

Birdwood v Northern Territory of Australia & Anor [2004] NTSC 20

PARTIES: PAULINE BIRDWOOD

v

NORTHERN TERRITORY OF
AUSTRALIA

AND

SHAWN LEWFATT

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 73/2003 (20307516)

DELIVERED: 8 April 2004

HEARING DATES: 4 and 5 March 2004

JUDGMENT OF: BAILEY J

REPRESENTATION:

Counsel:

Plaintiff: C Howse
Defendants: J Lawrence

Solicitors:

Plaintiff: C Howse
Defendants: Solicitor for the NT

Judgment category classification: C

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

Birdwood v Northern Territory of Australia & Anor [2004] NTSC 20
No. 73/2003 (20307516)

BETWEEN:

PAULINE BIRDWOOD
Plaintiff

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
First Defendant

AND

SHAWN LEWFATT
Second Defendant

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 8 April 2004)

The Plaintiff's Claim

- [1] On Wednesday 26 March 2003, the plaintiff was admitted to the Royal Darwin Hospital with an acute fracture in her left elbow joint.
- [2] The plaintiff alleges that on or about the preceding Wednesday, 19 March 2003, at Bennett Park, State Square, Darwin, she was approached by two Aboriginal Community Police Officers ("ACPO"), Shawn Lewfatt

(the second defendant) and Bernard Divine. The plaintiff alleges that the second defendant wrongfully assaulted and/or battered her by grabbing her left wrist and twisting her left arm, causing the fracture to the plaintiff's left elbow.

[3] The plaintiff seeks damages for loss and damage for the physical injury allegedly caused by the second defendant.

[4] It is not a matter of dispute that the second defendant and ACPO Divine were, at all material times, members of the Northern Territory Police Force for whom the first defendant is vicariously liable for torts committed in the performance or purported performance of their duties as police officers.

The defendants assert that the second defendant and ACPO Divine were, at all material times, acting in the performance or purported performance of their duties. The defendants otherwise deny the plaintiff's allegations and say that the actions of the ACPOs were lawful and that the ACPOs did not commit a tort against the plaintiff.

[5] The defendants deny that the second defendant and ACPO Divine wrongfully assaulted and/or battered the plaintiff and assert that on 19 March 2003 at approximately 3.35pm in the vicinity of State Square, Darwin, the ACPOs lawfully took the plaintiff into protective custody, including by the application of or use of reasonable, necessary and lawful force pursuant to s 128 of the *Police Administration Act* and conveyed her to the watch house at Berrimah.

[6] The plaintiff had also claimed, initially, aggravated and/or exemplary damages on the basis of the following allegations:

- “(a) whilst the plaintiff was in transit to the Berrimah watch house in the police caged vehicle, the second defendant activated the loud speaker communication to the cage where the plaintiff was seated and called the plaintiff a ‘slut’ on a number of occasions and made an offensive ‘finger up’ sign to her;
- (b) shortly after arrival at the Berrimah watch house, the second defendant addressed the plaintiff saying to her: ‘You’re nothing but a little whore and slut’; and
- (c) during the period of time that elapsed from the time of arrest to time of release, the plaintiff made repeated requests for pain relief whilst in the cells. Pain relief was refused.”

[7] These allegations were abandoned by Mr Howse, on behalf of the plaintiff, immediately before closing addresses.

Evidence for the Plaintiff

[8] The plaintiff is a 34 year old Aboriginal woman, unemployed, generally of no fixed abode and who follows an itinerant or ‘long-grasser’ lifestyle.

In support of her claim, the plaintiff gave evidence and called Dr Mike Wilkes, a radiologist and Dr Fiona McDonald, a general practitioner employed by Danila Dilba Health Service.

[9] The plaintiff gave evidence that on the day of the incident she had gone to Bennett Park with her then de facto, Noel. She had purchased a 6-pack of VB cans and Noel had a bottle of cream sherry. Before arriving at the park around noon, she had had two sips of Noel’s sherry. At the park, she

consumed four VB beers before the arrival of the police. The plaintiff described herself at that stage as “starting to get there” and “just a bit drunk”. At the park, the plaintiff sat with Noel on a bench. They were with a married couple, friends of Noel’s, who the plaintiff believes have left Darwin. There was also another group of drinkers close by in the park.

