SUPREME COURT OF QUEENSLAND

CITATION:	*Coffey v State of Queensland & Ors* [2012] QCA 368
PARTIES:	**JOHN LAWRENCE COFFEY** (appellant) **v** **STATE OF QUEENSLAND** (first respondent) **RON MIENTJES (POLICE OFFICER)** (second respondent) **DAVID McKENZIE (POLICE OFFICER)** (third respondent)
FILE NO/S:	Appeal No 6421 of 2012 SC No 493 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	21 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2012
JUDGES:	Margaret McMurdo P and Holmes and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is allowed.** **2. The judgment sum awarded at first instance in respect of the claim of battery as against the first respondent is increased by $12,000 to $43,628.80.** **3. Judgment is given in the sum of $600 against the second respondent in respect of the claim of battery.** **4. The appellant's claim is otherwise dismissed.** **5. The respondents are to pay the appellant's outlays on the appeal.** **6. The parties are to file written submissions by 4.00 pm on Tuesday 29 January 2013 as to the orders that should be made in respect of the costs of the proceedings at first instance.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCES WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – GENERALLY – where the appellant described an assault by Corrective Services officers moving

him through a lock – where the trial judge found the only other witness called, a Corrective Services officer, unreliable – where the appellant contends that the rejection of this witness' evidence should have led to an inference in favour of his evidence – where the trial judge rejected the appellant's account of the alleged assault for reasons independent of the Corrective Services officer's evidence – where the trial judge was not satisfied that such an assault had occurred – whether the trial judge's finding of fact should be set aside

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCES WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – GENERALLY – where the trial judge found that the appellant was the subject of a battery by Corrective Services and police officers in forcing him to the floor to enable the taking of a hair sample from him – where the trial judge found that the second respondent was not physically involved in the battery and did not direct Corrective Services officers to apply force as they did – where the appellant contends that the trial judge's findings were incorrect – where the video recording of the incident shows that the second respondent gave no directions in relation to the process by which the appellant was brought to the floor – where the video recording shows that the second respondent placed his foot on and moved the appellant's leg while the appellant was lying unconscious on the floor – whether the findings of the trial judge were incorrect – whether the actions of the second respondent did amount to a battery

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – DAMAGES INADEQUATE – where the appellant was awarded at first instance $12,000 exemplary damages, in addition to amounts for general and aggravated damages – where the appellant contends that the exemplary damages are inadequate – where the purposes of exemplary damages are to punish and deter the wrong-doer and to ameliorate the victim's sense of grievance – where the appellant was handcuffed and vulnerable in the power of Corrective Services officers – where the manoeuvre by the officers resulted in a significant battery sufficient to leave the appellant unconscious with a head wound – whether the award of exemplary damages was inadequate – whether the trial judge erred in the exercise of his discretion

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – QUESTIONS NOT RAISED ON PLEADINGS OR IN ARGUMENT – GENERALLY – where the appellant

had approximately 239 strands of hair removed while he lay on the floor unconscious – where the hair sample taken became an exhibit – where the trial judge found that the taking of such a large volume of hairs was excessive and went beyond what was reasonably necessary to take a DNA sample – where the trial judge found this to constitute a battery – where the appellant contended that the trial judge should have ordered the destruction of the hair, or its return to the appellant – where the appellant did not plead a cause of action or make any submission at trial regarding the entitlement to possession of the hair sample – whether the trial judge should have made an order regarding the return or destruction of the hair sample

TORTS – MALICIOUS PROCEDURE AND FALSE IMPRISONMENT – MALICIOUS CRIMINAL AND CIVIL PROCEEDINGS – ESSENTIALS OF CAUSE OF ACTION GENERALLY – MALICE – where the appellant was charged with contravening a requirement to provide a DNA sample – where charge was dismissed as not known to the law – where the appellant brought an action for malicious prosecution against the third respondent, who was the police officer who charged him – where the trial judge found that the third respondent had a reasonable but mistaken understanding of the relevant legal provisions – where the trial judge found that the prosecution was not brought without reasonable and probable cause or maliciously – whether the trial judge erred in his findings

Police Powers and Responsibilities Act 2000 (Qld)

Coffey v The State of Queensland & ors [2012] QSC 186, related
Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298; [2003] NSWCA 10, cited
Whitbread & Anor v Rail Corporation NSW & Ors [2011] NSWCA 130, considered

COUNSEL: The appellant appeared on his own behalf
K Philipson for the respondents

SOLICITORS: The appellant appeared on his own behalf
Crown Law for the respondent

[1] **MARGARET McMURDO P:** I agree with Holmes JA's reasons for allowing this appeal and with her Honour's proposed orders.

