Johnson v Northern Territory of Australia [2016] NTSC 49

PARTIES:	JOHNSON, Stuart Douglas v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING ORIGINAL JURISDICTION
FILE NO:	22 of 2013 (21310090)
DELIVERED:	30 September 2016
HEARING DATES:	26 October – 6 November 2015
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

LIMITATION OF ACTION – Extension of time – Statutory cause of action –No clear legislative intent to exclude *Limitation Act 1981* (NT) s 44 – *Police Administration Act 1978* (NT) s 162 – Grossly out of time but substantial records available - No prejudice to the defendant - Extension of time granted

POLICE – Tort claim –Lawful arrest - Alleged excessive force – On balance of probabilities the force was reasonably necessary to apprehend - Not excessive–Force did not materially contribute to the injuries claimed - Claim dismissed

POLICE – Tort claim – Alleged assault and battery - Assault and battery not established on balance of probabilities – Claim dismissed

TORT - Causation - A defendant's wrongful act must have caused or contributed to the harm for which the plaintiff seeks damages – Arrest did

not cause injury – Arrest did not exacerbate previous injuries - Causation not established

TORT – Damages - Loss of earning capacity and quantum claimed by the plaintiff excessive – Claim dismissed

TORT - Vicarious liability - Crown vicariously liable for acts of excessive force, assault and battery by members of Police Force - Force used was reasonably necessary in all of the circumstances – Claim dismissed

Limitation Act (NT), s 44, s 44 (1), s 44 (3)(b)
Personal Injuries (Liabilities and Damages) Act (NT), s 20, s 21, s 25, s 26, s 27,
Police Administration Act (NT), s 123, s128, s 162 91)

Johnson v Northern Territory of Australia [2014] NTSC 18; *Majindi v Northern Territory of Australia* (2012) 31 NTLR 150, applied.

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005) 221 CLR 568; *Amaca v Ellis* (2010) 240 CLR 11; *Cotchilli* [2007] NTSC 52*; Grimley* (1994) 121 FLR 236; *Jones v Dunkel* (1959) 101 CLR 298; *Kumar v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 28 FCR 128; *Leigh v Cole* (1853) 6 Cox CC 329; *March v E & MH Stramore Pty Ltd* (1991) 171 CLR 506; *Perkins v County Court of Victoria* (2000) 2 VR 246; *Queen Elizabeth Hospital v Curtis* (2008) 102 SASR 534; *R v Turner* [1962] VR 30; *Slaveski v Victoria* [2010] VSC 441; *St George Club Ltd v Hines* (1961) 35 ALJR 106; *Watts v Rake* (1960) 108 CLR 158; *Wilson* (unreported, Kearney J, 20 November 1998); *Zaravinos v New South Wales* (2004) 62 NSWLR 58, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	Self-represented
Defendant:	S Brownhill SC; J Ingrames

Solicitors:

Plaintiff:	Self-represented
Defendant:	Solicitor for the Northern Territory

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

Johnson v Northern Territory of Australia [2016] NTSC 49
No. 22 of 2013 (21310090)

BETWEEN:

STUART JOHNSON
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 30 September 2016)

Introduction:

[1] Stuart Johnson ('the plaintiff') brings an action against the Northern Territory ('the defendant'). The claim alleges assault and battery and the use of excessive force by members of the Northern Territory Police Force.[1] The claim arises from the alleged manner of the plaintiff's arrest conducted by Officers Martin Dole and Peter Winton on 14 July 2005. The arrest was executed outside of the plaintiff's residence at 2 Hong Street, Alice Springs.

[2] There is no allegation of false imprisonment. It is not suggested the arrest was unlawful in the sense that it was not undertaken pursuant to s 123 of the

[1] Amended Statement of Claim [6]-[9].

Police Administration Act. The claim alleges excessive force was used in the process of the arrest, causing injuries to the plaintiff, both physical and psychiatric and/or psychological. The injuries claimed included alleged exacerbation of previous injuries. The plaintiff seeks damages for the injuries alleged including for pain and suffering, humiliation and hurt, loss of earnings and earning capacity, and medical and other expenses.

[3] The defendant accepts the action is a "police tort claim" within the meaning of s 148 F (1) of the *Police Administration Act*, and as a result is vicariously liable for any tort committed by police officers during the arrest.[2] The defendant's case is that the arrest was executed lawfully, using only force as was reasonably necessary to apprehend and take the plaintiff into custody.[3] The defendant denies the allegations of assault and battery. A significant component of the defendant's case is that Officer Dole, the principal arresting officer, reasonably believed the force used in the arrest was necessary for the purposes of apprehending the plaintiff and taking him into custody.[4] The defendant denied the arrest caused or materially contributed to the injuries, or alternatively, that any injuries suffered were at the level of severity claimed by the plaintiff. In turn, it is argued the quantum of any damages the plaintiff may be entitled to in the event of establishing the claim should be significantly reduced.

[2] Further Amended Defence [2](a)(b).
[3] Further Amended Defence [6].
[4] Ibid.

[4] The plaintiff also seeks an extension of time to commence the proceedings, pursuant to s 44 of the *Limitation Act*. On 23 May 2014, the Full Court held that the two month limitation specified in s 162(1) of the *Police Administration Act* is capable of being extended by a court pursuant to s 44(1) of the *Limitation Act.*[5]

[5] The statement of claim sets out a series of delays and potential oversights by previous legal practitioners who have acted for the plaintiff.[6] The claim asserts that a psychiatric report received by the plaintiff in March 2012, advancing an opinion about the exacerbation of a previously diagnosed condition, is a fact material upon which he can apply to extend time to institute the cause of action.[7] As the writ was filed on 8 March 2013, the defendant points out the proceedings were commenced more than seven years out of time. The limitation period of two months prescribed by s 162 of the *Police Administration Act* expired on 14 September 2005. The defendant submits the application to extend time should be refused.

[6] In all of the circumstances, including the length of time that has elapsed since the incident leading to the claim, it was appropriate to hear the substantive claim and the application to extend time together. As might be expected, there are a number of points of commonality in the evidence or findings relevant to both the substantive claim and the application to extend time.

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[5] *Johnson v Northern Territory of Australia* [2014] NTSC 18.
[6] Amended Statement of Claim [14]-[23].
[7] Ibid [24]-[25].

[7] In many respects this is a sad case. The plaintiff holds a belief that his current medical and psychiatric conditions were caused, or pre-existing injuries were exacerbated, by the actions of police officers on 14 July 2005. Although the Court file and supporting material relevant to the application to extend time reveals that a series of legal practitioners have represented him in the past, Mr Johnson was not represented throughout this hearing. He had the assistance of a McKenzie friend (Mr Eaton) however that assistance is not in any way equivalent to legal representation. Apparently this lack of representation could not be avoided. As would be expected, Mr Johnson appeared to experience some of the difficulties any person conducting their own case would. At times he was unwell. On occasions this necessitated adjournments during the course of the hearing. Due to lack of funds he was unable to arrange the attendance of one or more expert witnesses. This is not to suggest fault on behalf of the plaintiff, however it underlines the difficulties any litigant faces by any measure when conducting their own case. Despite the difficulties associated with being unrepresented, the plaintiff conducted energetic cross examination of a number of the defence witnesses, who were police officers.

[8] It is unsurprising that one difficulty with respect to assessing the evidence was the sheer length of time between the critical events, and the hearing. This was somewhat mitigated for some witnesses who had access to contemporaneous records, however placed a number of witnesses in some difficulty in terms of accurate recall and raised questions about the

reliability of their recollections. The effluxion of time is a significant overall consideration in terms of assessing the evidence and considering whether this is an appropriate or just case to permit an extension of time. This is not the type of case where evidence of the critical events is preserved in documents or physical exhibits. As will be seen in these reasons, there are various associated helpful notes and records relevant to aspects of the claim after the arrest, as well as detailed custody and medical records, however much of the direct evidence about the arrest giving rise to the claim relies on the memory of witnesses.

[9] By way of background, after the plaintiff's arrest and the conclusion of the investigation, the plaintiff was charged with eight offences including possession of a commercial quantity of cannabis, supply of cannabis and stealing. The plaintiff agreed that various records representing the resolution of his criminal matters were correct. The plaintiff was remanded in custody after his arrest on 14 July 2005 and granted bail on 30 August 2005. A significant amount of the plaintiff's property was restrained. As a result of being charged with assault and intimidate a witness, bail was subsequently withdrawn, and the plaintiff was remanded in custody again on 18 November 2005. He was bailed again on 9 December 2005. After a number of delays related to legal representation, he obtained a grant of legal aid and his trial commenced in June 2006. He was found guilty on 30 June 2006 and sentenced to six years imprisonment with a three year non-parole period. He successfully appealed the convictions in August 2007 and all

convictions were quashed. He was remanded for the purpose of a re-trial, however pleaded guilty to a single charge of supply a commercial quantity of cannabis. He was sentenced on 27 November 2008, having spent one year and three months in prison. A sentence of three years and three months was suspended on 27 November 2008. In these proceedings the plaintiff maintained he had nothing to do with drugs and his plea of guilty to the charge was to finalise a lengthy and difficult process that had impacted on his family and marriage.

1.0 Evidence of the Facts and Circumstances Relevant to the Arrest

1.1 Stuart Johnson – General Summary of the Plaintiff's Evidence about the Events Immediately before the Arrest and the Arrest

[10] The plaintiff states on 14 July 2005, he and Michael Naudin, an electrician engaged as a caretaker at the plaintiff's workshop, left those premises just before 8:00 pm.[8] Mr Naudin drove the plaintiff's Toyota Land Cruiser to meet up at the home of some friends at Ellery Drive, Alice Springs. The plaintiff drove Mr Naudin's Commodore Station Wagon. The plaintiff's plan was to get his Land Cruiser from the Ellery Drive premises. He made a detour to the Diarama Village, intending to purchase some items from BJ's Convenience Store, take the items home, and then go to Ellery Drive. When he pulled up outside BJ's Convenience Store, he was being observed by the driver of a car, a Holden Vectra, positioned two spaces to his right, which had pulled in after him. A blond haired male in the car was staring at him.

[8] The summary in this part is drawn principally from the plaintiff's Affidavit of 8 October 2013, Exhibit P1.

The plaintiff states he became unsettled and pulled out to move his car into another space. The other driver, as the evidence subsequently discloses, was Officer Peter Winton. Officer Winton also pulled out and was parallel to the plaintiff's vehicle. The plaintiff states he decided not to stop but to head towards the Mobil Larapinta Service Station. Officer Winton followed him and stopped when the plaintiff stopped. The plaintiff says he was concerned for his safety.

[11] The plaintiff then decided to get out of his car and confront the driver who had fixed his eyes on him. The driver of the other car then stepped out holding an object in his left hand. The plaintiff yelled "what's your caper?" The driver, Officer Winton, advanced towards him still holding an object in his left hand. The plaintiff said he got back into his car quickly to avoid physical confrontation. The other driver moved to open the driver's side window of the plaintiff's car, reached through to grab the plaintiff's jacket on his shoulder and his wrist and said "don't go anywhere. I've got back up coming". The plaintiff says he was confused and fearful about what he considered to be an attempted assault on him, engaged the gears and drove off as the other driver said "I know where you live. There's people at your house". Throughout this incident the plaintiff claimed he did not know the other driver was a police officer.

[12] He then went home, stopping only to let Mr Naudin know that he would not be joining him at the Ellery Drive premises. He said he quickly told Mr Naudin what had happened and contrary to his initial plan, drove off without

swapping vehicles. The plaintiff said he feared the worst and decided to enlist help from a friend, Mr Hatchard, who was well known as a boxer. This was to assist him if needed at his home. Before reaching Mr Hatchard's residence he noticed an oncoming four wheel drive with its lights turned on to high beam. The evidence subsequently shows that the driver of that car was Detective Senior Constable Dole. Officer Dole's vehicle slowed abruptly and made a U-turn, ending up behind the plaintiff's car. The lights of his vehicle were on high beam and he accelerated until, on the plaintiff's version, it was tailgating his car. There was no police light, the vehicle was unmarked and no siren was used. The plaintiff said the tailgating and the use of high beam caused him to accelerate to avoid collision and he decided to bypass Mr Hatchard's home and head to his own residence. Given the perceived urgency as a result of these circumstances, the plaintiff cut through a break to the median strip and travelled diagonally along Larapinta Drive for 30 metres to gain access to his home in Hong Street, on his immediate right. He became increasingly desperate to ensure his family's safety.

[13] The plaintiff drove his car onto the foot path between the front fence and the street outside of his residence at 2 Hong Street. The other car pulled up behind at an angle. Both the plaintiff and the other driver got out of their cars. The other driver approached him quickly shouting "you're under arrest, I'm a police officer". The plaintiff immediately paused, not knowing who the driver was, however did not resist. He said the police officer, later

identified as Detective Senior Constable Dole, shouted at him "put your hands behind your back" and at the same time was spinning the plaintiff around to face the open driver's side doorway of the plaintiff's car. Officer Dole then forcibly held his arms behind his back and pushed him hard against the car. The driver of the Holden Vectra, Detective Winton, "was now out of his sedan and approaching the scene of the arrest". Officer Dole called out to Officer Winton "have you got any cuffs?" Officer Winton placed some flexi cuffs in Officer Dole's extended left hand and stepped back. As Officer Dole applied the cuffs he raised his right knee and forced it into the plaintiff's back, freeing his hands to create the necessary leverage to tighten the flexi cuffs. This caused the plaintiff extreme pain to his wrists and lower forearms as the cuffs were reefed upwards. He said the force of Officer Dole's knee in his back caused his spine to hyperextend into the open driver's side doorway, simultaneously pinning his chin to the roofline and his shins to the seal panel at the bottom of the station wagon. He did not resist arrest and said that no force was required to arrest him.

[14] The plaintiff states Officer Dole withdrew his knee and at that time put his left hand on his left shoulder and with his right hand took a firm grip of his hair at the back of his head. He said Officer Dole pulled his head back to an upright position and told the plaintiff "You're so fucked Stewy" before "Smashing the left side of my face into the roof of the station wagon." Officer Dole then took him by both shoulders and using his full weight, reefed him back once again, then pulled him backwards and pushed him

down with considerable force into the ground. As he had been cuffed with his arms behind his back, the plaintiff had no way of breaking his fall. He hit compacted, ungrassed ground taking most of the impact on his backside (coccyx), predominantly to his left side with his left leg twisted underneath him. He said he was winded and his lower back made a sharp cracking/popping sound and "felt like it had been broken". As he was laying on the ground the plaintiff said he was fighting for air and was on the brink of passing out due to the pain. He said he believed his back was freshly damaged and was later told this had exacerbated damage from a previous injury.

[15] The plaintiff states when Officer Dole was standing behind him, he put his left foot on the right side of his neck, just under and to the back of his right ear and twisted his shoe from side to side as if stubbing out a cigarette butt. Officer Dole then rolled his full body weight onto his unsupported neck as he walked over him towards Officer Winton, who had been watching the assault a couple of metres away. He said Officer Dole had effectively used his neck as a step, making a crunching noise as he did.

[16] The plaintiff said the police officers exchanged words with each other, took hold of him, dragged him along the ground and propped him up against the front fence of 2 Hong Street. Shortly afterwards, three uniformed officers arrived in two police paddy wagons. Two police officers assisted him to his feet and to the police paddy wagon. At that time he was experiencing intense pain in his lower back.

[17] I will describe the injuries alleged to have been caused during the arrest in due course, however at the outset it is necessary to consider the evidence that bears on the question of whether the plaintiff has proven the primary facts on the balance of probabilities in terms of whether he was assaulted and the manner of arrest that allegedly caused him injury. That assessment is to be made taking into account all of the evidence including any injuries that may be consistent with the plaintiff's account of the arrest. Evidence of injury has some capacity to support or confirm the plaintiff's claim and will be summarised and considered later in these reasons.

1.2 Stuart Johnson – Summary of Evidence Given in Cross Examination about the Events Immediately Before the Arrest and the Arrest

[18] In cross examination the plaintiff was adamant that he recalled the incident vividly, and "as close to" exactly the same as it was back in 2005. Asked if he had a very clear picture in his mind about what happened, the plaintiff said he had recurring nightmares. He said the events had passed through his mind many times, although he had not willingly gone over those events. He disagreed with the suggestion he had been able to build up a picture of what had happened. Asked about whether he had figured out the detail of which hand or foot, left or right was involved at various stages, he answered he was there and "saw it". Asked if over the course of some 16 seconds he was able to see whose hand and which hand went to which side of the body, he said "there was one foot and one hand. That's all". He agreed during the

arrest he was facing the vehicle with Officers Dole and Winton behind him. It was suggested to him that he would not have been able to see what they were doing behind him and he said no, but that he had heard them. It was put to him that he was figuring out what happened, based not on what he could see, but because of what he could hear and he said "part of my senses, yes".

[19] The plaintiff agreed his version of events about the lead up to the arrest and what occurred at Diarama Village differs from the agreed facts of his guilty plea entered on 27 November 2008. Contrary to Officer Winton's evidence, the plaintiff said he was not told Officer Winton was a police officer or had shown him his badge, although he acknowledged he did hear him say he had "back up" coming and agreed it was "possibly" a phrase commonly used by police, but not used on him before.[9]

[20] The plaintiff repeated that Officer Winton got out of the car with "an object in his hand", and that he had formed the view people were at his house intent on harming his family. This was the reason he needed to get home quickly, however he acknowledged he stopped on the way to tell Mr Naudin he was not coming for drinks, adding he asked Mr Naudin to come with him. The plaintiff acknowledged he had not included that point in his affidavit as he has "done a lot of paper work". To the suggestion he did not drive to the police station he said "I was heading in the general direction of the police station" and "because I had a car right behind me, no." He agreed he did not

[9] Transcript 26 October 2015, at 57.

phone police. He agreed he was driving very fast. He disagreed he took a straight line through a roundabout causing his tyres to clip the curb of the roundabout. He said "the car behind me did though". Asked if he took a short cut through the median strip and drove the wrong way down Larapinta Drive to get to Hong Street, he agreed but said he did not "jump" the median strip. He agreed he drove the wrong way down Larapinta Drive to get to Hong Street for approximately 20 metres.[10]

[21] In terms of the time the arrest took, the plaintiff said from the time Officer Dole placed his hands on him until the moment he was stopped was approximately "just over a minute".[11] Asked if it could have been 16 seconds, he said "actual touching my body, quite possibly" and "I haven't counted it".[12]

[22] The plaintiff confirmed his allegation was that he was handcuffed while standing in the open door of the vehicle after being spun around by Officer Dole. He agreed that was not what he told the Ombudsman who he told he was handcuffed on the ground.[13] He said he could have told them anything, he was on drugs.[14]

[10] Transcript 26 October 2015 at 59.
[11] Ibid.
[12] The 16 seconds refers to the alleged length of time of a video reconstruction, apparently made by the plaintiff but ruled inadmissible in these proceedings.
[13] Exhibit 4, Tender Documents, Tab 2 at 6.
[14] Transcript 26 October 2015 at 72-73.

[23] The plaintiff maintained Officer Dole hyper-flexed his spine.[15] He agreed that what he was saying was that as Officer Dole put the handcuffs on, he put his knee into his back, hyper-extending his spine. He agreed he did not see Officer Dole getting the handcuffs from Officer Winton. He said it was Officer Dole's right knee, suggesting if it was his left knee "we would have collapsed in a pile". Asked whether he told the Ombudsman about that, he said he was not sure what he told them. It was suggested to him that he did not tell the doctors at Alice Springs Hospital about this when taken from the Watch House to the hospital. He said he did tell them.

[24] The plaintiff agreed he probably did not tell the Ombudsman about the allegation of Officer Dole pulling his head back and smashing his face into the roof of his car. He agreed he did not tell the Alice Springs Hospital staff about this when taken to the hospital from the Watch House however maintained that it happened.[16]

[25] The plaintiff maintained Officer Dole took his shoulders and pulled him onto the ground backwards, causing him to land on his backside, extremely awkwardly and ending up breathless with his left foot and left leg twisted and stuck under his body, half on one side. He then heard a crack or pop from his back and assumed that was when the damage was done. It felt as though his back had been broken.[17]

[15] Transcript 26 October 2015 at 77.
[16] Ibid.
[17] Ibid at 66.

[26] The plaintiff adhered to his claim that Officer Dole stood behind him, put his foot on the right side of his neck, to the back of his ear and twisted his shoe from side to side like stubbing a cigarette.[18] Asked about not telling the Ombudsman about this particular allegation he said "I was more concerned about my back". For similar reasons he said he probably did not mention it to the Alice Springs Hospital doctors and possibly not to Dr Hickey.

[27] The plaintiff maintained that Officer Dole used his neck as a step when he walked over him towards Officer Winton. He acknowledged it was "quite possible" that he did not tell the Ombudsman about that. He said he told his lawyers but they left that allegation out of the statement of claim. He said he did not tell Alice Springs Hospital doctors as he was more concerned with his back. In relation to what he told Alice Springs Hospital staff about the diagnosis of a rash on his neck on 28 July 2005, he said not everything was recorded.

[28] The plaintiff agreed that when Officers Dole and Winton took hold of his arms and took him to the fence, it was not overly excessive but he was still in pain. He did not recall telling Officers Dole or Winton the cuffs were too tight and he was having difficulty breathing. He said they checked his back and noticed his hands were getting discoloured. The uniformed police arrived and they cut the flexi-cuffs, not because of what he said, but because Officer Dole or Winton had told them to. He did not tell the uniformed

[18] Transcript 26 October 2015 at 67.

officers he had been assaulted but told them he was in "incredible pain".[19] He said they assisted him to the paddy wagon as they could see he could not move.

1.3 Stuart Johnson – Evidence of his Various Accounts and Descriptions of the Arrest

[29] Mr Johnson agreed he had told many people, for example medical personnel, the Ombudsman and lawyers about the incident. Some of those matters with respect to the Ombudsman have already been referred to. He said he believed he told the truth on each occasion. As will be discussed, at the Watch House it is recorded the plaintiff complained of back pain. In his records of interview with police he made reference to "jumping on my neck" and "going for my neck". At first those statements appear to be probative and somewhat supportive of the plaintiff's claims, however they must be considered in the light of the various accounts given by him over time, and how his version compares with the evidence of other witnesses.

[30] The plaintiff was taken from the Watch House to the Alice Springs Hospital on 16 July 2005 at 17:33. The relevant record notes "P.L Backache (sic)"; "40 year old male BIB Cops with the presenting complain (sic) of backache for few day after bent over." References are made under the heading

[19] Transcript 26 October 2015 at 79.

"background" to L4-L5 disc protrusion; L5-S1 discs bulging; depression and medication, Cipramil.[20]

[31] On 17 July 2005 he was admitted to hospital.[21] A CT Lumbar Spine Scan was performed on 22 July 2005. Noted under "Clinical History" was "History of left sided sciatica. Got worse during last 1 week."[22] The discharge summary of 29 July 2005 stated in part "Presented with low back pain for few days after a fall".[23]

[32] Doctor Matarazzo, the plaintiff's GP recorded he first spoke to the plaintiff about the incident after his release on bail and he "described in quite vivid terms a rather vicious arrest whereby his back and his neck were quite significantly hurt".[24]

[33] After being referred by Dr Matarazzo to the orthopaedic and spinal surgeon Dr Osti, an MRI scan was performed in Adelaide. Dr Osti's apparent understanding of the history is set out in his letter to Dr Matarazzo of 9 September 2005 that states:[25]

> Thank you for asking me to see this rather challenging man with a long history of back pain linked to a work injury in 1995. Approximately 7 weeks ago as a result apparently of a case of mistaken identity he had been apprehended by police and had experienced sudden deterioration of his chronic back pain with irradiation to the left leg. He informed me that prior to the police

[20] Affidavit of Stuart Douglas Johnson, 8 October 2013, Exhibit P1 [44], annexure SDJ-10.
[21] Ibid [45], annexure SDJ-11.
[22] Ibid [47], annexure SDJ-12.
[23] Ibid [48], annexure SDJ-13.
[24] Letter of 21 August 2015, Exhibit 4, Tender Documents, Tab 7.
[25] Affidavit of Stuart Douglas Johnson, 8 October 2013, Exhibit P1 [50], annexure SDJ-15.

> intervention and its aggravation effects he had suffered from leg pain although no different between left and right.

[34] Accounts were also given to the Ombudsman, first on 9 August 2005: "one police officer was using him as a "trampoline" by jumping on his legs, and lower back. He now suffers from sciatic problems, which forces him to use a wheelchair." [26] On 12 September 2005 as the first complaint of seven complaints was made:

> One of the arresting officers (named) came up to the #C from behind and pulled him backwards towards him and told him to sit down #C stepped backwards as the officer pushed him down on his shoulder; the officer forced the #C all the way to the ground. The #C body was buckled backwards and to the left. His left foot was forced awkwardly behind his torso. The #c came to rest with his left leg under his bicep. The #C's head was close to the ground where he was cuffed.
>
> It is alleged that the arresting officer then stood on Mr Johnson's neck (the right side). The officer put one leg on Mr Johnson's neck with his full weight. He pressed/ bounced once, released and pressed/ bounced again "like a trampoline." In the process the officer exacerbated an injury which Mr Johnson did to his spine in 1995 (L4-L5) and caused damage to L5-S1 (hernia). As the officer released the pressure, the heel of his shoe scuffed over the skin on Mr Johnson's neck. This formed a scab which took three weeks to clear up. The officer said "stay there"; he then said "you're so fucked."

[35] The plaintiff was asked about the account of the incident he gave to the Ombudsman's Office on 9 August 2005 and whether he had said Officer Dole had spun him around and handcuffed him while he was standing in the open door of the vehicle facing the vehicle. He said when he made this complaint, he was on morphine. He was cross examined in some detail

[26] Exhibit 4, Tender Documents, Tab 2.

about drugs, how he obtained them and their effects. As to suggestions that contrary to his evidence he had told the Ombudsman he was handcuffed while on the ground,[27] he said he could have told them anything, he was on drugs and was impaired. He said the account given to the Ombudsman was not an accurate representation of what occurred. On further questioning about his call to the Ombudsman from the Alice Springs Correctional Centre on 9 August 2005,[28] he was asked if the summary of the complaints he had made against police was correct where he said that when he was arrested a police officer was using him as a trampoline by jumping on his legs and lower back. He answered he possibly said that but does not know if that was true as he was on medication.[29]

[36] The plaintiff was asked further about his attendance at the Ombudsman's Office on 12 September 2005.[30] He agreed it appeared that at that time he said that he was cuffed while on the ground. He again referred to medication, saying he was "not medicated now, not to that extent".[31] The plaintiff was asked further about the description he gave about Officer Dole standing on his neck (the right side), that "he put his leg on my neck, with his full weight. He pressed/bounced once, released and pressed/bounced again, like a trampoline." When it was suggested that that part of the account was not true, the plaintiff said he was on medication. It was put to him that it was not true, and he said "no".

[27] Exhibit 4, Tender Documents, at 3 and 6, from attendance on 12 September 2005.
[28] Exhibit 4; Tender Documents, Tab 2 at 1-3.
[29] Transcript, 26 October 2015 at 72.
[30] Exhibit 4; Tender Documents, Tab 2 at 6.
[31] Transcript, 26 October 2015 at 73.

[37] The plaintiff said the medication he was taking that was affecting him at the time of the call on 9 August 2005 and the later interview at the Ombudsman's Office on 12 September 2005, were supplied by Correctional Services. He said some of the medication was similar to those prescribed by his general practitioner, but that some was extra. Of the medications, he said Tramadol was one, but was not sure about Diazepam. He thought he had also taken Celebrex, prescribed by his general practitioner.

