THE PURIFICATION OF TORTS, THE CONSOLIDATION OF CRIMINAL LAW AND THE DECLINE OF VICTIM POWER

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Abstract

Gray v Motor Accidents Commission (1998) 196 CLR 1 resolved that the most appropriate arena for the punishment of individual wrongdoing resides within the Australian criminal law. The consequence of this decision is that wrongful acts may no longer give rise to exemplary damages in tort where a criminal charge is also laid. This article explores the consequences of *Gray* in terms of the evacuation of victim power in tort. It does this by examining how the last vestiges of the power of the victim to punish have now been absorbed by the state. A complete understanding of the issues at play in *Gray* not only indicates how victims have traditionally laid claim to the punitive process, but also explains why sectarian interests such as those of the victim continue to remain significant within the criminal jurisdiction, at least in terms of a politics of law reform.

I INTRODUCTION

Exemplary damages are designed to punish the defendant. Exemplary damages do this by effecting retribution, deterring the defendant and others from repeating the wrongful conduct, and conveying the disapproval of the jury or court.[1] These damages may also serve to satisfy the urge for revenge felt by victims. As such, exemplary damages may discourage the use of unlawful vengeance by victims following a tort.[2] However, the availability of exemplary damages has been curtailed in recent times in response to several concerns as to the

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1 See Law Commission of England and Wales (1997) *Aggravated, Exemplary and Restitutionary Damages*, Item 2 of the Sixth Programme of Law Reform, 53.

2 Cf *Merest v Harvey* (1814) 128 ER 761.

double punishment of tortfeasors, in both civil and criminal law.[3] Where the same set of facts lead to a civil claim for exemplary damages and a criminal charge, the courts have tended to restrict the availability of exemplary damages in favour of the criminal charge. In such instances, the awarding of exemplary damages is not seen as an adjunct to the laying of a criminal charge, but as undermining the fundamental purpose of the criminal law as the jurisdiction responsible for the punishment and correction of aberrant or offensive conduct. There is arguably, a perceived need to purify torts of punitive power and to consequently consolidate punishment within the criminal jurisdiction. The extent to which punitive power prevails in tort alongside the criminal charge was the issue in dispute in *Gray v Motor Accidents Commission* ('*Gray*').[4]

The facts of *Gray* indicate how the same incident may give rise to a claim for exemplary damages and a criminal charge. In 1988, the plaintiff Gray experienced a personal injury when the tortfeasor purposely drove his car into him. In 1991, the tortfeasor was convicted of intentionally causing grievous bodily harm to the victim/plaintiff and was sentenced to seven years' imprisonment. In 1993, the plaintiff brought an action in negligence against the tortfeasor for personal injury. Exemplary damages formed part of the claim. The insurer was substituted as defendant. The trial judge made an award in favour of the plaintiff but refused to award exemplary damages on the basis that the tortfeasor had been punished in a criminal court, thus obviating the purpose of the award. An appeal to the Supreme Court of South Australia was unsuccessful. The plaintiff appealed to the High Court.[5]

The characterisation of the role of the plaintiff as irrelevant to the awarding of exemplary damages was fundamental to the decision making process of the High Court in *Gray*.[6] With this in mind, the development of the criminal jurisdiction as the appropriate arena for the punishment of wrongdoing, separate from the private interests of the plaintiff, guided the court as to the extent to which punitive interests ought to prevail in tort.[7] In *Gray*, the juxtaposition of the state's right to punish offenders against the expression of the private interests of the victim in tort establishes how the punitive interests of the victim have been removed from tort for the development of criminal law and justice as a state enterprise.[8] The discursive 'contraction' of the punitive role of the victim in civil law alongside the discursive 'expansion' of the

3 As to authority on double punishment, see *Pearce v The Queen* (1998) 194 CLR 610.
4 (1998) 196 CLR 1.
5 *Gray* (1998) 196 CLR 1, 1.
6 *Gray* (1998) 196 CLR 1, 4-5, 7-8.
7 *Gray* (1998) 196 CLR 1, 13-15.
8 *Gray* (1998) 196 CLR 1, 31.

power of the state in administering the punitive process is fundamental to the majority and minority judgments.[9] Here, the court characterises the punitive power of the victim and state as different in nature but equal in control.[10] We see this with the reference of the majority judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ to the fact that the outcome of an exemplary award is equal to that of criminal punishment.[11] For the majority, civil and criminal punishment seeks to punish and deter aberrant or offensive conduct.[12] This warrants the curtailment of the simultaneous exercise of each power for want of 'double punishment'.[13] The majority in *Gray* held that a defendant subject to criminal and civil proceedings would be unduly punished if punitive power were applied twice for the same conduct.[14]

By inference, *Gray* also affirms that punitive power should be exercised by the agent which has subsumed responsibility for punitive control – the state.[15] *Gray* thus indicates how the right to remedy individual wrongdoing can be subsumed by the state. Importantly, mapping the transfer of punitive power as something exercisable by the state rather than the individual victim indicates how criminal law and procedure came to be included within the jurisdiction of the state through the articulation of a rhetoric of state power and sovereignty over the body of each person. This rhetoric excludes private or sectarian interests, rationalising punishment as something that ought to be exercised by the state for the purpose of the maintenance of all society.[16] For Beever this justifies exemplary damages as an award that marks the court's condemnation of the acts of the defendant, over the vindication of the private rights of the victim.[17] Beever notes:

> [I]t is widely held that punishment can be merited though no one has been harmed – possession of drugs being an obvious example. Hence, in awarding exemplary damages, a court cannot be taken to be concerned with the rights

9 *Gray* (1998) 196 CLR 1, 7-8 (Gleeson CJ, McHugh, Gummow, Hayne JJ); 31 (Kirby J); 40-41, 50 (Callinan J).

10 *Gray* (1998) 196 CLR 1, 14.

11 *Gray* (1998) 196 CLR 1, 14.

12 Criminal punishment tends, however, to be rationalised in other ways. This includes the rehabilitation of the offender, and, to a lesser extent, the urge for moral retribution felt by the victim and others. As to the need to consider competing interests in sentencing, see *R v Veen [No 1]* (1979) 143 CLR 458 and *R v Veen [No 2]* (1988) 164 CLR 465.

13 *Gray* (1998) 196 CLR 1, 14.

14 *Gray* (1998) 196 CLR 1, 13-15.

15 *Gray* (1998) 196 CLR 1, 13-17, 31.

16 Tyrone Kirchengast, *The Victim in Criminal Law and Justice* (1st ed, Houndmills, Basingstoke, Hampshire, UK: Palgrave Macmillan, 2006) 51-54.

17 A Beever, 'The Structure of Aggravated and Exemplary Damages', (2003) 23(1) *Oxford Journal of Legal Studies* 87.

> of the claimant. The court is expressing condemnation of the defendant, but condemnation of the defendant does not imply vindication of the claimant.[18]

The origins of this rhetoric may be found in the expression of the right of the King to the body of the accused to preserve the bodily integrity of all men for the purpose of war.[19] However, the contested removal of the last vestiges of these sectarian interests from criminal law, in this case that of the punitive power of the individual victim, indicates why such issues continue to present as significant within criminal justice doctrine. A complete understanding of the issues at play in *Gray* thus not only contributes to our understanding of the consolidation of criminal law around the interests of the state and society a *priori*, but also explains why sectarian interests such as those of the victim continue to remain significant within the criminal jurisdiction, at least in terms of a politics of law reform.[20]

Under English law, exemplary damages may be awarded where the facts satisfy the categories test[21] and the cause of action test.[22] The categories test was articulated by the House of Lords in *Rookes v Barnard*.[23] Here, Lord Devlin stated that exemplary damages were anomalous, for the reason that they confuse the civil and criminal functions of the law.[24] However, his Lordship was constrained by precedent from abolishing exemplary damages, and so instead restricted the extent of their availability.[25] His Lordship reclassified some apparently punitive past awards as compensatory, under the head 'aggravated

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18 Beever, above n 17, 99.

19 *R v Coney* (1882) 8 QBD 534-535.

20 *Gray* (1998) 196 CLR 1, 32-33; Such issues may include the proper role of the victim in sentencing, the entitlement of the victim to statutory crimes compensation, the function of a declaration of a Charter of Victim Rights, etc.

21 The restriction of the availability of exemplary damages was settled in English law in *Rookes v Barnard* [1964] AC 1129 through the establishment of categories for which exemplary damages would be available. These included: oppressive, arbitrary or unconstitutional action by servants of the government; wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the plaintiff; and where such an award is expressly authorised by statute.

