

Damages Extracts

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\$1m to assaulted burned telco clerk

***Lepan v TPG Telecom Limited* [2026] NSWDC 328 (11 September 2026) Fitzsimmons SC DCJ**

“On the afternoon of 22 November 2019, whilst working at the defendant’s Vodafone store in Campbelltown Macarthur Square (*‘the Macarthur store’*), the plaintiff interacted with a male customer who became hostile and verbally abusive towards him. Several hours later, the customer returned and confronted the plaintiff in a similarly hostile and abusive manner before producing a deodorant can and cigarette lighter. The deodorant can was sprayed and its contents ignited in the direction of the plaintiff’s head, creating a blowtorch and a fireball directed towards the plaintiff’s face. The plaintiff suffered superficial injuries to his arm and head as well as a significant psychiatric injury,” his Honour said [1].

Liability denied, past economic loss agreed, future economic loss in issue. Security expertise.

At [133], “I do not accept the defendant’s submission that staff at the Macarthur store were provided with adequate training including de-escalation and defence techniques when responding to customer aggression. It was the plaintiff’s evidence that a company portal, password protected, was available for staff to report incidents and to “learn” training. In cross examination, the plaintiff accepted the proposition put in a leading question that he had attended training sessions involving aggressive customers and agreed with a positive proposition that the training was “extensive”. However, only one training session was put to the plaintiff that he attended on 11 December 2018 which was completed online through the staff portal. The plaintiff “kind of remembered” attending the session although the time it was recorded as been completed (11:35 AM) was a busy time and it might well have been the case that the training session was signed off by a manager so that he could return to his primary task of selling. The training may have included a PowerPoint presentation. He had no specific recollection of going through any training module. It was not suggested to the plaintiff that he undertook any other training on managing customer aggression. There was no evidence that the plaintiff had completed any other training in managing customer aggression. Training records for the plaintiff maintained by the defendant were admitted into evidence, with the only record of such training being the portal online training completed on 11 December 2018. It was the plaintiff’s evidence that the only dedicated time for training outside usual work hours were visits to North Sydney approximately every six months. However, as the plaintiff was from Wollongong, he did not attend those sessions,” Fitzsimmons DCJ said.

Then “By operation of s 3B(1)(f) of the *Civil Liability Act* 2002 (NSW) (*‘CLA’*), civil liability for work injury damages is excluded from the provisions of the CLA. In those circumstances, breach and causation are to be determined at common law,” [140].

“It is well-established that an employer has a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury: *Kondis v State Transport Authority* [1984] HCA 61; (1984) 154 CLR 672 at 687-688; *Czatyрко v Edith Cowan University* [2005] HCA 14; (2005) 214 CLR 1 at [12].

“It is necessary to identify the relevant risk of harm or injury so as to determine what were the precautions required of the defendant to discharge its duty of care: *Roads*

and Traffic Authority of NSW v Dederer [2007] HCA 42; (2007) 234 CLR 330 at [50]; *Tapp v Australian Bushmen's Campcraft & Rodeo Association Limited* [2022] HCA 11 at [106].

"The employer's duty encompasses a duty to take reasonable care to protect an employee from the criminal behaviour of third parties however random or unpredictable such behaviour may be: *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254 at [26]. The employer retains the capacity to "control the situation by controlling the employee and the system of work that is followed." It is a duty to provide a safe system of work and to ensure the reasonable care is taken: *Modbury Triangle* at [110] per Hayne J.

"In determining the question of breach, the Court must first consider whether a reasonable employer in the defendant's position "would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff": *Wyong Shire Council v Shirt* [1980] HCA 12; [1980] 14 CLR 40 at 47 to 48. A risk which is not far-fetched or fanciful is real and therefore foreseeable: *Shirt* at 48. The question of breach is to be determined prospectively and not with the wisdom of hindsight: *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 at 461 to 463; *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at [31]," [144].

At [152], "I find the relevant risk of harm/injury for the purposes of determining breach is a risk of personal harm constituted by physical and/or psychological injury as a result of the actions of aggressive customers attending and interacting with staff at the Macarthur store."

"The conduct of customers at the store was such that the young Assistant Manager would regularly refer aggressive customers to the plaintiff in circumstances where she was unable to deal with them. The escalation in aggression in customers attending the store, and its impact upon staff, is no more starkly demonstrated than in the incident report completed by the plaintiff on 27 September 2019, only a matter of two months prior to the relevant incident. The plaintiff told his employer in the incident report, reviewed by the defendant's security team in accordance with its practices, that he no longer felt comfortable or safe at work. Attempts to reason with threatening customers was to no avail and, ominously, the plaintiff observed that there was "no good outcome"," [156].

"I accept the evidence of both experts that the online portal training such as that completed by the plaintiff on 11 December 2018 was wholly inadequate. I accept the opinion of Dr Zalewski that online training which might have been completed by the plaintiff (there being some doubt about this given the plaintiff's evidence that such training modules were often completed by managers) was entirely unsuitable, particularly in circumstances where it related to an employee's health and safety in the workplace, and where such training was required to avoid an employee's safety being put in jeopardy," [158].

"In all these circumstances, I am overwhelmingly satisfied that a reasonable employer in the defendant's position would have foreseen the risk to staff working at the Macarthur store of physical and/or psychological injury as a result of interacting with aggressive customers, and that the risk of harm was not far-fetched or fanciful. That risk was further heightened for the plaintiff in circumstances where the more aggressive customers would be routinely referred to him," [159].

"I am satisfied that the magnitude of the risk was significant. The experts agreed that for a range of reasons, levels of aggression in retail stores were out of control. As much was conceded by the defendant given its expert was asked to assume that customer aggression/violence towards employees is a major issue for all Australian retailers, but especially providers of essential services like telecommunications (Exhibit 7 pg. 8). Added to this is the fact that the Macarthur store was recording above average incidences of customer aggression, escalating in the year of the incident, and involving threats of violence. In the circumstances there was a very significant risk of harm being occasioned to a staff member such as the plaintiff at the Macarthur store. Again, that risk was further heightened by the fact that, as a matter of practice, the more aggressive customers were routinely referred to the plaintiff by the assistant Manager, as occurred at the time of the incident in question," [162].

