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## District Court of New South Wales

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### Randall v State of New South Wales [2013] NSWDC 277 (5 December 2013)

Last Updated: 12 February 2014

This decision has been amended. Please see the end of the decision for a list of the amendments.

District Court

New South Wales

Case Title:	Randall v State of New South Wales
Medium Neutral Citation:	<a href="#">[2013] NSWDC 277</a>
Hearing Date(s):	11-15, 18-19 March 2013; 22 April 2013; 3, 5 December 2013
Decision Date:	05 December 2013
Before:	Neilson J
Decision:	Verdict and judgment for plaintiff
Catchwords:	TORT - Assault - Plaintiff pushed and sprayed with OC spray by police TORT - False imprisonment - plaintiff detained by police without lawful excuse EVIDENCE - Credibility of police evidence, conflict of police and ambulance evidence DAMAGES - Aggravated compensatory damages - Exemplary damages
Legislation Cited:	<a href="#">Crown Proceedings Act 1988</a> <a href="#">Law Reform (Vicarious Liability) Act 1983</a>
Cases Cited:	State of New South Wales v Delly <a href="#">[2007] NSWCA 303</a>

State of New South Wales v Quirk [\[2012\]](#)

[NSWCA 216](#)

Zaravinos v State of New South Wales [\[2004\]](#)

[NSWCA 320](#)

Category: Principal judgment

Parties: Wayne Anthony John Randall (Plaintiff)  
State of New South Wales (Defendant)

Representation

- Counsel: C Steirn SC (Plaintiff)  
D Woodbury (Plaintiff)  
M Spartalis (Defendant)

- Solicitors: Foott, Law & Co. (Plaintiff)  
McCabe Terrill Lawyers (Defendant)

File Number(s): 2012/158922

Publication Restriction: No. Names of certain witnesses bowdlerised.

## JUDGMENT

1. HIS HONOUR: The plaintiff, Mr Wayne Anthony John Randall, brings an action for damages for the torts of assault and false imprisonment. The plaintiff claims compensatory damages, aggravated damages and exemplary damages. He brings his action against the State of New South Wales as being vicariously liable by statute for the wrongs committed by members of the New South Wales Police. The first three paragraphs in the statement of claim are these:

"(1) At all material times, Police Officers involved in this matter were members of the NSW Police Force and, as such, were, pursuant to [s 6](#) of the [Law Reform \(Vicarious Liability\) Act 1983](#), deemed to be persons in the service of the Crown.

(2) Pursuant to [s 8](#) of the [Law Reform \(Vicarious Liability\) Act 1983](#), the defendant is vicariously liable in respect of torts committed by persons in the service of the Crown.

(3) The plaintiff is entitled to bring these proceedings against the defendant pursuant to [s 5](#) of the [Crown Proceedings Act 1988](#)."

The first two pleas in the defence are these:

"(1) As to paragraphs 1 and 2 of the statement of claim, the defendant is unable to admit vicarious liability for the actions of the unnamed and unidentified police officers referred to in the statement of claim pursuant to the provisions of [Pt 4](#) and [ss 9-9C](#) of the [Law Reform \(Vicarious Liability\) Act 1983](#) NSW for the reason that notwithstanding particulars requested from the plaintiff and inquiries made up to the present time, the defendant has not been able to identify such police officers. However, the defendant's inquiries are ongoing and should it transpire as a result of further inquiries that the police

officers are able to be identified, then in those circumstances the defendant may file an amended defence making the necessary admissions, if appropriate.

(2) As to para 3 of the statement of claim, the defendant says that having regard to its present inability to identify the alleged police officers, it cannot make an admission pursuant to the provisions of the [Crown Proceedings Act 1988](#) (NSW) that it is the correct entity to sue in respect of the allegations raised by the plaintiff."

The defence was never amended. However a number of members of the New South Wales Police have been identified during the course of the hearing, and a large number of them have given evidence. For reasons which will in due course become apparent, the persons alleged by the plaintiff to be those involved in what he claims were tortious acts against him have been identified, and the defendant has not taken any point that the State of New South Wales is not vicariously liable for the actions of the named police officers.

2. The relevant parts of the statement of claim are these:

"(4) Between 12.30am and 2am on 23 April 2011, the plaintiff was on Canterbury Street in Casino in the state of New South Wales.

(5) At or about that time, the plaintiff was filming via his mobile phone the conduct of Police speaking to another citizen.

(6) At or about that time, the plaintiff was assaulted by a Police Officer.

(7) The Police Officer assaulted the plaintiff by:

(a) pushing/shoving the plaintiff (the 'first assault');

(b) deploying capsicum spray to the plaintiff's face and neck area whilst the plaintiff had raised his arms in the air (the 'second assault')[.]

(8) Immediately thereafter the plaintiff was arrested by one or more uniformed Police Officers by placing him under arrest.

(9) At that point the plaintiff was completely under the control and restraint of the Police Officers and was now detained against his will."

The statement of claim then provides particulars of the "wrongful arrest". The statement of claim then continues thus:

"(11) By virtue of being wrongly arrested the plaintiff was thereby falsely imprisoned.

(12) The plaintiff repeats the matters set out in paras 1 to 11 above.

(13) The plaintiff was physically arrested and taken into custody (the imprisonment).

(14) The plaintiff was taken by police vehicle to the Casino Police Station and placed into custody in the presence of the Police Officers.

(15) The plaintiff was released from custody around 2am on 23 April 2011 and therefore was falsely imprisoned for around two hours.

(16) Throughout the duration of being wrongfully arrested and falsely imprisoned the plaintiff was completely deprived of his liberty.

(17) The plaintiff was released without charge."

The remaining paragraphs in the statement of claim allege damage and particulars of both compensatory damages, aggravated damages, and exemplary damages are also given. In para 15 I have amended what was pleaded, namely "1.30am", to "2am", nunc pro tunc, as that amendment should have been made when the plaintiff amended par 4 of the statement of claim on 19 March 2013. The defendant does not admit any of the allegations made in pars 4 to 17, but specifically denies the causation of any damage.

3. As the plaintiff's case was eventually argued, he was assaulted at about 1.20am on Saturday, 23 April 2011, and immediately arrested without due cause. He was then conveyed in a caged police truck to the Casino Police Station, where he was imprisoned in a cell until treated by ambulance officers and released from custody without charge shortly after 1.44am, which is the time at which the ambulance officers finished their treatment of the plaintiff. The false imprisonment is alleged to have occupied approximately 30 minutes.
4. The defendant's case is, in essence, that the plaintiff's allegations are a fabrication. One view of the defence case is that the person treated by the ambulance officer was not the plaintiff, but the plaintiff's cousin, Colin Laurie, a 15-year-old Aboriginal youth. At the time of the alleged torts, the plaintiff was aged 20, and although he is a quarter-caste Aboriginal, he has the appearance of an Anglo-Celt. Another version of events open on the defence case is that the plaintiff pretended to police that he was Colin Laurie. In any event, the defendant puts the plaintiff to proof of his causes of action.
5. Relevant persons in these proceedings are the plaintiff, who was born on 15 October 1990, and was 20 years old at the time. Another person involved is his brother, Colin Randall, who was born on 6 November 1992, and was aged 18 at the time. Also mentioned is the plaintiff's cousin, Joshua Harvey, who was 22 years old at the time. The other relevant person is Colin Laurie, who was born on 23 December 1995, and was at the relevant time 15 years old.
6. Police involved in this matter are Senior Constable Michael John Opryszko who, on the evening of 22 to 23 April 2011, was working alone and driving the detectives' vehicle which has been described as a Pajero and had the call sign Casino 14. There were then those police working out of a Ford Falcon sedan which had the call sign Casino 38. Those officers were "Alpha" and "Beta". In a caged police vehicle with the call sign Casino 21 were "Gamma" and "Delta". Also involved were two members of the Highway Patrol, Leading Senior Constable Stephen Gordon Nixon and Senior Constable Michael Stewart whose vehicle is variously described but according to the police roster, exhibit D, was known as RM0069 and was also given a call sign of R207. Assisting the Casino police on the evening and night in question were two members of the New South Wales Police from Kyogle, driving a vehicle with the call sign Kyogle 23. They were Senior Constable Michael Douglas McCormack and Constable Claire Beek who subsequently married and was also promoted, and when giving evidence, was known as Senior Constable Claire Tuckett. Although Senior Constable McCormack and Constable Beek had the call sign Kyogle 23, that vehicle was actually out of service and they were driving a caged police truck identified as Bonalbo 26. I will refer to this pair as the officers in Kyogle 23. Where I need to refer to police officers, I shall refer to their rank at the dates now in question, 22 and 23 April 2011.
7. Also involved in this matter are two members of the New South Wales Ambulance Service. They are now retired paramedic Mr Glen Murray Stalker and Mr A Mactier. I shall refer to these ambulance officers as Mr Stalker and Mr Mactier.
8. The next thing to bear in mind is the course of these proceedings. I commenced a sitting of the civil jurisdiction of this Court at Coffs Harbour on Monday, 11 March 2013. After taking appearances, this exchange occurred:

"HIS HONOUR: The estimate here is one day. Is that correct, Mr Steirn?"