22 The availability of exemplary damages in English law is tempered by the holding that only those causes of action identified before *Rookes v Barnard* [1964] AC 1129 remain valid at common law. The Law Commission of England and Wales, above n 1, 54, suggests that '[t]he cause of action test, which further restricts the availability of exemplary damages, was formulated more recently by the Court of Appeal in *AB v South West Water Services Ltd* [1993] QB 507. The test requires that the causes of action for which exemplary damages are claimed are causes of action for which such damages had been awarded before *Rookes v Barnard* [1964] AC 1129'.

23 [1964] AC 1129.

24 *Rookes v Barnard* [1964] AC 1129, 1221; Law Commission of England and Wales, above n 1, 53.

25 *Rookes v Barnard* [1964] AC 1129, 1225-1226.

damages'.[26] This reclassification sought to capture most claims for exemplary damages. Lord Devlin stated that where a tort fell beyond these categories, it would generally be punishable as a crime.[27]

The categories test therefore entails that exemplary damages will not be available unless the case falls within one of three categories. This test has, however, been rejected in Australian law in *Uren v John Fairfax & Sons Ltd* ('*Uren*').[28] The High Court did accept Lord Devlin's clarification that damages had different objects, punishment being one, but rejected his Lordship's ruling that torts not remedied by compensatory damages would be punished as a crime. Taylor J stated:

> I agree that there was, perhaps, some room for a more precise definition of the circumstances in which exemplary damages might be awarded. But with great respect, I do not feel as Lord Devlin did, that such a far-reaching reform as he proposed, and in which the other Lords of Appeal engaged in the case agreed, was justified by asserting that punishment was a matter for the criminal law. No doubt the criminal law prescribes penalties for wrongs which are also crimes but it prescribes no penalty for wrongs which are not at one and the same time crimes, and in both types of cases the courts of this country, and I venture to suggest the courts of England, had admitted the principle of exemplary damages as, in effect, a penalty for a wrong committed in such circumstances or in such manner as to warrant the court's signal disapproval of the defendant's conduct.[29]

Uren left open the scope and nature that exemplary damages would play in Australian law. Tilbury, Noone and Kercher remarked that until recently, Australian courts have been content to leave the circumstances in which exemplary damages are applicable as indeterminate.[30] The trend more recently, however, has been to restrict the ambit of exemplary damages in both Australian and English law by either the enunciation of categories of matters for which exemplary damages are available, or the restriction of the availability of exemplary damages on the basis that certain preconditions are met.[31] This is also the case in *Gray*, in terms of the availability of exemplary damages alongside the criminal charge.

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26 *Rookes v Barnard* [1964] AC 1129, 1226.

27 *Rookes v Barnard* [1964] AC 1129, 1225; See J Swanton and B McDonald, 'Commentary on the Report of the English Law Commission on Aggravated, Restitutionary And Exemplary Damages', (1999) 7 *Torts Law Journal* 2, 184-202, 202.

28 (1966) 117 CLR 118; Upheld on appeal to the Privy Council. See *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 (PC).

29 *Uren* (1966) 117 CLR 118, 131.

30 M Tilbury, M Noone and B Kercher, *Remedies: Commentary and Materials* (3rd ed, Sydney: Lawbook Co, 2000), 485.

31 This may include the abolition of exemplary damages entirely, such as the case with personal injury damages arising out of negligence, following the *Civil Liability Act 2002* (NSW) s 21.

The reform of the availability of exemplary damages has led to the increased restriction of punitive victim power within the civil jurisdiction. The restriction of the role of the victim in the course of legal proceedings, in particular his/her role in punitive justice, suggests that the state continues to subsume the orthodox role of the victim in punishing wrongdoing. For example, exemplary damages may have become available in the attempt to outlaw duelling as a means of private settlement, popular during the seventeenth and eighteenth centuries.[32] Deemed to be outlawed for the protection of bodily integrity and for the good of the peace, duelling came to be prohibited as a means of settlement of insult and to maintain one's honour despite the fact that certain Australian judges even challenged others to duel as late as 1838.[33] It was during the early part of the nineteenth century that duelling significantly declined as an acceptable social practice amongst gentlemen.[34] However, the separating out of criminal law from tort came much earlier. Evidence of the formation of a 'criminal jurisdiction' came with the gradual transfer of prosecutorial power from the victim to the presenting jury in the thirteenth century.[35] This exclusion of the victim to tort represents how the control of criminal law was initially consolidated through the expression of criminal justice as a prerogative of the Crown. The emergence of the criminal jurisdiction from feudal law developed via the displacement of the right of the victim to the body of the offender.[36] This was mirrored some 400 years later with the outlawing of the duel on similar grounds. The emergence of criminal law and punishment as within the prerogative of the Crown emerged around 1250 with the outlawing of the private settlement through the restricted initiation of a criminal appeal.[37] It was at this point that

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32 *Cotogno v Lamb [No. 3]* (1986) 5 NSWLR 559, 567.

33 Though on each occasion challenge was made before the judge took office. See Phillips' Brief, 'Fetch Me My Rapier, Boy', (1994) 18 *Criminal Law Journal* 1, 223-224.

34 Challenging others to duel with weapons was seen as fighting, which when done in public was an affray, or an unlawful assembly when done in private. Duelling resulting in death was prosecuted as murder, which may have been reduced to manslaughter should the accused be able to raise the defence of provocation.

35 Daniel Klerman, 'Settlement and the Decline of Private Prosecution in Thirteenth-Century England' (2001) 19 *Law and History Review* 1, Spring, 1-66.

36 See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1977), 16-24; Susan Jacoby, *Wild Justice: The Evolution of Revenge* (1976), 18-23 (as to private settlement see 117-119; 125-126); Steven Eisenstat, 'Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment', (2004) 50 *Wayne Law Review*, 1115-1170.

37 The appeal was a form of early trial, administered by itinerant justices from Westminster. The appeal gave individual victims the ability to prosecute felonies committed against them, often initiated for the purpose of extracting a private settlement of money or land from the defendant. The practice of private settlement was outlawed in the thirteenth century as juries were required to present indictments to the visiting justices. As a result, victims began to initiate actions in civil law, creating, effectively,

victims began to initiate writ actions in common pleas to settle their disputes. Effectively, victims were displaced from their plenary control of criminal justice due to the Crown's need to punish wrongdoing. From the late thirteenth century, therefore, common pleas became the site of victim orientated justice. Since this time, tensions have existed as to the legitimate exercise of punitive power, at least in terms of the reserve of that power as it transferred to tort between victims, the Crown and state.

This limitation of victim power in tort demonstrates how criminal law has come to be seen as the most appropriate arena for the punishment of wrongdoing, over the need for the victim to access the accused for the purpose of punishment and dispute settlement. The transfer of this power suggests how the winding back of exemplary damages in tort reflects a broader discursive history in which the victim is excluded from the punitive control of the criminal, for the consolidation of punishment under the Crown. *Gray* suggests that the plaintiff as victim of wrongdoing continues to exercise the rudiments of punitive power not absorbed by the Crown under the guise of sovereignty and state.[38] Further, the consolidation of punitive power under the state, as indicated in *Gray*, shows that the development of criminal law, rather than being assumed as a manifestation of state power alone, has actually resulted from the gradual transfer of power from the victim of crime. *Gray* thus affirms the notion that the plaintiff as victim is indeed relevant to a broader explanation of the development of criminal law and procedure. As *Gray* demonstrates, the positioning of the victim as a subject more or less entitled to the exercise of punitive power, against the consolidation of criminal law under the state, is indeed crucial to our understanding of the development of criminal law and justice more generally.

II Artificial Boundaries: Tort, Criminal Law and the Power of the Victim

The history of exemplary damages in Australian law is based on the English common law. Over time, however, sharp distinctions have emerged between the nature and availability of the remedy in England and Australia. Exemplary damages were first articulated in Australian law by the High Court in *Whitfeld v De Lauret & Co* ('*Whitfield*').[39] Here, Knox CJ ruled that an exemplary award may follow where the

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the first distinctions between a public law enforced by between Crown and offender and a private law, enforced between individuals. See Kirchengast, above n 16, 44-49.

38 *Gray* (1998) 196 CLR 1, 13-15, 31.

