondent or, in default of agreement, in an amount assessed by the Court.** **5. The parties have leave to make submissions in writing about orders for the costs in the Trial Division and the amounts of interest, such submissions to be made within 14 days of these orders or within such other time as is directed by a judge of appeal or the registrar.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – WARRANTS, ARREST, SEARCH, SEIZURE AND INCIDENTAL POWERS –

ARREST AND DETENTION – EFFECTING ARREST – OTHER MATTERS – where the first appellant was present during the Palm Island riot in 2004 – where the first appellant was included on a list of people to be arrested for committing an indictable offence – where s 198(2) of the *Police Powers and Responsibilities Act* 2000 (Qld) requires that where an arrest is effected without a warrant, the relevant police officer hold a reasonable suspicion that the person has committed or is committing an indictable offence – where the officer who made the decision to arrest the first appellant was in Townsville – where the first appellant was arrested on Palm Island – where the officer who detained the first appellant did not make the decision to arrest the first appellant – where the charges against the first appellant were subsequently dropped – whether the officer who made the arrest held the required suspicion

PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – OTHER MATTERS – where the trial was heard over seven days between March and July 2012 – where judgment was not delivered until 20 February 2015 – where the respondent argued the delay did not bear upon the trial judges' adverse findings – whether the delay ought to be considered when reviewing the trial judges' findings

APPEAL AND NEW TRIAL – APPEAL-GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – GENERALLY – where the trial judge rejected the evidence of the second appellant – where the second appellant's evidence was corroborated by other evidence accepted by the trial judge – where the relevant evidence of the second appellant was not challenged – whether the Court ought interfere with the trial judge's findings

TORTS – MALICIOUS PROCEDURE AND FALSE IMPRISONMENT – FALSE IMPRISONMENT – ESSENTIALS OF CAUSE OF ACTION – where the police forced entry into the second appellant's residence – where the police were armed – where the second appellant was ordered to show the police officers where everyone was sleeping – where the second appellant was ordered to lie on the floor – where the second appellant could not do so because she was seven months pregnant – where she was subsequently allowed to sit on a couch – whether the second appellant was falsely imprisoned

DAMAGES – GENERAL PRINCIPLES – EXEMPLARY, PUNITIVE AND AGGRAVATED DAMAGES – where the appellants suffered personal injury in relation to each pleaded cause of action – where the appellants did not clearly distinguish between personal injury and other alleged consequences of the torts – where the respondent contended that general damages were necessarily confined to awards under the *Civil Liability*

Regulation 2003 – whether the appellants' claim for personal injury damages could be distinguished from their claim for other consequences of the torts – whether the other damages claimed were personal injury damages

DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – GENERAL PRINCIPLES – where the *Civil Liability Act* applied – where s 52(1) of the *Civil Liability Act* prohibits the awarding of exemplary, punitive or aggravated damages in relation to a claim for personal injury damages – whether the appellants' claim was *in relation to* a claim for personal injury damages – whether the appellants' were entitled to aggravated damages

DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – EXEMPLARY, PUNITIVE AND AGGRAVATED DAMAGES – where the trial judge assessed damages in the sum of $80,000 – where the first appellant alleged this sum was inadequate – where the arrest of the first appellant was associated with "extreme trauma" – where the first appellant was assaulted and forcefully detained in circumstances which were distressing and humiliating – where the first appellant was transported from Palm Island to the mainland – where the first appellant was remanded in custody for two full days – whether the award of damages was adequate

DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – where the trial judge provisionally assessed damages of $30,000 for the assault or false imprisonment of the second appellant – where the second appellant was threatened and her will overborne by armed police officers – where the period of her imprisonment was very short – where the situation was "extremely traumatic" – where the second appellant was required to assist police in the arrest of her partner – where the assessment of damages was adequate

Civil Liability Act 2003 (Qld), s 50, s 52(1), s 62, s 73
Civil Liability Regulation 2003 (Qld), s 6A
Personal Injuries Proceedings Act 2002 (Qld), s 9
Police Powers and Responsibilities Act 2000 (Qld), s 198(2), s 376(1)
Police Service Administration Act 1990 (Qld), s 3.2, s 7.1

Alderson v Booth [1969] 2 QB 216, considered
Cassell & Co Ltd v Broome [1972] AC 1027; [1972] UKHL 3, cited
Coffey v State of Queensland & Ors [2010] QCA 291, considered
Coleman v Watson & Shaw [2007] QSC 343, considered
Dellit v Small ex parte Dellit [1978] Qd R 303, cited
Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, cited
Dumbell v Roberts [1944] 1 All ER 326, considered

Expectation Pty Ltd v PRD Realty Pty Ltd (2004) 140 FCR 17; [2004] FCAFC 189, considered
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, considered
Hyder v Commonwealth of Australia (2012) 217 A Crim R 517; [2012] NSWCA 336, considered
Lamb v Cotogno (1987) 164 CLR 1; [1987] HCA 47, cited
Liversidge v Anderson [1942] AC 206; [1941] UKHL 1, cited
Martens v Stokes [2013] 1 Qd R 136; [2012] QCA 36, considered
New South Wales v Delly (2007) 70 NSWLR 125; (2007) 177 A Crim R 538; [2007] NSWCA 303, cited
New South Wales v Riley (2003) 57 NSWLR 496, [2003] NSWCA 208, considered
New South Wales v Williamson (2012) 248 CLR 417; [2012] HCA 57, considered
O'Hara v Chief Constable of Royal Ulster Constabulary [1997] AC 286, considered
R v Sica (2012) 232 A Crim R 459; [2012] QSC 429, cited
Re Bolton; Ex parte Beane (1987) 162 CLR 514; [1987] HCA 12, cited
Spautz v Butterworth (1996) 41 NSWLR 1; [1996] NSWSC 614, considered
State of New South Wales v Ibbett (2005) 65 NSWLR 168; [2005] NSWCA 445, considered
Trobridge v Hardy (1955) 94 CLR 147, [1955] HCA 68, cited
Williams v The Queen (1986) 161 CLR 278; [1986] HCA 88, cited
Wilson v New South Wales (2010) 207 A Crim R 499; [2010] NSWCA 333, considered

COUNSEL: S Keim SC, with A Coulthard, for the appellants
J A Griffin with K Philipson, for the respondent

SOLICITORS: Connolly Suthers Lawyers for the appellants
Crown Law for the respondent

[1] **FRASER JA:** Early in the morning of 27 November 2004 police officers, including approximately six armed members of the "Special Emergency Response Team" ("SERT") wearing black helmets and masks, forcibly entered the appellants' house, shouted commands at the second appellant, entered the first appellant's bedroom, took him from his bed, placed him on the floor, handcuffed him, and dragged him out to the street. Police transported the first appellant to Townsville. He was held in custody and questioned, taken before a magistrate on 29 November 2004, charged with unlawful assembly, and remanded in custody. Police subsequently withdrew that charge and instead charged the first appellant with riotous assembly and destruction of a building. In the subsequent committal proceedings the respondent ultimately conceded that it did not have a case against the first appellant. He was discharged.

[2] The first appellant sued the respondent for damages for trespass to the person (assault, battery, and false imprisonment) and malicious prosecution. The first appellant later abandoned the claim for malicious prosecution. The second appellant sued the

respondent for damages for assault and false imprisonment. The respondent conceded that it was liable if the police officers committed any of those alleged torts.

[3] The trial judge dismissed the appellants' claims and entered judgments in favour of the respondent. The appellants contend that those judgments should be set aside and judgments should be entered in their favour. For the following reasons those contentions should be upheld.

The first appellant's claim

[4] The respondent conceded that the acts of the police in detaining and imprisoning the first appellant amounted to torts actionable by the first appellant unless the respondent proved that those acts were authorised or excused by law. The concession was appropriate. On any view, unless that conduct was authorised or excused by law, it amounted to assault, battery and false imprisonment. As it was put by Fullagar J in *Trobridge v Hardy*[1], "The mere interference with the plaintiff's person and liberty constituted prima facie a grave infringement of the most elementary and important of all common law rights" and "It [is] for the defendant to justify [its conduct] … by reference to his office or otherwise." It is widely recognised that it is "one of the pillars of liberty" that "every imprisonment is prima facie unlawful and … it is for a person directing imprisonment to justify his act."[2]

[5] The respondent initially invoked a variety of statutory provisions to justify the acts of the police, but at the trial ultimately relied only upon s 198(2) and s 376(1) of the *Police Powers and Responsibilities Act* 2000 ("the PPRA") as it read in November 2004.[3] Section 198(2) provided that "…it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 7". (As the title of Chapter 7 states, it concerns "Powers and responsibilities relating to investigations and questioning for indictable offences".) Section 376(1) of the PPRA provided that "[i]t is lawful for a police officer exercising or attempting to exercise a power under this or any other Act against an individual, and anyone helping the police officer, to use reasonably necessary force to exercise the power".

[6] By the end of the trial it was uncontroversial that it was Detective Miles, a police officer stationed in Townsville, who decided that the first appellant should be arrested. The arrest has its origin in events which followed the death of a close friend of the first appellant, Mr Doomadgee. He died in police custody at Palm Island on 19 November 2004. At a public meeting on 26 November 2004, the chairperson of the Palm Island Council reported a medical opinion that Mr Doomadgee had died from internal bleeding caused by a rupture of his liver, a consequence of compressive force. The first appellant and another man, Mr Wotton, made emotion-charged statements at this meeting which were severely critical of police. This included an accusation by Mr Wotton that a police officer, Senior Sergeant Hurley, had murdered Mr Doomadgee. The meeting broke up and a riot ensued. The Palm Island police station was set alight, other buildings were destroyed, and police feared for their lives.

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1 (1955) 94 CLR 147 at 152.

2 Lord Atkin in *Liversidge v Anderson* [1942] AC 206 at 245. See also *Zaravinos v New South Wales* (2004) 62 NSWLR 58 at [12], [37] and [38], and *Hyder v Commonwealth of Australia* [2012] NSWCA 336 at [4] and [60].

3 The relevant reprint is Reprint 3R, which contains the provisions in force at the time of the relevant conduct. Any references to the PPRA are to this reprint.

Later that day, Detective Miles prepared a list of people who he thought should be arrested in connection with offences committed during the riot. The trial judge accepted the evidence of Detective Miles that he decided who should be arrested for questioning based both on information he gathered, and information he obtained from Detective Robinson, a police officer stationed on Palm Island. Detective Miles added the first appellant's name to the list of people to be arrested at about 9.00 pm on 26 November 2004. At that time the only information he had was his interpretation of a video (the video showed the public meeting and some aspects of the subsequent riot) and information available from police "running sheets". No police officer had at this time mentioned the first appellant adversely to Detective Miles. Detective Miles remained in Townsville whilst SERT officers and Detective Robinson entered the appellants' house on Palm Island and arrested the first appellant.

[7] The trial judge upheld the respondent's case that s 198(2) authorised the arrest of the first appellant because Detective Miles reasonably suspected that the first appellant had committed an indictable offence. The trial judge observed that s 198(2) authorised "the arrest without warrant of a person who a 'police officer reasonably suspects…has committed…an indictable offence'" and was "persuaded that the evidence available to Detective Miles was capable of raising in the minds of a reasonable person a suspicion that [the first appellant] had committed an indictable offence of the nature spoken of by Detective Miles in his evidence and that accordingly it was lawful for [the first appellant] to be arrested for questioning without warrant under s 198(2)…".[4] The trial judge also held that the police officers who entered the house "…did not act unreasonably, nor did they use unreasonable force when they arrested the first appellant and removed him from the house".[5] For those reasons the trial judge concluded that "In the circumstances [the first appellant's] arrest and detention was justified and not unlawful" and that "the detention of [the first appellant] for questioning between the 27th and 29th of November 2004 was lawful".[6]

Appeal grounds 5, 8 and 9

[8] Under appeal grounds 5, 8 and 9 the appellants contend that the trial judge's conclusion that s 198(2) of the PPRA authorised the arrest of the first appellant was wrong because Detective Miles, who was found to hold the suspicion required by that provision, did not arrest the first appellant and the police officer who did arrest the first appellant was not found to hold the required suspicion. The respondent replies that it was sufficient for the purposes of s 198(2) that the arrest of the first appellant was effected by police acting pursuant to orders of a superior officer, Detective Miles, who held the suspicion required by s 198(2).

[9] The parties presented the same competing contentions in final submissions at the trial. The trial judge's reasons do not advert to those contentions, but those reasons are premised upon a view that if a police officer who orders an arrest holds the suspicion required for a lawful arrest under s 198(2) it is not necessary that the police officer who makes an arrest in obedience to that order also holds the suspicion. The respondent supported that view by three arguments:

(1) the word "arrest" comprehends the conduct of a police officer in ordering subordinate officers to make an arrest;

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4 Unreported, 20 February 2015 at [82], [83].
5 Unreported, 20 February 2015 at [89].
6 Unreported, 20 February 2015 at [90] and footnote 142.

