Supreme Court

New South Wales

Case Name:	Hrdavec v State of New South Wales
Medium Neutral Citation:	[2021] NSWSC 560
Hearing Date(s):	13-14, 16 August 2018; 8, 12-13, 16-18 December 2019; 12 February 2020
Date of Orders:	18 May 2021
Decision Date:	18 May 2021
Jurisdiction:	Common Law
Before:	Walton J
Decision:	The State shall file short minutes of order reflecting this judgment.
Catchwords:	TORTS – amended statement of claim – malicious prosecution – the identity of prosecutor – reasonable and probable cause – malice – false imprisonment – damages – orders
Legislation Cited:	Bail Act 2013 (NSW) Crimes Act 1900 (NSW) Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 (NSW) Director of Public Prosecutions Act 1986 (NSW) Evidence Act 1995 (NSW) Law Enforcement (Powers and Responsibilities) Act NSW 2002 (NSW) Uniform Civil Procedure Rules 2005 (NSW)
Cases Cited:	A v State of New South Wales (2007) 230 CLR 500; [2007] HCA 10 Bailey v Director General of Natural Resources [2014] NSWSC 1012 Beckett v New South Wales (2013) 248 CLR 432; [2013] HCA 17

Beckett v State of New South Wales [2015] NSWSC 1017
Berry v British Transport Commission [1962] 1 QB 306
Briginshaw v Briginshaw (1938) 60 CLR 336
Clyne v State of New South Wales (No 1) [2011] NSWSC 629
Commonwealth of Australia v Fernando (2012) 200 FCR 1; [2012] FCAFC 18
Cowell v Corrective Services Commission (NSW) (1988) 13 NSWLR 714
Coyle v State of New South Wales [2006] NSWCA 95
Daniels v Telfer (1933) 34 SR (NSW) 99
Davis v Gell (1924) 35 CLR 275; [1924] HCA 56
Ea v Diaconu [2019] NSWSC 795
Ea v Diaconu [2020] NSWCA 127
Edwards v State of New South Wales [2021] NSWSC 181
Fernando v Commonwealth of Australia (No 4) [2010] FCA 1475
FP v R [2012] NSWCCA 182
Hamilton v State of New South Wales (No 13) [2016] NSWSC 1311
Hamod v New South Wales [2011] NSWCA 375
Hamod v State of NSW [2007] NSWSC 600
HD v State of New South Wales [2016] NSWCA 85
Hill v Woollahra Municipal Council [2003] NSWCA 106
Holgate-Mohammed v Duke [1984] AC 437
Hyder v The Commonwealth (2012) 217 A Crim R 571; [2012] NSWCA 336
Landini v State of New South Wales [2008] NSWSC 1280
Luxton v Vines (1952) 85 CLR 352; [1952] HCA 19
McDonald v Coles Myer Limited (1995) Australian Torts Report 81-361
Minister for Natural Resources v NSW Aboriginal Land Council (1987) 9 NSWLR 154
Mohamed Amin v Jogendra Bannerjee [1947] AC 322
Mutton v Baker [2014] VSCA 43
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170 at 171
Noye v Robbins; Noye v Crimmins [2007] WASC 98
Nye v State of New South Wales [2003] NSWSC 1212
R v Rondo (2001) 126 A Crim R 562; [2001] NSWCCA

	540 R v The Associated Northern Collieries (1910) 11 CLR 738 Ruddock v Taylor (2005) 222 CLR 612; [2005] HCA 48 SB v State of New South Wales [2016] NSWDC 189 Smith v State of New South Wales [2016] NSWDC 55 Spautz v Butterworth (1996) 41 NSWLR 1 State of New South Wales v Abed (2014) 246 A Crim R 549; [2014] NSWCA 419 State of New South Wales v Hathaway [2010] NSWCA 184 State of New South Wales v Landini [2010] NSWCA 157 State of New South Wales v Randall [2017] NSWCA 88 State of New South Wales v Riley (2003) 57 NSWLR 496; [2003] NSWCA 208 State of New South Wales v Robinson (2019) 266 CLR 619; [2019] HCA 46 State of NSW v Delly [2007] NSWCA 303 Watson v Marshall (1971) 124 CLR 621; [1971] HCA 33 Wilkie v The Commonwealth (2017) 263 CLR 487; [2017] HCA 40 Wood v State of New South Wales [2018] NSWSC 1247
Category:	Principal judgment
Parties:	Valentino Hrdavec (Plaintiff) State of New South Wales (Defendant)
Representation:	Counsel: T Molomby SC, with R Rasmussen (Plaintiff) M Spartalis with D Hume (Defendant) Solicitors: Nicopoulos Sabbagh Lawyers (Plaintiff) Makinson d'Apice Lawyers (Defendant)
File Number(s):	2016/308826
Publication Restriction:	Reference to certain individuals and places were removed and replaced with pseudonyms to prevent identification of the victim of the offences.

TABLE OF CONTENTS

JUDGMENT

INTRODUCTION

1 **HIS HONOUR:** By an amended statement of claim filed 31 August 2018 ("ASOC"), Mr Valentino Hrdavec ("the plaintiff") claimed damages for wrongful arrest, false imprisonment and malicious prosecution. His claim arose out of his arrest on 1 July 2015, and subsequent charging and prosecution, for aggravated sexual assault, contrary to s 61JA(1) of the *Crimes Act 1900* (NSW), and aggravated indecent assault, contrary to s 61M(1) of the *Crimes Act* (since repealed) (collectively, "the aggravated assaults"). On 11 December 2015, the charges against the plaintiff were dropped by the Office of the Director of Public Prosecutions ("ODPP").

2 The plaintiff sued the State of New South Wales ("the State") as being vicariously liable for the actions of Detective Sergeant Jason Pietruszka ("Inspector Pietruszka") and officers and constables of the NSW Police Force. Inspector Pietruszka was the Officer-in-Charge of the investigation into the aggravated assaults.

3 The State admitted that it would be vicariously liable for torts committed by Detective Inspector Pietruszka ("Inspector Pietruszka") and Constable Michael Mahony, Constable Darren Boyd and Constable Muhsen Bayzidi (although the proceedings were not continued against these officers) who was in service of the Crown, but denied any such alleged torts were committed. (Inspector Pietruszka held that rank at the hearing of his matter and hence he shall, for the balance of this judgment, be referred to in that fashion).

4 On 21 August 2019, the Court made orders by consent that included, *inter alia*, that the plaintiff was to file the ASOC with the omission of any allegation that Constable Boyd initiated a prosecution. By the filing of the ASOC, the subject of the claims brought by the plaintiff was confined to the conduct of Inspector Pietruszka. The same confinement was reflected in both the closing written submissions of the parties, and the agreed statement of issues filed by the parties on 19 February 2020.

RELEVANT PERSONS

5 At the outset of this judgment, it is useful to outline the *dramatis personae* in these proceedings.

The Hrdavec Family

6 The following members of the plaintiff's family were required for cross-examination:

(1) the plaintiff;

(2) the plaintiff's father, Sinisa Hrdavec ("Sinisa"); and

(3) the plaintiff's brother, Dorijan Hrdavec ("Dorijan").

7 Both the plaintiff's father and brother, for convenience and clarity, will be referred to by their first name in this judgment.

Inspector Pietruszka

8 Inspector Pietruszka was the main State witness. He arrested and charged the plaintiff in July 2015.

9 Inspector Pietruszka commenced as a student police office in 1997. He completed the Detectives Education Program in 2003. He was appointed a Senior Constable in around 2003. He was appointed Sergeant in June 2005.

As Sergeant, within the Redfern Local Area Command, he oversaw investigations being carried out by other officers. In March 2007, he was appointed Senior Sergeant and moved to City Central Local Area Command. He oversaw a crime management unit of approximately 30 officers.

10 In December 2007, Inspector Pietruszka moved to Central Metropolitan Region Officer, where he provided operational assistance to approximately 13 Local Area Commands. In January 2010, he transferred to Blacktown Local Area Command Detectives Office as Detective Sergeant Team Leader. In that role, he had command of any homicide or high profile investigation, often including sexual assaults. Inspector Pietruszka has experience in investigating a wide variety of offences, including sexual assaults (both immediate report and historical).

11 Inspector Pietruszka, in my view, is an experienced detective, with a long history of investigating and supervising investigations of alleged sexual assault.

12 Inspector Pietruszka was required for cross-examination.

Sergeant Mark Kneipp

13 On the evening of the plaintiff's arrest, the initial custody manager was Sergeant Mark Kneipp. Sergeant Kneipp accepted the plaintiff into custody at approximately 12.19am on 2 July 2015. He was required for cross-examination.

Police

14 In addition to Inspector Pietruszka, several police officers and detectives are mentioned throughout the factual background, with roles relevant to different stages of the arrest, charging and investigation. For present purposes it is unnecessary to identify each officer, save for noting that no claim is brought against those officers. As mentioned, it is the conduct and intent of Inspector Pietruszka, at the various stages, that is relevant to the claims before the Court.

Amy Williams, Tony Khawaga and Melissa Khawaga

15 Amy Williams is the partner of Dorijan. Tony and Melissa Khawaga are associates of the plaintiff.

The victim, alleged offenders and witnesses

16 On the night of 21-22 June 2015, there was a party (also referred to as a "gathering") at the premises of Mr Loyd Bandao in Blacktown ("the premises"). The party was attended by four males and two females. The "four males" were:

(1) Mr Bandao;

(2) Mr James Bruce, cousin of Mr Bandao;

(3) Mr "BJ" Alcazar, best friend of Mr Bandao; and

(4) the plaintiff.

17 The two females that attended the gathering were:

(1) Ms Patricia "Trish" Tejada, girlfriend of Mr Bandao; and

(2) MM, the victim of the aggravated assaults.

18 In addition to the six persons that attended the premises for the party, reference is also made to two persons present in the premises: the father and sister of Mr Bandao although no party contended they were involved in the party or connected to the events of the evening.

19 The aggravated assaults took place, on the evening of the party, in a bathroom external to the premises, which was a small tiled room that featured a toilet and sink, which was accessible via a single doorway from the outside yard. The location of the assault was referred to interchangeably as "the bathroom", "the toilet", "the cubicle" and "the crime scene". All four males were charged and arrested with respect to the aggravated assaults.

20 The accounts provided by Ms Tejada, MM, Mr Alcazar and the plaintiff, in the context of the investigation conducted by Inspector Pietruszka, were each before the Court and were the subject of controversy. I will return to those controversies within the context of the factual findings.

THE PRINCIPLES OF LAW

21 The relevant principles of law as to false imprisonment and malicious prosecution were recently set out by this Court in the judgment of *Edwards v State of New South Wales* [2021] NSWSC 181 at [7]-[43], [49]-[59], [65], [71]-[83]. I adopt those principles, which are set out below.

False Imprisonment

22 False imprisonment is the unlawful arrest or detaining of any person: *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714. A false imprisonment is an intentional, total and direct restraint on a person's liberty. There is no requirement that the defendant intend to act unlawfully or to cause injury. In that regard, liability for the tort may be considered as strict liability: *Ruddock v Taylor* (2005) 222 CLR 612; [2005] HCA 48 at [140] (per Kirby J, in dissent but not on this principle).

23 Thus, a significant difference between false imprisonment and malicious prosecution is that with false imprisonment, if the detaining or arrest was unlawful, the tort is established. The intent of the person doing the detaining is not relevant. See *Ruddock v Taylor* at [140].

24 In *Watson v Marshall* (1971) 124 CLR 621; [1971] HCA 33 the concept of imprisonment was given a broad meaning to include circumstances where a person is led to believe that if a person attempts for example to leave, they would be compelled by force to remain.

25 The power to arrest is given by s 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ("LEPRA"), which provides:

> **99 Power of police officers to arrest without warrant**
>
> (cf *Crimes Act 1900*, s 352, Cth Act, s 3W)
>
> (1) A police officer may, without a warrant, arrest a person if—
>
> (a) the police officer suspects on reasonable grounds that the person is committing or has committed an offence, and
>
> (b) the police officer is satisfied that the arrest is reasonably necessary for any one or more of the following reasons—
>
> (i) to stop the person committing or repeating the offence or committing another offence,
>
> (ii) to stop the person fleeing from a police officer or from the location of the offence,
>
> (iii) to enable inquiries to be made to establish the person's identity if it cannot be readily established or if the police officer suspects on reasonable grounds that identity information provided is false,
>
> (iv) to ensure that the person appears before a court in relation to the offence,

(v) to obtain property in the possession of the person that is connected with the offence,

(vi) to preserve evidence of the offence or prevent the fabrication of evidence,

(vii) to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence,

(viii) to protect the safety or welfare of any person (including the person arrested),

(ix) because of the nature and seriousness of the offence.

(2) A police officer may also arrest a person without a warrant if directed to do so by another police officer. The other police officer is not to give such a direction unless the other officer may lawfully arrest the person without a warrant.

(3) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person before an authorised officer to be dealt with according to law.

Note—

The police officer may discontinue the arrest at any time and without taking the arrested person before an authorised officer—see section 105.

(4) A person who has been lawfully arrested under this section may be detained by any police officer under Part 9 for the purpose of investigating whether the person committed the offence for which the person has been arrested and for any other purpose authorised by that Part.

(5) This section does not authorise a person to be arrested for an offence for which the person has already been tried.

(6) For the purposes of this section, property is connected with an offence if it is connected with the offence within the meaning of Part 5.

26 The High Court considered s 99(1)(a) in *New South Wales v Robinson* (2019) 266 CLR 619; [2019] HCA 46 ("*Robinson*"). In *Robinson*, the High Court emphasised that the relevant standard was suspicion. It observed (at [55]):

The degree of certainty of guilt required to charge

[55] It is true, as has been noticed, that, in *Williams v R* , Mason and Brennan JJ observed in obiter dictum that there was no reason to think that, "in general", an arresting police officer would be unable to make a complaint or to lay an oral information until he had had an opportunity to question the person arrested. But contrary to the majority's reasoning in the Court of Appeal, Mason and Brennan JJ are not to be taken thereby to have represented that what suffices to constitute reasonable grounds to suspect must necessarily be enough to lead an arresting officer to believe that the arrested person is so likely to be guilty of the offence for which he or she has been arrested that a charge is warranted. The essential point of both *Dumbell v Roberts* and *Hussien* — which Mason and Brennan JJ cited with evident approval in support of their analysis of reasonable grounds to suspect — was

that the requirement of reasonable grounds to suspect is "very limited" and nothing like as much as a prima facie case. As Lord Devlin stated in *Hussien*:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting point of an investigation of which the obtaining of *prima facie* proof is the end.

Likewise, as this Court observed in *George v Rockett* :

> Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam* , 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove."' The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown.
> In *Queensland Bacon Pty Ltd v Rees* , a question was raised as to whether a payee had reason to suspect that the payer, a debtor, 'was unable to pay [its] debts as they became due' as that phrase was used in s 95(4) of the *Bankruptcy Act 1924* (Cth). Kitto J said:
>
> > A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence", as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which "reason to suspect" expresses in sub s (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub section describes — a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.

[Footnotes omitted.]

27 The suspicion referred to in s 99(1)(a) must be held "on reasonable grounds". That is a familiar criterion in the exercise of statutory powers and attracts well-understood principles.

28 Reference may be made in this context to the judgment of the Court of Appeal in in *Hyder v The Commonwealth* (2012) 217 A Crim R 571; [2012] NSWCA 336 ("*Hyder*"). The facts in *Hyder* concerned Mr Christopher Gaggin, a Federal Police Agent, whom arrested the applicant without a warrant to do so, acting pursuant to the discretion to so act provided by s 3W(1)(a) of the *Crimes Act 1914* (Cth). Sub-section (1)(a) of s 3W relevantly provided that "[a] constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that: (a) the person has committed or is committing the

offence ...". At [15]-[19], as to the requirement of reasonable grounds, McColl JA (with Hoeben JA agreeing at [90]) stated the following:

> [15] The following propositions, adapted by reference to s 3W, can be extracted from decisions considering how a person required to have reasonable grounds either to suspect or believe certain matters for the purposes of issuing a search warrant or arresting a person might properly form that state of mind:
>
> (1) When a statute prescribes that there must be "reasonable grounds" for a belief, it requires facts which are sufficient to induce that state of mind in a reasonable person: *George v Rockett* (at 112);
>
> (2) The state of mind that the reasonable grounds for the relevant suspicion and belief exist must be formed by the person identified in s 3W (the "arresting officer"); the arresting officer may not "discharge the ... duty [of forming the relevant opinion] parrot-like, upon the bald assertion of the informant": *George v Rockett* (at 112), quoting *R v Tillett; Ex parte Newton* (1969) 14 FLR 101 (at 106) per Fox J;
>
> (3) The proposition that it must be the arresting officer who has reasonable grounds to suspect (or believe) the alleged suspect to be guilty of an arrestable offence is intended to ensure that "[t]he arresting officer is held accountable ... [and] is the compromise between the values of individual liberty and public order": *O'Hara v Chief Constable of Royal Ulster Constabulary* (at 291) per Lord Steyn (Lords Goff, Mustill and Hoffmann agreeing);
>
> (4) There must be some factual basis for either the suspicion or the belief: George v Rockett (at 112); the state of mind may be based on hearsay material or materials which may be inadmissible in evidence; the materials must have some probative value: *R v Rondo* [2001] NSWCCA 540; (2001) 126 A Crim R 562 (at [53](b)) per Smart AJ (Spigelman CJ and Simpson J agreeing); *Shaaban Bin Hussien v Chong Fook Kam* (at 949); *O'Hara v Chief Constable of Royal Ulster Constabulary* (at 293) per Lord Steyn;
>
> (5) "The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof": *George v Rockett* (at 116);
>
> (6) "Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture": *George v Rockett* (at 116);
>
> (7) What constitutes reasonable grounds for forming a suspicion or a belief must be judged against "what was known or reasonably capable of being known at the relevant time": *Ruddock v Taylor* [2005] HCA 48; (2005) 222 CLR 612 (at [40]) per Gleeson CJ, Gummow, Hayne and Heydon JJ; whether the relevant person had reasonable grounds for forming a suspicion or a belief must be determined not according to the subjective beliefs of the police at the time but according to an objective

criterion: *Anderson v Judges of the District Court of New South Wales* (1992) 27 NSWLR 701 (at 714) per Kirby P (Meagher and Sheller JJA agreeing); see also *O'Hara v Chief Constable of Royal Ulster Constabulary* (at 298) per Lord Hope;

(8) The information acted on by the arresting officer need not be based on his own observations; he or she is entitled to form a belief based on what they have been told. The reasonable belief may be based on information which has been given anonymously or on information which turns out to be wrong. The question whether information considered by the arresting officer provided reasonable grounds for the belief depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances and, having regard to the source of that information, drawing inferences as to what a reasonable person in the position of the independent observer would make of it: *O'Hara v Chief Constable of Royal Ulster Constabulary* (at 298, 301, 303) per Lord Hope. (O'Hara concerned the formation of a suspicion, but the proposition Lord Hope stated is equally applicable to the formation of a belief); it is "[t]he character of the circumstances [which have] to be decided: were they such as to lead to the specified inference?": *Queensland Bacon Pty Ltd v Rees* [1966] HCA 21; (1966) 115 CLR 266 (at 303) per Kitto J;

(9) "The identification of a particular source, who is reasonably likely to have knowledge of the relevant fact, will ordinarily be sufficient to permit the Court to assess the weight to be given to the basis of the expressed [state of mind] and, therefore, to determine that reasonable grounds for [it] exist": *New South Wales Crime Commission v Vu* [2009] NSWCA 349 (at [46]) per Spigelman CJ (Allsop P and Hodgson JA agreeing); see also *International Finance Trust Co Ltd v New South Wales Crime Commission* [2008] NSWCA 291; (2008) 189 A Crim R 559 (at [134] - [135]), per McClellan CJ at CL. Although McClellan CJ at CL was in dissent, Allsop P (with whom Beazley JA agreed) (at [51]) would have agreed with McClellan CJ at CL's conclusion in this respect subject to qualifications none of which are in issue in the present case. International Finance Trust Co Ltd v New South Wales Crime Commission was overturned in the High Court insofar as it concerned the constitutional validity of s 10 of the Criminal Assets Recovery Act 1990, but not in a manner which affects the statements concerning the reasonable grounds issue: *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319;

(10) In Holgate-Mohammed v Duke (at 443), Lord Diplock held that the words "may arrest without warrant" conferred on a public official "an executive discretion" whether or not to arrest and that the lawfulness of the way in which the discretion was exercised in a particular case could not be questioned in any court of law except upon the principles Lord Greene MR enunciated in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. That aspect of Lord Diplock's reasoning was applied in *Zaravinos v State of New South Wales* (at [28]) where Bryson JA (Santow JA and Adams J agreeing) held that that the validity of an exercise of the statutory power to arrest, in that case under s 352(2) of the *Crimes Act 1900* (which provided that "[a]ny constable or other person may without warrant apprehend"), was "not established conclusively by showing that the circumstances in

> s 352(2)(a) exist[ed], and that the validity of the decision to arrest and the lawfulness of the arrest also depend on the effective exercise of the discretion alluded to by the word 'may' "; see also *Bales v Parmeter* (1935) 35 SR (NSW) 182 (at 188) per Jordan CJ. *Holgate-Mohammed v Duke* has not been followed in Australia to the extent that Lord Diplock held that an arrest for the purpose of asking questions was lawful: see *Zaravinos v State of New South Wales* (at [31] - [33]); *Williams v The Queen* (at 299) per Mason and Brennan JJ.

[16] The primary judge referred (at [15]) with apparent approval to a statement in Purchas LJ's reasons in *Castorina v Chief Constable of Surrey* [1988] NLJR 180; Times, 15 June 1988, to the effect that "courses of inquiry which may or may not be taken by an investigating police officer before arrest are not relevant to the consideration whether on the information available at the time of the arrest he had reasonable cause for suspicion."

[17] It is not apparent that Purchas LJ's proposition is consistent with the statement in *George v Rockett* (at 112, see [15](2) above) to the effect that the arresting officer may not merely act as a cipher, or with the plurality's reasons in *Ruddock v Taylor* (at [40], see [15](7) above) that what constitutes reasonable grounds for forming a suspicion or a belief must be judged, inter alia, against what was "reasonably capable of being known at the relevant time". Prima facie, in my view, it will be a matter of fact in each case as to whether the materials the relevant person was considering were such as to prompt other inquiries before the relevant state of mind could be formed. This question was not argued and need not be finally decided.

[18] The point made in [15](8) above deserves some elucidation in the context of the appellant's complaints. As Lord Hope pointed out in *O'Hara v Chief Constable of Royal Ulster Constabulary* (at 301 - 302), it is frequently the case that:

> "[an arresting officer's] action is the culmination of various steps taken by other police officers, perhaps over a long period and perhaps also involving officers from other police forces. For obvious practical reasons police officers must be able to rely upon each other in taking decisions as to whom to arrest or where to search and in what circumstances. The statutory power does not require that the constable who exercises the power must be in possession of all the information which has led to a decision, perhaps taken by others, that the time has come for it to be exercised. What it does require is that the constable who exercises the power must first have equipped himself with sufficient information so that he has reasonable cause to suspect before the power is exercised."

[19] Lord Hope's remarks emphasise that the question of identifying the material sufficient to support an objective finding that, for relevant purposes, an arresting officer had reasonable grounds for his or her belief has to be approached with practical considerations as to the nature of criminal investigations in mind.

29 The Court of Criminal Appeal in *R v Rondo* (2001) 126 A Crim R 562; [2001] NSWCCA 540 discussed the notion of a reasonable suspicion as follows (at [52]-[53]):

> [52] In *Streat v Bauer; Streat v Blanco* (16 March 1998, CLD, unreported) I reviewed the authorities from other fields which help to elucidate s.357E and the words "suspects" and the clause "any person whom he [the member of the police force] reasonably suspects", namely *Queensland Bacon Pty Ltd v Rees* (1996) 115 CLR 266 at 303 per Kitto J, *George v Rocket* (1990) 170 CLR 104 at 115-116, *R v Armstrong* (1989) 53 SASR 25 at 27; *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 2 WLR 1 at 5 and 11 and *Anderson v Judges of the District Cour*t (1992) 27 NSWLR 701.
>
> [53] These propositions emerge:
>
> > (a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s 357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
> >
> > (b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.
> >
> > (c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.

30 In *Hamilton v State of New South Wales (No 13)* [2016] NSWSC 1311 ("*Hamilton*"), Campbell J described the test of suspicion on reasonable grounds under s 99(2) as a "relatively undemanding test": at [154].

31 The assessment of whether any suspicion was held on reasonable grounds is be judged from the "standpoint" of the officer "at the time of his decision to arrest or not in the circumstances then actually pertaining. The Court's evaluation is not to be made retrospectively": *Hamilton* at [155].

32 The state of mind referred to in s 99(1)(b) is satisfaction. The subject of the satisfaction is that the arrest be "reasonably necessary" (not "necessary") or one of the identified purposes (*contra* the form of LEPRA considered in *Robinson* was decided at [43]).

33 There is a well-established body of law dealing with the validity of the exercise of powers conditioned on the holding of a satisfaction. The satisfaction "must be formed reasonably and on a current understanding of the law" (see example, *Wilkie v The Commonwealth* (2017) 263 CLR 487; [2017] HCA 40 at

[109] (per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)). However, the ultimate criterion is that there be a satisfaction, lawfully formed, at the time the power was exercised; and error is not established merely because the Court itself would not have reached that satisfaction.

34 In order to be lawful, at the time of arrest, the arresting officer must intend to charge the arrested person: *Robinson* at [62]-[63] (per Bell, Gageler, Gordon and Edelman JJ).

Malicious Prosecution

35 The tort of malicious prosecution is committed when a person wrongfully and with malice institutes or maintains legal proceedings against another. At the heart of the tort is the notion that the institution of proceedings for an improper purpose is a "perversion of the machinery of justice": *Mohamed Amin v Jogendra Bannerjee* [1947] AC 322.

36 The constituent elements of the tort were stated by the plurality of the High Court in an extensive decision on the topic in *A v State of New South Wales* (2007) 230 CLR 500; [2007] HCA 10 ("*A v NSW*") at [1] (per Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). These were succinctly reformulated by the High Court in *Beckett v New South Wales* (2013) 248 CLR 432; [2013] HCA 17 ("*Beckett*") at [4], as follows:

(1) the prosecution was initiated by the defendant;

(2) the prosecution terminated favourably to the plaintiff;

(3) the defendant acted with malice in bringing or maintaining the prosecution; and

(4) the prosecution was brought or maintained without reasonable and probable cause.

37 In these proceedings, there is no dispute about the first two elements, except that there is an important secondary issue as to how long Inspector Pietruszka remained the prosecutor, with the State contending the case was taken over by the Director of Public Prosecutions ("DPP"). Further, in these proceedings, issues arise as to the third and fourth elements.

38 The conduct on which the tort focuses is the taking of an "active step" by the relevant prosecutor. A mere omission to act is not an active step. Nor is a state of affairs.

39 The principles and authorities were summarised by the Court of Appeal in *State of New South Wales v Landini* [2010] NSWCA 157 ("*Landini*") at [52]-[59] (per Macfarlan JA, with Tobias JA agreeing at [1], Sackville AJA agreeing at [119]). There, the Court of Appeal said:

> [52] To deal with these submissions, it is necessary to refer to authorities relating to the acts which are capable of constituting the maintenance of a prosecution for the purposes of the tort of malicious prosecution.
>
> [53] In *Daniels v Telfer* the plaintiff alleged that shortly after the defendants procured the issue of a warrant for the arrest of the plaintiff on a charge of larceny, the defendants became aware that the plaintiff was innocent of that charge. The plaintiff's Declaration filed in those proceedings alleged that the defendants "falsely and maliciously and without reasonable and probable cause refrained from taking any steps to prevent the execution of the said warrant and to prevent the plaintiff from being arrested thereunder" (*Daniels v Telfer* at 99). On demurrer, the Court held that the Declaration was defective as it did not allege that the defendants maliciously took any active step to continue the prosecution.
>
> [54] Harvey ACJ made the following observations:
>
> > "In my opinion malicious prosecution connotes an active prosecution of the plaintiff. It must be shown that at some time when the defendants took some steps towards pressing on the prosecution they were actuated by malice. Mere saying nothing, taking no part in pressing on the execution, in my opinion is no breach of any duty which the defendants owed to the plaintiff. They must at the time when they do something by way of prosecution of the defendant be actuated by malice and without reasonable or probable cause. All that is alleged here is that after the warrant had been properly issued they refrained from taking steps to withdraw the warrant. In my opinion that gives no cause of action. Had they taken any steps such as by way of giving evidence in support of the prosecution, had they actively prevented the giving of evidence by persons who were qualified to give evidence, had they suppressed evidence, then I think on the authorities on the cases which have been cited to us, particularly the case of *Fitzjohn v [Mackinder]* (8 C.B. (N.S.) 592 and 9 C.B. (N.S.) 505)[,] I think the Court is justified in saying that they took an active step actuated by malice without reasonable and probable cause sufficient to establish malicious prosecution; but mere abstaining from doing or taking any action at all is not, in my opinion, malicious prosecution" (at 102).
>
> [55] James and Halse Rogers JJ concurred. Halse Rogers J added the following observation:
>
> > "The only matter that has caused me any doubt is that in the course of the history the pleader alleges that the defendants procured a further adjournment of the hearing. That in itself of course was an active step

> and in my opinion in a declaration properly framed, if the plaintiff declared that after the arrest the defendants knowing of the innocence of the plaintiff maliciously and without reasonable and probable cause suppressed from the magistrate their knowledge of the innocence of the plaintiff and procured an adjournment and caused damage to the plaintiff, in my opinion that would give them ground for action …" (at 103).

[56] In *Fitzjohn v Mackinder*, a decision of the Court of Exchequer Chamber referred to by Harvey ACJ, the defendant gave false evidence in civil proceedings that the plaintiff had signed an acknowledgement. The plaintiff denied that the signature was his, but he was disbelieved by the County Court judge who determined the civil claim. The judge, on his own motion, bound the defendant over to prosecute the plaintiff for perjury. This the defendant did by preferring a bill of indictment, but the plaintiff was ultimately acquitted.

[57] The plaintiff was non-suited in his subsequent action against the defendant for malicious prosecution, but he succeeded in obtaining a verdict on appeal (Cockburn CJ, Bramwell and Channell BB agreeing, Blackburn and Wightman JJ dissenting). Cockburn CJ, with whom Channell B concurred, said this (9 CB (NS) 505 at 531; 142 ER 199 at 210):

> "In my opinion … a prosecution, though in the outset not malicious, as having been undertaken at the dictation of a judge or a magistrate, or, if spontaneously undertaken, from having been commenced under a bona fide relief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres malo animo in the prosecution, with the intention of procuring per nefas a conviction of the accused. Take, for instance, the case of a prosecutor, who, after the commitment of a prisoner, and before going before the grand jury, chanced to discover the clearest proof of the prisoner's innocence, and yet went on with the indictment and prosecution, suppressing the newly-ascertained facts, and supporting the case against the prisoner by evidence either absolutely false or rendered so by the suppression of facts which would have shewn the innocence of the accused. Can it be said that to prefer an indictment under such circumstances, to be followed up by such a course of proceeding as I have referred to, would not be a malicious prosecution, for which the man whose life or liberty had been put in peril by it should have a remedy by civil action?".

[58] *Daniels v Telfer* was followed in *Coleman v Buckingham's Ltd* where it was held that allegations that the plaintiff had maliciously and without reasonable and probable cause continued the prosecution of a civil proceeding by taking certain identified steps were capable of establishing the commission of the tort. The steps alleged to have been taken comprised the procuring of an order to proceed, and of a judgment, "by falsely and maliciously representing to the court by a false affidavit certain facts" (at 178).

[59] The joint judgment in *A v New South Wales* pointed out that "[t]he identification of the appropriate defendant in a case of malicious prosecution is not always straightforward. 'To incur liability, the defendant must play an active role in the conduct of the proceedings, as by 'instigating' or setting them in motion'" (at [34] citing John G Fleming, *The Law of Torts*, 9th ed (1998) LBC Information Services at p 676). Their Honours continued:

> "[35] In *Martin v Watson* ([1996] AC 74), a woman made an allegation that her neighbour had indecently exposed himself to her whilst standing on a ladder in his garden. She went to a police station and complained. A detective constable laid an information against the neighbour. At a hearing before the Magistrates' Court, the Crown Prosecution Service offered no evidence, and the charge was dismissed. The House of Lords held that, since the facts relating to the alleged offence were solely within the complainant's knowledge, and that as a practical matter the police officer who laid the information could not have exercised any independent discretion, the complainant could be sued for malicious prosecution, and upheld an award of damages against her. The complainant had 'in substance procured the prosecution' ([1996] AC 74 at 89). The police officer to whom the complaint was made had no way of testing the truthfulness of the accusation ([1996] AC 74 at 89). Lord Keith of Kinkel quoted with approval a statement by McMullin J in the Court of Appeal of New Zealand (*Commercial Union Assurance Co of New Zealand Ltd v Lamont* [1989] 3 NZLR 187 at 207-208), that a person may be regarded as the prosecutor if he puts the police in possession of information which virtually compels an officer to bring a charge".

40 In the context of the tort of malicious prosecution, a prosecution is not initiated by an arrest. Rather, it is not initiated until the process of a court is invoked. As the Victorian Court of Appeal held in *Mutton v Baker* [2014] VSCA 43 at [37]:

> [37] In the present case, there is simply no allegation in the statement of claim that the defendant has invoked or commenced the processes of any court. The statement of claim alleges nothing more than that a complaint was made to the police and that the police arrested the plaintiff. That conduct is insufficient by itself to ground an action in malicious prosecution. That part of the claim has no real prospect of success. In my opinion, the judge was right to dismiss it.

41 The tort has what the High Court has described as a "temporal dimension": *A v NSW* at [59]. The High Court said:

> [59] Thirdly, the action for malicious prosecution has a temporal dimension. To ask whether a prosecution was commenced or maintained without reasonable and probable cause directs attention to the state of affairs when the prosecution was commenced, or when the prosecutor (the defendant in the subsequent civil claim) is alleged to have maintained that prosecution. Moreover, it necessarily directs attention to what material the prosecutor had available for consideration when deciding whether to commence or maintain the prosecution, not whatever material may later have come to light.

42 What is relevant, however, is what the plaintiff proves about the material that the prosecutor had available for consideration, first when deciding whether to commence the proceedings, and thereafter from time-to-time during the maintenance of the prosecution, as opposed to any material that may have come to light subsequently: see also, *A v NSW* at [58].

43 The “temporal dimension” of the tort makes it critically important to identify the time at which each active step of initiation or maintenance occurred. It is at that time that the issue of malice and the issue of absence of reasonable and probable cause are to be assessed.

44 The High Court reinforced this temporal dimension in *Beckett* at [4]. There, the High Court said:

> [4] … One aspect of that consideration which assumes importance in this appeal is the discussion of the temporal dimension of the tort: proof of the absence of reasonable and probable cause directs attention to the state of affairs at the time the defendant is alleged to have instigated or maintained the prosecution. Evidence bearing on the existence of reasonable and probable cause is confined to the material available to the defendant at the time the prosecution was commenced or maintained.
>
> [Footnotes omitted.]

45 In *Wood v State of New South Wales* [2018] NSWSC 1247 (“*Wood*”), Fullerton J said (at [246]):

> [246] In an action for malicious prosecution the need for a close focus on what are contended to be deficiencies in the evidence is allied with the importance of recognising the temporal dimension to that enquiry. An enquiry into the question of the absence of reasonable and probable cause directs attention to the state of affairs that obtained when the prosecution was commenced or when it is alleged the prosecution was maintained. Moreover, as the High Court observed at [59] in *A v NSW*, the enquiry necessarily directs attention to the material the prosecutor had available for consideration when deciding whether to commence or maintain the prosecution, not any material that may have come to light thereafter.

46 This Court has repeatedly emphasised the importance of the temporal dimension: see example, *Bailey v Director General of Natural Resources* [2014] NSWSC 1012 (“*Bailey*”) at [307] and [346] (per Fullerton J); *Hamod v State of NSW* [2007] NSWSC 600 at [19] (per Simpson J); *Clyne v State of New South Wales (No 1)* [2011] NSWSC 629 at [56] (per Fullerton J).

47 The onus of establishing absence of reasonable and probable cause is on the plaintiff, and that typically gives rise to forensic difficulties. As the High Court observed in *A v NSW* (at [60]):

> [60] It is important to recognise that, in an action for malicious prosecution, the plaintiff must establish a negative (the absence of reasonable and probable cause). The forensic difficulty of proving a negative is well known. At least some of the questions presented in this appeal arise because there is an inevitable tendency to translate the negative question — whether the defendant prosecutor acted without reasonable and probable cause — into the

> different question — what will constitute reasonable and probable cause to institute criminal proceedings. The logical relationship between the two forms of question tends to obscure first, the importance of the burden of proof, and secondly, the variety of factual and forensic circumstances in which the questions may arise.

48 The High Court dealt with the test for absence of reasonable and probable cause throughout *A v NSW*. However, the following propositions from *A v NSW* warrants particular attention. At [77], the High Court stated:

> [77] There are three critical points. First, it is the negative proposition that must be established: more probably than not the defendant prosecutor acted without reasonable and probable cause. Secondly, that proposition may be established in either or both of two ways: the defendant prosecutor did not "honestly believe" the case that was instituted or maintained, or the defendant prosecutor had no sufficient basis for such an honest belief. …

49 The plaintiff bears the onus of proving a negative with respect to absence of reasonable and probable cause. That onus is normally met, at least in part, by the tender of the brief of evidence: *Hamod v State of New South Wales* [2011] NSWCA 375 at [33]; *State of New South Wales v Hathaway* [2010] NSWCA 184 ("*Hathaway*") at [180] (per Tobias, McColl and Macfarlan JJA). Thus, if the plaintiff presses on the Court some analytical approach to the evidence available in aid of a submission that there was an objective deficiency, then the plaintiff would normally tender all of the material available to the prosecutor.

50 That the onus is on the plaintiff in respect of each element is particularly important when a solely inferential case is mounted. Where a case relies on inferences, the onus of proof is discharged only if the circumstances "do more than give rise to conflicting inferences of equal degrees of probability": *Luxton v Vines* (1952) 85 CLR 352 at 358 (Dixon, Fullagar and Kitto JJ).

51 While the cross-examination of Inspector Pietruszka often travelled beyond the pleaded and particularised case, the Court should, it was submitted by counsel for the State, hold the plaintiff strictly to his pleaded case.

52 As to the standard of proof, s 140(1) of the *Evidence Act 1995* (NSW) states that the case must be proved on the balance of probabilities. However, under s 140(2), the Court is to take into account the nature of the cause of action, the nature of the subject matter of the proceeding and the gravity of the matters alleged. The allegations now made against Inspector Pietruszka are grave within the meaning of s 140(2) and of the utmost seriousness having regard to

the statements of principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336 ("*Briginshaw*") at 362 (per Dixon J).

53 The burden of proof on the plaintiff is, therefore, an onerous one because of the allegations of impropriety that the actions entail: *Landini v State of New South Wales* [2008] NSWSC 1280 at [45] (per Hall J) (it may be noted the relevant passage was not disturbed on appeal), referring to Dixon J's judgment in *Briginshaw*; see also *Hathaway* at [259]-[273]. That is, in order for the plaintiff to make good his case against Inspector Pietruszka, clear and cogent evidence is required: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171; *Briginshaw* at 361-362 (proof to the state of reasonable satisfaction cannot be produced by "inexact proofs, indefinite testimony, or indirect inferences", where the nature and consequences of the facts to be proved are grave and inherently unlikely).

54 In *Commonwealth of Australia v Fernando* (2012) 200 FCR 1; [2012] FCAFC 18 ("*Fernando*"), the Federal Court at [129]-[130] held:

> [129] In *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466; [2007] FCAFC 132, a Full Court of this court considered the standard of proof required in civil proceedings in the light of Briginshaw and the requirements of s 140. The Court said (at 480 [32]) that:
>
> > The mandatory considerations which s 140(2) specifies reflect a legislative intention that a court must be mindful of the forensic context in forming an opinion as to its satisfaction about matters in evidence. Ordinarily, the more serious the consequences of what is contested in the litigation, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion.
>
> The Full Court continued (at 482 [37]), saying that:
>
> > Ultimately, because this is a civil, not criminal, proceeding the civil standard of proof applies. Thus, the ACCC had to establish that the circumstances appearing in the evidence gave rise to a reasonable and definite inference, not merely to conflicting inferences of equal degrees of probability, that [the impugned conduct had occurred].
>
> [130] A finding that a Commonwealth Government Minister has deliberately exercised an important statutory power knowing that, in doing so, he was acting unlawfully is properly to be characterised as grave. The legal consequences are potentially serious as too is the effect on the Minister's reputation. In circumstances in which, on the facts found, conflicting inferences are open and one of those inferences is favourable to the respondent, the court will not be satisfied that the applicant's case has been proved to the

> necessary standard. For the reasons which we have explained this is such a case.

