

CITATION: *Stevens v Northern Territory of Australia and Ors* [2002] NTMC014

PARTIES: WESLEY SHANE STEVENS
Plaintiff
v
NORTHERN TERRITORY OF AUSTRALIA
First Defendant
and
DAVID MOORE
Second Defendant
and
KEVIN JOHN COOPER
Third Defendant
and
JOHN BOYD ORR KEIRS
Fourth Defendant
and
ANDREW JOHN CRAVEN
Fifth Defendant

TITLE OF COURT: Local Court
JURISDICTION: Local Court Act
FILE NO(s): 20100716
DELIVERED ON: 10 May 2002
DELIVERED AT: Darwin
HEARING DATE(s): 8, 9, 10, 11, 12 April 2002
JUDGMENT OF: Mr V M Luppino SM

CATCHWORDS:

Assault – Assault by Prison Officers on an inmate.

Vicarious liability – Whether Northern Territory is vicariously liable for the actions of prison officers – Scope of liability of an employer – Whether claimed actions were committed in the performance of their duties.

Evidence – Prior convictions of witnesses – Character evidence in civil matters.

Burden of Proof – Standard of Proof – Seriousness of allegations to be proved.

Prisons (Correctional Services) Act s 9; Police Administration Act s 163(1)

Steinberg v Federal Commissioner of Taxation (1975) 7 ALR 491; *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Bugg v Day*; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; *Rosecrance v Rosecrance* (1998) 146 FLR 298; *AG NSW v Perpetual Trustee Company* (1955) 92 CLR 113; *Lackersteen v Jones* [1998] 92 FLR 6; *Deatons Pty Ltd v Flew* (1949) 79 CLR 370.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Howse
First Defendant:	Mr O'Loughlin
Third-Fifth Defendants:	Mr Lewis

Solicitors:

Plaintiff:	NAALAS
First Defendant:	Withnall Maley
Third-Fifth Defendants:	Hunt and Hunt

Judgment category classification:	B
Judgment ID number:	[2002] NTMC014
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IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20100716

BETWEEN:

WESLEY SHANE STEVENS
Plaintiff

AND:

**NORTHERN TERRITORY OF
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First Defendant

DAVID MOORE
Second Defendant

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REASONS FOR JUDGMENT

(Delivered 10 May 2002)

Mr V M LUPPINO SM:

1. This action is a claim for damages for injuries, both physical and psychological, resulting from an alleged assault. The plaintiff (“Stevens”) alleges that he was assaulted while an inmate at Darwin Correctional Centre by the third (“Cooper”) fourth (Keirs”) and fifth (“Craven”) defendants, all of whom were then Prison Officers employed at that Centre. The claim against the first defendant is on the basis of vicarious liability for the acts of those defendants.

2. The pleadings in this matter comprise Particulars of Claim filed on 11 January 2001 and, as the initial pleadings lacked sufficient particularity, Further and Better Particulars filed 27 February 2001. The pleadings allege that on 12 November 2000 Cooper approached Stevens and poked his finger into Stevens' jaw whilst saying "what are going to do about it Stevens". It is alleged that Cooper then stuck his chest out, that action resulting in he cornering Stevens against a nearby wall. It is alleged that the fourth defendant ("Keirs") then put an arm around Stevens' neck and took hold of his right arm and that the fifth defendant ("Craven") then took hold of Stevens' left arm. While being restrained in this way by Keirs and Craven, Cooper is alleged to have said to Stevens "you cheeky little black cunt", slapped Stevens to the face with an open hand, and punched Stevens one time to the left side of the face.
3. The pleadings then allege that Cooper further assaulted Stevens. It is alleged that whilst Stevens was being restrained as aforesaid by Keirs and Craven, Cooper again slapped Stevens with an open hand to the face and kned Stevens in the thigh. It is alleged that Cooper also stuck his thumb in the mouth of Stevens in a gouging action.
4. There were three witnesses as to the facts called on behalf of Stevens. The first was Stevens himself. The second was Craig Cant ("Cant") and the last was Phillip Cubillo ("Cubillo"). Both Cant and Cubillo, like Stevens, are currently inmates of Darwin Correctional Centre and were also inmates on 12 November 2000.
5. Although Stevens presented relatively well during his evidence in chief, the version of events given in his evidence had a number of material differences to the allegations made in the pleadings. These differences are:-
 - 5.1 The pleadings allege one open handed slap and one punch. Although I thought the evidence was erratic vague and imprecise on this point,

it is clear from his evidence that the plaintiff suggests more than one slap was inflicted upon him.

- 5.2 His evidence did not make it clear that there were two separate discrete assaults as suggested in the pleadings.
 - 5.3 He gave no evidence in chief about being kned.
 - 5.4 Although he gave evidence that Cooper stuck his thumb in his mouth, he did not say that this was in a gouging motion. What he did say however is that at the same time Cooper had his middle and index finger near his eyes in a gouging motion or in an attempt to gouge at his eyes. This last allegation was not pleaded.
 - 5.5 In cross examination Stevens specifically denied a matter put by Stevens' counsel in his opening, namely that his defensive motion against Cooper was a flick with the hands; Stevens insisted it was a push; he must have at some stage told his legal representatives that it was a flick given his counsel's opening.
6. Stevens' evidence in chief was that on the day in question he had attended muster in the muster room of 'B' Block. He alleges that the claimed assault occurred in the corridor between the muster room and access corridor for the remainder of 'B' Block. With the assistance of a thumb nail sketch of the area, he gave evidence to indicate that access to the corridor referred to is via a two door air lock which is set up in such a way so that there is a continuous view from the control room to the muster room, the air lock and the corridor. The two air lock doors are operated from the control room. The control room has tinted glass when viewed from the muster room making it difficult to see into the control room from the muster room. Visibility into the control room however changes and is closer to normal from the air lock and from the corridor.

7. Stevens says that when he first went to the window of the control room Cooper abused him without cause. He alleges that Cooper said “piss off you piece of shit”. Stevens alleges that he said nothing in response. Compare however, the plaintiff’s opening where his counsel said that Stevens abused Cooper back.
8. Stevens then says that Cooper allowed him to proceed through the first air lock door but that Cooper continued his abuse. He said that Cooper made the same comment. This time Stevens said that he said similar words back to Cooper. This may be the retort which his counsel referred to in his opening (refer paragraph 7 above).
9. Stevens says that he then proceeded through the second door of the air lock that leads to the access corridor. He says that as he entered the corridor he saw that Cooper was there and Cooper started poking him in the face saying, “what are you going to do Stevens”. Stevens demonstrated the poke and demonstrated an action whereby he was poked with one finger under his jaw. Stevens says that he was trying to lean back and Cooper kept asking him what he was going to do. Stevens says that he retorted “what are you going to do”. He says that by this time he was bailed up and cornered against the window between the corridor and the control room. He showed where this occurred by reference to photos of the scene which were put in evidence (Exhibits P2 – P10). Contrary to the pleadings, he gave no evidence that Cooper stuck his chest out to corner Stevens. On its own, this omission would rightly be looked upon as being minor. He did say however that Cooper was very close to him and that Cooper’s chest was brushing Stevens’ chest. The sequence of events however varies with that in the pleadings.
10. Stevens says that all this took him totally by surprise. He didn’t expect what was happening as he hadn’t done anything to deserve this. He says he therefore pushed Cooper back with his open hands. He demonstrated this motion indicating both arms extended, palms open with the fingers pointing

up. Compare the plaintiff's opening where it was indicated that Stevens moved to "flick" Cooper's hand away. The evidence given by Stevens describes an action entirely different to this.

11. Stevens went on that after he pushed Cooper away, Keirs and Craven then proceeded to restrain him. He said that they were with Cooper when Stevens first saw Cooper in the corridor and they stood nearby and did nothing until he pushed at Cooper.
12. Stevens alleges that Keirs put his left forearm against his neck and took hold of his right arm and that Craven took hold of his left arm. It subsequently became clear that Stevens was describing Keirs taking a headlock hold on him.
13. Stevens claims that he could not defend himself while being restrained by Keirs and Craven and that he said words to the effect of, or asking them to, "pull up". He said that he had difficulty breathing. He alleged that the more he moved the more pressure was applied to his throat.
14. These actions alleged to have been committed by Keirs and Cravens are alleged to constitute the assault by them on Stevens as a separate assault to that of Cooper. It is not apparently denied that the initial restraint may have been justified but it is alleged that the continuing restraint while Cooper unlawfully assaulted Stevens amounts to an assault. At this point the evidence of Stevens was, I must admit, a little confusing particularly as to the sequence of events and as to the events generally. He alleges that Cooper hit him again with an open handed slap to the face. To confuse the sequence even more he then back tracked and said that this however was not the first hit and that the first hit was in fact a punch with a closed fist to the left side of his face. Stevens said that all blows were struck with considerable power and that the blows stunned him. Stevens said that Cooper hit him with his hand although he did not elaborate as to whether this was the slap, the punch or both. Stevens said that as Cooper kept

slapping him and as the others tightened their hold it was at that point that he asked them to “pull up”. In all he says there were three to four slaps by Cooper with an open hand but with some force. This is again inconsistent with the pleadings and the plaintiff’s opening which suggests the sequence is that Cooper poked Stevens, Stevens moved to flick Cooper’s hand away, Cooper inflicted one punch and three to four slaps, Keirs and Craven then restrained Stevens, Cooper continued hitting Stevens.