[10] The second defendant and ACPO Divine arrived in a caged police vehicle. ACPO Divine asked Noel to tip out his sherry. Noel responded by drinking it quickly in front of the ACPO. ACPO Divine asked the plaintiff to pick up rubbish. The plaintiff gave evidence that she did so and then sat down again on the bench. ACPO Divine told the plaintiff that she was too drunk and to come with the police to the watch house. ACPO Divine put on disposable gloves and took hold of her right wrist. The plaintiff’s evidence was that she told ACPO Divine that she was not coming with them, but was going home to Tomaris Court where she was staying temporarily.

[11] The plaintiff denied that she had refused to move on before ACPO Divine said that she was going with them. She denied being angry at being told to pour out the beer she had purchased. She denied that she was drunk. She denied swearing at ACPO Divine at this stage. She denied that she attempted to resist ACPO Divine by staying seated as he attempted to pull her up.

[12] According to the plaintiff, the second defendant came over and the plaintiff had said: “I’m not going”. The second defendant grabbed her left arm

(later in evidence she said her left wrist) and twisted it behind her back.

The plaintiff's evidence was that she heard it "click" and she felt pain.

It was only at this point, according to the plaintiff, that she swore at the police officers and began to struggle with them. She denied that the second defendant had one of his hands on her left wrist and one hand on her upper arm – this was the grip used by ACPO Divine on her right arm and wrist.

[13] The plaintiff, initially, gave evidence that she was walked to the caged police vehicle, held by ACPO Divine and the second defendant, and there the two officers "threw her in" while she swore at them and told them her arm was sore. Later in evidence, the plaintiff said that ACPO Divine opened the door to the caged rear of the vehicle and she had climbed inside, turned around and sat down.

[14] According to the plaintiff, she was alone in the rear of the police vehicle. At some point near Kormilda College, the second defendant turned on a loud-speaker on top of the vehicle and called her names such as 'slut' continuously until they arrived at Berrimah watch house. The sound was not limited to the caged enclosure of the vehicle – the sound was "going out into the street". The second defendant also turned to her and put his middle finger up in a rude gesture.

[15] At the watch house, the plaintiff says that she complained of pain to two female police officers and asked for Panadol or a painkiller. She did not explain why she was in pain and was told that she "just needed a rest".

Later in evidence, the plaintiff said that she had told a police officer that she had a sore arm (and pointed to her left arm). The police officer did not examine or touch her arm.

[16] The plaintiff was taken to a cell where, according to her evidence, two women were fighting. The plaintiff pressed the emergency call button in the cell several times (possibly four times) and asked for painkillers. Auxiliary Tanya Smith responded to these calls by telling her to go to sleep. The plaintiff says that she was released from the Berrimah watch house around 7pm. Her arm was very painful. The next day (Thursday 20 March 2003) her whole left arm was swollen and she had been seen by a female doctor at Danila Dilba Health Service who arranged for her arm to be x-rayed.

[17] The plaintiff's arm was x-rayed on Friday 21 March 2003 and after returning to Danila Dilba, she was immediately sent to Royal Darwin Hospital where her arm was operated upon and set in plaster.

[18] The plaintiff was referred to medical records that indicated she first went to Danila Dilba Health Service on Tuesday 25 March 2003 and that she was admitted to hospital on Wednesday 26 March 2003, the same day her arm was x-rayed. The plaintiff was insistent that she first visited Danila Dilba on the day after the incident in Bennett Park, ie Thursday 20 March and that she was admitted to hospital on the day after that, ie Friday 21 March 2003.

- [19] At various points in her evidence, the plaintiff gave the date of the incident at Bennett Park as 19 April 2003, 19 March 2003 and 19 November 2003.
- [20] Dr Fiona McDonald of Danila Dilba Health Service gave evidence that she saw the plaintiff on 26 March 2003. The plaintiff had been seen the previous day by Dr Paul Burgess who had arranged for the plaintiff's arm to be x-rayed. Dr McDonald's evidence was that the plaintiff was in obvious pain from her broken arm. She arranged for the plaintiff to go immediately to hospital. In Dr McDonald's opinion, as a general practitioner with a great deal of experience with trauma, the plaintiff's injury was consistent with her left arm having been grabbed and twisted behind her back vigorously.
- [21] Dr Mike Wilkes, a radiologist gave evidence that the plaintiff's left arm was x-rayed on 26 March 2003. Dr Wilkes noted that there was blood in the plaintiff's elbow joint, there was an acute fracture of the ulna and that at least two small bony fragments were present on the inner side of the elbow joints.
- [22] Dr Wilkes formed an opinion from the acute nature of the injury (ie a fracture line with sharp margins) and the presence of blood in the elbow joint that the plaintiff's injury had occurred no more than seven days before the x-ray was taken. In his opinion, the x-ray was consistent with the injury having occurred on any one of the seven days leading up to the x-ray. He also considered that the pain from an injury such as that suffered by the

plaintiff would be the greatest during the first 36-48 hours. After that he would expect the pain to settle down.

