PARTIES:	JAMBAJIMBA, Steven Gorey and LLOYD, David and SHEPHERD, Robert and NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	120 of 1985
DELIVERED:	19 SEPTEMBER 1997
HEARING DATES:	18 April 1997
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Procedure - Judgments and orders - Interest on judgments - No interest on exemplary damages -

Commonwealth of Australia v Murray and Anor (1988) Aust Torts Reports 80-207, followed.

Judgments and orders - Interest on judgments - Effect of delay -

Honey v Keyhoe (1973) 6 SASR 466 at 470 per Bray CJ., referred to.
Metro Meat Ltd v Werlick (1993) Aust. Torts Reports 81-242, referred to.

Judgments and orders - Interest on judgments - Purpose of interest -

Batchelor v Burke (1981) 148 CLR 448 at 455 per Gibbs CJ., referred to.
MBP (SA) Pty Ltd v Gogic (1991) 171 CLR 657 at 663, referred to.

Procedure - Costs - Third defendant successfully resisted plaintiff's claims - "Bullock" or "Sanderson" orders - Whether plaintiff should be relieved of consequences of lack of success against third defendant -

Supreme Court Rules (NT) 1987, r63.03(2) and 63.22(1) -

Lackersteen v Jones & Ors (No 2) (1988) 93 FLR 442 at 446, distinguished.
Mulready v J H & W Bell & Anor [1953] 2 All ER 215, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	Mr M Howden
First Defendant:	Mr J Stirk
Second Defendant:	No Appearance
Third Defendant:	Mr M Grant

Solicitors:

Plaintiff:	CAALAS
First Defendant:	McBride & Stirk
Second Defendant:	No Appearance
Third Defendant:	Solicitor for the NT

Judgment category classification:	B
Judgment ID Number:	mar97045
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 120 of 1985

BETWEEN:

STEVEN GOREY JAMBAJIMBA
Plaintiff

AND:

DAVID LLOYD
First Defendant

AND

ROBERT SHEPHERD
Second Defendant

AND

NORTHERN TERRITORY OF AUSTRALIA
Third Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 19 September 1997)

Interest and costs. Judgment was given for the plaintiff against the first and second defendants on 24 March 1997 in the sum of $9,500, being $4,000 for compensatory damages, $500 for aggravated damages and $5,000 for exemplary damages. His claim against them was for loss suffered as a

consequence of an assault which took place on 15 June 1985. He was unsuccessful in his claims to hold the third defendant vicariously liable for the acts of the other defendants, and independently liable for breach of duty of care

Submissions were received later as to interest and costs.

Interest

Interest is claimed on the judgment sum, excluding the award for exemplary damages, pursuant to s84 of the *Supreme Court Act* (NT) 1979. The assault upon the plaintiff took place on 15 June 1985, he underwent surgery on 25 June and was discharged from hospital on 8 July. There was medical evidence that pains from the attack would subside after a day or two thereafter, but no doubt there was pain and discomfort associated with the operation, and the plaintiff said that he felt sick for some months thereafter. No further evidence was given as to pain and suffering or any continuing compensable loss thereafter. This is not a case where the damage has accrued gradually over a period from the tort until judgment. Interest is not allowed on exemplary damages since they do not accrue until the award, and thus the plaintiff has not been kept out of those funds prior to judgment (*Commonwealth of Australia v Murray & Anor* (1988) Aust Torts Reports par80-207). The writ was issued in December 1985 and was endorsed with a claim for interest.

Although I was troubled by the delay in bringing the matter on for trial, I am not satisfied that the plaintiff should be deprived of any part of the interest. He may have had his judgment earlier if he had more vigorously pursued his claim, but the first and second defendants have had the use of the money in the meantime. In August 1995, the first defendant made application for the proceedings to be struck out for want of prosecution, or alternatively, that the action be transferred to the Local Court (a matter to be referred to later). The application was dismissed by Mildren J. on 23 August, but it may have had the effect of prodding the plaintiff into activity (*Honey v Keyhoe* (1973) 6 SASR 466 per Bray CJ. at p470). The trial commenced on 23 June 1996 after an unsuccessful application by the first defendant that it be adjourned indefinitely.

With respect, the views of the members of the Full Court of the Supreme Court of South Australia in *Metro Meat Ltd v Werlick* (1993) Aust Torts Reports par81-242, may well be borne in mind in relation to issues involving delay.

Interest is awarded to compensate the plaintiff for the detriment he has suffered by being kept out of his money, and not to punish the defendant for having been dilatory in settling the plaintiff's claim, per Gibbs CJ. in *Batchelor v Burke* (1981) 148 CLR 448 at 455, affirmed by the High Court in *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 663. I bear that in mind. No reason has been advanced to suggest that this Court should depart from the rate of 4% fixed in the latter case.

Interest is allowed for the period from 21 March 1986, when the first and second defendants filed their appearances, thus acknowledging that they were on notice as to the proceedings and the claim for interest, until date of judgment, 17 February 1997, on the sum of $4,500 being the compensatory and aggravated damages.

Costs

The first and second defendants must pay the plaintiff's costs of the proceedings against them.

