NEW SOUTH WALES COURT OF APPEAL

CITATION: State of NSW v Ibbett [2005] NSWCA 445

FILE NUMBER(S):
41119/04

HEARING DATE(S): 14 October 2005

JUDGMENT DATE: 13/12/2005

PARTIES:
State of New South Wales (Appellant)
Dorothy Isabel Ibbett (Respondent)

JUDGMENT OF: Spigelman CJ Ipp JA Basten JA

LOWER COURT JURISDICTION: District Court

LOWER COURT FILE NUMBER(S): DC 329/02

LOWER COURT JUDICIAL OFFICER: Phegan DCJ

COUNSEL:
J E Maconachie QC/K. Crysustomou (Claimant)
J J Garnsey SC/B E Kinsella (Opponent)
K M Richardson (Intervening for Attorney-General (NSW))

SOLICITORS:
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CATCHWORDS:
Damages – - assault and trespass committed by police officers - exemplary damages – aggravated damages - whether award of exemplary damages and/or aggravated damages against the State appropriate – whether award precluded by s21 of Civil Liability Act (2002) (NSW) – whether s3B(1)(a) operates to exclude the application of the Act – whether the proceedings were with respect to 'an intentional act done with intent to cause injury' - consideration of principle of coherence

LEGISLATION CITED:
Civil Liability Act 2002 (NSW)
Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW)
Constitution Act 1902 (NSW)
County Court (Jurisdiction) Act 1972 (Vic)
Law Reform (Vicarious Liability) Act 1983 (NSW)
Magistrates' Court Act 1971 (Vic)
Mental Health Act 1990 (NSW)

Police Act 1990 (NSW)

DECISION:
(1) Appeal dismissed
(2) Allow the cross-appeal in part and vary the orders in the District Court so as to
(a) set aside orders 1 and 2
(b) in relation to the assault, add an additional amount of $10,000 on account aggravated damages; and
(c) set aside the awards of exemplary damages and award in lieu thereof
(i) an amount of $25,000 with respect to the assault, and
(ii) an amount of $20,000 with respect to the trespass
(3) Direct that judgment be entered for the Plaintiff in the sum of $105,000
(4) Order the Appellant to pay the Respondent's costs of the appeal and cross-appeal

JUDGMENT:

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 41119/04
DC 329/02

SPIGELMAN CJ
IPP JA
BASTEN JA

13 December 2005

STATE OF NEW SOUTH WALES v DOROTHY ISABEL IBBETT

This is an appeal from a decision of the District Court awarding aggravated and exemplary damages against the State of NSW and in favour of Mrs Ibbett in relation to the unlawful conduct of police officers.

At about 2am in the morning, the son of Mrs Ibbett was being pursued by two police officers who suspected the son of having committed a traffic offence. The son drove into Mrs Ibbett's garage and closed the garage door. One of the police officers dived under the closing door and drew his revolver, pointed it in the direction of the son and sought to arrest him. Mrs Ibbett heard the commotion and entered the garage through a side door and told the officer to leave. The police officer pointed the revolver at Mrs Ibbett briefly, demanding that the door be opened for his fellow officer, before turning the gun back on the son. The police officers arrested the son and conducted a strip search on him in the vicinity of Mrs Ibbett.

Mrs Ibbett was successful in her action for trespass and assault. The trial judge awarded $15,000 in general damages for the assault and $10,000 in exemplary damages. In relation to the trespass, the trial judge awarded $20,000 in aggravated and $20,000 in exemplary damages.

The primary issue for determination by the Court of Appeal was whether the award of exemplary damages was precluded by the *Civil Liability Act* 2002 (NSW) and whether, in any event, the award was justified in the circumstances.

Held in relation to the Civil Liability Act:

Per Spigelman CJ (Basten JA agreeing):

1. Section 21 of the *Civil Liability Act* does not preclude the award of exemplary damages in this case: at [2].

2. The proceedings were with respect to "an intentional act…done with intent to cause injury" within s3B(1)(a) and therefore s21 is excluded: at [5]–[12].

3. In the alternative, this was not an action "where the act or omission that caused the injury…was negligence". While it is possible to succeed in trespass to the person on the basis of negligent conduct, the case was not run on that basis: at [18]–[19].

Per Ipp JA (otherwise agreeing with Spigelman CJ):

The definition of 'injury' in s11 should be applied to the term injury in s 3B(1)(a). The word 'injury' is wide enough to encompass anxiety and distress. Consequently, Section 3B(1)(a) operates to exclude the application of the Act, including s21: at [120]–[130].

Held in relation to exemplary damages for assault:

Per Spigelman CJ:

1. Turning the weapon on Mrs Ibbett was outrageous conduct justifying a finding of a contumelious disregard of Mrs Ibbett's rights and was deserving of the censure of the Court. This was one of the rare cases in which an award of exemplary damages was appropriate: at [28]

2. The findings by the trial judge that the police officer acted in a "reactive and impetuous way" in intentionally causing Mrs Ibbett fear and apprehension of harm supported a finding of conscious wrongdoing: at [33].

3. Even if the officer was not "conscious" of his wrongdoing, this was still an appropriate case for an award of exemplary damages. Subjective advertence to or knowledge of actual wrongdoing is not essential: at [34]–[52]

   Gray v Motor Accident Commission (1998) 196 CLR 1 and *Lamb v Cotogno* (1987) 164 CLR 1 applied.

   New South Wales v Riley (2003) 57 NSWLR 496 followed.

4. The amount of $25,000 in damages including $10,000 in exemplary damages for the assault was not sufficient to serve the objectives of punishment and deterrence or to manifest the Court's disapproval of the conduct. The award of exemplary damages should be increased to $25,000: at [78]–[80]

   Adams v Kennedy (2000) 49 NSWLR 78, *Lee v Kennedy* (2000) NSWCA 153 and *Vignoli v Sydney Harbour Casino* (2000) Aust Torts Reps ¶81-541 referred to.

Per Ipp JA (dissenting in relation to quantum)

1. Whether vicarious liability will support a claim for exemplary damages is not yet finally settled in Australia: at [139].

2. The dismissive attitude that the offending officer had towards the 're-education program' could not properly be used to bolster the justification for an award of exemplary damages: at [148].

   XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australasia) Pty Ltd (1985) 155 CLR 448; *Ali v Hartley Poynton Ltd [*2002] VSC 113; *S v The Attorney-General* [2003] NZCA 149 and *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 referred to.

3. It is wrong in principle to increase exemplary damages on the ground that other persons (not directly involved in the wrongful conduct) need to learn a lesson in circumstances where the State is vicariously liable for the conduct of identified police officers and no-none else: at [159].

4. It could never be appropriate and would be wrong in principle to determine the quantum of exemplary damages by having regard, globally, to conduct relating to a set of different causes of action: at [156].

   Adams v Kennedy (2000) 49 NSWLR 78 not followed.

5. *Lamb v Cotogno* does not support the proposition that 'the intention of exemplary damages is that they will cause a 'smart' or 'sting' and in any event it is difficult to comprehend how an increase in the award from $10,000 to $25,000 would cause a sting, particularly if regard is had to the State's annual budget: at [161] – [162].

   Lamb v Cotogno (1987) 164 CLR 1; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australasia) Pty Ltd* (1985) 155 CLR 448; *Commonwealth v Murray* [1988] Aust Torts Reports ¶80-217 and *Backwell v AAA* [1997] 1 VR 183 referred to.

Per Basten JA:

1. An award of exemplary damages, being designed to punish the defendant and to deter him or her and others from such conduct, is not concerned with any actual effect on the plaintiff or the extent of any injury: at [232].

2. The identification of the conduct by such epithets as contumelious, insulting, insolent, outrageous, or high-handed fastens on, as a critical element, the state of mind of the tortfeasor: at [233].

3. The phrase "conscious wrong-doing" does not require consciousness of each of the elements of a crime or tort, nor does disregard of a person's "rights" require identification of a particular legal right: at [234].

4. The quality of the conduct will depend on circumstances including the nature of the power being exercised by the tortfeasor and the seriousness of the effect on the plaintiff. The conferral of special power on a police officer is subject to jealously enforced conditions, designed to ensure that basic human rights and freedoms are not compromised beyond that which is demonstrably justifiable in the public interest: at [235].

5. The intention of exemplary damages is that they will cause a "smart or sting" and should not therefore be for an amount which is nominal or insignificant: at [236].

6. While there was no specific finding as to the state of mind of the offending police officer, there was at least implicitly a sufficient factual basis for an award of exemplary damages for the assault: at [244].

7. There is merit in making a global award for exemplary damages: at [280].

   Lamb v Cotogno (1987) 164 CLR 1; *Adams v Kennedy* (2000) 49 NSWLR 78, *Lee v Kennedy* (2000) NSWCA 153; *New South Wales v Riley* (2003) 57 NSWLR 496 and *Port Stephens Shire Council v Tellamist Pty Ltd* (2004) 235 LGERA 98 discussed.

<u>Held in relation to exemplary damages for trespass to land:</u>

Per Spigelman CJ:

1. An occupier of land has a right to expect that his or her guests will not be assaulted by policemen who seek to inappropriately arrest one of them at gunpoint, strip search him and then search his vehicle on the premises. The conduct of the police did not just show a disregard for the rights of the son, it also showed a disregard of her right, as owner of the property, to have her guests undisturbed: at [58].

2. While there was no basis for a finding of consciousness of wrongdoing, the conduct was highhanded and deserving of condemnation of the Court: at [59].

3. The award of $20,000 is an appropriate amount to serve as a deterrent and to mark the disapproval of the Court: at [102].

Per Ipp JA:

1. A property owner has no right to claim damages because his or her guests have been disturbed.

2. The finding by the trial judge that the issues relating to the lawfulness of the entry were 'complex' militates against a finding of reckless wrongdoing: at [177].

3. The award for exemplary damages for trespass to land should be set aside: at [175] – [183].

Per Basten JA (otherwise agreeing with Spigelman CJ):

1. The findings made justify the conclusion that when the police officer dived under the garage door, he was indifferent as to whether he had lawful authority for remaining on the plaintiff's land and he acted in a manner which showed palpable disregard for her rights as a proprietor. There was therefore a sufficient basis for the award of exemplary damages for the trespass to land: at [257].

2. There is merit in making a global award of exemplary damages: at [276].

   Adams v Kennedy (2000) 49 NSWLR 78 discussed.

Held in relation to aggravated damages for assault:

Per Spigelman CJ (otherwise agreeing with Basten JA):

The evidence of the offending officer in relation to the 're-education programme' was particularly offensive. The 'programme' was perfunctory in the extreme: at [75].

Per Ipp JA:

The conduct of the offending officer in assaulting Mrs Ibbett went 'beyond ordinary human fallibility'. The amount awarded for general damages ($15,000) was towards the middle of the range. An additional amount of $10,000 on account of aggravated damages should be awarded: at [136].

State of New South Wales v Riley (2003) 57 NSWLR 496 followed.

Per Basten JA:

1. It is clear that the trial judge intended to include, as part of the consequences of the unlawful entry, conduct of police officers whilst on the premises, which included pointing of the revolver at the Plaintiff. Because that was specifically the act of a particular officer, an award should have been made in respect of that specific element of misconduct, given the seriousness with which the trial judge viewed the circumstances: at [273]

2. There should be an amount of $10,000 awarded for aggravated damages in respect of the assault: at [284].

Held in relation to aggravated damages for trespass to land:

Per Spigelman CJ (otherwise agreeing with Basten JA):

1. The indignity and insult suffered by Mrs Ibbett was significantly affected by the way her guest, being her son resident on the premises, was treated: at [96].

2. There were additional factors such as one officer's 'intemperate and unprovoked outburst to the plaintiff about the fate facing her son as a consequence of his drug abuse' and the reaction by Mrs Ibbett to the evidence of the police officers in relation to the 're-education programme': at [97].

3. The amount of $20,000 awarded by his honour was an appropriate amount to serve as a deterrent and to mark the disapproval of the Court.

Lamb v Cotogno (1987) 164 CLR 1 applied. *Plenty v Dillon* (1991) 171 CLR 635 and *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 referred to.

Per Ipp JA (dissenting):

1. There exists no right sounding in damages to have one's guests undisturbed: at [168]–[173].

2. The errors identified by Basten JA should lead to the award of aggravated damages being set aside: at [174].

Per Basten JA (otherwise agreeing with Spigelman CJ):

The trial judge erred in taking into account the conduct of the police officers in the course of the subsequent prosecution of charges against her son and the plaintiff's reaction to their evidence of inadequate counselling: at [262] – [264].

IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 41119/04
DC 329/02

SPIGELMAN CJ
IPP JA
BASTEN JA

13 December 2005

STATE OF NEW SOUTH WALES v DOROTHY ISABEL IBBETT

Judgment

1 **SPIGELMAN**: The facts and statutory provisions appear in the judgment of Basten JA which I have read in draft.

Can Exemplary Damages be Awarded?

2 I agree with his Honour's conclusion that s21 of the *Civil Liability Act* 2002 ("the Act") does not operate in the present case. I wish to express my own reasons for reaching that conclusion.

3 The relevant statutory provisions are:

> "**Part 1**
>
> 3B(1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
>
> > (a) civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct – the whole Act except Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death.
>
> …
>
> **Part 2**
>
> 11 **Definitions**
>
> In this Part:
>
> ***injury*** means personal injury and includes the following:
>
> > (a) pre-natal injury,
> >
> > (b) impairment of a person's physical or mental condition,

(c) disease.

personal injury damages means damages that relate to the death of or injury to a person

…

21 In an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages."

4 Three legal issues have arisen. The Appellant must succeed on each. In my opinion, it fails on two and I do not find it necessary to decide the third.

1 Are these proceedings with respect to "an intentional act … done with intent to cause injury" within s3B(1)(a)?

2 Are these proceedings "an action … where the act or omission that caused the injury … was negligence" within s21?

3 Are these proceedings "an action for the award of personal injury damages" within s21?

5 The word "injury" is defined to mean "personal injury" for purposes of Part 2, a Part which is headed "Personal injury damages". I can see no reason to apply that definition to the word "injury" appearing in s3B(1)(a) for five reasons.

6 First, the respective Parts of the Act deal with distinct matters and nothing suggests that terminology is intended to bear the same meaning wherever deployed.

7 Secondly, each Part of the Act has its own definition section with Part 1, in which s3B appears, containing generally applicable definitions in s3, e.g. of the word "damages".

8 Thirdly, the definition sections in each Part contain repetition of the same definitions, indicating that each Part is to be regarded as discrete. (See, e.g. the definitions of "personal injury" in s5 for Part 1A, of "injury" in s11 for Part 2, of "personal injury" in s27 for Part 3 and in s51 for Part 7; and also the definition of "negligence" in s5 for Part 1A and in s27 for Part 3.)

9 Fourthly, when Parliament intended to pick up a definition section from one Part and apply it to another, it did so expressly, perhaps most forcefully for present purposes two subparagraphs later in s3B(1)(c) which excluded:

"(c) civil liability relating to an award of personal injury damages (within the meaning of Part 2) where the injury or death concerned resulted from smoking or other use of tobacco products …".

10 Fifthly, there is a direct contrast between the use of the word "injury" in s3B(1)(a) and the invocation of the definition of "personal injury" in s3B(1)(c).

11 I can see no reason why the word "injury" in s3B(1)(a) should not be given its natural and ordinary meaning. That meaning would encompass the harm occasioned by an apprehension of physical violence. (See also *Houda v NSW* [2005] NSWSC 1053 at [338]-[346] per Cooper AJ.)

12 In my opinion, in these proceedings s3B(1)(a) is satisfied in the case of the assault because there was an intention to cause injury.

13 With respect to the finding by Phegan DCJ on the assault, the critical factor was the combined effect of Constable Pickavance pointing his gun at Mrs Ibbett and saying, "Open the bloody door and let my mate in". The Constable pointed his gun at the victim with the expressed objective of coercing her into taking a particular course of action.

14 As his Honour held:

> "The combination of that action and the accompanying words were more than sufficient to satisfy the requirements of immediate apprehension of harm on the part of the plaintiff intentionally caused by Pickavance and therefore amounted to an assault."

15 To the same effect was his Honour's reiteration of this conclusion in the context of assessing damages:

> "[T]he action of Pickavance in turning his handgun on the plaintiff and ordering her to open the door in a voice described by the plaintiff as 'screaming loudly, very loudly' was calculated to cause fear and apprehension particularly in a woman of 69 years of age confronted as she was by a stranger in ordinary street clothes behaving in a highly agitated and threatening manner."

16 These findings of fact that Constable Pickavance acted with an intention to cause the relevant injury, i.e. an apprehension of physical violence, were open to his Honour, indeed, in my opinion, they were correct. Constable Pickavance did not merely point the gun at Mrs Ibbett in some kind of reflex action. He pointed the gun at her and demanded she do something whilst under the threat. The conclusion which his Honour drew that he intended to cause injury in the form of an apprehension of physical violence was justified.

17 Accordingly, s3B(1)(a) applies to exclude s21.

18 Alternatively, this ground of appeal fails as the proceedings do not answer the description in s21 of "an action … where the act or omission that caused the injury … was negligence". The present proceedings did not involve negligence.

19 The Appellant invoked the line of authority that it is possible to succeed in trespass to the person on the basis of negligent conduct. (See *Williams v Milotin* (1957) 97 CLR 465; *NSW v Lepore* (2003) 212 CLR 511 at [270].) However, this case was conducted, and conducted only, on the basis that the conduct of Constable Pickavance was intentional. (Cf *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [29].) The Appellant accepted that there was no pleading of negligence but submitted that one of the particulars of damage could only be awarded in a case of negligence. Whatever the original pleading may have implied, that was not the case run. The Appellant could not point to any part of the transcript of evidence, nor to any submissions at the trial, which suggested that a case of negligence was propounded below. For this alternative reason, s21 does not apply.

20 The third issue identified in par [4] above arises if the word injury, wherever appearing in the Act, should be understood as a reference to "personal injury". Are the present proceedings "an action for the award of personal injury damages" within the meaning of s21?

21 The concept of "personal injury" is reasonably well established in Australian legal practice. It has rarely, if ever, been used to refer to harm to reputation, deprivation of liberty, or to injured feelings such as outrage, humiliation, indignity and insult or to mental suffering, such as grief, anxiety and distress, not involving a recognised psychological condition. (See e.g. *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359-363.) An award for the emotional harm involved in apprehension of personal violence would not generally be regarded as an award for "personal injury damages".

