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| IN THE COUNTY COURT OF VICTORIAAT MelbourneCOMMON LAW DIVISION | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES  |

General List

 CI-16-98772

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| BEN MORRICE (a pseudonym) | Plaintiff |
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| v |  |
|  |  |
| JULIAN ORD (a pseudonym) | Defendant |

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| JUDGE: | HER HONOUR JUDGE TSALAMANDRIS  |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 12 May 2017 |
| DATE OF JUDGMENT: | 19 May 2017  |
| CASE MAY BE CITED AS: | MORRICE (a pseudonym) v ORD (a pseudonym) |
| MEDIUM NEUTRAL CITATION: | [2017] VCC 958 |  |

**REASONS FOR** **JUDGMENT**

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Subject: Damages Assessment

Catchwords: Assault – Assault against off-duty police officer – Injury to left eye socket – Aggravated damages

Cases Cited: *Woodhouse v Clinton* (unreported 10 October 2010); *Wright v Bramley* [2017] NSWDC 45; *Walker & Anor v Hann & Ors (No 2)* [2009] VSC 290; *Henry v Thompson* [1989] 2 Qd R 412

Judgment: Judgment in favour of the plaintiff

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| APPEARANCES: | Counsel | Solicitors |
| For the Plaintiff | Mr T Rhodes | Ms J. Johnstone |
|  |  |  |
| For the Defendant | Ms R Barnes | Mr P Duke |

HER HONOUR:

Introduction

# In the early hours of Sunday 9 March 2014, Mr Ben Morrice[[1]](#footnote-1) was at a nightclub with a group of friends, when an altercation arose between his group of friends and another group of men. Soon after, Mr Morrice left the club to walk his friends to their car. Whilst walking back to the club alone, Mr Julian Ord[[2]](#footnote-2), who had been part of the other group of men, drove past Mr Morrice in his car. Without any provocation, Mr Ord stopped his car, got out and punched Mr Morrice in the face, causing a fracture to the bone around Mr Morrice’s left eye.

# Mr Ord was subsequently charged with, and pleaded guilty to assault. He did not defend Mr Morrice’s claim for damages and the matter proceeded to trial as an assessment. Mr Morrice claims general damages, medical expenses and aggravated damages.

# Mr Ord was present in Court throughout the hearing, and, on multiple occasions, his counsel, Ms Barnes, expressed an unreserved apology to Mr Morrice for the assault. However, it was submitted that the damages awarded to Mr Morrice should be relatively modest, on the basis that he has made an excellent recovery from the facial fracture, with no ongoing requirement for psychiatric treatment. Mr Ord also denied that the circumstances of the assault gave rise to an entitlement to aggravated damages.

Circumstances of the assault

# Mr Morrice was celebrating a friend’s birthday at the Peel Hotel in Wellington Street, Collingwood, with his boyfriend and a group of friends. Soon after arriving, an altercation arose in which Mr Morrice’s boyfriend was punched by an unknown person at the hotel, causing him to fall into Mr Morrice. Security became briefly involved, and the matter diffused relatively quickly.

# Soon after the altercation, Mr Morrice left the hotel to walk his friends to their nearby parked car. Whilst walking back to the hotel, Mr Morrice noticed that a BMW four wheel drive slowed down as it passed him. He then saw a male, who had been involved in the earlier altercation, get out of the driver’s seat, and come towards him on the footpath. The male, subsequently identified as Mr Ord, said to him, “Where’s your boyfriend now?” before then punching Mr Morrice in the face, near his left eye. By this stage, a second male had exited the front seat of the car.

# Mr Morrice said he was struck a couple of times with a closed fist, on the left side of his face. Mr Morrice said he started yelling and that within a very short space of time, Mr Ord and the second male returned to the car and drove off. Mr Morrice was able to memorise the registration number on the car, and immediately typed it into his phone and texted it to his boyfriend.

# Mr Morrice subsequently gave a statement to the police. On 14 March 2014, Mr Morrice was shown a group of photographic images, after which he identified Mr Ord.

