



Précis Paper

Civil Proceedings for Assault

This presentation is an interesting discussion of issues that arise in civil proceedings for assault, including establishing self-defence at common law and under the *Civil Liability Act 2002* (NSW), awards of exemplary damages, and allowances for out-of-pocket expenses.

Discussion Includes

- Background facts
- Self defence at common law and under Civil Liability Act
- Exemplary damages where a criminal sanction has been imposed
- Was the criminal penalty substantial?
- Defendant's continued disregard for plaintiff's interests
- Damages for out-of-pocket expenses
- Damages under section 53 of the Civil Liability Act

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Civil Proceedings for Assault

1. In this edition of BenchTV, John de Greenlaw (Barrister – Ada Evans Chambers, Sydney) and Katherine Ferrier (Researcher – Ada Evans Chambers, Sydney) discuss the recent decision in the NSW Court of Appeal *Cheng v Farjudi* [2016] NSWCA 316.

Background and Material Facts

2. Mr Farjudi, the plaintiff in District Court proceedings, was injured as a consequence of Mr Cheng's assault and battery of him in September 2011. On the night of the incident, Mr Farjudi and his wife and Mr Cheng and his wife were playing poker machines at the Parramatta Leagues Club. Following a verbal exchange in which Mrs Farjudi asked Mr Cheng to make less noise, Mr Farjudi approached Mr Cheng, who was seated next to his wife at a poker machine. Mr Farjudi raised his left arm, with his hand facing upwards, although there was no suggestion that he formed a fist with that hand. Mr Cheng stood up and engaged in a fight with Mr Farjudi, pursuing him across the room and ultimately delivering at least two blows to his face. The events were captured on CCTV footage.
3. As a result of the assault, Mr Farjudi suffered from a fracture to the right orbit and a continuing post-traumatic stress injury. The defendant was interviewed by police and an electronic recording of the interview made (the "ERISP"). The defendant also signed a statement. After pleading guilty in criminal proceedings, Mr Cheng was convicted of assault occasioning actual bodily harm and sentenced to a good behaviour bond of 12 months under s 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).
4. Mr Farjudi then commenced civil proceedings against Mr Cheng in the District Court, seeking damages for assault and battery or, in the alternative, in negligence. In his defence, Mr Cheng denied having struck Mr Farjudi, indicating that the plea of guilty in the criminal proceedings was a "plea of convenience". In the alternative, Mr Cheng pleaded that he acted in self-defence within the meaning of s 52 of the *Civil Liability Act 2002* (NSW), in that he was acting in defence of his wife, or in self-defence as understood under the common law. Further, in the alternative, he pleaded that any damages to which Mr Farjudi might be entitled were limited by s 53 of the *Civil Liability Act*.
5. At trial, however, Mr Cheng did not dispute that he had struck Mr Farjudi once in the face. He maintained that he was acting in defence of his wife in circumstances where the respondent's actions were unlawful.

6. The trial judge held that Mr Cheng had assaulted Mr Farjudi, that he had punched him at least twice, had not acted in defence of his wife so as to be entitled to the statutory defence under s 52 and, in any event, had used excessive force. As on her Honour's findings self-defence was not made out, s 53 did not apply so as to limit any damages award. Her Honour's award of damages included general damages in the sum of \$100,000, exemplary damages in the sum of \$10,000 and awards for past domestic assistance in the sum of \$40,824 and future domestic assistance in the sum of \$20,594.

The Claim of Self-Defence

7. Section 52 of the *Civil Liability Act 2002* (NSW) provides in relevant part:

52 No civil liability for acts in self-defence

(1) A person does not incur a liability to which this Part applies arising from any conduct of the person carried out in self-defence, but only if the conduct to which the person was responding:

(a) was unlawful ...

...

(2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary:

(a) to defend himself or herself or another person ...