"For the same reasons, I am satisfied that there was a high degree of probability that an incident such as that involving the plaintiff on the day in question would occur. Indeed, I am satisfied that it was only a matter of time before an incident such as that which befell the plaintiff on the day in question occurred. Such a finding is further reinforced by the fact that the plaintiff, only two months prior to the incident in question, told his employer that attempts to reason with such customers had "no good outcome"," [163].

"I do not accept the defendant's contention that the measures in place at the time of the incident constituted a reasonable response to the risk. Its reliance upon the risk assessment completed in 2019 is misguided. It is readily apparent that the security assessment was commissioned in the context of swarming attacks which were occurring nationally, not only to Vodafone stores, but to other telco retail outlets. The methodology and approach taken to the risk assessment is consistent with the context in which it was commissioned. There was no attempt to identify whether any stores were exposed to a heightened risk of exposure by staff to aggressive customers. No analysis was done of the risk peculiar to individual stores. Consequently, no risk assessment was undertaken at the MacArthur store. Indeed, specific site risk assessments were only performed at two of the nationwide company retail outlets, both being in Melbourne," [165].

"In the absence of a security guard being assigned to the store, the timely attendance of centre security was dependent upon a sequence of events occurring. It would require a member of staff activating the duress button and/or calling centre security directly. In the event the duress button was activated, Vodafone security team would monitor the CCTV at the same time as contacting centre security. Mr Jackson agreed that the general expected response time centre security was somewhere between 5 and 10 minutes. Self-evidently, this was also dependent upon the proximity of centre security to the store and/or whether they were engaged in other security duties given the sheer size of the shopping centre. Such a delay in attendance of centre security was not adequate to deal with an aggressive customer whose behaviour escalated quickly," [167].

"In all the circumstances, I am satisfied that the defendant failed to take reasonable care to avoid the foreseeable risk of injury to the plaintiff in that it failed to provide adequate safeguards, being the placement of a security guard at the store, at a minimum on a Friday, during store trading hours. In other words, a reasonable

response to the risk would have been the placement of such a guard at the store at the relevant time,” [169].

On *causation*, having noted *March v Stramare (E & MH) Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 Mason CJ at [17] - [18], then at [180] “In the circumstances, I am satisfied that the defendant’s failure to have a security guard assigned to the store, at a minimum, during the Friday trading hours, caused and/or materially contributed to the plaintiff’s injury.”

Found residual capacity as shelf filler, \$250pw.

Past economic loss (\$909 - \$1086pw), agreed \$351,320.

Past superannuation “The parties agree that the plaintiff is to be awarded past loss of superannuation reflecting an average of 12.5% of the net loss less compulsory superannuation paid (\$7,792.25). I award past loss of superannuation in the sum of \$36,122.75 (\$351,320 x 12.5% - \$7,792.25,” [199].

Fox v Wood \$25,000 agreed.

Future economic loss [201] “It is agreed that but for the plaintiff’s injury, he would presently be earning \$1086 net per week. In accordance with my findings, the plaintiff is to be awarded full economic loss for 12 months (\$1,086 x 50.9 [5% multiplier 1 year] = \$55,277.40).

“In accordance with my findings, the plaintiff is to be awarded economic loss thereafter at \$836 net per week (\$1086 - \$250) until notional retirement age of 67. This calculation will need to be deferred for 12 months. I am satisfied that this component of future economic loss is to be reduced by the accepted 15% for vicissitudes. Accordingly, the plaintiff’s future economic loss, deferred for 12 months, is assessed at \$463,802 (\$836 x 685.6 (5% multiplier 21 years) x 0.952 (1 year deferral) -15%),” Fitzsimmons DCJ said [202].

Future superannuation “The parties agree that future loss of superannuation is to be calculated at 14.54% of the net loss (*Najdovski v Crnojlovic* [2008] NSWCA 175). I award future loss of superannuation in the sum of \$75,474.14 (\$519,079.40 x 14.54%),” [203].

Verdict and judgement for the plaintiff against the defendant in the sum of \$1,006,996.29.

P: *Ryan J* ins *Kells*. D: *Wilson J* ins *Hall & Willcox*

Exemplary damages v police

Camilleri v State of New South Wales [2026] NSWDC 329 (11 September 2026)
Scotting DCJ

Trespass to land, false imprisonment, malicious prosecution. Table below follows judgment style.

Tort ▼	Damages species ►	Compensatory	Aggravated	Exemplary	Aggregates
Trespass to land		\$10,000	\$10,000	\$20,000	\$40,000
False imprisonment		\$75,000	\$40,000	\$100,000	\$215,000
Malicious prosecution		\$30,000	na	na	\$30,000
Total					\$285,000
Interest	On \$200,000 past, at 2%pa: <i>MBP(SA) Pty Ltd v Gogic</i> [1991] HCA 3; (1991) 171 CLR 57				\$18,730

“The State accepts that it is vicariously responsible for the actions of the police officers involved and is liable to pay damages, if the plaintiff can establish the elements of the torts he has alleged,” Scotting DCJ said [2].

“At about 5.45pm on 7 January 2022, Senior Constable David Richards and Constable Andrew Dalton attended the plaintiff’s residence at an apartment block in Port Macquarie following a report to 000 from a supervisor at the Australian Taxation Office (ATO) that the plaintiff had threatened self-harm during a telephone call earlier that day with a subordinate. The police detained the plaintiff for the purpose of seizing his lawfully possessed firearms and entered his apartment. In the course of accessing the plaintiff’s gun safe, SC Richards located two butterfly knives which were prohibited weapons. The police continued to detain the plaintiff at the scene in an effort to get possession of firearms that were stored at his father’s house in Mount Druitt. When Sergeant Daniel Smith arrived on the scene, a decision was taken to have the plaintiff conveyed to a hospital pursuant to s 22 of the *Mental Health Act*. He continued to be detained by the police at the scene until an ambulance conveyed him to the hospital, at the request of the police,” [3].

