Fontin v Katapodis - [1962] HCA 63

HIGH COURT OF AUSTRALIA

Dixon C.J., McTiernan and Owen JJ.

FONTIN v. KATAPODIS
(1962) 108 CLR 177
10 December 1962

Damages

Damages—Compensatory damages—Assault—Provocation by plaintiff—Whether compensatory damages should be reduced.

Decisions

December 10.
The following written judgments were delivered:-
DIXON C.J. In my opinion the appeal by the defendant Fontin (No. 14 of 1962) should be dismissed with costs and the appeal by the plaintiff Katapodis should be dismissed as against the defendants respondents Millars Timber &Trading Co. Limited and Harris Scarfe &Sandovers Limited with costs, and allowed as against the defendant Fontin with costs. The order appealed against should be varied by increasing the amount of damages to 2850 pounds. (at p179)

2. I have had the advantage of reading the judgment prepared by Owen J. and agree in it. There is,

however, one reservation or observation which I would make: it is in relation to the reference to Reg. v. Howe (1958) 100 CLR 448 . In that case we were not concerned with the question whether there were any grounds in fact for a defence of self-defence to the charge of murder. The reason is that the Crown had obtained special leave to appeal for the purpose of examining the proposition or propositions of law upon which the order of the Supreme Court was founded, not the propositions of fact or of evidence which formed the basis or groundwork for the application of these propositions of law (if correct). (at p180)

McTIERNAN J. These appeals arise out of an action for assault and battery. The plaintiff was Katapodis and the defendants were Fontin and his employers, Millars and Sandovers. Katapodis alleged that Fontin assaulted and beat him and that Millars and Sandovers were vicariously liable on the same cause of action. The defendants said in answer to the alleged cause of action that Katapodis first assaulted and beat Fontin and he necessarily assaulted and beat Katapodis in his own self-defence. Millars and Sandovers denied that Fontin committed the alleged assault and battery in the course of carrying out his employment as their servant. Bridge J., who was the trial judge, found that Katapodis first beat and assaulted Fontin and he thereupon assaulted and beat Katapodis, but in so doing Fontin exceeded his right of selfdefence. Accordingly, he decided that Fontin was liable for the damage and loss which Katapodis suffered in the affray. The learned judge decided that Fontin did not assault and beat Katapodis in the course of Fontin's employment with Millars and Sandovers and accordingly dismissed the action as against them. The learned judge assessed the damages at 2,850 pounds which Katapodis should recover from Fontin in respect of the personal injury he suffered and the expenses and financial loss he incurred in consequence of the assault and battery. He found that Katapodis provoked Fontin into the assault and battery he sustained and on that basis mitigated the total damages of 2,850 pounds to the extent of 850 pounds. There was, therefore, a verdict and judgment of 2,000 pounds in favour of Katapodis against Fontin. (at p180)

2. The appeal by Fontin raises the question whether Bridge J. ought to have decided in his favour on the issue of self-defence; and the appeal by Katapodis raises the question whether the decision ought to have been that Millars and Sandovers were vicariously liable. Another question which is raised by Katapodis in his appeal is whether it was an error to mitigate or reduce the total damages assessed. (at p180)

3. None of the findings of fact made at the trial is called into question. The facts which the learned judge found are as follows: Katapodis had purchased goods for cash at the store conducted by Millars and Sandovers. Fontin was a servant of this firm and worked in the glass department of the store. His principal duty was to cut glass to sizes suitable for louvres ordered by customers. He did his work at a table behind which the uncut glass was stacked. The tools which he used were a wooden T square and a small cutter operated by hand. When Katapodis purchased the goods Fontin, a fellow Greek, assisted him because Katapodis was not able to converse in English. Katapodis paid cash and took the goods away with him, but the books of the firm contained no record of the payment. A few days afterwards Katapodis was at the store and Fontin pointed him out to the assistant manager as the customer who had not paid his account. This accusation enraged Katapodis who thereupon went home, found the receipt and produced it to the assistant manager at the store. The assistant manager apologized unreservedly to Katapodis and told him that the incident was closed. Katapodis insisted on his bringing the receipt to Fontin. Fontin was working at his table, attending to a customer. Katapodis and the assistant manager stood in front of the table and the receipt was shown to Fontin. The assistant manager apologized to Katapodis and repeated his assurance that the incident was closed. Katapodis called Fontin "a bad man". As the assistant manager turned to go away Katapodis began an altercation with Fontin and made an insulting

remark to him. Fontin replied to Katapodis in similar fashion. Katapodis then grabbed the T square by the end without the cross-piece and hit Fontin with it once on the arm and once on a shoulder. Katapodis had raised the T square to hit Fontin again. Fontin, thereupon, picked up an off-cut of louvre glass fifteen inches long and two to three inches wide and threw it at Katapodis' face. Katapodis dropped the T square and raised one of his hands to fend off the missile. It cut the socket of the thumb and severed the ulna nerve. Serious and permanent injury was done to the hand. The assault and battery alleged in the action was that Fontin threw the piece of glass at Katapodis and wounded him with it. It is not contested in this Court that Fontin did so. The justification pleaded in defence is that Katapodis hit Fontin with the T square and was about to hit him again. Katapodis does not here contest the finding that he did this. Bridge J. decided that Katapodis' attack on Fontin did not justify his throwing the piece of glass at Katapodis for the purpose of self-defence. It is clear that Fontin had a right to defend himself against being beaten by Katapodis. The question is whether, in the circumstances, it was reasonably necessary for him to throw the piece of glass at Katapodis in order to protect his right of personal safety. The piece of glass which he threw at Katapodis was capable of causing him serious injury. Aimed at the face it is clearly a very dangerous weapon. Apparently, Fontin realized this because he attempted to pitch it so that none of its edges would strike Katapodis. Katapodis had done only trifling harm to Fontin by hitting with the T square. Perhaps, Katapodis may have struck more severe blows if Fontin had not prevented him. But to throw the piece of glass at Katapodis as a means of self-defence was out of all reasonable proportion to the emergency confronting Fontin. No other weapon was available to Fontin but instead of throwing the piece of glass at Katapodis he could easily have moved away from him and thus have avoided further blows from the T square. Fontin had no need to stand his ground and it was not reasonably necessary for him to throw at Katapodis the cruel and cutting missile which he did throw. It was somewhat of the nature of a deadly weapon. The conclusion of Bridge J. that, in the circumstances, it was not reasonably necessary for Fontin to use it in self-defence, is right. The next question is whether Millars and Sandovers were responsible for the assault and battery committed by Fontin on Katapodis by throwing the piece of glass at him. Fontin being the servant of Millars and Sandovers. They were liable only if this trespass was committed by Fontin in the course of his service. The trespass was an unlawful act but Millars and Sandovers were nevertheless responsible if it was Fontin's mode of performing a duty which fell within the scope of his employment. The fight between Fontin and Katapodis was a sequel to the incident about the account. That incident generated the anger in Katapodis which lead to his abusing Fontin. However, the incident was then closed and what ensued cannot be held to be other than a personal quarrel. The need for Fontin to attack Katapodis by throwing the piece of glass at him did not arise from his employment. Katapodis did not, in the capacity of a customer, beat Fontin nor did Fontin, in the capacity of a servant, hit back. The fight occurred on the premises of Fontin's employers, but by throwing the piece of glass, at Katapodis he was not, in fact, serving his employers' interest or affecting to do so. In my opinion, it is not a reasonable conclusion from the evidence that Fontin was acting in the course of his employment while engaged in this altercation and affray between himself and Katapodis. The decision of Bridge J. on the question of vicarious liability is right. (at p182)

Following paragraph cited by:

State of New South Wales v Cuthbertson (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

In Fontin v Katapodis , McTiernan J observed, at 184 , that he considered it was "correct in principle to mitigate or reduce damages of the nature of exemplary damages

if the plaintiff has provoked the assault and battery complained of", but that "to mitigate or reduce actual or compensatory damages is to deprive the plaintiff pro tanto of a legal right". McTiernan J continued that in the case of assault and battery, which was the tortious conduct with which the court was concerned in that case, he was "inclined to the view that there ought to be no reduction of actual or compensatory damages for provocation in the case of assault and battery". However, his Honour had earlier, at 183, distinguished compensatory damages from "exemplary, punitive or aggravated damages", without any further discussion of the distinction between aggravated and exemplary damages.

Lamble v Howl at the Moon Broadbeach Pty Ltd (09 September 2013) (Douglas J)

77. The submission that contributory negligence is not available as a defence to an action for trespass to the person was not resisted by the defendant. [14] Nor was the further submission that the *Civil Liability Act* did not apply in respect of that cause of action because it does not involve a breach of duty as set forth in s. 4 .

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[14] See *Horkin v North Melbourne Football Club Social Club* [1983] 1 VR 153; *Fontin v Katopodis* (1962) 108 CLR 177 at 184 per McTiernan J ; *Sinclair v Caloundra Sub-Branch RSL Services Club Inc* [2001] QDC 196 per McGill QC DCJ at [94] .

Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)

33. An award of exemplary damages may be mitigated or reduced if it is found that the plaintiff has provoked the assault and battery complained of: *Fontin v Katapodis* (at 184) per McTiernan J.

Sinclair v Caloundra Sub-Branch RSL Services Club Inc (24 August 2001) (McGill DCJ.)

There was a plea of contributory negligence in para. 16 of the amended defence. There is an authority that contributory negligence is not available as a defence to an action for trespass to the person: Horkin v. North Melbourne Football Club Social Club [1983] VR 153 [33] ; and see Fontin v. Katapodis (1962) 108 CLR 177 at 184 per McTiernan J . In Hackshaw v. Shaw (1984) 155 CLR 614 the plaintiff sued both in negligence and in trespass, and judgment was entered for the plaintiff on the basis of a favorable finding by a jury as to negligence, although there was also a finding of contributory negligence which led to a reduction in the damages. The case was discussed in the High Court essentially as an action for negligence, but the claim in trespass was never abandoned (p.667), and the entry of judgment for the reduced amount of damages is consistent only with the apportionment legislation applying to the cause of action in trespass as well as the cause of action in negligence. However, so far as I can see that issue was not expressly discussed by their Honours, and in those circumstances I do not think I can regard this decision as authority for the proposition that damages for trespass to the person can be reduced on the basis of contributory negligence by the plaintiff. Fontin (supra) stands as authority for the proposition that compensatory damges are not to be reduced because of provocation on the part of the plaintiff, although the existence of

provocation is a factor which is relevant to the allowance of exemplary damages: see p. 187.

4. Katapodis, in his appeal, calls into question the deduction referable to provocation which the learned trial judge made from the total damages he assessed for damage and loss suffered by Katapodis as a result of his being hit by the piece of glass. The part of the judgment relevant to this question is: "Doing the best I can with this somewhat nebulous evidence as to the plaintiff's loss of earnings in consequence of his injury, I find that a fair figure to cover both past loss and possible future loss would be 1,500 pounds. I thus find the plaintiff's full pecuniary loss for expenses as well as past and future lost earnings to be 1,600 pounds. In respect of his general pain and suffering and loss of amenities and enjoyment of life I find that a fair figure for compensatory damages would be a further 1,250 pounds. Normally this would result in a total verdict for the plaintiff against Fontin of 2,850 pounds. However, as I consider that Fontin, in the commission of his assault, was substantially provoked by the plaintiff, this sum should be mitigated, in my view, to 2,000 pounds". It is contended for Katapodis that it is an error to mitigate or diminish the damages as assessed even if it is accepted that Katapodis provoked Fontin, thus causing him to resort to violence. Assault and battery is actionable per se and damages are "at large", so far as the trespass itself is concerned. Such damages may be nominal or substantial, according to the circumstances in which the plaintiff's right is infringed. A defendant's conduct may be such that it is right to require him to pay exemplary or punitive damages to the plaintiff. In the present case exemplary or punitive damages were not awarded. Having regard to the conduct of Katapodis, he had no ground for claiming damages of that kind. The damages awarded are actual and compensatory damages, nothing else. It may be that for the mere trespass itself Katapodis could have been awarded nominal damages. The damages awarded are solely for personal injury and consequent economic loss. They may be called compensatory or actual damages to distinguish them from exemplary, punitive or aggravated damages. The question is whether it was right to mitigate the damages computed by the trial judge. He mitigated or reduced them by 850 pounds for the reason that Katapodis provoked the assault that resulted in the injury and loss in respect of which he claimed damages of a compensatory character. There are conflicting views on the question whether in the case of assault and battery mitigation or reduction of damages on account of provocation by the plaintiff applies only to exemplary or punitive damages, not to compensatory or actual damages: Linford v. Lake (1858) H &N 276 (157 ER 475) ; Fraser v. Berkeley (1836) 7 Car &P 621 (173 ER 272) ; Pollock, Law of Torts 15th ed. (1951) p. 143; J.C. Fleming, Law of Torts, 2nd ed. (1961) p. 90; Clerk &Lindsell on Torts, 12th ed. (1961) p. 240, footnote 2; Halsbury, 3rd ed., vol. 11, p. 225; Sedgwick, Damages, 8th ed., Chap. XI; Collins v. Keenan (1914) 18 DLR 795 ; Evans v. Bradburn (1915) 25 DLR 611 ; Hartlen v. Chaddock (1957) 11 DLR 2 D, 705 ; Griggs v. Southside Hotel &German (1946) 4 DLR 73 ; Miska v. Sivec (1959) 18 DLR 2 D, 363 ; Rov v. St. Jean (noted briefly in Canadian Annual Digest Yearly Volume 1953, at p. 46); Vol. 6 C.J.S., Assault &Battery, s. 44 (e) 2a, p. 867; 16 A.L.R. 816 et seq; 6 3 A.L.R. 890 et seq; Restatement "Torts, Miscellaneous Torts, Defences, Remedies", s. 921, p. 622; and Powell v. Jonker (1959) IV SALR 443 . It would seem that the principle on which damages of all kinds are reduced or mitigated because of provocation in a case of assault and battery is that the plaintiff brought the trespass on himself. It is, as it were, contribution charged to him on account of his own fault. On the other hand, it is said that the law provides a remedy for any damage or loss occasioned by a wrongful act and, therefore, if provocation brings the defendant to do any act in excess of lawful self-defence which results in personal injury and economic loss to the plaintiff, he is entitled to just and adequate damages, and to mitigate or reduce actual or compensatory damages is to deprive the plaintiff pro tanto of a legal right. This would seem to place actual or compensatory damages for assault and battery on the same footing as damages for personal injury caused by

negligence. I am inclined to the view that there ought to be no reduction of actual or compensatory damages for provocation in the case of assault and battery. It seems to me to be correct in principle to mitigate or reduce damages of the nature of exemplary damages if the plaintiff has provoked the assault and battery complained of. It follows that the judgment of the Supreme Court of the Northern Territory should be varied by substituting the sum of 2,850 pounds for the sum of 2,000 pounds. I agree in the order proposed in the case of each appeal. (at p184)

OWEN J. These two appeals are brought in an action heard by Bridge J. in the Supreme Court of the Northern Territory. The plaintiff claimed damages for assault against three defendants. Two of them, Millars Timber &Trading Company Limited and Harris Scarfe &Sandovers Limited, were trading in partnership in Darwin under the name of Millars &Sandovers and carrying on a shop there, the assistant manager being a Mr. Miles. The other, Fontin, was an employee working in the shop. He was a Greek as was the plaintiff. On 6th December 1958 the plaintiff bought some earthenware pipes at the shop through Fontin. The plaintiff in fact paid the price of the pipes to some other employee but this was not known to Fontin who believed that the pipes had been taken away without payment and reported this to Miles. A few days later the plaintiff was again in the shop and was asked by Fontin to come with him to see Miles. They went to the latter's office where Fontin said that the plaintiff was the person who had bought the pipes but had not paid for them. The shop records did not show that payment had been made and the plaintiff was asked to produce the docket which he had been given when he bought the pipes. He could not then find it but later in the day did so and returned to the shop where he showed it to Miles who apologized and explained that a mistake had been made. The plaintiff then asked Miles to show the docket to Fontin and explain to him that payment had been made. Miles took him to where Fontin was working, showed him the docket and told him that payment had been made for the pipes on the day of the purchase. Miles again apologized to the plaintiff and began to walk away. Fontin was at work cutting sheets of glass on a bench behind which he was standing. On the bench was a wooden measuring stick about four feet long with a short cross piece at one end. Close behind where Fontin was standing were a number of large sheets of glass leaning against a wall. To his right there was a stack of boxes which would have prevented him from moving out from behind the bench in that direction, and to his left another man was standing. Under the bench piles of glass were stacked. As Miles moved away from the bench the plaintiff made an insulting remark to Fontin who replied in kind. The plaintiff then picked up the measuring stick and struck Fontin several times, causing the cross piece to break. He was about to strike Fontin again when the latter picked up a piece of glass about 15 inches long and 2 or 3 inches wide, which was lying on the bench, and threw it in the direction of the plaintiff's face. The plaintiff put up his hand to ward it off and the glass cut his wrist and inflicted serious and permanent damage to it. Apart from the piece of glass, the only other object on the bench was a small glass cutting instrument a few inches long. In reply to the claim of assault, a plea of self-defence was raised and the defendant companies pleaded also that, in assaulting the plaintiff, Fontin was not acting within the scope of his employment so as to make them responsible for his acts. The learned trial judge found that, in throwing the piece of glass at the plaintiff, Fontin had used more force than was reasonably necessary to protect himself and, for this reason, rejected the plea of self-defence. He found also that the assault by Fontin was not one for which his employers should be held liable. On the appeal both these findings of fact were attacked. Counsel for Fontin contended that, in all the circumstances, his client had not exceeded the limits of self-defence and counsel for the plaintiff argued that Fontin's act in throwing the piece of glass was done in furtherance of his employers' interests and that they should therefore be held responsible. In my opinion, no good reason has been advanced for distrubing either of the findings of fact made by the learned trial judge. He considered that Fontin might have taken steps of a less drastic kind to avoid the plaintiff's attack, for example, by moving out from behind the bench to his left. It is true that the fact that a

means of escape was open to a person who claims to have been defending himself against attack is not a decisive factor in considering whether he has acted reasonably (Reg. v. Howe (1958) 100 CLR 448) and the weight to be attached to such a circumstance will necessarily vary according to the circumstances. In the present case, his Honour thought that the fact that a means of escape was open was a very material matter and , in my opinion, he was right in taking that view. A further fact which, to my mind, is of importance in considering the issue of self-defence is that before the piece of glass was thrown, Fontin had called to Miles, who was, he said, "about a yard away", and that Miles was moving to his assistance when the glass was thrown. (at p186)

2. On the question of the defendant companies' liability, his Honour was of opinion that, in throwing the piece of glass to defend himself against the plaintiff's attack, Fontin was not doing something incidental to the performance of his duties and I think that finding was correct. It is true that the altercation between the plaintiff and Fontin had its origin in the fact that the latter had earlier reported to Miles that the plaintiff had not paid for the goods which he had bought some days before, but the inference is clear that what precipitated the attack with the measuring stick was the insulting remark made to the plaintiff by Fontin and that his response to the attack that followed was not an act done in furtherance or supposed furtherance of his employers' interests. (at p186)

Following paragraph cited by:

Northern Territory of Australia v Austral (28 March 2025) (Grant CJ; Reeves and Burns JJ)

> 72. The evidence did not reveal “conscious wrongdoing in contumelious disregard” of the respondents’ rights on the part of the officers of the appellant. It may be accepted that there are some circumstances in which an award of exemplary damages will be appropriate even if the officer was not “conscious” of his or her wrongdoing. [44] The reasons in *Gray* and *Lamb v Cotogno* allow that “conscious wrongdoing” is a usual but not essential condition to the award of exemplary damages. Although the state of mind of the individual actor will always be relevant, exemplary damages may also be awarded “where the defendant has acted in a high-handed fashion or with malice”, even in the absence of a specific consciousness of wrongdoing. [45] That is also reflected in what Hodgson JA said in the passage from *Riley* which has been extracted above, to the effect that conduct may be high-handed, outrageous and show contempt for the rights of others even if it is not malicious or even conscious wrongdoing.
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> [45] See *Fontin v Katapodis* (1962) 108 CLR 177 at 187. See also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 120, in which 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".