# Mr Ord was subsequently charged with assault. He pleaded guilty and was given a six month suspended sentence.

Mr Morrice’s injury, the treatment he received and the consequences

# Immediately after the assault, Mr Morrice was taken to St Vincent’s Hospital. A CT scan was performed, which showed a minimally displaced left medial maxillary wall fracture and subcutaneous emphysema in the periorbital region.

# Mr Morrice was then referred to the Royal Victorian Eye and Ear Hospital, where it was noted there was no evidence of global rupture and no retinal detachment or tear. However, it was noted that his eye movement was slightly limited, which was thought likely due to the related maxillary wall fracture.

# On 24 March 2014, Mr Morrice underwent surgery at St Vincent’s Hospital to fix a titanium plate to his left eye socket.

# Within approximately four weeks of the assault, Mr Morrice returned to work as a police officer. He was confined to office duties for the first four weeks, but thereafter returned to normal duties. Mr Morrice said that whilst he had no difficulties with his vision at that stage, he still had a blackened eye, such that he was placed on restricted duties, as it was considered inappropriate for him to be an operational police officer whilst the physical signs of his injury were still present.

# Mr Morrice said that he suffered swelling around his left eye as well as soreness in his cheekbones and nose for approximately 18 weeks after the assault. Mr Morrice initially used Endone medication to alleviate the pain, but stopped soon after as it caused him digestive problems. Mr Morrice said he then took Panadeine Forte for about two more weeks, and later took Panadol.

# In August 2016, Mr Morrice’s general practitioner referred him for a CT scan of his sinuses, as he was suffering from snoring and a recurrent blocked nose. The CT scan was reported as demonstrating that the medial half of his titanium plate had been displaced. Accordingly, Mr Morrice was referred to ear, nose and throat surgeon, Dr Deborah Amott.

# Dr Amott conducted an internal examination, and diagnosed a deviated septum and a polyp in the left nasal passage. Dr Amott considered the polyp was most likely caused by the trauma of the assault, but considered the deviated septum and the problems with snoring to be unrelated.

# On 2 May 2017, Dr Amott was scheduled to perform a septoplasty on Mr Morrice at the Epworth Hospital, at which time the polyp in his left nasal passage was to be removed.

# Mr Morrice was also referred to maxillofacial surgeon, Dr Graeme Wright, in relation to the reported displacement of the titanium plate. Dr Wright disagreed with what was reported on the CT scan, and considered there was no need for the titanium plate to be removed. In his report dated 12 April 2017, Dr Wright stated that Mr Morrice had received a good clinical outcome from the surgical repair, and noted that whilst there were objective signs of “slight entrpion and slight enopthal”, Mr Morrice was unaware of such issues.

# Mr Morrice said that he suffered from irritation and sensitivity in the lower lid of his left eye, such that he experiences discomfort when wearing contact lenses. As a result, Mr Morrice said that he now usually wears glasses, except when at work, as he then feels safer wearing contact lenses.

# Mr Morrice was cross-examined as to why he had not reported these issues to Dr Wright. He said that the focus of his appointment with Dr Wright, was his concern that the titanium plate had been displaced from his eye socket. Mr Morrice said he would likely have mentioned such issues to an optometrist, as he considered them more relevant to an eye examination. He did not think to mention them to Dr Wright.

# I considered Mr Morrice to be a highly credible and reliable witness, and I was entirely satisfied with his explanation as to why he did not report this complaint to Dr Wright. I accept Mr Morrice suffers discomfort whenever he wears contact lenses.

# Mr Morrice said that as a consequence of the assault, he is now socially withdrawn, to the extent that he is reluctant to attend social events, to go dancing at nightclubs, or to see live music at hotels. He said that he has only been to a pub approximately four to six times since the assault, and that he felt very apprehensive and uneasy on each such occasion. Mr Morrice previously enjoyed dancing and attending live music events, and has not been to a single nightclub since the assault.

# Mr Morrice is very anxious that any further assault or fracture to his face may result in a loss of vision to his injured eye.

# Mr Morrice accepted that whilst he was not a big drinker, he still enjoyed attending social outings with his friends. Following the assault, however, he said that he now prefers to stay home and watch television, or go camping with his boyfriend.

