Civil Punishment of the Uncivil: The Nature and Scope of Exemplary Damages in New Zealand.

by

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Lord Devlin wanted to restrict them,[1] Lord Reid to remove them[2] and Richardson J to redeem them.[3] These Judges were dealing with exemplary (or punitive) damages but differing as to the role of such damages in the law of torts. Difficulty arises because exemplary damages are awarded to punish a defendant who is guilty of "conscious wrong-doing in contumelious disregard of the plaintiff's rights".[4] As such they seem inconsistent with the function of damages in tort as defined by Mayne and McGregor[5] which is to compensate, not to punish, for harm done. However, another view[6] is that there are other functions of tort damages, including appeasement, justice and deterrence, and that since an award of exemplary damages fulfils such functions it plays a legitimate role in the law of torts.

The division of judges and academics over these two conflicting viewpoints has caused confusion and controversy in the law in this area in Commonwealth countries. It was not until 1982 that the conflict was resolved in New Zealand: in the cases of *Taylor v Beere*[7] and *Donselaar v Donselaar*[8] the Court of Appeal decided to award exemplary damages

[1] *Rookes v Barnard* [1964] AC 1129, 1203-1233; [1964] 1 All ER 367, 396-414 (HL).
[2] *Cassell and Co Ltd v Broome* [1972] AC 1027, 1083-1093; [1972] 1 All ER 801, 835-842 (HL).
[3] *Taylor v Beere* [1982] 1 NZLR 81, 87-93 (CA). *Donselaar v Donselaar* [1982] 1 NZLR 97, 107-112 (CA).
[4] *Whitefield v De Laurent and Co* (1920) 29 CLR 71, 77 *per* Knox CJ.
[5] *Mayne and McGregor On Damages* (12th ed, 1961) p 196.
[6] See, for example, Glanville Williams, "The Aims of the Law of Torts" (1951) 4 Current Legal Problems 137.
[7] *Supra*, note 3.
[8] *Supra*, note 3.

as a tort remedy "in any proper case".[9]

These two decisions form the basis of this article, the purpose of which is to examine the problems concerning exemplary damages which the Court of Appeal intended to solve; the extent and adequacy of the solution; and the resulting definition of the nature and scope of exemplary damages in New Zealand. This will be achieved in two steps. First, the history of exemplary damages in New Zealand will be discussed so that the problems facing the Court of Appeal can be identified. Secondly, the 1982 decisions themselves will be analysed, with emphasis on the extension of the scope of exemplary damages, the meaning of "any proper case", the role of exemplary damages in cases of personal injury, and directions to juries.

I. HISTORY OF EXEMPLARY DAMAGES IN NEW ZEALAND

A. Before 1964

The jurisdiction to award exemplary damages has been recognized in New Zealand since at least 1873, when in *M'Comb v Low*[10] Chapman J allowed a jury award of such damages for malicious prosecution. Between that time and 1964, subsequent Judges showed a similar reluctance to interfere with jury awards for exemplary damages unless they were extremely excessive or indicated that the jury was biased.[11] Exemplary damages were awarded mostly in cases of malicious prosecution or defamation, but could be sought in cases of personal torts or even trespass to property,[12] the test always being the defendant's intention. Malice, vexation and annoyance were seen as vital factors, as was the public outrage prompted by the defendant's behaviour.[13]

The judges also recognized that the purpose of exemplary damages was to "inflict a penalty upon the defendant and teach him a lesson",[14] but unfortunately they could not agree whether punishing a defendant was really a form of compensation for the plaintiff or whether it was completely separate from compensation. Thus on the one hand, Myers C J in *Matheson v Schneideman*[15] held that the award of exemplary damages was disproportionate to the damage which the plaintiff had suffered and consequently should not be remitted. On the other hand, Smith J in *Wah Jang and Co v West*[16]

[9] *Taylor v Beere, supra*, note 3, 88 per Richardson J.
[10] (1983) 1 NZ Jur 49.
[11] See, for example, *M'Comb v Low, ibid; Stapleton v Smith* (1888) 6 NZLR 663; *Butler v Black* [1920] NZLR 17.
[12] *M'Comb v Low, supra*, note 10, 53.
[13] *M'Comb v Low, ibid*, 53, 54; *Butler v Black, supra*, note 11, 20; *Wah Jong v West* [1933] NZLR 235, 240.
[14] *Wah Jang v West, ibid*, 237 *per* Smith J.
[15] [1930] NZLR 151.
[16] *Supra*, note 13.

distinguished between the compensatory aspect of damages and punishment, so it was the defendant's behaviour, and not the plaintiff's need, which was of prime importance in assessing exemplary damages. If this was the case, whether such damages were proportionate to the plaintiff's loss was irrelevant to their assessment. Given this confusion, the case-law needed clarification.

B. 1964-1972

An attempt to resolve such conflict was made by Lord Devlin in 1964 in the celebrated case of *Rookes v Barnard.*[17] He held that the compensatory function of ordinary damages was "essentially different" from the punishing and deterring function of exemplary damages, which were awarded "whenever it is necessary to teach a wrongdoer that tort does not pay."[18] It was therefore necessary in only three situations. These were:

(a) "Oppressive, arbitrary or unconstitutional action by servants of the government."[19] Private corporations and individuals, lacking the government servant's duty to the people, could wield their power in safety.
(b) Conduct cynically calculated by the defendant to make a profit which is likely to exceed any compensation she or he may have to pay the plaintiff.
(c) Awards of exemplary damages authorized by statute.