The Game Meats Company of Australia v Farm Transparency International Ltd (19 December 2024) (Snaden J)

240. A defendant's reasons for engaging in conduct that attracts an award of exemplary damages may be relevant to the amount that should be awarded: *Font in v Katapodis* (1962) 108 CLR 177, 187 (Owen J, with whom Dixon CJ agreed). So too may be the availability of criminal penalties: *Gray* , 15 [46]-[48] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *XL Petroleum* , 463 (Gibbs CJ).

S, M v S, RK (04 December 2019) (Schammer J)
State of South Australia v Holder (31 October 2019) (Kourakis CJ; Kelly and Stanley JJ)

25. Broadly, an award of exemplary damages will be justified where there is conscious wrongdoing in contumelious disregard of another's rights, [6] however an award of exemplary damages is not confined to contumelious conduct. [7] Th e defendant's conduct must be of such a character that it merits punishment, so that it must have been knowingly wanton, fraudulent, malicious, violent, cruel, insolent, high-handed or an abuse of power. [8] 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 wrongdoer. [9]

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[8] See *State of New South Wales v Delly* (2007) 70 NSWLR 125, 143 [88] ; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 122 (McTiernan J); *Fontin v Katapodis* (1962) 108 CLR 177, 187.

State of New South Wales v Cuthbertson (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

108. Finally, reference should be made to the State's submission that the primary judge did not identify that Senior Constable MacArthur had a malicious intent. In making this submission, the State referred to an observation of Owen J in *Font in v Katapodis* at 187. However, this misreads what Owen J said. Malice is not a necessary requirement for an award of exemplary damages, although historically it has come within one of the phrases used to describe conduct which may entitle a plaintiff to an award: *viz* "*wanton and malicious*" conduct: see *Lamb v Cotogno* at 3. However, the description that has come to be accepted is, as I have stated above, is "*conscious and contumelious disregard of the plaintiff's rights*".

Corso v Arias Holdings Pty Ltd (17 June 2016) (Judge Slattery)

111. Under Australian law, exemplary or punitive damages are those damages awarded over and above the amount necessary to compensate a plaintiff. In order to attract an award of these types of damages, it would be necessary for a defendant to have acted in a high handed fashion or with malice. [28] An award of this type of damages is intended to deter and punish a defendant by, for example, recouping excess profits realised as a result of wilful misconduct or penalising the defendant according to the defendant's means. [29]

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[28] *Fontin v Katapodis* (1962) 108 CLR 177 at 187.

Tilden v Gregg (16 June 2015) (McColl, Macfarlan and Meagher JJA)
Nash v State of New South Wales (10 June 2015) (Gibson DCJ)

178. The relevant principles for exemplary damages are helpfully set out by Hodgson JA in *New South Wales v Riley* at [136]-[138] as follows:

> "[136] Mr Maconachie submitted that, in awarding exemplary damages, the primary judge acted contrary to the principle that exemplary damages are an exceptional remedy which are rarely awarded: *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at [12] and [20] . He submitted that such damages are awarded only where there is "high-handed, insolent, vindictive or malicious conduct" amounting to or exhibiting a "conscious wrong-doing in contumelious disregard of another's rights": *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77, Gray at [14] . Contrary to the view of the primary judge, the present case had little similarity with *Adams v Kennedy* (2000) 49 NSWLR 78: in that case, there was no provocation, no apprehension of danger, and no concern for the victim's well-being. The provocation could preclude exemplary damages: *Fontin v Katapodis* (1962) 108 CLR 177 at 187 ; *Lamb v Cotogno* (1987) 164 CLR 1 at 13. Further, some of the primary judge's reasons were themselves erroneous: Constables Wallace and Heinjus did not exceed orders given by their commander, and the view that there was a falling away of grounds to justify detention was contrary to the finding that detention was justified under the Mental Health Act.
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> [137] Mr Toner relied on the submissions set out earlier in relation to aggravated damages. He submitted that the arrest was in breach of procedures laid down to prevent arbitrary arrests; the arresting police exceeded orders given by Sergeant Wilson; the application of physical force was entirely out of proportion to the limited threat, if any; forceful detention persisted after the reason for it fell away; the police conduct was high-handed; comparisons with *Adams v Kennedy* were justified; and the primary judge did not ignore "provocation".
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> [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."

Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)

69. As I have explained, in my view the appellants' conduct was not responsible for the commission of the tortious act: *Fontin v Katapodis* (at 187) per Owen J (with whom Dixon CJ agreed). Accordingly I would increase each appellant's award of aggravated damages to $7,500.

Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)
Coastline Constructions (Aust) Pty Ltd v Kakavas (18 December 2009) (Schmidt J)
Fuz v Carter (12 September 2006) (Studdert J)
State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)
State of New South Wales v Riley (01 August 2003) (Sheller and Hodgson JJA, Nicholas J)

136 Mr. Maconachie submitted that, in awarding exemplary damages, the primary judge acted contrary to the principle that exemplary damages are an exceptional remedy which are rarely awarded: Gray v. Motor Accidents Commission (1998) 196 CLR 1 at [12] and [20] . He submitted that such damages are awarded only where there is "high-handed, insolent, vindictive or malicious conduct" amounting to or exhibiting a "conscious wrong-doing in contumelious disregard of another's rights": Whitfeld v. De Lauret & Co. Ltd. (1920) 29 CLR 71 at 77, Gray at [14] . Contrary to the view of the primary judge, the present case had little similarity with Adams v. Kennedy (2000) 49 NSWLR 78 : in that case, there was no provocation, no apprehension of danger, and no concern for the victim's well-being. The provocation could preclude exemplary damages: Fontin v. Katapodis (1962) 108 CLR 177 at 187 ; Lamb v. Cotogno (1987) 164 CLR 1 at 13. Further, some of the primary judge's reasons were themselves erroneous: Constables Wallace and Heinjus did not exceed orders given by their commander, and the view that there was a falling away of grounds to justify detention was contrary to the finding that detention was justified under the Mental Health Act .

Chen v Karandonis (18 December 2002) (Beazley, Heydon and Hodgson JJA)

84 Exemplary damages are available where a party engages in *"conscious wrongdoing in contumelious disregard of another's rights"*: see *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 per Knox CJ. As is pointed out in Luntz's Assessment of Damages for Personal Injury and Death, 4th Ed, this phrase has become a term of art. Luntz, at para 1.7.4 expands upon this, describing the conduct necessary to ground an award of exemplary damages as being *"of such a character that it merits punishment, so that it must have been knowingly wanton, fraudulent, malicious, violent, cruel, insolent, high-handed or an abuse of power"*. He points out that:

> "all these descriptors have been used: see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 122 per McTiernan J (approving a statement of the pre- *Rookes v Barnard* law in *Mayne & McGregor on Damages* , 12th Ed, Sweet & Maxwell, London, 1961, p 196), 143 and 147 per Menzies J, 153 per Windeyer J (warning that 'exemplary damages must always be based upon something more substantial than a jury's mere disapproval of the conduct of the defendant'), 161 per Owen J. See also *Fontin v Katapodis* (1962) 108 CLR 177 at 187 (where defendant has acted in high-handed fashion or with malice); *Australian*

Consolidated Press Ltd v Uren (1966) 117 CLR 185 at 212 per Windeyer J (restricted to more flagrant instances of conscious wrongdoing)."

McNeill v Gold Coast City Council (08 March 2002) (Judge Robin Q.C.)

35. As noted at the outset, Mr McNeill claims compensatory damages, aggravated damages and exemplary damages. There has been, over the years, uncertainty as to the extent of overlap of the categories. In *Fontin v. Katapodis* (1962) 108 CLR 177, 187 , Owen J said:-

"In an action for assault, as in many other cases of tort, the conduct and motives of the parties may be taken into account either to aggravate or mitigate damages. In a proper case the damages recoverable are not limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice. But the rule by which the defendant in an action in which exemplary damages are recoverable is entitled to show that the plaintiff's own conduct was responsible for the commission of the tortious act and to use this fact to mitigate damages has no application to damages awarded by way of compensation. It operates only to prevent the award of exemplary damages or to reduce the amount of such damages which, but for the provocation, would have been awarded."

Of this case, Lord Denning said in *Lane v. Holloway* (1968) 1 QB 379, at 387 :-

"… the High Court of Australia, including the Chief Justice, Sir Owen Dixon, held that provocation could be used to wipe out the element of exemplary or aggravated damages but could not be used to reduce the actual figure of pecuniary compensation. So they increased the damages to the full £2,850.

I think that the Australian High Court should be our guide. The defendant has done a civil wrong and should pay compensation for the physical damage done by it. Provocation by the plaintiff can properly be used to take away any element of aggravation. But not to reduce the real damages."

For Queensland, the way in which the categories ought to be approached has been authoritatively determined by the Full Court in *Henry v. Thompson* (1989) 2 QdR 412, 415 :-

"Authorities establish that it was appropriate to award damages under each of the heads: Pain and suffering, aggravated damages, and exemplary damages (*Loudon v. Ryder* (1953) 2 QB 202, *X.L. Petroleum (N.S.W.) v. Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 and *Lamb v. Cotogno* (1987) 164 CLR 1). The argument for the appellants was to the effect that the learned trial judge had erred in awarding too much, either looked at globally or under each heading; the award was so high that it showed that the must have added in the components for aggravated damages and punitive damages more than once. On the other hand counsel for the respondent submitted that the award was a proper reflection of the

serious nature of the tort committed by the appellants and that, either looked at globally or under the separate heads, the award was within the range of what a reasonable jury could have awarded for so serious a wrong.

Lamb clearly confirms, if authority be necessary, the compensatory nature of aggravated damages. The court there said 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. Exemplary damages, on the other hand, go beyond compensation and are awarded 'as punishment to the guilty, to deter from any such proceedings for the future, and as proof of the detestation of the jury to the action itself'."

Whilst, as the court there noted, it may on occasions be difficult to differentiate between aggravated and exemplary damages, problems will be avoided if the differentiating factors referred to are kept in mind at the time of assessment."

Coloca v BP Australia Ltd and Another (30 March 1992) (O'Bryan J)

In Fontin v Katapodis (1962) 108 CLR 177 in an action for damages for assault tried before a judge alone the trial judge reduced the damages for provocation by the plaintiff. In the High Court, the learned trial judge was held to be in error. Owen J observed, at 187 : "In an action for assault, as in many other cases of tort, the conduct and motives of the parties may be taken into account either to aggravate or mitigate damages. In a proper case the damages recoverable are not limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice." (Emphasis added.)

LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (03 December 1990) (Hodgson J)

Mr Heydon submitted that the case did not come close to a case justifying exemplary damages as such. He referred me to passages in Uren v John Fairfax & Sons Pty Ltd (19 66) 117 CLR 118 at 122, 129, 153 and 160, all of which indicated that something like "contumelious" conduct was required; where contumelious meant contemptuous, humiliating and/or insulting. Alternatively, if what was relied on was the circumstance of greater advantage to the defendant than the possible damage to the plaintiff, one would need to find deliberate calculation to that effect by the defendant. Furthermore, in relation to exemplary damages, not only the defendant's conduct should be looked at, but also the plaintiff's, for example, provocation: see Lamb v Cotogno (at 13) and Fonti n v Katapodis (1962) 108 CLR 177 at 187. In this case, there had been prior dealings between the parties, and Mr Heydon submitted that LJP's conduct had contributed to

Chia's difficulties. LJP had known for some time that Chia proposed to build to the boundary, and had been told in June 1988 that scaffolding would be employed. It made no reply at the time, and in these circumstances, Chia's actions were not unreasonable.

Midalco Pty Ltd v Rabenalt (20 September 1988) (Kaye, Fullager and Teague JJ)
Cotogno v Lamb (No 3) (20 June 1986) (Kirby P, Glass and McHugh JJA)

The defendant contends that this passage indicates that the learned master misdirected himself. To attract exemplary damages there must be either an intentional or reckless disregard of the plaintiff's rights. Thus in XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (at 357 ; 647) Gibbs CJ spoke of "a high-handed and outrageous disregard for XL's rights" and Brennan J (at 362; 655) spoke of "conduct showing a conscious and contumelious disregard for the plaintiff's rights". I do not think that it is, or ever has been, enough to award exemplary damages that objectively a jury thinks that the defendant's conduct calls for punishment. Nor do I think that Owen J intended to say so in Fontin v Katapodis when he said (at 187) that exemplary damages might be awarded "for example, where the defendant has acted in a high-handed fashion or with malice". His Honour was giving an illustration, not a definition. However, by using the term "callously" I do not think that the master was intending to apply an objective test. I think that it is probable that he was using a short hand description of the applicable principle.

Cotogno v Lamb (No 3) (20 June 1986) (Kirby P, Glass and McHugh JJA)

There is no doubt that a claimant will lose his entitlement to exemplary damages where it is his conduct which has provoked the tortfeasor's action: see Halsbury's Laws of England, 3rd ed, vol 11 at 225; Sedgwick on Damages, 8th ed, par 384. It will often be the case that insulting behaviour is itself the product of an earlier hurt. Whatever may have been the previous law, in Fontin v Katapodis the High Court of Australia made it plain that provocation would operate to prevent an award of exemplary damages or to mitigate or reduce such damages by reference to the disproportion between the initial insult and the tort sued upon. In the nature of things, the former will generally be confined to words; the latter, to some physical retaliation causing damage. No absolute standard is laid down, such that any minor provocation, whenever occurring, will disentitle the victim to exemplary damages. The law considers the proximity and proportionality of the response. If it is neither proportionate nor approximate it may nonetheless reduce the amount of damages which, but for the provocation, would have been awarded: see Owen J in Fontin (at 187). The court will examine the conduct and motives of the parties: Pearce v Hallett (at 431). The objective of exemplary damages must be kept in mind. Being to punish and deter, it is appropriate to consider the blameworthiness of the tortfeasor's conduct. If, because of proximity in time and proportionality in degree, it is an understandable response to the provocation of the claimant, no exemplary damages will be called for. If, however, it is wholly disproportionate, the purposes of exemplary damages may nonetheless require that an award be made, although reduced by reason of the provocative conduct of the claimant: see also Lane v Holloway (at 387).

Cotogno v Lamb (No 3) (20 June 1986) (Kirby P, Glass and McHugh JJA)

> However, more recent authority, both in England and Australia, appears to have retreated from the prerequisite of conscious wrongdoing and to have embraced an alternative ground for the award of exemplary damages where, whatever the subjective intention of the tortfeasor, objectively he has acted in such a high-handed fashion as calls for punishment. Thus in Fontin v Katapodis (1962) 108 CLR 177 at 187 , Owen J said:
>
> "… In a proper case the damages recoverable are not limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice."

Cotogno v Lamb (No 3) (20 June 1986) (Kirby P, Glass and McHugh JJA)

> The plaintiff contends that the award was inadequate. The defendant contends that it was either excessive or should not have been made at all having regard to the very large sum of damages which the plaintiff received as compensatory damages. I am unable to agree with either objection to the master's assessment. It is well-settled that the conduct and motives of the parties in an assault case "may be taken into account either to aggravate or mitigate damages": Fontin v Katapodis (at 187). On any reckoning the plaintiff's conduct on this night was extraordinary, and the defendant, with some justification, feared for the safety of himself. As the master said, the defendant "was pursued by a distraught plaintiff who was threatening to kill him" and "he attempted to escape from the plaintiff who, as the car commenced to drive off, threw himself on the vehicle". Having regard to the responsibility of the plaintiff for what ultimately occurred and the lack of malice on the part of the defendant, I think that the master was entirely justified in awarding only $5,000 as exemplary damages.