(2) once Detective Miles formed the required suspicion he could delegate his power of arrest to a police officer who did not hold such a suspicion; and

(3) the same result was produced by reading s 198(2) together with s 3.2 and s 7.1 of the *Police Service Administration Act* 1990 (Qld).

[10] None of those arguments are open on the respondent's pleadings or were advanced by it at trial. The respondent's pleaded case was that the police officers who entered the appellants' house and arrested the first appellant held the suspicion required by s 198 for a lawful arrest: see [34] – [35] of these reasons. Consistently with that case, the respondent argued at the trial that "the raid and the arrest were carried out by members of SERT…".[7] In any event the respondent's arguments should be rejected.

[11] Section 198 was in Pt 1 of Ch 6 of the PPRA. Section 198(1) made it "lawful for a police officer, without warrant, to arrest an adult the police reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons…". The reasons set out in the following subparagraphs were evidently regarded as sufficiently special to justify arrest without warrant, for example, "(a) to prevent the continuation or repetition of an offence or the commission of another offence", "(f) to prevent the fabrication of evidence", and "(k) because of the nature and seriousness of the offence". Section 198(2) provided:

> "Also, it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating an offence, under chapter 7."

[12] Section 198(2) in terms authorised an arrest without warrant only if the police officer who made the arrest reasonably suspected that the person had committed or was committing an indictable offence. The ordinary meaning of the word "arrest" is "…bring to a standstill, check…seize…apprehend and take into custody (a person) by legal authority…"[8] That is consistent with what amounted to arrest at common law. In *Alderson v Booth*[9] Lord Parker CJ (with whom Blain and Donaldson JJ agreed) said:

> "There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that that is no longer the law. There may be an arrest by mere words, by saying "I arrest you" without any touching, provided, of course, that the defendant submits and goes with the police officer. Equally it is clear, as it seems to me, that an arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion."

[13] That passage has been applied in many cases including, for example by the Full Court (Lucas J, with whose reasons Hoare and W B Campbell J agreed) in *Dellit v Small ex parte Dellit*.[10] Consistently with *Alderson v Booth*, in *R v Sica*[11] Peter Lyons J approved

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7 Written submissions of the State of Queensland, 11 July 2012, [3.1].

8 *The Chambers Dictionary* (11th ed., 2008), Chambers Harrap Publishers Ltd.

9 [1969] 2 QB 216 at 220.

10 [1978] Qd R 303.

11 [2012] QSC 429 at 479-480.

the decision in *Wilson v New South Wales*[12] that, "[t]he requirements for an arrest are (1) communication of intention to make an arrest, and (2) a sufficient act of arrest or submission." Applying *Alderson v Booth*, the detention of a person by a police officer would not amount to an arrest by a superior police officer, remote from the scene of the arrest, who had ordered the detention.

[14] The inclusive definition of "arrest" in s 202(2) of the PPRA, which applied only in relation to an arrest under warrant, referred to "apprehend, take into custody, detain, and remove to another place for examination or treatment". That accorded with what amounted to an arrest at common law. The PPRA contained no definition of "arrest" for the purposes of s 198 and it contained no indication that it was intended to liberalise the meaning of the word in the way for which the respondent contends. Section 198(2) did extend the common law power of arrest without warrant by permitting an arrest for the purposes of questioning a person about an offence or investigating any offence, but it did so in terms which reflected the common law requirement that "the *arresting officer* must have satisfied himself at the time of the arrest that there are reasonable grounds for suspecting the guilt of the person arrested…" (emphasis added).[13]

[15] Section 198 is in this respect indistinguishable from the statutory provisions in respect of which the House of Lords in *O'Hara v Chief Constable of Royal Ulster Constabulary*[14] confirmed that although an arresting officer may in appropriate cases form the necessary reasonable suspicion upon the basis of information supplied by another police officer, the suspicion must be held by the arresting officer; it is not sufficient that it is held by a superior officer who ordered the arrest. Again, in *Hyder v The Commonwealth of Australia*[15] the New South Wales Court of Appeal adopted the literal construction of the relevantly indistinguishable language of s 3W(1)(a) of the *Crimes Act* 1914 (Cth) in holding that the person who must hold the belief required by that provision is the arresting officer. (That section provided that "[a] constable may, without warrant, arrest the person for an offence if the constable believes on reasonable grounds that: (a) the person has committed or is committing the offence…") McColl JA endorsed the statement by Lord Steyn (Lords Goff, Mustill and Hoffmann agreeing) in *O'Hara v Chief Constable of Royal Ulster Constabulary*[16] that this requirement is intended to ensure "[t]hat the arresting officer is held accountable" and is "the compromise between the values of individual liberty and public order". In *Dumbell v Roberts & Ors*[17] Scott LJ said:

> "The power possessed by constables to arrest without warrant, whether at common law for suspicion of a felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable protection to the community; but the power may easily be abused and become a danger to the community instead of a protection. The protection of the public is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting

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12 (2010) 207 A Crim R 499 at [59].

13 *Williams v The Queen* (1986) 161 CLR 278 at 300 (Mason and Brennan JJ), citing *Dumbell v Roberts* [1944] 1 All ER 326 at 329.

14 [1997] AC 286.

15 [2012] NSWCA 336 at [15(2)] (McColl JA), and [59(a)] (Basten JA).

16 [1997] AC 286 at 291.

17 [1944] 1 All ER 326 at 329.

> satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt."

[16] That construction and explanation of the requirement that a police officer who makes an arrest must suspect on reasonable grounds that the person arrested has committed a relevant offence are equally applicable in relation to s 198(2). Any differences between the office of constable under the common law and the powers and functions of a Queensland police officer under the PPRA have no bearing upon that conclusion. So much is also consistent with the context in which s 198 appears. The respondent's construction would render s 198(2) incongruous with the provisions for arrest under warrant in Pt 2 of Ch 6 of PPRA. Section 202 makes it lawful for a police officer acting under an arrest warrant issued under any Act or law to arrest the person named in the warrant. Under the respondent's construction, an order by a superior officer has substantially the same effect as an arrest warrant even though it lacks any of the statutory protections of personal liberty in Pt 2 of Ch 6: a sworn application stating the grounds on which the warrant is sought (s 203), a decision by a justice that there are reasonable grounds for the specified suspicion and that (other than for an indictable offence) proceedings by way of complaint and summons or notice to appear would be ineffective (s 204), and a written warrant identifying the alleged offence and other matters (s 205).

[17] The respondent relied upon two decisions of the Supreme Court of Western Australia that a power of arrest could be delegated by a police officer who formed the required suspicion to other police officers. Those decisions turned upon the construction of a provision of the Western Australian legislation which conferred upon police officers a power to delegate the performance of powers to another police officer. It is not necessary to consider whether those decisions are correct. The PPRA did not confer upon Detective Miles any relevant power of delegation. The respondent referred to s 197 of the PPRA, which precluded delegation of the powers of "an approving officer". Section 197 had no relevant application because it was in Ch 5 of the PPRA, concerning controlled operations and activities, rather than in Ch 6, concerning powers of arrest and custody. The respondent argued that the absence of a similar provision in relation to s 198(2) implied that the power of arrest was delegable. Such an important and far reaching power of delegation could not be constructed by a haphazard and unlikely implication of that kind.

[18] The statutory provisions which formed the basis for the respondent's final argument about the meaning of s 198(2) are s 3.2(1) and s 7.1(1) of the *Police Service Administration Act* 1990:

> "3.2 Relation to office of constable
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> (1) Subject to section 7.1 where it applies, in performance of the duties of office, an officer is subject to the directions and orders of the commissioner and to the orders of any superior officer.
>
> (2) A noncommissioned officer or a constable has and may exercise the powers, and has and is to perform the duties of a constable at common law or under any other Act or law.
>
> (3) An officer other than one referred to in subsection (2) has and may exercise the powers of a constable at common law or under any other Act or law.

(4) Except as prescribed by this section and section 6.4, this Act does not, in relation to any officer, derogate from the powers, obligations and liabilities of a constable at common law or under any other Act or law.

…

7.1 Responsibility for command

(1) At any incident –

(a) that calls for action by police; and

(b) at which officers are present;

the officer who is responsible for taking such action, and for action taken is –

(c) the officer designate for the purpose in accordance with established administrative arrangements;

(d) if there is no officer such as is referred to in paragraph (c) – the officer present who is most senior by rank;

(e) if there is no officer such as is referred to in paragraph (c) or (d) – the officer present who is most senior by length of continuous service as an officer." [18]

[19] Those sections do not influence the meaning of the conditions upon which s 198(2) of the PPRA makes it lawful for a police officer to arrest a person without warrant. The respondent's argument invokes s 3.2(1) and s 7.1, but those provisions concerned only the chain of command within the police force. A police officer might seek to invoke these provisions in internal disciplinary proceedings by arguing that the officer acted in accordance with an apparently lawful direction or order of a superior officer. The provisions are not open to the construction that they rendered lawful an arrest which was otherwise not authorised by law.

[20] Rejection of the respondent's construction of s 198(2) is required by its language, the statutory context supplied by the provisions for arrest under warrant, and the rationale for the requirement in s 198(2) that a police officer who arrests a person must reasonably suspect the person has committed or is committing an indictable offence. If a police officer who makes an arrest does not hold that suspicion, s 198(2) does not render the arrest lawful.[19] If, contrary to my own opinion, there is any ambiguity in s 198(2) in that respect, that construction nonetheless should be adopted because of the principle that a statute which affects personal liberty should be construed strictly in favour of the citizen.[20]

[21] "It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and

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18 The relevant reprint is Reprint 3H, which contains the provisions in force on 23 October 2004.

19 I note that the same construction of a relevantly indistinguishable provision was adopted in *Rowe v Kemper* [2009] 1 Qd R 247 by Holmes JA (as the Chief Justice then was) at 271 and by Mackenzie AJA at 275.

20 *Smith v Corrective Services Commission* (NSW) (1980) 147 CLR 134 at 139. See also *Hyder v Commonwealth of Australia* [2012] NSWCA 336 at [13] (McColl JA) and the other cases cited therein.

detention be scrupulously observed."[21] Upon the trial judge's findings of fact, the restraints imposed upon the power of arrest in s 198(2) of the PPRA were not observed in the important respect that the police officer who arrested the first appellant did not reasonably suspect that the first appellant had committed an indictable offence. If Detective Miles held such a suspicion (as the trial judge found, but the appellants disputed) that is irrelevant because Detective Miles did not arrest the first appellant. The arrest of the first appellant was therefore unlawful.

[22] It follows that s 376(1) of the PPRA did not justify the use of force by the police officers who arrested or assisted in the arrest of the first appellant. The respondent did not challenge the appellants' contention that the provision in s 376(1) making it lawful to use reasonably necessary force in exercising or assisting in the exercise of a power under the PPRA was capable of application in this case only if the arrest of the first appellant was made lawful by s 198(2).

The respondent's new case on appeal: Detective Robinson held the suspicion and made the arrest.

[23] The respondent's defence pleaded that Detective Robinson was one of the police officers who held the required suspicion, see [35] of these reasons. At the trial, however, the respondent did not run a case that Detective Robinson held the required suspicion. I accept the appellants' submission that the respondent's case was instead that Detective Miles held the required suspicion and that an unidentified member of SERT made the arrest.[22] The respondent's argument on appeal that Detective Robinson made the arrest and held the required suspicion is a new case.

[24] The testimony of the respondent's witnesses was incapable of supporting an inference that Detective Robinson reasonably suspected that the first appellant had committed an indictable offence. The officer in overall charge of the members of SERT, Inspector Mackay, had no role in determining who was to be arrested and did not enter the appellants' house.[23] Relevantly, the only evidence Inspector McKay gave was that there were 13 SERT officers available to him, as well as other police officers.[24] He did not give evidence from which an inference might be drawn that Detective Robinson either arrested the first appellant or held the required suspicion. Officer Kruger, the only member of the team of SERT officers who surrounded the appellants' house to give evidence at the trial, gave evidence that: he was part of that team; he did not enter the house and could not recall the circumstances of the first appellant's arrest.[25] Of the six or so SERT officers in the team who entered the house, only one gave evidence at the trial. He was permitted to do so under the pseudonym "SERT Operative 2". SERT Operative 2 gave evidence that he led the team of SERT officers who entered the appellants' house, but he had no independent recollection of the circumstances of the first appellant's arrest.[26] He gave evidence that Detective Robinson's role was to assist in identifying suspected offenders, to provide SERT officers with information (including descriptions of any alleged offender, the address and particulars of the place where the offender was believed to be, and details of any

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21 *Williams v The Queen* (1986) 161 CLR 278 at 296 (Mason and Brennan JJ) citing *Cleland v The Queen* (1982) 151 CLR 1 at 26 (Deane J).

