

New South Wales v Ibbett - [2006] HCA 57

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# HIGH COURT OF AUSTRALIA

GLEESON CJ,  
GUMMOW, KIRBY, HEYDON AND CRENNAN JJ

STATE OF NEW SOUTH WALES APPELLANT

AND

DOROTHY ISABEL IBBETT RESPONDENT

*New South Wales v Ibbett* [2006] HCA 57  
12 December 2006  
S227/2006

## ORDER

*Appeal dismissed with costs.*

## Representation

J E Maconachie QC with E Chrysostomou for the appellant (instructed by Crown Solicitor for New South Wales)

J J J Garnsey QC with B E Kinsella for the respondent (instructed by James Fuggle)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

## CATCHWORDS

### **New South Wales v Ibbett**

Tort – Trespass – Whether recognition of occupiers' rights of quiet enjoyment of land an appropriate consideration when awarding damages.

Damages – Aggravated damages – Exemplary damages – Where assault and trespass committed by police officers – Whether an award of general damages, aggravated and exemplary damages involves punishment twice for the same wrong.

Damages – Exemplary damages – Vicarious liability – Where the *Law Reform (Vicarious Liability) Act 1983 (NSW)* and the *Police Legislation Amendment (Civil Liability) Act 2003 (NSW)* assigned liability of police officers to the Crown – Whether award of exemplary or aggravated damages against the Crown appropriate.

Words and phrases – "double punishment", "aggravated damages", "exemplary damages", "vicarious liability".

*Crown Proceedings Act 1988 (NSW)*, s 5 .

*Law Reform (Vicarious Liability) Act 1983 (NSW)*, ss 6, 8, 9B, 9G(2) .

*Police Legislation Amendment (Civil Liability) Act 2003 (NSW)* .

1. GLEESON CJ, GUMMOW, KIRBY, HEYDON AND CRENNAN JJ. This appeal by the State of New South Wales from the New South Wales Court of Appeal [1] raises issues the resolution of which depends upon the interplay between the common law and several items of New South Wales legislation. The issues involve the nature and extent both of the interests protected and vindicated by an award of damages against the State for trespass to land and of the vicarious liability of the State for exemplary damages awarded in an action for trespass to land and for assault.

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[1] *State of New South Wales v Ibbett* [2005] NSWCA 445, reported in part in (2005) 65 NSWLR 168 .

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2. It should be observed at the outset that much of the criticism respecting the remedy of exemplary damages has been stimulated by such awards in defamation actions. This appeal does not arise from an action of that kind and, in any case, under the recent legislation in this country, no plaintiff may be awarded exemplary or punitive damages for defamation [2] .

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[2] See, eg, *Defamation Act 2005 (NSW)*, s 37 .

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#### The nature of the action

3. The respondent ("Mrs Ibbett") brought an action in the District Court for damages occasioned by reason of the conduct at her house of two members of the NSW Police [3] .

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[3] Established by the *Police Act 1990 (NSW)* . See, generally, *Jarratt v Commissioner of Police (NSW)* (2005) 79 ALJR 1581; 221 ALR 95.

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4. Following paragraph cited by:

*Landini v State of New South Wales* (17 December 2008) (Hall J)

The State was identified by s 5 of the *Crown Proceedings Act 1988 (NSW)* ("the Crown Proceedings Act") as the proper defendant. This rendered the State generally amenable to an action in tort based upon vicarious liability [4]. In former times, the circumstance that police officers often acted in the exercise of common law or statutory powers and according to "independent" discretions would have taken an action such as that of Mrs Ibbett outside the scope of the vicarious liability of the Crown [5]. However, in this respect, there has been further legislation.

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[4] Hogg and Monahan, *Liability of the Crown*, 3rd ed (2000) at 111112, 116. Section 10 of the *Crown Proceedings Act* repealed the *Claims against the Government and Crown Suits Act 1912 (NSW)*, whose nominal defendant procedures previously had been utilised in tort actions arising from police misconduct and including *Griffiths v Haines* [1984] 3 NSWLR 653 and *Lippl v Haines* (1989) 18 NSWLR 620.

[5] *Enever v The King* (1906) 3 CLR 969; *Jarratt v Commissioner of Police (NSW)* (2005) 79 ALJR 1581 at 1584 [4]-[5], 1593-1594 [70], 1603 [119]; 221 ALR 95 at 9697, 110, 123; Hogg and Monahan, *Liability of the Crown*, 3rd ed (2000) at 125127.

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5. Following paragraph cited by:

*Julia Wedding as trustee for the Julia Wedding Super Fund v Attorney General for New South Wales* (30 September 2016) (Slattery J)

Section 6 of the *Law Reform (Vicarious Liability) Act 1983 (NSW)* ("the 1983 Act") deems police officers to be persons in the service of the Crown. Section 8 renders the Crown vicariously liable in respect of torts committed by such persons in the course of their service and in performance or purported performance of an independent function. No occasion arises in this appeal to examine the statutory equation of the State, created by the Constitution of the Commonwealth, with the Crown [6]. The 1983 Act can be interpreted in accordance with its own terms and without reference to any possible constitutional questions.

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[6] *The Commonwealth v Mewett* (1997) 191 CLR 471 at 545552; cf *Byrne v Ireland* [1972] IR 241 at 272273 per Walsh J.

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6. Following paragraph cited by:

*Kable v State of New South Wales* (08 August 2012) (Allsop P at [1]; Basten JA at [67]; Campbell JA at [173]; Meagher JA at [174]; McClellan CJ at CL at [175])

Counsel for the State emphasised that s 8 is drawn in terms which apply the "master's tort" theory of vicarious liability, associated with the reasons of Fullagar J in *Darling Island Stevedoring and Lighterage Co Ltd v Long* [7], whereby the master is liable for a breach of duty resting on the servant, not on the master, and broken by the servant. The other theory, that adopted by Kitto J in *Long* [8], treats the act of the servant as the indirect act of the master.

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[7] (1957) 97 CLR 36 at 5657 ; cf *Majrowski v Guy's and St Thomas's NHS Trust* [2006] 3 WLR 125 at 129 per Lord Nicholls of Birkenhead; [2006] 4 All ER 395 at 401. .

[8] (1957) 97 CLR 36 at 6465 .

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7. Mrs Ibbett's action was commenced on 10 December 2002 against the State as third defendant and Senior Constables Pickavance and Harman as first and second defendants. Before trial, Mrs Ibbett discontinued her action against the individual defendants and the action proceeded to a hearing before Phegan DCJ (sitting alone) as one solely against the State. However, in 2003, the 1983 Act was amended, with respect to the pending litigation, by the *Police Legislation Amendment (Civil Liability) Act 2003 (NSW)* ("the 2003 Act"). The changes made by the 2003 Act of its own force relevantly applied to the pending action (s 9G(2)). Further, s 9B introduced a special regime in the following terms:

- "(1) A **police tort claim** is a claim for damages for a tort allegedly committed by a police officer (the **police officer concerned** ) in the performance or purported performance of the officer's functions (including an independent function) as a police officer, whether or not committed jointly or severally with any other person.
- (2) Except as provided by this Part, a person may not in any legal proceedings make a police tort claim against the police officer concerned, but may instead make the claim against the Crown.
- (3) A person who makes a police tort claim against the Crown in any legal proceedings may join the police officer concerned as a party to the proceedings only if the Crown denies that it would be vicariously liable for the alleged tort if it were established that the police officer concerned had committed the tort."

For the purposes only of s 9B(3) , the State admitted vicarious liability for the conduct of the two police officers.

### The facts

8. More should be said now respecting the facts. Mrs Ibbett was born in 1931. Her husband had died in 1995. Mrs Ibbett had owned three shops and had worked as a paymistress for 17 years. She last worked in 1987. Mrs Ibbett had been very involved with the bowling community and had been District President of the Lower North Coast District. The trial judge accepted her evidence, saying that she gave her testimony in a clear and matter of fact way, and without any sign of exaggeration or reason for suspecting invention.
9. Mrs Ibbett had three children, a daughter and two sons. One son, Warren, born in 1958, returned to live with his mother since his release from prison in 1997. This was after he had served a term of five and a half years imprisonment. That was the third of three lengthy periods of imprisonment served by him. He said in evidence at the trial of the present action that he had been a drug user "on and off over the years".
10. The events complained of by Mrs Ibbett occurred in the early hours of 23 January 2001 at the house then owned and occupied by her in Forster, on the North-central coast of New South Wales. The house had been built for Mrs Ibbett with the assistance of her son in fitting it out. The premises had four bedrooms and an attached double garage with access from the house.
11. Shortly before 2.00 am on 23 January 2001, whilst Mrs Ibbett was asleep in the main bedroom across a hallway directly behind the garage, her son arrived home in his van. He was pursued by a police vehicle. The police vehicle was occupied by the two police officers, Senior Constables Pickavance and Harman. They were acting under operational orders "to keep a lookout for" Mr Ibbett. However, the only offence, commission of which the police reasonably suspected Mr Ibbett, was a driving offence.
12. Mr Ibbett drove into the garage of the house and, using a remote control device, closed the roller door. As the roller door was closing, Senior Constable Pickavance dived under it and sought to arrest Mr Ibbett. He had no proper basis for making such an arrest or entering the property. He was not uniformed and was wearing casual clothing.
13. There was a commotion with both parties shouting or screaming at each other. This awakened Mrs Ibbett. Whilst Senior Constable Pickavance had his service pistol directed at Mr Ibbett, Mrs Ibbett opened a door leading from the hallway into the garage. She heard her son say to Senior Constable Pickavance, "Who are you? Get outta here." She repeated words to that effect, at which stage Senior Constable Pickavance swung towards her, pointing his gun at her and said, "Open the bloody door and let my mate in." Mrs Ibbett had never seen a gun before and was petrified. The trial judge regarded that description of her state of mind as no exaggeration.
14. To this point, Senior Constable Harman had been outside the house but came in when the roller door to the garage was reopened. Like Senior Constable Pickavance, he was not uniformed and wore casual clothing.

15. Mr Ibbett was removed to the driveway, handcuffed and pushed to the ground. Uniformed police arrived. Mr Ibbett's vehicle was removed onto the driveway and searched. He himself was returned to the garage and strip searched. Criminal proceedings were commenced against Mr Ibbett. However, these were subsequently withdrawn.
16. At the trial in the District Court of Mrs Ibbett's claim for damages against the State, Senior Constable Pickavance denied that he had pointed a gun at Mrs Ibbett, but his evidence was not accepted. The trial judge described him as "conspicuously careless with the truth". Senior Constable Harman was treated as a more forthright and reliable witness but much of his evidence impressed the trial judge as coloured by a sense of loyalty to his fellow officer.
17. Phegan DCJ concluded:

"It is very difficult to escape the conclusion that, contrary to their evidence, the police officers were on the look out for Ibbett, identified his van as it came along Lakes Way, pursued it and, in their determination to effect an arrest and in doing so find evidence of either house breaking or possession of drugs or both, had followed Ibbett into his mother's premises. Ibbett may have exceeded the speed limit and may even have driven erratically at times giving Pickavance and Harman some justification for an arrest and one of the subsequent charges which were laid against Ibbett. The hope of being able to make more serious criminal charges stick was dashed by the lack of adequate evidence found either on Ibbett or in his van."

18. **Following paragraph cited by:**

[Jeleskovic v Wagner \(No. 2\)](#) (22 April 2020) (Abadee DCJ)

His Honour found that the entry into the property by both police officers had been without lawful justification and had amounted to trespass to land. His Honour also held that the confrontation between Senior Constable Pickavance and Mrs Ibbett was more than sufficient to justify the requirements of an immediate apprehension of harm on her part, intentionally caused by Senior Constable Pickavance so as to amount to an assault.

19. These findings were not challenged in the Court of Appeal and are not challenged in this Court. Rather, the appeal turns upon questions concerning the damages that Mrs Ibbett was entitled to recover.

#### The damages award

20. **Following paragraph cited by:**

[Eedra Zey \(formerly using the pseudonym Eva Williams\) v State of New South Wales \(No. 3\)](#) (23 August 2024) (Acting Levy SC)



The formulation of the damages award both at trial and after an appeal and crossappeal to the Court of Appeal has been somewhat complicated. The trial judge entered a verdict and judgment for the trespass by both police officers in the sum of \$50,000 and for the assault by Senior Constable Pickavance in the sum of \$25,000. The award of \$25,000 for the assault represented \$15,000 as general damages and what his Honour said was an award "of modest proportions" of exemplary damages of \$10,000. The award of \$50,000 for trespass comprised general damages of \$10,000 to recognise "the offence and indignity to [Mrs Ibbett's] rights caused by the unlawful entry", aggravated damages of \$20,000 and exemplary damages of \$20,000.

21. No award of aggravated damages was made by the trial judge in respect of the assault. However, the Court of Appeal (Spigelman CJ, Ipp and Basten JJA) unanimously awarded \$10,000 aggravated damages for the assault. In addition, an order increasing the award of exemplary damages for the assault from \$10,000 to \$25,000 was supported by Spigelman CJ and Basten JA, Ipp JA dissenting. The awards of aggravated and exemplary damages for trespass, each of \$20,000, were retained by Spigelman CJ and Basten JA; Ipp JA would have made no awards under these heads. The Court of Appeal directed entry of judgment for Mrs Ibbett in the total sum of \$100,000.

#### The issues in this Court

22. In oral submissions to this Court, counsel for the State stressed that the interest of the State on the appeal was in establishing the applicable principles, rather than precise assessment of the various heads of damages awarded.
23. The State submits, first, that in upholding the awards of aggravated and exemplary damages for the trespass, the majority in the Court of Appeal (particularly Spigelman CJ) wrongly took into account the interest of the occupier of land in undisturbed enjoyment by the occupier and the guests of the occupier. In that regard, Spigelman CJ had held that, while in the present case an award of exemplary damages could not be supported, an award of damages for trespass to land can vindicate the right of an occupier to have undisturbed the owner's guests and residents. On the other hand, Ipp JA disagreed that such a right was recognised in the tort of trespass and the State supports what was said by Ipp JA.
24. Secondly, the State complains that, by awarding general damages, aggravated damages and exemplary damages for trespass to land, the State had been punished twice for the same wrong.
25. Thirdly, as to the awards of exemplary damages (for which the State is liable only vicariously), the State contends that Ipp JA was correct when he said:

"The State can only be punished for the conduct of those who train and discipline the police force when a case is properly made out based on the unlawful conduct of such officials. It is quite wrong, in my view, to fix the State with vicarious liability for the conduct of persons who are not before the court, who have not

been identified, whose conduct is not the subject of allegations in the pleadings, whose conduct has not been investigated at the trial, and against whom no specific findings have been made.

...

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

26. Before turning to consider the issues thus raised, three preliminary matters should be noted. The first is that, whatever may be the significance for the law of trespass of the undisturbed presence of guests of the occupier, the facts of this litigation have a narrower focus. Mr Ibbett was living in his mother's house and was a member of the household, not a guest in any transient or merely social sense; the position in respect of such persons may be put to one side in deciding the first issue on this appeal.
27. The second preliminary matter is that the case cannot be approached on the footing that the conduct of the police officers was to be explained in whole or part by reference to known violent propensities of Mr Ibbett. There was no finding to that effect and, in any event, Senior Constable Pickavance had denied pulling his gun but was not believed.
28. The third matter is that the police officers appear to have received limited "reeducation" from other officers (not of superior rank) with respect to their conduct at Mrs Ibbett's house on the night in question. Senior Constable Harman said he had "a quick briefing", the content of which he could not recall. Senior Constable Pickavance said he was told at a five minute meeting with an Education Development Officer ("EDO") that he should not have rolled out Mr Ibbett's vehicle and should have got a search warrant. The EDO said, "Oh boys you'd better do better next time." Mrs Ibbett said that she was offended by this seemingly trivial and apparently dismissive response to what had happened to her.

#### Trespass – the interest protected

#### 29. Following paragraph cited by:

*Wilson Parking Australia (1992) Pty Ltd v Roads Corporation* (26 March 2020)  
(Richards J)

26. VicRoads submitted that the evidence before the magistrate did not establish a cause of action in trespass against the registered owner or the driver of either vehicle. The tort of trespass to land protects a person's interest in maintaining the right to exclusive possession of land, free from uninvited physical intrusion. [11] The tort is committed by intentionally or negligently entering or remaining on land in the possession of another, without permission or other lawful authority. [12].

via  
[11] *New South Wales v Ibbett* (2006) 229 CLR 638, [29].  
*Singh v MIBP* (12 October 2017) (Judge Manousaridis)

We turn first to consider the award of aggravated and exemplary damages for the circumstances in which the trespass to Mrs Ibbett's property was committed by the two police officers. It is well established that the tort protects the interest of the plaintiff in maintaining the right to exclusive possession of her place of residence, free from uninvited physical intrusion by strangers. It is not the concern of the law here to protect title in the sense of ownership but, as in the present case, the party in possession may often also be the owner. But how extensive is that interest in exclusive possession?

30. Following paragraph cited by:

*Eedra Zey* (formerly using the pseudonym *Eva Williams*) v *State of New South Wales* (No 2) (17 July 2024) (Acting Levy SC)  
*Johnson v Buchanan* (11 May 2012) (Bell J)  
*State of New South Wales v Williamson* (05 July 2011) (Hodgson, Campbell and Macfarlan JJA)

In *Plenty v Dillon* [9], Mason CJ, Brennan and Toohey JJ said of the proposition that the trespass to the plaintiff's farm was of such a trifling nature as not to found liability in damages:

"[b]ut this is an action in trespass not in case and the plaintiff is entitled to some damages in vindication of his right to exclude the defendants from his farm".

In their discussion of the tort of trespass in their joint reasons in *Plenty*, Gaudron and McHugh JJ said that the policy of the law here was the protection of possession of property and the privacy and security of the occupier [10]. Among the authorities to which their Honours referred was the statement by Lord Scarman in another trespass case, *Morris v Beardmore* [11], emphasising the fundamental importance attached by the common law to the privacy of the home.

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[9] (1991) 171 CLR 635 at 645.

[10] (1991) 171 CLR 635 at 647.

[11] [1981] AC 446 at 464.

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31. Following paragraph cited by:

Irving v Pflugst (No 2) (11 September 2025) (Brown J)

MTH v State of New South Wales (06 June 2025) (Mitchelmore and Adamson JJA, Price AJA)

Newman v Whittington (26 March 2025) (Chen J)

100. Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing: *State of New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [31]. They are awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* (1987) 164 CLR 1, 8; [1987] HCA 47. That is, they are awarded when the harm done by the wrongful act was aggravated by the manner in which the act was done: *Uren v John Fairfax* (1966) 117 CLR 118, 130 and 149; [1966] HCA 40. (Where malice is involved, s 36 of the Act is relevant: see [104], below).

APC v Mr B (No. 3) (06 March 2025) (Schmidt AJ)

APC v Mr B (No 2) (13 December 2024) (Schmidt AJ)

AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle (20 September 2024) (Schmidt AJ)

TT v The Diocese of Saint Maron, Sydney & Ss (No 3) (01 August 2024) (Elkaim AJ)

298. In *AA v PD* [2022] NSWSC 1039, from [126] Chen J summarised the principles for the awarding of aggravated damages at [126]-[128]:

“Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing: *State of New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [31] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). They are awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* (1987) 164 CLR 1 at 8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); [1987] HCA 47. That is, they are awarded when the harm done by the wrongful act was aggravated by the manner in which the act was done: *Uren v John Fairfax* (1966) 117 CLR 118; [1966] HCA 40; *State of New South Wales v Abed* [2014] NSWCA 419 at [231] (Gleeson JA, Bathurst CJ and Macfarlan JA agreeing). The entitlement to aggravated damages therefore turns upon establishment of these elements.

#### **The defendant's conduct**

In order to secure an award of aggravated damages, typically (but not invariably) there must be “conscious wrongdoing in contumelious disregard of another's rights”: *Gray v Motor Accidents Commission* (1998) 196 CLR 1; [1998] HCA 70 at [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ). In *State of NSW v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208 at [138] (Hodgson JA, Sheller JA and Nicholas J agreeing) (*'Riley'*), explained

that whilst the presence of malice was not essential to ground an award of aggravated damages, and gave some guidance on the character of the defendant's wrongful conduct necessary to support such an award:

"Conduct may be high-handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing. 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 ..."

### **Injury to feelings**

As aggravated damages, like compensatory damages, are directed towards injury to (or hurt) feelings, the Court must take care not to "double-count". This is particularly relevant in a case whether the injury relied upon to justify an award of damages is psychiatric, rather than physical, injury. This means that, if a court has awarded damages for hurt feelings as part of ordinary compensatory damages, the award of aggravated damages must only be for the difference justified by this approach; that is, an award of so much as is necessary to bring the damages up to the upper end of the available range: *Riley* at [131]-[133] (Hodgson JA, Sheller JA and Nicholas J agreeing); *State of New South Wales v Radford* (2010) 79 NSWLR 327; [2010] NSWCA 276 at [95]-[96] (Sackville AJA, Beazley and Macfarlan JJA agreeing)."

*Al Haje v Ellassaad* (06 June 2024) (Elkaim AJ)

*Kucinskas v Lane (No 2)* (10 May 2024) (Elkaim AJ)

*Brown v Walker* (15 December 2023) (Waugh SC DCJ)

*Glavinic v Commonwealth* (01 December 2023) (Mossop J)

*Kneale v Footscray Football Club Ltd* (23 November 2023) (Richards J)

*Stradford (a pseudonym) v Judge Vasta* (30 August 2023) (Wigney J)

*Van Haren v Van Ryn* (05 July 2023) (Chen J)

*SR v Trustees of the De La Salle Brothers* (10 February 2023) (Cavanagh J)

*AA v PD* (05 August 2022) (Chen J)

*John XXIII College v SMA* (29 June 2022) (Murrell CJ; Loukas-Karlsson J; McWilliam AJ)

*John XXIII College v SMA* (29 June 2022) (Murrell CJ; Loukas-Karlsson J; McWilliam AJ)

*SMD v JDW* (12 May 2022) (Gibson DCJ)

*Lewis v Doyle* (18 February 2022) (Davies J)

194. Aggravated damages are also a form of compensatory damages which might be awarded to a plaintiff for stress, anxiety and hurt feelings resulting from circumstances and manner of the wrongdoing: *New South Wales v Ibbett* at [31]; *Miles v Doyle (No 2)* [2021] NSWSC 1312 at [31]. Aggravated damages must be distinguished from exemplary damages which are intended to punish the defendant for the behaviour that gave rise to the tort: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149. As Cavanagh J said in *Miles v Doyle (No 2)* at [49]:

The awarding of aggravated damages for sexual assault might be particularly apt in circumstances in which the person the subject of the assault suffers the long term burden of shame, embarrassment and indignation in addition to a psychiatric illness arising out of the deliberate conduct towards him.

