

# DISTRICT COURT OF QUEENSLAND

CITATION: *Patchett v Nichols* [2024] QDC 45

PARTIES: **HARLEY ANDREW PATCHETT**  
(Plaintiff)

**v**

**CALEB DANE NICHOLS**  
(First Defendant)

**And**

**DAVID GORDON NICHOLS**  
(Second Defendant)

FILE NO: 202/20

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court

DELIVERED ON: Monday 8 April 2024

DELIVERED AT: Brisbane

HEARING DATE: 26, 27 and 29 February 2024

JUDGE: Porter KC DCJ

ORDERS: **1. The Court will hear the parties as to the form of order to be made.**

CATCHWORDS: TORTS – Interference with the person – Trespass to the person – Assault – Battery – Liability-only trial – Where the first defendant purchased a used vehicle from the plaintiff's Business – where the plaintiff alleged a dispute arose over the vehicle which led the defendants assaulting the plaintiff – whether an assault occurred on the date of incident

EVIDENCE – Admissibility – Hearsay – Exception: documents – where an employee of the Business prepared a receipt for the payment of the repairs to the Van which contained statements which tended to support the plaintiff's case – whether the Receipt was properly admitted pursuant to section 92 *Evidence Act 1977* (Qld)

TORTS – Multiple wrongdoers, proportionate liability and

contribution – Joint wrongdoers – where the first plaintiff did not directly do acts which comprised the tort of battery by the second plaintiff – whether the first defendant is jointly liable as an accessory to the second defendant’s battery of the plaintiff

LEGISLATION:	<i>Evidence Act 1977</i> (Qld) s. 92(1)
SECONDARY SOURCES:	Forbes, <i>Evidence Law in Queensland</i> , (14 <sup>th</sup> Edn) <i>Halsbury’s Laws of Australia</i> (Online Edn current 4 July 2023) <i>Cross on Evidence</i> (Online version current March 2024) Sappideen and Vines, <i>Fleming on Torts</i> , (10 <sup>th</sup> Edn)
COUNSEL:	T A Nielsen & R Boal for the Plaintiff A C Harding for the Defendants
SOLICITORS:	Travis Schulz & Partners for the Plaintiff Delaney Lawyers for the Defendant

## Contents

Summary .....	3
Events up to 8 July 2017 .....	3
The parties and the Business as of 2017 .....	3
The purchase of the Van .....	5
The mechanical problems pre-July 2017 .....	7
The July 2017 repairs .....	8
8 July 2017 .....	8
Mr Patchett’s subsequent health and conduct .....	10
The shoulder injury and bruising .....	10
Mr Patchett’s mental health .....	11
The police investigation .....	12
The versions of disputed events .....	12
Mr David Nichols .....	12
Mr Caleb Nichols .....	15
Mr Moore .....	17
Mr De Marco .....	19
Mr Patchett .....	22
The Receipt .....	27
Admissibility of statements in the Receipt .....	27
Weight .....	29
The witnesses .....	30
Mr Nichols .....	30
Caleb .....	30

Both defendants.....	31
Mr Moore .....	32
Mr De Marco.....	33
Mr Patchett .....	34
<i>Brigginshaw</i> .....	34
Findings on contested issues of fact.....	35
Consequence of the findings .....	39
The pleaded case .....	39
These reasons on the pleaded case .....	40
The tortious causes of action.....	41
Accessory liability for Caleb? .....	44
Conclusion.....	46

### **Summary**

- [1] The plaintiff (**Mr Patchett**), through a company, operated a wholesale car yard at Mudgeeraba called Mudgeeraba Motor Mart (the **Business**). The first defendant (**Mr Caleb Nichols**) purchased a used vehicle from the plaintiff's company in February 2017. Mr Patchett alleges that on 8 July 2017, a dispute arose over that vehicle which led to Mr Caleb Nichols and his father (the second defendant, **Mr David Nichols**) (together, **the Nichols**) assaulting him. He seeks damages for assault and battery in respect of injuries caused by that alleged assault. On 8 September 2023, Judge Jackson ordered that the question of liability be decided separately.
- [2] For the reasons that follow, I find that the plaintiff has established that the defendants committed the torts of assault and battery as described in the findings below.

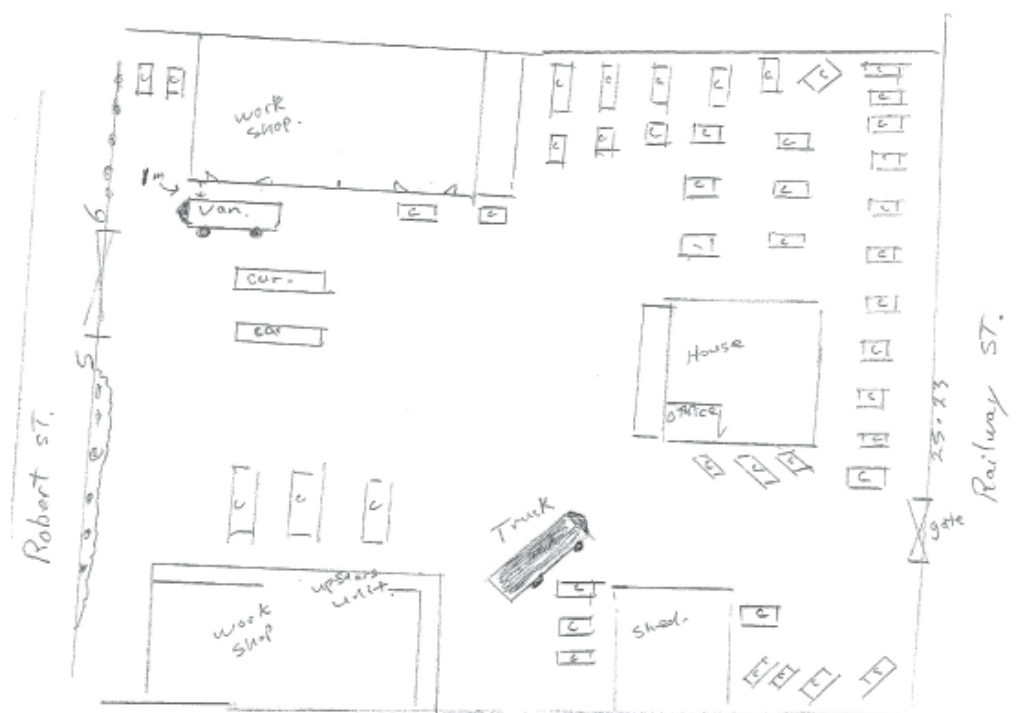
### **Events up to 8 July 2017**

- [3] All parties agree that there was an incident on 8 July 2017 and (subject to one important dispute of fact, and some relatively minor differences on points of details) broadly agree on the circumstances leading up to it.

### ***The parties and the Business as of 2017***

- [4] Mr Patchett was the owner of the company which operated the Business for many years. He was a long-standing licenced motor dealer and valuer. As of 2017 he was about 68 years old. He is now 75.

- [5] The Business occupied a site of about 1 acre with two points of street access, from Railway Street and Robert Street. It had four substantial structures: a one-story office near the Railway Street entrance, a workshop with an upstairs residential unit opposite the office, and two workshops either side of the Robert Street entrance. A diagram of the site was accepted as broadly accurate,<sup>1</sup> though there was disagreement as to the orientation of the Van on 8 July and the precise location of the Truck. The boxes marked “c” showed the estimated location of parking for cars for sale. There were many cars on the site from time to time, including on 8 July



2017.

- [6] Mr De Marco worked with Mr Patchett in the Business. He described his role as to run the Business for Mr Patchett. He obtained a motor dealer licence in 2005 and worked with Mr Patchett for about two years, up to the end of 2017. He said that he had not seen Mr Patchett since then, except briefly at some stage at an industry event. Mr De Marco had an arrangement with Mr Patchett's company where sometimes they would buy a vehicle together and share the profits. He said that arrangement applied to the Van. Mr Patchett was not so clear on the arrangement generally, nor the specific arrangement for the Van in particular. Whatever happened on 8 July 2017, Mr Patchett's mental health has decayed since then, which in my view impacts upon his recollection of detail (more on that later). However, I have no reason to doubt Mr De Marco's evidence on the point. Mr De Marco is a younger than Mr Patchett and was in his fifties in 2017.

<sup>1</sup> Ex. 2

- [7] Mr Caleb Nichols (**Caleb**) was about 20 years old in 2017. He worked as a carpenter. He had not purchased a vehicle before buying the Van. He was working with his father in the building industry about that time. Mr David Nichols (**Mr Nichols**) also works in the building industry. As at 2017, he did some building work on his own account but was also involved in site supervision of large projects. Father and son presented as quite different physical figures, and there was no suggestion they presented differently in 2017. Caleb was a slimmer figure. Mr Nichols was a large man, solidly built and of the order of 110 kg. They could be distinguished easily from one another, even from a distance.

***The purchase of the Van***

- [8] In about 2016, the Business purchased a 2007 model VW Transporter van (the **Van**). At that time, Caleb was looking for a vehicle to use for work. That led him to the Business. He met Mr De Marco. He showed an interest in the Van. He took it for a test drive with Mr De Marco. He said that on the test drive, the temperature gauge went up and down, and that Mr De Marco said that was an electrical fault and would be fixed.

- [9] Caleb's precise evidence about this discussion was as follows:

- (a) In examination, he said:

Okay. And do you recall anything notable about what happened during the test drive?---Yep. As we were driving the car, the temperature gauge kept going up and down. And Paul mentioned to me that it was a small electrical issue and it would be fixed by the time I pick up the vehicle.

Okay. So, at this point, had you purchased the vehicle?---No.

Okay. And did you have any other conversations with him before purchasing the vehicle?---No, not really.

Okay. Well, when you went to purchase the vehicle, you go back to the yard?---Yes.

And did you talk to him about the problem?---Yes. And he said it was all fixed.

- (b) In cross examination, he said this:<sup>2</sup>

And Mr De Marco said to you, didn't he, that you hadn't signed the – well, you hadn't elected to take out a warranty when you purchased the vehicle?---No, but he mentioned to me every – from the test drive that he would fix the – if there was a recurring issue, that he would fix it.

- [10] In examination, Mr De Marco did not recall a problem prior to Caleb purchasing the vehicle but did recall Caleb complaining about it overheating later. In cross examination, he did not directly concede that there was a problem in the test drive, but he did concede that if he had identified an electrical problem in the test drive he would have said that it would be corrected before sale. He seemed to be content to

---

<sup>2</sup> TS2-94.39

accept those propositions. He did not recall saying that if there were any problems with the Van, the Business would fix them.

- [11] It is common ground that there were subsequently at least three occasions where there was a problem with the vehicle. The pleadings on both sides were not specific on the issue. Until Caleb gave evidence, all parties acted at trial on the basis that the problem with the vehicle was overheating. Mr De Marco, for example, accepted that there was an early problem raised with overheating, and accepted that was the issue at other points.
- [12] However, Caleb was clear that the problem was the flickering of the temperature gauge, not overheating as such, and said that this was the problem on each occasion it was returned. Frankly, I am not surprised if this is correct. Caleb said that the problem he noticed in the Van manifested itself within minutes of driving the Van away after being repaired on at least three occasions. It seemed to me unlikely that the Van was overheating so quickly before the engine had been in use for any period. No one had any interest in reconstructing events one way or the other as to what the problem with the Van was.
- [13] Another insight on this issue is Mr David Nichols' evidence that he recalled Caleb describing some issue with the Van on the test drive, but that he was told about that after the contract to purchase was signed. He said he told Caleb he would not have bought the Van, but it was too late. Mr David Nichols might have been thinking of some later discussion, but Caleb's version was that it occurred just after signing the contract, and that seems to me likely to be the sort of thing he would recall.
- [14] This ambiguity in recollection on this minor matter reflects the fact that these events occurred many years ago. However, there was clearly an on-going problem or problems with the Van.
- [15] Caleb attended on 23 February 2017 and signed the sale contract. The sale price was \$14,409 incl. GST. He had arranged finance beforehand. Mr De Marco's recollection was that it took about a week prior to that for finance to be arranged. Caleb drove the Van away that day.
- [16] The contract expressly stated that the vehicle was not subject to a statutory warranty (nor was any contractual warranty included). Mr De Marco's evidence was that that it was his understanding at the time that there was no statutory warranty and that he offered Caleb an extended (presumably contractual) warranty when he bought the vehicle, but that Caleb decided against it.
- [17] Caleb said he was not offered the extended warranty because he was told the value of the car was too low. He said, "I don't think he offered that in that situation".<sup>3</sup> Whether that was correct or not, the most plain inference from this evidence is that Caleb's understanding was that there was no warranty on the Van (or at least that Mr De Marco took that position), despite Caleb's evidence that he would not have

---

<sup>3</sup> TS2-95.2

read the sale contract or noticed the specific exclusion of warranty. It is also highly unlikely that the extended warranty would have been mentioned without an explanation of the proposition which made it relevant: the lack of a statutory warranty.

- [18] This supports Mr Patchett and Mr De Marco's evidence that they shared the understanding that there was no warranty on the Van, and that Caleb understood that at the time he purchased the Van. I find accordingly.

