

CITATION: *O’Shea v Northern Territory* [2018]
NTSC 73

PARTIES: PHILLIP PEARCE O’SHEA

v

NORTHERN TERRITORY OF
AUSTRALIA

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
jurisdiction

FILE NO: 117 of 2017 (21758068)

DELIVERED: 25 October 2018

HEARING DATE: 26 September 2018

JUDGMENT OF: Luppino AsJ

CATCHWORDS:

Practice and Procedure – Application for leave to join police officers to enable a claim for punitive damages – Discretion to grant leave is at large – Onus is on the applicant to demonstrate an evidentiary basis for an award of punitive damages – Principles relevant to the assessment of evidence to determine the evidentiary basis.

Practice and Procedure – Evidence in interlocutory applications – Evidence is by affidavit unless the Court otherwise orders.

Supreme Court Rules, rr 40.02(a) and 40.03(1)(a).

Police Administration Act, ss 148C(1), (3), 148F(2), (4), (5).

Gaykamangu v Northern Territory of Australia [2016] NTSC 26.
Lackersteen v Jones & Ors (1988) 92 FLR 6.
Uren v John Fairfax and Sons Pty Ltd (1965) 117 CLR 118.
Lamb v Cotogno (1987) 164 CLR 1.
New South Wales v Delly [2007] NSWCA 303.
Lippl v Haines (1989) 18 NSWLR 620.
Fontin v Katapodis (1962) 108 CLR 177.
State of New South Wales v Riley (2003) 57 NSWLR 496.
Lane v Holloway 1967 3 All ER 129.
Law v Wright [1935] SASR 20.
Johnson v Northern Territory of Australia (2016) NTSC 49.
Slaveski v Victoria (2010) VSC 441.

REPRESENTATION:

Counsel:

Plaintiff:	J Lawrence SC
Defendant:	J Ingrames

Solicitors:

Plaintiff:	O'Brien Criminal & Civil Solicitors
Defendant:	Solicitor for the Northern Territory

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

O'Shea v Northern Territory [2018] NTSC 73
No. 117 of 2017 (21758068)

BETWEEN:

PHILLIP PEARCE O'SHEA
Plaintiff

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 25 October 2018)

- [1] In the substantive proceedings the plaintiff seeks damages from the defendant on the basis of its vicarious liability for torts committed by police officers pursuant to section 148C(1) of the *Police Administration Act* (“the PAA”). That liability does not extend to punitive damages by reason of section 148C(3) of the PAA.
- [2] The reference to punitive damages in section 148C of the PAA refers to damages otherwise known as exemplary damages. An award of punitive damages is designed to punish a tortfeasor for his or her behaviour and to

deter similar behaviour in the future.¹ The punitive element of exemplary damages is the feature that distinguishes them from general damages, which in contrast are compensatory in nature. Although additional damages can be awarded as aggravated damages where there are aggravating circumstances, aggravated damages are still compensatory in nature.² Punitive or exemplary damages go beyond compensation and therefore are distinct to general and aggravated damages.³

- [3] The plaintiff seeks to claim punitive damages but he can only recover such damages against the officers involved. To make that claim, it is necessary to join those officers for that purpose and the leave of the Court pursuant to section 148F(2) of the PAA is required. The plaintiff now seeks leave to join three police officers, namely Trent Bowtell (“Bowtell”), Benjamin Hosking (“Hosking”) and Scott Rose (“Rose”).
- [4] As I said in *Gaykamangu v Northern Territory*,⁴ the discretion to grant the leave provided for in section 148F(2) of the PAA is at large but there must be proper and adequate grounds. In particular, it must be demonstrated that there is sufficient evidence to justify an award of punitive damages. The onus is on the party seeking leave. In assessing the adequacy of the evidence presented, it is not necessary for the Court to decide the merits of the

¹ *Gaykamangu v Northern Territory* (2016) NTSC 26 at para 10.

² *Gaykamangu v Northern Territory* (2016) NTSC 26 at para 10 citing *Lackersteen v Jones & Ors* (1988) 92 FLR 6 at para 110.

³ *Gaykamangu v Northern Territory* (2016) NTSC 26 at para 10 citing *Uren v John Fairfax and Sons Pty Ltd* (1965) 117 CLR 118, *Lamb v Cotogno* (1987) 164 CLR 1 and *Lackersteen v Jones & Ors* (1988) 92 FLR 6.