[38] The plaintiff accepted after the arrest he was in custody until he was granted bail on 30 August 2005. He accepted he was returned to custody on 19 November 2005, however was at liberty when he was interviewed at the Ombudsman's Office on 12 September 2005. Asked whether that meant he could not have been given drugs at the relevant times by the Correctional Centre, he said that on release, drugs were given and "you take what you've got with you". Asked if that meant he was not under the influence of drugs when he spoke to the Ombudsman's Office, he said "that whole area is quite blurry".[32] He said he was still medicated from Bath Street Clinic, his general practitioner's clinic.

[39] On being taken to the Bath Street Clinic records, he agreed that on 1 September 2005 he was prescribed with Celebrex, a muscle relaxant and Stilnox, a sleeping tablet. He agreed that on 2 and 5 September 2005 no drugs were prescribed for him,[33] and that he saw the doctor on 13 September

[32] Transcript, 27 October 2015 at 154.
[33] Ibid.

2005, the day after his attendance at the Ombudsman's Office. It was put to him that there was nothing in the prescriptions at that time that reduced his ability to describe the events of the arrest. He replied he still had medication from before the arrest such as Tramadol and Coldagin Forte from Dr Matarazzo and had previously been prescribed an antidepressant.[34] He did not agree with the proposition that he was as able on 12 September 2005 as he was giving evidence in the hearing. He said it was the combination of the Tramadol and the intensity of the pain that was affecting him then, but that he was not suffering pain of that kind when giving evidence, although he was taking Tramadol.

[40] The plaintiff was asked about the seven complaints against police in the record of his complaint to the Ombudsman on 12 September 2005. He agreed he was able to recall the details about what occurred in relation to complaints numbered two to seven which primarily concerned police attendances to his house. He agreed the complaints made were pretty close to what happened.[35]

[41] The plaintiff was taken to the case note entries of the officer investigating his complaints, Greg Lade, of 29 September 2005, which concerned the

[34] Transcript, 27 October 2015 at 155.
[35] Transcript, 27 October 2015 at 108, Complaint 2 was police for mishandling property, failure to properly record alleging $5000 and papers went missing during the execution of a warrant; Complaint 3 concerning the search of his home; Complaint 4 custody of handling property including failure of police to notify the whereabouts of his dogs; a pet turtle died of starvation; Complaint 5 inappropriate disclosure of information; Complaint 6 concerning police procedures, lack of authority to install listening devices at his home; Complaint 7, refusal to access legal advice in custody.

arrangement of an interview to deal with his complaints against police.[36] His attention was drawn to a description of an attempt by Greg Lade to interview him at his home.[37] The plaintiff said he did not know if police came and banged on the front fence, although he accepted that it happened. He agreed that he was contacted by phone, went to the gate of his house, declined an opportunity to be interviewed about his complaints and referred investigators to his solicitor. He accepted what occurred was recorded in the letter from the Ombudsman to his solicitor, Mr Sinoch. The plaintiff was taken to correspondence requesting advice from his solicitor about whether he would make a statement.[38] He was referred to later correspondence advising that since there had been no response to that request of 25 November 2005, the Ombudsman was declining to investigate the complaint. The letter also noted the plaintiff had a legal remedy. Asked whether that was how his complaint against police was resolved and the plaintiff said "it seems to be".[39]

[42] The plaintiff was taken to a letter from Dr Windsor to Dr Matarazzo of 28 November 2007.[40] Dr Windsor wrote, "He states that he was forcibly made to lie prone until 'cuffed' …." The plaintiff said that those are "his words, not my words". He did not accept he had said that to Dr Windsor. He said he does not use the word "prone". He suggested the reason for the wrong notation was: "Watch too many cop movies" and then "I think it's an honest

[36] Transcript, 26 October 2015 at 73.
[37] Exhibit 4, Tender Documents, Tab 2 at 12.
[38] Ibid Tab 2 at 15.
[39] Transcript, 26 October 2015 at 74.
[40] Exhibit 4, Tender Documents, Tab 1 at 306-307.

mistake". He agreed with Dr Windsor's description of being manhandled and felt a crack.[41]

[43] He disagreed with the proposition that Officer Dole took him down quickly, placed him on his stomach and held him down with his body weight with a knee in between his shoulder blades. He maintained he was handcuffed while standing. The plaintiff was taken to later observations of Dr Windsor from 22 November 2007,[42] in particular: "Neck held down by boot and cuffed". The plaintiff said Dr Windsor had that wrong, indicating it was some time after the event.[43]

[44] The plaintiff was referred to an entry in the Alice Springs Hospital records on 19 July 2005 recording that the plaintiff told a physiotherapist that he was on his knees, head on the ground and twisted to the side when a police officer stood on his neck.[44] The plaintiff said, "That's what she's recorded. That's not what I said". He said it was an abbreviation.[45] He then agreed with his description that Officer Dole "put his left foot on the right side of [his] neck under and to the back of [his] ear and twisted his shoe from side to side like he was stubbing out a cigarette".

1.4 Initial Observations of the Plaintiff's Evidence

[45] The plaintiff has clearly given a number of inconsistent accounts, not only with respect to peripheral matters but importantly in terms of the mechanism

[41] Transcript, 26 October 2015 at 75.
[42] Exhibit 4, Tender Documents, Tab 1 at 51.
[43] Transcript, 27 October 2015 at 134-135.
[44] Exhibit 4, Tender Documents, Tab 1 at 3, [136].
[45] Transcript, 26 October 2015 at 67.

of the arrest. The arrest itself was on any account, including the plaintiff's, a very quick procedure that took place after a car chase and it is unlikely the plaintiff genuinely recalls each element of the procedure.

[46] It is not only the arresting officers who said the plaintiff was on his stomach when the flexi cuffs were placed on him, but also Officers Sims and Curtiss who also attended the scene.

[47] Ultimately, the recollection by the plaintiff of key historical matters set out in various records relevant to his claim is poor. Although extensive lapses in recollection are to be expected after such a lengthy period, the plaintiff was quick to accuse others, notably hospital staff, for any perceived errors that tended to detract from his claim.

[48] While it is of course entirely possible that incorrect records may have been entered from time to time through miscommunication or for other reasons, the plaintiff rejects the accuracy of almost all records potentially contrary to his case that were put to him in relation to his description of the critical events.

[49] Furthermore, the plaintiff's explanation for his accounts to the Ombudsman and his reliance on medication and its source were not convincing; changing throughout the course of his evidence. For example, his initial complaint to the Ombudsman on 9 August 2005 included the allegation of Officer Dole using him as a trampoline by jumping on his legs and lower back. On 12

September this changed to an allegation of Officer Dole putting one leg on his neck with the comment of "press/bounced like a trampoline".

[50] The plaintiff obviously did not see what Officers Winton and Dole were doing when they were behind him, yet he was prepared to suggest that he knew.

[51] It cannot be accepted that the plaintiff has a sound or reliable memory of the event, nor that his memory is currently the same, as he suggests it was, as 2005. The plaintiff's evidence reveals significant internal inconsistency. This especially comes to light when comparing the description given by the plaintiff in this hearing with the various descriptions of the incident on other occasions, including to health professionals which will be discussed in more detail in the context of the plaintiff's medical case.

[52] During this hearing when the plaintiff suggested the mechanics of the alleged neck injury to Officer Winton, he suggested: "you actually witnessed him (Officer Dole) standing on my neck."[46] Nothing was suggested about Officer Dole grinding his heel into the plaintiff's neck or using his neck as a step. Nor do the pleadings refer to Officer Dole using the plaintiff's neck as a step. It also appeared to be omitted from the history the plaintiff initially gave to Dr Hickey. Dr Hickey was unable to say when the plaintiff told him of this part of the allegation.[47]

[46] Transcript, 30 October 2015 at 356.
[47] Transcript, 02 November 2015 at 435-437.

[53] It is possible that the effect of various medications and the difficulties of being in custody, poor health and the inherent uncertainty of his circumstances explains in part the differing descriptions given by the plaintiff, however, overall his evidence in relation to the events giving rise to the claim are unreliable. His case is not assisted by his claim that he was never involved in drugs, or knew nothing about them, or that police approaches to him initially on 14 July 2005 were hostile acts of unknown persons intent on harm. As will be seen from the defendant's witnesses, the plaintiff had been under surveillance for some time and there were reasons his arrest became important in the context of a compromised listening device and the cessation of the investigation. The plaintiff's description of the lead up events to the arrest, that he was being chased by unknown men posing a danger to him and his family, are not credible. The plaintiff's account of his life potentially being threatened does not sit easily with his decision to stop in on his associate Mr Naudin while on his way home. Furthermore, while it is possible that his plea of guilty was ultimately entered on pragmatic grounds, given the whole history, including the surveillance and the evidential material gathered in the investigation, and that he was prepared to plead guilty to a serious charge, the claim that he was not involved with cannabis distribution or the facilitation of its supply is improbable.

[54] Overall, the descriptions of what the plaintiff said occurred in the arrest, particularly in relation to the allegation that Officer Dole stepped on his neck, and twisted his shoe as though stubbing out a cigarette, are deeply

conflicted and unreliable. Without credible supportive evidence, I could not on the balance, find the plaintiff's version of events with respect of the lead up to the arrest, or the arrest itself including the alleged assault, battery and use of excessive force, proven. The evidence that could potentially support the claim is unconvincing. This is also in the context of credible and convincing denials of the plaintiff's version, by the witnesses called by the defendant.

1.5 James Harvey Doyle – Summary and Discussion of Evidence

[55] James Harvey Doyle gave oral testimony in the plaintiff's criminal trial in 2006 and confirmed the transcript of that testimony is an accurate account of the evidence he gave.[48] At the time of the arrest he and his brother, Richard Harvey Doyle were living at 3 Hong Street, diagonally opposite 2 Hong Street.

[56] In evidence at the trial in 2006,[49] Mr Doyle said he looked across the road and saw a police officer walking towards a maroon station wagon where he said Stuart Johnson was standing with the door open, not moving. He said the police officer went up and stood behind Stuart Johnson and pushed him against the car. His head was about level with the roof. The police officer turned and asked another police officer for something who then retrieved what looked like handcuffs from the car and walked back over to the officer who was standing at the open door of the maroon car and handed them to

[48] This summary is drawn from the Affidavit of James Harvey Doyle, 18 December 2013, Exhibit P8.
[49] Affidavit of James Harvey Doyle, 18 December 2013, annexure JHD.

him. He agreed because he was standing on the opposite side of the road he could not see what was actually happening. Stuart Johnson lunged forward into the roof of the car. The police officer stood very close behind for a short time, placed his hands on his shoulders and pulled him backwards straight onto the floor. As they came backwards, Stuart Johnson rolled onto his left hand side. Mr Doyle said he had a partial view. He saw the police officer stand up after he had pushed him onto the ground. As the police officer started to walk over towards the driveway, he seemed to "lift up with an uneven step, like he'd stepped on something", and then continued to walk over to the other police officer. Mr Johnson continued to lie on his side. The police grabbed him under the arms and put him against the fence. Mr Doyle said he did not intervene because he did not know what was happening and heard the police officer identify himself as police, so did not want to get involved. He was approached later by Stuart Johnson who did a "door knock" to see if anyone had seen the incident. He thought it was a few weeks after the event. He was then contacted by Mr Johnson's solicitor and swore an affidavit on 24 June 2006. He agreed that was a few days before the jury trial in 2006.

[57] In cross examination James Doyle said his brother Richard parked the car right up in front of the house. When he was walking to the door he heard someone yell out and he moved to the end of the car, not the post box, so he was still near the house. He also said, however he heard the sounds of the cars when Mr Johnson and police pulled up and that is what sort of alerted

them to have a look. When it was put to him this was different to his evidence at the trial that the first thing that drew his interest was the words he heard called out he said "I agree with that's what I testified, that I heard that. But I'm pretty sure I heard cars pull up". Put to him this is different to what he said in 2006 he said "no, I'm just adding it".[50]

[58] In relation to the evidence he gave at the jury trial that he had known Mr Johnson "since about 2001", he said he had dealt with him in his capacity as a mechanic and waved to him as a neighbour. He also said he recognised the police officer Martin Dole, because he knows him. He said he had been standing in his front yard, in the drive way and he did not move any further. He believed he heard a noise when Stuart Johnson went to the ground but could not say exactly.

[59] Mr Doyle said he had been told Mr Johnson was fighting drug charges, which was why his testimony had been requested. He agreed Mr Johnson's lawyer told him that Mr Johnson had been quite badly hurt in the arrest.[51] He agreed it was fair to say that prior to the criminal trial and giving evidence in this hearing he had had a number of conversations with Mr Johnson or his lawyer and with his brother Richard Doyle about the arrest.[52] When questioned about various details that he could not recall, Mr Doyle acknowledged, "It was a very small incident in my life".[53] He also acknowledged that the arrest was just "being finished" when he walked

[50] Transcript 27 October 2015 at 174.
[51] Ibid at 178.
[52] Ibid at 179.
[53] Ibid at 175.

down his drive way to get a better look and that during the arrest, his view of Mr Johnson and Detective Dole was blocked by the vehicle.[54]

[60] When analysed, James Doyle's support for the plaintiff's case was not particularly strong. It was plain the arrest itself was a very quick incident and that Mr Doyle did not see much of it.

[61] As might be expected, with such a delay between giving evidence at the criminal trial and this hearing, a number of details of James Doyle's evidence changed. At the criminal trial he stated he heard a police officer identify himself and denied that he heard the plaintiff say anything at all. In his evidence in this hearing, he said he heard a police officer identifying himself, and Stuart Johnson got out of his car and identify himself to police. In this hearing James Doyle accepted his view was blocked during much of the arrest and could not see much below the roof of the car. He said the car was blocking his view when the plaintiff was on the ground.[55] Contrary to his own observations, he agreed that if the plaintiff had said to others he was handcuffed on the ground, he would accept that as accurate, although that differed from his evidence given during the jury trial when he said he thought the plaintiff was being handcuffed when he was standing up. He agreed he had made an assumption about the plaintiff being handcuffed when he was standing up. In relation to his previous evidence about the police officer's movements ("he seemed to lift up with an uneven step, like

[54] Transcript, 27 October 2015 at 175.
[55] Ibid at 176.

he'd stepped on something and just continued to walk over …") he said, "he just looked like he was on the edge of a concrete driveway".[56] He acknowledged he could not see where Office Dole's feet were and had made an assumption about what was going to happen.

[62] James Doyle's evidence that he was not able to to see much of the arrest is consistent with what could be ascertained from the view undertaken at Hong Street in terms of the line of sight from James Doyle's drive way, including the end of the drive way, to 2 Hong Street. The evidence James Doyle gave at this hearing is less supportive of the plaintiff's case than the evidence given in the 2006 trial. While he accepts that the transcript is a true and accurate record of what he said in 2006, his evidence has shifted in several respects. It is conceivable that within the different context of a criminal trial, his evidence in 2006 was not scrutinised in the same way by opposing counsel. James Doyle no longer fully adhered to the evidence he gave at trial.

[63] While I have not discounted to any significant degree James Doyle's evidence because he has had prior dealings with police, in particular Officer Dole, or his denials about that, in my view his recollection of events was of limited value given the line of sight issues and the fact that he had discussed the event with other interested parties as previously mentioned. While some aspects of his evidence are consistent with the evidence of Officers Dole and Winton, he did not recall Officers Sims and Curtiss arrive or see the flexi

[56] Transcript, 27 October 2015 at 177.

cuffs cut. Furthermore, it is clear he formed many impressions based on assumptions rather than actual recollections.

[64] This is particularly evident in his re-examination where he stated what he specifically recollected of the arrest: "Where he identified himself. That was probably the most stand-out to start with. And probably when they – you fell backwards or got pulled backwards onto the floor and where you stayed. I'd say that would be about it."[57]

1.6 Richard Harvey Doyle – Summary and Discussion of Evidence

[65] Richard Doyle gave evidence in the jury trial in 2006. His evidence in the jury trial was that at about 8:30 pm on 14 July 2005 he and his brother James Doyle returned to 3 Hong Street from Coles. When he got out of the car he heard a voice saying, "Police, stop you are under arrest". He and his brother walked down towards the entrance of their drive way at 3 Hong Street and observed their neighbour, Mr Johnson standing at the open driver side door way of a maroon Commodore. Officer Dole was walking briskly towards Mr Johnson who remained stationary. Officer Dole positioned Stuart Johnson against the Commodore such that Mr Johnson's body was protruding to the open door way of the car. Officer Dole called to Winton, "have you got any cuffs?" Officer Dole then appeared to be putting cuffs on Mr Johnson who had remained quiet with his arms behind his back. Mr Johnson raised his head as he stood upright just before Officer Dole pushed him back down into the roof of the car. Officer Dole put his hands

[57] Transcript, 27 October 2015 at 184-185.

onto Mr Johnson's shoulders and pulled him backwards causing Mr Johnson to fall heavily onto his bum, still with his hands behind his back. Richard Doyle said he thought Mr Johnson grunted when he hit the ground.

[66] In his evidence in the jury trial in 2006 Richard Doyle said at that point the bonnet of the Commodore was partly obstructing his vision. He said there was sufficient light for him to see Officer Dole who appeared to be stepping on something as he walked over Stuart Johnson to approach Officer Winton. He said the two police officers talked for a while, then picked Mr Johnson up from under his arms and pulled him back towards the fence. A paddy wagon pulled up and took Mr Johnson away.

[67] The overall tenor of Richard Doyle's evidence in this hearing was that he remembers very little of the incident or of the evidence that he gave in 2006.[58] As such, Richard Doyle's evidence cannot be given significant weight. It can barely be tested at all. He would adopt what he said in 2006 but does not have an independent recollection of the events. He agreed his affidavit[59] prepared for this matter was written for him by Mr Eaton and he had a quick look at it and signed it.[60] He agreed his recollection of events relied entirely on reading the transcript of 2006.[61] He acknowledged he would not be able to answer questions about things he had said in 2006, saying he had a vague recollection of what happened and believed the

[58] Transcript, 27 October 2015 at 186, 188-189 and 192.
[59] Affidavit of Richard Harvey Doyle, 18 December 2013, Exhibit P9.
[60] Transcript, 27 October 2015 at 186.
[61] Ibid

transcript to be fairly true and correct. Apart from that he said he did not have a lot to offer.[62]

[68] Parts of Richard Doyle's evidence is consistent with the accounts given by Officers Dole and Winton, save that he said handcuffing took place at the side of the car. In 2006, Richard Doyle said as Mr Johnson was standing in the doorway of his car, he saw a police officer walking up to him and it looked like the police officer was putting cuffs on his back, at the same time as pushing him. He saw the police officer push him down, pull him backwards and had his hands on his shoulders. He did not recall the flexi cuffs being cut off the plaintiff's wrists but agreed it may have happened. As one police officer went to walk towards the other one, "He sort of raised slightly as he was walking".[63]

[69] There is some inconsistency between the evidence of James Doyle in this trial and Richard Doyle given in 2006, about where they were when they saw the incident. Richard Doyle said in 2006 they were standing at the end of the driveway near the post box, whereas James Doyle said they were near their car, parked on the driveway where the front door is. This detail has a significant bearing on the viewing conditions. If James Doyle is correct, the view of the incident would not have been clear, as is apparently acknowledged to some degree by him.

[62] Transcript, 27 October 2015 at 186.
[63] Exhibit D22 at 728-729.

1.7 Martin Dole – General Summary of the Events Immediately Before the Arrest and the Arrest

[70] At the time of the events giving rise to the claim, Martin Dole was a Detective Senior Constable in the Drug Intelligence Unit, Alice Springs. At the time of this hearing he was Detective Acting Senior Sergeant in Northern Territory Police Professional Standards.

[71] Officer Dole states he had been involved for a number of weeks prior to the arrest in 'Operation Twilight'.[64] This operation included covert surveillance of the plaintiff and some of his associates in regard to significant cannabis distribution in Alice Springs, and was co-ordinated by Detective Sergeant Sims. As part of the operation he had obtained a warrant to install a surveillance device in the plaintiff's business premises, and familiarised himself with the plaintiff's daily activities and surveillance reports.

[72] Prior to the arrest he believed the plaintiff's drug related activities had continued for many years and had been the subject of an unsuccessful police operation some years before. He also understood the plaintiff had prior police involvement.[65] There was no significant challenge to this evidence.

[73] Officer Dole was called on duty on the night of the plaintiff's arrest. He was advised the investigation had been compromised when a surveillance device had been found by the plaintiff or one of his associates, who had each

[64] Affidavit of Martin John Dole, 2 October 2015, Exhibit D47.
[65] Ibid at [7].

fled by car in different directions. The associates were Michael Naudin, Franklin Henry and Stuart Pritchard.[66]

[74] Officer Michael Curtiss called Officer Dole to advise him that Officer Peter Winton had located the plaintiff at Diarama Village. Officer Dole went to Diarama Village to assist Officer Winton to apprehend the plaintiff for serious drug offences. Additionally, the plaintiff was to be apprehended to prevent him and his associates from getting drugs out of their premises and to recover the missing surveillance device.

[75] Officer Dole states that at Diarama Village he recognised the plaintiff's car, a maroon Commodore station wagon. The plaintiff was inside the car and Officer Winton was at the driver's side window. He pulled into the car park next to Officer Winton's car and was getting out to arrest the plaintiff when the plaintiff reversed out quickly and sped off towards the Mobil Service Station onto Larapinta Drive.

[76] Officer Dole spoke to Officer Winton and told him that Detective Sergeant Sims had instructed the plaintiff was to be arrested. As the plaintiff was out of sight, they got into separate unmarked cars to begin to search for him. He was in communication with Detective Sims but not with Officer Winton. He and Officer Winton drove in different directions and after driving to a number of locations where he thought the plaintiff might go, drove along Nelson Terrace and noticed the plaintiff's vehicle coming towards him at

[66] Affidavit of Martin John Dole, 2 October 2015.

speed. He did a quick u-turn and followed it. Although not using lights or sirens, he believed the plaintiff knew they were police officers because he was flashing his headlights and matching his speed. He said the plaintiff had also seen him previously and knew he was a police officer. He said the plaintiff's driving was excessively fast. He estimated the plaintiff's speed along Larapinta Drive to be 150 kph and said the plaintiff clipped the curb at a round-about, jumped the median strip near Hong Street and drove along the wrong side of the road as he headed towards his residence. Officer Dole pulled up behind the plaintiff's car as he pulled up onto the verge outside of 2 Hong Street.

[77] Officer Dole states he got out of his vehicle and ran to open the plaintiff's driver's side door as he was getting out of his car. He grabbed him near the shoulder area with both hands, pulled him out of the vehicle and put him straight down onto the ground face down. He said he did this very quickly. When the plaintiff was on the ground, he employed a three point hold with his knee on his back on his shoulder blades and was restraining his arms with his hands. He said the plaintiff was not given any opportunity to resist. Officer Dole told the plaintiff they were police officers and he asked Officer Winton if he had any handcuffs. Officer Winton retrieved some flexi cuffs and put them on the plaintiff's wrists.

[78] Officer Dole said he used that mechanism of arrest as he wanted to stop and secure the plaintiff before he had any opportunity to cause harm to either Officer Winton or himself and before he could get into his yard. He said he

understood and maintains that following a high speed chase, a traffic apprehension is dangerous. He stated the plaintiff was an "unknown quantity" and did not know what he had in his vehicle or on his person that might be used as a weapon. He thought from the high fence of the plaintiff's residence the yard appeared fortified which could have made arresting him difficult if he had been allowed to enter his yard. He believed that making the arrest of the plaintiff in that way, including handcuffing, was necessary and he would do the same today.

[79] Officer Dole stated he released his weight from the plaintiff after Officer Winton applied the cuffs and did a pat down to check for weapons. He also checked for weapons in the car. He does not recall if the plaintiff said anything while he was lying on his stomach however recalls he was not yelling or crying out. After the searches he considered him safe and pulled the plaintiff up from his stomach by rolling him over onto his back, pulling his knees up and getting him into a sitting position. They then shuffled him over to sit, leaning against the fence of his residence to wait for general duties officers to take him to the Watch House.

[80] Officer Dole said the arrest was consistent with his police training. He acknowledged ground stabilisation is not a standard way to make a traffic arrest but in the circumstances he thought it was appropriate. He denied allegations that he pulled the plaintiff's arm up behind his back, put the cuffs on him, hyper-flexed his back, pushed him into the driver's doorway

with his knee, slammed his face into the roof of the vehicle, put the heel of his shoe onto his neck, or used his neck as a step.

[81] Officer Dole also prepared a statement in relation to the criminal charges against the plaintiff and gave evidence at the committal proceedings in September 2005 and the Supreme Court trial in 2006.[67] He stated he remembered what occurred because of the nature of the allegations made against him by the plaintiff over an extended period of time. He has used relevant documents including statements and previous trial transcripts to refresh his memory. He does not recall seeing the Doyle brothers. He has not worked with Officer Winton very often. At the time of swearing his affidavit of 2 October 2015, he had been in the police force for 18 and half years and during that period has only had one complaint of using excessive force made in the context of a protective custody matter in 2002. The complaint was investigated and found to be unsubstantiated.

1.8 Martin Dole – Summary of Evidence Given in Cross Examination of the Events Immediately Before the Arrest and the Arrest

[82] In cross examination much of Officer Dole's evidence was confirmed. He agreed with the suggestion put to him that during the pursuit he was matching the plaintiff's speed. He disagreed with the suggestion that he was nudging the plaintiff's vehicle or that he was "right on (his) tail", rather stating, "I was behind you a bit". Officer Dole agreed that at the trial in

[67] All documents relevant to those matters are annexed to the Affidavit of Martin John Dole, 2 October 2015, Exhibit D47.

2006 his evidence was, "I was right behind him, right on his tail". That matter was not pursued further in cross examination. It is apparent from the transcript at the trial the phrase "right on his tail" is a reference to when they pulled up at 2 Hong Street.[68]

[83] Asked when it became apparent to Officer Dole that the plaintiff was going to Hong Street, he said it was not.[69] Asked if when he approached the plaintiff he said, "I'm a police officer", he answered, "No, I didn't". Asked if he was not too sure about that in 2006, he said he did not recall.

[84] Asked what he had meant by the description that as the plaintiff was getting out of the vehicle he "met" him and ground stabilised him, Officer Dole answered, "as I got to you Mr Johnson, you were attempting to get out of the vehicle. I grabbed you by the shoulders and I put you face down onto the ground". Asked whereabouts he grabbed him, Officer Dole said, "on the shoulder area of both - upper body shoulder area". He agreed the plaintiff did not resist. As to whether the plaintiff was compliant, he said it was difficult to answer because the plaintiff was ground stabilised and he was compliant once he was on the ground being restrained. As to how long the arrest process was, Officer Dole said it was very quick, it would have been seconds.

[68] Affidavit of Martin John Dole, 2 October 2015, annexure MJD-10 at T208.
[69] Transcript, 4 November 2015 at 486-488.

[85] Officer Dole said that at no stage did he spin the plaintiff to face the car.[70] Asked about his evidence on this subject at the 2006 trial, his attention was drawn to a question, "well how did you push him there?" and the answer was, "grabbed him by the shirt, spun him around, pushed him on the ground as we're trained to do".[71] He agreed he said the plaintiff was spun as in "spun around and pushed, face down, first into the ground".[72] It was then put to him that the sequence of events was that he pulled the plaintiff out of the car, put the plaintiff on the ground, put cuffs on him, rolled him onto this bum and put him against the fence and then waited for general duties in the paddy wagon to come. Officer Dole answered, "yeah look I don't want to be argumentative but I haven't said that we rolled you onto your bum at all". Officer Dole agreed he would have told Officer Sims that the plaintiff had been arrested and would have spoken to Officer Curtiss but could not remember what he had said.

