Gray v Motor Accident Commission - [1998] HCA 70

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

DONALD GRAY APPELLANT

AND

MOTOR ACCIDENT COMMISSION
(Formerly State Government Insurance Commission) RESPONDENT

Gray v Motor Accident Commission (A36/1997) [1998] HCA 70
17 November 1998

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Supreme Court of South Australia. In lieu thereof, order that the appeal to that Court be allowed with costs and there be a new trial on the issue of damages, other than aggravated and exemplary damages.*

3. *The costs of the new trial be in the discretion of the judge at that trial.*

On appeal from the Supreme Court of South Australia

Representation:

S W Tilmouth QC with G A Britton for the appellant (instructed by Aboriginal Legal Rights Movement Inc)

S Walsh QC with M F Newell for the respondent (instructed by Finlaysons)

CATCHWORDS

Donald Gray v Motor Accident Commission (formerly State Government Insurance Commission)

Damages - Personal injuries - Exemplary damages - Whether trial judge precluded from awarding exemplary damages where tortfeasor already punished in criminal proceedings.

Damages - Personal injuries - Exemplary damages - Where tortfeasor insured under a scheme of compulsory insurance.

Damages - Personal injuries - Economic loss.

Words and Phrases - "substantial punishment".

1. GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. The appellant, then aged 16 years, was seriously injured in September 1988 when he was struck by a motor car driven at him deliberately by Darren James Bransden. In March 1991, Bransden was convicted of causing grievous bodily harm with intent to cause grievous bodily harm to the appellant and was sentenced to seven years' imprisonment. The sentencing judge described the attack on the appellant as "brutal and cowardly" and one for which there was "no mitigating factor at all".

2. **Following paragraph cited by:**

   Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)

   In 1993, in the District Court of South Australia, the appellant commenced an action against Bransden claiming damages for personal injury. The action was framed (at least principally) as a claim for damages for negligence. In January 1995, pursuant to certain provisions of the *Motor Vehicles Act* 1959 (SA) the respondent, the compulsory third party insurer of Bransden, was substituted as defendant in the action. Although the respondent did not admit liability, there seems to have been no real dispute about that issue at trial. A certificate of the conviction of Bransden and the sentencing remarks relating to him were tendered by consent of the parties as evidence of the truth of their contents.

3. The trial judge (Judge Pirone) assessed the appellant's damages at $72,206 comprising $15,000 for past economic loss, $30,000 for future economic loss, $18,190 for what is called in s 35A of the *Wrongs Act* 1936 (SA) "noneconomic loss" and $9,016 for special damages. The trial judge made no award of exemplary damages. He held that if the appellant were otherwise entitled to such an award, the fact that the respondent (the compulsory third party insurer) was defendant to the action, not Bransden, the tortfeasor, was no bar to making an award but, Bransden having already been punished in the criminal court, it was not appropriate to award exemplary damages. He indicated that if he had decided to award exemplary damages he would have assessed those damages at $10,000.

4. The appellant appealed, unsuccessfully, to the Full Court of the Supreme Court of South Australia[1]. By special leave he now appeals to this Court.

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[1] *Gray v State Government Insurance Commission*, unreported, 10 September 1996.

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5. Two issues arise. First, should exemplary damages have been awarded? Secondly, was the award of compensatory damages manifestly inadequate?

Exemplary and aggravated damages

6. **Following paragraph cited by:**

Rock v Henderson; Rock v Henderson (No 2) (28 March 2025) (Kirk, Adamson and Ball JJA)

193. At trial, Mr Rock had claimed between $15,000 and $20,000 general damages, between $2,500 and $5,000 aggravated damages and between $5,000 and $10,000 exemplary damages. As Windeyer J explained in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149; [1966] HCA 40, in a passage which was referred to with approval by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Gray v Motor Accident Commission* (1998) 196 CLR 1, [1998] HCA 70 at [6] :

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

Day v The Ocean Beach Hotel Shellharbour Pty Ltd (05 August 2013) (Meagher, Emmett and Leeming JJA)

The distinction between aggravated and exemplary damages is often drawn. In *Uren v John Fairfax & Sons Pty Ltd* [2] , Windeyer J noted that it is a distinction that is "not easy to make in defamation, either historically or analytically and in practice it is hard to preserve" [3] . Nev ertheless, in the present context, it is a distinction which it is as well to bear in mind, if only to attempt to ensure greater accuracy of expression. In *Uren* , Windeyer J described the difference as being:

> "that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment moral retribution or deterrence." [4]

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[2] (1966) 117 CLR 118 .

[3] (1966) 117 CLR 118 at 149.

[4] (1966) 117 CLR 118 at 149.

7. **Following paragraph cited by:**

   El-Wasfi v State of New South Wales; Kassas v State of New South Wales (18 December 2017) (Leeming, Simpson and Payne JJA)

The present case is concerned with exemplary damages, not aggravated damages. Although counsel for the appellant sought to contend that aggravated damages might have been awarded in this case, no such claim was pleaded, no evidence was given in support of such a claim and accordingly the respondent was neither called on nor given the opportunity to make any answer to such a claim. Plainly, it is too late to raise that claim now [5] .

[5] *Coulton v Holcombe* (1986) 162 CLR 1.

The power to award exemplary damages

8. Exemplary damages have been awarded since at least the 18th century. Windeyer J [6] doubte d "whether the famous cases concerning Wilkes and the *North Briton* should be regarded as the origin of the idea" conveyed by the expression "exemplary damages". Rather, the matter depended upon "how far
you wish to go back and how much certainty you demand in the connecting links". In *Wilkes v Wood* [7] Lord Chief Justice Pratt said [8] :

> "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

[6] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 152.

[7] (1763) Lofft 1 [98 ER 489].

[8] (1763) Lofft 1 at 18-19 [98 ER 489 at 498-499].

9. This Court has long recognised the power to award such damages. So, in *The Herald and Weekly Times Ltd v McGregor* [9] it was assumed that "penal or vindictive damages" [10] or "exemplary damages" [11] might be awarded in a proper case. Several other examples are given in the judgments in *Uren* [12] .

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[9] (1928) 41 CLR 254 .

[10] (1928) 41 CLR 254 at 262 per Knox CJ, Gavan Duffy and Starke JJ.

[11] (1928) 41 CLR 254 at 266 per Isaacs J.

[12] Taylor J refers ((1966) 117 CLR 118 at 139) to *Willoughby Municipal Council v Halstead* (1916) 22 CLR 352, *Triggell v Pheeney* (1951) 82 CLR 497, *Williams v Hursey* (1959) 103 CLR 30 and *Fontin v Katapodis* (1962) 108 CLR 177. Menzies J refers ((1966) 117 CLR 118 at 145) also to *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71.

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10. Neither party invited us to reconsider *Uren* or the considerable body of authority in this Court that lies behind it and to which effect was given in the later decisions of the Court in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [13] and *Lamb v Cotogno* [14] . Not withstanding, then, what are sometimes seen as the anomalies and difficulties that attend the awarding of exemplary damages, this appeal concerns when such an award may be made, not whether any anomalies are such as to invite some radical change to the law.

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[13] (1985) 155 CLR 448 .

[14] (1987) 164 CLR 1 .

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11. **Following paragraph cited by:**

New South Wales v Bryant (16 November 2005) (Beazley, McColl and Basten JJA)

It is as well, however, to say something about some of those apparent anomalies. As Windeyer J said in *Uren* [15] :

> "Compensation is the dominant remedy if not the purpose of the law of torts today. But fault still has a place in many forms of wrongdoing. And the roots of tort and crime in the law of England are greatly intermingled. Some things that today are seen as anomalies have roots that go deep, too deep for them to be easily uprooted."

[15] (1966) 117 CLR 118 at 149-150 .

12. **Following paragraph cited by:**

Northern Territory of Australia v Austral (28 March 2025) (Grant CJ; Reeves and Burns JJ)
State of New South Wales v Madden (29 February 2024) (Bell CJ, Leeming and Stern JJA)
Amaca Pty Ltd v Werfel (21 December 2020) (Kourakis CJ; Nicholson and Livesey JJ)
State of New South Wales v Cuthbertson (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)
Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)
Gacic v John Fairfax Publications Pty Ltd (16 April 2015) (McColl, Macfarlan and Barrett JJA)
State of New South Wales v Quirk (20 July 2012) (Beazley and Hoeben JJA, Tobias AJA)

> 149. The appellant did not seek to challenge his Honour's award of $5,000 for what I will describe as ordinary compensatory damages. It did challenge the additional aggravated damages of $20,000 and the exemplary damages of $25,000. It was submitted that the normal compensatory damages and the aggravated compensatory damages were awarded otherwise then in accordance with the principle identified by Hodgson JA in *State of New South Wales v Riley* [2003] NSWCA 208; (2003) 57 NSWLR 496 at [131] . The appellant further submitted that the award of exemplary damages was made without determining the necessity for that rare remedy given the quantum of compensatory damages: *Gray v Motor Accident Commission* [1998] HCA 70; (1998) 196 CLR 1 at [12] and [20] ; *New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 at [34] . Finally, although it was conceded that some aggravated damage was justified, it was submitted that the award of $25,000 for both types of compensatory damages was outside the range of a properly exercised discretion when guided by what Hodgson JA said in *Riley* .

BHP Billiton Ltd v Parker (18 June 2012) (Doyle CJ; Gray and White JJ)
BHP Billiton Ltd v Parker (18 June 2012) (Doyle CJ; Gray and White JJ)
Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)
New South Wales v Bryant (16 November 2005) (Beazley, McColl and Basten JJA)

> 24 This last consideration involves acceptance that the function of tort liability is not merely to compensate the victims of tortious conduct, but also to deter

potential tortfeasors. In that sense, the awarding of exemplary damages need not be seen as an anomalous addition to tort law, but may rather be seen as providing an augmented element of deterrence, in the circumstances where such damages are available. Thus, in *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [11] the joint judgment of four members of the Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) commented on the view that there were apparent anomalies involved in the availability of exemplary damages, noting at [11]:

> "As Windeyer J said in *Uren* [*v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118 at 149-150]:
>
> > 'Compensation is the dominant remedy if not the purpose of the law of torts today. But fault still has a place in many forms of wrongdoing. And the roots of tort and crime in the law of England are greatly intermingled. Some things that today are seen as anomalies have roots that go deep, too deep for them to be easily uprooted.'"

The joint judgment in *Gray* continued, at [12]:

> "Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of case: ranging from abuse of governmental power exemplified by *Wilkes v Wood* and its associated cases, through defamation cases of the kind considered in *Uren*, to assault cases such as *Fontin v Katapodis* (1962) 108 CLR 177."

State of New South Wales v Riley (01 August 2003) (Sheller and Hodgson JJA, Nicholas J)
TCN Channel Nine Pty Ltd v Anning (25 March 2002) (Spigelman CJ, Mason P and Grove J)

Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of case: ranging from abuse of governmental power exemplified by *Wilkes v Wood* and its associated cases [16], through defamation cases of the kind considered in *Uren*, to assault cases such as *Fontin v Katapodis* [17]. And the examples could be multiplied[18].

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[16] *Huckle v Money* (1763) 2 Wils KB 205 [95 ER 768]; *Benson v Frederick* (1766) 3 Burr 1845 [97 ER 1130].

[17] (1962) 108 CLR 177 .

[18] Nicholas McBride in his essay "Punitive Damages" in Birks (ed), *Wrongs and Remedies in the TwentyFirst Century*, (1996) at 175 seeks to classify common law wrongs into five "families" and to demonstrate that nonEnglish common law courts have awarded punitive damages in all but the fifth of those families - breach of undertakings, including contracts.

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13. **Following paragraph cited by:**

Cramer v Geraldton Building Co (03 December 2004) (McLure J, EM Heenan J, LE Miere J)
Harris v Digital Pulse Pty Ltd (07 February 2003) (Spigelman CJ Mason P Heydon JA)
Brockway v Pando (07 August 2000) (Malcolm CJ, Kennedy J, Murray J)

> 44. Counsel for Mrs Pando submitted that the trial Judge could not have based his orders on a finding of breach of contract because exemplary damages are not available for breach of contract, but only for tort: ***Gray v Motor Accident Commission*** [1998] HCA 70; (1998) 73 ALJR 45 at [13] . In fact the trial Judge concluded his consideration of the breach of contract claim saying:
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> > "*Leaving aside* the question of damages which may flow from breach of contract, it is clear that Brockway can be liable for such breach." (Emphasis added.)

In *Butler v Fairclough* [19] , Griffith CJ observed:

> "The motive or state of mind of a person who is guilty of a breach of contract is not relevant to the question of damages for the breach, although if the contract itself were fraudulent the question of fraud might be material [20] . A breach of contract may be innocent, even accidental or unconscious. Or it may arise from a wrong view of the obligations created by the contract. Or it may be wilful, and even malicious and committed with the express intention of injuring the other party. But the measure of damages is not affected by any such considerations."

The position is put somewhat differently in *Restatement (Second) of Contracts* [21] :

> "Punitive 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."

The reasons underlying the apparent rule excluding an award of exemplary damages, even in cases of intentional or malicious breach of contract, were discussed by Friendly J in *Thyssen, Inc v SS Fortune Star* [22] . That case also is authority that an admiralty court does not award exemplary damages for a deviation or other breach of contract [23] .

[19] (1917) 23 CLR 78 at 89.

[20] *Bain v Fothergill* (1874) LR 7 HL 158 at 206-207 per Lord Chelmsford.

[21] (1979), §355; cf *Denison v Fawcett* (1958) 12 DLR (2d) 537 at 543 ; *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085 at 1106, 1107.

[22] 777 F 2d 57 at 63 (1985); cf *Hawkins v Clayton* (1988) 164 CLR 539 at 584 per Deane J.

[23] 777 F 2d 57 at 63-66 (1985).

14. **Following paragraph cited by:**

State of New South Wales v JR; State of New South Wales v Dickens; State of New South Wales v Jensen (20 December 2024) (Gleeson, White and Stern JJA)

> 227. Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future, and to reflect "detestation" for the action: *Lamb v Cotogno* at 8. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v Motor Accidents Commission* (1998) 196 CLR 1; [1998] HCA 70 at [14] .

Jay v Petrikas (12 December 2023) (Payne, Kirk and Griffiths JJA)

> 165. As to exemplary damages, the appellants have failed to identify any error in the primary judge's brief description of some of the relevant principles at PJ[687]:
>
> > Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future, and to reflect "detestation" for the action: *Lamb v Cotogno* (1987) 164 CLR 1 at 8. Genera lly speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at [14] ; *State of New South Wales v Abed* [2 014] NSWCA 419 at [230]-[234] .

Amaca Pty Ltd v Werfel (21 December 2020) (Kourakis CJ; Nicholson and Livesey JJ)
Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)
Lule v State of New South Wales (15 June 2018) (Beazley P, Macfarlan JA and Barrett AJA)

State of New South Wales v McMaster (10 August 2015) (Beazley P, McColl and Meagher JJA)
State of New South Wales v Abed (05 December 2014) (Bathurst CJ, Macfarlan and Gleeson JJA)
Dean v Phung (25 July 2012) (Beazley, Basten and Macfarlan JJA)

78. Ipp JA in *Ibbett* agreed with the Chief Justice, also adopting the language of *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1 at [14] that such damages were warranted where there was "conscious wrongdoing in contumelious disregard of another's rights": ibid at [137] . As further explained in *Gray* at [15] , "[i]n considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged".

BHP Billiton Ltd v Parker (18 June 2012) (Doyle CJ; Gray and White JJ)

205. At common law, exemplary damages may be awarded as part of the damages for a tort involving a reprehensible disregard of the plaintiff's interests, often expressed in the phrase "a contumelious disregard of the plaintiff's rights". [23] Their purpose is to punish and deter the wrongdoer. Thus in *Uren v John Fairfax & Sons Pty Ltd*, [24] Owen J said:

> [A] jury may award damages over and above those required to compensate the plaintiff for the injury suffered by him if it forms the opinion, on evidence justifying that conclusion, that the defendant's conduct in committing the wrong was so reprehensible as to require not only that he should compensate the plaintiff for what he has suffered but should be punished for what he has done in order to discourage him and others from acting in such a fashion. [25]
>
> In the same case, Windeyer J said that "exemplary damages … are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence". [26]

via
[23] *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 (Knox CJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129, 138 (Taylor J); *Gray v Motor Accident Commission* [1998] HCA 70 at [14] ; (1998) 196 CLR 1 at 7.

Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd (19 February 2008) (Spigelman CJ at 1; Beazley JA at 97; Hodgson JA at 98)
State of New South Wales v Delly (06 November 2007) (Ipp JA 1; Tobias JA ; Basten JA)
State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

221 In *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [14] the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ noted:

> "Because the kinds of case in which exemplary damages might be awarded are so varied, it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. Nevertheless, the phrase adopted Knox CJ in *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 of 'conscious wrongdoing in contumeliously disregard of another's rights' describes at least the greater part of the relevant field."

As their Honours noted, similar language was adopted by Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471, where his Honour referred to "conduct showing a conscious and contumelious disregard for the plaintiff's rights". In *Gray* after the passage cited above, the joint judgment continued at [15] :

> "In considering whether to award exemplary damages, the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged."

State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)
State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)
State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)
New South Wales v Bryant (16 November 2005) (Beazley, McColl and Basten JJA)
TCN Channel Nine Pty Ltd v Anning (25 March 2002) (Spigelman CJ, Mason P and Grove J)

> 180 Exemplary damages are awarded for "conscious wrongdoing in contumelious disregard of another's rights" (*Whitfield v De Lauret & Co Ltd* (19 20) 29 CLR 71 at 77), a phrase which covers "at least the greater part of the relevant field" *Gray v Motor Accident Commission* at [14] . Other expressions used have included "high-handed, insolent, vindictive or malicious" conduct. (*U ren v John Fairfax* at 129 per Taylor J. See also *Gray v Motor Accidents Commission* at [8]-[12].)

Because the kinds of case in which exemplary damages might be awarded are so varied, it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. Nevertheless, the phrase adopted by Knox CJ in *Whitfel d v De Lauret & Co Ltd* [24] of "conscious wrongdoing in contumelious disregard of another's rights" describes at least the greater part of the relevant field [25] .

[24] (1920) 29 CLR 71 at 77.

[25] See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 per Brennan J.

15. **Following paragraph cited by:**

State of New South Wales v Cuthbertson (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

120. As I said in *Whitbread & Anor v Rail Corporation NSW & Ors*: [9]

> "In considering whether to award exemplary damages 'the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged': *Gray* (at [15] ; (at [31]) 'the conduct of the wrongdoer is central to that enquiry') per Gleeson CJ, McHugh, Gummow and Hayne JJ. In contradistinction, in the case of aggravated damages the assessment is made from the point of view of the plaintiff: *State of New South Wales v Ibbett* [2005] NSWCA 445; (2005) 65 NSWLR 168 (at [83]) per Spigelman CJ; referred to with approval in *New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 (at [34])."

State of New South Wales v Cuthbertson (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)
Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)
The State of Western Australia v Cunningham [No 3] (23 November 2018) (Buss P, Murphy JA, Pritchard JA)

111. The first, if not principal, focus of the inquiry with respect to exemplary damages is upon the wrongdoer, and not the party who has suffered the wrongdoing. [178]

via
[178] ***Gray*** [15] .

The State of Western Australia v Cunningham [No 3] (23 November 2018) (Buss P, Murphy JA, Pritchard JA)
MacDougal v Mitchell (09 December 2015) (Meagher JA, Bergin CJ in Eq and Tobias AJA)
Vaysman v Deckers Outdoor Corporation Inc (22 May 2014) (Dowsett, Siopis and Besanko JJ)
Dean v Phung (25 July 2012) (Beazley, Basten and Macfarlan JJA)

78. Ipp JA in *Ibbett* agreed with the Chief Justice, also adopting the language of *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1 at [14] that such damages were warranted where there was "conscious wrongdoing in contumelious disregard of another's rights": ibid at [137] . As further explained in *Gray* at [15] , "[i]n considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged".

Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd (19 February 2008) (Spigelman CJ at 1; Beazley JA at 97; Hodgson JA at 98)

26. His Honour's consideration of the issue of exemplary damages commences with extensive quotations from the judgments of this Court in *Anning* at [180]-[188] and the joint judgment of the High Court in *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1 at [15] . His Honour also referred to the identification by Heydon JA of the applicable principles in *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 56 NSWLR 298 at [241]-[246] . In his judgment at [946], after the extensive quotations from *Anning* and *Gray* and reference to *Digital Pulse*, Smart AJ states "I have applied those principles".

State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)
State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)
Harris v Digital Pulse Pty Ltd (07 February 2003) (Spigelman CJ Mason P Heydon JA)
Accident Commission (1998) 196 CLR 1 at [15] (exemplary damages are

TCN Channel Nine Pty Ltd v Anning (25 March 2002) (Spigelman CJ, Mason P and Grove J)

In considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged. (The reaction of the party who is wronged to high-handed or deliberate conduct may well be a reason for awarding aggravated damages in further compensation for the wrong done. But it is not ordinarily relevant to whether exemplary damages should be allowed.) The party wronged is entitled to whatever compensatory damages the law allows (including, if appropriate, aggravated damages). By hypothesis then, the party wronged will receive just compensation for the wrong that is suffered. If exemplary damages are awarded, they will be paid in addition to compensatory damages and, in that sense, will be a windfall in the hands of the party who was wronged. Nevertheless, they are awarded at the suit of that party and, although awarded to punish the wrongdoer and deter others from like conduct, they are not exacted by the State or paid to it.