[23] Dr Wilkes gave evidence that the plaintiff's injury could only be caused by hyper-extension of the arm coupled with lateral force applied to the elbow joint. In his opinion, the grabbing of a wrist, coupled with twisting the arm behind the back while keeping the arm straight was "absolutely" consistent with the plaintiff's injury. Significant force would be required to cause an injury of this type as it involved the breaking of bone. Such an injury would be very painful. If a person's wrist and upper arm were grasped, followed by the arm being twisted up a person's back, Dr Wilkes would not expect to see an injury of the type suffered by the plaintiff. In such circumstances, he would expect to see a shoulder injury if sufficient force was applied.

Evidence for the Defendants

[24] The defendants called as witnesses the second defendant, ACPO Bernard Divine and two auxiliary police officers, Tanya Smith and Karen Norton (nee Bryant).

[25] The second defendant gave evidence that he is a 26 year old ACPO with six years experience of dealing with itinerant drinkers and social problems in Darwin.

[26] At around 3.30 – 3.35pm on 19 March 2003, the second defendant was working with ACPO Bernard Divine. He described stopping at Bennett Park and speaking to a group of five or six drinkers. He asked them to pour out

their alcohol and leave. Members of this group did so. The second defendant said that he saw ACPO Divine dealing with the plaintiff.

He heard ACPO Divine tell the plaintiff that she was intoxicated and would be coming for a sleep. The plaintiff said that she was not going and resisted ACPO Divine's attempts to help her to her feet.

[27] The second defendant gave evidence that he went over to assist his colleague. The plaintiff appeared intoxicated and abused him in foul language. This was consistent with 3 or 4 previous occasions when the second defendant had placed the plaintiff in protective custody.

[28] The second defendant asked the plaintiff to come for a sleep and the plaintiff continued to refuse. The second defendant described how he picked up the plaintiff by her upper left arm while ACPO Divine had one hand on her upper right arm and the other hand on her right wrist. The second defendant said that the plaintiff tried to pull away and he then grabbed her left wrist and moved her left forearm up her back. The second defendant denied that there was any hyper-extension of the plaintiff's left arm. The second defendant claimed that he used minimum force employing a technique which he had used in the past without difficulty on hundreds of occasions. The second defendant and ACPO Divine then walked the plaintiff five or six metres to the rear of the Police vehicle where, after the door was opened, the plaintiff climbed into the caged rear of the vehicle.

[29] On the drive to the Berrimah watch house, the second defendant denied making any gestures at the plaintiff with his finger, denied that the route took them anywhere near Kormilda College and denied using the roof-mounted loud speaker to verbally abuse the plaintiff. According to the second defendant, the roof-mounted loud speaker has a range of around 100 metres.

[30] At the Berrimah watch house, the second defendant completed a protective custody card with the plaintiff's details while ACPO Divine waited at the police vehicle with the plaintiff. ACPO Divine then escorted the plaintiff to the watch house reception where she was left in the company of Auxiliaries Smith and Norton. The plaintiff continued to be verbally abusive. According to the second defendant, at no stage of their encounter did the plaintiff complain of any pain in her arm, either to him, ACPO Divine or either of the female auxiliaries at the watch house.

[31] ACPO Divine gave evidence which to a very large extent was corroborative of the second defendant's evidence. On his account, the persons who had been drinking with the plaintiff left the scene after his request to do so. The plaintiff swore at him and said that "she was not moving for anyone" and words to the effect that she was "sick of police officers tipping out grog and picking on us."

[32] ACPO Divine described the plaintiff's efforts to pull away from him and the second defendant's assistance in pulling her to her feet by grasping her left

arm. The plaintiff continued to resist by swinging her legs and attempting to flop back down on the seat or ground. ACPO Divine gave evidence that the second defendant put the plaintiff's left arm behind her back before she walked to the rear of the police vehicle with the two police officers.

The plaintiff continued to verbally abuse them, but said nothing about being in pain. ACPO Divine conceded that he cannot now say precisely how the plaintiff's arm was positioned when the second defendant grabbed it.

