PROVOCATION IN TORT LIABILITY
A TIME FOR REASSESSMENT

By

S.K.N. Blay*

1. Introduction

In Common Law, the general view is that provocation is no defence as such to tort liability; whatever effect it has, is limited to the mitigation of aggravated or exemplary damages. The rationale for this is not clear but the view commands substantial support.[1] Thus it seems to be the case in Australia, that no matter how provocative the conduct of the plaintiff may be he is assured of compensatory damages in a tort action against the defendant unless the defendant can rely on self-defence where the circumstances permit. Several cases demonstrate this point quite clearly[2] but a recent Tasmanian case, *Downham* v. *Bellette & Ors* [3], underscores it even more. The families of the plaintiff and the defendants had been feuding for about 16 years. Towards the end of this time, the plaintiff adopted a rather unique method of conducting the feud; he took to excreting on the driveway of the first defendant usually on Saturday nights. The first defendant noticed the human excrement which reappeared on his driveway on Sunday mornings. Naturally, he suspected the plaintiff being responsible for the unwelcome deposits. He consulted with the second and third defendants, who then decided to watch the driveway one Saturday night. After a fruitless wait into the night they gave up. But they returned early Sunday morning to continue their vigil and ambush. This time their luck held; at 6 a.m., the plaintiff approached with a .22 rifle. He walked up to the middle of the driveway, put down his rifle and proceeded to defecate unaware of the presence of the second and third defendants. The defendants came out of their ambush and approached the plaintiff exposing him in *flagrante delicto* with the glare of a torch light they carried. The plaintiff reached for his rifle but was forcibly disarmed before he could pose any threat. He was then apprehended and punched by both defendants. The plaintiff consequently suffered fractured ribs, abrasions to his head and back and scratches to a substantial part of his body. The second defendant restrained the plaintiff as a result of which the plaintiff suffered injuries to his thumb and fingers. Meanwhile the first defendant who had been asleep came to join them. After restraining the plaintiff for one and a half hours, the defendants received a message from the police to release the plaintiff and they did so accordingly. The plaintiff subsequently brought an action against the defendants claiming damages for assault, battery and false imprisonment. His claim included aggravated damages for indignity and disgrace and humiliation resulting from trespass.

After a consideration of the facts, Underwood J. held that "[a]lthough the plaintiffs

*LL.B., LL.M., Ph.D., Lecturer in Law, University of Tasmania

1. J.G. Fleming, *The Law of Torts* 6th edn. Law Book 1983 at 77; H. Luntz, A.D. Hambly & R.A. Hayes. *Torts Cases and Commentary* 2nd edn. Butterworths 1985 at 279; H. Luntz, *Assessment of Damages for Personal Injury and Death* 2nd Edn. Butterworths 1983 at 74, 75; Sir G. Barwick (ed. in Chief) *Commentary on Halsbury's Laws of England* (4th edn.) Australia at 34; Note C. Munkman, *Damages for Personal Injuries and Death* 6th edn. 1980 at 37-39.
2. *Fontin* v. *Katapodis* (1962) 168 CLR 177; *Horkin* v. *North Melbourne Football Club Social Club* [1983] 1 V.R. 153; *Cotogno* v. *Lamb* (No.3) 1986 Aust. Torts Report 80-039; *R* v. *Mahon* (1982) 1 NSWLR 346; *The Queen* v. *Backo* (1977) 16 SASR 541. The situation in Queensland appears to differ. See *Grehan* v. *Kann* [1948] QWN 40; *White* v. *Connolly* [1927] St R Qd 75, *Love* v. *Egan* (1971) 65 QJPR 102.
3. (1986) Aust. Torts Reports 80-039, 67,824.

