CITATION:	*Northern Territory of Australia v Austral & Ors* [2025] NTCA 3
	AP5 of 2023 (21508785)
PARTIES:	NORTHERN TERRITORY OF AUSTRALIA
	v
	AUSTRAL, Ethan
	AP6 of 2023 (21508784)
	NORTHERN TERRITORY OF AUSTRALIA
	v
	O'SHEA, Leroy
	AP7 of 2023 (21510204)
	NORTHERN TERRITORY OF AUSTRALIA
	v
	WEBSTER, Keiran
	AP8 of 2023 (21513348)
	NORTHERN TERRITORY OF AUSTRALIA
	v
	BINSARIS, Josiah
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction

DELIVERED: 28 March 2025

HEARING DATES: 27 & 28 February 2024

JUDGMENT OF: Grant CJ, Reeves & Burns JJ

CATCHWORDS:

JUDGMENTS AND ORDERS – Damages – Exemplary and punitive damages

Whether error in awarding exemplary damages to each of the respondents – Whether exemplary damages manifestly excessive – Whether error in refusing to award aggravated damages to the respondent Binsaris – Basis of award of exemplary damages contrary to pleadings, evidence and uncontested findings of fact – Unnecessary to consider whether exemplary damages manifestly excessive – No evidence of subjective insult or humiliation on which to award aggravated damages to the respondent Binsaris – Appeal allowed – Cross-appeal dismissed.

Personal Injury (Liabilities and Damages) Act 2003 (NT), s 19
Supreme Court Act 1979 (NT) s 54, s 55
Youth Justice Act 2003 (NT) s 153, s 154, s 157

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

Fairfax & Sons Pty Ltd (1966) 117 CLR 118, *Victoria v Horvath* (2002) 6 VR 326, *Warren v Coombes* (1979) 142 CLR 531, *White & Ors v South Australia* (2010) 106 SASR 521, referred to.

JUDGMENTS AND ORDERS – Interest – Pre-judgment interest

Whether error in refusing to allow pre-judgment interest on the general damages awarded to each of the respondents – Once award of exemplary damages set aside no basis for refusing pre-judgment interest – Cross-appeal allowed.

Supreme Court Act 1979 (NT) s 84

Haines v Bendall (1991) 172 CLR 60, *MBP (SA) v Gogic* (1991) 171 CLR 657, referred to.

REPRESENTATION:

Counsel

Appellant/Cross-Respondent:	D McLure SC with T Moses
Respondents/Cross-Appellants:	K Foley SC with J McComish

Solicitors

Appellant/Cross-Respondent:	Solicitor for the Northern Territory
Respondents/Cross-Appellants:	North Australian Aboriginal Justice Agency

Judgment category classification:	B
Number of pages:	76

IN THE COURT OF APPEAL OF
THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v Austral & Ors [2025] NTCA 3

AP5 of 2023 (21508785)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant/Cross-Respondent

AND

ETHAN AUSTRAL
Respondent/Cross-Appellant

AP6 of 2023 (21508784)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant/Cross-Respondent

AND

LEROY O'SHEA
Respondent/Cross-Appellant

AP7 of 2023 (21510204)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant/Cross-Respondent

AND

KEIRAN WEBSTER
Respondent/Cross-Appellant

AP8 of 2023 (21513348)

BETWEEN:

NORTHERN TERRITORY OF AUSTRALIA
Appellant/Cross-Respondent

AND

JOSIAH BINSARIS
Respondent/Cross-Appellant

CORAM: GRANT CJ, REEVES and BURNS JJ

REASONS FOR JUDGMENT
(Delivered 28 March 2025)

THE COURT:

[1] This matter involves both appeals by the appellant and cross-appeals by the respondents. The appellant appeals against awards of exemplary damages made in favour of each of the respondents on the ground that damages of that nature were not properly ordered in the circumstances, or, in the alternative, that the quantum of exemplary damages awarded was manifestly excessive. The respondents cross-appeal from a decision not to award pre-judgment interest on the general damages awarded to each of them. In addition, the respondent Binsaris cross-appeals from a decision declining to award him aggravated damages.

Factual context

[2] These proceedings have a long history. The events upon which they are based occurred on 21 August 2014. On that date the respondents were

detainees at the Don Dale Youth Detention Centre (**the Centre**). All were housed within the Behaviour Management Unit (**BMU**) in the Centre. By way of background to the events which took place on 21 August 2014, approximately three weeks earlier, on 2 August 2014, the respondents, in company with another detainee within the BMU, Jake Roper (**Roper**), had successfully escaped from the Centre. They gained entry into the gym and armed themselves with long weight bars which they used in an unsuccessful attempt to break the lock on one of the gates at the Centre. They also brandished the bars to keep staff at bay. The respondents and Roper eventually managed to escape by climbing a fence and running away from the Centre. Three of the respondents were recaptured on 4 August 2014 and the remaining respondent was recaptured two days later. Upon their recapture the respondents and Roper were placed back in the BMU.

[3] On 21 August 2014, Roper again escaped from his cell, damaged property and caused a serious disturbance within the BMU. It is fair to say that he went on a rampage within the BMU causing considerable damage to property and presenting a real danger to any Centre staff who may have attempted to bring him under control and return him to his cell. For a period of time, the respondents Binsaris and Austral joined in the disturbance by damaging property within the cell they jointly occupied but at all times they remained within their cell. The

other two respondents remained in the cell they jointly occupied and took no part in the disturbance.

[4] After unsuccessful attempts were made by Centre staff to calm Roper down, those in charge of the Centre decided to deploy CS gas in order to subdue Roper so that he could be returned to his cell. CS gas is a tear gas and riot control agent commonly used by law enforcement agencies. When a person is exposed to CS gas it causes a burning sensation and tearing of the eyes, and intense irritation of the nose and throat causing coughing and difficulty breathing.

[5] The respondents were not the target of the deployment of the CS gas. The gas was deployed to bring Roper under control in a manner that would involve least danger to him, Centre staff and the other detainees. Despite that specific purpose and intention, the respondents were exposed to the CS gas when it was deployed by reason of their presence in the relatively confined space of the BMU.

[6] After the CS gas had been deployed within the BMU, Roper was secured and the cells in the BMU were unlocked. The respondents were handcuffed with their hands behind their backs and taken to a basketball court within the Centre where they were decontaminated by the use of a water hose.

The proceedings above and below

[7] Each of the respondents subsequently commenced proceedings in the Supreme Court claiming damages for assaults and batteries said to have been committed against them during this incident and in the following days. At first instance, the respondents succeeded on some of their claims, but not on their claims based on the use of CS gas because the original trial judge (**the primary judge**) held that the use of CS gas was lawful in the circumstances.[1] Although it was accepted that the CS gas fogger used to deploy the gas in the Centre was a prohibited weapon under the *Weapons Control Act 2001* (NT), the primary judge held that use of the CS gas in the circumstances was authorised by reason of an exemption for prison officers acting in the course of their duties, also found in the *Weapons Control Act*, to the general prohibition on possessing or using prohibited weapons.

[8] The respondents then appealed against the dismissal of their claims based on the use of CS gas. This appeal was dismissed by the Court of Appeal.[2] The respondents obtained special leave to appeal to the High Court. The High Court found that the use of CS gas within the Centre had been unlawful.[3] The basis for that finding was that the words in s 12(2) of the *Weapons Control Act* "in the course of his or her duties" were limited to the functions of a prison officer performing duties in a

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1 *LO & Ors v Northern Territory of Australia* [2017] NTSC 22; (2017) 317 FLR 324.

2 *JB & Ors v Northern Territory of Australia* [2019] NTCA 1.

3 *Binsaris & Ors v Northern Territory of Australia* [2020] HCA 22; (2020) 270 CLR 549.

prison or police prison, and did not extend to a youth detention centre. The orders of the Court of Appeal were set aside and the matters were remitted to the Supreme Court, constituted by a different judge, to assess damages for the respondents' claims based on the use of CS gas.

[9] On 1 September 2023, a judge of the Supreme Court awarded damages to each respondent.[4] The assessing judge awarded damages as follows:

(a) To Josiah Binsaris – $220, 000 constituted by $20,000 in general damages and $200,000 in exemplary damages.

(b) To Keiran Webster – $250,000 constituted by $30,000 in general damages, $20,000 in aggravated damages and $200,000 in exemplary damages.

(c) To Ethan Austral – $240,000 constituted by $25,000 in general damages, $15,000 in aggravated damages and $200,000 in exemplary damages.

(d) To Leroy O'Shea – $250,000 constituted by $30,000 in general damages, $20,000 in aggravated damages and $200,000 in exemplary damages.

[10] The assessing judge declined to make any award of aggravated damages to Josiah Binsarisas because he had not given evidence at the trial upon which any award could be made.[5] The assessing judge also

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4 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79.

5 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [33], [35], [48], [67], [71], [112].

declined to award interest on the general damages awarded to the respondents on the basis that they were not commercial entities and would "not be out of pocket by virtue of not being awarded interest for the sums awarded for general damages".[6]

The grounds of appeal and cross-appeal

[11] The appellant appeals from the orders made by the assessing judge awarding exemplary damages to each respondent. The grounds advanced by the appellant with regard to each respondent are:

(a) The assessing judge erred in awarding exemplary damages to the respondent in circumstances where the assessing judge did not find, and it was not open on the evidence to find, that any of the individual officers responsible for deploying the CS gas engaged in conscious wrongdoing and/or acted in contumelious disregard of the respondent's rights.

(b) The assessing judge erred in awarding exemplary damages on the basis that the appellant "allowed an environment to exist where senior officers did not know the extent of their powers".

(c) Alternatively, the award of $200,000 in exemplary damages to the respondent (for a total of $800,000 to the four respondents whose claims were heard together) is manifestly excessive.

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6 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [115]-[116].

[12] The appellant seeks orders that the award of $200,000 in exemplary damages to each of the respondents be set aside, and that the respondents pay the costs of the appeal.

[13] The respondents filed notices of cross-appeal from the decision of the assessing judge not to award interest on the general damages awarded to each respondent. Those notices plead that the assessing judge erred in declining to award pre-judgement interest on the grounds that:

(a) It was an error of principle to treat the award of exemplary damages as justification for not awarding pre-judgement interest.

(b) It was an irrelevant consideration that the cross-appellant had been awarded exemplary damages.

(c) It was an irrelevant consideration to treat the fact that the cross-appellant was not a “commercial entity” as a reason not to award pre-judgement interest.

(d) It was an error of fact to find that the cross-appellant was not out of pocket if pre-judgement interest was not awarded.

[14] The respondents assert that at the assessing judge should have awarded interest at the rate of four percent per annum for the period from 21 August 2014 to the date of judgment on 1 September 2023.

[15] In addition, the notice of cross-appeal filed by the respondent Binsaris contends that the assessing judge erred in declining to award

aggravated damages to him. The particulars of that ground of appeal are:

> In view of the objective circumstances and the evidence given by the other plaintiffs, the judge should have drawn the same inference in respect of the cross-appellant as she did in respect of the other plaintiffs about the existence of circumstances of aggravation, and awarded aggravated damages accordingly.

[16] The issues which arise on this appeal may therefore be summarised as follows:

(a) Did the assessing judge err in awarding exemplary damages to each of the respondents?

(b) If exemplary damages were available with regard to each respondent, did the assessing judge err by awarding a manifestly excessive amount?

(c) Did the assessing judge err in declining to allow interest on the general damages awarded to each of the respondents?

(d) Did the assessing judge err in not awarding aggravated damages to Binsaris?

Whether error in awarding exemplary damages

[17] In our opinion, the assessing judge did err in awarding exemplary damages to the respondents. Before giving reasons for this determination, it is necessary to say something briefly about the nature

of this appeal. Appeals are exclusively creatures of statute.[7] There are, generally speaking, three classes of appeals. They are:

> (1) Appeal in the strict sense — in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given. Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance.
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> (2) Appeals de novo — where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.
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> (3) Appeal by way of rehearing — where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not there was error at first instance." [8]

[18] The right of appeal in the present matter is conferred by s 51 of the *Supreme Court Act 1979* (NT), which provides that a party to a proceeding in the Supreme Court may appeal to the Court of Appeal from a judgment in the proceeding. On the hearing of an appeal, this Court is to have regard to the evidence in the proceeding from which the appeal arises and has power to draw inferences of fact.[9] On such an

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7 *Sweeney v Fitzhardinge* (1906) 4 CLR 716 at 725; *Grierson v The King* (1938) 60 CLR 431 at 436; *Gipp v The Queen* (1998) 194 CLR 106 at 145-146; *Byrnes v The Queen* (1999) 199 CLR 1 at 35.

