EXEMPLARY DAMAGES AND TORT: AN INTERNATIONAL COMPARISON

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INTRODUCTION

The troublesome question of exemplary damages has occupied the minds and pens of judges, law reformers and academics for an inordinate period over the last ten years. Three Law Reform Commissions - in Ontario,[1] England[2] and Ireland[3] - have debated whether exemplary damages should constitute a remedy in civil law generally, and in negligence actions particularly, and the basis upon which such damages should be assessed. In early 1998, the New Zealand Court of Appeal considered the availability of a civil claim for exemplary damages in respect of conduct that has been, or is likely to be, the subject of a criminal prosecution.[4] Then, on 17 November 1998, the High Court of Australia had cause to consider whether a defendant who has already been convicted and sentenced in criminal proceedings should be subject to an award of exemplary damages in a subsequent civil claim in negligence based on the same conduct.[5]

Despite the attention which has been bestowed upon the topic, numerous difficulties litter the path of a plaintiff seeking access to the exemplary damages honey-pot. One of those dilemmas concerns the distinction between exemplary and aggravated damages. The degree of overlap, and the very purpose for which each category exists, are ambiguous and unsatisfactory. This forms the subject of discussion in Part I of the article. The second Part briefly discusses the Australian case

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1 Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) (hereafter "*1991 Report*")

2 Law Commission for England and Wales, *Aggravated, Exemplary and Restitutionary Damages* (Consultation Paper no 132, 1993) (hereafter "*1993 Consultation Paper*"); Law Commission for England and Wales, *Aggravated, Exemplary and Restitutionary Damages* (Report no 247, 1997) (hereafter "*1997 Report*").

3 Law Reform Commission of Ireland, *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages* (1998) (hereafter "*1998 Consultation Paper*")

4 *Daniels v Thompson* [1998] 3 NZLR 22; appealed to the Privy Council sub nom *W v W* [1999] 2 NZLR 1, which appeal was dismissed

5 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494

law in which the availability of exemplary damages in cases of negligence has been canvassed. The small cache of relevant cases are marked by some judicial hesitation concerning the incorporation of exemplary damages within claims based upon unintentional torts, although such inconsistency appears to have been resolved recently by the High Court in *Gray v Motor Accident Commission* [6] Part III of the article draws from various sources - judgements both in Australia and overseas, reports of Law Reform Commissions and academic literature - the arguments for and against the availability of exemplary damages in the sphere of tort claims generally.

PART I THE DISTINCTION BETWEEN AGGRAVATED AND EXEMPLARY DAMAGES

The distinction between aggravated and exemplary damages is, as the High Court has admitted,[7] difficult.

The following separation was attempted by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd*:[8]

> aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment - moral retribution or deterrence. [9]

Subsequently, in *Lamb v Cotogno*,[10] the High Court explained:

> Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages on the other hand, go beyond compensation and are awarded as punishment to the guilty to deter from any such proceeding for the future and as a proof of the detestation of the jury to the action itself. [11]

More specifically, aggravated damages are a form of compensatory damages awarded to compensate the plaintiff for injury to feelings of pride, dignity or reputation, or mental distress and humiliation, which are caused by the defendant's malicious motive, insolence or arrogant disregard of the

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6 (1999) Aust Torts Reports 81-494

7 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129 per Taylor J, 149 per Windeyer J; *Lamb v Cotogno* (1987) 164 CLR 1 at 8; *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,518 per Kirby J. Also: *Backwell v AAA* (1996) Aust Torts Reports 81-387 where Ormiston JA noted the confusion with aggravated damages: at 63 393

8 (1966) 117 CLR 118

9 (1966) 117 CLR 118 at 149 per Windeyer J.

10 (1987) 164 CLR 1.

11 *Lamb v Cotogno* (1987) 164 CLR 1 at 8

plaintiff's rights [12] In the New Zealand defamation case, *Taylor v Beere*,[13] Somers J enlarged the role of aggravated damages as follows:

> They may include sums for loss of reputation, for injured feelings, for outraged morality and to enable a plaintiff to protect himself against future calumny or outrage of a similar kind and indignation ... at the injury inflicted on the plaintiff ... [14]

Most recently, in *Gray v Motor Accident Commission* (hereafter *Gray*),[15] Kirby J described them as damages 'given for conduct which shocks the plaintiff and hurts his or her feelings'[16]

Exemplary damages,[17] on the other hand, are not compensatory, but punitive. They are awarded for conduct 'which shocks the tribunal of fact, representing the community'[18]

However, there is a degree of overlap, in that the affront to the particular plaintiff will often coincide with the affront to the community.[19] Additionally, in order to obtain an award of aggravated damages, it appears that there must be more than a mere injury to the plaintiff's pride and dignity - some outrageous conduct on the part of the defendant which aggravated the circumstances of the injury also appears necessary. This element of aggravation may occur in the very manner in which the defendant committed the wrong, or in the defendant's conduct subsequent to the wrong.[20] But this gives rise to a real conceptual problem. As Fleming notes:

> For aggravated damages the defendant's misconduct is supposedly relevant only in so far as it affects the plaintiff's feelings. But this left unanswered why such damages for injury to feelings and dignity if they are no more than compensatory should be reserved only for victims of outrageous behaviour. If outrageous conduct then makes the difference their purpose must be to punish. All this goes to underline the ambiguity of the concept of aggravated damages.[21]

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12 A definition of this type was suggested by the Law Commission for England and Wales, 1993 *Consultation Paper* at 32, which definition was subsequently endorsed by the judiciary in England: see references in *1997 Report* at 11. Similar sentiments were expressed by Lord Reid in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1089

13 [1982] 1 NZLR 81

14 *Taylor v Beere* [1982] 1 NZLR 81 at 95

15 (1999) Aust Torts Reports 81-494

16 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,519

17 They are also variously called 'punitive damages', 'vindictive damages', 'exemplary damages', 'retributory damages' and 'penal damages'.

18 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,519 per Kirby J

19 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,519 per Kirby J

20 Law Commission for England and Wales, *1997 Report* at 3

21 Fleming, J *The Law of Torts* 9th ed. N.S.W: LBC Information Services, 1998 at 274

In other words, to trigger an award of aggravated damages seems to require proof of precisely the same type of conduct on the part of the defendant as would trigger an award of exemplary damages.[22] In some respects, aggravated damages may be seen to attempt the best of both worlds: seeking to compensate the plaintiff for intangible losses, while seeking to punish and deter outrageous tortious conduct on the defendant's part.[23]

The confusion inherent in the distinction between aggravated and exemplary damages was recently apparent in *Gray*. An entitlement to compensatory aggravated damages was raised for the very first time by the plaintiff on appeal to the High Court, although these damages were never pleaded, nor was any evidence ever given to support the claim at trial. Not surprisingly, the High Court refused to consider the belated application. However, Kirby J reminded the legal profession that:

> It is perhaps because of the lack of complete clarity of the differentiating features of aggravated damages, and doubts as to what they involve, that legal practitioners often fail to claim them and persons wronged often fail to recover them.[24]

In an effort to remove the problematical nature of these damages for the benefit of the legal profession, litigants, and the juries which have to assess such damages on occasion, the various Law Reform Commissions have offered suggestions about the treatment of aggravated damages which are interesting in their diversity.

The Ontario Commission recommended that a court should be empowered to award compensatory damages for injury to pride and dignity as part of the ordinary global award of damages for non-pecuniary loss; that aggravated damages, as they are currently understood, should be abolished;[25] and that exemplary damages be retained.[26] This would remove the overlap, and maintain a clean division between compensatory and exemplary damages. The Law Reform Commission of Ireland recommended that aggravated damages be retained for all torts, including negligence, but that they should be defined as damages 'to compensate a plaintiff for added hurt, distress or insult (over and above, and not including, any personal injury)'.[27] In that case, the only importance of the outrageous conduct of the defendant would be to ensure that it did indeed cause the distress to the plaintiff.[28]

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22 Ontario Law Reform Commission, *1991 Report* at 28.

23 Ontario Law Reform Commission, 1991 *Report* at 29. See also: Law Reform Commission of Ireland, 1998 Consultation Paper at 107.

24 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,518.

25 Ontario Law Reform Commission, *1991 Report* at 30.

26 Ontario Law Reform Commission, *1991 Report* at 38.

27 Law Reform Commission of Ireland, *1998 Consultation Paper* at 109.

28 Law Reform Commission of Ireland *1998 Consultation Paper* at 109. It was the provisional conclusion of some of the Commissioners that exemplary damages are

On the other hand, the Law Commission for England and Wales considered it vital to dispel the confusion once and for all, and define by statute that the label 'damages for mental distress' should be used instead of 'aggravated damages'[29] It also recommended that exemplary damages should be awarded only if the defendant's conduct showed a deliberate and outrageous disregard of the plaintiff's rights.[30]

It is submitted that the first and third suggestions above, by which aggravated damages are abolished *in their present form*, are to be preferred. That position clarifies the law, and serves to allow a greater conceptual separation between compensatory and exemplary damages. The proposal renders less important the question of outrageous conduct as an issue in compensatory damages, and removes the question of compensation from exemplary damages.[31]

Despite the attempts by the Australian judiciary to date to differentiate between aggravated and exemplary damages, and admonitions of the legal profession for the failure to grasp the purpose of aggravated damages,[32] it is an unfortunate reality, for that part of the profession engaged in tort litigation, that the distinction remains confusing and conceptually blurred.

PART II ARE EXEMPLARY DAMAGES AVAILABLE IN CLAIMS BASED ON NEGLIGENCE?

One of the initial questions surrounding exemplary damages is whether, at law, a person may claim and recover them, additional to compensatory damages, outside the province of intentional conduct. Prior to *Gray*, there was some division in Australian judicial opinion as to whether awards of exemplary damages could properly be made in negligence cases. Whilst some decisions indicated that such damages could indeed be recovered in a claim based on negligence,[33] doubts about the proper

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entirely unacceptable within the civil law while the remainder considered that non-compensatory damages are acceptable within the civil law generally and in respect of the tort of negligence specifically: at 125.