Caltex Oil (Australia) Pty Ltd v XL Petroleum (NSW) Pty Ltd (08 December 1982) (Hutley, Glass and Mahoney JJA)

> This case presents a problem upon which my researches and the extensive researches of counsel have produced no authority precisely in point, though there are many authorities which bear upon it, namely, what is the proper measure of damages where there are joint tortfeasors, one of whom alone is liable to pay exemplary damages, in the light of the abolition of the rule that separate judgments cannot be obtained against joint tortfeasors? The right to receive exemplary damages, and it is not an issue in this case that exemplary damages were properly awarded, is a substantive and not a mere procedural right. Moreover, in Australia, it is recognized that the right is not a mere anomaly, which may be curbed by judicial fiat as in England, but is preserved subject to legislative intervention. Its substantive character is emphasized by the rule that it is to be separately assessed and has its own special defences: Fontin v Katapodis (1962) 108 CLR 177, at p 187.

3. There remains a question relating to damages. The learned trial judge found that, as a result of his injuries, the plaintiff had incurred expense for medical and hospital treatment amounting to 100 pounds. He assessed the damages for earnings lost up to the date of the trial and for reduced earning capacity in the future at 1,600 pounds and went on to say "in respect of his general pain and

suffering and loss of amenities and enjoyment of life I find that a fair figure for compensatory damages would be a further 1,250 pounds". This, as his Honour said, would normally result in a verdict against Fontin for 2,850 pounds. He was of opinion, however, that since Fontin's action in throwing the glass had been provoked by the plaintiff, that fact might be taken into account in mitigation of damages. Accordingly he reduced the amount which he otherwise would have awarded to 2,000 pounds. In this respect, I think his Honour fell into error. In an action for assault, as in many other cases of tort, the conduct and motives of the parties may be taken into account either to aggravate or mitigate damages. In a proper case the damages recoverable are not limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice. But the rule by which the defendant in an action in which exemplary damages are recoverable is entitled to show that the plaintiff's own conduct was responsible for the commission of the tortious act and to use this fact to mitigate damages has no application to damages awarded by way of compensation. It operates only to prevent the award of exemplary damages or to reduce the amount of such damages which, but for the provocation, would have been awarded. The subject is discussed at length in Chap. XI of Sedgwick on Damages 8th ed. In s. 383 of that work, the learned author says "Since the cause for inflicting exemplary damages is a malicious intent on the part of the defendant, and the amount is regulated according to the degree of wrong, all circumstances bearing on the defendant's intent may be shown to the jury, to be considered by them. All circumstances which negative the existence of malice, or show the malice to have been but little, may be shown to mitigate the damages". And, in s. 384, he says "The existence of provocation, though it may not be a defence, will prevent the allowance of exemplary damages". To the same effect is the statement in Halsbury's Laws of England, 3rd ed. vol. 11 p. 224 that "a plaintiff, however, who has provoked the defendant's conduct by his own, will not be entitled to exemplary damages". We were referred, however, to the case of Griggs v. Southside Hotel Ltd. (1946) 4 DLR 73 which, it was submitted, was an authority for the proposition that compensatory damages may be reduced where the defendant's act giving rise to the cause of action is provoked by the plaintiff's conduct. The report does not make it clear whether or not the learned trial judge in that case reduced the amount of the compensatory damages which he would otherwise have awarded or merely treated the plaintiff's actions as justifying a refusal to grant exemplary damages. If he took the former course, I think, with respect, that he was wrong. (at p187)

4. In my opinion, the appeal by the defendant Fontin should be dismissed and that of the plaintiff should be allowed to the extent of increasing the damages awarded to him to 2,850 pounds. (at p188)

Orders

Appeal of Fontin (No. 14 of 1962) dismissed with costs.

Appeal of Katapodis (No. 15 of 1962) as against the respondents Millars' Timber &Trading Company Limited and Harris Scarfe &Sandovers Limited dismissed with costs. Appeal as against the respondent Fontin allowed with costs. Order of Supreme Court varied by increasing the amount of damages to 2,850 pounds.

Cited by:

Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

72. The evidence did not reveal "conscious wrongdoing in contumelious disregard" of the respondents' rights on the part of the officers of the appellant. It may be accepted that there are some circumstances in which an award of exemplary damages will be appropriate even if the officer was not "conscious" of his or her wrongdoing. [44] The reasons in *Gray* and *Lamb v Cotogno* allow that "conscious wrongdoing" is a usual but not essential condition to the award of exemplary damages. Although the state of mind of the individual actor will always be relevant, exemplary damages may also be awarded "where the defendant has acted in a high-handed fashion or with malice", even in the absence of a specific consciousness of wrongdoing. [45] That is also reflected in what Hodgson JA said in the passage from *Riley* whi ch has been extracted above, to the effect that conduct may be high-handed, outrageous and show contempt for the rights of others even if it is not malicious or even conscious wrongdoing.

via

[45] See *Fontin v Katapodis* (1962) 108 CLR 177 at 187. See also *Uren v John Fairfax & Sons Pty Ltd* (1 966) 117 CLR 118 at 120, in which 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".

Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

Ali v Hartley Poynton Limited [2002] VSC 113, *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, *Binsaris & Ors v Northern Territory of Australia* (2020) 270 CLR 549, *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349, *Byrnes v The Queen* (1999) 199 CLR 1, *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 , *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, *Cheng v Farjudi* (2016) 93 NSWLR 95, *Fontin v Katapodis* (1962) 108 CLR 177 , *Fox v Percy* (2003) 214 CLR 118, *Gipp v The Queen* (1998) 194 CLR 106, *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, *Gray v Motor Accident Commission* (1998) 196 CLR 1, *Grierson v The King* (1938) 60 CLR 431, *Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105, *Henry v Thompson* [1989] 2 Qd R 412, *House v The King* (1936) 55 CLR 499, *JB & Ors v Northern Territory of Australia* [2019] NTCA 1, *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 , *Lackersteen v Jones* (1988) 92 FLR 6, *Lamb v Cotogno* (1987) 164 CLR 1, *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324, *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, *New South Wales v Ibbett* (2006) 229 CLR 638, *New South Wales v Ibbett* (2005) 65 NSWLR 168, *Pollack v Volpato* [1973] 1 NSWLR 653, *State of New South Wales v Riley* (2003) 57 NSWLR 496, *Sweeney v Fitzhardinge* (1906) 4 CLR 716, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, *Victoria v Horvath* (2002) 6 VR 326, *Warren v Coombes* (1979) 142 CLR 531, *White & Ors v South Australia* (2010) 106 SASR 521, referred to.

Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

25. Turning to the relevant principles, the circumstances in which it is appropriate to award exemplary damages were considered by the High Court in *Gray v Motor Accident Commission (**Gray**)*. [19] The plurality in that matter stated (footnotes omitted):

> Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of cases: ranging from abuse of governmental power exemplified by *Wilkes v Wood* and its associated cases, through defamation cases of the kind considered in *Uren* , to assault cases such as *Fontin v Katapodis* ...
>
> ...

> Because the types 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 by Knox CJ in *Whitfeld v De Lauret & Co Ltd* of "conscious wrongdoing in contumelious disregard of another's rights" describes at least the greater part of the relevant field.
>
> In considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged. (The reaction of the party who is wronged to high-handed or deliberate conduct may well be a reason for awarding aggravated damages in further compensation for the wrong done. But it is not ordinarily relevant to whether exemplary damages should be allowed.) The party wronged is entitled to whatever compensatory damages the law allows (including, if appropriate, aggravated damages). By hypothesis then, the party wronged will receive just compensation for the wrong that is suffered. If exemplary damages are awarded, they will be paid in addition to compensatory damages and, in that sense, will be a windfall in the hands of the party who was wronged. Nevertheless, they are awarded at the suit of that party and, although awarded to punish the wrongdoer and deter others from like conduct, they are not exacted by the State or paid to it. [20]

The Game Meats Company of Australia v Farm Transparency International Ltd [2024] FCA 1455 (19 December 2024) (Snaden J)

> 240. A defendant's reasons for engaging in conduct that attracts an award of exemplary damages may be relevant to the amount that should be awarded: *Fontin v Katapodis* (1962) 108 CLR 177, 187 (Owen J, with whom Dixon CJ agreed). So too may be the availability of criminal penalties: *Gray* , 15 [46]-[48] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *XL Petroleum* , 463 (Gibbs CJ).

Cho v Dayoub [2024] NSWDC 97 -
Mansour v Marhop Pty Limited [2023] NSWDC 476 (08 November 2023) (Andronos SC DCJ)

> 93. The degree of force which may be used is a question of fact, dependent on all the circumstances: *Fontin v Katapodis* (1962) 108 CLR 177 . The onus of proving that the force used was reasonable in the circumstances and not out of proportion to the danger sought to be avoided lies on the defendant: *Pearce v Hallett* [1969] SASR 423; *McMaster* at [222] .

McCabe v Riechelmann [2023] NSWDC 44 (21 February 2023) (Dicker SC DCJ)

> 535. It is clearly established that at common law, self-defence may provide a defence to an allegation of tortious assault or battery. The onus is on the defendant in a particular case to establish the defence of self-defence. The defendant will need to establish:
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> 1. That he or she subjectively believed there was a threat of imminent harm to them;
>
> 2. That this threat required them to use physical force in self-defence; and
>
> 3. There were reasonable grounds to subjectively believe that the force actually used by them was necessary in the circumstances: see *Fontin v Katapodis* (1962) 108 CLR 177 at 181 where McTiernan J stated:

> "It is clear that Fontin had a right to defend himself against being beaten by Katapodis. The question is whether, in the circumstances, it was reasonably necessary for him to throw the piece of glass at Katapodis in order to protect his right of personal safety."

Mirosevich v Laughlan [2022] NSWSC 1103 (02 September 2022) (Garling J)

47. In *Gray,* Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> "[12] Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of cases: ranging from abuse of governmental power exemplified by Wilkes v Wood [(1763) Lofft 1; 98 ER 489] and its associated cases, through defamation cases of the kind considered in Uren [v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118], to assault cases such as Fontin v Katapodis [(1962) 108 CLR 177]. And the examples could be multiplied.
>
> ...
>
> [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..."

Schilling v Smith (No 2) [2022] NSWDC 329 -
Irlam v Byrnes [2022] NSWCA 81 (03 June 2022) (Simpson AJA, N Adams and Cavanagh JJ)

24. The High Court has not considered the question of whether a defence of contributory negligence is available for an intentional tort. However, it did consider a similar question in *Fontin v Katapodis* (1962) 108 CLR 177; [1962] HCA 63 , namely, whether compensatory damages awarded to a plaintiff arising from assault and battery can be reduced by the plaintiff's *provocation* of the defendant. That decision concerned an assault in which the plaintiff, after falsely being accused of not having paid his account, struck the defendant twice with an object. Before the plaintiff could continue this assault, the defendant threw a glass offcut at him which struck him in the hand when he raised his hands in defence. His hand was permanently injured as a result. The plaintiff brought proceedings for assault and battery against the defendant. Both self-defence and provocation were raised by the defendant.

Irlam v Byrnes [2022] NSWCA 81 (03 June 2022) (Simpson AJA, N Adams and Cavanagh JJ)

37. The above two cases were cited with approval by Williams J in *Dura Constructions (Aust) Pty Ltd v Dovigi* [2004] VSC 252 at [67]-[69] (footnotes omitted):

> "Whilst contributory negligence or fault is relevant to the assessment of damages in an action for negligence by the operation of the *Wrongs Act 1958* and its equivalents, it has been held that the contributory negligence of the victim may be taken into account in the assessment of exemplary damages, but will not reduce compensatory damages in relation to the intentional tort of battery: *Fontin v Katapodis* ; *Horkin v North Melbourne Football Social Club*.
>
> The different issue of the availability of the defence of contributory negligence or fault in an action for conversion was considered by Ormiston J (as his Honour then was) in *Australian Guarantee Corporation Ltd v Commissioner of the State Bank of Victoria* . His Honour took the view that the weight of authority and the opinion of text writers suggested that the defence was not available in cases of intentional torts except in the case of a claim for negligent injury. In *State of NSW v Riley* the New

South Wales Court of Appeal held that the defence of contributory negligence was available in relation to the unintended consequences of an action for trespass where some direct interference had been established.

I note that, nevertheless, in *R v MacGowan,* the Court of Criminal Appeal in New South Wales upheld the trial judge's reduction of compensation on the basis of the *di cta* in *McDonald* and the contributory negligence of the victim. Neither the High Court's decision in *Fontin v Katapodis* nor the issue of the relevance of the concept of contributory negligence to an assessment of compensatory damages in relation to an intentional tort was addressed."

Irlam v Byrnes [2022] NSWCA 81 (03 June 2022) (Simpson AJA, N Adams and Cavanagh JJ)

34. Brooking J went on to consider *Fontin v Katapodis* and provocation generally, observing the following at 162 :

"*Clearly provocation is no defence to an action for battery.* This is implicit in the decisions on whether provocation goes in mitigation of damages, and at times is made explicit in such decisions, as in *Thom v Graham* (1835) 13 Shaw (Ct of Sess) 1129; *Green v Costello* , [1961] NZLR 1010, at p. 1013 and the American cases of *Mahoning Valley Railway Co. v De Pascale* (1904) 70 Ohio St 179 and *Terry v Richardson* (1923) 123 SC 319, the relevant excerpts from which appear in 63 ALR 892 . In *Fontin v Katapodis* (1962) 108 CLR 177 the trial Judge assessed damages for a battery at 2850 pounds, no part of the award being in respect of aggravated or exemplary damages, but reduced the award to 2000 pounds by reason of provocation. The plaintiff appealed successfully to the High Court, which laid it down that, while provocation might prevent the award of exemplary damages or reduce the amount of such damages, it could not lead to a reduction in compensatory damages. Owen, J., with whom Dixon, CJ agreed, made no mention of aggravated damages. Such damages are compensatory: *Rookes v Barnard* , [1964] AC 1129, at pp. 1221 and 1228-38, per Lord Devlin; [1964] 1All ER 367. McTiernan, J., at p. 183, appears to have considered that provocation could prevent the award or reduce the amount of aggravated damages, and that is my view: cf. *Check v Andrews* Hotel Co. Ltd. (1974) 56 DLR(3d) 364; Luntz, *A ssessment of Damages for Personal Injury and Death*, supra, para. 1.817. In *Fontin v Katapodis* , supra, the incident occurred on 10 December 1958 in the Northern Territory, where apportionment legislation had been in operation since 1956: *Law Reform (Miscellaneous Provisions) Ordinance 1956*. Contributory negligence was not pleaded, and the question was dealt with as part of the law relating to mitigation of damages. *The judgments contain nothing dealing in terms with the matter of contributory negligence, yet one cannot avoid the impression that some reference would have been made to contributory negligence if in the opinion of the Court it would have been available had it been raised on the pleadings.* An observation of McTiernan, J.at (108 CLR) p. 184 may be thought not to countenance contributory negligence as a defence: [extracted above at [27]]."

(Emphasis added.)

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successfully to the High Court, which laid it down that, while provocation might prevent the award of exemplary damages or reduce the amount of such damages, it could not lead to a reduction in compensatory damages. Owen, J., with whom Dixon, CJ agreed, made no mention of aggravated damages. Such damages are compensatory: *Rookes v Barnard* , [1964] AC 1129, at pp. 1221 and 1228-38, per Lord Devlin; [1964] 1All ER 367. McTiernan, J., at p. 183, appears to have considered that provocation could prevent the award or reduce the amount of aggravated damages, and that is my view: cf. *Check v Andrews* Hotel Co. Ltd. (1974) 56 DLR(3d) 364; Luntz, *A ssessment of Damages for Personal Injury and Death*, supra, para. 1.817. In *Fontin v Katapodis* , supra, the incident occurred on 10 December 1958 in the Northern Territory, where apportionment legislation had been in operation since 1956: *Law Reform (Miscellaneous Provisions) Ordinance 1956*. Contributory negligence was not pleaded, and the question was dealt with as part of the law relating to mitigation of damages. *The judgments contain nothing dealing in terms with the matter of contributory negligence, yet one cannot avoid the impression that some reference would have been made to contributory negligence if in the opinion of the Court it would have been available had it been raised on the pleadings.* An observation of McTiernan, J.at (108 CLR) p. 184 may be thought not to countenance contributory negligence as a defence: [extracted above at [27]]."

(Emphasis added.)

Irlam v Byrnes [2022] NSWCA 81 (03 June 2022) (Simpson AJA, N Adams and Cavanagh JJ)

42. His Honour went on to observe at [104]-[108] in respect of contributory negligence:

"It seems clear that such a defence is not available at common law to a claim for damages for an intentionally inflicted injury: *Quinn v Leathem* [1901] AC 495 at 537 ; *Fo ntin v Katapodis* (1962) 108 CLR 177 ; *Horkin v North Melbourne Football Club Social Club* [1983] 1 VR 153. The contrary view, expressed in *Lane v Holloway* [1968] 1 QB 379, *Hoebe rgen v Koppens* [1974] 2 NZLR 597 and *Barley v Paroz* (Queensland Supreme Court, 4 April 1979, unreported), is I believe incorrect.

However, the wrist fracture was not inflicted intentionally, and was not proved to be other than an *indirect* consequence of the false imprisonment. This gives rise to two questions: (1) as an indirect consequence of the imprisonment, could it in any event be compensated in an action for trespass to the person; and (2) if it could be compensated in such an action, would a defence of contributory negligence lie because the injury was not intended?