55 In *Wood* at [30]-[31], Fullerton J did not accept the Court's observations in *Fernando* as being authority for the proposition that the plaintiff must exclude any hypothesis available or open on the evidence before finding an unfavourable hypothesis proved. Rather, her Honour noted:

> [30] … Competing hypotheses may be "open" but one of greater probability than another will allow a conclusion to be reached that, having regard to the matters to which reference must be made in s 140(2), it has been made out to the level of reasonable satisfaction.
>
> [31] Proper consideration of the conclusion expressed at [130] in *Fernando*, when considered in the context of what the Full Court of the Federal Court said in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466; [2007] FCAFC 132, and which was extracted at [129] of *Fernando*, reveals that the Court was concerned with conflicting "open" hypotheses for conduct where those hypotheses were of equal degrees of probability. To accept, as I understand the defendant to submit, that *Fernando* is authority for the proposition that an open and favourable hypothesis must be excluded before accepting a competing open and unfavourable hypothesis, even if it is less likely, would be, in my view, to alter the applicable standard of proof.

56 Particulars play an important role in a malicious prosecution case. Allegations of malice and absence of reasonable and probable cause are serious allegations and there is a special need for distinct pleading and clear proof. This is no more than an application of the general principle that an opposite party should always be fairly apprised of the nature of the of the case he or she is called upon to meet: *R v The Associated Northern Collieries* (1910) 11 CLR 738 at 740-741 (per Isaacs J).

57 These general principles are fortified by rr 15.3 and 15.4 of the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR"). Rule 15.3 states: "A pleading must give particulars of any fraud, misrepresentation, breach of trust, wilful default or undue influence on which the party relies".

58 Rule 15.4 states:

> **15.4 Allegations as to condition of mind**
>
> (cf SCR Part 16, rule 3; DCR Part 9, rule 21)
>
> (1) A pleading that alleges any condition of mind must give particulars of the facts on which the party pleading relies.

> (2) In subrule (1), ***condition of mind*** includes any disorder or disability of mind, any malice and any fraudulent intention, but does not include knowledge.

59 The effect of these rules, particularly r 15.4, is that particulars of malice and any state of mind relating to absence of reasonable and probable cause must be given. However, the function of the pleadings and particulars thereof in the disposition of these proceedings will be discussed further below.

60 As regards absence of reasonable and probable cause, the High Court's decision in *A v NSW* described the content of the "absence of reasonable and probable cause" element.

61 The Court identified two ways in which absence of reasonable and probable cause might be established, which are commonly described as "subjective" and "objective" aspects of the element. Those two aspects appear at [58] of the judgment, where their Honours said:

> [58] Secondly, the inquiry about reasonable and probable cause has two aspects. That is, to decide whether the prosecutor did not have reasonable and probable cause for commencing or maintaining the prosecution, the material available to the prosecutor must be assessed in two ways. What did the prosecutor make of it? What should the prosecutor have made of it? To ask only whether there was material available to the prosecutor which, assessed objectively, would have warranted commencement or maintenance of the prosecution would deny relief to the person acquitted of a crime prosecuted by a person who not only acted maliciously, but who is shown to have acted without forming the view that the material warranted prosecution of the offences. Conversely, to ask only what the prosecutor made of the material that he or she had available when deciding to commence or maintain the prosecution would favour the incompetent or careless prosecutor over the competent and careful.

62 The High Court returned to these two aspects at [70]-[71] of the judgment, where their Honours stated:

> [70] There are several questions bound up in the proposition that absence of reasonable and probable cause requires an examination of what the prosecution "made" or "should have made" of the material available to the prosecutor when he or she decided to prosecute, or to maintain an existing prosecution. As has already been noted, two kinds of inquiry are postulated: one subjective (what the prosecutor made of the available material) and the other objective (what the prosecutor should have made of that material). Does proof of the absence of reasonable and probable cause require proof of the absence of a state of persuasion (a "belief") in the mind of the prosecutor? What is the subject-matter of the state of persuasion that is to be considered? Is it a persuasion about the likelihood of a particular outcome of the prosecution (the conviction of the person prosecuted)? Is it a persuasion about what the material considered by the prosecutor reveals ("guilt" or "probable

> guilt" of the person prosecuted)? Or is it a persuasion about that material's sufficiency to warrant setting the processes of the criminal law in motion? What, if any, weight may be given by the prosecutor to the existence of various checks and balances, like the interposition of committal proceedings and the assignment of particular functions to the Director of Public Prosecutions, that form an integral part of the system of criminal justice?
>
> [71] Those questions should be answered as follows. If the plaintiff alleges that the defendant prosecutor did not have the requisite subjective state of mind when instituting or maintaining the prosecution, that is an allegation about the defendant prosecutor's state of persuasion. The subject-matter of the relevant state of persuasion in the mind of the prosecutor is the sufficiency of the material then before the prosecutor to warrant setting the processes of the criminal law in motion. If the facts of the particular case are such that the prosecutor may be supposed to know where the truth lies (as was certainly the case in *Sharp v Biggs*) the relevant state of persuasion will necessarily entail a conclusion (a belief of the prosecutor) about guilt. If, however, the plaintiff alleges that the prosecutor knew or believed some fact that was inconsistent with guilt (as the plaintiff alleged in *Mitchell v John Heine*) the absence of reasonable and probable cause could also be described (in that kind of case) as the absence of a belief in the guilt of the plaintiff.

63 At [80], the High Court identified two negative conditions for this element of the tort, the first of which relates to the subjective aspect of this element and the second of which relates to the objective aspect. Their Honours said:

> [80] … But unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for prosecution, or to have formed that view on an insufficient basis, the element of absence of reasonable and probable cause is not established.

64 In this case, the plaintiff relies on the subjective aspect of absence of reasonable and probable cause. He asserts that, as at 1 July 2015, Inspector Pietruszka knew that there was not reasonable and probable cause to prosecute the plaintiff.

65 Counsel for the State contended “it is not open to the [p]laintiff to run a case that objectively there was no basis for [Inspector] Pietruszka to form a view that there was no proper case to prosecute”. To succeed on the objective element, having regard to the fact that the plaintiff advances a “subjective” case, the plaintiff must establish that, at the time of each active step, Inspector Pietruszka had not honestly formed the view that there was a proper case for prosecution.

66 As to malice, it is well-established that the malicious purpose must be the sole or dominant purpose of the prosecutor. In *A v NSW* at [91], the High Court said:

> [91] What is clear is that, to constitute malice, the dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law – an "illegitimate or oblique motive". That improper purpose must be the sole or dominant purpose actuating the prosecutor.

67 The High Court continued at [93]:

> [93] Two further observations should be made about the element of malice. First, its proof will often be a matter of inference. But it is proof that is required, not conjecture or suspicion. Secondly, the reference to "purposes other than a proper purpose" might be thought to bring into this realm of discourse principles applied in the law of defamation or in judicial review of administrative action. No doubt some parallels could be drawn with the principles applied in those areas. But drawing those parallels should not be permitted to obscure the distinctive character of the element of malice in this tort. It is an element that focuses upon the dominant purpose of the prosecutor and requires the identification of a purpose other than the proper invocation of the criminal law.

68 The plaintiff must therefore prove that the sole or dominant purpose of Inspector Pietruszka at the time of the taking of each active step was some purpose other than the proper invocation of the criminal law.

Prosecutor

69 It is well-established that the inquiry as to the identity of the prosecutor is one of substance. In *Davis v Gell* (1924) 35 CLR 275 at 282, Isaacs ACJ said that the law “looks beyond legal theory and regards the person in fact instrumental in prosecuting the accused as the real prosecutor”. The inquiry is therefore into the person or persons who, at each time, are instrumental in prosecuting the then accused.

70 As Fullerton J in *Wood* observed, citing *Bailey* and *A v NSW*, it is important for the plaintiff to establish the identity of a prosecutor against whom it is said he was prosecuted maliciously.

71 The identity of the prosecutor is significant because it is that individual’s state of mind, and conduct, that is relevant for determining whether the tort of malicious prosecution is made out. In *Wood* at [580], Fullerton J remarked on the importance of properly identifying the prosecutor:

> [580] In *Bailey* I expressed the importance of the plaintiff establishing the identity of a prosecutor against whom it is said he was prosecuted maliciously as follows:
>
> > [284] In A’s case the High Court was not concerned with a general enquiry into the identity of those to whom responsibility or accountability for the tort of malicious prosecution might be extended.

> This much is clear from what was said at [36]-[38]. What the Court did emphasise was that it is important to properly identify the prosecutor in proceedings brought to recover damages for the tort of malicious prosecution in order to ground and focus the critical enquiry into whether the plaintiff has proved that person (or, if more than one prosecutor, those people) acted maliciously and without reasonable and probable cause in initiating and maintaining the proceedings and, as the Court said at [38], in focusing attention upon those critical questions, whether those who "effectively set the proceedings in motion" acted tortiously.
>
> [285] At [38] the Court said:
>
> > For the reasons explained by the House of Lords in *Glinski v McIver* [1962] AC 726, justice requires that the prosecutor, the person who effectively sets criminal proceedings in motion, accept the form of responsibility, or accountability, imposed by the tort of malicious prosecution. Insofar as one element of the tort concerns reasonable and probable cause, the question is not abstract or purely objective. The question is whether the prosecutor had reasonable and probable cause to do what he did; not whether, regardless of the prosecutor's knowledge or belief, there was reasonable and probable cause for a charge to be laid. The question involves both an objective and a subjective aspect.

72 Her Honour also noted (at [146]):

> [146] Since the accountability imposed by the tort of malicious prosecution is only imposed on a person who plays an active role in the conduct of the proceedings by effectively instigating or setting them in motion (see *A v NSW* [37]-[38]), it is necessary in this case to identify who the prosecutor is (or who the prosecutors are if there be more than one) as a discrete issue.

73 As this Court recently observed in *Ea v Diaconu* [2019] NSWSC 795 ("*Diaconu*") at [60] (per R A Hulme J), citing *Clark v State of New South Wales* [2016] NSWSC 808 at [59], even where the State is alleged to be vicariously liable for the tort of a prosecutor in a public prosecution, it remains necessary to identify the individual who is alleged to have committed the tort.

74 The Court, in *Diaconu*, summarily dismissed the plaintiff's statement of claim, which alleged the torts of misfeasance in public office and malicious prosecution. That decision was the subject of an application for leave to appeal: *Ea v Diaconu* [2020] NSWCA 127. I note that the applicant ultimately did not press the appeal insofar as it related to malicious prosecution. That is, the application proceeded on the basis of misfeasance in public office alone and the appeal was allowed against the first and third respondents.

75 The New South Wales Court of Appeal has recently cautioned against assuming that the Officer-In-Charge of an investigation is *ipso facto* a prosecutor. In *HD v State of New South Wales* [2016] NSWCA 85, the Court of Appeal observed (at [76]):

> [76] For the purposes of the appeal, it may be assumed, without deciding, since no argument was advanced to the contrary, that Detective Cameron is to be taken to be a prosecutor in relation to both the assault charge and the ADVO proceedings. In proceeding on this basis, I would hasten to add that it should not be assumed that, as a general proposition, all investigating police, let alone those named as "officer-in-charge" of the investigation, are to be treated as the real prosecutor. In all cases, it will depend on the circumstances.

76 In this case, the circumstances include the role of the DPP once it assumed carriage of the prosecution. That directs attention to s 9 of the *Director of Public Prosecutions Act 1986* (NSW) ("the DPP Act"), which states:

> **9 Taking over prosecutions or proceedings**
>
> (1) If a prosecution or proceeding in respect of an offence (whether it is an indictable offence or a summary offence) has been instituted by a person other than the Director, the Director may take over the matter and:
>
> (a) carry on the prosecution or proceeding,
>
> (b) carry on, on behalf of the prosecution or as respondent, an appeal in any court in respect of the offence,
>
> (c) institute and conduct, on behalf of the prosecution, an appeal in any court in respect of the offence, and
>
> (d) conduct, as respondent, an appeal in any court in respect of the offence.
>
> (2) The Director may not take over a matter under this section involving a summary offence, unless:
>
> (a) the offence is a prescribed summary offence, or
>
> (b) a person otherwise responsible for the matter has consented in writing.
>
> (3) Except as provided by subsection (2), the Director may take over a matter under this section whether or not the person otherwise responsible for the matter consents.
>
> (4) If the Director takes over a matter under this section:
>
> (a) the Director shall, as from the time when the Director complies with section 10 (1) in relation to the matter, be deemed to be the prosecutor in connection with the prosecution or proceeding concerned, and
>
> (b) the Director may decline to proceed further in the prosecution or to carry the proceeding further.

> (5) For the purposes of this section, proceeding includes any application, appeal or other proceeding commenced under Division 1A of Part 3 of the Confiscation of Proceeds of Crime Act 1989.

77 Section 10 provides for the Director to give notice when he or she takes over a matter under s 9 of the DPP Act.

78 The effect of s 9(4)(a) is to deem the DPP to be *the* prosecutor (not *a* prosecutor) in connection with the prosecution.

79 In written submissions, the plaintiff has taken the point that there is no evidence of the existence of a notice having been issued.

80 The plaintiff advanced the following submissions in reply as to the identity of the prosecutor:

> 17. The defendant says (para 208) that the plaintiff has belatedly taken the point that there is no evidence of the sending of a notice pursuant to Section 10(1) of the *Director of Public Prosecutions Act 1986*. The plaintiff's position is not belated. The earliest that a party can take a point about absence of evidence is in final submissions. The provisions of the DPP Act were specifically drawn to the attention of the court on 14 August 2018 by the defendant. There was specific reference to Section 9 (at T81, 5-7 and T96, 8-18). There was recognition there for the requirements of s.9(4) to be satisfied - "we say that s.9(4) makes clear that the Director is the Prosecutor, once the Director takes over and once the obligations under s.9 are satisfied ... ".
>
> …
>
> 18. In the present case, the issue is not the regularity of an act done by the DPP as prosecutor, but whether in fact the DPP had taken over the prosecution.
>
> 19. In any event, the resolution of that question does not finally determine the issue of who is liable for the maintenance. The relevance of whether the DPP took over the prosecution is that without specific evidence, any malice of Mr Pietruszka cannot be attributed to the DPP. But any malice of Mr Pietruszka will have been operating on the prosecution until the DPP had the opportunity to consider the case and take his own position. This was recognized at first instance in Av New South Wales, as narrated in the judgment of the High Court in [18]. There, the DPP formally took over the proceedings on 6 April 2001, but the original prosecutor was held to be liable for the maintenance of the prosecution up to 16 May 2001 "which was regarded as allowing for a reasonable period for the Director to consider his position after taking over the proceedings." This approach obviously was approved by the High Court. Thus, even if the defendant is correct, and it is to be presumed that the DPP took over the proceedings on 7 July 2015, the defendant remains liable for Mr Pietruszka's actions until the lapse of a reasonable period for the Director to consider his position.
>
> 20. … In the present case, the DPP cannot have been in a position to consider his position before receiving the brief. Mr Pietruszka did not serve the victim's statements on Mr Linegar until 24 July 2015, and the rest of the brief(apart

> from the DNA evidence) until 21 August. Mr Pietruszka said that he served these documents on Mr Linegar as soon as they became available to him ((Ex 20, p 505) second statement para 26(f)), so he would not have been able to serve them any earlier on the DPP. Thus the defendant must be liable for Mr Pietruszka's actions until at least 21 August. Other evidence suggests strongly that the DPP did not consider the matter in detail until early October.
>
> Two emails were sent from the DPP to Mr Pietruszka on 6 October 2015 (Ex 10, p53 and 52). The first, at 10.34 am, related to possible evidence from Alcazar. It was followed by another at 11.33 am, commenting that the evidence against the plaintiff was very weak. It seems very much that the DPP officer had only just looked at the evidence against the plaintiff after sending the first email.

81 Counsel for the State submitted that the evidence establishes that the Director in fact took over the prosecution by no later than 7 July 2015. The Court should infer, it was submitted, consistently with the presumption of regularity, that the DPP complied with his duties under s 10 of the DPP Act from the time he took over the prosecution. The Court does not need, it was contended, the notice to conclude that notice was given. This presumption of regularity is applicable to this content and permits the Court to presume that the DPP complied with all applicable procedures: see, example, *Minister for Natural Resources v NSW Aboriginal Land Council* (1987) 9 NSWLR 154 at 164; *Hill v Woollahra Municipal Council* [2003] NSWCA 106 at [51]-[52] (per Hodgson JA, with Ipp JA and Davies AJA agreeing at [62] and [63], respectively).

82 In the final disposition of these proceedings, it will be unnecessary to resolve the issue of when Inspector Pietruszka was no longer the prosecutor, given the conclusions I will reach as to maintenance of the prosecution. It is sufficient to observe at this juncture that it was common ground that Inspector Pietruszka remained the prosecutor until 7 July 2015.

THE PLAINTIFF'S PLEADINGS

83 The ASOC was lengthy with the pleadings and particulars extending over 15 pages, including several attached statements of particulars. Those statements are listed below:

(1) Statement of Particulars: Maintenance or Continuance of Criminal Process (28 paragraphs, 3 pages);

(2) Statement of Particulars: Lack of Reasonable and Probable Cause (1 paragraph, 2 pages);

(3) Statement of Particulars: Malice (45 paragraphs, 7 pages); and

(4) Statement of Particulars: Institution of Criminal Process (8 paragraphs, 1 page).

(For convenience, those statements are annexed to this judgment: Annexure A, B, C and D, respectively.)

84 In support of its application, the plaintiff filed closing written submissions dated 17 January 2020 (74 pages) and reply submissions dated 4 February 2020 (22 pages).

85 At the outset of closing written submission, the plaintiff accepted that "wrongful arrest" is not of itself a separate tort, but a necessary part of false imprisonment. An arrest involves a deprivation of liberty; if the arrest is unlawful the consequent deprivation of liberty is false imprisonment. Thus, there are two causes of action in issue, false imprisonment and malicious prosecution.

86 The claim in false imprisonment raises the issue of whether the arrest of the plaintiff, being an arrest without warrant, complied with the terms of s 99 of the LEPRA. The plaintiff acknowledged that if false imprisonment is established, it does not continue beyond the time at which the plaintiff was refused bail by a court, with the consequence that imprisonment continuing beyond that time becomes part of the claim for malicious prosecution.

87 Allowing for some vagueness in the pleadings, based upon the combination of those pleadings and submissions, the case for the plaintiff on liability, in broad terms, ultimately consisted of the following:

(1) On 1 July 2015 at or around 11.20pm, the plaintiff was wrongfully arrested at Blacktown railway station and subsequently falsely imprisoned by Inspector Pietruszka and Constable Mahoney: ASOC at para 2.

(2) The prosecutor who instituted, continued and maintained the proceedings against the plaintiff was Inspector Pietruszka. He was the prosecutor from the date of the plaintiff's arrest on 1 July 2015 until the date that the charges against the plaintiff were withdrawn on 11 December 2015.

(3) Inspector Pietruszka acted without reasonable cause:

(a) when he arrested the plaintiff on 1 July 2015;

(b) when he maliciously laid or caused be laid the charges with respect to the aggravated assaults against the plaintiff on 2 July 2015: ASOC at para 3.

(c) when he maintained or caused to be maintained against the plaintiff criminal proceedings for the charges with respect to the aggravated assaults: ASOC at para 4.

88 It should be observed that the plaintiff particularised his claim with respect to (3) above as being: as at 1 July 2015 ,when the plaintiff was arrested, Inspector Pietruszka knew that he did not have reasonable and probable cause to arrest and charge the plaintiff for the offences as charged.

89 The plaintiff seeks the following relief:

(1) damages for wrongful arrest, false imprisonment and malicious prosecution including aggravated and punitive damages;

(2) actual or special damages;

(3) interest;

(4) costs; and

(5) such orders as the Court shall deem necessary.

90 As to the particulars of damages, the plaintiff pleaded the following (at para 5 of the ASOC):

> **Particulars of Punitive Damages**
>
> The Defendant acted in contumelious disregard of the Plaintiff's rights.
>
> **Particular of Aggravated Damages**
>
> The Plaintiff suffered increased hurt and upset because he knew the Defendant had fabricated the allegations against him.
>
> The Plaintiff suffered increased hurt and upset because he knew the Defendant had arrested and charged him without reasonable and probable cause and further that it initiated and maintained a criminal prosecution against him for an improper purpose.
>
> **Actual and Special Damages**
>
> Please see the plaintiff's letter of 18 May 2018 for particulars of this claim.

ISSUES IN DISPUTE

91 During the course of closing submissions, the parties confirmed that an agreed chronology was before the Court. Following the closure of the parties respective cases, pursuant to directions of the Court, an amended and agreed statement of issues was received by the Court on 19 February 2020.

92 The parties agreement as to the issues in dispute joined was as follows:

False Imprisonment

(1) Whether the plaintiff was lawfully arrested pursuant to s 99(1)(a) and 99(1)(b) of LEPRA as set out in para 3 of the Defence?

(2) Did Inspector Pietruszka have reasonable grounds to suspect it was necessary to arrest the plaintiff pursuant to s 99(1)(b) of LEPRA as set out in paragraph 3(b) of the Amended Defence?

(3) Was the plaintiff lawfully imprisoned between 11.30 pm on 1 July 2015 and 31 July 2015?

(4) If not, what was the period of false imprisonment?

(5) Is the plaintiff entitled to damages for false imprisonment for the period following the bail refusal?

Malicious Prosecution

(1) Did Inspector Pietruszka:

(a) have an absence of reasonable and probable cause when commencing the prosecution?

(b) act maliciously in commencing the proceedings?

(c) continue and/or maintain the prosecution?

(d) have an absence of reasonable and probable cause when continuing and/or maintaining the prosecution?

(e) act maliciously in continuing and/or maintaining the prosecution?

(2) Is it open to the plaintiff to assert malice absent a particularisation of a malicious purpose?

(3) Must the plaintiff establish malice and an absence of reasonable and probable cause at the time of each act of initiation or maintenance on which the Plaintiff can rely?

Causation

(1) Whether the plaintiff suffered injury, loss and/or damage as alleged or at all and if so, the nature and extent of such injury, loss and/or damage?

(2) Whether and to what extent the plaintiff's alleged injury, loss and/or damage are causally related to the incident the subject of this proceeding and to other factors?

(3) What was the precise conduct that resulted in any injury or injuries?

(4) Whether the plaintiff suffered any loss or injury as a result of the alleged malicious prosecution?

Quantum

(1) Did the conduct of Inspector Pietruszka result in the alleged injuries to the plaintiff?

(2) Has the plaintiff made a claim for economic loss?

(3) If so, is the plaintiff entitled to economic loss?

(4) The quantum of the plaintiff's claim with respect to his claim for false imprisonment and malicious prosecution, including whether the plaintiff is entitled to:

(a) general damages including damages for deprivation of liberty from 1 July 2015 to 31 July 2015 and reputational damages;

(b) aggravated damages;

(c) exemplary damages;

(d) (Past) Economic loss;

(e) (future) Economic loss;

(f) loss of opportunity to maintain a career at UBank;

(g) Interest from 1 July 2015 to date.

(5) Is the plaintiff's case on quantum limited by the plaintiff's pleadings and particulars on damages?

93 In addition the above statement of issues with respect to quantum, was the following notation: "Note: The plaintiff has not filed a Statement of Particulars pursuant to UCPR 15.12".

AN OVERVIEW OF SUBMISSIONS FOR THE PLAINTIFF

94 This summary provides a broad overview of the plaintiff's case on malicious prosecution and false imprisonment. Particular elements of the submissions will be discussed during the course of this judgment.

Malicious Prosecution

A. Initiation, Maintenance or Continuance of Criminal Process

Initiation

95 It was common ground that Inspector Pietruszka initiated the prosecution of the plaintiff. The initiation occurred on 2 July 2015 at the time of charging. It did not occur prior to then at the time of arrest.

Maintenance or Continuation

96 The plaintiff's position is that Inspector Pietruszka was the prosecutor who continued and maintained the proceeding against the plaintiff. It is alleged that he was the prosecutor from the date of the plaintiff's arrest until the date that the charges against the plaintiff were withdrawn on 11 December 2015. The

pleaded acts of maintenance or continuance were listed in the statement of particulars (see Annexure A).

97 In written submissions, the plaintiff advanced the following submissions:

> 51.It is clear that the prosecution was initiated by Mr Pietruszka. He performed functions in relation to it throughout, for example through his emails to Mr Linegar, and serving the victim's three accounts on 24 July 2015 (T 584, 40-46; 585, 46 – 586, 13) and the remainder of the brief on 21 August 2015 (T587, 29-34). There is no evidence that the DPP ever formally took over the matter.
>
> 52. The *Director of Public Prosecutions Act 1986* provides for the DPP to take over prosecutions. Section 9(1) provides that the Director may take over a matter. Section 9(4)(a) provides that if the Director takes over a matter under the section "the Director shall, from the time when the Director complies with section 10(1) in relation to the matter, be deemed to be the prosecutor in connection with the prosecution or proceedings concerned." Section 10(1) provides:
>
> …
>
> 53. This section is in mandatory form, and the deeming of the Director to be the prosecutor pursuant to section 9(4)(a) is dependent upon its requirements being fulfilled. In the present case there is no evidence that they were. A notice pursuant to section 10(1)(a), if it existed, would have been directed to Mr Pietruszka. He gave no evidence of having received such a notice. Nor was there any evidence, to which the defendant would have had easy access, that the Registrar or other proper officer of the Court had received a notice pursuant to section 10(1)(b)(i).
>
> Moreover, given the important statutory office held by the Director, it can be comfortably concluded that if the Director intended to take over a prosecution, he would comply with mandatory statutory obligations such as those imposed by section 10(1).
>
> 54. Thus in the present case the Director cannot be deemed pursuant to section 9(4)(a), to be the prosecutor. The DPP may have purported to have taken over, but there is no evidence that he did so formally. To the extent that DPP personnel were involved, they must have been acting as agents of the prosecutor.

B. Reasonable and Probable Cause

98 Turning to the element of reasonable and probable cause, the plaintiff's position is that as at 1 July 2015, when the plaintiff was arrested at Blacktown Railway Station, Inspector Pietruszka knew that he did not have reasonable and probable cause to arrest and charge the plaintiff for the offences as charged (see Annexure B).

99 The plaintiff advanced the following submissions in support of a finding of an absence of reasonable and probable cause:

(1) To sustain the first charge, in considering the elements of the charge, it would be necessary to have evidence that the plaintiff had engaged in sexual intercourse with the victim (in the extended sense of the definition of "sexual intercourse" in s 61H of the *Crimes Act*). This was entirely lacking. Equally, evidence necessary to sustain the second charge was entirely lacking. At the time of charging the plaintiff, Inspector Pietruszka had accounts from three witnesses, the victim, Mr Alcazar and Ms Tejada. As to those accounts, it was submitted:

(a) The victim's account established, if accepted, that the plaintiff was present, but not that he had done anything.

(b) Mr Alcazar's account undermined the victim's account precisely as to the question of the plaintiff's presence, because on Mr Alcazar's account there were never more than three people (other than the victim) present. He said nothing that inculpated the plaintiff.

(c) Ms Tejada's account entirely exculpated the plaintiff.

Thus, at the time of the plaintiff's arrest there was, objectively, a complete absence of reasonable and probable cause.

100 The plaintiff contended that Inspector Pietruszka did not honestly belief there was a proper case for prosecution:

(1) To justify the arrest and charging of the plaintiff, Inspector Pietruszka relied on the original accounts given by the victim of having been gang raped by four men, and her use of general terms such as "they" and "all". Without these, there is nothing that could be used even to attempt to justify his actions.

(2) It was contended that Inspector Pietruszka's did not believe his "expressed rationale" for charging the plaintiff because "he did not apply it consistently himself". (In light of the preceding submission, I find the plaintiff's reference to an "expressed rationale" to refer to Inspector Pietruszka's view that the plaintiff was one of the four men in the bathroom and that all four men participated in the sexual assault). That inconsistency is demonstrated by the following:

(a) First, reference must be made to the initial reports by Detective Houldin:

(i) "A victim has been gang-raped by four persons"; and

(ii) "The victim has said there were four males involved in the assault. They are doing the SAIK now. I've spoken with the sexual assault counsellor. The victim has told them exactly what she told us at the scene".

(b) If Inspector Pietruszka was loyal to his own rationale, the evidence of Detective Houldin should have led him to include the

plaintiff as one of those who had engaged in sexual intercourse with the victim. He did not.

(c) Not only did Inspector Pietruszka disclaim that the plaintiff was one of those who had engaged in sexual intercourse, but at the hearing he confirmed he was not even sure that the plaintiff had put his fingers inside the victim (see T480.5-26).

(d) His uncertainty as to whether or not the plaintiff digitally penetrated the victim, it was submitted, directly contradicts, his frequently repeated rationale which allows no basis to distinguish the position of the plaintiff from that of the other three men (a further reference to Inspector Pietruszka's evidence as to his interpretation of MM's use of "they" and "all").

(e) Yet he said to the plaintiff during the ERISP: "I understand that [MM's] not saying that you placed your penis in her vagina OK" (see Q66 of the ERISP of the plaintiff).

(f) His expressed rationale is also directly contradictory to evidence he gave in re-examination (see T614.30-43):

> Q The question then goes on to say, "It talks about they also penetrated you with a penis. Do you remember who had sex with you that way", answer, "Yes" So it's talking – it's asking about – you were being asked about the evidence of the victim?
>
> A Yes.
>
> Q When the word they was used in that answer from the victim, what did you understand it to mean?
>
> A They, as the four persons in the bathroom.
>
> Q At 471.4, again a reference to the interview, this is a question. "And then around my, like butt and then, like they eventually like started like making their way to like genitalia area". Firstly, what did you make of the word they there?
>
> A Again, sir, the four people.
>
> Q What did you make of the word "their", "making their way", what did you understand that to mean?
>
> A They're making – the four people are making their way down.

(g) When directly challenged with the victim's qualifications, his answers at the hearing, it was contended, reveal a contrary state of mind (namely, that the plaintiff did not participate in the sexual assault):

> Q But on what you knew in this case, you didn't expect the plaintiff's DNA to turn up on the SAIK examination?
>
> A As I said, I would've been surprised if it had.
>
> Q That means you didn't think he'd had sex with the victim, did you?

A No, I don't believe he did.

Q You didn't at the time believe he did, did you?

A No.

Q Having sex meaning, inserting his penis in her vagina?

A Yes.

Q You didn't at the time believe he'd had his fingers in her, did you, because that leaves DNA, doesn't it?

A Inside her?

Q Yes?

A My understanding is that wouldn't come back.

Q That?

A My understanding is fingers, a SAIK would not reveal DNA from another person's fingers.

Q You didn't believe he'd had his fingers in her, did you?

A I wasn't sure, sir.

(h) That evidence was raised with Inspector Pietruszka in re-examination, where he specified that he formed the belief that the plaintiff had not had sex with the victim "once she provided that information". This must mean once the victim could nominate only “Loyd” and “BJ” as the people who had sex with her.

(i) On being referred to the question, "You didn't believe that he'd had his fingers in her, did you?" and his answer "I wasn't sure, sir", he said "Yeah, I couldn't discount that, no". He then said that at the time of charging the plaintiff, he had not discounted it. It was contended: “Discounting it is of course the reverse of the state of mind required to found reasonable and probable cause, being a positive belief in it, not an inability to discount it”.

Thus, it was submitted, his evidence at the hearing about his “expressed rationale” (a description reflecting the plaintiff’s position, as opposed to a description used or adopted by Inspector Pietruszka) for charging the plaintiff is internally contradictory. This indicates that it is an invention designed to provide a desperate defence for the indefensible. Inspector Pietruszka did not subjectively have reasonable and probable cause.

(3) Taken singularly, some of Inspector Pietruszka’s other misrepresentations might be explicable as genuine mistakes. He offered an explanation for only one, where he said that he had not recalled the remark by the victim “I’m not sure about the other guy” (T584.11-19).

However, given his "flagrant" manipulation and lying in relation to Ms Tejada's statement, the most probable conclusion is that all of these misrepresentations were deliberate.

(4) Precisely what Inspector Pietruszka's motive was cannot be known. It may well have been, as raised with him, to put pressure on the plaintiff or to destabilise him (T502.22-29; T509.12-14). But whatever his motive was, it is clear that it included using improper means to obtain information from the person arrested and charged, to attempt to undermine his alibi, and to present misleading information to the bail sergeant, the court, and the plaintiff's legal representatives. It was necessarily, overall, an improper motive.

101 In reply submissions, whilst the plaintiff to a great extent repeated the submissions set out above, the following additional submissions were advanced as to the any contention advanced by the State with respect to the significance of the plaintiff withdrawing "Jenka" as an alibi witness, shortly after offering her as one, and the fact that the plaintiff placed himself in the house with Ms Tejada, as opposed to sitting with her on the grass, it was submitted:

> 15. …It is difficult to know what one is meant to make of it. The withdrawal of Jenka as a witness (if that is what it was) cannot imply that the plaintiff was withdrawing his claim to have been with Ms Tejada at some time in the house, because he persisted in his request that the police talk to the father to confirm the same thing. And to say that he placed himself inside the house with Ms Tejada ignores that right at the start he had said that he was with her on the grass, and that she had confirmed that. Any claim by Mr Pietruszka to have believed that the plaintiff was saying that the only place that he had been with Mr Tejada was inside the house runs up against the fact that both the plaintiff and Ms Tejada had said that he had been with her on the grass, and Mr Pietruszka !mew that.

C. Malice

102 The plaintiff contended that the malice of Inspector Pietruszka in initiating, maintaining and continuing the prosecution against the plaintiff is to be inferred from the following facts, matters and circumstances (see Annexure C).

103 The plaintiff's submissions focused upon particular aspects of the investigation and evidence at the hearing, namely:

(1) the ERISP of the plaintiff, in particular, the "mistake" by Inspector Pietruszka with respect to the reference to the plaintiff in Ms Tejada's statement;

(2) the further statement of Ms Tejada, in particular, its impact upon the assessment of the "mistake" made in the ERISP and the contention that it reveals Inspector Pietruszka sought to undermine the alibi of the plaintiff; and

(3) the contrast between Inspector Pietruszka's evidence at the hearing against his conduct of the ERISP of the plaintiff, which, it was contended, highlights the "implausibility" of his evidence.

104 First, in support of its case as to malice, the plaintiff contended that Inspector Pietruszka made numerous misrepresentations in the ERISP with the plaintiff, in the Facts Sheet, in the interview on 2 July 2015 with Ms Tejada, and to the plaintiff's barrister. Inspector Pietruszka gave evidence that they were mistakes. However, in light of quantity of "mistakes" made, it was contended, the Court would not accept them as genuine errors. The most significant misrepresentation, it was contended, was the "deliberate" lie in the ERISP of the plaintiff with respect to Ms Tejada's statement, namely, his multiple representations to the plaintiff that Ms Tejada did not include reference to the plaintiff in her statement.

105 Secondly, as the further statement of Ms Tejada, the plaintiff's contentions *vis-à-vis* malice were focused upon the manner in which Inspector Pietruszka approached the second interview with Ms Tejada (and were supported by reference to the ERISP of the plaintiff). An analysis of that material, it was contended, revealed:

(1) a deliberate effort by Inspector Pietruszka "to undermine the alibi [of the plaintiff] by suggesting that the plaintiff may have tried to set it up"; and

(2) that Inspector Pietruszka always knew the content of Ms Tejada's statement and deliberately misrepresented it for his own purposes to both the plaintiff and Ms Tejada in their respective interviews.

106 The plaintiff also contended in written submissions that the malice of Inspector Pietruszka may be inferred by his "highly implausible evidence" given at the hearing. In support of that contention, the plaintiff extracted T484.4-T486.20, albeit without any analysis, save for stating that it was in contrast to Inspector Pietruszka's "actual behaviour" in the interview. In light of that reliance, the relevant extract is summarised below.

107 In summary, T484.4-T486.20 is an extract of cross-examination in which Inspector Pietruszka is questioned about a series of topics in quick succession.

(1) First, he was cross-examined as "the hope of getting anything more", namely, evidence, beyond the accounts of those that attended the party. He disputed the plaintiff was his "last chance of actually getting

something good about what happened in the toilet" and gave the following evidence:

> Q. Why wasn't he your last chance?
>
> A. I don't look at it like that, sir. I don't look at this guy needs to give me something to, for whatever reason, it's I looked at the evidence and I believe there was sufficient reason to charge him, sir. I didn't look at him as an opportunity get information.
>
> Q. Ever?
>
> A. At a point, yes.
>
> Q. You were thinking of that right from the start, weren't you?
>
> A. Not at all, no.

(2) Secondly, Inspector Pietruszka was questioned as to whether he had formed the view that "it would be really good" if the plaintiff provided evidence "against those other guys who didn't say anything?". He disagreed with the proposition put and gave the following evidence:

> Q. You never thought that?
>
> A. No, not at the time, no.
>
> Q. Haven't got the time to think that?
>
> A. Not at the time did I think that. No, sir.
>
> Q. Not at the time, I'm sorry, but isn't that one of the prime things an investigator thinks about?
>
> A. I don't sir, no. I don't think about what that person can give me at that time during that time. It's not something I consider.

(3) Thirdly, Inspector Pietruszka was questioned as to the purpose of an interview, namely, whether it is an opportunity for a person to give a version of events or, as put to him by senior counsel, an opportunity for the interviewer to get some information. Inspector Pietruszka described both opportunities as available at the time of an interview. He gave the following additional evidence:

> Q. What's the point of having a version of events if you can't use it for something?
>
> A. It's an opportunity for the person that's been arrested to provide a version of events if that, and then that version is reviewed and looked at and it would be presented to court, absolutely but my intention to arrest someone isn't guided by getting a version from someone.

108 As to the contention that aspects of the ERISP of the plaintiff may be contrasted, the plaintiff, once again, simply extracted passages of the material relied upon, namely, Q102, Q114 and Q118, without any analysis, save for noting that Q118 appears to indicate that Inspector Pietruszka approved Q118 being asked:

INSPECTOR PIETRUSZKA

Q102. Something very bad had happened and I believe you know about it and I'm giving you an opportunity to speak about it ...

DETECTIVE MAHONEY

Q114. ... is there any reason that if you weren't involved that you don't want to tell us about what other people might have done that night?

INSPECTOR PIETRUSZKA

Q118. I understand you may be scared Tino, I do.

False Imprisonment

109 As mentioned at the outset of this judgment, the plaintiff alleged wrongful arrest and false imprisonment. The plaintiff contended that the imprisonment of the plaintiff was unlawful because there was no valid power to arrest and, without a valid power to arrest, there was no valid power to detain the plaintiff.

110 The period of false imprisonment, it was submitted, ran from when the plaintiff was detained at the time of arrest at the train station to the time in which the plaintiff was refused bail by the Local Court of NSW (the following morning).

111 The plaintiff argued that the claim of false imprisonment comprised two grounds:

(1) first, that if Inspector Pietruszka did not suspect on reasonable grounds that the plaintiff had committed the first charge of sexual assault, then the arrest would have been invalid; and

(2) secondly, whether Inspector Pietruszka had decided prior to the arrest of the plaintiff that the plaintiff would be charged with the relevant offence. It was contended that if Inspector Pietruszka had not decided to charge the plaintiff prior to his arrest, the arrest would have been invalid and the following detention would constitute false imprisonment. Reference, in that respect, was made to the High Court authority of *Robinson*.

112 In support of the false imprisonment claim, the plaintiff advanced the following submissions:

(1) If the arresting officer had made an arrest and then subsequently realised the basis for the arrest was incorrect, the validity of the arrest would cease at that point. This is because when the basis of a valid arrest or reasonable grounds for arrest "disappears", imprisonment or detention after that would be false imprisonment.

(2) It was contended that the conduct and words of Inspector Pietruszka during the ERISP of the plaintiff, following the plaintiff's arrest, was capable of reflecting Inspector Pietruszka's state of mind at the time of

the plaintiff's arrest. Particular reliance, in that respect, was placed upon his statement at Q66 (namely, "I understand [MM's] not saying that you placed your penis in her vagina O.K."), which, it was submitted, indicated that at the time of the plaintiff's arrest, Inspector Pietruszka's state of mind was that he did not believe the plaintiff had done anything foundational to the charge for which he was arrested, being a sexual assault.

(3) If Inspector Pietruszka's state of mind at the time of the plaintiff's arrest was that the plaintiff had not committed the offence that he was being arrested for, it follows, the arrest was invalid.

