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## SUPREME COURT OF THE NORTHERN TERRITORY

**LACKERSTEEN v JONES and Others (No. 2)**

Asche CJ

**23 September, 15 November 1988 — [1988] NTSC 72; (1988) 93 FLR 442****COSTS – BULLOCK/SANDERSON ORDER – WHICH ORDER SHOULD BE MADE – PRINCIPLES GOVERNING THE MAKING OF SUCH ORDER.****Principles to be established before a Court can make a "Bullock" or "Sanderson" Order.**(See also *Bankamerica Finance Ltd v Nock and Anor* (1988) 1 All ER 81; MC 25/1988. Ed.)

**ASCHE CJ: [FLR 442]** In this case I gave judgment for the plaintiff against the first and second defendants for the torts of wrongful arrest, false imprisonment and assault, and ordered those defendants to pay the plaintiff's costs of the action against them. By this statement of claim the plaintiff alleged that the third defendant was vicariously liable for the torts of the first and second defendants. I found that in committing those torts the first and second defendants were not acting in the course of or within the scope of their employment with the third defendant. I reserved the question of the third defendant's costs since it appeared that there would be argument as to whether or not a "Bullock" or "Sanderson" order should be made that is, either that the [443] plaintiff pay the costs of the third defendant with a consequent order that the costs to be paid by the first and second defendants to the plaintiff include the costs which the plaintiff must pay to the third defendant (a "Bullock" order – see *Bullock v London General Omnibus Co* [1907] 1 KB 264; [1904-7] All ER 44) or the more direct route whereby the first and second defendants be ordered to pay the costs of the third defendant (a "Sanderson" order – see *Sanderson v Blyth Theatre Co* [1903] 2 KB 533). The latter form of order was described by Williams J in *Johnson's Tyne Foundry Pty Ltd v President, Ratepayers and Councillors of the Shire of Maffra* [1948] HCA 46; (1948) 77 CLR 544 at 572 as "the modern form of order".

Submissions have now been put to me on those questions. The plaintiff submits that either a "Bullock" or "Sanderson" order be made. Counsel for the first and second defendants argues that neither course is appropriate and the proper order is simply that the plaintiff pay the costs of the third defendant. Counsel for the third defendant has announced that on behalf of his client he takes no part in the argument. The defence of the third defendant was a denial that it was vicariously liable for the torts of the first and second defendants coupled with a denial of the plaintiff's allegations as to those torts. During the trial, however, and despite its denial of those allegations the third defendant took no part in the issues between the plaintiff and the first and second defendants; contenting itself with a submission at the end of the evidence, that if the plaintiff's allegations were proved, they established that the first and second defendants were not acting within the scope of or in the course of their employment with the third defendant; which submission succeeded. However, the third defendant had also involved itself to this extent, that it had served on both the first and second defendants notices claiming indemnity or contribution from them in respect of any sum which the plaintiff might recover against it.

[His Honour referred to further aspects of the case and to a number of authorities concerning the making of Bullock/Sanderson orders and continued] ... [449] From those cases therefore the following principles seem to be established before a judge can make a "Bullock" or "Sanderson" order.

1. It must be seen to have been reasonable and proper for the plaintiff to have sued the successful defendant.
2. The causes of action against two or more defendants need not be the same but they must be substantially connected or dependent the one on the other.
3. While it is essential to find that the plaintiff has acted reasonably and properly that alone is not sufficient. The court must find something in the conduct of the unsuccessful defendant which makes it a proper exercise of discretion.

4. Finally, in considering whether to make such an order, the court should, in the exercise of its discretion balance overall two considerations of policy: the first, that an unnecessary multiplicity of actions should not be forced on litigants, so that a plaintiff who acts reasonably in joining two or more defendants should not be penalised or lose the fruits of his victory in costs on the basis that he should have either elected or taken separate actions; secondly, that an unsuccessful defendant should not have to pay more than one set of costs merely because he is unsuccessful.

In this case the first and second defendants admitted in the pleadings that they were servants of the Crown. They denied all allegations relating to the torts alleged. They took a defence under s162 of the *Police Administration Act* which, had it been successful, would have protected them as servants of the Crown for acts done in pursuance of the statute and thereby they relied on their office as members of the Police Force and put in issue that their acts were done as servants of the Crown. They served notices of contribution against the third defendant. The conduct of their case was based on the proposition that their acts were not tortious and were done as part of their duties as police officers and that they acted correctly and in no way improperly within the ambit of their duties.

Hence the conduct of their case inevitably involved the third defendant; for the arrest and detention of the plaintiff and any physical restraint of him, and even on the facts admitted by the defendants, must inevitably have been tortious if done by a private individual and could only be justified as an exercise of Police power under the authority of the third defendant.

Furthermore, the issues raised by the statement of claim and the defences pointed to a middle way as a real possibility, namely that torts had been committed by the first and second defendants for which the third defendant was vicariously liable. Had such a position been reached the first and second defendants would, through their notices of contribution, have claimed against the third defendant. Whether they would have been successful is not to the point. The point is that the first and second defendants thereby again involved the third defendant.

I find that the plaintiff's costs against the third defendant were reasonably and properly incurred and in all the circumstances it appears to me that a [450] "Bullock" or "Sanderson" order should be made and the most convenient course would be the latter. I order that the first and second defendants pay the costs of the third defendant to be taxed in default of agreement. Further, on the question of costs overall I certify that the proceedings were proper for the engagement of senior counsel.

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