[33] ACPO Divine confirmed that the route taken to Berrimah watch house did not go near Kormilda College. He also denied that the second defendant either used his finger to gesture at the plaintiff or used the vehicle's public loud speaker during the journey.

[34] ACPO Divine also confirmed the evidence of the second defendant that the plaintiff continued to be verbally abusive at the Berrimah watch house. ACPO Divine did not hear the plaintiff complain of pain at Bennett Park, during the journey to Berrimah watch house or to either of the two female auxiliaries at the watch house reception.

[35] Auxiliary Police Officer Tanya Smith gave evidence that on 19 March 2003, she was on duty with Auxiliary Karen Norton from 7am to 7pm at the Berrimah watch house reception.

[36] Auxiliary Smith gave evidence that she was familiar with the plaintiff who had been placed in protective custody due to the level of her intoxication on at least six occasions. She gave evidence that she has no specific memory of

the events of 19 March 2003 in relation to the plaintiff. She cannot recall if the plaintiff requested pain relief on that day. However, her evidence was that her standard practice then (and now) was to provide painkillers if requested, regardless of whether she considered that they were necessary. She also gave evidence that requests for pain relief would be noted in the watch house computer records and that there was no indication of such a request by the plaintiff in the records for 19 March 2003 (Exhibit 4).

[37] Auxiliary Bryant recalled the second defendant and ACPO Divine bringing the plaintiff to Berrimah watch house on 19 March 2003. Bryant made entries on the computer at the plaintiff's reception and later in relation to cell checks (Exhibit 4).

[38] According to Auxiliary Bryant, persons brought to the watch house reception were invariably asked if they have any illness or injury and any positive answer recorded in the computer records. She recalls that when the plaintiff was brought to the watch house reception, the plaintiff was verbally abusive, unco-operative, reluctant to go to a cell and intoxicated. The plaintiff claimed to have a sore **right** wrist. Bryant examined, touched and twisted the plaintiff's right wrist which appeared, to her, to be normal. There was no sign of injury or swelling. The plaintiff did not ask for pain relief. In order to test her wrist, Auxiliary Bryant thrust or threw a blanket towards the plaintiff. According to Bryant, the plaintiff grabbed the blanket without any sign of pain or discomfort.

[39] The computer records show that the plaintiff was placed in a cell with one other woman. According to Bryant, any complaints of fighting and any requests for pain relief would be noted on the watch house computer records. There are no such entries for 19 March 2003. The records (Exhibit 4) indicate that the plaintiff had “NIL ILL/INJ”. According to Auxiliary Bryant this means that the plaintiff had no obvious signs of pain, injury or illness upon her arrival at the watch house.

Submissions, Findings and Judgment

[40] Mr Howse for the plaintiff reduced the issues in this case to three questions:

- a) Was the plaintiff’s arm broken?
- b) If so, was the breakage caused by the second defendant?
- c) If so, did the second defendant have any lawful excuse for breaking the plaintiff’s arm?

[41] Mr Howse frankly conceded that the plaintiff is “hopeless” with dates.

Aside from giving three different dates for the current incident, the plaintiff was referred to medical records relating to her hospital admission following an occasion when she stabbed herself in the left arm twice and the left leg once. The plaintiff was adamant that this incident occurred in 2004, “long after” the time her arm was broken in Bennett Park. The hospital records show that she was admitted on 22 April 2003, less than 4 weeks after her broken arm had been operated upon in March 2003.

[42] Mr Howse stressed that the evidence of Dr Wilkes and Dr McDonald was consistent with how the plaintiff said her arm came to be broken, ie the second defendant forcefully pulled her arm behind her back. Dr Wilkes' evidence was also that the plaintiff's arm could have been broken up to seven days before the x-ray was taken on 26 March 2003.

[43] Mr Howse submitted that the second defendant's evidence as to how he gripped the plaintiff and placed her left arm behind her back was not corroborated by ACPO Divine who could not say precisely what position the plaintiff's arm was in before the second defendant placed it behind her back. With respect to the watch house staff, Mr Howse stressed that Auxiliary Smith had no recollection of the particular day while Auxiliary Norton does recall the plaintiff complaining of wrist pain. In Mr Howse's submission, Ms Norton's explanation of recalling, in the witness box, that the plaintiff was complaining of pain in her right wrist (through visualising the scene almost a year later) is unconvincing.