22 The issue is whether such harm should be so regarded by reason of the reference, in the inclusive definition of "injury" in s11, to "impairment of a person's … mental condition". I incline to the view that the emotional reaction, often called "injured feelings", arising from the apprehension of physical violence and the accompanying sense of outrage or indignation is not an "impairment of a mental condition". However, the state of the law on mental harm at the time the Act was passed would need to be carefully reviewed before reaching a concluded view. The submissions did not undertake that task. This issue need not be determined.

23 The appeal based on the applicability of s21 of the Act should be dismissed.

Exemplary Damages for Assault

24 In the context of considering exemplary damages for the assault Phegan DCJ said:

> "In turning a gun, loaded as it was, on an elderly woman who was doing no more than exercising her lawful rights over her own property and whose demeanour offered no real threat to Senior Constable Pickavance, his action was excessive and totally out of proportion to the circumstances confronting him."

25 This finding followed on his Honour's earlier findings of fact that the Constable's behaviour at the time was both "erratic and intemperate", that he intentionally caused the apprehension of harm on the part of Mrs Ibbett by pointing the handgun at her and demanding that she engage in a course of action: that this occurred while he was behaving in a highly agitated and threatening manner and screaming loudly and that he did not identify himself as a police officer. The conduct was directed at an elderly woman who had been woken at about 1.45am. It occurred in an overall context where, on the police evidence, the police officer was engaged, and engaged only, in pursuing a person who had exceeded the speed limit and sought to evade pursuit, which offence the officer thought justified him both invading private property and drawing his weapon for the purpose of apprehending the offender.

26 His Honour did not accept the police evidence. Warren Ibbett, the Respondent's son, had a criminal record. The two officers were serving in the Regional Anti Theft Unit. Their brief had a photo of Warren Ibbett and a description of his van. The trial judge found that the police deliberately followed him after they saw his van pass them. He found that they intended to arrest him and search him and his van on suspicion.

27 The facts as found by his Honour could not justify the police conduct. Indeed, there is no appeal to this Court from Phegan DCJ's findings that there was both an assault of Mrs Ibbett and a trespass to her land. Nor is there an appeal from his Honour's award of general damages in either respect. This Court must proceed on the basis that there was both an assault and a trespass which could not be justified by reason of the fact that a police officer was acting in the discharge of his duties.

28 Turning the weapon on Mrs Ibbett was, in my opinion, outrageous conduct both in itself and in its context. It justifies his Honour's finding of a contumelious disregard of the plaintiff's rights. It also justifies the finding that his Honour expressed on two occasions that, not only was the conduct intentional, but the causing of an apprehension of harm was also intentional. I am quite satisfied that this conduct was deserving of the censure of the Court and that this was one of the rare cases in which an award of exemplary damages was appropriate.

29 A submission was made on behalf of the Appellant that Constable Pickavance's conduct should be understood as merely "reflexive or reactive", in response to Mrs Ibbett's appearance when he was seeking to effect an arrest of a speeding offender at gunpoint. The submission was based on his Honour's finding of fact that Constable Pickavance was "unexpectedly confronted" by Mrs Ibbett and on his Honour's finding that the Constable's "general behaviour" was "reactive and impetuous".

30 The submission elided any distinction between "reactive", his Honour's word, and "reflexive" the word of the submission. They are not equivalent. 'Reactive' like 'impetuous' carries an overtone of deliberation which is absent from "reflexive".

31 There is no basis for interpreting his Honour's reference to "unexpectedly confronted" as in some manner a finding that Constable Pickavance's reaction was an instinctive response to a threat. To begin with there is no evidence of any character to suggest that he made any such response. Constable Pickavance denied that he had drawn the gun at all. He never gave evidence that his was some kind of instinctive reaction. There is no basis for an inference that it was such. Nor does his Honour's finding that Constable Pickavance had a proclivity to engage in "reactive and impetuous behaviour" suggest that on this occasion his was a reflex reaction to a perceived threat. There is no evidence of, nor a finding of, a "threat". His Honour's finding goes no further than saying Mrs Ibbett's appearance was "unexpected". Constable Pickavance turned on Mrs Ibbett, screaming loudly, "Open the door and let my mate in". He wanted her to act. There is no suggestion of self-protection.

32 On the basis of the demand for action, the proper finding, which his Honour made, was that Constable Pickavance intended to cause in the mind of Mrs Ibbett an apprehension of immediate personal violence which would occur if Mrs Ibbett did not do as he, screaming loudly, demanded, and allow his partner entry to the premises. It is, in my view, inconsistent with the finding that he intended to cause an apprehension of harm to conclude that it was in any way an instinctive reaction.

33 Furthermore, his Honour's findings, twice expressed, that an immediate apprehension of harm on the part of Mrs Ibbett was "intentionally caused by Pickavance" and that his conduct was "calculated to cause fear and apprehension" was a proper basis for his Honour's conclusion that Constable Pickavance's conduct was in contumelious disregard of Mrs Ibbett's rights. It also supported a finding of "conscious wrongdoing". His Honour did not, in terms, use that terminology. Nevertheless, that is what his Honour intended by the findings he made, particularly the passage set out at [24] above, together with his Honour's statement that the Constable behaved in a "reactive and impetuous" way. This should be understood as a finding of "conscious wrongdoing", at least at the level of recklessness which, on the authorities to which I will refer, is sufficient.

34 Alternatively, even if Constable Pickavance was not "conscious" of his wrongdoing, this was still an appropriate case for an award of exemplary damages.

35 In *Gray v Motor Accident Commission* supra at [14] the joint judgment said that the formulation 'conscious wrongdoing in contumelious disregard of another's rights', "describes at least the greater part of the relevant field". This passage indicates that "conscious wrongdoing" although usual, is not essential. However, later in the joint judgment, their Honours seem to leave open the possibility that "conscious wrongdoing" was an essential requirement when they said:

> "[20] … the remedy is exceptional in the sense that it arises (chiefly if not exclusively) in cases of conscious wrongdoing in contumelious disregard of the plaintiff's rights."

36 The reference to "if not exclusively" suggests that their Honours were not deciding whether "conscious wrongdoing" was essential. Kirby J was clearly of the view that it was not (at [86]).

37 The joint judgment in *Gray* made it clear that the case before the Court involved an allegation of "conscious wrongdoing" (at [24]) and that "No question arises here of an intentional wrong being committed by inadvertence" (at [22]).

38 The authoritative statement in Australia of the purpose of an award of exemplary damages is that they are awarded to punish and deter. (*Gray* supra at [15], [31] and [32].) However, an equally authoritative statement is that such damages express the Court's condemnation of objectively outrageous behaviour. (*Lamb v Cotogno* (1987) 164 CLR 1 at 10.) The joint judgment in that case at 8 quoted Pratt LCJ in *Wilkes v Wood* (1763) 98 ER 489 at 498-499 that exemplary damages are awarded:

> "… as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the act on itself."

39 This is the same as the threefold statement of purpose by Lord Devlin in *Rookes v Barnard* [1964] AC 1129 at 1228:

> "… to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it."

40 Insofar as a purpose of an award of damages is to condemn conduct, it does not necessarily require subjective advertence to wrongdoing. Nor, in my opinion, even if the purpose should now be restricted to "punishment" and "deterrence", is any such restriction required.

41 The state of mind of the defendant is always relevant (see *Port Stephens Shire Council v Tellamist* [2004] NSWCA 353; 235 LGERA 98 at 401-402). In *Lamb v Cotogno* supra at 13 the High Court indicated that actual subjective advertence to wrongdoing is not necessary by applying a test extending beyond "intention" to "recklessness". The latter does not require "consciousness of wrongdoing". There is no reason to interpret the High Court's reference to recklessness as requiring conscious recklessness.

42 Further, as Fullagar J pointed out in *Midalco Pty Ltd v Rabenalt* [1989] VR 461 at 476-477, the joint judgment's references to "intention or recklessness" must be understood in the context of the case. The joint judgment referred with approval to *Fontin v Katapodis* (1962) 108 CLR 177 where Owen J, with whom Dixon CJ agreed, said at 187 that exemplary damages may be awarded "where the defendant has acted in a high handed fashion or with malice". Similarly in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 120, Taylor J referred to the relevant test as conduct that had been "high handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights". Conduct which is "high handed" is not necessarily knowingly wrongful.

43 Obtuseness, or arrogance, whether or not capable of being described as "reckless", which causes a defendant to believe that he or she had a right to act in the manner complained of, may itself require condemnation. Where such a belief cannot, or is not, reasonably held, as in this case, the process by which such a belief is formed must also be deterred and the conduct itself punished. Furthermore, if it be an alternative basis, the conduct may be properly condemned.

44 Subjective advertence to or knowledge of actual wrongdoing is not, in my opinion, essential before exemplary damages can be awarded.

45 This was the conclusion of Hodgson JA, with whom Sheller JA and Nicholas J agreed, at [9] and [147] in *New South Wales v Riley* (2003) 57 NSWLR 496, when his Honour said at [138]:

> "In my opinion, as made clear in *Gray*, while 'conscious wrong-doing in contumelious disregard of another's rights' describes the greater part of the field in which exemplary damages may properly be awarded, it does not fully cover that field. Similarly, malice is not essential: *Lamb v Cotogno.* Conduct may be high-handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrong-doing. However, ordinarily conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express

> the court's disapproval or (in cases where the defendant stood to gain more than the plaintiff lost) demonstrate that wrongful conduct should not be to the advantage of the wrong-doer."

I note that his Honour did not refer to the passage at [20] of *Gray* quoted above. Nevertheless, I agree with his Honour's reasoning.

46 The fullest articulation of the reasons for permitting an award of exemplary damages in the absence of subjective advertence of wrongdoing is the judgment of the Privy Council on appeal from New Zealand in *A v Bottrill* [2003] 1 AC 449 esp at 24-25, 37, 40, 45, 46 and 47. Although this case may not be authoritative on Australian common law, the emphasis given to the purpose of condemnation should be followed.

47 Although the matter may be open in the High Court, the reasoning in *Riley* at [138] is supported by Australian authority and this Court should not depart from *Riley*.

48 In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, it was no answer to the claim for exemplary damages for trespass to land by Caltex that the company believed that it owned the oil tanks on the land which it had spiked and rendered useless. (See at 452.) As Gibbs CJ, with whom Mason, Murphy and Wilson JJ agreed, put it at 461:

> "At the least, this action was taken by Caltex without bothering to ascertain whether it was lawful, indeed the jury may well have thought that Caltex did not care whether it was lawful or not: The jury might well have regarded the action of Caltex as showing a high handed and outrageous disregard for XL's rights, or, as Glass JA described it: 'an act of vandalism of the most disreputable kind, calling for the most indignant censure'."

49 His Honour went on at 461-462 to indicate that it was open to the jury to find that Caltex did not in fact have a genuine belief of a right to spike the tanks, but his Honour was there dealing with quantum, to which issue such a belief was clearly material. There is no suggestion in the judgment of Gibbs CJ that subjective advertence is a requirement before exemplary damages can be awarded. The passage I have quoted, in the context, suggests that it is not.

50 In a case in which two private investigators wrongfully asserted a right to enter certain premises by licence, that very insistence, contrary to the fact, was held to justify an award of exemplary damages. (*Schumann v Abbot & Davis* [1961] SASR 149 at 158-160.)

51 In *Johnstone v Stewart* [1968] SASR 142, a person entered a woman's residence in order to establish the adultery of his daughter's husband. Bray CJ said at 145:

> "It is urged that his motive was simply to find evidence of adultery and I agree. But I do not think that much improves his position. These melodramatic events were unnecessary. Coates had heard the voice of a man and a woman from what was obviously a bedroom and all the defendant had to do was to wait for morning and observe the plaintiff and Johnstone leaving the premises….
>
> The adulterous have as much right as the chaste to the protection of their castles against invasion and their persons against force".

52 Even if, in the present case, Phegan DCJ proceeded on the basis that Constable Pickavance's wrongdoing was not "conscious wrongdoing", in my opinion, an award of exemplary damages was still appropriate.

Exemplary Damages for Trespass to Land

53 The Appellant accepted that s21 of the *Civil Liability Act* could have no application to the claim for aggravated and exemplary damages for the trespass to land. It could not be, and was not, said that this cause of action was "for the award of personal injury damages" or that "the act or omission … was negligence". The Appellant challenged the appropriateness of the award of aggravated and exemplary damages for the trespass.

54 For the reasons given by Basten JA there is no basis for an award of exemplary damages with respect to the conduct of Constable Harman. The conduct of Constable Pickavance is, however, in a different position.

55 The relevant conduct of Pickavance was his action in pursuing another person, who was lawfully on certain premises, into those premises. He conducted that pursuit by diving under a closing garage door. Thereafter, he remained on the premises despite demands by the owner that he depart. There was no express finding of conscious wrongdoing, as Basten JA points out. That is not, in my opinion, for the reasons outlined above, dispositive of a case for exemplary damages, but it is of considerable significance in that regard.

56 The reasons given by his Honour for the award of exemplary damages do not, in my view, identify the principal circumstances pertinent to the award in this case. His Honour placed particular reliance on the fact that the two police officers maintained their position that they had never done anything wrong and this was in some manner evidence that they had acted in contumelious disregard of the plaintiff's rights.

57 I find this factor ambivalent. It is equally consistent with the existence, at the relevant time, of a belief that the entry onto Mrs Ibbett's property was in fact lawful. In this respect, the uncertainty of the law to which Basten JA refers, prevents this belief being characterised as obtuse or arrogant, to use the terminology I have adopted above. It is by no means clear to me that it rises to the level of "recklessness". Nor am I satisfied that the entry itself was sufficiently outrageous to require condemnation.

58 The case for an award of exemplary damages with respect to the trespass to land can, however, in my opinion, be based on the police officers' conduct towards a guest, indeed a resident, who was lawfully on the owner's property. An occupier of land has a right to expect that his or her guests will not be assaulted by policemen who seek to inappropriately arrest him at gunpoint, strip search him and then search his vehicle on the premises. This is not simply disregard of the rights of Mrs Ibbett's son. It also disregards her right, as the owner of the property, to have her guests undisturbed.

59 As I have indicated, unlike the assault, there is no basis for a finding of consciousness of wrongdoing. Nevertheless, this conduct was highhanded and deserving of the condemnation of the Court. I have referred above to the authorities that indicate that an award of exemplary damages is appropriate even in the absence of a finding of conscious wrongdoing.

60 The present is a borderline case. If the Respondent's son had done anything more serious than a speeding offence or negligent driving, or as his Honour found, there was any reasonable basis for suspicion of an offence, and there had been no brandishing of a weapon directed at him, I would not have regarded it as an appropriate case for an award of exemplary damages. Nevertheless, notwithstanding the fact that I do not accept all of his Honour's reasons for making the award, there is a proper basis for an award of exemplary damages. Whether there should be an award will be discussed below.

Coherence

61 The Appellant submitted that no award of exemplary damages, whether for the assault or for trespass to land, should be made against police officers by reason of the fact that the Parliament has adopted a range of mechanisms for ensuring proper conduct by police including the responsibilities of the Commissioner for Police under the *Police Act* 1990 (NSW), the Ombudsman, the Police Integrity Commission and the Inspector General of the Police Integrity Commission. The Appellant relied on *Sullivan v Moody* (2001) 207 CLR 562. To similar

effect, it was submitted, was the fact that the supervision and regulation of a Police Service is a core function of government and involves such a range of policy considerations that it is an inappropriate area for adjudication by the courts. Reference in this respect was made to the judgment of Gleeson CJ in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at par [6]. It was submitted that the control and regulation of the police as a core government function must remain the responsibility of the political arm of government and an award of exemplary damages is inappropriate.

62 In my opinion, neither of the principles invoked apply.

63 No issue of coherence arises. I have indicated in other judgments the basis upon which issues of coherence can lead to the courts developing the law of torts by restricting its application in certain respects. (See in particular *State of New South Wales v Paige* (2002) 60 NSWLR 371 at [93]-[94] and *Hunter Area Health Service v Presland* [2005] NSWCA 33 at [20]-[21].) The imposition of a duty of care may be inconsistent with some aspect of the scheme or, if not directly inconsistent, may be otherwise inappropriate by reason of the scope and purpose of the legislation. However, all of the authorities refer to some impact of liability in tort upon the efficacy or operation of a statutory scheme. I repeat my summary of the cases in *Presland* at [21]:

· liability in tort may 'distort [the] focus' of the statutory decision-making process; (*Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 101 [292])

· the decision may be made in a 'detrimentally defensive frame of mind'; (*Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 63D)

· a common law duty should not be imposed if it 'would … have a tendency to discourage the due performance of … statutory duties'; (*X v Bedfordshire County Council* [1995] 2 AC 633 at 739E)

· the imposition of a duty of care may 'undermine the effectiveness of the duties imposed by the statute'; (*Graham Barclay Oysters* supra at 574 [78])

· 'a common law duty could distort the performance of the functions of the statutory body'. (*Crimmins* supra at 77 [216])"

64 Mr J Maconachie QC who appeared for the Appellant acknowledged that there was no impingement of any character. He submitted that other mechanisms for control of the police were "more appropriate". The courts should not refuse to exercise the discretion to award exemplary damages, in those rare cases in which it is appropriate to do so, merely because other mechanisms for control of government authority exist. There have always been such mechanisms, even if not as elaborate as those developed with respect to the NSW Police Force over recent years. (See, e.g. *Plenty v Dillon* (1991) 171 CLR 635 at 654-655 quoted below at par [89].)

65 Even in the United Kingdom which has restricted the award of exemplary damages in *Rookes v Barnard* supra, in a manner not adopted in Australia, exemplary damages are allowed for the category of "oppressive arbitrary and unconstitutional action by the servants of the government". This category has always extended, perhaps particularly so, to illegal conduct by police officers. (See, e.g. David K Allan *Damages in Tort*, London, Sweet & Maxwell, 2000, at 5019-5022; Richard Clayton & Hugh Tomlinson *Civil Actions Against the Police*, 3rd ed, Thompson, Sweet & Maxwell, 2004, at 14030-14033.) The position in Australia, where the availability of exemplary damages is broader, can be no different.