***The mechanical problems pre-July 2017***

- [19] All witnesses agreed that dealings in relation to the Van were between Caleb and Mr De Marco up to 8 July 2017. Mr David Nichols thought he sent one email and might have had a telephone call.
- [20] Caleb gave a more detailed version than Mr De Marco about the mechanical problems. It is not surprising that Mr De Marco was not certain of the details. There was no suggestion that he had had anything to do with this matter for many years prior to receiving the subpoena to give evidence. It is less surprising that Caleb gave more detail. The purchase of the Van and the problems it had were certainly more important in his life than Mr De Marco's, and of course Caleb had been a party to this proceeding.
- [21] Despite the differing detail of recollection, there was broad agreement that the Van had problems and was returned for repairs on at least three occasions prior to the return of the vehicle on the last occasion which led to the events on 8 July 2017. Caleb gave evidence of returning the vehicle and being told of repairs to the water pump, the EGR and the radiator cap. Mr De Marco did not recall the first two but conceded that the Van came for repair on several occasions.
- [22] I accept that the Van was brought in at least 3 times to address defects before the occasion which led to the events on 8 July 2017. Caleb said that the Van was with the seller for some one to two weeks and sometimes more each time and that this caused him difficulty in needing another car. Mr Nichols recalled the need to provide Caleb with a vehicle while the Van was off the road. I accept that evidence.
- [23] By the time the Van was brought in for the last time, Mr De Marco considered it a problem vehicle. He accepted it was a "nightmare". Ultimately the Van was returned after Caleb said complained for at least the fourth time. It was this occasion which led to the events on 8 July 2017.
- [24] Caleb was not asked to pay for any of the pre-July 2017 repairs of which there were at least three such. I have found that it was the common understanding that no warranty applied. So, who paid for the earlier repairs and why?
- [25] Mr Patchett said Mr De Marco told him in relation to an earlier repair that Caleb was a "nice young boy" and Mr Patchett agreed they should cover the costs of those repairs. Mr De Marco was not asked about this specifically but gave similar evidence about the approach to the cost of the more expensive repairs leading to the

8 July incident, discussed below. Mr De Marco did not say anything about the earlier repairs being expensive when he gave evidence about them.

- [26] Caleb was asked about the costs of the earlier repairs. He said he was told by Mr De Marco of the costs and that some were \$1000 and \$2000. It seems inherently improbable that such relatively expensive repairs would have been done as a matter of course if no warranty existed. That is particularly so where the sale price of the Van was about \$12,500 excl. GST, and the profit margin on any view would have been significantly lost on repairs of such expense. I think that would be so even if Mr De Marco had made some statement during the test drive that the Business would repair the flickering temperature gauge. Given the context in which Caleb volunteered that evidence, (when being cross examined on the amount of the repairs on the last occasion), I am not persuaded that that evidence was correct. I find that the 8 July repairs were of quite a different order of magnitude in cost than the earlier repairs.

### ***The July 2017 repairs***

- [27] We now come to the alleged \$2000 agreement in relation to the July 2017 repairs.
- [28] In the lead up to 8 July 2017, Caleb complained again about the temperature gauge. Mr De Marco asked Caleb to bring it in again. Mr De Marco arranged a further check by a mechanic. He chose a different mechanic on this occasion because he was concerned that prior advice had not solved the problem. He said that the mechanic told him that the Van had a blown head gasket and that the repairs would cost \$4000. Caleb agreed that he was told what the problem was by Mr De Marco at the time. He also agreed the price was mentioned but said he did not recall the price. However, he agreed the repair was a sizeable one. It was in that context that he mentioned the costs of the earlier repairs mentioned in [26] above.
- [29] There are no documents in evidence showing the cost of any the repairs. The fate of the business records of the Business is explained in paragraph [103] below. I disregard the possibility that there was never any work done on the Van and that Mr De Marco fabricated the whole story of work being done and its cost. It was never suggested to Mr De Marco, and it is highly improbable given the uncontested history of repeat attempts to repair.
- [30] Whether Mr De Marco reached an agreement with Caleb that Caleb would contribute \$2000 towards the repairs is contested. Mr De Marco says that was discussed and agreed. Caleb rejects any suggestion of such discussion and agreement. I return to this below.

### **8 July 2017**

- [31] The following is common ground, not seriously disputed or accepted by me on the evidence.
- [32] 8 July 2017 was a Saturday. Mr Patchett arrived first. Mr Patchett was not planning to work on that day. (Indeed, my impression is that Mr Patchett by that stage was



leaving most of the day-to-day work on site to Mr De Marco.) Mr Patchett planned to help a friend with some gardening work. He intended picking up a truck owned by the Business for that purpose (the **Truck**). The Truck was one with a high cab, like the cab in the photograph tendered.<sup>4</sup> It had one or two steps up to get into the cab and the driver's seat was about 1.5m from the ground.

[33] Mr De Marco arrived next and saw Mr Patchett, though did not speak to him. He went to the office. Mr De Marco had arranged with Caleb for him to pick the Van up that day. The defendants arrived soon after and entered the yard through the Railway Street gate. They went over to look at the Van with Mr De Marco. All witnesses agree that the Van was parked roughly in the location shown on the sketch at [5] above, though:

- (a) The defendants placed it at an angle of about 45 degrees, rather than parallel; and
- (b) A witness, Mr Moore, placed the Van closer to the other end of the garage and facing towards Railway Street rather than Robert Street.<sup>5</sup>

[34] The defendants and Mr De Marco went over to the Van. The Van was started up and Mr David Nichols looked under the bonnet. There was no conflict at this point. A test drive was discussed. The detail is disputed, but it is not disputed that Mr De Marco then went over to Mr Patchett, and I accept he did that to ask him to assist. Mr Patchett came over to the Van and introduced himself. All agree this is the first time he had ever met or spoke to either of the defendants.

[35] All the principal protagonists agree that soon after he walked up to the Van, Mr Patchett turned off the ignition. What happens next is highly contentious. In broad terms, Mr Patchett and Mr De Marco give evidence that Mr David Nichols was aggressive and that they were manhandled (to use a neutral term) by the defendants. The defendants say that Mr Patchett was aggressive and fell to the ground in the process of grabbing at the keys of the Van. Mr Moore gives an account which corroborates some aspects of Mr Patchett's and Mr De Marco's account.

[36] Mr Patchett and Mr De Marco gave evidence that at some stage in the confrontation at the Van, Mr Patchett said to Mr David Nichols that he had had a heart operation and hip replacements.<sup>6</sup> Mr David Nichols agreed that Mr Patchett told him that he had a heart condition at the Van.<sup>7</sup>

[37] All the principal protagonists agree that the Truck was located roughly in the area shown in Ex. 2. Mr Moore, on the other hand, places it nearer to the Van as shown in Ex. 9. All agree (including Mr Moore) that soon after that first encounter at the

---

<sup>4</sup> Ex. 5.

<sup>5</sup> See Ex. 9.

<sup>6</sup> TS1-38.14; TS2-36.29.

<sup>7</sup> TS2-64.12; TS2-78.8.

Van, Mr Patchett went and climbed into the Truck, and that Mr David Nichols followed Mr Patchett to the Truck.

- [38] Both Mr Patchett and Mr David Nichols give evidence that Mr Nichols grabbed the keys of the Truck and Mr Patchett's mobile phone and threw the phone away. However, Mr David Nichols says he otherwise did no violence to Mr Patchett at the Truck or otherwise. Mr Patchett describes being pulled out of the Truck to the ground and an extended assault.
- [39] All agree that the Nichols left in the Van soon after, though each describes something different in that regard.
- [40] The resolution of the differing versions of this event are the central issue in this trial.

### **Mr Patchett's subsequent health and conduct**

#### ***The shoulder injury and bruising***

- [41] After the Nichols left, Mr Patchett went home. His daughter took some photographs which show Mr Patchett had a torn sleeve on the left arm of his T-shirt, a couple of small abrasions on this forehead. Mr Patchett went to see his doctor, Dr Mark Spanner. Dr Spanner was called. There was no reason to doubt his evidence. Dr Spanner confirmed that Mr Patchett had had both hips replaced and four coronary bypass surgeries in the years leading up to 2017. He also confirmed that he saw Mr Patchett on 8 July 2017. He had a note of that consultation and an independent recollection of it. He said that Mr Patchett complained of a sore right shoulder. Mr Patchett told the doctor that he had been assaulted. Dr Spanner recalled being told by Mr Patchett that there had been a confrontation, he feared for his life, and that someone had tried to take a car off the lot and did not want to pay, and he had tried to stop them. There was no note of this conversation in the medical notes.
- [42] Dr Spanner's examinations showed significant inhibition in movement in the shoulder, and he referred Mr Patchett for investigation which confirmed damage to the shoulder. There is no evidence this damage existed before 8 July. Dr Spanner did not note the cuts showing in the photographs, at least on his very brief notes. The cuts were self-evidently minor, I do not draw much from the doctor's failure to notice or record them.
- [43] Dr Spanner saw Mr Patchett again on 14 July 2017 and 24 July 2017. On the latter date, Mr Patchett complained about bruising he said was caused by the assault on his back and weakness in his thigh. Dr Spanner observed bruising on the right side of the chest on the back. This is consistent with photographs taken about that time.<sup>8</sup> There is no evidence or suggestion of any event post 8 July which might have caused this bruising.

---

<sup>8</sup> Ex. 7

- [44] Surgery was undertaken in August 2017 to repair the damage. Mr Patchett continued to complain about problems with his shoulder, and there were further investigations in late 2018 and another operation.
- [45] I find that Mr Patchett received a significant shoulder injury on 8 July 2017. I did not understand that ultimately to be disputed by the defendants. They cavil with how that injury occurred.

***Mr Patchett's mental health***

- [46] Starting in October 2017, Mr Patchett began complaining to Dr Spanner about anxiety, sleeplessness and trouble dealing with the memory of the alleged assault. As early as 4 October 2017, Dr Spanner wrote to a psychologist referring Mr Patchett for "PTSD" following an assault.<sup>9</sup> By late November 2017, Mr Patchett was in a very distressed state and Dr Spanner had to notify the police about his potential risk for suicide and threats of harm to the defendants. Mr Patchett also expressed distress that the police were not investigating or charging the Nichols. The police never charged the defendants.
- [47] Mr Patchett's mental health continued to decay. It appears to have reached its nadir in November 2018 when he was involuntarily admitted to hospital following a suicide attempt.<sup>10</sup> It appears he also had difficulties of his own with the police about this time and pleaded guilty to a stalking charge. The medical notes reflect rumination on the assault and the failure of the police to prosecute. A report at the time gives an insight into his mental condition. In late November 2017, Dr Siriwardhana, a psychiatric registrar at GCUH, described his understanding of the position as follows:

Mr Patchett was admitted to OPMH ward at GCUH in October after a suicidal attempt by hanging, where he was found by his neighbours and brought in to hospital. He has nil previous history of mental illness. Mr Patchett has reported that he was assaulted by strangers in July last year and again in January 2019. He reports his attempts to seek justice through the police services have been repeatedly rejected and he reports ongoing harassment by his perpetrators through phone calls and messages. He claims to be wrongly accused by them around 'stalking of a young girl' which he has a pending court hearing. These claims have been verified as being true by his wife during his recent hospital admission. There has been significant emotional distress and preoccupied of events since these events to the extent that he is not able to maintain normal level of functioning. He was assessed over a period of 3 weeks and noted not be displaying any psychotic features. His distress was considered to be more supportive of PTSD. He was commenced on a low dose Olanzapine and Sertraline with noted benefit in his distress.

- [48] There was no suggestion at trial that Mr Patchett had had mental health problems before 8 July 2017, certainly not of the extreme kind which quickly manifested afterwards. Nor was there evidence of harassment by the defendants. It is reasonable to conclude that those problems were triggered by the events of that

---

<sup>9</sup> Dr Spanner readily agreed he did not have specialist psychiatric training, but his use of the term does reflect the observations of a very experienced GP in relation to a patient he knew reasonably well. Mr Patchett's mental health deteriorated quickly.

<sup>10</sup> Ex. 11 p. 132

day. However, that does not mean that Mr Patchett's version is necessarily correct. How he might choose to remember an incident he found traumatic might be quite different from what occurred. Further, it is difficult to avoid the conclusion that his quick descent into severe mental illness might have been nascent and this incident, whatever happened, might have just been the trigger. To be clear, I do not consider the evidence of mental illness triggered seemingly by events on 8 July to be evidence which tends to prove that the defendants assaulted Mr Patchett as he says.

### **The police investigation**

[49] Mr De Marco called the police at some point after the defendants left. There was a police investigation. Mr Patchett gave a statement to police on 9 July 2017 which was tendered.<sup>11</sup> Mr Nichols also gave a statement to police in about October 2017 and Caleb gave a statement in January 2018. It seems likely Mr De Marco also provided a statement. Certainly, he was supportive of Mr Patchett at the time and expressed surprise in evidence that the police did not take more action about the matter.

[50] Also, during the investigation, the police spoke to Mr Adam Moore. Mr Moore was living in the unit located above the workshop, opposite the workshop where the Van was parked. His partner was the tenant. He was present on 8 July 2017 and heard and saw some parts of confrontation. He gave two statements to police. Based on the course of cross examination, in the first statement it would appear he gave evidence which described some form of assault. In late November 2017, however, he gave an addendum statement in which he said, "I cannot confirm if anyone was assaulted" and, "I cannot confirm if anyone was touched or physically harmed".

[51] Ultimately, no charges were laid.