15. Stevens says that in his position he could do nothing. I accept that that would likely be the case if the situation were as described. He says that Keirs and Craven did nothing to stop Cooper slapping him. Stevens then alleges that Cooper tried to gouge his eyes. He said that Cooper put his left thumb inside the left side of Stevens’ mouth (an extremely unlikely scenario given that they were facing each other). He said that Cooper then positioned the index finger and middle finger of his hand (whether the left or right he did not say, but presumably the left hand) just below his eyes in an attempt to gouge his eyes. This last action was not, I repeat, particularised in the pleadings.
16. Stevens then, apparently reminded that he had omitted one detail of the conversation, back tracked and indicated that Cooper had said to him words such as “you cheeky little black cunt”. He says however that this occurred at the start. Where precisely at the “start” this occurred was not explained in evidence in chief and this confused the sequence of events even more. Compare the pleadings which suggest that that was said after Keirs and Craven restrained Stevens and before any actual slaps or punches were inflicted.
17. Stevens alleges that at this point another Prison Officer, Mr Bates (“Bates”), entered the corridor and told Cooper to stop. He claims that after that, Cooper slapped him again, then backed off but then attempted to assault him again. He says however Bates intervened, and elbowed Cooper back and

therefore prevented Cooper's further attempted assault. He says that Bates then told Keirs and Craven to put him (Stevens) in an interview room for the purpose of, Stevens said, "to cool off". He confirmed that Keirs and Craven were still restraining him in the same manner when Bates intervened. Stevens said that he did not struggle at any stage and couldn't understand why Bates was putting him in the interview room "to cool off". Stevens says that Bates joined him in the interview room after a short time (approximately two minutes). Stevens said that before Bates entered the room that he spat blood in the interview room. He says that he did not show Bates any injury.

18. Stevens said that he saw Cant in the block that day and that Cant suggested that he should obtain treatment. He said that he had blood on his teeth and Cant pointed it out to him. He says that he again saw Cant the next day and claims that Cant noticed swelling to the side of his face. Cant later confirmed this in his evidence. Stevens said that at that time his neck and the inside of the gums were also sore. He says that he showed Cant the inside of his mouth and that Cant allegedly observed a cut. Stevens said that he knew there was a cut there as he could feel it and couldn't eat that night. A claimed inability to eat that night for something which even Cant as well as Dr Morgan subsequently described as a minor injury appears to be an exaggeration. Stevens did not see the prison doctor, Dr Morgan, until two days later.
19. Stevens alleges that he was taking Tryptanol, an antidepressant, at the time of the incident, the dosage being 100 milligrams at night and 50 milligrams in the morning. He said that he saw the doctor with a view to increasing the dose to help him but the doctor would not do so. He said he was feeling paranoid and uneasy because of what happened and that he did not trust anyone except prisoners. He said that he had the feeling of paranoia and fear for about two weeks after the incident. I am not sure what he meant by this because immediately thereafter he said that he did not get over it after

two weeks anyway. He said that his concerns lasted for “a while” and I am left only to guess at what that might mean.

20. In summary I found Stevens’ evidence in chief was at times confused and difficult to follow and was poor in terms of the sequence of events. It became far worse in cross-examination. He was cross-examined first by Mr Lewis on behalf of the third, fourth and fifth defendants. He did not present well at all. He appeared to be anticipating questions. He appeared to be guarded and defensive. It became quickly clear that Stevens had given evidence in criminal proceedings against Cooper and Stevens appeared to be more intent on concentrating on what were perceived errors in that evidence than on his evidence on this occasion. He referred at one point to “mistakes in that evidence” which was an unresponsive comment when Mr Lewis introduced the topic of that previous evidence.
21. On a number of occasions when obviously difficult questions and issues were raised, Stevens became extremely evasive and at times cheeky and at other times moderately aggressive. This was in response to what I thought were very proper questions put in an inoffensive way. At one point I had to direct Stevens to answer a question, so intent was he on bantering with Mr Lewis.
22. When asked in cross-examination why he did not say anything in his evidence in chief about the kneeling or the attempted kneeling by Cooper, Stevens’ explanation was that he was not asked about that. I consider that to be a feeble and defensive response. Certainly he was not specifically asked about that given the prohibition on leading questions in examination in chief. However questions in chief were properly put to him which would have given him the opportunity to comment on the kneeling. He should not have required prompting if such a serious event as he alleges herein actually occurred. Curiously though it is clear that he has made a complaint about kneeling in other evidence and the pleadings also make the allegation. That

he overlooked such an important issue in his evidence is telling as if such an event had occurred then it is almost inconceivable that he would have forgotten to mention that.

23. As cross-examination proceeded Stevens' evidence became more and more erratic. This was very evident while being cross-examined as to other inconsistent versions he gave, particularly versions recorded by the doctors who saw him. I thought Stevens' explanations were evasive. When he did answer, those answers were unconvincing. His attempt to explain the difference in the history he gave to one of the doctors when he said he was kicked not kneed was particularly unconvincing. That explanation was that he used those terms interchangeably "in frustration". This was extremely unlikely given the period of time that elapsed between when the events occurred and when the history was taken.
24. The most obvious example of Stevens being defensive and evasive in answering questions in cross-examination is the rather incredible evidence that he said that he was "blacking out" when being restrained by Keirs and Craven. It was in consequence of that, that he attempted to justify his claim of impaired recall of events. That is inconsistent with what appears to be adequate recall in his evidence in chief and in the various other versions that he has give without making any mention of black outs. There is no reference anywhere else to a black out occurring. I thought that this claim was untrue and was deliberately made to avoid answers to questions which I think Stevens perceived would put him in a bad light.
25. In cross-examination from Mr O'Loughlin for the first defendant, I thought it was telling that Stevens said that he was "uncontrollable" when Cooper verballled him and he verballled Cooper back. That would appear to justify Bates' action in putting Stevens in the interview room "to cool off". It likewise is inconsistent with Stevens' claim that he was taken totally by

surprise by Bates' action on the pretence that the he claims he had done nothing wrong.

26. Stevens, to his credit, conceded that the Keirs and Craven were only doing their job when they restrained him because they acted only when he pushed at Cooper. He actually said that they could rightly have thought that Cooper had to be defended from him. The combination of these two items of evidence would seem to belie the passive nature and stance that Stevens attempted to convey in his evidence in chief.
27. In addition to the foregoing observations in relation to Stevens' credibility, I set out here under a list of what I thought were other significant problems with his evidence. These are inconsistencies that are, as a whole, of such significance that I do not feel able to be adequately explained away by either the heightened tension of the situation or the lapse of time. Any attempt to explain the inconsistencies due to impaired recall from the passage of time is, in my view, unsustainable for a number of reasons. Firstly, I note that proceedings were commenced only some two months after the incident. Presumably therefore Stevens had cause to discuss the events with his solicitors when they were very fresh in his memory. Secondly, within a short time of the filing of the Particulars of Claim, there was a request for Further and Better Particulars. That request was answered within six weeks of the filing of the Particulars of Claim ie. at the end of February and only three months therefore after the events the subject of the claim occurred. Moreover, for the purposes of the Particulars, Stevens' attention to the essential matters comprised within the claim would have been directed and concentrated because he was responding to a specific request for detail and I therefore assume he considered these matters in greater detail. Thirdly, Stevens also had cause to discuss the events with Dr Morgan whom he saw only two days after the incident and obviously the facts when they were fresh in his memory. Lastly, the evidence shows that Stevens was interviewed by Detective Sergeant Lade ("Lade") a short time after the

incident when the facts were also fresh in his mind and had occasion to revisit the events at that time.

28. The specific problems with Stevens' evidence which I alluded to above are:-
 - 28.1 The inconsistencies with the opening which I discuss in paragraph five.
 - 28.2 The discrepancies in Stevens' evidence as to whether Cooper said "piss off ... or fuck off, you piece of shit"; before me he insisted it was the former, in the criminal proceedings against Cooper he agreed that he said the words "fuck off" were used; when pressed he agreed that the words "fuck off" were used and attempted to justify the discrepancy on the basis that it did not make any difference.
 - 28.3 He conceded that in his statement to Lade that the words "fuck off" were specified and although he conceded that he had with him a copy of the declaration he made to Lade, he insisted that he had not read through that declaration (something I consider unlikely) and said that he had only read it two weeks ago. He claimed that he had not used the declaration to refresh his memory even though as he claimed his memory on the day of the events was not so good. It would appear unlikely that he would not have taken the opportunity to refresh his memory.
 - 28.4 In cross examination he said that when Cooper first approached him he put two fingers under his jaw and when pressed for clarification maintained that it was one finger but jabbed twice, again inconsistent in any event with the opening.
 - 28.5 In cross-examination he maintained that he kept his hands to his side. In his words he had no reason to put them up. This, I think, is unlikely on his version although he conceded in cross examination

that when asked about that in the criminal proceedings he agreed that although his hands were at his side they came up as he retorted to Cooper.