39 (1920) 29 CLR 71.

tortfeasor evidences a conscious wrongdoing in contumelious disregard for another's rights.[40] This case held that damages may be compensatory or exemplary, with exemplary damages being distinguished on the basis that compensatory damages aim to award for a material loss, while exemplary damages aim to award for an infringed right and to punish and deter.[41] As such the plaintiff, as a victim who has suffered some wrong, was identified as central to its award. The award of exemplary damages was further developed in *Uren*, where the majority of the High Court considered the holding of *Rookes v Barnard*.[42]

Uren expressly rejected *Rookes v Barnard*.[43] In *Uren* Taylor J states that, but for the application of the three categories defined by Lord Devlin, punishment was not just a matter for the criminal law.[44] Further, by limiting the types of conduct that could give rise to an award of exemplary damages, Taylor J held that artificial boundaries would be established which were neither justified in principle nor precedent.[45] His Honour maintained that 'it is the function of the civil law to permit an award of damages by way of punishment',[46] and that exemplary damages have been considered from an early period to be 'punitive for reprehensible conduct and as a deterrent'.[47] Although the distinction between compensatory and exemplary damages was affirmed by the

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40 *Whitfeld* (1920) 29 CLR 71; Several qualifying conditions, developed contemporneously in our common law, need to be satisfied before exemplary damages are awarded. In addition to the test developed by Knox CJ in *Whitfeld*, Tilbury, Noone and Kercher, above n 30, 485, suggest that exemplary damages may be available if three key conditions are satisfied. First, that the conduct of the defendant is so egregious that it demands the punishment of the court. Second, that the award of damages must be able to fulfil its objective to punish the wrongdoing, and third, that the award must not be excluded by statute.

41 *Whitfeld* (1920) 29 CLR 71; Aggravated damages seek to award the plaintiff where the manner in which the tortious act was performed exacerbates the damage caused to the defendant. This needs to be distinguished from compensatory damages, which seek to place the plaintiff in that position before the wrong was committed. Clearly the most adequate way of achieving this is to award a sum of money, even in cases of non-pecuniary loss. Alternatively, the criminal law possesses various punitive remedies, of which death by hanging was for the most part, the most severe. Exemplary damages are distinguished from these criminal remedies due to the fact that, firstly, the money awarded was payable by the judgement debtor to the plaintiff directly. The state does not intervene in this award. Thus, exemplary damages mirror those remedies which are purely private. The fact that these damages are awarded for the express punishment of the tortfeasor, however, cause a blurring of the lines between the civil and criminal law. The fact that such damages are awarded in a private suit against a private individual, in the attempt to make a public statement about the culpability of some conduct, is what causes this 'blurring' to occur.

42 *Uren* (1966) 117 CLR 118, 118; *Rookes v Barnard* [1964] AC 1129.

43 *Uren* (1966) 117 CLR 118, 118-119; *Rookes v Barnard* [1964] AC 1129.

44 *Uren* (1966) 117 CLR 118, 137.

45 *Uren* (1966) 117 CLR 118, 130-133.

46 *Uren* (1966) 117 CLR 118, 137.

47 *Uren* (1966) 117 CLR 118, 138.

House of Lords and accepted by the High Court in *Uren*,[48] the strict limitations on the consideration of exemplary damages were not adopted. *Uren* thus left open the possibility of the commencement of civil and criminal proceedings for the same offensive conduct. Given the consolidation of victim prosecutorial and punitive power under the Crown and institutions of the state, it not surprising that this, before long, caused a conflict of laws.

The holding in *Gray*, the limitation of the awarding of exemplary damages where the same conduct gives rise to a criminal charge, has been critiqued from several perspectives. As suggested by Taylor J in *Uren*, exemplary damages are justified by the need to sanction offensive civil conduct that is 'not at one and the same time crimes'.[49] An overlap between tort and criminal law is thus consistent with the fragmented development of law in its control of offensive behaviour. This overlap is also consistent with the origins of each jurisdiction as flowing from the victim's or plaintiff's desire to recover some form of personal award that also punishes conduct that may not be clearly 'criminal'.[50] Taylor J's criticism of *Rookes v Barnard* flows from the traditional role of torts in punishing and deterring forms of wrongful conduct, private in nature. Punishment and deterrence are traditional aims of the law of intentional torts. In cases where the criminal process operates imperfectly, such as where the punishment imposed is inadequate, a civil award of exemplary damages may properly supplement the criminal law to ensure that offenders receive their 'just deserts'.[51]

Other criticisms of the boundaries established between crime and tort include the fact that exemplary damages perform a range of functions that regulate private conduct not immediately recognised in criminal law.[52] This includes the way exemplary damages seek to educate the public as to acceptable commercial behaviour, such as where punitive damages are awarded against tobacco companies selling products known to cause damage. Exemplary damages are also justified on the basis that they appease the individual victim.[53] Criminal law seeks to appease social concerns, rather than those of the private victim/subject. As such, exemplary damages take the individual claims of the victim into

48 *Uren* (1966) 117 CLR 118, 118-119.

49 *Uren* (1966) 117 CLR 118, 131.

50 *Uren* (1966) 117 CLR 118, 133.

51 J Manning, 'Reflections on Exemplary Damages and Personal Injury Liability in New Zealand', (2002) 2 *New Zealand Law Review*, 143-184.

52 J Smillie, 'Exemplary Damages and the Criminal Law', (1998) 6 *Torts Law Journal* 2, 113-122.

53 Beever, above n 17, 97 notes that this explanation alone may not justify their purpose.

account, averting the needs of the state altogether. This places victims in a primary role, a rewarding and potentially healing experience in itself, rather than the state which *a priori* seeks to interpret offensive conduct according to the social and community interest.[54]

Exemplary damages may be seen to complement the punitive function of the criminal law. Smillie argues that criminal law has come to rely too heavily on the initiatives and institutions of the state.[55] To expect criminal law to be the chief vehicle of social control of an increasingly diverse and multi-valued society, in which the individual is able to be substantially wronged by large international corporations, may result in the complete exclusion of particularised victim issues from the common law. The fact that offensive conduct can take several forms means that our legal system should be able to impose different punitive terms, to meet the particular needs of the victim. Thus, the exclusion of punitive control to the criminal law may, ultimately, diminish respect for the criminal law amongst victim groups and society. Here, *Gray* may inflame or aggravate victim groups who are already outraged as to the way they have been expressly excluded from the common law, in particular the criminal justice system. An overlap between tort and criminal law thus allows for the consideration of social and victim interests, consistent with the origins of each jurisdiction as flowing from the needs of the plaintiff.

Similar to the holding of *Gray, Daniels v Thompson*[56] reserved punitive power for the criminal law. In this case, the *Accident Rehabilitation and Compensation Insurance Act 1992* (NZ) and other Acts limited the plaintiff's claim for compensatory damages for personal injuries but these Acts did not prohibit an award of exemplary damages as these damages were punitive rather than compensatory. The case also gave rise to criminal charges, of which three of the defendants were convicted and one acquitted. The Court of Appeal of New Zealand considered whether the defendants had already been punished in criminal proceedings, and as such, whether the civil claim was a second or double punishment. The court held that a prior conviction, discharge without conviction or acquittal, barred subsequent civil proceedings for exemplary damages where the same set of facts gave rise to both actions. The court further ruled that where a criminal charge was pending or likely, civil proceedings should be stayed until the criminal charges were dealt with.[57]

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54 R Mulheron, 'The Availability of Exemplary Damages in Negligence', (2000) 4 *Macarthur Law Review*, 61-85.

55 Smillie, above n 52, 116.

56 [1998] 3 NZLR 22.

57 *Daniels v Thompson* [1998] 3 NZLR 22, 22-23.

The ability to bring a private action seeking exemplary damages for the same conduct giving rise to a criminal charge has therefore been barred in New Zealand. Following *Daniels v Thompson*, even where a civil action is commenced before a criminal charge is brought, it is for the judge to adjourn civil proceedings until it can be established whether charges will be laid. *Gray* and *Daniels v Thompson* thus bring into effect, as Taylor J put it, an artificial boundary between tort and criminal law.[58] This is recognised in *W v W and J v Bell*,[59] where Her Majesty's Privy Council dismissed an appeal from the Court of Appeal of New Zealand where the majority ruled that acquittal should also bar recovery of exemplary damages despite the fact that, as a consequence of the acquittal, no punishment was served on the defendant. Lord Hoffmann recognised, however, that the purposes of criminal and civil law may well be complementary:

> A prosecution is generally speaking initiated and controlled by the State. A civil action is initiated and controlled by the victim. Thus the prosecution of an action for exemplary damages enables the victim publicly to vindicate his or her version of events and inflict punishment, even revenge, in ways which a criminal prosecution may not satisfy. Punishment takes the form of damages which go to the victim rather than imprisonment or a fine which can afford her only a more indirect satisfaction. Allowing the victim to pursue such a claim may have a therapeutic value which mitigates the effects of the offence.[60]

The 'artificiality' of any boundary between tort and criminal law serve to remind us that the jurisdictions have intermingled roots. Victim prosecutorial power was gradually transferred to the King starting in the thirteenth century, thereby establishing a criminal jurisdiction accountable to the state in the due apprehension and punishment of crime. However the transfer of that power flows from the needs of the plaintiff in the settlement of private disputes. The artificiality of the establishment of boundaries against double punishment in tort is demonstrated by the fact that the power to punish wrongdoing to which the state now makes absolute claim is a power which originated through the early relocation of victim interests between tort and criminal law. The consolidation of punitive power results from the expansion of the domain of the state against the relevance of the private needs of the victim. The common law development of this relocation is demonstrated below.

