

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**IN THE DISTRICT COURT
AT WELLINGTON**

**CIV-2016-085-000458
[2017] NZDC 26931**

BETWEEN

KENT RICHARD BOYD
Plaintiff

AND

ATTORNEY-GENERAL (ON BEHALF
OF NEW ZEALAND POLICE)
Defendant

Hearing: 27 and 28 November 2017

Appearances: C Nicholls and D Ewen for the plaintiff
A Powell and D Harris for the defendant

Judgment: 20 December 2017

RESERVED JUDGMENT OF JUDGE C N TUOHY

Introduction

[1] The plaintiff (Mr Boyd) has claimed damages from the Crown in respect of two quite separate incidents in which he was arrested by police officers.

Brief Overview of the Incidents

[2] The first took place as long ago as 1 July 2010, when Mr Boyd was arrested by a police dog handler, Senior Constable Paul Fleck, in Wellington's Botanic Gardens in the early hours of the morning. During the arrest his leg was bitten by Senior Constable Fleck's dog, Cody. Mr Boyd alleges that excessive force was used in conducting that arrest.

[3] The second incident took place on the evening of 17 December 2012. On that occasion Mr Boyd was dining with a friend at the Green Parrot restaurant in Taranaki Street, Wellington. The then Prime Minister, John Key, also had a meal there that evening with his chief-of-staff and another person. Members of the Diplomatic Protection Service (DPS), who were police officers, were in attendance.

[4] After Mr Boyd and his friend finished their meals, an issue arose between Mr Boyd and a staff member of the Green Parrot as to who was to pay for the meals. Mr Boyd asserted that John Key had agreed to do so. Constable Gregory Betham, a member of the Diplomatic Protection Squad, intervened.

[5] Mr Boyd was then taken outside the restaurant by Constable Betham and restrained by him in a doorway next to the restaurant. Uniformed police arrived from the nearby Wellington Central Police Station. One of these was Constable Beaumont. She arrested the defendant for theft (of the meals). She took him back to the police station where he was held overnight. In the morning he was brought to Court and bailed. Mr Boyd alleges he was unlawfully assaulted and detained in that incident.

The Botanic Gardens Arrest

Basis of the Claim

[6] In relation to this incident, Mr Boyd has based his claim on two separate legal foundations. First, he claims that the dog handler used excessive force in setting the dog on him. That would amount to the common law tort of battery.

[7] He also claims that the manner in which the arrest was carried out amounted to a breach of s 23(5) of the New Zealand Bill of Rights Act 1990. This provides that *“everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person”*.

[8] Although these two bases of the claim are treated in Mr Boyd’s statement of claim as one cause of action, in reality they amount to two separate causes of action based upon the same factual assertion, the allegation that excessive force was used in

carrying out the arrest. The Crown disputes that assertion head on. The Crown case is that the arrest was justified and the force used was reasonable.

Was the Force used Reasonable?

[9] Mr Boyd and Senior Constable Fleck were the only two persons present when Mr Boyd was arrested. Both of them gave evidence at the trial. Their evidence conflicted on several significant points. It is necessary for the Court to decide which evidence it accepts and which it rejects.

[10] There is no disagreement about the general course of events. In the early hours of the morning of 1 July 2010, Mr Boyd assaulted a woman at a house situated at [address deleted] in Wellington¹, across the road from the Botanic Gardens. She made a 111 telephone call to the police.

[11] As a result of that call, Senior Constable Fleck, who was then on duty in Lower Hutt with his police dog Cody, was dispatched to [address deleted]. On arrival there, he was advised who the offender was and that he had been last seen heading into the Botanic Gardens at a point about opposite No [detail deleted].

[12] Constable Fleck cast his dog in that area and the dog immediately located a scent which it followed upwards into the area of the Gardens between Glenmore Street and the Lady Norwood Rose Garden. That area is largely covered in foliage, bush and trees and crossed by tracks and paths. It rises fairly steeply to a summit.

[13] At some point well up towards the summit, the dog located Mr Boyd. After identifying himself to Mr Boyd as a police officer and telling him to stop or he would let the dog go, Senior Constable Fleck did just that. The dog seized Mr Boyd's lower right leg inflicting bites which punctured the skin. When Senior Constable Fleck reached him, Mr Boyd was seated on the ground with the dog holding or biting his lower right leg. Senior Constable Fleck put handcuffs on Mr Boyd and then ordered the dog to release him.

¹ He was later convicted of that assault which is conclusive proof that he committed it: s 47(1) Evidence Act 2006

[14] Other officers quickly arrived on the scene. Mr Boyd was taken under arrest and placed in a police car parked in the vicinity of [address deleted]. Mr Boyd walked to the police car from the place where he was arrested. From Glenmore Street, he was taken to Wellington Central Police Station. He was examined there by a police doctor. The bites were not stitched and nor did Mr Boyd go to the hospital.

[15] While there was no dispute about that general outline of events, there were significant differences between Mr Boyd's version of events and that of Senior Constable Fleck. The main areas of dispute were:

- The nature of the terrain through which the dog tracked Mr Boyd and the area where he was arrested;
- Whether or not Mr Boyd stopped and sat down before the dog was released;
- What commands Senior Constable Fleck gave to the dog;
- What Senior Constable Fleck said to Mr Boyd after he was arrested.

