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EXEMPLARY DAMAGES: RETRIBUTION AND CONDEMNATION — THE PURPOSE CONTROLLING THE SCOPE OF THE EXEMPLARY DAMAGES AWARD

Abstract

Exemplary damages have caused a long and unresolved struggle with the underlying compensatory purpose of tort law because they award the plaintiff more than is necessary to compensate actual loss. This article identifies key principles from Australian High Court jurisprudence regarding such damages before turning to divergent authority from New Zealand and the New South Wales Court of Appeal. It is apparent from this review that the scope of the award (in terms of whether consciousness of wrongdoing is required) can only be determined by clarifying the proper purpose of the award of such damages. Only if the High Court continues to move from a punishment purpose to a condemnatory purpose will an award of exemplary damages be justified for less than conscious wrongdoing. It is argued that such windfall gain for the plaintiff is only justified when the defendant deserves punishment and consequently is required to have some subjective fault.

I Introduction

The ordinary tool for tort law to provide relief for a proven cause of action has always been an award of pecuniary damages. The generally accepted purpose of pecuniary damages is to compensate the plaintiff for their injury. Exemplary damages have caused a long and unresolved struggle with the underlying compensatory purpose of tort law because a plaintiff receives more than is necessary to compensate actual loss (a windfall gain). In Australia exemplary damages have been limited to cases where the defendant 'engaged in conscious wrongdoing in contumelious disregard'[1] for the plaintiff's rights. That limitation recognises the need for subjective fault to justify the imposition of a punishment on the defendant (also described as the imposition of retribution).

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1 *Whitfeld v De Lauret and Co* (1920) 29 CLR 71, 77 (Knox CJ) ('*Whitfeld*'), cited in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J) ('*Uren*'); *XL Petroleum (NSW) Pty Ltd v*

In the superior courts of New Zealand and at Australian intermediate court level, there has been discussion of awarding exemplary damages for objective wrongdoing rather than subjective or conscious wrongdoing.

This article argues that any future shift in the fault element required of a defendant to justify an award of exemplary damages will reflect a shift in the purpose of those exemplary damages. As the High Court has over time shifted the stated basis for an award of exemplary damages there may be some basis for movement in the future. However, it is argued that because criminal punishment in Australia focuses predominantly on a retributive function, courts should similarly constrain exemplary damages to civil cases where retribution is justified, namely those cases with subjective wrongdoing.

The article commences by examining in Part II the Australian High Court jurisprudence regarding exemplary damages. In Part III the article considers the diverging authority (in New Zealand and the New South Wales Court of Appeal) suggesting that conscious wrongdoing is necessary before a court can award exemplary damages. Finally in Part IV the article considers different expressions of the purpose of exemplary damages (retribution, specific deterrence, general deterrence, vindication of the plaintiff's interests, and condemnation of the defendant's conduct), identifying an increasing recognition of the ability of exemplary damages to serve a condemnatory purpose. It is concluded that consciousness of wrongdoing justifies punishment of the defendant, recognising the retributive aspect of punishment. Reliance on condemnation (or the communicative effects of a penalty) elevates society's interests over the individual defendant and fails to sufficiently justify the plaintiff's windfall gain from exemplary damages.

II High Court of Australia Jurisprudence: General Principles Regarding Exemplary Damages

This section examines the English approach to exemplary damages, as context to the High Court's jurisprudence, before identifying unresolved questions of principle.

A *The English Historical Position*

The label 'exemplary damages' appears to have first arisen in the 1763 English decision of *Huckle v Money.*[2] The plaintiff had been arrested and detained for approximately

Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448, 470 (Brennan J) ('*XL Petroleum*'); *Lamb v Contogno* (1987) 164 CLR 1, 13 ('*Lamb*'); *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Gray*').

2 (1799) 2 Wils KB 20; (1799) 95 ER 768 ('*Huckle*'). Note that whilst the case was reported in 1799, the judgment is dated 1763; see also David A Rice, 'Exemplary Damages in Private Consumer Actions' (1969) 55 *Iowa Law Review* 307, 308; Theodore Sedgwick, 'A Treatise on the Measure of Damages; Or, An Inquiry into the

six hours by the defendant, who had acted under an unlawful warrant.[3] The jury awarded £300 damages,[4] despite the plaintiff's limited injury (losing only 6 hours of his time). The Lord Chief Justice held, on a motion for a new trial, that the jury was right 'in giving exemplary damages'[5] on the basis that the defendant was 'exercising arbitrary power …; violating the Magna Carta; … and [acting in] a tyrannical and severe manner.'[6] The rationale for the principle was more fully explained by the Lord Chief Justice directing a jury in *Wilkes v Wood*.[7] He explained:

> Damages are designed not only as a satisfaction to the injured person, but likewise as a 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.[8]

The Court justified exemplary damages as both a punishment of the defendant and a tool to communicate the court's disapproval of the conduct.

Subsequently, exemplary damages became more common throughout England.[9] However, the stated rationale and purpose of the principle varied between different judges. Stated purposes included: to make an example,[10] to restrain a man from disregarding principles actuating the conduct of a gentleman,[11] and to prevent the practice of duelling (implicitly referring to a retribution or vindication purpose).[12] Implicit in each of these stated purposes is a notion of punishment, deterrence or retribution. Each focuses on the defendant's conduct as the trigger for the award.

Principles which Govern the Amount of Compensation Recovered in Suits at Law' (Baker, Voorhis and Co, 8th ed, 1891) 502 [348]; *New South Wales v Ibbett* (2006) 229 CLR 638, 648–9 [38] (*'Ibbett HCA'*).

3 *Huckle* (1799) 2 Wils KB 20; (1799) 95 ER 768, 768 [206]. Note that the *North Briton No 45* was alleged to have contained a libel on the three branches of the legislative body: *Wilkes v Wood* (1763) Lofft 1; 98 ER 489, 493 [8]–[9].

4 The equivalent of approximately $AUD 90,000 today: *Inflation Calculator* (2016) Bank of England <http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/default.aspx>; *Currency Conversion and Latest Exchange Rates for 90 World Countries* (8 April, 2017) The Money Converter <http://themoneyconverter.com>.

5 *Huckle* (1799) 2 Wils KB 20; (1799) 95 ER 768, 769 [207].

6 Ibid.

7 *Wilkes* (1763) Lofft 1; 98 ER 489, 498–99 [18]–[19] ('*Wilkes*').

8 Ibid.

9 John D Mayne and Lumley Smith, *Mayne's Treatise on Damages* (Stevens and Haynes, 7th ed, 1903) 44-5; F O Arnold, *The Law of Damages and Compensation* (Butterworth, 2nd Ed, 1919) 6–7. For earlier applications see, eg, *Tullidge v Wade* (1769) 3 Wils KB 18; 95 ER 909; *Merest v Harvey* (1814) 5 Taunt 442; 128 ER 761; *Emblen v Myers* (1860) 6 H & N 54; 158 ER 23; *Bell v Midland Railway Company* (1861) 10 CB NS 287; 142 ER 462.

10 *Tullidge v Wade* (1769) 3 Wils KB 18; 95 ER 909, 909 [19] (Wilmot CJ).

11 *Merest v Harvey* (1814) 5 Taunt 442; 128 ER 761, 761 [443] (Gibbs CJ).