58 *Uren* (1966) 117 CLR 118, 130-133.

59 [1999] UKPC 2.

60 *W v W and J v Bell* [1999] UKPC 2, [6].

III The Discursive Relocation of the Victim: The Availability of Exemplary Damages Alongside the Criminal Charge

In place of the restrictive categories approach of *Rookes v Barnard,* Canadian,[61] Australian and New Zealand[62] authorities apply a general test of availability, intended to catch all highly reprehensible civil wrongdoing. Australian law has declined to follow *Rookes v Barnard*,[63] but has curtailed the availability of exemplary damages in other respects. Prior to *Gray*, Australian authorities tended toward a position in which, with the possible exception of breach of contract or where law is modified by statute, exemplary damages are available for any civil wrong.[64]

A line of early authority exists protecting the plaintiff's entitlement to collect exemplary damages, on the basis that such damages were a personal award not to be sanctioned by the state.[65] However, the possibility that a defendant has or will be punished by criminal penalty poses the risk, if an award of exemplary damages is also available, that the defendant will be punished for the same conduct twice. It is in this context that *Gray* now places a bar on civil proceedings for exemplary damages where an adverse criminal determination has or is likely to be made. However, in English law, following *Rookes v Barnard*, the status of the simultaneity of civil and criminal proceedings remain unclear. The issue debated in the English cases was whether a criminal ruling automatically precludes an exemplary award. For this article, the development of English law in terms of the awarding of exemplary damages indicates the way the courts have grappled with the 'placement' of the personal interests of the victim under this head of loss. Significantly, this line of precedent considers the exercise of victim power against that of the state.

In *Archer v Brown*,[66] punishment already exacted by the criminal courts was treated as sufficient to bar an exemplary award. In this matter, Pain J decided not to award exemplary damages against a defendant who had

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61 For Canadian authority, see *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) (SCC).

62 *Taylor v Beere* [1982] 1 NZLR 81; *Donselaar v Donselaar* [1982] 1 NZLR 97. In *Daniels v Thompson* [1998] 3 NZLR 22, the imposition of, or likely liability to criminal punishment, was held to be a complete bar to the recovery of exemplary damages.

63 See *Uren* (1966) 117 CLR 118.

64 *Gray* (1998) 196 CLR 1, 13-15, 31.

65 *Huckle v Money* (1764) 95 ER 768; *Benson v Frederick* (1766) 97 ER 1130; *Tullidge v Wade* (1769) 95 ER 909; *Merest v Harvey* (1814) 128 ER 761; *Forde v Skinner* (1830) 172 ER 687; *Warwick v Foulkes* (1844) 152 ER 1298; *Emblen v Myers* (1860) 158 ER 23.

66 [1985] 1 QB 401.

already been convicted and imprisoned in respect of a corresponding criminal offence.[67] The rule upon which the judge relied did not question the sufficiency of the criminal punishment. The determinative issue in this case was, rather, that of 'double punishment':

> [W]hat seems to put the claim out of court is the fact that exemplary damages are meant to punish and the defendant has been punished. Even if he wins his appeal he will have spent a considerable time in gaol. It is not surprising that there is no authority as to whether this provides a defence, since there is no direct authority as to whether exemplary damages can be given in deceit. I rest my decision on the basic principle that a man should not be punished twice for the same offence. Since he has undoubtedly been punished, I should not enrich the plaintiff by punishing the defendant again.[68]

Archer v Brown however does not authoritatively state that a court will refuse exemplary damages where a defendant has already been punished by a criminal court. In *Archer v Brown* the defendant had spent a considerable time in prison, and would spend even more time in prison if an appeal against sentence failed. Accordingly it is possible that *Archer v Brown* is consistent with the court having a discretion to refuse an award of exemplary damages, which Pain J exercised in the circumstances, because, 'in view of the severity of the criminal punishment exacted, no further civil punishment was necessary or fair'.[69]

In *AB v South West Water Services Ltd*[70] the Court of Appeal of England and Wales indicated that a claim for exemplary damages may be struck out on the basis that the defendant had already been subject to a conviction and fine. In this matter, no reference was made to the size and sufficiency of such a fine. The Court of Appeal was content that the defendant had been criminally punished. These proceedings were striking out proceedings, such that the court must have been convinced that it was a 'clear and obvious' case, or one which was 'doomed to fail'.[71] It is arguable that the court considered that there was no scope for argument about the sufficiency of the punishment that was exacted by the criminal law. Hence, the fact that a criminal punishment had been incurred, regardless of its severity, was enough to invoke the discretion of the court so as to avoid a double punishment:

> In the present case there is the further complication to which I have already referred of the conviction and fine of the defendants. These problems persuade

67 *Archer v Brown* [1985] 1 QB 401, 401-402.

68 *Archer v Brown* [1985] 1 QB 401, 423G-H. Note that Pain J considers the double punishment of the tortfeasor as enriching the plaintiff twice over, rather than considering that the criminal law seeks to punish for the good of the state and community.

69 Law Commission of England and Wales, above n 1, 66.

70 [1993] QB 507.

71 *AB v South West Water Services Ltd* [1993] QB 507, 516C-E.

> me that there would be a serious risk of injustice to the defendants in this case if an award of exemplary damages were to be made against them. There is no injustice to the plaintiffs in refusing to permit such an award.[72]

However, the risk of double punishment does not arise where the offensive conduct leading to a claim for exemplary damages is materially different from that for which the defendant has already been punished in criminal proceedings. There is no basis to raise an objection to a punitive award in such a case. In *Asghar v Ahmed*,[73] exemplary damages were awarded to remedy an unlawful eviction, in respect of which the defendants had already been convicted. The Court of Appeal of England and Wales upheld the award on the basis that the trial judge had expressly directed his mind to the fact that the defendant had already been fined for the eviction, and that 'there was a great deal more to the outrageous conduct which followed the eviction which justified the judge's finding that it was an absolutely outrageous example of persecution by a landlord of a tenant'.[74] Though previous criminal proceedings will bar the recovery of exemplary damages, such an entitlement must be determined on the basis of the conduct complained of. If this conduct is materially different from that punished under the criminal law, the civil claim will survive. This decision places a sharp cleavage between the rights of the plaintiff as victim and Crown as prosecution in the pursuit of the punishment of offensive conduct.

John v MGN Ltd[75] holds, however, that where it is desirable that exemplary damages are awarded, they should not outweigh the severity of any criminal punishment. The courts have sought to protect the rights of the defendant against windfall awards, particularly by jury assessed awards. Even where the rule against double punishment is relaxed, authority has directed the judiciary towards considerable restraint in the awarding of exemplary damages. Judges are encouraged to weigh the damages to which the plaintiff is entitled against the punishment which might be imposed by the state. The Law Commission of England and Wales comments:

> The theme underlying the two principles of 'moderation' stated in *John v MGN Ltd* and by Lord Devlin in *Rookes v Barnard* is that 'restraint' is necessary for reasons of fairness to defendants: *inter alia*, 'excessive' awards might otherwise constitute an unjustifiable infringement of the defendant's civil liberties; they may constitute a greater punishment than would be likely to be incurred, if the conduct were criminal; and they are a punishment imposed without the

72 *AB v South West Water Services Ltd* [1993] QB 507, 527D-E, cf 516A-C.
73 (1985) 17 HLR 25.
74 *Asghar v Ahmed* (1985) 17 HLR 25, 29, Cumming-Bruce LJ.
75 [1997] QB 586.

safeguards which the criminal law affords an offender.[76]

English law holds that where conduct gives rise to a civil and criminal action, exemplary awards should not outweigh a sentence in a criminal court. The state, as the guardian of the needs of society, seeks to protect the interests of the defendant by limiting the rights of the plaintiff in his/her ability to attract personal pecuniary awards. In effect, the personal and private nature of the exemplary award in English law has been eroded by the intervention of stately interests. Effectively, this has occurred by the consolidation of state power, in terms of its control of the criminal law, over the private interests of the plaintiff as victim of wrongdoing. Through a series of cases, the state has thus subsumed the punitive 'territory' once enjoyed by the plaintiff. It is the assumption that the state extends the criminal law over all subjects, as a sovereign institution that provides for the unquestioned curtailment of victim orthodoxy by the judiciary.

