THE LAW REFORM COMMISSION

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

ON

AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES

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IRELAND
The Law Reform Commission
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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

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Mr. John Quirke is the Secretary to the Commission.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General fifty five Reports containing proposals for the reform of the law. It has also published eleven Working Papers, eleven Consultation Papers, a number of specialised Papers for limited circulation and eighteen Reports in accordance with Section 6 of the 1975 Act. Details may be found on pp. 132-137.

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INTRODUCTION

The Reference of the Attorney General

1. On 13 January 1997, pursuant to the provisions of section 4(2)(c) of the *Law Reform Commission Act, 1975*, the then Attorney General, Mr Dermot Gleeson, SC, requested the Law Reform Commission to examine and make recommendations in relation to

> "the principles governing the present law relating to aggravated, exemplary and restitutionary damages and their effectiveness as a remedy."

2. Without prejudice to this, the Attorney General also requested the Commission to:

> "review the exclusion of exemplary damages from any claim under section 7 (1) of the *Civil Liability Act, 1961* ... and to report as to whether aggravated or restitutionary damages are also excluded from any such claim and to review the absence of any statutory provision enabling a court to award exemplary, aggravated or restitutionary damages in a claim brought for the benefit of the dependants of the deceased, where the death of such a person is caused by the wrongful act of another ... and to submit ... proposals for any reform in respect of such law ... as the Law Reform Commission considers appropriate."

Outline of the Consultation Paper

3. This Consultation Paper has been prepared in response to the Attorney General's reference. Part I of the paper examines the established categories of damages and sets out the arguments, on both principled and practical levels, for and against the award of exemplary damages. Part II of the paper contains an analysis of the Irish, European, Commonwealth and American laws of punitive/exemplary and aggravated damages. Part III of the paper then examines the newly emerging law of restitutionary damages. Finally, Part IV sets out the possible options for reform of the law, drawing on the arguments of principle, the comparative material, and the unique demands of the Irish context.

4. In Part IV, the Commission's provisional conclusions on the central issue of principle are set out. Provisional recommendations are made in respect of the availability of exemplary damages in Irish law. These recommendations are not unanimous, in that whilst some of the commissioners favour the availability of exemplary damages for all tort actions and for breach of constitutional rights, some are of the view that such damages should be awarded only in cases of certain specified torts, as well as for breach of constitutional rights, and some favour their abolition in so far as the law permits. A number of provisional recommendations are then made by the paper on subsidiary issues in relation to exemplary damages, such as the regulation of quantum and the availability of

insurance for exemplary awards. These recommendations are made on the understanding that they are to apply only to the causes of action in which the recovery of exemplary damages is recommended.

5. Provisional recommendations are also made in the Consultation Paper on the availability of aggravated and of restitutionary damages. Further recommendations are made in relation to those sections of the *Civil Liability Act, 1961* which deal with exemplary and aggravated damages.

Terminology

6. The question of terminology in the law of damages is a vexed one. An attempt has been made in this paper to use terms as consistently and clearly as possible. In general in this paper, unless otherwise stipulated, the terms "exemplary damages" and "punitive damages" should be taken to refer to one and the same category, whilst the term "aggravated damages" refers to a distinct, and (at least partially) compensatory, category. In referring to the law of England, Ireland and Commonwealth countries, the term "exemplary damages" has been used in most instances, since that is the term most commonly in use in those jurisdictions. In the US, awards of damages with broadly the same purpose are usually called "punitive damages", and they are referred to as such in this paper. In a few instances, where there is an attempt to highlight inclusivity, or where there is a question of disputed terminology, the terms "punitive/exemplary" or "non-compensatory" have been used. "Non-compensatory damages" may be taken to include exemplary/punitive damages, restitutionary damages, and aggravated damages as they are presently defined.

Consultation Process

7. The Commission recognises the complex and controversial nature of this topic. All of the recommendations in this paper are tentative and provisional only. The final recommendations of the Commission will be made only after extensive consultation with all interested parties and the careful consideration of all submissions received. Following this consultation process, the Commission will make recommendations in its Final Report. **So that the Commission's final Report may be made available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission by 31 July 1998.**

PART I

CHAPTER 1: THE CATEGORIES OF DAMAGES

1.01 In civil law, compensatory damages are the primary monetary remedy, awarded on the basis of the loss or injury to the plaintiff, rather than on the basis of the defendant's fault. The common law has, however, long made provision for the award of non-compensatory damages. These have been variously described as punitive, exemplary, aggravated, vindictive, or retributive.[1] The place of these damages, in a civil law that is ostensibly purely compensatory, has always been precarious, and they have often been criticised as anomalous.[2] Non-compensatory damages exist on the boundary between the civil and the criminal law, and appear to import elements of the criminal law into the civil. The debate as to their validity is therefore grounded in rival conceptions of the role of the civil law, and its relation to and separation from the criminal law.

1.02 Our conception of the boundary between the civil and criminal laws, and of the extent to which this boundary may be regarded as permeable, is crucial to our consideration of non-compensatory damages. The basis and character of awards of exemplary damages on the one hand, and of the wider civil law on the other, and the compatibility of one with the other, is at the core of this paper's consideration of the categories of damages. Questions arise as to whether punishment is a defining characteristic of the criminal law only, or whether it is also inextricably an element of the civil law. The wider social function of the civil law, and the extent to which an award of damages in tort may address more than the relations between the parties to the action, is also to be considered.

1.03 At the outset, it is helpful to consider the accepted categories of damages, and to define each category, as it has been developed by the courts. Clear categorisation of damages according to their purpose is difficult. It may be thought that a rigid categorisation of damages is not warranted, and that any punitive element should be tolerated to co-exist with the compensatory, within an

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1 The definitions of these various categories are considered *infra* at paras.1.05-1.08. Aggravated damages are now generally defined as a species of compensatory damages. A further category is that of restitutionary damages, a recent development, considered *infra* Chapter 8.

2 Punitive damages have been described as: "a monstrous heresy ... an unhealthy excrescence, deforming the symmetry of the body of the law.": *Fay v Parker*, 53 N. H. 342 (1873) at p.382.

undifferentiated general award.[3] The creation of separate categories within a single award of damages may certainly seem artificial. A compensatory award will punish, even if it is not intended to, as a punitive award will, inevitably, compensate. The award of damages in several categories (exemplary, aggravated, compensatory) in a single case may result in undesirably large awards. There is the danger, identified by Windeyer J in *Uren v John Fairfax & Son*,[4] that the court may find itself "fixing a compensation figure swollen by aggravation, and then adding a fine on top".[5] However, a classification of particular awards as exemplary or compensatory has the benefit of relative transparency, and reduces the danger of large and unexplained general awards of damages which have no clearly apparent justification. The delineation of clear categories of punitive and compensatory damages may in fact serve to reduce the quantum of compensatory awards, in confining notions of punishment and deterrence to a single category.

1.04 For many years the law of damages was beset with uncertainty as to the meaning of the various terms - exemplary, punitive, aggravated - which were often used interchangeably and apparently at random. Judicial dicta, beginning with the judgement of the House of Lords in *Rookes v Barnard*, have helped to clarify the law. The accepted categories of damages, in so far as it is possible to define them, are as follows.

Compensatory Damages

1.05 The aim of compensatory damages is to compensate the plaintiff for the loss he has suffered, and to put him in the same position as if the tort had not been committed. This is unproblematic in the case of pecuniary loss, but less satisfactory in relation to non-pecuniary or intangible loss, where the award of damages compensates for mental and emotional distress. In such a case the award of damages is said to compensate the plaintiff "in so far as money can do so". However, it is arguable that where there is intangible loss resulting from injury to interests of personality (insult, humiliation, degradation, distress etc.) the

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3 Kelly, *The Inner Nature of the Tort Action*, (1967) II Ir. Jur. (n.s.) 279 argues that ostensibly compensatory awards may be coloured by a punitive intent, so that in fact the object of punishment (or "vindictiveness") permeates the entire law of damages, rather than being confined to a single category. Where exemplary damages are awarded, there is no anomaly; it is simply that the plaintiff and the Court feels a greater degree of indignation and desire for vengeance (at p.287). Lord Wilberforce, in his judgement in *Broome v Cassell*, discussed *infra* paras.3.17-3.20, doubted the separation of the categories of exemplary and aggravated damages, as being artificial. See also the judgement of Windeyer J in the Australian case of *Uren v John Fairfax & Sons Pty Ltd* (1966) 17 CLR 188 (*infra* para.4.06):

> "How far the different labels denote concepts really different in effect may be debatable ... in seeking to preserve the distinction we shall sometimes find ourselves dealing more in words than ideas."

4 *op cit.* fn.3

5 This problem can be dealt with to some extent by taking compensatory damages into account in the assessment of exemplary damages: see *infra* para.3.24.

award of damages does not serve a wholly compensatory purpose.[6]

Aggravated Damages

1.06 Aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interests of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant. It is because aggravated damages are awarded on the basis of the loss to the plaintiff that they are categorised as compensatory. However, the requirement that the defendant's conduct must have been exceptional in order for aggravated damages to be awarded, undermines the compensatory nature of aggravated damages, and suggests that they are, in part at least, awarded with reference to the moral quality of the defendant's actions. Aggravated damages appear to be a hybrid of the compensatory and exemplary models of damages. In practice, and especially in England, they have often been used to perform the function of exemplary damages.

Exemplary / Punitive Damages

1.07 Exemplary or punitive damages - the two terms are now regarded as interchangeable - are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a "contumelious disregard" for the rights of the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory; and the award may also have an important function in vindicating the rights of the plaintiff. The award signals to the defendant that "tort does not pay"[7] and at the same time it vindicates the rights of the plaintiff and the strength of the law.

Restitutionary Damages

1.08 Restitutionary damages are not compensatory in nature. Like exemplary damages, they look to the actions of the defendant rather than the damage to the plaintiff; but their aim is not to punish. Their purpose is to prevent the

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6 Kelly, *op cit*, fn. 3; English Law Commission, *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages*, (1993) paras.2.11-2.29. On damages for non-pecuniary loss generally, see White, *Irish Law of Damages for Personal Injuries and Death*, (1989) Chapter 6. White notes:

> "In the modern law of tort, the award in respect of non-pecuniary loss in a personal injury action may be said to be educational, vindicatory and functional. The vindicatory and functional attributes of the award may be subsumed within the concept of 'satisfaction' to the plaintiff." (para.6.2.01)

7 Per Lord Devlin in *Rookes v Barnard* [1964] AC 1129.

defendant being unjustly enriched as a result of his wrong, and to remove any profits or other benefits which the defendant has obtained as a result of the wrong to the plaintiff. Their recovery is most appropriate in cases involving damage to property interests. Although restitutionary damages have obtained some recognition by the English courts, their status in Irish law is still uncertain.[8]

8 See *infra* Chapter 8.

CHAPTER 2: ARGUMENTS FOR AND AGAINST EXEMPLARY DAMAGES

Arguments Against the Award of Exemplary Damages

Arguments Based on Principle

2.01 The first argument against the availability of exemplary damages as a civil law remedy is one of principle, and relates to the boundary between the civil and criminal laws. This boundary was clearly set out by Lord Mansfield in 1776:

> "Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions."[1]

2.02 Blackstone adopted a similar model:

> "Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties, which affect the whole community; and are distinguished by the harsher appellation of crimes and misdemeanours."[2]

2.03 It may be argued that punitive or exemplary damages, the purpose of which is to punish the defendant, are more characteristic of the criminal law than the civil: that their inclusion in the civil law usurps the function of the criminal law, and imports an alien public law function into the civil law.[3] The criminal law allows for the prosecution and punishment of acts which are regarded as morally reprehensible and as damaging to society as a whole, not merely to the individual victim. The civil law is generally described as contrasting with this, as having the function of regulating relationships between individuals and dispensing justice as between the parties to a case, without regard to the wider interests of society.[4] The function of punishment is closely associated with the criminal law,

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1 *Atcheson v Everitt*, 98 Eng. Rep. 1142, 1147 (27 K.B.1775)

2 Blackstone, *Commentaries*, Vol.3.

3 See for example, Andrew Burrows, *Reforming Exemplary Damages: Expansion or Abolition?* in Peter Birks (ed) *Wrongs and Remedies in the Twenty First Century* (1996)

4 Cross and Jones, *Introduction to the Criminal Law* (8th ed. 1976) Chapter 1.

so much so that it has arguably become exclusive to it. Deterrence is also associated with criminal rather than civil sanctions. In imposing exemplary damages, the court is attempting to punish, to vindicate the rights of the plaintiff, and to deter the infringement of the rights of others in the future, a wider social purpose which is traditionally within the sphere of public law.[5]

Arguments Based on Practicality

2.04 In addition, a number of arguments may be made which highlight the impracticability of including exemplary damages awards in the civil system. It may be argued that if the defendant is to be subjected to punitive sanctions, he should have the benefit of the procedural safeguards which are available in the criminal courts but not in the civil; and that his accusers should have to prove the charges against him on the basis of the criminal burden of proof. The criminal law's imposition of harsh penal sanctions is justified by its public function. It is also justified by the fact that only a narrow range of acts are criminal offenses, by the strict procedural safeguards which are imposed in criminal trials, and by the high standard of proof in such trials. Comparable safeguards do not exist where exemplary damages are imposed in civil cases. Thus public law elements are being introduced into an area of law which, arguably, is not equipped to deal with them. This point was made by Lord Reid in his House of Lords judgement in *Cassell & Co Ltd v Broome*[6] when he justified the restriction of exemplary damages as follows:

> "To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like - terms far too vague to be admitted to any criminal code worthy of the name. There is no limit to the punishment except that it must not be unreasonable... And there is no effective appeal against sentence."

2.05 A further objection to exemplary damages is that, where they are awarded, the defendant may have to answer to both the civil and the criminal courts in respect of the same wrong, and this will expose him to the possibility of being punished twice for the same wrong. In several jurisdictions, legislation makes particular provision for this eventuality, providing structures to limit actions against the defendant in both civil and criminal law.[7]

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5 In the US, where punitive damages occupy a considerably more prominent place in the legal system than is the case in other common law jurisdictions, the question of how the civil / criminal boundary can be adequately maintained has caused particular difficulty. See Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, (1992) 101 Yale L. J. 1795; and John C Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal And Civil Law Models - And What Can Be Done About It* (1992) 101 Yale L. J. 1875

6 [1972] 1 All ER 801 at p.837.

7 See *infra* paras.5.09 and 9.75-9.79.

2.06 Finally, the fourth argument made against exemplary damages is that the plaintiff will benefit from the award of exemplary damages, rather than the State, resulting in an unjust enrichment of the plaintiff. This "windfall" to the plaintiff is clearly problematic, since the award of exemplary damages is assessed with reference only to the defendant and his conduct, and does not aim to compensate the plaintiff. The plaintiff, who will already have been fully compensated for his loss by an award of compensatory damages, may become the fortunate beneficiary of the defendant's morally outrageous or unconstitutional or anti-social behaviour.

Arguments in Favour of the Award of Exemplary Damages

Arguments Based on Principle

The Punitive and Deterrent Function of the Civil Law

2.07 The proposition that exemplary damages necessarily usurp the function of the criminal law to the civil law is disputed by many commentators,[8] and there are some judicial dicta to the effect that the civil law may legitimately accommodate some punitive purpose.[9] The boundary between the civil and criminal laws need not be viewed as unbreachable. The civil and the criminal have many elements in common, although these may be emphasised more in one system than the other: both are largely fault-based; both to some extent condemn and stigmatise wrongful conduct; both impose sanctions.[10] The most significant perceived difference between the two systems of law is that the criminal law punishes, while the civil law does not. This, however, is also open to challenge; whilst punishment is certainly a characteristic of the criminal law, it is not at all clear that it is exclusive to it. Similarly, wider public functions of deterrence and social ordering which have traditionally been identified with the criminal law are not necessarily excluded from the civil law. In his seminal 1931 article on punitive damages, Morris pointed out that tort law does contain a deterrent function:

> "[I]n the liability with fault cases there is an admonitory function as well as a reparative function: and the linkage of these two functions supplies a reason for taking money from the defendant as well as one for giving

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8 Morris, *Punitive Damages in Tort Cases* (1931) 44 Harv L Rev 1173; Kelly, *The Inner Nature of the Tort Action*, (1967) II Ir. Jur. (n.s.) 279; K Mann, *op cit.* fn.5; White, *Exemplary Damages in Irish Tort Law*, (1987) ILT 60 (1989).

9 See the judgement of Lord Wilberforce in *Broome v Cassell & Co*, discussed *infra* paras.3.17-3.20; and the judgement of Richardson J in *Uren v John Fairfax & Son* (1966) 17 CLR 188, discussed *infra* para.4.06.

10 See Kenneth Mann, *op cit.* fn.5, at p.1804:

> "The criminal and civil paradigms attempt to abstract a set of traits form the complex and multifaceted nature of sanctions, in which substantial areas of overlap exist between civil and criminal law. Almost every attribute associated with one paradigm appears in the other."

it to the plaintiff."[11]

2.08 Lord Wilberforce, giving judgement in the English case of *Cassell & Co v Broome*, took a cautious approach to any rigid compartmentalisation of the civil and the criminal:

> "It cannot be lightly taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories; it may have been wiser than it knew."[12]

2.09 The argument may be made that a punitive purpose is not unknown to the civil law, even if the long tradition of awarding punitive damages is discounted. When subjected to close inspection, the distinction between the compensatory and punitive purposes of monetary sanctions is difficult to distinguish. J M Kelly[13] has pointed out that a monetary award for the loss of a limb cannot in any real sense compensate for the loss. He argues that the real purpose of the award of ostensibly compensatory damages is:

> "to put the plaintiff in possession of a sum of money which in the court's judgement ought to be enough to satisfy his vindictive feelings against the wrongdoer."

2.10 On this view, some punitive purpose is already present in the civil law, quite apart from the categories of punitive/exemplary or aggravated damages.[14] Once the wider social and moral purpose of the civil law is accepted in this way, categories of punitive/exemplary damages cease to appear anomalous.

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11 At p.1174.

12 [1972] 1 All ER 801 at p.860. See also Fridman, *Punitive Damages in Tort* (1970) 48 Can Bar Rev 373:

> "[I]t may be questioned whether compensation adequately represents the fundamental purpose of this part of the law. Another possible theory of liability in tort is that the function of the law is to lay down certain standards of conduct which the community is expected to observe since without the observation of such standards civilised life could not be carried on satisfactorily. This might be termed the social purpose of the law of torts ... "

White, *Irish Law of Damages for Personal Injuries and Death*, (1989) also identifies a social function of the law of torts: see para.6.2.02

13 J M Kelly, *op cit.* fn.8.

14 See also A I Ogus, *The Law of Damages*, (1973) at p.5: "[P]unitive functions have continued to infiltrate the law by more oblique methods ..."

The Criminal Law

2.11 The uncertain boundary between the law of tort and criminal law is also evidenced in the difficulties experienced by commentators on the criminal law, in arriving at a definition of a crime which satisfactorily distinguishes it from a civil wrong.[15] Acknowledging that punishment, since it is a feature also of the civil law, cannot be a determining factor, Smith and Hogan fall back on a procedural definition of a crime, emphasising the role of the State in prosecuting a criminal offence.[16] The 19th edition of *Kenny's Outlines of Criminal Law* advocates caution in attempting to define a criminal offence, stating that:

> "the truth appears to be that no satisfactory definition has yet been achieved, and that it is, indeed, not possible to discover a legal definition of crime which can be of value for English law.[17]"

2.12 The question has been considered in a number of cases in the Irish courts. The courts appear to favour a relatively narrow definition of a criminal offence, which relies on the characteristics of criminal proceedings, as well as on the punitive nature of the sanction.[18] In *Melling v O Mathghamhna*,[19] Kingsmill-Moore J set out a number of *indicia* of a criminal offence, as follows:

(i) They are offenses against the community at large and not against an individual;

(ii) The sanction is punitive, and if the penalty is a monetary one, failure to pay it involves imprisonment;

(iii) The offence requires *mens rea*.[20]

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15 The historical development of the division between the criminal and civil laws must also be borne in mind. In the early common law, the distinction between crime and tort was uncertain; it was only relatively late in the development of the law that a division between the two emerged with any clarity. Winfield, *The Province of the Law of Tort*, (1931) at p.190, described the laws of crime and tort in the early English law as a "viscous intermixture." See *infra* paras.3.02-3.04. In *Sutcliffe v Pressdram Ltd*, Nourse J in the Court of Appeal observed (in the context of a defamation case) that:

> "It was ... only natural in systems such as our own, where the civil action has been developed out of the criminal and has virtually replaced it, that juries should have tended to include a punitive (now called an exemplary) element in their awards of damages and, moreover, that judges should not have discouraged them from doing so." (at p.287)

16 Smith and Hogan, *Criminal Law*, (7th ed.) (1992) at p.19:

> "It is not in the nature of the act, but in the nature of the proceedings that the distinction consists; and both types of proceedings may follow where an act is both a crime and a tort."

17 J W C Turner, ed., *Kenny's Outlines of the Criminal Law* (19th ed.) (1966)

18 See discussion in Casey, *Constitutional Law in Ireland*, (2nd ed. 1992) pp.253-254; and in Kelly, *The Irish Constitution*, (3rd ed. 1994) pp.621-623.

19 [1962] IR 1.

20 At p.25. Regarding a possible definition of crime, Kingsmill-Moore J stated:

> "The anomalies which still exist in the criminal law and the diversity of expression in statutes make a comprehensible definition almost impossible to frame." (at p.24)

Thus the punitive nature of a penalty does not, in itself, necessitate its being characterised as criminal.

2.13 O Dálaigh J, in the same case, admitted the possibility of some punitive purpose in the civil law, but differentiated the criminal law on the basis of pre-trial detention, bail, search warrants and imprisonment for failure to pay a fine. He held that:

> "One of the chief characteristics of civil liability (as contrasted with criminal liability) is the obligation to make reparation and, in our times, not to have to suffer imprisonment if unable to make such reparation ... There are, of course, instances, such as that of defamation, when because of the circumstances of the injury, the law allows the reparation to be by such a sum as will be not only reparation but also a mark of disapproval or punishment ... It is not, however, a feature of civil proceedings that he plaintiff can have the defendant detained in jail before the proceedings commence and keep him there unless he can obtain bail ..."[21]

2.14 The character of a criminal offence was further considered in the case of *McLoughlin v Tuite*,[22] which involved penalties under the *Income Tax Act, 1967*, which were imposed in civil proceedings. The Supreme Court held that the penalties were not criminal in nature. Finlay C J considered that the penalty under the Act constituted a deterrent or sanction, but that, in the context of the income tax code, this did not in itself bring it within the ambit of the criminal law:

> "The Court is not satisfied that the provision for a penalty in that fashion in a code of taxation law ... clearly establishes the provisions of the section as creating a criminal offence."[23]

Compensatory Aspects of the Criminal Law

2.15 The tort/crime distinction is further called into question by recent developments which import more private and compensatory elements into the criminal law. In many common law jurisdictions, including Ireland, a range of measures have been introduced which are aimed at expanding the role of the victim of crime in the criminal justice process.[24] These measures include the preparation of victim impact statements and the payment of compensation to the victim by the offender. The making of a compensation order, in particular, as provided for by section 6 of the *Criminal Justice Act, 1993*, gives a compensatory

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21 At p.40.

22 [1989] IR 82

23 At p.90.

24 Helen Fenwick, *Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process?* (1997) 60 Mod. L. Rev. 317.

character to criminal proceedings. The section provides that, on conviction, the court may make an order requiring the convicted person to pay compensation in respect of any personal injury or loss which has resulted to any person from the offence. The compensation is to be assessed on the same basis as damages in a tort action: section 6 (1) provides that the compensation:

> "shall not exceed the amount of the damages that, in the opinion of the court, the injured party would be entitled to recover in a civil action against the convicted person in respect of the injury or loss concerned."

Arguments Based on Practicality

2.16 The objections to exemplary damages on the basis of the lack of procedural safeguards in civil law may also be contested. In addition, many of the inadequacies they point to may be redressed by legislative intervention.

1. Due Process

2.17 The absence of strict procedural safeguards, as well as the lower burden of proof in civil cases where exemplary damages may be awarded can be justified on the basis of the differing consequences of a finding of responsibility in the civil as opposed to the criminal law. Conviction of a criminal offence may result in the loss of liberty. The possibility of the imposition of this sanction warrants particular procedural safeguards, and a higher standard of proof. Where the liberty of the individual is not threatened, as in an action for exemplary damages, there is not the same necessity for these precautions.[25]

2. Unjust Enrichment

2.18 The plaintiff in a case in which exemplary damages are awarded against the defendant may benefit from a windfall. In many ways, however, he is the most appropriate person to benefit. It is the plaintiff who has been the victim of the wrong. It is also the plaintiff who has brought the action against the defendant, probably at considerable financial risk to himself. One commentator wrote:

> "[t]here is no windfall: the plaintiff had to shake the tree to obtain the fruit of justice; and, in so doing, he risked a large branch landing on his head rather than an apple".[26]

2.19 If it is considered that the enrichment of the plaintiff through the receipt of exemplary damages is unjust, there is an alternative: that the damages, or a

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25 One possible solution to the problem of the lack of procedural safeguards in the civil law is to introduce a higher standard of proof where exemplary damages are to be awarded. See *infra* paras.9.80-9.82.

26 Gregory S Pipe, *Exemplary Damages After Camelford*, (1994) 57 Mod. L. Rev. 91.

portion of them, go to the State, or to a public fund. Several US states now have "split-recovery" provisions which allow the state to claim a portion of each award of exemplary damages.[27]

3. *Double Jeopardy*

2.20 The danger of "double jeopardy" where there is a claim for exemplary damages lies in the fact that in many such cases the civil wrong complained of may also be a criminal offence. The defendant may find himself, for example, ordered to pay exemplary damages and to pay a criminal fine, in reference to the same wrong. White suggests that this problem could be resolved if the civil courts were to take into account in mitigation any criminal penalty which had already been imposed on the defendant in respect of the wrong for which he is being sued in damages.[28] Presumably, any exemplary damages already awarded could also be taken into account in mitigation by a criminal court imposing a penalty. This issue is addressed in the Ontario Law Reform Commission's *Report on Exemplary Damages*, which recommends that:

> "In determining the extent, if any, to which punitive damages should be awarded, the court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant."[29]

2.21 In Ireland, co-operation between the civil and criminal justice systems is already provided for in the *Criminal Justice Act, 1993*, in relation to compensation orders made by a trial judge on conviction. Section 9 of the Act provides that, where an award of damages is made in a civil case, and a compensation order has previously been made in respect of the same injury or loss, adjustments may be made to the amount of compensation awarded in the criminal case, so that it does not exceed the amount of damages. Where the damages awarded exceed the amount of the compensation order, only the sum of the excess is to be paid in damages; and where the damages awarded are less than the sum awarded as compensation, then the court may order that the sum by which the compensation exceeds the damages be repaid to the convicted person. The section then provides that, upon the award of damages being made, the compensation order shall cease to have effect.

4. *The Inadequacies of the Criminal Law*

2.22 In favour of the retention of exemplary damages, it may be argued that the criminal law is often inadequate to vindicate all the rights of the individual.

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27 See *infra* paras.5.24-5.28.

28 P M White, *Exemplary Damages in Irish Tort Law*, (1987) ILT 60 at p.62.

29 Ontario Law Reform Commission, Report on Exemplary Damages - Executive Summary (1991), Recommendation 5 (2).

Some important interests may not be designated criminal wrongs. Other wrongs may be both criminal offenses and civil wrongs. Where a wrong does constitute a civil offence, the discretion to prosecute belongs, in many cases, entirely to the Director of Public Prosecutions. Under the *Criminal Justice (Administration) Act, 1924*, private prosecutions may only be brought under limited circumstances.[30] In cases where no prosecution is brought, it is desirable, in order that the victim of the wrong may obtain redress, and for the benefit of society at large, that the victim bring an action for damages, and that there be the possibility that some form of exemplary damages be awarded. An award of exemplary damages may vindicate interests which are of central importance to society but which are either not protected by the criminal law, or have not been subject to prosecution in that particular case. It also vindicates the strength of the law which has been violated.

2.23 A further inadequacy of the criminal law relates to wrongs committed by corporations.[31] Sanctions, such as imprisonment, which are relied on by the criminal law to provide adequate punishment or deterrence in respect of individuals, are obviously ineffective in the case of corporations. A fine, which is likely to be the only available criminal sanction, may not be sufficient to punish or deter. Exemplary damages may achieve this purpose more readily, providing a sanction appropriate to the defendant's economic strength, and to the gravity of the wrong.

5. *Intangible Losses*

2.24 Exemplary damages play an especially important role in relation to intangible losses. The English Law Commission have placed particular emphasis on this, demonstrating the historically important part which exemplary damages have played in the protection of personality interests and the redress of intangible losses. Indeed, it is argued in the English Law Commission's Consultation Paper that it is difficult to style any award of damages for injury to interests of personality as purely compensatory. Given the indeterminate nature of the interests involved,

> "the compensation of intangible losses can appear closer to sanction, the

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30 Section 9 of the Act provides that:

> "(1) All criminal charges prosecuted upon indictment in any court shall be prosecuted at the suit of the Attorney General of Saorstát Eireann
>
> (2) Save where a criminal prosecution on a court of summary jurisdiction is prosecuted by a Minister, Department of State, or person (official or unofficial) authorised in that behalf by the law for the time being in force, all prosecutions in any court of summary jurisdiction shall be prosecuted at the suit of the Attorney General of Saorstát Eireann.

See Peter Osbourne, *Private Prosecutions: a Comparative Perspective* (1993) 3 Irish Crim L J 119

31 On the difficulties in the application of the criminal law to corporations, see generally, Victoria Lynn Sweigert and Ronald A Farrell, *Corporate Homicide: Processes in the Creation of Deviance*, Vol 15 No 1 Law and Society Review (1980-81) 161.

law perhaps seeming to be as much concerned with the fact of violation as with the effect it has had on the plaintiff."[32]

Exemplary damages are therefore a more suitable remedy than compensatory damages, in certain cases.

2.25 The English Law Commission Consultation Paper demonstrates that exemplary damages have been consistently awarded by the courts in cases of defamation, false imprisonment, assault and battery: torts which directly protect personality interests. Exemplary damages are seen as having a special and distinct role in the protection of these interests, and of vindicating individual rights as they relate to them. According to the paper, in a country without a written constitution, the awarding of exemplary damages is an especially vital technique for the protection of civil liberties. In the Consultation Paper, the English Law Commission gives as one of its reasons for recommending the retention of exemplary damages in English law, that "there is an intrinsic value in protecting personality rights and in empowering citizens to enforce those rights."[33] This conclusion is reenforced by the final recommendations of the English Law Commission.[34]

2.26 It is interesting to compare the English Law Commission's approach with the situation in Ireland, where the Supreme Court has expressly related the awarding of exemplary damages to the vindication of rights enshrined in the Constitution, and has stated the importance of exemplary damages as a weapon with which the courts can defend the constitutional rights of the individual.[35] This coincides with the English Law Commission's view of exemplary damages as a necessary means of protecting individual rights.

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32 At p.24. See also the dicta of Nourse J in *Sutcliffe v Presdram* [1990] 1 All E R 269:

> "In a case where compensation for injury to the plaintiff's feelings, original or aggravated, is claimed, the attention of the jury may thus be directed towards the reprehensible conduct of the defendant. And, however carefully the judge might seek to protect them against it, it would not be surprising if an element, even a large one, in their award exceeded a due consideration for the plaintiff's feelings and trespassed into punishment of the defendant's conduct." (at p.288)

33 At p.132. It is interesting to speculate on how this position may be affected by the incorporation of the European Convention on Human Rights into English Law. Possibly, the role of exemplary damages as a means to vindicate personal rights would not be altered, if the incorporation of the Convention follows the "New Zealand Model" which would retain the supremacy of the legislature over personal rights guarantees.

34 English Law Commission, Report No.247, *Aggravated, Exemplary and Restitutionary Damages*, (1997).

35 *Conway v INTO*, [1991] 2 IR 305.

PART II

CHAPTER 3: EXEMPLARY AND AGGRAVATED DAMAGES IN THE ENGLISH COMMON LAW

Historical Evolution

3.01 The historical precedents for punitive/exemplary damages are ancient and venerable. Punitive damages were awarded in Babylonian law under the code of Hammurabi, the earliest known legal code.[1] The Hittite laws of about 1400 BC also allowed for their recovery, as did the Hindu Code of Manu of about 200 BC.[2] Multiple damages awards were made under Roman law, and many commentators assert that the Roman law of delict was punitive in nature.[3] The delict of *injuria* (insult) for example, has been seen by commentators as a basis for punishment by way of a monetary award:

> "Although the Praetorian remedy was for what we should call damages, the essence of the delict was not loss but insult, and therefore, the money payment must usually have represented not compensation in the ordinary sense, but rather solace for injured feelings or affronted dignity, the action had ... the ... characteristics of a penal action."[4]

3.02 The origins and early development of exemplary damages in the English common law are obscure. The first recorded awards of exemplary damages in the English courts are not to be found until the eighteenth century. It is useful, however, to place exemplary damages in the context of the development of the early common law, and of the remedies and sanctions for which it provided.

3.03 In early Anglo-Saxon law, the necessity to limit recourse to the blood-feud resulted in the development of a complex system of composition, of the

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1 These damages were expressed as multiples of the value of goods stolen or otherwise illegally acquired: for example, §8 of the Code states that if a man stole an ox, sheep, ass or pig from the temple or palace he had to pay thirty-fold its value. See L Schlueter and K Redden, *Punitive Damages*, (3rd ed.) (1995) §1.1.