66 Furthermore, it is not clear why, in this case, the Court should be satisfied with other forms of disciplinary proceedings when there is no evidence before the Court that any action of any significant character was taken. Indeed the evidence before the Court indicates that such action as was taken, by way of a re-education programme, was plainly inadequate.

The Cross-Claim

67 Mrs Ibbett asserts that his Honour's awards of damages were inadequate under each head. She also challenges his failure to award aggravated damages in respect of the assault claim.

68 The Cross-Appellant submitted that the damages were manifestly inadequate. Reference was made to the award of higher exemplary damages in other cases particularly *XL Petroleum v Caltex Oil* supra; *Adams v Kennedy* (2000) 49 NSWLR 78 and *Lee v Kennedy* [2000] NSWCA 153. Reference was also made to the judgment of Heydon JA in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at [256] adopting the principle that exemplary damages "must not merely irritate, they must sting". No cases were referred to by the Cross-Appellant which indicated an appropriate level of general damages or aggravated damages with respect to either the assault or the trespass to the land.

69 His Honour awarded $15,000 general damages for the assault. He accepted Mrs Ibbett's evidence that she was "petrified". There is no doubt in my mind that this intentionally caused harm, accompanied by loud shouting and a demand for immediate action, justified a significant award of damages.

70 The Appellant relied on the short period of time that Constable Pickavance actually pointed the gun at Mrs Ibbett. However, as Gibbs CJ said in *XL Petroleum v Caltex Oil* supra when considering exemplary damages, at 461:

> "It was said that the infamous conduct was of short duration. I would not attach much significance to that fact in itself; much evil can be done in a moment."

71 So it was here. Given the degree of personal violence about which an apprehension was intentionally inflicted the amount of $15,000 is low. However, I am not prepared to conclude that it was so low as to indicate an error in the exercise of a broad discretion by the trial judge. I would not allow the cross-appeal in this respect.

72 With respect to the award for trespass to land, his Honour rejected the Cross-Appellant's case of any property damage or substantial consequential loss. There is no cross-appeal in that regard. He awarded the amount of $10,000 by way of recognition of the fact of the offence and the indignity caused to the plaintiff by the unlawful entry. In my opinion, this was not below the permissible range for an award of damages in the circumstances.

73 As noted above, the Cross-Appellant seeks an award of aggravated damages with respect to the assault. It is clear that his Honour regarded the matters relevant to this claim as also relevant to the award of aggravated damages with respect to the trespass to land and, accordingly, sought to avoid double counting. His Honour said:

> "The assault was an isolated and discrete act of Pickavance alone. No other police officer was involved and the subsequent conduct of the police while on the premises and the prosecution's subsequent withdrawal of charges against Warren Ibbett as well as the defence in these proceedings are more appropriately connected with the unlawful entry than with assault. I therefore make no award for aggravated damages with respect to the assault."

74 There was one significant element to which his Honour referred in the context of aggravated damages for the trespass to land which was pertinent to the assault by Constable Pickavance. I refer to the so-called "re-education programme" which Mrs Ibbett was told both of the officers would undergo as a result of their conduct on this evening. I set aside entirely as not relevant to this issue, the evidence with respect to Constable Harman and his participation in the re-education programme.

75 Constable Pickavance's response was particularly offensive when he said that the so-called "re-education" was a five minute discussion with a sergeant who said "Oh boys you'd better do better next time". The Appellant called no evidence to suggest that anything more occurred. Ipp JA refers to the re-education programme as "praiseworthy" and a "bona fide attempt" by the State to prevent misconduct recurring. I do not agree, with respect, that the State's conduct can be described in that way. On the evidence the "programme" was perfunctory in the extreme.

76 Mrs Ibbett gave evidence in reply that, with respect to Constable Pickavance's evidence, she was "shocked, amazed and felt deceived". His Honour found, in the context of aggravated damages for the trespass to land that:

> "The dismissive attitude displayed by … Pickavance in particular, largely diffused what would otherwise had been a significant mitigation of the adverse consequences of the unlawful entry. In such circumstances the attitude expressed by both police officers further aggravated the consequences of the trespass to land."

77 This reasoning is equally appropriate to an award of "aggravated" damages for the assault.

78 For somewhat different reasons Basten JA would vary the award of damages by awarding an amount of $10,000 on account of aggravated damages. This is an appropriate amount in all the circumstances.

79 The award of exemplary damages is to be assessed in the light of the awards of compensatory and aggravated damages. It is necessary for the Court to conclude that the amount of $25,000 to be awarded with respect to the assault was not sufficient to serve the objectives of punishment and deterrence to manifest the Court's disapproval of the conduct. In this regard the matter to which I have referred with respect to aggravated damages, i.e. the contemptuous attitude to the so-called "re-education programme" does indicate a need to take further steps to deter conduct where steps such as the re-education programme were clearly inadequate. Furthermore, the intentional act by Constable Pickavance of causing Mrs Ibbett in all of the circumstances at the time, to fear an immediate act of violence unless she acted in accordance with his demands, warranted a high degree of moral obloquy. There were no circumstances of any character which could conceivably have justified the Constable turning his gun on Mrs Ibbett and demanding that she act in a particular manner. Such conduct deserves condemnation by the Court.

80 His Honour awarded an amount of $10,000 by way of exemplary damages for the assault claim. In my opinion, this is manifestly inadequate.

81 The conduct in *Adams v Kennedy* and *Lee v Kennedy* supra, where amounts of $100,000 and $120,000 respectively were awarded, did involve a longer period of conduct and greater intensity of misconduct. Nevertheless, the amount is totally out of proportion to what was awarded here. Similarly, the amount of $35,000 awarded in *Vignoli v Sydney Harbour Casino* (2000) Aust Torts Reps 81-541 involved a false imprisonment for a period of time, but did not involve the intense fear occasioned, albeit for a short period, in Mrs Ibbett. In my opinion, the amount of the award for exemplary damages in this case should be increased to $25,000.

82 I have indicated above my reasons for dismissing the Appellant's appeal insofar as it submitted that there was no basis for an award of exemplary damages for trespass to land. This does not, however, dispose of the Appellant's appeal on quantum with respect to the award of exemplary damages. That can only be determined after the Court determines the appropriate award by way of compensatory damages, whether as general damages or as aggravated damages. See my analysis of the need to separate the heads of damage in *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [155]-[166].

83 In this regard it is relevant to note that the matters to which I have referred as justifying an award of exemplary damages are also pertinent, as is often the case, to an award of aggravated damages. The difference is that in the case of aggravated damages the assessment is made from the point of view of the Plaintiff and in the case of exemplary damages the focus is on the conduct of the Defendant. Nevertheless, it is necessary, as I

have noted above, to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation.

84 The relevant test is that set out in *Lamb v Cotogno* supra at 8:

> "Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like."

85 In *Appleton v Garrett* [1996] P.I.Q.R 1 at 4 Dyson J said that aggravated awards were appropriate:

> "… where the manner in which the wrong was committed was such as to injure the plaintiff's proper feelings of pride and dignity or gave rise to humiliation, distress, insult or pain. Examples of the sort of conduct which would lead to these forms of intangible loss were conduct which was offensive or which was accompanied by malevolence, spite, malice, insolence or arrogance."

86 In *Shattock v Devlin* [1990] 2 NZLR 88 the court referred to compensating the plaintiff for "his sense of outrage and emotional reaction".

87 In *Thompson v Commission of Police* [1998] QB 498 the Court of Appeal stated at 516:

> "Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious, or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted."

88 As the Court of Appeal stated in *Thompson*, aggravated damages can be awarded where (at 516):

> "… there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award was restricted to a basic award…the total figures for basic and aggravated damages should not exceed what [the jury] consider fair compensation for the injury which the plaintiff has suffered."

89 In *State of NSW v Riley* supra, Hodgson JA said at 528:

> "If, in addition to ordinary compensatory damages for injury to feelings, aggravated damages are to be awarded, then plainly it is important to avoid double counting; and the question arises, what can the additional aggravated damages be compensation for when injury to feelings have already been included in ordinary compensatory damages?
>
> …if a court has awarded damages for hurt feelings as part of ordinary compensatory damages, the award of aggravated damages must only be the difference justified by this approach, that is, an award of so much as is necessary to bring the damages up to the upper end of the available range"

90 In *Plenty v Dillon* (1991) 171 CLR 635 police officers trespassed upon the plaintiff's land purporting to serve process. Gaudron and McHugh JJ said at 654-5:

> "In his judgment, the learned trial judge said that, even if a trespass had occurred, it was "of such a trifling nature as not to found [sic] in damages". However, once a plaintiff obtains a

> verdict in an action of trespass, he or she is entitled to an award of damages. In addition, we would unhesitatingly reject the suggestion that this trespass was of a trifling nature. The first and second respondents deliberately entered the appellant's land against his express wish. True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. Although the first and second respondents were acting honestly in the supposed execution of their duty, their entry was attended by circumstances of aggravation. They entered as police officers with all the power of the State behind them, knowing that their entry was against the wish of the appellant and in circumstances likely to cause him distress. It is not to the point that the appellant was uncooperative or even unreasonable. The first and second respondents had no right to enter his land. The appellant was entitled to resist their entry. If the occupier of property has a right not to be unlawfully invaded, then, as Mr Geoffrey Samuel has pointed out in another context, the "right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric": 'The Right Approach?' (1980) 96 Law Quarterly Review 12 at 14, cited by Lord Edmund-Davies in Morris v Beardmore, at 461. If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official. The appellant is entitled to have his right of property vindicated by a substantial award of damages."

91 In the present case, Phegan DCJ awarded damages for trespass to land on the basis of recognising "the offence and indignity to the plaintiff's rights". It is important, however, to recognise the restrictive basis on which his Honour made this award. His Honour's consideration of the liability for trespass to land consisted of several pages of reasoning including reference to authority. However, throughout his Honour referred and referred only to "wrongful entry". His Honour concluded this analysis with the following passage:

> "In this case Pickavance's dramatic entry into the plaintiff's garage in pursuit of Ibbett and the presence of both police officers on the premises was not preceded by any request to the plaintiff containing a proper announcement of their reason for entry. Unlike the police officers in *Nassif* they were not in uniform and at least until well after entry did nothing to identify themselves to either the plaintiff or her son, I do not accept the evidence of the police officers that words such as 'stop police' were shouted by Pickavance before he dived under the garage door. Even if such words were used at that point, I fail to see how they could have constituted a proper announcement in the accepted sense. In those circumstances their conduct fell well outside the protection offered by the principles applied in that case and enunciated in earlier decisions applying the provisions of s 352 of the Crimes Act. I therefore find that the entry onto the plaintiff's premises by both police officers was without lawful justification and amounted to a trespass to land for which the plaintiff is entitled to an appropriate remedy by way of damages."

92 The focus on entry in this way does not encompass other aspects of the conduct of Constable Pickavance which enhanced the extent to which Mrs Ibbett suffered insult or indignity or outrage. (As to such elements see H Luntz *Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, Australia, 2002 at pars 1.7.10-1.7.11; David K Allen *Damages in Tort*, supra at 5-014; Richard Clayton and Hugh Tomlinson *Civil Actions Against the Police*, 3rd ed, supra at 14022-14029 and 14078-14080.)

93 His Honour awarded the amount of $20,000 by way of aggravated damages in this regard. Basten JA accepts that the award of $20,000 aggravated damages was appropriate, despite having identified an error in his Honour's approach.

94 I agree that at least with respect to the factor of withdrawal of the charges, his Honour took into account a consideration irrelevant to the assessment of aggravated damages for the trespass to land. Accordingly, the exercise of the judgment as to what is an appropriate award for this purpose falls to be conducted again in this Court.

95 Bearing in mind that his Honour focused only on the actual act of entry it is understandable that he awarded an amount as low as $10,000 for the trespass to land. The other conduct which occurred after the act of entry in the continuation of the trespass was such as to substantially add to the sense of indignation, anger, outrage and insult suffered by Mrs Ibbett.

96 It is pertinent to note that there is no appeal from the finding against both Constable Pickavance and Constable Harman that they committed a trespass. It is nevertheless clear that Constable Harman's conduct was of a different order to that of Constable Pickavance. It is difficult to identify what it was that Constable Harman did that was wrong. Nevertheless, the failure to appeal from the finding that his Honour made and the award of the general damages he gave with respect to the trespass to land means that the case must be assessed on the basis that Constable Harman had done something wrong.

97 The indignity and insult suffered by Mrs Ibbett was significantly affected by the way her guest, indeed her own son resident on the premises, was treated. This is, as I have noted in my discussion of exemplary damages above, is a matter which adds to the damage suffered by way of insult and indignity to the property interest of the owner. This conduct included:

· Constable Pickavance pointing a gun at Warren Ibbett.

· Warren Ibbett's arrest and strip search, which was within either sight or eye shot of Mrs Ibbett.

· The continued shouting and screaming by Constable Pickavance, not at the moment at which he pointed the gun at Mrs Ibbett which has been taken into account on the assault charge.

98 In addition there was:

· What his Honour identified at Constable Pickavance's "intemperate and unprovoked outburst to the plaintiff about the fate facing her son as a consequence of his drug abuse".

· The reaction by Mrs Ibbett to the evidence of Constable Pickavance and Constable Harman about the irrelevance of the re-education programme about which promises had been made, relevantly with respect to the trespass not the assault.

99 These are factors which entitled his Honour to make an award of aggravated damages in this case.

100 The list of factors I have identified are not coincident with those to which his Honour referred. They do not include the question of the withdrawal of charges against her son, with which I agree with Basten JA.

101 In my opinion, the conduct of Constable Pickavance was considerably worse than the conduct of the television crew in *TCN Channel Nine Pty Ltd v Anning* supra where this Court refused to interfere with an award by way of aggravated damages of $25,000 (see at [179] and [194]). In my view his Honour's award of $20,000, even if in part based on irrelevant considerations, was an appropriate award.

102 The factors that I have identified above as supporting an award of aggravated damages include the matters which I have earlier referred to as possibly justifying an award of exemplary damages. The issue that arises is whether $30,000 by way of compensatory damages is sufficient in all of the circumstances, or whether a further amount by way of punishment and deterrence is appropriate. I would not have thought it was but for one factor. This is the factor that I have referred to already in the context of the assault referrable only to Constable Pickavance. Although in the case of Constable Harman the re-education programme took longer, on his evidence "about 30 minutes". In this regard, I separate such "re-education" as is pertinent to illegal entry on premises from "re-education" with respect to the deployment of the firearm as considered above with respect to exemplary damages for assault.

103 It does not appear that the alternative mechanism of ensuring that inappropriate conduct by police officers does not occur was treated with sufficient seriousness. For that reason alone it appears to me that an additional amount by way of deterrence is appropriate. In my opinion a small award of $20,000 as determined by his Honour is an appropriate amount to serve as a deterrent and to mark the disapproval of the Court in this respect. It is modest but I would not increase it in all the circumstances.

Conclusion

104 For these reasons, in my opinion, the appeal should be dismissed with costs and the cross-appeal allowed in part with costs.

105 I agree with the orders proposed by Basten JA.

106 **IPP JA:**

The appeal and cross-appeal

107 I have had the benefit of reading the reasons of Spigelman CJ and Basten JA in draft. I agree in some respects with their Honours and disagree in others.

108 This appeal and cross appeal concern two causes of action, trespass to the person (to which I shall refer as the assault) and trespass to land (to which I shall refer as the trespass).

109 After making some preliminary observations, I shall address the issues relating to the assault and thereafter I shall turn to the issues relating to the trespass.

110 As regards the assault, the trial judge (Phegan DCJ) awarded Mrs Ibbett $15,000 for general damages and $10,000 for exemplary damages. He declined to make an award for aggravated damages.

111 As regards the trespass, his Honour awarded Mrs Ibbett $10,000 for general damages, $20,000 for aggravated damages and $20,000 for exemplary damages. The State argues that awards of exemplary and aggravated damages should not have been made and appeals against these awards.

112 Mrs Ibbett cross-appeals. She contends that the awards for general and exemplary damages in respect of both causes of action are excessively low. She contends that the trial judge erred in failing to award aggravated damages in respect of the assault. She does not cross-appeal against the amount of aggravated damages in respect of the trespass.

The cross-appeal as to general damages for the assault

113 The pointing of the gun and the generally aggressive behaviour of Constable Pickavance regarding Mrs Ibbett lasted only for a matter of seconds. She was not physically touched. In my opinion, the amount of $15,000 awarded for general damages for the assault is within discretion. The cross-appeal in respect of this issue should fail.

The application of s 3B(1)(a) and s 21 of the *Civil Liability Act*

114 In its notice of appeal the State asserts that the trial judge erred in holding that Pt 1 of the *Civil Liability Act* 2002 (NSW) did not preclude the court from awarding exemplary and aggravated damages in this case. The reference to Pt 1, in reality, is a reference to s 3B(1)(a) (which is in Pt 1). Section 3B(1)(a) provides that the Act

does not apply to civil liability (and awards of damages in proceedings in respect of civil liability) "in respect of an intentional act that is done with intent to cause injury or death …".

115 The State contends that the tort of assault alleged by Mrs Ibbett contains within it an element of negligence. On that basis, it contends that s3B(1)(a) does not operate to exclude the application of the Act to Mrs Ibbett's claims. The next limb of the State's argument is that, as the Act applies to Mrs Ibbett's claims, s 21 of the Act operates so as to preclude an award of exemplary or aggravated damages. Section 21, which is in Pt 2 of the Act, provides:

> "21. In an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages."

116 Recommendation 2 (described as the "overarching recommendation") of the final report by the panel appointed by the Commonwealth and State governments to review the law of negligence recommended that the legislation incorporating its recommendations "should apply (in the absence of express provision to the contrary) to any claim for damages for personal injury or death resulting from negligence regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action". The final report explained (in para 2.3) that it used the term "negligence" in this context to mean "failure to exercise reasonable care and skill". The *Civil Liability Act* incorporates provisions that adopt Recommendation 2 and the concept of "negligence" in the sense proposed; see s 5 and s 5A (Pt 1A), s 11A (Pt 2), and ss 27 and 28 (Part 3).

