

## Bell Gully Junior Mooting Competition 2015

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### *Attorney-General v Miller in the Moot Court of Appeal*

#### Instructions to Mooters

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**NB Please note that these materials are confidential and should not be discussed with any person who is not competing in or helping organise the moot.**

#### ***General Instructions***

1. Mooters can only rely on cases included in the permissible authorities list.
2. The only issues on appeal are those set out after the High Court judgment. Senior counsel should address the first ground of appeal. Junior counsel for each side should address the second ground of appeal.
3. No authority is binding on the Moot Court of Appeal.

#### ***Structure of the moot***

4. In making their key legal submissions, counsel should address the following:
  - (a) What is the law?
  - (b) Did the trial judge apply the correct legal test? If not, what legal test should be applied?
  - (c) Has the test been applied correctly? If not, how should the test have been applied?

## Problem

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The following is an extract from the judgment of Danaher J in *Miller v Attorney-General* in the High Court at Timaru.

### Facts

1. Shortly after 2pm on Tuesday 7 April 2015, the Police were called to a property in Fairview, on the outskirts of Timaru. A neighbour had heard the occupants arguing loudly for most of the morning, and had called Police out of concern for the mother and her two young children living at the address.
2. Constable Scott and Constable Marty Hernandez arrived at the property at 2.15pm to find a male in his late thirties dousing the exterior of the house with fuel from a fuel can. The man had long hair and wore a cap low over his face so that his face was largely hidden. The two constables, noting the man's agitated state, suspected that he was under the influence of substances of some sort. The two constables attempted to apprehend the man and a struggle ensued.
3. During the course of the struggle, the man brandished a knife and stabbed both constables causing serious wounds. Constable Marty Hernandez sustained lacerations on his face and forearms, while Constable Scott was stabbed in the shoulder so that the mobility of his arm was seriously affected. Constable Scott also lost his glasses in the altercation.
4. Witnesses later testified that as the man lunged for Constable Scott, his cap was knocked off. At this point Constable Scott clearly recognised the man, shouting "*Hey you! I know you - you're the bugger that was rude about my wife at the pub the other day. You think you can just say what you want, huh?!*" The altercation continued and in the confusion, the man managed to escape in a motor vehicle. The wounded Constable Scott gave chase in the Police vehicle, calling for support from another nearby unit and leaving Constable Marty Hernandez to check on the occupants of the house.
5. Constable Scott and the second Police vehicle chased the man in a high speed pursuit for nearly 40 kilometres, through Timaru's city centre. The cars reached speeds of 120km/h, far in excess of the posted speed limits, which were 50km/h for the majority of the pursuit. The officers were required to execute a number of dangerous manoeuvres, as the man drove erratically and evasively, with no regard for other vehicles on the road.
6. Fearing for the safety of the public, and in consultation with the second Police unit, the Communications Supervisor at the Timaru Communications Centre ordered that both units abandon the pursuit. The second Police vehicle complied with the order and abandoned the pursuit. In evidence, the District Commander told the Court that the second Police vehicle was in regular contact with the Communications Supervisor in compliance with the Police policy requiring constant re-evaluation of the safety risk of the pursuit. Constable Scott failed to maintain radio contact with either the Communications Centre or the second Police vehicle, and failed to acknowledge or comply with the order to abandon the pursuit. Additionally, other witnesses testified that only the second Police vehicle had engaged its siren and lights.
7. After the order to abandon pursuit was given, Constable Scott continued to pursue the offender for a further 90 seconds before both vehicles lost control on a corner near Waimataitai Primary School. The Constable Scott's Police vehicle slid sideways at high speed, striking the plaintiff, Mr Miller, and narrowly missing his daughter on a pedestrian crossing outside the school before colliding with a stationary vehicle. Constable Scott was killed instantly upon impact. Mr Miller sustained multiple injuries due to being struck

by Constable Scott's vehicle. His vertebrae was fractured, and he is now confined to a wheelchair. The offender was later apprehended and convicted on a number of counts.