### **The versions of disputed events**

#### ***Mr David Nichols***

##### *Examination*

[52] Mr Nichols said Caleb had told him about an overheating problem and said that he understood from Caleb that Mr De Marco had said he would fix the "overheating" problem when it arose in the test drive, and that he had no discussion with Caleb about him owing further money on the Van.

[53] Mr Nichols had not gone with Caleb to collect the Van before. He said Caleb asked him to come on this occasion to check over the Van. He met Mr De Marco in his office and told him they were there to pick up the Van. They went together to the Van; Mr De Marco started the vehicle and popped the bonnet and Mr David Nichols did some basic inspections. He said they revved the Van to see if it would

---

<sup>11</sup> Ex. 8.

overheat. He said that while this was happening an older man he had not met before approached the Van and was introduced by Mr De Marco. That was Mr Patchett.

- [54] He said Mr Patchett said something about having done a lot of work on the Van for them. Mr Patchett's tone was half amicable but a bit agitated. He said he and Caleb were on the driver's side door near the garage with the Van parked at an angle. He then said:

I remember ... I was talking at Caleb, but more or less addressing the other two gentlemen, and I was basically saying ... how disappointed I was with the – with the service and, you know, how Caleb's been paying the car off for such an extended period and how – how disappointed I was that he was never provided a car, and it was kind of round ... about this point that Harley dived – pushed – forced his way through at ... quite considerable force that – I mean, he half barged me out of the way, and I was quite taken aback. He's ... lunged at the keys in the car with one of his hands and ... snapped it off, but ... he was half caught up ... on the threshold of the vehicle, and ... I was in utter disbelief that he'd done it. He'd snapped the key off in the ignition and ... I said some not so choice words at the time...

I said "what the fuck are you doing you silly old bastard".

- [55] He said Mr Patchett had fallen in an awkward position and they, or he, helped Mr Patchett up. He recalled Mr Patchett saying that he'd "had enough of this bullshit". He said there followed an animated argument between all four men and that Mr Patchett was as angry as anyone could get. Mr Nichols said that he stated they had had enough and would take the Van and fix it themselves. He told Caleb to back the Van out and Mr Nichols stood behind him to guide Caleb.

- [56] Mr Nichols then observed Mr Patchett getting into a Pantech Truck. He said:

... it was in the driveway, and he started it up, and I just thought to myself, "Oh, he's going to try and block the driveway, this guy." So – so I've gone down to the – down to the truck and I've opened up the door and the truck was running, but I don't think he could move it because he was waiting for the air to build up in the brakes, and so – yeah. I've taken the keys out of the ignition. He had his phone in his hand. I think I threw his phone over my shoulder and went out to Caleb and started guiding him back more. And soon as Caleb was free of the truck and around towards the front gate, I've – the last thing I can remember is Paul and Harley standing there on the left-hand side, and I just threw Harley the keys and I said, "Mate, we're out."

- [57] Mr Nichols did not say why he took the phone, and on inquiry, said he did not know why. On being led about the mention of a test drive, he agreed he had a discussion with Mr De Marco about a test drive, and then discussed it again when Mr Patchett arrived. On that discussion he said:

I just said that I'd prefer to have a look at the car with Caleb by ourselves so I can – we can take it for a whiz up the road. We can pull over. We can have a good look at it ourselves without the pressure of those guys being there. And ... that's kind of where he was starting to get wound up. He goes, "There's no fucking way you're driving that car without me being in it," and – which I – and I said, "Why can't we drive it? What's the problem?" So – but he – he was adamant he wasn't going to let us drive the car. Yeah.

*Cross examination*

[58] In cross examination, Mr Nichols said he and Caleb were dropped off by Isaac, another son. He said he was definitely not angry when he arrived, rather he was disappointed. He accepted he had not accompanied Caleb to pick up the Van before or knew of any previous difficulty in collection. He was asked whether he told police in his statement that, on the way in, Caleb thanked him for coming “because these guys were going to put it over him for sure”. After some prevarication he accepted he said that to police and accepted that was what he thought at the time.

[59] He accepted he told police that he had had many emails and phone calls with the yard himself about the Van, though described that as a poor choice of words. He maintained he knew nothing of any agreement to pay \$2000 and said that so far as he knew, Caleb did not have that money, and that he, Mr Nichols, would have had to pay that.

[60] He was challenged about why he asked for a test drive in circumstances where Caleb owned the car. Mr Nichols said that was what was normally done when test driving a car. He rejected the suggestion that he asked to go for a test drive because he knew money was owing on the Van. He said Mr De Marco was not concerned about the test drive, but that Mr Patchett was and insisted on going.

[61] He was challenged on his statement to police that Mr Patchett was diving through the air horizontally and conceded this was exaggerated. He denied that he confronted Mr Patchett and was the instigator of angry words. He said he was not angry that day.

[62] He said he was about 110 to 120 kg, had played a bit of football and done a little bit of boxing, then:

Yes. And did you tell the police that, “If I put one finger on that bloke, he would be on a stretcher heading off in a meat wagon”?---For sure.

So you’re a tough guy?---Well, I don’t perceive myself as that but I – you know, he’s a very frail individual and consider myself a larger type of person. And if I dearest laid hands on him like I’ve read in his brief, there’s – I – it’s nonsense. It - - -

But you’ve got a temper, haven’t you, Mr Nichols?---No.

[63] He accepted he had pleaded guilty to an offence of common assault on a taxi driver, under the influence of alcohol. He said he did not recall the details. Then this:

... And, on this occasion, the 8th of July 2017, you thought that your son was being ripped off by some dodgy car salesman, didn’t you? I don’t know about ripped off. I – you know, he purchased a vehicle. He was happy with the van. He just wanted to have a car that he could drive home. I – by all accounts, they were trying to do the right thing but I just don’t think they knew how to get it repaired.

Well, did you tell the police that you called them a *bunch of thieving, robbing buggers*? Yeah, yep.

And did you tell the police that, “*I’ve never seen two blokes rip off a young man*”? Yeah, well, I think that [indistinct] another period, yeah, I – yeah. To be disappointed with how it was handled, yeah. *I think they were a bunch of con artists, rip offs, yes.*

Yes? Yep.

[underlining and italics added]

[64] The contrast between what Mr Nichols first said (underlined) and what Mr Nichols told the police (italics) is stark. The former is the language of a temperate and fair person. The latter is the language of an angry man.

[65] Mr Nichols recalled Mr Patchett speaking about a heart problem after getting him up off the ground. He denied he followed Mr Patchett to the Truck. He said he had his back to Mr Patchett for 30 seconds or so and was still conversing with Mr De Marco (who was being half helpful) then turned around and saw Mr Patchett at the Truck. He was again asked why he cast the mobile away, and said it was a heat of the moment thing. When I asked if he was very angry at that time his answer was:

I was – not angry, but I was – I was still in shock that – what had even just happened. I – angry, disappointed, shock, worried about, you know – you know, Caleb and, you know, this vehicle. I was just – I was – honestly, I – I think I was more in disbelief about what had just happened.

[66] The response and its tone and manner were unpersuasive. When it was put to Mr Nichols that it was not his right to take the keys from the Truck, he said possibly no. And when it was put to him that he did so because he was enraged, he said he did it because he wanted to get the Van out and he did not want Mr Nichols to do any more damage, though what damage might have already been done is unclear.

[67] He maintained he did not pull Mr Nichols from the Truck or otherwise touch him, except to help him up after his dive for the keys.

### ***Mr Caleb Nichols***

#### *Examination*

[68] Caleb said that during the test drive of the Van, the temperature gauge kept going up and down and that Mr De Marco said it was an electrical fault which would be fixed. He did not recall any other conversations before purchase. He recalled collecting the Van, and within a couple of kilometres the gauge started the same behaviour. this happened on at least three occasions. Caleb said on the fourth (or at least the last) occasion that he recalls telling Mr De Marco again that the problem was not fixed, and that Mr De Marco told him to bring it in again, and that he would get another mechanic to look at the problem. He confirmed it was always the same issue with the gauge going up and down. (I again observe that this is not seemingly consistent with overheating).

[69] He said on 8 July he went with his father and gave broadly the same version as to the events leading up to Mr Patchett coming over as his father, though less detailed.

He said no discussion of a test drive had occurred to that point. He described what occurred next:

So that's when Dad's gone, "We want to take it for a test drive," and then Harley sort of said, "No, you're not without us." And then Dad's like, "Well, that's a bit unfair. Like, we want to take it for a test drive with ourselves, without the pressure of you guys being there with us." And that's when Harley's got agitated and started firing up.

- [70] He said Mr Patchett went into a psychotic state and was swearing and then "Superman dived" for the key. He grasped the key, snapped it out of the ignition, and came down on the sidestep, headfirst. They helped him up and Mr Patchett continued swearing. He then said Mr Patchett "just made his way away from the scene" towards the Railway Street gates. He said Mr Patchett did not take the key but snapped the fob off from the steel part of the key. He said then his father said to get into the car and leave and that he started to guide Caleb out to the front of the yard. He then said his father walked out of sight, toward the Railway Street end towards the right, as he was driving out. He saw the two men "having a civil conversation". His father jumped in the car and they left.

*Cross examination*

- [71] Caleb agreed on no prior occasion had he taken a test drive, nor taken his father with him. He gave the evidence about the price of earlier repairs referred to in paragraph [26] above. He recalled being told that the last repair would be to the head gasket. He recalled being told it was going to be a sizable repair, he said similar to the EGR repair which he said was \$1000 to \$2000. He was asked about the extended warranty issue, and I have set out that evidence in paragraph [16] and [17] above.
- [72] He maintained that there was no discussion of a \$2000 contribution nor that he told his father of such, nor that he took his father so he could take the Van without paying that sum. He said he would have told his father if such a demand was made, and that he would not be embarrassed about telling his father of such a demand, despite his father's reservations about the purchase of the Van.
- [73] He agreed that his father told Mr De Marco that he wanted to take a test drive with just Caleb and his father. He said Mr Patchett came over about that time. He denied his father called Mr Patchett and Mr De Marco cheats. He said rather that his father said they were taking a test drive and Mr Patchett said, "no you're not" and then repeated his version of Mr Patchett's superman dive and sudden intense anger. He said Mr Patchett was yelling and screaming that they could not take a test drive, though Caleb could not recall him giving any reason. He rejected Mr Patchett's version. He confirmed, in particular, that he did not see his father go over to the Truck, and that as he drove out, he saw Mr Patchett, no longer psychotic, and standing near his father, seemingly talking.



**Mr Moore***Examination*

- [74] Mr Moore is an aluminium fabricator. As at July 2017, he had been living for at least a year in the unit upstairs from the workshop on the site. He had come to know Mr Patchett as the owner of the Business. From the unit where he lived, he could see down over the car park. He marked his view on Ex. 9 with extended arrows. He confirmed he could see directly across to the workshop where all agree the Van was parked. That exhibit confirms that he could not see the area where the other witnesses say the Truck was parked. He said that the Truck could not have been parked there because his partner, Stacey, had a car was parked there.
- [75] He recalled an occasion where there were loud voices, a Saturday morning. Only one such occasion came to mind. He looked through the window and saw a couple of guys yelling and talking at Mr Patchett and “carrying one”. He saw a large guy and a young fellow. He did not know them. He said:
- And then what happened?---Andrew was trying to get the keys out of the ignition or something. It was beside – it was beside the driver’s side, and he was trying to get the keys, and then the young fella’s on the passenger side trying to reach over so he don’t get the keys or something.
- Yes?---And then the big fella’s standing beside Andrew, just yelling and carrying on. And then – so then I remember on the other side, which is the second – near the second arrow is where Andrew – he got pushed against the wall – against the roller door, and he got – I remember seeing him stand up.
- Who pushed him against the - - -?---The big fella.
- [76] He did not notice Mr De Marco there. He saw Mr Patchett get up and start walking down to where he had his truck parked. As noted, he placed the truck near the garage where the Van was parked, not to the right of the unit as the other witnesses said.
- [77] He said he saw the big fellow (who it is safe to assume was Mr David Nichols), followed Mr Patchett to the truck yelling at Mr Patchett, not friendly but on the edge of aggression. Mr Patchett was not yelling. He saw Mr Patchett get into the Truck and come out again when Mr Nichols put his hand on Mr Patchett’s shoulder or the pillar of the Truck. He did not see Mr Patchett pulled out.
- [78] He gave a first statement to police which appears from his cross examination to have been broadly consistent with his oral evidence. He said that Mr De Marco said something to him about being contacted by the police and that he should watch what he says, “because if they conflict, you’ll be in trouble”. He said his partner urged him not to get involved. He said later this was after his first statement. He then went to the police and did an amendment where “I’m backed off from it all”. He confirmed his evidence under subpoena was true. He said he had not seen any aggression from Mr Patchett in the two years he lived there. That was not in his system. He was more “lovey-dovey”.