2 David G Owen, *Punitive Damages in Products Liability Litigation* (1975) 74 Mich. L. Rev. 1257 at 1262, fn. 17.

3 W Buckland and A McNair, *Roman Law and Common Law* (1965) at p.344:

> 'delict is imbued with the idea of vengeance, and the action is primarily not for damages but for a penalty, though this is usually unliquidated; the primary aim is not compensation.'

The Twelve Tables made provision for multiple damages awards. See also B Nicholas, *Roman Law* (1962) and Schlueter and Redden *op cit.* fn.1. at §1.2.

4 Nicholas, *op cit.* fn.3 at p.217.

payment of *bot* (compensation) and *wer* to the injured party or his family.[5] In the twelfth century, this system was replaced, in the English courts at least, with "marvellous suddenness"[6] by a system which made the most serious offenses crimes against the King (and abolished *bot* and *wer* for their commission), made lesser offenses punishable by monetary fines (replacing *wite*) and in other cases replaced the *bot* with an award of damages.[7] Gradually, damages became the dominant remedy in civil actions.[8] In the early stages of their development, awards of double or treble damages were common.[9]

3.04 In the early common law, at the point where awards of damages first began to be made, there was no clear conception of the civil/criminal divide.[10] Although civil actions were distinguished, all causes of civil action, including torts, were considered to be punishable offenses.[11] Pollock and Maitland emphasise that, in this period:

> "every cause for a civil action is an offence and ... every cause for civil action in the king's court is an offence against the king, punishable by amercement, if not by fine and imprisonment."[12]

3.05 The fourteenth and fifteenth centuries saw the emergence of a distinct civil law.[13] Increasingly, the concept of intent became central to the criminal law, and criminal liability became associated with moral wrongdoing, rather than with the mere fact of injury. In this it differed from the civil law of the time, which retained its basis in strict liability.[14] By this period, compensation had come to be identified with civil remedies. Holdsworth quotes Hale, explaining the differing effects of incapacities such as madness, in the civil and criminal laws:

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5 Holdsworth, *A History of the English Law*, Vol II, (2nd ed.) pp.44-45. There might also be a *wite* payable to the king or other lord. This is the genesis of the public role in the sanctioning of an offence. At its height, this system became "very cumbrous" (Pollock and Maitland, *The History of the English Law Before the Time of Edward I* (2nd ed. 1898) Vol II p.458).

6 *ibid.* p.458.

7 Pollock and Maitland, op. cit. fn.5, at p.526 suggest that the ideas which informed the payment of *bot*, such as the "tariffs" for various offenses, may have lingered for a time in the early law of damages.

8 Pollock and Maitland *op cit.* fn.5, at pp.522-525.

9 Pollock and Maitland, *op cit.* fn.5, at p.522, cite as double damages "in a crude form" the provision of Stat. Mert. c.6. which states that if a male ward marries without the consent of the lord, the lord may hold the land for an additional period so as to obtain twice the value of that "marriage" of which he has been deprived. Multiple awards appear in a number of statutes of Edward I. A provision, of 1275 states that "trespassers against religious persons, shall yield double damages.": Statute of Westminster I, 3 Edw. 1, c. 1, vol. 1., cited in Owen, *op cit.* fn.1. at p.1263, fn.18. A statute of Gloucester of 1278, 6 Edw. I, c 5, allowed for the award of treble damages for waste.

10 Holdsworth, *op cit.* fn.5 at p.43.

11 Pollock and Maitland, *op cit.* fn.5, at p.519.

12 *ibid.* p.572. The action for trespass, for example, for which some of the earliest awards of damages were made, was closely related to the criminal Appeal, and the records of the time aver to a conception of trespass as a punishable offence (See Holdsworth, Vol. III, p.573).

13 Holdsworth, *op cit.* fn.5, Vol III pp.371-372.

14 Holdsworth, *op cit.* fn.5, Vol III pp.373-374.

"such a recompense [in civil law] is not by way of penalty, but a satisfaction of damage done to the party; but in cases of crimes and misdemeanours, where the proceedings against them are *ad poenam*, the law in some cases ... takes notice of these defects [such as madness] and ... relaxeth ... the severity of their punishments."[15]

3.06 The first express awards of exemplary damages were made in judgements of the English courts of the eighteenth century.[16] They concerned punishable conduct by agents of the State, which interfered with the personal rights of the plaintiffs. Awards of exemplary damages were made in two cases which arose out of the government's suppression of John Wilkes's *The North Briton*. In *Wilkes v Wood*, the plaintiff challenged the search of his home on foot of a general warrant, and was awarded large damages for trespass. Pratt L J held that

"[d]amages are designed not only as a satisfaction for the injured person but likewise as a punishment for 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."[17]

3.07 In the second case arising out of the incident, *Huckle v Money*,[18] a journeyman printer who had been taken into custody during the raid on the *North Briton*, was awarded £300 damages. Lord Camden accepted that the plaintiff had not suffered any serious injury, but, notwithstanding this, refused to set aside the award as excessive. He stated that the jury had been correct in awarding exemplary damages, since:

"To enter a man's home by virtue of a name-less warrant, in order to procure evidence is worse than the Spanish Inquisition, a law under which no English-man would wish to live an hour; it was a most daring public attack upon the liberty of the subject."

3.08 Although these cases are the first in which awards of exemplary damages are recorded, it is likely that the doctrine of exemplary damages had already developed to some extent in the English common law. Several theories have been put forward as to the possible evolution of a category of exemplary damages.[19] It has been suggested that it may have emerged in order to circumvent the power of a defendant, under the Writ of Attaint, to take proceedings against the jury where they had awarded an excessive sum of damages against him. The doctrine of exemplary damages provided an additional

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15 *ibid.* p.375.

16 A pre-16th Century example of an exemplary damages award may be *Chalouner v Moesle* (The Eyre of Northamptonshire), 34 Edward III, 97 Seld Soc 428, where, on appeal, "the justices ... assessed the damages at 10 marks because they saw by inspection that it was a heinous trespass."

17 (1763) Lofft. 1.

18 (1763) 2 Wils. 205.

19 See Schleuter and Redden, op.cit. fn.1, §1.3. Also, Sales, *The Emergence of Punitive Damages in Products Liability Actions: A Further Assault on the Citadel*, 14 St. Mary's L. J. 351 (1983).

justification for substantial awards, and thus strengthened the immunity of the jury, and the strength of the jury as an institution. A second explanation lies in the unavailability, under the early common law, of damages for mental anguish, embarrassment and other intangible loss. Exemplary damages may have been used to fill this lacuna. In the early case of *Tullidge v Wade*,[20] Judge Bathurst stated:

> "the circumstances of time and place, when and where the insult is given, requires different dangers, as it is a greater social insult to be beaten upon the Royal Exchange than to be beaten in a private room."[21]

3.09 Another possible reason for the development of a category of exemplary damages is the need to forestall revenge.[22] Finally, it is possible that exemplary damages were developed as a civil law response to the criminal law's inadequacy in protecting offenses against the person, in contrast to the protection given to offenses against property.

3.10 Whatever the merits of these various explanations of the origins of exemplary damages, it appears that the development of the doctrine from the eighteenth century onwards was relatively unprincipled. Awards of exemplary, punitive or vindictive damages continued to be made by the English courts, but the judgements contain no explanation of the basis of the awards.[23] In Ireland the law was applied in a similarly haphazard manner.[24]

The Present English Law

3.11 The present English law in relation to the award of exemplary damages is regarded by many as unsatisfactory and unprincipled.[25] The combined effect of the decisions in *Rookes v Barnard*[26] and *AB v South West Water Services*[27] has been to place strict limits on awards of exemplary damages.[28] The Court

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20 3 Wils. KB 18 95 Eng Rep. 909.

21 At p.910.

22 Holdsworth, a History of the English Law (4th ed., 1936) pp.43-45, 50-51.

23 There are dicta approving exemplary damages in *Benson v Frederick* (1766) 3 Burr. 1845; in *Tullidge v Wade* (1769) 3 Wils. 18; *Emblen v Myers* (1860) 6 H & N 54; and in *Bell v Midland Ry Co* (1861) 10 C.B.N.S. 287. The principle of exemplary damages was approved in obiter dicta by the Court of Appeal in *Whitham v Kershaw* (1886) 16 QBD 613; in *Finlay v Chirney* (1888) 20 QBD 494; *Dumbell v Roberts* [1944] 1 All E R and in *Butterworth v Butterworth and Englefield* [1920] P. 126. Awards of exemplary damages were upheld by the Court of Appeal in *Owen and Smith v Reo Motors (Britain) Ltd* [1934] All ER 734; *Loudon v Ryder* [1953] 1 All E R741; *Williams v Settle* [1960] 2 All E R 806.

24 See *infra* paras.7.14-7.18.

25 See the *Report of the English Law Commission on Aggravated, Exemplary and Restitutionary Damages*, (Law Com No. 247) December 1997, See also *infra* para.3.15.

26 [1964] 1 All E R 347

27 [1993] 1 All ER 609

28 Although the English Law Commission has pointed out that exemplary damages, while restricted at appellate level, continue to enjoy a healthy existence in the lower English courts. *Aggravated, Exemplary and Restitutionary Damages - A Consultation Paper* (1993) p.16.

of Appeal has attempted, in *Broome v Cassell & Co,*[29] to excise *Rookes v Barnard*, and restore exemplary damages to their former central position, but this attempt has been conclusively rejected by the House of Lords, on appeal in the same case.[30] The English Law Commission, in its *Report on Exemplary, Aggravated and Restitutionary Damages*,[31] has provisionally recommended extensive changes in the English law of exemplary and aggravated damages.[32]

Rookes v Barnard: Exemplary Damages Reluctantly Accepted as Legitimate but Awards Constrained

3.12 The case of *Rookes v Barnard*,[33] decided in 1964, marked an important watershed in the development of the law of exemplary damages in English law. The case concerned an industrial dispute over membership of the Association of Engineering and Shipbuilding Draughtsmen (AESD), a trade union. The appellant, an employee of BOAC, had resigned his membership of the union, following a disagreement with it. His fellow employees, including the respondents, all of whom were members of the union, threatened industrial action if the appellant was not dismissed from his post, and the appellant was duly dismissed by his employers, despite the absence of any breach of the employment contract on his part. The appellant claimed damages against the respondents for using unlawful means to induce BOAC to terminate his contract of service, and for conspiracy. The jury found in favour of the appellant and awarded exemplary damages, on the basis that there had been a deliberate attempt to bring illegal pressure to bear on BOAC to dismiss the appellant.

3.13 In his House of Lords speech in the case, Lord Devlin made the important distinction between aggravated and exemplary damages, confirming the status of aggravated damages as compensatory. He viewed exemplary or punitive damages as an anomaly within the civil law,[34] but held that, given the long history of exemplary damages in English law, it was not within the power of the House of Lords to abolish them.[35] Lord Devlin was also convinced that, in certain circumstances, the award of exemplary damages would serve a useful purpose in vindicating the strength of the law; to that extent their anomalous nature could be disregarded.[36] He therefore restricted awards of exemplary damages to three categories of situations:

1. Where there had been "oppressive, arbitrary or

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29 [1971] 2 QB 354

30 *Cassell & Co v Broome* [1972] 1 All ER 801.

31 *op. cit.* fn.25.

32 See also the English Law Commission's Consultation Paper, *op cit.* fn.28.

33 *op cit.* fn.26.

34 At p.407.

35 At p.410.

36 *ibid.*

unconstitutional action by the servants of the government";

2. Where "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"; or

3. Where exemplary damages are expressly authorised by statute.

3.14 Lord Devlin went on to set out considerations which should be taken into account in the assessment of any award of exemplary damages.[37] They are:

1. The requirement that the plaintiff be a victim of punishable behaviour;[38]

2. The requirement that restraint should be exercised in the award of exemplary damages; and

3. The requirement that the means of the parties should be taken into account.

3.15 Given the strictures of Lord Devlin's limitations on exemplary damages, compensatory, including aggravated, damages must be relied on to do much of the work which might previously have been done by exemplary damages. Lord Devlin stated that, in making an award of exemplary damages, the jury must be directed to have regard to the sum of compensatory damages awarded. The jury should be directed that exemplary damages should be awarded "if, but only if" the sum of compensatory damages is inadequate to punish the defendant.[39]

3.16 There has been much criticism of Lord Devlin's three categories of situations in which exemplary damages may be awarded.[40] In relation to the first category, it has been questioned why oppressive action by a State authority should be distinguished from similar action by a private entity wielding comparable power, such as a privatised industry, a large corporation, or a trade union. Concerning the second category, critics have pointed out that it is illogical to penalise conduct motivated by the desire for profit, while leaving unpunished conduct motivated by spite or malice.

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37 *ibid.*, p.411.

38 This limitation allows that the damages should be assessed only in so far as his wrong has injured the plaintiff.

39 *ibid.*, p.411. Although Lord Devlin's remarks as to the possible punitive affect of an award of compensatory damages were made in regard to the assessment of quantum, in a case where exemplary damages had already been found to be legitimate (ie in a case which came within one of Lord Devlin's three categories) the dicta show an acceptance that compensatory damages may have a punitive effect, and indicate that such an effect is more acceptable (and less anomalous) where it is not expressed or intended to be punitive.

40 Hodgkin and Vetch, *Punitive Damages - Reassessed* (1972) 21 I.C.L.Q. 118; R Burglass, *Some Thoughts on Exemplary Damages*, (1969) 34 Sask. L. Rev., 325; Pipe, *Exemplary Damages after Camelford*, (1994) 57 Mod. L. Rev. 91.

Rookes v Barnard Criteria Loosened in Cassell & Co v Broome

3.17 Dissatisfaction with *Rookes v Barnard*[41] was demonstrated by the attempt by the Court of Appeal, in *Broome v Cassell & Co*,[42] to overthrow it. Lord Denning in that case described Lord Devlin's categorisation as "hopelessly illogical and inconsistent". This view was not shared by the House of Lords, which, on appeal,[43] reinstated the doctrine of *Rookes v Barnard.* They did attempt to mitigate its strictures, however, by adopting a broad interpretation of Lord Devlin's categories.

3.18 In regard to the first category, Lord Hailsham interpreted it as applying, not just to servants of the government in the strict sense of the word, but also to the police, local officials, and:

> "it may be that in the future it will be held to include other abuses of power without warrant by persons purporting to exercise legal authority."[44]

Lord Reid also interpreted the scope of this category broadly:

> "the context shows that the category was never intended to be limited to crown servants. The contrast is between 'the government' and private individuals".[45]

Lord Reid saw the category as including "all those who by common law or statute are exercising functions of a governmental character." In Lord Diplock's opinion, the first category was not confined to torts committed by servants of central government. It embraced all persons purporting to exercise powers of government, central or local, conferred on them by statute or at common law by virtue of the official status or employment which they held.[46]

3.19 A similar approach was taken by the House of Lords in relation to Lord Devlin's second category. Lord Hailsham thought that, on this point, "a broad rather than a narrow interpretation of Lord Devlin's words was absolutely essential."[47] It was not necessary, in order to ground recovery of exemplary damages, to show that the defendant had calculated that the sum of damages which might be awarded to the plaintiff would be less than the defendant's profit. It was only necessary to show, generally, that the defendant had acted with knowledge that he would more than likely profit from the tortious action:

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41 *op cit.* fn.26.

42 *op cit.* fn.29.

43 *Cassell & Co. v Broome* [1972] 1 All E R 801

44 *ibid.*, per Lord Hailsham at p.829.

45 *ibid.*, p.838.

46 *ibid.*, p.873.

47 *ibid.*, p.830.

whether this was because the potential plaintiff was unlikely to sue, or because any award of damages he might recover would be negligible, was immaterial.[48]

3.20 Thus, although the categorisation imposed by *Rookes v Barnard* was affirmed, it was indicated that the House of Lords would tolerate some flexibility in the application of the categories. In the case of at least one of the speeches, that of Lord Wilberforce, this flexibility was grounded in an express ambivalence as to the compensatory or punitive nature of exemplary damages.[49] Lord Wilberforce, while accepting that the judgement of the House of Lords in *Rookes v Barnard* must stand, expressed grave reservations as to its alteration of the law, and a certain amount of sympathy with the Court of Appeal's attempt to excise it.[50] In his speech, he doubted whether a single purpose could be discerned from any particular award of damages, as each plaintiff might have many motives in seeking the award.[51] It was regrettable, therefore, that damages had been rigidly compartmentalised with reference to their purpose; in this Lord Wilberforce was particularly concerned that the awarding of damages under a number of headings would lead to excessive amounts being awarded by juries.

Rookes v Barnard to Apply in Limited Causes of Action: AB v South West Water Services

3.21 The scope of application of exemplary damages was further diminished by the decision by the Court of Appeal in 1993 in the case of *AB v South West Water Services*.[52] That case placed additional restrictions on the award of exemplary damages, limiting the number of torts in regard to which they could be awarded, to those torts in respect of which exemplary damages had been awarded prior to the decision in *Rookes v Barnard.* The case raised the question of whether the plaintiffs could recover exemplary damages for the tort of public nuisance. In holding that they could not, and in restricting recovery of exemplary damages to a settled range of torts, the Court of Appeal relied on dicta of the House of Lords in *Cassell & Co v Broome,*[53] where Lord Diplock had stated that:

> "*Rookes v Barnard* was not intended to extend the power to award

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48 *ibid.*, p.831.

49 *ibid.*, at p.860:

> "it cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages ... As a matter of practice English law has not committed itself to any of these theories; it may have been wiser than it knew."

50 *ibid.*, p.866

51 ibid. p.861.

52 *op cit.* fn.27.

53 *op cit.* fn.30

exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence and deceit. Its express purpose was to restrict, not to expand, the anomaly of exemplary damages."[54]

3.22 The effect of the decision in *AB v South West Water Services* is that further development of the English law of exemplary damages is largely forestalled. One commentator has lamented that: "the law is now fossilised in a form dependent on the accidents of pre-1964 litigation."[55] It is clear that, however liberally the courts may construe the *Rookes v Barnard* judgment, the exceptions it allows to the general prohibition on exemplary damages are confined to a determinate range of torts. On an examination of the caselaw, it is not entirely clear what this range of torts may be. There are conflicting authorities, for example, on whether deceit is included within the range of torts for which exemplary damages are recoverable.[56] The English courts have been steadfast in their refusal to extend recovery of exemplary damages to cases of negligence, and, following *AB v South West Water Services*, such cases would now clearly be excluded.[57] It would appear, however, that in some cases of statutory torts, created subsequent to *Rookes v Barnard*, exemplary damages may be recoverable. In *Bradford Metropolitan City Council v Arora,*[58] it was held that exemplary damages could be recovered for racial and sexual discrimination under the *Race Relations Act 1976*.[59]

Quantum of Exemplary Damages

3.23 In the recent case of *Thompson v Commissioner of Police,*[60] the Court of Appeal set limits to the amount of exemplary damages that could be awarded by a jury, and laid down guidelines for the directions to be given to a jury assessing damages. The Court held that an award of £50,000 was the maximum appropriate for exemplary damages in a civil action against the police. This was, the Court held, a figure:

> "sufficiently substantial to make it clear that there had been conduct of a nature which warranted serious civil punishment, and indicated the

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54 [1972] 1 All ER 801 at p.874 per Lord Diplock.

55 Alan Reed, *The End of the Line for Exemplary Damages?* 143 NLJ (1993) 929 at p.931.

56 *Mafo v Adams* [1970] 1 QB 148; *Archer v Brown* [1985] QB 401; *Metall und Rohstoff AG v AcliMetals (London) Ltd* [1984] 1 Lloyds Rep 589

57 *Barbara v Home Office* (1984) 134 NLJ 888; *Munro v Ministry for Health* (Unreported); See P R Ghandi, *Exemplary Damages in Public Nuisance*, Solicitor's Journal, 27 November 1992, 1196.

58 [1991] 3 All E R 545.

59 See Alan Reed, *op cit.* fn.55. Exemplary damages had previously been held by the Court of Appeal to be available in cases of racial discrimination under the *Race Relations Act 1976: Alexander v Home Office* [1988] 1 WLR 1968.

60 The Times, 20 Feb. 1997.

jury's vigorous disapproval of what had occurred but at the same time recognised that the plaintiff was the recipient of a windfall in relation to exemplary damages."

3.24 The Court of Appeal held that, where exemplary damages were appropriate, it should be explained to the jury that such an award was exceptional, and that such damages should only be awarded where the compensatory and aggravated damages awarded would not have the effect of adequately punishing the defendant. It would provide a useful check on exemplary damages, the Court held, if it were accepted that the total sum of damages, including exemplary damages, should not exceed three times the basic (compensatory) damages awarded. In response to a submission that the disciplinary proceedings available against the officers concerned should be taken into account in the calculation of damages, the Court held that this would be permissable only where there was good evidence that the proceedings were likely to take place, and there was a reasonable chance that they would succeed.

Aggravated Damages

3.25 Prior to the House of Lords' decision in *Rookes v Barnard,* the separate identity of the award of exemplary damages was not clearly established, and the term "aggravated damages" was often used interchangeably with "punitive damages" and "exemplary damages". In that case, Lord Devlin stressed that aggravated damages were compensatory in nature, and that they could be awarded in cases in which:

> "the injury to the plaintiff has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied."[61]

3.26 The award of aggravated damages looks to both the injury to the feelings of the plaintiff, and to the conduct of the defendant in injuring him. In English law, before there can be an award of aggravated damages, it must be shown both that there was exceptional conduct on the part of the defendant, such as malice, insolence or arrogance, and that this resulted in mental distress or suffering - not physical suffering[62] - on the part of the plaintiff. Furthermore, the plaintiff in the case must be aware of the malice or exceptional conduct of the defendant, so that it may be shown that he has been affected by it.[63]

3.27 An award of aggravated damages may be made in respect of the conduct

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61 At p.412.

62 It is likely that aggravated damages cannot be awarded in favour of a plaintiff corporation, since such a plaintiff is incapable of mental suffering: *Columbia Pictures Industries Inc. v Robinson* [1987] Ch. 38.

63 *Alexander v Home Office* [1988] 1 WLR968

of the defendant subsequent to the wrong, for example during trial. In *Sutcliffe v Presdram Ltd*,[64] Nourse J in the Court of Appeal listed the factors which, in a libel case, might ground an award of aggravated damages, as including:

> "... conduct calculated to deter the plaintiff from proceeding; persistence, by way of a prolonged or hostile cross-examination of the plaintiff or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct whether of the preliminaries or of the trial itself in a manner calculated to attract further wide publicity; and persecution of the plaintiff by other means."[65]

3.28 Lord Devlin, in his speech in *Rookes v Barnard*, saw aggravated damages as making exemplary damages unnecessary in many cases. Despite his view of aggravated damages as being compensatory, he stated that "aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages". Thus, since the courts refer both to the conduct of the defendant and the effect on the plaintiff, there has been some ambiguity as to whether the function of the award of aggravated damages is compensatory or punitive, or an amalgam of both. This ambiguity may be seen in Lord Hailsham LC's dicta in *Cassell & Co v Broome*[66]:

> "In awarding aggravated damages, the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solution. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more adequate solution."[67]

3.29 The requirement that, in order for aggravated damages to be awarded, there must be exceptional conduct on the part of the defendant, characterised by malice, insolence or arrogance, leaves the award of aggravated damages in negligence cases open to question. The English courts have held that aggravated damages may not be awarded in negligence cases or in cases of breach of contract. In *Kralj v McGrath*,[68] the Court implied that it was the punitive nature of aggravated damages which made them unsuitable to be awarded in negligence cases. Woolf J stated:

> "It is my view that it would be wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence, the concept of aggravated damages ... If the principle is right, a higher award of

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64 [1990] 1 All E R 269

65 At p.288.

66 *op cit*, fn.30.

67 At pp.825-826.

68 [1986] 1 All ER 54

damages would be appropriate in a case of reckless driving which caused injury than would be appropriate in cases where careless driving caused identical injuries. Such an approach seems to me to be wholly inconsistent with the general approach to damages in this area, which is to compensate the plaintiff for the loss she has suffered ... and not to treat those damages as being a matter which reflects the degree of negligence or breach of duty of the defendant."[69]

3.30 The exclusion of aggravated damages in negligence and breach of contract cases was reaffirmed by the Court of Appeal in *AB v South West Water Services*.[70] In that case the Court also placed a further limitation on the recovery of aggravated damages, when it held that the plaintiff's feelings of anger and indignation at his treatment by the defendant were not sufficient to ground aggravated damages, since such feelings did not constitute pain or suffering.[71]

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69 At p.61.

70 *op cit.* fn.27 at pp.624-625.

71 *ibid.* at p.624.

CHAPTER 4: EXEMPLARY DAMAGES IN OTHER COMMON LAW COUNTRIES

4.01 Since the decision of the House of Lords in *Rookes v Barnard*,[1] the courts of other common law countries have been concerned to prevent or limit the impact of that decision in their own law. It now seems clear that *Rookes v Barnard* is not a potent force outside England, and that awards of exemplary damages are acceptable in the majority of common law countries. Having given a wider sphere of application to exemplary damages, the courts of Canada, Australia and New Zealand have developed jurisprudence on the principles on which awards of exemplary damages are to be based, and in particular, on the standard of culpability which gives rise to liability for exemplary damages.[2]

Canada: Rookes v Barnard Rejected[3]

4.02 The Canadian courts award both aggravated and exemplary damages. A clear distinction is made between the two types of awards, and aggravated awards are regarded as compensatory.[4]

4.03 In the case of *Vorvis v Insurance Corporation of British Columbia*[5], the Canadian Supreme Court rejected the limitations placed on exemplary damages by *Rookes v Barnard*. Although the Court confirmed that exemplary damages could be awarded under Canadian law, it stated that such awards should be confined to cases of extreme conduct deserving of condemnation and punishment. The conduct would have to be harsh, vindictive, reprehensible or exhibit a malicious motive, in order for exemplary damages to be awarded.

4.04 Despite this cautious approach, the Canadian courts have allowed for the

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1 [1964] 1 All E R 367.

2 Collis, *Tort and Punishment*, (1996) A.L.J., 47; Hodgkin and Vetch, *Punitive Damages - Reassessed* (1972) 21 I.C.L.Q. 118.

3 See Symposium: *Punitive Damages in Contract and Tort*, Vol 16, no 3, Canadian Business Law Journal (1990) 241. The law of the province of Quebec is considered separately in Chapter 6.

4 See Cooper-Stevenson and Saunders, *Personal Injury Damages in Canada* (1981) at p.55. In *Robitaille v Vancouver Hockey Club* [1981] 3 WWR481, it was held by Esson J that:

> "[a]ggravated damages are not given to punish the defendant but as extra compensation to the plaintiff for the injury to his feelings and dignity, particularly where the injury to him has a been increased by the manner of doing that injury."

5 (1989) 58 DLR (4th) 193.

recovery of exemplary damages in cases of negligence, albeit only in rare cases. In *Robitaille v Vancouver Hockey Club*,[6] the British Columbia Court of Appeal upheld an award of exemplary damages for negligence and explained its decision as follows:

> "The reason why awards of exemplary damages in negligence cases are rare is because in most negligence cases the conduct of the defendants, apart from lack of care, has not been blameworthy. In the case on appeal, the negligence of the defendant flowed from, and was directly linked with, the arrogant and high-handed conduct of the officers and servants of the defendant."[7]

4.05 In *Dhalla v Jodrey*,[8] Jones JA, giving judgement in the Supreme Court of Nova Scotia, stated *obiter* that exemplary damages could be awarded in addition to general damages in a negligence case. He relied on a passage from Waddams, *The Law of Damages*:

> "Generally, therefore, exemplary damages are not awarded for negligence, but a case can be imagined where the defendant deliberately exposes the plaintiff to a risk without justification. In such a case - which can be said to amount to recklessness - the court might consider an exemplary award to be appropriate."

Australia: Rookes v Barnard Rejected

4.06 The Australian courts have also rejected the *Rookes v Barnard* limitations, in *Uren v John Fairfax & Sons, Pty Ltd,* and the connected case of *Australian Consolidated Press v Uren*.[9] In the first case, the High Court of Australia ruled that exemplary damages could be awarded where there was a "contumelious disregard of the rights of the plaintiff". Exemplary damages were distinguished from aggravated damages on the basis that the state of mind of the defendant was relevant in exemplary damages cases but not relevant to an award of aggravated damages. Therefore, it would not be necessary to establish malice to ground an award of aggravated damages, and aggravated damages could be awarded in cases of negligence. In the later case of *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*,[10] the High Court emphasised the deterrent and social function of exemplary damages. It detected a social purpose in the English conception of exemplary damages:

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6 [1981] 3 WWR481.

7 [1981] 3 WWR481 at p.510.

8 (1985) 16 DLR 732.

9 (1968) 117 CLR 118; (1968) 117 CLR 185. See Collis, *op cit.* fn. 2.

10 (1985) 155 CLR 448

"[t]he social purpose to be served by an award of exemplary damages is, as Lord Diplock said in *Broome v Cassell & Co*, 'to teach the wrongdoer that tort does not pay'."

4.07 Again, in *Lamb v Cotongo,*[11] the Court saw the aim of an award of exemplary damages as deterrence of both the defendant and of others, stating that: "the deterrence which is intended extends beyond the actual wrongdoer and the exact nature of his wrongdoing."[12]

4.08 In the past decade, the Australian courts have moved towards an acceptance of awards of exemplary damages in negligence cases. The foundations were laid in *Lamb v Cotongo*,[13] in which it was held that:

"the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious".

4.09 In *Coloca v BP Australia*,[14] the Supreme Court of Victoria held that exemplary damages could be awarded for personal injuries caused by negligence, but that such awards would be "unusual and rare", and should be awarded only where the conduct of the defendant towards the plaintiff merited punishment.

4.10 In contrast to the liberal approach of the Australian courts towards awards of exemplary damages, there have been a number of legislative restrictions on such awards. In New South Wales, the legislature has abolished exemplary damages in cases of motor accident injuries, industrial injuries, and defamation claims. In Victoria, exemplary damages have been abolished in relation to motor accident cases and industrial injury claims.[15]

4.11 The decision in *Lamb v Cotongo*[16] is also interesting on the issue of insurance cover for an award of exemplary damages. In the case, the Australian High Court approved an exemplary damages award where the plaintiff was indemnified against the award. The Court reasoned that the object of the award was not alone to deter the defendant, but also to deter other persons of like mind and, generally, to deter conduct of the same reprehensible kind.

4.12 Another issue which has been explored by the Australian courts is that of the award of exemplary damages in cases of joint tortfeasers. In *XL Petroleum*

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11 (1987) 164 CLR 1

12 For a recent discussion of the Australian law of exemplary damages, see the judgement of the Federal Court of Australia in *Sanders v Snell* [1997] 229 FCA (9 April 1997).

13 (1987) 164 CLR 1

14 [1992] 2 VR 441.

15 Collis, *op cit.* fn.2.

16 *op cit.* fn.11.

(NSW) Pty. Ltd. v Caltex Oil (Australia) Pty. Ltd,[17] the High Court of Australia held that there was no objection in principle to the making of an exemplary award against one of multiple defendants, and confining the award to compensation in respect of the others.

New Zealand: The Complicating Variable of No-Fault Liability[18]

4.13 The situation in New Zealand differs from that in the other jurisdictions so far discussed in that the New Zealand law of damages has been shaped by the *Accident Compensation Act, 1972*, which established a comprehensive no-fault compensation scheme for personal injury as a result of accident. Under the Act, compensatory and aggravated damages cannot be awarded for such injuries, but the Act is silent on the question of exemplary damages. In *Donselaar v Donselaar*,[19] the New Zealand Court of Appeal held that the Act did not preclude the award of exemplary damages. In arriving at this ruling, the Court had to circumvent the objection that exemplary damages are parasitic on compensatory damages: since they arise indirectly out of the injury, it is argued, they cannot be awarded in cases where no award of compensatory damages is made. This position is inferred from Lord Devlin's dictum that, in order for exemplary damages to be awarded, the plaintiff must be the victim of punishable behaviour.[20] Where no compensatory damages are awarded, the implication is that the plaintiff has suffered no compensatable injury; therefore her receipt of a exemplary damages "windfall" award, imposed to serve a public law function, is unjustifiable. This approach creates difficulties in cases to which the *Accident Compensation Act* applies, as the Act's exclusion of compensatory damages would seem to exclude by implication any award of exemplary damages.

4.14 Cooke J, giving judgement in the Court of Appeal, considered that the *Accident Compensation Act* did not intend to preclude awards of exemplary damages in the cases to which it applied. He therefore saw no obstacle to awarding exemplary damages in the case before him. Cooke J admitted that the award of exemplary damages without a compensatory award created difficulties in the assessment of quantum;[21] but he found that any such difficulties were overridden by considerations of social policy, which made it essential to allow for the award of exemplary damages as effective sanctions against certain wrongs. At a time of change in New Zealand society the law must not withhold:

> "constitutional remedies for high-handed and illegal conduct, public or

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17 (1985) 155 CLR 448.

18 See generally, Todd (ed.), *The Law of Torts in New Zealand* (1991), p.871 *et seq.*

19 [1982] 1 NZLR 97.

20 *Rooks v Barnard, op cit.* fn. 1, at p.411.

