CITATION:	*LO v Northern Territory of Australia; EA v Northern Territory of Australia; KT (as Litigation Guardian for KW) v Northern Territory of Australia; and LB (as Litigation Guardian for JB) v Northern Territory of Australia (No 2)* [2018] NTSC 86
PARTIES:	LO v NORTHERN TERRITORY OF AUSTRALIA
AND:	EA v NORTHERN TERRITORY OF AUSTRALIA
AND:	KT (as Litigation Guardian for KW) v NORTHERN TERRITORY OF AUSTRALIA
AND:	LB (as Litigation Guardian for JB) v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	14 of 2015 (21508784) 15 of 2015 (21508785) 19 of 2015 (21510204) 26 of 2015 (21513348)
DELIVERED:	3 December 2018
HEARING DATE:	On the papers
JUDGMENT OF:	Kelly J

REPRESENTATION:

Counsel:

Plaintiffs:	K Foley
Defendant:	T Moses

Solicitors:

Plaintiffs:	North Australian Aboriginal Justice Agency Ltd
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID Number:	Kel1814
Number of pages:	13

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

LO v Northern Territory of Australia; EA v Northern Territory of Australia; KT (as Litigation Guardian for KW) v Northern Territory of Australia; and LB (as Litigation Guardian for JB) v Northern Territory of Australia (No 2)
[2018] NTSC 86
No. 14 of 2015 (21508784), No. 15 of 2015 (21508785), No. 19 of 2015 (21510204) and No. 26 of 2015 (21513348)

BETWEEN:

LO
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND BETWEEN:

EA
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND BETWEEN:

KT (as Litigation Guardian for KW)
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND BETWEEN:

LB (as Litigation Guardian for JB)
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 3 December 2018)

[1] On 21 March 2017 I delivered judgment in these four proceedings which were heard together. Each of the plaintiffs sued the defendant for damages for assault and battery said to have occurred while the plaintiffs were detained at Don Dale Youth Detention Centre ("Don Dale"). The majority of the allegations arise out of an incident which occurred at Don Dale on 21 August 2014 and its aftermath.

[2] The plaintiffs claimed damages for assault and battery arising out of a number of incidents.

(a) The first was the incident at Don Dale on the night of 21 August 2014 which culminated in the release of CS gas[1] into the area of the BMU where the plaintiffs were detained.

1 The full name of CS gas is o-chlorobenzylidene malononitrile

(b) The second incident was the transfer of the plaintiffs from Don Dale to Berrimah Correctional Centre ("Berrimah") in a van on the night of 21 August 2104 while handcuffed.

(c) The third incident involved three of the plaintiffs (EA, JB and KW) being taken to a medical appointment at Berrimah the next day (22 August 2014) handcuffed, shackled and wearing spit hoods.

(d) The fourth incident was an alleged assault and battery of LO by a prison officer in a cell in Berrimah on 23 August 2014.

(e) The fifth incident involved all four plaintiffs being taken from Berrimah to Darwin Correctional Centre, 325 Willard Road, Howard Springs ("Holtze") on 25 August handcuffed, shackled and wearing spit hoods.

(f) The sixth and seventh incidents were two alleged assaults and batteries of EA by Youth Justice Officers ("YJOs') on 5 and 6 April 2015 in which EA was ground stabilised and handcuffed.

[3] The defendant pleaded that the actions of the YJOs and prison officers concerned had been reasonable and necessary in the circumstances except for certain minor admissions. (The defendant admitted liability for placing shackles and spit hoods on the plaintiffs in the third and fifth incidents. In relation to the third incident, the defendant denied that the plaintiffs were

handcuffed behind their backs, but admitted that, if they had been, that would not have been reasonable.)

[4] I gave judgment for the defendant on all of the plaintiff's claims except those in relation to which the defendant had admitted liability and made a factual finding that the plaintiffs EA, JB and KW had been handcuffed behind their backs during the third incident. The damages I awarded were:

EA	damages for battery on 22 August 2014	$ 5,000
	damages for battery on 25 August 2014	$ 5,000
	aggravated damages	$ 2,000
		$12,000
JB	damages for battery on 22 August 2014	$ 5,000
	damages for battery on 25 August 2014	$ 5,000
	aggravated damages	$ 2,000
		$12,000
KW	damages for battery on 22 August 2014	$ 5,000
	damages for battery on 25 August 2014	$ 5,000
	aggravated damages	$ 7,000
		$17,000
LO	damages for battery on 25 August 2014	$ 5,000
	aggravated damages	$ 7,000
		$12,000

I refused the plaintiffs' claims for exemplary damages.

Costs applications

[5] The plaintiffs submit that the defendant should pay each plaintiff's costs of and incidental to the proceeding to be taxed on the standard basis. The defendant submits that the plaintiffs should pay the defendant's costs of and

incidental to the proceeding taxed on the indemnity basis from the making of the defendant's first Calderbank offer".

