Small v Mahony [2006] NTSC 97

PARTIES:	SMALL, Aaron Troy
	v
	MAHONY, Shallyn Lee
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SC 115 of 2005 (20508827)
DELIVERED:	15 December 2006
HEARING DATES:	4-7 December 2006
JUDGMENT OF:	RILEY J

CATCHWORDS:

DEFAMATION – Police officer acting in course of employment – Duty to communicate information – Occasion of qualified privilege – Absence of malice

CLAIM UNDER POLICE ADMINISTRATION ACT – Effect of s 162(1) – Claims statute barred

Northern Territory v Mengel (1995) 185 CLR 307, followed
Stephens v WA Newspapers (1994) 182 CLR 211, followed
Dunlop v Woollahra Municipal Council [1981] 1 NSWLR 76, referred to
Cornwall v Rowan (2004) 90 SASR 269, referred to
Stuart v Bell (1981) 2 QB 341, followed

Adam v Ward (1917) AC 309, followed
Toogood v Spyring (1834) 149 ER 1044, followed

Police Administration Act (NT), s 162(1)

REPRESENTATION:

Counsel:

Plaintiff:	Self-represented
Defendant:	I Morris

Solicitors:

Plaintiff:	Self-represented
Defendant:	Hunt & Hunt

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

Small v Mahony [2006] NTSC 97
No SC 115 of 2005 (20508827)

BETWEEN:

SMALL, Aaron Troy
Plaintiff

AND:

MAHONY, Shallyn Lee
Defendant

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 15 December 2006)

[1] The plaintiff, who is a self-represented law student, seeks damages against the defendant, a police officer, arising out of events that occurred in Alice Springs on 1 September 2004. The plaintiff alleged that on that date the defendant defamed him on three separate occasions, that she unlawfully arrested or imprisoned him and that she committed the tort of misfeasance in public office.

The background

[2] On 1 September 2004 the plaintiff was an employee of the Red Dog Café in Alice Springs. He gave evidence that there was an ongoing concern held by his employer and by himself regarding the use by others of a private rubbish bin rented by the business. On several occasions the plaintiff had been in dispute with workers from the Alice Springs Town Council regarding the use of the bin. As a consequence he had researched the city by-laws in relation to the issue and he described the council's view of the relevant by-law as "suspiciously vague". He had decided that the situation was unfair to his employer. By virtue of his research he concluded that: "I was obliged to remove all such rubbish (ie rubbish wrongly placed in his employer's bin) and place it in the Alice Springs Council bins as I was prohibited from permitting it to remain elsewhere".

[3] On 1 September 2004 he went to the bin to dispose of some rubbish. He noticed that someone else ("some ignorant person") had put their rubbish in the bin. He removed it and threw it on the ground. He described himself as being "generally amused at the pettiness and small mindedness of people". He said he was intending to place the removed rubbish in a council bin. Before he could do so he was approached by two women who "arrogantly and rudely" asked him what he was doing removing rubbish from the bin and, according to him, they insisted that he explain himself and return the rubbish to the bin. There was an exchange of words between himself and the women. The plaintiff returned to the café leaving the removed rubbish

where he had thrown it. He said he did not wish to become "embroiled in yet another argument over the bin". He later went back to the bin with further rubbish from the café and was again approached by the two women. They insisted that he dispose of the rubbish which he had previously removed from the bin. A further argument took place between the plaintiff and the two women following which he again returned to the café. Later he returned to the bin for a third time and the two women were still present. He said they were aggressive in their attitude whilst he was being reasonable. They again questioned him regarding the proper disposal of the rubbish and as they did so one walked behind him. He said he felt threatened and he said to the women words to the effect of: "If I am assaulted I will defend myself". His evidence was that he regarded the woman behind him as a "serious and impending threat". He did not explain why he could not walk away as he had before. He then said to them that he had "knocked a woman out" just the week before because she had attacked his fiancée. He said in his evidence that the two women then "acted terrified" and they telephoned the police. He described the two women as engaging in "arrogant, argumentative and obstructive behaviour, utterly unreasonable and uncalled for". He told the two women his name and where he worked and said the police could be in touch with him. He then returned to the café.

