

AUSTRALIA / JUDGMENT

Prisk v Danslow [2024] NSWDC 535

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District Court

New South Wales

Medium Neutral Citation: Prisk v Danslow [2024] NSWDC 535

Hearing dates: 11 November 2024

Date of orders: 13 November 2024

Decision date: 13 November 2024

Jurisdiction: Civil

Before: Acting Judge Levy SC

Decision: See paragraph [73] for orders

Catchwords: TORTS – intentional torts – trespass to person – assault – battery – default judgment entered in absence of filed defence – assessment of compensatory, aggravated and exemplary damages and pre-judgment interest

Legislation Cited: Civil Liability Act 2005 (NSW), s 3B(1)(a)

Crimes Act 1900 (NSW), s 35(2)

Uniform Civil Procedure Rules 2005 (NSW), r 42.1

Cases Cited: Adams v Kennedy [2000] NSWCA 152; (2000) 49 NSWLR 78

Cassel & Co Ltd v Broome [1972] AC 1027

Fox v Wood (1981) 148 CLR 438; [1981] HCA 41

Gray v Motor Accidents Commission (1998) 196 CLR 1; [1998] HCA 70

Lamb v Cotogno (1987) 164 CLR 1; [1987] HC 47

Nadjovski v Crnojlovic [2008] NSWCA 175

NSW v Ibbett (2006) 229 CLR 638; [2006] HCA 57

NSW v Landini [2010] NSWCA 157

Penrith City Council v Parks [2004] NSWCA 201

Planet Fisheries Pty Ltd v La Rosa (1968) 119 CLR 18

Radford v State of NSW [2010] NSWCA 276

Rookes v Barnard [1964] AC 1129; [1964] UKHL 1

Spautz v Butterworths & Anor [1996] NSWSC 614; [1996] 41 NSWLR 1

State of New South Wales v Riley (2003) 57 NSWLR 496; [2003] NSWCA 208

State of NSW v Abed [2014] NSWCA 419

State of NSW v Moss (2000) 54 NSWLR 536; [2000] NSWCA 133

State of NSW v Quirk [2012] NSWCA 216

State of NSW v Zreika [2012] NSWCA 37

Category: Principal judgment

Parties: Andrew Ralph Prisk (Plaintiff)

Darren Danslow (Defendant)

Representation: Counsel:

Mr MT Vesper (Plaintiff)

Mr D Cameron, solicitor (Defendant)

Solicitors:

Kenny Spring Solicitors (Plaintiff)

Mr D Cameron (Defendant)

File Number(s): 2024/00219430

Publication restriction: None

Judgment

Introduction

1. The plaintiff, Mr Andrew Prisk, brings these proceedings claiming common law compensatory, aggravated and exemplary damages, and pre-judgment interest, from Mr Darren Danslow, the defendant, following an unprovoked violent assault and battery committed upon him by the defendant in the car park of the Oberon RSL Club on the evening of Tuesday 9 February 2023. The Civil Liability Act 2005 (NSW) does not apply to this case: s 3B(1)(a).

Procedural background

1. On 24 July 2024, absent the filing of a defence by or on behalf of the defendant, and pursuant to a notice of motion filed on behalf of the plaintiff, the Registrar entered a default judgment against the defendant. The proceedings were listed for an assessment hearing in Bathurst on 11 November 2024. At the hearing the defendant was present and was represented by his solicitor. No application was made to set aside the default judgment and there was no application for an adjournment. The essential primary facts are not in dispute.

Evidence overview

1. The plaintiff gave oral evidence from a temporary overseas location by means of an AVL connection. He described the events of the assault and battery and their aftermath in detail. The plaintiff also relied upon the content of a court book: Exhibit "A", Tabs 1 – 28, pp 1 – 204. The defendant gave brief oral evidence on limited issues in light of the default judgment. None of that evidence was exculpatory of his actions. Prior to the hearing the defendant had not proffered any form of apology or contrition to the plaintiff.