But what of malice, vexation and annoyance? Lord Devlin felt these contributed to the injury to the plaintiff's feelings or added psychological injury to the physical injury the plaintiff may have suffered, and as such could be considered under extra-compensatory (or aggravated) damages. In fact, outside the three categories

> "... [a]ggravated damages can do most, if not all, the work that could be done by exemplary damages. Insofar as they do not, assaults and malicious injuries to property can generally be punished as crimes."[20]

Exemplary damages were thus reduced to an anomaly. Damages were approached more frequently now from the plaintiff's viewpoint; if the defendant's behaviour had been particularly aggressive, high-handed or malicious, this meant that the plaintiff had suffered more (by way of humiliation or wounded pride, for example), and hence was awarded more as compensation.

If the tort fell under one or more of the three categories, however, Lord Devlin proposed the following considerations to aid a judge or jury when awards for exemplary damages were being determined[21]:

(a) *The plaintiff must be the victim of punishable behaviour:*

Two points emerge from this. First, it appears that exemplary

[17] *Supra*, note 1.
[18] *Ibid*, 1227; 411.
[19] *Ibid.*
[20] *Ibid*, 1230; 412.
[21] *Ibid*, 1227; 411.

damages are parasitic, since they arise only when the defendant's wrong-doing has harmed a victim. If there has been no injury, there can be no damages.

Secondly, it would be "an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence."[22] But even if the plaintiff had suffered, she or he would be receiving a windfall, a fact that had troubled Chapman J in 1873,[23] and which concerned the House of Lords in *Cassell & Co Ltd v Broome*[24] in 1972. Lord Hailsham LC, for example, recommended that juries should remember that an award of exemplary damages puts money into the plaintiff's pocket but contributes nothing to "the rates and revenue of central government",[25] while Lord Reid considered such an award "... a pure and undeserved windfall at the expense of the defendant",[26] and this justified a severe restriction on the award of exemplary damages if not abolition.

(b) *The power to award exemplary damages must be exercised carefully in case it is used against liberty:*

Lord Reid, in *Cassell v Broome*, gave great weight to this consideration. He likened exemplary damages to a fine, which would be better left to criminal codes under which there is protection for offenders; whereas, in a civil action, the only limit to punishment is its unreasonableness — there will be no judicial interference unless the award is "manifestly too large or small".[27] In Lord Reid's opinion, exemplary damages are

> "... inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind. And there is no effective appeal against sentence."[28]

(c) *The parties' means and everything which "aggravates or mitigates the defendant's conduct"*[29] *is relevant to an assessment of exemplary but not compensatory damages:*

Lord Devlin also warned that the fact that these two kinds of damages differ, should never mean there are two awards. To avoid this "double-counting", he proposed the following test: Where exemplary damages are appropriate, juries should be directed that, *if but only if*, the sum they intend to award as compensation, (including aggravated damages) is inadequate to punish the defendant, they can

[22] *Ibid.*
[23] *Supra*, note 10, 54.
[24] *Supra*, note 2.
[25] *Ibid*, 1082; 833. See also 1099; 847 *per* Lord Morris.
[26] *Ibid*, 1086; 837.
[27] *Ibid*, 1065; 819 *per* Hailsham LC.
[28] *Ibid*, 1087; 838.
[29] *Rookes v Barnard, supra*, note 1, 1228; 411.

award a larger sum to indicate "their disapproval of the defendant's conduct and to deter her or him from repeating it".[30]

The initial reaction in New Zealand was to adopt Lord Devlin's restrictive approach[31] but then the Privy Council in *Australian Consolidated Press v Uren*[32] upheld the Australian trend of awarding exemplary damages for a much wider range of categories. Their Lordships ruled that although it may be advantageous if development of law in Commonwealth countries proceeds along similar lines, "... the need for uniformity is not compelling...."[33] especially in matters of domestic significance — for example, the law concerning exemplary damages in one country being well-settled.

McGregor J did not find the need for uniformity compelling either. In *Fogg v McKnight*[34] he followed *Uren's* case,[35] holding that the well-settled judicial approach in New Zealand had been to recognize that exemplary damages may be recovered for assault in more cases than Lord Devlin would allow. Thus, *Rookes v Barnard*[36] could be departed from in safety.

However, McGregor J stood alone in this respect. Most of his brethren continued to endorse Lord Devlin's decision, especially as the Law Lord had defined the scope of exemplary damages and clearly distinguished between exemplary and aggravated damages. Some of the judges in fact gave no further reason for their refusal to allow an award of exemplary damages than the citation of *Rookes v Barnard*[37] and *Cassell v Broome.*[38]

C. 1972-1982

Section 5(1) of the Accident Compensation Act 1972, (now replaced by section 27(1) of the Accident Compensation Act 1982), created further division amongst the judiciary. It provides that, subject to the provisions of the section:

> "... where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered ... *no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any court in New Zealand, independently of this Act....*" (emphasis added).

Thus, where one could once bring an action before the Courts for

[30] *Ibid*, 1228; 411.
[31] See, for example, *Truth v Bowles* [1966] NZLR 303 (CA) and *Greville v Wiseman* [1967] NZLR 795.
[32] (1967) 41 ALJR 66; (1966) 117 CLR 185 (High Ct of Aust); [1969] AC 590.
[33] *Ibid*, 73.
[34] [1968] NZLR 330.
[35] *Supra*, note 32.
[36] *Supra*, note 1.
[37] *Ibid.*
[38] *Supra*, note 2. See *Carrington v Attorney-General and Murray* [1972] NZLR 1106; *Harris v Lombard New Zealand Ltd* [1974] 2 NZLR 161.

compensatory (which includes aggravated) damages, one now looks to the Accident Compensation Corporation for a remedy. Furthermore, if exemplary damages are parasitic, because the plaintiff must have suffered injury, one could argue they are damages arising directly or indirectly from injury covered by section 5(1), and are therefore unavailable in cases of personal injury, such as assault.