# Mr Morrice received psychological counselling from psychologist, Ms Gina Cindone, on one occasion. He said that he felt he was able to cope without further counselling, and that he had done so with the support of his family and friends.

# Mr Morrice has continued to work as a police officer, and in November 2016, was promoted to the role of detective. As part of his job, Mr Morrice is frequently involved in investigating violent criminal acts. He feels he is able to cope with such work, as he attends incidents with his work partner and with proper equipment, and is able to call for backup if needed. In such circumstances, Mr Morrice said that he feels he is sufficiently supported at work. When he is out socially, however, Mr Morrice feels vulnerable, as he does not have the same support and equipment.

# I accept Mr Morrice’s explanation as to why he is able to cope with such incidents at work, but feels vulnerable when he is off duty. I commend Mr Morrice for his stoicism in returning to work and advancing his career, despite the apprehension he feels for his own personal safety.

General damages

# I am satisfied that, at the time of the assault, Mr Morrice suffered immediate and severe pain in his face and left eye region. He then underwent surgery, and continued to suffer pain in the weeks thereafter. Mr Morrice has been left with a permanent titanium plate situated below his left eye.

# I accept that Mr Morrice suffers slight entrpion, which is a malposition resulting in the inversion of his eyelid. I also accept that he suffers slight enopthal, which is displacement of the eye. Although both are very mild conditions, I do accept that Mr Morrice suffers discomfort when wearing contact lenses. I also accept that, as a young man, whose preference before the assault, was to wear contact lenses, that this is a significant inconvenience. I accept that whilst Mr Morrice is able to wear contact lenses to work, it causes him discomfort when he does.

# I am also satisfied that the assault has had a significant psychological impact upon Mr Morrice. Although he only attended one psychological counselling session, I accept that Mr Morrice prefers to obtain support from his family and friends. I consider it significant that he has modified his social activities at a relatively young age. On the night of the assault, he was out at a club with his partner and friends, however, this is something he now avoids doing. I consider this to be a significant interference with his enjoyment of life.

# Mr Rhodes submitted that Mr Morrice’s damages should be assessed in the range of $75,000 to $100,000. Ms Barnes submitted that damages should be more modest, and in the range of $35,000 to $50,000.

# In assessing Mr Morrice’s damages, I am mindful that he was 26 years of age at the time of the assault and that he is now only 29 years of age. As an Australian male, with a predicted life expectancy of approximately 80 years, Mr Morrice will continue to suffer these consequences for the next 50 years.

# In addition to the need for surgery, and the significant pain and suffering endured by Mr Morrice at the time of the assault and in the weeks thereafter, I consider that the permanent presence of the titanium plate, the discomfort associated with wearing contact lenses and his reluctance to socialise, in particular, his avoidance of clubs, is such that Mr Morrice should be entitled to general damages of $100,000.

Medical and like expenses

# Mr Morrice made a claim for out of pocket expenses, totalling $283.50 and I award these to him in full.

Aggravated damages

# Mr Morrice claimed that he should be entitled to aggravated damages, by virtue of the circumstances in which he was assaulted. It was submitted that Mr Morrice was subject to a vicious and unprovoked assault, in which Mr Ord struck Mr Morrice twice on his face. Mr Ord had another male with him, whilst Mr Morrice was alone. Mr Rhodes submitted that such circumstances were designed to instil fear in Mr Morrice, such that an award of $50,000 for aggravated damages is appropriate.

# In support of the plaintiff’s claim, Mr Rhodes referred me to two decisions. The first was a decision of his Honour Judge Wodak in *Woodhouse v Clinton* (unreported decision of 10 October 2010), in which the plaintiff was ultimately awarded $5,000 in aggravated damages, after being attacked by the defendant, in his home. The plaintiff had been asleep at home with his partner and children, when he was awoken by the defendant knocking at the door. The defendant then accused the plaintiff of having an affair with his wife, by which time the plaintiff’s partner and children had woken. To avoid any distress to his family, the plaintiff went outside with the defendant. The plaintiff was then assaulted by the defendant, who kicked his head, made an attempt to choke him and repeatedly threatened to kill him. Wodak, J considered an award of aggravated damages was justified in the circumstances, and awarded such damages in the sum of $5,000.

