HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

Matter No D9/2025

ETHAN AUSTRAL — APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA — RESPONDENT

Matter No D10/2025

JOSIAH BINSARIS — APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA — RESPONDENT

Matter No D11/2025

LEROY O'SHEA — APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA — RESPONDENT

Matter No D12/2025

KEIRAN WEBSTER — APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA — RESPONDENT

Austral v Northern Territory
Binsaris v Northern Territory
O'Shea v Northern Territory
Webster v Northern Territory
[2026] HCA 20
Date of Hearing: 11 March 2026
Date of Judgment: 17 June 2026
D9/2025, D10/2025, D11/2025 & D12/2025

ORDER

Matter No D9/2025

1. *Appeal allowed with costs.*

2. *Special leave to cross-appeal granted.*

3. *Cross-appeal allowed in part.*

4. *Orders 1, 2 and 4 made by the Court of Appeal of the Northern Territory on 28 March 2025 be set aside and, in their place, it be ordered that:*

    (a) *Appeal allowed in part.*

    (b) *Orders 1, 2 and 3 made by the Supreme Court of the Northern Territory on 1 September 2023 be set aside and, in their place, it be ordered that:*

        (i) *The defendant is to pay the following to the plaintiff, Ethan Austral:*

            General damages: $25,000
            Aggravated damages: $15,000
            Exemplary damages: $50,000
            Total: $90,000

        (ii) *Pursuant to s 84 of the* Supreme Court Act 1979 *(NT), the plaintiff be awarded interest on the general damages awarded at the rate of 4% per annum for the period from 21 August 2014 to the date of judgment on 1 September 2023.*

5. *The appellant has liberty to apply to vary any orders as to costs made by the Court of Appeal of the Northern Territory.*

Matter No D10/2025

1. *Appeal allowed with costs.*

2. *Special leave to cross-appeal granted.*

3. *Cross-appeal allowed in part.*

4. *Orders 1, 2 and 4 made by the Court of Appeal of the Northern Territory on 28 March 2025 be set aside and, in their place, it be ordered that:*

    (a) *Appeal allowed in part.*

    (b) *Orders 1, 2 and 3 made by the Supreme Court of the Northern Territory on 1 September 2023 be set aside and, in their place, it be ordered that:*

        (i) *The defendant is to pay the following to the plaintiff, Josiah Binsaris:*

            General damages: $20,000
            Exemplary damages: $50,000
            Total: $70,000

        (ii) *Pursuant to s 84 of the* Supreme Court Act 1979 *(NT), the plaintiff be awarded interest on the general damages awarded at the rate of 4% per annum for the period from 21 August 2014 to the date of judgment on 1 September 2023.*

5. *The appellant has liberty to apply to vary any orders as to costs made by the Court of Appeal of the Northern Territory.*

Matter No D11/2025

1. *Appeal allowed with costs.*

2. *Special leave to cross-appeal granted.*

3. *Cross-appeal allowed in part.*

4. *Orders 1, 2 and 4 made by the Court of Appeal of the Northern Territory on 28 March 2025 be set aside and, in their place, it be ordered that:*

    (a) *Appeal allowed in part.*

    (b) *Orders 1, 2 and 3 made by the Supreme Court of the Northern Territory on 1 September 2023 be set aside and, in their place, it be ordered that:*

        (i) *The defendant is to pay the following to the plaintiff, Leroy O'Shea:*

            General damages: $30,000
            Aggravated damages: $20,000
            Exemplary damages: $50,000
            Total: $100,000

        (ii) *Pursuant to s 84 of the* Supreme Court Act 1979 *(NT), the plaintiff be awarded interest on the general damages awarded at the rate of 4% per annum for the period from 21 August 2014 to the date of judgment on 1 September 2023.*

5. *The appellant has liberty to apply to vary any orders as to costs made by the Court of Appeal of the Northern Territory.*

Matter No D12/2025

1. *Appeal allowed with costs.*

2. *Special leave to cross-appeal granted.*

3. *Cross-appeal allowed in part.*

4. *Orders 1, 2 and 4 made by the Court of Appeal of the Northern Territory on 28 March 2025 be set aside and, in their place, it be ordered that:*

   (a) Appeal allowed in part.

   (b) Orders 1, 2 and 3 made by the Supreme Court of the Northern Territory on 1 September 2023 be set aside and, in their place, it be ordered that:

      (i) The defendant is to pay the following to the plaintiff, Keiran Webster:

      General damages: $30,000
      Aggravated damages: $20,000
      Exemplary damages: $50,000
      Total: $100,000

      (ii) Pursuant to s 84 of the Supreme Court Act 1979 *(NT), the plaintiff be awarded interest on the general damages awarded at the rate of 4% per annum for the period from 21 August 2014 to the date of judgment on 1 September 2023.*

5. *The appellant has liberty to apply to vary any orders as to costs made by the Court of Appeal of the Northern Territory.*

On appeal from the Supreme Court of the Northern Territory

Representation

K E Foley SC and J A G McComish with M F Delany for each appellant (instructed by North Australian Aboriginal Justice Agency Ltd)

D A McLure SC with T J Moses and H C Cooper for the respondent in each matter (instructed by Solicitor for the Northern Territory)

CATCHWORDS

Austral v Northern Territory
Binsaris v Northern Territory
O'Shea v Northern Territory
Webster v Northern Territory

Damages – Exemplary damages – Where appellants exposed to CS gas at youth detention centre – Where High Court held in *Binsaris v Northern Territory* (2020) 270 CLR 549 that spraying of CS gas constituted unlawful battery of appellants – Where High Court remitted matter to Supreme Court of Northern Territory for assessment of damages – Whether exemplary damages should be awarded – Whether Court of Appeal of Supreme Court of Northern Territory failed to execute judgment of High Court in accordance with s 37 of *Judiciary Act 1903* (Cth) – Whether Court of Appeal erred in approach to exemplary damages – Whether Court of Appeal erred in holding that it was not open to assessing judge to award exemplary damages on direct liability basis – Whether award of $200,000 to each appellant for exemplary damages manifestly excessive – Whether pre-judgment interest should be awarded on general damages.

Words and phrases – "aggravated damages", "assessment of damages", "attribution", "battery", "bystanders", "care, control, and custody", "conscious wrongdoing", "contumelious disregard", "damages", "defence of lawful authority", "denunciation", "deterrence", "direct liability", "discretion", "doctrine of finality", "exemplary damages", "fact-finding", "general damages", "lawful authority", "lawful option", "manifestly excessive", "moral retribution", "parity", "pleaded case", "pre-judgment interest", "proportionality", "proportionate punishment", "reasonable and necessary", "remitter", "reprehensible conduct", "state of mind", "systems and training", "tort of battery", "tortious conduct", "totality", "unlawful", "vicarious liability".

Judiciary Act 1903 (Cth), s 37.
Supreme Court Act 1979 (NT), s 84.
Weapons Control Act 2001 (NT), ss 6, 12(2).
Youth Justice Act 2005 (NT), ss 151, 152(1), 153, 157(2).

1 GAGELER CJ AND STEWARD J. This is the final chapter in a decade-long litigious saga which has arisen out of the notorious events of the night of 21 August 2014 when prison officers called to an emergency situation at the Behaviour Management Unit of the Don Dale Youth Detention Centre in the Northern Territory, acting on the authority of the Director of Correctional Services, deployed CS gas to subdue a rampant detainee – Jake Roper – causing personal injury to other detainees who were locked in their cells nearby. Understanding its denouement necessitates a recap of the events to date.

2 Four of the injured detainees – the present appellants – claimed damages from the Northern Territory of Australia – the present respondent – in actions for battery in the Supreme Court of the Northern Territory. The Northern Territory defended the actions on the ground that the use of the CS gas by the prison officers was authorised by provisions of the *Youth Justice Act 2005* (NT).

3 The defence of statutory authority was accepted at first instance by the primary judge (Kelly J),[1] whose decision dismissing the claim of each of the four injured detainees was upheld on appeal to the Court of Appeal (Southwood J, Riley and Graham A-JJ),[2] but was rejected on further appeal to this Court (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) in *Binsaris v Northern Territory*.[3] Having rejected the defence, this Court made orders in the appeal of each detainee: that the appeal be allowed; that the decision of the Court of Appeal be set aside; that, in place of the decision of the Court of Appeal, it be ordered that the order of the primary judge dismissing the claim be set aside; that in place of the decision of the primary judge, it be ordered "that there be judgment for the [injured detainee] on the claim for damages for battery arising out of the use of CS gas at Don Dale Youth Detention Centre on 21 August 2014"; and that "the matter be remitted to another judge of the Supreme Court of the Northern Territory for assessment of damages".

4 On remitter to the Supreme Court of the Northern Territory, the assessment of damages which had been ordered was undertaken without receipt of further evidence. The assessing judge (Blokland J) awarded damages to each injured detainee.[4] The damages awarded included: in the case of each detainee, general damages in amounts between $20,000 and $30,000; in the cases of three of the four detainees, aggravated damages in amounts between $15,000 and $20,000; and in

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1 *LO v Northern Territory* (2017) 317 FLR 324.

2 *JB v Northern Territory* (2019) 343 FLR 41.

3 (2020) 270 CLR 549.

4 *Binsaris v Northern Territory* [2023] NTSC 79.

the case of each detainee, exemplary damages in the amount of $200,000. Having regard to the size of the award of exemplary damages, the assessing judge declined in the exercise of her discretion to award pre-judgment interest on the general damages.

5 On appeal by the Northern Territory from the decision of the assessing judge, the Court of Appeal (Grant CJ, Reeves and Burns JJ) held that the assessing judge was wrong to have awarded exemplary damages.[5] The Court of Appeal in each case accordingly set aside the award of exemplary damages which had been made by the assessing judge and exercised its discretion to award pre-judgment interest on the general damages.

6 Against the backdrop of this already protracted litigious history, this Court granted special leave to appeal to each of the four injured detainees from so much of the more recent decision of the Court of Appeal as set aside the award of exemplary damages which had been made by the assessing judge. The grant of special leave to appeal was not at large; it was confined to three specific grounds.

7 As ultimately reformulated, the grounds on which the injured detainees were granted leave to appeal were as follows:

> "1. The Court of Appeal erred by overturning the [assessing] judge's assessment of exemplary damages on a basis that was inconsistent with this Court's judgment in *Binsaris v Northern Territory* ... and thus failed to execute the judgment of this Court in accordance with s 37 of the *Judiciary Act 1903* (Cth).
>
> 2. The Court of Appeal erred by holding that the relevant state of mind inquiry for exemplary damages is whether the individuals who authorised the unlawful conduct that founded the battery claim knew that their conduct was unlawful.
>
> 3. The Court of Appeal erred in holding that it was not open to the assessing judge to award exemplary damages on a direct liability basis."

8 Pre-empting the potential for the appeals to result in reinstatement of the award of exemplary damages made by the assessing judge, the Northern Territory sought special leave to cross-appeal on two grounds. The first was that the amount of the award of exemplary damages to each injured detainee was manifestly excessive in view of the awards amounting in total to $800,000. The other was that reinstatement of the award of exemplary damages to each detainee removed the

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5 *Northern Territory v Austral* [2025] NTCA 3.

basis for the exercise of discretion to award pre-judgment interest on the general damages.

9 As argument developed in the hearing, it became apparent that none of the grounds on which special leave to appeal had been granted turned on any underlying issue of legal principle on which the parties were divided.

10 There was no dispute between the parties that the function of the assessing judge was to "execute the judgment" of this Court in *Binsaris v Northern Territory* in accordance with s 37 of the *Judiciary Act 1903* (Cth) by assessing the damages to which each injured detainee on the judgment for damages for battery arising out of the use of CS gas at the Don Dale Youth Detention Centre on 21 August 2014 was entitled. There was no dispute that the function of the Court of Appeal, on the appeals to it under s 51 of the *Supreme Court Act 1979* (NT), had been to conduct a "real review"[6] of the decision of the assessing judge in order to determine on the "correctness standard"[7] whether exemplary damages ought to have been awarded and, if so, to determine on the "*House v The King* standard" of "judicial restraint"[8] whether exemplary damages in the amount of $200,000 was appropriate. There was no dispute that the assessing judge and the Court of Appeal were obliged to perform those functions on the basis of an acceptance of the findings of fact that had been made by the primary judge insofar as those findings were not inconsistent with the decision of this Court in *Binsaris v Northern Territory*.[9]

11 There was no dispute between the parties that exemplary damages are awarded not to compensate an injured party but "to punish the wrongdoer and deter others from like conduct" and that, whilst the "boundaries of the field in which they may properly be awarded" cannot be stated with precision, the phrase

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6 *Fox v Percy* (2003) 214 CLR 118 at 126 [25].

7 *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at 449 [1], 456 [16], citing *Warren v Coombes* (1979) 142 CLR 531.

8 *Steven Moore (a pseudonym) v The King* (2024) 282 CLR 460 at 467 [14]. See also *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 559 [40], 582-583 [128].

9 *Peacock v D M Osborne & Co* (1907) 4 CLR 1564 at 1568; *R v Carroll* (2010) 77 NSWLR 45 at 52 [27]; *Harvard Nominees Pty Ltd v Tiller [No 4]* (2022) 403 ALR 498 at 514-515 [45]-[49].

"'conscious wrongdoing in contumelious disregard of another's rights' describes at least the greater part of the relevant field".[10]

12 There was no dispute between the parties that the claims of the injured detainees had in substance been advanced against the Northern Territory on the basis of "direct liability" as distinct from "vicarious liability", as those terms have recently been clarified by this Court in *Bird v DP (a pseudonym)*,[11] and that exemplary damages are in principle capable of being awarded on that basis.

13 Each of the three grounds of appeal was revealed instead to turn on whether or not the joint reasons for judgment of the Court of Appeal are to be read as disclosing a departure from accepted legal principle.

14 Without needing to consider whether and if so how our own reasoning might have differed from that of the Court of Appeal were we to have been called upon to review the decision of the assessing judge afresh, and therefore without needing to endorse everything that appears in the reasons for judgment of the Court of Appeal, we think it sufficient to record that we are unable to discern in those reasons for decision any of the departures from legal principle sought to be attributed to the Court of Appeal by any of the three grounds of appeal on which special leave to appeal has been granted. That is to say, we are unable to accept that the Court of Appeal committed the errors sought to be attributed to it.

15 We would therefore dismiss each appeal, as a consequence of which the issues raised by the proposed cross-appeals would not arise. Because the cross-appeals would turn on a novel and disputed question of legal principle, however, it is appropriate that we record that, had we considered that question to arise, we would have answered it in the same way and for the same reasons as Gordon, Edelman, Gleeson, Jagot and Beech-Jones JJ. We would therefore have joined with their Honours in granting special leave to cross-appeal, allowing each cross-appeal on the first of its grounds and reducing each award of exemplary damages from $200,000 to $50,000.

16 Conscious of being in dissent on appeals raising no issue of legal principle, we will attempt to explain with concision why we are unable to discern error in the impugned reasoning of the Court of Appeal.

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10 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [14]-[15], quoting *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77.

11 (2024) 98 ALJR 1349 at 1358 [31], 1361-1362 [44]; 419 ALR 552 at 560, 564.

Ground 1: consistency with *Binsaris v Northern Territory*

17 An important issue of fact presented to and determined by the primary judge was framed in terms of whether or not deployment of the CS gas was "reasonable and necessary".

