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# WOTTON V QUEENSLAND AND PALM ISLAND'S QUEST FOR JUSTICE

by Stewart Levitt and Daniel Meyerowitz-Katz

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## INTRODUCTION

*Wotton v Queensland*<sup>1</sup> is a representative action brought against the State of Queensland by lead Applicants Lex Wotton, his wife Cecilia, and mother Agnes, on behalf of the Indigenous population of Palm Island affected by the tectonic events that occurred in November 2004. The writers are from Levitt Robinson Solicitors, who act for the Applicants.

The Applicants allege systemic racial discrimination by the Queensland Police Service ('QPS') in the aftermath of the Palm Island Riots in November 2004, which followed the death in police custody of Cameron Doomadgee (posthumously known as 'Mulrunji'). The Applicants contend that throughout, the QPS demonstrated a systemic and wilful disregard for the human rights of the Indigenous residents of Palm Island. Specifically, the Applicants allege that the QPS breached the human rights of the people of Palm Island:

1. to equality before the law and equal protection of the law<sup>2</sup>
2. to security of person<sup>3</sup>
3. to liberty of movement<sup>4</sup>
4. to not be subjected to inhuman and degrading treatment or punishment<sup>5</sup>
6. to police protection.<sup>6</sup>

The Applicants allege that, had non-Indigenous people been placed in a similar situation (although it is inconceivable that they could have been), they would have had their rights respected. Accordingly, the Applicants allege that the QPS and the State of Queensland were in breach of s 9 of the Commonwealth *Racial Discrimination Act 1975* ('RDA').

A similar complaint to the Human Rights and Equal Opportunity Commission (as it then was) was previously abandoned because it had the propensity to compromise Lex Wotton's defence and grave criminal charges against him, made by the Queensland State in the context of the riots.<sup>7</sup> The current claim was commenced in the Australian Human Rights Commission on 25 March 2010 whilst Lex Wotton remained imprisoned for 'riot causing damage',

and was conciliated in Townsville in February 2012, with the Anna Bligh Government in caretaker mode.

On 13 June 2013, after the Campbell Newman Government had been elected in Queensland, the 2010 claim was terminated in the Australian Human Rights Commission on the ground that there was no reasonable prospect of settlement. Proceedings were commenced in the Federal Court on 9 August 2013.

This article will provide a brief outline of the relevant events, focusing on the actions of the QPS and the Queensland Government,<sup>8</sup> as well as outlining the legal claim and its justification.

## DEATH IN CUSTODY

At about 10.20am on 19 November 2004, Mulrunji walked past two police officers on Dee Street, Palm Island: Senior Sergeant Christopher Hurley, the Senior Police Officer on Palm Island, and Police Liaison Officer Lloyd Bengaroo.

Mulrunji was known as a "happy-go-lucky" character who spent his time hunting and fishing, and had not previously had trouble with the law. He had a weakness for alcohol but was otherwise a 36-year-old man in good health. He was well loved by his partner and his stepson.

Whilst passing Hurley and Bengaroo that morning, Mulrunji challenged Bengaroo as to why he, an Indigenous police officer, was helping to arrest other Indigenous persons. Mulrunji continued walking and then, depending on the account, either began singing, or turned and swore at Hurley and Bengaroo. Hurley arrested Mulrunji for public nuisance.

En-route to the police station, Mulrunji vociferously protested his arrest. When Hurley opened the doors to the "paddy-wagon", Mulrunji resisted exiting the police vehicle. Hurley dragged him out. They exchanged blows. The two continued to grapple with each other and, according to Hurley, fell through the door of the station.

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Between leaving the police van and being dragged into a cell, Mulrunji suffered a black eye, a bruised jaw, four broken ribs, and a severely ruptured liver caused by 'severe compressive force applied to the upper abdomen'.<sup>9</sup> He lay in the police cell screaming and writhing for about 30 minutes, without any attempt being made by police to attend to him or to call for medical assistance. He died at about 11am from intra-abdominal haemorrhaging.<sup>10</sup>

When later asked about this incident, Hurley at first said that he had landed next to Mulrunji as they fell together through the door of the police station. Hurley subsequently changed this account to his landing on top of Mulrunji. The change occurred after medical evidence had shown that Hurley's falling on Mulrunji was a plausible alternative explanation for the ruptured liver to Hurley's having beaten or kicked Mulrunji to death.<sup>11</sup>

## INVESTIGATION

Queensland's Crime and Misconduct Commission ('Misconduct Commission') concluded in 2010 that the QPS investigation into the death of Mulrunji, conducted on 19 and 20 November 2004 by Detective Inspector Warren Webber, Detective Senior Sergeant Raymond Kitching, and Detective Sergeant Darren Robinson, 'was seriously flawed, its integrity gravely compromised in the eyes of the very community it was meant to serve'.<sup>12</sup> It is beyond the scope of this article to detail all of the flaws in the investigation but it is worthwhile to parse a salient few.