STEIRN: Pardon, yes, that would be correct.

SPARTALIS: It would be a very short matter, your Honour, if it is."

The case started on Monday 11 March, and continued till Friday 15 March. Then recommenced again at Coffs Harbour on Monday, 18 March, and the evidence was completed on Tuesday, 19 March 2013. The estimate was one day and the evidence took seven. The curial process was interrupted repeatedly with calls for documents and their production and the issuing of at least one subpoena, urgently, for production, and evidence was adduced on a piecemeal basis. It was an extended form of discovery which certainly prolonged the proceedings and raised new issues from time to time.

9. I make no criticism of any of the lawyers involved in this case. It appears that the matter developed a life of its own as various avenues were explored. The matter was eventually fixed for two days in Sydney, 3 and 4 December 2013, the idea being that addresses would take place on the 3rd and judgment would be delivered on the 4th. Mr Spartalis addressed me from 10am to 4.40pm on Tuesday and Mr Steirn addressed me from 10am till 3.40 yesterday and was followed by a short address in reply by Mr Spartalis. That caused me to have to give judgment today.
10. The plaintiff's case was a very simple one. The plaintiff is a usually resident in South Grafton where he lives with his mother. At the time of giving evidence he was employed by Hungry Jack's and had been so employed for five years. He has been undertaking Certificates in Sound Production, and at the time he gave evidence, was studying for Certificate IV. On 22 April 2011 the plaintiff went to Casino to attend a friend's 18th birthday. He was not a regular visitor to Casino but he decided to go there to celebrate his friend's birthday.
11. The evidence discloses that there was a large 18th birthday party being held in Casino on 22 April 2011 and the friend identified by the plaintiff was "Bernie". There is also reference in the police evidence to the large 18th birthday party in Canterbury Street but, whether that was Bernie's party or another, the evidence does not disclose. Nothing however turns on that. In order to attend the party the plaintiff was to stay with one of his aunts, Christine Bennett. The plaintiff had another aunt, Barbara Harvey, who lived in Boronia Crescent, Casino, and one can infer that Barbara Harvey is the mother of Joshua Harvey whom I mentioned earlier.
12. The plaintiff attended Bernie's party and left it and went to the local RSL Club. The RSL Club in Casino is known as the RSM Club, being, as I understand it, an abbreviation for Returned Soldiers' Memorial Club. When the plaintiff went to the RSM he went there with his brother, Colin, and with his cousin, Josh Harvey. According to the plaintiff's evidence-in-chief when he left the RSM Club he was walking "home" with his brother and his cousin, Joshua. They were going back to his aunt's house. The plaintiff was not challenged about his journey from the RSM Club back to his aunt's house. The plaintiff commenced his narrative of what happened on the evening in question with a long answer recorded at p 10 of the transcript. I paraphrase it in this fashion: The plaintiff, his brother, and Joshua saw as they were walking home some police on their left. The plaintiff and Joshua started to muck around and then Colin Randall advised that he wished to go home. They went round a corner and the plaintiff then realised that his brother was also mucking up. The plaintiff said that he then looked to his right as he was in West Street and noticed that his brother was not ahead of him, heading directly towards his aunt's place and he saw lights on the side of the school in West Street and then he saw police. The plaintiff then said that his brother was on the opposite side of the street to him and he saw the police approaching his brother. He saw them jump out of a car and then go towards Colin Randall and he saw them, "like, intimidate him and everything and, yeah, like they were pushing him around."
13. When the plaintiff saw this interaction between the police and his brother Colin, he took out his BlackBerry mobile phone and tried to obtain a video recording of this interaction. The plaintiff said that he was hiding behind one of the caged police trucks, familiarly known as paddy wagons, because he knew that the police were not going to react kindly if they caught him making a video recording of their activities with his brother. The plaintiff indicated that he was holding his phone in front of his face with a hand on each side of his phone. The plaintiff said

that he was recording for at least thirty seconds, and perhaps as much as a minute when this happened:

"Well, as I had the phone in my face and I was recording and listening to what the police were saying and that, yeah, a police officer just like came up out of nowhere and surprised me and pushed me in the chest and then said like, 'What are you doing,' and I was, like, 'I'm recording you police, like, there's five of you on my younger brother and, you know, I'm recording that,' and then he said, 'Don't assault a police officer.'"

The plaintiff denied that he assaulted any police officer. The plaintiff said that when he heard that expression he was scared and he realised, or rather thought, that the policeman was trying to get his phone, which was being used as a video camera, from him. The plaintiff raised his hands above his shoulders with the camera and the police officer then said, "Assault me again and I'll pepper spray you." According to the plaintiff that was said in an intimidatory fashion.

14. The plaintiff then said that the policeman pulled out his pepper spray and sprayed him and he dropped to the ground. He said that he was unable to see anything after the pepper spray was sprayed into his face and he dropped his phone and covered his face. He dropped to the ground because, not being able to see anything, he was scared and if he was on his feet something else might happen to him. The plaintiff said that after being sprayed he was unable to physically open his eyes and his whole face was burning. He said that he was on the ground for about five seconds or so and held both his hands over his face. He said that he was, in essence, required to hold his hands over his face for nearly all the time, "99.9%" of the time until he was eventually decontaminated by ambulance officers. After a short time on the ground the plaintiff said that he felt an arm grab him on the shoulder and he heard the words, "You're under arrest," and then he felt another arm on his other side and he was lifted up off the ground, he believed by two officers, and was pushed into the back of a caged police truck. He believed that they were two male officers wearing the uniform of the New South Wales Police.
15. He heard the door of the paddy wagon being shut. He heard the motor switched on, and they drove the plaintiff to what he believed was a police station. The plaintiff accepted that he was saying things to the police such as, "What did I do wrong?" The trip to the police station was some five minutes long. Five minutes is generally used in the vernacular as indicating a relevantly short time, just like the biblical forty days and nights indicates a very long time. The evidence from police officers indicates that the length of a journey from the corner of West Street and Canterbury Street, Casino, to the Casino Police Station on the corner of Richmond and Walker Streets takes about one minute. This exchange then occurred:

"HIS HONOUR

Q. Yes. Well, see all I'm getting at is the nearest other police station is at probably Lismore, which is about a half hour away, were you in the car that long?

A. No, I wasn't in there for half an hour.

Q. Or Grafton, which is about an hour away?

A. No, it wouldn't have been an hour, no.

Q. West would be Kyogle, there for about an hour in the back of a paddy wagon for about an hour?

A. No.

STEIRN

Q. Well, why do you know it's Casino Police Station?

A. Well, when, when the ambulance fixed up my eyes like I could squint a little bit like I had to see like that.

Q. No. We just want to know why - do I take it, I won't lead but...

STEIRN: Is there any dispute it's the Casino Police Station.

SPARTALIS: Yes."

It can be seen from the outset that everything was in dispute. There is no longer any dispute that if the plaintiff went to a police station, it was the Casino Police Station. The plaintiff said that when he was eventually released from the police station he walked home to his auntie's house which was a walk of about half an hour. There can be no doubt that if what the plaintiff says be correct that he was taken to the Casino Police Station rather than some other station.

16. When the caged police vehicle arrived at the police station, the cage was opened, the plaintiff was grabbed by an arm and was led into the police station. Because he could not see his way, he needed to follow a police officer. When he tried to open his eyes he felt more stinging than when he had his eyes covered with his hands and, presumably, shut. The plaintiff said he was put in one of the cells and he just sat down on a seat and put his hands over his eyes. He described the seat as being a "cold metal seat". It is clear from other evidence the plaintiff gave that when he was placed in this cell that the door was shut because he could recall the door being opened later.
17. The plaintiff was asked if he had any discussion with the police. The plaintiff said that he was remonstrating, in essence, with the police about why they applied capsicum spray to his face. He said he made that inquiry, if not demand, multiple times because he wanted to know why he had been sprayed, what he had done wrong. After being in a cell for some time, he recalled the door of the cell being opened and then he noticed ambulance officers treating his face. The plaintiff said he saw two ambulance officers, and then this evidence was given:

"Q. Could you describe the treatment by feeling, what did you feel that they were doing for you?

A. It just felt like a conditioner or something on my face and just water, like, just felt--

Q. Did he tell you something about it at the time as to what it was?

A. It was like a shampoo, he said, it was a shampoo or like a shampoo.

Q. Is that your words or his?

A. His words."

That evidence is perfectly acceptable because Mr Stalker gave this evidence as to the "high-tech" treatment for oleo-capsicum spray on the human face:

"Our treatment is, I mean it's quite simply it's the use of, we have little satchels of Johnson's baby shampoo and we use that, place the patient's head over the sink and all over the patient's head, yeah, and then we get the patient to rub it all through them and over where they're stinging and then copious amounts of water and shampoo."

The description of the treatment which the plaintiff said he was given is consistent with his actually being treated, and the application of Johnson's baby shampoo by ambulance officers is not something that most members of the community would expect. They would expect something much more sophisticated than a mere proprietary, baby product. In other words, what the plaintiff said about his treatment had the ring of truth about it.