[2] **HOLMES JA:** The appellant brought an action against the three respondents claiming damages for breaches of common law and statutory duties of care; assault; battery; false imprisonment; and malicious prosecution. The claim arose out of events on 5 March 2001 when a Queensland Police Service team, established for the purpose of collecting DNA samples from prisoners, went to Lotus Glen Correctional Centre where the appellant was an inmate. The appellant claimed that he was assaulted by Corrective Services and police officers on three occasions in

connection with the taking of a hair sample from him: the first as he was escorted to the room where the sampling was to take place; the second when he was forced to the ground before the procedure was performed; and the third when the hair was taken from his head. He was subsequently prosecuted for contravening a requirement to provide a DNA sample.

[3] The relevant grounds of appeal were, that the trial judge erred in failing to find that there was an assault on the first occasion claimed, when the appellant was being escorted for the purposes of the procedure; that although the judge found that there was a battery when the appellant was forced to the ground, he had erred in failing to find the second respondent, Detective Sergeant Mientjes, liable in relation to that battery, and had awarded exemplary damages in an amount which was manifestly inadequate; that his Honour had erred in failing to order the return of the hair sample taken; and that he had erred in failing to find for the appellant on his claim for malicious prosecution.

The failure to find that the appellant was assaulted while being escorted

[4] The appellant claimed that while he was being taken through an access area at the gaol to the officers' mess where the sampling was to take place, he was assaulted by three unidentified Corrective Services officers who smashed his head into a perspex window and handcuffed him. The trial judge was not satisfied that the assault had occurred. The appellant asserted that his evidence of the assault should have been accepted, given that the only Corrective Services officer who gave evidence about the incident, denying it, had been discredited. That was a Mr Boundy. The learned trial judge said that because of Mr Boundy's "patently incorrect" account as to later events involving the appellant, he was unable to accept his evidence as reliable where it was uncorroborated.

[5] The appellant submitted that a rejection of Mr Boundy's evidence should have led to an inference in favour of his evidence. That, of course, does not follow: the fact that Mr Boundy was found unreliable because of other matters did not mean that the opposite of his account was necessarily true. The trial judge rejected the appellant's version because of reasons independent of Mr Boundy's evidence. A video recording was commenced on the appellant's arrival in the officers' mess. The trial judge saw no sign, in that recording, that the appellant was dazed or in pain from a recent assault. The appellant's failure to make any complaint in circumstances in which he was at pains to assert his rights was, his Honour considered, inconsistent with any such assault having occurred.

[6] The learned judge was entitled to form a view of the appellant from the video recording and other observations of him as he gave evidence. Given his Honour's advantage in hearing and seeing the appellant as a witness, one would be hesitant to depart from his view, and nothing that can be seen in the video recording of the appellant's demeanour and attitude suggests that it is appropriate to do so. The appellant does not seem taken aback by anything at the start of the video recording and he is, as the trial judge observed, not hesitant in making his opinions known; a failure to make complaint of a very recent assault seems at odds with that presentation. There is no basis for interfering with his Honour's finding of fact in this regard.

Failure to find that the second respondent was liable for battery

[7] The appellant was taken into the officers' mess at the prison where there was a verbal exchange between him and the second respondent, Senior Constable

Mientjes, about whether he would supply a sample by way of mouth swab. He was warned that if he did not, another police officer present, Sergeant Smith, would take hair samples. When the appellant was unresponsive, he was formally required to allow Sergeant Smith to collect hair samples from him, and Sergeant Smith instructed him to comply with his directions for that purpose. As the appellant made protests about wanting legal representation and proof of authorisation, Sergeant Smith directed all Corrective Services officers in attendance to lay him on the ground.