[4] Direct evidence of the confrontation near the rubbish bin was given by the two women who were concerned in that incident and by their companion

who was a short distance away. Their descriptions differed markedly from that given by the plaintiff. The women were aged 43 and 45 years at the time. Dale Rabbett was a visitor to Alice Springs. She told the Court of being present in the carpark along with Libby Kartzoff and Beverley Hadfield. They were at their vehicle parked at the rear of the café. Ms Kartzoff had changed the nappy of her child and had taken the nappy to the rubbish bin. On the way she picked up an empty pizza box from the ground and deposited both the nappy and the pizza box into the bin. Ms Rabbett then saw a young man, who turned out to be the plaintiff, remove the pizza box and throw it on the ground. He was asked by Ms Kartzoff why he had done so and he explained that the bin was privately owned and not for public use. Ms Kartzoff then picked up the pizza box from the ground and took it to another bin which was nearby. She returned to her vehicle.

[5] In the meantime the plaintiff went into the café and came out with a lock with which to lock the bin. Ms Kartzoff suggested to him that he would not have a problem if he kept the bin locked. The plaintiff then became upset and animated, making exaggerated physical gestures and swearing. Ms Rabbett was concerned for her friend and went over to stand alongside her. She thought she might be able to calm the plaintiff down. She failed. The volume of the plaintiff's voice became louder and louder although he was not shouting. He became more aggressive and agitated. Ms Rabbett suggested to him that it was only a bin, that he should calm down and things

were “getting out of perspective”. She said he then stepped towards her and into her “personal space”. His face was so close to her face that she could feel his breath. He was almost standing on her feet. He said words to the effect of: “I hit a woman in the head here last week”.

[6] Ms Rabbett said that at this stage she was terrified and could not move. She asked the plaintiff whether he was threatening her and he responded: “You can take it as you please”. Ms Rabbett was relieved to hear her friend, Ms Kartzoff, say she was going to call the police. Once that occurred the plaintiff immediately underwent a change of demeanour from being hostile and aggressive to being defensive. He moved away from her and said that he had done nothing wrong. He said he would wait for the police but after a short time he said that he would be in the café if the police wished to speak to him. The police did attend and the events were described to them by Ms Rabbett and Ms Kartzoff.

[7] Ms Rabbett, Ms Kartzoff and Ms Hadfield each denied that anyone had stood behind the plaintiff. Ms Rabbett said the plaintiff was directly in front of her and very close to her so that he occupied the whole of her vision. Her friend, Ms Kartzoff, was on her left-hand side.

[8] The evidence of Ms Kartzoff was to similar effect. She said the plaintiff was very angry. When he spoke to Ms Rabbett he was “toe to toe” with her and said that he had either “thumped or decked” a woman in the carpark a week before. At that time Ms Kartzoff was very frightened and telephoned

the police. Both witnesses said the plaintiff had been to the bin on only two occasions rather than the three referred to by him. They did not accept that the plaintiff had said he would defend himself. They did not give evidence of the plaintiff making any reference to his fiancée being attacked at the time he said he hit the woman the week before.

[9] Ms Hadfield, who was aged 66 at the time, was also present. She remained a short distance away at the car minding the child. She saw the plaintiff confront her friends, Ms Kartzoff and Ms Rabbett, and could hear his raised voice. Her friends were standing side by side. She described the plaintiff as aggressive. She said she clearly heard him say: "I punched a woman in the face or head just last week". She then heard Ms Kartzoff say she was calling the police.

[10] I accept the evidence of the three women in preference to that of the plaintiff. This was a young man who acknowledged an anger management problem. The problem had been with him for some years and he was, as he stated, still employing strategies to control his anger. He acknowledged that he had a significant concern relating to the use of the rubbish bin. He previously had disagreements with officers of the Alice Springs Town Council over the issue, and it was clearly a matter of some moment to him. He suspected, correctly, that the bin had been used by one of the women and this led to a confrontation. He acknowledged that he threw the pizza box from the bin to the ground. He acknowledged informing the women that he had in the week prior struck another woman in the same carpark. He gave as

his only reason for making that statement to Ms Rabbett that he was seeking to emphasise that he would defend himself as he was concerned that one of the two women had gone behind him. That was denied by each of the women concerned. Having heard the denials the plaintiff, in the course of his submissions, accepted that neither woman passed behind him. The plaintiff's explanation for his threatening remarks is without foundation. I find it did not occur. In my view the plaintiff invented that part of his story in order to explain his conduct. The more likely explanation for his conduct is that he lost his temper. He was seeking to frighten the women and he did so.

