SUPREME COURT OF QUEENSLAND

CITATION:	*WAQ v Di Pino* [2012] QCA 283
PARTIES:	**WAQ** (appellant) **v** **CONSTANTINO DI PINO** (respondent)
FILE NO/S:	Appeal No 1674 of 2012 DC No 3369 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 October 2012
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2012
JUDGES:	Fraser and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to amend notice of appeal granted.** **2. Appeal dismissed.** **3. Appellant to pay respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ASSESSMENT OF DAMAGES – where judge below ordered the respondent pay damages to the appellant for trespass to the person in the form of sexual assault – where appellant appeals against judgment – whether the trial judge erred in finding that the appellant did not suffer psychiatric injury in the form of post traumatic stress disorder as a result of the actions of the respondent – whether the trial judge erred in not ordering the respondent pay aggravating and exemplary damages *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183, cited *Amalgamated Television Services Pty Ltd v Marsden (No 2)* (2003) 57 NSWLR 338; [2003] NSWCA 186, cited *Backwell v AAA* [1997] 1 VR 182, cited *Browne v Dunn* (1893) 6 R (HL) 67, cited *Bulstrode v Trimble* [1970] VR 840; [1970] VicRP 104, cited

Cassell & Co Ltd v Broome [1972] AC 1027; [1972] UKHL 3, cited
Gray v Motor Accident Commission (1998) 196 CLR 1; [1998] HCA 70, cited
Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89; [2007] HCA 22, cited
HSH Hotels (Australia) Ltd v Multiplex Constructions Pty Ltd [2004] NSWCA 302, cited
McFadzean v Construction, Forestry, Mining and Energy Union [2004] VSC 289, cited
R v di Pino [2004] QCA 39, cited
Rookes v Barnard [1964] AC 1129; [1964] UKHL 1, cited
State of New South Wales v Zreika [2012] NSWCA 37, cited
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; [1966] HCA 40, cited
Williams v Dawson [2000] WASCA 205, cited

COUNSEL: C C Heyworth-Smith with H Blattman for the appellant
M Black for the respondent

SOLICITORS: Murphy Schmidt for the appellant
John P Bussa & Co for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA**: The appellant and respondent were plaintiff and defendant respectively in proceedings which were tried in the District Court at Brisbane on 18 and 19 August 2011. The appellant appeals from a judgment given on 27 January 2012 by which the respondent was ordered to pay her damages of $146,027.83 including interest components which totalled $6,879.50, and to pay her costs of those proceedings.

[3] The appellant claimed damages from the respondent for trespass to the person in the form of sexual assault. The factual circumstances giving rise to the claim occurred on 15 January 2002. The respondent operated a barber's shop business. At that time, the appellant's mother had been working for the respondent for about four years on a casual basis. The appellant who was 13 years old at the time, helped out at the shop intermittently. She would sweep the floors and do odd jobs.

[4] Two incidents occurred on 15 January at a time when there were no customers in the shop. In the first incident, as the appellant and the respondent were watching tennis on television in the backroom of the shop, he put his left arm around her waist and then slipped his left hand up to rest on her breast. She pushed his hand away. The second incident occurred a short time later in the same room. The respondent picked up both of her legs and suggested he rub one of them which she had said was sore. Twice he rubbed the appellant's vagina through her clothing despite attempts on her part to dissuade him from doing so.

[5] With respect to the first incident, the respondent was convicted on a single count of unlawfully and indecently dealing with the appellant. An appeal against conviction

failed.[1] He was, however, acquitted in respect of two similar counts arising from the second incident.

[6] Liability of the three amounts was not in issue in the civil proceedings. The learned Judge was required to assess quantum. Apart from the interest components of $6,879.50, damages were assessed as follows:

Heads of Damages	**Amount $**
General damages	$30,000.00
Past economic loss	$15,000.00
Future economic loss	$80,000.00
Loss of superannuation benefits	$8,550.00
Special damages	$598.33
Future expenses	$5,000.00

[7] The appellant sought, but was not awarded, aggravated damages and exemplary damages.

Notice of Appeal

[8] At the commencement of the hearing of the appeal, the appellant sought leave to amend her notice of appeal. An amendment to Ground 1 was proposed. The amendment was opposed. The hearing of the appeal proceeded on the basis that determination of the application for leave to amend be reserved, that the court hear argument on the appeal as if leave had been granted, and that counsel for the respondent notify the court during the hearing of any actual prejudice to his client that might arise from the taking of that course. No prejudice was notified.