This is the contention of R.D. McInnes,[39] who also asserts that it is "inequitable" that the victim of a "more morally blameworthy act" should receive more, by way of exemplary damages, than a person who is equally incapacitated, but has no conscious wrongdoer to blame. Since exemplary damages focus on fault, they are "... totally inconsistent with a compensatory scheme in which fault liability plays no part."[40] He also stresses the danger of someone's being punished twice for the same act (the "double-jeopardy" argument): an assault could lead to a conviction and an award of exemplary damages against the perpetrator. McInnes agrees with Lord Reid that deterrence and punishment ought to be left to the criminal law, and concludes by urging the Court of Appeal to recognise that exemplary damages are obtainable only in cases which do not involve personal injury by accident.

There were certainly cases to support this view in the 1970s. Quilliam J in *Donselaar v Donselaar*[41] and White J in *Koolman v Attorney-General*[42] were only two of the judges who held that separate actions for exemplary damages could not be brought for personal injury, while Jeffries J in *Betteridge v McKenzie*[43] felt "... tolerably certain the legislature did not wish to leave to injured persons the right to impose private fines on wrongdoers when there are ample avenues about elsewhere."

However, O'Regan J, in *Howse v Attorney-General*,[44] vigorously defended exemplary damages, arguing that since the object of section 5(1) is to prevent the recovery of *compensation* other than that provided by the Act, and since exemplary damages are intended to punish, and not to compensate, they are not affected by the subsection. In awarding them, one does not look at the event from the plaintiff's point of view,[45] but at the defendant's conduct, at that act contrary to law which

[39] R D McInnes, "Punishing the Words of Section 5(1): The Other School of Thought Replies" [1978] NZLJ 158.
[40] *Ibid*, 11.
[41] Unreported, Supreme Court Wellington, 28 July 1977. (A.454/76).
[42] Supreme Court Wellington, 3 October 1977 (A.519/76); [1978] RL 46.
[43] Unreported, Supreme Court Wellington, 7 December 1978 (A.103/77); *Donselaar v Donselaar, supra*, note 3, 102 *per* Cooke J.
[44] Supreme Court Palmerston North, 22 December 1977 (A.132/75); [1978] RL 138.
[45] Cf: *G v Auckland Hospital Board* [1976] 1 NZLR 638, 640. To award damages from the sufferer's point of view is, of course, to award compensatory damages.

deserves punishment. An action against such conduct thus does not arise directly or indirectly from the injury.

Thus the problems which the New Zealand Court of Appeal had to deal with in 1982 were:

1. One New Zealand judge had adopted the more liberal approach of the Privy Council in *Australian Consolidated Press v Uren*,[46] while the others had followed the more restricted guidelines in *Rookes v Barnard*[47] and *Cassell v Broome*.[48] Consistency was sorely lacking. Thus the task of the Court was to provide an authoritative definition of exemplary damages.

2. Judges and academics could not agree on the effect (or lack of effect) of section 5(1) of the Accident Compensation Act 1972 on exemplary damages. The Court was required to determine whether exemplary damages for personal injury by accident are parasitic.

3. The Court was further required to establish guidelines for directions to the jury. Was Lord Devlin's "If but only if" test sufficient to avoid double-counting?

II. 1982 AND BEYOND: THE COURT OF APPEAL DECIDES

A. An Authoritative Definition of The Scope of Exemplary Damages

In *Taylor v Beere*[49] the appellant had obtained a photograph of Mrs Beere and, despite her vehement objections, published it in an "indecent" sex manual. Her neighbours, believing she had consented, were appalled. She was "astounded, horrified and extremely angry", but the appellant apparently regarded it as a joke. The jury regarded it in a different light, however, and awarded Mrs Beere $12,500 for defamation. This award, according to Cooke J, "... almost certainly included some element of exemplary damages".[50]

The case eventually reached the Court of Appeal, which dismissed Mr Taylor's appeal, holding that New Zealand courts were free to depart from the restrictions imposed by Lord Devlin. Adopting the words of Lord Morris in *Uren's* case,[51] in which he had said that whether there should be punitive damages in a particular country depends on whether its laws on the subject are "well-settled", the Court of Appeal held that prior to 1964, the law in New Zealand had been so settled; exemplary damages had been awarded free from restrictions akin to those in *Rookes v Barnard*.[52]

[46] *Supra*, note 32.
[47] *Supra*, note 1.
[48] *Supra*, note 2.
[49] [1982] 1 NZLR 81.
[50] *Ibid*, 82.
[51] *Supra*, note 32, 73.
[52] *Supra*, note 1.

An analysis of the latter case provided the Court with further reasons for rejecting Lord Devlin's three categories. For example, as Richardson J argued, if the principle is that exemplary damages are awarded to show that tort does not pay, then by limiting them to three narrow and arbitrary categories, one provides so few opportunities to show that the tort does not pay, that one limits the principle itself.[53] Furthermore, Lord Devlin's first category was suspect because it singled out government servants and it failed to specify who would bear the responsibility for government employee's actions:

> "If the focus is to shift to the employer of the defendant where is the line to be drawn? Are wholly (or substantially) publicly owned (or financed) trading corporations and local bodies and quangos included?"[54]

Turning to the second category, the learned judge disapproved of the singling out of the profit motive, because oppressive actions motivated by financial greed were no worse than those motivated by spite, malice or a lust for power. What should be important is the *quality* of the conduct, not the "occupation of the defendant or ... any fine analysis of his motivation".[55] Cooke J adds that the fine and difficult distinctions involved in a test for calculation of profit are "... especially undesirable in actions tried by juries".[56] In other words, most jurors are not mathematicians.