IV Exemplary Damages and the Consolidation of the Criminal Law in *Gray*

In *Fontin v Katapodis*,[77] Owen J articulates various factors that need to be considered in assessing exemplary damages. These include the impact of the award on the defendant and the factors which may aggravate or mitigate the reading of the defendant's conduct.[78] Further conditions include other compensatory damages, if available. Affirmed in *Gray*, exemplary damages are in addition to compensatory damages. Exemplary damages are awarded as a windfall sum for the plaintiff, as based on the conduct of the tortfeasor. The majority held that rather than focus on whether an award of exemplary damages is of right to the plaintiff, the nature of the wrong being litigated must be first considered.[79] Here, focus must be placed on the conduct of the wrongdoer. As exemplary damages seek to punish the wrongdoer and deter others from like conduct, the wrongdoing must be examined in such a way as to determine whether the tortfeasor ought to be punished. Apart from the threshold articulated in *Whitfeld*, two considerations must be borne in mind. These include, as framed in the overall conduct of the tortfeasor, the punitive element of the remedy, and whether its awarding would be a deterrent. In *Gray*, the majority added a third factor, that state punishment and the possibility of a criminal charge

76 Law Commission of England and Wales, above n 1, 78-79.
77 (1962) 108 CLR 177.
78 *Fontin v Katapodis* (1962) 108 CLR 177, 184-187.
79 *Gray* (1998) 196 CLR 1, 10-14, 16.

need to be considered as a precursor to the award.[80] The state is thus added as a significant factor in the consideration of the relevance of exemplary damages, historically a private award.

The bar espoused in *Gray* restricts the award of exemplary damages to a limited class of litigants whose cause of action does not involve conduct that has given or could give rise to a criminal charge. Instead, only that conduct which is flagrant, heavy-handed and outrageous, but non-criminal, can attract the sanction of exemplary damages.[81] This has led some to argue that exemplary damages, as they now stand, may be confused with aggravated damages.[82] The most obvious examples where exemplary damages are recoverable include assault, defamation, malicious prosecution, trespass to land, some intentional economic torts, and cases of abuse of public power actionable under the tort of misfeasance in a public office. Trespass to the person for example, which may also raise assault charges under the criminal law would see the restriction of the availability of the award, given the likelihood that such conduct will give rise to a criminal charge. The reasons behind this restriction include the fact that the principal purpose of the award is the punishment of wrongful conduct. This is a sanction originally attached to the right of the plaintiff as victim of wrongdoing, which has now been subsumed by the Crown and state for the maintenance of social control. As punishment is the primary goal of exemplary damages, the general deterrence of others is achieved as a natural consequence of the public infliction of appropriate punishment on the individual wrongdoer by the criminal courts. The need to further punish the tortfeasor in a civil court is thus obviated and would amount to an affront to the principle of double punishment in any event.

The majority in *Gray*, reasoned that exemplary damages have no role to play in responding to the private needs of victims.[83] Exemplary damages must not be awarded to remunerate victims for any injury or loss suffered due to the conduct of the defendant. The majority held that exemplary damages can neither be justified by a need to appease a victim's desire for revenge, nor to discourage private acts of retribution.[84] While exemplary damages may have once served to correct inadequate enforcement of the criminal law, this is no longer considered relevant. Once the criminal process is set in motion, any deserved punishment should be imposed by the criminal law. *Gray*, hence rejects the related argument that civil claims for exemplary damages are justified by the

80 *Gray* (1998) 196 CLR 1, 16.
81 See *New South Wales v Ibbett* (2006) 229 CLR 638, 638-639, discussed below.
82 Law Commission of England and Wales, above n 1, 10-11.
83 *Gray* (1998) 196 CLR 1, 13-17.
84 *Gray* (1998) 196 CLR 1, 5.

therapeutic benefits that victims of crime derive from being able to sue their assailants on an equal footing and with greater control over the conduct of the claim than in criminal proceedings. Addressing this issue, the High Court suggested that victims now receive appropriate recognition in the criminal jurisdiction. This is evidenced in terms of victim assistance schemes, and perhaps by the fact that victim impact statements are able to be presented to sentencing courts. Victim compensation can also be awarded in most jurisdictions to appease the victim's financial needs arising out of a criminal act. Sentencing provisions may also allow for the awarding of restitution for pain and suffering, in addition to criminal injuries compensation. The majority of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Gray* set this out as follows:

> There is an appearance of tension between using civil proceedings to compensate a party who is wronged and using the same proceedings to punish the wrongdoer. But there is a tension only if it is assumed that "... a sharp cleavage between criminal law on the one hand and the law of torts and contract on the other is a cardinal principle of our legal system". As Windeyer J points out in *Uren*, the "roots of tort and crime" are "greatly intermingled". And it is not only the roots of tort and crime that are intermingled. The increasing frequency with which civil penalty provisions are enacted, the provisions made for criminal injuries compensation, the provisions now made in some jurisdictions for the judge at a criminal trial to order restitution or compensation to a person suffering loss or damage (including pain and suffering) as a result of an offence all deny the existence of any "sharp cleavage" between the criminal and the civil law. The tension we have mentioned may therefore be more apparent than real.[85]

The apparent tension between civil and criminal law thus provides the framework through which the majority judges abolished the awarding of exemplary damages where a criminal charge has been laid. The majority judges reasoned:

> Where, as here, the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted, we consider that exemplary damages may not be awarded. We say 'may not' because we consider that the infliction of substantial punishment for what is substantially the same conduct as the conduct which is the subject of the civil proceeding is a bar to the award; the decision is not one that is reached as a matter of discretion dependent upon the facts and circumstances in each particular case.
>
> There are at least two reasons in principle why that is so.
>
> First, the purposes for the awarding of exemplary damages have been wholly met if substantial punishment is exacted by the criminal law. The offender is punished; others are deterred. There is, then, no occasion for their award.
>
> Secondly, considerations of double punishment would otherwise arise. In *R v Hoar* Gibbs CJ, Mason, Aickin and Brennan JJ said that there is "a practice, if not a rule of

85 *Gray* (1998) 196 CLR 1, 8.

> law, that a person should not be twice punished for what is substantially the same act". That practice or rule would be breached by an award of exemplary damages in the circumstances described.[86]

Exemplary damages should not confer any benefit that may be considered pecuniary or therapeutic where the conduct giving rise to a civil claim also attracts a criminal sanction. The state thus assumes responsibility for the punishment of the offensive conduct. Additionally, an exemplary award will not be considered until the state has concluded its punitive function. This means that the plaintiff must wait until the matter has been referred to the police and Office of the Director of Public Prosecutions. The plaintiff can only then initiate a civil action for exemplary damages where charges are not bought by the state. These restrictions ensure that punishment lies with the criminal law, enacted by the state.

However, Kirby J in *Gray* offers a different perspective, arguing that criminal punishment may exist alongside exemplary damages, albeit as a matter of discretion for the trial judge.[87] In exercising this discretion, Kirby J determines that criminal punishment must be taken into account, with the award of exemplary damages being consequently moderated. Kirby J acknowledges that despite any apparent unfairness by punishing a wrongdoer twice, the power to award exemplary damages, even in light of a charge for the same conduct, is derived from the private nature of the tort.[88] Suggested in his Honour's reference to the American jurisprudence, that as criminal punishment flows from the domain of the state, the plaintiff continues to be entitled to an award for the satisfaction of personal damage. The personal power of the victim to claim such an award is not to be subsumed by the state. This however is limited by the fact that the courts are to take into account the severity of any criminal punishment in the calculation of exemplary damages. Where this occurs, discretion on the part of the trial judge is key. His Honour held:

> [I]t is impossible to contest, in the face of authority, the relevance of the fact of criminal punishment of the tortfeasor. The essential argument against doing so is that criminal proceedings are outside the control of the person injured and are designed to achieve the purposes of the State. If the injured party has suffered in an additional way, such as would ordinarily attract an entitlement to exemplary damages, why should such entitlement be lost simply because of the operation of the criminal law? This approach has found favour in some jurisdictions in the United States of America. Authority exists in that country supporting the refusal of a request to instruct the jury to consider a criminal

86 *Gray* (1998) 196 CLR 1, 14.

87 *Gray* (1998) 196 CLR 1, 32.

88 *Gray* (1998) 196 CLR 1, 31-32. See also B Feldthusen, 'The Civil Action for Civil Battery: Therapeutic Jurisprudence?' (1993) 25(2) *Ottawa Law Review* 203.