[11] The three witnesses were mature women and they each told a similar story. They were each impressive witnesses. Their evidence was largely unchallenged by the plaintiff. To the extent that alternative positions were put to the witnesses in cross-examination they maintained their initial versions of events. The story they each told was consistent with what had been said to the police back in 2004. It was also consistent with the evidence of Constable Mahony that one of the women (presumably Ms Rabbett) was upset and shaking when police arrived.

[12] The three women impressed me as being reliable historians and I accept their evidence. I note that the plaintiff was similarly impressed at least by Ms Kartzoff. He said of her: "Unfortunately for my case I do believe her quite highly".

The first publication

[13] The police arrived soon after the plaintiff had returned to the cafe. The defendant was one of the officers concerned and the other was Constable Fox. The conversation between the defendant and the plaintiff which followed; the defendant's discussion with the employer of the plaintiff; and the subsequent recording of the incident by way of report on the police PROMIS system provided the bases for the complaints of defamation made by the plaintiff.

[14] The versions of what took place at the café differ as between the plaintiff on the one hand and Constable Fox and the defendant on the other. The plaintiff described a discussion in which he was given no chance to speak or to tell his story. He said that Constable Mahony arrived with Constable Fox and, before he had a chance to say anything, told him that the "complainants" did not wish to press charges but: "I want to discuss what you did with you". She then said: "I don't need to hear your side of the story, I already know what happened" and then: "I know that you had an argument with two women who approached you after having seen you take rubbish from a bin and … say that you threatened to attack them unless they put the rubbish down". He said he then endeavoured to say something but was "rudely cut off" by the defendant who spoke over the top of him. She raised her voice and said: "So you're saying that you threatened to beat them up for picking up rubbish that you had thrown on the ground?" He said he then managed to ask whether the matter could be discussed in private

and was told: "No, I'm not prepared to discuss this in private as I am concerned that you may attack us if we do so". He said he was asked his name and address on three separate occasions, he was threatened with being arrested under the Misuse of Drugs Act and: "I was informed that if I did not remain in order to enable the defendant to say what she intended to say that I would be arrested for failure to comply with a lawful order". He said the version of events provided by the two women complainants was then spelled out to him. He responded by admitting that he had hit a woman earlier, as reported, and justified this by saying that the woman had threatened to assault his fiancée. He confirmed that he told the two women of previously striking a woman as part of a warning because he thought their actions were "overtly menacing and threatening".

[15] The plaintiff said he acknowledged to the police officers that he had in the past had difficulty with anger management issues and that he had learnt to walk away from arguments. He had done so twice on this occasion. He said there were a number of people who could hear the conversation and people were staring. According to the plaintiff the conversation finished in the following manner:

> "This is far more than I ever intended to cop, every person within the field of view, including customers and staff at the three cafes were openly staring at this time, having clearly heard more than enough to make them stop what they were doing in order to do so. I stated, 'Is that it, because I am leaving now and I really don't care any more if you arrest me'. Mahony stated, 'No, that is not it'. I said 'Stiff. I'm leaving now and I intend to make a formal complaint regarding your behaviour in this incident.' Her response to which was 'I intend to report your behaviour to your employer as I feel it is appropriate that

> she should know what sort of a bastard she is employing'. I responded 'Mate if you make out that it happened in the nasty one-sided manner that you did here it's probable that I would be dismissed'. She responded 'That is not my problem. You should have thought of that before you did what you did'. I then left her and Fox."

He later said that he left because he "was not prepared to listen to the rather one-sided version of events coming out of Ms Mahony".

[16] The plaintiff went on to say that he spoke with his employer by telephone and then went home. The conversation with his employer is significant. He was asked what he told his employer and he said:

> "That there had been an argument over the bin at the rear of the café. That two women had used the bin and then argued about whether or not I was entitled to remove the rubbish from the bin. And that they then called the police and said I had threatened them."

Subsequently his employer dismissed him.

[17] In cross-examination the plaintiff acknowledged that he had an anger management problem at an earlier time. He said that he also had a drug problem involving the use of amphetamines and LSD. He subsequently suffered acute psychotic episodes. When pressed, he acknowledged that he had also used morphine and that he had been on a methadone program on two occasions. He acknowledged that as late as 2002 or 2003 he was having irrational thoughts of harming others and he sought medical treatment in that regard. He said he presently suffers from anxiety, depression and agoraphobia.