8 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [57], with footnotes omitted.

9 *Supreme Court Act*, s 54.

appeal this Court is empowered to give such judgment as, in all the circumstances, it thinks fit.[10]

[19] It is tolerably clear from these provisions that the present appeal falls within the third category of appeal described in *Lacey* and is by way of rehearing. In conducting an appeal by way of rehearing this Court is obliged to conduct a "real review" of the trial and the primary judge's reasons. In *Fox v Percy*, the plurality stated:

> Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect".[11]

[20] The conduct of that task is informed and governed by the relevant appellate standard. In *Minister for Immigration and Border Protection v SZVFW* (***SZVFW***)[12], Gageler J (as his Honour then was) identified two types of appellate standard: the discretionary standard set out in *House v The King*[13] and the "correctness standard" adopted in *Warren v Coombes*[14].

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10 *Supreme Court Act*, s 55(1)(b).

11 *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [25]. See also *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [29]-[34].

12 *Minister for Immigration and Border Protection v SZVFW* (supra) at [35]-[50].

13 *House v The King* [1936] HCA 40, 55 CLR 499.

14 *Warren v Coombes* (1979) 142 CLR 531.

[21] In an appeal of the former kind, "[i]t is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion."[15]. In an appeal of the latter kind, "[t]he duty of the appellate court is to decide the case – the facts as well as the law – for itself. In so doing it must recognise the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision they consider that it was wrong, they must discharge their duty and give effect to their own judgment."[16]

[22] Justice Gageler went on in *SZVFW* to observe that the line between these two standards was "tolerably clear and workable". His Honour described it in the following terms:

> The line is not drawn by reference to whether the primary judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case

15 *House v The King* (supra) at 504-505.

16 *Warren v Coombes* (supra) at 552. See also *Chief Executive Officer Department of Health v KMD & Ors* [2024] NTCCA 8 at [79]-[84], and the approval of that formulation by the High Court in *KMD v CEO (Department of Health NT)* [2025] HCA 4 at [20]-[21], [45].

> the correctness standard applies, or tolerates a range of outcomes, in which case the *House v R* standard applies.[17]

[23] More recently, the delineation has been similarly described as:

> … that between questions lending "themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions" in which event "it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance", and questions to which there is but one legally permissible answer, even if that answer involves a value judgment".[18]

[24] It was accepted by all parties that the correctness standard applies in the present appeal in determining whether the assessing judge erred in awarding exemplary damages. There could only be one legally correct answer to the question whether circumstances existed to permit an award of exemplary damages. It follows that this Court has an obligation to conduct a real review of the proceedings before the assessing judge and of her Honour's reasons. In doing so, this Court may draw its own inferences from the evidence before the assessing judge. The caveat that this Court should bear in mind that it has not seen or heard the witnesses based upon whose testimony the assessing judge gave the judgment is, in the present case, of little moment as the assessing judge also did not hear or see the witnesses give their

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17 *SZVFW* (supra) at [49]. See also Kifel CJ at [18], Nettle and Gordon JJ at [85]-[87]. Subsequently applied in *R v Bauer* [2018] HCA 40, 266 CLR 56 at [61] and *Collaery v R* [2021] ACTCA 28 at [53]-[54].

18 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32, (2023) 97 ALJR 857 at [16].

evidence. As such, this Court is in as good a position as the assessing judge to weigh the evidence and draw conclusions of fact.

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

> Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of cases: ranging from abuse of governmental power exemplified by *Wilkes v Wood* and its associated cases, through defamation cases of the kind considered in *Uren*, to assault cases such as *Fontin v Katapodis* …
>
> …
>
> Because the types of case in which exemplary damages might be awarded are so varied, it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. Nevertheless, the phrase adopted by Knox CJ in *Whitfeld v De Lauret & Co Ltd* of "conscious wrongdoing in contumelious disregard of another's rights" describes at least the greater part of the relevant field.
>
> In considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged. (The reaction of the party who is wronged to high-handed or deliberate conduct may well be a reason for awarding aggravated damages in further compensation for the wrong done. But it is not ordinarily relevant to whether exemplary damages should be allowed.) The party wronged is entitled to whatever compensatory damages the law allows (including, if appropriate, aggravated damages). By hypothesis then, the party wronged will receive just compensation for the wrong that is suffered. If exemplary damages are awarded, they will be paid in addition to compensatory damages and, in that

19 *Gray v Motor Accident Commission* (1998) 196 CLR 1; [1998] HCA 70.

> sense, will be a windfall in the hands of the party who was wronged. Nevertheless, they are awarded at the suit of that party and, although awarded to punish the wrongdoer and deter others from like conduct, they are not exacted by the State or paid to it.[20]

[26] Although the question at issue in *Gray* was whether exemplary damages should be awarded in circumstances where the criminal law had already been brought to bear on the defendant and substantial punishment inflicted, the principles expressed in the foregoing passage are of general application. As that passage implicitly recognises, it is not necessary for a person who has been subjected to an actionable wrong to establish that the tortfeasor acted with malice before an award of exemplary damages may be made. Although conscious wrongdoing and contumelious disregard form the ground on which damages of that type are ordinarily awarded, in *Lamb v Cotogno* the High Court stated:

> [T]he absence of actual malice does not disentitle the plaintiff to exemplary damages. Whilst there can be no malice without intent, the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word.[21]

[27] In the later case of *State of New South Wales v Riley*, Hodgson JA stated to similar effect:

> In my opinion, as made clear in *Gray*, while "conscious wrongdoing 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

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20 *Gray v Motor Accident Commission* (supra) at [12], [14]-[15].

21 *Lamb v Cotogno* (1987) 164 CLR 1 at 13.

> 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.[22]

[28] In the present case, the assessing judge's reasoning for the decision to award exemplary damages to the respondents was expressed as follows:

> The awards to be made for general and aggravated damages will be appropriate for the amount of time the plaintiffs were subject to mistreatment constituting battery and its associated distress, physical and psychological. The conditions which gave rise to this unlawful use of force perpetrated on youths in a Detention Centre for whose safety and wellbeing the defendant was responsible for [*sic*] must never be allowed to happen again. I accept the difficulties the Youth Justice Officers experienced, however the defendant must take responsibility for putting them in that position or creating the conditions where they thought they had no option but to resort to unlawful unreasonable and excessive force. The mode of force used should not have been in the range of options available but it is the Northern Territory as the defendant who bears that responsibility. Young people in custody must be protected from exposure to such danger. This is fundamental. The Court must demonstrate its disapproval of the Northern Territory allowing this to take place, noting the Northern Territory accepts vicarious responsibility for the acts of the officers. The plaintiffs have made good the propositions set out at [11] above with respect to the claim for exemplary damages.
>
> In awarding exemplary damages I have regard to the fact the plaintiffs for the most part were bystanders. They were not the reason the CS gas was deployed. As youths under 18 and under the care of the defendants, the Northern Territory was responsible for their safety and welfare. Senior officers working in a youth custodial situation should never have been placed in a situation where they thought it was lawful to use a weapon when it was not.

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22 *State of New South Wales v Riley* (2003) 57 NSWLR 496 at [138].

The unlawfulness goes further than mere negligence. It is a contravention of an offence provision of the *Weapons Control Act*. The deployment of the CS gas was deliberate. Its purpose was to incapacitate Jack Roper but the plaintiffs were directly exposed to it. They were treated as though they were the troublemakers. The trouble caused by two of the plaintiffs was earlier than the deployment of the gas and not at the level of Jack Roper's conduct. At the time of the deployment the plaintiffs were in their cells. As above the excerpts from the footage give some insight into the callous way the plaintiffs were treated both during and after the exposure. The incident as a whole shows the plaintiffs were treated in a manner which recklessly disregarded their rights and interests.

While some acknowledgement of wrongdoing or an apology by the defendant may have lessened the need for a punitive approach to damages, after such a lengthy time since the critical incident it is not such a significant factor. I accept, as reminded by counsel for the defendant that the defendant participated in and helped facilitate the Royal Commission and Board of Inquiry into the Protection and Detention of Children and that is in its favour. Further, through observation of the work of the Court it is clear there have been some improvements in terms of programme availability in the Detention Centre and some legislative change. There has been implementation of a number of the recommendations of the Royal Commission and Board of Inquiry which took place after this incident, but I am principally having regard to the events of 2014. This must never be allowed to happen again.

On behalf of the plaintiffs, it is argued their Indigenous status is relevant. The Northern Territory disagrees. The fact the plaintiffs are Aboriginal is a factor. Unlawful actions by any arm of law enforcement, including Correctional Services, towards Aboriginal people adds to alienation and disengagement from the broader community for complex reasons which for many, but not all Aboriginal people, continue to resonate. It lessens trust between citizens and law enforcement authorities and lessens social cohesion in the broader community.[23]

23 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [96]-[99].

[29] There was no doubt that the officers in question considered the deployment of CS gas was lawful at the time, and that it was necessary in the circumstances which then presented. There was in their conduct no malice or conscious wrongdoing in contumelious disregard of the respondents' rights. The gravamen of the assessing judge's award of exemplary damages was that there had been an unlawful use of force, and although the officers in question were operating in very difficult (and, in fact, very dangerous) circumstances, the lawfulness of using CS gas had not been "seriously reviewed at an institutional level" and the appellant should never have allowed officers working in a youth custodial situation to have been placed in a situation where they thought it was lawful to use the CS gas when it was not. The case put by the respondents both before the primary judge and before the assessing judge was that the appellant's liability was founded solely on vicarious liability, but the award of exemplary damages was made on the basis that the appellant bore a primary and direct liability. For the reasons described below, this was not a case either pleaded by the respondents or which the appellant was required to meet.

[30] In addition to the question of pleadings, in this appellate review of the assessing judge's reasons and determination it must be borne in mind that the determination can only have been made on the basis of the evidence which was before the primary judge and consistently with the findings of fact made by the primary judge on that evidence to the

extent they remained undisturbed following appeal. Accordingly, in order to address the appellant's contention that exemplary damages should not have been awarded to the respondents, it is necessary to consider the pleadings of the respondents in the proceedings and the findings of fact made by the primary judge.

[31] The Statements of Claim filed on behalf of each respondent pleaded the claim for exemplary damages arising from the use of CS gas in similar form. Each respondent pleaded that the administration of CS gas was grossly excessive and high-handed; made in a confined space; unnecessary in the circumstances; disproportionate to any risk which presented; and unwarranted in the circumstances when dealing with juveniles. The case pleaded by the respondents focussed on the use of the CS gas in the circumstances that then existed, and not on any alleged inadequacy on the part of the appellant in training the staff of the Centre, or others, about the lawful availability of CS gas as a measure for dealing with detainee violence.

[32] Consistent with those pleadings, an examination of counsel for the respondents' opening address to the primary judge does not reveal any claim for either general, aggravated or exemplary damages based on an allegation that the appellant had failed to train its staff properly or otherwise to review the lawfulness of using CS gas at an institutional level. Similarly, the respondents' written outline of closing submissions focused on the lawfulness of the use of CS gas within the

Centre and whether it was reasonable and necessary to use CS gas in the circumstances that existed on 21 August 2014. The importance to the present appeal of the way in which the case was pleaded and run by the respondents at trial will become apparent.

[33] The primary judge made the following findings of fact regarding the events of the night of 21 August 2014 and, in particular, the decision to employ CS gas and its ultimate use:[24]

(a) On the evening of 21 August 2014, the BMU was occupied by six detainees. The first cell was vacant, Webster and O'Shea were in the second, Roper was in the third cell and Austral and Binsaris were in the fourth cell. The fifth cell housed another detainee who was not involved in the proceedings before the primary judge.