16. **Following paragraph cited by:**

R v Ronen (19 April 2006)
National Australia Bank Ltd v Maher (No 2) (23 November 1999) (WINNEKE, P., CALLAWAY and BATT, JJ.A.)

> 36. There is one final matter. It has been assumed for many years that exemplary damages may be awarded by a judge sitting alone. Mr. Karkar was disposed to concede that the correctness of that assumption could now be tested only in the High Court. (There was no jury in either *Lamb v. Cotogno* (1987) 164 C.L.R. 1 or *Gray v. Motor Accident Commission* (1 998) 73 A.L.J.R. 45.) That concession may well be correct, but it does seem odd that rules under the *Judicature Act* 1883 (Vic.) and its successors in this State dealing with "mode of trial" should effect such a fundamental change. (The same is true if the rubric is "practice and procedure", for the issue is different from that decided in *Naughton v. Colonial Provident Life & General Assurance Co. Ltd.* [1928] V.L.R. 533 at 538.) It is one thing to be found deserving of punishment and punished by a jury of one's fellow citizens without the safeguards of a criminal trial; it is another thing to be found deserving of punishment and punished without those safeguards by a judge. For an award of exemplary damages stands in place of both conviction and sentence. The better view of the rules made under the *Judicature Act* may have been that a plaintiff claiming exemplary damages was obliged to secure trial by jury. They preceded the developments referred to in *Gray v. Motor Accident Commission* at [16] and the avowed purpose of exemplary damages, as that case recognizes, is to punish: see especially [26], [40-43] and [95]. There is no need to consider the question further in the present case. As the President's judgment shows, there is a good deal to be said on both sides.

There is an appearance of tension between using civil proceedings to compensate a party who is wronged and using the same proceedings to punish the wrongdoer. But there is a tension only if it is assumed that "... a sharp cleavage between criminal law on the one hand and the law of torts and contract on the other is a cardinal principle of our legal system"[26]. As Windeyer J points out in *Uren* , the "roots of tort and crime" are "greatly intermingled" [27] . And it is not only the roots of tort and crime that are intermingled. The increasing frequency with which civil penalty provisions are enacted [28] , the provisions made for criminal injuries compensation [29] , the provisions now made in some jurisdictions for the judge at a criminal trial to order restitution [30] or compensation to a person suffering loss or damage (including pain and suffering) as a result of an offence [31] all deny the existence of any "sharp cleavage" between the criminal and the civil law. The tension we have mentioned may therefore be more apparent than real.

[26] Street, *Principles of the Law of Damages*, (1962) at 34. See also *McGregor on Damages*, 16th ed (1997), par 430.

[27] (1966) 117 CLR 118 at 149. See also *Prosser and Keeton on The Law of Torts*, 5th ed (1984) at 7-9.

[28] See, for example, Corporations Law, Pt 9.4B .

[29] See, for example, *Criminal Injuries Compensation Act* 1978 (SA) .

[30] See, for example, *Criminal Law (Sentencing) Act* 1988 (SA), s 52 ; *Sentencing Act* 1991 (Vic), Pt 4, Div 1 .

[31] See, for example, *Criminal Law (Sentencing) Act* 1988 (SA), s 53 ; *Sentencing Act* 1991 (Vic), Pt 4, Div 2 .

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17. We do not mention these matters so that we might attempt to resolve any tensions that are thus identified; it is not necessary to do so in this appeal. But they are matters that may well bear upon when exemplary damages may be awarded.

18. In *Uren* this Court declined to adopt the limitations on the award of exemplary damages stated by the House of Lords in *Rookes v Barnard* [32] . In *Rookes v Barnard* it was held that exemplary damages could be awarded only in three kinds of case [33] :

- oppressive, arbitrary or unconstitutional acts by government servants;

- where the defendant's conduct had been calculated to make a profit which might well exceed the compensation payable to the plaintiff; and

- where expressly authorised by statute.

It was said that there are three considerations that should always be borne in mind when awards of exemplary damages are being considered [34] :

- they can be awarded only if the plaintiff was the victim of the punishable behaviour;

- the power to award exemplary damages is not only a weapon that can be used in defence of liberty, it is a weapon that can be used against liberty; and

- the means of the parties, and all matters which aggravate or mitigate the conduct are relevant to the assessment of such damages.

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[32] [1964] AC 1129 .

[33] [1964] AC 1129 at 1226-1227 per Lord Devlin.

[34] [1964] AC 1129 at 1227-1228 per Lord Devlin.

19. The limitations on the availability of exemplary damages stated in *Rookes v Barnard* have been criticised in England and elsewhere [35] . The United Kingdom Law Commission, in its report *Aggravated, Exemplary and Restitutionary Damages* [36], concluded that the boundaries set in *Rookes v Barnard* were not "consistent with either sound principle or sound policy"[37]. It said that its recommendations (for expanding the availability of exemplary damages) were guided by five aims which, it may be assumed, the Commission thought were not fulfilled by application of *Rookes v Barnard* [38]:

> "First, exemplary damages should be an exceptional remedy, rarelyawarded and reserved for the most reprehensible examples of civil wrongdoing which would otherwise go unpunished by the law. Secondly, their availability (and assessment) must be placed on a clear, principled basis. Thirdly, although flexibility is necessary, unnecessary uncertainty as to the availability and assessment of the remedy must be avoided. Fourthly, defendants must not be unfairly prejudiced. Fifthly, the impact on the administration and funding of civil justice should not be adverse."

The last four of those aims are not controversial (although the way in which they are to be implemented may be). The first may excite more debate but it will serve as a useful framework for considering some of the issues that arise in this case.

[35] In Australia, reference need be made only to *Uren* . In Canada, see, for example, *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085. In New Zealand, see, for example, *Fogg v McKnight* [1968] NZLR 330; *Taylor v Beere* [1982] 1 NZLR 81; *Donselaar v Donselaar* [1982] 1 NZLR 97.

[36] United Kingdom, Law Commission No 247, (1997).

[37] United Kingdom, Law Commission No 247, *Aggravated, Exemplary and Restitutionary Damages*, (1997), par 1.2.

[38] United Kingdom, Law Commission No 247, *Aggravated, Exemplary and Restitutionary Damages*, (1997), par 1.17.

An exceptional remedy

20. **Following paragraph cited by:**

State of New South Wales v Cuthbertson (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)
Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)
Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)
Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)

If, as we have earlier suggested, the remedy is exceptional in the sense that it arises (chiefly, if not exclusively) in cases of conscious wrongdoing in contumelious disregard of the plaintiff's rights, at least two further questions arise: are exemplary damages available where the plaintiff's claim is for damages for negligence rather than some intentional wrong, and is the award of exemplary damages a matter of right or does it depend on the exercise of a discretion informed by some identifiable criteria?

Negligence and exemplary damages

21. Provoked by differing limitation periods for claims for damages for personal injury caused by negligence and other torts, there was a deal of debate in the 1960s about whether trespass to the person could be committed negligently [39] .

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[39] See, for example, *Kruber v Grzesiak* [1963] VR 621; *Letang v Cooper* [1965] 1 QB 232.

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22. **Following paragraph cited by:**

Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd (16 July 2021) (Meagher, Leeming and White JJA)
Amaca Pty Ltd v Werfel (21 December 2020) (Kourakis CJ; Nicholson and Livesey JJ)

639. The High Court in *Gray v Motor Accident Commission* accepted that exemplary damages could not properly be awarded in a case of negligence absent “conscious wrongdoing”, and, for that reason, they did not arise in “most negligence cases be they motor accident or other kinds of case”. [390]

via
[390] *Gray v Motor Accident Commission* (1998) 196 CLR 1, [22] , see also *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136, [1204]-[1214] (Gray J).

NSW Commissioner of Police v Zurich Australian Insurance Ltd (19 December 2016) (Meagher and Ward JJA, Emmett AJA)
Croucher v Cachia (09 June 2016) (Beazley P, Ward and Leeming JJA)
Couch v Attorney-General (No 2) (24 March 2010)

> [147] After the *Bottrill* litigation, Professor Todd wrote another article in which he observed that the majority in the Court of Appeal and the minority in the Privy Council had appropriately put the focus squarely on the defendant's conduct.[234] The plaintiff should be required to show intentional or consciously reckless misconduct. The Professor referred in support of this proposition to the decision of the High Court of Australia in *Gray v Motor Accident Commission* , [235] which I will discuss later, and said that there were a number of reasons for preferring the view of the majority in the Court of Appeal to that of the majority in the Privy Council which ultimately prevailed. He too made the point that the reasoning of the majority in the Privy Council seemed to suffer from assuming what they were seeking to prove.

via

[235] *Gray v Motor Accident Commission* [1998] HCA 70, (1998) 196 CLR 1 at [22] .

Port Stephens Shire Council v Tellamist Pty Ltd (27 September 2004) (Giles, Santow and Ipp JJA)

> 321 With those trespasses having just taken place, it is significant that on 16 August 1991 Mr McMahon, having by then been fully apprised of the situation, nevertheless instructed Daracon by letter to re-commence the works in full knowledge of Tellamist's protests (T, 348G-I) but first providing Daracon with an indemnity. As the trial judge points out at [114] whether the letter was drafted before or after the trespasses does not improve the position for Council. It appears that no further incursions took place until the subsequent trespasses in November 1991 (more precisely 18, 27 and 29 November 1991) and 23 December 1991, the latter occurred in breach of the Council's written undertaking to Tellamist of 5 December 1991 not to further trespass on its land. The Council claimed the latter trespass was due to inadvertence on the part of Daracon's employee and the trial judge found that the failure to honour the undertaking was due to a lack of care rather than contumelious disregard (Red, 78B-C). In my view the trial judge was correct in stating that the Council had given the plaintiff a formal undertaking and had an obligation to ensure that such an undertaking was honoured (Red, 77X). In particular, I do not think the Council can hide behind the negligence of its agents and employees in this respect so far as damages are concerned. However, though close to the line, I would not conclude that these latter trespasses constituted cases "*framed in negligence, in which the defendant can be shown to have acted in contumelious disregard of the rights of the plaintiff*" (*Gray* (supra) at [22]). By that I mean the degree of negligence of the Council came close to being reckless, so as to approach high-handedness; compare *State of New South Wales v Riley* (2003) 57 NSWLR 496 per Hodgson JA at 530 and Kirby J in *Gray* at [p86], the latter concluding:

> "Punishment for deliberate wrongdoing is certainly a consideration in deciding the applicability of exemplary damages. But it is not the sole reason for the award of such damages. The more recent cases on the subject, including in this court, have accepted that such damages may be recovered whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world."

(ii) Amount of exemplary damages (ii) Amount of exemplary damages

We do not think it necessary to revisit that debate. No question arises here of an intentional wrong being committed by inadvertence. For present purposes it is enough to note two things. First, exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case. But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff. Cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer, well knowing of an extreme danger thus created, persisted in employing the unsafe system might, perhaps, be of that latter kind [40] . No doubt other examples can be found.

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[40] See, for example, *Midalco Pty Ltd v Rabenalt* [1989] VR 461; *Coloca v BP Australia Ltd* [1992] 2 VR 441; *Trend Management Ltd v Borg* (1996) 40 NSWLR 500.

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23. In many jurisdictions in the United States reckless indifference to the rights of others and other culpable conduct short of malicious intent is sufficient for the issue of an award of exemplary damages to be left to a jury [41] .

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[41] *Smith v Wade* 461 US 30 at 44-48, 52 (1983).

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24. **Following paragraph cited by:**

State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

> 37 The joint judgment in *Gray* made it clear that the case before the Court involved an allegation of "conscious wrongdoing" (at [24]) and that "No question arises here of an intentional wrong being committed by inadvertence" (at [22]).

Secondly, the present proceeding, although said to have been framed as an action in negligence, appears to have been conducted at trial as if it were a claim in trespass. The allegation made in the appellant's statement of claim, and pursued at trial, was that Bransden drove his vehicle "deliberately towards [the appellant] without regard for the safety of [the appellant]" and such evidence of the events as was given at trial was all directed to showing Bransden deliberately inflicted injury on the appellant. Whatever may be the true characterisation of the pleading, the case was conducted as one of conscious wrongdoing by the tortfeasor.

A "discretionary" remedy?

25. **Following paragraph cited by:**

Rickard & Wilson & Active Safety Services Pty Ltd v Testel Australia Pty Ltd (21 February 2019) (Kourakis CJ; Kelly and Bampton JJ)

> 112. The award of exemplary damages involves the exercise of a discretion. [8] The principles in *House v King* [9] also apply to this issue. I do not accept that the Judge's characterisation of the culpability of Mr Wilson or Active constitutes an error in the exercise of the discretion.

via
[8] *Gray v The Motor Accident Commission* (1998) 196 CLR 1 at [25] .

Reported cases usually speak of a "discretion" to award exemplary damages [42] . Standing alone, such a description, even if followed by the expression "to be exercised judicially" is of little assistance. At best, it invites attention to what are the criteria that are to inform the exercise of that discretion.

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[42] See, for example, *Lamb v Cotogno* (1987) 164 CLR 1 at 12-13 ; *Trend Management Ltd v Borg* (1996) 40 NSWLR 500 at 505.

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26. **Following paragraph cited by:**

State of New South Wales v Madden (29 February 2024) (Bell CJ, Leeming and Stern JJA)

Because exemplary damages are awarded to punish, it is not surprising that their quantification should be treated as a matter for the discretion of the tribunal assessing damages. And for so many years that was a task for the jury, not the judge. Yet there is little to be found in the cases which would identify the proper instructions to a jury for performing this part of its function. Rather, it seems to be treated in a way not very different from what is called the jury's "constitutional right" to return a verdict of manslaughter notwithstanding proof of the elements of murder. That is, it is treated as if it is a power of the jury that is not to be hedged about by any more precise criterion for its use than the jury's intuitive conclusion that the defendant's conduct was sufficiently reprehensible to warrant punishment. Yet it is clear that there are thought to be limits on the power.

27. That reliance on the intuitive reaction of a jury may prove an insufficient restraint on the power to award exemplary damages is amply demonstrated by recent decisions of the United States Supreme Court about whether particular jury awards of exemplary damages have contravened the constitutional requirement for due process [43] .

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[43] See, for example, *Pacific Mutual Life Insurance Co v Haslip* 499 US 1 (1990); *TX O Production Corp v Alliance Resources Corp* 509 US 443 (1993); *BMW of North America Inc v Gore* 517 US 559 (1996).

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28. Exemplary damages have long been recognised in the United States [44] . In *Uren* [45] , Windeyer J set out with evident approval the following statement by Grier J, writing in 1851 for a unanimous Supreme Court in *Day v Woodworth*:

> "It is a wellestablished principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. 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. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. ... *This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case*." [46] (Emphasis added)

It seems that little guidance is given to juries in the United States about how that discretion should be exercised. In at least some jurisdictions in that country, juries are given instructions about the awarding of exemplary damages. The instructions have two principal elements: first, that the purpose of an award of exemplary damages is to punish the defendant and to protect the public by deterring the defendant and others from doing such wrong in the future and, second, that in making its assessment the jury must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrong [47] . (Sometimes, juries may also be told to consider the wealth of the defendant.)

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[44] *The Amiable Nancy* 16 US 546 at 558 (1818) per Story J.

[45] (1966) 117 CLR 118 at 136-137 .

[46] 54 US 362 at 371 (1851).

[47] cf the instructions to the jury considered in *Haslip* 499 US 1 at 6, 19 (1990).

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29. **Following paragraph cited by:**

State of New South Wales v Ibbett (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

The instructions given to juries are therefore very general. In some jurisdictions, where only general instructions of the kind we have described are given to juries, appellate courts will review the findings of juries about exemplary damages by reference to a more elaborate set of criteria [48] . Nevertheless, O'Connor J (in her dissenting opinion in *Pacific Mutual Life Insurance Co v Haslip*) could say that "[o]ur cases attest to the wildly unpredictable results and glaring unfairness that characterise commonlaw punitive damages procedures." [49]

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[48] See, for example, the list of factors derived from *Green Oil Co v Hornsby* 539 So 2d 218 223-224 (1989) discussed in *Haslip* 499 US 1 at 51-52 (1990).

[49] 499 US 1 at 49 (1990).

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30. What has happened in the United States might well be thought to suggest that describing the power to award exemplary damages as a discretionary power to be exercised having regard to purposes of punishment and deterrence and the character and degree of the wrongdoing gives insufficient guidance about how the power should be exercised. Nor is the problem resolved by attempting to analyse the question in terms of "rights" or "claims" rather than discretionary

powers. To do so may do little more than provoke an unproductive debate about jurisprudential classifications. What is important is to consider what it is that entitles a plaintiff to an award of exemplary damages or (to put it in the language of power or discretion) permits or requires the making of an award.

31. **Following paragraph cited by:**

> Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D (06 July 2022) (Bell CJ, Gleeson and Brereton JJA)
>
> 235. On the question of exemplary damages, the primary judge stated that "[a] more important case for the Court to express its own view about such conduct was argued to be difficult to imagine": PJ [664]. Her Honour referred to the decision of the High Court in *Gray* at [31] as authority for the proposition that exemplary damages are "awarded to punish wrongdoers and to deter others from such conscious wrongdoing, in contumelious disregard of other's rights": PJ [667]. In view of this overarching principle, B was awarded exemplary damages in the amount of $70,000.

No doubt the conduct of the wrongdoer is central to that enquiry: for exemplary damages are concerned to punish the wrongdoer and deter others from like conduct, not to compensate the party that was wronged. But there are other factors which must be considered. In this case, attention was directed to the fact that the defendant was a third party insurer, and that the tortfeasor had been convicted and punished for a criminal offence.

Insurance and exemplary damages

32. In *Lamb v Cotogno* the Court rejected the contention that "since the object of exemplary damages is to punish and deter, it is inappropriate that they should be awarded where the wrongdoer is insured under a scheme of compulsory insurance against liability to pay them" [50] . The Court reached that conclusion for a number of reasons including that the deterrence intended by an award "extends beyond the actual wrongdoer and the exact nature of his wrongdoing" [51] and that their award appeases the victim and assuages any urge for revenge felt by the victim [52] .

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[50] (1987) 164 CLR 1 at 9.

[51] (1987) 164 CLR 1 at 9.

[52] (1987) 164 CLR 1 at 9-10 .

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33. At the end of his submissions, counsel for the respondent sought leave [53] to reopen the decision in *Lamb v Cotogno* . That application might properly be described as belated. But even if it had been made earlier, we would have declined to reopen the decision. It is a recent judgment of the Court in which the five Justices who heard the matter gave a single set of reasons. Those are matters which may themselves be sufficient reason for refusing to reopen *L amb v Cotogno* . But in addition to those considerations, it is as well to recall that no application was made to reopen and reconsider the logically anterior questions about the availability of exemplary damages that were decided in *Uren* and the other cases we have mentioned. The leave sought should be refused.

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[53] *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

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34. It follows that the fact that the tortfeasor was insured under a compulsory scheme of insurance against any liability for exemplary damages would not bar the award of such damages.

35. In this case, of course, the defendant was the compulsory insurer, not the tortfeasor, and any award would be made against it, not the tortfeasor. Nevertheless, in this case that would have been no bar to an award of exemplary damages.

36. The parties accepted that the effect of s 125A(3)(a) of the *Motor Vehicles Act* (introduced to the Act in 1983) was to make the respondent liable to the appellant in whatever respects Bransden would have been liable. Section 125A(3)(a) provides:

> "Where, in pursuance of this section, an insurer has been joined as a defendant to an action -
>
> *(a)* the insurer will be taken to have directly assumed the liability (if any) of the insured person upon the claim in respect of death or bodily injury and, where such a liability is found to exist, judgment upon that claim will be given not against the insured person but against the insurer ... ."

It follows that nothing turns on the substitution of the respondent as defendant in place of Bransden.

37. **Following paragraph cited by:**

New South Wales v Bryant (16 November 2005) (Beazley, McColl and Basten JJA)

Secondly, if, as is now the case under the relevant South Australian legislation, the compulsory insurer is entitled to "recover from the insured person any money paid or costs incurred by the insurer" in respect of the liability the insurer incurred where the insured person drove a motor vehicle with the intention of causing the death of, or bodily injury to, a person

or another's property [54] there would seem to be powerful reason to think that the interposition of the insurer's liability should not affect the power to award exemplary damages. (There may be serious doubt, however, whether the respondent has any right of recovery from the insured person in this case. The Act was amended to deal with cases of intentional conduct by the insured only in 1993[55] and the events giving rise to the present claim happened in 1988.) It is, however, not necessary to resolve these questions in order to dispose of the present appeal.

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[54] *Motor Vehicles Act* 1959 (SA), s 124A(1)(aa) .

[55] *Statutes Amendment (Motor Vehicles and Wrongs) Act* 1993 (SA).

Significance of criminal punishment

38. The factor which weighed most heavily with the primary judge in considering whether to award exemplary damages was that Bransden had been sentenced to a substantial term of imprisonment for the actions which gave rise to the appellant's claim.

39. The first aim adopted by the Law Commission spoke of reserving the award of exemplary damages for cases of wrongdoing "which would otherwise go unpunished by the law"[56]. W hat significance should be attached to the fact of earlier criminal punishment?

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[56] United Kingdom, Law Commission No 247, *Aggravated, Exemplary and Restitutionary Damages*, (1997), par 1.17.

