

AUSTRALIA / JUDGMENT

Charleston v Sinclair [2024] NSWDC 292

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District Court

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District Court

New South Wales

Medium Neutral Citation: Charleston v Sinclair [2024] NSWDC 292

Hearing dates: 17, 18 and 19 April 2024

Date of orders: 18 July 2024

Decision date: 18 July 2024

Jurisdiction: Civil

Before: Cole DCJ

Decision: (1) Verdict and judgment for the plaintiff against the defendant in the sum of \$111,064.22.

(2) The question of costs is reserved.

Catchwords: TORTS — Trespass to the person — Assault – Battery - Damages

Legislation Cited: Civil Liability Act 2002 (NSW)

Evidence Act 1995 (NSW)

Cases Cited: Briginshaw v Briginshaw [1938] HCA 34

Croucher v Cachia [2016] NSWCA 132

Fox v Percy [2003] HCA 22

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

Riechelmann v McCabe [2024] NSWCA 37

Seltsam Pty Ltd v Ghaleb [2005] NSWCA 208

State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in Liq) [1999] HCA 3

Texts Cited: K Barker, P Cane, M Lunney and F Trindale, The Law of Torts in Australia, 5th edn, Oxford University Press, Australia and New Zealand, 2011

Category: Principal judgment

Parties: Fiona Jean Charleston (Plaintiff)

Denise Kerry Sinclair (Defendant)

Representation: Counsel:

Mr S Grey (Plaintiff)

Mr H Thomas-Dubler (Defendant)

Solicitors:

Wyatts Compensation Lawyers (Plaintiff)

Makinson d'Apice Lawyers (Defendant)

File Number(s): 2023/48396

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JUDGMENT

1. Ms Fiona Charleston alleges that she was subjected to assault and battery by Ms Denise Sinclair in the evening of 7 March 2020.
2. Ms Charleston alleges that she suffered injury, loss and damage as a result of the alleged assault and battery. She seeks general damages, reimbursement for out of pocket medical expenses and aggravated damages.
3. The Evidence Act 1995 (NSW) provides, in s 140:

140 Civil proceedings: standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
 - (a) the nature of the cause of action or defence, and
 - (b) the nature of the subject-matter of the proceeding, and
 - (c) the gravity of the matters alleged.

1. In *Riechelmann v McCabe* [2024] NSWCA 37 ('*Riechelmann*'), at [59], in the context of allegations of trespass, assault and battery, the Court of Appeal said:

59. Given the seriousness of the allegations, this Court – as for the trial judge (see J [542]-[548]) – is required to take account of the principle in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 362, as manifest in s 140(2) of the Evidence Act 1995 (NSW), in considering whether they are made out.

1. The allegations of battery in the present matter are at least as serious as those in *Riechelmann*. In this judgment, wherever I make a finding of fact, I make it bearing in mind the considerations in s 140 of the Evidence Act 1995 (NSW). I also apply the *Briginshaw* standard, namely, proof on the balance of probabilities on the basis of clear and cogent evidence which has induced in me actual persuasion.

The events of 7 March 2020

Ms Charleston's version of events

1. Ms Charleston was living in a country town in New South Wales in March of 2020, and had lived there for about three years.

2. Ms Charleston usually went to a local hotel to spend time with some friends on Saturday afternoons. It was her evidence that, on Saturday 7 March 2020, she went to the hotel at about 1pm. She drove her car to the hotel and met her friends there.
3. About an hour after Ms Charleston arrived, Ms Sinclair arrived at the hotel with three other people, and they all sat at a table next to the table Ms Charleston and her friends were sitting at.
4. It was Ms Charleston's impression that Ms Sinclair and her friends were pointing, laughing and sniggering at Ms Charleston.
5. After some time, a friend of Ms Charleston's by the name of Sarah approached her, and Ms Charleston and Sarah went out into the beer garden to talk.
6. At about 3-3:30pm, Ms Alice Wood (referred to in the transcript as Ms Fisher) arrived at the hotel with her three children and her groceries. Ms Charleston thought that the children were about 9, 12 and 14 years old at the time. By the time Ms Wood and her children arrived at the hotel, Ms Charleston estimates that she had consumed about three schooners of beer.
7. Ms Wood said that her car had broken down, and Ms Charleston offered to drive Ms Wood and her children to their home, which was part-way between the hotel and Ms Charleston's home.
8. Ms Charleston drove Ms Wood and her children to their home in Mountain Street, which was a journey of about five minutes, and Ms Charleston parked her car on the opposite side of the road from Ms Wood's house. Ms Charleston and Ms Wood and the three children got out of the car and went in to Ms Wood's house, which has about ten steps up to the front door. At first, Ms Charleston said that, as they did so, Ms Sinclair drove into the driveway of her own house. In cross-examination, Ms Charleston clarified that she did not actually see Ms Sinclair drive into her driveway, but she looked in that direction and saw that Ms Sinclair was standing in her driveway, by her car. Ms Sinclair's house is a short distance from Ms Wood's house, on Cement Avenue, which runs off Mountain Street approximately at a right angle. Ms Sinclair's house is visible from Ms Wood's house because both houses are opposite a reserve area (sometimes referred to as "the paddock") which runs the distance from Ms Wood's house, down Mountain Street, to Cement Avenue, which is Ms Sinclair's street.
9. Ms Charleston also said, in evidence, that she and Ms Wood were putting the groceries away when Ms Wood saw Ms Sinclair at the end of her driveway, looking towards Ms Wood's house. She said this occurred about fifteen minutes from their arrival at Ms Wood's house. Ms Charleston said that, from Ms Wood's house, she saw Ms Sinclair, in her driveway "strike a pose". Ms Charleston said that Ms Wood leaned against the front doorframe of her house and put her hand on her hip, also "striking a pose", "being smart and silly".

10. Ms Charleston said that Ms Sinclair then walked up Mountain Street towards Ms Wood's house "screaming and yelling and really going off". Ms Sinclair's dog was with her and was not on a leash.
11. Ms Charleston and Ms Wood walked out of Ms Wood's house down the steps to the road and crossed the road to "find out what the problem was". Ms Charleston indicated that she sought to meet Ms Sinclair out of the house out of consideration for Ms Wood's three children. She said that Ms Sinclair was yelling abuse at her as Ms Sinclair walked up the road towards Ms Charleston and Ms Wood.
12. Ms Charleston said that Ms Sinclair arrived at a point about a metre away from her, as she stood across Mountain Street from Ms Wood's house next to the fence around the reserve. In cross-examination, Ms Charleston said that she and Ms Wood were standing about two houses down the road from Ms Wood's house. From the photographs tendered, it can be seen that the fence, between the road verge and the reserve, from opposite Ms Wood's house to the corner of Ms Sinclair's street, from the ground up, is made of less than a metre of chicken wire topped with several strands of wire and then a strand of barbed wire, running along a series of metal star pickets (also referred to, in the evidence, as star posts) of varying heights. The fence is not in pristine condition and leans in places.
13. As Ms Sinclair approached, Ms Charleston was to the left of the fence, as she faced Ms Sinclair, and Ms Wood was to Ms Charleston's left. Ms Charleston said, in evidence, that neither she nor Ms Wood said anything to Ms Sinclair. In cross-examination, she said that she might have said "What's wrong" to Ms Sinclair. Ms Charleston denied abusing Ms Sinclair verbally.
14. It was Ms Charleston's evidence that when Ms Sinclair arrived at a point about a metre away from her, Ms Sinclair lunged at Ms Charleston and punched or pushed her, causing Ms Charleston to fall on her back on the fence, with the barbed wire in her back. In cross-examination, Ms Charleston said that she was "stuck" on the barbed wire because barbs were sticking into her back. Ms Sinclair was then on top of Ms Charleston and was punching her in the face "many times". Ms Charleston said that Ms Sinclair punched with a closed fist, and that she punched Ms Charleston six or seven times. Most of the punches landed on the left side of Ms Charleston's face. Ms Charleston said that she grabbed Ms Sinclair's left arm and tried to punch her. She landed one punch near Ms Sinclair's eye. In cross-examination, Ms Charleston denied punching Ms Sinclair more than once. She said that Ms Wood was trying to pull Ms Sinclair off Ms Charleston. She succeeded, but then Ms Sinclair kicked Ms Charleston in the head, in the ribs and in the crotch. Ms Wood pulled Ms Sinclair away again.
15. In evidence, Ms Charleston said:

Denise lunged at me, and the next thing I know I was in that barbwire fence with the barbwire in my back. You can't sort of move. Anyway, she was on top of me. She was punching me many times in the face. I did grab her left arm, I think, and I tried to punch her. Alice was trying to pull her off me. So, I'm still laying down in the fence, and Alice got her off me. And then she started to kick me.

I can remember laying there and seeing her foot come towards me and thinking "Shit, this is going to hurt". She kicked me in the head. She kicked me in the ribs. She kicked me in the private parts. When Alice got her off and I got out of the barbwire fence, I don't know what happened to Denise then. I don't – I guess – no, actually I'll step back a bit. I got out of the barbwire fence, stood up, she tried to sool the dog onto me.