[18] He was asked about his mood at the time of the conversation with the police officers. He said he was "bemused" and that he had a smile on his face. He was not upset, he was frustrated. This view of his mood and demeanour does not fit comfortably with his mood and demeanour when he left the carpark. The plaintiff said he only raised his voice on one occasion and that was to ask if they could discuss the matter in private. When he sought to have the conversation take place in a more private location the defendant declined to move down the alleyway because "she was afraid that I would attack her".

[19] After a good deal of cross-examination the plaintiff acknowledged that the observations made by him to Ms Rabbett in the presence of Ms Kartzoff to the effect that he had previously knocked a woman out in the same area, could have had the result that they felt threatened by what he said.

[20] The plaintiff was the only person to give evidence in his case.

[21] The defendant gave evidence of being called on the police radio to attend an incident. When she and her partner, Constable Fox, arrived there were two women present. One of the women was visibly shaking and was quite upset. Constable Mahony obtained from them their version of events which included that the plaintiff had told them he had previously assaulted another woman and from his demeanour they had felt threatened. During this part of the conversation the plaintiff had stepped towards one of the women and

intruded into her personal space. The women told her that they did not want to lodge a formal complaint but did want her to caution the plaintiff.

[22] Constable Mahony and her partner then spoke with Mr Small at the entry to an alleyway that ran between the Red Dog Café and the Red Rock Café. He was inside the alleyway and they were at the entrance. Constable Mahony said that as he came to talk with them the plaintiff appeared to be very angry and upset and did not have a smile upon his face. She introduced herself and Constable Fox and he then cut her off, saying that he knew why the police were there. She told him that she needed to inform him of the complaint that had been made to her and she would then provide him with an opportunity to tell his side of the story. She said he kept cutting her off and she asked him a couple of times to calm down. When she told him the version of events provided by the two women he "gave a loud sigh (and) he rolled his eyes". He was very angry. She acknowledged she told the plaintiff that she had been informed by the women that "he had told the complainants that he had assaulted someone in the same carpark".

[23] The plaintiff asked if they could discuss the matter in private and he walked back down the alleyway. She responded that she would not speak to him there because she was concerned for the safety of the plaintiff as well as herself and her partner in the event that any physical altercation should occur in such a confined space. The alleyway was about a metre wide with blank walls on each side. She was worried that in his agitated state something could happen. She asked him why he was so upset and he "yelled

out" that he had anger management problems. At that time he was waving his arms about and had his fists clenched. His face was red. She asked if he wanted to tell her his side of the story but he walked away.

[24] In cross-examination by the plaintiff it was put to Constable Mahony that the plaintiff had attended voluntarily upon the police officers at all times. She agreed with that proposition. He was at all times free to leave if he chose to do so. Indeed, when the conversation ended, it was because he elected to walk away notwithstanding that the police officers wished to continue discussing matters with him.

[25] Constable Mahony denied that she had used the words of which the plaintiff complains and which are conveniently set out in the statement of claim. Some of the topics raised were addressed but not in the words of which complaint is made. She denied having told the plaintiff that she did not need to hear his story. Constable Fox, who was also called to give evidence, provided general support for the evidence of Constable Mahony and did not contradict her. He said the conversation with Mr Small terminated when Mr Small "stormed off".

[26] Insofar as it remains necessary to consider the differing versions of events, I accept the version of events provided by Constables Mahony and Fox over that provided by the plaintiff. Their description of the demeanour of the plaintiff fits comfortably with the description provided by the witnesses to the earlier incident, Ms Rabbett, Ms Kartzoff and Ms Hadfield. There is no

apparent reason why Constable Mahony would conduct herself in the manner described by the plaintiff. This, for her and her partner, was a routine matter. She knew none of the participants. She was not intending to do other than get the plaintiff's version of events. There was no intention to lay charges or to take the matter further. She was winding up the investigation. On the other hand, the plaintiff had shown himself to be very concerned by events surrounding his employer's rubbish bin. He had previously had disagreements with others. He became quite angry quite quickly with Ms Rabbett and Ms Kartzoff in the circumstances I have described. He showed his anger in his agitation and in the threat he made. His conduct on the earlier occasion is quite consistent with the description of his reaction to the visit by Constable Mahony and Constable Fox to his place of employment. I do not accept him as an accurate historian.