conduct was reprehensible it did not justify the assault and subsequent period of false imprisonment": and that "the plaintiff was the victim of an actionable assault, battery and false imprisonment"[4]. On the specific issue of provocation, Underwood J. noted that the plaintiff's act of "defecating in the first defendant's driveway was calculated to annoy the defendants and members of their families who use that driveway and was the immediate and precipitating cause of the assault and false imprisonment".[5] He however observed that "the plaintiff's conduct is relevant to a claim for aggravated damages". In so holding, Underwood J. found support in Owen J.'s view in *Fontin* v. *Katapodis* that:

> [in] a proper case the damages recoverable are not limted to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice. But the rule by which the defendant in an action in which exemplary damages are recoverable is entitled to show the plaintiff's own conduct was responsible for the commission of the tortious act and to use this fact to mitigate damages has no application to damages awarded by way of compensation.[6]

The essential principle underlying this view was best summed up by Lord Denning in the later case of *Land* v. *Holloway*[7]: "[p]rovocation by the Plantiff can properly be used to take away any element of aggravation but not to reduce real damages".[8] Basing himself on these cases Underwood J. thus concluded that the plaintiff is disentitled from recovering aggravated damages by reason of "his *provocation and insulting conduct*".[9] He consequently awarded compensatory or real damages on the following basis: $300 against the three defendants for the insult to the plaintiff's feelings and dignity (which insult was found to be minimal) and for a relatively short period of detention; $500 *Griffiths* v. *Kerkemeyer* damages and $3,500 general damages against the second and third defendants for the battery.

For the layman, cases such as *Downham* v. *Bellette* almost defy any sense of justice and represent an apparent confusion as to what interest the law aims at protecting. It is a confusion which perhaps a practitioner may risk resolving to his client by saying: "odd as it may seem, no matter how provocative the conduct of your irritant neighbour maybe, yes even if you see him defecating on your own driveway, do not touch him. If you do, you may be asked to pay him compensation. This is the law; it just is!". For the student, the general treatment of provocation raises fundamental questions about the nature of tort liability and the attendant compensation theories. None of the cases frequently cited to support the limited effect of provocation in torts provides any rationale for this position. But whatever the rationale may be (if there is any) the rather stringent application of the principle in cases such as *Fontin* v. *Katapodis* and *Downham* v. *Bellette*, calls for a reassessment of the effect of provocation in tort liability. The objective of this article is to analyse critically the current treatment of provocation and to suggest reasons for reassessment.

2. The Search for a Rationale

Prior to *Fontin* v. *Katapodis* there was general agreement that provocation by the plaintiff could mitigate the award of exemplary and aggravated damages. However there were

4. *Ibid.* at 67,827.
5. *Ibid.* at 68,830.
6. *Supra* n.2. at 187.
7. [1968] 1 QB 379.
8. *Ibid.* at 387.
9. *Supra* n.3. at 67,030.

conflicting views as to whether the mitigation extended to compensatory damages as well. In *Fontin* v. *Katapodis* McTiernan J. acknowledged this fact by citing not less than twelve authorities to indicate the extent of the controversy[10]; he concluded:

> I am inclined to the view that there ought to be no reduction of actual or compensatory damages for provocation in the case of assault and battery. It seems to me to be correct in principle to mitigate or reduce damages of the nature of exemplary damages if the plaintiff has provoked the assault and battery complained of.[11]

McTiernan J. did not explain why it would not be as correct in principle to allow provocation to reduce or mitigate actual or compensatory damages and why he was, for that matter, inclined to the view that "there ought to be no reduction of such damages".