[86] Later in cross examination Officer Dole was asked again about 'spinning' the plaintiff and it was suggested that he did not spin the plaintiff on the ground and Officer Dole answered, "You were on the ground. I didn't spin you. Is that what you're saying?" He was then asked, "When I was standing, did you spin me?" Officer Dole answered, "As we came out of the car we spun straight down to the ground". Officer Dole indicated his two hands to the right of himself pushing downwards to the floor. He said he

[70] Transcript, 4 November 2015 at 490 - 491.
[71] Affidavit of Martin John Dole, 2 October 2015, annexure MJD-10 at T209.
[72] Transcript, 4 November 2015 at 492.

could say spun or turned to the right and downward.[73] He disagreed with the suggestion he spun the plaintiff facing the car. He said he did not push him into the car or that cuffs were put on the plaintiff while he was standing.[74] Officer Dole disagreed he pulled the plaintiff upwards, standing him up by the shoulders, or that he pulled him back and as he stumbled, pushed him to the ground. He said he was 100% sure about that. Asked if he remembered putting his foot on his neck and he said, "I never put my foot on your neck" stating that no time would that be a practice that a police officer would do. He agreed it would be dangerous.[75] He agreed with the suggestion he had put his arms under the plaintiff's arms and that Officer Winton had put his under the other side and shuffled him back to the fence. Officer Dole said he was not sure when Officer Curtiss arrived but that he was there before the general duties officers arrived. Officer Dole said he believed Officer Sims arrived shortly after the arrest but was not sure.[76]

1.9 Discussion of Martin Dole's Evidence of the Arrest and Surrounding Circumstances

[87] Little of Officer Dole's evidence, save the particular allegations comprising the claim of assault, battery and the use of excessive force was challenged. Officer Winton substantially confirms his account and Officers Sims and Curtiss agree the plaintiff was laying face down when they arrived at 2 Hong Street. Given the background of the surveillance and the plaintiff's manner

[73] Transcript, 4 November 2015 at 504.
[74] Ibid.
[75] Ibid at 505.
[76] Ibid.

of driving, together with the unchallenged evidence to be summarised about the police practice of ground stabilisation in certain situations, Office Dole's decision to use this method is consistent with accepted police procedures and practice. Officer Dole was not challenged in any significant way about the factors that informed his belief about the appropriate mode of arrest or the reasonableness of his belief. He readily accepted the proposition that the plaintiff did not resist, but explained the other factors that were relevant to his decision. In terms of the events leading up to the arrest, there is no reason to reject Officer Dole's evidence. It is a more credible explanation for the chase at speed than the plaintiff's version of events. In relation to the alleged battery or excessive force, Officer Dole's evidence is consistent with the evidence of Officer Winton.

[88] Officer Dole's evidence must of course be assessed in the light of what occurred at the police station and the evidence relevant to the claims of injury or the exacerbation of an injury. In one interview the plaintiff made reference to "going for my neck" and "jumping on my neck." During the second interview the plaintiff was advised by Officer Sims that he could make a complaint. Officer Dole acknowledged he should have addressed the complaint immediately but was focused on the investigation. The interviews will be discussed further in these reasons. This does not lead me to reject Officer Dole's version of events. The apparent inconsistencies that arose in his evidence when compared with his trial evidence were adequately

explained by him. Ultimately, I assessed his testimony as clear, coherent and credible.

1.10 Peter Winton – Summary of Evidence of Events Before the Arrest and the Arrest

[89] Officer Winton is now an Acting Team Leader of a unit of the Australian Federal Police but at the relevant time was a Senior Constable in the Northern Territory Police. He had been a Northern Territory police officer for over 18 years. He resigned as a Sergeant on 11 October 2013 and commenced with the Australian Federal Police. He described the general background details of "Operation Twilight" as involving the covert surveillance of the plaintiff in relation to "large scale illicit drug dealings of cannabis".[77] He recalled being told that a surveillance device in the plaintiff's premises had been found and to follow the plaintiff who had fled the premises. He followed the plaintiff to Diarama Village. He said he got out of his vehicle and walked to his car. He recalled showing the plaintiff his police badge and told him he was a police officer. He cannot now recall whether he told the plaintiff he was under arrest or whether he told him he wanted to speak with him, but he said he had no doubt that the plaintiff knew he was a police officer. The plaintiff was pursued after he drove off after that interaction. Officer Dole joined him in the search for the plaintiff. He described the pursuit, noting the plaintiff was driving fast and

[77] This summary is drawn primarily from the Affidavit of Peter Winton, 30 September 2015, Exhibit D30.

dangerously. The manner of his driving led Officer Winton to conclude the plaintiff knew police were following him.

[90] Officer Winton stated that when they arrived at 2 Hong Street, Officer Dole got out of his vehicle very quickly and arrested Stuart Johnson "before he made it to his front gate". Officer Winton recalled the arrest as ordinary with nothing untoward. He said the apprehension of Mr Johnson was "pretty much" completed before he got out of his vehicle. He approached Officer Dole, returned to his own vehicle to collect handcuffs, returned to Mr Johnson and put handcuffs on him. As he had been evading police for the last half an hour he considered he was a flight risk. He also referred to the seriousness of the offences he was suspected of committing. He confirmed the plaintiff did not resist arrest and confirmed that if there had been a struggle it would have stayed in his mind but nothing "stands in [his] memory". He said he had a good view of the arrest and did not see anything like Officer Dole bending Mr Johnson forward into the door of the vehicle, or bashing his face onto the vehicle roof or standing on his neck. He said those things did not happen and was surprised to hear that those allegations had been made. He recalled also that soon after the arrest Mr Johnson was taken by general duties officers. Officer Winton states he has never been subject to disciplinary action as a member of the police force.

1.11 Peter Winton – Evidence Given in Cross Examination on Events before the Arrest and the Arrest

[91] Officer Winton agreed with the suggestion that initially the plaintiff was travelling at normal speed.[78] Asked if he was instructed to arrest the plaintiff at or around Diarama Village he said he did not recall but agreed his previous evidence was that he was instructed to follow Mr Johnson, not to arrest him. He acknowledged that in previous evidence he had agreed that he was using a two way hand held radio. He did not recall that the hand held radio was not working for a time. He agreed he was watching the plaintiff at Diarama Village. After an interaction with each other, he agreed it was at that point the plaintiff sped off. He disagreed with a suggestion that Officer Dole was not standing by Mr Johnson's car. His recollection was that Officer Dole arrived just as he was leaving.[79] Officer Winton agreed he found the plaintiff ten minutes later and it was then that the plaintiff accelerated,[80] and he turned to follow. He concluded Officer Dole was in front of him, following Mr Johnson.[81] He agreed it was about then the plaintiff started driving dangerously and said his recollection was that he did not lose sight of the plaintiff from that time.[82]

[92] He agreed with the suggestion that at Hong Street, Officer Dole was, "onto him" as soon as he opened his door. Officer Winton said his recollection was the plaintiff was moving towards the gate but did not get very far.

[78] Transcript, 30 October 2015 at 328.
[79] Ibid at 334.
[80] Ibid at 335.
[81] Ibid at 336.
[82] Ibid at 337.

Taken to the trial transcript of 2006 where Officer Winton had said "he didn't really have much time to get anywhere" he commented that his memory was that the plaintiff was "aiming towards the gate".[83] Officer Winton agreed his memory was a bit of a blur. He agreed he was getting out of the car at the time of the arrest and his was the third car in the row. He did not recall conversations. He agreed there was lighting in the area of Hong Street. He said the only time he did not have the plaintiff and Officer Dole in his sight was when he went back to get the flexi cuffs. He said he did not recall sliding the plaintiff to the fence. He did not see anybody else during the arrest. He agreed a paddy wagon turned up.[84] Asked whether the plaintiff was compliant and Officer Winton answered, "It's a hard question to answer, compliant … compliant is (sic) as far as you are running away from police after a listening device got found in your house".[85] He agreed there were no compliance issues after the arrest and the arrest happened quickly.

[93] He disagreed that he or Officer Dole stepped on the plaintiff's neck saying, "I couldn't imagine at any stage he's stood on your neck, no".[86] Officer Winton was asked: "I've actually missed one vital step actually, the step. Whilst I was laying on the ground and before you both picked me up and took me to the fence, you actually witnessed him standing on my neck. Do

[83] Transcript, 30 October 2015 at 339.
[84] Ibid at 341.
[85] Ibid at 343.
[86] Ibid at 345.

you remember that?"[87] He answered "no". It was suggested to him that Officer Dole immediately grabbed the plaintiff, spun him around while standing in the open doorway of the car, faced him into the open side of the car, and held him against the car. He was then handed cuffed and they were applied tightly while using his knee to brace against the plaintiff's back. Officer Winton said that was not his recollection. Asked if he remembered the plaintiff's body being pushed into the open side of the car on the driver's side, he said "no". Asked if he remembered Officer Dole pulling the plaintiff's head backwards and pushing it forward, striking the roof of the car and he said, "no". Asked if he remembered Officer Dole pulling the plaintiff backwards by the shoulders and pushing him down at the same time (pushing him down with his weight on his shoulders so that he landed on his buttocks and remained there for a short period of time on his back), Officer Winton answered, "no".[88] Officer Winton said he had not spoken to either Detective Dole or Detective Sims recently about the matter.

1.12 Discussion of Officer Winton's Evidence

[94] Officer Winton's evidence was straightforward. He clearly confirmed the reasons for the pursuit of the plaintiff and his arrest and that there was nothing untoward about the arrest. He gave adequate reasons for using handcuffs. His evidence is largely consistent with Officer Dole's, and I accept that they have not spoken to each other recently about the matter.

[87] Transcript, 30 October 2015 at 356.
[88] Ibid at 355-356.

[95] Officer Winton was not involved in later interviews at the police station with the plaintiff. His recollections are not clear with respect to the presence of other officers or peripheral details.

[96] In as much as the Amended Statement of Claim alleges Officer Winton aided and abetted Office Dole in a battery and the use of excessive force, there is nothing in the evidence of Office Winton that could support liability on that basis.

1.13 Clinton Sims – Summary of his Evidence of the Background Circumstances and his Involvement with the Plaintiff

[97] At the time of the incident Superintendent Sims was a Detective Sergeant in the drug and intelligence unit. He co-ordinated "Operation Twilight". The operation involved the use of listening devices to conduct covert surveillance of the plaintiff and his associates in relation to clandestine operations at his business premises at Shed 1, 60 Elder Street, involving the dealing of cannabis.[89] The intelligence in relation to the plaintiff concerned suspicions about the plaintiff's distribution of large amounts of cannabis in Alice Springs. His affidavit provided a significant amount of detail in relation to that operation. In addition to utilising an observation post, video surveillance and a listening device, a tracking device was also installed on what he described as the plaintiff's "lead vehicle", a Toyota Land Cruiser.

[89] Affidavit of Clinton Thomas Sims, 19 October 2015, Exhibit D44.

[98] On the night of the arrest, one of the plaintiff's associates, Michael Naudin, found a surveillance transmission device with a bug sweeping device. Detective Sims called the officers involved in the operation and briefed them on the next phase, as the investigation had been compromised. Officer Sims tasked members who were on their way to follow the drivers who had left the plaintiff's shed at Elder Street. He believed the plaintiff's maroon Commodore station wagon probably had items of interest such as drugs or the surveillance transmission device. He said he directed Officers Dole and Winton to locate that vehicle and if they found the plaintiff, to arrest him.

[99] The next he heard was that the plaintiff had been arrested outside his premises at 2 Hong Street. When he arrived, Officer Michael Curtiss was there and the plaintiff was lying face down on the verge next to his vehicle with his hands behind his back in flexi cuffs. He was sat up by Officers Winton and Dole and complained about the tightness of the flexi cuffs which were removed. He did not remember the plaintiff saying anything else. If he had complained about being assaulted by police or any other injuries, Officer Sims said he would remember that and would most likely have noted it in his police diary.

[100] Officer Sims provided copies of four warrants that were executed at 2 Hong Street. The first was a warrant authorising the use of a surveillance device issued on 8 June 2005 and was executed on 28 June 2005. The second and third warrants were issued under s 120 B of the *Police Administration Act*, the fourth under s 34 of the *Criminal Property Forfeiture Act*. Finally, a

warrant running sheet was provided concerning execution of one warrant in 2005.[90]

1.14 Clinton Sims - Cross Examination on Background Circumstances and Involvement with the Plaintiff

[101] Officer Sims was cross examined extensively about the listening device and its placement. He said he was at the listening post on 14 July 2005 and left after 6:30, leaving Officer Michael Curtiss behind.[91] He said the listening post was within minutes from Elder Street. He said he had to make a number of enquiries with other members before the vehicle was apprehended and they had lost electronic surveillance. He said that would have been around 7:00 to 7:30.

[102] Officer Sims agreed he had seen footage of the plaintiff on the videos from the surveillance of the shed. Asked if the plaintiff had a walking stick, he could not recall.[92] Officer Sims said Detective Dole advised him that a warrant was executed at 2 Hong Street coinciding with the plaintiff's arrest. Detective Beth Wilson had the drug search warrant for 2 Hong Street and Officer Sims contacted her to execute that warrant. He confirmed he had been in radio contact with other officers and agreed a battery of a police portable radio was in the rear of the vehicle the plaintiff was driving, which he found out later was Officer Winton's radio battery. He said approximately 20 to 25 members were recalled to duty by him that day.

[90] Affidavit of Clinton Thomas Sims, 2 November 2015, Exhibit D45.
[91] Transcript, 4 November 2015 at 465.
[92] Ibid at 467.

[103] Officer Sims' further description of the arrest was that as he drove into 2 Hong Street, the plaintiff was lying on the ground and two officers were in the process of handcuffing him. When he had turned around, parked his vehicle and arrived at the location, the plaintiff had been sat up by the officers and police communications were contacted.[93] He agreed the arrest took a couple of minutes and that Officer Winton was cuffing the plaintiff.

1.15 Discussion of Clinton Sims' Evidence

[104] Officer Sims' evidence provides substantially more detail of the surveillance operation and the justification for arrest. It supports the reasonableness of the belief that arresting police officers possessed that the investigation had been compromised and that they needed to act expeditiously to arrest the plaintiff for the charged offences and preserve evidence. Very little of his evidence was challenged. Although not present for the whole process of arrest, his evidence substantially supports the evidence of Officers Dole and Winton, particularly that the plaintiff was lying face down and that he recalled him complaining about the tightness of the flexi cuffs. Although the plaintiff has taken the point that in oral evidence Officer Sims said he was present during the arrest, thus potentially showing inconsistency with Officers Dole and Winton, that evidence in proper context clearly refers to him arriving at the end of the physical arrest. It is clear that he observed some of the process.

[93] Transcript, 4 November 2015 at 473.

1.16 Michael Curtiss – Summary of Evidence

[105] In July 2005, Michael Curtiss was a Constable in the Domestic Personal Violence Protection Unit of the Northern Territory Police.[94] Prior to the plaintiff's arrest he had been involved in "Operation Twilight". He did not know much about the plaintiff, other than he was suspected of importing large quantities of cannabis in the Northern Territory and selling it. He was aware of the activities of his associates.

[106] On the night of his arrest, Officer Curtiss was in the observation post of 2 Hong Street with Officers Sims and Morgan. He understood a surveillance device had been discovered and disabled.

[107] After Officers Sims and Morgan left, he received a call from Officer Sims to go to Hong Street. When he arrived the plaintiff was lying face down on the verge next to the maroon station wagon with his hands behind his back in handcuffs. He saw Officers Dole and Winton who he understood had arrested the plaintiff. He heard the plaintiff saying that the handcuffs were too tight. He was on the ground at that time. Officers Dole and Winton helped the plaintiff stand up to take the pressure off his hands. General duties officers arrived a short time later.

[108] In cross examination Officer Curtiss said he could not remember other cars in Hong Street at that time, other than the plaintiff's and both officers'.[95] Apart from Officers Dole, Winton and the plaintiff, Officer Curtiss said he

[94] Affidavit of Michael Paul Curtiss, 29 September 2015.
[95] Transcript, 4 November 2015 at 514.

did not notice anybody else there.[96] He could not recall what the position of various cars were or whether they were close to each other.[97] Asked how long it was until Detective Sims turned up and he said he did not see Detective Sims, therefore, "I can't tell you".[98]

1.17 Discussion of Officer Curtiss's Evidence

[109] It is clear Officer Curtiss does not have significant recall of certain details, however his evidence on the position of the plaintiff when he arrived, and that the plaintiff complained of tightness of the flexi cuffs, is consistent with the evidence of Officers Dole, Winton and Sims. His evidence of the surveillance and the belief that the plaintiff had committed offences is also consistent with arresting officers.

1.18 Summary and Discussion of The Evidence Senior Constable Theo Karaminidis and Senior Constable Justin Firth

[110] Officers Karaminidis and Firth were general duties constables at the time of the arrest,[99] and attended the scene to take the plaintiff to the Watch House. Officer Karaminidis cut the flexi cuffs off the plaintiff's wrists with a multi-tool and replaced them with ordinary handcuffs. He recalled the plaintiff complaining that his wrists were sore but there was nothing else unusual about the plaintiff at the scene of the arrest or at the Watch House. Officer Firth has only vague recollections of attending to take Mr Johnson to the

[96] Transcript, 4 November 2015 at 515.
[97] Ibid at 514.
[98] Ibid at 519.
[99] Affidavit of Theo Karaminidis, 28 September 2015, Exhibit D28; Affidavit of Justin Anthony Firth, 29 September 2015, Exhibit D49.

Alice Springs Watch House and does not remember him saying anything in particular when he arrived, or during his dealings with him. He said if he had made a complaint about an injury or assault he thought he would remember.

2. Evidence of Events Shortly After the Arrest

2.1 Stuart Johnson – Evidence of Events at Alice Springs Watch House

[111] The plaintiff maintained that after his arrest at the Watch House he made continuous pleas for medical assistance concerning his back and neck and also for medication that he was taking at that time. He acknowledged some of his medication was given to him on 15 July 2005, the day after the arrest, but the intensity of the pain in his lower back was such that he was taken to the emergency department of Alice Springs Hospital the next day.[100] The plaintiff was admitted to Alice Springs Hospital on 17 July 2005. On 22 July 2005, a CT Lumbar Spine Scan was done which showed "nothing that was not already known"[101] however, the intensity of the pain told him "a different story". He was discharged from hospital on 29 July 2005. The discharge summary notes include "Lumbar Disc prolapse L4-5, L5-S1"; "Presented with Low back pain for a few days after a fall. On Ex tenderness + on L4-L5 area in the back".[102] He then tried to get around with crutches but the pain was too debilitating and he was forced to rely on a wheelchair.

[100] Affidavit of Stuart Douglas Johnson, 8 October 2013, Exhibit P1 at [44].
[101] Ibid at [47], annexure SDJ-12.
[102] Ibid [47]-[48], annexure SDJ-13.

He consulted Dr Matarazzo, his General Practitioner, and was referred to the Orthopaedic Surgeon, Mr Orso Osti.

[112] In cross examination the plaintiff explained it was within seconds of arriving at the Watch House that he said needed medical assistance. He said he told anyone he came across walking past his cell about his back and also asked for a lawyer. He did not agree the Offender Journal,[103] was accurate.[104] He did not accept the entry that recorded he takes medication "for his spine, (broken spine approx. 10 years ago – anti-inflammatory medication taken for same) and for depression".[105] He disagreed that he had said he takes his medication in the morning. He said he did not understand the entry concerning a pinched nerve in his left thumb but accepted it was possible he said that. He accepted redness was observed around his wrist. He accepted it was recorded that his medication was at home with his wife who was aware he was in custody. He accepted the notations in the Offender Journal that he requested to speak with his lawyer, and that Officer Dole would be notified. He possibly accepted there was an entry noted of a 2004 Promis alert that he may be anti-police. He accepted a number of other entries concerning his management while in the Watch House.[106] Although he accepted an entry as correct that he had requested to speak to his lawyer, he said they had left out recording his request to see a doctor. He said no

[103] Exhibit 4; Tender Documents, Tab 5.
[104] Transcript, 26 October 2015 at 80.
[105] Exhibit 4; Tender Documents, Tab 4.
[106] Transcript, 26 October 2015 at 80-85.

one was listening to him about his pain from his back and he stopped saying it.[107]

[113] It was drawn to his attention that amongst all of the entries, there were none until 23:50 on 15 July that concerned a complaint about back pain. He accepted as correct the notation that he had requested and was given Panadeine for back pain. He said the auxiliaries working at the Watch House misrepresented what he was saying.

2.2 Lynette Hilton – Evidence of Observations and Records of the Plaintiff by Watch House Staff

[114] At the time of the plaintiff's arrest until 16 July 2005, Lynette Hilton was a police auxiliary on duty at the Alice Springs Watch House.[108] She explained Watch House procedures and produced the relevant Watch House Log and Offender Journal. She said that if a prisoner complained of pain, or needed medical assistance, the Watch House Commander would be notified and a decision would be made about medical attention. She acknowledged that at that time, unlike current practice, there was no nurse stationed at the Watch House. If further medical attention was required, a person in custody would be escorted to hospital. If a person was observed to be in pain or otherwise distressed it would be documented in the Watch House Log and the Offender Journal and the Watch House Commander would be notified. Persons in custody are checked every 10-15 minutes for this purpose.

[107] Transcript, 26 October 2015 at 83.
[108] Affidavit of Lynette Mary Hilton, 1 October 2015, Exhibit D25.

[115] If a complaint of assault was made, this would be documented. In addition, with respect to the plaintiff, a Detention Assessment was made by her colleague. The plaintiff was one of three men detained at the Watch House at that time. Ms Hilton did not remember the plaintiff showing any signs of being hurt or injured or complaining of being assaulted by police while she was present. She acknowledged however that the Detention Assessment recorded the plaintiff having suicide signs or health problems and being in obvious pain or injury; that he took medication for a broken spine, caused approximately 10 years previously, and for depression for which he would require medication in the morning; and that he had a pinched nerve in his left thumb.

[116] Ms Hilton was cross examined as to her training, relationship with senior officers for the purposes of advice, delegation of responsibilities and her experience. She was also cross examined on the type of cells available, cleaning, blankets and mattresses.

[117] She agreed she brought the plaintiff a clean blanket. She recalled him obtaining bail and going to court. She agreed she saw the plaintiff sign bail papers. She could not say why the plaintiff's toilet breaks were documented. She agreed some items were tagged 'awake and sitting up' or 'asleep' or 'appears to be asleep'. She said different auxiliaries report in different ways. She was asked about an entry that records Officers Sims and Dole being with the plaintiff at the Watch House and Ms Hilton said they obviously came there but that she could not say from the records whether

that was the plaintiff's request. She acknowledged that if the plaintiff requested them to attend it would be in the Offender's Journal.

[118] Ms Hilton acknowledged an entry indicating the plaintiff was at the hospital. Ms Hilton said she could not remember if there had been an earlier request, however noted that in the Offender's Journal there were many references to hospital. She did not enter the record of the broken spine from "approximately ten years prior", saying that notation was made from Officer Kerr. On being questioned about the provision of medication, Ms Hilton pointed out an entry that Officer Dole was to organise the plaintiff's wife to attend with medication.

[119] Ms Hilton agreed there was an entry of 16 July 2005 that a shower was offered, and the plaintiff stated he had back pain. She acknowledged another similar entry and said that the Watch Commander would have been spoken to and requested the plaintiff be taken to Alice Springs Hospital.

2.3 Discussion of Lynette Hilton's Evidence and Watch House Records

[120] The relevant Watch House records are detailed, contemporaneous records,[109] clearly explained by Ms Hilton. I see no reason to find the records to be incomplete, nor to reject Ms Hilton's largely unchallenged evidence. On the night in question the plaintiff complained of back pain but did not attribute

[109] Exhibit 4, Tender Documents, Tabs 3-4.

this to police or to the arrest and did not make any complaint with respect to his neck.

[121] The Watch House records in summary indicate the plaintiff advised staff he was on medication for his "broken spine" from 10 years ago and for depression. The plaintiff advised he had a pinched nerve in his left thumb. Watch House staff observed redness around his wrist but no swelling was noted. He asked Watch House staff if he could speak to his wife and lawyer. His complaint about back pain was not made until 23:50 hours on 15 July 2005. He was then given Panadeine and said he was "ok". He next told staff of back pain on 16 July at 16:56 hours, and was then spoken to about medication and the Watch Commander arranged for him to be taken to Alice Springs Hospital.[110] As has been referred to, the discharge record of 29 July 2015 noted Lumbar Disc Prolapse and presentation of low back pain for a few days "after a fall".

2.4 Records of Interview between Stuart Johnson and Investigating Police

[122] During a recorded interview with Officer Dole and Detective Senior Constable Morgan at 21:07 hours on 15 July 2005, the plaintiff requested his wife be notified that he was in custody.[111] Officer Dole asked the plaintiff about speaking to Watch House staff about the medication he was required to take. The plaintiff advised him about pain killers for his spine, Sykrenol

[110] All records contained in Exhibit 4, Tender Documents, Tabs 3-5.
[111] Transcript of Record of Interview, Affidavit of Martin John Dole, 2 October 2015, Annexure MJD-2.

and a script and said that his wife would have those items. He stated, "She's got a thing for it (inaudible) I have to take for spine but (inaudible) going for my neck I usually have to take pain killers for my spine". Officer Dole then asked if his wife would be able to arrange his medication and the plaintiff agreed and then stated "(inaudible) for my neck". Officer Dole then asked, "Last night?" and the plaintiff answered, "yeh". Officer Dole stated, "I believe you were apprehended, after fleeing police, you were apprehended on the street that's correct?" and the plaintiff answered, "yeh, remember jumping on my neck". Officer Dole says, "I don't recall you talking about it. In relation to the offences, is there anything you want to tell us while the tape's running?" The plaintiff then tells police he wants to speak to his wife. Asked if there is anything further he wants to say and he says "no".

[123] At the time of making the allegation of, "going for my neck" or "jumping on my neck",[112] according to the transcript there is no complaint about injury to his neck or pain to his neck. The reference to pain in that conversation appears to relate to the plaintiff's "spine".

[124] On the next evening, 16 July 2005 at 11:01 hours, a further record of interview was conducted between Officer Dole, the plaintiff and Detective Sims.[113] The plaintiff was asked how he was feeling and he said, "a lot of pain". He was asked if he wanted to suspend the interview but stated,

[112] Affidavit of Martin John Dole, 2 October 2015, D47, Annexure MJD-2.
[113] Affidavit of Clinton Thomas Sims, 19 October 2015, D44.

"no I'll be right". Apart from personal details covering his history of employment, education, informing his wife and asking about seeing his solicitor, throughout most of the interview the plaintiff provided no comment to the allegations in respect of offending.

[125] At the end of the interview he was asked if there was anything further he wished to say and he said, "after I was handcuffed and thrown onto the ground by this fellow here the other night, and I offered no resistance, he stood on my neck. Subsequently, screw up my back again and I'm in a lot of pain because if it." He was told he was free to make a complaint about the way that he was dealt with by police and that it could be arranged at the conclusion of the interview. So far as can be ascertained, there was no specific complaint of pain or injury to his neck. Although the Alice Springs Hospital records will be discussed later in relation to scabbing on the plaintiff's neck, this was treated as a rash by hospital staff and the evidence indicates the plaintiff has a history of that condition.[114] The plaintiff's cross examination of police officers suggested the existence of further unrecorded interviews covering material relevant to the plaintiff's claims, however other conversations of relevance were denied and there is no other support for those claims in the evidence.[115] No complaint of pain or injury was made to other officers attending the scene, aside from the flexi cuffs that were too tight and hurting the plaintiff's wrists. Given the difficult circumstances of being in custody and the inherent stresses on persons in

[114] Exhibit 4, Tender Documents at 378 and 179.
[115] Transcript, 4 November 2015 at 496.

custody, it is not surprising if generally complaints about mistreatment or injury are not made, however the plaintiff did not appear to have difficulties or feel restrained from making complaints about his treatment by police, including the flexi cuffs at the time of arrest and for back pain and depression.