AN OVERVIEW OF SUBMISSIONS FOR THE STATE

Pleading Deficiencies

113 The State contended that the plaintiff's pleadings in the ASOC was deficient. It was contended that the deficiencies in the plaintiff's pleadings created fundamental problems in their case. The State submitted that the plaintiff's ASOC was affected by the following issues:

(1) the pleading itself was brief and, without particulars, would be embarrassing and liable to be struck out;

(2) as a result, the soundness of the pleading rises and falls on the adequacy of the particulars;

(3) there is a special need for particulars in the case of a tort such as malicious prosecution, where the allegations are serious, involve malice and involve a state of mind;

(4) the plaintiff was aware, at the time he proposed the amendments to his pleading, that particularisation by reference to the elements of the tort and the temporal aspect of the tort, was necessary.

114 It was submitted by the State that particulars play an important role in a malicious prosecution case. As allegations of malice and absence of reasonable and probable cause are serious allegations, the State submitted there is a special need for distinct pleading and clear proof. It was contended that this is no more than an application of the general principle that an opposite party should always be *fairly* apprised of the nature of the of the case he is called upon to meet: *R v The Associated Northern Collieries* (1910) 11 CLR 738 at 740-741 (per Isaacs J).

115 The State submitted that the effect of UCPR rr 15.3 and 15.4, particularly r 15.4, is that particulars of malice and any state of mind relating to absence of reasonable and probable cause must be given by the plaintiff.

116 The State noted that, whilst the cross-examination of Inspector Pietruszka often travelled beyond the pleaded and particularised case, the Court should (and must) hold the Plaintiff strictly to his pleaded case.

Malice

117 The State submitted the plaintiff's particularisation of malice as deficient and lacking for the following reasons:

(1) There was *no* engagement at all with the temporal aspect of the tort. It was necessary to allege that a specified malicious purpose was held at *each* time an active step was taken. The pleadings do not do that. A general allegation that there was a malicious purpose when initiating and maintaining the prosecution does not adequately engage with the temporal dimension of the tort: there was no specification of the purpose said to have been held at the time of each active step.

(2) There was no plea that the relevant purpose (whatever that may be) was the sole or dominant purpose actuating Inspector Pietruszka.

Reasonable and Probable Cause

118 As to the particulars of absence of reasonable and probable cause, the State submitted the plaintiff's pleadings were deficient for the following reasons:

(1) The only date on which there was alleged to have been absence of reasonable and probable cause is 1 July 2015. That can be seen from the introductory words of para 1 of the ASOC, "As at 1 July 2015 when the plaintiff was arrested at Blacktown Railway Station …".

(2) The only time at which the plaintiff's alleged to have been absence of reasonable and probable cause was the time of arrest.

(3) The time of arrest was not the taking of an active step in a prosecution. The prosecution does not commence until a charge is laid.

(4) In this case, the plaintiff was not charged until 2 July 2015.

(5) This, it was contended, was not simply a technical point, although as a technical point it would still be fatal. There was a material change in the information before Inspector Pietruszka after arrest and prior to charge when Inspector Pietruszka interviewed the Plaintiff.

(6) Further, on no view is there any particularisation of the absence of reasonable and probable cause after the 2 July 2015 – that is, at the time of the acts of maintenance.

(7) So far as the "temporal dimension" goes on the case as particularised, the only temporal moment that is relevant is 1 July 2015. But that moment predates any active step in the initiation or maintenance of the prosecution.

Maintenance and Continuance

119 The State engaged in detailed analysis of each of the plaintiff's particulars in relation to maintenance or continuance. The State contended that the plaintiff did not assert that there was an absence of reasonable and probable cause at the time of any of those steps of maintenance or continuance. Examples of the State's approach to analysing the plaintiff's particulars are as follows:

> *Particular (8)*
>
> 235. Particular (8) asserts:
>
> > The content of the Statement of the victim dated 3 July 2015 and the strength of the police case against the plaintiff was misrepresented by D.Sgt. Pietruzska to the plaintiff's lawyer by email on 7 July 2015, in that:
> >
> > > (i) The statement of Alcazar did not unequivocally put the plaintiff in the bathroom with the complainant at the time of the offence.
> > >
> > > (ii) The victim had not made statements to police immediately following the events where she maintained that four people including 'valentine' [sic] were in the bathroom committing the offences
> > >
> > > (iii) The victim had not made statements to treating hospital staff immediately following the events where she maintained that four people including 'Valentino' were in the bathroom committing the offences.
> > >
> > > (iv) Suggested that the victim could 'no longer recall' whether the plaintiff was present when the offence occurred.
> > >
> > > (v) Did not mention the statements of Patricia Tejada which put the plaintiff on the grass with her looking after her and not in the bathroom committing the assault.
> > >
> > > (vi) Had not served the police brief including the statements referred to above on the plaintiff's legal representatives.
>
> 236. Subject to one qualification, the sending of an email by Pietruszka to Linegar was capable of being an active step in the prosecution.
>
> 237. The qualification is that, by now, the DPP had probably taken carriage of the prosecution and was the relevant prosecutor.
>
> 238. Nothing else in this particular is relevant to whether there was an act of maintenance.
>
> 239. Further, it is irrelevant to allege that the police case was "misrepresented" unless it is also alleged (which it is not) that Pietruszka knew of the misrepresentation.
>
> 240. Sub-particulars (iv), (v) and (vi) are non-grammatical and vague.
>
> 241. In any event, none of the matters alleged to be misrepresentations were misrepresentations (or have been shown to be misrepresentations). For

example, so far as Pietruszka had been told, the victim had made statements to the police that the Plaintiff had been in the toilet.

…

Particular (15)

265. Particular 15 states:

> D.Sgt. Pietruszka took no steps to have the charges against the plaintiff withdrawn notwithstanding his knowledge of the contents of the statements of Patricia Tejada, the statements of the victim, the statement of Denis Lim, and the contents of the ERISP of Billy Joel Alcazar in circumstances where D.Sgt. Pietruszka was obliged to do so.

266. This particular asserts an omission, not an active step.

267. The particular does not assert any time at which the omission is said to have occurred.

268. The particular does not identify the basis upon which Pietruszka was "obliged" to take steps to have the charges withdrawn.

269. The particular is also wrong in terms. Pietruszka communicated his view to the DPP that the proceedings should be terminated.

Identity of the Prosecutor

120 As to the identity of the prosecutor, the State submitted that the DPP took carriage of the prosecution no later than 7 July 2015. The State contended that the Court should find the DPP to have been the sole prosecutor, and Inspector Pietruszka should not be found to be a prosecutor. The State contended this is the correct approach to the facts due to the following reasons.

(1) From the time the DPP took carriage of the matter, it was deemed by statute to be "the" prosecutor.

(2) After the DPP took carriage of the matter, Inspector Pietruszka was not "instrumental" in prosecuting the plaintiff. For example, the evidence indicated that Inspector Pietruszka did not make decisions about whether to oppose bail or whether to discontinue charges.

(3) That Inspector Pietruszka was the officer-in-charge of the prosecution at the police does not mean he was the prosecutor.

121 The State submitted there was no basis for the plaintiff's contention that the DPP was acting as Inspector Pietruszka's agent. The State contended that the plaintiff has not identified evidence in support of that contention. It further contended that the plaintiff failed to identify the nature of the agency and scope of the agency arrangement alleged by the plaintiff. The State submitted that, as

the plaintiff did not plead an agency arrangement, the Court should not receive that contention.

Merit

Reasonable and probable cause – objective and subjective

122 The State contended the plaintiff's case as to the absence of reasonable and probable cause was pleaded as a subjective case rather than an objective case and an objective case should "not be received". The State submitted that the plaintiff's written submissions failed to particularise an absence of reasonable and probable cause. It was contended that an argument as to the absence of reasonable and probable cause could not be constructed by the plaintiff at the late stage of proceedings such as the closing written submissions.

123 The State contended the plaintiff's pleaded case was solely that Inspector Pietruszka knew as at 1 July 2015 that there was no reasonable and probable cause to prosecute. The State contended that at that time, the information available to Inspector Pietruszka was capable of establishing a proper case to prosecute. As at 1 July 2015, the information available to Inspector Pietruszka was that he:

(1) had been informed by Constable Boyd that the victim had named the plaintiff;

(2) was aware that there were four males present at the party; and

(3) had been informed by the victim that there were four males who had assaulted her and they all took turns.

Malice

124 The State submitted that the plaintiff's case lacks merit as it failed to establish that Inspector Pietruszka had a malicious purpose. It was contended that the plaintiff did not articulate and could not articulate any particular malicious purpose. The State submitted that Inspector Pietruszka did not need a malicious reason to prosecute the plaintiff as he had evidence from the victim that she was raped by four males, and there were only four males at the party, one of which was the plaintiff.

125 The State submitted that should the Court find that there was a malicious purpose (which they contend there was not), the plaintiff did not and could not establish that such malicious purpose was the sole or dominant purpose. It was contended that Inspector Pietruszka believed that the plaintiff was guilty of sexual assault. It was contended that the plaintiff failed to show that Inspector Pietruszka would not have charged and prosecuted on that basis alone.

126 The State submitted the plaintiff's case is flawed due to deficiencies in their pleadings. The State contended that the plaintiff had not specified a malicious purpose or particularised a time at which the malicious purpose was held.

Maintenance or Continuance

127 The State contended that the plaintiff's case was insufficiently pleaded to establish that Inspector Pietruszka took active steps to maintain the prosecution against the plaintiff. In responding to the plaintiff's particulars 22 to 25, the State contended that Inspector Pietruszka did not take active steps in the prosecution of the plaintiff. It was contended by the State, for example in response to particular 23, that the conduct of Inspector Pietruszka could not be considered as active steps taken to maintain the prosecution of the plaintiff when Inspector Pietruszka's conduct was steps taken towards terminating the prosecution of the plaintiff:

> *Particular (23)*
>
> 289. Particular 23 states:
>
> > On or about 6 October 2015 a member of the ODPP submitted to the Director of Public Prosecutions (or his delegate) a report in which was sought advice as to the sufficiency of evidence against the plaintiff and advice as to whether to terminate the charges against him.
>
> 290. The factual predicate for this particular is not made out.
>
> 291. In any event, it is not an active step by Pietruszka and is not an act of maintenance.
>
> 292. Further, even if it were, a step towards the termination of the prosecution is not an active step in the maintenance of the prosecution.

FACTUAL FINDINGS AND RESOLUTION OF INTERMEDIATE ISSUES

128 It is convenient to address the factual background by reference to what was known to Inspector Pietruszka at various points in time from 22 June 2015 to 11 December 2015. This approach is consistent with the parties' summaries of

the relevant facts in their respective written submissions. Furthermore, this approach is appropriate in light of the nature of the plaintiff's claims *vis-à-vis* malice and absence of reasonable and probable cause, which ultimately rises and falls on what Inspector Pietruszka was aware of at the relevant time in the manner earlier discussed in the section of this judgment dealing with the relevant principles.

129 As illuminated by the plaintiff's statements of particulars and the parties' respective submissions, several factual controversies arose. Throughout the following summary, I resolve those factual controversies, for the most part, in chronological order dealing with various aspects of the issues brought by the parties as to the torts.

Credit Findings

130 Prior to turning to factual background, it is important to note, at this juncture, that after close observation of the respective witnesses, I consider the plaintiff and his father to be unreliable witnesses. Earlier in this judgment, the Court indicated its view as to the credit of the Inspector Pietruszka as a witness. I now turn to a summary of my findings with respect credit of the plaintiff's witnesses and Inspector Pietruszka.

Credit of the Plaintiff

131 The State sought a finding that the plaintiff was not a reliable witness. For the following reasons, and in light of my observations made in the section of my judgment entitled "Factual Findings and Resolution of Intermediate Issues", I accept that submission.

132 My overall impression of the plaintiff's evidence was that he was often evasive and unresponsive. His credibility was significantly affected by circumstances where his father was required to be cautioned about giving signals or indications to his son whilst he was in the witness box.

133 Other aspects of the plaintiff's evidence were simply implausible. One significant example was the plaintiff's evidence about a Facebook Chat message, which read: "Come Yallah pussy's gonna close". The following exchange occurred in cross-examination:

Q. Then you say, “Coming over shortly”. And then there’s the entry, “Come yella pussy’s gonna close”. What did you understand that to mean?

A. His house.

Q. Sorry?

A. His House.

Q. You understand that “Come yella pussy’s gonna close” means his house?

A. He’s going to close his house.

Q. Do you normally refer to a house by the name “pussy” do you?

A. He refers it to many things. He’s very silly bloke.

134 The explanation that “pussy” meant a “house” was self-evidently prepared and not credible.

135 A further illustration was the plaintiff’s evidence as to who entered the toilet with him at Blacktown Police Station – Inspector Pietruszka or Constable Mahoney or both, with different past statements saying different things – was inherently implausible.

136 Another example of implausibility of the plaintiff’s evidence was the plaintiff’s insistence in evidence that his time in prison left him socially reclusive and depressed. Despite that, the plaintiff maintained in evidence that he was “ready, willing and able” to return to work upon his release from prison. The evidence is inconsistent; and it reflects a self-serving strategy of saying that which will assist the plaintiff without regard to the truth. The plaintiff’s evidence as to the effect of custody on his mental health is also contrary to his contemporaneous admissions: he told the psychologist at Parklea Correctional Centre that he was adjusting well to custody

137 Other aspects of the unreliability of the plaintiff’s evidence were as follows:

(1) the plaintiff’s denial he was cautioned at the police station was inconsistent with the contemporaneous record of interview. It was also contrary to Inspector Pietruszka’s written statement in relation to the criminal proceedings;

(2) the plaintiff’s denial that he was read his rights at the police station was inconsistent with the contemporaneous record of interview; and

(3) the plaintiff's denial that Inspector Pietruszka said he was under arrest for sexual assault was inconsistent with the contemporaneous record of interview.

138 In light of those findings, where the plaintiff's evidence is in conflict with other witness evidence of the State's witnesses, I prefer the evidence of the State witnesses.

Credit of Sinisa

139 My observations regarding the conduct of the plaintiff in receiving assistance from his father during the course of his cross-examination applies with even greater force with respect to assessing the credibility of Sinisa. In any event, I do not consider Sinisa to be a reliable witness. He was significantly evasive to the point where the Court indicated that consideration would be given to issuing a direction.

Credit of Inspector Pietruszka

140 The plaintiff made a strong attack upon the evidence of Inspector Pietruszka. It was contended that his evidence was incoherent at times or contained contradictions such that overall the Court should find his evidence was false, particularly in relation to the interview of Ms Tejada. It was submitted that Inspector Pietruszka was a "cynical and manipulative man".

141 I do not accept that Inspector Pietruszka's evidence was dishonest or unreliable or that ultimately he was a witness lacking in credit. That conclusion needs to be seen in the context of a number of concessions, made by him, as to errors made by Inspector Pietruszka during his investigation.

142 My overall impression of the evidence of Inspector Pietruszka was that he presented credibly under rigorous cross-examination. He made appropriate concessions even accepting serious error, such as his acceptance of what he said in the ERISP of the plaintiff about the first statement of Ms Tejada. When presented with the error, he did not challenge it, he indicated "I don't disagree sir" in answer to a question.

143 Again, I will make further observations (directly or indirectly) as to Inspector Pietruszka's evidence in the course of making findings of fact below.

Credit of Dorijan

144 I do not consider that Dorijan, was an unreliable witness. However, I accept the submission of the State that the weight that can be afforded his evidence was affected, to a degree, by the absence of documents which were the legal foundations as to the views he expressed as to renumeration structure, noting that his evidence related to the plaintiff's employment prospects.

Credit of the associates of the plaintiff

145 Similar conclusions may be reached with respect to the credibility of Amy Williams, Tony Khawaga and Melissa Khawaga. Each of the associates of the plaintiff gave evidence as to their perceptions of the plaintiff's personality. The weight of that evidence, as with Dorijan's evidence as to that matter, is effected by the fact that none of those persons were the plaintiff or experts. The weight of the evidence is diminished accordingly.

146 I now return to the fact background and resolution of intermediate issues, which as mentioned above, will be dealt with for the most part in chronological order.

Factual Findings and Resolution of Intermediate Issues

22 June 2015

147 On 22 June 2015, at about 5am, Inspector Pietruszka received a call from Detective Elyse Houldin. Detective Houldin had been a Detective since about 2013. Inspector Pietruszka was of the view that Detective Houldin was a "competent and professional" detective. Inspector Pietruszka was aware that she had been "Police Officer of the Year" at the Blacktown Local Area Command in the 2014 year. Inspector Pietruszka had worked with Detective Houldin on a number of investigations, including sexual assaults where she was the Officer-In-Charge. He thought Detective Houldin was an "exceptional detective".

148 During the call on 22 June 2015, Detective Houldin said to Inspector Pietruszka words to the following effect:

> Could you please come to work to assist me and Detective SINGH with a sexual assault investigation? *A victim has been gang-raped by four persons.* I am at the crime scene in Blacktown and all offenders are no longer here. There has been penile, oral and digital penetration.

[Emphasis added.]

149 It was by that conversation that Inspector Pietruszka was first advised of the occurrence of a gang-rape in Blacktown, and was informed that, at that stage, Detective Houldin understood there to be "four" offenders.

150 In his statement of dated 20 July 2018 ("the First Inspector Pietruszka Statement"), Inspector Pietruszka gave evidence that he formed the view that the conduct that Detective Houldin referred to "might involve an aggravated sexual assault, which is a serious offence".

151 Shortly after the call from Detective Houldin, Inspector Pietruszka arrived at Blacktown Police Station. Upon arrival, he was briefed by a combination of detectives and police officers:

(1) Detectives Houldin and Singh, in the "Detectives Office";

(2) Constables Bayzidi and Boyd, in the "Muster Room";

(3) Crime Scene Officer Scott, by telephone.

152 In addition the above briefings, Inspector Pietruszka viewed photographs of the scene, reviewed a copy of Constable Bayzidi's notebook and viewed exhibits that had been obtained from the crime scene. The photographs viewed were not annexed to his statement. The following explanation was provided for their omission:

> 22. … I do not now recall precisely which photographs I viewed that morning and, in particular, whether they were from the attending police or from the Crime Scene officers. I therefore have not been able to obtain the precise photographs for the purposes of this statement.

153 As a result of those briefings, together with his review of Constable Bayzidi's notebook, Inspector Pietruszka obtained the following information as at the morning of 22 June 2015:

(1) Detectives Houldin and Singh had spoken to the victim.

(2) The crime scene was at a residence in Blacktown (earlier defined as "the premises").

(3) On the night of 21-22 June 2015, there had been a party at the premises.

(4) The crime scene was an external bathroom containing a toilet and sink. Inside that bathroom was a small bin. Detectives Houldin and Singh had searched the bathroom and found the victim's bra (minus a bra strap),

hair extensions and underwear in the bin. The missing bra strap was found under the bathroom door.

(5) Outside the toilet was an outdoor area littered with bottles, predominantly from alcoholic spirits. Between the outdoor area and the bathroom there was also a grassed area, which had vomit at various points.

(6) Four males had been involved in the offence. Detective Houldin told Inspector Pietruszka: “The victim has said there were four males involved in the assault”.

(7) Detective Houldin also told Inspector Pietruszka that the victim had told the sexual assault counsellor “exactly what she told us at the scene”.

(8) A Sexual Assault Investigation Kit (“SAIK”) was being undertaken.

(9) Detectives Houldin and Singh had obtained a statement from Ms Patricia Tejada. Inspector Pietruszka read the statement of Ms Tejada that morning via Detective Houldin’s iPad. Ms Tejada said there were only four males at the party. Detective Houldin also told Inspector Pietruszka that Ms Tejada had “named only four males as being present at the gathering”. The males identified by Ms Tejada were as follows:

    (a) James Bruce, nominated as the offender;

    (b) Loyd Bandao, boyfriend of the witness and cousin of Mr Bruce;

    (c) “BJ” Alcazar, best friend of Mr Bandao; and

    (d) “Valentino”, a friend of Mr Bandao who “turned up later”, namely, the plaintiff.

(10) Detective Houldin had spoken with a sister of Mr Bandao, Jenka Bandao. Ms Bandao said that she was inside the premises the whole night looking after her younger sister and that Ms Bandao had not gone outside to the party at all during the evening. Detective Houldin told Inspector Pietruszka that Ms Bandao said “she didn’t see anything”.

(11) After reading Ms Tejada’s statement, Inspector Pietruszka formed the following views:

    (a) Aspects of what Ms Tejada had told Detectives Houldin and Singh were “at odds” with what the victim had said to Detective Houldin. In particular, Inspector Pietruszka noted in his first statement that “TEJADA concentrated on BRUCE and lessened the involvement of the three other males”.

    (b) Ms Tejada was intoxicated at the time of the offence.

(12) Constables Bayzidi and Boyd had attended the crime scene and the victim had said to them that “four males” had been involved in the offence. Constable Bayzidi said to Inspector Pietruszka: “She told us that she was raped by four males. It was James, BJ and two other guys”.

(13) Constable Boyd reported that the victim had said words to the following effect: “James came in and so did Loyd. BJ and Valentino also came in. They took turns”.

The Statement of Ms Tejada

154 As mentioned above, one of the documents that Inspector Pietruszka reviewed on the morning of 22 June 2015 was the written statement of Ms Tejada. An extract of her account appears below:

> 9. We sat in the back yard talking and drinking. After I drank the three UDL’s I had a glass of Jim Beam and a shot of Vodka. At some point I started to feel really sick and I vomited on the concrete near where we were sitting. [MM] took me to the bathroom which is outside. We both went into the bathroom which is really small and just has a toilet in it. I was vomiting in the toilet and then [MM] vomited in the toilet as well.
>
> 10. When I was in the bathroom James and the boys were checking up on us to make sure we were ok. They knocked and we opened the door. Loyd took me outside and I sat on the grass and I was vomiting there as well. *My other friend, Valentino, was looking after me.* He came a bit later but I don’t remember exactly what time he got there. I know Valentino as he is a friend of Loyd’s.
>
> 11. I was sitting on the grass just outside the back door to the main house and I heard [MM] moaning. She was still in the toilet. *I think James was in the toilet with her because Valentino and BJ were looking after me when I was sitting on the grass.* Loyd went to the bathroom to get [MM] out, I wasn’t looking and I’m not sure if he went inside the bathroom or not. She didn’t come out and Loyd came back over to me. A few minutes after that James went out of the bathroom and sat down on a chair near where I was sitting. [MM] was still in the bathroom and Loyd went and got here. The next thing I remember was Loyd saying he was taking [MM], James and BJ home. *He told Valentino to stay and look after me. He stayed for half an hour or an hour and then he left.*
>
> 12. I didn’t see [MM] when she came out of the bathroom. I was on the ground and I didn’t see anyone leaving.
>
> …
>
> 14. After Valentino left I went to sleep in Loyd’s room and the Cops woke me up. I have no idea what time that was.
>
> 15. When [MM] was in the bathroom and I heard her moaning, I didn’t hear any complaining or screaming. I would have gotten up but I was too drunk on the floor. *I thought her and James were probably having sex. I don’t know if anyone else went into the bathroom whilst her and James were in there. I think Loyd and BJ checked on her but I don’t know. I was surprised by what was going on.*
>
> [Emphasis added.]

155 As to the information available to Inspector Pietruszka, after reading that statement, the following findings may be made:

(1) Ms Tejada indicated that she was drunk, and so drunk that she could not get up from the floor;

(2) Ms Tejada thought that it had been only Mr Bruce and the victim in the toilet having sex. But she could not recall who went into the bathroom.

(3) Ms Tejada recalled the following with respect to the movements of the plaintiff:

(a) when Ms Tejada was sick in the bathroom "Valentino, was looking after me";

(b) when Ms Tejada was seated in the grass area "Valentino and BJ were looking after me";

(c) a short time later, when Mr Bandao was preparing to leave he told the plaintiff to stay and look after Ms Tejada, the plaintiff "stayed for half an hour or an hour and then he left".

(4) Ms Tejada did not state that the plaintiff had not gone into the bathroom.

(5) So far as Ms Tejada's statement carried any implication that the plaintiff had not gone into the bathroom, it was inconsistent with the victim's statement that there had been four males at the party and all four had been in the bathroom.

156 As to that statement, the plaintiff contended that "[f]rom her account, it was clear that the plaintiff had been with her while the victim was in the toilet". That submission was supported with reference to para 10 of Ms Tejada's statement (extracted above).

157 Whilst it is true that Ms Tejada made no statement that the plaintiff left her to go to the bathroom, that omission, in and of itself, does not sustain a conclusion that Inspector Pietruszka subsequently acted without reasonable or probable cause, nor does it support an inference that he acted with malice in initiating, maintaining or continuing the prosecution against the plaintiff. The reasons for that conclusion are as follows:

(1) An investigator's decision to arrest and/or charge a person is informed by the entirety of the evidence available at the relevant time. As evinced by the above summary, as at the time of reading Ms Tejada's statement, Inspector Pietruszka had been briefed as to the account provided by MM (and, later, obtained an ERISP from MM). His express observation as to the inconsistencies between the two accounts (namely, that they were "at odds") indicates he had taken that factor into consideration.

(2) The weight attributed to each statement was a matter for the investigator, but both MM and Ms Tejada make known the fact of their intoxication at the time; a fact that an experienced detective, which I

have found Inspector Pietruszka to be, no doubt took into consideration when assessing the evidence and subsequently making the decision to arrest and charge the plaintiff.

The first ERISP with MM

158 Later on the morning of 22 June 2015, Inspector Pietruszka attended MM's address with Detective Singh and carried out an electronically recorded conversation with MM ("the first ERISP of MM"). The interview commenced at approximately 7.40am (a completion time was not recorded). A transcript of the first ERISP of MM (10 pages) was before the Court.

159 Following some preliminary questions as to name and location, Inspector Pietruszka asked MM to "tell us please what, what happened this morning?". MM said the following, *inter alia*, in reply:

> … the next thing I knew the guys were kind of just like crowded into that tiny little toilet. And, I, I don't know what happened, but I just remember vaguely them laughing and like carrying on. And then I don't know how one thing led to another, but it just got to the point that they were touching me.

160 By the next question, Inspector Pietruszka sought clarification and expansion of MM's answer:

> When you say they were touching you, and that's when it happened, can you tell me, when you say that's what happened, what do you mean by it happened?

161 MM provided the following response:

> At first like, I don't know, they were laughing and carrying on and, you know, I don't know what was funny, what was, but um, at first it was, I don't know, it was like it was a joke, and then someone started like tugging on like my clothes, someone had like pulled my pants down, taken my bra off, and then like at first it was just someone fondling like with fingers, and they like they all took turns. *There was like four of them*.
>
> [Emphasis added.]

162 Once again, Inspector Pietruszka sought further clarification. He asked, "when you say fondling and fingers, were you at all penetrated with fingers". To which MM said, "Yes, I was".

163 Following that clarification, Inspector Pietruszka asked MM a series of questions with respect to what happened next. That exchanged is extracted below (with questions italicised for the purpose of distinguishing from answers):

After they were [sic], penetrated you with their fingers, what happened after that?

I don't know, they were still carrying on. And then like after that I guess they were sick of the fingers, someone had decided oh, pull my pants down it'll be fun, and then oh, and then they all took turns. Like it was ---

I understand it's difficult [MM], I really do. When they took your pants off did anyone attempted [sic] to put their penis inside you?

Yes. I, I, I specifically remember, because I said "No."

Who put their penis inside you?

I remember the guy, one of the bigger guys, his name was BJ, and I remember Lloyd [sic], because Lloyd [sic] had been carrying on the last couple of days that he wanted to get with someone, and I just, I didn't expect it to be me, and like that.

164 The next series of questions concerned MM's identification of "the four people". MM identified three males by name, namely, "Lloyd" (sic), "BJ" and "James". As to the fourth person, she was unable to provide a name because he was unfamiliar to her: "I don't know one of them at all".

165 Returning to the unidentified male, Inspector Pietruszka asked further questions to obtain information as to his identity from MM. That exchange is extracted below (with questions italicised, once again, for the purpose of distinguishing from answers):

O.K. So, so far we have Lloyd [sic], BJ, James, and some guy you've never met, and you don't know his name. Can you describe him for me?

He's not very tall. He's kind of Caucasian. He's got kind of orange hair and he was like kind of like a, like stubble, but, and he's not very tall. He's not much taller than ---

Does, do these guys work?

Um, I think so.

Do you know what anyone, I know James you said had started a new job today as an accountant. What about the others, do they have jobs?

Um, I'm not sure, but the guy that I don't know, he kind of just like popped out of nowhere. He's like kind of like a random character that was just there. …

166 Turning to the order at which the four males entered the bathroom. MM said that "Lloyd [sic] and BJ" were the first to enter the bathroom. In answer to the question "[h]ow long were they there… before they were joined by one or the other two", MM said: "Not long".

167 During the interview, Inspector Pietruszka asked whether there was a reason for MM "struggling to remember" how the assault started and finished. MM said: "I, I mean, I was also affected by alcohol and um, but that was, that was just it, I was just… drunk".

168 Later in the interview, when discussing who of the men "penetrated" MM, Inspector Pietruszka asked if MM remembered what "the other two were doing" when that act occurred (being a reference to "James" and the unidentified fourth male). MM said:

> They were all kind of just like hovering over me while I was trying to like keep upright in the, in the little tiny bathroom and little toilet and um, I don't know, I just remember hands, hands everywhere.

169 The interview ended with Inspector Pietruszka informing MM of the next steps in the investigation. He said:

> What we're going to do, we're going to let you sleep. O.K. And then tomorrow you're going to come, we're going to ask you to come to the police station and we're going to go over this again, and we're going to tell you where we're at. O.K. If anyone tries to contact you in relation to this, let us know straight away.

170 In his first statement, Inspector Pietruszka gave the following evidence as to his preliminary views following the first ERISP of MM:

> 24. … During that conversation, she described the offence in basic detail and referred to four male offenders. She did not name [the plaintiff] but gave a description of the fourth male. I subsequently formed the view that her description matched [the plaintiff]. I formed this view based on a comparison of the victim's description with the Facebook photograph of [the plaintiff] which I later obtained (as I described below) and my perceptions of [the plaintiff] when I observed on arrest (which I also described further below). A copy of that photograph is behind Tab 4 of JJP-1.

The second ERISP with MM

171 Later on the afternoon of 22 June 2015, MM attended Blacktown Police Station and gave a second electronically recorded statement ("the second ERISP of MM"). A copy of that statement, together with the transcript of the second ERISP of MM (33 pages) was before the Court.

172 The interview was conducted by Inspector Pietruszka with Detective Megan Oxley. It commenced at approximately 11.20am and finished at 12.21pm.

173 At the outset of the interview, Inspector Pietruszka asked MM if she was "comfortable to speak with me… or would [she] prefer to speak with a

female?". MM said she "would prefer a female". As such, in accommodating that request, Inspector Pietruszka was only present for the first half of the interview. At around the half way mark, Inspector Pietruszka exited the interview and Detective Senior Constable Natalie Vrana ("DSC Vrana") entered the interview room. Detective Oxley continued the balance interview with DSC Vrana, in absence of Inspector Pietruszka. Inspector Pietruszka listened to the balance immediately after the statement was completed.

174 The relevant aspects of the second ERISP of MM relate to the victim's account of the assault. That subject matter was covered primarily by Detective Oxley in the absence of Inspector Pietruszka, as such, it is unnecessary to relay each question, save for the establishing context. There is no contention that either Detective Oxley or DSC Vrana acted improperly in her conduct of the interview.

175 During the second ERISP of MM, MM provided the following information and accounts of her assault to Detective Oxley:

(1) In the response to an open ended question of "what happened", MM gave the following response:

> I became sick, so I was throwing up in the bathroom and before I knew it, the guys that were outside had crowded inside. I don't know how or when they really got there, I just remember that they were all kind of there and crowding and hovering and then like I just remember them laughing and like carrying on, and um, like, I don't remember how that, like, one thing led to another, but they all started touching me, like, I just remember, hands everywhere, I could feel them everywhere. Um, and like I wasn't even conscious that, you know, they had pulled my pants down or anything, you know, taken my bra off …

(2) The toilet was described as "very small".

(3) As to MM's first memory following the exit of Ms Tejada, MM recalled:

> I was bent down at the toilet because I was also sick and then that's when, like, I just remember the guys just starting to hover and crowd.

(4) Detective Oxley sought clarification as to who was crowding MM, to which the victim replied:

> I'm pretty sure it was Loyd and BJ at first and then the other guys came around and they all, like they all started carrying on. I remember them laughing and then from the laughter it started to like, like, they started to, like, get way too friendly and touching me and then. Like, it just kept getting worse.

(5) Detective Oxley then sought clarification as to "who was touching [MM]". The victim said:

> I remember specifically Loyd and BJ um, I'm not really sure, like, it was, I don't know, they were all just carrying on and like they just took turns.

(6) Detective Oxley asked whether MM remembered where they touched her. MM said:

> Um, they just started touching me around here and then around my, like, my butt, and then, like, they eventually, like, started, like making their way to my, like, genitalia area.
>
> …
>
> I don't remember who it was that started it.
>
> …
>
> Um, but specifically I remember, like, seeing Loyd and BJ touch me.

(7) MM confirmed that she saw Mr Bandao and BJ touch her. In the context of follow up questions with respect to that touching by "Loyd and BJ", Detective Oxley asked "whereabout were they touching you?". MM gave the following reply:

> Um, like just everywhere, their hands were just everywhere on me.
>
> …
>
> Um, I have like this vague, vague, like, image of BJ um, forcing me for oral sex.
>
> …
>
> Like it's very vague though, but I can, I just kind of like recall it a little bit.

(8) Immediately following those answer, Detective Oxley sought clarification and the following exchange occurred:

> Yeah. What can you picture, what, you can see BJ?
>
> A. Yeah.
>
> And then what else?
>
> A. All the other guys were there too, they were just watching.

(9) The next series of questions and responses concern the conduct of BJ:

> And when you said he was trying to get you to perform oral sex, how was he doing that?
>
> A. Um, because I was crouched down and I most likely, I'm pretty sure I had fallen to the ground at this point, it all occurred in this, like, little space of a toilet.
>
> Yeah.
>
> A. Um, I just remember kind of just, like, them grabbing me and I think this is the point where they had taken off my beanie and my hair extensions, like they'd yanked it off.
>
> O.K.

A. And then um, I just kind of remember them grabbing me and just forcing it down my throat. Like I can feel my throat hurts now.

When you say forcing it down your throat, can you explain to me what they were forcing?

A. They were forcing um, their penis into my mouth, down my throat, it was choking me, I can still feel it, like, here at the back of my throat.

Yeah. And who, who was that?

A. I'm pretty sure it was BJ.

(10) Following those questions as to the conduct of BJ, Detective Oxley asked "so while he was doing that, what happened after that?". MM gave the following answers:

> Um, and then there's like a blank and then I kind of just like remember vague images of like, someone, I'm pretty sure it was Loyd, who had, like, pulled down my pants, pulled down my underwear and, you know, that's three layers that you've got to get through … Pulled down those and like, had started having sex with me and I remember um, I was trying to like, I was, like groaning to push them away, trying to, but I, like, what' what do I have against four guys, and I was drunk so I ---

(11) Following a description of Mr Bandao taking off her pants, MM described what happened next:

> And then I just like, I just remember being penetrated --- like several times and like, fingers, not just, like, not just penises, they also touched me with their hands … like, in my, vagina, like, and I remember I was saying "It hurts" …But they all just like laughed it off.

(12) When asked whether she could hear "them say anything in particular", MM said: "They were just saying that I'm a little slut". She could not remember who it was that spoke those words. MM continued:

> Like, and just in the background. And then that's, they were just like carrying on they were just like laughing and, like, I don't know what really they were laughing at, they were just like, laughing, they were like, really ecstatic for some reason.

(13) During the interview, MM said at one stage she was able to turn around and see Mr Bandao. The following exchange then occurred:

> And do you remember seeing if his pants were undone or ---
>
> A. I kind of have a vague memory but it's just very vague.
>
> That's all right. Describe to me what you saw.
>
> A. Um, basically like I just saw penis, just basically, and they were kind of just like touching themselves in front of me while, like, someone else was, like, having their turn with me basically, the others would be just like, laughing and like, touching themselves.
>
> So they all had their – whereabout were their pants?
>
> A. Like, if, I don't know if it was like one of the ones that had a, like a zip --- or they still kind of had it on, it's just like their penis was just out.

(14) DSC Vrana asked some follow up questions as to the above exchange:

> So you said they just all had their penises out.
>
> A. Yeah, basically.
>
> And they were all touching their penises ---
>
> A. Yeah.
>
> --- while another one was having a turn at you.
>
> A. Yeah.
>
> O.K. Was it only through the vagina, was it anywhere else that, that they touched?
>
> A. Um, no, they, there wasn't anal sex or anything, it was just that one moment that I remember or oral sex and just like them touching my vagina was all I could remember.
>
> O.K. Do you know whose penis was whose, were you able to tell?
>
> A. I don't, I have no idea, like, I just, I was so confused, I was like, like they were all just crowding, I was so confused I was so lost, like, I'm still trying to process everything right now.

(15) As to the description of "the other guys" (being a reference to Mr Bruce and the unidentified fourth male), MM said:

> I remember seeing James and kind of the other guy, but I didn't really remember them being near me. … Like, I think the closest was like, like me and the two other guys, the two um, kind of Caucasian guys that un, I remember mainly, like, like, the people that were, like, really, like, hovering and crowding was BJ and Loyd.

(16) As to the location of "the other guys" (being a reference to James and the unidentified fourth male), when Mr Bandao and Mr Alcazar were playing with themselves, MM said:

> I could see and hear the other guys, like, like, kind of… Just like I could see their faces … And they were kind of just laughing, I couldn't see, couldn't make out what they were doing.

(17) As to whether MM could see their penises, she said: "I'm pretty sure I've seen, I saw James' but I'm not sure about the other guy".

(18) Earlier in the interview, MM provided a description of the "other guy". She said "he's a bit taller than me, he's also Caucasian background and he kind of has like red hair, like natural red hair, and that's all I can remember". She could not recall his name.

(19) Turning to whether MM could remember who touched her, MM said:

> It was BJ. I remember BJ touching me … He was just, like, I don't know, he was kind of just like rubbing up against every, like, bit of surface on my body… Like, he just has his hand just everywhere.

(20) MM said she could only recall BJ and Mr Bandao touch her vagina.

The account of MM

176 There were factual controversies as to the conclusions that were reasonably available to Inspector Pietruszka, as at the time of arrest and charging the plaintiff, on the face of the victim's account, which comprised of the first and second ERISP of MM (at that stage). The two primary contentions concerned whether, by that account, MM had either expressly or impliedly stated that all four males "took turns" and/or participated in the assault she described. As well as the related considerations as to the significance of MM's use of the pronoun "they" and the qualifications MM provided throughout her account. Those controversies are related to the consideration of reasonable and probable cause and false imprisonment and will be addressed in turn.

177 The plaintiff submitted that upon a review of both the first and second ERISP of MM, "it is clear that, when asked to attribute acts to individuals, she could not say that the fourth man had done anything to her". Whilst it was conceded that MM also spoke of activity that occurred that did not involve touching, which, it was accepted, could be interpreted "as preparation for engagement in sexual activity, that is, the men having their penises out and touching them". It was submitted that in relation to the "the fourth person she was not sure of that", namely, she was not sure whether or not he partook in that activity.

178 As to the use of "they", the plaintiff submitted that MM tended to use the word "they" loosely (though understandably) in referring to actions of any member of the group, even where obviously it could have been the action of only one. It was submitted, the example of MM's initial account that "*someone*… pulled my pants down" in the first ERISP of MM, when contrasted with her repetition of the incident in the second ERISP of MM, "like I wasn't even conscious that, you know, *they* had pulled my pants down or anything", is one example where "they" is being used as a generic pronoun as opposed to indicating a multiple persons.

179 Putting aside considerations of the other evidence available or not available to Inspector Pietruszka at the time of arrest, which I will return to below, the plaintiff contended that "the victim's account in relation specifically to the fourth person was that he was present, but not that he did anything".

180 The State contended that account of MM, in particular the second ERISP of MM, was of significance. Reliance was placed on six particular passages, which, it was contended, "make it clear that the witness was saying that the four males at the party were in the toilet and that all of them 'took turns'". Those passages, with emphasis by the State, are extracted below:

(1) "I just remember *that they were all kind of there and crowding and hovering* and then like I just remember them laughing and like carrying on";

(2) "I was bent down at the toilet because I was also sick and then that's when, like, I just remember *the guys* just starting to hover and crowd";

(3) "I'm pretty sure it was Loyd and BJ at first and then *the other guys* came around and they all, like they all started carrying on";

(4) "I remember specifically Loyd and BJ um, I'm not really sure, like, it was, I don't know, they were all just carrying on and *like they just took turns*";

(5) "*All the other guys were there too*, they were just watching"; and

(6) "I was trying to like, I was, like groaning to push them away, trying to, but I, like, what' *what do I have against four guys,* and I was drunk".