29 Law Commission for England and Wales, *1997 Report* at 3

30 Law Commission for England and Wales, *1997 Report* at 6, 101, 109-10

31 Ontario Law Reform Commission, *1991 Report* at 30. Similarly, in *Trend Management Ltd v Borg* (1996) 40 NSWLR 500, Mahoney P was prepared to assume that exemplary damages as a concept is confined to damages which are non-compensatory in their nature : at 503

32 In *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494, Kirby J stated of that matter: 'The differential entitlement to aggravated damages just seems to have been overlooked as it was at trial in *Cotogno v Lamb* and in many other cases before and since. To permit the matter to be ventilated for the first time in this Court would involve ... inefficiency and condonation of professional oversight : at 65,519

33 *Coloca v BP Australia Ltd* [1992] 2 VR 429 per O Bryan J at 442 and 447-8; *Backwell v AAA* (1996) Aust Torts Reports 81-387 per the Supreme Court of Victoria Court of Appeal although the quantum of exemplary damages was reduced on that appeal; *Trend Management v Borg* (1996) 40 NSWLR 500 per Mahoney P at 503-4

award of exemplary damages in the context of negligence were expressed in other instances [34]

Then, in November 1998, the High Court had occasion to consider in *Gray* whether, and if so the circumstances in which, exemplary damages could be awarded in actions pleaded in negligence.

The plaintiff, Donald Gray, an Aboriginal Australian, was hit by a car driven at him deliberately by the defendant Darren Bransden. At the time of the accident the plaintiff was aged 16 years. At first instance, it was found that Bransden drove directly at a group of Aboriginal youths with the intention of running down Gray and seriously hurting him. Two and a half years later Bransden was convicted of causing grievous bodily harm with intent to do such harm, and was sentenced to seven years' imprisonment. Then, two years after the criminal trial, the plaintiff commenced an action for damages for negligence giving rise to personal injury. The injuries were extensive: fractures to both legs, multiple contusions to the face and head, and a residual cognitive defect. At trial, damages were assessed by the District Court of South Australia at $72,206. No award was made for exemplary damages on the basis that Bransden had already been punished in the criminal court. The Court took the view that in this situation a civil penalty in the guise of exemplary damages was inappropriate. Gray appealed against this decision, and on the basis that the compensatory damages were manifestly inadequate.[35]

The High Court framed two questions for consideration:

(i) are exemplary damages available where the plaintiff's claim is for damages for negligence rather than some intentional wrong; and

(ii) is the award of exemplary damages a matter of right or does it depend on the exercise of a discretion informed by some identifiable criteria?[36]

The Court confirmed that there may be rare cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff.[37] However, in this case, the majority was of the opinion that, although Gray's action was pleaded in negligence, it was conducted at trial as if it were a claim in

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34 *Midalco Pty Ltd v Rabenalt* [1989] VR 461 especially Kaye J (at 467) and Fullagar J (at 476-7); *Cullinan v Urban Transit Authority of NSW* (unreported) NSW Supreme Court (20 December 1991) per Carruthers J

35 The second basis of the appeal was allowed, and a new trial was ordered on the issue of damages.

36 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 65,505

37 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ McHugh Gummow and Hayne JJ at 65,505; see also: Kirby J at 65,516

trespass, that is, that Bransden deliberately drove his vehicle towards the plaintiff without regard for the latter's safety[38] Despite this, the High Court approved of previous Australian authority[39] in which negligence combined with contumelious disregard of the plaintiff's rights was found to give rise to an award for exemplary damages. The High Court confirmed that exemplary damages are indeed available in Australia where the plaintiff's claim is for damages for negligence rather than for some intentional wrong

As Kirby J noted, the conclusion is significant as there was no authority of the High Court on the point until this case.[40] However, ultimately, the observations by the Court in this respect were obiter only as the trial judge's conclusion about the effect of the prior criminal sentence were upheld. As substantial punishment was imposed on Bransden for the conduct which was the subject of the tort action, exemplary damages could not be awarded.[41]

Therefore, the threshold question in this jurisdiction is the required quality of the negligent wrong done by the defendant. In this respect, the principal focus of the enquiry is upon the wrongdoer, not the plaintiff.[42] Unfortunately, the tests of the appropriate behaviour that warrants an award of exemplary damages have differed in expression, and many of them have been postulated in cases which did not involve a claim in negligence. The standard of required culpability has been variously described as contumelious[43] behaviour which falls short of being malicious, but includes the defendant behaving in a humiliating manner and in wanton disregard of the plaintiff's welfare;[44] conduct which discloses a contumelious disregard of the rights of the plaintiff;[45] conscious wrongdoing in contumelious disregard for the plaintiff's

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38 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 65 506

39 For example: *Coloca v BP Australia Ltd* [1992] 2 VR 429, *Trend Management v Borg* (1996) 40 NSWLR 500

40 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65 515

41 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,509

42 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,504 per Gleeson CJ, McHugh, Gummow and Hayne JJ

43 This word is defined in Delbridge, A. (ed.) *The Macquarie Dictionary*, 3rd ed. N.S.W.: The Macquarie Library, 1997 to mean: insulting manifestation of contempt in words or actions; contemptuous or humiliating treatment : at 476

44 *Lamb v Cotogno* (1998) 164 CLR 1 at 13 per Mason CJ, Brennan, Deane, Dawson, and Gaudron JJ (assault); *Midalco Pty Ltd v Rabenalt* [1989] VR 461 at 477 per Fullagar J (negligence); *Backwell v AAA* (1996) Aust Torts Reports 81-387 at 63 390 per Ormiston JA (negligence).

45 *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118 at 129 per Taylor J and 123 per McTiernan J (defamation); *Coloca v BP Australia Ltd* [1989] VR 461 at 448 per O'Bryan J (negligence), where His Honour quoted from Mayne, J. *Mayne & McGregor on Damages* 12th ed. London: Sweet & Maxwell, 1961 at 196; see also: *Trend Management Ltd v Borg* (1996) 40 NSWLR 500 at 502 per Mahoney P.

rights;[46] conduct which is high-handed, oppressive, and insolent;[47] or recklessness amounting to conduct with either knowledge of the risks and dangers involved but with a disregard of the consequences for the plaintiff *or* some knowledge of the risks but intentionally and deliberately failing to inform oneself further.[48]

In addition to these tests, there are two caveats upon the power of a judge or jury to award exemplary damages in actions for personal injuries caused by negligence. First, in *Coloca v BP Australia Ltd*,[49] O'Bryan J held that such awards would be 'unusual and rare',[50] and should only be granted where the conduct of the defendant towards the plaintiff merited punishment. Indeed, in *Trend Management v Borg*,[51] Mahoney P cautioned:

> it is important that exemplary damages be awarded only where the findings are of the kind to which the High Court has referred . . . if exemplary damages are to perform the function which the Australian law has assigned to them, it is important that the seriousness of the conduct involved be not diluted.[52]

Second, in *Backwell v AAA*,[53] the Victorian Court of Appeal endorsed the view of Lord Devlin in *Rookes v Barnard*[54] that exemplary damages may be properly awarded 'if, and only if' the sum that was in mind to award as compensation was inadequate to punish the defendant for his conduct.[55]

However, the lack of definition of those circumstances when an award of exemplary damages is warranted has been the cause of judicial

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46 *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118 at 154 per Windeyer J; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 471 per Brennan J (trespass to land); *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 per Knox CJ (inducing breach of contract); *Backwell v AAA* (1996) Aust Torts Reports 81-387 at 63,389 per Ormiston JA; *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,504.

47 *Commonwealth of Australia v Murray* (1988) Aust Torts Reports 80-207 at 68,051 per Priestley JA citing the trial judge's summing up with approval (action in nuisance).

48 *Midalco Pty Ltd v Rabenalt* [1989] VR 461 at 470 per Kaye J.

49 [1992] 2 VR 441.

50 *Coloca v BP Australia Ltd* [1992] 2 VR 441 at 448.

51 (1996) 40 NSWLR 500.

52 *Trend Management v Borg* (1996) 40 NSWLR 500 at 509. Similarly in the recent decision of the New Zealand Court of Appeal, *Ellison v I* [1998] 1 NZLR 416, it was cautioned that because negligence is an unintentional tort those cases [of exemplary damages] are likely to be rare indeed: at 419. For commentary upon the effect of that decision in New Zealand, see: Beck, A. 'Exemplary Damages in New Zealand: Sunset and Evening Star' (1998) 6 *Tort Law Review* 194.

53 (1996) Aust Torts Reports 81-387.

54 [1964] AC 1129 at 1228.

55 (1996) Aust Torts Reports 81-387 at 63,396 per Ormiston JA (with whom Brooking JA agreed).

resentment towards, and restriction upon, such damages. As Lord Reid despaired in *Broome v Cassell & Co Ltd*:[56]

> There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like - terms far too vague to be admitted to any criminal code worthy of the name.[57]

In *Gray*, the majority of the High Court noted that the grant of exemplary damages has often been termed a discretionary exercise - having regard to the purposes of punishment and deterrence and the character and degree of the wrongdoing - albeit that such a description gives insufficient guidance about how the power should be exercised.[58] However, the fact that the defendant was a third party insurer and the wrongdoer had been convicted and punished for a criminal offence, was considered relevant in determining whether or not to award the damages in that particular case.

PART III ARGUMENTS FOR AND AGAINST EXEMPLARY DAMAGES IN TORT GENERALLY

Numerous arguments, both in respect of the *availability* and the *assessment* of exemplary damages in tort actions generally, have been postulated by courts, law reform commissioners, practising lawyers and academics throughout the world. The purpose of this Part is to set out as clearly and concisely as possible the criticisms and support which exemplary damages have garnered. The arguments are outlined as they have been mooted in the relevant source from which they came, without any comment from the author, to enable readers to consider the cogency and efficacy of the arguments for themselves. For the sake of convenience, the propositions are loosely grouped according to topic. The topics, although not in any particular order of ascendancy or source, are as follows:

- Windfall to the plaintiff;
- The purpose of exemplary damages;
- Perceived benefits for the plaintiff of an award;
- Interplay with the criminal law;
- Interaction with legislative schemes;
- Role of aggravated damages;
- The financial means of the defendant;
- Quantum of the award;
- Logistics of a trial;

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56 [1972] AC 1027.

57 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1087.

58 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 65,507.

- Corporations and exemplary damages;
- Double jeopardy;
- The insured defendant;
- Where more than one defendant;
- Where more than one plaintiff; and
- Vicarious liability for exemplary damages.