21 The absence of compensatory damages in personal injuries cases arising from accidents has led to difficulties in the assessment of exemplary damages, as they cannot be assessed in proportion to the sum of compensatory damages. See B W Collis, *Tort and Punishment*, (1996) 70 ALJ 47.

private, if it is reasonably possible to provide them ... we should try to meet a problem occasioned by the *Accident Compensation Act* by consciously moulding the law of damages to meet social needs."[22]

4.15 In a judgment handed down on the same day as that in *Donselaar,* the Court of Appeal, in *Taylor v Beere,*[23] followed *Australian Consolidated Press v Uren,*[24] in holding that the restrictions imposed in *Rookes v Barnard*[25] were not binding on the New Zealand courts. The court envisaged a wide scope for exemplary damages. Richardson J saw exemplary damages as performing a vital social function, since the criminal law cannot be the only "vehicle of social control of an increasingly diverse and multi-value society." In the light of this, it cannot be assumed that the role of the civil law is purely compensatory: tort law,

> "cannot be fitted neatly into a single compartment ... [i]t is a hybrid of private law and public interests, issues and concerns."[26]

4.16 The Court in the *Donselaar*[27] case held that since, under the *Accident Compensation Act*, compensatory or aggravated damages could no longer be awarded, purely punitive or exemplary damages would have to be made to do some of the work previously done by aggravated damages. Thus, the distinction between aggravated and exemplary damages is no longer very clear in New Zealand law.

South Africa

4.17 The South African law of tort, known more commonly as the law of delict, has its basis in Roman-Dutch law. The status of punitive/exemplary damages in South African law is controversial. It appears that, in general, exemplary damages may not be recovered. Where exemplary-type awards have been made, it is also possible to classify them as aggravated damages, or as a species of "sentimental damages" with a basis in the distress or suffering of the plaintiff.[28]

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22 *op cit.* fn.19, p.106. The New Zealand Court of Appeal has reaffirmed *Donselaar,* in *Green v Matheson* [1989] 3 NZLR 564 and *Willis v AG* [1989] 3 NZLR 574, distinguishing exemplary damages from compensatory, and placing them outside the scope of the *Accident Compensation Act.*

23 [1982] 1 NZLR 81

24 *op cit.*, fn.9.

25 *op cit.*, fn.1.

26 *ibid.*, p.90.

27 *op cit.* fn.15.

28 *R G McKerron, The Law of Delict,* (1971) at p.113. *Ntandazeli Fose v The Minister of Safety and Security* CCT 14/96 at p.18, states that the appellate court has recognised that punitive damages may be awarded in defamation cases and in cases of adultery.

4.18 In a recent case dealing with the award of punitive damages for breach of constitutional right, *Ntandazeli Fose v Minister of Safety and Security*,[29] the Constitutional Court refused to award punitive damages for breach of the plaintiff's constitutional rights.[30] The plaintiff in the case had suffered serious assault at the hands of members of the security forces. He sought a substantial award of "constitutional damages", which were to include "an element of punitive damages".[31] Discussion of the issues in the Constitutional Court was in the context of section 7 (4) (a) of the Interim Constitution of South Africa, which allowed for a cause of action and "appropriate relief" against the State for infringement of a fundamental constitutional right. Ackermann J held that there was no reason why "appropriate relief" under this section should not include an award of damages, where this would be necessary to protect the rights infringed. He expressed serious reservations, however, about the award of exemplary damages, both in general and in particular against the State for breach of constitutional rights.[32] He concluded that:

> "... we ought not, in the present case, to hold that there is any place for punitive constitutional damages. I can see no reason at all for perpetuating an historical anomaly which fails to observe the distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution."[33]

4.19 Central to the rejection of punitive damages by the Court was the public policy consideration that such awards made against the state would place an unjustifiable burden on public resources.[34] It was suggested by Didcott J, *obiter*, that a punitive damages award against a private corporation might be more easily justified.[35]

Nigeria

4.20 After some initial uncertainty, the Nigerian courts have now rejected the doctrine of *Rookes v Barnard,* and have accepted that exemplary damages can

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29 *op cit.* fn.28.

30 The approach of the South African Supreme Court in the case contrasts with the approach of the Irish Supreme Court, which has viewed punitive damages as a necessary means to vindicate constitutional rights: see *infra* Chapter 7.

31 *Fose v Minister of Safety and Security*, *op cit.* fn. 28, at p.4.

32 *ibid.*, pp.19-20.

33 *ibid.*, pp.20-21.

34 It was also stressed by the Court that, in a case such as the instant one, the deterrent effect of a punitive damages award would be likely to be slight, since a large monetary award against the State would be unlikely to deter potential torturers (per Didcott J at p.23, and Ackermann J p.21.)

35 *ibid.* p.24.

continue to be awarded under Nigerian law.[36] In *Ezeami v Ejidike*[37] the Supreme Court held, *obiter*, that *Rookes v Barnard* was "of strong persuasive authority" in Nigerian law. Dicta of the Court of Appeal, in *Shugaba Abdul Rahman v Minister of Internal Affairs*[38] suggested that *Rookes v Barnard* might be binding on the Nigerian courts, but the Supreme Court found otherwise in *Eliochin v Mbadiwe*,[39] finally issuing a decisive rejection of Lord Devlin's restrictions, and awarding exemplary damages.

Conclusions

4.21 The caselaw which has been discussed in this Chapter demonstrates that the courts of commonwealth countries have considered exemplary damages carefully and on a principled basis. The English law has for the most part not been considered persuasive. Whilst the trend in the majority of common law jurisdictions appears to be towards a wide availability of exemplary damages, limited by a high standard of culpability, it would seem that South Africa is an exception to this.

4.22 A striking feature of some of the leading commonwealth cases has been the emphasis placed by the courts on the social function and practical effect of exemplary damages, and on the need to consider them in the wider social context. This may serve either to broaden the scope of their recovery (as in New Zealand) or to limit it (as in South Africa). The law of the commonwealth jurisdictions demonstrates the wide scope which exists for the development of exemplary damages within the common law, and in doing so suggests that there remains much possibility for the development, both judicial and legislative, of the Irish law.

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36 See generally, Hakeem Ogunniran, *Awarding Exemplary Damages in Tort Cases: the Dilemma of Nigerian Courts* [1992] J. Afr. L. 111

37 [1964] 1 All N L R 402

38 [1986] NWLR 502

39 [1986] NWLR (Pt 14) 47

CHAPTER 5: PUNITIVE DAMAGES IN THE UNITED STATES

5.01 In the US, more so than in other common law jurisdictions, the availability of punitive damages in tort actions is well established.[1] Punitive damages are awarded on the basis of wilful or wanton conduct, or of a conscious and deliberate disregard of the interests of others.[2] Their purpose is to punish outrageous conduct, and to deter both the defendant and others.[3] As a result of their central place in the legal system, US jurisprudence regarding punitive damages is highly developed, and the courts have addressed many of the difficult issues inherent in such awards. US punitive damages law is also of particular interest from an Irish perspective, since it has developed against the background of a written Constitution, which has at times been an influence, and at times a constraint, on the development of the law. Awards of punitive damages in the US courts have been subjected to constitutional challenge on a number of grounds, including due process, equal protection, excessive fines and double jeopardy. Although the courts have been dismissive of arguments that punitive damages are in themselves unconstitutional,[4] particular awards may be struck down in certain circumstances.

5.02 There has been considerable concern in the US that awards of punitive damages may be unreasonably high. Since the 1960s, when punitive damages first began to be awarded for bad-faith breach of insurance contracts and in products liability cases, punitive awards have been high and frequent. There has been criticism of the lack of control over the quantum of punitive damages, and the

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1 The term "exemplary damages" is not generally used in US law. The category of punitive damages in US law is clearly distinct from that of compensatory damages. A number of cases have emphasised that the purpose of punitive damages is purely punitive: *Gertz v Robert Welch Inc.*, (1974) 418 US 323; *International Bhd. of Elec. Workers v Foust* (1979) 442 US 42; *City of Newport v Fact Concerts Inc.*, (1981) 453 US 247. Aggravated damages are unknown to US law, and their function is largely performed by punitive damages. Several states prohibit the award of punitive damages, including: Massachusetts; Nebraska; Washington; and New Hampshire. In Indiana, punitive damages may not be recovered if the defendant is also subjected to criminal action for the same act. See R K Stropus, *Bernier v Burris: The Constitutional Implications of Abolishing Punitive Damages in Medical Malpractice Actions* Vol 19 No. 4 ULJ 1285

2 Prosser and Keeton, *The Law of Torts*, (5th ed.) (1984) p.9.

3 Restatement (Second) of Torts §908

4 In *Day v Woodworth* 54 U.S. (13 How.) 362 (1851) the Supreme Court stated:

> "We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument."

This has been subsequently relied on by the Supreme Court as authority for the constitutionality of punitive damages, but Schlueter and Redden, *Punitive Damages* (3rd ed.) (1995) at §3.1, caution against reliance on the case, since the comments quoted above were obiter dicta.

breadth of jury discretion in the assessment of quantum.[5] Although the validity of concerns over excessive awards is questioned by some commentators, it has led to numerous constitutional challenges in the courts, and to repeated intervention by State legislatures.

Constitutional Challenges to Punitive Damages Awards

Due Process

5.03 The most significant constitutional difficulties with punitive damages have arisen in relation to due process, both substantive and procedural.[6] In the 1927 case of *Louis Pizitz Dry Goods Co v Yeldell,*[7] the Supreme Court held that punitive damages were not in violation of substantive due process, as then understood.[8] That case involved the vicarious liability of an employer for punitive damages. The Supreme Court held that the imposition of punitive damages on the employer did not violate the guarantee of substantive due process. It must be assumed that if the imposition of such an award is justifiable in these circumstances, the compatibility of the majority of punitive damages awards with substantive due process is assured.

5.04 Further difficulties have arisen regarding the procedural protections in punitive damages cases, and the mechanisms of assessment of punitive damages. In particular, where very large punitive damages awards are made, procedural due process may be violated.

5.05 In the cases of *Pacific Mutual Life Insurance v Haslip,*[9] and *TXO Production Corporation v Alliance Resources,*[10] the Supreme Court, while upholding the constitutionality of the punitive awards before them, held that

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5 *Gertz v Robert Welch Inc.*, 418 U.S. 323 (1974):

> "In most jurisdictions, jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."

6 Substantive due process (as derived from the Fifth and Fourteenth Amendments) places limits on the government's ability to deprive the individual of rights, based on whether the deprivation is such as to "shock the conscience" and on the relative weight of the State interest and the rights of the individual concerned. Procedural due process focuses on procedural protections and is governed by the principal that the individual must be treated fairly by the government.

7 (1927) 247 U.S. 112

8 Although strongly favoured by the US Supreme Court in early 20th Century, notions of substantive due process fell out of favour in the late 1930s and have been controversial ever since. Substantive due process was employed by the Supreme Court to strike down a range of reforming labour law legislation imposing, *inter alia*, minimum working hours and minimum wages. It was associated with the conservative economic philosophy which dominated the Supreme Court at that time. The leading case of the substantive due process era was *Lochner v New York* 198 US 45 (1905). See Laurence H Tribe, *American Constitutional Law* (2nd ed., 1988) Chapter 8; and Jerome A Barron and C Thomas Dienes, *Constitutional Law: Principles and Policy* (2nd ed., 1982) pp.338-355.

9 (1991) 499 U.S. 1

10 (1993) 509 U.S. 443

excessive punitive damages might involve a breach of procedural due process.[11] In a third case of a constitutional challenge before the Supreme Court, *Oberg v Honda Motor Company*,[12] the Court reversed a finding of constitutionality of an award by the Oregon Supreme Court, and remanded the award for reconsideration, holding that the prohibition on judicial review of punitive damages awards in the Oregon Constitution, was contrary to the due process guarantee.[13] Following this, in the recent case of *BMW v Gore*[14], the Supreme Court struck down an award of $2 million punitive damages, on the grounds that the award was grossly excessive and that the defendant had not received sufficient notice that such a severe penalty, effectively equivalent to a criminal penalty, would be imposed. The Court held that:

> "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of a penalty that a state may impose."

5.06 The Court listed three "guideposts" to be taken into account in deciding whether there had been sufficient notice of the award:

1. The degree of reprehendsibility of the defendant's conduct;

2. The disparity between the harm to the plaintiff and the damages awarded;

3. The difference between the penalty and civil penalties imposed in comparable cases.[15]

5.07 Following *BMW v Gore,*[16] the US Supreme Court has struck down punitive awards in a number of cases.[17] In *Continental Trend Resources, Inc v*

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11 Earlier cases had upheld punitive awards against challenges on grounds of due process: *Burke v Deere*, 780 F Supp. 1225 (S.D. Iowa 1991) and *Cathey v Johns-Manville Sales Corp.*, 776 F.2d 1565 (6th Cir. 1985), where the award was upheld as in accordance with due process despite the defendant's plea that he had been subjected to multiple civil punishment in respect of the same wrong. In *Haslip*, the Court stated that punitive damages awards made on the basis of unlimited jury discretion "may invite extreme results that jar one's constitutional sensibilities." (*op cit.* fn.9 at p.18) In *TXO Productions, op cit.* fn.10, at p.2720, the Court refused to formulate a test for the unconstitutionality of excessive awards, holding that there could be no "mathematically bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."

12 320 Or. 544, 888 P.2d 8 (1995)

13 The Court held that the standard of review should be whether there was a rational basis for the award, and whether a rational trier of fact would make such an award. The Court took the view that there was a range of punitive damages which a jury could reasonably award in any given case.

14 (1996) 116 S. Ct. 1589

15 See casenote on *BMW v Gore* in (1996) 110 Harv. L. Rev. 145.

16 *op cit.* fn.14.

17 See Newman and Ahmuty, *Post-BMW Punitive Damages Decisions - Part I*, New York Law Journal, January 29 1997. Awards were struck down or reduced in *Patterson v PHP Healthcare Corp.* 90 F3d 927 (1996);and in *Lee v Edwards* 101 F3d 805 (2d Cir. 1996).

OXY USA Inc.,[18] an award of $30 million, remanded to the tenth circuit by the Supreme Court for reconsideration, was found to be excessive and in violation of the due process guarantee. In addition to the three "guideposts" set out in *BMW*, the Court also took into account the wealth of the defendant. The defendant's wealth could, it was held, be especially significant where a wealthy defendant had acted oppressively in seeking to force or prolong litigation, or had attempted to "impose its corporate will" on the plaintiff.

5.08 A further aspect of the impact of procedural due process on punitive damages is the possibility of imposing more stringent procedural safeguards and higher standards of proof in punitive damages cases.[19] Many states have made legislative provision for a higher standard of proof, usually an intermediate standard which may require "clear and convincing evidence". Some commentators have argued that an intermediate standard of proof may be constitutionally required, given the serious consequences of an award of punitive damages. In order for this to be the case, however, it would have to be shown that the consequences of an award of punitive damages were more serious than the merely financial, for example, that the imposition of a punitive award resulted in the stigmatisation of the defendant. The grounds for a finding of this nature are generally regarded as dubious.[20]

Double Jeopardy

5.09 In the majority of US states, potential criminal liability for a wrong does not preclude the award of punitive damages for the same wrong. Punitive damages and criminal penalties are seen as having clearly distinct functions, and are not regarded as capable of substituting one for the other. Contentions that punitive damages violate the Double Jeopardy Clause have been rejected by the courts in a majority of states,[21] although a small number of state courts have held that punitive damages cannot be awarded for an act which may also be the subject of a criminal prosecution.[22]

Excessive Fines

5.10 A further ground on which the constitutionality of punitive damages awards has been challenged is the eighth amendment's prohibition on excessive fines. However, the courts have repeatedly rejected challenges made on this

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18 101 F3d 634 (10th Cir 1996)

19 Schlueter and Redden *op cit.* fn.4 §3.4.

20 *Santosky v Kramer* (1982) 455 U.S. at 756. Stigmatisation of defendant might require the imposition of a higher burden of proof, but there are doubts as to whether the stigma associated with an award of punitive damages would be sufficient to require this: See Schlueter and Redden, *op cit.* fn.4, §3.4

21 For example, *Dougherty v Firestone Tire and Rubber Co.* 85 FRD 693 (N.D. Ga. 1980)

22 Schlueter and Redden, *op cit.* fn.4, §3.9

basis.[23] It would appear that an award of punitive damages will not be found to be contrary to the Eighth Amendment unless it can be shown to be quasi-criminal in nature.[24]

Scope of the Availability of Punitive Damages

Torts

5.11 In most states, punitive damages are available in the majority of tort cases.[25] The primary exception to the availability of punitive damages for torts is negligence. In general, in the US, negligence is not enough to give rise to an award of exemplary damages, without some degree of "aggravated" negligence, involving "wilful or wanton" or reckless disregard for the rights of others.[26] In a number of states, "gross" negligence can ground a punitive award.[27] The *Restatement (Second) of Torts*, §908 does not accept gross negligence as capable of grounding punitive damages; some element of recklessness or outrageousness is required. It states that:

> "Reckless indifference to the rights of others and conscious action in deliberate disregard of them ... may provide the necessary state of mind to justify punitive damages."

5.12 Although, in most states, the standard of culpability required for the imposition of punitive damages is a high one, in general it is not commensurate with the standard of intent which would ground liability in an intentional tort.[28] Wanton or reckless conduct does not amount to intentional conduct: therefore, in most states, there may be cases where intent is not established, yet where punitive damages are recoverable.

5.13 A punitive award may be made in a products liability case on the basis

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23 See, for example, *Palmer v AH Robbins and Co.* 684 P. 2d 187 (Colo.1984) where the Supreme Court of Colorado held that the Eighth Amendment "has no application to a civil proceeding involving punitive damages claims ancillary to a civil cause of action." (at p.217). Schlueter and Redden, *op cit.* fn.4, at §3.10.

24 Relying on the US Supreme Court case of *Ingraham v Wright*, (1977) 430 U.S. 651.

25 Schlueter and Redden, *op cit.* fn.4.

26 In a number of States, the level of culpability which grounds punitive damages is set out in legislation: COLO. REV.STAT. ANN. §13-21-102; NEV. REV.STAAT. §42-010; OKLA. STAT. ANN. TIT. 23, §9; S.D. COMP. §21-3-2. In the majority of States it is determined by caselaw. For example, in *Wangsen v Ford Motor Co.* (97 Wis.2d 260, 294 NW2d. 437 (1980)) the Supreme Court of Wisconsin held that there need not be proof of intentional desire to injure, vex or annoy, or proof of malice, to sustain an award for punitive damages. A reckless indifference to or disregard of the rights of others would be sufficient to ground such an award. The important standard to be met, according to the court, was the outrageousness of the defendant's conduct. Where this could be shown, the fact that the defendant was liable either in negligence or in strict liability did not defeat the claim for punitive damages. See generally Schlueter and Redden, *op cit.* fn.4, §9.3 (A).

27 Prosser and Keeton, *The Law of Damages*, p.7 *et seq.* Gross negligence may be defined as the failure to use the slightest care: Schlueter and Redden, *op cit.* fn.4. §9.3 (A).

28 Although the courts of some states define the level of conduct required as being so close to intent that it creates the same liability. See Schlueter and Redden, *op cit.* fn.4, §9.3 (A).

of negligence, strict liability, or breach of warranty. The "MER 29" cases of 1967, which concerned the sale of a drug which had side-effects which were known to the company but undisclosed by it to the public, clearly established this.[29] However, the availability of punitive damages in such cases, particularly where liability has been on the basis of negligence, has been controversial.[30] The award of punitive damages in products liability cases causes particular difficulty, since in the nature of such cases, there is likely to be a large number of awards made in relation to one defective product, and the burden on the defendant may thus be very great. An additional difficulty is that, in this type of case, the award of punitive damages is likely to be made against a corporate defendant, and therefore questions arise as to the propriety of penalising innocent shareholders. These difficulties were acknowledged by Judge Friendly in *Roginsky v Richardson - Merrell, Inc.*, when he warned of the dangers of "overkill" in products liability cases.[31]

5.14 Punitive damages may also, however, be particularly appropriate and particularly necessary in cases of products liability. As has been pointed out by commentators on the US law,[32] a punitive award may be the only effective deterrent against a manufacturer who knowingly markets a defective and dangerous product, having calculated that the profits will outweigh any possible compensatory damages. This policy justification for punitive damages was recognised by the court in *Sturm, Ruger & Co. v Day.*[33] The Court held that, in relation to products liability, punitive damages could act as a deterrent in:

> "cases in which a product may cause numerous minor injuries for which potential plaintiffs might decline to sue, or in cases in which it would be cheaper for the manufacturer to pay compensatory damages to those who did present claims than it would be to remedy the product defect."[34]

5.15 In the light of the concerns referred to above, a number of states have taken steps to restrict the recovery of punitive damages in product liability cases,[35] and several states have enacted legislation to prohibit their recovery altogether.[36]

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29 *Toole v Richardson-Merrell, Inc.* (1967) 251 Cal. App. 2d. 689; and *Roginsky v Richardson-Merrell, Inc.* 254 F. Supp. 430 (S.D.N.Y. 1966). Punitive damages had, however, been awarded in one previous products liability case: *Fleet v Hollenkamp* (1852) 52 Ky. 175, 13 B. Man. 219.

30 Owen, *Punitive Damages in Products Liability Litigation*, (1976) 74 Mich. L. Rev., 1257, 1268 See Brian M English, *Oliver v Raymark: Holding the Line on Punitive Damages* (1988) 63 Notre Dame L. Rev., 63 at 67, fn. 22.

31 378 F.2d 832 (2d Cir.1967)

32 Owen, *op cit.* fn.30.

33 594 P.2d 38 (Alaska 1979)

34 *ibid.* p.47. See Schlueter and Redden, *op cit.* fn.4 at §9.5(A).

35 For example, in Illinois, statute provides for a higher standard of proof in products liability cases (1995 IL H.B.20). In Missouri, statute provides that punitive damages may not be awarded in product liability cases where the product complies with federal or state standards (1995 MO H.B.672).

36 Schlueter and Redden, *op cit.* fn.4, §9.5 (A).

Contract

5.16 The general rule in US law is that punitive damages cannot be recovered for breach of contract;[37] but this exclusion has to some extent been eroded by the courts. In the majority of states, punitive damages may be awarded where there is a breach which also constitutes an independent tort. This exception is also allowed by the *Restatement (Second) of Contracts,* §355 of which states that:

> "[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable".

Given the wide and ever-expanding range of torts, this exception can allow for punitive damages awards in a large proportion of contract cases. Liability in punitive damages in contract cases has arisen most frequently for fraudulent misrepresentation, and for the breach of an implied contract of good faith and fair dealing.[38]

Liability of State Authorities

5.17 In contrast to the position in English law, where wrongdoing by the "servants of the government" is one of the exceptional cases in which exemplary damages can be recovered, the norm in the US is to except government and State authorities, as well as municipalities, from liability for punitive damages. This is grounded in the principle of sovereign immunity, and is also justified by the policy argument that punitive awards against public authorities would penalise innocent taxpayers. Both the federal government and many US states have enacted legislation which prohibits the award of punitive damages against State authorities. In Wisconsin, for example, statute precludes the recovery of exemplary damages even against agents and officers of the State.[39] At federal level, the *Federal Tort Claims Act* confers immunity from punitive damages awards on the US State.[40] It appears that at State level, where there is no legislation on this matter, the courts will adopt a similar approach, based on the public policy grounds referred to above, and will refuse to make punitive awards against the State.[41]

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37 Schlueter and Redden, §7.0.

38 Schlueter and Redden, *op cit.* fn.4 at §7.3(A).

39 Wisconsin Stat. Ann. § 893.80.

40 But the statute does not prohibit the award of damages which may have an incidental punitive effect: see Schlueter and Redden, *op cit.* fn.4 at §19.2 (A).

41 However, courts will award punitive damages against public bodies in certain exceptional circumstances, such as where the body has ratified or authorised the wrongful act of an agent or employee, where the body has acted intentionally, wilfully or maliciously (for example where the wrong constituted government policy) or where punitive damages are specifically authorised by statute. Schlueter and Redden, *op cit.* fn.4 at §4.4(B)(2)(c).

Vicarious Liability

5.18 In accordance with the punitive and deterrent function of punitive damages, the general rule in US law is that they may not be imposed on a defendant found vicariously liable for the wrong of another. This rule is subject to exceptions, most notably in relation to the liability of employers for the wrongs of employees. The general rule is that, where the employee is acting in the course of his employment, the employer may be liable for punitive damages.[42] This allows for the imposition of punitive damages against an employer in cases where the employer has not been at fault, but is justified as an incentive to good management and a deterrent against the employment of incompetent employees.[43] The *Restatement (Second) of the Law of Torts* takes a more limited view of the vicarious liability of employers than that of many State courts. It provides that vicarious liability may be imposed where:

(1) the principal authorised the doing and the manner of the act; or

(2) the agent was unfit and the principal was reckless in employing him; or

(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or

(4) the principal or a managerial agent of the principal ratified or approved the act.[44]

5.19 Under the Restatement, prior authorization, as well as ratification or approval may be implied from the action or inaction of the employer.[45]

Limitations on the Quantum of Punitive Damages

5.20 In an attempt to address the difficulties with excessive awards of punitive damages and the consequent windfalls which may accrue to plaintiffs, states have imposed a number of restrictions on the quantum of punitive damages, either by imposing "caps" on quantum, by limiting awards in cases where there are multiple claims, or by apportioning a part of the award to the State.

5.21 In most states the limits affect only certain causes of action; however, in

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42 See Schlueter and Redden, *op cit.* fn.4 at §4.4(B)2(a).

43 *ibid.*

44 §909

45 But where ratification is implied from silence, it must be shown that all material facts are possessed by the principal: *K-Mart v Judge* 515 s.w. 2d. 148, cited in Schlueter and Redden, *op cit.* fn.4 at §4.4(B)(2)(a)

Virginia, the statutory cap applies without exception.[46] Other states have limited the amount of punitive damages proportionate to compensatory damages awarded in the case.[47]

Constitutionality of Legislative Restrictions

5.22 There has been some controversy as to the constitutionality of legislative restrictions on punitive damages. In a series of cases, the constitutionality of such limitations has been challenged before the courts, on the grounds that they violate principles of due process, equal protection, and access to the courts.[48] The courts have demonstrated a reluctance to hold limitations on punitive damages to be contrary to due process and equal protection guarantees. Both the US Supreme Court and the majority of state courts have applied a "rational basis" test, which presumes the validity of a statute where it is shown not to be arbitrary or irrational. The application of this test has ensured that the majority of the challenged provisions are upheld, since limitations on the quantum of punitive damages may be seen as serving a valid public purpose.[49] A minority of states have departed from this approach and applied a more stringent test of "intermediate level scrutiny" against which statutory limitations have been more readily struck down.[50]

5.23 Challenges have also been brought to restrictions on punitive damages on the basis of state constitutional provisions which confer rights of access to the courts. Two arguments have been successful: that the restriction constitutes an unauthorised interference of the legislature with the plaintiff's common law rights, and that the restriction interferes with the plaintiff's right of redress, in the shape of the award made in his favour.[51]

Split Recovery Statutes

5.24 Split recovery statutes, which allow a portion of a punitive damages award to be recovered by the State, have been enacted in a number of US states in an attempt to deal with the "windfall" dilemma in cases where punitive

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46 VA. CODE ANN. § 8.01 -38.1 (Michie 1992)

47 For example, an Alabama statute caps punitive damages at $250,000, with some exceptions: ALA CODE ANN § 51 - 12 - 5.1 (Supp. 1994); Georgia caps punitive damages at $250,000: GA. CODE ANN § 51 - 12- 5.1; Kansas caps punitive damages at $5 million or the highest annual gross income earned by the defendant over the past five years, with some exceptions: KAN. STAT. ANN. § 60 - 3702 (e);, Nevada caps punitive damages at $300,000 when actual damages are less than $100,000: NEV. REV. STAT. ANN. § 42.005 (Michie 1992); Texas caps punitive damages at the greater of $200,000 or four times actual damages, with exceptions for intentional torts: TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.007,.008 (West Supp. 1995). Several constitutional challenges to statutory caps on punitive damages have been defeated: *Bagley v Shortt* 410 SE 2d 738 (Ga 1991); *Mack Trucks* 436 S.E. 2d. See Janet V Halloran, *Social Interests Versus Plaintiff's Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages*, (1995) 26 Loyola U Chicago L Rev 405.

48 Schlueter and Redden, *op cit.* fn.4 at §3.12.

49 *Duke Power Co. v Carolina Environmental Study Group, Inc.* 438 U.S. 59 (1978)

50 Schlueter and Redden, *op cit.* fn.4 §3.12.

51 *Smith v Department of Insurance* 507 So. 2d 1080(Fla. 1987); *Detar Hospital v Estrada 694 S.W.2d 359.*

damages are awarded.[52] The Florida *Tort Reform and Insurance Act, 1986,* for example, provides that 60% of punitive damages in personal injury or wrongful death cases are to be paid to the State.[53] Split recovery statutes have been subject to a number of constitutional challenges. These have been on two grounds: one, that they infringe the right to due process of the plaintiff, since they constitute an unfair "taking" by the State of the damages awarded to the plaintiff; and second, that any measure of damages which goes directly to the State contravenes the prohibition on excessive fines which is part of the due process protection contained in the Constitution.

5.25 Interestingly, findings by the courts that apportionments of punitive damages to the State are unconstitutional have been predicated on an interpretation of the awards as in part compensatory. In *McBride v General Motors Corporation,*[54] a provision in a Georgia statute which stipulated that seventy-five percent of all punitive damages awarded in products liability cases should be diverted to the State was struck down as unconstitutional on a number of grounds, the primary ground being that the plaintiff had a property right in the award of punitive damages. The Court reasoned that, since there was some compensatory purpose to an award of punitive damages, the plaintiff had a property right in the award which was protected by the due process guarantees in the Constitution. The Court also held that the statute was discriminatory, in that it allowed the State to claim a portion of damages from successful plaintiffs in product liability cases, but not from plaintiffs who had been successful in other causes of action.

5.26 In *Kirk v Denver Publishing Co.*[55] a Colorado State Court struck down a split recovery statute on the basis that it represented a taking of the plaintiff's property without just compensation, in violation of the fifth and fourteenth amendments. The Court held that the compensatory function served by punitive damages awards[56] meant that the award vested in the plaintiff on the making of the judgement, and could not afterwards be reclaimed by the State.[57]

5.27 In *Kirk v Denver Publishing*, it was crucial that the terms of the statute which was struck down expressed the award as going first, in full, to the plaintiff, with a portion of it then being transferred to the State. Awards which are

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52 By 1995, nine states had adopted 'split-recovery' statutes requiring a part of punitive damages to go for a public purpose. Janet V Halloran, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages*, (1995) 26 Loyola U. Ch. L. J. 407.

53 The constitutionality of the statute was upheld in *Gordon v State* 608 So. 2d 800 (Fla. 1992). See casenote in (1993) 106 Harv L Rev 1691.

54 737 F Supp. 1563 (MD Ga. 1990). See Halloran, *op cit.* fn.52, at p.419.

55 818 P. 2d 262 (Colo. 1991)

56 Two dissenting judgements, delivered by Rovira C J and Lohr J, argued that compensatory and punitive damages, although interrelated, were separate causes of action.

57 A number of decisions of the Georgia Supreme Court decided subsequent to *Kirk* and *McBride* reject the application of principles of compensatory damages to punitive damages awards which was fundamental to the outcome of those cases: *Bagely v Shortt* 410 S.E. 2d 738 (Ga 1991); *Mack Trucks Inc v Conkle* 436 S.E. 2d 635 9Ga. 1993); *State v Moseley* 436 S.E. 2d (G. 1993) See Halloran, *op cit.* fn.52, pp.424 -428.

expressed by statute to accrue directly to the State, without first going to the plaintiff, will not fall on the unfair "takings" challenge, since the damages are never in the possession of the plaintiff, and are therefore not "taken" from her. This was the reasoning adopted by the Supreme Court of Florida in *Gordon v State*[58], in which Florida's split recovery statute was upheld as constitutional. The Supreme Court held that there had been no "taking" of the damages in that case because the plaintiff had no right to receive the punitive damages: there was "no cognisable, protectable right to the recovery of punitive damages at all". A distinction was drawn by the Court between compensatory damages, which the plaintiff did have a right to, and punitive damages. This accords with the nature of punitive damages as addressing not the injury to the plaintiff, but the wrongdoing of the defendant, and with the view that any recovery of punitive damages by the plaintiff is a "windfall", which cannot accrue to her as of right.

5.28 Some commentators have identified *Gordon v State*, and other subsequent decisions, as indicative of a trend towards greater acceptance of split recovery statutes.[59] However, the characterisation of split recovery statutes as transferring a portion of damages directly to the State raises the possibility that, under the US Constitution, large awards of exemplary damages may be struck down as contravening the "excessive fines" prohibition in the Eighth Amendment.

Mass Tort Actions

5.29 One area in which the US jurisprudence is more developed than in other common law jurisdictions is that of the award of punitive damages in mass tort litigation. Difficulties have arisen in the US where a large number of actions have been taken in respect of the same wrong, with the possibility that punitive damages may be awarded in all or many of them; this situation has arisen, for example, in products liability cases.[60] In such a situation there is a danger of "overkill": that a series of punitive awards against the same (usually corporate) defendant may result in what one commentator has described as "a form of corporate capital punishment."[61] The bankruptcy of the defendant following a series of punitive damages awards may be socially undesirable, resulting in the loss of jobs and services, and may also be disproportionate to the degree of wrongdoing by the corporate defendant. In addition, it may deprive other victims, who have been less speedy in bringing their claims, of any damages at all, either compensatory or punitive, for the wrong done to them. In *Roginsky v*

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58 *op cit.* fn.53.