12 Ibid 761 [444] (Heath J).

B Rookes v Barnard — *House of Lords Limits Exemplary Damages*

Prior to 1964, no consistent or enunciated test had developed in English Courts to identify the circumstances in which exemplary damages would be awarded. In that year the House of Lords effectively exploded the law of exemplary damages in England.[13] Lord Devlin[14] delivered the critical speech which noted the punishment and deterrence object of exemplary damages[15] and stated: 'It may well be thought that this confuses the civil and criminal functions of the law.'[16]

A primary justification for reconsidering exemplary damages was the confused and disjointed early cases of exemplary damages. The House of Lords considered that many cases cited to justify exemplary damages were cases where damages were large and the plaintiff's injury was aggravated by 'the motives and conduct of the defendant … such as to injure the plaintiff's proper feelings of dignity or pride.'[17] Lord Devlin later noted that such cases were properly cases of aggravated damages being a type of compensatory damages.[18] In such cases punishment, if required, could usually be given by the criminal law.[19]

His Lordship identified that there was a 'valuable purpose [for awards of exemplary damages in] restraining the arbitrary and outrageous use of executive power'[20] and 'vindicating the strength of the law'. As a consequence of the limited purpose for exemplary damages, his Lordship identified two categories at common law, in addition to awards authorised by statute, within which exemplary damages would be justified, namely:

1 Cases of 'oppressive, arbitrary or unconstitutional actions by the servants of the government'[21] and,

2 those in which the 'defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'.

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13 *Rookes v Barnard* [1964] AC 1129, 1221 ('*Rookes*').

14 Ibid 1179 (Lord Reid), 1197 (Lord Evershed), 1203 (Lord Hodson), 1238 (Lord Pearce).

15 Ibid 1221.

16 Ibid.

17 Ibid, citing *Huckle* (1799) 2 Wils KB 20; (1799) 95 ER 768; *Benson v Frederick* (1766) 3 Burr 1845; 97 ER 1130.

18 *Rookes* [1964] AC 1129, 1229-230.

19 Ibid 1230.

20 Ibid 1223.

21 Ibid 1226.

The second category was considered to be necessary in order to 'teach wrongdoers that tort does not pay'[22] and to show that the law 'cannot be broken with impunity.'[23] Lord Devlin's reasoning does not clearly identify why the deterrence purpose applies to a profit case and not to other categories of conduct. The decision is not sufficiently reasoned to explain a punitive aspect for some categories of tort but not others.

In addition to the categories, Lord Devlin also identified three considerations to be applied in making any exemplary damages award, regardless of categorisation. Firstly, the plaintiff must be the victim of the behaviour in order to receive the award of damages.[24] Secondly, any award must be made with restraint, having regard to its ability to be a weapon.[25] Thirdly, the means of the parties are material to the assessment of quantum.[26] These considerations were not new, and largely adopted the common law position of the time.

His Lordship's stated purposes of exemplary damages[27] moved away from the imposition of a penalty on a wrongdoer or deterrence. He expressly stated that in cases outside of the categories, such as assaults and malicious injuries to property, it was not appropriate that: '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.'[28]

However, concepts of punishment were reinforced by Lord Devlin's explanation about the scope of the award. He considered the jury ought to be directed only to award such sum as necessary to impose a punishment. He said:

> if, but only if, the sum which they have in mind to award as compensation … is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.[29]

C *The Australian 'Test'*

Since 1920, the High Court has consistently accepted the language that exemplary damages will be awarded in cases of 'conscious wrongdoing in contumelious

22 Ibid 1227.

23 Ibid.

24 Ibid.

25 Ibid.

26 Ibid 1228.

27 Namely to restrain the arbitrary and outrageous use of executive power and to vindicate the rule of law.

28 *Rookes* [1964] AC 1129, 1230.

29 Ibid 1228.

disregard of another's rights.'[30] This contrasts with the experience in England where no consistent language was adopted. The use of the word 'in' links the necessary 'contumelious disregard' to the wrongdoing which is alleged to found the cause of action. That is, poor conduct disconnected from the wrong is not to be taken into account.

In *Gray v Motor Accident Commission* the majority said that 'exemplary damages are awarded rarely'[31] and only for the purpose of recognising and punishing fault, 'but not every finding of fault warrants their award. Something more must be found.'[32]

In looking for that 'something more' the majority doubted that a single formula was applicable, but recognised that Knox CJ's approach from *Whitfeld* of 'conscious wrongdoing in contumelious disregard of another's rights' 'describes at least the greater part of the relevant field'[33]

D *A Flexible Standard*

Clearly, the Australian 'test' contains some flexibility and courts retain a broad discretion.[34] The flexibility was particularly apparent in *Uren v John Fairfax & Sons Pty Ltd.*[35] There the High Court considered the appropriate application of exemplary damages in light of the House of Lords' decision in *Rookes v Barnard*.[36] The Court held that *Rookes v Barnard* is not to be followed in Australia,[37] and that on the facts it was not open to make an award of exemplary damages.[38]

Four of the five Justices cited and adopted Knox CJ's language in *Whitfeld*, asking whether the defendant acted in contumelious disregard of the plaintiff's rights.[39]

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30 *Whitfeld* (1920) 29 CLR 71, 77 (Knox CJ), cited with approval; *Uren* (1966) 117 CLR 118, 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 470 (Brennan J)*; Lamb* (1987) 164 CLR 1, 13; *Gray* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

31 *Gray* (1998) 196 CLR 1, 6 [12] (Gleeson CJ, McHugh, Gummow, Hayne JJ).

32 Ibid.

33 Ibid 7 [14], see also 9 [20] that exemplary damages are exceptional and arise 'chiefly if not exclusively' in cases where this is satisfied.

34 *Uren* (1966) 117 CLR 118, 129 (Taylor J), 160-1 (Owen J); *XL Petroleum* (1985) 155 CLR 448*,* 463 (Gibbs CJ) regarding a broad discretion for the Court of Appeal.

35 (1966) 117 CLR 118.

36 [1964] AC 1129.

37 *Uren* (1966) 117 CLR 118, 123 (McTiernan J), 139 (Taylor J), 147 (Menzies J), 161 (Owen J); see also 154 (Windeyer J): that *Rookes* did not exhaustively identify the cases in which exemplary damages may be allowed.

38 *Uren* (1966) 117 CLR 118, 129 (Taylor J), 154 (Windeyer J), 157 (Owen J); *Contra* 125 (McTiernan J), 147–8 (Menzies J).

39 Ibid 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J).

McTiernan J adopted the materially similar approach stated in *Mayne & McGregor on Damages*:

> Such damages are variously called punitive damages, vindictive damages, exemplary damages and even retributory damages. They can apply *only* where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights.[40]

The members of the Court split on the application of the unanimously accepted test, perhaps demonstrating its uncertain meaning. The majority considered that the conduct was not sufficiently egregious to justify an award, whilst the minority considered contumelious disregard was present. Members of both the majority and minority used similar language to describe the defendant's conduct. Justice Menzies, in dissent in the result, labelled the defendant's conduct as 'malicious, wilful and reprehensible' stating that 'the defendant recklessly and arrogantly attacked the plaintiff's reputation'.[41] Justice Taylor spoke of conduct which had been 'high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights.'[42] Whilst this differentiation might cause concern, Taylor J expressly recognised that the existing test in Australia was certain but permitted flexibility in application.[43]

E *Focus on Conduct of Wrongdoer in the Commission of the Tort*

The majority in *Gray* emphasised that any inquiry into exemplary damages focuses on the conduct of the wrongdoer.[44] Importantly, in the context of considering the availability of exemplary damages in negligence, the majority emphasised the element of conscious wrongdoing, stating: 'exemplary damages could not properly be awarded in a case of alleged negligence in which there was no *conscious wrongdoing* by the defendant.'[45]

In *Lamb v Cotogno*[46] the High Court considered an argument that exemplary damages were inappropriate because the conduct triggering the award was not connected to the tortious act.[47]

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40 Ibid 122–3 (emphasis added).

41 Ibid 143.

42 Ibid 129.

43 Ibid.

44 *Gray* (1998) 196 CLR 1, 7 [15], 12 [30] (Gleeson CJ, McHugh, Gummow, Hayne JJ).