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40. **Following paragraph cited by:**

Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)
Cheng v Farjudi (21 November 2016) (Beazley P, Ward JA and Harrison J)
Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)
Harris v Digital Pulse Pty Ltd (07 February 2003) (Spigelman CJ Mason P Heydon JA)

Where, as here, the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted, we consider that exemplary damages may not be awarded. We say "may not" because we consider that the infliction of substantial punishment for what is

substantially the same conduct as the conduct which is the subject of the civil proceeding is a bar to the award; the decision is not one that is reached as a matter of discretion dependent upon the facts and circumstances in each particular case.

41. There are at least two reasons in principle why that is so.

42. **Following paragraph cited by:**

Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)

First, the purposes for the awarding of exemplary damages have been wholly met if substantial punishment is exacted by the criminal law. The offender is punished; others are deterred. There is, then, no occasion for their award.

43. **Following paragraph cited by:**

Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)

Secondly, considerations of double punishment would otherwise arise. In *R v Hoar* [57] Gibbs CJ, Mason, Aickin and Brennan JJ said that there is "a practice, if not a rule of law, that a person should not be twice punished for what is substantially the same act" [58] . That practice or rule would be breached by an award of exemplary damages in the circumstances described.

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[57] (1981) 148 CLR 32 .

[58] (1981) 148 CLR 32 at 38 citing *Connolly v Meagher* (1906) 3 CLR 682. See also *Pearce v The Queen* (1998) 156 ALR 684.

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44. Because, in this case, substantial punishment was imposed on the tortfeasor for the conduct which was in issue in the civil proceedings, it is not necessary to decide whether the bar arises only where the punishment is "substantial" or how close must be the similarity between the conduct that is the subject of the two proceedings.

45. **Following paragraph cited by:**

Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)

> 43. The plurality concluded in *Gray* (at [40]) that exemplary damages may not be awarded where, as in that case, the criminal law had been brought to bear upon the wrongdoer and substantial punishment inflicted. It was not difficult to conclude in *Gray* that substantial punishment had been inflicted upon the wrongdoer who had been convicted of causing grievous bodily harm with intent to cause grievous bodily harm to the plaintiff and was sentenced to seven years imprisonment. Moreover the Court was able to discern whether the facts which formed the basis for the wrongdoer's conviction and sentence were those relied on in the civil proceedings because, as i have said, the certificate of his conviction and the sentencing remarks relating to him were tendered by consent of the parties as evidence of the truth of their contents: *Gray* (at [2]) . Because there was no doubt about the severity of the wrongdoer's punishment, the plurality did not (at [44]) find it "necessary to decide whether the bar arises only where the punishment is 'substantial' or how close must be the similarity between the conduct that is the subject of the two proceedings." However it is clear that to raise the bar the plurality judgment contemplated (at [40]), it must be possible to determine the wrongdoer has suffered "substantial punishment" and that there is " 'substantial identity' between the conduct that is the subject of the criminal and civil proceedings": *Gray* (at [45]).

Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)

No doubt references to "substantial punishment" and to the need for "substantial identity" between the conduct that is the subject of the criminal and civil proceedings may lead to difficult questions of fact and degree. What is substantial punishment? Does it matter if the prosecuting authorities and the offender reach some arrangement about what will be charged and, if charged, admitted? Does it matter if for reasons personal to the accused (or for other reasons) only a nominal penalty is imposed in the criminal proceedings? Does it matter if the criminal offence charged is an offence of strict liability?

46. **Following paragraph cited by:**

Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)

> Gray at [46] .

Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)

> Gray at [46] .

Cheng v Farjudi (21 November 2016) (Beazley P, Ward JA and Harrison J)

47. Her Honour acknowledged, at [151], the usual rule that when a person has been the subject of a criminal penalty in respect of the conduct that was the subject of the claim, it is not appropriate to award exemplary damages because the criminal conviction and sentence imposed have adequately dealt with the elements of punishment and deterrence which are integral to an award of exemplary damages: see *Gray v Motor Accidents Commission* [1998] HCA 70; 196 CLR 1 at [46] ; *Tilden v Gregg* [2015] NSWCA 164 at [66] .

Cheng v Farjudi (21 November 2016) (Beazley P, Ward JA and Harrison J)
Tilden v Gregg (16 June 2015) (McColl, Macfarlan and Meagher JJA)
Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)

40. It is apparent from *Gray* (at [46]) that if criminal proceedings are to be relied upon to defeat a claim for exemplary damages, the defendant must prove the criminal charges, alleged the same conduct as alleged in the civil proceedings. That is what happened in *Gray* by the tender of the certificate of conviction of the wrongdoer and the sentencing remarks relating to him as evidence of the truth of their contents .

Whitbread v Rail Corporation New South Wales (24 May 2011) (Giles, McColl and Whealy JJA)

These, too, are not questions that fall for decision in this case. At first sight, however, if criminal charges, alleging the same conduct as is alleged in a civil proceeding, have been brought and proved, it would be a most unusual case in which it was open to a civil court to conclude that the outcome of those criminal proceedings did not take sufficient account of the need to punish the offender and deter others from like conduct. There seems to be much to be said in favour of the views reached by a majority of the Court of Appeal of New Zealand in *Daniels v Thompson* that for a civil court to revisit a sentence imposed in a criminal court for the purpose of deciding whether the criminal received his or her just deserts is "contrary to principle" and must "undermine the criminal process" [59] .

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[59] [1998] 3 NZLR 22 at 48 per Richardson P, Gault, Henry and Keith JJ; cf 76-77 per Thomas J.

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47. Other considerations may well arise if relevant criminal proceedings ended in the accused's acquittal. But again those questions do not now arise and we do not deal with them [60] .

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[60] cf *Daniels v Thompson* [1998] 3 NZLR 22 at 50-52 per Richardson P, Gault, Henry and Keith JJ; cf 77 per Thomas J.

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48. **Following paragraph cited by:**

Roberts v The State of Western Australia (08 March 2005) (Templeman J, McLure J, Jenkins J)

No doubt difficult questions may also arise where it is possible or probable that criminal proceedings will be brought but those proceedings have not been brought or, if started, have not been finished. The rule in *Smith v Selwyn* [61] no longer applies in some jurisdictions [62] . Thus it is possible for civil proceedings to be brought and concluded without there being any clear indication about whether criminal proceedings will follow. It may be doubted, however, that the mere possibility of later criminal prosecution is reason enough not to award exemplary damages in a proper case. More difficult questions might arise if it were clear that such proceedings were probable or had been begun but it is likely that in such circumstances trial of the civil proceedings may, in any event, be delayed until conclusion of the criminal proceedings. But again these questions do not arise here: Bransden had been prosecuted and sentenced.

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[61] [1914] 3 KB 98 .

[62] *Supreme Court Act* 1986 (Vic), s 41 ; *Criminal Code Act* 1924 (Tas), s 9 . *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26; *P T Garuda Indonesia Ltd v Grellman* (1994) 48 FCR 252.

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49. Although we consider the two matters of principle that we have mentioned (satisfaction of the purposes for an award and consideration of double punishment) are sufficient reason for the conclusion we have expressed, we consider that nothing in cases decided in this country or in other common law jurisdictions would suggest the adoption of a contrary view.

50. First, it is a conclusion consistent with such authority as there is on the point in this country [63] .

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[63] See particularly *Watts v Leitch* [1973] Tas SR 16. *Lamb v Cotogno* is not to the contrary. Although the defendant in that case was convicted of an offence arising out of the incident the subject of the civil suit (see *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 573) no point was made of that fact on appeal to this Court.

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51. Secondly, in Canada, courts have declined to award punitive damages where the defendant has been imprisoned[64]. (It may be that different considerations arise in some Canadian jurisdictions where some criminal punishment other than imprisonment is imposed.) We note, however, that the Ontario Law Reform Commission recommended[65] that the fact of prior criminal prosecution should not be a bar to an award of punitive damages but 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.

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[64] See Waddams, *The Law of Damages*, 2nd ed (1991), par 11.470; CooperStephenson and Saunders, *Personal Injury Damages in Canada*, (1981) at 699; Ontario Law Reform Commission, *Report on Exemplary Damages*, (1991) at 43.

[65] *Report on Exemplary Damages*, (1991) at 46.

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52. As might be anticipated, no single view of these questions has been uniformly adopted in the many jurisdictions of the United States [66] . But in some of those jurisdictions the question is put in terms like those put forward by the Ontario Law Reform Commission namely: exemplary damages should not be awarded if the defendant has been *sufficiently* puni shed by the criminal justice system.

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[66] Compare on the one hand: *Jackson v Wells* 35 SW 528 (1896); *Wirsing v Smith* 70 A 906 (1908); *King v Nixon* 207 F 2d 41 (1953); *Browand v Scott Lumber Co* 269 P 2d 891 (1954); *White v Taylor* 277 SE 2d 321 (1981) and on the other: *Redden v Gates* 2 NW 1079 (1879); *Bundy v Maginess* 18 P 668 (1888); *Luther v Shaw* 147 NW 18 (1914); *Morris v MacNab* 135 A 2d 657 (1957); *Shelley v Clark* 103 So 2d 743 (1958); *E F Hutton and Co Inc v Anderson* 596 P 2d 413 (1979); *Coppinger Color Lab Inc v Nixon* 69 8 SW 2d 72 (1985).

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53. Putting the question in these terms emphasises the importance of addressing the underlying question of principle. How are the civil courts to set about a task of punishing a defendant when the criminal courts have already done so? In particular, how is the civil court to assess the adequacy of the punishment inflicted as the result of a criminal prosecution? If the criminal process has taken its course, why should it be open to a plaintiff in a civil proceeding to contend that the punishment inflicted is inadequate? Is it enough (as the Ontario Law Reform Commission suggest[67]) that the victim of a crime may bring forward at a civil trial matters that go to punishment but are not brought forward at a criminal trial? How does that proposition fit with provisions made for sentencing courts to consider victim impact statements?

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[67] *Report on Exemplary Damages*, (1991) at 45.

54. **Following paragraph cited by:**

Fede v Gray by his tutor New South Wales Trustee and Guardian (14 December 2018) (McColl, Basten and Meagher JJA)

No doubt, if the punishment inflicted by a criminal court is properly regarded as substantial (and a term of imprisonment would seem always to be so) no question of inadequacy should arise. But what if a financial or other noncustodial penalty is exacted? How is the adequacy of that penalty to be judged [68] ?

[68] See *Daniels v Thompson* [1998] 3 NZLR 22 at 52-53 per Richardson P, Gault, Henry and Keith JJ; cf 73 per Thomas J.

55. Again, none of these questions arises here. On any view, substantial punishment has been inflicted on the wrongdoer in this matter. But to express the rule to be applied by a civil court in deciding whether exemplary damages may be awarded, simply as a discretion to be exercised according to whether, having regard to the nature of the defendant's conduct and the need to punish it and deter others from repeating it, exemplary damages should be awarded, may very well obscure deepseated and difficult questions of principle.

56. Here, however, because substantial punishment was imposed on Bransden for the conduct that was the subject of this action exemplary damages could not be awarded.

Compensatory damages

57. For the reasons given by Kirby J, the damages awarded to the appellant were manifestly inadequate.

Proposed orders

58. The appeal should therefore be allowed with costs, the order of the Full Court dismissing the appeal to that Court be set aside, in lieu there should be orders that the appeal be allowed with costs, and there be a new trial on the issue of damages (other than aggravated and exemplary damages). The costs of the new trial should be in the discretion of the judge at that trial.

59. KIRBY J. This appeal from the Full Court of the Supreme Court of South Australia[69] raises two questions. The first concerns a suggested error on the part of the Full Court in failing to correct the decision of the primary judge (Pirone DCJ) who refused to award

exemplary (or punitive) damages in the circumstances of the case. The second concerns a complaint that the Full Court should have held that the amount allowed for pre-trial economic loss and future loss of earning capacity was manifestly inadequate, so as to authorise and require the recalculation of the damages.

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[69] *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996.

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60. Special leave was granted primarily to permit examination, yet again [70] , of the vexed question of exemplary damages. The quantification of damages in this case, a matter which would not normally attract the attention of the Court, was doubtless left open in case it might require reconsideration in the light of the outcome of the claim for exemplary damages. Whilst I am of the opinion that the claim for exemplary damages was rightly dismissed, the examination of the other components of the damages, occasioned by the appeal, demonstrates error which required correction by the Full Court. The only acceptable solution is a retrial of the question of damages. However, such damages must exclude the exemplary damages claimed.

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[70] See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Fontin v Katapodis* (1962) 108 CLR 177; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; *Lamb v Cotogno* (1987) 164 CLR 1.

The facts

61. Mr Donald Gray (the appellant) is an Aboriginal Australian. On 9 September 1988 at Salisbury, a suburb of Adelaide, he was injured when struck by a motor vehicle driven by Mr Darren Bransden. The motor vehicle was insured under the compulsory third party provisions of the *Motor Vehicles Act* 1959 (SA) ("the MV Act")[71] . The insurer was the State Government Insurance Commission now renamed the Motor Accident Commission ("the Commission").

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[71] Pt IV of the Act.

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62. The primary judge found that the appellant was injured when Mr Bransden drove directly at a group of Aboriginal youths, including the appellant, doing so with the intention of running the appellant down and seriously hurting him. At trial, liability for negligence was not

disputed. Nor was it contested that Mr Bransden's conduct was deliberate, evidencing a want of regard for the safety and person of the appellant. Contributory negligence was not shown. The case was therefore one for the assessment of damages.

63. Mr Bransden was charged with the criminal offence of intentionally causing grievous bodily harm to the appellant [72] . He was convicted of this offence by a jury[73] and sentenced to seven years imprisonment[74]. The sentencing judge described his conduct as inexcusable, with no mitigating factor at all. It was, he said, a "blatant breach of the law" that was "brutal and cowardly". The primary judge in these proceedings took a similar view of Mr Bransden's conduct.

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[72] *Criminal Law Consolidation Act* 1935 (SA), s 21 .

[73] *R v Bransden*, unreported, Supreme Court of South Australia, 26 February 1991 (Bollen J).

[74] *R v Bransden*, unreported, Supreme Court of South Australia, 14 March 1991 (Bollen J).

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64. The background of the appellant was explained in the evidence. He was abandoned by his parents soon after birth. He was brought up by an aunt and uncle. He attended public schools but, because he was one of only two Aboriginal students at the secondary school, he was continuously picked on. He played various sports at school and was chosen for successful Australian Rules football teams in his local area. He enjoyed long distance running. He was visited occasionally by his natural father and when, in 1987 his aunt and uncle died, he went to live with a cousin in Salisbury. He commenced a course at a college there which specialises in Aboriginal education. However, he left the college to take a six month job at a local school earning $250 a week net. The work involved building school facilities. Necessarily, it required the appellant to engage in squatting, lifting materials and bending. The primary judge accepted that the appellant liked the work, that he did it well and that his performance was satisfactory. This was his situation at the time he was deliberately run down and injured.

65. As a result of the impact, the appellant suffered organic and psychological injuries. The former included fractures of the tibia and fibula of both legs and multiple contusions to his face and head. As found by the primary judge, the injury to the appellant's head resulted in initial confusion, disorientation, incomprehensible verbalisation and retrograde amnesia. He was left with a cognitive impairment.

66. Between the injury and the trial the appellant was admitted to hospital on three occasions for various procedures. He came under the care of Dr Anthony Ingman. He did not return to work or to college. He began drinking alcohol to excess. He claimed that after his injuries he turned to drinking "full on". He also became involved in a variety of criminal offences[75], most of them relatively minor. He was sentenced to various terms of imprisonment between 1990 and 1993, usually for several days but on one occasion for five months. At the trial of his action in June 1995, he told the primary judge that he had given up drinking alcohol

altogether after his last term of imprisonment. However, his natural father, to whom he had gone after his release from custody, contradicted this statement. He said that the appellant had been drinking alcohol, although not every day, whilst staying at his home and had been drunk "[o]n a couple of occasions".

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[75] Before the subject injuries were inflicted upon him, the appellant had once been convicted of larceny. However, he was fined $50 and placed on a six month good behaviour bond. No conviction was recorded.

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67. The appellant brought proceedings in the District Court of South Australia, initially against Mr Bransden, claiming damages against him for negligence. The claim was not framed in terms of trespass to the person. Amongst the damages claimed was a specific claim for exemplary damages. In 1995 the proceedings were amended to substitute State Government Insurance Commission as the defendant[76]. The substitution of the Commission for Mr Bransden was effected pursuant to s 125A of the MV Act . That section provides that the Court may, on the application of the insurer, join it as a defendant to the action. Where it is so joined the insurer is taken to have "directly assumed the liability (if any) of the insured person upon the claim in respect of ... bodily injury and, where such a liability is found to exist, judgment upon that claim will be given not against the insured person but against the insurer" [77] . Although provision is made for the insured person to remain a party for purposes of defending, in effect, a property claim or prosecuting a counter-claim, neither of these was relevant. In accordance with the MV Act , Mr Bransden "cease[d] to be a party to the action" [78] . Provision is made in certain circumstances for the insurer to recover from the insured in respect of its liability where the insured has contravened or failed to comply with a term of the policy of insurance [79] . The appellant submitted that this possibility, although not yet carried into effect, continued to expose Mr Bransden to the possibility of recovery at the suit of the Commission, for example for any exemplary damages which the Commission was ordered to pay by reason of Mr Bransden's deliberate driving.

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[76] By order of a Master of the District Court on 23 January 1995 on the application of the Commission.

[77] MV Act, s 125A(3)(a) .

[78] MV Act, s 125A(3)(b) .

[79] MV Act, s 124A(1) .["Where an insured person incurs a liability against which he or she is insured under this Part and the insured person has contravened or failed to comply with a term of the policy of insurance ... by driving a motor vehicle ... with the intention of causing ... bodily injury to ... a person ... the insurer may ... recover from the insured person any money paid or costs incurred by the insurer in respect of that liability."]

Decision of the primary judge

68. The primary judge assessed the appellant's damages at $72,206. Judgment was entered in his favour in that sum together with an amount for interest. The components of the judgment were $15,000 for past economic loss; $30,000 for future economic loss; and $18,190 for non-economic loss (calculated in accordance with the *Wrongs Act* 1936 (SA), s 35A(b)[80]). The out-of-pocket expenses were agreed at $9,016. The appellant complained that this judgment was "manifestly inadequate". Specifically, he argued that the judge had erred on failing to include a sum for exemplary damages. More generally, he complained that the amounts provided for economic loss, past and future, were erroneous, being arrived at by faulty reasoning which should be corrected on appeal. He submitted that such correction was available, notwithstanding several references by the judge to credibility findings which were adverse to him.

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[80] That section provides that in such cases non-economic loss is to be assigned a numerical value on a scale rising from 0 to 60. The primary judge assigned the number 17. At the relevant time, this produced the component of the judgment of $18,190. See the definition of "prescribed amount" in s 35A(6)(b).

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69. On the claim for exemplary damages, Pirone DCJ accepted that exemplary damages were legally available in a case such as this, notwithstanding the fact that the appellant had not expressly framed his case in terms of trespass to the person and that the defendant before the Court was not the tortfeasor himself but his compulsory third party insurer. The judge found that, if the appellant was entitled to an award of exemplary damages, it should be in the sum of $10,000. However, after reference to a decision of the Supreme Court of Tasmania in *Watts v Leitch* [81] , Pirone DCJ accepted that he had a discretion to award, or refrain from awarding, exemplary damages. Although he was not bound by the Tasmanian decision, it accorded with his own opinion. Taking into account the fact that Mr Bransden had already been punished by being sentenced to a substantial period of imprisonment in respect of the same conduct, the judge concluded that no award of exemplary damages "should" be made.

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[81] [1973] Tas SR 16 at 20 per Nettlefold J.

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70. As to the claim for economic loss, the appellant presented himself at trial as totally and permanently unemployable. Essentially, this perspective of the facts was based upon the contention that he had been progressing reasonably, despite adversity, until the deliberate wrong done to him by Mr Bransden. He had regular work, was a keen sportsman, had attended college for a time and hoped to begin a career working on an oyster or abalone farm by the age of 20. After the injury his life was dislocated.

71. The primary judge accepted that the appellant's earning capacity had been diminished as a result of the subject injuries, both in relation to the past and with respect to the future. In

measuring the extent of his loss, he recorded his preference for the evidence of Dr Ingman. That witness had testified that:

> "[I]n work that involved heavy lifting and carrying [the appellant] would be restricted, and also in work requiring squatting or bending ... He could do this work intermittently and more slowly than the average person."

Dr Ingman concluded:

> "The reality is that, unless he happened to be in a situation where someone wanted a person who worked more slowly, he would be better employed in something else."

72. Although accepting that the injury to the head was "significant and severe" and although generally accepting the evidence of Mr Mark Reid, a neuropsychologist, that the appellant had suffered cognitive impairment which Mr Reid, as to approximately 75%, attributed to the accident, the primary judge concluded that the appellant had a pre-existing short-term memory impairment. He therefore found that the short-term memory problems were not related to the subject incident.

73. The reasons advanced to support this conclusion, vital to the calculation of past and future economic loss, were two. The first involved consideration of a number of comments on the appellant's scholastic performance at secondary school when he was in his early teens. The second related to the judge's assessment of the appellant as a witness and his observations of him whilst he was in the witness box. The judge also seems to have been affected by the fact that the appellant's natural father deposed, contrary to the appellant's own testimony, that he was still drinking alcohol. Taking these considerations into account, as well as the disadvantages inevitably flowing from the appellant's criminal record, Pirone DCJ concluded that the appellant had "evinced no intention or genuine desire to make use of his residual earning capacity" in the past and that "the same may be true of him at other times in the future". He therefore reached the monetary allocations already mentioned after "wielding the broad axe". Essentially, his Honour concluded that the "obvious lack of motivation" which the appellant displayed after injury, and demonstrated during his evidence, had its roots not in the trauma and dislocation of the wrong done to him by Mr Bransden but in personality traits already obvious when he was at high school. He did not accept the appellant's evidence that he could not play pre-injury sports; although he was prepared to concede that long distance running might now be beyond him.

