

STATE OF NEW SOUTH WALES v IBBETT (S227/2006)

Court appealed from: New South Wales Court of Appeal

Date of judgment: 13 December 2005

Date of grant of special leave: 16 June 2006

At around 2.00am on 23 January 2001 Mr Warren Ibbett was being pursued by two police officers who suspected him of having committed a traffic offence. He then drove into his mother's garage and closed the door. One of those officers dived under the closing door and drew his revolver. Mrs Ibbett heard the commotion and entered the garage through a side door. She then told that police officer to leave. He then pointed his gun at Mrs Ibbett briefly and demanded that his colleague be granted access. That officer then turned his gun back on Mr Ibbett. Mr Ibbett was then arrested and strip-searched in Mrs Ibbett's vicinity.

Mrs Ibbett successfully sued the State of New South Wales ("the State") in both trespass and assault. On 19 November 2004 Judge Phegan awarded her \$15,000 in general damages and \$10,000 in exemplary damages in relation to the assault. He also awarded her \$20,000 in aggravated damages and \$20,000 in exemplary damages for the trespass.

The main issue for the Court of Appeal was whether an award of exemplary damages was precluded by the *Civil Liability Act 2002 (NSW)* ("the Act"). The secondary issue was whether such an award was justified in any event.

On 13 December 2005 the Court of Appeal dismissed the State's appeal. It also allowed Mrs Ibbett's cross-appeal. Chief Justice Spigelman and Justice Basten held that section 21 of the Act did not preclude the award of exemplary damages in this case. This is because the proceedings were with respect to "an intentional act...done with intent to cause injury" within the meaning of section 3B(1)(a) of the Act. Justice Ipp, who otherwise agreed with Chief Justice Spigelman, held that the definition of "injury" in section 11 should be applied to the term "injury" in section 3B(1)(a).

In relation to the award of exemplary damages for the assault, Chief Justice Spigelman held that the police officer's conduct was outrageous and it deserved the Court's censure. His Honour then held that the exemplary damages should be increased to \$25,000. Justice Basten also held that there was a sufficient factual basis for an award of exemplary damages. Justice Ipp however dissented as to quantum.

With respect to the award of exemplary damages for the trespass to land, Chief Justice Spigelman held that the police officers' conduct showed a complete disregard of Mrs Ibbett's right to have her guests undisturbed. His Honour then found that an award of \$20,000 was appropriate in the circumstances. Justice Basten agreed that that police officer had a palpable disregard for Mrs Ibbett's rights as a proprietor. Justice Ipp however held that a property owner has no right to claim damages because his or her guests have been disturbed. His

Honour therefore would have set aside the award of exemplary damages for trespass to land.

With respect to the award of aggravated damages for the assault, Justices Ipp and Basten held that an additional amount of \$10,000 should be awarded. With respect to the award of aggravated damages for trespass to land, Chief Justice Spigelman held that the \$20,000 awarded by Judge Phegan was appropriate. Justice Ipp however would have set aside that award.

The grounds of appeal include:

- The Court of Appeal erred in awarding aggravated and/or exemplary damages for trespass to land on the ground that, inter alia, the interest of the owner, or the occupier, of land in his or her guests being undisturbed was sufficient to support an award of such damages.
- The Court of Appeal erred in failing to observe that an award of "general damages" for trespass to land involves an element of punishment, deterrence or rebuke and therefore punished the Appellant twice for the same wrong or alternatively failed to have proper regard to the overlap between such general damages, aggravated damages and exemplary damages.