45 Ibid 9 [22] (Gleeson CJ, McHugh, Gummow, Hayne JJ) (emphasis added).

46 (1987) 164 CLR 1.

47 Ibid 12.

The plaintiff in *Lamb* sued for trespass to the person, arising out of the defendant attending the plaintiff's premises to serve a summons. The plaintiff threw himself on the bonnet of the defendant's car. The defendant drove in such a manner as to throw the plaintiff off and cause him serious injuries, before driving off, leaving the injured plaintiff on the roadside. The plaintiff was awarded $203,570 damages including $5000 exemplary damages.[48]

In the appeal, the defendant argued that the conduct which justified exemplary damages was the defendant leaving the plaintiff on the roadside, which occurred after the tort was complete. The tort, trespass, involved only the act of hitting the plaintiff with the car. It was argued that leaving the plaintiff did not constitute a separate tort, was not part of the established trespass, and therefore could not justify exemplary damages.[49] The Court rejected that submission. It was not necessary to view separately the act of leaving the plaintiff on the road. The Court considered that it was able to have regard to all of the circumstances of the commission of the tort:

> It was open to the master [sic] to regard the conduct of the defendant in abandoning the plaintiff in the manner in which he did as displaying a cruel or reckless disregard for the welfare of the plaintiff and an indifference to his plight and as colouring the whole of the conduct of the defendant, including the assault which was found to have been made upon the plaintiff. So regarded, the tort of which the defendant was guilty was committed in circumstances amounting to an insult to the plaintiff.[50]

At first instance, the Master had held that the defendant had not acted with malice, describing the act of leaving the plaintiff as 'callous.' It was argued that this was insufficient to support the award of exemplary damages. The Court construed the Master's reasons to find the 'necessary' intent or recklessness to justify an award, stating:

> … the use of the word [callous] is, we think, sufficient in its context to indicate that the master saw the defendant as having behaved in a humiliating manner and in wanton disregard of the plaintiff's welfare. Elsewhere in his reasons he described the whole incident as "horrendous". *In those circumstances, the absence of actual malice did not disentitle the plaintiff to exemplary damages.* Whilst there can be no malice without intent, *the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word*: Street, [Principles of the Law of Damages, (1982)], pp 30-31. It is clear that the master formed the view that the defendant's conduct warranted an award of exemplary damages to mark the disapprobation of the Court and in so doing it cannot be said that he exceeded the bounds of his function.[51]

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48 Ibid 5.

49 Ibid 12.

50 Ibid 13.

51 Ibid (emphasis added).

The Court identified a close connection between the tort and the circumstances justifying the exemplary damages. Further, it considered that whilst malice is not necessary to justify an award of exemplary damages, contumelious behaviour requires some intent or recklessness as to the plaintiff's rights.

F *Conduct After the Tort has Evidential Value*

Mere disapproval of the defendant's conduct is not sufficient to trigger exemplary damages.[52] Evidence of the contumelious behaviour in the tort is required to satisfy the trier of fact of the relevant conduct.[53] A court can consider conduct occurring after the wrong as evidence of malice in the commission of the wrongdoing.

In *NSW v Ibbett* two New South Wales police officers wearing plain clothes attended Mrs Ibbett's home in the middle of the night to arrest her son. They did not have lawful authority to attend. One of the police officers dived under a closing roller door and drew his revolver, pointed it in the direction of the son. Mrs Ibbett heard the commotion, entered the garage through a side door and told the officer to leave. The police officer pointed the revolver at Mrs Ibbett briefly, demanding that the door be opened for his fellow officer, before turning the gun back on the son. The police officers arrested the son and conducted a strip search on him in the vicinity of Mrs Ibbett. The trial judge and the Court of Appeal allowed Mrs Ibbett aggravated and exemplary damages. The High Court[54] unanimously refused the appeal, finding that the State was vicariously liable for the conduct of its officers.[55] In reaching its conclusion the Court took into account evidence of a re-education program that was conducted sometime after the arrest of the plaintiff.[56] It was evidence against the State (as a defendant) as to its attitude to the conduct and provided evidence of the officers' attitudes at the time of the wrong.[57]

Similarly, in two defamation cases, the *Herald and Weekly Times Ltd v McGregor*[58] and *Triggell v Pheeney*[59] the High Court accepted that subsequent conduct might provide evidence of malice at the time of the relevant publication and justify an award of exemplary damages.[60] Isaacs J in *Herald and Weekly Times* emphasised

52 *Uren* (1966) 117 CLR 118, 153 (Windeyer J).

53 Ibid 154 (Windeyer J).

54 *New South Wales v Ibbett* [2005] NSWCA 445 (*'Ibbett NSWCA'*) (note that the authorised report (2005) 65 NSWLR 168, 172, 175, 185 omits significant parts of the exemplary damages discussion); *Ibbett HCA* (2006) 229 CLR 638.

55 Note, the *Law Reform (Vicarious Liability) Act 1983* (NSW) modified the common law principles regarding vicarious liability.

56 *Ibbett HCA* (2006) 229 CLR 638, 654–655 [60].

57 *Ibbett NSWCA* [2005] NSWCA 445, [75] (Spigelman CJ), cited in *Ibbett HCA* (2006) 229 CLR 638, 14–15 [60].

58 (1928) 41 CLR 254 ('*Herald and Weekly Times*').

59 (1951) 82 CLR 497 ('*Triggell*').

60 *Herald and Weekly Times* (1928) 41 CLR 254, 267; *Triggell* (1951) 82 CLR 497, 518.

(in dissent but agreeing with the majority on this point) that subsequent conduct must be connected to the conduct complained of by actual malice in order to trigger exemplary damages. This was picked up by the majority in *Triggell*[61] who stated the settled law that:

> the conduct of the defence [in the litigation] may be taken into consideration not only as evidencing malice at the time of publication or afterwards, as, for instance, in filing a plea, but also as improperly aggravating the injury done to the plaintiff, if there is a lack of bona fides in the defendant's conduct or it is improper or unjustifiable.[62]

G *The Defendant's Financial Circumstances*

When considering an award of exemplary damages, evidence of the tortfeasor's means are admissible and relevant to quantum because they are material to his ability to satisfy a judgment; to infer that he acted in contumelious disregard by taking advantage of his wealth; and to assess the quantum that will provide a sufficient deterrent to repeated conduct.[63]

H *Provocation*

In *Fontin v Katapodis*[64] the Court held that provocation by the plaintiff is mitigatory and may reduce or prevent an award of exemplary damages. In so doing it implicitly recognised the defendant's fault as relevant to the award. It is further implicit that it considered exemplary damages to serve a retributive purpose.

I *Vicarious Liability*

As discussed above, the High Court held in *Ibbett HCA* that the State was liable for exemplary damages awarded for a police officer's tort.[65] The State had admitted it was vicariously liable pursuant to legislation.[66] Accordingly, the Court did not consider in detail the basis for exemplary damages applying, and did not consider the general policy question of why an employer could be vicariously liable for exemplary damages.

There is some tension arising from an employer's vicarious liability for exemplary damages. Vicarious liability has long provided difficult considerations in relation

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61 (1951) 82 CLR 497.

62 Ibid 514.

63 *XL Petroleum* (1985) 155 CLR 448, 461 (Gibbs CJ), 472 (Brennan J).

64 (1962) 108 CLR 177 ('*Fontin*').

65 *Ibbett HCA* (2006) 229 CLR 638, 654 [56], albeit questions remain about the inquiry to demonstrate vicarious liability. See Paul Walker, 'Vicarious liability for exemplary damages: A Matter of Strict Liability?' (2009) 83 *Australian Law Journal* 548, 549, 563.