[16] The significance of these aspects is that Mr Boyd's case was that he was not trying to avoid arrest, rather he had simply taken a short cut to the city through the Gardens entering by way of the Main Entrance; that he was walking on sealed tracks; that when he was called upon to stop by Senior Constable Fleck, he did stop and sit down, in other words, surrendered to the arrest; that Senior Constable Fleck unnecessarily caused the dog to attack him; and that when Senior Constable Fleck got to him, he ordered the dog to bite him further up the leg where he did not have the protection of a boot; and that after he had been put in the police car Senior Constable Fleck made a remark to him to the effect that he deserved what he got (meaning the dog bites) because he had earlier presented a firearm to police; in other words, that Senior Constable Fleck had used the dog to apply unnecessary and excessive force against Mr Boyd in revenge or as punishment for Mr Boyd's previous behaviour towards police.

[17] Senior Constable Fleck's evidence was that he had been told before he began trying to locate him that it was Mr Boyd he was looking for², that he was being sought in relation to an assault with a weapon on his female partner, that he was in breach of his bail in that he was both associating with his partner and intoxicated, that the partner had called 111 after locking herself in the toilet and that Mr Boyd had with him a knife, metal bar and handcuffs³. He was also aware that Mr Boyd had been previously convicted of presenting a firearm to police.

[18] Senior Constable Fleck said that after locating a track in the Gardens at a point roughly opposite [address deleted], his dog Cody followed the track onto a steep gully into thick bush. He said that he and the dog (which was attached to him by a 15 metre leash) tracked about 400 – 500 metres into the bush.

[19] At that point he said he heard branches breaking in front of him and challenged "*Police dog, stop or I'll let the dog go*". He got no reply, but could clearly see a male figure moving in front of him as he shone his torch. He continued tracking up a steep bank while the male continued to push forward into bush in order to get away. With a better view of the male, he again challenged loudly using the same words he had earlier used. The male kept going.

[20] Senior Constable Fleck said he believed then that the male was Mr Boyd and that he was trying to avoid arrest. He decided to apprehend Mr Boyd using the dog. In making that decision, he said he took into account the fact that it was dark, that the terrain was steep and bush covered, the possibility that Mr Boyd was armed together with his behaviour in prior dealings with the police and the safety of the female who had been assaulted.

[21] He said he released Cody from her leash, giving her the command "*rouse*" which is a command to attack the person being pursued. At that time, Mr Boyd was about 8 – 10 metres away. The dog ran forward and apprehended Mr Boyd, seizing his lower leg with its mouth and biting and/or holding it.

² He had been involved in arresting him at his parents' property in Ohariu Valley 11 days previously.

³ A pocket knife and a pair of plastic handcuffs were taken from Mr Boyd after his arrest.

[22] Senior Constable Fleck said that by the time he reached them, Mr Boyd was on the ground with the dog still holding him by his leg. He then handcuffed Mr Boyd behind his back and commanded the dog to release him which she did. He said that he had no personal feelings towards Mr Boyd and the arrest was a standard arrest successfully carried out in accordance with accepted practice. He denied making the remark which Mr Boyd said that he made after Mr Boyd was put in the patrol car.

[23] In order to resolve the significant differences between their respective accounts of the event, it is necessary to assess the credibility and reliability of the evidence which each of them gave.

[24] I found the evidence of Mr Boyd either untruthful, implausible, or unreliable in several material respects.

[25] His evidence about why he was in the area of the Gardens in which he was arrested was so implausible that it could only have been untruthful. He said that he was taking a shortcut through that area. He vacillated about his intended destination. More than once he said he was going to the Railway Station to catch a train or bus to Johnsonville. (He acknowledged no trains or buses were running at that hour). He also said he may have been going into “town” (by which I understood he meant the Lambton Quay area) with a view to catching a taxi. (No cash or bank cards were listed in the possessions taken from him at the Police Station, although three cell phones were).

[26] The general area is pictured in a Google aerial photograph which was printed out and used in evidence at the hearing and it will be familiar to many residents of Wellington City. No one heading into town or to the Railway Station from [address deleted] would climb the steep hill which rises above Glenmore Street and the Lady Norwood Rose Garden on the way. Far from being a shortcut, that area is not on any direct route to the Railway Station or to town from [address deleted] and climbing through it, whether on a sealed path or through bush, would involve significant physical exertion. Furthermore, if he had entered the Gardens through the Main Entrance and stayed on formed paths, the scent which led the dog to him would not have been located where it was.

[27] If Mr Boyd had really wanted to head into town or to the Railway Station from [address deleted], he would have walked there via Tinakori Road and Bowen Street; or if, as he said, he intended to go through the Bolton Street Cemetery despite the time of night, he would simply have crossed the road and walked through the Centennial Entrance of the Gardens or up the steps below it and along the sealed road which runs alongside Anderson Park below the hill he was arrested on.

[28] The only reasonable inference is that he was hiding out in the area in which he was located. That inference is also supported by the timing. On his evidence he must have left [address deleted] at about 3.55 am, when Senior Constable Fleck was contacted by Police Comms after the 111 call. He was not there when the first police officers arrived there at 4.12 am and searched the address for him. Senior Constable Fleck's tracking in the Gardens started after that, probably about 4.18 am and the arrest took place a few minutes later, probably between 4.20 am and 4.25 am. Had Mr Boyd been walking to town or the Railway Station when he left the vicinity of [address deleted], he would have arrived there well before the time of his arrest in the Gardens even if, as he said, he had stopped for a cigarette on the way.

[29] I also found implausible the evidence which Mr Boyd gave about the commands which Senior Constable Fleck gave to his dog. Mr Boyd said that when he let the dog go Senior Constable Fleck told her to "*get him*" and that when he saw the dog biting his ankle, which was protected by his boot, he told her to "*go higher bitch*" and the dog then bit him higher on the leg. Senior Constable Fleck said the command to attack which he gave was "*rouse*" and the dog would not understand an instruction to "*go higher*".