117 The general intent and import of Pt 1A of the *Civil Liability Act* (which is headed "Negligence"), Pt 2 (which is headed "Personal injury damages"), and Pt 3 (which is headed "Mental harm"), read with s 3B(1), is that, save as set out in s 3B(1), these Parts apply to any claim for damages for personal injury or death resulting from negligence (meaning "failure to exercise reasonable care and skill") regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action.

118 There is no specific provision in Pt 2 to the effect that "negligence" in that Part means "failure to exercise reasonable care and skill" but in my opinion "negligence" in s 21 should be so construed. I agree with Basten JA that a "failure" to exercise reasonable care and skill (in the definitions of "negligence" in ss 5 and 27) assumes the existence of a duty to exercise reasonable care and skill.

119 In my opinion, for a defendant to be able to rely on the application of the Act to a claim based on a cause of action that does not allege a breach of a duty to exercise reasonable care and skill, the defendant would have to plead (or, depending on the circumstances, otherwise appropriately and timeously contend) that the Act applies on the ground that the damages result from "negligence". The defendant should crystallise the issues in such a way that the trial judge is called upon to make a finding in this respect. It would ordinarily not be appropriate for a defendant to raise such an argument for the first time on appeal.

Does s 3B(1)(a) apply so as to trigger the operation of s 21?

120 The State accepts that s 21 does not apply to the claims for aggravated and exemplary damages for trespass. That cause of action was neither "for the award of personal injury damages" nor did it involve "negligence". Thus, the State's argument as to the preclusionary effect of s 3B(1)(a) was directed only to the assault cause of action.

121 An essential element of the application of s 3B(1)(a) is that the civil liability asserted must be in respect of "injury".

122 The damages sustained by Mrs Ibbett were, according to the trial judge's findings, caused by "anxiety and distress". The State contended that s 3B(1)(a) did not apply because the anxiety and distress did not amount to an "injury" within that section.

123 The State submitted that s 11 supported its argument. Section 11 provides that in Pt 2 "personal injury damages means damages that relate to the death of or injury to a person," and that, in Pt 2:

> "Injury means personal injury and includes the following:
>
> (a) pre-natal injury,
>
> (b) impairment of a person's physical or mental condition,
>
> (c) disease."

The State contended that the meaning of injury as defined in s 11 should be applied to the meaning of injury in s 3B(1)(a).

124 I would not uphold this submission. In my view, anxiety and distress would be an "impairment" of a person's mental condition in accordance with the ordinary meaning of "impairment", as the word is used in s 11.

125 In my opinion, irrespective of whether the ordinary meaning of the word is attributed to "injury", or whether it is given the meaning defined in s11, the word is wide enough to encompass anxiety and stress.

126 The State also sought to place some reliance on Pt 3 (and the provisions relating to mental harm in that Part). In my view these provisions do not advance the State's argument. Section 31 (which is in Pt 3) provides that "there is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness". This section implicitly recognises that, but for its provisions, there would be liability to pay damages for pure mental harm that consisted of something less than a recognised psychiatric illness. That is to say, the Act would otherwise apply to mental harm that is not caused by a recognised psychiatric illness.

127 Next, the State argued that s 3B(1)(a) applied so as to exclude the application of the Act as the "civil liability" asserted was not in respect of "an intentional act of that is done with intent to cause injury …" but in respect of negligence.

128 I consider this submission to be entirely without merit. The State did not plead (or otherwise appropriately contend at the trial) that the Act applies on the ground that the damages result from "negligence". Spigelman CJ points out: "this case was conducted, and conducted only, on the basis that the conduct of Constable Pickavance was intentional". The Chief Justice observes that, whatever the original pleading may have implied (in regard to the particulars of damage), a case of negligence was not run. For that reason, the trial judge made no finding that Mrs Ibbett's damages (on either cause of action) resulted from negligence. These matters, alone, are fatal to this argument.

129 In any event, Spigelman CJ demonstrates that "the proper finding, which his Honour made, was that Constable Pickavance intended to cause in the mind of Mrs Ibbett an apprehension of immediate personal violence" and that Constable Pickavance's actions were not in consequence of an instinctive reaction. For the reasons that Spigelman CJ gives, I agree that the requisite element of intent in relation to the assault was established and found, and is correct.

130 I would, therefore, not uphold the State's arguments on this issue. Accordingly, s 3B(1)(a) operates to exclude the application of the Act and, in particular, s 21, to Mrs Ibbett's assault claim.

Aggravated damages for the assault

131 The trial judge awarded no aggravated damages for the assault because of the perceived difficulties of separating the consequences of the assault and the invasion of Mrs Ibbett's property. His Honour said that he thought the more appropriate course would be to leave the question of aggravation "to the damages recoverable for the unlawful entry". Mrs Ibbett cross-appeals against the failure to award aggravated damages for the assault.

132 In my view, where an award for aggravated damages is appropriate, the Court is required to do the best it can in assessing the aggravated damages caused by different categories of conduct. As I discuss more fully below, the notion of lumping together awards of damages for different causes of action offends against basic concepts of fairness.

133 Aggravated damages are compensatory damages awarded to compensate the plaintiff for the aggravation suffered by the plaintiff as a result of the tort. The purpose of exemplary damages, on the other hand, is to punish the defendant, to act as a general and specific deterrent, and to demonstrate the court's disapproval of the defendant's conduct.

134 It follows that the same conduct can give rise to exemplary damages and aggravated damages. That does not give rise to double counting as the two categories of damages are awarded for different purposes.

135 Hodgson JA in ***State of New South Wales v Riley*** (2003) 57 NSWLR 496 explained (at 528):

> "If, in addition to ordinary compensatory damages for injury to feelings, aggravated damages are to be awarded, then plainly it is important to avoid double counting; and the question arises, what can the additional aggravated damages be compensation *for* when injury to feelings have already been included in ordinary compensatory damages?"

His Honour answered the question he so posed by saying:

> "[I]n cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility … the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified."

His Honour proceeded (at 529):

> "This means that, if a court has awarded damages for hurt feelings as part of ordinary compensatory damages, the award of aggravated damages must only be for the difference justified by this approach, that is, an award of so much as is necessary to bring the damages up to the upper end of the available range."

136 In my opinion, the conduct of Constable Pickavance in assaulting Mrs Ibbett went "beyond ordinary human fallibility" and I accept that an award of aggravated damages should have been made. In my view, the amount awarded for general damages ($15,000) was towards the middle of the range. I agree that an additional amount of $10,000 on account of aggravated damages should be awarded. I would uphold the cross-appeal to this extent.

Did the trial judge err in his discretion in awarding exemplary damages for the assault?

137 I repeat that I agree with Spigelman CJ that the trial judge rightly found that Constable Pickavance intended to cause Mrs Ibbett to apprehend immediate personal violence. I agree with the Chief Justice that

Constable Pickavance's actions were not in consequence of an instinctive reaction. Accordingly, I agree that Constable Pickavance's actions amounted to "conscious wrongdoing in contumelious disregard of another's rights". On this basis, I agree that the trial judge was entitled to award exemplary damages for the assault and did not err in the exercise of his discretion in this respect: ***Gray v Motor Accident Commission*** (1998) 196 CLR 1 at [14].

138 I express no view as to whether any other basis might exist for the award of exemplary damages in respect of the assault.

139 My agreement that the trial judge was entitled to award exemplary damages is subject to one reservation. Exemplary damages were claimed on the ground of vicarious liability alone. The law as to whether vicarious liability will support a claim for exemplary damages is not yet finally settled in Australia: see the discussion in ***Ali v Hartley Poynton Ltd*** [2002] VSC 113 per Smith J at [607] to [610]. Exemplary damages were awarded on the ground of vicarious liability in ***XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australasia) Pty Ltd*** (1985) 155 CLR 448 but it appears to have been assumed that vicarious liability could give rise to exemplary damages and the issue was not discussed. The New Zealand Court of Appeal, in a carefully reasoned judgment (***S v The Attorney-General*** [2003] NZCA 149), has held that there should be no vicarious liability for exemplary damages. In ***Kuddus v Chief Constable of Leicestershire Constabulary*** [2002] 2 AC 122 Lord Scott at [123] to [137] in obiter remarks disapproved of the concept. The question was not raised before us, so I take it no further.

Coherence

140 In my opinion, the State's argument as to coherence is without foundation. There is no conflict between an award of exemplary or aggravated damages based on unlawful assault or trespass to land committed by police officers and any duty that may be imposed on police officers. I do not accept that there might be other appropriate remedies available that would achieve the same ends as exemplary or aggravated damages, but even if there were that would not bear on the concept of coherence as it arises in regard to the issues in this case.

The amount of the exemplary damages awarded for the assault

141 As I have mentioned, Mrs Ibbett cross-appeals on the ground that the amount of the exemplary damages awarded for the assault ($10,000) is too low.

142 Spigelman CJ would award $25,000 for exemplary damages awarded for the assault. Basten JA would make a single lump sum award of $45,000, thereby combining the damages for the assault and those for the trespass, but otherwise would agree with the Chief Justice.

143 I would not uphold the cross appeal in relation to the amount of the exemplary damages. I need to explain why I disagree with Spigelman CJ and Basten JA in this respect.

144 Spigelman CJ would increase the exemplary damages for three reasons. They are:

(a) Constable Pickavance's attitude to the re-education programme indicates "a need to take further steps to deter conduct where steps such as the re-education programme were clearly inadequate".

(b) The conduct of Constable Pickavance "indicated a high degree of moral obloquy".

(c) The amount awarded was: "totally out of proportion" to what was awarded in ***Adams v Kennedy*** (2000) 49 NSWLR 78 and ***Lee v Kennedy*** (2000) NSWCA 153.

145 The re-education programme (leaving aside the sinister nomenclature) calls into question the very nature of the State's vicarious liability.

146 Pickavance, apparently, scorned the programme. The trial judge referred to the "dismissive attitude" he displayed. This occurred relatively long after the tort. By no stretch of the imagination could it be said that Pickavance's conduct in being dismissive of the programme played any part in the tort of assault for which the State was held to be vicariously responsible. Spigelman CJ refers to ***Thompson v Commissioner of Police*** [1988] QB 498, which is authority for the proposition that aggravating features can include humiliating circumstances at the time of the arrest or inappropriate conduct "in relation to the arrest or imprisonment or in conducting the prosecution" (at 516). Pickavance's resistance to re-education is far removed from these matters.

147 The State, entirely of its own volition, provided a re-education programme in an attempt to ensure that Pickavance's conduct would improve and that he would not behave in a similar way again. The State's response could only be described as praiseworthy. It was described by the trial judge as a measure that, but for Pickavance's dismissive attitude, would have been "a significant mitigation of the adverse consequences of the unlawful entry". An increase in the exemplary damages because Pickavance did not treat the re-education programme with due respect would, thus, unfairly penalise the State (in effect for attempting unsuccessfully to improve the conduct of its police officers).

148 In these circumstances I do not think that Pickavance's conduct in regard to the re-education programme can properly be used to increase the amount of exemplary damages payable by the State. It is one thing to punish a defendant on the ground that it is vicariously liable for the acts of others, even though it has not been found to have done anything wrong itself. It is quite another thing to increase the punishment because the defendant's employees respond inappropriately to its bona fide attempts to prevent their misconduct recurring. That would be taking punishment of the innocent to extremes.

149 I can deal with the second and third reasons given by Spigelman CJ together.

150 I do not think that conduct of the police officers in ***Adams v Kennedy*** (2000) 49 NSWLR 78 and ***Lee v Kennedy*** (2000) NSWCA is in any way comparable to the conduct of Pickavance.

151 In ***Adams v Kennedy***, the police officer handcuffed the plaintiff and inflicted physical violence on him "as a result of which the plaintiff suffered a serious injury" (per Priestley JA at 81). The handcuffing of the plaintiff caused massive rotator cuff tendon ruptures that led to a wasting of the trapezius muscle and all the rotator cuff muscles, causing a marked restriction in the range of movement.

152 In ***Lee v Kennedy*** police officers grabbed hold of Ms Lee, dragged her out of the bedroom and wrestled with her down the hallway and then out of the house. One took hold of her in a headlock. The police officers ripped her clothing so that her undergarments and body were exposed. She was handcuffed, put in the police van and taken to the police station. Only that evening was she given a jumper to cover herself.

153 The assault on Mrs Ibbett was nothing like the assaults in ***Adams v Kennedy*** and ***Lee v Kennedy***. The pointing of the gun and screaming took place over a very brief period, and Mrs Ibbett was not touched. Although Pickavance's egregious conduct was intentional, the intention was formed spontaneously and the assault lasted no longer than seconds.

154 I accept that the conduct of Constable Pickavance is capable of requiring the State to pay exemplary damages, but this is a borderline case. The moral obloquy attaching to Pickavance's conduct is not comparable to that of the police officers in the ***Kennedy*** cases. The matters to which I have referred led the trial judge to fix the exemplary damages at $10,000 and that was entirely within his Honour's discretion.

155 Basten JA observes:

> "As is apparent from **Adams v Kennedy**, an unlawful arrest by a police officer may well give rise to separate causes of action based on assault, trespass to land, false imprisonment and possibly an unlawful search. In such circumstances it may be appropriate, as the Court held in **Adams**, to make a single award of exemplary damages covering different aspects of the continuous course of conduct."

156 I disagree. In my opinion, it could never be appropriate and would be quite wrong in principle to determine the quantum of exemplary damages by having regard, globally, to conduct relating to a set of different causes of action. This would involve a failure to assess the damages that independently arise out of each cause of action, and the making of a single award that, umbrella-like, covers all the causes of action. In my opinion, the Court in ***Adams v Kennedy*** manifestly erred by doing this.

157 It is dangerous, in cases involving multiple causes of action, to make one aggregate award of damages as injustice may be the consequence. This is particularly so where the defendant is liable in respect of several causes of action, solely on vicarious grounds, for the conduct of more than one person. In every case, but particularly in such cases, a defendant is entitled to know what amount in respect of damages has been attributed to each cause of action so that, if it wishes, it can appeal against that award. A lumping together of the awards tends to negate the defendant's right of appeal. Further, the aggregation of the different amounts in respect of the different causes of action may give rise to a tendency to regard the aggregate of the conduct involved as having an exponential effect. That is to say, there may be a tendency to attribute greater moral obloquy to the aggregate of the conduct, even though different persons were involved in separate and independent acts giving rise to different and unrelated causes of action. In the case of vicarious liability this would be quite unfair. Generally, the making of one aggregate award tends to blur boundaries that fairness requires to be defined.

158 Basten JA states that a ground for increasing the amount of exemplary damages is the need "albeit indirectly through the mechanism of vicarious liability 'to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen': ***Adams v Kennedy*** at [36]".

159 In my view, however, it is wrong in principle, where the State is being sued on the grounds of its vicarious liability for the conduct of identified police officers and no one else, to increase exemplary damages on the ground that other persons (not directly involved in the wrongful conduct) need to learn a lesson.

160 The State can only be punished for the conduct of those who train and discipline the police force when a case is properly made out based on the unlawful conduct of such officials. It is quite wrong, in my view, to fix the State with vicarious liability for the conduct of persons who are not before the court, who have not been identified, whose conduct is not the subject of allegations in the pleadings, whose conduct has not been investigated at the trial, and against whom no specific findings have been made.

161 In ***Lamb v Cotogno*** (1987) 164 CLR 1 the High Court said at 10:

> "Moreover, whilst the smart or sting will obviously not be the same if the defendant does not have to pay an award of exemplary damages, it does serve to mark the court's condemnation of the defendant's behaviour and its effect is not entirely to be discounted by the existence of compulsory insurance".

Basten JA considers that this statement is authority for the proposition that "the intention of exemplary damages is that they will cause a 'smart or sting'.". I do not agree. That is an extension of the High Court's observations and is inconsistent with the rule that there is a need for restraint and moderation

when awarding exemplary damages: ***XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australasia) Pty Ltd*** per Gibbs CJ (with whom Mason and Wilson JJ agreed) at 463; ***Commonwealth v Murray*** [1988] Aust Torts Reports 80,207 at 68,052-3 per Priestley JA; ***Backwell v AAA*** [1997] 1 VR 182 at 205 (per Ormiston J with whom Brooking J agreed).

162 I would add that it is difficult to comprehend how an award against the State of New South Wales could be said merely to irritate because it is $10,000 but would sting if it were $25,000, particularly if regard is had to the State's annual budget. The force of the proposition is not, in my view, increased if the amount is increased to $45,000 by lumping the tort of assault together with the tort of trespass.

163 I would dismiss the cross-appeal in respect of the amount of exemplary damages awarded for the assault.

General damages for the trespass

164 In my opinion, the amount of $10,000 awarded for general damages for the trespass is within discretion. The cross-appeal in respect of this issue should fail.

Aggravated damages for the trespass

165 His Honour awarded Mrs Ibbett $20,000 for aggravated damages for the trespass. The State contends that the judge erred in his discretion in making this award. Mrs Ibbett does not cross-appeal in respect of this award.

166 Basten JA points out that the trial judge, in assessing aggravated damages, erred by having regard to two factors irrelevant to that issue. Firstly, the judge took into account "the insult and humiliation implicit in the aftermath of the withdrawal of the charges against [Mrs Ibbett's] son". Secondly, the judge took into account Mrs Ibbett's reaction to the inadequate counselling afforded to the police officers. Additionally, as Basten JA says, the evidence suggesting impropriety on the part of Constable Harman was not clearly identified. I agree that the trial judge erred in the respects identified.

167 Notwithstanding these three errors in assessing the aggravated damages for the trespass, Basten JA concludes that for reasons identified by the Chief Justice the amount awarded by the trial judge for aggravated damages remains within appropriate range.

168 The reasons identified by the Chief Justice were, substantially, the indignity and insult suffered by Mrs Ibbett in the way her son, as a guest, was treated by the police. Spigelman CJ states:

> "An occupier of land has a right to expect that his or her guests will not be assaulted by policemen who seek to inappropriately arrest him at gunpoint, strip search him and then search his vehicle on the premises."

The Chief Justice describes this as a right of Mrs Ibbett, as the owner of the property, "to have her guests undisturbed".

169 I respectfully disagree with the Chief Justice and Basten JA. In my opinion, no such right (sounding in damages) has ever existed and it does not now exist.

170 I know of no authority that supports the existence of the right of an owner of property to claim damages because his or her guests have been disturbed in some way.