66 *Ibbett HCA* (2006) 229 CLR 638, 649 [39]–[40].

to exemplary damages.[67] Traditionally, courts recognised the retributive purpose of exemplary damages by restricting vicarious liability for exemplary damages to cases where the employer participated in or ratified the tort.[68] The position was modified, at least in the United States, in favour of extending vicarious liability for exemplary damages to employers regardless of their fault.[69]

If the purpose of exemplary damages is to punish the defendant (an employer) for their wrongdoing, and the employee acted without specific authorisation of the employer, on what basis is the employer liable? If the employer did not authorise the conduct, the punishment is not deserved. As Giliker has postulated, 'why should a party without fault be liable for a punitive award of damages in circumstances where the actual culprit avoids payment.'[70] To answer that broad question, it may be argued that courts could only justify vicarious liability for exemplary damages if the purpose of exemplary damages includes vindicating the rule of law.[71] Arguably, making an employer vicariously liable for exemplary damages will encourage closer supervision and control of employees to comply with the civil law. If the exemplary damages award exists to vindicate the rule of law in that way, it may be appropriate for an employer who has otherwise met the Salmond vicarious liability test,[72] to pay the award.

However, the better view is that the long unsettled policy underpinning vicarious liability has conflated questions of fault in exemplary damages awards. Historically, it has not been clear whether courts had to look for fault by the employer in order to hold them vicariously liable.[73] Although still the subject of debate,[74] the High Court now considers vicarious liability to be premised on a strict liability basis where liability is imposed on the employer for the employee's wrong.[75] Accordingly there

67 Rice, above n 2, 318.

68 Charles T McCormick, 'Some Phases of the Doctrine of Exemplary Damages' (1929) 8 *North Carolina Law Review* 129, 143.

69 Ibid 145.

70 Paula Giliker, 'Vicarious Liability in Tort: A Comparative Perspective' (2010) 3 *Journal of European Tort Law* 18.

71 *Ibbett HCA* (2006) 229 CLR 638, 649-650 [39]–[40].

72 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 149 [42] (French CJ, Kiefel, Bell, Keane, Nettle JJ): consider whether the act (a) is authorised by the employer; or (b) is an unauthorised mode of doing some other act authorised by the employer. Their Honours went on further to explain that an employer would also be liable for unauthorised acts provided that they are 'so connected' with authorised acts that they may be regarded as modes, although improper modes, of doing them.

73 Judge Douglas J McGill, 'Exemplary Damages and Vicarious Liability' (Speech delivered at the Queensland Law Society Symposium, Law Society House, 30 March 2012) <http://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/djmcgill/papers/1>.

74 See, eg, Giliker, above n 70, 1, 17.

75 *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148 [39] (French CJ, Kiefel, Bell, Keane, Nettle JJ).

is no need to look for fault on the part of the employer. The ability to hold employers vicariously liable for exemplary damages, in the absence of employer's fault, reflects the strict liability that underpins vicarious liability. Consequently, an employer's vicarious liability for exemplary damages does not represent any diminution of the fault required to award exemplary damages.

Exemplary damages are a different type of damages than compensatory damages. The overarching questions regarding vicarious liability for exemplary damages are better addressed by considering the proper basis for vicarious liability, rather than examining the specific requirements for exemplary damages. The questions regarding vicarious liability for exemplary damages are similar to vicarious liability for compensatory damages arising from an intentional tort. In each case there remains a significant lack of clarity regarding the basis of vicarious liability where there is egregious intentional wrongdoing by an employee.

J *Exemplary Damages are Separate from Aggravated Damages*

Aggravated and exemplary damages may be awarded in the same action, provided that appropriate care is taken not to double count.[76]

III Consciousness of Wrongdoing

As identified above, Australian courts have inquired whether the defendant engaged in 'conscious wrongdoing in contumelious disregard of the plaintiff's rights'[77] before awarding exemplary damages. That reflects the historical assumption that 'an element of conscious wrongdoing was always required.'[78] Currently, there is some doubt in Australian intermediate courts, derived from New Zealand authority, as to whether consciousness of wrongdoing is necessary to trigger exemplary damages.

A *New Zealand's Approach — Consciousness is Required*

1 A v Bottrill — *The Majority*

In *A v Bottrill*[79] the Privy Council held, by majority on an appeal from the New Zealand Court of Appeal, that: 'Intentional wrongdoing or conscious recklessness is

76 *Ibbett HCA* (2006) 229 CLR 638, 648 [35]–[36].

77 *Whitfeld* (1920) 29 CLR 71, 77 (Knox CJ), citing *Uren* (1966) 117 CLR 118, 138 (Taylor J), 147 (Menzies J), 154 (Windeyer J), 160 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 470 (Brennan J)*; Lamb* (1987) 164 CLR 1, 13; *Gray* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

78 Silvia M Demarest and David E Jones, 'Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?' (1986-7) 18 *St Mary's Law Journal* 797, 814.

79 [2003] 1 AC 449 ('*Bottrill*').

not an essential pre-requisite to an order for payment of exemplary damages. Legal principle does not require that the court's jurisdiction should be limited in this way.'[80]

The decision was by a slim majority and featured a strong dissent from Lords Hutton and Millett. The majority limited its decision to cases of negligence.[81] The majority and minority disagreement on the purpose of an award of exemplary damages was the significant reason for the difference in the result.

Unique attributes of New Zealand law had a significant impact on the decision. First, New Zealand has implemented a no fault accident compensation legislative regime. As a consequence of that scheme persons who suffer personal injury have no right to sue, except for exemplary damages.[82] A claim for exemplary damages is the only cause of action available for those plaintiffs focussed on vindicating their suffering using formal court processes. It could be argued that this has created increased focus on the availability of exemplary damages in New Zealand than elsewhere.

Second, the Privy Council applied the New Zealand common law test for exemplary damages of 'truly outrageous conduct'.[83] This is not the same as the Australian approach discussed above. The 'outrageous' test implies that the Court must be enraged at the conduct,[84] which distorts the assessment of damages by focussing on the court's view of the conduct rather than the defendant's culpability.

In considering the legal principles, the majority commenced its inquiry with the rationale of the jurisdiction to award exemplary damages. The majority explained its concern that a requirement of subjective advertence could lead to different treatment in different cases of equivalent outrageous conduct. The Court stated:

> In principle the limits of the court's jurisdiction to award exemplary damages can be expected to be co-extensive with this broad-based rationale. … It could not be right that certain types of outrageous conduct as described above should attract the court's jurisdiction to award exemplary damages and other types of conduct, satisfying the same test of outrageousness, should not, unless there exists between these types a rational distinction sufficient to justify such a significant difference in treatment.[85]

In making that statement, the Privy Council did not focus on the defendant's conduct from the defendant's perspective. Rather, it focussed on the outrageousness of the conduct viewed from the court or the plaintiff's perspective. The Privy Council

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80 Ibid 461 [50] (Lord Nicholls, delivering the majority decision).

81 Ibid 451 [2].

82 *Bottrill* [2003] 1 AC 449, 461 [53]; see, eg, *Donselaar v Donselaar* [1982] 1 NZLR 97.

83 *Bottrill* [2003] 1 AC 449, 452 [4], 456 [23]–[25].

84 David G Owen, 'Problems in Assessing Punitive Damages Against Manufacturers of Defective Products' (1982) 49 *University of Chicago Law Review* 47.

85 *Bottrill* [2003] 1 AC 449, 455–6 [22].

assumed that subjective advertence is not a controlling factor to assess whether conduct is outrageous.

