

Tort does not pay:

A guide to exemplary damages

While rare in practice, there are occasions where the conduct giving rise to a plaintiff's cause of action may justify an award of exemplary damages. Exemplary

damages differ from other types of damages in that they are not compensatory and are unrelated to the plaintiff's actual loss.



John Purnell SC is a Barrister at Blackburn Chambers
PHONE (02) 6249 7990 EMAIL purnell@blackburnchambers.com.au

In *Gray v Motor Accident Commission*,¹ a case involving the intentional running down of the plaintiff by the defendant driver, the High Court adopted this statement as to the purpose of exemplary damages:

'Exemplary damages...are intended to punish the defendant and presumably to serve one or more of the objects of punishment, namely, moral retribution or deterrence.'²

The High Court went on to accept that the award of exemplary damages is discretionary, and examined the factors that go to the exercise of the discretion.

THE DEFENDANT'S CONDUCT – MORE THAN FAULT, LESS THAN MALICE

The joint judgment in *Gray* states: 'Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found.'³

In *Lamb v Cotogno*,⁴ a case involving trespass to the person, the High Court stated: 'The absence of actual malice did not disentitle the plaintiff to exemplary damages. Whilst there can be no malice without intent the intent or recklessness necessary to justify an award for exemplary damages may be found in contumelious behaviour which falls short of being malicious or as not aptly described by the use of that word.'⁵

In *Marsden v Amalgamated Television Services Pty Ltd*,⁶ the court held: 'In assessing exemplary damages the court may take into account all matters which it sees fit. The court may award exemplary damages to punish the defendant for conduct which is shown by the plaintiff to be fraudulent, violent, cruel, insolent, wanton or indicative of contumelious disregard of the plaintiff's rights.'⁷

The phrase adopted by Knox CJ in *Whitfield v De'Lauret & Co Ltd*⁸ that exemplary damages may be awarded when there is a 'conscious wrongdoing and contumelious disregard of another's rights' describes at least the greater part of the argument for exemplary damages.

This phrase was applied by Judge

Skoien of the Queensland District Court in *Grosse v Purvis*⁹ when he awarded \$20,000 exemplary damages for breach of privacy in a stalking case.

WHETHER A CRIMINAL SANCTION HAS BEEN IMPOSED

In the joint judgment in *Gray*, Gleason CJ and McHugh, Gummow and Hayne JJ held that: 'Where...the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted we consider that exemplary damages may not be awarded. We say it "may not" because we consider that the infliction of substantial punishment for what is substantially the same conduct which is the subject of the civil proceedings is a bar to the award.'¹⁰

The court went on to give two reasons for disallowing exemplary damages in this case.

- First, the deterrence and punishment aims of exemplary damages had been exacted by the criminal law.

- Second, a person should not be punished twice for what is substantially the same act.

THE DEFENDANT'S IDENTITY

The law in Australia is clear that the mere fact that exemplary damages will be paid by an insurer rather than the defendant 'in person' is irrelevant.

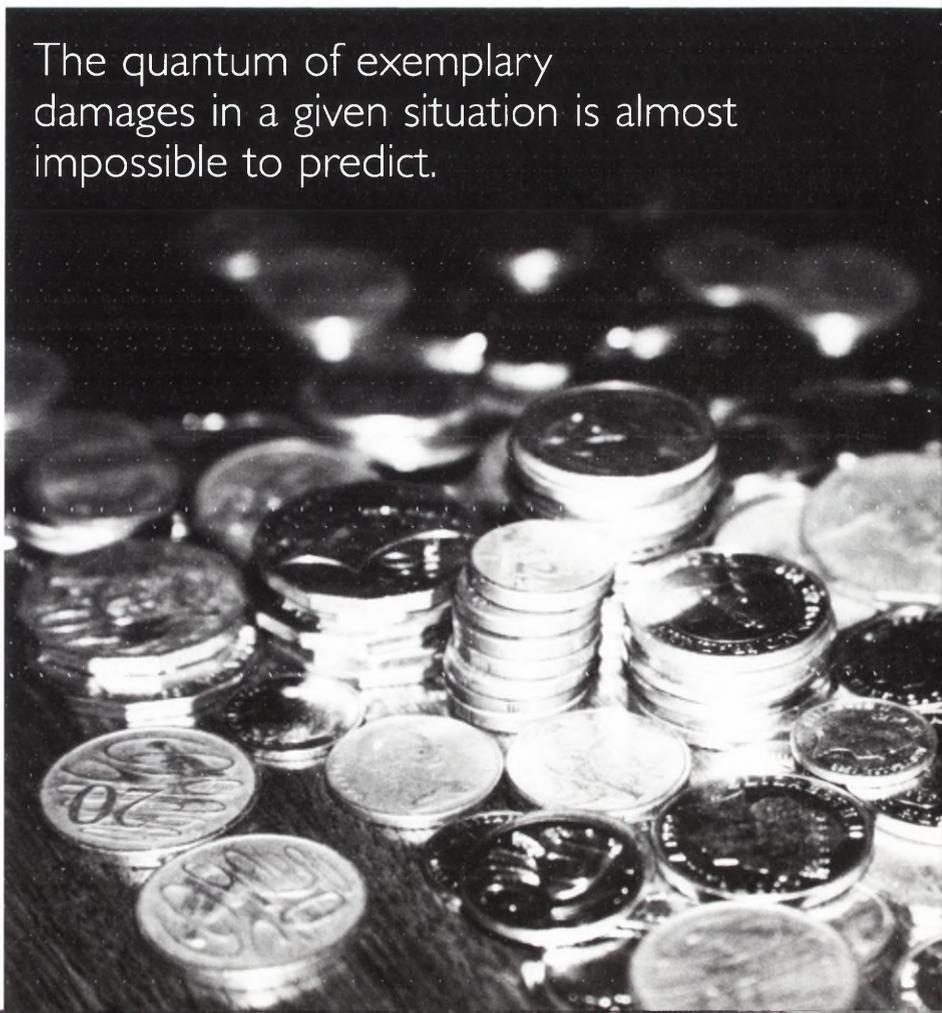
In the case of *Lamb*, the court said: 'Whilst the smart or sting will obviously not be the same if the defendant does not have to pay an award of exemplary damages, it does serve to mark the court's condemnation of the defendant's behaviour.'¹¹