**Gindy v Capital Lawyers Pty Ltd (No 2) (17 December 2021) (Penfold J)**

87. The distinction between aggravated and exemplary damages is well established. In *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; [1966] HCA 40, Taylor J, at 130, explained that aggravated damages are compensatory in nature resulting from the “circumstances and manner of the defendant’s wrongdoing”. Aggravated damages may be awarded to reflect the extent to which the wrongful conduct increased the hurt to the plaintiff. The injury compensated by an award of aggravated damages may be “intangible”: *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [31].

**PP v DD (No 2) (15 October 2021) (Cavanagh J)**

**SMA v John XXIII College (No 2) (07 August 2020) (Elkaim J)**

**Cosco v Hutley (No 2) (13 July 2020) (Rothman J)**

**Nationwide News Pty Ltd v Rush (02 July 2020) (White, Gleeson and Wheelahan JJ)**

430. Aggravated damages may be awarded by way of compensation for injury resulting from the circumstances and manner of a publisher’s wrongdoing, such as conduct which manifests malice: *Uren* at 130 (Taylor J) and at 149 (Windeyer J); *Carson* at 71 (Brennan J); *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [31] (the Court). Where malice is in issue, s 36 of the *Defamation Act* provides that the Court is to disregard the malice or state of mind of the defendant except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff. The harm caused to a person by the conduct of the publisher, and the circumstances and manner of publication may be inferred: *Andrews* at [74] (Glass JA). As we have stated, in the present appeal there is no challenge to the Judge’s findings in support of the conclusion that the manner in which the appellants published the defamatory matters aggravated the harm to Mr Rush.

**Hamilton v State of New South Wales (05 June 2020) (Walton J)**

1102. As to damages, the plaintiff relied on her written submissions. The primary submissions, with respect to damages, was as follows:

1. The plaintiff claimed an entitlement to damages (general, aggravated and exemplary) by reason of the loss and damage pleaded in the third further amended statement of claim, including psychological injury and harm (consisting of post-traumatic stress disorder and major depressive disorder, in association with generalised anxiety).
2. The plaintiff’s entitlement to damages in these proceedings was not governed by the principles set out in the *Civil Liability Act*.

Subsection 3B(1)(a) of that Act excludes an “intentional act that is done by the person with intent to cause injury...”. It follows, also, that the limitation in s 21 of the *Civil Liability Act* on exemplary, punitive and aggravated damages in actions for the award of personal injury damages (where the act or omission that caused the injury or death was negligence), does not apply.

3. Accordingly, in these proceedings, damages should be assessed pursuant to common law principles.

1. General damages “are supposed to be an amount adequate to compensate the plaintiff for all consequences of the defendant’s wrongful conduct that are not too remote”: *State of New South Wales v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208 (“*Riley*”) at [127] .
2. Aggravated damages are also available in cases where general damages may be awarded: *Riley* at [129] . In that case, Hodgson JA observed (at [131]) that:

[131] However, in cases of hurt to feelings caused by wrongdoing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.

3. In *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [31] , Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ observed that:

[31] Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing.

4. On the question of exemplary damages, in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at [26]-[27] ; [89], it was expressly decided that the tort of misfeasance in public office is an appropriate vehicle for the award of exemplary damages. The contumeliousness of the conduct that is the gravamen of such cases is what makes an award of exemplary damages appropriate.
5. In *Riley* , Hodgson JA made the following observations (at [138] ) concerning exemplary damages:

[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.

[Footnotes omitted.]

6. The conduct relied upon by the plaintiff demonstrates that the plaintiff's is such a case.

*ZYX v JD* (26 November 2019) (SLEIGHT CJDC)

*ZYX v JD* (26 November 2019) (SLEIGHT CJDC)

*H L v H P* (24 October 2019) (Elkaim J)

*Johnson v The State of South Australia* (27 March 2019) (Tilmouth J)

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

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

*Nyoni v Shire of Kellerberrin (No 10)* (19 October 2018) (Barker J)

112. As the primary judge noted, at [340] of the primary judgment, aggravated damages are compensatory in nature, whereas exemplary damages – considered further below – are penal in nature. As observed in *New South Wales v Ibbett* (2006) 229 CLR 638 at [31]; [2006] HCA 57 (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ), aggravated damages are a form of general damages, given by way of compensation for injury to an applicant, which may be intangible, resulting from the circumstances and manner of the wrongdoing.

*Blythe v Willis* (22 February 2018) (Emmett AJA)

*Houston Moran v State of New South Wales* (17 February 2017) (Montgomery DCJ)

*Wotton v State of Queensland (No 5)* (05 December 2016) (Mortimer J)

1617. In their reply submissions, the applicants contend that the respondents have approached the claim to damages as if it is a claim for personal injury arising from negligence, and they contend that is an erroneous approach. They contend if there is an analogy it is with the intentional torts of battery and false imprisonment. They also contend that, beyond medical injury (whether physical or physiological), orders for



compensation should reflect “the seriousness and impact of the wrong”, referring to *Bulsey* at [108] (Fraser JA) and *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [31] .

*Monaghan v Australian Capital Territory (No 2)* (30 November 2016) (Mossop AsJ)

201. Aggravated damages are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1 at 8. Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are awarded to punish and deter the wrongdoer: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 at 129-130 ; *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [31] , [33] . Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *NSW v Ibbett* at [34]; *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1 at [15] . The various categories of damages that may be awarded for trespass to the person, including assault and false imprisonment, are not self-contained. There is a close relationship between an award of ordinary compensatory damages for injury to the plaintiff's feelings and an award of aggravated damages: *New South Wales v Radford* [2010] NSWCA 276; (2010) 79 NSWLR 327 at [97] ; *State of New South Wales v Zreika* [2012] NSWCA 37 at [64] .

*Peter Michael Travers v The State of New South Wales* (14 November 2016) (Montgomery DCJ)

*Fred Saad v State of New South Wales; Ashley Saad v State of New South Wales* (12 September 2016) (R S Hulme AJ)

*Sahade v Bischoff* (23 December 2015) (Basten and Gleeson JJA, Beech-Jones J)

*Nyoni v Shire of Kellerberrin (No 6)* (23 November 2015) (Siopis J)

340. It is the case that aggravated damages are compensatory in nature, whereas exemplary damages are penal in nature, and that the highhanded and disrespectful conduct by Mr Mitchell was directed to Mrs Nyoni and not to Mr Nyoni; who was then in hospital. However, in *New South Wales v Ibbett* (2006) 229 CLR 638 at [31] , Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ observed:

Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing. The interest of the plaintiff against invasion of the exclusive possession of the plaintiff extends to the freedom from disturbance of those persons present there with the leave of the plaintiff, at least as family members or as an incident of some other bona fide domestic relationship. The affront to such persons may aggravate the infringement of the right of the plaintiff to enjoy exclusive and quiet possession. (Footnotes omitted.)

*Bulsey v State of Queensland* (06 October 2015) (Fraser JA and Atkinson and McMeekin JJ,)  
*Balven v Thurston* (07 August 2015) (Wilson J)  
*Young v State of New South Wales (No 2)* (11 April 2013) (Adamson J)  
*Crilly v Bumble Group Pty Limited t/a My Security* (30 January 2012) (Levy SC DCJ)  
*Coffey v State of Queensland* (22 October 2010) (Muir and Fraser JJA and Cullinane J,)  
*Moses v State of New South Wales (No. 3)* (14 October 2010) (Gibson DCJ)  
*Darcy v State of New South Wales* (21 September 2010) (Johnstone DCJ)  
*Withyman v State of NSW* (01 September 2010) (Elkaim SC DCJ)  
*New South Wales v Corby* (03 March 2010) (Beazley, Tobias and Basten JJA)

44 Her Honour, correctly, dealt separately with aggravated and exemplary damages. In the context, that was necessary because there is a plethora of statements of the highest authority to support the proposition that aggravated damages are compensatory. The State referred to passages in *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 at 129-130 (Taylor J), at 149 (Windeyer J); *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1 at 8 and *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, where the following appeared in the judgment of the Court at [31] :

“Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing.”

*Care Park Pty Ltd v Universal One Communication Pty Ltd* (18 December 2009) (Hoeben J)

*Morris v Karunaratne* (27 November 2009) (Johnstone DCJ)

260. The plaintiff has pointed to a number of circumstances she says aggravated the assaults and the battery she was required to endure. Many of her allegations were, as I have found, not proved. Others, in my view were more properly the province of the Family Law Court. It is also to be observed that I have already made a substantial award of damages for violation of the dignitary interest. The High Court has said, in *New South Wales v Ibbett* (2006) 229 CLR 638 at [31] :

“Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing.”

*Morris v Karunaratne* (27 November 2009) (Johnstone DCJ)

*Hage-Ali v State of NSW* (14 October 2009) (Elkaim SC DCJ)

*Morro v Australian Capital Territory* (10 September 2009) (Gray J)

54. On the question of aggravated damages applying to circumstances like the present case, Tobias JA in *New South Wales v Delly* (2007) 70 NSWLR 125 ( *Delly* ) cited the High Court in a joint judgment in *New South Wales v Ibbett* (2006) 229 CLR 638 at [31] for the general proposition:

Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from circumstances and manner of the wrongdoing.

Tobias JA went on to say (at [80]):

It was nevertheless common ground that the relevant principles to be applied in determining whether an award of aggravated damages was appropriate were articulated by Hodgson JA, with whom on the question of damages Sheller JA and Nicholas J agreed, in *New South Wales v Riley* (2003) 57 NSWLR 496 where, after observing (at [1271]) that ordinary compensatory damages are supposed to be an amount adequate to compensate a plaintiff for all consequences of the defendant's wrongful conduct that are not too remote, his Honour asked himself: what room is there for additional damages, which although dependant on some aggravating feature of the defendant's wrongful conduct, are still supposed to do no more than compensate for the consequences of that conduct? His Honour responded to his own question in the following terms:

131. In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt [feelings] neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.

*Landini v State of New South Wales* (17 December 2008) (Hall J)

Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing [12]. The interest of the plaintiff against invasion of the exclusive possession of the plaintiff extends to the freedom from disturbance of those persons present there with the leave of the plaintiff, at least as family members or as an incident of some other bona fide domestic relationship. The affront to such persons may aggravate the infringement of the right of the plaintiff to enjoy exclusive and quiet possession [13].

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[12] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129130.

[13] cf *Brame v Clark* 62 SE 418 at 419 (1908); *May v Western Union Telegraph Co* 72 SE 1059 at 1062 (1911); *Douglas v Humble Oil & Refining Company* 445 P 2d 590 (1968); *Restatement of Torts*, 2d, vol 1, Appendix (1966), §162.

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32. The decision of the majority in the Court of Appeal to uphold the award of aggravated damages partly by reference to the affront to Mrs Ibbett of the treatment of her son as well as herself was consistent with basic principle. The same is true, subject to what now follows, of the award of exemplary damages for the trespass. This outcome invites attention to the second main complaint by the State, namely, that respecting alleged "double punishment" for the same wrong.

"Double punishment"

33. **Following paragraph cited by:**

*Al Haje v Elassaad* (06 June 2024) (Elkaim AJ)

*Van Haren v Van Ryn* (05 July 2023) (Chen J)

89. Exemplary damages serve a different function to aggravated damages. They go beyond compensation, and are awarded to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again: *Lamb v Cotogno* (1987) 164 CLR 1, 8; [1987] HCA 47; *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [33] ('*Ibbett*'); *State of New South Wales v Abed* (2014) 246 A Crim R 549; [2014] NSWCA 419 at [232]-[233].

*Toth v State of NSW* (16 November 2021) (Montgomery DCJ)

*Rushton v Commonwealth Superannuation Corporation* (09 June 2020) (Griffiths J)

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

It should be stated that there is no error as such in making an award of damages in a single sum for both aggravated and exemplary damages. In *Uren v John Fairfax & Sons*, Taylor J pointed out that the same set of circumstances may justify an award of either. See also *Lamb v Cotogno* (1987) 164 CLR 1 at 8; [1987] HCA 47; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*; *State of New South Wales v Ibbett* at [33]. In *State of New South Wales v Ibbett*, the court stated, at [35]:

"[35]In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once."

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

103. It should be stated that there is no error as such in making an award of damages in a single sum for both aggravated and exemplary damages. In *Uren v John Fairfax & Sons*, Taylor J pointed out that the same set of circumstances may justify an award of either. See also *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47 at 8; *XL Petroleum NSW Pty Ltd v Caltex Oil (Aust) Pty Ltd*; *New South Wales v Ibbett* at [33]. In *New South Wales v Ibbett*, the Court stated, at [35]:

“In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once.”

*Cooper v Neubert* (26 May 2017) (Estcourt J)

*Day v The Ocean Beach Hotel Shellharbour Pty Ltd* (05 August 2013) (Meagher, Emmett and Leeming JJA)

40. Although it can be difficult to separate aggravated and exemplary damages, it is necessary to do so: *Lamb v Cotogno* (1987) 164 CLR 1 at 8; *Gray v Motor Accident Commission* [1998] HCA 70; (1998) 196 CLR 1 at [6]; *New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 at [33]. They were distinguished by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 as follows (at 149):

"[A]ggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment-moral retribution or deterrence."

*Coffey v State of Queensland* (22 October 2010) (Muir and Fraser JJA and Cullinane J)

*Gunns Limited v Alishah (No 4)* (31 May 2010) (Porter J)

54. The conceptual distinction between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages was maintained in *Lamb v Cotogno*, and further confirmed in *New South Wales v Ibbett* (2006) 229 CLR 638 at [33]. At [34] Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ highlighted the need to maintain the conceptual distinctions between aggravated and exemplary damages, and said that it was necessary to determine both heads of compensatory damages before deciding whether or not an award of exemplary damages was justified. At [35] their Honours said that in cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damage, and no element more than once.

*Morro v Australian Capital Territory* (10 September 2009) (Gray J)  
*State of New South Wales v Dely* (06 November 2007) (Ipp JA 1; Tobias JA ;  
Basten JA)

105. The term “aggravated damages” is something of a misnomer. It refers to a component of compensatory damages referable to circumstances of aggravation: see, eg, *Plenty v Dillon* (1991) 171 CLR 635 at 655 (Gaudron and McHugh JJ). Thus false imprisonment may be accompanied by threats, with rudeness or with appreciable contempt; or it may be carried out courteously but in error. It may continue after it is challenged; or it may occur without challenge. The question is how to assess the effect of the circumstances of aggravation, once established, on the plaintiff: *State of New South Wales v Ibbett* [2006] HCA 57; (2006) 81 ALJR 427 at [33] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). Damages attributable to the circumstances of aggravation are primarily awarded for injury to the plaintiff’s feelings caused by insult or humiliation.

In *Uren v John Fairfax & Sons Pty Ltd* [14], Taylor J, after observing that aggravated damages fix upon the circumstances and manner of the wrongdoing of the defendant, contrasted the function of exemplary damages as punishment and deterrent of the wrongdoer. His Honour added that [15]:

"in many cases, the same set of circumstances might well justify either an award of exemplary or aggravated damages".

Subsequently, in *Lamb v Cotogno* [16], in the joint reasons of five members of the Court, the conceptual distinction was drawn between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages. Their Honours added that in some cases it might be difficult to differentiate between aggravated damages and exemplary damages. Gleeson CJ, McHugh, Gummow and Hayne JJ spoke in like terms in *Gray v Motor Accident Commission* [17].

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[14] (1966) 117 CLR 118.

[15] (1966) 117 CLR 118 at 130.

[16] (1987) 164 CLR 1.

[17] (1998) 196 CLR 1 at 4 [6]; see also at 3436 [100]-[103].

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

Al Haje v Elassaad (06 June 2024) (Elkaim AJ)

Binsaris, Webster, Austral & O'Shea v Northern Territory of Australia (01 September 2023) (Blokland J)

Van Haren v Van Ryn (05 July 2023) (Chen J)

90. Some further matters should also be noted in connection with exemplary damages. First, there is a need for moderation and restraint when awarding exemplary damages: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 463; [1985] HCA 12; *Backwell v AAA* [1997] 1 VR 182, 205. Put another way, exemplary damages are awarded rarely and not every finding of fault warrants such an award: *State of New South Wales v Zreika* [2012] NSWCA 37 at [61] ('Zreika'). The "fact that an award of exemplary damages constitutes an expression of the Court's disapproval of the conduct does not mean that the Court's disapproval is a sufficient reason to make an award": *State of NSW v Delly* (2007) 70 NSWLR 125; [2007] NSWCA 303 at [117]. Secondly, it is necessary to determine and assess "both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation": *Zreika* at [63]; *Ibbett* at [34]. Thirdly, in "cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damage and no element more than once": *Ibbett* at [35]; *Zreika* at [63]. Such an approach avoids the risk of overcompensation or "double punishment".

Best v Rosamond (24 July 2019) (Abadee DCJ)

Brighten v Traino (08 July 2019) (Basten, Gleeson and Brereton JJA)

Johnson v The State of South Australia (27 March 2019) (Tilmouth J)

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

120. As I said in *Whitbread & Anor v Rail Corporation NSW & Ors*: [9].

"In considering whether to award exemplary damages 'the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged': *Gray* (at [15]; (at [31]) 'the conduct of the wrongdoer is central to that enquiry') per Gleeson CJ, McHugh, Gummow and Hayne JJ. In contradistinction, in the case of aggravated damages the assessment is made from the point of view of the plaintiff: *State of New South Wales v Ibbett* [2005] NSWCA 445; (2005) 65 NSWLR 168 (at [83]) per Spigelman CJ; referred to with approval in *New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 (at [34])."

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

White v Johnston (18 February 2015) (Barrett, Emmett and Leeming JJA)

173. In *New South Wales v Zreika* [2012] NSWCA 37, Sackville AJA (with whom Macfarlan and Whealy JJA agreed) said in respect of these two heads of damages in an action for malicious prosecution:

"60 ...Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are rewarded to punish and deter the wrongdoer; *Uren v John Fairfax & Sons Pty Limited* (1966) 117 CLR 118 at 129-130, per Taylor J, cited with approval in *New South Wales v Ibbett* (2006) 229 CLR 638 at 646-647 [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *New South Wales v Ibbett*, at [34]; *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both; *New South Wales v Ibbett* at 647 [33] - [34].

61 Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future and to reflect "detestation" for the action; *Lamb v Cotogno* (1987) 164 CLR 1 at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno* at 6, [12]. Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v MAC* at 7, [14].

62 Exemplary damages made be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: *New South Wales v Ibbett*: *New South Wales v Landini*, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police;

should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen.

*Ibbett*, at 653 [51], citing *Adams v Kennedy* [2000] 49 NSWLR 78, at 87, per Priestley JA.

63 In a frequently cited passage, Brennan J in *XL Petroleum (NSW) Pty Limited v Caltex Oil (Aust) Pty Limited* (1985) 155 CLR 448, at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless, in *New South Wales v Ibbett* at 647 [34], the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once."



*State of New South Wales v Quirk* (20 July 2012) (Beazley and Hoeben JJA, Tobias AJA)

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

*Moses v State of New South Wales (No. 3)* (14 October 2010) (Gibson DCJ)

*Corby v State of New South Wales* (05 June 2009) (Murrell SC DCJ)

In the present case, awards were made under both heads. However, Spigelman CJ was alive to the conceptual distinctions involved, as appears in the following passage:

"In this regard it is relevant to note that the matters to which I have referred as justifying an award of exemplary damages are also pertinent, as is often the case, to an award of aggravated damages. The difference is that in the case of aggravated damages the assessment is made from the point of view of the Plaintiff and in the case of exemplary damages the focus is on the conduct of the Defendant. Nevertheless, it is necessary, as I have noted above, to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation."

35. **Following paragraph cited by:**

*Tickle v Giggle for Girls Pty Ltd (No 2)* (23 August 2024) (Bromwich J)

244. In *Kaplan*, Mortimer CJ affirmed the proposition that aggravated damages were available under s 46PO(4) where racial discrimination under s 9(1) of the RDA had been made out: at [1759]-[1789]. The proceeding involved findings that a state school principal had failed to take steps to address high levels of antisemitic bullying. Aggravated damages were awarded to one of the applicants, a former student, for the school principal's failure to take steps to ensure his safety following an assault at a park, which was found to have increased the applicant's hurt: at [1787]-[1789], citing *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [35]. The cited portion of *Ibbett*, for completeness, is authority for no more than the orthodox proposition that, where the conduct giving rise to a tort increases the hurt to the subject of the tort, aggravated damages may be available. *Kaplan* does not state whether the principal's failures were included in, or occurred after the lodging of, the complaint to the AHRC that gave rise to the proceeding.

*Al Haje v Elassaad* (06 June 2024) (Elkaim AJ)

126. In *Van Haren v Van Ryn* [2023] NSWSC 776, from [89], Chen J said this about exemplary damages:

"Exemplary damages serve a different function to aggravated damages. They go beyond compensation, and are awarded to punish the defendant for

conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again: *Lamb v Cotogno* (1987) 164 CLR 1, 8; [1987] HCA 47; *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [33] ('Ibbett'); *State of New South Wales v Abed* (2014) 246 A Crim R 549; [2014] NSWCA 419 at [232]-[233].

Some further matters should also be noted in connection with exemplary damages. First, there is a need for moderation and restraint when awarding exemplary damages: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 463; [1985] HCA 12; *Backwell v AAA* [1997] 1 VR 182, 205. Put another way, exemplary damages are awarded rarely and not every finding of fault warrants such an award: *State of New South Wales v Zreika* [2012] NSWCA 37 at [61] ('Zreika'). The "fact that an award of exemplary damages constitutes an expression of the Court's disapproval of the conduct does not mean that the Court's disapproval is a sufficient reason to make an award": *State of NSW v Delly* (2007) 70 NSWLR 125; [2007] NSWCA 303 at [117]. Secondly, it is necessary to determine and assess "both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation": *Zreika* at [63]; *Ibbett* at [34]. Thirdly, in "cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damage and no element more than once": *Ibbett* at [35]; *Zreika* at [63]. Such an approach avoids the risk of overcompensation or "double punishment".

#### *Kaplan v State of Victoria (No 8)* (14 September 2023) (Mortimer CJ)

1789. I consider Zack should be awarded \$30,000 in aggravated damages as part of his compensation for Mr Minack's contravention of s 9 of the RDA. Mr Minack's conduct after the park incident, but really as part of a course of conduct of downplaying what had happened to Zack at BSC, increased Zack's hurt (see *Ibbett* at [35]) and Zack should be compensated for that.