*Cross examination*

- [79] In cross examination, he adhered to his recollection of where and how the Van was parked. He said he gave his first statement, then spoke to Mr De Marco. He said Mr De Marco asked him if he heard the altercation, he said yes and that he'd given a statement, and Mr De Marco said he would end up in Court over it. He said again Mr De Marco said something like: watch what you say so his statement does not conflict with Mr Patchett's. However, Mr Moore said he did not know what Mr Patchett had said, and Mr De Marco did not tell him. He conceded that Mr Patchett told his partner what happened, and that she in turn told him, but that this happened after he had given his first statement.
- [80] He seemed to say that Mr Patchett asked him to make a statement but later to say he assumed Mr Patchett told the police he could be a witness because the police called him. He was eventually reasonably clear, at least, that Mr Patchett did not speak to him at all, and Mr De Marco did not speak to him until after the first statement.
- [81] He said he spoke to Mr De Marco and that sometime after that he was called by the police again. He said again that he did not want to be involved and repeated that a number of times: not his issue, not his problem.
- [82] When then asked how he became involved, he said that Mr De Marco would have known he was there because he told Mr De Marco that. That seems to be a different conversation to the conversation about having to go to Court. He said he did not discuss the matter further with Mr De Marco at that earlier time, because "its not something you want to talk about".
- [83] Mr Moore conceded that his addendum statement said that he would not have been able from his position to confirm if either the "young man or the old man had been physically assaulted". He also conceded that he had said, "I cannot confirm if anyone was assaulted" and, "I cannot confirm if anyone was touched or physically harmed".
- [84] When challenged about the inconsistency he variously sought to confine the scope of those statements to seeing what occurred at the Truck, to claim a poor memory from an accident, to suggest that the statement went further than his instructions to the police officer, and that the officer was putting his own words in the statement.
- [85] After that passage, Mr Moore confirmed he could not see Mr Patchett pulled to the ground from the Truck. His version is conveniently stated at the end of his evidence:

So that it's clear: I suggest to you that, Mr Moore, that you certainly didn't see an assault at the truck by Mr Nichols, and I'm talking about the truck being the vehicle that you've marked - - -?---Yeah. No, I said that, yes.

Okay?---I said that I didn't see that.

You said you saw Mr [Nichols] reach in - - -?---He either had his hand against the pillar where the door closes, or it was on his shoulder, but from the angle I've seen, I couldn't say 100 per cent where it was.

Okay. So what you saw is him reaching towards - - -?---Reaching it whole and just reaching over, yeah.

Okay?---Like, he was either holding the pillar, like leaning against it, or what he was doing.

[86] He was firm that he saw Mr Patchett pushed against the roller door by Mr David Nichols.

### ***Mr De Marco***

#### *Examination*

[87] Some of Mr De Marco's evidence leading up to the 8<sup>th</sup> is set out above. Mr De Marco recalled the last occasion that the Van was brought back in. He said he received a quote to fix it for \$4000. He said he told Mr Patchett about the quote and that he'd spoken to Caleb and Caleb had agreed to put in \$2000. He said the repairs were ultimately more expensive, some \$6000. He said he had a further discussion with Mr Patchett, where Mr Patchett said that because Caleb was a nice young lad the Business would cover the rest of the costs. He said the repairs were carried out. (There was no evidence from the defendants that further repairs were required on the Van).

[88] He said he informed Caleb the repairs were finished, and he could collect the vehicle. He said:

I spoke to him. He was ... working, so he was going to come in on the Saturday morning. He was going to put his \$2000 on a bankcard, and he was meant to be in about half eight, and I believe he came in about 9 o'clock.

[89] Mr De Marco arrived that Saturday morning and noted Mr Patchett was already present. He prepared a receipt for the payment which Caleb had agreed to make in the dealer receipt book kept by the Business, though a carbon copy of that receipt was never given to Caleb (the **Receipt**). A copy was tendered:

**DEALER'S RECEIPT**  
Motor Dealers and Chattel Auctioneers Regulation 2014

*Motorway Wholesale*

NEW VEHICLE	<input type="checkbox"/>
USED VEHICLE	<input checked="" type="checkbox"/>
OTHER	<input checked="" type="checkbox"/>
Date of Payment 8 / 7 / 2017	
G 408675	Stock No. 2497

Received from *Caleb Nichols*  
Address *3026/3029 The Boulevard*  
*Camerra* Postcode *4211*

The sum of ..... dollars  
..... cents \$ *2,000*

By Cash / ☒ Card / Cheque drawn by: .....  
being ☒ as applicable

<input type="checkbox"/> An option on the proposed purchase	<input type="checkbox"/> A deposit on the purchase
<input checked="" type="checkbox"/> Payment in full	<input checked="" type="checkbox"/> Payment of balance owing
<input checked="" type="checkbox"/> Other <i>Engine Repairs</i>	Vehicle Purchase Price \$

*\$2,000 to be contributed by Caleb Nichols assigned*  
Of the vehicle described hereunder

Make <i>V.W</i>	Model <i>Transporter TS</i>	Colour <i>White</i>
Engine No. <i>BRS025829</i>	Built Date <i>5/07</i>	
Chassis/VIN No. <i>WV1ZZZ2H27H064016</i>	Reg. No.	

or on behalf of the Motor Dealer  
Signature: *A. De Marco*  
Name: .....

**MTA QUEENSLAND**

[90] Mr De Marco said that the Nichols arrived about 9. He collected the keys for the Van, walked to the Van, started it up, and opened the bonnet at Mr Nichols' request. He said Mr Nichols inspected the engine, and then said he wanted to take the vehicle for a test drive. Mr De Marco said that someone would go on the test drive. Mr Nichols said just he and Caleb would go. Mr De Marco said he would go and get Mr Patchett. He collected Mr Patchett from the Truck, which was located by Mr De Marco, as indicated on Exhibit 2.

[91] On the way to the Van:

I just said to Andrew, "They want to take it for a test drive. They want to go on their own, but I've suggested one of us goes as well, because if there's an issue we need to be there as well." We knew that – we'd test-driven the van anyway, and we knew it went well, but it needed one of us with the vehicle as well.

[92] He said he did not discuss the \$2000 at that time. He said when they arrived at the Van, Caleb was in the Van somewhere and Mr David Nichols was by the front driver's door which was open. Mr Patchett approached Mr Nichols. He said what happened next:

The father ... used the F word, basically, to say that they were the only people who were going in that van for a test drive, and then Andrew leaned in and turned the keys – turned it off and got the keys out. He held the keys, and then next minute, all hell let loose.

- [93] He said Mr Nichols was angry. He said Mr Patchett “leaned in and grabbed the keys”, then the defendants “went for” Mr Patchett to get the keys, and Mr Nichols threw Mr Patchett against the workshop wall. Then Caleb and Mr Nichols had Mr Patchett against the wall trying to get the keys. He said he tried to pull them both off Mr Patchett. Caleb shouted that Mr Patchett had broken the key. Mr Nichols was yelling that he was going to “fucking kill” Mr Patchett. He heard Mr Patchett say something about his heart bypass and hips. He saw Mr Nichols throwing punches at Mr Patchett. The melee was by this stage past the back of the Van. He said Caleb then barged Mr De Marco, dazing him.
- [94] His next observation was that Mr Patchett and Mr Nichols were near the Truck and heard Mr Nichols yelling more angry threats. He said he next observed Mr Nichols over Mr Patchett who was on the ground and the cab door was open. He did not see how they came to be in those positions; he did not see Patchett fall from the cab.
- [95] He said he next observed Caleb driving the Van past Mr De Marco having turned the Van around, and that Caleb screamed to his father to get in the Van, and they drove out.
- [96] He said he went over to Mr Patchett and got him up off the ground. He said Mr Patchett’s shirt was ripped down the front and he had blood on all over his face. He appeared in a state of shock. He called the police at some stage thereafter. He said the \$2000 was never paid.

*Cross examination*

- [97] Mr De Marco agreed that he and Mr Patchett paid at least \$6500 on repairs and did not make a profit on the Van.
- [98] He was cross examined about the history of problems with the Van. He said he did not recall details. He did broadly accept the vehicle came in for repair on more than one occasion and made some concessions when prompted by details, such as a repair of a radiator cap. He frankly conceded that “it sounds like a nightmare situation”. He was challenged on the alleged conversation with Caleb about the \$2000. He conceded he never sent Caleb any document relevant to that alleged agreement.
- [99] He agreed that the dealings with the Nichols were civil up until he went to get Mr Patchett, though Mr Nichols had said that he wanted to test drive the Van and did not trust mechanics. He agreed he did not mention the \$2000 before that point.
- [100] He said he told Mr Patchett about the test drive requirement and that one of them should go as well. He did not remember mentioning the \$2000 at that point. He rejected that Mr Patchett said they were not going anywhere in the Van, but that he

did say he would go on the test drive. He said although no-one was angry at this stage, when Mr Nichols said they were the only ones going, he thought something might not be right.

- [101] He rejected the suggestion that Mr Patchett said, “you can get fucked, I’ve had a gutful”, and was angry when he leaned in to get the keys. It was suggested by counsel that Mr Patchett dived in for the keys, “hit his head on the body of the” Van, and fell to the ground. Mr De Marco rejected those suggestions. Mr Harding (who appeared for the defendants) opened that proposition.<sup>12</sup> Neither Caleb nor Mr Nichols gave evidence Mr Patchett hit his head when falling after his superman dive. He rejected the suggestion Mr Patchett said, “I’m going to get you blokes”, though Mr Nichols did not give that evidence. (Caleb’s evidence as to what he saw was inconsistent with any such furious parting outburst.)<sup>13</sup>
- [102] He said he did not recall he discussed the matter with Mr Patchett at the time but was sure they would have spoken about it. He said he did not recall discussing the police investigation, but said he was surprised more action was not taken. He had not had any contact with Mr Patchett for many years since, except bumping into him once.

### ***Mr Patchett***

#### *Examination*

- [103] Mr Patchett said that he was not good with bookwork because of his dyslexia, and he had others do paperwork. He said that after 8 July, he shut the Business down. He said the books and records were probably sent to a shipping container at his farm. No complaints about disclosure were raised at trial.
- [104] He had no direct dealings with the sale of the Van. He recalled one minor problem, which he agreed with Mr De Marco they should fix, because Mr De Marco said Caleb was nice young man. He did not recall any further problems until around the time of the alleged assault.
- [105] He said Mr De Marco told him that Caleb said the car was overheating, and that Mr De Marco told Caleb not to drive the car, but that Caleb drove it anyway and that this damaged the head gasket. He said Mr De Marco told him about the quote for the head gasket repairs and that Caleb had agreed to pay half. He recalled the price ended up higher, about \$6,500. Mr Patchett said he just paid the invoice expecting \$2000 from Caleb, because Mr De Marco kept saying he was a nice boy.
- [106] Mr Patchett explained his diagram of the site. He said he was sitting in the Truck waiting for his friend when he noticed the defendants with Mr De Marco. Mr De Marco then came up to him and asked him to go for a test drive with the father while the son pays the \$2000. Mr Patchett agreed and walked over to the Van with Mr De Marco following. He says what occurred next was:

---

<sup>12</sup> TS2-58.16.

<sup>13</sup> TS2-104.45.

Well, I put my hand out to shake his hand, and I said, “My name is Andrew”, and it was like a scary movie from there on. He was yelling, “Eff this; eff that. I’m not paying this; I’m not paying that. You this; you that”, and I thought to myself, what has happened to this guy? Face was red, eyes popping out of his head – he was crazy. So I couldn’t hear him, so I leant over to turn the engine off so I could hear what he was saying.

... he was using “Fuck, I’ll kill you. You’re this; I’ll burn your place down”. He was crazy. Crazy. But the engine was running, and I just couldn’t hear exactly what it was, and I thought if I turn the engine off, I can talk to him.

- [107] He said he leaned over to turn off the engine, but the key came out, though he didn’t notice it. He said he was thumped in the back of the neck by the person in the passenger seat. The next thing he recalled was that he was in a headlock and Mr De Marco was up against the shed door. He said Caleb yelled out that Mr Patchett had the keys and then that he had bent the key, and Caleb said he’d try to start the Van so they could “get out of here”. Mr Patchett then described the further assault as follows:

Yes?---And the father said that, “I’ll take care of me” – father said, “You take care of Paul”, and I see Paul go down on the ground again, and the father is just pushing me against the van and the shed door like a baseball bat - - -

...thumping me, and somehow ... I managed to stop and look at this man in the eye, and I said, “I’ve just had a heart operation, two new hips”; I said, “What is your problem?” “I’m going to fucking kill you; I’m going to burn your place down”. He was crazy. He was crazy. I feared for my life. It was like a horror movie. So I thought I’d run down to Cheaper Auto Spares where I could get help, and as I was running down, I thought I’ll go around the back of the truck, and I could see him following me; he’s chasing me, and I got – opened the door of the truck up and I had to climb up into the truck.

Yes?---And I shut the door, and I went to get my phone out, and this man was thumping and yelling and carrying on, opened the door. The keys were in my truck; he took them out and threw them over the fence, and he’s yelling...I was frightened for my life... So I tried to get over to the passenger seat to get away from him, but he had my arm and he’s pulling and I’m hanging onto the steering wheel  
...He had my right arm... he’s strong and he pulled me and I could see and I went down – had my shoulder on the concrete - - -

Yes?--- - - - terrible pain and I’m lying down there and he’s kicking me. “I’m going to kill you, I’m going to kill you”... And I managed to roll under the truck and.. he’s kicking me and he’s yelling out and then when I’m lying there I [indistinct] saw a van drive down and I heard the boy yell out “Dad, let’s get the fuck out of here quick” and they left me lying there half dead...

- [108] His evidence was given emotively, and tearfully at times, including in cross examination. It was matched at times with a sense of grievance at being challenged about the events.<sup>14</sup> I consider the emotion was sincere (though that does not mean the evidence was accurate).