171 The recognition of such a right would give rise to serious anomalies, apart from creating a novel reward for hospitality. Were such a right to be acknowledged, the property owner's damages would depend upon the number of guests being entertained at a given time. Thus, were police officers to trespass into an intimate dinner party for two, the house owner's damages would be substantially less than were they to trespass into a large house party for, say, 20. Would the damages for a party of two be one-twentieth of the damages awarded for a party of 20? Or would the amount of damages depend on the peculiar sensitivities of the guests present? Would more be awarded for disturbance to a neurotic guest than one of laconic temperament? Would the host receive more from upset to a close friend or relative than a nodding acquaintance? And more for a distinguished visitor than the children next door?

172 I understand the proposition to be that it is the host's hurt, not the distress of the guests, that is the consequence of the infringement of the right postulated. But, presumably, the more distress is caused to the greater number of guests (and the close and more important the relationship) the more the hurt (and therefore, the greater the damages) to the host.

173 These oddities demonstrate that there is no reason in policy to recognise the postulated right. This does not mean, of course, that guests in a house in which police have trespassed have themselves no remedy. In a proper case, they may have claims in their own right, but that is not presently the issue.

174 In my view, the errors identified in relation to the award of aggravated damages for the trespass should lead to the appeal succeeding in regard to this head of damage.

Exemplary damages for the trespass

175 The trial judge awarded Mrs Ibbett $20,000 for exemplary damages for the trespass.

176 I agree with Basten JA that the trial judge erred in taking into account the conduct of Constable Harman on this issue. Constable Harman's conduct did not warrant the making of an award of exemplary damages for the trespass.

177 I agree with Basten JA that the views expressed by the trial judge in regard to the "complex issues" relating to the lawfulness of the entry militate against a finding of deliberate wrongdoing in regard to the trespass. I would add that that finding that the issues were complex militates against a finding of reckless wrongdoing.

178 Basten JA rightly points out that there was no finding that Constable Pickavance knew that he was exceeding his powers in entering upon Mrs Ibbett's land.

179 I agree with Basten JA that the State has demonstrated error in the approach taken by the trial judge with respect to the award of exemplary damages for the trespass.

180 Basten JA, nevertheless, takes into account other conduct, including that relating to the assault, and would award an aggregate sum of $45,000 as exemplary damages for the assault and the trespass. I have expressed my fundamental disagreement with this approach.

181 As I understand the reasons of Spigelman CJ, his Honour would dismiss the appeal against the award of exemplary damages for the trespass because "the alternative mechanism of ensuring that inappropriate conduct by police officers does not occur was treated with sufficient seriousness". For the reasons I have given, I do not consider this to be an appropriate ground for determining that the State should be vicariously liable for exemplary damages.

182 I would uphold the appeal against the award of exemplary damages for the trespass to land and set aside the award made in this respect.

Conclusion

183 In summary, I propose the following orders:

(a) I would uphold the appeal in respect of the award of aggravated damages for trespass and would set aside the award of $20,000 under this head.

(b) I would uphold the appeal in respect of the award of exemplary damages for trespass and would set aside the award of $20,000 under this head.

(b) I would uphold the cross appeal in respect of aggravated damages for the assault and would make an award of $10,000 under this head.

(c) Otherwise I would make no other orders on the appeal and cross- appeal.

(d) I would order Mrs Ibbett to pay 50% of the costs of the appeal.

184 **BASTEN JA:** On 23 January 2001, in the early hours of the morning, Mrs Ibbett ("the Plaintiff") was asleep in her home at Forster on the north-central coast of New South Wales. Shortly before 2am her son, Mr Warren Ibbett, arrived home in his van, pursued by a police vehicle. The only offence, commission of which the police reasonably suspected Mr Ibbett, was a driving offence. When he arrived at his mother's home, Mr Ibbett drove into the garage and, using a remote control device, closed the roller door. As the door closed, one of the officers, Senior Constable Pickavance, dived under the closing door and sought to arrest Mr Ibbett. Although the officer denied it, the primary judge found that Constable Pickavance had a pistol drawn and pointed in the direction of Mr Ibbett. There was a commotion with both Ibbett and Pickavance shouting or screaming at each other. Whilst Constable Pickavance had his service pistol directed at Mr Ibbett, the Plaintiff opened a door leading from the house into the garage. She heard Mr Ibbett say to Constable Pickavance: "Who are you? … Get out." She repeated those words at which stage Constable Pickavance swung around towards her, briefly pointing his gun at her, before he turned back to Mr Ibbett.

185 The second officer, Senior Constable Harman, was outside at this stage, but came in when the roller door of the garage was reopened.

186 As a result of these events, the Plaintiff brought proceedings against the two police officers and the State of New South Wales, alleging trespass to her property and assault by Constable Pickavance. The trial judge held that the entry onto the property was unlawful and constituted a trespass, and that the conduct of Constable Pickavance in pointing a gun at the Plaintiff constituted an assault. These findings were not challenged on the appeal.

187 By the time his Honour gave judgment, the individual officers had been removed as defendants to the action, leaving only the State of New South Wales, which accepted vicarious liability for the conduct of both officers. There being no challenge to his Honour's judgment for the Plaintiff for assault and for trespass to land, this appeal and a cross-appeal by the Plaintiff concern the availability and quantification of aggravated and exemplary damages, on each cause of action.

Findings with respect to damages

188 In relation to the assault, his Honour awarded $25,000 damages which comprised an amount of $15,000 by way of general damages for the assault and the sum of $10,000 by way of exemplary damages for the conduct of Constable Pickavance in threatening the Plaintiff by turning to her with his pistol pointed at her. No challenge is brought by the State to the award of general damages, which was for "anxiety and distress caused by the assault", on the basis that the assault caused no medically identifiable injury, either by way of physical or psychiatric condition.

189 The State's challenge, in relation to the assault, was limited to the award of exemplary damages and was based on two limbs, namely:

(a) that an award of exemplary damages was precluded by the *Civil Liability Act* 2002 (NSW), and

(b) even if that were not so, the findings of the trial judge did not justify such an award.

190 No award was made by way of aggravated damages in relation to the assault, his Honour concluding (at p 21):

> "Because the consequences of the assault and of the invasion of the plaintiff's property by way of unlawful entry are not easily separated, the more appropriate course in my view is to leave the question of aggravation to the damages recoverable for the unlawful entry."

However, as his Honour also noted, the assault was "an isolated and discrete act of Pickavance alone". There is no suggestion that his Honour was in error in taking that approach, but the Plaintiff cross-appealed from this failure, and with respect to the quantum of both general and exemplary damages.

191 In relation to the trespass to land, his Honour noted that no damage to property had been demonstrated. Accordingly, his Honour awarded $10,000 by way of general damages "to recognise the offence and indignity to the plaintiff's rights caused by the unlawful entry". There was no appeal by the State against that award.

192 Secondly, in relation to the trespass to land, his Honour awarded a sum of $20,000 by way of aggravated damages and a sum of $20,000 for exemplary damages associated with the unlawful entry onto the plaintiff's premises. Those awards are also challenged. Both awards are challenged on the same broad grounds as the award of exemplary damages for the assault, namely that:

(a) neither award was permissible under the *Civil Liability Act*, and

(b) his Honour's findings did not justify the award at all, in terms of exemplary damages or the quantum of the award, in terms of the aggravated damages.

The Plaintiff cross-appealed with respect to the quantum of the general and exemplary damages awarded, and the failure to award aggravated damages in relation to the assault.

193 It is convenient to deal first with the arguments put forward by the State in relation to the operation of the *Civil Liability Act*, as, if successful, they will provide a complete answer to the awards under challenge.

Relevant statutory provisions

194 The operative provision of the *Civil Liability Act*, relied upon by the State, is s 21, which reads as follows:

> **21 Limitation on exemplary, punitive and aggravated damages**
> In an action for the award of personal injury damages where the act or omission which caused the injury or death was negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages.

195 It may be noted that, in the present case, no judgment has been obtained against the police officers (for reasons which will be considered below) and the liability of the State is the vicarious liability of the Crown effected by s 8(1) of the *Law Reform (Vicarious Liability) Act* 1983 (NSW) ("the *Vicarious Liability Act*"). The *Civil Liability Act* makes further provision in that regard:

> **3C Act operates to exclude or limit vicarious liability**
> Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort.

It was accepted that the State was a "person" for the purposes of s 3C and that the State could be vicariously liable for conduct for which the police officers could not be liable, despite the effect of s 10(2) of the *Vicarious Liability Act*. Nevertheless, it is convenient to set out s 10 of that Act in full:

> **10 Effect of statutory exemptions**
> (1) In this section:
> **person** includes the Crown;
> **statutory exemption** means a provision made by or under an Act which excludes or limits the liability of a person.
> (2) For the purposes of determining whether or not a person is vicariously liable in respect of a tort committed by another person, any statutory exemption conferred on that other person is to be disregarded.
> (3) Except as provided by this section, nothing in this Act affects a statutory exemption conferred on a person.

The position adopted by the parties may be accepted on the basis that s 10(3) will prevent the Crown being vicariously liable only if a statutory exemption extends to the vicarious liability of the Crown and that the combined effect of ss 3C and 21 of the *Civil Liability Act*, to the extent of their operation, has that effect.

196 More time was devoted in the course of argument to the operation of s 3B(1)(a) of the *Civil Liability Act*. The State recognised that, if it established that s 21 had operation with respect to the assault, it nevertheless needed to establish that the operation of that provision was not excluded by the terms of s 3B. As there is an inter-relationship between those two provisions, it is convenient to deal with s 3B(1)(a) together with s 21. Section 3B relevantly provides:

> **3B Civil liability excluded from Act**
> (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows:
> (a) civil liability in respect of an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct –

> the whole Act except Part 7 … in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death.

197 Although reference to s 3B may be of value in understanding the scope of s 21, unless s 21 applies in its terms, it will not be necessary to consider the particular difficulties of construction arising from the somewhat awkward terminology of s 3B.

198 The *Civil Liability Act* has undergone at least one major transmogrification and several more contained amendments in the course of its short life. However, before seeking in this history explanations for any anomalies, it is appropriate first to consider the language of s 21. The first concept which needs to be identified is the phrase "personal injury damages". Section 21 comes in Part 2 of the *Civil Liability Act*, which commences with the following section:

> **11 Definitions**
> In this Part:
> ***injury*** means personal injury and includes the following:
> (a) pre-natal injury,
> (b) impairment of a person's physical or mental condition,
> (c) disease.
> ***personal injury damages*** means damages that relate to the death of or injury to a person.

It will be noted that the definition of "injury" has two limbs. The first limb is that injury means "personal injury"; the second is an inclusive and presumably non-exhaustive definition. The term "personal injury" is not defined in s 11, but is defined in s 5. Although s 5 is found in Part 1A, headed "Negligence", it is convenient to set out its definitions.

> **5 Definitions**
> In this Part:
> ***harm*** means harm of any kind, including the following:
> (a) personal injury or death,
> (b) damage to property,
> (c) economic loss.
> ***negligence*** means failure to exercise reasonable care and skill.
> ***personal injury*** includes:
> (a) pre-natal injury, and
> (b) impairment of a person's physical or mental condition, and
> (c) disease.

If one ignores the use of the conjunctive "and" in the definition of "personal injury", it can be seen that for the purposes of Part 1A, the terms "injury" and "personal injury" are interchangeable. (The broader definition of "harm", in s 5, which includes personal injury, is not used in s 21 and need not be addressed at this stage.)

199 The second term used in s 21 is the word "action", which is not defined in the *Civil Liability Act*. Relevantly for present purposes, it is sufficient that the term "action" is ample to include proceedings for damages in tort: cf *Vezitis v McGeechan* [1974] 1 NSWLR 718 at 720D-E (Taylor J). However, one possible limitation on the operation of the section is that, whatever the nature of the tort, the action must seek to recover damages that "relate to", relevantly, injury to a person: see s 11, "personal injury damages" and s 21. (As noted by the Chief Justice at [53] above, the State did not argue that s 21 had any operation with respect to the trespass to land.)

200 The second part of the provision is less clear. Assuming that the first part of the definition is satisfied, the action must further be one "where the act or omission that caused the injury … was negligence". The term "negligence" is not defined in Part 2, but is defined in Part 1A, for the purposes of Part 1A only. Further, if it had been intended to identify the nature of the "act or omission" in question, one might have expected the adjective "negligent" rather than the noun "negligence" to be adopted. In legal parlance, the term "negligence" describes a basis for liability in tort involving the existence and contravention of a duty of care owed to the party injured. If that approach were adopted, s 21 could not apply to the present case, the causes of action being formulated in assault and trespass to land.

201 It is not clear whether a different result should be reached by application of the definition contained in s 5. According to that definition, negligence means "failure to exercise reasonable care and skill". In the context, the description of a failure would seem to assume the existence of a duty to exercise reasonable care and skill. It would seem that no different result is achieved by adopting that definition, even though s 5 does not, in its terms, apply to s 21.

202 The third limb of s 21 is constituted by the prohibition against an award of exemplary, punitive or aggravated damages. Why the section refers to damages "in the nature of" aggravated damages, is not entirely clear, but, if the section has no operation in the present case, this question need not be explored further.

203 If, contrary to these views, the words "failure to exercise reasonable care and skill" should be imported into s 21 as the meaning of "negligence", and without any assumption as to the existence or otherwise of a duty of care, no different result is reached, at least so far as exemplary damages are concerned. That is because the test which must be satisfied in order to justify an award of exemplary damages, is that the defendant has engaged in "conscious wrongdoing in contumelious disregard for the rights of" another person: see *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [14] set out at [221] below. A mere failure to exercise reasonable care and skill will not satisfy that test: an intentional act is required. However, as noted below, an intentional act, at least if done with intent to injure, will take the matter outside the operation of the *Civil Liability Act*, by virtue of s 3B(1)(a).

204 In relation to the question of aggravated damages, there is a real doubt as to whether such damages are properly awarded under the general law for a cause of action in negligence: see *Hunter Area Health Service v Marchlewski* (2000) 51 NSWLR 268 at [110] (Mason P, Stein and Heydon JJA agreeing).

205 The State sought to avoid this dilemma by calling in aid the principle that even an intentional tort such as an assault or trespass could be satisfied by negligent conduct: see *Williams v Milotin* (1957) 97 CLR 465. That argument should not succeed unless the term "negligence" was construed as descriptive of conduct, rather than as importing the legal elements of a cause of action in negligence. For the reasons noted above, that conclusion is unattractive. Nevertheless, even if it be correct, and even if one can have negligent "intentional torts" that construction should not be accepted for the purposes of the *Civil Liability Act*. Why that is so requires some reference to the history of the Act.

206 When originally enacted, s 3B(1) was contained in Part 2, dealing with personal injury damages, and was s 9(2). The relevant provisions in s 9 then provided:

9 Application of Part

(1) This Part applies to and in respect of an award of personal injury damages, except an award that is excluded from the operation of this Part.

(2) The following awards of damages are excluded from the operation of this Part:

(a) an award where the fault concerned is an intentional act that is done with intent to cause injury or death or that is sexual assault or other sexual misconduct … .

Section 21 was in the same terms as the present provision, although it used, consistently with s 9, the term "fault" in place of "act or omission", although fault was defined as "act or omission": see s 3 of the original *Civil Liability Act*.

207 As originally enacted, the *Civil Liability Act* was largely restricted to making provision with respect to awards of personal injury damages. The term "personal injury damages" was defined in s 3:

> ***Personal injury damages*** means damages that relate to the death of or injury to a person caused by the fault of another person.

In the Second Reading speech for the Civil Liability Bill, the Premier said:

> "Clause 21 deals with exemplary damages. As a result of consultation on the bill, the prohibition on exemplary and punitive damages has been narrowed. These damages will be excluded only in negligence actions and actions where the fault concerned is negligence. For example, where an employer is sued on the basis of its vicarious liability for its employee's negligence, exemplary or punitive damages will not be available."

208 Reforms which the Premier described in his Second Reading speech as "stage 2 reforms" were set out in the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW) which added new parts to the *Civil Liability Act* and restructured the Act so that provisions, such as s 9, which originally appeared in Part 2, were made applicable to the whole of the Act and definitions which dealt with personal injury damages only were included in Part 2 of the Act and made applicable to that Part only. The introduction of a new Part 1A entitled "Negligence" introduced provisions which concerned questions going to liability, rather than damages. It also introduced a new Part 3 entitled "Mental Harm" to which reference will be made below. Finally, it may be noted that Part 1A included a new s 5A dealing with the application of that Part which provides:

> **5A Application of Part**
>
> (1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.
>
> (2) This Part does not apply to civil liability that is excluded from the operation of this Part by s 3B.

209 This provision was no doubt thought to be unnecessary when the Act was limited to the imposition of constraints on awards of damages. However, it demonstrates why the term "negligence" is defined as "failure to exercise reasonable care and skill" and is not limited to claims for the tort of negligence. Despite the fact that the definition is contained in Part 1A and s 5A is similarly limited in its operation, the better view is that these provisions merely made explicit what was implicit in the drafting of s 21 at all times, namely that it was intended to cover awards of damages flowing from a lack of reasonable care and skill, whatever the cause of action pleaded.

210 There remains a question whether negligence, so understood, is limited to 'ordinary' failures to take reasonable care and skill, or whether it includes gross or even reckless failures. That in turn would raise a question as to whether gross negligence or recklessness can be sufficient to justify an award of exemplary damages under the general law in circumstances which fall outside the category of an "intentional act done with intent to cause injury" in s 3B(1)(a). In my view neither of these questions need be answered in this case.

211 The Plaintiff sought to escape from these questions by arguing that her award was not an award of "personal injury damages", because it did not relate to injury, for the purposes of s 21. Although "injury" is

defined in s 11 to include "impairment of a person's physical or mental condition", that terminology, she argued, was not intended to include impairment constituting something less than a recognised psychiatric condition. The trial judge held, in awarding damages with respect to the assault:

> "Even in the absence of evidence that the assault caused any medically (including psychiatrically) identifiable injury, the anxiety and distress caused by the assault should be compensated by an appropriately substantial award of general damages …"

There being no recognized psychiatric illness, there was, the Plaintiff argued, no impairment of her mental condition.