59 Halloran, *op cit.* fn.52, at p.423: "the judiciary [has begun] to defer to the legislative will."

60 For example, in product liability cases against the manufacturers of asbestos, formaldehyde, the defoliant Agent Orange, and Dalkon Shield inter-uterine devices. In the case of the Anti-cholestoral drug, MER/29, over 1,500 personal injury lawsuits were filed against the manufacturers (in either the state or the federal courts). In one case relating to the product, *Roginsky v Richardson-Merrell op cit.* fn.29, Judge Friendly warned of the dangers of overkill. However, in the instance of the MER/29 cases, over 95% of them were settled out of court. Punitive damages were awarded in only three cases, one of which was reversed. See Richard A Seltzer, *Punitive Damages In Mass Tort Litigation* (1983) 52 Ford. L. Rev. 37

61 Brian M English, *Oliver v Raymark: Holding the Line on Punitive Damages*, (1988) 63 Notre Dame L. Rev. 63.

Richardson-Merrell[62] Judge Friendly gave voice to some of these concerns, raising the possibility that:

> " ... a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin."[63]

5.30 Several proposals have been made to mitigate the "overkill" effect of punitive damages awards in mass actions. Owen[64] has proposed that plaintiffs in such actions be permitted to recover punitive damages only up to an aggregate sum, which could be either $5 million or 5% of the defendant's net worth. The disadvantage of this approach would be that plaintiffs whose case came to trial early would claim a disproportionate amount of the available damages, to the detriment of other potential plaintiffs.

5.31 A further proposal, recommended by the *Restatement (Second) of Torts*,[65] is that in each case arising out of the same wrong, the jury be informed of any other awards which have been given against the same defendant, or which may be imposed against the defendant in future.[66] Morris[67] has proposed that, where there are multiple claims, any assessment of punitive damages should be withheld until all compensatory claims are resolved.

5.32 Another possibility, in the US, is that where there is a series of claims against the same defendant in respect of the same wrong, there should be joinder of the claims, or the institution of a class action.[68] Under the US *Federal Rules of Civil Procedure*, a class action is possible provided a number of criteria are satisfied, regarding the number of plaintiffs, the similarity of their claims, the similarity of the legal and factual issues in dispute in the cases, and the adequacy of representation of the parties.[69] It is the view of many commentators, however, that joinder of claims may only be appropriate where there are a small

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62 *op cit.* fn.29.

63 At p.841.

64 Owen, *Problems in Assessing Punitive Damages against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1

65 § 908

66 Judge Freindly in *Roginsky*, *op cit.* fn.29, was critical of this proposal, and took the view that disclosure of previous awards would be unhelpful to "even the most intelligent jury" (at p.839).

67 Morris, *Punitive Damages in Tort Cases*, (1931) 44 Harv. L. Rev. 1173.

68 Joinder of claims is permissable under Rule 23 of the Federal Rules of Civil Procedure. In two cases, the *Dalkon Shield* and the *Skywalk* cases, such a certification was made and claims in the cases were joined; however the certification was struck down on appeal on the grounds that it had not been established that separate punitive awards would inevitably prevent later awards from being made. See Richard A Seltzer, *op cit.* fn.60.

69 Regulation of the circumstances in which class actions should be permitted is difficult and delicate, and has been controversial in the US. The law requires some "nexus" between the cases to be joined. Seltzer, *op cit.* fn.60.

number of plaintiffs,[70] and that a class action may not be at all suited to the determination of "mass tort" claims. The Federal Rules Advisory Committee gave its opinion as follows:

> "A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defences to liability, would be present, affecting the individuals in different ways."[71]

5.33 The American Bar Association's Special Committee on Punitive Damages made a series of proposals for the regulation of punitive damages awards in cases where there are multiple plaintiffs.[72] Amongst these was the suggestion that there be one mass trial in regard to punitive damages, which would be binding on all plaintiffs and future plaintiffs. The award would then be distributed amongst plaintiffs on a *per capita* basis and a portion placed in an interest-bearing fund, managed by trustees, for the benefit of future plaintiffs.

Insurance

5.34 Much concern has been expressed in the US at the availability of insurance for punitive damages awards. The majority of state courts have ruled insurance for punitive damages to be permissable, and have construed insurance contracts which make no mention of punitive damages, as providing cover for them.[73] It has been held that insurance contracts must be construed to give effect to the expectation of the insured,[74] and in most cases this has been seen as including an expectation that punitive damages be insured under the contract.

5.35 In a minority of states, insurance for punitive damages is prohibited as being contrary to public policy.[75] The leading case which advocates this position is *Northwestern National Casualty Co. v McNulty*,[76] in which the Court of Appeals for the Fifth Circuit refused to consider the terms of an insurance contract in a punitive damages case, since insurance cover for punitive damages would violate public policy. Judge Wisdom, giving judgement for the Court, reasoned that:

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70 Morris, *Punitive Damages in Tort Cases*, (1931) 44 Harv. L. Rev. 1173

71 Cited in ABA Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination* (1986).

72 *ibid.*

73 Schlueter and Redden, *op cit.* fn.4. at §17.2(B).

74 *Lazenby v Universal Underwriters Insurance Co.* 214 Tenn. 639, 383 S.W.2d. 1 (1964)

75 However, even in states where insurance for punitive damages is prohibited on public policy grounds, it may be permitted where the award is made on the basis of vicarious liability, since in such a case there is no policy reason why the defendant should not pass on the burden of the penalty: *Ohio Casualty Insurance Co. v Welfare Finance Co.* 75 F.2d 58 (8th Cir. 1934).

76 307 F.2d 432 (5th Cir. 1962)

"[w]here a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. ... [P]ublic policy should invalidate any contract of insurance against the civil punishment that damages represent."

Conclusions

5.36 The US law of punitive damages is obviously more highly developed than that of other common law jurisdictions. Although the central role of punitive damages sets the US law apart from the Irish law, the difficulties which have arisen in relation to punitive damages in the US, and the measures which have been taken in response to these difficulties, are of great interest in regard to the emerging Irish law. In particular, the various mechanisms which US states have used to limit quantum, to divert portions of awards to the State, and to deal with cases involving multiple plaintiffs, suggest possible ways forward for the Irish law on these difficult issues. The role of the US Constitution in placing limits on punitive damages awards is also intriguing from an Irish point of view. Whilst "due process" challenges of the type brought to punitive awards in the US courts appear unlikely under the present Irish law, the possibility of a developing Irish due process law, with implications, as in the US, for punitive damages, should be borne in mind.

CHAPTER 6: DAMAGES IN CIVIL LAW JURISDICTIONS

Germany

6.01 In general, German law does not allow for the recovery of punitive damages. In the German civil law, non-monetary remedies are employed in preference to damages awards. Where damages are awarded, they are based primarily on the principle of compensation. Section 249 of the BGB provides for the basic principle of compensation in cases of delict, importing principles of restitution in kind, and the restoration of the plaintiff to the position which he was in prior to the commission of the wrong.[1] Section 847 of the BGB, which extends the application of section 823, provides that an injured party may be awarded "equitable compensation in money" for personal injury.[2]

6.02 Within the context of a compensatory system of damages, German law also recognises a second justification for an award of damages: the principle of satisfaction. This second principle, which originated in Swiss Law,[3] has been especially to the forefront in cases concerning damages for non-economic loss. The principle of satisfaction is generally explained without any reference to the punishment of the defendant. It is explained simply as reparation for non-pecuniary harm, and is distinguished from punishment in that it is concerned with the victim of the wrong rather than the wrongdoer.[4]

6.03 In a case decided in 1955,[5] the German Supreme Court was asked to rule on whether Section 847 BGB required a court, in assessing an award of damages, to take into account the culpability of the defendant. The Court stated

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1 The section states:

> "A person who is obliged to make compensation shall restore the situation which would have existed if the circumstances rendering him liable to make compensation had not occurred. If compensation is required to be made for injury to a person or damage to a thing, the creditor may demand, instead of restitution in kind, the sum of money necessary for such restitution."

2 § 823 (1) provides for compensation for economic loss sustained by injury to the "life, body, health, freedom, property or other right" of the plaintiff. § 847 extends this to non-economic loss: "[i]n the case of injury to the body or health, or in the case of deprivation of liberty, the injured party may also demand fair compensation in money for non-pecuniary damage." See P R Handford, *Moral Damage in Germany*, (1978) 27 I.C.L.Q. 849.

3 Hans Stoll, *Penal Purposes in the Law of Tort*, (1970) 18 AJCL 3. J M Kelly, *The Inner Nature of the Tort Action* (1967) Ir. Jur. 279, at p.289 points out that the common law also at one stage made use of the concept of satisfaction. The first edition of Mayne and McGregor on Damages, of 1856, defines damages as the "pecuniary satisfaction obtainable by success in an action."

4 See Stoll, *op cit.* fn.3, quoting the Swiss jurist C Chr Burckhard, that non-pecuniary loss is really uncompensatable, but that damages in satisfaction restore the pleasure/pain balance (with a different kind of pleasure) and provide "psychological satisfaction by means of a real success."

5 BGHZ 18, 149

that there could be no direct penal function to a civil damages award. It did recognise, however, that where, as in the case of non-economic losses, the award and the measure of punitive damages could not be wholly explained by the principle of compensation, the "satisfaction" of the plaintiff for the wrong committed against him must be recognised as a further reason for the damages award.[6] The Court held:

> "damages for pain and suffering have a dual function. They are meant to provide the injured party with adequate compensation for that kind of damage. At the same time, however, they are meant to indicate that the tortfeaser owes the victim "satisfaction" for what he has done to him."[7]

6.04 The Court stressed that the compensatory principle was the first and paramount principle by which damages were to be assessed; but the culpability of the defendant could also be a factor. In assessing damages in cases of non-economic loss, several factors should be taken into account. The first of these, and the most important, was the severity of the plaintiff's suffering. The second factor was the degree of blameworthiness of the tortfeaser:

> "it would be incomprehensible if the trial judge could not award higher damages for pain and suffering in the case of a crime, than where the external consequences are the same, but occurred as a result of error in normal human intercourse which might be committed by anybody."[8]

Further factors to be considered were the economic circumstances of the injured party and the economic circumstances of the tortfeaser.

6.05 In arriving at the conclusions discussed above, the Court examined the historical evolution of the law of damages. It recognised that the ostensibly compensatory award of damages in civil law still bore the mark of its more punitive ancestors:

> "... something inherent in the purpose of making good is a reminder of its former function as a fine ... damages for pain and suffering have their origin in criminal law, and ... in the laws of the German States in modern times, different types were fashioned according to the respective stages of development, which still reflect in some respects their antecedents in criminal law."[9]

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6 The Court held that, in cases of intangible loss, "the purpose to effect restitution cannot be achieved through restitution in kind, as is the case when the damage is pecuniary." Markensis, *The German Law of Torts: a Comparative Introduction*, (3rd ed.) (1994) p.946.

7 *ibid.* p.949.

8 *ibid.*, p.952.

9 *ibid.*, p.950.

6.06 Caselaw both before[10] and subsequent to the 1955 decision supports a partial justification of a damages award with reference to the quality of the defendant's conduct, where the case involves interference with basic personality rights, or intangible loss. In the *Herrenreiter* case of 1958,[11] it was recognised that the purpose of an award of damages in satisfaction was to re-assert the dignity of the victim of the wrong. The award of damages was seen as symbolic of the importance of human dignity and freedom. The Court held that awards of damages based on the principles of compensation and satisfaction could be made in cases of injury to personality rights, since the provisions of the BGB allowing for the award of damages must be interpreted in the light of the constitutional guarantees of human dignity and personal development.

6.07 Again, in the *Ginseng* case of 1961,[12] the Court recognised the importance of satisfaction where basic personality rights had been interfered with. In awarding a substantial sum of damages, the Court stressed that the defendant's motive had been profit, and that a significant award of damages was necessary to deter such conduct. The consequence of the *Ginseng* case, and the later *Fernsehansagerin* case, is that, for damages to be awarded in a case of intangible loss, there must be:

1. Serious injury to the plaintiff;

2. Serious misconduct by the defendant;

3. No suitable alternative remedy to damages.[13]

France

6.08 Exemplary damages are unknown to French law. The French Civil Code allows for recovery of damages, for either physical or intangible loss (*dommages moraux*), on the basis of fault. In cases where *dommages moraux* are awarded, the defendant's fault may be taken into account in the assessment of damages, and there have been suggestions from academic commentators that *dommages moraux* can be justified on the basis of the punishment of the defendant.[14]

Italy

6.09 Under Italian law, exemplary damages are not awarded. Compensatory damages may be awarded for either contract or tort, by either a civil court, or,

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10 Stoll, *op cit.* fn.3, p.4.

11 BGHZ 26 349

12 BGHZ 35, 363 (1961).

13 Handford, op. cit. fn.2.

14 English Law Commission, Consultation Paper No 132, *Aggravated, Exemplary and Restitutionary Damages*, (1993) at para.4.19. See also René David, *English Law and French Law* (1980) p.166: "the Courts will inevitably take into account the gravity of the fault committed, although French law professes to ignore the concept of vindictive or exemplary damages..."

where the wrong also gives rise to a criminal case, by a criminal court. Article 2043 of the Civil Code provides that compensation is payable for the commission of any fraudulent, malicious or negligent act that causes unjustified damage. "Moral damages" may also be recovered, but only where the loss or damage suffered results from a crime. Where moral damages are not clearly quantifiable, they may be awarded on an "equitable basis".

Belgium

6.10 Belgian law allows for the recovery of damages in cases of tort and breach of contract, on a compensatory basis only.[15] Compensation is available for mental distress as well as economic loss. Damages may also be awarded for loss of reputation, but the quantum of such damages is usually so small as to be merely symbolic.

Denmark

6.11 Damages in the Danish legal system are made on a compensatory basis.[16] By *Act No. 599* of 9 August 1986, damages may also be awarded for a negligent violation of an individual's freedom, peace, honour or person.

The Netherlands

6.12 Under the law of the Netherlands, damages for tort and breach of contract, assessed exclusively on a compensatory basis, may be awarded only where there is specific statutory provision for them.[17] There is some (restrictive) provision for civil remedies in criminal proceedings. Provision is made to co-ordinate awards made in the civil and criminal courts, to guard against two awards of damages being made in respect of the same wrong.

Greece

6.13 Compensatory damages for torts or breach of contract may be awarded by both the civil and the criminal courts, under Greek law.[18] The basis for the award of damages is reparation for injury or loss, and the amount to be awarded is determined by the actual loss sustained.

6.14 Under Articles 919, 920 and 921 of the Civil Code, damages may be

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15 Sheridan and Cameron, *EC Legal Systems: An Introductory Guide* (1992), Belgium - p.37.

16 *Ibid.* Denmark - p.35.

17 *Ibid.* The Netherlands - p.29.

18 *Ibid.* Greece - p.25.

awarded in several circumstances, amongst them where the injury was inflicted intentionally, in such a way as to contravene the morals of society.

Luxembourg

6.15 Compensatory damages may be awarded by both the civil and the criminal courts in Luxembourg; exemplary damages are not awarded.[19] Damages are available for both mental distress and loss of reputation. Provision is made to co-ordinate the civil and criminal systems; where a plaintiff has brought a claim before a civil court, a similar claim may not be instituted on the criminal side.[20]

Spain

6.16 Damages, which are assessed on a compensatory basis only, may be awarded in the Spanish civil courts, and, in appropriate circumstances, in the criminal courts.[21] Compensation may be awarded for both material damage and mental distress. Damages for mental distress are awarded with reference to a number of factors, which include the character of the harm suffered, the financial position of the defendant, and whether there was an intention on the part of the defendant to cause harm to the plaintiff.

Portugal

6.17 Damages in Portuguese law are based on compensatory principles.[22] The award must put the plaintiff in the same position as he would have been in had the injury or loss not occurred. Civil damages may be awarded in criminal proceedings as well as civil, where the loss relates to a criminal offence.[23]

Austria

6.18 Although damages awarded by the Austrian courts are characterised as compensatory, the degree of culpability of the defendant is one factor which determines the level of damages to be awarded.[24] Lost profits may be recovered by the defendant where there is a high degree of culpability amounting to gross negligence or intent; whereas in a case of ordinary negligence, only

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19 *ibid.* Luxembourg - p.31.

20 *ibid.* Luxembourg, p.34.

21 *ibid.* Spain - pp.43-45.

22 *ibid.* p.29.

23 *ibid.* p.31.

24 Sheridan and Cameron, *EFTA Legal Systems: An Introductory Guide* (1993), Austria - p.43.

compensation for immediate damage may be recovered. Damages are generally awarded in the civil courts, but a criminal court may also make an award of damages following a verdict of guilty in a criminal case.

Finland

6.19 Under the Finish *Act on Damages*,[25] compensatory damages may be awarded in cases of intentional or negligent tortious conduct.[26] In tort cases, damages are usually not awarded for economic loss, but may be so awarded where the loss has been caused by a criminal act, or by an abuse of public power.

Norway

6.20 The Norwegian law of damages is contained in the Code on Damages.[27] Under the Code, damages are purely compensatory; no provision is made for the award of exemplary damages.

Sweden

6.21 The Swedish *Act on Damages* makes provision for liability for and calculation of damages.[28] Under the Act, damages are compensatory in nature. They are available for personal injury, mental distress and loss of reputation, but are awarded for pure economic loss only when they relate to an act which is also a criminal offence. Damages are normally awarded in the civil courts, but can be awarded in a criminal case, provided that this does not unduly complicate the proceedings.

Quebec

6.22 The law of the province of Quebec in relation to damages is interesting in that it provides an example of the importation of the predominantly common law concept of exemplary damages into a civil law jurisdiction. Under the original *Civil Code of Lower Canada* of 1866, exemplary damages were not recoverable. Damages recovered in tortious actions were envisaged, under Article 1053 of the Civil Code, as being purely compensatory.

6.23 Exemplary damages were introduced into Quebecois law, however, by

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25 31.5.1974/412

26 Sheridan and Cameron, *op cit.* fn. 24, Finland - p.31.

27 *ibid.* Norway - p.37.

28 *ibid.* Sweden - p.35.

way of a number of legislative changes.[29] Express provision is made for exemplary damages in the *Charter of Rights and Freedoms of Quebec*, of 1976, where there is an unlawful and intentional attack on a right or freedom protected by the Charter.[30] Exemplary damages are recoverable not only in cases where a right in the Charter is violated through a tortious wrong, but also where the violation is through breach of contract.[31] The Canadian Supreme Court has adopted a cautious interpretation of the meaning of "unlawful and intentional interference" in section 49 of the Charter. In *Quebec (Public Curator) v Syndicat national des employés de l'hopital St-Ferdinand*, the Supreme Court expressly rejected an approximation of unlawful and intentional interference with concepts of gross or exceptional fault. The Court held that, for unlawful interference to be characterised as intentional, the result of the wrongful conduct must have been desired:

> "there will be unlawful and intentional interference within the meaning of the ... Charter when the person who commits the unlawful interference has a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct, or when that person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause."

6.24 The Court emphasised that this standard fell short of specific intent, but went beyond simple negligence, so that:

> "an individual's recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test."

6.25 In the case of *Augustus v Gosset*,[32] which was simultaneously heard by the Supreme Court, a similarly restrictive interpretation of the standard of fault necessary to ground exemplary damages was adopted. The Court held that the action of a police officer, in mistakenly shooting a suspect whilst pointing a loaded gun at him in an effort to prevent his escape, did not amount to "intentional interference" with his right to life.

6.26 The transportation of exemplary damages into the civil law system of Quebec has presented an anomaly which the courts have negotiated only with difficulty. The Canadian Supreme Court, adjudicating on exemplary damages claims under Quebecois law, has recognised the anomalous nature of exemplary

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29 Lois Perret, *Les Dommages Punitifs en Droit Civil Quebecois*, 16 Can. Bus. L. J. 285.

30 Article 49. Exemplary damages have also been incorporated into a number of other Quebecois statutes, for example, under Article 272 of the *Consumer Protection Law* of 1980.

31 Perret, *op cit.* fn.29, p.288. In awarding damages under the Charter, the courts have taken into account all surrounding circumstances, including the wealth of the defendant and the possible unjust enrichment of the plaintiff. The courts have refused to award punitive damages where the defendant has already been subjected to a fine in respect of the same wrong: *Papadatos c Sutherland* (1987) 40 DLR (4th) 755.

32 [1996] 3 S. C. R. 268.

damages within the Quebecois legal system, but has nevertheless viewed exemplary damages as having become an integral part of the system of civil liability under the Charter of Rights and Freedoms. In *Béliveau St-Jacques v Fédération des employées et employés de services publics inc.*,[33] the Supreme Court held that an action for exemplary damages must be considered to be a part of the system of civil liability, and could not be dissociated from the principles of civil liability normally applicable.[34] The case concerned sexual harassment of an employee, contrary to the provisions of the *Charter of Rights and Freedoms*. The court held that, even if an award of exemplary damages were to be considered not to be dependent on an existing award of compensatory damages, such an exemplary award must at least be grounded on a finding of an unlawful interference with a right guaranteed by the Charter. As a result, it was impossible not to associate the award of exemplary damages with the general principles of civil liability.[35]

6.27 Amendments made to the law of obligations in 1987 incorporated provision for exemplary damages into the Civil Code, in an attempt to harmonise its provisions with those of the *Charter of Rights and Freedoms*. Article 1677 provides that exemplary damages may be recovered where there is

> "an attack on [the plaintiff's] fundamental rights and liberties, resulting from the intentional conduct or gross negligence of the defendant, or where the law expressly provides for the recovery of exemplary damages."

6.28 There is express provision, in Article 1678, that exemplary damages shall not be awarded if the defendant has already been fined or paid exemplary damages in respect of the same wrong. Article 1679 provides that the amount of exemplary damages must not exceed that necessary to assure their deterrent function. All relevant circumstances must be taken into account in their calculation, including the wealth of the defendant. Article 1680 provides that an exemplary damages award may be directed to a body, designated by the Court, which is directly concerned with the prevention of the type of harm perpetrated by the defendant.

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33 [1996] 2 S.C. R. 345.

34 The question arose in the context of an immunity from "civil liability" conferred on employers by the *Act respecting industrial accidents and occupational diseases (AIAOD)*, in cases where compensation had already been paid to an injured employee under the no-fault compensation scheme operated under that Act. The majority of the Court held that exemplary damages did form part of the general system of civil liability, and therefore the employer was immune in respect of them.

35 LaForest, and L'Heureux-Dubé JJ, in their partly dissenting judgement, stressed that the award of exemplary damages was autonomous and distinct from compensatory remedies. Since exemplary damages were an exceptional and anomalous remedy in the law of Quebec, and since they derived solely from legislation, they could be regarded as set apart from the normal category of civil liability, as understood in the law of Quebec. Therefore, the civil immunity clause at issue in the case applied only to compensatory remedies and did not confer immunity in respect of exemplary damages.

Conclusions

6.29 The law of damages in the civil law jurisdictions presents a very different prospect to the law of the common law jurisdictions which have already been considered, and to the Irish law. In the civil law systems, there is no acknowledged punitive purpose to awards of damages, although traces of an unacknowledged punitive purpose may be discerned in some jurisdictions by commentators. Although the exclusively compensatory character of damages awards in these jurisdictions establishes a solid civil/criminal boundary, it is interesting to note that several of the civil law jurisdictions surveyed above do not insist on a strict civil/criminal division as regards procedural matters, in that they allow civil damages to be claimed in the course of criminal proceedings.

CHAPTER 7: THE IRISH LAW

The Place of Exemplary Damages in Irish Law

7.01 The Irish courts inherited the English common law approach to damages, which allowed for the recovery of damages characterised as exemplary, punitive, substantial or vindictive, in certain cases of especial wrongdoing. There was for many years a dearth of modern authority on the position of aggravated, exemplary and punitive damages in Irish law, and it was uncertain whether the Irish law would follow the English in imposing restrictions on exemplary damages. Recent decisions have gone some way towards clarifying the law, and have set its development on a somewhat different course to that of the English law. It has now been made clear by the Supreme Court, in *Conway v Irish National Teachers Organisation,*[1] that recovery of exemplary damages in Irish law is not limited to the categories set out in *Rookes v Barnard,* and that exemplary damages may be recovered in Irish law, for breach of a constitutional right. The Constitution has thus been made fundamental to the Irish law of exemplary damages, and its demands are likely to give the development of the Irish law in this area a distinct character.

7.02 Once it is accepted that exemplary damages can be awarded for infringements of constitutional rights, the categorisation of *Rookes v Barnard* is rendered at least in part redundant. In regard to the first category, any oppressive conduct by a servant of the State would be likely to constitute a breach of a constitutional right; so this category is subsumed within the constitutional right ground of recovery. In addition to this, however, it is also established that exemplary damages may be recovered for breach of constitutional rights by a private individual. This possibility allows for very wide recovery, and may indeed encompass recovery of exemplary damages in many common law torts, since there is a high level of identity between the protection afforded by the personal rights provisions in the Constitution, and that afforded by the law of torts.

The Constitutional Dimension

7.03 Constitutional considerations arise in the law of exemplary damages in two distinct ways. Firstly, in setting out a duty to vindicate the rights of the individual, the Constitution creates an imperative for exemplary awards to be available in appropriate cases where an individual's constitutional rights have

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1 [1991] 2 IR 305

been interfered with. Secondly, there is the prospect that the Constitution may operate, as constitutional provisions have operated in other jurisdictions, to impose restrictions on the award of exemplary damages, in order to safeguard the rights of the defendant.

Exemplary Damages for Breach of Constitutional Rights

7.04 The right to recover damages as a remedy for breach of a constitutional right was first established in *Meskell v CIE*.[2] In that case Walsh J stated that a right guaranteed by the Constitution:

> "can be protected ... or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and ... the constitutional right carries within it its own right to a remedy."

7.05 In *Kennedy v Ireland*,[3] the right to recover damages for breach of constitutional rights was reiterated.[4] The damages in that case were expressed as "substantial"; from the judgement of Hamilton P, they can best be characterised as an amalgam of exemplary and aggravated damages.[5] Hamilton P endorsed *Meskell v CIE* and emphasised that in the case before him, the only remedy available to the plaintiffs for breach of their constitutional rights lay in an award of damages. He acknowledged the possibility that exemplary damages could be recovered for the breach of a constitutional right, stating:

> "In the events which have happened, the only remedy which the plaintiffs can obtain in this court, which, as one of the organs of the State is obliged to respect, defend and vindicate the personal rights of the citizens, lies in damages. Damages may be compensatory, aggravated, exemplary or punitive."

7.06 In *Educational Company of Ireland v Fitzpatrick (No. 2)*[6] it was established that the right to obtain damages for breach of constitutional rights applied not only in actions against the State, but also in actions between two individuals. Budd J in the High Court held that:

> "if one citizen has a right under the Constitution, there exists a correlative duty on the part of other citizens to respect that right and not to interfere with it."[7]

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2 [1973] IR 132

3 [1987] IR 587

4 See also *Kearney v Minister for Justice* [1986] IR 116;and *Hayes v Ireland* [1987] ILRM 651.

5 See *infra* paras.7.28-7.29.

6 [1961] IR 345

7 At p.368. The decision was upheld by the Supreme Court.

7.07 The first case in which an award of exemplary damages for breach of a constitutional right was expressly granted was *Conway v Irish National Teachers' Organisation.*[8] In that case, it was held that exemplary damages must be available in cases of infringement of constitutional rights, in order for those rights to be fully vindicated.[9]

7.08 There has been much discussion and little certainty as to the impact which constitutional rights and so-called "constitutional torts" will have on the law of tort in general. There is a large overlap between the two: many actions which are tortious wrongs are also likely to be infringements of constitutional rights. In the immediate aftermath of *Meskell v CIE*,[10] concern was expressed by some commentators that actions based on infringements of constitutional rights would subsume much of the common law of torts.[11] These fears have so far proved unfounded. *Dicta* of the Supreme Court in *Hanrahan v Merck Sharpe and Dohme*[12] suggest a more cautious approach to constitutional torts by the courts, and evince a reluctance to allow constitutional rights to modify the law of torts. In *Hanrahan*, it was submitted by the plaintiffs that the onus of proof which it was necessary for them to reach in order to establish nuisance was too high to adequately vindicate their constitutional rights, which had also been breached by the defendant in the case. In rejecting this argument, Henchy J in his Supreme Court judgement affirmed the distinctive nature and role of the law of tort. Stating that the personal rights provisions of the Constitution had never been relied on to shape the form of existing tort law, he held that, although a plaintiff could claim for damages on the basis of violation of his constitutional rights, this would have to be done directly, independent of the claim in tort, and "where he founds his action in tort he is normally confined to the limitations of that tort." Therefore, the law of tort is not to be modified by constitutional rights.[13]

7.09 Since exemplary damages incorporate a more public purpose than is usually associated with the law of tort, their recovery in cases of breach of constitutional right may often be particularly appropriate. It was emphasised by the court in *Conway*, however, that exemplary damages would not be recoverable in every case of breach of a constitutional right; and it must be assumed, and would be desirable, that recovery of exemplary damages should be dependant on the gravity of the infringement of the right. It was pointed out by Binchy that infringements of a constitutional right, for example the right to bodily integrity, may range from the minor to the very serious.[14]

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8 [1991] 2 IR 305

9 See judgement of Finlay CJ p.506, discussed *infra*, paras.7.31-7.36.

10 *op cit.* fn.2.

11 Heuston, *Personal Rights Under the Irish Constitution (1976)* 11 Ir. Jur. (n.s.) 205

12 [1988] ILRM 629

13 See Binchy, *Constitutional Remedies and the Law of Torts*, in James O'Reilly ed., Human Rights and Constitutional Law (1992): "In this passage Henchy J betrays a striking reluctance to involve the courts in the role of refashioning tort law, root and branch." See also McMahon and Binchy, *Irish Law of Torts*, (2nd ed. 1990), pp.9-11 for analysis of *Hanrahan*.

14 Binchy, *Constitutional Remedies and the Law of Torts, op cit.* fn.13.

7.10 The reach of exemplary damages in Irish law is at least commensurate with the ambit of constitutional rights. It is as yet unclear whether exemplary damages can be recovered in the generality of common law tort actions, but it is probable that they can. It must be borne in mind that any amendment of the present law which would expressly confine exemplary damages to actions for breach of a constitutional right could result in a greater "constitutionalization" of the law of tort, as more emphasis would be placed on constitutional claims in order to avail of exemplary damages.

The Constitutional Rights of the Defendant

7.11 Where an exemplary award is made against a defendant in the course of a civil trial, the possibility of infringement of the defendant's constitutional rights must be considered, having regard to the lesser procedural safeguards and the lower burden of proof which apply in the determination of a claim for exemplary damages. Such an infringement would appear to be most unlikely, since the constitutional guarantee of fair trial in due course of law is specifically stated to apply only to criminal trials, and not to actions in tort or contract, however large the sum of damages awarded.[15]

7.12 The nature of a criminal trial to which Article 38 would apply was considered by the Supreme Court in *Goodman International v Hamilton (No. 1)*[16] where the legitimacy of the Tribunal of Inquiry established to investigate practices in the beef industry was challenged by the plaintiffs, against the due process guarantee of Article 38. Finlay C J held that:

> "The essential ingredient of a trial of a criminal offence in our law ... is that it is had before a court or judge which has got the power to punish in the event of a verdict of guilty. It is of the essence of a trial on a criminal charge or a trial on a criminal offence that the proceedings are accusatorial, involving a prosecutor and an accused, and that the sole object and purpose of the verdict, be it one of acquittal or conviction, is to form the basis for either a discharge of the accused from the jeopardy in which he stood, in the case of an acquittal, or for his punishment for the crime which he has committed, in the case of a conviction."[17]

7.13 The principle of "fair procedures" which as been developed by the courts and expressed as arising from the personal rights guarantees in Article 40.3, does have a wider application than that of Article 38. It was first set out in *In Re Haughey*,[18] which dealt with the procedures before the Dáil Public Accounts

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15 Article 38.

16 [1992] 2 IR 542

17 See Kelly, *The Irish Constitution* (3rd ed.) (1994) at p.572.

18 [1971] IR 217

Committee. The requirements of fair procedures as set out in that and in subsequent cases have a limited scope, and would not seem to demand any additional procedural safeguards in cases involving exemplary damages.[19]

7.14 Also of potential relevance in this context is the principle of constitutional justice. The phrase "constitutional justice" was coined by Walsh J in the 1965 case of *McDonald v Bord na gCon*[20] as a more appropriate term for the principle previously known as natural justice.[21] Constitutional justice is potentially a much wider principle than natural justice, and has been described by commentators as constituting a "reservoir of due process."[22] To date, there has been very little development of the concept by the courts, however. It has been suggested, in *O'Donoghue v Vetinary Council*[23] that, where the result of proceedings could be that the defendant would be prevented from practising his profession, constitutional justice would require that a criminal standard of proof be applied; but the Court in that case made no ruling on the issue. It has been held by the Supreme Court, in the case of *Banco Ambrosiano v Ansbacher & Co.*,[24] that a higher standard of proof is not required in civil cases which involve serious allegations of fraud. In the light of this it would seem unlikely that additional procedural safeguards or an alteration in the standard of proof would be required in exemplary damages cases.