(b) At some time on 21 August 2014, Roper, Austral and Binsaris covered the CCTV cameras in their cells with toilet paper. One or more of them yelled out to other detainees to do the same. O'Shea and Webster did not follow their example. Later, when given their meals in the cell, Austral and Binsaris said they were not going to give the dinner plates back. The significance of this was that there was evidence that knives could be made from broken dinner plates.

24 *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324 at [59]-[107.

(c) One of the detainees said words to the effect of, “Fuck ‘em. Let’s just run amok.” All of the detainees except O’Shea and Webster started kicking the doors of their cells and yelling out things like, “Fuck you. You are fucking us around.” The detainees broke their cell lights and removed the metal brackets for use as improvised weapons. The respondents Austral and Binsaris smashed a hole about the size of a soccer ball in the metal mesh on their cell door. They used the metal bracket from their broken light to chip bits of render from the wall and throw them at staff entering the BMU.

(d) Just after 5 pm, Shift Supervisor Hansen telephoned Assistant General Manager (**AGM**) Sizeland and told him that the detainees in the BMU were misbehaving and throwing rocks or pieces of concrete at staff. AGM Sizeland instructed Shift Supervisor Hansen to closely monitor the situation and give the detainees time to calm down.

(e) Roper smashed a hole in the metal mesh on his cell door, put his hand through the hole and opened the door. This allowed him access to the exercise yard, which was a relatively narrow space outside the cells.

(f) Once outside his cell, Roper began yelling, running around and using the metal bracket from his cell light to smash various items. He smashed the window between the BMU and the admissions unit, climbed through it and smashed a computer in the admissions

unit. He then took a fire extinguisher and walkie-talkie from the admissions unit back into the BMU. He then broke the window in the locked door leading into the basketball court and the window between the BMU and the storeroom. In fact, he broke all of the windows to which he had access. He also used the fire extinguisher in an attempt to break the locks on the doors leading out of the BMU.

(g) At about 7:45 pm, AGM Sizeland received a further telephone call, this time from Superintendent Caldwell, who told him that the detainees in the BMU were becoming increasingly aggressive and violent towards Centre staff. AGM Sizeland then travelled to the Centre, stopping on the way to pick up two Youth Justice Officers who regularly worked in the BMU and had a good working relationship with the detainees in question, and who AGM Sizeland considered were best placed to negotiate with them.

(h) When AGM Sizeland and the two Youth Justice Officers arrived at the Centre, they were informed that Roper had escaped from his cell. AGM Sizeland attempted to look into the BMU but that attempt was abandoned when it became apparent that Roper's mental state and actions made it too dangerous. As soon as Roper saw AGM Sizeland, he said, "I'll fucken stab you, you white

cunt." AGM Sizeland formed the view that his presence was aggravating Roper and withdrew.

(i) The cameras in the BMU were either covered or partly covered, making it difficult for AGM Sizeland to assess from the outside what was happening in the BMU. From what AGM Sizeland could see, it appeared that some of the other detainees were also attempting to break out of their cells. AGM Sizeland could also see that there was a lot of glass on the floor near the entry door to the BMU which presented a hazard to both staff and detainees.

(j) The Youth Justice Officers who had accompanied AGM Sizeland to the Centre attempted at his direction to speak with Roper and calm him down, but with no success. Roper continued to yell abuse, throw objects around the BMU and hit doors with a fire extinguisher. One of the Youth Justice Officers asked Roper to allow him to go into the BMU to pick up the glass from the floor, but Roper responded by throwing things at the door, making entry by the Youth Justice Officer impossible.

(k) AGM Sizeland directed the Youth Justice Officers to each go to potential exit points from the BMU in order to contain Roper and prevent him from escaping from the BMU. That was to minimise Roper's access to objects that could be used as improvised weapons and to minimise the safety risk to Roper himself. At some point, Roper put some bedding over the broken glass in the

window between the BMU and the storeroom and tried to climb through. One of the Youth Justice Officers in the storeroom used what appeared to be a broom to push Roper back.

(l) Superintendent Caldwell notified Commissioner Middlebrook, who was the Commissioner of Corrections at that time, of the events that had taken place at the Centre. Commissioner Middlebrook left the meeting he was attending and went to the Centre. Before doing so, he made a telephone call to Grant Ballantine, the Acting General Manager of the Berrimah Correctional Centre (**Berrimah**), which was an adult prison, and asked him to mobilise members of the Immediate Action Team (**IAT**) and a dog handler with a general-purpose dog.

(m) Commissioner Middlebrook asked for the Corrections staff to be deployed because he was aware that the same five detainees had escaped from the Centre three weeks previously. Following their subsequent capture, the five detainees had made it clear to staff at the Centre that they considered the fence to the Centre presented no real barrier and that they would attempt to escape again if given opportunity. Commissioner Middlebrook's intention was to put the dog on the fence line to prevent any attempted escape.

(n) The IAT members from Berrimah arrived at the Centre at about 8:30 pm. They were equipped with masks, helmets, protective vests, shields and batons. Their equipment bags also contained

aerosol canisters of CS gas. At the direction of AGM Sizeland, members of the IAT attempted to remove broken glass from the floor in a corridor next to the BMU. Two IAT officers held their shields up to the broken windows to stop projectiles thrown by Roper from coming through. As the IAT officers were trying to remove the glass, Roper directed the fire extinguisher nozzle through the broken window and discharged the dry powder extinguisher at the IAT officers, impeding their vision and causing at least one of them some difficulty in breathing.

(o) When Commissioner Middlebrook arrived at the Centre he could hear the detainees in the maximum-security section of the Centre kicking and banging on the doors and yelling out. He formed the view that the incident with Roper was inciting a number of the other detainees who were housed in the maximum-security block. He was concerned that those detainees might escape from their cells as the Centre was built to domestic rather than prison standards. In addition, Commissioner Middlebrook was concerned about the prospect of a fire or other large-scale damage to the Centre. That concern was based upon the fact that some of the detainees involved had in a previous incident pulled the central air-conditioning cassettes from the ceiling and entered the roof space. There was no alternative housing for detainees if the Centre was rendered inoperable. For those reasons, Commissioner

Middlebrook formed the opinion that he had to bring the situation under control quickly.

(p) Commissioner Middlebrook was briefed on Roper's conduct and the events that had occurred. AGM Sizeland told Commissioner Middlebrook that some of the detainees in the other cells in the BMU had damaged light fittings and light switches. That gave rise to a concern that the electrical system would fail and staff would have to deal with the situation in the dark. At some point before the CS gas was deployed, the fire alarm went off and had to be deactivated.

(q) Commissioner Middlebrook was told that Youth Justice Officers had tried to negotiate with Roper but he responded by throwing objects at them. One of the Youth Justice Officers had received a "nasty cut" to his shoulder as a result. Commissioner Middlebrook then observed some of the Youth Justice Officers again trying to communicate with Roper, who swung a metal object and threw objects at the Youth Justice Officers in response. Commissioner Middlebrook also observed the Youth Justice Officers attempting to open the door to the BMU to clear debris, but being prevented from doing so on each occasion by Roper throwing more objects.

(r) Commissioner Middlebrook suggested taking the general-purpose dog into the BMU through the door from the basketball court to force Roper to retreat and give IAT members an opportunity to

enter the BMU. This plan could not be put into effect because Roper had damaged the lock on the door from the basketball court with the fire extinguisher and the door could no longer be opened. Commissioner Middlebrook formed the opinion that IAT members could not safely enter the BMU to subdue Roper unless he was first distracted. To attempt entry otherwise would present a risk of serious injury to both staff and Roper.

(s) When it became clear the dog could not be deployed, AGM Sizeland suggested that they consider the use of CS gas. Commissioner Middlebrook confirmed that the IAT members had CS gas in aerosol form which, in combination with their training, would enable deployment of only the amount of gas necessary. Commissioner Middlebrook concluded that talking to Roper was not going to cause him to desist from his conduct. Accordingly, Commissioner Middlebrook authorised the IAT members to deploy CS gas within the BMU.

(t) AGM Sizeland had been exposed to CS gas operationally and in training many times and he understood that it did not have long-term effects. He believed that the temporary discomfort to the BMU occupants caused by exposure to CS gas was preferable to the risk of serious and potentially permanent injury to Roper and/or staff if other action were taken. After the use of CS gas had been approved, AGM Sizeland made arrangements for the

occupants of the BMU to be decontaminated with water in an open area adjacent to the BMU. He also organised staff into teams to go into the BMU to remove detainees as soon as Roper had been subdued.

(u) AGM Sizeland called out to Roper, "Get on the ground and surrender or gas will be deployed." One of the IAT members read out a "proclamation" warning Roper that if he did not immediately stop his actions "chemical agents and physical control will be used." Roper did not comply. A member of the BMU then directed three short bursts of CS gas, each of less than one second in duration, into the BMU through a broken window. This did not result in Roper becoming compliant. After a short wait, a further burst of two seconds' duration was deployed into the BMU.

(v) After about one minute, Roper could still be heard yelling abuse and hitting the wall with objects. A further six "extremely short" bursts of gas were then directed into the BMU. Based on his training, the operator considered this to be an appropriate volume for the space into which it was being deployed. This finally caused Roper to surrender. As soon as Roper was subdued, the cells in the BMU were unlocked and the respondents were taken onto the adjacent basketball court and decontaminated. The respondents were removed from their cells as quickly as possible consistent with maintaining security.

[34] The appellant submitted to the primary judge that the use of CS gas had been lawful, in the sense that the use of CS gas was an option lawfully available to be utilised within the Centre to maintain order where circumstances warranted its use. There was never any dispute that the use of force against detainees was permitted in order to maintain discipline at a detention centre. There were, relevantly, two issues that arose in the trial relating to the use of CS gas on 21 August 2014. The first was whether the use of CS gas was a type of force permitted by law. The second was, if the use of CS gas was lawful in that sense, whether the use of CS gas was reasonably necessary in the circumstances that existed at the Centre on 21 August 2014. The second issue arose because at the material time s 153(1) of the *Youth Justice Act 2003* (NT) provided:

> **153 Discipline**
>
> (1) The superintendent of a detention centre must maintain discipline at the detention centre.
>
> (2) For subsection (1), the superintendent may use the force that is reasonably necessary in the circumstances.

[35] The respondents' understanding that these issues were discrete and to be addressed separately in the course of the trial is demonstrated by the written submissions filed on their behalf in the trial. The respondents submitted:

> 15. The law of battery protects against *unpermitted* contacts.
>
> 16. Accordingly, an act will not constitute a battery, as that term is used in the law of tort, if there is authority at law to do that

act. The onus of proof lies with the [appellant] to establish that its actions were authorised by law.

17. The NT contends that it had authority to use the CS gas, and moreover that its use was reasonable and necessary in the circumstances.

18. The question of authority is a threshold issue for the NT in order to make out its defence. If there was no authority to use the CS gas, its use constituted a battery. However, if the NT does satisfy the Court that it had general authority to use CS Gas, the next question arises – was the use in *these circumstances* permitted?

(Emphasis as per original)

[36] Consistent with that approach, the respondents' written submissions addressed separately the authority at law to use CS gas within the Centre and, on the assumption that such authority existed, whether the use of the CS gas on 21 August 2014 was reasonable and necessary.

[37] As already described, the primary judge held that the use of CS gas was use of a type of force permitted by law. That decision was upheld on appeal by this Court. On appeal to the High Court, four of the five members of the Court held that although the use of CS gas was a type of force that was permitted or authorised in an adult prison, it was not permitted or authorised within the Centre. The decision of the High Court conclusively determined the first issue which was before the primary judge, meaning that the use of CS gas constituted an actionable wrong in the form of battery committed against the respondents for which the appellant was vicariously liable. As such, the respondents were entitled to compensatory damages. The mere fact

that the use of CS gas was unlawful, however, did not justify an award of exemplary damages. As the plurality of the High Court said in the passage from *Gray* which is extracted above, something more must be demonstrated.

