DAMAGES IN FALSE IMPRISONMENT MATTERS

A Paper Delivered by Mark A Robinson, Barrister,
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Introduction

I am asked to discuss the issues or factors that are to be considered in the assessment of the quantum of damages in false imprisonment matters.

The Law of False Imprisonment

False imprisonment is an action in the species or genus of trespass to the person which is committed when the voluntary conduct of one person directly subjects another to total deprivation of freedom of movement without lawful justification. Special damage is not required (see, *Laws of Australia*, (LBC), Volume 33.8 Intentional Torts).

It most commonly arises in the context of arrests by police officers or confinement by a retailer of a suspected shoplifter and, more recently, in immigration detention matters. Conduct amounting to false imprisonment in these circumstances is sometimes preceded or accompanied by an assault or battery or other trespass. A action for false imprisonment can arise in a number of different circumstances where the liberty of a person can be restrained without lawful justification including in cases of domestic slavery.

It is not a necessary element of the tort for a plaintiff to establish the fault of the defendant in false imprisonment cases. The detention and the "directness" of the cause must be proven. It is then for the defendant to demonstrate lawfulness in justification. The plaintiff does not carry the onus of establishing unlawfulness as one of the elements of the tort - *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 611 (per O'Bryan J).

As Kirby J states in *Ruddock v Taylor* (2005) 222 CLR 612 at [140] (in dissent, but not as to this):

> "Wrongful imprisonment is a tort of strict liability. Lack of fault, in the sense of absence of bad faith, is irrelevant to the existence of the wrong. This is because the focus of this civil wrong is on the vindication of liberty and reparation to the victim, rather than upon the presence or absence of moral wrongdoing on the part of the defendant. A plaintiff who proves that his or her imprisonment was caused by the defendant therefore has a prima facie case. At common law it is the defendant who must then show lawful justification for his or her actions." (footnotes omitted).

The tort of false imprisonment has a long history and reflects the fundamental interest of the common law in protecting individual liberty and freedom of movement

(*Ruddock v Taylor* (2005) 222 CLR 612 per Kirby J at [137]). For example, in one case, Fullagar J. stated:

> "The mere interference with the plaintiff's person and liberty constituted prima facie a grave infringement of the most elementary and important of all common law rights.": *Trobridge v Hardy* 1955 94 CLR 147 at 152.8 per Fullagar J.

False imprisonment can even occur without the knowledge of the plaintiff: *Murray v Ministry of Defence* [1988] 1 WLR 692 at 701C (House of Lords - per Lord Griffiths, all other judges agreeing).

The law recognises two classes of false imprisonment cases. The first class of case involves deprivation of liberty by means of close physical restraint in a prison or in a similar physical confinement. The second class of case need not arise from actual physical confinement and extends beyond the use of force to restraint by threats or submission to assertion of authority provided it has an effect on the mind and freedom of the plaintiff.

The second class of false imprisonment cases has been described as "a psychological type of false imprisonment" - see Francis A Trindade, "The Modern Tort of False Imprisonment" page 229 at 246.7 in *Torts in the Nineties*, ed by Nicholas J Mullaney, LBC, Sydney, 1997; and Francis A Trindade, *The Law of Torts in Australia*, 3rd edition, 1999, page 56.2. The expression is derived from the description of this kind of imprisonment by Dunfield J. in *Chaytor v London, New York and Paris Association of Fashion Ltd* (1961) 30 DLR (2d) 527 at 536-537 (Newfoundland Supreme Court, Canada).

False imprisonment may occur within a particular space: *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT Rep 44 at 53 per Atkin LJ - or within defined bounds, but not within a whole country (see *Louis v Commonwealth* (1987) 87 FLR 277).

In **1215** the *Magna Carta* made provision for false imprisonment. The definitive form of the document as it appeared in 1297 at clause 29 provided for the following (as reproduced in *Sources of English Legal and Constitutional History*, ed Michael Evans and R Ian Jack, Butterworths, Sydney at page 54):

> "29. No free man shall be taken or imprisoned or disseised of his freehold, liberties or free customs or outlawed or exiled or in anyway ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of land. To no one will we sell, to no one will we deny or delay right or justice."