2.5 Martin Dole – Evidence of an Allegation Being Made Against Him by the Plaintiff and his Response

[126] Officer Dole acknowledged he first heard about an allegation that he had assaulted the plaintiff during the arrest in the recorded interview at the Watch House with the plaintiff on 15 July 2005 at 11:08pm.[116] The text of that part of the interview has already been set out. Further, he acknowledged the plaintiff briefly complained of an assault to Officer Sims and himself in an interview on 16 July 2005.[117] Officer Dole said at the time of those allegations being made he was focused on having the plaintiff dealt with in relation to the offences and on retrieving the missing surveillance device back. He recalled that Officer Sims told the plaintiff he could make a complaint later if he wished. Officer Dole states that with hindsight it may have been better for him had he addressed the complaint immediately, but he regarded the arrest as a "non-event". The diary entry noting the arrest is annexed to his affidavit.[118]

[116] Affidavit of Martin John Dole, 2 October 2015, Exhibit D47 Annexure MJD-2.
[117] Ibid annexure MJD-3.
[118] Ibid annexure MJD-4.

2.6 Martin Dole – Cross Examination on the Complaint made by the Plaintiff and his Response

[127] In cross examination Officer Dole agreed with the suggestion that the complaint alleged in the record of interview with the plaintiff was very serious. He did not agree that he had spoken to the plaintiff prior to the recording. Asked if he agreed with the accuracy of the transcript and he said he thought that the paragraph that appears to say, "I don't recall you talking about it" may have been, "I don't recall what you are talking about". He said the transcript had not been verified, it was a prosecution transcript. It was put to him that it had been produced in court several times and he was asked if he had verified it. Officer Dole replied it states on the back that it is not verified. He said he believed he might have thought he meant something else rather than what was transcribed. He said it is possible the words were around the wrong way. In relation to why Officer Dole did not say anything when the plaintiff told Officer Sims he wanted to make the complaint, he said it is not practice to argue with people in an interview. Asked if he thought to say anything at all, he replied in the negative. He agreed with the suggestion he considered the statement of the plaintiff as "rambling".[119]

[128] Asked if, when the plaintiff went to the interview room from Cell 8 he walked unhampered with a normal stride and gait Officer Dole said he did not notice anything significant about the way he was moving; he was not

[119] Transcript, 4 November 2015 at 498.

hanging onto walls or struggling to move and he assumed he would have noticed that. Asked whether it was obvious that he was in pain and Officer Dole said he did not recall and the plaintiff looked normal. Officer Dole said he did not know who called for his transfer from Alice Springs Watch House to the hospital. Aside from the record of interview, Officer Dole said he was not aware of the plaintiff wanting to make a complaint. Asked if when going back to the Watch House he remembered the plaintiff "dragging the chain" and having to wait for him, and he said no. He said from his recollection the plaintiff walked with a normal gait and he would have noticed something wrong if it were otherwise.

2.7 Clinton Sims – Evidence Relevant to the Records of Interview

[129] Officer Sims states he had a conversation with Stuart Johnson at 11:08 pm on 15 July 2004 when Mr Johnson was advised police were in a position to interview him formally. Mr Johnson requested his solicitor and spoke to a representative of his solicitor.[120] Officer Sims also annexed "CS5", a copy of the transcript of the record of conversation on 16 July 2005 in which the plaintiff alleged he was thrown to the ground and that Officer Dole had stood on his neck. He was advised he could make a formal complaint.

[130] When walking from the cell to the interview room at the police station, Officer Sims was asked if he noticed any impairment that the plaintiff had and he answered, "definitely not". Asked if at the conclusion of the record of interview Officer Sims recorded the plaintiff's complaint, he said he did

[120] Transcript annexed and marked "CS4" to the Affidavit of Clinton Thomas Sims, 19 October 2015.

not because the plaintiff did not pursue it and did not ask Officer Sims to take his complaint after the record of interview. Officer Sims said he was surprised when the statement was made. He said the focus of his evidence and statutory declarations in 2005 were on the items that had been located in the investigation, not on Mr Johnson's arrest.

2.8 Rita Helen Rose – Summary and Discussion of Evidence, Photos Taken on 23 July 2005 and Relevant Hospital Notes

[131] Before the Court is a photograph of the right side of the plaintiff's neck.[121] The photograph indicates redness in an area behind the ear and what appears to be blood, dried blood or scabbing. Ms Rita Rose, the plaintiff's former partner, states she took this photo on 23 July 2005 at Alice Springs Hospital.[122]

[132] Ms Rose's evidence was that she visited the plaintiff who is her ex-de facto husband at Alice Springs Hospital around lunchtime on 23 July 2005. He told her that during the arrest one of the officers, as part of an assault on him, ground his shoe into his neck as if stubbing out a cigarette butt. This was followed by using the area just below the plaintiff's right ear on his neck as a step. Ms Rose took the photo annexed to her affidavit. She said she had taken more photos but only the annexed one and a similar one remained after police raided their home, picked up her camera and deleted photos.

[121] Affidavit of Stuart Douglas Johnson, 8 October 2013, Exhibit P1, annexure SDJ-10.
[122] Affidavit of Rita Helen Rose, 11 October 2013, Exhibit P10, annexure RHR-1.

[133] On 28 July 2005, the plaintiff complained of an itchy rash on his neck, which was reviewed by hospital staff including a doctor. It was found to be a rash and was treated with calamine lotion and antibiotics. There is no record of the plaintiff at that time telling hospital staff about an injury to his neck from the arrest. A similar condition was recorded by nursing staff at Alice Springs Hospital on 22 May 2007.[123]

[134] Ms Rose and the plaintiff continue to live with each other at 2 Hong Street, although they are separated. Ms Rose acknowledged she continues to care for the plaintiff.[124] Although this is a factor to be considered when assessing her evidence, of more importance is her highly sensitised suspicions about police. She suggested police did not have a warrant to search her home, and that no option was given for her and the children to go elsewhere during the search. She agreed police found large amounts of cash although she was not sure about cannabis. She also said police had been in the house unlawfully, because she found "a bug" in her house, (that is, a police device to intercept conversations), which she took as an indication police entered her house when she was not there.[125] There is clear evidence before the Court that a series of warrants were executed at 2 Hong Street.[126] Asked about other searches conducted at her house by police, she made references to noticing things going missing and windows and doors being left open.

[123] Exhibit 4, Tender Documents, Tab 1.
[124] Transcript, 28 October 2015 at 205-213.
[125] Ibid at 207.
[126] Exhibit D45.

[135] Ms Rose clearly has a negative attitude towards police and is highly suspicious, to the point of irrational. This leads me to conclude that much of her evidence is unreliable. Ms Rose said she had no memory of the plaintiff's injury in 1995, aside that there was something about compensation of some description.[127] It might be expected the work injury in 1995, the compensation and the cessation of employment would be a significant event that Ms Rose would remember.

[136] Ms Rose lived in Alice Springs with the plaintiff for 23 years.[128] Despite that, aside from the photograph, she gave no evidence about the plaintiff's condition, capacity or her observations of him after the arrest. It is unclear why she did not offer evidence about these matters, however in circumstances where the plaintiff was unrepresented at the hearing, and where there is a possibility that evidence of this kind could without care infringe the opinion exclusion rule, I do not think it fair to draw an adverse inference in the sense of the rule in *Jones v Dunkel*.[129] Ms Rose appeared very anxious. Any evidence she could give on this point may well be subject to criticism given her relationship with the plaintiff. Overall however there is little in the way of evidence of detailed lay observations at the crucial time made of the plaintiff. While it is possible Ms Rose could have evidence to add to those observations, I would not draw an inference against the plaintiff for her lack of evidence about it.

[127] Transcript, 28 October 2015 at 205-206.
[128] Affidavit of Rita Helen Rose, 11 October 2013 at [10].
[129] (1959) 101 CLR 298.

[137] In the end Ms Rose's evidence is of little value. Importantly, because of the diagnosis with respect to the scabbing on the neck a fortnight after the arrest, the photos are not evidence supportive of the claim that Officer Dole intentionally injured the plaintiff's neck in the manner described by the plaintiff. Ms Rose has obviously been socially or emotionally affected by the events, particularly having property seized and frozen and her former partner wrongly imprisoned. She felt she signed a deed in respect of some of the forfeited property in circumstances where she believes her lawyer did not take note of her response to the claim. It has been very upsetting for her given that she believes Mr Johnson was innocent and she states she had a nervous breakdown. She was asked if she was angry at police and the government and she said, "I've tried to put it behind me. My career was ruined, my children still get ridiculed, you couldn't possibly understand what the last 10 years have been like".[130]

3.0 Character Evidence Relevant to Officer Martin Dole and Officer Peter Winton

3.1 Superintendent Charles Farmer[131]

[138] Superintendent Charles Farmer was in charge of the Complaint Management Division of the Professional Standards Command, Northern Territory Police Force. Superintendent Farmer conducted searches on the appropriate data bases and registers for any matters involving allegations of assault or excessive force against Officers Dole and Winton.

[130] Transcript, 28 October 2015 at 213-215.
[131] Affidavits of Charles Robert Farmer, 24 September 2015 and 1 October 2015.

[139] In relation to Officer Dole he stated one complaint was received on 1 October 2002 in relation to an apprehension alleged to involve excessive force used by then Brevet Sergeant Dole and another officer. The complaint was investigated and dismissed. The investigation proceeded notwithstanding the original complainant did not want to proceed.[132] The existence of this complaint came to light as a result of advice provided by Officer Dole. It was not retrieved in the initial search undertaken by Superintended Farmer.[133] Officer Dole at that time had been a member of the Northern Territory Police Force for 18 years.

[140] In relation to Officer Winton, one complaint had previously been made in 2011. It was found after investigation there was no evidence to support the allegation.[134] Officer Winton was also a member of the Northern Territory Police Force for over 18 years.

[141] None of the material produced by Superintendent Farmer was subject to cross examination.

3.2 Discussion of Character Evidence

[142] This evidence was unchallenged and is accepted. It is clear that both officers are of good character with sound police service records and neither have a reputation for the inappropriate use of force. I am mindful people of good character may also commit wrongful acts. This evidence is to be given

[132] Affidavit of Charles Robert Farmer, 1 October 2015, annexure CRF-I1.
[133] Ibid exhibit D27.
[134] Ibid exhibit D26.

due weight in the assessment of their evidence, balanced against the proposition that evidence of good character can not defeat objectively proven facts. In weighing the evidence, the character evidence makes it less likely that each officer would commit intentional wrongful acts of the kind alleged, but it is only one factor and not determinative of the ultimate issue.

4.0 Senior Sergeant Andrew Barram – Expert Evidence with Respect to Arrest Procedures

[143] Senior Sergeant Barram provided an expert report in relation to arrest technique.[135] Senior Sergeant Barram is attached to the PFES College, Berrimah and is Officer in Charge of the Operational Safety Section. His qualifications are annexed to his affidavit.[136]

[144] Senior Sergeant Barram was asked to assume the following facts:[137]

(a) that the person arrested was suspected by the arresting officer to have committed serious drug offences and been the subject of recent surveillance operation;

(b) the arresting officer had been tasked with taking the suspect into custody after the surveillance operation had been compromised by the suspect's discovery of the surveillance device at business premises;

(c) the suspect was understood by the arresting member as having a history of anti-police behaviour and the possible propensity for violence;

[135] Affidavit of Andrew James Barram, 18 September 2015, Exhibit D48.
[136] Ibid exhibit D48, annexure AJB-1.
[137] Ibid exhibit D48, annexure AJB-2 at [5].

(d) the arresting member was of the opinion that the suspect had, immediately prior to arrest, fled from police and had driven at high speed and driven dangerously; and

(e) the opinion was the suspect was fleeing to home premises sufficiently fortified to make access difficult and the arresting officer had followed the suspect's vehicle to his home premises and arrived as the suspect had parked and was in the process of exiting his vehicle.

[145] A description of "ground stabilisation" and a "three point hold down" are given in his expert report.[138] There is also a photo illustration of the three point hold down position. It is of direct relevance that the three point hold down position is the default position taught to all officers as advisable for handcuffing. It requires the officer to place one knee directly on the scapula of the subject and apply weight to hold the subject down. Once the hand on that side is available for cuffing, the second knee is placed behind the elbow and hard up against the subject's side, meaning that their arm is placed behind their back and they cannot move it because of the placement of the second knee.

[146] The expert report also makes clear that deploying ground stabilisation is for the safety of all involved. Police are obliged to use only the minimum amount of force necessary to effect the arrest. The three point hold down is described as the desired process leading to resolution of the ground

[138] Affidavit of Andrew James Barram, 18 September 2015, Exhibit D48 at [16]-[19], annexure AJB-3.

stabilisation, and as the tried and tested method to ensure subject control while meeting the minimum force obligation. It is also noted that the objective of handcuffing is control and save in exceptional circumstances the preference is to handcuff subjects with their hands to the rear for greater control. It is also noted that from 6 September 2013, NT Police adopted a policy of handcuffing all persons who are taken into custody under arrest. Prior to that date it was at the member's discretion, safety being the main consideration. Handcuffs are considered a low level of force and their early application prevents the potential need for greater use of force to control. On the assumptions he was given, Senior Sergeant Barram concluded members of the Northern Territory Police Force acted appropriately, using only such force as was required to effect an arrest under the given circumstances.

[147] It was not raised in the hearing, however the legal grounds for arrest without a warrant require a reasonable belief on the part of the arresting officer that the person has committed or is to commit an offence. Suspicion, although often used interchangeably is not sufficient for arrest; it is reasonable belief. On that basis, in my view the assumed fact (a) does not state the correct legal test, however the legality of the arrest is not under challenge, but rather the force used. In any event, the officers possessed the requisite belief. Senior Sergeant Barram's report is primarily directed to the mode of arrest and whether the level of force was excessive.

4.1 Discussion of the Expert Evidence

[148] This evidence was not challenged. The factual basis for the opinion offered was well made out, when the evidence of Officers Dole, Winton, Sims and Curtiss is taken together.

[149] The ground stabilisation method and the three point hold is the method of arrest that was utilised by Officer Dole. If not a conclusion that can be made directly, it may be inferred as a possibility that if the plaintiff felt anything near his neck, it may have been the use of the three point hold after the ground stabilisation. This involved Officer Dole's knee and body weight being placed on the plaintiff's upper back, between his should blades and likely to be close to his neck, or possibly touching it. This can be seen from the illustration annexed to the report.[139] Senior Sergeant Barram's evidence well supports the defendant's case that the method and force utilised in the arrest was appropriate given all of the circumstances.

5. Evidence of Injuries – Summary and Discussion of Medical and Associated Evidence

5.1 Stuart Johnson – Evidence of Injuries, Medical History and Treatment

[150] The essence of the plaintiff's case is that the process of arrest involved the use of excessive force outside what is permissible in the execution of police duties and that the arrest or alternatively, the assault and battery, caused him

[139] Affidavit of Andrew James Barram, 18 September 2015, Exhibit D48, annexure AJB-3.

to sustain the injuries particularised in the pleadings.[140] The injuries particularised are:[141]

(i) severe left sided sciatica from a lumbosacral disc protrusion;

(ii) pain and numbness in left leg and left foot;

(iii) inability to walk normally (left foot drop);

(iv) paraesthesia and sensory change in a left sciatic S1 radicular distributor;

(v) accelerated degeneration of neck vertebrae and discs resulting in multilevel spondylosis with advanced C4/5/6/7 changes and loss of disc height;

(vi) urinary and anal incontinence;

(vii) numbness between scrotum and anus;

(viii) loss of interest in and capacity to have sex;

(ix) major aggravation of depressive disorder with elements of post-traumatic stress disorder;[142] and

(x) he is largely avoidant of others and social contact.

[140] Amended Statement of Claim at [8].
[141] Amended Statement of Claim at [10].
[142] Further particulars of this pleaded injury are set out in the Amended Statement of Claim (i-viii).

[151] The plaintiff alleges that as a result of injuries caused by the claimed assault, battery and use of excessive force, he has physically deteriorated and he has been unemployed since the date of arrest. As a consequence he states he is permanently impaired in terms of his capacity to perform work in the future. The plaintiff states he had no mobility problems before the arrest, had a normal gait and walked unaided. After the arrest he requested and was given a wheelchair for a time, a walker, crutch and finally a walking stick.[143] Given the plaintiff's various medical conditions prior to the arrest and on an ongoing basis, issues of causation are significant. Whether any of the current medical conditions can be attributed to the manner of arrest requires close examination.

[152] The plaintiff claimed that when at the Watch House he repeated his plea for medical assistance concerning his back and neck and also for the medication he was on.[144] The plaintiff also said that when he was assisted by police officers taking him to the paddy wagon, he was experiencing intense pain in his lower back. However, general duties Officers Karaminidas and Firth do not recall anything unusual about the plaintiff or anything that would indicate he was in pain or injured except Officer Karaminidas recalling the complaint with the flexi cuffs and their removal. As summarised already, he raised bare allegations about police "jumping on" his neck or "stood on my neck" when formally interviewed by investigating officers. The plaintiff rejects that he had mentioned to Watch House staff, in the context of back

[143] Affidavit of Stuart Douglas Johnson, 8 October 2013, Exhibit P1 at [4].
[144] Ibid at [38]-[39].

pain, an injury of 10 years prior, although the Watch House records are to the contrary. It is common ground, as a result of his complaints of pain while at the Watch House, he was taken to Alice Springs Hospital on 16 July 2005 and admitted on 17 July 2005. He was discharged on 29 July 2005.

[153] Prior to being discharged, on 22 July 2005, a CT Lumbar Spine scan was done. The report notes the history of left sided sciatica that "got worse during last 1 week." The conclusion reads: [145]

> Annular disc bulges at both L4-5 and L5-S1. The annular disc bulge at L5-S1 is probably just touching the exiting left S1 nerve root but the previously identified focal disc fragment seen adjacent to the S1 nerve root on the previous scan from 2003 now appears to have resolved.

[154] On the advice of Dr Matarazzo the plaintiff flew to Adelaide to see the Specialist Orthopaedic Surgeon Dr Orso Osti. The plaintiff points out that he was wheeled into a purpose built capsule in order to take the flight.[146] An MRI was undertaken at the request of Dr Osti. Reference has already been made to the history as appears to be understood by Dr Osti.

[155] Dr Osti's report of 9 September 2005 recites that since mid-July the plaintiff's left leg pain had become prevalent and not settled. Additionally, urgency and episodes of urinary incontinence and difficulty sustaining an erection was noted. The description of pain was mainly centred over the left buttock with irradiation to the left leg, numbness affecting the outer aspect of the left leg and the sole of the left foot. Otherwise, the plaintiff's

[145] Affidavit of Stuart Douglas Johnson, 8 October 2013, Exhibit P1 at [49], annexure SDJ-12.
[146] Ibid [49].

medical state was considered satisfactory, but as a result of his mid-1990's injury he had become depressed. The interpretation of the MRI demonstrated left postero-lateral disc protrusion at L4-5 with no effect on either nerve root. His presentation was said to be likely due to his L5-S1 disc problem "compounded by depression and general overlay." A cautious assessment of the possibility of micro-discectomy was given.[147]

[156] The plaintiff also relies on notes of Dr Dayananda of 11 November 2005,[148] recording the plaintiff being referred to Dr Michelle for pain, left sided sciatic pain and weakness of L5 and L4, and that he may need discectomy and discussion of an epidural.

[157] On 6 July 2006, Dr Matarazzo referred the plaintiff to Dr Dayananda as he believed he sustained a "significant lower back injury during his arrest and has persisting evidence and symptoms of disc prolapse and nerve root compromise.[149] On 2 October 2006 Dr Dayananda wrote to Dr Matarazzo[150] advising that the plaintiff reported worsening sciatic pain, left sole dense numbness and lateral calf numbness. Bladder and bowel problems had not recurred. Disc decompression was recommended to free the nerve root. Surgery was cautiously discussed, advising the aim is to prevent further deterioration.

[147] Affidavit of Stuart Douglas Johnson, 8 October 2013, Exhibit P1 at [50], annexure SDJ-15.
[148] Ibid [51], annexure SDJ-17.
[149] Ibid [54], annexure SDJ-20.
[150] Ibid annexure SDJ-21.

[158] On 1 November 2006, Dr Matarazzo wrote to Dr Jenifer De Lima, Medical Officer at Northern Territory Corrections, setting out Dr Dayananda's opinions from 11 November 2005 and 2 October 2006.[151]

[159] In 2007 the plaintiff states that when he was still in custody and when a stool he was sitting on collapsed, he was taken to Adelaide for treatment.

[160] Doctor Osti reviewed the plaintiff in March 2007 and advised the earlier MRI scan that was performed in 2005 had demonstrated an L5-S1 disc protrusion with compression of the left S1 nerve root, consistent with the plaintiff's presentation.[152] Doctor Osti advised that the plaintiff informed him that he continued to suffer from disabling left sided pain, radiating from left buttock to the left leg and numbness to the left foot. Dr Osti notes he previously advised of the option of micro-discectomy, as well as a further MRI.

[161] The MRI report of 26 April 2007 noted significant disc protrusion at the L5-S1 level causing moderate to severe stenosis and compression of the S1 nerve roots. Degenerative changes were noted on T1 and T2. At L4-5 minor disc bulge was noted without significant neural foraminal stenosis. Reference was made to the CT images from 2002 which demonstrated a sequestered fragment that compressed and displaced the left S1 nerve root.[153] On 27 April 2007 Dr Osti recommended surgical decompression and

[151] Affidavit of Stuart Douglas Johnson, 8 October 2013, Exhibit P1 [55], annexure SDJ-22.
[152] Ibid [56], annexure SDJ-23.
[153] Ibid annexure SDJ-24.

partial discectomy at L5-S1, and performed the surgery on 4 May 2007. The plaintiff states this gave him some temporary relief although an infection necessitated a further operation.[154]

[162] The plaintiff clearly acknowledged he suffered an injury in March 1995 while working for Mereenie Oil. However his evidence was that prior to the arrest he did not have an injury to his lumbar spine at the L5/S1 level.[155] In cross examination the plaintiff agreed his case is that the injury he had in 1995 caused soft tissue damage to his L4/5 vertebrae, whereas the arrest caused him soft tissue damage to his S1/L5 vertebrae. He also agreed that surgery he had in 2007 related to the S1/L5 vertebrae. This evidence is of significance as a full report of a CT Scan in 2003 to be discussed further indicates there was an injury to L5-S1.

[163] The plaintiff confirmed it was his case that if not for the arrest, surgery would not have been necessary in 2007. He confirmed that the pain stemming from the injuries set out in paragraph 10(i)-(iv) of his Amended Statement of Claim was exacerbated from his pervious injuries as well as the new injuries which had formed as a result of the arrest. The plaintiff said it was mainly his left side that was affected by the arrest as opposed to the 1995 injury. He said he could not say what side of the body the 1995 injury affected, it could have been both sides but it was temporary.[156] Asked if his evidence was that if not for the arrest he would not have the problems on the

[154] Affidavit of Stuart Douglas Johnson, 8 October 2013, exhibit P1 at [58], annexure SDJ-26.
[155] Affidavit of Stuart Douglas Johnson, 8 October 2013 at [41]-[42], annexure SDJ-5, annexureSDJ-6; Transcript 26 October 2015 at 54.
[156] Transcript, 26 October 2015 at 55.

right side of his body and he said, “Not to the extent that I’ve got them, no”. The plaintiff accepted records taken by ambulance officers after he was medivaced to Alice Springs Hospital in 1995 that indicated he reported a tingling sensation radiating from his lumbar region down through his legs.[157]

[164] The plaintiff agreed with the content of an entry from Alice Springs Hospital of 16 March 1995,[158] that he presented with “back pain/collapse” and headaches. He did not understand what a record of “domestic or social problems” next to “rhinoplasty” meant.[159] He accepted it was possible that he had told the doctor he had not smoked “pot” within the last 48 hours. He did not accept as correct the notation in those records “difficult historian”. As to how that injury occurred the history recorded: “no witnesses. Injured back but managed to get to car and first gear and was overcome with pain”. The plaintiff agreed that was close to what happened. Asked if the observation[160] “lower limb neuro-sensation like, back pain” was consistent with his presentation, he could not remember. He agreed the notation was consistent with what he was saying in terms of soft tissue injury and the plan to be discharged home. He agreed he was prescribed Diazepam, Ibrufen and Panadol and that he made a workers compensation claim in respect of that injury.

[165] The plaintiff agreed he had the CT scan at that time because he was still suffering pain. The scan report noted “A minor annular bulge at the L4/5

[157] Exhibit 4, Tender Documents, Tab 1 at 47.
[158] Ibid Tab 2 at 37.
[159] Transcript, 27 October 2015 at 116.
[160] Exhibit 4, Tender Documents, Tab 1 at 38.

level of doubtful significance. No evidence of nerve root compression at any of the levels examined." He agreed he had five months off work and was assessed by TIO as being fit to return to work. He acknowledged he lost his employment, continued his claim and added a psychological component that was resisted.

[166] The plaintiff agreed he was reviewed in March 1996 by an orthopaedic surgeon.[161] At that time he had told his GP of symptoms of recurrent pain of an episodic nature in his lower back, mainly involving his right side with pain radiating to his buttock and leg, lasting for a few weeks. He agreed those episodes were ongoing in 1998 and he was referred to a neuro-surgical registrar at the Royal Adelaide Hospital. He said he was unsure whether the workers compensation was resolved but thought the $60,000 payment he received was for unfair dismissal. He said he made a claim in a Fair Work Court. He then agreed the payment was for workers compensation.[162] He accepted it was probably correct that the payment was for a partial permanent disability. Asked if that was because he was no longer able to carry out manual work and he said "at that time no".

[167] An entry in the records of Alice Springs Hospital Emergency Department dated 19 July 1998 recorded,[163] the plaintiff presenting with "pain in left shoulder" and limited movement. It also noted he slipped on a stair (first stair) and fell onto left shoulder, possibly with a loss of consciousness. The

[161] Transcript 27, October 2015 at 119.
[162] Ibid at 120.
[163] Exhibit 4, Tender Documents, Tab 1 at 33.

plaintiff appeared to accept that record save that he clarified it was not that he fell downstairs but that he slipped off the first stair.[164]

[168] He was taken to an entry of July 2000 at Alice Springs Hospital recording him being assaulted and pushed against a wall.[165] He said he could not remember the event but had vague recollections. He accepted he presented with a complaint that related to his right shoulder and thoracic region, having chest pain radiating down his right arm. He said he assumed the history indicating he was pushed backwards against the corner of the brick wall, where he struck his right shoulder blade, just to the right of his thoracic spine, was correct. He accepted that he told the doctor on that occasion there was increasing stiffness to his neck, right shoulder and thoracic spine and shooting pains down the right arm, into the little finger and tingling. Asked whether he accepted the observation "unable to put chin on chest due to tenderness in cervical spine" the plaintiff said he was grabbed by the throat.

[169] Asked whether he recalled an injury to his S1 vertebrae in 2002, initially the plaintiff said he could not recall. He was asked about references in records from 2007 to a CT in 2002 but he said he did not know. The notation on the 2007 record from Queen Elizabeth Hospital is "the previous CT images from

[164] Transcript, 27 October 2015 at 121.
[165] Exhibit 4, Tender Documents, Tab 1 at 27.