⁴ (2016) NTSC 26 at para 20.

plaintiff's claim or to assess the credibility of the evidence relied on. It is only necessary for the claimant to establish a prima facie case of entitlement to punitive damages. For that purpose the evidence is to be taken at its highest in favour of the plaintiff. In the case of inferential evidence that means that all inferences in favour of the plaintiff which are available on the evidence are to be drawn. It therefore follows that the mere denial of the allegations by the defendant, or the officers, is not a basis for refusing leave.

[5] Relevant also to the question of leave is the basis for the entitlement to punitive damages. The test, pronounced by the High Court in *Lamb v Cotogno*,⁵ is that an award of punitive damages can be made to punish police for conduct which amounts to conscious and contumelious disregard of a person's rights, to deter future instances of that conduct and to mark the Court's condemnation of that conduct.

[6] The conduct required for the purposes of the test goes beyond mere circumstances of aggravation. In *New South Wales v Delly*,⁶ the New South Wales Court of Appeal said:-

Circumstances of aggravation do not necessarily demonstrate conduct of a kind warranting an award of exemplary damages. Such an award is justified by reference, not to the effects on the plaintiff, but to the knowledge, intention or recklessness of the tortfeasor.⁷

⁵ (1987) 164 CLR 1.

⁶ [2007] NSWCA 303.

⁷ [2007] NSWCA 303 at para 115.

- [7] Moreover, it does not automatically follow that where police go beyond the reasonable use of force that they have done so with contumelious disregard for the person's rights.⁸ In assessing whether to award punitive damages, provocative conduct on the part of the plaintiff can be considered by the Court and it can result in the plaintiff only recovering compensatory damages⁹ as all circumstances are to be taken into account and that includes evidence that the plaintiff has brought the attack on himself by provocative conduct.¹⁰
- [8] The evidence filed on behalf of the plaintiff on the application was the transcript of the evidence of the three police officers in the hearing of criminal charges against the plaintiff in the Local Court. Those charges were based on the same events as comprise the plaintiff's current claim. Footage from a body worn camera worn by Bowtell was in evidence at the hearing in the Local Court but that footage had not been exhibited to any affidavit evidence filed by the plaintiff. At the commencement of the hearing, Mr Lawrence SC for the plaintiff, sought leave to also put that in evidence on the basis that its omission had been an error in judgment by the plaintiff's solicitors. Given the reliance Mr Lawrence subsequently placed on that footage, its omission was most surprising. The defendant did not object and therefore leave was given.

⁸ *Lippl v Haines* (1989) 18 NSWLR 620 at 639-640.

⁹ *Fontin v Katapodis* (1962) 108 CLR 177 at 183; *State of New South Wales v Riley* (2003) 57 NSWLR 496 at para 140; *Lane v Holloway* 1967 3 All ER 129 at 162.

¹⁰ *Law v Wright* [1935] SASR 20 at 25.

[9] There was no direct evidence from the plaintiff on the application but there was a late application for an adjournment to enable an affidavit of the plaintiff to be provided. It seems that an affidavit of the plaintiff had not been provided in the belief that doing so would expose the plaintiff to cross examination. The adjournment was only sought following confirmation that the plaintiff would not be subject to cross-examination.¹¹ That was opposed by the defendant. The failure of the plaintiff to provide an affidavit appears to have been a deliberate strategy on the part of the plaintiff or his legal representatives, albeit based on an inadequate knowledge of the Rules of Court. The defendant's case had been prepared with significant reliance on the absence of evidence of the plaintiff. The plaintiff must have been aware of that given the detailed submissions of the defendant served well before the hearing. In those circumstances, and as the application for the adjournment came very late,¹² the application was refused.

[10] The Amended Statement of Claim which the plaintiff proposed to file if leave was granted¹³ was put in evidence. Although the allegations in that document are not evidence for the purposes of the application, I think it is useful to have regard to the allegations to better understand the case for punitive damages which the plaintiff seeks to make.

¹¹ Evidence on interlocutory applications is by affidavit, see rule 40.02(a) of the *Supreme Court Rules*. Although the Court can order a deponent to give evidence orally pursuant to rule 40.03(1)(a), that would normally only occur on application by a party and for good reason and it is not the norm.

¹² The application was made after I had indicated that I would be reserving my decision and immediately before I adjourned.

¹³ Pursuant to sub-sections 148F(4) and (5) of the PAA.