18. The plaintiff said that he was treated for, "[m]aybe five minutes but it would have not been much longer than that." The plaintiff estimated that he was in the cell for about thirty minutes to an hour before the advent of the ambulance officers. Again, that was only an estimate of time and on the facts of the case is an overestimate, but it may represent merely the experience of a long, long time, as far as a young man was concerned, sitting by himself in a police cell suffering from a discomfort and being, in effect, blinded, waiting for treatment.
19. After the ambulance officers had treated the plaintiff, a police officer gave back to the plaintiff his mobile phone. After telling me about the police officer giving back his mobile phone the plaintiff said this:

"I was speaking to him, like, 'Why did you pepper spray me?' like, I don't know if it was him but, you know, he's a police officer so I was saying, 'Why did you pepper spray me?' and he still didn't give me no clear, clear answer or anything like that and then I said, 'I live in Grafton,' and...he said, 'You'll see me around a lot more,' along them lines."

The plaintiff said that he was then let go and he went home to his aunt's place. The next day, which I inferred was on 23 April, the plaintiff checked his phone and noticed that all the video recordings which he had made on his phone had been deleted.

20. In March 2011 the plaintiff had attended a music festival in Brisbane. It was known as Superfest. It was the first such concert that he had attended. His BlackBerry took only one memory stick at a time, as well as having an internal memory. Not only the video film which he exposed prior to his being sprayed with OC spray but also the videos that he had recorded at Superfest had been deleted, as well as any other entries on the memory stick then in his phone and its own internal memory.
21. When asked how he felt about being sprayed with OC spray the plaintiff said that he was, "scared and helpless". When asked how he felt about being placed in a police cell, the police said he, "Just hated everything. I was just pretty angry." He was also upset at the fact that his inquiries of the police were not being answered. When asked how he felt about the fact that, since that time up until giving evidence on 11 March this year, the police were denying that anything untoward had happened to him, he told me it made him feel angry and depressed.
22. In cross-examination, the plaintiff agreed that he had taken alcohol on the evening prior to the events about which he was complaining. Prior to going to the RSM the plaintiff had been drinking Tooheys Extra Dry beer. He said at most he would have drunk a sixpack of those beers, but also estimated that he may have only drunk four. One can safely find that he drank at least four bottles of Tooheys Extra Dry. At the RSM Club he drank three cans of Bundaberg Red Rum and cola. The plaintiff is a tall man but a thin one. I can accept that he was affected by alcohol at the time of the events of which complained. He went on to say that he went to Bernie's party at about some time between 7.30 and 8pm on 22 April. When cross-examined about his interaction with the police the plaintiff told me that he was, before being sprayed, pushed in the chest by a policeman. He said that the policeman said to him, "What are you doing?". The plaintiff said that the policeman pushed him hard enough for him to stumble backwards. He went on to give this evidence:

"...he pushed me in the chest and he's like what, you know, 'What do you think you're doing?', I'm like, 'I'm recording youse, what youse doing to my younger brother, who's about five years', then he said, 'Assault me again.', then I put my hand up in the air, you know, 'I didn't assault you', blah, blah, blah, and then he just pulled out his pepper spray and pepper sprayed me."

One will recall from the statement of claim which I have quoted that the first assault alleged was a pushing/shoving of the plaintiff, and the second assault was the deployment of OC spray on the plaintiff's person. The plaintiff omitted to tell me in chief of the first assault, but he did volunteer it in



cross-examination and it can hardly be suggested that it was some novel invention of the plaintiff because it had been pleaded in the statement of claim which commenced these proceedings.

23. Mr Spartalis then pressed the witness very properly to try to identify the police officer who confronted him. He described him as a "big boy", and he said that he was, "a lot bigger than the rest of the cops that [were] over there." He then volunteered that the officer was obese. The plaintiff said that he was 175 centimetres tall, and that this policeman was about five centimetres shorter than him, placing his height at about 170 centimetres. When asked about the colour of the policeman's hair, the plaintiff said that the policeman was wearing a hat or cap. On the second day, the plaintiff described the officer as being stocky or solidly built and was unable to give his age, but he said, "I wouldn't say he was young." Many police officers are male, in their 30s and 40s, many these days still are heavily built, and it is common these days for policemen to wear baseball caps with police insignia. A height of 170 centimetres is not unusual. The plaintiff really gives only a generic description of the policeman who he said assaulted him and does not enable one to make any particular finding based on any description.
24. When pressed as to why he could not give any better description of his assailant, the plaintiff told me that he was more concerned about trying to protect himself than he was in trying to identify the policeman or take particular note of any identifying feature. I can accept the plaintiff's evidence in that regard.
25. The plaintiff was then cross-examined about his cousin, Colin Laurie. The plaintiff told me that Colin Laurie had been at Bernie's party but he did not go with the plaintiff and his brother and Joshua Harvey to the RSM Club because he was too young to go to licensed premises, and also that Colin Laurie was not with him "through any of this incident", meaning the interaction of the police with Colin Randall, and the interaction of the police with the plaintiff.
26. The plaintiff then said that he was staying with his aunt, Christine Bennett, who lived near the train station at Casino, and not with Barbara Harvey who lived at Boronia Crescent, Casino, where Colin Laurie was staying. By looking at the map, exhibit H, one can see that if one follows Canterbury Street due west from the RSM Club which has been marked with a red cross, one arrives very close to the Casino railway station. Boronia Crescent, Casino, is not shown on exhibit H, but it is shown on exhibit O, and it is a long way away from the intersection of West and Canterbury Streets, Casino, and a long way away from both the police station and the RSM Club.
27. The plaintiff was asked whether when he was in custody at the Casino Police Station he saw or heard anyone else. He said he did not. He was then asked if his cousin, Colin Laurie, was at the Casino Police Station when he was, and the plaintiff was completely unaware of the presence of any person other than himself and the police at the police station.
28. The plaintiff was asked about the caged police truck or paddy wagon into which he was placed. He said that the caged police truck was white. In that regard he is correct. The two police trucks involved in the current matter were Casino 21 and Kyogle 23 and each of them has a white cage at the rear. However, the entry to the caged truck is at the back end of each side of the truck, and not in the middle at the back. The middle of the back of a caged truck is where one would expect to find the entrance to the cage, if it was the old-fashioned Black Maria that used to be used by the Police Force. The plaintiff has been criticised about the fact that he said that he got into the back of the caged truck through the door in the middle of the back but, as the plaintiff pointed out in answer to a question on p 51, he merely assumed the door was at the back of the truck. The evidence does not disclose that he is overly familiar with police caged vehicles. In cross-examination the plaintiff was insistent that he felt two officers placing him into the back of the truck, one on each arm. They pushed him in. They may have lifted up his legs to get him inside the cage.
29. The plaintiff also said that when he left the police station he was not given any "paperwork or anything". That was what he volunteered in answer to the question that he was not charged with any offence. Presciently, Mr Spartalis cross-examined the plaintiff on the second day of the hearing by suggesting to him that the incident with his brother occurred at approximately

1.20am on 23 April 2011. It is now common ground that the answer to that question should have been in the affirmative, however, the plaintiff would not accede to that at the time because as far as he was aware he was treated by ambulance officers at 1.30 and the time between the events in which he was engaged and his treatment by the ambulance officers was much longer than ten minutes. However, the plaintiff did concede that he didn't know the exact time and was only providing rough estimates. Indeed, the plaintiff's answers given on p 13 of the transcript of 12 March 2013 clearly indicate that the plaintiff was reconstructing to an extent in trying to provide times and the length of any event.

30. In further cross-examination the plaintiff was asked whether the police attempted to decontaminate him from the OC spray and he said that the police did not. This question and answer were then recorded:

"Q. And you're a hundred per cent sure that no police officer assisted you by providing you with water or taking you to a bubbler?"

A. No. I don't think they would have after they pepper sprayed me [.] Why would - like it's a bit stupid, you pepper spray someone and then you help them, they were obviously very evil that night in a sense."

The words "obviously very evil" are clearly the plaintiff's perception of what had happened to him on this evening at the hands of police. I then pointed out to Mr Randall that he should try to moderate his language and leave the arguing of the case to his lawyers. However, if one accepts the plaintiff's evidence what happened to him can be seen in many respects to have been evil.

31. The plaintiff was then cross-examined about whether he was being aggressive and ranting to the ambulance officers. That part of the cross-examination commences on p 19 of 12 March 2013. The plaintiff's position is that he was not being aggressive or ranting to the ambulance officers but may have been acting in a hostile fashion towards police, and bearing in mind what the plaintiff said happened to him and bearing in mind his state of intoxication, one can understand he may have been aggressive, and he may have been expostulating or ranting. As Mr Stalker pointed out, it is common for those sprayed with capsicum spray to be aggressive because of firstly having been sprayed with capsicum spray, and secondly being in custody.
32. Mr Spartalis then returned to the question of whether there was anybody in the Casino Police Station in custody at the time the plaintiff was. The plaintiff answered that inquiry thus:

"Well, according to you there was Colin Laurie there, but I don't recall Colin Laurie being there, as I said I couldn't see. I was in my own world."

This question and answer were then given:

"Q. Can I suggest this to you, that the person who the ambulance officers treated was a person who identified himself by the name of Colin Laurie?"