[38] The decision of the majority of the High Court in the present claims was based upon the proper interpretation of provisions of the *Weapons Control Act*, the *Prisons (Correctional Services) Act* (NT) (subsequently repealed) and the *Youth Justice Act*. It is unnecessary to set out the reasoning of the majority of the High Court for these purposes. It is sufficient to observe that it cannot be suggested that the interpretation of the relevant legislation which was adopted by the primary judge, and subsequently by the Court of Appeal, in coming to the albeit erroneous conclusion that the use of CS gas was use of force of a type permitted by law was an outlandish or patently untenable interpretation of the relevant legislation. The primary judge, three judges of the Court of Appeal and one Justice of the High Court all interpreted the relevant legislation as permitting the use of CS gas.

[39] It was suggested to Commissioner Middlebrook in cross-examination at trial that he knew as at 21 August 2014 that use of CS gas was only lawful in adult prisons, but he denied that suggestion. There was no evidence casting doubt upon that denial. Indeed, in the respondents' written submissions provided to the primary judge concerning their claim for exemplary damages, the matters which the respondents

submitted were relevant to the primary judge making a "substantial" award of exemplary damages in their favour did not include any suggestion that Commissioner Middlebrook, or any other person involved in the decision to use CS gas on 21 August 2014, was knowingly acting contrary to law. It may also be noted that there was no suggestion in the respondents' submissions at trial that any part of their claim for exemplary damages was based upon an allegation of inadequate training by the appellant of its employees regarding when the use of CS gas would be unlawful or of some institutional failure to conduct a review of the lawfulness of using CS gas in youth detention centres. The position adopted by the respondents at trial in that respect carried through to the assessment of damages following remittal. The respondent's submissions before the assessing judge did not address any issue of systemic failure by the appellant as a basis for the award of exemplary damages.

[40] Turning then to the second issue regarding the use of CS gas, which was the reasonable necessity of its use, the primary judge found that it was both reasonable and necessary in the circumstances that existed in the Centre on 21 August 2014 for the appellant to deploy CS gas. Of course, the primary judge addressed this issue in the light of the threshold determination that it was a type of force that could lawfully be used in the Centre. As already seen, the determination of that second issue was necessitated by the qualifying requirement of reasonable

necessity on any use of force in a detention centre imposed by s 153(2) of the *Youth Justice Act*.

[41] In addressing that issue, the primary judge observed that there was no evidence that CS gas had a different or more harmful effect upon young people of the ages of the respondents than on adults. As such, the fact that the respondents were minors did not, of itself, render the use of CS gas unreasonable. The primary judge considered and rejected the respondents' submissions that alternative responses other than the use of CS gas remained and were available to the appellant in dealing with the situation that existed at the Centre on 21 August 2014. In determining that the respondents' claims based on the use of CS gas failed, the primary judge said:

> I am satisfied that at the time the CS gas was discharged into the BMU at Don Dale on 21 August 2014:
>
> (a) an emergency situation existed;
>
> (b) the prison officers who attended, including PO Flavell who discharged the gas, were responding to a request for assistance from the superintendent of the corrections centre within the meaning of *Youth Justice Act*, s 157(2);
>
> (c) those prison officers, including PO Flavell, were prescribed persons within the meaning of the *Weapons Control Act* and were acting within the course of their duties as prison officers;
>
> (d) Commissioner Middlebrook authorised the use of the CS gas;
>
> (e) the use of the CS gas was reasonable and necessary, there being no other option reasonably available involving less force and less risk to the safety of detainees and staff. [25]

25 *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324 at [166].

[42] On appeal to this Court from the decision of the primary judge, the appellants (the respondents in the present proceedings) stated in their written submissions:

> These proceedings involved claims of battery by four young people detained at Don Dale in 2014. Most of the claims, but not all, arose from the events at Don Dale on 21 August 2014 during which a decision was made to deploy CS gas (tear gas) into the Behavioural Management Unit (BMU). *Much of the trial concerned whether the use of the CS gas was authorised by law, and if so, whether its use was reasonable or necessary. By their appeals, the appellants do not challenge the primary judge's conclusion on the latter issue*. Rather, the appeals (by grounds 1-4) concern whether the use of CS gas was authorised.
>
> (Emphasis added)

[43] It is clear that in the appeal from the decision of the primary judge to this Court, the respondents accepted that if the use of CS gas was use of a type of force authorised by law to be employed in the Centre, its use in the circumstances that existed on 21 August 2014 was reasonably necessary. In other words, they accepted that the use in those circumstances did not constitute the use of a level of force that was not reasonably necessary. Unsurprisingly therefore, the appeal from this Court to the High Court was confined to the issue of whether the use of CS gas in the Centre constituted the use of a type of force authorised by law. To the limited extent that the issue of the reasonable necessity to deploy CS gas was addressed by the High Court, Gageler J (as his Honour then was), in a judgment in which he dissented on the

issue of the lawfulness of the use of CS gas in the Centre, said (footnotes omitted):

> The Northern Territory, in my opinion, is also correct in its contention that the findings of the primary judge establish that the deployment of the CS gas was reasonably necessary to restrain conduct by Jake Roper which constituted a breach of the peace. In her careful and comprehensive reasons for judgment, her Honour found that the CS gas "was not used *on* the detainees in their cells" but "for the purpose of temporarily incapacitating Jake Roper so that he could be taken back in the safe custody … in a way that avoided the risk of serious … injury to Jake Roper and/or the prison officers". She agreed with the contemporaneously formed opinions of the Director and of the prison officers who comprised the Immediate Action Team that "use of the CS gas was the least hazardous option available, constituted the least degree of force which could be used in the circumstances, and carried the least risk of serious injury to Jake Roper and to staff". The effect of the deployment of the CS gas on the other detainees was not ignored in that calculus but was, rather, reasonably assessed by the Director and the members of the Immediate Action Team to be outweighed by the risks of serious injury to Jake Roper and to staff. "Despite the fact that the inevitable consequence of using the gas was that detainees who were restrained in their cells would also be exposed to the gas", her Honour found, "it was both reasonable and necessary in the circumstances to use the gas to temporarily incapacitate Jake Roper and so bring the crisis to a close".[26]

[44] The importance of the finding by the primary judge that the use of the CS gas was not a use of force in excess of that called for by the situation is clear. That finding was made while accepting that the respondents (and Roper) were minors. It follows that, in the present case, the "something more" which the plurality in *Gray* said needs to

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26 *Binsaris & Ors v Northern Territory of Australia* (2020) 270 CLR 549 at [31]. Justice Gageler ultimately found that although the deployment of CS gas was both authorised under statute and reasonably necessary to restrain a breach of the peace by Jake Roper, the attendant common law immunity did not provide a defence to a claim in battery by the other detainees who were exposed to the CS gas as bystanders who suffered collateral harm by reason of the necessitous use of force.

be found in order to justify an award of exemplary damages cannot be found in any submission that the deployment of CS gas was unnecessary or excessive in order to meet the threat presented by the conduct of Roper.

[45] In the present appeal, the respondents submitted that the findings made by the primary judge on this issue did not bind the assessing judge for the purpose of awarding exemplary damages. They submitted that the primary judge had never made the findings for the purpose of awarding exemplary damages for the deployment of the CS gas. That is undoubtedly true, for the simple reason that the primary judge held that the deployment of CS gas was lawful; but this submission is not to the point. Even if the use of CS gas within the Centre had been permitted by statute at the time, in order to avoid liability to the respondents in tort for battery for compensatory, aggravated and/or exemplary damages, the appellant had to prove that its actions fell within the limitations fixed by s 153(2) of the *Youth Justice Act*; that is, that they were reasonably necessary in the circumstances.

[46] The finding made by the primary judge that deployment of CS gas was reasonable and necessary was not linked to the finding that the use of CS gas was not prohibited by statute. It was a separate finding relevant to another issue, being whether the use of that level of force was unreasonable or unnecessary. It is not correct to say, as the respondents submitted, that the primary judge assessed the reasonableness of the

appellant's conduct in deploying CS gas through the lens of lawfulness. The primary judge considered each issue separately and found, albeit erroneously, that the use of CS gas in the Centre was not prohibited by statute. The primary judge then quite separately went on to find that the level of force used was both necessary and not unreasonable in the circumstances. This second finding was conceded by the respondents in their appeal to this Court from the decision of the primary judge and that finding has not been successfully challenged or otherwise set aside.

[47] In an abstract sense it may be correct to say that the use of CS gas could never have been reasonably necessary as its use was prohibited by statute, but such an approach conflates the lawfulness of the type of force used and the lawfulness of the level of force used. The unlawfulness of the use of the CS gas entitles the respondents to compensatory damages but does not, of itself, justify an award of exemplary damages. That is because it is possible to say in all cases where a battery has been committed that the plaintiff should not have been exposed to the wrongful act. That is what entitles the plaintiff to compensatory damages, but it does not necessarily, and will rarely, found an award of exemplary damages.

[48] The orders made by the High Court in upholding the appeal by each respondent were that the order of the primary judge entering judgment for the present appellant on the claim for battery arising out of the use

of CS gas on 21 August 2014 be set aside, judgment for the respondent be substituted; and that the matter be remitted to another judge of the Supreme Court "for assessment of damages". As the terms of those orders demonstrate, this was not a case in which allowing the appeals resulted in the matter being remitted for a new trial. The remittal in the present case was limited to an assessment of damages on the respondents' claims regarding the use of CS gas. That assessment could only be a continuation of the proceedings conducted before the primary judge. The relevant issues and principles which govern the scope of a court's task on remittal were set out in some detail by Jackson J in *Harvard Nominees Pty Ltd v Tiller (No 4)*, in which his Honour stated:

> The obvious and important qualification is that the remitter is to be conducted in light of the decision of the Full Court in which the remitter is ordered. That has at least three implications. The first is that the court on remitter must act consistently with the Appeal Judgment. That includes not only the ultimate orders made, which may give express direction to the court on remitter, but also the reasons for decision. The authorities for this basal proposition tend to be in the context of s 37 of the *Judiciary Act 1903* (Cth), which imposes on courts to which the High Court remits a cause an express obligation to execute the judgment of the High Court in the same manner as if it were their own judgment: see the authorities collected by Pritchard J in *Investments (WA) Pty Ltd v City of Swan* [2012] WASC 278 at [35]. The power to remit under s 28(1)(c) of the *Federal Court Act* is not accompanied by any similar express requirement, although the different power under s 28(1)(g) is: see s 28(2). But none of the parties here suggested that this made any difference; where an appellate court, higher in the hierarchy that a primary court, determines a matter in a certain way, it must follow that the primary court cannot depart from that determination on remitter.
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> The second implication is that where the appellate court has disturbed findings of the primary court, and therefore potentially

reopened issues that the primary court had resolved, it will be open to the primary court to determine those issues afresh, once again provided that it does so in accordance with the judgment of the appellate court. This will of course include issues that are expressly within the scope of the order of remittal. No application to reopen for the purpose of determining those issues will be necessary. In relation to those issues, the court on remitter may reach a conclusion different to the one it reached the first time. It may of course be required to do so because of the findings of the appellate court.

The third implication is in part a corollary of the second, and arises from the character of the remitter hearing as a continuation of the previous trial. It is that the primary court, on remitter, cannot go outside the scope of what is remitted, or reconsider any of its previous findings that have not been disturbed by the appellate court, unless it determines in accordance with ordinary principles that it is in the interests of the administration of justice to give leave to reopen.

Once again, the authority for the confining effect of the scope of the remitter is mostly based on s 37 of the *Judiciary Act*, in the context of High Court appeals: see *Carroll* at [27]. But there is no reason to think that remitters under s 28(1)(c) of the Federal Court Act are any different. It is elementary that if the Full Court has remitted the matter to the primary court to determine specified matters, it is those matters and those matters alone that the primary court has authority to determine. And it follows from the fact that the remitter is a continuation of the previous trial that, subject to the effect of the appellate court's judgment, and to any application to reopen in the interests of justice, the court will not depart from the findings it has already made.