Windfall to the plaintiff

AGAINST: The primary object of an award of damages is to compensate a plaintiff for injury caused by conduct of the defendant, not to provide a windfall to the plaintiff so that he is placed in a better position (in pecuniary terms) than before the negligence or other tort occurred. If exemplary damages are awarded, the plaintiff, who will already have been fully compensated for his loss by an award of compensatory damages, may become the fortunate recipient of the defendant's punishment.[59] Indeed, in *Broome v Cassell & Co Ltd*,[60] Lord Reid called the award 'a pure and undeserved windfall at the expense of the defendant' and considered that this justified the severe restriction, if not abolition, of exemplary damages.[61]

AGAINST: In circumstances where the defendant, a public service provider, is found liable to pay exemplary damages, and the liability is not met by insurers, the money paid for the benefit and windfall of the individual plaintiff will not be available to finance the publicly beneficial activities of that defendant. The result being that one gains at the expense of many.[62]

FOR: One method by which to prevent a windfall to the plaintiff is to enact legislation so that a part of any exemplary damages award is payable to the State or to another public fund. This is demonstrated by the 'split recovery' style of legislation applicable in some US jurisdictions which allows for a proportion of exemplary damages to be paid to the

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59 See for example: Law Reform Commission of Ireland, *1998 Consultation Paper* at 9; Law Commission for England and Wales, *1997 Report* at 79. The windfall argument was also noted but not with any particular concern, by the majority in *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 65,504.

60 [1972] AC 1027.

61 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1086. Also Lord Hailsham LC at 1082, Lord Morris at 1099, and Lord Diplock at 1126.

62 This was noted by Law Commission for England and Wales, *1997 Report* at 80 in the discussion of *Thompson v MPC* [1997] 3 WLR 403, where the defendant was a police authority, although the Commission noted that this argument is not applicable if the damages are to be met by insurers rather than the public service provider.

State.[63] Alternatively, if exemplary damages arise out of a mass disaster claim from product liability, industrial safety, or transport accidents, payment may be made to a reserve compensation fund.[64]

FOR: Additionally, doubts have been expressed as to whether the plaintiff can be truly said to have obtained a windfall gain when it was the plaintiff who instituted the action against the defendant, usually at considerable financial risk to himself.[65] After all, litigation is expensive, the risk of loss is not inconsiderable, and the community must be prepared to pay plaintiffs to give effect to the punitive function of tort law.[66]

FOR: In any event, as Lord Diplock eloquently stated in *Broome v Cassell & Co Ltd*,[67] the plaintiff 'can only profit from the windfall if the wind was blowing his way'.[68] In other words, all other things being equal, windfall cases would tend to be those where the conduct is deserving of relatively greater punishment. If exemplary damages were not permitted in such cases, the real windfall would be to the defendants who committed the most outrageous torts. If there is to be a benefit, better it go to a plaintiff prepared to litigate than to a flagrant wrongdoer.[69]

Purposes of exemplary damages

FOR: The capacity to award exemplary damages is designed to vindicate the strength of the law,[70] 'to teach the wrongdoer that tort does not pay;'[71] and to uphold society's commitment to fundamental legal rights and values.[72]

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63 These are outlined by the Law Reform Commission of Ireland, *1998 Consultation Paper* at 44-6. For example the Florida *Tort Reform and Insurance Act* 1986 provides that 60% of exemplary damages in personal injury or wrongful death cases are to be paid to the State.

64 Suggested for example by the Citizen Action Compensation Campaign, and approved by the Law Commission for England and Wales in *1993 Consultation Paper* at 74-138.

65 Pipe, G. Exemplary Damages After Camelford (1994) 57 *Modern Law Review* 91.

66 Ontario Law Reform Commission, *1991 Report* at 56.

67 [1972] AC 1027.

68 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1126 cited with approval by Richardson J in *Taylor v Beere* [1982] 1 NZLR 81 at 91.

69 Ontario Law Reform Commission, *1991 Report* at 57-8.

70 *Rookes v Barnard* [1964] AC 1129 at 1226 per Lord Devlin. See also: Law Reform Commission of Ireland, *1998 Consultation Paper* at 15.

71 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 472 where Brennan J cited with approval Lord Diplock's statement to this effect in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1130 and called this a social purpose of exemplary damages.

72 *Daniels v Thompson* [1998] 3 NZLR 22 at 69 per Thomas J (dissenting).

FOR: Exemplary damages aim to fulfill three legitimate functions of the civil law:

(a) punishment of the defendant (as described by the synonymous term of such an award as 'punitive damages');
(b) deterrence of others (a purpose expressed in the term 'exemplary damages'); and
(c) the means of providing a mark of a court's or jury's condemnation of the behaviour.[73]

FOR: An award of exemplary damages also serves to appease the person wronged by the defendant's flagrant behaviour.[74]

FOR: Exemplary damages can eliminate the defendant's gains or profit from the conduct, whereas compensatory damages do not achieve this end, concentrating as they do upon the effect of the tort upon the plaintiff. Exemplary damages can prevent unjust enrichment in circumstances where the profit accruing to the defendant as a result of the misconduct would exceed the compensation that the defendant would be required to pay to the plaintiff.[75]

AGAINST: Given the modern criminal processes, the sole purpose of exemplary damages is to discharge the traditional criminal processes of punishment and deterrence. They have no role to play in responding to any private needs of victims.[76]

Perceived benefits for the plaintiff

FOR: Modern society has a tendency to be vocal, factional, discordant and inclined to pursue remedies against perceived wrongdoers.[77] Exemplary damages serve to assuage the desire for revenge and self-help that might endanger the peace of good society.[78]

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73 See: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 per Brennan J; *Lamb v Cotogno* (1987) 164 CLR 1 at 8-9; *Rookes v Barnard* [1964] AC 1129 at 1230 per Lord Devlin. See also: Ontario Law Reform Commission, *1991 Report* at 17. However it has been argued that while the deterrence theory is appropriate to cases involving public official defendants (or those who exercise legal authority) it is not appropriate to the private situation: McMahon, J. Exemplary damages: A useful weapon in the legal armoury? (1988) 18 *VUWLR* 35 at 41.

74 *Lamb v Cotogno* (1987) 164 CLR 1 at 9; *Daniels v Thompson* [1998] 3 NZLR 22 at 68 per Thomas J (dissenting); *Trend Management Ltd v Borg* (1996) 40 NSWLR 500 at 505 per Mahoney P.

75 Ontario Law Reform Commission, *1991 Report* at 17.

76 *Daniels v Thompson* [1998] 3 NZLR 22 at 29.

77 These comments were made in respect of New Zealand society in *Donselaar v Donselaar* [1982] 1 NZLR 97 at 106-7 per Cooke J.

78 *Lamb v Cotogno* (1987) 164 CLR 1 at 9. However, the Law Commission for England and Wales, *1997 Report*, notes that the importance of this benefit has arguably diminished over time: at 53.

FOR: *The ability to pursue exemplary damages provides to a plaintiff* an opportunity to derive empowerment and control such that, from a personal situation of heartbreak and loss, others in the community might benefit from the deterrent effect of an award of exemplary damages. For example, in *Backwell v AAA*,[79] the plaintiff was asked during the trial what she was looking for in the case. Her reply: 'I am looking for that it never happens to anybody else. I would hate anybody to go through what I have been through.'[80]

FOR: The opportunity to pursue exemplary damages in a civil trial offers the plaintiff non-economic 'therapeutic' benefits, in comparison with the rigours of criminal proceedings. In pursuing exemplary damages the civil standard of proof provides the plaintiff with greater *equality with the defendant*. In addition, the plaintiff enjoys the advantage of representation by counsel, providing a far greater degree of control over the conduct of the process than would otherwise be enjoyed by a complainant in criminal proceedings.[81]

AGAINST: Exemplary damages are equivalent to a private fine, but private vengeance is not worthwhile to encourage, nor should it any longer be a demand to be met by exemplary damages.[82]

AGAINST: *The psychological or therapeutic satisfaction provided to a* plaintiff by exemplary damages can be adequately fulfilled by an award of aggravated damages.[83] Aggravated damages can compensate the

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79 (1996) Aust Torts Reports 81-387

80 This quotation appears in: McSherry B. Medical Negligence and artificial insemination (1995) 2 *Journal of Law and Medicine* 180 at 181. Such therapeutic benefits are also acknowledged by the Ontario Law Reform Commission *1991 Report* at 34.

81 See: Manning J. Torts and Accident Compensation [1996] *New Zealand Law Review* 442 at 457. The author provides the example of the New Zealand case G v G (unreported, High Court M 535/95, 15 October 1996) in which a woman sued her former husband a doctor, in respect of a relationship characterised by physical, sexual and psychological abuse and violence, in a civil action rather than in criminal or disciplinary proceedings. The plaintiff sought exemplary damages for eight separate types of assault or battery and was awarded $85 000 for this head of damage. For further discussion of this point in the context of sexual battery actions, see the energetic and interesting debate demonstrated in: Smillie, J. Exemplary Damages for Personal Injury [1997] *New Zealand Law Review* 140; Manning J. 'Professor Smillie's Exemplary Damages for Personal Injury: A Comment' [1997] *New Zealand Law Review* 176; Smillie, J. Exemplary Damages and Accident Compensation: A Response to Joanna Manning [1997] *New Zealand Law Review* 314. The argument expressed in the accompanying text was particularly favoured by Thomas J (dissenting) in respect of female plaintiffs, in *Daniels v Thompson* [1998] 3 NZLR 22 at 73-4.

82 *Daniels v Thompson* [1998] 3 NZLR 22 at 29. See also: Ontario Law Reform Commission *1991 Report* at 34.

83 Freckelton I. Exemplary Damages in Medico-legal Litigation (1996) 4 *Journal of Law and Medicine* 103 at 105.

plaintiff for any outrage or humiliation that plaintiff might feel at the manner of the defendant's conduct.