- [109] He said he first experienced pain in his shoulder and neck when he fell to the ground from the Truck. Mr Patchett further described the events at the Van in these

---

<sup>14</sup> See for example TS1-70

terms: “pushing me against the Van and the shed door and yelling out”. He said that Caleb had attacked him while his father held him to get the key. He said he did not know he had the key. He said it happened quickly.

- [110] He said after they left, Mr De Marco came down and pulled him from under the Truck and took him to the office. Mr De Marco called the police. He decided to go to the Doctor. His daughter took some photographs when he got home. They show a torn t-shirt sleeve and a cut on his forehead.<sup>15</sup> He gave evidence of the bruising which he said emerged a couple of weeks later, which he showed to Dr Spanner.<sup>16</sup>

#### *Cross examination*

- [111] Mr Patchett seemed to have difficulty focussing on the questions he was asked. A good example is his difficulty in answering the question as to who first mentioned the \$2000 in his conversation with Mr De Marco.<sup>17</sup> In this conversation he also volunteered that the Business had put a new motor in the Van. That was a *non sequitur* to the question and was also seemingly incorrect.
- [112] Mr Patchett denied there was any conversation about a test drive when he arrived at the Van. He said Mr Nichols just started abusing him. He was cross examined on the detail and order of events. It was suggested he could not have been hit on the neck by Caleb while being held in a headlock by Mr Nichols. Mr Patchett conceded that, but said it all happened quickly. When asked about the car key incident he said:

Yes. And you grabbed at the key, I suggest to you, and you snapped off the plastic part of it, which I will describe to you as the demobilising part of the key? I didn't – I didn't break anything off the key. It was the force of the son hitting me.

So what – what do you say happened with the – you say the key got broken, do you? I – I just saw it as a quick glance. It was bent like that. That's all I saw, as a quick of a flash, like that.

What did you see? You saw something bent? The key was bent, just like a – like that, and the son yelled out, “He's eff bent the key,” and the father said, “Start the vehicle up.” You know, “Fix it.” But I didn't bend it. It had bent because of the force of the boy hitting me.

Yes. So I suggest to you that you – you grabbed at the key with a lunge motion and then pulled down on the key and broke off the demobiliser? Well, that's what you say, but it didn't happen like that.

And the metal part of the key was still in the ignition? I don't know. I – I was getting bashed up. I don't know.

- [113] This evidence differed from his evidence in chief about trying to turn the vehicle off, and not knowing he had the key in his hand at first: see [107]. It was not the only occasion where he expanded on his evidence of a specific event in cross examination.

---

<sup>15</sup> Ex.6.

<sup>16</sup> Ex. 7.

<sup>17</sup> TS1-59



- [114] He was examined in detail about his version of the alleged assaults, and Mr Patchett maintained his version, though said Mr Nichols was threatening to kill him and burn the place down repeatedly. He said Mr De Marco was pushed up against the shed wall twice by Caleb. He maintained that all Caleb did, after the initial hit to his neck, was trying to get the key. He added when pressed that Caleb punched him, but withdrew that when specifically asked about it. It was an emotive response to the questioning.<sup>18</sup>
- [115] He was then cross examined about events at the Truck. He was challenged about the fact that if afraid, the office might have been closer. Mr Patchett explained about his intention, abandoned quickly, to get to Super Cheap, then going for the Truck. He said the Truck was never started by him. When asked what Mr Nichols was saying while he was in the Truck, and whether anything was said about money, he said Mr Nichols said that he was not going to pay any \$2000. That was the first time that he said that in evidence, though he later corrected himself and said that it was said at the Van, not at the Truck. He denied he planned to block the Van with the truck.
- [116] He maintained his evidence about telling Mr Nichols of his heart and hip operations. He emotionally reasserted Mr Nichols' threats to kill him and burn the place down. He was again asked about the removal of the keys of the Truck: he said he did not notice Mr Nichols take them out, but he did notice him throw them away.
- [117] Mr Patchett was asked about whether he had a temper and he described himself a very kind and calm. It was suggested to Mr Patchett then that he was angry that the \$2000 had not been paid and he hatched a plan to falsely allege he had been assaulted to get back at the Nichols, and thereafter lied to Dr Spanner and the police. He rejected that suggestion.
- [118] He was then cross examined on his police statement. He accepted it was read to him (bearing in mind he said he was dyslexic) and he accepted it as accurate before he signed it. He was cross examined extensively on his evidence in the statement about whether his mobile phone was thrown away, with a view to demonstrating unreliability it seems. Clearly now, that evidence was substantively correct, as it was conceded by Mr Nichols, though the defendants' case was opened on the basis that the assertion that the phone was taken was wrong.<sup>19</sup>
- [119] The police statement was ultimately tendered unconditionally. Mr Harding identified the following further inconsistencies and omissions:
- (a) Mr Patchett did not tell police that Mr Nichols threatened to murder him when he said he would call police, and did not recall Mr Nichols threatening to call fair trading and the media (cf. statement paragraph 15);

---

<sup>18</sup> TS1-69

<sup>19</sup> TS2-58.32 cf. TS2-64.38 to .44; TS2-78.23

- (b) He did not recall if he told police he asked Mr De Marco if the \$2000 had been paid or not before the test drive, though accepted he knew that Caleb had not paid it (cf. statement paragraph 8);
- (c) Mr Patchett's sequence of events as stated at trial did not have Mr De Marco being pushed up against the shed door by Caleb because Mr De Marco was trying to get Mr Nichols off Mr Patchett, in contrast to the last sentence of paragraph 11 of the statement;
- (d) Mr Patchett did not give evidence that he was ducking and weaving punches, as he told the police (cf. statement paragraph 12);
- (e) He denied in evidence that the Truck was running, but said it was running in his statement;
- (f) He was asked if Mr Nichols said at the Truck that he would not pay \$2000. Mr Patchett had said that was said at the Van, not at the Truck (cf. statement paragraph 17);
- (g) Mr Patchett fell directly on the concrete, but told police he landed against Mr Nichols and then onto the ground (cf. statement paragraph 17).
- (h) Mr Patchett he never told police he had been kicked by Mr Nichols but gave evidence at trial that he was kicked (cf statement paragraph 18: the father tried to kick him and missed).

[120] Mr Patchett's performance in cross examination on these points of detail was mixed. At first, I accept he did not understand the precise nature of the questioning about inconsistencies and omissions compared to his previous statement. I mean no disrespect when I say Mr Patchett is not a linguistically sophisticated man. Once he appeared to understand the nature of the questioning, he sometimes adopted the police statement as correct<sup>20</sup> and sometimes he maintained his current recollection was correct. A notable example was his insistence he was kicked on the ground before he rolled under the Truck to get away, though the statement does not say that.

[121] It was put to him that he had made threats of varying kinds against the police. He denied that he made the threats suggested, though in my view the tenor of his evidence was that if he made them, he did not mean them. He gave evidence about his belief in conspiracies and corruption in the police investigation. He accepted he had pleaded guilty to one count of stalking, though did not accept he had done anything wrong. He gave an emotional and extended version of another alleged offence of violence against him. It was put to him that he had made various threats to Dr Spanner against the Nichols. He was evasive when asked about that, and again the tenor of his evidence was that if he made them, he did not mean them. He admitted he had told a Dr Matthews in August 2019 that the defendants had said if

---

<sup>20</sup> TS1-96.43 to 97.05

he contacted police he would be murdered. He did not give that evidence either in his police Statement or at trial.

## **The Receipt**

### ***Admissibility of statements in the Receipt***

- [122] A copy of the Receipt was tendered. Mr De Marco gave evidence of having prepared the Receipt on the Friday evening or Saturday morning in preparation for Caleb's attendance. Mr De Marco explained the kind of receipt book he had used: a book which created carbon copies and was kept for use in the Business. He could not say what had become of the original receipt book; there was no suggestion he would know. He identified the document as a copy of the one he prepared. It was tendered over Mr Harding's objection.<sup>21</sup> He submitted that it was not a contractual document because there was no suggestion it was even given to the defendants. He submitted it was a document going only to credit. At the time I overruled that objection on the basis the document did not go solely to credit, as it recorded the alleged agreement. On reflection, the basis upon which I permitted tender at that time was likely mistaken. The contract was pleaded as entirely oral, and the Receipt was not a document which could inform the existence of that contract. However, having invited further submissions on the issue, I am now satisfied it was properly admitted.
- [123] The Receipt, explained as it was by Mr De Marco, was hearsay evidence: that is, out of court statements relied upon for the truth of their content in Court. It also contained statements which could be characterised as prior consistent statements. On both related grounds it was prima facie inadmissible unless recent invention was suggested in cross examination.<sup>22</sup> Recent invention was not suggested to Mr De Marco.
- [124] However, it was evidence in documentary form and s. 92 *Evidence Act 1977* has to be considered. That section provides, relevantly:

#### **92 Admissibility of documentary evidence as to facts in issue**

- (1) In any proceeding (not being a criminal proceeding) where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, subject to this part, be admissible as evidence of that fact if—
  - (a) the maker of the statement had personal knowledge of the matters dealt with by the statement, and is called as a witness in the proceeding; or
  - (b) the document is or forms part of a record relating to any undertaking and made in the course of that undertaking from information supplied (whether directly or indirectly) by persons who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the information they supplied, and the person who supplied the information recorded in the statement in question is called as a witness in the proceeding.

---

<sup>21</sup> TS2-10.17 to 13.31

<sup>22</sup> *Cross on Evidence* (Online version current March 2024) at [17305]

- (2) ...
- (3) The court may act on hearsay evidence for the purpose of deciding any of the matters mentioned in subsection (2) (a), (b), (c), (d) or (f).
- (4) For the purposes of this part, a statement contained in a document is made by a person if—
  - (a) it was written, made, dictated or otherwise produced by the person; or
  - ...

[125] The Receipt is a document which contains statements, both in narrative form (i.e. the handwritten note of the agreement) and in a form which permits relevant evidence to be gleaned from the document (i.e. the reference to “Engine Repairs” and the tick next to “Payment of balance owing” allows one to reasonably infer the purpose of the payment to which it referred, and the fact that the amount was, at the time of preparation, still owing). Both kinds of statement can be statements for the purpose of the precatory words of s. 92(1) because statements for the purpose of the section include both statements which tend to establish a fact either directly and statements which do so by implication.<sup>23</sup>

[126] In my view, the Receipt contains statements which tend to establish the following facts (whether directly or by implication):

- (a) There had been some act or acts, the effect of which was that Caleb agreed to contribute \$2000, which balance was owing;
- (b) That contribution was for engine repairs to the Van;
- (c) That agreement was reached at some time prior to 8 July 2017; and
- (d) That contribution was to be paid by card.

[127] Obviously direct oral evidence of each of those facts would be relevant and admissible if given by Mr De Marco, and indeed he gave that evidence. The effect of s.92(1) is therefore to make the statements in the Receipt admissible in evidence despite their hearsay character.

[128] These statements are, of their nature, previous consistent statements in respect of Mr De Marco’s oral evidence at trial. Obviously, not every statement admissible under s. 92(1) will have that quality, not least because it is not always necessary to call the maker of the statement: see 92(2) and (3). However, such statements will frequently have that character. Section 92 requires the statement to be one of which direct oral evidence be admissible. However, it imposes no other statutory limit. There is no basis to read down the scope of s. 92(1) to limit it to statements other than those which are previous consistent statements. That proposition is evident to me from the plain words of the section, though it has also been accepted in a leading text.<sup>24</sup>

---

<sup>23</sup> Forbes Evidence Law in Queensland 14<sup>th</sup> Edn at [92.14] and [92.18]

<sup>24</sup> Forbes (11<sup>th</sup> edn) at 92.26.

**Weight**

- [129] The Receipt is an important piece of evidence. It supports Mr De Marco's account at least to this extent: that Mr De Marco had a conversation with Caleb from which Mr De Marco concluded that he had reached an agreement that Caleb pay \$2000 towards engine repairs on the Van and that Caleb had told him he intended to pay by card. That is not conclusive evidence that words were said which objectively communicated agreement in those terms, much less that Caleb subjectively understood that that was Mr De Marco's demand, and he agreed to it. Misunderstandings between parties in oral conversations are common, particularly where money is concerned. However, the document does tend to demonstrate that it is highly improbable that there was no such discussion between Mr De Marco and Caleb, and that is very difficult to reconcile with Caleb's evidence, summarised in [72] above.
- [130] The question then arises as to whether the Receipt should be accepted as authentic. I do accept it as such, for the following reasons.
- [131] **First**, even allowing for the ease with which documents can be fabricated using a copier, the Receipt does present as having features consistent with a page from the kind of carbon copy receipt book described by Mr De Marco.
- [132] **Second**, an explanation was given as to what became of the records of the Business. Mr Patchett said that they were probably in a shipping container at his farm. He was not challenged on whether he had complied with his duty of disclosure. He clearly was not a person who had much interest in or understanding of documents. Further, there was no specific challenge at trial to disclosure in respect of the copy of the Receipt.<sup>25</sup> In any event, it was Mr De Marco who gave evidence that he prepared the Receipt and proved this copy. The document cannot, therefore, be the work of Mr Patchett.
- [133] **Third**, the only realistic explanation from Mr De Marco preparing the Receipt, other than it accurately records his understanding at the time of the result of his discussions with Caleb, is that he created it as an evidence generating exercise. This was not suggested to him and it is hard to see why he would have done so. There seems no basis to infer that he knew at the time that the question of the \$2000 agreement would be an important one. And even if he did, his relationship with Mr Patchett ended soon after 8 July 2017. He has never pressed charges and he has never sought to recover money on the Van on his own account. He seemingly has had no motive to bolster his account. By far the most likely conclusion is that it is an authentic document prepared at the time.
- [134] **Fourth**, as will be seen, I do not find Caleb's evidence on the \$2000 issue persuasive. In my view it provides no satisfactory answer to Mr De Marco's evidence.