- 28.6 The absence of any evidence in chief from Stevens of the claimed action of Cooper in attempting to knee him, albeit that this was pleaded, as well as his inconsistent evidence in the criminal proceedings; I repeat that I was very unimpressed by the feeble explanation he gave for not saying anything namely that he wasn't specifically asked about it and therefore did not consider it necessary to say anything.
- 28.7 The numerous occasions when he contradicted his own evidence and sometimes claiming a lack of recall yet having shown no difficulty in providing some information to his own counsel when asked sufficiently similar questions in chief.
- 28.8 His reluctance to concede the history apparently given to Dr Morgan and Dr Kenny, coincidentally those histories being against interest ie. Dr Morgan records a history of Stevens having told him that he was "forcibly restrained after non-compliance with a request by an Officer". This was against interest and Stevens denied saying it. It is inconceivable that Dr Morgan made this up or got it wrong. At this point getting an answer at all out of Stevens, let alone a concession that he should have made, was like drawing teeth and that of course does not assist his credibility.
- 28.9 Stevens could however recall that he told Dr Morgan that he was poked repeatedly under the jaw and that he was slapped and punched to the left side of the face, and that a thumb was forcibly inserted in his mouth and of the attempted gouge; there is also an inconsistency with the issue of the slap and punch to the left side of the face.

- 28.10 Although he conceded that he told Dr Morgan that he had been kicked and kneed to the left thigh, in evidence before me he back tracked and said it wasn't a kick and maintained that he meant to say that Cooper tried to knee him; Stevens attempted to maintain that a kick and a knee were the same or that he used the terms interchangeably "in frustration"; I considered his explanations to be feeble and entirely unconvincing on this point.
- 28.11 In the same context, given the minor injuries described, it is extremely unlikely that he bled the next day from his mouth wound yet that is what he told Dr Morgan.
- 28.12 Stevens agreed that in evidence in the criminal proceedings he said the words "... Cooper punched first" (my emphasis); that very much again belies the passive position which Stevens maintains he took; I think it is extremely telling that when Stevens was challenged with this evidence with some force, his retort to Mr Lewis was to even suggest that Mr Lewis had doctored the transcript, such was the extent of his defensiveness and evasiveness.
- 28.13 His omission to mention anything about the attempted eye gouge in his evidence in chief.
- 28.14 His inconsistent evidence in the criminal proceedings regarding the number and sequence of slaps and or punches.
- 28.15 His claim before me, for the very first time, that he started blacking out while being restrained by Keirs and Craven; there was no mention anywhere else of this and moreover Stevens raised it, I consider that he offered it as an excuse, in an attempt to explain an inconsistency in his evidence which is not favourable to his credibility.

- 28.16 A number of particularly difficult questions were put to him regarding Dr Kenny's report and Stevens took the very defensive stance after some questioning that as he had not seen Dr Kenny's report (most unlikely in my view) he could not answer any questions about that report.
- 28.17 He did concede that he told Dr Kenny that he had small cuts ie. in the plural, inside the mouth which is both inconsistent with all of the versions that he had given elsewhere and is also an attempt to exaggerate the extent of his injuries.
29. There were also issues relating to the character of Stevens. That he is a prisoner was conceded and is of course self-evident. His criminal record was tendered by consent (Exhibit D3-11). He is serving a significant term of imprisonment for offences of dishonesty. His criminal record is significant. His record for offences of dishonesty comprise 18 offences for unlawful entry, 16 for stealing and five for unlawful use of a motor vehicle. The evidence of Dr Kenny is also relevant to credibility. He stated that one of the characteristics of persons suffering a personality disorder of the type from which the plaintiff suffers is that they are more likely to engage in untruths.
30. The plaintiff called two other witnesses namely Cant and Cubillo. Cant said he was an inmate at Darwin Correctional Centre on the day in question and remains an inmate. He has been an inmate since early 1999 serving a sentence of 12 years and 6 months for being knowingly concerned in importation of a prohibited substance.
31. He said that he was in the muster room on the day in question. He said that before the muster he heard an exchange of words between Stevens and someone in the control room, someone whose voice he could not identify. The person in the control room allegedly told Stevens to "fuck off" to which Stevens replied "you fuck off". Cant testified that thereafter Stevens may

have gone to the toilet but it was after this exchange that the muster was called. He said that thereafter Stevens went to the air lock door again. There was again an exchange of words but he did not say whether they were in an abusive or aggressive context. He said that he heard that something was said to Stevens, he could not say what but that he heard Stevens respond with “what are you going to do about it”. He said that Stevens then walked through the air lock door and thereafter he was out of his sight.

32. Cant says that shortly thereafter he heard a scuffle that lasted less than one minute. He only heard the sounds of the scuffle comprising footsteps, keys rattling and voices although he could not make out what was said or by whom. He said that at the end of that one minute period things went quiet. He said that he next saw Stevens between ten minutes and thirty minutes afterwards when he came back out through the air lock. Cant confirmed that he spoke to Stevens and he said that he told him to see a doctor because of his concern for infection. He said that Stevens had blood on the inside of his mouth. He said that Stevens actually showed this to him. He also noted that one side, (he did not say which side) of Stevens’ face looked red and swollen.
33. In cross-examination Cant agreed that the injury to the mouth was very minor and if not for concerns for infection he would not have suggested any treatment.
34. He conceded that the words he heard from inside the control room before the muster contained the phrase “fuck off” but he rightly conceded that it was a long time ago and he couldn’t be sure. He agreed that Stevens had said words approximately or to the effect of “open the fucking door” when Stevens was in the air lock and he confirmed that it was said in an impatient manner. Despite Cant’s criminal record I was of the view that he was not deliberately lying or giving unreliable evidence. He acknowledged that Cooper is a better person than Stevens and wouldn’t lie just to help Stevens.

He was believable in his presentation and sounded genuine. He answered all questions well and spontaneously. He rightly conceded matters that were appropriate. I thought his evidence was believable, subject only to questions of the reliability of his evidence given the passage of time since the occurrence of the events.

35. Cant's evidence becomes relevant to the extent that he confirms Stevens' evidence about what happened in the lead up to Stevens going through the air lock. The discrepancy however is that Cant alleges that the occasion when Stevens went up to the tinted control room window and was apparently abused from inside the control room was before the muster. It does not coincide with the version of events given by Stevens. It is not entirely inconsistent with a version of events subsequently given by Cooper. It is not clear from the evidence of Cooper whether Cooper was in fact in the control room at the time that someone from therein apparently abused Stevens given the sequence of events discussed in paragraph 31. To the extent that he confirmed that he heard Stevens from within the air lock say words to the effect of "open the fucking door" he confirms the version of events of Cooper. In relation to the lead up to the scuffle he also said that he heard Stevens say, "what are you going to do about it". In my view this is not consistent either with Stevens' version or that of Cooper.
36. The net result is that I think Cant's evidence is neutral.
37. The next witness called on behalf of the plaintiff was Cubillo, another prisoner. Cubillo must know Stevens well as he says that he has worked regularly with Stevens. He says that he was working in the dining room on 12 November 2000 and recalls an incident occurring. He said he was in the dining room that was on the other side of the corridor to the control room when he first noticed something relevant. He said that he had a clear unobstructed view of the corridor. He said that his attention was first drawn by some commotion and swearing. He said he heard the words "smart black

cunt”. He identified the speaker as Cooper whose voice he said he knew. He said he identified Stevens saying, in response, words to the effect of “what are you going to do about it”. He then said that Cooper pointed his finger at Stevens in a motion somewhat similar to, but not identical to, what has been described by Stevens as the jabbing under the neck. He then said a couple of punches were thrown.

38. He seemed to be mindful and anticipating what would be put to him in cross-examination. Clearly he had recently considered or reviewed a previous statement. I say this as he described how Stevens had just come through the air lock corridor and he thinks that he had closed the door. He indicated, volunteered in fact, that he is not sure he put this in his statement.
39. He says the next thing that occurred was a couple of punches and slaps were directed by Cooper at Stevens. He qualified the finger pointing episode saying that he could not be sure there was contact but if not the finger came very close to making contact.
40. When asked what Stevens did after saying, “what are you going to do about it” he again volunteered, apparently in anticipation and possibly having refreshed his memory from a previous statement, that Stevens’ hands were down. He was confused as to the sequence of events initially saying that the order was firstly a punch then slaps then another punch but immediately afterwards he indicated that he could not say for sure whether the punches came first.
41. He then describes how Keirs put a choke hold on Stevens and together with Craven they restrained Stevens. He said that this occurred immediately after the pointing but could not put this in the sequence of events involving the punches and slaps. He did say that Stevens was being punched before Keirs and Craven came out of the control room. He was led on the question as to what Keirs and Craven was doing while Stevens was being punched. Clearly he was not coming up to proof at this point and this obviously

leading question was put. He had been vague on the point until the leading question was put but gave a very positive answer after that. I am not prepared to give that answer any weight at all.