In the same case Owen J. also took the view that the rule by which provocation may be used to mitigate the exemplary damges 'has no application to damages awarded by way of compensation'.[12] Unlike McTiernan J., Owen J. made no reference to the different opinions on the issue as expressed in several authorities. He only noted that the subject is discussed at length in Chapter XI of *Sedgwick on Damages* (8th edition) and in *Halsbury's Laws of England* (3rd edition) Vol. 11 at 224.[13] With great respect, Owen J's reliance on these two authorities without more is intriguing. For one thing the views expressed in both authorities are equivocal. Sedgwick argues that "the existence of provocation, though it may not be a defence, will prevent the allowance of exemplary damages",[14] *Halsbury's Laws of England* on the other hand states "a plaintiff...who has provoked the defendant's conduct by his own will *not be entitled* to exemplary damages".[15] The essential issue discussed in the two authorities is exemplary damages. Both authorities unequivocally indicate that provocation will prevent the award of or not entitle the plaintiff to exemplary damages. But they do not suggest that provocation will not reduce compensatory damages. In fact they make no mention of compensatory damages at all and could obviously not be the appropriate authorities to support Owen J.'s position. Indeed *Halsbury's Laws of England* appears to have dealt with the effect of provocation on compensatory damages for the first time ever in the fourth edition of the series which was published more than a decade after *Fontin* v. *Katapodis*. In Volume 12 (4th ed.) it is stated in very unequivocal terms: "[p]rovocation does not serve to reduce the damages recoverable by way of compensation for physical injury, though it may negative the award of aggravated or exemplary damages".[16] The original authority cited to support this rule of law is *Fontin* v. *Katapodis*![17] The citation of *Fontin* v. *Katapodis* by *Halsbury* as the original source of the rule, undermines the propriety of Owen J.'s reliance on earlier editions of *Halsbury* as a basis for his decision.

Secondly, Owen J. himself presided over the Full Court of the New South Wales Supreme Court in the case of *Hill* v. *Cooke*[18] in which he implicitly admitted that provocation can mitigate compensatory damges. In that case, the plaintiff (policeman) who had provoked

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10. *Supra* n.2. at 183. In this regard, it is of interest to note that in Australia, there were at least three cases which seemed to suggest that provocation could mitigate actual or compensatory damages. See *Hill* v. *Cooke* (1958) 58 SR (N.S.W.) 49 at 50; *Sharp* v. *Baker* (1947) 64 WN (N.S.W.) 178 at 179; *Grehan* v. *Kann* [1948] QWN 40. None of these cases was cited in *Fontin* v. *Katapodis*.
11. *Ibid.* at 184.
12. *Ibid.* at 187.
13. *Ibid.*
14. *Sedgwick on Damages* 8th edn. s. 384.
15. *Halsbury's Laws of England* 3rd edn. Vol. 11 at 225.
16. Para. 1158 at 454.
17. *Supra* n.2.
18. *Supra* n.10.

the defendant with abusive language to slap him twice in the face brought a claim for damages for assault. The plaintiff suffered no actual damage; but given that assault is actionable *per se*, he was nonetheless entitled to the award of damages. The jury awarded him one pound. On an appeal based on inadequate damages, Owen J. held *inter alia:*

> [i]t is apparent that they [i.e. the jury] took the view, which they were entitled to take, that the defendant had struck the plaintiff but had been provoked into doing so by the plaintiff's abuse. The case was one in which the damages awarded might range from a nominal amount to a substantial sum, and, in my opinion, the jury were fully entitled if they thought fit, to award only the nominal amount of one pound.[19]

The judgment does not indicate whether the damages awarded were compensatory, aggravated or exemplary. But clearly, being nominal, the damages could not have been exemplary and neither could they have been aggravated. Indeed to the extent that nominal damages are awarded (albeit contemptuously) where breach of right is proved, they are compensatory in nature. An important point about *Hill* v. *Cooke* however is that it was not cited in *Fontin* v. *Katapodis*; but whatever rule one may want to infer from it, it is arguably of relative validity today in the light of the High Court's ruling in *Fontin* v. *Katapodis*. This then brings us back to the case of *Fontin* v. *Katapodis* itself. The case represents the first time the effect of provocation on compensatory damages had come before the High Court. Faced with the existing conflicting authorities, the Court was of course not bound to follow any one line of authorities; it had the choice of establishing its preference. In the face of the conflicting opinions, the preference had to be based on some legal justification or rationale which would be capable of explaining the merits of the preference. Thus on reading *Fontin* v. *Katapodis* the question that arises is 'what was the rationale behind the court's preference for limiting provocation to the mitigation of exemplary and aggravated damages?' If one should seek support for the court's preference in the hardly existent 'established' authorities (as Owen J. appears to have done) the question still remains (on a much broader level): 'what is the rationale for the Common Law's preference for such a limitation? The analysis of this rationale is central to any critique of the Australian treatment of provocation in civil actions.