AGAINST: If the party wronged does have the opportunity to participate in criminal proceedings in respect of the conduct, that party's interests now receive appropriate recognition in the criminal process, which requires sentencing judges to be provided with 'victim impact statements', and to consider awards of compensation or reparation as part of the criminal sentence.[84] Therefore, it is not the function of exemplary damages in tort law to confer any therapeutic benefits upon the plaintiff.[85]

Interplay with criminal law

AGAINST: Exemplary damages confuse the criminal and civil standards of proof. They are designed to punish the defendant, although he has not been provided in a civil trial with the usual protections or safeguards of the criminal law (for example, higher standard of proof, the right against self-incrimination, and the right to silence).[86] Thus, it is arguable that penal sanctions, in the form of exemplary damages, are being introduced into an area of law which is not equipped to cope with them.

In *Rookes v Barnard*,[87] Lord Devlin said:

> I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law.[88]

Lord Reid was also one of the strongest opponents of the award of exemplary damages in civil actions, and stated in respect of this argument:

> It is no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them?[89]

AGAINST: Punishment, deterrence and condemnation are not the legitimate functions of tort law and should occur only within the context of the criminal law.[90] This policy argument was well expressed by the Law Reform Commission of Ireland as follows:

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84 *Daniels v Thompson* [1998] 3 NZLR 22 at 35

85 See: Smillie, J. Exemplary damages and the criminal law (1996) 6 *Torts Law Journal* 113 at 114

86 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1087 per Lord Reid; 1100 per Lord Morris; 1127-8 per Lord Diplock; and 1135 per Lord Kilbrandon. See also: Ontario Law Reform Commission *1991 Report* at 19

87 [1964] AC 1129.

88 [1964] AC 1129 at 1230

89 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1087

90 *Rookes v Barnard* [1964] AC 1129 at 1221 per Lord Devlin; *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1086 per Lord Reid and 1127-8 per Lord Diplock; *AB v South West Water Services Ltd* [1993] QB 507 at 528-9 per Sir Thomas Bingham MR

> The criminal law allows for the prosecution and punishment of acts which are regarded as morally reprehensible and as damaging to society as a whole, not merely to the individual victim. The civil law is generally described as contrasting with this, as having the function of regulating relationships between individuals and dispensing justice as between the parties to a case, without regard to the wider interests of society. The function of punishment is closely associated with the criminal law, so much so that it has arguably become exclusive to it. Deterrence is also associated with criminal rather than civil sanctions. In imposing exemplary damages, the court is attempting to punish, to vindicate the rights of the plaintiff, and to deter the infringement of the rights of others in the future, a wider social purpose which is traditionally within the sphere of public law.[91]

It follows, then, that if exemplary damages only serve the limited functions of punishment and deterrence of wrongdoers, then in circumstances where an offender has been convicted and sentenced in criminal proceedings, there is no basis left to support exemplary damages in respect of the same conduct.[92] Punishment and deterrence have been met by the sentence.

AGAINST: The capacity of the courts to accomplish the purposes of punishment, deterrence, and condemnation in civil law depend upon the chance scenario of litigation being initiated and not settled, which is not necessarily connected to the type of tortious conduct involved, and which demonstrates the essentially random selection of a civil defendant as an vehicle for the court to engineer changes to community behaviour.[93]

AGAINST: If there is a deficiency in the criminal and regulatory systems, it should be dealt with directly by the amendment of those systems. They should not be patched up through the civil law[94]

AGAINST: A non-monetary remedy, such as a published declaration, could more appropriately serve to vindicate a community's outrage at flagrant behaviour that offends the plaintiff's feelings, or which causes humiliation and distress.[95]

FOR: Although certain evidential protections of the criminal law are not available to a defendant in a civil action for negligence or other tort, the lower burden of proof can be justified upon the basis that exemplary damages do not expose the defendant to the potential loss of liberty.[96]

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91 *1998 Consultation Paper* at 7-8

92 *Daniels v Thompson* [1998] 3 NZLR 22

93 Freckelton I "Exemplary Damages in Medico-legal Litigation" (1996) 4 *Journal of Law and Medicine* 103 at 105.

94 Law Commission for England and Wales *1997 Report* at 96.

95 Law Commission for England and Wales, *1997 Report* at 96

96 Law Reform Commission of Ireland *1998 Consultation Paper* at 13; Ontario Law Reform Commission, 1991 Report at 55

Thus, in the absence of a threat to the liberty of the individual, the strict procedural safeguards are not necessary

FOR: Tort and crime are not compartmentalized any longer There is no 'sharp cleavage' between the criminal and civil law, making the tension of using civil proceedings to both compensate the plaintiff and punish the wrongdoer more apparent than real [97]

> The boundary between the civil and the criminal laws need not be viewed as unbreachable .. The most significant perceived difference between the two systems of law is that the criminal law punishes while the civil law does not This, however, is also open to challenge; whilst punishment is certainly a characteristic of the criminal law it is not at all clear that it is exclusive to it [98]

There is a considerable body of judicial opinion that the roots of tort and crime are intermingled[99] to the extent that, if it is accepted that one of the purposes of tort law is punitive, then exemplary damages no longer seem anomalous [100]

FOR: Additionally, the question has been asked as to why a deterrence or punitive function should not be available to tort via an award of exemplary damages when some statutes authorise criminal courts to compensate victims of crime in respect of any personal injury or loss which has resulted from the offence,[101] whilst others prescribe civil penalties.[102]

FOR: In any event, careful instructions to the jury by the judge to take special care, and the introduction of a higher standard of proof, in serious cases where exemplary damages are pleaded, should protect the defendant.[103] For example, in *Backwell v AAA*,[104] the trial judge

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97 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 65,504-5

98 Law Reform Commission of Ireland *1998 Consultation Paper* at 9 See also: Law Commission for England and Wales, 1993 *Consultation Paper* at 114 A similar suggestion was made by Lord Wilberforce in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1114

99 For example: *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1114 per Lord Wilberforce; *Taylor v Beere* [1982] 1 NZLR 81 at 90 per Richardson J; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149-50; *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ, McHugh Gummow and Hayne JJ at 65,504

100 Law Reform Commission of Ireland *1998 Consultation Paper* at 10

101 For example: *Taylor v Beere* [1982] 1 NZLR 81 at 90 per Richardson J; see also *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ, McHugh, Gummow and Hayne JJ at 65,504

102 For example: *Corporations Law* Pt 9 4B, cited in *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 per Gleeson CJ, McHugh Gummow and Hayne JJ at 65,504

103 Tilbury, M 'Exemplary Damages in Medical Negligence (1996) 4 *Tort Law Review* 167 at 171

104 (1996) Aust Torts Reports 81-387

'special care' because the allegations against the defendant doctor were 'serious', as were the consequences of an award of exemplary damages [105] This direction was also given by the trial judge in *Midalco Pty Ltd v Rabenalt*.

FOR: The opportunity for the courts to discourage criminal behaviour also depends upon those particular cases that come before them In that respect, the imposition of punishment by means of exemplary damages is no more selective or opportunistic than in the sphere of criminal law.[107]

FOR: Criminal, regulatory and administrative sanctions are inadequate.[108] The remedy of exemplary damages serves as a response to public concern over the failure of the criminal law (and statutory law[109]) to penalise those responsible for serious and blatant acts which result in grievous injury or death.[110] An award of exemplary damages may supplement the criminal law to ensure that wrongdoers who engage in exceptional conduct receive their 'just desert'[111] in circumstances where the criminal process operates imperfectly or where the punishment imposed is inadequate.[112]

FOR: A defendant's punishment in criminal proceedings should not operate as an absolute bar to a civil claim for exemplary damages It is merely one factor that a court should take into account when determining whether an exemplary award is appropriate [113]

Interaction with legislative schemes

FOR: The capacity to claim exemplary damages is useful to maximise the monetary benefits for a plaintiff when statutory law has either

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105 *Backwell v AAA* (1996) Aust Torts Reports 81-387 at 63,387

106 [1989] VR 461 at 475 per Kaye J However note the perceived danger of confusing juries if one standard of proof was required to be applied to compensatory damages, and a higher standard in respect of exemplary damages (Ontario Law Reform Commission, *1991 Report* at 55)

107 *Midalco Pty Ltd v Rabenalt* [1989] VR 461 at 475 per Kaye J

108 Law Commission for England and Wales, *1993 Consultation Paper* at 115-16; Law Commission for England and Wales, *1997 Report* at 95.

109 In *1993 Consultation Paper*, the Law Commission for England and Wales noted that the fines imposed for breach of safety regulations are often inadequate, particularly when death or serious injury has resulted from the breach: at 116

110 This submission was put forward by the Association of Personal Injury Lawyers to the Law Commission for England and Wales *1993 Consultation Paper* at 74.

111 Ontario Law Reform Commission, *1991 Report* at 33

112 *Daniels v Thompson* [1998] 3 NZLR 22 at 72-7 per Thomas J (dissenting)

113 *Daniels v Thompson* [1998] 3 NZLR 22 at 78 per Thomas J (dissenting) His Honour was especially moved by the argument that if a bar was placed upon

abolished actions at common law for compensatory damages, or has placed a maximum limit on the compensatory damages recoverable by the plaintiff.[114]

FOR: The responsibility is on Parliament to specify the circumstances in which exemplary damages should be excluded in tort actions.[115] If legislators do not pursue that avenue, then it is within the power of the court to award them in appropriate cases.

AGAINST: If a statutory regime is in place for determining compensatory damages, it is difficult and artificial for the court/jury to decide exemplary damages in isolation without examining whether the amount awarded by way of compensatory damages, the sub-stratum, was proper and adequate.[116] In this sense, exemplary damages are parasitic, only to be awarded where compensatory damages are insufficient to achieve punishment. If there are no compensatory damages, rather a statutory sum, then the trial must involve all the features of litigation which were a familiar spectacle before the statutory compensation scheme.[117] Thus, as one author notes, the problem is that 'exemplary damages will be awarded, attached to an imaginary amount of compensation which can be considered but not used - a most unsatisfactory system of awarding damages by any account'.[118]

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exemplary damages where the accused had been convicted and punished, a female plaintiff would then be deprived of access to civil proceedings in which her position is dramatically improved in comparison with her status or role as a complainant and witness in a prosecution brought by the state : at 73. See also: Ontario Law Reform Commission, *1991 Report* at 46; Law Commission for England and Wales, *1997 Report* at 135, where the approach adopted - exemplary damages are not barred by prior criminal proceedings - was similar to that of Thomas J.