2002 were reviewed which demonstrated a sequested fragment which compressed and displaced the left S1 nerve root medially".[166]

[170] The plaintiff said he had no recollection of an emergency department record of 12 September 2003 which noted "sciatica, long standing complaint, exacerbated few days ago. No sleep for 3 days. Left leg has intermittent spasms. Pale face and moist skin."[167] The plaintiff was taken to a further entry of 12 September 2003 from the Alice Springs Hospital inpatient clinical progress notes recording "lower back pain for 6 years". He agreed with the history and that he had suffered lower back pain for six years related to the earlier work injury. He agreed that he had told the doctor about intermittent left buttock pain, left leg pain and numbness to his left foot. He agreed he had told the doctor of a history of "cluster headaches".[168] He accepted he had said "left buttock/leg pain for the last 5 days" and that the doctor had noted "an unprovoked onset of left buttock and leg pain", and that he had told the doctor "radiating down the side of [his] leg to his left foot". He agreed it was possible he had told the doctor he was taking intermittent pain relief and that he had presented with an increase of pain. He accepted there was a diagnosis of "disc change/nerve impingement".[169] The plaintiff was taken to the entry relevant to the recommendation to have a CT of the lumbar spine. The notation is "disc bulge at L5 and disc fragment at S1, noted to both be on the left side". He agreed the notation of

[166] Exhibit 4, Tender Documents, Tab 1 at 352.
[167] Ibid at 215.
[168] Transcript, 27 October 2015 at 124-125.
[169] Exhibit 4, Tender Documents, Tab 1 at 221.

the orthopaedic surgeon's review included "L5/S1 on left side impinging on nerve root".[170]

[171] The plaintiff was asked about the completeness of the report annexed to his affidavit as SDJ-6.[171] It was suggested the annexed report could not be complete because there was no reference to the L5/S1 vertebrae. The plaintiff said he assumed so, but did not know. The CT report of 12 September 2003 became Exhibit D5 in these proceedings and was put to the plaintiff. The plaintiff was asked if the medical history, including the CT report of 12 September 2003, revealed that he suffered from the same types of symptoms that he suffered after the arrest. He answered "much worse now" and commented in respect of the symptoms "very similar, very similar".[172] He agreed that those symptoms at some times were quite severe before the arrest. He agreed that a week after the CT scan was done in 2003 he returned to the emergency department.

[172] The full copy of the CT report dated 12 September 2003 indicates the plaintiff had an injury to the disc at the L5/S1 level, comprising a disc protrusion extending into the region of the left S1 nerve root, possibly with a sequestered component, with possible impingement on the left S1 nerve root. It was not properly explained why this part of the CT report of 12 September 2003 concerning the injury at L5/S1 level was not included in the

[170] Transcript, 27 October 2015 at 128; Exhibit 4, Tender Documents, Tab 1 at 222.
[171] Affidavit, Stuart Douglas Johnson, 8 October 2013, Exhibit P1 at [42], annexure SDJ-6.
[172] Transcript 27 October 2015 at 130.

plaintiff's affidavit, which included only half of the same report.[173] This lack of explanation diminishes the credibility and reliability of the plaintiff's evidence and claim.

[173] The plaintiff acknowledged the considerable periods in custody that he had spent on remand were soul destroying; that he thought it was going to kill himself; and that he was desperate to be released. It was suggested to him that he was prepared to exaggerate symptoms to avoid going back into custody but he said that was not the case. He agreed that a number of bail applications were not successful. It was suggested to him that on one occasion he had refused to go back to the Alice Springs Correctional Centre from the Alice Springs Hospital once he was medically cleared. He said he had no say in the matter.

[174] With respect to the record of 28 July 2005 at Alice Springs Hospital[174] noting he was complaining of a rash on his neck, the plaintiff rejected that was all he had complained of, although he appeared to accept he was treated with Phenergan and Calamine lotion. The rash was noted again by hospital staff on 29 July 2005. He was taken to entries for similar symptoms in 2007. He maintained he told hospital staff his neck was stepped on but that the staff had written scabbing.

[173] Compare Affidavit, Stuart Douglas Johnson, 8 October 2013 at [42]; SDJ-6 with Exhibit D5.
[174] Exhibit 4; Tender Documents at 179; Transcript 26 October 2015 at 69-70. Discussed also in the context of Rita Rose's evidence summarised below at [131]-[137].

[175] The plaintiff was taken to Alice Springs Hospital records of 3 August 2005.[175] He agreed there was a notation of an exacerbation of a long-standing back injury. He was asked about that notation indicating he had told the doctor he had been treated with NAID, a non-steroid or anti-inflammatory drug. He said he did not say that, but rather the doctor had written it. He agreed he told the doctor that he had spoken of court and "possible bail on Friday". He was then asked about the notation "he therefore seeks admission to hospital till then". After further questioning the plaintiff agreed that the notation came from something that he had told the doctor. He accepted a number of observations noted in the record including a recommendation for Tramadol and Diazepam. In relation to the notation, "refuses discharge back to Alice Springs Correctional Centre," the plaintiff said he realised who the doctor was, that she was the visiting medical officer to the prison and "now I know why it's written this way". He said that doctor resigned after he applied for freedom of information and that she was extremely biased against him. He agreed her notation meant there was nothing to justify his continued admission to hospital, commenting "in her view yes".

[176] Those same medical notes refer to the plaintiff being in a wheelchair, then lying on the bed on his right, lateral position with his hips or knees flexed as a maximum relief position. They record the plaintiff was examined in a supine position but was able to move with ease into that position without

[175] Exhibit 4; Tender Documents, Tab 1 at 20.

pain exacerbation. A later observation records "no region of specific pain on palpitation of lumbo-sacral spine."[176] The plaintiff agreed he was then taken back to the Alice Springs Correctional Centre by ambulance.[177]

[177] The plaintiff agreed he saw Dr Dyananda, an orthopaedic surgeon from Alice Springs Hospital, on 10 August 2006, after the jury trial while he was awaiting sentence. The purpose was to obtain a report in relation to the sentencing hearing. The plaintiff was referred to a letter written by his wife, that he assumed, (but could not remember) he requested, to Dr Dyananda of 14 August 2006.[178] In particular he was asked about the sentence "he has said that the only reason the case failed was because he complained about the police handling and the damage they caused." The plaintiff said his view was slightly different but was "along those lines." As to the next part, "your report will have a direct impact on the length of the sentence", the plaintiff said that was probably his own view.

[178] The plaintiff agreed the following part of the letter was important: "some of the things the Court needs to know, namely, that the injury he currently has is separate and distinct from an older injury." He disagreed with the proposition that he thought the Court might go easier on him if the doctor's report could link his condition with treatment of him by police. He said he was trying to differentiate his symptoms because everyone was saying that he just had a bad back. Asked if Dr Dyananda declined in his report to make

[176] Exhibit 4, Tender Documents, Tab 1 at 20.
[177] Transcript, 26 October 2015 at 91; Exhibit 4, Tender Documents, Tab 1 at 21.
[178] Exhibit 4, Tender Documents, Tab 1 at 322.

any observation about the relationship of his symptoms to the prior injury, the plaintiff said he had not read it. It was pointed out to the plaintiff that it was attached to his affidavit and he said he could not keep all of this in his head. Ultimately he agreed that Dr Dyananda did not make any observation between his symptoms of August 2006 and any prior injury.[179]

[179] The plaintiff was referred to the records of Queen Elizabeth Hospital of 17 May 2007 when after surgery in Adelaide he was recuperating in the Yatala Prison infirmary. The record of the final separation summary from the Queen Elizabeth Hospital of 11 May 2007 states: [180]

> 42 year old prison inmate was re-admitted to hospital with aggravated back pain and left leg sciatica. He was previously discharged back to Yatala Prison infirmary. While there, he had a fall which aggravated his back pain and left leg sciatica.
>
> According to the nursing staff in Prison, the patient feigned the fall and refused to eat and drink and was non-compliant with his medication, giving them no option but to bring him back to hospital.

[180] The plaintiff disagreed with the content of that record. He said he was not given food or drink and was made to crawl to paramedics when they arrived at Yatala Prison. He said the nursing staff lied. The note further indicated he had been receiving physiotherapy and was deemed safe for discharge. He said he had no physio and he took his medication when it was given to him.

[179] Transcript, 26 October 2015 at 93.
[180] Exhibit 4, Tender Documents, Tab 1 at 359.

[181] The plaintiff was also taken to records from 29 May 2007 indicating he had been complaining of 8/10 pain. [181] He was asked about the observation that in his body language he did not show this amount of pain.[182] The plaintiff said 8/10 was fairly low and this was someone's opinion. In relation to an observation "patient is very manipulative and I suggest that prison staff always be in the room," he said he tried to get staff to take a photo, but that was refused. He said the staff were afraid. He disagreed with the general proposition that he would exaggerate symptoms,[183] or with the suggestion that he had been described as a "difficult historian".[184]

[182] The plaintiff had significant difficulty recalling earlier incidents and treatments for various injuries. He had scant memory of any assault in 2000; any fall or accident in 2002 resulting in treatment; whether there was continued pain from the acknowledged injury in 1995; or why there would have been a CT in 2002. Neither did he recall the presentation at the emergency department of Alice Springs Hospital on 12 September 2003 resulting in a nursing diagnosis of "sciatica long standing complaint exacerbated a few days ago. No sleep 3 days. Left leg has intermittent spasms". He was uncertain about a number of treatments and scans relating to sciatica in and after 2003.

[181] Exhibit 4, Tender Documents, Tab 1 at 389.
[182] Transcript, 26 October 2015 at 96.
[183] See in particular Transcript 26 October 2015 at 97.
[184] See for example, Transcript, 26 October 2015 at 117.

5.2 Dr Matarazzo

[183] It is perhaps unsurprising in the light of the plaintiff's medical history, that the accounts provided by him to his general practitioner, principally Dr Matarazzo, are not always accurate. In brief, the histories provided by the plaintiff to Dr Matarazzo included that immediately after the arrest he suffered crippling pain, was unable to walk independently and suffered from neurological symptoms including bladder and bowel incontinence. Being unable to walk independently after the arrest is contrary to the Watch House records and the lay observations of police at the time, although the plaintiff did complain of pain and was noted in the detention assessment as "obvious pain or injury", suicide signs or health problems.[185]

[184] Dr Matarazzo has been the plaintiff's general practitioner for over 20 years.[186] Dr Matarazzo is obviously an experienced and committed general practitioner. The Court appreciated the significant amount of time he devoted to giving evidence, including being subject to a lengthy cross examination. Dr Matarazzo readily acknowledges he is not qualified in the areas of psychiatry or psychology, nor is he an orthopaedic surgeon or neuro-surgeon. Where his opinion, in part by necessity given his role as general practitioner, strays into those speciality areas, the Court is unable to give those opinions significant weight. The difficulty with acceptance of Dr Matarazzo's ultimate opinion is his reliance on a somewhat distorted history, noting he is obliged to rely on patient history to a large degree.

[185] Exhibit 4, Tender Documents, Tab 5.
[186] Exhibit P35.

His ultimate opinions are somewhat diminished by a lack of information available to him or considered by him in respect of injuries suffered by the plaintiff, both before and after the arrest.

[185] In respect of the plaintiff contacting him by telephone and describing "a rather vicious arrest whereby his back and his neck were quite significantly hurt", Dr Matarazzo said he recalled thinking that it was highly likely that the manner of his apprehension would have caused quite a severe exacerbation to his previous back problems. Dr Matarazzo said an injury to the lower lumbar disc could cause a compression of the nerves in the lower back and pelvis, producing symptoms consistent with those related to him by the plaintiff.[187] Dr Matarazzo records that he referred the plaintiff to a specialist orthopaedic surgeon, Mr Orso Osti and noted the MRI taken at that time confirmed a severe degree of lower lumbar disc prolapse with significant nerve root entrapment. The symptoms also included sciatic pain down the left posterior leg, to the sole of the left foot with marked numbness and weakness in the lower leg as well as pudendal-area neurological symptoms and signs. Dr Matarazzo thought this was consistent with the MRI findings. He noted that both Mr Osti and Dr Dayananda indicated that spinal surgery would be required. Dr Matarazzo understood the plaintiff had no access to any of his funds "seized and quarantined by the system", and consequently was unable to have the required back surgery discectomy until 2007.

[187] Exhibit P35 at 2.

[186] Dr Matarazzo's opinion was that the prolonged delay between injury and back surgery resulted in an unsatisfactory outcome. His opinion was that by that stage, the entrapped nerves had become so damaged that they were unable to fully recover. As a consequence, the plaintiff was left with significant symptoms involving his left leg, down to his foot as well as more subtle symptoms of nerve damage in the lower sacral areas affecting the perineal and pudendal areas that led to difficulties with control of urination, defecation and sexual function. Dr Matarazzo noted significant "foot drop" on the left side that was quite a problem for him walking and requiring the assistance of a walking stick due to a significant limp. He stated that many of the symptoms have persisted with little improvement which indicates the condition is permanent and irreversible. He said the plaintiff requires medications that includes Tramadol, anti-inflammatories and the anti-depressant medication, Citalopram.

[187] Dr Matarazzo referred to the history in his report. This included the description of an officer with his foot firmly and forcibly planted onto the plaintiff's neck during his arrest. Dr Matarazzo concluded that the plaintiff's current symptoms and radiological evidence of advanced osteoarthritis and loss of disc height in his cervical spine were consistent with a significant exacerbation caused by injury in a man of his relatively young age.[188]

[188] Exhibit P35 at 2.

[188] Dr Matarazzo states Mr Johnson was quite shattered emotionally and this set him back psychologically "far far more" than his situation after his fall in 1995. Since the 2005 incident, he has described feelings of anger, dejection, hopelessness, helplessness, anxiety, depression and significant suicidal ideations. Dr Matarazzo spent many hours in consultation with him and counselling him. Although much more controlled currently, Dr Matarazzo states the plaintiff exhibits "a seething hurt and anger deep within him, which can so easily be brought to the surface".

[189] Dr Matarazzo's conclusions are that the manner in which the plaintiff was arrested and incarcerated in 2005 lead to quite severe and permanent sequelae, both of a physical and psychological nature.[189] He states that although Mr Johnson had some symptoms following the 1995 accident, the subsequent episode created a very dramatic worsening or exacerbation of those and produced new problems not previously present. Dr Matarazzo stated "although I do not purport to be a psychiatrist, my experience leads me to conclude that Mr Johnson is clearly affected by PTSD (Post Traumatic Stress Disorder). I also do not purport to be a neurosurgeon, but my long, medical experience leads me to believe that his present neurological symptoms in his neck, lower back and cauda equina are permanent and that his pain and disabilities will be chronic".

[190] Dr Matarazzo was asked in cross examination about spinal disc compromise and degenerative changes of the lumbar discs. He acknowledged

[189] Exhibit P35 at 4.

degeneration to him meant deterioration, a wearing out, thinning and aging process.[190] He explained degenerative change can occur with age, may follow trauma and in his experience trauma may hasten degenerative change. He acknowledged that discs do not regenerate as well as organ systems. Dr Matarazzo acknowledged that degenerative changes can cause quite severe pain, including radiated pain to the hips and legs. In severe cases, perhaps numbness or tingling in the legs and difficulty walking and that these changes occur over time. He acknowledged that if there is an injury to the disc itself, the initial symptoms might resolve but subsequently there may be symptoms as a consequence of degenerative change. He acknowledged degenerative events progress gradually. He also accepted the proposition that a patient may not be aware of those changes or may put up with them until they become noticeable. He acknowledged spinal discs may be impaired or affected through degenerative change or trauma.

[191] Dr Matarazzo accepted the proposition that if a disc is sufficiently compromised there may be an impact on the nerve root ending. He suggested this may be either pressure on the spinal cord or on the spinal nerves themselves by virtue of a bulge. He accepted this could also be by virtue of a fragment that breaks off and remains in the spinal canal. He acknowledged this may lead to the patient suffering sciatic pain, or nerve root pain, being pain which originates in the lower back or at the location of the disc and then travels through the buttock and down the legs, perhaps as

[190] Transcript, 2 November 2015 at 369-370.

far as the heels. It may sometimes start at the lower level, dependant on how it impinges on the nerve roots.[191]

[192] Dr Matarazzo acknowledged sciatic or nerve pain symptoms often bear on one side of the body rather than the other and the symptoms can include: leg pain that may be described as a burning or a tingling; weakness or numbness in the knee that may extend as far as the foot; difficulty in moving the leg or foot, "foot drop"; and it may also include sharp pain making it difficult to either walk or stand.[192] Dr Matarazzo was taken to his clinical records of 8 June 2006.[193] The notation is "also has a 'crick' in the R side of neck since his assault – more restricted on looking to R side". He agreed with the proposition that in the absence of any treatment regime or investigation in relation to the plaintiff's neck, it would suggest it was not serious.[194]

[193] Dr Matarazzo was asked about a record of the plaintiff's attendance at his clinic on 30 September 2013.[195] The note was recorded by Dr Tipnis and reads, "history: came with request for x-ray; had been assaulted in 2007; says was requested by spinal surgeons for Cspine x-ray; no pain; no other complaints. Examination: looks well; Cspine; No midline tenderness; No para-spinal tenderness; movements normal; power in upper limbs 5/5 reason for contact; x-ray request." Dr Matarazzo said he did not know if the record

[191] Transcript, 2 November 2015 at 371.
[192] Ibid.
[193] Exhibit 4, Tender Documents, Tab 7 at 23.
[194] Transcript, 2 November 2015 at 374.
[195] Exhibit 4, Tender Documents, Tab 7 at 7.

was correct.[196] Dr Matarazzo was asked for comment on the x-ray record obtained as a result of the referral by Dr Tipnis,[197] and agreed it revealed "fairly text book degenerative changes".[198]

[194] The report of a CT scan performed on 3 October 2013 sought by the plaintiff after recording the x-ray report was referred to by Dr Matarazzo.[199] Dr Matarazzo was asked to consider the report and the conclusion that read, "moderately advanced multi-level spondylosis and facet arthropathy. Multi-level C4/T1 mild central spinal canal narrowing without high grade stenosis. Multi-level mild/moderate foraminal stenosis. Clinical correlation required. If there is on-going clinical concern then Mr Jonson should be considered for a definitive assessment." Asked if the conclusion represented text book degenerative changes, Dr Matarazzo disagreed saying there were a lot of advanced changes and they would not be his words but he was not a radiologist and this was a radiologist's report. He agreed the reference to "facet arthropathy" was a reference to abnormality in the facet joints, which can wear with degeneration, but also with trauma or both.[200] Asked if the references in the conclusion were in relation to degenerative change, Dr Matarazzo said degenerative or traumatic or both. In relation to the spinal canal narrowing without high grade stenosis, Dr Matarazzo said degenerative change can occur either from the aging process or from trauma

[196] Transcript, 2 November 2015 at 374.
[197] Exhibit 4, Tender Documents, Tab 7 at 78.
[198] Transcript, 2 November 2015 at 375.
[199] Exhibit 4, Tender Documents, Tab 7 at 76.
[200] Transcript, 2 November 2015 at 376.

or both.[201] Dr Matarazzo agreed with the proposition that degenerative change can be caused from trauma, but is different to traumatic change. He said trauma may hasten the development of the wear and tear earlier.

[195] Dr Matarazzo was asked about the reference in the CT report to "clinical correlation required". He said while not knowing what the radiologist intended, it tells the doctor to relate the report findings to the patient's symptoms. If the patient has no complaints, the findings are ignored. If however the symptoms correlate with the findings then it has a different meaning and if there were on-going clinical concerns an MRI is required for a definitive answer.[202] Dr Matarazzo agreed the reference to C7/T1 did not indicate a compromise of the disc to a major degree that needed surgical decompression. He agreed there was not significant nerve root impact requiring surgical decompression, apart from possibly that the C5-C6 osseous foraminal stenosis may or may not be impacting on nerve roots. He agreed that was as high as it could be put in relation to the impact on nerve roots.[203]

[196] Dr Matarazzo was taken to his records of 4 October 2013 of the plaintiff seeing Dr Patel,[204] in particular to an entry reporting the plaintiff getting neck pain, headaches and some tingling in the arms from time to time. Dr Matarazzo was asked to consider whether if there was no reference anywhere earlier than that date to tingling, it is a safe assumption that the

[201] Transcript, 2 November 2015 at 376.
[202] Ibid at 376-377.
[203] Ibid at 377.
[204] Exhibit 4, Tender Documents, Tab 7 at 6.

plaintiff did not make that complaint to any of the doctors at his clinic. He agreed that was a logical conclusion.[205] The entry also records the plaintiff requesting an MRI scan. In relation to the MRI report,[206] Dr Matarazzo stated it "corroborates a little bit what the CT indicated". He suggested the MRI gives a better image of nerves than the CT scan does, noting the report indicated the C4-5 possibly compressing the exit of the C5 nerve root. He agreed the report does not expressly or definitively identify a nerve root compression or an impingement.[207]

[197] Dr Matarazzo was referred to a letter to Dr Patel from a neurologist in relation to arranging conduction studies of the right ulnar nerve.[208] Dr Matarazzo could not comment on whether that was to be arranged because of inconclusive findings concerning a complaint of tingling.[209] In relation to the nerve conduction studies, Dr Matarazzo was taken to the letter from Dr Harding, a neurosurgeon of 3 April 2014, in respect of tests done in March 2014.[210] In particular he was referred to the following points made: no evidence of ulnar neuropathy; no wasting of ulnar innervated muscles; no evidence of ulnar neuropathy at the elbow, but a mild median neuropathy at the wrist consistent with mild carpel tunnel syndrome. Dr Matarazzo agreed carpel tunnel syndrome occurs in the wrist, and has nothing to do with the neck. He was asked about the concluding paragraph that the symptoms or

[205] Transcript, 2 November 2015 at 377-378.
[206] Exhibit 4, Tender Documents, Tab 7 at 75.
[207] Transcript, 2 November 2015 at 379.
[208] Exhibit 4, Tender Documents, Tab 7 at 61-62.
[209] Transcript, 2 November 2015 at 380.
[210] Exhibit 4, Tender Documents, Tab 8 at 137.

paresthesia may reflect degenerative joints disease and he suggested, "in his neck area, yes". He agreed with the proposition that the condition seen in the neurological investigation disclosed a clear case of degenerative changes to the cervical spine. On whether they are consistent with an age related condition, he commented that it may be, but perhaps in an older person. He conceded it was possible that they could simply be age related in the plaintiff's case.[211] Dr Matarazzo agreed with the proposition that degenerative changes to the cervical spine could be age related or consistent with a work related condition where a person's work life involves bending over and twisting from side to side, or with an injury to the neck sometime in the past, or all three.[212]

[198] Dr Matarazzo was taken to an email he wrote to Dr Osti on 13 December 2013[213], and a record of the same date,[214] that read: "caught me up with recent issues – esp his neck. X-rays and CAT scan and has had an MRI …" Dr Matarazzo said this record did not mean he considered this a recent issue in the sense that he was not previously aware of it, but said he meant all the recent events while he was away. He did not think it could be inferred that the neck problems had suddenly appeared. Asked about the absence from the records until December 2013, Dr Matarazzo said he accepted there was no written record since. Asked if that meant the plaintiff had made no further complaints about his neck or that if there was a significant issue with

[211] Transcript, 2 November 2015 at 380.
[212] Ibid at 380-381.
[213] Exhibit 4, Tender Documents, Tab 7 at 5.
[214] Ibid Tab 7 at 6.

his neck he would expect a written record, Dr Matarazzo said except in situations where there are other issues that are even more dominant. Dr Matarazzo was asked to assume that the degenerative changes in the reports were caused by a neck injury as opposed to solely degeneration. It was suggested that in those circumstances there was no way of identifying objectively when the neck injury occurred. Dr Matarazzo agreed it was impossible to distinguish between an injury that occurred in 2005 and an injury in 2002. In relation to distinguishing it from an injury that occurred in 1995, he said possibly.[215]

[199] Dr Matarazzo said he was aware of the plaintiff's fall in 1995 and injuring his lumbar spine. He did not recall there was a report of the plaintiff falling on a step in 1999 and attending Alice Springs Hospital. He could vaguely recall an assault in 2000 when Mr Johnson was pushed against a wall. In relation to the Alice Springs Hospital records in 2000 indicating a complaint of shooting pain down his spine, pain and tingling in his right arm and stiffness in his neck, Dr Matarazzo said that unless he had written something down he could not recall it. In relation to an assault on the plaintiff in 2004 by intruders, where the plaintiff was placed in a headlock and kicked and complained of a painful ankle and stiff neck, Dr Matarazzo indicated that while it "stirs a memory" he doubted he could recall it.[216] He said it was possible that any of those falls or assaults could have easily contributed to the trauma that precipitated the changes seen to the plaintiff's neck in 2013.

[215] Transcript, 2 November 2015 at 281.
[216] Ibid at 383.

[200] Broadly, Dr Matarazzo agreed that that if the factual assumptions he relied on in his report are not correct, [217] this would necessitate a review of his opinion. In relation to the plaintiff's lower back condition, Dr Matarazzo agreed the two causes identified by him were the arrest in 2005 and the failure to have surgery until 2007,[218] leading to the less than satisfactory outcome after the eventual discectomy surgery. In relation to the conclusion that a cause of the lower back condition was the arrest in 2005, Dr Matarazzo agreed the factual assumptions were that investigations after the arrest disclosed that Mr Johnson had a disc prolapse with nerve root impingement at the L5/S1 level; that the prolapse required surgery in 2007; that there was no such injury to the L5/S1 disc before the arrest; that there were neurological symptoms after the arrest including sciatic pain down the left leg, numbness and tingling in the left leg and foot, left foot drop and difficulty walking, and pudendal area neurological symptoms; that these symptoms were not evident before the arrest; that the pain was reported as being much more severe after the arrest; and that there were no other relevant injuries after the arrest.[219] Dr Matarazzo agreed he had not had access to all of the Alice Springs Hospital records, and that the records were not in his immediate recollection because it was a "long event".[220]

[217] Exhibit P35.
[218] Transcript, 2 November 2015 at 385.
[219] Ibid at 385-386.
[220] Transcript, 2 November 2015 at 386.

[201] Dr Matarazzo was referred to the CT lumbar spine report dated 12 September 2003.[221] Dr Matarazzo did not recall seeing the document but said it is more than likely that he had.[222] He agreed the report indicated the plaintiff complained of pain in his left buttock and left foot and sock numbness in his left foot. He agreed at L4, L5 there is a reference to a small to moderate central disc protrusion. Also noted is mild to moderate narrowing of the central canal. He agreed at L5-S1 level, a broad based annular bulge was noted, superimposed left para-central disc protrusion and hypo-dense soft tissue in the region of the left S1 nerve root. In lay terms he accepted that a protrusion possibly with a sequestered component meant part of the disc had broken off and remained in the spinal canal. He agreed that the impression recorded by the radiologist is that the disc protrusion, possibly with a sequestered component, would impinge the left S1 nerve root. He agreed there was evidence of degenerative change at L4 and L5-S1 levels. Dr Matarazzo accepted the background as set out in the Alice Springs Hospital records of 12 September 2003.[223] He acknowledged the record stated: "lower back pain, 6 years"; "work related fall"; "since intermittent left buttock/leg pain"; and "last 5 days". He was referred to numbness in the foot for the last five days; radiating pain down left side of leg to left foot; exacerbation with hip flexion and associated numbness, left foot with soft distribution; as well as a further entry "this morning with

[221] Exhibit D5.
[222] Transcript, 2 November 2015 at 386.
[223] Exhibit 4, Tender Documents, Tab 1 at 223; Transcript 2 November 2015 at 387-388.

increased pain, worst ever". Asked if he was aware of this presentation in 2003 and he said he was not made privy to the hospital records.