Although noting the 'different forms of words [that] have been used, each with its own shades of meaning'[86] to describe the rationale of exemplary damages, the majority expressly relied upon a condemnation and retributive (or punishment) rationale.[87] However the majority decision is clearly premised on the condemnatory rationale having more significance. The critical part of the majority decision relied on the fact that a conscious or advertent mental state was not necessary to fulfil a condemnatory rationale.[88] In applying its reasoning, the majority said:

> if the judge decides that … the defendant's conduct satisfies the outrageous test *and condemnation is called for*, in principle the judge has the same power to award exemplary damages as in any other case [where conscious wrongdoing is found] satisfying this test.[89]

Although earlier referring to the retributive rationale, the majority gave it no emphasis in deciding whether conscious wrongdoing was necessary. The majority considered arguments that exemplary damages required conscious conduct because the criminal law requires subjective advertence did not assist consideration of the issue.[90] In particular, because 'criminal law is not exclusively confined to cases of advertent conduct',[91] it could not provide a principled basis to identify when punishment was necessary.[92]

The underlying reason for the majority's decision was that there was no sound basis to limit judicial discretion.[93] If the test of outrageous conduct was met, it was not appropriate to prevent the Court from exercising its outrage at that conduct by requiring conscious wrongdoing. In reaching that conclusion, the majority emphasised that exemplary damages are for exceptional cases only.[94] Further, it identified that ordinarily to satisfy the outrageousness test, 'misconduct will be of a subjectively advertent nature.'[95]

In addition to questions of principle, the majority considered questions of policy, particularly whether a test of conscious wrongdoing would limit the number of

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86 Ibid 455 [20].

87 Ibid.

88 Ibid 458 [37].

89 Ibid (emphasis added).

90 Ibid 457 [30].

91 Ibid.

92 Ibid 457 [29]–[30].

93 Ibid 456–7 [26]–[28]. Their Honours had regard to the idea that '"never say never" is sound judicial admonition': 456–7 [27].

94 Ibid 456 [25].

95 Ibid; see also 456 [24], 463–4 [64].

unsuccessful claims for exemplary damages.[96] That is an important access to justice issue. If the exemplary damages test is uncertain or difficult to apply it creates an unstable foundation for liability which might make settlements difficult, complicate the provision of advice, and cause delays and unpredictable decision making in the legal system. The majority considered that a test of conscious wrongdoing would not provide any additional certainty in the identification of those cases properly justifying exemplary damages.[97] If claimants were prepared to prove the outrageous criterion, it 'would seem unlikely' to deter them from seeking to persuade the court of a subjective advertence criterion.[98]

2 A v Bottrill — *The Minority*

The minority, Lords Hutton and Millett, expressly disavowed the condemnatory purpose of exemplary damages, in preference for the retributive purpose.[99] In so doing they were in direct disagreement with the majority. As a consequence, they held that the defendant could only be punished if there was a consciousness of wrongdoing. They said:

> if the primary purpose of exemplary damages is to punish, it follows that punishment should not be imposed unless the defendant has intended to cause harm to the plaintiff or has been subjectively reckless as to whether his conduct will cause harm.[100]

The minority relied on 'well-established principle'[101] to reach this point, namely: 'the notion that some guilty mind is a constituent part of crime and punishment [which] goes back far beyond our common law.'[102]

The minority also disagreed with the majority on the uncertainty point. They considered that uncertainty in the law would be increased if there was no threshold test of intent or recklessness as outrageous conduct was not a certain threshold.[103]

For reasons that follow, it is argued that the minority's view is more consistent with the High Court's approach to exemplary damages and legal principle.

96 Ibid 462 [54].

97 Ibid 463 [59].

98 Ibid.

99 Ibid 466 [77].

100 Ibid 465–6 [76].

101 Ibid.

102 Ibid, citing *Sweet v Parsley* [1970] AC 132, 156 (Pearce LJ).

103 *Bottrill* [2003] 1 AC 449, 466 [81].

B *Uncertainty — New South Wales Court of Appeal*

The New South Wales Court of Appeal has expressed diverging views about whether consciousness of wrongdoing is required to award exemplary damages.

1 New South Wales v Riley

In *New South Wales v Riley*[104] Hodgson JA, for the New South Wales Court of Appeal, suggested that conduct which was less than conscious wrongdoing could justify an award of exemplary damages. His Honour said:

> In my opinion, as made clear in *Gray*, while "conscious wrong-doing in contumelious disregard of another's rights" describes the greater part of the field in which exemplary damages may properly be awarded, it does not fully cover that field. Similarly malice is not essential: *Lamb v Cotogno*. Conduct may be high-handed, outrageous, show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing. However, ordinarily conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express the court's disapproval or (in cases where the defendant stood to gain more than the plaintiff lost) demonstrate that wrongful conduct should not be to the advantage of the wrong-doer.[105]

The Court of Appeal concluded there was no basis to award exemplary damages.[106] The case was pursued as one of conscious wrongdoing by the police in applying excessive force during the arrest and knowingly acting in excess of power. These obiter comments purported to comment on a matter not in issue and deduce a principle from the decisions in *Gray* and *Lamb*. Hodgson JA adopted the language of Lord Devlin in *Rookes*, and looked for conduct other than conscious wrongdoing in contumelious disregard. This focus was clearly on the condemnatory purpose of exemplary damages rather than the retributive purpose.

2 NSW v Ibbett — *New South Wales Court of Appeal*

In *New South Wales v Ibbett*[107] the New South Wales Court of Appeal considered the basis underpinning the award of exemplary damages. The High Court decision in this matter is discussed above, however, the limited grounds of appeal did not deal with these questions regarding consciousness of wrongdoing. Mrs Ibbett pursued causes of action in both assault and trespass to land. Each member of the Court of Appeal dealt with the two causes of action separately and made separate findings of fact in relation to the police officers' states of mind for the different causes of action.

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104 (2003) 57 NSWLR 496.

105 Ibid 530 [138].

106 Ibid 531 [141]–[143].

107 (2005) 65 NSWLR 168.

The Court awarded exemplary damages for the assault on the basis that the defendant had acted consciously in contumelious disregard of the plaintiff's rights.[108] The factual finding was that in drawing his gun the officer intended to cause the plaintiff to apprehend immediate personal violence.[109]

Trespass to land was more complicated. A majority (Ipp and Basten JJA) required there to be a consciousness of wrongdoing before exemplary damages could be awarded.[110] However, a differently constituted majority awarded exemplary damages on the facts. Chief Justice Spigelman awarded exemplary damages for the trespass to land on the basis that consciousness of wrongdoing was not required, and on his view of the facts there was no consciousness in this case.[111] Justice of Appeal Basten awarded exemplary damages for the trespass to land on the basis that a finding of consciousness of wrongdoing was open on the facts.[112] Justice of Appeal Ipp, in dissent on the result, declined to award exemplary damages for the trespass to land on the basis that there was no conscious (deliberate or reckless) wrongdoing.[113]

(a) The Majority's View — Consciousness is Required

Justice of Appeal Basten, with whom Ipp JA agreed on this point,[114] emphasised that exemplary damages, however the scope of the power be described, 'fastens on … the state of mind of the tortfeasor'.[115] In requiring consciousness of wrongdoing, he explained that: 'to say that the conduct has some 'objective' element is apt to mislead if it is intended to identify some element of severity or seriousness, absent a particular state of mind.'[116]

Further, Basten JA considered that conscious wrongdoing in contumelious disregard is a composite phrase, and care ought to be taken not to break it down into parts, which obscure its meaning. Accordingly, the proper meaning does not require 'consciousness of each of the elements of a crime or tort.'[117]

(b) Chief Justice Spigelman's View — Consciousness Not Required

Chief Justice Spigelman considered that 'subjective advertence to or knowledge of actual wrongdoing is not … essential before exemplary damages can be awarded.'[118]

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108 *Ibbett NSWCA* [2005] NSWCA 445, [28] (Spigelman CJ), [137] (Ipp JA), [244] (Basten JA).