In **1520**, the definition of false imprisonment contained in the authoritative work *Termes de la Lay*, was set out in the following terms:

> "`Imprisonment' is no other thing, but the restraint of a man's liberty whether it bee in the open field, or in the stocks, or in the cage in the streets or in a man's owne house, as well as in the common gaole; and in all the places the party so restrained is said to be a prisoner so long as he hath not his liberty freely to

> goe at all times to all places whither he will without baile or main, prise or otherwise." Cited with approval in *Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT Rep 44 at 51 per Duke LJ and Atkin LJ at 53 and in *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 599 (per Murphy J).

In **1765**, William Blackstone set out the following in his *Commentaries on the Laws of England*, first edition, Volume 1, "Of the Rights of Persons" at pages 131 and 132:

> "Of great importance to the public is the prefervation of this perfonal liberty: ...
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> The confinement of the perfon, in any wife, is an imprifonment. So that the keeping a man againft his will in a private houfe, putting him in the ftocks, arrefting or forcibly detaining him in the ftreet, is an imprifonment. And the law fo much difcourages unlawful confinement...".

Those principles have been applied in English, Australian, Canadian and American cases. They were discussed in *Bird v Jones* (1845) 7 QB 741 (115 ER 668) at 744 & 745 per Coleridge J and 747-748 per Williams J.

As to defences, lawful authority is a complete defence or answer to an action for false imprisonment - *Ruddock v Taylor* (2005) 222 CLR 612 per McHugh J at [54] & [64] (in dissent but not on this point); see also *Ruddock v Taylor* (2003) 58 NSWLR 269 at [4] (per Spigelman CJ). What constitutes lawful authority can be a difficult concept to define or identify in a given context. For example there may be direct statutory authority, implied statutory authority or authority derived from contract.

In recent years, and because of the increasing use of mandatory detention of certain aliens in Australia (styled as "illegal non-citizens" in the *Migration Act 1958*(Cth)) and the decreasing use of amnesties and grants of humanitarian visas for permanent residency, the question of false imprisonment at the hands of executive or administrative authorities is in current controversy. The Commonwealth Ombudsman has recently investigated the complaints of many overseas visitors and residents in Australia – see the many "Immigration detention review reports tabled in Parliament", the Ombudsman's reports to Parliament about people in long-term immigration detention (at http://www.comb.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports).

There were 346 reports tabled in Parliament as at 13 February 2008. Many of these reports identify false imprisonment issues and make non-binding recommendations for payment of compensation.

As to executive detention, the High Court of Australia has held that it is a fundamental principle of Australia's constitutional law that the executive may not interfere with the liberty of an individual without valid authorisation.

In *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528-529, Deane J explained:

> "The common law of Australia knows no lettre de cachet or executive warrant pursuant to which either citizen or alien can be deprived of his freedom by mere administrative decision or action. Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce the detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate. ... It cannot be too strongly stressed that these basic matters are not the stuff of empty rhetoric. They are the very fabric of the freedom under the law which is the prima facie right of every citizen and alien in this land. They represent a bulwark against tyranny." (cited in *Ruddock v Taylor* (2005) 222 CLR 612 per McHugh J at [120] and Kirby J at [138].)

General Damages

The full range of general damages is available to a plaintiff in a false imprisonment action with the exception of contemptuous damages.

Aggravated damages and exemplary damages are available.

Kirby J discussed the common law's approach to general damages in *Ruddock v Taylor* (2005) 222 CLR 612 at [140] in the following terms:

> "the principal function of the tort is to provide a remedy for "injury to liberty" (Trindade and Cane, *The Law of Torts in Australia*, 3rd ed (1999) at 302). It is not, as such, to signify fault on the part of the defendant. Damages are awarded to vindicate personal liberty, rather than as compensation for loss *per se* (Balkin and Davis, *Law of Torts*, 3rd ed (2004) at 62 [3.37]. Contrast the tort of negligence, where damages are awarded to compensate for loss or damage.)."

Assessment of general damages in false imprisonment cases is informed by the following accepted principles:

- from J Fleming, *The Law of Torts* 8th ed, LBC (1992) at 29

  > "False imprisonment trenches not only upon a person's liberty but also on his dignity and reputation, and this is reflected in the calculation of damages."

- from Trindade and Cane, *The Law of Torts in Australia*, 3rd Edition, OUP (1999) at 302.