Decision of the Full Court

74. In the Full Court, the reasons for rejecting the appellant's appeal were given by Millhouse J[82]. On the complaint concerning the refusal to include exemplary damages, it was recorded that the Commission had conceded that such damages "could have been awarded. It was a matter of discretion"[83]. Reference was made to *Watts v Leitch* and to the primary judge's consideration of the fact that the driver had already been punished by imprisonment. Millhouse J accepted that the primary judge had a discretion which he had chosen not to exercise in favour of the appellant. He considered that there was no reason why the Full Court should interfere.

[82] Bollen and Williams JJ concurring.

[83] *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 4.

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75. On the more general complaint concerning the suggested inadequacy of the damages, Millhouse J referred to the "adverse view of the appellant's credibility"[84] formed by the primary judge, the "appalling" school reports, the resort to drinking alcohol and the appellant's criminal record. He concluded[85]:

> "The sad fact is that the appellant's chances of achieving much by way of employment in life have always been small. Although [counsel] argued that the learned judge should not have, nor should we, set store by those school reports I cannot see why not. They don't shew much promise ... The learned judge had ... found the reports pointed to the appellant's lack of motivation: he found that this lack of motivation had gone on. There is no reason for us to review these findings."

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[84] *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 3.

[85] *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 4.

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76. Whilst accepting that the assessment for non-economic loss in this case was "quite low", the Full Court declined to intervene. As to the economic loss, on the footing that the appellant's future "given his lack of skills and motivation" was never a good one and that he had been left with "little permanent disability"[86], those sums were also left undisturbed. The result was that the Full Court dismissed the appeal.

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[86] *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 4.

Common ground

77. Upon some questions raised by the appeal there was common ground between the parties:

1. The Commission accepted that it was liable to the appellant for any exemplary damages that might be awarded in the proceedings arising out of the conduct of Mr Bransden. No point was taken that liability for such damage would fall

outside the policy. I shall assume that this is so whatever might be the subsequent rights of the Commission, as insurer, to recover the whole or any part of the damages from Mr Bransden [87] . Had it been otherwise, or had the matter been in doubt, it would have been necessary to join Mr Bransden once again as a party so that he could be given the opportunity to be heard before any such damages were ordered affecting him. Neither party suggested that Mr Bransden should be afforded notice of the hearing to protect his contingent interests in its outcome. In light of the conclusion to which I have come, it is unnecessary to explore this problem.

2. The references to the criminal proceedings, made by the primary judge, arose out of the tender of part of the transcript of those proceedings, including the remarks on the sentencing of Mr Bransden [88] . This tender was received by consent of the parties. It served simply to confirm the conclusions independently reached by the primary judge so that no question arises as to such use. The case was conducted on the basis that there was no, or no sufficient, provocation on the part of the appellant to justify or explain Mr Bransden's conduct [89] . A defence of contributory negligence, although pleaded, was not pressed.

3. Whilst contesting the adequacy of the primary judge's quantification of pain and suffering, the appellant concentrated his attack on the judgment in terms of the omission of exemplary damages and the alleged errors in the calculation of the allowances for economic loss. The appeal was conducted on the footing that the quantification of the potential exemplary damages by the primary judge was accepted. The appellant therefore asked that $10,000 be added to his judgment if he were to succeed on that ground of appeal alone. If he succeeded on the complaint about economic loss, the appellant asked that there be a general retrial as to damages. This represented a departure from the relief initially sought in the grounds of appeal where the appellant had asked that the proceedings be returned to the Full Court for assessment of damages or that this Court should substitute its own assessment.

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[87] Pursuant to MV Act, s 124A .

[88] The certificate of conviction was admitted pursuant to the *Evidence Act* 1929 (SA), s 34A .

[89] In this respect the case was different from *Lamb v Cotogno* (1987) 164 CLR 1.

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78. Although not specifically pleaded, the appellant sought, under the claim for compensatory damages, to argue that allowance ought to have been made for aggravated damages. At the very close of the hearing, the Commission, for its part, asked the Court to reconsider the authority of its decision in *Lamb v Cotogno* [90] . This is where the common ground ran out. The Commission objected to any allowance for aggravated damages. It relied, to support its objections, upon the formulation of the grounds of appeal and argument, and the way in

which the proceedings had been conducted in the courts below. The appellant did not expressly object to this Court's reopening *Lamb v Cotogno* , but stated his strong support for that decision.

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[90] (1987) 164 CLR 1 .

The issues

79. The issues raised by the appeal are:

1. Should the authority of this Court in *Lamb v Cotogno* be reopened to permit the Commission, as a compulsory insurer, to contest the applicability to it of the law entitling a plaintiff to recover exemplary (or punitive) damages on the grounds of the conduct of the tortfeasor whom it is obliged to indemnify? (The reopening issue).

2. If not, is the holding in *Lamb v Cotogno* inapplicable to the facts of this case on the footing either (a) that the claim in *Lamb v Cotogno* was framed in terms of trespass to the person, whereas in this case the sole cause of action pleaded by the appellant was negligence? or (b) on the basis that in *Lamb v Cotogno* the defendant was the tortfeasor, whereas in this case the sole defendant was, by statute, the Commission, punishment of which was said to be neither rational nor fair. (The scope of exemplary damages issue).

3. If the Commission is prima facie liable to the appellant under the holding in *La mb v Cotogno*, is that liability affected in any way by the provisions of the *Wrongs Act*, s 35A limiting recovery of damages in the case of motor vehicle accidents? (The *Wrongs Act* issue).

4. If exemplary damages may be recovered, is the award of such damages discretionary and, if so, did the discretion miscarry by reference to the way in which the prior criminal conviction and punishment of Mr Bransden was treated? (The criminal punishment issue).

5. Having regard to the pleadings and the conduct of the proceedings, is the appellant entitled to aggravated damages in addition, or in the alternative, to the exemplary damages claimed? (The aggravated damages issue).

6. In respect of the remainder of the appeal, the question is whether the award of damages for economic loss, past and future, is manifestly inadequate and whether, having regard to the reasons given by the primary judge (including his references to his assessment of the credibility of witnesses) the Full Court was authorised and required to intervene to correct the misassessment. (The economic loss issue).

The reopening issue

80. This Court in *Lamb v Cotogno* decided that there was nothing in the language or scheme of the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW) which prohibited the award of exemplary damages to a plaintiff injured as a result of the driving of a vehicle insured under that Act. In the New South Wales Court of Appeal, I concluded, by reference to the legislation and my understanding of its purposes, that exemplary damages were inappropriate and unavailable in such circumstances [91] . Such an award would, as a matter of practicality, neither punish nor deter the driver responsible nor motorists generally. I considered that it would produce absurd results [92] . I suggested that realism required that the role of the insurer should be taken into account, at least where its obligations arose from a statutory scheme providing for compulsory insurance [93] . Upon one view, the decision of this Court, in *Kars v Kars* [94] (decided since *Lamb v Cotogno*) suggests a greater willingness, on the part of this Court to consider the scope and applicability of common law entitlements where they arise for elucidation in the context of a compulsory statutory scheme for universal insurance. However, nothing said in *Kars* casts doubt on the authority of *Lamb v Cotogno* [95] . In some Australian jurisdictions, legislation has been introduced to overcome the effect of *Lamb v Cotogno* [96] . No such provision has been enacted in South Australia.

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[91] *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570.

[92] (1986) 5 NSWLR 559 at 568 referring to Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed (1983) at 68.

[93] (1986) 5 NSWLR 559 at 571.

[94] (1996) 187 CLR 354 .

[95] See especially (1996) 187 CLR 354 at 381-382 .

[96] See eg *Motor Accidents Act* 1988 (NSW), s 81A and *Motor Accident Insurance Act* 1994 (Q), s 55(1) . Under s 55(2) of the Queensland Act it is provided that a court may enter a separate judgment against an insured person for exemplary or punitive damages. An insured person is not entitled under a statutory policy to indemnity against such an award: s 55(3) . There is no reference to exemplary damages for motor vehicle accidents under any other Australian statute. See MV Act , *Transport Accident Act* 1986 (Vic) ; *Motor Vehicle (Third Party Insurance) Act* 1943 (WA) ; *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas) ; *Motor Accidents (Compensation) Act* 197 9 (NT) ; *Motor Traffic Act* 1936 (ACT) .

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81. Until the holding in *Lamb v Cotogno* is displaced by legislation or overruled by this Court, it must be applied to the same or analogous circumstances. The suggestion that the rule in *Lamb v Cotogno*, if applicable, should not be followed was unavailable to the Commission in the courts below. Unless the decision could be distinguished, it was the duty of all Australian courts to conform to the principle which that decision established [97] . In its written submissions, the Commission, rather tentatively, suggested that the Court might wish to depart from its holding in *Lamb v Cotogno* or to alter or modify the principle which that decision established[98]. It submitted that there was no policy or other justification for an

award of exemplary damages against it, as the compulsory statutory insurer substituted in accordance with the legislation, for the tortfeasor who was no longer a party to the action.

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[97] *Garcia v National Australia Bank* (1998) 72 ALJR 1243 at 1246; 155 ALR 614 at 619.

[98] Respondent's written submissions, par 7.

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82. Outside Australia, a body of judicial and other legal writing exists which lends support to the view that shifting the burden of exemplary damages to an insurer, at least in the case of statutory schemes of compulsory insurance, insufficiently serves the purposes of punishment, deterrence and disapprobation for which the common law provided the remedy of exemplary damages. Cases where the tortfeasor is privately insured and where the insurer is held liable to indemnify the insured which is vicariously liable for highhanded conduct on the part of an employee can be readily distinguished [99] . But where the damages are defrayed not by the wrong-doer but by an insurer pursuant to a statutory obligation, judges [100] and other commentators[101] have questioned the applicability of exemplary damages as fulfilling the objects for which such damages are ordinarily provided. Some have even questioned whether, in the case of private insurance, an obligation to indemnify an insured for the consequences of criminal conduct might not be unenforceable, as contrary to public policy[102]. One United States judge questioned the point of publicly punishing an insurer since "it has done no wrong" [103] . In the case of a compulsory statutory insurer, and particularly where (as in the present case) the Commission was then the sole insurer licensed to issue policies under the MV Act , by punishing it "society would then be punishing itself for the wrong committed by the insured" [104] . Arguably, doing this would defeat or undermine the achievement of the objects of the legislation.

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[99] *Ohio Casualty Insurance Co v Welfare Finance Co* 75 F 2d 58 at 59 (8th Cir, 1934); Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 200.

[100] For example Wisdom J (with whom Jones J concurred) in *Northwestern National Casualty Co v McNulty* 307 F 2d 432 at 440-441 (5th Cir, 1962); *Affiliated FM Insurance Co v Beatrice Foods Co* 645 F Supp 298 at 303-305 (ND Ill, 1985).

[101] For example *McGregor on Damages*, 16th ed (1997) at par 466 n 1; CooperStephenson and Saunders, *Personal Injury Damages in Canada* (1981) at 702.

[102] Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981) at 709.

[103] *Northwestern National Casualty Co v McNulty* 307 F 2d 432 at 440 (5th Cir, 1962).

[104] *Northwestern National Casualty Co v McNulty* 307 F 2d 432 at 440-441 (5th Cir, 1962).

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83. Whatever weight these arguments might be thought to have, they cannot, as a matter of authority, affect the outcome of these proceedings whilst *Lamb v Cotogno* stands. Some day it may be necessary to reconsider the correctness of that decision [105] . However, it is a relatively recent and unanimous holding of the Court. It was arrived at with acknowledgment that the contrary arguments had "strength" [106] . In the present appeal, the Commission's application to reargue the point was not clearly signalled either at the special leave hearing or in the written submissions. It was not even raised in the oral arguments for the Commission until the very close of its submissions and then only as a result of direct questioning by the Court. This Court may have been differently constituted had a clear indication been earlier given that the Commission sought to challenge the correctness of its earlier authority. In these circumstances, it is not appropriate to permit the Commission to reargue the holding in *Lamb v Cotogno* [107] . This appeal must be approached in conformity with the law as there stated.

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[105] In *Daniels v Thompson* [1998] 3 NZLR 22, the New Zealand Court of Appeal (by majority) departed from the approach taken in *Lamb v Cotogno* . The Court of Appeal held that all claims for exemplary damages in relation to conduct that has been, or was likely to be, the subject of a criminal prosecution were inadmissible. See also Smillie, "Exemplary damages and the criminal law" (1998) 6 *Torts Law Journal* 113.

[106] (1987) 164 CLR 1 at 9.

[107] The appellants did not refer to the then recent decision of the New Zealand Court of Appeal in *Daniels v Thompson* [1998] 3 NZLR 22. Indeed, neither party referred to that decision in argument.

The scope of exemplary damages issue

84. The Commission accepted that the restrictive approach to the recovery of exemplary damages in England [108] had not been followed in Australia. In this country, awards of exemplary damages were available to a wider catalogue of causes of action than English law now provides. Thus, such damages have been recovered in actions framed in terms of trespass to chattels [109] , trespass to land [110] , trespass to the person [111] , deceit [112] , reckless negligence [113] and defamation [114] , unless expressly excluded by statute[115]. Although there was no holding of this Court on the point, the Commission urged that the purposes for which exemplary damages were awarded were inapplicable to a cause of action framed in negligence. Its argument went thus: where the only wrong pleaded and proved was breach of a duty of care, it was inappropriate to award exemplary damages in order to make an example of the defendant or to mark the court's strong disapproval or to punish the defendant or to provide a remedy which would discourage revenge and self-help. Because the appellant had not conducted his case on the footing that it involved a trespass to the person, he was confined to the damages available for the wrong of negligence. This meant compensatory damages

(including aggravated damages). It did not extend to exemplary or punitive damages. In so far as the evidence suggested deliberate wrongdoing against the appellant by Mr Bransden, that was merely the factual background upon which the cause of action was to be considered. The remedies provided by law were defined by the cause of action, not the evidence.

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[108] *Rookes v Barnard* [1964] AC 1129 at 1226-1227 .

[109] *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584.

[110] *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448.

[111] *Lamb v Cotogno* (1987) 164 CLR 1.

[112] *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251.

[113] *Midalco Pty Ltd v Rabenalt* [1989] VR 461 (the trial in that case appears to have been conducted on the assumption that exemplary damages were available, and the Court of Appeal did not disturb the finding).

[114] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118.

[115] Luntz, *Assessment of Damages for Personal Injury and Death*, 3rd ed (1990) at par 1.7.4, n 4 and 5.

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85. Because this point is not decided by authority, it is necessary to decide it as a matter of principle. Originally, the language used in most cases where exemplary damages were awarded suggested that the feature of the cause attracting such damages was the existence of an intent on the part of the tortfeasor to harm the victim[116] or some form of conscious wrongdoing in contumelious disregard of the victim's rights [117] . It was for that reason that exemplary damages were provided in cases of intentional torts. Sometimes such damages were refused where intentional injury could not be established [118] . However, even in some of the older cases, exemplary damages were occasionally awarded where wilful negligence was shown followed by high-handed conduct towards the victim [119] . Although punitive damages would not be awarded for acts properly described as accidents, framed in terms of the tort of negligence[120], proof that the wrong went beyond mere negligence and could be characterised as wanton, reckless or outrageous would attract exemplary damages[121].

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[116] Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 173-174.

[117] cf *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77.

[118] See eg *Kaytor v Lion's Driving Range Ltd* (1962) 35 DLR (2d) 426 at 431-432 .

[119] See eg *Emblen v Myers* (1860) 6 H & N 54 [158 ER 23].

[120] Hawley, "Punitive and Aggravated Damages in Canada" (1980) 18 *Alberta Law Review* 485 at 496.

[121] *Blacquiere's Estate v Canadian Motor Sales Corporation Ltd* (1975) 10 Nfld & PEIR 178 at 207.

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86. In Canada, the proposition that such damages were not available to a cause of action framed in negligence has been rejected[122]. It is recognised that, depending on the circumstances, a claim framed in negligence can attract such damages [123] . Professor Fleming acknowledged that awards of exemplary damages in actions for negligence were comparatively rare[124]. However, he noted that such damages had been recovered in product liability cases [125] and cases involving unsafe working conditions [126] . What mattered, he said, was "the conduct of the wrong doer, not the nature of the tort" [127] . I agree. Punishment for deliberate wrongdoing is certainly a consideration in deciding the applicability of exemplary damages. But it is not the sole reason for the award of such damages. The more recent cases on the subject, including in this Court, have accepted that such damages may be recovered whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world. The first objection therefore fails.

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[122] *Robitaille v Vancouver Hockey Club Ltd* (1979) 19 BCLR 158 at 179.

[123] *Denison v Fawcett* [1958] OR 312 at 319; McBride, "Punitive Damages" in Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (1996) 175 at 179 n 8; cf *Kator v Lion's Driving Range Ltd* (1962) 35 DLR (2d) 426 at 432.

[124] Fleming, *The Law of Torts*, 9th ed (1998) at 273.

[125] *Vlchek v Koshel* (1988) 52 DLR (4th) 371.

[126] *Trend Management Ltd v Borg* (1996) 40 NSWLR 500; *Coloca v BP Australia Ltd* [1992] 2 VLR 441.

[127] Fleming, *The Law of Torts*, 9th ed (1998) at 273 citing *Coloca v BP Australia Ltd* [1992] 2 VLR 441 at 445.

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87. What of the complaint that, of their nature, exemplary damages do not apply where the defendant is the Commission and where the actual tortfeasor is no longer a party to the action? Certainly, these features distinguish the present case from *Lamb v Cotogno* where the wrongdoer (and not the insurer) was the defendant on the record. However, the distinction is an insubstantial one. It is not sufficient to distinguish *Lamb v Cotogno* from this case. By the MV Act , where the insurer has been joined as defendant it is "taken to have directly assumed the liability (if any) of the insured person" [128] . If the liability of the insured extends to

exemplary damages, judgment for such damages must be given "not against the insured person but against the insurer" [129] . Because, by *Lamb v Cotogno*, the insured is liable for exemplary damages, the Commission, by the Act, steps into his shoes. It assumes his liability. Considerations of its entitlement to recover from the insured are irrelevant to the obligations which the Act imposes on the insurer. To the objection that it is the Commission, an insurer, and not the tortfeasor personally which has to foot the bill, the answer must be that this is precisely what *Lamb v Cotogno* countenanced. The second objection likewise fails.

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[128] s 125A(3)(a) .

[129] s 125A(3)(a) .

The *Wrongs Act* issue

88. The Commission next suggested that the award of exemplary damages was subject to significant restrictions because of the terms of the *Wrongs Act* and particularly the provisions of s 35A limiting recovery of damages for "noneconomic loss". The legislative scheme contained in s 35A of the *Wrongs Act* is unique to South Australia. The section, as applicable at the relevant time, provided that "where damages are to be assessed for or in respect of an injury arising from a motor accident" its provisions apply. There was no dispute that the appellant's claim fell well within the section. The contest was whether the terms of the section included exemplary damages within the damages that may be "awarded for non-economic loss"[130]. If they were so included, the common law was excluded and the damages had to be assessed by reference to a scale "running from 0 to 60"[131] and by reference to a "prescribed amount"[132].

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[130] *Wrongs Act*, s 35A(1)(b).

[131] s 35A(1)(b)(i).

[132] s 35A(1)(b)(ii).

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89. The issue raised by this objection is the subject of authority in South Australia. In *Andary v Burford* [133], the Supreme Court, with reference to earlier decisions of the Local and of the District Court of South Australia, concluded that s 35A was not intended to exclude the recovery of exemplary damages; nor did such damages fall within its terms. I agree. In order to abolish a civil right to exemplary damages by statutory implication (no express abolition appearing) a clearer indication of the parliamentary purpose would be required. "Non-economic loss" is defined in s 35A(6) to mean:

> "(a) pain and suffering;

(b) loss of amenities of life;

(c) loss of expectation of life;

(d) disfigurement".

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[133] [1994] Aust Torts Reports ¶81-302 (Millhouse J).

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90. Although exemplary damages are "non-economic" in the generality of that expression, they do not fall within any of the stated paragraphs of the definition. They are not, therefore, controlled by the assessment prescribed by s 35A. They remain to be assessed, where applicable, according to common law principles. The statement that the purpose and application of the section is to impose a cap on general damages [134] is irrelevant in this instance.

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[134] *Packer v Cameron* (1989) 54 SASR 246 at 251.

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91. In New Zealand, where a similar problem arose under the *Accident Compensation Act* 1972 (NZ), the Court of Appeal reached a like conclusion [135] . It held that the general language of the Act excluding defined entitlements to damages at common law did not prohibit recovery of exemplary damages having regard to their special features and purposes. If the recovery of such damages were to be abolished, the abolition would have to be effected by clear legislation, specifically addressed to that objective [136] . I would reach the same conclusion here. Accordingly, the *Wrongs Act* issue also fails.

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[135] *Donselaar v Donselaar* [1982] 1 NZLR 97.

[136] [1982] 1 NZLR at 105 per Cooke J. See now *Daniels v Thompson* [1998] 3 NZLR 22. See also Smillie, "Exemplary damages and the criminal law" (1998) 6 *Torts Law Journal* 113 at 118-120.