[30] Mr Boyd's evidence requires the Court to accept either that "*go higher*" is a command which the dog had been trained to respond to by biting a person higher up on the body than it is already doing, or that it generally understands English. Neither alternative seems at all likely. It also seems much more likely that the command for a police dog to attack is "*rouse*" as Senior Constable Fleck said, not "*get him*". I conclude that Mr Boyd's evidence on this aspect is either made up or mistaken.

[31] It is quite possibly the latter of those alternatives because I also conclude that at the time of the event Mr Boyd was intoxicated and for that reason (and the passage of time), his evidence could not be relied upon. Senior Constable Fleck formed the belief that he was heavily intoxicated when he arrested him. Detective Constable Japeth smelt alcohol on him and found a wine cask bladder inside his jacket immediately after the arrest. At the Police Station the bladder was recorded as containing 200 mls. Detective Constable Japeth connected the wine bladder with a “*Country Red Wine*” cardboard cask found at the flat occupied by the female who had been assaulted by Mr Boyd. Mr Boyd himself estimated he had drunk a litre of wine.

[32] On the other hand, I found Senior Constable Fleck’s evidence to be plausible in all respects and consistent with other proven circumstances. His account of his arrival at the scene and the tracking of the defendant through the Gardens was entirely plausible. The timings he gave fitted with other evidence. The evidence he gave about the commands he gave his dog and its actions was credible, and described what one would expect to take place in the circumstances.

[33] Importantly, the injuries suffered by Mr Boyd were no more than one would expect from the apprehension by a police dog of a fleeing offender in those circumstances. The bite marks were all in one area of the lower left leg. None of them were serious enough to even require a stitch. There was some implied criticism in cross-examination that Mr Boyd was not taken to hospital. He was seen by an experienced Police doctor within an hour or so of his arrest. Obviously the doctor saw no need for further treatment. All of that is consistent with Senior Constable Fleck’s account of events. It is also inconsistent with the suggestion that he treated Mr Boyd more harshly than he needed to because he had a personal antipathy towards him.

[34] For those reasons I accept Senior Constable Fleck’s evidence in preference to that of Mr Boyd.

[35] That evidence, together with that of the other relevant witnesses for the defendant, satisfies me that the arrest of Mr Boyd was lawful, justified and carried out without excessive force. I consider that Senior Constable Fleck’s decision to use the

dog to apprehend Mr Boyd was entirely justified by the circumstances which he alluded to and that it was carried out with no more force than necessary.

[36] Both causes of action in relation to this incident fail on this point. It is therefore unnecessary to address any limitation or other issues.

The Green Parrot Incident

Basis of the Claim

[37] Mr Boyd has pleaded two causes of action in respect of this incident. Although it is not entirely clear from the statement of claim, it appears that the first of these relates to the actions of members of the Diplomatic Protection Squad and the second relates to the actions of uniformed police officers after their arrival at the Green Parrot and subsequently.

[38] As to the former, Mr Boyd's claim is that he was unjustifiably assaulted and detained and falsely imprisoned by the DPS; and that their actions were in breach of ss 22 and 23(5) of the New Zealand Bill of Rights Act 1990⁴.

[39] As to the latter, Mr Boyd asserts that his arrest by uniformed police was unlawful and unjustified, as was his continued detention in police custody. He claims that this amounted to false imprisonment and was also in breach of s 22 of the New Zealand Bill of Rights Act.

[40] It is logical and convenient to address these claims in the way that they have been pleaded by first examining the actions of the DPS members in respect of Mr Boyd and then the subsequent actions of uniformed police officers.

Actions of the DPS

⁴ Section 23(5) is reproduced at para [7] above. Section 22 provides:

22 Liberty of the person

- Everyone has the right not to be arbitrarily arrested or detained.

[41] Although there was a considerable emphasis at the trial on what exactly happened in the Green Parrot during the course of the evening, this aspect of Mr Boyd's claim is founded upon the physical force which was applied to him by the DPS after a dispute arose about payment when he was about to leave the restaurant.

[42] It is therefore necessary to identify the nature of the physical force which was applied to Mr Boyd and the circumstances in which it was applied and then to consider whether that force was justified.

[43] The evidence about that came primarily from Mr Boyd and Constable Betham, the DPS member who restrained him. Additionally, there was evidence from former DPS member Danny Schaare and from Constable Elizabeth Beaumont, the uniformed officer who arrested Mr Boyd. Mr Schaare's evidence was limited to what happened inside the Green Parrot and Constable Beaumont's related solely to what happened outside the Green Parrot. There was no evidence called from any staff member of the Green Parrot. Nor did Mr Boyd's dinner companion, Andre Jellema, give evidence.

[44] Mr Boyd's affidavit evidence was that when he went to the restaurant with Mr Jellema, he had sufficient funds available to pay for the meal and drinks for both of them. He said that during the course of the evening, Mr Key agreed to pay for their meals. He said that when he went to leave the restaurant, he went to the area where customers pay and said to the staff member there, "*John's got our tab*", pointing to Mr Key.

[45] He stated that there was further discussion with the staff member, who appeared to him disbelieving. The staff member then approached a DPS member sitting at a table by the entrance. He stated that while this was happening, he remained at the reception area and Mr Jellema had left the restaurant.

[46] He stated that he saw the DPS member who had been approached by the staff member speak into his radio. Then two DPS members entered the restaurant from outside, grabbed him and pulled him outside. He stated that he was grabbed or marched by either one or both of them 7 – 10 metres to the entrance way of a

neighbouring apartment building. He was pushed up against a wall so his face was next to it and his right arm twisted up behind his back.