1. Ms Charleston stood up and heard Ms Sinclair say to her dog "Sic her, get her, get her". The dog, however, did not attack Ms Charleston.
2. In cross-examination, it was put to Ms Charleston that she then picked up a star picket. It was put to her that Ms Wood held Ms Sinclair's hands behind her back and that Ms Charleston hit Ms Sinclair on the head with the star picket. Ms Charleston denied picking up a star picket and hitting Ms Sinclair with it.
3. Ms Charleston said, in evidence "I'm not really sure what happened then". Her next clear memory is of Ms Wood taking her back to Ms Wood's house and cleaning up her face and "all the blood". The police arrived about half an hour to an hour later.
4. Ms Charleston said that the physical altercation took no longer than a couple of minutes.
5. In cross-examination, it was put to Ms Charleston that the encounter with Ms Sinclair happened at about 6pm, rather than between 4pm and 5pm. Ms Charleston denied that. It was further put to Ms Charleston that she was intoxicated when the encounter took place. She denied that also.
6. Ms Charleston said that there was no-one else on the road at the time of the encounter.
7. Ms Charleston recalled having a glass of white wine at Ms Wood's house on 7 March 2020, but she could not be certain whether that occurred before or after the encounter with Ms Sinclair opposite Ms Wood's house.
8. Photographs taken in the late afternoon of 7 March 2020 in Ms Wood's backyard show bruising around one of Ms Charleston's eyes and down her cheek.
9. Photographs taken in the evening of 7 March 2020 at Ms Charleston's house show marks on her lower right leg and on the top of her foot. There is also a photograph of Ms Charleston's back, which shows three long roughly horizontal scratches, which have broken the skin. When she was giving evidence, Ms Charleston showed her back, upon which marks from the scratches are still faintly evident.

10. It was put to Ms Charleston, in cross-examination, that she returned to the hotel after the encounter with Ms Sinclair and continued drinking with Ms Wood. It was put to her that she fell down some stairs at the hotel. Ms Charleston denied this.
11. Ms Charleston went to the local hospital the next morning, 8 March 2020. She was given a tetanus shot. She was sore in the back, face, eye, jaw and ribs. She had blood coming out of one of her ears. She was assessed and sent to a larger, regional hospital by ambulance.
12. It was discovered that a ligament in the top part of Ms Charleston's right foot had pulled away from the bone and pulled a divot out of the bone. There was also an injury to her heel. She was put into a moon boot for six weeks and a foot brace for three months after that.
13. Ms Charleston also had one chipped tooth, one broken tooth and a broken plate. These dental injuries were treated shortly after the incident. The broken tooth was extracted.
14. Ms Charleston said that she finds that her right foot aches by the end of the day when she has been on her feet a lot during the day. She takes Panadeine Forte for the pain. The pain does not tend to disturb her sleep. Her ribs also hurt if she fails to sit straight. Ms Charleston said that her back has healed and no longer troubles her, although there are scars.
15. Ms Charleston indicated that the incident had had an impact on her mental health, which I will discuss below (see [132]-[153]).
16. Ms Charleston said that in the months following 7 March 2020, until 13 August 2020 when she moved to a different town, Ms Sinclair drove past her house on numerous occasions, yelling abuse at her.

Ms Wood's version of events.

1. Ms Wood gave evidence of being in the back yard of her house with Ms Charleston in the mid to late afternoon of 7 March 2020. She said that her three children were also in the house, and that the children were 12, 13 and 14 years old at the time.
2. Ms Wood said that she and Ms Charleston were "catching up" and drinking white wine. She said that she did not notice how many drinks Ms Charleston had, but she said that they had not been at the house for very long before the incident with Ms Sinclair, so it would not have been many.
3. Ms Wood said that she went to the front of the house at one point and looked out the window and saw Ms Sinclair looking towards her house, she presumed because Ms Charleston's car was parked in the road. Ms Wood said that she went to the "front landing", just outside the front door at the top of the outside stairs to the front door and "took the mickey" out of the way Ms Sinclair was standing in Ms Sinclair's driveway. She did that by copying the way Ms Sinclair was standing. Ms Wood said that she thought Ms Sinclair yelled something at her, though she was not certain, and she could not recall whether she responded.

4. Ms Wood said that she went back into her backyard and told Ms Charleston that Ms Sinclair had been "checking out where she was". Ms Wood said that she and Ms Charleston then carried on talking. Ms Sinclair then appeared in the road outside Ms Wood's house and called for Ms Charleston to come out. Ms Charleston and Ms Wood came out of the house and went down to the road. Ms Sinclair was then on the verge of the road on the same side as Ms Wood's house, calling Ms Charleston. Ms Wood said that Ms Charleston and Ms Wood then argued. Both were heated. Ms Wood thought that Ms Sinclair was the aggressor, but Ms Charleston was arguing as well.
5. Ms Wood said that she was walking behind Ms Charleston, and, before she had caught up with her, Ms Sinclair was punching Ms Charleston in the face. She said that Ms Charleston was walking backwards across the road trying to get away and Ms Sinclair was coming forwards, punching her. When they reached the fence, they fell, with Ms Sinclair continuing to punch Ms Charleston and also knee her in the groin. Ms Charleston was on the bottom and Ms Sinclair was on top of her. Ms Charleston was on "the crumpled up kind of squashed fence".
6. Ms Wood tried to pull Ms Sinclair off Ms Charleston by pulling her by her feet.
7. Ms Wood said that there was no-one else in the vicinity at the time.
8. Ms Wood thought that Ms Sinclair might have punched Ms Charleston in the face between five and ten times while they were on their feet and then five or six more times on the ground. Ms Wood said it happened very fast.
9. Ms Wood said that Ms Sinclair was calling to her dog, but the dog did not come to her.
10. Ms Wood pulled Ms Sinclair's feet to get her off Ms Charleston, and Ms Sinclair got up and walked away, towards her own house. Her dog was then at the corner of Mountain Street and Cement Avenue. Ms Wood believes that Ms Sinclair's dog is a bull terrier.
11. Ms Wood then helped Ms Charleston to get free of the fence and took her back to Ms Wood's house. Ms Charleston's face was injured and she was crying. Her foot had been also been injured and she was having difficulty walking properly. Ms Wood helped her to clean up.
12. Ms Wood denied that Ms Charleston picked up a star picket at any time. She denied holding Ms Sinclair's hands behind her back.
13. In cross-examination, Ms Wood said that Ms Sinclair was uninjured at the end of the incident. There was no blood on her face or on the top of her head.
14. Ms Wood said that she and Ms Charleston stayed at her house for a couple more hours. They did not call the police. However, the police came to Ms Wood's house at about 7 or 8pm to enquire about Ms Charleston having assaulted Ms Sinclair.

15. In cross-examination, it was suggested to Ms Wood that she and Ms Charleston returned to the hotel after the police left and continued to drink. It was suggested that Ms Charleston fell down some stairs. Ms Wood denied going to the hotel that night and denied that Ms Charleston fell down some stairs.

Ms Sinclair's version of events

1. Ms Sinclair has lived in her house in Cement Avenue for twenty-four years. She said that, as at 7 March 2020, four of her five children were living with her, and a friend, Ms Pizany, was also staying with her.
2. Ms Sinclair said that she went to the hotel with three of her friends, including Ms Pizany, at about 1pm on 7 March 2020. She said that she had something to eat, drank water and left after about an hour. She went home with Ms Pizany. She drove in her own car.
3. Later in the afternoon, Ms Sinclair said, she received a telephone call on her mobile phone but could not get reception in her house, so she left her house to try to take the call. She said phone reception in her house is still bad and always has been.
4. Ms Sinclair said that she was at the end of her driveway by the letterbox, on the phone, when she heard Ms Wood yelling at her from Ms Wood's front verandah, calling her names. She said Ms Wood was calling to Ms Charleston "She's out here, Fiona".
5. Ms Sinclair said that she and Ms Wood were friends until September 2019 when they fell out.
6. Ms Sinclair said that she responded to Ms Wood. Ms Charleston also started yelling abuse at Ms Sinclair. As they yelled abuse, Ms Wood and Ms Charleston came down the stairs of Ms Wood's house. Ms Sinclair said that Ms Charleston yelled "I'm going to fucking smash you" to her.
7. Ms Sinclair said that she ended her telephone call and walked to the intersection of Cement Avenue and Mountain Street, at the corner of the reserve. Ms Sinclair said that Ms Pizany came out of Ms Sinclair's house and stood "near the trees" on the other corner of Cement Avenue and Mountain Street on the same side as Ms Sinclair's house. Ms Pizany was standing with Ms Wood's bull terrier, whose name is Kane.
8. Ms Sinclair said that Ms Wood and Ms Charleston were walking towards her down Mountain Street. She said that both women continued to yell at her, and she was yelling back. She was moving towards them and they were moving towards her. Ms Sinclair said that Ms Charleston then punched her to the left side of the face with her right hand, in the middle of Mountain Street close to the intersection with Cement Avenue.

9. Ms Sinclair said that she punched Ms Charleston back, that Ms Charleston "grabbed hold" of her hair and that the two of them "ended up on the ground somehow". She said that she continued to punch Ms Charleston and Ms Charleston continued to punch her in the head and body. She said that they would have been on the ground for about a minute, and that as she was getting up, Ms Wood was grabbing her arms, pulling her backwards.
10. Ms Sinclair said that Ms Pizany was still on the other side of Cement Avenue.
11. Ms Sinclair said that she only ended up on top of Ms Charleston because Ms Charleston had hold of her hair. Ms Sinclair said that they fell on the fence.
12. Ms Sinclair said that once she had gotten to her feet, Ms Wood grabbed her arms. She said that Ms Charleston got up. In evidence, she said the following (transcript p 169):

Q. So once Fiona was on her feet, what happened?

A. I don't know she had, pretty sure it was a star post that she had in her hand, but she hit me on top of the head with it. I felt the blood coming down my face.

