



Case Summary - State of New South Wales v Quirk

Another Model Litigant Trap to Avoid

August 2012

State of New South Wales v Quirk [2012] NSWCA 216 is a recent decision of the New South Wales Court of Appeal, presided over by Beazley JA, Hoeben JA and Tobias AJA.

Facts

Mr Quirk was arrested on two occasions by police in early March 2006. Mr Quirk alleged that, during the first arrest, he was assaulted and detained in custody for seven hours. The second time Mr Quirk was arrested he claims he was again assaulted, handcuffed and forcibly taken into custody. Mr Quirk was consequently charged with various offences, including sexual offences, which were ultimately dismissed or terminated in his favour. Mr Quirk subsequently instituted proceedings in the Supreme Court against the State of New South Wales (the State), on the basis that it was vicariously liable for the alleged actions of the police officers involved. In relation to the first arrest, Mr Quirk sued for malicious prosecution and abuse of process. As to the second arrest, he sued for assault, malicious prosecution, false imprisonment and abuse of process.

The trial judge dismissed Mr Quirk's claims in relation to the first arrest, but upheld his claims of assault, false imprisonment and malicious prosecution for the second arrest, awarding damages totalling \$175,000. The State appealed, challenging the trial judge's findings on the three claims arising from the second arrest, the awards of damages and costs.

Summary

In a recent decision, the New South Wales Court of Appeal awarded \$95 000 in damages to a man who made claims of assault and false imprisonment against the New South Wales police. The Court also considered the principles that apply to a claim of malicious prosecution.

The case is important for all VGSO clients as it highlights the Crown's role as a model litigant and the financial repercussions of a failure to comply with the requirements of this role. In this case, the Court ordered that the State of New South Wales pay Mr Quirk's pre-hearing costs on an indemnity basis as it had unnecessarily wasted Mr Quirk's time and money by failing to properly assess the prospects of success of the appeal until the day prior to the hearing.

On the day before the hearing of the appeal, the State informed the Court that it had decided to abandon its appeal against the assault and false imprisonment findings. The State confirmed it would proceed only with its appeal against the malicious prosecution finding and the quantum of damages awarded for all three causes of action.

Judgment

The Court of Appeal unanimously allowed the appeal.

Malicious prosecution

The Court of Appeal overturned the trial judge's finding of malicious prosecution. The Court confirmed that, for a malicious prosecution claim to succeed, the plaintiff must prove both malice and an absence of reasonable and probable cause on the part of the prosecutor. The Court found the trial judge had erred as he had failed to deal with the issue of malice after finding that Mr Quirk had proved an absence of reasonable and probable cause.

Damages

The Court of Appeal awarded \$95,000 for the successful claims of assault and false imprisonment, a significantly lesser sum than the \$175,000 that was awarded at trial. Fifty five thousand dollars was awarded for the assault, including \$30,000 in compensatory aggravated damages and \$25,000 for exemplary damages.

The Court of Appeal found that, when assessing the false imprisonment claim, the trial judge had erred in his description of exemplary damages, by stating that the purpose of exemplary damages was 'to assuage [Mr Quirk] for sustaining this tortious conduct'. The Court commented that, while compensatory damages are made from the point of view of the plaintiff, the focus of exemplary damages must be on the conduct of the defendant and whether there is a need for the Court to punish, deter or condemn this conduct. Importantly, the Court confirmed the rule that exemplary damages must be assessed separately and distinctly to compensatory damages. The award made by the trial judge for false imprisonment was set aside, and the Court instead awarded \$40,000, which included \$25,000 in compensatory damages (including aggravated damages) and \$15,000 in exemplary damages.

Model Litigant Issues

Because of its late abandonment of two of its appeal grounds, the Court of Appeal ordered the State to pay Mr Quirk's costs of the appeal on an indemnity basis up to and including the day before hearing. The Court was heavily critical of the State's decision to abandon the appeal against the findings of assault and false

imprisonment the day before the hearing. The Court noted that the State's advisors should have properly assessed their prospects of successfully appealing the findings of assault and false imprisonment at a far earlier point in time, ideally before the notice of appeal was even issued. In failing to do so, the State had caused Mr Quirk unnecessary cost and wasted time. The Court commented that the conduct of the State and its advisors was 'simply not good enough given that the State is required to be a model litigant by assisting the court to arrive at a proper and just result'.

Importance of case

The decision of the Court of Appeal in this case demonstrates the importance of early assessment of prospects of success in civil proceedings, and especially in appeals by the State. **By raising grounds of appeal and then abandoning those grounds the day before the hearing, the State placed itself at risk of adverse costs orders and judicial criticism.**

This case summary is provided for general information only. For further information or legal advice on any issues raised in this case summary please contact:

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