“SC Richards completed a form entitled “Request by a member of the New South Wales Police Force for assessment of a detained person” (the s 22 Form) about his interaction with the plaintiff and gave it to the triage nurse at the hospital. The s 22 Form contained representations that were false, misleading and or had no reasonable basis in fact. After considering the information in the s 22 Form, two doctors at Port Macquarie Base Hospital detained the plaintiff as a “mentally ill person” within the meaning of s 14 of the *Mental Health Act*. On 9 January 2022, the plaintiff was transferred to Coffs Harbour Base Hospital, which was a declared mental health facility that was operating a COVID ward. After being seen by a psychiatrist on 10 January

2022, who obtained an independent history from his mother, the plaintiff was discharged on 11 January 2022,” [4].

“On 20 January 2022 the plaintiff was served with two Court Attendance Notices alleging two offences against s 7 *Weapons Prohibition Act 1998* relating to the possession of the butterfly knives. He was convicted of the offences in the Local Court but later acquitted on an appeal to the District Court,” [5].

“For the *trespass to land* claim, the State contended that the plaintiff consented to SC Richards entering his apartment for the purpose of seizing the firearms. The plaintiff contended that his consent was induced by threats that the police would enter the premises forcibly, pursuant to a power they did not have. The State also contended that the entry was justified by the defence of necessity or the common law power to prevent a breach of the peace, however the latter two matters were not pleaded in its Defence. The State contended that SC Richards had the power to seize the plaintiff’s firearms, and that he was acting in good faith when he did so without first serving a notice suspending his firearms licence, such that the damages for the trespass to land should be nominal,” [6].

“For the *false imprisonment* claim, the plaintiff contended that he was first detained at about 5.55pm when he was told by SC Richards that he was required to comply with a power that was not available to the officer. The State conceded that the plaintiff was detained at the apartment block pursuant to s 22 of the Mental Health Act at about 6.30pm, as a result of SC Richards’ “evolving assessment”. Thereafter, the State contended that the plaintiff was detained as a result of the independent exercise of the powers of the medical practitioners provided for by s 19 of the Mental Health Act. The plaintiff contended that SC Richards was active in promoting and causing the detention of the plaintiff at the hospital by providing false information in the s 22 Form and was thereby liable for the plaintiff’s detention at the hospital until he was discharged on 11 January 2022,” [7].

“For the malicious prosecution claim, the State conceded that the proceedings were terminated in the plaintiff’s favour, but denied that SC Richards was the relevant prosecutor, that he acted maliciously and that the proceedings were commenced without reasonable and probable cause,” [8].

Trespass to land incidents

Later [163] “A person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter: *Kuru v State of New South Wales* [2008] HCA 26; (2008) 236 CLR 1 at [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ), *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1 at 10, *Entick v Carrington* (1765) 2 Wils KB 275 at 291, *Great Central Railway Co v Bates* [1921] 3 KB 578 at 581-582, *Southam v Smout* [1964] 1 QB 308 at 320, *Morris v Beardmore* [1981] AC 446 at 464 and *Eccles v Bourque* [1975] 2 SCR 739 at 742-743,” Scotting DCJ said.

“Except in cases provided for by the common law and by statute, police have no special rights to enter land: *Kuru* at [44] and *Halliday* at 10,” [164].

“Entry into a person’s dwelling is a serious invasion of property and privacy rights and ought to be supported by defined powers at common law or under statute that

specifically authorise entry into private property: Balkin and Davis, *Law of Torts*, 6th edition, 2021 at [6.12],” [165].

“In trespass to land, consent is accepted to be a defence, for which the defendant bears the onus of proof: *Plenty v Dillon* (1991) 171 CLR 635 at 647 (Gaudron and McHugh JJ), *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s case)* [1992] HCA 15; (1992) 175 CLR 218 at 311 (McHugh J) and *Lord v McMahon* [2105] NSWSC 1619,” [166].

“The defence of consent to trespass to land is usually framed in terms that the plaintiff gave the defendant “leave or licence” to enter the land. *Lord v McMahon* at [145]. The test as to whether leave or licence is granted is objective and a question of fact: *Halliday* at 6-7,” [167].

“Consent is no consent, if it is not directed to the nature and character of the act: *Papadimitropoulos v The Queen* [1957] HCA 74; (1957) 98 CLR 249 at 260 (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ) and *White v Johnston* [2015] NSWCA 18; (2015) 87 NSWLR 779 at [68]. Consent demands a perception as to what is about to take place, including the character of the act: *Papadimitropoulos* at 261,” [168].

“A person who has an invitation or permission to enter the land of another for a specific purpose commits a trespass if he enters for any other purpose, especially if that other purpose be an unlawful purpose: *Barker v The Queen* [1983] HCA 18; (1983) 153 CLR 338 at 342 (Mason J, as he then was),” [169].

“The defence of necessity requires the defendant to prove that there was a state of imminent peril and the steps that were taken were reasonable. The subjective belief of the defendant is not relevant to the defence: *State of New South Wales v McMaster* [2015] NSWCA 228; (2015) 91 NSWLR 666 at [222] (Beazley P, McColl and Meagher JJA agreeing),” [170].

“A person may enter premises in circumstances that would otherwise amount to a trespass if that person believes in good faith and upon objectively reasonable grounds that it is necessary to do so in order to (1) preserve human life, or (2) prevent serious physical harm to another person, or (3) to render assistance to another person who has suffered serious physical harm: *Dehn v Attorney-General* [1988] NZHC 418; [1988] 2 NZLR 564,” [171].