[27] In the course of his final address the plaintiff abandoned some matters of which he made complaint in his statement of claim. In relation to this discussion the only remaining complaint of defamation made by the plaintiff is that the defendant said the words: "You admitted assaulting a woman in the same carpark a week ago". The imputation being, according to the plaintiff, that he had committed the offence of assault on the woman. Given the circumstances and consistent with the evidence of the defendant it is likely that the defendant said something to the effect that: "You told the complainants that you assaulted a woman in the same carpark a week ago".

In his final address the plaintiff accepted that form of words as reflecting what was said by the defendant to him on that occasion.

[28] The plaintiff points out that the defendant accepted that she used the word "assault" which, he submitted, was not a correct description of what had taken place because he had claimed to be acting in self-defence or, at least, in the defence of another and therefore could not be found guilty of the offence of assault. He referred to the evidence of the three women present at the time of the earlier incident who described him as admitting having "hit", "thumped", "decked", or "punched" the woman. He drew a distinction between those expressions and the term "assault". He contended that the ordinary man would understand the expression to mean the offence of assault.

[29] What was said by the defendant to the plaintiff was intended by her to reflect what Ms Rabbett and Ms Kartzoff had reported. In my view it did so. The plaintiff told them that he had hit (to use one description) a woman in the same carpark a week before. None of those witnesses indicated that he qualified the statement by reference to having done so in self-defence or in defence of another. He was seeking to frighten the women. He did not say that he was justified or authorised in his conduct and neither did he give any reason for them to assume that to be so. What he described to those witnesses was an assault as is commonly understood and also as is defined in s 187 of the Criminal Code. "Assault" is there defined as follows:

> "The direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of bodily harm or by means of false and fraudulent representations as to the nature of the act or by personation."

This is an accurate description of what the plaintiff described to the witnesses. It is, in turn, what the defendant conveyed to the plaintiff in their subsequent conversation. She was not accusing him of the offence of assault, she was simply recounting what she had been told and doing so accurately. The ordinary reasonable person overhearing the conversation would understand that the plaintiff had *told* the women that he had assaulted a woman in the carpark a week before, not that he had *in fact* assaulted a woman, only that he said he had done so. That of course was true.

[30] When Constable Mahony used the word "assault" it was, in the circumstances, simply a convenient summary of the various descriptions that had been provided to her by others for what had been said by the plaintiff at the time of the altercation. In my view the use of the word in those circumstances was a fair description of what the plaintiff had said and what had been put to her by others. She was reporting to him what others had told her in order to allow him a fair opportunity to respond if he wished to do so.

[31] What was said by Constable Mahony to the plaintiff was the truth. The matter of which the plaintiff now complains was true. The plaintiff had informed the witnesses, Ms Rabbett and Ms Kartzoff, that he had assaulted a

woman in the same carpark a week before. Whilst he may not have used the word "assaulted", taken in the context in which the words were spoken that description accurately reflected the import of his statement.

[32] I turn to consider whether there was any publication of the matter of which complaint is made. The plaintiff gave evidence that a number of people heard the conversation between himself and Constable Mahony. In his statement of claim he pleaded that there were 15 to 19 people at the Red Rock Café, 16 to 20 people at the neighbouring Red Dog Café and 37 to 52 people at The Lane Café on the other side. At the time of the conversation Mr Small was a short distance into the alleyway depicted in the photographs which became exhibit D1. The alley was only about one metre wide. He had a blank wall on either side of him. The police officers were at the entry to the alleyway and effectively blocking that entry. I do not accept the evidence of the plaintiff that he could see people staring at them or that others could "clearly" hear. Given the nature of the alleyway, the buildings and the presence of the police officers at the entry to the alleyway that was improbable. His field of vision was restricted by the closeness of the walls on either side of him and by the presence of the police in front of him.

[33] The plaintiff gave evidence that he could identify only one individual present at the time. He identified that man as "American Bob" who he said was "a friend of a friend" of himself. The presence of this person was not raised with either police officer during the course of their evidence. The man was not called to give evidence of his presence and no explanation was

provided for not calling him. There is no evidence that the alleged witness was in a position to hear anything. At its highest he was said to be "watching". I do not accept the evidence of the plaintiff as to the presence of this man or that he was watching. If he had been in a position to see or hear what was going on he would have been both visible and close by to Constable Fox who was, inter alia, watching the mall. Constable Fox said there was no-one nearby.