Consistent with this, in *Re The Spanish Club Ltd* [2015] NSWSC 661 at [53]-[54] (***Spanish Club 1***), Black J reached the following conclusions:

> The effect of the authorities seems to me to be that, unless an application to reopen my judgment is successful, when made more than two years after that judgment was given and after an appeal from it has been determined, it is not open to me, having reached factual and legal findings in a final judgment in the proceeding, to the extent those findings have not been upheld on appeal, now to reach different or contrary factual and legal findings as to the same issues in the same

> proceeding. Still less as it is open to me, as a trial judge, to reach findings contrary to those which the Court of Appeal has reached in the same matter, albeit the matter had a different proceeding number in the Court of Appeal. Mr Walker accepted as much in oral submissions.
>
> Mr Walker fairly accepted in oral submissions that, subject to appeal, the determination of a matter in a proceeding is binding for the purposes of that proceeding. ...
>
> It is true that his Honour reached these conclusions after considering arguments based on *res judicata* and issue estoppel, but it seems to me, with respect, that the same conclusion can be reached by the different route I have outlined.[27]

[49] We respectfully adopt what was said by Jackson J in that passage as a correct statement of the governing principles when a matter is remitted to a trial court following an appeal. The assessing judge was aware that issues of fact determined by the primary judge had not been subsequently challenged and considered how the decision of the High Court on appeal and the subsequent remittal of the matter to the Supreme Court constituted by a different judge affected the exercise of fact finding on the assessment of damages. In that regard, the assessing judge said (footnotes omitted):

> Although the facts found by the primary Judge are not challenged and are relied on here, there are additional considerations relevant to fact finding in the sense that there is now a significant question about how the unlawfulness of the use of the CS gas should affect the assessment of damages. To that extent, some of the relevant issues which fall for consideration here, were not part of the reasoning of the primary Judge because they were not required to be.

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27 *Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105 at [45]-[49]. The decision of Jackson J on these particular issues was upheld on appeal in *Harvard Nominees Pty Ltd v Nicolleti* [2022] FCAFC 179.

Many of the claims before the primary Judge were not related to the matter now under consideration. As pointed out by counsel for the defendant, some of the other claims are closely related to the deployment of the CS gas. An example is the claim at [23] of Leroy O'Shea's Second Further Amended Statement of Claim which includes a sequence of allegations 'marshalling guards in riot uniforms and equipment, and bringing in attack dogs as well as administering CS gas intentionally or recklessly'. Those parts of the claim which failed before the primary Judge, save for the use of CS gas remain undisturbed. So much is clear, however it is appreciated caution is required. The defendant also pointed out the findings about why the CS gas was used and that those findings remain intact including why it was regarded the safest option available. While that may be so, it seems on remittal that the option of the CS gas, how or why it was considered and then used by the officers informs the findings. While respecting the primary Judge's findings, the assessment here must be undertaken on the understanding that the 'option' of the use of CS gas was unlawful. The findings of the primary Judge must now be understood in that context.

That the High Court found the use of CS Gas to be unlawful in a youth detention context must inform the award of damages in a substantial way. There would be no point in remitting the matter for assessment of damages before another Judge if this was simply a technical matter. This was not an adult facility. This was a facility to detain children and youths, albeit in an institution which on the evidence before the primary Judge was "really beyond its life fit for purpose". That being the case, notwithstanding some of the plaintiffs were difficult and hard to control youths, as might be expected in a youth detention centre, the deployment of an unlawful weapon which affected other youths who were in their cells must have some impact on the award of damages.

It is the case as the respondent submitted, the trial Court and the Court of Appeal ruled that the use of the CS gas was not in breach of the *Weapons Control Act*. While in those circumstances lack of knowledge of the unlawfulness of the use of the CS gas mitigates the position of the officers involved to some degree the same benevolence should not be extended to the Northern Territory. A review of the material before the primary Judge does not indicate that the lawfulness or otherwise of the CS gas had ever been seriously reviewed at an institutional level or that the individuals concerned had turned their mind to the issue. This includes senior

> officers. There was no indication that advice about the lawfulness or otherwise of such a weapon was ever sought by any relevant Department, the Detention Centre itself or any individual at a time before the occurrence of any critical event such as the one which developed here. There is no evidence that the Youth Justice Officers, including senior officers knew they had positive lawful authority to use the CS gas in a youth detention setting.
>
> It was pointed out in submissions that neither Mr Sizeland, nor Mr Middlebrook, according to their evidence, turned their minds to the question of lawfulness. Mr Sizeland recommended to Mr Middlebrook that the CS gas be used but that "The training did not deal with the use of CS gas on young people in youth detention". He was not aware that the CS gas fogger was a prohibited weapon or that resources were available with reference to use of CS gas in youth detention centres. While Mr Sizeland denied that he knew it was not authorised, there was no evidence he or Mr Middlebrook turned their mind to the question of the lawfulness of the use of the CS gas fogger. Needless to say, senior officers should know, or should find out whether the use of particular weapons are lawful or not in the setting concerned, in particular of a youth detention centre.[28]

[50] It is necessary for these purposes to address a number of the statements made by the assessing judge in the above extract. First, it is undoubtedly correct that the findings of the primary judge regarding the reason for the deployment of the CS gas remained unaffected by the appeals from the primary judge to this Court and then from this Court to the High Court. It is difficult to know what the assessing judge meant in saying that the finding of the High Court that use of CS gas was not permitted within the Centre "must inform the award of damages in a substantial way." If the assessing judge intended to say that the ruling of the High Court meant that the respondents were

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28 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [74]-[78].

entitled to damages according to law for exposure to the CS gas, then there is nothing objectionable or remarkable about that statement. If, however, the assessing judge meant to convey that the High Court's ruling on the issue on appeal, and subsequent remittal of the proceedings to the Supreme Court, was a relevant circumstance in determining whether exemplary damages should be awarded, and any assessment of the quantum of those damages, then we must respectfully disagree. The *ratio* of the High Court's decision was that the use of the CS fogger within the Centre was not authorised by any exception or exemption found in the *Weapons Control Act*, and as such its use on 21 August 2014 was unlawful. The ruling of the High Court said nothing which was relevant to determining whether circumstances existed to justify an award of exemplary damages.

[51] It was also incorrect, with respect, to state that the respondents had submitted that "neither Mr Sizeland, nor Mr Middlebrook, according to their evidence, turned their minds to the question of lawfulness" of the use of CS gas within the Centre. What the respondents actually submitted to the assessing judge in relation to this issue was:

(a) "[W]e say …that it was clear that CS gas was not authorised to use in a detention centre. But we'll also say that to the extent there was any uncertainty about that on the part of, for example, Commissioner Middlebrook, that situation should never have been allowed to occur. It should never have been possible that senior people did not know what their own laws said about the use of CS gas."

(b) "Now we say that there should never have been any room for that kind of misapprehension (as to the lawfulness of the use of CS gas within the Centre). It should not have been understood to be an option open to them to use CS gas…But to the extent there was uncertainty we say that the policies and guidelines with respect to youth detention should have made it clear, you shouldn't have room for doubt about matters of this kind…"

[52] We have been unable to identify any submission by the respondents to either the primary judge or to the assessing judge to the effect that either Commissioner Middlebrook or Mr Sizeland gave evidence that he had failed to turn his mind to the lawfulness of the use of CS gas within the Centre. There was only a hypothesis that no thought had been given to the issue of lawfulness. Accordingly, the assessing judge's description of the respondents' submission on that issue was incorrect.

[53] It is also instructive in this context to examine what evidence there was in relation to the states of mind of those involved in approving the use of CS gas on 21 August 2014. The primary judge did not make any finding on the issue of the belief of those involved in the use of the CS gas as to the lawfulness of their actions. It was unnecessary to do so because the primary judge found that its use was lawful. The issue did not arise on the hearing of the appeal from the primary judge to this Court or on the appeal from this Court to the High Court.

[54] The evidence of AGM Sizeland at trial concerning his understanding of the position regarding the use of CS gas within the Centre on 21 August 2014 was as follows:

> MS FOLEY: In August 2014 when you were deputy superintendent were you aware that an article used to deploy CS Gas was a prohibited weapon for the purposes of the *Weapons Control Act*? --- No I did not.
>
> MS FOLEY: You say that even though in 2013 you were the security chief of the [Darwin Correctional Centre]? --- Yes.
>
> MS FOLEY: And that you were the first IAT commander and had a role in emergency response? --- Yes.
>
> MS FOLEY: So you weren't aware that in August 2014 prison officers had an exemption under the *Weapons Control Act* to be able to carry prohibited weapons? --- I knew we had exemptions. I wasn't clearly present with the Act you're referring to.
>
> …
>
> MS FOLEY: I suggest to you that in August 2014 you knew that CS Gas was not authorised for use in a youth detention Centre at all under any circumstances? --- No that's not correct.[29]

[55] It is tolerably clear from that evidence that AGM Sizeland believed there were exemptions in place which permitted the use of CS gas in a youth detention centre. The fact that he may not have been aware of the actual provisions of the *Weapons Control Act* is not to the point in the present case. If a reading of the provisions of the *Weapons Control Act* would have made it abundantly clear to a person in the position of AGM Sizeland that the use of CS gas was unlawful in the Centre under any circumstances, then an unfamiliarity with the terms of the governing legislation may have been relevant. However, as has been

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29 Appeal Book (**AB**) 521-523.

demonstrated by the divergence of judicial opinion at various stages of these proceedings, the issue was not so clear.

[56] The evidence of Commissioner Middlebrook at trial on this issue was as follows:

> MS FOLEY: You were aware in August 2014 weren't you that an article used to deploy CS gas was a prohibited weapon for the purposes of the *Weapons Control Act* weren't you? --- Not for correctional offices in a correctional setting.
>
> MS FOLEY: I'm not asking about the exemptions. I am asking as a general proposition were you aware that an article used to deploy CS gas was a prohibited weapon?
>
> MR McLURE: I object.
>
> THE WITNESS: It would be to use it outside a correctional centre.
>
> MS FOLEY: So you're aware, from what you're saying, there was an exemption under the *Weapons Control Act* for prison officers in correctional centres? --- Yes. Yeah, correctional centre and the juvenile detention centre is a correctional centre.
>
> …
>
> MS FOLEY: You were aware though that Youth Justice Officers didn't have such an exemption? --- The youth officers didn't use the chemical. The prison officers used the chemical.[30]

[57] Commissioner Middlebrook subsequently denied that he knew on 21 August 2014 that the use of CS gas was only authorised in adult custodial centres.

[58] A fair reading of the evidence of AGM Sizeland and Commissioner Middlebrook leads to the conclusion that to the extent they did not turn their minds to the use of CS gas in the Centre on 21 August 2014 this

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30 AB 594.

was because they already had a belief that its use was authorised. This is very different to a reckless state of mind constituted by an understanding that it may not be authorised but using it anyway, or an attitude of not caring one way or the other whether its use was authorised.

[59] The basis for and significance of the assessing judge's finding that AGM Sizeland was unaware "that resources were available with reference to use of CS gas in youth detention centres"[31] is unclear, particularly in the light of the finding by the primary judge that there was no evidence that CS gas had a different or more harmful effect upon young people of the ages of the respondents than on adults. That finding by the primary judge also disposes of any submission that the fact that the respondents were youths by itself justifies an award of exemplary damages. While it is no doubt correct to say that senior officers working in a youth detention centre should know what types of force may, and may not, be used in that setting, that is not to say that an honest mistake on their part will necessarily ground an award of exemplary damages.

[60] In the light of the findings made by the primary judge that the level of force used was not disproportionate to the threat presented by the conduct of Roper, it was not open to the assessing judge to find that the

31 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [78].

actions of the appellant towards Roper constituted "unreasonable or excessive force" other than in the general sense that the use of CS gas within the Centre was prohibited by statute. An assessment of the relevant evidence leads to the conclusion that those responsible for the decision to deploy CS gas on 21 August 2014 honestly, and not unreasonably, believed that its use in the Centre by Corrections Officers was lawful.

[61] The relevant evidence, in conjunction with the primary judge's finding that there was no other option reasonably available involving less force and less risk to the safety of detainees and staff,[32] also leads to the conclusion that those responsible for the decision also held the reasonable belief that it was necessary to bring the situation with Roper in the BMU to a quick conclusion and that the use of CS gas was the safest method of dealing with the situation. The regrettable fact that the safest method of dealing with the situation was contrary to the provisions of the *Weapons Control Act* did not bespeak malice or conscious wrongdoing in contumelious disregard of the respondents' rights. In fact, conduct which, although unlawful, is done reasonably and in good faith is the "antithesis of conduct which should be punished by an award of exemplary damages".[33]

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32 See the findings in *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324 at [154]-[165].