The Impact of the European Convention on Human Rights

7.15 Further questions arise as to the compatibility of exemplary damages with due process guarantees contained in the European Convention on Human Rights. Article 6 of the Convention deals with fair process in both civil and criminal trials. Certain of the guarantees apply only to those "charged with a criminal offence"; others apply "in the determination of civil rights and obligations or of any criminal charge." Under Article 6.1, in any case which involves a determination, either of civil rights and obligations, or of a criminal charge, the defendant is entitled to a fair and public hearing, and to a judgement which is delivered in public, except where special considerations apply. Article 6.2 allows for the presumption of innocence in criminal cases, and Article 6.3 affords

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19 In *In re Haughey*, the principle of fair procedures was held to require that the applicant was entitled to be afforded "reasonable means of defending himself". This imported the right to receive a copy of the evidence which reflected on his good name; leave to cross-examine his accusers; permission to give rebutting evidence; and leave for his counsel to address the Dáil Committee. In *The State (Healy) v O'Donoghue* [1976] IR 325 fair procedures was characterised as an evolving concept, subject to "change and development". See Kelly, *The Irish Constitution* (3rd ed., 1994) pp.614-619.

20 [1965] IR 217, 242.

21 At p.242:

> "In the context of the Constitution, natural justice might be more appropriately termed constitutional justice and must be understood to import more than the two well-established principles that no man should be a judge in his own cause and *audi alteram partem*."

22 Gerard Hogan and David Gwynn Morgan, *Administrative Law in Ireland*, (2nd ed., 1991).

23 [1975] IR 398

24 [1987] ILRM 669.

additional guarantees to those subject to a criminal charge, including adequate time to prepare a defence, a right to legal representation, and a right to cross-examine witnesses.

7.16 The scope of application of the guarantees which apply where an individual is "charged with a criminal offence" is not clear. There is considerable jurisprudence from the Court of Human Rights on the issue of what may constitute a criminal offence for the purposes of the article, mostly in relation to disciplinary and regulatory offenses. The Court has not to date, however, considered cases on the boundary between the civil and criminal laws. There have been no rulings regarding exemplary damages or any analogous remedies.

7.17 The Court has held, in *Engel v Netherlands*[25] that the mere definition of an offence in the national law as non-criminal will not be determinative. The Court will apply its own "autonomous definition" of the term "criminal offence" as it is used in Article 6. In *Engel* it was held that, in determining whether an offence is to be regarded as criminal, the Court will normally take into account three factors:

1. The classification of the law of the defendant State;

2. The nature of the offence;

3. The degree of severity of the possible punishment.

7.18 To date, these three factors have been applied by the Court mainly in cases relating to regulatory or disciplinary offenses. It has been held that, in this context, the nature of the offence may be determined by whether the offence is aimed only at internal regulation (e.g. of a profession or a workplace) or has wider applicability to society at large. With regard to the third consideration, a severe penalty is required in order to render the offence criminal, at least where the criminal nature of the offence is not otherwise clear. In *Engel*, the Court held that imprisonment would render an offence criminal unless it could not, by its nature, duration or manner of execution, be considered "appreciably detrimental" to the offender. Penalties of two to three weeks' imprisonment were considered insufficient to bring an offence into the criminal sphere. In contrast to this, however, the Court in *Öztürk v FRG*[26] held that an offence under the Road Traffic Regulations, which was defined as regulatory in German law, and which was punishable only by a fine, was criminal in nature. The offence satisfied the second requirement of the Engel test, since it applied to society as a whole, rather than to a small defined group. The Court found that once the general nature of the offence was clearly criminal rather than civil, a monetary fine, the purpose of which was punitive and deterrent, was sufficient to bring the offence into the criminal category. It was also significant that the offence in

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25 A 22 (1976) The case concerned military disciplinary proceedings.

26 A 73 (1984)

question was one that would be classified as a criminal offence in most other Council of Europe states. In *Campbell and Fell v UK*,[27] it was held that the loss of remission of a prison sentence could also be regarded as a criminal sanction.

7.19 In *Société Stenuit v France*[28], it was held that sanctions under EU competition law should be classified as administrative rather than criminal. On the other hand, offenses under price-fixing regulations (*Dewer v Belgium*[29]), and under customs regulations (*Salabiaku v France*[30]) have been held to be criminal by the Court, although forfeiture of goods under customs regulations has been held not to be a criminal penalty (*AGOSI v UK*[31]).

7.20 The Court has not considered anything approximating to exemplary damages in relation to Article 6. It is difficult to judge whether a civil case in which exemplary damages were imposed would be regarded as a "criminal offence" under the article, but the further requirement under subsections two and three of Article 6, that the defendant must be the subject of a criminal charge, would be likely to exclude exemplary damages cases from the category of criminal offenses to which Article 6 applies.

7.21 In order for the guarantees in Article 6 (2) and (3) to apply, the applicant must have been "charged" with a criminal offence. The meaning of "charge" in Article 6 has also been considered by the Court in a series of cases. These relate mainly to offenses which are acknowledged as criminal but where the moment at which the accused became subject to a charge is in dispute. The Court has held that "criminal charge" should be given a substantive rather than a formal meaning. It has been held to be: "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence" or some other act which carries such an implication or "substantially affects" the suspect. The suspect has been regarded by the Court as charged with a criminal offence where he has been arrested for a criminal offence;[32] or when he has been officially informed of the prosecution against him.[33] The concept of a charge is difficult to apply to a case of exemplary damages, which are set squarely within civil law procedure, and may arise as one of a range of possible civil remedies in a tort case. In a case where exemplary damages are claimed, the defendant is not at any stage "charged with an offence"; he is only sued for liability in tort, or for breach of constitutional rights.

7.22 Even if it is accepted that exemplary damages cases would not be classified as involving a "criminal offence" under Article 6, the fair trial

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27 A 80 (1984)

28 A 232-A (1992) Com. Rep.

29 A 35 (1980)

30 A 141-A (1988)

31 A 108 (1986)

32 *Wemhoff v FRG* A 7 (1968)

33 *Neumeister v Austria* A 8 (1968)

guarantees in Article 6 (1) would still apply to such cases, to the extent that they are determinative of "civil rights and obligations". The requirements of Article 6 (1) should create no particular difficulties in exemplary damages cases. With regard to the burden of proof, it has been held by the Commission in *G v France*[34] that the burden of proof to be imposed in civil cases is a matter for the individual State.

Article 14

7.23 In cases where there has been no violation of Article 6, it must still be considered whether the rights contained in the Article have been applied in a way that is discriminatory. Under Article 14, it must be shown that there has been differential treatment of individuals in analogous situations, on one of a number of grounds listed in Article 14, or on further, unidentified, grounds of "other status". The caselaw of the Court on Article 14 makes clear that not all differences of treatment will be regarded as discrimination. Where there is an "objective and reasonable" justification for the difference in treatment of persons in analogous positions, Article 14 will not apply.[35] Whether the application of higher due process standards in criminal cases than in civil cases involving exemplary damages could be regarded as discriminatory against defendants in exemplary damages cases must remain a matter for debate. A finding of discrimination would not seem to follow automatically from the imposition of exemplary damages in some cases. The differing quality and severity of the sanctions imposed in civil and in criminal cases could be seen as justifying the difference; it might well be considered that on these grounds the two situations would not be analogous.

7.24 It must also be considered that discrimination must be on the basis of a particular aspect of the applicant's status. If, for example, it could be demonstrated that civil exemplary damages cases were being used systematically against a certain class of wrongdoers, in order to penalise them without having to satisfy a higher burden of proof in a criminal prosecution, then an issue might arise under Article 14. Short of this scenario, it would seem that Article 14 would not be an issue in exemplary damages cases.

The Irish Caselaw: Early Irish Acceptance of Exemplary Damages

7.25 Several older authorities establish the availability of punitive/exemplary damages in Irish law. In *Reeves v Penrose*,[36] exemplary damages were awarded in a case of trespass. In *Worthington v Tipperary (SR) County Council*,[37] the

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34 No. 11941/86 57 DR 100 (1988)

35 *Rasmussen v Denmark* A 87 (1984)

36 (1890) 26 LR Ir. 141.

37 [1920] 2 IR 233.

doctrine of punitive damages was accepted. Moloney C.J. held that:

> "punitive or vindictive damages stand upon an entirely different footing, and are given not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner."

7.26 Thus the original status of exemplary damages was well established.[38] Subsequent to the decision in *Rookes v Barnard,* however, there was uncertainty as to the impact of that case on Irish law. Caselaw gave varying indications. In *Dillon v Dunnes Stores Ltd,*[39] an award of exemplary damages was made against a policeman. Such an award could have been made under Lord Devlin's categorisation on the basis that the policemen were public servants, but the Court at least appeared to accept a wider availability of exemplary damages. In *McDonald v Galvin,*[40] the High Court again appeared to accept a broad availability of exemplary damages.

Confusion over Terminology: Exemplary Damages and Punitive Damages

7.27 There was for a time some confusion, arising from decisions of the Irish courts, as to the distinctions to be drawn between the various species of damages, and in particular between punitive and exemplary damages. In most jurisdictions, these two categories have long been regarded as identical; but in *Kennedy v Ireland,*[41] Hamilton P appeared to draw a distinction between them, without, however, indicating its conceptual basis. The distinction was based on the wording of the *Civil Liability Act, 1961.* Section 7 (2) of the Act refers to "punitive" damages in the context of survival actions, whereas Section 14 (4) refers to "exemplary" damages in the context of concurrent wrongdoers. In *Conway v Ireland,*[42] Barron J in the High Court expressly followed Hamilton P's decision, but made no reference to a distinction between the two categories of damages. Binchy and Byrne offered a "mundane explanation" of the differing wording in the *Civil Liability Act, 1961*: that the provisions had each been borrowed from separate sources, and that the difference in terminology had simply been overlooked.[43] This explanation was subsequently accepted by the Supreme Court in *McIntyre v Lewis,*[44] McCarthy J saying that he saw "no real difference of meaning between the two terms".[45]

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38 See White, *Exemplary Damages in Irish Tort Law* (1987) I.L.T. 60; also White, *Irish Law of Damages for Personal Injuries and Death* (1989) Chapter 1.

39 Unreported, 20 December 1968 (131/5/6 - 1966) (SC).

40 Unreported, 23 February, 1976 (1975-1183P) (HC)

41 [1987] IR 587.

42 Unreported, High Court, 2 November 1988.

43 Byrne and Binchy, *Annual Review of Irish Law, 1987*, p.343; and Id., *Annual Reveiw of Irish Law, 1988*, p.460.

44 [1991] 1 IR 121

45 Noted in Byrne and Binchy, *Annual Reveiw of Irish Law, 1990*, p.577.

7.28 Hamilton P, in *Kennedy v Ireland*,[46] also appeared to suggest that the categories of aggravated and exemplary damages might be regarded as interchangeable. He held that the plaintiffs in that case were entitled to "substantial damages" and that, in the circumstances of the case, it was "irrelevant whether they should be described as aggravated or exemplary." In assessing the amount of "substantial damages" to be awarded, he held that the court should have regard to:

1. The distress suffered by the plaintiff;

2. The fact that the interference with the plaintiff's rights was deliberate, conscious and unjustified; and

3. The fact that there had been a breach of a constitutional obligation by the State.

7.29 The first of these considerations, with its focus on compensating the loss suffered by the plaintiff, suggests that the damages are in the nature of aggravated damages; whilst the second consideration suggests a concentration on the conduct of the defendant which is more in accordance with an award of exemplary damages. The third consideration also suggests an award which is exemplary in purpose, since it imports a public law (and perhaps a deterrent) aim into the award of damages: that of the protection and vindication of constitutional rights.

The Current Status of Rookes v Barnard in Ireland

7.30 The question of the status of *Rookes v Barnard* was first dealt with by the Supreme Court in the case of *McIntyre v Lewis*,[47] although that case did not conclusively resolve the question, as the Supreme Court were divided on it. The case concerned the assault and malicious prosecution of the plaintiffs by the defendants, who were members of the gardaí. Hederman J held that "in cases like this, where there is an abuse of power by employees of the State, the jury are entitled to award exemplary damages."[48] This statement would suggest some limitation on the scope of exemplary damages, but Byrne and Binchy[49] caution against interpreting it as a wholesale endorsement of Lord Devlin's categorisation. O'Flaherty J reserved his position on the question of whether exemplary damages were confined to the *Rookes v Barnard* categories, while McCarthy J was less circumspect, expressly rejecting Lord Devlin's doctrine, as contrary to the dynamism of the common law.[50]

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46 *op cit.* fn.3.

47 [1991] 1 IR 121

48 *ibid.*, at p.134.

49 *op cit.* fn.45.

50 At p.138.

7.31 The law on exemplary damages was clarified to a considerable extent by the decision of the Supreme Court in *Conway v Irish National Teachers' Organisation.*[51] That case involved an action for damages for conspiracy to interfere with the constitutional right to primary school education, taken by a group of children whose education had been disrupted by an industrial dispute. Finlay C J in the Supreme Court analyzed the headings of damages potentially available in Irish law, for both tort and infringement of constitutional rights. He listed these headings as:

(1) Compensatory damages, calculated "to recompense a wronged plaintiff".

(2) Aggravated damages, which were compensatory damages increased by the conduct of the wrongdoer. Their award must be "in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant".

(3) Exemplary or punitive damages (no distinction is drawn between the two). These damages "mark the court's particular disapproval of the defendant's conduct ... and its decision that it should publicly be seen to have punished the defendant for such conduct."[52]

Finlay CJ thus appeared to endorse the availability of exemplary damages in all tort cases, as well as in cases involving a breach of a constitutional right. The exemplary damages award made in the case, however, referred only to the breach of a constitutional right, and not to any liability in tort.

7.32 It is possible that, following this case, the availability of exemplary damages in Ireland may be limited to Lord Devlin's three categories, as well as to cases where there is a breach of constitutional right. This is the interpretation given to the judgement in the *Law Reform Commission Report on the Civil Law of Defamation.*[53] It may, however, be unduly narrow. Dicta of the judges in the case suggest a more thoroughgoing rejection of Lord Devlin's categories. Griffin J, concurring with Finlay CJ, stated very clearly that there is "no valid reason, in logic or common sense" for the limitation imposed by Lord Devlin's first category.[54] He considered it unnecessary to deal with the other categories. McCarthy J stated:

"I do not accept that the categories for the award of exemplary damages

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51 [1991] 2 IR 305. See Byrne and Binchy, *Annual Review of Irish Law, 1991* at p.448 *et seq.*

52 At p.503.

53 Report on the Civil Law of Defamation (1991) pp.66-68.

54 At p.511. Griffin J placed emphasis on the rejection of Lord Devlin's categories in other common law countries, citing in particular *Uren v John Fairfax and Sons Ltd* (1967) 117 CLR 118.

are as limited as set out in the speech of Lord Devlin in *Rookes v Barnard*."[55]

Griffin J appeared not to confine the award of exemplary damages to cases of breach of constitutional rights. He stated that exemplary damages may be awarded where there is "wilful and conscious wrongdoing in contumelious disregard of another's rights."[56]

7.33 Finlay C J emphasised that in the case before the Court, the intended and direct consequence of the defendant's acts was the plaintiff's deprivation of her constitutional right to free primary education. This, coupled with the special responsibility of the defendant union towards the educational rights of children, was the basis for the award of exemplary damages. Finlay C J identified four reasons for the award:

1. That the right breached was the constitutional right of a child;

2. That the right breached was of fundamental importance;

3. That it must be presumed the defendants were aware of this importance;

4. That the breach of the right was an intended consequence of the defendant's actions.

7.34 Thus Finlay CJ based the award of exemplary damages on intended breach of a constitutional right of fundamental importance. He characterised the award of exemplary damages as a necessary means to defend constitutional rights. He stated:

> "it seems to me that the court could not be availing of powers as ample as the defence of the Constitution and of constitutional rights requires unless, in the case of breach of those rights, it held itself entitled to avail of one of the most effective deterrent powers which a civil court has, the awarding of exemplary or punitive damages."[57]

7.35 McCarthy J echoed this, saying:

> "Every member of the judiciary has made a public declaration to uphold the Constitution; it would be a singular failure to do so if the courts did not, in appropriate cases such as this, award such damages as to make an example of those who set at nought the constitutional rights of

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55 At p.513.

56 At p.509.

57 At p.506.

others."[58]

7.36 Finlay CJ emphasised, however, that it should not be inferred that exemplary damages should be awarded in every case of a wrong which involved the breach of a constitutional right.

7.37 Finlay CJ's discussion of exemplary damages seems to suggest a deterrent purpose behind such damages, as well as a denunciatory one. He sees the award of exemplary damages as a weapon with which the courts can defend the Constitution. In his judgement, he stated that exemplary damages should not be awarded in every case where there was a breach of a constitutional right, but in the case before the Court, it was appropriate to mark the court's disapproval of the defendant's conduct.

7.38 Griffin J saw the object of exemplary damages as being:

> "to punish the wrongdoer for his outrageous conduct, to deter him and others from any such conduct in the future, and to mark the court's ... detestation and disapproval of that conduct".[59]

7.39 In the recent case of *Cooper v O'Connell*,[60] the Supreme Court left open the question of the availability of exemplary damages in tort cases. Keane J, giving judgement for the Supreme Court, quoted extensively from Finlay C J's judgement in *Conway v INTO*. He interpreted that case as having rejected the *Rookes v Barnard* restrictions on exemplary damages and as allowing exemplary damages in "some, but not all, cases where there is an invasion of the Plaintiff's constitutional rights". Keane J held that, on the facts of the case, the conduct of the defendant was not such as to warrant the imposition of exemplary damages. It was therefore unnecessary for the Court to decide the question of the precise extent of the availability of exemplary damages in Irish law. The question of whether exemplary damages could be awarded in a case of negligence was left open.

7.40 Keane J referred to exemplary damages as a "drastic but necessary measure" and emphasised that they should be confined to cases of exceptional misconduct. He saw exemplary damages as having primarily a social function. Emphasising their deterrent role in making an example of the defendant, he stated that:

> "[i]n developing the law as to such damages, the courts in this jurisdiction, as in other common law jurisdictions, have essentially been concerned with the principles of public policy which demand that, in a

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58 At p.513.

59 At p.509.

60 Supreme Court, 5 June 1997.

literal sense, an example should be made of the Defendant."[61]

7.41 It appears from the judgments in the case that the award of exemplary damages may also depend on the relationship between the parties. There may have to be a special relationship of trust or responsibility, or of inequality, between the plaintiff and defendant, before exemplary damages can be recovered - but whether this is a necessary condition is not clear from the judgements.

Principles Governing the Assessment of Quantum

7.42 The factors outlined by Lord Devlin, which are to be taken into consideration in awards of exemplary damages, have been set out above. They have been viewed with favour by the Irish courts. In *McIntyre v Lewis*,[62] O'Flaherty J adopted Lord Devlin's three considerations: that the plaintiff must be the victim of punishable behaviour; that there must be restraint in the award of exemplary damages; and that the means of the plaintiff and defendant must be taken into account. Hederman J, in the same case, endorsed the principle in *Rookes v Barnard*, that the amount of exemplary damages awarded should be in proportion to the amount of compensatory damages awarded. O'Flaherty J held that exemplary damages should be "kept on a tight rein".[63] Both O'Flaherty J and Hederman J also held that the damages awarded for the two separate wrongs in the case, assault and malicious prosecution, should "bear some relation to each other".[64] Both held that the sum of exemplary damages awarded in the case should be reduced. McCarthy J dissented on this, however, holding that in the circumstances of the case, £30,000 exemplary damages was an appropriate sum.[65]

Aggravated Damages

7.43 The judgement of Finlay CJ in *Conway v INTO*[66] also contains important dicta as to the nature and function of aggravated damages. Aggravated damages were seen as having both compensatory and punitive purposes: they were defined by Finlay CJ as compensatory damages which are increased by certain factors. These include:

> "(a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or

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61 At p.21.

62 *op cit.* fn.47.

63 At p.141.

64 Per Hederman J at p.134.

65 At p.137.

66 [1991] 2 IR 305

(b) conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action"[67]

7.44 Finlay CJ made it clear that this enumeration was not to be regarded as comprehensive; other factors could also ground an award of aggravated damages. Aggravated damages were seen as grounded in both the outrageous conduct of the defendant and the injury of the defendant. This confirms aggravated damages as a hybrid of compensatory and exemplary damages. Finlay CJ stated in his judgement that:

> "...the circumstances which may properly form an aggravated feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant."[68]

7.45 In *Cooper v O'Connell*,[69] the Supreme Court refused to make an award of aggravated damages. The absence of malice or deliberation on the part of the defendant was crucial to this refusal. On the facts of the case, the Court found that, although the defendant had been "seriously negligent", there had been no element of oppressiveness, arrogance or outrage in his conduct: nothing to distinguish it from an ordinary case of professional negligence. The fact that the defendant had put liability in issue was also held to be insufficient to justify an award of aggravated damages.

7.46 It would seem that the Irish courts tend towards a greater acceptance of the punitive element in awards of aggravated damages than their English counterparts. The dual function of aggravated damages, at once compensatory and punitive, has been acknowledged and accepted by the Irish courts. Nevertheless, the continued classification by the courts of aggravated damages as a category of compensatory damages leaves room for confusion as to their true character.

Exemplary Damages for Breach of European Union Law

7.47 In addition to liability for breach of a constitutional right, there is a possibility that exemplary damages may be recoverable for breaches of European

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67 At p.503.

68 *Ibid.*

69 *op cit.* fn.60.

Union law, at least where the breach is by the State.[70] In the joined cases of *Brasserie du Pêcheur* and *Factortane III*,[71] the European Court of Justice held that the State could be held liable in damages to individuals for legislation which was contrary to EU law, if it could be shown that the legislation affected the rights of individuals, that the breaches of individual rights involved were serious, and that there was a causal link to the damage to the plaintiff in the case.[72] It was held by the Court that such damages could include exemplary damages, where exemplary damages could have been awarded in a similar action founded on domestic law. Thus recovery of exemplary damages for breach of EU law is made dependant on the availability of exemplary damages in domestic law. There has been a suggestion, in the Irish High Court, that exemplary damages could be awarded against the State for breaches of EU law: *Tate v Minister for Social Welfare and the Attorney General*.[73] In that case the Court refused to award punitive damages against the State for its failure to pay equal social welfare to women, "in view of the very large sums involved" in the case; but it is implicit in the judgement of the Court that punitive damages could be awarded for a breach of EU law in an appropriate case.

The Civil Liability Act, 1961

7.48 The *Civil Liability Act, 1961* recognises exemplary damages as a separate head of damages. The Act places two important limitations on the award of such damages.[74] The first relates to survivor actions, and the second to actions for wrongful death.

Survivor Actions

7.49 Section 7 (2) of the Act expressly excludes an award of exemplary damages where a cause of action survives for the benefit of the estate of a deceased person. The section excludes recovery for "exemplary damages, or damages for any pain or suffering or for personal injury or for loss or diminution of expectation of life or happiness." White is of the view that damages for "pain and suffering" would probably include aggravated damages, which would therefore not be recoverable in a survivor action.[75] Restitutionary damages do not appear to be excluded by the section.

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70 See L Neville Brown, *State Liability to Individuals in Damages: an Emerging Doctrine of European Union Law* (1996) Ir. Jur. (n.s.) 7.

71 (1996) 3 ECR 1-1029

72 The principle of State liability for breach of European Community law was first established in the case of *Francovich v Italy* (Case C-6 C-9/90) [1991] ECR-15357). The European Court of Justice held (at para.37) that:

> "it is a principle of community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of community law for which they can be held responsible."

73 [1995] 1 ILRM 507

74 The content of the relevant sections is not discussed in the Dáil Debates on the Act.

75 *Irish Law of Damages*, *op cit.* fn.38, at p.440.

7.50 The exclusion of exemplary damages awards to the estate of deceased person appears to be at odds with the nature of these damages, with their punitive rather than compensatory purpose. The exclusion of compensatory or aggravated damages in such an action would be more understandable, since the recipients of the damages will be the beneficiaries of the plaintiff's estate, not the plaintiff himself who has suffered the loss and injury. In the case of exemplary damages, which are awarded according to the behaviour of the defendant, rather than the loss or injury to the plaintiff, there is no reason why the defendant's estate should be considered a more undeserving recipient of the exemplary damages "windfall" than the plaintiff himself.

Concurrent Tortfeasers

7.51 Section 14 (4) of the Act states that where there are concurrent tortfeasers, and punitive damages are to be awarded against one of them, such damages shall not be awarded against another tortfeaser merely because he is a concurrent tortfeaser. This means that where the misconduct of one of the defendants leaves him open to an award of punitive damages, another defendant in the same case who is not equally culpable will not have to suffer the burden of the punitive award.

7.52 Section 14 (4) represents an exception to the general rule regarding concurrent wrongdoers. In general, and subject to section 14 and a number of other exceptions, each concurrent wrongdoer is liable for all of the damage and loss suffered by the plaintiff.[76]

7.53 It is unclear from the Act whether "concurrent tortfeasers" includes a vicariously liable tortfeaser. The Act, in section 11, defines "concurrent wrongdoer" to include those liable through vicarious liability, but it is unclear whether this also applies to the term "concurrent tortfeaser", which is not defined. If vicariously liable individuals were included within the meaning of "concurrent tortfeaser", then punitive damages awards could not be made against, for example, vicariously liable employers would not necessarily be liable in punitive damages, in their own right. While there has been no decision of the courts on the interpretation of sections 11 and 14, dicta of McCarthy J in *McIntyre v Lewis* support the view that section 14 does not apply to cases of vicarious liability.[77]

7.54 The reference to "punitive" damages in section 14 (4) as opposed to the "exemplary" damages referred to in section 7 (2), has given rise to some uncertainty as to the scope of the provisions. While Byrne and Binchy maintain

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76 Section 12 (1)

77 *McIntyre v Lewis, op cit.* fn.47, at p.139:

> "It is not necessary to decide the construction of subsection 4 of section 14 but I would incline to the view that it is not relevant to circumstances where the liability of the concurrent tortfeaser is vicarious."

that the two terms are identical, and see the differing terminology as the result of an error of drafting,[78] White considers that the scope of "punitive" damages in section 14 (4) is wider than that of exemplary damages in the earlier section, and includes both exemplary and aggravated damages. This, he argues, accords with the purpose of section 14 (2), which is to prevent a concurrent tortfeaser having to pay damages which are exclusively the result of the wrongful conduct of another.[79] Such an interpretation is based on a view that punitive and exemplary damages have distinct meanings in Irish law (White admits that the terms are synonymous in English law). This view must now be regarded as mistaken, following the decision of the Supreme Court in *Conway v INTO.*[80] In that case Finlay CJ expressly stated that "in our law punitive and exemplary damages must be recognised as constituting the same element". Given these dicta, it must now be taken that "punitive" damages in section 14 (4) refer to exemplary damages only, and that therefore the section does not preclude the recovery of aggravated damages against a concurrent tortfeaser. This situation is unsatisfactory, since in effect it allows one defendant to be penalised for the wrongful conduct (or the injury arising out of wrongful conduct) of a second defendant.

7.55 This anomaly only occurs, however, if aggravated damages are considered to have some punitive or exemplary element. If aggravated damages are to be re-conceptualised as purely compensatory, and without reference to the outrageous conduct of the defendant, then there is no substantive difficulty with allowing for their recovery against a concurrent tortfeaser.[81]

Wrongful Death

7.56 Part IV of the *Civil Liability Act, 1961* allows for recovery of damages in wrongful death cases by the dependants of the deceased. The effect of section 49 (1) (a) of the Act, however, is to exclude the recovery of exemplary damages in such a case. Section 49 (1) (a) provides:

> "the damages under section 48 shall be -
>
> (i) the total of such amounts (if any) as the jury or the judge, as the case may be, shall consider proportioned to the injury resulting from the death to each of the dependants, respectively, for whom or on whose behalf the action is brought, and
>
> (ii) subject to paragraph (b) of this subsection, the total of such amounts (if any) as the judge shall consider reasonable compensation for mental distress resulting from the death to

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78 See discussion *supra* para.9.06.

79 *Irish Law of Damages*, *op cit.* fn.38 at p.16.

80 *op cit.* fn.1.

81 See *infra* Chap.9.

each of such dependants."

7.57 The damages recoverable under subsection (i) have been judicially interpreted to be "in the nature of a compensation for the pecuniary loss sustained by the dependants".[82] The damages for mental distress allowed for in subsection (ii) are also expressed as compensatory. Mental distress damages must be reasonable, and must not exceed a fixed sum, presently set at £7,500. This would not allow for the recovery of damages approximating to aggravated damages for mental distress. White sees the function of damages for mental distress as vindicatory. They have a "vindicatory effect as a token and acknowledgement of grief needlessly inflicted by the wrongdoer upon the relatives of one wrongfully killed."[83]

Comparative Law of Damages for Wrongful Death

7.58 The exclusion of exemplary damages in cases of wrongful death is mirrored in other jurisdictions. The English position on the measure of damages which may be recovered is restrictive. Under the *Fatal Accidents Act, 1976*, only damages for pecuniary loss may be recovered in an action for wrongful death, with one exception: the spouse or parent of a deceased person may claim for damages for bereavement. It has been established by the courts that mental suffering of the relatives of a deceased person cannot be considered in computing damages: *Blake v Midland Ry.*[84]

7.59 In Australia, it has been held by the Supreme Court of Victoria, in *Reindel v James Hardie & Co Pty Ltd*,[85] that, under the relevant statute making provision for recovery of damages in cases of wrongful death, there could be no award of exemplary damages. In Canada, there are conflicting authorities on the question. In *Blacquiere's Estate v Canadian Motor Sales,*[86] it was held by the Prince Edward Island Supreme Court that, although exemplary damages for wrongful death were not appropriate in the case before the court, such damages could be awarded for wrongful death in an appropriate case. In *Nichols v Guiel*,[87] however, the Supreme Court of British Columbia held that exemplary damages could not be awarded in cases of wrongful death, since the tortious conduct had not been directed against the plaintiff, and in any case the relevant statute allowed only for the recovery of damages on the basis of the survivor's pecuniary loss. In the US, recovery of punitive damages in actions for wrongful

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82 *Gallagher v Electricity Supply Board* [1933] IR 558, at 566 (Interpreting the predecessor of the 1961 Act, the *Fatal Accidents Act, 1846*). The Court went on to hold that "nothing in the nature of a solatium on account of mental sufferings occasioned by such death may lawfully be awarded by the jury". See Anthony Kerr, *The Civil Liability Acts 1961 and 1964* (1993) pp.100-106.

83 *Irish Law of Damages for Personal Injuries and Death*, *op cit.* fn.38, at p.389.

84 (1852) 18 QB 93

85 [1994] 1 VR 619.

86 (1975) 10 Nfld and PEIR 178

87 (1983) 4 WWR175

death is permissible in some states, where there is a wrongful death statute which authorises punitive damages either expressly or by implication.[88]

88 Schlueter and Redden, *Punitive Damages*, (3rd ed.) (1995) §9.9 (A). States which expressly authorise punitive damages for wrongful death are: Colorado, Kentucky, Montana, Nevada, New Mexico, South Carolina, and Texas.

PART III

CHAPTER 8: RESTITUTIONARY DAMAGES

The Principle Against Unjust Enrichment

8.01 The principle against unjust enrichment is a fundamental one, that a wrongdoer should not profit from his own wrong.[1] It was clearly set out in a number of Eighteenth Century judgements of Lord Mansfield, exemplified by his statement in *Moses v MacFerlan*[2] that:

> "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

8.02 The *US Restatement on the Law of Restitution* expresses the same principle succinctly as follows:

> "a person who has been unjustly enriched at the expense of another is required to make restitution to the other."

8.03 Unjust enrichment has been slow to achieve recognition as a distinct and unified category of the civil law. Actions which reverse unjust enrichment were historically dismissed as cases of quasi-contract, or as remnants of the old forms of actions. In the case of *Fibrosa Spolka Akcyjna v Fairboairn Lawson Combe Barbour Ltd*[3], however, Lord Wright affirmed the centrality of the unjust enrichment principle:

> "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep."

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1 See Eoin O'Dell, *The Principle Against Unjust Enrichment*, (1993) 15 D.U.L.J. 27.

2 (1760) 2 Burr. 1005, at 1012.

3 [1942] 2 All E R 122 at p.135.

8.04 At first sight, the principle against unjust enrichment may appear abstract and aspirational to the point of unworkability, and this has resulted in allegations that it merely represents a species of "palm tree justice". In fact, the "unjust" aspect of unjust enrichment refers not to some vague criterion of morality, but to a definable range of situations where the courts will hold, on the basis of the established caselaw, that an enrichment ought to be reversed.[4] Unjust enrichment is best seen as a unifying principle which encompasses a range of legal measures.[5] This view of the principle was put forward by Deane J in the High Court of Australia in the case of *Pavey and Matthews v Paul*[6] where he characterised unjust enrichment as:

> "a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question of whether the law should, in justice, recognise the obligation in a new or developing category of case."[7]

8.05 In order for a wrongdoer to be unjustly enriched, three elements must subsist: first, there must have been a benefit to the defendant; second, this benefit must have been at the expense of the plaintiff; and third, the enrichment of the defendant must have been unjust. The benefit to the defendant may have been either positive or negative; that is, the defendant may have received a benefit merely through saving himself expense. The benefit may include money, a service, or goods. Where the defendant has received a service, the courts may require that the defendant has requested the service, or at least has freely accepted it.