Credit

1. The factual content of the plaintiff's evidence was given stoically, in a straightforward manner. It was not inherently improbable in any respect. No adverse credit issues arose from within his evidence. I have accepted the plaintiff's evidence as truthful and reliable in its entirety.
2. The defendant was aged 45 years at the time of the events in question. At that time he was employed as a corrections officer. He had been in that job for 10 years. He substantially conceded the content and the effect of the confrontational conversation he had initiated with the plaintiff prior to committing battery upon him, but he sought to dispute the plaintiff's account that he had punched the plaintiff in the face, and instead claimed that he only forcefully pushed the plaintiff's face with the open palm of his hand. That explanation was contrary to the non-traversal of the facts pleaded by the plaintiff which based the default judgment. The defendant's version was problematic because of the ensuing estoppel. Whilst the defendant's solicitor submitted that the defendant was remorseful, that belated statement had no mitigatory effect.

Facts

1. The plaintiff is presently aged 60 years. The incident giving rise to these proceedings occurred whilst he was acting lawfully in the course his employment as a mobile speed camera operator in the Bathurst area. At that time the plaintiff was engaged in performing a civic duty in the public interest of promoting road safety.

2. In the lead-up to the events in question, at about 6:52pm on that evening, the plaintiff had set up a series of roadside signs in Oberon Street warning motorists of the presence of the mobile speed camera that he was operating. He then drove his vehicle into the car park at the Oberon RSL Club. But for the events in question, he had planned to remain in that location until about 10:20pm, sitting in his vehicle in order to observe and supervise the operation of the equipment which he had set up and for which he was responsible.
3. At approximately 8:20pm on that evening, whilst the plaintiff was seated in the driver's seat of his stationary vehicle in the course of his employment, the defendant walked purposefully towards the plaintiff's vehicle in an agitated manner and then stood adjacent to the driver's side door of the plaintiff's vehicle. He then knocked on the driver's side window and sought to attract the plaintiff's attention in conversation. In those events, the defendant's agitated manner and tone became incrementally aggressive towards the plaintiff.
4. At that time, as became evident from the ensuing conversation which was initiated by the defendant, he seemed to have been actuated by a mistaken and misplaced concern over an issue of public safety which was within the remit of the police, and not citizenry vigilantism. In that regard, the defendant had angrily assumed that the plaintiff was a paedophile waiting for access to children.
5. In the events which ensued, the plaintiff wound down his driver's side window by several inches in order to speak with the defendant, following which the following conversation took place:

The Defendant said: "What are you doing here?"

The plaintiff replied: "Waiting for a friend."

The Defendant said: "What's your friend's name?"

The Plaintiff replied: "None of your business."

The Defendant said: "That's bullshit. You're not waiting for anybody. You're a paedophile: You're waiting for kids."

The Plaintiff replied: "Well actually, I work with the speed camera cars and I put the signs out. You can see one in front of me. There's two more down the road with the camera car."

The Defendant said: "You're a fucking dog. Open the door. Open the door."

The Plaintiff replied: "Mate this is being recorded audio and video. Just walk away."

The Defendant said: "I don't fucking care. Open the door."

The Plaintiff replied: "Smartest thing is walk away. This is being audio and video recorded back to base."

1. During that conversation the defendant repeatedly shouted at the plaintiff saying: "Open the fucking door". The defendant's manner and tone became increasingly agitated and aggressive as those events unfolded.
2. In those events the plaintiff felt anxious and was fearfully concerned for his safety. He sensed that something untoward was about to occur and he wanted to defuse the situation. He attempted to operate the electric switch to close his driver's side window but the force of the defendant's action of pushing down on the glass caused the retention mechanism to fail. The window pane then dropped into the cavity of the door, thereby exposing the plaintiff to access by the defendant. I do not accept the defendant's contrary evidence of denial as it was inconsistent with paragraph 10 of an undisputed statement of agreed facts: Exhibit "A", Tab 25, p 187.
3. In light of the defendant's close proximity, his threatening demeanour, his shouting behaviour, and his described actions, the plaintiff felt a great sense of fear and foreboding. He immediately experienced a realistic fear and alarm that the defendant would proceed to inflict physical harm on him. In the course of those events, I accept that the defendant aimed a quick and powerful right-handed punch which the plaintiff saw coming, and which squarely and forcefully connected with his face. The plaintiff had pleaded that factual averment of a punch in his statement of claim and that fact has not been denied on the pleadings.
4. The focal point of the force of the defendant's punch resulted in a shocking forceful and painful fist contact with the plaintiff's mouth. The impact of that punch caused the plaintiff's head to be forced back towards the passenger seat within the vehicle.
5. There is a relatively short gap in the continuity of the plaintiff's recollection of those events which makes him believe he may have lost consciousness for a short period of time. That view is reinforced by the fact that before the events described above, the engine of the plaintiff's vehicle and the air-conditioning were running, whereas afterwards, when he came to his senses, he realised his engine had been switched off and his car keys could not be found until the next day, when they were located across the road some distance away after some searching had taken place. Although the defendant denies that he did so, the compelling inference is that after he had struck the plaintiff he had switched off the vehicle ignition and had thrown away the keys.
6. In the described assault and battery the plaintiff suffered lacerations, bleeding and bruising to his face and mouth, and multiple dental injuries, including the avulsion of an incisor tooth which was spat out at the scene. The full extent of the plaintiff's injuries were not immediately apparent to him at the scene.