212 There may be a doubt as to whether limiting the concept of "impairment of mental condition" to an impairment involving a recognised psychiatric illness accords with the general understanding of the term "impairment" or with its use in the statute. In ordinary usage, the term "impairment" connotes a diminution of an antecedent state of affairs or a departure from an objective standard. In discrimination law the term is used to describe departure from a standard; in tort law, it is used to describe departure from a state of affairs caused by the act of the tortfeasor. The ordinary meaning of the term may not reflect a distinction drawn by the law between emotional distress and a psychiatric condition. (As to the nature of the distinction see generally *Tame v New South Wales* (2002) 211 CLR 317 at [285]-[296] (Hayne J).)

213 In the statutory context, the *Civil Liability Act* uses the term "harm" in a sense which may be broader than that of "personal injury". Thus, in Part 3, the Act limits the liability to pay damages for mental harm in certain circumstances. Section 31 provides:

> **31 Pure mental harm – liability only for recognised psychiatric illness**
> There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

Similarly, s 33 provides:

> **33 Liability for economic loss for consequential mental harm**
> A court cannot make an award of damages for economic loss for consequential mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

These provisions would appear to leave to the general law the question whether a person may recover damages for non-economic loss for consequential mental harm, which does not consist of a recognised psychiatric illness. But they undoubtedly use the term "harm" in a sense which extends beyond recognised psychiatric illness.

214 The fact that the concept of harm is broader than that of injury does not turn on the use of the word "impairment". In Part 1A, the term "impairment" is used only in the definition of personal injury: s 5. In Part 3, the term "impairment" is used in the definition of "mental harm", as well as in the definition of "personal injury". It would be curious if the term "impairment" in the definition of personal injury in Part 3 had some different meaning, but, as the Chief Justice notes, this Act does not use terminology uniformly, but confines its definitions: see [5]-[11] above.

215 The Plaintiff also sought to rely on the judgment of Smith J in *Graham v Robinson* [1992] 1 VR 279 to support her argument that damages awarded for injury to feelings and emotional distress would not constitute damages for "personal injury". That case was concerned with the application of the jurisdictional limit of the Magistrates Court, under s 3 of the *Magistrates' Court Act* 1971 (Vic). The case did not turn on the meaning of "impairment". Although that term did not appear in the *Magistrates' Court Act*, it did appear in the *County*

Court (Jurisdiction) Act 1972 (Vic), to which his Honour referred in considering the upper limit of the jurisdiction of the Magistrates' Court. The *County Court Act* defined personal injury to include "any disease and any impairment of a person's physical or mental condition": s 37(2). Applying that understanding to a defamation case, Smith J held that injury to reputation and emotional distress did not constitute an impairment of a mental condition at all, and therefore did not constitute personal injury. A decision, albeit concerned with similar language, in relation to a different Act and a different cause of action, provides limited assistance in construing the *Civil Liability Act*.

216 The second and third questions identified by the Chief Justice at [4] are first, whether there was in this case "an action … where the act or omission that caused the injury … was negligence" and, separately, whether the proceedings are "an action for the award of personal injury damages". Having held that the present proceedings did not involve negligence, at [18], the Chief Justice finds it unnecessary to determine the answer to the third question: at [22]. Given the subject matter, scope and purpose of Part 2 of the *Civil Liability Act*, there may be some doubt as to whether the second and third questions are properly severable. Thus, accepting that the focus of s 21 is on damages in an action for negligence, the term "personal injury damages", given the somewhat circular definitions in s 11, is a phrase probably intended to include any damages which may properly be awarded in proceedings in negligence. That conclusion is confirmed by the fact that "personal injury damages" is defined to mean damages that relate to the death of or injury to a person: s 11. The word "damages" is defined in s 3, for the purposes of the Act and not merely the Part, to include "any form of monetary compensation" with certain irrelevant exclusions. The definition of "injury" is limited to "personal" injury, which would appear to exclude injury to property, but is otherwise inclusive rather than exclusive. Thus, although I agree that it is not necessary to answer the third question posited by the Chief Justice at [4], that is because the question cannot readily be separated from the second, but does not, in my view, suggest any additional restriction on the scope of s 21. However, his Honour's conclusion with respect to the second question, with which conclusion I agree, means that s 21 has no operation in relation to these proceedings.

217 The first question identified by the Chief Justice, and answered adversely to the State, is that the present proceedings are "in respect of civil liability … in respect of an intentional act that is done with intent to cause injury". His Honour's reasoning at [5]-[17] above demonstrates that this statutory formula is satisfied in relation to the assault on the Plaintiff.

218 I accept the reasoning of the Chief Justice that the concept of "injury" in s 3B(1)(a) is not restricted to, although it would include, personal injury. His Honour also concludes that, on the present facts, the act of Constable Pickavance, constituting the assault, was done "with intent to cause injury": at [16]. In the course of submissions, limited attention was paid to the scope or purpose of this phrase, and what precisely it was intended to add to the concept of "an intentional act". After the completion of the hearing, the Court's attention was directed to the English Court of Appeal decision in *Douglas v Hello! Ltd (No. 3)* [2005] 3 WLR 881. However, on the basis that s 21 does not cover the claim in trespass to land, and does not, in its terms, apply to the assault, the construction of s 3B(1) is not critical to the outcome and hence *Douglas* need not be considered in any detail.

219 *Douglas* was a case involving the publication of photographs taken at wedding of two individuals described as "well-known film actors", who had entered into a contract with a magazine interested in publishing pictures and stories about celebrities for exclusive coverage of the wedding. An unauthorised photographer, described in the judgment as a paparazzo, managed to take pictures secretly and sell them to a second magazine with like interests. The latter sought to publish the photographs for its own benefit, rather than with the predominant purpose of damaging the former. An issue arose, as to whether it was liable for a tort identified as "unlawful interference with economic and other interests": Judgment at [155]. The first question concerned the intention of publisher. The Court said at [159]:

> "There are a number of contenders for the test of the state of mind that amounts to an 'intention to injure' in the context of the tort that we have described as 'unlawful interference'. These include the following:
>
> (a) an intention to cause economic harm to the claimant as an end in itself; (b) an intention to cause economic harm to the claimant because it is a necessary means of achieving some

> ulterior motive; (c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm; (d) knowledge that the course of conduct will probably cause the claimant economic harm; (e) knowledge that the course of conduct undertaken may cause the claimant economic harm coupled with reckless indifference as to whether it does nor not."

The precise distinctions intended by these possible classifications are not entirely self-evident. Further, the judgment proceeds to make distinctions between motive, purpose and means and between what might be described as "a purpose" and "the predominant purpose": see at [174]-[177] and [223]. Further, the limits of the categories tend to be uncertain because of the reference to "ulterior motive" in (b), but not elsewhere. Some of these difficulties are resolved by the further discussion in the judgment, but as that analysis was not considered in argument in this Court, such questions need not be resolved here.

220 Undoubtedly ss 3B and 21 are intended to be complementary. But it is sufficient to hold that the prohibition on the award of exemplary damages, found in s 21, does not in its terms apply, without the need to rely on s 3B, such reliance being thereby otiose.

Exemplary damages – general principles

221 In *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [14] the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ noted:

> "Because the kinds of case in which exemplary damages might be awarded are so varied, it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. Nevertheless, the phrase adopted Knox CJ in *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 of 'conscious wrongdoing in contumeliously disregard of another's rights' describes at least the greater part of the relevant field."

As their Honours noted, similar language was adopted by Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471, where his Honour referred to "conduct showing a conscious and contumelious disregard for the plaintiff's rights". In *Gray* after the passage cited above, the joint judgment continued at [15]:

> "In considering whether to award exemplary damages, the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged."

222 The difficulty in the present case is that there is no express finding as to whether either Constable Pickavance or Constable Harman acted, as against the Plaintiff, with a conscious and contumelious disregard of her rights. Accordingly, it is necessary to consider further the test required by authority to be applied in such a case.

223 In *Lamb v Cotogno* (1987) 164 CLR 1, the defendant sought to serve a summons on the plaintiff, which he declined to accept. The defendant then left the summons on the driveway, returned to his car and backed it out of the driveway. The plaintiff tried to stop him by throwing himself across the bonnet of the car. The defendant then drove in a manner which dislodged plaintiff, throwing him on to the roadway, inflicting serious injuries. He then drove off. The High Court held (at 12):

> "It was open to the master to regard the conduct of the defendant in abandoning the plaintiff in the manner in which he did as displaying a cruel or reckless disregard for the welfare of the

> plaintiff and an indifference to his plight and as colouring the whole of the conduct of the defendant, including the assault which was found to have been made upon the plaintiff. So regarded, the tort of which the defendant was guilty was committed in circumstances amount to an insult to the plaintiff."

Later, the joint judgment stated (at 13):

> "It is true that the master expressly found the actions of the defendant to be without malice, although it is not entirely clear whether that finding extended to the abandonment of the plaintiff. That act was described by the master as callous and although it was submitted that mere callousness, involving no element of intent or recklessness, would not support an award of exemplary damages, the use of the word is, we think, sufficient in its context to indicate that the master saw the defendant as having behaved in a humiliating manner and in wanton disregard of the plaintiff's welfare. Elsewhere in his reasons he described the whole incident as 'horrendous'. In those circumstances, the absence of actual malicious did not disentitle the plaintiff to exemplary damages. Whilst there can be no malice without intent, the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word... ."

224 This last passage in the joint judgment in *Lamb* has given rise to some debate in subsequent cases over the state of mind of the defendant sufficient to warrant an award of exemplary damages. Two points, however, are clear since *Gray*. First, the classical statement in *Whitfeld* should not be approached in a formulaic way, as if it were equivalent to statutory language. The second and related matter is that no single formulation will necessarily be sufficient, given the variety of cases in which the issue could arise. In the case of a claim involving an intentional tort on the part of a police officer, a critical element is the fact that a search, entry onto premises or arrest will be inherently unlawful, unless justified, in the particular circumstances provided for by statute or the general law. Such a situation is significantly different from the exposure of workers to high levels of asbestos fibre and dust in a work environment: accordingly, for present purposes there may be limited assistance to be drawn from the latter class of cases, which include *Midalco Pty Ltd v Rabenalt* [1989] VR 461 (Vic Full Court) and *Coloca v BP Australia Ltd* [1992] 2 VR 441 (O'Bryan J), the former involving asbestos and the latter benzol fumes.

225 Three recent decisions of this Court have dealt with the position of claims against police officers. The first was *Adams v Kennedy* (2000) 49 NSWLR 78. The events in issue commenced with the defendant officer questioning the plaintiff at his home about a motor vehicle accident which had occurred earlier on the day in question. The plaintiff refused to answer questions, "in aggressive and coarse language" and "complained the police were continually harassing him": ibid at [9]. The officer returned later the same afternoon with two other constables in order to arrest the plaintiff. The constables entered the land, at which point a melee broke out involving not only the plaintiff but others who had been in the house, including his de facto wife. The plaintiff was eventually handcuffed, but in the course of handcuffing him, the defendant twisted his arm behind his back in manner which caused a serious injury. The Court found that the defendant had no reasonable suspicion sufficient to justify the arrest which, was therefore unlawful: at [30]. It followed that the forcible entry onto the premises was unlawful and constituted a trespass to property: at [31].

226 In concluding that exemplary damages were available in these circumstances, Priestley JA (Sheller and Beazley JJA agreeing) merely stated that such damages were justified on the basis of the principles explained in *Lamb v Cotogno*: at [35]. However his Honour did make comments in relation to the separate causes of action and as to the appropriate quantum. At [36] Priestley JA stated:

> "In the present case, although strictly it would be proper to award a separate amount for each cause of action, it seems to me that since the different causes of action arose out of the one series of closely connected events, it is appropriate to award an aggregate figure in respect of all the causes of action. That figure should indicate my view that the conduct of the defendants was reprehensible, mark the Court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of

> the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen. In my assessment the appropriate assessment should be fixed at the aggregate sum of $100,000."

227 The second case involved Mr Adams' de fact wife, Ms Susan Lee: *Lee v Kennedy* [2000] NSWCA 153. She brought separate proceedings against the police, she too having been arrested and taken to the police station, where she was kept in custody for some hours in humiliating circumstances. Priestley JA summarised the evidence in the following passages at [11] and [12]:

> "The trial judge then referred to what happened in the melee outside the house, which he said at the very worst involved the plaintiff using a broom handle to try and pry one of the police officers off her husband whom they were attacking quite forcefully while trying to handcuff him.
>
> The trial judge then made these findings: the plaintiff left the melee and went inside the house to make a telephone call for assistance. The police officers … followed her inside, never suggested at any time that she was under arrest for anything, grabbed hold of her, dragged her out of the bedroom, and wrestled with her down the hallway and then out of the house. One of them took hold of her in a headlock. While getting her out of the house they ripped her clothing so that her undergarments and body were exposed. She remained in this state while being handcuffed, put into the police van taken to the police station and until later in the evening when the legal practitioner who went to the police station to represent her and Mr Adams gave her a jumper to cover herself."

The trial judge awarded a sum of $15,000 for what his Honour had described as "aggravated damages or exemplary" damages. Priestley JA described the sum as "completely inadequate" and this Court awarded $25,000 for aggravated damages and a further sum of $120,000 by way of exemplary damages, covering the separate causes of action globally, as in *Adams*: at [19].

228 More recently, this Court dealt with circumstances in which police officers had, on two occasions in July and September 1997, assaulted, falsely imprisoned and trespassed on the land of the plaintiff, in purported execution of powers under the *Mental Health Act* 1990 (NSW): *State of New South Wales v Riley* (2003) 57 NSWLR 496. As noted by Sheller JA at [7]:

> "The respondent established that the police officers on the first occasion had assaulted and falsely imprisoned him, had trespassed on his land and, in breach of their duty of care to him, had failed to exercise reasonable care for his safety while he was in their custody. The respondent recovered general damages, aggravated damages and exemplary damages for the assault and false imprisonment, general damages and exemplary damages for the trespass and general damages, out-of-pocket expenses and damages for loss of past and future earning capacity in the claim of negligence."

No aggravated or exemplary damages were awarded in relation to the second event.

229 The primary concern expressed by Sheller JA was in relation to the argument that a person could be taken into custody under the *Mental Health Act* without being told the reason for his apprehension: at [30]. However, his Honour agreed with Hodgson JA (as did Nicholas J) that exemplary damages were not appropriate in the circumstances. At [138], after referring to the passage cited above from *Gray* as not an exclusive statement of the preconditions to an award of exemplary damages, Hodgson JA said:

> "Similarly, malice is not essential: *Lamb v Cotogno.* Conduct may be high-handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing."

This statement should not, on the other hand, be read in isolation. Hodgson JA continued:

> "However, ordinarily conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express the Court's disapproval or (in cases where the defendants stood to gain more than the plaintiff lost) demonstrate that wrongful conduct should not be to the advantage to the wrong-doer."

230 His Honour noted that there was "no finding of malice against the police": at [139]. After holding that there was error in the approach adopted by the trial judge, his Honour considered the correct approach and stated, at [141]:

> "I have found the question of whether the police conduct in this case merited an award of either aggravated or exemplary damages a difficult one. Certainly it is of the highest importance that police officers know and observe the limits and conditions for valid arrest. Certainly, the use of excessive force, particularly the over-tight application of handcuffs causing significant injury to the respondent, was a most serious matter. Furthermore, the courts must be astute to protect the rights of persons whose behaviour is disturbed by traumatic events in their lives. On the other hand, in my opinion the police were faced with a difficult and potentially very dangerous situation, which had been created by the respondent's own conduct, in either discharging a firearm or acting so as to give rise to a very reasonable apprehension that he had done so. The primary judge did not find malice in the police, and did not find that the police were not, to some extent at least, acting out of concern for the respondent's own interests."

His Honour held that no award should be made on account of exemplary damages.

231 On one view, his Honour's suggestion that conduct may be high-handed, outrageous and show contempt, even if not malicious or involving conscious wrong-doing, may be read as establishing an objective test of high-handedness. That possibility was considered by Ipp JA in *Port Stephens Shire Council v Tellamist Pty Ltd* (2004) 235 LGERA 98. The facts of *Tellamist* were remote from the exercise by police officers of a power of arrest. They concerned the removal by the Shire Council of a large number of mature trees, together with other foliage and undergrowth, from what was intended to be a "public reserve" adjoining the land owned by Tellamist, but which was in fact still part of that land. The primary judge had held that exemplary damages might be recovered "whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world". Of that passage, Ipp JA stated that he did not see how conduct, even when objectively measured, could so qualify "without having some regard to the knowledge, intention, or recklessness (in other words, the state of mind) of the defendant": at [401]. Nor, he suggested, was Hodgson JA saying anything different in the passage referred to above in *Riley*: at [402]. In applying this approach, his Honour ultimately concluded that he did not think that "the conduct of the Council comes anywhere near contumelious behaviour: even if the formula of objective, high-handed, behaviour is applied": at [457]. Accordingly, (Giles JA agreeing) the award of exemplary damages was set aside.

232 On the basis of these authorities, the following propositions may be accepted. First, an award of exemplary damages, being designed to punish the defendant and to deter him or her and others from such conduct, is not concerned with any actual effect on the plaintiff or the extent of any injury. As noted by Spigelman CJ in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, at [55]-[56], the possible purpose of appeasing the plaintiff by assuaging any urge for revenge is not inconsistent with that proposition, that purpose itself being an underlying justification for the criminal law.

233 Secondly, identification of the conduct by such epithets as contumelious, insulting, insolent, outrageous, or high-handed fastens on, as a critical element, the state of mind of the tortfeasor. Indeed, to say that the conduct has some "objective" element is apt to mislead if it is intended to identify some element of severity or seriousness, absent a particular state of mind. Shooting to kill may be a most serious form of conduct, but it does not necessarily involve contumelious behaviour; on the other hand, a sneer may be objectively trivial behaviour, but properly be described as contumelious.

234 Thirdly, although the phrase "conscious wrong-doing in contumelious disregard of another's rights" involves a number of conceptual elements, to break it down into constituent parts may tend to obscure the composite meaning. Thus, in *Lamb*, the Court stated at 13:

> "That act [of abandoning the plaintiff] was described by the master as callous and although it was submitted that mere callousness, involving no element of intent or recklessness, would not support an award of exemplary damages, the use of the word is, we think, sufficient in its context to indicate that the Master saw the defendant as having behaved in a humiliating manner and in wanton disregard of the plaintiff's welfare."