[44] Mr Lawrence for the defendants submitted that the plaintiff's evidence cannot be relied upon for proof on the balance of probabilities that the second defendant broke the plaintiff's arm through the use of excessive force. Mr Lawrence submitted that it is inherently improbable for the second defendant to have used the level of force suggested or for the watch house staff to have ignored the plaintiff's complaints of wrist pain and requests for pain-killers.

[45] In Mr Lawrence's submission the second defendant's evidence as to what occurred with the plaintiff was credible and largely corroborated by ACPO Divine and the watch house staff. In contrast, the plaintiff first sought medical assistance six days after the encounter with the second defendant at Bennett Park. In Mr Lawrence's submission, the plaintiff's evidence that she was not drunk, did not struggle and said nothing offensive to the police until after her arm was broken flies in the face of the evidence of both the apprehending officers and the watch house staff.

[46] The onus rests upon the plaintiff to prove her case on a balance of probabilities. There is no doubt, and I so find, that the plaintiff's left arm was broken by 26 March 2003. There is no doubt, and I so find, that there was a confrontation between the second defendant and the plaintiff at Bennett Park on 19 March 2003. The essential issue in this matter is whether the plaintiff's broken arm was caused by the second defendant. In very large measure, the answer to that question rests upon the respective credibility of the plaintiff and the second defendant. There is no corroboration of the evidence of the plaintiff or the evidence of the second defendant as to precisely what occurred between them at Bennett Park – albeit that the second defendant's version of events finds a great deal of support in the evidence of ACPO Divine and the Berrimah watch house staff, auxiliaries, Smith and Norton.

[47] The plaintiff was an unreliable and unsatisfactory witness. She was prone to exaggeration and invention. She was quick to reject any suggestion that her

state of intoxication at Bennett Park was such as to excite Police attention or cause her to behave in a combative and unreasonable manner. She was quite unyielding, not only on her assertion that the second defendant broke her arm, but that he did so on the day before she visited Danila Dilba Health Service on the first occasion. In large part, I consider that the plaintiff's version of events is based on false reminiscence. I think that she may well believe the truth of what she said happened at Bennett Park but she is mistaken.

[48] The plaintiff is quite clearly mistaken in saying that her arm was broken on the day before she first sought assistance at Danila Dilba Health Service. On all the evidence of the plaintiff's medical records and Drs McDonald and Wilkes (called on her behalf) the plaintiff did not attend at Danila Dilba Health Service until six days after her encounter with the second defendant.

[49] Where the evidence of the plaintiff is in conflict with that of Dr McDonald, Dr Wilkes, the second defendant, ACPO Divine and/or Auxiliaries Smith and Norton, I reject her evidence and accept the evidence of those witnesses. In particular, I find that the second defendant was a reliable and truthful witness, as was ACPO Divine. Similarly, I find that the two doctors and the watch house staff were reliable and truthful witnesses.

[50] I have afforded very substantial weight to the evidence of the second defendant and to the evidence of ACPO Divine.

[51] I find that on 19 March 2003, the plaintiff was in an advanced state of intoxication at Bennett Park when she was approached by ACPO Divine. I find that she was verbally abusive towards ACPO Divine and later to the second defendant. I find that she resisted the efforts of the two police officers to place her in protective custody due to the state of her intoxication. I find that ACPO Divine grasped the plaintiff by the upper right arm and wrist. I find that initially the second defendant grasped the plaintiff by her left upper arm and subsequently grasped her left wrist, moving the plaintiff's left arm behind her back. I am satisfied that the second defendant did not use unnecessary force in placing the plaintiff in protective custody and that nothing he did in relation to the plaintiff caused her left arm to break.

[52] On the basis of the evidence, I am not able to find precisely how or when the plaintiff suffered the break to her left arm. It may well be that the plaintiff's broken arm was caused in the manner suggested by Dr Wilkes – but, if so, it is not possible to find who was responsible for the fracture. It may well also be that the plaintiff suffered her broken arm a day or two before the x-rays were examined by Dr Wilkes. This would be consistent with Dr Wilkes' evidence that the pain from the injury would be at its most intense during the first 36-48 hours after the fracture.

[53] The plaintiff has not established her case that the second defendant wrongfully assaulted and/or battered her by grabbing her left wrist and twisting her left arm, causing the fracture to her left elbow.

There will be judgment for the defendants. The plaintiff's action is dismissed. The plaintiff is ordered to pay the costs of the first and second defendants.