Q. Did you see where that post came from?

A. It could've been anywhere there, that fence is so rubbished and junky it - and old, there's bits and pieces all over the place. She could've just got it out of the grass there. It's not - that grass right on the edge there is never mowed down or anything because of that dip.

Q. And so did you ever see Fiona looking around that area or?

A. No - I, like yeah, I - Alice had a hold of me. I don't know, when she was at her feet, that's when she hit me in the head.

Q. So what were you doing whilst you were being restrained by--

A. Trying to get out of it, trying to get out of Alice's arms.

Q. How were you doing that?

A. I'm just struggling, trying to kick out at - to get away. And trying to keep my dog at bay, yeah I--

Q. How were you doing that?

A. Just telling him, "Kane, no, git. No." Telling him to get home, like, I didn't want him to be there.

Q. What was Kane doing at that time?

A. He was pretty staunch, like he was jumping up and - bull terrier, jumping up and down barking and carrying on, though, like, quite a lot.

Q. You were telling him "No"?

A. "Get home".

Q. So when you say Fiona struck you to the head with some sort of post were you still being restrained at that time?

A. I, I'd just got out of Alice's arms when she'd hit me.

Q. What happened after that?

A. I felt the blood. I just sort of turned, spotted Mel right there.

Q. You're indicating over your right shoulder?

A. 'Cause I was sort of facing to - well facing up the road where I was.

Q. So if we go back to page 1 on tab 20.

A. Yeah, so I was facing up Mountain Street.

Q. Up Mountain Street?

A. Yep, and I turned to my right to look back towards Cement Avenue.

Q. And you could see?

A. Mel.

Q. Where was she?

A. Right at that corner, right there.

Q. Still at that corner?

A. Yep.

Q. Where those trees were?

A. Yeah, well she's--

Q. What happened after you were struck to the head?

A. I could feel the blood down my face.

Q. Did you do anything?

A. I just turned to sort of try and get home, to get away from them.

Q. What was Fiona doing at this time?

A. Still yelling but then Alice sort of tried - calmed her a bit, was like "Let's go".

Q. And you could hear her say that?

A. Yeah, yep.

Q. Did you make it back home?

A. Yes.

Q. What did you do once you were home?

A. Went inside, looked at my face like got in the car, went straight to the police station. Got my daughter to take me straight into the police station.

1. Ms Sinclair said that her daughter took a photograph of Ms Sinclair's face and the top of her head. The photographs are in evidence. Three photographs show Ms Sinclair with a substance which could be dried blood on her left eyebrow in two places and beside her left eyebrow. There is a scratch on her left cheek. One photograph shows the top of Ms Sinclair's head, with what could be a dark red scratch on the scalp and a bright red substance to the right of the scratch, on Ms Sinclair's blonde hair. A further photograph shows the bright red substance colouring a small area of Ms Sinclair's hair. Ms Sinclair said that the scratch was on her crown.
2. There is a further photograph which Ms Sinclair said was taken a day or two after the incident. It was clearly not taken on the day of the incident, because there has been a noticeable change to Ms Sinclair's face. This photograph shows a bruise to the left of Ms Sinclair's eyebrow and a scratch on her left cheek, in the same place as the scratch in the photograph taken on 7 March 2020. There is no dried blood on or near Ms Sinclair's left eyebrow, and no obvious injury to that area, though Ms Sinclair's hair covers some of the area in the photograph.
3. In cross-examination, it was pointed out to Ms Sinclair that, in her Defence, she says that on the day of the incident she was walking her dog with a friend who was staying with her and that she "let go of her dog's leash in order to defend herself". Ms Sinclair agreed that the Defence was written on her instructions. She said, however, that she did not walk her dog with a leash.
4. Ms Sinclair was taken to a further version of the incident in a letter from her lawyers briefing Dr Xia. Ms Sinclair agreed that there was no mention of walking her dog or being with a friend in that version. The letter did not mention Ms Sinclair being hit with a star picket or star post either.
5. In cross-examination, Ms Sinclair agreed that she had told her lawyers that Ms Charleston and Ms Wood might have returned to the hotel after the incident and Ms Charleston might have fallen down some stairs. She said "someone" who had been in the hotel that night had told her that. She then said that she did not think that she had told her lawyers that Ms Charleston had fallen down stairs.
6. Ms Charleston's version of events was put to Ms Sinclair and she denied it.
7. Ms Sinclair said, in evidence, that she went to the hospital on the night of 7 March 2020 and "They cleaned up my face, fixed my head".

Ms Pizany's version of events

1. Ms Pizany said that she had lunch at the hotel on 7 March 2020 with Ms Sinclair and two other people. Then she went back to Ms Sinclair's house with Ms Sinclair.
2. Ms Pizany said that she was making a cup of tea in Ms Sinclair's house when she saw Ms Sinclair across the road on her phone "making a phone call".
3. Ms Pizany said that she could hear a commotion "up the other end of the street". At first she stayed inside, but then she decided to go and ask Ms Sinclair if she wanted a cup of tea.
4. Ms Pizany said:

...And I thought, "I'll go and see if she wants a cup of tea". And by that time, the altercation between her and the other two ladies had started. I didn't quite see exactly what was happening. I was trying to get Kane away from Denise and get him to go home and make sure that Denise was okay.

Q. Kane is Denise's dog?

A. Yes.

Q. Where was he during this period of time?

A. He was just sort of running around at the same area as us, and Denise was telling him to go home, and I was also "Come on, Kane. Come home".

...

Q. Could you make out anything said during the yelling and screaming?

A. I wasn't - I wasn't actually taking any notice of like what was actually being yelled and screamed out. Yeah, I was just more interested in getting up there and making sure Denise was okay and getting Kane away and making sure he was fine.

Q. You said you saw an altercation?

A. Yes, well, I couldn't see exactly what was going on because Denise had her back to me, and I was behind Denise. But one lady hit Denise from her front while the other lady held her arms, holding her back to stop her from retaliating. Denise started to kick her legs out. That's when the other one picked the star picket up and hit Denise with the star picket, and--

Q. So--

A. --after all of that, I - yeah, I just grabbed Kane and got Kane to come down. And then Denise and I proceeded, and she had to go to the hospital to have her - to have it fixed up.

Q. You said from your vantage point Denise had her back to you?

A. Yeah, I, I couldn't see what was going - because Denise - Denise's back - I was walking up towards Denise. Denise was there and the other girl, one girl in front, and one girl coming behind to hold her back.

Q. You saw one woman restraining Denise?

A. Yes.

Q. And the other one hitting her?

A. Yes.

Q. Are you able to say or describe that hit?

A. I, I--

Q. Was it a--

A. All I--

Q. --hand or a--

A. I, I - I can't really recall whether it was , you know, an open hand or whatever. I just recall that it was yep, she was lashing out, Denise couldn't, because she had her restrained, arms restrained, she couldn't do anything. So, she started to kick her feet to get out of it, and then Fiona grabbed the star picket, hitting Denise in the forehead.

Q. Did you see Fiona grab the star picket?

A. I did.

Q. Where did she grab that from?

A. The side paddock. There was kind of like a barbed wire fence or something there.

Q. Are you able to say the size of that picket?

A. Not really, no.

Q. What did Fiona do with that picket?

A. Hitting Denise in the head.

Q. Are you able to say where on the head it hit Denise?

A. (No verbal reply)

Q. And that's sort of slightly above the brow?

A. Yep.

Q. To the right?

A. Yep.

Q. So after you saw Denise get struck with the star picket, what happened?

A. After that I just, I walked up and then as I said I got Kane, and got Kane to come home, and I said to Denise, "Yeah all right, come on, we better take you to the hospital."

Q. Where were the other two women at that time--

A. They'd taken off by that matter - by that time.

Q. Sorry, they'd--

A. Once they seen me and realised that I was coming up, they left.

Q. So what did you do after you got to Denise then?

A. I just walked back down to Denise's house with Denise and Kane, and we jumped in the car and went to the police station, and we went to the hospital.

1. Ms Pizany gave several versions of what she saw occur in the street between the three women on 7 March 2020. She said, in summary, that she thought she saw "Fiona" punching Ms Sinclair while Ms Wood held Ms Sinclair's hands behind her back. She was unsure because she was facing Ms Sinclair's back and could not see clearly. She agreed that she had never seen "Fiona" before that day. She could not recall what "Fiona" was wearing or the colour of her hair. All she could recall was that she was a "chubby, chubby sort of a girl". Ms Charleston, however, has a slender build, and the hospital records before me, which record her weight the day after the assault confirm that she was not "chubby" in March of 2020.
2. Ms Pizany said that she went to the police station with Ms Sinclair, but that she stayed in the car.

Credibility

1. In assessing the credibility of each of the witnesses of fact, I take into account that none of those witnesses is accustomed to giving precise accounts of events and strictly confining their account to what they actually saw and heard, rather than conversationally relating what they "know" happened by inference or because someone else has told them. I also take into account that, for most of the day on Saturday 7 March 2020, none of the witnesses of fact would have been paying particular attention to the precise time at which events occurred or other circumstantial detail which was not important to them at the time.
2. I also take into account the lapse of time between the events of 7 March 2020 and the trial. Notoriously, memories of events can tend to become less clear and less accurate as time goes by.