No word from the classical formulation is contained in the last part of this sentence, but the meaning is clearly intended to be the same. It follows that the reference in the classical phrase to "conscious wrong-doing" does not require consciousness of each of the elements of a crime or tort, nor does disregard of a person's "rights" require identification of a particular legal right.

235 Fourthly, the quality of the conduct will, in every case, depend on the circumstances. Those circumstances will include the nature of the power being exercised by the tortfeasor and the seriousness of the effect on the plaintiff. These elements may combine, as they do in the present case. The conferral of special power on a police officer is subject to jealously enforced conditions, designed to ensure that basic human rights and freedoms are not compromised beyond that which is demonstrably justifiable in the public interest.

236 Fifthly, the intention of exemplary damages is that they will cause a "smart or sting": *Lamb*, 164 CLR at 10. As was stated by Palmer J in *Digital Pulse Pty Ltd v Harris* (2002) 166 FLR 421 at [133], "they must not merely irritate, they must sting". For that reason, awards should not generally be for an amount which is nominal, or insignificant. However, it should be added that Palmer J considered that $10,000 was appropriate in the circumstances of that case and that, in *Lamb*, the amount upheld was an award of $5,000. (I note that the passage from the judgment of Palmer J in *Digital Pulse* was attributed in *Amalgamated Television Services Pty Ltd v Marsden (No. 2)* (2003) 57 NSWLR 338 at [23] to Heydon JA in the appeal, *Harris v Digital Pulse*. Although Heydon JA quoted the passage from the trial judge at [254], the language was not his. The error was repeated in *James v Hill* [2004] NSWCA 301 at [84].) Nevertheless, Heydon J stated at [256], "all of the trial judge's reasoning on the above points is entirely correct", the principle thereby being adopted by this Court, Spigelman CJ agreeing at [3]. (Mason P also cited much of the same passage at [74] though not the particular paragraph noted above.)

237 Finally, there is a danger in extracting and giving independent weight to statements to the effect that exemplary damages are an expression of curial disapprobation. They are, but only in the sense that any imposition of a penalty by the Court can be so characterised. The expression of such disapprobation is not at large: it involves the exercise of judicial power, at the behest of a party to civil litigation, and can only occur in accordance with established legal principle.

Assault - exemplary damages

238 Although not necessarily inconsistent with the approach adopted by this Court in *Adams v Kennedy*, the trial judge assessed separate amounts of exemplary damages in relation to the brief incident in the course of which Constable Pickavance turned his handgun towards Mrs Ibbett and, more generally, in relation to the trespass to land and the conduct of the officers whilst on the land. For reasons which will be explained below,

the conduct in question forming part of a continuous action by the police officers, and in particular Constable Pickavance, one award of exemplary damages would have been appropriate. That aspect of the matter can conveniently be addressed in the context of the cross-appeal by the Plaintiff in relation to the quantum of damages awarded. In considering the appeal, it is preferable to deal with the incidents separately, as did his Honour.

239 In dealing with the test for exemplary damages, the primary judge stated that "the defendant must be shown to have exhibited contumelious disregard of the plaintiff's rights", the defendant being a reference to Constable Pickavance. In relation to the facts, his Honour continued:

> "In turning a gun, loaded as it was, on an elderly woman who was doing no more than exercising her lawful rights over her own property and whose demeanour offered no real threat to Senior Constable Pickavance, his action was excessive and totally out of proportion to the circumstances confronting him."

This was said to justify an award of exemplary damages of "modest proportions".

240 Although his action is described as "excessive" and "totally out of proportion to the circumstances confronting him", there is no express finding as to his intention or state of mind.

241 In relation to the incident involving the handgun, Constable Harman was not present at the relevant time in the garage. The primary judge expressed reservations about the evidence of Constable Pickavance, describing him at one point as "conspicuously careless with the truth". Accordingly, as his Honour noted, it was necessary to make "a choice between the evidence of the plaintiff and her son on the one hand and that of Pickavance on the other". The choice was necessary because Constable Pickavance denied having his gun out of its holster. His Honour's findings in respect of this part of the action were as follows:

> "It is consistent with the generally reactive and impetuous behaviour of Pickavance on the occasion in question that in his determination to apprehend Ibbett even after Ibbett's arrival in the garage a handgun would have been drawn in order to achieve a speedy arrest. It is also consistent with his general behaviour that when unexpectedly confronted by the plaintiff and challenged by her he would turn his gun on her. As in most respects I found the plaintiff's evidence reliable and convincing and I therefore find that she was threatened by Pickavance when he pointed the handgun at her and shouted 'Open the bloody door and let my mate in'. The combination of that action and the accompanying words were more than sufficient to satisfy the requirements of immediate apprehension of harm on the part of the plaintiff intentionally caused by Pickavance and therefore amounted to an assault."

The assault would not, of course, be unlawful, unless the conduct was not justified in the circumstances. The later finding that it was excessive may be understood to satisfy that requirement. In considering the question of compensation, his Honour concluded that the officer's conduct "was calculated to cause fear and apprehension particularly in a woman of 69 years of age confronted as she was by a stranger in ordinary street clothes behaving in a highly agitated and threatening manner": Judgment at p 20.

242 In his evidence in chief, Constable Pickavance denied pointing a gun at the Plaintiff, or at Mr Ibbett. He said that the gun was located in the holster on his right hip. He did give evidence that he "screamed at" the Plaintiff to the effect that he wanted the door open "now".

243 Constable Pickavance was challenged in cross-examination in relation to his evidence that he did not draw his pistol out of the holster (Tcpt 148-149) and was challenged at some length as to his belief that he had a

right to enter the premises in the circumstances that had arisen, without a search warrant (Tcpt 156-157). Any consciousness of wrongdoing must have flowed from the absence of justification for entering the premises. Whether a consciousness of wrongdoing in that respect would be sufficient to justify a specific finding in relation to his use of the weapon is unclear. Assuming that in relation to the pointing of the pistol at Mr Ibbett, there was conscious wrongdoing in contumelious disregard of his rights, there is the further question of whether the turning of the gun towards the Plaintiff also constituted such conscious and contumelious wrongdoing. Mr Ibbett's evidence as to what happened suggested a relatively brief incident with his mother (Tcpt 64-65):

> "Q. What happened then?
> A. After we finished arguing or around when we were still arguing, Mum come to the inside door – I was sort of making my way towards him, arguing with him, you know, getting up closer and then he turned to the internal door with the gun and Mum was standing there and then he turned straight back towards me again.
>
> Q. Did you hear anything – did your mother say anything that you heard?
> A. I think she said something. "Who are you", I think she said.
>
> Q. What happened then?
> A. He just pointed the gun back at me – he just pointed it at Mum quick and then pointed it back at me and then as I was walking up closer to him he grabbed hold of me … .'

244 His Honour used the words "reactive and impetuous", which may well have described his turning of the gun towards the Plaintiff. That does not, by itself, clearly demonstrate conscious wrongdoing in contumelious disregard of rights. However, the circumstances may give the matter a particular complexion. If his Honour had been satisfied that Constable Pickavance knew that he had acted unlawfully in entering the premises, it would have been open to his Honour to conclude that the drawing of the pistol demonstrated an insolent or contumelious disregard of the rights of those on the premises and that the assault on the Plaintiff fell into that category. The lack of specific findings makes this a difficult case to determine on appeal. On balance, it appears to me that his Honour was aware of the correct test to be applied and was satisfied on the balance of probabilities that the conduct of Constable Pickavance with respect to the gun warranted appropriate findings, which were made, at least implicitly. This conclusion is confirmed by the findings made with respect to the trespass to land, set out below.

245 The challenge to the award of exemplary damages with respect to the assault should, in my view, fail, both on the legal and factual bases.

Trespass to land – exemplary damages

246 In relation to the trespass to land, the primary judge made awards of exemplary damages in relation to the conduct of both Constables Pickavance and Harman. His Honour stated:

> "The adherence of both Pickavance and Harman to the view that they had done nothing wrong notwithstanding of the withdrawal of charges against Ibbett and the subsequent internal investigation is evidence of the disregard shown by those two police officers to the plaintiff's proprietary rights. They showed no concern even in the witness box for the extent to which the plaintiff's rights had been infringed and I have no difficulty in finding that both police officers, but again particularly Pickavance, had in the context of the unlawful entry onto the plaintiff's premises displayed a 'contumelious disregard' of the plaintiff's rights."

His Honour awarded $20,000 for exemplary damages associated with the unlawful entry onto the premises, being twice that awarded in relation to the assault with the gun.

247 There are three aspects of his Honour's reasoning and award which give rise to concern. First, it is necessary to consider the finding with respect to Constable Harman, about whose conduct his Honour made few specific findings. Although he entered the premises at about the same time as Constable Pickavance, he did not dive under the garage door as it was closing. Accordingly, he was not party to anything which happened in the garage, until the door had been re-opened. When recounting the evidence, the primary judge had stated:

> "There is no dispute that a considerable amount of shouting between Ibbett and Pickavance followed Pickavance's entry into the garage although it was less clear whether there was any contribution from Harman whose own evidence was that he proceeded to the front door of the premises, not the garage door. He banged on the front door which was situated immediately to the right of the garage."

His Honour noted some intervening events and then returned to the story so far it concerned Constable Harman.

> "Given the amount of noise at the time, she may not have heard Harman. It was some time shortly after the plaintiff had proceeded to the front door and then back to the garage that the garage door re-opened. Harman was under the impression that the plaintiff activated the door in response to his call but there is no other evidence to support that conclusion."

The evidence was thus left in this state: his Honour did not expressly accept Constable Harman's impression, but nor did he reject it. Up until that point, there was little material to suggest that Constable Harman was acting beyond any implied right he may have had to seek permission from the owner of the premises to be on the land.

248 Constable Harman apparently entered the garage immediately the door was opened and, with Constable Pickavance, took Mr Ibbett out on to the driveway. He was involved in the handcuffing of Mr Ibbett and, apparently, an incident in which Mr Ibbett was pushed to the ground. Other police then arrived on the scene and assisted Constable Harman to push Mr Ibbett's van out of the garage into the driveway, where it was searched. All that was found in the van was a brown sports bag containing "gloves, pliers, spanner, hacksaw blade and other tools", together with a "bag of syringes". At one stage Constable Pickavance screamed at the Plaintiff that her son had a "thousand dollar a week habit" and "You're going to find him dead, dead in the gutter with a needle in his arm". The primary judge described Constable Pickavance's behaviour as "erratic and intemperate". His Honour also rejected evidence given by both police that Mr Ibbett spat at Pickavance when he was being restrained and that he was stripped searched in the garage, a matter which both police denied.

249 His Honour considered whether the entry on the premises was justified by an implied licence, in accordance with the principles identified in *Lippl v Haines* (1989) 18 NSWLR 620. His Honour rejected that conclusion on the basis that "permission was not sought prior to entry and any such licence was clearly negated when the police officers were told in quite unambiguous terms by both the plaintiff and her son to leave the premises". The reference to seeking permission before entry is unclear: the point of the implied licence is to permit entry on to land in order to seek such permission. Further, the reference to both police officers being told to leave is not clearly supported by the evidence, absent some finding as to what Constable Harman knew or heard, as a result of the confrontation in the garage, which occurred whilst he was outside and the door was shut.

250 The primary judge also took account of subsequent events. Within a few days of the incident, the Plaintiff had lodged a complaint with the Ombudsman. An investigation was undertaken and the Plaintiff was informed that the officers had been spoken to by senior officers with respect to the incident. According to the Plaintiff, she was informed that "managerial action by way of an education program" was to be conducted involving the police officers responsible for Mr Ibbett's arrest. The cross-examination of Constable Harman dealt with the "education program" on more than one occasion. After describing the circumstances at the premises, he was asked about the "re-education" session, which he said had lasted about half an hour. He was asked (at Tcpt 39(12)):

"Q. Did it change the way you conduct yourself as a police officer?
A. I don't think I can conduct myself poorly at any time.

Q. Do you think you conducted yourself poorly on this evening?
A. No, I don't think I conducted myself poorly at all."

After some further cross-examination in relation to the resistance given by Mr Ibbett to the arrest counsel returned to this issue (Tcpt 41(44)):

"Q. I take it from what you've said in your evidence a minute ago that the education package or briefing, half hour briefing, has made no difference at all to the way you conduct yourself?
A. I don't think I conduct myself inappropriate at any time.

Q. It hasn't made any difference to the way -
A. No.

Q. You're not sorry in any way, contrite in any way about what you did on that night?
A. No, my actions, I believe my actions were totally appropriate."

251 Constable Harman was also cross-examined about the entry onto the premises (at Tcpt 47-48)).

"Q. Nobody at any time had given you permission to go on to that property, had they?
A. Didn't think we needed permission to go on to the property.

Q. Did that re-education session, briefing that you had undergone, did that change your mind about whether you thought you needed permission to go on to that property?
A. Not that I recall."

252 This Court was not taken to any evidence in which Constable Harman indicated consciousness of his own wrongdoing or intentional disregard of the plaintiff's rights with respect to her land. If such a conclusion were to be reached, the evidence set out above would need to be disbelieved. His Honour made no express finding as to Constable Harman's state of mind. In those circumstances, no finding justifying an award of exemplary damages in relation to Constable Harman's conduct was warranted.

253 A second concern in relation to his Honour's reasoning and findings with respect to the trespass is that the lawfulness of the entry involved "complex issues", a factor which militates against a conclusion of deliberate wrongdoing. As his Honour noted in his findings, after dealing with the assault:

> "The claim for wrongful entry on to the plaintiff's premises raises more complex issues particularly of legal principle which are not so capable of easy resolution. As I foreshadowed I am prepared to assume, contrary to my impression of much of the evidence in the defendant's case that the conduct of Ibbett and his manner of driving justified a charge of negligent driving."

There followed an extensive discussion of the law, as a result of which, his Honour concluded:

> "In this case Pickavance's dramatic entry into the plaintiff's garage in pursuit of Ibbett and the presence of both police officers on the premises was not preceded by any request to the plaintiff containing a proper announcement of their reason for entry. … I do not accept the

> evidence of the police officers that words such as 'stop, police' were shouted by Pickavance before he dived under the garage door. Even if such words were used at that point, I fail to see how they could have constituted a proper announcement in the accepted sense. In those circumstances their conduct fell well outside the protection offered … and enunciated in earlier decisions applying the provisions of s 352 of the *Crimes Act*. I therefore find that the entry onto the plaintiff's premises by both police officers was without lawful justification and amounted to a trespass to land for which the plaintiff is entitled to an appropriate remedy by way of damages."

Although no challenge was made to this finding, in its terms, that finding is insufficient to show, even by implication, that the police officers actually knew, or even ought to have known, that they had no lawful right to enter the premises to effect an arrest, at the time of entry. Indeed, his Honour's remark that that question itself involved complex issues of legal principle suggests the contrary.

254 A third concern relates to the relevance of a number of the cases to which his Honour referred, including *Lippl v Haines* (1989) 18 NSWLR 620 and *R v O'Neil* (2001) 122 A Crim R 510. Both related to forcible entry to land. As stated by Gleeson CJ in *Lippl* (at 622D):

> "The above principles are stated in terms of forcible entry, because that is the problem which arises in the present case. Non-forcible entry may give rise to additional questions such as questions of implied licence, which are not presently relevant: c.f. *Halliday v Nevill* (1984) 155 CLR 1."

Halliday v Nevill involved charges of driving a motor car whilst disqualified, driving with a blood alcohol content exceeding the prescribed limit and consequential offences of resisting police, assault and escape from lawful custody. The short facts were that the appellant had done no more than reverse a motor vehicle onto the street when he apparently saw the police approaching and drove back into the driveway whence he had come. They spoke to him at the rear of his car in the driveway, with the police car parked across the entrance. He was arrested. The story continued (at p 6):

> "Then, while the appellant and Police Constable Nevill were walking back down the driveway towards the police car, the appellant suddenly broke away from Police Constable Nevill's grasp and ran across Liberty Parade and entered his own home at No. 370. The police officers pursued him into the house where a scuffle took place before he was finally overcome. The two charges of resisting the police officers and the two charges of assault all relate to the scuffle that occurred in his own home."

255 The appeal was concerned only with the lawfulness of the arrest in the driveway across the road, not with the subsequent events in his own home, as that entry had statutory justification if he were escaping from a lawful arrest: *Nevill v Halliday* [1983] 2 VR 553, 555 (Brooking J). The joint judgment of Gibbs CJ, Mason, Wilson and Deane JJ, held that, as a member of the police force, the respondent "had an implied or tacit licence from the occupier to set foot on the open driveway for the purpose of questioning or arresting a person whom he had observed committing an offence on a public street in the immediate vicinity of that driveway". Their Honours continued (at p 8):

> "Any such occupier who desires to convert his path or driveway adjoining the public road into a haven for minor miscreants can, by taking appropriate steps, preclude the implication of a licence to a member of the police force to enter upon the path or driveway to effect an arrest with the result that a police officer's rights of entry are restricted to whatever overriding rights he might possess under some express provision or necessary implication of a statute [or] the common law."

256 The primary judge distinguished *Halliday* on the basis that the entry here "was of a much more intrusive kind and clearly without the plaintiff's consent". That conclusion was presumably based on the fact that the police (or at least Constable Pickavance) entered the garage by going under a closing door, which was no doubt intended to exclude anyone who might otherwise have had an implied licence to come on to the driveway. However, because there was no finding that Constable Pickavance knew that he was exceeding his powers, in circumstances where the precise limits of power may have involved difficult legal questions, the primary judge must be understood to have awarded exemplary damages on the basis of something less than deliberate wrongdoing.

257 Whether or not at the time of entry to the Plaintiff's land Constable Pickavance knew that he was exceeding his powers as a police officer, from the moment that he dived under the closing garage door, it was reasonable to infer that he was indifferent as to whether he had lawful authority for remaining on the Plaintiff's land and that he acted in a manner which showed palpable disregard for her rights as a proprietor. The findings of fact justifying that conclusion have been referred to above. Accordingly, despite the concerns with respect to aspects of his Honour's findings, I am not persuaded that the conduct of Constable Pickavance, accepted by the trial judge, was insufficient to warrant an award of exemplary damages. The question of quantum will be addressed below, in relation to the cross-appeal.