  > "The compensatory damages are assessed by reference, *inter alia*, to the duration of the deprivation of liberty and to hurt or injury to the plaintiff's feelings, that is to say the injury, mental suffering, disgrace and humiliation suffered as a result of the false imprisonment."

(Both of these passages were cited with approval in *Goldie v Commonwealth of Australia (No.2)* (2004) 81 ALD 422 at [14] (French J)).

Other cases also speak of the purpose of such general damages as constituting a form of solace or solatum to the plaintiff for suffering a hurtful experience - *McDonald v Coles Myer Ltd (t/as K-Mart Chatswood)* (1995) AustTortsR |81-361 at page 62,687.

The defendant's conduct up to and including conduct at the trial of the action is relevant to assessing general and aggravated damages - *Spautz v Butterworth* (1996) 41 NSWLR 1 and *McDonald v Coles Myer Ltd (t/as K-Mart Chatswood)* (1995) AustTortsR |81-361.

Any pecuniary loss is plainly recoverable as well - *McDonald v Coles Myer Ltd (t/as K-Mart Chatswood)* (1995) AustTortsR |81-361 at page 62,690 (per Powell JA) citing as an example *Childs v Lewis* (1924) 40 TLR 870. In that case Powell also said (at page 62,609:

> "The principal heads of damage to which, in the past, regard appears to have been paid are, the injury to liberty, the injury to the plaintiffs feelings, ie the indignity, mental suffering, disgrace and humiliation, with any attended loss of social status, and, where it can be demonstrated that the imprisonment has had a deleterious effect on the plaintiff's health, any resultant physical injury, illness or discomfort (*Lowden v Goodrick* (1791) PEAKE 64; *Pettit v Addington* (1791) PEAKE 87). In addition to damages falling under one or other of the heads to which I have just referred, the manner in which the imprisonment is effected may lead to an award of aggravated compensatory damages, as also may the subsequent conduct of the defendant, if it tends to show that the defendant is persevering in the charge (*Warwick v Foulkes* (1844) 12 M and W 507; *Walter v Alltools* (1944) 61 TLR 39 (CA)), although it has been suggested (McGregor on Damages 15 Ed (1988) at 1029) that an unsuccessful plea by the defendant that the plaintiff was guilty of the offence charged against him by the defendant should not lead to an aggravation of damages, unless it is shown the defendant made the charge mala fide."

It is permissible to compare damages awards in other false imprisonment cases so as to arrive at a comparable quantum of damages - *Spautz v Butterworth* (1996) 41 NSWLR 1 at 13D. Economic loss was here there to constitute a component of the damages award - *Spautz v Butterworth* (1996) 41 NSWLR 1 at 18D.

In *Louis v Commonwealth* (1987) 87 FLR 277 (Kelly J) the Federal Court held (at page 284) that the question of damages for false imprisonment in Australia at common law were "*very much at large*". The Court held its function in this regard is "*that of a jury*". Importantly, the Court asserted that, just as in any action in tort, the defendant must take the plaintiff as it finds him or her. In that case, persons were deported from Hong Kong to Australia. Official documents of deportation came into effect in Hong Kong and the authorities there asked Qantas Airlines to take them to Australia as per the usual informal arrangement. The Court held that in the absence of an official order directing the airline to carry the passengers, they were all carried to Australia against their will and they were wrongly imprisoned (for about a day).

For one plaintiff, a Philippine citizen, the Court awarded $10,000 having regard to her:

- deep humiliation; and,
- her deep seated and real unwillingness to return to Australia.

For the second plaintiff, a former Australian citizen who purported to renounce his citizenship and who considered himself stateless, the Court awarded $20,000 having regard to:

- the humiliation of arrest and imprisonment on board the aircraft;
- having a restraining hand placed on him by the Qantas security officer;
- him being aware of the presence of a doctor and security such that if he objected to what was happening to him, he know he would be forcibly detained and sedated for the duration of the flight.

The remaining three plaintiffs were children and were awarded the grand nominal sum of $100 each as they were considered as "too young to have suffered".

In *McDonald v Coles Myer Ltd (t/as K-Mart Chatswood)* (1995) AustTortsR |81-361 at page 62,687 the NSW Court of Appeal held the Court must take into account the whole of the conduct of the defendants until the time of verdict which may have the effect of increasing the injury to the plaintiff (Per Clarke JA, with Powell JA agreeing - See also *Spautz v Butterworth* (1996) 41 NSWLR 1at 17G to 18A.)