There is hardly any work which provides a comprehensive discussion of the rationale for restricting the effect of provocation in civil suits. So what follows is a critique of what can presumably be used as justifications for the limited application of provocation:

(a) Discouraging Vengeance and Retributive Justice

It is not the function of the law of torts to encourage retribution or vengeance. It may thus be argued that a party who is provoked by another is enjoined from taking the law into his own hands by resorting to vengeance. In any case, the defendant who takes the law into his own hands cannot expect to benefit by the law through a mitigation of the damages awarded in compensation against him. The policy basis of this view would seem to be that to excuse the defendant's act to any degree would amount to condoning his conduct and encouraging retributive justice.

The retributive justice argument is hardly plausible and indeed irrelevant to the issue of provocation. The "defence" of provocation is founded on the recognition that in certain instances the plaintiff's wrongful conduct may be sufficient to deprive a reasonable person in the defendant's circumstances of the power of self control and thus make the defendant react in a heat of passion with no moment of deliberation.[20] In a situation where the

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19. *Ibid.* at 49.
20. See generally B. Brown "The Ordinary Man in Provocation: Anglo Saxon Attitudes and Unreasonable Non-Englishmen" (1963) 13 ICLQ 203.

defendant is provoked to the point of losing his self-control it seems rather inept to think that he would also possess the calmness of mind to remember the law's dislike for what seems like retributive justice. The point to note here is that the retributive justice argument has no deterrent value whatsoever once the defendant is provoked and loses his self-control. Furthermore the argument wrongly assumes that any reaction of the defendant which is provoked by the plaintiff is retributive. Retribution by its very nature consists in an action which is both premeditated and punitive. On the other hand a provoked reaction when used as a basis for the "defence" relates only to that instant reaction of the defendant in the heat of passion. Indeed the general view is that provocation is not a valid defence where the alleged provoked conduct is premeditated or where sufficient time has elapsed to cool the defendant's passion to enable him to regain his self-control.[21] Thus, like retribution, a provoked reaction is always a response to a given conduct; but unlike retribution, such a reaction is neither premeditated nor necessarily punitive. The courts implicitly admit this fundamental distinction once provocation is used to mitigate aggravated and exemplary damages. Aggravated damages are normally awarded against the defendant where his conduct is seen to be brutal, or where his motives are malicious or spiteful.[22] Similarly, exemplary damages may be awarded where the defendant is found guilty of some "conscious wrong doing in contumelious disregard of another's rights".[23] The defendant's conduct "must be high handed, insolent and vindictive".[24] Whenever the courts allow provocation to mitigate exemplary or aggravated damages it follows logically that the defendant's act in question does not posess these aforementioned elements.

(b) **The Compensation Theory Argument**

Another possible argument for restricting the effect of provocation may be one based on a sort of compensation theory in torts generally. The basis of this argument is that the law of torts is concerned principally with compensation for losses or injuries caused by the defendant's wrongful acts. Thus where the act causes any injury to the plaintiff, the latter is entitled to compensation irrespective of his own provocative conduct; to mitigate any compensatory damages awarded to the plaintiff would amount to depriving him of a legal right.[25] Despite the superficial attraction of this argument it misses the central issue in dealing with provocation. It is conceded that the wrongful act of the defendant attracts a corresponding level of compensation to the injured plaintiff; but the issue is whether the plaintiff is still entitled to the same level of compensation even where he has by his deliberate conduct provoked such "wrongful" act? Indeed the question arises as to whether the defendant's act in such circumstances is wrongful at all. A wrongful act is that which violates or infringes the right of another without a lawful excuse. By its very nature an act which is induced or provoked by the deliberate conduct of the plaintiff can hardly be classified as wrongful. If the plaintiff provokes a given conduct he in effect invites it; he thus implicitly consents to that interference with his rights. The action of the defendant in such cases cannot be deemed wrongful because as the maxim goes, "no harm is done to him who consents".[26]