7. After that assault, the defendant walked away from the plaintiff's vehicle towards a nearby stationary vehicle. The plaintiff then heard the voice of the female driver of that stationary vehicle call out to the defendant to get in the vehicle. The defendant then did so by entering the passenger seat and the vehicle then abruptly left the scene without leaving any identifying details. At that time the plaintiff noted the registration number of that vehicle.
8. After the plaintiff had gathered his senses, he contacted his superiors. An ambulance was summoned, he was treated at the scene and he was advised to see a dentist for assessment and treatment as nothing more could be done for him at that time. He was very distressed and experienced a lot of pain in his mouth, teeth and gums. He attended Bathurst police station to report the incident the next day.
9. A forensic police investigation then followed. After examining some CCTV footage, the defendant was identified as the perpetrator of the assault on the plaintiff. Police officers then attended at the defendant's home at 12 Campbells River Road, Black Springs, where they issued the defendant with a statutory demand for information. In response, the defendant then identified himself, and his wife Melissa Danslow respectively, as the passenger and the driver of the vehicle which had left the scene. The defendant declined to be further interviewed by police. He was given a court attendance notice in relation to the incident.
10. Based on the statement of agreed facts referred to at paragraph [12] above, which was prepared with the assistance of legal advice in consultation with a representative of the Office of the Director of Public Prosecutions, the defendant subsequently pleaded guilty to the charge of recklessly causing grievous bodily harm contrary to s 35(2) of the Crimes Act 1900 (NSW). He was sentenced to a 2-year Intensive Correctional Order which involved a suspended sentence.

Consideration

1. The compelling conclusion arising from the evidence is that the defendant's actions, in sequence, comprised a series of focussed verbal assaults on the plaintiff, followed by a severe battery comprising a punch to the face, all of which the defendant committed intentionally and with malice. There were no mitigating circumstances. The defendant's actions were high-handed. They were carried out with contumelious disregard for the plaintiff and his rights. Before striking the plaintiff the defendant had chosen to ignore the plaintiff's reasonable explanations for his legitimate presence at the scene which had attracted the defendant's ire.

Injuries, treatment and disabilities

1. The plaintiff's initial injuries comprised lacerations and bruising to the mouth and gums, the dislodgment and avulsion of a tooth, damage to his two upper central incisors, and soft tissue injuries to his lower jaw and to his neck.