Nevertheless, the Court of Appeal's departure from English authority is not complete. Although the judges adopt the pre-1964 New Zealand approach with respect to restrictions, they also adopt the distinction between aggravated and exemplary damages which had not been drawn in the past.[57] Nor do they challenge the oft-quoted phrase that "[e]xemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay".[58] Thus in defining exemplary damages, Somers J recognises they "are not compensatory but are intended to punish the defendant".[59] He also cites with approval the comment of an Australian judge that they are awarded "only in cases of conscious wrongdoing in contumelious disregard of the plaintiff's rights".[60] The Court is not disagreeing as to the nature of exemplary damages as defined by Lord Devlin, but with the scope of such damages. To justify this view the Court had to meet a number of objections. They were considered in detail by Richardson J.

[53] *Taylor v Beere, supra*, note 49, 92.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid*, 87.
[57] *Ibid*, 87-88, *per* Richardson J; 93, 95 *per* Somers J.
[58] *Rookes v Barnard, supra*, note 1, 1228; 411. See also *Taylor v Beere, supra*, note 58, 89 *per* Richardson J.
[59] *Taylor v Beere, supra*, note 49, 93.
[60] *Ibid.* Taken from *Whitfield v De Laurent and Co, supra*, note 4, 77.

The judge lists four objections to a tortious remedy which punishes and makes an example of a defendant because of her or his outrageous conduct: the windfall argument, the tort/crime dichotomy, the double-jeopardy argument and the challenge to juries' competency. He concentrates on the tort/crime dichotomy and addresses himself to the competency of juries, but one must look a little more closely at his judgment to find the answers to the other two issues.

For Richardson J, two considerations are particularly relevant. The first is that one cannot clearly separate the concerns of the law of torts and the criminal law, especially as "the roots of tort and crime ... are greatly intermingled".[61] Tort law "cannot be fitted neatly into a single compartment ... [i]t is a hybrid of private law and public interests, issues and concerns".[62] He cites with approval the words of Lord Wilberforce, who dissented in *Cassell v Broome*,[63] stating one cannot simply assume that the purpose of tort law is compensation alone and that the criminal law is "the better instrument for conveying social disapproval".[64]

Richardson J believes there is no legislative support for the separation of criminal and tort law. He mentions statutes which authorize criminal courts to compensate and adds that we may be expecting too much of the criminal law as a "vehicle of social control of an increasingly diverse and multi-value society".[65] The State cannot legislate for all matters of concern, and too many criminal sanctions may cost the criminal law its respect. Besides, there are areas of the law such as defamation, where criminal laws simply do not provide practical alternative punishments. Exemplary damages are thus justifiable and needed.

It is at this point that Richardson J perhaps answers the double-jeopardy argument, that someone could be punished twice for the same offence. Many torts are not also crimes and defamation does not have an alternative criminal remedy, so there will in fact be few cases where double-jeopardy will arise. McInnes concedes it is "[a]dmittedly a rare situation — but conceivable".[66] Hence there is the possibility such a case will arise, and until then, the question of double-jeopardy, rare as it might be, remains open.

Next, Richardson J denies that it is inappropriate for judges and juries to award more than compensation to the plaintiff, echoing the words of Lord Diplock, another dissenter in *Cassell v Broome*, that the plaintiff "can only profit from the windfall if the wind was blow-

[61] *Ibid*, 90.
[62] *Ibid.*
[63] *Supra*, note 2, 1114; 860.
[64] *Ibid.*
[65] *Taylor v Beere, supra*, note 49, 90.
[66] McInnes, *supra*, note 39, 11 n (t).

ing his way".[67] If the only way a plaintiff can gain extra-compensatory damages is by being the victim of the defendant's act, then it is only fair that the extra amount should "find its way, with the compensatory portion of the damages, into the plaintiff's pocket".[68] According to Richardson J, because the New Zealand legal costs system is not very punitive, this is to the disadvantage of "meritorious" plaintiffs.

However, to make up for the plaintiff's disadvantage is surely to compensate, and, as McInnes comments, "... such considerations are properly the concern of costs, not of damages, especially not punitive damages which are in no respect compensatory".[69] This is a strong, and as yet unanswered objection, and Richardson J's defence of exemplary damages can stand quite successfully without reference to costs.

On the other hand, if one accepts the principle of exemplary damages, they must be awarded to someone. Yet why award them to the plaintiff and not to the State? Implicit in Lord Devlin's first consideration[70] and Lord Diplock's words, is one answer: it would be absurd if someone benefited from a windfall when the wind was blowing in another direction. Cooke[71] and Somers[72] JJ have another answer: compensation and punishment must be awarded as a global sum to avoid double-counting or two separate sums for the same event. To award the plaintiff the compensatory and the State the exemplary damages would be to do what all judges since the days of Lord Devlin have tried to avoid.

Richardson J's second consideration is pragmatic: exemplary damages are obviously useful since they have been claimed and awarded in many and various ways throughout the Commonwealth. These awards "... amply demonstrate the felt need for this kind of civil remedy".[73] "Felt needs", which sometimes differ from people's real requirements, do not always justify the implementation or retention of the "needed" subject. However, in this case, the fact that exemplary damages are felt to be needed and are well used, coupled with the fact that much of the opposition to their use is faulty (and, apart from some minor points concerning the windfall and double-jeopardy argument, can be destroyed), is positive evidence for their retention.