#### *Van Haren v Van Ryn* (05 July 2023) (Chen J)

*John XXIII College v SMA* (29 June 2022) (Murrell CJ; Loukas-Karlsson J; McWilliam AJ)

#### *Gindy v Capital Lawyers Pty Ltd (No 2)* (17 December 2021) (Penfold J)

88. Exemplary damages are awarded to "punish and deter" the wrong-doer. They are not compensatory. It is usually said that exemplary damages may be awarded where a defendant has acted in "conscious and contumelious disregard of the plaintiff's rights": see *Uren v John Fairfax & Sons* at 154 per Windeyer J; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; [1985] HCA 12 at 471. The damages so awarded mark the court's "disapprobation of the conduct": *New South Wales v Ibbett* at [35].

#### *Toth v State of NSW* (16 November 2021) (Montgomery DCJ)

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

103. It should be stated that there is no error as such in making an award of damages in a single sum for both aggravated and exemplary damages. In *Uren v John Fairfax & Sons*, Taylor J pointed out that the same set of circumstances may justify an award of either. See also *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47 at 8; *XL Petroleum NSW Pty Ltd v Caltex Oil (Aust) Pty Ltd*; *New South Wales v Ibbett* at [33]. In *New South Wales v Ibbett*, the Court stated, at [35]:

“In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once.”

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

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

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

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

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

*Drew Cuthbertson v State of New South Wales; Daniel Fletcher v State of New South Wales* (15 December 2017) (Montgomery DCJ)

305. The categories of damages that may be awarded for trespass to the person, assault or wrongful imprisonment are not self-contained. In a case such as the present, there is a close relationship between the award of ordinary compensatory damages for Mr Fletcher’s feelings and an award of aggravated damages: *Smith*’s case supra at [157] and [158]. While aggravated damages can be awarded to reflect the extent to which the circumstances of SC Walker’s conduct increased the hurt to Mr Fletcher, a single sum can be awarded for both aggravated and exemplary damages: *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [35]. At [31] the High Court stated “aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and the manner of the wrongdoing”. At [33] the High Court recognised that whereas aggravated damages fix upon the circumstances and manner of the wrongdoing of the defendant, and the function of exemplary damages is punishment and deterrence of the wrongdoer; nevertheless it can be difficult to differentiate between aggravated damages and exemplary damages.

*Costello v State of NSW* (23 June 2017) (Judge Levy SC)

[Exton v State of NSW](#) (13 April 2017) (Judge Levy SC)  
[Houston Moran v State of New South Wales](#) (17 February 2017) (Montgomery DCJ)  
[Smith v State of New South Wales](#) (22 April 2016) (Judge Levy SC)  
[Young v State of New South Wales \(No 2\)](#) (11 April 2013) (Adamson J)  
[Moses v State of New South Wales \(No. 3\)](#) (14 October 2010) (Gibson DCJ)  
[White v State of South Australia](#) (09 April 2010) (Anderson J)

In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once. Such an approach was adopted by Bray CJ in [Johnstone v Stewart](#) [18]. In the present case, Basten JA favoured a variation of this approach, with a global award of exemplary damages in respect of the causes of action in trespass and in assault. However, in the event, nothing turned on the different approaches in this regard because the global award of \$45,000 was equal to the distinct awards of \$25,000 and \$20,000 favoured by Spigelman CJ.

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[18] [1968] SASR 142 at 144-145. The judgment of Bray CJ in this respect is discussed with a measure of approval by Professor Julius Stone, "Double Count and Double Talk: The End of Exemplary Damages?", (1972) 46 *Australian Law Journal* 311 at 325.

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36. **Following paragraph cited by:**

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

The reasons for judgment of the two members of the majority in the Court of Appeal should be read as a whole. When this is done, it is apparent that Spigelman CJ and Basten JA were mindful of the conceptual distinctions between aggravated and exemplary damages and of the dangers of an excessive overall award where some or all of the factors supporting one head of damages also supported the other. Accordingly, the complaint made by the State of "double punishment" is not made out.

37. There remains the complaint by the State respecting the treatment of its vicarious liability for exemplary damages.

Exemplary damages

38. Following paragraph cited by:

*Attalla v State of NSW* (29 May 2018) (P Taylor SC DCJ)

116. Mr Attalla referred to *New South Wales v Ibbett* : [61] .

*“An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government.”*

*via*

61. (2006) 229 CLR 638 at [38] ; [2006] HCA 57 .

*Moses v State of New South Wales* (No. 3) (14 October 2010) (Gibson DCJ)

[312] The relevant principles have been helpfully summarised by Anderson J in *White v South Australia*, *supra* at [430] – [460] as follows:

“[430] Aggravated damages are awarded as compensation for injury to the plaintiff’s feelings caused by the defendant’s insulting or humiliating conduct. The High Court said, in contrasting aggravated and exemplary damages, in *Lamb v Cotogno* (1987) 164 CLR 1 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.

[431] In *Lamb* , the respondent Cotogno was enraged when the appellant Lamb tried to serve him with a summons. The respondent threatened to kill him. As the appellant attempted to leave the property, the respondent threw himself across the appellant’s bonnet and held on as he attempted to drive away. In fear, the appellant drove off, then attempted to dislodge the respondent by accelerating and swerving. He eventually braked suddenly which threw the respondent off, injuring him seriously. The appellant drove away. Provocation was taken into account in the assessment of damages. \$5,000 was awarded as exemplary damages.

[432] Such damages have been awarded for wrongful imprisonment in the past (see *Myer Stores Ltd v Soo* ) and

in those cases the circumstances of the detention was relevant.

[433] Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149 described aggravated damages as those “given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done”.

[434] In *Cassell & Co Ltd v Broome* [1972] AC 1027 Lord Hailsham said at 1073 :

In awarding “aggravated” damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.

[435] In *New South Wales v Delly* (2007) 70 NSWLR 125, Delly was wrongfully arrested as an accessory to the murder of Paul Harris. She was asked her name and date of birth and taken into custody without being told she was under arrest or the reasons for her custody. She was held in a room from approx 8.30 am. By 11.00 am the police had formed the view she could not be charged. However, she was not told she could leave. At 12 noon she was released. Aggravated damages were awarded by the primary judge because Delly was held for a number of hours. The award was set aside. An award of \$10,000 for exemplary damages was made by the Court of Appeal because police knowingly and deliberately held Delly for an hour after knowing she could not be charged.

[436] *Delly* was appealed to the High Court and special leave was refused.

[437] In *McDonald v Coles Myer Ltd* (1995) Aust Torts Reports 81-361 (NSWCA), the appellant was arrested and charged with shoplifting at K-Mart. The Magistrate found that there was “no case to answer”. The appellant then brought a claim for wrongful arrest and false imprisonment. The case was compounded by the defendant’s patently false and offensive imputations during trial that the plaintiff was mentally ill. No apology was made. Damage to the appellant’s reputation due to the allegations was a

consideration. The appellant was awarded \$13,500 aggravated compensatory damages at first instance, which was increased to \$27,000 on appeal.

[438] Clarke JA, citing Lawrence LJ in *Walter v Alltools Ltd* (1944) 171 LT 371 at 372, said:

In my opinion that case lays down that any evidence in a case of false imprisonment which shows, or tends to show, that the defendant is persevering in the charge which he originally made in bringing about the false imprisonment, is evidence which may be given for the purpose of aggravating the damages. In the same way, the defendant would be entitled to give any evidence which tended to show that he had withdrawn, or had apologised for having made, the charge on which the false imprisonment proceeded. The general principle, in my view, is that any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false.

[439] Provocative conduct by a plaintiff may reduce the amount of aggravated damages otherwise appropriate, or even disentitle a plaintiff from such damages. In my view none of the plaintiffs engaged in any conduct which could be regarded as provocative.

### **(iii) Exemplary damages**

[440] Exemplary (or punitive) damages are awarded in order to punish the defendant for "conscious wrongdoing in contumelious disregard of another's rights": as stated by Knox CJ in *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77. It is my understanding that this is the preferred definition in Australia.

[441] The decision in *Lamb* has confirmed that exemplary damages may be awarded in the absence of any malice on the part of the defendant. The decision also shows that the conduct that makes exemplary damages appropriate can actually occur after the tort has been committed.

[442] In *Lamb* the event giving rise to exemplary damages was the appellant's act of driving off after the respondent was seriously injured by the appellant. The \$5,000



exemplary damages awarded was upheld, for the appellant's "callous" conduct in driving off.

[443] Aside from punishing the defendant, exemplary damages may be awarded to demonstrate the court's disapproval of the defendant's conduct and to provide general and specific deterrence.

[444] In *Delly* Ipp JA said at [24] :

[24] As Tobias JA observes, exemplary damages will be awarded to plaintiffs in cases where it is necessary to punish the defendant for the defendant's anti-social behaviour to the plaintiff and to deter others from like conduct.

[445] In *New South Wales v Ibbett* (2006) 229 CLR 638, the Court at [38] cited the rule in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558 :

The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government.

[446] In *Ibbett* , two plain-clothes police officers entered a residence at night without justification and sought to arrest a resident, pointing a gun at him and his mother who was the owner of the premises. The mother was awarded \$50,000 for trespass and \$50,000 for assault, which award was upheld by the High Court.

[447] I note also the comments in *Delly* per Ipp JA at [25] :

A tendency has developed to assume that, where plaintiffs are successful in cases of false imprisonment, exemplary (and, indeed, aggravated) damages should be awarded automatically against the police. Such a tendency is incorrect and should be avoided. The requirement laid down by the law must be applied, properly, in each individual case. I record my express agreement with what Basten JA has written (at 149 [115]–[117] *infra*).

Basten JA said at [115]–[117]:



[115] Circumstances of aggravation do not necessarily demonstrate conduct of a kind warranting an award of exemplary damages. Such an award is justified by reference, not to the effects on the plaintiff, but to the knowledge, intention or recklessness of the tortfeasor. An award of exemplary damages may be justified by “conscious wrongdoing in contumelious disregard of the plaintiff’s rights”. On the other hand, actual subjective advertence to wrongdoing is not necessary, at least, it would seem, in circumstances where the conduct is objectively outrageous so that the tortfeasor can properly be described as reckless.

[116] One purpose of an award of exemplary damages is to deter both the wrongdoer and others who may be in his or her position from a repetition of the kind of conduct under scrutiny. In the present case, it is the State of New South Wales, rather than the individual police officers who will suffer the financial burden of an award. Further ... such an award may indirectly have a deterrent effect on the police officers concerned through the response of the Police Service. It is, therefore, important to preserve the deterrent effect of such an award. That effect will tend to be diminished if the preconditions for an award are not tightly controlled. No doubt it is important that police officers know and observe the limits of their powers: however that desirable end will not make a careless or mistaken exercise of power outrageous or high-handed.

[117] The fact that an award of exemplary damages constitutes an expression of the Court’s disapproval of the conduct does not mean that the Court’s disapproval is a sufficient reason to make an award.

[448] Before making an award of exemplary damages, I must review all evidence which might mitigate the defendant’s conduct.

[449] In *Andary v Burford* (1994) Aust Torts Reports 81-302, a truck driver (appellant) and car driver (respondent) were in a minor accident, which turned into a verbal altercation. The appellant tried to drive off and avoid further argument but the respondent got out of her car, abused the appellant, and held on to the side of his truck. The appellant, while moving, shook his truck door to dislodge her, and after she

fell to the road in a heap he continued to drive away. The appellant appealed against the magistrate's decision to award \$7,500 in exemplary damages without reduction for the respondent's provocation. Millford J allowed the appeal and reduced the damages by half for the respondent's loud, drunk and abusive provocative conduct.

[450] As I have said, I have not found there to be any provocation on the part of the plaintiffs or any lawful motivation for the defendant's conduct in committing the offences.

### **Distinction between aggravated and exemplary damages**

[451] As already discussed, aggravated damages are generally compensatory in nature and are awarded to restore the plaintiff's dignity and to compensate for conduct which has shocked them. Exemplary damages, on the other hand, indicate the court's disapproval of the defendant's conduct.

[452] The distinction between the two heads of damage was first recognised in England in 1964 in *Rookes v Barnard* [1964] AC 1129 (HL) at 1221 per Lord Devlin.

[453] It has been accepted in Australia that the distinction is difficult to make in some circumstances.

[454] In *Uren* Taylor J said at 129 :

Prior to *Rookes v Barnard* the law relating to exemplary damages both in England and in this country was that damages of that character might be awarded if it appeared that, in the commission of the wrong complained of, the conduct of the defendant had been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights. Various expressions had been employed to describe such conduct and the law, though, of necessity invested with a degree of flexibility, was sufficiently certain. The cases in which this principle has been acted upon are numerous and it is sufficient for the present to say that it has been acted upon in this Court on a number of occasions. It is, perhaps, desirable to point out that there had been a degree of confusion between "aggravated" and "exemplary" damages and sufficient attention has not, in the past, been given to the distinction between these two concepts.

Windeyer J said at 149:

[A]ggravated damages are given to compensate the plaintiff

when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve to one or more of the objects of punishment — moral retribution or deterrence.

### **Double punishment**

[455] While the purposes of aggravated damages and exemplary damages are different, both may be awarded if appropriate.

[456] An example of that would be intentionally insulting conduct, which offends both the plaintiff and the court. This proposition was considered in *Johnstone v Stewart* [1968] SASR 142.

[457] The court stated in *Ibbett* at [35], referring to the “global” approach:

[35] In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once. Such an approach was adopted by Bray CJ in *Johnstone v Stewart*.

[458] The court affirmed the remarks of Spigelman CJ in the judgment appealed from at [34]:

[34] ... it is relevant to note that the matters to which I have referred as justifying an award of exemplary damages are also pertinent, as is often the case, to an award of aggravated damages. The difference is that in the case of aggravated damages the assessment is made from the point of view of the plaintiff and in the case of exemplary damages the focus is on the conduct of the defendant. Nevertheless, it is necessary, as I have noted above, to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation.

[459] In a case such as the present one, I must be mindful of the remarks of the court at [36] with respect to:

[36] ... the conceptual distinctions between aggravated and

exemplary damages and of the dangers of an excessive overall award where some or all of the factors supporting one head of damages also support(s) the other.

[460] Relevantly, Smith J in *Walker v Hamm (No 2)* [2009] VSC 290 said at [63] :

[63] It has been noted in the authorities that there is no necessary proportionality between compensatory and exemplary damages. In addition, however, it has been recognised that in reality there can be an element of punishment in aggravated damages. As a result, in considering whether to award exemplary damages and, if so, their quantum, it is necessary to consider whether the awarded compensatory damages, including aggravated damages, address any need that may exist in a particular case for punishment of the tortfeasor through the award of exemplary damages. Double punishment must be avoided. Further, the court should approach any assessment with restraint and moderation. It also appears to be established that deciding whether to award exemplary damages, and their quantification, generally will involve the exercise of discretion except where there is no room for a discretion.”

*White v State of South Australia* (09 April 2010) (Anderson J)

445. In *NSW v Ibbett* (2006) 229 CLR 638, the Court at [38] cited the rule in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558 :

The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government.

The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government [19]. Indeed, the first reported use of the expression "exemplary damages" may have been by Pratt LCJ[20] in *Huckle v Money* [21]. *Huckle* was one of several tort actions in the Court of Common Pleas [22] arising from the use by the administration of George Grenville[23] of general warrants in its campaign in the 1760s against the activities of John Wilkes and the publication styled the *North Briton*. The jury in *Huckle* awarded no less than

£300 damages, an enormous sum for the times, and the Lord Chief Justice said they were not excessive.

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[19] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558 ; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 143144 [17] .

[20] Subsequently Lord Chancellor (1766-1770) as Lord Camden.

[21] (1763) 2 Wils KB 205 at 207 [ 95 ER 768 at 769 ]. The defendant was a King's messenger, sued for trespass, assault and false imprisonment by a journeyman printer. The term "exemplary damages" was also used by the Court of Common Pleas in *Grey v Grant* (1764) 2 Wils KB 252 at 253 [ 95 ER 794 at 795 ].

[22] Another was *Wilkes v Wood* (1763) Lofft 1 [ 98 ER 489 ], where the award by a special jury in favour of John Wilkes was £1000. Wood was an under-secretary of State: Watson, *The Reign of George III*, (1960) at 100. See also the discussion of these cases by Binnie J in *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 at 619621 .

[23] First Lord of the Treasury (1763/1765), in succession to the Earl of Bute.

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39. **Following paragraph cited by:**

*Stradford (a pseudonym) v Judge Vasta* (30 August 2023) (Wigney J)

Windeyer J later doubted whether the origin of the idea conveyed by the term "exemplary damages" was as recent as *Huckle* [24] . However that may be, what is well established is that an award of exemplary damages may serve "a valuable purpose in restraining the arbitrary and outrageous use of executive power" and "oppressive, arbitrary or unconstitutional action by the servants of the government". The words are those of Lord Devlin, no supporter of the general use of this remedy [25] . His Lordship added that [26] :

"the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service".

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[24] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 152153 ; see also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 5 [8] .

[25] *Rookes v Barnard* [1964] AC 1129 at 1223, 1226. .

[26] [1964] AC 1129 at 1226. .

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40. Following paragraph cited by:

Stradford (a pseudonym) v Judge Vasta (30 August 2023) (Wigney J)

Deputy Commissioner of Taxation v Frangieh (No 3) (20 March 2017) (Harrison AsJ)

763. The cross claimant also seeks an award of exemplary punitive damages on account of the misfeasance in public office. Exemplary damages for misfeasance were recognised in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 at 147-149 (“*Kuddus*”) which was in turn approved by the High Court in *New South Wales v Ibbett* (2006) 229 CLR 638 (“*Ibbett*”) at [40] as follows:

In *Kuddus v Chief Constable of Leicestershire*, Lord Hutton considered these remarks of Lord Devlin with the added authority of his own judicial experience in Northern Ireland, including his award of exemplary damages in *Pettigrew v Northern Ireland Office*. Lord Hutton concluded in *Kuddus*:

“I think that a number of cases decided by the courts in Northern Ireland during the past thirty years of terrorist violence give support to the opinion of Lord Devlin in *Rookes v Barnard* that in certain cases the awarding of exemplary damages serves a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law. Members of the security forces seeking to combat terrorism face constant danger and have to carry out their duties in very stressful conditions. In such circumstances an individual soldier or police officer or prison officer may, on occasion, act in gross breach of discipline and commit an unlawful act which is oppressive or arbitrary and in such cases exemplary damages have been awarded.”

His Lordship in *Kuddus* added:

“In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times.”

In *Kuddus v Chief Constable of Leicestershire Constabulary* [27], Lord Hutton considered these remarks of Lord Devlin with the added authority of his own judicial experience in Northern Ireland, including his award of exemplary damages in *Pettigrew v Northern Ireland Office* [28]. Lord Hutton concluded in *Kuddus* [29]:

“I think that a number of cases decided by the courts in Northern Ireland during the past 30 years of terrorist violence give support to the opinion of Lord Devlin in *Rookes v Barnard* [30] that in certain cases the awarding of exemplary damages

serves a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law. Members of the security forces seeking to combat terrorism face constant danger and have to carry out their duties in very stressful conditions. In such circumstances an individual soldier or police officer or prison officer may, on occasion, act in gross breach of discipline and commit an unlawful act which is oppressive or arbitrary and in such cases exemplary damages have been awarded."

His Lordship added [\[31\]](#) :

"In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times."

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[\[27\]](#)      [\[2002\] 2 AC 122 at 147](#)149 .

[\[28\]](#)      [\[1990\] NI 179 at 181](#)182.

[\[29\]](#)      [\[2002\] 2 AC 122 at 147](#) .

[\[30\]](#)      [\[1964\] AC 1129 at 1223, 1226](#) .

[\[31\]](#)      [\[2002\] 2 AC 122 at 149](#) .

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### Vicarious liability

41. In previous times, the situation respecting vicarious liability in tort was complicated by the rules respecting Crown immunity in England. On that subject, and with reference to the reasons of Cockburn LCJ in *Feather v The Queen* [\[32\]](#) , Gummow and Kirby JJ remarked in *The Commonwealth v Mewett* [\[33\]](#) :

"[A] servant of the Crown was responsible at common law for a tortious act done to a fellow subject, although done by the authority of the Crown, and to that tortfeasor the immunity of the Crown would afford no defence. Moreover, in most instances, the action against the officer or servant of the Crown would have the same effect as a petition of right would have, 'since, in a proper case, the Crown [would] defend its officer and become responsible for any damages awarded'[\[34\]](#)."

The first sentence of that passage explains the constitution of the actions against the under-secretary of State, King's messenger and other officials sued in the saga of John Wilkes during the reign of King George III. The second sentence explains why the personal means of comparatively lowly officials, sued at a time when Crown immunity still barred a direct action, would not constrain awards of exemplary damages.



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[32] (1865) 6 B & S 257 at 295296 [122 ER 1191 at 1205 ].

[33] (1997) 191 CLR 471 at 543. .

[34] Robertson, *The Law and Practice of Civil Proceedings By and Against the Crown and Departments of the Government*, (1908) at 351.

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42. The 2003 Act takes the statute law of New South Wales even further with respect to police tort claims. Section 9B(2) applied in the present case by denying the competency of an action against the two police officers themselves and providing "instead" for the claim to be made against the State. Earlier statute law in New South Wales had both rendered the State amenable to actions in tort (s 5 of the *Crown Proceedings Act* , referred to earlier in these reasons) and had deemed the vicarious liability of the State to extend to wrongs of the nature of those committed by Senior Constables Pickavance and Harman (s 6 of the 1983 Act).

#### The case law

43. The 1983 and 2003 Acts were enacted in New South Wales against a background of the case law in Australia which accepted that a defendant whose liability in tort was vicarious might suffer an award of exemplary damages. In *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* [35] , an award of exemplary damages had been made by Macfarlan J on the counts of trespass to goods and conversion by employees of the defendant [36] ; this Court upheld the decision of the New South Wales Court of Appeal not to add an additional award on the counts of trespass to land by those employees. Thereafter, in an action in trespass tried in 1981, a New South Wales jury awarded exemplary damages of \$400,000 against Caltex Oil (Australia) Pty Ltd. That award was reduced to \$150,000 but otherwise upheld by the New South Wales Court of Appeal in 1982 [37] and, thereafter, by this Court [38] . Caltex had procured the spiking by others of the plaintiff's tanks.

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[35] (1968) 121 CLR 584 .

[36] (1968) 121 CLR 584 at 591, 599, 622623 .

[37] *Caltex Oil (Australia) Pty Ltd v XL Petroleum (NSW) Pty Ltd* [1982] 2 NSWLR 852.

[38] *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448.

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44. Following paragraph cited by:



Such authorities in this Court assume that awards of exemplary damages may properly be made against a principal or employer who is vicariously liable for the tortious acts or omissions of an agent or employee; they do not canvass any rationale for the making of such awards.