It seems clear that contributory negligence is available as a defence to an action for unintentional trespass: see *Venning v Chin* (1974) 10 SASR 299 ... And in J G Fleming, *Law of Torts*, 9th ed (1998) Sydney, LBC Information Services, the following appears (at 316): 'Even at common law contributory negligence was not a defence to all torts. Thus it did not apply to intended injury as distinct from unintended consequences of wilful wrongdoing'. (Footnotes omitted.)

Returning to my two questions, I am inclined to the view that, once some direct interference is established so that an action for trespass does lie, even indirect consequences of that interference can be compensated in the action for trespass (although such action would not lie at all if there was no direct interference but only indirect consequences). However, *where there are indirect and unintended consequences* of the trespass, *I think the better view is that the defence of contributory negligence is available in respect of those unintended consequences.* This view has some support from the decision of the Court of Appeals of New York in *Sindle v New York City Transit Authority* 352 NYS2d 183 (1973), which concerned a false imprisonment action brought by a schoolboy who sustained injuries attempting to escape from a moving bus. Jason J, with whom the other six judges agreed, said this (at 187): 'Where the damages follow as a consequence of the plaintiff's detention without justification an award may include those for bodily injuries ... And although confinement perceived to be unlawful may invite escape, the person falsely imprisoned is not relieved of the duty of reasonable care for his own safety in extricating himself from the unlawful detention'.

> For those reasons, I do not think that the circumstance that the false imprisonment continued until after the respondent arrived at Moruya Hospital affects either the amount of damages or the reduction for contributory negligence."
>
> (Emphasis added.)

Irlam v Byrnes [2022] NSWCA 81 (03 June 2022) (Simpson AJA, N Adams and Cavanagh JJ)

48. His Honour continued at [127]-[128]:

> "By adopting as its indicium of operation the availability of contributory negligence at common law, the 1965 Act requires continuing reference to the common law. The circumstances in which contributory negligence might operate in a case of trespass were discussed by Bray CJ in *Venning v Chin* (1974) 10 SASR 299 at 317-322 . However, the circumstances of that case involved an unremarkable running-down case pleaded in trespass, and therefore give limited guidance.
>
> The present case is far removed from either *Riley* or *Venning* on its facts. Furthermore, in determining whether contributory negligence is available at common law in the present circumstances, it may be necessary to consider questions of coherence in relation to provocation. That is because, in the context of an intentional tort, it is likely that the plaintiff's conduct could as readily be characterised as provocation as a failure to take reasonable care in his or her own interest. The availability of a defence of provocation is itself contentious: see *Horkin v North Melbourne Football Club Social Club* [1983] 1 VR 153 (Brooking J) and *Fontin v Katapodis* (1962) 108 CLR 177 . In *Plumb v Breen* (unrep, NSWSC, 13 December 1990) Young J held that there was no defence of provocation in answer to a battery, but considered that a different conclusion might be reached in Queensland. However, absent statutory influence, there should not be a difference of approach to the common law in different Australian jurisdictions: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [135] . (In relation to provocation, see generally Trindade, Cane and Lunney, *The Law of Torts in Australia* (4th ed, OUP, 2007) at par 2.5.9.)

Irlam v Byrnes [2022] NSWCA 81 -
Irlam v Byrnes [2022] NSWCA 81 -
Southon v Ray [2022] NSWDC 32 (24 February 2022) (Abadee DCJ)

226. Mr Ray argues that no aggravated damages should be awarded as he was provoked [7] .

via

7. Fontin v Katapodis (1962) 108 CLR 177

Ms P v Mr D [2020] NSWSC 224 (16 March 2020) (Simpson AJ)

148. In *Gray,* Gleeson CJ, McHugh, Gummow and Hayne JJ said:

> "12. Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of cases: ranging from abusive governmental power exemplified by *Wilkes v Wood* [(1763) Lofft1 [1998 ER 489]) and its associated cases, through defamation cases of the kind considered in *Uren* , to assault cases such as *Fontin v Katapodis* [(1962) 108 CLR 177]. And the examples could be multiplied."

S, M v S, RK [2019] SADC 184 (04 December 2019) (Schammer J)

Cribb v Freyberger [1919] WN 22; *Trevorrow v The State of South Australia (No. 5)* [2007] SASC 285; *Trevorrow v The State of South Australia (No. 6)* [2008] SASC 4; *Wheeler v Page* (1982) 31 SASR 1; *Medlin v SGIC* (1985) 182 CLR 1; *Husher v Husher* (1999) 197 CLR 138; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *State of New South Wales v Riley* (2003) 57 NSWLR 496; *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71; *State of New South Wales v Delly* (2007) 70 NSWLR 125; *Fontin v Katapodis* (1962) 108 CLR 177 ; *Gray v Motor Accident Commission* (1998) 196 CLR 1; *R v D* (1997) 69 SASR 413, considered.

S, M v S, RK [2019] SADC 184 -
State of South Australia v Holder [2019] SASCFC 135 (31 October 2019) (Kourakis CJ; Kelly and Stanley JJ)

Holder v State of South Australia [2018] SADC 83; *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193; *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71; *State of New South Wales v Delly* (2007) 70 NSWLR 125; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Fontin v Katapodis* (1962) 108 CLR 177 ; *New South Wales v Ibbett* (2006) 229 CLR 638; *Adams v Kennedy* (2000) 49 NSWLR 78, considered.

State of South Australia v Holder [2019] SASCFC 135 (31 October 2019) (Kourakis CJ; Kelly and Stanley JJ)

25. Broadly, an award of exemplary damages will be justified where there is conscious wrongdoing in contumelious disregard of another's rights, [6] however an award of exemplary damages is not confined to contumelious conduct. [7] The defendant's conduct must be of such a character that it merits punishment, so that it must have been knowingly wanton, fraudulent, malicious, violent, cruel, insolent, high-handed or an abuse of power. [8] 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 wrongdoer. [9]

via

[8] See *State of New South Wales v Delly* (2007) 70 NSWLR 125, 143 [88] ; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 122 (McTiernan J); *Fontin v Katapodis* (1962) 108 CLR 177, 187.

Corowa v Winner [2019] QDC 135 (06 August 2019) (Richards DCJ)

58. In *Fontin v Katapodis* , the court noted that the test of whether the force used is reasonably necessary is the question to be asked if self-defence is raised:

> "It is clear that Fontin had a right to defend himself against being beaten by Katapodis. The question is whether, in the circumstances, it was reasonably necessary for him to throw the piece of glass at Katapodis in order to protect his right of personal safety. The piece of glass which he threw at Katapodis was capable of causing him serious injury. Aimed at the face it is clearly a very dangerous weapon. Apparently, Fontin realised this because he attempted to pitch it so that none of its edges would strike Katapodis. Katapodis had done only trifling harm to Fontin by hitting with the T square. Perhaps, Katapodis may have struck more severe blows if Fontin had not prevented him, but to throw the piece of glass at Katapodis as a means of self-defence was out of all reasonable proportion to the emergency confronting Fontin. No other weapon was available to Fontin but instead of throwing the piece of glass at Katapodis he could easily have moved away from him and thus have avoided further blows from the T square." [18]

via

[18] *Fontin v Katapodis* (1962) 108 CLR 177 per McTiernan J at 178 [3]

Corowa v Winner [2019] QDC 135 -
Ryan v Bunnings Group Limited [2020] ACTSC 353 (27 February 2019) (Loukas-Karlsson J)

> common law, a defence of self-defence is made out where there is just cause and a reasonable response. Eastlake further submitted that, if self-defence is not found, there was nevertheless provocation and therefore a reduction in exemplary damages may be warranted: *Fontin v Katapodis* (1962) 108 CLR 177 (*Fontin*).

Ryan v Bunnings Group Limited [2020] ACTSC 353 (27 February 2019) (Loukas-Karlsson J)

> Eastlake noted that the conduct of the plaintiff can be taken into account in considering exemplary damages: *Fontin* . Eastlake further submitted at [394]-[397] that the claim for exemplary damages should be rejected on the following grounds:

Ryan v Bunnings Group Limited [2020] ACTSC 353 (27 February 2019) (Loukas-Karlsson J)

> common law, a defence of self-defence is made out where there is just cause and a reasonable response. Eastlake further submitted that, if self-defence is not found, there was nevertheless provocation and therefore a reduction in exemplary damages may be warranted: *Fontin v Katapodis* (1962) 108 CLR 177 (*Fontin*).

Ryan v Bunnings Group Limited [2020] ACTSC 353 (27 February 2019) (Loukas-Karlsson J)

> Any provocation by the plaintiff of the defendant will not have the effect of reducing compensatory damages: *Fontin* at [4] .

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

> "[257] ... may be reduced if the plaintiff's conduct has been provocative, since all the circumstances must be taken into account in determining the hurt to the plaintiff's feelings, and such circumstances include the fact that the plaintiff's own behaviour may have brought the attack on himself: Fontin v Katapodis at 183 per McTiernan J ; Horkin v Port Melbourne Football Club Social Club [1983] 1 VR 153 at 162 per Brooking J; O'Connor v Hewitson & Anor [1979] Crim L R 4 6; Hill v Cooke [1958] SR (NSW) 49."

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

93. In *Whitbread v Rail Corporation New South Wales* , Whealy JA accepted, at [257] , after identifying the difference between aggravated damages and exemplary damages, that both types of damages could be reduced if the plaintiff had engaged in provocative conduct. His Honour observed that although aggravated damages are compensatory, such damages:

> "... may be reduced if the plaintiff's conduct has been provocative, since all the circumstances must be taken into account in determining the hurt to the plaintiff's feelings, and such circumstances include the fact that the plaintiff's own behaviour may have brought the attack on himself: *Fontin v Katapodis* at 183 per McTiernan J ; *H orkin v Port Melbourne Football Club Social Club* [1983] 1 VR 153 at 162 per Brooking J; *O' Connor v Hewitson & Anor* [1979] Crim L R 4 6; *Hill v Cooke* [1958] SR (NSW) 49."

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

Fontin v Katapodis (1962) 108 CLR 177; [1962] HCA 63 , *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57, *Whitbread v Rail Corporation New South Wales* [2011] NSWCA 130, considered.

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

Anderson v Bowles (1951) 84 CLR 310 ; [1951] HCA 61 Australian Consolidated Press Ltd v Uren (1966) 117 CLR 185 ; [1966] HCA 37 Avenhouse v Hornsby Shire Council (1988) 44 NSWLR 1 Berry v British Transport Commission [1962] 1 QB 306 Bradlaugh v Edwards (1861) 11 CBNS 377 ; 142 ER 843 Carter v Walker (2010) 32 VR 1 ; [2010] VSCA 340 Coleman v Buckingham's Ltd [1963] SR (NSW) 171 ; 80 WN 593 Croucher v Cachia (2016) 95 NSWLR 117 ; [2016] NSWCA 132 Cuthbertson v State of New South Wales [2017] NSWDC 367 Diamond v Minter [1941] 1 KB 656 Fontin v Katapodis (1962) 108 CLR 177 ; [1962] HCA 63 Foxall v Barnett (1853) 23 LJQB 7 ; 118 ER 1014 Gray v Motor Accident Commission (1998) 196 CLR 1 ; [1998] HCA 70 Hawkins v Permarig Pty Ltd [2004] 2 Qd R 388 ; [2004] QCA 76 Lamb v Cotogno (1987) 164 CLR 1 ; [1987] HCA 47 Latoudis v Casey (1990) 170 CLR 534 ; [1990] HCA 59 Lee v New South Wales Crime Commission (2012) 224 A Crim R 94 ; [2012] NSWCA 262 Loton v Devereux (1832) 3 B & Ad 343 ; 110 ER 129 Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471 ; [2007] NSWCA 377 Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388 ; [2001] HCA 69 Pritchet v Boevey (1833) 1 C & M 775 ; 149 ER 612 State of New South Wales v Ibbett [2005] NSWCA 445 State of New South Wales v Ibbett (2006) 229 CLR 638 ; [2006] HCA 57 State of New South Wales v Koumdjiev (2005) 63 NSWLR 353 ; [2005] NSWCA 247 State of New South Wales v Randall [2017] NSWCA 88 State of New South Wales v Riley (2003) 57 NSWLR 496 ; [2003] NSWCA 208 TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333 ; [2002] NSWCA 82 Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 ; [1966] HCA 40 Whitbread v Rail Corporation NSW [2011] NSWCA 130 Whitfeld v De Lauret and Company Ltd (1920) 29 CLR 71 ; [1920] HCA 75 XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448 ; [1985] HCA 12

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

In Fontin v Katapodis , McTiernan J observed, at 184 , that he considered it was "correct in principle to mitigate or reduce damages of the nature of exemplary damages if the plaintiff has provoked the assault and battery complained of", but that "to mitigate or reduce actual or compensatory damages is to deprive the plaintiff pro tanto of a legal right". McTiernan J continued that in the case of assault and battery, which was the tortious conduct with which the court was concerned in that case, he was "inclined to the view that there ought to be no reduction of actual or compensatory damages for provocation in the case of assault and battery". However, his Honour had earlier, at 183, distinguished compensatory damages from "exemplary, punitive or aggravated damages", without any further discussion of the distinction between aggravated and exemplary damages.

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

108. Finally, reference should be made to the State's submission that the primary judge did not identify that Senior Constable MacArthur had a malicious intent. In making this submission, the State referred to an observation of Owen J in *Fontin v Katapodis* at 187. However, this misreads what Owen J said. Malice is not a necessary requirement for an award of exemplary damages, although historically it has come within one of the phrases used to describe conduct which may entitle a plaintiff to an award: *viz* "*wanton and malicious*" conduct: see *Lamb v Cotogno* at 3. However, the description that has come to be accepted is, as I have stated above, is "*conscious and contumelious disregard of the plaintiff's rights*".

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

95. Although the observations of McTiernan J in *Fontin v Katapodis* to which I have referred may not provide a clear statement that aggravated damages may be denied or reduced in the face of a plaintiff's provocative conduct, and subject to what I say below, I am of the opinion that as a matter of principle that must be correct.

State of New South Wales v Cuthbertson [2018] NSWCA 320 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 -
O'Shea v Northern Territory [2018] NTSC 73 (25 October 2018) (Luppino AsJ)

39. In my view, taking the evidence as a whole, even at its highest, it does not support the entitlement to punitive damages. In any case, had I been of the view that there was sufficient evidence to satisfy the necessary threshold to claim punitive damages, it is clear from the evidence that the plaintiff's uncooperative, aggressive and provocative behaviour necessarily contributed to the methods adopted by the police officers. That would arguably also negate any entitlement to punitive damages based on *Fontin v Katapodis* and *State of New South Wales v Riley* previously referred to[22] and leave may have been refused on that basis also.

O'Shea v Northern Territory [2018] NTSC 73 -
Rachel Margaret Dunn v CIC Allianz Australia Insurance Limited [2017] NSWDC 203 (09 August 2017) (Mahony SC DCJ)

92. It was further submitted that if the court accepts the version of the plaintiff, she had, prior to the movement of the vehicle, clearly informed the driver that she was not willing to travel further with him. In the absence of consent, the deceased driver took her liberty away by the deliberate movement of the vehicle, thereby causing her injury. He had no right to do so, and in the circumstances, his conduct constituted false imprisonment of the plaintiff, insofar as there was an intention, without her consent, to restrain her liberty and take her to the police station. Liability for that tort may be considered, it was submitted, as strict liability, relying on *Ruddock v Taylor* (2005) 222 CLR 612 at [140] per Kirby J. Thus, a defence of contributory negligence was unavailable, relying on *Fontin v Katapodis* [1962] HCA 63 .

Charles Henry Thomlinson v The State of New South Wales [2016] NSWDC 369 -
Charles Henry Thomlinson v The State of New South Wales [2016] NSWDC 369 -
Warren v Lawton [No 3] [2016] WASC 285 (07 September 2016) (LE Miere J)

79. The second point made by the plaintiffs is that ***Pukallus v Cameron*** is authority for the proposition that the contract cannot be rectified so as to include the access road, west road and extending into the pond because the mistake shared by the parties was not a mistake in embodying their intention in the Contract of Sale but a mistake as to what features were within the boundaries of the agreed exclusive use area. In ***Pukallus v Cameron*** the respondent sold the appellants land described in the contract as including 'subdivision 1 of portion 1154'. Both parties believed that an area containing a bore and cultivation lay within the land but in fact it was within land retained by the respondent. This was discovered after completion of the contract. The appellant obtained an order from the Supreme Court of Queensland for rectification of the contract so that the description included reference to an adjoining strip of subdivision 2 containing the cultivated area. This order was set aside by the Full Court. The High Court dismissed an appeal from the decision of the Full Court. The decision in ***Pukallus v Cameron*** was explained by Sackar J in ***W&K Holdings (NSW) Pty Ltd v Mayo*** [2013] NSWSC 1063. On appeal, the New South Wales Court of Appeal varied the orders of Sackar J but noted that no complaint was made on appeal concerning Sackar J's statement of the legal principles concerning rectification, including his Honour's reference to ***Pukallus v Cameron*** . Sackar J explained the decision in ***Pukallus v Cameron*** as follows:

In my view, I do not think it is accurate to say that the principle emerging from ***Pukallus v Cameron*** is that rectification is not available where the relevant mistake is as to the effect of agreed terms rather than the form or expression of words. If that proposition was correct, the doctrine of rectification would almost be reduced to operate to correct purely clerical errors. It is true that the parties in ***Pukallus v Cameron*** had a common intention to include a bore and cultivation area within the conveyance. However, the unavailability of rectification in the case of ***Pukallus v Cameron*** was based on an absence of evidence of sufficient specificity of the parties' precise common intention, and the court's consequent inability to formulate a precise term as to the location of the new boundary so as to include within the contract the portion of land which the parties intended to convey.