[11] The proposed Amended Statement of Claim alleges the commission of three separate torts by the three named officers but without attributing which actions are alleged to constitute the individual torts and without attributing which actions were effected by each of the three officers. The plaintiff's submissions reveal that the allegations are against all three officers in respect of the three torts broadly on a joint enterprise basis. Although that is an established principle of the criminal law, I do not consider that the principle applies also in civil cases. Mr Lawrence could not point to any authority to support that. Rather he conceded that the application of that principle to civil claims is not clear,¹⁴ which I think puts it too highly.

[12] The evidence on the application shows that on 10 October 2017, a team of police officers, some from the Tactical Response Group and some drug squad detectives, attended at the home of the plaintiff's parents, where the plaintiff also resided, to execute a drugs search warrant. The plaintiff was the "person of interest". The plaintiff is well known to police. He is a senior member and officeholder of the Hells Angels motorcycle club. At a briefing held before the execution of the search warrant, officers were alerted to the plaintiff's record of violence, intimidation, anti-police behaviour, carrying of concealed weapons and the possibility that he was in possession of a firearm.

[13] The Tactical Response Group officers were involved because of those concerns. They attended in force. They were wearing helmets, gloves and

¹⁴ Transcript at page 17.

ballistic vests and all carried firearms. Some also had batons, tasers and OC spray and one was also armed with a shotgun. On arrival the first person seen by officers was the plaintiff's elderly father. Bowtell remained with him outside for a short time while the other officers, two of whom were Hosking and Rose, entered the residence.

[14] The evidence in the Local Court hearing is that Hosking said that on entry to the house he saw the plaintiff, who was yelling and waving his arms aggressively, was moving quickly towards Rose with clenched fists. Rose said that the plaintiff had a look of pure rage on his face and that he (Rose) yelled to the plaintiff to get on the ground. Rose said that the plaintiff did not comply and instead lunged in his direction. Hosking said that he punched the plaintiff to the face when the plaintiff was within striking distance of Rose to prevent an anticipated assault by the plaintiff on Rose. Rose did not see Hosking punch the plaintiff. Rose tackled the plaintiff and brought him to the ground and Hosking then assisted Rose to keep the plaintiff on the ground.

[15] The tackle by Rose resulted in the plaintiff being taken to the ground face down with his hands underneath his body. Due to the alert that the plaintiff may have had a firearm (he didn't), the plaintiff was told to move his hands out from under his body but he refused to do so. Hosking repeated that demand under threat of use of a taser but the plaintiff failed to comply and continued to resist. By this time Bowtell had arrived on the scene. The taser was then used. The plaintiff continued to resist and the taser was used again.

The plaintiff then moved one hand out from under his body and punched Hosking on the leg. As a result the taser was used again.

[16] Bowtell then managed to take hold of one of the plaintiff's arms. The plaintiff however continued to strike at Hosking. Bowtell said that he therefore deployed OC spray on to the floor close to the plaintiff's face. The plaintiff became compliant and Hosking was able to secure the plaintiff's arm. Cuffs were then applied to the plaintiff and he was taken outside to decontaminate him.

[17] The footage from the body worn camera recorded both audio and video and is clearly the best objective evidence.¹⁵ That footage shows that the key events occur over a relatively brief period of one and a half minutes. Nothing directly relevant regarding the plaintiff is seen until Bowtell enters the house and he comes upon two officers struggling with the plaintiff on the ground. The plaintiff is swearing and officers are shouting instructions to the plaintiff, which he ignores. One officer manages to take hold of the plaintiff's arm but the plaintiff pulls it back underneath his body. Officers continue to shout at the plaintiff, and also swear at him, telling him to stop resisting but he continues to strenuously resist. Then the taser is used four times, with calls to the plaintiff to cease resisting in between each use. However the plaintiff continues to strenuously resist even when officers are seen holding both his arms behind his back. Although it is not apparent from

¹⁵ Although audio in the initial stages was not recorded, nor was the audio for a period at the end due to a fault with the unit.

the footage, it then appears that the OC spray was deployed as shortly after the plaintiff can be heard coughing, the shouting has ceased and the plaintiff has stopped resisting. The video is lost for approximately 30 seconds but the plaintiff can be heard saying, a number of times, that he cannot breathe. For the next few minutes the plaintiff is first seen lying passive on the floor, then standing, with officers guarding him. As the plaintiff is walked past the camera, blood can be seen above the plaintiff's right eye and other marks are apparent on his face. The plaintiff is taken outside where it appears he is decontaminated with water from a garden hose. Shortly after that the footage ends.