Grounds of appeal and relief

[9] The grounds of appeal raised by the amended notice of appeal were addressed by the parties in both their written and oral submissions. They focus upon three matters. These matters are the learned Judge's findings with respect to injury to the appellant's psychiatric condition and their effect upon his assessment of damages, the refusal of aggravated damages, and the refusal of exemplary damages. Grounds of appeal 1 and 2 relate to the first of these matters; Ground 3 to the second of them; and Grounds 4, 5 and 6 to the third.

The substantive relief sought by the appellant is that her damages be re-assessed in the District Court.

Grounds 1 and 2 generally

[10] These grounds as amended are as follows:

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1 *R v Di Pino* [2004] QCA 39.

> "1. The learned trial judge erred in finding that the Plaintiff did not suffer psychiatric injury in the form of post traumatic stress disorder as a result of the actions of the defendant, or that she would probably have had significant psychological problems anyway because of other factors (Reasons [59]), and then basing his assessment of damages on that finding, on the grounds that such finding:
>
> (a) was against the evidence or the weight of the evidence before him.
>
> (b) was based on an impermissible use by the learned trial judge of medical records in evidence, in that those records were used by his Honour to make findings against the credit of the Plaintiff (in particular, the uses referred to in **Reasons [52], [53] and [54]** where the matters said to affect credit were not put to the Plaintiff under cross-examination (**Reasons [55] to [58]**).
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> 2. The learned trial judge erred in finding in **Reasons [59]** that the Plaintiff did not suffer psychiatric injury in the form of post traumatic stress disorder as a result of the actions of the Defendant and basing his assessment of damages on that finding where such finding is inconsistent with his Honour's finding in **Reasons [49]** that *'I accept that as a result of the defendant's behaviour the subject of the proceeding the plaintiff suffered post traumatic stress disorder which is chronic and which has produced varying symptoms which were controlled by medication and at times counselling'*."

[11] Both of these grounds refer to paragraph [59] in the learned Judge's reasons. In that paragraph, his Honour set out the following finding:

> "I find the plaintiff did not suffer psychiatric injury in the form of post traumatic stress disorder as a result of the actions of the defendant. Her condition was made, worse, at least for a time, by later independent events. The plaintiff's condition is probably significantly worse than it would have been had the defendant's abuse not occurred, but she would probably have had significant psychological problems anyway because of other factors. The plaintiff's condition has improved as a result of treatment, a more settled life and greater maturity, and it is likely that it will continue to improve."

[12] Ground 2 contains an accurate extract from paragraph [49] of the reasons. In it, the learned Judge states that he accepts that the appellant suffered post traumatic stress disorder as a result of the respondent's behaviour. That statement is irreconcilable with the first sentence in paragraph [59]. The statement and the first sentence do, however, reconcile if the latter is read as if the word "not" were omitted from it.

[13] It is, I think, quite clear that the presence of the word "not" was unintended and what the learned Judge intended to say is accurately ascertained by reading the sentence as if that word were omitted from it. That that meaning was intended by him is evident not only from the extract from paragraph [49] but also from what is

said in paragraph [59] following the first sentence and, significantly, from the methodology adopted by the learned Judge in assessing general damages.

[14] In that exercise, his Honour said:

> "In the light of all the evidence, if damages were to be assessed for the whole of the plaintiff's current psychiatric state I would assess them at $40,000, but this figure should be reduced by $15,000 to allow for the hypothetical psychological state of the plaintiff, assessed on the basis of probabilities, had the defendant's conduct, never occurred. That produces a figure of general damages of $25,000, to which I would add $5,000 for violation of personal integrity, to produce an award of general damages of $30,000. …"[2]

It is evident from this methodology that damages were assessed on the footing that the appellant did suffer some psychiatric injury as a consequence of the respondent's actions.

[15] Thus, to the extent that Ground 1 is premised upon a finding having been made that the appellant sustained no psychiatric injury as a result of the respondent's actions or upon general damages having been assessed as if no such injury had been sustained by her, it misapprehends both the finding the learned Judge did make and how he assessed general damages. Ground 2, it may be noted, is wholly premised upon these misapprehensions.