Principles

[6] Costs are in the discretion of the Court, which must be exercised judicially. The ordinary rule is that costs follow the event. Absent "some special or unusual feature in the case",[2] costs should be awarded on the standard basis. Indemnity costs may be awarded in the Court's discretion where there has been an imprudent refusal of an offer of compromise.[3]

> [T]here is no presumption that a party who rejects a Calderbank offer should pay the offeror's costs on an indemnity basis if the offeree receives a less favourable result. However, the rejection of a Calderbank offer is a relevant consideration when considering whether or not to award indemnity costs. The question to be asked is whether the rejection of the offer was unreasonable in the circumstances.[4]

[7] The defendant submits that it was substantially successful and that the plaintiffs should pay the defendant's costs. The defendant relies on Calderbank offers made before the trial and submits that the defendant's costs should be taxed on an indemnity basis from 22 September 2016, the date the plaintiffs rejected the defendant's first Calderbank offer.

---

2 *BAE Systems Australia Ltd v Rothwell* (2013) 275 FLR 244 at [26]; *Preston v Preston* [1981] 3 WLR 619 at 637

3 *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233, cited with approval in *BAE Systems Australia Ltd v Rothwell* (2013) 275 FLR 244 at [26]

4 *Blackbear (NT) Pty Ltd v Want* [2013] NTSC 63 at [6]

[8] I agree that the defendant was substantially successful and that the plaintiff's should therefore pay the defendant's costs. True, the plaintiffs each received an award of damages, but:

(a) the plaintiffs were entirely unsuccessful on each of their principal claims;

(b) with one minor exception (set out at [3] and [4] above) the parts of their claims on which the plaintiffs succeeded were those in relation to which the defendant had admitted liability.

[9] The question is whether those costs should be taxed on an indemnity basis and, if so, from what date.

The offers of settlement made by the Plaintiffs and the Defendant

[10] By letter of 7 July 2015, the plaintiffs made an offer to accept $50,000 each for general damages, $25,000 each for aggravated damages and $20,000 each for exemplary damages plus costs. The defendant did not respond to those offers.

[11] By a letter dated 19 September 2016 headed "without prejudice save as to costs" and expressed to be made in accordance with the principles in *Calderbank v Calderbank*,[5] ("the first offer"), the defendant separately offered to each plaintiff to settle the proceedings by paying each plaintiff $100,000 plus costs as taxed or agreed, subject to a Deed of Settlement and

5 [1975] All ER 333

Release in a form acceptable to the defendant being executed by the parties. The offer was expressed to remain open until 5.00 pm on 22 September 2015.

[12] On 22 September 2016, the plaintiffs rejected the defendant's offer and made four separate counteroffers, all made without prejudice save as to costs.

(a) LO offered to accept an offer of $350,000 plus costs, as taxed or agreed. LO's counteroffer was conditional upon a public apology (the precise terms of which, it was said, could be discussed at a later time) and confirmation that children would no longer be permitted to be placed in the Behavioural Management Unit ("BMU") at Don Dale – or a commitment to disallow that form of punishment in future.

(b) The offer on behalf of KW was to accept $350,000, plus costs, as taxed or agreed. The offer was conditional upon a written apology for KW and his mother and commitment by the defendant to improve the rules or policies of Don Dale with KW being consulted on any improvements. (The precise terms of the apologies and improvements to the rule and policies of Don Dale were to be discussed at a later date).

(c) EA offered to accept $200,000 plus costs conditional upon a public apology being made to him, the terms of which could be agreed upon a later date.

(d) JB offered to accept $250,000 plus costs, taxed in default of agreement.

[13] On 23 and 24 September 2016, in separate letters, each headed "without prejudice save as to costs" and expressed to be made in accordance with the principles in *Calderbank v Calderbank*, the defendant offered to settle the proceedings against each of the plaintiffs by paying "$135,000 plus costs as taxed or agreed, subject to a confidential Deed of Settlement and Release in a form acceptable to the Northern Territory being executed by the parties." (In addition, EA and LO were advised that instructions for their requests for an apology had been sought and that a response would be provided as soon as those instructions were received. Offers of written apologies were added the next day. LO was also advised that the Don Dale facility in which LO was detained in at 21 August 2014 was decommissioned and accordingly the BMU at the facility was no longer in use.) (This is referred to as "the second offer".)

[14] By a letter dated 24 September 2016, KW rejected the defendant's second offer and made a counteroffer to accept $250,000 plus costs to be agreed or taxed in settlement of the proceeding.

[15] By letter dated 25 September 2016, LB rejected the defendant's second offer and invited the defendant to accept his earlier offer of $250,000 on the terms set out in that offer.

[16] By letter dated 25 September 2016, LO rejected the defendant's second offer and made a counteroffer to accept $250,000 plus costs to be taxed in default of agreement.

[17] By letter dated 25 September 2016, EA rejected the defendant's second offer made a counteroffer to accept $200,000 plus costs to be taxed in default of agreement.

[18] By letters dated 25 September 2016, headed "without prejudice save as to costs" and expressed to be made in accordance with the principles in *Calderbank v Calderbank*, the defendant made a third round of offers ("the final offers") offering to pay each plaintiff $150,000 plus costs to be agreed or taxed, subject to a confidential Deed of Settlement and Release in a form acceptable to the parties being executed by the parties. These offers did not include the offer of any apology.