[47] He stated that he twisted to relieve pressure and his left arm was flung around so that he felt his hand brushing against a gun in the officer's shoulder holster. Another officer then came in and flattened him against the wall. He stated that he was kned in the back of the thigh while held against the wall. He stated that he was held against the wall for several minutes until uniformed police arrived.

[48] Constable Betham was a member of the DPS team that evening. He stated in his affidavit that he was designated as a Close Protection Officer for Mr Key and was with Mr Schaare inside the restaurant close to Mr Key throughout the evening. He observed Mr Boyd and his companion throughout.

[49] He stated that he observed an argument taking place at the counter between Mr Boyd and a member of the Green Parrot's staff. Mr Boyd was pointing at Mr Key. He approached the counter at that point. He thought Mr Boyd was trying to leave the restaurant without paying for his meal.

[50] He stated that the argument was getting heated at this stage. Mr Boyd began yelling out to Mr Key that he was going to pay for his dinner. People in the restaurant were looking around. Constable Betham stated in his affidavit that he opened the restaurant door and guided Mr Boyd through the door with his hands because he was being disruptive.

[51] He stated that once outside he restrained Mr Boyd by pulling his arm behind his back and he pulled him away from the plate glass windows of the Green Parrot and into a doorway next door. He continued to restrain him in that way until uniformed police arrived.

[52] Thus, while their respective accounts of the force applied to Mr Boyd have broad similarities, there are significant differences: specifically, how Mr Boyd was removed from the restaurant itself, whether more than one DPS officer was involved

in removing and restraining him and where the officer(s) came from; and the degree of force used to hold his arm and restrain him outside the restaurant.

[53] In assessing the general reliability of the witnesses in regards to the events at the Green Parrot, certain factors need to be taken into account. With regard to Mr Boyd's evidence, I keep in mind that he was affected by alcohol. Indeed, for reasons explained below I consider he was intoxicated. The police officers were on duty and not affected by alcohol. On the other hand, both Mr Schaare and Constable Betham were in the position of having to recall the details of this incident after an interval of several years. Mr Boyd was able to produce a video recording of a media interview which he gave only three days after the event, which was materially consistent with his evidence in Court. Against that, I formed the view from his evidence in relation to the Botanic Gardens incident that he is quite capable of distorting and exaggerating events.

[54] On a close analysis of the oral evidence given at trial by Mr Boyd and Constable Betham, there was little material difference between them as to how and by whom Mr Boyd was removed from the restaurant. Indeed, except for the description of it as "*manhandling*", in the end there did not seem to be any significant disagreement.

[55] Constable Betham accepted that he guided him outside and in doing so held him by the arms. In cross-examination Mr Boyd was uncertain about whether another officer came in from outside and appeared to accept that it was only Constable Betham that was in physical contact with him at that time. I am satisfied from Mr Schaare's evidence that Constable Betham came from where he was sitting in the restaurant as he said and not from outside.

[56] I find that the extent of Constable Betham's contact with Mr Boyd prior to him being restrained outside the restaurant is that he took Mr Boyd by the arm and firmly directed him out of the restaurant through the door and onto the street. In that respect, I reject the evidence of Mr Boyd that he was "*manhandled*" outside by two DPS members. There is nothing to support his allegation that two officers came in from the street, a claim which conflicts with the evidence of both DPS witnesses. There is

no evidence that he resisted being taken outside. I think that his description of what happened is likely to be exaggerated and I prefer that of Constable Betham who gave his oral evidence in a straightforward way with no indication that he was trying to sanitise events.

[57] Nor do I consider that there is much real disagreement about the force applied outside the restaurant. Constable Betham does not dispute that he put Mr Boyd's arm behind his back and forcibly took him into the entrance of the neighbouring apartment building and held him there in that way until the uniformed police arrived.

[58] I am satisfied that Constable Betham applied sufficient force to Mr Boyd's arm to ensure he did not struggle and by holding him in that way and blocking him with his body he prevented him from leaving the place he was in. I am not satisfied that any other DPS member physically restrained Mr Boyd, or applied any physical force to him. It is very likely that Constable Parlane, who had been stationed outside the restaurant, was quickly there to support Constable Betham, but his assistance would hardly have been necessary. Constable Betham is a large and obviously powerful man and Mr Boyd made it clear that he was aware of the futility in the circumstances of physical resistance on his part.

[59] I am satisfied that he must have been held in that way for a few minutes before the arrival of uniformed police. The evidence did not enable that time to be fixed exactly. Wellington Central Police Station is only a short distance from the Green Parrot, but there was no evidence about where Constable Beaumont was when she received a call to go there.

Justification for DPS Actions

[60] The force used by Constable Betham was the only force which I find was applied to Mr Boyd by DPS members. There are two aspects to it which need to be considered separately; first, the force applied in removing Mr Boyd from the restaurant which I do not consider amounted to a detention; secondly, the force applied to him outside on Taranaki Street.

[61] Detention in terms of s 22 of the BORA and in the sense required to establish the tort of false imprisonment requires a total restraint from which the person concerned cannot escape⁵. That did not take place until Mr Boyd was restrained by having his arm put up behind his back outside the restaurant.

[62] Before that, though, he did take hold of Mr Boyd's arm and guide him firmly out of the restaurant. The question arises as to whether that amounted to the tort of battery.

[63] Battery is the intentional application of force to the body of another person without consent or lawful justification⁶. For the reasons which follow, I consider that this application of force was justified in law in that it was carried out in the course of Constable Betham's common law duty to prevent an anticipated breach of the peace.

[64] In *R v Howell*⁷, the English Court of Appeal said in a passage often cited in New Zealand cases:

We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.