45. The nature of vicarious liability most recently was treated by this Court in *Sweeney v Boylan Nominees Pty Ltd* [39] and need not be further considered here. But why, it has been asked, should shareholders of a corporation bear the burden of the punishment by the medium of an award of exemplary damages for corporate conduct in which they took no part?[40] That question itself recapitulates arguments presented in the nineteenth century in related fields, before the development of modern ideas of corporate identity and responsibility[41].

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[39] (2006) 80 ALJR 900; 227 ALR 46.

[40] Waddams, *The Law of Damages*, 3rd ed (1997), §11.420.

[41] See Chapman and Trebilcock, "Punitive Damages: Divergence in Search of a Rationale", (1989) 40 *Alabama Law Review* 741 at 798801, 819821.

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46. Particular considerations respecting exemplary damages apply where the principal or employer is the State or a statutory emanation of the State. Reference has been made already to the views expressed on that subject, at least where military, police and prison officers are concerned, by Lord Hutton in *Kuddus* [42]. On the other hand, in that case Lord Scott of Foscote did not accept that a deterrent purpose was a sufficient justification for exemplary damages in vicarious liability cases [43].

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[42] [2002] 2 AC 122 at 147149.

[43] [2002] 2 AC 122 at 161.

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47. **Following paragraph cited by:**

*Couch v Attorney-General* (No 2) (24 March 2010)

Shortly thereafter, in *S v Attorney-General* [44], the New Zealand Court of Appeal held that, if not as a matter of power, then at least as a prudential consideration, an award of exemplary

damages against the Crown should not be made in respect of the tortious acts of foster parents against children placed in their care by the Superintendent of Child Welfare; this was because the Department was not "directly at fault" [45] . However, Blanchard J, who gave the principal reasons in *S v Attorney-General* , reserved the position where a police officer deliberately or recklessly directly inflicted personal injury on the plaintiff [46] . Moreover, in this Court, it has been said that there may be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff [47] .

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[44] [2003] 3 NZLR 450 .

[45] [2003] 3 NZLR 450 at 475 .

[46] [2003] 3 NZLR 450 at 474-475 .

[47] *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 910 [22], 2729 [84]-[87] ; cf *A v Bottrill* [2003] 1 AC 449 at 463-464 ; *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 at 634-635 .

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48. In the United States, the Due Process Clause of the Fourteenth Amendment and the prohibition by the Eighth Amendment upon excessive fines and cruel and unusual punishments have been used to place constitutional restraints upon the levels of exemplary damages awards by State court juries [48] . There is also a long line of authority in the United States which denies awards of exemplary damages against State municipal corporations which violate the constitutional rights of plaintiffs; such awards have been said by the United States Supreme Court to be "contrary to sound public policy" for the reason that they "would burden the very taxpayers and citizens for whose benefit the wrongdoer was being chastised" [49] . To that, the answer of those today of like mind with Pratt LCJ in 1763, and Lord Devlin in 1964, would be that in these cases the proceeds of taxation represent the price paid for maintaining respect by public officials for the observance of the rule of law, to the benefit of taxpayers and society as a whole.

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[48] *BMW of North America Inc v Gore* 517 US 559 (1996); *Cooper Industries Inc v Leatherman Tool Group Inc* 532 US 424 (2001).

[49] *Newport v Fact Concerts Inc* 453 US 247 at 263 (1981).

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### The submissions by the State

49. On the present appeal, the State did not directly challenge the availability to the trial judge in this case and to the Court of Appeal of an award against the State of exemplary damages. However, counsel for the State emphasised the importance here of the adoption by s 8 of the 1983 Act of the "master's tort" theory of vicarious liability. Counsel then submitted that:

"the focus in determining the liability and the quantum of the liability for exemplary damages has to be on the miscreants, the wrongdoers, and that involves looking at their position in terms of means and the like and determining what would be an appropriate order against them, not what would be an appropriate order against the State".

This would reflect the proposition that s 8 of the 1983 Act imposes vicarious liability in respect of the torts, not the acts, of the police officers.

50. Counsel accepted that it followed from his submission that, in so far as the police officers may have been contemptuous of their reeducation, while this would legitimately be reflected either as aggravated or exemplary damages, it should not count against the police officers and not count against the State that the State did not respond properly by providing an effective reeducation programme.

51. **Following paragraph cited by:**

*Carrie Peters (a Pseudonym) v State of Victoria* (31 October 2023) (Clayton J)  
*Makri v State of New South Wales* (19 June 2015) (Gibson DCJ)  
*Moses v State of New South Wales (No. 3)* (14 October 2010) (Gibson DCJ)  
*State of New South Wales v Landini* (09 July 2010) (Tobias and Macfarlan JJA,  
Sackville AJA)

Counsel for the State went on to stigmatise as illegitimate what had been said by Priestley JA when delivering the principal reasons in *Adams v Kennedy* [50] as follows:

"That figure [of exemplary damages] should indicate my view that the conduct of the [police officer] defendants was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen."

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[50] (2000) 49 NSWLR 78 at 87. Sheller and Beazley JJA agreed with Priestley JA.

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52. Following paragraph cited by:

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

24. Lord Hutton's remarks, as was pointed out in *New South Wales v Ibbett* (at [52]), were to similar effect as Priestly JA's statement in *Adams v Kennedy* [2000] NSWCA 152; (2000) 49 NSWLR 78 (at [36]) when delivering the principal reasons:

"That figure [of exemplary damages] should indicate my view that the conduct of the [police officer] defendants was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen."

It may be added that, shortly thereafter, Lord Hutton was to speak to similar effect in *Kuddus* [51] in the passage set out earlier in these reasons.

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[51] [2002] 2 AC 122 at 149.

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53. Nor was Priestley JA the first to take such an approach to an award of exemplary damages in respect of the misuse of coercive powers entrusted to public officials. In *Peeters v Canada* [52], the Federal Court of Appeal (Heald, MacGuigan and Linden JJA) upheld an award of \$Can16,000 as "punitive" damages for an assault on the plaintiff, whilst in prison, committed by officers of the Correctional Service of Canada ("CSC"). After referring to the training given to CSC officers respecting the proper use of force on inmates, the Court remarked [53]:

"The theory was excellent, but the CSC members clearly had not been trained to the point where reasonable restraint was second nature to them, as they should have been, as employees expected to use force. Instead, at the first temptation they succumbed to what the trial judge rightly called 'goon-squad machismo'."

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[52] (1993) 108 DLR (4th) 471.

[53] (1993) 108 DLR (4th) 471 at 482.

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Conclusions respecting vicarious responsibility and exemplary damages

54. Following paragraph cited by:

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

25. After referring to the fact that a like approach to that of Priestley JA and Lord Hutton had been taken in *Peeters v Canada* (1993) 108 DLR (4th) 471, the plurality held ( *New South Wales v Ibbett* ( at [54] )) that the approach taken in cases such as *Adams* and *Peeters* should be accepted. .

The approach taken in cases such as *Adams* and *Peeters* should be accepted. It is supported by the observations of Lord Devlin and Lord Hutton to which reference has been made earlier in these reasons. The submissions by counsel for the State should be rejected.

55. First, the course of development over the last two and a half centuries of the law respecting Crown liability in tort does not support attention to the financial means of the miscreant public officers as a significant and limiting determinant of the quantum of liability. Reference has been made earlier in these reasons to what was said on the subject in *The Commonwealth v Mewett* [54] .

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[54] (1997) 191 CLR 471 at 543. .

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56. Secondly, the New South Wales legislative reforms do not require, in obedience to a "master's tort" theory, determination solely of what would be an appropriate award of exemplary damages against the police officers to the exclusion of considerations affecting the State itself.
57. The doctrine, associated in Australia with *Ennever v The King* [55] , which excepted the exercise of independent discretions from the legislative changes otherwise providing for the vicarious tort liability of the Crown, would have denied any award of exemplary or other damages against the State in the present case. The changes introduced by the 1983 Act rendered the State vicariously liable in tort, but s 9B , introduced by the 2003 Act, denies attribution of liability to the State in the present litigation simply by reference to a "master's tort" theory. The scheme of s 9B is to require persons in the position of Mrs Ibbett to sue only the State, and to do so "instead" of making a claim against the police officers.

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[55] (1906) 3 CLR 969 .

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58. There are several qualifications to this new legal regime. The State is not rendered vicariously liable for police torts if it otherwise would not be so liable (s 9E(a)). The State

may deny vicarious liability (s 9B(3)), something it did not do in this case. Further, there is preserved the possibility that the State may claim damages, contribution or indemnity against police officers (s 9E(b)). This too did not occur here. However, a principal object of the 2003 Act was to require the bringing of actions against the State instead of against the police officers concerned and to do so without affecting the rights of recovery by plaintiffs.

59. In the Second Reading Speech in the Legislative Assembly on the Bill for the 2003 Act, the Minister for Police explained the reasons for the Bill by referring to vindictive claims made against individual police officers by criminals they apprehended and to the stress thereby caused, even though "individual officers may not be personally liable to pay damages". However, he added that "plaintiffs' rights of recovery are not affected by the bill"[\[56\]](#).

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[\[56\]](#) New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 November 2003 at 49714972.

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60. Spigelman CJ concluded on the evidence that the reeducation programme indicated conduct by the State which was perfunctory in the extreme. Basten JA referred to *Adams* [\[57\]](#) and said that although:

"the inadequacy of the subsequent counselling was not the fault of Constable Pickavance, the evidence as to what took place in that regard prevents the State arguing that an award is not necessary to give effect to the purpose identified in *Adams*".

It was consistent with principle and with the evidence for their Honours to have included those considerations in their treatment of the awards of exemplary damages. It follows that all of the State's criticisms of the awards of damages upheld by the majority of the Court of Appeal fail.

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[\[57\]](#) (2000) 49 NSWLR 78 ..

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### Orders

61. The appeal should be dismissed with costs.

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**Cited by:**

[Irving v Pfingst \(No 2\)](#) [2025] QSC 224 -  
[MTH v State of New South Wales](#) [2025] NSWCA 122 -  
[MTH v State of New South Wales](#) [2025] NSWCA 122 -  
[Northern Territory of Australia v Austral](#) [2025] NTCA 3 -  
[Northern Territory of Australia v Austral](#) [2025] NTCA 3 -  
[Northern Territory of Australia v Austral](#) [2025] NTCA 3 -  
[Newman v Whittington](#) [2025] NSWSC 275 (26 March 2025) (Chen J)

100. Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing: [State of New South Wales v Ibbett](#) (2006) 229 CLR 638; [2006] HCA 57 at [31]. They are awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like: [Lamb v Cotogno](#) (1987) 164 CLR 1, 8; [1987] HCA 47. That is, they are awarded when the harm done by the wrongful act was aggravated by the manner in which the act was done: [Ure n v John Fairfax](#) (1966) 117 CLR 118, 130 and 149; [1966] HCA 40. (Where malice is involved, s 36 of the Act is relevant: see [104], below).

[APC v Mr B \(No. 3\)](#) [2025] NSWSC 142 -  
[Meredith v State of New South Wales \(No.4\)](#) [2025] NSWSC 13 -  
[In the matter of Iderful Pty Limited \(No 2\)](#) [2024] NSWSC 1670 -  
[APC v Mr B \(No 2\)](#) [2024] NSWSC 1608 -  
[McAllister v WA Police](#) [2024] WASC 503 (11 December 2024) (Forrester J)

New South Wales v Ibbett [2006] HCA 57 ; (2006) 229 CLR 638

[McAllister v WA Police](#) [2024] WASC 503 -  
[McAllister v WA Police](#) [2024] WASC 503 -  
[McIntosh v Peterson \[No 2\]](#) [2024] WASC 428 (25 November 2024) (Quinlan CJ)

New South Wales v Ibbett [2006] HCA 57 ; (2006) 229 CLR 638

[McIntosh v Peterson \[No 2\]](#) [2024] WASC 428 -  
[McIntosh v Peterson \[No 2\]](#) [2024] WASC 428 -  
[McIntosh v Peterson \[No 2\]](#) [2024] WASC 428 -  
[Prisk v Danslow](#) [2024] NSWDC 535 -  
[AA v Trustees of the Roman Catholic Church for the Diocese of Maitland-Newcastle](#) [2024] NSWSC 1183 -  
[Tickle v Giggle for Girls Pty Ltd \(No 2\)](#) [2024] FCA 960 (23 August 2024) (Bromwich J)

244. In [Kaplan](#), Mortimer CJ affirmed the proposition that aggravated damages were available under s 46PO(4) where racial discrimination under s 9(1) of the RDA had been made out: at [1759]-[1789]. The proceeding involved findings that a state school principal had failed to take steps to address high levels of antisemitic bullying. Aggravated damages were awarded to one of the applicants, a former student, for the school principal's failure to take steps to ensure his safety following an assault at a park, which was found to have increased the applicant's hurt: at [1787]-[1789], citing [New South Wales v Ibbett](#) [2006] HCA 57; 229 CLR 638 at [35]. The cited portion of [Ibbett](#), for completeness, is authority for no more than the orthodox proposition that, where the conduct giving rise to a tort increases the hurt to the subject of the tort, aggravated damages may be available. [Kaplan](#) does not state whether the principal's failures were included in, or occurred after the lodging of, the complaint to the AHRC that gave rise to the proceeding.

[Tickle v Giggle for Girls Pty Ltd \(No 2\)](#) [2024] FCA 960 -  
[Eedra Zey \(formerly using the pseudonym Eva Williams\) v State of New South Wales \(No. 3\)](#) [2024] NSWDC 359 -



[Cosenza v State of South Australia](#) [2024] SASC 97 -  
[Cosenza v State of South Australia](#) [2024] SASC 97 -  
[Cosenza v State of South Australia](#) [2024] SASC 97 -  
[TT v The Diocese of Saint Maron, Sydney & Ss \(No 3\)](#) [2024] NSWSC 943 (01 August 2024) (Elkaim AJ)

298. In [AA v PD](#) [2022] NSWSC 1039, from [126] Chen J summarised the principles for the awarding of aggravated damages at [126]-[128] :

“Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing: [State of New South Wales v Ibbett](#) (2006) 229 CLR 638; [2006] HCA 57 at [31] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). They are awarded for injury to the plaintiff’s feelings caused by insult, humiliation and the like: [Lamb v Cotogno](#) (1987) 164 CLR 1 at 8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); [1987] HCA 47. That is, they are awarded when the harm done by the wrongful act was aggravated by the manner in which the act was done: [Uren v John Fairfax](#) (1966) 117 CLR 118; [1966] HCA 40; [State of New South Wales v Abed](#) [2014] NSWCA 419 at [231] (Gleeson JA, Bathurst CJ and Macfarlan JA agreeing). The entitlement to aggravated damages therefore turns upon establishment of these elements.

#### The defendant’s conduct

In order to secure an award of aggravated damages, typically (but not invariably) there must be “conscious wrongdoing in contumelious disregard of another’s rights”: [Gray v Motor Accidents Commission](#) (1998) 196 CLR 1; [1998] HCA 70 at [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ). In [State of NSW v Riley](#) (2003) 57 NSWLR 496; [2003] NSWCA 208 at [138] (Hodgson JA, Sheller JA and Nicholas J agreeing) (*Riley*), explained that whilst the presence of malice was not essential to ground an award of aggravated damages, and gave some guidance on the character of the defendant’s wrongful conduct necessary to support such an award:

“Conduct may be high-handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing. 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 ...”

#### Injury to feelings

As aggravated damages, like compensatory damages, are directed towards injury to (or hurt) feelings, the Court must take care not to “double-count”. This is particularly relevant in a case whether the injury relied upon to justify an award of damages is psychiatric, rather than physical, injury. This means that, if a court has awarded damages for hurt feelings as part of ordinary compensatory damages, the award of aggravated damages must only be for the difference justified by this approach; that is, an award of so much as is necessary to bring the damages up to the upper end of the available range: [Riley](#) at [131]-[133] (Hodgson JA, Sheller JA and Nicholas J agreeing); [State of New South Wales v Radford](#) (2010) 79 NSWLR 327; [2010] NSWCA 276 at [95]-[96] (Sackville AJA, Beazley and Macfarlan JJA agreeing).”

[Eedra Zey \(formerly using the pseudonym Eva Williams\) v State of New South Wales \(No 2\)](#) [2024] NSWDC 289 -  
[D’Arcy v Australian National University](#) [2024] FedCFamC2G 609 -  
[Al Haje v Elassaad](#) [2024] NSWSC 689 (06 June 2024) (Elkaim AJ)

126. In [Van Haren v Van Ryn](#) [2023] NSWSC 776, from [89], Chen J said this about exemplary damages:

“Exemplary damages serve a different function to aggravated damages. They go beyond compensation, and are awarded to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff’s rights and to deter him from committing like conduct again: *Lamb v Cotogno* (1987) 164 CLR 1, 8; [1987] HCA 47; *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [33] (*Ibbett*); *State of New South Wales v Abed* (2014) 246 A Crim R 549; [2014] NSWCA 419 at [232]-[233].

Some further matters should also be noted in connection with exemplary damages. First, there is a need for moderation and restraint when awarding exemplary damages: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 463; [1985] HCA 12; *Backwell v AAA* [1997] 1 VR 182, 205. Put another way, exemplary damages are awarded rarely and not every finding of fault warrants such an award: *State of New South Wales v Zreika* [2012] NSWCA 37 at [61] (*Zreika*). The “fact that an award of exemplary damages constitutes an expression of the Court’s disapproval of the conduct does not mean that the Court’s disapproval is a sufficient reason to make an award”: *State of NSW v Delly* (2007) 70 NSWLR 125; [2007] NSWCA 303 at [117]. Secondly, it is necessary to determine and assess “both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation”: *Zreika* at [63]; *Ibbett* at [34]. Thirdly, in “cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damage and no element more than once”: *Ibbett* at [35]; *Zreika* at [63]. Such an approach avoids the risk of overcompensation or “double punishment”.

[Al Haje v Elassaad](#) [2024] NSWSC 689 -

[Al Haje v Elassaad](#) [2024] NSWSC 689 -

[Al Haje v Elassaad](#) [2024] NSWSC 689 -

[Kucinkas v Lane \(No 2\)](#) [2024] NSWSC 544 -

[Carvana v State of New South Wales](#) [2024] NSWSC 254 (15 March 2024) (Wright J)

251. Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing: *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 (*NSW v Ibbett*) at [31] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). Relevant injury to the plaintiff for these purposes includes injury to the plaintiff’s feelings caused by insult, humiliation and the like: *Lamb v Cotogno* (1987) 164 CLR 1 at 8 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); [1987] HCA 47.

[Brown v Walker](#) [2023] NSWDC 566 -

[Glavinic v Commonwealth](#) [2023] ACTSC 361 -

[Kneale v Footscray Football Club Ltd](#) [2023] VSC 679 -

[Carrie Peters \(a Pseudonym\) v State of Victoria](#) [2023] VCC 1791 -

[Wood v State of Queensland](#) [2023] QSC 221 -

[Wood v State of Queensland](#) [2023] QSC 221 -

[Kaplan v State of Victoria \(No 8\)](#) [2023] FCA 1092 (14 September 2023) (Mortimer CJ)

1753. See also *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [33]-[35].

[Kaplan v State of Victoria \(No 8\)](#) [2023] FCA 1092 (14 September 2023) (Mortimer CJ)

1789. I consider Zack should be awarded \$30,000 in aggravated damages as part of his compensation for Mr Minack’s contravention of s 9 of the RDA. Mr Minack’s conduct after the park incident, but really as part of a course of conduct of downplaying what had happened to Zack at BSC, increased Zack’s hurt (see *Ibbett* at [35]) and Zack should be compensated for that.

Binsaris, Webster, Austral & O'Shea v Northern Territory of Australia [2023] NTSC 79 (01 September 2023) (Blokland J)

Binsaris & Ors v Northern Territory of Australia [2020] HCA 22; Bulsey v State of Queensland [2015] QCA 187; Cruse v State of Victoria (2019) 59 VR 241; JB & Ors v Northern Territory of Australia [2019] NTCA 1; Kunoth-Monks v Healey [2013] NTSC 74; Lamb v Contogno (1987) 164 CLR 1; LO & Ors v Northern Territory of Australia [2017] NTSC 22; Majindi v Northern Territory [2012] NTSC 25; NSW v Ibbett (2006) 229 CLR 638; Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; White v South Australia [2010] SASC 95; Whitfield v De Lauret & Co Ltd (1920) 29 CLR 71; Wooton v State of Queensland (No 5) [2016] FCA 1457; XI Petroleum (NSW) Pty Ltd v Caltex Oil Australia Pty Ltd [1985] HCA 12, referred to.

Binsaris, Webster, Austral & O'Shea v Northern Territory of Australia [2023] NTSC 79 (01 September 2023) (Blokland J)

95. Justice Brennan has said that an award of exemplary damages 'is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again'. [36] In addition to determining whether the exceptional circumstances of a case call for an award of exemplary damages, the Court will also consider whether the other damages already awarded against the defendant are sufficient to fulfil the retributive, punitive or deterrent purposes of exemplary damages. In NSW v Ibbett [37], the High Court, when dismissing an appeal, quoted the earlier judgment of Spigelman CJ who stated that it is necessary: [38]

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

via

[37] (2006) 229 CLR 638 .

Binsaris, Webster, Austral & O'Shea v Northern Territory of Australia [2023] NTSC 79 -  
Binsaris, Webster, Austral & O'Shea v Northern Territory of Australia [2023] NTSC 79 -  
Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020 -  
Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020 -  
Stradford (a pseudonym) v Judge Vasta [2023] FCA 1020 -  
State of New South Wales v Spedding [2023] NSWCA 180 (09 August 2023) (Bell CJ, Ward P and Adamson JA)

315. Exemplary damages are particularly significant where public officials have been involved in the commission of the tort or torts. In State of New South Wales v Ibbett (2006) 229 CLR 638; [2006] HCA 57, the High Court (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ), at [39], approved the statements of Devlin LJ in Rookes v Barnard [1964] AC 1129 at [1223] and [1226] that:

"... an award of exemplary damages may serve 'a valuable purpose in restraining the arbitrary and outrageous use of executive power' and 'oppressive, arbitrary or unconstitutional action by the servants of the government' ...

... 'the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service.'"

State of New South Wales v Spedding [2023] NSWCA 180 -  
Van Haren v Van Ryn [2023] NSWSC 776 (05 July 2023) (Chen J)

90. Some further matters should also be noted in connection with exemplary damages. First, there is a need for moderation and restraint when awarding exemplary damages: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 463; [1985] HCA 12; *B ackwell v AAA* [1997] 1 VR 182, 205. Put another way, exemplary damages are awarded rarely and not every finding of fault warrants such an award: *State of New South Wales v Zreika* [2012] NSWCA 37 at [61] ('Zreika'). The "fact that an award of exemplary damages constitutes an expression of the Court's disapproval of the conduct does not mean that the Court's disapproval is a sufficient reason to make an award": *State of NSW v Delly* (2007) 70 NSWLR 125; [2007] NSWCA 303 at [117]. Secondly, it is necessary to determine and assess "both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation": *Zreika* at [63]; *Ibbett* at [34]. Thirdly, in "cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damage and no element more than once": *Ibbett* at [35]; *Zreika* at [63]. Such an approach avoids the risk of overcompensation or "double punishment".