[34] The defendant gave evidence that she did not think that anyone else could have heard the conversation. She was not aware of anyone in the area of the entry to the alleyway. There was no-one standing nearby, the nearest tables were about two metres away and she thought they were not occupied. She said: "So far as I am aware there was no-one else that would have heard the conversation". Constable Fox kept watch whilst Constable Mahony spoke with the plaintiff. Constable Fox was looking around and said, to his observation, there was no-one nearby. He was not aware of anyone in a position to hear the conversation. The only person possibly near to the location was a fellow employee of the plaintiff, an unnamed female who, a little earlier, was somewhere within the Red Dog Café. Where she was at the time of the conversation has not been the subject of evidence. The plaintiff has not led any evidence from that employee or anyone else who claims to have seen what took place or to have heard the conversation.

[35] There is no evidence that is suggestive of circumstances that would provide a basis for concluding that anyone heard the conversation. I do not accept

that the people in the surrounding cafes, if, indeed, there were any, could hear what was said. The defendant was talking into the alleyway and the plaintiff was inside the alleyway. Given all of the circumstances I do not accept that it has been established on the balance of probabilities that anyone did or would have been able to hear what was being said.

[36] In addition a defence of qualified privilege is available to the defendant. I will address that defence shortly.

The second publication

[37] The second publication of which the plaintiff complains arose out of a discussion between the defendant and the employer of the plaintiff, Ms Elizabeth Schindler. The only evidence in that regard came from Constable Mahony. Contrary to the suggestion of the plaintiff that Constable Mahony took the matter up with Ms Schindler, it was Ms Schindler who contacted the police. She did so after the plaintiff had contacted her and reported in some detail what had occurred that afternoon. Constable Mahony said that as she and Constable Fox were about to leave the area they received a message to the effect that the employer wished to meet with them. They were in the carpark when Ms Schindler arrived. Ms Schindler identified herself as the owner of the cafe and she asked if they had experienced some trouble with the plaintiff. The defendant was unable to recall the exact words of the conversation but, in general terms, said that she explained that police had received a report regarding an

altercation involving Mr Small and the complainants, who said they felt threatened, and that he had been representing himself as an employee of Ms Schindler's business. She outlined the version of events provided by the women and concluded by saying she would leave the matter in the hands of Ms Schindler.

[38] In cross-examination Constable Mahony stated that she did not inform Ms Schindler of the plaintiff's version of events because he had declined to provide that to the police officers. She informed the Court that she had told Ms Schindler there was a concern expressed by the three ladies regarding the behaviour of the plaintiff. No greater detail was led from the witness and Ms Schindler was not called by either party.

[39] During the course of his address the plaintiff advised that he no longer pressed the claim for damages for defamation arising out of this conversation. I need consider it no further. However the conversation remains relevant to the claim by the plaintiff for damages based upon the allegation of misfeasance in a public office.

The third publication

[40] The third publication of which the plaintiff complains is the entry on the police PROMIS system. This is a computer based record-keeping system which is completed by police officers during the course of and at the completion of investigations undertaken by them. It is accessible to serving police officers and some administrative staff and, in normal circumstances,

to no-one else. Constable Mahony advised that officers are required to record information on the PROMIS system as part of their duties. At the time she had made more than 1500 such reports on PROMIS. On this occasion Constable Mahony completed an entry on the PROMIS system after returning to the station and at the end of her shift. In the course of the document she noted that a "caution" had been issued to the plaintiff. There was a brief description of the events as provided by the women witnesses. There was no record of the version of events subsequently provided by the plaintiff because he, at that time, had refused to discuss matters with police.

[41] Constable Mahony did not describe what constituted a caution. Whatever it may be in the present circumstances it is not something that shows up on a person's criminal history. It has no formal status except, possibly, in relation to juveniles. For present purposes it seems it is no more than a shorthand way of recording that the plaintiff was spoken to by police.

[42] Again the focus of the plaintiff's concern was the use of the word "assaulted" in describing what the plaintiff had said to Ms Rabbett and Ms Kartzoff. The information contained in the PROMIS entry is merely an abbreviated record of the events which occurred earlier in the afternoon of 1 September 2004. The observations I have made regarding the claim of the plaintiff arising out of those events apply equally to the record contained in the PROMIS entry. In particular the information recorded by Constable Mahony on the PROMIS system was true. Further, it was an occasion covered by qualified privilege and I now turn to address that issue.