22 Respondent's written submissions at the trial, [3.1], [4.27]-[4.29]; AB 1005, 1014-1015.

23 Unreported, 20 February 2015 at [57], [61].

24 Unreported, 20 February 2015 at [56].

25 Unreported, 20 February 2015 at [65].

26 Unreported, 20 February 2015 at [68].

other occupants), and to approach the front door with six or seven SERT officers.[27] Officer Kruger gave similar evidence about Detective Robinson's role.[28] No witness gave evidence that Detective Miles directly or indirectly communicated to Detective Robinson that Detective Miles held the suspicion required by s 198(2), the material upon which Detective Miles allegedly relied for such a suspicion, or the alleged grounds upon which Detective Miles held any such suspicion.

[25] The respondent did not call Detective Robinson to give evidence. It adduced evidence that Detective Robinson suffered from a post-traumatic stress disorder which rendered it dangerous for his health for him to be called. In this appeal the respondent relied only upon transcribed police interviews with Detective Robinson on 26 and 27 November 2004 and a statement by Detective Robinson signed on 1 April 2005 as support for its contention that Detective Robinson held the suspicion required by s 198(2) of the PPRA. In the statement there are only two references to the first appellant. First, Detective Robinson referred to a public meeting held at the site of the council building on 22 November 2004 at which Mr Wotton was the main speaker and demanded that Senior Sergeant Hurley be removed from the Island, arrested, and charged with the murder of Mr Doomadgee. In that context, Detective Robinson stated that there was a crowd in which "the vocal persons were…six men, including the first appellant." That provides no support for a conclusion that Detective Robinson suspected (reasonably or otherwise) that the first appellant had committed an indictable offence.

[26] The second reference in the statement to the first appellant comprises three paragraphs in "Entry 5":

> "…at 05:45hrs police arrived at the Bulsey house, Puttaburra Lane to locate the suspect David John BULSEY… I attended the front door, knocked hard and in a loud voice announced "police open up". I again knocked hard and announced "police open up". The door was locked and S.E.R.T. made a forced entry into the dwelling… . During this time Yvette LENOY, the defacto partner of David BULSEY came to the front window and spoke with myself *(told us to wait and she would open the door)…* A search of the dwelling was conducted and David BULSEY was located lying on the bed in the main bedroom. I said "your (sic) under arrest for the riots yesterday". I heard a S.E.R.T. officer provide instruction and observed he was handcuffed and secured and escorted from the house. He was transported…and handed over to waiting detectives."

[27] That statement arguably suggests that Detective Robinson arrested the first appellant, but there is no statement that Detective Robinson suspected, and no identification of any grounds for a suspicion, that the first appellant had committed an indictable offence. The description of the first appellant as "the suspect" does not imply that Detective Robinson himself suspected the first appellant of having committed an indictable offence in circumstances in which the evidence indicated that Detective Robinson did not decide who should be arrested. Upon the evidence of SERT Operative 2 and Officer Kruger mentioned in [24] of these reasons, Detective Robinson's role was to assist the SERT officers. The trial judge referred to Detective Miles' evidence that Detective Robinson did not have any role in selecting the people included on the list of people to be arrested and held that it was Detective Miles who

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27 Unreported, 20 February 2015 at [57], [58], [64].

28 Unreported, 20 February 2015 at [64].

decided that the first appellant should be arrested.[29] The first appellant was "the suspect" only because Detective Miles had put the first appellant's name on a list.

[28] The respondent also relied upon the following statements by Detective Robinson in the transcribed interviews. "[When Mr Wotton went into the garage of the police station and accused police of killing Mr Doomadgee] "behind him was David Bulsey and David said something like, words to the effect of "he should be in jail", "…and the number of people swelling all swelling in front of the garage it there was just people coming from everywhere. Lexy Wotton and David Bulsey were still there. . . . [Later at the hospital where police took refuge] there was David Bulsey again" and he, with others, "were all there and they were demanding that Hurley be charged with murder and put in jail…" The interviewer referred to a statement by Detective Robinson that Mr Wotton was "controlling the crowd" and asked who Detective Robinson considered were "the key elements that [were] controlling, directing, influencing?" Detective Robinson responded "Yep, that's those names like … David Bulsey … I'll give David Bulsey some credit here when it looked like Richo [a police officer], I'd probably tell he was going to be hit with the Stillsons at one stage, Bulsey pulled Lexy Wotton out of the garage and back to the crowd, that's the only pro-police thing if I had to say that I saw him do…these names off (sic) Lexy Wotton, David Bulsey..." Detective Robinson referred to another eight people and went on to say that "if those people weren't there, that crowd would not have been there, you know". The interviewer suggested that, "then obviously the [riot] …would not have occurred?", to which Detective Robinson replied, "[a]bsolutely, those people are responsible for what's gone on."

[29] It is again notable that Detective Robinson did not say that he suspected the first appellant of committing an indictable offence. The respondent's new case on appeal is that an inference to that effect should be drawn. The absence of any assertion to that effect in Detective Robinson's statement is telling. I accept the appellants' argument that various other circumstances also opposed the inference being drawn: Detective Robinson gave the first appellant credit for coming to the aid of police by disarming Mr Wotton and thereby preventing an attack upon another police officer (an incident that was recorded on the video), Detective Miles gave evidence (albeit with some equivocation), that Detective Robinson did not include the first appellant's name in a list of names of nine or ten people who were involved in the riot,[30] and although Detective Robinson gave evidence in the committal proceedings he did not, in those proceedings, give any evidence against the first appellant.[31]

[30] At the trial the respondent did not rely upon this documentary evidence of statements by Detective Robinson as proof that he suspected or reasonably suspected that the first appellant had committed an indictable offence. The evidence was insufficient for that purpose.

The appellants' pleading and conduct of the trial

[31] The respondent argued that the appellants' statement of claim, especially the particulars of that pleading, and the appellants' conduct of the trial "limited the reasonable suspicion enquiry to "the person on behalf of the Defendant who ordered that the First Plaintiff be arrested…". The same arguments, and the appellants' arguments to the contrary, were made in the parties' submissions at the end of the trial. The trial judge did not rule upon the point.

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29 Unreported, 20 February 2015 at [72].

30 Transcript, 3 April 2012 at 6-43, 6-44; AB 330-331.

31 Respondent's written submissions at the trial, [9.24]; AB 1025.

[32] I accept the appellants' contention that a critical flaw in the respondent's pleading is that the particulars upon which this point was mainly based were not given as particulars of the appellants' allegations that the arrest of the first appellant was unlawful.

[33] Paragraph 4(g) of the statement of claim pleaded that:

> "the arrest and detention of the first plaintiff was [sic] unlawful and not authorized by the *Police Powers and Responsibilities Act* 2000 and/or the *Public Safety Preservation Act* 1986;[32] nor did the police officers who performed the purported arrest and imprisoned the first plaintiff have any other lawful basis whatsoever for entering the house and arresting him and taking him into custody, nor did they have any lawful authority to issue the commands to the second plaintiff".

The respondent argued that the appellants should have pleaded, but did not clearly plead, that the arrest of the first appellant was unlawful on the ground that the arresting officer did not hold the required suspicion. This argument wrongly assumed that the appellants bore the onus of proving that the first appellant was wrongfully arrested. Instead, the appellants' pleading of the material facts required to make out the torts they alleged was sufficient to throw the onus upon the respondent to justify the police conduct.

[34] Although paragraph 4(g) was unnecessary, it foreshadowed that the appellants would challenge the lawfulness of the arrest. There is no reason to doubt that the respondent appreciated that the onus remained on it to prove that all of the requirements for a lawful arrest were met. That is suggested by the circumstances that the respondent did not seek any particulars of paragraph 4(g) and that the respondent itself alleged that the arrest was authorised by s 198 of the PPRA. In particular, paragraph 1(h)(iii) of the respondent's defence alleged that the "police officers had a reasonable suspicion that the first plaintiff had committed the criminal offence of being riotously assembled, destroying a building", paragraph 3(s) of the defence admitted that "police officers entered the bedroom where the first plaintiff was located and therein arrested him", and paragraph 4(l) of the defence denied paragraph 4(g) of the statement of claim and specifically alleged that:

> "(i) pursuant to section 19(1) and/or 19(2) of the PPRA it was lawful for the police officers who arrested and imprisoned the first plaintiff to enter the house;" (Section 19(1) empowered a police officer to "enter a place and stay for a reasonable time on the place … to arrest the person without warrant …". Section 19(2) empowered a police officer to enter a dwelling on the place without the occupier's consent to arrest or detain a person if the police officer reasonably suspected the person was at the dwelling.)
>
> (ii) pursuant to … section 198 of the PPRA, the arrest, taking into custody and detention of the first plaintiff were lawful…"

[35] In response to a request by the appellants to identify the police officers who the respondent alleged had a reasonable suspicion that the first appellant had committed the alleged offences, the respondent answered that "the identity of the police officers other than Detective … Webber and Darren Robinson is subject to public interest immunity".[33] The respondent also claimed public interest immunity in response to

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32 At the trial the State conceded that the latter Act had no potential application.

33 Plaintiff's Request for Further and Better Particulars of the Defence, dated 15 July 2010, [2(b)] and Defendants' Response to Plaintiff's Request for Further and Better Particulars of the Defence, dated 15 December 2010, [2(b)].

the appellants' request for it to identify the police officers who entered the house.[34] Reading paragraphs 1(h)(iii), 3(s), and 4(l) of the defence together with those particulars, the respondent assumed the onus of proving that the police officers who entered the appellants' house arrested the first appellant and that they held a reasonable suspicion in the terms specified in s 198 of PPRA.

[36] In paragraph 3 of the appellants' amended reply they denied the allegation in paragraph 1(h)(iii) of the defence that police officers had a reasonable suspicion that the appellant had committed the alleged criminal offence, and the appellants pleaded in paragraph 11 as follows:

> "(a) as to the allegations of law in paragraph 4(1)(i) of the defence, the plaintiffs say the police officers who entered the plaintiffs' dwelling house did not have a reasonable cause or legal basis to arrest or detain the first plaintiff without warrant and … the general power pursuant to section 19(1) and/or section 19(2) purportedly relied upon by the defendant was of no force or effect in all the circumstances of the case.
>
> (b) as to the matters of law pleaded in paragraph 4(1)(ii) of the defence, the plaintiffs say the police officers had no reasonable cause or legal basis to arrest the first plaintiff for an alleged offence under sections 62 and/or 72 of the Criminal Code of Queensland ("Code"), nor was there any legal basis for the purported exercise of powers by them pursuant to … section 198 of PPRA as alleged, and the plaintiffs deny the matters set forth in 4(1)(ii) as untrue ..."

[37] The expression "the police officers" in paragraph 11(b) clearly means "the police officers who entered the plaintiffs' dwelling house" mentioned in paragraph 11(a). The respondent's pleaded case was that the police officers who entered and purported to arrest the first appellant held the suspicion required by s 198 for a lawful arrest and the appellants challenged that case.

[38] The particulars upon which the respondent mainly relied for its pleading point were given in response to requests for particulars of paragraphs 4(f) and 4(h) of the appellants' statement of claim. Paragraph 4(f) alleged that "the defendant knew or ought to have known through its police officers (including the police officer who had ordered other police officers to arrest the first plaintiff on the 27th November 2004), that the first plaintiff had attempted to stop the incident outside the Palm Island Police Station on the 26th November 2004 and had not committed the offence with which he was initially charged or the subsequent amended charge." Paragraph 4(h) alleged that "[t]he prosecution of the first plaintiff for the offences the subject of the charges, was without any lawful justification and was a prosecution taken against the first plaintiff in circumstances where at all material times the defendant knew or ought to have known that there was no factual or circumstantial basis for arresting, imprisoning, charging and prosecuting the first plaintiff in respect of the alleged offences." Paragraph 4(f) was evidently intended to lay a foundation for the more general allegation in paragraph 4(h), which on its face concerned the claim for malicious

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[34] Plaintiffs' Request for Further and Better Particulars of the Defence, dated 15 July 2010, [4], Defendants' Response to Plaintiff's Request for Further and Better Particulars of the Defence, dated 15 December 2010, [4(c)].

prosecution. The language of those paragraphs is not the language of an allegation that the arrest was not authorised by s 198. The appellants' particulars of paragraphs 4(f) and 4(h) reflected the forms of those paragraphs. They contained no indication that the appellants waived any aspect of the respondent's onus of proving its own case that the police officers who entered the house and purported to arrest the first appellant held a suspicion required by s 198 for a lawful arrest.

[39] Similarly, the conduct of the appellants' senior counsel in cross-examining Detective Miles upon his evidence that he reasonably suspected the first appellant of affray, unlawful assembly and riot, and in otherwise seeking to support the claim for malicious prosecution advanced in paragraphs 4(f) and 4(h) of the statement of claim (which at that time had not been abandoned) was not inconsistent with the appellants' denial of the respondent's allegation that the police officers who entered and purported to arrest the first appellant held the suspicion required by s 198 for a lawful arrest. The respondent also relied upon the omission of any suggestion in the cross-examinations of Detective Miles and the other police officers that the police officer who arrested the first appellant did not reasonably suspect that the first appellant had committed an indictable offence. That is of no significance in circumstances in which, although the onus was upon the respondent to prove that the arresting police officer reasonably suspected that the first appellant had committed an indictable offence, it had not adduced any evidence which supported such a conclusion.