8.06 The remedies which reverse an unjust enrichment are scattered throughout a number of areas of the law, and include both equitable and common law remedies. Where the wrong is one against property, remedies which reverse unjust enrichment may include the recovery of land or an equitable lien on the land. Where the wrong is personal, the remedies may include an action for money had and received, an account of profits, recision or restitutionary damages (which may be for tort, contract, or equitable wrongs).

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4 See Birks, *An Introduction to the Law of Restitution*, (1989) pp.18-19. See also Burrows, *The Law of Restitution*, (1993) p.1.

5 At common law, these include the action for money had and received, for money paid, for *quantum meruit* and *quantum valebant*; In equity, tracing, account, subrogation, liens and (arguably) constructive trusts.

6 (1987) 162 CLR 221

7 At p.226.

Restitution for Wrongdoing

8.07 The majority of remedies which reverse unjust enrichment are not based on the commission of a tort or breach of contract by the defendant. They are based solely on the fact of his unjust enrichment. Such remedies have been labelled as instances of recovery for unjust enrichment by subtraction. On the other hand, cases where restitutionary remedies arise out of the commission of a tort, breach of contract or equitable wrong are said to involve unjust enrichment by wrongdoing.[8] Remedies available for unjust enrichment by wrongdoing include restitutionary damages for tort or for breach of contract.

8.08 This paper is concerned solely with the award of restitutionary damages, in either tort or contract, or in cases of breach of fiduciary duty, and not with any of the other remedies which may be said to reverse unjust enrichment. One of the questions which must be considered is the respective ambit of the various restitutionary remedies, and the circumstances in which restitutionary damages will be awarded as opposed to an independent restitutionary award.[9]

8.09 In cases where restitutionary damages are awarded, restitution is based on the wrong done to the plaintiff, such as a tortious wrong or breach of contract. Restitutionary principles can be said to be operating at a secondary level, or to be dependent on the claim in tort or contract.[10]

8.10 The crucial distinction between unjust enrichment by subtraction and unjust enrichment by wrongdoing in that, in cases of the latter, it is not necessary to show that the benefit to the defendant arose directly out of a commensurate loss to the plaintiff. In other words, the second element which is necessary to establish unjust enrichment, the requirement that the benefit was "at the expense of the plaintiff" operates differently in cases of unjust enrichment by wrongdoing. In such cases, it is sufficient to show that the defendant's benefit arose directly

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8 See Birks, An Introduction to the Law of Restitution (1989) pp.23-24, 40-41, 313-315, *Macmillan Inc. v Bishopsgate investment Trust plc.* (No. 3) [1995] 3 All E R 747; *Halifax Building Society v Thomas* [1995] 4 All E R 673.

9 The choice between these two remedies has practical implications, as differing periods of limitation may occasionally apply, and the plaintiff's duty to mitigate his loss occurs only in the case of an award of damages, and not in the case of an independent restitutionary award. The limitation period for actions in both tort and contract is normally six years from the accrual of the action (section 11 (1) (a) and section 11 (2) of the Statute of Limitations); by section 11 (1) (b) of the Statute of Limitations, the period of limitation for "quasi contract" (now generally known as restitution, is also six years from the accrual of the cause of action. In some tort cases, however, there may be a shorter period of limitation. The limitation period is three years only in an action claiming damages for slander, negligence, or breach of duty, where the damages include damages in respect of personal injuries. See James C Brady and Tony Kerr, *The Limitation of Actions* (2nd ed.) (1994), Chapters 2 and 3 and pp.202-203.

10 See English Law Commission, *Aggravated, Exemplary and Restitutionary Damages - A Consultation Paper* (1993), para.7.11.

out of the wrong to the plaintiff.[11] The fact that the plaintiff may not have sustained a monetary loss equivalent to the defendant's gain is immaterial.[12] This is well illustrated by the US case of *Federal Sugar Refining Co v United States Equalisation Board*.[13] In that case, the defendants had induced the Norwegian government to repudiate its contract for the sale of sugar which it had made with the plaintiff, and to enter into a second contract with themselves, the defendants. As a result of the fluctuating price of sugar and the defendants' monopoly of export licences, the plaintiff would in any event have made no profit from the repudiated contract; but the defendant did make a profit. The court rejected the argument that damages could not be awarded since nothing had been taken away from the plaintiff and added to the wealth of the defendant, holding that:

> "the action is not for damages for breach of contract, but for the profit which the defendant is alleged to have made as the result of it s alleged wrongful acts."[14]

8.11 This position is also reflected in the decision of Denning J in *Strand Electric and Engineering Co v Brisford Entertainments*.[15] In that case, the defendants had hired equipment from the plaintiffs and had refused to return it within the required time. It was established that, even if the equipment had been returned as required, the plaintiffs might not have been able to re-hire it within the relevant time, and so might not have made any profit from it. Nevertheless, it was held that damages could be recovered, since the sum of damages was not confined to the loss of the plaintiffs.[16]

8.12 The irrelevance of the plaintiff's loss has consequences for the quantum of restitutionary damages which may be awarded. In the case of an award of

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11 The case of *Phillips v Homfray* (1883) 24 Ch. D. 439, is authority against this, but the case has been widely criticised and departed from, both in the court decisions set out below and by commentators (see Goff and Jones *The Law of Restitution*, (3rd ed., 1986) at p.611). In *Phillips v Homfray*, the majority of the Court of Appeal held that, where the deceased defendant had trespassed on the plaintiff's land by using underground passages under the plaintiff's land for the removal of minerals. The plaintiff had not suffered any material loss corresponding to the profit arising from the trespass. It was held that the plaintiff could not recover in restitution, since the profit:

> "must be some profit of which the plaintiff has been deprived, and not merely a negative benefit which the testator may indirectly have acquired by saving himself the expense of performing his duty."

12 Goff and Jones, *op cit. fn.11*, (3rd ed.) (1986) state that:

> "[i]f the defendant's conduct can be characterised as wrongful, then he cannot assert that his benefit was not gained at the plaintiff's expense, since the plaintiff suffered no loss, and that the gain was at the expense of another." (at p.25)

13 268 F. 575 (1920) (S.D.N.Y.) Discussed in Goff and Jones, *op cit.* fn.11 at p.614.

14 At p.583.

15 [1952] 2 QB 246.

16 See also the case of *Boardman v Phipps*, [1967] 2 A C 45, concerning breach of fiduciary duty, where it was held that restitution of the defendants profits resulting from his breach of fiduciary duty could be recovered by his employers, despite the fact that the defendant had not deprived his employer of them in the first place.

restitutionary damages, there need not be any exact correlation between the loss to the plaintiff and the gain to the defendant, as would be strictly required in a case of unjust enrichment by subtraction. In cases of restitutionary damages, where the unjust enrichment is based on a wrong, the plaintiff may be awarded a sum which exceeds the loss which he has suffered.

Development of the Law: Waiver of Tort

8.13 Traditionally, the situations in which the compensatory remedy for tort could be replaced with a restitutionary remedy were governed by the rule of 'waiver of tort', a mechanism which originated in the complexities of sixteenth to nineteenth century forms of action, and survived as an anomaly and a legal fiction. Where a plaintiff wished to recover damages for a tort in restitution rather than in compensation, he would be said to have "waived the tort", abandoning his claim to compensation and thus leaving the way free for a restitutionary remedy to be awarded.[17] In fact, the tort had not been "waived" since the restitutionary remedy was itself based on the finding of tortious liability. Traditionally, only certain torts could be waived, and therefore the ambit of recovery in the restitution measure was limited according to cause of action. Most of those torts which could be waived were proprietary in nature, such as conversion, or wrongful interference with land or goods.[18]

8.14 In the case of *United Australia Ltd v Barclay's Bank Ltd*,[19] the House of Lords cast doubt on the validity of the waiver of tort doctrine. The question which arose in that case was whether, once the plaintiff "waives the tort" and begins an action in assumpsit, he was debarred from bringing any further proceedings in tort. The House of Lords held that he was not, and recognised that the action in assumpsit was itself based on the tort. Therefore the tort itself was not really waived at all: merely, a new remedy was substituted. If it were otherwise, if the effect of waiver of tort were to declare that no tort had been committed, then, since there would have been no wrong, no action in assumpsit could lie. Viscount Simon LC approved the position of the US Restatement of the Law of Restitution that:

> "[t]he election to bring an action for assumpsit is not ... a waiver of tort but is the choice of one of two alternative remedies."

8.15 In the light of the *United Australia* case, the language of waiver of tort may now be considered to be largely redundant.[20] Once the language of waiver of tort has been abandoned, there can be a clearer view of a single, tortious

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17 *Hambly v Trott* (1776) 1 Cowp. 371; *Lightly v CLouston* (1808) 1 Taunt 112.

18 Although the tort of deceit could also be waived - and in *Lightly v Clouson*, *op cit.* fn.17, the tort of seduction was waived, where the defendant had wrongfully taken the plaintiff's apprentice into his employment.

19 [1941] AC 1 (HL)

20 See S Hedley, *The Myth of Waiver of Tort* (1984) 100 L.Q.R. 653; but this is disputed by some commentators: see Beatson, *The Nature of Waiver of Tort*, (1979) 17 U. W. Ont. L. Rev. 1.

cause of action giving rise to either a compensatory or a restitutionary remedy. The Irish courts also appear to have moved towards this view, and towards an acceptance of awards of damages which are based on restitution.[21]

The Present Law of Restitutionary Damages

England

8.16 Although restitutionary damages have at least gained a foothold in the English common law, their precise status remains unclear. For the most part, restitutionary damages will be relevant in cases involving property, and it is principally in relation to the proprietary torts that the courts have considered restitutionary principles.[22]

8.17 Restitutionary damages may be appropriate in a variety of situations. This includes cases where the plaintiff has transferred money to the defendant, or where the defendant, without authorization, has made use of the plaintiff's property, or has sold the property of the plaintiff, and the plaintiff wishes to recover either a fair licence fee for the property, or the profits of the defendant's use or sale. The difficulty is that many awards in the above situations may be justifiable on both a restitutionary and a compensatory basis. As a result, the rationale for awards in these cases is not always clear.

8.18 The English courts have tended towards a restitutionary approach to damages in several cases, and in a few instances have awarded damages on the basis of the gain to the defendant. They have at times gone to great lengths, however, to characterise such awards as compensatory. Thus the task of establishing a distinct category of restitutionary damages is a difficult one. It is has been argued (although the argument is a strained one) that every instance in which damages have been awarded with reference to the gain to the defendant are in fact justifiable on the basis of compensation.[23] The more realistic view is that restitutionary damages do constitute an emerging category of damages in English law.[24]

8.19 Initial signs of judicial favour for restitutionary damages were to be seen in the case of *Whitwham v Westminster Brymbo Coal & Coke Co*,[25] which

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21 See *infra* paras.8.33-8.38.

22 There may be occasional cases where restitutionary damages are warranted under the headings of other torts. Goff and Jones give the example of a thug who is paid to assault the plaintiff: in such a case, restitutionary damages would be an appropriate remedy for the tort of battery.

23 Such arguments often rely heavily on the idea of lost opportunity to bargain, by which the court presumes that the plaintiff would have made a bargain with the defendant regarding the property in question, and awards a sum which compensates him for the loss of the sum he would have made from such a bargain. See, e.g. *Shape and Waddams, Damages for Lost Opportunity to Bargain*, (1982) 2 OJLS 290.

24 See English Law Commission, Report No 247, *Aggravated, Exemplary and Restitutionary Damages* (1997) para.3.4.

25 [1896] 2 Ch. 538

involved the trespass of the defendant on the land of the plaintiff by the tipping of spoil from their colliery onto the defendant's land. Although the Court in that case appeared to base the award of damages primarily on compensation, a compensatory justification for the award is somewhat strained, since there is no clear loss to the plaintiffs, unless it be the loss of the opportunity to bargain with the defendant for a fee for the use of the land. The award is more easily explained in restitutionary terms, and some dicta in the judgements support this. Lindley J, for example, stated that "if one person has without leave of another been using that other's land for his own purposes, he ought to pay for such user."

8.20 The case of *Strand Electric and Engineering Co Ltd v Brisford Entertainments*[26], has been central to the development of the law of restitutionary damages. In that case, the defendant retained hired equipment after the period of hire had expired. The plaintiff brought proceedings for damages in detinue. Damages as assessed by the trial judge amounted to roughly half the rate of hire for the period for which the equipment had been retained, as the trial judge had taken into account the possibility that another hirer might not have been found for the equipment, that the hiring rate might have been reduced, and that the equipment could have been destroyed. In the Court of Appeal, it was held that these contingencies did not justify a reduction in the sum of damages. Somervell L J stated that the wrong done to the plaintiff was not merely the deprivation, but also the user of the goods. Once the defendant had used the goods, he could not plead that the goods could not have been otherwise used by the plaintiff. The plaintiffs were entitled to a sum representing the reasonable hire of the goods. Somerville L J did not adopt a restitutionary rationale for the award of damages.[27] This contrasts, however, with the reasoning of Denning L J.

8.21 The judgement of Lord Denning is the most significant for the development of the law of restitutionary damages. Lord Denning took a restitutionary view of the damages to be awarded. According to this view, once the defendant has made use of the goods, he is liable for the sum it would have cost to hire the goods, irrespective of whether the owner would have found any alternative use for them, or whether he in fact suffered any loss. This position is arrived at by analogy with the law regarding detention of land, and in particular, with *Whitwham v Westminster Brymbo Coal Company*.[28] As a result of *Whitwham:*

> "a wrongdoer who uses land for his own purposes without the owner's consent, as, for instance, for a fair ground, or as a wayleave, must pay

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26 [1952] 1 All E R 796.

27 *Ibid.* at p.799:

> "[I]n considering the measure of damages as raised here, I think that the actual benefit which the defendants have obtained is irrelevant. The damages could not, in my view, be increased by showing that a defendant by his use of the chattel had made much more than the market rate of hire. Equally, they cannot be diminished by showing that he had made less."

28 *op cit.* fn.25.

a reasonable hire for it, even though he has done no damage to the land at all."

Lord Denning stated that the same principle should apply to the detention of goods, and that in cases where goods had been wrongfully retained:

> "the claim for a hiring charge is ... not based on the loss to the plaintiff but on the fact that the defendant has used the goods for his own purposes. It is an action against him because he has had the benefit of the goods. It resembles therefore an action for restitution, rather than an action for tort."

8.22 In *Penarth Dock Engineering Co Ltd v Pounds*[29], Lord Denning in the Court of Appeal expressly awarded damages on the basis of the benefit which had accrued to the wrongdoer by reason of his wrong. The facts were that the defendant had sold to the Plaintiff a floating pontoon which was located in the plaintiff's dock. It was a term of the contract of sale that the pontoon should be removed as soon as possible; but the pontoon was not removed. It was found as a matter of fact by the Court that the plaintiff company had suffered no loss as a result of the failure to remove the pontoon. Lord Denning held that damages could be awarded in spite of this, since

> "in a case of this kind the test is not what the plaintiffs have lost, but what benefit the defendant has obtained by having the use of the berth."

8.23 An award of damages which may contain an award of restitutionary damages in the guise of compensation is *Bracewell v Appleby,*[30] which involved a trespass over the defendant's road. Damages were assessed on the basis of compensation for loss of a "hypothetical bargain",[31] with the court considering what sum the plaintiff could fairly have charged the defendant for a right of way over the road; although it is clear from the facts that the plaintiff would not have granted any such right of way. The award made was not expressly restitutionary; however, in assessing damages, the Court examined the profit which the defendant had derived from his wrong, and in the light of this a restitutionary interpretation of the award may be the most appropriate.

8.24 In *Carr-Saunders v Dick McNeil Associates Ltd.*[32] Millet J held that he was entitled, in the assessment of damages, to consider the amount of profits which the defendant would receive from the wrongful development of a building

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29 [1963] 1 Lloyd's Rep. 359.

30 [1975] Ch. 408

31 *Per* Graham J at p.1000:

> "It seems to me that the defendant must be liable to pay an amount of damages which, insofar as it can be estimated is equivalent to a proper and fair price which would be payable for the acquisition of the right of way in question."

32 [1986] 2 All E R 888

which interfered with the plaintiff's easement of light.[33] Millet J held that in assessing damages in the case, the profit which the defendant could expect to make from the development of the building could be taken into account.[34]

8.25 The 1994 case of *Ministry of Defence v Ashman*,[35] confirms the trend towards a restitutionary approach to damages in appropriate cases of proprietary torts.[36] In that case, Hoffmann J in the Court of Appeal held that a claim for mense profits for trespass could give rise to a restitutionary award, remarking that "nowadays I do not see why we should not call a spade a spade."[37] The case concerned a Ministry of Defence house which was let to a member of the military. On his vacating the house, his family were given notice to vacate, but they remained in the property for some time. The Ministry claimed damages in the amount of the market value of the property, although the property had been let at a reduced rate, and a similar reduction would have been allowed to any new tenant during the period in which Mrs Ashman held over. The Ministry argued that, on restitutionary principles, an award should be made which reflected the value which the defendant had derived from her wrong.

8.26 The Court of Appeal accepted this argument in principle, but in the circumstances of the case, they ruled that the market value of the house was not decisive. Mrs Ashman would not in any event have been able to afford a house on the open market; her only alternative to the subsidised housing would have been a local authority house and thus the sum due in restitution was the cost of local authority housing for the period of overholding. This was the effect of what has come to be known as "subjective devaluation" where the amount due in restitution is reduced by the particular circumstances of the defendant.[38]

8.27 Ashman's authority was severely restricted, however, by the 1995 case of *Inverugie Investments Ltd v Hackett*,[39] where the Privy Council rejected a restitutionary approach to the assessment of damages for trespass. The defendant in the case was the owner of a hotel who had wrongfully occupied 30 apartments in the hotel which had been sub-let to the plaintiff. The Privy Council held that the defendant was liable for rental on a daily basis, despite the fact that it had not made any profits from its occupation of the apartments. Thus the sum to be paid in mense profits was calculated objectively, without regard to the actual profit made, or to subjective devaluation. Lloyd L J saw mense profits

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33 Burrows, *op cit.* fn.4, p.386 *et seq.*

34 At p.896: "Accordingly I am entitled to take account of the servient owner's bargaining position and the amount of profit which the defendants would look to in the development of their site."

35 [1993] 32 E.G.L.R 102. For commentary on this case see Cooke, *Trespass, Mense Profits and Restitution*, (1994) LQR 420.

36 See also the similar case of *Ministry of Defence v Thompson* [1993] 2 E.G.L.R 107, decided by the Court of Appeal three weeks after Ashman, in which a similar ruling was made.

37 At p.105. Lloyd L J adopted a compensatory approach in his judgement, however, seeing the award of damages as compensation for a notional loss to the plaintiffs.

38 See Birks, *op cit.* fn.4 at p.109.

39 [1995] 1 WLR 713. For a discussion of this case, see Peter Watts, *Restitutionary Damages for Trespass*, (1996) 112 LQR 39.

as neither wholly compensatory nor wholly restitutionary, but rather as combining elements of both.

8.28 The question of the award of restitutionary damages for breach of contract has also been considered by the English courts. The general rule is that restitutionary damages are not available for breach of contract. In *Tito v Waddell (No.2)*[40] McGarry V C refused to allow restitutionary damages to be awarded for breach of contract, adopting instead a wholly compensatory approach. He stated that:

> "it is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong. The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff."[41]

8.29 An earlier case which suggests a more sympathetic attitude towards restitutionary principles in awards of damages is *Wrotham Park Estate Co v Parkside Homes Ltd*,[42] in which damages were awarded which were a percentage of the profits made by the defendant from the breach of a restrictive covenant. The damages were characterised as damages for loss of opportunity to bargain, as being a reasonable price which the plaintiff could have obtained for releasing the defendant from the covenant; but it was accepted by the Court that on the facts the plaintiff would not have granted any such release.[43] It was held that the appropriate award of damages would be "such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a *quid pro quo* for relaxing the covenant." The award is clearly open to a restitutionary interpretation, although whether its basis is in restitution or compensation is not made clear by the Court.[44] The breach of contract involved in the case clearly constitutes a proprietary wrong, and this may explain the divergence from the general prohibition on restitutionary damages for breach of contract.

8.30 The issue of restitutionary damages for breach of contract arose again in the Court of Appeal in the case of *Surrey v Bredero Homes Ltd*.[45] The case

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40 [1977] Ch. 106, 332. See also the Scottish case of *Teacher v Calder* [1899] AC 451, where restitutionary damages were refused where the defendant breached a contract to invest in the plaintiff's business and invested in another business instead, thereby making a profit.

41 At 332E.

42 [1974] 2 All E R .

43 Brightman J at p.341:

> "On the facts of this particular case, the plaintiffs, rightly conscious of their obligations towards existing residents, would clearly not have granted any relaxation [of the covenant], but for present purposes I must assume that they would have been induced to do so."

44 Shape and Waddams, (1982) OJLS 290 argue that the basis of the award is compensatory.

45 [1993] 3 All E R 705. See Andrew Burrows, *No Restitutionary Damages for Breach of Contract*, LI. M. C. L. Q., 452

concerned a breach of covenant by the defendant, who had purchased land from the plaintiffs and had covenanted to build only a limited number of houses on the site. In breach of this covenant, he built a larger number of houses than had been provided for. The plaintiffs did not seek injunctive relief to prevent the defendant from building the houses, but after the houses had been built and sold on, they sued the defendant for damages. The plaintiffs argued that they were entitled to damages based on the profits the defendant had made by building the additional houses, or based on their lost opportunity to bargain with the defendant for a relaxation of the covenant. Both the trial judge and the Court of Appeal found that the plaintiffs were entitled to nominal damages only, since they had suffered no loss. The Court of Appeal did consider restitution as a principle on which awards of damages could be based. Steyn L J took a conservative approach, however, and saw restitution as confined to cases, either of tort or of contract, where some proprietary interest was infringed. *Wrotham Park* was distinguished, since that case had involved an award of equitable damages. In the instant case, there was no possibility of equitable as opposed to common law damages being awarded, since at the stage which had been reached there was no possibility of an injunction or specific performance.[46]

8.31 Thus it can be seen from the English caselaw that damages based on the principle of restitution have been awarded in cases of trespass, detinue, nuisance (where the tort involves interference with an easement of light) and (possibly) breach of contract. In the case of a tort, it appears that there must be some proprietary element to the wrong before restitutionary damages will be awarded. This view of the current law is bolstered by the recent decision of the Court of Appeal in *Halifax Building Society v Thomas*,[47] in which the plaintiff was refused an award of restitutionary damages against the defendant for the tort of deceit. Peter Gibson L J, commented that, in regard to awards of restitutionary damages, "there is no decided authority that comes anywhere near to covering the present circumstances."

8.32 Although restitutionary damages in tort appear to have been confined by the courts to cases involving infringements of property rights, they will not be awarded in all such cases. This was made clear by the Court of Appeal in *Stoke-on-Trent City Council v W & J Wass Ltd.*,[48] where it refused to award restitutionary damages for an infringement of the plaintiff's proprietary right to hold a market in a specific place. The Court held that the "user principle" whereby a defendant could be held liable in restitutionary damages for unauthorised user of the plaintiff's property, did not apply where, as in the instant case, it could not be shown that the plaintiff had suffered any loss. Norse J stated:

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46 This distinguishing of *Wrotham Park* has been criticised, notably by Burrows, *The Law of Restitution*, *op cit.* fn.4, at p.400, where he argues that there is no reason to treat *Wrotham Park* as confined to equitable damages.

47 [1998] Ch 217

48 [1988] 3 All E R 394.

"the user principle ought not to be applied to the infringement of the right to hold a market where no loss has been suffered by the market holder."[49]

Ireland

8.33 Some early judicial support for restitutionary damages may be gleaned from the decision of the Irish Supreme Court in *Maher v Collins*,[50] where O'Higgins J, although emphasising that damages were primarily compensatory, acknowledged that there may be:

> "exceptional and particular cases where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed any compensation likely to be payable to the plaintiff."

He went on to say: "[i]n such rare and exceptional circumstances other considerations may apply." This statement was made in the context of a possible award of exemplary damages. It can be inferred that the primary purpose for which O'Higgins J would have awarded non-compensatory damages in such a case would have been to prevent the plaintiff from profiting from his wrong. Although the inference is controversial, on one view, these dicta may be relied on as authority for the proposition that restitutionary damages can be recovered in Irish law.

8.34 Restitutionary damages as a remedy in both contract and tort are most clearly endorsed in *Hickey v Roches Stores*[51]. In that case, Finlay P expressed agreement with Lord Denning's dicta in *Strand Electrical and Engineering Co Ltd v Brisford Entertainments*[52]. He held that, although as a general rule damages in both tort and contract should be compensatory, there were a number of exceptions to this rule, one of which was restitutionary damages. Finlay P stated that:

> "where a wrongdoer has calculated and intended by his wrongdoing to achieve a gain or profit which he could not otherwise achieve and has in that way acted mala fide then irrespective of whether the form of his wrongdoing constitutes a tort or a breach of contract the Court should in assessing damages look not only to the loss suffered by the injured party but also to the profit or gain unjustly or wrongly obtained by the wrongdoer."[53]

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49 At p.401.

50 [1975] IR 232

51 [1993] Rest. Law Rev. 196

52 *op cit.* fn.26.

53 At p.208.

8.35 If, in such circumstances, an award of compensatory damages would still allow the wrongdoer to profit from his wrong, then the damages awarded should be restitutionary, such as to "deprive him of that profit."

8.36 Although Finlay J endorses restitutionary damages, for both contract and tort, he is careful to confine their recovery for breach of contract to cases where the defendant has acted *mala fide*. This limitation is made necessary, he states, by the need for certainty as to contractual obligations.[54]

8.37 Reliance was also placed on Lord Denning's judgement in the *Strand Electric* case in the most recent Irish case to suggest that restitutionary damages may be recoverable: *Hanley v ICC Finance Ltd.*[55] That case dealt with the tort of conversion. In the High Court, Kinlen J interpreted Lord Denning's analysis in *Strand Electric* as subsuming the torts of detinue and conversion into a claim for restitution. Kinlen J favoured such an approach, finding it "very attractive". However, since the claim for damages had already been settled in the instant case, he considered it unnecessary to discuss the matter in more detail.

8.38 From the caselaw, it appears that while the Irish courts have demonstrated a degree of sympathy towards restitutionary damages as a remedy, they have only, in *obiter dicta*, established their availability in cases of either tort or contract where there is mala fides, and, with less certainty, for the torts of conversion and detinue. But it is far from clear that the Irish courts have in fact ever expressly made an award of restitutionary damages.

Difficulties with Awards of Damages Based on Restitution

8.39 Several difficulties arise in regard to the award of restitutionary damages for contract or tort.

Arguments Based on Principle

1. As with exemplary damages, it may be argued that restitutionary damages undermine the compensatory nature of the civil law. They focus on the benefit to the defendant rather than on the plaintiff's loss.

2. Further difficulties arise if restitutionary damages are confined to certain torts and certain instances of breach of contract, where the plaintiff's property rights are infringed. If the basis for restitutionary damages is the protection of property rights, the question arises why property rights

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54 Since the defendant in the case before the court had not acted *mala fides*, restitutionary damages were not awarded, and Finlay P's remarks were *obiter* only.

55 [1996] 1 ILRM 463.

merit such particular protection, and the presence of restitutionary principles in the law of damages is called into question.

Arguments Based on Practicality

1. One difficulty which arises in relation to any non-compensatory damages is the possibility that the plaintiff may receive a windfall from the award, since it is likely he will receive a sum which exceeds his own loss. This is particularly so in the case of restitutionary damages in a situation where the defendant has made a profit from his wrong to the plaintiff.

2. A further difficulty is that, in cases where restitutionary damages take account of the profits which the defendant has made from his wrong, there may be difficulties of assessment and attribution, since it may not be possible to determine with any certainty what portion of the defendant's profits are attributable to his wrong.

3. In some cases it may be difficult to attribute a monetary loss to a particular defendant, as a number of factors may have caused or contributed to the loss. This problem arose in the case of *Stoke-on-Trent City Council v W & J Wass Ltd,*[56] where the trial judge found that there was no evidence to link the plaintiff's loss to the defendant's wrong.[57]

4. An argument which is frequently made against restitutionary damages, particularly where they are awarded for breach of contract, is that they are damaging to economic activity. This is the doctrine of "efficient breach".[58] Under this doctrine, compensatory damages are seen as the most economically efficient, because they allow, for example, a party to a contract to breach the contract if he feels that, having compensated the other party, he will still be economically better off. Restitutionary damages would prevent him from taking such a course. The doctrine of efficient breach is controversial, however, and has been severely criticised, as refusing to accommodate any element of morality in the law of contract.[59] It also appears to be at odds with the tort of interference with contractual relations.

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56 [1988] 3 All E R 394

57 The defendant had established an illegal market and the plaintiff's market had not been profitable; but it was found that this could have been due to a number of factors, and not necessarily attributable to the success of the defendant's market. Per Norse J, quoting from the judgement of the trial judge, p.397.

58 Peter Birks, *Restitutionary Damages for Breach of Contract: Snepp and the Fusion of Law and Equity* (1987), Lloyd's Maritime and Commercial Law Quarterly, 421 at p.441.

59 E.g. Peter Linzer, *On the Amorality of Contract Remedies - Efficiency, Equity and the Second Restatement,* (1981) 81 Col. L. R. 111

Arguments in Favour of Restitutionary Damages

8.40 The advantages of finding a place for restitutionary damages in the law of contact and tort may be summarised as follows.

Arguments Based on Principle

1. In tort cases, restitutionary damages are the most effective way of protecting the principle against unjust enrichment, without resort to the complicated and anachronistic doctrine of waiver of tort. Restitutionary damages allow for the express protection of this important principle, within the law of damages. Whilst unjust enrichment may also be prevented by the award of exemplary damages (per Lord Devlin's second category in *Rookes v Barnard*) this is a less reliable means of protecting against unjust enrichment, and it must be desirable that, for the sake of clarity, where restitution is the guiding principle for an award of damages, the award be labelled as restitutionary, rather than exemplary or compensatory.

Arguments Based on Practicality

1. One advantage of restitutionary damages, from a practical point of view, is that they are, in many cases, relatively easily quantifiable. They will only become more difficult to quantify where the defendant has made a profit from the wrong, and there is difficulty in assessing what portion of the profit made is attributable to the wrongdoing. In the majority of cases, however, restitutionary damages will be more easily quantifiable than exemplary damages.

2. A further advantage is that restitutionary damages do not necessitate the same proof of malicious or high-handed disregard for rights which is the basis of an award of exemplary damages. In this way, restitutionary damages may fill a role in allowing substantial damages, and imposing a measure of deterrence, in cases where a plaintiff would have difficulty in establishing a case for exemplary damages.

3. It may be argued in favour of restitutionary damages that they have at least some deterrent effect against those who seek to profit from a wrong, since they strip the wrongdoer of any profit he may have gained. However, the category of restitutionary damages cannot safely be justified on the basis of deterrence, since some restitutionary awards, made where there is no intentional wrongdoing, cannot be viewed as deterrent. The aim and guiding principle of restitutionary damages is distinct from that of exemplary damages: it is to reverse unjust enrichment. Deterrence may be a secondary or incidental effect of a restitutionary award.

Extent of the Availability of Restitutionary Damages

8.41 If restitutionary damages are to be acknowledged as a part of the law of damages, questions arise as to the range of situations in which their award should be permissible. The extent of the award of restitutionary damages depends on the justification which is given for them. The following are the primary possibilities.

1. Restitutionary damages could be awarded on the basis that they provide an effective means for the protection of property rights. The proposition put forward by Jackman is of relevance here. Jackman[60] has argued that the justification for the award of restitutionary damages is the protection of certain "facilitative institutions" which include private property, relationships of trust and confidence, and contracts. The purpose of restitutionary damages, on this analysis, is to ensure respect for private property. The focus is on private property as an institution. On Jackman's view, it is the harm which is done to the institution which triggers the right to restitution, rather than the harm to the individual. If such a theory were to be the basis of restitutionary damages awards, they would be available only in cases involving proprietary torts or cases of breach of contract which also had a proprietary character.

2. Restitutionary damages could be awarded to prevent the deliberate exploitation of wrongdoing for profit. This justification looks to the moral quality of the defendant's conduct. It has been put forward as a possible justification by Birks,[61] and also resembles the second category of exemplary damages as put forward by Lord Devlin.[62] If exploitation of wrongdoing alone is to be relied upon, then recovery of restitutionary damages would not be confined to proprietary torts, but would be potentially available in all tort cases and possibly also in cases of breach of contract. The difficulty with this option is that it imports notions of punishment into the award of restitutionary damages, which are primarily based, not on the level of fault of the defendant, but on the fact of his enrichment.

3. Recovery of restitutionary damages could be linked to the availability of equitable remedies such as specific performance or injunctions. For

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60 I M Jackman, *Restitution for Wrongs*, (1989) 48 CLJ 302

61 In *An Introduction to the Law of Restitution*, *op cit.* fn.4, at pp.326-233, Birks viewed recovery of restitutionary damages as possible in three situations:

> (a) where there is deliberate exploitation of wrongdoing;
> (b) where the wrong is anti-enrichment;
> (c) where it is sought to deter the possibility of harm (prophylaxis).