[65] I am satisfied that Mr Boyd was behaving in the restaurant in the way Constable Betham described. I do not think Mr Key agreed to pay for his and his friend's meals. The only evidence about that issue came from Mr Boyd and from his own witness, Mr Key⁸. Mr Key stated that his recollection was that when Mr Boyd suggested that Mr Key should be paying for their meals, he replied something along the lines of "*yeah, lots of people say that*". That sort of comment does not convey agreement to pay. If Mr Key had agreed to pay, I think he would have clearly stated that in his affidavit and, indeed, would have said so and paid on the night. The fact that he did neither leads me to reject Mr Boyd's evidence on this point.

⁵ *Wright v Bhosale & Attorney-General* [2015] NZHC 3367 at Para 51

⁶ *P v T* [1998] 1 NZLR 257

⁷ [1982] QB 416

⁸ Mr Schaare and Constable Betham both said they did not hear any such conversation, but Mr Key's evidence makes it clear there was one.

[66] I am also satisfied that Mr Boyd was intoxicated by the time he went to leave. He himself said that he and his friend had consumed two bottles of beer and two bottles of red wine between them at the restaurant. (He was not questioned about whether he had drunk any alcohol before he got there). Mr Schaare described him as having been slurred in his speech and slightly unsteady on his feet earlier in the evening, though not grossly drunk. Constable Betham said that when he came to their table earlier in the evening, he smelled of alcohol, his speech was slurred, he stumbled and he spilt red wine from his glass onto their table. He thought that he was intoxicated then. He described him as “*pretty drunk*” at the time of the argument over the bill. Both he and Mr Schaare, who were keeping an eye on him throughout the evening, thought he did not eat anything⁹.

[67] I have come to the conclusion that when Mr Boyd claimed that Mr Key had agreed to pay for the meals, he was either “*trying it on*” or deliberately causing trouble. The conversation with the staff member was becoming heated and loud, Mr Boyd was pointing at Mr Key and other diners would have had their attention drawn to what was happening. To put it in simple terms, Mr Boyd was intoxicated and causing a scene.

[68] Although there was no evidence that Mr Boyd had actually used or threatened violence, or damaged property, given his level of intoxication, the way he was behaving, the presence of the Prime Minister and other members of the public, it was reasonable for Constable Betham to anticipate that the situation might escalate to the point where an actual breach of the peace would occur imminently.

[69] In *Minto v McKay*¹⁰, the Court of Appeal held that a police constable has a common law duty and power to take reasonable steps for the purpose of attempting to avert an anticipated breach of the peace. Although in that case, the step taken was the seizing of a loud hailer, the Court approved the decision of the House of Lords in *Albert v Lavin*¹¹ where it was held that the physical restraint of a person by a constable

⁹ That may explain why the bill for the two meals, including two bottles of red wine and two bottles of beer, came to only \$84 which seems very cheap even by 2012 price levels.

¹⁰ [1987] 1 NLR 374; (1987) 2 CRNZ 330.

¹¹ [1982] AC 546

was justified by that common law power. However, the Court made it clear that the apprehended breach of the peace must be imminent and the steps taken reasonable, that is, not excessive, unnecessary or improper.

[70] I consider those conditions were fulfilled in this case. Immediate action was required to prevent the situation getting out of control. The actions of Constable Betham were no more than to hustle Mr Boyd out of the restaurant, thereby taking him away from a situation where some form of physical altercation with other people or property damage could take place.

[71] There is no doubt, though, that once his hand was put behind his back outside the Green Parrot, Mr Boyd was totally restrained from going anywhere and thus detained by Constable Betham. In those circumstances, it is well established that the defendant bears the burden of proving that the detention was lawful¹².

[72] The defence pleaded¹³ to any use of force, or detention of Mr Boyd by DPS officers is that police arrested Mr Boyd in accordance with lawful authority and in a fair and reasonable manner. More specifically¹⁴ that the DPS member who detained Mr Boyd was entitled to do so because Mr Boyd was behaving in a disorderly manner and had failed to pay for his meal before leaving the restaurant.

[73] In his submissions, Mr Powell specified the lawful authority as s 315(2)(a) of the Crimes Act which relevantly provides:

Any constable ... may arrest and take into custody without a warrant –

- (a) Any person whom he finds disturbing the public peace or committing any offence punishable by imprisonment.

...

[74] Mr Powell's submissions proceed on the basis that the process of arrest and detention by Constable Betham pursuant to s 315(2)(a) started once he held Mr Boyd's arm behind his back outside the windows of the Green Parrot and began to move him

¹² *Liversedge v Anderson* [1942] AC 206, 245; [1941] 2 ALL ER 338, 362 (HL)

¹³ In para [46] of the Statement of Defence

¹⁴ In para 46.1

away towards the apartment entrance way next door where he was held until the arrival of Constable Beaumont.

[75] Mr Betham's affidavit evidence about why he detained Mr Boyd was unequivocal. He stated that he did not arrest him, although he believed he could have done so for breaching the peace. He gave no oral evidence modifying that statement at the hearing. Nor was there any suggestion that he used any words of arrest, or told Mr Boyd why he was being detained. So while Mr Powell made extensive submissions with reference to a range of authorities to support Mr Betham's entitlement to arrest Mr Boyd pursuant to s 315(2)(a), there was no evidence that Mr Betham ever purported to do so either pursuant to that power or any other one.