[40] The respondent argued that the appellants, in their opening, and again on the fourth day of the trial, confined their case to the proposition that Detective Miles did not hold the suspicion required by s 198. In opening the appellants' case, senior counsel stated that in a recorded interview after the first appellant had been taken into custody he said that "during the events which followed his speech, he was trying to be a peace maker and not a trouble maker and that's really our case."[35] That could not possibly be regarded as an abandonment of the appellants' pleaded case, particularly against the background that senior counsel had earlier foreshadowed that the Crown's case "that police officers were entitled to arrest [the first appellant] … because … somebody in the police … service … had a reasonable suspicion … that he was involved in criminal activity … would call for an examination … of who made the decision and whether – the decision to arrest … was reasonable in the circumstances…"[36]

[41] The relevant discussion on the fourth day occurred after the appellants' senior counsel had cross-examined Detective Webber about the basis of his decision to make a declaration of a state of public emergency under the *Public Safety Preservation Act* 1986. In response to a question by the trial judge the respondent's senior counsel stated that the respondent did not rely upon that Act to justify the arrest. The respondent relied upon subsequent observations by the appellants' senior counsel that: "…there is still an issue of whether the conduct of the police officers … in arresting, apprehending and purporting to arrest my client … was based on a reasonable suspicion that an offence had been created (sic); If … the police officers … considered that they were authorised by the declaration … that could lead your Honour to conclude that nobody turned their mind to the issue of reasonable suspicion of an offence … that's necessary to support a claim of lawfulness under the *Police Powers and Responsibilities Act*, and that's a matter of what was in the mind of the policemen, the relevant policemen". The trial judge observed that the appellants' senior counsel had not suggested when cross-examining Inspector Mackay, that he had not turned

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35 Transcript, 27 March 2012, 1-15; AB 14.

36 Transcript, 27 March 2012, 1-7, 1-8; AB 6-7.

his mind to the issue. The appellants' senior counsel responded that Inspector Mackay and the other SERT officer (Officer Kruger) gave evidence to the effect that they just did what they were told to do and had not decided who was to be apprehended. The primary judge asked whether it was the appellants' case "that the law does not allow the arrest of people who may be reasonably suspected of involvement in crime, in the circumstances of riots and arson". The appellants' senior counsel replied that this was not the appellants' case but that "somebody has to have the reasonable suspicion and if that's not proved then the door is closed on lawfulness…". In the course of further discussion the appellants' counsel observed that the respondent now relied upon the *Police Powers and Responsibilities Act* and "that's the one that requires, I think it is, a reasonable suspicion that an offence has been committed" and "if because the relevant decision-maker, who we haven't heard from yet – it's not the SERT people, doesn't have that suspicion, because he or she simply doesn't turn their mind to it, because…in their minds…they're doing something…under the authority of the emergency declaration…".[37] After answering further questions by the trial judge, the appellants' senior counsel observed that Detective Miles was going to give evidence and that he "has been advanced as the relevant witness who'll talk about the decision making".

[42] The respondent's argument was that by those general statements the appellants abandoned reliance upon the requirement in s 198(2) of the PPRA that the reasonable suspicion of the commission of an indictable offence must be held by the police officer who makes the arrest. That conclusion is not justified. The references by the appellants' senior counsel to the "relevant policemen" and "relevant decision-maker" suggested that a belief held by any police officer was not sufficient. The statements by the appellants' senior counsel to the effect that if no police officer was proved to have the reasonable suspicion the arrest would necessarily be unlawful were correct. There was also no inconsistency between an argument that Detective Miles did not in truth reasonably suspect that the first appellant had committed an indictable offence and an argument that any suspicion he held was irrelevant upon the proper construction of s 198(2) of PPRA. The respondent was entitled to run both arguments against the possibility that only one of them would be accepted. (In the result the trial judge rejected the former argument and did not rule upon the latter argument.)

[43] The respondent did not argue that the appellants expressly waived any aspect of the respondent's onus of proving the lawfulness of the purported arrest. The matters upon which the respondent relied fell well short of justifying an implied waiver.

[44] The respondent conceded that in the appellants' closing address at the trial the appellants' senior counsel adverted to the issue concerning the state of mind of the arresting officer or officers at the scene of the arrest.[38] That was a significant understatement. In response to an argument by the respondent's senior counsel that "on the proper reading of the pleadings, the particulars and the way the case is being conducted, the basis that's put forward for any assault, battery, or false imprisonment has simply been that there wasn't a case against the first plaintiff…",[39] the appellants' senior counsel made submissions which occupy about 12 pages of transcript.[40] Those submissions elaborated upon propositions in the appellants' written outline that: Detective Miles "ultimately was offered by the defendant as having the "relevant

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37 Transcript, 30 March 2012, 4-26; AB 229.
38 Outline of submissions on behalf of the respondent, filed 21 August 2015.
39 Transcript, 12 July 2012, 7; AB 361.
40 Transcript, 12 July 2012; AB 405-415, 427-429.

reasonable suspicion", he did not have such a suspicion, he could not reasonably have held such a suspicion, on a proper interpretation of the relevant statutes any reasonable suspicion he held did not make lawful the forcible arrest of the first appellant by other police officers who did not give evidence of any personal belief as to "reasonable suspicion", and the proper construction of s 198 of the PPRA was that "the particular officer who enters or arrests etc…must have the reasonable suspicion".[41] The appellants' senior counsel argued, correctly as I would hold, that: the appellants had pleaded that the arrest and taking away of the first appellant was unlawful "because the officers who did those things didn't have the requisite suspicion, reasonable suspicion",[42] the effect of the statute was "that the men or women who performed the physical act of entry and arrest must have that suspicion";[43] the pleading point argued by the respondent incorrectly assumed that it was for the appellants to plead and prove non-compliance by the arresting police officer or officers with the statutory provision authorising arrest;[44] and the onus of establishing the relevant reasonable suspicion was upon the respondent.[45]

[45] Senior counsel for the respondent did not advert to the pleading point in his closing submissions in reply at the trial. It seems that the respondent was content to take its chances upon a ruling in its favour in the reasons for judgment. The trial judge should have ruled against the respondent. I would reject the respondent's arguments about the appellants' pleading and conduct of the trial.

The first appellant's claim: Conclusion

[46] The respondent did not prove that the conduct of the police in detaining and imprisoning the first appellant was authorised or excused by law. It follows from the trial judge's acceptance of the first appellant's evidence and the respondent's concessions mentioned in [2] and [4] of these reasons that the first appellant proved the alleged torts of assault, battery, and false imprisonment for which the respondent was liable.

[47] That conclusion makes it unnecessary to consider the appellants' challenges in appeal grounds 2 – 4, 6, 7 and 10 – 13 to the trial judge's finding that Detective Miles reasonably suspected that the first appellant had committed an indictable offence.

The second appellant's claim

[48] The trial judge rejected the second appellant's claim on the ground that she had not proved that the police who forcibly entered the house assaulted or imprisoned her in the ways she had alleged.

[49] The second appellant gave evidence that in November 2004 she lived with the first appellant and their six children (aged between three and seven years) in a house on Palm Island. A relative and her two children were staying in the house at the time. The second appellant was then 29 years old and seven months pregnant. Shortly before 6.00 am on 27 November 2004 she heard a noise from outside. The second appellant was the only person awake in the house. She saw people on the verandah in black wearing black helmets and with a mask or goggles covering their eyes. They were carrying rifles. The second appellant was frightened. Some men went around the

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41 Plaintiffs' outline of closing submissions, [50]-[55]; AB 1056-1057.
42 Transcript, 12 July 2012, AB 405.
43 Transcript, 12 July 2012, AB 406.
44 Transcript, 12 July 2012, AB 414.
45 Transcript, 12 July 2012, AB 427.

house and some men came up onto the verandah. The second appellant also saw two police officers who were not dressed in black. Someone shouted to her, "Get away from the door". She replied, "Wait a minute, I'll open the door for youse". Someone told her to move away from the door. As she put her hand on the door knob to open it, the door flew open. She heard a big cracking noise and a lot of shouting. About five armed men dressed in black and two police officers in plain clothes, one of whom she recognised as Darren Robinson, entered the house. The second appellant was upset and screaming. She asked the men what they were doing. The men told her to shut up and asked, "Where's the suspect?". Two men ran into the kitchen pointing their guns around.

[50] The following exchange occurred in the second appellant's evidence in chief:

> "I think you said earlier - I think you used a phrase something like, "They were waving their guns around?"-- Yes, they was.
>
> Yes. And can you be - I know it happened quickly but can you be more precise about where the guns were being pointed as they were being waved around?-- As they were walking and they're coming in the house really quick.
>
> Yes?-- And like when they were looking around like pointing it around the place."

[51] The second appellant looked towards other windows and saw a person at the window with a gun. Someone shouted at her to, "Shut up, shut up, shut up". The second appellant said that, "[e]verybody was … screaming and … shouting at me … [t]elling me to shut up. Somebody shouted at her, "Shut up. If you don't shut up, we're going to arrest you." The second appellant gave the following evidence:

> "[T]hey wanted to know which room David was in, who was sleeping in which room, how many was in there. … I only got to the top of – just before the laundry where the top of the hallway. … And they got me to point out who was in which room."

The laundry adjoined bedrooms at the back of the house. The second appellant's evidence therefore conveyed that she had moved from the front of the house to a position near the back of the house from which the various bedroom doors were all visible.

[52] The second appellant gave evidence that police officers, "told me to go and sit down on the couch. Everybody was screaming. They was all shouting." One of the police officers told her "to get down on the floor and lay down". She was also told to put her hands behind her head. The second appellant protested that she was seven months pregnant and could not lie on her stomach. She appealed to Detective Robinson. He told other police officers that she was alright and to leave her alone. The second appellant was then told to sit on the floor. She replied that she could not. The second appellant was then told to "sit on the couch and shut up". She complied. The second appellant gave evidence that one of the men dressed in black and holding a gun was standing on the side of the couch "… there where they made me sit down, I couldn't move… they told me to stay one place… one was standing beside… like, they were all over everywhere and a heap of them run down the hallway." She was frightened, in shock, crying, and shaking. Her children were crying and screaming.

[53] The second appellant gave evidence that she saw police dragging the first appellant out of the house. His hands were behind his back and there was a towel around him.

A relative took a pair of jeans from the bedroom outside for the first appellant. The first appellant was then driven away in a police vehicle.

[54] The trial judge accepted that, subject to specific reservations which are not presently relevant, all of the witnesses who gave evidence gave their evidence honestly, to the best of their recollections. The trial judge therefore did not doubt the honesty of the second appellant's evidence. The trial judge also observed that he was "impressed by [the second appellant's] dignity, her obvious concern for her family and the way she conducted herself in evidence notwithstanding the recollection of the events and the aftermath upset her." The trial judge accepted her evidence that she offered to open the front door for the police but that before she could do this the police forced it open and damaged it. Otherwise, the trial judge found that the second appellant's recollection of the relevant events was "not reliable and was unconsciously a product of reconstruction." In reaching that conclusion the trial judge relied upon the circumstances that at the relevant time the second appellant was seven months pregnant, unwell, had only a "sketchy recollection of her doings on the 26th", the events would have been "distressing and dramatic", they occurred very quickly and over a very short period of time, the second appellant was frightened, upset and crying, and the second appellant did not mention in her evidence the allegation in her statement of claim that the police officers pointed guns at her. The trial judge noted that in the statement of claim the second appellant had particularised the assault upon her as the police officers "pointing their guns at her in her own residence and ordering her to lie on the floor against her will" and she had particularised the false imprisonment as her being required to go to different parts of the house against her will in circumstances where she was deprived of her liberty to refuse".

[55] The trial judge concluded that the rejection of the second appellant's evidence necessarily meant that the second appellant had not proved either of the alleged assault or the alleged false imprisonment.

Appeal grounds 1, 14 and 15

[56] Appeal ground 1 contends that the trial judge's delay in giving judgment with reasons prejudiced the appellants' case "in that the delay was detrimental to the quality of recall by His Honour of the actual testimony of witnesses and the attendant assessment of reliability and credibility of witnesses including that of the [a]ppellants." Appeal ground 14 contends that the trial judge was wrong to dismiss the second appellant's claim because the trial judge's "non-acceptance" of her evidence on the ground that it was "unreliable due to pregnancy issues [was] inconsistent with [the trial judge's] acceptance of other linked important evidence". Appeal ground 15 contends that the trial judge "erred in failing to draw a reasonable inference from all of the evidence of the SERT Operatives' forced entry into the [s]econd [a]ppellant's home, that the SERT Operatives' guns were pointed at the second appellant and that she was not free to move about in her own home and that she was required under duress to go to different parts of her residence by SERT Operatives."