Ms Charleston

1. It was Ms Charleston's perception that her recollection of the events of 7 March 2020 was clear until she was punched, after which it became "a bit of a blur" (see transcript p 122). She explained what she meant by that phrase in the following way:

A. Blur is it's so quick. Everything happened so fast. Like, suddenly I was in the fence, and she was on me. It was just so quick. That's what I mean by a blur. Not prior or anything else. Just the actual assault itself, was just - I can't even explain it. It was just instant.

Q. Would you describe your recollection as the events leading up to the assault as clear and vivid?

A. Yes.

Q. The blur you refer to, is the particular sequence of how many times you were hit to which body part, with which hand, et cetera et cetera?

A. Yes, yes.

1. Ms Charleston's evidence was given confidently and thoughtfully. However, it is clear on the evidence that she and Ms Sinclair had formed adverse views of each other prior to 7 March 2020, on account of a series of events which was not clearly described and need not be set out here. For this reason, when Ms Charleston says that, at the hotel, Ms Sinclair and her friends were talking about her, laughing and pointing at her and sniggering, it may be that she amplified innocuous behaviour by the members of Ms Sinclair's group in her mind or misinterpreted some or all of what happened. For that reason, I do not place any weight upon what Ms Charleston says Ms Sinclair did at the hotel.
2. Some of Ms Charleston's evidence showed a tendency to relate a version of events which was coloured by self-interest. For example, Ms Charleston said that she could not recall calling out to Ms Sinclair in Mountain Street before the physical altercation. Ms Wood frankly conceded that both she and Ms Charleston called out to Ms Sinclair. I prefer Ms Wood's evidence, as it is more probable given the escalation of the events. Ms Charleston also gave an age for Ms Wood's daughter which was several years younger than her actual age, which helped her explain why she left Ms Wood's house to confront Ms Sinclair. It may be that Ms Charleston guessed Ms Wood's daughter's age in her early accounts of the day, and guessed an age which suited her rationale.
3. Ms Charleston also made some admissions which are potentially against her interest, for example, that she punched Ms Sinclair in the left hand side of the face, once, in self-defence whilst the two women were on the ground.
4. It has not been established that Ms Charleston's behaviour or her recollection were influenced by her consumption of alcohol.

5. Ms Charleston's account of the events in Ms Wood's house prior to the physical altercation was much less detailed than Ms Wood's and omitted a period of time, prior to the incident, during which she and Ms Wood, according to Ms Wood, were sitting in the backyard drinking white wine and talking. I prefer Ms Wood's account of this part of the day. Ms Wood's account was given confidently and quite consistently. Ms Charleston's evidence was slightly less consistent. At first, she said that she saw Ms Sinclair pull up in her driveway, but, later in her evidence, she said that she had not seen that. She tended to conflate what she knew of the day from other people with what she experienced. For example, I prefer Ms Wood's account that she "struck a pose", imitating Ms Sinclair, when she was alone in the doorway of her house, and then went to tell Ms Charleston about it in the back yard. Ms Charleston may now believe that she saw that part of the incident, but I prefer Ms Wood's account.
6. Extracts from an interview that Ms Charleston did with two police officers on 24 March 2020 were put to Ms Charleston in cross-examination. In that interview, Ms Charleston was asked if she knew who threw the first punch. She replied, "Well I don't think I did". When asked about this in cross-examination, she said "...it's just the way I speak". At the end of her evidence, she demonstrated the tone and emphasis with which she made the remark, which were clearly intended to convey that the idea that she would throw the first punch was far-fetched. She placed emphasis on the words "don't" and the second "I". The police interview was not tendered in evidence.
7. I believe the essential elements of Ms Charleston's account of the physical altercation with Ms Sinclair. It was clear when Ms Charleston gave evidence that the progression of the incident from shouting in the street to a violent battery of her shocked and upset her profoundly. She became visibly upset at that point of her narrative and I accept that her reaction was genuine. Ms Charleston's account of the physical confrontation is consistent with her injuries and broadly consistent with Ms Wood's account. There is a difference, in that Ms Wood said that Ms Sinclair kneed Ms Charleston in the groin, and Ms Charleston said that Ms Sinclair kicked her in the groin, but that does not affect my assessment of Ms Charleston's credibility with respect to what happened during the physical altercation. I accept, on the balance of probabilities, that Ms Sinclair kicked Ms Charleston in the head, the ribs and the groin when she got up off of Ms Charleston. I prefer Ms Wood's account of where she, Ms Charleston and Ms Sinclair were standing when the altercation began up until Ms Charleston fell on her back onto the barbed wire fence whilst being punched by Ms Sinclair. I also accept Ms Wood's recollection that Ms Charleston was punched between five and ten times before she fell on the fence. Again, this does not affect my assessment of Ms Charleston's credibility in relation to the events of the physical altercation. It seems to me that the experience of being punched and kicked whilst pinned to the ground on top of the barbed wire has assumed prominence in Ms Charleston's memory of 7 March 2020 and her recollection of the surrounding events is less clear.

8. Ms Wood gave her evidence in a straightforward manner. She did not hesitate to give evidence which did not paint her in the best light; for example, she was frank about yelling at Ms Sinclair. I accept Ms Wood's account of the events leading up to the physical altercation. I also accept her account of the physical altercation, except that where Ms Charleston gives detail that Ms Wood did not give, such as the kick to her head, ribs and groin, I accept Ms Charleston's account. Ms Charleston's account of being kicked is very clear and is consistent with her injuries. Ms Wood was occupied at that time in trying to pull Ms Sinclair off Ms Charleston, so her focus was on that task.
9. Both Ms Wood and Ms Charleston denied going back to the hotel in the evening or night of 7 March 2020. I accept their evidence. Ms Charleston was injured and in pain and I accept her evidence that she just wanted to go home when she left Ms Wood's house, and did go straight home.

Ms Sinclair

1. Ms Sinclair's account of the incident in Mountain Street and the events immediately before it in examination in chief was not entirely consistent with the account which formed the basis of her Defence and the account given by her lawyers in the briefing letter to Dr Xia, presumably on her instructions.
2. In cross-examination, Ms Sinclair tended, from time to time, to answer part only of the question asked, or to make a statement which was not responsive to the question. This gave the impression that she was being evasive.
3. I am satisfied, on the basis of Ms Charleston and Ms Wood's evidence, that Ms Sinclair initiated the confrontation, in response to Ms Wood's "pose" and calling out, by walking up Mountain Street yelling abuse. I am satisfied that Ms Sinclair was the aggressor in the physical altercation and that Ms Charleston punched Ms Sinclair once in the face in an attempt to defend herself. I do not believe that Ms Charleston pulled Ms Sinclair's hair and brought her to the ground.
4. I do not believe Ms Sinclair's account, in evidence, of Ms Wood holding her arms behind her back, Ms Sinclair breaking free and Ms Charleston hitting her on the crown of the head with a star post as she did so. I note that Ms Sinclair's defence says that the post in question was a sail post, which is a different kind of post from a star post or star picket. The injury to the crown of Ms Sinclair's head in the photograph is a small scratch. Star posts are made of steel. In order to strike Ms Sinclair with a star post, Ms Charleston would have had to raise it in the air above or beside Ms Sinclair's head and bring it down or let it fall down onto her head. It is improbable that a small scratch would be the outcome from being hit on the head with a metal star post. The following exchange took place with Ms Sinclair in evidence in chief:

Q. What happened after you were struck to the head?

A. I could feel the blood down my face.

Blood from the scratch on the crown of Ms Sinclair's head which is shown in the photograph would not have "come down" her face. If the red in her hair next to the scratch on her head in the photograph is blood, then it is clear that it did not flow far from the scratch at all, and the direction of the flow was down the back of her head.

1. This part of Ms Sinclair's narrative is an invention designed to level up the blame for the physical altercation. No medical evidence in relation to any injury to Ms Sinclair was adduced.
2. Ms Sinclair's account of Ms Pizany being present did not appear in her account of the incident to the police. In evidence at the trial she said that there was a young boy in the park "that watched the whole incident that came down to see if I was alright". There is no prior account in evidence of a young boy being present. Neither Ms Wood nor Ms Sinclair saw either Ms Pizany or a boy. I prefer their evidence to Ms Sinclair's evidence.

Ms Pizany

1. Ms Pizany's account of the events of 7 March 2020 in Mountain Street in the late afternoon or evening was not persuasive. She presented in quite a confident manner in examination in chief, however, when giving her evidence, she sought either to tell her whole story in outline quickly or to digress into matters which were not responsive to the questions.

2. Ms Pizany's cross-examination by Mr Grey began with the following exchange:

Q. Are you aware that making a false statement while under oath is an offence in New South Wales?

A. Yes.

Q. Are you aware that it carries a maximum sentence of ten years in prison?

A. No, I'm not aware of that, no.

Q. I want you to take all the time you need and let me know if there's anything about the evidence you've just given that you would like to clarify or correct?

A. No to my - yeah no I, I believe I've been telling the truth, telling it as I saw it, as it happened. And for what I can recall, that's what I recall happening.

Q. Are you sure you're comfortable with that?

A. Yep.

1. Although Ms Pizany said she was "comfortable", her demeanour changed markedly during this exchange. Her voice became very quiet and she looked very concerned. Shortly afterwards, during cross-examination, she became quite agitated and defensive and needed to be given a short time to calm down.

2. I bear in mind the remarks of Kirby J in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in Liq)* [1999] HCA 3 at [88] ("the State Rail Authority case"):

There is a growing understanding, both by trial judges and appellate courts, of the fallibility of judicial evaluation of credibility from the appearance and demeanour of witnesses in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new.