18 Having heard the testimony of a great many witnesses – who included Commissioner Middlebrook (who was the Director of Correctional Services who authorised the deployment of the CS gas), Assistant General Manager Sizeland (who had experience of exposure to CS gas and who recommended its deployment to Commissioner Middlebrook), Prison Officer Flavell (who was the prison officer who discharged the CS gas) and Mr Colin Kelaher (an independent expert on the operation of correctional facilities) – and after weighing each of the potentially reasonable alternative courses of action advanced on behalf of the injured detainees,[12] the primary judge ultimately concluded that "the use of the CS gas was reasonable and necessary, there being no other option reasonably available involving less force and less risk to the safety of detainees and staff".[13]

19 In the course of reaching that ultimate conclusion of fact, the primary judge found that "Commissioner Middlebrook, AGM Sizeland and the prison officers present on the night ... all considered that use of the CS gas was the least hazardous option available, constituted the least degree of force which could be used in the circumstances, and carried the least risk of serious injury to Jake Roper and to staff".[14]

20 In its review of the decision of the assessing judge, the Court of Appeal relied on these findings of the primary judge as to the objective reasonableness of and necessity for the deployment of the CS gas and as to the contemporaneous belief of the officers of the Northern Territory who were responsible for its deployment in concluding that "it was not open to the assessing judge to find that the actions of the [Northern Territory] towards Roper constituted 'unreasonable or excessive force' other than in the general sense that the use of CS gas within the [Detention] Centre was prohibited by statute",[15] and that the officers honestly and reasonably believed not only that the deployment of the CS gas was lawful but also

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12 *LO v Northern Territory* (2017) 317 FLR 324 at 350-352 [154]-[165].

13 *LO v Northern Territory* (2017) 317 FLR 324 at 353 [166(e)].

14 *LO v Northern Territory* (2017) 317 FLR 324 at 349 [152].

15 *Northern Territory v Austral* [2025] NTCA 3 at [60]. See *Binsaris v Northern Territory* [2023] NTSC 79 at [96].

that the deployment of the CS gas was the safest method of dealing with the emergency situation which existed.[16]

21 The nub of the argument on behalf of the injured detainees in respect of the first ground of the appeals is that it was not permissible for the Court of Appeal to rely on these findings of the primary judge to draw these conclusions of fact because the findings were made on the assumption that the deployment of the CS gas was lawful. That assumption, it was argued, was inconsistent with the holding of four members of this Court in *Binsaris v Northern Territory* (Kiefel CJ and Keane J and Gordon and Edelman JJ) that the use of the CS gas was contrary to the criminal prohibition in s 6 of the *Weapons Control Act 2001* (NT).[17] What this Court has subsequently held to have been criminally prohibited, it was argued, can no longer be accepted to have been reasonable.

22 Rejecting that argument, we consider that the findings of the primary judge were available to be relied on by the Court of Appeal in the manner in which they were. To explain why, it is necessary to explain how the issue of whether or not deployment of the CS gas was "reasonable and necessary" arose before the primary judge. It is also necessary to explain how that issue related to the issue of whether or not the use of the CS gas was contrary to the criminal prohibition in s 6 of the *Weapons Control Act*. Lamentably, the explanations are not simple.

23 By its defence to each claim in battery, the Northern Territory pleaded that the deployment of the CS gas was in fact "reasonable and necessary" as a step towards establishing that the deployment of the CS gas was authorised by the *Youth Justice Act* either: as "necessary or convenient" to "maintain order and ensure the safe custody and protection of all persons" within the Detention Centre within the meaning of ss 151(3)(c) and 152(1); or as involving the "use [of] force that [was] reasonably necessary in the circumstances" to "maintain discipline" at the Detention Centre within the meaning of s 153(1) and (2).

24 At some stage before the conclusion of the hearing before the primary judge, the Northern Territory seems to have abandoned reliance on the second of those sources of authority, and the primary judge expressed scepticism as to its potential application.[18]

25 The issue of whether the use of the CS gas was contrary to the criminal prohibition in s 6 of the *Weapons Control Act* was not a preliminary and

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16 *Northern Territory v Austral* [2025] NTCA 3 at [60]-[61].

17 (2020) 270 CLR 549 at 559-560 [15]-[20], 585-586 [107]-[109].

18 *LO v Northern Territory* (2017) 317 FLR 324 at 346-347 [134]-[135].

freestanding issue. Rather, it was inextricably linked to the issue, which had been pleaded and which remained live at the conclusion of the hearing before the primary judge, as to whether the use of the CS gas was "necessary or convenient" to "maintain order and ensure the safe custody and protection of all persons" within the Detention Centre within the meaning of ss 151(3)(c) and 152(1) of the *Youth Justice Act*.

26 The link between the issues of criminal prohibition and statutory authority arose through the combination of s 12(2) of the *Weapons Control Act*, which relevantly provided that the criminal prohibition in s 6 had no application to a "[prison officer] acting in the course of his or her duties as [a prison officer]", and s 157(2) of the *Youth Justice Act*, which operated to produce the result that a prison officer called upon to assist in an emergency situation at a detention centre was taken to have been delegated the powers "necessary" to "maintain order and ensure the safe custody and protection of all persons" within the detention centre within the meaning of ss 151(3)(c) and 152(1) of the *Youth Justice Act*.

27 Whether the criminal prohibition in s 6 of the *Weapons Control Act* applied to the deployment of CS gas by Prison Officer Flavell, who was found to have been called upon to assist in an emergency situation at the Detention Centre, therefore turned on the answers to two questions: was Prison Officer Flavell "acting in the course of his ... duties as [a prison officer]" within the meaning of s 12(2) of the *Weapons Control Act*; and was the deployment of the CS gas "necessary" to "maintain order and ensure the safe custody and protection of all persons" within the Detention Centre within the meaning of ss 157(2), 151(3)(c) and 152(1) of the *Youth Justice Act*. The primary judge answered both of those questions in the affirmative, leading to the conclusion that the criminal prohibition in s 6 of the *Weapons Control Act* had no application.

28 The reasoning of Kiefel CJ and Keane J in *Binsaris v Northern Territory* to the contrary conclusion – that the criminal prohibition in s 6 of the *Weapons Control Act* applied to the deployment of the CS gas by Prison Officer Flavell – turned on their Honours giving a negative answer to the first of those questions. Their Honours held that, as a matter of statutory construction, a prison officer assisting in an emergency situation at a detention centre under ss 152(1) and 157(2) of the *Youth Justice Act* was not "acting in the course of his or her duties as [a prison officer]" within the meaning of s 12(2) of the *Weapons Control Act*.[19] The separate reasoning of Gordon and Edelman JJ took the same approach to the construction of s 12(2) of the *Weapons Control Act*.[20]

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19 *Binsaris v Northern Territory* (2020) 270 CLR 549 at 559-560 [14]-[17].

20 *Binsaris v Northern Territory* (2020) 270 CLR 549 at 585-586 [108].

29 There is therefore no logical inconsistency between the finding of the primary judge that the deployment of the CS gas was in fact reasonable and necessary, on the one hand, and the conclusion of four members of this Court in *Binsaris v Northern Territory* that the criminal prohibition in s 6 of the *Weapons Control Act* was not excluded on the proper construction of s 12(2) of the *Weapons Control Act*, on the other hand.

30 Nor can we see how, in finding that the deployment of the CS gas was in fact reasonable and necessary, the primary judge can be taken to have assumed that the deployment did not breach the criminal prohibition in s 6 of the *Weapons Control Act*.

31 Whether the criminal prohibition in s 6 of the *Weapons Control Act* had been breached, as we have already explained, turned on whether s 12(2) of the *Weapons Control Act* operated to exclude it. And whether s 12(2) of the *Weapons Control Act* operated to exclude s 6, as we have already explained, was a live and complex issue the resolution of which had been pleaded to turn in part on the question of whether deployment of the CS gas was in fact a reasonable and necessary course of action from the range of *practically* available courses of action. For the primary judge to have confined her attention to whether deployment of the CS gas was a reasonable and necessary course of action from the range of *legally* available courses of action would have begged that critical question. Nothing in the language the primary judge used or the structure of her Honour's reasons for judgment indicates that she did.

32 In short, whether or not deployment of the CS gas was reasonable and necessary to maintain order and ensure safety in the emergency situation that had arisen at the Detention Centre was put to and decided by the primary judge as an issue of fact. The unambiguous finding of the primary judge was that deployment of the CS gas was the least forceful and least hazardous means of bringing the emergency situation to an end from the range of courses of action which were practically available to the officers of the Northern Territory who had to deal with that situation. That finding was not based on any assumption that the deployment of the CS gas was lawful and was therefore not inconsistent with the conclusion of four members of this Court in *Binsaris v Northern Territory* that the deployment was prohibited by s 6 of the *Weapons Control Act*.

33 In relying on the finding of the primary judge that deployment of the CS gas was reasonable and necessary, and on related findings of the primary judge that the officers involved believed that deployment of the CS gas was reasonable and necessary, the Court of Appeal did not deviate from the faithful execution of the order made by this Court in *Binsaris v Northern Territory* that the matter be remitted for the assessment of damages.

Ground 2: lack of conscious wrongdoing

34 There is no suggestion that the Court of Appeal misstated the principles governing the award of exemplary damages. We cannot accept that, in holding that the "conduct and states of mind of the individual officers" did not justify the making of an award of exemplary damages in the circumstances,[21] the Court of Appeal misapplied those principles by confining its attention to the lack of conscious wrongdoing on the part of the officers involved in the deployment of the CS gas to the exclusion of the objective circumstances as a whole.

35 Having concluded that the evidence did not reveal "conscious wrongdoing in contumelious disregard" of the rights of the injured detainees, the Court of Appeal acknowledged in the very next sentence that "there are some circumstances in which an award of exemplary damages will be appropriate even if the officer was not 'conscious' of his or her wrongdoing".[22] Going on to explain why, "[e]ven allowing for the breadth of the relevant test", an award of exemplary damages was not appropriate in the objective circumstances of the case before it, the Court of Appeal highlighted a number of aspects of those circumstances, the most prominent of which was that the officers "adopted the means of dealing with the situation which was the safest available in the circumstances".[23]

36 In so doing, as we have explained, the Court of Appeal acted consistently with the critical finding of the primary judge to the effect that the deployment of the CS gas was the least forceful and least hazardous means of bringing the emergency situation to an end from the range of practically available courses of action. Other aspects of the objective circumstances which the Court of Appeal highlighted were: that "[t]here was no evidence that CS gas was more harmful to juveniles of the ages of the [detainees] than to adults"; that "[t]he gas was deployed in a controlled and graduated manner to ensure that only the minimum amount of gas necessary was used"; and that "[o]nce Roper was subdued, the [detainees] were removed from their cells and decontaminated".[24]

37 Once again, we cannot accept that the Court of Appeal made the error of principle sought to be attributed to it in the ground of appeal.

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21 *Northern Territory v Austral* [2025] NTCA 3 at [74].

22 *Northern Territory v Austral* [2025] NTCA 3 at [72].

23 *Northern Territory v Austral* [2025] NTCA 3 at [73].

24 *Northern Territory v Austral* [2025] NTCA 3 at [73].

Ground 3: direct liability

38 The final ground of appeal is focused on two paragraphs in the reasons for judgment of the Court of Appeal,[25] which appear immediately after the statement of conclusion that the circumstances did not justify the making of an award of exemplary damages and that the assessing judge had erred in concluding otherwise.[26] The first of the two paragraphs, commencing, "[i]n addition", introduced an additional criticism of the reasoning of the assessing judge that is summed up in the conclusion stated in the last sentence of the second of the two paragraphs that "[a]s a matter of pleadings and procedural fairness, it was not open to the assessing judge to award exemplary damages on a direct liability basis as opposed to a vicarious liability basis".

39 Despite the language used in these paragraphs, it is apparent that the Court of Appeal was not denying that the claims of the injured detainees were in substance claims of direct liability against the Northern Territory in the sense that the claims were based on attributing to the Northern Territory the conduct of the officers concerned. It is also apparent that the Court of Appeal was not denying that exemplary damages can be awarded on that juristic basis. What the Court of Appeal appears to have been saying was that the assessing judge had gone beyond the case that had been put on behalf of the injured detainees insofar as the assessing judge had taken account of certain systemic acts and omissions on the part of the Northern Territory that went beyond the conduct of the officers attributed to it.[27]

40 Whether or not the Court of Appeal's additional criticism of the assessing judge was warranted, two things appear to be plain. The first is that the Court of Appeal did not make the error of principle sought to be attributed to it in the ground as formulated (and reformulated in the course of argument); it did not hold "that it was not open to the assessing judge to award exemplary damages on a direct liability basis". The second is that the Court of Appeal's additional criticism of the assessing judge was immaterial to the conclusion it had already reached, namely that the objective circumstances did not justify the making of an award of exemplary damages.

Conclusion

41 We would dismiss each appeal with costs.

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25 *Northern Territory v Austral* [2025] NTCA 3 at [75]-[76].

26 *Northern Territory v Austral* [2025] NTCA 3 at [74].

27 See *Binsaris v Northern Territory* [2023] NTSC 79 at [77], [93].

GORDON, EDELMAN, GLEESON, JAGOT AND BEECH-JONES JJ.

Introduction

42 In the early evening of 21 August 2014, there was a disturbance involving some of the detainees in the Behaviour Management Unit ("the BMU") of the Don Dale Youth Detention Centre ("Don Dale") in the Northern Territory. One of the detainees, Jake Roper, broke out of his cell in the BMU and began to damage property, including breaking windows. He was agitated and aggressive. The other detainees, including the appellants, remained locked in their cells and were not involved in Jake Roper's conduct after he broke out of his cell, but were mere bystanders to the subsequent events. Attempts to calm and subdue Jake Roper failed, including a plan to take a police dog into the BMU to distract Jake Roper, who was believed by one officer to be afraid of the dog, to enable him to be subdued while distracted. Shortly after 8.30pm, following a request by the Director of Correctional Services (referred to as "Commissioner Middlebrook" by the courts below), officers from the Immediate Action Team ("the IAT") at Berrimah prison (an adult prison) arrived. They had masks, helmets, protective vests, shields, batons, and CS gas (o-chlorobenzylidene malononitrile), a type of tear gas, which was able to be dispersed by a device known as a CS fogger.

43 The effects of CS gas were described in a training manual for IAT officers. CS gas causes "extreme burning of the eyes, irritation of the nose and throat, tightness of the chest, difficulty in breathing, possible fear of suffocation, dizziness, vertigo and nausea". If used in large enough concentrations, CS gas "can cause serious injury or death", especially in a confined space. The cells within the BMU were confined spaces. Nevertheless, Commissioner Middlebrook authorised the spraying of CS gas into the BMU to subdue Jake Roper (and therefore into the cells in which the appellants were locked). When assessing how to deal with Jake Roper, who had attempted to climb through a broken window out of the BMU but was forced back using a broom by officers, one of the officers said "let the fucker come through because while he's coming through, he'll be off balance. I'll pulverise the little fucker. Oh shit, you're recording." Another officer said "[g]o grab the fucking gas, we'll gas him through fucking, get Jimmy to gas him through here".[28] When the handler for the police dog asked the Commissioner whether the IAT would "gas the lot of them", the Commissioner responded: "I don't mind [sic] how

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28 *Binsaris v Northern Territory* [2023] NTSC 79 at [85].

much gas you use".[29] The CS gas was sprayed ten times into the BMU. When Jake Roper reacted to the sprays of CS gas, some officers laughed and said "[t]hat'll learn you" and "[n]ow he's shitting himself".[30]

44 The officer's reference to "gas[sing] the *lot of them*" included gassing the four appellants, who were locked in their cells in the BMU. They received no warning that CS gas would be used. They were exposed to the CS gas for between three and six and a half minutes.[31] Two of the appellants, Leroy O'Shea and Ethan Austral, were asthmatic. If they had been adults held in prison, applicable protocols would have required their health status to have been checked before the use of CS gas on them. Leroy O'Shea said that he thought he was going to die and that the "worst thing was not knowing how long it was going to last and how long we were going to have to sit in there and burn".[32] Another of the appellants, Keiran Webster, who was in the same cell, said that it "was so hard to breathe that Leroy and I thought we were going to die".[33] After Jake Roper had been subdued, the appellants were handcuffed behind their backs. They were taken from their cells and sprayed with a hose while lying on their stomachs. After being seen, only briefly at 10.00pm, by a nurse they were transferred, in handcuffs, to Berrimah prison.