A. Yeah, and?

The response recorded is a vernacular, rhetorical response which is, in fact, a denial of the proposition that was put to the witness. Clearly it was being suggested to the plaintiff that the person being treated was Colin Laurie. That question must have been put on instructions from a member of the Police Force. Furthermore it is consistent with some evidence given by some members of the Police Force.

33. Later Mr Spartalis put to the plaintiff that he may have given his name as Colin Laurie, but he denied that he did so and pointed out that he was unlikely to put a younger member of his family

in a position where he could be seen to be in trouble. The plaintiff denied that two police officers took him "home" to Boronia Crescent at about 1.30am on that evening. Clearly that question was also put on instructions provided to Mr Spartalis by the police. The almost final questions put to the plaintiff were these:

"Q. Let me put this to you, Mr Randall, can I suggest to you that either you were mistaken that you were in police custody at the time alleged?

A. I was mistaken?

Q. Yeah, about being there?

A. The ambulance report proves that I was there in the custody of the police.

Q. Or can I suggest to you that perhaps by error you gave police the name of Colin Laurie, if it was you who in fact the--

A. If I did give the name - okay...

Q. ... police had taken into custody?"

A. Well, why is it that on the ambulance report it says Wayne Randall, not Colin Laurie, and Colin Laurie is not sitting in my position right now. That proves that I was there, the ambulance prove that I was in the police station, I got pepper sprayed, not Colin Laurie. Any further questions."

In answer to that response Mr Spartalis sat down.

34. Exhibit B are records produced by the Ambulance Service of New South Wales. The Ambulance Service received a call from the police radio at 1:23:19 on the morning of 23 April 2011. The call was answered at 1:25:29. That information is contained in the computer-generated records of the Ambulance Service in exhibit B. According to the manual records an ambulance was booked at 1.23 and arrived at the Casino Police Station at 1.31, and made contact with a patient at 1.32. The complaint was about "capsicum spray", and the narrative is this: "Decontamination of male patient in police custody - patient aggressive and ranting." The name recorded of the patient is Wayne Randall, but the surname has been misspelt by omitting the final "l". The address given for Mr Randall is merely Grafton. His date of birth is not recorded, but his age is recorded as being 20 years old. Mr Stalker gave evidence. He made it clear that he had no independent recollection of treating the plaintiff at the Casino Police Station, but confirmed that he was the officer who carried out the treatment, and he said that the top part of the manual ambulance record had been filled in by his co-worker, Mr Mactier. That apparently is the normal procedure, and the ambulance officer who renders the treatment fills in the lower part of the manually completed ambulance record.
35. It is clear from Mr Stalker's evidence that Mr Stalker was at home on call with one ambulance vehicle, and Mr Mactier was at the local hospital with another ambulance vehicle on call, that they met at the Casino ambulance station and then proceeded in one vehicle to the Casino Police Station. They finished their treatment of the plaintiff and called "clear" at 1.44am, which means that they were free to attend another job from that time onwards. In essence, it tells me when they finished treating the plaintiff.
36. Accordingly, after the ambulance officers left the police station, there would have been some short time in which the plaintiff would have been given his phone back, have a desultory conversation with at least one police officer, and then would have left the station. If it be correct the plaintiff was assaulted at 1.20, then one could see that he left the police station a few minutes after 1.44 and one therefore can say that the extent of any false imprisonment was approximately 30 minutes.

37. The first thing I have to say is this: I formed a favourable impression of the plaintiff and I am prepared to accept that he has done his best to tell me the truth. Clearly his memory of events was affected by what actually happened to him as well as by the fact that he was intoxicated at the time relevant events occurred. One can understand over-estimating a time and he may have felt abandoned in the police station. One can understand that he was not keeping any record of when things were happening when he was out "partying", being at Bernie's party and then at the RSM, and one can understand his reconstruction of events which has led to various particulars being given which were obviously incorrect. However I can accept the kernel of what the plaintiff told me, that he was pushed by a police officer, sprayed with OC spray, put into the back of a police caged truck, taken to Casino Police Station, and kept there for about a half hour, and that whilst there, he was decontaminated by Mr Stalker of the New South Wales Ambulance Service.
38. In making that finding about the plaintiff's credibility I anticipate other findings about credibility which I must make concerning other persons. The plaintiff is clearly corroborated by Mr Stalker, and for reasons to which I will in due course turn, I can accept that they did treat Wayne Randall at the Casino Police Station rather than Colin Laurie. The records of the Ambulance Service are clear and there is no reason for the Ambulance Service or Mr Stalker or Mr Mactier to be in any way partisan towards the plaintiff or indeed partisan towards the police. I clearly accept the ambulance records as being accurate and the evidence of Mr Stalker, as far as it goes, has been reliable.
39. To deal with the police evidence, I should firstly deal briefly with the position of Senior Constable Opryszko. As I have already mentioned he was working alone on this occasion. On Friday, 22 April 2011, about 8.05pm a man living in Casino, reported that his daughter's friend, a 13-year-old girl, had been sexually assaulted. The allegation was penile vaginal penetration. Police attended within ten minutes. The principal attending officer was initially Alpha. At 9.30pm he was relieved by Senior Constable Opryszko who, between 9.30pm and 1.50am, guarded the crime scene where the sexual assault had taken place. Senior Constable Opryszko was joined by Sergeant Carroll of the Crime Scene Unit at 1.10am on the morning of 23 April 2011, thus causing him to leave the crime scene at 1.50am. Eventually he returned to the Casino Police Station shortly after 1.50. It is possible that he may have stopped to refill the Pajero with petrol, but that would have not taken any great time. Senior Constable Opryszko was rostered to work until 3pm and he did so. When asked if he could recall who was present when he returned to the police station, Senior Constable Opryszko was unable to remember who was there. Senior Constable Opryszko has nothing to do with the current matter and neither his conduct nor his evidence can be in any way called into question.
40. It is perhaps convenient if I deal firstly with the police case against Colin Randall. At 2am on the morning of 23 April 2011 Alpha made an entry in his police notebook when he was at Casino Police Station. The entry is this:

"St Mary's High School. Colin Randall. Failed to comply. Requested several times to leave as done on four other occasions and stated, 'No, I'm staying here'. Was going to be arrested for continuing offence then ran from police. Not sighted again. POI known and [infringement notice] to be issued for failing to comply."

On a later shift commencing at 7.57pm on 23 April 2011 Alpha generated a COPS entry. He commenced that by giving the time and date as, "About 0200 hours Saturday 23 April 11." However, in his evidence Alpha admitted that the actual events occurred at about 1.20 or 1.30. In chief this evidence was given:

"A. Well, I pulled out into West Street, I noticed Colin Randall, I've spoken to Colin Randall in the past, on that where I've marked that X sitting down against the wall and I've approached Colin Randall.

Q. What time was that?

A. It would have been about 1.20."

In cross-examination at the foot of p 49 and the top of p 50 of the transcript of 14 March 2013 Alpha said that his notebook entry was made at 2am and he estimated from the time of making the entry in the notebook that the events occurred at about 1.20, 1.30am on the morning of 23 April 2011.

41. The narrative generated by Alpha in the COPS entry is this:

"On Friday 22/4/11 police closed a large 18th birthday party within Casino and as a result large groups of persons left and soon entered the Casino CBD. One of these persons being the accused, Colin Randall. Police first spoke to Randall near the Cecil Hotel, where he was abusive towards police and inciting the group to engage in arguing with the police, and also challenging police. The accused was moved on and continued walking, being told to leave the Casino CBD area and to go home. The accused was again spoken to in front of KFC Casino where he challenged police again, police telling him again to move on and leave the area or be arrested for failing to comply. Police having had to also attend to other jobs, left the area and soon returned to find the accused loitering around McDonald's carpark, only 50 metres from where he was last told to leave the area.

Police advised him again to move away from the area completely. Police followed a large group of persons behind the Casino RSM before returning to Casino McDonald's area where the Kyogle police were conducting a vehicle stop and the accused was there abusing police. He soon walked away on seeing the police.