The criminal punishment issue

92. The appellant then objected that the courts below had treated the award of exemplary damages as discretionary and had erred in their approach to providing them. Specifically, he argued that *Watts v Leitch* was incorrectly decided and that it was erroneous to approach the question

by reference solely to the fact that the tortfeasor had suffered criminal punishment. The Commission supported the decisions below and contested the suggestion that the discretion had miscarried.

93. Two preliminary questions are presented by this issue. The first is whether the liability of the tortfeasor to punishment is relevant. The second is whether, if it is, taking it into account is properly described as discretionary. Both of these questions were answered in the affirmative by the courts below.

94. Turning to the first question, it is impossible to contest, in the face of authority, the relevance of the fact of criminal punishment of the tortfeasor. The essential argument against doing so is that criminal proceedings are outside the control of the person injured and are designed to achieve the purposes of the State. If the injured party has suffered in an additional way, such as would ordinarily attract an entitlement to exemplary damages, why should such entitlement be lost simply because of the operation of the criminal law? This approach has found favour in some jurisdictions in the United States of America[137]. Authority exists in that country supporting the refusal of a request to instruct the jury to consider a criminal fine imposed on the defendant in reduction of his civil liability to the plaintiff[138]. Where there are multiple plaintiffs, a particular problem arises for treating criminal punishment as relevant. How, then, is the criminal punishment of the defendant to be apportioned in assessing the several civil claims? This consideration, and the fact that what is at stake are the damages to which the plaintiff is entitled, has caused some courts to conclude that the fact that a tortfeasor has been punished criminally, or is liable to be so punished, is not material to the question of the plaintiff's entitlement to the exemplary damages which belong to the plaintiff[139].

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[137] Gustafson, "Damages - Punitive Damages and Double Jeopardy" (1946) 21 *Notre Dame Lawyer* 206 at 208.

[138] *Redden v Gates* 2 NW 1079 (1879). See Gustafson, "Damages - Punitive Damages and Double Jeopardy" (1946) 21 *Notre Dame Lawyer* 206 at 208.

[139] *Jefferson v Adams* 4 Del 321 (1845); *Redden v Gates* 2 NW 1079 (1879); *Irby v Wilde* 46 So 454 (1908); *Dubois v Roby* 80 A 150 at 154 (1911).

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95. The foregoing opinions are outside the mainstream of applicable legal authority. They are, moreover, inconsistent with basic principle. The rule that a person shall not be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law is a fundamental principle of human rights [140] . There is no reason for excluding its operation in this area of discourse except for the inter-position of compulsory insurance, which authority holds is not reason enough. That is why liability to criminal punishment, and more especially the imposition of such punishment (and particularly that of imprisonment) have been repeatedly held in Australia [141] , England [142] , Canada [143] , New Zealand [144] and in many jurisdictions of the United States[145], as relevant to the provision of exemplary damages (and even aggravated compensatory damages). Courts commonly take into account the fact and severity of any criminal punishment imposed or to which the tortfeasor is liable. Particular exceptions have been suggested where the criminal

punishment imposed on the defendant, or to which the defendant may be liable, is regarded as insubstantial. An example is where the tortfeasor was conditionally discharged in the criminal proceedings [146] . Adopting this approach may appear to breach the rule against double punishment by permitting a civil court to add, in effect, to the punishment imposed on the wrongdoer by the criminal court acting within its powers[147]. Because, generally, a criminal trial is heard and determined before a civil action, the practical problems of reconciling the two systems are ordinarily avoided. But they can arise when the criminal punishment is unknown or delayed[148]. However, complaints of this kind are really addressed to the fundamental problem of retaining exemplary damages in civil cases where the tortfeasor is also liable to criminal punishment [149] . The way that the law has endeavoured to grapple with this problem is by recognising a discretion to award, or to withhold, exemplary damages and, in awarding them, to moderate their amount by reference to considerations of criminal punishment. Exemplary (or punitive) damages are said to be uncommon outside the common law. They certainly present conceptual problems. But they are too deeply embedded in our law to be abolished by a court. They have been accepted by this Court as part of Australian law [150] . We must live with, and adapt to, the difficulties. Discretion is the way this is done.

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[140] International Covenant on Civil and Political Rights, Art 14.7. See also *Pearce v The Queen* (1998) 72 ALJR 1416; 156 ALR 684.

[141] For example *Watts v Leitch* [1973] Tas SR 16 and *O'Reilly v Hausler* (1987) 6 MVR 344.

[142] *Rookes v Barnard* [1964] AC 1129; *Archer v Brown* [1985] QB 401 at 423 ; *AB v South West Water Services Ltd* [1993] QB 507 at 516. See also The United Kingdom Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247, 1997, p. 135.

[143] *Natonson v Lexier* [1939] 3 WWR 289 at 291 ; *Loedel v Eckert* (1977) 3 CCLT 145 at 150-151; *Kenmuir v Heutzelmann* (1977) 3 CCLT 153 at 158; *Norberg v Wynrib* [1 992] 4 WWR 577; Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 197; Hawley, "Punitive and Aggravated Damages in Canada" (1980) 18 *Alberta Law Review* 485 at 503-504; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981) at 699. See also the report of the Ontario Law Reform Commission, *Report on Exemplary Damages*, 1991, at 43-46.

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

[145] See eg *Borkenstein v Schrack* 31 Ind App 220; 67 NE 547 (1903); Gustafson, "Damages - Punitive Damages and Double Jeopardy" (1946) 21 *Notre Dame Lawyer* 206 at 207.

[146] *Connors v Doak* (1978) 24 NBR (2d) 85; Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 197198.

[147] Waddams, *The Law of Damages*, 2nd ed (1991) at ¶11.470.

[148] Waddams, *The Law of Damages*, 2nd ed (1991) at ¶11.480.

[149] As Lord Devlin commented in *Rookes v Barnard* [1964] AC 1129 at 1230. See also Lord Reid in *Broome v Cassell & Co* [1972] AC 1027 at 1087.

[150] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Lamb v Cotogno* (1987) 164 CLR 1.

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96. The notion that a plaintiff's entitlement to a component of damages at common law is a matter of discretion is exceptional. Damages are ordinarily the plaintiff's right, being the remedy devised by the common law to effect its purposes. However, the description of exemplary damages as "discretionary" is embedded in the case law. In *Rookes v Barnard* [151] , Lord Devlin explained the instruction to be given to the jury where exemplary damages were available. They might award such damages "if, but only if" [152] the compensatory damages were inadequate to mark the court's disapproval of the tortfeasor's conduct and to deter him and others from repeating such conduct. Thus the component of exemplary damages was not a right but an element of the damages which the jury could elect to provide or to withhold. In *Broome v Cassell & Co* , Lord Hailsham described an award of punitive damages as "discretionary" [153] . There are similar descriptions in Canadian[154] and Australian authority [155] . Indeed, the existence of a discretion has been described as a "safety valve" permitting the tribunal of fact to decline the award of exemplary damages if some factor makes it proper to refuse them[156].

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[151] [1964] AC 1129 .

[152] [1964] AC 1129 at 1228.

[153] [1972] AC 1027 at 1060. See also Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) at pars 4.29, 4.40.

[154] *Blacquiere's Estate v Canadian Motor Sales Corporation Ltd* (1975) 10 Nfld & PEIR 178 at 205.

[155] *Watts v Leitch* [1973] Tas SR 16 at 20.

[156] Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) at par 1.20.

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97. I accept that describing the process involved as "discretionary" may encourage a certain looseness of thinking. However, to some extent that is inherent in the interaction of criminal punishment and civil damages which are described as being in part punitive. It is a discretion to be exercised in accordance with principle. If one of the reasons for awarding exemplary damages is the punishment of the wrongdoer in an emphatic and public way, it is obviously

relevant to take into account the fact that this may already have been done or is likely to follow. Once exemplary damages are seen as supplementary to compensatory damages (an addition that may or may not be appropriate in the particular case) the fact that a plaintiff may lose them (or have them reduced by reference to the actions of others in the criminal courts) does no offence to reason. The primary judge's description of exemplary damages as discretionary was therefore correct.

98. As to the appellant's objection that, a discretion being established, the primary judge erred in exercising it solely by reference to the imprisonment of Mr Bransden, I cannot agree. The language used, as in *Watts v Leitch* [157] was consistent with a recognition that exemplary damages *might* be awarded but *should* not because of the substantial term of imprisonment to which the wrongdoer had been sentenced. No error was therefore shown on this issue in the approach of the primary judge or of the Full Court. It was open to Pirone DCJ to conclude that the imprisonment to which Mr Bransden was sentenced would adequately fulfil all of the purposes for which an award of exemplary damages in this case would otherwise have been appropriate.

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[157] [1973] Tas SR 16 at 23-24 .

The aggravated damages issue

99. Belatedly, the appellant sought to include in his claim for compensatory damages an additional element for aggravated damages, although this had not been pleaded or advanced at trial.

100. **Following paragraph cited by:**

State of New South Wales v Cuthbertson (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

State of New South Wales v Cuthbertson (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

The difficulty of distinguishing between aggravated damages and exemplary damages has been acknowledged by this Court [158] . To some extent compensatory, aggravated and exemplary damages overlap [159] . Thus, compensatory damages themselves may, to some degree, fulfil the purposes for which exemplary damages exist. These are ambiguous concepts [160] and, at least in part, anomalous[161]. However, it is clear that, by Australian law, compensatory damages may be enlarged to include a component for the aggravated circumstances in which a wrong to the plaintiff has occurred [162] . It is perhaps because of the lack of complete clarity of the differentiating features of aggravated damages [163] , and doubts as to what they involve, that legal practitioners often fail to claim them and persons wronged often fail to recover them. This is doubtless why it has been proposed that the "misleading phrase", aggravated damages, should be replaced by a specific component of

damages for mental distress[164]. The danger of double counting in the provision of aggravated damages is an ever present one [165] . The differentiation between "aggravated damages" and "exemplary damages" became more marked following *Rookes v Barnard* [166] . It assumes critical importance in those jurisdictions where exemplary damages, as such, have been abolished by statute.

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[158] *Uren v John Fairfax & Sons Pty Ltd* (1962) 117 CLR 118 at 149 per Windeyer J.

[159] *Watts v Leitch* [1973] Tas SR 16 at 23 ; *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 576 ; cf Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 196.

[160] Fleming, *The Law of Torts*, 9th ed (1998) at 274.

[161] See Stone, "Double Count and Double Talk: The End of Exemplary Damages?" (1972) 46 *Australian Law Journal* 311. Professor Stone points out (at 314) that there was an analogy in Roman law designed to buy off plaintiffs and to prevent them taking vengeance into their own hands: the award of quadruple losses (*furtum manifestum*). The re appear to be contemporary analogies, for example, in the legal systems of some countries whereby a financial settlement, acceptable to the family of a victim, may avoid or mitigate the criminal punishment of the perpetrator.

[162] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129-130, 149 ; *Justin v Associated Newspapers Ltd* (1966) 86 WN (Pt 1) (NSW) 17 at 42, 44; *Rigby v Associated Newspapers Ltd* (1966) 68 SR (NSW) 414 at 430-432, 438-439 .

[163] *Thompson v Commissioner of Police of the Metropolis* [1997] 3 WLR 403 at 414; [1997] 2 All ER 762 at 773.

[164] Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) at par 1.9.

[165] *Thompson v Commissioner of Police of the Metropolis* [1997] 3 WLR 403 at 414; [1997] 2 All ER 762 at 772 ; cf *Broome v Cassel & Co* [1972] AC 1027 at 1072 per Lord Hailsham of St Marylebone LC.

[166] [1964] AC 1129 .

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101. Aggravated damages are given for conduct which shocks the plaintiff and hurts his or her feelings. Exemplary damages are awarded for conduct which shocks the tribunal of fact, representing the community[167]. Obviously the two affronts will often coincide and overlap. But in awarding an additional element in the plaintiff's compensatory damages as aggravated damages for such affront, the attention of the decision-maker must be concentrated upon the impact which the wrong had on the plaintiff and the particular injury done to his or her feelings.

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[167] Fleming, *The Law of Torts*, 9th ed (1998) at 274; Salmond and Heuston, *Law of Torts*, 21st ed (1996) at 503.

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102. In England [168] and Canada [169] , authority exists that claims for exemplary damages do not need to be pleaded and, by analogy, the same might be said of aggravated damages, being within a claim for compensatory damages, generally expressed. In Australia, a stricter approach has been taken to the pleading of aggravated damages [170] . It was not argued that any special rule or practice of pleading in South Australia governed the question in this case. Whilst each case depends upon its own circumstances, basic principle requires that, if a particular claim has not been in issue, and a case fought on that basis, a party should not be obliged to meet such a claim for the first time on appeal where the conduct of its case might have been different if notice of the claim had been given before the trial [171] .

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[168] *Broome v Cassell & Co* [1972] AC 1027 at 1083. Lord Hailsham proposed that the issue be referred to the Rule Committee and pointed out that there was much to be said for the view that in such a case the defendant should not be taken by surprise. See now Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) at par 1.22.

[169] *Starkman v Delhi Court Ltd* (1961) 28 DLR (2d) 269 at 274 ; *Paragon Properties Ltd v Magna Envestments Ltd* (1972) 24 DLR (3d) 156 at 163-164 ; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981) at 690.

[170] *Cotogno v Lamb* (noted in (1985) 2 MVR 480). On this point see the unreported reasons for judgment: Court of Appeal of NSW, 9 August 1985 at 7-8 per Mahoney JA (McHugh JA concurring).

[171] *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 .

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103. The last consideration applies here. Had aggravated damages been sought by the appellant, the Commission's case could well have been different. It would have been entitled to explore, test and challenge suggestions of particular hurt to, and affront on the part of, the appellant. As it is, the appellant himself gave little evidence specifically, relevant to such questions. The differential entitlement to aggravated damages just seems to have been overlooked as it was at trial in *Cotogno v Lamb* and in many other cases before and since. To permit the matter to be ventilated for the first time in this Court would involve not only inefficiency and condonation of professional oversight. It would risk procedural unfairness to the Commission. Assuming that such damages were otherwise available to him, the appellant's belated application for an award of aggravated damages in the appeal should therefore be refused.

The economic loss issue

104. The foregoing analysis means that it was open to the primary judge and the Full Court to conclude that the appellant was not entitled to exemplary damages. Their reasoning on this issue was correct. To that extent, the appeal must be dismissed. However, there remains the appellant's complaint about the manifest inadequacy of the award of general damages for economic loss, past and future. Here, I consider that the appellant is on much stronger ground.

105. On the face of things, it might seem (as the Full Court observed) an unpromising case to reopen the primary judge's estimation of the economic impact of the injuries on the appellant. Pirone DCJ said that the appellant had made "an unfavourable impression"[172] upon him and, in several places in his reasons, that he did not believe him[173]. Because the assessment of the economic consequences of an injury, especially in a person who has served various periods of imprisonment, involves evaluation which is difficult and disputable at the best of times, the primary judge's estimate of someone in the position of the appellant is usually of first importance. In such matters, appellate courts exercise restraint out of their respect for the advantages which the trial judge enjoys over the appellate courts in the estimate of the credibility of witnesses [174] . Nevertheless, the exercise of such restraint does not necessarily mean that the appeal is "hopeless" or "doomed to failure" as the Full Court suggested[175]. Three features of Pirone DCJ's reasons provide the key to unlock the door of appellate intervention which would otherwise be closed by the stated assessments of the credibility of the appellant and his witnesses:

1. Pirone DCJ made it plain that he preferred the evidence of the appellant's medical witnesses, Dr Ingman and Mr Reid. He only rejected the latter's opinion that the appellant's short-term memory problem was causally related to the subject incident "[f]or reasons which I give later"[176]. When those reasons are examined they are, with respect, unconvincing. Most especially, they depended, in large part, upon the judge's examination of the appellant's school records. The judge quoted from three school reports[177]. He extracted teacher comments to the effect that the appellant was finding it difficult to cope, sometimes lacked concentration, required frequent supervision and encouragement and "constant reminders to return notes from home". From these brief comments by teachers about the appellant, the judge felt able to conclude, despite the unanimous medical opinion, that the appellant's shortterm memory problem was not related to the subject accident. He said that, in his opinion, it was "pre-existing and therefore not compensable". A fuller review of the school reports gives no objective foundation for this conclusion. In the case of a young Aboriginal student, who had been abandoned by his natural parents at birth and who was in a school with only one other Aboriginal where he was picked on, the school reports appear unremarkable. Woven through them are various positive comments about the appellant's friendliness, cooperative nature, improvement and effort to work to the level of his ability. To call the school records "appalling" as the Full Court did is unreasonable. To infer from them that the appellant was already stamped with a short-term memory problem appears completely unsafe. To allow them to reinforce an impression which, after injury, the appellant gave in the witness box involves suspect reasoning. It makes inadequate allowance for the fact that, objectively, the appellant had done reasonably well for himself, given his many

disadvantages. He had completed school. He had started college. He had secured employment and was performing it satisfactorily until injured by Mr Bransden's driving.

2. Although the foregoing might not, of themselves, be sufficient to permit an appellate court to substitute a different view on the appellant's credibility and prospects from that expressed by the primary judge, a passage in the reasoning of Pirone DCJ shows that the rejection of the appellant's credibility was not an opinion derived from the testimony of the appellant himself. Pirone DCJ indicates expressly that up to a point towards the end of the appellant's cross-examination "I had formed a favourable impression of him"[178]. What caused him to change was the evidence of the appellant's father, described as "totally inconsistent" with that of the appellant himself. Whilst it was open to the primary judge to be impressed by the appellant's father, the latter's testimony was quite limited, doubtless because of the absence of a long term relationship between them. It seems to have turned, in the mind of the trial judge, upon the appellant's assertion that he had given up drinking alcohol completely and his father's denial of that fact. Such a contradiction seems scarcely sufficient to warrant changing a "favourable" impression of the witness to one of complete disbelief of his testimony and rejection of his evidence.

3. When, in these circumstances, regard is also paid to the testimony of the medical witnesses whose evidence the primary judge said he generally accepted, the impact of the appellant's injuries on his employment capacity take on a different quality. Dr Ingman, for example, said that the appellant was restricted in work requiring squatting or bending, heavy lifting and carrying. He also said that he would work more slowly. These are disabilities of crucial importance to the employability of a young Aboriginal man with no more than school education, effectively with little more to sell in the employment market than his labour. The judge preferred his own estimate of the appellant's prospects in life for that of the two psychologists whose testimony he otherwise said he generally accepted. Very properly, he put his concerns about the school reports to one of the psychologists, Mr Walsh. Although the latter's answers are quoted in the judge's reasons, I do not derive from them any support for the proposition that they demonstrated the kind of defects of intellect and character which the judge thought effectively doomed the appellant to a life much the same as that which had unfolded after injury: long periods of unemployment, interrupted only by periods in prison. On the contrary, Mr Walsh stated that, having reviewed the school reports, his opinion would have been the same. There was no evidence from the latter of any pre-injury brain damage. Instead, there was evidence that the appellant was trying hard at school. His sporting prowess and early quest for employment bear out this conclusion. Whilst further, more detailed, examination of the school history, beyond the brief reports used by the primary judge, might have been useful, Mr Walsh said that he "would still be of the opinion that the problem that I have seen is one which is caused by brain dysfunction"[179], ie caused in large part in the subject accident. The provision of an allowance for future economic loss of an unskilled worker aged 23 at trial of only twice the sum provided for economic loss to the time to trial and amounting in all to only $30,000 appears on its face incongruous.

[172] *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 34.

[173] *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 18, 23, 24, 33, 34.

[174] See eg *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178 ; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 ; *Zuvela Pty Ltd v Cosmarnan Concrete Pty Ltd* (1996) 71 ALJR 29 at 31; 140 ALR 227 at 229-230 .

[175] *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 1.

[176] *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 3.

[177] *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 4-5, 32-33.

[178] *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 20.

[179] Cited by Pirone DCJ: *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 7.

106. The duty of the Full Court was to re-examine the complaints about the suggested serious inadequacy of the damages for economic loss, much as I have done [180] . The mention of estimates of credibility in the reasons of the primary judge does not insulate those reasons from proper analysis. When analysed, although correct on the issue of exemplary damages, they display serious errors in the treatment of past and future economic loss. It is not possible for this Court, which has not seen the appellant, to recalculate his damages. That must be done by a court which has those advantages but which does not engage in reasoning which, with respect, was seriously flawed.

[180] See *Warren v Coombes* (1979) 142 CLR 531 at 551.

Orders

107. I agree in the orders proposed by Gleeson CJ, McHugh, Gummow and Hayne JJ.

108. CALLINAN J. This is an appeal from the Full Court of the Supreme Court of South Australia dismissing an appeal from a judgment of Pirone DCJ of that State.

Proceedings at first instance

109. On 9 September 1988 the appellant, a young aboriginal man of 16 years, was walking across a street in Salisbury, South Australia when he was struck by a motor car deliberately driven at him by another man for whose actions the respondent statutory insurer is liable. The appellant suffered personal injuries in respect of which he claimed, and was awarded in the District Court of South Australia, damages of $72,206.

110. The driver of the motor car was convicted of the offence of causing grievous bodily harm with intent to do such harm as a result of the running down of the appellant. He was sentenced to a term of imprisonment of seven years to be served on the expiration of other sentences which he was serving at the time of trial. The trial judge found, indeed it was not contested, that the driver acted maliciously.