The court went on to say that the general deterrence aim of the award was still achieved, as was the aim of assuaging the victim's urge for revenge.

It should be noted, however, that in practice many insurance policies do not cover exemplary damages.

OTHER FACTORS

The court in *Gray* discussed the question of whether a rigid formula



could be laid down to cover the multiple areas in which exemplary damages are awarded.

'Because the kinds of cases in which exemplary damages might be awarded are so varied it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded.'¹²

HOW MUCH?

The likely quantum of exemplary damages in a given situation is almost impossible to predict. The unpredictability arises because the damages are unrelated to loss, and because of their rarity. Guidance from the case law includes the following:

'What amount awarded to the victim of a public outrage is enough to serve at once as a solatium, vindication and compensation to him and a requital to the wrongdoer can only be solved by an exercise of a discretionary judgment.'¹³

There is no necessary proportionality between the quantum of exemplary

damages and compensatory damages. However, the quantum of the compensatory damages is relevant as it may of itself be sufficient to impose punishment on the defendant. The defendant's capacity to pay is a relevant consideration to quantum.¹⁴

There should be 'moderation' in quantum.¹⁵

FALSE IMPRISONMENT, UNLAWFUL ARREST AND TRESPASS TO PROPERTY

In *Adams v Kennedy*,¹⁶ the New South Wales Court of Appeal considered a case where a police officer attended the plaintiff at his home to ask questions about a car accident. The plaintiff was somewhat unhelpful and told the police officer to go away.

The police officer later returned with two other officers. One officer told the plaintiff they were there to arrest him, but did not tell the plaintiff what he was to be arrested for. The plaintiff resisted arrest and a melee developed in the course of which one of the officers tried to handcuff the plaintiff and twisted his arm in such a way that he was seriously injured.

Priestly JA found that the defendant's conduct was such that there should be an award of exemplary damages in each of the causes of action, that is trespass to property, trespass to the person and false imprisonment.

Priestly JA held that: 'In the present case, although strictly it would be proper to award a separate amount for each cause of action, it seems to me that since the different causes of action arose out of the one series of closely connected events, it is appropriate to award one aggregate figure in respect of all the causes of action. That figure should indicate my view that the conduct of the defendants was reprehensible and marked the court's disapproval of it.'¹⁷

Exemplary damages were assessed at \$100,000.

DEFAMATION

In *Gray*, Callinan J states: 'Exemplary damages may turn out to be

one of the only effective means of checking excesses of increasing and concentrated media power, and perhaps indispensable for that reason, provide the most frequent occasions for an award of them.'¹⁸

Exemplary damages are an available remedy in respect of defamation, except where abolished by statute. It should be noted, however, that the absence of the remedy locally does not preclude an award if the defamatory material has been broadcast in jurisdictions in which the remedy remains.

In *Marsden*, Levine J applied the principles of *Pfeiffer v Rogerson*¹⁹ and held that the plaintiff could claim exemplary damages in respect of defamatory material published in states in which such damages were available, despite the unavailability of the remedy in the *lex fori*.