114 For a discussion of the Victorian position following the limitation on damages in industrial accident common law actions for losses other than pecuniary losses, see: Moore, D. Industrial Accidents and Exemplary Damages: The *Rabenalt* Case (1989) 2 *Insurance Law Journal* 153 at 158-9. For a description of the position in New Zealand following the enactment of s 5(1) of the *Accident Compensation Act* 1972 and its replacement by s 27(1) of the *Accident Compensation Act* 1982, see, for example: McMahon, J. Exemplary Damages: A useful weapon in the legal armoury? (1988) *VUWLR* 35; Ryan, C. Civil Punishment of the Uncivil: The Nature and Scope of Exemplary Damages in New Zealand (1984) 5 *Auckland University Law Review* 53.

115 For example: *Motor Accidents Act* 1988 (NSW), s81A; *Workers Compensation Act* 1987 (NSW) s151R; *Defamation Act* 1974 (NSW), s46(3)(a). For further examples and discussion see: Collis, B QC. Tort and Punishment - Exemplary Damages: The Australian Experience (1996) 70 *ALJ* 47 at 52-3. See also: Tilbury, M. Exemplary Damages in Negligence Claims (1997) 5 *Tort Law Review* 85 at 87.

116 *Donselaar v Donselaar* [1982] 1 NZLR 97 at 106-7 per Cooke J.

117 *Donselaar v Donselaar* [1982] 1 NZLR 97 at 115-16 per Somers J.

118 Ryan, C. Civil Punishment of the Uncivil: The nature and scope of exemplary damages in New Zealand (1984) 5 *Auckland University Law Review* 53 at 72.

AGAINST: If there is a maximum financial penalty under the criminal law/disciplinary proceedings, an award of exemplary damages that exceeds it might be seen as undermining Parliament's intention in limiting the penalty.[119]

Role of aggravated damages

FOR: Aggravated damages can, in theory, be awarded for negligence.[120] This, in itself, appears to be controversial, and in Australia aggravated damages are more likely to be awarded for those torts which protect the plaintiff's dignatory interests, such as defamation, false imprisonment, malicious prosecution and trespass to the person.[121] However, if exemplary damages are not available, the tendency exists for juries to overstate aggravated damages so as to include a 'de facto' punitive element, which is not the function of aggravated (compensatory) damages.[122] In other words, if exemplary damages are not available, there is a danger that the punitive element of the civil law will remain concealed within ostensibly compensatory awards of damages.[123]

AGAINST: In circumstances where the defendant has acted with malice, Lord Devlin[124] considered that the resulting vexation and annoyance to the plaintiff contributed to the injury to the plaintiff's feelings, or added psychological injury to the physical injury the plaintiff may have suffered. Such injury, in his opinion, could be viewed as extra-compensatory, or aggravated, damages: '... aggravated damages can do most, if not all, the work that could be done by exemplary damages'.[125]

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119 Law Commission for England and Wales, 1993 *Consultation Paper* at 110

120 This was confirmed by Ormiston JA in *Backwell v AAA* (1996) Aust Torts Reports 81-387 at 63 394

121 Tilbury, M. Exemplary Damages in Medical Negligence (1996) 4 *Tort Law Review* 167 at 171; Luntz H *Assessment of Damages for Personal Injury and Death* 3rd ed Sydney: Butterworths, 1990 at para 1 7 11. According to the Law Commission for England and Wales, *1997 Report* at 14 aggravated damages are not available in that jurisdiction for negligence, as illustrated by *Kralj v McGrath* [1986] 1 All ER 54 at 60-1.

122 A trend in this direction in New South Wales following the enactment of s46 of the *Defamation Act* 1974 which abolished exemplary damages for defamation is noted by Fleming J *The Law of Torts* 9th ed N S W: I BC Information Services 1998 at 659 footnote 689

123 Tilbury, M. Exemplary Damages in Medical Negligence (1996) 4 *Tort Law Review* 167, where the author describes any element of compensatory damages aimed at punishment as a heresy : at 170. See also Law Reform Commission of Ireland *1998 Consultation Paper* at 99

124 *Rookes v Barnard* [1964] AC 1027

125 *Rookes v Barnard* [1964] AC 1027 at 1230. A similar sentiment was expressed by Somers J in *Taylor v Beere* [1982] 1 NZLR 81 at 95. However as noted in Part I of this article, there are compelling reasons for the abolition of aggravated damages altogether

The financial means of the defendant

AGAINST: The financial circumstances of the defendant are relevant to ascertain the capacity of that party to satisfy a judgement of exemplary damages, and to determine what sum is necessary to act as a deterrent and punishment.[126] If, however, the means of the defendant is relevant to the assessment of exemplary damages, this may cause an unwarranted intrusion into the affairs of that party, and increase the expense of pre-trial discovery and trial expenses.[127]

AGAINST: If the means of the defendant are relevant to the assessment of exemplary damages, disproportionate litigation against asset-rich defendants is a distinct possibility.[128]

AGAINST: If the defendant is a competitor of the plaintiff's, the plaintiff may acquire a competitive advantage by obtaining the right to seek discovery of the defendant's financial affairs. There is a consequent potential for abuse.[129]

FOR: Exemplary damages do not fulfil a punitive and deterrent function unless they vary according to the wealth of the defendant, because, in the pithy wording of one judge, 'There is no greater inequality than the equal treatment of unequals'.[130]

FOR: If the means of the defendant are relevant to the assessment of exemplary damages, practice shows that no great precision is required to determine such 'wealth' and that careful controls are imposed by judges both at discovery and at trial.[131]

Quantum of award

AGAINST: There is no proportionality necessary between the measures of compensatory and exemplary damages.[132] Substantial

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126 *XI Petrolem (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 471-2. See also: Law Reform Commission of Ireland, *1998 Consultation Paper* at 106.

127 Law Commission for England and Wales, *1993 Consultation Paper* at 86 (the Commission did not support inquiry into the financial position of the defendant as a precondition of such an award: at 141); Law Reform Commission of Ireland, *1998 Consultation Paper* at 111-12; Ontario Law Reform Commission, *1991 Report* at 51.

128 Law Commission for England and Wales, *1997 Report* at 141.

129 This was the dissenting view expressed by two Commissioners of the Ontario Law Reform Commission: *1991 Report* at 53.

130 *Dennis v United States*, 339 US 162 (1950) at 184 per Frankfurter J.

131 This was the view of the Ontario Law Reform Commission. *1991 Report* at 51-52.

132 *XI Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 471 per Brennan J (dissenting); *Lamb v Cotogno* (1987) 164 CLR 1 at 9; cf *Backwell v AAA* (1996) Aust Torts Reports 81-387 at 63 394 per Ormiston JA.

exemplary damages can be awarded for a tort that causes minimal damage.[133]

AGAINST: There is no limit upon the monetary penalty, 'except that it must not be unreasonable;'[134] the punishment must be 'neither too great nor too little for the conduct'[135] and a suitable direction must be provided to a jury to 'exercise restraint'[136] These directions have resulted from perceived excessive awards of exemplary damages, about which the Supreme Court of Victoria recently expressed concern:

> The warning [to juries about restraint and moderation] is perhaps even more important in an era when reports either factual or fictional, of excessive awards of exemplary damages in the United States are reported in the papers and on television.[137]

AGAINST: The quantum of exemplary damages is difficult because it is not capable of objective assessment, and the amounts are seen as capricious, whether determined by judge or jury. Where the assessment of damages is tied, not to a loss that can be objectively measured, but to subjective factors, such as the gravity of the defendant's conduct, the process is inevitably a discretionary one.[138]

For example, in *Backwell v AAA*,[139] the jury's assessment of exemplary damages in the sum of $125,000 was reduced by the Court of Appeal to $60,000 because the award was excessive in all the circumstances.[140] Why that was so, and why the lower figure was any more appropriate, was not explained. It has been suggested that the fact that the defendant expressed regret at the trial for her conduct, although not referred to by the appellate judges as a reason for the reduction in exemplary damages, may be as relevant in a negligence case as an apology in a defamation action.[141] The fact that there can be such

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133 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 471-472 per Brennan J.

134 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1086-1087 per Lord Reid. Alternatively the award must be reasonable and just: *Backwell v AAA* (1996) Aust Torts Reports 81-387 at 63,392 per Ormiston JA.

135 *Backwell v AAA* (1996) Aust Torts Reports 81-387 at 63,392.

136 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 463, per Gibbs CJ; 471-472 per Brennan J; *Rookes v Barnard* [1964] AC 1129 at 1227-1228 per Lord Devlin.

137 *Backwell v AAA* (1996) Aust Torts Reports 81-387 at 63,392 per Ormiston JA.

138 Law Reform Commission for England and Wales, *1993 Consultation Paper* at 83.

139 (1996) Aust Torts Reports 81-387.

140 (1996) Aust Torts Reports 81-387 at 63,400 per Ormiston JA (with whom Brooking JA agreed).