### **The claim and issues before the Court**

8. Mr Miller has been granted accident compensation under the accident compensation scheme. He now claims that the Crown is vicariously liable in tort for Constable Scott's negligence and recklessness, and should be ordered to pay exemplary damages.
9. Mr Miller has filed a statement of claim alleging:
  - (a) The Crown is vicariously liable in tort for the actions of Constable Scott; and
  - (b) The actions of Constable Scott warrant an award of exemplary damages.
10. Both parties accept that Constable Scott was an employee of the Crown at the time of the incident, and that there was no issue relating to the Crown Proceedings Act 1950. Similarly, there is no issue arising out of the accident compensation scheme. The Crown concedes that an award of exemplary damages can be made despite the statutory bar, under the rule in *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA) (affirmed in *Couch v Attorney General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149).
11. I also note that there are no criminal charges pending or contemplated against the Police in regard to this incident.

### **Vicarious liability**

12. During the course of their submissions, both counsel referred me to *Canadian Pacific Railways Co v Lockhart* [1942] AC 591 (PC) where the "scope of employment" test was discussed.
13. Counsel for Mr Miller submitted that Constable Scott was clearly acting within the scope of his employment at the time of the accident. Although his actions in continuing the pursuit were unauthorised, they were still connected to his employment. Counsel submitted that this satisfied the test in *Canadian Pacific Railways*.
14. I accept that Constable Scott was on duty at the time of the accident, and had, up until the order to abandon the pursuit, been leading an authorised pursuit of a criminal offender.
15. Counsel for Mr Miller argued that the order to abandon pursuit was merely an attempt to regulate Constable Scott's actions within the scope of his employment, and were not sufficient to absolve the Crown of liability, citing *Attorney-General v Hartley* [1964] NZLR (SC) 785.
16. The Crown submitted that by disobeying a direct order, Constable Scott's actions fell outside the scope of his employment, absolving the Crown of liability. The Crown submitted that a temporal connection is not sufficient to bring Constable Scott's actions within the scope of his employment. The Crown submitted that the order limited, as opposed to regulated, the scope of Constable Scott's employment. Finally, the Crown submitted that as Constable Scott pursued the offender for his own revengeful purposes, he acted outside the scope of his employment.
17. I do not accept the Crown's submissions on this point. Despite the fact that Constable Scott was in violation of a direct order at the time of the accident, and that there had been violations of the Police Pursuit Policy, I am of the view that his actions were sufficiently connected as to bring them within the scope of his employment. While Constable Scott

clearly recognised the offender, I am not convinced he pursued the offender for his own revengeful purposes. The Crown is, therefore, vicariously liable for his actions at the time of the accident.

## Exemplary damages

18. The law is clear in stating that exemplary damages are essentially punitive in nature and are not intended to compensate a plaintiff but to punish and deter a defendant. Counsel have cited the Supreme Court authority on exemplary damages, *Couch v Attorney General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.
19. Until recently, the threshold for an award of exemplary damages in New Zealand was “outrageousness” – i.e., in the view of the Judge or Jury was the conduct in question so outrageous that it warranted an award of exemplary damages? (*Bottrill v A* [2003] 2 NZLR 721 (PC)).
20. While the minority of the Supreme Court in *Couch* endorsed the Privy Council’s “outrageousness” test (reasons usefully summarised by Her Honour Elias CJ at [3]–[7]), the majority of the Supreme Court adopted the position taken by the majority of the Court of Appeal in *Bottrill* that an element of “conscious recklessness” was required (see Tipping J at [111]–[113], [115], [150]):