As to the "Goldie Saga", in *Goldie v Commonwealth of Australia* (2000) 180 ALR 609 the Federal Court dismissed an application alleging unlawful detention for four days of a non-citizen where there was a suspicion that the relevant visa had expired. On appeal to the Full Court of the Federal Court, it was held (by majority) that the detention of the appellant was unlawful in that it was not based on knowledge or a reasonable suspicion that the appellant was an unlawful non-citizen under section 189(1) of the *Migration Act 1958*(Cth) - *Goldie v Commonwealth of Australia* (2002) 117 FCR 566. In *Goldie v Commonwealth of Australia (No.2)* (2004) 81 ALD 422 (French J) the applicant was awarded damages of $22,000 for false imprisonment (which, if calculated, was for the four days about $5,500 per day).

The Court said (at [11]-[12]):

> "Counsel referred to *Louis v Commonwealth of Australia* (1987) 87 FLR 277. In that case the total period of unlawful detention was a few hours. The events in question occurred in 1982. The court decision was in 1987. Mrs Louis was awarded $10,000 and Mr Louis $20,000. It is submitted for the applicant that given the change in money values between 1987 and 2003, the equivalent amount today would be approximately $20,000 and $40,000. Also cited was *State of New South Wales v Riley* [2003] NSWCA 208. For false imprisonment lasting about one hour and associated with the application of tight handcuffs a sum of $40,000 was awarded. This was upheld by the Court of Appeal which, however, set aside an award for aggravated and exemplary damages in the case.
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> There is little to be gained by multiplying references to cases each of which will turn on their own facts."

The Court came to its own figure of damages by reason of the facts that:

- the initial arrest occurred in a public setting (his work);
- he suffered indignity as a result;
- a physical constraints was placed on him at the time of arrest that was undignified (an officer placed his had through the plaintiff's belt while they were walking so he would not escape); and,
- he was subject to physical trespasses – being patted down and searched and his tie, belt and shoelaces were removed.

In *Taylor v Ruddock*, unreported, 18 December 2002, NSW District Court, Murrell DCJ, at first instance, the Court considered the quantum of general damages for the plaintiff's loss of liberty for two periods of 161 days and 155 days, most of which were served out in "immigration detention" under the *Migration Act 1958*(Cth) but which were in fact served out in NSW prisons (and not at, for example Villawood, an immigration detention centre). The Court found that the plaintiff was unlawfully imprisoned for the whole of those periods and awarded him $50,000 for the first period of 161 days (that is $310.56 per day if one were to calculate it that way) and $60,000 for the second period of 155 days (that is $387 per day). Put together – for a total period of 316 days wrongful imprisonment, the Court awarded a total of $110,000 (that is $348.10 per day).

In that case, on the question of general damages, the District Court (at [132] –[135]) surveyed some of the (very little) case law on quantum in this area. The Court discussed *Thompson; Hsu v Commissioner of Police of the Metropolis* [1998] QB 498 (Lord Woolf MR, Auld LJ and Sir Brian Neill) where the UK Court of Appeal considered guidance that should be given to civil juries in damages awards for two claims for wrongful imprisonment and malicious prosecution The Court of Appeal said (at 515D-F):

> "In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for twenty four hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale."

In a rough conversion made as at 18 February 2008 (without bring the amount into today's dollars), the sum of UK$3,000 for the first day converts to AUD**$6,441.89**. This passage was set out by the District Court as a stating point.

