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New South Wales v Ibbett [2006] HCA 57; (2006) 231 ALR 485; (2006) 81 ALJR 427 (12 December 2006)

Last Updated: 12 December 2006

HIGH COURT OF AUSTRALIA

GLEESON CJ,

GUMMOW, KIRBY, HEYDON AND CRENNAN JJ

STATE OF NEW SOUTH WALES APPELLANT

AND

DOROTHY ISABEL **IBBETT** RESPONDENT

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

12 December 2006

S227/2006

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

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

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

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

CATCHWORDS

New South Wales v Ibbett

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

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

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

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

Crown Proceedings Act 1988 (NSW), s 5.

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

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

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

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

   The nature of the action

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

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

5. Section 6 of the *Law Reform (Vicarious Liability) Act 1983* (NSW) ("the 1983 Act") deems police officers to be persons in the service of the Crown. Section 8 renders the Crown vicariously liable in respect of torts committed by such persons in the course of their service and in performance or purported performance of an independent function. No occasion arises in

this appeal to examine the statutory equation of the State, created by the Constitution of the Commonwealth, with the Crown[6]. The 1983 Act can be interpreted in accordance with its own terms and without reference to any possible constitutional questions.

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

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

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

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

The facts

8. More should be said now respecting the facts. Mrs **Ibbett** was born in 1931. Her husband had died in 1995. Mrs **Ibbett** had owned three shops and had worked as a paymistress for 17 years. She last worked in 1987. Mrs **Ibbett** had been very involved with the bowling community and had been District President of the Lower North Coast District. The trial judge accepted her evidence, saying that she gave her testimony in a clear and matter of fact way, and without any sign of exaggeration or reason for suspecting invention.

9. Mrs **Ibbett** had three children, a daughter and two sons. One son, Warren, born in 1958, returned to live with his mother since his release from prison in 1997. This was after he had served a term of five and a half years imprisonment. That was the third of three lengthy periods of imprisonment served by him. He said in evidence at the trial of the present action that he had been a drug user "on and off over the years".

10. The events complained of by Mrs **Ibbett** occurred in the early hours of 23 January 2001 at the house then owned and occupied by her in Forster, on the North-central coast of New

South Wales. The house had been built for Mrs **Ibbett** with the assistance of her son in fitting it out. The premises had four bedrooms and an attached double garage with access from the house.

11. Shortly before 2.00 am on 23 January 2001, whilst Mrs **Ibbett** was asleep in the main bedroom across a hallway directly behind the garage, her son arrived home in his van. He was pursued by a police vehicle. The police vehicle was occupied by the two police officers, Senior Constables Pickavance and Harman. They were acting under operational orders "to keep a lookout for" Mr **Ibbett**. However, the only offence, commission of which the police reasonably suspected Mr **Ibbett**, was a driving offence.

12. Mr **Ibbett** drove into the garage of the house and, using a remote control device, closed the roller door. As the roller door was closing, Senior Constable Pickavance dived under it and sought to arrest Mr **Ibbett**. He had no proper basis for making such an arrest or entering the property. He was not uniformed and was wearing casual clothing.

13. There was a commotion with both parties shouting or screaming at each other. This awakened Mrs **Ibbett**. Whilst Senior Constable Pickavance had his service pistol directed at Mr **Ibbett**, Mrs **Ibbett** opened a door leading from the hallway into the garage. She heard her son say to Senior Constable Pickavance, "Who are you? Get outta here." She repeated words to that effect, at which stage Senior Constable Pickavance swung towards her, pointing his gun at her and said, "Open the bloody door and let my mate in." Mrs **Ibbett** had never seen a gun before and was petrified. The trial judge regarded that description of her state of mind as no exaggeration.

14. To this point, Senior Constable Harman had been outside the house but came in when the roller door to the garage was re-opened. Like Senior Constable Pickavance, he was not uniformed and wore casual clothing.

15. Mr **Ibbett** was removed to the driveway, handcuffed and pushed to the ground. Uniformed police arrived. Mr **Ibbett**'s vehicle was removed onto the driveway and searched. He himself was returned to the garage and strip searched. Criminal proceedings were commenced against Mr **Ibbett**. However, these were subsequently withdrawn.