**The community had long both experienced and witnessed harsh treatment under the Queensland 'justice' system, often leading to their incarceration.**

First, contrary to official police policy,<sup>13</sup> there were close associations between the investigating officers and Hurley, the man in whose custody Mulrunji's death occurred. Darren Robinson, the lead officer dispatched to Palm Island to investigate how Mulrunji had been killed, was a friend of Hurley's. The police investigation team fraternised with Hurley throughout the investigation. Hurley met them at the airport on their arrival at Palm Island and drove Webber and Kitching to the police station. He also hosted the investigating officers at the police barracks, where he lived, for a barbecue and beer that evening, prior to being questioned by them.

Second, there was the treatment of Bengaroo, the Indigenous police officer involved in the incident. Hurley was 'somewhat

disparaging' towards him, affording Bengaroo neither authority nor respect.<sup>14</sup> Despite both Hurley and Bengaroo being present at Mulrunji's arrest, Hurley alone performed the re-enactment for police investigators.

In his interview with Inspectors Webber and Williams, Bengaroo explained that he did not follow Hurley and Mulrunji into the police station as he 'was thinking, um, if I see something I might get into trouble myself'. Webber simply responded 'Oh, OK' and moved on. The officers did not explore what exactly Bengaroo had been afraid of seeing.<sup>15</sup>

Third, two separate Indigenous witnesses to Mulrunji's plight in the police lock-up claimed to have seen Hurley assault Mulrunji. When Officer Kitching filled out his report to the Coroner, he did not mention the assault allegations, so the pathologist conducting the autopsy was not informed of the allegations of serious assault. Kitching did, however, see fit to include the claim that Mulrunji had, in the past, drunk bleach.<sup>16</sup> Hurley's towering physical stature—particularly compared with Mulrunji's—was also no small consideration.

## THE RIOT

The investigating officers ultimately found no wrongdoing on behalf of the police regarding Mulrunji's death. For the Palm Island community, this triggered a venting of indignation, grief and anger. The community had long both experienced and witnessed harsh treatment under the Queensland 'justice' system, often leading to their incarceration, and here was a police officer who was, in their eyes, "getting away with murder".

When the results of the post-mortem were read out at a public meeting on the island on 26 November 2004, it led to almost a quarter of the island's adult population rioting. Some 300-400 people moved on the police station, burnt it down, and chased the police officers out—demanding that they leave the island for good. Before long, however, police reinforcements arrived. The protesters dispersed in despair, forlornly returning to their homes.

Later that day, the QPS mobilised its elite Special Emergency Response Team ('SERT'), the special weapons and tactics arm of the QPS, and sent them to Palm Island. Equipped with assault rifles and riot gear, and masked by balaclavas, SERT spent the morning of 27 November 2004 raiding the homes of Indigenous residents identified as suspects by police Sergeant Darren Robinson.

Witness statements taken by the Levitt Robinson team record allegations of masked and uniformed police deploying tasers against unarmed (and often cooperative) suspects and forcing

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children to lie face down at gunpoint, as they ransacked homes without warrant or excuse. No warrant had been obtained to arrest any person or to enter any premises. SERT purported to do this under an 'emergency situation'<sup>17</sup> which Detective Inspector ('DI') Webber had declared in the wake of the riot; supposedly in accordance with s 5 of the Queensland *Public Safety Preservation Act 1986* ('PSRA'), which applied to such emergencies as explosions, fires, oil or chemical spills and aircraft accidents.

DI Webber claimed that the 'emergency situation' fitted the description of 'any other accident that causes or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment'. Not only is it doubtful that an 'accident' under PSRA s 5 had occurred, but if there were an 'emergency situation', it had manifestly ended once the rioters had dispersed. Yet the declared 'emergency situation' remained under proclamation until 8am on 28 November 2004 and was used as a pretence for the violent arrests of persons who, at the time of arrest, offered no resistance and posed no threat to law and order.