[202] Taken to the relevant emergency department record one week later,[224] Dr Matarazzo acknowledged the record; sciatica post-work injury recently worsening; work injury eight years ago, sciatica two to three times per year until recently, more constant and debilitating. The symptoms are noted as pain from left hip to sole foot, paraesthesia in right lateral thigh, foot drop on left when severe. Dr Matarazzo commented that this was not an uncommon history that he had seen of the plaintiff even before the 2005 event.[225]

[203] A further entry of 21 October 2003,[226] was shown to Dr Matarazzo. He acknowledged that according to that entry the plaintiff presented for an epidural steroid injection but that the procedure could not be undertaken because the plaintiff had a vaso vagal reaction.[227] Dr Matarazzo acknowledged he was aware the plaintiff was seeing the orthopaedic surgeon, Dr Dayananda at the Alice Springs Hospital. Dr Dayananda had referred him to Dr Freddiani to provide a second opinion and further treatment in regard to left L5 root pain. Dr Matarazzo acknowledged that on 24 October 2003, the plaintiff came to his clinic for a second opinion.[228] He agreed that by 2003 the plaintiff's sciatic symptoms were so bad that the

[224] Exhibit 4, Tender Documents, Tab 1 at 25.
[225] Transcript, 2 November 2015 at 389.
[226] Exhibit 4, Tender Documents, Tab 1 at 204-205.
[227] Transcript, 2 November 2015 at 389.
[228] Exhibit 4, Tender Documents, Tab 8 at 107; Transcript 2 November 2015 at 390.

possibility of surgery was discussed. Asked if at that time the plaintiff was suffering some quite significant left sided neurological symptoms, Dr Matarazzo said he did not recall the referred pain and that although a doctor mentioned it at the hospital, he did not personally recall the plaintiff having foot drop at that time. Asked whether given another doctor had written that into the medical records it was likely the plaintiff had told the doctor, he agreed, "it's possibly right".[229] Dr Matarazzo agreed a further observation that could be taken from the records was that the symptoms the plaintiff was suffering from in 2003 were undoubtedly associated with the impingement of the nerve root at the L5-S1 level.

[204] In relation to factual assumptions concerning the pudendal neurological symptoms, Dr Matarazzo said he was not aware that when the plaintiff was taken to Alice Springs Hospital from the Watch House 48 hours after arrest the plaintiff reported that he had no bowel or urinary symptoms.[230] Dr Matarazzo was taken to Alice Springs Hospital records of September 2005, six weeks after the arrest when he reported bowel and bladder urgency to a physiotherapist and then saw Dr Osti in September 2005. Dr Matarazzo acknowledged Dr Osti's report concerning complaints of urgency, episodes of urinary incontinence and difficulty sustaining an erection.[231]

[229] Transcript, 2 November 2015 at 391.
[230] Exhibit 4, Tender Documents, Tab 1 at 130; Transcript 2 November 2015 at 391.
[231] Exhibit 4, Tender Documents, Tab7 at 81.

[205] In relation to a record from Dr Dayananda of 11 November 2005,[232] that indicated urinary and bladder symptoms had recovered well and there is no urgency of discectomy, Dr Matarazzo said he would infer that Dr Dayananda had asked the plaintiff and perhaps was told that they had recovered. Dr Matarazzo accepted Dr Dayananda was not aware of other pudendal symptoms. In relation to a further note of Dr Dayananda of October 2006, referring to seeing the plaintiff on 10 August 2006 and noting that the clinical picture remained the same except for some paraesthesia inside of left foot, no bladder instability, Dr Matarazzo said he did not know why he wrote that. He said he did not know whether it came about from Dr Dayananda asking, adding that orthopaedic surgeons do not tend to go into very personal details such as impotence in the way that a general practitioner might. Dr Matarazzo agreed with the proposition that pudendal symptoms would be very important to an assessment of the spinal condition. He accepted it was fair to assume that Dr Dayananda would focus his attention on any pudendal symptoms reported to him by the plaintiff. He agreed it was possibly a fair assumption that if the plaintiff reported an issue such as sustaining an erection, it would be recorded in Dr Dayananda's notes. In relation to a record of orthopaedic Registrar Alex of 14 December 2006, Dr Matarazzo acknowledged the record meant bowel/bladder were within normal limits.

[232] Exhibit 4, Tender Documents, Tab 1 at 332.

[206] Dr Matarazzo acknowledged the first recorded reference to pudendal area neurological symptoms in his records were 8 June 2006.[233] He said he remembered the plaintiff had mentioned this much earlier in various conversations. He acknowledged he recorded low libido and sexual dysfunction, referring to evidence or symptoms of perineal nerve deficit.[234] Asked if those symptoms could possibly be a consequence of what is going on in the plaintiff's life at the time in terms of charges and being on remand, Dr Matarazzo said they were often multifactorial and said "undoubtedly". He also agreed sexual dysfunction could be a consequence of taking medication like Citalopram and also agreed it was possible the symptoms had nothing to do with the arrest.[235]

[207] In re-examination Dr Matarazzo said that he did not remember the plaintiff complaining of sexual dysfunction, bowel or urinary issues as side effects of Citalopram or Cipramil,[236] but said he had not looked at his notes in relation to that.

[208] On a thorough review of the material Dr Matarazzo has relied on, it becomes clear that his conclusions, although genuinely held, cannot firmly stand. It may have been difficult for him to give considered opinions in cross examination given he had not previously had access to many of the records, including the Alice Springs Hospital records both prior to the arrest and since that time.

[233] Exhibit 4, Tender Documents, Tab 7 at 23.
[234] Transcript, 2 November 2015 at 394.
[235] Ibid at 394.
[236] Ibid at 448.

[209] In relation to his own clinic's records, Dr Matarazzo initially accepted the records accurately represent a patient's contact with the clinic, however, as can be seen from the summary of his evidence, his answers with respect to the absence of records of complaints of symptoms did not reflect his initial stated confidence.

[210] Dr Matarazzo was effectively obliged to formulate his opinions based on the plaintiff's history of the arrest and the events the plaintiff said followed. He was not to know the competing versions that fundamentally tested the credibility of the plaintiff's version of arrest. The competing and stronger versions in the form of the evidence of police officers, custody and other records test the completeness and correctness of the history the plaintiff gave Dr Matarrazo. Given how the plaintiff explained the arrest and asserted poor treatment overall in the criminal justice system, it is unsurprising Dr Matarazzo concluded the plaintiff was the victim of a "gross injustice". This was likely to have influenced his perspective of the plaintiff's conditions and their causes. As a committed doctor, Dr Matarazzo developed serious concerns for the plaintiff and the way he understood he had been treated. He was inclined not to test the plaintiff's history who he considered for good reason to be vulnerable in terms of his mental health. The weight to be given to his original conclusions must be significantly reduced. Although the Court can be satisfied as to Dr Matarazzo's diagnosis of the plaintiff's current condition, that same satisfaction cannot be found in respect of the cause.

5.2 Dr Bernard Hickey

[211] The psychiatrist Dr Hickey also spent considerable time giving evidence. The Court appreciated the time he spent giving evidence and his willingness to discuss his diagnosis and methodology openly.

[212] He interviewed the plaintiff on 27 and 30 July 2015.[237] As a result of the history given in the interviews and from his examination, Dr Hickey diagnosed the plaintiff with post-traumatic stress. As would be expected, the history Dr Hickey relied on was provided by the plaintiff.

[213] In the history recorded by him, Dr Hickey refers to the 1995 back injury, particularly the C4-5. When not "re-employed" Dr Hickey recorded the plaintiff became depressed. Symptoms were depressed mood, and difficulty thinking and moving. He was prescribed anti-depressants and pain medication by Dr Abusah. Dr Hickey notes that between 2000 and 2005 the plaintiff was functioning well and his work included motorcycle tours and race car fabrication.

[214] The history taken by Dr Hickey of the arrest was that at Diarama Village the plaintiff described the following event:

- Someone was monitoring his actions and the plaintiff confronted him and he said there were others at his house;
- The plaintiff went to go to his house and the man tried to grab him;

[237] Affidavit of Bernard Hickey, 6 August 2015, Exhibit P37, annexure BH; Report of 27 October 2015 at 39.

- The plaintiff was followed by unidentified, unmarked cars and went to his house;
- The men identified as police officers;
- The plaintiff was unsure of this but was detained, head bashed into roof rack, hands/arms tied behind his back, pushed/slammed onto the ground, felt something pop in his back, immense pain;
- The assailant stood on the plaintiff's neck, that was very painful and neck pain has continued;
- At the Watch House he was lying on a concrete floor, in pain;
- He was not permitted to see a doctor or lawyer;
- He eventually saw a doctor who did nothing;
- He received bail after two months in prison;
- He was reviewed by Dr Matarazzo.

[215] Dr Hickey states the plaintiff has been completely overtaken by the event, and has experienced anger, intrusive thoughts, reliving memories and trauma. He was socially isolated as a result and used heavy sedation at times to suppress his distress and insomnia. Other difficulties were also noted, for example the drug charges being heard in 2006; his assets being frozen; his difficulties finding and financing legal representation; the findings of guilt and six years jail; the appeal; the further charges of related offences; and his plea of guilty under pressure. Dr Hickey said the plaintiff felt as though his life was taken away from him.

[216] As part of the history, some of the plaintiff's medical history was summarised. Dr Hickey noted the nerve injury to his spine, back pain, use of a walking stick and the medication for pain and depression. He said the plaintiff suffers intrusive thoughts and nightmares related to the trauma and accompanying distressing emotions. He is emotionally numb, has a negative view of the world and is socially isolated. He is irritable and angry and finds it hard to relate to his children. He described an exaggerated fear.

[217] Dr Hickey recorded the plaintiff seeking redress for what happened to him, and that he is unable to function well enough to work due to physical and mental injuries.

[218] During the interviews Dr Hickey described the plaintiff as agitated, anxious, distressed, angry and irritable with depressed mood, affect with limited upward range, tearful at times and affect congruent to content. He was described as having reasonable insight into associating his trauma stressors and consequences with his current on-going distressed state. Dr Hickey said his story was internally consistent and PTSD would be almost an expected outcome in the context. Dr Hickey states there is a case to be made for relapse of his earlier depression in the 1990s from which he appeared to have fully recovered, however it was Dr Hickey's opinion that PTSD is his primary diagnosis currently as he satisfied the PTSD criteria. He noted the plaintiff's depression may be in reasonable remission due to anti-depressant treatment. Dr Hickey outlined the diagnostic criteria for PTSD, from the WHO, International Classification of Diseases 10, Classification of Mental

and Behavioural Diagnostic Criteria for Research (ICD10) and the relevant symptoms that in his opinion meet the recognised criteria for a diagnosis of PTSD.

[219] Dr Hickey told the Court the first report he wrote dated 27 July 2015 would have been finalised after the second interview of 30 July 2015.[238] For his second report Dr Hickey agreed he had referred to reports by Dr Frost and his referral letter from Dr Matarazzo. He agreed he did not consider Alice Springs Hospital or other Bath Street Clinic records relevant to the plaintiff.[239] Dr Hickey told the Court his diagnosis was based on the first two assessments of July 2015, however it was confirmed by subsequent interviews. He told the Court he had seen the plaintiff 10 times since 27 July 2015. Dr Hickey agreed the first report dated 27 July 2015 included everything he thought was material to the diagnosis. The second report of October 2015 included the plaintiff telling him that his neck was stood on during the arrest. Dr Hickey acknowledged the history of the plaintiff's neck being stood on was not in the first report but said he could not remember whether it was relayed to him or not. He said he did not see that as significant if it was not mentioned. Dr Hickey said he could not be certain that Mr Johnson did not state this part of the history in the earlier interviews.

[238] Transcript, 2 November 2015 at 410.
[239] Ibid at 410.

[220] Dr Hickey said he used the diagnostic criteria for PTSD from ICD10 because the changes from The American Psychiatric Associations Diagnostic and Statistical Manual of Mental Disorders IV or V, (DSM-IV) to (DSM-V) are confused.[240] He acknowledged DSM-V commenced in 2013 and the previous edition, DSM-IV is still used for diagnosis. He did not agree that the ICD10 criteria was used for the purpose of resource allocation in health systems. He said one instrument is the World Health Organisation's instrument and the other (DSM) is from the American Psychiatrists Association. He preferred the ICD10 because it was simpler to use. He said there was not a lot of difference between the ICD10 and DSM-IV. He commented also that the criteria for the DSM frequently shifts.[241] He disagreed that a comparison between the instruments of diagnosis revealed significant differences. He said there was a difference but it was not great.[242]

[221] Dr Hickey said PTSD was not difficult to diagnose; it has a pattern of symptoms and the history forms the basis of the diagnosis. Dr Hickey agreed that if the self-report is flawed, the diagnosis may be flawed and may be more difficult to make. He said he was not aware of evidence that showed the history given by the plaintiff was wrong.[243] He indicated it would be difficult to feign the symptoms as they would have to be sustained over a long period of time. As to being prepared to make his diagnosis on

[240] Transcript, 2 November 2015 at 412.
[241] Ibid at 413.
[242] Ibid at 414-415.
[243] Transcript, 2 November 2015 at 418.

the basis of the first two consultations, he said he went into the detailed history and his impression was the emotions, distress and the response the plaintiff was having in terms of his psychological, emotional and behavioural function was consistent with the diagnosis of PTSD. He considered it would be impossible to act the response given the extent to which the plaintiff was reacting during the interview. Dr Hickey acknowledged the DSM-IV requires a practitioner to consider the prospect of malingering where financial remuneration might arise. He acknowledged he had not specifically addressed that but thought it was covered by reference in his opinion of internal consistency in the history matching the examination.[244]

[222] As to Criteria A concerning the exposure to the stressful event,[245] Dr Hickey listed "arrest, jailing and loss of assets and ability to work is such a stressor". In respect of the diagnosis of PTSD it was suggested he could not separate one factor like "jail" from others as the identified stressor and he answered, "I think there's a number of stressors there that each by themselves qualify for a Criteria A stressor". Asked if that was the way he described it in his report he said "not specifically in the wording there".[246]

[223] In respect of Criteria B under the heading of "Persistent Remembering or Reliving" by intrusive flashbacks,[247] Dr Hickey recorded the plaintiff "reliving" and being distressed in the interview when recounting the events.

[244] Ibid at 412.
[245] The full criteria A is set out in Exhibit P39.
[246] Transcript, 2 November 2015 at 421.
[247] The full criteria B is set out in Exhibit P39.

He also reported nightmares related to the trauma. Dr Hickey agreed this was a matter of self-reporting, however pointed to the distress in the interview. He acknowledged there was no way to consider nightmares and agreed he did not speak to anyone else to verify them. In relation to there being no general practitioner records in respect of a history of nightmares or flashbacks during the relevant period, Dr Hickey said, "It would raise a question and you'd want to know – have an understanding of why that was happening".[248]

[224] Dr Hickey acknowledged Criteria C "Actual or Preferred Avoidance of Circumstances"[249] relies on self-reporting. He noted the plaintiff is fearful of police and courts and avoids these if possible, as a result of association with the trauma. Asked if a relentless pursuit of legal proceedings including representing himself in court on many occasions is inconsistent with someone who is fearful of police and courts and avoids them, Dr Hickey answered, "no, I think there's another side to PTSD, is that often serious sense of injustice and anger that occurs as well as the other fear symptoms. Fear and anger are often connected. Often that's powerful enough to sort of cause almost a dogged desire for some sort of justice or redress, even to the extent of causing further pain." Asked if that is not something he relied on when he reached his diagnosis, he answered, "I don't think – I think I have. I have taken that into account." He agreed there was nothing in his report about a dogged pursuit of legal proceedings or claims to justice. He said

[248] Transcript, 2 November 2015 at 422.
[249] The full criteria C is set out in Exhibit P39.

that was not necessary to meet the criteria. He agreed he relied on what he had been told.

[225] In relation to Criteria D(2)(a) "Persistent Symptoms Not Present Before Exposure to the Stressor Showing Two Further Symptoms" and "a difficulty in falling or staying asleep",[250] the report notes the plaintiff required sedation to fall asleep and can only sleep for two hours at a time. Dr Hickey accepted that he relied in part on Dr Matarazzo's report as well as the plaintiff's history. Dr Hickey acknowledged that if there was evidence of sleep difficulties prior to the arrest he would need to consider that carefully in order to decide whether this was significant to the diagnosis. He acknowledged this was similar with respect to Criteria D(2)(b) "Irritability or Outbursts of Anger". He acknowledged he would need to carefully consider the diagnosis if any of the criteria were present prior to the arrest. He acknowledged the self-reporting nature of most of the material.

[226] Dr Hickey acknowledged he did not address Criteria E, that in respect of Criteria B and C, the question of on-set of symptoms and delay of on-set for more than six months was not addressed in his report. He said he was not being specific but the on-set was not delayed. He also said it was a "typo" that Criteria E did not also include reference to matters in Criteria D with respect to the issue of on-set of symptoms delayed more than six months.[251]

[250] The full criteria D (2) (a) is set out in Exhibit P39.
[251] Transcript, 2 November 2015 at 426.

[227] Although not dealt with in his report he was asked about Criteria F in the DSM-IV concerning significant distress or impairment in social occupation or other functioning that is a consequence of PTSD. Asked if this was vital to the diagnosis, Dr Hickey said it may be arguable. He said he considers the whole event as a threat to the person's wellbeing rather than looking at one aspect. He said the whole assessment of a person and the effect on their function is hard to separate in real life. He agreed that in DSM-IV, without Criteria F, there is no diagnosis.[252]

[228] Doctor Hickey's ultimate opinion suffers from a number of problems. He has been seeing and treating the plaintiff since July 2015. He made the diagnosis on the basis of the two interviews with him. He had very little access to other records save for the referral from Dr Matarazzo. Contrary however to the submission made on behalf of the defendant, he was entitled as a psychiatrist to rely on the instrument he considered to be most appropriate, in this instance the ICD10, rather than DSM, IV or V. He gave his reasons for doing so, particularly that he thought the criteria that had recently changed from DSM-IV to DSM-V was confused. He accepted that DSM-IV was commonly used diagnostically. He accepted DSM-IV required the further criteria to be met. It is within his expertise to settle on the appropriate instrument. Not all of the criteria as between DSM-IV and DSM-V appear to be settled.

[252] Ibid at 427.

[229] As would be expected, he relied primarily on the plaintiff's history, and accepted that if it was flawed, this would effect his diagnosis. He relied considerably on what he said was the internal consistency of the plaintiff's history and the history contained in Dr Matarazzo's and Dr Frost's reports. He was however, unaware of evidence that is before the Court that would seriously challenge much of the history he obtained from the plaintiff. This is particularly so in relation to what he believed were the facts of the arrest and the existence of previous disturbances. Even with a correct history of what occurred at the arrest, Dr Hickey, with respect to Criteria A, considered that each of the stressors would qualify as a Criteria A "Stressor". It is difficult to accept that loss of assets or loss of ability to work is a stressor that has the capacity to fulfil the criteria required for a diagnosis of PTSD. It was not explained how such stressors could be considered to possess the qualities to ground the diagnosis.

[230] Doctor Hickey was prepared to accept that the reliability of the history might be questioned if there were, as is the case, an absence from GP records of reports of nightmares and flashbacks and possibly no evident distress or fear manifest on the part of the plaintiff in regularly attending Courts and interacting with police witnesses as a litigant in proceedings. Although this was to a degree explained in cross examination, it is not considered in his report as "another side" to PTSD. Doctor Hickey did not consider in any comprehensive way whether a number of the symptoms were present prior to the relevant stressor. The medical records already

discussed, and the evidence of the plaintiff indicates, the plaintiff had some problems with respect to headaches and sleeping prior to 1995.[253] He was referred by Dr Matarazzo to Dr Abusa for recurring pains in his lower back, anxiety, depression and frustration. The plaintiff agreed he had those symptoms in 1996.[254] The timing of the onset of symptoms is not dealt with in any comprehensive manner in the report. Given the complexities of the plaintiff's medical history including psychological conditions in the past, it was necessary to deal with this comprehensively to properly ground the conclusion.

[231] As there are significant issues with respect to the self-reporting and the history overall given by the plaintiff, the weight of Dr Hickey's evidence is somewhat diminished. I would not however reject his diagnosis that the plaintiff suffers PTSD or a serious psychological condition of a similar kind, however taken with the other evidence, I can not be satisfied that it was the arrest that caused the plaintiff's condition.

6. Observations of Witnesses About The Plaintiff's Work History and Capacity

6.1 Stuart Johnson

[232] The plaintiff is qualified in many areas and has significant skills, especially in mechanical matters. At 23 he gained a qualification as an aircraft engine fitter when he was in the Royal Australian Air Force. He also gained the

[253] Transcript, 27 October 2015 at 144.
[254] Transcript, 27 October 2015 at 145; Exhibit 4, Tender Documents, Tab 1 at 348-349.

trade qualification of diesel engineer in 1986.[255] In 1990 he received an Australian recognised trade certificate as a qualified engineer.[256] He also gained certification in electronic fuel injection and in automotive air-conditioning.[257] The plaintiff has not however worked as an aircraft engine fitter since 1987.[258] He has previously worked on an oil rig but not since 1995 when he was injured.[259]

[233] The plaintiff states he has not been employed since 14 July 2005, the date of the arrest. Prior to that time he states he was self-employed in his vehicle repair and maintenance business at Shed 1/60 Elder Street. He said he established that business in 1991 while he was working on oil rigs on a two week on, two week off basis. This allowed him to establish the repair and maintenance business.[260] In that business he also owned a second business that he established in 1994, Alice Springs Motorcycle Tours. That business was also terminated at the time of the arrest. He used five Harley Davidson motorcycles to take tourists to notable destinations in Central Australia. He said his workshop was deemed "Crime used" on 14 July 2005.

[234] Prior to the arrest, he said he had been working as a motor mechanic. He agreed he went on sickness benefits for some time but did not agree it was for a year.[261] He said his business was "on the side" and he received cash

[255] Affidavit of Stuart Douglas Johnson, 18 September 2015, Exhibit P3, SDJ-27, SDJ-28.
[256] Ibid annexure SDJ-29.
[257] Ibid annexure SDJ-30, SDJ-31.
[258] Transcript, 27 October 2015 at 120.
[259] Ibid at 160.
[260] Affidavit of Stuart Douglas Johnson, 8 October 2013 at [4]-[6].
[261] Transcript, 27 October 2015 at 143-144.

payments and did not keep proper records. He did not fill out income tax returns for the business.[262]

[235] He acknowledged from 2005 until 2011 he stayed at home with the children. He also acknowledged he could not use a computer.[263] He said he has tried to work on many occasions but cannot remember all of the details. He was not sure if it was more than five occasions. He said he had tried to work in the following positions: mechanical work in a deceased friend's diesel workshop; for a limited period for Alan Thorpe at Stuart Highway Auto's; and answered phones for Peter Goodwin at North Point Paint and Panel, but was not sure for how long. He said he attempted to work at each place but did not function well. He said he would try anything available, usually mechanical work, and did not get paid. The work he obtained was from friends who helped him to get on his feet.

[236] He said Alice Springs Motorcycle Tours was not his main business (that he derived most of his earnings from) at the time of the arrest. He said he kept the records as good as he could but Rita kept the books until about 2003. He had more than seven employees. His main role was to market the business. He would also work on the bikes at his workshop at 1/60 Elder Street. He agreed Alice Springs Motorcycle Tours sustained a loss every year it

[262] Ibid at 158,160.
[263] Ibid at 64.

operated. Over the years 1999 to 2004, its net loss was approximately $190,000.[264] He tried to make it successful but started at the wrong time.

6.2 Damien Armstrong

[237] Damien Armstrong states he first met the plaintiff in 1997, [265] when the plaintiff was the owner and proprietor of Alice Springs Motor Cycle Tours and he was a tour guide. He described the plaintiff's workshop, both his mechanical repair shop and the base for Alice Springs Motor Cycle Tours, as impressive in scale and complexity of works: (for example fabrication, customisation and restoration of high performance and classic vehicles). The plaintiff was very energetic with engineering skills across a number of disciplines including petrol, diesel, electrical and modification. Before 2001 it was difficult to get an appointment with the plaintiff.

[238] Mr Armstrong said he picked up work at the plaintiff's workshop as a trade assistant. The last work he performed was in May 2005. He later learned of the plaintiff's arrest for cannabis related offences. He said he saw the plaintiff "many months later", on crutches and having extreme difficulty walking. He noted the plaintiff's appearance and demeanour had changed; he had gained weight, was very pale and could no longer walk unassisted. He describes the plaintiff as a stark contrast from the man he knew previously. They remain friends and the plaintiff occasionally calls him to assist with lifting and carrying heavy objects.

[264] Transcript, 27 October 2015 at 159-160.
[265] Affidavit of Damien John Armstrong, 16 September 2015, Exhibit P12.

[239] In cross examination Mr Armstrong's evidence was not as positive in his support of the plaintiff compared with the contents of his affidavit. Rather than friends, Mr Armstrong suggested, "we are very closely associated" and in relation to assistance given to the plaintiff he said, "If any person asks for my help I will help that person". Asked if he was suggesting there was nothing special to him about Mr Johnson he said, "I believe so". [266] When pressed about whether he was impressed with the workshop, he said "I could say moderately impressed". He acknowledged he wanted to assist the plaintiff. He believed this would help him recover compensation as a fair course of justice should be followed through.[267] Mr Armstrong acknowledged that the observations he had made of the plaintiff would have been more than six months up until a year after May 2005.[268] He indicated he was aware the plaintiff had served prison time, had been through a confiscation process and was struggling financially. Further, his bail had been revoked and he was trying to get funds together to pay for legal representation. He agreed all of those things had taken a "terrible toll" on him. He agreed he felt sorry for him.[269]

6.3 Alan Thorpe

[240] Mr Thorpe first met the plaintiff in 1990 and employed him as a technical mechanic. The plaintiff had sought after diagnostic skills obtained when he

[266] Transcript, 28 October 2015 at 219-220.
[267] Ibid at 223.
[268] Ibid.
[269] Transcript, 28 October 2015 at 225.

was an aircraft fitter in the Royal Australian Air Force.[270] He attested to the plaintiff's significant knowledge incorporating mechanical, electrical and hydraulic skills. He attested to his good character, honesty and loyalty towards Mr Thorpe's own business. He relied on the plaintiff if he needed help. He described the plaintiff's strong work skills and ethic. After the injury, he offered the plaintiff a position as a workshop supervisor to avoid physical work but the plaintiff could not cope. He said he was a different person to the one he knew. He agreed they continue to remain friends.[271] He agreed the events following the arrest had taken a terrible toll on the plaintiff and he felt sorry for him.[272] His belief was that the plaintiff had been "set up".[273] Mr Thorpe had previously assisted the plaintiff with money for bail and in respect of the criminal trial. In respect of the plaintiff not being able to cope in the position that he provided, he agreed the plaintiff did not have the skills to learn to be proficient with the computer system and tried for less than one day to learn how to use that system.[274]

6.4 Daniel Warren

[241] Daniel Warren states he witnessed the plaintiff working on a least 100 hundred vehicles between January and June 2005.[275] He said there would have been around half a dozen bike tours. He said he would de-grease and clean the underbodies of cars the plaintiff was working on as a cost

[270] Affidavit of Alan Geoffrey Thorpe, 14 December 2015, Exhibit P13.
[271] Transcript, 28 October 2015 at 228.
[272] Ibid at 232-233.
[273] Ibid.
[274] Transcript, 28 October 2015 at 231.
[275] Affidavit of Daniel Pearce Warren, 15 December 2015, Exhibit P14.

reduction negotiation between them. Mr Warren accepted a number of propositions put to him that because he was not in a position to pay for the work, he was grateful to the plaintiff agreeing to do the work and allowing him to pay it off.[276] As a result of what the plaintiff told him, the arrest caused him concern. The plaintiff needed his help. He understood the plaintiff was standing up to fight against the injustice done to him.[277]

6.5 Peter Errol Goodwin

[242] Mr Goodwin is a motor mechanic, panel beater and spray painter,[278] and was self-employed with North Point Paint and Panel and Pedro's Auto and Vintage Restoration between 1990 and 2014. At the time of the hearing he was still self-employed at Pedro's Paint and Panel. He has known the plaintiff both on a business and personal level since 1990. He contracted the plaintiff in mid 1990 to handle difficult mechanical work on classic vehicles and motorcycles being restored. He also worked on other vehicles coming through the workshop for repair. The plaintiff charged a minimum of $50 per hour in cash. He considered the plaintiff to have superior and excellent skills and gave a number of examples of his restoration work. During an absence through his own injury in February 2005, he asked the plaintiff to operate his paint and panel business. To compensate him for loss of revenue from Alice Springs Motorcycle Tours and his vehicle repair and maintenance business, he allowed him to take 100 per cent of the net

[276] Transcript, 28 October 2015 at 230.
[277] Ibid at 244.
[278] Affidavit of Peter Errol Goodwin, 12 September 2013, Exhibit P15.

profits of his business in cash. As Mr Goodwin was in rehabilitation for longer than anticipated, he asked the plaintiff to close the business. When the plaintiff was arrested in July 2005, Mr Goodwin's property and bank accounts were also frozen. Immediately following the plaintiff's arrest, the plaintiff was no longer able to walk, confined to a wheelchair and crutches and using a walking stick. He said he would not now engage the plaintiff to carry out maintenance and repair work.