Levine J offered the following non-exhaustive categories of conduct that may warrant an award of exemplary damages with respect to defamation:

- Knowledge of the falsity of the material published.
- Reckless disregard as to truth or falsity of the matter published.
- Knowledge of unreliability.
- Conduct at the time of publication.

EXEMPLARY DAMAGES AND NEGLIGENCE

The majority judgment in *Gray* states: 'Exemplary damages could not properly be awarded in the case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily then, questions of exemplary damages will not arise in most negligence cases, be they motor accidents or other kinds of cases. But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiffs or persons in position of the plaintiff. Cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer well knowing of an extreme danger thus created, persisted in



employing an unsafe system might perhaps be of the latter kind. No doubt other examples can be found.²⁰

EXEMPLARY DAMAGES AND MEDICAL NEGLIGENCE

In certain factual situations a court may award exemplary damages in medical negligence cases. In *Backwell v AAA*,²¹ the Court of Appeal in Victoria considered whether the defendant's conduct was capable of giving rise to exemplary damages, a jury having ordered the defendant to pay damages of \$190,000, including \$125,000 in exemplary damages.

The plaintiff became pregnant, but was advised by the doctor to have a termination because of complications that could arise from incompatible Rhesus factors of the mother and the foetus. The doctor told the plaintiff that if she did not terminate the pregnancy it would be difficult for her to get back on the donor program not only in Victoria, but also in other states. The doctor also said that any publicity resulting from her having a stillbirth after donor insemination could reveal the plaintiff's identity and close the clinic.

The plaintiff acted on the doctor's advice and had a termination,

to the plaintiff, it was open to the jury to find that the doctor's conduct involved a conscious wrongdoing and a contumelious disregard of the plaintiff's rights.

On appeal, the court upheld the award of exemplary damages, but reduced the amount from \$125,000 to \$60,000.

In *Tan v Benkovich*,²² the appellant doctor was a plastic surgeon consulted by the plaintiff who was considering a facelift. The defendant told the plaintiff that he would make her look 20 years younger, that she would feel like a different person and that the operation would not leave her looking like a 'mummy'.

The doctor did not inform the plaintiff of the full range of risks, namely facial asymmetry, nerve damage and dimpling of the lips. Unfortunately, these risks eventuated, despite the exercise of due care in the procedure.

The trial judge found that the doctor was negligent in not informing the plaintiff of the risks and that the plaintiff would not have undergone the procedure had all these risks been made known to her.

The plaintiff was awarded both exemplary and aggravated damages at first instance. On appeal, the award of exemplary damages was set aside on the basis that there was no contumelious behaviour on the part of the surgeon.

In allowing the appeal, the Full Court held that it was not improper for the plastic surgeon to employ 'entrepreneurial flair' to encourage his patient to proceed with the facelift she was anxious to have.

Importantly, it was accepted on appeal that there might be cases where negligence in attending is so gross as to merit an awarding of exemplary damages.

BREACH OF CONTRACT

In *Hospitality Group Pty Ltd v Australia Rugby Union Ltd*,²³ the Full Federal Court applied the principle of *Gray* and held that exemplary damages cannot be recovered for breach of contract.



Exemplary damages may turn out to be one of the only effective means of checking excesses of increasing and concentrated media power.

The defendant was a doctor at a fertility clinic. The plaintiff and her husband were unable to have children by natural means due to histo-incompatibility. In addition, the plaintiff and her husband had different Rhesus factors (the plaintiff was negative and the husband double positive).

The plaintiff enrolled in the donor insemination program. They selected a donor who was Rhesus negative and who had similar physical characteristics and educational background to the husband. The plaintiff was inseminated with the correct semen on two occasions.

Unfortunately, on the third occasion the plaintiff was inseminated with semen from a donor who was Rhesus positive and from an incompatible ethnic background. The three inseminations occurred on consecutive days.

contradicting her religious beliefs. She developed depression and underwent psychiatric treatment.

At trial, the doctor claimed that her motive for making the statements, which she did not believe and now regretted, was the plaintiff's wellbeing. The doctor conceded that the statements were threats, but denied that in making them she was motivated by profit and the preservation of her own reputation and character. The doctor did not ask about the plaintiff's moral or religious beliefs or those of her husband. She did not talk to the plaintiff about the possibility of the first or second insemination having caused the pregnancy.

At first instance, Ormiston JA held that having regard to the doctor's admitted threats and deliberate misstatements

BREACH OF FIDUCIARY DUTY

In *Harris v Digital Pulse Pty Ltd*,²⁴ a majority of the New South Wales Court of Appeal held that there was no power in New South Wales to award exemplary damages for breach of fiduciary duty by an employee.