[76] An arrest can be achieved by conduct alone without any words being used by the person carrying out the arrest provided that person makes it clear by his conduct that the person he detains is no longer free to leave¹⁵. However, the person making the arrest must purport to be exercising a lawful authority to arrest when he does so.¹⁶

[77] The fact that Constable Beaumont formally arrested Mr Boyd for theft on the basis of information given to her by Constable Betham is consistent with Constable Betham's evidence that he himself had not exercised a power of arrest. If he had, there would have been no need for a further arrest. He could have simply delivered Mr Boyd into the custody of Constable Beaumont for her to carry out the remaining tasks required of the police when a person is arrested and taken into custody. It commonly happens that one police officer carries out an arrest and then hands over the arrested person to other officers for further processing¹⁷.

[78] I have therefore reached the conclusion that Mr Boyd was not arrested by Constable Betham because Constable Betham never purported to exercise a power of arrest. The first time Mr Boyd was arrested was by Constable Beaumont after her arrival on the scene. It follows that the detention of Mr Boyd by Constable Betham

¹⁵ *Arahanga v R* [2012] NZCA 480; [2013] 1 NZLR 189

¹⁶ *R v Goodwin* [1993] 2 NZLR 153 (CA) at pp174, 190, 197, 201, 205

¹⁷ That is what happened after Senior Constable Fleck arrested Mr Boyd in 2010

outside the Green Parrot was unlawful. In New Zealand the police have no power to detain except following an arrest¹⁸

[79] I intend, nevertheless, to consider whether, in the circumstances as I have found them to be, Constable Betham could have lawfully arrested him under s 315 (2)(a) of the Crimes Act. That is relevant to the assessment of damages.

[80] In my view, the words of paragraphs (a) and (b) of s 315(2)(a) and (b) are to be read in conjunction with each other. The former relates to the situation where a constable is actually present observing a disturbance of the public peace or the commission of an imprisonable offence, whereas paragraph (b) relates to his or her power of arrest after either of those events has occurred. It follows that the words “*disturbing the public peace*” in paragraph (a) should be read as meaning “*causing a breach of the peace*” in conformity with the very clear wording of paragraph (b).

[81] Read in this way the power to arrest for disturbing the peace duplicates the power of arrest given to a constable under s 42(2) of the Crimes Act. On that basis, the mere apprehension of the commission of a breach of the peace would not be enough to trigger a power of arrest. The power of arrest may only be exercised after a breach of the peace has been actually committed¹⁹.

[82] For the reasons explained above, I do not consider that Mr Boyd’s behaviour in the restaurant had quite reached that level. Accordingly I do not think that the behaviour Constable Betham observed justified him in arresting Mr Boyd for breaching the peace.

[83] Under the other limb of s 315(2)(a), Constable Betham would have been justified in arresting Mr Boyd if he had found him committing an imprisonable offence. What Constable Betham thought Mr Boyd was engaged in was attempting to leave the restaurant without paying for his meal. It was that conduct for which the charge of theft of the meal was later laid.

¹⁸ *Blundell v Attorney-General* [1968] NZLR 341; *R v Waaka* [1987] 1 NZLR 754; *Police v Cox* [1989] 2 NZLR 293 (CA)

¹⁹ *Attorney-General v Reid* [1986]; *Minto v McKay* (supra)

[84] Theft was never the appropriate charge for that. Theft requires a taking of property without the consent of the owner. The meals, in liquid form or otherwise, were voluntarily provided by the restaurant to Mr Boyd and his friend. The imprisonable offence which is usually charged in “*dine and dash*” cases is the offence under s 240(1)(b) of the Crimes Act of obtaining credit by deception. In practical terms that requires the proof that at the time he ordered and ate the meal, the diner had no intention of paying for it. But the fact that the wrong charge was laid is not important. The issue is whether Constable Betham had “*found*” Mr Boyd committing an imprisonable offence.

[85] In his submissions, Mr Powell referred to a number of English decisions in which the Court interpreted legislation expressions similar to s 315(2)(a), which confer a power of arrest on a constable who “*finds*” someone disturbing the peace or committing an offence punishable by imprisonment. Perhaps the most apposite is a passage from the judgment of Bankes LJ in *Trebeck v Croudace*²⁰:

In many instances in which the power of arrest is given to constables by statute the language used gives an indication as to the intention of the legislature. In many cases the expression used in relation to the offender is “found offending” or “who shall commit in view of the constable”. Language such as this appears to indicate pretty plainly that the person intended by the Legislature to be the judge of whether the occasion warrants the arrest is the constable. If that is so, the honest belief of a constable on reasonable grounds is a sufficient justification for his action

I accept that this is the test to be applied in respect of an arrest under s 315(2)(a).

[86] I have no doubt that Constable Betham had an honest belief that Mr Boyd had committed the offence of obtaining credit by deception (which would have been complete when he obtained and consumed the meal). He had some reason for his belief. Mr Schaare said that he and Constable Betham were already suspicious because of his behaviour that Mr Boyd was going to do a “*runner*” to the degree where he warned the restaurant staff about his suspicion. Then Mr Boyd’s companion left the restaurant separately before him. He said Mr Boyd then got up and approached the exit where he was stopped by staff, whereupon the claim that Mr Key had agreed

²⁰ [1918] 1 KB 158 at 168

to pay was made. Neither Mr Schaare or Constable Betham believed it because they did not believe Mr Key had.

[87] The power of arrest given by s 315(2)(a) must necessarily be exercised immediately, if at all. There is no time for a full investigation. Nevertheless it should not be exercised on flimsy evidence. Here, looking at the matter on the basis of what was known to Constable Betham at the time Mr Boyd was directed outside, I consider that his belief that an offence had been committed by Mr Boyd was reasonable and would have justified an arrest.

[88] However, if Mr Boyd had then made a genuine offer of immediate payment, exercising the power of arrest may not have been reasonable even though the offence had technically been already committed. The coercive power to arrest a person and take them into custody may not have been a proportionate response to an unsuccessful attempt to avoid paying an \$84 debt which had already been settled.