(It may be noted, the above extracts also appear in preceding summary of the second ERISP of MM, but with context).

181 Further, as to MM's consistent use of "they", the State contended that:

> In context, the use of "they" emphasised the reasonableness of forming a suspicion that all of the four had been involved in the attack. The use of "they" was consistent with the victim having been subjected to a violent, group attack by four undifferentiated males, all of whom participated in the sexual assault.

182 Whilst I ultimately find that the contents of the first and second ERISP of MM, when considered in their entirety, provide a reasonable basis for further investigation into the allegation that "four males" participated in the assaults, for the reasons that follow, I do not accept the simplified analysis adopted by the State with respect to the second ERISP of MM:

(1) The emphasised passages relied upon by the State, as set out above, for the most part, were stripped of context. The questions and answers, together with any emphasised passage relied upon therein, must be understood within the context of the line of questioning adopted by the interviewer.

(2) Turning to passages (1)-(3), in the preceding list, whether considered in isolation or collectively, they do not sustain a conclusion that all four males "took turns". Each account, when considered in context, simply

reveals, as submitted by the plaintiff, that MM identified four men in the bathroom with her at the time of the assault. The reference to "carrying on" may relate to any of the activities to which MM had referred to at that period including laughing.

(3) Turning to passage (4), whilst it is true that MM says "they just took turns", that answer appears within an account of "Loyd and BJ" touching her, which account is subsequently qualified by MM, she says she was "not really sure" as to whom was touching her.

(4) Turning to passage (5), once again, that extract only goes to the identification of people in the room. It occurs in the context of a discussion of the conduct of "BJ". MM's answer does not confirm that each male took turns assaulting her. Rather, it confirms that during one part of the assault, "BJ" was the primary perpetrator with "the others" watching.

(5) Finally, as to passage (6), the reference to "what do I have against four guys", once again, is relevant to the identification of four males in the bathroom, as opposed to supporting an inference that they each took turns.

183 It may also be noted, whilst I accept that contention by the plaintiff that several aspects of MM's account make specific mention of the conduct of individual males, namely, "Loyd" and "BJ", and at times the usage of pronoun, particularly when considered in context, supports an inference that at times MM was using the word generically. That finding, however, does not apply globally to MM's use of "they". I accept that at times, the use of "they" was consistent with the victim having been subjected to a group assault and the use of "they" represents an inability for MM to differentiate between each male, but believed "*they*" each were present and participated to some extent. That finding is supported by the below extract.

184 Whilst I have found that the passages relied upon by the State do not support the specific inference sought to be drawn, I accept that other aspects of the second ERISP of MM, in particular the victim's use of "they", when considered in context, specifically address activity undertaken by the group, which, in my view, support a finding that the victim's account could be reasonably understood as suggesting that all four males participated in the assault, namely:

> Um, basically like I just saw penis, just basically, and *they were kind of just like touching themselves in front of me while, like, someone else was, like, having their turn with me basically, the others would be just like, laughing and like, touching themselves.*

…

So you said they just all had their penises out.

A. Yeah, basically.

And they were all touching their penises ---

A. Yeah.

--- while another one was having a turn at you.

A. Yeah.

O.K. Was it only through the vagina, was it anywhere else that, that they touched?

A. Um, no, they, there wasn't anal sex or anything, it was just that one moment that I remember or oral sex and just like them touching my vagina was all I could remember.

[Emphasis added.]

185 As to "qualifications" within the accounts of MM, the plaintiff contended that MM's account was subject to some significant qualifications:

(1) She had obviously been "badly drunk", to the extent that she had major gaps in her memory. She was disoriented, confused and extremely distressed.

(2) She had a very limited opportunity for observation of the persons in the bathroom. She had her back to the door, and therefore to the people who had come in. For most of the time she appears to have been bent over, crouched over the toilet. She had turned around a couple of times and caught glimpses. In the particularly small space, no more than two people could have been directly next to her. She was a short person anyway, and while crouched down certainly could not have seen over the tops of the men. With two or three crowding around her, crouched over, it would have been very difficult for her to see anything of a fourth. Thus, it was contended, MM's account, even as to the mere presence of a fourth person, was subject to considerable reservations.

186 To the extent that the plaintiff's submissions with respect to the qualifications provided by MM should have the effect of reducing the weight put on that evidence, namely, it could not meet the requisite standard of proof at trial, that is not a consideration for the Court to engage in with respect to the present proceedings. Had the matter proceeded to trial, that would have been a matter for the jury to consider. For present purposes, the issue is whether, on the basis of all the material before Inspector Pietruszka, he formed the suspicion (and reasonably formed the suspicion) that the plaintiff had been one of the victim's assailants. There was ample material – both in what the victim told

Inspector Pietruszka and the other accounts that Inspector Pietruszka received from police officers – to support the formation of that suspicion.

187 It is true that MM's account was qualified and she admitted that her memory was vague. However, when considered in its entirety, her account suggested four men were present for the majority of the time and that all four men participated in the assault at some stage. As to the extent of participation, whether it be simply watching, masturbating/touching and/or penetrating her, that remained unclear on her account. However, the accounts of MM do not exclude the possibility that the fourth male had a role, beyond watching, in those acts other than penile penetration of the victim's vagina. Nor did that qualification or some sense of vagueness render the subsequent suspicion formed by Inspector Pietruszka unreasonable nor sustain a conclusion that any continued investigation into role played by the fourth person lacked reasonable and probable cause, particularly, when considered in the light of other evidence available to Inspector Pietruszka at the time of arrest, namely, that only four males were present at the gathering including the plaintiff and the physical description provided by MM, appeared to match that of the plaintiff. Further, the fact a fourth person is said to have been present for part of the assault would remain a relevant factor for investigators.

188 A related issue raised by the plaintiff was the prospect of digital penetration of MM *simpliciter* and, in the context of "crowding issues" in the toilet, if there had been four assailants (and difficulties in all four males participating in the assault).

189 With respect to the cross-examination of Inspector Pietruszka the plaintiff placed particular reliance upon answers given at T480. I will refer to a slightly wider extract than that relied upon by the plaintiff as follows (T479.41-T480):

> Q. So at the time you arrested him, you had no information one way or the other about any DNA results?
>
> A. No.
>
> Q. You said you would have been surprised but, if I remembered your answer, the essence of the answer you were just giving me about the DNA results was, number 1, you've had surprises in the past?
>
> A. Yes.

Q. But on what you knew in this case, you didn't expect the plaintiff's DNA to turn up on the SAIK examination?

A. As I said, I would've been surprised if it had.

Q. That means you didn't think he'd had sex with the victim, did you?

A. No, I don't believe he did.

Q. You didn't at the time believe he did, did you?

A. No.

Q. Having sex meaning, inserting his penis in her vagina?

A. Yes.

Q. You didn't at the time believe he'd had his fingers in her, did you, because that leaves DNA, doesn't it?

A. Inside her?

Q. Yes?

A. My understanding is that wouldn't come back.

Q. That?

A. My understanding is fingers, a SAIK would not reveal DNA from another person's fingers.

Q. You didn't believe he'd had his fingers in her, did you?

A. I wasn't sure, sir.

Q. Do you agree with this, the account you had from the victim or the accounts you'd had from the victim, at the time you arrested the plaintiff, established the presence of four people in the toilet?

A. Five including the complainant.

Q. I'm sorry, I meant other than her?

A. Yes.

Q. You're quite right.

A. Yes.

Q. It did that, didn't it?

A. Yes.

Q. She had said that four people were there?

A. Yes.

Q. But in terms of people who did anything, she identified only two, didn't she, Loyd and BJ?

A. Again, specifically she did nominate those two regarding fingers and, I believe, intercourse but she did state that all of them were grabbing at her, laughing, playing with themselves.

[Emphasis added.]

190 The italicised answer given by Inspector Pietruszka, when seen in the context of the questioning, relates to DNA evidence. Inspector Pietruszka confirmed that he did not believe the plaintiff's DNA would "turn up" from DNA testing because he did not believe the plaintiff had penile vaginal intercourse with MM and his experience was that digital penetration would not result in a positive DNA result. The lack of certainty he referred to related to that circumstance and not because he had formed the view that he could properly exclude on the evidence that the plaintiff had digitally penetrated MM as confirmed in his subsequent answers, which revert back, in large measure, to MM's account (consistent with my earlier discussion of her account).

191 Further examination of parts of Inspector Pietruszka's cross-examination confirm this analysis:

> Q. She had said that four people were there?
>
> A. Yes.
>
> Q. But in terms of people who did anything, she identified only two, didn't she, Loyd and BJ?
>
> A. Again, specifically she did nominate those two regarding fingers and, I believe, intercourse but she did state that all of them were grabbing at her, laughing, playing with themselves.
>
> …
>
> Q. Isn't this true, that on the accounts you had from her at the time you arrested the plaintiff, the only thing that her accounts established about the plaintiff was that he was there in the toilet as the fourth person?
>
> A. Again, I disagree. Her version stated and continually stated, all of them, they were four people grabbing, that's her version, sir.
>
> …
>
> Q. Putting fingers inside her?
>
> A. Yes.
>
> Q. Those two, touching her in any way, those two?
>
> A. She did state all of them, sir.
>
> Q. No, but in terms of identifying who she saw touch her, she could only say Loyd and BJ, couldn't she?
>
> A. Again, I disagree.
>
> Q. Could you show me please in the document where she said it was any of the others when she was asked who it was?
>
> A. By name, sir again, by name it is all of them, she doesn't say the other guy did this, she doesn't say Bruce or however she refers to them, did this; she just

states that all of them, all of them, that's how she refers to them; they, all of them.

192 I interpose to note that I have earlier dealt with MM's use of the word "they".

193 Returning to Inspector Pietruszka's evidence in cross-examination:

> Q. In other words, she never gave any means of identifying anyone who had touched her other than Loyd or BJ?
>
> A. On specific issues, yes, sir.
>
> Q. On specific issues. The best she did was a general reference to the group?
>
> A. Yes.

194 I will return to that statement of Mr Alcazar but at this juncture I note the following evidence of Inspector Pietruszka:

> Q. Because he makes, if what he says is true there were never four people present there. Four other than the victim?
>
> A. Sir I don't think it's unusual for a co accused to remove themselves to lessen their criminal involvement but on what he said then he did remove himself yes and that would place three males in the bathroom and not four.

195 As to the charges, Inspector Pietruszka gave the following evidence:

> Q. The first one, that on the 21st day of June 2015 at Blacktown in the State of New South Wales, he did have sexual intercourse with the victim?
>
> A. Yes.
>
> Q. At the time of laying that charge, you had no basis to say that he had sexual intercourse with the victim, did you?
>
> A. Sir, the offence relates to being in company whilst a sexual assault was occurring. His actions at the time don't require him to actually be having sex with the victim. He has to be present when this is occurring, that is what I believed at the time.
>
> Q. That's what you believed at the time, you say. You did not intend then to assert in this charge that he, himself, had had sexual intercourse with the victim, is that what you say?
>
> A. I'm saying that, sir, he the charge relates to being present or in company, present and in company.
>
> Q. I'm asking you whether in laying this charge you intended to assert that he had had sexual intercourse with the victim?
>
> A. No.
>
> Q. In relation to the second charge, you refer to an act of indecency, to wit, grabbing, fondling and groping the breast area and genitalia of the victim?
>
> A. Yes.
>
> Q. In laying that charge, did you intend to assert that he himself had grabbed, fondled or groped the breast area and genitalia of the victim?

A. Yes, I did, sir.

Q. You did?

A. Yes.

Q. You did intend to say that he had done those actual acts himself?

A. Yes, and had been in company with others, yes.

196 When his evidence as to the two charges are read together, and some allowance is made for confusion created by the second question in the extract (by referring to “sexual intercourse with the victim”) and the answer given to that question is taken into account, it is tolerably clear that, when Inspector Pietruszka excluded “sexual intercourse” from the first charge, he was not referring to the extended definition of that expression in s 61HA of the *Crimes Act*.

197 Inspector Pietruszka gave evidence in re-examination that he believed that it was not possible, on the evidence available to him at the time, to exclude that the plaintiff had digitally penetrated MM notwithstanding him standing in the bathroom behind two assailants.

198 In re-examination, Inspector Pietruszka then gave the following evidence (at T614):

> Q. The question then goes on to say, "It talks about they also penetrated you with a penis. Do you remember who had sex with you that way", answer, "Yes". So it's talking it's asking about you were being asked about the evidence of the victim?
>
> A. Yes.
>
> Q. When the word they was used in that answer from the victim, what did you understand it to mean?
>
> A. They, as the four persons in the bathroom.
>
> Q. At 471.4, again a reference to the interview, this is a question, "And then around my, like butt and then, like they eventually like started like making their way to like genitalia area". Firstly, what did you make of the word they there?
>
> A. Again, sir, the four people.
>
> Q. What did you make of the word "their;" "making their way", what did you understand that to mean?
>
> A. They're making the four people are making their way down.

199 A further relevant extract of re-examination, relied upon by the State, is extracted below:

Q. I take you to the next question [being a reference to a question put by senior counsel during cross-examination], “Anyone who came in behind the first two would have to get past the first two somehow to get to her, wouldn’t he”, and your answer is, “I believe that’s fair”. Are you indicating in that answer that the people behind the first two people could not touch the victim?

A. No, I’m not saying that, sir.

Q. What are you saying?

A. That if they wanted to I guess engage in sexual intercourse and that, they would have to move the other two apart but they could reach over and touch behind someone.

Q. When you say touch, do you include in that digitally penetrate?

A. I believe it’s possible, yes, sir.

Q. What I’m asking you is you’re not excluding that possibility by that answer?

A. You can’t – no, you can’t exclude that at all, sir, no. It’s yes …

…

Q Just in response to that question there, when you were speaking about four people grabbing, it’s in the context of questions preceding that relating to touching; what did you include in the word, grabbing?

A. Well, grabbing at her clothing, sir. It’s grabbing at her wig, her beanie, hair extensions, hands all over her body, grabbing.

Q. A bit further down on that page there at 39, you were asked about, sorry, at 34, “The crucial act, like having full on sex with her?” Answer, “yes, those too”. Then, again, putting fingers inside her?” Answer, “Yes.” Did you consider putting fingers insider her was a crucial act as well?

A. It is, sir, it’s a sexual assault.

Q. Did you have any evidence at the point of charge that would exclude the possibility of the plaintiff having inserted his fingers inside her?

A. No, sir.

…

Q. So, in terms of the charge, what aspect are you relying on, in terms of penetration, what aspect were you relying on in respect of the plaintiff?

A. The plaintiff, within that respect obviously that he was present at the time when the sexual assault was being – when the victim was being subjected to oral sex and penile/vaginal sexual assault by a group of people and he was present at the time and participating in a form that would be touching, grabbing, et cetera.

Q. When you say touching, what do you mean?

A. Indecently assaulting and grabbing her, attempting to place his fingers into her vagina or grabbing her vagina, that is touching.

Q. Digital penetration?

A. Yes.

200 In reply submissions, the plaintiff contended that extracts of re-examination relied upon by the State, as extracted above, do not advance the State's argument as to Inspector Pietruszka's belief that the plaintiff had digitally penetrated the victim. It was submitted:

> 9. …This passage does not make out the defendant's point. In part, Mr Pietruszka's position in it is a retreat to his earlier rationale about the plaintiff having been present while the assault was occurring, combined with the plaintiff "indecently assaulting and grabbing her, attempting to place his fingers inside her vagina or grabbing her vagina." One cannot derive a belief that the plaintiff placed his fingers inside the victim from his merely attempting to do so, expressed as an alternative to grabbing her vagina. This formulation indicates lack of certainty and the absence of a belief that the plaintiff did exactly anything. It is speculating between possibilities, consistent with the answer in cross-examination. "I wasn't sure, sir." (T480, 26). This obviously represents his true position. If there is any conflict between these two parts of Mr Pietruszka's evidence, (which the plaintiff submits there is not), his first version should be preferred.
>
> 10. That is because it is clear that in this section of his re-examination Mr Pietruszka was trying to retreat from a number of things he had said in cross-examination. For example, he had been asked in cross-examination:
>
> > Q. The first one, that on the 21st day of June 2015 at Blacktown in the State of New South Wales, he did have sexual intercourse with the victim?
> >
> > A Yes.
> >
> > Q At the time of laying that charge, you had no basis to say that he had sexual intercourse with the victim, did you?
> >
> > A Sir, the offence relates to being in company whilst a sexual assault was occurring. His actions at the time don't require him to actually be having sex with the victim. He has to be present when this is occurring, that is what I believed at the time.
> >
> > Q That's what you believed at the time, you say. You did not intend then to assert in this charge that he, himself, had had sexual intercourse with the victim, is that what you say?
> >
> > A I'm saying that, sir, he -the charge relates to being present or in company, present and in company.
> >
> > Q I'm asking you whether in laying this charge you intended to assert that he had had sexual intercourse with the victim?
> >
> > A No.
> >
> > (T533, 40-534, 9)
>
> It is plain from the context that the term "sexual intercourse" in this passage was understood to have the same sense as in the charge quoted. It is also plain that Mr Pietruszka was relying on the plaintiff's mere presence -"He has to be present when this is occurring" -and no more. Mr Pietruszka's attempt to retreat from this in re-examination is unconvincing. (at T620, 36-621, 1). In particular, it ignores the specificity of his answer:

> "Sir, the offence relates to being in company whilst a sexual assault was occurring. His actions at the time don't require him to actually be having sex with the victim. He has to be present when this is occurring, that is what I believed at the time."
>
> (T533, 46-49).

201 It follows from my earlier discussion that I do not accept the plaintiff's submissions as to the evidence of Inspector Pietruszka on re-examination. I do not consider that there is any inconsistency between his evidence in cross-examination and re-examination. Inspector Pietruszka's evidence does not demonstrate that he did not hold an honestly held belief that there was a proper basis for the prosecution particularly in relation to digital penetration.

202 Inspector Pietruszka's answer at T480 does not indicate a lack of certainty in the plaintiff digitally penetrating MM (or "grabbing" her vagina) or that the plaintiff had not been part of a group of four persons engaged in that those acts which were contrary to the provisions of s 61JA (and s 61M) of the *Crimes Act*. His evidence in re-examination was not, in that context, contradictory at all. Inspector Pietruszka's evidence was consistently that he could not properly exclude that the plaintiff had engaged in the acts charged so far as they involved digital penetration of MM (falling within the wider definition of "sexual intercourse" given by s 61HA) in company with another person or person (as discussed in *FP v R* [2012] NSWCCA 182). In my view, on a fair reading of his evidence in cross-examination and re-examination, Inspector Pietruszka had formed the view that the plaintiff had engaged in such conduct (or could not be excluded as having been so engaged). This latter evidence in re-examination did not represent a retreat from his evidence that the evidence disclosed that four persons, one being the plaintiff, had engaged in digital penetration (and other conduct attracting the provisions of s 61M of the *Crimes Act*).

203 The State submitted that Inspector Pietruszka's view that there had been digital penetration was consistent with what Detective Houldin had told him, namely, that "[a] victim has been gang-raped by four persons". I accept that submission.

204 The plaintiff also contended that Inspector Pietruszka's rationale of "they" and "all" being a reference to all four males was "a fraud, created to defend what he must recognise as indefensible". It was submitted that on a consideration of his evidence during cross-examination, it is clear, that "he did not really believe it".

Notwithstanding his appropriate concessions that at times MM made specific reference to individuals which did not include the plaintiff, it was submitted that he maintained a “bizarre” and improbable position that the victim’s references to “they” and “all” included the plaintiff.

> Q. And then going over the first answer, but look where the answer continues, “I just remember kind of just like them grabbing me and I think this is the point where they had taken off my beanie and my hair extensions, like they’d yanked it off.” Now you didn’t think she was saying that all four people together took off her beanie did you?
>
> A. Sir I did.
>
> Q. You did?
>
> A. I did.
>
> Q. You didn’t think she meant one of the crowd but I can’t say which one?
>
> A. No sir.
>
> Q. Are you aware that people sometimes use the word they that way?
>
> A. I am aware yes.
>
> Q. It’s a fairly common way of speech isn’t it that people if they don’t know who it was there’s a group of people there they’ll tend to say they did this, they did that, when they mean one of the group did it?
>
> A. I hadn’t really thought about that sir but if you say so. I don’t have issue with it if you think that’s how people talk, they say they, I have heard it before but in this situation I was of the belief that she was saying they referring to the four people were engaged in this act together.
>
> Q. In other words you thought she meant that they all reached over and simultaneously got a grab of her beanie and ripped it off did you?
>
> A. I believe that they, they as a group, ripped her clothes off and took her beanie off, took her hair extensions off yes.
>
> Q. Well let’s take the points one at a time. It was them, and the bit I’ve just read to you, “I just remember kind of just like them grabbing me?”
>
> A. Yes.
>
> Q. Did you understand you say that you understood that to mean all four of them grabbed her?
>
> A. Yes.
>
> Q. All right. “And I think this is the point where they had taken off my beanie”?
>
> A. Yes.
>
> Q. You read that as meaning all four of them took off my beanie?
>
> A. The group of four.
>
> Q. “And my hair extensions”?
>
> A. Yes sir.

205 The plaintiff described the above evidence as “an invention designed to provide a desperate defence for the indefensible”. It was contended that Inspector Pietruszka did not subjectively have reasonable and probable cause.

206 As to the plaintiff’s contentions *vis-à-vis* the subjective account of Inspector Pietruszka’s interpretation of the account of MM at the hearing, in my view, they are not supported by a fair reading of his evidence. My observation of Inspector Pietruszka was that he was a cooperative witness, who, notwithstanding some brief moments of confusion and/or frustration, made concessions where appropriate and endeavoured to answer all questions put to him. His answers support a conclusion that his view, having read and/or watched the accounts of the victim, was that the four males present at the party each participated in the sexual assault of MM to varying degrees. Thus, I do not find that subjective view expressed by Inspector Pietruszka, in particular with respect to his interpretation of MM’s use of “they” and/or “all”, to be glaringly improbable. That finding broadly confirms with my earlier analysis of MM’s used of the pronoun “they”.

207 I will return to my consideration of reasonable and probable cause at the completion of the factual background, at a separate juncture.

22 June to 1 July 2015

208 Between 22 June and 1 July 2015, Inspector Pietruszka viewed photos of the crime scene which had been uploaded to the police “ViewIMS” system. The photographs viewed were annexed to his first statement and included, *inter alia*, photographs of the bathroom (namely, the area in which the assault occurred), the toilet, the bin (with clothing and hair extensions in it), the bra strap *in situ* under the bathroom door, the outdoor area and the grass area. Inspector Pietruszka considered the photographs were consistent with MM’s version of events.

209 On 28 June 2015, Inspector Pietruszka received a written statement from Constable Boyd, which he considered to be consistent the briefing he was earlier provided by Constable Boyd on 22 June 2015.

210 Constable Boyd's statement recounted a conversation that he had with the victim at around 11pm on the night of the sexual assault. During that conversation:

(1) as to what happened, MM said: "Loyd and his friends assaulted me in the toilet, they assaulted me… Sexually assaulted me, they raped me";

(2) as to how many people were in the toilet at the time, MM said: "Trish was at first then Loyd took her outside onto the grass. James came in and so did Loyd. BJ and Valentino also came in. They took turns"; and

(3) in answer to a question as to the description of "Valentino", MM said: "Caucasian with red hair. I don't know what he was wearing".

211 At this juncture, it may be noted, this is the first record of MM naming the fourth male. In both the first and second ERISP of MM, she did not identify the fourth person by name. However, in all three records, the fourth male was described as "Caucasian" and as having either "red" or "orange" hair.

212 On or around 30 June 2015, Inspector Pietruszka was provided with a copy of a photograph of the plaintiff. The photograph was taken from a social media account of the plaintiff. In his first statement, Inspector Pietruszka stated that he "observed that the photograph appeared to match the description given by the victim of the fourth male". As earlier mentioned, prior to taking this step, Inspector Pietruszka was aware of the names of four men that had attended the gathering on 21 June 2015, having read the statement of Ms Tejada.

213 Upon formulating the view that the identity of the fourth male was the plaintiff, Inspector Pietruszka obtained a copy of the plaintiff's criminal history. By his first statement, Inspector Pietruszka said that he attached "[a] copy of a document containing that history". The copy of the criminal history attached to his statement is dated 12 January 2017 and includes reference to the aggravated charges subsequently withdrawn. As such, it is evident that the record is not the same that Inspector Pietruszka accessed on or around 30 June 2015. Inspector Pietruszka said that "I observed that [the plaintiff] had a previous warrant arrest, but I could not find an offence that was linked to that warrant". This appears consistent with the record attached to the statement, albeit retrieved later in time, which included reference to a "warrant executed" on 16 December 2014.

214 In conducting a further search on the police COPS system, Inspector Pietruszka observed that the plaintiff had previously been listed as the victim for an offence. The relevant Officer-In-Charge in relation to that offence was Detective Sergeant Condon.

215 On 30 June 2015, Inspector Pietruszka called Detective Sergeant Condon. During that call, Detective Sergeant Condon said words to the following effect:

> Mr HRDAVEC was the victim in an assault. He was subpoenaed and refused to attend Court, resulting in the issue of a warrant for his arrest. After Mr HRDAVEC had made the initial complaint he largely refused to co-operate with us.

Arrests and Interviews of Suspected Offenders

216 Between 22 June and 1 July 2015, detectives from Blacktown Police Station arrested four males in connection with the sexual assault of MM, namely:

(1) Mr Bruce on 22 June 2015;

(2) Mr Bandao on 25 June 2015;

(3) Mr Alcazar on 29 June 2015; and

(4) the plaintiff on 1 July 2015.

217 Both Mr Bruce and Mr Bandao declined to provide a statement and/or participate in an electronically recorded interview. Mr Alcazar agreed to participate in an ERISP on the date of his arrest.

The ERISP of Mr Alcazar

218 By his first statement, Inspector Pietruszka said that he listened to the ERISP of Mr Alcazar before the evening of 1 July 2015 (namely, prior to the arrest of the plaintiff). A copy of that ERISP was annexed to his statement and before the Court.

219 As it was information available to Inspector Pietruszka before the arrest of the plaintiff, as derived from the ERISP of Mr Alkazar, a summary of the relevant passages follows.

220 In the course of his ERISP, Mr Alcazar:

(1) said that he had had 3 to 4 grams of cannabis that day (being the day of the interview), but that he was a regular cannabis user, was feeling “alright” and could understand the questions;

(2) confirmed that the plaintiff, together with Mr Bruce and Mr Bandao, had been present at the gathering with him on the evening of 21 June 2015;

(3) indicated that there were six people present, four boys and two girls at the gathering;

(4) was informed that MM provided a statement that included an allegation against him, the relevant extract appears below:

> Q182 OK. [MM's] provided us a statement to say that she was sexually assaulted on that night, um, by you.
>
> A. Me?
>
> Q183 Yes. What can you tell me about that?
>
> A. Me?
>
> Q184 Yes.
>
> A. Just me?
>
> Q185 You were a person named. You're a person that she told us about. What do you want to tell me about it?
>
> A. Nothing.

(5) was asked a series of questions relating to entering the toilet when MM was in there, extracted below:

> Q231 Did you go into the toilet cubicle while [MM] was in there?
>
> A. Yeah.
>
> Q232 Tell me what happened when you were in there.
>
> A. I got in there, all the boys were there.
>
> Q233 Keep going.
>
> A. That's it.
>
> Q234 When you say, all the boys, who are you talking about?
>
> A. The boys that were there.

(6) said that the plaintiff was not in the toilet initially, but came into the toilet cubicle after he left.

221 At 11.30pm on 1 July 2015, Inspector Pietruszka arrested the plaintiff. I will return to a summary of that arrest following a consideration of the factual controversies concerning the account of Mr Alcazar and, subsequently, whether such evidence impacted upon Inspector Pietruszka's perception of existence of reasonable and probable cause to arrest and maintain proceedings against the plaintiff.

222 The ERISP of Mr Alcazar attracted controversy as, beyond the accounts of MM (earlier set out), his was the only other account of who was inside the toilet. In

particular, the plaintiff placed emphasis on the fact that at no stage during the account of Mr Alcazar does Mr Alcazar say what happened in the toilet. Hence, it was contended that "any case to this point relied entirely on the accounts of the victim as to the activity that occurred". I now turn to the submissions of the parties with respect to significance of the account of Mr Alcazar to the arguments concerning reasonable and probable cause.

223 The plaintiff contended that Mr Alcazar's account did not implicate the plaintiff, and to some extent undermined MM's account. Reference was made to the following aspects of the ERISP of Mr Alcazar:

(1) He stated that the plaintiff only entered the cubicle "when I left", which he repeated twice. It was contended that that this account contradicts MM's account of four people being present at the same time.

(2) He did not say whether any of the others were still in the toilet when he left, or when the others left. When directly questioned about when people left the cubicle, he said: "I don't know", "I'm not sure" and "I don't remember". (Although I note that on Mr Alcazar's account, others were in the toilet when he was present and he poses the question (in answer to a question), "Just me?" resisting the notion that only he was present in the toilet with MM).

(3) He gave no account of what the plaintiff did in the toilet, or how long he remained there. If indeed the plaintiff went in, it may well have been to bring the victim out (remembering that she could not remember how this occurred).

224 On the basis that Mr Alcazar's account placed the plaintiff, not only at the party, but in the toilet, the State contended that the Court would reject the contention that Mr Alcazar's account weakened the victim's account. For the reasons that follow, I accept that submission.

225 Each aspect of the evidence with respect to the investigation into the aggravated assaults, for the purposes of the torts before the Court, must be considered through the lens of what was known to Inspector Pietruszka at the relevant time; in particular, that assessment is not to be done in isolation, nor is it assisted by relying upon extracts of material devoid of context. Whether or not Inspector Pietruszka's formation of a suspicion that the plaintiff had committed a sexual assault on the victim was reasonable must be assessed in light of the totality of what was known to him.

What was known to Inspector Pietruszka immediately prior to making the decision to arrest the plaintiff?

226 By 1 July 2015, Inspector Pietruszka had formed the view that the plaintiff was one of a group of four males that had sexually assaulted the victim. The material available to Inspector Pietruszka by that time, immediately prior to arresting the plaintiff, was relevantly as follows:

(1) the information conveyed via the briefings at Blacktown Police Station;

(2) the statement of Ms Tejada;

(3) the first ERISP of MM;

(4) the second ERISP of MM;

(5) the statement of Constable Boyd;

(6) photographs of the crime scene;

(7) a photograph of the plaintiff taken from a social media account; and

(8) the ERISP of Mr Alcazar.

227 (For completeness, it may also be noted, that Inspector Pietruszka, at that stage, had also obtained the result of a COPS search with respect to the plaintiff as well as additional information about plaintiff, with respect to an unrelated matter, via a conversation with Detective Sergeant Condon).

228 From reviewing that material, Inspector Pietruszka had knowledge of the following:

(1) the victim had identified that four persons were involved in the offence;

(2) the victim gave identifying information that matched the description of plaintiff;

(3) the victim had identified that the plaintiff was present at the crime scene;

(4) four males were identified by name, together with their respective relationships to each other (namely, cousins and/or friends);

(5) Ms Tejada had said that the plaintiff had sat with her on the grass while she was being sick, but she was not sure who had gone into the bathroom because of her intoxication; and

(6) Mr Alcazar had indicated that all the boys present had been in the toilet and, while the plaintiff was not initially in the toilet, had gone into the toilet after him.

229 Inspector Pietruszka stated he had considered the aforementioned material before arresting the plaintiff and, based upon the same, had formed the view

that the plaintiff was one of the four males involved in the incident about which MM complained on 22 June 2015, as at 1 July 2015, Inspector Pietruszka had satisfied himself that it was necessary to arrest the plaintiff.

230 On that basis (and upon the basis of the material referred to above), in his first statement, Inspector Pietruszka stated that the level of satisfaction was further informed by the following matters:

(1) He was of the view that he needed to arrest the plaintiff to ensure that he appeared before a court in relation to the offence. Inspector Pietruszka was aware from his conversation with Detective Sergeant Condon that there had previously been problems in securing the plaintiff's attendance at Court and securing his cooperation with a police investigation. He was also aware that he suspected the plaintiff of committing a very serious offence, which carried with it a greater risk of abscondment.

(2) He was of the view that he needed to arrest the plaintiff to avoid the risk that he would harass or interfere with witnesses. He was aware that the plaintiff lived in the same area as the victim. He was aware that sometimes sexual assault offenders harass or intimidate the victim. It had occurred on previous cases in which he had been involved.

(3) He was of the view that it was necessary and appropriate to arrest the plaintiff because of the nature and seriousness of the offence. The offence was aggravated sexual assault in company, a gang rape. That is a serious offence, and the victim of the offence was a vulnerable female.

231 I will return to my finding in that respect, in the conclusions section of this judgment.

1-2 July 2015

The arrest of the plaintiff and events prior to charging

232 The Court has before it two accounts as to what occurred at the time of the arrest of the plaintiff, namely, the evidence of Inspector Pietruszka and the evidence of the plaintiff. As earlier mentioned, both witnesses were required for cross-examination. For reasons that I have earlier set out (and supplemented by my observations below), I accept the account provided by Inspector Pietruszka and, save for the presence of corroborating evidence, have placed little weight upon the evidence of the plaintiff, in this respect, whom I have found not to be a witness of credit.

233 On 1 July 2015, at approximately 11.30pm, Inspector Pietruszka attended Blacktown Train Station, where he saw the plaintiff. Inspector Pietruszka, who was wearing a suit, approached the plaintiff and presented his police identification. There was then a conversation to the following effect:

> Pietruszka: Valentino?
>
> Plaintiff: Yes.
>
> Pietruszka: I'm Detective Sergeant Jason Pietruszka from Blacktown Police Station. Did your mother tell you I was at your house earlier?
>
> Plaintiff: Yeah, I'm coming to see you now. I'm just waiting for my dad.
>
> Pietruszka: I've saved you the trouble. I need to inform you that I am investigating an aggravated sexual assault that occurred in Blacktown upon [MM]. I want you to understand that you are under arrest for that offence. Do you understand that?
>
> Plaintiff: Can you repeat that please?
>
> Pietruszka: I'm telling you that you are under arrest for sexual assault. You don't have to say or do anything, anything you say or do will be recorded and may later be used as evidence. Do you understand that?
>
> Plaintiff: Yeah, ok.

234 Beyond that conversation, Inspector Pietruszka also recalled the plaintiff said: "I have an alibi. I will tell you everything".

235 After announcing the arrest of plaintiff, the following steps were taken by Inspector Pietruszka (all of which occurred prior to the custody manager's bail decision):

(1) he searched the plaintiff;

(2) he walked with the plaintiff by foot to Blacktown Police Station;

(3) upon arrival at the police station, he walked the plaintiff to the charge room and placed him in a cell;

(4) he then provided the plaintiff's details to the custody manager;

(5) he escorted the plaintiff's father to the charge room and gave the plaintiff and his father time to speak;

(6) he spoke with the plaintiff and his father and attempted to answer their questions;

(7) he allowed the plaintiff time to contact a solicitor;

(8) he spoke again with the plaintiff and his father and attempted to answer their questions;

(9) he spoke to the plaintiff and asked him whether he wished to hear the full allegations against him electronically;

(10) he conducted an ERISP of the plaintiff;

(11) he instructed Detective Mahony to "conduct a forensic procedure immediately after the interview". Shortly after the interview, Detective Mahony approached Inspector Pietruszka with a set of discs and said "these are the discs and documentation from the buccal swab"; and

(12) he charged the plaintiff and submitted the charge to the custody manager for the purposes of bail determination.

236 I will review in more detail those steps below.

237 Inspector Pietruszka provided an account of the search of the plaintiff in his first statement, which is extracted below:

> 39. The plaintiff was holding a bag. He placed it on a seat at which time I opened it and searched it. Nothing of interest was located. I then proceeded to conduct a pat down search of the plaintiff. It is my practice that, when I take a person into custody, I conduct a search. This is to ensure the safety of that person and police. The Code of Practice for Crime provides an overview for the reasons for searching upon arrest. They are:
>
> > (a) that would present a danger to a person, or
> >
> > (b) that could be used to assist a person to escape from lawful custody, or
> >
> > (c) that is a thing with respect to which an offence has been committed, or
> >
> > (d) that is a thing that will provide evidence of the commission of an offence, or
> >
> > (e) that was used, or is intended to be used, in or in connection with the commission of an offence.
>
> 40. On searching the plaintiff, in his possession was an Apple iPhone, I took possession of this item. Whilst this was occurring Detective MAHONY arrived. We escorted the plaintiff to Blacktown Police Station and into the custody area. He was placed in the dock area. Thereafter, custody procedures followed.

238 In the second evidentiary statement of Inspector Pietruszka dated 12 December 2018 ("the second statement of Inspector Pietruszka"), Inspector Pietruszka provided further information:

> 8. … I seized the Plaintiff's mobile phone following the search near the train station. When I seized the phone, I believe [sic] that it had evidence in connection with the commission of an offence, namely, aggravated sexual assault.

239 Inspector Pietruszka, together with Detective Mahoney, conveyed the plaintiff on foot to Blacktown Police Station. During that walk, Inspector Pietruszka had

minimal conversation with the plaintiff. In his first statement, Inspector Pietruszka recalled that the extent of any conversation had was reflected in answers 8-13 of the ERISP of plaintiff dated 2 July 2015 (set out below).

240 Whilst walking back to the police station, Inspector Pietruszka did not question the plaintiff about the sexual assault. Rather, the plaintiff volunteered to Inspector Pietruszka that he had been on the grass helping Ms Tejada (T436:8-12). During cross-examination he rejected the suggestion that the plaintiff said: “I am innocent, I have nothing to hide” (T437.27). During cross-examination, the fact of that statement being said was never put to the plaintiff, the plaintiff did, however, accept that he had said to Inspector Pietruszka words to the effect that “I will tell you everything”. The focus of the cross-examination, with respect to the conversation between the train station and the police station, was whether the conversation was instigated by Inspector Pietruszka’s questions or whether the plaintiff volunteered information. On balance, I consider Inspector Pietruszka’s account of the conversation may be accepted. I will return to a more concentrated consideration of the plaintiff’s account, which supports that finding, below.

241 They arrived at the police station at approximately 12.01am. At the police station, Inspector Pietruszka walked the plaintiff to the charge room and placed him in the cell. Inspector Pietruszka then provided the plaintiff’s details to the custody manager, Sergeant Mark Kneipp. Sergeant Kneipp accepted the plaintiff into custody at approximately 12.19am on 2 July 2019.

242 At 12.21am, Sergeant Kneipp read the plaintiff the information contained in a form entitled: “Caution and Summary of Part 9 of the Law Enforcement (Powers & Responsibilities) Act 2002”. The form set out the plaintiff’s rights whilst he is detained in police custody. A copy was provided to the plaintiff. The form provides for the person in custody to sign as a means of confirming they understand the information that has been read to them. The plaintiff refused to sign. Sergeant Kneipp recorded that the plaintiff said: “I don’t wish to sign now”. Sergeant Kneipp executed the form at 12.34am.

243 Between 12.45am and 1.22am, the plaintiff spoke to his mother by telephone.

244 At approximately 12.52am, Inspector Pietruszka led the plaintiff's father to the charge room and, as mentioned above, gave the plaintiff and his father time to speak.

245 While at the police station, the plaintiff indicated that he wished to speak to a lawyer. At 1.22am, the plaintiff's family contacted a solicitor, Mr Joseph Nashed, on behalf of the plaintiff.

The account of the plaintiff of his arrest

246 The account of the plaintiff consists of his statement dated 15 July 2018 (Ex 1) and his evidence at the hearing.

247 In written submissions, emphasis was placed upon the account of the plaintiff, in particular, his evidence as to the absence of a caution as fundamental to the tort of false imprisonment. During the course of oral submissions a correction was also made as the plaintiff's characterisation of the significance of the absence of a caution at the time of arrest, in written submissions, upon the validity of the arrest. Senior counsel submitted:

> … I really should correct and we accept the defendant is right about this. We said in our submissions, I think, that the arrest was invalid if Mr Pietruszka had not cautioned. Now, we accept that's not right. *It was improper not to caution, if he didn't caution and it too would go to malice but we accept that the effect of that would be on the admissibility of anything that the plaintiff subsequently said which was sought to be used against him* in an incriminatory way and we're not talking about that here, of course.
>
> [Emphasis added.]

248 Thus, the factual controversies with respect to the conversations had between Inspector Pietruszka and the plaintiff, together with his conduct at the time of arrest, as recounted by the plaintiff, are relied upon primarily in support of malice. I now turn to summary of the plaintiff's account.