[57] The appellants argued that the trial judge erred by not accepting the second appellant's evidence and by not finding that she had proved the torts upon which she sued. Senior counsel for the appellants acknowledged the observation in *Fox v Percy* that appellate courts must respect the advantages of trial judges "especially where their decisions might be affected by their impression about the credibility of witnesses whom the trial judge sees but the appellate court does not",[46] but argued that there was such

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46 (2003) 214 CLR 118 at 127 [26] (Gleeson CJ, Gummow and Kirby JJ).

a delay in the delivery of the judgment by the trial judge as to cast serious doubt upon the trial judge's ability to reject the second appellant's evidence. The respondent argued that *Fox v Percy* stood for the proposition that appellate intervention in such a case was warranted only where rejected evidence was "incontrovertible", where the decision was "glaringly improbable", or where it was "contrary to compelling inferences".[47]

[58] The governing principle is that appellate courts must make "proper allowance for the advantages of the trial judge" but that if, having done so, "they conclude that an error has been shown, they are authorised, and obliged, to discharge their appellate duties in accordance with the statute".[48] In a passage in *Devries v Australian National Railways Commission* cited in *Fox v Percy*, Brennan, Gaudron, and McHugh JJ adopted an observation that appellate intervention is justified where "it can be shown that the trial judge 'has failed to use or has palpably misused his [or her] advantage'…".[49] The two examples of such cases mentioned in this passage upon which the respondent relied are not the only kinds of cases which meet that test. For example, particularly where there has been a very long delay in judgment after trial, an appellant might demonstrate that there must have been such a mistake in the "recollection…of evidence" [50] as justifies appellate interference.

[59] Regrettably, the delay in the delivery of the reasons was extraordinary. The trial was heard over seven days between March and July 2012, with further submissions made at the trial judge's invitation in late January 2013. Judgment was not delivered until 20 February 2015, and even then the trial judge's reasons for judgment were not published. Reasons were eventually provided on 2 March 2015, nearly three years after the last witness gave evidence on 3 April 2012. The Court cannot know what explanation there may be for the delay, but no explanation for delay of that magnitude could be satisfactory from the perspective of the parties or the public.

[60] The appellants relied upon the principles expressed by the Full Court of the Federal Court in *Expectation Pty Ltd v PRD Realty Pty Ltd*[51] concerning challenges to findings of fact where there has been relevant delay in the delivery of a judgment. Of particular relevance are the principles that such a delay makes it necessary "to look with special care at any finding of fact challenged on appeal" and "[t]he mere fact of a long delay itself weakens a trial judge's advantage…" and "must be taken into account when reviewing findings made by a trial judge…"[52]

[61] The respondent argued that the delay did not bear upon the trial judge's adverse findings about the second appellant's evidence because those findings were mainly based upon inconsistencies between her evidence and the particulars of her pleaded case. That argument is inconsistent with the trial judge's expressed reliance also upon "the circumstances, of [the second appellant's] evident ill health … and other circumstances of the events …" Furthermore, although the trial judge referred to "inconsistencies", in the passage which preceded that reference the trial judge identified, as relevant to the reliability of the second appellant's evidence, only one inconsistency. It

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47 (2003) 214 CLR 118 at 128 [29] (Gleeson CJ, Gummow and Kirby JJ).

48 (2003) 214 CLR 118 at 127 - 128 [27] (Gleeson CJ, Gummow and Kirby JJ).

49 (1993) 177 CLR 472 at 479 quoting from *SS Hontestroom v SS Sagaporic* [1927] AC 37 at 47, cited in *Fox v Percy* (2003) 214 CLR 118 at 127 [26].

50 (2003) 214 CLR 118 at 12 [24] (Gleeson CJ, Gummow and Kirby JJ).

51 (2004) 140 FCR 17. See also *Monie v Commonwealth of Australia* (2005) 63 NSWLR 729, in which the New South Wales Court of Appeal applied *Expectation Pty Ltd v PRD Realty Pty Ltd* and discussed other authorities on the topic.

52 (2004) 140 FCR 17 at [69] and [70].

was that the second appellant did not in her evidence verify the allegation in her statement of claim and particulars that the police officers pointed their guns "at her". I do not accept the respondent's argument that this was such a substantial departure from the pleaded case that the trial judge's rejection of the second appellant's evidence was inevitable. The passage in the second appellant's evidence quoted in [50] of these reasons suggests that the second appellant may have misunderstood the relevant question as an enquiry about where the police officers were when they pointed their guns, rather than as an enquiry about the direction in which they pointed their guns. That is suggested by her answer that "they were walking and their coming in the house real quick … And like when they were looking around like pointing it around the place". A misunderstanding of that kind is not unusual. It does not seem very significant in circumstances in which the second appellant was not asked a direct question on the topic, such as: "In what direction were their guns pointed?"

[62] Another potentially relevant issue arises from the circumstance that, after a very long delay, judgment was entered with no reasons. In *Expectation Pty Ltd v PRD Realty Pty Ltd* their Honours said:

> "The problem is not restricted to fading memory. A judge who comes to make an inordinately delayed decision will inevitably be subjected to great pressure to complete and publish the judgment. A conscientious judge could not but feel that pressure. It is almost inevitable that there will also be some form of external pressure – whether from the parties, the management of the Court, the press or parliamentarians. That pressure could well unconsciously affect the process of decision-making and the process of giving reasons for decision. The decision that is easiest to make and express will have great psychological attraction. As was recently said by the Western Australian Court of Appeal in *Mount Lawley Pty Ltd v Western Australian Planning Commission* (2004) 136 LGERA 16, in the course of a valuable review of the significance of delay in the delivery of judgments (at [31]):
>
> > …. a long delay can give rise to disquiet … because of the suspicion, on the part of the losing party, that the task may have become too much for the trial Judge and that he or she had been unable, in the end, to grapple adequately with the issues." [53]

[63] It is not necessary to further consider that issue or to elaborate upon the parties' submissions about the effect of the trial judge's delay in delivering judgment and publishing reasons. That is not to downplay the seriousness of the delay, but for the following reasons the second appellant's appeal must succeed even without reference to those principles expressed in *Expectation Pty Ltd v PRD Realty Pty Ltd* which would render the trial judge's findings more vulnerable to challenge.

Reliability of the second appellant's evidence

[64] The respondent argued that the trial judge's rejection of the second appellant's evidence was not inconsistent with the respondent's admissions or the evidence of Inspector McKay and SERT Operative 2, but the respondent did not contradict the appellants' argument that the admissions and evidence were consistent with the second appellant's evidence. There were powerful indications in those admissions and evidence that the second appellant's evidence was reliable. The trial judge did not advert to those matters in this context.

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53 (2004) 140 FCR 17 at [74].

[65] A very striking feature of the case is that the second appellant's evidence about the beginning and the end of the police raid was corroborated in detail by uncontroversial evidence. As to the beginning of the raid, the second appellant's evidence about Detective Robinson speaking to her, her evidence that he accompanied a group of armed men dressed in black, wearing black helmets and a mask or goggles who entered the house, and her evidence of what occurred during that entry, accorded very closely with what SERT Operative 2 described as the standard operating procedure: the SERT officers were dressed in dark clothing with a balaclava, a helmet, and perhaps a vest, and they carried their rifles in a way which would allow them to be used quickly; typically between six and eight people would go into the house; those officers would approach the front door; Detective Robinson would knock on the door and identify them as police; the officers would wait for a period of time determined by their team leader and then they would enter; they would force entry by breaking the door open if required; and the SERT officers would go in very quickly. It is also telling that even the detail in the second appellant's evidence that, whilst one group of men entered through the front door, another group of men surrounded the house was supported by the evidence of SERT Operative 2: that it was standard operating procedure that one group of SERT officers would go into the house and another group of SERT officers would surround the house to make sure people could not escape. The second appellant's evidence that, despite her offer to open the door, the group of men forced entry into her house was also corroborated by other evidence. It accorded with the italicised words in Detective Robinson's statement quoted in [26] of these reasons. It was also consistent with evidence given in general terms by Inspector McKay that the situation on Palm Island after the riots on 26 November 2004 had been assessed as being high risk, and that what was put in place was a "templated response" which sought to create the situation where the "offender" has "no other option but to comply". Inspector McKay gave evidence that "sometimes that occurs purely from the presence… [of] an officer dressed in … black garments, with police written across the front, with a helmet, with a long arm … and we've [the SERT teams] experienced a great deal of compliance by people simply seeing police in that configuration".[54]

[66] As to the end of the raid, the second appellant's evidence that the armed men dragged the first appellant out of the house whilst he had his hands behind his back and a towel around him accorded both with the first appellant's evidence to that effect, which the trial judge accepted,[55] and with the evidence of SERT Operative 2 that typically the suspect would be handcuffed and taken by some of the SERT officers out of the house as quickly as possible.

[67] Furthermore, much of the second appellant's evidence of what occurred during the raid after the officers entered the house was consistent with uncontroversial evidence. The second appellant's evidence that some of the men who entered her house were holding guns which they pointed and waved around, and that they demanded that she tell them where "the suspect" was and who was in what room, was consistent with the evidence of SERT Operative 2 of the standard procedure: one or more of the police officers would point their guns at a person encountered in the house until satisfied that the person was not a threat; if police were looking for a man and a woman opened the door the SERT officers would still enter the room in their usual

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54 It should be noted, however, that the respondent did not contend that there was any evidence that police directed their attention to the possible reaction of the occupants of the appellants' house and decided that any of them might in fact engage in any course of action which the "templated response" was designed to defeat.

55 See [105] of these reasons.

way, and quickly try to ascertain where the wanted person was and apprehend that person. The second appellant's evidence was also strongly supported by the respondent's admissions that: "police officers shouted commands to the second plaintiff to lie on her stomach on the floor of the house but… she was subsequently told to sit…"; "… the [second appellant] was required by the police officers to go to different parts of the house";[56] and "… when undertaking such search and arrest operations as were conducted on the subject date, it was standard procedure for SERT officers to have a gun aimed at a person in premises being searched until it was determined that such person was unarmed and/or posed no threat to the safe conduct of the operation being undertaken …" Furthermore, the second appellant's evidence of the fear and shock she felt during the raid derived support from the evidence of SERT Operative 2 that the standard procedure was designed to "shock and awe" and that it was likely to ensure that those in the house were "shocked, frightened".

[68] Those many and striking similarities between the second appellant's evidence of what occurred and accepted or uncontroversial evidence very strongly supported the material parts of the second appellant's evidence. It is also significant that the only part of her evidence about the raid that was challenged in cross-examination, that she offered to open the door to the police, was consistent with Detective Robinson's statement and accepted by the trial judge. Otherwise, it was not put to the second appellant that any of her evidence about the events of the morning of 27 November 2004 was incorrect. Furthermore, as I have mentioned, of the many police officers who entered the appellants' house, the respondent called only SERT Operative 2, who gave no evidence of what occurred during the police raid. No witness contradicted the second appellant's evidence about the raid.

[69] In summary, the evidence of the second appellant which the trial judge found was not reliable was accepted by the trial judge as being given honestly, it was consistent with the evidence of the first appellant which the trial judge accepted, it was consistent with the evidence of the police officers which the trial judge accepted, it was consistent with admissions made by the respondent, it was not challenged in cross-examination, it was not contradicted by any evidence, and it was not objectively incredible or improbable.

[70] In that context the trial judge's reasons for impugning the reliability of the second appellant's evidence are not persuasive. The circumstance that the second appellant was seven months pregnant has no apparent bearing upon the reliability of her evidence. It was not suggested to the second appellant that her health or pregnancy might have any bearing upon the accuracy of her memory. The trial judge's statement that the second appellant had "only a sketchy recollection of her doings on the 26th" was footnoted with a reference to her answer to a question about where she went after she had spent the morning of 26 November 2004 in hospital. She answered, "I'm, not too sure. I think I went up to listen to the speech in the mall". She was also not sure about the times of some of her activities on that day. On the other hand, she gave detailed evidence about her activities that afternoon: she attempted to ring home in the afternoon believing that the first appellant and the children were at home, no one answered the phone, on her way home she bumped into someone at the shops who told her she should go home to her children, she encountered the first appellant on her way home and they went home together, and her children were at home. She

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56 The admission was accompanied by a denial that this was against respondent's will and a contention that she "willingly went to different parts of the house to identify the persons where in rooms at the house", but the respondent led no evidence to support the denial or contention.

described her subsequent activities. There was nothing in this evidence to suggest that the second appellant might have difficulty recalling the very remarkable events of the following morning. As the trial judge observed, "The circumstances of the entry into the house and [the first appellant's] arrest by armed police officers would have been distressing and dramatic". The trial judge did not explain why this was thought to make her recollection unreliable, rather than searing those events in her memory. No doubt in some cases, perhaps many cases, it is open to conclude that the suddenness or violence of events, or the resulting shock and fear in a witness, detracts from the reliability of a witness' evidence of the events, but the striking consistency between uncontroversial and accepted evidence and a great many material aspects of the second appellant's account compels the conclusion that this is not such a case.