16. At the trial in the District Court of Mrs **Ibbett**'s claim for damages against the State, Senior Constable Pickavance denied that he had pointed a gun at Mrs **Ibbett**, but his evidence was not accepted. The trial judge described him as "conspicuously careless with the truth". Senior Constable Harman was treated as a more forthright and reliable witness but much of his evidence impressed the trial judge as coloured by a sense of loyalty to his fellow officer.

17. Phegan DCJ concluded:

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

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

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

The damages award

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

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

The issues in this Court

22. In oral submissions to this Court, counsel for the State stressed that the interest of the State on the appeal was in establishing the applicable principles, rather than precise assessment of the various heads of damages awarded.

23. The State submits, first, that in upholding the awards of aggravated and exemplary damages for the trespass, the majority in the Court of Appeal (particularly Spigelman CJ) wrongly took into account the interest of the occupier of land in undisturbed enjoyment by the occupier and the guests of the occupier. In that regard, Spigelman CJ had held that, while in the present case an award of exemplary damages could not be supported, an award of damages for trespass to land can vindicate the right of an occupier to have undisturbed the owner's guests and residents. On the other hand, Ipp JA disagreed that such a right was recognised in the tort of trespass and the State supports what was said by Ipp JA.

24. Secondly, the State complains that, by awarding general damages, aggravated damages and exemplary damages for trespass to land, the State had been punished twice for the same wrong.

25. Thirdly, as to the awards of exemplary damages (for which the State is liable only vicariously), the State contends that Ipp JA was correct when he said:

"The State can only be punished for the conduct of those who train and discipline

> the police force when a case is properly made out based on the unlawful conduct of such officials. It is quite wrong, in my view, to fix the State with vicarious liability for the conduct of persons who are not before the court, who have not been identified, whose conduct is not the subject of allegations in the pleadings, whose conduct has not been investigated at the trial, and against whom no specific findings have been made.
>
> ...
>
> I would add that it is difficult to comprehend how an award against [the State] could be said merely to irritate because it is $10,000 but would sting if it were $25,000, particularly if regard is had to the State's annual budget. The force of the proposition is not, in my view, increased if the amount is increased to $45,000 by lumping the tort of assault together with the tort of trespass."

26. Before turning to consider the issues thus raised, three preliminary matters should be noted. The first is that, whatever may be the significance for the law of trespass of the undisturbed presence of guests of the occupier, the facts of this litigation have a narrower focus. Mr **Ibbett** was living in his mother's house and was a member of the household, not a guest in any transient or merely social sense; the position in respect of such persons may be put to one side in deciding the first issue on this appeal.

27. The second preliminary matter is that the case cannot be approached on the footing that the conduct of the police officers was to be explained in whole or part by reference to known violent propensities of Mr **Ibbett**. There was no finding to that effect and, in any event, Senior Constable Pickavance had denied pulling his gun but was not believed.

28. The third matter is that the police officers appear to have received limited "re-education" from other officers (not of superior rank) with respect to their conduct at Mrs **Ibbett**'s house on the night in question. Senior Constable Harman said he had "a quick briefing", the content of which he could not recall. Senior Constable Pickavance said he was told at a five minute meeting with an Education Development Officer ("EDO") that he should not have rolled out Mr **Ibbett**'s vehicle and should have got a search warrant. The EDO said, "Oh boys you'd better do better next time." Mrs **Ibbett** said that she was offended by this seemingly trivial and apparently dismissive response to what had happened to her.

Trespass - the interest protected

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

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

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

In their discussion of the tort of trespass in their joint reasons in *Plenty*, Gaudron and McHugh

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

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

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

"Double punishment"

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

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

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

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

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

35. In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award

one sum which represents both heads of damages and no element more than once. Such an approach was adopted by Bray CJ in *Johnstone v Stewart*[18]. In the present case, Basten JA favoured a variation of this approach, with a global award of exemplary damages in respect of the causes of action in trespass and in assault. However, in the event, nothing turned on the different approaches in this regard because the global award of $45,000 was equal to the distinct awards of $25,000 and $20,000 favoured by Spigelman CJ.