Next, the District Court (at [135]) considered *Spautz v Butterworth* (1996) 41 NSWLR 1 where the plaintiff was "unceremoniously cast into a prison in which he was to remain for 56 days" following a peremptory arrest without warning or the opportunity to set his affairs in order. There, "false information had been provided in the warrants, which branded the plaintiff as a criminal convicted of criminal

defamation. The plaintiff suffered solitary confinement for seven days, visual and sensory deprivation for all but a few hours of each day." (*ibid*) The approach to damages in *Spautz* was considered by the District Court to be "consistent" with the approach in *Thompson*. In *Spautz v Butterworth* (1996) 41 NSWLR 1, the NSW Court of Appeal awarded the sum of $1,339 per day for 56 days false imprisonment general damages alone. The Court there took into account (at page 18E-G) the following matters:

(a) a peremptory arrest without warning or opportunity to set the plaintiff's [appellant's] affairs in order;

(b) false information in the warrant branding the plaintiff as a criminal convicted of criminal defamation;

(c) finger-printing, handcuffing, and the taking of the plaintiff's personal possessions;

(d) incarceration within a police lock-up at Wallsend;

(e) temporary loss of ability to speak or otherwise communicate;

(f) being put in a police paddy wagon and being delivered to a maximum security prison;

(g) solitary confinement at Maitland prison for seven days;

(h) visual and sensory deprivation for all but a few hours of each day;

(i) general humiliation; and,

(j) treating the plaintiff without distinction from convicted felons.

Ultimately, in *Taylor v Ruddock*, the District Court held that since prior to his wrongful imprisonment the plaintiff had served many years in NSW prisons as a child sex offender, imprisonment was "not his first experience of a loss of liberty" (at [140]). The court also took into account the fact that the plaintiff was a person of "low repute" (who would "inspire aversion in many") and "who would not have felt the disgrace and humiliation experienced by a person of good character in similar circumstances" (*ibid*). However, he was awarded general damages for:

- compensation for the extended periods of loss of liberty during which he suffered deprivations;
- For some injury to his feelings; and
- For the (limited) psychiatric injury which he sustained (*ibid*).

Aggravated and exemplary damages were refused.

For various reasons, mostly constitutional and mostly not relevant to the topic of this paper, that award was ultimately set aside by the High Court of Australia by majority (in *Ruddock v Taylor* (2005) 222 CLR 612 (per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; with McHugh and Kirby JJ dissenting). However, before that occurred, in the NSW Court of Appeal, in *Ruddock v Taylor* (2003) 58 NSWLR 269 at [45] to [50] (per Spigelman CJ with Ipp JA agreeing) the Court upheld the general damages award of $110,000, finding that the award was quite "low" and was

at the "bottom" of the legally permissible range of general damages. The Court stated (at [48]-[49]):

> "The period for which the Respondent was deprived of his liberty was a very long one. In *Spautz* this Court, allowing an appeal against inadequacy, decided that an appropriate award of general damages was $75,000 for a person who was imprisoned for 56 days. The Respondent's period of detention, much of it in prison, was for two periods of 161 and 155 days. Obviously there are differences in the situations between Dr Spautz and the Cross-Appellant.
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> Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as "*the initial shock of being arrested*" (*Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 at 515). As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish."

The Approach

Accordingly, when taking instructions for general damages purposes, one should seek to elicit detailed evidence from the client and potential witnesses going to:

- The personal history of the plaintiff and his or her background and any relevant pre-existing conditions or beliefs or fears;

- That history should be as detailed as possible, describing the plaintiff's feelings and all the sensations experienced (unlike the usual practice of drawing affidavits as to merely describing factual events);

- Medical evidence should be sought; and

- Any economic loss should be explored in detail and supported by documents.

The intention of the plaintiff's evidence should be to seek to place the Court firmly in the shoes of the plaintiff as plainly and as graphically as possible.

One cannot underestimate the importance of also gathering anecdotal evidence regarding the amount of damages paid to other plaintiffs by way of settlement or compromise in particular claims. Of course, most of these are effected in combination with a confidentiality deed (and, perhaps a Court approved "gag order"). This merely means that ascertaining the quantum paid is difficult. However, any such information or scrap of information would be useful to know in going through a process of attempting to settle a particular claim.

For example, Cornelia Rau has reportedly agreed to accept $2.4 million in damages for false imprisonment from the Commonwealth (Sydney Morning Herald, 19 February 2008, page 2; See also the Research Brief dated 31 March 2005 by the Commonwealth's Department of Parliamentary Services titled "*The detention of Cornelia Rau: legal issues*") (If calculated, the daily rate for the 300 days Ms Rau spent in detention would be about $8,000 per day).

In addition in February 2005, media reports stated that the Commonwealth paid $25,000 compensation to a French tourist wrongly held in Sydney's Villawood detention centre for four days (Research Brief, *ibid*, at page 22, ABC Radio transcript, AM, 15 February 2005). (If calculated, the daily rate for the 4 days would be about $6,250 per day.)

