



Case Summary

New South Wales v Zreika

April 2012

Facts

On 20 July 2006, a shooting occurred at a home in Parramatta. On the same evening, the plaintiff visited a Coles Express store after having an argument with his girlfriend and engaged in a bizarre monologue, in which he said that he had 'had enough' and referred to killing someone. The store attendant reported the plaintiff's outburst to police.

On 25 July 2006, the plaintiff was arrested whilst at work by members of the Operational Training Unit. During the arrest, the plaintiff alleged that he was pushed to the ground, dragged, trodden on and had a shotgun pointed at him. The plaintiff was taken into custody and charged with assault, shooting at a person with intent to inflict grievous bodily harm, and malicious wounding. The plaintiff was in custody until being bailed on stringent conditions on 21 September 2006. On 27 January 2007, after the case had been handed over to the DPP, all charges were withdrawn.

The plaintiff sought damages for wrongful arrest, assault and battery during the arrest, and malicious prosecution. The evidence showed that the plaintiff did not match eyewitness descriptions of the shooter, the plaintiff's car did not match eyewitness descriptions of the shooter's car, and the plaintiff was not identified as the shooter in a photo array held a few days after his arrest.

Summary

In the recent case of *New South Wales v Zreika*,¹ the New South Wales Court of Appeal upheld the trial judge's findings of wrongful arrest, assault and battery, and malicious prosecution against the State. The Court of Appeal reduced the exemplary damages award for malicious prosecution, but otherwise upheld the trial judge's substantial damages award.

Judgment at Trial

Walmsley DCJ of the District Court found that the plaintiff had made out his claims of wrongful arrest, assault and battery, and malicious prosecution.

The plaintiff's arrest was wrongful because the arresting officer did not have reasonable grounds to suspect that the plaintiff had committed the offences with which he was charged. While the plaintiff's behaviour in the Coles Express store was initially suspicious, powerful exculpatory evidence — namely the differences between the descriptions of the shooter and the plaintiff — came to light in the days before the plaintiff's arrest, which the arresting officer ignored. The plaintiff was awarded \$50,500 compensatory damages and \$10,000 aggravated damages for wrongful arrest.

Walmsley DCJ accepted the plaintiff's evidence as to the manner of his arrest, and concluded that the police had used more force than was reasonably necessary. His Honour awarded the plaintiff \$10,000 compensatory damages for assault and battery.

Finally, Walmsley DCJ held that malicious prosecution had been made out. His Honour suggested that the State lacked reasonable and probable cause to continue the prosecution from the outset. Further, after the arresting officer learned that the plaintiff had not been identified in the photo array, the officer became well aware that the case against the plaintiff was unmeritorious and bound to fail. The officer's decision to maintain the proceedings in the face of this knowledge constituted the necessary malice. The plaintiff was awarded \$75,000 compensatory damages, \$100,000 exemplary damages, \$25,000 aggravated damages, \$29,356 defence costs and \$5000 economic loss for malicious prosecution.

In total, the plaintiff was awarded damages of \$340,105.

Court of Appeal Judgment

The judgment of the Court of Appeal was given by Sackville AJA, with whom McFarlan and Whealy JJA agreed.

The State had challenged the trial judge's findings that wrongful arrest and assault and battery were made out. The State did not challenge the finding that malicious prosecution was made out, but did challenge the award of aggravated and exemplary damages for that claim.

The Court of Appeal reviewed the evidence and agreed with the trial judge that wrongful arrest was made out. Since the plaintiff's arrest was wrongful, there was no lawful justification for the use of any force to arrest the plaintiff and thus the trial judge's findings on assault and battery were also upheld. There was no challenge to the quantum of damages for these claims.

The Court dismissed the State's challenge to the award of aggravated damages for malicious prosecution. The plaintiff's distress and anger at his situation whilst he was in custody provided a sound basis for the \$25,000 aggravated damages award. On the issue of exemplary damages for malicious prosecution, the Court observed that the authorities established that '[i]t is necessary assess compensatory damages, including

aggravated damages, before determining whether exemplary damages should be awarded'.² The trial judge had erred by assessing exemplary damages before aggravated damages, thus failing to consider whether an award of \$100,000 for exemplary damages was necessary or appropriate having regard to the considerable sums awarded for compensatory and aggravated damages.

In reassessing the exemplary damages award for malicious prosecution, the Court emphasised that

it is a very serious matter, demanding condemnation from a Court, when a police officer maintains a prosecution knowing that it is bound to fail and ... knowing that the accused person is in custody. In these circumstances, the primary judge was correct to emphasise the importance of bringing home to the State the need to educate and guide police in the exercise of their considerable powers to affect the liberty of individuals.

This consideration meant that exemplary damages were warranted. However, in light of the \$100,000 already awarded for compensatory and aggravated damages, the Court of Appeal held that the exemplary damages award should be reduced to \$50,000.

¹ [2012] NSWCA 37.

² Ibid [63].

Further Information

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