8. Thus, in order to establish a defence under s 52, a defendant must establish that their conduct was in response to an unlawful act. "Unlawful" within s 52 includes tortious conduct: *State of New South Wales v McMaster* [2015] NSWCA 228. Moreover, it must be shown that the conduct was necessary to defend the defendant or another person. In contrast, self-defence at common law does not require an unlawful act. It must, however, be established that the defendant's actions were proportionate to the threat.
9. The issue of whether Mr Farjudi committed an unlawful act was of utmost importance in the trial as, had this been established, s 52 would provide a complete defence to the claim. At trial, Mr Cheng claimed to have been acting in defence of his wife, a claim that the trial judge ultimately rejected based upon discrepancies in the defendant's case and with the CCTV footage. On appeal, Mr Cheng contended that Mr Farjudi's approach towards Mr Cheng and his wife as they sat playing the poker machines was sufficiently confronting, threatening and intimidatory to raise an expectation in them of physical contact such that Mr Cheng's conduct was unlawful. This argument was also rejected by the Court of Appeal as being inconsistent with the CCTV footage, and the Court found that there was nothing in the manner of Mr Farjudi's remonstrance that would have caused Mr Cheng or his wife to fear that physical contact was threatened, let alone imminent.

10. The trial judge also found that Mr Cheng's response to Mr Farjudi was not proportionate to any threat that he may have posed to Mr Cheng or his wife. The electronic recording of Mr Cheng's interview with the police indicated that he had hit Mr Farjudi in retaliation, rather than as a means of protecting her from further attack. Given that the response was not proportionate, the common law claim of self-defence also failed.
11. Prior to the appeal, Mr Cheng conceded that his response to Mr Farjudi was not proportionate. Accordingly, he was unable to establish a complete defence pursuant to s 52. He would, however, be able to invoke s 53 should the other elements be made out. Section 53 of the *Civil Liability Act* limits the award of damages in circumstances where self-defence would have been established had the actions of the defendant been reasonable. Where the actions taken in self-defence were not a reasonable response, damages are not to be awarded unless the circumstances were exceptional *and* a failure to award damages would be harsh and unjust. However, in this case, because Mr Farjudi had failed to establish an "unlawful act", s 53 was not engaged.

General Damages

12. Once the defendant's intentional tort was established, s 3B(1)(a) of the *Civil Liability Act* applied, so as to exclude the operation of the Act with three exceptions. This allowed the trial judge to award general damages, and damages were awarded for past and future out-of-pocket expenses and domestic assistance. The trial judge considered that aggravated damages were adequately taken into account in assessing general damages.
13. On appeal, Mr Cheng disputed the award of general damages, arguing that there was no evidence upon which the award of out-of-pocket expenses could be based. This ground of appeal was rejected after a factual consideration of the evidence.

Exemplary Damages

14. The trial judge accepted submissions made on behalf of the plaintiff that the bond to which Mr Cheng had been sentenced was minimal, and would not have acted as a deterrent. Accordingly, she awarded the sum of \$10,000 in exemplary damages. The trial judge also took into account the fact that the defendant had admitted guilt in criminal proceedings, but denied having punched Mr Farjudi in his defence of the civil proceedings.
15. On appeal, Mr Cheng contended that there should be no award of exemplary damages due to the fact that he had been criminally sanctioned by the s 9 good behaviour bond, with a conviction recorded. This should have been considered "substantial punishment", in

accordance with the test laid down by the High Court in *Gray v Motor Accidents Commission* [1998] HCA 70; 196 CLR 1. In *Gray*, the High Court held that an award of exemplary damages may not be awarded where a person has been convicted and "substantial punishment" imposed for the same conduct that is the basis of a claim in civil proceedings. This left the door open to an award of exemplary damages where the criminal sanction is not considered to be "substantial punishment".