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

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

Exemplary damages

38. The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government[19]. Indeed, the first reported use of the expression "exemplary damages" may have been by Pratt LCJ[20] in *Huckle v Money*[21]. *Huckle* was one of several tort actions in the Court of Common Pleas[22] arising from the use by the administration of George Grenville[23] of general warrants in its campaign in the 1760s against the activities of John Wilkes and the publication styled the *North Briton*. The jury in *Huckle* awarded no less than £300 damages, an enormous sum for the times, and the Lord Chief Justice said they were not excessive.

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

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

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

> "I think that a number of cases decided by the courts in Northern Ireland during the past 30 years of terrorist violence give support to the opinion of Lord Devlin in *Rookes v Barnard*[30] that in certain cases the awarding of exemplary damages serves a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law. Members of the security

> forces seeking to combat terrorism face constant danger and have to carry out their duties in very stressful conditions. In such circumstances an individual soldier or police officer or prison officer may, on occasion, act in gross breach of discipline and commit an unlawful act which is oppressive or arbitrary and in such cases exemplary damages have been awarded."

His Lordship added[31]:

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

Vicarious liability

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

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

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

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

The case law

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

in 1982[37] and, thereafter, by this Court[38]. Caltex had procured the spiking by others of the plaintiff's tanks.

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

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

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

47. Shortly thereafter, in *S v Attorney-General*[44], the New Zealand Court of Appeal held that, if not as a matter of power, then at least as a prudential consideration, an award of exemplary damages against the Crown should not be made in respect of the tortious acts of foster parents against children placed in their care by the Superintendent of Child Welfare; this was because the Department was not "directly at fault"[45]. However, Blanchard J, who gave the principal reasons in *S v Attorney-General*, reserved the position where a police officer deliberately or recklessly directly inflicted personal injury on the plaintiff[46]. Moreover, in this Court, it has been said that there may be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff[47].

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

The submissions by the State

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

> "the focus in determining the liability and the quantum of the liability for

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

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

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

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

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

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

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

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

Conclusions respecting vicarious responsibility and exemplary damages

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

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

56. Secondly, the New South Wales legislative reforms do not require, in obedience to a "master's tort" theory, determination solely of what would be an appropriate award of exemplary damages

against the police officers to the exclusion of considerations affecting the State itself.

57. The doctrine, associated in Australia with *Enever v The King*[55], which excepted the exercise of independent discretions from the legislative changes otherwise providing for the vicarious tort liability of the Crown, would have denied any award of exemplary or other damages against the State in the present case. The changes introduced by the 1983 Act rendered the State vicariously liable in tort, but s 9B, introduced by the 2003 Act, denies attribution of liability to the State in the present litigation simply by reference to a "master's tort" theory. The scheme of s 9B is to require persons in the position of Mrs **Ibbett** to sue only the State, and to do so "instead" of making a claim against the police officers.

58. There are several qualifications to this new legal regime. The State is not rendered vicariously liable for police torts if it otherwise would not be so liable (s 9E(a)). The State may deny vicarious liability (s 9B(3)), something it did not do in this case. Further, there is preserved the possibility that the State may claim damages, contribution or indemnity against police officers (s 9E(b)). This too did not occur here. However, a principal object of the 2003 Act was to require the bringing of actions against the State instead of against the police officers concerned and to do so without affecting the rights of recovery by plaintiffs.

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

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

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

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

Orders

61. The appeal should be dismissed with costs.

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

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

[3] Established by the *Police Act 1990* (NSW). See, generally, *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 79 ALJR 1581; 221 ALR 95.

[4] Hogg and Monahan, *Liability of the Crown*, 3rd ed (2000) at 111-112, 116. Section 10 of the Crown Proceedings Act repealed the *Claims against the Government and Crown Suits Act 1912*

(NSW), whose nominal defendant procedures previously had been utilised in tort actions arising from police misconduct and including *Griffiths v Haines* [1984] 3 NSWLR 653 and *Lippl v Haines* (1989) 18 NSWLR 620.

[5] *Enever v The King* [1906] HCA 3; (1906) 3 CLR 969; *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 79 ALJR 1581 at 1584 [4]- [5], 1593-1594 [70], 1603 [119]; [2005] HCA 50; 221 ALR 95 at 96-97, 110, 123; Hogg and Monahan, *Liability of the Crown*, 3rd ed (2000) at 125-127.