---

<sup>25</sup> TS3-40 to 41.

### **The witnesses**

[135] I now turn to observations about the credibility and reliability of each of the witnesses before making the detailed findings on the contested matters.

#### ***Mr Nichols***

[136] Mr Nichols presented as a dominant personality, and a forceful and able man. His evidence was flawed, however, by his determination to assert he was not angry at any time while at the Lot, and the lengths he went to in maintaining that plainly wrong assertion. I reject his evidence in that respect:

- (a) **First**, I refer to paragraphs [63] and [64] above. That evidence demonstrated that Mr Nichols was not being frank with the Court;
- (b) **Second**, Mr Nichols' evidence about the mobile phone was inconsistent with him not being angry when he went over to the Truck. In my view, he was struggling to avoid conceding what was plainly obvious: that he took the phone and threw it away in anger. His evidence on that issue was rendered more unsatisfactory because it is evident from the opening of the case, and from the cross examination of Mr Patchett, that Mr Nichols' admission that he took the phone and threw it away was most likely made for the first time in his evidence in chief at trial. Add to that the fact that he took out the keys and threw them away.
- (c) **Third**, Mr Nichols' statement to police that if he had assaulted Mr Patchett, he would have left in a meat wagon, is instructional as to Mr Nichol's attitude to Mr Patchett.

[137] Mr Nichol's evidence about not being angry was wrong and self-serving. It related to the central factual question in the case: who was the aggressor? I do not consider Mr Nichols a reliable witness on the events of 8 July.

#### ***Caleb***

[138] Caleb's evidence was difficult to reconcile with other evidence which I accept as correct:

- (a) Most compellingly, his evidence is extremely difficult to reconcile with the existence and terms of the Receipt, which provides significant support for the substance of Mr De Marco's evidence on this issue;
- (b) Further, even on his account, the idea that Mr Patchett and his father were standing together apparently at peace after Mr Patchett's psychotic anger and his father's aggressive action of taking the keys and the mobile, is unbelievable. I reject it.

[139] Further, Caleb went into the building industry like his father. At the time he was working with (likely under) his father. It was my impression that Caleb was, at the time, a young man who was influenced a good deal by his father when these events

occurred. Even if that is no longer the case, there is a real possibility of Caleb concurring in his father's views of this event in the inevitable discussions which they had about this event over the years, albeit without any deliberate attempt by Mr Nichols to influence his evidence. It is very likely indeed that father and son, working together much of the time, involved together in these proceedings and the police investigation, discussed the events, and tended to reinforce an exculpatory recollection in Caleb in particular.

- [140] That is not to say that the accounts by the defendants are the result of deliberate collusion, as the plaintiff suggested in written submissions. While collusion is possible, there is not sufficient evidence to reach that conclusion. Nor is it necessary that there be deliberate collusion. The mechanism described in the previous paragraph is sufficient to explain the common inaccuracy in the evidence given by the defendants.
- [141] For these reasons, taken together, I have significant reservations as to the reliability of Caleb's evidence.

***Both defendants***

- [142] There are two other matters which impact on my approach to the defendants' evidence.
- [143] **First**, both defendants have an interest in giving an account which is exculpatory. That is not to say that evidence is to be questioned simply because of this consideration. Most parties in proceedings who give evidence will be in a similar position. However, their evidence needs to be weighed against the evidence of Mr De Marco and Mr Moore. As I will observe, they are witnesses with no interest in the outcome of this case that could be identified. Indeed, both struck me as having no wish to be involved, with Mr Moore being extremely reluctant. Further, for reasons I give below, I found both reliable on the key events of the day.
- [144] **Second**, a key objective reference point in assessing the evidence in this case is the injuries which Mr Patchett received. I am satisfied that he received a serious injury to his shoulder during the confrontation with the defendants, along with the minor cut to his head and the bruising on his back shown in the photographs. I do not accept that the defendants' evidence provides a reasonable explanation for those injuries:
- (a) **First**, the evidence of Mr Patchett diving to the keys and falling was exaggerated by both defendants, even on their own account;
  - (b) **Second**, there was no reason for such a manoeuvre to reach the keys from the driver's side if a person is standing on the driver's side;
  - (c) **Third**, the fall they describe seems an improbable way for the significant injury to Mr Patchett's shoulder;

- (d) **Fourth**, the injury to the shoulder was relatively serious and painful. Yet nothing in the defendants' account suggests any pain response by Mr Patchett when they helped him up or after; and
- (e) **Fifth**, it is difficult to see how bruising to his back occurred from the events they describe.

[145] A fall from the Truck on the other hand, provides a persuasive mechanism for the injury to the shoulder. Being pushed forcefully up against the wall of the workshop provides a persuasive mechanism for the bruising observed.

***Mr Moore***

[146] Mr Harding advanced a spirited challenge to Mr Moore's reliability as a witness, and he had a good deal to work with. However, taken as a whole, I consider he was giving reliable evidence on at least three contentious issues:

- (a) That Mr Patchett was a peaceable man who, up to that point, Mr Moore had never heard yelling in anger;
- (b) That it was Mr Nichols who was doing the yelling, not Mr Patchett; and
- (c) That Mr Nichols pushed Mr Patchett against the wall of the garage at least once.

[147] I accept that evidence for the following reasons.

[148] **First**, I mean no disrespect to Mr Moore when I say that, in observing him giving evidence, he did not have the ability effectively to deceive. He might have been mistaken, but not dishonest.

[149] **Second**, Mr Moore was an extremely reluctant witness. He only attended under subpoena. He said he did not want to get involved at the time and his demeanour was of extreme reluctance to be involved now. I accept his evidence that he gave his second "addendum" statement because of concern that he might end up being involved in proceedings. In my view, his suggestions that the investigating officer was prompting him to a renege on his initial statement is explicable by his embarrassment at having done so. (It is also possible that his evidence in this regard is correct, though it is unfair to the investigating officer to make any such assumption). I do not concur in Mr Harding's submission that there something murky about the fact that Mr Moore could not remember details of discussions with Mr De Marco, given the time that had passed since these events.

[150] **Third**, he had no apparent reason to be partial. That conclusion is reinforced by the fact that he had had nothing to do with Mr Patchett since the events in question.

[151] **Fourth**, I accept he was likely mistaken in his recollection of several details. However, these were the kind of details which can vary between different witnesses, or which can become blurred over time. That extends to his evidence about the Truck and what occurred there. However, they do not provide a basis to



doubt Mr Moore's evidence about the events in [146] above. It is not surprising that Mr Moore would remember the main events and be vague on secondary detail.

- [152] **Fifth**, I accept that Mr Moore had a proper basis to express his assessment of Mr Patchett's character, having lived on the site of the Business for at least a year before July 2017. His description of Mr Patchett as "lovey-dovey" had an authenticity to it which was compelling. He was also well placed to know whether a raised voice was Mr Patchett's voice, or someone else's voice.
- [153] **Sixth**, I do not accept that Mr Moore's evidence supports the conclusion that his view of the Van was obscured. Mr Moore might have had less of a view of events at the Truck. Frankly, I thought his evidence about the location of the Truck and the events at it were less compelling and had the flavour of being unintentionally reconstructed, at least to some extent (he said the Truck could not have been parked where the other witnesses said, because that is where his partner usually parked, though she might not have been parked there on that particular day). But he was clearly less certain of his evidence about events at the Truck.
- [154] In summary, Mr Moore presented as an unsophisticated and reluctant witness endeavouring to tell the truth as he recalled it when finally forced to give evidence under oath, and who had a clear recollection of the key events on what was a very unusual day at the Site.

### ***Mr De Marco***

- [155] Mr De Marco's evidence was more difficult to impugn. Mr Harding focussed on inconsistencies between Mr De Marco and Mr Patchett, though some variation in the details is to be expected. I found Mr De Marco's evidence to be persuasive for the following reasons.
- (a) **First**, he had no reason to be partial in favour of Mr Patchett. He has had nothing to do with him for many years. Indeed, there is no reason to believe he has given much thought to this matter for many years. That alone would be sufficient to explain vagueness in the details of events.
  - (b) **Second**, in the course of his evidence he was quite comfortable saying that he did not recall details he was asked about, and so far as I could determine, did not embellish or reconstruct to make his account more credible. This is again consistent with a person who has no reason for partiality.
- [156] While his recollection of details almost certainly has decayed over time, I accept he was attempting to give a truthful account, and there was no basis to think he had reconstructed the key events in mistaken manner.

### ***Mr Patchett***

- [157] Finally, we come to Mr Patchett. There is no doubt that he presented as an emotional witness, obsessed with his belief that the defendants had assaulted him and, perhaps more important to him, that the police had failed him. He presented in

the witness box as the person he was: a person who had had a complete breakdown in his mental health following these events. I accept that Mr Patchett gave an exaggerated account of the assaults on him as compared to his police statement, and that he has embellished the account in his mind over the years. However, the police statement was taken the day after the assault and tendered in evidence. It shows that, while Mr Patchett's account of the assault has become exaggerated over time, in its fundamental aspects have remained consistent with his account given to the police the day after the alleged assault.

**Brigginshaw**

- [158] Before proceeding to making my findings of fact, I refer to this well-known passage from *Brigginshaw v Brigginshaw* (1938) 60 CLR 336 at 362 per Dixon J:

[R]easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

- [159] Mr Harding submitted that the seriousness of the allegations sought to be proved against the defendants is highly relevant. He submits that the consequences flowing from a finding that an assault occurred would be serious for each of the defendants. He submitted that in considering the gravity of the consequences, I should consider the reputational effect on a person of the finding. As to the tenderness the Court should show to a party based on potential reputational damage, he relied on two cases.
- [160] In *Commonwealth v Fernando* (2012) 200 FCR 1 at [130], the Full Court observed that a finding that a Commonwealth Government Minister had deliberately exercised an important statutory power knowing that, in doing so, he was acting unlawfully, is properly to be characterised as grave. The legal consequences are potentially serious, as too is the effect on the Minister's reputation.
- [161] In *Ashby v Slipper* (2014) 219 FCR 322, Mansfield and Gilmour JJ observed at [68]:

As to the gravity of the allegations of abuse made by Slipper these were most serious: that the collateral purpose of Ashby, in combination with others, was to vilify Slipper, expose him to opprobrium and scandal, bring him into disrepute and to destroy or seriously damage his reputation and standing, his political position and career for the purpose of advancing the political interests of the LNP and/or Brough and by those means to enhance or promote Ashby's and Doane's prospects of advancement or preferment within or at the hands of the LNP. Those allegations of improper purpose would, necessarily, raise for Ashby, and those

with whom he was asserted to have acted in combination, serious consequences to their personal and professional reputations. Each would undoubtedly be viewed as guilty of grave moral delinquency. Such was the case when RD Nicholson J in *Maritime Union of Australia v Geraldton Port Authority* (1999) 93 FCR 34 found that a claim of unlawful conspiracy to cause injury on the part of government ministers executing their public duties was a serious matter requiring consideration pursuant to s 140(2) as an adverse finding against the parties accused would raise an event of “grave moral delinquency”: at [206]

- [162] I have borne those authorities in mind in these reasons. However, they must be applied in the circumstances where what is alleged here against the defendants is a confrontation over an inadequate car purchase which spilled over into an assault or assaults. While such findings are serious, they do not, in my view, allege grave moral delinquency. And while such findings would have some impact on the reputation of each defendant, this cannot be pushed too far. It is far from obvious that a civil finding of that kind would have serious consequences for their professional reputations in the building industry.

### **Findings on contested issues of fact**

- [163] Mr De Marco obtained a quote to fix the head gasket problem in around mid-2017. That quote was for \$4000. Up to that time, attempts had been made to repair the problem, (whether the problem was overheating or an erratic heat gauge) for relatively little cost. For the head gasket, Mr De Marco was not willing to cover the cost. Mr De Marco had a conversation with Caleb which led him to conclude Caleb had agreed to pay \$2000 towards this using his card. I reject Caleb’s evidence he was not asked to make that contribution:

- (a) Caleb understood that the Van was not covered by any warranty, and the problem had turned out to be quite different from a mere electrical problem. A contribution in that context was a reasonable request;
- (b) The detail about payment by bank card is consistent with Caleb otherwise not having the funds to pay that sum; and
- (c) The Receipt strongly corroborates Mr De Marco’s version.

- [164] I am not able to conclude to the relevant standard that Caleb told his father about that arrangement. He might have reconstructed the discussion in his own mind such that he came to believe there was no such agreement. Or he might have been embarrassed to tell his father. It is also possible he told Mr Nichols about it. However, it matters little in considering Mr Nichols conduct, because he had sufficient grounds for anger arising from his view that the Business had ripped his son off.

- [165] I find that both Mr De Marco and Mr Patchett believed that a payment of \$2000 was due on the Van and accept that they might well have discussed this or referred to it during that morning. Though whether they did or not, and when, is not a vital detail.