111. After reviewing a number of cases and rejecting a submission by the respondent that exemplary damages were not available against a statutory insurer such as the respondent, the primary judge resolved to apply a decision of Nettlefold J in *Watts v Leitch* [181] in which the latter said:

> "The court has a discretion to award or refrain from awarding exemplary damages. This discretion must be exercised judicially and after a consideration of all the relevant evidence.
>
> The fact that the defendant was fined in the Criminal Court must be taken into account when considering the question of exemplary damages."

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[181] [1973] Tas SR 16 at 20.

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112. In view of the punishment already imposed upon the driver, Pirone DCJ dismissed the claim for exemplary damages, saying, in doing so, that, had he been minded to make an award of them, $10,000 would have been the appropriate measure.

The appeal to the Full Court

113. The appellant appealed to the Full Court of the Supreme Court of South Australia on a number of grounds all of which failed. On the question whether exemplary damages should have been awarded Millhouse J, (with whom Bollen and Williams JJ agreed) said this:

> "The only other matter is exemplary damages. Mr Stratford conceded that on the authority of *Lamb v Cotogno* [182] exemplary damages could have been awarded. It was a matter of discretion. He referred to the third edition of Luntz, *Assessment of Damages* in which the learned author, on the authority of *Watts v*

Leitch [183] says that where a defendant has pleaded guilty to a criminal charge arising out of an incident in which a plaintiff was injured and been sentenced, there should be no exemplary damages, 'since the defendant had already been punished.' Just the situation here. The learned judge was aware of his discretion to award exemplary damages and chose not to exercise it in favour of the appellant. There is no reason why we should interfere."

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[182] (1987) 164 CLR 1 at 9.

[183] [1973] Tas SR 16 .

The appeal to this Court

114. The grounds of appeal to this Court are as follows:

1. The Full Court was in error in failing to find that the appellant was entitled to exemplary damages in circumstances when he had suffered injuries intentionally inflicted by the use of a motor vehicle and in particular misapplied the principles relating to exemplary damages enunciated by the High Court in *Lamb v Cotogno* and in particular was in error in purporting to apply a decision of a single judge of the Tasmanian Supreme Court in *Watts v Leitch* in the context of punishment already suffered by the tortfeasor when assessing exemplary damages.

2. The Full Court was in error in failing to increase the damages for future economic loss to which the appellant was entitled when the amount awarded at first instance of $30,000 was to compensate a 23 year old man for the rest of his working life when his disabilities of both legs and the effect of a close head injury sustained when he was 16 years of age were significant and severe.

3. The Full Court was in error in its decision by accepting the trial judge's finding that the head injury was significant and severe and the injuries to his legs gave rise to a permanent disability of 10 per cent loss of use of the right leg and 5 per cent loss of use of the left leg and then proceeding, without warrant to find there was little permanent disability.

4. The Full Court failed to rectify the error made by the learned trial judge in placing great weight on the content of the appellant's school reports of his two years' secondary school when assessing his loss of earning capacity.

115. Ground 1 does not directly raise the question of the role (if any) that exemplary damages should play in this country in the law of damages for which a statutory insurer is responsible

but may call for some consideration of the application of *Lamb v Cotogno* [184] in the context of the South Australian motor vehicles insurance legislation.

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[184] (1987) 164 CLR 1 .

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116. The notion that compensation is to be assessed by an independent tribunal appointed and maintained by the state, according, and confined to the damage and loss actually sustained by a victim, evolved with the advance of civilisation over time. Private vengeance, of which the Sicilian vendetta is one example, was widespread until comparatively recent times[185].

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[185] In early Roman law there existed the possibility of avoiding retaliation by agreement, to pay compensation. Provision for compensation was made by the Twelve Tables, which were wooden (and bronze) tablets erected in the market place in Rome in 451-450BC. One of their provisions allowed retaliation to be avoided by agreement. The relevant provision has been translated:

> "If one person maim another, let there be retaliation unless they come to an agreement" (see Thomas, *Textbook of Roman Law*, (1976) at 349.)

In Justinian's Institutes, further reference can be found.

> "Under the Twelve Tables the penalty for this delict was, for a damaged limb, retaliation; and for a broken bone a sum of money appropriate to the great poverty of the people of those times. Later the praetors began to allow victims to put their own value on the wrong. … The penalties of the Twelve Tables have fallen into disuse, while the praetors' system – also called the honorarian – is frequently applied in the courts. The valuation of contempts rises and falls according to the victim's social standing and honour." (Book IV Title 4 from the translation by Birks and McLeod, *Justinian's Institutes* (1987) at 127.)

The Roman law delicts retained until the very end a punitive character, requiring the wrongdoer to pay more than compensation (see Nicholas, *An Introduction to Roman Law*, (1962) at 208).

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117. As Kirby P points out in *Cotogno v Lamb [No 3]* [186] , punitive damages may have originated in England in an attempt by the courts to stamp out duelling.

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[186] (1986) 5 NSWLR 559 at 567. See also Lord Diplock in *Cassell v Broome* [1972] AC 1027 at 1127.

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118. Modern civil law systems do not recognise exemplary damages. In Scotland, the leading case is *Black v North British Railway Co* [187] . Lord President Dunedin said there was:

> "… no authority for any distinction between damages and 'exemplary damages' in the law of Scotland. The very heading under which it is treated in our older books 'Reparation' excludes the idea." [188]

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[187] 1908 SC 444 .

[188] 1908 SC 444 at 453.

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119. Similarly, neither French[189] nor German[190] law recognises the concept of exemplary damages.

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[189] Article 1382 of the French Civil Code contains a general principle of liability to compensate for "damage" occasioned by fault. The availability, however of *dommages moraux* has been rationalised as being punitive in nature: see for example Savatier, *Theori e des obligations*, 3rd ed (1974).

[190] Markesinis, *A Comparative Introduction to the German Law of Torts*, 3rd ed (1994) at 921.

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120. In all but limited categories of cases, the House of Lords in *Rookes v Barnard* abolished punitive or exemplary damages [191] .

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[191] [1964] AC 1129 at 1226-1227 . The three categories in which exemplary damages were held to be available are (i) oppressive, arbitrary or unconstitutional action by servants of the government; (ii) wrongdoing which is calculated to make a profit; (iii) express authorisation by statute.

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121. The decision in *Rookes v Barnard* was not greeted with universal approval by text writers[192] , courts of other jurisdictions [193] , and all judges in the United Kingdom [194] .

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[192] See for example Tilbury, "Factors Inflating Damages Awards" in Finn (ed) *Essays on Damages*, (1992) at 104, where the author refers to the "irrationality" of the Devlin categories.

[193] In Canada, see *Vorvis v Insurance Corporation of British Colombia* (1989) 58 DLR (4th) 193; in Nigeria, see *Eliochin (Nig) Ltd v Mbadiwe* (1986) NWLR (Pt 14) 47 (on appeal to the Supreme Court); New Zealand, *Taylor v Beere* [1982] 1 NZLR 81; Ireland, *Conway v Irish National Teachers Organisation* [1991] ILRM 497.

[194] See *Cassell v Broome* [1972] AC 1027 at 1114, 1119.

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122. In the landmark decision of *Uren v John Fairfax & Sons Pty Ltd* [195] , signalling an intention of this Court to depart whenever it might be thought appropriate to do so from decisions of the House of Lords, the High Court decided not to follow or apply *Rookes v Barnard* [196] :

> "Upon full consideration, I do not think that the decision of the House of Lords [in *Rookes v Barnard*] should force this Court to conclude that the law here is other than what it has for so long been taken to be, viz. that where an action is based upon a personal wrong and the defendant has acted arrogantly, mindful only of its own interests and, to use the phrase of Knox CJ, 'in contumelious disregard' of the rights of the plaintiff, 'damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner' for his outrageous conduct [197] ."

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[195] (1966) 117 CLR 118 .

[196] (1966) 117 CLR 118 at 147 per Menzies J.

[197] See *Finlay v Chirney* (1888) 20 QBD 494 at 504 per Bowen LJ.

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123. In the United Kingdom itself there was division of opinion with respect to the theory and utility of exemplary damages. In *Cassell v Broome* , a case in which exemplary damages were claimed on the basis that a defamatory publication was calculated to make a profit for a publisher in excess of any compensatory damages that might be awarded, Lord Reid said [198] :

> "It [the concept of exemplary damages] is confusing the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties."

By contrast, Lord Wilberforce said [199] :

> "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 …

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 … ."

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[198] [1972] AC 1027 at 1086.

[199] [1972] AC 1027 at 1114.

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124. Defamation cases, in which exemplary damages may turn out to be one of the only effective means of checking excesses of increasing and concentrated media power, and perhaps indispensable for that reason, provide the most frequent occasions for an award of them [200] . As the majority of the Court of Appeal of New Zealand in *Daniels v Thompson* [201] said:

> "Exemplary damages may fulfil a useful role in helping to control deplorable conduct outside the reach of the criminal law, such as in the area of defamation [202] ."

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[200] In New South Wales, exemplary damages for defamation were abolished by the *Defamation Act* 1974 (NSW) s 46(3)(a) . There is a serious question whether juries, well aware of and anxious to show their disapprobation of the abuse of media power, may not simply have proceeded to award exemplary damages under the guise of aggravated compensatory damages. It is difficult otherwise to understand the magnitude of the awards of $600,000 in *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44 and, on the retrial of the case, before a second jury of $1.3m (see *Carson v John Fairfax and Sons Ltd*, unreported, Supreme Court of New South Wales, 6 May 1994, Levine J). As Viscount Radcliffe PC, GBE said:

> "A man may glitter with new and valuable ideas or burn with wise thoughts or passionate feelings, but if he is to communicate them to any circle wider than that of his own immediate friends he has got to render them acceptable to the real licensors of thought today, the editors, the publishers, the producers, the controllers of radio and television." ("Censors", The Rede Lecture at Cambridge University, 4 May 1961, in Lord Radcliffe, *Not in Feather Beds: Some Collected Papers*, (1968) at 162.)
>
> See also Lewis, *Make No Law: The Sullivan Case and the First Amendment*, (1991) at 207:
>
> "Television is even more of an oracle. Its pervasive reach has made national eminences of the network anchor men and women and the top reporters. To the public, that looks like power – and power sometimes exercised in an unaccountable, even arrogant way. The networks, big newspapers and magazines

ask questions and demand answers but when anyone wants to know about their business, they wrap themselves in the First Amendment and refuse to answer. So it often appears to the public."

Exemplary damages have also been abolished in running down cases and master and servant cases by the ***Motor Accidents Act*** 1988 (NSW) s 81A , *Workers Compensation Act* 1987 (NSW) s 151R , *Motor Accident Insurance Act* 1994 (Qld) s 55 , *Accident Compensation Act* 1985 (Vic) s 135A(7)(c) and the *Transport Accident Act* 1986 (Vic) s 93(7) .

[201] [1998] 3 NZLR 22 at 43.

[202] *Taylor v Beere* [1982] 1 NZLR 81 at 90 per Richardson J.

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125. In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* [203] , Brennan J discussed the modern rationale for exemplary damages:

"As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In *Merest v Harvey* [204] substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, Gibbs CJ saying:

'I wish to know, in a case where a man disregards every principal which actuates the conduct of gentlemen, what is to restrain him except large damages?'

The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in *Broome v Cassell & Co* [205] , 'to teach a wrong-doer that tort does not pay'."

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[203] (1985) 155 CLR 448 at 471.

[204] (1814) 5 Taunt 442 [128 ER 761].

[205] [1972] AC at 1027 at 1130.

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126. Discussing this case in *Lamb v Cotogno* [206] , Mason CJ, Brennan, Deane, Dawson and Gaudron JJ said:

"It was argued on behalf of the defendant that, since the object of exemplary damages is to punish and deter, it is inappropriate that they should be awarded where the wrongdoer is insured under a scheme of compulsory insurance against

liability to pay them. Clearly there is strength in that submission, but in our view it cannot succeed. The object, or at least the effect, of exemplary damages is not wholly punishment and the deterrence which is intended extends beyond the actual wrongdoer and the exact nature of his wrongdoing [207] . It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace [208] . This consideration probably had more force when exemplary damages were in their infancy, but it nevertheless remains as an aspect of them. It should, perhaps, be interpolated that exemplary or punitive damages are not without their critics who assert generally that they are both anachronistic and anomalous[209]. They nevertheless remain as part of the law. When exemplary damages are awarded in order that a defendant shall not profit from his wrongdoing or even where they are described as a windfall to the plaintiff – a description which the plaintiff is unlikely to accept – the element of appeasement, if not compensation, is none the less present.

So far as the object of deterrence is concerned, not only does it extend beyond the defendant himself to other like-minded persons, but it also extends generally to conduct of the same reprehensible kind. Whilst an award of exemplary damages against a compulsorily insured motorist may have a limited deterrent effect upon him or upon other motorists also compulsorily insured, the deterrent effect is undiminished for those minded to engage in conduct of a similar nature which does not involve the use of a motor vehicle."

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[206] (1987) 164 CLR 1 at 9-10 .

[207] See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 138 ; Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed (1983) at 66-67; Street, *Principles of the Law of Damages*, (1962) at 33-34; cf *Costi v Minister of Education* (1973) 5 SASR 328.

[208] cf *Merest v Harvey* (1814) 5 Taunt 442 [128 ER 761].

[209] See, generally, Street, *Principles of the Law of Damages*, (1962) at 33-35.

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127. Whilst the element of appeasement may be of considerable importance, with respect, for myself, I would doubt whether an award of exemplary damages payable by a statutory insurer of motor vehicle drivers, would be likely to have any deterrent effect upon those who might be minded to engage in conduct of a similar nature not involving the use of a motor vehicle.

128. In the New South Wales Court of Appeal in *Cotogno v Lamb [No 3]* [210] , Kirby P wrote a powerful dissenting judgment in which his Honour said:

"Exemplary damages have been awarded in cases of trespass to the person [211] . It is therefore necessary to approach the present case on the basis that, under the

common law, as applied in Australia, exemplary damages are generally available to the plaintiff suing, as the appellant did, in trespass unless the preconditions for an award of such damages are not made out, a defence is established disentitling the plaintiff or a statute sufficiently indicates the exclusion of the application of exemplary damages in the circumstances of the case."

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[210] (1986) 5 NSWLR 559 at 568.

[211] *Johnstone v Stewart* [1968] SASR 142; *Pearce v Hallett* [1969] SASR 423.

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129. Kirby P went on to say [212] :

"… I am of the opinion that exemplary damages are inappropriate and are not available in cases where the action concerns the death of or bodily injury to a person caused by or arising out of the use of an insured motor vehicle within the meaning of the Act. This conclusion is not inconsistent with the authority of the High Court or of this Court, on the subject of exemplary damages. The precise issue raised in this case has not previously been authoritatively determined. Its determination as I have proposed would at once effect the legislative scheme for compulsory third party insurance in motor vehicle cases, leave untouched the general law on exemplary damages, including in cases of trespass to the person, limit in an acceptable way the availability of anomalous exemplary damages, and avoid the absurd result of levying motorists generally by a derisory amount for the 'punishment or deterrence' to be inflicted on a motorist such as the respondent. Furthermore, it would recognise that the basic social purposes served by exemplary damages are to impose punishment or deterrence on a person whose conduct in the future is likely to be modified by the award of exemplary damages against him and to deter members of the public tempted to act in a like manner by the effective public denunciation and punishment of unacceptable behaviour. An award such as is here proposed can fulfil none of these purposes."

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[212] (1986) 5 NSWLR 559 at 570-571 .

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130. There is much force in his Honour's observations. I would, with respect for myself, have been minded to adopt and apply his Honour's reasoning if I were free to do so because in my opinion the punitive purpose of exemplary damages is overwhelmingly the predominant purpose. But *Lamb v Cotogno* [213] is a recent unanimous decision of five Justices of this Court. Furthermore, I think that the statutory scheme here is a quite different one from that under consideration in *Lamb v Cotogno* , and, in my view this aspect of the case depends for its resolution upon the terms of the particular South Australian statute pursuant to which the damages are recoverable, the *Motor Vehicles Act* 1959 (SA) . It is therefore neither necessary

nor appropriate to deal with the belated application by the respondent for leave to argue that *La mb v Cotogno* should be reconsidered.

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[213] (1987) 164 CLR 1 . See also *Kars v Kars* (1996) 187 CLR 354 at 378-382 per Toohey, McHugh, Gummow and Kirby JJ in which their Honours accepted that there will inevitably be anomalies in the assessment and awarding of damages in cases in which the wrongdoer is insured: especially will this be so where the insured is covered under a scheme of compulsory insurance.

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131. There have been amendments made to the Act since the appellant was injured. It was common ground that the case and the appeals fell to be decided under the provisions in force at the time of the running down of the appellant and this appears to be so[214].

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[214] See s 19 of the *Statutes Amendment (Motor Vehicles and Wrongs) Act* 1993 (SA):

> "The amendments made by this Act do not affect a cause of action, right or liability that arose before the commencement of this Act."

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132. Section 102 imposed on drivers an obligation to drive only insured motor vehicles on a road or wharf.

133. Section 107 provided as follows:

> "Notwithstanding any enactment, an insurer under a policy of insurance (whether under this Part or otherwise) in relation to a motor vehicle is, as from the date of the policy, liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover."

134. Section 112 was in these terms:

> "Where-
>
> *(a)* a person has obtained judgment in an action against an insured person for death or bodily injury caused by, or arising out of the use of, an insured motor vehicle;
>
> and
>
> *(b)* before the action came on for hearing the insurer knew that the action had been commenced,

the judgment creditor may recover by action from the insurer such amount of the money (including costs or a proportionate part of those costs) payable pursuant to the judgment as relates to death or bodily injury and has not been paid."

135. It seems to me that exemplary damages awarded to a person who has suffered bodily injury as a result of high handed [215] or malicious conduct prima facie may be said to "relate" to bodily injury within the meaning of s 112.

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[215] See Kirby P in *Cotogno v Lamb [No 3]* (1986) 5 NSWLR 559 at 574-575 .

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136. Section 124 required that the owner, person in charge, or driver of a motor vehicle involved in an accident give notice of particulars of it.

137. Section 124A made provision for recovery by the statutory insurer of damages for death or bodily injury caused when an insured has contravened the term of the policy or has driven the vehicle under the influence of a drug or alcohol:

> "(1) Where an insured person incurs a liability against which he or she is insured under this Part and the insured person has contravened or failed to comply with a term of the policy of insurance-
>
> *(a)* by driving a motor vehicle while so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle;
>
> or
>
> *(b)* by driving a motor vehicle while there is present in his or her blood a concentration of .15 grams or more of alcohol in 100 millilitres of blood,
>
> the insurer may, by action in a court of competent jurisdiction, recover from the insured person any money paid or costs incurred by the insurer in respect of that liability.
>
> (2) Where an insured person incurs a liability against which he or she is insured under this Part and the insured person has, to the prejudice of the insurer-
>
> *(a)* contravened or failed to comply with a term of the policy of insurance other than one referred to in subsection (1);
>
> or
>
> *(b)* contravened or failed to comply with-
>
> (i) a requirement of section 124;

or

(ii) a provision of section 126,

the insurer may, by action in a court of competent jurisdiction, recover from the insured person so much of the money paid or costs incurred by the insurer in respect of that liability as the court thinks just and reasonable in the circumstances."

138. In this case the insurer chose to be joined as a defendant in the action pursuant to s 125A :

"(1) Where an action for damages or other compensation has been commenced in a court against an insured person in respect of death or bodily injury resulting from the use of a motor vehicle, the court may, on the application of the insurer, join it as a defendant to the action.

(2) The court may not join an insurer as a defendant to an action under subsection (1) unless the court is of the opinion that-

(a) there is an actual or potential conflict of interest between the insurer and the insured in relation to the presentation of the defence;

and

(b) the defence proposed by the insurer in relation to which the actual or potential conflict of interest arises is, in the circumstances of the case, not merely speculative.

(3) Where, in pursuance of this section, an insurer has been joined as a defendant to an action-

(a) the insurer will be taken to have directly assumed the liability (if any) of the insured person upon the claim in respect of death or bodily injury and, where such a liability is found to exist, judgment upon that claim shall be given not against the insured person but against the insurer;

(b) the insured person remains a party to the action only for the purposes of-

(i) defending a claim that is not a claim in respect of death or bodily injury;

or

(ii) proceeding upon a counterclaim,

and where there is no such claim or counterclaim, the insured person ceases to be a party to the action;

(c) the insured person may not be joined as a third party to the action;

(d) the insured person is, notwithstanding paragraphs *(b)* and *(c)*, entitled to be heard in the proceedings upon any question related to the claim in respect of death or bodily injury;

(e) for the purpose referred to in paragraph *(d)*, the insured person is entitled to be represented by counsel of his or her own choice, and the insured person's costs must be paid by the insurer unless, in the opinion of the court, there are special reasons for ordering otherwise;

and

(f) the insurer may apply to call the insured person to give evidence and, in that event, the person will be called, or summoned to appear, as a witness and be liable to cross-examination by the insurer.

(4) No judgment or finding of a court in proceedings in which an insurer has been joined as a defendant under this section is binding in subsequent proceedings against the insured person under section 124A ."

139. The language of s 125A(3)(a) is very wide. Here there was no doubt that the insured was potentially liable to pay exemplary damages. That liability was, in my opinion, a liability "upon [a] claim in respect of …bodily injury" within the meaning of s 125A(3)(a) .

140. Unlike some other States, South Australia has not enacted legislation expressly exempting statutory motor vehicle insurers from liability for exemplary damages[216].