> fine imposed on the defendant in reduction of his civil liability to the plaintiff. … The rule that a person shall not be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law is a fundamental principle of human right. ... That is why liability to criminal punishment, and more especially the imposition of such punishment (and particularly that of imprisonment) have been repeatedly held in Australia, England, Canada, New Zealand and in many jurisdictions of the United States, as relevant to the provision of exemplary damages (and even aggravated compensatory damages). Courts commonly take into account the fact and severity of any criminal punishment imposed or to which the tortfeasor is liable. Particular exceptions have been suggested where the criminal punishment imposed on the defendant, or to which the defendant may be liable, is regarded as insubstantial. An example is where the tortfeasor was conditionally discharged in the criminal proceedings. Adopting this approach may appear to breach the rule against double punishment by permitting a civil court to add, in effect, to the punishment imposed on the wrongdoer by the criminal court acting within its powers. … The way that the law has endeavoured to grapple with this problem is by recognising a discretion to award, or to withhold, exemplary damages and, in awarding them, to moderate their amount by reference to considerations of criminal punishment. Exemplary (or punitive) damages are said to be uncommon outside the common law. They certainly present conceptual problems. But they are too deeply embedded in our law to be abolished by a court. They have been accepted by this Court as part of Australian law. We must live with, and adapt to, the difficulties. Discretion is the way this is done.[89]

Kirby J reminds us that the ability to claim exemplary damages resides in the plaintiff as private victim and must be distinguished from the objects of the state in seeking a criminal conviction. His Honour indicates that where there is some interaction of the criminal and civil jurisdictions, exemplary damages need to be awarded discretely, to take into account these competing interests. It is thus relevant to take into account the fact that a tortfeasor may have already been punished in criminal law, when a court considers the quantum of damages. This is to ensure that the tortfeasor is punished in an emphatic and public way according to the fundamental principles of human rights and justice. For Kirby J, exemplary damages are inherently discretionary; their award inclusive of many concerns including those of the state, the plaintiff/victim, and tortfeasor. The objects of the state however are not to be confused with the rights of the plaintiff such that it is not possible to bar the awarding of such damages *per se* on the basis that the rationale of the exemplary award has already been met by the state. This attests to the fact that the principal rationale of exemplary damages cannot be clearly separated from the criminal law, without the construction of an 'artificial boundary'. The characterisation of the punitive power of the plaintiff as different from that of the state is what leads Kirby J to the conclusion that exemplary awards may exist alongside the criminal charge. This is in direct contest with the characterisation of

89 *Gray* (1998) 196 CLR 1, 31-32.

entitlement of the plaintiff and state to the punishment of the tortfeasor or defendant in the majority decision.[90]

It is therefore important to examine the characterisation of the plaintiff and state as exercising a right to punish wrongdoing. To this end, Callinan J suggests that exemplary damages were a late development in civil law, which may have arisen out of the outlawing of the common law duel. As Kirby P points out in *Cotogno v Lamb [No 3]*, punitive damages may have originated in England in an attempt by the courts to stamp out duelling.[91] Callinan J remarks, however, that the method of the assessment and distribution of such damages was soon taken over by the state:

> The notion that compensation is to be assessed by an independent tribunal appointed and maintained by the state, according, and confined to the damage and loss actually sustained by a victim, evolved with the advance of civilisation over time.[92]

The power of the availability of exemplary damages, for Callinan J, thus resides in the early power of the plaintiff as private victim of wrongdoing. This is extracted in a footnote in his Honour's judgment in *Gray*:

> In early Roman law there existed the possibility of avoiding retaliation by agreement, to pay compensation. Provision for compensation was made by the Twelve Tables, which were wooden (and bronze) tablets erected in the market place in Rome in 451-450BC. One of their provisions allowed retaliation to be avoided by agreement. The relevant provision has been translated: "If one person maim another, let there be retaliation unless they come to an agreement" (see Thomas, *Textbook of Roman Law* (1976) 349). In Justinian's Institutes, further reference can be found. "Under the Twelve Tables the penalty for this delict was, for a damaged limb, retaliation; and for a broken bone a sum of money appropriate to the great poverty of the people of those times. Later the praetors' began to allow victims to put their own value on the wrong. … The penalties of the Twelve Tables have fallen into disuse, while the praetors' system – also called the honorarian – is frequently applied in the courts. The valuation of contempts rises and falls according to the victim's social standing and honour." (Book IV Title 4 from the translation by Birks and McLeod, *Justinian's Institutes* (1987), p 127.) The Roman law delicts retained until the very end a punitive character, requiring the wrongdoer to pay more than compensation (see Nicholas, *An Introduction to Roman Law*, (1962) at 208).[93]

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90 *Gray* (1998) 196 CLR 1, 13-17.

91 *Gray* (1998) 196 CLR 1, 42; See *Cotogno v Lamb [No. 3]* (1986) 5 NSWLR 559, 567, Kirby P, 'It appears that punitive damages may have originated in the attempt by the court to stamp out the practice of duelling by permitting civil juries to punish insult by the award of exemplary damages'; see *Merest v Harvey* (1814) 128 ER 761; Cf Windeyer J in *Uren* (1965) 117 CLR 118, 148, 153: 'Certainly, the award of such damages was seen as part of the armoury by which the courts kept the peace. They originated before the organisation of the modern police force and the 19th century reforms to the criminal justice system'.

92 *Gray* (1998) 196 CLR 1, 41.

93 *Gray* (1998) 196 CLR 1, 41 (footnote 189).

A duel, often resulting in the death or maiming of the tortfeasor, was outlawed for the good of the King's men, the sanctity of the body and the peace. In place of violent self-help, the victim gained a right to an award of damages. These damages sought to punish the offender in addition to whatever was awarded by means of compensation, to restore the plaintiff to his/her pre-tort position. The plaintiff gained a right to an award of exemplary damages in addition to nominal compensation, for the express punishment of the tortfeasor. The majority in *Gray* cite this development in the eighteenth century decision of Lord Chief Justice Pratt in *Wilkes v Wood*.[94] His Lordship held that damages are not only designed to compensate the injured person, but to also punish the guilty.[95] This punishment should thus act as deterrence for any similar future act, and as proof of the detestation the jury had for the original conduct itself.

As suggested by Callinan J, exemplary damages have a history preceding their articulation in the common law.[96] Records before 1763 may not tell of the significant role of punishment in satisfying the needs of the plaintiff. What is confirmed, however, is the fact that exemplary damages flow directly from orthodox needs of the plaintiff to attract damages that may, amongst other heads of loss, offer to remedy wrongdoing. Australian and English law continue to identify exemplary damages as a punitive award payable to an individual plaintiff as a private person. Until the majority judgment in *Gray*, the plaintiff continued to exercise this private punitive power in a plenary way. The fact that this is barred by the majority judges on the basis of the double punishment of the tortfeasor[97] however suggests that the needs of the plaintiff continue to be modified for the consolidation of the power to punish in criminal law. Henceforth, *Gray* affirms that the power of the plaintiff to the body of the accused has been instituted within the state. This indicates that the orthodox right of the plaintiff to punish forms a fundamental aspect of the genesis of criminal law by the discursive relocation of the right of the plaintiff to the body of the accused.

With the intermingled roots of criminal law and tort in mind, Callinan J holds that the awarding of exemplary damages may lie alongside a criminal charge or conviction by virtue of the origin of exemplary damages as flowing from the plaintiff as private victim of wrongdoing.[98] Much like the decision of Kirby J, Callinan J advocates the role of judicial discretion:

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94 (1763) 98 ER 489.
95 *Wilkes v Wood* (1763) 98 ER 489, 490-491.
96 *Gray* (1998) 196 CLR 1, 41.
97 *Gray* (1998) 196 CLR 1, 14.
98 *Gray* (1998) 196 CLR 1, 41-43.

> The fact of the imposition of punishment and its extent and impact on the defendant will always be relevant factors, probably on most occasions the major and decisive factors. They may not however be conclusive ones for all cases. Other matters will require consideration: for example, the likelihood or otherwise of criminal proceedings in a particular case, the existence and effect of any victim's compensation legislation, the nature of the conduct of the defendant, the extent to which the plaintiff may be entitled to be appeased, and would benefit from being appeased, the means of the defendant, the deterrent effect upon the defendant, any profit derived by the defendant from the wrongdoing and the deterrent effect upon the potential wrongdoing community generally. A court would also be entitled to take into account that lesser punishments may have been, or might be imposed as a consequence of the acceptance of a lesser plea, the availability (for what might be sound policy reasons in and for the purposes of the criminal law) of a small penalty only, the desirability of the less condemnatory process by way of civil rather than criminal proceedings, the need to encourage compliance with the law, and the fact that the possibility of any criminal sanction is illusory.[99]

The curtailment of exemplary damages accords with the rise of criminal law and punishment as the sole domain of the state. Although the minority judgments of Kirby and Callinan JJ in *Gray* call for some discretion on the part of the trial judge, the weight of authority demands that a plaintiff is not entitled to exemplary damages where the injurious conduct gives rise to a criminal action.[100] Although the High Court acknowledges that exemplary damages may continue to play a role in punishing wrongdoing in limited circumstances, the majority in *Gray* advocate the purification of torts by ruling that punitive power should reside in the state.