There were various media reports about Ms Vivian Solon, the disabled Australian woman who was wrongly deported to the Philippines and left there for four years. The matter of compensation was mediated by Sir Anthony Mason AC. The mater was settled for an undisclosed sum. However, her lawyers made it well known that they were seeking damages in the order of $10 million (see, for example, "Settlement Here for Deported Solon", 6 December 2006, www.lawyersweekly.com.au).

Cases and settlements known to Legal Aid may also act as a guide in the assessment of the proper quantum of damages to seek and to aim for in negotiating a proper compromise.

Aggravated and Exemplary Damages

In *NSW v Ibbett* (2006) 229 CLR 638 the High Court described the differences between aggravated and exemplary damages in the following terms (in the context of a trespass to land) (at [31] to [40]):

> "Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing [*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129-130]. The interest of the plaintiff against invasion of the exclusive possession of the plaintiff extends to the freedom from disturbance of those persons present there with the leave of the plaintiff, at least as family members or as an incident of some other bona fide domestic relationship. The affront to such persons may aggravate the infringement of the right of the plaintiff to enjoy exclusive and quiet possession [cf *Brame v Clark* (1908) 62 SE 418 at 419; *May v Western Union Telegraph Co* (1911) 72 SE 1059 at 1062; *Douglas v Humble Oil & Refining Co* (1968) 445 P (2d) 590; *Restatement of Torts*, 2d, vol 1, Appendix (1966), §162]." And
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> "In *Uren v John Fairfax & Sons Pty Ltd* [(1966) 117 CLR 118], Taylor J, after observing that aggravated damages fix upon the circumstances and manner of the wrongdoing of the defendant, contrasted the function of exemplary damages as punishment and deterrent of the wrongdoer. His Honour added that [(1966) 117 CLR 118 at 130] : "in many cases, the same set of circumstances might well justify either an award of exemplary or aggravated damages." Subsequently, in *Lamb v Cotogno* [(1987) 164 CLR 1], in the joint reasons of five members of the Court, the conceptual distinction was drawn between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages. Their Honours added that in some cases it might be difficult to differentiate between aggravated damages and exemplary damages. Gleeson CJ, McHugh, Gummow and Hayne JJ spoke in

> like terms in *Gray v Motor Accident Commission* [1998) 196 CLR 1 at 4 [6]; see also at 34-36 [100]-[103]].”

As to exemplary damages, the High Court held that (at [38]):

> “… an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government [*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 143-144 [17]]” and (at [39]):
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> “[W]hat is well established is that an award of exemplary damages may serve "a valuable purpose in restraining the arbitrary and outrageous use of executive power" and "oppressive, arbitrary or unconstitutional action by the servants of the government".” (footnotes omitted)

The basis of an award for exemplary damages may reflect punishment of the defendants for their “anti-social” behaviour towards the plaintiff (*McDonald v Coles Myer Ltd (t/as K-Mart Chatswood)* (1995) AustTortsR |81-361 at page 62,685).

In the context of false imprisonment cases the NSW Court of Appeal in *Spautz v Butterworth* (1996) 41 NSWLR 1 at 15 indicated a useful passage in explaining the complexities in this area as that found in the speech of Lord Diplock in *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124-1126, where his Lordship said:

> “The three heads under which damages are recoverable for those torts for which damages are ‘at large’ are classified under three heads: (1) compensation for harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value upon physical hurt, as in assault, upon curtailment of liberty, as in false imprisonment or malicious prosecution, upon injury to reputation, as in defamation, false imprisonment and malicious prosecution, upon inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation. (2) Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or the motive for which the defendant did it. This Lord Devlin calls ‘aggravated damages’. (3) Punishment of the defendant for his anti-social behaviour to the plaintiff. This Lord Devlin calls ‘exemplary damages’….”

In *State of NSW v Delly* [2007] NSWCA 303 (Ipp, Tobias and Basten JJA) the Court considered an appeal from a very high award of damages in a wrongful arrest and imprisonment matter at Queanbeyan. The plaintiff was a 23 year old mother simply taken by the police and held for under a day at the police station in the possible context of a murder investigation. She was not informed of the charge and not told that at some point during the day, the police decided they would not charge her. They only let her go later.