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[216] See for example the following provisions:

Section 81A of the *Motor Accidents Act* 1988 (NSW) :

"A court shall not award exemplary or punitive damages to a person in respect of a motor accident".

Section 55 of the *Motor Accident Insurance Act* 1994 (Qld) :

"(1) No award of exemplary or punitive damages may be made against an insurer on a motor vehicle accident claim.

(2) However, if the court is of the opinion that the conduct of an insured person is so reprehensible that an award of exemplary or punitive damages is justified, the court may give a separate judgment against the insured person for the payment of exemplary or punitive damages.

(3) An insured person is not entitled, under a CTP insurance policy, to an indemnity against an award of exemplary or punitive damages."

See also ***Workers Compensation Act*** 1987 (NSW) s 151R ; *Accident Compensation Act* 1985 (Vic) s 135A(7)(c) ; *Transport Accident Act* 1986 (Vic) s 93(7) .

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141. Accordingly, on the proper construction of the *Motor Vehicles Act* 1959 (SA) , in my opinion if the appellant had been able to make out a case for exemplary damages, he would have been entitled to recover them from the respondent statutory insurer and the fact that they are to be paid by a statutory insurer becomes irrelevant as a discretionary consideration. The insurer was, by the Act, placed in no better or worse a position than the driver with respect to any liability for exemplary damages. A court should therefore look at the conduct of the insured and matters peculiar to him or her and the plaintiff, and not the ultimate liability of the statutory insurer in deciding whether exemplary damages should be awarded.

142. At first instance Pirone DCJ thought that the fact that the defendant motorist had been punished in the Criminal Court was the decisive discretionary consideration against an award of exemplary damages.

143. The fact of the imposition of punishment and its extent and impact on the defendant will always be relevant factors, probably on most occasions the major and decisive factors [217] . They may not however be conclusive ones for all cases. Other matters will require consideration: for example, the likelihood or otherwise of criminal proceedings in a particular case, the existence and effect of any victims compensation legislation, [218] the nature of the conduct of the defendant, the extent to which the plaintiff may be entitled to be appeased, and would benefit from being appeased, the means of the defendant, the deterrent effect upon the defendant, any profit derived by the defendant from the wrongdoing and the deterrent effect upon the potential wrongdoing community generally. A court would also be entitled to take into account that lesser punishments may have been, or might be imposed as a consequence of the acceptance of a lesser plea, the availability (for what might be sound policy reasons in and for the purposes of the criminal law) of a small penalty only, the desirability of the less condemnatory process by way of civil rather than criminal proceedings, the need to encourage compliance with the law[219], and the fact that the possibility of any criminal sanction is illusory [220] . These matters are in my view relevant whether the cause of action is in trespass or negligence, although in the latter, particularly in accidental running down cases, occasions for an award of exemplary damages are likely to be extremely rare indeed [221] .

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[217] cf *A B v South West Water Services Ltd* [1993] QB 507 at 527 per Stuart Smith LJ:

> "In the present case there is the further complication to which I have already referred of the conviction and fine of the defendants. These problems persuade me that there would be a serious risk of injustice to the defendants in this case if an award of exemplary damages were to be made against them."

[218] For example *Criminal Injuries Compensation Act* 1978 (SA) .

[219] See Law Commission Consultation Paper No 132, *Aggravated, Exemplary and Restitutionary Damages*, (1993) at 114-127; Law Commission Report No 247, *Aggravate d, Exemplary and Restitutionary Damages*, (1997) at 96-97.

[220] See *Defamation Act* 1889 (Qld) s 34 which operates to require a prior order of the Supreme Court for a defamation prosecution.

[221] In *Daniels v Thompson* [1998] 3 NZLR 22, the Court of Appeal of New Zealand by a majority took the view that there should be an absolute bar on exemplary damages when criminal proceedings have been instituted and whether a conviction or an acquittal has resulted. Thomas J (dissenting), whilst accepting that an award of exemplary damages would be exceptional when criminal proceedings have been taken was opposed to the absolute rules proposed by the majority.

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144. The trial judge here did make a provisional assessment of exemplary damages of $10,000 taking the relevant factors into account. However his Honour exercised the power which was undoubtedly available to him not to award any sum under this head of damages because of the criminal penalties imposed on the defendant. The Full Court did not think that the trial judge fell into error in doing so and nor do I.

145. The appellant was given general leave to appeal. His counsel launched an attack upon the trial judge's award of damages for future economic loss assessed at $30,000. The three principal bases for the attack were that his Honour misused, or in some way misunderstood the school reports on the appellant tendered in evidence; that his Honour overlooked or gave insufficient weight to the fact that the appellant was in employment at the time of his injury; and, that on its face, the sum of $30,000 is so grossly and manifestly inadequate as to call for increase.

146. These arguments were apparently pressed and rejected on the appeal to the Full Court.

147. It is now submitted that the Full Court fell into error in not accepting these submissions and in two other respects:

(i) by making a significant factual error in holding that there was "little permanent disability"; and,

(ii) in not discharging its entire appellate jurisdiction to consider whether there was a "wholly erroneous estimate of the damages": *Precision Plastics Pty Ltd v Demir* [222] .

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[222] (1975) 132 CLR 362 at 369.

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148. It was also said that there was an inexplicable disproportion between the award for pre-trial loss of earning capacity ($15,000) for a period of 6.75 years (9 August 1988 to 28 June 1995) and $30,000 for the rest of the appellant's life. The appellant's counsel pointed out that it was proved that the appellant was in fact earning $250 per week (net) when he was injured.

149. In my view, the primary judge and the Full Court in reviewing his Honour's assessment of damages for future economic loss did fall into error in three respects even though from the

school reports the appellant's pre-injury future looked unpromising: in treating the report cards as if they were indicative of an almost complete lack of earning capacity on the part of the appellant, despite the short periods that they covered and the appellant's age when they were made; by awarding an amount which is manifestly inadequate to compensate a relatively seriously injured young man without skills and entirely dependent upon his physical capacity to pursue remunerative employment; and, in failing to give weight to the relevant consideration that the appellant was in paid employment, albeit of limited duration when he was struck by the defendant's motor vehicle. Any impression of inadequacy is heightened by the obvious disparity between the amounts assessed for past and future economic loss.

150. The appellant tried to mount an argument that he was entitled to recover but had not been awarded aggravated damages. A claim for these was neither pleaded nor pursued in the courts below. Such a claim requires specific pleading, particulars and evidence directed to it. For these reasons the Court should not entertain this argument.

151. I would allow the appeal with costs and substitute for the orders of the Full Court an order that the matter be remitted to the District Court for a retrial confined to the issue of general damages for future economic loss. The respondent should also pay the appellant's costs of the appeal to the Full Court and I would order accordingly.

Cited by:

FitzGerald v Foxes Lane (NSW) Pty Ltd [2025] NSWCA 212 -
Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

27. In the later case of *State of New South Wales v Riley* , Hodgson JA stated to similar effect:

> In my opinion, as made clear in *Gray* , while "conscious wrongdoing in contumelious disregard of another's rights" describes the greater part of the field in which exemplary damages may properly be awarded, it does not fully cover that field. Similarly, malice is not essential: *Lamb v Cotogno* . Conduct may be high-handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrong-doing. However, ordinarily conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express the court's disapproval or (in cases where the defendant stood to gain more than the plaintiff lost) demonstrate that wrongful conduct should not be to the advantage of the wrong-doer. [22]

Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

Ali v Hartley Poynton Limited [2002] VSC 113, *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, *Binsaris & Ors v Northern Territory of Australia* (2020) 270 CLR 549, *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349, *Byrnes v The Queen* (1999) 199 CLR 1, *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 , *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, *Cheng v Farjudi* (2016) 93 NSWLR 95, *Fontin v Katapodis* (1962) 108 CLR 177, *Fox v Percy* (2003) 214 CLR 118, *Gipp v The Queen* (1998) 194 CLR 106, *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, *Gray v Motor Accident Commission* (1998) 196 CLR 1 , *Grierson v The King* (1938) 60 CLR 431 , *Harvard Nominees Pty Ltd v Tiller (No 4)* [2022] FCA 105, *Henry v Thompson* [1989] 2 Qd R 412, *House*

v The King (1936) 55 CLR 499, *JB & Ors v Northern Territory of Australia* [2019] NTCA 1, *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 , *Lackersteen v Jones* (1988) 92 FLR 6, *Lamb v Cotogno* (1987) 164 CLR 1, *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324, *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, *New South Wales v Ibbett* (2006) 229 CLR 638, *New South Wales v Ibbett* (2005) 65 NSWLR 168, *Pollack v Volpato* [1973] 1 NSWLR 653, *State of New South Wales v Riley* (2003) 57 NSWLR 496, *Sweeney v Fitzhardinge* (1906) 4 CLR 716, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, *Victoria v Horvath* (2002) 6 VR 326, *Warren v Coombes* (1979) 142 CLR 531, *White & Ors v South Australia* (2010) 106 SASR 521, referred to.

Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 (28 March 2025) (Kirk, Adamson and Ball JJA)

193. At trial, Mr Rock had claimed between $15,000 and $20,000 general damages, between $2,500 and $5,000 aggravated damages and between $5,000 and $10,000 exemplary damages. As Windeyer J explained in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149; [1966] HCA 40, in a passage which was referred to with approval by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Gray v Motor Accident Commission* (1998) 196 CLR 1, [1998] HCA 70 at [6] :

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

Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

72. The evidence did not reveal "conscious wrongdoing in contumelious disregard" of the respondents' rights on the part of the officers of the appellant. It may be accepted that there are some circumstances in which an award of exemplary damages will be appropriate even if the officer was not "conscious" of his or her wrongdoing. [44] The reasons in *Gray* and *Lamb v Cotogno* allow that "conscious wrongdoing" is a usual but not essential condition to the award of exemplary damages. Although the state of mind of the individual actor will always be relevant, exemplary damages may also be awarded "where the defendant has acted in a high-handed fashion or with malice", even in the absence of a specific consciousness of wrongdoing. [45] That is also reflected in what Hodgson JA said in the passage from *Riley* which has been extracted above, to the effect that conduct may be high-handed, outrageous and show contempt for the rights of others even if it is not malicious or even conscious wrongdoing.

Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

26. Although the question at issue in *Gray* was whether exemplary damages should be awarded in circumstances where the criminal law had already been brought to bear on the defendant and substantial punishment inflicted, the principles expressed in the foregoing passage are of general application. As that passage implicitly recognises, it is not necessary for a person who has been subjected to an actionable wrong to establish that the tortfeasor acted with malice before an award of exemplary damages may be made. Although conscious wrongdoing and contumelious disregard form the ground on which damages of that type are ordinarily awarded, in *Lamb v Cotogno* the High Court stated:

> [T]he absence of actual malice does not disentitle the plaintiff to exemplary damages. Whilst there can be no malice without intent, the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word. [21]

Northern Territory of Australia v Austral [2025] NTCA 3 -
Northern Territory of Australia v Austral [2025] NTCA 3 -
Northern Territory of Australia v Austral [2025] NTCA 3 -
Northern Territory of Australia v Austral [2025] NTCA 3 -
State of New South Wales v JR; State of New South Wales v Dickens; State of New South Wales v Jensen [2024] NSWCA 308 (20 December 2024) (Gleeson, White and Stern JJA)

> *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47; *State of New South Wales v Riley* (2003) 57 NSWLR 496; [2003] NSWCA 208; *Gray v Motor Accidents Commission* (1998) 196 CLR 1; [1998] HCA 70 ; *State of New South Wales v Madden* (2024) 113 NSWLR 509; [2024] NSWCA 40, considered.

State of New South Wales v JR; State of New South Wales v Dickens; State of New South Wales v Jensen [2024] NSWCA 308 (20 December 2024) (Gleeson, White and Stern JJA)

227. Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future, and to reflect "detestation" for the action: *Lamb v Cotogno* at 8. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v Motor Accidents Commission* (1998) 196 CLR 1; [1998] HCA 70 at [14] .

State of New South Wales v JR; State of New South Wales v Dickens; State of New South Wales v Jensen [2024] NSWCA 308 -
Bird v DP (a pseudonym) [2024] HCA 41 -
Willmot v Queensland [2024] HCA 42 -
Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 (08 November 2024) (Beach and Orr JJA; J Forrest AJA)

238. The decision of the High Court in *Uren* was appealed to the Privy Council. In dismissing the appeal from the High Court, the Privy Council, in approving a passage in *Mayne & McGregor on Damages*,[79] said that exemplary damages:

> can apply only where the conduct of the defendant merits punishment which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights. [80]

via

[80] *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221, 237 (Lord Morris of Borth-y-Gest for the Court). See also *Lamb v Cotogno* (1987) 164 CLR 1, 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); [1987] HCA 47 ; *Gray v Motor Accident Commission* (1998) 196 CLR 1, 5–9 [8]–[20] (Gleeson CJ, McHugh, Gummow and Hayne JJ); [1998] HCA 70 (' *Gray*').

Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 (08 November 2024) (Beach and Orr JJA; J Forrest AJA)

239. An award of exemplary damages, as can be seen, focuses on the defendant's conduct, and not upon the plaintiff who was wronged. [81]

via

[81] *Gray* (1998) 196 CLR 1, 7 [15] (Gleeson CJ, McHugh, Gummow and Hayne JJ); [1998] HCA 70 .

Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 -
Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 -
Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 -
Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 -
Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 -
Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 -
State of New South Wales v Madden [2024] NSWCA 40 -
State of New South Wales v Madden [2024] NSWCA 40 -
State of New South Wales v Madden [2024] NSWCA 40 -
State of New South Wales v Madden [2024] NSWCA 40 -
Care A2 Plus Pty Ltd v Pichardo [2024] NSWCA 35 (22 February 2024) (Bell CJ, Stern JA and Basten AJA)

131. In *Hill v James* [2004] NSWSC 55 at [280] , Bergin J observed that:

> "Essential elements of the tort of deceit include the falsity of the representation, the defendant's knowledge that the representation is false and the defendant's intention that the plaintiff will rely upon or be induced to act upon the false representation. This kind of conduct, essential for the proof of the tort, may fit within the descriptions of the type of conduct that has been found to warrant the award of exemplary damages – 'contumelious disregard for the plaintiff's rights', 'conscious wrongdoing'", 'high-handed' and 'reprehensible': *Gray v Motor Accident Commission* (1998) 196 CLR 1 ; *Lamb v Cotogno* (1987) 164 CLR 1."

Jay v Petrikas [2023] NSWCA 297 (12 December 2023) (Payne, Kirk and Griffiths JJA)

165. As to exemplary damages, the appellants have failed to identify any error in the primary judge's brief description of some of the relevant principles at PJ[687]:

> Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future, and to reflect "detestation" for the action: *Lamb v Cotogno* (1987) 164 CLR 1 at 8. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v Motor Accidents Commission* (1998) 196 CLR 1 at [14] ; *State of New South Wales v Abed* [2014] NSWCA 419 at [230]-[234] .

CCIG Investments Pty Ltd v Schokman [2023] HCA 21 -
Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D [2022] NSWCA 119 (06 July 2022) (Bell CJ, Gleeson and Brereton JJA)

235. On the question of exemplary damages, the primary judge stated that "[a] more important case for the Court to express its own view about such conduct was argued to be difficult to imagine": PJ [664]. Her Honour referred to the decision of the High Court in *Gray* at [31] as authority for the proposition that exemplary damages are "awarded to punish wrongdoers and to deter others from such conscious wrongdoing, in contumelious disregard of other's rights": PJ [667]. In view of this overarching principle, B was awarded exemplary damages in the amount of $70,000.

Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D [2022] NSWCA 119 -
Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D [2022] NSWCA 119 -
Australian Building and Construction Commissioner v Pattinson [2022] HCA 13 (13 April 2022) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

92. In *Comcare v Banerji* [104] , in discussing the operation of s 15 of the *Public Service Act 1999* (Cth) , which permits the imposition by an employer of penalties including fines on an Australian Public Service employee, Kiefel CJ, Bell, Keane and Nettle JJ said that s 15 requires a "lawful,

proportionate response to the nature and gravity of [the] misconduct" governed by a principle that a "[b]reach of the impugned provisions renders an employee of the APS liable to no greater penalty than is proportionate to the nature and gravity of the employee's misconduct". It is difficult to see why a civil penalty provision imposing only monetary penalties should be treated any differently. As Gleeson CJ, McHugh, Gummow and Hayne JJ said in *Gray v Motor Accident Commission* [105] , after referring to matters including "[t]he increasing frequency with which civil penalty provisions are enacted", such matters "deny the existence of any 'sharp cleavage' between the criminal and the civil law".

Australian Building and Construction Commissioner v Pattinson [2022] HCA 13 -
Australian Building and Construction Commissioner v Pattinson [2022] HCA 13 -
Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27 (08 September 2021) (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ)

132. The point is simply that like the criminal law [231] , with which the roots of torts are "greatly intermingled" [232] , where two or more people engage in tortious acts with a common design the acts of each are attributed to the other [233] . As Scrutton LJ explained in *The Koursk* [234] , "mere similarity of design on the part of independent actors, causing independent damage, is not enough; there must be concerted action to a common end". This is a general principle applicable to all torts and civil wrongs[235].

via

[232] *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6 [11] , quoting *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149150 .

Burrows v Macpherson & Kelley Lawyers (Sydney) Pty Ltd [2021] NSWCA 148 -
Minister for Home Affairs v Benbrika [2021] HCA 4 (10 February 2021) (Kiefel CJ, Bell, Gageler, Keane, Gordon, Edelman and Steward JJ)

140. It is that value, that fundamental idea, which underlies the principle in *Lim* , and which sees the involuntary detention of a person by the State as prima facie punitive, and permissible *only* as an incident of the adjudgment and punishment of criminal guilt (apart from the recognised exceptions) [268] . But it also must be acknowledged that the exceptions are "neither clear nor within precise and confined categories" [269] .

via

[268] See Stellios, *The Federal Judicature: Chapter III of the Constitution* , 2nd ed (2020) at 249-250. See also *Witham v Holloway* (1995) 183 CLR 525 at 534 ("Punishment is punishment, whether it is imposed in vindication or for remedial or coercive purposes. And there can be no doubt that imprisonment and the imposition of fines ... constitute punishment"); *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 16 [54] ; Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (2008) at 4-5; Ashworth and Zedner, *Preventive Justice* (2014) at 14, 20, 166-167, 180.

Minister for Home Affairs v Benbrika [2021] HCA 4 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 (21 December 2020) (Kourakis CJ; Nicholson and Livesey JJ)

639. The High Court in *Gray v Motor Accident Commission* accepted that exemplary damages could not properly be awarded in a case of negligence absent “conscious wrongdoing”, and, for that reason, they did not arise in “most negligence cases be they motor accident or other kinds of case”. [390]

via

[390] *Gray v Motor Accident Commission* (1998) 196 CLR 1, [22] , see also *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136, [1204]-[1214] (Gray J).

Amaca Pty Ltd v Werfel [2020] SASCFC 125 (21 December 2020) (Kourakis CJ; Nicholson and Livesey JJ)

647. The Full Court held that a sound reason not to make an award of exemplary damages would be where the defendant had already been subjected to a criminal sanction for the same breach. [399]

via

[399] *BHP Billiton Ltd v Parker* (2012) 113 SASR 206, [231] , citing *Gray v Motor Accident Commission* (1998) 196 CLR 1 .

Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Mr D v Ms P [2020] NSWCA 174 -
Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

110. "[E]xemplary damages may be awarded for conduct of a sufficiently reprehensible kind" [141] . They are appropriate where "the conduct of the defendant merits punishment" because it "is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he [or she] acts in contumelious disregard of the plaintiff's rights" [142] . Exemplary damages "go beyond compensation and are awarded 'as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself'" [143] . The award also "serve[s] to mark the court's condemnation of the defendant's behaviour" [144] . In *Lamb v Cotogno* , the Court noted that the award has a "punitive aspect" [145] , but may also have a compensatory effect in practical terms [146] . In so far as the award is a deterrent, it serves as a deterrent both to the defendant and to others [147] .

via

[146] *Lamb* (1987) 164 CLR 1 at 9-10 . See also *Gray* (1998) 196 CLR 1 at 34 [100] .

Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Vella v Commissioner of Police (NSW) [2019] HCA 38 -
Mann v Paterson Constructions Pty Ltd [2019] HCA 32 (09 October 2019) (KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ)

37. Absent adherence to the rescission fallacy, there is nothing "anomalous" in a defaulting party enjoying the protection of the contract's ceiling on the amounts recoverable by way of damages. That each party is freed from further performance of its primary obligations is no reason why the innocent party should be entitled to enforce a remedy which has no relationship to the expectations embodied in those primary obligations. It is a matter of public policy that under the law of contract a defaulting party is not to be punished for its breach [58] . As Lord Hoffmann said in *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [59] : "[T]he purpose of the law of contract is not to punish wrongdoing but to

satisfy the expectations of the party entitled to performance." And that is so even if the breach was deliberate or selfinterested. In *Butler v Fairclough* [60] , in a passage later adopted by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Gray v Motor Accident Commission* [61] , Griffith CJ said:

> "The motive or state of mind of a person who is guilty of a breach of contract is not relevant to the question of damages for the breach, although if the contract itself were fraudulent the question of fraud might be material. A breach of contract may be innocent, even accidental or unconscious. Or it may arise from a wrong view of the obligations created by the contract. Or it may be wilful, and even malicious and committed with the express intention of injuring the other party. But the measure of damages is not affected by any such considerations."

via

[61] (1998) 196 CLR 1 at 67 [13] ; [1998] HCA 70 .

