

Episode 138: Summary

Episode name: (Unlawfully) Arrested Development: The Criminal Lawyer's Guide to Intentional Torts and Police Powers

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What area(s) of law does this episode consider?

Intentional torts; false imprisonment and malicious prosecution. The defences of lawful justification and self-defence.

Why is this topic relevant?

Building a strong defence for intentional torts claims requires a deep understanding of not only legal and tortious principles, but their application to high-pressure circumstances.

This kind of work often places practitioners at the centre of some of the most complex intersections of the law, where their role is not only about defending actions but also about understanding the nuanced balance between the powers granted to police officers and the rights of individuals.

Some recent decisions handed down by the Court of Appeal have raised questions of what constitutes false imprisonment, how powers of arrest are lawfully exercised, and when police should be able to detain, seize and arrest without warrants.

What legislation is considered in this episode?

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) ('LEPRA')

Evidence Act 1995 (Cth); *Evidence Act 1995* (NSW) ('*Evidence Act*')

Civil Liability Act 2002 (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 2002* (WA); *Wrongs Act 1958* (Vic) ('*Civil Liability Act*')

What cases are considered in this episode?

[*Hannam v State of New South Wales \(No 9\)* \[2022\] NSWSC 648](#)

- The plaintiff sustained severe injuries after jumping from a fourth-floor balcony while intoxicated and under the influence of drugs, during which police unsuccessfully tried to stop him with a taser. The plaintiff argued that the police's actions constituted battery, assault, and negligence, holding the State of New South Wales vicariously liable. The court found that the taser's use was lawful under statute, the plaintiff's intoxication and dangerous actions were significant factors, and the *Civil Liability Act's* dangerous recreational activity defence defeated the claims.

Lake v Dobson (1980) (1981) 5 PS Rev 2221

- An individual was arrested for nude sunbathing at a bay in Coogee. It was argued that arrest, being equivalent to an additional penalty for most people, should only be used as a last resort and only when a summons would not suffice. The court found that arrest should indeed be reserved for situations of clear necessity and emphasised that less intrusive measures should be prioritised when possible.

[DPP v Carr \[2002\] NSWSC 194](#)

- Carr was arrested for offensive language after swearing at a police officer, with the situation escalating to charges of resisting arrest, assaulting police, and intimidation. It was argued that the arrest was improper because the officer knew Carr's identity and address, could have proceeded via summons or a Court Attendance Notice and acted out of expediency rather than necessity. The court found the arrest improper, upheld the exclusion of evidence under section 138 of the *Evidence Act*, and confirmed the officer's recklessness in disregarding proper procedures.

[R v McClean \[2008\] NSWLC 11](#)

- The defendant was approached by police investigating a suspected break-and-enter, provided her identification, and attempted to leave but was restrained, arrested, and charged with assaulting and resisting police. It was argued that the arrest was unlawful because it was for investigative purposes, not for commencing proceedings, and did not satisfy the statutory requirements of section 99(3) of LEPRA, as the police already had her identity and no suspicious circumstances warranted arrest. The court found the arrest unlawful, emphasising that arrest solely for investigation is impermissible under section 99(3), that arrest is a last resort, and any subsequent detention based on an unlawful arrest is invalid.

[New South Wales v Robinson \[2019\] HCA 46](#)

- Mr. Robinson alleged he was wrongfully arrested because the officer lacked reasonable grounds to believe arrest was necessary under section 99(3) of LEPRA, specifically to prevent a repetition of an offence. It was argued that for an arrest to be lawful, the arresting officer must both honestly believe and have reasonable grounds to believe the arrest is necessary for one of the purposes specified in s.99(3), with "necessary" implying that the action is essential or indispensable. The High Court upheld the Court of Appeal's decision, ruling that an arrest is lawful only if it is made with the intention, at the time, to charge the individual and take them before a magistrate, and that arrest cannot be justified for mere questioning or investigative purposes.

[Hunter New England Area Health Service v A \[2009\] NSWSC 761](#)

- The court addressed the legal status of an advance healthcare directive where a patient, Mr. A, refused dialysis and the hospital sought confirmation of the directive's validity. It was argued that a capable adult has the right to refuse medical treatment via an advance care directive, and if clear, unambiguous, and applicable to the situation, such directives must be respected, with administering prohibited treatment constituting battery. The court found that medical necessity can be a defence to intentional trespass torts in emergencies where consent cannot be obtained, but an advance healthcare directive negates the defence if it explicitly applies to the circumstances.

[NSW v McMaster \[2015\] NSWCA 228](#)

- The plaintiff was shot by police, and while his claims of negligence were unsuccessful, the trial judge ruled that the shooting constituted a battery. It was argued that the police officers' actions were protected from liability for battery due to the legal principles governing their duties, including the provisions of section 230 of LEPRA. The court found that the police officers' actions were lawful and reasonably necessary under section 230, which made what would otherwise be a battery lawful in this context.