45 Despite some ambiguity throughout these proceedings due to references to the liability of the Northern Territory as "vicarious", the claims by the appellants were not based upon vicarious liability – "liability based on the attribution of the liability of another"[34] – but were concerned with liability of the Northern Territory based upon agency principles of attribution of the mental states and actions of the

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29 *Binsaris v Northern Territory* [2023] NTSC 79 at [87]. Note: Kelly J recorded Commissioner Middlebrook as saying "I don't care how much gas you use": see *LO v Northern Territory* (2017) 317 FLR 324 at 338 [86] fn 13.

30 *Binsaris v Northern Territory* [2023] NTSC 79 at [86].

31 *Binsaris v Northern Territory* [2023] NTSC 79 at [102]-[103].

32 *Binsaris v Northern Territory* [2023] NTSC 79 at [20]. See also at [103].

33 *Binsaris v Northern Territory* [2023] NTSC 79 at [28], [102], [105].

34 *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1361 [44]; 419 ALR 552 at 564.

relevant officers to the Northern Territory.[35] There was no dispute in this Court that all mental states and actions of the relevant officers could be attributed to the Northern Territory. In these appeals, therefore, the mental states and actions of the officers described above were the mental states and actions of the Northern Territory and the liability of the Northern Territory was a liability for its own acts.

46 The central issue in these appeals is whether exemplary damages should be awarded against the Northern Territory for the tort of battery as a result of each appellant being intentionally and unlawfully exposed to the CS gas. The answer to that question requires consideration of all of the circumstances (including before and after the Northern Territory deployed CS gas upon the appellants as minors in and under the care, control, and custody of the Northern Territory in a youth detention centre)[36] surrounding the commission of the torts by the Northern Territory. In the assessment of all of those circumstances it has been the case for more than 250 years that the belief by a person in the lawfulness of their conduct, even if the lawful belief is based on a "constant practice of the office", is not sufficient to deny exemplary damages where that conduct calls for moral retribution, deterrence, and denunciation.[37] That is particularly the case where the person is a body politic acting by agents of the Executive Government.[38] This is a case where the conduct attributed to the body politic calls for an award of exemplary damages as moral retribution and denunciation and to deter against its repetition.

The proceedings and the issues concerning exemplary damages

47 The appellants brought claims against the Northern Territory, including for compensatory (general and aggravated) damages, interest on general damages and exemplary damages, for the tort of battery as a result of being intentionally and unlawfully exposed to the CS gas. The Supreme Court of the Northern Territory (Kelly J)[39] relevantly dismissed the appellants' claims for damages against the

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35 *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349 at 1358 [31]; 419 ALR 552 at 560, citing *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165 at 185-186 [50], 187-189 [55]-[58] and *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 at 380.

36 See *Lamb v Cotogno* (1987) 164 CLR 1 at 12-13.

37 *Wilkes v Wood* (1763) Lofft 1 at 19 [98 ER 489 at 499].

38 *New South Wales v Ibbett* (2006) 229 CLR 638 at 648-649 [38]-[39].

39 *LO v Northern Territory* (2017) 317 FLR 324.

Northern Territory, concluding that the use of the CS gas was authorised by law, thereby providing to the Northern Territory a defence to the appellants' claims for damages for the tort of battery. The Court of Appeal of the Supreme Court of the Northern Territory (Southwood J, Riley and Graham A-JJ)[40] dismissed the appellants' appeals.

48 In 2020, a majority of this Court in *Binsaris v Northern Territory* ("*Binsaris HCA*")[41] allowed an appeal by each of the four appellants, holding that the spraying of CS gas into the BMU at Don Dale involved the use of a prohibited weapon in contravention of the *Weapons Control Act 2001* (NT) and was not otherwise authorised by any legislation, including the *Youth Justice Act 2005* (NT). The spraying of the CS gas thereby constituted an unlawful battery of the appellants. In consequence, this Court set aside the relevant orders of the courts below. This Court further ordered that the "matter be remitted to another judge of the Supreme Court of the Northern Territory for assessment of damages".[42]

49 Another judge of the Supreme Court, Blokland J, heard and decided the remitted matter. Blokland J awarded each appellant general damages of between $20,000 and $30,000, aggravated damages (in some cases) of between $15,000 and $20,000, and exemplary damages of $200,000 for each appellant.[43] Blokland J also refused to award interest on the general damages under s 84 of the *Supreme Court Act 1979* (NT) on the basis that the appellants, by reason of the "reasonably significant" award of exemplary damages, would "not be out of pocket" if interest on the general damages was not awarded.[44]

50 The Court of Appeal (Grant CJ, Reeves and Burns JJ) allowed the Northern Territory's appeals against, and therefore set aside, Blokland J's awards of exemplary damages, and allowed the appellants' cross-appeals against, and therefore set aside, Blokland J's refusal to award interest on the general damages and awarded interest under s 84 of the *Supreme Court Act* at the rate of 4% per annum for the period from 21 August 2014 (the date that the tort of battery was

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40 *JB v Northern Territory* (2019) 170 NTR 11.

41 (2020) 270 CLR 549.

42 *Binsaris HCA* (2020) 270 CLR 549 at 560 [21], 587 [112].

43 *Binsaris v Northern Territory* [2023] NTSC 79 at [119].

44 *Binsaris v Northern Territory* [2023] NTSC 79 at [116].

committed against each appellant) to 1 September 2023 (the date of Blokland J's judgment).[45]

51 Pursuant to grants of special leave to appeal, the appellants contend that the Court of Appeal erred on three grounds in that it: (1) overturned Blokland J's assessment of exemplary damages on a basis that was inconsistent with this Court's judgment in *Binsaris HCA*, and thus failed to execute the judgment of this Court in accordance with s 37 of the *Judiciary Act 1903* (Cth); (2) held that the relevant state of mind inquiry for exemplary damages is whether the individuals who authorised the unlawful conduct that founded the battery claim knew that their conduct was unlawful; and (3) held that it was not open to Blokland J to award exemplary damages on a direct liability basis. For the reasons below, the appeals should be allowed on all three grounds.

52 If the appeals to this Court were allowed, as we have concluded that they should be, and an award of exemplary damages reinstated, the Northern Territory sought special leave to cross-appeal on two grounds. The first ground was that the award of $200,000 to each appellant (to a total of $800,000) for exemplary damages was manifestly excessive. The second ground was that Blokland J's substantial award of exemplary damages meant that "it was within the judicial discretion to decline to award interest [on general damages] because to do so was unnecessary to restore [each] appellant to the position in which he would have been but for the [Northern Territory's] tortious act".

53 The first of those grounds raises an important issue of legal principle suitable for the grant of special leave, concerning the principles limiting the award of exemplary damages. The second ground concerning the award of interest on general damages is a confined issue which was treated by Blokland J as tied to the quantification of exemplary damages. It therefore arises incidentally to disposing of the first ground of the cross-appeals. As the appellants' appeals must be allowed, it is appropriate that special leave to cross-appeal be granted on both grounds. As will also be explained, the award of $200,000 to each appellant was manifestly excessive. Exemplary damages of $50,000 should be awarded to each appellant. The Court of Appeal's award of interest on general damages should remain.

Appeal ground (1) – the consequences of *Binsaris HCA*

54 The Court of Appeal overturned Blokland J's assessment of exemplary damages on a basis that it was contrary to undisturbed findings of Kelly J that the

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45 *Northern Territory v Austral* [2025] NTCA 3 at [103].

use of the CS gas was, relevantly, "reasonably necessary". The appellants contended that the reasoning of the Court of Appeal was inconsistent with this Court's judgment in *Binsaris HCA*, and thus that the Court of Appeal failed to execute the judgment of this Court in accordance with s 37 of the *Judiciary Act*. The appellants' contentions must be accepted.

Principles

55 Under s 37 of the *Judiciary Act* this Court may remit a cause to the court from which an appeal was brought for the execution of the judgment of the High Court. Upon remitter, it is "the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment". It was common ground that by s 37 of the *Judiciary Act* it was the duty of Blokland J and of the Court of Appeal in the appeals from the orders of Blokland J to execute this Court's judgment in *Binsaris HCA*. Those courts had no power to make an order inconsistent with that judgment.[46] An obligation to the same effect existed irrespective of s 37 because an assessment of damages is a part of the same matter (the claims for damages) as the decision on liability. The common law doctrine of finality, which embodies the "need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct",[47] applied both to this Court's holding in *Binsaris HCA* that the battery of each appellant by subjecting him to CS gas was not authorised by law and to those findings of Kelly J not inconsistent with or otherwise undermined by this Court's judgment.

Application of s 37 of the Judiciary Act and the doctrine of finality to this matter

56 As explained, this Court held by majority in *Binsaris HCA* that no legislation authorised the use of the CS fogger to spray CS gas into the BMU and that the use of the CS fogger to do so on 21 August 2014 while the appellants were detained in cells in the BMU was prohibited by s 6 of the *Weapons Control Act* (a provision creating a criminal offence) and constituted the commission of the tort of battery against the appellants.

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46 See, eg, *Peacock v D M Osborne & Co* (1907) 4 CLR 1564 at 1567-1568; *R v Weiss [No 2]* (2006) 164 A Crim R 454 at 472 [99]-[102]; *R v Carroll* (2010) 77 NSWLR 45 at 52 [27]; *Investments (WA) Pty Ltd v City of Swan* (2012) 190 LGERA 205 at 212-213 [35]; *Harvard Nominees Pty Ltd v Tiller [No 4]* (2022) 403 ALR 498 at 514-515 [45]-[49]; *Harvard Nominees Pty Ltd v Nicoletti* [2022] FCAFC 179.

47 *Rogers v The Queen* (1994) 181 CLR 251 at 273.

57 Kiefel CJ and Keane J held that the deployment of the CS fogger in Don Dale was unlawful.[48] Their Honours agreed with the orders proposed by Gordon and Edelman JJ.[49] Gordon and Edelman JJ reached the same conclusion that the deployment of the CS fogger in Don Dale was unlawful, recording that "[t]here were no findings in the courts below, nor was it contended in this Court, that when the CS gas was used the appellants or Jake Roper were committing an offence that justified its use. Nor was there any finding that the appellants, as distinct from Jake Roper, were participating in a breach of the peace at the time of the use of the CS gas. There was, therefore, no evidence that a police officer could have lawfully used CS gas in the circumstances."[50] Gordon and Edelman JJ said that "there should be orders allowing the appeals ... and judgment for the appellants for damages to be assessed in respect of their claim for battery by being exposed to CS gas intentionally and deliberately discharged by a prison officer at the Detention Centre on 21 August 2014".[51] Gageler J agreed that the appellants' appeals should be allowed and the orders proposed by Gordon and Edelman JJ made albeit on the different basis that, although the use of the CS fogger to spray CS gas into the BMU was lawful to restrain a breach of the peace by Jake Roper, that fact did not provide the Northern Territory with a defence to the claims of battery by the appellants, who were mere "bystanders" to the breach of the peace committed by Jake Roper. Gageler J imposed liability on the basis of the principle that "a police officer taking intentional action which involves a calculated choice to do an act which it is known will cause harm to a bystander in order to avoid a risk of greater harm to the police officer or to someone else" has no immunity from liability if the harm so inflicted is tortious.[52]

58 It follows from the reasoning of this Court in *Binsaris HCA* that the Northern Territory had no defence of lawful authority to the appellants' claims for damages for the tort of battery. This is why the order for remittal from this Court was "for assessment of damages" and not for determination of the commission of the tort of battery. Because Kelly J had concluded (wrongly) that there was lawful authority for the commission of what would otherwise be the tort of battery, Kelly J

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48 *Binsaris HCA* (2020) 270 CLR 549 at 560 [20].

49 *Binsaris HCA* (2020) 270 CLR 549 at 560 [21].

50 *Binsaris HCA* (2020) 270 CLR 549 at 584-585 [105].

51 *Binsaris HCA* (2020) 270 CLR 549 at 571 [53].

52 *Binsaris HCA* (2020) 270 CLR 549 at 566 [42], 568 [46], 569 [49].

had not considered the assessment of damages for that tortious conduct. But Kelly J had made factual findings about the conduct and the circumstances in which it occurred relevant to the assessment of damages for the commission of the tort. The question then is, which of those factual findings stand and which are vitiated by her Honour's wrong legal conclusion that there was lawful authority for the commission of what would otherwise be the tort of battery?

59 The Northern Territory submitted that all of Kelly J's factual findings remained undisturbed by this Court's decision in *Binsaris HCA* because the appeals from Kelly J were confined to a question of law concerning the Northern Territory's defence of lawful authority to the appellants' claims and did not include an appeal against any factual finding Kelly J made. That proposition, however, fails to confront the reality that many factual findings are made within a context the parameters and substance of which are defined by a proper construction of relevant statutory provisions and a proper understanding and application of relevant legal principles.

60 In the context of administrative decision-making, Gummow and Hayne JJ referred to the "notorious difficulty of disentangling findings of fact from conclusions about applicable legal principle".[53] As subsequently observed by Basten JA, "[w]hile [Gummow and Hayne JJ] were at pains to distinguish the repeat of an administrative decision-making process from a further judicial hearing in adversarial litigation, there is nevertheless force in the statement of principles, as applied to adversarial litigation".[54] In adversarial litigation, while the parties define the issues, issues of fact often arise for decision within a particular legal framework dependent on the correct construction of statutory provisions (as in the present case) or the correct understanding and application of legal principles.

Kelly J's unaffected findings

61 Kelly J made several findings unaffected by this Court's decision in *Binsaris HCA* about: Don Dale as a youth detention centre, including the BMU; the personal circumstances of each of the appellants; and the events on 21 August 2014.

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53 *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 541 [74].

54 *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2009) 168 LGERA 1 at 13 [40].

Youth detention centre

62 Don Dale was a youth detention centre under the *Youth Justice Act*.[55] As Gordon and Edelman JJ described in *Binsaris HCA*, such a detention centre is not a prison but is for the detention of youth as young as ten who have contravened the law.[56] The "regime of the *Youth Justice Act* is calibrated to deal with youth offenders".[57] The objects of the *Youth Justice Act* include, in s 3(e), "ensur[ing] that a youth who has committed an offence is given appropriate treatment, punishment and rehabilitation". The general principles set out in s 4 of the Act include that: "(d) a youth must be dealt with in the criminal law system in a manner consistent with his or her age and maturity and have the same rights and protection before the law as would an adult in similar circumstances"; "(f) a youth who commits an offence should be dealt with in a way that allows him or her to be re-integrated into the community"; and "(g) a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community".[58]

63 As Gordon and Edelman JJ further explained in *Binsaris HCA*: (i) the Minister may approve an establishment to be a youth detention centre; and (ii) a "detainee" is defined as a youth lawfully detained in a detention centre, being a youth who has committed an offence and is ordered to serve a term of detention or who is alleged to have committed an offence and is not admitted to bail.[59] Further: (iii) the Director of Correctional Services must appoint "the superintendent for a detention centre"; and (iv) the superintendent of the detention centre "is responsible, as far as practicable, for the physical, psychological and emotional welfare of detainees in the detention centre", "must maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise", and "must maintain discipline at the detention centre" and in so doing may "use the force that is reasonably necessary in the circumstances". Reasonably necessary force does not include,

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55 The relevant version of the *Youth Justice Act* is that in force on 21 August 2014.