42. Police were called to the area after officers were nearly hit by a beer can at the vehicle stop, and located the accused not far away on West Street, Casino. He was stopped and spoken to by other police and was issued with a further move-on direction and was to leave immediately. The accused then engaged in an argument with police, challenging police authority and the fact that police couldn't tell him what to do. Police expressed to the accused to leave immediately or be arrested. He said to police, 'No. I'm staying here.'
43. The accused in the police views had ample opportunities to leave the area of Casino CBD several times, and police felt that the accused was testing police and the limits in which he could go to before being arrested. With the accused having total disregard for police authority and police ensuring community safety, and the accused's neglect to move on, police attempted to grab and arrest the accused, but he fled upon being grabbed. Police gave chase, but lost sight of the accused, who was still abusing police, saying, 'Fucking dogs,' whilst running away. Given the amount of times the accused was spoken to and total ignorance of the accused, police have issued the accused with a fail to comply with police direction infringement notice."
44. Exhibit V is an in-car video recording made from the Highway Patrol vehicle manned by Leading Senior Constable Nixon and Senior Constable Stewart. The Cecil Hotel is on the corner of Barker and Centre Street, Casino. Centre Street is the main street of Casino. It carries both route 91 and Highway 44. I understand it to have been renumbered the B91, that is the Summerland Way, and Highway 44 is the Bruxner Highway. Exhibit V shows police vehicles pulling up at the corner of Barker Street and Centre Street, Casino, between 12.33am and 12.35am. There was a commotion at the intersection of Barker and Centre Streets, on the corner of the intersection directly opposite the Cecil Hotel. That is obviously the commotion that is first referred to. That Colin Randall moved on can be gleaned from the fact that exhibit V shows Colin Randall walking along Centre Street at 12:39am heading north, that is away from the Cecil Hotel and in the direction of McDonald's, which is on the corner of Centre Street and Canterbury Street.
45. Walking north along Centre Street from its intersection with Barker Street, the first road to be crossed is Simpson Parade. The next road to be crossed is Canterbury Street. As I said, McDonald's is on the corner of Canterbury Street and Centre Street in the south-west corner of that intersection. On the north-west corner of the Canterbury Street and Centre Street intersection is the Catholic Church. Indeed it appears from exhibit J that the Catholic Church, as

an institution as distinct from a building, owns the whole, or at least most of, the block comprised of Canterbury Street to the south, Centre Street to the east, North Street to the north and West Street to the west. The southern part of the Catholic Church block comprises the church itself in the east and then the Convent of Mercy, and then St Mary's Catholic College, and on the western side are a series of buildings that has been referred to variously as the Relihan Centre. The northern side of the Catholic church block comprises St Mary's Primary School.

46. It is clear that the place where the police attempted to arrest Colin Randall was in West Street near a bus bay near the Relihan Centre, and one can accordingly see a location placed on the COPS entry for the Colin Randall matter, exhibit K, a location of "on footpath St Mary's High School". It would therefore be only a relatively short distance from the McDonald's carpark to West Street where Colin Randall was when the police sought to arrest him.
47. The narrative which I have quoted also refers to a beer can being thrown at a police vehicle. That vehicle was in fact Kyogle 23, and the place where the vehicle was when the can was thrown at it has been marked with a red "X" on Centre Street near the Catholic Church building itself on exhibit J. It is not known who threw the can, but Constable Beek did not seem particularly perturbed by it.
48. Exhibit V, the in-car video, clearly shows some of the events that occurred in West Street. When the police sought to arrest Colin Randall, he ran away into the school yards in the Catholic Church block. Those who pursued him were Alpha, who had sought to arrest him, and Senior Constable Stewart from the Highway Patrol. Accordingly that fixes the interaction of the police with Colin Randall at about 1.20am on West Street, Casino, in the block between North Street and Canterbury Street. The plaintiff therefore attempted to expose video film on his camera of the interaction of the police and Colin Randall at about 1.20am on 23 April 2011.
49. I should indicate that Exhibit K, the COPS entry which I have quoted, gives Colin Randall's address as Boronia Crescent, Casino, and observed that he was "well known to police". It also describes Colin Randall, the plaintiff's brother, as being an Aboriginal, having a light brown complexion.
50. Exhibit V corroborates the arrival of a number of police vehicles in West Street where Colin Randall had his interaction with police. My notes made of the in-car video indicate the relevant events commenced at about 1.19am on 23 April 2011. Alpha's "partner" on this evening was Beta. His statement is exhibit R. I quote four parts of his statement:

"6. I recall that some time between the hours of 1am and 2am on Saturday the 23rd of April 2011 Alpha, myself and several other officers who I believe to be Senior Constable Stewart, Senior Constable Nixon, Gamma and Delta, were on West Street in Casino behind the St Mary's High School. Also at this location were several other persons, only one of whose identity is known to me, Colin Randall.

7. Colin Randall was near the footpath behind St Mary's High School speaking with Alpha. Several other officers, including myself, were on the middle of West Street speaking with an irate, belligerent and intoxicated male whose identity is not [known] to me, but appeared to me to be about 18 years old. I cannot remember the identity of all of the officers that were near me, but there were about three or four other officers near me, and about three other officers near Alpha, about 7 metres away from me.

8. I heard various officers repeatedly tell the male on the road to 'get back', however he continued to stand very close to police. I cannot recall which officers told this person to get back, but the words "get back" were repeated several times by police. This male was holding his arms out by his side and [spoke] to police with a raised voice. I cannot remember what this male was saying.

9. I had a police issued Maglight torch in my hands and pushed this male to his chest in a 'check drill' type push. I did this to maintain a reactionary gap between myself and the male. As I was doing this another officer deployed a short burst of OC spray towards the male. Some of this OC spray made contact with my face, including my eyes. The OC spray also made contact with the male's face, and

appeared to take effect almost immediately. I had minimal involvement in what happened after this point as I was washing my eyes out with saline solution."

Exhibit R was made by Beta on 6 November 2012, 18 months after the events in question. There is a relevant entry in his police notebook, a copy of which is exhibit U. The entry is this:

"23-04-2011

1:20am

Sprayed with OC spray."

One might think that that is a recording by Beta of the fact that at 1.20am on 23 April 2011 he was sprayed with OC spray. However, Beta tried to maintain that that was not the time when the event occurred, but the time that he recorded it in his notebook. The evidence of Beta in that regard I cannot accept. It defies logic and commonsense, and defies other objective evidence, and is inconsistent with the evidence of Alpha as to timing. The important point, however, is that there is no doubt that Beta was the collateral damage to the application of OC spray at about 1.20am on a male person in West Street, Casino.

#### LUNCHEON ADJOURNMENT

51. HIS HONOUR: Before moving on to another topic, I should point this out: the effect of the plaintiff's evidence was that he attended the RSM Club with his cousin, Joshua Harvey, and his brother, Colin Randall, and was then walking with his brother towards the place where he was staying that night near the Casino Railway Station with one of his aunts. There was no cross-examination of the plaintiff directed to the absence of his brother from the plaintiff's company as recorded in exhibit K, that is, his brother's being near the Cecil Hotel at about 12.35am, or walking towards the McDonald's carpark later on that night. Nor was it ever suggested to the plaintiff that he was in his brother's company at the Cecil Hotel or near the Cecil Hotel, or in any place other than a route between the RSM Club and where he was to stay on the evening in question.
52. I also point out that assuming that the person that Beta described as "an irate, belligerent and intoxicated male" who was about 18 years old and was the person pushed by Beta with a "check drill" type push before the deployment of OC spray, was the plaintiff, the plaintiff was not cross-examined about this alleged interaction with Beta. Furthermore, the plaintiff was not cross-examined to suggest that he was told by officers to "get back", nor was he cross-examined to suggest that he was holding out his hands by his side, which of course would be inconsistent with the plaintiff's holding a mobile phone used as a video camera in front of his face with his two hands. That is a significant flaw in the presentation of the defendant's case, but perhaps counsel was forced not to cross-examine on that basis because of other instructions which he had.
53. There is another piece of evidence to suggest the plaintiff's interaction with police in West Street, Casino, was at about 1.20am on 23 April 2011. That is an entry in the notebook of Delta which records that at 1.20 on 23 April 2011 in West Street at its intersection with Canterbury Street there was the plaintiff, whose date of birth is given, and whose address in South Grafton is given, and whose mobile phone number is given, but is put in as "a record only". That clearly placed the plaintiff at 1.20am in West Street, Casino.
54. It is now important to go back to earlier events. Exhibit S is a CIDS message. It represents a message broadcast over the police radio. The informant is given as "T J Butler". Whether that person is male or female I do not know. The complaint was that between 100 and 200 people were fighting. The location of this brawl was in the street after the train bridge, Hotham Street, Casino. The message was broadcast at 11.48pm on Friday, 22 April 2011. Police vehicles sent to attend were Casino 21, Casino 38, Kyogle 23 and the Highway Patrol vehicle. That represents

all the police resources available in Casino with the exception of Senior Constable Opryszko. Exhibit S is cross-referenced to COPS entry E14436697. That COPS entry is exhibit 7. This COPS entry was commenced by Delta at 4.19am on 23 April 2011. The narrative is this:

"About 11.40pm on Friday, the 22nd of April 2011, police have been called to a large group of intoxicated persons yelling and attempting to start fights in Hotham Street, Casino.

Police have attended the [location] and found the group of persons all having come from the party at 94 Canterbury Street.

Police have once again moved the group on."

It is clear that the principal response vehicle to this broadcast about a brawl was Casino 21. The inference to be drawn is that the party at 94 Canterbury Street was the same large 18th birthday party that was referred to at the commencement of the narrative in exhibit K. One can see therefore a large number of young people in the streets of Casino after the 18th birthday party had been shut down.