#  The second was a very recent decision of his Honour Judge Levy in the New South Wales case of *Wright v Bramley* [2017] NSWDC 45. In that case, the plaintiff, the duty manager at a hotel, was assaulted by the defendant, a highly intoxicated guest, who was agitated as hotel staff had stopped serving alcohol to him and his guests. Levy, J accepted that a violent and frightening clash took place, during which blows were struck and in which the defendant threatened to kill the plaintiff. Levy, J considered it appropriate to award aggravated damages, on the basis the defendant’s threat to kill had instilled fear in the plaintiff. It was accepted that the plaintiff was petrified by the uncertainty of what might possibly eventuate. The plaintiff was awarded aggravated damages in the sum of $50,000.

# Ms Rhodes, however, submitted that the circumstances surrounding the assault did not justify an award of aggravated damages. Ms Rhodes referred me to the decision of Justice Smith in *Walker & Anor v Hamm & Ors (No 2)* [2009] VSC 290. In that case, an award of aggravated damages was made against a police officer who assaulted Mr Walker in his home, whilst his mother was present. Whilst Mr Walker was on the ground, and unable to protect himself from the blows, the police officer struck him a number of times with his baton. When Mr Walker was then hand-cuffed and submissive, the police officer stamped on his right elbow. Justice Smith ultimately concluded that the police officer’s conduct was cowardly and vicious.[[3]](#footnote-3)

# In that case, Justice Smith considered the principles relevant to the awarding of aggravated damages. It was noted that such damages are awarded:

“where the harm done to the plaintiff has been aggravated by the way in which that harm was done.”[[4]](#footnote-4)

# In addition, Justice Smith noted that:

“The more insulting, humiliating or affronting the conduct of the defendant, the greater the indignity that the plaintiff is likely to suffer and the greater the injury to the plaintiff’s feelings is likely to be and the greater the award of damages should be.”[[5]](#footnote-5)

# Further, Justice Smith noted that, in the event that aggravated damages were to be awarded, the defendant’s conduct, including events up to and including the trial, may be a relevant consideration.

# Ms Rhodes submitted that, whilst the assault was unprovoked, there was no conduct by the defendant that would justify an award of aggravated damages. Ms Rhodes noted that there was no offensive conduct after the assault, and that Mr Ord had pleaded guilty to the assault, thereby relieving Mr Morrice from having to give evidence in a criminal proceeding. Further, he noted that Mr Ord did not seek to defend the current case and that he was present in court to demonstrate his contrition.

# Ms Rhodes also referred me to a decision of *Henry v Thompson* [1989] 2 Qd R 412, in which aggravated damages were awarded in circumstances in which the defendant had urinated on the plaintiff after assaulting him.

# Having considered the circumstances of the assault, and the defendant’s conduct thereafter, and applying the principles most clearly enunciated by Justice Smith in *Walker & Anor*, I am not satisfied that aggravated damages are justified in this case. I accept that it was an unprovoked attack on Mr Morrice who was alone at the time, and that it caused him significant fear. However, beyond the assault, whilst Mr Ord’ conduct was reprehensible, I am not satisfied he did anything to further insult or humiliate Mr Morrice. I consider the circumstances of this case fall well short of the behaviour demonstrated by the defendants in the abovementioned cases of *Woodhouse*, *Wright*, *Walker* and *Henry*. I shall therefore make no such award of aggravated damages in this case.

Conclusion

# I therefore award Mr Morrice damages of $100,283.50.

# I will now hear from the parties in relation to costs.

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1. a pseudonym. [↑](#footnote-ref-1)
2. a pseudonym. [↑](#footnote-ref-2)
3. 2009] VSC 290 at [30] [↑](#footnote-ref-3)
4. Ibid at para [35] [↑](#footnote-ref-4)
5. Ibid at para [36] [↑](#footnote-ref-5)