If one accepts for the purposes of argument that an unauthorized act remains wrongful

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21. *Holmes* v. *D.P.P.* [1946] AC 588; *Parker* v. *The Queen* (1963) 111 CLR 610 (H.C.), 111 C.L.R. 655 (P.C.).
22. *Halsbury's Laws of England* (4th edn.) Vol. 12, para 1189 at 472.
23. *Whitfeld* v. *De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 per Knox C.J.
24. *Fontin* v. *Katapodis supra* n.2. at 187 per Owen J; See also *Australian Consolidated Press Ltd* v. *Uren* (1967) 117 CLR at 212 per Windeyer J.
25. See the view expressed by McTiernan J. in *Fontin* v. *Katapodis supra* n.2. at 184.
26. Using this line of reasoning a Canadian court established a relationship between provocation and implied consent and used it as a basis for a valid defence. See *Zinck* v. *Strickland* (1981) 45 NSR (2d) 451.

even if provoked by the plaintiff, the compensation theory argument still remains unconvincing. Compensation is a fundamental aspect of the law, but it is not the aim of the law to award compensation for every breach as such. In several instances it may be possible for a defendant to confess and admit a wrongful act but still avoid any liability (and the payment of compensation for that matter) by pleading specific justifications or exonerating factors. In such circumstances, an otherwise wrongful act may then be excused by law. In the case of self-defence for instance where it is accepted as a valid defence it means that though there has been a breach of the plaintiff's right, such breach was warranted in the given situation and thus justifiable. The plaintiff is consequently not awarded any compensation, the breach notwithstanding. The rationale for the law's position in such cases is rather obvious: it is ludicrous to award compensation against a person who acts in defence of himself. Conversely, it seems hardly justifiable to award compensation to a plaintiff who by his misconduct induces the defendant to act in self-defence. The issues here apply with equal force to the case of provocation. In other words where the plaintiff by his own conduct causes the defendant to lose his self-control and to react in the heat of passion in breach of the plaintiff's rights, it would literally amount to "rewarding" the plaintiff for his own wrong to award him any damages without taking conduct into account.

The existing practice of limiting provocation to the mitigation of only exemplary and aggravated damages is based neither on any sound legal authority nor on principles of public policy. This, coupled with the fact that there is a good case for allowing provocation to mitigate compensatory damages, throws the wisdom behind the current practice into doubt.

3. The Case for allowing Provocation to Mitigate Compensatory Damages

(a) The Relationship between Provocation and Contributory Negligence

The basis of mitigation of damages due to provocation is that the plaintiff brought the trespass upon himself; the mitigation is therefore a form of contribution charged to the plaintiff on account of his own conduct. The basis of provocation in this respect is very similar to contributory negligence which can be defined as the unreasonable conduct of a plaintiff which contributes to his own injury. Provocation is thus the intentional tort equivalent of contributory negligence. However unlike provocation, contributory negligence operates to mitigate both compensatory and exemplary damages. Given the rather obvious relationship between the two types of "defences", there is hardly any justification for recognising a wider scope of application for contributory negligence while restricting the effect of provocation. Indeed the restrictive effect of provocation tends to favour the plaintiff unduly. It is now well established that in Australia, where the facts of a case so permit, the plaintiff can opt to sue either in trespass or negligence.[27] Thus under the current law, a plaintiff — who by his own conduct contributes to a breach of his right by the defendant — can avoid any of the liability by framing his action in trespass where the defendant is precluded from pleading contributory negligence[28] and provocation has only a limited effect. It is an anachronism for modern tort law to foster the avoidance of liabilities by any party by a simple change in pleadings on the same facts.