[A v State of New South Wales \[2007\] HCA 10](#)

- The plaintiff was arrested and charged with sexual offences against his two stepsons. The plaintiff argued that the police officer lacked reasonable grounds to charge him, particularly in relation to the charge concerning the younger boy, where there was evidence suggesting the boy might have fabricated the story. The High Court agreed that the police officer lacked reasonable grounds for the charge related to the younger child but found there was sufficient basis for the charge concerning the older child, emphasising that prosecutors must have reasonable and probable cause, not just potential for further inquiries.

[Beckett v New South Wales \[2013\] HCA 17](#)

- Roseanne Beckett was convicted in 1991 of offences against her husband, but her convictions were quashed in 2005, and the Director of Public Prosecutions decided not to pursue further charges. Beckett later filed a claim for damages for malicious prosecution, with the key issue being whether she needed to prove her innocence to maintain her claim. The High Court allowed Beckett's appeal, ruling that a plaintiff does not need to prove their innocence when the prosecution has terminated in their favour.

[Wood v State of New South Wales \[2018\] NSWSC 1247](#)

- Gordon Woods was initially convicted of the murder of Caroline Byrne in 2008 but was later acquitted by the NSW Court of Appeal, which found the conviction unreasonable and criticised the prosecution and expert witness. Woods subsequently brought a claim for malicious prosecution, arguing that the case was pursued without reasonable cause and with malice for an ulterior purpose. The court agreed that the prosecution lacked reasonable cause, criticised the Crown Prosecutor's actions, but ultimately dismissed the claim, finding no evidence of malice in the prosecutor's conduct.

[HD v State of New South Wales \[2016\] NSWCA 85](#)

- Police obtained an interim Apprehended Domestic Violence Order against a father after his daughter reported an assault, but later denied being hit by him. The father claimed unlawful arrest and malicious prosecution after the assault charge was dismissed, arguing that the prosecution lacked reasonable and probable cause. The Court of Appeal upheld the trial judge's decision, finding that the prosecution was not motivated by malice, the police acted within their public duty, and there was a reasonable basis for the charge.

[State of New South Wales v Spedding \[2023\] NSWCA 180](#)

- Mr. Spedding was wrongfully arrested and charged with child sexual assault offences in 2014 as part of an effort to apply pressure in the investigation of the disappearance of William Tyrrell. The plaintiff argued that the arrest lacked reasonable grounds, was malicious, and that the Office of the Director of Public Prosecutions should be liable for malicious prosecution, while also asserting misfeasance in public office and abuse of process. The Court of Appeal upheld the primary judge's decision, finding that the police officers lacked reasonable and probable cause, and that their actions were malicious and constituted misfeasance and abuse of process, though the ODPP was not liable for malicious prosecution.

What are the main points?

- Intentional torts refer to a group of torts committed against a person, including battery, false imprisonment or unlawful detainment and malicious prosecution.
- The powers that police officers have are outlined in LEPR. LEPR contains most police powers, with some common law powers existing outside of it.
- Police often commit intentional torts lawfully in the execution of their duties. For example, they commit battery when they put handcuffs on them to arrest them. As such, police can access the defence of lawful justification to defeat any tortious claims. This defence hinges on whether the exercise of that power was valid, which requires consideration of reasonable suspicion and other requirements in LEPR.

- Consent plays a crucial role when police officers exercise their power to search individuals. A search is validly executed if a person willingly submits to it by giving consent.
- Police officers have the power to conduct searches without a warrant under LEPRA if they have reasonable suspicion that a person is in possession of something illegal. The test for whether suspicion was reasonable is objective.
- The *Evidence Act* allows challenges to the admissibility of evidence obtained during an unlawful arrest, emphasising the importance of reasonable grounds for arrest. The case of *Carr* reinforced that unlawful arrests undermine legal integrity, making evidence obtained through such means potentially inadmissible.
- Self-defence involves consideration of the conduct preceding the act of self-defence. It is important to assess the reasonableness of the defendant's subjective belief that they were in danger and the proportionality of their response.
- The tort of malicious prosecution involves four elements:
 - Proceedings initiated against the plaintiff by the defendant, usually in the criminal sphere;
 - Proceedings terminated in favour of the plaintiff;
 - Initiation or maintenance of proceedings acted maliciously; and
 - The defendant acted without reasonable and probable cause.

What are the practical takeaways?

- Intentional torts is an emerging area of law which involves cases against individuals or entities, not just the state of New South Wales.
- Law students should gain exposure to both plaintiff and defendant work in this area, as it can be rewarding and important in protecting the rights of individuals and law enforcement officers. This exposure can help in understanding and addressing issues such as police powers abuse and protecting vulnerable individuals who may not have the resources to pursue legal action.