Parties' submissions

[19] The plaintiffs contend that it was not unreasonable for them to have rejected each of the defendant's offers for the following reasons.

(a) Each settlement offer was "subject to a Deed of Settlement and Release in a form acceptable to the [defendant] being executed by the parties". That introduced uncertainty into the terms of the offer.

(b) The principal issues at trial – whether there was authority to use the CS gas and whether the use was reasonable (even if it was authorised) –

were live issues and the plaintiffs were not unreasonable in wanting to take those questions to trial.

(c) Awards of damages in tort-based claims involving the use of force by public officers are complex and difficult to predict, and reasonable minds may well differ in their assessment of the likely outcome.[6]

(d) The defendant's offers did not distinguish between the plaintiffs' claims and so did not adequately reflect an assessment of the individual merits of each plaintiff's case.

(e) The offers did not specify an additional allowance for interest.

[20] I do not find any of these reasons compelling. I consider that it was unreasonable in the circumstances for the plaintiffs to have rejected what were very generous offers of settlement. At the time the first offer was made the plaintiffs were in possession of the expert report relied on by the defendant as establishing the reasonableness of the conduct of the defendant's officers. They were therefore in a position to assess the likelihood of success. It is noteworthy that the plaintiffs did not call their own expert evidence to contradict the conclusions in this report.

[21] Further, I consider the fact that the defendant offered the same amount to each plaintiff in each offer to be irrelevant. The amounts offered by the

---

6 The plaintiffs referred in written submissions to an ABC report quoting a government spokesperson as having said "the Chief Minister was advised the settlement cost could be up to $250,000 for each plaintiff." This was not in evidence before me and would, in any event be inadmissible hearsay. Nor is it relevant.

plaintiffs in their counter-offers were totally disproportionate to any amount of damages likely to have been awarded to the plaintiffs (including interest on those claims) particularly in light of the fact that the statement of claim did not allege any injury to any of the plaintiffs, and the amounts offered by the defendant were generous no matter which plaintiff's potential claim is considered.

[22] The only factor that might suggest it was not unreasonable to reject the offers was the fact that each was subject to the signing of a deed of settlement and release. Depending on the complexity of the claims being settled, such a condition can introduce an element of uncertainty which may make rejection of the offer not unreasonable. It is often preferable, if a deed of release is to be insisted upon, to at least specify the terms to be included in such a deed in the offer (or attach a draft deed). The defendant relied on *Magenta Nominees Pty Ltd v Richard Ellis (Western Australia) Pty Ltd*[7] in which an offer made subject to the parties entering into a deed of settlement and release was held to be a proper offer not attended by latent ambiguity. The plaintiffs relied on *Chapel Road Pty Ltd v ASIC (No 11)*[8] in which an offer subject to such a condition specifying a release to be given by "any entities associated with Chapel Road and those persons standing behind it" was held not capable of acceptance. Each of these cases turns on its own particular circumstances.

---

7 (Unreported, Full Court of the Federal Court of Australia, 29 August 1995)

8 [2014] NSWSC 636

[23] In this case, I do not think that the addition of a condition that the parties enter into a deed of settlement and release in a form acceptable to the Territory in the first offer (or a deed acceptable to both parties in the later offers) rendered the offers incapable of acceptance or made it reasonable to reject them.[9] That condition was not raised by the plaintiffs as an obstacle to acceptance at the time. The first offer of 19 September 2016 was promptly rejected on 22 September and a counter-offer made. The inference is that the plaintiffs simply considered the offer to be too low. That was unreasonable.

[24] ORDER: The plaintiffs are to pay the defendant's costs of and incidental to the proceedings to be taxed on the standard basis to 22 September 2016 and on an indemnity basis after 22 September 2016. (These costs are to include the costs of all interlocutory proceedings other than those which have been the subject of separate costs awards.)

Interest:

[25] The defendant has submitted that the plaintiffs are not entitled to an award of interest by reason of s 29(a) of the *Personal Injuries (Liability and Damages) Act* which provides that a court must not order payment of interest on damages awarded for non-pecuniary loss in claims for damages for personal injuries. This Act does not apply. I have already made a finding

9 It should be noted that the counter-offers made to the first offer by some of the plaintiffs (referred to in para [12] above) were subject to a condition that the defendant issue an apology, the terms of which were not specified, but, it is said, were to be subject to later agreement.

that the claims on which the plaintiffs succeeded in this proceeding were not claims for damages for personal injuries.[10]

[26] The plaintiffs did not plead a claim for interest by way of damages.[11] They are therefore entitled to simple interest at the usual rate of 4% per annum from the date the cause of action arose (22 and 25 August 2014) to the date of judgment.

[27] ORDER: The amount of interest awarded to EA and JB will be $1,238.40 and to KW and LO will be $1,754.40.

---

10 *LO v Northern Territory of Australia; EA v Northern Territory of Australia; KT (as Litigation Guardian for KW) v Northern Territory of Australia; and LB (as Litigation Guardian for JB) v Northern Territory of Australia* [2017] NTSC 22 at [370]-[383]

11 See *Hungerfords v Walker* (1989) 171 CLR 125