Kirby J also acknowledged, however, that a witness's demeanour could validly influence the perception of their credibility in the mind of the trial judge (see the *State Rail Authority* case at [90]-[91]) (see also *Fox v Percy* [2003] HCA 22 at [72]-[86]).

1. Ms Pizany's overt response to being told the maximum penalty for making a false statement under oath indicated that she felt considerably more anxious about giving evidence after being given that information than before. Her subsequent agitation and defensiveness indicated that she was not comfortable about the evidence she was giving.
2. There were elements of Ms Pizany's evidence which did not ring true. It was odd that, having heard a commotion of raised voices in the street from inside the house, Ms Pizany's response, on her evidence, was to go out into the street with the intention of offering Ms Sinclair a cup of tea. Given that, on her account, her friend was being assaulted in the face with a star picket whilst her hands were held behind her back, the preoccupation that Ms Pizany indicated that she had with getting the dog away from the scene, as a priority, would have been an unusual response. Ms Pizany did not, on her own evidence, act in accordance with the level of concern for Ms Sinclair's welfare that might be expected in the circumstances if her account of the incident were factual.
3. Ms Pizany's account conflicts in notable ways with all of the other accounts. She did not see Ms Charleston and Ms Sinclair on the ground. That could be explained by the timing of her arriving on the scene. Her account of what she did see, however, is at odds with Ms Sinclair's account in that Ms Pizany indicated that "Fiona" hit Ms Sinclair with a star picket on the forehead, specifically the right front of her face, just above the brow, whereas Ms Sinclair said that she was hit on the crown of her head, which is at the top of the back of the skull. Ms Sinclair said that she was hit with the star picket just after she broke free from Ms Wood's grip on her arms. Ms Pizany described Ms Sinclair as having her arms restrained when she was hit with the star picket. Ms Pizany could not describe either Ms Wood or Ms Charleston in any way except to say that Ms Charleston was a "chubby, chubby sort of girl", which she certainly is not. The hospital records for the day following the incident record Ms Charleston's weight and height, and it is clear that she was not 'chubby' on the day of the altercation. In addition, Ms Sinclair gave evidence that her daughter took her to the police. She did not say that Ms Pizany was with her on that journey. Ms Pizany said that she went to the police station with Ms Sinclair but stayed in the car. Ms Pizany made no mention of Ms Sinclair's daughter being present. Ms Pizany's account is wholly inconsistent with Ms Wood's

account and Ms Charleston's account. Both Ms Wood and Ms Charleston said that Ms Pizany was not present at the time of the physical altercation.

4. I am not persuaded of anything that Ms Pizany said on the balance of probabilities and I will not take the evidence she gave into account. I do not believe that she was present during any part of the altercation. This also adversely affects Ms Sinclair's credibility.

Medical evidence of physical injuries to Ms Charleston

1. An independent expert report of Dr Gehr, an orthopaedic surgeon, dated 27 July 2023, was adduced in evidence by the plaintiff. Dr Gehr was not required for cross-examination.
2. The relevant records from both of the hospitals visited by Ms Charleston in the days after 7 March 2020 and clinical records from Dr Nguyen, a psychiatrist, were also adduced in evidence by the plaintiff..
3. The report of Dr Gehr and the hospital records disclose that Ms Charleston suffered the following physical injuries in the physical altercation with Ms Sinclair:
 1. Comminuted fracture of the anterior process of the calcaneus (the heel) with overlying soft tissue swelling. Fracture along the anteroinferior tibia and medial malleolus. Soft tissue swelling.
 2. Soft tissue swelling at the DIP joint (ie the uppermost joint) of the right index finger.
 3. Bruised left eye area (raccoon eye).
 4. Erythema above right orbit.
 5. Tenderness over lower left ribs.
 6. Blood in ear canal.
 7. Abrasion and laceration to left flank and lumbar area.
 8. Tenderness to the perineum.
 9. Two chipped teeth.
1. Ms Charleston's right foot was treated with a moon boot for six weeks and a brace on the right foot and ankle for a further three months.
2. As at the date of Dr Gehr's report, which was 27 July 2023, Ms Charleston was experiencing continuing pain in her right foot and leg, and could not stand for more than 45 minutes, or walk for more than 30 minutes. She had a decreased range of motion of her ankle and hindfoot.
3. Dr Gehr said that the injuries were consistent with Ms Charleston's account of the incident on 7 March 2020.

4. Dr Gehr noted that Ms Charleston was having the following difficulties with the activities of daily living:
 1. Difficulty dressing.
 2. Difficulty cleaning.
 3. Unable to assist with gardening and mowing lawn.
 4. Unable to undertake bushwalking, fishing and jogging, which were all activities she previously enjoyed.
 5. She is able to drive a car with some difficulty.
1. Ms Charleston gave evidence at the trial that her right foot aches at the end of the day, particularly when she has been on her feet a lot during the day. She takes Panadeine Forte for the pain. The pain does not usually disturb her sleep.
2. Ms Charleston said that she presently only has pain in her rib area if she doesn't sit up straight. She has light scarring on her back from the barbed wire, consisting of several horizontal lines.

Conclusion on the facts of the physical altercation

1. I find that Ms Sinclair was standing in her driveway on Cement Avenue in the late afternoon of 7 March 2020 when she saw Ms Wood, at the top of the stairs to her house in Mountain Street, imitating the way she was standing. Ms Sinclair yelled something at Ms Wood and left her driveway, walking down Cement Avenue to Mountain Street and then up Mountain Street towards Ms Wood's house.
2. Ms Wood went back into her house and out to the backyard to speak to Ms Charleston. Ms Wood and Ms Charleston then heard Ms Sinclair, who was standing on Mountain Street on the same side of the street as Ms Wood's house, a short distance from Ms Wood's house, calling to Ms Charleston to come out. Ms Charleston and Ms Wood left Ms Wood's house to speak to Ms Sinclair.
3. Ms Sinclair and Ms Charleston then had a brief, heated conversation which ended when Ms Sinclair punched Ms Charleston on the left side of her face. Ms Charleston walked backwards over the roadway, trying to get away from Ms Sinclair, with Ms Sinclair walking forwards towards her, continuing to punch her. Ms Sinclair punched Ms Charleston between five and ten times whilst they were both standing.
4. Ms Sinclair pursued Ms Charleston, punching her until Ms Charleston reached the fence and fell on her back on the barbed wire as Ms Sinclair punched her. It is likely that it was at this point that Ms Charleston sustained the injuries to her lower leg and foot. Ms Sinclair fell on top of her and continued to punch her five or six more times. Ms Sinclair punched Ms Charleston in the face and in the ribs whilst she was on the ground.

5. With her right hand, Ms Charleston punched Ms Sinclair once in the face, near the eye, in self-defence, whilst she was on the ground with Ms Sinclair on top of her. Ms Charleston also grabbed Ms Sinclair's left arm at one point when the two women were on the ground.
6. Ms Wood attempted to pull Ms Sinclair off Ms Charleston, and eventually succeeded, and, as she stood up, Ms Sinclair kicked Ms Charleston in the head, the ribs and the groin. Ms Wood was behind Ms Sinclair at the time of the kicking, concentrating on her struggle to get Ms Sinclair to her feet, and did not realise that Ms Sinclair's foot was connecting with Ms Charleston as Ms Wood pulled her up and away.
7. I find that, once Ms Wood had succeeded in pulling her to her feet and away from Ms Charleston, Ms Sinclair called "sic her" to her dog, but the dog did not respond. Ms Sinclair then walked back down Mountain Street towards Cement Avenue to her home. There was no further physical interaction between Ms Sinclair and Ms Charleston or Ms Wood that day. I do not believe Ms Sinclair's account of being hit with a sale post or a star post. I do not believe that Ms Pizany witnessed any part of the interaction between the parties in Mountain Street on 7 March 2020.
8. For the reasons set out above, the account of the physical interaction between Ms Sinclair and Ms Charleston that I have accepted is largely Ms Wood's account. The only deviation from Ms Wood's account is that I have found that Ms Sinclair kicked Ms Charleston in the head, the ribs and the groin as she was being dragged off Ms Charleston by Ms Wood. The basis for that finding is Ms Charleston's evidence, set out above at [20], which is consistent with the injuries she was recorded as having at the hospital she attended the next day.
9. As a result of Ms Sinclair punching and kicking her, Ms Charleston received significant injuries and became distressed. I find that immediately after the altercation Ms Charleston spent some time at Ms Wood's house, as Ms Wood cleaned up her face, and then she drove herself home. She did not return to the hotel. She did not fall down any stairs.

Subsequent to 7 March 2020

1. Both Ms Sinclair and Ms Charleston were charged with affray. Ms Sinclair said, in evidence, that she pleaded guilty in the knowledge that both she and Ms Charleston had been charged, thinking that it was fair. Ms Charleston pleaded not guilty and the charge against her was withdrawn.
2. It was Ms Charleston's evidence that, subsequent to 7 March 2020, Ms Sinclair frequently drove past her house and yelled abuse, sometimes many times a day. Ms Charleston said that she moved to a different town on 13 August 2020 out of fear of Ms Sinclair. I accept that Ms Sinclair drove past Ms Charleston's house from time to time between 7 March 2020 and 13 August 2020 and yelled abuse at Ms Charleston. Ms Charleston's account of the frequency of these events has varied. I accept that, on some days, it happened several times. I accept that fear of Ms Sinclair arising from the battery on Ms Charleston was aggravated by Ms Sinclair's subsequent behaviour. I accept that Ms Charleston moved to a different town out of

fear of Ms Sinclair.