109 Ibid [137] (Ipp JA).

110 Ibid [177], [180]–[181] (Ipp JA), [233]–[257] (Basten JA).

111 Ibid [59]–[60], [102].

112 Ibid [257].

113 Ibid [177]–[178], [182].

114 Ibid [177]–[178], [181].

115 Ibid [233].

116 Ibid.

117 Ibid [234].

118 Ibid [44].

In reaching this view, his Honour cited *Riley* discussed above. His Honour reasoned that recklessness is not necessarily conscious,[119] that 'high handed conduct' is not necessarily knowingly wrongful,[120] and that the purpose of condemnation embodied in exemplary damages does not necessarily require subjective advertence of wrongdoing.[121] His Honour echoes the majority's view in *Bottrill*, discussed above.

Chief Justice Spigelman does not clearly state the test to determine an award of exemplary damages but appears to accept the position that 'outrageous' conduct can be sufficient. This is not consistent with High Court authority which, by requiring contumelious disregard of a plaintiff's interests, focuses clearly on the defendant's attitude to the plaintiff. It requires an assessment of the defendant's subjective state of mind and their conduct towards the plaintiff. 'Outrageous conduct' is an objective test. It focuses the inquiry on whether the Court is outraged by the conduct, rather than specifically looking at the defendant's state of mind about the conduct towards the plaintiff.

Moreover, in reaching this view, his Honour did not give weight to the orthodox approach stated by the High Court in *Gray*, discussed below. His reasoning does not properly reflect the meaning of 'recklessness' which necessarily entails some element of subjective advertence, also discussed further below. Despite his views referred to above, his Honour nevertheless recognises that although a finding of conscious wrongdoing is not dispositive of a case for exemplary damages, it is 'of considerable significance in that regard'.[122]

C *The High Court — Earlier Decisions Contrary*

In *Gray* the joint judgment identified the 'greater part of the field' being 'conscious wrongdoing in contumelious disregard.'[123] Later the joint judgment suggested that although it was unnecessary to decide, the test embracing the composite phrase of consciousness of wrongdoing in contumelious disregard, may be almost exclusive.[124] In dealing with the question of whether exemplary damages were available in the tort of negligence, the joint judgment stated:

> First, exemplary damages *could not properly be awarded* in a case of alleged negligence in which there *was no conscious wrongdoing* by the defendant. … But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff.[125]

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119 Ibid [42].

120 Ibid.

121 Ibid [40].

122 Ibid [55].

123 *Gray* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

124 Ibid 9 [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

125 Ibid 9–10 [22] (emphasis added).

Accordingly, in cases framed in negligence, conscious wrongdoing is necessary. *Gray* did not address the contention that conscious wrongdoing is not required — the Court did not need to on the facts. Although pleaded in negligence *Gray* was conducted as a case of conscious wrongdoing. The plaintiff sued the third party insurer in respect of injury caused by the driver of the motor vehicle who had been convicted of intentionally causing grievous bodily harm in relation to the same incident. There are no Australian High Court cases where exemplary damages have been awarded for less than conscious conduct.

The majority in *Bottrill* relied on *Gray*, suggesting that it has left open the possibility of exemplary damages in cases where there is no conscious wrongdoing.[126] However *Gray* is an example of judicial caution, deciding only the case before it, whilst signalling very clearly that conscious wrongdoing is required. There is nothing to suggest that any cases outside the 'field' of Knox CJ's test are inadvertent conduct. Such a result is inconsistent with the retributive purpose of the award, discussed in further detail below.

One issue considered in *Lamb* was whether the Court could allow exemplary damages where the master described the relevant conduct as 'callous' against a finding that there was no actual malice in the relevant conduct. The Court concluded that the conduct in the whole of the incident justified exemplary damages. It considered leaving the plaintiff on the side of the road in combination with the immediately preceding tort (battery using the car). After noting that there was no finding of malice, the Court said:

> Whilst there can be no malice without intent, *the intent or recklessness necessary* to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word.[127]

In stating 'intent or recklessness [is] necessary to justify … exemplary damages' the Court required conscious wrongdoing. Interestingly, Spigelman CJ in *Ibbett NSWCA* suggested that the reference to recklessness in *Lamb* did not extend to 'conscious recklessness' and recklessness did not require 'consciousness of wrongdoing.'[128] However, he did not explain why that was so. Recklessness is a legal term. It is a subjective state of mind, requiring actual knowledge of risk on the part of the defendant. It is accepted that: 'conduct is relevantly reckless if there is foresight on the part of an accused of the probable consequences of his actions and he displays indifference as to whether or not those consequences occur.'[129]

Reckless conduct, being subjective, is properly within the class of conscious wrongdoing.

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126 *Bottrill* [2003] 1 AC 449, 460 [45].

127 *Lamb* (1987) 164 CLR 1, 13 (emphasis added).

128 *Ibbett NSWCA* [2005] NSWCA 445, [41].

129 *R v Nuri* [1990] VR 641, 643 citing *R v Crabbe* (1985) 156 CLR 464.

D *The Meaning of 'Contumelious'*

The meaning of 'contumelious' further indicates that the court ought to be looking at a subjective state of mind in order to award exemplary damages. The Macquarie Dictionary defines 'contumely' to mean '1. insulting manifestation of contempt in words or actions; contemptuous or humiliating treatment' and '2. a humiliating insult.' Contempt is defined as 'the *feeling* with which one regards anything considered mean, vile or worthless'.[130] On the basis of the definitions, in order for a court to find that a defendant acted in contumelious disregard of a plaintiff's rights, it must be satisfied regarding the defendant's feelings or state of mind towards the plaintiff. The language of contumely, contempt and humiliation, focuses on subjective feelings.

This interpretation is consistent with the historical understanding of contumelious which was described to be conduct which is 'wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like.'[131]

E *Purpose*

The argument about whether consciousness of wrongdoing is an essential element of exemplary damages comes down to an assessment of the proper purpose or rationale for exemplary damages. The Privy Council in *A v Bottrill* and the New South Wales Court of Appeal in *Ibbett*, each divided according to the purpose of the award of exemplary damages. Those judges who considered an award of damages might be awarded for inadvertent conduct, or conduct which did not amount to conscious wrongdoing, accepted that a condemnatory purpose of the award alone was sufficient to justify the power to award exemplary damages.[132] The judges who considered that exemplary damages were limited to conscious wrongdoing applied a retribution rationale.[133] Implicit in their reasoning, punishment would only be deserved if the plaintiff had a subjective mental state or conscious wrongdoing, to justify the imposition of punishment by the civil court. Consequently, the following part considers the proper purpose of an award of exemplary damages.

IV Purpose of Power to Award Exemplary Damages — Controlling the Scope of the Award

The foregoing parts demonstrate that the purpose of exemplary damages is stated differently in various cases. The stated purpose is critical to tying together the

130 Susan Butler (eds), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2009), 369, 373 (emphasis added).

131 Harvey McGregor, 'Mayne & McGregor on Damages' (1963) 21 *Cambridge Law Journal* 144, 196, cited in *Uren* (1966) 117 CLR 118, 122–123 (Windeyer J).

132 *Bottrill* [2003] 1 AC 449, 458 [37]; *Ibbett NSWCA* [2005] NSWCA 445, [40]–[44] (Spigelman CJ).

133 *Bottrill* [2003] 1 AC 449, 465 [76]; *Ibbett NSWCA* [2005] NSWCA 445, [232]–[234] (Basten JA).

application of the test and identifying the proper scope of the remedy.[134] It can be expected that the 'limits of the court's jurisdiction to award exemplary damages … be co-extensive with [its] broad-based rationale.'[135] If a court relies upon the condemnatory aspect of punishment, it can broaden the application of exemplary damages to conduct less than conscious wrongdoing.

A *Effects of Exemplary Damages — Aspects of Punishment*

The punishment purpose for exemplary damages is a common theme of exemplary damages cases. Different cases rely upon different effects of the imposition of the penalty when discussing the purpose of exemplary damages.