[71] There being no challenge to the trial judge's finding that the second appellant gave her evidence honestly, if she was also a reliable historian her evidence should be accepted. Adopting the terminology from *Fox v Percy* upon which the respondent relied, for the reasons I have given the trial judge's conclusion that the second appellant's evidence, other than one aspect of it, was unreliable was "contrary to compelling inferences". Even giving full weight to the advantage of the trial judge in seeing and hearing the evidence unfold at the trial, an examination of the record compels acceptance of the appellants' argument that the trial judge's finding that the second appellant's evidence was unreliable should be set aside and replaced by findings that the second appellant's evidence was reliable and should be accepted.

Did the second appellant's evidence prove the alleged torts?

[72] The trial judge adopted textbook definitions of the torts alleged by the second appellant: false imprisonment is "… without lawful justification … subjecting another to a total restraint of movement by either causing[57] a confinement or preventing the person from leaving the place where he or she is [consider *Marshall v Watson* (1972) 124 CLR 640; *Symes v Mahon* [1922] SASR 447]" and assault is "the intentional creation in another of imminent harmful or offensive conduct".[58] Those are conventional definitions and they are not in issue in this appeal.

[73] The trial judge rejected the second appellant's claim for the following reasons:[59] there was "no evidence" at the trial supporting the second appellant's claims; the second appellant had not given evidence that the police pointed guns at her; the rejection of her evidence meant that she had not proved the assault as alleged ("pointing their guns at her in her own residence and ordering her to lie on the floor against her will") or the false imprisonment as alleged ("being required to go to different parts of the residence against her will in circumstances where she was deprived of her liberty to refuse"); it was "difficult to conclude" that acceptance of her evidence would establish her claims; the second appellant's evidence of the alleged commands to lie down or sit on the floor "did not suggest that she was commanded to do so against her will" when, after her protest, she was permitted to sit down; and the second appellant's evidence did not support a conclusion that she went to different parts of the house against her will or that she had submitted to the directions of the police.

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57 It is not necessary to consider whether the act may be negligent rather than intentional: see Balkin & Davis, *Law of Torts*, 4th Ed., LexisNexis Butterworths, Australia at 49.

58 Unreported, 20 February 2015 at [75], quoting from Fleming, *The Law of Torts*, 10th Ed, Law Book Co, 2011, at 2.60, 2.70 and 2.80. That definition of "assault" was adopted in *Rixon v Star City Pty Ltd* (2001) 53 NSWLR 98 at 114.

59 Unreported, 20 February 2015 at [72].

[74] The respondent made submissions which supported the trial judge's reasoning and conclusion. I accept the appellants' argument that evidence given by the second appellant (which was supported in material respects by the respondent's admissions and evidence adduced by it) did prove that the second appellant submitted to the directions of the police and went to different parts of the house against her will. What happened after police entered the house must be understood in the context of the circumstances of that entry. The reaction to the second appellant's offer to open the door was that armed police shouted at her to get away from the door, broke the door open, and a group of police dressed in black entered the appellants' house waving and pointing their firearms and repeatedly shouting commands at the second appellant. This conduct was calculated to have the shocking and frightening effect upon the second appellant of which she gave evidence. As the second appellant said, and as is entirely unsurprising in the circumstances described in the evidence, the second appellant was frightened, in shock, crying, and shaking whilst her children, doubtless awoken by the noise, were crying and screaming. The effect of the respondent's own admissions is that the police officers did not ask for the second appellant's cooperation. They shouted "commands" at the second appellant to lie on the floor and they "required" her to go to different parts of the house. Consistently with those admissions, the second appellant's evidence was that, in the chaotic situation in which armed men were shouting at her, telling her to shut up, and threatening to arrest her if she did not do so, the police "got me" to identify the occupants of the rooms. Similarly, the second appellant gave evidence that the police "made me sit down" and that she "couldn't move". That occurred in the context of the manifestly threatening conduct of the police which had occurred and where the threat was reinforced by a man standing at the side of the couch holding a firearm. The inference is readily drawn that the second appellant's will was entirely overborne and she felt compelled to obey the police commands and requirements. That this was precisely what police intended is suggested both by their conduct and by the evidence of SERT Operative 2 that this was the standard procedure adopted that morning to "shock and awe" and its adoption was likely to ensure that those in the house were in fact "shocked, frightened".

[75] In the situation described in the evidence, the respondent's argument that the second appellant's will was not wholly overborne cannot be accepted. The fact that the police gave the second appellant permission to sit on the couch after she explained her inability to lie on her stomach or sit on the floor hardly detracts from the conclusion that the police controlled her movements. In short, the second appellant was made a frightened and shocked prisoner in her own home. There being no lawful justification for that, the second appellant proved the respondent was liable for the tort of false imprisonment.

[76] It is debatable whether the second appellant's evidence established an assault upon the second appellant. The better view is that it did. The second appellant's evidence of a group of armed men, dressed in black, breaking the front door and rushing into her home close to where she was standing and waving and pointing their guns around whilst shouting commands at her, and thereby shocking and frightening her as that conduct was intended to do, satisfies the definition of an assault. That the police officers pointed their guns "at her" was only one aspect of the particulars of the assault alleged in paragraph 3 of the statement of claim. Although I would not be prepared to find that police officers pointed their firearms at the second appellant in the absence of direct evidence to that effect from the second appellant, in light of the evidence that it was standard procedure for SERT members to point a firearm at any occupant found in the house there is no basis for a positive finding that it did not occur. In all

other respects the second appellant's evidence fell within the particulars and there was no objection to any of the second appellant's evidence on the ground that it went beyond the particulars. The second appellant's evidence established the assault.

[77] I would add that whether or not an assault was established would appear to have no bearing upon the quantum of damages recoverable by the second appellant. The second appellant cannot be compensated for having a firearm pointed directly at her because she did not prove that particular of her claim, but even if she did not prove an assault she should be compensated for the threatening conduct of the police holding and waving firearms around in her presence. That is so because that conduct, and every other aspect of the conduct of the police in entering the house and detaining and removing the first appellant in the second appellant's presence, bore upon the nature, seriousness and impact upon the second appellant of her false imprisonment.

Damages

[78] At the trial the appellants relied upon evidence from Dr Likely, a consulting psychiatrist and the respondent relied upon evidence from a different consultant psychiatrist, Dr Chalk.

[79] In relation to the first appellant, the trial judge accepted the evidence of Dr Chalk in preference to that of Dr Likely. The trial judge concluded that the first appellant suffered from a chronic adjustment disorder with depressed and anxious mood, and that this was a consequence of the events of 27 November 2004 and the immediate aftermath when the first appellant was held in prison on the mainland. The trial judge adopted Dr Chalk's assessment of the first appellant's psychiatric impairment pursuant to the *Civil Liability Regulation* 2003 (Qld) of five per cent, which resulted in the calculation of a component for general damages referable to the first appellant's personal injury of $5,000. That assessment is not in issue. In addition to the calculated general damages for personal injuries of $5,000, the trial judge assessed the damages recoverable by the first appellant at $35,000 for the assault and battery in his forcible arrest and $45,000 for his false imprisonment from 27 to 29 November. The trial judge therefore considered that the total amount of any award of damages to the first appellant should be $85,000, plus interest.

[80] The second appellant claimed damages for personal injury. The trial judge rejected that claim and it is not in issue in this appeal. The trial judge made a provisional assessment of (non-personal injury) general damages recoverable by the second appellant for assault or false imprisonment of $30,000.

The respondent's notice of contention

[81] The respondent contended that the "non-awarding" of damages to the appellants should be upheld on the ground that the appellant's claims were "for damages based on a liability for personal injury" within the meaning of the definitions in the *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA")[60] and the *Civil Liability Act* 2003 (Qld) ("CLA").[61] The respondent argued that the appellants pleaded that they sustained personal injuries in relation to each cause of action upon which they relied without clearly differentiating between personal injury and other alleged consequences of the torts; matters such as humiliation and distress, which in some circumstances might not constitute personal injury and "could well have been an emotive reactions [sic]

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60 The relevant reprint is Reprint 1C, which contains the provisions in force on 8 December 2003.

61 Subject to footnote 63, the relevant reprint is Reprint 1B, which contains the provisions in force on 25 September 2004.

which constituted part of the psychological/psychiatric injury".[62] The respondent also argued that so much of each appellants' claim as was not (if considered in isolation) a claim for personal injury damages should be regarded as being part of such a claim because it was combined with a claim for personal injury damages. The conclusion for which the respondent contended was that general damages were necessarily confined to awards under the *Civil Liability Regulation* 2003.

[82] That argument impliedly invoked s 62(1) in Ch 3 of CLA. It provides that, "[f]or an injury arising after 1 December 2002, general damages must be calculated by reference to the general damages calculation provisions applying to the period within which the injury arose."[63] The "general damages calculation provisions" applicable in this case are prescribed in a schedule specified in s 6A of the *Civil Liability Regulation* 2003. That schedule does not allow amounts for personal injury damages other than the scale amounts. Section 9(1) of the PIPA precludes a claimant from starting a proceeding in a court "based on a claim" until the claimant has given written notice of the claim, in an approved form, to the proposed respondent to the proceeding. Other provisions regulate the required pre-court procedures which follow the giving of such a notice.

[83] The term "personal injury" is defined to include various injuries including "psychological or psychiatric injury". The term "claim", is defined in PIPA to mean "a claim, however described, for damages based on a liability for personal injury, whether the liability is based in tort or contract or in or on another form of action including breach of statutory duty and, for a fatal injury, includes a claim for the deceased's dependants or estate". That does not refer to the originating process (also called a "claim") or the statement of claim. Rather, it refers to the "demand or assertion of rights" for personal injury damages, a demand or assertion which ultimately may be articulated in the claim and statement of claim.[64]

[84] There is no serious difficulty in identifying the appellants' claims for personal injury damages as these were articulated in their statement of claim. Such a claim was articulated by the first appellant in paragraph 6 of the statement of claim (damages for "psychological sequelae as a consequence of the actions of the defendant's police officers as set forth herein") and by the second appellant in paragraphs 9(b), (d) and (e) of the statement of claim (damages for specified complications in her pregnancy and pain and suffering).

[85] The other damages which the appellants are entitled to recover for the torts committed against them are not personal injury damages. The appellants' statement of claim and particulars refer to such matters as "humiliation", "the seriousness of the nature of the assault and battery… [and] the false imprisonment …in the context of the unlawfulness of the arrest and detention.", the "deprivation of liberty", and "an assessment of the circumstances in which the second plaintiff was assaulted and deprived of liberty in her own residence by officers of the Queensland Police Service".[65] In *State of New South Wales v Ibbett*,[66] in a passage to which I referred in *Coffey v State of Queensland*,[67] Spigelman CJ said:

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62 Outline of Submissions on behalf of the respondent, 21 August 2015, [63].

63 Section 62(1), in this form, was substituted in the CLA, and related amendments were made to the *Civil Liability Regulation* 2003 (Qld), by the *Civil Liability and Other Legislation Amendment Act* 2010 (Qld), ss 12, 19 and 20.

64 *Martens v Stokes* [2013] 1 Qd R 136 at 143[29].

65 Statement of Claim, [6], [9(d)]; Particulars, [5] – [7] (first appellant) and [8] (second appellant).

66 (2005) 65 NSWLR 168 at 172 [21].

67 [2010] QCA 291.

> "The concept of 'personal injury' is reasonably well established in Australian legal practice. It has rarely, if ever, been used to refer to harm to reputation, deprivation of liberty, or to injured feelings such as outrage, humiliation, indignity and insult or to mental suffering, such as grief, anxiety and distress, not involving a recognised psychological condition. (See for example, *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359–363.) An award for the emotional harm involved in apprehension of personal violence would not generally be regarded as an award for 'personal injury damages'."

[86] Consistently with that analysis, in *New South Wales v Williamson*,[68] French CJ and Hayne J, with whose reasons Kiefel J agreed, held that a claim for damages for deprivation of liberty is not a "claim for personal injury damages" within the meaning of s 11 of the *Civil Liability Act* 2002 (NSW) ("damages that relate to the death of or injury to a person", the term "injury" being broadly defined to mean "personal injury" including "impairment of a person's physical or mental condition"). French CJ and Hayne J observed:[69]

> "Even assuming, however, that the respondent did allege that the act of wrongful imprisonment (as distinct from the batteries he alleged he had suffered) had caused him some personal injury, the claim for false imprisonment was necessarily a claim for damages on account of the deprivation of liberty with any accompanying loss of dignity and harm to reputation. The deprivation of liberty (loss of dignity and harm to reputation) is not an 'impairment of a person's physical or mental condition' or otherwise a form of 'injury' within s 11 of the Liability Act. The claim for false imprisonment, at least to the extent to which it sought damages for deprivation of liberty, is not a 'claim for personal injury damages'."