(b) The Implications of Counterclaims

Where a defendant pleads self-defence successfully, he is allowed absolute immunity. On the other hand, where the defendant's conduct is proved to be excessive, his defence will

27. *Heyward* v. *Georges* [1966] VR 202; *Shaw* v. *Hackshaw* [1983] 2 VR 65 on appeal (1984) 155 CLR 614.
28. *Venning* v. *Chin* (1974) 10 SASR 299 at 317; *Horkin* v. *North Melbourne Football Club Social Club supra* n.2.

fail irrespective of the plaintiff's provocative conduct or initial attack. It seems however that in such cases nothing prevents the defendant from prosecuting a cross action against the plaintiff for his initial provocative conduct.[29] Where the action succeeds and appropriate damages are awarded it has the effect of offsetting or reducing any compensatory damages payable by the defendant in the original action. Conversely, it reduces the net compensatory damages the plaintiff ultimately takes home on account of his own provocative conduct. Admittedly actions and cross-actions in such cases would be seperate suits, but nonetheless the fact still remains that once the courts award damages against a plaintiff in a cross-action, they explicitly admit that the plaintiff is not without blame, and implicitly recognise that the plaintiff's provocatory conduct can reduce his compensatory damages. It therefore seems inconsistent for the courts to adopt the view that provocation cannot effect the quantum of compensatory damages awardable to the plaintiff.

(c) **Possible Qualifications to the Rule in *Fontin* v. *Katapodis***

The High Court's decision in *Fontin* v. *Katapodis* was later to be adopted by Lord Denning in *Lane* v. *Holloway*.[30] The two cases are thus frequently cited as authorities to support the proposition that provocation in torts is only restricted to mitigating exemplary and or aggravated damages. Despite the apparent entrenchment of the rule in these two cases, there is dicta in at least one case to suggest that in appropriate instances, the effect of provocation can and should be extended to mitigate all types of damages. In *Murphy* v. *Culhane*[31] the plaintiff widow brought an action to claim damages for compensation under the (English) *Fatal Accidents Act* 1834-1959. The facts were that the deceased husband had plotted along with some other men to beat the defendant. During the execution of their plot, and a struggle that was described as a "criminal affray" the defendant hit the deceased with a plank on the head and killed him. In a subsequent criminal trial, the defendant pleaded guilty to manslaughter and was sentenced to five years imprisonment accordingly. The plaintiff then brought the action against the defendant for damages under the *Fatal Accidents Act* on behalf of herself and her baby daughter. In her statement of claim, the plaintiff alluded to the fact that the defendant assaulted and beat the deceased to death and indicated that evidence was to be adduced to show that the defendant had been convicted on his own plea of guilty for manslaughter in an earlier proceeding. In his statement of defence, the defendant admitted assaulting and killing the deceased and the fact of his conviction by a criminal court. But the statement further stated that the assault occurred during and as part of a criminal affray which was initiated by the deceased and his accomplices. On these grounds the defendant sought to plead the defences of *ex turpi causa non oritur actio, volenti non fit injuria* and (more significantly for our purposes) provocation.