[18] Absent evidence from the plaintiff, the plaintiff's version of events is indirect only i.e., the matters put in cross-examination during the Local Court hearing. These were:-

1. In cross-examination of Hosking, that Rose did not see Hosking punch the plaintiff or that the plaintiff had his hands raised, contrary to the statement of Hosking;
2. That Bowtell deliberately sprayed OC spray directly into the plaintiff's eyes;
3. That Bowtell, being the only officer with a body worn camera, deliberately delayed his entry into the house to ensure there was no footage of the events surrounding the entry by police into the house;

4. That police officers deliberately and unnecessarily kned the defendant.

[19] As to the first of these, the challenge was based on Rose's evidence that he did not see Hosking punch the plaintiff. That is an inconsistency on its face, although in the end Rose did not agree that Hosking did not punch the plaintiff, only that he did not see a punch. In any case the punch was admitted by Hosking, and the reason for it was explained, and Mr Lawrence relied on the punch as part of his argument that the actions of the police were "over the top".¹⁶ Hence, although that was a credit issue in the Local Court, and although it may be a credit issue in the substantive proceedings, for the reasons discussed below I do not think that assists the plaintiff in the current application as, given the surrounding evidence, it is nonetheless not evidence to support punitive damages.

[20] Both the second and third matters were denied by Bowtell and he maintained that he sprayed the OC on the floor next to the plaintiff's face. The deployment of the OC spray was not seen on the footage and without evidence from the plaintiff there is nothing to contradict that evidence of Bowtell. I should add however that if there was evidence which established that the OC was sprayed directly into the plaintiff's eyes, that would support an entitlement to punitive damages. The third matter cannot amount to evidence which can be a basis to demonstrate the plaintiff's entitlement to punitive damages as, in any case, it is not evidence which goes to establishing that entitlement. It is purely a disputed matter put in cross

¹⁶ Transcript pages 9 and 11.

examination. Hence, neither of these matters achieve anything in the current application.

[21] The fourth matter was refuted, not by denial of the action but on the basis that it was necessary to ensure the imperative of securing the plaintiff's arms and because of his persistent resistance, something which appears to be confirmed by the video of the events from the body worn camera.

[22] Mr Lawrence also relied on cross-examination in the Local Court of various inconsistencies in the evidence of the three police officers. One inconsistency which he particularly relied on was in respect of Rose and as to whether the plaintiff was trying to "push" past him or was "rushing" past him. It was put to Rose in cross-examination in the Local Court that the plaintiff was just trying to get to his mother and child to help or protect them. However there is no evidence of what the plaintiff was then intending to do.

[23] Mr Lawrence argued that the foregoing matters supported the plaintiff's allegations, I think by application of the prima facie case principle of putting the evidence at its highest. However, as the police officers rejected the allegations put in cross-examination, the matters put are not evidence before me. The requirement to take the evidence at its highest does not convert a matter denied in cross-examination from a bare challenge to positive evidence of the fact of the matters that were put. There must be actual evidence to support the contrary version alleged. Evidence by the

plaintiff may have sufficed, but there is none. Moreover the cross-examination does not appear to have been effective as the Judge in the Local Court proceedings found the plaintiff guilty of resisting a member of the police force in the execution of his duty and assaulting a police officer (Rose) whilst in the execution of his duty.¹⁷

[24] I deal now with what I consider to be the only evidence presented on the application which can arguably support the plaintiff, that is the footage from the body worn camera. It was argued that overall the footage revealed conduct by the police which was over the top namely, the police officers attending in force, attired and equipped as they were, coupled with the way that they entered the house and challenged the plaintiff, Hosking punching the plaintiff then the use of the taser and the deployment of the OC spray. It was argued that the conduct of the police was disproportionate and went beyond what was necessary. It was submitted that it was evidence which demonstrated an entitlement to punitive damages if it was taken at its highest.

[25] The submission continued that against the overwhelming numbers of police the plaintiff was not a serious threat and was not going to be able to avoid an arrest. However, as I discuss below, I am satisfied that the evidence before me shows that the use of force was justified, as was the use of the taser and the OC spray. The most telling evidence of that is the extent of the

¹⁷ Affidavit of Jennifer Dennis made 30 August 2018, annexure JD4.

resistance of the plaintiff notwithstanding that he faced overwhelming numbers against him.