2. The next day the plaintiff obtained initial emergency dental treatment. One tooth had already been avulsed, and two others had to be extracted as they were considered to be unsalvageable and unsuitable for supporting a partial denture. It later became necessary to remove the remainder of his entire upper dentition in order to fit a full upper denture, but that step proved to be an ineffective and intolerable solution for the plaintiff. Before the described injuries the plaintiff had no dental issues of concern.
3. The unchallenged dental opinion is that the plaintiff requires the surgical insertion of multi-stage endo-osseous dental implant fixtures which will be associated with considerable pain and discomfort. Due to resultant mal-occlusion issues, the plaintiff also now requires the complete removal of his lower teeth and the insertion of a full lower arch implanted dental prosthesis. That treatment will also be associated with considerable discomfort, inconvenience and recurrent maintenance expense over the plaintiff's remaining years.
4. In that regard that treatment will require that the plaintiff undergo regular ongoing dental treatment comprising removal and maintenance of the prosthetic arches every 6 months, which will be inconvenient, and which will result in occasional loss of income due to time required to be taken from work, as well as significant associated expense to be incurred relating to the daily use of cleaning materials for his dental prostheses.
5. The plaintiff continues to experience permanently impaired mastication. He has cosmetic deformity due to loss of dentition, and scarring to his upper and lower lips. He experiences considerable stress, anxiety, fear and constant watchful hypervigilance. He is anxious about possible further repercussions from the defendant. The attack on him constantly plays on his mind. He was not afflicted by such problems or avoidance before he was attacked by the defendant. He now has significant difficulty sleeping for more than several hours at a time, and he experiences disturbing flashbacks to the circumstances of the assaults. He has lost considerable confidence and avoids leaving his house unless necessary because he fears for his safety. He feels safer at home. He is wary and apprehensive of people approaching him. He avoids face to face contact with people.
6. When the plaintiff is at work operating speed cameras, he is on constant guard looking at his surrounds through his mirrors and is always in a state of alert ready to leave the scene in the event of trouble. He is now apprehensive about his ability to continue working and fears he may have to cease work before his previously planned retirement age.
7. On a daily basis, the plaintiff remains constantly aware of the discomfort and altered appearance in his mouth. That awareness is exacerbated when he is talking and eating. This is a big concern to him. He must remain mindful of what he eats. This occurs multiple times each day as a permanent feature of his life and he is embarrassed and feels awkward about the need to remove and manage the hygiene of his present temporary denture.

8. On 24 April 2024 the plaintiff was referred to a psychologist for management of his psychotrauma and his described psychological symptoms: Exhibit "A", Tab 11, p 38. He has been unable to pursue further psychological treatment because of the limitations imposed by the shift work arrangements associated with his employment.
9. The defendant submitted the plaintiff's psychological difficulties could not have been that severe in light of the plaintiff's non-pursuit of psychological treatment. I reject that submission in light of the plaintiff's explanation as cited above. In any event, the defendant's solicitor did not submit that the plaintiff has unreasonably failed to mitigate his damages. The defendant carries the onus of proof for any such assertion.
10. The plaintiff has already incurred out-of-pocket expenses totalling \$4739.45. A claim is made for future out-of-pocket expenses for ongoing treatment from dentists, for oral surgery, and for prosthodontics. That treatment will involve periodic replacement of his existing and future dental prostheses.
11. I accept that the plaintiff has incurred past loss of income of \$3473. He also makes a claim for ongoing periodic loss of income in the coming years because he has to undergo further expensive and complex dental treatments and he will need occasional days away from his work. He might not be able to continue working until the age of 67 years.

Assessment of damages

1. The plaintiff's claim for compensatory, aggravated and exemplary damages stands to be assessed in the following sequence.

Past out-of-pocket expenses

1. I assess the plaintiff's past out-of-pocket expenses, which were largely paid by the workers' compensation insurer on a recoverable basis, at \$4,739.45.

Future out-of-pocket expenses

1. The plaintiff makes a claim for future out-of-pocket expenses in the sum of \$140,155.55: MFI "1", paragraph 3.
2. That claim comprises the following elements:
 - (a) Initial full upper arch implant retained prosthesis \$34,365.00
 - (b) 15th year replacement of upper arch implant retained prosthesis (\$34,365 x 0.642 deferred on the 3 per cent discount tables) \$22,062.33
 - (c) Initial full lower arch implant retained prosthesis \$22,910.00
 - (d) 15th year replacement of lower arch implant retained prosthesis (\$22,910 x 0.642 deferred on the 3 per cent discount tables) \$14,708.22

- (e) Ongoing costs for dental visits, 6 monthly maintaining and cleaning costs associated with implants, over the counter medication and dental hygiene products, and psychological counselling, at a combined estimated cost of \$2600 per annum or \$50 per week projected at 3 per cent over 25 years (x 922.2) \$46,110.00

Total \$140,155.55

1. Whilst each of those elements seem inherently reasonable, nevertheless, some discounts must necessarily be applied, first to allow for the fact that the described extensive treatment will be unlikely to occur at a cost to be paid immediately, and secondly, a discount must be applied to the projected amounts to reflect potential conventional vicissitudes.
2. Accordingly, I assess the plaintiff's future treatment costs in the discounted rounded down amount of \$130,000.