*Van Haren v Van Ryn* [2023] NSWSC 776 (05 July 2023) (Chen J)

89. Exemplary damages serve a different function to aggravated damages. They go beyond compensation, and are awarded to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again: *Lamb v Cotogno* (1987) 164 CLR 1, 8; [1987] HCA 47; *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [33] ('Ibbett'); *State of New South Wales v Abed* (2014) 246 A Crim R 549; [2014] NSWCA 419 at [232]-[233].

*Van Haren v Van Ryn* [2023] NSWSC 776 -  
*Van Haren v Van Ryn* [2023] NSWSC 776 -  
*Reeves v State of New South Wales (No 2)* [2023] NSWDC 232 -  
*SR v Trustees of the De La Salle Brothers* [2023] NSWSC 66 -  
*Harrington v Shoard* [2023] QDC 11 (09 February 2023) (Sheridan DCJ)  
*New South Wales v Ibbett* (2006) 229 CLR 638

*Harrington v Shoard* [2023] QDC 11 (09 February 2023) (Sheridan DCJ)

135. Aggravated damages are a form of general damage given by way of compensation for injury to the plaintiff, which is often intangible. [36] It is not a separate head or category of damage to general damages; rather, it is included within the award for general damages and "focuses on the circumstances of the wrongdoing which have made the impact of it worse for the plaintiff. It is not to go beyond compensation for the aggravation of the harm to repute or feelings. It is not a means for punishing a defendant." [37].

via

[36] *New South Wales v Ibbett* (2006) 229 CLR 638, 646 [31].

*Harrington v Shoard* [2023] QDC 11 -  
*Romani v State of New South Wales* [2023] NSWSC 49 -  
*Re DCA Enterprises Pty Ltd* [2023] NSWSC 11 (23 January 2023) (Black J)

188. Mr Butt also submits that exemplary damages may be awarded in circumstances involving a deliberate, intentional or reckless disregard for a plaintiff and its interests, or a contumelious disregard of a plaintiff's rights, where compensatory damages are insufficient to punish, deter or indicate the Court's approval of the defendants' conduct, and he refers to relevant considerations to such an award as noted in *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298; [2003] NSWCA 10 at [254] ("*Harris v Digital Pulse*") and *State of NSW v Ibbett* (2006) 229 CLR 638; [2006] HCA 57. Mr Butt points to factors which he submits support an award of exemplary damages, including the use of false contracts and documentation, the use of invented persons such as Messrs Geggo and Greggo, and the amount that was added to the rights fee, in misstating it to be \$9 million rather than \$5 million.

*Spedding v State of New South Wales* [2022] NSWSC 1627 -

*AA v PD* [2022] NSWSC 1039 -

*Walker v State of Queensland* [2022] QDC 168 -

*Walker v State of Queensland* [2022] QDC 168 -

*John XXIII College v SMA* [2022] ACTCA 32 -

*John XXIII College v SMA* [2022] ACTCA 32 -

*John XXIII College v SMA* [2022] ACTCA 32 -

*John XXIII College v SMA* [2022] ACTCA 32 -

*SMD v JDW* [2022] NSWDC 156 -

*Lewis v Doyle* [2022] NSWSC 92 (18 February 2022) (Davies J)

194. Aggravated damages are also a form of compensatory damages which might be awarded to a plaintiff for stress, anxiety and hurt feelings resulting from circumstances and manner of the wrongdoing: *New South Wales v Ibbett* at [31]; *Miles v Doyle (No 2)* [2021] NSWSC 1312 at [31]. Aggravated damages must be distinguished from exemplary damages which are intended to punish the defendant for the behaviour that gave rise to the tort: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at [49]. As Cavanagh J said in *Miles v Doyle (No 2)* at [49]:

The awarding of aggravated damages for sexual assault might be particularly apt in circumstances in which the person the subject of the assault suffers the long term burden of shame, embarrassment and indignation in addition to a psychiatric illness arising out of the deliberate conduct towards him.

*DP (a pseudonym) v Bird* [2021] VSC 850 (22 December 2021) (J Forrest J)

470. Although both cases resulted in the award being upheld, neither offers any definitive guidance. In *Ibbett*, the liability of the State arose as a result of misconduct by police and liability turned on the application of a particular statutory provision. Indeed, the High Court's remarks appear to, at least, leave open the question of the rationale behind an award where vicarious liability has been imposed upon an innocent party:

Such authorities in this Court assume that awards of exemplary damages may properly be made against a principal or employer who is vicariously liable for the tortious acts or omissions of an agent or employee; they do not canvass any rationale for the making of such awards.

The nature of vicarious liability most recently was treated by this Court in *Sweeney v Boylan Nominees Pty Ltd* and need not be further considered here. But why, it has been asked, should shareholders of a corporation bear the burden of the punishment by the medium of an award of exemplary damages for corporate conduct in which they took no



part? That question itself recapitulates arguments presented in the nineteenth century in related fields, before the development of modern ideas of corporate identity and responsibility. [302]

DP (a pseudonym) v Bird [2021] VSC 850 (22 December 2021) (J Forrest J)

469. However, there are a couple of instances where exemplary damages have been awarded against an employer which has been held vicariously liable for the actions of its employee. In New South Wales v Ibbett, [300] the High Court considered the question of the State's responsibility for such an award of damages where a police officer assaulted the plaintiff. Subsequently in Zorom Enterprises Pty Ltd v Zabow, [301] the New South Wales Court of Appeal upheld an award of exemplary damages against an employer where a bouncer unlawfully assaulted a patron of a nightclub.

DP (a pseudonym) v Bird [2021] VSC 850 (22 December 2021) (J Forrest J)

472. Whilst the decisions in Ibbett, Zorom Enterprises and Bryant might tend to the conclusion that exemplary damages may be available in a vicarious liability situation, Ibbett and Bryant (in which there is a fulsome discussion of the concept) turned directly upon principles of statutory construction and police misconduct.

DP (a pseudonym) v Bird [2021] VSC 850 (22 December 2021) (J Forrest J)

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via

[300] (2006) 229 CLR 638 ('Ibbett').

DP (a pseudonym) v Bird [2021] VSC 850 -

Gindy v Capital Lawyers Pty Ltd (No 2) [2021] ACTSC 304 (17 December 2021) (Penfold J)

87. The distinction between aggravated and exemplary damages is well established. In Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; [1966] HCA 40, Taylor J, at 130, explained that aggravated damages are compensatory in nature resulting from the "circumstances and manner of the defendant's wrongdoing". Aggravated damages may be awarded to reflect the extent to which the wrongful conduct increased the hurt to the plaintiff. The injury compensated by an award of aggravated damages may be "intangible": New South Wales v Ibbett (2006) 229 CLR 638; [2006] HCA 57 at [31].

Gindy v Capital Lawyers Pty Ltd (No 2) [2021] ACTSC 304 (17 December 2021) (Penfold J)

88. Exemplary damages are awarded to "punish and deter" the wrong-doer. They are not compensatory. It is usually said that exemplary damages may be awarded where a defendant has acted in "conscious and contumelious disregard of the plaintiff's rights": see Uren v John Fairfax & Sons at 154 per Windeyer J; XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448; [1985] HCA 12 at 471. The damages so awarded mark the court's "disapprobation of the conduct": New South Wales v Ibbett at [35].

Toth v State of NSW [2021] NSWDC 615 -

Toth v State of NSW [2021] NSWDC 615 -

PP v DD (No 2) [2021] NSWSC 1312 -

Commissioner of Police (NSW) v Ritson (No.5) [2021] FCCA 1835 -

417. The relevant principles governing the award of exemplary damages were conveniently summarised in the State of New South Wales v Zreika [937] by Sackville AJA, where his Honour stated at [60]-[64]:-

...Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are awarded to punish and deter the wrongdoer: Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; 117 CLR 118, at 129-130, per Taylor J, cited with approval in New South Wales v Ibbett [2006] HCA 57; 229 CLR 638, at 646-647 [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: NSW v Ibbett, at [34]; Gray v Motor Accidents Commission [1998] HCA 70; 196 CLR 1, at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: NSW v Ibbett, at 647 [33]. [34].

61 Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future and to reflect "detestation" for the action: Lamb v Cotogno [1987] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: Lamb v Cotogno, at 6 [12]. Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": Gray v MAC, at 7 [14].

62 Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: NSW v Ibbett; NSW v Landini, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:

"should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen."

Ibbett, at 653 [51], citing Adams v Kennedy (2000) 49 NSWLR 78, at 87, per Priestley JA.

63 In a frequently cited passage, Brennan J in XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd [1985] HCA 12; 155 CLR 448, at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless, in NSW v Ibbett, at 647 [34], the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the Court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once.

64 I endeavoured to summarise the effect of the authorities in New South Wales v Radford [2010] NSWCA 276, at [97], as follows (Beazley and Macfarlan JJA agreeing):

"These authorities demonstrate that the various categories of damages that may be awarded for trespass to the person, including assault and false imprisonment, are not self-contained. There is a close relationship between an award of ordinary compensatory damages for



injury to the plaintiff's feelings and an award of aggravated damages. It is necessary to assess compensatory damages, including aggravated damages, before determining whether exemplary damages should be awarded and, if so, the quantum of any such award."

Rawlings v Royal Caribbean Cruises Ltd [2020] NSWDC 822 -

SMA v John XXIII College (No 2) [2020] ACTSC 211 -

Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

112. By contrast, aggravated damages are "compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like" [150]. They are "a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing" [151].

via

[151] Ibbett (2006) 229 CLR 638 at 646 [31]. See also Uren (1966) 117 CLR 118 at 149.

Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

111. Exemplary damages may also have particular significance in restraining executive power. In Ibbett, the Court considered exemplary damages for trespass to land and said [148]:

"The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government." (footnote omitted)

The Court went on to say that it is "well established ... that an award of exemplary damages may serve 'a valuable purpose in restraining the arbitrary and outrageous use of executive power' and 'oppressive, arbitrary or unconstitutional action by the servants of the government'" [149].

Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

172. Damages awards to vindicate a plaintiff's reputation, whether the impaired reputation is consequent upon defamation or false imprisonment, are concerned with loss. They focus upon the consequences of publication upon the plaintiff's reputation including any diminution in the regard with which the plaintiff is held by others and any isolation of the plaintiff [296]. The award "looks to the attitude of others to the [plaintiff]" and "must not exceed the amount appropriate to compensate the plaintiff for any relevant harm he or she has suffered" [297]. Hence, putting exemplary damages to one side, if the plaintiff's general reputation was so poor prior to the publication that the statement or implication could do no further injury then this element of "vindication" would require only nominal damages [298]. The same is true of infringement of a right by an act of assault or false imprisonment where no loss is suffered: "the law vindicates that right by awarding nominal damages" [299]. And if nominal damages are insufficient to serve the purpose of "restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law" then exemplary damages can be awarded [300]. There is no place for a separate species of vindicatory damages.

[300] *New South Wales v Ibbett* (2006) 229 CLR 638 at 649 [40], referring to *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at 147 [75].

*Lewis v Australian Capital Territory* [2020] HCA 26 -

*Lewis v Australian Capital Territory* [2020] HCA 26 -

*Lewis v Australian Capital Territory* [2020] HCA 26 -

*Lewis v Australian Capital Territory* [2020] HCA 26 -

*Lewis v Australian Capital Territory* [2020] HCA 26 -

*Jamal v State of New South Wales* [2020] NSWDC 377 (17 July 2020) (Hatzistergos DCJ)

140. The relevant principles governing the award of exemplary damages were conveniently summarised in the *State of New South Wales v Zreika* [225] by Sackville AJA, where his Honour stated at [60]-[64]:-

...Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are awarded to punish and deter the wrongdoer: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118, at 129-130, per Taylor J, cited with approval in *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, at 646-647 [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *NSW v Ibbett*, at [34]; *Gray v Motor Accidents Commission* [1998] HCA 70; 196 CLR 1, at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: *NSW v Ibbett*, at 647 [33]. [34].

61 Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future and to reflect "detestation" for the action: *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno*, at 6 [12]. Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v MAC*, at 7 [14].

62 Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: *NSW v Ibbett*; *NSW v Landini*, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:

"should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen."

*Ibbett*, at 653 [51], citing *Adams v Kennedy* (2000) 49 NSWLR 78, at 87, per Priestley JA.

63 In a frequently cited passage, Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* [1985] HCA 12; 155 CLR 448, at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless, in *NSW v Ibbett*, at 647 [34], the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the Court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would

represent both heads of damage and ensure that no element is compensated more than once.

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"These authorities demonstrate that the various categories of damages that may be awarded for trespass to the person, including assault and false imprisonment, are not self-contained. There is a close relationship between an award of ordinary compensatory damages for injury to the plaintiff's feelings and an award of aggravated damages. It is necessary to assess compensatory damages, including aggravated damages, before determining whether exemplary damages should be awarded and, if so, the quantum of any such award."

*Jamal v State of New South Wales* [2020] NSWDC 377 (17 July 2020) (Hatzistergos DCJ)

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further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the Court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once.

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*Cosco v Hutley (No 2)* [2020] NSWSC 893 -

*Nationwide News Pty Ltd v Rush* [2020] FCAFC 115 (02 July 2020) (White, Gleeson and Wheelahan JJ)

430. Aggravated damages may be awarded by way of compensation for injury resulting from the circumstances and manner of a publisher's wrongdoing, such as conduct which manifests malice: *Uren* at 130 (Taylor J) and at 149 (Windeyer J); *Carson* at 71 (Brennan J); *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [31] (the Court). Where malice is in issue, s 36 of the *Defamation Act* provides that the Court is to disregard the malice or state of mind of the defendant except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff. The harm caused to a person by the conduct of the publisher, and the circumstances and manner of publication may be inferred: *Andrews* at [74] (Glass JA). As we have stated, in the present appeal there is no challenge to the Judge's findings in support of the conclusion that the manner in which the appellants published the defamatory matters aggravated the harm to Mr Rush.

*Asbog Veterinary Services Pty Ltd v Barlow* [2020] QDC 112 -

*Rushton v Commonwealth Superannuation Corporation* [2020] FCA 777 -

*Hamilton v State of New South Wales* [2020] NSWSC 700 (05 June 2020) (Walton J)

1102. As to damages, the plaintiff relied on her written submissions. The primary submissions, with respect to damages, was as follows:

1. The plaintiff claimed an entitlement to damages (general, aggravated and exemplary) by reason of the loss and damage pleaded in the third further amended statement of claim, including psychological injury and harm (consisting of post-traumatic stress disorder and major depressive disorder, in association with generalised anxiety).
2. The plaintiff's entitlement to damages in these proceedings was not governed by the principles set out in the *Civil Liability Act*. Subsection 3B(1)(a) of that Act excludes an "intentional act that is done by the person with intent to cause injury...". It follows, also, that the limitation in s 21 of the *Civil Liability Act* on exemplary, punitive and aggravated damages in actions for the award of personal injury damages (where the act or omission that caused the injury or death was negligence), does not apply.
3. Accordingly, in these proceedings, damages should be assessed pursuant to common law principles.

1. General damages “are supposed to be an amount adequate to compensate the plaintiff for all consequences of the defendant’s wrongful conduct that are not too remote”: *State of New South Wales v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208 (“Riley”) at [127] .
2. Aggravated damages are also available in cases where general damages may be awarded: *Riley* at [129] . In that case, Hodgson JA observed (at [131]) that:

[131] However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.

3. In *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [31] , Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ observed that:

[31] Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing.

4. On the question of exemplary damages, in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at [26]-[27] ; [89], it was expressly decided that the tort of misfeasance in public office is an appropriate vehicle for the award of exemplary damages. The contumeliousness of the conduct that is the gravamen of such cases is what makes an award of exemplary damages appropriate.
5. In *Riley* , Hodgson JA made the following observations (at [138] ) concerning exemplary damages:

[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.

[Footnotes omitted.]

6. The conduct relied upon by the plaintiff demonstrates that the plaintiff’s is such a case.

*Hamilton v State of New South Wales* [2020] NSWSC 700 -



43. For much of the history of the common law, police officers and other "peace officers" were subject to the general doctrine that "any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability" [32]. Over time, the practice in relation to a public officer appointed by the Crown came to be that "in a proper case, the Crown [would] defend its officer and become responsible for any damages awarded" [33]. But persistence of the common law doctrine did much to explain the reluctance of the common law to visit tortious liability on public officers whose conscientious discharge of official duties to safeguard the interests of the public on occasions required them to make the hard choice of sacrificing the interests of some in order to preserve the greater interests of others. History had thrown up memorable instances where catastrophes had ensued because necessary hard choices had not been made by public officers for fear of incurring personal liability [34]. Hence, the provision to a "public champion" of a defence of public necessity [35].

via

[33] *The Commonwealth v Mewett* (1997) 191 CLR 471 at 543, quoting Robertson, *The Law and Practice of Civil Proceedings By and Against the Crown and Departments of the Government* (1908) at 351. See also *New South Wales v Ibbett* (2006) 229 CLR 638 at 650 [41].

Jeleskovic v Wagner (No. 2) [2020] NSWDC 126 -

Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -

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Smethurst v Commissioner of the Australian Federal Police [2020] HCA 14 -

Wilson Parking Australia (1992) Pty Ltd v Roads Corporation [2020] VSC 135 (26 March 2020) (Richards J)

26. VicRoads submitted that the evidence before the magistrate did not establish a cause of action in trespass against the registered owner or the driver of either vehicle. The tort of trespass to land protects a person's interest in maintaining the right to exclusive possession of land, free from uninvited physical intrusion. [11]. The tort is committed by intentionally or negligently entering or remaining on land in the possession of another, without permission or other lawful authority. [12].

via

[11] *New South Wales v Ibbett* (2006) 229 CLR 638, [29].

Brose v Baluskas (No 6) [2020] QDC 15 -

ZYX v JD [2019] WADC 164 (26 November 2019) (SLEIGHT CJDC)

49. An issue raised by the parties in these proceedings is the extent to which the delay by the plaintiff in commencing proceedings is explained by way of the limitation periods that existed prior to the introduction of s 6A of the Act. The defendant contends that the limitation periods that applied prior to the introduction of s 6A did not prevent the plaintiff taking action earlier. It is submitted by the defendant that because the plaintiff has pleaded continuing sexual conduct from 1974 until 1991, the plaintiff could have commenced proceedings (at least based on his alleged sexual conduct in 1991) at any time up until 1997 (on the basis of a time limitation of six years for a claim arising out of a breach of duty of care). However, the submission is in my opinion misconceived. The cause of action in this matter is a child sexual abuse cause of action. The period of the cause of action expired when the plaintiff turned 18 and any limitation period prior to the introduction of s 6A of the Act ran from the date she turned 18. Although the plaintiff pleads further sexual acts and further harassment

occurred after she turned 18, these are not pleaded as a separate cause of action. They are pleaded as a circumstance giving rise to a claim for aggravated damages. A claim for aggravated damages is compensatory in nature, resulting from the circumstances and manner of wrongdoing: *State of New South Wales v Ibbett* [50]. Aggravated damages are additional compensation for the injured feelings of a plaintiff. It is a key requirement that the defendant's conduct increased the plaintiff's suffering: *Carter v Walker* [51]. However, there is a more fundamental flaw in any contention by the defendant that it is relevant the plaintiff had ample opportunity to commence proceedings prior to the introduction of s 6A of the Act. The need for an explanation of the delay is now largely removed because the plaintiff does not need to provide grounds for an extension to a limitation period but is entitled to commence an action as no limitation period now applies in respect to a child sexual abuse action. Instead the focus turns to the effect of the delay on the issue of the defendant receiving a fair trial. *Batistatos* [52], *Moubarak* [53]. I say the reason for delay is now 'largely removed' because in rare cases it may still be relevant in combination with other reasons if it demonstrates a circumstance that makes it unjustifiably burdensome for the defendant to be required to defend the action: *Connellan v Murphy* [54] (*Connellan*).

*ZYX v JD* [2019] WADC 164 -

*ZYX v JD* [2019] WADC 164 -

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*ZYX v JD* [2019] WADC 164 -

*ZYX v JD* [2019] WADC 164 -

*Wagner v Nine Network Australia Pty Ltd* [2019] QSC 284 (22 November 2019) (Applegarth J)

185. Aggravated damages are a form of general damages given by way of compensation for injury to the plaintiff which may be intangible. [51]. The better view is that they are not a separate category or head of damages. [52]. Professor Tilbury's illuminating article explains why this should be so. [53].

via

[51] *New South Wales v Ibbett* (2006) 229 CLR 638 at 646 [31]; [2006] HCA 57 at [31].