Punishment is the imposition of a penalty on the defendant, or can also specifically refer to the 'retributive' aspect of the imposition of punishment.[136] In the case of exemplary damages the retributive aspect is the imposition of the pecuniary penalty in addition to any compensatory damages awarded to the plaintiff. In criminal contexts there are other types of punishments imposed such as imprisonment or a criminal record. Australian cases have used the retributive aspect as the rationale for exemplary damages.[137] Inherent in the imposition of a penalty is the recognition of fault or conduct which justifies penalty,[138] or to ensure that the defendant has their just deserts.

In addition to the retributive aspect, courts often justify a punishment by reference to the effects of the imposition of a penalty in the context of formal court proceedings. The following four categories of the effects of punishment are consequences derived from the imposition of a penalty and could not occur to the same extent without a penalty being imposed.[139]

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134 *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, 145 [64]–[68] ('*Kuddus*'); Jason N E Varuhas, 'Exemplary Damages: 'Public Law' Functions, Mens Rea and Quantum' (2011) 70 *Cambridge Law Journal* 284, 285–6; Joanna Manning, 'Exemplary Damages and Criminal Punishment in the Privy Council' (1999) 7 *Torts Law Journal* 1, 5.

135 *Bottrill* [2003] 1 AC 449, 455–6 [22].

136 Retributive function reflects criminal sentencing language. See, eg, Michele Cotton, 'Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment' (2000) 37 *American Criminal Law Review* 1313, 1315, 1361.

137 See, eg, *Whitfeld* (1920) 29 CLR 71, 81 (Isaacs J); *Herald and Weekly Times* (1928) 41 CLR 254, 266 (Isaacs J), 272 (Higgins J); *Fontin* (1962) 108 CLR 177; *Uren* (1966) 117 CLR 118, 123–127 (McTiernan J), 130–131 (Taylor J), 145 (Menzies J), 149 (Windeyer J), 158 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 462–3 (Gibbs CJ), 471 (Brennan J); *Lamb* (1987) 164 CLR 1, 9; *Gray* (1998) 196 CLR 1, 6 [12] (Gleeson CJ, McHugh, Gummow, Hayne JJ), 28–29 [86] (Kirby J).

138 See, eg, the minority in *Bottrill* [2003] 1 AC 449.

139 A similar approach was adopted in Recent Development, 'The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages' (1966) 41 *New York University Law Review* 1158.

Firstly, the penalty imposed may deter the defendant from conducting similar wrongs in future — specific deterrence. Some Australian judges have justified an award of exemplary damages on the basis of specific deterrence.[140] For example, in *XL Petroleum (NSW) Pty Ltd v Caltex Oil* Brennan J considered that an award of exemplary damages 'is intended to punish the defendant … and to deter him from committing like conduct again.'[141]

Secondly, a punishment imposed on a defendant may deter others in the community from undertaking similar wrongs in future. This is known as general deterrence. Some Australian judges have used general deterrence to justify an award of exemplary damages.[142]

Some cases do not clearly distinguish between specific deterrence or general deterrence.[143] The two are closely linked. Whatever penalty operates to deter a specific wrongdoer also creates a threat to future potential wrongdoers in the community.[144] However, where specific deterrence is the rationale for exemplary damages, certain matters would be taken into account on an assessment of damages, for example the defendant's capacity to meet the award. If general deterrence were to be the sole rationale, then there would be no basis to consider the defendant's capacity to meet the award.[145]

Thirdly, an award of exemplary damages in civil proceedings and the consequent windfall gain provides the plaintiff with some personal vindication beyond the finding of liability. The plaintiff is vindicated by the court recognising the defendant's wrongdoing, laying blame on the defendant and providing the plaintiff with the fruits of the court's recognition of that blame, the exemplary damages. In other words the plaintiff's interest in retribution is satisfied by both the process and the 'windfall' gain, vindication of the plaintiff. Rarely have courts justified exemplary damages on this basis.[146] Vindication of the plaintiff is one of the most controversial

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140 *Uren* (1966) 117 CLR 118, 149 (Windeyer J), 158 (Owen J); *XL Petroleum* (1985) 155 CLR 448, 471 (Brennan J); *Lamb* (1987) 164 CLR 1, 9.

141 *XL Petroleum* (1985) 155 CLR 448, 471; see also 462–3 (Gibbs CJ), referring to punishment as the basis to assess quantum of an award.

142 See, eg, *Uren* (1966) 117 CLR 118, 158 (Owen J); *Lamb* (1987) 164 CLR 1, 9, 10; *Gray* (1998) 196 CLR 1, 7 [15] (Gleeson CJ, McHugh, Gummow, Hayne JJ); *Ibbett HCA* (2006) 229 CLR 638, 649 [40].

143 See, eg, *Whitfeld* (1920) 29 CLR 71, 81 (Isaacs J); *Uren* (1966) 117 CLR 118, 130 (Taylor J), 158 (Owen J).

144 John Smillie 'Exemplary Damages and the Criminal Law' (1998) 6 *Torts Law Review* 1, 2.

145 Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 *Oxford Journal of Legal Studies* 87, 101–2; see also Michael J Legg, 'Economic Guidelines for Awarding Exemplary Damages' (2004) 30 *Monash University Law Review* 303, 312.

146 See, eg, *Herald and Weekly Times* (1928) 41 CLR 254, 266 (Isaacs J); *Uren*, (1966) 117 CLR 118, 148–150 (Windeyer J); *Lamb* (1987) 164 CLR 1, 9.

stated rationales for exemplary damages, having been rejected by some authors as having any proper role.[147] The High Court has acknowledged that it remains, despite having less force than it had in the past.[148] In at least some cases, it is the personal vindication arising from exemplary damages which motivates a plaintiff to pursue proceedings which might not otherwise be pursued.[149]

Finally, there is a public denunciation or example made of the defendant, condemnation. The condemnatory purpose has been used to justify exemplary damages together with a retributive aspect.[150] Condemnation is naturally aligned with deterrence, where the public message deters others from acting in a similar way in the future.[151] Kirby J in *Gray* said:

> But [punishment] is not the sole reason for the award of such damages. The more recent cases on the subject, including in this Court, have accepted that such damages may be recovered whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world.[152]

Although there is a general reference to 'recent cases' none are specifically identified. This recognises a different interest from punishment (imposing a penalty), namely disapprobation. When the court imposes an exemplary damages award, given the rare circumstances in which such awards are made, it makes a strong representation about its view regarding the severity of the defendant's conduct. In this way, the imposition of the exemplary damages penalty facilitates the court marking its disapproval or making an example of the defendant. As identified above, in *Bottrill* and *Ibbett NSWCA*, the condemnation rationale justified an amendment to the scope of the application of exemplary damages. The retributive aspect of imposing a penalty in public court proceedings enables the public condemnation of the defendant which may have the effect of deterring future wrongs and vindicating the plaintiff.

B *Retributive vs Non-Retributive Purposes — Protecting Different Interests*

As punishment is more usually the province of criminal law[153] it is helpful to consider criminal law punishment theories and rationale. The proper purpose of

147 Hugh Evander Willis, 'Measure of Damages when Property is Wrongfully taken by a Private Individual' (1908–9) 22 *Harvard Law Review* 419*,* 420; Beever, above n 145, 97.

148 *Lamb* (1987) 164 CLR 1, 9–10.

149 McCormick, above n 68, 130.

150 *Herald and Weekly Times* (1928) 41 CLR 254, 266 (Isaacs J); *Uren* (1966) 117 CLR 118, 127 (McTiernan J), 131 (Taylor J); *Lamb* (1987) 164 CLR 1, 10; *Gray* (1998) 196 CLR 1, 6 [12] (Gleeson CJ, McHugh, Gummow, Hayne JJ), 28–29 [86] (Kirby J).