56 (2020) 270 CLR 549 at 569 [51], 570 [53].

57 *Binsaris HCA* (2020) 270 CLR 549 at 575 [77].

58 *Binsaris HCA* (2020) 270 CLR 549 at 575-576 [75]-[78].

59 (2020) 270 CLR 549 at 577 [80], referring to *Youth Justice Act*, ss 5(1), 24, 83(1)(l), 148.

amongst other things, "(a) striking, shaking or other form of physical violence"; or "(c) compulsion to remain in a constrained or fatiguing position". As their Honours put it, the statutory exclusions from the concept of "force that is reasonably necessary in the circumstances" "show that corporal punishment is not permitted", a fact their Honours described as "unsurprising given that the [*Youth Justice Act*] deals with the detention of youth, some as young as ten, and given the objects and general principles for the administration of the Act".[60]

64 As Gordon and Edelman JJ also explained in *Binsaris HCA*, s 157(2) of the *Youth Justice Act* "provide[d] a mechanism by which the superintendent, in an emergency, may use additional skilled resources, namely police and prison officers, to fulfil the superintendent's function of maintaining order and ensuring the safe custody and protection of all persons within the detention centre".[61]

The BMU

65 The BMU in Don Dale contained cells. Kelly J found that: (i) "[c]onditions in the BMU were harsh"; (ii) the toilet facilities were "unhygienic" – there "was a toilet in each cell which gave no real privacy when the cell was shared, and there was no running water for washing hands or for drinking"; (iii) the cells had no windows; (iv) there was no natural light in the BMU other than a glass panel above a locked door in the exercise yard outside the cells; (v) when "two detainees shared a cell, one slept on a mattress on a raised concrete slab and the other slept on a mattress on the floor"; (vi) meals had to be eaten in cells and drinking water brought to detainees in their cells; (vii) detainees were allowed out of their cells for one hour each day to shower, exercise and use the telephone; (viii) the BMU was not air-conditioned and was hot; and (ix) the detainees had no access to any form of entertainment while in their cells.[62] Kelly J described the conditions in the BMU overall as "extreme".[63] Kelly J said that "[o]ne can readily understand the

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60 *Binsaris HCA* (2020) 270 CLR 549 at 577-578 [81]-[82] (emphasis removed), referring to *Youth Justice Act*, ss 5(1), 151(1), (2), (3)(c), 153(1)-(3).

61 (2020) 270 CLR 549 at 579 [86].

62 *LO v Northern Territory* (2017) 317 FLR 324 at 329-330 [15]-[20].

63 *LO v Northern Territory* (2017) 317 FLR 324 at 350-351 [157].

frustration of the [appellants] at being kept in such conditions, especially not knowing how long they were to be kept there".[64]

66 Commissioner Middlebrook considered the conditions in the BMU to be "inappropriate". However, there was no alternative secure facility to accommodate the appellants in the BMU, each of whom had previously attempted to escape Don Dale.[65] Commissioner Middlebrook "commented that there had been a lack of investment in youth justice in the Northern Territory for years; that this wasn't a problem that had just arisen in 2014, it had been festering for a long, long time, and successive governments hadn't really taken responsibility for the situation".[66] Commissioner Middlebrook also gave evidence that Don Dale was "really beyond its life fit for purpose"[67] and commented on the "poor quality" of training of youth justice officers compared with prison officers.[68]

The appellants

67 On 21 August 2014, Ethan Austral had just turned 16. He shared a cell in the BMU with Josiah Binsaris, who was aged 15. Leroy O'Shea, aged 17, was held in another cell in the BMU with Keiran Webster, aged 15. Jake Roper was in a separate cell in the BMU, as was another detainee.[69]

68 The appellants each had a lengthy history of youth crime and had engaged in extremely problematic behaviours while detained in Don Dale, including escaping on 2 August 2014 before being recaptured.[70] Despite it not being fit for purpose, the appellants were returned to Don Dale and were placed in the "inappropriate", "harsh" and "extreme" conditions of the BMU because there was no secure alternative available. Neither the appellants nor the Northern Territory

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64 *LO v Northern Territory* (2017) 317 FLR 324 at 331 [27].

65 *LO v Northern Territory* (2017) 317 FLR 324 at 330 [21].

66 *LO v Northern Territory* (2017) 317 FLR 324 at 330 [22].

67 *LO v Northern Territory* (2017) 317 FLR 324 at 337 [77].

68 *LO v Northern Territory* (2017) 317 FLR 324 at 330 [22].

69 *LO v Northern Territory* (2017) 317 FLR 324 at 326 [2], 327 [6], 328 [8], [10], 328-329 [12], 334 [59].

70 *LO v Northern Territory* (2017) 317 FLR 324 at 326-328 [4]-[11], 329 [13].

knew how long the appellants would have to be held in the BMU before the proposed longer-term secure alternative in part of Berrimah prison would become available.[71]

69 Ethan Austral and Leroy O'Shea both suffered from asthma.[72]

21 August 2014

70 Kelly J doubted the credibility of the appellants' evidence[73] in that each had "a motive to exaggerate the things they say were done to them and to minimise their own misbehaviour", albeit that Leroy O'Shea and Keiran Webster did not "misbehave[] in any way" during the night of 21 August 2014.[74] That said, Kelly J accepted that the appellants' evidence "as to the broad sweep of events did not differ in any substantial respect" from that of the officers who gave evidence, at least to the time at which the CS gas was sprayed into the BMU.[75]

71 Sometime during 21 August 2014 Jake Roper, Ethan Austral and Josiah Binsaris covered up the CCTV cameras in their cells with toilet paper, started kicking the doors and yelling out obscenities, broke their lights and removed the metal brackets for use as improvised weapons. Ethan Austral and Josiah Binsaris smashed a hole in the metal mesh on their cell door, making a hole about the size of a soccer ball. They used the metal bracket from their broken light to chip bits of render from the wall and throw them at staff entering the BMU.[76] At some point Ethan Austral and Josiah Binsaris ceased their misconduct.

72 Jake Roper also smashed a hole in the metal mesh on his door. He was able to put his hand through the hole, opened his door and got out into the exercise yard – a narrow room or wide corridor outside the cells. He then yelled out, ran around and used the metal bracket from his light to smash the window between the BMU and the admissions area, climbed through the broken window and smashed

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71 *LO v Northern Territory* (2017) 317 FLR 324 at 330 [21], 330-331 [24], 331 [27].

72 *LO v Northern Territory* (2017) 317 FLR 324 at 348 [142].

73 Noting that Josiah Binsaris did not give evidence.

74 *LO v Northern Territory* (2017) 317 FLR 324 at 333 [44].

75 *LO v Northern Territory* (2017) 317 FLR 324 at 340 [94].

76 *LO v Northern Territory* (2017) 317 FLR 324 at 334 [60]-[61].

a computer. He took a fire extinguisher and walkie talkie from the admissions area back into the corridor, broke all the available windows in the BMU and used the fire extinguisher to try to break the locks on the doors. He threw things through the broken windows.[77]

73 Keiran Webster and Leroy O'Shea did not take part in the disturbance at any point. At all times all detainees in the BMU other than Jake Roper remained locked in their cells until removed by officers after the CS gas was deployed.[78]

74 Having been notified of the disturbances at the BMU by the superintendent of Don Dale, Superintendent Caldwell, the Assistant General Manager of Don Dale ("AGM"), James Sizeland, arrived at about 8.00pm. He tried to see into the BMU but Jake Roper (who by this time had escaped from his cell) was throwing and poking things through the windows and it was too dangerous for AGM Sizeland to raise his head to the openings to get a better view of what was happening. AGM Sizeland saw a lot of glass on the floor near the entry to the BMU and tried to remove it using a mattress to protect himself from projectiles. When Jake Roper saw AGM Sizeland he "went wild" and threatened to stab him, using obscene language. AGM Sizeland withdrew and asked Youth Justice Officer Kelleher to speak to Jake Roper to try to calm him down. Jake Roper kept "yelling abuse, throwing objects around the BMU and hitting the doors with the fire extinguisher". Youth Justice Officer Kelleher tried for some time to calm Jake Roper down without success. AGM Sizeland instructed other youth justice officers to go to each potential escape route from the BMU. Jake Roper used some bedding to try to climb out of the storeroom window and one of the youth justice officers used a broom to push him back into the BMU.[79]

75 Superintendent Caldwell had also called Commissioner Middlebrook about the disturbance. Commissioner Middlebrook called the acting general manager of Berrimah prison and requested that an IAT and a dog handler with a dog be sent to Don Dale. The IAT sent to Don Dale, consisting of three prison officers, were equipped with masks, helmets, protective vests, shields and batons and aerosol canisters of CS gas. AGM Sizeland asked the IAT to remove the broken glass from the corridor of the BMU but Jake Roper directed the fire extinguisher nozzle

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77 *LO v Northern Territory* (2017) 317 FLR 324 at 335 [63]-[64], [66].

78 *LO v Northern Territory* (2017) 317 FLR 324 at 341 [101].

79 *LO v Northern Territory* (2017) 317 FLR 324 at 335-336 [65]-[73].

through the broken window and discharged the dry powder extinguisher at the IAT officers.

76 When Commissioner Middlebrook arrived at the BMU, he could hear the detainees kicking and banging on their doors and yelling out. He considered the situation to be critical because if substantial damage had been done to Don Dale it could have rendered the facility inoperable and he did not have anywhere to relocate the 30 or so detainees and house them within a short period of time. He decided that "he had to bring the situation to a close quickly".[80]

77 Commissioner Middlebrook suggested taking the dog into the BMU via one entrance to try to distract Jake Roper, hoping he would retreat to the other end of the room (there being some evidence that he was afraid of the dog) so that the IAT officers could safely go into the room through the door from the corridor and grab hold of him. This did not work, however, as the lock on the door of the relevant entrance was broken and the IAT officers could not open the door. Commissioner Middlebrook did not consider that the IAT officers could safely go into the room to tackle Jake Roper unless he was first distracted by the dog. AGM Sizeland and Commissioner Middlebrook both considered that trying to talk to Jake Roper was not working as he was not listening, was not talking to the officers and threw objects at them each time they opened the door to the BMU. AGM Sizeland suggested to Commissioner Middlebrook that they consider using CS gas. Commissioner Middlebrook asked the IAT officers whether they had CS gas and what form of gas they had. The IAT officers told Commissioner Middlebrook that they had aerosols. The video footage at this time records the prison officer who was the dog handler asking if it was proposed to "gas the lot of them", to which Commissioner Middlebrook responded "I don't care how much gas you use". Commissioner Middlebrook agreed in evidence that this "seems like a very callous comment".[81] Commissioner Middlebrook authorised the officers to deploy the CS gas into the BMU.[82]

78 AGM Sizeland directed a youth justice officer to stand by at the basketball court with a hose to wash down the detainees after they had been removed from the BMU, as he knew they would need to be placed in fresh air and decontaminated with water to remove the residue of the CS gas from their skin. He also organised

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80 *LO v Northern Territory* (2017) 317 FLR 324 at 336-337 [74]-[79].

81 *LO v Northern Territory* (2017) 317 FLR 324 at 338 [86] fn 13.

82 *LO v Northern Territory* (2017) 317 FLR 324 at 338-339 [83]-[88].

the officers into teams to go into the BMU to remove the detainees as soon as Jake Roper had been subdued. AGM Sizeland called out to Jake Roper, "[g]et on the ground and surrender or gas will be deployed". Jake Roper did not surrender and forcefully pushed a large metal light fitting through the window of the door. One of the prison officers in the IAT then read out this text: "[o]n the orders of the Officer in Charge of the Prison[83] and the powers invested in me, you are ordered to stop your actions and do as I instruct you immediately. If you fail to do so, chemical agents and physical control will be used to restore the security and good order of the Prison." Jake Roper did not comply and yelled out "[c]ome and get me dog cunts". One of the prison officers in the IAT directed three short bursts of gas into the BMU through a broken window. Jake Roper continued swearing and moving around in an agitated manner. After a short wait, the prison officer directed another two-second burst of gas into the BMU. The prison officer waited for approximately one minute to see if Jake Roper would comply, but he could hear him still hitting objects against the wall and yelling abuse. The prison officer discharged about six further "extremely short" bursts of gas into the BMU. Jake Roper came within sight of the officers behind the door and lay on the ground. Two prison officers entered the BMU and, wearing gas masks, handcuffed Jake Roper and took him to be decontaminated. After Jake Roper was secured, AGM Sizeland entered the BMU without a gas mask and unlocked the cells and officers removed the other detainees, including the appellants, from their cells to be decontaminated.[84]

Kelly J's potentially affected findings

79 Kelly J's potentially affected findings were made in the course of her Honour describing the relevant events and deciding if the appellants were entitled to damages for tortious battery by reason of an officer of the Northern Territory spraying them with CS gas. In that context, Kelly J recorded that the Northern Territory "admits that the [appellants] were exposed to the CS gas but says that it was reasonable and necessary in the circumstances".[85] While not identified as such in Kelly J's judgment, it is apparent from the pleadings that the Northern Territory contended that the actions it took through its servants or agents were "reasonable

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83 As noted, Don Dale was a youth detention centre, not a prison.

84 *LO v Northern Territory* (2017) 317 FLR 324 at 340-341 [92]-[101].

85 *LO v Northern Territory* (2017) 317 FLR 324 at 342 [108].

and necessary" and therefore authorised by various statutory provisions including, relevantly, s 153 of the *Youth Justice Act*, which provides in part that:

> "(1) The superintendent of a detention centre must maintain discipline at the detention centre.
>
> (2) For subsection (1), the superintendent may use the force that is reasonably necessary in the circumstances.
>
> (3) Reasonably necessary force does not include:
>
> (a) striking, shaking or other form of physical violence; or
>
> (b) enforced dosing with a medicine, drug or other substance; or
>
> (c) compulsion to remain in a constrained or fatiguing position; or
>
> (d) handcuffing or use of similar devices to restrain normal movement.
>
> (4) However, if the superintendent is of the opinion that:
>
> (a) an emergency situation exists; and
>
> (b) a detainee should be temporarily restrained to protect the detainee from self-harm or to protect the safety of another person,
>
> the superintendent may use handcuffs or a similar device to restrain the detainee until the superintendent is satisfied the emergency situation no longer exists."

80 As there is no common law defence to the tort of battery of mere reasonable necessity to prevent harm,[86] the Northern Territory's contention is to be understood to mean that it had been conferred by legislation with the right to commit what would otherwise be the tort of battery including, relevantly, by s 153(1) and (2) of

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86 eg, *Department of Immigration, Local Government and Ethnic Affairs v Mok* (unreported, Supreme Court of New South Wales, 30 September 1992).

the *Youth Justice Act*, that right constituting a complete defence to the appellants' claims.