Assault and battery

1. The tort of battery was described in *Croucher v Cachia* [2016] NSWCA 132 at [20] to [25] by Leeming JA, with whom Beazley P and Ward JA agreed:
20. Battery is one of three forms of trespass to the person, the others being assault and false imprisonment. While it is conveniently and conventionally labelled as an "intentional tort", in contrast with negligence, such labels can obscure the necessary analysis of (a) the elements of the tort and (b) how the tort is affected by statute. As it is put in Clerk & Lindsell on Torts (20th ed, 2010, Sweet & Maxwell) at 986, "in this context 'intention' has a very particular meaning".
21. A defendant who directly causes physical contact with a plaintiff will commit a battery unless the defendant proves that the defendant was "utterly without fault". The requisite direct contact will be present if the defendant uses an instrument (such as gardening shears): *Darby v Director of Public Prosecutions* [2004] NSWCA 431; 61 NSWLR 558 at [73].
22. Although battery is an intentional tort, a battery may occur when the defendant is merely negligent. It was in those circumstances that a unanimous High Court said in *Williams v Milotin* (1957) 97 CLR 465 at 474 that "[i]t happens in this case that the actual facts will or may fulfil the requirements of each cause of action" (ie battery and negligence).
23. Within the allegations concerning battery, Mr Cachia's pleading alleged that "[t]he attack was intentional and designed to inflict serious injury" (para 7). That allegation was, strictly speaking, unnecessary in order to establish liability (although, arguably, the allegation was intended to engage s 3B(1)(a) of the Civil Liability Act thereby permitting the award of damages at common law including exemplary damages – see below). It is clear law in this country that trespass to the person caused by a blow does not require the plaintiff to prove anything about intention. I cannot put the point more clearly than did Jacobs JA, with Manning and Moffitt JJA agreeing, in *Timmins v Oliver* (unreported, New South Wales Court of Appeal, 12 October 1972). Jacobs JA was writing three months after the commencement of the Supreme Court Act 1970 (NSW) which would bring to an end common law issue pleading refined by Baron Parke which had been said by Cotton LJ, shortly after it had been abolished a century earlier in England, in *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at 414, to "conceal as much as possible what was going to be proved at the trial". Jacobs JA rejected a demurrer to two bare declarations alleging that the plaintiff had sustained injuries from the defendants driving a motor boat against him, saying:

"Nothing more has ever been required in an action based on trespass than an allegation of the battery and it is too late in the day to change this now. ... Can we as the curtain falls for the last time on declarations in trespass which have held the stage for centuries say that the play has all this time been played wrongly and according to a bad script? I think not."

24. The fact that the onus lay on the defendant, and the nature of what was required to be proven, was explained by Windeyer J in *McHale v Watson* (1964) 111 CLR 384 and by Street CJ (with whom Ferguson and James JJ agreed) in *Blacker v Waters* (1928) 28 SR (NSW) 406 at 410, in both cases tracing the matter back to *Weaver v Ward* (1616) Hob 134; 80 ER 284. There it was said that no man may be excused of a trespass "except it may be judged utterly without his fault". The position in this respect is essentially unchanged four centuries later.

25. As Gummow J said in *Stingel v Clark* [2006] HCA 37; 226 CLR 442 at [47]:

"[I]n *McHale v Watson*, Windeyer J demonstrated that, contrary to the view taken by Diplock J in *Fowler v Lanning*, in an action for trespass to the person by a blow or missile it was for the defendant to aver and prove the absence of intent and negligence on the defendant's part, rather than for the plaintiff to aver and prove that the defendant acted either intentionally or negligently."

Gummow J dissented in the result, but the statement of principle reproduced above is uncontroversial. Further, "negligence" means, in this somewhat unfamiliar context, an absence of fault on the part of the defendant (this is another way in which "negligent" bears a variety of meanings, depending upon the context: see *Paul v Cooke* [2013] NSWCA 311; 85 NSWLR 167 at [39]-[41]).

1. I am satisfied that Ms Sinclair committed battery against Ms Charleston by repeatedly punching her in the face whilst they were on their feet and by continuing to punch her in the face and the ribs whilst Ms Charleston was on the ground and Ms Sinclair was on top of her. Ms Sinclair committed battery when she kicked Ms Charleston in the head, ribs and groin as Ms Sinclair was pulled to her feet by Ms Wood.
2. Ms Sinclair initiated the attack on Ms Charleston by punching her in the left side of her face. Every element of Ms Sinclair's attack on Ms Charleston was intentional.
3. Assault is a direct and intentional threat made by the defendant (or some person or thing within the defendant's control) that places the plaintiff in reasonable apprehension of imminent contact with the plaintiff's person (K Barker, P Cane, M Lunney and F Trindale, *The Law of Torts in Australia*, 5th edn, Oxford University Press, Australia and New Zealand, 2011 at 44).
4. In the circumstances of the present matter, after Ms Sinclair's first punch, Ms Charleston was under threat of, and apprehended, continued punches and kicks until the point that Ms Sinclair walked away. Ms Sinclair committed assault against Ms Charleston.
5. In her Defence, Ms Sinclair pleaded self-defence.
6. The Civil Liability Act 2002 (NSW) provides, in ss 52 and 53:

52 No civil liability for acts in self-defence

- (1) A person does not incur a liability to which this Part applies arising from any conduct of the person carried out in self-defence, but only if the conduct to which the person was responding—
 - (a) was unlawful, or
 - (b) would have been unlawful if the other person carrying out the conduct to which the person responds had not had a mental health impairment or a cognitive impairment at the time of the conduct.
- (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary—
 - (a) to defend himself or herself or another person, or
 - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
 - (c) to protect property from unlawful taking, destruction, damage or interference, or
 - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

- (3) This section does not apply if the person uses force that involves the intentional or reckless infliction of death only—
 - (a) to protect property, or
 - (b) to prevent criminal trespass or to remove a person committing criminal trespass.

53 Damages limitations apply even if self-defence not reasonable response

- (1) If section 52 would operate to prevent a person incurring a liability to which this Part applies in respect of any conduct but for the fact that the conduct was not a reasonable response in the circumstances as he or she perceived them, a court is nevertheless not to award damages against the person in respect of the conduct unless the court is satisfied that—
 - (a) the circumstances of the case are exceptional, and
 - (b) in the circumstances of the case, a failure to award damages would be harsh and unjust.
- (2) If the court determines to award damages on the basis of subsection (1), the following limitations apply to that award—
 - (a) Part 2 (with the exception of Division 3 of that Part) applies with respect to the award of damages despite section 3B(1)(a), and
 - (b) no damages may be awarded for non-economic loss.

1. In *Croucher v Cachia*, at [42]-[46], Leeming JA said:
42. Sections 52 and 53 depend upon whether the conduct to which the defendant was responding was (or would have been) "unlawful". In *State of New South Wales v McMaster* [2015] NSWCA 228; 328 ALR 309 it was held that unlawful extended to conduct which was merely tortious, as opposed to criminal (see at [200]-[204] per Beazley P, with whom McColl and Meagher JJA agreed). I think that *McMaster* is probably to be read as meaning that tortious conduct in this context does not merely mean that the elements of a tort have been established, but also that no defence has been made out. This gives rise to complexities, which were not the subject of any submissions when the appeal was argued, once it is observed that in most cases when self-defence is invoked there will have been an assault in the technical tortious sense. There is a tortious assault where the act of a person causes another person reasonably to apprehend a threat of force or violence: see *Barton v Armstrong* [1969] 2 NSW 451 at 455 and *State of New South Wales v McMaster* at [205].
43. Further, the onus of establishing the elements of self-defence lies on the defendant: *Presidential Security Services of Australia Pty Ltd v Brilley* [2008] NSWCA 204; 73 NSWLR 241 at [162]; contrast the position in crime. That accords with ordinary principles of ordinary statutory construction: see *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520. I am conscious that the matters mentioned in the previous paragraph may give rise, at least in theory, to some more precise questions as to the onus of establishing aspects within the "unlawful" element of statutory self-defence. However, the present case seems most unlikely to turn on onus, and I should not be understood as expressing any view on such questions, which, once again, were not the subject of argument.
44. Once a plaintiff's conduct has been found to be unlawful, s 52 prescribes two necessary and sufficient conditions to establish a defence of self-defence: demonstrating the requisite subjective belief on the part of the defendant, and also that the defendant's conduct was a reasonable response to the circumstances as perceived by him or her. One should be cautious before labelling the second limb of the test as "objective", because it contains both subjective and objective elements: *Sangha v Baxter* at [151]; I shall refer below to the "reasonable response limb" of the defence.
45. In the event that the only reason for the defence under s 52 being unavailable is that the reasonable response limb was not satisfied, then s 53 imposes a prohibition upon ordering damages, which can be lifted if the court is satisfied that the circumstances are exceptional and that it would be harsh and unjust not to order damages, in which case damages are available, but calculated on a special basis.
46. Self-defence is also available as a defence to battery at common law. The common law defence is preserved alongside ss 52 and 53 by s 3A(1):

"3A Provisions relating to operation of Act

- (1) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law."

In *State of New South Wales v McMaster* at [210] (Beazley P, McColl and Meagher JJA agreeing on this issue), this Court held that self-defence at common law was preserved.