[8] As the trial judge found, the appellant was man-handled to the ground in such a way that his head was driven into the floor, knocking him unconscious and causing a gash above one eye. The learned trial judge found that the force used was not reasonably necessary and that the appellant had proved battery by the Corrective Services officers for which the first respondent, the State of Queensland, was vicariously liable. However, he found that there was no evidence that Senior Constable Mientjes was physically involved in the battery or directed the Corrective Services officers to apply force as they did. The appellant contends that those findings were wrong.

[9] An examination of the video recording shows that his Honour was correct in observing that there was no evidence Senior Constable Mientjes directed the application of force. When the appellant did not comply with either proposed means of providing a DNA sample, Senior Constable Mientjes took no part in directing what occurred next. It was Sergeant Smith who actually instructed the Corrective Services officers to take hold of the appellant and place him on the ground. However, the recording also shows that Senior Constable Mientjes did place his foot on one of the appellant's legs while he was first lying unconscious on the floor. The movement, a push of one leg towards the other, appears casual and somewhat disrespectful: it was not explicable as an attempt to maintain the appellant in the recovery position, nor were the appellant's legs thrashing about in such a way as to require their restraint.

[10] The appellant was entitled to judgment against the second respondent in respect of this incident. The action amounted to a battery, but a very minor one, which should sound in correspondingly modest damages: I would roll up an award for general damages with an allowance for interest, to give a total of $600.

Inadequacy in award of exemplary damages

[11] The learned judge awarded $7,500 in general damages for the battery, $7,500 in aggravated damages and $12,000 in exemplary damages. The appellant appeals against the amount of exemplary damages as inadequate. He contends that the limited award failed in the purpose of exemplary damages, to sting and to deter similar conduct in the future.

[12] The trial judge made these findings about the battery. Before Sergeant Smith asked him to lie on the floor, Corrective Services officers had already taken hold of the appellant, and had begun to apply downwards and forwards pressure to him while his hands were handcuffed. There was no prospect of his being able to comply in the position he was being moved in. It was of some note that he was not asked to lie down earlier, nor was there any request that he position himself sitting or lying so as to enable hair samples to be taken. Nothing was done to guard against his falling, as he did, while pressure was being applied to his upper rear shoulders. One of the

Corrective Services officers grabbed the appellant's leg and raised it behind him higher than his head, while another took his left knee, with the result that his upper body tipped downwards and his head was driven into the floor. His Honour summarised:

> "The whole of these events, from the end of Constable's Smith instruction to the officers to lie Mr Coffey down on the ground to the impact of Mr Coffey's face into the ground, only took about six seconds. The unnecessarily hurried mix and method of force adopted by the four men, executed without material forewarning to the handcuffed Mr Coffey, exhibited no sign of any planning or co-ordination directed at ensuring Mr Coffey was taken to ground safely. In the event there was such a plan then it was either ill conceived or botched in its execution."[1]

[13] Over the course of the event, the trial judge found, the appellant's actions were not violent or threatening, and he offered no passive resistance. At the highest, he tried to stay upright to avoid injury. What was done to him was

> "an ineptly executed and unsafe method of taking [him] to ground and from the outset exceeded the force that was reasonably necessary".[2]

His Honour observed that exemplary damages should be used to mark the Court's "strong disapproval" of the actions constituting the battery. He accepted that the officers had not meant to injure the appellant, but their combined application of force was intended and continuing. The impact of the appellant's head on the ground and the injury and unconsciousness caused by it were a foreseeable risk. His Honour continued:

> "That in a room containing multiple police and Corrective Services Officers a handcuffed prisoner who did not behave violently could not be guided safely to lay on the floor speaks for itself. The exercise was carried out in a hurried, ill-prepared and excessively forceful way without any proper regard for the safety of Mr Coffey. It warrants strong disapproval."[3]

[14] In *Harris v Digital Pulse Pty Ltd*[4] Heydon JA (then a member of the New South Wales Court of Appeal) accepted the correctness, as a general proposition, of the trial judge's threefold exposition of the purposes of exemplary damages:

> "To punish the wrongdoer for reprehensible conduct; to deter not only the wrongdoer but others of like mind in the community from similar conduct; to ameliorate the victim's sense of grievance and thereby to abate the urge for self help or violent retribution, to the danger of the public peace."[5]

Spigelman CJ expressed general agreement with the reasons of Heydon JA.