Gibbs CJ said (at 448):

'... [the parties] had no common intention as to where the boundary line of the land sold should go to ensure that the bore and cultivation were included ... In these circumstances, to order that the contract be rectified by fixing a boundary line that included part of subdivision 2 was both to depart from so much of the common intention of the parties as had been correctly expressed in the written contract and to formulate a term (as to the situation of the boundary) which neither party had intended to include in the contract ...'

Wilson J (with whom Gibbs CJ agreed) said (in selected passages, citations omitted):

'[The trial judge] was mindful of the obligation resting upon the plaintiffs to show precisely the form to which the contract should conform. He noted that during the trial the plaintiffs had amended the statement of claim to plead in the alternative a representation by Mr Cameron which differed from the particulars supplied earlier, a circumstance which indicated some uncertainty about the precise representation. The evidence of the male appellant reflected this uncertainty. Nevertheless, his Honour stated:

The parties had not determined exactly how far south of the cultivation the boundary would go. But it was clearly understood by them that it would at least skirt the southernmost part of the 27 acres of cultivation. This is a sufficient identification of the land to be included.

...

The case raises no issue as to the principles which govern the rectification of a contract. Those principles are not in dispute ... [The] plaintiff [must] advance "convincing proof" that the written contract does not embody the final intention of the parties. The omitted ingredient must be capable of such proof in clear and precise terms. The Court must not assume for itself the task of making the contract for the parties.

...

[E]ven if a new boundary was in contemplation, the appellants face the difficulty of proving the precise term which it is said was agreed between the parties and which through mutual mistake was not incorporated in the written contract. It is not enough merely to prove that the bore and twenty-seven acres of cultivated land were intended to be included in the land the subject of the sale. Although the learned trial judge made a finding in those terms, he recognized that the evidence required the fixation of a new boundary line parallel to the present southern boundary to subdivision 1. The evidence led for the appellants failed to establish such a line with any clarity.

...

[The trial judge] acknowledged that the parties had not determined how far south of the cultivation the boundary would go, but ruled that sufficient identification of the land to be included was to be found in their "clear understanding" that it would at least skirt the southernmost part of the twenty-seven acres of cultivation. In my respectful opinion, his Honour's conclusion is a rationalization of the evidence that might be supportable only if the established principles concerning rectification did not require convincing proof of the precise variation to the written agreement.'

Brennan J said (in selected passages, citations omitted):

'The finding made by [the trial judge] as to the intention of the parties appears to be amply supported by the evidence, but it is not reflected precisely in the order for rectification which his Honour made. The intention which he found was that a parcel of land, undefined except that it included the bore and the cultivation, was to be included in the sale. The order, however,

described a parcel to the south of subdivision 1 and specified its boundaries. The order went beyond what his Honour found the common intention of the parties to be, and therefore the terms of his order cannot be supported.

...

Where parties enter into a written contract for the sale of land and describe the parcel of the land sold by its survey description, the hypothesis is that the boundaries of the parcel are fixed in accordance with that description and not by reference to boundary fences, survey pegs or other topographical features. The hypothesis may be rebutted by proof that the parties agreed upon the parcel of land to be sold by reference to such fences, pegs or other precise topographical features ...

...

In the present case, the parties had not identified, by reference to fences or other topographical features, the precise boundaries of the parcel the subject of the sale before they entered into the written contract.

...

There was no evidence tending to show that Mr Pukallus and Mr Cameron had agreed on a southern boundary corresponding with that fixed by the order of the learned trial judge.'

The intention that the land include a bore and a particular cultivation area (ie merely 'features' of the land) was not sufficiently specific to enable an order to be crafted to reform the contract. Gibbs CJ, Wilson and Brennan JJ were at pains to emphasise that the barrier to rectification in ***Pukallus v Cameron*** was the absence of sufficient evidence of the parties' precise intention to enable the court to formulate with sufficient precision a variation to the contract that would include the bore and cultivation area within the conveyance. In other words, there were a multitude of possible permutations to an order for rectification, all of which could have had the desired effect of including the bore and cultivation area within the conveyance, but there was no evidence as to which of those orders was intended by the parties at the time of entry into the contract.

In light of this, perhaps the proposition that subsequently decided cases have broadened the availability of rectification by enabling it to be ordered where the parties are mistaken about the effect of deliberately chosen words, is an unwarranted characterisation of the true position. As Wilson J observed, ***Pukallus v Cameron*** did not raise any issue as to the principles which govern the rectification of a contract. The case illustrates the necessity of evidence of sufficient particularity, of the parties' common intention. There needs to be evidence not only of the effect which the parties intended to achieve, but also of the precise method by which the parties intend that effect to be achieved, in order to enable the court to have an evidentiary basis for formulating the terms of the order for rectification [93] [98].

Warren v Lawton [No 3] [2016] WASC 285 (07 September 2016) (LE Miere J)

79. The second point made by the plaintiffs is that ***Pukallus v Cameron*** is authority for the proposition that the contract cannot be rectified so as to include the access road, west road and extending into the pond because the mistake shared by the parties was not a mistake in embodying their intention in the Contract of Sale but a mistake as to what features were within the boundaries of the agreed exclusive use area. In ***Pukallus v Cameron*** the respondent sold the appellants land described in the contract as including 'subdivision 1 of portion 1154'. Both parties believed that an area containing a bore and cultivation lay within the land but in fact it was within land retained by the respondent. This was discovered after completion of the contract. The appellant obtained an order from the Supreme Court of Queensland for rectification of the contract so that the description included reference to an adjoining strip of subdivision 2 containing the cultivated area. This order was set aside by the Full Court. The High Court dismissed an appeal from the decision of the Full Court. The decision in ***Pukallus v Cameron*** was explained by Sackar J in ***W&K Holdings (NSW) Pty Ltd v Mayo*** [2013] NSWSC 1063. On appeal, the New South Wales Court of Appeal varied the orders of Sackar J but noted that no complaint was made on appeal concerning

Sackar J's statement of the legal principles concerning rectification, including his Honour's reference to ***Pukallus v Cameron*** . Sackar J explained the decision in ***Pukallus v Cameron*** as follows:

> In my view, I do not think it is accurate to say that the principle emerging from ***Pukallus v Cameron*** is that rectification is not available where the relevant mistake is as to the effect of agreed terms rather than the form or expression of words. If that proposition was correct, the doctrine of rectification would almost be reduced to operate to correct purely clerical errors. It is true that the parties in ***Pukallus v Cameron*** had a common intention to include a bore and cultivation area within the conveyance. However, the unavailability of rectification in the case of ***Pukallus v Cameron*** was based on an absence of evidence of sufficient specificity of the parties' precise common intention, and the court's consequent inability to formulate a precise term as to the location of the new boundary so as to include within the contract the portion of land which the parties intended to convey.
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> Gibbs CJ said (at 448):
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> '... [the parties] had no common intention as to where the boundary line of the land sold should go to ensure that the bore and cultivation were included ... In these circumstances, to order that the contract be rectified by fixing a boundary line that included part of subdivision 2 was both to depart from so much of the common intention of the parties as had been correctly expressed in the written contract and to formulate a term (as to the situation of the boundary) which neither party had intended to include in the contract ...'
>
> Wilson J (with whom Gibbs CJ agreed) said (in selected passages, citations omitted):
>
> '[The trial judge] was mindful of the obligation resting upon the plaintiffs to show precisely the form to which the contract should conform. He noted that during the trial the plaintiffs had amended the statement of claim to plead in the alternative a representation by Mr Cameron which differed from the particulars supplied earlier, a circumstance which indicated some uncertainty about the precise representation. The evidence of the male appellant reflected this uncertainty. Nevertheless, his Honour stated:
>
> The parties had not determined exactly how far south of the cultivation the boundary would go. But it was clearly understood by them that it would at least skirt the southernmost part of the 27 acres of cultivation. This is a sufficient identification of the land to be included.
>
> ...
>
> The case raises no issue as to the principles which govern the rectification of a contract. Those principles are not in dispute ... [The] plaintiff [must] advance "convincing proof" that the written contract does not embody the final intention of the parties. The omitted ingredient must be capable of such proof in clear and precise terms. The Court must not assume for itself the task of making the contract for the parties.
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> ...
>
> [E]ven if a new boundary was in contemplation, the appellants face the difficulty of proving the precise term which it is said was agreed between the parties and which through mutual mistake was not incorporated in the written contract. It is not enough merely to prove that the bore and twenty-seven acres of cultivated land were intended to be included in the land the subject of the sale. Although the learned trial judge made a finding in those terms, he recognized that the evidence required the fixation of a new boundary line parallel to the present southern boundary to subdivision 1. The evidence led for the appellants failed to establish such a line with any clarity.
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> ...
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> [The trial judge] acknowledged that the parties had not determined how far south of the cultivation the boundary would go, but ruled that sufficient identification of the land to be included was to be found in their "clear understanding" that it would at least skirt the southernmost part of the twenty-seven acres of cultivation. In my respectful opinion, his Honour's conclusion is a rationalization of the evidence that might be supportable only if the established principles concerning rectification did not require convincing proof of the precise variation to the written agreement.'
>
> Brennan J said (in selected passages, citations omitted):

'The finding made by [the trial judge] as to the intention of the parties appears to be amply supported by the evidence, but it is not reflected precisely in the order for rectification which his Honour made. The intention which he found was that a parcel of land, undefined except that it included the bore and the cultivation, was to be included in the sale. The order, however, described a parcel to the south of subdivision 1 and specified its boundaries. The order went beyond what his Honour found the common intention of the parties to be, and therefore the terms of his order cannot be supported.

...

Where parties enter into a written contract for the sale of land and describe the parcel of the land sold by its survey description, the hypothesis is that the boundaries of the parcel are fixed in accordance with that description and not by reference to boundary fences, survey pegs or other topographical features. The hypothesis may be rebutted by proof that the parties agreed upon the parcel of land to be sold by reference to such fences, pegs or other precise topographical features ...

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Warren v Lawton [No 3] [2016] WASC 285 (07 September 2016) (LE Miere J)

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In light of this, perhaps the proposition that subsequently decided cases have broadened the availability of rectification by enabling it to be ordered where the parties are mistaken about the effect of deliberately chosen words, is an unwarranted characterisation of the true position. As Wilson J observed, ***Pukallus v Cameron*** did not raise any issue as to the principles which govern the rectification of a contract. The case illustrates the necessity of evidence of sufficient particularity, of the parties' common intention. There needs to be evidence not only of the effect which the parties intended to achieve, but also of the precise method by which the parties intend that effect to be achieved, in order to enable the court to have an evidentiary basis for formulating the terms of the order for rectification [93] [98].

Warren v Lawton [No 3] [2016] WASC 285 (07 September 2016) (LE Miere J)

80. The facts of this case are distinguishable from those in ***Pukallus v Cameron*** . In ***Pukallus v Cameron*** the redefinition of the boundary, to give effect to the parties' intention to include the bore and cultivation in the conveyance, could have been achieved by a number of different means and there was insufficient evidence to enable the court to determine which of those means the parties might have intended. In the present case the parties possessed a

common intention that the exclusive use area was to include the access road and the west road and apex into the middle of the dam. Therefore, their common intention was that the western boundary is to be the western edge of the access road and the west road and to extend as far as the middle of the dam.

7.7 Precise correction needed

Warren v Lawton [No 3] [2016] WASC 285 -
Warren v Lawton [No 3] [2016] WASC 285 -
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Warren v Lawton [No 3] [2016] WASC 285 -
Warren v Lawton [No 3] [2016] WASC 285 -
Brunoro v Brunoro (No 3) [2016] ACTSC 189 (29 July 2016) (Mossop AsJ)
Fontin v Katapodis (1962) 108 CLR 177
Glover v Roche

Brunoro v Brunoro (No 3) [2016] ACTSC 189 (29 July 2016) (Mossop AsJ)

175. Exemplary damages, on the other hand, are intended to punish the defendant for "conscious wrongdoing in contumelious disregard for another's rights": *Whitfeld v de Lauret & Co Ltd* (1920) 29 CLR 71 at 77. In addition to the punishment of the defendant, an award of exemplary damages may be intended to demonstrate the Court's disapproval of the conduct and to deter the defendant and others from similar behaviour: *Uren* at 158. Prior to making an award of exemplary damages, it is necessary to review all the evidence relating to the defendant's conduct. The defendant's motivation for the tortious act and any evidence of the plaintiff's provocation of the defendant's act must be considered: *Fontin* (1962) 108 CLR 177 .

Brunoro v Brunoro (No 3) [2016] ACTSC 189 (29 July 2016) (Mossop AsJ)

149. A person justifying a battery by reason of self-defence must establish that no more than reasonable force in the circumstances was used: *Fontin v Katapodis* (1962) 108 CLR 177 (*Fontin*). What is reasonable force is a question of fact varying with the circumstances of the case and an important factor is the means of defence used in relation to the harm threatened: *Cook v Beal* (1697) 1 Lord Raym 176; 91 ER 1014 : *Dale v Wood* (1822) 7 Moore CP 33.

Brunoro v Brunoro (No 3) [2016] ACTSC 189 -
Paciocco v Australia and New Zealand Banking Group Ltd [2016] HCA 28 (27 July 2016) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

254. Courts of common law have long exercised the power to award exemplary damages to punish a tortfeasor in certain circumstances [282] ; but the courts have consistently refused to countenance the enforcement of attempts to impose punishment by contract as a sanction for nonperformance or to threaten such punishment [283] . As Lord Hoffmann said in *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [284] :

> "the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance."

via

[282] *Fontin v Katapodis* (1962) 108 CLR 177; [1962] HCA 63 ; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; [1966] HCA 40; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; [1985] HCA 12; *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47.

Corso v Arias Holdings Pty Ltd [2016] SADC 62 (17 June 2016) (Judge Slattery)

Watson Specialised Tooling Pty Ltd v Stevens [1991] 1 Qd R 85; *Boley v Owen* [1944] Tas SR 45; *Australian Competition and Consumer Commission (ACCC) v Dataline.Net.Au Pty Ltd* [2006] FCA 1427; *Arthur v Vaupotic Investments Pty Ltd* [2005] FCA 433; *Lunar Park Sydney Pty Ltd v Bose* [2006] FCA 94; *Australi an Competition and Consumer Commission (ACCC) v 1 Cellnet LLC* [2005] FCA 856; *Macquarie Bank Ltd & Anor v Seagle* (2005) 146 FCR 400; *Vordemeirer v Alguna (No 3)* (1997) 195 LSJS 472; *Micarone v Perpetual Trustees* (1999) 75 SASR 1; *SP Hywood Pty Ltd v Standard Chartered Bank Ltd* (SASC Perry J, S 3764, 21 December 1992, BC 9200151, unreported); *Battye v Shammall* (2005) 91 SASR 315; *Cooper v Maloney (No 3)* [2012] SASC 153; *Banque Commerciale SA v Akhill Holdings Limited* (1990) 169 CLR 279; *Ultramares Corporation v Touche* 174 N.E. 441 (1932); *Fontin v Katapodis* (1962) 108 CLR 177 ; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448; *Ali v Hartly Ponton Limited* [200 2] VSC 113; *AB v Southwest Water Limited* [1982] MLJ 26 June 1992; *Chloroben Chemical Corp v Comegys* 464 A2d 887 (Dell 1983); *Ford Motor Co. v Nowak* 638 SW2d 582 (1982); *Rawlings Sporting Goods Co Inc v Daniels* 619 SW2d 435 (1981); *Nixon v Phillip Morris Aust Pty Ltd* (1999) ATPR 41-707; *Tetuam v AH Robins Co* 738 P2d 1210 (Kan 1987); *Crump v Equine Nutrition Systems Pty Ltd (T/A Horsepower)* [2006] NSWSC 512; *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, considered.

Corso v Arias Holdings Pty Ltd [2016] SADC 62 (17 June 2016) (Judge Slattery)

111. Under Australian law, exemplary or punitive damages are those damages awarded over and above the amount necessary to compensate a plaintiff. In order to attract an award of these types of damages, it would be necessary for a defendant to have acted in a high handed fashion or with malice. [28] An award of this type of damages is intended to deter and punish a defendant by, for example, recouping excess profits realised as a result of wilful misconduct or penalising the defendant according to the defendant's means. [29]

via

[28] *Fontin v Katapodis* (1962) 108 CLR 177 at 187.

Farjudi v Cheng [2015] NSWDC 297 -
State of New South Wales v McMaster [2015] NSWCA 228 (10 August 2015) (Beazley P, McColl and Meagher JJA)

146. In *Fontin v Katapodis* , the respondent suffered a serious injury to his hand when he used it to block a piece of glass, fifteen inches long, which the appellant had thrown at his face in the course of an argument. The respondent at the time had been hitting the appellant with a T square.

State of New South Wales v McMaster [2015] NSWCA 228 (10 August 2015) (Beazley P, McColl and Meagher JJA)

151. It is not necessary for present purposes to further consider Dixon CJ's reservation expressed in relation to the decision in *Howe* as the State's primary submission on this ground was that *Fontin* stated an objective test for the determination of whether self-defence had been made out, whereas the correct test was that stated in *Zevecic* which has both objective and subjective elements. For the same reason it is not necessary to consider the State's suggested analysis of McTiernan J's judgment as in fact containing a subjective element, notwithstanding the purely objective way in which his Honour stated the test.