However, of these three justifications, it is the first which is the most important. The third situation will arise only very rarely, and the second justification was subsequently withdrawn by Birks, on the grounds that distinguishing an anti-enrichment from an anti-harm wrong would be too difficult.

62 In his judgement in *Rookes v Barnard*, discussed *supra*, para.3.13-3.16.

example, Beatson recommended that restitutionary damages be available in similar circumstances to specific performance.[63]

4. Restitutionary damages could be awarded only in cases where compensatory damages would be an inadequate remedy. Birks has put forward this justification as a possible basis for restitutionary damages for breach of contract.[64]

5. Restitutionary damages could be available in all cases where the defendant's gain is the result of his commission of the tort (or breach of contract).

6. Recovery of restitutionary damages may be limited by a combination of the means listed above. An example of this approach may be seen in the provisional recommendations of the English Law Commission regarding restitutionary damages. In its Consultation Paper, the English Law Commission recommended that restitutionary damages be available where:

   a. There has been interference with a property right or an analogous right, or deliberate wrongdoing which could have been restrained by injunction.

   b. The gains made by the defendant are attributable to the interest of the plaintiff infringed.[65]

7. In considering reforming legislation which would describe the extent of the availability of restitutionary damages, a final possibility is that such legislation should not set out in detail the ambit of restitutionary damages, but should leave this question to the courts. This is the option favoured by the English Law Commission in its Final *Report on Aggravated, Exemplary and Restitutionary Damages*.[66] This option is attractive first of all because restitutionary damages is still a new and

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63 Beatson, *The Use and Abuse of Unjust Enrichment*, (1991) at p.17.

64 Birks, *Restitutionary Damages for Breach of Contract: Snepp and the Fusion of Law and Equity*, *op cit.* fn.58, at pp.441-442:

> "A basic commitment to compensatory damages can be maintained and reconciled with the exceptional availability of restitutionary damages by adding this restraint upon the latter: there should be no recourse to restitutionary damages - not even in the case of cynical breach for the sake of gain - unless on the particular facts compensatory damages are demonstrably an inadequate remedy, having regard to the objectives which the victim of the breach had hoped to achieve through full performance of the contract."

65 Consultation Paper, *op cit.* fn.10, Part VII. at p.170. The Law Commission did not follow these recommendations in its final report. Instead it recommended that the scope of the availability of restitutionary damages should be left to the courts to determine, and should not be given detailed definition in legislation. See English Law Commission, Report No.247, *Aggravated, Exemplary, and Restitutionary Damages*, (1997) at para.6.2.

66 Report of the English Law Commission, *op cit.* fn.65, pp.40-43.

developing area of the law, and its detailed codification in legislation may therefore be premature.[67]

8.42 We do not see the necessity of limiting the recovery of restitutionary damages to cases involving an infringement of property rights. *We provisionally recommend that the concept of restitutionary damages be recognised in Irish law. Whilst some of the Commissioners provisionally recommend that restitutionary damages should be available only in cases involving the deliberate exploitation of wrongdoing for profit, some provisionally recommend that restitutionary damages should be available for all torts and equitable wrongs. The Commission does not recommend that restitutionary damages be made available in cases of breach of contract. The Commission is provisionally of the opinion that restitutionary damages should not be provided for in legislation, but should be left to the development of the courts.*

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67 Consultation by the English Law Commission yielded the result that 69% of consultees favoured leaving the development of the law of restitutionary damages to the courts. Although the general recommendation of the Commission was that restitutionary damages should not be legislated for, the Commission did recommend that, in order to bring the law of restitutionary damages into line with that on exemplary damages, legislation should stipulate that restitutionary damages be available in cases where "a defendant has committed a tort, an equitable wrong or a statutory civil wrong, and his conduct showed a deliberate and outrageous disregard of the plaintiff's rights" (para.6.2(7)) The English Law Commission felt that it would be unacceptable to allow for situations where exemplary damages would be recoverable but where the more moderate remedy of restitutionary damages would be excluded.

PART IV

CHAPTER 9: OPTIONS FOR REFORM

The Threshold Issue of Principle: The Compatibility of Non-Compensatory Damages with the Civil Law

Two Overall Approaches

9.01 Before setting out the practical options for reform of the law, it is necessary to note the Commission's views on a general threshold issue of principle. This issue forms the background to the main recommendations in this Consultation Paper. Simply put, the core question is whether non-compensatory damages, and in particular, damages which are expressly punitive and deterrent in their purpose, are acceptable as a matter of principle within the civil law. Since this question goes to the very legitimacy of punitive damages, it is logically prior to the question of how such damages can be reformed.

9.02 The acceptability, as a matter of principle, of punitive and deterrent elements within the civil law of damages has already been discussed in some detail in Chapter 2. In this section we revisit briefly some of the arguments set out in that Chapter, in the light of the differing views taken by individual members of the Commission. This discussion forms the context for the Commission's recommendations. Questions of both high principle as well as practicality are at play here.

Arguments Against Non-compensatory Damages

9.03 It is plausible to argue that punitive aims are utterly foreign to the civil law and, to the extent to which they currently exist, should be expurgated from it altogether. This view is based, *inter alia,*

- on a conceptually sharp distinction between civil and criminal law. Such a conception of the civil/criminal divide renders punitive/exemplary damages unacceptable, and may, to a lesser extent, call into question the award of aggravated, and of restitutionary, damages. The sharpness of the civil/criminal divide holds true in most continental civil law systems where, as a result, punitive damages are disallowed.

- on a concern for the lack of sufficient due process safeguards where punishment is imposed through an award of damages in

a civil case and on the possible consequences of these shortcomings for the rights of the defendant. Where a wrong is dealt with in the civil courts by way of the imposition of exemplary damages, the lower standard of proof, and the less rigorous and exacting procedures to protect the rights of the defendant, give rise to considerable concern.

- on a concern that the award of punitive damages can and does give rise to an enrichment or "windfall" to the plaintiff and that this feature is not easily handled except by creating additional anomalies.

- on an understanding that the application of an appropriate punitive sanction (assuming such sanction to be warranted) can be satisfactorily left to the criminal law or to regulatory law which is, in any event, steadily expanding.

9.04 *It is the view of some of the Commissioners that such concerns cannot be adequately addressed by modification of the civil law of exemplary damages, and it is their provisional conclusion that exemplary damages are therefore entirely unacceptable within the civil law.*

Arguments For Non-compensatory Damages

9.05 It may also be argued that damages which have a punitive or exemplary purpose are wholly acceptable within the civil law, and should be retained and further regulated within it. This view is based, *inter alia,* on the following points:

- there is no sharp divide between civil and criminal law. Neither sphere is hermetically sealed and elements of public purpose are present on either side. Since both the civil and the criminal law regulate society, albeit in differing ways, it is therefore right in principle and wholly natural that the civil law should incorporate some element of public purpose, and that this should be evidenced in awards of non-compensatory damages.

- the majority of common law jurisdictions have accepted the availability of punitive/exemplary damages and have demonstrated that they may be incorporated as a harmonious part of the civil law of damages.

- regardless of the availability of punitive/exemplary damages, some element of punitive and deterrent purpose is inevitably present in many cases where awards of damages are made. The most honest and effective approach is to acknowledge this reality and then seek to set down clear parameters to the award of exemplary damages, in order to ensure that the punitive element within the civil law is both visible and regulated. If

exemplary damages are not available to channel the punitive elements within the civil law, there is a danger that such elements will remain concealed within ostensibly compensatory awards of damages, featuring in cases where expressly punitive awards would not be justifiable.

- satisfactory mechanisms can be found to temper the element of windfall to the plaintiff.

- if exemplary damages awards are considered sufficiently serious to warrant it, the standard of proof can be appropriately modified in response to the genuine concern about due process.

- exclusive reliance on the criminal law or regulatory sanction is not satisfactory. The criminal law is often inadequate to vindicate rights. Furthermore, the individual lacks control over the criminal process. Full justice would seem to require at least the possibility that a punitive element might enter into the equation in a civil suit where it involves egregious and fundamentally anti-social behaviour on the part of the defendant.

9.06 *Non-compensatory damages are therefore, in the provisional opinion of some of the Commissioners, acceptable in principle within the civil law.* The only remaining issue on this view is the basis and criteria on which they are awarded.

9.07 *We invite submissions on the compatibility of punitive damages with civil law as a matter of principle. We also invite submissions as to the practicability of eliminating all punitive elements from the law of damages.*

The Availability of Exemplary Damages in Cases of Tort or Breach of Constitutional Rights

9.08 The most significant issue to be decided in relation to this topic is the extent of the availability of exemplary damages in the civil law. In deciding this issue, it must be taken into account that, following the decision of the Supreme Court in *Conway v INTO*, exemplary damages must be provided for in cases of breach of constitutional rights, in order to vindicate those rights. This constitutional imperative limits the possibility of restricting exemplary damages.

9.09 There are several options:

1. Exemplary damages could be made available in all cases of tort, breach of constitutional rights and breach of contract.

2. Exemplary damages could be made available in all cases of tort and breach of constitutional rights, but excluded in cases of breach of contract.

3. Exemplary damages could be made available in all cases of breach of constitutional rights and in some specified torts.

4. Exemplary damages could be made available only in certain specified categories of cases, along the lines of *Rookes v Barnard*.

5. Exemplary damages could be abolished, within the limits of the Constitution.

Option 1: Availability of Exemplary Damages for Tort, Breach of Constitutional Right and Breach of Contract

9.10 This option would entail a significant extension of the availability of exemplary damages, to cases of breach of contract. At present, exemplary damages are not recoverable in breach of contract cases: this was established in the case of *Addis v Gramophone Co.*[1] Several justifications are usually given for the exclusion of exemplary damages in cases of breach of contract:

1. Breach of contract usually involves pecuniary, rather than intangible, loss, and is therefore more suited to awards of compensatory damages.

2. A contract is a private agreement, in the breach of which there is no wrong against the wider public which would justify punishment by exemplary damages.

3. Since a contract is a private agreement, the parties should have the option of breaking it and paying the consequent compensatory damages, should they choose to do so, without leaving themselves open to a large and indeterminate award of exemplary damages.

9.11 Canadian Law, as well as the law of some US States, permits recovery of exemplary damages for wanton or fraudulent breaches of contract, and in New Zealand, a decision of the Court of Appeal suggests that the ban on exemplary damages in breach of contract cases should be reconsidered.[2]

9.12 In the Irish context, the constitutional dimension must be borne in mind. There is the possibility that a breach of a particular contract may also raise issues

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1 [1909] AC 488

2 *Hetherington v Faucet* [1989] 2 NZLR

of the infringement of constitutional rights by a defendant. However, in such a case, exemplary damages could be claimed under the head of breach of constitutional rights, without reliance on the breach of contract itself. *It is the provisional opinion of the Commission that the availability of exemplary damages should not be extended to cases of breach of contract.*

Option 2: Availability of Exemplary Damages in All Tort Cases and in Cases of Breach of Constitutional Rights

9.13 The second possibility is that exemplary damages should be available in all tort cases and cases of breach of constitutional rights, provided that a sufficient level of culpability is established. This is the approach taken by the majority of common law countries. It is supported by considerations of logic and consistency. It may be argued that exceptional misconduct may occur under the heading of any tort, and that it is better to limit exemplary damages with reference to the exceptional nature of the misconduct than with reference to the cause of action concerned.

9.14 The arguments against this approach reflect the theoretical and practical difficulties with exemplary damages, which were outlined in the first chapter. Widespread availability of exemplary damages is difficult to reconcile with a strict civil/criminal divide, and can only be based on a more fluid conception of the boundary between the civil and criminal systems. If this fluid model of the civil/criminal divide is accepted, practical difficulties remain to be dealt with. It must be ensured that awards are not excessive or frequent, that exemplary damages are awarded only in the most appropriate cases, and that issues of the rights of the defendant and the windfall to the plaintiff are addressed. The workability of this option, therefore, depends on the acceptance of mechanisms to regulate procedure and the quantum of awards, and on the setting out of a high standard of culpability to ground exemplary damages, over and above the standard for liability in compensatory damages.[3] *Some of the Commissioners are provisionally in favour of this option. In making this recommendation, it is emphasised that exemplary damages are intended to be awarded in only the rarest and most exceptional cases.*

Option 3: Restriction of Exemplary Damages Awards to Cases of Breach of Constitutional Rights and to Some Specified Torts

9.15 According to this approach, legislation would list either the causes of action for which exemplary damages were to be recoverable, or those for which such damages were to be excluded. In several common law jurisdictions, statutes preclude recovery of exemplary damages in some actions.[4] Within the limits of the Constitution, this approach could be taken in Ireland. For example, it would

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3 The issue of the necessary standard of culpability should be seen as distinct from that of the standard of proof applicable in an exemplary damages case.

4 See *supra* paras.5.11-5.15;4.09.

be possible to abolish recovery for exemplary damages in cases of negligence. To date, neither exemplary nor aggravated damages have been awarded in cases of negligence in the Irish courts, but there are no *dicta* to the effect that such recovery would not be permissible. The development of the law by the Canadian and Australian courts in relation to the recovery of exemplary damages for negligence would indicate that the retention of exemplary damages in negligence actions within strict limits (i.e. only where the defendant's negligence is particularly culpable), is a practical option.[5]

9.16 *Some of the Commissioners are provisionally in favour of this option, and provisionally recommend that exemplary damages should be available only in cases of breach of constitutional right, and in cases of defamation.*

Option 4: Restriction of Exemplary Damages Awards to Categories of Exceptional Circumstances, along the lines of *Rookes v Barnard*

9.17 An approach based on the decision in *Rookes v Barnard* would confine exemplary damages to three types of case: where the plaintiff had been injured as a result of the oppressive, arbitrary or unconstitutional conduct of a servant of the government; where the defendant had calculated that he could make a profit from his wrong; and where exemplary damages were expressly authorised by statute. There would be difficulties with the adoption of this approach in the Irish context, as constitutional considerations would demand a wider availability of exemplary damages. At least in respect of infringements of constitutional rights, a further category for the availability of exemplary damages would have to be stipulated.

9.18 Regardless of these considerations, it must be borne in mind that to adopt a *Rookes v Barnard* style approach would be to steer the law in a very different direction than that taken by the majority of common law countries.[6] The widespread dissatisfaction with which the *Rookes v Barnard* classification has come to be regarded in England[7] counsels against its adoption here. *The Commission does not favour this approach.*

Option 5: Abolition of Exemplary Damages within the Limits of the Constitution

9.19 The abolition of exemplary damages accords with a purist approach to the civil/criminal divide, and a conception of the civil law as entirely compensatory, without punitive or social purpose. An abolitionist approach to exemplary damages also reflects a concern that punitive sanctions should not be

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5 The Ontario Law Reform Commission has recommended that punitive damages should be available in negligence cases, as well as in nuisance cases, and cases of equitable wrongs. See *Report on Exemplary Damages (Executive Summary)* (1991) Recommendations 15-18.

6 See *supra* Chapter 4.

7 See *supra* Chapter 3.

imposed without stringent criminal-type due process standards, and a higher burden of proof.

9.20 In the light of the Supreme Court's decision in *Conway v INTO*, it must be doubted whether the complete abolition of exemplary damages is permissible in Irish law. It may in fact be unconstitutional. This possibility was raised by the Law Reform Commission in the *Report on Civil Liability for Defamation.*[8] The report did not come to a conclusion on the constitutional validity or otherwise of the abolition of exemplary damages, but it took the view that, given the possibility of a judicial interpretation that an award of exemplary damages for defamation was necessary to vindicate the constitutional rights of the individual, it would be best to retain exemplary damages for defamation, on a principled basis set out in legislation.

9.21 There is no reason why the abolition of exemplary damages in tort cases with no constitutional element or analogue would offend the Constitution. Given the wide scope of personal rights under the Constitution, and the considerable scope for wide judicial interpretation of these rights, a confinement of exemplary damages to "constitutional torts" might not have any great practical significance, except to result in the characterisation of claims in tort as claims for breach of constitutional rights, where exemplary damages were to be sought. *Some members of the Commission provisionally favour the abolition of exemplary damages except in cases where they are required to vindicate constitutional rights.*

The Culpability of the Defendant

9.22 The determining factor in the decision as to whether exemplary damages can be recovered in a particular case is the moral quality of the wrong done by the defendant. What standard of culpability should ground exemplary damages? Precise definition is difficult, but judicial statements of the standard usually incorporate one of several elements:

1. Serious disregard of or recklessness as to the rights of the plaintiff;[9]

2. Malice or vindictiveness;[10]

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8 P.66 *et seq.*

9 *E.g. Uren v John Fairfax and Sons* (1966) 17 CLR 188, "contumelious disregard for the rights of the plaintiff"; US *Restatement on the Law of Torts (Second)* §908: "reckless indifference to the rights of others and conscious action in deliberate disregard of them"; *Conway v INTO*, [1991] 2 IR 305: "contumelious disregard of another's rights".

10 E.g. *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193: "harsh, vindictive, malicious motive".

3. Conduct which is outrageous or flagrant in its breach of moral standards.[11]

9.23 The Law Reform Commission in the *Report on the Civil Law of Defamation* recommended that exemplary damages should be awarded (for defamation) where:

> "the conduct of the defendant has been high handed, insolent or vindictive or has exhibited a disregard for the plaintiff's rights so gross as clearly to warrant punishment over and above that which has been inflicted upon him by an award of compensatory damages."[12]

9.24 This definition would accord with the law in most common law jurisdictions. It could usefully apply, not alone to defamation, but to all causes of action. The requirement of a "disregard for the plaintiff's rights" would seem not to necessitate a deliberate act on the part of the defendant; recklessness or negligence would be enough.

9.25 It may be objected that a test of this type would, by itself, be too general to provide certainty as to the circumstances in which exemplary damages can be awarded, and that more detailed legislative provision would need to be made.[13] It would be desirable, however, that some flexibility be retained, and a measure of discretion left to the courts. *The Commission provisionally recommends that, in causes of action where exemplary damages are available, they should be awarded where the Court finds the conduct of the defendant to have been high-handed, insolent or vindictive, or to have exhibited a gross disregard for the rights of the plaintiff.*

The Purpose of Exemplary Damages

9.26 The immediate purpose of an award of exemplary or punitive damages is generally to punish behaviour which is seen to be especially egregious. There are also more public purposes to the award: the condemnation of socially undesirable behaviour, deterrence of similar conduct in the future, making an example of the defendant (a purpose expressed in the term "exemplary damages", which highlights the social and deterrent function of the award); and the vindication of the rights of the plaintiff. At times, punitive or exemplary damages have been seen as having an additional purpose, to compensate the plaintiff. Some incidental compensatory effect is unavoidable. But the purposes of an award of exemplary damages must be distinguished from the effects, often incidental, which the award may have. The purpose of an award of exemplary

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11 *E.g. Wagsen v Ford Motor co.* 97 Wis. 2d 260, 294 NW 2d.437 (1980), "outrageousness"; *Vorvis v Insurance Corporation of British Columbia op cit.* fn.9; "reprehensible".

12 Law Reform Commission, *Report on The Civil Law of Defamation*,(1991) para.14.31

13 See English Law Commission, *Aggravated, Exemplary and Restitutionary Damages - A Consultation Paper* (1993), paras.6.10-6.13.

or punitive damages should be defined as closely as possible, so that there may be greater consistency and clarity in the making of damages awards.

9.27 The effects of exemplary damages, in order of importance, may be listed as follows:

1. punishment;

2. deterrence of the defendant;

3. deterrence of others;

4. vindication; and

5. compensation.

9.28 The aim and purpose of the damages may be either punitive or deterrent, or may incorporate elements of both. In a number of US states, punitive damages are ascribed a deterrent purpose, or, most commonly, a combination of punitive and deterrent purposes.[14] The US *Restatement (Second) on the Law of Torts*, for example, incorporates both punitive and deterrent purposes to punitive damages, stating that they are awarded against a defendant:

> "to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[15]

9.29 The present Irish law likewise incorporates both deterrent and vindicatory purposes for exemplary damages. This is a natural consequence of the recognition of exemplary damages as a means to vindicate constitutional rights, and to prevent and deter their breach. In *Conway v INTO*,[16] Finlay C J referred to exemplary damages as "one of the most effective deterrent powers which a civil court has",[17] and Griffin J saw the object of exemplary damages as being:

> "to punish the wrongdoer for his outrageous conduct, to deter him and others from any such conduct in the future, and to mark the court's ... detestation and disapproval of that conduct".[18]

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14 Sykvia M Demarest and David E Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?*, (1987) 18 St. Mary's L. J. 797 at p.802.

15 §908

16 [1991] 2 IR 305

17 At p.506.

18 *ibid.*, p.509.

9.30 A deterrent award looks to the future, aiming to prevent future undesirable conduct by the defendant and by others. Thus, to some extent, it looks beyond the immediate circumstances of the case, and beyond the actual wrong done by the defendant to the plaintiff. It acknowledges that the award has a social purpose, in seeking to discourage a particular type of undesirable behaviour.

9.31 A deterrent purpose to exemplary damages could allow for the recovery of larger awards than would be possible if the award were purely punitive. But it is unlikely that, when adopted in the context of a system of careful regulation of quantum, it would result in an increase in quantum in all exemplary awards. A deterrent award of damages would aim to provide an economic disincentive to the defendant and others to follow a similar course of conduct to the defendant's. If operated correctly, this would result in awards tailored to deter effectively a particular defendant. Awards might be large, on occasion, where they were made against a particularly wealthy defendant (and would probably be largest in cases of wealthy corporate defendants), but they would be unlikely to be excessive.

9.32 An exemplary damages award, the purpose of which is solely to punish the defendant, looks only to the wrong of the defendant. It thus looks backwards, rather than to any possible future conduct of the defendant or others. The advantage of this outlook is that it is likely to lead to smaller awards than an approach which looks to the possible future conduct of others; but it would not necessarily lead to any greater certainty in the assessment of quantum. The drawback of an award the purpose of which is solely punitive is that it takes on more of the character of an instrument of retribution and vengeance.

9.33 The most realistic approach may be one which admits both a punitive and a deterrent purpose to awards of exemplary damages. On this approach, the immediate purpose of the award would be to punish, but retribution would not be regarded as forming the principal basis of the penalty; significant regard would be had to the need to deter future similar undesirable conduct by the defendant, and, perhaps more importantly, by others. *The Commission provisionally favours an approach which recognises both the punitive and the deterrent purposes of an award of exemplary damages, but which emphasises the social function of the award, in discouraging third parties from engaging in conduct similar to the defendant's.*

Terminology

9.34 The confusion caused by the use of differing terminology in the law of damages has been described in previous chapters. It is desirable, at this stage in the development of the law, that a single term should be settled on to describe damages the aim of which is punishment of the defendant, and the deterrence of both the defendant and others. The two terms which have been used

interchangeably in the common law and particularly in Irish law are "exemplary damages" and "punitive damages".[19]

9.35 The term punitive damages obviously entails a more accurate description of an award, the immediate aim and effect of which is to punish. The term "exemplary damages" on the other hand, better describes the deterrent aim and effect of the award, which makes an example of the defendant and, as a result, discourages similar future behaviour on the part of others. Whilst "punishment" describes the primary and immediate aim and effect of the award, "deterrence" and "example" could be seen as describing the wider social function of the award.[20] *The Commission provisionally recommends that the term "exemplary damages" should be adopted as the most appropriate term to describe an award of damages with both a deterrent and a punitive purpose.*

Aggravated Damages

9.36 With regard to aggravated damages, there are three principal options:

1. The retention of aggravated damages as they are presently defined;

2. The abolition of aggravated damages;

3. The redefinition of aggravated damages to emphasise a compensatory function.

9.37 The category of aggravated damages is undoubtedly the most problematic in terms of both theory and practice. Although classified as compensatory, aggravated damages are ambiguous in that they are in part gauged according to the outrageous or exceptional conduct of the defendant. As defined by Finlay CJ in *Conway v INTO*, they are:

> "in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant."[21]

In any individual award of aggravated damages, therefore, punitive and compensatory purposes and justifications compete.

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19 Terms such as "vindictive damages" "retributory damages" and "substantial damages" appear to have largely fallen into disuse and can be disregarded.

20 In *Cassell v Broome*, [1972] 1 All ER 801 at p.826, Lord Hailsham favoured the adoption of the term "exemplary damages" on the grounds that it more accurately reflected the "policy of the law as expressed in the cases" and the law's intention of teaching the defendant that "tort does not pay."

21 [1991] 2 IR 305, at p.503. See *supra* paras.7.43-7.44. This definition would appear to allow for a clearer punitive element than is provided for under the English law: see *supra* para.3.25-3.28.

9.38 The approach to be taken in relation to aggravated damages is largely dependant on the extent to which exemplary damages are to be available. If exemplary damages were to be abolished or their recovery severely restricted, there would be a strong case for the retention of aggravated damages as a means of taking into account the mental suffering of the plaintiff caused by the outrageous conduct of the defendant, since the redress of this suffering is an (incidental) consequence of an award of exemplary damages. The retention of aggravated damages in this form and in these circumstances, however, is open to the criticism that it allows exemplary damages in by the back door, in the guise of aggravated damages, without imposing the safeguards which are associated with an award which is openly characterised as exemplary. Furthermore, aggravated damages as they are at present constituted would not entirely fill the role of exemplary damages in that the present law does not allow for the award of aggravated damages in certain causes of action, such as negligence.[22]

9.39 If, on the other hand, exemplary/punitive damages are to be retained and their recovery allowed in a broad range of actions, the question arises whether aggravated damages are then rendered superfluous. It is notable that, in English law especially, aggravated damages have, to a large extent, been used to fill the role that might otherwise be filled by exemplary/punitive damages.[23] It is notable also, that in the jurisdiction where punitive damages are most firmly established, the United States, aggravated damages are not awarded.[24]

9.40 The Ontario Law Reform Commission, in its *Report on Exemplary Damages*, recommended the retention of exemplary damages, to be awarded and quantified on "retributivist principles", and the abolition of aggravated damages.[25] The abolition of aggravated damages would certainly assist in clarifying the law. It would facilitate a greater conceptual separation between compensatory and exemplary damages, since the conceptual basis of aggravated damages is the least clear of all the categories of damages. If there is a broadly-based availability of exemplary damages, there would seem to be no real practical need for an additional category of aggravated damages.

9.41 The outright abolition of aggravated damages may, however, be seen as too radical an alteration to the present law of damages. If this is the case, a further option would be to retain a category of "aggravated damages" but to redefine them in some way, so that they are characterised as purely compensatory.

9.42 One method of redefinition would be to abolish the requirement that the mental distress of the plaintiff must have been caused by the outrageous or exceptional conduct of the defendant. The English Law Commission considered

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22 *supra* paras.3.29-3.30; para.7.45.

23 Lord Devlin in *Rookes v Barnard* expressly approved this, saying that aggravated damages could do much of the work of exemplary damages. See *supra* para.3.28.

24 See *supra* para.5.01, fn.1.

25 *Report on Exemplary Damages, Executive Summary*, p.5, recommendations 2 and 3.

(but finally rejected)[26] the removal of the "exceptional conduct" requirement. In favour of the abolition of the exceptional conduct requirement, the English Law Commission argued that:

> "true injury to feelings, or to pride and dignity and the like, is worthy of legal protection regardless of whether or not the defendant's wrongful conduct is also exceptional."[27]

9.43 As the English Law Commission noted, the redefinition of aggravated damages in this manner would essentially entail their abolition, and would subsume aggravated damages within the general category of compensatory damages. Damages for intangible loss, including mental distress, are already available in some tortious actions.[28] The primary difficulty with the elimination of the exceptional or outrageous conduct requirement for aggravated damages would be that damages for mental suffering might be more difficult to identify, to demonstrate and to assess, if they could not be inferred and if their existence and extent could not be evidenced by reference to the conduct of the defendant.

9.44 In the light of this, a less radical redefinition of aggravated damages should be considered. It seems clear that some reference to the conduct of the defendant would have to be made in the award and assessment of aggravated damages. The consideration of the conduct of the defendant could, however, be limited to causation: the outrageous conduct of the defendant could be considered only to the extent that it formed the cause of, and was evidence of, the distress to the plaintiff. The essence of the redefinition would then be in the shifting of the focus from the defendant's conduct to the intangible loss which that conduct may have caused, and to the compensation due to the plaintiff for it. Aggravated damages could be defined in legislation along the following lines:

> "Aggravated damages are damages to compensate a plaintiff for added hurt, distress or insult to him (over and above, and not including, any personal injury) caused by the manner in which the defendant committed the wrong giving rise to the plaintiff's claim, or by the defendant's conduct subsequent to the wrong."

9.45 This redefinition would remove the recognition in the judgement of the Supreme Court in *Conway v INTO*,[29] that there must be a consideration of the conduct of the defendant as relevant in itself to the assessment of damages.

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26 See English Law Commission, Report No.247, *Aggravated, Exemplary, and Restitutionary Damages*, (1997) at p.26.

27 para.6.49.

28 See White, *Irish Law of Damages For Personal Injuries and Death*, (1989) Chapter 6.

29 [1991] 2 IR 305

9.46 *The provisional recommendation of the Commission is that the category of aggravated damages should be retained in Irish law, and that the reference to the conduct of the defendant should also be retained, but that aggravated damages should be defined so as to ensure and emphasise their compensatory nature. We provisionally recommend that the definition set out in paragraph 9.44 be adopted.*

9.47 If aggravated damages are to be defined as purely compensatory, it must be determined whether they should be restricted to certain torts, or be made available in all causes of action. At present, aggravated damages are not awarded in negligence cases, because of the requirement of outrageous or cavalier conduct on the part of the defendant. However, there may be some negligence cases where aggravated are appropriate. *The Commission therefore provisionally recommends that aggravated damages should not be confined to particular tortious causes of action, but should be available for all torts.*

Limitations on Quantum of Exemplary Damages

9.48 The following paragraphs set out some of the possible limitations on the quantum of exemplary damages. Careful limitation of quantum would be essential to any recommendation which would allow for a wide recovery of exemplary damages. With the enactment of legislation allowing for the wider recovery of exemplary damages, come concerns that awards of damages could reach undesirably high levels, as is often perceived to be the case in the US.[30] Very large awards may be unfair to many defendants, as well as economically undesirable, perhaps resulting in bankruptcy or insolvency and consequent redundancies. They may also result in the plaintiff receiving a very large windfall. The concern over unreasonable awards can be dealt with in several ways: by the application in each case of principles of the assessment of exemplary damages; by imposing monetary caps on awards of exemplary damages; or, by providing that the award, or a part of it, is payable to the State or to a public fund (although this would not address the problem of unfairness to the defendant).

9.49 The quantum of exemplary damages to be awarded is determined by the purpose of the award. Therefore, in accordance with our earlier recommendations, the overriding consideration in the assessment of quantum of exemplary damages should be the social function of the award in marking the unacceptability of the defendant's conduct. The amount of damages should be assessed so as to adequately but not excessively penalise defendants for the wrong done, having regard to their financial position. The effective deterrence of similar conduct in the future should also be a factor.

9.50 The present law on the assessment of exemplary damages was first set out by Lord Devlin, in his judgement in *Rookes v Barnard*.[31] Lord Devlin's

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30 See *supra* para.5.02.

31 [1964] AC 1129. Discussed *supra* paras.3.12-3.16.

principles have been accepted by the Irish courts.[32] They provide that, when assessing the quantum of damages, the following principles must be applied:

1. The plaintiff must be a victim of punishable behaviour;

2. Restraint must be exercised in the assessment of the damages; and

3. The means of the parties must be taken into consideration.

The Plaintiff as a Victim of Punishable Behaviour

9.51 The requirement that the plaintiff be a victim of punishable behaviour imposes a key restraint on the quantum of exemplary damages, and expresses an important distinction between punishment in the criminal law, and punishment and deterrence as effected by the civil law. Lord Devlin's principle should not be taken as requiring that the defendant's actions must be punishable by the criminal law, before exemplary damages can be awarded. Rather, the principle stipulates that the defendant can only be punished for the wrong he has committed where his wrong has injured the plaintiff: it must be the plaintiff who is the victim of the defendant's punishable behaviour. Further, it is implied in the limitation that he may only be punished to the extent that the plaintiff is injured. He may not be punished in respect of the wider impact of his conduct, which may also have injured others.

The Means of the Parties

9.52 Consideration by the Court of the means of the parties, and in particular of the means of the defendant, is important in that it maximises the punitive and deterrent effect of the award of damages, guarding against unfair awards being made against an impecunious defendant, and, equally, ensuring that the award has an appropriate impact on a wealthy defendant. If it is accepted that the means of the parties must be considered in some way by the Court, however, questions arise as to how extensive this consideration should be.[33]

9.53 The admission of detailed evidence of wealth raises several difficulties. It may lead to delays in trials, with discovery of the relevant documents being sought in every case in which there is a possibility of exemplary damages being awarded. It may, in any case, be very difficult to ascertain the precise wealth of the defendant. Moreover, a detailed investigation of a defendant's finances could result in a serious, and perhaps unnecessary, intrusion into his private financial

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32 *supra* para.7.42.

33 See Demarest and Jones, *op cit.* fn.14.

affairs.[34] In the light of these difficulties, the Ontario Law Reform Commission recommended that there should be no detailed investigation into the defendant's wealth. The English Law Commission has followed this recommendation.[35] It has recommended that the wealth of the defendant should be considered in the assessment of damages only where the issue is raised by the defendant. The English Law Commission proposes that the defendant should be permitted to show that he does not have the means, without undue hardship, to discharge the exemplary award which the Court would otherwise make. Where the defendant adduces sufficient evidence to satisfy the Court of potential hardship, the Court may then reduce the award by a sum appropriate to avoid such hardship.