Qualified privilege

[43] The circumstances give rise to defences of qualified privilege. The defendant has claimed that both the conversation she held with the plaintiff and that with his employer were occasions of qualified privilege. Similarly the entry of the information on to the PROMIS system was said to be an occasion of qualified privilege.

[44] The test for determining whether such privilege exists was stated by Lord Atkinson in *Adam v Ward* (1917) AC 309 (at 334) as follows:

> "A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

The underlying justification for the existence of such a defence is "the common convenience and welfare of society": *Toogood v Spyring* (1834) 149 ER 1044. The privilege attaches to the occasion and the defence may be defeated if the plaintiff can establish that the defendant was actuated by malice at the time: *Stephens v WA Newspapers* (1994) 182 CLR 211 at 238.

[45] It is to be noted that the duty to make the communication is not necessarily a legal duty but may include a social or moral duty. Whether there is such a duty is to be determined by reference to the standard of values entertained by persons of ordinary intelligence and moral principle in the community: *Stuart v Bell* (1891) 2 QB 341 at 350.

[46] In my view on each occasion the communications of the defendant were covered by qualified privilege. In relation to the discussion between herself and the plaintiff at the entrance to the alleyway she was acting in accordance with a duty to inform the plaintiff of the allegations made against him in order to allow him the opportunity to provide any response he may wish to make. She was doing no more than reporting the complaints of others for this purpose. She had a relevant duty to communicate that information to the plaintiff and, of course, he had a corresponding interest in receiving it. Although the plaintiff alleged that the defendant was motivated by malice that allegation is without any foundation.

[47] It is unnecessary to consider the status of the occasion of the discussion with the employer as no claim is pursued in that regard, however, in my view, it would have been an occasion of qualified privilege.

[48] In relation to the report completed by the defendant and placed on the PROMIS system that was also an occasion of qualified privilege. The defendant was required by the terms of her employment to complete such a report which then constituted the police record of the events. The need for the police to keep such a record is obvious. In addition to constituting the permanent record for the purposes of the police force such an entry also enabled senior officers to monitor the activities of junior officers and to ensure that matters are properly investigated, dealt with and finalised. This is a clear occasion of qualified privilege.

Unlawful imprisonment

[49] The plaintiff claims that the defendant "committed the tort of unlawful arrest and/or imprisonment". It was his submission that the defendant detained the plaintiff at the time of his conversation with her by "blocking the only feasible safe means of escape", being the entrance from the Todd Street Mall to the alleyway. He further alleged that the defendant informed him that if he did not stay precisely where he was she would arrest him for failing to comply with a lawful direction.

[50] I do not accept the evidence of the plaintiff that he was threatened with arrest under the Misuse of Drugs Act or for failure to comply with a lawful order. He did not put that to Constable Mahony and the only question asked of Constable Fox in relation to the issue was whether Constable Fox had threatened him with arrest under the "drugs misuse Act". The officer replied that he was not familiar with that Act. The matter was not pressed.

[51] I do not accept the evidence of the plaintiff that he believed he would be arrested or held by force if he sought to leave. In the course of his own evidence he indicated that at one stage he moved further down the alleyway and away from the police officers without prompting any response on their part. He later walked away from the interview, again without any response.

[52] The plaintiff entered the alleyway via a doorway at the rear of the alleyway that led into his place of employment. There was never any suggestion that he could not depart the scene through that door. There was no effort on his

part to leave via the exit to the alleyway into the Todd Street Mall. The fact that the plaintiff was free to leave at any time he chose was demonstrated by the fact that he did so. At no point was he told that he was under arrest. He was not told that he was not free to depart. There is no merit in this claim.

Misfeasance in public office

[53] The plaintiff claims that the defendant committed the tort of misfeasance in public office by intentionally or with contumelious disregard for his welfare publishing the information regarding the incident to his employer, Ms Schindler.

[54] The nature of a claim of this kind has been discussed in a number of authorities including *Dunlop v Woollahra Municipal Council* [1981] 1 NSWLR 76; *Northern Territory v Mengel* (1995) 185 CLR 307 and *Cornwall v Rowan* (2004) 90 SASR 269 at 323. In *Northern Territory v Mengel* Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ observed (at 345) that misfeasance in public office was "a deliberate tort in the sense that there is no liability unless there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power". Later in the judgment their Honours said (at 347):

> "The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is

> de facto authority, there will ordinarily only be personal liability. And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton*, or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach."