Past loss of income

1. The plaintiff has been paid \$1900 gross or \$1473 net for his past loss of income incurred when he had to take time off work for dental treatment. Those payments were made by the workers' compensation insurer. He also estimates that he has incurred a further loss of \$2000 for occasional days off from his work shifts when he has felt unable to work due to his disabilities.
2. The defendant's submissions were critical of that latter element of the claim, seeking to cast doubt upon it because the plaintiff had not made workers' compensation claims for that additional time off work. In my view, that criticism should have no impact on this element of the claim. I accept as truthful the plaintiff's evidence on the need for those additional days off work and for the loss of work shifts. I accept his modestly expressed evidence of the estimate of this additional element of his loss.
3. I therefore assess the plaintiff's past loss of income for a total of 2 weeks off work for dental treatment and his estimate of the occasional subsequent days off work at \$3,473.

Fox v Wood

1. The plaintiff has had tax in the amount of \$427 deducted from his workers' compensation payments: Exhibit "A", Tab 17, p 70. That sum must be added to his damages: Fox v Wood (1981) 148 CLR 438; [1981] HCA 41. I assess that component of his damages at \$427.

Future economic loss and related loss of superannuation

1. The plaintiff makes a claim for future loss of income for the extensive remedial dental treatment he will require, including periodic days off work for the maintenance of his proposed implants every 6 months. The plaintiff identifies this future loss at \$46,983.

2. That sum comprises an initial 12 weeks off work for treatment comprising a full arch dental prosthesis at \$2500 per week net (\$30,000) and a further estimate of \$16,983 for estimated time off work at \$51 per week due to pain, namely, \$51 per week over 7 years of remaining working life projected on the 3 per cent discount tables (x 333.0).
3. The plaintiff is now apprehensive about his work and worries that he may not be able to continue with his work until his planned retirement in a further 7 years.
4. I am satisfied that the cited evidence demonstrates that the plaintiff has and will suffer a diminution in his future earning capacity and as a consequence, he is likely to suffer financial losses, both for time off work for treatment and pain management, and in relation to his apprehensions over being able to continue working, especially as he remains fearful of working in remote locations.
5. The plaintiff also makes a claim for 13 per cent of that total sum for future loss of superannuation, namely \$6107.79.
6. In my assessment, although the defendant accepts that the submitted assessments for future loss of income and superannuation are open on the evidence, those sums are not readily capable of such precise monetary projections. Furthermore, the assessed sum requires an appropriate conventional discount for potential adverse vicissitudes. In those circumstances I consider that the appropriate method of compensating the plaintiff for this head of loss is to assess a discounted buffer amount: *Penrith City Council v Parks* [2004] NSWCA 201, at [5]; *State of NSW v Moss* (2000) 54 NSWLR 536; [2000] NSWCA 133, at [72]; *Nadjovski v Crnojlovic* [2008] NSWCA 175, at [53], [58].
7. Accordingly, I assess the plaintiff's damages for future economic loss and loss of superannuation in the discounted rounded down buffer amount of \$45,000.

General compensatory damages, including aggravated damages.

1. The assessment of general compensatory damages or non-economic loss in cases such as this is necessarily an evaluative exercise. In this case, the assessment of general damages is at large and is not assisted or informed by comparable cases: *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 18, at p 726; *Cassel & Co Ltd v Broome* [1972] AC 1027, at 1124 – 1126.
2. The plaintiff has experienced a shocking assault and battery which has left him with significant ongoing physical and psychological disabilities that continue to adversely affect his daily life and the amenity of his life as has already been described. His ability to eat and speak normally, and his confidence continues to be impaired. He now speaks with a lisp. He has had to significantly change his diet as he cannot bite into foods that are hard, including steak and apples. His dental prosthesis has its practical limitations in that regard. This has created a loss of enjoyment from eating. He suffers embarrassment if he eats sticky foods in company. The remaining cosmetic oral and dental defects cause him daily embarrassment.