[26] There would be some merit to that argument if that was the extent of the evidence. However, the application of the prima facie case principles does not mean that snippets of evidence are looked at in isolation. All of the evidence on the application has to be considered. Relevantly, there is evidence explaining why the police conducted themselves in the way that they did. That evidence was challenged in cross-examination in the Local Court hearing but it was not discredited there, nor did the police officers concede what was put in challenge. The plaintiff's submission looks at parts of the evidence in isolation. When viewed in its totality, that evidence does not provide a basis to support an entitlement to punitive damages.

[27] Mr Lawrence also argued that the plaintiff would have been fearful and asked me to infer that. I disagree. The evidence of the plaintiff's strenuous and continuous resistance is inconsistent with such an inference. Likewise with the submission that the plaintiff was not going to fight off seven men, suggesting I think that the officers' actions in acting in force or in such numbers was unnecessary. That is also in contradiction of the evidence as the plaintiff has seriously resisted the police officers even when faced with overwhelming numbers against him. It was also suggested that the plaintiff's resistance was ineffective in the face of the number of police. I cannot see how that helps the plaintiff. The resistance alone is serious and persistent and does not support any inference of a belief by the plaintiff that he would

achieve nothing by the resistance. More importantly again, that does not provide an evidentiary basis to support an entitlement to punitive damages.

[28] Lastly there was reliance on the evidence of an utterance by the plaintiff's mother. On the footage, an elderly woman, who is apparently the plaintiff's mother is heard to say words to the effect of 'there is no need for that' as she is seen exiting the house. Mr Lawrence argued that that established that the police conduct was unnecessary. Prima facie case principles require me to ignore obvious credibility issues with that evidence, specifically that the plaintiff's mother would naturally support him. However, although Mr Lawrence asked me to infer that the utterance referred to the police conduct overall, I would not be prepared to draw that inference as it is not clear precisely what the plaintiff's mother was referring to. More relevantly however it is only evidence of the opinion of the plaintiff's mother. It is not evidence that establishes what she saw, i.e., what actually was occurring, or that whatever she was referring to was unnecessary, even on the basis of an implied assertion.

[29] Turning now to apply the foregoing to the claimed entitlement to punitive damages as set out in paragraph 22 of the proposed Amended Statement of Claim. That paragraph provides:-

The Plaintiff also claims punitive damages for his false imprisonment, assault and battery. In so claiming, the Plaintiff relies on the matters pleaded above and the following additional matters:

Particulars of punitive damages

1. The conduct of Senior Constable Trent Bowtell, Benjamin Hosking and Sergeant Scott Rose in punching, tasing, assaulting and OC spraying the Plaintiff was excessive, unnecessary, heavy handed and in contumelious disregard of the Plaintiff's rights;

2. Further particulars may be provided in due course.

[30] I have already discussed the evidence of the plaintiff being punched.¹⁸ The only evidence of that, the justification for that and the circumstances surrounding it, comes from the transcript of the evidence in the Local Court proceedings. I have already said that there is no evidence before me to contradict that evidence and therefore there is no evidence which demonstrates an entitlement to punitive damages in respect of the punch, or punching as described in the proposed Amended Statement of Claim. Evidence from the plaintiff to the contrary, supported by the prima facie case principles may have resulted in a different conclusion but there is no evidence from the plaintiff.

[31] In relation to false imprisonment, if I correctly understand Mr Lawrence's argument, once excessive force is used in an arrest the arrest becomes unlawful notwithstanding that the plaintiff was otherwise lawfully arrested.¹⁹ This submission was unsupported by authority. The argument seems to share the approach of the criminal law in respect of charges of resist arrest or assault police in the execution of their duty. In such circumstances, illegal conduct by police officers negates the element of "execution of duty" and therefore nullifies the entire offence, as an essential

¹⁸ See paras 14, 18 and 19 above.
¹⁹ Transcript at page 29.

element of the offence is not established. No authority was submitted to show that a similar approach applies in respect of civil claims.

[32] It is also not clear on the evidence in the current application as to precisely what is alleged to amount to false imprisonment as distinct to assault and/or battery. The proposed Amended Statement of Claim is unhelpful in that respect as it is replete with embarrassing allegations which bundles the allegations of punching, tasing, OC spraying and assault. The proposed Amended Statement of Claim would be liable to strike out for that reason. To the extent however that the facts relating to the arrest also relate to the assault and to the battery, there is obvious overlap.