141 Tilbury M. Exemplary Damages in Medical Negligence (1996) 4 *Tort Law Review* 167 at 171. For further criticism concerning the revised figure of exemplary damages see: Weybury, D. The Appeal in the Case of the Mixed-up Sperm: *Backwell v AAA*' (1996) 4 *Torts Law Journal* 214 at 218-219.

uncertainty as to the factors which the Court of Appeal did consider in reassessing the award precisely illustrates the argument

Additionally, in this case, Ormiston and Brooking JJA reduced the figure to 48% of that nominated by the jury In contrast, Tadgell JA considered the original award to be 'perversely high by at least a factor of between three and four'[142] Thus, the lowest figure which His Honour would have contemplated was about $30,000 This represents only half of the eventual award, demonstrating the largely divergent views of even experienced appellate judges

To make matters even more uncertain, it has been recognised that there is little to be gained by referring to awards that have been made in other cases since these can only be understood if the facts are fully known.[143] Also, on every given fact scenario, 'everything which aggravates or mitigates the defendant's conduct is relevant,'[144] which necessarily gives rise to a large number of factors, many of them subjective.[145]

The Ontario Law Reform Commission considered that, of all the arguments against exemplary damages in tort, 'concerns about the absence of clear principles to govern the size of the award are among the most basic'[146] Moreover, the Law Commission for England and Wales gloomily predicted that 'reasoned, consistent and proportionate awards' are 'almost impossible' to achieve if juries have the task of determining the quantum of exemplary damages.[147]

AGAINST: It is a feature of the criminal law that, by explicitly stating maximum statutory penalties, the defendant has a reasonable idea of the punishment that will be imposed There is no such 'guidance' for a defendant when being punished in tort, other than the 'moderate' or 'reasonable' limits.[148]

AGAINST: In circumstances where the awards of damages are itemised under the various categories and heads, it was stated in

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142 (1996) Aust Torts Reports 81-387 at 63,380

143 *Warby v Cascarino, The Times,* 27 October 1989 per Lord Donaldson MR (CA) cited by the Law Commission for England and Wales, *1993 Consultation Paper* at 4

144 *Rookes v Barnard* [1964] AC 1129 at 1228 per Lord Devlin

145 Law Commission for England and Wales *1997 Report* at 72.

146 Ontario Law Reform Commission, *1991 Report* at 46

147 Law Commission for England and Wales, *1997 Report* at 2 In *Thompson v MPC* [1997] 3 WLR 403 Lord Woolf MR noted that the jury awards referred to the court disclosed a range of figures both striking and which disclosed no logical pattern : at 415

148 Ontario Law Reform Commission, *1991 Report* at 47

Broome v Cassell & Co Ltd[149] that compensatory and exemplary sums should not be determined separately and then added together, but determined as one global sum.[150] In this way, it is only if what the defendant deserves to pay as punishment exceeds what the plaintiff deserves to receive as compensation that the plaintiff can be awarded the excess as exemplary damages. However, the practice is that juries and judges tend to itemise their awards. This, it is suggested, increases the risk of double-counting.[151]

AGAINST: Where the defendant's conduct has produced grievous injury, a large award of compensatory damages is likely to have the effect of punishing the defendant, rendering exemplary damages unnecessary. This possibility was noted by Ormiston JA in *Backwell v AAA*[152] as follows:

> One could have a plaintiff who was rendered quadriplegic as a result of an assault or a blatantly drunken escapade in a car where the terrible consequences arose in part from a particular physical weakness or some chance consequence of the original accident, where compensatory damages might be fairly assessed in excess of $1M. In such a case, even though the damages awarded are entirely directed to compensating the plaintiff, the amount might also be viewed as more than sufficient punishment or deterrence.[153]

AGAINST: Very large awards may be economically undesirable, if they result in bankruptcy or insolvency or redundancies.[154]

AGAINST: Exemplary damages in tort generally offend the need for a rational relationship between the scale of values applied in different classes of case. This is witnessed by the 'sensational sums' awarded in defamation cases, as opposed to awards in those personal injury cases that are based upon negligence.[155]

AGAINST: If exemplary damages awards should be moderate, and the circumstances in which they will be awarded should be fairly predictable, they are unlikely to act as much of a deterrent.[156]

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149 [1972] AC 1027.

150 [1972] AC 1027 at 1060, 1062, 1082 per Lord Hailsham; 1089 per Lord Reid; 1117 per Lord Wilberforce, and 1126 per Lord Diplock.

151 Law Commission for England and Wales, *1993 Consultation Paper* at 85.

152 (1996) Aust Torts Reports 81-387.

153 (1996) Aust Torts Reports 81-387 at 63,395.

154 Law Reform Commission of Ireland, *1998 Consultation Paper* at 110.

155 Law Reform Commission of Ireland, *1993 Consultation Paper* at 113.

156 Law Commission for England and Wales, *1997 Report* at 102 although this argument was not accepted by the Commission: at 104.

Logistics of a trial

AGAINST: To prevent staggering awards of exemplary damages, it may be appropriate to hold back from the jury evidence of the wealth of a defendant that might prejudice that party. This will require a further control by the court during trial.

AGAINST: If exemplary damages are available in tort actions, they may encourage claims that have little basis in liability, or may encourage claims that have a good basis in liability but little chance of settling because of the plaintiff's expectation of exemplary damages, thus imposing greater burdens on court resources [157]

AGAINST: Spurious claims for exemplary damages may coerce defendants to settle claims, or settle claims for higher amounts than they would otherwise [158]

AGAINST: The unpredictability of awards of exemplary damages makes the settlement negotiations of the defendant difficult, for it is quite impossible to calculate accurately the potential exposure [159]

AGAINST: If an appeal is instituted in respect of an award of exemplary damages, the appellate court has not had the opportunity to assess the credibility of witnesses so as to reassess the damages. The relevance of this point was made by the High Court in *Lamb v Cotogno*:[160]

> The Master having seen the witnesses and heard their evidence formed the view that the circumstances justified the exercise of his discretion in favour of an award of exemplary damages. Whilst it is far from clear that this case called for such an award we are not persuaded that we would be justified in departing from the order of the Master is circumstances where his conclusion was essentially based upon assessment of fact. [161]

This renders appellate revision of an exemplary damages award difficult, although not impossible, as demonstrated by *Backwell v AAA*.

AGAINST: If the defendant is subject to a jury trial, the jury must take on the unaccustomed role of punishment. Whilst a judge may be trusted

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157 Law Commission for England and Wales, *1993 Consultation Paper* at 112.

158 Ontario Law Reform Commission, *1991 Report* at 1. However the Commission noted that responses to its enquiries during the course of the investigations necessary to compile the report indicated that insurers were able to distinguish meritorious claims and discount others: at 25.

159 Ontario Law Reform Commission *1991 Report* at 1.

160 (1987) 164 CLR 1.

161 (1987) 164 CLR 1at 12-13.

to act without emotion, a jury without experience of punishment may be swayed by emotion and by images of the plaintiff.[162]

This was noted in *Backwell v AAA*:[163]

> It should be remembered that this parasitic form of damages involves the infliction of a punishment which has no necessary reference to the loss suffered by the plaintiff and so in imposing a punishment by way of exemplary damages juries are asked to take on a role which they ordinarily do not have in relation to punishment namely the fixing of an appropriate penalty. .[164]

AGAINST: The litigation of tort claims is already expensive, and the incorporation of claims for exemplary damages is likely to increase costs. This is because, in order to assess the punishability of the defendant's behaviour, it is necessary for the effect of the tort upon the plaintiff to be assessed.[165] If that assessment is indeed necessary, then the length of a trial may increase considerably as full details of the plaintiff's suffering are adduced.[166]

FOR: The appellate court is in equally as good a position to determine the quantum of exemplary damages as the tribunal of fact. Whether that assessment at first instance is made by judge or jury, the assessment 'is subject to review in the ordinary way.'[167] Also, the question is not an objective assessment. In the end, it is a matter of impression only, which can be formed from the court transcripts. Therefore, the expense of a new trial is unnecessary.[168]

FOR: A successful plaintiff will only recover a portion of his legal costs. A wrongdoer, whose conduct justifies the imposition of exemplary damages, thereby imposes a burden on the innocent plaintiff, which exemplary damages can incidentally remedy.[169]

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162 *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1087 per Lord Reid

163 (1996) Aust Torts Reports 81-387

164 (1996) Aust Torts Reports 81-387 at 63,392 per Ormiston JA

165 This factor was considered relevant by Cartwright J in G v G (unreported) [1996], NZ High Court, (15 October 1996).

166 Beck, A. Exemplary Damages for Negligent Conduct (1997) 5 *Tort Law Review* 90 at 92.

167 *Taylor v Beere* [1982] 1 NZLR 81 at 92 per Richardson J

168 It was apparent in *Trend Management v Borg* (1996) 40 NSWLR 500 that Mahoney P was comfortable revisiting the conclusions of the trial judge as to whether the employer acted contumeliously during the relevant period of employment: at 507. In *Backwell v AAA* (1996) Aust Torts Reports 81-387, the majority reassessed the quantum of exemplary damages and considered that to be the appropriate course where the parties have requested that the appellate court do so in order to reduce the expense and other burdens of a re-trial. However Ormiston JA referred to the transcript of proceedings before a trial judge as a notoriously unreliable guide for an appellate court: at 63,398.

169 Ontario Law Reform Commission *1991 Report* at 18

Corporations and exemplary damages

FOR: It is unacceptable to immunise corporations from the consequences of their managerial actions, and hence, corporations should be treated the same as natural persons for the purposes of exemplary damages [170]

FOR: Exemplary damages are particularly apposite for defendant corporations. The criminal sanctions, such as imprisonment, are obviously inadequate measures for deterrence or punishment against such defendants. A fine, likely to be the only available criminal sanction, may not be sufficient. Exemplary damages provide a sanction that may be more appropriate to the corporation's financial position and to the seriousness of the wrong.[171]

AGAINST: It is not rational to punish a corporation, as the punishment will fall ultimately on innocent shareholders.[172]

Double jeopardy

AGAINST: To permit exemplary damages in tort gives rise to a possible double jeopardy. The danger lies in the fact that, in many cases, the civil wrong complained of may also be a criminal offence. A defendant who has been finally acquitted, or convicted, of a wrong in criminal or disciplinary[173] proceedings should not be tried for the same wrong again, which a plaintiff might seek to do in order to obtain an award of exemplary damages in tort proceedings. The defendant should not be exposed to the possibility of being punished twice for the same wrong [174]

This argument was expressly approved with some force by a majority of the High Court in *Gray v Motor Accident Commission*:[175]

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170 Ontario Law Reform Commission at 39.

171 Law Reform Commission of Ireland 1998 *Consultation Paper* at 15. Also see Ontario Law Reform Commission *1991 Report* at 50-51 for an interesting discussion of the effect of exemplary damages in respect of the same conduct upon corporations of different wealth.

172 Law Reform Commission of Ireland *1998 Consultation Paper* at 39

173 This is particularly relevant where proceedings are conducted by an organisation by which the defendant is employed or by the professional organisation of which the defendant is a member. For example, in relation to a defendant doctor see Fisher, A. Exemplary Damages and Medical Negligence [1997] *New Zealand Law Journal* 31 at 33.

174 For example: *Watts v Leitch* [1973] Tas SR 16 per Nettlefold J; *A B v South West Water Services Ltd* [1993] QB 507 at 527 per Stuart Smith LJ, where the claim for an award of exemplary damages was struck out on the ground, inter alia of the conviction and fine of the defendants.