33 *Victoria v Horvath* (2002) 6 VR 326 at [60].

[62] The respondents submitted that it would be unrealistic to consider the appropriateness of the award for exemplary damages confined only to the deployment of CS gas, and that the episode must be viewed "holistically", including post-exposure conduct such as handcuffing the respondents and the method of decontamination employed. Although it can be accepted that other conduct may be taken into account in awarding exemplary damages, an award of that type can only be made to punish the tortious conduct. The decision in *Lamb v Cotogno* does not stand for any broader proposition. Although the award of exemplary damages in that matter took into account that the defendant had left the plaintiff by the roadside after the tortious act of causing injury by the use of a motor vehicle, that act formed part of the compensable wrong. Having caused the plaintiff's injuries through a tortious act, the defendant was under a duty to take reasonable steps to alleviate the effect of his wrongdoing. The defendant's cruel and reckless disregard for the welfare of the plaintiff, and the indifference to his plight, meant that the tort was committed in circumstances amounting to insult to the plaintiff.[34]

[63] Some care must be taken in accepting the respondents' submission that the conduct properly taken into consideration in assessing whether exemplary damages should be awarded is not confined to conduct surrounding the commission of the tort. That submission was made

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34 *Lamb v Cotogno* (1987) 164 CLR 1 at 13.

with reference to the decision of the New South Wales Court of Appeal in *Cheng v Farjudi*.[35] The relevant passage in that decision referred as authority to the earlier decision in *Channel Seven Sydney Pty Ltd v Mahommed*. The uncontroversial principle expressed in that case is that in defamation proceedings a claim for exemplary damages may be made with reference to the defendant's subsequent conduct and statements, including in relation to the issue of malice.[36]

[64] Although the consideration of conduct taking place following the commission of the tort is not restricted to defamation cases, the conduct in question must be directly related to the effect of the tortious conduct, rather than to some different species of wrong. In the matter of *White & Ors v South Australia*, the police officers who committed the torts of assault, wrongful arrest and false imprisonment knew the conditions in which the plaintiffs were imprisoned were degrading and had thereby engaged in conscious wrongdoing in contumelious disregard of the plaintiff's rights. The State was vicariously liable for that conduct. Subsequent statements by the Deputy Premier and Police Minister had failed to acknowledge the manner in which the police officers had dealt with the plaintiffs, and none of the police officers had been held accountable despite adverse findings by the Police

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35 *Cheng v Farjudi* (2016) 93 NSWLR 95; [2016] NSWCA 316 at [55]-[56].

36 *Channel Seven Sydney Pty Ltd v Mahommed* [2010] NSWCA 335; (2010) 278 ALR 232 at [216]. The reasons in that case also address the principle that compensatory damages may be awarded to provide solace for injury and hurt caused or occurring after publication, but that has nothing to say about exemplary damages.

Complaints Authority.[37] To the extent the award of exemplary damages was made on that basis, it reflected the duty on the State to take reasonable steps to alleviate the effect of the police wrongdoing for which it was vicariously liable. Neither the reasons nor the result in that case advance the proposition that exemplary damages may be awarded for a purported tortious liability which has not been pleaded and established at trial.[38] In making the assessment, the primary focus must be on the conduct for which the defendant is held liable and the state of mind of the tortfeasor.[39]

[65] Accepting that other conduct may be taken into account for the limited purposes described above in awarding exemplary damages, the difficulty for the respondents is that much of this submission runs contrary to findings of fact made by the primary judge which have not been challenged on appeal or overturned. In addition, a fair assessment of the evidence does not support the proposition that unnecessary force

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37 *White & Ors v South Australia* (2010) 106 SASR 521 at [461]-[470]. It is a matter of some interest in the current context that one of the plaintiffs was an 11-year-old Aboriginal child who was indirectly sprayed with capsicum spray by police during the course of their unlawful arrest of the adult protesters. Although the child received compensatory damages, no award of exemplary damages was made in relation to that battery.

38 The decision in *Ali v Hartley Poynton Limited* [2002] VSC 113 at [612]-[620] also does not advance that proposition. In that matter the defendant stockbroking firm was found to be vicariously liable for the negligence and false and misleading conduct of its brokers. The basis for the award of exemplary damages was that the conduct of the brokers constituted a conscious and contumelious disregard for the rights of the plaintiff by ignoring its public promises and ignoring the plaintiff's rights and interests. It was a matter of context only that this disregard occurred in an environment in which misconduct of that nature was facilitated, and that other clients were treated in a similar fashion as a result.

39 See *New South Wales v Ibbett* [2005] NSWCA 445; (2005) 65 NSWLR 168 at [233].

was employed by the officers of the appellant or that the respondents were subjected to humiliating conduct after their exposure to the gas.

[66] In order to understand why handcuffing the respondents was reasonable in the circumstances, it is necessary to briefly consider the backgrounds of the respondents. The primary judge provided a brief background for each of the respondents and Roper, referring to the respondents by their initials, in the following terms (footnotes omitted):

> **EA**
>
> On 21 August 2014, EA had just turned 16. He spent his 16th birthday in a cell in the Behaviour Management Unit ("BMU") at Don Dale in which he was locked for 23 hours a day. He shared that cell with another of the plaintiffs, JB. (All of the plaintiffs were held in the BMU in the same conditions.)
>
> Video footage of EA taken at the Berrimah Correctional Centre at Berrimah ("Berrimah") on 25 August 2014 shows that in August 2014 EA was about 6 feet tall, solidly built (not fat) and well-muscled.
>
> By this date EA had an extensive criminal history starting from when he was 11 years old. He had been found guilty of one charge of assaulting a female and one charge of property damage. He had also been found guilty of numerous offences of dishonesty: four charges of unlawful use of a motor vehicle, two charges of unlawful possession of property, six charges of trespass, seven charges of aggravated unlawful entry, and 14 charges of stealing. Up to that time he had also been dealt with five times for breaches of bail and four times for failure to comply with Youth Court orders. In addition, before 21 August 2014 he had committed one further offence of property damage, one of being armed with an offensive weapon, two offences of escaping from lawful custody/detention, four trespasses, five more aggravated unlawful entries, six more thefts, three offences of unlawful use of a motor vehicle and two of receiving stolen property. However, he was dealt with for those matters after 21 August. The offences of being

armed with an offensive weapon, escape from custody, trespass on enclosed premises, escape from lawful detention, stealing and aggravated unlawful entry were all committed during an escape from Don Dale on 2 August 2014 with the other plaintiffs or while he was at large following that escape.

EA's behaviour during his detention in Don Dale can only be regarded as extremely problematical. In the period of approximately six months before the incident on 21 August 2014, he had committed five assaults against staff or other detainees (pushing, punching, kicking/stomping on someone's head, throwing a chair and a wheelie bin, in two separate incidents, in each of which the thrown object hit the victim); one act of property damage (smashing up lights) and six incidents in which he threatened to assault staff or other detainees (including threats to "smash" others, kick their heads in or hurt them). Three of the threats were accompanied by actual violence, others by aggressive posturing. He was also involved in one escape attempt and one successful escape along with the other plaintiffs and Jake Roper.

JB

JB too was a fit looking, well-built young man. On 21 August 2014, he was 15 years old and by that time he too had a lengthy criminal history. He had been found guilty of recklessly endangering serious harm, possessing or carrying a controlled weapon, and 10 charges of unlawful damage to property, as well as disorderly behaviour, resisting police and possession of cannabis. He too had been found guilty of numerous offences of dishonesty: two charges of receiving or unlawfully possessing property, seven charges of unlawful use of a motor vehicle, 17 charges of aggravated unlawful entry (and three of trespass) and 17 charges of stealing; as well as nine charges of property damage, eight breaches of bail and six failures to comply with Youth Court orders. Importantly for present purposes, by this time he had also been found guilty on two occasions of escaping from lawful custody or detention. In addition, before 21 August 2014 he had committed further offences of unlawful use of a motor vehicle, trespass, being armed with an offensive weapon, a further offence of escaping from lawful custody and a further offence of escaping from lawful detention. However, he was dealt with for these offences after 21 August 2014. The offences of escaping from lawful detention, trespass and being armed with an offensive weapon were committed during the escape on 2 August, or while he was at large following that escape.

While in detention at Don Dale before 21 August 2014, JB was involved in a series of planned, attempted, and actual escapes.

(a) On 24 March 2013, JB and 10 others broke out onto the roof of the facility in an attempt to escape, and during the attempt they caused damage to the facility.

(b) On 8 August 2013, another detainee reported that JB and others were planning an escape. Four days later, on 12 August 2013, JB got out onto the roof again in another attempt to escape and again property was damaged in the attempt.

(c) Police reported to Don Dale that while JB and the others were in police custody following the attempt on 12 August 2013, there had been a scuffle in the cells with police officers and JB and the others were overheard making plans to again escape from custody.

(d) On 17 February 2014, when he was appearing in the Court of Summary Jurisdiction ("CSJ"), JB jumped over the screen in the dock and ran out of the courtroom and then out onto the street.

(e) On 13 March 2014 a Youth Justice Officer ("YJO") overheard JB and another detainee discussing escaping by attacking a staff member and taking her keys.

(f) On 30 May 2014 JB damaged the door of an escort vehicle in what was construed as an escape attempt.

(g) On 2 August 2014, all of the plaintiffs (JB, EA, LO and KW) along with Jake Roper, successfully escaped from Don Dale.

LO

On 21 August 2014, LO was 17½. Up until 2 August 2014, he had no history of violent offending but had been found guilty of numerous offences of dishonesty: 11 charges of stealing, six of aggravated unlawful entry, two of receiving stolen property, three of property damage, one of trespass and one of unlawful use of a motor vehicle. He also had six breaches of bail, two breaches of Youth Court Orders and one breach of a suspended sentence. In addition he had committed a number of offences – breach of bail, escape from lawful custody, being armed with an offensive weapon, trespass and unlawful use of a motor vehicle - for which he was dealt with after 21 August. All of these, except the breach of bail, arose out of the 2 August escape and its aftermath.

Before the escape which led to the detainees being placed in the BMU, LO had one recorded incident of non-compliance and abuse of staff and two of non-compliance and abuse of staff in which he also threatened staff, but no incidents of actual violence.

KW

On 21 August 2014, KW was 15 years old (due to turn 16 in early November). He too had no history of violent offending but by 21 August 2014 he had been found guilty of very many offences of dishonesty: 18 charges of unlawful use of a motor vehicle, 20 charges of stealing, 12 of aggravated unlawful entry, three of trespass and three of property damage. He also had three breaches of bail and six failures to comply with Youth Court orders. He had also committed a number of offences before 21 August which were dealt with after that date. These included one charge of escaping lawful detention, one of trespass and one of being armed with an offensive weapon arising out of the escape on 2 August and one charge of stealing, two of aggravated unlawful entry and two of unlawful use of a motor vehicle committed while he was at large.

There is no evidence that KW was involved in any incidents of violence, threats, abuse or non-compliance at Don Dale before taking part in the successful escape with Jake Roper and the other plaintiffs on 2 August 2014.