[87] The respondent cited *Martens v Stokes*,[70] in which a plaintiff's claim and statement of claim alleged in general terms that he had suffered loss and damage and that he had been severely injured in various ways. Margaret Wilson AJA (McMurdo P and White JA agreeing) considered that the alleged physical, emotional and psychological injury was "personal injury", it was not clear what the pleading meant by a claim for "financial injury", and because that plaintiff had not complied with the pre-litigation requirements of PIPA he was not entitled to commence his proceedings "in so far as it is the claim for personal injuries".[71] Margaret Wilson AJA considered that it was unclear whether some of the claims were beyond the scope of PIPA. For those reasons, the statement of claim was struck out with leave to file and serve a further statement of claim. As was submitted for the appellants, the respondent's argument is inconsistent with Margaret Wilson AJA's statement that the disentitling effect of noncompliance with the pre-litigation requirements of PIPA applied only "in so far as it is a claim for personal injuries".

[88] The respondent also relied upon a passage in *Coffey v State of Queensland*.[72] The relevant issue in that case concerned the application of s 73 of the CLA. It provides that "[a] proceeding in a court based on a claim for personal injury damages must be

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68 (2012) 248 CLR 417.
69 (2012) 248 CLR 417 at [34].
70 [2013] 1 Qd R 136.
71 [2013] 1 Qd R 136 at [33].
72 [2010] QCA 291.

decided by the Court sitting without a jury." The definitions in the CLA of "claim" and "personal injury" are the same as the definitions in PIPA. Mr Coffey claimed general damages as well as exemplary and aggravated damages for an assault which caused personal injury and for malicious prosecution and negligence. I concluded that the better view was "that the plaintiff's claims against the third defendant, and some components of his claims against the second defendant, would not themselves constitute claims for damages for personal injury if they did not also include reference to other harm which is conventionally regarded as "personal injury. However it is not necessary to decide that question. Because material components of the damages claimed against the first and second defendants do relate to alleged personal injury, the plaintiff's proceeding is 'based on a claim for personal injury damages' even though it may also be based upon other kinds of claims. The plaintiff's proceeding is therefore caught by s 73."[73]

[89] In that case the plaintiff characterised his general damages claim as being for "violation of his person". Personal injury - the alleged removal of an excessive number of hairs on his head - was at the heart of his claim for damages for assault. The way his claim was articulated created a difficulty in separating the claimed personal injury damages from other claimed damages. My tentative view "that the plaintiff's claims against the third defendant, and some components of his claims against the second defendant, would not themselves constitute claims for damages for personal injury if they did not also include reference to other harm which is conventionally regarded as 'personal injury'" was expressed in that context. It could not be applied in this case where the appellants' claims for personal injury damages are articulated in a way that allows those claimed damages to be disentangled from their other claims.

[90] As I understood the appellants to accept, the first appellant is not entitled to be compensated in an unregulated award of general damages for emotional or other conditions which form part of the psychological injury for which the trial judge awarded $5,000 under the *Civil Liability Regulation* 2003, but there is no serious difficulty in making separate, non-overlapping assessments of those different categories of damages. The trial judge did so without apparent difficulty.

[91] Section 73 of the CLA, the construction of which was in issue in *Coffey*, does not bear any resemblance to s 62. The respondent's argument wrongly assumes that s 62 applies other than in an award of personal injury damages. Section 50, the first provision in part 1 of Ch 3, provides that "[s]ubject to section 5, this chapter applies only in relation to an award of personal injury damages." Furthermore, s 62 applies the general damages calculation provisions in the regulation only in relation to "general damages" for an "injury". The latter term is defined to mean "personal injury". The definition of the former term refers to conventional components of damages for personal injury; "pain and suffering", "loss of amenities of life", "loss of expectation of life" and "disfigurement". Accordingly, s 62 and the prescription of general damages in the *Civil Liability Regulation* 2003 do not apply in an assessment of damages which are not personal injury damages. The respondent's contention fails for these reasons.

Appeal ground 16

[92] What is in issue under appeal ground 16 is whether or not s 52(1) in Ch 3 of CLA precludes awards of aggravated damages. Section 52(1) of CLA provides that, "A court can not award exemplary, punitive or aggravated damages in relation to

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73 [2010] QCA 291 at [30].

a claim for personal injury damages." Section 52(2) provides that s 52(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 …" Because the appellants did not allege that the police intended to cause personal injury, s 52(2)(a) could not operate to exclude the application of s 52(1).

[93] The trial judge accepted that it was part of the appellants' cases that they sustained a personal injury in the form of a psychiatric injury as a result of the alleged torts. Having accepted the evidence of Dr Chalk, the trial judge found that the allegedly wrongful imprisonment of the first appellant contributed to his psychiatric injury. The trial judge also found that, because the conduct of police in the alleged assault, battery and false imprisonment caused the first appellant to suffer a personal injury, "his claim for damages as pleaded and (subject to the issue of justification) proven can be said to be "in relation to a claim for personal injury damages", so that s 52 of CLA prevented the recovery of aggravated and exemplary damages.

[94] It is only aggravated damages that are in issue. The trial judge held that s 10.5(2) of the *Police Service Administration Act* 1990 precluded an award of exemplary damages. The appellants did not challenge that conclusion. (They had abandoned their claim to exemplary damages by an amendment to their reply pleading.) The conceptual distinction between exemplary damages and aggravated damages is that aggravated damages are assessed from the plaintiff's perspective, whereas an assessment of exemplary damages focusses upon the defendant's conduct. In *Lamb v Cotogno,*[74] the High Court confirmed that aggravated damages "are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like".

[95] The appellants argue that s 52 of the CLA applies only to personal injury damages and that aggravated damages under other heads are not "aggravated damages in relation to a claim for personal injuries damages". The respondent argues that it is not to the point that false imprisonment and assault did not themselves constitute personal injuries. The respondent argues that the appellants' pleading does not differentiate the damages claimed for personal injuries from the other claimed damages, and the claimed aggravated damages remain a claim "in relation to a claim for personal injury damages".

[96] I have mentioned that s 50 provides that Ch 3 "applies only in relation to an award of personal injury damages." In holding that s 52(1) precluded an award of aggravated damages in relation to all of the appellants' claims, the trial judge referred to a relationship between a pleaded claim for damages and a claim for personal injury damages. In my respectful opinion that was an error. Section 52(1), read with s 50, instead refers to a relationship between an **award** of aggravated damages on the one hand, and a claim (meaning a demand or assertion of rights) for, and an award of, personal injuries damages on the other hand.

[97] Because the second appellant did not obtain an award of personal injury damages and does not now claim such damages, s 52(1) does not preclude an award to her of aggravated damages. The question is whether that provision precludes an award of aggravated damages to the first appellant.

[98] An award of aggravated damages for the assault, battery and wrongful imprisonment which makes no allowance for personal injury is not an award of personal injury damages. The question, however, is whether it is an award "in relation to" a claim

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74 (1987) 164 CLR 1 at 8.

for personal injury damages. The flexibility of the expression "in relation to" makes it difficult to regard s 52(1) (or s 50) as being unambiguous in that respect. Whilst that expression is capable of encompassing the broadest possible range of relationships, its scope in a particular case must depend upon the context in which it appears.[75]

[99] A narrower scope of the relationship than that which the trial judge adopted is suggested by the exclusion in s 52(2) of the application of s 52(1) "to a claim for personal injury damages". Similarly, the heading of Ch 3 refers to the "Assessment of damages for personal injury". The heading is a part of the Act[76] and may be taken into account in determining the scope of a section which is not expressed in unambiguous terms.[77] Chapter headings in statutes are necessarily very succinct and should not too readily be regarded as influencing the construction of sections to which they relate. In this case, however, the chapter heading is consistent with the language of s 52(2) and supplies some support for the narrower construction of "in relation to" in s 52.

[100] It is also necessary to bear in mind the relevant part of the definition of "claim". So far as personal injury is concerned, the definition refers to "a claim, however described, for damages based on a liability for personal injury…" Damages may be and commonly are awarded for assault, battery, and false imprisonment whether or not a plaintiff is injured or suffers loss. In so far as personal injury results from those torts, it may be said that they create a liability for personal injury, but that is not so insofar as a plaintiff is entitled to compensation for his or her humiliation, indignity, distress, discomfort, and the like. It seems natural in this context to read s 52(1) as precluding an award of aggravated damages only in relation to the death of or personal injury to a person.

[101] Furthermore, the results of the broader construction advocated by the respondent seem very odd: a plaintiff who is assaulted, battered, and falsely imprisoned by agents of the State may recover aggravated damages in addition to ordinary damages for those trespasses to the person, but such a plaintiff may not do so where he or she also suffers personal injury and claims, and is awarded, damages for that personal injury. It is not easy to accept that the legislative purpose was that adding injury to insult should limit the damages for the insult in that way.

[102] For these reasons, the better construction of s 52(1) is that it does not preclude an award of aggravated damages to the appellants as additional compensation (not including compensation for personal injury) for assault, battery or false imprisonment.

The respondent's notice of contention and appeal ground 16: does the CLA apply at all?

[103] In relation to the notice of contention and appeal ground 16 it may be arguable that the provisions of the CLA upon which the respondent relied do not apply at all in relation to a claim for personal injury damages based upon the intentional torts upon which the appellants sued.[78] The argument is mainly (although not exclusively) based

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75 *Workers Compensation Board of Queensland v Technical Products Pty Ltd* (1988) 165 CLR 642 at 653 (Deane, Dawson and Toohey JJ).

76 *Acts Interpretation Act* 1954 (Qld), s 14(1), s 35C.

77 *Silk Bros Pty Ltd v State Electricity Commission (Vic)* (1943) 67 CLR 1 at 16 (Latham CJ, Rich and McTiernan JJ concurring).

78 Cockburn and Madden, 'Intentional Torts to the Person', (2007) 18 *Insurance Law Journal*, 1 at 4-8, which refers to observations directed to a different point by Keane JA in *Newberry v Suncorp Metway Insurance Ltd* [2006] 1 Qd R 519 at [16] (and see also at [34]). The article also refers to possible responses, including reliance upon the wide terms of the definition of "claim" and of s 52(2).

upon the provision in s 4 that parts of the Act, including s 52, "apply only in relation to a breach of duty happening on or after…" specified times, the provision in s 5 excluding the application of CLA "if the harm resulting from the breach of duty owed to the claimant is or includes" certain injuries, extrinsic material which is said to show that the legislative purpose concerned only claims for breach of duty, and the proposition that intentional torts do not involve a breach of duty. An argument to that effect was not advanced in *Coffey v State of Queensland* or in this appeal. I mention it merely to make it clear that my reasons are not intended to foreclose the point. If the provisions upon which the respondent relied do apply in relation to intentional torts, for the reasons I have given those provisions in any event do not preclude the appellants from recovering the damages, including aggravated damages, which they seek in this appeal.

The first appellant's damages

[104] Appeal ground 17 contends that the trial judge's assessment of damages (other than the assessment of $5,000 for personal injury damages, which is not in issue) in respect of the first appellant in the total sum of $80,000, was inadequate. The appellants submitted that, accepting that the assessment of damages of this kind is very much a matter of personal impression, the arrest of the first appellant and the way in which it was carried out was associated with such "extreme trauma" as to make the trial judge's assessments inadequate.

[105] The trial judge accepted the first appellant's evidence. There was no challenge to the following summary in the trial judge's reasons:

> "[12] His evidence was that on the evening after the riot he was at home and that he went to bed at a normal time of 8 o'clock.
>
> [13] In the morning he heard a big bang which woke him up, the next thing he knew he was on the floor with a boot at his head, the men had guns and helmets, he was handcuffed behind his back, he had no pants on, only a shirt. He recognised that Darren Robinson was there, he said he was scared. He gave evidence he was not expecting to be arrested, that if he had been asked he would have gone down to the police station voluntarily to answer any questions as he had nothing to hide.
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> [14] He recalled guns being held by the SERT operatives pointing at his head and back. He could not recall any words being uttered about him being under arrest after which he was taken out to the police vehicle.
>
> [15] He said that when he was taken outside he had a towel around his body, the police had placed it there. He gave evidence that he could hear his wife calling out, "Leave him alone. He never done nothing wrong." He said that his children were present at the house but he could not see whether they witnessed these events. In addition his sister-in-law had been sleeping in a bedroom. When he was out in the street a pair of his trousers were produced and they were put on him by the police. He said he felt very embarrassed about being exposed in the street and having trousers put on him in front of people. He was very scared.