### **THE WASH-UP (OR WHITEWASH) INQUESTS**

The inquest into Mulrunji's death was not completed until 27 September 2006.<sup>18</sup> Acting State Coroner ('ASC') Christine Clements found that Hurley was responsible for Mulrunji's death. In December 2008, Hurley challenged the findings of the Inquest.<sup>19</sup> Eventually, the Queensland Court of Appeal overturned the ASC's finding that Hurley had caused Mulrunji's death by punching him, but left the balance of her findings intact.<sup>20</sup>

The case was remitted to the District Court to re-examine the cause of death. Deputy Chief Magistrate Hine found that Hurley fell on top of Mulrunji, got up, dragged Mulrunji into the police station, punched him in the head three times, then dragged him into the cell. His Honour did not, however, determine whether Mulrunji had been killed accidentally, deliberately, or recklessly.<sup>21</sup> His Honour made it clear that the reason for his inconclusive findings was the intentional cover-up and manipulation of evidence by the officers involved in the initial QPS investigation.<sup>22</sup> However, none of those officers were ever charged for perverting the course of justice. Rather, they were promoted and decorated.<sup>23</sup>

### **REVIEWS**

On 19 December 2006, an Investigation Review Team ('Review Team') was formed to review the investigation of November 2004. The Review Team took until November 2008 to find that the investigators had done nothing wrong. The Misconduct Commission then began a 'review of the review'.

The Misconduct Commission finally released its report in June 2010. The report was damning of the investigation into the death in custody, finding that the investigating officers had 'failed the people of Palm Island, the broader Indigenous community, and the public generally' and had 'damaged public confidence in the integrity of the QPS'.<sup>24</sup>

The Misconduct Commission further concluded that the investigating officers had failed to comply with relevant police procedures and, worse, had 'not demonstrated any insight into their failings'.<sup>25</sup> The Misconduct Commission also concluded that the OPS' *Palm Island Review* was focused on simply allowing the officers concerned to provide largely unchallenged explanations for their conduct ... rather than finding out what actually happened.<sup>26</sup>

After the Commission's report, the QPS did not take any disciplinary action against any of the officers involved. Misconduct Commission Chairperson, Martin Moynihan labelled that decision 'almost incomprehensible'.<sup>27</sup>

### **PROSECUTION AND TRIAL**

After receiving the report of the Inquest, in direct contradiction to the Inquest's findings, the DPP determined that 'the only satisfactory explanation for the fatal injury was an accidental fall' and declined to press charges against Hurley.<sup>28</sup> Under substantial public pressure, including from the Howard Government, on 4 January 2007 the Queensland Attorney-General appointed former NSW Supreme Court Chief Justice, Sir Laurence Street, to review the DPP's decision not to prosecute.

Sir Street overturned the DPP's decision on 25 January 2007, finding that, 'a jury could well conclude that the injury was inflicted by Senior Sergeant Hurley's knee and that there is no reasonable hypothesis of how the injury was sustained that is consistent with ... an accident'.<sup>29</sup> Hurley was acquitted of manslaughter by a Townsville jury five months later, after six days of what could almost be described as a 'show trial'.

### **THE CLAIM**

The Applicants allege that it would be inconceivable for the above events to have occurred anywhere in Queensland other than in a remote Indigenous community. Elsewhere, police would tread extremely carefully when someone dies in custody—especially from an apparently violent death. A suspect officer would be suspended and a meticulous inquiry conducted. Similarly, the idea of a heavily armed, commando-like police unit spending a whole day engaged in storming into dwellings without warrant and arresting unarmed residents in front of their children—who were

also commonly held at gunpoint—would simply be inconceivable in most of Australia.

Had anything similar occurred in a non-Indigenous community, the reaction of the government would have been entirely different. The police officers involved would have lost their careers. Government officials would have distanced themselves immediately, and would have quickly arranged to compensate the victims. In contrast, Chris Hurley was quietly promoted to Acting Inspector<sup>30</sup> and, in 2008, the Bligh Government gave Darren Robinson an award for his ‘bravery’ on Palm Island.<sup>31</sup>

Section 9 of the RDA is an exotic law, and notoriously difficult to employ. There are more straightforward causes of action in tort or administrative law potentially arising from the relevant facts. However, after witnessing the Kafkaesque series of investigations, inquiries and reviews, with harsher and harsher sentences imposed on accused ‘rioters’<sup>32</sup> whilst the police officers were not only not disciplined for their conduct, but promoted and rewarded, the Applicants relinquished all hope of achieving justice through the Queensland State legal system and have instead turned to the federal jurisdiction.

## CONCLUSION

The fatal breakdown of law and order on Palm Island because of the dereliction of duty by the state police service triggered the people of Palm Island to riot in November 2004. They rioted against a system that, so far as they could see, treated them as inferior to other Australians.