“The question of necessity is viewed at the time of the actions in question and not retrospectively: *McMaster* at [217],” [172].

“At common law, it is recognised that where a breach of the peace reasonably appears to be about to be committed that every citizen has the right to take reasonable steps to prevent it occurring, which will include in appropriate cases detaining a person against their will: *Albert v Lavin* [1982] AC 546 at 565 (Lord Diplock) and *Coleman v Power* [2004] HCA 39; (2004) 220 CLR 1,” [173].

“A breach of the peace occurs where harm is actually done or is likely to be done to a person or to property, or where a person is put in fear of such harm, through actual or threatened violence: *R v Howell* [1982] QB 416 at 427,” [174].

“The statement in *Howell* is unlikely to be exhaustive and a breach of the peace includes a “wide range of actions and threatened actions that interfere with the ordinary operation of civil society, and a threat or realistic apprehension of self-harm

could constitute a breach of the peace, depending on the facts of the case”: *Bouffler* at [164], following *State of New South Wales v Tyszyk* [2008] NSWCA 107 at [87]- [98] (Campbell JA) and *McMaster* at [32(6)],” [175].

“The duty to prevent a breach of the peace is exceptional and if not kept in proper bounds could be a recipe for officious and unjustified intervention in other people’s affairs: *Laporte v Chief Constable of Gloucestershire* [2007] 2 AC 105 at [62] (Lord Rodger). The common law guards against this danger by insisting that the duty arises only when the police officer apprehends that a breach of the peace is “imminent”, “or about to take place or is about to be committed”, or will take place in the immediate future. The apprehension “must relate to the near future”: *McLeod v Commissioner of Police of the Metropolis* [1994] EWCA Civ 2; [1994] 4 All ER 553 at 560F,” [176].

“The reasonable apprehension of an imminent breach of the peace is an important threshold requirement which must exist before any action can be taken: *Laporte* at [114] (Lord Brown),” [177].

“Action short of an arrest cannot be taken to prevent a breach of the peace which is not sufficiently imminent to justify an arrest: *Laporte* at [50] (Lord Bingham), [66] (Lord Rodger), [116] (Lord Brown), [141] (Lord Mance),” [178].

Considered LEPR s 9.

False imprisonment incidents

“A person is not detained because they are prevented or delayed from going about their daily activities by everyday exigencies, such as being caught up in a crowd or asked to produce a valid train ticket and supporting documents. If a police officer is not exercising a power of arrest but reinforces a request through the actual use of force, or an actual or implicit threat of the use of force if the person does not comply, the act of detaining the person will be unlawful, if it requires justification: *State of New South Wales v Le* [2017] NSWCA 290 at [5],” [180].

“The court must assess what a reasonable person in the particular circumstances of the person would have inferred from the conduct of the police officer, and the state of mind of the person is not determinative: *Le* at [7],” [181].

“A person will also be liable for false imprisonment if the person is active in promoting and causing the imprisonment: *Myer Stores Ltd v Soo* [1991] VicRp 97; [1991] 2 VR 597 at 629, *Spautz v Butterworth* [1996] NSWSC 614; (1996) 41 NSWLR 1 at 26, *Coles Myer Ltd v Webster* [2009] NSWCA 299 at [104] (Ipp J) and *Ruddock v Taylor HC* at [112],” [182].

“To be active in promoting or causing imprisonment requires something more than being a passive bystander who merely provides information to a decision maker who exercises an independent discretion: *Myer* at 617 and *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597. This includes if the person detaining the plaintiff would not have acted at all, absent of the urging of the defendant: *Ruddock v Taylor* [2003] NSWCA 262; (2003) 58 NSWLR 269 at [33] (Spigelman CJ), and *Pike v Waldrum* [1952] 1 Lloyd’s Reports 431. This can include cases where there is a “mischievous quality” of what the promoter did: *Ruddock v Taylor CA* at [40] (Spigelman CJ),” [183].

“The question to be determined is whether what the alleged promoter did went beyond laying information before the decision maker for them to take such action as they thought fit, or if it amounted to a direction, procuring, direct request or direct encouragement that they should detain the plaintiff: *Davidson* at 604 (Sir Thomas Bingham MR, Waite LJ agreeing) and *Coles Myer* at [116], citing *Commonwealth Life Assurance v Brain* [1935] HCA 30; (1935) 53 CLR 343, which was a malicious prosecution case,” his Honour said [184].

“The deliberate provision of false information that can only be within the knowledge of the complainant makes it virtually impossible for the decision maker to exercise any independent discretion or judgement, and the detention of the plaintiff should be regarded as brought about directly by the complainant: *Coles Myer* at [115], citing *Martin v Watson* [1996] AC 74, a malicious prosecution case,” [185].

“A person can be liable for false imprisonment if they seek to invoke a power maliciously and without reasonable and proper cause, both of which can be demonstrated by proving that the power was used for an improper purpose. Ignorance of the law is not malice unless it is so gross to provide that malice in fact exists: *Pike* at 452,” [186].

“Whether a police officer has a relevant state of mind for the exercise of a power is a question of fact that can be proved through direct testimony or by drawing inferences from proven facts: *State of New South Wales v Bouffler* [2017] NSWCA 185; 95 NSWLR 521 at [231]- [232], incorporating the well-known principles in *Luxton v Vines* [1952] HCA 19; (1952) 85 CLR 352, *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 and *Holloway v McFeeters* [1956] HCA 25; (1956) 94 CLR 470,” [187].