1. Ms Sinclair has not established that Ms Charleston committed any unlawful act, be it criminal or tortious, before Ms Sinclair began punching her in the face. It is not unlawful to participate in a verbal altercation. In any event, Ms Sinclair did not say that she punched Ms Charleston as a result of any belief that she formed in the course of the verbal argument. She said that Ms Charleston punched her first, and that she punched Ms Charleston in response. As I have said, I do not believe that Ms Sinclair began punching Ms Charleston in response to Ms Charleston punching her. I do not believe that Ms Sinclair formed the belief that she needed to defend herself against Ms Charleston. Ms Sinclair was the aggressor and threw the first punch. Ms Sinclair had the upper hand, physically, at all times during the physical altercation. Ms Charleston punched Ms Sinclair once only, when she was on the ground, in an unsuccessful attempt to get Ms Sinclair off her and to stop Ms Sinclair punching her. Ms Charleston's punch was thrown in self-defence.
2. Section 53 of the Civil Liability Act 2002 (NSW) is not available to Ms Sinclair because her conduct was not a response to unlawful conduct.
3. Ms Sinclair has failed to establish the defence of self-defence at common law. Ms Sinclair has not established that she held a belief on reasonable grounds that her battery of Ms Charleston was necessary for her own protection or for the protection of another.

Medical evidence of psychiatric injury to Ms Charleston

1. Two psychiatrists provided independent expert reports; Dr Chow (called by the plaintiff) and Dr Xia (called by the defendant). Dr Chow and Dr Xia gave evidence concurrently.
2. In his report, Dr Chow recorded that Ms Charleston has had a long history of anxiety and depression, for which she has taken medication, on and off, for many years. Dr Chow recorded that Ms Charleston began seeing a psychologist and a psychiatrist in 2018. Later that year, she moved house and, by 2020, her psychological state was more stable.
3. Dr Chow said that Ms Charleston's psychological state worsened due to the trauma of the assault. He said that Ms Charleston moved house to avoid harassment from Ms Sinclair, and that Ms Charleston "continues to be hypervigilant".
4. Dr Chow said that Ms Charleston's psychological symptoms warranted a diagnosis of post-traumatic stress disorder. He said that she was improving with treatment, but that she would need ongoing psychological and psychiatric treatment.

5. Dr Chow said that Ms Charleston had "suffered a psychiatric injury of traumatic and depressive nature of moderate severity, which is ongoing". Dr Chow acknowledged her previous depression and anxiety and said, "I am of the opinion that her underlying psychiatric condition was aggravated by the trauma associated with the assault of 7 March 2020". Dr Chow noted that Ms Charleston had become avoidant since 7 March 2020, reducing her engagement in hobbies, and being less social. He said, however, that there had been some improvement.
6. Dr Chow recommended that Ms Charleston see a psychologist every two to four weeks and a psychiatrist every one to two months at least for 18 to 24 months. Dr Chow said that the "aggravation injury" would require Ms Charleston to stay on medication for five years.
7. In her report, Dr Xia set out Ms Charleston's physical and mental history in some detail, together with the information gleaned in the consultation.
8. Dr Xia noted Ms Charleston's prior diagnoses.
9. Dr Xia said that Ms Charleston described "increasing distress in the context of her stressors (which included stressors outside of the subject incident)" at the time. Dr Xia said "However, her magnitude of distress was not to the point of requiring increased pharmacological or psychological treatment except for the short-term use of medications to assist with sleep".
10. Dr Xia noted that Ms Charleston described some hypervigilance relating to Ms Sinclair, but said "However, she does not experience traumatic flashbacks or memories. She does not experience nightmares or dreams regarding the subject incidents. She does not fulfil criteria for a Posttraumatic Stress Disorder."
11. Dr Xia said, in her report:
 187. Increased fear and anxiety, as well as feelings of lack of safety, when in the immediate vicinity of a person with whom you believe has previously assaulted and harassed you significantly would be considered to be a normative reaction.
1. Dr Xia said:

Based on the information available to me at present, it is my opinion that Ms Charleston did not suffer a diagnosable psychological or psychiatric disorder as a result of the subject events. While Ms Charleston likely experienced negative symptoms of distress and anxiety in the acute period following the subject events, this would be considered a normative reaction in the context of being assaulted and reportedly harassed by the perpetrator of said assault, particularly in the context of underlying psychological vulnerabilities.

1. Dr Xia said that Ms Charleston's diagnosed mental health conditions are all attributed to matters prior to the incident. Dr Xia thought, however, that the Court proceedings might be a factor in Ms Charleston's "deteriorations in mental state". She noted that Ms Charleston had a pattern of going off her medication because she feels well, and then resuming it within the year because her mental state deteriorates again. In the context of Ms Charleston's history,

Dr Xia agreed with Dr Chow that Ms Charleston should stay on her medication for a period of five years. Dr Xia also agreed that Ms Charleston would benefit from psychological treatment.

2. Dr Xia said, in her report:

...it is my opinion that Ms Charleston's mental health symptoms and diagnoses predated the subject incident, and that the subject incident did not cause a primary psychiatric injury, nor cause a significant exacerbation of her pre-existing psychiatric conditions.

1. A substantial disagreement between Dr Chow and Dr Xia was discussed at some length in their joint report dated 27 March 2024 and in their concurrent evidence at the trial. In summary, both doctors acknowledged that Ms Charleston had pre-existing psychiatric diagnoses referable to prior trauma. Dr Xia believes that the low mood, anxiety, poor sleep, anxiety and fearfulness experienced by Ms Charleston after the incident were normal responses to the stresses she was experiencing at the time, including the assault. Dr Chow disagreed. Dr Chow said that he had taken into account the significant assault [battery], involving multiple injuries with bruises and broken bones and the immediate effect on Ms Charleston, including escalated distress, anxiety, avoidant behaviour and concern for safety months and years after the incident. Dr Chow pointed out that Ms Charleston was so traumatised that she abandoned her home and moved to another town.

2. Dr Chow said, in the joint report:

An individual with normal fortitude would easily develop acute stress disorder, adjustment disorder, or even post-traumatic stress disorder with the level of significant physical assault Ms Charleston suffered. With Ms Charleston's pre-existing psychiatric history, and therefore vulnerabilities, she is even more likely to develop a psychiatric illness as a result of such significant physical assault.

In my opinion the psychological complaints, significant distress, and impairment as a result of the subject assault are certainly more than a normative stress response.

As a result of the aggravated psychiatric injury from the subject assault, Ms Charleston suffered increased poor sleep, increased anxiety, increased avoidance and agoraphobia, increased hypervigilance and started response to triggers, reduced motivation, reduced engagement in hobbies and social activities.

The fact that she did not increase or change her antidepressant does not necessarily mean that she did not suffer an aggravated psychiatric injury as a result of the subject assault. She was already on a high dose antidepressant of Duloxetine and changing antidepressant would likely cause significant withdrawal symptoms which could further affect her psychological state. Therefore, additional medications such as Quetiapine and Olanzapine were used.

1. Dr Chow further said that Ms Charleston's anxiety, stress, lack of appetite, weight loss, and interference with social and domestic activities were disabilities arising from the aggravation to mental illness. Dr Chow acknowledged that other factors, such as the death of her father, also had an impact on Ms Charleston at the relevant time, but said:

I would consider those limitations and disabilities remain partially the result of the aggravated psychiatric injury due to subject assault. [sic]

1. A further substantial disagreement between Dr Chow and Dr Xia was whether Ms Charleston's symptoms following the assault came within the description of Post Traumatic Stress Disorder under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5).
2. In evidence, Dr Xia did not resile from her opinion that Ms Charleston's distress or impairment in social, occupational or other important areas of functioning following the incident were not clinically significant as required by criterion G of the description of PTSD in the DSM-5. Dr Xia had formed her opinion on the basis that she understood Ms Charleston to have told her that she did not have nightmares about the incident. It was put to her that Ms Charleston had given evidence that she did have nightmares about the incident, and that the nightmares were occurring less frequently than immediately after 7 March 2020. Ms Charleston said, in evidence, that, by the time of the trial, she was having a nightmare about the assault once every two to three weeks (transcript p 38-39). Dr Xia said that, if she assumed that Ms Charleston was being truthful about that, it could be relevant to criteria B of the description of Post Traumatic Stress Disorder in DSM-5, which requires, among other things, "Recurrent distressing dreams in which the content and/or affect of the dream are related to the traumatic event(s)". Dr Xia said that she would need to know more about the degree of the impact of the nightmare on Ms Charleston to reconsider her view.
3. Dr Chow, in evidence, pointed out that Ms Charleston had discussed her intrusive memories about the incident with her doctors, and particularly her treating psychiatrist, recurrently. Dr Chow said that he thought she met criteria 4 and 5 of criterion B of the description of PTSD in the DSM-5, which are "Intense or prolonged psychological distress at exposure to internal or external cues that symbolize or resemble an aspect of the traumatic event(s)" and "Marked physiological reactions to internal or external cues that symbolize or resemble an aspect of the traumatic events". Dr Chow said that Ms Charleston had hypervigilance and startle response. She told him that she had recurrent flashback moments. Dr Chow was confident that she satisfied the criteria for Post Traumatic Stress Disorder.
4. Where the psychiatrists differ in their opinion, I prefer the evidence of Dr Chow. Both psychiatrists interviewed Ms Charleston via telehealth, but, plainly, Ms Charleston was more forthcoming with Dr Chow and, for that reason, he had a more accurate and comprehensive picture of her symptoms with respect to the Post Traumatic Stress Disorder diagnosis. Her account of her symptoms to her treating doctor has been as consistent over the period since 7 March 2020 as could be expected and supports Dr Chow's diagnosis.