State of New South Wales v McMaster [2015] NSWCA 228 (10 August 2015) (Beazley P, McColl and Meagher JJA)

158. The State contended that test from *Zecevic* applied to the conduct of Constable Fanning, notwithstanding that *Zecevic* was a criminal case. The State accepted that this test was inconsistent with the formulation of the test by McTiernan J in *Fontin v Katapodis* which required only the satisfaction of the objective question whether, in the circumstances, it was

reasonably necessary to do what was done. However, the State contended that the statements in *Zecevic* relating to "*general application*" and "*consistency*" were intended to convey their general application not only within the criminal law but in the civil context as well and that *Fontin v Katapodis* was no longer good law as to the test to be applied in a civil suit.

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State of New South Wales v McMaster [2015] NSWCA 228 (10 August 2015) (Beazley P, McColl and Meagher JJA)

159. In support of its submission that the test to be applied was that stated in *Zecevic* , the appellant also relied upon the references in *Fontin v Katapodis* to *Howe* as indicating that the test for self-defence in civil and criminal cases was the same. In addition, it submitted that the underlying requirement for coherence in the law pointed to the test in *Zevicic* being the applicable test at common law. The submission, put simply, was that it would be curious if a person was permitted to respond in a particular way under the criminal law but would, by the same act, be exposed to tortious liability. Finally, it relied on a number of authorities in which *Zecevic* has been applied to civil suits, including *Watkins v State of Victoria* [2010] VSCA 138; 27 VR 543.

State of New South Wales v McMaster [2015] NSWCA 228 (10 August 2015) (Beazley P, McColl and Meagher JJA)

144. As indicated above, the trial judge, at [202], stated that at common law, a defence of self-defence cannot be made out unless the force used was both necessary and proportionate to the threat faced. He cited *Fontin v Katapodis* and my statement in *Underhill v Sherwell* that:

> "... any defensive act in which a person who is in danger engages must be reasonably necessary ... if excessive force is used the defence fails."

State of New South Wales v McMaster [2015] NSWCA 228 -
Tilden v Gregg [2015] NSWCA 164 -
Nash v State of New South Wales [2015] NSWDC 144 (10 June 2015) (Gibson DCJ)

178. The relevant principles for exemplary damages are helpfully set out by Hodgson JA in *New South Wales v Riley* at [136]-[138] as follows:

> "[136] Mr Maconachie submitted that, in awarding exemplary damages, the primary judge acted contrary to the principle that exemplary damages are an exceptional remedy which are rarely awarded: *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at [12] and [20] . He submitted that such damages are awarded only where there is "high-handed, insolent, vindictive or malicious conduct" amounting to or exhibiting a "conscious wrong-doing in contumelious disregard of another's rights": *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77, Gray at [14] . Contrary to the view of the primary judge, the present case had little similarity with *Adams v Kennedy* (2000) 49

NSWLR 78; in that case, there was no provocation, no apprehension of danger, and no concern for the victim's well-being. The provocation could preclude exemplary damages: *Fontin v Katapodis* (1962) 108 CLR 177 at 187 ; *Lamb v Cotogno* (1987) 164 CLR 1 at 13. Further, some of the primary judge's reasons were themselves erroneous: Constables Wallace and Heinjus did not exceed orders given by their commander, and the view that there was a falling away of grounds to justify detention was contrary to the finding that detention was justified under the Mental Health Act.

[137] Mr Toner relied on the submissions set out earlier in relation to aggravated damages. He submitted that the arrest was in breach of procedures laid down to prevent arbitrary arrests; the arresting police exceeded orders given by Sergeant Wilson; the application of physical force was entirely out of proportion to the limited threat, if any; forceful detention persisted after the reason for it fell away; the police conduct was high-handed; comparisons with *Adams v Kennedy* were justified; and the primary judge did not ignore "provocation".

[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."

Lamble v Howl at the Moon Broadbeach Pty Ltd [2013] QSC 244 (09 September 2013) (Douglas J)

77. The submission that contributory negligence is not available as a defence to an action for trespass to the person was not resisted by the defendant. [14] Nor was the further submission that the *Civil Liability Act* did not apply in respect of that cause of action because it does not involve a breach of duty as set forth in s. 4 .

via

[14] See *Horkin v North Melbourne Football Club Social Club* [1983] 1 VR 153; *Fontin v Katopodis* (1962) 108 CLR 177 at 184 per McTiernan J ; *Sinclair v Caloundra Sub-Branch RSL Services Club Inc* [2001] QDC 196 per McGill QC DCJ at [94] .

Lamble v Howl at the Moon Broadbeach Pty Ltd [2013] QSC 244 (09 September 2013) (Douglas J)
Fontin v Katopodis (1962) 108 CLR 177; [1962] HCA 63 , cited

Miller v Muir [2013] WADC 6 (21 January 2013) (Bowden DCJ)

Fontin v Katapodis (1962) 108 CLR 177

Miller v Muir [2013] WADC 6 -
Deutsch v Rodkin [2012] VSC 450 (28 September 2012) (Hargrave J)

79. In considering whether to award exemplary damages and, if so, in what amount, the Court may consider whether the offending conduct was the result of the provocation by the plaintiff. [15] In this case, Erwin's conduct in locking Robert out of the Cooee business, changing its banking arrangements to accounts under his sole control, and misappropriating substantial receipts of the Cooee business for his personal purposes and for excessive management fees was provocative. It should be taken into account in determining whether exemplary damages should be awarded and, if so, in what amount.

via

[15] *Williams v Hursey* (1959) 103 CLR 30, 83-4, 110, 132 ; *Fontin v Katapodis* (1962) 108 CLR 177 .

Ormerod v Court [2012] WADC 33 (07 March 2012) (Sweeney DCJ)

70. His Honour summarised the evidence of all of the witnesses in some detail. Following that he gave the following reasons, which I have set out in full given the nature of the grounds of appeal:

> In relation to this particular matter (the appellant) has the onus or the job of satisfying this court on the balance of probabilities as to what he said, that is, that he was assaulted by (the respondent). There needs to be something briefly said about assaults and batteries in relation to this particular matter. It is common and it is well settled law that an assault is any direct threat by a person that places another person in reasonable apprehension of an imminent contact by that person. Battery, however, is slightly different. That is a direct act of a person that has the effect of causing contact with the body of another person without that other person's consent.
>
> Now, in relation to this particular matter I can summarise it briefly, and there doesn't seem to be any dispute, that there was contact between (the respondent) and (the appellant), either that it was a punch or that it was a push. (The appellant) said he didn't actually know whether it was a punch or a push being it happened so quickly, and he said it came – he said, 'I was punched', but he said, 'It came out so quickly' and it was just under the front section, just under his nose.
>
> It does not seem to be in dispute and I have to say that the evidence by Mr Rowbell (sic: Wrobel), Mr Collins, Mr Brown and (the respondent) himself, all that evidence suggests and I have to find and I do find as a matter of fact that the contact between (the respondent) and (the appellant) was a push by an open hand and not as a punch, a closed fist. The evidence is quite clear on that, in my view, even the evidence of (the appellant), that that was the case. (The respondent) said he pushed him in the face and that may well have been and so I accept that.
>
> So it's not in dispute, really, that there was a battery by (the respondent) upon (the appellant). That does not seem to be in dispute. What is in dispute is, firstly, the damage caused by that push to (the appellant). The defendant says that because – as a result – because of what had been said, that is, that there was no blood appearing between – as he walked out nobody saw blood; (the respondent), Mr Collins, Mr Brown and Mr (Wrobel) did not see any blood upon or any injury upon (the appellant), that the damage was consistent with pushing to the face with a split lip inside the lip and maybe bruising inside. I do not accept (the appellant's) evidence that his injuries were such that he couldn't open his mouth and show it to the doctor, he couldn't do that. In fact, he showed his lip to the policeman, as his evidence suggested today. So I am satisfied that there was that split lip and cut.
>
> In relation to the tooth, I am not satisfied on the balance of probabilities, at least, that the injury to the tooth was caused by (the respondent). There was no complaint – and I firstly indicate there was no complaint to the police that there was injury to his tooth. There was no complaint to the doctor that there was injury to his tooth, and in fact there is evidence to suggest that the tooth and (sic: had) been chipped and I accept that there was a visual observation by Mr (Wrobel) that (the appellant's) front tooth had been chipped quite some time ago. Regardless of how it got there, there is quite – evidence that I can accept.
>
> I also note that there was no complaint about the tooth until he went to the doctor in 2007, 21 March 2007, and it wasn't until some time later that he'd even mentioned about the tooth in any event. So as far as the tooth is concerned I find on the balance of probabilities that there was no – the pushing of (the appellant) by (the respondent) did not do any damage to that tooth, however, as I've made a finding earlier, based on the evidence given by those people I've mentioned, it is quite clear that (the respondent) did push (the appellant). I do find on his evidence, at least, that he did push to the extent to the face and therefore he could have and would have on the balance of probabilities caused a minor injury as suggested, a split lip that he showed the police, in the inside of his mouth, given the fact that he may have had a chipped tooth, or he did have a chipped tooth prior to that.
>
> Now, establishing that, as I've indicated before, the onus is upon the claimant to prove on the balance of probabilities that (the respondent's) damage was wilful and that it was acting – it was in fact a tortious action or act. (The respondent) has the onus therefore to then satisfy this court

on the balance of probabilities that he was acting in self defence. A person who is threatened or attacked by another person and who reasonably believes that he or she is in danger of death or serious injury can act in order to protect his or her right of personal safety. That act that is done in self defence, however, must be reasonably necessary, and I ask you to see the case of ***Fontin v Katapodis*** (1962) 108 CLR 177 and more particularly at page 181. At page 182 it was said that that must be not – and the force used must not be excessive.

I look at the evidence of (the appellant). He says that he was standing, talking to the barman and in fact (the respondent) came over to him. He was the one that was aggressive and said, 'It was me'. They were talking in conversation about not having a go at the children but if there were any problems about the children (the respondent) is to – should have rung the police and he didn't get it all out, he said, but he said before he got the chance to finish that conversation (the respondent) punched him as he suggested.

I look at the other evidence, all the other evidence, given by his witness Mr (Wrobel), other witnesses, Mr Brown, Mr Collins and, yes, himself, that suggests and as I find as a matter of fact, (the respondent) did not move. He simply said, 'Yes, it was me' or words to that effect when it was said quite loudly by (the appellant), 'Who is having a go at my kids?' and as a result of that, and I find also, that on the evidence given by all the other witnesses that (the appellant) was loud, was aggressive and was frustrated – one other word used was frustrated and also heated.

So I accept the evidence of those several witnesses, all of those witnesses, including Mr (Wrobel) in (the appellant's) case, that he was in fact quite aggressive, loud and was – seemed to be intimidating, was another word used. I also find that (the respondent) did not move from his position. I find that it was (the appellant) that approached and walked up to (the respondent). I accept that the evidence by the witnesses Brown, Collins, (Wrobel), all indicate that (the appellant) went within varying – six inches from some people, 20 centimetres from other people, but was in a short, close distance, and as far as that's concerned, I accept that (the appellant) did in fact come up extremely close to (the respondent) and was quite loud and yelling and aggressive.

I accept even on the balance of probability, but I accept to a higher degree the evidence given by (the respondent) that he was concerned, that he said – and the words were, 'He got right I my face'. He said, 'I was worried he was going to headbutt me so I pushed him away'. He said, 'His face was about 20 centimetres away'. On two occasions he said that he was worried that he was going to headbutted. He was also worried, he said he was intimidated.

On that basis, and I return to the case of ***Fontin v Katapodis*** , if a person reasonably believes that he or she is in danger of death or serious injury – and in this case the serious injury, my understanding of (the respondent's) evidence, that he was concerned that he would be headbutted, that on my understanding would result in serious injury. In my view therefore (the respondent) was reasonable in pushing (the appellant) away and he did so – and I find as a finding of fact that (the respondent) did in fact push (the appellant) away in self defence. Therefore, I find that the plaintiff, or in this case the complainant, has not made out his case on the balance of probabilities and I find and I give judgment in favour of the defendant.

Ormerod v Court [2012] WADC 33 (07 March 2012) (Sweeney DCJ)

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I look at the other evidence, all the other evidence, given by his witness Mr (Wrobel), other witnesses, Mr Brown, Mr Collins and, yes, himself, that suggests and as I find as a matter of fact, (the respondent) did not move. He simply said, 'Yes, it was me' or words to that effect when it was said quite loudly by (the appellant), 'Who is having a go at my kids?' and as a result of that, and I find also, that on the evidence given by all the other witnesses that (the appellant) was loud, was aggressive and was frustrated – one other word used was frustrated and also heated.

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other people, but was in a short, close distance, and as far as that's concerned, I accept that (the appellant) did in fact come up extremely close to (the respondent) and was quite loud and yelling and aggressive.

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On that basis, and I return to the case of *Fontin v Katapodis* , if a person reasonably believes that he or she is in danger of death or serious injury – and in this case the serious injury, my understanding of (the respondent's) evidence, that he was concerned that he would be headbutted, that on my understanding would result in serious injury. In my view therefore (the respondent) was reasonable in pushing (the appellant) away and he did so – and I find as a finding of fact that (the respondent) did in fact push (the appellant) away in self defence. Therefore, I find that the plaintiff, or in this case the complainant, has not made out his case on the balance of probabilities and I find and I give judgment in favour of the defendant.

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

257. Mr Neil argued that it was wrong for the trial judge to take into consideration the "provocative behaviour of the plaintiffs and their belligerence" in assessing aggravated damages. From the material I have earlier referred to, there was ample evidence to justify his Honour's findings that both brothers had repeatedly used offensive language and acted in a manner that might properly be described as belligerent. It is true that they had not demonstrated any physical violence towards the transit officers prior to the assaults, but their overall attitude and conduct was properly described as belligerent. I do not consider that the trial judge fell into error by taking this matter into account on the issue of the quantum of aggravated damages. *Fontin v Katapodis* is authority for the proposition that provocation does not have the effect of reducing "actual" compensatory damages, that is, damages for medical expenses, loss of earning capacity and non-pecuniary loss that is not aggravated by the defendant's conduct. On the other hand, although aggravated damages are correctly described as compensatory, such damages may be reduced if the plaintiff's conduct has been provocative, since all the circumstances must be taken into account in determining the hurt to the plaintiff's feelings, and such circumstances include the fact that the plaintiff's own behaviour may have brought the attack on himself: *Fontin v Katapodis* at 183 per McTiernan J ; *Horkin v Port Melbourne Football Club Social Club* [1983] 1 VR 153 at 162 per Brooking J; *O'Connor v Hewitson & Anor* [1979] Crim L R 4 6; *Hill v Cooke* [1958] SR (NSW) 49.

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

68. As Whealy JA has explained (at [235]) aggravated damages may be reduced if the plaintiff's own behaviour may have brought the attack on himself. This proposition is drawn from *Fontin v Katapodis* and appears to depend on understanding the references in that case to exemplary damages included aggravated damages. That is because it was only in *Rookes v Barnard* that the distinction between aggravated and exemplary damages was explained and accepted in *Uren v John Fairfax & Sons Pty Ltd* : see Halsbury's, *Laws of Australia* , LexisNexis at [135-605].

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

33. An award of exemplary damages may be mitigated or reduced if it is found that the plaintiff has provoked the assault and battery complained of: *Fontin v Katapodis* (at 184) per McTiernan J.

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

> 69. As I have explained, in my view the appellants' conduct was not responsible for the commission of the tortious act: *Fontin v Katapodis* (at 187) per Owen J (with whom Dixon CJ agreed). Accordingly I would increase each appellant's award of aggravated damages to $7,500.

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Coastline Constructions (Aust) Pty Ltd v Kakavas [2009] NSWSC 1438 -
Coastline Constructions (Aust) Pty Ltd v Kakavas [2009] NSWSC 1438 -
Coastline Constructions (Aust) Pty Ltd v Kakavas [2009] NSWSC 1438 -
Elite Protective Personnel Pty Ltd v Salmon [2007] NSWCA 322 (14 November 2007) (Beazley JA; McColl JA ; Basten JA)

> 128 The present case is far removed from either *Riley* or *Venning* on its facts. Furthermore, in determining whether contributory negligence is available at common law in the present circumstances, it may be necessary to consider questions of coherence in relation to provocation. That is because, in the context of an intentional tort, it is likely that the plaintiff's conduct could as readily be characterised as provocation as a failure to take reasonable care in his or her own interest. The availability of a defence of provocation is itself contentious: see *Horkin v North Melbourne Football Club Social Club* [1983] 1 VR 153 (Brooking J) and *Fontin v Katapodis* (1962) 108 CLR 177 . In *Plumb v Breen* (unrep, NSWSC, 13 December 1990) Young J held that there was no defence of provocation in answer to a battery, but considered that a different conclusion might be reached in Queensland. However, absent statutory influence, there should not be a difference of approach to the common law in different Australian jurisdictions: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [135] . (In relation to provocation, see generally Trindade, Cane and Lunney, *The Law of Torts in Australia* (4th ed, OUP, 2007) at par 2.5.9.)

Elite Protective Personnel Pty Ltd v Salmon [2007] NSWCA 322 (14 November 2007) (Beazley JA; McColl JA ; Basten JA)
Fontin v Katapodis [1962] HCA 63 ; (1962) 108 CLR 177
Franklins Limited v Burns; Burns v Franklins Limited

Fuz v Carter [2006] NSWSC 771 (12 September 2006) (Studdert J)
Fontin v Katapodis (1962) 108 CLR 177
Lamb v Cotogno

Fuz v Carter [2006] NSWSC 771 -
State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)
Fontin v Katapodis (1962) 108 CLR 177
Graham Barclay Oysters Pty Ltd v Ryan

State of New South Wales v Ibbett [2005] NSWCA 445 -
New South Wales v Bryant [2005] NSWCA 393 -
Dura Constructions (Aust) Pty Ltd v Dovigi [2004] VSC 252 (20 July 2004) (Williams J)

> 67. Whilst contributory negligence or fault is relevant to the assessment of damages in an action for negligence by the operation of the *Wrongs Act* 1958 and its equivalents, it has been held that the contributory negligence of the victim may be taken into account in the assessment of exemplary damages, but will not reduce compensatory damages in relation to the intentional tort of battery: *Fontin v Katapodis* [46] ; *Horkin v North Melbourne Football Social Club* [47] .