The argument that the jury is not competent to award exemplary damages is swiftly dealt with. Richardson J holds that since juries' and

[67] *Supra*, note 2, 1126; 870.
[68] *M'Comb v Low, supra*, note 10, 54.
[69] McInnes, *supra*, note 39, 11.
[70] *Rookes v Barnard, supra*, note 1, 1228; 411. See discussion, *infra*, pp. 55-56.
[71] *Taylor v Beere, supra*, note 49, 83-87.
[72] *Ibid*, 96.
[73] *Ibid*, 91.

judges' powers to award such damages are "subject to review in the ordinary way"[74] and there is no evidence that such review is inadequate, the argument fails. We can now consider the scope of exemplary damages following *Taylor v Beere.*

For Richardson J, any attempt to define and determine the type of tort to which exemplary damages are to be confined is fraught with difficulty. Upholding all the objections to Lord Devlin's restrictions as examples, he argues that "... any other categorisation which attempts to limit the generality of the application of the exemplary principle is likely to be susceptible to similar criticisms".[75] It can be seen then, that regardless of the tort, if the defendant's conduct deserves punishment, Richardson J will provide it.

Somers J is more cautious. He concedes that restrictions similar to those in *Rookes v Barnard*[76] and *Cassell v Broome,*[77] are not necessary. "[B]ut that is not to say that our law remains unaffected by what has been said in those two landmark cases."[78] Somers J believes these cases have affected New Zealand law in establishing the distinction between aggravated and exemplary damages, so that:

> "... many cases which had hitherto been regarded as suitable for the award of exemplary damages are really cases of aggravated compensatory damages. The demarcation itself operates to limit the occasions when exemplary damages are appropriate."[79]

Richardson J agrees that the aggravated/exemplary distinction has been clarified by the House of Lords, but he would not see this as limiting exemplary damages, especially as there are no New Zealand examples of awards of exemplary damages which should have been aggravated damages. Somers J says that exemplary damages are not to be awarded as often as before, but only in cases of "conscious wrong-doing" and "contumelious disregard of rights". Richardson J agrees with the "contumelious disregard test", but does not view it as a new test. Rather, it is one which the New Zealand Courts have used for quite some time.[80] Thus there may be some residual difference between the judges as to how this test is to be applied.

Despite his caution, Somers J states that exemplary damages may be awarded in those circumstances referred to in *Mayne and McGregor.*[81] This text, published before 1964, permits an award of exemplary

[74] *Ibid*, 92.
[75] *Ibid*, 92.
[76] *Supra*, note 1.
[77] *Supra*, note 2.
[78] *Taylor v Beere, supra*, note 49, 95.
[79] *Ibid.*
[80] *Ibid*, 88. See, for example, *M'Comb v Low, supra*, note 10, where there had to be 'public scandal' and 'outrage'; *Matheson v Schneideman, supra*, note 15, at 160 where the defendant's conduct had to 'deserve punishment'; and *Wah Jang v West, supra*, note 13, 237 where the defendant 'needed to be taught a lesson'.
[81] *Supra*, note 5.

damages where the defendant's conduct "merits punishment ... is wanton ... discloses fraud, malice, violence, cruelty, insolence ... or ... he acts in contumelious disregard of the plaintiff's rights".[82] An examination of those circumstances referred to in *Mayne and McGregor*[83] will thus provide some guide to the future.

The authors say that one cannot recover exemplary damages in contract.[84] This certainly is what has been previously thought in New Zealand. Chapman J, for example, distinguished between contract and tort with respect to exemplary damages;[85] *Addis v Gramophone Ltd*[86] has been followed at least twice in New Zealand,[87] while in *Furniss v Fitchett*[88] Barrowclough J remarks that he thought the plaintiff had brought her action in tort, not in contract, because counsel had clearly requested exemplary damages and "such damages are seldom awarded for contract".[89] None of the judges in *Taylor v Beere*[90] refers to exemplary damages in contract, so the question remains to be settled.

More importantly, the authors advocate the award of exemplary damages in almost every intentional tort conceivable. They suggest that cases in which these damages are claimed are more likely to be those where the person rather than property is affected, since torts against the person are more likely to be prompted by malicious or high-handed conduct.

However, exemplary damages may be awarded for torts against property and trespass to goods, "... where there has been a wanton intentional interference by the defendant".[91] Again, this has been the case in New Zealand, where claims for exemplary damages have usually surfaced in suits for defamation or malicious prosecution, and other attacks on the plaintiff's person.[92] More recently, conspiracy, be it to defraud an owner of flats by "rigging" an auction,[93] or to intimidate an oil-tanker driver who "stood up" against his union,[94] has given rise to exemplary damages.

So too has trespass to property. In *Lucas v Auckland Regional*

[82] *Ibid*, 196.
[83] *Supra*, note 5.
[84] *Ibid*, pp 196, 199-200.
[85] *M'Comb v Low, supra*, note 10, 53.
[86] [1909] AC 488, especially at 495.
[87] *Last-Harris v Thompson Bros* [1956] NZLR 995; *Cowles v Prudential Assurance Co* [1957] NZLR 124.
[88] [1958] NZLR 396
[89] *Ibid*, 399.
[90] *Supra*, note 49.
[91] Mayne and McGregor, *supra*, p.197.
[92] See, for example, *M'Comb v Low, supra; Butler v Black, supra; Matheson v Schneideman, supra; Wah Jang v West, supra; Taylor v Beere, supra*, to name but a few.
[93] *Harding v Kummer and Others*, High Court Auckland, 21 March 1983 (A.1107/80), Casey J. [1983] RL 308; "The Capital Letter", Vol 6, No 14 (238) 7.
[94] *O'Boyle v Liggett and Others*, High Court Christchurch, 4 October 1982 (A.174/81), Cook J; [1983] RL 117.