Jake Roper

For the sake of completeness, mention should be made of the behaviour in Don Dale of the other escapee, Jake Roper, whose behaviour on 21 August 2014 led to the events which are complained of by the plaintiffs in this proceeding. About two weeks before the escape, Jake Roper king hit another detainee and kicked him forcefully in the head while he was lying on the ground. The other detainee was sent to hospital.[40]

[67] The primary judge determined that it was "reasonable and necessary" to handcuff the respondents based upon their histories. That finding was not challenged or overturned on appeal. It was not open to the assessing judge to make a different finding. In any event, the finding

40 *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324 at [2]-[12].

by the primary judge in that respect was correct having regard to the evidence. In addition, the primary judge, having viewed the video recording of the respondents being decontaminated, rejected an allegation that the guards were rough with the respondents and stated:

> The video footage does not support this allegation. It shows the detainees, handcuffed behind their backs, lying face down being hosed down. The corrections officers were talking to them in a calm but firm manner and from what I could see hosing them down with a hand placed on the detainee's shoulder. The video shows Jake Roper complaining that he couldn't breathe properly, not because of the gas, but because of the water flowing over his face. The guard then desists and is directed by someone in the background to direct the water onto the detainee's head in a different position - which he does. The hose is held in that more appropriate position by the officers hosing down the other detainees. At another time the video shows a guard checking and adjusting the handcuffs on one of the detainees.[41]

[68] There was evidence that O'Shea and Austral both suffered from asthma, which would have been revealed if their medical records had been examined before a decision was made to deploy the gas. There was, as the primary judge stated, no evidence that anyone involved in making the decision to use CS gas on 21 August 2014 was aware of the fact that those respondents had a history of asthma. Indeed, AGM Sizeland stated that he knew each of the respondents "fairly well" and he was unaware that they had a history of asthma. The primary judge determined that given the urgency of the situation it would have been unreasonable to expect those responsible for the decision to use the gas

41 *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324 at [184].

to have searched the respondents' medical records before determining to deploy the substance. The fact that O'Shea and Austral had histories of asthma could not, in the circumstances, justify an award of exemplary damages.

[69] In submissions before the assessing judge, the respondents placed emphasis on the fact that they were juveniles at the time that these events occurred. As can be seen from the from the reasons of the assessing judge which are extracted above, that submission was accepted and instrumental in the determination to award exemplary damages. While the use of CS gas was unlawful in a youth detention centre, it was lawful in an adult correctional facility. Interestingly, and tangentially, there were circumstances in which juveniles could be held, at least temporarily, in adult correctional facilities.[42] Accordingly, if the respondents had been held in an adult correctional facility and exposed to CS gas lawfully used in that facility they would not have been entitled to any form of damages for that exposure. This illustrates that there was no blanket prohibition on the use of CS gas in circumstances where it could affect persons under the age of 18.

[70] The evidence at trial also sustained a finding that those responsible for the decision to deploy CS gas in the Centre on 21 August 2014 took care to ensure that only the minimum amount of the gas necessary to

42 See *Youth Justice Act*, s 154 as at 21 August 2014.

subdue Roper was used. Those findings included that Commissioner Middlebrook was aware that CS gas could be deployed using different methods, some of which involved less precise deployment of the substance than others. Commissioner Middlebrook was informed that the prison officers had the gas in aerosol form so he was satisfied that this would enable the operators to use a limited amount of gas and to target its use. It is also clear that the officer who deployed the CS gas took care to ensure that only the minimum amount of gas necessary was used. There was a graduated approach adopted by the officer who deployed the gas. As described above, there were initially three short bursts of less than one second in duration. After a short wait, during which Roper was not subdued, there was a further burst of two seconds' duration. This also did not subdue Roper and after a further minute the final six "extremely short" bursts were deployed. The manner in which the gas was deployed was the minimum required to bring Roper under control and was targeted directly at Roper. The manner in which the gas was deployed does not justify awards of exemplary damages.

[71] It was, with respect, incorrect on the part of the assessing judge to say that the respondents "were treated as though they were the troublemakers" in relation to the deployment of the CS gas. That may well have seemed to the respondents to be the case, because they were also affected. But in assessing whether any obloquy is justified by way

of exemplary damages, it is important to bear in mind that the deployment of the gas was directed towards Roper and not the respondents.[43] This was not a case in which custodial officers, to use a general description, used force which they knew was unlawful and excessive directed towards prisoners for no reason.

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

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43 See the finding in *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324 at [138].

44 See *New South Wales v Ibbett* (2005) 65 NSWLR 168 at [34]-[52].

45 See *Fontin v Katapodis* (1962) 108 CLR 177 at 187. See also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 120, in which Taylor J referred to the relevant test as conduct that had been "high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights".

outrageous and show contempt for the rights of others even if it is not malicious or even conscious wrongdoing.

[73] Even allowing for the breadth of the relevant test, the evidence in this case did not reveal high-handed or outrageous conduct showing contempt for the rights of the respondents. The youth justice officers and correctional officers present at the Centre on 21 August 2014 were placed in an emergency situation by the actions of Roper. They dealt with the situation in a manner which they believed to be lawful, but regrettably was not. They adopted the means of dealing with the situation which was the safest available in the circumstances. There was no evidence that CS gas was more harmful to juveniles of the ages of the respondents than to adults. The gas was deployed in a controlled and graduated manner to ensure that only the minimum amount of gas necessary was used. Once Roper was subdued, the respondents were removed from their cells and decontaminated.

[74] It must be concluded, therefore, that the assessing judge purported to make multiple findings of fact which were either directly or indirectly inconsistent with findings made by the primary judge and which had not been set aside. The decision of the High Court that the use of CS gas was unlawful in the Centre at that time did not entitle the assessing judge to disregard those facts found by the primary judge to which reference has been made in the foregoing discussion. Even were that not so, a real review of the proceedings before the Court below, as is

required in an appeal of this nature, leads necessarily to the conclusion that the conduct and states of mind of the individual officers in these circumstances did not justify making an award of exemplary damages in these cases.

[75] In addition, the basis upon which the assessing judge awarded exemplary damages differed from that upon which those damages were sought by the respondents. The case pleaded by the respondents was that the appellant was vicariously liable for the wrongful actions of its employees in the events that occurred on 21 August 2014, including their use of CS gas on that day. No case of direct liability on the part of the appellant was ever pleaded or addressed at the trial.[46] The determination by the assessing judge that exemplary damages were appropriate based on a suggested failure on the part of the appellant to properly train its employees, or to conduct some unspecified form of institutional review of the use of CS gas, was a determination of direct wrongdoing by the appellant, and constituted a finding of primary rather than vicarious liability on its part. That was not a basis on which

46 There was also no pleading, submission or evidence to the effect that the appellant had a relevant non-delegable duty of care to procure the careful performance of work by the prison officers and youth justice officers in its employ, and that an award of exemplary damages could be made on the basis of a breach of that duty. The factual inquiry for a non-delegable duty in the circumstances would have been quite different from the inquiries pursued at trial: see, for example, *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349; [2024] HCA 41 at [40]-[41]. In the absence of any pleading or evidence relevant to the imposition and scope of a non-delegable duty of care, it cannot be said that any such duty extended to ensuring that CS gas was not used in the Centre or, more broadly, to ensuring that the respondents were somehow protected from that particular form of battery. It also cannot be said that any breach of a hypothetical non-delegable duty in the circumstances of this case would properly attract an award of exemplary damages. That is particularly so having regard to the belief that its use was lawful and to the divergence of judicial opinion on the issue already described.

it was open to the assessing judge to make an award of exemplary damages. If an award of exemplary damages was unavailable by reference to the conduct and states of mind of the individual officers, it was not open to make the appellant vicariously liable to pay exemplary damages.[47]

[76] There is considerable force to the appellant's submission that if a case of direct liability on the part of the appellant had been run by the respondents alleging failures to train employees properly, to review the lawfulness of the use of CS gas and related issues, this would have opened up a wide range of potential evidence, including legal and policy advice provided within the relevant agencies of the appellant relating to the use of CS gas in juvenile detention centres. As a matter of pleadings and procedural fairness, it was not open to the assessing judge to award exemplary damages on a direct liability basis as opposed to a vicarious liability basis.

[77] For these reasons, the appeals are allowed on this ground.

Whether exemplary damages manifestly excessive

[78] Given the finding that the awards of exemplary damages were made in error and will be set aside, it is unnecessary to consider whether the awards of exemplary damages were manifestly excessive. This is also

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47 *Victoria v Horvath* (2002) 6 VR 326 at [57]-[60]. This is very different to the situation in which exemplary damages are available by reference to the conduct of the individual officers, and the State is held vicariously liable for exemplary damages in reflection of its responsibility for the oversight, training and discipline of its officers: see, for example, *New South Wales v Ibbett* (2006) 229 CLR 638 at [49]-[53].

one of the exceptions to the general requirement expressed in *Kuru v State of New South Wales* that an intermediate court of appeal deal with all grounds of appeal.[48] That is because the finding that circumstances did not exist to warrant an award of exemplary damages precludes any contingent assessment of whether the quantum of exemplary damages awarded was manifestly excessive. The same considerations which govern whether the circumstances existed to warrant an award of exemplary damages will also be decisive in the determination of the appropriate quantum of those damages.

[79] Even were this Court to assume that the appellant failed in some duty to conduct an institutional review of the use of CS gas in youth detention centres, or to implement a proper training regime in that respect, in the circumstances of this case those findings would not sustain an award of exemplary damages in any amount. Similarly, even if this Court were to accept for the purpose of the exercise that the treatment of the respondents in the aftermath was in some way callous, in the assessment of exemplary damages the primary focus must be on the states of mind of the custodial officers. The level of exemplary damages awarded can only be commensurate with the extent to which the conduct was high-handed, outrageous, contemptuous of the respondent's rights, malicious and/or consciously unlawful, which in our assessment it was not for the reasons we have described.

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48 *Kuru v State of New South Wales* (2008) 236 CLR 1; [2008] HCA 26 at [12].

[80] The one observation we would make in relation to this ground of appeal is that the assessing judge awarded $200,000 to each plaintiff by way of exemplary damages without any consideration of the total amount of exemplary damages required to mark the disapproval of the appellant's conduct. As Hutley JA observed in *Pollack v Volpato*:

> Whereas compensatory damages have to be approached by looking at the situation of the plaintiff in consequence of the wrongful act to which he has been subjected, punitive damages have to be looked at from the side of the defendant. If he is to be punished, it is his proper punishment which provides the basis for the assessment of damages.[49]

[81] In this case, the assessing judge did not conduct any examination from the side of the appellant to determine what total amount of exemplary damages constituted a proper punishment, or the extent to which the quantum of exemplary damages required modification to take into account their unavailability in respect of any personal injury. As the appellant has submitted, since the "focus is on the conduct of the defendant"[50] rather than the perspective of the plaintiff, it is the total award of $800,000 which is relevant to the assessment of manifest excess. Without any exposition of how the conduct of the appellant and its officers warranted a total award in that amount, it has the appearance that the appellant has been punished four times for what is substantially the same conduct. That appearance is reinforced by the

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49 *Pollack v Volpato* [1973] 1 NSWLR 653 at 657.

50 *New South Wales v Ibbett* (2006) 229 CLR 638 at [34], approving the observations of Spigelman CJ in *New South Wales v Ibbett* (2005) 65 NSWLR 168.

fact that the total award of exemplary damages falls well above the outer limits of such awards in the comparative cases referred to at Annexure A of the Appellant's Outline of Submissions dated 16 October 2023, including cases involving serious acts of gratuitous and brutal violence by law enforcement officers for which the State is vicariously liable.

Whether error in declining to allow interest on general damages

[82] The appellant conceded that the respondents' cross-appeals on this issue should succeed if the appellant was successful on its appeals in relation to the awards of exemplary damages. The appellant's reasoning in that respect may be summarised briefly as follows.

[83] Subject to exceptions not presently relevant, s 84(1) of the *Supreme Court Act 1979* (NT) confers a broad discretion on the court to award interest up to judgment in the following terms:

> In any proceeding in respect of a cause of action that arises after the commencement of this Act the Court may order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of that sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[84] The discretionary standard set out in *House v The King*, rather than the correctness standard, applies in determining whether the assessing judge erred in declining to allow interest on general damages. In the exercise of that discretion, the assessing judge did not err by taking into account the awards of exemplary damages which had been made.

Unlike general damages, exemplary damages are not compensatory. Because of the very substantial award of exemplary damages made by the assessing judge, it was within the judicial discretion to decline to award interest because to do so was unnecessary "[to restore] a plaintiff to the position in which he or she would have been but for the defendant's negligence".[51]

[85] The assessing judge's determination was not to fix the awards of general damages to the value of money at the time of judgment.[52] It was to recognise that the respondents were adequately compensated for being kept out of their money in the interim period by the awards of exemplary damages which were made. However, if the awards of exemplary damages are set aside, the basis for the decision to decline to award interest is removed and the respondents are entitled to an award of interest on general damages at four percent over the period between when the cause of action arose in the date of the judgment.