[243] He agreed he and the plaintiff were very close friends. When he saw the plaintiff and made the observations about his health, it was at least around January or February 2006. It was then he concluded the events had taken an awful toll on the plaintiff.[279]

6.6 John Trull

[244] Mr Trull is a long term friend of the plaintiff. He engaged the plaintiff to do mechanical work for him from around 1990 /91 until 2000.[280] The plaintiff charged $50 cash per hour. Whenever he visited the plaintiff there were five to six cars at his workshop. The plaintiff also worked on Go-Karts for his Go-Kart hire business, added a roll cage to an off road vehicle and performed restoration work on four project restorations. Since the arrest it is difficult to hold a conversation with the plaintiff. Mr Trull agreed he had provided assistance to the plaintiff in 2007 to resist the criminal property forfeiture proceedings and considered he had been "a bit hard done by" and

[280] Affidavit of John Lawrence Trull, 15 September 2015, Exhibit P19.

that he was assisting him for justice. Mr Trull agreed the plaintiff's experiences, including being gaoled believing he was innocent, had taken a toll and had an effect on him.[281] Despite the plaintiff's difficulties, I agree with the submission made on behalf of the defendant that it is difficult to see how Mr Trull could come to the conclusion the plaintiff found it difficult to hold a conversation given the plaintiff has conducted this litigation without representation.

6.7 Graeme Dermody

[245] Mr Dermody is a diesel engineer and owns and operates Centralian Heavy Plant Maintenance.[282] Mr Dermody first met the plaintiff when they were both working at Mereenie Oil in early 1994. On the two weeks on and two weeks off cycle the plaintiff would return to Alice Springs to operate his vehicle repair and maintenance business. Mr Dermody currently employs fitters at a minimum of $60 per hour and some are contracted at $100 per hour. He said $120,000 per annum is what a diesel fitter would expect to be paid out bush. The plaintiff stopped work at Mereenie Oil in 1995 after his fall.

6.8 Ray Hatchard

[246] Mr Hatchard has worked for Neta Glass for 26 years and has known the plaintiff since late the1990s.[283] He considers himself the plaintiff's mate. He states the plaintiff did cash work on his classic car including installing a

[281] Transcript, 29 October 2015 at 268.
[282] Affidavit of Graeme Beirne Dermody, September 2015, Exhibit P16.
[283] Affidavit of Raymond Alexander Hatchard, September 2015, Exhibit P17.

new brake booster and welding the chassis. The plaintiff could no longer do this work after July 2005.

6.9 David Pierson

[247] Mr Pierson is employed by Repco Auto Parts as a trade team leader. He knew the plaintiff in the early 2000s when the plaintiff began purchasing mechanical auto parts from him.[284] He sold parts for a very wide range of vehicles to the plaintiff, increasing substantially between 2001 and 2005. Until mid-2005 he could not estimate how many thousands of dollars worth of mechanical parts he sold to the plaintiff. He knew the plaintiff through his purchase of Repco parts but also through their background in motorcycles and the mechanical trade. He agreed in relation to selling mechanical parts to the plaintiff it would be impossible to track the purchases of customers over time or how much they had spent. His evidence about the plaintiff's purchases would be a "rough idea".[285] Mr Pierson moved away from his original estimate that the plaintiff ceased coming into the store from mid-2005 suggesting that was a rough calculation, it was probably about 2007 and 2008. He indicated the plaintiff in recent times had been doing a job on a Monaro.[286]

[284] Affidavit of David John Pierson, September 2015, Exhibit P20.
[285] Transcript, 29 October 2015 at 272.
[286] Ibid at 270, 272-273.

6.10 Glenn Schilds

[248] Mr Schilds owns and operates Alice Springs Brake and Clutch.[287] He has known the plaintiff since 1994. Prior to 2005 he sought out the plaintiff's mechanical and engineering skills on a number of occasions when specialist experience was required. He stated the plaintiff was working for himself and was very busy. Around 2002 he tried to offer the plaintiff employment at $80,000 per annum. The plaintiff declined that offer. He preferred to work on his businesses. He has not offered the plaintiff meaningful work since July 2005.

6.11 Danny Kunoth

[249] Mr Kunoth is the former owner of a number of cattle stations. He first met the plaintiff in the early 1990's.[288] He would often pay the plaintiff $50 per hour to work on vehicles and machinery. Sometimes he paid $80 per hour cash when he needed to drive or fly him to his station "Lamboo". Sometimes the plaintiff would remain at the station for up to six weeks to complete repair and maintenance work. He often asked the plaintiff to come and work for him fulltime but the plaintiff was content working at his own businesses. He has not been able to use the plaintiff's services since 2005. The cash work on vehicles at the station occurred perhaps once or twice a year.[289]

[287] Affidavit of Glenn Anthony Schilds, 16 September 2015, Exhibit P29.
[288] Affidavit of Danny John Kunoth, September 2015, Exhibit P21.
[289] Transcript, 27 October 2015 at 275 - 276.

7.0 Principle Findings and Conclusions

[250] Observations and assessments of the evidence from witnesses have been made throughout these reasons. Relevant findings below are made on the balance of probabilities. Generally the plaintiff bears the onus to prove the facts forming the basis of the claim. To the extent that any assault, battery or use of excessive force is claimed by the defendant to be justified, the defendant bears the onus to prove the facts or circumstances which show the arrest was lawful and the use of force justified.[290] The following findings and conclusions relevant to the plaintiff's claim are justified on consideration of the whole of the evidence.

7.1 The Genesis of the Arrest

[251] The plaintiff and his associates were subjects of a covert surveillance operation conducted by the Drug and Intelligence Unit of the Northern Territory Police. The surveillance operation sought to find evidence of suspected drug operations including those suspected of being conducted at the plaintiff's business premises at Shed 1/60 Elder Street. The plaintiff's residence at 2 Hong Street was also under observation. Police intelligence included suspicions about the plaintiff's involvement in bringing cannabis into the Northern Territory and participation in the distribution of large amounts of cannabis. Various mechanisms were used to conduct the surveillance operation including an observation post, video surveillance, listening devices and a tracking device on one of the plaintiff's cars. Both

[290] *Zaravinos v New South Wales* (2004) 62 NSWLR 58 at [2].

Officer Dole and Officer Winton had been involved in the surveillance operation and understood the surveillance operation concerned suspicions of significant cannabis offending.

[252] Police who were engaged in the surveillance operation became aware that one of the plaintiff's associates had found a surveillance transmission device with a bug sweeping device. The activities of the plaintiff and an associate led police engaged in the operation to reasonably believe that on 4 July 2005 the plaintiff was driving his Commodore station wagon and probably had drugs and/or the surveillance transmission device with him. Police engaged in the surveillance operation were briefed about this development. Officers Dole and Winton were separately directed to locate the plaintiff's station wagon and to arrest him if he was found.

[253] Officer Dole was briefed about the compromised investigation. He advised Officer Winton that they were instructed to arrest the plaintiff. Both officers were told the plaintiff had fled his premises. Both believed the plaintiff had committed significant offences and would compromise or destroy evidence. I find both officers had reasonable grounds to believe the plaintiff had committed serious cannabis offences and was evading police.

[254] In as much as the plaintiff in these proceedings expressly or impliedly asserted that he was not involved in cannabis offending, that is not accepted, noting that along with the other evidence, he entered a plea of guilty in 2007 to a single charge of supply a commercial quantity of cannabis. To the

extent the plaintiff asserts his plea of guilty was entered without genuinely accepting criminal responsibility, or that he did not commit the offence, that assertion is not accepted.

[255] When Officers Dole and Winton were tasked to find the plaintiff, the grounds for arrest without warrant pursuant to s 123 of the *Police Administration Act* "believes on reasonable grounds that the person has committed, is committing or is about to commit an offence", were well made out.

[256] The plaintiff's case that at Diarama Village he believed he was being watched, followed and pursued by persons intent on and with a preparedness to inflict harm on himself or his family is rejected. At least from the time Officer Winton showed him his badge and told him not to go anywhere, the plaintiff knew police were attempting to speak with him. I find the plaintiff knew police were looking for him, knew they were investigating him and knew the approach from Officer Winton was an approach from a police officer and that police were attempting to arrest him.

[257] If that finding is incorrect it remains the case that Officer Winton reasonably believed the plaintiff was aware he was a police officer. Officer Dole reasonably believed the plaintiff fled police after the interaction with Officer Winton at Diarama Village. Both police officers reasonably believed the plaintiff was evading apprehension.

[258] After the plaintiff fled Diarama Village area, Officers Dole and Winton attempted to find him, in separate cars. They were in unmarked vehicles. Although not in marked police cars, Officer Dole was flashing his headlights and matching the plaintiff's speed. The plaintiff's various claims that he did not know police were pursuing him are rejected. During the pursuit of the plaintiff, Officers Dole and Winton continued to have reasonable grounds to arrest the plaintiff. The plaintiff's suggestion he was returning home for fear of persons intent on harming his family is rejected. It is more likely he was returning to 2 Hong Street to take steps that would have further compromised the investigation and to evade arrest. The plaintiff drove dangerously and at high speed to his residence at 2 Hong Street to evade police and conceal or compromise evidence.

7.2 The Arrest at 2 Hong Street

[259] When the plaintiff pulled up onto the verge outside of 2 Hong Street, Officer Dole pulled up behind him and ran to the plaintiff's driver's side door as the plaintiff got out of his maroon commodore. Officer Dole grabbed the plaintiff near his shoulder area with both hands, pulled him out of the car and put him straight down onto the ground, face down. The manoeuvre was performed very quickly. When the plaintiff was on the ground, Officer Dole employed a three point hold with his knee and put his full weight on the plaintiff's back in between his shoulder blades and restrained the plaintiff's arms with his hands. The arrest was undertaken as soon as the plaintiff opened his car door. Officer Winton was nearby and saw the arrest.

[260] The plaintiff did not resist arrest. The plaintiff was not given any opportunity to resist arrest by Officer Dole as a result of him utilising the process of arrest chosen.

[261] Towards the completion of the arrest Officer Winton approached Officer Dole. Officer Winton returned to his own vehicle to collect handcuffs after being asked by Officer Dole if he had any. When Officer Winton retrieved flexi cuffs, he put them on the plaintiff's wrists while Officer Dole maintained the three point hold. The flexi cuffs were put on the plaintiff when he was on the ground and once applied, Officer Dole released his weight from the plaintiff who remained on the ground. The plaintiff and his vehicle were then quickly searched. Both officers assisted the plaintiff to a sitting position and pulled him over to lean against the fence at 2 Hong Street.

[262] The plaintiff's case that he was instructed by Officer Dole to turn and face his vehicle, that he spun the plaintiff around and pulled his arms up behind his back and then fitted flexi cuffs while he was standing, is rejected. The flexi cuffs were fitted to the plaintiff when he was on the ground, facing the ground. It is also rejected that Officer Dole pushed the plaintiff into the side of his car and that while upright, pushed a knee into the plaintiff's back causing his body to bend forward into the open driver's door of his car. The plaintiff's chin was not wedged on the roofline of his car with his shins wedged against the seal panel at the bottom of the car. Officer Dole did not take the plaintiff's hair and slam the left side of the plaintiff's face to the

roof of his car. The plaintiff did not land on his buttocks. He was put straight down, onto the ground, face down. Officer Dole did not put the heel of his shoe onto the plaintiff's neck and grind it. Nor did he use the plaintiff's neck as a step. Officer Dole used standard techniques for the arrest and immobilisation of a suspect when the suspect evades police.

[263] After the arrest the plaintiff complained of the tightness of the flexi cuffs. He did not complain of any other discomfort, injury or mistreatment at that time. Senior Constable Karaminidis, one of two general duties officers who attended the scene to take the plaintiff to the Watch House cut the flexi cuffs and replaced them with metal handcuffs.

7.3 Assault and Battery

[264] Bearing in mind the credibility and reliability issues with the plaintiff's evidence, the marginal support at most from other witnesses and in the face of a clear and credible denial by Officer Dole, with supporting evidence from Officers Winton and Sims, and to some extent Curtiss, I am not persuaded on the balance of probabilities that Officer Dole committed the acts alleged by the plaintiff said to constitute assault and battery. In as much as the plaintiff characterised the arrest as a vicious and brutal attack on him and that may impliedly raise an issue about whether Officer Dole was ill motivated towards him, there is no evidence of an antagonistic history between Officer Dole and the plaintiff. Clearly the motivation was to arrest the plaintiff for cannabis offending in the context of him evading

police. The claim that the conduct was intended to humiliate the plaintiff is rejected. The faultless disciplinary records of both Officers Dole and Winton after lengthy police service tends to indicate neither are persons with a disposition to assault suspects. Character is an additional factor that in combination with the other evidence makes the alleged assault and battery unlikely.

[265] Although for the purposes of the criminal law "assault" includes the actual application of force as well as the threatened application of force, the actual application of force is not an element of the tort "assault". To prove the intentional tort assault it must be shown that the defendant threatened force, violence or other offensive contact towards the plaintiff; that the threat is accompanied by an intention to cause the plaintiff to fear that the threat of force, violence or offensive contact would be immediately carried out; and that the threat caused the plaintiff to believe on reasonable grounds that the threat would be carried out.[291] The gravamen of the tort of assault is creating the apprehension in the plaintiff's mind of physical contact. There is no requirement to induce an apprehension of infliction of actual harm.[292]

[266] The pleadings do not include any allegation of the required apprehension. In as much as the evidence raises the plaintiff's apprehension that being pursued prior to arrest placed him in fear of harm, that is rejected. In any

[291] C Goodhand and P O'Brien, Intentional Tort Litigation in Australia, Federation Press 2015 at 9; *Phillips v R* (1971) 45 ALJR 467; *Hall v Fonceca* [1983] WAR 309;*White v State of South Australia* (2010) 106 SASR 521 at 582; noting recklessness maybe suffice, however negligence will not satisfy at common law: *Macpherson v Brown* (1975) 12 SASR 184.
[292] Sappideen C and Vines P, Fleming's The Law of Torts, 10th Edition Thomson Reuters, 2011 at 31.

event, it is not pleaded as part of the plaintiff's case. The plaintiff knew police had tried to speak to him and were going to arrest him. The pursuit of the plaintiff was justified in the circumstances. Nothing turns on this matter of definition. Where a threat of contact is carried out the incident is properly described as "assault and battery".

[267] The tort of battery is distinguished from assault. Battery is committed by "intentionally bringing about harmful or offensive contact with another person's body."[293] There is some support for negligent contact rather than intentional contact being sufficient to constitute battery,[294] however the plaintiff's case was not pleaded on that basis.

[268] The Amended Statement of Claim asserted as an alternative to a wilful or deliberate assault, that Officer Dole was negligent in the manner of his arrest. [295] With respect to these and other parts of the Amended Statement of Claim, the plaintiff was granted leave to amend,[296] but did not amend at any time before or during the hearing. The defendant did not answer the negligence point and related pleadings on the ground of embarrassment. At the hearing the plaintiff proceeded solely on the basis of intentional or deliberate acts constituting assault and battery. Negligence was not pursued. A duty of care in the context of a lawful arrest executed by police

[293]Sappideen C and Vines P, Fleming's The Law of Torts, 10th Edition Thomson Reuters, 2011 at 31.
[294] Halsbury's Laws of Australia V26, [415] – [345]; C Goodhand and P O'Brien, Intentional Tort Litigation in Australia, at 5; *Slaveski v Victoria* (2010)VSC 441 at [241], per Kyrou J
[295] Amended Statement of Claim [8] (c) (b).
[296] Orders of Master Luppino, 13 May 2015.

is rarely upheld.[297] The real question is whether the force used was excessive.

[269] Implicit in the power to use force to carry out an arrest is that the force be reasonable or not excessive. Protection from harm during arrest is primarily provided through the requirement that force be reasonable and not excessive. The facts said to support the pleaded case of assault and battery have not been proven.[298]

7.4 The Power to Arrest, Reasonable Force or Excessive Force

[270] Force was however used to effect the arrest and apply flexi cuffs. When force that would otherwise amount to battery is used but is undertaken with lawful authority, it is justified at law and constitutes a defence to the action. In *Majindi v Northern Territory of Australia,*[299] Mildren J set out the position in the Northern Territory:

> The apprehension of the plaintiff, the handcuffing of him, and placing him in the police van, and taking him to the Watch house and holding him in a cell is prima facie evidence of an assault and battery, deprivation of liberty and false imprisonment unless justified by law.

[271] The defendant relied on the power in s 123 of the *Police Administration Act* to arrest a person and take them into custody without warrant where the police officer believes on reasonable grounds that the person has committed, is committing or is about to commit an offence. While the power to arrest is

[297] C Goodhand and P O'Brien, Intentional Tort Litigation in Australia at 39-41.
[298] Amended Statement of Claim at 6.
[299] (2012) 31 NTLR 150 at [44].

governed by s 123 of the *Police Administration Act*, the common law determines how a lawful arrest must be effected. The test for validity of an arrest under s 123 of the *Police Administration Act* is twofold. The officer must subjectively believe the person has committed, or is about to commit the offence, and the belief must be based on reasonable grounds. Reasonable grounds require more than suspicion. This requires an examination of the information known to the arresting officer.[300] A person carrying out the arrest may use reasonable force to effect an arrest. The authorities on the point recognise the right to use force is a corollary of the right to effect an arrest.[301]

[272] As to the reasonableness of the force used, Kyrou J explained in *Slaveski v Victoria:*[302]

> The person exercising the power of arrest is entitled to use such a degree of force as in the circumstances they reasonably believe to be necessary to effect their purpose, provided that the means adopted by them are such as a reasonable person placed as they were placed would not consider to be disproportionate "to the evil to be prevented."

[273] This last phrase may be taken to refer to circumstances such as escape, resist or other significant non-compliance with submission to the arrest or to the continuation of offending. As the right to liberty is sacrosanct, the use of

[300] *Cotchilli* (unreported, Mildren J, 23 October 2007); *Wilson* (unreported, Kearney J, 20 November 1998); *Grimley* (1994) 121 FLR 236.
[301] *Slaveski v Victoria* [2010] VSC 441 at [126] per Kyrou J, citing *R v Turner* [1962] VR 30 at 36 per O'Bryan, Dean and Hudson JJ.
[302] Ibid n 301 at [127], citing *R v Turner* [1962] VR 30 at [36].

force and whether it is reasonable must be assessed in the context of orthodox and strict principles governing the power of arrest.

[274] Clearly arrest constitutes the deprivation of liberty of the person arrested. To protect personal liberty the law that permits and provides the circumstances in which a police officer may arrest or detain an individual is strictly construed. The approach that is taken to strictly construing s 123 of the *Police Administration Act* applies equally to the application of principles governing the circumstances in which the use of force will be considered reasonable. The relevant authorities also emphasise that the assessment of whether a police officer's conduct is reasonable must be made in a manner that has regard to the many exigencies relevant to the circumstances in which an arresting officer's decision is made. Those include the need for a quick decision, possibly in an emergency or other pressured environment. The assessment should not be made by reference to hindsight.[303] In *Slaveski v Victoria*, Kyrou J summarised the current authorities:

> In *Walker v Hamon,*[304] Smith J emphasised that an assessment of the reasonableness of a police officer's conduct must be made in a 'realistic manner' that takes into account the 'reality that the officer has to make decisions quickly, often in emergencies and under pressure'. Similar statements appear in other cases. In *Woodley v Boyd*[305] for example, Heydon J said that 'In evaluating the police conduct, the matter must be judged by the pressure of events and the agony of the moment, not by reference to hindsight'.[306] His Honour then referred to the following observation of Connor J in *McIntosh v Webster*[307] 'Arrests are frequently made in circumstances of

[303] *Slaveski v Victoria* [2010] VSC 441 at [130], (some footnotes omitted).
[304] [2008] VSC 596.
[305] [2001] NSWCA 35.
[306] Ibid.
[307] (1980) 43 FLR 112.

> excitement, turmoil and panic [and] it would be altogether unfair to the police as a whole to sit back in the comparatively calm and leisurely atmosphere of the court room and there make minute retrospective criticisms of what an arresting constable might or might not have done or believed in the circumstances.'[308]

[275] The assessment of whether the force used was reasonable and proportionate to the circumstances of the arrest must have regard to those principles but must also be made in the context of the strict principles governing the protection of liberty of the subject.

[276] If Officer Dole had smashed the plaintiff's face on the roof of the car, thrown him backwards to the ground, ground his shoe into the plaintiff's neck and used his neck as a step, having cuffed him when standing up, clearly such force would not only have constituted battery, but would not be reasonable force to effect arrest in the circumstances and would amount to excessive force. As indicated, those allegations principally contained in paragraph 6 of the Amended Statement of Claim have been rejected.

[277] If a police officer physically restrains a person for the purpose of effecting an arrest the officer will be liable in battery if the arrest is unlawful.[309] There is no claim that the arrest was unlawful. If the arrest is lawful, liability arises only if the force used to the effect the arrest is excessive. Particular 6 (c) of the Assault and Battery Claim states:

> Dole informed the plaintiff that he was under arrest. He did not indicate the nature of the offence for which the arrest related.

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[308] (1980) 43 FLR 112, 113.
[309] *Slaveski v Victoria* [2010] VSC 441, per Kyrou J.

[278] Although a person arrested is entitled to know the grounds upon which they are arrested, that requirement does not apply where the circumstances are such that the person must know the nature of the alleged offence or where, through their conduct it is impossible to convey the information. Given the circumstances of the arrest after the car chase, it cannot be the case that the arrest is invalid for that reason. I did not understand the plaintiff's case to be put in that way. In any event, it is fair to infer the plaintiff knew the reason for his arrest.

[279] I find the force that was used to effect the plaintiff's arrest, essentially by utilising the technique of ground stabilisation, followed by the three point hold as described in Officer Dole's evidence, was reasonable in the circumstances of this particular arrest. Ground stabilisation in many situations may amount to a use of excessive force, but not on this occasion. Had this been an arrest that was effected by simply visiting the plaintiff when he was at home at 2 Hong Street and informing him that he was under arrest, provided there was no resistance or non-compliance, it is likely ground stabilisation in those circumstances would be excessive force. However, in the circumstances of the arrest the subject of the proceedings, the defendant has proven on the balance of probabilities that the use of a fast take down, and ground stabilisation with the three point hold was necessary and not excessive to effect the plaintiff's arrest.

[280] Officer Dole reasonably believed the plaintiff had committed serious cannabis offences. That by itself may not justify the use of force to arrest,

however coupled with the belief genuinely held that the plaintiff had been fleeing and evading police after interference either by the plaintiff or an associate or both with a surveillance device, the need to effect the arrest in the manner that Officer Dole did was reasonable. The plaintiff's conduct had all of the appearances of evading police. That in turn engaged police in a pursuit of him at speed. Apart from offences related to cannabis, Officer Dole believed an arrest was necessary given the manner of the plaintiff's driving. That the plaintiff pulled up outside of his own residence did not diminish the belief that the plaintiff was evading arrest, given his residence was surrounded by a high fence that may have made entry to the premises more difficult. It was not unreasonable for Officer Dole to think the plaintiff may have intended to head towards his house or yard. The fast take down method was likely to prevent a more difficult situation in which to effect the arrest, particularly if the plaintiff had gone into his residence. The unknown factors such as whether the plaintiff may have had a weapon or whether he had harmful intentions towards police are less concrete factors but in the circumstances of the apprehension at the conclusion of the car chase, they are likely to have been of some relevance to the decision to arrest quickly and immobilise the plaintiff. A firearm was located in the plaintiff's residence when the search warrant was executed the day after the arrest.

[281] The unchallenged evidence of Senior Sergeant Andrew Barram, based on factual assumptions that were proven during the course of the hearing,

supports the defendant's case that the method used to effect the arrest was consistent with standard police arrest techniques applicable to circumstances such as those encountered by Officer Dole.

[282] Other factors that to a lesser extent bear upon the reasonableness of the manner of arrest were background matters of police intelligence suggesting some of the plaintiff's associates may have links to interstate motorcycle gangs and information from the police database PROMIS warning the plaintiff maybe "anti-police", and potentially violent or uncooperative with police. Factors of this nature are of some, but less significant weight. It was the chase in the circumstances already described after the investigation was compromised, along with the reasonable belief the plaintiff had committed significant cannabis offences, that justified the use of force of the level utilised in the arrest. It was also reasonable to believe the plaintiff at the moment of getting out of his car may attempt to enter his residence. On the plaintiff's version he thought the unknown persons were intent on doing harm to himself or his family. On either version it is likely the reason he drove to 2 Hong Street was to enter his premises.

[283] In relation to handcuffing, the plaintiff was handcuffed with flexi cuffs by Officer Winton when he was on the ground. Officer Winton was not challenged with respect to his belief about the necessity to handcuff the plaintiff.[310] His stated reasons were "because he had been evading police for the last half an hour and was a flight risk. There was also the seriousness of

[310] Affidavit of Peter Winton, 30 September 2015, Exhibit D30 at [14].

the offences he was suspected of committing". This was consistent with the expert evidence of Senior Sergeant Andrew Barram in terms of acceptable contemporary police practice with respect to handcuffing.

[284] A police officer is not entitled to use handcuffs on a person merely because an arrest has been effected.[311] All of the circumstances must be examined to determine whether there are reasonable grounds for the use of handcuffs. In *Perkins v County Court of Victoria,*[312] relied on by Kyrou J in *Slaveski v Victoria,* Charles JA explained the circumstances must disclose some special feature in order for reasonable grounds to exist in all of the circumstances to use handcuffs. His Honour cited additional circumstances such as the necessity to prevent the prisoner escaping; or committing some further offence; or endangering the safety of persons or property.[313] Justice Kyrou also relied on the following from Williams J in *Leigh v Cole*:[314]

> With respect to handcuffing, the law undoubtedly is, that police officers are not only justified, but they are bound to take all reasonably requisite measures for preventing the escape of those persons they have in custody for the purpose of taking them before the magistrates; but what those reasonable measures are must depend entirely upon circumstances, upon the temper and conduct of the person in custody, on the nature of the charge, and a variety of other circumstances which must present themselves to the mid of anyone. As to supposing that there is any general rule that everyone conveyed from the police station to the magistrates court is to be handcuffed, seems to me an unjustifiable view of the law, and one on which the police officers are mistaken. In many instances a man may be conveyed before the magistrates without handcuffing him, and taking him thus publicly through the streets.

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[311] *Slaveski v Victoria* [2010] VSC 441 at [131] per Kyrou J.
[312] (2000) 2 VR 246.
[313] (2000) 2 VR 246, 267 at [44].
[314] (1853) 6 Cox CC 329.

[285] In *Kumar v Minister for Immigration, Local Government and Ethnic Affairs*,[315] Lockhart J held that the power of arrest exercised by an officer of a government department implied a power to handcuff an arrested person, but only to prevent that person from escaping or endangering the safety or property of other persons. In that case it was determined that the handcuffing of the applicant was unreasonable because his conduct had not suggested that he was likely to escape or to act in a violent manner. The unlawfulness of the handcuffing however did not vitiate the already completed lawful arrest.