249 Turning first to the time of the arrest, the plaintiff provided the following account of Inspector Pietruszka's conversation and conduct:

(1) Inspector Pietruszka told him to empty my pockets and he took the plaintiff's mobile telephone. "Nobody cautioned me before or during the searches" (Ex 1, para 6).

(2) The plaintiff asked the officers "if we could wait for my father". They said that we could wait only a few minutes. After a very short time Inspector

Pietruszka said, "We can't wait any longer. We have to go" (Ex 1, para 7).

(3) As to what occurred whilst being conveyed to the police station (Ex 1, para 8):

> 8. Whilst we were walking to the Police Station Detective Sergeant Pietruszka started to ask questions about the assault on [MM]. I said to him "I was helping Trisha who was sick on the grass. I am innocent. I have nothing to hide. I will tell you everything at the police station." Detective Sergeant Pietruszka responded with the words "You are a liar. I know you were involved and I am going to make sure that you spend the rest of your life in jail". I was shocked and very scared.

(4) As to an incident that occurred upon arrival at the police station (Ex 1, para 9):

> 9. At some point soon after I arrived at the police station I asked to go to the toilet. Whilst I was in the toilet urinating Detective Sergeant Pietruszka burst in and demanded that I tell him the PIN code to my mobile telephone because he said that I had evidence on it. He said, “You’re going to go to gaol and meet someone called the Skaf brothers”. I did as he asked. I was very scared.

(5) As to the conversation that preceded the holding of the ERISP (Ex 1, para 12):

> 12. When Detective Sergeant Pietruszka and Constable Mahony came into the room they told my father to leave. I said to them "I don't want to answer any questions until I see a lawyer". Detective Sergeant Pietruszka said to me "Did you get in contact with a lawyer?". I said "No. Though my family they are trying but they tell me that no one will come here so late. I think a lawyer will come tomorrow". Detective Sergeant Pietruszka said "We have to do the interview now". I said "No. I want to see a lawyer first". Detective Sergeant Pietruszka said "No we must do the interview now". I did not know what else to do so I went along with Detective Sergeant Pietruszka.

250 During cross-examination, the plaintiff provided the following evidence about the conversations at the train station:

> Q. I asked you some questions earlier about when Pietruszka approached you, do you remember that?
>
> A. Yes.
>
> Q. And he said his name and you said that he said you're under arrest for the rape of the victim, do you recall that?
>
> A. Yes.
>
> Q. Aside from those words, did you have any other conversation with Pietruszka?
>
> A. After he said?
>
> Q. Yes?

A. So I did say I was waiting for my father to arrive and then, yeah and then after he then said I'm under arrest for the rape of the victim even when I crossed the road.

Q. That's the totality of the conversation, is it, that you recall?

A. Yes.

251 As to the conversation that occurred whilst he was conveyed to the police station, the plaintiff provided the following evidence:

Q. As you were walking back to the police station, which is not very far from the train station, is it?

A. That's right.

Q. You started asking questions about the victim, didn't you?

A. No.

Q. Did you say anything about an alibi?

A. I did mention an alibi, yes.

Q. You said, didn't you, that you were on the grass with Trish?

A. I was taking care of Trisha, yes.

Q. Did you tell Pietruszka that you'd tell him everything when you went to the station?

A. Yes.

Q. I just want to put to you that during the time you were with Pietruszka at the railway station, and on the way to the police station, he did not question you at all about the circumstances of the night the sexual assault took place; do you accept that?

A. He did ask me questions.

Q. You volunteered certain information, and that was the limit of any information that you gave to Detective Pietruszka that night, isn't that right? On the way to the police station.

A. Sorry, I don't understand that question.

Q. The only information that was imparted during the journey from the train station to the police station was from you, in the terms you've already indicated, to Pietruszka that you were helping Trish, isn't that right?

A. Are you talking about from when we were towards the front of the 7/11, approaching to Blacktown Police Station? Just want to confirm.

Q. I'll do it this way. During the time you were arrested and during the time you were walked to the police station, Pietruszka did not question you about the sexual assault incident, do you accept that?

A. No, he did question me.

Q. You're confusing him questioning you with you providing him information about you being present with Trish, isn't that right?

A. Sorry, can you repeat that question?

Q. Do you not understand that question?

A. I just want to make sure I heard it correctly.

Q. Well, tell us what you heard?

A. That I just started talking to him about what happened on the night and that I was with Trish.

Q. No, what I was putting to you is that you were confused about your meaning of a conversation and what you mean to say is that because you told Pietruszka certain things about Trish, you consider that Pietruszka was asking you questions about the night of the sexual assault, correct?

A. No, he started the conversation with me.

Q. Yes, what did he say to you?

A. He asked about what happened and where was I.

Q. That's totally untrue, isn't it?

A. That's true.

252 As to why he did not “complain” when given the opportunity at the police station, he gave the following answers:

Q. When you were at the ERISP and you had the opportunity to complain,

why didn't you complain about the fact that you now assert that Pietruszka was questioning you en route from the train station to the police station?

A. Sorry, can you repeat that? Just didn't quite understand that question.

Q. You didn't understand it?

A. Yeah.

Q. Is it that you didn't hear it or you didn't understand it?

A. A bit of both.

Q. Why didn't you complain to the custody manager when you had the opportunity to when you were in the record of interview room to complain to him that Pietruszka had questioned you en route from the train station to the police station?

A. I didn't know exactly who he was, I didn't understand any of it.

Q. The officer told you who he was, didn't he?

A. Yes.

Q. Yes and you could have said at the end of the record of interview when you were in the room with Sergeant Kneipp that, even if you didn't know Pietruszka's name, the officer that just walked out of the room, you could have described him that way, couldn't you?

A. I didn't know who he was exactly.

Q. Sir, it's a pretty simple question, wasn't it? Wasn't it?

A. Sorry, can you repeat it.

Q. Are you avoiding answering the questions, are you?

A. No, it's I get a bit confused because I feel like we're jumping parts a bit. So.

SPARTALIS: All right, I'm going to speak up a little bit, your Honour, I'm not shouting at the witness but I'm just raising my voice so he can't complain that I'm speaking softly.

Q. When you were at the end of the record of interview and you were in the presence of Sergeant Kneipp, the person who had identified himself to you as the independent officer, you could have then had the opportunity to complain to him that Pietruszka had questioned you en route from the train station to the police station, isn't that right?

A. I didn't know exactly what I can and can't talk to him about. I didn't understand any of it. I didn't even understand his exact position.

Q. Well, he explained it to you, didn't he?

A. Yeah, but I thought because everyone was telling me something different, I didn't know if I could trust him. I thought they might do something else to me.

Q. He identified the fact that he was not associated with the investigation, didn't he?

A. He said that.

Q. Yes, he said he was independent, didn't he?

A. Yes.

Q. And you had no reason whatsoever to disbelieve him, did you?

A. I didn't know exactly who he was. I didn't, I didn't, so.

Q. Are you saying you didn't have a reason to disbelieve him, is that your answer?

A. Yeah, I didn't trust him.

253 As to the conversation that occurred prior to the ERISP, the plaintiff gave the following account:

Q. Turn it over for a moment. Just close it up for a moment, please? Just so it's not in your view. And Pietruszka asked you if you wanted to hear the allegations made against you, didn't he?

A. Yes.

Q. That's when you were taken, around that time, to the room where the interview took place?

A. It's not there was a little bit more in between that though.

Q. What's the "bit more"? Tell us?

A. He said, "We have to tell you your allegations and we need to go and do an interview right now." And I said, "I don't want to; I want to speak to a solicitor first." And he said, "No, we have to go."

Q. All right, that answer is a complete fabrication, isn't it?

A. Does "fabrication" mean made up?

Q. Yes?

A. No, it's truth.

Q. You see you wanted to know the allegations, didn't you?

A. (No verbal reply)

Q. Didn't you?

A. I didn't want to conduct an interview.

Q. I asked you whether you wanted to hear the allegations, isn't that right?

A. No. I was told I have to.

Q. That's untrue, sir, isn't it?

A. It's true.

254 During the course of cross-examination the plaintiff, in addition to denying he was cautioned at the time of arrest, he denied:

(1) he was cautioned at the police station;

(2) he was read his rights at the police station; and

(3) that Inspector Pietruszka said he was under arrest for sexual assault.

255 Those passages served to confirm my earlier observation as to the plaintiff's credit, in particular, having considered the evidence of the plaintiff, including my observations of his demeanour at the hearing, I do not accept the account of the plaintiff with respect to his arrest and events prior to him being charged. My reasons for the finding, in addition to my credit findings set out earlier in this judgment, are as follows:

(1) The witness demonstrated a consistent lack of credibility in light of the objective facts; in particular, with respect to his evidence concerning the arrest and his subsequent management in custody.

(2) In light of my credit findings about the plaintiff, I also find there to be substantial issues with the reliability of his version of events, particularly when considered in the light of the credible testimony of Inspector Pietruszka and the objective evidence (see T488-T489).

(3) The plaintiff's account of conversations that suggest malice and unfairness by Inspector Pietruszka are entirely inconsistent with the record of the ERISP of the plaintiff (which I will return to below). At the outset of the interview, the conversation had at Blacktown Train Station through to arrival at Blacktown Police Station is relayed to him. The plaintiff accepted the summary as accurate and made no addition or correction.

(4) Further, upon the completion of the interview, Sergeant Kneipp made the usual inquiries as to fairness of the process. He accepted that he

had his rights read to him. As to whether he participated in the interview "of [his] own accord", he answered "[n]o comment". Notwithstanding the opportunity to put a complaint on the record, none were made by the plaintiff.

2 July 2015

Inspector Pietruszka's search of the plaintiff's phone

256 Early on the morning of 2 July 2015, Inspector Pietruszka conducted a search of the plaintiff's phone.

257 He obtained a Facebook message sent from Mr Bandao to the plaintiff on the night of the sexual assault. The message read: "Come Yallah pussys gonna close". A copy of that message and other message obtained from the plaintiff's phone, including "Facebook chats" with "Trish Tejada", "Jenka Bandao" and "Brad Harvey" were annexed to his statement.

258 The Facebook chat between "Brad Harvey" and the plaintiff included, *inter alia*, the following messages sent to the plaintiff: "Ok my little rapist Hahahahaha" and "What did they say now? They charge u with anything?".

259 As the contents of those messages and chats were put to the plaintiff during his ERISP (set out below), I accept that Inspector Pietruszka was abreast of the content of the Facebook chat messages prior to conducting the interview and, it follows, prior to charging the plaintiff.

The ERISP of the Plaintiff

260 At approximately 1.30am, Inspector Pietruszka conducted an ERISP with the plaintiff. The ERISP continued until 2.09am. Inspector Pietruszka decided to conduct an ERISP after the plaintiff said words to the effect that he wished to hear the allegations against him, and Inspector Pietruszka decided that was appropriately done in the context of an electronically recorded interview. In his second statement, Inspector Pietruszka denied the contention that he "insisted" the plaintiff take part in the ERISP. A transcript of the ERISP of the plaintiff (20 pages) was produced.

261 During cross-examination, Inspector Pietruszka gave the following explanation for why he considered an ERISP to be appropriate:

> Q. Why then did you think you were entitled to put him in front of a machine and record what he said?

> A. Sir, during the time that I was talking to Mr Hrdavec, the plaintiff, he indicated that he wanted to hear the allegations. I had been speaking with both him and his father in the cell room, dock, charge room, whatever you want to call it, of the police station. It was more of a, I guess you'd say an argument, but our facts, the charges, what was happening, so I offered him the opportunity, and to be fair to and to be fair to myself, to record it electronically regarding hearing the allegations. I made that clear in the interview where I asked him if he wished to hear the allegations.

262 The course taken was, in my view, both available and reasonable.

263 I now turn to a summary of the ERISP of the plaintiff, which was before the Court.

264 The ERISP of the plaintiff was conducted by Inspector Pietruszka, together with Detective Mahony. At the outset of the interview, it may be noted, that the plaintiff permitted the detectives to call him “Tino”.

265 Preliminary matters were dealt with at the start of the interview, as follows:

(1) The plaintiff accepted that, at the train station, Inspector Pietruszka had presented his police identification, told him his name, and told him (twice) that he was under arrest for “sexual assault”.

(2) The plaintiff accepted that Sergeant Kneipp had explained to the plaintiff his rights in custody and, in answer to a question as to whether he understood his rights, the plaintiff said, “kind of yeah”.

(3) Inspector Pietruszka sought clarification of the plaintiff’s answer with respect to understanding rights, “are there any right you don’t understand?”. To which the plaintiff answers. “the four hours waiting”. Inspector Pietruszka explained: “police can keep you for four hours O.K. So, your time of arrest was 11.30 technically we can keep you till 3.30 it’s known as investigation time”. Inspector Pietruszka also explained that police may apply to judge to extend that time by up to 8 hours. The plaintiff confirmed he understood.

(4) Following a discussion of the plaintiff’s rights, Inspector Pietruszka said “I can tell you though ah we have no intention of keeping you longer than four hours ah, within that time we will make a determination on whether ah, you are to be charged O.K. Ah, once we charge you that four hours stops and we move to charge process”.

(5) Prior to turning to the allegations against the plaintiff, Inspector Pietruszka confirmed that the interview was being recorded and that the plaintiff was not required say anything and that “anything you say or do we are going to record”.

266 Following those preliminary matters, Inspector Pietruszka put the allegations against the plaintiff to him. Whilst the plaintiff confirmed that he understood the allegation put, he offered no comment (see Q38-Q59). The following aspects of

that series of questions were the subject of controversy, which will be returned to below:

(1) At Q38, Inspector Pietruszka, prior to listing the allegations said, “So, you are stating that you don’t want to speak say anything until you lawyer gets here but I will explain the allegations to you to be fair”.

(2) Q49 and Q50:

> Q49. Well this is the allegation and it’s alleged that while this was occurring you were present and you had your penis in your hands and were indecently assaulting her and do you know what I mean by indecently assault?
>
> A. No
>
> Q50. [01.33] You were fondling her and grabbing her breasts and her ah, her vaginal area. And do you understand that?
>
> A. I understand.

(3) At Q51 to Q55, Inspector Pietruszka mentioned a discussion at the train station, that is, very soon after the arrest, where the plaintiff had said that he had an alibi, being that “Trisha” had been sick on the grassed area and that he had been with her comforting her.

(4) At Q57:

> I will say that we have a statement from Trisha and she doesn’t mention you being there at all with her. We have obtained at interview with a person named as Alcazar who states and again this is the allegation he states that yes he was in the room with yourself he was at, and when I say room I mean bathroom, he was in the bathroom with yourself. Ah, ah, Bruce and um, Loyd um, Bandao so, the four of you were in the room with [MM]. And he states that ah, things were occurring but he can’t really recall what he states he left that room and he was outside and whilst he was outside he states you went back into that bathroom and you stayed in there for fifteen minutes.

267 By his second statement, Inspector Pietruszka denied that he “attempted to trick or coerce the Plaintiff to give answers to questions that he had earlier indicated that he did not wish to answer”. He said: “I endeavoured during the interview to explain the allegations and circumstances of the offences”.

268 At Q59-Q70, Inspector Pietruszka asked the following questions:

> Q59. Do you wish to make a comment about that?
>
> A. No, I’ve got nothing to say.
>
> Q60. [01.35] O.K. And do you understand now why I’m talking to you?
>
> A. Ah hmm.
>
> Q61. And do you understand that people have stated things about you?

A. Ah hmm.

Q62. Do you understand that?

A. Yeah.

Q63. O.K. Is there anything you wish to ask me?

A. Um, can you give me ….. test …..?

Q64. Test .....?

A. Yeah. My fingerprints what you have got to do.

Q65. What ---

A. Because I didn't touch her sort of like.

Q66. I understand [MM's] not saying that you placed your penis in her vagina O.K.

A. And my fingerprints as well.

Q67. All right. So, it's been over a week O.K. So, that the DNA on your fingers won't be there, but how, how do you know about that, have you spoken with any person related to this offence since that day?

A. No how, how ese would youse know.

Q68. About what?

A. Like, ….. all the fingerprints, DNA is on her.

Q69. Well fingerprints no.

A. Oh.

Q70. [01.35] DNA. From obviously from playing a penis into inside her your saying and it and I need to clarify so you, you are saying you were there but you didn't touch her?

A. I didn't even see her there.

269 Next, Inspector Pietruszka told the plaintiff that Ms Tejada did not include him in her statement (see Q72-Q76):

Q72. Do you wish to present any evidence to the contrary to say no I didn't do it?

A. Trisha.

Q. Well I've stated to you Trisha ...

A. Oh.

Q73. ... has made a statement and you are not included in that statement. Do you understand what I mean by that?

A. O.K. Then um, ...

Q74. No, do you understand what I mean that you are not included in that statement?

A. So, can I ask her again?

> Q75. No, well. We took a statement from her on the night it happened O.K. the day it happened she is stating that you weren't with her whilst she was being sick she said she was on the ground by herself she doesn't mention you. If you are saying that you were there and you were with her I can go and canvas it with her again. Is that what you are saying?
>
> A. Yes.
>
> Q76. O.K. All right. I will speak with Trisha and again but again a statement was obtained from her and you weren't mentioned.

270 Next, the plaintiff turned to identify two other people who could support his alibi: Mr Bandao's father and sister, respectively. The plaintiff said that they either saw him "taking care of" or "helping" Ms Tejada (Q77-Q85). As to the location of his assistance that was observed, the plaintiff said "This was all in the house" and not on the grass (A86). Upon Inspector Pietruszka confirming that he would "speak with them", the plaintiff told him to speak with Ms Tejada and Mr Bandao's father but "not the sister don't worry" (A88).

271 Due to the inconsistency of the location where Ms Tejada was getting sick, when considered against her own account of being moved from the bathroom to the grass, Inspector Pietruszka repeated that allegation and emphasised that "she is saying she is somewhere different to where you are saying you were" (Q89-92). Whilst the plaintiff said he understood the allegation and the clarification therein, he did not provide further comment and gave "no audible response".

272 At Q96, Inspector Pietruszka accepted that the plaintiff had "provided… alibi which [he] asked questions about". He then offered the plaintiff the opportunity to either "finish the interview" or continue. If the latter was nominated, Inspector Pietruszka advised that "you can comment on the allegations you can say if you were there, you can provide any version you like right now I'm giving you the opportunity to speak freely". The plaintiff answered that question with a request: "Can you ask Loyd's dad to agree I was in the house taking care of Trisha he saw me".

273 From Q97-Q103, Inspector Pietruszka pressed the plaintiff further about the consistency of this alibi and the significance of providing an indication as to "when this was occurring". The plaintiff was consistently recorded as providing "no audible response". Save for the following answers at Q102-104:

Q102. … But you are telling me that you were inside with her being Trisha. But how do you known that was the same time something was occurring in that bathroom?

A. During the whole night ---

Q103. The whole night.

A. Loyd had saw me with he that's my witness for the alibi.

Q104. The whole night. The whole night.

A. Speak to Trisha.

274 At that juncture Inspector Pietruszka repeated that he had already spoken with Ms Tejada: "We already have, I told you that it doesn't mention you" (Q105).

275 The next series of questions concerned "some Facebook chat" and the plaintiff's knowledge of MM's assault in the bathroom. At Q107-Q110:

Q107. There was some Facebook chat so, you knew about?

A. I heard some, something about it.

Q108. What did you hear?

A. (NO AUDIBLE RESPONSE)

Q109. Good answer. In your Facebook chat it mentions I think someone calls you a rapist. That's there isn't it?

A. (NO AUDIBLE RESPONSE)

Is that correct?

PLAIN CLOTHES CONSTABLE MAHONY

Ah hmm. That message is in your Facebook chat.

DETECTIVE SERGEANT PIETRUSZKA

Q110. [01.43] And there's another message referring to an incident that occurred at Bandao's house so, you were aware of it. As I said the allegations are that all four people were in that room a very small bathroom with a girl that weigh forty four kilo's and is a hundred and forty centimetres tall it's an extremely small girl, intoxicated. Can you provide any comment onto the allegation?

A. No

276 At Q111, Inspector Pietruszka returned to the plaintiff's comment at the Blacktown Police Station:

Q111. At the train station you said when we get back you will tell me everything, I wouldn't say this is everything. Um, we will ah, what was I going to go. Ah, Bandao, I'll speak with Loyd Bandao's father um, all right as I said I'll speak with Trisha again, however I have already told you about that. You mention Loyd's sister is there any reason you changed your mind about that one?

A. No comment.

277 At Q112-113, Inspector Pietruszka turned to two questions about Mr Alcazar:

> Q112. Is there any reason why Alcazar would say that he left the room the bath room [sic] and he saw you go in there for, for at least fifteen minutes?
>
> A. No comment.
>
> Q113. Do you not get on with Alcazar because you went to school with him at … Patrician brothers at Blacktown?
>
> A. No comment.
>
> O.K.

278 For completeness, as earlier mentioned, at the end of the interview Sergeant Kneipp, as an officer independent of the investigation, asked the plaintiff a number of questions. The exchange included the following:

(1) Sergeant Kneipp referred to the Caution and Summary Part 9. Sergeant Kneipp asked whether the plaintiff accepted that Sergeant Kneipp had read the document to him earlier. The plaintiff answered "Yeah, you read the rights".

(2) Sergeant Kneipp asked whether the plaintiff had spoken to the police "of [his] own accord". The plaintiff answered "[n]o comment", but did not deny that he had participated of his own accord.

279 In Inspector Pietruszka's first statement, he identified a "number of things said (or not said)" by the plaintiff that were of "particular importance to my subsequent decision to charge [the plaintiff]" (at para 44). That passage is extracted below:

> (a) I put the allegations in their entirety to Mr Hrdavec and he declined to comment: A59. See also A71.
>
> (b) Mr Hrdavec denied speaking to any person involved in the matter (A67, A105), but this was inconsistent with what was subsequently said to me by Ms Tejada later on 2 July 2015 (see A142 in Ms Tejada's 2 July 2015 statement).
>
> (c) Mr Hrdavec offered "Trisha" as evidence to exclude his involvement in the offence: A 72.
>
> (d) Mr Hrdavec claimed that Jenka BANDAO saw him looking after Ms Tejada (A84), but this was inconsistent with what Jenka Bandao had said to Detective Houldin on 22 June 2015 as reported to me by Detective Houldin on that day.
>
> (e) Mr Hrdavec asserted that he was with Ms Tejada inside the house, not outside (A86).
>
> (f) Mr Hrdavec changed his mind on having police speak with Jenka BANDAO but offered no comment as to why (A111). The plaintiff offered Jenka BANDAO as an alibi witness in question 84, 85 and 86 of the interview with the plaintiff on the 21 July 2015. He quickly changed his claim about speaking with

> Jenka BANDAO in question 88 when he said, 'Yeah, not the sister, don't worry.' When asked in question 111 why he no longer wanted Police to speak with Jenka BANDAO, the plaintiff said, 'No comment'.

280 It was Inspector Pietruszka's perception during the interview that the plaintiff's demeanour and approach to answering questions "were consistent with a person who had been involved in the offence". He further noted: "When presented with facts, information and assertions, he refused to comment. This was, in my experience, unusual and aroused my suspicions". At the completion, the interview did not cause Inspector Pietruszka to change his "suspicion as to [the plaintiff's] involvement in the offence".

When Inspector Pietruszka formed an intent to charge the plaintiff

281 During the course of oral submissions, senior counsel for the plaintiff submitted that plaintiff's case as to wrongful arrest relied primarily upon the evidence of Inspector Pietruszka and the objective evidence, and did not depend upon the plaintiff's account of what was said and/or done at the time of arrest. As to the unlawful nature of the arrest, during closing submissions, the plaintiff crystallised the two bases of its case *vis-à-vis* unlawful arrest, as follows:

(1) Whether Inspector Pietruszka did not suspect on reasonable grounds that the plaintiff had committed the offence, for which Inspector Pietruszka says he arrested him, that is the first charge of sexual assault, the arrest was invalid.

(2) Whether Mr Pietruszka had decided, prior to the arrest to charge the plaintiff.

282 It was conceded by the plaintiff, if the Court were to find the arrest to be valid, it follows, there can be no false imprisonment.

283 Senior Counsel submitted that "arrest" commences with an announcement and continues with the holding of the person. It remains justified "only for so long as the suspicion based on reasonable grounds lasts". Hence, the significance of the controversy *vis-à-vis* Inspector Pietruszka's state of mind at the time of arrest and immediately prior to charging the plaintiff.

284 Upon consideration of particular questions asked by Inspector Pietruszka's during the ERISP of the plaintiff, together with his evidence at the hearing, it was contended that the Court may infer that Inspector Pietruszka did not have the requisite state of mind at the time of arrest, thereby, rendering the arrest

unlawful. A summary of the submissions advanced by the plaintiff, in that respect, follows:

(1) In written submissions, the plaintiff contended that "[f]rom the ERISP and from his recent evidentiary statement it seems clear that at the time of arrest [Inspector] Pietruszka had not decided to charge the plaintiff'". That was supported by reference to Q23 of the ERISP, in which he told the plaintiff that he was yet to make the decision. Further, it was contended that "[t]here is no hint in either of these documents that [Inspector] Pietruszka had already decided to charge the plaintiff, yet that is what he said in evidence" (being a reference to the list that appears at para 44 of his statement, extracted above).

(2) During cross-examination, Inspector Pietruszka gave the following evidence with respect to his intention to charge the plaintiff:

> Q. And did you make the determination that he was to be charged before the end of the interview or after it?
>
> A. My intention obviously was to when I arrested him was to charge him, however during an interview I can't discount someone providing evidence that excludes them from the offence. That being said if he had provided something information he wasn't present at the time or et cetera, then obviously he would have been released.
>
> Q. Well he did provide information that he wasn't present at the time didn't he?
>
> A. There was other evidence to suggest he was involved sir.
>
> Q. He provided an alibi?
>
> A. Again sir there was evidence that suggested he was involved in the offence.
>
> Q. You made your decision to charge him at the end of the interview didn't you?
>
> A. It reinforced my decision to charge him.
>
> Q. No, you told him were you telling the truth when you spoke to him?
>
> A. Of course I was sir.
>
> Q. Were you telling the truth when you said to him within that time we will make a determination on whether you are to be charged?
>
> A. I wouldn't have said it but as I stated, as an interview progresses in my experience you cannot discount someone providing exculpatory evidence so, yes. That's in my experience sir.
>
> Q. Yes
>
> A. So when I stated that I was explaining the four hours and I was explaining obviously we were going to interview him and then the determination will be made but as I stated he was arrested, he was going to be charged unless he provided evidence to the exclude him and I take on board what you've said with the alibi but there was other evidence I believed.

Q. Well I'm not I'll come back to some of the other evidence in a moment, but you made your decision to charge him I suggest to you at the end of the interview, towards the end of the interview?

A. Sir as I stated, my intention when I arrested him he was to be charged. During an interview I can't discount someone providing evidence that excludes them.

Q. Well that's not the way that's not the way you expressed it to him is it?

A. No it's not. But

…

Q. In paragraph 44 of your evidence statement?

A. Yes, sir.

Q. A number of things said or not said during the interview were of particular importance to my subsequent decision to charge.

A. Yes, but as I stated, it was reinforced following the interview.

Q. It doesn't say anything about reinforcing, does it?

A. No, sir, it does not.

Q. This says that your decision to charge him was subsequent to the arrest, doesn't it?

A. The exact wording?

Q. "My subsequent decision to charge".

A. Subsequent.

…

Q. That means, does it not, that you made your decision to charge after you conducted the electronically recorded interview referred to in paragraph 43?

A. No, I disagree, sir.

(3) During the course of the ERISP of the plaintiff, at Q66 (see extracted above), Inspector Pietruszka said “I understand [MM] is not saying that you placed your penis in her vagina OK”. That statement was said to reflect a state of mind that at the point of that question Inspector Pietruszka did not believe the plaintiff committed the sexual assault he was subsequently charged with following the ERISP.

(4) Question 66, it was submitted, revealed Inspector Pietruszka’s consideration and recognition of “quantifications” by MM throughout her account, namely, her inability to nominate anyone other than Mr Bandao or Mr Alcazar as penetrating her with their penises. His acknowledgement of the force of the victim's qualification about who had put his penis into her plainly must have extended to her similar qualifications as to who had touched her in her vagina generally.

(5) Turning to the timing of Q66, it was submitted, nothing of substance was borne out of the conversations between the plaintiff and Inspector Pietruszka at the time of the arrest to the time of the ERISP. In that light, it was contended, it may be inferred that he had the same state of mind at the time of Q66 as he had at the time of the arrest.

(6) During cross-examination, Inspector Pietruszka confirmed he did not believe that the plaintiff had penetrated the victim with his penis and he expressed doubt as to whether he believed the plaintiff had digitally penetrated the victim (relying on the earlier extracted passage from T480).

(7) Thus, with respect to the first charge, Inspector Pietruszka did not suspect on reasonable grounds that the plaintiff had committed the offence. Therefore, he lacked, subjectively, reasonable and probable cause to arrest the plaintiff for the first charge.

285 As to the contentions *vis-à-vis* Q66, in oral submissions, counsel for the State submitted:

> SPARTALIS: So question 66 is apparently the high water mark of evidence against Pietruszka's state of mind, according to the plaintiffs. That is not so, your Honour. What it's dealing with is allegations are put to the plaintiff earlier in the interview. He's asked at question 59, "Do you wish...nothing to say". Then at 63, "Is there anything...give me a test?" Question 64, "Test?" Answer,
>
> "Yeah, my fingerprints, what you've got to do." My friend says well, if I was in the criminal trial that's evidence of innocence fingerprints. Fingerprints inside a vagina, that's how it's being put. "Yeah, my fingerprints...sort of like". So in other words, "I didn't touch her, you won't find my fingerprints." So for Pietruszka's state of mind, that doesn't add anything. How could it possibly add anything? And he says later in the interview, you know, you don't get DNA anyway from touching. He says, "All right because I...sort of like". "I didn't touch her sort of like". It's not, "I didn't touch her at all", and there's a distinction there. There's reservation.
>
> And, then, at question 66, "I understand the...her vagina, okay". That's said to mean, should mean to Pietruszka, well, there's no sexual assault. That's just entirely wrong. And then you go on, "And my fingers...know about that?" So what it means is, on an objective analysis of Pietruszka's state of mind at that time on that very little bit of information is, look, fingerprints are not going to expose anything here, and secondly, I know according to [MM] that you didn't penetrate her with your penis. You say your hand. And it's unlikely there's going to be DNA on your fingers. So how would that change Pietruszka's state of mind at that point in time, in any event, because he knows what the outcome is. He's not expecting to find any DNA in respect of the plaintiff's sperm because that's discounted. So that doesn't add anything to his innocence. And this is reflected later in the ERISP. So at p 254, which is 17 of the transcript, and I'm at about point 6 is your Honour with me there on the page? And on the right hand side, "As I said...states something different".
>
> So what he is doing there, at the end of the interview, is reaffirming what he said earlier, and that was that Tejada had not put the plaintiff on the grass with him. It was an error, and that demonstrates it. And just reading on, "As I said...in the room", so there is someone putting him in the room again. We

> know who that is. "So DNA or...to the Court". That sums it up. And that is consistent with what he said to the plaintiff. Well, you know, if necessary, we will bring the offenders before the Court. And that's what he's saying to the plaintiff. Just pardon me for one moment, your Honour. So in other words, the Court should reject that Pietruszka deliberately lied to the plaintiff about Tejada's statement. Just pardon me. Your Honour, unless there's anything further, they're our submissions.

286 For the reasons that follow, I do not accept the plaintiff's contention as to Inspector Pietruszka's state of mind prior to conducting the ERISP (namely, at the time of arrest) and immediately following the ERISP (namely, at the time of charging the plaintiff):

(1) First, irrespective of his intention at both stages, as an investigator, Inspector Pietruszka is called to re-evaluate his decision to charge or not charge the plaintiff, in light of the evidence that becomes available. I accept that at the time of the plaintiff's arrest, Inspector Pietruszka had intended to charge the plaintiff, in light of the evidence available to him at that time. However, consistent with police practice, that decision would be subject to any subsequent information obtained; for example, any information provided by the plaintiff, should the plaintiff participate in an ERISP, and any relevant information retrieved from the plaintiff's phone.

(2) Secondly, the fact that Inspector Pietruszka said in the ERISP that he would "make a determination on whether … you are to be charged" following the ERISP, does not establish that Inspector Pietruszka did not intend to charge the plaintiff. To the contrary, it indicates that Inspector Pietruszka was open to being persuaded that *no* charges should be laid; notwithstanding his intention at the time of arrest to charge the plaintiff (as based upon the material available to him at that time). That is consistent with good police practice.

(3) Thirdly, I do not characterise his oral evidence that "I can't discount someone providing evidence that excludes them from the offence" and reference to the ERISP as "reinforc[ing]" his decision to charge as disingenuous. On the contrary, it reflects the conduct of an experienced and professional detective. Just as the ERISP may serve to exclude the plaintiff from the offence, it may also further implicate and/or it may not provide further evidence to either end. I accept that the items listed at para 44 of his first statement reinforced his decision to charge the plaintiff.

(4) Fourthly, as to the use of the word "subsequent" in para 44, I have treated it as having its ordinary meaning, namely, meaning a decision that "followed" the ERISP. I find no basis to infer an absence of intention to charge existed at the time of the arrest upon the use of "subsequent" in para 44 with respect to the decision to initiate the formal charge process following the ERISP. In other words, the intention to charge at the point of arrest was confirmed after the ERISP having regard to, *inter alia*, the matters raised during the ERISP.

(5) Finally, as to Q66 of the ERISP, when considered in the surrounding context (namely, Q57-70):

(a) I reject the plaintiff's submissions regarding Q66 and, in the broad, accept the oral submissions of counsel for the State.

(b) The statement in the Q66 concerns the evidence of MM. In conveying that statement it is true that Inspector Pietruszka is suggesting the absence of penile vaginal intercourse, but the surrounding exchanges are consistent, in my view, with Inspector Pietruszka suggesting that the plaintiff was in the bathroom with MM and volunteering questions with respect to fingerprints. The discussion of fingerprints is only suggestive of the plaintiff wishing to exclude the possibility that his hand having touched MM. Consistent with his evidence before the Court, Inspector Pietruszka was of the view that touching by hand (extending to digital penetration) would not leave DNA but, nonetheless he expressly explored (as part of his then held suspicion) that the plaintiff did touch MM including by digital penetration. The explanation given by the plaintiff must have raised a further doubt: "I didn't even see her there" (A70).

287 In reaching that conclusion, I have also had regard to my prior findings with respect to the evidence of Inspector Pietruszka, namely, with respect to the accounts of MM, the account of Mr Alcazar and what was known to Inspector Pietruszka immediately prior to making the decision to arrest the plaintiff.

Representations made by Inspector Pietruszka in the ERISP

288 The plaintiff contended that during the course of the ERISP of the plaintiff, Inspector Pietruszka knowingly made five representations that were without foundation and characterised as "very prejudicial to the plaintiff, and likely to produce fear and shake his confidence". By making such statements, it was submitted that Inspector Pietruszka "knew" that he did not have reasonable and probable cause to arrest and charge the plaintiff for the offences as charged and acted with malice.

289 For ease of reference, and with some repetition, the relevant representations will be set out below and dealt with *seriatim*.

The first representation

290 The first representation relied upon by the plaintiff was Q43:

> Q46. At this time whilst this was occurring the others in the room yourself included had their penises exposed and were and you would say masturbating while this was occurring. And do you understand that?

291 The plaintiff submitted that there was "no basis for this". Reliance, in that respect, was placed upon the victim's earlier statement in the second ERISP of MM, with respect to the fourth male, "I'm not sure about the other guy".

292 As to the first representation, the defendant contended that the "precise misrepresentation alleged is not apparent". As to the plaintiff's reference to the statement of MM failing to provide foundation, the State submitted that the first representation was identified by reference to what was alleged, not what the victim had said. Further, in any event, the victim had said that "they just took turns" and "They were kind of just like touching themselves in front of me". Therefore, it was not erroneous to assert (if it was asserted) that the victim had alleged that the plaintiff (as one of the four assailants in the toilet) had his penis in his hands and was indecently assaulting her.

293 For the following reasons, I do not accept the submission advanced by the plaintiff with respect to the first representation:

(1) First, the foundation for the allegation at Q46 is plainly based upon the account of MM. During the second ERISP of MM, the victim was asked to provide clarification as to what was occurring while one of the "*they*" were "having a turn at you" (which expression referred to penile and/or digital penetration). The victim had accepted that "they just all had their penises out" and "they were all touching their penises". When asked to provide specifics as to movements and locations, MM said she was confused by the crowding. However, she made a clear allegation that four men were in the room and accepted that "all" of them were either exposing themselves and/or masturbating, whilst she was sexually assaulted. Reference should also be made in this context to the first ERISP of MM, where the victim referred to an assault by four men (which is also consistent with the initial briefings by Detective Houldin and Constable Boyd to Inspector Pietruszka, who both made reference to a gang-rape and/or sexual assault that involved four offenders based upon accounts from the victim).

(2) Secondly, as to the plaintiff's reliance upon MM's statement "I'm not sure about the other guy", that statement must be considered in context:

(a) MM is answering a series of questions that require her to reconsider a recent and traumatic event.

(b) MM's answers, when considered collectively, at times reveal certainty (for example, "It was BJ, I remember BJ was touching me"), and at other times she appears to depart herself from specific details and/or admit that she cannot recall (for example, "I could see their faces… And they were kind of just like

laughing, I couldn't see, couldn't make out what they were doing").

(c) After concentrating on the acts of Mr Bandao and Mr Alcazar, MM is asked to turn to consider "the other guys" and what "*they*" were doing. The answer relied upon by the plaintiff appears in the following context:

> Q. … Did you see their penises?
>
> A. I'm pretty sure I've seen, I saw James' but I'm not sure about the other guy.

(d) Whilst her answers with respect to the other guys, at times, suggest they had a lesser role in the incident, the answer relied upon does not in and of itself work to exculpate the plaintiff from involvement in the incident, particularly in light of MM's earlier answers (for example, she accepted that "all" of the males, when not penetrating her, had their penises out).

294 Hence, I reject the plaintiff's contention that Q46 was a misrepresentation of the allegation made against the plaintiff. On the material available to Inspector Pietruszka at the time of the interview, it was an available and important allegation to put to the plaintiff. As earlier mentioned, matters of proof of the facts surrounding the allegation, had the charge not been withdrawn, are properly a matter for the jury to consider.

The second representation

295 The second representation relied upon by the plaintiff appeared in Q49 and Q50:

> Q49. Well this is the allegation and it's alleged that while this was occurring you were present and you had your penis in your hands and were indecently assaulting her and do you know what I mean by indecently assault?
>
> A. No
>
> Q50. [01.33] You were fondling her and grabbing her breasts and her ah, her vaginal area. And do you understand that?
>
> A. I understand.

296 The plaintiff contended, once again, "[t]here was no basis for this". That submission was supported with general reliance upon the account of MM. It was submitted that "[t]he victim had not said that the plaintiff had touched her at all".

297 As to contention that MM never said the plaintiff had touched her, the State highlighted the following extracts of MM's account:

(1) “their hands were just everywhere on me”; and

(2) “they also touched me with their hands … like, in my vagina”.

298 In light of those passages, it was submitted that it was not erroneous to assert (if it was asserted) that the victim had alleged that the plaintiff (as one of the four assailants in the toilet) had grabbed her breasts and her vaginal area.

299 For the reasons that follow, I reject the plaintiff’s contention *vis-à-vis* the second representation:

(1) As to the representation made in Q49, I repeat and adopt my reasons with respect to the first representation.

(2) Turning to the allegation at Q50, reference may be made to both the first and second ERISP of MM. At the outset of the first ERISP of MM, which it may be noted was Inspector Pietruszka’s first interview with the victim and conducted at her home, MM provided the following account of what happened to her:

> … someone started like tugging on like my clothes, someone had like pulled my pants down, taken my bra off, and then like at first it was just someone fondling like with fingers, and they like they all took turns. There was like four of them.

(3) As earlier observed, that initial account of MM was consistent with the description of the offending provided by Detective Houldin, namely, “gang rape” by four males. Further, in the second ERISP of MM, as I have earlier found, the victim at times used the pronoun “they” to refer to all four males. The State provided an apt example of such usage by highlighting MM’s answer, “they also touched me with their hands … like, in my vagina”; when considered in context, a reasonable inference available to an investigator reviewing that material is that MM was making reference to all the males in the room:

> And then I just like, I just remember being penetrated --- like several times and like, fingers, not just, like, not just penises, *they also touched me with their hands* … like, in my, vagina, like, and I remember I was saying “It hurts” …But *they all just like laughed it off*.
>
> [Emphasis added.]

To that it may be added, MM’s manner of recounting events, as earlier discussed, was to consistently use the pronoun “they” (both generically and when discussing conduct attributed to a specific individual); by that style of recounting, an investigator reviewing and/or participating in the interview cannot readily exclude specific individuals from every aspect of the assault described by MM.