Dura Constructions (Aust) Pty Ltd v Dovigi [2004] VSC 252 -
Dura Constructions (Aust) Pty Ltd v Dovigi [2004] VSC 252 -
State of New South Wales v Riley [2003] NSWCA 208 (01 August 2003) (Sheller and Hodgson JJA, Nicholas J)

> 136 Mr. Maconachie submitted that, in awarding exemplary damages, the primary judge acted contrary to the principle that exemplary damages are an exceptional remedy which are rarely awarded: Gray v. Motor Accidents Commission (1998) 196 CLR 1 at [12] and [20] . He submitted that such damages are awarded only where there is "high-handed, insolent, vindictive or malicious conduct" amounting to or exhibiting a "conscious wrong-doing in contumelious disregard of another's rights": Whitfeld v. De Lauret & Co. Ltd. (1920) 29 CLR 71 at 77, Gray at [14] . Contrary to the view of the primary judge, the present case had little similarity with Adams v. Kennedy (2000) 49 NSWLR 78 : in that case, there was no provocation, no apprehension of danger, and no concern for the victim's well-being. The provocation could preclude exemplary damages: Fontin v. Katapodis (1962) 108 CLR 177 at 187 ; Lamb v. Cotogno (1987) 164 CLR 1 at 13. Further, some of the primary judge's reasons were themselves erroneous: Constables Wallace and Heinjus did not exceed orders given by their commander, and the view that there was a falling away of grounds to justify detention was contrary to the finding that detention was justified under the Mental Health Act .

State of New South Wales v Riley [2003] NSWCA 208 (01 August 2003) (Sheller and Hodgson JJA, Nicholas J)

Fontin v. Katapodis (1962) 108 CLR 177
Gray v. Motor Accidents Commission

State of New South Wales v Riley [2003] NSWCA 208 -
Chen v Karandonis [2002] NSWCA 412 (18 December 2002) (Beazley, Heydon and Hodgson JJA)

> 84 Exemplary damages are available where a party engages in *"conscious wrongdoing in contumelious disregard of another's rights"*: see *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 per Knox CJ. As is pointed out in Luntz's Assessment of Damages for Personal Injury and Death, 4th Ed, this phrase has become a term of art. Luntz, at para 1.7.4 expands upon this, describing the conduct necessary to ground an award of exemplary damages as being *"of such a character that it merits punishment, so that it must have been knowingly wanton, fraudulent, malicious, violent, cruel, insolent, high-handed or an abuse of power"*. He points out that:
>
> > "all these descriptors have been used: see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 122 per McTiernan J (approving a statement of the pre- *Rookes v Barnard* law in *Mayne & McGregor on Damages* , 12th Ed, Sweet & Maxwell, London, 1961, p 196), 143 and 147 per Menzies J, 153 per Windeyer J (warning that 'exemplary damages must always be based upon something more substantial than a jury's mere disapproval of the conduct of the defendant'), 161 per Owen J. See also *Fontin v Katapodis* (1962) 108 CLR 177 at 187 (where defendant has acted in high-handed fashion or with malice); *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 212 per Windeyer J (restricted to more flagrant instances of conscious wrongdoing)."

McNeill v Gold Coast City Council [2002] QDC 29 (08 March 2002) (Judge Robin Q.C.)

> 35. As noted at the outset, Mr McNeill claims compensatory damages, aggravated damages and exemplary damages. There has been, over the years, uncertainty as to the extent of overlap of the categories. In *Fontin v. Katapodis* (1962) 108 CLR 177, 187 , Owen J said:-
>
> > "In an action for assault, as in many other cases of tort, the conduct and motives of the parties may be taken into account either to aggravate or mitigate damages. In a proper case the damages recoverable are not

> limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice. But the rule by which the defendant in an action in which exemplary damages are recoverable is entitled to show that the plaintiff's own conduct was responsible for the commission of the tortious act and to use this fact to mitigate damages has no application to damages awarded by way of compensation. It operates only to prevent the award of exemplary damages or to reduce the amount of such damages which, but for the provocation, would have been awarded."

Of this case, Lord Denning said in *Lane v. Holloway* (1968) 1 QB 379, at 387 :-

> "... the High Court of Australia, including the Chief Justice, Sir Owen Dixon, held that provocation could be used to wipe out the element of exemplary or aggravated damages but could not be used to reduce the actual figure of pecuniary compensation. So they increased the damages to the full £2,850.
>
> I think that the Australian High Court should be our guide. The defendant has done a civil wrong and should pay compensation for the physical damage done by it. Provocation by the plaintiff can properly be used to take away any element of aggravation. But not to reduce the real damages."

For Queensland, the way in which the categories ought to be approached has been authoritatively determined by the Full Court in *Henry v. Thompson* (1989) 2 QdR 412, 415 :-

> "Authorities establish that it was appropriate to award damages under each of the heads: Pain and suffering, aggravated damages, and exemplary damages (*Loudon v. Ryder* (1953) 2 QB 202, *X.L. Petroleum (N.S.W.) v. Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 and *Lamb v. Cotogno* (1987) 164 CLR 1). The argument for the appellants was to the effect that the learned trial judge had erred in awarding too much, either looked at globally or under each heading; the award was so high that it showed that the must have added in the components for aggravated damages and punitive damages more than once. On the other hand counsel for the respondent submitted that the award was a proper reflection of the serious nature of the tort committed by the appellants and that, either looked at globally or under the separate heads, the award was within the range of what a reasonable jury could have awarded for so serious a wrong.
>
> *Lamb* clearly confirms, if authority be necessary, the compensatory nature of aggravated damages. The court there said 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. Exemplary damages, on the other hand, go beyond

compensation and are awarded 'as punishment to the guilty, to deter from any such proceedings for the future, and as proof of the detestation of the jury to the action itself'."

Whilst, as the court there noted, it may on occasions be difficult to differentiate between aggravated and exemplary damages, problems will be avoided if the differentiating factors referred to are kept in mind at the time of assessment."

McNeill v Gold Coast City Council [2002] QDC 29 (08 March 2002) (Judge Robin Q.C.)

6. While the position at common law may have been different, it has long been established that a defence of provocation as an excuse for an assault may be pleaded in civil as well as criminal proceedings in Queensland, having regard to the *Criminal Code* : *White v. Connolly* (19 27) St R Qd 75. The onus lies on the defendant to establish the defence on the balance of probabilities: *Grehan v. Kann* (1948) QWN 40. See, in this court, *Love v. Egan* (1971) 67 QJPR 102, which applied *Fontin v. Katapodis* (1962) 108 CLR 177 and *Lane v. Holloway* (1968) 1 QB 379. I was satisfied in *Kirwood v. Bishop* (4695 of 1988, 5 February 1992) by reference to *Hall v. Foneca* (1983) WAR 309, that the defence of self-defence is similarly applicable (as would be that of aiding in self-defence under s.273 of the Code); Judge McGill S.C. proceeded on the basis of the applicability of ss.270 and s.277 in *Sinclair v. Caloundra Sub-Branch RSL Services Club Inc* (20 01) QDC 196.

Sinclair v Caloundra Sub-Branch RSL Services Club Inc [2001] QDC 196 (24 August 2001) (McGill DCJ.)

There was a plea of contributory negligence in para. 16 of the amended defence. There is an authority that contributory negligence is not available as a defence to an action for trespass to the person: Horkin v. North Melbourne Football Club Social Club [1983] VR 153 [33] ; and see Fontin v. Katapodis (1962) 108 CLR 177 at 184 per McTiernan J . In Hackshaw v. Shaw (1984) 155 CLR 614 the plaintiff sued both in negligence and in trespass, and judgment was entered for the plaintiff on the basis of a favorable finding by a jury as to negligence, although there was also a finding of contributory negligence which led to a reduction in the damages. The case was discussed in the High Court essentially as an action for negligence, but the claim in trespass was never abandoned (p.667), and the entry of judgment for the reduced amount of damages is consistent only with the apportionment legislation applying to the cause of action in trespass as well as the cause of action in negligence. However, so far as I can see that issue was not expressly discussed by their Honours, and in those circumstances I do not think I can regard this decision as authority for the proposition that damages for trespass to the person can be reduced on the basis of contributory negligence by the plaintiff. Fontin (supra) stands as authority for the proposition that compensatory damges are not to be reduced because of provocation on the part of the plaintiff, although the existence of provocation is a factor which is relevant to the allowance of exemplary damages: see p.187.

Sinclair v Caloundra Sub-Branch RSL Services Club Inc [2001] QDC 196 -
Droga v Coluzzi [2000] NSWSC 1081 (24 November 2000) (Master Harrison)

72 Aggravated and exemplary damages have recently been discussed by the Court of Appeal in Ad am v Kennedy & Ors [2000] 152; Hunter Area Health Service v Marchlewski & Anor [2000] NSWCA 294 ; and Tan v Benkovic [2000] NSWCA 295 . These cases involve actions for negligence. The plaintiff referred to Fontin v Katapodis (1962) 108 CLR 177 ; Whitfield v De Laret & Co Limited (1 920) 29 CLR 71 ; Lamb v Cotogno (1987) 164 CLR 1 and Gray v Motor Accident Commission (1998) 196 CLR 1 . The difference between aggravated and exemplary damages was explained in Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 at 149 where Windeyer J said:

Droga v Coluzzi [2000] NSWSC 1081 (24 November 2000) (Master Harrison)

Fontin v Katapodis (1962) 108 CLR 177
Whitfield v De Laret & Co Limited

Poole v Piggott [2000] QDC 254 -
Poole v Piggott [2000] QDC 254 -
Hamersley Iron Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch [2000] WASC 66 (17 March 2000) (Parker J)
Fontin v Katapodis (1962) 108 CLR 177
Hadmor Products v Hamilton

Hamersley Iron Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch [2000] WASC 66 (17 March 2000) (Parker J)
Fontin v Katapodis (1962) 108 CLR 177
Hadmor Products v Hamilton

Hamersley Iron Pty Ltd v The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Workers - Western Australian Branch [2000] WASC 66 -
Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

9. This Court has long recognised the power to award such damages. So, in *The Herald and Weekly Times Ltd v McGregor* [9] it was assumed that "penal or vindictive damages" [10] or "exemplary damages" [11] might be awarded in a proper case. Several other examples are given in the judgments in *Uren* [12].

via

[12] Taylor J refers ((1966) 117 CLR 118 at 139) to *Willoughby Municipal Council v Halstead* (1916) 22 CLR 352, *Triggell v Pheeney* (1951) 82 CLR 497, *Williams v Hursey* (1959) 103 CLR 30 and *Fontin v Katapodis* (1962) 108 CLR 177 . Menzies J refers ((1966) 117 CLR 118 at 145) also to *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71.

Gray v Motor Accident Commission [1998] HCA 70 -
Gray v Motor Accident Commission [1998] HCA 70 -
Gray v Motor Accident Commission [1998] HCA 70 -
Kruger v the Commonwealth [1997] HCA 27 (31 July 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh and Gummow JJ)
[326] See generally with respect to the award of exemplary damages, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129, 138-139 per Taylor J, 147 per Menzies J, 154 per Windeyer J, 160-161 per Owen J; *Australian Consolidated Press v Uren* (1966) 117 CLR 185. For cases where exemplary damages have been awarded in actions of trespass to the person see: *Fontin v Katapodis* (1962) 108 CLR 177 ; *Lamb v Cotogno* (1987) 164 CLR 1 and for false imprisonment see: *Huckle v Money* (1763) 95 ER 768; 2 Wils KB 205; *Watson v Marshall and Cade* (1971) 124 CLR 621.

Coloca v BP Australia Ltd and Another [1992] 2 VR 441 (30 March 1992) (O'Bryan J)
Whitfeld v De Lauret (1920) 29 CLR 71 ; Fontin v Katapodis (1962) 108 CLR 177 ; Uren v John Fairfax and Sons Pty Ltd (1966) 117 CLR 118 ; Oldham v Lawson (No. 1) [1976] VR 654 ; Donselaar v Donselaar [1982] 1 NZLR 97 ; XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448 ; Lamb v Cotogno (1987) 164 CLR 1 ; Musca v Astle Corporation Pty Ltd (1988) 80 ALR 251 ; Midalco Pty Ltd v Rabenalt [1989] VR 461 and Rafferty v James Hardie and Co Pty Ltd (unreported, Coldrey J, 4 April 1991), considered.

Coloca v BP Australia Ltd and Another [1992] 2 VR 441 (30 March 1992) (O'Bryan J)

In Fontin v Katapodis (1962) 108 CLR 177 in an action for damages for assault tried before a judge alone the trial judge reduced the damages for provocation by the plaintiff. In the High Court, the

learned trial judge was held to be in error. Owen J observed, at 187 : "In an action for assault, as in many other cases of tort, the conduct and motives of the parties may be taken into account either to aggravate or mitigate damages. In a proper case the damages recoverable are not limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice." (Emphasis added.)

LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd 24 NSWLR 499 (03 December 1990) (Hodgson J)

Fontin v Katapodis (1962) 108 CLR 177 Lamb v Cotogno (1987) 164 CLR 1 Fontin v Katapodis (1962) 108 CLR 177 Lamb v Cotogno (1987) 164 CLR 1

LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd 24 NSWLR 499 (03 December 1990) (Hodgson J)

Anchor Brewhouse Developments v Berkley House (Docklands Developments) (1987) 38 Build LR 82 . Armory v Delamire (1722) 1 Stra 505 ; 93 ER 664 . Caprino Pty Ltd v Gold Coast City Council (1982) 53 LGRA 243 . Charrington v Simons & Co Ltd [1971] 1 WLR 598 ; [1971] 2 All ER 588 . Eardley v Granville (1876) 3 Ch D 826 . Fontin v Katapodis (1962) 108 CLR 177 . Goodson v Richardson (1874) 9 LR Ch App 221 . Graham v K D Morris & Sons Pty Ltd [1974] Qd R 1 . Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd [1957] 2 QB 334 . Lamb v Cotogno (1987) 164 CLR 1 . O'Grady v Westminster Scaffolding Ltd [1962] 2 Lloyd's Rep 238 . Pollack v Volpato [1973] 1 NSWLR 653 . Schu mann v Abbott [1961] SASR 149 . Swordheath Properties Ltd v Tabet [1979] 1 WLR 285 ; [1979] 1 All ER 240 . Thors v Weekes (1989) 92 ALR 131 . Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 . Whitwham v Westminster Brymbo Coal and Coke Co [1896] 2 Ch 538 . Woollerton and Wilson Ltd v Richard Costain Ltd [1970] 1 WLR 411 ; [1970] 1 All ER 483 . XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448 . Yakamia Dairy Pty Ltd v Wood [1976] WAR 57 .

LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd 24 NSWLR 499 (03 December 1990) (Hodgson J)

Mr Heydon submitted that the case did not come close to a case justifying exemplary damages as such. He referred me to passages in Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 at 122, 129, 153 and 160, all of which indicated that something like “contumelious” conduct was required; where contumelious meant contemptuous, humiliating and/or insulting. Alternatively, if what was relied on was the circumstance of greater advantage to the defendant than the possible damage to the plaintiff, one would need to find deliberate calculation to that effect by the defendant. Furthermore, in relation to exemplary damages, not only the defendant’s conduct should be looked at, but also the plaintiff’s, for example, provocation: see Lamb v Cotogno (at 13) and Fontin v Katapodis (1962) 108 CLR 177 at 187. In this case, there had been prior dealings between the parties, and Mr Heydon submitted that LJP’s conduct had contributed to Chia’s difficulties. LJP had known for some time that Chia proposed to build to the boundary, and had been told in June 1988 that scaffolding would be employed. It made no reply at the time, and in these circumstances, Chia’s actions were not unreasonable.

LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd 24 NSWLR 499 -
LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd 24 NSWLR 499 -
LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd 24 NSWLR 499 -
Hall v A & A Sheiban Pty Ltd [1989] FCA 65 (15 March 1989) (Lockhart(1), Wilcox(2) and French(3) JJ)

The decision of the House of Lords in Rookes v Barnard supra, restricted the circumstances in which exemplary damages might be awarded in English law. In Uren v John Fairfax & Sons Pty. Ltd. (1966) 117 CLR 118 , the High Court held that the category of cases in which exemplary damages might be awarded in Australian law was not so restricted. The Privy Council accepted that result in Australian Consolidated Press Ltd. v Uren (1967) 117 CLR 221 . Australian courts have since accepted that exemplary damages might be awarded in an action for trespass to the person (Fontin v Katapodis (1962) 108 CLR 177); in an action for trespass to land (XL Petroleum (NSW) Pty. Ltd. v Caltex Oil (Australia) Pty. Ltd., supra); and in an action for the tort of deceit (Musca v Astle

Corporation Pty. Ltd., supra). In the XL Petroleum Case, supra, Brennan J. observed at 471 that the considerations entering into the assessment of exemplary damages differed from those which determined compensatory damages, and that the amount of damages awarded in the two categories would not necessarily be proportionate. It follows that, if exemplary damages were available under s. 81 of the Act , a higher award of such damages might be justifiable although the compensatory damages established were of a relatively low amount.