““Because the law places a high value on personal liberty, a statute which authorises the detention of a person must be strictly construed”: *Hyder* at [13], citing *Zaravinos v State of New South Wales* [2004] NSWCA 320 at [23] (Bryson JA, Santow JA and Adams J agreeing), citing *Williams v The Queen* [1986] HCA 88; (1986) 161 CLR 278 at 292 and 296 and *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134 at 139, *George v Rockett* [1990] HCA 26; (1990) 170 CLR 104 at 110 – 111, *State of New South Wales v Corbett* [2007] HCA 32; (2007) 230 CLR 606 at [87] (Callinan and Crennan JJ, Gleeson CJ and Gummow J generally agreeing and at [16] per Kirby J),” [188].

“In determining if the police officer holds a relevant belief, it must be borne in mind that the court is considering a preliminary stage of proceedings, rather than one requiring evidence that amounts to prima facie proof: *O’Hara v Chief Constable Ulster Constabulary* [1997] AC 286 at 293 (Lord Steyn),” [189].

“Where a statute requires that there must be “reasonable grounds” for a belief, it requires facts which are sufficient to induce that state of mind in a reasonable person: *George v Rockett* at 112,” [190].

“The state of mind must be formed by the police officer exercising the power and the Court must also be satisfied that there are reasonable grounds for the relevant belief. The judicial duty is not discharged by parrot-like recitation of the bald assertion of the police officer: *George v Rockett* at 112-113,” [191].

“The reason why the police officer exercising the power must hold the relevant belief on reasonable grounds, is to hold that police officer accountable: *O’Hara* at 291 (Lord

Steyn, Lords Goff, Mustill and Hoffman agreeing). The protection of the person the subject of the power lies in the nature of the test, in that there must be reasonable grounds for the police officer holding the relevant belief: *O'Hara* at 296 (Lord Hope) and 291 (Lord Steyn)," [192]. ...

Elements of malicious prosecution

At [218], Scotting DCJ: "In an action for malicious prosecution the plaintiff must establish that:

- (1) Criminal proceedings were initiated by the defendant against the plaintiff.
- (2) The proceedings were terminated in favour of the plaintiff.
- (3) The defendant acted without reasonable and probable cause.
- (4) The defendant in initiating or maintaining the proceedings acted with malice: *A v State of New South Wales* [2007] HCA 10; (2007) 230 CLR 500."

Damages principles [224] – [239].

"For trespass to land and false imprisonment, the torts are actionable per se and do not require proof of special damage," Scotting DCJ said [224].

"General damages for the tort of false imprisonment are awarded to compensate the loss of liberty, the loss of dignity and the loss of reputation and include damages for hurt feelings, mental suffering, humiliation, and disgrace: *Spautz v Butterworth* [1996] NSWSC 614; (1996) 41 NSWLR 1 at 17 (Clarke JA)," [225].

"The tort of malicious prosecution requires proof of damage because it is an action on the case: *State of New South Wales v Landini* [2010] NSWCA 157 at [20] (Macfarlan JA)," [229].

"*Aggravated damages* are awarded by way of compensation for injury to the plaintiff's feelings caused by insult, humiliation and the like, resulting from the circumstances and manner of the defendant's wrongdoing: *Lamb v Cotogno* [1987] HCA 47; (1987) 164 CLR 1 at 8, and *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1960) 117 CLR 118 at 129-130 (Taylor J)," [232].

"Compensatory damages should be decided first before determining if an award of exemplary damages should be made: *State of New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 at [34]," [234].

"*Exemplary damages* go beyond compensation and are designed to punish and to deter wrongdoers. Such awards assuage any urge for revenge felt by the victims and discourage self-help remedies: *Lamb v Cotogno* at 9 and *Uren* at 129-130," [235].

"The objectives of an award of exemplary damages are to punish the wrongdoer, deter him and others from committing the conduct again, to provide vindication to the victim and to denounce the wrongdoer's behaviour: *James v Hill* [2004] NSWCA 301 at [64] (Tobias JA)," [236].

"If exemplary damages are to fulfill their threefold purpose, they must not merely irritate, they must sting. There is no necessary proportionality between compensatory damages and the amount of exemplary damages awarded against the defendant: *Whitbread v Rail Corporation NSW* [2011] NSWCA 130 at [65] (McColl JA)," [237].

In [371] “I have assessed the damages higher than the plaintiff’s contentions, which I am not bound by.”

Then, “From his arrival at the plaintiff’s apartment, SC Richards knew that he could not enter the plaintiff’s apartment without his consent or a search warrant. SC Richards wrongfully insisted that he had a power to seize the plaintiff’s firearms and that he could obtain a search warrant to gain forcible entry and to cause damage if the plaintiff refused to grant entry. The plaintiff’s consent was vitiated by the threats of forcible entry and property damage, in pursuit of a power that SC Richards did not have. The plaintiff was excluded from his apartment during the unlawful entry. He should be compensated for the invasion of his right to exclusive use and occupation of his apartment, the entry into his home, the access to the gun safe and the search for and seizure of his firearms licence. The plaintiff gave evidence, which I accept, that he felt like he had been deprived of his rights and “stood on” and that he was upset and concerned by the police’s entry into his apartment. The plaintiff has ruminated on the unlawful seizure of one of the firearms that he considered to be a family heirloom. The appropriate award of general damages for trespass to land is \$10,000,” [372].

“The plaintiff is also entitled to an award of aggravated damages for the humiliation of being excluded from his apartment and being made to wait in the stairwell with Cst Dalton, the distress caused by the threats of forcible entry and property damage and the manner in which his purported consent was obtained. These features take the case beyond the ordinary consequences of a trespass to land. The appropriate award of aggravated damages for trespass to land is \$10,000,” [373].

“The unlawful entry was brought about by SC Richards insisting that he had a power that was unavailable to him. He bullied the plaintiff into consent through threats of forcible entry and property damage. SC Richards’ conduct was high-handed and demonstrated a contumelious disregard for the plaintiff’s rights. This is an appropriate case for an award of exemplary damages to punish the police officers involved, to mark the Court’s strong disapproval and condemnation of the behaviour and to deter police officers from similar conduct in the future. The appropriate award of exemplary damages for trespass to land is \$20,000,” [374].