- [166] I find that there was a request for a test drive from the defendants and that Mr De Marco said that the driver would have to be accompanied. It is likely and understandable given the history of problems, that Mr De Marco wanted he or Mr Patchett to see for themselves whether there was any remaining problem, especially as they almost certainly knew by this time that they owed the mechanic \$6500, not \$4000, a likely a loss on the Van even if Caleb paid his \$2000.
- [167] However, I accept Mr De Marco's evidence that there was a change in atmosphere when he mentioned the need to accompany the driver of the Van. I find that Mr Nichols went with his son that day already very angry about the treatment he thought his son had received from the Business. He believed the Business to be con artists who had ripped off his son with a nightmare used car. Mr Nichols just needed something to manifest this anger. There was no need for any mention of the \$2000 to trigger Mr Nichols.
- [168] I find the trigger for the anger occurred when Mr Patchett was introduced. It is not clear to me what the trigger was, perhaps he identified Mr Patchett as the owner, perhaps something was said about the test drive. That was Mr De Marco's recollection. Perhaps Mr Patchett said something about the money already spent on the Van. It is unnecessary finally to determine the trigger. What I find did occur is that Mr Nichols started to give vent to his opinions angrily and loudly, berating and insulting Mr Patchett and the Business. (Mr Nichols gave a sanitised version of this: at [54] above). Each of Mr De Marco and Mr Moore's evidence supports that finding. And it provides an explanation for Mr Patchett turning off the Van.
- [169] Further, the proposition that Mr Patchett was the one to become aggressive is inconsistent with his character as observed by Mr Moore. Perhaps more compelling, it is inconsistent with his behaviour in relation to car which had no warranty but which had cost \$6500 to repair. Notably, no claim was made by Mr Patchett for any further contribution to this work, despite the inadequacy of the contribution he believed Caleb was making, nor was there any suggestion of Mr Patchett being concerned about the situation at any earlier time. Up to that time, the evidence suggests Mr Patchett had a benign attitude to Caleb.
- [170] I find that Mr Patchett moved to turn off the Van but did not do it aggressively as the defendants allege. I find that, as Mr De Marco said, at that point "all hell let loose". The precise details of that part of the confrontation are difficult to be certain about, given the passage of time and the chaotic nature of the event itself. As I have observed, Mr Patchett has exaggerated the whole assault over time. I am not satisfied that the initial struggle at the Van was as violent as Mr Patchett now says. His police statement is more modest and is more reliable.
- [171] However, I do accept as correct Mr Moore's evidence that he saw Mr Patchett pushed against the wall by Mr Nichols. That evidence alone is sufficient to exclude the version of the defendants, because on their case they did not manhandle anyone.

[172] I am satisfied that:

- (a) There was a physical struggle between Mr Patchett and both defendants over the key, the key tag broke off the metal key, and the defendants obtained the part held by Mr Patchett from him by force;
- (b) Mr De Marco tried to intervene in that struggle and was forcefully shoved away by one of the defendants, probably Caleb;
- (c) Mr Nichols did make threats against Mr Patchett to kill him, though I do not accept that were intended literally, but were rather an expression of Mr Nichols' anger;
- (d) As that struggle continued, Mr Nichols forcefully shoved Mr Patchett against the wall of the workshop more than once; and
- (e) During that struggle, Mr Patchett was very afraid and told Mr Nichols about his heart and hip problems.

[173] Although both Mr De Marco and Mr Patchett said punches were thrown, I am not persuaded that deliberate punches were thrown. There are many kinds of actions which can look like punches when parties are struggling with each other, but which are not in fact deliberate attempts to strike with a fist. Even if punches were thrown, which I accept is possible, it seems unlikely they connected. There is no sign of serious injuries to Mr Patchett of the kind one would expect, especially if Mr Nichols was the assailant, as Mr Nichols himself said.

[174] It is not in dispute that Mr Patchett walked to the Truck and got in. It is not in dispute that Mr Nichols followed him. The question is why?

[175] In his police statement, Mr Patchett said he told Mr Nichols around this time that he was going to call the police. He adopted this evidence in cross examination. Mr Patchett gave evidence that he retreated in fear in the direction of the Truck and saw Mr Nichols following him and so he climbed into the Truck and tried to lock the door. There are two obvious reasons for Mr Nichols to follow Mr Patchett, on my findings so far. The first is that he remained angry and wanted to take out the anger further on Mr Patchett. The other is that he pursued Mr Patchett to prevent him from using his phone to call the police. Mr Nichols could not explain at trial why he took the phone. This provides a likely explanation.

[176] In contrast, Mr Nichols' explanations for his pursuit makes no sense. If Mr Patchett was the one responsible for the confrontation, why would Mr Nichols follow him? Mr Nichols' answer is that he believed Mr Patchett might be going to block the Van from departure with the Truck. But why would Mr Nichols think he was going to do such a thing? On Mr Nichols' evidence, he knew nothing about the money allegedly owing on the Van. Further Caleb had had the Van for months and had delivered and picked up the Van without difficulty. Mr Nichols knew that. It is unclear whether the Truck was started or not, but whether it was or not, blocking the Van with the Truck is a very improbable response from Mr Patchett, and hardly

something one would assume without any threat or suggestion being made by Mr Patchett. There is no suggestion of Mr Patchett saying such a thing. And if he thought that Mr Patchett was indeed going to try to block the driveway, consistent with Mr Patchett's alleged fury, why take and throw away his phone?

- [177] I reject Mr Nichols' explanation as to why he pursued Mr Patchett. I find he pursued Mr Patchett because he was in a rage and wanted to prevent him calling the police.
- [178] I find Mr Patchett climbed into the cab (something that would be very hard to do if Mr Patchett had already suffered the injury to his shoulder by falling at the Van). He sat in the seat and tried to lock the door. Mr Nichols prevented him doing so, he took the mobile and threw it away, and he took the keys out of the Truck.
- [179] I find he then pulled Mr Patchett out of the cab in anger. I do not think he intended to hurt Mr Patchett. But I accept he pulled with sufficient force that Mr Patchett fell onto the ground (whether he bounced off Mr Nichols or not is irrelevant detail) and landed on his shoulder, causing the injury to that shoulder.
- [180] I am conscious that for this finding, there is no corroborating observations by either Mr Moore or Mr De Marco. However, given my findings based on the gravamen of the evidence of all three witnesses to this point, falling from the Truck is the most obvious and likely mechanism by which the injury occurred. Further, Mr Nichols was angry and easily capable of dragging Mr Patchett out with a good deal of force. I have not overlooked Mr Moore evidence on this point, but I have explained my analysis of this evidence already at [153] above.
- [181] I consider that Mr Patchett has exaggerated over time what happened after this. I accept he remained in fear of Mr Nichols and probably did end up on the ground, and possibly tried to hide under the Truck. Mr De Marco said that is how he found him, and I accept that evidence. However, I am not persuaded the violent assault Mr Patchett describes thereafter occurred. It is inconsistent with his police statement and as I have said, I do not think Mr Nichols was intent to doing him real harm, albeit, in his anger he did so.
- [182] However, I do accept that he suffered the cut on his head shown in the photographs at Exhibit 6 and the bruising to his back shown in Exhibit 7 during either the struggle with Mr Nichols at the Van, or the struggle at the Truck.
- [183] It only remains to observe that I reject Caleb's evidence that he saw his father and Mr Patchett standing [seemingly civil] side by side when he picked up his father in the Van. As I have observed, even on his evidence that was extremely improbable on any view of the evidence.

## Consequence of the findings

### *The pleaded case*

[184] The amended statement of claim (the **SOC**) relevantly pleaded the factual basis for the claim for damages for assault and for battery as follows:

25. The Plaintiff informed the Second Defendant that he would accompany him during the test drive of the Van.
26. *The Second Defendant replied to the Plaintiff with words to the effect of “No you fucking wont [sic], you’re not coming with me, I’m going with my son, you’re nothing but cheats [and various other insults about the Plaintiff’s character and business conduct].*
27. *the Plaintiff reached inside the Van and turned off the ignition key and removed it from the ignition to stop the Van’s engine.*
28. *The Second Defendant grabbed the Plaintiff with both hands and pushed him.*
29. *The First and Second Defendants advanced towards the Plaintiff and threw punches at the Plaintiff.*
30. The Plaintiff was struck a number of times by the First and Second Defendant’s punches.
31. *The Plaintiff was pushed up against a nearby shed door within the Business premises.*
32. *The First Defendant [and the Second Defendant, grappled with the Plaintiff to obtain the key stub and], forcibly removed the [key stub of the] Van keys from the Plaintiff’s hand.*
33. *The Plaintiff attempted to distance himself from the First and Second Defendants and moved towards the back of the Van.*
34. *The Second Defendant continued to pursue the Plaintiff and verbally threatened to kill the Plaintiff and to burn down the Business.*
35. *The Plaintiff told the Second Defendant to calm down and informed the Second Defendant that the Plaintiff had undergone five heart bypasses and wo hip replacements in the past.*
36. *The Plaintiff ran from the Second Defendant and entered the cabin of a nearby truck.*
37. *The Plaintiff entered the truck cabin, closed the door and attempted to engage the truck’s central locking system.*
38. *The Second Defendant opened the door of the truck and said to the Plaintiff words to the effect of “we’re not paying the \$2,000” and “you’re lucky I didn’t kill ya.”*
39. *The Second Defendant grabbed the Plaintiff’s mobile phone out of his hand and grabbed the keys to the truck and threw them to the ground.*
40. *The Second Defendant grabbed the Plaintiff by his arm and dragged him out of the truck’s cabin.*
41. *The Plaintiff fell out of the truck and onto the Second Defendant before falling to the ground.*
42. *The height of the truck seat to the ground was approximately 1.5 metres.*
43. *Upon falling to the ground, the Plaintiff experienced immediate pain in his right shoulder.*

44. *The Plaintiff feared for his life and rolled under the truck to get away from the Second Defendant.*
45. The Second Defendant kicked and attempted to kick at the Plaintiff while he remained under the truck.
46. *The First Defendant called out to the Second Defendant to get in the Van.*
47. *The Second Defendant entered the passenger seat of the Van and the First Defendant drove the Van out of the Business premises.*
48. *As a consequence of the assault and battery perpetrated by the First and Second Defendants against the Plaintiff, the Plaintiff sustained the following injuries ("the injuries"):*
  - (a) *A cut to the forehead;*
  - (b) *Injuries to the neck, right shoulder, right flank, right arm, right leg (including hip and knee), back and chest; and*
  - (c) *A psychological injury.*
49. *The Plaintiff attended for medical treatment of the injuries* and was diagnosed with suffering from a full thickness complete rupture of the subscapularis tendon along with a partial thickness tear of the subraspinatus tendon.
50. On 21 August 2017, *the Plaintiff underwent surgery to his right shoulder*, being an arthroscopy, arthroscopic bankart repair, arthroscopic acromioplasty and open cuff repair.
51. *The Plaintiff has experienced psychological symptoms following the assault and battery* of the First and Second Defendants and has been diagnosed with suffering from Post-Traumatic Stress Disorder and Major Depressive Disorder.

[italics and comments in bold added]

### ***These reasons on the pleaded case***

- [185] The effect of my findings is that the plaintiff has made out the substance of the allegations in the SOC italicised above, with some modifications noted in bold text. This is not to limit the relevant findings to those matters. However, the principal findings are covered by those allegations in the SOC. In that sense, the events as found by me fall within the scope of the pleading.
- [186] I have hesitated over finding the technical aspects of the injury to the shoulder were established, as that was not a focus of the trial on liability. I have, however, found that there was a significant shoulder injury which required surgery on two occasions and that that injury was caused by the fall from the Truck.
- [187] My findings also lead to the following conclusions:
- (a) Caleb has not been found to have done any of the acts pleaded other than to grapple with Mr Patchett to get the stub of the key out of his hand;
  - (b) Mr Nichols yelled abuse in a threatening manner at Mr Patchett when he first approached the Van and, at some stage in the melee following the turning off of the ignition, he threatened to kill Mr Patchett (albeit without actually intending to do so); and



- (c) Mr Patchett has been found to have suffered some, but not all, of the physical injuries pleaded in paragraph 48 SOC.

[188] As to the physical injuries, the fact that all the alleged injuries were not established at trial does not preclude evidence being led of those further injuries being caused by the facts as found, nor does it preclude evidence as to the seriousness of those injuries. The focus of the trial on consequences of the alleged acts was relevant to determining what acts if any relied upon as giving rise to the plaintiff's claim were proved.

[189] While a finding in this trial that particular injuries were caused by particular acts will bind the parties in any hearing as to damages as a matter of fact, that does not mean that further evidence to sustain alleged physical consequences cannot be led on the damages hearing, so long as that evidence is consistent with the findings of fact which were made.

***The tortious causes of action***

[190] The plaintiff articulates his causes of action arising from the allegations as to the events on 8 July as follows:

52. The actions of the First and Second Defendants as pleaded in paragraphs 26 and 28 to 47 inclusive herein, amount to an assault on the Plaintiff in circumstances where:
  - (a) The First and Second Defendants, by use of their words and/or actions, threatened the Plaintiff with harm and/or violence;
  - (b) the threats were made with the intention to threaten or scare the Plaintiff and to create an apprehension of imminent harm on the Plaintiff; and
  - (c) the threats induced in the Plaintiff a fear for his safety.
- 52A. The assault pleaded at paragraph 52 herein was unlawful insofar as the assault was not authorised, justified or excused by law.
53. The actions of the First and Second Defendants as pleaded in paragraphs 26 and 28 to 47 inclusive herein, amount to a battery on the Plaintiff in circumstances where:
  - (a) The First and Second Defendants made physical contact with the Plaintiff;
  - (b) the physical contact performed by the First and Second Defendants on the Plaintiff was done intentionally and voluntarily;
  - (c) the physical contact was a direct action on the Plaintiff by the First and Second Defendants; and
  - (d) the physical contact on the Plaintiff caused the Plaintiff harm and injury as pleaded at paragraphs 48 to 51 inclusive herein.
- 53A. The battery pleaded at paragraph 53 herein was unlawful insofar as the battery was not authorized, justified or excused by law.