55. Exhibit W is another CIDS message generated at 12.31am on 23 April 2011. The informant is Casino 21, meaning Delta and Gamma. The broadcast was about another brawl. The mobiles responding were, in addition to Casino 21, Casino 38 and Kyogle 23. However, it became clear from exhibit V, the in-car video, that the Highway patrol vehicle also attended. The CIDS message generated at 12.31am is cross-referenced to COPS entry E44438766 about which I shall have more to say shortly.
56. My notes of the in-car video which is exhibit V commence with events starting at 00:33:35. They show a police caged vehicle, Casino 21, parked at a 45 degree angle on the left-hand side of Barker Street. At 00:33:47 Gamma is shown on the footpath following a group of young people walking east, that is down Barker Street towards its intersection with Centre Street. At 00:34:06 another caged vehicle comes up to the pedestrian crossing across Barker Street and parks on it. That was Kyogle 23. At 00:34:15 one can see Constable Beek alighting from the passenger side of Kyogle 23. At 00:34:23 Senior Constable McCormack alights from the driver's side of Kyogle 23 and runs in front of the vehicle and follows Constable Beek at a jog. Constable Beek had been heading eastward towards the intersection of Barker Street and Centre Street. At 00:34:38 one can see Senior Constable McCormack drawing his OC spray and shaking it. He gave evidence that he did not use it on this evening, and I have no reason not to accept his statement to that effect.
57. At 00:34:53 Casino 38, the sedan occupied by Alpha and Beta, comes into view. At 00:35:10 one sees a young male person under arrest. The age of the person I cannot discern from the film, but the person is clearly under the age of 30. He is wearing shoes, a white T-shirt and shorts. He is handcuffed. At 00:35:13 a door to the caged truck of Kyogle 23 is opened and at 00:35:20 the person who had been handcuffed was pushed inside the caged truck. Those escorting the arrested person are Senior Constable Stewart and Gamma. At 00:35:23 Senior Constable Stewart gave the thumbs up and one second later the door of the caged truck was shut. Eventually, both Casino 21 and Kyogle 23 moved out of Barker Street and turned left into Centre Street. At 00:38:57, one can see a transfer of the person who had been placed in the rear of Kyogle 23 into the rear of Casino 21. One caged truck pulled up beside the other and the prisoner was transferred from Kyogle 23 to Casino 21. As that was occurring, the Highway Patrol vehicle pulled out from behind the caged trucks and travelled north along Centre Street. What Casino 21 did then is not the subject of any contemporaneous or objective evidence.
58. At 1:52:23 on 23 April 2011, a phone call was made to 000 and was answered by the Ambulance Service. The call appears to have been answered at 1:56:31. The informant was Mr Hayden Simpson, and his address was given. The record makes it clear that the 000 call was made from a public telephone. The gist of the message, from the computer generated records in exhibit N, gives a location opposite the Casino High School near the shops and indicates that the informant said that the police had sprayed the patient in the eye and then left. The handwritten



ambulance records concerning this attendance show a booking time of 1.53am, completely consistent with the computer generated record of the Ambulance Service.

59. The handwritten records show that the ambulance vehicle arrived at the scene at 2.06am and had contact with the patient at the same time. The place of contact was outside the garage on Queensland Road, Casino. The patient is said to be Colin Laurie, but the Christian name has been spelt with two "l"s rather than one, and the final "e" of Laurie has been omitted. Like Mr Randall's name in the other ambulance record I have mentioned, there is a misspelling of names. Indeed, the document itself suggests that the person who completed the ambulance record concerning Wayne Randall was the same person who generated the record concerning Colin Laurie. In fact, it was the same two ambulance officers who attended to this call: Mr Mactier and Mr Stalker. It would appear that on this occasion, as on the earlier occasion, Mr Mactier filled out the patient details and Mr Stalker did the treatment. The ambulance record gives Mr Colin Laurie's date of birth, 23 December 1995, which is known to be Colin Laurie's date of birth, his correct age at the time, 15 years, and gives an address at Maxwell Street, Grafton, not an address in Casino.
60. The narrative contained in the handwritten record is "capsicum spray/intoxication". The narrative then records a male patient with sore eyes. The patient stated that he was earlier sprayed with OC spray by the police. The narrative records that the patient was decontaminated at the scene, and the patient then stated that he just wanted to go home. The ambulance officers called in clear at 2.18am, meaning that they were with Mr Laurie from 2.06 to 2.18am, a period of some 12 minutes.
61. The first thing to note is that Casino High School is on a road which bears one of two titles: Queensland Road and Summerland Way. A red "X" marked on Summerland Way on exhibit O represents the Casino High School site. That was placed there by Delta. The "X" marked on exhibit O is not far from the place where Boronia Crescent, Casino, is. One can infer from the fact that where Colin Laurie was that he was heading towards Boronia Crescent, the home of one of his aunts. Why he was not then at home is not known on any objective basis.
62. Not only did the Ambulance Service respond to the request by Hayden Simpson for the an ambulance to treat his friend or acquaintance, Colin Laurie, but the Ambulance Service also advised police of the complaint which had been made by Hayden Simpson to the Ambulance Service. The computer-generated ambulance records indicate notification to the police at 1:59:49 on 23 April 2011. The advice by the Ambulance Service generated another CIDS message. That message is exhibit M. It was generated at 2.01am on 23 April 2011. The message is this:

"Hayden Simpson claims police sprayed 15-year-old friend with capsicum spray and left the scene - persons now requesting ambos. Informant contact number" -

and then is given a mobile phone number. That mobile phone number I cannot find in the ambulance records, exhibit N, at all. However, one might think that mobile telephone numbers might be available to the Police Force. In any event the evidence discloses that after the broadcast of that message Alpha phoned Hayden Simpson and was advised that the name of the person claiming to have been sprayed with capsicum spray was in fact Colin Laurie.

63. At 4.25am on 23 April 2011 Gamma commenced a COPS entry. The COPS entry is E44438766. That is the same COPS entry cross-referenced in CIDS message generated at 12:31am on 23 April 2011 which is exhibit W, and to which I have earlier referred, before passing on to refer to what is shown on exhibit V, the police in-car video. The narrative generated by Gamma is this:

"About 1am on Saturday, 23 April 2011, police were attending a brawl at the corner of Barker and West Street, Casino. When police arrived a large group were walking east on Barker Street.

Police told the group to keep moving on, however the group continued to swear and yell at police. The POI Laurie was talking in the group when he started to yell out loud, 'Fuck you, you cunts.'

Police grabbed the POI and told him to face the wall. The POI turned on police and tried to push police away and run. Police were able to hold onto the POI, however he continued to struggle and break free from police grasp.

Police released a one-second burst of OC spray to subdue the POI and give police enough time to handcuff the POI. Police then had to control friends of the POI who decided to get involved in the situation.

The POI was conveyed back to Casino Police Station where he was decontaminated from the affects [sic] of OC. At this time the POI was asked for his name and age. The POI stated that he was from South Grafton and was staying at his aunty's house at Boronia Crescent, Casino. Police conveyed the POI to Boronia Crescent, Casino, where he was left in the care of his aunty.

A short time later police received a call from the Ambulance that a young person called them in relation to feeling the affects [sic] of OC spray. Police believe the POI walked in the front door and walked out the back heading back towards town.

The POI is only 15 years old and was well affected by alcohol. Police made patrols of the area for the POI but he could not be seen."

According to evidence given by Delta, Casino 21 went out searching for Colin Laurie between 3.40am and 3.45am on 23 April 2011, but were unable to find him. Why they made no inquiry at Boronia Crescent is curious. Exhibit E, the COPS entry generated by Gamma at 4.25am on 23 April 2011, indicates that Casino 21 responded at 12.31am on 23 April, for 10 minutes, and that there was a further attendance between 1.00 and 1.30am on 23 April 2011, when the actual powers used were a "move on" and the further classification was, "Refused direction, intoxicated person."

64. There is no record in any police notebook for Colin Laurie on 22 or 23 April 2011. There is no record whatever of Colin Laurie at the Casino Police Station. The only record which exists to nominate Colin Laurie, as far as the police records are concerned, is exhibit E, one generated at 4.25am on 23 April, a long time after the CIDS message was broadcast at 2.01am on the same morning.
65. Clearly, the referencing of exhibit E, this COPS entry, to the CIDS message, created at 12.31am on 23 April 2011, would indicate that the person shown in the in car video as having been arrested at 12.35am, was in fact Colin Laurie. In exhibit E, it is clearly admitted that Colin Laurie was sprayed with OC spray. The police then go on to say that they took him to Casino Police Station and decontaminated him themselves. However, the ambulance officers found Colin Laurie undecontaminated at 2.06am on Queensland Road near the Casino High School.
66. Inconsistent with what is contained in exhibit E, certain members of the New South Wales Police in these proceedings have sought to maintain that Colin Laurie was attended to, not by them at the Casino Police Station, but by members of the Ambulance Service, and that that the person decontaminated at the police station was Colin Laurie or the plaintiff pretending to be Colin Laurie but not the plaintiff in his own name.
67. The flaw in any such reconstruction is that it creates too many inconsistencies and implausibilities. The biggest implausibility is this: I know that at 1.32am, Mr Mactier and Mr Stalker, and in particular Mr Stalker, treated a person identified as Wayne Randall aged 20, at the Casino Police Station. Necessarily, decontaminating someone for the effects of OC spray in the face and in particular the eyes would require the treating ambulance officer to be "up close and personal" with the patient. One would think he would have to look the patient in the eyes to make sure that there was nothing more sinister than some irritation from OC spray. I know that the same two ambulance officers attended upon a person identified as Colin Laurie, aged 15, at 2.06am, 34 minutes later. Certain police want me to believe that these two people are in fact the same person, and that Mr Mactier and Mr Stalker, both seasoned, experienced ambulance officers, could not tell that one person they treated was the same as the person they treated 34

minutes later. That is implausible in the extreme. Furthermore, it postulates that an experienced, seasoned ambulance officer could not tell the difference between a 15-year-old youth and a 20-year-old man. That is equally implausible. Such implausibilities are scoffed at by learned counsel for the defendant, but with the utmost respect, he must live in a different world to me.