[55] In the same case Brennan J said (357):

> "I respectfully agree that the mental element is satisfied either by malice (in the sense stated) or by knowledge. That is to say, the mental element is satisfied when the public officer engages in the impugned conduct with the intention of inflicting injury or with knowledge that there is no power to engage in that conduct and that that conduct is calculated to produce injury. These are states of mind which are inconsistent with an honest attempt by a public officer to perform the functions of the office. Another state of mind which is inconsistent with an honest attempt to perform the functions of a public office is reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce. The state of mind relates to the character of the conduct in which the public officer is engaged – whether it is within power and whether it is calculated (that is, naturally adapted in the circumstances) to produce injury."

[56] In the present case the defendant did not act beyond power. She was acting in the course of her duties in responding to the request for information from Ms Schindler. She did not approach Ms Schindler but, rather, Ms Schindler approached police who referred her on to Constable Mahony who was about to depart the scene. Ms Schindler had a legitimate interest in the subject matter of the complaint made by Ms Rabbett and Ms Kartzoff. The complaint concerned her employee who was, at the time, claiming to have acted in the course of his employment, in the interests of Ms Schindler and

on her instructions. There was no limitation upon the defendant's authority to disclose information to Ms Schindler.

[57] There is nothing to suggest that the defendant acted other than in good faith in so proceeding. There is no evidence that she acted with intention to cause harm to the plaintiff or that this was other than an honest attempt to perform the functions of her office.

[58] A further problem for the plaintiff in pressing this claim is that, at the time the defendant spoke with Ms Schindler, Ms Schindler had already spoken with the plaintiff. The content of that conversation is set out at par [16] above. The evidence of what Constable Mahony told Ms Schindler appears in par [37] above and in the following question and answer:

> "You advised Ms Schindler that there was reasonable grounds to suspect Mr Small of both offences and that he had admitted to both those offences?---We didn't tell that – any information in regards to you admitting to it. I stated to her that there was a concern expressed to us by ladies in regards to your behaviour towards people and in – and that she may address it as it may cause problems with her business."

[59] The issue was also addressed in the PROMIS report which recorded:

> "(Members) also spoke with Small's boss, Beth Schindler, who stated she would speak with him about his behaviour. She also stated that Small has behavioural problems, but she has been trying to give him a go."

[60] The information provided to Ms Schindler by Constable Mahony did not go beyond what Ms Schindler already knew from the plaintiff. The subsequent termination of his employment has not been shown to be related to the

conversation between Constable Mahony and Ms Schindler. Damage has not been demonstrated.

[61] The plaintiff made submissions regarding the Information Act (NT) and the Anti-Discrimination Act (NT). I do not see either of those Acts as having any relevance to these proceedings and, in light of the conclusions I have reached, it is unnecessary to address the submissions.

[62] The claim that the defendant committed the tort of misfeasance in public office must be dismissed.

The claims are statute barred

[63] Section 162(1) of the Police Administration Act, as it was at the time, was in the following terms:

> "Subject to this section, all actions and prosecutions against any person for anything done in pursuance of this Act shall be commenced within two months after the act complained of was committed, and not otherwise."

The proceedings in this matter were originally commenced in the Small Claims Court in April 2005. I have found that at all material times Constable Mahony was acting in the course of her duties as a member of the Police Force of the Northern Territory and was pursuing her duties as required by her appointment as a member of the police service. In so doing she was acting pursuant to the requirements of the Police Administration Act. The proceedings were commenced out of time and are statute barred.

Conclusion

[64] The plaintiff's proceedings are statute barred. Had they not been statute barred they would, in any event, have been unsuccessful.

[65] The claim in regard to the words spoken to the plaintiff by the defendant would not have succeeded because:

(a) the words complained of were true,

(b) they were not shown to have been published, and

(c) they were spoken on an occasion of qualified privilege.

[66] The claim in regard to the conversation between the defendant and the employer was abandoned.

[67] The claim in respect of the entry on the PROMIS system would not have been successful because:

(a) the words complained of were true, and

(b) they were communicated on an occasion of qualified privilege.

[68] The claim for damages for unlawful arrest and/or unlawful imprisonment would have been unsuccessful as being without foundation.

[69] The claim for damages for misfeasance in public office would have been unsuccessful as being without foundation.

[70] The plaintiff's claim is dismissed and there will be judgment for the defendant.

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