[33] Although the use of force in effecting an arrest is technically an assault and a battery, police are entitled to use reasonable force when effecting an arrest²⁰. Incidental and necessary assault and/or battery is an aspect of the reasonable force which is permitted to effect an arrest. Reasonableness is measured against two factors. Firstly, that the police officer reasonably believes that the force is necessary to affect the arrest. Secondly, that the means adopted by the police officer are such that a reasonable person would not consider it to be disproportionate to the objective of the arrest. That objective generally, and specifically in this case, is the prevention of escape, the avoidance of resistance to the arrest and the commission of a further offence, such as by the use of a firearm. Although the plaintiff did not have a firearm, given the concerns regarding the possibility that the plaintiff had

²⁰ *Johnson v Northern Territory of Australia* (2016) NTSC 49.

a firearm, absent evidence that the police knew that the plaintiff did not have a firearm, that does not change anything. According to the test,²¹ based on the alerts given to police officers at the earlier briefing, and even disregarding the plaintiff's resistance, I am of the view that the available evidence establishes that the actions of the police did not go beyond what was reasonably necessary in accordance with that test. Therefore that does not establish that police acted with conscious and contumelious disregard of the plaintiff's rights.

[34] As to the use of the taser, in the context of the severe and continuing resistance by the plaintiff and again the risk factors notified to the officers, particularly violence and possible possession of a handgun, the plaintiff's resistance to having his arms being secured behind his back and the plaintiff's actions in continually putting his hands back underneath his body all justifiably heightened concerns that he may have been reaching for a handgun. That was the evidence of the officers. That evidence, although challenged in cross-examination, was uncontradicted and is compelling in the circumstances. The taser was used in an attempt to achieve the cessation of the plaintiff's resistance so that the plaintiff's arms could be secured. On that evidence, and absent a contrary version on the plaintiff's behalf, the tasing was again justified and appropriate, at least in the context of negating the test of entitlement to punitive damages.

²¹ *Slaveski v Victoria* (2010) VSC 441.

[35] Necessarily the same conclusion must be arrived at in respect of the use of the OC spray. Despite four applications of the taser, the plaintiff continued to resist violently such that at least three officers could not adequately restrain him. Once OC spray was deployed the effect on the plaintiff's resistance was dramatic and immediate.

[36] The only evidence of the events surrounding the deployment of OC spray is from the transcript of the evidence in the Local Court as the deployment of the OC spray is not apparent from the footage. Only the aftermath of the immediate end of resistance by the plaintiff and the subsequent decontamination is seen. Again, although the officers' versions were challenged in cross-examination in the Local Court, the cross-examination did not extract an admission from the officers that their actions were either unnecessary or inappropriate. Without contrary evidence from the plaintiff which establishes the matters put in cross-examination for the prima facie principles to properly apply, the evidence as it stands merely shows justification and certainly cuts across the entitlement to punitive damages.

[37] Overall I am of the view that the plaintiff's claim of entitlement to punitive damages is unsupported by the evidence led on the application. The plaintiff's argument relies heavily on the preferred status otherwise afforded by the prima facie case principles. The plaintiff's case amounts to little more than a submission that as the evidence relied on can, on a favourable view, establish that the police conduct was disproportionate (and I do not agree with that in any case) then, as the evidence is to be taken at its highest

in favour of the plaintiff, a finding should be made that the officers' actions were with conscious and contumelious disregard of the plaintiff's rights.

[38] The plaintiff's argument takes the relevant evidence in isolation and that is not the correct approach. The prima facie case principles merely obviate the need to assess the credibility of the evidence and only assists the plaintiff if there is evidence to support the plaintiff's entitlement to punitive damages. In simple terms the test assumes acceptance of the evidence led by or on behalf of the plaintiff. However that evidence must first be sufficient to demonstrate the entitlement to punitive damages. The evidence led does not do that. The submissions of Mr Lawrence disregard the requirement for actual evidence demonstrating an entitlement to punitive damages and his submissions ignore the totality of the evidence.

[39] In my view, taking the evidence as a whole, even at its highest, it does not support the entitlement to punitive damages. In any case, had I been of the view that there was sufficient evidence to satisfy the necessary threshold to claim punitive damages, it is clear from the evidence that the plaintiff's uncooperative, aggressive and provocative behaviour necessarily contributed to the methods adopted by the police officers. That would arguably also negate any entitlement to punitive damages based on *Fontin v Katapodis* and *State of New South Wales v Riley* previously referred to²² and leave may have been refused on that basis also.

²² See paragraph 7 above.

[40] The leave the plaintiff seeks is therefore refused.

[41] I will hear the parties as to ancillary orders and costs.