Balla DCJ awarded general damages of $25,000 (held on appeal to be in the highest of the permissible range) and $10,000 for aggravated damages (set aside entirely on appeal) and $25,000 for exemplary damages (reduced to $10,000 on the appeal).

Tobias JA (at [76]) explained that the award of general damages was made to compensate the plaintiff for:

- curtailment of her liberty;
- the humiliation of being taken to the police station under arrest as observed by her 3 and a half year old daughter Rose;
- her concern with respect to her daughter Rose whilst she was detained at the police station;
- the distress that Rose had, apparently, observed the respondent being arrested and driven away by the police and the necessity to care for her baby Jasmine when detained in the anti-theft room in the presence of other police officers with a consequent lack of privacy.

As to aggravated damages, Balla DCJ had awarded such damages because the plaintiff had been kept in a small room with her small child for some hours. The Court of Appeal (Tobias JA) cited the above passage from *NSW v Ibbett* (2006) 229 CLR 638 at [31] with approval and set out the relevant principles as follows (*State of NSW v Delly* [2007] NSWCA 303 at [80]-[81] per Tobias JA):

> "[the principles] were articulated by Hodgson JA, with whom on the question of damages Sheller JA and Nicholas J agreed, in *State of New South Wales v Riley* [2003] NSWCA 208; (2003) 57 NSWLR 496 where, after observing (at 528 [127]) that ordinary compensatory damages are supposed to be an amount adequate to compensate a plaintiff for all consequences of the defendant's wrongful conduct that are not too remote, his Honour asked himself: what room is there for additional damages, which although dependant on some aggravating feature of the defendant's wrongful conduct, are still supposed to do no more than compensate for the consequences of that conduct? His Honour responded to his own question in the following terms:
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> > "131 In my opinion, the only principled explanation must be along the following lines. It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrong-doing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt [feelings] neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt to feelings caused by wrong-doing ***that goes beyond ordinary human fallibility***, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified."
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> The issue which therefore arises is whether the conduct of the police in detaining the respondent in the circumstances found by the primary judge

> ***went beyond ordinary human fallibility*** so as to justify any increment to the ordinary compensatory damages already included in her Honour's award of $25,000. What made the respondent's detention unlawful was the failure of the police officers to inform her that she was under arrest and the reason why she was being arrested. That position continued for four hours. It would seem that the difficulty was that the relevant police officers simply could not determine whether the respondent had committed an offence or not – at least until they had interviewed other witnesses. As such, they kept the respondent in the dark." (my emphasis)

As the general damages award was already extremely high, the Court of Appeal simply overturned the aggravated damages award.

Basten JA set out his particular view [105]-[113] that there is a blurry line between compensatory damages and aggravated damages that makes it appropriate for them to be assessed together. He said the term "aggravated damages" is something of a misnomer. It refers to a component of compensatory damages referrable to circumstances of aggravation. He discussed the test for aggravated damages as was adopted in the case by Ipp JA. Ipp JA had concluded that an award of aggravated damages will not be available unless the conduct of the defendant "was neither bona fide nor justifiable": (at [21]) (a test he derived from *Spautz v Butterworth* (1996) 41 NSWLR 1 at 18A) Basten JA considered the application of those criteria as a general constraint on an award "may give rise to difficulties" (at [106].

As to the **punitive or exemplary damages** component, the Court wanted to punish the police officers for failing to inform the plaintiff that she was under arrest and the reason for that arrest and for failing to inform her at 11am that she was free to go when it was decided that she would not be charged (she therefore had been kept an additional one and a half hours).

Tobias set out the general principles as to exemplary damages (at [85]-[88]). The touchstones are:

- the considerations are quite different from compensatory damages and there need be no necessary proportionality between the assessments;
- it is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again;
- the social purpose is to teach a wrong-doer that "tort does not pay";
- it is to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self- help likely to endanger the peace;
- it marks the court's condemnation of the defendant's behaviour; and,
- it is an exceptional remedy which was rarely awarded and then only where there is high-handed, insolent, vindictive or malicious conduct.

It was held that the award of exemplary damages of $25,000 was too high and $10,000 was awarded instead. Basten JA (at [118]) dissented from the majority in this regard.