Trespass to land – aggravated damages

258 There was a separate challenge raised by the Crown to the award of aggravated damages. No award was made in this regard in relation to the assault with a firearm, on the basis that "the consequences of the assault and of the invasion of the plaintiff's property by way of unlawful entry are not easily separated". However, the difficulty with this course is that, as his Honour noted, the assault was "an isolated and discrete act of Pickavance alone". There is a danger in treating it as but another consequence of the unlawful entry, if Constable Harman were to be implicated in the damages for the assault, in which he had no part.

259 When dealing with the question of aggravated damages in respect of the trespass to the land, his Honour noted that such damages are "compensatory in nature and are awarded for injury to the plaintiffs' feelings caused by insult or humiliation" – referring to *Lamb v Cotogno* and *Hunter Area Health Service v Marchlewski* (2000) 51 NSWLR 268. The reference to *Hunter Area Health Service* does not greatly assist in this discussion. In that case, Mason P was concerned with the question whether aggravated damages should be awarded for mental distress or injured feelings, in a negligence claim. His Honour held that such an award was inappropriate, a conclusion now reflected in s 21 of the *Civil Liability Act*. One reason for adopting that view was that, at least when parasitic or consequential upon other types of damage, compensation for mental distress, vexation or annoyance is available in a negligence action, according to principles identified in *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1 at 37-39, referring at 38G to *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359-360. As Mason P continued in *Hunter Area Health Service* at [110]:

> "To speak of aggravated damages as a separate component can only have the capacity to confuse and run the risk as to double compensation … ."

260 In the present case, the trial judge was conscious of the risk of double compensation, noting:

> "Had the consequences of the act of trespass being confined to the initial entry on to the plaintiff's driveway and into the plaintiff's garage the amount awarded by way of compensatory damages would be an adequate reflection of those consequences."

Additional elements were then identified, including:

(a) conduct of other police officers on the plaintiff's premises;

(b) subsequent prosecution of charges against the plaintiff's son, and

(c) evidence of the Plaintiff as to her response to evidence given by each of Constables Pickavance and Harman as to the effect of the "re-education programs" to which each was subjected.

261 In relation to the first element, his Honour referred to the removal of Mr Ibbett's van from the garage and its subsequent search, together with his arrest and strip search. He also referred to Constable Pickavance's "intemperate and unprovoked outburst to the plaintiff about the fate facing her son as a consequence of his drug abuse". All of these events, as his Honour noted, occurred on her premises and as part of the continuing trespass. Those factors are, in my view, relevantly connected with the tort and support an award of aggravated damages.

262 The second factor, the prosecution of charges, falls into a different category. His Honour referred to "the insult and humiliation implicit in the aftermath of the withdrawal of the charges against her son". That appears not to refer to the withdrawal itself, which might well have been viewed as an element of vindication, to the extent that it affected the plaintiff, but to the effect of the so-called "re-education program". However, the relevance of this conduct is somewhat obscure. It appears to have been the case that other officers promised the Plaintiff that Constables Pickavance and Harman would be subject to some form of counselling or direction, such promise being made at the time she withdrew her complaint to the Ombudsman. Precisely what counselling or re-education took place is unclear. In the case of Constable Harman, it was apparently a process which took some 30 minutes, although with Constable Pickavance, who appears to have been more at fault, the process was much shorter. In neither case does it seem to have brought home to either constable the fact or nature of the misconduct in which they were involved. That, however, would appear to be the fault of the senior officers, rather than of either of the constables. Further, such instruction as was given was given separately and, it would appear, in different circumstances. On one view, the thrust of this complaint should better have been directed at the State directly, rather than vicariously, on the basis that it failed to take appropriate steps to correct misconduct which was brought to the attention of those responsible for the Police Service. That, however, was not the way in which the matter appears to have been addressed. In my view these circumstances cannot be relevant to aggravated damages, based on the tortious conduct of the two constables.

263 It follows that the third element, namely the plaintiff's reaction to their evidence of their inadequate counselling, is not a factor by way of aggravation. If they were not criticised for an improper exercise of power, by those in authority over them, they in turn should not be criticised for failure to concede the error of their ways. However, the conduct of a defendant sufficient to aggravate damages must be "in some way unjustifiable, improper or lacking in bona fides": *Mirror Newspapers Ltd v Fitzpatrick* [1984] 1 NSWLR 643 at 653B (Samuels JA). In the present circumstances, each of the constables gave evidence which, in varying degrees, was inconsistent with the elements of aggravation. For example, each denied that Mr Ibbett was stripped searched and Constable Pickavance denied that he drew his pistol from its holster. Furthermore, as already noted, the evidence suggesting impropriety on the part of Constable Harman was not clearly identified. Nevertheless, for the reasons identified by the Chief Justice at [94]-[97] above, referring to the findings made by the trial judge as to relevant circumstances, the amount of his Honour's award in relation to aggravated damages with respect to the trespass to land remains within the appropriate range and need not be varied.

"Principle of coherence"

264 A further argument was raised by the State in resistance to the proposition that exemplary damages should be awarded against the police. That argument was said to be derived from the "principle of coherence" referred to, by way of example, in *Sullivan v Moody* (2001) 207 CLR 562. The principle of coherence, it was argued, requires that the Court have regard to the fact that responsibility or control for the actions of police officers has been reposed by statute in the Commissioner of Police (see, *Police Act* 1990 (NSW) ss 139, 148, 173 and 181D) and, in addition, jurisdiction to consider complaints about police officers has been reposed in the Ombudsman, the Police Integrity Commission and the Inspector General of the Police Integrity Commission, to say nothing of the general criminal law.

265 The so-called 'principle of coherence' may have a different application in different areas of the law. Its operation in the context of disciplinary action in relation to a teacher in a public school was discussed in detail

by Spigelman CJ in *State of New South Wales v Paige* (2002) 60 NSWLR 371, at [97]-[177]; see also Spigelman CJ in *Hunter Area Health Service v Presland* [2005] NSWCA 33, at [20]-[41].

266 The argument against the imposition of liability for exemplary damages, was supplemented by reference to the principle that, the provision, conduct, supervision and regulation of the Police Service, being a core function of government, is an inappropriate area for adjudication by the Courts. Reference was made by way of analogy to *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [6] and [7] (Gleeson CJ).

267 Dealing with the latter case first, the principles upon which reliance was placed in *Graham Barclay Oysters* concerned the inaction of the Government and the Local Council in failing to exercise powers available to them under relevant State statutory provisions allowing control of pollution in Wallis Lake and its tributaries, in order to prevent threats to public health and to provide environmental protection. It was in that context that Gleeson CJ commented on the difficulty in "inviting the judicial arm of government to pass judgment upon the reasonableness of the conduct of the legislative or executive arms of government". Although, as his Honour noted, three members of the majority in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [162] accepted that it may be "proper and necessary for a court to decide whether the priorities of a local council in dealing with road repairs in various locations were reasonable", nevertheless, his Honour noted that "the scope for judicial examination of the reasonableness of governmental spending priorities was not held to be, and cannot be, at large". The thrust of these comments, however, was not concerned with a liability which may be imposed on a State government for the tortious acts of its police officers. Indeed, such liability has been expressly accepted by the State pursuant to the *Vicarious Liability Act*, s 8. Nor was it argued that the liability of the State under that legislation did not extend to exemplary damages. Accordingly, there is nothing in *Graham Barclay Oysters*, which provides assistance with respect to the present question.

268 The principle derived from *Sullivan v Moody* also lies within a different area. Indeed, to describe the case as involving an application of the 'principle of coherence' may not be entirely helpful. The reference to coherence makes better sense in the context of the general law, as noted by the reference at [50] to the judgment of Gummow J in *Hill v Van Erp* (1995-97) 188 CLR 159 at 231. The thrust of *Sullivan* was that, in circumstances where legislation imposed an obligation on State officers to identify and take steps to protect children at risk of harm, it would not be conducive to the proper exercise of such statutory powers to impose a duty of care to avoid harm to possible abusers. That required consideration not merely of the foreseeability of harm, if care were not taken, but the question of policy involved in the imposition of the duty. As the Court noted, in discussing the reasons of the Full Court of the Supreme Court of South Australia, at [41]:

> "The question was whether the provisions of that scheme were incompatible with there being a duty owed to the plaintiff. The statute imposed a duty upon the defendants to protect children, to investigate allegations of child abuse, and to make necessary reports. The interests of the child were to be the paramount consideration. … From all this there was inferred a statutory intention 'that the common law should be excluded in so far as the alleged perpetrator of the abuse is concerned'."

Their Honours accepted that approach, concluding that no duty was owed. The judgment proceeded at [42]:

> "If it were otherwise, at least two consequences would follow."

At [55] the Court held:

> "More fundamentally, however, these cases present a question about coherence of the law. Considering whether the persons who reported their suspicions about each appellant owed that appellant a duty of care must begin from the recognition that those who made the report had other responsibilities. A duty of the kind alleged should not be found if that duty would not be compatible with other duties which the respondents owed."

269 There is no lack of coherence, or incompatibility, in subjecting the State to an award of exemplary damages in relation to the misconduct of police officers in appropriate cases. The development of more sophisticated means of regulation and new complaint mechanisms may suggest that the general criminal law and the limited availability of exemplary damages has not been effective in controlling inappropriate conduct on the part of police officers, or merely that more flexible mechanisms, not involving litigation, should be available to handle such complaints.

270 Care should be taken to avoid reliance on a perception of incompatibility with a statutory scheme, eliding into an argument based on 'the equity of the statute' or 'statutory analogy'. The latter form of reasoning has been rejected more than once as a basis for developing general law principles: see Finn P "Statutes and the Common Law: The Continuing Story" in Corcoran S and Bottomley S (eds) (2005, Federation Press) pp 57-62. In this particular context, in *Lamb v Cotogno*, the joint judgment stated (at p 11):

> "Even if it were possible for a court to go beyond what a statute actually enacts and to draw from it some principle to be applied by way of analogy in fashioning the common law, it would not assist the defendant's argument in this case. Such an approach was first suggested by Pound in 1907, but it has never really gained general acceptance, at all events in that simple form … ."

In that case, no incompatibility was held to exist between compulsory third party insurance legislation and the award of exemplary damages. Speaking generally, there is a difference between expanding the operation of a statutory principle into areas where the Parliament has not ventured, and accommodating general law principles to give effect to an enacted principle within its prescribed area of operation. The argument of the State may have crossed this boundary between permissible and impermissible principles of construction.

271 These arguments may, perhaps, be better understood as an invitation to expand the range of circumstances in which exemplary damages might not be awarded because other steps have been taken, resulting in appropriate punishment and a sufficient level of deterrence. Whilst the relevance of those factors may be accepted, it is not the existence of such mechanisms for alternative means of punishment or deterrence, but the operation of those mechanisms in a particular case, which may render an award of exemplary damages inappropriate. There was no persuasive evidence that such steps had been taken in the present case to deal with the officers, at least in terms of the findings of misconduct made by the primary judge.

272 Finally, the State placed emphasis on the principle, frequently acknowledged, that awards of exemplary damages should be rare. However, that principle may better be expressed as a requirement that the pre-conditions to the making of an award should be strictly applied. One may hope that the occasion for such an award will indeed be rare: nevertheless, if the occasion arises, an award will be appropriate, whether or not a number of similar awards have been made in recent times.

Plaintiff's cross-appeal

273 The Plaintiff cross-appealed against so much of his Honour's judgment as constituted a failure to award aggravated damages in respect of the assault claim. In my view this element of the cross-appeal should succeed. It is clear that his Honour intended to include, as part of the consequences of the unlawful entry, conduct of police officers whilst on the premises, which included the pointing of the revolver at the Plaintiff. Because that was specifically the act of Constable Pickavance, an award should have been made in respect of that specific element of misconduct, given the seriousness with which his Honour viewed the factual circumstances, as found by him.

274 The plaintiff also sought to cross-appeal in relation to the inadequacy of the amounts awarded both by way of compensatory damages and exemplary damages.

275 In relation to the compensatory damages awarded with respect to the assault, the challenge to the plaintiff's appearance was apparently reactive, Constable Pickavance not knowing who she was or whether she constituted a threat to his safety. He should, perhaps, have looked first and swung the gun second: however, because of the short-lived nature of the threat, the distress caused to the plaintiff must have been limited. I would not interfere with his Honour's assessment in that regard. Similarly, the distress caused to the plaintiff by the intrusion on her property, by way of compensatory damages, was very much a matter for assessment by the primary judge. No error of principle was demonstrated in relation to his assessment.

276 As is apparent from *Adams v Kennedy*, an unlawful arrest by a police officer may well give rise to separate causes of action based on assault, trespass to land, false imprisonment and possibly an unlawful search. In such circumstances it may be appropriate, as the Court held in *Adams*, to make a single award of exemplary damages covering different aspects of the continuous course of conduct. In the present case either approach may be open: Constable Pickavance's action in turning his handgun towards the Plaintiff occurred at a time when Constable Harmon was not present and was capable of being dealt with as a separate and severable incident. On the other hand, it could properly be viewed as but one element in a course of aggressive and offensive behaviour on the part of Constable Pickavance on the Plaintiff's property. I am conscious of the dangers adverted to by Ipp JA at [157] above: but, in my view, none of them eventuates from the course I would propose in this case.

277 As noted above, there were no factual findings made in relation to Constable Harman personally which could properly form the basis of an award of exemplary damages based on his conduct. Because it is necessary to identify a relevant state of mind in relation to an individual tortfeasor, it is not, in my view, appropriate to impute to Constable Harman the beliefs or intentions of Constable Pickavance: cf *Port Stephens Shire Council v Tellamist*, 235 LGERA at [406]. For this reason, his Honour's award, specifically in relation to the trespass to land, other than the assault, cannot be sustained.

278 Nevertheless, the aspects of the conduct of Constable Pickavance which are described in detail by the Chief Justice, and warrant an award of aggravated damages in relation to the trespass to land, also support an award of exemplary damages which takes those matters into account. Further, the view that exemplary damages should "sting" and not merely irritate, supports the conclusion that an award, if justified at all, should be in a significant amount. Part of its purpose will be, albeit indirectly through the mechanism of vicarious liability, "to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen": *Adams*, at [36]. Although, as noted above at [262] the inadequacy of the subsequent counselling was not the fault of Constable Pickavance, the evidence as to what took place in that regard prevents the State arguing that an award is not necessary to give effect to the purpose identified in *Adams*: see also [271] above.

279 The position of the Plaintiff in these proceedings is closer to the position of the plaintiff in *Lee v Kennedy*, than that of Mr Adams. The conduct of the police officers in the present case, however, is not in the same league as the conduct in relation to Ms Lee, to whom an award of $120,000 was made some five years ago. Nevertheless, the finding that Constable Pickavance, having drawn his handgun, pointed it towards the Plaintiff is a matter of some seriousness. That seriousness is aggravated by the continuation of his aggressive and offensive behaviour after any possible danger had passed. In my view an appropriate award of exemplary damages, limited to the conduct of Constable Pickavance in the course of the events in question, should be an amount of $45,000.

280 The Chief Justice proposes that separate awards of exemplary damages should be made in respect of each cause of action. His Honour would increase the award with respect to the assault to $25,000 and would not interfere with the assessment of the trial judge of $20,000 with respect to the trespass. Ipp JA agrees with the approach of separate awards, but would not interfere with the trial judge's assessment of $10,000 with respect to the assault and would overturn the assessment with respect to the trespass. As the global award I favour is a minority view, but reaches the same figure as the Chief Justice, I am content to agree with the orders proposed by his Honour, as nothing said above is intended to suggest that such an approach is not available.

Conclusions

281 The Plaintiff was successful in her action, based on the intentional conduct of each of the constables. The awards for compensatory damages made in her favour were not based on negligence. Accordingly s 21 of the *Civil Liability Act* had no operation.

282 Consistently with this conclusion, at least in relation to the assault, s 21 could have had no operation, whatever the scope of its own language, because the damages flowed from intentional acts which were intended to cause injury in the manner in which his Honour so found. In that case, s 3B excluded the operation of Part 2 of the Act in any event.

283 The Plaintiff also filed a notice of contention seeking to assert that provisions of the *Civil Liability Act* were invalid, in that they were in breach of s 5 of the *Constitution Act* 1902 (NSW) or, in the alternative, were invalid pursuant to s 109 of the *Constitution*, because they purported to abrogate or restrict common law rights. Neither of these grounds had any merit, and were reduced to the status of "formal submissions", to which no argument was addressed at the hearing. Nevertheless, they had been the subject of written submissions filed on behalf of the Plaintiff and had induced the Attorney-General for the State of New South Wales to intervene in opposition to the arguments so presented. It is implausible that the arguments raised could not have been satisfactorily dealt with by senior counsel for the State, but as he did not address them, those matters can be disregarded in relation to costs as between the parties. The results otherwise suggest that the State should pay the Plaintiff's costs of the appeal. Although the Plaintiff was only partly successful on the cross-appeal, she has obtained a significant increase in the verdict. In addition that part of the argument formed only a limited part of the hearing. She should have her costs of that proceeding also. The costs order made by the primary judge should not be disturbed.

284 I would make the following orders:

(1) Appeal dismissed.

(2) Allow the cross-appeal in part and vary the orders in the District Court so as to:

(a) set aside orders 1 and 2;

(b) in relation to the assault, add an additional amount of $10,000 on account aggravated damages; and

(c) set aside the awards of exemplary damages and award in lieu thereof:

(i) an amount of $25,000 with respect to the assault, and

(ii) an amount of $20,000 with respect to the trespass.

(3) Direct that judgment be entered for the Plaintiff in the sum of $105,000.

(4) Order the Appellant to pay the Respondent's costs of the appeal and cross-appeal.

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IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL

CA 41119/04
DC 329/02

SPIGELMAN CJ
IPP JA
BASTEN JA

16 December 2005

STATE OF NEW SOUTH WALES v DOROTHY ISABEL IBBETT

Addendum

THE COURT:

1. On 13 December 2005, the Court delivered judgment allowing the cross-appeal in part and varying the amounts awarded by the trial judge. The total damages so awarded were $100,000. Through an error of arithmetic, order (3) directed that judgment be entered for the plaintiff in the District Court in the sum of $105,000. With the consent of the parties, and pursuant to rule 36.17 of the Uniform Civil Procedure Rules 2005, the amount identified in order (3) is varied to $100,000.

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LAST UPDATED: 19/12/2005