3. I accept the plaintiff's submission that aggravated damages are called for in this instance because of the frightening circumstances of the assault and battery and because the determined actions of the defendant were carried out with deliberate mal-intent, to cause harm to the plaintiff notwithstanding his reasonable attempts at seeking to de-escalate the situation which was created by the defendant's aggressive behaviour and his apparently dismissive decision to ignore the plaintiff's responses, and instead persist in escalating his verbal assaults on the plaintiff to the stage of an actual physical battery.
4. The plaintiff had not done anything to provoke the defendant's aggressive and criminal behaviour. Furthermore, the defendant's uninformed misperceptions about the plaintiff had led him to lose control of his own emotions and behaviour in an outrageous and antagonistic way for which he has made no timely attempt to express his remorse or apologies. The defendant remained indifferent and impervious to the plaintiff's reasonable explanations, he rejected them out of hand and immediately resorted to aggression and physical violence for which he has not expressed appropriate and timely contrition. At the time he seemed unable to grasp that the plaintiff was simply performing his public duty in the interests of promoting road safety. Instead, the defendant resorted to the vile accusation of paedophilia, insultingly and humiliatingly referring to the plaintiff as a "fucking dog".
5. In assessing damages, I recognise the need to avoid the potential for the overlapping of general compensatory and aggravated compensatory damages. To ensure that principle is observed and applied, the amounts awarded for general compensatory damages for assault and battery should ordinarily be assessed as one composite sum more towards the lower end of the range for such damages: *Radford v State of NSW* [2010] NSWCA 276, at [97]; *State of NSW v Zreika* [2012] NSWCA 37, at [63] – [64].
6. However, in this case, and counter-balancing those latter considerations, the deliberate and determined mal-intended conduct of the defendant as cited above has, in my assessment, added to and increased the plaintiff's feelings of hurt and distress, particularly where he had been performing an important public duty which was made known to the defendant, and where the defendant had chosen to disregard the plaintiff's explanation for his lawful presence at the scene and has inflicted indignity, hurt feelings, humiliation and mental suffering upon the plaintiff, without any convincing indications of contrition. Those matters should be reflected in the assessment of damages: *Spautz v Butterworths & Anor* [1996] NSWSC 614; [1996] 41 NSWLR 1, at p 18.
7. The plaintiff is entitled to compensatory general damages for his experience of the initial fear and apprehension when he was confronted by the defendant, and for his experience of the painful violent physical assault and battery, as well as the severe emotional shock that accompanied those events. Those elements of damage crystallised the damages at the time the defendant assaulted and battered the plaintiff.

8. In addition, the effects of those circumstances have left the plaintiff with significant ongoing unpleasant and disturbing daily reminders of those egregious events, both in the physical and emotional spheres of his existence, including when undertaking commonplace frequently occurring activities, such as when working, speaking, eating, and attending to his oral hygiene. The plaintiff, at age 60 has an estimated median statistical life span of a further 25 years. That is a considerable period of time in which to have to continue to endure such disabilities.
9. In my assessment, general damages for pain, suffering and loss of amenity of life, including a significant element for aggravated damages, should be assessed towards the mid to upper end of the range.
10. The aggravating element of the plaintiff's damages is justified by the repeated nature of the verbal attacks on the plaintiff and the deliberate infliction of humiliation to which he was subjected including when he was unlawfully punched: *Lamb v Cotogno* [1987] HC 47; (1987) 164 CLR 1, at [11]. The defendant's conduct was so outrageous as to require an additional element for aggravated damages to compensate the plaintiff for the injury to his "proper feelings of dignity and pride": *Rookes v Barnard* [1964] AC 1129; [1964] UKHL 1, at p 1921.
11. In assessing aggravated damages, I recognise and have taken into account that such damages are compensatory in nature and therefore double or overlapping compensation should be avoided: *State of New South Wales v Riley* [2003] NSWCA 208; (2003) 57 NSWLR 496, at [130] – [131].
12. The plaintiff submitted that general damages should be assessed at \$150,000 to which an element of aggravated damages of \$50,000 should be added. The effect of the defendant's submissions was that whilst the aggravating element was on the high side, overall, an assessment along the lines submitted on the plaintiff's behalf was open on the evidence. That submission on behalf of the defendant was fairly made.
13. That said, in my view, a cautionary element of discount must be applied to the submitted global sum of \$200,000 to ensure the avoidance of potential overlap. In my assessment, the plaintiff's general compensatory damages, including a component of aggravated damages, should be assessed in the rounded down discounted sum of \$190,000.