[89] While Constable Betham had Mr Boyd under restraint outside the restaurant, there were further words spoken about payment for the meal. Constable Betham said that he recalled the restaurant manager following them outside and asking Mr Boyd if he could pay and Mr Boyd saying that he had no money and that Mr Key had said he would pay.

[90] Mr Boyd stated in his affidavit that he told the DPS members that he had his Eftpos card in his pocket and would pay if Mr Key would not. If he had made that offer it seems unlikely that it would have been ignored, at least by the restaurant manager. No one seems to have ever actually paid the bill. His statement also contradicts the answer he gave to Constable Beaumont, as recorded by her in her notebook when she interviewed him shortly after he was taken to Wellington Central Police Station. Although he initially told her that he intended to pay with his card until John Key said he would pay, when she asked him whether he tried to pay when it became a problem, he said *“No. John Key said he had it covered, our drinks and our meal”*.

[91] In summary, I am not satisfied that Mr Boyd did offer to pay the bill while he was being held outside the Green Parrot so I am of the view that an arrest by Constable Betham for obtaining credit by deception would have been both authorised under the second limb of s 315(2)(a) and reasonable.

Actions of the Uniformed Police

[92] There is little dispute about what happened after the arrival of Constable Beaumont and other uniformed police. She stated in her affidavit evidence that when she arrived he was being held by DPS staff. He was abusing them but not struggling. He kept saying “*the fucking Prime Minister said he would pay for my meal*”.

[93] She said that she arrested him for theft of the meal. She asked him if he understood his rights. She made a note in her notebook to that effect shortly afterwards. He was protesting that John Key would pay for his meal. Although she did not say so in so many words, I think it is implicit in that evidence that she told him the reason for his arrest at the time of the arrest and he understood it. He abused her in a nasty and obscene way. She took him to Wellington Central Police Station, arriving there at 10.24 pm. I infer that she did not spend long with him outside the Green Parrot.

[94] At the station, Mr Boyd continued to verbally abuse police directing particularly nasty and obscene language to female officers. Shortly after arrival at the station, a check of the police database was made which disclosed that Mr Boyd was subject to a bail condition relating to alcohol. The exact nature of this condition was the subject of some controversy at the hearing.

[95] Mr Boyd said the condition was “*not to be found intoxicated in public*”. Constable Beaumont and other police at the station thought it was “*not to consume alcohol*”. That is evident because after Mr Boyd refused to undergo a breath test, a police officer managed to hold a breath testing device close enough to his mouth to get a reading of “*Alcohol*” which indicates no more than that he had consumed alcohol, but not how much. Mr Boyd said in evidence that the reading showed less than the “*Youth*” level (i.e. more than 150 mg of alcohol per millilitre of breath but

less than 400). I am sure he is wrong about that. A different type of device is needed to measure the various levels relevant to drink driving offences. That device would have required his co-operation.

[96] The evidence as to the exact wording of the bail condition was deficient. No one produced documentation from the Court which imposed the condition. The bail bond Mr Boyd signed on his appearance the next day contained both conditions: “*Not to consume alcohol*” and “*Not to be found in a public place and submit to a breath screening test on demand*”. It is illogical to have both. A condition “*not to be found intoxicated in a public place*” is not intended to completely prohibit the consumption of alcohol. While documentation produced from the police database suggests that Mr Boyd was initially granted police bail with a “*not to consume alcohol*” condition on his wilful damage charge, the fact that on the night the police understood he was required to submit to a breath test strongly suggests that that was superseded by a Court-imposed condition “*Not to be found intoxicated in a public place and submit to a breath screening test*”. That sometimes happens at first Court appearance. The weight of evidence supports Mr Boyd’s evidence that that is the bail condition he was subject to.

[97] However, that finding does not assist Mr Boyd’s case. I am quite satisfied that Mr Boyd was intoxicated while in the Green Parrot and from then on for the reasons explained above. His behaviour at the police station tends to confirm that he was intoxicated. (As well as his abusive and obscene language to police, he also tried to take his clothes off in Constable Beaumont’s presence, saying “*you love me baby, you love this*”). The Green Parrot is a public place in the sense intended by the condition in that the public generally has access to it. Taranaki Street is certainly a public place. He could have been arrested there for breach of his bail condition if the police had known about it then.

[98] It is unnecessary to record much more of the night’s events. Mr Boyd was given access by telephone to his lawyer. He was not granted police bail. He spent the rest of the night in the cells. It is not clear whether he was formally arrested for breach of bail, but he was certainly brought before the Court in the morning on the basis that

he had been arrested for that and for theft of the meal. He was granted Court bail. The charge of theft was withdrawn by the police at the next appearance.

Justification

[99] I am satisfied that Constable Beaumont's arrest of Mr Boyd was justified under s 315(2)(b) of the Crimes Act. She had good cause to suspect that he had committed an offence punishable by imprisonment, that is, the offence of obtaining credit by deception. The "*good cause*" was the information about that which was provided to her by DPS members²¹. The fact that the officer chose the wrong charge technically does not invalidate the arrest²².

[100] The arrest justified Mr Boyd's detention until he was brought before the Court next day which was the earliest possible time given the hour of the night at which he was arrested. It would have been reasonable for Mr Boyd to have been granted police bail after his arrest if the only relevant factor was that he was charged with dishonestly obtaining the meal. But it was not. His behaviour at the police station was good reason not to grant him police bail because he was obviously intoxicated and acting in an aggressive and abusive manner. As well as that, he was in breach of a condition of his bail on his existing charge of wilful damage.