[86] The appellant's reasoning in that respect should be accepted. The appellant has been successful on its appeals in relation to the awards of exemplary damages and, accordingly, the respondents' cross-appeals from the decision of the assessing judge not to award interest on general damages are allowed.

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51 *Haines v Bendall* (1991) 172 CLR 60 at 66.

52 Cf *MBP (SA) v Gogic* (1991) 171 CLR 657 at 663.

Whether error in not awarding aggravated damages to JB

[87] As adverted to in the consideration of the previous ground of cross-appeal, aggravated damages differ from exemplary damages. The purpose of an award of exemplary damages is to punish the wrongdoer and such damages are not awarded to compensate the wronged individual. In *Uren v John Fairfax & Sons Pty Ltd*, Windeyer J described the difference in the following terms:

> [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.[53]

[88] In *Carson v John Fairfax & Sons Ltd*, a majority of the High Court said:

> For the moment, it suffices to say that aggravated damages, awarded to reflect conduct by the defendant which aggravates the injury and increases the harm done to the appellant, are compensatory in nature …[54]

[89] The focus in determining whether to make an award of aggravated damages is on the effect of the wrongdoer's conduct on the injury or harm done to the wronged individual. It is a private focus based on the injury or harm actually occasioned to the individual by the wrongful conduct. This is to be contrasted with the focus of exemplary damages, which is on the conduct itself and the perceived need to punish the

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53 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149.

54 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 50-51.

wrongdoer for the conduct and to deter such conduct in the future. This is a public focus based on the public interest. It follows from these observations that an award of aggravated damages is not justified by the wrongdoing alone. To justify an award of aggravated damages it must be demonstrated that there was conduct by the wrongdoer which "aggravated the injury and increased the harm" done to the wronged person.

[90] The assessing judge addressed the awarding of aggravated damages as follows:

> I have regard to the fact the plaintiffs were not the targets of the CS gas. They were all in their cells. They could have been, but were not told what was about to happen. One of the plaintiffs gave evidence there was an intercom. In any event they had no reassurance that this would be a brief dose of the gas, that they would be safe and would be taken out of the cells. There is a sense of grievance expressed as to why they were treated roughly, handcuffed from behind, placed on the basketball court on their stomachs and hosed. It was in order to decontaminate and contain them but it was a rough process. Given what they had endured, they deserved to be treated with more care than the callousness evident on the available footage. The plaintiffs look uncomfortable on the footage. They had not behaved like Jake Roper. Leroy O'Shea and Ethan Austral were asthmatic. They deserved more care after what had occurred but were not seen by a nurse until 10:00pm and then only briefly. The post exposure treatment extended the distress felt. The manner used for decontamination was humiliating.
>
> There were however, fortunately no lasting effects. No further health concerns appear to have been reported to the nurse. The defendant points out the plaintiffs do not appear to be distressed when they are handcuffed on the ground and notes at times they are laughing. They were laughing at times when they could see each other's faces, however that reaction could be for many reasons. It can readily be inferred that there would be a sense of relief after experiencing the sensation of not feeling as though they could breathe when they were in their cells. The three

> plaintiffs who gave evidence about that part of the episode should receive some form of aggravated damages for the rather callous treatment after the exposure to the gas and the extended physical and psychological consequences. The use of force in the form of the CS gas was contrary to the *Youth Justice Act* and the obligations on Youth Justice Officers to keep detainees safe. This is all in the broader context of an unlawful use of force. As there is no evidence from Josiah Binsaris, I am unable to make an assessment under this head of compensatory damages.
>
> I will award $20,000 each of the plaintiffs, Keiran Webster and Leroy O'Shea as aggravated damages. I will award Ethan Austral $15,000.[55]

[91] The reasons given by the assessing judge for awarding aggravated damages to the respondents Webster, O'Shea and Austral were, in summary:

(a) they were not informed about the proposed use of CS gas and had no assurance that their exposure to the gas would be brief;

(b) they were aggrieved at being treated roughly after they were removed from their cells after Roper was subdued;

(c) O'Shea and Austral were asthmatic and "deserved more care", but were not seen by a nurse until 10 pm; and

(d) the manner used for decontamination was "humiliating".

[92] It may be presumed that the reason for the assessing judge making higher awards of aggravated damages to Webster and O'Shea was that they had histories of suffering from asthma and Austral did not. There was no evidence that Binsaris had a history of asthma, so that

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55 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [111]-[113].

circumstance identified by the assessing judge is irrelevant for these purposes.

[93] The issue to be determined on this ground of cross-appeal is whether the assessing judge erred in declining to award aggravated damages to Binsaris on the basis that he had not given evidence. The appeal on this ground attracts the correctness standard. The decision not to award aggravated damages was not discretionary but was part of an evaluative process that permits of only one correct answer. In the application of that standard, the question is whether the assessing judge was able to draw inferences from the evidence which would justify a finding that the conduct of the appellant's officers actually and subjectively offended the respondent Binsaris's dignity or outraged his feelings.

[94] They are not matters which may be inferred simply on the basis that he had no warning that the CS gas was going to be deployed and no assurance that his exposure would be brief. It is not enough that the court considers the conduct deserves condemnation. There must be evidence of injury to the plaintiff's feelings caused by the insult or humiliation of the conduct.[56] That distinction is encapsulated in the saying that aggravated damages are payable where the defendant's conduct shocks the plaintiff, while exemplary damages are payable where the defendant's conduct shocks the court.

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56 *Lamb v Cotogno* (1987) 164 CLR 1 at 8; *Lackersteen v Jones* (1988) 92 FLR 6 at 41.

[95] The position of Binsaris in this respect may be contrasted with the position of the other respondents. There was a complete dearth of evidence from Binsaris at trial, and therefore before the assessing judge. There was no direct evidence upon which the assessing judge could base any findings about the additional subjective effects of the conduct of the appellant's officers upon Binsaris. The cross-appellant's specific complaint is that in view of the objective circumstances and the evidence given by the other plaintiffs, the assessing judge should have drawn the same inference in respect of the cross-appellant as she did in respect of the other plaintiffs about the existence of circumstances of aggravation and awarded aggravated damages accordingly. The two difficulties with that complaint are that aggravated damages are not concerned with "objective circumstances", and the assessing judge's findings in relation to the other respondents were based on their direct evidence as to their feelings rather than inferential in nature.

[96] That evidence was contained in affidavits made by each of the other respondents which were read into evidence at trial and included statements, for example, about the subjective and differing effects that the teargas had on each of them. The evidence from O'Shea included the following passages:

> The teargas affected me badly and from the way I saw [Webster] acting, it seemed to affect him badly as well. My throat was burning, I was choking, my eyes were stinging and my nose was

> running. [Webster] looked like he was throwing up. I had asthma and a heart-attack condition. The guards knew I had asthma because they provided me with Ventolin in the past. I found it really hard to breathe.
>
> …
>
> After they sprayed the teargas, I felt complete fear. I thought I was going to die. The worst thing was not knowing how long it was going to last and how long we were going to have to sit in there and burn.
>
> …
>
> [Webster] and I were treated the same as, or worse, than the other detainees even though we were not involved. I feel that I was treated the worst because I was the oldest. This felt very unfair because I was not involved in what happened.[57]

[97] The evidence from Webster included the following passages:

> That's when the guards threw something into the BMU and it felt like it exploded. I thought it was a bomb but I now know it was tear gas. I heard everyone react. [O'Shea] and I jumped down on the floor, ran towards the back of our cell and put the sheet and mattress over us.
>
> I was affected immediately. I couldn't breathe properly. It felt like an anxiety attack. I couldn't open my eyes because it hurt too much. I got an instant headache as soon as I got a whiff of it. I never had a headache like that before. It was extremely painful.
>
> It was so hard to breathe that [O'Shea] and I thought we were going to die. At first we were kind of joking about dying and then we started to seriously believe it because it was just so hard to breathe. I thought that I was eventually going to stop breathing. We started shaking each other's hands and saying our goodbyes.[58]

[98] The evidence from Austral included the following passages:

> Then all the guards were standing at the door near the admissions area and they sprayed the hall with gas.
>
> The guards did not give a warning before they sprayed the gas.

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57 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [20].

58 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [28].

> They could have spoken to us through the intercom or they could have yelled at us through the admin or basketball area. We would have heard that.
>
> The spray made me feel sick. I felt pain on my face and it was hurting my eyes. I had my shirt over my mouth so it didn't get in my mouth because it tasted yuck.[59]

[99] Even allowing for the fact that the respondents could not claim aggravated damages for physical consequences amounting to personal injury,[60] that evidence also dealt with psychological consequences such as fear of impending death, feelings of unfair treatment and grievance about the lack of warning. The assessing judge was able to infer that the respondent Binsaris would have suffered "similar physical consequences" to the other respondents, and awarded general damages accordingly, but was unable to draw any inference in relation to psychological consequences.[61] That is because evidence of psychological impact is inherently subjective in the sense that it depends upon the person's perception of the event. The only evidence of the respondent Binsaris's subjective experience was what could be seen on the video recording which showed him and the other respondents laughing and in good spirits. Even if one accepts the assessing judge's attribution of their reaction to relief, it certainly does not sustain an inference that Binsaris was suffering some form of psychological insult or humiliation. The failure on the part of Binsaris

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59 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [31].

60 *Personal Injury (Liabilities and Damages) Act 2003* (NT), s 19.

61 *Binsaris & Ors v Northern Territory of Australia* [2023] NTSC 79 at [109].

to give evidence was unexplained and the only inference properly open was that any evidence he may have given in this respect would not have assisted his cause.

[100] Generally speaking, it will be necessary for the plaintiff himself or herself to give evidence of his or her subjective experience in order to attract an award of aggravated damages. In some circumstances the testimony of other witnesses and documentary evidence may tend to prove the plaintiff's subjective experience even in the absence of direct evidence from the plaintiff. The relevant part of the decision in *Amalgamated Television Services Pty Ltd v Marsden* may be explained by the fact that there was evidence of the plaintiff's subjective loss adduced from other sources.[62] Evidence of that nature may include such things as an account from a spouse or treating medical practitioner of distress displayed by the plaintiff when describing the event in question.[63]

[101] In the absence of any evidence of this nature in support of the claim for aggravated damages by Binsaris, the assessing judge was correct to conclude that "as there is no evidence from [Binsaris] I am unable to make an assessment under this head of compensatory damages". It follows that this ground of cross-appeal must be dismissed.

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62 *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1353], [1362], [1469].

63 See, for example, *Henry v Thompson* [1989] 2 Qd R 412.

Orders

[102] We make the following orders in the matters involving Austral, O'Shea and Webster:

1. The appellant's appeal dated 11 September 2023 is allowed.
2. The award of exemplary damages in order 1 of the orders made by on 1 September 2023 is set aside.
3. The respondent's cross-appeal dated 26 September 2023 is allowed.
4. Order 3 of the orders made on 1 September 2023 is set aside and in its place it is ordered that pursuant to s 84 of the *Supreme Court Act*, the respondent be awarded interest at the rate of 4% per annum for the period from 21 August 2014 to the date of judgement on 1 September 2023.

[103] We make the following orders in the matter involving Binsaris:

1. The appellant's appeal dated 11 September 2023 is allowed.
2. The award of exemplary damages in order 1 of the orders made on 1 September 2023 is set aside.
3. Ground 2 of the respondent's cross-appeal dated 26 September 2023 is allowed.
4. Order 3 of the orders made 1 September 2023 is set aside and in its place it is ordered that pursuant to s 84 of the *Supreme Court Act*, the respondent be awarded interest at the rate of 4% per

annum for the period from 21 August 2014 to the date of judgement on 1 September 2023.

5. Ground 1 of the respondent's cross-appeal dated 26 September 2023 is dismissed.

[104] If costs cannot be agreed, the parties are to file and serve submissions as to the appropriate costs orders on these appeals and cross-appeals, limited to four A4 pages, within 14 days of publication of these reasons.