68. One would think that if the two persons treated by the ambulance officers were one and the same they would note it because they would be concerned that their earlier ministrations to the patient had failed their purpose. They might also be concerned that a patient had been sprayed with OC spray a second time. True it is that Mr Stalker did not give evidence about that but that is explicable by the fact that at the time he gave evidence, 12 March 2013, no-one had available to him the ambulance records relating to Colin Laurie. One will note in the transcript, and from what is contained in exhibit N, that on the afternoon of Wednesday, 13 March 2013, I granted leave to the plaintiff to issue a subpoena for production addressed to the Ambulance Service of New South Wales requiring the production of any record relating to the treatment of Colin Laurie, date of birth 23 December 1995, at Casino on 22 April 2011, and 23 April 2011, and any record of any call or calls made to the Ambulance Service of New South Wales by or on behalf of any member of the New South Wales Police for the attendance of any ambulance or ambulance officer at Casino Police Station between 11pm on 22 April 2011 and 3am on 28 April 2011. I directed the subpoena be served by facsimile transmission by 11am on 14 March 2013. I abridged time for the return of the subpoena, made the subpoena returnable at 10am on Friday, 15 March 2013, and directed the subpoena might be obeyed by sending the documents by facsimile transmission to the Coffs Harbour Court House. In fact the Ambulance Service was kind enough to send the documents by facsimile transmission to the Court House at 9.31am on Thursday, 14 March 2013, and they were then produced to counsel and the matter then continued.
69. In his evidence, Gamma said that around 1.25 to 1.30, in between those two times, on the morning of 23 April 2011, he arrested a person named Colin Laurie. He said that later on, that is at some time after the arrest, he found out that Colin Laurie was 15. He then said that they took him back to the station and he looked him up in the police computer system and that brought up his details. In other words, merely by having a person's name, one can find out his details from pre-existing police records. I offer the observation that one does not need to have the physical body of the person in the police station to make that inquiry. One needs only to have the person's name. He also said that there was no other person at the police station when Colin Laurie was there. He said that there was no custody manager at Casino on the night of 22 and 23 April, as the senior officer was Senior Constable Opryszko who was guarding the crime scene.
70. He also said that Colin Laurie was arrested in West Street near St Mary's High School. He mentioned that there were other vehicles in attendance; Kyogle 23 and Casino 38. Gamma also said that Delta decontaminated Colin Laurie at Casino Police Station. That of course is consistent with exhibit E. However, he went on to say that the ambulance officers turned up at the Casino Police Station when Colin Laurie was there. He went on to say this:

"Q. What did they do when they arrived?

A. They attempted to give treatment to the person I know as Colin Laurie in the dock with the door open, he abused them and at that stage they refused treatment.

Q. When you say he abused them, what do you mean?

A. He told them to 'Fuck off.'

Q. Did anything happen?

A. No, the ambulance officers refused to treat him.

Q. And took his advice and they left?

A. Yes."

The witness was then shown the COPS entry and acknowledged that he created the document. I would point out that there was no mention in exhibit E of any turning up at the police station by ambulance officers to treat Colin Laurie, nor is there any statement in exhibit E to suggest that the ambulance officers refused to treat Colin Laurie because Colin Laurie would not cooperate with them.

71. Gamma went on to give evidence that he and Delta made arrangements to take Colin Laurie back to his aunty's place. He also went on to say that he called for an ambulance only once and not twice. Gamma said that only one person was sprayed with OC spray at St Mary's School, and that Beta got a secondary spray, but the person sprayed was Colin Laurie. Gamma could not tell me who sprayed capsicum spray on Colin Laurie, but Delta told me that it was in fact Gamma.
72. In cross-examination, Gamma told me that the ambulance was called for by car radio at 1.23am when the Casino 21 was still in West Street with Colin Laurie in the back of the truck. He also said that before he and Delta left the Casino Police Station to take Colin Laurie back to Boronia Crescent, Alpha had turned up at the police station. In Gamma's estimate, Colin Laurie was at the police station for about ten to fifteen minutes.
73. Alpha gave evidence that when he returned to the police station at 2am there was a small Aboriginal male in custody. However, Alpha did not see his face. Alpha went on to refer to that small Aboriginal male as "the young chap" who was bending over the basin being decontaminated for OC spray. Learned counsel for the defendant was quick to seize on his "young chap" because he then commenced a question "This young person..." which, of course, has a meaning in law much more technical than "the young chap".
74. In cross-examination Alpha said that he heard Delta and Gamma leave Casino Police Station five or ten minutes after he arrived at 2 o'clock because he heard them leaving the side door. He had them leaving the side door at 2.05 or 2.10, or somewhere in between. This evidence cannot be true because at 2.06 the ambulance officers were treating Colin Laurie outside the garage on Queensland Road near the Casino High School.
75. If it were true it would mean that Colin Laurie had been in police custody from thirty-five minutes after midnight to after 2am with no record being generated whatever, with no contact with the minor's parent or guardian, with no contact with the appropriate Aboriginal liaison officer, with no contact with Juvenile Justice, and no contact with any superior officer such as the duty officer at Lismore. Alpha would have been accompanied by his partner for the evening, Beta, but Beta in his evidence could not recall if there was anybody in the police station in custody when he returned with Alpha at 2am.
76. I am completely unable to accept the evidence of Alpha that he saw a small Aboriginal male who might have been 15 when he returned to the Casino Police Station at 2am. It is, in my view, evidence invented to assist the case being mounted by Gamma and Delta. Gamma and Delta both want me to find that the person whom the ambulance people attended to at Casino Police Station was Colin Laurie rather than Wayne Randall. I reject that evidence in its entirety. Although I don't need to formally find so, there is much strength in the submission to me on behalf of the plaintiff that exhibit E, the COPS event generated concerning Colin Laurie on 4.25am on 23 April 2011, was generated only to try to remedy the mischief caused by the CIDS message of 2.01am on 23 April 2011.
77. However, in order to try to cover up the "mischief" caused by the current plaintiff's complaint, Gamma and Delta appear to want me to believe that the plaintiff was pretending to be Colin Laurie, or that Colin Laurie was the person treated by the ambulance officers at 1.34, and that the plaintiff is merely riding on Colin Laurie's coat-tails in order to make a substantial sum of money out of something that never occurred. I am afraid the probabilities are that Delta and Gamma have tried to cover up their misconduct by making assertions on oath which are false and mischievous, to say the least.
78. The evidence of Delta is similar in many respects to the evidence of Gamma. Delta also gave evidence that ambulance officers attended at the Casino Police Station whilst Colin Laurie was present. Delta says that he admitted the ambulance officers to the charge room. He identified

one ambulance officer as Mr Stalker. He, like Gamma, said that Colin Laurie refused treatment. Delta, like Gamma, said that there was no-one else at the station at the time Colin Laurie was there and that there was no-one else in custody, seeking thereby to make it impossible for the plaintiff to have been at the police station at the time that they would have me believe Colin Laurie was arrested.