[191] The plaintiff pleads assault and battery, and they are separate torts, albeit related. The position is explained in a leading text<sup>26</sup> as follows:

[2.06] Of the various forms of trespass to the person the most common is the tort known as battery, which is committed by intentionally bringing about a harmful or offensive contact

---

<sup>26</sup> Sappideen and Vines *Fleming on Torts* (10<sup>th</sup> Edn)

with another person's body. The action, therefore, serves the dual purpose of affording protection to the individual not only against bodily harm but also against any interference with the plaintiff's person which is offensive to a reasonable sense of honour and dignity. The insult in being touched without consent was traditionally regarded as sufficient, even though the contact is only trivial and not attended with actual physical harm. "The least touching of another in anger is a battery," as is such offensive and insulting behaviour as spitting in another person's face, cutting a person's hair or kissing a woman. The element of personal indignity is given additional recognition by awarding aggravated or even exemplary damages to compensate for any outrage to the plaintiff's feelings. The plaintiff need not even have been conscious of the contact at the time it occurred, as when a person is abused while asleep or under an anaesthetic; the affront is as serious to the person when discovered after the event as if the person had been conscious of it at the time.

...

[2.7] Assault consists of intentionally creating in another person an apprehension of imminent harmful or offensive contact. If the threat is actually carried out, the whole incident is properly described as an "assault and battery". Usually both offences occur in rapid succession, and in common parlance the word "assault" is frequently used as including a battery. But the one offence may be committed without the other. A battery may be inflicted on a victim who does not expect it and therefore cannot complain of assault, as where the victim is struck from behind without warning. Conversely, there may be an assault without a battery if the threat to inflict unlawful force is not in fact carried out.

Assault allows redress for the creation of an undesired emotional state unaccompanied by external injury. This is unusual for tort law, but it was decided at an early stage that assault warranted legal redress, partly as an aid to punishing offenders who had attempted to commit the crime of battery, partly because it minimised the temptation to retaliate.

Since the gist of assault lies in the apprehension of impending contact, the effect on the victim's mind created by the threat is the crux, not whether the defendant actually had the intention to follow it up. The intent required for the tort of assault is the desire to arouse apprehension of physical contact, not necessarily to inflict actual harm. Hence it is actionable to point a pistol for the mere purpose of frightening. It is sufficient if the threat would have aroused an expectation of physical aggression in the mind of a reasonable person not afflicted with exaggerated fears or peculiar and abnormal timidity.

- [192] The SOC pleads a rolled-up allegations of assault and of battery. It does not distinguish between the actions of Mr Nichols and Caleb, nor between the several alleged threats (for assault) or the several pleaded physical acts (for battery).
- [193] There was no submission by the defendants that to the extent the threats and physical acts pleaded were made out on the evidence, those threats and acts did not have the character pleaded in SOC 52 and 52A and 53 and 53A.
- [194] However, I am not satisfied that the abusive language by Mr Nichols towards Mr Patchett when he first arrived at the Van comprised the tort of assault. The elements of the tort of assault are articulated nearly in *Halsbury's Laws of Australia*<sup>27</sup> as follows (footnotes omitted):

Assault is an intentional offer of force or violence to the person of another, who reasonably believes that the threat will be carried out forthwith. The menace must be accompanied by an

---

<sup>27</sup> Online service as current 4 July 2023 at [415-355]

intention to raise in the mind of the person threatened an apprehension that violence is about to be committed. Thus, for instance, it is an assault to point a loaded gun at a person, whereas if the gun is not loaded, the tort is committed only if the plaintiff is unaware of that fact.

- [195] While Mr Nichols ladled out insults and abuse to Mr Patchett, and undoubtedly did so in an intimidating manner, not least because of the size and suddenness of the verbal spray directed at Mr Patchett, I do not consider it comprised an offer of force of violence or was said with the intention of raising an apprehension of violence. On my findings, it was the touching of the ignition key of the Van which triggered sudden violence.
- [196] The next stage in the events on 8 July was the struggle with Mr Patchett to get the key. I have found that Caleb participated in that struggle with Mr Nichols. In the course of that struggle, both Mr Nichols and Caleb made intentional physical contact with Mr Patchett which was offensive and likely to cause injury. Each of Caleb and Mr Patchett committed the tort of battery by engaging in that struggle. Although it is possible that there was some minor injury resulting from that struggle, I was not in a position to make a finding to that effect.
- [197] The next stage in the events is the grappling by Mr Nichols with Mr Patchett in which Mr Patchett was pushed against the wall of the garage on more than one occasion. It is difficult to be certain how this further act related to the struggle over the key. However, I accept Mr De Marco's characterisation of it as a single melee in which Caleb participated, at least to the extent of pushing or barging Mr De Marco. Albeit there is no evidence he was responsible for any further act against Mr Patchett directly.
- [198] The Court of Appeal recently referred with approval to this articulation of the elements of battery by Justice Cooper in the judgment under appeal.<sup>28</sup> The plaintiff must establish on balance that:
- (a) There was an intentional or negligent act by the defendant;
  - (b) Which immediately or directly caused physical contact with the plaintiff; and,
  - (c) Which was likely to cause injury or affront.
- [199] It appears that questions of consent and lawfulness arise by way of defence.<sup>29</sup>
- [200] I am satisfied that the actions involving pushing Mr Patchett against the wall amounted to a battery of Mr Patchett by Mr Nichols.
- [201] Finally, there is the pursuit of Mr Patchett to the Truck and what followed there. To my mind these events are part of a single act of assault and battery, comprised of Mr Nichols pursuing Mr Patchett, then carrying out the acts of taking the keys and

<sup>28</sup> *Doerr v Gardiner* [2023] QCA 160 at [74].

<sup>29</sup> *Pringle v Everingham* [2006] NSWCA 195 at [40] to [45].

the mobile phone and pulling Mr Patchett out of the Truck. I am satisfied these actions together amounted to an assault and battery of Mr Patchett by Mr Nichols.

***Accessory liability for Caleb?***

- [202] As already noted, the SOC rolls up the allegations of battery against Caleb and Mr Nichols. However, it does not plead any basis for Caleb to be liable for acts of Mr Nichols, nor vice versa. Where Caleb and Mr Nichols are acting together in a specific respect, it is open to the Court to conclude they are jointly liable for the tort committed during that joint endeavour. I find that the struggle to get the key stub from Mr Patchett was a joint battery by Caleb and Mr Nichols. They are jointly liable in respect of that tort.
- [203] However, I am not satisfied to the necessary standard that Caleb directly shoved Mr Patchett against the garage wall, nor that he was directly much less in the assault and battery which followed at the Truck. The plaintiff nonetheless submits that Caleb is jointly liable with his father for these further torts.
- [204] The plaintiff's primary submission is that Caleb is jointly liable with his father for all tortious acts by his father that day because those acts were the consequence of a conspiracy between the defendants to take the Van without paying the \$2000, knowing payment was required. The defendants' response to this was that no such conspiracy was pleaded, nor put to the defendants. Both of those propositions are correct. It seems likely to me that such a conspiracy had to be both pleaded and put to the defendants if it was to be pursued. However, I do not have to engage with those issues because I am not persuaded to the necessary standard that any such conspiracy existed.
- [205] The plaintiff's secondary submission is that Caleb is responsible jointly with his father for the acts of both he and his father in the vicinity of the Van. On my findings, that issue arises in respect of the shoving of Mr Patchett against the garage wall, discussed at [197] above. For the reasons that follow, I find that Caleb is jointly liable with Mr Nichols for that battery.
- [206] The principles which inform when tortfeasors can be jointly liable were considered in *Thompson v Australian Capital Territory Pty Ltd* (1996) CLR 574. It is sufficient to cite Gummow J, with whom Gaudron J agreed, and who relevantly observed (at 606, footnotes omitted):

In England, Australia and New Zealand, criteria for the identification of joint tortfeasors are to be found in expressions used in *The "Koursk"* [1926] P 140. Scrutton LJ (at 155) there spoke of "two persons who agree on common action, in the course of, and to further which, one of them commits a tort", saying that in such a case there is one tort committed by one of them "in concert with another". Sargant LJ (at 159-160) accepted the proposition that persons are joint tortfeasors when their "respective shares in the commission of the tort are done in furtherance of a common design" so that those who "aid or counsel, direct, or join" in the commission of the tort are joint tortfeasors.

[207] How are these general principles applied to a case like this one? Some guidance can be found in *Pringle v Everingham* [2006] NSWCA 195. There, one of the many issues was whether one police officer was responsible for the unlawful assault of another police officer during an arrest by both officers. That was dealt with by Hutley AJA, with whom Mason P and Santow JA agreed, as follows:

[86] The second of the matters to which reference should be made is the defendants' complaint that, despite finding that Const Hutchinson had not assaulted the plaintiff, the judge erroneously held him jointly liable for the assault by Const Pringle.

[87] As pleaded in his Statement of Claim, the plaintiff's claim for assault was that "the first to third defendants did assault and beat the plaintiff, causing him injury and damage". The particulars were that "the first to third defendants then assaulted the plaintiff by spraying him with capsicum spray and handcuffing him while purporting to arrest him". That claim could have been more specifically pleaded, but in my view it is sufficiently widely expressed as to include the joint participation by each of the police officers in each of the three assaults on the plaintiff alleged.

[88] In his initial judgment, and before hearing argument on the point, the judge found that both police officers "were really jointly participating in the events". He pointed out in the subsequent argument on this issue that both officers sprayed the plaintiff, and he posed the question whether the action by Const Pringle was a frolic of its own, or whether it was "so far removed" from the actions of Const Hutchinson that there should be different verdicts. He thought that it was not "going to make a great deal of difference [as] the State must be vicariously liable". He thought that the only question was whether or not it would affect any costs order, and he was concerned that the plaintiff may have to pay the costs of the second defendant. In his second judgment, which dealt only with the issue of joint liability, the judge said:

Counsel for the plaintiff has submitted that Const Hutchinson, by virtue of his temporal and physical proximity to Const Pringle, was participating in the commission of a tort by Const Pringle. There certainly was a temporal and physical proximity by Const Hutchinson in the tort committed by Const Pringle.

Whilst the tort committed by Const Pringle was independent and separate, I do not consider that Const Hutchinson was so independent or separate that the verdict in favour of the plaintiff should not also be entered against him.

He then entered verdicts in favour of the plaintiff against both police officers and the State of New South Wales.

[89] Quite apart from the worrisome concern he expressed as to the effect his findings would have on the incidence of costs, and again with due respect to the judge, he appears to have seriously misdirected himself as to the nature of a joint liability in tort.

[208] His Honour then referred to *Thompson*, and then observed:

[92] There is no evidence that Const Hutchinson participated in a common design by Const Pringle to assault the plaintiff unlawfully. The joint enterprise identified by counsel for the plaintiff on appeal was one "to arrest and subdue the plaintiff". If that was the only joint enterprise in which Const Hutchinson was involved, he was not liable for the action of Const Pringle in the course of that particular enterprise in assaulting the plaintiff unlawfully unless — by way of analogy to a joint criminal enterprise — such an assault was a possible incident of that enterprise which was within his contemplation at the time he joined it: *Johns v R* (1980) 143 CLR 108 at 130–131; *McAuliffe v R* (1995) 183 CLR 108 at 113–116 and 233–

236. That is not how the case was put at the trial and, as the judge held, the tort committed by Const Pringle was "independent and separate" (see para [88] supra).

- [209] In my view, it is established on the evidence that Caleb and Mr Nichols participated in a common design to obtain the key stub from Mr Patchett and are jointly liable for that battery. I am also persuaded that that common design extended to Mr Nichols' battery of Mr Patchett by shoving him into the garage wall. I accept Mr De Marco's evidence that the struggle for the key and the shoving of Mr Patchett, including into the wall on at least one occasion, was part of a single melee (to use Mr De Marco's words) in which Caleb also came into contact with Mr De Marco. Having embarked on the struggle for the key, and having continued involvement in it, at least by barging into Mr De Marco in the course of a single melee and not withdrawing from scene to signal his abandonment of the struggle with Mr Patchett, I find Caleb is jointly liable with Mr Nichols for the battery on Mr Patchett when he was pushed into the garage door by Mr Nichols.
- [210] Accordingly, I find the defendants jointly liable for the assault and battery involved in the struggle for the key and subsequent pushing of Mr Patchett into the garage wall and the threatening words used by Mr Nichols during that struggle.
- [211] I also find Mr Nichols alone liable for the assault and battery comprised in his pursuit of Mr Patchett to the Truck and his actions there.

### **Conclusion**

- [212] The plaintiff has made out the liability of the defendants as articulated in this judgment. Damages remain to be determined. I will hear the parties as to costs and as to any further orders necessary or desirable for the further hearing and determination of the proceedings.