81 In upholding that defence, and concluding (wrongly) that there was lawful authority for the Northern Territory to use CS gas on the appellants, Kelly J held that: (i) the use of the CS fogger by the prison officer was not an offence under the *Weapons Control Act*;[87] and (ii) "the use of the CS gas was reasonable and necessary, there being no other option reasonably available involving less force and less risk to the safety of detainees and staff".[88] Both these findings were relevant only for the purpose of determining if the Northern Territory's defence of lawful authority should be upheld.

82 The problem for these findings is that they, and the evidence on which they were based, all assume the legal conclusion that the use of the CS fogger to spray CS gas into the BMU was authorised by law when, as later decided by a majority in this Court, that use was prohibited by the *Weapons Control Act* and not authorised by any legislation, including s 153(1) and (2) of the *Youth Justice Act*. To explain, it is necessary to consider the evidence.

83 Commissioner Middlebrook was satisfied that the use of CS gas was "the best and least dangerous or harmful method he had at the time to defuse the situation". He was also satisfied that the prison officer's training would have had him deploy only the amount of gas that was "actually necessary".[89]

84 AGM Sizeland said that he had considered the options and determined that the least use of force that could be applied to deal with the emergency situation and to prevent injury and harm to the detainees and to staff was to deploy CS gas, which is why he recommended its use to Commissioner Middlebrook.[90] AGM Sizeland gave evidence that Superintendent Caldwell (who did not give evidence) said he agreed with that decision.[91] There was an emergency situation at Don Dale, and the fact that Superintendent Caldwell called

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87 *LO v Northern Territory* (2017) 317 FLR 324 at 345 [125].

88 *LO v Northern Territory* (2017) 317 FLR 324 at 353 [166(e)].

89 *LO v Northern Territory* (2017) 317 FLR 324 at 338 [86].

90 *LO v Northern Territory* (2017) 317 FLR 324 at 339 [89].

91 *LO v Northern Territory* (2017) 317 FLR 324 at 345 [129].

Commissioner Middlebrook to attend Don Dale is "ample evidence that he considered it was an emergency situation".[92]

85 AGM Sizeland said that "he had been exposed to CS gas operationally and in training many times and his understanding was that it does not have long term effects". He "formed the view that the temporary discomfort of the BMU occupants was preferable to the risk of serious and potentially lasting or permanent injury to Jake Roper and/or to staff, and that the dangers associated with the use of CS gas were less than any other action available". The prison officers in the IAT gave evidence to a similar effect and "said that they agreed with the decision to deploy the gas as the least dangerous option available".[93]

86 Kelly J is to be taken to have accepted "the evidence of Commissioner Middlebrook, AGM Sizeland and the prison officers present on the night that ... they all considered that use of the CS gas was the least hazardous option available, constituted the least degree of force which could be used in the circumstances, and carried the least risk of serious injury to Jake Roper and to staff".[94] In respect of the option of the prison officers in the IAT simply entering the BMU to subdue Jake Roper, Kelly J concluded that "that would have been a more dangerous option to both the prison officers and Jake Roper than using the gas".[95]

87 Kelly J also accepted the evidence of an expert, Colin Kelaher, who had worked in corrective services for 33 years including as the superintendent or general manager of various correctional facilities. Mr Kelaher said that in the circumstances he assumed (in effect, the events as described above), "[w]eighing up all of these scenarios and risks to all concerned, the most reasonable option was the deployment of the CS Gas".[96] In Kelly J's words: (i) "[d]espite the fact that the inevitable consequence of using the gas was that detainees who were restrained in their cells would also be exposed to the gas, in my view it was both reasonable and necessary in the circumstances to use the gas to temporarily incapacitate Jake

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92 *LO v Northern Territory* (2017) 317 FLR 324 at 346 [132].

93 *LO v Northern Territory* (2017) 317 FLR 324 at 339-340 [90]-[91].

94 *LO v Northern Territory* (2017) 317 FLR 324 at 349 [152].

95 *LO v Northern Territory* (2017) 317 FLR 324 at 352 [165].

96 *LO v Northern Territory* (2017) 317 FLR 324 at 349 [147].

Roper and so bring the crisis to a close before it escalated even further";[97] and (ii) "the use of the CS gas was reasonable and necessary, there being no other option reasonably available involving less force and less risk to the safety of detainees and staff".[98]

88 It is apparent that in giving evidence that "the best and least dangerous or harmful method he had at the time to defuse the situation" was to spray CS gas into the BMU, Commissioner Middlebrook is to be taken to have assumed that this was an option that was lawfully available to use at the time. It is improbable that, had Commissioner Middlebrook known or had any genuine doubt about the lawfulness of spraying CS gas into the BMU, he would have authorised its use, thereby exposing the prison officer spraying the gas and himself to the risk of having committed a criminal offence. The same conclusion applies to the evidence of AGM Sizeland, the hearsay evidence about Superintendent Caldwell's view, and the evidence of the other officers and Mr Kelaher.

89 Consequently, Kelly J's reasons include no findings about what was likely to have occurred had any officer present known or had a genuine doubt about the lawfulness of the spraying of CS gas into the BMU. In particular, Kelly J's reasons include no finding that had the officers present known or had a genuine doubt about the lawfulness of the spraying of CS gas into the BMU they would have reached the same conclusion that doing so was "reasonable and necessary, there being no other option reasonably available involving less force and less risk to the safety of detainees and staff".[99] It is obvious that the evidence of the officers and Mr Kelaher to this effect (as accepted by Kelly J) assumed that the spraying of CS gas into the BMU was a lawful option against which the other options they considered had to be measured in terms of risks to the safety of the detainees and the officers present.

90 The simple point is this. Without the officers having assumed the lawfulness of the use of CS gas they could not have acted as they did or have given the evidence they gave. Without Kelly J concluding that the use of the CS gas was authorised by law, Kelly J could not have found that "the use of the CS gas was reasonable and necessary, there being no other option reasonably available

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97 *LO v Northern Territory* (2017) 317 FLR 324 at 352-353 [165].

98 *LO v Northern Territory* (2017) 317 FLR 324 at 353 [166(e)].

99 *LO v Northern Territory* (2017) 317 FLR 324 at 353 [166(e)].

involving less force and less risk to the safety of detainees and staff".[100] This finding therefore cannot stand following this Court's decision in *Binsaris HCA*.

Blokland J's reasons

Overall approach of Blokland J

91 In her Honour's reasons for judgment on the assessment of damages, Blokland J correctly recognised that the task was "to assess damages, in the light of the judgement and ruling by the High Court".[101] In response to the Northern Territory's submission that on remittal her Honour's "fact-finding role is limited to any additional facts not decided by [Kelly J] which are necessary to determine quantum. Care should be taken to ensure that any additional findings are not inconsistent with those of [Kelly J]", Blokland J correctly observed that "additional findings may be required as [Kelly J] was not dealing with the matter in a context of the use of a weapon which was unlawful in the circumstances of a Detention Centre. [Kelly J] was dealing with the CS gas on the basis its use was lawful."[102] Blokland J also rightly observed that "[a]lthough the facts found by [Kelly J] are not challenged and are relied on here, there are additional considerations relevant to fact finding in the sense that there is now a significant question about how the unlawfulness of the use of the CS gas should affect the assessment of damages. To that extent, some of the relevant issues which fall for consideration here, were not part of the reasoning of [Kelly J] because they were not required to be."[103] As Blokland J put it:[104]

> "The [Northern Territory] also pointed out the findings about why the CS gas was used and that those findings remain intact including why it was regarded the safest option available. While that may be so, it seems on remittal that the option of the CS gas, how or why it was considered and then used by the officers informs the findings. While respecting [Kelly J's] findings, the assessment here must be undertaken on the understanding that

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100 *LO v Northern Territory* (2017) 317 FLR 324 at 353 [166(e)].

101 *Binsaris v Northern Territory* [2023] NTSC 79 at [7].

102 *Binsaris v Northern Territory* [2023] NTSC 79 at [59]-[60].

103 *Binsaris v Northern Territory* [2023] NTSC 79 at [74].

104 *Binsaris v Northern Territory* [2023] NTSC 79 at [75]-[84] (footnotes omitted).

the 'option' of the use of CS gas was unlawful. The findings of [Kelly J] must now be understood in that context.

That the High Court found the use of CS Gas to be unlawful in a youth detention context must inform the award of damages in a substantial way. There would be no point in remitting the matter for assessment of damages before another Judge if this was simply a technical matter. This was not an adult facility. This was a facility to detain children and youths, albeit in an institution which on the evidence before [Kelly J] was 'really beyond its life fit for purpose'. That being the case, notwithstanding some of the [appellants] were difficult and hard to control youths, as might be expected in a youth detention centre, the deployment of an unlawful weapon which affected other youths who were in their cells must have some impact on the award of damages.

...

[Kelly J] was dealing with this issue as though the use of CS gas was lawful. As a ruling has been made by the High Court that its use was not lawful, the CS gas cannot now be considered as a reasonable option. [Kelly J] ruled out a number of other options the officers could have taken, but that was in a context where the use of the CS gas was an available option. As its use was unlawful, it cannot now be found to have been reasonable. Had the officers known deployment of the gas was unlawful they would have considered other options. For example, reference was made by [Kelly J] to an earlier incident in which police negotiators talked detainees down from the roof of the Detention Centre. Calling police was rejected as an option, however it may be reasonably inferred that conclusion would have been different if the CS gas was not an available option. That option may have been available even accepting the previous incident when police were called had not reached the same level of concern as here. By force of circumstances other options would have been considered but were not taken up given the Youth Justice Officers resort to the CS gas."

92 These observations correctly reflect the effect of this Court's judgment in *Binsaris HCA* on Kelly J's fact-finding having regard to the operation of s 37 of the *Judiciary Act* and the common law doctrine of finality. They also correctly reflect the state of the evidence as explained below.

Blokland J's findings

93 Blokland J must be taken to have found that the officers present did not know that using the CS fogger to spray the CS gas into the BMU was unlawful. Her Honour is to be understood as saying that the officers, in effect, assumed that this conduct was lawful and, by reason of that assumption, did not think about any contrary possibility on 21 August 2014.[105]

94 Blokland J noted that a "review of the material before [Kelly J] does not indicate that the lawfulness or otherwise of the CS gas had ever been seriously reviewed at an institutional level or that the individuals concerned had turned their mind to the issue" and "[t]here was no indication that advice about the lawfulness or otherwise of such a weapon was ever sought by any relevant Department, the Detention Centre itself or any individual at a time before the occurrence of any critical event such as the one which developed here. There is no evidence that the Youth Justice Officers, including senior officers knew they had positive lawful authority to use the CS gas in a youth detention setting."[106] Blokland J recorded in this regard that AGM Sizeland had said that "[t]he training did not deal with the use of CS gas on young people in youth detention" and "[h]e was not aware that the CS gas fogger was a prohibited weapon or that resources were available with reference to use of CS gas in youth detention centres".[107] These negative findings were open on the evidence, the last finding meaning no more than that already explained – that the officers assumed that using the CS fogger to spray CS gas into the BMU was lawful and, by reason of that assumption, did not think about any contrary possibility that its use was unlawful on 21 August 2014. Blokland J's point was that if the Northern Territory had wished to prove that it had adequately considered whether the use of CS gas in a youth detention centre was lawful, it was for the Northern Territory to adduce evidence of the steps it had taken to inform itself about that issue and to train its officers accordingly. As it stood, the evidence was to the contrary.

95 Blokland J considered it obvious that "senior officers should know, or should find out whether the use of particular weapons [is] lawful or not in the

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105 *Binsaris v Northern Territory* [2023] NTSC 79 at [77]-[78].

106 *Binsaris v Northern Territory* [2023] NTSC 79 at [77].

107 *Binsaris v Northern Territory* [2023] NTSC 79 at [78].

setting concerned, in particular of a youth detention centre".[108] This conclusion is not open to criticism. Blokland J was not denying that Kelly J and the Court of Appeal had both decided that the use of the CS fogger to spray CS gas into the BMU was lawful so that, at the least, it could be said that the question of the lawfulness of its use was not straightforward. Her Honour's point was that there was no evidence that the Northern Territory or the senior officers had taken any step to satisfy themselves that the use of CS gas was lawful against minors being held in a youth detention centre. That being correct, the fact that the legality of the use of CS gas in a youth detention centre is not straightforward is irrelevant.

96 Blokland J, proceeding on the description of Kelly J as to how the events unfolded, said that she did not "underestimate the challenges which the Youth Justice Officers faced on this occasion", noting, however, that throughout the events Keiran Webster and Leroy O'Shea were playing cards in their cell and the other appellants were not involved in Jake Roper's conduct other than initially.[109] Blokland J found that the "level of the hazard [presented by Jake Roper's conduct] was plain at various times in the lead up to the deployment of the CS gas". Blokland J also found that: (i) the appellants "were bystanders at the time of the deployment of the CS gas"; (ii) Don Dale was not fit for purpose as a youth detention centre given that "difficult behaviours may be anticipated given the very purpose of the Detention Centre is to detain children and youths who have committed (often) serious offences and are likely to have come from difficult to extremely difficult social circumstances"; and (iii) the Northern Territory had not given "the officers the knowledge or tools to deal with the situation lawfully".[110]

97 Blokland J characterised the evidence as showing a "level of hostility, high handedness ... on the part of some officers towards detainees".[111] The evidence that Blokland J had in mind undoubtedly included that summarised at [43] above.

98 Blokland J identified documentary evidence of the Northern Territory which set out in detail "the hazardous nature of CS gas including its recognised health effects". Blokland J rightly considered that this objective evidence strongly

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108 *Binsaris v Northern Territory* [2023] NTSC 79 at [78].

109 *Binsaris v Northern Territory* [2023] NTSC 79 at [79].

110 *Binsaris v Northern Territory* [2023] NTSC 79 at [80], [83].

111 *Binsaris v Northern Territory* [2023] NTSC 79 at [85].

supported the appellants' evidence about the effects that the CS gas had on them.[112] Given the corroborating documentary evidence, it was open to Blokland J to so find, despite the doubts that Kelly J had about the appellants exaggerating parts of their evidence. The documentary evidence: included the harmful effects of CS gas referred to at [43] above; said that "[n]ormal exposure during outdoor use causes no known lasting effects" (in respect of which Blokland J observed that the use in this matter was in a confined space from which the appellants could not escape); and said that if used in large enough concentrations, CS gas "can cause serious injury or death". According to the documentary evidence, "when CS is released in a confined space, the possibility of an overdose must be considered. If the time for a lethal dosage is calculated to be [ten] minutes, then theoretically, a person in the room has only a 50/50 chance of survival after [ten] minutes".[113]

99 Blokland J recorded in respect of the appellants who were asthmatic, Leroy O'Shea and Ethan Austral, that "[t]heir health status was not checked as the procedures which pertain to adults dictated it should have been".[114] Blokland J's point was that the documented procedures for the use of CS gas in prisons in the Northern Territory required a health check of those to be subjected to the CS gas and the officers involved either did not know this or overlooked it.

100 Blokland J considered that as the Northern Territory "has the right, indeed the obligation, to hold children and young people in detention on remand or to serve sentences imposed by the courts", "[w]ith that right or obligation comes a high level of responsibility", including by s 151(3)(c) of the *Youth Justice Act*, under which the superintendent must ensure the safe custody and protection of all persons within the precincts of the detention centre. Blokland J said that the "fact the officers of the [Northern Territory] did not know that a particular weapon used in the detention centre was unlawful, meant the [Northern Territory] failed in some of its most fundamental duty to keep detainees safe. The fact that courts after the event found on a technical basis the use of force was lawful is largely irrelevant. It was an unlawful use of force."[115] Her Honour's point, entirely valid, was that the Northern Territory did not ensure that its youth justice officers knew whether using

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112 See *Binsaris v Northern Territory* [2023] NTSC 79 at [20], [28], [31], [102]-[103], [105], [107], [109].