Generally

Care should be taken not to mix up the quantum of damages for general and aggravated and exemplary damages. It is preferable that separate awards be made for each category. However, a trial court possesses considerable discretion in this regard and "the range of available conclusions is wide" (see, *Zaravinos v NSW* (2004) 62 NSWLR 58 where the Court of Appeal considered an unlawful detention of about 3 hours and approved a mixed award of $25,000 in damages and $5,083 interest).

Note should be made of section 21 of the *Civil Liability Act 2002*(NSW)("CLA") which provides:

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

Damages for false imprisonment are plainly not "personal injury damages" in that sense. Care must be taken when drawing pleadings in this area so as to keep what is claimed separate from any other cause of action.

In many false imprisonment cases, legal practitioners are very tempted to plead every possible claim or cause of action available and this can muddy the waters in a damages sense. For example, a claim for damages that relates to the impairment of a person's physical or mental condition **is** a claim for personal injury damages within the meaning of the CLA. If that claim is couched in negligence, section 21 CLA will apply to exclude exemplary and aggravated damages. However, the principles in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 compel one to at least consider all of the available claims as the plaintiff might be estopped from seeking to bring them later against the same defendant. As was noted by Meagher JA in *Ruddock v Taylor* (2003) 58 NSWLR 269 at [82]:

> "An overall requirement of an *Anshun* estoppel is reasonableness. It does not arise unless it was unreasonable of the party sought to be estopped not to plead the cause of action in question."

In practice, this means that careful consideration needs to be given to the various claims that may have accrued at a particular time. It may also mean that consideration should be given to the nature of the different causes of action that might be available: for example, one does not normally seek damages in a judicial review case (*ibid;* and, for example, *Park Oh Ho v Minister for Immigration & Ethnic Affairs* (1989) 167 CLR 637).

Great care must also be used in identifying multiple causes of action in complex cases and identifying how this impacts in damages awards. For example in *Trevorrow v State of South Australia (No 5)*[2007] SASC 285 (Gray J - 1 August 2007), the plaintiff brought an action against the State of South Australia claiming misfeasance of public office, false imprisonment, breach of duty of care and breach of fiduciary

and statutory duties. In 1949 and 1954 the State received legal advice that it did not have the authority to remove Aboriginal children absent certain procedures being followed. In 1957 the plaintiff aged 13 months was taken to hospital. In January 1958 the plaintiff was removed from hospital and placed into the care of a foster family by a statutory board and government department. He lived with a foster family until about 1967 and then he was in and out of various institutions. The plaintiff was successful on all these causes of actions including false imprisonment (at [982]-[993]) (the judgment is 294 pages – 1290 paragraphs long).

A total sum of $525,000.00 was awarded (including an exemplary damages component) plus, a lump sum of $250,000.00 in lieu of 50 years of interest on part of the award (in *Trevorrow v State of South Australia (No 6)* [2008] SASC 4 (Gray J - 1 February 2008).

It is difficult to discern in the judgment which award of damages relates to which cause of action.

If many different causes of action are brought and only one is successful, apart from the risk of confusion (in submissions, the conduct of the case and in the ultimate determination) there is also the risk that the defendant will seek costs in respect of the unsuccessful parts. For example, NSW sought costs before the trial judge in *State of New South Wales v Stanley* [2007] NSWCA 330 (Beazley & Tobias JJA & Hislop J). There, a case was conducted based on many causes of action and it was only successful in false imprisonment. The plaintiff was awarded $15,000 general damages for being wrongly held at Parramatta police station for 4 hours. However, notwithstanding he had sought much more, including further counts of false imprisonment and actions in assault, battery, malicious prosecution and wrongful arrest, the trial judge awarded the plaintiff his entire costs. That decision was upheld on appeal. However, the costs decision is discretionary and it could equally have been made in the State's favour in large amount.

Great caution must also be used in seeking to compare damages assessments in cases where other causes of action are pleaded in addition to false imprisonment (see, for example: *Coyle v State of New South Wales* [2006] NSWCA 95 (Mason P, Handley & Tobias JJA) – where assault, wrongful arrest, false imprisonment and malicious prosecution were all pleaded. The same was the case in *Houda v State of New South Wales* [2005] NSWSC 1053 (Cooper AJ).

Thank You