[16] In tacit acknowledgement of this, in both written submissions and oral argument, the appellant concentrated on the aspect of Ground 1 that is directed at the finding in the third sentence in paragraph [59] that the appellant probably would have had significant psychiatric problems anyway because of other factors. This was a finding that the learned Judge clearly did make and, as paragraph [63] in the reasons reveals, he did assess general damages for psychiatric injury on that basis.

[17] Ground 1 criticises the findings which it addresses on the two bases set out in paragraphs (a) and (b) thereof. It is evident from the appellant's written submissions that paragraph (a) is directed only at the premised finding that no psychiatric injury was sustained by the appellant as a result of the defendant's actions. In content, it is substantially the same criticism as that contained in Ground 2 and suffers from having been based upon the same misapprehensions.

[18] Thus the appellant's oral submissions were focused upon the criticism in paragraph (b) of Ground 1. In argument both parties referred to it as the *Browne v Dunn* point.

Ground 1(b)

[19] This ground arises in circumstances where, at the commencement of the trial, the appellant tendered documents which were assembled into two volumes and divided into topics. The various topics to which the documents related included the respondent's criminal trial, medical reports concerning the appellant prepared by three practitioners, her medical records, financial documents relating to the appellant and her educational documents including school reports. In all, the two volumes contain some 415 pages of documents. Subject to a requirement that two of the authors of the medical reports, Dr Catherine Oelrichs, a consultant

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[2] Reasons [63].

psychiatrist, and Ms Corle Liebenberg, a specialist mental health social worker, be available for cross-examination, the respondent did not object to the tender. The two volumes became exhibit 1. No limitation was placed by agreement upon the use that the Court might make of any of the documents in exhibit 1.

[20] The appellant, Dr Oelrichs and Ms Liebenberg, both gave evidence on the first day of the trial, the latter two by telephone link. A 10 page type written statement by the appellant dated 16 August 2011[3] was tendered in her evidence. An affidavit by Dr Oelrichs sworn 31 January 2011[4] was tendered. The two other exhibits were a bundle of solicitors' correspondence[5] and documents relating to an adjournment.[6] The appellant's case was closed towards the end of the first day of the trial. The respondent did not adduce evidence. Addresses were heard on the second day.

[21] The evidence before the learned Judge identified three matters which, broadly speaking, contributed to the appellant's current psychiatric problems. He summarised them as follows:

> " … The first was her unsettled background and home life, including the difficulties with her mother and the difficulties with the mother's partners. The second was the actions of the defendant the subject of this proceeding, and the third was the incident in about July 2002 when the applicant was raped by her boyfriend. …"[7]

It is sufficient to refer to the report of Dr Oelrichs and to the cross-examination of her for support for the learned Judge's identification of the appellant's home life situation, the rape, and of course, the respondent's conduct, as contributors.[8]

[22] For the purposes of assessing damages, it was therefore necessary for the learned Judge to make findings as to the extent to which the defendant's actions had caused the plaintiff's current psychiatric condition. They are encapsulated in paragraph [59] of the reasons to which reference has been made. Those findings resulted from the approach taken by his Honour to causation which he explained[9] as being one of comparing the appellant's "…current state with a hypothetical situation where [the respondent's] actions had not occurred, that is a situation where [the appellant] with her pre-existing vulnerabilities was subjected to the stressors which subsequently occurred, the rape and the subsequent problems with the mother's domestic situation".

[23] The appellant has not challenged either the identification by the learned Judge of the contributors to her current psychiatric condition or the approach taken by him towards the issue of causation.

[24] Ground 1(b) contains a criticism of the use by the learned Judge of medical records to make adverse findings of credit against the appellant. Ground 1 itself links those findings to the finding that the appellant would probably have had significant psychiatric problems in any event.

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3 Exhibit 2.
4 Exhibit 3.
5 Exhibit 4.
6 Exhibit 5.
7 Reasons [43].
8 Report p 15; Transcript 1-54; 1-56.
9 Reasons [56].

[25] It is clear that the learned Judge did regard the appellant's evidence as to the seriousness of her problems as being unreliable. He said:[10]

> " … Overall, I did not regard the plaintiff as a reliable witness and am wary about accepting her evidence, except where it is corroborated or inherently plausible."