(4) It is true that the State erroneously relied upon MM's answer, "their hands were just everywhere on me". (When considered in context of the interview (see the summary of the second ERISP of MM, above), the reference to "their", in that answer, is plainly a reference to Mr Bandao and Mr Alcazar) but that does not displace the general, other references by the victim in her ERISP to all (four) persons being involved in the assault.

(5) Whilst it is true, by the second ERISP of MM, further details were provided, which included attributing specific touching to Mr Bandao and Mr Alcazar, in my view, in light of the material available to him, the substance of the allegation put in Q50 was properly available to Inspector Pietruszka. In making that finding it should also be noted, it is not the place of the Court in proceedings such as the present to critique a decision that was reasonably available to the investigator on the basis that another choice was equally available and not taken.

The third representation

300 The third representation relied upon by the plaintiff concerns Inspector Pietruszka's references to the evidence of Ms Tejada and "the alibi" of the plaintiff, in particular, the representation that Ms Tejada provided a statement but that statement did not include reference to the plaintiff (see Q57, Q75 and Q104-105).

301 The plaintiff submitted that such a representation is "flagrantly false" when considered in the light of Ms Tejada's evidence, which is extracted below:

> 10. When I was in the bathroom James and the boys were checking up on us to make sure we were ok. They knocked and we opened the door. Loyd took me outside and I sat on the grass and I was vomiting there as well. My other friend, *Valentino was looking after me*. *He came a bit later but I don't remember exactly what time he got there. I know Valentino as he is a friend of Loyd's.*
>
> 11. I was sitting on the grass just outside the back door to the main house and I heard [MM] moaning. She was still in the toilet. I think James was in the toilet with her because Valentino and BJ were looking after me when I was sitting on the grass. Loyd went to the bathroom to get [MM] out, I wasn't looking and I'm not sure if he went inside the bathroom or not. She didn't come out and Loyd came back over to me. A few minutes after that James went out of the bathroom and sat down on a chair near where I was sitting. [MM] was still in the bathroom and Loyd went and got her. The next thing I remember was Loyd saying he was taking [MM], James and BJ home. *He told Valentino to stay and look after me. He stayed for half an hour or an hour and then he left.*
>
> *…*
>
> 14. *After Valentino left I went to sleep in Loyd's room and the Cops woke me up. I have no idea what time that was.*
>
> [Emphasis added.]

302 The plaintiff also relied upon Q118:

> Q118. … what you have provided so far about alibi's again I have concerns with because you have previous knowledge about the investigation in that something has occurred and police have been visiting and um, you may have had the opportunity I guess, I could say to um, put alibi's in place…

303 It was contended, by that statement, that Inspector Pietruszka "tried to throw doubt on the force of the plaintiff's alibi by suggesting that it might have been set up". In the light of Ms Tejada's statement, it was submitted, that the suggestion at Q118 "was entirely without foundation". At para 14 of that statement, Ms Tejada said she had gone to sleep in the house and had been woken by the police. Her statement, it was also emphasised, was taken shortly afterwards. Therefore, it was submitted, there was "no opportunity for the plaintiff to have put an alibi in place, and no evidence even that he could have known at that time that the police were involved".

304 In support of its case as to malice, the plaintiff advanced the following additional submissions about Inspector Pietruszka's conduct of the interview of the plaintiff, which are plainly relevant to my consideration of the third representation. The contentions are twofold

(1) Inspector Pietruszka had knowledge of the content of the Ms Tejada's first statement at the time of the ERISP of the plaintiff; and

(2) Inspector Pietruszka knowingly misrepresented the Ms Tejada's first statement for his own purposes to both the plaintiff and Ms Tejada. (I will return to the alleged misrepresentation to Ms Tejada, separately, in the context of her further statement).

305 At this juncture, it may be noted, by his second statement, Inspector Pietruszka accepted that "on a small number of occasions during the ERISP, I misquoted statements made by Patricia TEJADA. I did not do so deliberately". During cross-examination, he also accepted it was a serious error to have made.

306 The plaintiff advanced the following submissions, relevant to its case as to malice:

(1) The most "egregious" misrepresentation was that in the ERISP of the plaintiff, when Inspector Pietruszka repeated twice, that the plaintiff was not mentioned in Ms Tejada's statement. Mr Pietruszka accepted that this was "absolutely" a serious error (see T498.39-50).

(2) As to why the Court would not accept it as a genuine error, reference was made to the following:

(a) The ERISP of the plaintiff occurred early on the morning of 2 July 2015. The statement of Ms Tejada was obtained 10 days prior to that interview. The passage of time between the two statements was not substantial, such that one would not reasonably expect issues to arise as to memory on part of Inspector Pietruszka.

(b) Inspector Pietruszka had read Ms Tejada's statement on the morning of 22 June 2015; and had reviewed it prior to the interview with the plaintiff.

(c) At the hearing, Inspector Pietruszka agreed that it was a statement with which he was familiar on 1 July 2015. Whilst he gave evidence that he could not say when he had last read it, it was submitted, by that answer, it may be inferred that "the first time was not the only time" that he read/reviewed that statement.

(d) Ms Tejada's statement was not part of a proliferation of evidence. As at the time of the ERISP, Inspector Pietruszka had only three sources of direct evidence of what had happened at the scene: the victim, Mr Alcazar, and Ms Tejada.

In this context, it was contended, "it is close to impossible to imagine how an honest mistake could have been made".

(3) Reference was also made to that fact that although he had ample opportunity, Inspector Pietruszka offered no explanation for the mistake he claimed to have made. He was not shy of volunteering explanations in cross-examination, and to do so was well open in re-examination. There is no sensible reason for not offering an explanation if there was one. Inspector Pietruszka offered no explanation for it because he could not do so plausibly. It was not a mistake. It was a deliberate lie, or rather series of lies, in the course of the ERISP of the plaintiff.

(4) The lie, it was contended, was also exposed by Q118-Q119 of the ERISP. At that part of the interview, Inspector Pietruszka expressed his "concerns" about the plaintiff's alibi. During cross-examination, Inspector Pietruszka accepted that he was suggesting to the plaintiff "you've known there was trouble brewing and you've had the opportunity, knowing that we might be coming around knocking on the door to fix up an alibi". It was contended that by those questions, Inspector Pietruszka falsely represented to the plaintiff that his alibi was not supported by the statement Ms Tejada. By that intentional lie, Inspector Pietruszka set out to undermine the alibi itself.

(5) As to the malice of the approach adopted by Inspector Pietruszka in Q118-Q119, reference was once again made to the timing of Ms Tejada's first statement. It was contended that any effort to influence Ms Tejada would have had to have occurred prior to that statement, which was of course prior to anyone being arrested.

(6) At the hearing, once it was pointed out that in order to influence the first statement of Ms Tejada, any intervention by the plaintiff would have to have occurred before 4am, Inspector Pietruszka "changed his ground"

for concern, from having a concern that the plaintiff could have been prompted to act by knowledge of the investigation, to a concern that he could have set up an alibi pre-emptively, in case the police became involved. There was a telling momentary hesitation as he absorbed the implications of Ms Tejada's statement having been taken so early:

> Q. So if the plaintiff had set up an alibi, he had to contact Tricia before 4 o'clock that morning, didn't he?
>
> A. On that day?
>
> Q. Yes.
>
> A. What about afterwards?
>
> Q. Well, she had made the statement already by then.
>
> A. Yes

(7) Reference was also made to the following evidence at the hearing:

> Q. And you believed, you say earlier in the interview, that the statement did not mention him?
>
> A. No, that's correct.
>
> Q. So the statement could not have been an alibi for him, could it, if it didn't mention him?
>
> A. If it didn't mention him, no.
>
> Q. So you could have had no concern about his interfering, let's call it, with Tejada in relation to an alibi if she had not in fact given him an alibi?
>
> A. Sir, my concern with Tejada, as stated, was that she focussed on one person being in that bathroom and everyone else was with her on the grass. So whether it be BJ or whether it be Loyd or whether it be the plaintiff, her only focus was on one person in that bathroom. So my concern was, was there a coercion or a something set in place about that and I only asked that fact. I questioned was that possible.

(8) As to the final answer in the immediately preceding extract it was submitted that the answer reveals a full consciousness that Ms Tejada had said that the plaintiff was with her on the grass ("everyone else was with her on the grass"). It relates to Inspector Pietruszka's state of mind during the ERISP of the plaintiff, specifically when asking Q118 and Q119. Thus, if Mr Pietruszka's evidence is true, he held two conflicting states of mind during the ERISP of the plaintiff. On the one hand, when telling the plaintiff that he was not mentioned in Ms Tejada's statement, he honestly believed that to be true, while on the other hand, to explain concern that he held about the alibi ("that she focussed on one person being in that bathroom and everyone else was with her on the grass") he believed that Ms Tejada placed the plaintiff on the grass.

(9) Of course, in reality there can have been no conflicting states of mind. The single state of mind of Inspector Pietruszka was obviously that Ms Tejada had mentioned the plaintiff. His evidence otherwise produces "fundamental incoherence", where during the same episode he was

both aware and unaware that Ms Tejada had said that the plaintiff was with her on the grass.

(10) Thus, his evidence at the hearing that he honestly believed during the ERISP that the plaintiff had not been mentioned in Ms Tejada's statement is false, and necessarily knowingly false. As to why the Court would not accept the evidence, the following submissions were advanced:

(a) If what Inspector Pietruszka said in the ERISP of the plaintiff was an honest mistake, he must at some time have come to know that. One would think that would be a memorable moment. During cross-examination he volunteered that he had corrected it during the ERISP, but accepted that he never mentioned the fact that he was incorrect to say that Ms Tejada never mentioned the plaintiff (T516.9-39).

(b) Notwithstanding an assertion that he fixed the error during the ERISP, Inspector Pietruszka was unable to identify anywhere in the ERISP where he had corrected his mistake, and on examination of the document it is plain that he did not.

307 In written submissions, the State submitted that the plaintiff's contention *vis-à-vis* the representation as to the contents of Ms Tejada's statement "goes nowhere" because in both Inspector Pietruszka's written and oral evidence he accepted that was an error on his part. The State did not directly respond the plaintiff's argument with respect to Q118.

308 For the following reasons, in my view, the third representation (including the contentions advanced with respect to Q118) does not support a finding of malice and/or that Inspector Pietruszka knowingly charged the plaintiff, notwithstanding an absence of reasonable and probable cause:

(1) First, whilst I accept that the representation made by Inspector Pietruszka that the plaintiff was not mentioned by Ms Tejada was plainly erroneous, Inspector Pietruszka accepted that error. I do not find that Inspector Pietruszka knowingly sought to mislead and/or "trip" the plaintiff up by providing a false account of the evidence. On the evidence before the Court, I accept that Inspector Pietruszka made a mistake in his recollection of that evidence at the time of the interview.

(2) Secondly, notwithstanding the admitted error, Inspector Pietruszka made correct reference during the ERISP to Ms Tejada's statement that upon exiting the bathroom, she made her way directly to the grass area, where she was subsequently sick again. Several answers by the plaintiff were at odds with that statement:

(a) At Q55, Inspector Pietruszka sought clarification with respect to a statement made by the plaintiff at or around the time of his arrest

at the train station: “You stated and tell me if I’m wrong that she was sick on the grassed area and you were comforting her. Is that correct”. In reply, the plaintiff initially answered “Do I have to answer that?” and, subsequently, “Can’t remember”.

(b) At A96, the plaintiff volunteers the following statement: “Can you ask Loyd’s dad to agree I was in the house taking care of Trisha he saw me”.

(c) At Q99-Q101, Inspector Pietruszka sought clarification as to timing of the plaintiff’s movements due to an inconsistency, namely, Ms Tejada has stated she was outside and “now you’re saying no, no you were inside with her”. The plaintiff provided “no audible response” to those series of questions.

(d) At Q102-Q104, the plaintiff told Inspector Pietruszka that he had been inside with Ms Tejada “[d]uring the whole night… Loyd had saw me with her that’s my witness for the alibi… Speak to Trisha”.

Thus, whilst the representation that Ms Tejada had not mentioned the plaintiff in her statement was erroneous, the context in which submissions as to malice or absence of reasonable cause must be considered in the light of all of the material available to Inspector Pietruszka and his dealing with it during the course of the ERISP. The alibi was affected by inconsistent accounts by Ms Tejada and the plaintiff as to whether the plaintiff was in the toilet, the house or outside the house and at what time relative to the assault.

(3) Thirdly, turning to Q118, in context, that question arises out of a discussion of the contents of several “Facebook Chats” attributed to the ownership of the plaintiff. Whilst those chats are not shown to the plaintiff, at this stage, the plaintiff is aware that the police had taken possession of his phone at the time of arrest and the content that caught the attention of Inspector Pietruszka was put to him (see for example, at Q109 “In your Facebook chat it mentions I think someone calls you a rapist. That’s there isn’t it?”, which is a reference to the Facebook chat between “Brad Harvey” and the plaintiff, which included a message sent to the plaintiff that stated: “Ok my little rapist Hahahahaha”). As earlier set out, those Facebook chats reveal that prior to his arrest (and after the date of the incident), the plaintiff had engaged in contact with, relevantly, with Ms Tejada (and others). Thus, the reference to “put alibi’s in place” is not entirely informed by the fact Ms Tejada’s statement was taken at an earlier juncture. It is not unreasonable for Inspector Pietruszka to infer that the plaintiff was potentially discussing matters with Ms Tejada in light of evidence of continued contact since the assault and his repeated request that police “speak to Trisha [again]”. His consideration of the possibility and

> relevance of potential contact with Ms Tejada *after* the taking of her first statement is further indicated by Inspector Pietruszka's answer in cross-examination, "What about afterwards?" in response to a question by senior counsel for the plaintiff, "So if the plaintiff had set up an alibi, he had to contact Tricia before 4 o'clock that morning [on that day], didn't he?".

309 In the result, I do not accept the third representation supports a finding of malice and/or a finding that there was an absence of reasonable and probable cause when Inspector Pietruszka ultimately charged the plaintiff. In particular, the reasonableness of the questions asked by Inspector Pietruszka, including his erroneous reference to the statement of Ms Tejada in the context of the plaintiff's alibi, are informed by the context of the interview. It is erroneous to consider the questions in isolation, devoid of context.

The fourth and fifth representation

310 The source of the fourth and fifth representation is Q57:

> Q57. … We have obtained at interview with a person named as Alcazar who states and again this is the allegation he states that yes he was in the room with yourself he was at, and when I say room I mean bathroom, he was in the bathroom with yourself. Ah, ah, Bruce and um, Loyd um, Bandao so, the four of you were in the room with [MM]. And he states that ah, things were occurring but he can't really recall what he states he left that room and he was outside and whilst he was outside he states you went back into that bathroom and you stayed in there for fifteen minutes.

311 The plaintiff contended that the above extract is "fundamentally false" on two counts:

(1) Mr Alcazar did not say that he had been in the room with the plaintiff, he explicitly said twice that the plaintiff had entered after he himself had left; and

(2) Mr Alcazar did not say that the plaintiff stayed in the bathroom for fifteen minutes.

312 The latter representation was also repeated at Q112.

313 Both the fourth and fifth representations relate to Inspector Pietruszka's recounting of the evidence of Mr Alcazar. The State contended that, as Inspector Pietruszka accepted an error was made, the argument "goes nowhere". This is further the case, it was submitted, as Inspector Pietruszka "is not on trial for misrepresentation".

314 I have earlier set out my findings with respect to the credibility of Inspector Pietruszka. Having found him to be a witness of credit, I accept his evidence that his recollection of Mr Alcazar's account was imperfect, which led to the erroneous representations identified by the plaintiff. Notwithstanding those conceded errors, I do not find they sustain a finding of malice and/or suggest that Inspector Pietruszka knowingly acted without reasonable and probable cause. To the extent those errors are relied upon by the plaintiff, they attach little weight.

Forensic Procedure: Buccal swab

315 Between approximately 2.20am and 2.30am, Sergeant Kneipp conducted a forensic procedure (a buccal swab) on the plaintiff.

The Facts Sheet

316 On the morning of 2 July 2015, Inspector Pietruszka prepared a Facts Sheet in relation to the anticipated charges against the plaintiff ("the Facts Sheet").

317 An extract from the Facts Sheet, setting out the assault and the alleged involvement of the plaintiff, appears below:

> [MM] remained in the bathroom and co-accused BANDAO returned along with co-accused ALCAZAR, the co-accused BRUCE and accused person HRDAVEC. The room was overcrowded and the accused and co-accused persons commenced to laugh at [MM] and carry on immaturely and inappropriately.
>
> [MM] made an attempt to get to her feet however struggled to do so due to her intoxication and the overcrowding within the room. Whilst she remained crouched on the floor of the bathroom, the accused HRDAVEC and the co-accused persons began to touch her all over her body, including on her breasts and her vagina, on the outside of her clothing. The force of this touching led to [MM's] hair extension being ripped from her head.
>
> …
>
> During these assaults the accused HRDAVEC and the co-accused persons each had their penis' removed from their pants and continued to touch [MM] on her breasts, vaginal area and body. Her shirt and bra were both removed and she was rendered naked in the small cramped room with the four males. It should be noted [MM] is 150cm tall and weighs just 44 kilos, being an extremely slight build. As much as [MM] tried she could not make the accused and the accused persons cease their assaults. [MM] had no way of leaving the room as she could not possibly access the door due to the presence of the accused and the co-accused persons in the room.
>
> After co-accused BANDAO removed his penis from [MM's] vagina, co-accused ALCAZAR positioned himself behind [MM] and placed his penis into her

> vagina. [MM] became disoriented and confused and was extremely distressed. She could feel fingers being inserted in her vagina and on a number of subsequent occasions felt a penis inserted in her vagina, however she was unable to ascertain who was continuing these assaults. It should be noted that whilst [MM] can not specify which person committed the sexual acts at certain points, the accused HRDAVEC and co-accused BRUCE were present.
>
> …

318 The Facts Sheet also included summary of arrest and referred to aspects of the ERISP of the plaintiff, that is extracted below:

> About 11.30pm on Wednesday 1st July 2015, the accused HRDAVEC was arrested at Blacktown Train Station. He was cautioned and searched in accordance with safeguards of the Law Enforcement (Powers and Responsibilities) Act (LEPRA) 2002. He was conveyed to Blacktown Police Station where he was introduced to the custody manager and explained his rights as per Part 9 of LEPRA 2002.
>
> The accused was interviewed by Police. The accused refused to say anything but wished for the allegations to be explained to him which Police did. During this time, allegations as stated by various sources involved in the investigation were carefully explained to the accused. After hearing the allegations the accused wished to provide an alibi witness. He stated that on that particular evening, witness TEJADA was sick and he was caring for her in the lounge room of the premises. The accused refused to provide comment on when in the evening this was or what was occurring around him when he was with TEJADA. It was also explained to the accused that TEJADA provided a statement to Police where she states that she was outside being ill on the grass area and not inside the premises with the accused as he was stated. Following these issues, the accused simply stated 'no comment' to all remaining questions.
>
> The accused consented to a forensic procedure (buccal swab) which was obtained.

319 Within that Facts Sheet, Inspector Pietruszka also included a summary of his present view as to the involvement of the plaintiff:

> Police will assert that the accused actions within the external bathroom of [the premises], on the 21st of June 2015, between 10:00pm and midnight, amount to serious sexual assaults against the complainant, [MM]. The presence of the accused within the bathroom caused [MM] to be unable to leave the bathroom and resulted in her being subject to numerous on-going sexual assaults. At no time did the accused offer [MM] any assistance or attempt to remove her, or any of the co-accused persons from the room. The accused actively engaged with the co-accused persons during the commission of the offences and his presence in the bathroom can be deemed as being for no other purpose than facilitating the sexual assault of [MM].

320 By his second statement, Inspector Pietruszka stated that he “created [the Facts Sheet] based on the information I had available to me at the time”.

321 The plaintiff contended that Inspector Pietruszka included untrue statements about the plaintiff's alleged involvement in the Facts Sheet, which statements were intended to show that the plaintiff was in fact guilty of the charges. The plaintiff relied upon the following "misrepresentations" as evidence of the malice of Inspector Pietruszka in initiating, maintaining and continuing the prosecution against the plaintiff.

322 The plaintiff relied upon two extracts of the Facts Sheet. The first alleged misrepresentation appears below:

> Whilst [MM] remained crouched on the floor of the bathroom, the accused HRDAVEC and the co-accused other persons began to touch her all over her body, including on her breasts and her vagina, on the outside of her clothing.
>
> …
>
> During these assaults the accused HRDAVEC and the co-accused persons each had their penis removed from their pants and continued to touch [MM] on her breasts, vaginal area and body.

323 The second alleged misrepresentation is extracted below:

> The accused was interviewed by Police. The accused refused to say anything but wished for the allegations to be explained to him which Police did. During this time, allegations as stated by various sources involved in the investigation were carefully explained to the accused. After hearing the allegations the accused wished to provide an alibi witness.

324 The plaintiff advanced the following submissions to support a conclusion that the first and second alleged misrepresentations sustain a finding that Inspector Pietruszka acted with malice:

(1) Inspector Pietruszka had knowledge of the following:

  (a) the bail sergeant would refer to the facts sheet for the purpose of considering bail;

  (b) the facts sheet would be before the court for the same purpose;

  (c) the only information that the plaintiff's legal representative would have initially was the Court Attendance Notice ("CAN"), the charges and the Facts Sheet.

(2) As to the significance of that knowledge, reliance was also placed upon the following extract of Inspector Pietruszka's evidence during cross-examination:

> Q. Well, it's not just on what I've said. Imagine the position of the bail sergeant, you wouldn't expect the bail sergeant to know anything else about the case except what's in the fact sheet, would you?
>
> A. Yes.

Q. And the charges?

A. Yes.

Q. Indeed, the legal representative of the accused, if he comes on board, say the next morning, would get the fact sheet, wouldn't he?

A. Yes.

Q. Normal procedure, and the charges.

A. Mm.

Q. So apart from anything the client told him, from official sources, the legal representative of the accused would have just this facts document?

A. Yes, absolutely.

Q. And that would not tell the bail sergeant or the legal representative that the police had a statement supporting the alibi that the accused gave very shortly after he was arrested?

A. Yes.

Q. He'd have no idea of that, would he?

A. No.

Q. In fact, the idea it gives then about Ms Tejada's statement is there's something wrong about it, doesn't it?

A. About Tejada's statement?

Q. Yes?

A. Yes.

Q. You think that's an unfair effect of the fact sheet?

A. I think there was, I think there were issues in Ms Tejada's statement, sir.

Q. I'm not asking you that, I'm asking you do you think the fact sheet created an unfair effect to the mind of the bail sergeant?

A. No, sir, I don't.

(3) As to the first alleged misrepresentation, it was contended, there was no foundation for it in relation to the plaintiff.

(4) As to the second alleged misrepresentation, it was contended that it suggests that the plaintiff wished to provide an alibi only after hearing the allegations. In fact, well before hearing the allegations, and very shortly after being arrested, he had said, according to Inspector Pietruszka during the ERISP “that [Ms Tejada] was sick on the grassed area and you were with her comforting her”. In the Facts Sheet, that was twisted into: “He stated that on that particular evening, witness Tejada was sick and he was caring for her in the lounge room of the premises”. A reader of the Facts Sheet would have no idea of the simple reality that shortly after being arrested, not having heard any detail of the allegations, the plaintiff said that he had been comforting

"Trisha" who had been sick on the grass, and that the police already had a statement from Ms Tejada, taken shortly after the incident, confirming that fact.

(5) Further, it was only after being told repeatedly, and falsely, that Ms Tejada's statement did not mention him, that the plaintiff asked that the police speak to others who had seen him with her. When he said that this was inside the house (no mention of the lounge room), Inspector Pietruszka chose to see that as a contradiction of Ms Tejada, as she had said in her own statement, having been sick on the grassed area, disregarding the fact that what the plaintiff had originally said was entirely consistent with that. If those facts are accepted, it was submitted, it is not surprising that the plaintiff decided not to comment further.

(6) Inspector Pietruszka also did not change the Facts Sheet after he received the information about what the victim had said in her interview on 3 July 2015.

325 In reply to those contentions, the State submitted:

(1) As to the first alleged misrepresentation, the State relied upon its earlier submission with respect to the contended misrepresentations in the ERISP of the plaintiff, namely, the precise misrepresentation alleged is not apparent. The Facts Sheet sets out what was presently alleged and, more importantly, was based upon what was known to Inspector Pietruszka at that time. Further, it corresponds to what was said by MM:

(a) "they just took turns"; and

(b) "They were kind of just like touching themselves in front of me".

It was not, therefore, erroneous to assert that MM had alleged that the plaintiff – as one of the four assailants in the toilet – had his penis in his hands and was indecently assaulting her.

(2) By the second alleged misrepresentation, the State submitted that whilst the plaintiff relied upon that statement as containing a representation that plaintiff *only* offered an alibi after hearing the allegations, the text does not carry the representation alleged. Further, even if it did, it was contended, there is no reason to think that Inspector Pietruszka *intended* the text to carry that representation. The text in the Facts Sheet is true: after hearing the allegations, the plaintiff wished to provide an alibi witness. There was nothing inaccurate in conveying that the plaintiff had said that he was caring for Ms Tejada in the lounge room (not on the grass): in the ERISP, the plaintiff expressly said that he was not helping Ms Tejada on the grass, but was instead doing so in the house.

326 In my view, neither the first or second alleged misrepresentation sustains an argument that Inspector Pietruszka acted with malice. As the State correctly

submitted, the foundation for each of the representations is found in the evidence available to Inspector Pietruszka at the time of drafting the Facts Sheet, namely, the ERISPs of MM and, significantly, the ERISP and the plaintiff. Whilst the plaintiff seeks to rely upon the statement of Ms Tejada as supportive of the initial alibi proffered by the plaintiff at or around the time of arrest, that was not the alibi ultimately relied upon by the plaintiff at the time of the ERISP. The alibi included in the Facts Sheet is a summary of what the plaintiff said during the interview. Whilst it is true he did not expressly say "the lounge room", the plaintiff emphasised that he was inside the house when taking care of Ms Tejada and not outside.

327 Further, I accept that State's submissions that whilst the plaintiff relied upon that statement as containing a representation that plaintiff *only* offered an alibi after hearing the allegations, the text does not carry the representation alleged. Further, even if it did, it was contended, there is no reason to think that Inspector Pietruszka *intended* the text to carry that representation.

328 Finally, evidence as to alibi is a matter for a jury to ultimately consider. It is not the purpose of a facts sheet to set out every account available at that stage.

The Charging of the Plaintiff

329 At approximately 2am, Inspector Pietruszka prepared a CAN for the purpose of charging the plaintiff.

330 Two charges were included on the CAN:

(1) aggravated sexual assault, contrary to s 61JA(1) of the *Crimes Act*; and

(2) aggravated indecent assault, contrary to s 61M(1) of the *Crimes Act*.

331 I pause at this juncture to briefly mention the elements of each charge.

332 Section 61JA(1) was in the following terms:

> **61JA Aggravated sexual assault in company**
>
> (1) A person--
>
> > (a) who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse, and
> >
> > (b) who is in the company of another person or persons, and
> >
> > (c) who--

(i) at the time of, or immediately before or after, the commission of the offence, intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or

(ii) at the time of, or immediately before or after, the commission of the offence, threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or

(iii) deprives the alleged victim of his or her liberty for a period before or after the commission of the offence,

is liable to imprisonment for life.

333 Section 61HA provides an extended meaning for the expression “sexual intercourse” as follows:

61HA Meaning of "sexual intercourse"

For the purposes of this Division,

"sexual intercourse" means--

(a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by--

(i) any part of the body of another person, or

(ii) any object manipulated by another person,

except where the penetration is carried out for proper medical purposes, or

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or

(c) cunnilingus, or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

334 Assuming that the prosecution alleged aggravation by virtue of the plaintiff depriving MM of her liberty for a period before the alleged commission of an offence (see s 61J(2)(i)) then the elements of the offence are as follows:

(1) the accused had sexual intercourse (s 61HA) with the victim; and

(2) the sexual intercourse occurred without the consent of the victim (s 61HE(5); and

(3) the accused knew or was reckless (s 61HE(3)) to the lack of consent of the victim to the sexual intercourse (s 61I); and

(4) the accused was in the company of another person or person (s 97); and

(5) for a period before or after the sexual intercourse the accused deprived the victim of his/her liberty.

335 Section 61M was repealed in 2018 (see *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW)) but applied at the time of the plaintiff's arrest and the laying of charges against him. At the time was in the following terms:

> **61M Aggravated indecent assault**
>
> (1) Any person who assaults another person in circumstances of aggravation, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 7 years.
>
> (2) Any person who assaults another person, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 10 years, if the other person is under the age of 16 years.
>
> (3) In this section, ***circumstances of aggravation*** means circumstances in which:
>
> (a) the alleged offender is in the company of another person or persons, or
>
> (b) (Repealed)
>
> (c) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or
>
> (d) the alleged victim has a serious physical disability, or
>
> (e) the alleged victim has a cognitive impairment.

336 The elements of the offence are:

(1) the accused assaulted (s 61L) the victim; and

(2) that assault was accompanied by an act of indecency (s 61N) on or in the presence of the victim which occurred before, after or at the time of the assault; and

(3) the assault occurred in a circumstance or circumstances of aggravation alleged.

337 The Crown need not prove a separate assault if the act of indecency was committed on the victim, although that is not an issue in this case.

338 The plaintiff was charged at or around 4.45am.

339 In the first statement of Inspector Pietruszka, as to his belief and actions at the time of charging the plaintiff he said:

> 49. At the time I caused Mr HRDAVEC to be charged, I believed that he had committed the offence with which he was charged. That belief was based on the information I then had to hand, as identified above.
>
> 50. I deny that I caused Mr HRDAVEC to be charged out of malice towards him. My intention was to ensure that the perpetrators of the sexual assault were charged and put before the Court.

340 At the time of charging the plaintiff, Inspector Pietruszka marked a box on the police computer system indicating that the matter was for the DPP.

Refusal of bail

341 Following the charging of the plaintiff, an initial bail determination under s 43 of the *Bail Act 2013* (NSW) was made by the Custody Manager, Sergeant Kneipp.

342 Sergeant Kneipp prepared a statement dated 23 July 2018. In that statement he stated that "I have no recollection of the events of that evening of the 1 and 2 July 2014… beyond that which is contained in the [Custody Management Record] and the other documents which I exhibit to this statement".

343 Sergeant Kneipp provided evidence of his usual practice when tasked with making a bail decision:

> 24. … it is my practice to:
>
> (a) read the facts sheet prepared by the charging officer;
>
> (b) obtain and read the COPS profile of the accused recording the accused's interactions with the police; and
>
> (c) form a view as to what bail decision should be made.

344 At approximately 4:56am, Sergeant Kneipp refused bail.

345 As to that decision, Sergeant Kneipp said the following:

> 28. The offences with which [the plaintiff] was charged were "show cause" offences. Where an offence is a show cause offence, it is my practice not to grant bail unless the accused provides a sufficient reason (or reasons) to be at liberty. I do not now recall my precise reasoning process in declining to grant [the plaintiff] bail. However, I have no reason to doubt that I departed from my general practice in not granting bai absent a sufficient reason. I note that the fact sheet indicates that [the plaintiff] did not comment on a number of adverse allegations put to him. That is a factor to which I would ordinarily give some weight in making a bail decision for a show cause offence.

346 I accept that bail was refused because the plaintiff had been charged with a "show cause" offence and the plaintiff had not shown cause as to why he

should be granted bail. Further, I accept the decision maker, with respect to the refusal of bail by the police, was Sergeant Kneipp.

347 From 5.32am, Sergeant Scicluna took over as Custody Manager. Sergeant Kneipp had no further involvement in the custody, investigation or prosecution of the plaintiff.

DPP took carriage of the proceedings

348 Sometime after 2 July 2015 and prior to 7 July 2015, the DPP took carriage of the matter.

Further Statement of Ms Tejada

349 On 2 July 2015 at 6pm, Inspector Pietruszka obtained a further statement from Ms Tejada. The statement was electronically recorded, with a duration of 40 minutes.

350 The following elements of Ms Tejada's further statement may be noted:

(1) At Q16:

> Q16. Following on from this statement firstly, is there anything else you wish to tell us about this matter that you recall now or that you didn't recall at the time now that it's been a week since the, the incident?
>
> A. Mmm.

(2) Ms Tejada's recollection was that the plaintiff and Mr Bandao had been looking after her (A19):

> I remember still that I was like, the one sitting down on the ground 'cause I was like, I was intoxicated. Also I remember that my friend Valentino and Lloyd [sic] was looking after me. That also I remember that Lloyd [sic] was, Lloyd [sic] took [MM] home and I remember, the, the next thing I remember the cops was in the house and stuff yep.

(3) Ms Tejada said that she met up with the plaintiff in person since the incident and answered in the negative when asked whether the plaintiff had asked her to say anything on his behalf (Q144-146)

(4) At Q165-Q176, Inspector Pietruszka addressed the Facebook Chat messages on the plaintiff's phone and inquired whether the plaintiff had approached her to "tell the police this". In reply, Ms Tejada said: "No because I was just like, I'm gunna say what I know and… from what is happening".

(5) At Q177-Q188, Inspector Pietruszka put the plaintiff's alibi that he was with Ms Tejada "the whole night" to Ms Tejada. She appeared to indicate that the plaintiff and Mr Bandao had been looking after her at the time of the incident. The relevant extract follows:

Q177. Because when we spoke with him last night he said, No, Patricia, I was with Patricia ---

A. The whole night ---

Q178. Yeah.

A. Yeah they were looking after me yeah.

Q179. Yeah but in your statement, firstly you were, they were looking after you after the incident not at the time, that's in your statement.

A. ….. sorry I was intoxicated that night ---

Q180. [18:17:55] Mmm.

A. ----and from what was happening he was with me the whole time and Lloyd [sic] and I could hear like people around me and, and then when they left he was with me there, me too ----

Q181. Yeah ---

A. --- he was with ---

Q182. When they ---

A. --- me too.

Q183. When they took her home ---

A. Yeah he was with me ---

Q184. I'm ---

A. --- too yeah yeah ---

Q185. --- talking about like at the time, so. You were on the grass being sick ---

A. Yeah. And then the ---

Q186. --- …… ---

A. --- guys were around me.

Q187. ..... yeah at some point the guys were around you.

A. Yeah, yeah ---

Q188. You said when you went in the house they were around you.

A. Mmm.

Inspector Pietruszka suggested that answer was inconsistent with her earlier statement, which he said stated they were looking after her "after" the incident, Ms Tejada said "sorry I was intoxicated at the time".

(6) At Q223:

Q223. O.K. So it's still the case that when you were on the grass you, you saw James but you can't really remember seeing anyone else whilst you're being sick?

A. 'Cause I wasn't really looking ---

(7) Ms Tejada indicated that she had difficulties remembering what had occurred because she had been intoxicated (A302).

(8) Ms Tejada suggested that she was outside for most of the time she was sick on the grass and went inside "after when they left" (Q363-Q369):

> Q363. One thing I'll ask. Are you, are you close friends with Valentino?
>
> A. Not really.
>
> Q364. O.K. No, as I said 'cause he, he was adamant that you're his alibi and can state that he was with you ...
>
> A. Mmm...
>
> Q365. ... inside.
>
> A. Mmm
>
> Q366. But as your statement says this was all happening when it was all outside so, I want to ...
>
> A. .....
>
> Q367. But I, I ...
>
> A. We were outside too.
>
> Q368. Yeah
>
> A. Yeah.
>
> Q369. Yeah, I want to make sure though. But he said that you were inside.
>
> A. That was when, after when they left yep ...

351 The further statement of Ms Tejada was the basis of two factual controversies relating to the plaintiff's claim *vis-à-vis* malice. In summary, the plaintiff contended:

(1) the manner in which Inspector Pietruszka approached the second interview with Ms Tejada reveals a deliberate effort "to undermine the alibi [of the plaintiff] by suggesting that the plaintiff may have tried to set it up". That contention was supported with reference to Q165-Q185; and

(2) Inspector Pietruszka always knew the content of Ms Tejada's first statement, and misrepresented it for his own purposes to Ms Tejada during the further interview of Ms Tejada.

352 Turning to the first contention that Inspector Pietruszka sought to deliberately undermine the alibi of the plaintiff, the following submissions were advanced:

(1) Notwithstanding Inspector Pietruszka's earlier representation to the plaintiff that he would make enquires about his alibi to Ms Tejada, "[Inspector] Pietruszka never enquired about details of the alibi". Further, questions such as how long she had been on the grassed area, whether the plaintiff had been with her the whole time, or whether he

had left her for any period, were also never posed by Inspector Pietruszka.

(2) Inspector Pietruszka misrepresented to Ms Tejada what was in her own statement, namely, "in your statement, firstly you were, they were looking after you after the incident, not at the time, that's in your statement" (see Q179). It was contended such a misrepresentation should be properly construed as a lie.

(3) As to any potential outstanding confusion regarding whether Ms Tejada was outside on the grass area or inside, the plaintiff relied upon Ms Tejada's answers to Q363-Q369, which, it was contended confirms the plaintiff's alibi.

(4) The plaintiff ultimately contended that in light of that extract, by the completion of Ms Tejada's further statement, Inspector Pietruszka "knew that the alibi was sound, despite his efforts to undermine it".

(5) Instead of checking the alibi, he appears to have set out to undermine it. Speaking to Ms Tejada of the plaintiff, Inspector Pietruszka asked:

> Q175. Well did he ever approach you and say, can you tell the police this?
>
> A. No because I was just like, I'm gunna say what I know and ...
>
> Q176. Yeah.
>
> A. ... from what is happening.
>
> Q177. Because when we spoke with him last night he said, No, Patricia, I was with Patricia ...
>
> A. The whole night.
>
> Q178. Yeah.
>
> A. Yeah they were looking after me yeah.
>
> Q179. Yeah but in your statement, firstly you were, they were looking after you after the incident not at the time, that's in your statement.
>
> (Ex 20, p 288)

The latter statement, it was submitted, was "quite false", as Inspector Pietruszka acknowledged (see T600.7-36). However, he denied that it was knowingly incorrect (T600.39).

(6) When the statement is considered in the light of Inspector Pietruszka's conduct to the ERISP of the plaintiff, there is evidently "irresolvable problems in the logic of [Inspector] Pietruszka's position". It was contended, it shows a radical shift in Inspector Pietruszka's consciousness since the ERISP of the plaintiff, which had only been conducted that morning. By Q175-Q179, it is clear, Inspector Pietruszka went from believing that Ms Tejada did not mention the plaintiff when conducting the ERISP of the plaintiff, to believe that she *did* mention him looking after her, though after the incident. It was contended that

"[s]uch a change can have come about realistically only by his having looked at Ms Tejada's statement. Yet having looked at it so recently, he still got it wrong.

(7) The plaintiff further submitted, in reply submissions, that by the very act of enquiring about an alibi, Inspector Pietruszka "thereby reveal[ed] that he knew, contrary to his evidence, that Ms Tejada had given the plaintiff one".

353 Turning to the contention that Inspector Pietruszka "always knew" the content of Ms Tejada's first statement, and misrepresented it for his own purposes to Ms Tejada (noting I have earlier dealt with the submission as advanced with respect to the plaintiff during the ERISP), the plaintiff submitted:

(1) If Inspector Pietruszka's account of being mistaken, with respect to his memory of Ms Tejada's statement in the ERISP of the plaintiff, was correct, he still held his mistaken belief at the time the ERISP concluded. In light of that contention, the plaintiff made the following observations:

(a) That evening at 6pm, he interviewed Ms Tejada. The interesting question is whether his asserted belief about the content of her statement changed during the period until then. At the police station he had immediate access if he wanted it to all the records of the investigation (T492.27-29). He had told the plaintiff five times that he would talk again to Ms Tejada (Q76, Q87, Q91, Q100 and Q111).

(b) It is most unlikely in these circumstances that Inspector Pietruszka did not refer to Ms Tejada's statement in preparation for his interview with her. If he had done so, he would have discovered his mistake.

(c) Inspector Pietruszka said that he could not remember whether at the time of the interview, he thought that Ms Tejada's statement mentioned the plaintiff:

> Q13. So when you came to interview her later that evening, did you think her statement mentioned him or not?
>
> A. I can't recall, sir. I don't honestly remember.

(2) Against the background of those preliminary observations, it was the contended, it is clear that Inspector Pietruszka had Ms Tejada's statement of 22 June 2015 during his interview with her. At the start of the interview, she was given a document (Q6-8) and asked to read out the standard statement proforma introduction, which she did at A9. Then this occurred:

> Q13. The rest of it is a statement that you previously made ...
>
> A. Mmm Mmm
>
> Q14. ...which was made on the 22nd of June which you signed ...