175 (1999) Aust Torts Reports 81-494

> 'Where as here 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 may not because we consider that the infliction of substantial punishment for what is substantially the same conduct as the conduct which is the subject of the civil proceeding is a bar to the award; the decision is not one that is reached as a matter of discretion dependent upon the facts and circumstances in each particular case [176]

Two reasons were expressed for that view: first, the purpose of exemplary damages - punishment and deterrence - are wholly met if the criminal law has exacted substantial punishment; and second, double punishment would otherwise arise.[177]

AGAINST: The High Court also approved the view of the majority in *Daniels v Thompson*[178] that for a civil court to revisit a sentence imposed in a criminal court must undermine the criminal process [179] As the Ontario Law Reform Commission expressed the argument, there is at least the appearance that the second (civil) judge is overruling the first, which may damage the stature of the criminal system somewhat in the public eye [180]

AGAINST: The position adopted by the High Court raises a number of conundrums, which the court noted that it did not have to deal with, and which were difficult For example: what constitutes 'substantial punishment'? What is needed to have a 'substantial identity' between the civil and criminal proceedings such that exemplary damages in tort are barred? What happens if the accused/defendant is acquitted in the criminal proceedings? What is the position if it is possible or probable that criminal proceedings will be brought, or remain uncompleted? What effect should any past or likely payment under victims' compensation legislation have upon the award of exemplary damages? And how is a civil court to assess the adequacy of the punishment inflicted in the criminal prosecution?[181]

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176 (1999) Aust Torts Reports 81-494 at 65,508 per Gleeson CJ McHugh, Gummow and Hayne JJ. Kirby J at 65 517 cited the earlier Australian authorities of *Watts v Leitch* [1973] Tas SR 16 and *O'Reilly v Hausler* (1987) 6 MVR 344 with approval, but considered that the award of exemplary damages is truly a discretionary one Such a view was embedded in the case law and was inherent in the interaction of criminal punishment and civil damages which are described in part as being punitive: at 65 518

177 (1999) Aust Torts Reports 81-494 at 65 508 per Gleeson CJ McHugh, Gummow and Hayne JJ.

178 [1998] 3 NZLR 22

179 *[1998] 3 NZLR 22 at 48 per Richardson P, Gault, Henry and Keith JJ*

180 Ontario Law Reform Commission *1991 Report* at 45

181 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65 508-65,509 per Gleeson CJ, McHugh, Gummow and Hayne JJ, at 65 526 per Callinan J

The very existence of these questions is indicative of the difficulty that accompanies the awarding of exemplary damages in tort actions.[182]

FOR: If criminal prosecution or disciplinary proceedings (the latter particularly in cases of professional negligence) have already given rise to punishment of the defendant, that should not necessarily preclude an award of exemplary damages, because punishment is only one of the reasons for such an award.[183]

FOR: Further, the double jeopardy argument can be overcome, it has been suggested (and in contrast to the view of the High Court majority in *Gray*), by ensuring that courts take into account any penalties that have been imposed previously. As the Ontario Law Reform Commission noted:

> In determining the extent, if any, to which punitive damages should be awarded the court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant.[184]

The insured defendant

AGAINST: If the defendant is insured under a compulsory insurance scheme in respect of negligent conduct, it is the insurer, not the defendant, who pays the exemplary damages. This shifting of the burden of payment thus has minimal deterrent effect upon the actual wrongdoer.[185] Nor does an award exact any punishment upon the wrongdoer, in which event the predominant purposes of such an award are entirely unfulfilled.[186]

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182 Several of the issues consequent upon earlier or likely criminal proceedings and subsequent claims for exemplary damages were canvassed in detail by the New Zealand Court of Appeal in *Daniels v Thompson* [1998] 3 NZLR 22. Whilst a comprehensive discussion of that decision is beyond the scope of this paper, an excellent analysis of the decision is contained in Smillie, J. Exemplary Damages and the Criminal Law (1998) 6 *Torts Law Journal* 113.

183 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65 518 per Kirby J

184 Ontario Law Reform Commission, *1991 Report* at 46; Law Reform Commission of Ireland, *1998 Consultation Paper* at 14. Such an approach was preferred by Kirby J in *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,517-65 518, and by Thomas J in *Daniels v Thompson* [1998] 3 NZLR 22 at 76-78

185 Law Commission for England and Wales, *1993 Consultation Paper* at 146; Law Commission for England and Wales, *1997 Report* at 91. Also: *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,514 per Kirby J

186 In *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494, Callinan J stated that if His Honour had been free to do so in the absence of *Lamb v Cotogno*, he would have been minded to adopt and apply the argument expressed in the accompanying text: at 65,524

And to extend this argument a little further, it is very doubtful whether an award of exemplary damages payable by a statutory insurer, of say, motor vehicles, would be likely to have any deterrent effect upon others in the community who might be minded to engage in conduct of a similar nature not involving the use of a motor vehicle [187]

AGAINST: If the object of compulsory insurance schemes is to contain claims so as to keep premiums at affordable levels, that aim is compromised by the award of exemplary damages against insurers.[188] If permitted, the exposure to the risk of exemplary damages will come to be treated as just another cost of productive activity, to be spread across the whole community through the pricing of goods and services [189]

AGAINST: The following question, postulated by Luntz and Hambly,[190] contains an implicit argument against the award of exemplary damages in circumstances where the defendant has the benefit of compulsory third party motor vehicle insurance:

> Would the premiums contributed by motorists be better spent on awarding exemplary damages to a person who is fully compensated for the injuries suffered or on compensating those who receive no damages for their injuries because they cannot prove fault? [191]

AGAINST: If the insurer is a compulsory statutory insurer, and the sole insurer, punishment against it means that 'society would then be punishing itself for the wrong committed by the insured'

FOR: Exemplary damages should be available in circumstances where the defendant is compulsorily insured against liability, because the object of the award is not alone to deter the defendant, but also to deter other persons of like mind and, generally, to deter conduct of the same reprehensible kind.[193] The element of appeasement which an award of exemplary damages brings to the person wronged is present, even where it is the insurer who pays [194] It is because of the multi-purpose

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187 This doubt was expressed by Callinan J in *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,524

188 Tilbury, M. Exemplary Damages in Negligence Claims (1997) 5 *Tort Law Review* 85 at 87

189 Smillie, J Exemplary Damages for Personal Injury [1997] *New Zealand Law Review* 140 at 173

190 Luntz, H and Hambly D *Torts Cases and Commentary* 4th ed 1995

191 Luntz, H and Hambly D *Torts Cases and Commentary* 4th ed 1995 at 522

192 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65 515 per Kirby J

193 *Lamb v Cotogno* (1987) 164 CLR 1 at 9-12

194 *Lamb v Cotogno* (1987) 164 CLR 1 at 10

nature of the award that exemplary damages may be awarded against an insured defendant [195]

FOR: Even where a defendant against whom exemplary damages are awarded is insured, some deterrent or punitive effect may be caused by the loss of no-claims bonuses, the adjustment of premiums, or payment of deductibles stipulated in the policy,[196] or by the refusal of insurance altogether [197]

FOR: To allow a defendant liable for exemplary damages to be held harmless against them by insurance greatly improves the plaintiff's prospects of recovering the sum awarded [198]

FOR: The interposition of the insurer between the plaintiff and the wrongdoer should particularly have no effect upon the award of exemplary damages in circumstances where the insurer has a statutory entitlement to recover the sum from the insured However, it was confirmed in *Gray* that the fact that there is no such entitlement is not a bar to an award of exemplary damages against the insurer.[199]

Where more than one defendant

AGAINST: The award is difficult in the case of joint defendants It has been argued that any award of exemplary damages should be one sum only, and limited to whatever is necessary to punish the defendant who bears the *least* responsibility for the tort [200] As a result, the defendant

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195 In *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 leave was sought to reopen the decision of *Lamb v Cotogno* which leave was refused, given that it was a recent decision of the High Court in which the five Justices gave a single set of reasons: at 65,507 per Gleeson CJ, McHugh Gummow and Hayne JJ; at 65,516 per Kirby J There was no special significance in the fact that the claim in *Lamb v Cotogno* was framed in terms of a trespass to the person, whereas the sole cause of action pleaded in *Gray* was negligence

196 *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 WLR 493 at 504 per Simon Brown LJ

197 Demarest S and Jones D Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest? (1987) 18 *St Mary's Law Journal* 797 at 820

198 *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 WLR 493 at 502 This reason was one of many which caused the Law Commission for England and Wales, *1997 Report*, to favour the liability of insured defendants for exemplary damages: at 169-178

199 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65 507-65,508 per Gleeson CJ, McHugh Gummow and Hayne JJ The majority were of the view that there was a serious doubt as to whether the insurer was entitled to recover any sum from Bransden under the *Motor Vehicles Act 1959* (SA) s 124A(1)(aa) given the timing of the accident

200 For example: Ghandi P R Exemplary Damages in the English Law of Tort (1990) 10 *Legal Studies* 182 at 198 This was the position adopted by the House of Lords in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1063-1064 per Lord Hailsham, 1090 per Lord Reid 1105 per Viscount Dilhorne, and 1122 per Lord Diplock

who is most culpable 'obtains a benefit' by having a joint but less culpable co-defendant. This places importance upon the ability of the plaintiff's solicitors to identify the best defendant against which to bring proceedings, in order to avoid the underpunishment of the most culpable defendant.[201]

FOR: In *XI Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*,[202] the High Court held that there was no objection to the making of an exemplary award against one of multiple defendants, and confining the award to compensatory damages in respect of the co-tortfeasors.[203] This constitutes 'several liability' in relation to exemplary damages.[204]

Where more than one plaintiff

AGAINST: The award of exemplary damages is difficult in the case of several plaintiffs. The first difficulty is in the case of apportionment.[205] A single sum should be assessed and then divided amongst the number of successful plaintiffs, rather than ($X multiplied by the number of plaintiffs). Whilst the number of plaintiffs may serve to multiply the compensatory damages, it should have no effect upon exemplary damages, given that they are measured by having regard to the defendant's conduct.[206] To do otherwise would result in the over-punishment of the defendant.[207]

AGAINST: The second difficulty is in the matter of assessment, where existing actions have not been consolidated, or potential causes of action have not yet accrued.[208] Where group litigation is concerned, successive plaintiffs in later actions may miss out on exemplary damages (or even compensatory damages if the defendant no longer has the capacity to satisfy any judgement), yet the standard of the defendant's conduct is the same in respect of the later plaintiffs as it had been for the earlier litigants.[209]

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201 Law Commission for England and Wales *1993 Consultation Paper* at 87; Law Commission for England and Wales, *1997 Report* at 80

202 (1985) 155 CLR 448

203 (1985) 155 CLR 448 at 464 per Mason J, and 470 per Brennan J.