*Wagner v Nine Network Australia Pty Ltd* [2019] QSC 284 -

*Wang v State of New South Wales* [2019] NSWCA 263 -

*State of South Australia v Holder* [2019] SASCF 135 -

*State of South Australia v Holder* [2019] SASCF 135 -

*H L v H P* [2019] ACTSC 299 -

*Best v Rosamond* [2019] NSWDC 344 -

*Brighten v Traino* [2019] NSWCA 168 -

*Johnson v The State of South Australia* [2019] SADC 35 (27 March 2019) (Tilmouth J)

*Road Traffic Act 1961* (SA) s 40H, s 40V(1), s 40V(1)(a)(b)(c), s 40V(2), s 40V(3), s 40V(4), s 42, s 47E, s 116(1)(b), s 145, s 145(1a), s 145(5)(a), s 145(5d), s 145(5h), s 145(5g); *Summary Offences Act 1953* (SA) s 6(2) s 74 AB(3), s 75, s 78(1), s 78(2); *Roberts v Brebner* [1963] SASR 40; *Samuel v Broad* (1974) 8 SASR 576; *Police v Peek* (2007) 97 SASR 1; *DPP v Hamilton* (2011) 33 VR 505; *R v Dam & Nguyen* (2015) 123 SASR 511; *R v Prinse* (1998) 196 LSJS 267; *R v Hooper* (1995) 64 SASR 480; *Motor Vehicles Act 1959* (SA) s 96(1)(a) and (b); *R v Stafford* (1976) 13 SASR 392; *R v Nguyen* (2013) 117 SASR 432; *Road Safety Act 1986* (Vic) s 59(1), s 59(5); *Walker v West* (1981) 2 NSWLR 570; *R v McKay* [1957] VR 560; *R v Turner* [1962] VR 30; *Bail Act 1985* (SA) s 8(1), s 13(3); *R v Bennett & Clark* (1986) 44 SASR 164; *R v O'Neill* [1996] 2 Qd R 326; *R v Young* [1998] 1 VR 402; *R v Pennant* [1998] 2 VR 453; *R v Edwards* [1998] 2 VR 354; *R v O'Halloran* (2000) 182 ALR 431; *R v Carroll* (2002) 213 CLR 635; *R v Gilham* (2007) 73 NSWLR 308; *R v P, NJ (No 2)* (2007) 99 SASR 1; *R v McGee* (2008) 253 LSJS 289; *R v Hi Ngo* [2010] 1 Qd R 193; *R v Joud, Benbrika, Raad & Sayadi* (2011) 32 VR 400; *R v Dalton* (2011) 111 SASR 170; *R v Hughes* (2015) 93 NSWLR 474; *Lamb v Cotogno* (1987) 164 CLR 1; *White v South Australia* (2010) 106 SASR 521; *New South Wales v Riley* (2003) 57 NSWLR 496; *Macpherson v Brown* (1976) 12 SASR 184; *Lindley v Rutter* [1981] 1 QB 128; *R v Phillips* (1971) 45 ALJR 467; *Walker v West* [1981] 2 NSWLR 570; *Feldman v Buck* [1966] SASR 236; *Archontoulis v Samuels* (1981) 91 LSJS 370; *R v Santos & Carrion* (1987) 61 ALJR 668; *Hunter v Chief Commissioner* [1996] 2 Qd R 326; *Cameron v Cole* (1944) 68 CLR 571; *Posner v Collector for Inter-State Destitute Persons* (Vic) (1946) 74 CLR 461; *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448; *Uren v John Fairfax & Sons Ltd* [1968] SASR 142; *New South Wales v Ibbett* (



2006) 229 CLR 638 ; *Johnstone v Stewart* [1968] SASR 142; *New South Wales v Abed* (2014) 246 A Crim R 549; *State of New South Wales v Landini* [2010] NSWCA 157; *Hamilton v State of New South Wales (No 13)* [2016] NSWSC 1311; *State of New South Wales v Quirk* [2012] NSWCA 216; *Adams v Kennedy* (2000) 49 NSWLR 78; *Cunningham v Traynor* [2016] WADC 168; *The State of Western Australia v Cunningham (No 3)* [2018] WASCA 207; *Zaravinos v State of New South Wales* (2004) 62 NSWLR 58; *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498; *Watson v Marshall* (1971) 124 CLR 621; *State of New South Wales v Coleman* [2000] NSWCA 183; *Coyle v State of New South Wales* [2006] NSWCA 95; *Eaves v Donnelly & State of Queensland* [2011] QDC 207; *Coleman v Watson* [2007] QSC 343; *Majindi v Northern Territory of Australia* (2012) 260 FLR 459; *Randell v New South Wales* [2013] NSWDC 277; *Smith v New South Wales* [2016] NSWDC 55; *Raad v State of New South Wales* [2017] NSWDC 63; *Costello v New South Wales* [2017] NSWDC 152; *Hemelaar v Walsh* [2017] QDC 151; *Lule v State of New South Wales* [2018] NSWCA 125; *Attalla v State of NSW* [2018] NSWDC 190; *Gibb-Smith v State of New South Wales* [2018] NSWDC 204; *Police Complaints and Discipline Act 2016 (SA)* s 44, s 44 (d) , referred to.

*Johnson v The State of South Australia* [2019] SADC 35 -

*Johnson v The State of South Australia* [2019] SADC 35 -

*Johnson v The State of South Australia* [2019] SADC 35 -

*Johnson v The State of South Australia* [2019] SADC 35 -

*Johnson v The State of South Australia* [2019] SADC 35 -

*Johnson v The State of South Australia* [2019] SADC 35 -

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

*State of New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 ( Ibbett HCA) at [35] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

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

120. As I said in *Whitbread & Anor v Rail Corporation NSW & Ors*: [9] .

“In considering whether to award exemplary damages ‘the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged’: *Gray* (at [15] ; (at [31]) ‘the conduct of the wrongdoer is central to that enquiry’) per Gleeson CJ, McHugh, Gummow and Hayne JJ. In contradistinction, in the case of aggravated damages the assessment is made from the point of view of the plaintiff: *State of New South Wales v Ibbett* [2005] NSWCA 445; (2005) 65 NSWLR 168 (at [83] ) per Spigelman CJ; referred to with approval in *New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 (at [34] ).”

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

103. It should be stated that there is no error as such in making an award of damages in a single sum for both aggravated and exemplary damages. In *Uren v John Fairfax & Sons*, Taylor J pointed out that the same set of circumstances may justify an award of either. See also *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47 at 8 ; *XL Petroleum NSW Pty Ltd v Caltex Oil (Aust) Pty Ltd*; *New South Wales v Ibbett* at [33] . In *New South Wales v Ibbett* , the Court stated, at [35] :

“In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once.”

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

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“[35]In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once.”

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

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[State of New South Wales v Cuthbertson](#) [2018] NSWCA 320 -

[State of New South Wales v Cuthbertson](#) [2018] NSWCA 320 -

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[State of New South Wales v Cuthbertson](#) [2018] NSWCA 320 -

[Talacko v Talacko](#) [2018] VSC 751 -

[Talacko v Talacko](#) [2018] VSC 751 -

[Talacko v Talacko](#) [2018] VSC 751 -

[The State of Western Australia v Cunningham \[No 3\]](#) [2018] WASCA 207 (23 November 2018) (Buss P, Murphy JA, Pritchard JA)

[New South Wales v Ibbett](#) [2006] HCA 57; (2006) 229 CLR 638.

[The State of Western Australia v Cunningham \[No 3\]](#) [2018] WASCA 207 -

[Nyoni v Shire of Kellerberrin \(No 10\)](#) [2018] FCA 1576 (19 October 2018) (Barker J)

112. As the primary judge noted, at [340] of the primary judgment, aggravated damages are compensatory in nature, whereas exemplary damages – considered further below – are

penal in nature. As observed in [New South Wales v Ibbett](#) (2006) 229 CLR 638 at [31] ; [2006] HCA 57 (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ) , aggravated damages are a form of general damages, given by way of compensation for injury to an applicant, which may be intangible, resulting from the circumstances and manner of the wrongdoing.

[Juliette Pratten v State of New South Wales](#) [2018] NSWDC 299 (12 October 2018) (Hatzistergos DCJ)

227. The relevant principles governing the award of exemplary damages were conveniently summarised in *State of New South Wales v Zreika* by Sackville AJA:-

"[60] ... Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are awarded to punish and deter the wrongdoer: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118, at 129-130, per Taylor J, cited with approval in *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, at 646-647 [31], [33] . Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *NSW v Ibbett*, at [34]; *Gray v Motor Accidents Commission* [1998] HCA 70; 196 CLR 1, at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: *NSW v Ibbett*, at 647 [33]. [34].

[61] Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future and to reflect "detestation" for the action: *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno* . at 6 [12] . Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v MAC*, at 7 [14].

[62] Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: *NSW v Ibbett*; *NSW v Landini* , at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:

"should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen."

[Ibbett](#) , at 653 [51] , citing *Adams v Kennedy* (2000) 49 NSWLR 78, at 87, per Priestley JA.

[63] In a frequently cited passage, Brennan J in *X L Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* [1985] HCA 12; 155 CLR 448, at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless, in *NSW v Ibbett*, at 647 [34], the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the Court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once." [444].

[Juliette Pratten v State of New South Wales](#) [2018] NSWDC 299 -  
[Gibb-Smith v State of New South Wales](#) [2018] NSWDC 204 -  
[Gibb-Smith v State of New South Wales](#) [2018] NSWDC 204 -  
[Gibb-Smith v State of New South Wales](#) [2018] NSWDC 204 -

116. Mr Attalla referred to *New South Wales v Ibbett* : [61]

*“An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government.”*

via

61. (2006) 229 CLR 638 at [38] ; [2006] HCA 57 .

*Attalla v State of NSW* [2018] NSWDC 190 -

*Attalla v State of NSW* [2018] NSWDC 190 -

*Blythe v Willis* [2018] NSWSC 131 -

*Lewis v Australian Capital Territory* [2018] ACTSC 19 -

*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 -

*Drew Cuthbertson v State of New South Wales; Daniel Fletcher v State of New South Wales* [2017] NSWDC 367 (15 December 2017) (Montgomery DCJ)

305. The categories of damages that may be awarded for trespass to the person, assault or wrongful imprisonment are not self-contained. In a case such as the present, there is a close relationship between the award of ordinary compensatory damages for Mr Fletcher’s feelings and an award of aggravated damages: *Smith*’s case supra at [157] and [158] . While aggravated damages can be awarded to reflect the extent to which the circumstances of SC Walker’s conduct increased the hurt to Mr Fletcher, a single sum can be awarded for both aggravated and exemplary damages: *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57 at [35] . At [31] the High Court stated “aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and the manner of the wrongdoing”. At [33] the High Court recognised that whereas aggravated damages fix upon the circumstances and manner of the wrongdoing of the defendant, and the function of exemplary damages is punishment and deterrence of the wrongdoer; nevertheless it can be difficult to differentiate between aggravated damages and exemplary damages.

*Singh v MIBP* [2017] FCCA 2461 (12 October 2017) (Judge Manousaridis)

*New South Wales v Ibbett* [2006] HCA 57 .

*Plaintiff S10-2011 v Minister for Immigration and Citizenship*

*Singh v MIBP* [2017] FCCA 2461 -

*Costello v State of NSW* [2017] NSWDC 152 (23 June 2017) (Judge Levy SC)

618.

To establish an entitlement to exemplary damages, the plaintiff must show that her arrest and detention was not only wrongful, but also, that the circumstances involved or amounted to conscious wrongdoing on the part of the police, in contumelious disregard of her rights, such that the conduct should be seen as being reprehensible, and requiring an expression of disapproval to bring home to those officials of the State responsible for overseeing the workings of the police force, that police officers must be appropriately trained so that unlawful and contumelious infringement of personal liberty does not continue to occur in other instances: *State of NSW v Zreika* [2012] NSWCA 37, at [61] – [62] , following *Gray v Motor*



*Accidents Commission* [1998] HCA 70; (1998) 196 CLR 1, at p 7, [15] ; *NSW v Ibbett* [2006] HCA 57; (2006) 229 CLR 638, at pp 646 – 647 ; [31], [33]; *NSW v Landini* [2010] NSWCA 157, at [14] ; *Adams v Kennedy* [2000] NSWCA 152; (2000) 49 NSWLR 78, at 36.

*Costello v State of NSW* [2017] NSWDC 152 -

*New South Wales v DC* [2017] HCA 22 -

*Cooper v Neubert* [2017] TASSC 33 -

*Exton v State of NSW* [2017] NSWDC 83 -

*Exton v State of NSW* [2017] NSWDC 83 -

*Deputy Commissioner of Taxation v Frangieh (No 3)* [2017] NSWSC 252 (20 March 2017) (Harrison AsJ)

763. The cross claimant also seeks an award of exemplary punitive damages on account of the misfeasance in public office. Exemplary damages for misfeasance were recognised in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 at 147-149 (“*Kuddus*”) which was in turn approved by the High Court in *New South Wales v Ibbett* (2006) 229 CLR 638 (“*Ibbett*”) at [40], as follows:

In *Kuddus v Chief Constable of Leicestershire*, Lord Hutton considered these remarks of Lord Devlin with the added authority of his own judicial experience in Northern Ireland, including his award of exemplary damages in *Pettigrew v Northern Ireland Office*. Lord Hutton concluded in *Kuddus*:

“I think that a number of cases decided by the courts in Northern Ireland during the past thirty years of terrorist violence give support to the opinion of Lord Devlin in *Rookes v Barnard* that in certain cases the awarding of exemplary damages serves a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law. Members of the security forces seeking to combat terrorism face constant danger and have to carry out their duties in very stressful conditions. In such circumstances an individual soldier or police officer or prison officer may, on occasion, act in gross breach of discipline and commit an unlawful act which is oppressive or arbitrary and in such cases exemplary damages have been awarded.”

His Lordship in *Kuddus* added:

“In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times.”

*Elleray v Rail Corporation NSW* [2017] NSWCA 23 -

*Elleray v Rail Corporation NSW* [2017] NSWCA 23 -

*Houston Moran v State of New South Wales* [2017] NSWDC 19 -

*Houston Moran v State of New South Wales* [2017] NSWDC 19 -

*Charles Henry Thomlinson v The State of New South Wales* [2016] NSWDC 369 (16 December 2016) (Hatzistergos DCJ)

488. The relevant principles governing the award of aggravated and exemplary damages are conveniently summarised in *State of New South Wales v Zreika* by Sackville AJA:-

“[60] ... Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are awarded to

punish and deter the wrongdoer: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118, at 129-130, per Taylor J, cited with approval in *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, at 646-647 [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *NSW v Ibbett*, at [34]; *Gray v Motor Accidents Commission* [1998] HCA 70; 196 CLR 1, at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: *NSW v Ibbett*, at 647 [33]. [34].

[61] Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future and to reflect "detestation" for the action: *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno* . at 6 [12]. Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v MAC*, at 7 [14].

[62] Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: *NSW v Ibbett*; *NSW v Landini* , at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:

"should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen."

*Ibbett*, at 653 [51], citing *Adams v Kennedy* (2000) 49 NSWLR 78, at 87, per Priestley JA.

[63] In a frequently cited passage, Brennan J in *X L Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* [1985] HCA 12; 155 CLR 448, at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless, in *NSW v Ibbett*, at 647 [34], the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the Court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once." [694].

*Cunningham v Traynor* [2016] WADC 168 -

*Cunningham v Traynor* [2016] WADC 168 -

*Wotton v State of Queensland (No 5)* [2016] FCA 1457 (05 December 2016) (Mortimer J)

1617. In their reply submissions, the applicants contend that the respondents have approached the claim to damages as if it is a claim for personal injury arising from negligence, and they contend that is an erroneous approach. They contend if there is an analogy it is with the intentional torts of battery and false imprisonment. They also contend that, beyond medical injury (whether physical or physiological), orders for compensation should reflect "the seriousness and impact of the wrong", referring to *Bulsey* at [108] (Fraser JA) and *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [31].

*Monaghan v Australian Capital Territory (No 2)* [2016] ACTSC 352 (30 November 2016) (Mossop AsJ)

201. Aggravated damages are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1 at 8. Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the

defendant's wrongdoing, while exemplary damages are awarded to punish and deter the wrongdoer: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 at 129-130; *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *NSW v Ibbett* at [34]; *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1 at [15]. The various categories of damages that may be awarded for trespass to the person, including assault and false imprisonment, are not self-contained. There is a close relationship between an award of ordinary compensatory damages for injury to the plaintiff's feelings and an award of aggravated damages: *New South Wales v Radford* [2010] NSWCA 276; (2010) 79 NSWLR 327 at [97]; *State of New South Wales v Zreika* [2012] NSWCA 37 at [64].

*Monaghan v Australian Capital Territory (No 2)* [2016] ACTSC 352 -  
*Peter Michael Travers v The State of New South Wales* [2016] NSWDC 297 -  
*RS v HS* [2016] WADC 157 (11 November 2016) (Levy DC)

224. Aggravated damages are awarded to compensate a plaintiff when the harm done by a wrongful act was aggravated in the manner in which the act was done: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118, 149. It is a key requirement of a claim for aggravated damages that the conduct must have increased the plaintiff's suffering. In *New South Wales v Ibbett* (2006) 229 CLR 638, the High Court described aggravated damages as 'a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of wrongdoing' (per Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ at [31]).

*RS v HS* [2016] WADC 157 -  
*Okwume v Commonwealth of Australia* [2016] FCA 1252 -  
*Julia Wedding as trustee for the Julia Wedding Super Fund v Attorney General for New South Wales* [2016] NSWSC 1379 -  
*Reilly v State of New South Wales* [2016] NSWDC 234 -  
*Fred Saad v State of New South Wales; Ashley Saad v State of New South Wales* [2016] NSWSC 1247 -  
*Smith v State of New South Wales* [2016] NSWDC 55 (22 April 2016) (Judge Levy SC)

269. To establish an entitlement to exemplary damages, the plaintiff must show that his arrest and detention was not only wrongful, but also amounted to conscious wrongdoing on the part of the police, in contumelious disregard of his rights, such that the conduct was reprehensible, and required an expression of disapproval to bring home to those officials of the State responsible for overseeing the workings of the police force, that police officers must be appropriately trained so that unlawful and contumelious infringement of personal liberty does not continue to occur in other instances: *State of NSW v Zreika* [2012] NSWCA 37, at [61] – [62], following *Gray v Motor Accidents Commission* [1998] HCA 70; (1998) 196 CLR 1, at p 7, [15]; *NSW v Ibbett* [2006] HCA 57; (2006) 229 CLR 638, at pp 646 – 647; [31], [33]; *NSW v Landini* [2010] NSWCA 157, at [14]; *Adams v Kennedy* [2000] NSWCA 152; (2000) 49 NSWLR 78, at 36.

*Smith v State of New South Wales* [2016] NSWDC 55 -  
*Sahade v Bischoff* [2015] NSWCA 418 -  
*Sahade v Bischoff* [2015] NSWCA 418 -  
*Sahade v Bischoff* [2015] NSWCA 418 -  
*Sahade v Bischoff* [2015] NSWCA 418 -  
*Nyoni v Shire of Kellerberrin (No 6)* [2015] FCA 1294 (23 November 2015) (Siopis J)

340. It is the case that aggravated damages are compensatory in nature, whereas exemplary damages are penal in nature, and that the highhanded and disrespectful conduct by



Mr Mitchell was directed to Mrs Nyoni and not to Mr Nyoni; who was then in hospital. However, in [New South Wales v Ibbett](#) (2006) 229 CLR 638 at [31], Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ observed:

Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing. The interest of the plaintiff against invasion of the exclusive possession of the plaintiff extends to the freedom from disturbance of those persons present there with the leave of the plaintiff, at least as family members or as an incident of some other bona fide domestic relationship. The affront to such persons may aggravate the infringement of the right of the plaintiff to enjoy exclusive and quiet possession. (Footnotes omitted.)

[Nyoni v Shire of Kellerberrin \(No 6\)](#) [2015] FCA 1294 -  
[North Australian Aboriginal Justice Agency Ltd v Northern Territory](#) [2015] HCA 41 (11 November 2015) (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ)

241. Those concerns are unwarranted. The powers of police to arrest a person and take him or her into custody are only to be exercised for the purposes for which the powers are granted and, therefore, only for a legitimate reason. Where, therefore, a police officer reasonably suspects that a person has committed, is committing or is about to commit an infringement notice offence of such a minor nature that it does not carry or is unlikely to be visited with a penalty of imprisonment, then, unless the offence is continuing or there is an ongoing risk to public safety or order, it is difficult to conceive of a legitimate reason for the police officer to arrest the person rather than issue an infringement notice "on the spot". The exercise of police powers is also subject to well-established mechanisms of legal supervision. Actions in assault, trespass and false imprisonment lie in respect of unlawful arrest, and exemplary damages may be awarded [247]. And, in the Northern Territory, a deliberate delay in bringing a person who has been arrested before a court is a crime punishable by imprisonment [248].

*via*

[247] [New South Wales v Ibbett](#) (2006) 229 CLR 638; [2006] HCA 57.

[Bulsey v State of Queensland](#) [2015] QCA 187 -  
[Beckett v State of New South Wales](#) [2015] NSWSC 1017 -  
[Beckett v State of New South Wales](#) [2015] NSWSC 1017 -  
[Beckett v State of New South Wales](#) [2015] NSWSC 1017 -  
[Beckett v State of New South Wales](#) [2015] NSWSC 1017 -  
[State of New South Wales v McMaster](#) [2015] NSWCA 228 -  
[Balven v Thurston](#) [2015] NSWSC 1103 -  
[Makri v State of New South Wales](#) [2015] NSWDC 131 -  
[Tilden v Gregg](#) [2015] NSWCA 164 -  
[Angeleska \(known as Slaveska\) v State of Victoria](#) [2015] VSCA 140 (10 June 2015) (Warren CJ, Tate JA and Ginnane AJA)

107. Mrs Slaveska submitted that even if this Court were to hold that some of her actions included claims for damages that relate to personal injury consequent upon the torts she alleged, the associate judge should not have dismissed her claims to the extent that they did not rely on any such personal injury. She submitted that the [Limitations Act](#) does not extinguish causes of action and that the respondents could raise a limitations point as a defence. She maintained that she remained entitled to nominal, aggravated and exemplary damages in vindication of her rights. She relied on the High Court's decision in [New South Wales v Ibbett](#) [97] as an example of a case where significant damages were awarded for infringement of the right in an action for trespass.

via

[97] (2006) 229 CLR 638 .

*Angeleska (known as Slaveska) v State of Victoria* [2015] VSCA 140 (10 June 2015) (Warren CJ, Tate JA and Ginnane AJA)

115. Applying those principles to this case, it follows that Mrs Slaveska's claims in respect of Incidents 5 to 10, 12 and 13 were brought out of time *to the extent* that they claim damages that relate to personal injury. Nevertheless, while personal injury damages appear to be a significant part of the relief Mrs Slaveska seeks, it cannot be said that she has not claimed any other relief. Among other matters, Mrs Slaveska has alleged the deprivation of her liberty, violation of property rights, and conduct causing her to apprehend imminent harmful contact. In relation to all her claims, she has sought '[d]amages, including compensatory, aggravated and exemplary damages'.<sup>[105]</sup> Any nominal damages to which Mrs Slaveska may be entitled ought not to be regarded as 'related to personal injury'.<sup>[106]</sup> Nor should any exemplary damages, given their punishment and deterrent function,<sup>[107]</sup> However, aggravated damages should be regarded as 'related to personal injury' to the extent that they compensate for personal injury.<sup>[108]</sup> as opposed to the infringement of rights.<sup>[109]</sup>

via

[109] See *New South Wales v Ibbett* (2006) 229 CLR 638, 646–7<sup>[31]</sup> (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ), citing *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129–30 .

*Angeleska (known as Slaveska) v State of Victoria* [2015] VSCA 140 (10 June 2015) (Warren CJ, Tate JA and Ginnane AJA)

107. Mrs Slaveska submitted that even if this Court were to hold that some of her actions included claims for damages that relate to personal injury consequent upon the torts she alleged, the associate judge should not have dismissed her claims to the extent that they did not rely on any such personal injury. She submitted that the *Limitations Act* does not extinguish causes of action and that the respondents could raise a limitations point as a defence. She maintained that she remained entitled to nominal, aggravated and exemplary damages in vindication of her rights. She relied on the High Court's decision in *New South Wales v Ibbett* [97] as an example of a case where significant damages were awarded for infringement of the right in an action for trespass.