[101] I am satisfied that Mr Boyd's arrest outside the Green Parrot by Constable Beaumont was justified, as was his subsequent detention until his Court appearance the next morning. I am also satisfied that there was no breach of the rights recognised under s 22 of the BORA.

Summary of Findings

[102] The only aspect of Mr Boyd's claim which has been successful relates to him being held and detained by Constable Betham outside the Green Parrot. I have found that there was no lawful justification for this detention, essentially because Constable

²¹ It is well established that a constable can have "*good cause*" based on information provided by other police officers.

²² Section 316(1) of the Crimes Act does not require the exact legal offence to be correctly specified.

Betham did not purport to arrest him and a New Zealand police officer has no legal right to detain a person except pursuant to a statutory power to arrest.

[103] This detention lasted for no more than a few minutes. No more force was used than necessary to stop Mr Boyd struggling and to ensure he could not escape. Nevertheless, the use of force without lawful justification amounts to the tort of battery and the detention amounts to the tort of false imprisonment. It also constitutes a breach of s 22 of the BORA.

Remedy

[104] In his statement of claim Mr Boyd seeks unspecified damages of \$10,000 in respect of this aspect of his claim. This contrasts with the claim in relation to the Botanic Gardens arrest for which exemplary damages were specifically sought. I intend to consider both compensatory and exemplary damages.

[105] I intend to first consider damages for the torts which I have found are established. It is only if that provides inadequate compensation that it would be necessary to consider separately compensation for BORA breaches which arise out of the same facts²³.

[106] Compensatory damages for false imprisonment are designed to compensate the plaintiff for the harm caused by it. The principal heads are loss of liberty (which is time related), injury to feelings, indignity, mental suffering and humiliation, loss of reputation and pecuniary loss, if any²⁴. It is not necessary to consider damages for battery separately as the application of force is taken into account as part of the false imprisonment.

[107] In principle, I do not consider that compensatory damages for false imprisonment should be reduced for contributory conduct of the defendant, for example, because as in this case, he could have been lawfully arrested²⁵. Nevertheless,

²³ *Manga v Attorney-General* [2000] 2 NZLR 65; *Attorney-General v Hewitt* [2000] 2 NZLR 110; *Wright v Bhosale & Attorney-General* [2015] NZHC 3367

²⁴ *Caie v Attorney-General* (HC Akld, CP 334-SD99 6 April 2001, Fisher J)

his conduct may be relevant to the assessment of the cause and degree of any claimed injury to his feelings.

[108] It is clear from the evidence that Mr Boyd was upset and angry about his detention outside the restaurant. However, for the reasons explained above, I think he must have known that the claim which had led to it, that John Key would pay for his meal, was not genuine (although he may have since persuaded himself otherwise).

[109] The detention took place in a public street and was, no doubt, observed by members of the public. Any humiliation arising from that, however, must be seen against the background of the way Mr Boyd was voluntarily behaving inside the restaurant in the presence of members of the public.

[110] A certain amount of force was applied to restrain him as described above, but he was not struck or hurt in any way and did not suffer any injury.

[111] Perhaps the most significant factor in relation to the false imprisonment is its brevity. It lasted for just a few minutes, most likely about five minutes, certainly less than 10. This distinguishes this case from all the cases referred to by counsel in respect of damages. All of them involved unlawful detentions for periods in excess of two hours, most of them for much longer periods.

[112] There is no suggestion that Mr Boyd suffered any pecuniary loss as a result of the detention.

[113] Mr Boyd did not claim any injury to his reputation, not surprisingly given his own evidence as to the large number of his previous arrests by police and the previous convictions which he acknowledged.

[114] Both counsel referred me to a number of authorities in which damages for false imprisonment by police had been awarded. It is unnecessary to list them, or discuss them in detail. As always the circumstances of each case are different from each other and from this case. Probably the most helpful is the decision of Hinton J in *Wright v*

²⁵ See the discussion of that issue by Fisher J in *Caie v Attorney-General (supra)*

*Bosale & Attorney-General*²⁶ because it is fairly recent and because it contains a full survey of awards made in earlier cases. In general terms, compensatory awards have been far from generous, often small fractions of the amounts sought or initially awarded by juries.

[115] Guided generally by those authorities and taking into account the factors referred to above, I am satisfied that the damages awarded to compensate Mr Boyd for his brief detention without lawful justification should be fixed at \$750.

[116] I do not consider there is any basis for an award of exemplary damages. As explained above, Constable Betham could have arrested Mr Boyd without warrant under s 315(2)(b) of the Crimes Act for the offence of obtaining credit by deception. If he had known of it, he could have arrested him for breach of his bail condition not to be found intoxicated in a public place. Why he chose not to himself exercise a power of arrest, but to detain Mr Boyd until uniformed police could arrive to do that, was not explained. But there is no basis to think he was acting in bad faith.

[117] Nor do I think there is any basis for an additional award for breach of the rights recognised in ss 22 or 23(5) of the BORA. They arise out of the same facts as the tortious claims. There is no additional factor referable to those rights. Nor is it necessary to award any additional sum to vindicate those rights.

Result

[118] The first and third causes of action alleged by Mr Boyd have not been established and the claims made under them are dismissed. The claims made under the second cause of action have been established. The sum of \$750 in compensatory damages is awarded to Mr Boyd in respect of them.

²⁶ Supra

[119] There are also claims under that cause of action for interest and costs. Interest is not appropriate for non-pecuniary loss. I was advised that Mr Boyd is legally aided and, of course, the defendant represents the Crown. In those circumstances, and given the outcome, it may be that the question of costs is moot. In case that is not so, the parties have leave to file memoranda as to costs within 21 (working) days.

C N Tuohy
District Court Judge