42. Cubillo said that he only saw punches and slaps, presumably as well as the finger pointing which he described. In other words he did not say anything about attempts to gouge Stevens' eyes or of Cooper having a thumb in Stevens' mouth or any attempt by Cooper to knee Stevens.
43. Cubillo then said that Bates came out and broke it up. He said that Bates actually told Cooper to stop but that Cooper continued. He said therefore Bates got in between Cooper and Stevens and elbowed Cooper away. He says that at this time Keirs and Craven let Stevens go and Cooper then took another swing at Stevens. Cubillo says that Bates then pushed Cooper away. Stevens did not describe this.
44. Likewise he said that when he saw Stevens in the interview room immediately afterwards he noticed that there was a scratch in the shape of a fingernail on Stevens' left cheek. Again there has been no similar evidence from any other person particularly not from Stevens himself. Such an injury would have been apparent I think for more than two days and Dr Morgan would have seen this. Cubillo was quite insistent on the accuracy of his version.
45. The impression given by Cubillo of Cooper's actions toward Stevens is of a flurry of assaults and attempted assaults not consistent with the plaintiff's version. In cross-examination, the discrepancies between Cubillo and Stevens' evidence and with other versions was highlighted. The question of the sequence of blows and the types of blows and number were explored in cross-examination. He did agree however that all the blows that struck had force behind them, something which would become very relevant in the context of the medical evidence.

46. Cubillo, conveniently I thought, claimed lack of recall of giving evidence in the criminal prosecution of Cooper to the effect that he knew Stevens was going to take the matter to court. If nothing else this shows some discussion between Stevens and Cubillo, an occurrence which Cubillo was not prepared to concede or agree.
47. In addition his evidence of the number, frequency and type of blows swung and/or struck was vague, inconsistent and unconvincing throughout. His evidence was littered with examples of inconsistencies with other evidence he gave before me and with other statements he had made. These other statements include his evidence in the criminal prosecution of Cooper as well as the statement he made to investigating police. Importantly for someone taking an interest in what was occurring and having an unobstructed view, his version differs markedly from that of Stevens.
48. Cubillo also gave some evidence that I thought was most unlikely. It was in the context of something that came up where this evidence would amount to a convenient explanation for a shortcoming in Cubillo's evidence. He was asked whether he saw the attempted eye gouge to which he replied in the negative. As to why he would have missed something as significant as this he offered the explanation that it might have occurred in the short time that he jumped back over the counter to turn the urn off in the kitchen. Bearing in mind the rather dramatic scene which was unfolding before him, at least on his evidence, I am amazed that he could claim to have been distracted by a boiling urn even if coincidentally the urn began to boil at that very moment.
49. I very much form the view that Cubillo was merely reciting what he had been told and was doing a poor job at that. It was also telling that as the quality of his evidence faulted even more he started to become very coy and evasive in his answers. His explanation for not saying anything about the

boiling urn in his evidence in chief, ie. that he was not asked this specifically, was unconvincing and lacking credibility.

50. Also he would not concede that Stevens pushed Cooper at all yet even Stevens conceded this and this appears to have been conceded in one version or another in all the evidence given before me. Likewise, even Stevens agreed that Cooper came out of the control room followed by Keirs and Craven. Cubillo however was insistent that Keirs and Craven only came out after Cooper had commenced his assault on Stevens.
51. He had to be specifically asked in cross-examination about the apparent attempted kick by Cooper to Stevens' groin. He described a very specific action by Stevens in putting his knees together to prevent the blow. His feeble explanation for not mentioning this in his evidence in chief, ie. that that no one specifically asked him was, in my assessment, likewise most unconvincing.
52. Lastly there was some evidence which I found impossible to accept. He had been specifically asked if he had spoken about his evidence with Stevens at all and he denied that he had ever done so. However he confirmed that Stevens came back to work in the kitchen with him that day and was there for at least another one to two weeks. Significant opportunity was presented therefore for some discussion between Stevens and Cubillo regarding the incident. Furthermore given how concerned Cubillo seemed to be at the time, given how dramatic and out of the ordinary the events were, I thought it would have been an irresistible urge to discuss the matter. I am suspicious of is apparent lie which then leads me to the conclusion that there has been some collusion between Stevens and Cubillo.
53. The prior record of Cubillo was also the subject of extensive cross-examination. He admitted to a significant criminal history going back to 1979 but with many offences involving offences of dishonesty. There were

significant offences of that type for example unlawful entry and armed robbery.

54. Overall, Cubillo was an unimpressive witness. His antecedents are poor. There were objective problems with his evidence. His evidence was erratic and inconsistent. He appeared evasive when confronted with difficult issues. His failure to mention aspects conceded by everyone else (including Stevens) leads me to doubt precisely how much he did see or can now recall. Overall I consider him to be an unreliable witness and I have severe doubts as to the reliability of his version of events.
55. Relevant to the credibility of the plaintiff, Cant and Cubillo is their prior convictions and the use to which they can be put in assessing the veracity of those witnesses. *Bugg v Day* [1949] 79 CLR 442 is authority for the proposition that witnesses can be cross-examined on their prior convictions. This is one of the exceptions to the collateral evidence rule and if a witness denies a previous conviction, the party has a right to adduce contradictory evidence. There is however a limitation. This was expressed by Dixon J in *Bugg v Day* where at page 467 his Honour said:-

“...I think the better view is that at common law a conviction of a witness for an offence could not be used for the purpose of discrediting him if the offence was not of such a nature as to tend to weaken confidence in the credit of the witness, that is to say in his character or trustworthiness, that is to say in his character or trustworthiness as a witness of truth”.
56. Common sense dictates that this should be true. The conviction for an old offence will not necessarily be damaging to the trustworthiness of a person as a witness of truth. Similarly convictions for petty offences or for offences not involving dishonesty. The rationale behind the rule is that before a conviction is damaging it must be truly adverse to the reliability of the witness in the relevant sense. Essentially one needs to reveal a person prepared to either lie or mislead to suit his purpose. This is my opinion of both Stevens and Cubillo.

57. The number extent and type of prior convictions of the plaintiff (which I refer to in paragraph 29 above) make his prior convictions a matter clearly within the *Bugg v Day* principle. In relation to Cubillo, the evidence of his prior convictions is referred to in paragraph 53 above. I think the convictions in the case of the plaintiff and Cubillo carry considerable weight in terms of challenging the veracity of their evidence given their nature and type and, particularly in the case of the plaintiff, the number of prior convictions. I do not think it is a coincidence only that their evidence was the most unreliable of all the evidence I heard. In the case of Cant however the evidence of prior convictions is less relevant and speaks more of his bad character than of his propensity to dishonesty. In any event I formed the view that he was not being untruthful.
58. Dr Kenny gave medical evidence in support of the plaintiff's claim for damages. A report he prepared dated 10 September 2001 following his examination of Stevens at the prison was tendered (Exhibit P12). Dr Kenny is independent. He said he has a special interest in psychiatry in the prison context. As a doctor, particularly a psychiatrist, I accept that the history he is given is crucial to the undertaking of his duties properly. I have no hesitation in accepting the accuracy of the history he records.
59. Dr Kenny's evidence showed out a number of inconsistencies in the history he took compared to the version of events given by Stevens in his evidence. I thought it was particularly noteworthy that Dr Kenny found Stevens to be pleasant, coherent and cooperative during the interview. In his evidence Stevens said that he was quite annoyed with Dr Kenny as regards to the timing of the interview and that he was not in the right frame of mind for the interview. This was offered by Stevens to somehow justify or provide an explanation for discrepancies in what he apparently told Dr Kenny and his version in evidence. As he is independent, I prefer Dr Kenny's account of the plaintiff's demeanour which therefore contradicts yet another aspect of the plaintiff's evidence.