[15] The trial judge here faced a difficult task in arriving at a figure for exemplary damages which met that tripartite purpose. Events of this kind are, fortunately, rare

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1 *Coffey v The State of Queensland & ors* [2012] QSC 186 at [42].
2 At [64].
3 At [103].
4 (2003) 56 NSWLR 298.
5 At 343.

in litigation. His Honour appears to have been offered only one example as a guide: *Whitbread & Anor v Rail Corporation NSW & Ors*.[6] In that case, two members of the New South Wales Court of Appeal held that the conduct in question was not such as to warrant exemplary damages; the third, McColl JA, disagreed. The appellants were two brothers in their early 20s who entered a railway station intoxicated and carrying alcohol and engaged in a dispute with some transit officers. When one of them threatened to "fucking smash" a transit officer, the latter lunged at him, grabbed him by the throat and forced him to the ground. When his brother moved to remonstrate, the transit officer seized him by the arm and threw him to the ground, slamming his head into the ground and slapping his face two or three times. McColl JA would have awarded each appellant $10,000 by way of exemplary damages.

[16] In the present case, the appellant was handcuffed and vulnerable and in the power of the Corrective Services officers. The manoeuvre to which they subjected him was, as the learned trial judge said, "hurried, ill-prepared and excessively forceful". The battery was a significant one, sufficient to leave the appellant unconscious; that in itself was some measure of head injury. The exercise was carried out with a signal disregard for the appellant's safety and wellbeing. It should have been apparent that he had been injured. Even once he had been rendered unconscious, the officers did not move promptly to assist him.

[17] The exercise of arriving at a figure which appropriately recognises the aims of exemplary damages is necessarily a subjective one, but I have concluded that the appellant is right in saying that the award in this case was inadequate. An award of $12,000 was not such as to be likely to make a real impression of the kind needed; to mark disapproval and to ensure that the first respondent took steps to deter such conduct for the future. The trial judge erred in the exercise of his discretion. A figure of $24,000 should be substituted in order to achieve the purposes of awarding exemplary damages.

Failure to order destruction or return of hair sample

[18] Once the appellant had been thrown to the floor where he lay unconscious, Sergeant Smith set about pulling hairs from his head using his gloved hands. The hair taken became an exhibit; it contained, his Honour said, 239 strands of hair, far in excess of what was necessary for a DNA sample. He found that the taking of such a large volume of hairs involved an application of force to the appellant that went beyond what was reasonably necessary to take a DNA sample and constituted battery for which the first defendant was vicariously liable. He awarded $500 in general damages and $500 in aggravated damages in respect of that battery.

[19] Those conclusions did not give rise to any appeal grounds other than one asserting that the judge ought to have ordered that the hair sample be destroyed or returned to the appellant. The difficulty for the appellant, which is insurmountable, is that he did not plead any cause of action which could result in an entitlement to return of the hair, nor did he make any submission at trial to the effect that it ought to be returned. The issue of who was entitled to possession of the hair sample was simply not litigated before his Honour; consequently his omission to make an order entailed no error.

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6 [2011] NSWCA 130.

Failure to find malicious prosecution claim made out

[20] About a month after these events, the appellant was charged with contravening Senior Constable Mientjes' requirement that he provide a DNA sample by using a mouth swab. The magistrate dismissed the charge on the basis, firstly, that provisions of the *Police Powers and Responsibilities Act* 2000 dealing with the taking of DNA samples by consent applied (which does not appear to be correct) and had not been complied with, and, secondly, that the Act did not provide any power to require a DNA sample to be given by a prisoner although it gave the power to take the sample (which does appear to be correct). Consequently, he dismissed the charge, a result which was upheld on appeal to the District Court.