Interest on past general damages

1. The plaintiff is entitled to interest on past general damages. I apportion the past element of compensatory damages at \$75,000. Interest should be assessed at 2 per cent on that sum over 1.75 years to date: \$2,625.

Exemplary damages

1. To establish an entitlement to exemplary damages which go beyond compensatory damages, the plaintiff must show that the defendant's actions were not only wrongful, but that also, the circumstances involved or amounted to conscious wrongdoing on the defendant's part, where the defendant acted in conscious contumelious disregard of the plaintiff's rights, such that the conduct should be seen as being reprehensible, and requiring an expression of deterrent retributive, or punitive disapproval: *State of NSW v Zreika* [2012] NSWCA 37, at [61] – [62], following *Gray v Motor Accidents Commission* [1998] HCA 70; (1998) 196 CLR 1, at p 7, [15]; *NSW v Ibbett* [2006] HCA 57; (2006) 229 CLR 638, at pp 646 – 647; [31], [33], [34]; *NSW v Landini* [2010] NSWCA 157, at [114]; *Adams v Kennedy* [2000] NSWCA 152; (2000) 49 NSWLR 78, at 36, 87.
2. I find that the defendant's conduct and actions meet and satisfy those requirements.
3. The defendant's actions were high-handed, outrageous, and showed utter contempt for the plaintiff's lawful rights in circumstances where, for whatever reason, the defendant had closed his mind to the plaintiff's reasonable explanations for being at the scene, and instead, the defendant persisted with his unfounded vigilante-like belief, vilely accusing the plaintiff of being a paedophile who was waiting in the car park seeking to practise that perversion on vulnerable children.
4. Pursuant to that unfounded belief, the defendant purported to exact upon the plaintiff an extra-judicial punishment. As a longstanding serving corrections officer at the time, he ought to have known better than to persist with his chosen unlawful course of conduct.
5. In my view, an award of exemplary damages is therefore justified as an award of compensatory damages alone does not sufficiently represent or express societal disapproval of the defendant's contemptible conduct: *State of NSW v Abed* [2014] NSWCA 419, at [233]; *State of NSW v Riley* [2003] NSWCA 208; (2003) 57 NSWLR 496, at [138]; *State of NSW v Quirk* [2012] NSWCA 216, at [163].
6. The assault and battery of the plaintiff was not only carried out in aggravated circumstances but the harm inflicted on the plaintiff was calculated intentionally to cause him injury and humiliation. This was in contumelious disregard of his rights. In that sense, the defendant's verbal abuse and his powerful punch to the plaintiff's face was delivered with misconceived and malicious intent. Those factors justify an award of exemplary damages. In those circumstances I assess the plaintiff's entitlement to exemplary damages in the claimed amount of \$25,000 as was submitted on behalf of the plaintiff.

Summary of damages assessment

1. My assessment of the plaintiff's damages is summarised as follows:
 - (a) Past out-of-pocket expenses \$4,739.45

- (b) Future out-of-pocket expenses \$130,000.00
- (c) Past loss of income \$3,473.00
- (d) Fox v Wood \$427.00
- (e) Future economic loss including the related future loss of superannuation \$45,000.00
- (f) General compensatory damages including aggravated damages \$190,000.00
- (g) Interest on past general damages \$2,625.00
- (h) Exemplary damages \$25,000.00

Total \$401,264.45

Disposition

1. There must be a verdict and judgment entered in favour of the plaintiff in the assessed amount of \$401,264.45 including pre-judgment interest.

Costs

1. There is no reason why the plaintiff's costs of the proceedings should not follow the event: UCPR r 42.1.

Orders

1. I make the following orders:
 1. Verdict and judgment for the plaintiff in the assessed amount of \$401,264.45 including pre-judgment interest.
 2. The defendant must pay the plaintiff's costs on the ordinary basis unless a party can demonstrate a basis for some other costs order.
 3. The exhibits may be returned.
 4. Liberty to apply on 7 days' notice if further or other orders are required.

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Decision last updated: 13 November 2024

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Prepared on 25 October 2026 · Esheria