60. In addition to highlighting inconsistencies in Stevens' version, Dr Kenny confirmed that Stevens has a personality disorder. He confirmed that Stevens had an underlying depressive condition but that this was not a separate psychiatric illness. Dr Kenny described Stevens' symptoms following the events on the day in question as an anxiety response resulting in a temporary aggravation of his pre-existing depression. Dr Kenny said however that Stevens' major problem is his personality disorder. He said that his depression fluctuates but it is not a major problem at all. He described it as transient and minor. He said that depression was not uncommon with prisoners and it stems not only from the environment but also from the length of the sentence. He expressed the opinion that persons with the personality disorder of Stevens are more likely to engage in untruths.
61. Dr Morgan, the prison doctor as at November 2000, was called on behalf of the plaintiff. He saw Stevens at the request of the Superintendent of the prison on 14 November 2000 ie. 2 days after the incident in question. He took a history and was therefore alert to the signs that he had to examine for. His examination revealed a two-centimetre laceration inside Stevens' left cheek that did not require any treatment. He found no evidence of swelling or bruising. He was of the view that medical intervention was not required and Stevens was discharged.
62. He expressed the opinion that the injuries might or might not be consistent with the version put by the plaintiff. He expressed the view that there was no evidence of slapping or punching but conceded that if there had been swelling as a result of that, that it was conceivable that the swelling could have resolved in the intervening period up to the date of his examination. It was put to him in cross-examination that the blows were alleged to have been full force punches or slaps. In that event Dr Morgan expressed the opinion that he would have expected to see some soft tissue swelling or bruising even after a lapse of two days if a full force clenched fist blow had

been struck. I remind myself at this point that both Stevens and Cubillo were quite insistent regarding this. He expressed the opinion that the more numerous the blows the more likely there would be signs of swelling and bruising. He expressed the view that a full force slap might produce trauma but that it might not be evident after two days. He confirmed that he found no evidence of trauma on Stevens' face externally. The veracity of Cubillo's account of having seen a cut or scratch on Stevens' cheek when he saw Stevens in the interview room is dealt a considerable blow by this independent evidence. Similarly in relation to Stevens' claim of being struck full force blows which stunned him.

63. He was asked specifically regarding the injury to the inside of the left cheek. He was unable to say whether its age was less than or more than two days. He confirmed that it could be of almost any duration. He also said that he could not rule out it being self-inflicted but that there were no obvious signs that it was.
64. He confirmed that he made a full examination, including an examination of the lower limbs and found no sign of bruising.
65. He confirmed that Stevens had not given a history of being restrained in a choking position or that he had experienced loss of consciousness. Stevens gave evidence of this before me and apparently that was the first time ever that those symptoms had been mentioned. I consider it inconceivable that he would not mention something that significant when interviewed by a doctor who was specifically enquiring into those injuries only two days later. I view this as another major issue regarding the plaintiff's credibility.
66. Dr Morgan also gave evidence that he was aware of the history of the attempted gouge to the eyes and accordingly checked the whole of Stevens' face, particularly the eyes. He said he found no marks consistent with the attempt described by Stevens. Again, this highlights a significant failing in Stevens' evidence.

67. The plaintiff's case then closed and Mr Lewis opened for the third, fourth and fifth defendants. He first called Cooper, the third defendant. Cooper gave evidence that he has been in the prison service for over 12 years, that he is one of five dog handlers employed at the prison, that in that role his duties give him a roving commission throughout the prison and it was in that circumstance that he found himself in the control room of B Block at the time and date in question.
68. He identified Stevens in court and said he knew of the plaintiff through the plaintiff's association with the prison service. He described Stevens as a "regular". Cooper gave evidence that he has no convictions for any offences and that in particular he was acquitted of criminal charges based on the same facts as the claim before me.
69. The evidence as to how long Cooper was in the control room on the day in question in the lead up to the events is not clear. Cooper's evidence was that he arrived there at approximately 11.00am and he gave evidence that at that time Bates, Keirs and Craven were in the control room. He did not say how long he had been there before the incident, nor did he say whether he was there at the time of the muster. He said he was sitting in the control room in the vicinity of the controls for the air lock doors. It was for that reason that he operated the controls when Stevens sought to go through the air lock.
70. Cooper said that Stevens came to the tinted window between the control room and the muster room, simply banged on the window but said nothing. He said that he referred to Keirs and Craven and was told that Stevens was allowed to come through. He therefore opened the first door. Cooper says that Stevens looked at him through the glass while he was in the air lock and directed words to him to the effect of "open the fucking door you cunt". Cooper described this as part of a torrent of abuse that then came from Stevens while he was in the air lock.

71. Cooper then says that he then opened the second door of the air lock, waited for that door to be locked again after Stevens passed through then, after requesting Keirs and Craven to go with him, exited the control room door into the corridor to speak to Stevens. He then said that he approached Stevens who was near the second door and asked him what his problem was. He said that he approached to within approximately one metre of Stevens. According to Cooper, Stevens' response was to say "fuck off" and to then raise both his arms and push at Cooper. Cooper said that by reason of the distance between them that Stevens barely contacted his (Cooper's) chest.
72. Cooper said that his response was to step back and that Keirs and Craven then moved in and restrained Stevens. He said that Craven went to Stevens' left and Keirs went to Stevens' right and each grabbed Stevens by an arm. He said that Stevens struggled momentarily but Keirs and Craven had a secure grip on him. Cooper said there was a further exchange between he and Stevens. Cooper says that he asked Stevens "what is your fucking problem" and that Stevens' response was to the effect that he (Cooper) was a "smart cunt".
73. Cooper said that it was at this point that Bates came out and asked what was going on. Cooper said he gave Bates a quick outline of the events and then Craven and Keirs took Stevens to the interview room at the direction of Bates. He said Keirs and Craven maintained their grip on Stevens at all times while Stevens was in Cooper's view. Cooper denied the evidence given by Stevens of the assaults and denied the specific instances referred to by Stevens in his evidence. Cooper gave evidence that he left the Block shortly afterwards. While leaving B Block he said he saw Stevens on the way out and that Stevens said words to the effect of "goodbye Mr Cooper", apparently with no animosity. He said in evidence that he said nothing in response to Stevens. He denied Stevens' evidence that he (Cooper) said to Stevens words, in a menacing manner, to the effect "I'll see you later Stevens". He said that he again saw Stevens later that day while Stevens'

medication was being dispensed to him. He said he had a short conversation with Stevens but nothing was said about what had occurred earlier that day.

74. He confirmed that he made a statement to Lade approximately two weeks later.
75. Cooper's evidence was very precise. His responses were very spontaneous and he impressed me as a witness. There were some inconsistencies in his evidence but none that caused me any concern. He was then cross-examined by Mr Howse. He said in cross-examination that he assumed that when Stevens approached the window that he wished to go through to the kitchen for work duties. His explanation for why then he checked with the other persons in the control room was that as it was the maximum security section, he was just checking more out of courtesy. That explanation appears quite acceptable and reasonable to me.
76. He denied Cant's evidence that when Stevens approached, someone from inside the control room told Stevens to "fuck off" and that Stevens then responded to that. He maintains that nothing was said by Stevens, that he just banged on the window. As I said in paragraph 35 hereof, it is not entirely clear as to which occasions Stevens approached the control room was being referred to by Cant and he could have been referring to an earlier occasion that same day.
77. Cooper says that after he let Stevens in through the first door of the air lock, Stevens directed a torrent of abuse at him without any apparent reason. He specifically denied Stevens' version and that Stevens was told words to the effect of "fuck off you piece of shit".
78. Cooper was cross-examined about an incident report that he completed. He agreed that he completed one and one is required to be submitted whenever force is used on a prisoner. He conceded that the terminology used by him in that incident report was to the effect that he, Keirs and Craven restrained the

prisoner. He was asked to explain why he said that in the incident report given that his evidence before me was that he had made no contact at all with Stevens and came to within no less than one metre of Stevens. His explanation was that the wording used was meant to convey the impression that the prisoner was restrained and that all three persons were involved in the action but not necessarily meaning that the action of restraint was inflicted by all three persons. He maintained that the incident report was completed in brief outline form only. His explanation seems plausible when the incident report is viewed in isolation but I am mindful also of the fact that the incident report can be interpreted in a way inconsistent with his current evidence.

79. Cooper refused to concede that he was angry at Stevens but conceded that he was annoyed at Stevens for what he had said and wanted to find out what his problem was. He said he became annoyed when Stevens called him a “smart cunt”. He said that he then expressed his annoyance by raising his voice and swearing back at Stevens.
80. He maintained that he never touched Stevens. He said that at all times he maintained what he called a “reaction gap”, ie a safe distance in the event of some action or reaction by Stevens. Cooper was asked whether Stevens was ever put in a bear hug by anyone involved and Cooper said that he was not. That allegation had been put by Mr Lewis for the third, fourth and fifth defendants, to one of the witness called by Stevens, possibly Stevens himself.
81. Cooper was then cross-examined regarding the statement he made to Lade but not much seemed to turn on that. Likewise there was some brief cross-examination regarding Cooper’s evidence on his criminal prosecution and again nothing much seemed to turn on that.
82. Mr Cooper was then cross-examined by Mr O’Loughlin, counsel for the Northern Territory. That cross-examination went to the issue of prison

directives. Cooper said that he was aware of the directives and was aware of the definition of “necessary force” used in those directives. He conceded that if it were established that he had hit Stevens after Stevens was “satisfactorily restrained” that he would then be in breach of the directive. Similarly he acknowledged that the directive requires that he does not provoke prisoners and he agrees that if Stevens made out his case then he would be in breach of that directive.