What of the costs as between the plaintiff and the third defendant? It successfully resisted two claims upon which the plaintiff sought judgment against it. It was not joined as a defendant because the plaintiff was unsure of the party from whom he was entitled to redress. It was sued firstly, on the basis that it was vicariously liable for the acts of the other defendants for the assault and their failure to inform other police to whom they delivered the plaintiff that he might be injured. The second basis of the claim against the third defendant was for failing in an alleged duty of care whilst the plaintiff was in the police cells at Alice Springs.

The plaintiff seeks a "Bullock" or "Sanderson" order so that it might be relieved, or possibly relieved, of the consequences which would ordinarily flow from its lack of success against the third defendant. It was noted by Asche CJ. in *Lackersteen v Jones & Others (No.2)* (1988) 93 FLR 442 (in

which the law relating to such costs orders was reviewed in detail at p446) that the plaintiff could not even reach the third defendant (the same party here) without proving the torts of the first and second defendants (other members of the police force) and thus there was a connection between them. However, this case is distinguishable. In *Lackersteen,* the police defendants pleaded that their acts were not tortious but were done as part of their duties as police officers. "Hence" said his Honour "the conduct of their case inevitably involved the third defendant ..." (p449). The police defendants in this case denied that there had been any assaults at all, and also denied a specific allegation in the statement of claim that their torts were committed in the performance, or purported performance of their duties. Consistent with their denials, they did not claim contribution from the third defendant. The plaintiff's claim against the two policemen was clearly based upon conduct on their part which could not possibly be sheeted home to the third defendant. The plaintiff's costs against that defendant on that count were not reasonably and properly incurred. It is not reasonable that the unsuccessful defendants should have to pay two sets of costs. I also bear in mind that the third defendant was obliged to have its interests represented throughout the trial because of the separate claim against it. As to that second matter, it is, in the words of the Court of Appeal in *Mulready v J H & W Bell Ltd & Anor* [1953] 2 All ER 215 "entirely independent" and "in no way connected with" the claim based upon the assault. It was the claim based upon negligence of unnamed police officers relating to the time the plaintiff had been in the police cells.

The plaintiff must pay the costs of the third defendant.

Scale of Costs

Judgment was given for the plaintiff against the first and second defendants for damages in the sum of $9,500. Rule 63.22(1) provides that where:

> "a plaintiff recovers … an amount which is within the jurisdiction of the Local Court, and the Court makes an order that the defendant pay the plaintiff's costs of the proceedings, the plaintiff is not entitled to recover from the defendant an amount for costs which exceeds that which he would have recovered in the Local Court, unless the Court is satisfied that he had good reason to commence the proceedings in the Court".

That rule is subject to r63.03(2) which relevantly provides that where, in the opinion of the court, the strict application of O63 would result in an anomaly, the court may make such order in relation to costs as it thinks equitable in the circumstances.

The damages awarded were within the jurisdiction of the Local Court which has been at $40,000 since 1 January 1991. If it is permissible to add interest, for the purpose of determining the amount which the plaintiff recovered, the total still lies within that jurisdiction. If the plaintiff is to avoid the consequential costs penalty, he must satisfy this Court that there was good reason to commence the proceedings in this Court. When those proceedings were commenced, the jurisdiction of a Local Court was $10,000, but an assessment by the plaintiff or his legal advisers as to the likely award would appear to be irrelevant. That would open up a range of enquiry which

could substitute for the operation of the rule an expectation of recovery rather than the actual recovery (*O'Doherty v McMahon* [1971] VR 625 at p630). It was suggested in that case that "complexity of the case or other like difficulties" might be regarded as being relevant to overcome the costs penalty thereunder consideration. In *Cromer v Harry Rickards' Tivoli Theatres Limited* [1921] SASR 325 at p335 Angas Parsons J. referred to the "... whole of the circumstances of the case, its difficulty in point of law, the complexity of the evidence, and the amount of damages awarded ..." for feeling justified in certifying the action for trial in the Supreme Court in a case where the plaintiff had recovered a sum within the jurisdiction of the Local Court (other cases are referred to in *Williams* at par63.24.20).

The issues in this case in reasonable contemplation when the writ was issued, involved serious questions going to misbehaviour of members of the police force, the duty of care of the third defendant for people in the custody of police, and its vicarious liability all depending upon the facts as found after a contest. The plaintiff was not then to know what issues might be raised by the defences, but could anticipate a plea based on s162 of the *Police Administration Act* (NT) 1979, at least. He was by himself when assaulted and could not have anticipated that there would be no evidence from the first and second defendants. He was entitled to anticipate that the task ahead of him would be difficult, both in relation to fact and law. In my opinion, it was a fit matter to be brought in this jurisdiction and he has accordingly shown good reason why he did so. He is entitled to his costs on the scale applicable in this Court.

Orders

1. That there be included in the sum for which judgment is given against the first and second defendants interest at the rate of 4% on the sum of $4,500 for the period from 21 March 1986 to 17 February 1997.

2. That the first and second defendants pay the plaintiff's costs on the Supreme Court scale.

3. That the plaintiff pay the third defendant's costs.