Authority[95] exemplary damages were awarded against two traffic officers who repeatedly drove their car into that of the plaintiff, while pursuing him because of a traffic offence. In *Percy v Le Heux*[96] the defendant — in an action not uncommon in this country — felled a large number of trees on the boundary between his property and that of the plaintiff, refusing to heed the latter's warnings, or to seek his legally-required consent. Cook J awarded $1,000 exemplary damages for the "extra-ordinarily high-handed" trespass.

In the field of nuisance, too, exemplary damages may be awarded. In *Riley v Amalgamated Brick And Pipe Co*[97] aggravated damages were awarded against housing developers who removed soil and scrub cover, causing flood damage to the plaintiff's property, because, although White J doubted that their conduct justified exemplary damages, he did not regard it as fair and reasonable. The decision suggests that, had the defendants behaved in the requisite high-handed manner, exemplary damages would have been awarded for nuisance.

It is obvious, therefore, that the circumstances in *Mayne and McGregor*,[98] and the practice in New Zealand, show exemplary damages have and and will be awarded in every tort where the defendant has intentionally and contumeliously wronged the plaintiff. In this respect, Somers J is closer in approach to Richardson J than it may initially appear. It would be fair to say that in *Taylor v Beere*[99] no limitation has been placed on exemplary damages in tort. That they are different from aggravated damages is a definition of their function, rather than a limitation.

B. A Determination of the Nature of Exemplary Damages for Personal Injury

If exemplary damages can be awarded "in any proper case" wherever the tortfeasor has intentionally and contumeliously wronged the plaintiff, they must be available for assault. In coming to this conclusion in *Donselaar v Donselaar*,[1] the Court of Appeal had to overcome a great deal of conceptual and semantic difficulty.

In this case, one brother hit the other with a hammer, but the court refused to allow a claim of exemplary damages because damages for personal injury and injured feelings were being sought. These are compensatory and were covered by the Accident Compensation Act 1972. John Donselaar's appeal was thus dismissed in a few sentences,

[95] Supreme Court Auckland, 24 March 1980 (A.1003/79), Pritchard J; [1980] RL 174.
[96] Unreported, High Court Christchurch, 12 February 1982 (A.381/79), Cook J.
[97] High Court Wellington, 7 May 1982 (A.452/77), White J; [1982] RL 270.
[98] *Supra*.
[99] *Supra*, note 49.
[1] [1982] 1 NZLR 97.

the bulk of the judgment being devoted to the justification of a claim for exemplary damages by a victim of assault and battery.

The first judgment is that of Cooke J. Having cited with approval the words of O'Regan J in *Howse v Attorney-General*,[2] the learned Judge quotes a passage from Dr Geoffrey Palmer's book, *Compensation for Incapacity*,[3] which he sees as "evidence that to preserve exemplary damages ... would not be to fail to grasp the social philosophy represented by the 1972 Act ... it is fair inference that the social reformers whose ideas inspired the legislation did not deliberately set out to do away with exemplary damages following assault or battery".[4]

After warning of the approach he is going to take, Cooke J next turns to two difficulties he must face "frankly". The first is that "... in the natural and ordinary use of words, a claim for exemplary damages against an assailant does arise indirectly out of the injury".[5] The plaintiff cannot gain the remedy unless she or he has been the victim — a link between the defendant's conduct and the plaintiff's suffering must be established. However, Cooke J dismisses the difficulty as a "purely semantic one", admitting that there are two views on the matter (probably the views taken by Collins and McInnes[6]) but the point "need not be treated as decisive if one thinks as I do that Parliament did not have the problem of exemplary damages in mind".[7]

It is not clear what the learned Judge means at this point. He could mean that, when drafting the Statute, Parliament did not even contemplate the particular problems which would arise if one sought exemplary damages for assault and battery, so any consideration of Parliamentary intention is irrelevant. Thus, one must look elsewhere, at social policy, for example, if one wishes to justify the use of exemplary damages. If this is the learned Judge's belief, then Professor Fuller's objection to such arguments is pertinent:

> "This view conceives the mind to be directed toward individual things, rather than towards general ideas, toward distinct situations of fact rather than toward some significance in human affairs that these situations might share. If this view were taken seriously then we would have to regard the intention of the draftsman of a statute directed against "dangerous weapons" as being directed toward an endless series of individual objects: revolvers, automatic pistols, daggers, Bowie knives, etc...."[8]

[2] *Supra*, note 44.
[3] (1979) at pp 271-278.
[4] *Donselaar v Donselaar, supra*, 105.
[5] *Ibid*, 105.
[6] Collins, [1978] NZLJ 158; McInnes, *supra*, note 39.
[7] *Donselaar v Donselaar, supra*, 106.
[8] Fuller, *"The Morality of Law"* (1964), 84. See also P J Evans, "Meaning, Intention and Policy in the Interpretation of Statutes", Thesis LLM, University of Auckland 1969, 22-36.