113 *Binsaris v Northern Territory* [2023] NTSC 79 at [88]-[89].

114 *Binsaris v Northern Territory* [2023] NTSC 79 at [90].

115 *Binsaris v Northern Territory* [2023] NTSC 79 at [93].

CS gas in a youth detention centre was lawful or unlawful. If the Northern Territory had done so, the youth justice officers either (i) would have believed the use was lawful and, despite being wrong in that regard, would have been properly trained in its use and risks; or (ii) would have known that the use was unlawful, in which event their lack of training in its use and risks would have accorded with the fact that its use was prohibited by law. As it was, due to the Northern Territory's lack of systems and training, the youth justice officers were in the worst possible position of assuming that the use of CS gas was lawful whilst knowing little to nothing about the Northern Territory's own procedures for the use of CS gas on adult prisoners, let alone minors being held in a confined space. This is the context in which Blokland J also rightly said that the "conditions which gave rise to this unlawful use of force perpetrated on youths in a Detention Centre for whose safety and wellbeing the [Northern Territory] was responsible for must never be allowed to happen again".[116]

101 Blokland J accepted the "difficulties the Youth Justice Officers experienced" but said that the Northern Territory "must take responsibility for putting them in that position or creating the conditions where they thought they had no option but to resort to unlawful unreasonable and excessive force" when that "mode of force used should not have been in the range of options available".[117] There is no inconsistency between this conclusion and any finding of Kelly J not affected by the holding in *Binsaris HCA*. First, as to the mode of force, as Gordon and Edelman JJ said in *Binsaris HCA*, the *Youth Justice Act* does not contemplate corporal punishment of a detainee for breach of discipline, let alone such punishment of a detainee who is a mere bystander to another detainee's breach of discipline.[118] Second, Kelly J had made detailed findings about the harsh conditions of the appellants' detention and had also said that "no doubt it would have been proper for the authorities to take into account the lengths to which the young detainees had been driven by the extreme conditions under which they had been held and to have taken whatever steps they could to expedite alternative arrangements".[119] Moreover, there was Commissioner Middlebrook's evidence that Don Dale was part of a situation that had been "festering for a long, long time"

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116 *Binsaris v Northern Territory* [2023] NTSC 79 at [96].

117 *Binsaris v Northern Territory* [2023] NTSC 79 at [96].

118 (2020) 270 CLR 549 at 577-578 [80]-[82].

119 *LO v Northern Territory* (2017) 317 FLR 324 at 350-351 [157].

and where "successive governments hadn't really taken responsibility for the situation".[120]

102 Blokland J accurately described the relevant circumstances as involving a deliberate deployment of CS gas into the confined space of the BMU where: (i) the appellants at the time of the deployment were bystanders locked in their cells; (ii) the Northern Territory should never have allowed its youth justice officers to be placed in that situation in terms of the lack of fitness for purpose of Don Dale, the extreme and harsh conditions of the BMU, and the lack of systems and training of youth justice officers as to the use of CS gas; and (iii) the video footage showed that the appellants were treated callously (as set out above).[121] Those findings were well supported by the evidence and provided a secure foundation for Blokland J's view that the "Court must demonstrate its disapproval of the Northern Territory allowing [these events] to take place"[122] by an award of exemplary damages, the essential purpose of an award of exemplary damages being to punish the wrongdoer for "reprehensible conduct" and to ensure general and specific deterrence of the wrongful conduct.[123]

Errors in the Court of Appeal's reasons relevant to ground (1)

103 In overturning Blokland J's award of exemplary damages, the Court of Appeal held that "[t]here was no doubt that the officers in question considered the deployment of CS gas was lawful at the time, and that it was necessary in the circumstances which then presented. There was in their conduct no malice or conscious wrongdoing in contumelious disregard of the [appellants'] rights."[124]

104 In reaching this conclusion, the Court of Appeal erred in relying upon Kelly J's finding that "the use of the CS gas was reasonable and necessary, there being no other option reasonably available involving less force and less risk to the

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120 *LO v Northern Territory* (2017) 317 FLR 324 at 330 [22].

121 *Binsaris v Northern Territory* [2023] NTSC 79 at [97].

122 *Binsaris v Northern Territory* [2023] NTSC 79 at [96].

123 *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 81. See also, eg, *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6-7 [12]-[15].

124 *Northern Territory v Austral* [2025] NTCA 3 at [29].

safety of detainees and staff".[125] That finding was directed to the existence of lawful authority for the use of the CS fogger to spray CS gas into the BMU and, as such, depended on Kelly J's conclusion that this conduct was not prohibited by the *Weapons Control Act* and could constitute the use of reasonably necessary force to maintain discipline in accordance with s 153(1) and (2) of the *Youth Justice Act*. As explained,[126] Kelly J's legal conclusion was erroneous and that finding could not stand.

105 The Court of Appeal, however, said that "[t]he importance of the finding by [Kelly J] that the use of the CS gas was not a use of force in excess of that called for by the situation is clear".[127] According to the Court of Appeal this meant that the fact that CS gas was illegally used on minors did not constitute "something more" than a mere finding of fault as said in *Gray v Motor Accident Commission*[128] to be required before exemplary damages would be awarded.[129] However, as Blokland J recognised, the concept of an "excess" of force is relative. As explained, given the decision of this Court in *Binsaris HCA*, Kelly J's finding cannot be understood in the way expressed by the Court of Appeal. Adapting the Court of Appeal's language, the "situation" could not have "called for" the use of CS gas because that was not a lawful option. As such, it was not an "available" option. Thereby, the officers' assessment of what the situation called for at the time and the subsequent assessment by Mr Kelaher fundamentally miscarried, as did Kelly J's fact-finding process.

106 These errors of the Court of Appeal underpin the balance of its reasoning leading it to the view that exemplary damages should not be awarded to the appellants. For example, the Court of Appeal recorded the appellants' submission in their initial appeals to that Court that they did not challenge Kelly J's conclusion that the use of CS gas was "reasonable or necessary", only that its use was not authorised by law.[130] The Court of Appeal said that meant that if the use of CS gas had been lawful, then the appellants accepted that its use on 21 August 2014 was

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125 *LO v Northern Territory* (2017) 317 FLR 324 at 353 [166(e)].

126 See [82] above.

127 *Northern Territory v Austral* [2025] NTCA 3 at [44].

128 (1998) 196 CLR 1 at 6 [12].

129 *Northern Territory v Austral* [2025] NTCA 3 at [44].

130 *Northern Territory v Austral* [2025] NTCA 3 at [42].

"reasonably necessary".[131] None of that can follow in circumstances where the question Kelly J was answering was whether the use of CS gas was "reasonably necessary" to maintain discipline because the Northern Territory contended that its use of CS gas was authorised by s 153(1) and (2) of the *Youth Justice Act*. That is, the concept of "reasonably necessary" was relevant only because it was the foundation for an argument that those provisions gave the officers statutory authority to use CS gas.

107 The reason for this error of the Court of Appeal is exposed by its statement that the "finding made by [Kelly J] that deployment of CS gas was reasonable and necessary was not linked to the finding that the use of CS gas was not prohibited by statute ... It is not correct to say ... that [Kelly J] assessed the reasonableness of the [Northern Territory's] conduct in deploying CS gas through the lens of lawfulness."[132] This conclusion is wrong. As Kelly J's reasons disclosed, the assessment of whether the use of CS gas was "reasonably necessary" was for the purpose of deciding if the use was authorised by s 153(1) and (2) of the *Youth Justice Act*. In deciding that issue, Kelly J's conclusion of reasonable necessity was based on her Honour's erroneous views about the meaning and effect of the *Weapons Control Act* and the *Youth Justice Act*. Indeed, the only foundation of Kelly J's conclusion of "reasonable necessity" that remains unaffected is that "(a) an emergency situation existed", the balance all reflecting the wrong assumption of the officers involved at the time and her Honour's erroneous legal conclusions.[133]

108 Ground (1) of the appellants' appeals therefore must be allowed.

Appeal ground (2) – error in approach to exemplary damages?

109 The Court of Appeal held that "the conduct and states of mind of the individual officers in these circumstances did not justify making an award of exemplary damages".[134] The appellants contended that the Court of Appeal erred in holding that the relevant state of mind inquiry for exemplary damages was whether the individuals who authorised the unlawful conduct that founded the

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131 *Northern Territory v Austral* [2025] NTCA 3 at [43].

132 *Northern Territory v Austral* [2025] NTCA 3 at [46].

133 *LO v Northern Territory* (2017) 317 FLR 324 at 353 [166].

134 *Northern Territory v Austral* [2025] NTCA 3 at [74].

battery claim knew that their conduct was unlawful. As will be explained, the Court of Appeal proceeded from a misunderstanding of the purposes of an award of exemplary damages, the officers' inferred state of mind about use of CS gas, and the field of circumstances which might justify an award of exemplary damages. The ground must be upheld.

The purposes of an award of exemplary damages

110 The focus of compensatory damages, in rectifying wrongful acts and repairing their consequences (so far as money can do),[135] is upon "restoration" of the plaintiff.[136] By contrast, exemplary damages, in punishing a defendant, "have to be looked at from the side of the defendant".[137] In that respect, exemplary damages are an example of the point made by Windeyer J that the roots of crime and tort in English law are "greatly intermingled"[138] with, at common law, the criminal law and the law of torts often being "different ways for a victim to pursue justice for the same wrongful act".[139] Today, the purposes of the criminal law and the law of torts remain closely associated, as seen in statutory provisions for civil penalties and for criminal injuries compensation.[140] There remains no "sharp cleavage" between the criminal law and civil law.[141] Consistently with this interaction, an award of exemplary damages shares the central purposes of

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135 *Stewart v Metro North Hospital and Health Service* (2025) 99 ALJR 1348 at 1354 [25]; 424 ALR 468 at 475.

136 *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 80.

137 *Pollack v Volpato* [1973] 1 NSWLR 653 at 657. See also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [15].

138 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149.

139 Seipp, "The Distinction Between Crime and Tort in the Early Common Law" (1996) 76 *Boston University Law Review* 59 at 83. See also Holmes, *The Common Law* (1882) at 44; Cane, *The Anatomy of Tort Law* (1997) at 119.

140 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7-8 [16].

141 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7-8 [16], quoting Street, *Principles of the Law of Damages* (1962) at 34.

punishment, including moral retribution (just desert), deterrence,[142] denunciation, and "assuag[ing] any urge for revenge".[143]

111 The kinds of case in which exemplary damages might be awarded are so varied that it has been doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded.[144] The phrase adopted to describe "at least the greater part of the relevant field" is "conscious wrongdoing in contumelious disregard of another's rights".[145] The necessary conduct has been described as disclosing "fraud, malice, violence, cruelty, insolence or the like".[146] In the context of an award of exemplary damages, the concept of "malice" may mean no more than proof of a state of mind involving some personal animus against the plaintiff.[147] A "contumelious disregard" of a plaintiff's rights may arise even if the disregard of the plaintiff's rights is unintentional or occurs by conduct believed to be lawful, the meaning of contumelious conduct being conduct that is apt to humiliate and insult the plaintiff.[148] While a finding of "conscious wrongdoing in contumelious disregard of another's rights" may be sufficient it is not necessary for an award of exemplary damages.[149]

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142 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149. See also *The Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254 at 266.

143 *Lamb v Cotogno* (1987) 164 CLR 1 at 9.

144 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [14].

145 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [14], quoting *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77.

146 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 122.

147 *A v New South Wales* (2007) 230 CLR 500 at 519 [55].

148 *Lamb v Cotogno* (1987) 164 CLR 1 at 13; *New South Wales v Riley* (2003) 57 NSWLR 496 at 530 [138].

149 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [14], quoting *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77.

112 The core, or "strict",[150] purpose of punishment, moral retribution or just desert, features most prominently in instances where "the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government".[151] In that calling to account, exemplary damages serve "a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law".[152] This reflects the fact that "the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service".[153]

113 Nevertheless, it is only if other legal consequences, including compensation and interest on the compensation, are insufficient when compared with the amount needed to achieve moral retribution, deterrence, and denunciation that exemplary damages will be required.[154] Hence, in *Gray v Motor Accident Commission*,[155] this Court held that exemplary damages were not available where substantial punishment had already been imposed by the criminal law: "the infliction of substantial punishment for what is substantially the same conduct as the conduct which is the subject of the civil proceeding is a bar to the award".

114 There are cases where large awards of exemplary damages are sometimes made due to features of the tortious conduct that require specific and general deterrence. For instance, deterrence is an important feature in instances where an award of compensatory damages would not be sufficient to disgorge actual or expected benefits to a defendant. The role of deterrence in such cases is similar to one type of account and disgorgement of profits,[156] although an award of

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150 *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 at 336 [19].

151 *New South Wales v Ibbett* (2006) 229 CLR 638 at 648 [38].

152 *New South Wales v Ibbett* (2006) 229 CLR 638 at 649 [40], quoting *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at 147 [75].

153 *Rookes v Barnard* [1964] AC 1129 at 1226.

154 *Rookes v Barnard* [1964] AC 1129 at 1228.

155 (1998) 196 CLR 1 at 14 [40].

156 See also *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1 at 12-13 [9], 15 [16].

exemplary damages in these cases is a more "blunt instrument"[157] than these remedies because the award is not limited to actual profits. In these cases, the award of exemplary damages aims, at least, to disgorge the profits made by a cynical wrongdoer, including, although not limited to,[158] circumstances of wrongdoers who have "calculated that the money to be made out of ... wrongdoing will probably exceed the damages at risk".[159] Some of the cases to which the appellants referred in their submissions on the cross-appeals were of this nature but the absence of any motive of gain or profit by the Northern Territory in this case makes those cases inapt comparisons.[160] But deterrence, both general and specific, as well as denunciation remain important features in determining that an award of exemplary damages is justified even in cases without a motive of profit or gain that affects the award.

Court of Appeal's approach to exemplary damages

115 While referring to the correct principles to be applied,[161] the Court of Appeal's assessment of whether exemplary damages should be awarded miscarried. The Court of Appeal treated the officers' inferred state of mind about use of CS gas (a "belief" that such use was lawful) as effectively determinative against the appellants.[162] Even if the officers had held such a belief (as opposed to merely assuming the lawfulness of the use of CS gas), that approach is wrong in principle, as a wrongdoer's state of mind does not cover the field of circumstances which might justify an award of exemplary damages.

116 Moreover, as will be explained in relation to ground (3) below, the Court of Appeal did not recognise that the appellants' claim was against the Northern Territory because the tortious conduct of its officers was attributable to the

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157 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1130.

158 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 153.

159 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1078, quoting *Rookes v Barnard* [1964] AC 1129 at 1227.

160 See *Directed Electronics OE Pty Ltd v OE Solutions Pty Ltd [No 10]* [2023] FCA 1656; *Seaforth Securities Pty Ltd v Zoya Investments Pty Ltd* (2024) 261 LGERA 299.

161 *Northern Territory v Austral* [2025] NTCA 3 at [24]-[27], [48].

162 See, eg, *Northern Territory v Austral* [2025] NTCA 3 at [29], [55], [60]-[61].

Northern Territory. This meant that while the officers' state of mind in merely assuming that the use of CS gas in a youth detention centre was lawful was relevant, an assessment of the need for moral retribution, deterrence, and denunciation cannot be confined to that fact. All the circumstances need to be considered.