To similar effect, he noted:[11]

> "There is also the consideration that, for the reasons I have expressed, I am not prepared to accept the plaintiff's account of the seriousness of her problems at face value. …"

[26] The reasons for judgment suggest that the view that the learned Judge took of the appellant's credibility did influence his findings at two levels. One level was as to her actual current psychiatric condition. The other was as to her hypothetical psychiatric condition had the respondent's actions not occurred. The finding with respect to the latter was that she would have had significant psychological problems. It is the finding that her psychological problems would otherwise be significant which the appellant complains is infected by the findings as to her credibility.

[27] The learned Judge reached the findings as to credibility through a lengthy process in which he scrutinised the appellant's evidence, including that given in exhibit 2. He compared it with information in the documents in exhibit 1. He looked also for internal inconsistency in her evidence. He observed:[12]

> "I should say something about the credibility of the plaintiff. There was no particular challenge to her credibility on the part of the defendant, but it will be apparent from various matters that I have mentioned in the course of these reasons that there were several occasions where what she said in her evidence, particularly in Exhibit 2, was inconsistent with other material, particularly contemporaneous documents, or internally inconsistent."

[28] The appellant's criticism of the process undertaken by the learned Judge was founded upon the following passage in the joint judgment of McColl and Tobias JJA in *Ali v Nationwide News Pty Ltd.*[13] At [112] their Honours said:

> "There can be no doubt that where factual evidence is not cross-examined upon, prima facie it should be accepted. However, it ought not necessarily be accepted where, as Tobias JA said in *Multiplex*, there is a credible body of evidence of a substantial character in direct contradiction of the non cross-examined evidence….".

[29] In summary, the appellant submitted that for a number of factual issues, the learned Judge disbelieved her evidence notwithstanding that she was not cross-examined on the issue and the material on which he relied to disbelieve her did not amount to a credible body of evidence of a substantial character in direct contradiction of her evidence on the issue. It was said that for his Honour to have done so was not in conformity with *Ali* and was unfair. To have based findings as to credit generally on the rejection of her evidence on those issues, it was argued, was also unfair.

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10 Reasons [54].
11 Reasons [58].
12 Reasons [52].
13 [2008] NSWCA 183.

[30] I do not understand that, by way of the observations to which I have referred, McColl and Tobias JJA intended to summarise the rule in *Browne v Dunn*.[14] But more significantly for present purposes, what their Honours wrote needs to be read in context. In the preceding paragraph of their reasons, their Honours cited from another decision of Tobias JA[15] in which his Honour cited the following passage from the judgment of Newton J in *Bulstrode v Trimble*:[16]

> "I know of no case where it has been held that where evidence of a witness upon a particular matter is allowed to pass without cross-examination, but evidence of a substantial character is called by the opposite party in direct contradiction thereof, the judge or jury is required in law to accept the former evidence. And, in my view, this is plainly not the law."[17]

[31] Significantly, the contradictory evidence of a substantial character to which the remarks of Newton J were directed is evidence which has been called by the opposite party. I understand McColl and Tobias JJA to have intended their remarks to be similarly directed. Moreover, I do not read what their Honours said in *Ali* to be directed in any way to the circumstance where a party, in its own case, has adduced evidence which contradicts evidence otherwise given by that party.

[32] It will be recalled that the documents in exhibit 1 were tendered by the appellant. They were received without any limitation upon the use that the Court might make of them. The appellant's submissions involve a proposition that the learned Judge could not resort for any purpose to any of the information within the documents which contradicted the appellant's evidence otherwise given, unless the respondent had cross-examined her or, where appropriate, witnesses called in her case, on the contradiction. I cannot accept that proposition as a true statement of the law. No authority was cited by the appellant for it. Where there is divergence within the evidence led by a party, the responsibility lies with the party leading it to explain the divergence. That party may not refrain from explaining the divergence with the comfort that it will have no forensic utility unless cross-examined upon by the party against whom the divergent evidence is led.

[33] I therefore do not accept the basis upon which the criticism in Ground 1(b) is founded. The learned Judge was not constrained in the manner suggested by the appellant as to the use that he was entitled to make of the information in the documents in exhibit 1 for deciding whether or not to accept her evidence given orally or by exhibit 2, on factual matters or for assessing the credibility of her evidence generally.