5. As for the aggravation of the depression and anxiety disorders, I accept Dr Chow's analysis because it reflects a more accurate assessment of the seriousness of the battery Ms Charleston was subjected to and the severity of the aggravated symptoms. I accept that Ms Charleston's psychiatric symptoms following 7 March 2020 were more than a normative response to an adverse event. I accept that her low mood, her increased anxiety and the impairment of both her social life and her enjoyment of her hobbies constituted an aggravation of her pre-existing depression and anxiety disorders.

Summary of findings with respect to damage caused by the battery

1. In her further amended statement of particulars Ms Charleston claimed damages with respect to the following injuries:
 - (a) Injury to the right ankle
 - (b) Injury to the head
 - (c) Injury to the chest
 - (d) Abrasions and lacerations to the left flank and lumbar area
 - (e) Injury to the left shoulder
 - (f) Injury to the right hand
 - (g) Injury to the left eye
 - (h) Severe aggravation of pre-existing depression
 - (i) Psychiatric sequelae
 - (j) Aggravation of post traumatic stress disorder
 - (k) Chipped teeth
 - (l) Fracture of the right calcaneus, medial malleolus and antero-inferior tibia.
1. All of the above injuries have been established as having been sustained by Ms Charleston in the battery by Ms Sinclair on 7 March 2020. The left shoulder pain was described in the hospital notes for 8 March 2020 as "mild tenderness over left shoulder". An X-ray and ultrasound of Ms Charleston's left shoulder did not show anything of concern related to the battery, and I assume that the mild tenderness resolved rapidly. The fracture involving the medial malleolus and antero-inferior tibia was the injury to the right ankle, so (a) and (l) overlap. There is also overlap between items (h), (i) and (j).
2. In Ms Charleston's Further Amended Statement of Particulars, the following particulars of continuing disabilities were pleaded:
 - (a) Continuing pain and restriction of movement of the right ankle and foot.
 - (b) Pain and restriction of movement of left lower ribs.

- (c) Headaches.
 - (d) Anxiety and stress.
 - (e) Lack of appetite.
 - (f) Weight loss
 - (g) Interference with social and domestic activities.
1. All of the particulars of continuing disability pleaded have been established on the evidence. Ms Charleston said that the pain in her ribs was presently only occurring when she did not sit straight. I note that complaints of headache referable to the incident do not appear in the clinical notes after 3 July 2020 (see the report of Dr Gehr, p 4).

General Damages

1. Ms Charleston has claimed the sum of \$75,000 on account of general damages on the basis of the non-economic loss occasioned to her by the pain, disability and loss of enjoyment and amenities of life arising from the battery of 7 March 2020, together with the non-economic loss likely to be experienced by her as a result of her injuries from the battery in the future.
2. In support of the claim, *Graves v West (No 2)* [2015] NSWSC 306 ('Graves'), a decision of Button J, was referred to. In *Graves*, Button J noted that general damages are incapable of mathematical calculation and are at large.
3. I bear in mind that general damages are compensatory and must be devoid of any punitive element.
4. The defendant relied upon the decision in *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208. Ipp J, with whom Mason P agreed, said, at [105]-[107]:

105 Where a defendant alleges that the plaintiff suffered from a pre-existing condition, the evidential onus as explained in *Watts v Rake* and *Purkess v Crittenden* remains on the defendant and must be discharged by it. Nevertheless, to the extent that the issues involve hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring, the exercise of "disentanglement" discussed in those cases is more easily achieved. That is because the court is required to evaluate possibilities in these situations – not proof on a balance of probabilities.

106 Without intending to give an exhaustive list of possibilities, it may be that, had the defendant's negligent act not occurred, a pre-existing condition might have given rise to the possibility that the plaintiff's enjoyment of life and ability to work would have been reduced and to a susceptibility to further injury; in addition, other causes entirely unrelated to the defendant's negligent act might have contributed to the plaintiff's ultimate condition.

107 Appropriate allowances must be made for these contingencies. A proper assessment of damages requires the making of a judgment as to the economic and other consequences which might have been caused by a worsening of a pre-existing condition, had the plaintiff not been injured by the defendant's negligence. A pre-existing condition proved to have possible ongoing harmful consequences (capable of reasonable definition) to the plaintiff, even without any negligent conduct on the part of the defendant, cannot be disregarded in arriving at proper compensation.

1. It is clear in this matter that Ms Charleston suffered from pre-existing mental health conditions, the symptoms of which were aggravated by the battery on 7 March 2020. She was diagnosed with depression and anxiety prior to 7 March 2020. In her report, Dr Xia records that Mr Watt, a psychologist, believed in 2019 that Ms Charleston may fulfil the criteria for Complex Posttraumatic Stress Disorder ('PTSD'). PTSD is mentioned in Ms Charleston's general practitioners' clinical notes, and in correspondence from Mr Watt to the general practitioner, where it is described as a mental health diagnosis pertinent to her case. I have found that, subsequent to the battery, Ms Charleston exhibited symptoms of depression, anxiety and post-traumatic stress disorder. I take into account that, at the time of the battery, Ms Charleston was affected by personal circumstances, including the break-up of a long-standing relationship, which may have contributed to the aggravation of her symptoms of depression and anxiety. I also take into account that she experienced adverse events subsequent to 7 March 2020, including the death of her father, which also contributed to her depression and anxiety. I take into account Ms Sinclair's ongoing harassment of Ms Charleston by driving past her house and yelling abuse at her. In assessing damages, I make allowances for the other sources of the aggravation of Ms Charleston's mental health symptoms. I consider, however, that the battery was a significant element of the aggravation of the symptoms of anxiety, depression and PTSD referable to the battery. I take into account, though, that Ms Charleston's account of her current mental health shows that she has experienced some improvement, and both Dr Chow and Dr Xia are confident that, with further treatment from a psychiatrist and a psychologist, she will improve further.
2. As to Ms Charleston's physical injuries, the most enduring of them are the scarring to Ms Charleston's back, the chipped tooth and the broken tooth and the pain in her right foot and ankle. Of these, the most serious is the pain in her right foot and ankle, which also limits her ability to participate in and her enjoyment of gardening, bushwalking and jogging, and prevents her from standing comfortably for more than 45 minutes. Dr Gehr recommends the use of a firm ankle brace when walking "any distance" on an indefinite basis.
3. It was submitted on behalf of the plaintiff that an award of \$75,000 would be appropriate. It was submitted that the award in *Graves* was an appropriate guide to the general damages in the present matter. The plaintiff in *Graves* was a 25 year old man who was punched in the jaw from behind during a rugby game, away from the play, in 2011. He suffered a severely broken jaw and dental injuries. Operative treatment was required, including the wiring shut of the jaw for a period of time. Complex dental work was required over a period of years,

with complications along the way. The plaintiff was also diagnosed with PTSD.

4. The physical injuries suffered by the plaintiff in Graves were more severe than Ms Charleston's physical injuries. However, the PTSD suffered by Mr Graves resolved almost completely within three years, so Ms Charleston's mental health prognosis is more complex.
5. Taking into account that the incidents in the two matters occurred nine years apart, and the award of damages in Graves was made in 2015, I agree that an award of \$75,000 on account of general damages in this matter is appropriate. I further agree with the submission on behalf of the plaintiff that \$50,000 of that award is attributable to past non-economic loss, and \$25,000 is attributable to future non-economic loss.
6. The plaintiff is entitled to simple interest on the \$50,000 portion of the general damages at 2% for four years, which is \$4,000.
7. The plaintiff sought aggravated damages in the sum of \$30,000 on account of Ms Sinclair's persistent harassment of Ms Charleston in the months subsequent to the battery, and Ms Sinclair's conduct of her case, involving, as it did, untrue allegations of violent conduct on the part of Ms Sinclair and the calling of evidence from a person who claimed to have been present at the incident, but who was not present.
8. I am satisfied that circumstances of aggravation are present in this matter, particularly the on-going harassment of Ms Charleston, which further reinforced her anxiety and feelings of a lack of safety. I consider that an award of \$15,000 by way of aggravated damages is appropriate.
9. Ms Charleston sought the following award of future treatment expenses:
 - a. The plaintiff will require three appointments with a foot and ankle surgeon annually at \$300 per attendance (150) \$865.38
 - b. The plaintiff will require an MRI scan of the right ankle and foot \$1,500.00
 - c. The plaintiff will require ongoing medication at \$10.00 per week for five years (243) \$2,430.00
 - d. The plaintiff will require monthly psychological attendances at \$220.00 per session for two years (101) \$5,127.69
 - e The plaintiff will require six psychiatric sessions per year for two years at \$300.00 per session (101) \$3,496.15
 - F The plaintiff will require monthly general practitioner appointments for five years at \$65 per attendance (243) \$3,645.00

Total \$17,064.22

1. All of the future treatment expenses claimed have been substantiated on the evidence of Dr Gehr and Dr Chow, and I will award them. The defendant did not contest the quantum of the future treatment expenses claimed but contested the entitlement to any award.

Orders

1. Orders will issue in the following terms:
1. Verdict and judgment for the plaintiff against the defendant in the sum of \$111,064.22.
2. The question of costs is reserved.

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Decision last updated: 18 July 2024

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