151 Rice, above n 2, 309.

152 *Gray* (1998) 196 CLR 1, 28–29 [86].

153 Glanville Llewelyn Williams and B A Hepple, *Foundations of the Law of Tort* (Butterworth, 1976) 2.

criminal punishment, to the extent that either retribution or condemnation prevails, is a complex sociological question subject to intense academic debate.

Whilst it is beyond the scope of this paper to delve into the arguments in any real depth, modern Australian sentencing practice reflects a strong emphasis on retribution. Proportionality to the offending is the guiding principle for criminal sentencing.[154] Although legislation requires courts to look beyond a strict retributive focus, and take into account factors such as deterrence and the defendant's circumstances to reach an appropriate sentence in applying the legislation, sentencing judges must impose a sentence proportionate to the offending.[155] Having regard to the protection of society is only one factor in imposing that sentence.[156] A court may not allow the protection of the society to predominate so as to impose preventative detention.[157] Thus Australian criminal law sentencing practice places significant importance on retribution and matters personal to the defendant, whilst maintaining as a secondary consideration the protection of society.

Australian criminal law sentencing practice is not directly transferable to questions of exemplary damages, where personal liberty is not in issue. However, the principles underlying criminal law sentencing provide helpful guidance.

This discussion demonstrates that as one moves away from retributive purposes towards the non-retributive purposes (such as general deterrence and condemnation) the individual defendant is removed from the consideration.[158] General deterrence and condemnatory purposes are both focussed on community needs and the court's communicative functions. The imposition of a penalty on the defendant is the means by which the community interests are pursued. Even specific deterrence is about protecting society from that defendant, not about ensuring that defendant is rehabilitated or receives their just deserts. If these communicative functions are the predominant basis for the imposition of the penalty, the rights of the defendant might be subordinated to the wider community interests.

C S Lewis has argued that the concept of fault by the defendant is the only way in which punishment can be just.[159] Similarly, Lords Hutton and Millet explained in *Bottrill* that fault or a 'mental element' by the defendant is the justification for any penalty being imposed.[160] The exemplary damages are provided to the plaintiff as

154 *Chester v The Queen* (1988) 165 CLR 611, 618, citing *Veen v The Queen [No 1]* (1979) 143 CLR 458, 467, 468, 482–483, 495; *Walden v Hensler* (1987) 163 CLR 561; *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472–474, 485–486.

155 See, eg, *Criminal Law Sentencing Act 1988* (SA) s 10.

156 *Veen v The Queen (No 2)* (1979) 143 CLR 458, [9]–[10] (Mason CJ, Brennan, Dawson, Toohey JJ).

157 Ibid.

158 C S Lewis, 'The Humanitarian Theory of Punishment' [1954] *Res Judicatae* 224, 225.

159 Ibid.

160 *Bottrill* [2003] 1 AC 449, 465 [76].

a windfall gain over and above compensation of their actual loss. If the significant departure from the compensatory purpose of tort law is to be justified, fault is a necessary component.

Further, fault enhances the specific deterrent value of the penalty. If a penalty is imposed for conscious wrongdoing and acts on the consciousness, it is a certain punishment. It seems to the defendant to be less arbitrary and more deserved if it attaches to their specific state of mind, as opposed to an external objective judgement of conduct.

C *Australia's Recent Shift from Retributive Focus*

In *Gray*, the majority continued to emphasise retribution and deterrence as the rationale for exemplary damages.[161] The majority also emphasised that the focus of the inquiry is the defendant's wrongdoing[162] further enhancing the retributive aspect of exemplary damages.[163] However, complex and emotional factual situations have pushed the High Court's focus away from a retribution or deterrence rationale toward the community centred condemnatory focus.

In *Lamb*, the High Court unanimously relied on the plaintiff's vindication interest and the condemnatory effects of the penalty to justify awarding exemplary damages where the defendant was insured.[164] The defendant did not have to pay the exemplary damages award. Accordingly, concepts of retribution and imposing a proportionate penalty on the defendant were not relevant to the award because, in a practical sense, the insurer was to bear the liability.

Ibbett HCA, discussed above, imposed vicarious liability for exemplary damages. The statutory context in *Ibbett HCA* makes it difficult to extrapolate a general principle. Legislation transferred liability from the employee police officers to the State. As discussed above, whilst there is some retributive aspect to the award, insofar as the State's conduct was relevant to the liability for exemplary damages, that was not the stated basis for the finding of vicarious liability. The State had admitted it was vicariously liable pursuant to the legislation.[165] The Court considered exemplary damages were appropriate to vindicate the strength of the rule of law and to deter the conduct of other officers.[166] It appeared to apply community focused purposes of exemplary damages. This might be a signal, albeit not strong, of a shift away from a retributive purpose.

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161 *Gray* (1998) 196 CLR 1, 7 [15] (Gleeson CJ, McHugh, Gummow, Hayne JJ).

162 Ibid.

163 Note that Kirby J in dissent referred to recent cases where curial disapprobation could justify an award of exemplary damages whatever the subjective intention of the tortfeasor: *Gray* (1998) 196 CLR 1, 28–29 [86].

164 *Lamb* (1987) 164 CLR 1, 10.

165 *Ibbett HCA* (2006) 229 CLR 638, 639.

166 Ibid 649–650 [39]–[40].

V Conclusion

Whilst the underlying purpose of torts within the common law system is a debated issue[167] the generally accepted principle is that the primary role is to compensate plaintiffs for harm incurred.

Exemplary damages do not fit into the compensatory framework, instead existing to punish the defendant for wrongdoing. This inconsistency has provided the underlying criticism of exemplary damages since at least the 1800s. Critics argue that punishment has no place in tort law and cannot justify a windfall gain to the plaintiff. Where the case law is unclear about the appropriate scope of exemplary damages, the potential windfall gain creates significant practical issues in resolving disputes prior to costly trials. Despite ongoing academic criticism of exemplary damages, courts have considered that they serve a valuable purpose, filling an 'otherwise … regrettable lacuna.'[168]

Some courts have recognised that, in addition to ensuring that the defendant is punished for their wrongdoing, an award of exemplary damages provides a tool to achieve community focussed ideals of communicating the court's view of the conduct and deterring future wrongdoing. The communicative functions arise by the imposition of a penalty beyond the compensatory damages.

There is a difficult sociological question as to whether a civil law penalty can be justified where the primary purpose of the penalty is to achieve community based goals of condemnation of conduct or communication of a deterrent message. Australian law recognises a retributive purpose of exemplary damages. Australian courts have primarily focused on the quality of the conduct of the defendant in justifying the imposition of a penalty. Only in recent cases has there been a shift toward justifications based on condemnation or communication rationales.

Traditionally fault, in terms of subjective or conscious wrongdoing, justifies punishment. Without fault, societal interests are elevated above the defendant's interests. In the absence of some consciousness of wrongdoing by the defendant, the windfall gain of exemplary damages is not justified. By allowing exemplary damages where there is less than conscious wrongdoing, the condemnatory or communicative functions of punishment prevail over the retributive effects so that the society's interests are elevated to cause the plaintiff's interests to prevail over the defendant's interests. Accordingly, the inconsistency between the compensatory purpose of tort law and the punishment purpose of exemplary damages is minimised if conscious wrongdoing is a necessary precondition to trigger an award of damages.

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167 See, eg, discussions of corrective justice and rights based theories in Carol Harlow, 'A Punitive Role for Tort Law?' in Carol Harlow, Linda Pearson, and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 247; Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Thomson Reuters, 2011) 211; John Murphy, 'Misfeasance in a Public Office: A Tort Law Misfit' (2012) 32 *Oxford Journal of Legal Studies* 51.

168 *Kuddus* [2002] 2 AC 122, 145 [63] (Lord Nicholls); see also *Uren* (1966) 117 CLR 118.