[34] Whilst this ground fails for that reason, it ought to be noted that the appellant was cross-examined on a number of the factual issues which the appellant selected for the purpose of advancing oral argument on it. There was an issue as to when the appellant began receiving counselling at school – whether it was before or after the rape by a boyfriend. The school record indicated that it was afterwards. The appellant was cross-examined on the issue.[18] Moreover, there was apparent conflict between her oral evidence and a statement in exhibit 2 on the issue.

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14 (1893) 6 R (HL) 67.

15 *HSH Hotels (Australia) Ltd v Multiplex Constructions Pty Ltd* [2004] NSWCA 302 (Mason P and Hodgson JA agreeing).

16 [1970] VR 840.

17 At 849.

18 T1-26.

[35] There was also an issue as to whether or not the appellant had learning difficulties prior to the defendant's actions. A school record within exhibit 1 indicated prior learning difficulties. The appellant was cross-examined on the topic.[19] As well, there was an issue as to the onset of behavioural problems for the appellant with drinking, smoking, anger and bullying of peers. Another school record within exhibit 1 indicated that she had begun to experience these problems in 2001. She was cross-examined with respect to them.[20] The cross-examination was conducted with particular reference to a school memorandum within exhibit 1 which referred to the problems.

[36] There was, however, one issue where the learned judge did not accept the appellant's evidence and she had not been cross-examined on it. In her statement, exhibit 2, the appellant said that she has difficulty with any form of sexual intimacy and that she even dislikes her husband looking at her body. She attributes this to the respondent's actions. The learned judge did not accept this evidence. He was satisfied from a history revealed in notes forming part of the medical records in exhibit 1 that the appellant does not suffer sexual aversion in consequence of the respondent's actions.

[37] The documents in exhibit 1 disclosed a history in which the appellant had had a number of boyfriends. There were reported instances of difficulties in these relationships at times, some associated with mutual violence. However, the appellant had not reported any sexual difficulties with them. On this state of the appellant's own evidence, it was clearly open to the learned judge not to accept her evidence on the matter in exhibit 2. There was no infringement of the rule in *Browne v Dunn* in his rejection of the evidence on the footing that it was not corroborated by contemporaneous documentation notwithstanding an absence of cross-examination on the issue. As the passage from *Bulstrode* to which I have referred reminds, he was not required by law to accept the evidence in exhibit 2 on the issue.[21]

[38] During the course of oral submissions on ground 1(b), counsel for the appellant made two other complaints about how the learned judge had reached findings concerning the appellant's psychiatric condition. It was acknowledged that they were not based upon the rule in *Browne v Dunn*.

[39] One of these complaints concerned reliance by his Honour on Dr Oelrichs' observation that the appellant presented as a difficult historian and that there were inconsistencies between the account given by her to Dr Oelrichs and other evidence before the court.[22] The observation made by Dr Oelrichs was:

> "However, she presented as a difficult historian in that she was quite distracted by her children and also distracted about giving clear details in history."[23]

It was submitted that the omission by the learned judge to refer to the presence of the children reflected a theme in his judgment, "suggesting a problem with her credit whereas, in fact, it's just because she's a bit distracted".

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19 T1-29.
20 T1-29, 30.
21 See also *Williams v Dawson* [2000] WASCA 205 at [37], [38].
22 Reasons [15].
23 AB258.

[40] I am unable to agree with this submission. As his Honour explained,[24] he did not regard the appellant as a reliable witness. He did not, however, say that he regarded her as a dishonest witness. What was significant for him in reaching the view that she was unreliable was that she had presented as a difficult historian. It did not so much matter for his purposes whether that situation had arisen from her being distracted during the course of the interview with Dr Oelrichs. It mattered even less what those distractions were.

[41] Another complaint was to the effect that the learned judge had "cut off" the appellant in the course of answering a series of questions asked of her by him relating to her intention to move to her father's house and take up his offer to send her to a different school. The exchange between the appellant and the learned judge occurred towards the end of her cross-examination. I am unable to regard this complaint as having real substance. Had it been thought that the appellant had not had the opportunity to state fully what she might have wished to say on the topic, there was ample opportunity for her counsel to take it up in the re-examination which followed almost immediately thereafter.

[42] For these reasons, both grounds 1 and 2 cannot succeed.

Ground 3: Aggravated Damages

[43] The learned judge was not persuaded that on the facts of the case, an award of aggravated damages was justified.[25] He began his consideration of the topic with an adoption of Professor Luntz's description of aggravated damages as damages awarded to compensate the plaintiff for increased mental suffering due to the manner in which the defendant behaved.[26] The description accords with that given by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*[27] that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which it was done.