> [16] Thereafter he was taken to the airport. While he was waiting at the airport he heard that his wife was going to be taken to the Townsville Hospital. He was worried about her pregnancy. She was seven months pregnant. After arriving in Townsville he was taken to the Mundingburra Police Station where he was locked in a cell and after a time questioned. He said he answered the questions and cooperated with the questioning. He was held in the watchhouse after his interview from Saturday 27th November until Monday 29th when he first appeared before a magistrate and was remanded in custody after bail was refused…
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> [17] … He said that as a result of his experiences at the incidents and after he would never trust the police again and he said that it was very hard on him if he visited the mall at Palm Island. He no longer lives with … the second [appellant] but lives by himself…
>
> [20] Concerning his arrest he said that he was asleep when the police entered, he did not hear them say anything, that he was thrown on the floor and that he had no clothes on the lower part of his body and that he was very scared. When it was suggested that no-one pointed a firearm at the back of his head he said:
>
> "Well, I felt boots on me. A big boot on my head and on my back. I felt that. Weight was on me and I guess they do that and they hold guns on you, that's what they do. They wouldn't take guns in the house otherwise. They were looking for me and there was no need for that. If they would've knocked in a good way and said, '[the first appellant] can you come down to the police station'; I would've happily walked out and jumped in the police car … I would've walked out myself'"
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> [21] In re-examination he maintained that he saw that the police who entered the bedroom included SERT officers and Darren Robinson and that some wore helmets and had guns. He did not see Darren Robinson holding a gun and said that Robinson "treated him 'alright'. He was 'pretty good'."

[106] The trial judge took into account that the first appellant "was assaulted and forcibly detained", that the circumstances in which he was arrested "were no doubt distressing, probably shocking to him and also humiliating", and that it was "a serious matter for police officers to forcibly arrest and then subsequently detain a person without lawful justification."[79] As was submitted for the appellants without contradiction, the trial judge did not advert to the high degree of force applied to the first appellant and the great intimidation of him during the wrongful arrest. Further, although the trial judge did advert to the circumstances of the first appellant's arrest, the trial judge did not advert to the circumstance that during the period of the first appellant's false imprisonment, exceeding two full days, he was treated as a criminal suspect in relation to the notorious and heavily publicised riots on Palm Island.

[107] The appellants referred to the award in *Coleman v Watson & Shaw*[80] of $20,000 as damages in relation to the false arrest and imprisonment in a watch house for about five hours of a man who had been attending the first meeting of the Queensland

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79 Unreported, 20 February 2015 at [102].

80 [2007] QSC 343 at [68].

Legislative Assembly outside Brisbane. That was a far less serious case of false imprisonment, notwithstanding that the torts involved interference by the State with that plaintiff's fundamental democratic rights.

[108] In my respectful opinion the total sum of $80,000 damages awarded to the first appellant for assault, battery and false imprisonment was manifestly inadequate. In part that is so because of the absence of any award for aggravated damages and in part because the award insufficiently recognises the seriousness and impact of the wrong done to the first appellant. The very great seriousness of the wrong is demonstrated by the evidence of the police witnesses and the evidence of the first appellant which the trial judge accepted, as well as the consistent evidence of the second appellant: on the morning after serious damage had been done to public buildings in the first appellant's island community by persons other than the first appellant, and in circumstances in which the first appellant was grieving for the death of a close friend who had earlier died in police custody, he was awoken early in the morning by the invasion of a large group of armed police into and around his house, he was manhandled from his bed onto the floor, he was handcuffed, dragged out of his own home where his children and his shocked and frightened partner, who was seven months pregnant, were present, he was taken onto a public street whilst only partially dressed, he was taken from the place where he lived, he was transported to the mainland, he was imprisoned, he was questioned by police as a suspect in relation to extensively publicised and notorious offences in which he had played no part, and he was held in custody for more than two full days before being remanded by a magistrate.

[109] A very substantial award of damages is required to compensate the first appellant for the wrong done to him by that wrongful exercise of executive power over a citizen. As I have mentioned, the first appellant is not entitled to compensation, apart from the $5,000 which the trial judge assessed for his psychological injury under the *Civil Liability Regulation* 2003, for anything which forms part of that psychological injury. Also, because exemplary (punitive) damages are precluded by statute, the award may not include any element of punishment of those who committed the torts or of the respondent. Otherwise, the award should properly and fully compensate the first appellant, including by way of compensation which takes into account the violence and the particularly distressing and humiliating circumstances of the torts.

[110] An appropriate award is $165,000, comprising damages (including aggravated damages) of $60,000 for assault, battery, and false imprisonment during the wrongful arrest, damages (including aggravated damages) of $100,000 for false imprisonment after the wrongful arrest (ending at the time when the first appellant was taken before a magistrate), and general damages of $5,000 for personal injury as assessed by the trial judge. The respondent should be ordered to pay interest on damages.

The second appellant's damages

[111] The trial judge's provisional assessment of $30,000 for the assault or false imprisonment of the second appellant must be disregarded in view of my conclusion that the trial judge mistook the facts upon which that assessment was based. It is necessary to assess the second appellant's damages afresh.

[112] The second appellant, who was making a cup of tea in the family home whilst her partner and children were asleep, was threatened and her will was overborne by a team of armed police who entered her home whilst another team of armed police surrounded it. Orders were shouted at her and she had no realistic choice but to obey

those orders. She was rendered helpless to assist her partner whilst he was dragged, handcuffed and only partially clothed onto the street and imprisoned. As the respondent argued, it is relevant that the period during which the second appellant was falsely imprisoned was very short, but it is also relevant that this heavily pregnant lady's co-operative offer to open the door was met by a force of police brandishing firearms and shouting orders after breaking through the front door. The extraordinarily traumatic atmosphere revealed by her evidence must be taken into account. So too must the very real indignity of the second appellant being required to assist the police in locating her partner, and watching helplessly whilst police, treating him as a suspect in notorious and highly publicised offences, dragged him onto the street partially dressed and handcuffed.

[113] An appropriate award of damages to the second appellant for assault and false imprisonment is $70,000. Interest should be added to that sum.

Proposed orders

[114] The appeals should be allowed with costs. The parties should be allowed an opportunity to make submissions about the amounts of interest on damages and the appropriate orders for costs in the trial division if they cannot agree upon those matters.

[115] I favour the following orders:

(a) Allow each appellant's appeal with costs.

(b) Set aside the orders and judgments in the trial division.

(c) Order that judgment be entered for the first appellant against the respondent in the sum of $165,000 plus interest in an amount to be agreed between the first appellant and the respondent or, in default of agreement, in an amount assessed by the Court.

(d) Order that judgment be entered for the second appellant against the respondent in the sum of $70,000 plus interest in an amount to be agreed between the second appellant and the respondent or, in default of agreement, in an amount assessed by the Court.

(e) The parties have leave to make submissions in writing about orders for the costs in the Trial Division and the amounts of interest, such submissions to be made within 14 days of these orders or within such other time as is directed by a judge of appeal or the registrar.

[116] Since writing those reasons I have had the advantage of reading McMeekin J's reasons, with which I respectfully agree.

[117] **ATKINSON J:** I agree with the reasons for judgment of Fraser JA and of McMeekin J and with the orders proposed by Fraser JA.

[118] I wish to add that the treatment of the appellants breached their most fundamental right, the right to personal liberty which is the most basic and fundamental of the human rights recognised by the common law. This fundamental right was referred to by Mason and Brennan JJ in their joint judgment in *Williams v The Queen*[81] in the following terms:

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[81] (1986) 161 CLR 278 at 292.

> "The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights': *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause': *Commentaries on the Laws of England* (Oxford, 1765), Bk 1, pp 120-121, 130-131. He warned:
>
> > 'Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities'.
>
> …
>
> The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes."

[119] The appellants in this case were not treated as one might expect in a civilised society governed by the rule of law and it is appropriate that they should be adequately compensated for the grievous wrong done to them.

[120] **McMEEKIN J:** I have had the advantage of reading the reasons of the Fraser JA. I agree with those reasons and the orders that his Honour proposes.

[121] I wish to say something about the damages and why I agree that some substantial amount is warranted. Some might think that what has occurred here is a failure to comply with some technicality in the law – for example had the officer in Townsville, Detective Miles who gave evidence that he had the reasonable suspicion required under the legislation, flown to the island and personally carried out the arrest all would have been well. If that had been the evidence then it would have been necessary to examine more closely the questions of the reasonableness of the suspicion held and the force used in the extraordinary events that followed. But insistence on compliance with the pre-conditions that the law imposes is not to insist on a technicality of little moment.

[122] In *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 Deane J said [at 528–529]:

> "The common law of Australia knows no letter de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. That being so, it is the plain duty of any such officer to satisfy himself that he is acting with the authority of the law in any case where, in the name of the Commonwealth, he directs that a person be taken and held in custody. The lawfulness of any such administrative direction, or of actions taken pursuant to it, may be challenged in the courts by the person affected: by application for a writ of habeas corpus where it is available or by reliance upon the constitutionally entrenched right to seek in this Court an injunction against an officer of the Commonwealth. *It cannot be too strongly*

> *stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land. They represent a bulwark against tyranny. They provide the general context of the present case.*" (my emphasis)

cited with approval in *Ruddock v Taylor* (2003) 222 CLR 612 by McHugh J at [120] and Kirby J at [138].

[123] The executive, through the police, wield enormous power. It is essential that that power be used within the confines of the law. It is important that the courts acknowledge fully the hurt that can be done when the power is misused. The vehicle for doing that is by an award of significant damages. But the cases provide little guidance on how to assess those damages. Clarke JA usefully examined the categories of damage available for false imprisonment in *Spautz v Butterworth* (1996) 41 NSWLR 1 at 14 – 15:

> "… In order to examine this question and the relationship between general compensatory damages and aggravated compensatory damages it is useful to refer to some general principles concerning the awarding of ordinary, and aggravated, compensatory damages.
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> *McGregor on Damages*, 15th ed (1988) par 1619 says:
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> > 'The details of how damages are worked out in false imprisonment are few: generally it is not a pecuniary loss but a loss of dignity and the like, and is left much to the jury's or judge's discretion. The principal heads of damage would appear to be the injury to liberty, ie. the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, ie. the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status. This will all be included in the general damages which are usually awarded in these cases: no breakdown appears in the cases.'
>
> A difficulty in the assessment of damages arises because the distinction between ordinary and aggravated compensatory damages may become blurred in defamation and false imprisonment cases. I have previously discussed the relevant principles in the context of defamation in *Australian Consolidated Press Ltd v Ettingshausen* (Court of Appeal, 13 October 1993, unreported), and I returned to the topic in *McDonald*, which was, as I have already said, another case involving wrongful arrest and false imprisonment. As indicated in both those cases, the passage I find most useful in explaining the complexities in this area is to be found in the speech of Lord Diplock in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124–1126, where his Lordship said:
>
> > 'The three heads under which damages are recoverable for those torts for which damages are "at large" are classified under three heads: (1) compensation for harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value upon physical hurt, as in assault, upon

> curtailment of liberty, as in false imprisonment or malicious prosecution, upon injury to reputation, as in defamation, false imprisonment and malicious prosecution, upon inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation. (2) Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or the motive for which the defendant did it. This Lord Devlin calls "aggravated damages". (3) Punishment of the defendant for his anti-social behaviour to the plaintiff. This Lord Devlin calls "exemplary damages' …"

[124] The High Court has held that "aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from circumstances and manner of the wrongdoing": *New South Wales v Ibbett* (2006) 229 CLR 638 at [31] per Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ.

[125] The quite startling feature of this case when compared to other decisions is not so much the period of the unlawful imprisonment but the manner in which the appellants were treated. Fraser JA has summarised the salient features.[82] A very significant award of compensatory and aggravated damages was plainly justified. But in what amount?

[126] Hodgson JA gave consideration to the relevant principles in *New South Wales v Riley* (2003) 57 NSWLR 496. His judgment was referred to with approval by Tobias JA in *New South Wales v Delly* (2007) 177 A Crim R 538 at 555-556:

> "It was nevertheless common ground that the relevant principles to be applied in determining whether an award of aggravated damages was appropriate were articulated by Hodgson JA, with whom on the question of damages Sheller JA and Nicholas J agreed, in *New South Wales v Riley* (2003) 57 NSWLR 496 where, after observing (at [1271]) that ordinary compensatory damages are supposed to be an amount adequate to compensate a plaintiff for all consequences of the defendant's wrongful conduct that are not too remote, his Honour asked himself: what room is there for additional damages, which although dependant on some aggravating feature of the defendant's wrongful conduct, are still supposed to do no more than compensate for the consequences of that conduct? His Honour responded to his own question in the following terms:
>
> > 'In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt [feelings] neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of

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[82] See [108] and [112] above.

> under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.'"

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

[128] An examination of past decisions where awards have been made for egregious conduct falling within the rubric of false imprisonment and the like torts suggest to me that the amounts proposed by Fraser JA are appropriate: *Spautz v Butterworth* (1996) 41 NSWLR 1; *Houda v State of New South Wales* (2005) Aust Torts Reports 81-816; *Morro & Anor v Australian Capital Territory* [2009] ACTSC 118; *Eaves v Donelly & Anor* [2011] QDC 207; *Zreika v State of New South Wales* [2011] NSWDC 67; *Majindi v The Northern Territory of Australia, Miller and Fitzell* [2012] NTSC 25. The fact situation in each of those cases differed from that here, and precise comparison would mean little, but those decisions indicate a consistent view in Australian courts that very substantial awards are appropriate in the facts that pertain here.

[129] In my view the awards proposed by Fraser JA achieve the appropriate level of compensation. I therefore join in the orders proposed by his Honour.