204 This solution of several liability in respect of exemplary damages was also suggested by the Ontario Law Reform Commission in *1991 Report* at 59, and endorsed by the Law Commission for England and Wales, *1997 Report* at 157-161

205 Law Commission for England and Wales *1997 Report* at 69

206 Law Commission for England and Wales, *1997 Report* at 88.

207 In *AB v South West Water Services Ltd* [1993] QB 507 the size of the class of plaintiffs was sufficient reason to refuse an exemplary award altogether as inappropriate

208 Law Commission for England and Wales, *1997 Report* at 69

209 Law Commission for England and Wales, *1993 Consultation Paper* at 88. Also Law Reform Commission of Ireland *1998 Consultation Paper* at 115.

FOR: A principle best described as 'first past the post takes all [210] may be workable if special provisions restricting subsequent actions by multiple plaintiffs, in respect of the same conduct of the defendant, are implemented by statute.[211]

Recognising vicarious liability for exemplary damages

AGAINST: It is inappropriate to impose exemplary damages on a defendant who is only vicariously liable. In the case of compensatory damages, the shift of the burden of payment to an innocent party is reasonable, where the purpose of the award is to ensure that the plaintiff is paid something, but not in the case of punitive damages where the defendant is not liable for any wrongdoing.[212] The punitive and deterrent effect on the wrongdoer will be lost if that person is allowed to avoid personal responsibility because of strict vicarious liability on the part of another, such as the employer.

In *McLaren Transport Ltd v Somerville*,[213] Tipping J stated that 'Mr Stumbles' [the foreman's] conduct merits condemnation and punishment' - and then upheld the exemplary damages award as against the employer. The employer was punished for no wrongdoing on its part.[214] It appears that the case proceeded on the assumption that if Mr Stumbles' tortious act fell within the scope of his employment, the doctrine of vicarious liability applied automatically to hold the employer strictly liable for all the consequences, including an award of exemplary damages.[215]

AGAINST: If the employer is entitled to seek an indemnity or contribution from the employee tortfeasor, and if the means of the wrongdoing employee are irrelevant to the size of the sum which the employer is vicariously liable to pay, there is the fear that the individual employee could indirectly be made to pay a sum in excess of what he would have had to pay if that employee had been sued and his own means taken into account.[216]

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210 Law Commission for England and Wales, *1997 Report* at 147.

211 This scheme is explained by the Law Commission for England and Wales, *1997 Report* at 148-154.

212 Beck A. Exemplary Damages for Negligent Conduct (1997) 5 *Tort Law Review* 90 at 92.

213 [1996] 3 NZLR 424.

214 Apparently at trial, the District Court did take into account the lack of training provided to the foreman, as well as the practice of allowing customers into the workshop. However these issues were not relied upon by Tipping J on appeal.

215 Similarly, the Law Commission for England and Wales, *1997 Report*, notes that all reported decisions in that jurisdiction have proceeded on the basis that the doctrine of vicarious liability applies to liability for exemplary damages, without going beyond that mere assumption to question whether and how the doctrine *should* apply: at 89.

216 Law Commission for England and Wales, *1997 Report* at 78 and 90.

FOR: It is open to a court to simply order that the defendant employer is not liable vicariously for any award of exemplary damages made against an employee. The difficulty referred to above can be easily overcome by the exercise of judicial discretion.[217] This occurred in *Canterbury Bankstown Rugby League Football Club v Rogers*.[218] Both aggravated and exemplary damages were awarded against a football player who deliberately 'took' an opponent out of the game. The Club was held vicariously liable for the assault action, but was ordered only to pay the aggravated,[219] and not the exemplary,[220] damages. The reasoning of Giles AJA was that:

> it would be contrary to the justification for exemplary damages to award the same [sum of exemplary damages] against Canterbury Bankstown simply on the ground that it is vicariously liable for what [the player] did. It would have to be shown that Canterbury Bankstown itself engaged in conduct showing a conscious and contumelious regard for Rogers' rights so that it should be punished and deterred from engaging in like conduct.[221]

FOR: Vicarious liability, on the part of an employer, for exemplary damages imposed in respect of wrongdoing on the part of an employee serves a valuable deterrent function by encouraging employers to exercise closer control, supervision and discipline over their employees so as to deter tortious conduct.[222]

FOR: Additionally, one purpose in extending the doctrine of vicarious liability to exemplary damages may be to obtain and ensure the employer's co-operation in 'flushing out' the employee wrongdoer, in those rare instances where the plaintiff has no way of proving the identity of the person who committed the tortious act, although there is no doubt that the person in question was acting in the course of his employment by a readily identified employer.[223]

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217 The Law Commission for England and Wales *1997 Report* notes that a sensitive use of the court's discretion in this regard was mooted recently by Lord Woolf MR in *Thompson v MPC* [1997] 3 WLR 403 at 418; at 78-79.

218 (1993) Aust Torts Reports 81-246.

219 (1993) Aust Torts Reports 81-246 at 62 553.

220 (1993) Aust Torts Reports 81-246 at 62,554.

221 (1993) Aust Torts Reports 81-246 at 62,554.

222 This suggestion, by Pritchard J in *Monroe v Attorney-General* (unreported) New Zealand High Court, Auckland, (27 March 1985) was made in the context of the New Zealand jurisdiction where compensatory damages, which also serve that function, could not be awarded under the Accident Compensation Scheme. See also: Law Reform Commission of Ireland *1998 Consultation Paper* at 120; Ontario Law Reform Commission, *1991 Report* at 58 and 84. For a rebuttal of the argument, see: Smillie, J. 'Exemplary Damages for Personal Injury' [1997] *New Zealand Law Review* 140 at 163-167.

223 This was also raised as a justification for the imposition of exemplary damages on the Crown in the case referred to in the previous footnote in respect of assaults

FOR: Vicarious liability may be justified on restitutionary principles in some cases. If an employer has profited from the wrong of his employee, then the imposition of exemplary damages on him provides a means of reversing the unjust enrichment of the employer.[224]

Additionally to all of these conundrums, and however problematical the retention of exemplary damages in tort law *generally* may be viewed by courts and law reform commissioners throughout the common law world, the availability of exemplary damages in *negligence actions specifically* provides even further scope for critical arguments.

CONCLUSION

Despite attempts by the judiciary to differentiate between aggravated damages and exemplary damages, the trigger which activates entitlement to both is some outrageous or contumelious conduct on the part of the defendant. This overlap has been, and will continue to be, productive of confusion and conceptual difficulties. The purpose and assessment of aggravated damages in negligence actions requires urgent clarification.

The fact that *Gray v Motor Accident Commission*[225] represented the fifth decision upon which the High Court has examined the question of exemplary damages in the last 33 years[226] indicates two points: that the topic contains 'deep-seated and difficult questions of principle'[227], and that the matter is productive of uncertainty in that hub of a legal system: the solicitor's office. A product of that uncertainty is increased *time* per client matter. A product of that time is increased professional costs, both for the plaintiff client and for the community generally where the defendant is insured in respect of liability and costs. It has been stated that the case against exemplary damages 'appears to be essentially theoretical, rather than practical'[228]. However, surely the rising, and in many cases unattainable, costs of tort litigation are one of the more practical aspects of the debate.

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committed by unidentified police officers during the course of the Springbok rugby tour of New Zealand in 1981. The argument is similarly demolished by Smillie J. Exemplary Damages for Personal Injury [1997] *New Zealand Law Review* 140 at 168-171.

224 Law Reform Commission of Ireland, *1998 Consultation Paper* at 120; also Law Commission for England and Wales, *1997 Report* at 161-168, where vicarious liability for exemplary damages was endorsed.

225 (1999) Aust Torts Reports 81-387.

226 Kirby J makes this point at (1999) Aust Torts Reports 81-494 at 65,510. The previous decisions were: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Fontin v Katapodis* (1962) 108 CLR 177; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) CLR 448; and *Lamb v Cotogno* (1987) 164 CLR 1.

227 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,509 per Gleeson CJ, McHugh, Gummow and Hayne JJ.

228 Law Commission for England and Wales, *1997 Report* at 105.

As is pointed out by the Law Commission for England and Wales, the various approaches which lawyers prefer in the 'exemplary damages and tort' debate largely reflect differences in the precision with which the individual lawyer wishes to divide different branches and functions of the law. The argument for abolishing exemplary damages seeks to draw a bright line between the civil and criminal law. The argument for retaining them is content with a 'fuzzy' line, with a range of punishments from civil punishment, through criminal fines, to imprisonment.[229] The arguments are, as the Commission admitted, 'finely balanced'.[230]

In the author's opinion, the abolition of exemplary damages in tort actions is generally to be preferred. It accords with the purist approach between the functions of the civil and criminal law, and conceives of the civil law as entirely compensatory. The numerous arguments against punitive damages in tort, and the particular difficulty with identifying the degree of culpability required on the part of a negligent defendant, contribute to a lack of clarity of expression and application of the law in this country.

The topic of exemplary damages - the frequency with which they are pleaded, their effect upon insurance against civil liability, their consequences upon the costs of trial preparation and conduct, and their effect upon the institution and settlement of litigation - appears worthy of law reform consideration and empirical investigation in Australia in the future. However, for the present, and despite the numerous negative arguments associated with the availability of exemplary damages in civil claims, the High Court's recent obiter endorsement of their availability in negligence in *Gray v Motor Accident Commission* injects the debate with a measure of realism. As Kirby J noted with some resignation:

> [Exemplary damages] certainly present conceptual problems. But they are too deeply embedded in our law to be abolished by a court. They have been accepted by this Court as part of Australian law. We must live with and adapt to, the difficulties.[231]

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229 Law Commission for England and Wales, *1997 Report* at 101.

230 Law Commission for England and Wales, *1997 Report* at 101.

231 *Gray v Motor Accident Commission* (1999) Aust Torts Reports 81-494 at 65,517-65,518 per Kirby J.