*Angeleska (known as Slaveska) v State of Victoria* [2015] VSCA 140 -

*Nash v State of New South Wales* [2015] NSWDC 144 -

*Angeleska (known as Slaveska) v State of Victoria* [2015] VSCA 140 -

*Angeleska (known as Slaveska) v State of Victoria* [2015] VSCA 140 -

*Angeleska (known as Slaveska) v State of Victoria* [2015] VSCA 140 -

*Angeleska (known as Slaveska) v State of Victoria* [2015] VSCA 140 -

*Graves v West (No 2)* [2015] NSWSC 306 -

*White v Johnston* [2015] NSWCA 18 -

*Paul James McCarthy v State of New South Wales* [2013] NSWDC 247 (20 December 2013) (Mahony SC DCJ)

173. In *New South Wales v Zreika* [2012] NSWCA 37, Sackville AJA (with whom Macfarlan and Whealy JJA agreed) said in respect of these two heads of damages in an action for malicious prosecution:

"60 ...Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are rewarded to punish and deter the wrongdoer; *Uren v John Fairfax & Sons Pty*

*Limited* (1966) 117 CLR 118 at 129-130, per Taylor J, cited with approval in *New South Wales v Ibbett* (2006) 229 CLR 638 at 646-647 [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *New South Wales v Ibbett*, at [34]; *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both; *New South Wales v Ibbett* at 647 [33] - [34].

61 Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future and to reflect "detestation" for the action; *Lamb v Cotogno* (1987) 164 CLR 1 at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno* at 6 [12]. Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v MAC* at 7 [14].

62 Exemplary damages made be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: *New South Wales v Ibbett*; *New South Wales v Landini*, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police;

should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen.

*Ibbett*, at 653 [51], citing *Adams v Kennedy* [2000] 49 NSWLR 78, at 87, per Priestley JA.

63 In a frequently cited passage, Brennan J in *XL Petroleum (NSW) Pty Limited v Caltex Oil (Aust) Pty Limited* (1985) 155 CLR 448, at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless, in *New South Wales v Ibbett* at 647 [34], the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once."

[Paul James McCarthy v State of New South Wales](#) [2013] NSWDC 247 -

[Paul James McCarthy v State of New South Wales](#) [2013] NSWDC 247 -

[SSYBA Pty Ltd v Lane](#) [2013] WASC 445 (13 December 2013) (McKechnie J)

*State of New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638.

*State of New South Wales v Beck; Commissioner of Police v Beck* [2013] NSWCA 437 (13 December 2013) (Beazley P, Barrett and Ward JJA)

52. At [69], his Honour added that the response of the officers whose responsibility it was to consider whether action should be taken against Mr Beck was "woefully inadequate", noting that the allegations made by Mr Beck against Sergeants Sullivan and Deas were extremely serious "involving the commission of criminal offences". His Honour noted that Mr Beck's response to the first s 181D notice indicated that Mr Beck was with friends on the occasion in question but that no attempt had been made to interview them and that the response to the 30 January 2008 notice included statutory declarations of those persons but that no investigation as to the truthfulness of the Sergeants' statements had been undertaken. His Honour considered that there had been a "gross failure of responsible management" that enlivened the relevance, to the assessment of exemplary damages, of a passage in *NSW v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 at 646-647 to the effect that the assessment of exemplary damages in a case of conscious and contumelious disregard by the police of plaintiff's rights "should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen".

*Appeal in malicious prosecution proceedings*

SSYBA Pty Ltd v Lane [2013] WASC 445 -

Justin McMaster v State of New South Wales No. 12/4882; Georgia Karakizos v State of New South Wales No. 12/27695; Kayla McMaster v State of New South Wales No. 12/27725 [2013] NSWDC 244 -  
Fazio v The City of Melville [No 2] [2013] WADC 147 -

Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 (05 August 2013) (Meagher, Emmett and Leeming JJA)

40. Although it can be difficult to separate aggravated and exemplary damages, it is necessary to do so: Lamb v Cotogno (1987) 164 CLR 1 at 8; Gray v Motor Accident Commission [1998] HCA 70; (1998) 196 CLR 1 at [6]; New South Wales v Ibbett [2006] HCA 57; (2006) 229 CLR 638 at [33]. They were distinguished by Windeyer J in Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 as follows (at 149):

"[A]ggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment—moral retribution or deterrence."

Young v State of New South Wales (No 2) [2013] NSWSC 330 -

Young v State of New South Wales (No 2) [2013] NSWSC 330 -

Miller v Muir [2013] WADC 6 -

Miller v Muir [2013] WADC 6 -

Beck v State of New South Wales; Beck v Commissioner of Police New South Wales [2012] NSWSC 1483 (10 December 2012) (Adams J)

67. The plaintiff also seeks exemplary damages. The most recent discussion of this matter in the Court of Appeal is State of New South Wales v Zreika [2012] NSWCA 37 -

[60] A plaintiff who succeeds in an action for malicious prosecution will not necessarily receive either aggravated or exemplary damages. Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are awarded to punish and deter the wrongdoer: Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; 117 CLR 118, at 129-130, per Taylor J, cited with approval in New South Wales v Ibbett [2006] HCA 57; 229 CLR 638, at 646-647 [31], [33]. Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: NSW v Ibbett, at [34]; Gray v Motor Accidents Commission [1998] HCA 70; 196 CLR 1, at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: NSW v Ibbett, at 647 [33]. [34].

[61] Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future and to reflect "detestation" for the action: Lamb v Cotogno [1987] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: Lamb v Cotogno, at 6 [12]. Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": Gray v MAC, at 7 [14].

[62] Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: NSW v Ibbett; NSW v Landini, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:

"should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen." [Italics mine.]

Ibbett, at 653 [51], citing Adams v Kennedy (2000) 49 NSWLR 78, at 87, per Priestley JA.

[63] In a frequently cited passage, Brennan J in XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd [1985] HCA 12; 155 CLR 448, at 471, observed that the considerations that enter into the assessment of compensatory damages are quite different from those that govern the assessment of exemplary damages and that there is no necessary proportionality between the assessment of the two categories. Nonetheless,



in *NSW v Ibbett*, at 647 [34], the plurality endorsed the proposition that it is necessary to determine both heads of compensatory damages before deciding whether or not a further award is necessary to serve the objectives of punishment, deterrence or condemnation. Their Honours also said (at [35]) that where the same circumstances increase the hurt to the plaintiff and also make it desirable for the Court to mark its disapprobation of the conduct, a single sum may be awarded. Such an award would represent both heads of damage and ensure that no element is compensated more than once.

[Beck v State of New South Wales; Beck v Commissioner of Police New South Wales](#) [2012] NSWSC 1483 -

[Beck v State of New South Wales; Beck v Commissioner of Police New South Wales](#) [2012] NSWSC 1483 -

[Perpetual Trustee Company Ltd v Burniston \[No 2\]](#) [2012] WASC 383 -

[Perpetual Trustee Company Ltd v Burniston \[No 2\]](#) [2012] WASC 383 -

[Perpetual Trustee Company Ltd v Burniston \[No 2\]](#) [2012] WASC 383 -

[Perpetual Trustee Company Ltd v Burniston \[No 2\]](#) [2012] WASC 383 -

[Ritson v Myers](#) [2012] NSWSC 1504 -

[Kable v State of New South Wales](#) [2012] NSWCA 243 -

[State of New South Wales v Quirk](#) [2012] NSWCA 216 -

[Lee and Robert Rumble v Liverpool Plains Shire Council](#) [2012] NSWDC 95 (05 July 2012) (Mahony SC DCJ)

168. The purpose of exemplary damages is that they are awarded to punish and deter - see [NSW v Ibbett](#) per Spigelman CJ at [38]. In *Lamb v Cotogno* (1988) 164 CLR 1, the majority referred to an oft-cited description of exemplary damages contained in *Mayne & McGregor On Damages*, 12th Ed, 1961 (pg 196):

"Such damages ... can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard for the plaintiff's rights."

[Lee and Robert Rumble v Liverpool Plains Shire Council](#) [2012] NSWDC 95 -

[Johnson v Buchanan](#) [2012] VSC 195 (11 May 2012) (Bell J)

61. The discussion of trespass in *Plenty* is extensive. Mason CJ, Brennan and Toohey JJ also approved [35] the statement in *Entick* that even a minute unauthorised invasion of private property was a trespass. Their Honours referred to the various forms of legal authority which might justify such an intrusion, including statutory permission and implied licence. [36] Gaudron and McHugh JJ also approved [37] *Semayne's Case* and *Entick*. Citing these and other authorities, their Honours said the 'policy of the law is to protect the possession of property and the privacy and security of its occupier'. [38] This draws attention to the point made by Lord Scarman in *Morris v Beardmore* [39] that the law of trespass has a human rights dimension. It protects the right to privacy of the home which is specified in art 8(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. [40] In this State, that right is protected by s 13(a) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). [41] Reflecting the same policy, in *Coco v The Queen* [42] the High Court acknowledged the right of a person to exclude others from their property was a fundamental right or freedom which, therefore, could only be abrogated by legislation clearly and unmistakably evincing that intention. [43] In *New South Wales v Ibbett*, [44] Gleeson CJ, Gummow, Kirby, Heyden and Crennan JJ approved the judgments of Mason CJ, Brennan and Toohey JJ and of Gaudron and McHugh JJ in *Plenty*, as well as the judgment of Lord Scarman in *Morris*, and joined in 'emphasising the fundamental importance attached by the common law to the privacy of the home'. [45]

[Johnson v Buchanan](#) [2012] VSC 195 (11 May 2012) (Bell J)

62. It was made clear in *Entick* that a person who enters another's land without authority 'is a trespasser, though he does no damage at all'. [46] That damage is not an element of the tort

of trespass was the basis of the judgment for nominal damages which was upheld by this court in *Dumont v Miller* [47] and the judgment of the Supreme Court of New South Wales in *Waters v Maynard*, [48]. As Gaudron and McHugh JJ held in *Plenty*, [49] the interest which is protected by the law of trespass is the possession of property and the privacy and security of its occupier. In that case, Mason CJ, Brennan and Toohey JJ held the plaintiff was entitled to some damages simply because the entry was not justified. That was because, in an action for trespass, the plaintiff was entitled (by damages) to 'vindication of his right to exclude the defendants from his [property]'. [50]. This statement of principle was approved [51] by Gleeson CJ, Gummow, Kirby, Heyden and Crennan JJ in *Ibbett*. Their Honours said the interest protected by the tort of trespass was 'the right to exclusive possession of [one's] place of residence, free from uninvited physical intrusion by strangers'. [52].

via

[51] *Ibbett* (2006) 229 CLR 638, 646 [30].

*Johnson v Buchanan* [2012] VSC 195 -

*Johnson v Buchanan* [2012] VSC 195 -

*Johnson v Buchanan* [2012] VSC 195 -

*Johnson v Buchanan* [2012] VSC 195 -

*Cooper v Mulcahy* [2012] NSWSC 373 -

*State of South Australia v Treglown* [2012] SASC 47 -

*State of South Australia v Treglown* [2012] SASC 47 -

*State of New South Wales v Zreika* [2012] NSWCA 37 -

*State of New South Wales v Zreika* [2012] NSWCA 37 -

*Crilly v Bumble Group Pty Limited t/a My Security* [2012] NSWDC 3 -

*State of New South Wales v Williamson* [2011] NSWCA 183 -

*State of New South Wales v Williamson* [2011] NSWCA 183 -

*Maynes v Casey* [2011] NSWCA 156 -

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

*New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638

*Niven v SS*

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

25. After referring to the fact that a like approach to that of Priestley JA and Lord Hutton had been taken in *Peeters v Canada* (1993) 108 DLR (4th) 471, the plurality held ( *New South Wales v Ibbett* ( at [54] ) ) that the approach taken in cases such as *Adams* and *Peeters* should be accepted.

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

24. Lord Hutton's remarks, as was pointed out in *New South Wales v Ibbett* ( at [52] ), were to similar effect as Priestly JA's statement in *Adams v Kennedy* [2000] NSWCA 152; (2000) 49 NSWLR 78 ( at [36] ) when delivering the principal reasons:

"That figure [of exemplary damages] should indicate my view that the conduct of the [police officer] defendants was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen."

[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 -  
[Windridge Farm Pty Limited v Grassi](#) [2011] NSWSC 196 -  
[Fernando v Commonwealth of Australia \(No 4\)](#) [2010] FCA 1475 (24 December 2010) (Siopis J)  
[New South Wales v Ibbett](#) (2006) 229 CLR 638  
[Kuddus v Chief Constable of Leicestershire](#)

[Fernando v Commonwealth of Australia \(No 4\)](#) [2010] FCA 1475 -  
[Maynes v Casey](#) [2010] NSWDC 285 (23 December 2010) (Sidis DCJ)

143 In [Ibbett](#) police officers went further than the path or driveway and entered the plaintiff's dwelling house, one by diving under a closing roller door, the other after the plaintiff opened the door at gunpoint to allow him to enter. The trial judge's findings that their entry was unlawful and amounted to a trespass were not challenged.

[Maynes v Casey](#) [2010] NSWDC 285 -  
[Maynes v Casey](#) [2010] NSWDC 285 -  
[Hardie Finance Corporation Pty Ltd v Ahern \[No 3\]](#) [2010] WASC 403 (22 December 2010) (Pritchard J)

The State of New South Wales v Ibbett (2006) 229 CLR 638

[Hardie Finance Corporation Pty Ltd v Ahern \[No 3\]](#) [2010] WASC 403 -  
[Carter v Walker](#) [2010] VSCA 340 (14 December 2010) (Buchanan, Ashley and Weinberg JJA)

309. It is true that, in [New South Wales v Ibbett](#), [247] the High Court had this to say:

In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of [aggravated and exemplary] damages and no element more than once.

via

[247] (2006) 229 CLR 638, 648.

[Carter v Walker](#) [2010] VSCA 340 -  
[Carter v Walker](#) [2010] VSCA 340 -  
[Carter v Walker](#) [2010] VSCA 340 -  
[New South Wales v Radford](#) [2010] NSWCA 276 (28 October 2010) (Beazley and Macfarlan JJA, Sackville AJA)

91. In [Uren v John Fairfax & Sons Pty Ltd](#) [1966] HCA 40; 117 CLR 118, at 129-130, Taylor J pointed out that there had been a degree of confusion between aggravated and exemplary damages. The former, Taylor J said, are:

“given by way of **compensation** for injury to the plaintiff, though frequently intangible, resulting from the circumstances and manner of the defendant's wrongdoing.” (Emphasis added.)

By contrast, exemplary damages are awarded:



“to ‘punish and deter’ the wrongdoer though, in many cases, the same set of circumstances might well justify either an award of exemplary or aggravated damages.”

These passages were cited with approval by the High Court in *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 (“*Ibbett* (HCA)”), at 646-647 [31], [33]; see also *Myer Stores Ltd v Soo* [1991] 2 VR 597, at 602, per Murphy J.

*New South Wales v Radford* [2010] NSWCA 276 -

*Coffey v State of Queensland* [2010] QCA 291 -

*Coffey v State of Queensland* [2010] QCA 291 -

*Coffey v State of Queensland* [2010] QCA 291 -

*Downing v WIN Television (NSW) Pty Ltd* [2010] NSWSC 1132 (21 October 2010) (Ball J)

54 In order to establish an entitlement to exemplary damages in respect of WIN’s trespass, Mr Downing must establish that WIN’s conduct amounted to a conscious and contumelious disregard of Mr Downing’s rights: *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638; *TCN Channel Nine v Ilvarity Pty Ltd* [2008] NSWCA 9; 71 NSWLR 323.

*Downing v WIN Television (NSW) Pty Ltd* [2010] NSWSC 1132 -

*Moses v State of New South Wales (No. 3)* [2010] NSWDC 243 (14 October 2010) (Gibson DCJ)

[331] As to exemplary damages, I note the statement of the Court of Appeal in *State of New South Wales v Landini* at [113]-[114] as follows:

“[113] The purposes of an award of exemplary damages were referred to by the plurality in *Lamb v Cotogno* [1987] HCA 47; (1987) 164 CLR 1. Their Honours quoted with approval the following observations of Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* [1985] HCA 12; (1984-1985) 155 CLR 448:

As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff’s rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In *Merest v Harvey* ((1814) 5 Taunt 442; 128 ER 761) substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, Gibbs CJ saying: “I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?”

The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in *Broome v Cassell & Co* ([1972] AC, at p 1130) ‘to teach a wrong-doer that tort does not pay’ (*XL* at 471; *Cotogno* at 9).

[114] The decision of the High Court in *New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 confirmed that exemplary damages may be awarded against a person who, although not personally responsible for the commission of the relevant tort, is vicariously liable in respect of such a tort and that there is no barrier to the award of such damages against a State in respect of conduct of police officers for whose torts the State is responsible. The plurality judgment in

that case approved the following observation of Priestley JA in *Adams v Kennedy* [2000] NSWCA 152 ; (2000) 49 NSWLR 78:

That figure [of exemplary damages] should indicate my view that the conduct of the [police officer] defendants was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen (*Adams* at 87 ; *Ibbett* at [51] ).”

*Moses v State of New South Wales (No. 3)* [2010] NSWDC 243 (14 October 2010) (Gibson DC)

[314] I have been guided by the Court of Appeal's analysis of these damages in *Coyle, supra* and *Ibbett, supra*.

*Moses v State of New South Wales (No. 3)* [2010] NSWDC 243 (14 October 2010) (Gibson DC)

*New South Wales v Ibbett* (2006) 229 CLR 638  
*O'Hanlon v Electricity Supply Board* [1969] IR 75 at 96

*Moses v State of New South Wales (No. 3)* [2010] NSWDC 243 (14 October 2010) (Gibson DC)

[312] The relevant principles have been helpfully summarised by Anderson J in *White v South Australia, supra* at [430] – [460] as follows:

“[430] Aggravated damages are awarded as compensation for injury to the plaintiff's feelings caused by the defendant's insulting or humiliating conduct. The High Court said, in contrasting aggravated and exemplary damages, in *Lamb v Cotogno* (1987) 164 CLR 1 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.

[431] In *Lamb* , the respondent Cotogno was enraged when the appellant Lamb tried to serve him with a summons. The respondent threatened to kill him. As the appellant attempted to leave the property, the respondent threw himself across the appellant's bonnet and held on as he attempted to drive away. In fear, the appellant drove off, then attempted to dislodge the respondent by accelerating and swerving. He eventually braked suddenly which threw the respondent off, injuring him seriously. The appellant drove away. Provocation was taken into account in the assessment of damages. \$5,000 was awarded as exemplary damages.

[432] Such damages have been awarded for wrongful imprisonment in the past (see *Myer Stores Ltd v Soo* ) and in those cases the circumstances of the detention was relevant.

[433] Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149 described aggravated damages as those “given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done”.

[434] In *Cassell & Co Ltd v Broome* [1972] AC 1027 Lord Hailsham said at 1073:

In awarding “aggravated” damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.

[435] In *New South Wales v Delly* (2007) 70 NSWLR 125, Delly was wrongfully arrested as an accessory to the murder of Paul Harris. She was asked her name and date of birth and taken into custody without being told she was under arrest or the reasons for her custody. She was held in a room from approx 8.30 am. By 11.00 am the police had formed the view she could not be charged. However, she was not told she could leave. At 12 noon she was released. Aggravated damages were awarded by the primary judge because Delly was held for a number of hours. The award was set aside. An award of \$10,000 for exemplary damages was made by the Court of Appeal because police knowingly and deliberately held Delly for an hour after knowing she could not be charged.

[436] *Delly* was appealed to the High Court and special leave was refused.

[437] In *McDonald v Coles Myer Ltd* (1995) Aust Torts Reports 81-361 (NSWCA), the appellant was arrested and charged with shoplifting at K-Mart. The Magistrate found that there was “no case to answer”. The appellant then brought a claim for wrongful arrest and false imprisonment. The case was compounded by the defendant’s patently false and offensive imputations during trial that the plaintiff was mentally ill. No apology was made. Damage to the appellant’s reputation due to the allegations was a consideration. The appellant was awarded \$13,500 aggravated compensatory damages at first instance, which was increased to \$27,000 on appeal.

[438] Clarke JA, citing Lawrence LJ in *Walter v Alltools Ltd* (1944) 171 LT 371 at 372, said:

In my opinion that case lays down that any evidence in a case of false imprisonment which shows, or tends to show, that the defendant is persevering in the charge which he originally made in bringing about the false imprisonment, is evidence which may be given for the purpose of aggravating the damages. In the same way, the defendant would be entitled to give any evidence which tended to show that he had withdrawn, or had apologised for having made, the charge on which the false imprisonment proceeded. The general principle, in my view, is that any evidence which tends to aggravate or mitigate the damage to a man’s reputation which flows naturally from his imprisonment must be

admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false.

[439] Provocative conduct by a plaintiff may reduce the amount of aggravated damages otherwise appropriate, or even disentitle a plaintiff from such damages. In my view none of the plaintiffs engaged in any conduct which could be regarded as provocative.

### (iii) Exemplary damages

[440] Exemplary (or punitive) damages are awarded in order to punish the defendant for "conscious wrongdoing in contumelious disregard of another's rights": as stated by Knox CJ in *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77. It is my understanding that this is the preferred definition in Australia.

[441] The decision in *Lamb* has confirmed that exemplary damages may be awarded in the absence of any malice on the part of the defendant. The decision also shows that the conduct that makes exemplary damages appropriate can actually occur after the tort has been committed.

[442] In *Lamb* the event giving rise to exemplary damages was the appellant's act of driving off after the respondent was seriously injured by the appellant. The \$5,000 exemplary damages awarded was upheld, for the appellant's "callous" conduct in driving off.

[443] Aside from punishing the defendant, exemplary damages may be awarded to demonstrate the court's disapproval of the defendant's conduct and to provide general and specific deterrence.

[444] In *Delly* Ipp JA said at [24] :

[24] As Tobias JA observes, exemplary damages will be awarded to plaintiffs in cases where it is necessary to punish the defendant for the defendant's anti-social behaviour to the plaintiff and to deter others from like conduct.

[445] In *New South Wales v Ibbett* (2006) 229 CLR 638, the Court at [38] cited the rule in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558 :

The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government.

[446] In *Ibbett* , two plain-clothes police officers entered a residence at night without justification and sought to arrest a resident, pointing a gun at him and his mother who was the owner of the

premises. The mother was awarded \$50,000 for trespass and \$50,000 for assault, which award was upheld by the High Court.

[447] I note also the comments in *Delly* per Ipp JA at [25] :

A tendency has developed to assume that, where plaintiffs are successful in cases of false imprisonment, exemplary (and, indeed, aggravated) damages should be awarded automatically against the police. Such a tendency is incorrect and should be avoided. The requirement laid down by the law must be applied, properly, in each individual case. I record my express agreement with what Basten JA has written (at 149 [115]–[117] *infra*).