On these pleadings the plaintiff applied for judgment under the Rules of the Supreme Court which empower a court to give judgment on admissions. On the state of the existing authorities the court felt bound to shut out the defendant's defences and to give judgment to the plaintiff accordingly. The defendant appealed. In the Court of Appeal, counsel for the plaintiff (respondent) argued *inter alia* that the defendant's admission of an lawful assault shows the plaintiff's unlawful entitlement to compensation without more. Relying on *Fontin* v. *Katapodis* and *Lane* v. *Holloway*, he further argued that "the rule by which a defendant, where exemplary damages are reasonable, can show that the plaintiff's own conduct was

29. Fleming, *supra* n.1. at 79.
30. *Supra* n.7.
31. [1977] 1 QB 94.

responsible for the tortious act and use that fact to mitigate damages has no application to damages awarded by way of compensation".[32]

The Appeal Court rejected these arguments and allowed the appeal, noting that it should be open for the defendant to be able to put his defences so as to see the extent of his liabilities.[33] On the important issue of provocation, Lord Denning observed:

> There are two cases which seem to show that, in a civil action for damages for assault, damages are not to be reduced because the plaintiff was himself guilty of provocation. Provocation, it was said, can be used to wipe out the element of exemplary damages but not to reduce the actual figure of pecuniary damages. It was so said by the High Court of Australia in 1962 in *Fontin* v. *Katapodis* (1962) 108 CLR 177 and followed by this court in 1968 in *Lane* v. *Holloway* [1968] 1 QB 379. But those were cases where the conduct of the injured man was trivial — and the conduct of the defendant was savage — entirely out of proportion to the occasion. So much so that the defendant could fairly be regarded as solely responsible for the damage done.
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> I do not think they can or should be applied where the injured man, by his own conduct, can fairly be regarded as partly responsible for the damage he suffered. So far as the general principle is concerned, I would like to repeat what I said in the later case of *Gray* v. *Barr* [1971] 2 QB 554, 569: "In an action for assault, in awarding damages, the judge or jury can take into account, not only circumstances which go to aggravate damages, but also those which go to mitigate them". That is the principle I prefer rather than the earlier cases.[34]

Lord Denning's views here amounted to an unequivocal qualification to the rule in *Fontin* v. *Katapodis* and *Lane* v. *Holloway*. It was in this regard a recognition of the injustice the defendant stood to suffer from an unqualified application of the *Fontin* v. *Katapodis* rule. More significantly, Lord Denning's approach clearly leaves it open for a court to use provocation as a basis to mitigate compensatory damages wherever appropriate.

Murphy v. *Culhane* was decided about a decade ago, but it has not been received favourably in Australia. Indeed it was held in *R* v. *Mahon*[35] and *The Queen* v. *Backo*[36] that the principle of mitigation introduced in *Murphy* v. *Culhane* is not available in Australia. Since decisions of the English High Court have only persuasive force in Australia one may have to concede that perhaps *Murphy* v. *Culhane* is not good law in Australia. But on the other hand it is important to note that over the years, the courts in Australia have tended to cite *Fontin* v. *Katapodis* and *Lane* v. *Holloway* together as the leading authorities on the question as have the courts in England. It thus seems logical to suggest that qualifications introduced in England to reduce the rigidity of the rule in the two cases could and should be acceptable in Australia. So far the Australian High Court has not considered *Murphy* v. *Culhane*, but it could be said that when the question of the effect of provocation on compensatory damages comes up before the Court again, it will be open for it to introduce the *Murphy* v. *Culhane* qualifications to allow mitigation of compensatory damages in appropriate circumstances. The Court would have every good reason to reassess the rule in *Fontin* v. *Katapodis* in favour of such qualifications because as McLoughlin D.C.J. observed in the Queensland case of *Love* v. *Egan*[37], it seems absurd that the current law

32. *Ibid. at 96.*
33. *Ibid. at 99.*
34. *Ibid. at 98.*
35. *Supra* n.2.
36. *Supra* n.2.
37. *Supra* n.2.

should allow a person who is guilty of the most outrageously provoking conduct to recover full compensatory damages for any injuries occasioned by a reasonable response to his conduct. It seems ... even more absurd that if he claims only compensatory damages, the circumstances of his conduct are irrelevant and may not be pleaded or given in evidence.[38]

38. *Ibid. at 104.*