79. When cross-examined about his notebook entry, to which I made reference much earlier in these reasons, Delta said that Wayne Randall was in a group of about 20 people and he had interaction with Wayne Randall at 1.20am. Besides his wanting to move all those persons on, Delta did not take the details of any person who failed to move on other than those of the current plaintiff. I found that evidence strange, especially when bearing in mind the plaintiff's allegations, one can understand a person such as Delta recording details of the plaintiff in his notebook if he was to be arrested, taken to the station, and decontaminated after being sprayed with OC spray. The fact is that although the details of the plaintiff are recorded, no reason at all is given in the notebook for why the plaintiff's details were recorded. That, in my view, itself is somewhat suspicious. One would think if one were recording details of a putative offender in a police notebook one would at least want to record there why the record was being made. That is commonsense. I am afraid that I cannot accept the evidence of either Gamma or Delta.
80. I have already made criticism of part of the evidence of Alpha and part of the evidence of Beta. I make no criticism of any other police witness but I do thank Leading Senior Constable Stephen Nixon whose evidence, and the in-car video which he brought to court, has greatly assisted me. I have no hesitation in finding that the person arrested by Gamma and Senior Constable Stewart at 12.35am on 23 April 2011 was in fact Colin Laurie. I have no hesitation finding that he had been sprayed with OC spray by Gamma. I have no hesitation finding that eventually he was placed in Casino 21. What happened to him thereafter is not recorded in any contemporaneous document. I do know where he was found by ambulance officers complaining about not having been decontaminated after having been sprayed by OC spray. It is of course possible that he was taken back to the Casino Police Station. An attempt may have been made by police, namely Gamma and Delta, to decontaminate him there, and then perhaps they took him towards his "home" address, that is, Boronia Crescent. However he had not reached that place which he referred to when speaking to the ambulance officers as "home" when the ambulance officers attended upon him at 2.06am to decontaminate him. It seems to me more likely that Casino 21 merely dropped Colin Laurie off somewhere and hoped that he would not create any mischief. Mischief was caused by the CIDS message generated at 2.01am.
81. I am satisfied on the balance of probabilities that the evidence of Gamma and Delta is not to be accepted at all and that the plaintiff was pushed and sprayed with OC spray by either Gamma or Delta at about 1.20am, then placed by them in the back of Casino 21 and taken to the Casino Police Station where he was imprisoned in a cell and kept there until the arrival of ambulance officers, Mr Stalker and Mr Mactier, who decontaminated him. I accept that the plaintiff was released from custody shortly after 1.44pm, after about half an hour in custody.
82. Bearing in mind what the plaintiff told me about his mobile phone, I accept what prompted the intervention by Gamma and Delta was the attempt by the plaintiff to film the interaction of other police with Colin Randall and that caused Delta and Gamma to deal with the plaintiff in the way they did. Spraying the plaintiff with OC spray caused him to drop his mobile camera. They took it, erased video footage on it, and then returned it to him so that no untoward film could later be displayed in court of any police interaction with his brother, Colin Randall. In other words, I am satisfied on the balance of probabilities the plaintiff has made out his case for the torts of assault and false imprisonment.
83. Much time was spent in dealing with submissions made about the rule in *Browne v Dunn*. That is a rule of fairness. That requires a party to put to a witness such evidence as the party has that would indicate that their evidence not be believed, or to put to the witness matters which will be used against him. Such matters cannot be put unless one knows what the material one has is. Here the evidence was introduced in such a piecemeal fashion that no-one at the close of the plaintiff's case had any idea what was to be said in the defendant's case. I wholly suspect that learned counsel for the defendant was in much the same position as his learned opponents at that time. In any event I am persuaded by the address of Mr Steirn, which has been recorded, that it

was fairly put to witnesses that their evidence was not to be accepted. In fact, I put on one occasion to Delta that he was not telling the truth, so blatant did it become. Much was also said in submissions about the failure to call Colin Laurie. When one looks at it analytically, the party that should have called Colin Laurie was not the plaintiff but the defendant. Colin Laurie had nothing to do with the plaintiff's case. The plaintiff maintained that it was he and not Colin Laurie who was sprayed with OC spray and taken to the police station. If the defendant wanted to say that that was what happened to Colin Laurie and Colin Laurie was in the police station when the plaintiff says he was in the police station, the defendant should have called Colin Laurie but did not. As I put in the course of argument there is no property in a witness.

84. I have inquired of counsel for the parties whether they need any further reasons for judgment on liability. I am told that they do not. I intend to take a short adjournment and then I will come back and deal with damages.

#### SHORT ADJOURNMENT

85. HIS HONOUR: I turn now to an assessment of the plaintiff's damages. The plaintiff has specifically eschewed an award of damages for personal injury. I can understand the legislative provisions which decided the plaintiff to make that election. However, actions for assault and false imprisonment are both actions in trespass and are actionable without proof of any damage.
86. I have carefully taken into consideration the principles applicable to the award of damages in a case of this nature, in particular what fell from Basten JA in *State of New South Wales v Delly* [2007] NSWCA 303; (2007) 70 NSWLR 125 at [104] to [118]. I have also taken into account what fell from Tobias AJA in *State of New South Wales v Quirk* [2012] NSWCA 216 between [148] and [164].
87. Here what is described as the "first assault" in the statement of claim, a pushing backwards, was only minor. The spraying of the capsicum spray into the plaintiff's face is much more serious. It rendered him temporarily unable to see much, if anything, for a period of at least quarter of an hour. It was in contumelious disregard of his liberty, it was in contumelious disregard of his person, and of his dignity. It was a personal affront.
88. The use of an agent such as capsicum spray is, in my view, equivalent to the use of an implement to carry out the assault, such as a weapon, such as a club, piece of wood, baseball bat or the like that are often used in assaults. It clearly interfered with the plaintiff's personal dignity and with his safety. He was assaulted in a public place where there were no doubt others present, as the evidence clearly attests. That is a further insult to the person.
89. Much time was spent yesterday considering other cases where similar issues have arisen. Every case, of course is, different. Here we have a young man who was assaulted in the early hours of a Saturday morning when he was trying to make his way from licensed premises to his temporary place of abode in Casino, where he had come to do something which was not unlawful, to expose video film of police interacting with his brother, no doubt in the expectation that he might assist his brother if his brother got into any difficulty. The reason for the assault clearly was to get hold of the plaintiff's mobile telephone/video camera so that any untoward footage could be removed by the police. The motive for the assault is not rage, but self-interest. Doing the best I can, I award \$20,000 to the plaintiff for aggravated compensatory damages for the assault.
90. For the false imprisonment I must bear in mind what fell from Bryson JA in *Zaravinos v State of New South Wales* [2004] NSWCA 320; (2004) 62 NSWLR 58 at [52]:

"Damages are not capable of being related proportionately to the length of the period of detention, and 'a substantial proportion of the ultimate award must be given for what has been described as 'the initial shock of being arrested': *Ruddock v Taylor* [2003] NSWCA 262 per Spigelman CJ at [49]. That substantial proportion of the ultimate award of damages could not vary to whether the detention was for about two and three-quarter hours or for about three and a half hours."

However, I must bear in mind here that the period of detention was short, about half an hour, but the plaintiff was left, no doubt, confused, demoralised, angry, upset, bewildered and no doubt frightened by what had happened to him. I say frightened because he had been assaulted by the police once, was in their power or control and could harbour in his mind a fear of further indignities being heaped upon him. Doing the best I can, I assess the plaintiff's damages for false imprisonment, being aggravated damages, in the sum of \$15,000.

In this case I am persuaded that exemplary damages are appropriate. The Court must condemn the conduct of Delta and Gamma in seeking to hide what they did from the time it occurred right up until giving evidence and in fact persisting with that in the defence of this case which continued until I commenced these reasons for judgment earlier today. As has been submitted by Mr Steirn, QC for the plaintiff, what the police did was calculated, cold-blooded and cynical, in complete disregard of the plaintiff's human rights, and done for the purpose of making sure that any video film exposed by the plaintiff would not cause police officers some grief in the future. The attempt to hide what had happened is to be condemned. All members of our community expect that due process will occur. In the current case, due process did not occur. The plaintiff was not processed as he ought to have been done after he was arrested, and the police, because of their continued denial of doing what they did, offer no explanation for why they arrested the plaintiff. The only reason for the arrest which the evidence allows me to find is that the plaintiff wanted to video the interaction of his brother and the police and the police did not want that to occur.

91. In an earlier case, decided over a half decade ago, it was suggested that the maximum amount payable for punitive damages in a similar sort of case was \$25,000. Times move on and we move on with them. I have determined that the appropriate amount of exemplary or punitive damages to award against the defendant in respect of both the causes of action - not in respect of each but in respect of both - is a sum of \$30,000. If my mathematics be correct, the total of those sums is \$65,000.
92. If any further explanation be needed for the award of exemplary damages it is this. The rule of law is the bedrock of our society, the basis of our democracy and our civil and political rights. When those who are sworn to uphold the rule of law flout it, damage is done. A citizen looks to a constable of police to use his powers to protect that citizen's rights. When a constable of police misuses his powers to infringe the citizen's rights, the confidence of that citizen in the rule of law is shaken. The citizen can become cynical. His trust in the constabulary is lessened. The prestige of the constabulary is impaired. It is important that the Court demonstrate its purpose to uphold the rule of law and the integrity of our institutions.

#### SUBMISSIONS REGARDING INTEREST

93. HIS HONOUR: I feel some of sympathy for the State which must bear punitive damages, although they are essentially being awarded for the conduct of Gamma and Delta. However, the State has a duty to ensure that police officers do carry out their office according to law and not according to whim. It is unfortunate that no senior officer, some commissioned officer or even a sergeant, was available in Casino on the weekend in question. That may have caused better behaviour on the part of Gamma and Delta.

#### FURTHER SUBMISSIONS

94. Counsel now agree that the plaintiff is entitled to some interest on some part of the plaintiff's damages. The aggravated compensatory damages which I have awarded amount to \$35,000. Both parties agree that it is appropriate that I award interest on half that sum from 23 April

2011. After the usual protracted period of discussion, counsel are now agreed that the interest payable on \$17,500 from 23 April 2011 to date is \$3563. For those reasons I give verdict in judgment for the plaintiff against the defendant for \$68,563. I order the defendant to pay the plaintiff's costs. I recommend to the taxing officer that the plaintiff's costs include fees for both senior and junior counsel.

#### SUBMISSIONS REGARDING COSTS

95. HIS HONOUR: Liberty to apply on the question of costs within seven days. Notice to be given to my Associate so that we can make a further listing if it's to be argued.

96. \*\*\*\*\*

#### Amendments

11 Feb 2014      Amendments to counsel appearing.

Paragraphs:

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