[21] Detective Sergeant McKenzie was the officer who laid the charge against the appellant, and it was his conduct in doing so which was the basis for the appellant's action in malicious prosecution against him. It was unsuccessful, the trial judge finding that it had not been proved that the prosecution was without reasonable and probable cause or was malicious. The applicant's appeal grounds include assertions that that finding was erroneous and that the trial judge erred in not accepting as evidence a report by the prosecutor in the summary proceedings, prepared for the appeal against the dismissal of the charge.

[22] The report in question was an advice prepared by the police prosecutor on the prospects of appeal. The prosecutor was not called to give evidence and counsel for the respondents, not surprisingly, objected to the report's tender through Sergeant McKenzie, who had not seen it before. In the circumstances, his Honour's ruling that the document was not admissible was plainly correct.

[23] The appellant contended that the malicious prosecution claim should have succeeded because the charge brought against him alleged that he contravened Senior Constable Mientjes' requirement to provide a DNA sample by using a mouth swab, but Senior Constable Mientjes had given evidence he had not given him a direction to use the mouth swab. The appellant was handcuffed and could not have used a mouth swab himself, as was apparent from the video tape. It followed that the prosecution could not have been initiated with reasonable and probable cause and that it must have been malicious.

[24] The appellant's reference to Senior Constable Mientjes' evidence was taken out of context. The question and answer relied on was as follows:

> "Did you - did you provide a mouth swab to Coffey?-- No, the requirement was to follow the directions by Sergeant Smith. I would never - never at any stage as a requirer would I have possession of a mouth - a mouth swab."

Senior Constable Mientjes explained that whether the appellant was released from handcuffs depended on whether he agreed to supply the DNA sample. Because the appellant had not acceded to the requirement, nothing further had been done by way of provision of the mouth swab.

[25] If the charge requiring the giving of a DNA sample had been properly brought as a matter of law, it would have been open to a Magistrate to find on the evidence of the video recording that the appellant, through his prevarication and refusal to acknowledge what he was being asked, had indicated that he would not comply with

the requirement. The third respondent, Sergeant McKenzie, had consulted the police prosecutor about the charge; his evidence was that he believed it properly brought. The learned judge found, consistently with the evidence, that Sergeant McKenzie had a reasonable but mistaken understanding of the relevant legal provisions. His Honour's conclusion in dismissing this claim was correct: there was no evidence from which malice could be inferred.

Conclusions

[26] I would allow the appeal to the extent of giving judgment for the appellant in respect of the claim of battery against the second respondent in the amount of $600 for general damages and interest, and increase the amount of exemplary damages awarded against the first respondent to $24,000. In the result, the appellant will have achieved a better outcome than that offered by the respondents prior to trial, with consequences for the costs orders. The trial judge had previously reasoned that since the appellant had succeeded against only one of three respondents, he should have only half of his costs; that reasoning may no longer hold.

[27] The parties should have the opportunity to make written submissions as to what costs orders should now be made in respect of the trial, other than two orders relating to costs in respect of specific matters. They were orders for the appellant to pay the costs thrown away in consequence of an order of 9 June 2010 vacating the trial date, and the costs of an application filed 1 February 2012, including costs thrown away on an adjournment on 3 February 2012. Those orders should stand.

Orders

[28] The orders should be:

1. The appeal is allowed.

2. The judgment sum awarded at first instance in respect of the claim of battery as against the first respondent is increased by $12,000 to $43,628.80.

3. Judgment is given in the sum of $600 against the second respondent in respect of the claim of battery.

4. The appellant's claim is otherwise dismissed.

5. The respondents are to pay the appellant's outlays on the appeal.

6. The parties are to file written submissions by 4.00 pm on Tuesday 29 January 2013 as to the orders that should be made in respect of the costs of the proceedings at first instance.

[29] **WHITE JA:** I have read the reasons for judgment of Holmes JA. I agree with her Honour's reasons and the orders which she proposes.