[44] The compensatory nature of aggravated damages requires that in order for them to be awarded, the manner or circumstances in which the defendant's actionable wrongful conduct was carried out increased the plaintiff's suffering.[28] It was therefore appropriate for the learned judge to require that he be satisfied by proof that the appellant's suffering had been increased on that account before awarding her aggravated damages.

[45] The appellant does not submit that the learned judge misapprehended the applicable legal principles. Rather, the ground of appeal, as elaborated in written submissions and summarised at the hearing, is that he erred in failing to take into account two matters, namely, certain features of the respondent's offending conduct and non-admissions pleaded by the respondent in the proceedings.

[46] The features of the offending conduct which the written submissions highlight are her youth, the respective ages of the appellant and the respondent at the time, his

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24 Reasons [54].

25 Reasons [70].

26 Reasons [64]; Luntz, "Assessment of Damages for Personal Injury and Death" (4th edition 2002) p 71.

27 (1966) 117 CLR 118 at 149, cited by the majority in *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 4.

28 Luntz, "Assessment of Damages for Personal Injury and Death: General Principles" (2005) p 7.15; *McFadzean v Construction, Forestry, Mining and Energy Union* [2004] VSC 289 at [14].

sex and his position of authority as an employer, the persistence in his conduct despite protest, and the fact that it ceased only when a customer came into the shop. Without doubt, these factors added to the egregiousness of the respondent's conduct. The learned judge was evidently aware of them. The question for him was whether there was proof that the appellant's suffering had thereby been increased so as to warrant an award of aggravated damages.

[47] The appellant has not identified evidence which would be apt to prove that there was actual increased suffering by the appellant on account of those features. Nor is it said that there was evidence of that kind that the learned judge failed to take it into account. The absence of this from the appellant's submissions creates difficulty for her argument. A further difficulty is that in his assessment of damages, the learned judge did make allowance under some other heads of damage for a number of the features which the appellant has highlighted. This is evident from paragraph [64] in the reasons where his Honour remarked:

> "…I have already allowed a component of damages for violation of personal integrity which I think is properly treated as part of general damages rather than aggravated damages, and which covers the features that it was a trespass of a sexual nature on a child. I do not consider that the fact that the plaintiff was vulnerable, having come from a broken home, justifies an award of aggravated damages; it is relevant to the assessment of the severity of the psychiatric injury suffered by her."

[48] So far as the non-admissions are concerned, the appellant singles out for criticism as a misconstruction of the position, the following observation by the learned judge at paragraph [66] of the reasons:

> "… The case on liability was never denied on the pleadings, and there was no resiling from the deemed admission."

In its terms, this statement is unexceptionable. In his defence filed on 16 December 2010, the responded pleaded bare non-admissions to paragraphs 5 to 10 inclusive of the statement of claim which contained the allegations relating to both the first and the second incident. The pleading was not materially changed in this respect in an amended defence filed on 18 August 2011. Per force of UCPR r 166(5), the respondent was deemed to have admitted the allegations in those paragraphs and per force of the deemed admissions, the fact that the respondent had committed the offending actions which constituted each incident, was not in issue.

[49] The appellant also draws a contrast between the circumstances of a deemed admission of offending conduct arising from a pleaded non-admission and the circumstances of a pleaded admission or a pleaded admission coupled with an apology. Those circumstances can be validly distinguished but it does not at all follow from their contrasting nature that unless there is a pleaded admission or a pleaded admission coupled with an apology, an award of exemplary damages ought be made because of the way a defence is pleaded.

[50] In my view, this ground of appeal is not made out.

Grounds 4, 5 and 6 generally

[51] These grounds all relate to the topic of exemplary damages. As formulated in the amended notice of appeal, they also concern how the learned judge had regard for

the respondent's financial position in deciding whether an award of exemplary damages was appropriate for the case.

[52] However, the appellant's written submissions with respect to ground 4 were devoted to an issue of legal principle, namely, whether or not the "if, but only if," test for awarding exemplary damages applies in Queensland. The following discussion of ground 4 addresses that issue. The appellant's written submissions with respect to grounds 5 and 6 retain their focus on the respondent's financial position.