To *false imprisonment damages*, the plaintiff was detained by the police from 5.55pm on 7 January 2022 until he was returned home in patient transportation on 11 January 2022.

“The plaintiff was detained at the location in public view. The relevant events took place on a warm summer evening when there were lots of people moving through and close to the location. The plaintiff complained a number of times about being the centre of police attention concerning his firearms, which were observable, in such a public location. He had three or four officers surrounding him at all times, inferring that he needed to be controlled for public safety. He was then conveyed away from the location in an ambulance. The detention at the location in such public circumstances amounted to serious loss of reputation in the apartment block where he lived. On several occasions, the plaintiff alerted the officers to the public attention he was receiving at the location. I am satisfied that the plaintiff also suffered a significant loss of dignity,” [378].

“At Port Macquarie Base Hospital, the plaintiff was locked in a mental health seclusion room, as a means of infection control, but it would have constituted a serious

and invasive injury to his liberty. As an involuntary patient, he was forced to take medications without his consent. At Port Macquarie Base Hospital, he was denied access to his mobile telephone and contact with his family. He suffered a significant shock of being detained as an involuntary patient. He was transferred to Coffs Harbour Base Hospital after some days under the powers in the Mental Health Act. His detention continued because he could not be seen by a psychiatrist on his admission and he continued to be medicated without his consent. The circumstances of his confinement at Coffs Harbour Base Hospital were less restrictive, but he was still an involuntary patient and not free to leave. In Coffs Harbour Base Hospital he had contact with other patients who were withdrawing from drugs, which scared him. The plaintiff's detention under the Mental Health Act also amounted to a serious loss of reputation and dignity," Scotting DCJ said [379].

General damages for false imprisonment \$75,000 [381].

Aggravated damages for false imprisonment "seriously humiliating circumstances at the apartment block where he lived" - \$40,000 [382].

In [383] "The police conducted themselves in a high-handed manner with a contumelious disregard for the plaintiff's rights. The conduct of the police was disgraceful and warrants punishment, denunciation and deterrence. This is an appropriate case for an award of exemplary damages for those reasons and to mark the Court's strong disapproval and condemnation of the conduct. The appropriate award of exemplary damages for false imprisonment is \$100,000," his Honour said.

To *malicious prosecution damages*, "The criminal proceedings were brought for an improper purpose by SC Richards. SC Richards knew that he induced the plaintiff to consent to permitting him to enter the apartment through the use of threats of exercising powers that were not available to him. If I am wrong on the lack of consent issue and the plaintiff consented to the officer's entry into the apartment, then I am satisfied that the plaintiff only consented to the seizure of the firearms and not to the seizure of any other item that may be of interest to the police with the result that the seizure of the butterfly knives was not authorised by the consent given," [388].

General damages for malicious prosecution \$30,000.

Costs.

Hearing 6 days in February 2026.

P: Hogan K ins Adventure Legal. D: Gollan M ins Norton Rose Fullbright

\$39,000 fixed costs in CA dismissal

Zey v State of New South Wales [2026] NSWCA 208 (30 September 2026) Ward ACJ, Mitchelmore JA

Dismissing with gross sum costs orders unrepresented application for leave to appeal from Levy ADCJ.

The Court [46] “The principles relating to the making of a gross sum costs order are well settled. In *Gabrielle v Abood (No 4)* [2023] NSWCA 100 at [6], the Court summarised the applicable principles as follows:

“The power to make a gross sum costs order provided by s 98(4)(c) of the *Civil Procedure Act 2005* (NSW) is discretionary. Authority establishes that the discretion is not confined and may be exercised whenever the circumstances warrant its exercise; it should only be exercised when the Court considers that it can do so fairly between the parties, and that includes having sufficient confidence in arriving at an appropriate sum on the materials available; courts have typically applied a discount in assessing costs on a gross sum basis; and the court is not required to undertake a detailed examination of the kind that would be appropriate to taxation or formal costs assessment...”

“In addition to the matters to which the Court referred in that extract, courts have also taken into account s 59 of the *Civil Procedure Act*, which requires the Court to implement steps to eliminate unnecessary delay; and s 60 of the Act, which imposes a requirement to maintain costs within a range which is “proportionate to the importance and complexity of the subject-matter in dispute”: *Amirbeaggi v EB (No 2)* [2023] NSWCA 184 (“*Amirbeaggi v EB*”) at [4]-[5],” [47].

“The Court has a broad understanding of the costs involved in proceedings before it, but “it is usual for a party seeking a gross sum costs order to provide evidence of the costs in fact incurred and paid”: *Amirbeaggi v EB* at [13]. As noted above, the State read an affidavit of Mr Thompson, who is a partner at Wotton Kearney (WK) and has practised as a litigation solicitor for some 14 years,” [48].

“According to Mr Thompson’s affidavit, since the applicant filed her summons seeking leave to appeal, WK had rendered invoices (copies of which were exhibited to his affidavit) for professional costs and disbursements totalling \$84,373.12. From this total, Mr Thompson subtracted the costs associated with: (i) miscellaneous attendances pre-dating the commencement of the appeal; (ii) the applicant’s application in the District Court to stay enforcement of the costs order; (iii) the State renewing a writ of levy in relation to the applicant’s property and seeking to register that writ; and (iv) costs of the Federal Court proceedings in which the applicant sought to restrain the State in relation to its conduct in the Court of Appeal proceedings. This left a claim for professional costs of \$41,753.51 and disbursements of \$14,149.61, totalling \$55,903.12 (including GST). Mr Thompson estimated that there was (conservatively) approximately \$10,000 in work in progress as at the time of affirming his affidavit, including the costs associated with preparing the affidavit and written submissions on the motion,” [49].