[286] Given the pursuit of the plaintiff in the circumstances that it arose, it was not unreasonable for Officer Winton to handcuff him. The claim of the use of excessive force must be dismissed. The force used to apprehend the plaintiff and take him into custody was justified in all of the circumstances.

7.5 Injuries and Causation

[287] As it has been found that the force used to arrest the plaintiff was not excessive force in the particular circumstances, the plaintiff is not entitled to compensation for any injury suffered as a result of the arrest.

[288] If I am wrong in that conclusion, I am not satisfied in any event that the plaintiff's injuries and conditions were caused by the actions of police on 14 July 2005. I will deal briefly with the issue of causation.

[315] (1991) 28 FCR 128.

[289] It is conceivable the arrest, in the terms as found here, was physically confronting to the plaintiff. At that time and for some time after he may have felt pain. He complained of back pain at the Watch House and later when on remand. There may have been pain and discomfort with being taken to the ground and taken into custody. Because of the complexity and long history of the plaintiff's conditions however, it is not possible to conclude the arrest contributed to the exacerbation of his conditions in a material way or at all. Neither is it possible to conclude a fresh injury was caused. The plaintiff's medical conditions that are claimed to be the result of the arrest are conditions of long standing. They are attributable to multiple causes and incidents both before and after the arrest. A causal link with the arrest cannot on balance be found. The plaintiff and a number of associates gave evidence of his deterioration at some time after the arrest. The plaintiff's associates did not however make a direct comparison before or shortly after the arrest. Most did not observe him until he had been released from custody some time later.[316] The plaintiff's former partner gave no evidence on his physical deterioration. The plaintiff asserts that his deterioration is due to the arrest and in part delayed treatment. He now needs a walking stick and has at times used a wheelchair and other aids. He believes he has been treated unjustly by police and throughout the custody, trial and sentencing process. He believes this has contributed to his psychological deterioration.

[316] For example, Damien Armstrong saw the plaintiff "more than six months up to a year after May 2005"; Peter Goodwin, saw the plaintiff "around January or February 2006".

[290] For a plaintiff to succeed, a defendant's wrongful act must have caused or contributed to the harm for which the plaintiff seeks damages.[317] The defendant's conduct need not have been the sole cause, but if the defendant did not contribute to the harm, the defendant cannot be liable.[318] The majority in *March v E & MH Stramore Pty Ltd,*[319] favoured the application of a 'common sense' approach to problems of causation. Earlier authority is to similar effect:

> The common law concept of causation is concerned with determining whether some breach of a legal norm was so significant that, as a matter of common sense, it should be regarded as a cause of damage.[320]

[291] Causation is a question of fact that must be determined by applying common sense to the facts of each case.[321] That there is a possibility the injuries were caused by the actions of police at arrest is not sufficient to prove a causal link; nor does proof of default followed by injury show that the default caused the injury.[322] The position has been described as similar to principles that apply to compensation claims when it is necessary to show that employment contributed to the injury.[323] The plaintiff bears both the

[317] Luntz, Assessment of Damages for Personal Injury and Death, Butterworths Fourth Edition at 149 citing, with other authorities, *March v E & MH Stramore Pty Ltd* (1991) 171 CLR 506.
[318] Ibid.
[319] (1991) 171 CLR 506.
[320] *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at [41].
[321] *March v E & MH Stramore Pty Ltd* (1991) 171 CLR 506, per Mason CJ at 515.
[322] *St George Club Ltd v Hines (1961)* 35 ALJR 106 at 107.
[323] Ibid

legal and evidential burden of demonstrating the causal link between the breach or wrongful act and the injury.[324]

[292] In relation to consecutive causes, and natural causes in particular, Luntz summarises the position as follows:[325]

> It is now well established that where the effects of the defendant's wrong would have occurred in any event owing to a natural condition from which the plaintiff was already suffering or which develops before the trial, the defendant is not liable for these effects, i.e. casual responsibility is attributed to the natural condition and not the wrongful act.

[293] Counsel for the respondent has drawn the Court's attention to a number of relevant authorities, in particular *Queen Elizabeth Hospital v Curtis,*[326] where Kourakis J has usefully dealt with a similar issue:

> [128] It is not sufficient that a plaintiff prove that the injury was first discovered after the wrongful conduct. If it is not shown that the injury occurred after the relevant breach of duty the inductive force of the reasoning to which I have referred vanishes. At least in the world as we know it, conduct cannot be the cause of an injury that precedes it. A plaintiff cannot prove that a breach of duty has caused the injury for which damages are sought without proving that he or she did not suffer that injury before the occurrence of the acts or omissions by which the duty was breached. I accept that a plaintiff may prove his or her previous good health in a number of ways. The absence of symptoms, the opinion of a medical practitioner who has conducted a medical examination prior to the conduct, or the temporal features of the aetiology of the disease are the most obvious examples. Less obviously, the previous good health of the plaintiff might also be established by evidence that the plaintiff was not previously exposed to any conditions that could have caused the injury. However, in this case the evidence showed the very opposite. It showed that the plaintiff had been suffering the

[324] Consistent with *Watts v Rake* (1960) 108 CLR 158.
[325] Luntz, Assessment of Damages for Personal Injury and Death at [2.6.4].
[326] (2008) 102 SASR 534 at [128], [130].

> acute symptoms of meningitis for many hours before she presented at the defendant's hospital.
>
> …
>
> [130] I am not prepared to accept, on the present state of authorities, that for reasons of policy, a plaintiff should be excused from establishing that the injury did not pre-exist the defendant's negligence where it is difficult to do so because of the poor state of scientific knowledge. To do so would impose an onus to disprove causation on the defendant. Let it be assumed that the evidence showed that hearing tests had been performed before the time at which antibiotic treatment should have started. It could hardly be doubted that the plaintiff would be expected to lead that evidence and that her claim would be dismissed if she failed to adduct evidence that the tests showed that she had not lost her hearing at that time. It follows that it would reverse the onus of proof to find for the plaintiff, unless the defendant adduced evidence that the hearing test revealed that the plaintiff had already lost her hearing. The asbestos exposure causes where the plaintiff's injury is shown to have been caused by the wrongful conduct of one defendant or the other, and where contribution may be ordered between defendants, are in a special category. The different and more difficult policy questions that arise where the competing possibilities are between a wrongful cause and an innocent cause or causes do not allow the application to this case of the policy solution developed in those cases.

[294] The defendant submits the approach to be taken is that if the arrest was unlawful, the plaintiff must prove that the harm he had suffered would probably not have been sustained had the relevant duty been met.[327] With some modification given the intentional nature of the wrong alleged, and having regard to the application of the same principles in *Queen v Elizabeth Hospital v Curtis*, that is the approach taken here.

[327] *Amaca v Ellis* (2010) 240 CLR 11 at [51]-[62].

[295] In general terms, because the plaintiff's various conditions after the arrest were the same or at least very consistent with the nature of the symptoms and conditions before the arrest, I am unable to find there has been an exacerbation of those conditions attributable to the arrest. I have set out the plaintiff's pleaded injuries above.

[296] Based on the evidence of Dr Matarazzo and Dr Hickey and the medical records tendered, in broad terms it can be found the plaintiff's current symptoms and conditions comprise sequelae from a compromised disc at L5-S1 level in his lumbar spine and nerve root compression at that level; degenerative changes in his cervical spine; and psychological conditions involving depression and anxiety, including some symptoms of PTSD.

[297] Prior to the arrest the plaintiff's conditions and symptoms included significant disc compromise at the L5-S1 level. This involved nerve root compression and as was noted in 2003 the plaintiff suffered nerve root/ sciatic symptoms including radiating pain, numbness in his left leg and foot and foot drop. The nerve root and sciatic symptoms became more constant and debilitating. The plaintiff and Dr Matarazzo discussed surgery at around that time. As has been demonstrated from the records, the plaintiff had suffered symptoms of depression and anxiety from at least 1995.

[298] As has been summarised already, in relation to the cervical spine condition, Dr Matarazzo agreed there was a clear case of degenerative change which could be age or work related, or an injury sometime in the past. There was

no way to identify when such an injury occurred objectively or how to distinguish the condition from previous injury. He agreed any one of the plaintiff's falls in 1995, 1999, 2000 or 2004 could be the trauma leading to the presentation of the cervical spine in 2013.

[299] The plaintiff made no complaint regarding neck pain or an injury to his neck to Alice Springs Hospital staff after being taken there by the Watch House staff. He was taken to Alice Springs Hospital for a medical assessment on 16 July 2005 after he told Watch House staff his back was "giving him pain". Nothing was indicated about neck pain. There is no record in the available medical material of complaints of neck pain until 2013. Relevant medical investigations were then commenced. It is unlikely that Dr Matarazzo would not have recorded a complaint of neck pain if it had been made prior to 2013. I am unable to find the cervical spine symptoms and condition were caused by the arrest.

[300] In relation to the compromised disc at L5-S1 in the lumbar spine, as discussed this was evident in 2003 when the full CT scan was considered.[328] The symptoms discussed by the plaintiff in 2003 when he also considered surgery are similar to those he said he experienced after the arrest and are continuing. The plaintiff states the symptoms are more severe. Dr Matarazzo appeared to accept that the multiple negative life experiences the plaintiff had experienced such as imprisonment and associated serious legal difficulties could effect pain perception and coping. There are a number of

[328] Exhibit D5.

examples in the medical material, a number of which are reviewed in these reasons, when the plaintiff's descriptions of sensations of pain have been inconsistent with the objective observations. Although Dr Matarazzo did not accept that the various falls the plaintiff had between 1995 and the hearing, coupled with degenerative changes, could have caused the plaintiff's present condition, he concluded that in addition to the arrest another cause for the spinal condition was the failure to have surgery between the time of the injury and 2007. Doctor Matarazzo agreed in relation to the plaintiff's fall in prison in 2007 that for a person with his spinal condition that was quite serious. The opinion that the arrest aggravated the condition of the lumbar spine is based primarily on the plaintiff's reported increase in symptoms.

[301] As there are problems of reliability and credibility with respect to some of the plaintiff's reports in regard to symptoms, and with respect to other parts of his evidence, there is not sufficient evidence to establish the claimed lumbar spine condition was caused or contributed to by the arrest. The plaintiff's lumbar spine condition is just as likely to have been caused by degenerative changes consequent upon the injury to the L5-S1 disc observed from 2003, further injury to that disc from his fall in 2007, and the delay in not having surgery until 2007. It would be quite wrong to isolate the arrest as a cause of any exacerbation of his condition when considered in the light of other relevant events.

[302] In relation to the neurological pudendal symptoms, Dr Matarazzo accepted that given the timing of the onset of various symptoms, it was equally possible those symptoms were not brought about as a result of the arrest. More particularly in that regard I find the urinary and bowel incontinence issues were resolved within two months of the arrest and did not re-appear until around June 2007. They could have been caused by any number of injuries to the plaintiff's lumbar spine before or after arrest. I find sexual dysfunction did not appear until around June 2006 and could have been caused by a multiplicity of issues leading to his general social deterioration such as his serious legal problems and the anti-depressant medication. I find it was unlikely that the arrest caused the onset of these conditions.

[303] When reviewing Dr Hickey's evidence, it was concluded that the plaintiff's psychological condition could not be attributed to the arrest. There are multiple factors that may have contributed to the plaintiff's deteriorated mental state. A number would appear to be very serious. In circumstances where the plaintiff does not believe he committed any offence or cannot accept for whatever reason that he did, the initial remand in custody must have been a significant factor. Additionally, both he and his wife were subject to criminal property forfeiture applications and restraint of their property. He and his wife were under significant financial stress. The evidence in this hearing indicates he had difficulties securing legal representation for the criminal trial. After being on bail with onerous conditions, there were further offences filed against him in November 2005

and his bail was revoked. He was granted bail on 9 December 2005 with conditions and after various complications and delays went to trial in June 2006 and was found by guilty on 30 June 2006. He was sentenced to six years in prison and remained in prison from 3 October 2006 until 9 August 2007. He was then, as indicated at the outset, sentenced on 27 November 2008 after pleading guilty to one count of supplying a commercial quantity of cannabis. Forfeiture proceedings continued for some time. Additionally, the plaintiff had experienced symptoms of depression and anxiety from at least 1995. It is unlikely the arrest materially contributed to his psychological state.

8.0 Loss of Earning Capacity and Quantum

[304] Had the plaintiff's claim been successful, damages would be far more limited than the calculation he provided of $2,548,820. The plaintiff did not file these calculations until the hearing. His claim comprises loss of earnings of $100,000 per annum from 14 July 2005 to 2010. The plaintiff submits the assessment thereafter should be calculated on the basis that the $100,000 per annum be increased by three per cent per annum until he turns 67 on 15 August 2031. Those calculations are stated not to include "forfeited superannuation", medical costs and legal and associated costs.[329] The plaintiff estimated "pain and suffering plus humiliation and hurt" be assessed at $850,000. He has also calculated estimated disability pension

[329] Affidavit of Stuart Douglas Johnson, 20 October 2015.

payments he has received and would receive, to be deducted from the total. The plaintiff provided those calculations on an interim basis.

[305] Even if the plaintiff's claim had been successful, on the available material, the Court would have been unable to asses an amount for pain and suffering as the *Personal Injuries (Liabilities & Damages) Act* ('PILDA') requires the Court to make an assessment of that kind based on a medical report setting out the degree of permanent impairment.[330] No report meeting that requirement was tendered.

[306] Although there is significant material before the Court about the plaintiff's high level of skill as a mechanic and in related fields, and he is held in high regard by friends and work associates, the evidence lacks sufficient cogency from which reasonable final conclusions concerning pecuniary loss can be drawn.[331]

[307] The plaintiff's principle business operated at a loss. It did not appear to provide him with an income. He received most payments for occasional work by cash. There are no records of his earnings. There is evidence about what he and others recall he received from time to time for casual work or brief appointments. There are no indications of the amount of casual work he was engaging in. Prior to the arrest he appeared to work irregularly.

[330] Sections 25-27 of the *Personal Injuries (Liabilities & Damages) Act.*
[331] Above at 6-6.11.

[308] It is unlikely the plaintiff would have travelled to work in remote areas and potentially earn the $120,000 salary suggested by Mr Dermody. The plaintiff had previously rejected work out of town, preferring to be with his family and working in his business in Alice Springs although occasionally he took on casual jobs in remote areas.

[309] The sum suggested by Mr Shilds of $80,000 per annum that he offered the plaintiff to work for him as a mechanic is perhaps more realistic but the plaintiff did not accept the offer. The plaintiff was not at that time interested in full time work.

[310] It is unlikely that the plaintiff's businesses kept him in full employment. Injuries from 1995 and prior to the arrest had left him impaired to some degree and it is safe to conclude on balance, that the plaintiff did not enjoy full earning capacity at the time of arrest, although it is accepted he had some capacity to earn.

[311] Section 20 of PILDA provides for assessment of damages to be awarded for past and future loss of earnings and past and future impairment of earning capacity. Loss of earnings cannot be calculated here as there are insufficient records or other evidence before the Court to make such a determination.

[312] In respect of the claim for loss of earning capacity,[332] there is insufficient evidence on which to make anything other than a broad based partial assessment.

[313] On the available evidence it is reasonable to conclude that the restriction provided under s 20 of PILDA, to disregard gross weekly earnings that exceed three times the average weekly earnings, would not be relevant in this case. The ABS Weekly Ordinary Time Earnings,[333] for adults in the Northern Territory at the time of assessment is $1692.00 before taxation, therefore, $87,994 annually. None of the sums suggested by the plaintiff would exceed the restriction in s 20 of PILDA. The Weekly Ordinary Time Earnings is close to the $80,000 Mr Shilds said he offered the plaintiff for work, although the offer was not accepted. It is appreciated Weekly Ordinary Time Earnings were not raised in the hearing, however they are readily ascertainable as public records and incidentally coincide with the offer previously made by Mr Shilds. In my view the offer made by Mr Shilds of $80,000 per annum is a reasonable reflection of the value of the plaintiff's possible earning capacity taken at its highest without consideration of factors that tend to reduce it.

[314] In assessing the plaintiff's loss of earning capacity, a number of broad factors would need to be considered for which there is scant or no evidence. For example: the plaintiff is likely to have had reduced earning capacity

[332] Amended Statement of Claim at [12] (i).
[333] Published November 2015.

prior to the arrest as he received worker's compensation after the 1995 injury on the basis of an impairment; the available evidence indicates that prior to the arrest, aside from his business, he worked occasionally but rarely in full time work; and his work as a mechanic and in related trades was at one time highly sought after by friends and associates however he did not always take up offers of employment or work and he only occasionally travelled remotely for work. Further, he still has some capacity for work as there is evidence he still occasionally works on cars. The extent of this work is however unclear.

[315] In awarding damages for loss of future earning capacity the Court must consider relevant assumptions concerning events and adjust the assessment accordingly.[334] Aside from the plaintiff's assumption that he would work until aged 67, there have been no submissions about appropriate assumptions or contingencies.

[316] It is customary to provide an assessment of damages in the event of an unsuccessful claim. Calculations for a number of potential heads of damage have not been provided by the plaintiff with an indication to provide them in the future. Consequently, any attempt at assessment cannot be complete.

[317] On the material currently before the Court, taking a broad brush approach, had the plaintiff been successful it would be reasonable to award the plaintiff $40,000 per annum for loss of future earning capacity, from July

[334] Section 21 of the *Personal Injuries (Liabilities & Damages) Act*.

2005 to August 2031. The discount rate at 5 per cent required by s 22 PILDA would need to be calculated. It is appreciated this is incomplete but no further assessment can be made at this time on the available material. Had the plaintiff been successful, it would have been appropriate to allow further submissions and calculations to be provided to the Court.

[318] Although a number of the restrictions provided by PILDA do not apply to intentional torts when personal injury damages are not sought,[335] the plaintiff's claim is not put on that basis. The claim clearly does seek personal injuries. The Court is unable to assess damages on a basis that excludes the restrictions under PILDA.

9.0 Extension of Time

[319] The plaintiff seeks an extension of time. The limitation period prescribed by s 162 of the *Police Administration Act* expired on 14 September 2005. The writ in these proceedings was filed on 8 March 2013 and proceedings were commenced 7.5 years out of time. The Full Court held in *Johnson v Northern Territory of Australia*,[336] that the time prescribed by s 162 of the *Police Administration Act* could be extended pursuant to s 44 of the *Limitation Act*.

[320] By any measure the proceedings are not just out of time but are grossly out of time. This is especially so in the context of a prescribed limitation period of two months. Unusually however, because the plaintiff was the subject of

[335] *Majindi v Northern Territory of Australia & Ors* (2012) 31 NTLR 150 at [44] per Mildren J.
[336] *Johnson v Northern Territory of Australia* [2014] NTSC 18.

a lengthy police investigation and a criminal trial, and had made complaints against police on 9 August 2005, there are substantial records available that have mitigated the prejudice the defendant would have otherwise suffered. Although grossly out of time, the action was not "out of the blue" and a significant amount of evidence, particularly relevant to the defence case has been preserved.

[321] The plaintiff made initial complaints against police to the Ombudsman on 9 August 2005. Further information was obtained by the Ombudsman on 12 September 2005. The plaintiff points out that when he lodged the complaint he was 34 days within the expiration of the two month limitation period.[337] He submits the Ombudsman and the Office of the Commissioner of Police wilfully exhausted the two month limitation period imposed by s 162 (1) of the *Police Administration Act*. There is no evidence to support that assertion.

[322] In as much as the plaintiff's submission implies that by complaining to the Ombudsman he has the commenced an action against the Territory under part VIIA of the *Police Administration Act,* this is misguided. The complaints against police cannot be considered to be the commencement of an action. Section 162 of the *Police Administration Act* is directed to the commencement of a "police tort claim", being an action against the Northern Territory.

[337] Affidavit of Stuart Douglas Johnson, 17 January 2014, Exhibit P2.

[323] I see nothing in the plaintiff's material or the Ombudsman's records that suggests the defendant acted in such a way as to wilfully exhaust the limitation period or to induce or allow the plaintiff to believe in error that he had fulfilled the requirements tantamount to or actually commencing an action.

[324] Consistent with its processes for dealing with complaints against police, the Ombudsman's Office determined the complaints would be dealt with by the Joint Review Committee. Consistent with usual practice, the investigation of the complaints was to be conducted by the Professional Responsibility Division of the Northern Territory on behalf of the Ombudsman under supervision of the Joint Review Committee.[338] The plaintiff was advised of this process.[339] The plaintiff was advised a senior police officer would need to obtain more detail from him. Those attempts were made but were unsuccessful. In any event the plaintiff referred the investigating officer to his solicitor.[340] On 29 September 2005, the plaintiff's solicitor advised the Ombudsman's Office he would be commencing civil proceedings in relation to the complaint and arrest but was waiting for medical reports.[341]

[325] On 25 November 2005 the Ombudsman's Office wrote to the plaintiff's solicitor referring to difficulties with obtaining a comprehensive statement from the plaintiff and to the commencement of the civil action and sought advice as to whether the issues to be dealt with in the complaints would be

[338] Exhibit 4, Tender Documents, Tab 2 at 9.
[339] Ibid.
[340] Ibid Tab 2 at 12.
[341] Ibid.

addressed by the civil action or whether the plaintiff was willing to provide a statement for the purpose of the complaints.[342] The next letter from the Ombudsman's Office advised that as there had been no response to the previous letter, the Ombudsman would decline to investigate as the plaintiff had a remedy he was pursuing.[343]

[326] The plaintiff accepts he received confirmation of his complaints of 9 August 2005.[344] In that letter he was asked to respond within 14 days with additional information. If a response was not received, the letter states the office would be unable to proceed further with his complaints. The plaintiff states he responded within 14 days, awaited further advice and then attended the interview on 12 September 2005, two days inside the expiration date. The plaintiff also relied on a letter from the Ombudsman's Office of 29 September 2005 outlining the details of his complaints.[345] He drew the Court's attention to the fact that the letter is dated 15 days outside of the expiration date of the limitation period.

[327] The plaintiff said he received no further communication and believed that his matters were being satisfactorily handled by the Commissioner of Police. He states he was frustrated by apparent inaction and instructed his solicitor to commence civil proceedings by 8 November 2005.

[342] Exhibit 4, Tender Documents, Tab 2 at 15.
[343] Ibid Tab 2 at 16.
[344] Affidavit of Stuart Douglas Johnson, 17 January 2014, annexure SDJ-1.
[345] Ibid annexure SDJ-2.

[328] A case note entry from the Ombudsman's Office file of 22 November 2005 notes the plaintiff's solicitor advised he had "filed" the action but was waiting for medical reports, that the "particulars" of the writ had not been provided and he indicated he had "12 months to do".[346] Even if the processes within the Ombudsman's Office were not to the plaintiff's satisfaction, he was not prevented from filing the action. The communication between the Ombudsman's Office and the plaintiff's solicitor indicated this was progressing. The plaintiff knew he could instruct a solicitor to commence proceedings and it may be inferred that he did. Nothing in the Ombudsman's processes could have prevented him from commencing an action. While the plaintiff's lawyer did not commence proceedings within time, there is a lack of a full explanation as to why the matter is so grossly out of time, as opposed to only marginally so.

[329] The relevant principles governing extension of time applications are summarised by Thomas J in *Northern Territory v O'Connor and Rapaic*.[347] As those principles make clear, it is the plaintiff who must establish that the justice of the case requires an exercise of discretion in his favour.

[330] The plaintiff must establish that an extension of time would not result in significant prejudice to the defendant. The commencement of an action out of time is considered to be prima facie prejudicial to the plaintiff. In this case, it is clear that the recollections of some witnesses have deteriorated,

[346] Exhibit 4, Tender Documents, Tab 2 at 12.
[347] [2003] NTSC 56 at [25]-[26].

particularly James and Richard Doyle. As indicated above, their evidence could not be properly tested, particularly with respect to Richard Doyle. The diminished weight given to their evidence as a result of its deficiencies did not prejudice the defendant. While potentially there was prejudice as a result of the deterioration of their memories, and being unable to properly test the evidence, those matters were dealt with by commonly used processes assessing the weight and reliability of the evidence.

[331] Although certain points in the Amended Statement of Claim,[348] relevant to the extension of time are not supported by any evidence, there are a number of relevant records available. Although just outside of the limitation period, the plaintiff's solicitor indicated to the Ombudsman's Office that he would be commencing proceedings. It may be inferred the plaintiff instructed his solicitor to issue proceedings, if not precisely within the two month period, then shortly after. This was conveyed by the solicitor to the Ombudsman's Office. It is then unclear why the matter was delayed further.

[332] The defendant accepts proceedings No 42 of 2005 were commenced by the plaintiff by writ and summons in 2005, however the documents were not served upon the defendant until 19 March 2007.

[333] When served, the writ was supported by an affidavit of the plaintiff's solicitor dated 16 March 2007. The defendant was also served with that affidavit. As the one year period permitted by the rules to effect service had

[348] Amended Statement of Claim at [15]-[25].

expired, an application was made by the plaintiff to extend the validity of the writ. The application was opposed and the Court refused to extend the validity of the writ. Those proceedings naming the Northern Territory as the defendant were consequently dismissed on 21 March 2007.

[334] Although the plaintiff claims writ No 9 of 2009 (20920976) was filed on 22 June 2009 against Officer Dole, the defendant says it was not served in those proceedings. The plaintiff bears the onus to prove service or that relevant notice was given to the defendant. No evidence has been led to prove the defendant was served.

[335] It is appreciated that a number of important considerations operate against granting the plaintiff the extension of time. The legislative policy considerations operate against the plaintiff as the delay is extensive; there has been a deterioration of some evidence; and only a small part of the delay has been explained.

[336] As indicated however, there has been significant cogent evidence produced on behalf of the defendant. It is inferred this evidence has been available despite the length of the delay because of the earlier investigation and criminal proceedings against the plaintiff. Some of the issues raised and evidence given in the plaintiff's trial in 2006 were directly relevant to these proceedings as was material gathered in the original investigation. Although it is extremely unusual, in this particular case the defendant was not actually prejudiced. The substantial amount of evidence adduced on behalf of the

defendant lost little of its value by virtue of the delay. It appears this was because it had been largely preserved from earlier proceedings.

[337] The plaintiff's claim has been unsuccessful, however as already noted, he made some attempts at an earlier time to progress the claim. Although unsuccessful, it is apparent he believes, and has for some time believed that he was injured when arrested by police. It is accepted that a significant part of the delay has not been satisfactorily explained, however the plaintiff made attempts through solicitors to progress his claim at the outset.

[338] Although the plaintiff was not successful, on balance the interests of justice were best served in these unusual circumstances by a full hearing to finally determine the issues that have long been outstanding between the parties.

[339] While the order extending time will be made for the reasons given, the residual discretion in s 44 (3) (b) of the *Limitation Act* is not relevant. The plaintiff sought to rely on the receipt of a report from Dr Frost in 2012 expressing an opinion that the arrest on 14 July 2005 exacerbated a previously diagnosed condition of depression and therefore was a fact material. The residual discretion in s 44 (3) (b) of the Act applies only to limitation periods provided by the *Limitation Act*.

[340] Potentially this material might be regarded as a relevant factor to consider in the exercise of the discretion to extend the time within which to bring a police tort claim, however the position is by no means clear. The receipt of Dr Frost's report in 2012 does not explain the delay in commencing

proceedings with respect to the physical injuries the plaintiff claimed were attributable to the arrest.

Orders

1. The plaintiff's application for an extension of time is granted for the commencement of proceedings for relief until 8 March 2013 pursuant to s 44 of the *Limitation Act.*

2. The plaintiff's claims are dismissed and I order judgment for the defendant.

3. Reasons for the decision are published.

4. I will hear the parties as to costs.