Ground 4

[53] The appellant claimed exemplary damages in respect of the respondent's conduct constituting the second incident. In view of the conviction for the conduct which constituted the first incident, and consistently with *Gray*,[29] exemplary damages were not sought in respect of that incident.

[54] The "if, but only if" test to which reference has been made owes its name to the explanation of it given by Lord Devlin in *Rookes v Barnard*[30] as follows:

> "In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum. If a verdict given on such direction has to be reviewed upon appeal, the appellate court will first consider whether the award can be justified as compensation and if it can, there is nothing further to be said. If it cannot, the court must consider whether or not the punishment is, in all the circumstances, excessive."[31]

[55] The learned judge concluded that he ought apply this test and did apply it in reasoning towards his decision not to award exemplary damages.[32] In ground 4, the appellant submits that he erred in so doing.

[56] The learned judge gave three reasons for applying the test. One of them was that it had not been repudiated by the High Court of Australia.[33] The appellant referred to several High Court authorities where aspects of the law relating to exemplary damages were considered. It is unnecessary to refer to them specifically, it being sufficient for present purposes to note that in none of them is the "if, but only if," test examined and held to be inapplicable in Australia.

[57] A second reason was that the test had been applied by intermediate courts of appeal in two other jurisdictions in Australia.[34] It is of particular significance for this Court that the test has been applied by other Australian and intermediate courts of appeal.

[58] It was applied by the Court of Appeal of Victoria in *Backwell v AAA*.[35] That appeal involved a medical negligence suit which arose out of a mistaken insemination. The

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29 At p 14.
30 [1964] AC 1129.
31 At 1228.
32 Reasons [91]-[95].
33 Para [91].
34 Para [92].
35 [1997] 1 VR 182.

plaintiff was on a donor insemination program and was inseminated with semen from a donor with an incompatible blood type. She was threatened into an abortion against her religious beliefs.

[59] The court held that the trial judge misdirected the jury by not instructing them that they could award exemplary damages only if the sum which they had in mind to award as compensation was inadequate to punish the defendant doctor for her conduct. The "if, but only if," test was discussed and adopted by Ormiston JA[36] with whom Brooking JA agreed.[37] His Honour considered that the test is applicable to cases where general damages are not at large as well as to those where such damages are wholly or in part at large such as those for defamation, trespass or false imprisonment.[38] The formulation of the test by Lord Devlin and Lord Reid's subsequent exegesis of it in *Cassell & Co Ltd v Broome*[39] were also endorsed by Tadgell JA.[40]

[60] In *Amalgamated Television Services Pty Ltd v Marsden (No 2),*[41] the Court of Appeal of New South Wales gave effect to the test in the context of proceedings for defamation. Speaking at a level of general principle, the court (Beazley JA, Giles JA and Santow JA) said:

> "There is no decision binding us, on strict rules of precedent, to application of the "if, but only if" principle. We have reservations as to its consistency with the different natures and purposes of compensatory and exemplary damages, perhaps more clearly recognised of recent times. However, we consider that on the present state of the authorities we should give effect to the principle. To its continuing vitality in England, Canada and New Zealand there is added its recent affirmation in the Victorian Court of Appeal, and it has been applied in cases at first instance to which it is unnecessary to refer. … As an intermediate court of appeal, we think that we would be departing from our proper role if we were to move the law from its present position, and as has been seen the respondent held back from submitting that compensatory damages and exemplary damages are wholly divorced."[42]

[61] Most recently, and after delivery of the reasons for judgment under appeal, the test was again applied by the Court of Appeal of New South Wales in *State of New South Wales v Zreika*[43] in proceedings for damages for wrongful arrest, assault and battery and malicious prosecution. In evident adoption of the test, Sackville AJA, with whom Macfarlan JA and Whealy JA concurred, concluded[44] that the trial judge had erred in failing to consider expressly whether the proposed award of $100,000 for exemplary damages was necessary or appropriate having regard to the sums to be awarded for compensatory and aggravated damages.

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36 At pp 206-208.
37 At p 184.
38 At p 208.
39 [1972] AC 1027 at 1089.
40 At p 184.
41 (2003) 57 NSWLR 338.
42 At [24].
43 [2012] NSWCA 37.
44 At [70].