117 Leaving the issue of the attribution of the officers' tortious conduct to the Northern Territory to be dealt with as part of ground (3), it is apparent that the Court of Appeal did not consider, or sufficiently consider, other factors, including: (a) that the appellants were minors detained in a youth detention centre; (b) that the appellants were bystanders, who were effectively treated as collateral damage in the officers' efforts to subdue Jake Roper; (c) the failure to check the appellants' medical records before spraying the CS gas into the confined space of the BMU; (d) that the CS gas was sprayed into a confined space from which the appellants could not escape; (e) the comments by the officers exposing their callous attitude to the detainees; (f) the humiliating and rough treatment of the appellants after the spraying of the CS gas; and (g) the delayed and inadequate medical care given to the appellants after their exposure to CS gas. Finally, and particularly pertinent, is the Northern Territory's failure to train its officers adequately to ensure that this type of conduct would not occur. Some of these failures are considered in more detail below.

118 The Court of Appeal considered the fact that the appellants were minors only by proposing that "there was no evidence that CS gas had a different or more harmful effect upon young people of the ages of the [appellants] than on adults"[163] and, had any of the appellants been held in an adult prison, the use of CS gas on them would have been lawful.[164] These observations miss the point. It is irrelevant that the use of CS gas might have been lawful in some other situation. The fact is that the appellants were minors detained in a youth detention centre, where the use of CS gas was unlawful. The absence of evidence that CS gas has particularly harmful effects on children does not render its use in a youth detention centre any less reprehensible. In fact, the only evidence available of training and instruction of officers of the Northern Territory in the use of CS gas assumed that the CS gas would be used on adults in prisons, not on minors (whether in a prison or in a youth detention centre). As it was for the Northern Territory to prove lawful authority for the otherwise tortious conduct, that evidentiary position alone supported Blokland J's conclusion that the appellants' status as minors under the care, control,

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163 *Northern Territory v Austral* [2025] NTCA 3 at [41], [59]. See also at [73].

164 *Northern Territory v Austral* [2025] NTCA 3 at [69].

and custody of the Northern Territory was relevant to the characterisation of the Northern Territory's conduct as, in effect, reprehensible and justifying exemplary damages.[165]

119 The Court of Appeal considered the fact that the appellants were bystanders only by proposing that it was Jake Roper who was the target of the CS gas and that the appellants had to be exposed to the CS gas as they were being held in the BMU with Jake Roper.[166] This misses the point that the officers knew that the appellants were locked in their cells and used the CS gas knowing that the appellants would be subjected to it and without means of escaping its effects. The officers therefore intentionally subjected the appellants to the CS gas when the appellants presented no risk of harm to the officers or otherwise. This is to be weighed in circumstances where Kelly J rejected the reasonableness of the option of the IAT officers (who had helmets, protective vests, shields and batons) simply entering the BMU to subdue Jake Roper on the basis that so doing would have been "a more dangerous option to both the prison officers and Jake Roper than using the gas",[167] without consideration of the welfare of the appellants, locked in their cells, who would also be exposed to the gas for however long it took for officers to subdue and secure Jake Roper.

120 It is to be inferred that the Court of Appeal did not consider the fact that two of the appellants had asthma to be relevant because of Kelly J's findings that the situation called for an urgent response and it was not "reasonable" given that urgency to check the appellants' medical records.[168] But that fails to confront the fact that, as Blokland J observed, "[t]heir health status was not checked as the [Northern Territory's] procedures which pertain to adults dictated it should have been".[169]

121 The Court of Appeal considered the fact that the appellants were locked in their cells and could not escape from the CS gas only by proposing that the officers "took care to ensure that only the minimum amount of the gas necessary to subdue

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165 *Binsaris v Northern Territory* [2023] NTSC 79 at [93], [96], [97].

166 *Northern Territory v Austral* [2025] NTCA 3 at [5], [33(s)-(t)], [71], [73].

167 *LO v Northern Territory* (2017) 317 FLR 324 at 352 [165].

168 *Northern Territory v Austral* [2025] NTCA 3 at [68].

169 *Binsaris v Northern Territory* [2023] NTSC 79 at [90].

Roper was used".[170] This conclusion is difficult to reconcile with Commissioner Middlebrook's statement "I don't care how much gas you use" and with the fact that the CS gas was sprayed into the BMU no less than ten times. The Court of Appeal also failed to have regard to the evidence, discussed by both Kelly J[171] and Blokland J,[172] that CS gas was designed to be used outside and its use within the confines of the BMU therefore posed a greater health risk to the detainees. Together with the lack of any evidence of training or instruction on the use of CS gas on other than adult prisoners, these matters all supported Blokland J's conclusion that the use of the CS gas on the appellants in their cells was relevant to the characterisation of the Northern Territory's conduct as, in effect, reprehensible and justifying exemplary damages.[173]

122 The Court of Appeal did not refer to the callous comments of Commissioner Middlebrook or the other officers, which are relevant to the characterisation of the Northern Territory's conduct. As Blokland J rightly found, these comments showed "a level of hostility, high handedness ... on the part of some officers towards detainees".[174] A callous and harsh comment by an officer under the immediate pressure of extreme provocation and intimidation is one thing. But for the Commissioner to say in front of the prison officers responsible for deploying the CS gas that he did not care how much gas was used discloses a serious failure of professional discipline and maintenance of professional standards under the exigencies of the moment. The same conclusion applies to the manifest satisfaction expressed by some of the officers at Jake Roper's suffering under the effects of the CS gas.

123 The Court of Appeal referred to the treatment of the appellants during the incident by noting that Kelly J found that the appellants "were removed from their cells as quickly as possible consistent with maintaining security"[175] and by saying that the appellants could be seen on the video-recording in evidence "laughing and

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170 *Northern Territory v Austral* [2025] NTCA 3 at [70].

171 *LO v Northern Territory* (2017) 317 FLR 324 at 347-348 [138]-[140].

172 *Binsaris v Northern Territory* [2023] NTSC 79 at [88]-[89].

173 *Binsaris v Northern Territory* [2023] NTSC 79 at [38], [89], [96]-[97].

174 *Binsaris v Northern Territory* [2023] NTSC 79 at [85].

175 *Northern Territory v Austral* [2025] NTCA 3 at [33(v)].

in good spirits" when they were decontaminated.[176] The Court of Appeal appears to have accepted the Northern Territory's submission that there was no evidence the appellants were "particularly distressed or concerned about the events which had occurred" or "humiliat[ed]" by their treatment.[177] That conclusion is inconsistent with the evidence of Leroy O'Shea, Ethan Austral and Keiran Webster as to the effect that the use of CS gas had upon them. The conclusion is also inconsistent with common sense. The notion that any person, young or not, would not be particularly distressed or concerned by being subjected to tear gas from which they could not escape is incredible. In circumstances where the objective evidence about the effects of CS gas matched the evidence of the appellants about what they had experienced (being unable to breathe, fearing they would die, being left to "burn"), the only conclusion open on the evidence was that the appellants had suffered significant pain and distress by being exposed to CS gas. Blokland J was also correct to describe the treatment of the appellants after the CS gas was used as being "in a rough manner"[178] and humiliating.[179]

124 The appellants were handcuffed, made to lie face down on the basketball court, and sprayed with a fire hose. They did not receive immediate medical attention. When they did receive medical attention later that evening from a nurse, the records disclose that it was wrongly believed that they had been subjected to capsicum spray.[180] As Blokland J put it, the appellants "deserved more care" and their post-exposure treatment and humiliating decontamination increased their distress and sense of grievance and was relevant to the characterisation of the Northern Territory's conduct as, in effect, reprehensible and justifying exemplary damages.[181]

125 The Court of Appeal did not refer to the appellants' indigeneity, which Blokland J considered relevant, her Honour observing that unlawful actions by law enforcement officers towards Aboriginal people "lessens trust between citizens

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176 *Northern Territory v Austral* [2025] NTCA 3 at [99].

177 *Binsaris v Northern Territory* [2023] NTSC 79 at [65], [67].

178 *Binsaris v Northern Territory* [2023] NTSC 79 at [25]. Cf *LO v Northern Territory* [2017] NTSC 22 at [184].

179 *Binsaris v Northern Territory* [2023] NTSC 79 at [100].

180 *Binsaris v Northern Territory* [2023] NTSC 79 at [25], [28], [32], [33], [35], [111].

181 *Binsaris v Northern Territory* [2023] NTSC 79 at [111].

and law enforcement authorities and lessens social cohesion in the broader community".[182] It is not that the circumstance of the appellants' indigeneity transformed the officers' conduct from acceptable to reprehensible. The conduct would have been reprehensible irrespective of the indigeneity of the appellants. But that does not mean that Blokland J was wrong to recognise that the battery of Indigenous youth while held in the care, control, and custody of the state may have a particularly corrosive effect on the social compact.

126 Finally, a circumstance significant to the award of exemplary damages was that the Northern Territory was responsible for the officers' wrong assumption about the lawfulness of their conduct (as Blokland J reasoned). Recognising that the claim was against the Northern Territory because the tortious acts of its officers were attributable to the Northern Territory, the reasons that Blokland J considered the circumstances required the Northern Territory to be punished for its reprehensible conduct in failing to train its officers adequately to deal with serious disturbances at youth detention centres and to ensure youth detention centres were fit for purpose[183] are obvious. The Northern Territory had a duty to ensure the physical, psychological and emotional welfare and safe custody and protection of all detainees in the detention centre. Knowing that Don Dale was unfit for purpose, as it undoubtedly did given Commissioner Middlebrook's evidence, it was for the Northern Territory to provide adequate training to its officers to ensure they could respond lawfully and appropriately to serious misconduct by a detainee held in Don Dale. The Northern Territory manifestly failed to do so and, in so doing, is to be inferred as having also failed to ensure its officers could maintain their professional discipline in the face of provocative and intimidatory conduct by one detainee.

127 In these circumstances, the Court of Appeal's rejection of any suggestion that the officers, in so doing, acted in contumelious disregard of the appellants' rights discloses its erroneous application of the applicable principles to the facts of this case.

128 Ground (2) of the appellants' appeals therefore must be allowed.

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182 *Binsaris v Northern Territory* [2023] NTSC 79 at [99].

183 *Binsaris v Northern Territory* [2023] NTSC 79 at [76], [93].

Appeal ground (3) – direct liability of the Northern Territory?

129 During the hearing, the appellants sought leave to amend this appeal ground to read "[t]he Court of Appeal erred in holding that it was not open to [Blokland J] to award exemplary damages on a direct liability basis". We would grant that leave.

130 In oral argument the Northern Territory submitted that the Court of Appeal had done no more than apply the principle in *Coulton v Holcombe.*[184] That principle, as presently relevant, is that parties are bound by their conduct of the trial. The Court of Appeal said that "[t]he case put by the [appellants] both before [Kelly J] and before [Blokland J] was that the [Northern Territory's] liability was founded solely on vicarious liability, but the award of exemplary damages was made on the basis that the [Northern Territory] bore a primary and direct liability. For the reasons described below, this was not a case either pleaded by the [appellants] or which the [Northern Territory] was required to meet."[185]

131 It is not clear what the Court of Appeal meant when it said that the Northern Territory's liability was founded solely on vicarious liability and not on direct liability. The Court of Appeal could not have meant to deny that the appellants had brought a claim based upon principles of agency – attribution of the state of mind and acts of the officers to the Northern Territory – even though such a claim is one of direct liability. The appellants' pleaded claims were based upon such attribution, albeit that the legal consequence of this was expressed in terms that the Northern Territory was "vicariously liable" for the conduct of its servants or agents. As discussed in *Bird v DP (a pseudonym)*,[186] the term "vicarious liability" is ambiguous in that it has been used to mean: (i) that the person doing the wrongful act is an agent of a principal and acting within the agent's authority, in which event the liability "is a form of primary liability where the *acts* of another person are attributed to the defendant on the basis that the acts were done for the defendant with the defendant's express, implied or apparent authorisation of the acts, or ratification of the acts by the defendant";[187] (ii) a form of liability imposed on a defendant for breach of a "non-delegable duty";[188] and (iii) a form of "secondary

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184 (1986) 162 CLR 1.

185 *Northern Territory v Austral* [2025] NTCA 3 at [29].

186 (2024) 98 ALJR 1349; 419 ALR 552.

187 (2024) 98 ALJR 1349 at 1358 [31]; 419 ALR 552 at 560 (emphasis in original).

188 (2024) 98 ALJR 1349 at 1359 [36]; 419 ALR 552 at 561.

liability based on attribution of liability, not attribution of the acts, of a wrongdoer to a defendant".[189] *Bird v DP (a pseudonym)* explained the inaptness of the first two uses of "vicarious liability", with only the third category of "liability based on the attribution of the liability of another" being "vicarious liability in its true or proper sense".[190] During the oral hearing of these appeals, the Northern Territory also accepted that the appellants had run a case based on direct liability in the sense of liability based on agency.

132 The Court of Appeal's real objection was Blokland J taking into account the inadequate training by the Northern Territory of its employees regarding the use of CS gas in youth detention centres in her Honour's award of exemplary damages. This was said either to be outside the pleaded case or to involve a denial of procedural fairness (or both).

133 It may be accepted that the appellants' pleaded case against the Northern Territory did not specify any inadequacy of training or instruction by the Northern Territory of its officers as a factor to be taken into account for an award of exemplary damages. The appellants did plead, however, that the use of CS gas in the BMU was "grossly excessive and high handed", referring to, amongst other things, that the CS gas was used in a confined space, in a youth detention centre, against detainees already confined in cells, when the detainees were juveniles, and having regard to the obligations concerning the use of force as set out in the *Youth Justice Act*. The appellants' pleadings referred to one provision of the *Youth Justice Act*, s 153, the terms of which have been set out above, and to "internal management procedures of Don Dale".

134 The transcript of the hearing before Kelly J discloses that senior counsel for the appellants tendered a document, "Youth Detention and Remand Centre Procedures and Instructions". The document was tendered as relevant to damages, senior counsel's submission being that "not one word in this document ... authorises the use of tear gas". Senior counsel for the appellants also tendered a document, "Immediate Action Team Course Northern Territory Corrections". It may be inferred that this document was available to the IAT, who were prison officers. Senior counsel submitted to Kelly J that this document said that chemical agents should not be used if prisoners are compliant or physically restrained, noting that the appellants were compliant and locked in their cells when the CS gas was used in the BMU. Kelly J, having determined that the use of CS gas was done with

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189 (2024) 98 ALJR 1349 at 1361 [44]; 419 ALR 552 at 564.

190 (2024) 98 ALJR 1349 at 1361 [44]; 419 ALR 552 at 564.

lawful authority, had no occasion to consider the relevance of these documents to exemplary damages.

135 On the remitted hearing before Blokland J, senior counsel for the appellants made oral submissions in respect of exemplary damages including that: (i) the appellants were minors in the care and custody of the Northern Territory; (ii) the Northern Territory should never have allowed the situation to occur that Commissioner Middlebrook and other senior officers did not realise that CS gas was not able to be lawfully used in a youth detention centre; (iii) the Northern Territory's policies and guidelines with respect to youth detention should have made it clear that CS gas could not be used in youth detention centres, such use being prohibited by law and potentially lethal; and (iv) the Northern Territory's lack of proper management systems meant that the senior officers involved decided to use CS gas in a confined space, where the appellants had no escape route, and without checking the appellants' medical records.