Midalco Pty Ltd v Rabenalt [1989] VR 461 -
Cotogno v Lamb (No 3) 5 NSWLR 559 (20 June 1986) (Kirby P, Glass and McHugh JJA)

The defendant contends that this passage indicates that the learned master misdirected himself. To attract exemplary damages there must be either an intentional or reckless disregard of the plaintiff' s rights. Thus in XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (at 357 ; 647) Gibbs CJ spoke of "a high-handed and outrageous disregard for XL's rights" and Brennan J (at 362; 655) spoke of "conduct showing a conscious and contumelious disregard for the plaintiff's rights". I do not think that it is, or ever has been, enough to award exemplary damages that objectively a jury thinks that the defendant's conduct calls for punishment. Nor do I think that Owen J intended to say so in Fontin v Katapodis when he said (at 187) that exemplary damages might be awarded "for example, where the defendant has acted in a high-handed fashion or with malice". His Honour was giving an illustration, not a definition. However, by using the term "callously" I do not think that the master was intending to apply an objective test. I think that it is probable that he was using a short hand description of the applicable principle.

Cotogno v Lamb (No 3) 5 NSWLR 559 (20 June 1986) (Kirby P, Glass and McHugh JJA)

There is no doubt that a claimant will lose his entitlement to exemplary damages where it is his conduct which has provoked the tortfeasor's action: see Halsbury's Laws of England, 3rd ed, vol 11 at 225; Sedgwick on Damages, 8th ed, par 384. It will often be the case that insulting behaviour is itself the product of an earlier hurt. Whatever may have been the previous law, in Fontin v Katapodis the High Court of Australia made it plain that provocation would operate to prevent an award of exemplary damages or to mitigate or reduce such damages by reference to the disproportion between the initial insult and the tort sued upon. In the nature of things, the former will generally be confined to words; the latter, to some physical retaliation causing damage. No absolute standard is laid down, such that any minor provocation, whenever occurring, will disentitle the victim to exemplary damages. The law considers the proximity and proportionality of the response. If it is neither proportionate nor approximate it may nonetheless reduce the amount of damages which, but for the provocation, would have been awarded: see Owen J in Fontin (at 187) . The court will examine the conduct and motives of the parties: Pearce v Hallett (at 431). The objective of exemplary damages must be kept in mind. Being to punish and deter, it is appropriate to consider the blameworthiness of the tortfeasor's conduct. If, because of proximity in time and proportionality in degree, it is an understandable response to the provocation of the claimant, no exemplary damages will be called for. If, however, it is wholly disproportionate, the purposes of exemplary damages may nonetheless require that an award be made, although reduced by reason of the provocative conduct of the claimant: see also Lane v Holloway (at 387).

Cotogno v Lamb (No 3) 5 NSWLR 559 (20 June 1986) (Kirby P, Glass and McHugh JJA)

However, more recent authority, both in England and Australia, appears to have retreated from the prerequisite of conscious wrongdoing and to have embraced an alternative ground for the award of exemplary damages where, whatever the subjective intention of the tortfeasor, objectively he has acted in such a high-handed fashion as calls for punishment. Thus in Fontin v Katapodis (1962) 108 CLR 177 at 187 , Owen J said:

"... In a proper case the damages recoverable are not limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice."

Cotogno v Lamb (No 3) 5 NSWLR 559 (20 June 1986) (Kirby P, Glass and McHugh JJA)

There is no doubt that a claimant will lose his entitlement to exemplary damages where it is his conduct which has provoked the tortfeasor's action: see Halsbury's Laws of England, 3rd ed, vol 11 at 225; Sedgwick on Damages, 8th ed, par 384. It will often be the case that insulting behaviour is itself the product of an earlier hurt. Whatever may have been the previous law, in Fontin v Katapodis the High Court of Australia made it plain that provocation would operate to prevent an award of exemplary damages or to mitigate or reduce such damages by reference to the disproportion between the initial insult and the tort sued upon. In the nature of things, the former will generally be confined to words; the latter, to some physical retaliation causing damage. No absolute standard is laid down, such that any minor provocation, whenever occurring, will disentitle the victim to exemplary damages. The law considers the proximity and proportionality of the response. If it is neither proportionate nor approximate it may nonetheless reduce the amount of damages which, but for the provocation, would have been awarded: see Owen J in Fontin (at 187) . The court will examine the conduct and motives of the parties: Pearce v Hallett (at 431). The objective of exemplary damages must be kept in mind. Being to punish and deter, it is appropriate to consider the blameworthiness of the tortfeasor's conduct. If, because of proximity in time and proportionality in degree, it is an understandable response to the provocation of the claimant, no exemplary damages will be called for. If, however, it is wholly disproportionate, the purposes of exemplary damages may nonetheless require that an award be made, although reduced by reason of the provocative conduct of the claimant: see also Lane v Holloway (at 387).

Cotogno v Lamb (No 3) 5 NSWLR 559 (20 June 1986) (Kirby P, Glass and McHugh JJA)

Fontin was expressly followed in this regard by the English Court of Appeal in Lane v Holloway [19 68] 1 QB 379 at 387, 392, 393. The applicability of exemplary damages to cases falling short of intended insult has also been approved by Street in his Principles of the Law of Damages (at 30-31):

"To sustain an award of exemplary damages the defendant must have intended to annoy, abuse or insult the plaintiff or have behaved in an insolent or arrogant manner so that it is desirable to punish or make an example of him."

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The respondent also resisted the award of exemplary damages on the ground that the master's findings justified a conclusion that the appellant had provoked the conduct complained of. It is true that the master preferred the respondent's version (and that of his wife) to the version of events given by the appellant. Because this finding is not disturbed, the matter must be approached on the basis that the master accepted that the appellant ran towards the respondent shouting and threatening to kill him, flung himself across the bonnet and hung onto the same until finally dislodged. It was conceded by the respondent that his behaviour in driving off in a closed vehicle, swerving from side to side and breaking violently to dislodge the appellant was not conduct proportionate to the provocation of the appellant. It was for this reason that self-defence was not argued in this case: cf Fontin v Katapodis . The appellant argued that to the extent that there was provocation, it was transitory and could not be compared, in proportion or time, to the severity of the conduct inflicted on him. Making every concession for the respondent's history of osteomylitis, his recent hospitalis- ation, his inexperience in process serving and the presence of his wife, the appellant argued that any provocation could not justify what the respondent did.

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The plaintiff contends that the award was inadequate. The defendant contends that it was either excessive or should not have been made at all having regard to the very large sum of damages which the plaintiff received as compensatory damages. I am unable to agree with either objection to the master's assessment. It is well-settled that the conduct and motives of the parties in an assault case "may be taken into account either to aggravate or mitigate damages": Fontin v

Katapodis (at 187). On any reckoning the plaintiff's conduct on this night was extraordinary, and the defendant, with some justification, feared for the safety of himself. As the master said, the defendant "was pursued by a distraught plaintiff who was threatening to kill him" and "he attempted to escape from the plaintiff who, as the car commenced to drive off, threw himself on the vehicle". Having regard to the responsibility of the plaintiff for what ultimately occurred and the lack of malice on the part of the defendant, I think that the master was entirely justified in awarding only $5,000 as exemplary damages.

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Australian Consolidated Press Ltd v Uren (1966) 117 CLR 185 ; affirmed [1969] 1 AC 590 . Cassell & Co Ltd v Broome [1972] AC 1027 . Costi (formerly Constantinou) v Minister of Education and Purslow (1973) 5 SASR 328 . Cotogno v Lamb (Court of Appeal, 9 August 1985, unreported) . Cotogno v Lamb (No 2) (1985) 3 NSWLR 221 . Donselaar v Donselaar [1982] 1 NZLR 97 . Dugan v Mirror Newspapers Ltd (1978) 142 CLR 583 . Fontin v Katapodis (1962) 108 CLR 177 . Geelong Harbour Trust Commissioners v Gibbs Bright & Co (a Firm) [1974] AC 810 . Hardy v Motor Insurers' Bureau [1964] 2 QB 745 . Hilton v Wells (1985) 59 ALJR 396 ; 58 ALR 245 . Johnstone v Stewart [1968] SASR 142 . Lane v Holloway [1968] 1 QB 379 . Lister v Romford Ice & Cold Storage Co Ltd [1957] AC 555 . Loudon v Ryder [1953] 2 QB 202 . McCann v Parsons (1954) 93 CLR 418 . Merest v Harvey (1814) 5 Taunt 442 ; 128 ER 761 . Moran v McMahon (1985) 3 NSWLR 700 . Morris v Ford Motor Co Ltd [1973] QB 792 . Myers v Director of Public Prosecutions [1965] AC 1001 . Pearce v Hallett [1969] SASR 423 . Pettitt v Pettitt [1970] AC 777 . Planet Fisheries Pty Ltd v La Rosa (1968) 119 CLR 118 . Pollack v Volpato [1973] 1 NSWLR 653 . Public Service Board of New South Wales v Osmond (1986) 60 ALJR 209 ; 63 ALR 559 . Queensland v The Commonwealth (1977) 139 CLR 585 . Radovskis v Tomn (1957) 9 DLR (2d) 751 . Rookes v Barnard [1964] AC 1129 . Southern Pacific Co v Jensen 244 US 205 (1917) . State Government Insurance Commission (SA) v Trigwell (1979) 142 CLR 617 . Uren v John Fairfax & Sons Pty Ltd (1965) 117 CLR 118 . Warnink (Erven) Besloten Vennootschap v J Townend & Sons (Hull) Ltd [1979] AC 731 . Watts v Leitch [1973] Tas SR 16 . Whitfeld v De Lauret and Co Ltd (1920) 29 CLR 71 . Wilkes v Wood (1763) Lofft 1 ; 98 ER 489 . XL Petroleum (NSW) Ltd v Caltex Oil (Aust) Pty Ltd (1985) 59 ALJR 352 ; 57 ALR 639 .

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Caltex Oil (Australia) Pty Ltd v XL Petroleum (NSW) Pty Ltd [1982] 2 NSWLR 852 (08 December 1982) (Hutley, Glass and Mahoney JJA)

Benson v Frederick (1766) 3 Burr 1845 ; 97 ER 1130 . Cassell & Co Ltd v Broome [1972] AC 1027 . Chapman v Lord Ellesmere [1932] 2 KB 431 . Dougherty v Chandler (1946) 46 SR (NSW) 370 ; 63 WN 183 . Fontin v Katapodis (1962) 108 CLR 177 . Heydon's Case, Sir John (1612) 11 Co Rep 5 a ; 77 ER 1150 . Huckle v Money (1763) 2 Wils 205 ; 95 ER 768 . Rookes v Barnard [1964] AC 1129 . Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 . Wah Tat Bank Ltd v Chan Cheng Kum [1975] AC 507 . Wilkes v Wood (1763) Lofft 1 ; 98 ER 489 .

Caltex Oil (Australia) Pty Ltd v XL Petroleum (NSW) Pty Ltd [1982] 2 NSWLR 852 (08 December 1982) (Hutley, Glass and Mahoney JJA)

This case presents a problem upon which my researches and the extensive researches of counsel have produced no authority precisely in point, though there are many authorities which bear upon it, namely, what is the proper measure of damages where there are joint tortfeasors, one of whom alone is liable to pay exemplary damages, in the light of the abolition of the rule that separate judgments cannot be obtained against joint tortfeasors? The right to receive exemplary damages, and it is not an issue in this case that exemplary damages were properly awarded, is a substantive and not a mere procedural right. Moreover, in Australia, it is recognized that the right is not a mere anomaly, which may be curbed by judicial fiat as in England, but is preserved subject to legislative intervention. Its substantive character is emphasized by the rule that it is to be separately assessed and has its own special defences: Fontin v Katapodis (1962) 108 CLR 177, at p 187.

Horkin v North Melbourne Football Club Social Club [1983] 1 VR 153 (22 July 1982) (Brooking J)

Fontin v Katapodis (1962) 108 CLR 177 ; Lane v Holloway, [1968] 1 QB 379; [1967] 3 All ER 129; Murphy v Culhane, [1977] QB 94; [1976] 3 All ER 533, discussed.

Horkin v North Melbourne Football Club Social Club [1983] 1 VR 153 -
R v Mahon [1982] 1 NSWLR 346 (26 March 1982) (O'Brien CJ of Cr D)

> When s 437 is read in the light of Fontin v Katapodis one of the purposes of s 437(3) can be confirmed. Notwithstanding that the offender has been convicted of an assault occasioning injury or loss after the failure of a claim of self-defence the court can still determine against giving any award to the immediate victim if his conduct directly or indirectly contributed to his injury or loss. But by reason of the decision in McDonald's case the application of the ordinary principles of assessment of damages provides no mitigation of the quantum of the direction by reason of that conduct once it is determined that a direction should be given. Even then if principles applicable to the assessment of the damages of the deceased (were he the aggrieved person) were applicable to the assessment of the quantum of the direction in favour of the relatives there would be no mitigation of that quantum by reason of the conduct of the deceased which contributed to their injury and loss.

R v Mahon [1982] 1 NSWLR 346 (26 March 1982) (O'Brien CJ of Cr D)

> A petition by the plaintiff for leave to appeal to the House of Lords was dismissed by the Appeal Committee of the House. This distinction was not drawn in Fontin v Katapodis , though it might still be open having regard to the facts of that case as they were dealt with in the judgments. However, in a claim under the Fatal Accidents Act, provided the deceased had a right of action at the time of his death which could not have been defeated by a complete defence the damages to which his dependants are entitled is not assessed on the same basis as his damages. They are entitled to be compensated for the loss they sustained unaffected by any conduct of the deceased which would have mitigated his damages. As Lord Denning said in Gray v Barr [1971] 2 QB 554, at p 569 :
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> "At one time in our law no action would have lain for the death of Mr. Gray; but, by the Fatal Accidents Act 1846, it was enacted that, if Mr. Gray had lived, i.e., only been injured and not died, and living would have been entitled to maintain an action and recover damages — then his widow and children can do so. They stand in his shoes in regard to liability, but not as to damages.
>
> The first question, therefore, is whether Mr. Gray, had he lived, would have had a cause of action. The answer is: Yes, he would: but it would have been an action for assault, not for negligence. Whenever two men have a fight and one is injured, the action is for assault, not for negligence. If both are injured, there are cross-actions for assault. The idea of negligence — and contributory negligence — is quite foreign to men grappling in a struggle. In an action for assault, in awarding damages, the judge or jury can take into account, not only circumstances which go to aggravate damages, but also those which go to mitigate them."

R v Mahon [1982] 1 NSWLR 346 (26 March 1982) (O'Brien CJ of Cr D)

> Benjamin v Currie [1958] VR 259 . Curran v Young (1965) 112 CLR 99 . Fisher v Smithson (1978) 17 SASR 223 . Fleming v White ; Gamble v Hiles [1981] 2 NSWLR 719 . Fontin v Katapodis (1962) 108 CLR 177 . George Hudson Ltd v Australian Timber Workers' Union (1923) 32 CLR 413 . Gray v Barr [1971] 2 QB 554 . Lane v Holloway [1968] 1 QB 379 . McDermott v Tintoretto (Owners) [1911] AC 35 . Murphy v Culhane [1977] QB 94 . Poore, Re (1973) 6 SASR 308 . R v Backo (1977) 16 SASR 541 . R v Bowen (1968) 90 WN (Pt 1) (NSW) 82 . R v Dennis (Cantor J, 9th September, 1980, unreported) . R v Fernando (Ash J, 9th July, 1980, unreported) . R v Forsythe [1972] 2 NSWLR 951 . R v McCafferty (No 2) [1974] 1 NSWLR 475 . R v McDonald [1979] 1 NSWLR 451 . R v Markham (Yeldham J, 2nd July, 1980, unreported) . R v Perry (Yeldham J, 29th June, 1979 and 1st November, 1979, unreported) . R v Salem (O'Brien CJ of Cr D, 17th November, 1981, unreported) . R v Tcherchian (1969) 90 WN (Pt 1) (NSW) 85 . Sharpe v Baker (1947) 64 WN (NSW) 178 . Wythe v Crimes Compensation Tribunal [1980] VR 33 .

R v Mahon [1982] 1 NSWLR 346 (26 March 1982) (O'Brien CJ of Cr D)

The same result is achieved under the English Fatal Accidents Act, although Fontin v Katapodis is no longer followed there. It was initially expressly followed by the English Court of Appeal in Lane v Holloway [1968] 1 QB 379, but both cases were distinguished by that Court in Murphy v Culhane [1977] QB 94, where Lord Denning MR, with whose judgment the other member of the Court agreed said (at p 98):

"But those were cases where the conduct of the injured man was trivial — and the conduct of the appellant was savage — entirely out of proportion to the occasion. So much so that the defendant could fairly be regarded as solely responsible for the damage done. I do not think they can or should be applied where the injured man, by his own conduct, can fairly be regarded as partly responsible for the damage he suffered. So far as general principle is concerned, I would like to repeat what I said in the later case of Gray v. Barr [1971] 2 Q.B. 554, 569 : 'In an action for assault, in awarding damages, the judge or jury can take into account, not only circumstances which go to aggravate damages, but also those which go to mitigate them.' That is the principle I prefer rather than the earlier cases."

R v Mahon [1982] 1 NSWLR 346 -
R v Mahon [1982] 1 NSWLR 346 -
R v McDonald [1979] 1 NSWLR 451 -
R v McDonald [1979] 1 NSWLR 451 -
Bennett v Dopke [1973] VR 239 (16 August 1972) (WINNEKE, CJ, GILLARD and MENHENNITT, JJ)

That was, of course, a circumstance relevant to the plea of self-defence or justification, but it was only one of the circumstances for the jury to take into account. It cannot be said to be a decisive factor: see Fontin v Katapodis (1962) 108 CLR 177 ; [1963] ALR 582, per Owen , J, at (CLR) p. 186. In our view that particular circumstance was entirely a factor for the jury to consider, and to determine what effect should be given to it in the circumstances as they found them to be at the critical time.

Australian Consolidated Press Ltd v Uren [1967] HCA 21 -