[62] The clear direction given by the High Court in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*[45] is that in relation to non-statutory law, intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in other jurisdictions within Australia unless they are convinced that the law as expounded in those decisions is plainly wrong. Conformity with this direction required that the learned judge not depart from applying the "if, but only if," test in his assessment of exemplary damages unless he was convinced that it is wrong. His Honour regarded the reasoning in *Backwell* in respect of the validity of the test to be persuasive; he was not convinced that the test is wrong.[46] It was therefore correct for him to apply the test.

[63] So also, this Court is required to apply the test unless convinced that it is wrong. There is, I think, genuine reason for querying whether the test ought to be one of universal applications and how it may apply to causes of action for personal injury where general damages are wholly compensatory and not at large. It is open to question how it is that general damages which are wholly compensatory might also be punitive. To identify questions such as these is one thing. It is quite another to be convinced that what is questioned is plainly wrong. I am not so convinced. In my view this Court is required to apply the "if, but only if," test in a case such as the present one.

[64] In these circumstances ground 4 cannot succeed.

Ground 5

[65] This ground concerns the way in which the learned judge had regard to the respondent's financial position for the purpose of assessing exemplary damages. The criticism made in written submissions is that his Honour proceeded on the footing that insofar as the respondent's financial position was relevant, the onus of proof was on the appellant as plaintiff to prove the respondent's financial position.

[66] This criticism is rather misdirected. The learned judge did not proceed on that footing. At para [86] of the reasons, in response to a submission for the plaintiff, he explained his view as being this: that in absence of any evidence as to a defendant's financial position, it was appropriate for a court to assume that it was average. The remarks that follow indicate that by "average", he meant neither "particularly well off" or "unusually modest". He added that, in his view, for proof that a defendant was particularly well off, the onus lay with the plaintiff; and that for proof that a defendant's means were unusually modest, proof lay with the defendant.

[67] However, the learned judge did not act upon the views he expressed for the purpose of deciding whether to award exemplary damages in this case. It was not necessary for him to do so. He was not confronted with a situation where there was no evidence at all concerning the respondent's financial circumstances. Nor was he required to determine whether either party had discharged an onus to prove, on the one hand, particularly well off means, or on the other, unusually modest means.

[68] As the learned judge recounted at para [85] of the reasons, there was some, but rather limited, evidence before him as to the respondent's financial position. His occupation was known. Also there was evidence, which had been adduced by

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45 (2007) 230 CLR 89 at 153-4 and continuing.

46 Reasons [91].

the appellant and to which his Honour specifically referred, that the respondent was a bankrupt, that he had once been a co-owner of two parcels of land which had been transferred to his wife pursuant to a Family Court order, and that he had not satisfied an order for payment of criminal compensation of $22,500. The learned judge concluded from those circumstances that he ought to proceed on the assumption that the respondent's financial position was "poor". That he was able to reach that conclusion on the evidence before him displaced any need for him to consider whether an onus of proof had been discharged.

[69] Ground 5 also cannot succeed.

Ground 6

[70] This ground contends that the learned judge erred in finding that the respondent had discharged an onus on him to prove that his financial position was unusually modest. As explained in relation to ground 5, his Honour did not resolve the issue of the respondent's financial position by finding that he had adduced evidence which proved that his means were unusually modest. This ground also is misdirected and cannot succeed.

Disposition

[71] For these reasons, I consider that this appeal fails and must be dismissed.

[72] It remains to note that the respondent has filed a notice of contention. In the circumstances, it is unnecessary to decide the issue raised by the notice. However, I intend to make some brief remarks in relation to it. The contention is that the decision not to award exemplary damages should be affirmed on the basis that the respondent had already been dealt with in criminal proceedings in relation to the conduct in question.

[73] Were it necessary to decide that issue, I would reject the contention. The learned judge confined his consideration of exemplary damages to the respondent's conduct which constituted the second incident for which he was acquitted. That was conduct distinctly different in time and content from that which constituted the first incident for which he was convicted and punished. In light of these distinct differences, the observations of the majority in *Gray*[47] that the infliction of a substantial punishment by criminal process is a bar to an award of exemplary damages in civil proceedings for substantially the same conduct, do not offer support for the contention.

Orders

[74] I would make the following orders:

1. Leave to amend notice of appeal granted.
2. Appeal dismissed.
3. Appellant to pay respondent's costs of the appeal on the standard basis.

[75] **MULLINS J:** I agree with Gotterson JA.

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47 At p 14.