136 In response, senior counsel for the Northern Territory did not suggest that these submissions about the systemic failings of the Northern Territory on which the appellants relied were outside of the case as pleaded and put before Kelly J. No submission was made that Blokland J deciding the matter on the basis of those submissions would deny the Northern Territory procedural fairness because the submissions, as the Court of Appeal put it, "opened up a wide range of potential evidence, including legal and policy advice provided within the relevant agencies of the [Northern Territory] relating to the use of CS gas in juvenile detention centres".[191]

137 To the contrary, it was only before the Court of Appeal that the Northern Territory, for the first time, contended that the appellants had put to Blokland J a case which they had not pleaded. In its written submissions to the Court of Appeal, the Northern Territory recorded that the appellants' case in oral submissions before Kelly J had been that "their exemplary damages claim was directed at the body politic and so the Territory should not have allowed there to be any uncertainty about whether or not CS gas could be used at Don Dale". The Northern Territory had responded to these submissions by submitting to Kelly J that they were outside the scope of the appellants' pleaded case. Kelly J did not have to and therefore did not decide this issue. And the Northern Territory plainly did not maintain its objection in that regard before Blokland J.

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191 *Northern Territory v Austral* [2025] NTCA 3 at [76].

138 While in general the relief claimed by a party is limited to that available on the pleadings, that is not so where the parties have conducted all or some of the case on a different basis.[192] Even if the appellants departed from their pleaded case (which is by no means obvious), it is clear that the parties conducted the hearing before Blokland J on the basis the appellants contended that the systemic failings of the Northern Territory supported an award of exemplary damages. In circumstances where the Northern Territory made no complaint about how the appellants put this aspect of their case, Blokland J was entitled to proceed on the basis that the contest included the systemic failings of the Northern Territory. It follows that before the Court of Appeal there was no scope for the principles in *Coulton v Holcombe*[193] to be applied against the appellants. If anything, on the principles explained in that case, it is the Northern Territory which must be bound by the way it ran its case before Blokland J, which did not include any contention that the appellants were unable to submit that the Northern Territory's failings justified an award of exemplary damages, the relevant "trial" for the application of those principles being that before Blokland J – the only trial concerning damages for the appellants being sprayed with CS gas.[194] Putting it another way, it cannot have been procedurally unfair for Blokland J to have decided the issue of exemplary damages on the very basis put before her Honour by the appellants in circumstances where the Northern Territory did not object to that basis as outside the scope of the pleadings or as involving any unfairness to it. Instead, the Northern Territory put its case on the basis of the continued application of the findings of Kelly J which, for the reasons given, had no continuing application. Having nailed its colours solely to that mast before Blokland J, it was not open to the Northern Territory to try a new argument before the Court of Appeal.

139 Ground (3) of the appellants' appeals therefore must be allowed.

Conclusions in respect of the appeals

140 For these reasons Blokland J did not err in concluding that the reprehensible conduct of the Northern Territory required an award of exemplary damages to be made in favour of each appellant. Each was a minor in the care, control, and custody of the Northern Territory in a youth detention centre and each was a mere

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192 *Banque Commerciale SA, en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287, 288.

193 (1986) 162 CLR 1.

194 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8, 11.

bystander to the circumstances which caused the officers to spray CS gas into the BMU. The officers' actions in so doing treated the appellants as acceptable collateral damage in their efforts to subdue Jake Roper in circumstances exposing a callousness and gross disregard for the welfare of the appellants when evaluating the options available in an overall context of manifestly inadequate systems and training of officers concerning the use of CS gas against minors in a youth detention centre.

The cross-appeals

The proportionality of an award of exemplary damages

141 Just as a fundamental concern in criminal punishment is proportionality with the wrongdoing,[195] so too the quantum of an exemplary damages award must be proportionate to the wrongdoing in the sense of being moderate and not excessive when having regard to the wrongdoing.[196] As with criminal law, achieving proportionality between penalty and wrongdoing can be assisted by consideration of principles of totality (a remedy commensurate with the wrong that also should not be crushing to the wrongdoer[197]), parity, and consistency of penalty,[198] and whether multiple instances of wrongdoing are founded on the same

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195 *Hoare v The Queen* (1989) 167 CLR 348 at 354; *Markarian v The Queen* (2005) 228 CLR 357 at 385 [69].

196 *Backwell v AAA* [1997] 1 VR 182 at 205-206, citing *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 463; Luntz and Harder, *Assessment of Damages for Personal Injury and Death*, 5th ed (2021) at 184-185 [1.9.14]; Swanton and McDonald, "Commentary on the report of the English Law Commission on *Aggravated, Restitutionary And Exemplary Damages*" (1999) 7 Torts Law Journal 184 at 192.

197 *Mill v The Queen* (1988) 166 CLR 59 at 63; *Postiglione v The Queen* (1997) 189 CLR 295 at 304, 308, 340-341.

198 *Wong v The Queen* (2001) 207 CLR 584 at 591 [6].

facts or course of conduct.[199] These principles have been described as "analytical tools which assist in the determination of a reasonable application of the law".[200]

142 In a decision of the Court of Appeal of England and Wales, which was subsequently referred to on this point with approval by Lord Dyson (in reasoning on this issue with which all other members of the Supreme Court in that case agreed),[201] it was said that where the same conduct by a defendant involves multiple instances of wrongdoing and exemplary damages are considered to be necessary then (at least where all the victims are before the court) the appropriate course is, in very broad terms, to consider the amount of exemplary damages that the defendant ought to pay and then to apportion that sum amongst the plaintiffs. The division of exemplary damages among multiple plaintiffs will not necessarily be equal if the wrongdoing to one is more egregious than another. Where all the victims are before the court, this approach, as a general rule, is likely to ensure that the amount of exemplary damages is not disproportionate to the wrongdoing and will be distributed in a just manner.

The award by Blokland J and the effect on interest

143 The four appellants were awarded general and, in some cases, also aggravated damages, totalling (respectively) $20,000, $50,000, $40,000, and $50,000. In awarding each appellant a further amount of $200,000 as exemplary damages, Blokland J did not mention the considerations of totality, parity or course of conduct. Her Honour's dispositive reasoning was as follows:[202]

> "For the reasons already stated and to ensure the [Northern Territory] knows this must never happen again and to show the Court's disapprov[al] of unlawful force being used on children or youths in detention, I will award $200,000 to each [appellant] by way of exemplary damages."

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199 *Ryan v The Queen* (1982) 149 CLR 1 at 22.

200 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450 at 469-470 [45] (footnote omitted).

201 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 300 [167], citing *Riches v News Group Newspapers Ltd* [1986] QB 256.

202 *Binsaris v Northern Territory* [2023] NTSC 79 at [114].

144 The appellants also sought interest, although only on an award of general damages. Blokland J held that pre-judgment interest on general damages under s 84(1) of the *Supreme Court Act* should be refused. Blokland J said:[203]

> "Th[e] [appellants] are unlike a commercial entity where particular features which are not present here apply. On the one hand it is appropriate that the sums awarded under general damages keep their value. On the other hand the [appellants] will have the benefit of a reasonably significant sum through the award for exemplary damages. Although that it is not at all the purpose of the award for exemplary damages, as a matter of fact the [appellants] will not be out of pocket by virtue of not being awarded interest for the sums awarded for general damages. In the exercise of the discretion there will be no award for interest to be paid."

As may be observed, Blokland J treated the issue of whether to award interest on general damages as tied to, and dependent on, her Honour's quantification of exemplary damages.

Cross-appeal ground (1) – exemplary damages and manifest excess

145 This was not a case such as may arise in respect of interests of a plaintiff in property or information, where the total amount of exemplary damages may be large in order to reflect, for example, the profits cynically made by a defendant tortfeasor. Rather, in circumstances where the acts of the individual officers were attributed to the Northern Territory, the award was primarily made for reasons of moral retribution, deterrence, and denunciation where the amount of compensatory damages was insufficient to have that effect.

146 Nevertheless, even accepting that the means of a defendant (which are substantial in the case of the Northern Territory) can be important to the assessment of exemplary damages,[204] the total award of $800,000 is an amount which substantially exceeds what was required to achieve appropriate moral retribution,

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203 *Binsaris v Northern Territory* [2023] NTSC 79 at [116].

204 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 461, 471-472.

deterrence, and denunciation. The amount also substantially exceeds the range of exemplary damages awards made generally for torts to the person.[205]

147 The appellants referred to judicial awards of exemplary damages for child sexual abuse in amounts of around $200,000[206] and $300,000[207] and an award of $200,000 in exemplary damages against the State of New South Wales for an unprovoked assault by a police officer, attributed to the State, which left the plaintiff unconscious with a closed head injury and was described as "vicious and disgraceful and deserving the highest disapprobation".[208] Whilst none of those circumstances is closely comparable, all those cases illustrate that the award of $800,000 in exemplary damages substantially exceeds the proportionate punishment.

148 As the Northern Territory submitted, it may well be that Blokland J determined that an amount of $200,000 was an appropriate award of exemplary damages for the Northern Territory's tortious conduct but that her Honour did not apply considerations of totality and course of conduct which would have resulted in that amount being apportioned between the four appellants. No party suggested that there were any considerations particular to any of the appellants which required an award of exemplary damages different from the others. Indeed, the appellants accepted that "the same or similar awards would likely be made". The submission of the Northern Territory that an award of $200,000 should be apportioned equally among the four appellants should be accepted.

Cross-appeal ground (2) – relationship between exemplary damages and interest on compensatory damages

149 The Northern Territory submitted that Blokland J's decision to deny interest on general damages was only disturbed by the Court of Appeal due to the decision

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205 Maher, "An Empirical Study of Exemplary Damages in Australia" (2019) 43 *Melbourne University Law Review* 694 at 714-715 (Table 2), 718 (Table 4); Fielding, "Exemplary damages and police wrongdoing: An empirical analysis" (2024) 29 *Torts Law Journal* 53 at 60, 68, 82 (fn 76).

206 *Kucinskas v Lane [No 2]* [2024] NSWSC 544 at [20], [23] ($350,000 for general, aggravated, and exemplary damages, including $140,000 for general damages).

207 *APC v Mr B [No 3]* [2025] NSWSC 142 at [43].

208 *Knight v New South Wales* [2004] NSWSC 791 at [105].

of the Court of Appeal to set aside the award of exemplary damages. Hence, it was argued, if the award of exemplary damages is reinstated, then the rationale for the refusal of interest would be re-enlivened and Blokland J's discretionary decision not to award interest on general damages should be restored.

150 The submissions of the Northern Territory should not be accepted because Blokland J erred in excluding interest on general damages based on the award of exemplary damages. As explained above, an assessment of compensation, and interest on compensation, is anterior to an assessment of exemplary damages because the latter are only awarded if the purposes of punishment have not been satisfied by other legal orders. The determination of compensation, and of interest on the compensation for being kept out of the money from the time of accrual of the cause of action, should be conducted before any assessment of exemplary damages. Hence, "[t]he party wronged is entitled to whatever compensatory damages the law allows ... If exemplary damages are awarded, they will be paid in addition to compensatory damages".[209]

151 Pre-judgment interest provisions such as s 84(1) of the *Supreme Court Act* confer a discretion on the court but the discretion must be "exercised in accordance with legal principle".[210] Section 84(1) is a provision which appears to follow the general model recommended in England in 1934 based on the concept that a successful plaintiff "is entitled to compensation for the deprivation"[211] for being "kept out of [the] money" from the time that the damages should have been paid.[212] The award of pre-judgment interest is therefore usually "an essential element in the achievement of true compensation"[213] and pre-judgment interest is "almost

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209 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [15].

210 *Cullen v Trappell* (1980) 146 CLR 1 at 17; *Haines v Bendall* (1991) 172 CLR 60 at 66-67.

211 *Riches v Westminster Bank Ltd* [1947] AC 390 at 400. See also Great Britain, Law Revision Committee, *Second Interim Report* (1934) Cmd 4546 at 5; *Law Reform (Miscellaneous Provisions) Act 1934* (UK).

212 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1953) 88 CLR 164 at 166-167.

213 *Haines v Bendall* (1991) 172 CLR 60 at 66.

invariably" allowed.[214] It is not in accordance with legal principle, and may fail to restore the plaintiff's position, for an assessment of compensation to be reduced by reference to the existence or quantum of exemplary damages which were, themselves, based on the adequacy of compensation.

152 Blokland J accordingly erred in excluding an award of interest on the general damages. There was no suggestion by any of the parties of any error by the Court of Appeal in the assessment of pre-judgment interest or the date from which it should run.[215] The assessment of pre-judgment interest by the Court of Appeal on general damages should not be disturbed. Interest should not be awarded on exemplary damages.

Orders

153 The appeals should be allowed with costs. The cross-appeals should be allowed on the first ground only. The second ground should be refused. Since one ground of the cross-appeals was successful and the other was not, there should be no order for costs of the cross-appeals in this Court.

154 Orders 1 and 2 of the Court of Appeal's orders made on 28 March 2025 in each matter should be set aside. In place of those orders of the Court of Appeal, it should be ordered that the appeal be allowed in part, and orders 1 and 2 of the orders of Blokland J made on 1 September 2023 in each matter be set aside and, in their place, it be ordered as follows:

Matter No 14 of 2015 (O'Shea)

The defendant pay the following to the plaintiff, Leroy O'Shea:

General damages:	$30,000
Aggravated damages:	$20,000

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214 *Homeowners Insurances Pty Ltd v Job* (1983) 2 ANZ Insurance Cases ¶60-535 at 78,115; *Falkner v Bourke* (1990) 19 NSWLR 574 at 576; *Donellan v Watson* (1990) 21 NSWLR 335 at 345; *Miller Heiman Pty Ltd v Sales Principles Pty Ltd* (2017) 94 NSWLR 500 at 516 [84].

215 See *State Government Insurance Office (Q) v Biemann* (1983) 154 CLR 539 at 545, quoting *Fire and All Risks Insurance Co Ltd v Callinan* (1978) 140 CLR 427 at 432.

Exemplary damages:	$50,000
Total:	$100,000

Matter No 15 of 2015 (Austral)

The defendant pay the following to the plaintiff, Ethan Austral:

General damages:	$25,000
Aggravated damages:	$15,000
Exemplary damages:	$50,000
Total:	$90,000

Matter No 19 of 2015 (Webster)

The defendant pay the following to the plaintiff, Keiran Webster:

General damages:	$30,000
Aggravated damages:	$20,000
Exemplary damages:	$50,000
Total:	$100,000

Matter No 26 of 2015 (Binsaris)

The defendant pay the following to the plaintiff, Josiah Binsaris:

General damages:	$20,000
Exemplary damages:	$50,000
Total:	$70,000

155 In order to ensure that the orders represent interest on general damages only, it is necessary to set aside order 4 of the Court of Appeal's orders made on 28 March 2025 in each matter. In its place, it should be ordered that order 3 of each of the orders made by Blokland J on 1 September 2023 be set aside and in their place it be ordered that pursuant to s 84 of the *Supreme Court Act*, the plaintiff be awarded interest on general damages at the rate of 4% per annum for the period from 21 August 2014 to the date of judgment on 1 September 2023.

156 There is no record in this Court of the costs orders (if any) made by the Court of Appeal.[216] In circumstances in which the appellants should have been successful on the appeal to the Court of Appeal they should prima facie be entitled

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216 *Northern Territory v Austral* [2025] NTCA 3 at [104].

to their costs in the Court of Appeal. The appellants have liberty to apply to vary any orders as to costs made by the Court of Appeal.