The appellants were employees of the respondent company. At the beginning of their employment they signed employment contracts that contained terms preventing them from competing with the company while they remained employed.

During their employment, the appellants secretly established their own business and secured contracts with prospective clients of the respondent. The respondent sued the appellants for breach of employment contracts, breach of fiduciary duty and breach of duty under the *Corporations Act 2001* (Cth).

In addition to the usual remedies, the respondent also sought exemplary damages. The respondent was successful, receiving an account of profits from both appellants for breach of contracts and fiduciary duty, equitable compensation from one of the appellants for breach of duty and misuse of confidential information, and exemplary damages for breach of fiduciary duty. The appellants sought leave to appeal against the orders for exemplary damages.

The case provides compelling reading for those interested in historical, amusing and learned erudition concerning the development of the law of equity in New South Wales.

In setting aside the award of exemplary damages, the majority left the door open for equity and penalty to perhaps one day become friends.

Spigelman CJ said it was unnecessary and undesirable to decide the case on the basis that a punitive monetary award could never be awarded in equity. Remedial flexibility is a characteristic

of equity jurisprudence, he said.

He stated that the case should be determined on the basis of whether a power to make a punitive monetary award could exist where the relationship between the parties was created by contract, in which one party has a fiduciary obligation to act in the interests of the other in relevant respects.

Equity does not bear the same relationship to the instinct for revenge as the institution of marriage does for the sexual appetite.

His Honour noted that a punitive monetary award was incompatible with the law relating to penalties in contracts, in that had the contract between the parties included a provision specifying a penalty would be payable for a

breach, then such a provision would have no legal effect.

Heydon JA, in one of his last 'hurras' before elevation to the High Court, attempts a 'Roddy Meagher' in an otherwise Sir Victor Windeyer judgment of learned historical proportions, when he says in his conclusion: 'In short, equity does not bear the same relationship to the instinct for revenge as the institution of marriage does for the sexual appetite.'²⁵

TRADE PRACTICES ACT 1974

The High Court's decision in *Marks v GIO Australia Holdings Ltd*²⁶ has the effect of preventing the award of exemplary damages under sections 82 and 87 of the Trade Practices Act. These sections confer upon the relevant court the power to make various orders, including the award of damages for contravention of provisions of Parts IV and V of the Act.

The court held that the wording of sections 82 and 87 limited any award to compensatory damages.

REPRESENTATIVE PROCEEDINGS

It is not yet clear whether exemplary damages are available in respect of

negligence claims litigated in representative proceedings pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth). A declaration in favour of this was set aside on appeal due to deficiencies in the pleadings.²⁷

THE PLAINTIFF'S CONDUCT

In respect of a claim for exemplary damages, the defendant is entitled to show that the plaintiff's own conduct was responsible for the commission of the tortious act and to use this fact to prevent or reduce the award of the exemplary damages.²⁸

SPECIFIC PLEADING

In cases where exemplary damages are to be claimed, the Statement of Claim and the particulars should reflect this. Failure to do so may result in no such damages being awarded.

THE FUTURE OF EXEMPLARY DAMAGES

Courtesy of the Ipp recommendations, there is now a general move to abolish exemplary damages in negligence claims. In New South Wales and the Northern Territory, exemplary damages have been abolished in all personal injury cases. In Queensland they are to be abolished in personal injury cases, but there is a proposal to reinstate them for unlawful acts and sexual assault misconduct cases.

In the Australian Capital Territory and the other states, the relevant legislation has to be referred to in all cases before a claim is made. However, it can be stated with confidence that the opportunity for a successful exemplary damages claim will be rare indeed. **PL**

Endnotes: 1 (1998) 196 CLR 1. 2 p 4. 3 p 6. 4 (1987) 164 CLR 1. 5 p 13. 6 [2001] NSWSC 410. 7 para 4929. 8 (1920) 29 CLR 71 at 77. 9 (2003) QDC 151. 10 supra 1, p 14. 11 supra 4, p 10. 12 supra 1, p 7. 13 *Smith's Newspapers Ltd v Becker* (1932) 47 CLR 279 at 300. 14 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471-72. 15 *ibid*, p 463. 16 (2000) 49 NSWLR 78. 17 p 87. 18 supra 1, p 43. 19 (2000) HCA 36. 20 supra 1, p 491. 21 (1996) Aust Torts Reports 81-387. 22 (2000) NSWCA 295. 23 (2001) FCA 1040; 110 FCR 157. 24 (2003) 44 ACSR 390. 25 para 476. 26 (1998) 196 CLR 494. 27 See *Nixon v Phillip Morris (Australia) Ltd* (1999) 95 FCR 453. 28 See *Fontin v Katapodis* (1962) 108 CLR 177.