> A. Mmm Mmm
>
> Q15. Following on from this statement firstly, is there anything else you wish to tell us about this matter that you recall now or that you didn't recall at the time now that it's been a week since the, the incident.?
>
> A. Mmm.

A simple analysis of Q6-Q14, reveals Ms Tejada was asked to "read" from his first statement, this is indicated by her reading of the proforma, which was followed by a confirmation that "[t]he rest of it is a statement that you previously made… on 22nd of June". The "it" being her statement. Thus, , it is clear that at this interview Ms Tejada had a physical copy of her first statement.

(3) Further, it is clear that the statement referred to in Q205 "I'm just going through your statement now, OK" was the same statement. It makes no sense for the latter to be a reference to the electronic recording of the interview itself, which was continuing as the parties spoke, and could not have been gone through in any meaningful way, despite Inspector Pietruszka's evidence to the contrary (see T603.45-T604.19).

(4) A notable feature of the interview is that, despite what had been said in the ERISP with the plaintiff, though the alibi was raised, there was no question aimed at checking it. It was contended, by the plaintiff, that by the following evidence of Inspector Pietruszka at the hearing, he agreed with that submission:

> Q. Well you see, if you were checking the alibi, the key thing to check with her would have been, wouldn't it, whether he had been with her for the whole time?
>
> A. Yes.

354 After considering the further statement of Ms Tejada, the ERISP of the plaintiff and the evidence of Inspector Pietruszka during cross-examination, it was submitted, the simple explanation for "all this incoherence and contradiction" is that Inspector Pietruszka's evidence is false. The plaintiff contended:

> [H]e always knew the content of Ms Tejada's statement, and misrepresented it for his own purposes to both the plaintiff and Ms Tejada. Mr Pietruszka is a cynical and manipulative man. The rest of his evidence stands to be assessed in that light.

355 In reply, the State's submissions focused upon Inspector Pietruszka's approach to the plaintiff's alibi throughout the further statement of Ms Tejada. It advanced the following submissions:

(1) It is not correct that Ms Tejada's further statement "confirmed" that the plaintiff was on the grass. Ms Tejada's statement indicated that she was

intoxicated, was not looking at who went into the toilet and also placed Mr Bandao was on the grass with her as well as the Plaintiff. The significance of the reference to Mr Bandao, it was contended, was the fact he was confirmed to be in the bathroom by the victim.

(2) Nor is it correct that Inspector Pietruszka "never enquired about details of the alibi". Inspector Pietruszka invited Ms Tejada to volunteer information about the incident (see Q16), which ultimately led Ms Tejada to address the alibi (see A19).

(3) Nor was it incorrect for Inspector Pietruszka to say that, in Ms Tejada's first statement, she had said that "they were looking after you after the incident, not at the time". In para 11 of her first statement, Ms Tejada had said that the plaintiff was looking after her after the incident in the toilet; but she did not say that the plaintiff was looking after her during the incident.

(4) Further as to the plaintiff's reliance upon Q363-Q369, it was contended that the answers of Ms Tejada do not establish the plaintiff's alibi was sound. *A fortiori*, they do not establish that Inspector Pietruszka knew it was sound. To the contrary, they establish that it remained unclear whether and when Ms Tejada was inside and outside.

356 I do not accept the contention advanced by the plaintiff that an analysis of the further statement of Ms Tejada supports a conclusion that Inspector Pietruszka's primary goal was to undermine the alibi of the plaintiff. Rather, the interview reveals the contrary:

(1) Over the course of 40 minutes, Inspector Pietruszka allowed Ms Tejada to add any further details and/or supplement her earlier statement with further recollections; as with the victim, Ms Tejada was quite intoxicated on the night of the assault, and may not have been completely sober at the time of her first statement.

(2) Taking the lead from Ms Tejada's answers, Inspector Pietruszka would seek further clarification of answers and/or put aspects of the plaintiff's account to Ms Tejada.

(3) As to the questions relating to whether or not the plaintiff told Ms Tejada what to say, I find that course of questioning reasonable in light of the evidence available to Inspector Pietruszka at that time. Following the retrieval of the Facebook Chat messages from the plaintiff's phone, together with his personal assessment of the plaintiff's demeanour and responses during his ERISP, it is evident that Inspector Pietruszka formed a suspicion that the plaintiff and Ms Tejada may have been colluding prior to his arrest. In light of that evidentiary basis referred to (and set out earlier in this judgment), I find that suspicion to be reasonable in the circumstances. Further, as that suspicion is directly tied to the weight put on the evidence of Ms Tejada, it was necessary to explore as part of the investigation her account of the events of the evening and particularly the issues surrounding the plaintiff's alibi. Thus,

I do not consider it to be a step taken for the purpose of undermining the plaintiff's account and/or alibi.

(4) As to Inspector Pietruszka's contention that Ms Tejada had initially stated that the plaintiff was only assisting her "after the incident". Whilst that is not strictly correct, the initial account provided by Ms Tejada does not account for the whereabouts of the plaintiff for "the whole night". The relevant extract appears below:

> 10. When I was in the bathroom James and the boys were checking up on us to make sure we were ok. They knocked and we opened the door. Loyd took me outside and I sat on the grass and I was vomiting there as well. *My other friend, Valentino, was looking after me.* He came a bit later but I don't remember exactly what time he got there. I know Valentino as he is a friend of Loyd's.
>
> 11. I was sitting on the grass just outside the back door to the main house and I heard [MM] moaning. She was still in the toilet. *I think James was in the toilet with her because Valentino and BJ were looking after me when I was sitting on the grass.*
>
> [Emphasis added.]

That statement does not enable a clear timeline of the plaintiff's movements to be confirmed. Thus, the question in the further interview with Ms Tejada reveals that the issue remained unclear and/or was at odds with Inspector Pietruszka's understanding of the evidence (which, as to that specific aspect at the time of the interview, may have been incorrect). Notwithstanding the error, it did not reveal malice, but a mere mistake in the context of the uncertainty of Ms Tejada's account. Further, the question provided an opportunity for Ms Tejada to potentially further assist with timing and/or the whereabouts of the plaintiff at the time of the incident.

(5) I also accept that answers at Q363-Q369, as submitted by the plaintiff, are relevant to an assessment of the plaintiff's alibi. Whilst the State is correct to state that Ms Tejada's answers leave the issue unclear, her responses suggested that for the majority of the time she was sick she was outside but, upon the others leaving, she went inside before departing. Thus, it partially corroborated the account provided by the plaintiff that he was inside with her. However, it does not confirm the plaintiff's alibi was entirely sound. Whilst Ms Tejada accounts for the plaintiff's whereabouts more clearly in her further statement, the account remains at odds with the plaintiff's account in his ERISP, in particular, the assertion that he was with her the whole night and that he was with her in the house and not on the grass. The clarity is further impacted by the plaintiff's decision to decline to provide a timeline of movements and simply stated he was with Ms Tejada "the whole time" and was not outside on the grass.

357 As to the contention that Inspector Pietruszka “always knew” the content of Ms Tejada’s statement, I adopt my earlier finding set out above. Further, in the light of that findings above and upon my assessment of the Inspector Pietruszka’s conduct of his interview with Ms Tejada, I do not find that he misrepresented Ms Tejada’s first statement to Ms Tejada. Nor do I find that any aspect of Ms Tejada’s statement was represented to the Ms Tejada for a purpose other than a proper purpose and in the ordinary course of conducting a police investigation.

3 July 2015

The third ERISP with MM

358 On 3 July 2015 at 1.56pm, the victim made a further written statement. Inspector Pietruszka had phoned MM around 5pm the previous day to tell her that people had been charged, and she had told him that she had remembered some things better. The statement adopts the contents of a further ERISP carried out on 3 July 2015, a transcript of which was before the Court.

359 In the course of that interview, the following exchange occurred:

> Q24. Do you remember when the last time was that you saw Valentino.
>
> A. Yeah.
>
> Q25. Do you remember when the last time was that you saw Valentino?
>
> A. Right before I got into the bathroom.
>
> Q26. O.K. Do you recall seeing Valentino in the bathroom?
>
> A. No, no.
>
> Q27. How many, what the most amount of people that was in the bathroom at one time?
>
> A. I would say around three, including myself.
>
> Q28. O.K.
>
> A. It was a very small space.
>
> Q29. Yeah.
>
> A. Not, not much people would have fit in it. I’m pretty sure three.

360 By his first statement, Inspector Pietruszka explained the effect of that evidence upon steps taken with respect to the investigation and prosecution of the plaintiff:

56. This evidence from the victim did not cause me to form a definite view that Mr HRDAVEC was not involved in the sexual assault. I had information that four offenders had been present in the bathroom during the offence. I also had information suggesting there were only four males at the party, one of whom was Mr HRDAVEC.

57. Also, it has been my experience that victims of sexual assault commonly change their evidence at various points in the investigation, including as to the identity of the offender or offenders. I had had previous experience in victims asserting that a person was involved, then denying their involvement and then re-asserting that the person was involved. I had also had experience in victims denying that a person was involved and then asserting that the person was involved.

58. The evidence from the victim nevertheless caused me to form a view that the prosecution case had weakened considerably. I formed the view that bail should not be opposed at the next mention of Mr HRDAVEC's matter.

361 The plaintiff contended that with the new of evidence of MM, "if ever there had been a case against the plaintiff, it completely disappeared". During cross-examination, that contention was put to Inspector Pietruszka:

Q. Well the evidence you had came from three people didn't it?

A. Sir, the crime scene I think it was telling as well. And you haven't mentioned it but the crime scene does depict a version consistent with what the victim had told at the time. So there was a crime scene, she had a number of bruises on her body which again indicated that something had occurred in that bathroom so there was aspects of her version that was consistent but it had weakened considerably with that but it hadn't – what word did you use?

Q. Disappeared?

A. It hadn't disappeared, no.

Q. It had Mr Pietruszka, it had?

A. No I disagree.

Q. Well look, you had let's call it, you referred to the crime scene evidence, you mean things lying on the ground, bottles, tissues, vomit, all those things?

A. I'm talking about hair extensions, underwear, bra.

Q. Her clothes?

A. In a bin in that area.

…

Q. Those things didn't help you know how many people did it did they?

A. It confirmed her version of events that she was in that bathroom with people pulling at her clothing, pulling her hair extensions out.

Q. Of course it did ...

A. Taking her underwear off, removing her bra. It gave credit to what she had stated that four people had been involved in that offence.

Q. No it didn't have anything to do with the number of people Mr Pietruszka?

A. I disagree sir.

…

Q. It gives credit to what she said in supporting the fact that she was attacked?

A. Precisely.

Q. And these various things were removed from her?

A. By four people.

Q. It doesn't say anything about the number of people does it?

A. She said four people.

Q. She said four people but how does the bra in the bin confirm it was four people?

A. So I agree that at no point did she say so and so took my bra off and put it in the bin. She doesn't not identify one person doing that.

Q. Or the hair piece or any of the other things?

A. No she just refers to they did this, they.

Q. They did it yes. And that's just one reason why the crime scene evidence does not assist at all in establishing – how many people took part in the offences, you agree with that don't you?

A. No I don't. I disagree and I've stated why.

362 The plaintiff described the above evidence, as with his evidence with respect to his view of the earlier accounts by MM, as "an invention designed to provide a desperate defence for the indefensible". It was contended that Inspector Pietruszka did not subjectively have reasonable and probable cause.

363 Notwithstanding that fact, it was contended, that the plaintiff was falsely imprisoned for a further four weeks. By the new evidence, Inspector Pietruszka had formed the view that the prosecution case had weakened. However, on the basis of MM's initial accounts of "four males" being present, combined with his experience working with victims of sexual assault commonly changing their evidence, it did not cause Inspector Pietruszka to form a definite view that the plaintiff was not involved in the sexual assault.

7 July 2015

Communication with the then Counsel for the Plaintiff

364 By his first statement, Inspector Pietruszka also gave the following evidence as to his initial communication with counsel for the plaintiff, Mr Peter Linger, following the third ERISP of MM:

> 58. The evidence from the victim nevertheless caused me to form a view that the prosecution case had weakened considerably. I formed the view that bail should not be opposed at the next mention of Mr HRDAVEC's matter. I communicated this view to Mr HRDAVEC's barrister, Peter LINEGAR, by email on 7 July 2015. I also communicated to him that the victim had changed her story, but that there were aspects of the evidence which continued to cause me concern as to Mr HRDAVEC's involvement. Copies of my communications with Mr LINEGAR from 7 July 2015 and onwards are behind Tab 18 of JJP-1.

365 On 7 July 2015, Inspector Pietruszka sent an email to the plaintiff's counsel, Mr Linger, about a forthcoming mention of the plaintiff's matter. In the email, Inspector Pietruszka said:

> As discussed.
>
> On Friday 3rd July 2015, a statement was obtained from the complainant in this matter where she states that she cannot confirm if your client, Valentino HRDAVEC was in the room when the sexual assault occurred.
>
> I will raise this with the prosecutors on Thursday should a bail application be made.
>
> Despite this statement from the complainant, there is evidence that is at odds with that statement such as evidence obtained from a co-accused person which puts your client in the bathroom with the complainant and comments made immediately following the alleged offence to Police, the 1st complainant and treating hospital staff where she maintained that four persons including 'Valentino' were in the bathroom committing the mentioned offences. However, if the complainant now cannot recall if your client was present when this offence occurred, it is important that you and the courts be made aware of this.

366 The plaintiff advanced the following submissions with respect to email sent by Inspector Pietruszka to Mr Lineger:

(1) Whilst it is accepted the words "As discussed" refer to a prior phone call, the content of that did not go beyond what was in the email. That submission was supported with reference to Inspector Pietruszka's evidence during cross-examination:

> Q. In whatever that discussion was, you didn't tell him any more than was in the email, did you?
>
> A. I believe it's fair to say, sir, that I provided to him in that email sorry, in that conversation what's in that email.

(2) The text of the email shows that his claim to have communicated to Mr Linegar the view that bail should not be opposed is false. There is no mention there of not opposing bail, merely advising the prosecutors of the fact that the victim had said that she could not confirm the plaintiff's presence.

(3) At this time, the only documentation relating to the matter that Mr Linegar could have had was the CAN and the misleading and "distorted" Facts Sheet. As such, notwithstanding the email sent:

(a) He would have had no means of knowing which elements of the latter came from the co-accused and which from the victim.

(b) He could have had no idea of the real effect on the strength of the case of the change of position in the victim, and he would have had no idea of the true force of the alibi.

(c) He would, however, have clearly understood that Mr Pietruszka was still asserting that there was a sound foundation for the prosecution case. Mr Pietruszka's account of this episode is clearly dissembling.

367 The State submitted that it can be inferred from the terms of the email that there followed an oral conversation between Inspector Pietruszka and Mr Linegar to the effect of what is set out in the email. I accept that submission.

368 The State contended that the following observations may be made about the email.

(1) First, the whole tenor of the email is inconsistent with any suggestion that Inspector Pietruszka was motivated by malice. To the contrary, in the email, Inspector Pietruszka identified to the plaintiff's then barrister that there had been a material change in circumstances favourable to the plaintiff, which should be drawn to the court's attention on the bail application.

(2) Secondly, it can be inferred from the email that, at least by now, the DPP had taken carriage of the prosecution. That is to be inferred from Inspector Pietruszka's indication that he would raise the matters "with the prosecutors".

(3) Thirdly, it was correct that the victim's new material was at odds with what had been said by a co-accused (namely, Mr Alcazar), who had indicated that the plaintiff had entered the bathroom.

(4) Fourthly, it was correct (to Inspector Pietruszka's knowledge) that the victim's new material was at odds with what she had told Constable Boyd and the sexual assault counsellor in the aftermath.

369 The State further contended that there is no evidence as to the information that Mr Linegar had at this time, and no inference should be drawn in the plaintiff's favour as to precisely what information Mr Linegar had at this point (wherein various submissions are made as to what Mr Linegar must have known at this point).

370 I do not accept that the email sent by Inspector Pietruszka sustains a finding of malice.

371 As to what material was at that stage available to counsel for the plaintiff, in light of my findings with respect to Inspector Pietruszka and the email, it is not strictly necessary to make a finding in that respect. Such a fact would not alter my assessment of the presence of malice and/or an absence of reasonable and probable cause.

372 In any event, contrary to the plaintiff's submission that Mr Linegar would have been left uncertain as to the significance of Inspector Pietruszka's communication due to the Facts Sheet, the email from Inspector Pietruszka made clear that the victim said that she "could not confirm" the plaintiff was in the room "when the sexual assault took place".

373 Whilst it is true the email does not expressly assert the view that Inspector Pietruszka would not oppose bail, it is implicit on the face of the email that, as Inspector Pietruszka stated, recognition was given to the then counsel for the plaintiff that "the prosecution case had weakened considerably". As to the latter paragraph commencing with "Despite this statement from the complainant", the email points out that there is contradictory evidence to the victim's fresh account. The contents therein suggests that notwithstanding a "weakened" prosecution case, the evidence still suggests the case brought against the plaintiff presently remained viable.

Statement of MM's boyfriend

374 Later on 7 July 2015, Inspector Pietruszka obtained a statement from Denis Lim, the victim's boyfriend. Mr Lim's evidence included the following:

(1) Ms Tejada was "hammered";

(2) one of the males present at the party had a name beginning with "V";

(3) Mr Lim had been inside watching television, and then left to move his car and then left early following a phone call from his aunt.

375 Mr Lim's statement placed the plaintiff at the party and confirmed that Ms Tejada was intoxicated, but did not otherwise illuminate.

9 July 2015

Mention

376 On 9 July 2015, the plaintiff's matter was mentioned in court. Mr Linegar did not apply for bail, the reasons for which are apparent from Mr Linegar's email of 16 July 2015 below.

16-24 July 2015

Further communications with Mr Linegar

377 On 16 July 2015, Mr Linegar sent an email to Inspector Pietruszka which stated:

> Further to our conversation last week re: this matter.
>
> Our client now has a bail application listed at Penrith Local Court on 31 July.
>
> We did not proceed with a bail application at Parramatta last week; preferring to wait until further of the Police brief was available. In particular, we await service of the complainant's audio statement/transcript. Could you please advise if that is likely to be available in the next week or so.

378 Inspector Pietruszka replied later on 16 July 2015, stating: "I will be in a position next week to serve you with those statements".

379 On 24 July 2015, Inspector Pietruszka sent an email to Mr Linegar, which attached transcriptions of the victim's statements. It said:

> Please see the transcription for the victims statements.
>
> These are only transcriptions and whilst they are accurate, I am yet to fully check them against the recording. That will be done in the near future.
>
> As you can see they are word documents and not scanned PDF files. Once checked by me it would be a PDF file.
>
> If you need anything else please let me know.

380 There is no evidence that Mr Linegar "needed" anything else or expressed any view to that effect.

28-31 July 2015

Mention and related communications

381 On 28 July 2015, the police wrote to the DPP indicating that bail should not be opposed at the next mention.

382 On 29 July 2015, at approximately 2:29pm, a representative of the DPP sent an email to Inspector Pietruszka stating:

> I have the DPP list this Friday 31 July. This accused is going for bail at that time.
>
> Peter Linger of counsel has told me that you are agreeable to the accused getting conditional bail, and that the complainant has made a 3rd electronically recorded interview wherein she says this accused was not present at the relevant time.
>
> Please let me know your views as to bail, perhaps we need to update the Police Facts as to this accused as well. Is what I have been told about the complainant's current view as to this accused's involvement correct? If so can I get a copy of that relevant transcript.

383 The following observations by counsel for the State made about that email may be accepted:

(1) Mr Linegar and Inspector Pietruszka had had a communication in which Inspector Pietruszka had said that he was amenable to the plaintiff obtaining conditional bail.

(2) Mr Linegar and Inspector Pietruszka had had a communication in which Inspector Pietruszka said that the victim had given a statement saying that the "accused was not present at the relevant time".

(3) The fact those communications occurred, counts against the drawing of any inference as to malice.

384 As to my ultimate conclusion as to malice, I will return to that within the consideration of this judgment.

385 On 29 July 2015, at approximately 6pm, Inspector Pietruszka sent an email to the DPP stating as follows:

> I have spoken with Peter and informed him of the victims third statement. I felt it was important to disclose that 3rd statement. I made it clear that whilst her statement does say that, her conversations on the night and the following morning to police, family and doctors had HRDAVEC in the room and part of the offence.
>
> With the 3rd statement casting doubt on HRDAVEC's involvement I don't appose [sic] bail, I think it would be unfair to do so. I have approached his barrister regarding HRDAVEC making a statement (induced or otherwise) in relation to this matter.

386 The following observations may be made about that email:

(1) Inspector Pietruszka expressed a view as to what should happen regarding bail, but that was ultimately a decision that was going to be made by the DPP.

(2) Inspector Pietruszka's approach – his identification of evidence against the prosecution case, his indication that bail should not be opposed and his identification that an "unfair" approach should not be taken are relevant to the question of malice.

31 July 2015

Plaintiff granted bail

387 On 31 July 2015, there was a further mention of the plaintiff's matter. At that hearing, the plaintiff applied for and was granted bail. The plaintiff adduced no evidence explaining what occurred at that hearing.

August 2015

388 On 12 August 2015, Inspector Pietruszka attended the Metropolitan Remand and Reception Centre at Silverwater to speak with Mr Alcazar.

389 On 14 August 2015, Mr Linegar sent an email to Inspector Pietruszka which stated:

> As yet, I have not been able to conduct a conference with my instructing solicitor and the client, Valentino to discuss just how the matter will progress from a defence point of view. We do hope to do that now on 21 August. My view, however, is that the client may well not be able to make an informed decision on the matter we have discussed, without first considering all of the brief material in the prosecution case. If possible, could the balance of the brief (at least as against our client) be served by 20 August next week?

390 It can be inferred, in the absence of evidence from Mr Linegar, from this email that Mr Linegar was having difficulties speaking to his client and that had prevented a discussion as to "how the matter will progress from a defence point of view".

391 On 20 August 2015, Inspector Pietruszka replied to Mr Linegar's email of 14 August 2015. He stated:

> Sorry for the late reply.
>
> I can have the brief served today.

392 Because of some scheduling difficulties, Inspector Pietruszka did not serve the brief on 20 August 2015, but instead served the brief on 21 August 2015.

393 On 24 August 2015, Mr Linegar sent an email to Inspector Pietruszka which stated:

> Thanks for the docs on Friday. I assume that is the whole police brief except for the DNA results- could you please confirm?
>
> I am in the process of organizing a conference with the client for later this week.

394 On 25 August 2015, Inspector Pietruszka sent an email to Mr Linegar which stated:

> That is correct, it is the majority of the brief.

395 On 31 August 2015, Inspector Pietruszka attended the premises to speak with Ms Bandao. Ms Bandao declined to make a statement.

396 That same day, Mr Linegar sent an email to Inspector Pietruszka, which stated:

> I apologise for the delay in returning to you- I note that the matters are listed for mention at Court on 4 September for defence reply to the police brief. My instructing solicitor, Jim Nicopoulos, has been advised by the client that he wants access to the whole of the brief, including DNA test results before finally deciding on his preferred course of action.
>
> Are you able to say when the balance of the brief, including DNA results, will be available.

397 Later on 31 August 2015, Inspector Pietruszka sent an email to Mr Linegar stating:

> Unfortunately I can't say how long the brief will take in respect to DNA. The results have been coming in over the last few weeks. I can confirm that your clients DNA has not been matched to anything so far. In light of what the victim originally said in respect to your clients involvement in the offence, I don't expect his DNA to match the SAIK examination.
>
> I have requested statements from Forensic Biology, as soon as it is available I will let you know.

6 October 2015

398 On or around 6 October 2015, Inspector Pietruszka received documentation from the DPP identifying evidence that Mr Alcazar was proposing to give. The document indicated that Mr Alcazar could give evidence, including evidence to the following effect:

> Loyd went into the toilet and brought Patricia out onto the lawn. He lay on the ground. Valentino was with Patricia.
>
> …
>
> Billy-Joe walked out and sat with Patricia and Valentino. Valentino was never in the toilet.

399 When Inspector Pietruszka read Mr Alcazar's proposed evidence, it led him to form a definite view that the plaintiff was not involved in the offence.

400 On 6 October 2015, at 11.33am, a representative of the DPP sent an email to Inspector Pietruszka stating:

> One further thing, I note that the evidence against Valentino is very weak. I should really raise the issue of terminating the charges against him in the same report.
>
> What are your views in terminating the charges against him? Can you also ask the victim her views?

401 On 6 October 2015, at 12.05pm, Inspector Pietruszka replied to the DPP stating:

> I agree, the case should be terminated.
>
> The victim has already stated he wasn't involved and has no issue if the charges against him are dropped.

402 The State correctly contended that the willingness of Inspector Pietruszka to cause the charges to be dropped (and to identify the weakness in the prosecution case) "does not sit well with any suggestion that Inspector Pietruszka was motivated by malice". I will return to that submission in the context of my consideration of the plaintiff's claim of malice below.

21-22 October 2015

403 On 21 October 2015, a representative of the DPP sent an email to Inspector Pietruszka stating:

> I just received a Direction from chambers as follows:
>
> …
>
> 4. No further proceedings against Valentino Hrdavec.

404 That same day, after receiving this information, Inspector Pietruszka called Mr Linegar and said:

> Peter, I have received notification from the DPP. All charges against Valentino will be withdrawn.

405 During that call, the following conversation also occurred:

> Inspector Pietruszka: Does Valentino wish to assist the investigation and make a statement for the prosecution regarding the events that night?
>
> Linegar: I will seek instructions from my client.

406 On 22 October 2015, Inspector Pietruszka sent an email to the DPP stating:

> I spoke with HRDAVEC's barrister, informed him of no further proceedings against his client. I am waiting to hear if he will make a statement. I'm not holding out much hope.

16 November 2015

Mr Alcazar interview

407 On 16 November 2015, Inspector Pietruszka facilitated an interview with Mr Alcazar for the purpose of taking a witness statement from him. Inspector Pietruszka was not able to attend, but he listened to the recording within the two days after it was taken. Inspector Pietruszka included a summary of the effect of that statement:

> 73. … During that interview, Mr ALCAZAR gave evidence to the effect that Mr HRDAVEC was not involved in the offence. The interview was electronically recorded. I listened to the recording within two days. Mr ALCAZAR's evidence confirmed the view that I had formed in October as described above that Mr HRDAVEC was not involved in the sexual assault.

CONCLUSIONS

408 The findings in the preceding section of this judgment lay the foundations for the conclusion that the plaintiff has failed to establish either his malicious prosecution claim or false imprisonment claim. As to the former, I have concluded that the plaintiff has failed to establish either an absence of reasonable and probable cause or malice, in the initiation or maintenance of the prosecution against the plaintiff until the withdrawal of charges against him. As to the latter, the plaintiff has not established that the plaintiff's arrest was wrongful.

409 It is unnecessary to resolve, in that light, the issue of when, if at all, Inspector Pietruszka ceased to be the prosecutor prior to the withdrawal of charges against the plaintiff.

410 It was common ground that Inspector Pietruszka initiated the prosecution on 2 July 2015 at the time of the charging of the plaintiff. In particular, I find that the plaintiff has not established the absence of reasonable and probable cause or malice in that respect.

411 On the parties' cases, Inspector Pietruszka maintained the prosecution until 7 July 2015. I will find, assuming he maintained the prosecution of the plaintiff until the charges were withdrawn, that, the plaintiff failed to establish:

(1) that Inspector Pietruszka did actually take steps in maintenance (in some respects and with regard to the plaintiff's particularised claim);

(2) his contentions as to the character of the steps actually taken; or

(3) that the steps taken in the maintenance of the prosecution were undertaken with the absence of reasonable and probable cause or with malice.

412 Nonetheless, I propose to make one observation about the status of the prosecutor so far as it may bear upon the question of damages. It is true that the question of damages does not arise for determination in light of the finding that judgment should be given for the State. However, less a different view be taken of the conclusion that I have reached, it is appropriate that I briefly deal with the question of damages which will be undertaken below.

413 The question as to whether the DPP had taken over the prosecution after 7 July 2015 may also have implications for the assessment of damages (it would have otherwise been relevant to malice but, as mentioned, I have found no case for malice in the maintenance of the prosecution until the withdrawal of charges).

414 In that respect, I consider that there is merit in the contention advanced by the plaintiff that, even assuming that the DPP had become the prosecutor from 7 July 2015 (and thus, irrespective of the absence of a notice under s 10 of the DPP Act), it does not necessarily follow that the original prosecutor would be held liable for the maintenance of the prosecution until the lapse of a reasonable period for the DPP to consider his position: see *A v NSW* at [18].

415 In the present case, I accept that the DPP could not have been placed to consider its position until at least the receipt of the victim's statements on 24 July 2015 or, more likely, until the receipt of the brief which was served on 21 August 2015. I note, in that respect, Inspector Pietruszka's evidence was that he was not able to serve the documents any earlier in time and hence, he would not have been able to serve them any earlier on the DPP.

416 Those assessments are relevant to the assessment of damages to which I will later return.

417 Before turning to the particular aspects of the plaintiff's malicious prosecution case, I propose to say something briefly about particulars about which the State devoted considerable attention.

418 In broad terms, I accept the submission by the plaintiff that the Court must ultimately resolve the merits of the proceedings on the admitted evidence and the plaintiff is not precluded from seeking a verdict on a pleaded cause of action alleged in reliance on the facts actually established by that evidence: *Deare v Pullman* (1982) 148 CLR 658 at 644 (and see *Leotta v Public Transport Commission of NSW* [1976] 50 ALJR 666 at 668).

419 That is not to suggest that the pleadings will not ultimately govern the disposition of the proceedings. There is substance to the contentions of the State in that respect as set out earlier in this judgment. However, given the conclusions I have reached as to the merits of the plaintiff's case, I do not propose to dwell further on that question.

Reasonable and probable cause

420 As earlier mentioned in a discussion of relevant legal principle, the High Court made it clear in *A v NSW* that an inquiry about reasonable and probable cause has two parts. In order to decide whether a prosecutor did not have reasonable and probable cause the material available to the prosecutor must be assessed. The first question is subjective, namely, what the prosecutor made of the available material and the later objective, namely, what the prosecutor should have made of that material.

421 Where a plaintiff alleges, as in this case, that the prosecutor did have the requisite subjective state of mind when instituting or maintaining the prosecution, that is an allegation about the State prosecutor's state of persuasion. The subject matter of the relevant state of persuasion in the mind of the prosecutor is the sufficiency of the material then before the prosecutor to warrant setting the process of the criminal law in motion: *A v NSW* at [71]. If, as in this case, the plaintiff alleges that the prosecutor knew of a fact or facts inconsistent with guilt, the absence of reasonable and probable cause may be described as the absence of a belief in the guilt of the plaintiff (the same approach would apply to a belief of some fact inconsistent with guilt).

422 Thus, the High Court identified two negative conditions for this element of the tort, the first of which relates to the subjective aspect of the element and the

second which relates to the objective element. At [80] of *A v NSW*, the High Court stated:

> [80] In cases where the prosecutor acted on material provided by third parties, a relevant question in an action for malicious prosecution will be whether the prosecutor is shown not to have honestly concluded that the material was such as to warrant setting the processes of the criminal law in motion. (There may also be a real and lively question about the objective sufficiency of the material, but that may be left to one side for the moment.) In deciding the subjective question, the various checks and balances for which the processes of the criminal law provide are important. In particular, if the prosecutor was shown to be of the view that the charge would likely fail at committal, or would likely be abandoned by the Director of Public Prosecutions, if or when that officer became involved in the prosecution, absence of reasonable and probable cause would be demonstrated. *But unless the prosecutor is shown either not to have honestly formed the view that there was a proper case for prosecution, or to have formed that view on an insufficient basis, the element of absence of reasonable and probable cause is not established.*
>
> [Emphasis added.]

423 It is therefore appropriate to turn firstly to the subjective element. In that respect, I will deal with the issue globally with the institution and maintenance of the charges against the plaintiff, notwithstanding particular submissions made by the State as to limitations in the pleadings.

424 In my view, there is no proper basis to find that, as at 1 July 2015, Inspector Pietruszka knew there was no reasonable or probable cause to prosecute. That is so because as at that date, Inspector Pietruszka had available to him the following information:

(1) Detective Houldin had informed him of a gang rape of a victim by four males.

(2) Constable Boyd had informed him that the victim had named the plaintiff.

(3) There were only four males present at the party.

(4) Ms Tejada had identified the four males present at the party by name in her statement.

(5) The victim had advised that there were four males who had assaulted her and they all took turns.

(6) The victim gave identifying information that matched the description of the plaintiff.

(7) Photographs of the plaintiff obtained from a social media account.

(8) Further, I have found that the victim's references in her interview to "they" could be properly understood, in substantial part, as a reference

to the four males in the toilet engaged in the conduct she described. Further, in the context of a violent sexual assault, where the victim had identified four males as being involved, it was reasonable to interpret "they" as a reference to four males.

(9) Ms Tejada had said that the plaintiff had sat with her on the grass while she was being sick, but she was not sure who had gone into the bathroom because of her intoxication.

(10) Mr Alcazar had indicated that the boys present had been in the toilet and, while the plaintiff was not initially in the toilet, had gone into the toilet afterwards.

425 These matters were amply capable of establishing a proper case to prosecute as at 1 July 2015.

426 On 2 July 2015, and before charging, Inspector Pietruszka conducted an ERISP of the plaintiff. I accept the submission of the State that during the ERISP the plaintiff did not offer any cogent or consistent explanation as to his alibi. He had offered Mr Bandao's sister and father as alibi witnesses but subsequently, at least with respect to Mr Bandao's sister, withdrew part of his account without further explanation. He did offer an alibi with respect to Ms Tejada, which placed him with Ms Tejada the "whole time" and, additionally, placed him inside the house, which sat ill with Ms Tejada's recollection that she was on the grass at times with the plaintiff (that information came out of the statement from Ms Tejada). Further, the plaintiff expressly rejected the possibility that he assisted Ms Tejada whilst she was on the grass: "no, no, no this was all in the house" (A86). Otherwise, the plaintiff largely refused to comment on allegations made against him. An additional consideration arising prior to the charging was that Ms Tejada did not say that the plaintiff was not involved or could not have been involved in the offence. She was unable to say who went into the toilet because she was intoxicated. As will be evident from the discussion in the section of this judgment entitled "Factual Findings and the Resolution of Intermediate Issues", there is no basis for drawing an inference of maintenance or continuation based upon a consideration that the material known to Inspector Pietruszka materially changed after 1 July 2015 or 2 July 2015 such that there became no reasonable or probably cause to continue or maintain the prosecution

427 Having regard to my earlier discussion in that section of the judgment no different conclusion may be reached with respect to material obtained by Inspector Pietruszka after the plaintiff was charged so as to warrant the acceptance of the plaintiff's submissions as to continuance and maintenance.

428 I will briefly expand upon those conclusions in two parts. There is substance in the State's contention that the plaintiff does not clearly assert whether there was an absence of reasonable and probable cause with respect to steps taken in maintenance. In any event, having regard to the findings made in the earlier section of this judgment to which I have referred, I do not consider that such a finding may properly be made.

429 As to the question of whether there were steps made in maintenance or continuance of the prosecution by Inspector Pietruszka, two further observations should be made:

(1) There are a number of steps referred to in the plaintiff's submissions as to maintenance about which there may be real doubt about whether Inspector Pietruszka had engaged in an act of maintenance at all. For example, knowledge by Inspector Pietruszka of the further ERISP interview of Mr Alcazar or the taking of a further statement of Ms Tejada on 2 July 2015 were not active steps in maintenance of the prosecution. Nor was knowledge of Inspector Pietruszka of the interview at Blacktown Police Station with MM on 3 July 2015. Further, a failure to take a step, in the sense of an omission, (such as the failure to provide materials to the plaintiff's lawyer) is not an active step in maintenance. Similarly, an omission (if it be correct) that Inspector Pietruszka did not bring the plaintiff before the Court for bail at an earlier time or that he failed to take steps to have the charges withdrawn does not properly constitute maintenance.

(2) More significantly, there were steps taken by Inspector Pietruszka that would constitute maintenance but they do not constitute a basis for the plaintiff's claim for malicious prosecution. Without repeating earlier observations, I provide some examples. I have found that Inspector Pietruszka's email to the plaintiff's lawyer of 7 July 2015 did not constitute misrepresentation. The email relevantly updated the plaintiff's lawyer as to the revised position taken by MM. By that communication, Inspector Pietruszka did not assert that the prosecution had a strong case against the plaintiff but rather, maintained that the prosecution was viable. I have earlier found that that conclusion was available in the context of a recognition of a weakening of the prosecution's case. I have also rejected submissions that Inspector Pietruszka did not take appropriate steps to advise the plaintiff's lawyers in his trial as to matters relevant to him seeking bail. I have also dealt with issues raised

by the plaintiff as to exchanges between Inspector Pietruszka and Mr Linegar, including as to the provision of a brief of evidence. More particularly, I consider that steps taken by Inspector Pietruszka after 7 July 2015 were consistent (with increasing vigour) of him seeking to terminate the prosecution which reached a zenith on 6 October 2015 when Inspector Pietruszka specifically expressed his view that the proceedings should be terminated.

430 In the light of those conclusions, it is strictly unnecessary to consider the objective element. Nonetheless, it may be shortly stated that the evidence available to Inspector Pietruszka constituted a sufficient and proper case for prosecution. Very little attention was paid by the plaintiff to the second charge brought under s 61M(1) of the *Crimes Act*. As to s 61JA, at the time of charging the plaintiff Inspector Pietruszka had material corresponding to and supportive of the elements of that charge (as I have discussed earlier in this judgment):

(1) The plaintiff had sexual intercourse with MM within the extended meaning of that expression in s 61HA in the sense that Inspector Pietruszka could not exclude on the material digital penetration of the vagina by the plaintiff.

(2) The sexual intercourse occurred without the consent of the victim, having regard to the victim's account and the surrounding circumstances.

(3) The plaintiff was in the company of at least one other person (see my earlier discussion of the elements of the offence).

(4) For a period before or after the sexual intercourse the plaintiff deprived the victim of her liberty in the sense that he constituted, on MM's account, one of the four persons standing between her and the door of the narrow opening of the bathroom (at various stages bent over or on the ground).

431 As to s 61M, digital penetration would of course constitute an assault. Again, the alleged assault occurred in a circumstance of aggravation, namely, the offence occurred in company. No submissions were substantially advanced as to the question of acts of indecency but the general conduct described by the victim as taking place in the bathroom and in particular digital penetration, would seem to satisfy that criteria.

Malice

432 There is real substance in the submissions of the State in this respect that the plaintiff did not articulate any particular malicious purpose. Further, the foregoing review of the material available to Inspector Pietruszka was to the

effect that the victim had been raped by four males and there were only four males at the party where the rape was said to have occurred, one of whom was the plaintiff.

433 Further, I accept the submission of the State that the plaintiff has not established that, if there was a malicious purpose, it was the sole or dominant purpose. As I have found Inspector Pietruszka believed that upon arrest and subsequent charging the plaintiff, that he was guilty of sexual assault, even though he accepted that the ERISP (or some later evidence) had the prospect to exculpate the plaintiff (which it eventually did not). That was the foundation for the charging of the plaintiff.

434 These considerations dovetail with the pleading issues raised by the State but again is unnecessary to further explore those considerations. Rather, I will consider some particular issues raised by the plaintiff going to the merits of his case in this respect.

435 The plaintiff did not press submissions regarding the failure to caution the plaintiff. Further, as earlier discussed, I have rejected the plaintiff's contentions concerning the questioning of the plaintiff in the ERISP.

436 Nor is there anything rising out of the plaintiff being searched that would give rise, having regard to my earlier findings, to a finding of malice. Nor do I accept, for earlier reasons given, that the evidence demonstrates that Inspector Pietruszka insisted on the plaintiff answering questions in the ERISP before consulting his lawyer (the plaintiff expressed a desire to inquire about the allegations after he requested a lawyer).

437 Further, as to the plaintiff being given opportunities to identify an alibi in my view Inspector Pietruszka gave him ample opportunity to do so.

438 Based on my earlier conclusions, there is no proper basis for any allegation that Inspector Pietruszka recommended that bail be denied. Nor do I consider that there is any evidence of malicious purpose arising out of the preparation of the Fact Sheet for the purposes bail. At the end of the day, the bail application was made in a context of the applicant being required to show cause for the purposes of the *Bail Act*.

439 I do not consider that the victim's statement of 3 July 2015, namely, the third ERISP of MM, exculpated the plaintiff to the extent that, on 3 July 2015, the victim said there were only three assailants. Whilst, that statement was contrary to her earlier repeated insistence that there had been four assailants, Inspector Pietruszka was aware that sexual assault victims sometimes change their evidence over time and not necessarily owing to circumstances of improved memory or recollection.