The majority judgment in *Gray* provides that where a criminal charge is laid, the plaintiff must now be satisfied by the exercise of punitive power by the state. In turn, criminal injuries compensation and restitution is offered to compensate the victim for his/her loss of punitive control. Arguably, *Gray* suggests how the constitution of the criminal law, and the state which administers it, is based on the redefining of the punitive power of the plaintiff as a justiciable concern of the state where acts fall within the domain of the criminal law. Ultimately, it is the simultaneity of state and plaintiff in punishing wrongdoing, despite potentially differing objects as to the ends of the exercise of that power, that provides for the curtailment of exemplary damages. Significantly, this shows that the right of the plaintiff to punish is integral to the development of the criminal law.

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99 *Gray* (1998) 196 CLR 1, 50-51.

100 *Gray* (1998) 196 CLR 1, 15-17.

V Clarifying the Role of Exemplary Damages following *Gray*

Decisions of the High Court subsequent to *Gray* affirm that exemplary damages have a role to play as remedy for civil damages, distinguishing such damages from general and aggravated damages, as in *New South Wales v Ibbett* ('*Ibbett*').[101] In this case, the High Court recognised that characteristic of the award of exemplary damages was their punitive and deterrent purpose. Where circumstances arise, as they did in *Ibbett*, where executive officers of the state act against an individual unlawfully, exemplary damages may serve to secure the rights of the individual and condemn the acts of the defendant.[102] In *Ibbett*, two police officers entered the property of the plaintiff. The officers were accused of trespass and assault. Affirming that the entry on to the plaintiff's land was unlawful, the High Court distinguished the role of exemplary damages as a remedy for torts against individuals by the state executive, despite, as was the case here, the possibility of a criminal charge on the individual police officers.[103] By virtue of the *Crown Proceedings Act 1988* (NSW) s 5 and the *Law Reform (Vicarious Liability) Act 1983* (NSW) ss 8 and 9, the state is identified as the relevant defendant where a remedy in tort is sought against individual members of the police force.[104] As a result, the state is vicariously liable for acts of the police committed in the course of their duty. This, in *Ibbett* serves to distinguish exemplary damages alongside the possibility of a criminal charge on the basis that they may be relevant in condemnation of improper acts for which the state is vicariously liable:

> The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government.[105]

The validity of exemplary damages as a means of restraining the arbitrary exercise of state power against individuals has also been affirmed in England and Wales. In *Kuddus v Chief Constable of*

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101 (2006) 229 CLR 638.

102 *Ibbett* (2006) 229 CLR 638; Also see *Kuru v State of NSW* [2008] HCA 26 for a similar case involving trespass by the police following a domestic violence dispute.

103 *Ibbett* (2006) 229 CLR 638, 638-642.

104 Police officers, acting as common law constables, assumed individual responsibility for their actions, though the Crown or state may be liable as master for a breach of duty occasioned by a subject in service of the Crown.

105 *New South Wales v Ibbett* (2006) 229 CLR 638, 648.

Leicestershire Constabulary,[106] a case which had to decide whether exemplary damages may be awarded where the plaintiff established that the defendant has committed the tort of misfeasance in public office, Lord Hutton considered the ruling of Lord Devlin in *Rookes v Barnard*, finding as follows:

> I think that a number of cases decided by the courts in Northern Ireland during the past 30 years of terrorist violence give support to the opinion of Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1223, 1226 that in certain cases the awarding of exemplary damages serves a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law. Members of the security forces seeking to combat terrorism face constant danger and have to carry out their duties in very stressful conditions. In such circumstances an individual soldier or police officer or prison officer may, on occasion, act in gross breach of discipline and commit an unlawful act which is oppressive or arbitrary and in such cases exemplary damages have been awarded. I refer to two of these cases.[107]

Though declining to decide whether exemplary damages were valid *per se*, Lord Hutton went on to indicate:

> In my opinion the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times.[108]

Significantly however, Lord Hutton identifies a basis upon which exemplary damages may still be awarded despite the fact that criminal charges have been or will be laid. As demonstrated in *Ibbett*, where the executive is vicariously liable for the conduct of its officers, exemplary damages may be awarded against the executive despite a charge being brought against the individual tortfeasor. Lord Hutton notes:

> Moreover in some circumstances where one of a group of soldiers or police officers commits some outrageous act in the course of a confused and violent confrontation it may be very difficult to identify the individual wrongdoer so that criminal proceedings may be brought against him to punish and deter such conduct, whereas an award of exemplary damages to mark the court's condemnation of the conduct can be made against the Minister of Defence or the Chief Constable under the principle of vicarious liability even if the individual at fault cannot be identified.[109]

This is a significant departure from *Gray*, in that recognition is paid to the fact that exemplary damages serve a unique purpose aside from punishment meted out under the criminal law. The purpose of

106 [2002] 2 AC 122.
107 *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, 147.
108 *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, 149.
109 *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, 149.

exemplary damages in cases where the state is found to be vicariously liable for executive officers is to invoke change leading to the future restraint of such behaviour by the government. However, Lord Scott of Foscote rebukes such a notion, indicating that a punitive award against someone other than that actual tortfeasor would do little to deter like conduct in future. Rather, if its aim is to deter such conduct, the award ought to be made against the individual tortfeasor:

> It is possible that exemplary damages awards against the actual wrongdoers which they would have to meet out of their own pockets would have a deterrent effect upon them and their colleagues.[110]

The reasoning of Lord Scott of Foscote essentially brings us back to the notion that exemplary damages are essentially punitive, seeking to condemn the actual wrongdoing of the tortfeasor. In terms of the argument of this paper, this reasoning leads us back to *Gray*, in that despite the liabilities of the individual tortfeasor, it is for the state to punish the guilty where such conduct may also give rise to a criminal charge. No alternative tortfeasor, the state, ought to be punished for individual wrongdoing.

The basis upon which exemplary damages and criminal punishment may be conflated was also addressed in *A v Bottrill*.[111] On appeal from the Court of Appeal of New Zealand before Her Majesty's Privy Council, this case concerned a claim of damages arising out of the examination of four cervical smears of the plaintiff.[112] The misreporting of the smears resulted in the plaintiff developing invasive cervical cancer.[113] The issue here was the extent to which the tortfeasor must have possessed a subjective advertence as to the damage occasioned. Lord Nicholls of Birkenhead delivered the judgment of the majority. His Lordship dismissed the analogy that eligibility for exemplary damages ought to be assessed by the criminal standard because of the similarities between exemplary damages and criminal punishment:

> Awards of exemplary damages differ from other monetary payment orders made in respect of tortious conduct. They serve a quite different function. Their function is not to compensate. Their primary function is to punish. They also serve as an emphatic vindication of the plaintiff's rights and as a deterrent. Punishment is a function normally reserved for the criminal law. Typically criminal law punishes advertent conduct, not inadvertent conduct. From this it is an easy and seemingly attractive step to conclude that, as with punishment for crime, so with exemplary damages regarding tortious conduct, the defendant's conduct must be advertent.

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110 *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, 157, Lord Scott of Foscote.

111 [2002] 1 AC 449.

112 *A v Bottrill* [2002] 1 AC 449, 450-451.

113 *A v Bottrill* [2002] 1 AC 449, 450-451.

> This reasoning is not compelling. For the most part crimes require advertence, but this is not always so. Criminal law is not exclusively confined to cases of advertent conduct. The analogy with criminal law cannot therefore furnish any reason in principle why exemplary damages in cases of negligence must always be confined to cases of intentional wrongdoing or conscious recklessness.[114]

However, in dissent, Lords Hutton and Millett held that the Court of Appeal of New Zealand was right to find that exemplary damages should only be awarded where the tortfeasor was subjectively aware of the risk of damage to the plaintiff, and then acted deliberately or recklessly to take the risk.[115] Dissenting on this basis, their Lordships indicate just how similar exemplary damages are to the criminal law, at least in terms of standards of liability for warrant of punishment:

> An essential part of the reasoning of the Court of Appeal, stated in paras 42 and 43 of the judgment of the majority, is that the primary purpose of an award of exemplary damages is to punish the defendant, and therefore such an award should only be made against a defendant who is consciously aware that his conduct is wrong or who appreciates the risk to which he is putting the plaintiff, so that the quality of his conduct so closely approaches that involved in doing intentional harm that civil punishment is an appropriate response.[116]

The grappling of the courts over the extent to which exemplary damages are consistent with punishment in the criminal law indicates the removal of plaintiff's right to the body of the wrongdoer, despite beginning in the thirteenth century, continues today. Although the issue as to the extent to which exemplary damages may be available where a criminal charge is laid is generally settled, exceptions continue to arise. This indicates that despite the rise of the dominance of the criminal law over actions to which victims would formerly lay claim, the extent to which the criminal law gains plenary control over the punitive process continues to be questioned.