Basten JA said at [115]–[117]:

[115] Circumstances of aggravation do not necessarily demonstrate conduct of a kind warranting an award of exemplary damages. Such an award is justified by reference, not to the effects on the plaintiff, but to the knowledge, intention or recklessness of the tortfeasor. An award of exemplary damages may be justified by “conscious wrongdoing in contumelious disregard of the plaintiff’s rights”. On the other hand, actual subjective advertence to wrongdoing is not necessary, at least, it would seem, in circumstances where the conduct is objectively outrageous so that the tortfeasor can properly be described as reckless.

[116] One purpose of an award of exemplary damages is to deter both the wrongdoer and others who may be in his or her position from a repetition of the kind of conduct under scrutiny. In the present case, it is the State of New South Wales, rather than the individual police officers who will suffer the financial burden of an award. Further ... such an award may indirectly have a deterrent effect on the police officers concerned through the response of the Police Service. It is, therefore, important to preserve the deterrent effect of such an award. That effect will tend to be diminished if the preconditions for an award are not tightly controlled. No doubt it is important that police officers know and observe the limits of their powers: however that desirable end will not make a careless or mistaken exercise of power outrageous or high-handed.

[117] The fact that an award of exemplary damages constitutes an expression of the Court’s disapproval of the conduct does not mean that the Court’s disapproval is a sufficient reason to make an award.

[448] Before making an award of exemplary damages, I must review all evidence which might mitigate the defendant’s conduct.

[449] In *Andary v Burford* (1994) Aust Torts Reports 81-302, a truck driver (appellant) and car driver (respondent) were in a minor accident, which turned into a verbal altercation. The appellant tried to drive off and avoid further argument but the respondent got out

of her car, abused the appellant, and held on to the side of his truck. The appellant, while moving, shook his truck door to dislodge her, and after she fell to the road in a heap he continued to drive away. The appellant appealed against the magistrate's decision to award \$7,500 in exemplary damages without reduction for the respondent's provocation. Millford J allowed the appeal and reduced the damages by half for the respondent's loud, drunk and abusive provocative conduct.

[450] As I have said, I have not found there to be any provocation on the part of the plaintiffs or any lawful motivation for the defendant's conduct in committing the offences.

### **Distinction between aggravated and exemplary damages**

[451] As already discussed, aggravated damages are generally compensatory in nature and are awarded to restore the plaintiff's dignity and to compensate for conduct which has shocked them. Exemplary damages, on the other hand, indicate the court's disapproval of the defendant's conduct.

[452] The distinction between the two heads of damage was first recognised in England in 1964 in *Rookes v Barnard* [1964] AC 1129 (HL) at 1221 per Lord Devlin.

[453] It has been accepted in Australia that the distinction is difficult to make in some circumstances.

[454] In *Uren* Taylor J said at 129:

Prior to *Rookes v Barnard* the law relating to exemplary damages both in England and in this country was that damages of that character might be awarded if it appeared that, in the commission of the wrong complained of, the conduct of the defendant had been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights. Various expressions had been employed to describe such conduct and the law, though, of necessity invested with a degree of flexibility, was sufficiently certain. The cases in which this principle has been acted upon are numerous and it is sufficient for the present to say that it has been acted upon in this Court on a number of occasions. It is, perhaps, desirable to point out that there had been a degree of confusion between "aggravated" and "exemplary" damages and sufficient attention has not, in the past, been given to the distinction between these two concepts.

Windeyer J said at 149:

[A]ggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve to one or more of the objects of punishment — moral retribution or deterrence.

### **Double punishment**



[455] While the purposes of aggravated damages and exemplary damages are different, both may be awarded if appropriate.

[456] An example of that would be intentionally insulting conduct, which offends both the plaintiff and the court. This proposition was considered in *Johnstone v Stewart* [1968] SASR 142.

[457] The court stated in *Ibbett* at [35], referring to the “global” approach:

[35] In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once. Such an approach was adopted by Bray CJ in *Johnstone v Stewart*.

[458] The court affirmed the remarks of Spigelman CJ in the judgment appealed from at [34]:

[34] ... it is relevant to note that the matters to which I have referred as justifying an award of exemplary damages are also pertinent, as is often the case, to an award of aggravated damages. The difference is that in the case of aggravated damages the assessment is made from the point of view of the plaintiff and in the case of exemplary damages the focus is on the conduct of the defendant. Nevertheless, it is necessary, as I have noted above, to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation.

[459] In a case such as the present one, I must be mindful of the remarks of the court at [36] with respect to:

[36] ... the conceptual distinctions between aggravated and exemplary damages and of the dangers of an excessive overall award where some or all of the factors supporting one head of damages also support(s) the other.

[460] Relevantly, Smith J in *Walker v Hamm (No 2)* [2009] VSC 290 said at [63]:

[63] It has been noted in the authorities that there is no necessary proportionality between compensatory and exemplary damages. In addition, however, it has been recognised that in reality there can be an element of punishment in aggravated damages. As a result, in considering whether to award exemplary damages and, if so, their quantum, it is necessary to consider whether the awarded compensatory damages, including aggravated damages, address any need that may exist in a particular case for punishment of the tortfeasor through the award of exemplary damages. Double punishment must be avoided. Further, the court should approach any assessment with restraint and moderation. It also appears to be established that deciding whether to award exemplary damages, and their quantification, generally will involve the exercise of discretion except where there is no room for a discretion.”

[Moses v State of New South Wales \(No. 3\)](#) [2010] NSWDC 243 -  
[Moses v State of New South Wales \(No. 3\)](#) [2010] NSWDC 243 -  
[Moses v State of New South Wales \(No. 3\)](#) [2010] NSWDC 243 -  
[Moses v State of New South Wales \(No. 3\)](#) [2010] NSWDC 243 -  
[Moses v State of New South Wales \(No. 3\)](#) [2010] NSWDC 243 -  
[Moses v State of New South Wales \(No. 3\)](#) [2010] NSWDC 243 -  
[Darcy v State of New South Wales](#) [2010] NSWDC 210 -  
[Darcy v State of New South Wales](#) [2010] NSWDC 210 -  
[Withyman v State of NSW](#) [2010] NSWDC 186 (01 September 2010) (Elkaim SC DCJ)  
[New South Wales v Ibbett](#) (2006) 229 CLR 638  
[New South Wales v Lepore](#)

[Withyman v State of NSW](#) [2010] NSWDC 186 -  
[State of New South Wales v Landini](#) [2010] NSWCA 157 (09 July 2010) (Tobias and Macfarlan JJA, Sackville AJA)

114 The decision of the High Court in [New South Wales v Ibbett](#) [2006] HCA 57; (2006) 229 CLR 638 confirmed that exemplary damages may be awarded against a person who, although not personally responsible for the commission of the relevant tort, is vicariously liable in respect of such a tort and that there is no barrier to the award of such damages against a State in respect of conduct of police officers for whose torts the State is responsible. The plurality judgment in that case approved the following observation of Priestley JA in [Adams v Kennedy](#) [2000] NSWCA 152; (2000) 49 NSWLR 78:

“That figure [of exemplary damages] should indicate my view that the conduct of the [police officer] defendants was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen” ([Adams](#) at 87; [Ibbett](#) at [51]).

[State of New South Wales v Landini](#) [2010] NSWCA 157 -  
[State of New South Wales v Landini](#) [2010] NSWCA 157 -  
[Gunns Limited v Alishah \(No 4\)](#) [2010] TASSC 24 (31 May 2010) (Porter J)

54. The conceptual distinction between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages was maintained in *Lamb v Cotogno*, and further confirmed in [New South Wales v Ibbett](#) (2006) 229 CLR 638 at [33]. At [34] Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ highlighted the need to maintain the conceptual distinctions between aggravated and exemplary damages, and said that it was necessary to determine both heads of compensatory damages before deciding whether or not an award of exemplary damages was justified. At [35] their Honours said that in cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damage, and no element more than once.

[White v State of South Australia](#) [2010] SASC 95 (09 April 2010) (Anderson J)

445. In [NSW v Ibbett](#) (2006) 229 CLR 638, the Court at [38] cited the rule in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558:

The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government.

[White v State of South Australia](#) [2010] SASC 95 -

[White v State of South Australia](#) [2010] SASC 95 -  
[White v State of South Australia](#) [2010] SASC 95 -  
[Couch v Attorney-General \(No 2\)](#) [2010] NZSC 27 (24 March 2010)

[15] In Australia there are judgments which refer with apparent approval to the Privy Council approach. The reasons of Kirby J in the High Court of Australia in [Gray v Motor Accident Commission](#) [35] (with which the majority did not express disagreement) and the judgment of Spigelman CJ in the Court of Appeal of New South Wales in [State of New South Wales v Ibbett](#) [36] (which was not on this point directly addressed by the High Court) indicate the view that awards of exemplary damages should not be confined to cases where the defendant intended to cause harm or was consciously reckless as to the risks involved. Kirby J in [Gray](#) considered that exemplary damages were available “whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world”. [37] In [Gray](#) (where the question whether conscious recklessness is a condition for exemplary damages in negligence did not have to be resolved) the majority of the High Court considered that “conscious wrongdoing in contumelious disregard of another’s rights’ describes at least the greater part of the relevant field”, [38] a position consistent with the approach of the Privy Council in [Bottrill](#). In the High Court in [New South Wales v Ibbett](#), [39] it is the case that in a footnote [40] the Court indicated that it considered the views of the Privy Council in [Bottrill](#) and the Supreme Court of Canada in [Whiten v Pilot Insurance Co](#) [41] were to be contrasted with the statement in [Gray](#) that “there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff”, [42]. And it may be that the position in Australia in relation to negligence will yet move to requiring subjective recklessness in the sense of conscious assumption of risk of harm to the plaintiff. The Court of Appeal in New South Wales in [State of New South Wales v Delly](#), [43] a decision decided after [Ibbett](#), was however prepared to allow that subjective advertence to harm is not always necessary for an award of exemplary damages. But neither [Ibbett](#) nor [Delly](#) were cases where the cause of action was in negligence. [44] Further cases in Australia will no doubt require consideration of the general approach indicated by the High Court in [Lamb v Cotogno](#) [45] that exemplary damages express the Court’s condemnation of objectively reckless behaviour. [46] [Lamb v Cotogno](#) suggests that callousness provides sufficient justification for exemplary damages. [47] As things stand, it is drawing a rather long bow to maintain that the present decision brings New Zealand law into line with Australian law.

[Couch v Attorney-General \(No 2\)](#) [2010] NZSC 27 (24 March 2010)

[166] [Ibbett](#) was appealed to the High Court of Australia. [254] In a unanimous judgment the High Court in reference to [Gray](#)’s case said “[m]oreover, in this Court, it has been said that there may be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff”. [255] Significantly the Court also implied disagreement with the decision of the Privy Council in [Bottrill](#) by saying, after its reference to [Gray](#) in a footnote, “cf [A v Bottrill](#) [2003] 1 AC 449 at 463-464”. [256] This seems to confirm that in Australia conscious appreciation of wrongdoing, ie subjective recklessness, is a necessary ingredient in cases framed in negligence.

Canada

via

[254] [New South Wales v Ibbett](#) [2006] HCA 57, (2006) 229 CLR 638.

[Couch v Attorney-General \(No 2\)](#) [2010] NZSC 27 -  
[Couch v Attorney-General \(No 2\)](#) [2010] NZSC 27 -  
[Couch v Attorney-General \(No 2\)](#) [2010] NZSC 27 -  
[Couch v Attorney-General \(No 2\)](#) [2010] NZSC 27 -  
[New South Wales v Corby](#) [2010] NSWCA 27 (03 March 2010) (Beazley, Tobias and Basten JJA)

44 Her Honour, correctly, dealt separately with aggravated and exemplary damages. In the context, that was necessary because there is a plethora of statements of the highest authority to support the proposition that aggravated damages are compensatory. The State referred to passages in *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 at 129-130 (Taylor J), at 149 (Windeyer J); *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1 at 8 and *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, where the following appeared in the judgment of the Court at [31] :

“Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing.”

*New South Wales v Corby* [2010] NSWCA 27 (03 March 2010) (Beazley, Tobias and Basten JJA)  
*New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638  
*State of New South Wales v Bujdosó*

*New South Wales v Corby* [2010] NSWCA 27 -  
*Care Park Pty Ltd v Universal One Communication Pty Ltd* [2009] NSWSC 1405 -  
*Care Park Pty Ltd v Universal One Communication Pty Ltd* [2009] NSWSC 1405 -  
*Morris v Karunaratne* [2009] NSWDC 346 (27 November 2009) (Johnstone DCJ)

260. The plaintiff has pointed to a number of circumstances she says aggravated the assaults and the battery she was required to endure. Many of her allegations were, as I have found, not proved. Others, in my view were more properly the province of the Family Law Court. It is also to be observed that I have already made a substantial award of damages for violation of the dignitary interest. The High Court has said, in *New South Wales v Ibbett* (2006) 229 CLR 638 at [31] :

“Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing.”

*Morris v Karunaratne* [2009] NSWDC 346 -  
*Hage-Ali v State of NSW* [2009] NSWDC 266 -  
*Hage-Ali v State of NSW* [2009] NSWDC 266 -  
*Morro v Australian Capital Territory* [2009] ACTSC 118 (10 September 2009) (Gray J)

54. On the question of aggravated damages applying to circumstances like the present case, Tobias JA in *New South Wales v Delly* (2007) 70 NSWLR 125 ( *Delly* ) cited the High Court in a joint judgment in *New South Wales v Ibbett* (2006) 229 CLR 638 at [31] for the general proposition:

Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from circumstances and manner of the wrongdoing.

Tobias JA went on to say (at [80]):

It was nevertheless common ground that the relevant principles to be applied in determining whether an award of aggravated damages was appropriate were articulated by Hodgson JA, with whom on the question of damages Sheller JA and Nicholas J agreed, in *New South Wales v Riley* (2003) 57 NSWLR 496 where, after observing (at [1271]) that ordinary compensatory damages are supposed to be an amount adequate to compensate a plaintiff for all consequences of the defendant's wrongful conduct that are not too remote, his Honour asked himself: what room is there for additional damages, which although dependant on some aggravating feature of the defendant's wrongful

conduct, are still supposed to do no more than compensate for the consequences of that conduct? His Honour responded to his own question in the following terms:

131. In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt [feelings] neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.

Morro v Australian Capital Territory [2009] ACTSC 118 -

Dean Cameron Smith v Cheeky Monkeys Restaurant [2009] NSWDC 257 (18 August 2009) (Rolfe DCJ)

51 The court is entitled to approach the matter on this basis, not only based on what Grove J said, but more importantly (with respect), on what the High Court had to say in New South Wales v Ibbett (2006) 231 ALR 485 referring to what was said in Plenty v Dillon (1991) 171 CLR 635 at 645. In the circumstances I am satisfied that I can award compensatory damages including damages at large as part of the plaintiff's general damages because of the plaintiff's entitlement not to have his person violated. That was a case of trespass to the plaintiff's farm which gave rise to an entitlement of the plaintiff to receive damages in vindication of his right to exclude the defendants from his farm.

Dean Cameron Smith v Cheeky Monkeys Restaurant [2009] NSWDC 257 -

Walker v Hamm (No 2) [2009] VSC 290 (22 July 2009) (Smith J)

13. Counsel for Carter has submitted that the claims for aggravated and exemplary damages arise out of the same circumstances and that it would be appropriate to make one award, not two, if liability for those damages is found against Carter. In advancing this argument, counsel relied upon New South Wales v Ibbett [3]. In that case, the High Court cited with approval the following passage from the judgment of Spiegelman CJ in the Court of Appeal decision in that matter

“In this regard it is relevant to note that the matters to which I have referred as justifying an award of exemplary damages are also pertinent, as is often the case, to an award of aggravated damages. The difference is that in the case of aggravated damages the assessment is made from the point of view of the plaintiff and in the case of exemplary damages the focus is on the conduct of the defendant. Nevertheless, it is necessary, as I have noted above to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation”. [4].

His Honour went on to state



“In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a Court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of [aggravated and exemplary] damages and no element more than once”.

[5]

[Walker v Hamm \(No 2\)](#) [2009] VSC 290 -  
[Walker v Hamm \(No 2\)](#) [2009] VSC 290 -  
[Walker v Hamm \(No 2\)](#) [2009] VSC 290 -  
[Walker v Hamm \(No 2\)](#) [2009] VSC 290 -  
[Walker v Hamm \(No 2\)](#) [2009] VSC 290 -  
[Walker v Hamm \(No 2\)](#) [2009] VSC 290 -  
[Walker v Hamm \(No 2\)](#) [2009] VSC 290 -  
[Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd \(No 2\)](#) [2009] FCA 754 (17 July 2009) (Rares J)

38. And, in [New South Wales v Ibbett](#) (2006) 229 CLR 638 at 648 [38] Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ observed:

“The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society.”

[Corby v State of New South Wales](#) [2009] NSWDC 117 -  
[Corby v State of New South Wales](#) [2009] NSWDC 117 -  
[Corby v State of New South Wales](#) [2009] NSWDC 117 -  
[Webster v Coles Myer Ltd; Thompson v Coles Myer Ltd](#) [2009] NSWDC 4 (28 April 2009) (Gibson DCJ)  
[State of New South Wales v Ibbett](#) (2006) 229 CLR 638  
[State of New South Wales v Ibbett](#)

[Webster v Coles Myer Ltd; Thompson v Coles Myer Ltd](#) [2009] NSWDC 4 -  
[Landini v State of New South Wales](#) [2008] NSWSC 1280 -  
[Landini v State of New South Wales](#) [2008] NSWSC 1280 -  
[Landini v State of New South Wales](#) [2008] NSWSC 1280 -  
[Varmedja v Varmedja](#) [2008] NSWCA 177 -  
[Varmedja v Varmedja](#) [2008] NSWCA 177 -  
[State of New South Wales v Delly](#) [2008] HCATrans 226 -  
[Kuru v State of New South Wales](#) [2008] HCA 26 -  
[Kuru v State of New South Wales](#) [2008] HCA 26 -  
[Hayes v Woodcroft Tavern](#) [2008] SADC 20 -  
[Hayes v Woodcroft Tavern](#) [2008] SADC 20 -  
[Hayes v Woodcroft Tavern](#) [2008] SADC 20 -  
[TCN Channel Nine Pty Ltd v Ilvari Pty Ltd](#) [2008] NSWCA 9 -  
[TCN Channel Nine Pty Ltd v Ilvari Pty Ltd](#) [2008] NSWCA 9 -  
[Nationwide News Pty Ltd v Naidu](#) [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

275. In addition, it has been decided that a person may be liable for exemplary damages even though their liability for the contumelious act is vicarious: see [Healing \(Sales\) Pty Ltd v Inglis Electrix Pty Ltd](#) [1968] HCA 60; (1968) 121 CLR 584; [New South Wales v Ibbett](#) [2006] HCA 57; (2006) 81 ALJR 427 at 435 [41] ff; [Zorom Enterprises Pty Ltd v Zabow & Ors](#) [2007] NSWCA 106 at [44]-[45] ;



[Nationwide News Pty Ltd v Naidu](#) [2007] NSWCA 377 -  
[Photi v Target Australia Pty Ltd](#) [2007] NSWDC 265 -  
[Photi v Target Australia Pty Ltd](#) [2007] NSWDC 265 -  
[State of New South Wales v Delly](#) [2007] NSWCA 303 (06 November 2007) (Ipp JA 1; Tobias JA ; Basten JA)

105. The term “aggravated damages” is something of a misnomer. It refers to a component of compensatory damages referable to circumstances of aggravation: see, eg, [Plenty v Dillon](#) (1991) 171 CLR 635 at 655 (Gaudron and McHugh JJ). Thus false imprisonment may be accompanied by threats, with rudeness or with appreciable contempt; or it may be carried out courteously but in error. It may continue after it is challenged; or it may occur without challenge. The question is how to assess the effect of the circumstances of aggravation, once established, on the plaintiff: [State of New South Wales v Ibbett](#) [2006] HCA 57; (2006) 81 ALJR 427 at [33] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ). Damages attributable to the circumstances of aggravation are primarily awarded for injury to the plaintiff’s feelings caused by insult or humiliation.

[State of New South Wales v Delly](#) [2007] NSWCA 303 (06 November 2007) (Ipp JA 1; Tobias JA ; Basten JA)

[State of New South Wales v Ibbett](#) [2006] HCA 57 ; (2006) 81 ALJR 427

[State of New South Wales v Delly](#) [2007] NSWCA 303 -  
[State of New South Wales v Delly](#) [2007] NSWCA 303 -  
[Cassidy v. McDonald](#) [2007] QCA 332 (10 October 2007) (Jerrard JA, Keane JA and Douglas JJ,)

[New South Wales v Ibbett](#) (2006) 231 ALR 485 , considered

[Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd](#) [2007] HCA 38 -  
[Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd](#) [2007] HCA 38 -  
[Seven Network Ltd v News Ltd](#) [2007] FCA 1062 (27 July 2007) (Sackville J)

3254. Similarly, there is no basis for an award of aggravated damages in this case. Aggravated damages are compensatory in nature: [New South Wales v Ibbett](#) (2006) 231 ALR 485, at 492 [33], *per curiam*. Such an award depends upon showing that the injury to the innocent party has been aggravated by conduct which is insulting or reprehensible: [Uren v John Fairfax & Sons Ltd](#) (1966) 117 CLR 118, at 151, *per* Windeyer J. The injury to Seven does not answer that description.

[Mickelberg v Western Australia](#) [2007] WASC 140 -  
[Mickelberg v Western Australia](#) [2007] WASC 140 -  
[New South Wales v Fahy](#) [2007] HCA 20 -  
[New South Wales v Fahy](#) [2007] HCA 20 -  
[New South Wales v Fahy](#) [2007] HCA 20 -  
[New South Wales v Fahy](#) [2007] HCA 20 -  
[Zorom Enterprises Pty Ltd v Zabow](#) [2007] NSWCA 106 -  
[Zorom Enterprises Pty Ltd v Zabow](#) [2007] NSWCA 106 -  
[Varmedja v Varmedja](#) [2007] NSWDC 385 -  
[Willmington & Anor v. Cassidy](#) [2007] QDC 73 -  
[Willmington & Anor v. Cassidy](#) [2007] QDC 73 -  
[Willmington & Anor v. Cassidy](#) [2007] QDC 73 -  
[A v New South Wales](#) [2007] HCA 10 (21 March 2007) (Gleeson CJ Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)

94. At a time before the development of what now is known as administrative law, significant questions of public law, and of abuse of power by public officials, were determined as issues

in tort actions [94]. What may be understood as echoes of the administrative law principles respecting improper purpose in the exercise of a statutory power may sometimes be heard in the reference in the tort of malicious prosecution to improper purposes of prosecutors.

*via*

[94] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558; *State of New South Wales v Ibbett* (2006) 81 ALJR 427; 231 ALR 485.