Moreover, a Statute prohibiting "dangerous weapons", enacted last century, is not barred from applying to dangerous weapons invented since them. In other words, absence of a section referring specifically to a case of contumeliously assaulting another with a hammer does not mean such a case cannot come within the ambit of the Act. More attention should be given to Parliamentary intention and statutory interpretation.

Alternatively, Cooke J may mean Parliament did not have the problem of exemplary damages in mind because it was addressing itself to something different, namely compensation or negligence. Since the intention of the Accident Compensation Act 1972, as set out in section 4, is to make provision for safety and to prevent accidents, to rehabilitate and especially to compensate, and since exemplary damages neither promote safety, prevent accidents, rehabilitate nor compensate, they fall outside the ambit of the Act. *Expressio unius est exclusio alterius.*

Whichever view the learned Judge intends, it is interesting to note that the new Accident Compensation Act 1982 has come into force since his judgment. Parliament has had its opportunity to amend the troublesome section 5(1), if its intention was contrary to the way in which Cooke J and his fellow Judges in the Court of Appeal have interpreted it. Parliament has made one change to the subsection: section 5(1) has become section 27(1).

The second difficulty is that compensatory and exemplary damages tend to overlap and cannot be considered in isolation. To award exemplary damages unaccompanied by any other award is to go where no Law Lord has ever gone before. However, "... whatever novelty is involved has to be balanced against other considerations".[9] For Cooke J, such considerations are those of policy, of the needs and problems of New Zealand society, and of the way exemplary damages cater for these.

The learned judge indicates a need to have effective sanctions against the irresponsible, malicious or oppressive use of power; and also to maintain a punitive remedy for the commonplace types of trespass and assault, if accompanied by insult or contumely which touch the life of ordinary men and women.[10] New Zealand society has become "more vocal, factional and discordant",[11] therefore it is

> "... no time for the law to be withholding constitutional remedies for high-handed and illegal conduct, public or private, if it is reasonably possible to provide them ... we should try to meet a problem occasioned by the Accident Compensation Act by consciously moulding the law of damages to meet social needs."[12]

[9] *Donselaar v Donselaar, supra*, 106.
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid*, 107.

The only feasible way of doing this would cause Lord Devlin to turn in his grave: "... as compensatory damages (aggravated or otherwise) can no longer be awarded, exemplary damages will have to take on part of the latter's role".[13]

This does not mean that the floodgates are open, however, and Cooke J, perhaps conscious of the novelty of his approach, discourages immoderate awards, or those given merely because "the statutory benefits may be felt to be inadequate".[14] Judges will have to ensure that the damages are awarded for the purpose for which they were designed, for if they are not, and too many unmeritorious claims are won, Parliament may abolish the remedy of exemplary damages. Accordingly, unlike their approach in other areas of tort, the Courts must award exemplary damages for assault and battery only in the clearer and more extreme cases.

Contrasting with the powerful prose of Cooke J is the analytical approach of Richardson J, who prefers not to discuss "more general policy considerations ... which are not expressed in the legislation itself".[15] He examines section 5(1) and concludes that not only does it bar proceedings only for damages arising directly or indirectly from injury and not the causes of action, but also that "... on a fair reading of the provision in its statutory context and giving the words their ordinary meaning, the subsection does not reach proceedings for exemplary damages".[16]

By referring to "statutory context", the learned Judge means one must consider the aims of the Act, which do not include punishment, deterrence or retribution. The fact that section 5(1) was amended shorly after the Act was passed, to read "no proceedings ... shall be brought" instead of "no action shall lie", indicates an intention to retain causes of action. The Judge also refers to section 45A of the Criminal Justice Act 1954, which "... contemplates in the context of punitive action the possibility of recovery of damages notwithstanding the receipt of accident compensation",[17] and which indicates a Parliamentary intention to implement a punitive system alongside one of compensation.

Referring to the "ordinary meaning" of the words, the learned Judge argues that the focus of section 5(1) is on the injury received, whereas the focus of exemplary damages is on the outrageous manner in which the defendant has behaved. It is not an apt use of language to say that exemplary damages arise even indirectly out of personal in-

[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid*, 109.
[16] *Ibid.*
[17] *Ibid*, 110.

jury by accident suffered by the plaintiff,[18] for if such damages "arise" at all, they arise out of the defendant's acts.

Richardson J then turns to the question of assault and battery torts which are actionable without proof of damage, and therefore do not require proof that the plaintiff has been injured. Regardless of how slight the harm might be, once a person has caused the plaintiff reasonable fear of imminent harm (assault), or applied force unjustifiably to the plaintiff (battery), she or he has commited an actionable tort. Richardson J can see no reason in principle why a plaintiff should not sue in battery for exemplary damages alone.[19]

In this, the learned Judge is supported by historical example: in *Huckle v Money*[20] in 1763, exemplary damages were awarded despite the trifling injury; in *Merest v Harvey*[21] in 1814, Heath J recalled a case where such damages were given merely for knocking a man's hat off, albeit high-handedly; and ... [n]either in these authorities nor in later reported cases ... has it been held that exemplary damages could be awarded only where there was an award of compensatory damages.[22]

Lord Devlin did stipulate, of course, that the plaintiff must be the victim of the punishable conduct, but as Richardson J observes, the Law Lord said it would be absurd if a plaintiff, *totally unaffected* by the conduct, obtained a windfall, but not that the plaintiff had to seek compensatory damages.

An example to clarify this point would be that D, threatened by E's raised fist, may not by physically hurt or mentally distressed, so there would be no need to seek compensatory damages. But D is still affected in that she may feel threatened or even enraged by E's high-handed conduct, as may members of the community who watched E demonstrate his aggressive behaviour. Richardson J would support this as being a case for exemplary damages.