Later [64], “Noting that the power in s 98(4)(c) of the *Civil Procedure Act* should only be exercised when the Court considers that it can do so fairly between the parties, and applying the broad brush approach that is appropriate for such orders, the Court has applied an overall discount in fixing the amount of the gross sum costs order. The Court will fix the amount of costs at \$35,000. As for the post-judgment costs associated with the present two applications, for which the State has some \$10,000 in work in progress, the Court fixes the amount of costs at \$4,000,” their Honours determined.

R: *Woodland, S ins Wotton Kearney*

Policy arrest unreasonable

Corban v State of New South Wales [2026] NSWDC 363 (7 October 2026) Waugh SC DCJ

“The plaintiff, Ms Corban, sues the defendant, the State of New South Wales, for damages for false imprisonment, assault and battery as a result of what she alleges was her unlawful arrest by Constable Carey at Maroubra Police Station on the night of Wednesday 19 October 2022,” [1].

“The question of the lawfulness of Ms Corban’s arrest turns on the application to the facts of two provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (“LEPRA”), being the power of police officers to arrest without warrant under section 99 and their obligation to provide the reason for arrest under section 202,” his Honour said [2].

“Following her arrest, Ms Corban was charged with an offence against section 14(1) of the *Crimes (Domestic And Personal Violence) Act 2007* (NSW). Section 14(1) provided that “A person who knowingly contravenes a prohibition or restriction specified in an apprehended violence order made against the person is guilty of an offence”,” [3].

“She was kept in custody overnight and granted bail in Waverley Local Court the following afternoon. The charge brought against her under section 14(1) was dismissed in the Waverley Local Court on 12 September 2023,” [4].

Later, “The Court of Appeal considered the operation of s.99(1)(b) most recently in *State of New South Wales v Dennis* (2025) 117 NSWLR 404, [2025] NSWCA 118,” [69].

In [103] “I find, that the true and overriding reason that Constable Carey decided to arrest Ms Corban was that she felt she had no discretion other than to arrest because of her understanding of the general policy.

“I find that her satisfaction that arrest was reasonably necessary was legally unreasonable because it was arbitrary in the sense discussed in *New South Wales v Dennis* [2025] NSWCA 118; (2025) 117 NSWLR 404. It was arbitrary because rather than forming her own view and exercising her own discretion as the arresting officer as required by s 99(1)(b), she simply applied what she understood to be the general policy,” [104].

Then, “To summarise my conclusions on liability, I have found that Ms Corban’s arrest was unlawful on 3 separate and independent bases: firstly, because I am not satisfied that Constable Carey suspected *on reasonable grounds* that Ms Corban had committed an offence (s.99(1)(a)); secondly, because Constable Carey’s subjective satisfaction that arrest was reasonably necessary was legally unreasonable (s.99(1)(b)); and thirdly, because there was a failure to comply with the obligation to provide the reason for the arrest (s.202(1)(c)),” [125].

In [155], “The legal principles relevant to the assessment of damages for false imprisonment in circumstances similar to the present case were summarised in *State of New South Wales v Smith* [2017] NSWCA 194; (2017) 95 NSWLR 662 at [153]-[167] per McColl JA (Leeming JA & Sackville AJA agreeing on the issue of damages)...”.

“There is no doubt that the initial shock of being arrested was considerable and that she felt considerable mental suffering, disgrace and humiliation as a result of the arrest and what followed. Her shock, mental suffering and humiliation was compounded or aggravated by a number of factors which included that (a) she attended the police station voluntarily and had been given no forewarning that she might be arrested; (b) having reached the age of 53, she had never been placed in police custody before; (c) Ms Corban was concerned that she had never left her children at home alone overnight before, that her 20 or 21-year-old son suffered anxiety and was likely to worry, and her daughter was only 10 years old as well as suffering a behavioural disorder; (d) Ms Corban herself was already mentally and emotionally fragile or vulnerable in that she suffered from PTSD, had suffered a mild brain injury and had an injured neck; (e) her pain medication (cannabis oil) was taken from her; (f) she was required to reveal private parts of her body so that her tattoos could be photographed; (g) she was transferred from one location to another in the middle of the night in the back of a van,” [160].

“In all of the circumstances I consider that an award of \$25,000 for general and aggravated damages is warranted. I do not consider it necessary or appropriate in the circumstances to attempt to apportion that sum between general and aggravated damages,” Waugh DCJ said [161].

“The plaintiff is entitled to interest on the general and aggravated damages at 2% for 4 years in accordance with *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 and *Metropolitan Meat Industry Board v Williams* (1991) 24 NSWLR 54 at 58-59. On that basis I allow \$2000 for interest,” [163].

“Ms Corban is also entitled to damages for assault and battery constituted by the 2 searches. I allow \$1,500 for each search, giving a total of \$3,000 for the searches,” [164].

“For those reasons, I assess the plaintiff’s damages in the sum of \$30,000 made up as follows: (a) \$25,000 for general and aggravated damages; (b) \$2,000 for interest on general and aggravated damages; and (c) \$3,000 for the searches,” [165].

Costs.

P: *O’Connell S, of O’Brien Criminal and Civil Solicitors*. D: *Size R ins McCabes*

Peer opinions defeat amputation claim

***Zvicer v Hunter New England Local Health District* [2026] NSWSC 1241 (8 October 2026) Lonergan J**

“This a medical negligence claim brought by the first plaintiff, Vesna Zvicer, against the Hunter New England Local Health District (HNELHD). In the plaintiffs’ further amended statement of claim filed 11 February 2021, Ms Zvicer claims that the failure to perform a fasciotomy on her left leg on 11 November 2020 caused or materially led to her requiring a below knee amputation on that leg. Where in this judgment I refer to the “left leg”, I am referring to that portion of her left limb which lies between the knee and foot. In this sense, it is to be distinguished from the left thigh,” Lonergan J said [1].