9.54 *The Commission is provisionally of the view that, in cases where exemplary damages are awarded, the wealth of the defendant should only be taken into account on the application of the defendant to the Court, where he adduces evidence to the effect that he would be unable to pay the sum of exemplary damages imposed, or that such sum would impose undue hardship on him.*

The Relationship with Compensatory Awards

9.55 There is scope for legislation to clarify the law on quantum further. It is at present unclear whether or to what extent a compensatory award of damages is to be taken into account when calculating an additional award of exemplary damages. Since a compensatory award inevitably has some (all be it unintended) punitive and deterrent effect, it should be taken into account when calculating the exemplary award. This point was emphasised by Lord Hailsham in *Broome v Cassell*.[36]

9.56 In some cases, for example where compensatory damages are awarded to a number of plaintiffs against the same defendant, the compensatory award may have a significant (though incidental) punitive and exemplary effect. In *Rookes v Barnard*, the House of Lords held that, where compensatory damages were adequate in themselves to punish the defendant, exemplary damages should not be awarded. In this way, exemplary damages were characterised as a remedy of last resort. Lord Devlin held that a jury should be instructed to award exemplary damages:

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34 Where the defendant is a corporation, the application of a right of privacy is unclear. In the recent Supreme Court decision of *In the Matter of Article 26 and the Employment Equality Bill, 1996*, Unreported, SC, 118/97, the Supreme Court appeared to hold that a provision requiring an employer to disclose his financial circumstances to an outside party, was contrary to the Constitution (at p.73). Although the Court did not specify the nature of the unconstitutionality, it may be inferred that considerations of privacy, and primarily of commercial privacy, were being considered.

35 English Law Commission, *op cit.* fn.36, para.6.3(26).

36 The Ontario Law Reform Commission has recommended that compensatory damages should not be taken into account in the assessment of punitive damages. See Report on Exemplary Damages (Executive Summary) (1991) Recommendation 9. The English Law Commission, in its *Report on Aggravated, Exemplary and Restitutionary Damages, op cit*, fn.26, recommended that legislation should provide that exemplary damages should only be awarded "if the judge considers that the other remedies which are available to the Court will be inadequate alone to punish the defendant for his conduct." (Recommendation 20, at p.187).

"if, but only if, the sum which they have in mind to award as compensation ... is inadequate to punish [the defendant] for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it ..."[37]

9.57 *The Commission provisionally recommends that it should be stipulated that, in cases where compensatory (including aggravated) damages have a sufficiently punitive and deterrent effect, no award of exemplary damages should be made.*

Statutory Caps

9.58 Statutory caps could be imposed on damages in respect of particular causes of action, as is the case in many US states.[38] They would guard against the most unreasonable awards, but would have to be employed in tandem with the general, flexible principles regarding the quantum of damages referred to above.

9.59 Caps may either be straight caps (eg. a provision limiting punitive damages awards to £10,000 in defamation cases) or may be drafted as formulae to be calculated on the basis of, for example, the sum of compensatory damages awarded (e.g. exemplary damages could be limited to three times the compensatory damages awarded).

9.60 Caps on exemplary damages awards are open to the criticism that they are an arbitrary limitation. They do not allow factors such as the degree of culpability, or the differing wealth of defendants, to be taken into account. In the case of a particularly wealthy defendant, a cap on exemplary damages may undermine the punitive and deterrent effect of the award.

9.61 *The provisional recommendation of the Commission is that caps should not be imposed on exemplary damages awards.*

Further Measures of Control of Exemplary Damages Awards

The Transfer of Exemplary Damages to the State

9.62 Consideration could be given to introducing a US-style "split-recovery" provision, which would allow for a proportion of exemplary damages awards to go to the State. Such provisions have the advantage that they remove the "windfall" to the plaintiff, and thus provide an answer to one of the most trenchant criticisms which is made of the category of exemplary damages. As an alternative to recovery directly to the State, provision could be made for a

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37 [1964] 1 All E R 347 at p.411.

38 See *supra* para.5.21.

portion of an award of exemplary damages to go to a central public fund. In situations where there are a number of cases being taken which are all related to the same wrong, provision could be made for a part of the exemplary damages award to be paid into a fund which would benefit some cause related to the wrong, for example research into a particular illness, or healthcare for an afflicted group. Such a fund could be administered by the High Court. Applications could then be made to the Court in relation to the allocation of funds, by relevant government departments, semi-state bodies, or other interested groups.

9.63 It is possible that constitutional difficulties might arise with any measure which would transfer a portion of an award of damages to the State. Such a measure might be found to be in breach of the constitutional guarantee of property rights. Similar difficulties have arisen with split recovery legislation in the US, but in some US states constitutional challenge has been successfully evaded by provisions that award punitive damages direct to the State.[39] If the damages accrue directly to the State then the plaintiff can have no property right in them.

9.64 *Some of the Commissioners provisionally favour the recovery of a portion of an exemplary damages award to the State, or to a central fund administered by the State, provided that suitable procedures are put in place for the administration of these funds.*

9.65 *Some of the Commissioners provisionally take the view that no portion of an exemplary damages award should go to the State, but that the full amount of the award should be recovered by the plaintiff.*

Exemplary Damages Awards in "Mass Tort" Actions

9.66 If exemplary damages are to be retained, particular consideration must be given to the question of how exemplary damages will be assessed where several claims arise out of the same tortious (or constitutional) wrong. Such a situation would be likely to arise, for example, in a products liability case, or in the case of a mass disaster. Where there are a large number of potential plaintiffs, care must be taken in the apportionment of damages, so that every person who has suffered injury, and not only those who manage to get their case to court early, will obtain some compensation. A large award of exemplary damages made in favour of the first plaintiff to have his case heard in court, may deprive subsequent litigants who have suffered similar injury of even

39 See *supra* para.5.27.

compensatory damages, since the defendant may no longer have the means to pay.[40]

9.67 From the defendant's point of view, it is also important that damages in a "mass tort" situation be assessed on a consideration of all potential claims which may be made in respect of the wrong. If each case were to be considered in isolation, there would be the possibility that the defendant would be punished several times over in respect of the same wrong, and thus subjected to a type of double jeopardy. There is also a risk, in an extreme case, that the defendant will be made bankrupt or insolvent, with the consequent loss to the economy, loss of jobs etc.

9.68 It is not desirable that exemplary damages be ruled out altogether in "mass tort" situations. It may be argued that a series of compensatory awards will serve to punish the defendant sufficiently, but this is not necessarily the case. In many cases, the defendant may be insured against awards of compensatory damages. In addition, in a case where there are many potential plaintiffs, a number of these may choose not to pursue an action, and, of those who do bring proceedings, a number of them may settle for considerably less than they would be awarded in damages at trial. Some of the primary possibilities are as follows.

1. Legislation could allow for one award of exemplary damages, to be made in the first case which comes to court, and paid into a central fund which will benefit in some way all those who have suffered injury as a result of the defendant's wrong. The likelihood of further awards of compensatory damages being made would be taken into account in the making of the exemplary award. Where new evidence of the defendant's culpability came to light in subsequent cases, a "top-up" award could be made, and paid into the same fund, to take account of the new evidence.

2. A single exemplary award of this type could be held in a trust fund for the benefit of all litigants and potential litigants. The award could be divided notionally among those litigants likely to come forward, and a portion of the damages (which portion might have to be adjusted over time) could then be awarded to each successful plaintiff.

3. All compensatory damages claims arising out of the wrong could be decided first. Only when all potential plaintiffs have

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40 In the US, the argument has been made that the first plaintiff to bring an action is entitled to received the award of punitive damages, in recognition of the risk which he has taken in pursuing the case, and the effort and expense which it has cost him. Subsequent plaintiffs, following in his path, will find it considerably easier to prove their case, as they will be able to "piggyback" on the case established by the first plaintiff. However, this argument is made in the context of the US system by which each party pays his own costs in litigation. In this jurisdiction, the successful plaintiff would be likely to be awarded costs, and so the burden of bringing the first case would not be so great.

had their claims for compensatory damages settled would a single exemplary damages award be made, and this would then be shared out among all the plaintiffs. There are obvious practical difficulties with this proposal, and it might well be impossible to operate in some cases.[41] In a products liability case, for example, it may not be possible to ascertain precisely how many people have been injured by the defective product, or the injury caused by the product may not become apparent at once.

4. A further possibility, which is recommended in the US *Restatement (Second) on the Law of Torts*,[42] is that the jury in a tort case where other awards have been made in respect of the same wrong should be informed of these awards. Previous awards could then be taken into consideration in the assessment of quantum of damages. This procedure would certainly be workable, but would not provide a complete solution. Those who brought the initial actions would still be more likely to receive higher awards than subsequent plaintiffs.

5. A related possibility is that a single award of exemplary damages should be made in the first case to be decided, and should be recovered entirely by the plaintiff or plaintiffs in that case. Subsequent plaintiffs would then recover in compensatory damages only. This is the arrangement recommended by the English Law Commission in their *Report on Aggravated Exemplary and Restitutionary Damages.* Although the approach may appear to be unfair, the English Law Commission points out that it provides a workable and uncomplicated solution, and that since the function of the exemplary award is punitive and deterrent, rather than compensatory, its recovery to a single plaintiff should create no difficulties.

6. Consideration could be given to allowing for a class action to be taken where there were a number of plaintiffs with similar claims. At present, there is no provision for class actions to be taken in the Irish courts. In the US such actions are possible, under Rule 23 of the Federal Rules of Civil Procedure. The difficulty which has arisen in many cases in the US is that a number of plaintiffs have been reluctant to allow their cases to be joined in a class action.[43] There is provision, under Rules 23 (b) (1) (A) and (B), for class actions to be made mandatory,

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41 For a critical commentary on this proposal, see Owen, *Punitive Damages in Products Liability Litigation* (1976) 74 Mich. L. Rev., 1257 at p.1324.

42 §908

43 Richard A Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control* (1983) Ford. L. Rev. 37

so that once a class action has been certified by the court, all plaintiffs or potential plaintiffs from within that class cannot opt out of the class, and are bound by the result of the case. If class actions were to be introduced in Ireland in cases where punitive damages were to be claimed, it seems likely that it would be necessary to include a mechanism whereby adherence to such a class mandatory, where a class is certified by the court.

9.70 The difficulty which arises with several of these options is that they sit uneasily with the idea that the award of exemplary damages should be made with reference only to the injury which has been done to the plaintiff, and not with reference to the wider harm or potential harm which may have resulted from the conduct of the defendant. For example, in a products liability case where a large number of persons have been affected, if only a single exemplary award is made in the first case to come to trial, then that award cannot take into account the full scale of the defendant's misconduct. Wanton disregard for one person's rights is perhaps less morally culpable than wanton disregard for the rights of a large section of the general public. However, this objection to the "single punitive award" solutions may not have much practical force. In defence of such solutions it is arguable that the single award of exemplary damages is likely to be supplemented by awards of compensatory damages in subsequent cases, each of which will have some incidental punitive effect. Furthermore, there is a compelling argument that an appropriate level of punishment must not be pursued to the point of bankrupting the defendant.

9.71 *Some of the Commissioners provisionally take the view that, in cases where there are multiple plaintiffs, the mechanism set out in option one, whereby a single exemplary award is made into a central fund and subsequent top-up awards may then be added to it, should be adopted.*

9.72 *Some of the Commissioners provisionally take the view that a single exemplary award should be made to the first plaintiff (or joint plaintiffs) whose case comes to court, as is set out in option five.*

Insurance

9.73 A further issue to be considered is whether insurance in respect of exemplary damages awards should be prohibited. It has been suggested that contracts of insurance in respect of exemplary damages must be void as against public policy, since they shift the burden of punishment to an innocent third party, the insurer, and undermine the punitive effect of the award on the defendant.[44]

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44 See Owen, Punitive Damages in Products Liability Litigation, (1976) 74 Mich. L. Rev 1257 at p.1308.

9.74 It may be argued that insurance against exemplary awards will still allow for some punitive effect, since an exemplary award will result in the defendant having to pay higher premiums and may result in his being refused insurance altogether.[45]

9.75 *The Commission provisionally recommends that insurance should continue to be permitted in respect of exemplary damages awards.*

Relationship with the Criminal Law

9.76 If some punitive function is to be acknowledged in the civil law, provision must be made to allow for the co-existence of exemplary damages with the criminal law. Legislation could provide for fines imposed on the defendant to be taken into account in the calculation of damages, and vice versa. Provisions of this type are already in place in regard to compensation orders made under section 6 of the *Criminal Justice Act, 1993.* Section 6 provides that compensation orders made in criminal cases shall not award a greater sum than that which, in the opinion of the Court, the injured party would have received in a civil action.[46] Section 9 of that Act allows for adjustments to be made to a compensation order, which is made by the judge on conviction of a criminal offence, where there is a subsequent award of damages in the civil courts in respect of the same injury or loss.[47] This Act provides a useful model for the interaction of the criminal law and awards of exemplary damages.

9.77 On this model, some of the provisions which could be introduced are as follows:

1. Where exemplary damages are awarded in respect of a tort which is also a crime, it could be provided that the amount of exemplary damages awarded should not exceed the fine that could be imposed by the court in respect of the crime.

2. Where a fine has already been imposed in respect of the wrong and an award of exemplary damages is made which exceeds the amount of the fine, it could be provided that only the amount of that excess should be paid in exemplary damages.

3. Similarly, where an award of exemplary damages has already been made and the matter then comes before the criminal courts, it could be provided that, if the fine imposed exceeds the exemplary damages, only the amount of that excess should be paid as a fine.

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45 Sylvia Demarest and David Jones, *Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest?* 18 St. Mary's L. J. 797 at 820.

46 Section 6 (6)

47 See *supra* para.2.15.

4. It could be provided that, where a fine is imposed in respect of a wrong for which exemplary damages have already been awarded, and the amount of the fine is less than the amount of exemplary damages, the Court could order that the amount by which the damages exceeded the fine be repaid.

9.78 *The Commission provisionally recommends that, where a fine has already been imposed in respect of a wrong, an exemplary damages award should not be imposed in a civil action arising from the same facts.*

9.79 *Some of the Commissioners provisionally recommend that, where a civil action for exemplary damages is instituted regarding a wrong which may also result in criminal proceedings, the civil action should be deferred until the criminal proceedings have been decided, or until it has been conclusively determined that no criminal proceedings will take place.*

9.80 *Some of the Commissioners provisionally recommend that a civil case involving a claim for exemplary damages should proceed where criminal proceedings may also be pending, and that any award of exemplary damages should be taken into account in the subsequent imposition of a fine.*

The Standard of Proof

9.81 The standard of proof which is at present applicable in cases where exemplary damages are awarded is the civil one, the balance of probabilities; but it may be argued that exemplary awards warrant the higher safeguard of the criminal standard of proof. A higher standard of proof would also reduce the number of exemplary damages awards. Failing the application of the criminal standard, there is the possibility that an intermediate standard of proof could be applied in cases where exemplary damages are claimed. This has been the compromise adopted by some US states, which have applied a standard of "clear and convincing evidence".[48] Adopting an intermediate standard of proof may, however, cause confusion, and it is arguable that the imposition of a criminal standard of proof is an unnecessary constraint on exemplary damages.

9.82 *Some of the Commission provisionally recommend that the normal civil standard of proof should apply in exemplary damages cases, subject to the proviso that it must be clearly shown that the defendant has engaged in conduct which has been high-handed, insolent or vindictive, or which has exhibited a gross disregard for the rights of the plaintiff.*

9.83 *Some of the Commissioners favour an intermediate standard of proof in exemplary damages cases, which would require there to be clear and convincing evidence of the defendant's liability.*

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48 Schlueter and Redden, *Punitive Damages*, (3rd ed. 1995) §5.3(H)(2).

Vicarious Liability

9.84 A finding of vicarious liability in a case where exemplary damages are awarded causes particular difficulty. It is the essence of the law of vicarious liability that one person is made liable for the wrong of another, regardless of whether he has been at fault in any way.[49] If the aim and justification of exemplary damages is the punishment of the defendant, then it is difficult to justify the imposition of an exemplary award on an innocent employer. The usual justification for vicarious liability, that it ensures that the plaintiff will be compensated, does not apply in the case of exemplary damages, since compensation is not the aim of the award.

9.85 The primary justification for the imposition of vicarious liability for exemplary damages is one of deterrence. The liability of the employer may be justified on the grounds that an employer who is made to pay an exemplary award will ensure that his employees do not commit similar wrongs in future. On this basis, the *US Restatement (Second) of Torts* allows for the liability of an employer for punitive damages where there has been authorization, ratification or approval of the employee's tortious act. The Restatement also makes the employer liable where he has recklessly employed an unfit agent, and for all acts within the scope of employment by agents employed in a managerial capacity.[50]

9.86 A further possibility is that vicarious liability may also be justified, in some cases, on restitutionary principles. If the employer has profited through the wrong of his employee, then the imposition of exemplary damages on him provides a means of reversing the unjust enrichment of the employer.

9.87 Concerning the vicarious liability of employers, there are three primary options.

1. To provide for vicarious liability for exemplary damages, on the same basis as for compensatory damages, justified on grounds of deterrence.

2. To provide for vicarious liability on the basis of an intermediate standard which would require some measure of fault, complicity or recklessness on the part of the employer.[51]

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49 See McMahon and Binchy, *The Irish Law of Torts*, (2nd ed.) (1990) Chapter 43.

50 §909

51 The Ontario Law Reform Commission (*Report on Exemplary Damages*, recommendation 11) has recommended that an employer should only be vicariously liable for punitive damages where he has tacitly approved the conduct of the employee. The Commission also recommended that the Court should choose between the imposition of vicarious liability for all or a portion of the award of punitive damages, or the exclusion of employer liability for punitive damages in the particular case (recommendation 11(2)).

3. To exclude the possibility of vicarious liability in regard to awards of exemplary damages.

9.88 The exclusion of vicarious liability for exemplary damages in all circumstances would undermine the deterrent effect of exemplary awards and might allow larger groups or corporations to evade liability in exemplary damages. An intermediate standard along the lines of that set out in option 2 may be more appropriate. Mere passive or tacit approval may be regarded as insufficient to ground vicarious liability, however. If this is the case, a measure of recklessness or negligence as to the conduct of the employee could be required.

9.89 *Some of the Commissioners provisionally favour the retention of the normal rules of vicarious liability in exemplary damages cases.*

9.90 *Some of the Commissioners provisionally favour the approach set out in option two, whereby vicarious liability will only be imposed where it can be demonstrated that there has been recklessness on the part of the employer or other principal in respect of his employee's rights.*

The Civil Liability Act, 1961

Survivor Actions

9.91 The exclusion of exemplary damages awards, in section 7 of the Act, where the cause of action survives for the benefit of the estate of a deceased person, is anomalous.[52] The exclusion could only be justified if exemplary damages are conceptualised as purely retributive, as an instrument of private retribution or vengeance, or as a vindication of the rights of the plaintiff alone. If they are viewed in this way, then only the injured person has a legitimate interest in receiving the award of exemplary damages. It has been made clear in the course of this paper, however, that exemplary damages are not susceptible to such simplistic definition. Punitive/exemplary damages have a significant public function. They vindicate rights, including constitutional rights, uphold the strength of the law and deter future infringements. Their function is much wider than private retribution. Punishment, deterrence, and the vindication of rights are no less legitimate aims of an award of damages where the person injured by the defendant's wrong is deceased, than when he is still alive. There is no reason why an award of exemplary damages, justified on a punitive and deterrent basis, should not be awarded in a survivor action. An exemplary award is made with reference to the conduct of the defendant, rather than to the damage or loss to the plaintiff, and the fact that it is made for the benefit of the plaintiff's estate rather than the plaintiff should not exclude the award.

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52 See *supra* paras.7.49-7.50.

9.92 *The Commission provisionally recommends that section 7 of the Civil Liability Act, 1961 should be amended to allow for the recovery of exemplary damages where a cause of action survives for the benefit of the estate of a deceased person.*

Wrongful Death[53]

9.93 The exclusion of exemplary damages in wrongful death cases also appears to be unnecessary. Wrongful death cases may of course involve serious misconduct on the part of the defendant, and exemplary damages may therefore be particularly appropriate. As is the case where survivor actions are concerned, the exclusion of exemplary damages can only be justified if a narrow retributivist view is taken of their aim and purpose. In principle therefore, it follows that exemplary damages should be available in wrongful death cases, subject to the usual limitations on quantum. *The Commission provisionally recommends that section 49 of the Civil Liability Act, 1961 should be amended to allow for the recovery of exemplary damages in wrongful death cases.*

Concurrent Tortfeasers[54]

9.94 The provisions of section 14 of the *Civil Liability Act, 1961,* which stipulate that punitive damages shall not be awarded against one of concurrent tortfeasers, merely because he is a concurrent tortfeaser, would be problematic if aggravated damages were to be retained. The fact that the section seems to allow aggravated damages to be awarded against both tortfeasers, even where only one of them is responsible for the aggravation of the loss, appears to be anomalous, in the context of the present conception of aggravated damages. It is arguable, however, that if aggravated damages are to be redefined as purely compensatory, their exclusion in respect of concurrent tortfeasers is unnecessary *Some of the Commission provisionally recommend that section 14 of the Civil Liability Act, 1961 should be amended to clarify that aggravated damages should not be awarded against a concurrent tortfeaser who is not responsible for the aggravation of the loss. Some of the Commissioners provisionally recommend that the section should not be amended, and that the recovery of aggravated damages against a concurrent tortfeaser should only be prohibited where the aggravated award arises out of the exceptional misconduct of one of the concurrent tortfeasers.*

Causes of Action Subsisting Against Deceased Persons

9.95 Under section 8 of the *Civil Liability Act, 1961,* it appears that exemplary or restitutionary damages may be awarded where there is a cause of action subsisting against the estate of a deceased wrongdoer, or where damage has been suffered by the deceased in respect of which a cause of action could have

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53 Discussed *supra* paras.7.56-7.57.

54 Discussed *supra* paras.7.51-7.55.

subsisted. The section does not specifically refer to the recovery of exemplary or restitutionary damages but there is no exclusion of their recovery.

9.96 The awarding of exemplary damages against the estate of a deceased tortfeaser might be seen as difficult to justify, since those suffering the penalty will be the innocent beneficiaries of the estate. Against this it may be argued that, had the award been made within the lifetime of the tortfeaser, the estate would equally well have been diminished by the sum of the exemplary damages. An award of restitutionary damages against the estate is clearly justified, since it will prevent the unjust enrichment of the estate.

9.97 *Some of the Commissioners provisionally recommend that, under section 8 of the Civil Liability Act, 1961, exemplary damages should continue to be available against the estate of a deceased wrongdoer. Some of the Commissioners provisionally recommend that section 8 should be amended to provide that exemplary damages should not be so available.*

Pleading Exemplary, Aggravated and Restitutionary Damages

9.98 Under the present rules of court, there is no requirement that exemplary damages be specifically pleaded by a plaintiff. In English law, however, exemplary damages must be specifically pleaded where they are claimed in either the High Court or the County Court, and aggravated damages must be specifically pleaded where they are claimed in the County Court.[55]

9.99 The Irish law on this point was set out by McCarthy J in *McIntyre v Lewis,*[56] where he held that the plaintiff's failure to claim exemplary or punitive damages did not disentitle her to an exemplary award.[57] McCarthy J did suggest, however, that he would favour the introduction of a requirement that the plaintiff inform the defendant of any claim for punitive damages and of the ground of the claim, since:

> "[f]irst principles would appear to suggest that the general purpose of pleading, as far as the plaintiff is concerned, is the giving of fair notice to the defendant of the issues which are to be tried and the allegations which are to be made against him."[58]

9.100 McCarthy J acknowledged that there should be exceptions to any such rule. The principal objection to a rule requiring that exemplary damages be

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55 RSC O.18 r8 (3);CCR 1981 O6 r1B. Aggravated Damages need not be pleaded in the High Court, although it is usually advisable that they should be pleaded. In the case of Prince *Ruspoli v Associated Newspapers Plc.* 11 December 1992, the Court of Appeal held that aggravated damages should have been pleaded, in the particular circumstances of that case.

56 [1991] 1 IR 121

57 It was important that no attempt had been made by the defendant to require the plaintiff to amend her pleadings so as to include a claim for exemplary or punitive damages.

58 At p.507.

specifically pleaded is that facts grounding the award of exemplary damages may only come to light in the course of the trial. In such circumstances, it should still be open to the court to make an exemplary award. It was also argued forcefully by Phillmore L J in the Court of Appeal in *Broome v Cassell* that exemplary damages need not be pleaded at the start of the trial, since one of the factors which could ground an award of exemplary damages was the manner of the defendant's conduct of the trial itself.[59] Clearly, if there is a rule requiring exemplary damages to be specifically pleaded, there must be some provision for an amendment to be made so as to claim for exemplary damages in the course of, or at the conclusion of, the trial, in particular circumstances.

9.101 *Some of the Commissioners provisionally recommend that exemplary, aggravated and restitutionary damages should be specifically pleaded. This requirement should, however, be subject to a discretion to amend the pleadings during the course of the proceedings. Some of the Commissioners provisionally recommend that exemplary, aggravated and restitutionary damages should not be required to be specifically pleaded.*

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59 At p.215: "the suggestion ... that a claim for exemplary damages must be pleaded is quite ridiculous ... I suppose a fresh amendment ought to be sought after each offensive step in the conduct of the defence. If this is right, the suggestion is again unworkable and therefore wrong."

SUMMARY OF PROVISIONAL CONCLUSIONS AND RECOMMENDATIONS

Provisional Conclusions: The Threshold Issue of Principle

1. It is the view of some of the Commissioners that such concerns cannot be adequately addressed by modification of the civil law of exemplary damages, and it is their provisional conclusion that exemplary damages are therefore entirely unacceptable within the civil law. (para.9.04)

2. In the provisional opinion of some of the Commissioners, non-compensatory damages are acceptable in principle within the civil law. (9.06)

3. The Commission invites submissions on the compatibility of punitive damages with civil law as a matter of principle. We also invite submissions as to the practicability of eliminating all punitive elements from the law of damages. (9.07)

Provisional Recommendations

The Availability of Exemplary Damages

1. It is the provisional opinion of the Commission that the availability of exemplary damages should not be extended to cases of breach of contract. (para.9.12)

2. Some of the Commissioners are provisionally in favour of the availability of exemplary damages in all cases of tort and in cases of breach of constitutional rights. In making this recommendation, it is emphasised that exemplary damages are intended to be awarded only in the rarest and most exceptional cases. (para.9.14)

3. Some of the Commissioners provisionally recommend that exemplary damages should be available only in cases of breach of constitutional right and in cases of defamation. (para.9.16)

4. Some of the Commissioners are provisionally of the view that exemplary damages should be abolished, except in cases where they are required to vindicate constitutional rights. (para.9.21)

5. The Commission provisionally recommends that, in causes of action where exemplary damages are available, they should be awarded where the Court finds the conduct of the defendant to have been high-handed, insolent or vindictive, or to have exhibited a gross disregard for the rights of the plaintiff. (para.9.25)

6. The Commission provisionally favours an approach which recognises both the punitive and the deterrent purposes of an award of exemplary damages, but which emphasises the social function of the award, in discouraging third parties from engaging in conduct similar to the defendant's. (para.9.33)

7. The Commission provisionally recommends that the term "exemplary damages" should be adopted as the most appropriate term to describe an award of damages with a deterrent and punitive purpose. (para.9.35)

The Availability of Aggravated Damages

8. The provisional recommendation of the Commission is that the category of aggravated damages should be retained in Irish law, and that the reference to the conduct of the defendant should also be retained, but that aggravated damages should be defined so as to ensure and emphasise their compensatory nature. We provisionally recommend that aggravated damages should be defined as follows:

> "Aggravated damages are damages to compensate a plaintiff for added hurt, distress or insult to him (over and above, and not including, any personal injury) caused by the manner in which the defendant committed the wrong giving rise to the plaintiff's claim, or by the defendant's conduct subsequent to the wrong." (paras.9.46 and 9.44)

9. The Commission provisionally recommends that aggravated damages should not be confined to particular tortious causes of action, but should be available for all torts. (para.9.47)

The Availability of Restitutionary Damages

10. We provisionally recommend that the concept of restitutionary damages be recognised in Irish law. Whilst some of the Commissioners provisionally recommend that restitutionary damages should be available only in cases involving the deliberate exploitation of wrongdoing for profit, some provisionally recommend that restitutionary damages should be available for all torts and equitable wrongs. The Commission does not recommend that restitutionary damages be made available in cases of breach of contract. (para.8.42)

11. The Commission is provisionally of the opinion that restitutionary damages should not be provided for in legislation, but should be left to the development of the courts. (para.8.42)

Subsidiary Regulation of Exemplary Damages

12. The Commission is provisionally of the view that, in cases where exemplary damages are awarded, the wealth of the defendant should only be taken into account on the application of the defendant to the Court, where he adduces evidence to the effect that he would be unable to pay the sum of exemplary damages imposed, or that such sum would impose undue hardship on him. (para.9.54)

13. The Commission provisionally recommends that it should be stipulated that, in cases where compensatory (including aggravated) damages have a sufficiently punitive and deterrent effect, no award of exemplary damages should be made. (para.9.57)

14. The provisional recommendation of the Commission is that caps should not be imposed on exemplary damages awards. (para.9.61)

15. Some of the Commissioners provisionally favour the recovery of a portion of an exemplary damages award to the State, or to a central fund administered by the State, provided that suitable procedures are put in place for the administration of these funds. (para.9.64)

    Some of the Commissioners provisionally take the view that no portion of an exemplary damages award should go to the State, but that the full amount of the award should be recovered by the plaintiff. (para.9.65)

16. Some of the Commissioners provisionally take the view that, in cases where there are multiple plaintiffs, legislation should allow for one award of exemplary damages, to be made in the first case which comes to court, and paid into a central fund which will benefit in some way all those who have suffered injury as a result of the defendant's wrong. Where new evidence of the defendant's culpability came to light in subsequent cases, a "top-up" award could be made, and paid into the same fund, to take account of the new evidence. (paras.9.71 and 9.68)

    Some of the Commission provisionally take the view that a single exemplary award should be made to the first plaintiff (or joint plaintiffs) whose case comes to court. Subsequent plaintiffs would then recover in compensatory damages only. (paras.9.72 and 9.68)

17. The Commission provisionally recommends that insurance should continue to be permitted in respect of exemplary damages awards. (para.9.75)

18. The Commission provisionally recommends that, where a fine has already been imposed in respect of a wrong, an exemplary damages award should not be imposed in a civil action arising from the same facts. (para.9.78)

Some of the Commissioners provisionally recommend that, where a civil action for exemplary damages is instituted regarding a wrong which may also result in criminal proceedings, the civil action should be deferred until the criminal proceedings have been decided, or until it has been conclusively determined that no criminal proceedings will take place. (para.9.79)

Some of the Commissioners provisionally recommend that a civil case involving a claim for exemplary damages should proceed where criminal proceedings may also be pending, and that any award of exemplary damages should be taken into account in the subsequent imposition of a fine. (para.9.80)

19. Some of the Commissioners provisionally recommend that the normal civil standard of proof should apply in exemplary damages cases, subject to the proviso that it must be clearly shown that the defendant has engaged in conduct which has been high-handed, insolent or vindictive, or to has exhibited a gross disregard for the rights of the plaintiff. (para.9.82)

Some of the Commissioners provisionally favour an intermediate standard of proof in exemplary damages cases, which would require there to be clear and convincing evidence of the defendant's liability. (para.9.83)

20. Some of the Commissioners provisionally favour the retention of the normal rules of vicarious liability in exemplary damages cases. (para.9.89)

Some of the Commissioners, however, provisionally favour an approach whereby vicarious liability will only be imposed where it can be demonstrated that there has been recklessness on the part of the employer or other principal in respect of his employee or agent's rights. (para.9.90)

21. The Commission provisionally recommends that section 7 of the *Civil Liability Act, 1961* should be amended to allow for the recovery of exemplary damages where a cause of action survives for the benefit of the estate of a deceased person. (para.9.92)

22. The Commission provisionally recommends that section 49 of the *Civil Liability Act, 1961* should be amended to allow for the recovery of exemplary damages in wrongful death cases. (para.9.93)

23. Some of the Commissioners provisionally recommend that section 14 of the *Civil Liability Act, 1961* should be amended to clarify that aggravated damages should not be awarded against a concurrent tortfeaser who is not responsible for the aggravation of the loss. (para.9.94)

Some of the Commissioners provisionally recommend that the section should not be amended, and that the recovery of aggravated damages against a concurrent tortfeaser should only be prohibited where the aggravated award arises out of the exceptional misconduct of one of the concurrent tortfeasers. (para.9.94)

24. Some of the Commissioners provisionally recommend that, under section 8 of the *Civil Liability Act, 1961*, exemplary damages should continue to be available against the estate of a deceased wrongdoer. (para.9.97)

Some of the Commissioners provisionally recommend that section 8 should be amended to provide that exemplary damages should not be so available. (para.9.97)

25. Some of the Commissioners provisionally recommend that exemplary, aggravated and restitutionary damages should be specifically pleaded. This requirement should, however, be subject to a discretion to amend the pleadings during the course of the proceedings. (para.9.101)

Some of the Commissioners provisionally recommend that exemplary, aggravated and restitutionary damages should not be required to be specifically pleaded. (para.9.101)

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