An opposing argument might be that if E hits D and injures her, he has violated her rights to a greater extent than if he had merely threatened her and so more exemplary damages should be awarded. Hence the measure of such damages is dependent on whether there is an injury or not. A possible answer would be that while the amount may be increased, this is because the *conduct* required more punishment, the defendant has acted in a more reprehensible manner, and, of course, the *award* of the damages does not depend on the injury.

Somers J agrees that exemplary damages do not depend or arise out of the injury, and he too turns to the objects of the Accident Compen-

[18] *Ibid*, 109.
[19] *Ibid*, 110.
[20] (1763) 2 Wils 205; 95 ER 768.
[21] (1814) SC 1 Marsh 139; 128 ER 761.
[22] *Donselaar v Donselaar, supra*, 111.

sation Act 1972 to show that exemplary damages are not governed by section 5(1). He agrees also with the principle behind exemplary damages, which he expresses as "a salutory punishment of and a deterrent to high-handed contumelious activity".[23] While conceding that such damages serve a useful purpose, he admits to encountering conceptual and procedural difficulties in their application. He thus sides with Cooke J as to the need for restraint when awarding these damages for assault and battery, and cannot escape the notion that, contrary to what Richardson J says, exemplary damages are parasitic:

> "... assuming the conduct of the tortfeasor merits punishment, exemplary damages are only to be awarded where compensatory damages are insufficient to achieve that end. If there are no compensatory damages, there is no starting point for the assessment of exemplary damages."[24]

If this is so, a judge or a jury must consider, in a case concerning personal injury:

> "... what sum would be appropriate as compensatory damages in order to determine whether any, and if so what sum ought to be awarded to achieve appropriate punishment. Necessarily, this must involve all those features of a trial for damages for personal injury which were a familiar spectacle before the Accident Compensation Act 1972."[25]

Thus, the Act, passed to remove compensation from the Courts, will be subverted to some extent. Furthermore, how is one going to direct a jury on this point?

C. Guidelines for the Jury

Directions to the jury for all cases of intentional torts, especially assault and battery, have to be approached carefully. For this reason, Lord Devlin established three considerations to aid a judge or jury making an award of exemplary damages, and the "if but only if" test. Although the New Zealand Court of Appeal rejects Lord Devlin's three categories of exemplary damages, the Judges seem to accept the considerations.

The first consideration, that the plaintiff must be the victim of the punishable conduct, is undeniable and is admitted, especially by Richardson J in *Donselaar v Donselaar*[26] and *Taylor v Beere*.[27] The second, that care must be taken in case an award is made against liberty, is, interestingly, not commented upon, although Somers J in *Donselaar v Donselaar* does point out that one of the functions of the Court of Appeal is to exercise control over jury verdicts and an unreasonably high (or low) verdict will be set aside. The third, that the

[23] *Ibid*, 115.
[24] *Ibid*, 116.
[25] *Ibid*.
[26] *Supra*, 111.
[27] *Supra*, 91.

means of the parties and any factors mitigating or aggravating the defendant's conduct must be considered, is also endorsed by Somers J in *Donselaar v Donselaar*. In fact, in that case, all the judges felt the blame should have been shared by both brothers, which would have raised the question of whether John would have received fewer or no exemplary damages because of *his* conduct, if he had been able to bring such an award.

However, in *Taylor v Beere*, Somers J rejects the "if but only if" test because it "... tends to produce an award which is an aggregate of isolated considerations and is likely, I think, to produce just that result which it is aimed to prevent".[28] For example, one could, under this test, consider the compensatory aspects alone and if, but only if, they were insufficient, one would add exemplary damages. This could be seen as adding two awards together, a double-counting of which judges do not approve. To award a "global sum",[29] as Cooke J terms it, is preferable.

To award a global sum is to "... take into account among all the factors punishment for the defendant, if they think that his conduct does require it ... any doubling up must be carefully avoided".[30] A jury thus considers the tort, the hurt to the plaintiff's feelings, and the defendant's conduct, all at once, arriving at a single award.

The award of a global sum becomes difficult when compensation is handled by the Accident Compensation Corporation and punishment by the Court, for here two different awards, from two different sources, recreate the whole problem of double-counting.

However, Richardson J, the only Judge who does not mention double-counting, is untroubled by this. As previously discussed, he has no objection to a suit for exemplary damages alone, and does not regard exemplary damages as parasitic, or dependant upon compensatory damages. Consequently, the learned Judge has no difficulty in presenting before a panel of twelve ordinary New Zealanders a claim for exemplary damages for assault or battery, excluding personal injury and compensatory damages;[31] the jury must look to the quality of the defendant's conduct and not the quality of the plaintiff's injury. This, however, would be difficult if the plaintiff were to appear in Court showing obvious signs of serious injury. The exemplary damages then may include elements of the compensatory. This would not worry Cooke J, who sees exemplary damages as doing the work of the compensatory in the field of personal injury, but it would trouble Somers J.

[28] *Supra*, 96.
[29] *Ibid*, 87.
[30] *Ibid.*
[31] *Donselaar v Donselaar, supra.* 112.

Somers J perceives the problem clearly. Assuming that he is right and exemplary damages are parasitic, they 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. "A new approach is necessary",[32] he declares, but no-one can yet be sure what this will be. A few test cases may be required to clarify the situation. Although, as Cooke and Somers JJ suggest, this may not be necessary as the Court may choose to leave the issue to Parliament which may readily enough put the matter aright.[33]

[32] *Ibid*, 116.
[33] *Ibid*, 115.