83. Character evidence was then called on behalf of the third, fourth and fifth defendants. This was without objection by the other parties. Such evidence is not usual in civil cases and in fact some authorities go as far as to say that parties in a civil proceedings cannot lead evidence of good character. To that extent this is different to the position of an accused in criminal proceedings. (See Cross on Evidence, Sixth Edition page 562, paragraph 19165). The character evidence came from two prison officers, namely Prison Officers Hoskins and Cope. Hoskins spoke of the reputation of each of the defendants for honesty and in short he said that of the many people that he knows that know each of the defendants, everyone respected each of those defendants. In cross-examination Hoskins confirmed that this was with knowledge of the fact of the allegations in the current proceedings. He did say in cross-examination that if Cooper had in fact punched or assaulted Stevens as alleged that it would not change his view of Cooper. Obviously Hoskins would not be in a position to comment on what the many people that he claims to know that know Cooper would consider of Cooper on that assumption.
84. Cope also said that he knows many people who knew each of the third, fourth and fifth defendants. In respect of Cooper he said his general reputation amongst those people was that he was held in high regard for his honesty and integrity. Similarly he said that Keirs was held in high regard, especially for his honesty and Craven was regarded as being honest.

85. The next witness called on behalf of the third, fourth and fifth defendants was Senior Prison Officer Bates. He had been mentioned often in the evidence of the witnesses of fact who have given evidence up to that point. He confirmed that he was in the control room on the day and time in question. He said that he was on the phone at the time at the end of the control room away from the muster room. He said he heard something directly outside the control room that sounded like a loud verbal argument. As a result he said he terminated his call and left the control room to see what was happening. He said that on exiting from the control room he saw that Stevens had been restrained by Craven and Keirs, with Craven having him by the right arm and Keirs by the left arm. He said that Cooper was standing in front of Stevens approximately three feet away from him.
86. He said that he heard a verbal exchange between Stevens and Cooper and said words to the effect of “right, that’s enough”. Bates said that he then looked to see if any other prisoners were around and after doing so he directed Craven and Keirs to remove Stevens to the interview room. He says that they maintained their grip on Stevens at all times. Bates said that once Stevens had been taken to the interview room he went and spoke to Cooper in the control room and following that he then went and spoke to Stevens in the interview room.
87. In relation to his conversation with Cooper, Bates said that he asked him what had happened. Cooper, he claims told him that Stevens had mouthed off words to the effect of “open the fucking door” while he was in the air lock and that Cooper went to see what his problem was. Cooper reported to him that Stevens had pushed him in the chest.
88. In relation to his conversation with Stevens in the interview room Bates said that he asked Stevens what had occurred. He said that Stevens told him that Cooper was a “smart cunt” that he (Stevens) did “fuck all”, or “it’s fuck all”

and then asked a number of times whether he (Stevens) would lose his job in the kitchen as a result of those events.

89. Bates said that he saw no injuries on Stevens at the time, particularly none on his face. As Stevens indicated that he wished to make a complaint about the incident, Bates said that he would tell “the Chief”. He said he was satisfied that Stevens had settled down and he therefore then let him return to work.
90. He confirmed that he made a statement to Lade. Evidence was led from him that at the time he made the statement he was suffering the tail end of the effects of a severe gastric illness and was not feeling well. He confirmed that he had read the transcript of that interview and didn’t think that it was accurate.
91. Bates said that he didn’t see anything in the lead up to the verbal argument he heard in the corridor. He specifically said that he did not see Cooper strike Stevens at all or at any time nor did he see Cooper with his thumb in Stevens’ mouth or attempt to gouge his eyes. He also said that Stevens did not complain to him that Cooper had either slapped him, punched him, attempted to gouge his eyes or attempted to knee him in the groin.
92. Mr Howse then cross-examined Bates in relation firstly to the incident report that he completed on that day. He was shown the incident report and identified his signature on the document and confirmed that it was made on 12 November 2000. His incident report was subsequently tendered (Exhibit P14). Bates agreed that the incident report indicated that he reported that all three officers (Cooper, Keirs and Craven) had restrained Stevens. As that was in contradiction to his evidence before me as to the actions of Cooper, he attempted to explain that on the basis that his comment was a generalisation in outline form about the involvement of the officers rather than precisely the role they took. That is quite possible but I find that very curious.

93. He was also cross-examined in relation to the statement that he gave to Lade. Bates confirmed that he had read the statement the day before he gave evidence before me. It was put to him that during that interview he had said that Cooper had had a verbal confrontation with Stevens and that Cooper and Stevens had, “sort of”, hold of each other. Although Bates did not deny that what was transcribed had been correctly transcribed he doubted now whether that was accurate.
94. He agreed however that there was a good deal of inconsistency between his report on the incident report and the record of the interview with Lade. That stated the obvious and this was not a major concession by him. He could offer no explanation for the difference in that version of events and the version given before me in evidence. By that I assume that he means that he could offer no other explanation other than the one that he had already given namely that his generalised comment was more a description of the officers involved rather than the precise role that they took in restraining Stevens. Interestingly I note that it was the same explanation given by Cooper in his evidence when justifying a similar type of comment in his incident report.
95. When other extracts from his interview with Lade were put to him, Bates conceded that what was put had been said and did not seem to challenge that that was what he meant at the time. I must say that I was very troubled by the very selective nature of the parts of his interview with Lade that he now challenged. My suspicion is of course compounded by the fact that the aspects he now challenges are essentially anything approaching consistency with the version of events given by Stevens or witnesses called on behalf of Stevens.
96. Mr Howse cross-examined Bates in relation to Stevens’ prison job. Bates confirmed that there are only three prison jobs in the whole of B Block and on average there are 20 prisoners in that Block. He confirmed that the jobs are a privilege and he confirmed that nothing was subsequently done to take

Stevens' job away from him, the inference obviously being that no action was taken because he had not done anything wrong. There is some reference about this in Exhibit P14. However, in answer to a question from me, Bates indicated that it is not up to him to decide whether Stevens would lose his job, it would be decided by a superior. When I asked him what would initiate consideration of that disciplinary action, Bates said that the incident report filled that role. I found it very interesting that Bates made favourable comments about Stevens in that regard in the incident report. I consider that to be consistent both with Bates accepting the version of events put by Cooper as well as a version where Stevens is not at fault. It is a two edged sword and I regard that as neutral. Moreover the fact that Exhibit P14 confirms that Stevens was very much concerned about his job seems to indicate some sort of consciousness of guilt on Stevens' part. It is difficult to see what other inferences can be drawn, unless Stevens were to suggest that he was concerned that his role in that incident could result in him being improperly blamed for the incident. He gave no evidence as to why he said that. The spontaneity of that comment as confirmed in Exhibit P14 strongly suggests to me that Stevens was indeed worried about what he had done wrong and what disciplinary action he might properly face. Although I accept that this could cut both ways I think it is more an indication that what actually occurred was not consistent with the version of events told to me by Stevens.

97. Bates was also cross-examined about a number of other aspects of his statement to Lade inconsistent with the version being put before me. These aspects included:-
 - 97.1 The relative roles of Keirs and Craven in terms of restraining Stevens;
 - 97.2 That Cooper was sent to the control room after the incident to "cool down";

- 97.3 That he didn't notice all of the other officers leaving the control room even though he was right by the door and even though they apparently left in somewhat of a hurry;
- 97.4 That he would not concede that he had been disturbed while he was on the phone by the three hurriedly leaving the control room;
- 97.5 That although he conceded there was a heated argument between Cooper and Stevens when he came out of the control room, he maintained his version as per his evidence in chief.
98. Mr Howse's submissions put Bates as a central figure as to why I should find the plaintiff's case proved. Certainly there are many unsatisfactory aspects to Bates' evidence. I am of the view that Bates was a poor witness. I consider his evidence to be unreliable and is subject to too many inconsistencies to be properly accounted for by either the lapse of time or on account of problems with observations based on the heightened emotions of the events of the time. Mr Howse has submitted that the primary issue for determination is whether the plaintiff was struck or assaulted by the third fourth and fifth defendants and a secondary issue is whether all those defendants and Bates are attempting to cover up their impropriety. He submits that if I find as he suggests in terms of the secondary issue that then I can, and should, find in favour of the plaintiff on the primary issue. That appears to be a tacit acknowledgment of the weaknesses in the plaintiff's case standing alone. However I do not accept that by rejecting Bates' evidence that that somehow establishes the plaintiff's case. I discuss this in my detail below when addressing issues of the burden of proof.
99. Craven gave evidence after Bates. Craven confirmed that he followed Cooper out of the control room and into the corridor following the occurrence of something out of the ordinary, precise details of which he could not now recall. He said this occurrence took place as Stevens was coming through the air lock. He said that as he came into the corridor

Stevens was just coming through the second door of the air lock and was approximately one metre inside the corridor. He said that Cooper spoke to Stevens and the conversation became heated. He formed the view that Stevens might become aggressive towards Cooper and was alert to this. He said he reacted when he saw Stevens make what he described as a flicking motion with the back of both of his hands towards Cooper's chest. He said he quickly moved in behind Stevens and took hold of him in a bear hug. He says Cooper was then immediately in front of Stevens and approximately three quarters of a metre away from him. He said that Keirs also responded as soon as he (Craven) did and took hold of Stevens' left hand. When Keirs did that, Craven said he released Stevens from the bear hug and took hold of Stevens' right arm. He said that this all happened in a very short time, a matter of two to three seconds from when he first started to act to the time that he released the bear hug. The short duration of the bear hug might explain why neither Cooper nor Keirs said anything about that.