“Ms Zvicer claims that HNELHD is vicariously liable for the acts and/or omissions of its medical staff at the hospital [John Hunter], who she claims erroneously concluded that her left leg was dead on the morning of 11 November 2020. She says that had they not reached that conclusion, they would (or should) have performed a fasciotomy on her left leg. Had they done so, she says that she would not have required a below knee amputation,” her Honour said [3].

“HNELHD did not dispute that it owed a duty of care to Ms Zvicer but denied that it owed a duty of care to her children. HNELHD ultimately denied liability, asserting that the plaintiffs had failed to establish any breach of duty; it invoked ss 50 and 51 of the *Civil Liability Act 2002* (NSW) in doing so. HNELHD went on to assert that, even if a fasciotomy had been performed on Ms Zvicer’s left leg on 11 November 2020, neither she nor her children [consequential psychiatric claims] would have avoided the loss that each claims to have suffered,” [5].

“For the reasons that follow, the plaintiffs have not established their claims, and the proceedings must be dismissed,” [6].

Later, “In *Paul v Cooke* (2013) 85 NSWLR 167; [2013] NSWCA 311, Leeming JA suggested (at [53]-[56]) that if a case can conveniently be decided under s 51 [CLA inherent risk], it should be, and that once s 51 is engaged, there is no liability for a failure to exercise reasonable care and skill,” [98].

At [125], “I am satisfied that the relevant peer opinion against which the actions of HNELHD must be assessed extends to both orthopaedic and vascular surgeons.”

[129] “In *South Western Sydney Local Health District v Gould* at [30], Leeming JA identified the following uncontroversial propositions in relation to s 50 of the *Civil Liability Act*:

“(1) it is settled that the defendant bears the onus of establishing the elements of s 50(1) (namely, he or she was a “professional” and acted in a manner which, at the time, was widely accepted in Australia by peer professional opinion as competent professional practice): *Dobler v Halverson* (2007) 70 NSWLR 151; [2007] NSWCA 335 at [60]- [61] and *Sydney South West Area Health Services v MD* [2009] NSWCA 343 at [20]- [21], [51] and [58];

(2) it is clear from s 50(3) that there may be inconsistent bodies of peer professional opinion each of which is widely accepted;

- (3) it is clear from s 50(4) that peer professional opinion may be widely accepted without being universally accepted;
- (4) subject to s 50(2), when the elements of s 50(1) are made out, the defendant does not incur a liability in negligence;
- (5) if the court considers that the opinion is irrational, then the section does not to that extent apply;
- (6) the test of “irrational” in s 50(2) is not otherwise defined, but in light of s 50(3) and (4) it cannot be sufficient for peer professional opinion to be irrational merely because one peer, or a body of peers, does not share that opinion.”

Lonergan J “To these propositions may be added the fact that s 50 of the *Civil Liability Act* does *not* require proof of a specific pre-existing practice. It is engaged by evidence that, in the same circumstances, a substantial body of peer professional opinion would have considered the manner in which the relevant professional acted to be competent professional practice. Evidence that a substantial body of competent professional peers would, in the same circumstances, have acted in the same way will generally have that effect: *Dean v Pope* (2022) 110 NSWLR 398; [2022] NSWCA 260 at [317],” [130].

“I am satisfied that HNELHD has established that, in deciding not to perform a fasciotomy on Ms Zvicer’s left leg when he was performing her surgery on 11 November 2020, Dr Nicholson acted in a manner which, at the time, would have been widely accepted in Australia by peer professional opinion as competent professional practice,” [173].

In [195] “...even if (contrary to the view I have reached) Ms Zvicer had established that the muscles in her left leg were sufficiently viable at the time Dr Nicholson performed his surgery to have been capable of being salvaged by a fasciotomy, she has not established that performing that procedure would have prevented the necrosis which developed in her left foot and heel, that — based on the evidence of Professor Harris and Dr Robinson, which I accept — itself led to her needing a below knee amputation of the left leg.”

Hypothesised damages [196].

At [204] “It was submitted by HNELHD that, in the present case, any duty of care owed to Ms Zvicer’s children would potentially be inconsistent with that owed to Ms Zvicer by her treating doctors. I disagree. As was the case in *Gifford v Strang Patrick*, the duty said by Ms Zvicer’s children to have been owed to them was wholly derivative of that owed to Ms Zvicer herself.”

“I am satisfied that Ms Zvicer’s treating doctors owed a duty of care to her children to prevent psychiatric injury and that HNELHD would be vicariously liable for any harm caused by a breach of that duty,” [206].

“I have concluded that HNELHD did not breach the duty of care it owed to Ms Zvicer. For the same reasons as I have given in reaching that conclusion, I am not satisfied that HNELHD breached any duty of care it owed to Ms Zvicer’s children,” [207].

“The principal difficulty with that aspect of the claims made by Ms Zvicer’s children lies in the fact that they failed to establish that the psychiatric illnesses that each claimed

to be suffering from — and, in the case of Jai, that he suffers from — would have been avoided if her left leg had not been amputated,” [253].

“At the very highest, it might be suggested that a partial foot amputation might have carried with it the chance of a better outcome for Ms Zvicer’s children from a psychiatric perspective. That is plainly not enough for them to have established causation in the sense required by ss 5D and 5E of the *Civil Liability Act: Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12 at [46]- [47], [111], and [66]-[67],” Lonergan J said [269].

Dismissed with costs.

P: *Casselden A SC, Darcy-King P* ins *Shine*. D: *Cheney R SC, Epstein B* ins *Norton Rose Fulbright*

Backyard

“If exemplary damages are to fulfill their threefold purpose, they must not merely irritate, they must sting,” Scotting DCJ, *Camilleri*

“I have assessed the damages higher than the plaintiff’s contentions, which I am not bound by,” Scotting DCJ, *Camilleri*

“I am not satisfied that the amount sought for exemplary damages by the plaintiff would sufficiently serve the purposes of punishment, denunciation and deterrence,” Scotting DCJ, *Camilleri*

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