As the Misconduct Commission noted in 2010: ‘considerable time has passed since the events... however... the desire for resolution of these matters should not take precedence over the need for justice to be seen to be done.’<sup>33</sup> Four years after the Commission’s report, we are still waiting for justice.

Despite everything that has happened, the Applicants have still placed their trust in the legal system, and are seeking justice through it. The Palm Island community want to comfortably entrust the police with their protection, and this can only occur if there is acknowledgement and redress for the wrongdoing by the perpetrators and their superiors. Specifically, the Applicants seek two things: compensation for the Palm Island community, and a declaration by the Court or a public acknowledgement by the State of Queensland that what occurred was unjust and unacceptable.

According to Palm Island officials who spoke to the writers, there has been a measurable, albeit small, improvement in conditions in the community over the past couple of years. Nevertheless, the

spectre of November 2004 lingers, and will continue to do so until the structures of the state fall into line with Australia’s international obligations with respect to Indigenous civil rights.

*Stewart Levitt is the Principal of Levitt Robinson Solicitors and has represented Lex Wotton since 2005, including at his criminal trial and in his case in the High Court.*<sup>34</sup> *Daniel Meyerowitz-Katz is a solicitor at Levitt Robinson Solicitors.*

- 1 *Wotton v Queensland* (2013) QUD535.
- 2 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) art 26(‘ICCPR’); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 12 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(1) (‘ICERD’).
- 3 ICERD art 5(b); ICCPR art 9.
- 4 ICCPR art 12.
- 5 ICCPR art 7.
- 6 See generally, *R v Metropolitan Police Commissioner* [1968] 2 QB 118.
- 7 See *Wotton v Queensland* [2007] FCA 280.
- 8 For more extensive accounts see: *The Tall Man* (directed by Tony Krawitz, Blackfella Films, 2011); Joanna Watson, *Palm Island: Through a Long Lens* (Aboriginal Studies Press, Canberra, 2010).
- 9 Office of the State Coroner (Qld), Finding of Inquest – ‘Inquest into the Death of Mulrunji’ (14 May 2010) COR 2857/04(9) [94] (‘*Second Inquest*’).
- 10 Office of the State Coroner (Qld), Finding of Inquest – ‘Inquest into the Death of Mulrunji’ (27 September 2006) COR 2857/04(9) 7 (‘*First Inquest*’).
- 11 *Ibid* 24-7.
- 12 Queensland Crime and Misconduct Commission, *CMC Review of the Queensland Police Service’s Palm Island Review* (June 2010) xxiii, 164 (‘*CMC Report*’).
- 13 QPS, *Operational Procedures Manual* (October 2007), s 1.17.
- 14 *First Inquest*, above n 10, 5.
- 15 *Ibid* 5.
- 16 *Ibid* 10.
- 17 *Public Safety Preservation Act 1986* (Qld) s 8.
- 18 *First Inquest*, above n 10.
- 19 *Hurley v Clements* [2008] QDC 323.
- 20 *Hurley v Clements* (2009) 1 Qd 215.
- 21 *Second Inquest*, above n 9, [364]-[367].
- 22 *Ibid* [333]-[347].
- 23 See below, n 29-30.
- 24 *CMC Report*, above n 12, xxiv.
- 25 *Ibid*, xxv.
- 26 *Ibid*.
- 27 Queensland Crime and Misconduct Commission, ‘QPS takes no disciplinary action against Palm Island officers’ (Media Release, 15 March 2011).
- 28 Queensland, ‘Palm Island Death in Custody Cameron Doomadgee’ Report by Sir Laurence Street AC KCMG QC (2007) 1 < <http://www.parliament.qld.gov.au/documents/TableOffice/TabledPapers/2007/TP1647-2007.pdf>>.
- 29 *Ibid*.
- 30 ‘Palm Island officer Chris Hurley promoted while fellow officers face sanctions’, *News.com.au* (online), 17 June 2010 <<http://www.news.com.au/national/palm-island-officer-chris-hurley-promoted-while-fellow-officers-face-sanctions/story-e6frfkvr-1225880670086>>.
- 31 Michael McKenna, ‘Bravery awards to police who ran’, *The Australian*, 27 October 2008, <<http://www.theaustralian.com.au/archive/news/bravery-awards-to-police-who-ran/story-e6frg6oo-111117862388>>.
- 32 See, eg, *R v Poynter* [2006] QCA 517; *R v Dunne* [2006] QCA 290; *Clumpoint v DPP* [2005] QCA 43.
- 33 *CMC Report*, above n 12, xxiii.
- 34 *Wotton v Queensland* (2012) 246 CLR 1.