[6] *The Commonwealth v Mewett* (1997) 191 CLR 471 at 545-552; cf *Byrne v Ireland* [1972] IR 241 at 272-273 per Walsh J.

[7] [1957] HCA 26; (1957) 97 CLR 36 at 56-57; cf *Majrowski v Guy's and St Thomas's NHS Trust* [2006] 3 WLR 125 at 129 per Lord Nicholls of Birkenhead; [2006] 4 All ER 395 at 401.

[8] [1957] HCA 26; (1957) 97 CLR 36 at 64-65.

[9] [1991] HCA 5; (1991) 171 CLR 635 at 645.

[10] [1991] HCA 5; (1991) 171 CLR 635 at 647.

[11] [1981] AC 446 at 464.

[12] *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 129-130.

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

[14] [1966] HCA 40; (1966) 117 CLR 118.

[15] [1966] HCA 40; (1966) 117 CLR 118 at 130.

[16] [1987] HCA 47; (1987) 164 CLR 1.

[17] (1998) 196 CLR 1 at 4 [6]; see also at 34-36 [100]-[103].

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

[19] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* [1996] HCA 3; (1997) 188 CLR 501 at 558; *Enfield City Corporation v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135 at 143-144 [17].

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

[21] [1799] EngR 225; (1763) 2 Wils KB 205 at 207 [95 ER 768 at 769]. The defendant was a King's messenger, sued for trespass, assault and false imprisonment by a journeyman printer. The term "exemplary damages" was also used by the Court of Common Pleas in *Grey v Grant* [1799] EngR 191; (1764) 2 Wils KB 252 at 253 [95 ER 794 at 795].

[22] Another was *Wilkes v Wood* [1763] EngR 103; (1763) Lofft 1 [98 ER 489], where the award by a special jury in favour of John Wilkes was £1000. Wood was an under-secretary of State: Watson, *The Reign of George III*, (1960) at 100. See also the discussion of these cases by Binnie J in *Whiten v Pilot*

Insurance Co [2002] 1 SCR 595 at 619-621.

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

[24] *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 152-153; see also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 5 [8].

[25] *Rookes v Barnard* [1964] UKHL 1; [1964] AC 1129 at 1223, 1226.

[26] [1964] UKHL 1; [1964] AC 1129 at 1226.

[27] [2002] 2 AC 122 at 147-149.

[28] [1990] NI 179 at 181-182.

[29] [2002] 2 AC 122 at 147.

[30] [1964] UKHL 1; [1964] AC 1129 at 1223, 1226.

[31] [2002] 2 AC 122 at 149.

[32] (1865) 6 B & S 257 at 295-296 [1865] EngR 205; [122 ER 1191 at 1205].

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

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

[35] [1968] HCA 60; (1968) 121 CLR 584.

[36] [1968] HCA 60; (1968) 121 CLR 584 at 591, 599, 622-623.

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

[38] *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [1985] HCA 12; (1985) 155 CLR 448.

[39] [2006] HCA 19; (2006) 80 ALJR 900; 227 ALR 46.

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

[41] See Chapman and Trebilcock, "Punitive Damages: Divergence in Search of a Rationale", (1989) 40 *Alabama Law Review* 741 at 798-801, 819-821.

[42] [2002] 2 AC 122 at 147-149.

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

[44] [2003] 3 NZLR 450.

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

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

[47] *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 9-10 [22], 27-29 [84]-[87]; cf *A v Bottrill* [2003] 1 AC 449 at 463-464; *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 at 634-635.

[48] *BMW of North America Inc v Gore* [1996] USSC 42; 517 US 559 (1996); *Cooper Industries Inc v Leatherman Tool Group Inc* [2001] USSC 29; 532 US 424 (2001).

[49] *Newport v Fact Concerts Inc* [1981] USSC 169; 453 US 247 at 263 (1981).

[50] [2000] NSWCA 152; (2000) 49 NSWLR 78 at 87. Sheller and Beazley JJA agreed with Priestley JA.

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

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

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

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

[55] [1906] HCA 3; (1906) 3 CLR 969.

[56] New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 November 2003 at 4971-4972.

[57] [2000] NSWCA 152; (2000) 49 NSWLR 78.

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