“[E]xemplary damages may be awarded if, but only if, the defendant deliberately and outrageously ran a consciously appreciated risk of causing personal injury to the plaintiff. Whether running such a risk should be regarded as outrageous will depend on the degree of risk that was appreciated and the seriousness of the personal injury that was foreseen as likely to ensue if the risk materialised (per Tipping J at [179])”.
21. The test for exemplary damages therefore focuses on the state of mind of the defendant as a precursor to any assessment of whether the defendant’s conduct was outrageous.
22. Counsel for Mr Miller suggests that the correct approach to exemplary damages is that endorsed by Elias CJ in *Couch* – i.e., the ultimate touchstone should simply be “outrageousness”. Mr Miller argues that this test is clearly met in the present circumstances. In any event, Mr Miller argues that the test of the majority requiring conscious recklessness is also met.
23. Mr Miller relies upon the circumstances of the pursuit, including the speeds at which it was conducted, the fact that Constable Scott was seriously injured, the failure of Constable Scott to engage his lights and warning siren, and the time at which the pursuit was conducted, as evidence that he must have appreciated the risk of harm at which he was putting the public in continuing the pursuit and therefore was consciously reckless in continuing it. Constable Scott was obliged to follow the orders of the Communications Supervisor, who was in control of the pursuit. He failed to do so. In addition, Constable Scott breached several other Police Pursuit Policy requirements.
24. The Crown argues that the majority of the Supreme Court has authoritatively determined that for an award of exemplary damages the defendant must have consciously appreciated the risk of causing harm and the conduct concerned must have been outrageous. Simple “outrageousness” is too uncertain to provide a stand-alone test and does not recognise that a person who consciously chooses to run a risk of causing harm is more blameworthy than a person who causes harm without choosing to do so.
25. The Crown has argued that Constable Scott was justified in initiating the pursuit. That goes without saying. However, it is his conduct at the time of the accident with which we are concerned. Despite the obvious risk that the offender posed to the safety of the public, the risks the pursuit posed in itself were as great if not greater. Focusing

objectively on the state of mind of Constable Scott, I conclude that the nature of his conduct was such that it posed a direct and real threat to the safety of the public and that the Constable consciously appreciated this risk. This was a risk so great that Constable Scott's continuance of the pursuit up until the point where the accident occurred was a clear display of recklessness for the obvious potential danger posed to members of the public in the circumstances and the nature of the pursuit he was engaged in. It therefore warrants an award of exemplary damages.

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The Crown now appeals the decision of Danaher J to the Moot Court of Appeal

### **Further instructions**

The only issues are those raised in the High Court, i.e., whether:

1. The Crown is vicariously liable in tort for the actions of Constable Scott; and
2. The actions of Constable Scott warrant an award of exemplary damages.

NOTE: You are to presume that if both of the issues above are answered in the affirmative, the Crown may be held vicariously liable for exemplary damages in respect of Constable Scott's actions. Do not argue this point.

The *Police Pursuit Policy* provides:

- The primary responsibility for the initiation of a pursuit rests with the police officer driving the primary pursuing patrol vehicle.
- Police patrol vehicles engaged in a pursuit must engage their lights and warning siren.
- The officer in control of a pursuit is the dispatcher or Communications Centre Supervisor.
- Police officers in pursuit must constantly assess the risk of harm to the public.
- The officer in control may order the abandonment of the pursuit.
- An order to abandon the pursuit must be stated unequivocally, and must be understood to be clearly directed to all police vehicles involved in the pursuit.
- On receipt of an order to abandon a pursuit, the pursuing officers must immediately reduce their speed to within the posted speed limit and disengage their lights and siren.

You should not raise arguments relating to the finding of negligence, or proceedings under the Crimes Act 1961.

Compensatory damages are not payable for any personal injuries covered by the Accident Compensation Act 2001. You should not raise arguments in relation to the accident compensation scheme, except to the extent that they relate to the availability of exemplary damages.

You should not refer to case law beyond those authorities listed below.

No authority is binding on the Moot Court of Appeal.

## List of Permissible Authorities

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1. *Couch v Attorney General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 — NOTE: you are only to rely on the judgments of Elias CJ (minority) and Tipping J (majority);
2. *Bottrill v A* [2003] 2 NZLR 721 (PC);
3. *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 (PC);
4. *Attorney-General v Hartley* [1964] NZLR 785 (SC); and
5. *Taylor v Beere* [1982] 1 NZLR 81 (CA).