440 I do not consider that Inspector Pietruszka's engagement with the plaintiff's then counsel, Mr Linegar, constituted any basis to find malice for the reasons I have earlier discussed. Nor do I consider that Inspector Pietruszka's approach to the termination of the charges, again for reasons earlier provided, was undertaken with a malicious purpose. There was no malice demonstrated.

441 Taken overall and for the reasons identified, there is no proper basis to infer malice.

False Imprisonment

442 I accept the submission of the State that the plaintiff's contention in this respect is to the effect that the imprisonment of the plaintiff was unlawful because there was no valid power to arrest and, there being no valid power to arrest, there could be no power to detain. Further, I note Mr Molomby SC's concession that this pleading could not be sustained if the Court were to find there was no wrongful arrest.

443 In my view, the arrest of the plaintiff was lawful for two reasons.

(1) The provisions of s 99(1)(a) of the LEPRA were satisfied. Whilst involving some repetition of my earlier conclusions as to information available to Inspector Pietruszka at the time of arrest (and charging) of the plaintiff, the Inspector held a well-founded suspicion that the plaintiff was one of a group of four males that had sexually assaulted MM for the following reasons:

(a) the victim had identified that four persons were involved in the offence;

(b) the victim gave identifying information that matched the plaintiff;

(c) the victim had identified that the plaintiff was present at the crime scene;

(d) Ms Tejada had said that the plaintiff had sat with her on the grass while she was being sick, but she was not sure who had gone into the bathroom because of her intoxication;

(e) Mr Alcazar had indicated that the boys present had been in the toilet and, while the plaintiff was not initially in the toilet, had gone into the toilet afterwards.

(2) Secondly, s 99(1)(b) of the LEPRA was satisfied in the making of the arrest of the plaintiff. At the time of the arrest, as I have earlier found, Inspector Pietruszka had formed an intention to charge the plaintiff. The following forms the basis for the conclusion (and an acceptance of Inspector Pietruszka's evidence in that respect):

(a) Inspector Pietruszka was of the view that he needed to arrest the plaintiff to ensure that he appeared before a court in relation to the offence. Inspector Pietruszka was aware from his conversation with Detective Sergeant Condon that there had previously been problems in securing the plaintiff's attendance at court and securing his cooperation with a police investigation. He was also aware that he suspected the plaintiff of committing a very serious offence, which plainly carried with it a greater risk of abscondment.

(b) Inspector Pietruszka was of the view that he needed to arrest the plaintiff to avoid the risk that he would harass or interfere with witnesses. He was aware that the plaintiff lived in the same area as the victim. He was aware that sometimes sexual assault offenders harass or intimidate the victim. It had occurred on previous cases in which he had been involved.

(c) Inspector Pietruszka was of the view that it was necessary and appropriate to arrest the plaintiff because of the nature and seriousness of the offence. The offence was aggravated sexual assault in company, a gang rape. That is a serious offence, and the victim of the offence was a vulnerable female.

444 I consider that the provisions of s 202 of the LEPRA are met in the arrest of the plaintiff.

445 Section 202 of the LEPRA, relevantly, states:

202 Police officers to provide information when exercising powers

(1) A police officer who exercises a power to which this Part applies must provide the following to the person subject to the exercise of the power –

(a) evidence that the police officer is a police officer (unless the police officer is in uniform),

(b) the name of the police officer and his or her place of duty,

(c) the reason for the exercise of the power.

(2) A police officer must comply with this section –

(a) as soon as it is reasonably practicable to do so, or

(b) in the case of a direction, requirement or request to a single person – before giving or making the direction, requirement or request.

446 At the time of arrest, Inspector Pietruszka stated his name, stated that he was a Detective, stated that he was from Blacktown Police Station and stated that the plaintiff was under arrest for sexual assault

447 Lastly, I turn to the question of the length of the detention.

448 Section 114 of the LEPRA, relevantly, states:

114 Detention after arrest for purposes of investigation

(1) A police officer may in accordance with this section detain a person, who is under arrest, for the investigation period provided for by section 115.

…

(4) The person must be:

(a) released (whether unconditionally or on bail) within the investigation period, or

(b) brought before an authorised officer or court within that period, or, if it is not practicable to do so within that period, as soon as practicable after the end of that period.

449 Section 115 of the LEPRA is extracted below:

115 Investigation period

(1) The investigation period is a period that begins when the person is arrested and ends at a time that is reasonable having regard to all the circumstances, but does not exceed the maximum investigation period.

(2) The maximum investigation period is 4 hours or such longer period as the maximum investigation period may be extended to by a detention warrant.

450 Section 116 of the LEPRA states:

116 Determining reasonable time

(1) In determining what is a reasonable time for the purposes of section 115 (1), all the relevant circumstances of the particular case must be taken into account.

(2) Without limiting the relevant circumstances that must be taken into account, the following circumstances (if relevant) are to be taken into account:

(a) the person's age, physical capacity and condition and mental capacity and condition,

(b) whether the presence of the person is necessary for the investigation,

(c) the number, seriousness and complexity of the offences under investigation,

(d) whether the person has indicated a willingness to make a statement or to answer any questions,

(e) the time taken for police officers connected with the investigation (other than police officers whose particular knowledge of the investigation, or whose particular skills, are necessary to the investigation) to attend at the place where the person is being detained,

(f) whether a police officer reasonably requires time to prepare for any questioning of the person,

(g) the time required for facilities for conducting investigative procedures in which the person is to participate (other than facilities for complying with section 281 of the Criminal Procedure Act 1986) to become available,

(h) the number and availability of other persons who need to be questioned or from whom statements need to be obtained,

(i) the need to visit the place where any offence concerned is believed to have been committed or any other place reasonably connected with the investigation of any such offence,

(j) the time during which the person is in the company of a police officer before and after the person is arrested,

(k) the time taken to complete any searches or other investigative procedures that are reasonably necessary to the investigation (including any search of the person or any other investigative procedure in which the person is to participate),

(l) the time required to carry out any other activity that is reasonably necessary for the proper conduct of the investigation.

(3) In any criminal proceedings in which the reasonableness of any period of time that a person was detained under this Part is at issue, the burden lies on the prosecution to prove on the balance of probabilities that the period of time was reasonable.

451 Section 117 of the LEPRA, relevantly, states:

117 Certain times to be disregarded in calculating investigation period

(1) The following times (to the extent that those times are times during which any investigative procedure in which a person who is detained under this Part is to participate is reasonably suspended or deferred) are not to be taken into account in determining how much of an investigation period has elapsed:

(a) any time that is reasonably required to convey the person from the place where the person is arrested to the nearest premises where facilities are available for conducting investigative procedures in which the person is to participate,

(b) any time that is reasonably spent waiting for the arrival at the place where the person is being detained of police officers, or any other persons prescribed by the regulations, whose particular knowledge of the investigation, or whose particular skills, are necessary to the investigation,

(c) any time that is reasonably spent waiting for facilities for complying with section 281 of the Criminal Procedure Act 1986 to become available,

(d) any time that is required to allow the person (or someone else on the person's behalf) to communicate with a friend, relative, guardian, independent person, Australian legal practitioner or consular official,

(e) any time that is required to allow such a friend, relative, guardian, independent person, Australian legal practitioner or consular official to arrive at the place where the person is being detained,

(f) any time that is required to allow the person to consult at the place where the person is being detained with such a friend, relative, guardian, independent person, Australian legal practitioner or consular official,

(g) any time that is required to arrange for and to allow the person to receive medical attention,

(h) any time that is required to arrange for the services of an interpreter for the person and to allow the interpreter to arrive at the place where the person is being detained or become available by telephone for the person,

(i) any time that is reasonably required to allow for an identification parade to be arranged and conducted,

(j) any time that is required to allow the person to rest or receive refreshments or to give the person access to toilet and other facilities as referred to in section 130,

(k) any time that is required to allow the person to recover from the effects of intoxication due to alcohol or another drug or a combination of drugs,

(l) any time that is reasonably required to prepare, make and dispose of any application for a detention warrant or any application for a search warrant or crime scene warrant that relates to the investigation,

(m) any time that is reasonably required to carry out charging procedures in respect of the person,

(n) any time that is reasonably required to carry out a forensic procedure on the person under the Crimes (Forensic Procedures) Act 2000, or to prepare, make and dispose of an application for an order for the carrying out of such a procedure.

452 The plaintiff was arrested at approximately 11.30pm. The plaintiff was denied bail at approximately 4.56am. The total period of detention prior to the refusal of bail was no longer than 5 hours and 26 minutes. The plaintiff does not assert that there was some unlawfulness in the decision to refuse bail, and does not assert that any tort was committed in refusing bail. From the time that bail was refused, the source of the power to detain was the decision to refuse bail.

453 I accept the submission of the State that for the purposes of the LEPRA, the following periods, which were not disputed, do not count towards the "investigation period":.

(1) The time required to convey the plaintiff from the railway station to the police station, which I infer was approximately 5 minutes (s 117(1)(a) of the LEPRA).

(2) The time while the plaintiff was speaking to his mother, approximately 37 minutes (s 117(1(d) of the LEPRA).

(3) The time the plaintiff took to attempt to contact a solicitor, which is not known (s 117(1)(d) of the LEPRA).

(4) The time to carry out the buccal swab forensic procedure, which was approximately 10 minutes (s 117(1)(n) of the LEPRA).

(5) The time to carry out charging procedures, which was approximately 2 hours and 36 minutes (s 117(1)(m) of the LEPRA).

454 Once those matters are taken into account, 3 hours and 28 minutes is deducted the "investigation period".

455 That leaves an "investigation period" of 1 hour and 58 minutes, which is well within the maximum four hours.

456 In ascertaining the reasonable time, the following factors are relevant:

(1) The plaintiff was young and in good physical condition (s 116(1)(a) of the LEPRA).

(2) The offences were serious (s 116(1)(b) of the LEPRA);

(3) Time for searches must be taken into account (s 116(1)(k) of the LEPRA).

457 In all the circumstances, I consider the time involved in the investigation period was reasonable.

Conclusion: Malicious prosecution and false imprisonment

458 It follows from the aforementioned conclusion that the plaintiff's case for malicious prosecution and false imprisonment must fail and, correspondingly, the ASOC should be dismissed. Judgment should be entered for the State.

459 I shall now consider damages in the event a different view is taken to that conclusion.

DAMAGES

460 The plaintiff sought damages in the following categories:

(1) General damages, including damages for deprivation of liberty from 1 July 2015 to 31 July 2015.

(2) Reputational damages.

(3) Aggravated damages.

(4) Exemplary damages.

(5) (Past) economic loss.

(6) (Future) economic loss.

(7) Loss of opportunity to maintain a career with UBank.

(8) Interest on all the above from 1 July 2015 to date.

General Damages

461 There was no dispute as to the principles applicable to the assessment of general damages. The plaintiff's submissions in that respect may be accepted.

462 General damages are compensatory in nature and must focus upon the impact on the plaintiff of the alleged tortious conduct of the defendant. An award of general damages should be in an amount adequate to compensate the plaintiff for all consequences of the defendant's wrongful conduct that are not too remote: see *State of New South Wales v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208 at [127] per Hodgson JA). His Honour Justice O'Keefe J noted in *Nye v State of New South Wales* [2003] NSWSC 1212 (at [247]) that general damages:

> [247] … are intended to provide for any financial losses including loss of earnings both actual and potential future losses of such a kind, and are apt to include a money value for physical hurt, curtailment of liberty, injury to reputation (if appropriate) and any inconvenience or disturbance of the life of the plaintiff (Broome v Cassell & Co (1972) AC 1027 at 1073 per Lord Hailsham LC; at 1124 per Lord Diplock.)

463 In *Spautz v Butterworth* (1996) 41 NSWLR 1 (at 17G and 18B), Clarke JA (with whom Priestley and Beazley JJA agreed) said this about compensatory and aggravated damages:

> [W]here a plaintiff is entitled to compensatory damages for wrongful arrest or false imprisonment, it is proper for the Court, in assessing ordinary compensatory damages, to take into account the whole of the conduct of the defendant at the time of verdict which may have the effect of increasing the injury to the person's feelings. Such matters might include the absence of

> apology and the reaffirmation of the truth of the matters. However, for a plaintiff to be entitled to aggravated damages, he or she must show that the conduct of the defendant was neither bona fide nor justifiable.
>
> …
>
> Applying those principles to the present case, I would conclude that the additional matters relied on by the appellant are not grounds which may be taken into account by the Court in considering an award of aggravated damages absent any evidence of mala fides or lack of justifiability. However, they may be taken into account in assessing an award of general compensatory damages. Matters such as the indignity, mental suffering, disgrace and humiliation suffered by the appellant as a result of the false imprisonment are to be included in general damages. Any conduct of the first respondent which may have had the effect of increasing the injury to the appellant's feelings is also to be included in the general compensatory damages.

464 In wrongful arrest and false imprisonment actions, general damages should include an amount for curtailment of liberty and associated hurt feelings (including humiliation, distress and loss of status): see *State of NSW v Delly* [2007] NSWCA 303 at [76].

465 In *McDonald v Coles Myer Limited* (1995) Australian Torts Report 81-361 at 4, Powell JA referred to the types of damage for which the plaintiff may be compensated in a successful action for false imprisonment as follows:

> Further, as the tort of false imprisonment is derived from trespass, a plaintiff need not prove actual damage, although any pecuniary loss which is not too remote is recoverable (see, for example, *Childs v Lewis* (1924) 40 TLR 870). The principal heads of damage to which, in the past, regard appears to have been paid are, the injury to liberty, the injury to the plaintiffs feelings, ie the indignity, mental suffering, disgrace and humiliation, with any attended loss of social status, and, where it can be demonstrated that the imprisonment has had a deleterious effect on the plaintiff's health, any resultant physical injury, illness or discomfort (*Lowden v Goodrick* (1791) PEAKE 64; *Pettit v Addington* (1791) PEAKE 87). In addition to damages falling under one or other of the heads to which I have just referred, the manner in which the imprisonment is effected may lead to an award of aggravated compensatory damages, as also may the subsequent conduct of the defendant, if it tends to show that the defendant is persevering in the charge (*Warwick v Foulkes* (1844) 12 M and W 507; *Walter v Alltools* (1944) 61 TLR 39 (CA)), although it has been suggested (McGregor on Damages 15 Ed (1988) at 1029) that an unsuccessful plea by the defendant that the plaintiff was guilty of the offence charged against him by the defendant should not lead to an aggravation of damages, unless it is shown the defendant made the charge mala fide.

466 In *Coyle v State of New South Wales* [2006] NSWCA 95 ("*Coyle*"), the Court (in circumstances where it was contended by the defendant that false imprisonment for 2.5 hours should only sound in a nominal award of damages) stated (at [99]):

> [99] It is difficult to imagine, for a person who is otherwise generally a law abiding citizen, a more humiliating experience or a greater shock to one's equilibrium than being forcefully deprived of one's liberty for even a relatively short period of time in circumstances which are entirely unjustified. This is all the more so where that curtailment of liberty is accompanied, as in the present case, by the detained person being handcuffed and marched through a crowd of onlookers and then incarcerated in a police paddy wagon, locked in a cell at the police station and fingerprinted and photographed as a criminal. Not surprisingly, the whole experience must have been both humiliating and highly embarrassing.

467 In Australia, there is no authoritative guideline on how to calculate damages in wrongful imprisonment or malicious prosecution cases by reference to the period of time the plaintiff was detained. There is no clear arithmetical symmetry. Each case appears to have been decided on its facts and the reasoning behind the quantum of damages is usually short. An Australian case where a Court calculated the damages for wrongful detention in an arithmetical way was at first instance in *Spautz v Butterworth*, where a daily rate was applied. However, this was overturned on appeal, and a lump sum was substituted: see *Beckett v State of New South Wales* [2015] NSWSC 1017 per Harrison J at [670].

468 In *McDonald v Coles Myer Limited* at 7, Powell JA stated that the types of damage for which the plaintiff may be compensated in a successful action for malicious prosecution were as follows:

> The principal heads of damage to which regard have conventionally been had in relation to a claim for malicious prosecution are injury to the plaintiff's reputation, injury to his feelings that is for the indignity, humiliation and disgrace caused him by the fact of the charge being referred against him, pecuniary loss – as, for example, as a result of his being dismissed from his employment – and the expenses incurred in defending himself against the prosecution, or, where he has been awarded costs against the prosecutor, the amount by which the costs incurred exceeded the costs awarded. In addition, if the facts warrant it, an award of aggravated compensatory damages may be made.

469 In cases of malicious prosecution general damages will be similarly be awarded for damage to fame and character; *Noye v Robbins; Noye v Crimmins* [2007] WASC 98 ("*Noye v Robbins*") at [261]. This head of general damages is sometimes referred to as reputational damages. In *Noye v Robbins*, Heenan J held that had he found for the plaintiff, he would have awarded $50,000 for injury to reputation.

470 In *Berry v British Transport Commission* [1962] 1 QB 306, the Court of Appeal held that the financial consequences of the destruction or damage to reputation are recoverable. Devlin and Danckwerts LJJ held that reputational damages were recoverable where the imputed criminal offence would cause a reasonable observer to form the view that it was a damaging reflection on the "fair fame" of the plaintiff.

471 Damages will also be awarded for the inconvenience and disturbance to the plaintiff's life, as well as the stress constituted by the fear of conviction: see *Coyle* at [92].

472 The plaintiff relied upon the following factors as matters which should be taken into account in the assessment of the quantum of damages and to increase the quantum of damages:

(1) Deprivation of liberty: the plaintiff was arrested and remanded in custody from 1 July 2015 to 31 July 2015 when bail was granted.

(2) The conduct of the defendant in arresting the plaintiff at the railway station, failing to caution him, laughing at him and subjecting the plaintiff to a search of his person and his belongings by railway transit officers who had no legitimate role in the arrest of the plaintiff including the embarrassment, fear, and hurt caused to the plaintiff thereby.

(3) The defendant's conduct in questioning the plaintiff about the events for which the plaintiff was arrested whilst escorting the plaintiff to the police station, receiving information about the plaintiff's alibi, accusing the plaintiff of being a liar and falsely denying that the conversation occurred or that the plaintiff said the things that he alleged (particularly about his innocence and his alibi witness).

(4) The oppression, hurt and indignation of being questioned and subjected to a deliberately misleading ERISP when the plaintiff had said that he did not want to say or do anything until he had a lawyer present.

(5) The effect on the plaintiff of being in protective custody which included fear of being hurt or killed in gaol because of the nature of the charges preferred against him, including sleeplessness and nightmares and not having a girlfriend for 2 years after release.

(6) The injury to his feelings and the humiliation of being subjected to charges of which he was innocent including the anguish of being subjected to judicial proceedings from 1 July 2015 until 11 December 2015 when they were formally withdrawn.

(7) The immediate and ongoing effects on the plaintiff of incarceration and the nature of the charges proffered against him, inability to sleep, change from outgoing personality to quiet and reserved, retreat from

social engagement, reluctance to be seen in public, loss of confidence/self-esteem, concern that he would be recognised because of media publicity, comments made by others that he is a gang rapist.

(8) The plaintiff's knowledge that reports by well-respected media outlets of his arrest and charging for serious sexual assaults remain on the internet in a form easily found and read by conducting a google search of the plaintiff's name and will stay there forever and have, and will continue to have, a detrimental effect on his employment prospects.

(9) The anguish and shame of losing a well-paid job with UBank which the plaintiff enjoyed and in which he had received no inadequate or dissatisfactory performance reviews and was unable to recover.

473 I will turn firstly to the question of false imprisonment and detention, upon the premise, for the purposes of this part of my judgment, that the plaintiff's arrest was unlawful.

474 The assessment of ordinary damages is essentially an evaluative question for the judge, to be decided in the circumstances of the case: see *Smith v State of New South Wales* [2016] NSWDC 55 at [256].

475 In *SB v State of New South Wales* [2016] NSWDC 189 ("*SB*"), the District Court considered the ordinary damages which should be awarded for a false imprisonment of one day. The Court (Hatzistergos DCJ) awarded $10,000 in ordinary damages for the false imprisonment: *SB* at [266].

476 In *State of New South Wales v Abed* (2014) 246 A Crim R 549; [2014] NSWCA 419 ("*Abed*"), the Court of Appeal affirmed an award of $10,000 ordinary damages for false imprisonment. In that case, the plaintiff was detained for approximately three hours: see at [12]. In *Abed*, in order to effectuate the imprisonment, police had seized the plaintiff's arms and forced her to the ground to handcuff her: see at [224]. There is nothing similar in the present case.

477 Here, the detention was well short of one day. On the evidence, the plaintiff was not mistreated in the course of the detention. Further, the plaintiff gave no evidence that he was shocked to be arrested. Nor is that evident from the plaintiff's responses in his ERISP.

478 Taking into account those considerations, in my view, ordinary damages for false imprisonment should be $8,000.00. I make no separate assessment on

the assumption that the plaintiff's arrest was lawful but the detention thereafter became unlawful prior to the bail decision, although plainly damages would be less on that account.

479 Before turning to the particular factors relied upon by the plaintiff, I should deal with the submission advanced by the State that the plaintiff should not be entitled to damages reflecting a loss of liberty between the time of the refusal of bail by Sergeant Kneipp and his release from detention on 31 July 2015.

480 The State made that submission on the following basis:

(1) The plaintiff's counsel failed to apply for bail. Linegar was not called to explain that decision.

(2) From no later than 7 July 2015, the prosecutor was the DPP. From no later than that point, steps to maintain the proceedings (including decisions relating to discontinuance) were the responsibility of the DPP, not Inspector Pietruszka.

481 As to the first of those contentions, I reject the submission in reply by the plaintiff that it was Inspector Pietruszka's conduct that contributed to Mr Linegar not making the bail application. I reject the contention that Inspector Pietruszka's email of 7 July 2015 did not accurately represent the effect of MM's statement of 3 July 2015. Nor do I consider that Mr Linegar's email of 16 July 2015 should alter that conclusion.

482 Nor do I accept the plaintiff's submissions that the provisions of s 74 of the *Bail Act* would necessarily act as a barrier given the contents of the 7 July 2015 email of Inspector Pietruszka.

483 However, I accept the submission of the plaintiff that it was reasonable for Mr Linegar to delay the making of a bail application until he was in receipt of the victim's statements. That would be the preferable basis for the making of a bail application not only because of the considerations arising under s 74 of the *Bail Act* but because the plaintiff was required to cross the hurdle of the show cause provisions of that Act. I do not consider the failure to call Mr Linegar to explain his decision adversely affects that conclusion. It follows that I reject the contention advanced by the plaintiff in that respect.

484 The second aspect of the State's contention is substantially affected by my approach to the question of whether the DPP may properly be found to have taken over the prosecution of the plaintiff.

485 Those considerations relate to the first factor relied upon by the plaintiff.

486 As to the second factor relied upon by the plaintiff above, the State is correct to submit there is nothing improper in arresting the plaintiff at a railway station which was proximate to the police station and at the time of the arrest, was reasonably private. The plaintiff abandoned the contention that the plaintiff was not cautioned. The evidence does not sustain that he was laughed at. Nor was there anything improper in searching him upon arrest. Inspector Pietruszka's explanations for doing so may be readily accepted.

487 As to the third factor, I have earlier rejected the plaintiff's contentions in that respect.

488 Similarly I have earlier rejected the component of the fourth factor, which relies upon a proposition that the plaintiff was subjected to a "deliberately" misleading ERISP (based upon the notion of the plaintiff requesting a lawyer). There does not seem to be any other reliance upon the questioning in the ERISP under the arguments raised with respect to the fourth factor. Further, Inspector Pietruszka conducted the ERISP of the plaintiff because the plaintiff wished to hear the allegations against him and Inspector Pietruszka decided that it should be done in the context of an electronically recorded interview.

489 As to the fifth factor, the evidence does not sustain any causal link between the plaintiff's arrest or prosecution and the plaintiff not having a girlfriend for two years. I accept the State's submission that there is no expert evidence as to the casual relationship between arrest or prosecution and any sleeplessness or personality change, but nonetheless I accept the contention of the plaintiff (at least by inference) that the plaintiff's detention in protective custody (including a fear of being hurt or killed in goal because of the nature of the charges brought against him) would have resulted in adverse personal consequences which included sleeplessness (consistent with the plaintiff's evidence).

490 Save for the consideration of whether Inspector Pietruszka ceased as a prosecutor after 7 July 2015, I accept the sixth factor relied upon by the plaintiff.

491 As to the seventh factor, I have earlier found that the weight which may be attributed to the evidence of personality change, retreat from social engagement and loss of confidence and self-esteem is limited. However, I shall make limited allowance for that factor.

492 As to the eighth factor, I do not accept the State's submission that there is an absence of evidence that the internet entries remain in place and thereby have the prospects of being detrimental to future employment prospects of the plaintiff. The thrust of the plaintiff's submission that the effect of the internet entries is significant in that respect may be accepted.

493 As I will further discuss below, there are real difficulties in the plaintiff establishing, on the evidence, a connection between media reports of the plaintiff's arrest or charging and any employment consequences for the plaintiff or evidence that may properly establish that those factors contributed to UBank not continuing the plaintiff's probationary employment. In that respect, it may be emphasised the plaintiff's employment was a probationary and, therefore, offered a wide discretion to UBank not continue the plaintiff's employment if it chose to do so.

494 The plaintiff contended that his employment was terminated on 6 July 2015 and that his probationary period for that employment ended on 16 July 2015, some 10 days later. However, the proximity to the end of the probationary period merely emphasises, in my view, that many discretionary factors may operate in the cessation of probationary periods, even where there has been a history of an acceptable engagement, irrespective of the existence of the media reports upon which the plaintiff relies. Further, there is no direct evidence of the reasons for termination of the plaintiff's employment and as I will note later, he was absent from work without explanation for two days prior to the termination of his employment.

495 I consider, however, that some allowance should be made in the assessment of damages in this respect for loss of chance of the retention of employment or the finding of new employment after termination of employment with UBank.

Reputational damages

496 The plaintiff's made the following submission in this respect:

> 79. The plaintiff's arrest and remand in custody was reported by well known and widely read media outlets. Those articles appeared in the print newspapers and the internet. They appeared on the internet on and from 2 July 2015. They named the plaintiff and included images of him. They were published online under headlines such as "*Four charged over teen gang rape*" (yahoo7 News), "*Four charged with gang raping teen at Blacktown party*" (SMH.com.au), "*Teen girl gang raped in back yard*" (Daily Telegraph) (Exhibit 10 - tab 3). These articles still appear online and are readily found by conducting a Google search of the plaintiff's name (Exhibit 14, Exhibit 15). They will stay there forever unless removed by the publishers of those articles. It is submitted that there is little or no prospect of that happening.
>
> 80. Apart from one apology published by Tune Media there were are no articles on the internet that demonstrate or show the result that the criminal proceedings have been dropped as against the plaintiff. The Tune Media apology no longer appears on the internet. A potential employer having conducted a google search would have to ask the plaintiff the result of the charges (assuming they chose to interview him after having discovered the articles) and believe him. There is no known (and readily accessible) mechanism for a member of the public asking the Police what the result of the charges was.
>
> 81. The plaintiff has no criminal convictions and is a person of unblemished character. The publication to a wide audience throughout New South Wales of charges of gang rape (of which he is innocent) must have a profound effect on his good fame and character. That effect endures to this day and will continue into the future.
>
> 82. In *Beckett v NSW (supra)*, Harrison J. awarded an amount of $120,000 for reputational damages, reduced from a claimed $350,000 (at [748] and [825]), because Ms Beckett stood convicted of some charges. That is not the case here where Mr Hrdavec is a person of unblemished reputation.

497 As earlier mentioned, I do not accept the submission of the State that there is no evidence demonstrating an absence of media articles that indicate the charges against the plaintiff were dropped or that the apology no longer appears on the internet.

498 Nor do I accept the submission of the State that there is an absence of evidence that an employer who searched the internet would need to ask the plaintiff to ascertain the results of the charge as that may be reasonably

understood as a step an employer may take in all the circumstances if the articles continue to appear in through a Google search.

499 However, it is important to note that evidence was admitted provisionally, following objection, that the plaintiff had been compensated in an amount of $315,000.00 inclusive of costs for asserted reputational damage arising from the charges. That evidence, in my view, is relevant to the question of damages in this respect and should be admitted. It must, therefore, be taken into account in the assessment of damages in this respect. As a broad proposition, the State was correct to submit that there is no causation for damage if in fact the plaintiff has been compensated.

500 The plaintiff contended that the damages awarded to the plaintiff in the other proceedings differed from the present matter because:

(1) First it related to publications some ten months after the plaintiff was arrested and charged and after the media publicity caused by his charging. It was therefore not compensation in relation to that publicity but was in respect of quite different publicity some considerable time later. The plaintiff received no compensation for any reputational damage suffered over that first period after he was charged.

(2) The reputational damage suffered during that first period is the damage which continues now and will continue indefinitely. It is damage inflicted universally on the plaintiff in any part of the world where anyone chooses to enquire about him using the internet. Particularly it is damaging to the plaintiff all over Australia.

(3) The compensation that the plaintiff received from Fairfax Media Publications was in respect of articles published by them after the plaintiff was released from custody and after his charges had been discontinued.

(4) It is clear from the Deed between the parties that the publications complained of asserted that he was guilty of the charges when in fact at the time of publication those charges had been discontinued. Those same articles do not appear in the google search that comprises Exhibit 15. The Deed provided for the plaintiff's name to be removed from the article within 7days. Such compensation as has been received for those articles can have no bearing upon the reputational damage caused by the reporting of the plaintiff's arrest, charge and incarceration in July 2015 which reporting remains on the internet.

501 There is substance in the plaintiff's submission here. However, the State is correct to submit that damages in this respect need substantively to be assessed for a closed period what the plaintiff has described as the first period.

502 As to the plaintiff's submission that the plaintiff was a person of unblemished character, the State relied upon the fact that the plaintiff failed to comply with a subpoena to give evidence but otherwise the submission should be accepted.

503 I do not accept that submission. The plaintiff was not cross-examined about this question and no criminal recorded of the plaintiff was tendered. The warrant was issued only with respect to a failure to appear in respect to a subpoena upon which the plaintiff proffered an explanation. That evidence was the subject of objection by the State. If the State intended to raise the point taken here then a different ruling may have been made as to the tender. I reject the State's submission as to this factor.

Aggravated damages

504 The plaintiff submitted that the following circumstances aggravated the plaintiff's claim for damages:

(1) Permitting transit officers to assist with the plaintiff's arrest and body search in a public place.

(2) The manner in which the plaintiff was tricked into taking part in an ERISP in the absence of a lawyer and in the face of his expressed desire to not participate until a lawyer was present.

(3) The deliberately misleading manner in which he was questioned by Inspector Pietruszka during the ERISP.

(4) The deliberate attempt to undermine the plaintiff during the ERISP by misleading him into thinking that Ms Tejada (the plaintiff's alibi witness) did not back up his version of what had happened.

(5) The deliberate compilation of a misleading Facts Sheet that was likely to mislead both the Court and the plaintiff's legal representations.

(6) The deliberate failure to inform adequately the plaintiff's legal representative of the victim's withdrawal of any allegation the plaintiff and its effect on the strength of the case against the plaintiff.

505 The principles governing aggravated and exemplary damages were stated in *Abed* at [230]-[234], where the Court of Appeal observed:

> [230] The principles upon which aggravated and exemplary damages are awarded are well established and were not in issue on the appeal. The principles were summarised by Sackville AJA (Macfarlan and Whealy JJA agreeing) in *New South Wales v Zreika* [2012] NSWCA 37 at [60]-[64]. It is necessary to keep in mind the conceptual distinction between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages. The assessment of aggravated damages is

made from the point of view of the plaintiff, whereas in the case of exemplary damages the focus is on the conduct of the defendant.

[231] Aggravated damages are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1 at 8. Aggravated damages are given to compensate the plaintiff when the harm done to him or her by a wrongful act was aggravated by the manner in which the act was done: *Uren v John Fairfax* [1966] HCA 40; 117 CLR 118 at [ ] [sic] (Windeyer J).

[232] Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future, and to reflect "detestation" for the action: *Lamb v Cotogno* at 8. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v Motor Accidents Commission* (*Gray v MAC*) [1998] HC 70; 196 CLR 1 at [14].

[233] In *State of New South v Riley* [2003] NSWCA 208; 57 NSWLR 496 Hodgson JA (Sheller JA and Nicholas J agreeing) expressed the view (at [138]) that the description in *Gray v MAC* does not fully cover the field. His Honour said that "Conduct may be high handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing". However, Hodgson JA also observed that, ordinarily, conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express the Court's disapproval or, in cases where the defendant stood to gain more than the plaintiff lost, demonstrate that the wrongful conduct should not be to the advantage of the wrongdoer.

[234] In *New South Wales v Radford* [2010] NSWCA 276; 79 NSWLR 327, Sackville AJA (Beazley and Macfarlan JJA agreeing) summarised the effect of the authorities as follows:

> [97] These authorities demonstrate that the various categories of damages that may be awarded for trespass to the person, including assault and false imprisonment, are not self-contained. There is a close relationship between an award of ordinary compensatory damages or injury to the plaintiff's feelings and an award of aggravated damages. It is necessary to assess compensatory damages, including aggravated damages, before determining whether exemplary damages should be awarded and, if so, the quantum of any such award.

506 I do not accept the various factors relied upon by the plaintiff to establish aggravated damages do establish a basis for aggravated damages for the following reasons:

(1) No proper basis has been established as to why the involvement of transit police in the search of the plaintiff would warrant the award of aggravated damages.

(2) The contention that Inspector Pietruszka tricked the plaintiff into participating in the ERISP in the absence of a lawyer is inconsistent with my earlier findings.

(3) So too is the contention that Inspector Pietruszka did something which was deliberately misleading in the ERISP.

(4) I have earlier found against the proposition that Inspector Pietruszka "deliberately" attempted to undermine the plaintiff during the ERISP by misleading him into thinking that Ms Tejada's did not back up his version.

(5) I have earlier found against the contention that Inspector Pietruszka compiled a deliberately misleading Fact Sheet.

(6) I have earlier found that Inspector Pietruszka did not "deliberately" fail to inform Mr Linegar of the victim's "withdrawal of any allegation" or its effect on the plaintiff's trial. I agree with the submission of the State that Inspector Pietruszka's email to Mr Linegar of 7 July 2015 was frank.

507 It follows that I would refuse to award aggravated damages.

Exemplary damages

508 The plaintiff's submissions as to exemplary damages was expressed in the following terms:

> 85. Pietruszka's conduct in using improper means to obtain information from a young person (the plaintiff was then 19 years old), in the early hours of the morning, when no lawyer was present (contrary to his expressed desire), to attempt to undermine his alibi, and to present misleading information to the bail sergeant, the Court, and the plaintiff's legal representatives are matters that should attract the Court's opprobrium and sound in an award of exemplary damages. Such conduct is a serious misuse of the power of the State's investigative and prosecutorial powers and is in contumelious disregard of the plaintiff's entitlement to be treated fairly and consistently with the presumption of innocence.

509 This submission is entirely based upon premises which I've rejected as having any factual foundation earlier in this judgment. It follows that I would not award exemplary damages.

Economic loss: causation

510 The plaintiff made the following submissions in this respect:

(1) The plaintiff had been working for UBank, apparently a subsidiary of the National Australia Bank Ltd, since October 2014. Initially his employment was casual. He was offered a full time position from April 2015 on 3 months' probation. His contract provided that his employment could be terminated during the probationary period on 1 weeks written notice, or immediately with payment of 1 weeks salary in lieu of 1 weeks' notice. The plaintiff's probationary period was due to finish later in July 2015.

(2) The plaintiff's manager had told him that he was very good at the job. The manager said that the plaintiff was very friendly and that the customers really liked him. During the whole time that the plaintiff was working for UBank no inadequacy or unsatisfactory aspect of his

performance was raised by his employer. There was a system that allowed for such inadequacy or dissatisfactions to be raised with employees, and the plaintiff was aware of that having happened to other employees.

(3) The plaintiff's employment was terminated with immediate effect by a letter dated 6 July 2015. No reason was given in the letter. The plaintiff submitted that against the background as outlined above, it was highly improbable that the reason for the termination was inadequate performance.

(4) The plaintiff had been charged in the early hours of the previous Thursday, 2 July 2015. His name, with those of the other three charged, was published prominently in the media, including well known and widely distributed publications such as the Daily Telegraph and the Channel Nine News, from that afternoon. The plaintiff contended that it is likely employees and managers of the NAB became aware of one or more of these publications.

(5) By 6 July 2015, the plaintiff had, of course, been absent from work without explanation for two days. The plaintiff contended that it was unlikely that the plaintiff would have been terminated summarily, without a reason being given if that were the cause. The plaintiff contended that a more likely explanation for his absence would have been sought. The plaintiff contended that the summary termination of his employment, without any reason, fits well with the state of mind of someone who had seen any of the media articles and understood that the plaintiff was in custody, meaning further that there would be no point in exercising the milder option of giving a weeks' notice.

(6) The plaintiff contended that given that the plaintiff had been working for his employer, one way or another, for more than 8 months, and that no inadequacy or dissatisfaction with his performance had been raised before he left work late on Wednesday 1 July 2015, the overwhelming inference is that the cause of his termination was something that occurred after that time. The plaintiff contended that the publicity of his arrest and charge was the obvious explanation. The letter was sent as promptly as one would expect if that publicity had come to the attention of his employer late on Thursday, 2 July 2015, or, as is probably more likely on Friday, 3 July 2015. The plaintiff submitted that there is a strong inference that the cause of the termination of his employment was the media publicity of his arrest and charging. If it was not, the only other possibility on the evidence was his unexplained absence from work for two days.

511 I have earlier discussed this issue. However, some further observations may be made in this context.

512 The State submitted that there is a perfectly plausible explanation for the discontinuation of the plaintiff's employment: he was on probation and his probationary period was up. No inference favourable to the plaintiff as to the

reason for his termination should be drawn. He has failed to seek evidence from UBank (for example, by way of subpoena) that could have established the reason for his termination. That submission is sound. The plaintiff was not summarily terminated. UBank was not required to provide a reason for termination of a probationary employee. Apart from the proximity to the end of the probationary period, the mere fact of his unexplained absence from work over two days may have been sufficient to justify the cessation of his probation without notice. As earlier indicated, I consider the limit of any award made in this respect must be a loss of chance. Quantum of economic loss

513 The plaintiff made the following written submission in this respect:

> 92. The plaintiff claims special loss through the termination of his employment at the NAB (UBank) on 6 July 2015.
>
> 93. The plaintiff's claim for financial loss is the difference between present day earnings and what he would have earned had he remained at the bank. His present day earnings have been with Rhino Rack since 25 August 2015. For the period between the date of termination with NAB (UBank) and commencing with Rhino Rack the plaintiff had no present day earnings. His loss for that period was therefore his former salary at NAB (UBank).
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> 94. The plaintiff's earnings at Rhino Rack have fluctuated between There are no figures for his first year in 2015. His average yearly gross earnings from Rhino Rack have been approximately $37,000. $31,560.00 gross (2016) and $40,071.00 gross (2018).
>
> 95. While the plaintiff was employed at NAB his basic fortnightly salary (gross) was $1905.26. In addition he earned shift and penalty loadings. His total gross earnings for those 10 weeks were $13,594.76 that is a weekly average of $1359.00 or an annual amount of $69,693. Thus the difference between what the plaintiff has in fact earned at Rhino Rack and what he would have earned if he had continued at NAB (UBank) is approximately $32,000 per year (gross). The plaintiff claims this amount for the last 4.5 years, being $144,000.00 and into the future.
>
> 96. The plaintiff acknowledges that given the vicissitudes of life this cannot be projected indefinitely into the future. However he submits that on a fair estimation an extrapolation for at least the next 10 years is available giving a future economic loss of $320,000. A major factor to be taken into account in assessing the future is the drastic effect on any improvement in the plaintiff's employment prospects because of the prominent presence on the internet of the articles labelling him as a gang rapist.

514 Based on the foregoing analysis, I would have assessed damages at $25,000.00.

CONCLUSION

515 In all the circumstances, there should be judgment for the State. In the absence of any disentitling conduct or other relevant factors, the State should have its costs of the proceedings as agreed or assessed. In the event of any dispute as to costs, the State should file and serve within 14 days of this judgment, submissions in support of any application as to costs it makes together with any supporting evidence in that respect. The plaintiff shall have a further 14 days after service of those materials in which to respond and put on evidence in reply.

516 The State shall file short minutes of order reflecting this judgment. Those short minutes of order shall reflect the position as to costs, either as agreed or, in lieu of agreement, in accordance with the foregoing procedure for the resolution as to a dispute as to costs.

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Annexure-A (6823446, pdf)

Annexure-B (4085085, pdf)

Annexure-C (16498274, pdf)

Annexure-D (53383, pdf)