VI The Rise of the Sovereignty and Dominance of Criminal Law

The criminal law grew out of the enforcement of the resolution of private disputes. The state at this point was associated not with a series of organised institutions constituted in the public sphere, but the business of the King in administering the needs of the kingdom. All relations governed by law were essentially that of private property, leading some to argue that the common law protected the propertied interests of the few who had access to the legal system. Before the thirteenth century and the abolition of the private settlement, law

114 *A v Bottrill* [2003] 1 AC 449, 457, Lord Nicholls of Birkenhead.
115 *A v Bottrill* [2002] 1 AC 449, 469.
116 *A v Bottrill* [2003] 1 AC 449, 465.

was thus essentially private.[117] The common law at this time mirrored the social relations of the time, which developed in terms of what we now understand to be the jurisdictions of criminal law and tort. An examination of the changes to trespass to the person into the law of assault as an offence against the person suggests how the expanding domain of the criminal law came to subsume various aspects of private law. Much like the victim's right to private prosecution through the ability to inform a court of an offence, however, the right to bring an action for trespass to the person survives today.[118] Similarly, the punitive power of the plaintiff as victim survives today in the form of exemplary damages.

Though modified in *Gray*, exemplary damages are awarded for the punishment of the tortfeasor for contemptuous disregard for the rights of the tort victim. However, exemplary awards may not serve a beneficial purpose where the offender has already been, or is likely to be, punished by the criminal law. Arguably, when viewed through the same lens that prohibits double recovery, exemplary damages should not be awarded when the offender has been already punished by the state.[119] The move away from private law as a source of punishment to the criminal jurisdiction however, is one that began with the rise of the enforcement of King's peace through the mandatory prosecution of offences before the King's itinerant justices. Despite the requirement that certain serious forms of wrongdoing be acted upon by the state for the good of society, the growth in the sovereignty and dominance of the state in prosecuting wrongdoing does not necessarily come at the total expense of the private needs of the tort victim. Debate as to the private nature of exemplary damages explicates an argument as to the right to the ownership of punishment, or more precisely, whether criminal law is sovereign to that of private law. As the majority in *Gray* suggest, punishment for wrongdoing is more appropriately dealt with in the criminal jurisdiction. The result of *Gray* is that the tort victim has no right to punish privately where punishment, though of a different nature and perhaps to different ends, has been administered by the state.

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117 As between private citizens, without the formal administration of the state. For example, in terms of the common law duel, see the dictum of Callinan J in *Gray* (1998) 196 CLR 1, 42.

118 Tyrone Kirchengast, above n 16, 96.

119 This implies the argument that in a criminal court, the offender has been punished by standards equal to or higher than that set in the civil jurisdiction. Not only has the defendant been convicted beyond reasonable doubt rather than on the balance of probabilities, but may have been subject to punitive terms substantively different from a pecuniary civil award.

In the history of criminal law, the needs of the state have generally dominated those of the individual. This is evidenced where the King subsumed the right to prosecute and punish all felons, creating misdemeanour offences where the peace was at risk of being disturbed.[120] As victim power came to be restricted by the Crown, in particular with the abolition of the duel in the eighteenth century, exemplary damages were increasingly awarded. Unlike the criminal law, exemplary damages were sought by the victim directly, with no involvement of the state. Set apart from compensatory and aggravated damages, exemplary damages were seen as an express punishment at the request of the tort victim. Rudiments of victim punitive power were thus preserved, though isolated to relevant civil actions.

However, when set against the private interests of the individual, common law courts are now finding in favour of the criminal law as the arena in which wrongdoing can be legitimately punished. This is to the exclusion then of any private punitive action. In terms of the development of tort and criminal law, this is consistent with hundreds of years of state based regulation in which the victim's right to the body of the accused was gradually subsumed by the Crown. The King and state have subsumed the rights of the victim with regard to the punitive control of the offender in criminal law. Consistent with this history, the decline of the remedy of exemplary damages suggests the continuation of the decline of the express right of the private citizen to recover non-compensatory or non-aggravated damages for a private misadventure. This evidences the consolidation of the right to punishment, once held exclusively by the plaintiff as victim, under the Crown. Just as the emergence of the King's peace in the twelfth century rationalised the development of the presenting jury, the control of punitive justice under the state legitimates the limitation of exemplary awards. Like the development of the criminal law in the twelfth century, the sovereignty of the criminal law has been asserted over that of private law as the more appropriate arena for the meting out of punishment, when the two jurisdictions are called to sanction the same conduct.

Uren suggests that the development and separation of criminal law from civil law remains incomplete.[121] Indeed, it goes as far as to suggest that exemplary damages complement the criminal law, allowing for the signal disapproval of the outrageous conduct of the defendant.[122] The curtailment of exemplary damages, some 800 years after the King first took control of criminal justice, thus suggests the influential role

120 Tyrone Kirchengast, above n 16, 133-135.
121 *Uren* (1966) 117 CLR 118, 137.
122 *Uren* (1966) 117 CLR 118, 131.

of the private needs of the tort victim in the development of criminal law. More precisely, the way in which the tort victim is now being excluded from civil law for the dominance of the criminal jurisdiction suggests how the private needs of the plaintiff have been central to the continued development and growth of institutions of criminal justice by the gradual removal of the right to punish from the self to the state.

The transfer of victim power to the state by the limitation of exemplary damages has not gone uncontested. Judicial opinions on the matter range from the abolition of exemplary damages *per se* to its limitation to a defined array of torts.[123] Others suggest that exemplary damages serve an express purpose in the civil jurisdiction, complementing the objects of the criminal law.[124] The exclusion of the victim by the discursive 'relocation' of their common law powers to the state, and arguments to the contrary, suggests that the tort victim continues to possess interests, specifically the right to access the offender and to enact punishment upon him/her, that influence the development of criminal law. The artificiality of the separation of punitive power to the state attests to the fact that there is nothing innate about the state's monopolisation of punishment. Instead, the state derives this monopolisation by shifting the boundaries of power and control to exclude the tort victim as a relevant site of punitive justice.

VII The Purification of Torts by the Evacuation of Victim Power

Various perspectives suggest that exemplary damages arose out of the outlawing of the common law duel. Accordingly, victims were provided something in its place – a pecuniary award. It had a similar purpose, to punish the defendant. From the eighteenth century exemplary damages were awarded where the conduct of the tortfeasor was so outrageous that they deserved to be punished. Exemplary damages also sought to deter others from like conduct. However, by the time exemplary damages were instituted in the common law, the criminal jurisdiction had well absorbed the right to exercise punitive power for the good of society. For the greater part of the history of exemplary damages therefore, the award generally complemented the criminal charge. This was because before the rise of the metropolitan police to prosecute in the name of the public, wrongful conduct would generally be actioned at the will of the victim, who would do so either by information or by writ. Once the state had subsumed the last vestiges of victim power,

123 See, for example, *Rookes v Barnard* [1964] AC 1129, 1225-1226.

124 See, for example, the difference between the majority and minority judgments in *Gray* (1998) 196 CLR 1, 13-17, 31, 50.

however, victims were excluded to civil law. The possibility now exists for double punishment, as despite the will of the victim, the police may seek to charge offenders for the public good.

The separation of tort and criminal law is now affirmed by the institutionalisation of criminal prosecutions in a state authority and the severe limitation of victim power in the criminal courts. Accordingly, the exercise of victim power in the civil jurisdiction causes problems for the exercise of state power in the criminal jurisdiction for want of double punishment. In the different authorities traced, with perhaps some recent distinctions in *Ibbett* and *Kuddus v Chief Constable of Leicestershire Constabulary* on the basis of the vicarious liability of the Crown, the state generally prevails over the personal interests of the victim. This affirms, therefore, that the transfer of victim power to the state has, in effect, constituted the state in the context of its administration of punitive power, through the express limitation of the exercise of similar victim power in tort. As Beever's account of the literature and cases indicates, victims have long associated the recovery of exemplary damages with the exercise of a private right to justice. Even though exemplary damages may be awarded in condemnation of the defendant, victims are generally loathe to relinquish their interest in punishment even though it has now been long subsumed by the state, within the criminal jurisdiction. This connection with punishment perhaps explains the victim's continuing interest in punishment in the criminal justice system and in tort.