16. The Court of Appeal considered two subsequent decisions, *Niven v SS* [2006] NSWCA 338 and *Whitbread v Rail Corporation NSW* [2011] NSWCA 130. In *Niven*, a plaintiff was awarded substantial damages for injury suffered consequent upon sexual assaults perpetrated upon him by the defendant. Between the date of the first instance decision and the hearing of the defendant's appeal against the award of damages, the defendant was acquitted of charges relating to the same conduct as was subject of the civil proceedings claim for damages. The Court held there was no error in an award of exemplary damages being made, essentially on the basis that as the defendant had been acquitted no question of double punishment arose.
17. *Whitbread* concerned proceedings for assault, battery and false imprisonment arising from an altercation between a transit officer and the appellants. The transit officer was prosecuted for assault in the Local Court and found guilty of assaulting both appellants. The transit officer appealed to the District Court. The conviction in respect of one appellant was quashed, and the finding of guilt in respect of the other appellant was confirmed but no conviction was recorded pursuant to s 10 of the *Crimes (Sentencing Procedure) Act* and a good behaviour bond imposed. The trial judge refused to make an order for exemplary damages and referred to the fact the transit officer had been prosecuted, finding that the matters would remain on his criminal record and could be regarded as punishment.
18. In the Court of Appeal, Whealy JA held that "where 'substantial punishment' has not been imposed, or where it is arguable that it has not, there is no reason why the trial judge cannot have some regard to the nature of those proceedings and their outcome as a factor, amongst others, in determining whether or not to award exemplary damages. The criminal proceedings brought against the transit officer were a factor relevant to the determination whether to award exemplary damages, but did not provide an absolute bar. There was no error by the trial judge in failing to award exemplary damages.
19. The Court of Appeal also referred to *R v Mauger* [2012] NSWCCA 51, where the Court of Appeal held, in the context of a Crown appeal, that a bond imposed under s 10 of the *Crimes (Sentencing Procedure) Act*, with no conviction recorded, was a penalty that carried with it serious consequences if breached.

20. President Beazley, delivering the judgment for the Court of Appeal in this case, was ultimately not prepared to find that a conviction recorded and the imposition of a bond was not a substantial penalty (at [105]). However, the award of exemplary damages was nonetheless proper due to the manner in which Mr Cheng had conducted his defence. Her Honour held (at [110]):

[Mr Cheng's] conduct in denying the assault and swearing a defence that he had only pleaded guilty "for convenience" demonstrated a continuing contumelious disregard for the respondent's rights, not only to be able to engage in social activities without being subjected to the serious assault that was inflicted upon him, but also by the continuing conduct in denying that same conduct and requiring the respondent to engage in a seven day trial to vindicate his civil right to damages. [...] [T]he manner in which the appellant contested the proceedings was a continued display of a disregard for the respondent's interests, in circumstances where the CCTV footage made his denial of the assault and its intensity and his claim of unlawful conduct by the respondent untenable.

Lessons for Practitioners

21. Mr de Greenlaw reminds practitioners that establishing reliance upon ss 52 and 53 of the *Civil Liability Act* is a fact intensive process. It is therefore important to ensure that every component of those sections is dealt with. In particular, a defendant must establish that there was an unlawful act, to which he or she responded. This can include tortious conduct.
22. If an unlawful act is established, but the actions were not proportionate, s 53 of the *Civil Liability Act* will be engaged.
23. In relation to exemplary damages, Mr de Greenlaw considers that this case suggests that where consideration of a criminal sanction would involve a collateral attack on that sanction, it is unlikely that exemplary damages will be awarded in future cases.

BIOGRAPHY

John de Greenlaw

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John practiced as a solicitor for over 20 years before being called to the NSW Bar in 2001. He practices primarily in commercial and common law, including NSW and federal workers compensation claims, public liability and professional and medical negligence matters.

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Katherine is a researcher at Ada Evans Chambers. She has studied at Sydney University, attaining a BIGS and a BA (Hons) and is currently completing her JD.

BIBLIOGRAPHY

Focus Case

Cheng v Farjudi [2016] NSWCA 316

Benchmark Link

https://benchmarkinc.com.au/benchmark/weekly_insurance/benchmark_25-11-2016_weekly_insurance_law_review.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/582e311ee4b058596cba1845>

Cases

State of New South Wales v McMaster [2015] NSWCA 228

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

Niven v SS [2006] NSWCA 338

Whitbread v Rail Corporation NSW [2011] NSWCA 130

R v Mauger [2012] NSWCCA 51

Legislation

Civil Liability Act 2002 (NSW)

Crimes (Sentencing Procedure) Act 1999 (NSW)