100. Craven said that Cooper made no contact with Stevens at all. He said that the conversation between Stevens and Cooper continued after that but he could not now recall the words. He said that within a very short time Bates came out and got in front of Stevens and between Stevens and Cooper and asked what was going on. Craven refuted that any assault or contact was made by Cooper with Stevens and each of the separate contacts alleged by Stevens was inquired of and he refuted each of them.
101. He confirmed that Bates asked he and Keirs to take Stevens to the interview room. He said that he did not see any injuries on Stevens at the time. He confirmed that he was also interviewed by Lade some two weeks after the incident and he also confirmed that he gave evidence in the criminal prosecution.

102. In cross-examination questions were asked of the incident report that he completed on the date of the incident. He was shown the report and identified it as his.
103. Mr Howse made an issue of the lack of detail about actual statements in the incident report, suggesting that this was deliberately done and with an ulterior motive. Craven's explanation for that was that he did not consider it out of the ordinary for a prisoner to swear at a prison officer. The converse would have been unusual and he would have specifically had occasion to recall details of that had it occurred. Craven however indicated that he was of the view that the report was to be routine because nothing further would come of the incident and he considered the report he ultimately submitted to be sufficient. I consider that to be an acceptable explanation despite the submissions of Mr Howse on that aspect.
104. Overall I do not think that Craven was shaken much in cross-examination. There were a number of areas in his evidence where his evidence was not strong. The incident report suggested that Cooper had taken some steps to restrain Stevens. I thought that Craven's explanation of this was a little shaky in that he said that the action of Cooper referred to was an action of commencing a forward movement towards Stevens. He said this occurred close to the time that he (Craven) put the bear hug on Stevens. He said that as soon as he bear hugged Stevens, Cooper stopped his forward motion and that overall he had not actually moved any distance. I must admit that that evidence was difficult to understand. Mr Howse submitted that this evidence smacked of a cover up but I do not agree. I think that is an inappropriate conclusion to draw from the available facts and I am not prepared to infer anything like that.
105. In his interview with Lade, Craven agreed that he used the words "tempers were flashing". He conceded that this referred to both Cooper and to Stevens. Craven however denied that Cooper was angry and I thought

Craven was shaky in his explanation of this or as to whether or not he had ever seen Cooper angry.

106. Craven however maintained that Cooper had not approached Stevens closer than the distance previously specified. It was put to him, and he conceded that he said to Lade that the two were "...face to face, nose to nose and going hammer and tong..." or like words to that effect. I did not consider him to be very convincing when he attempted to explain that "nose to nose" simply meant facing each other.
107. In cross-examination by Mr O'Loughlin, Craven confirmed knowledge of paragraph 2.2.4 of the Directive regarding the use of force. He confirmed that he was aware of that on the day in question. He agrees that when he and Keirs had hold of Stevens that Stevens was then satisfactorily restrained within the meaning of that term as it appears in that Directive. He agreed that even if Stevens was slapped once whilst so restrained that that would be beyond the scope of the duties of the prisoner officer who slapped him.
108. Overall however, and despite Mr Howse's powerfully put submissions regarding Craven's evidence, I thought Craven gave evidence in a very credible manner. His answers were spontaneous and very matter of fact and totally void of emotive comment. Overall, I thought that in terms of presentation that he was the best of the witnesses who gave evidence before me.
109. The last witness called was the fourth defendant, John Keirs. I was also quite impressed with his evidence, albeit that there were also some unsatisfactory aspects. Like Craven he presented well and gave his evidence very matter of factly and in what I thought was a very credible manner. He was convincing in his explanations and importantly I thought that he was quite prepared to concede things were appropriate, albeit offering acceptable explanations for alternative propositions.

110. Mr Howse particularly pressed the point that various actions which Keirs denied seeing (ie. the finger poke under the chin, grappling by Cooper with Stevens while Stevens was restrained, the attempted knee by Cooper to the groin of Stevens) might have occurred either before Keirs came out of the control room into the corridor or whilst he was focusing his attention on Stevens. Keirs was very convincing as to why this should be. He conceded the possibility of the proposition put to him by Mr Howse but, in what I thought was a very telling answer, he said that although Mr Howse's proposition might be so, the fact that he was focussing his attention on Stevens meant that it would not be possible for Cooper to do what was suggested without he seeing it.
111. Keirs is the only person to give evidence that when he and Craven took hold of Stevens they turned him approximately 90 degrees in a clockwise action away from Cooper. Mr Howse pressed a point that he was doing so to turn him away from Cooper. That was conceded but that cuts both ways ie. it turns Stevens away from Cooper and vice versa. It is not, standing alone, in any way indicative of whom needed protection from whom.
112. In cross-examination Keirs did not agree that tempers of Cooper and Stevens were flashing. He said that Cooper was not overly aggressive. Mr Howse suggested to him that it was a reconstruction when he says that Cooper could not have grappled with Stevens or struck Stevens in the positions they were in. I do not agree. I think that Keirs answer on this point, namely that he would have seen the claimed actions if they occurred because of his directed focus on Stevens, is extremely believable.
113. Keirs' interview with Lade was also the subject of cross-examination. It was put to him that he had there conceded that Cooper might have hit Stevens. Despite Mr Howse's efforts to prevent Keirs explaining that, it was cleared up in re-examination that what he was conceding was that Cooper may have hit Stevens before he (Keirs) had come out into the

corridor and without Keirs therefore having seen it. That however does not take the matter any further except in my view to increase the credibility of Keirs. Not only was he prepared to make appropriate concessions before me, he had shown this trait at the time that he was interviewed by Lade.

114. Far from being biased in favour of Cooper and against Stevens I think it shows that Keirs demonstrated great objectivity. The only possible faults I could find with the evidence of Keirs was that he did not seem prepared to concede at all that Cooper was showing any aggression at all towards Stevens and he attempted to sheet home all the aggression to Stevens. Secondly, his comment that Stevens was not accepting the authority of Cooper or was not accepting his instruction to desist, something only he mentioned, and very much unsupported by the evidence that he had given to that point.
115. In cross-examination by Mr O'Loughlin, Keirs made the same concessions as had been made by Craven. The case of the third, fourth and fifth defendants was then closed.
116. Mr O'Loughlin did not call any evidence and that then was the extent of the evidence before me.
117. I now apply my assessment of the witnesses to the facts and the law. It is first necessary to consider the question of the burden of proof and the applicable standard of proof.
118. I reiterate that I consider that there are unsatisfactory aspects of the evidence of all witnesses as to the facts, albeit more so on the side of the plaintiff.
119. In terms of the burden of proof, it is clear in civil cases that the burden of proof is on the plaintiff and the standard, with some qualification discussed below, is on the balance of probabilities. In this regard it is also clear I think

that it is sufficient if matters requiring proof are established on an overall view of the evidence called, including the evidence called by the defendant.

120. On that view, the approach suggested by Mr Howse in his submissions, i.e. that if I find a cover up then I should find in favour of the plaintiff on the issue of the assault, is sometimes an acceptable way to approach the question of proof. However to the extent that this suggests that by finding some impropriety on the part on the defendants or the defendants' witnesses or showing that those persons are not to be believed always proves the contrary is not a valid approach. As was said by Gibbs J in *Steinberg v Federal Commissioner of Taxation* (1975) 7 ALR 491 at 504:-

“The fact that a witness is disbelieved does not prove the opposite of what he asserted.... It has sometimes been said that where the story of a witness is disbelieved, the result is simply that there is no evidence on the subject..., but although this is no doubt true in many cases it is not correct as a universal proposition. There may be circumstances in which an inference can be drawn from the fact that the witness has told a false story, for example, that the truth would be harmful to him; and it is no doubt for this reason that false statements by an accused person may sometimes be regarded as corroboration of other evidence given in a criminal case... Moreover, if the truth must lie between two alternative states of fact, disbelief in evidence that one of the state of facts exists may support the existence of the alternative state of facts...”

121. The present case seems to me is one where I am entitled to, and should, act on the simple approach set out in the first sentence quoted above. The circumstances in the present case do not seem to me to fall into any of the types of case referred to by Gibbs J which permit a contrary inference. In any event in this case, even if I were to draw a contrary inference, that could not go as far as allowing me to believe the evidence of the plaintiff or Cubillo. The approach I take is to view the evidence of all witnesses overall and reach my conclusions. Inherent in that is that the shortcomings in all the witnesses versions are viewed as a whole rather than an approach which appears, with respect, to be putting the cart before the horse. I am a long way short of finding that third fourth and fifth defendants and the witnesses

called on their behalf are lying. If it came to that I am more prepared to reach that conclusion in relation to the plaintiff and Cubillo. Moreover this highlights the problem with the approach suggested by Mr Howse in that it ignores the significant problems of the evidence of the plaintiff and his witnesses.

122. A consideration of the question of the burden of proof and the standard of proof namely the balance of probabilities involves two things. In the simplest of terms it involves being satisfied that something is more likely than not. It is necessary also that this Court must be persuaded of and have a belief in the occurrence or existence of a fact before it can be found. Facts cannot be found proved as a result of a mere mechanical comparison of probabilities independently of any belief in the existence of those facts.
123. The nature and seriousness of the allegations to be proved can also affect the standard of proof. This follows from the often quoted extract of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (“Briginshaw”) where at page 361 his Honour said;

“The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found; It cannot be found as a result of a near mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of that occurrence of a given description or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.”

124. This has subsequently been approved of by the High Court in the *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 (“Neat”). In *Neat*, the Court in approving the Briginshaw formulation said at page 449:-

“The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary “where so serious a matter as fraud is to be found”. Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting the conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not likely make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.”

125. The approach has also been approved of by the Court of the Appeal of the Northern Territory in *Rosecrance v Rosecrance* (1998) 146 FLR 298 (“Rosecrance”) where the Court of Appeal confirmed that Mildren J at first instance had correctly applied the civil standard. At page 301 the Court of Appeal said:-

“It was submitted that the question whether the plaintiff was wearing a seat belt and the likelihood of reduced degree of injury were both questions of inference and that this Court was in as good a position as the learned trial judge to decide on the proper inference to be drawn from the facts, and that the Briginshaw principle was confined to proving allegations akin to fraud or criminal misconduct. However we do not consider that the learned trial judge erred. He correctly applied the civil standard. His Honour’s reference to Briginshaw was simply an acknowledgment that the gravity of the consequences flowing from his findings were proper considerations in deciding whether contributory negligence had been proved.”

126. In this case the allegations of assault by prison officers upon the prisoner have very serious consequences for all concerned. It is self-evidently a

serious matter for the plaintiff. Likewise it is a serious matter for each of the defendants involved. In this case criminal proceedings have already been brought against Cooper and he has been tried and acquitted. However it is not criminal misconduct upon which the principle is based. It is based on the consequences flowing from the findings. This seriousness determines the appropriate weight to be given to the evidence before a finding can be acted upon in a search for the truth.

127. With the burden of proof to the appropriate standard on the plaintiff, it is not enough for the plaintiff to draw proof based on a claimed improbability of the version given by the defendants and their witness. That overlooks the requirement that this Court must be convinced of the truth of the matters the plaintiff alleges. After weighing all of the evidence I am not satisfied in that regard.
128. I therefore come to the conclusion that the plaintiff has not satisfied the burden placed on him. Although it is clear that something occurred and although there are many questions as to how it occurred, who was responsible, what the underlying or originating cause is etc, at the end of the day my task is to determine the truth of what occurred on the balance of probabilities applying a standard consistent with the foregoing discussion. The plaintiff has not persuaded me.
129. Therefore the plaintiff's claim is dismissed. There remains the issues of vicarious liability and assessment of damages. Despite my findings and in case it should become relevant I make some brief comments regarding those issues.
130. The claim against the first defendant is based on vicarious liability for the actions of the third, fourth and fifth defendants. That liability is established by the interrelationship of the *Prisons (Correctional Services) Act* and the *Police Administration Act*.

131. Section 9 of the former Act provides as follows:

“Every officer while acting as such, shall by virtue of his or her appointment be deemed to be a member of the police force and to have all powers and privileges of such a member for the purposes of the performance of his or her duties as an officer.”

132. No issue was taken that the third, fourth and fifth defendants are “officers” within the meaning of that term in that Act. Each gave evidence to that effect and that was not challenged. Presumptions apply as to the regularity of their appointment.

133. Section 163(1) of the *Police Administration Act* provides as follows;

“Subject to subsection (3), the Crown is liable in respect of a tort committed by a member in the performance or purported performance of his duties as a member in like manner as a master is liable in respect of a tort committed by his servant in the course of the employment of that servant and, shall in respect of such tort, be treated for all purposes as a joint tortfeasor with the member.”

134. The foregoing establishes, on a statutory basis, the liability of the first defendant for the actions of the third, fourth and fifth defendants in specified circumstances. It overrules the common law rule that the relationship of master and servant did not exist between the Crown and an appointed public officer such as a member of the police force and other persons in its civil service. See *AG NSW v Perpetual Trustee Company* (1955) 92 CLR 113 for a statement of the principle and *Lackersteen v Jones* [1988] 92 FLR 6 (“Lackersteen”) which acknowledges the application of the principle.

135. Lackersteen also acknowledged the statement of principle in *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 which is essentially that an employer is liable for an act of an employee where the act done comes within the scope of the employee’s authority in that the employee is performing either an act actually required of him by the employer or an act incidental to the employment. In Lackersteen, Asche CJ declined the claim for vicarious

liability in reliance of bad faith on the part of the police officers involved. I consider that that says no more than that the police officers exceeded their authority and hence their actions went beyond the scope of their employment. As such, those actions were neither authorised by the Northern Territory nor was the excess complained of incidental to the employment.

136. For the purposes of this discussion I assume that all the claims made by the plaintiff as to the various assaults alleged by him are established. On that scenario, it is my view that the Northern Territory would be vicariously liable for the acts of Keirs and Craven but not for the acts of Cooper. Even the plaintiff conceded that there was nothing improper in the actions of Keirs and Craven in taking hold of him given he conceded they had cause to believe that he (Stevens) may have acted against Cooper at that time. What is alleged against them is that they have assaulted the plaintiff by maintaining their restraint upon him while Cooper punched or slapped or gouged or kneed Stevens. There is no evidence that they knew what Cooper intended to do when he confronted Stevens in the corridor. They were however entitled to restrain Stevens for the reasons aforesaid. The only fault on their part is that they may have restrained Stevens too long and in particular while Cooper assaulted him but without any forewarning that that might have occurred. In those circumstances and given the time span involved, at the very worst it could be alleged against Keirs and Craven that they have acted in a way equivalent to what was described as the kind of excessive zeal which Asche CJ in Lackersteen acknowledged would come within the concept of vicarious liability.
137. Cooper however has gone well beyond excessive zeal. I think this is so despite the submissions of Mr Howse that what Cooper did was unplanned and occurred on the spur of the moment and therefore Cooper's actions came within the concept, also discussed in Lackersteen, of an improper mode of doing an unauthorised act. If I were to accept the version of events put forward by Stevens, Cooper's actions would be well beyond excessive zeal

and well beyond an improper mode of performing an authorised act. Contrary to the submissions of Mr O'Loughlin, I think that Cooper was entitled to speak to Stevens about "his problem" after the abuse handed out by Stevens while in the air lock. In doing so, contrary to Mr O'Loughlin's submissions, I am of the view that Cooper was performing a duty or function of his position and furthering his employer's interests. That interest is the maintenance of discipline at the prison, which I think is an essential matter in the proper running of any prison. I therefore would not deny that Cooper was acting in the performance of his duties to that point. However, the unnecessary and persistent nature of the assault alleged against Cooper after Stevens was satisfactorily restrained by Keirs and Craven leads me to the conclusion that Cooper's actions were not "in the performance or purported performance of his duties". Accordingly the Northern Territory would not be vicariously liable for his actions.

138. On the question of assessment of damages, at best the evidence led on behalf of the plaintiff shows minor injuries. Whatever bruising or discomfort existed, if any, resolved within two days given the evidence of Dr Morgan. Beyond that the only physical injury is the two centimetre laceration found by Dr Morgan on the inside of the plaintiff's cheek. He considered that to be minor and not warranting any treatment. The plaintiff however said that he could not eat on the night in question as a result of that. I have already said that I consider that to be an exaggeration. Stevens also gave evidence that he felt uneasy for "a while" after the incident suggesting psychological issues. He said that he did not trust anyone except prisoners, a curious statement in itself. The evidence of Dr Kenny is relevant at this point. He confirms that the only psychological type injury sustained by Stevens as a result of this assault was a temporary aggravation of his pre-existing depressive condition. He however described this as minor and transient. He said that the plaintiff's condition was of the type that fluctuated in severity. Stevens' evidence as to the effects and duration was vague and flimsy. Dr Kenny did

not express it any more precisely and I think the evidence establishes a very nominal aggravation.

139. Having regard to the foregoing and all the evidence before me, the plaintiff's claim in the prayer for relief (\$20,000.00) is exceptionally optimistic. I would award the sum of \$4,000.00 for general damages. No other head of damage was claimed. I would allow interest on general damages in accordance with the principles in Rosecrance that I would fix at \$240.00. I would award that amount against each of the third, fourth and fifth defendants. As I have indicated I would find the first defendant is vicariously liable in the case of the fourth and fifth defendants but not in the case of the third defendant.

Dated this 10th day of May 2002.

V M LUPPINO
STIPENDIARY MAGISTRATE