Mann v Paterson Constructions Pty Ltd [2019] HCA 32 -
Rickard & Wilson & Active Safety Services Pty Ltd v Testel Australia Pty Ltd [2019] SASCFC 16 (21 February 2019) (Kourakis CJ; Kelly and Bampton JJ)

112. The award of exemplary damages involves the exercise of a discretion. [8] The principles in *House v King* [9] also apply to this issue. I do not accept that the Judge's characterisation of the culpability of Mr Wilson or Active constitutes an error in the exercise of the discretion.

via

[8] *Gray v The Motor Accident Commission* (1998) 196 CLR 1 at [25] .

Rickard & Wilson & Active Safety Services Pty Ltd v Testel Australia Pty Ltd [2019] SASCFC 16 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

Anderson v Bowles (1951) 84 CLR 310 ; [1951] HCA 61 Australian Consolidated Press Ltd v Uren (1966) 117 CLR 185 ; [1966] HCA 37 Avenhouse v Hornsby Shire Council (1988) 44 NSWLR 1 Berry v British Transport Commission [1962] 1 QB 306 Bradlaugh v Edwards (1861) 11 CBNS 377 ; 142 ER 843 Carter v Walker (2010) 32 VR 1 ; [2010] VSCA 340 Coleman v Buckingham's Ltd [1963] SR (NSW) 171 ; 80 WN 593 Croucher v Cachia (2016) 95 NSWLR 117 ; [2016] NSWCA 132 Cuthbertson v State of New South Wales [2017] NSWDC 367 Diamond v Minter [1941] 1 KB 656 Fontin v Katapodis (1962) 108 CLR 177 ; [1962] HCA 63 Foxall v Barnett (1853) 23 LJQB 7 ; 118 ER 1014 Gray v Motor Accident Commission (1998) 196 CLR 1 ; [1998] HCA 70 Hawkins v Permarig Pty Ltd [2004] 2 Qd R 388 ; [2004] QCA 76 Lamb v Cotogno (1987) 164 CLR 1 ; [1987] HCA 47 Latoudis v Casey (1990) 170 CLR 534 ; [1990] HCA 59 Lee v New South Wales Crime Commission (2012) 224 A Crim R 94 ; [2012] NSWCA 262 Loton v Devereux (1832) 3 B & Ad 343 ; 110 ER 129 Nationwide News Pty Ltd v Naidu (2007) 71 NSWLR 471 ; [2007] NSWCA 377 Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 208 CLR 388 ; [2001] HCA 69 Pritchet v Boevey (1833) 1 C & M 775 ; 149 ER 612 State of New South Wales v Ibbett [2005] NSWCA 445 State of New South Wales v Ibbett (2006) 229 CLR 638 ; [2006] HCA 57 State of New South Wales v Koumdjiev (2005) 63 NSWLR 353 ; [2005] NSWCA 247 State of New South Wales v Randall [2017] NSWCA 88 State of New South Wales v Riley (2003) 57 NSWLR 496 ; [2003] NSWCA 208 TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333 ; [2002] NSWCA 82 Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 ; [1966] HCA 40 Whitbread v Rail Corporation NSW [2011] NSWCA 130 Whitfeld v De Lauret and Company Ltd (1920) 29 CLR 71 ; [1920] HCA 75 XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448 ; [1985] HCA 12

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

120. As I said in *Whitbread & Anor v Rail Corporation NSW & Ors*: [9]

> "In considering whether to award exemplary damages 'the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged': *Gray* (at [15] ; (at [31]) 'the conduct of the wrongdoer is central to that enquiry') per Gleeson CJ, McHugh, Gummow and Hayne JJ. In contradistinction, in the case of aggravated damages the assessment is made from the point of view of the plaintiff: *State of New South Wales v Ibbett* [2005] NSWCA 445; (2005) 65 NSWLR 168 (at [83]) per Spigelman CJ; referred to with approval in *New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 (at [34])."

State of New South Wales v Cuthbertson [2018] NSWCA 320 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 -
Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316 (14 December 2018) (McColl, Basten and Meagher JJA)

Gray at [46] .

Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316 (14 December 2018) (McColl, Basten and Meagher JJA)

Gray at [46] .

Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316 -
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Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316 -
The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 (23 November 2018) (Buss P, Murphy JA, Pritchard JA)

111. The first, if not principal, focus of the inquiry with respect to exemplary damages is upon the wrongdoer, and not the party who has suffered the wrongdoing. [178]

via

[178] *Gray* [15] .

The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 -
The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 -
The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 -
Lule v State of New South Wales [2018] NSWCA 125 -
Lule v State of New South Wales [2018] NSWCA 125 -

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3 -
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3 -
El-Wasfi v State of New South Wales; Kassas v State of New South Wales [2017] NSWCA 332 -
NSW Commissioner of Police v Zurich Australian Insurance Ltd [2016] NSWCA 365 -
NSW Commissioner of Police v Zurich Australian Insurance Ltd [2016] NSWCA 365 -
Cheng v Farjudi [2016] NSWCA 316 (21 November 2016) (Beazley P, Ward JA and Harrison J)

Gray v Motor Accidents Commission [1998] HCA 70; 196 CLR 1 ; *Tilden v Gregg* [2015] NSWCA 164.

Cheng v Farjudi [2016] NSWCA 316 (21 November 2016) (Beazley P, Ward JA and Harrison J)

47. Her Honour acknowledged, at [151], the usual rule that when a person has been the subject of a criminal penalty in respect of the conduct that was the subject of the claim, it is not appropriate to award exemplary damages because the criminal conviction and sentence imposed have adequately dealt with the elements of punishment and deterrence which are integral to an award of exemplary damages: see *Gray v Motor Accidents Commission* [1998] HCA 70; 196 CLR 1 at [46] ; *Tilden v Gregg* [2015] NSWCA 164 at [66] .

Cheng v Farjudi [2016] NSWCA 316 -
Cheng v Farjudi [2016] NSWCA 316 -
Cheng v Farjudi [2016] NSWCA 316 -
Cheng v Farjudi [2016] NSWCA 316 -
Cheng v Farjudi [2016] NSWCA 316 -
Cheng v Farjudi [2016] NSWCA 316 -
Croucher v Cachia [2016] NSWCA 132 -
Bragdon v Director of the Fair Work Building Industry Inspectorate [2016] FCAFC 64 -
MacDougal v Mitchell [2015] NSWCA 389 -
MacDougal v Mitchell [2015] NSWCA 389 -
Jackson v Abram [2015] SASCFC 175 -
State of New South Wales v McMaster [2015] NSWCA 228 -
Tilden v Gregg [2015] NSWCA 164 -
Tilden v Gregg [2015] NSWCA 164 -
R v Omar [2015] NSWCCA 67 -
Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 (16 April 2015) (McColl, Macfarlan and Barrett JJA)

91. It was in the context of that finding that the primary judge came to consider the issue of exemplary damages. The primary judge set out the legal principles concerning awards of exemplary damages in the following manner:

> "[282] In *Uren v John Fairfax & Sons Pty Ltd* [1965] – [1966] 117 CLR 118 at 149, Windeyer J stated:
>
> > '... first, it is necessary to notice that, whatever be the position in torts other than defamation, the distinction between aggravated and exemplary damages is not easy to make in defamation, either historically or analytically; and in practice it is hard to preserve. The formal distinction is, I take it, that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence.'

[283] In *Uren* , Windeyer J at p 153 also stated that the decision in *Rookes v Barnard* [19 64] AC 1129 emphasised that exemplary damages must always be based on something more substantial than a jury's mere disapproval of the conduct of a defendant. His Honour further observed:

> '... the decision makes clear too, if it was ever in any doubt, that all matters that may aggravate compensatory damages do not of themselves justify the addition or inclusion of the further purely punitive element ... The wrong must be one of a kind for which exemplary damages might be given; and the facts of the particular case must be such that exemplary damages could properly be given ... There must ... be evidence of some positive misconduct to justify a verdict for exemplary damages. There must be evidence on which the jury could find that there was, at least, a 'conscious wrongdoing in contumelious disregard of another's rights'. I select that particular phrase out of many, because it has been used more than once in this Court ...'

[284] In *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6 , the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) observed that:

> 'Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their reward. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of cases: ranging from abuse of governmental power ... through defamation cases of the kind considered in *Uren* , to assault cases ...'

[285] Accordingly, it is now well established that the award of exemplary damages is an exceptional remedy in cases of conscious wrongdoing in contumelious disregard of a plaintiff's rights."

Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 -
Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 -
Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 -
Fernando v Commonwealth [2014] FCAFC 181 (22 December 2014) (Besanko, Barker and Robertson JJ)

95. In *Uren v John Fairfax & Sons Pty Limited* (1966) 117 CLR 118, Windeyer J (at 149) described the difference between aggravated and exemplary damages as being:

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

(*Gray v Motor Accident Commission* (1998) 196 CLR 1 at 4 , [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ).

Fernando v Commonwealth [2014] FCAFC 181 (22 December 2014) (Besanko, Barker and Robertson JJ)
Gray v Motor Accident Commission (1998) 196 CLR 1
House v The King

Fernando v Commonwealth [2014] FCAFC 181 -
State of New South Wales v Abed [2014] NSWCA 419 -
State of New South Wales v Talovic [2014] NSWCA 333 -
Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 (22 May 2014) (Dowsett, Siopis and Besanko JJ)

22. In *Gray* , the High Court was concerned with prior criminal proceedings and a subsequent application for the award of exemplary damages. In the English cases to which I have

referred, the Court of Appeal was dealing with contempt proceedings and other criminal proceedings. Presently, I am considering the relevance of an award of additional damages (pursuant to the *Copyright Act 1968* (Cth) (the "Copyright Act")) to the penalty to be imposed subsequently for conduct in contempt of court, such conduct comprising at least some of the conduct in respect of which the additional damages were awarded. The present position differs from that in *Gray* in two respects:

- in *Gray*, the award which was sought was of exemplary damages whilst here, the award was of additional damages; and

- in *Gray*, the criminal penalty was imposed before the question of damages was considered whilst here, the award of damages occurred before the penalty for contempt was considered.

The first distinction must be considered, having regard to the nature of additional damages under the Copyright Act, and the nature of exemplary damages as explained in the cases. The second distinction may involve an examination of the general policy against double punishment, the extent to which additional damages punish breaches of the Copyright Act, and the extent to which, in this case, there is any overlap between the punishment effected by the award of additional damages and the punishment for contempt. The lastmentioned issue may involve a consideration of conflicting public interests in avoiding double punishment and upholding the integrity of the administration of justice. Although the majority in *Gray* considered that the prior criminal punishment was a bar to the award of exemplary damages, there appears to be no clear authority for the proposition that a prior award of additional (or exemplary) damages will bar later punishment for contempt arising out of substantially the same conduct.

Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 (22 May 2014) (Dowsett, Siopis and Besanko JJ)

16. In *Gray v Motor Accident Commission* (1998) 196 CLR 1, the High Court considered the availability of exemplary damages where the wrongdoer had previously been subjected to criminal sanctions for substantially the same conduct. At [40] [44] their Honours said:

> 40. Where, as here, the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted, we consider that exemplary damages may not be awarded. We say "may not" because we consider that the infliction of substantial punishment for what is substantially the same conduct as the conduct which is the subject of the civil proceeding is a bar to the award; the decision is not one that is reached as a matter of discretion dependent upon the facts and circumstances in each particular case.
>
> 41. There are at least two reasons in principle why that is so.
>
> 42. First, the purposes for the awarding of exemplary damages have been wholly met if substantial punishment is exacted by the criminal law. The offender is punished; others are deterred. There is, then, no occasion for their award.
>
> 43. Secondly, considerations of double punishment would otherwise arise. In *R v Hoar* ... , Gibbs CJ, Mason, Aickin and Brennan JJ said that there is a "practice, if not a rule of law, that a person should not be twice punished for what is substantially the same act" ... . That practice or rule would be breached by an award of exemplary damages in the circumstances described.

44. Because, in this case, substantial punishment was imposed on the tortfeasor for the conduct which was an issue in the civil proceedings, it is not necessary to decide whether the bar arises only where the punishment is "substantial" or how close must be the similarity between the conduct that is the subject of the two proceedings.

Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 (22 May 2014) (Dowsett, Siopis and Besanko JJ)

22. In *Gray* , the High Court was concerned with prior criminal proceedings and a subsequent application for the award of exemplary damages. In the English cases to which I have referred, the Court of Appeal was dealing with contempt proceedings and other criminal proceedings. Presently, I am considering the relevance of an award of additional damages (pursuant to the *Copyright Act 1968* (Cth) (the " Copyright Act ")) to the penalty to be imposed subsequently for conduct in contempt of court, such conduct comprising at least some of the conduct in respect of which the additional damages were awarded. The present position differs from that in *Gray* in two respects:

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Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 -
Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 -
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Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 -
Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 -
Jew v Holloway [2013] VSCA 260 -
Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 (05 August 2013) (Meagher, Emmett and Leeming JJA)

43. Exemplary damages must "not be out of all proportion in the circumstances": *Adams* at [35] . Exemplary damages may exceed compensatory damages in an appropriate case: *Adams* is one example, and in copyright contexts, see *Raben Footwear Pty Ltd v Polygram Records Inc* [199 7] FCA 370; (1997) 75 FCR 88 and *Aristocrat Technologies Australia Pty Ltd v DAP Services*

(Kempsey) Pty Ltd [2007] FCAFC 40; (2007) 157 FCR 564 at [54] . I am conscious of the difficulties, identified in *Gray v Motor Accident Commission* at [25]-[31] , in describing the power to award exemplary damages as "discretionary", but that does not deny that there is apt to be a wide range of amounts which may be ordered without appellable error. Other judges might have been minded to order larger exemplary damages than the primary judge. However, I am not persuaded that the primary judge, who had the benefit of seeing Ms Day and Mr James, went outside the broad discretion open to him in making an order of exemplary damages in the same amount as the sum of general and aggravated damages.

Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 -
ISJ v The Queen [2012] VSCA 321 -
ISJ v The Queen [2012] VSCA 321 -
ISJ v The Queen [2012] VSCA 321 -
ISJ v The Queen [2012] VSCA 321 -
ISJ v The Queen [2012] VSCA 321 -
ISJ v The Queen [2012] VSCA 321 -
WAQ v Di Pino [2012] QCA 283 (19 October 2012) (Fraser and Gotterson JJA and Mullins J,)
Gray v Motor Accident Commission (1998) 196 CLR 1; [1998] HCA 70 , cited

WAQ v Di Pino [2012] QCA 283 (19 October 2012) (Fraser and Gotterson JJA and Mullins J,)

43. The learned judge was not persuaded that on the facts of the case, an award of aggravated damages was justified. [25] He began his consideration of the topic with an adoption of Professor Luntz's description of aggravated damages as damages awarded to compensate the plaintiff for increased mental suffering due to the manner in which the defendant behaved.[26] The description accords with that given by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* [27] that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which it was done.

via

[27] (1966) 117 CLR 118 at 149, cited by the majority in *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 4.

Dean v Phung [2004] NSWCA 223 (25 July 2012) (Beazley, Basten and Macfarlan JJA)

78. Ipp JA in *Ibbett* agreed with the Chief Justice, also adopting the language of *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1 at [14] that such damages were warranted where there was "conscious wrongdoing in contumelious disregard of another's rights": ibid at [137] . As further explained in *Gray* at [15] , "[i]n considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged".

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State of New South Wales v Quirk [2012] NSWCA 216 (20 July 2012) (Beazley and Hoeben JJA, Tobias AJA)

149. The appellant did not seek to challenge his Honour's award of $5,000 for what I will describe as ordinary compensatory damages. It did challenge the additional aggravated damages of $20,000 and the exemplary damages of $25,000. It was submitted that the normal compensatory damages and the aggravated compensatory damages were awarded otherwise then in accordance with the principle identified by Hodgson JA in *State of New South Wales v Riley* [2003] NSWCA 208; (2003) 57 NSWLR 496 at [131] . The appellant further submitted that the award of exemplary damages was made without determining the necessity for that rare remedy given the quantum of compensatory damages: *Gray v Motor Accident Commission* [1998] HCA 70; (1998) 196 CLR 1 at [12] and [20] ; *New South Wales v Ibbett* [2006] HCA 57; (2006) 229 CLR 638 at [34] . Finally, although it was conceded that some aggravated damage was justified, it was submitted that the award of $25,000 for both types of compensatory damages was outside the range of a properly exercised discretion when guided by what Hodgson JA said in *Riley* .

BHP Billiton Ltd v Parker [2012] SASCFC 73 (18 June 2012) (Doyle CJ; Gray and White JJ)

205. At common law, exemplary damages may be awarded as part of the damages for a tort involving a reprehensible disregard of the plaintiff's interests, often expressed in the phrase "a contumelious disregard of the plaintiff's rights". [23] Their purpose is to punish and deter the wrongdoer. Thus in *Uren v John Fairfax & Sons Pty Ltd,* [24] Owen J said:

> [A] jury may award damages over and above those required to compensate the plaintiff for the injury suffered by him if it forms the opinion, on evidence justifying that conclusion, that the defendant's conduct in committing the wrong was so reprehensible as to require not only that he should compensate the plaintiff for what he has suffered but should be punished for what he has done in order to discourage him and others from acting in such a fashion. [25]

In the same case, Windeyer J said that "exemplary damages ... are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence". [26]

via

[23] *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 (Knox CJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129, 138 (Taylor J); *Gray v Motor Accident Commission* [1998] HCA 70 at [14] ; (1998) 196 CLR 1 at 7.

BHP Billiton Ltd v Parker [2012] SASCFC 73 (18 June 2012) (Doyle CJ; Gray and White JJ)

413. It is to be noted that there is no definition of the words "exemplary damages" in the *Dust Diseases Act* . It may be understood that these words are used with their common law meaning. A statement of the common law principles may be found in the judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Gray v Motor Accident Commission* : [95]

> We do not think it necessary to revisit that debate. No question arises here of an intentional wrong being committed by inadvertence. For present purposes it is enough to note two things. First, exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case. But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff. Cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer, well knowing of an extreme danger thus created, persisted in employing the unsafe system might, perhaps, be of that latter kind. No doubt other examples can be found.

[Footnote omitted.]

Generally at common law, it has been accepted that awards of exemplary damages are unusual, even rare.

via

[95] *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9-10 .

BHP Billiton Ltd v Parker [2012] SASCFC 73 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 -
Bradshaw v Secure Funding Pty Ltd [2012] QCA 52 (16 March 2012) (Margaret McMurdo P, Chesterman JA and Margaret Wilson AJA,)

72. The primary judge considered that this claim was arguable. Her Honour continued -

> "[32] ...The issue is whether the plaintiffs can prove any damages as a result of the breach of such an implied obligation.
>
> [33] The plaintiffs were legally represented in relation to the first and second proceedings. Although they received the benefit of an order for costs assessed on the standard basis in respect of the dismissal of those proceedings, they are out of pocket by the difference between those standard costs and the costs they actually incurred. The problem for the plaintiffs is that there is good authority to support the defendant's submissions that, as the plaintiffs agreed to the dismissal of those proceedings with an order for costs in their favour on a standard basis, they cannot now pursue the defendant for the difference between their standard costs and solicitor/client costs. That is because that claim for the difference in costs as damages was able to be raised when seeking costs in the first and second proceedings. It can be contrasted to claiming the difference in costs as damages for the tort of malicious prosecution or circumstances where the costs of the original proceeding were not able to be pursued in that proceeding: *Avenhouse v Hornsby Shire Council* ;[60] *Que anbeyan Leagues Club Ltd v Poldune Pty Ltd* ;[61] *Hawkins v Permarig Pty Ltd.* [62]
>
> [34] The other types of loss particularised in paragraphs A to H of paragraph 35 of the statement of claim have either been addressed by the defendant or have not been the subject of evidence by the plaintiffs. The plaintiffs' claim for aggravated and exemplary damages has no application to a claim for damages for breach of contract: *Gray v Motor Accident Commission.* [63] I am satisfied that the defendant has shown that, even if the plaintiffs re-pleaded their claim for damages for breach of contract, the plaintiffs will not prove any damages (other than nominal damages)."

via

[63] (1998) 196 CLR 1 , 4-7 .

Bradshaw v Secure Funding Pty Ltd [2012] QCA 52 -
State of New South Wales v Zreika [2012] NSWCA 37 -
Gacic v John Fairfax Publications Pty Ltd [2011] NSWCA 362 (24 November 2011) (Giles and McColl JJA, Sackville AJA)

114. Further, exemplary damages are awarded "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself": *Wilkes v Wood* [1763] EngR 103; (1763) Lofft 1 (at 19) (98 ER 489, at 498-499) per Pratt LCJ cited with approval in the joint judgment in *Lamb v Cotogno* [1987] HCA 47; (1987) 164 CLR 1 (at 8). While "it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. ... the phrase ... of 'conscious wrongdoing in contumelious disregard of another's rights' describes at least the greater part of the relevant field": *Gray v Motor Accident Commission* [1998] HCA 70; (1998) 196 CLR 1 (at [14]) per Gleeson CJ, McHugh, Gummow and Hayne JJ. The question whether the respondents engaged in conduct warranting an award of exemplary damages is also a matter which should be considered at first instance.

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

57. Tobias JA regarded the whole tenor of the High Court's approach in *Gray* to the award of exemplary damages as consistent with his conclusion, even though the Court in *Gray* "was at one with the New Zealand Court of Appeal in Daniels in concluding that exemplary damages should not be awarded in a civil trial where the defendant, in a preceding criminal trial, had had inflicted upon him or her 'substantial punishment'" (at [64]). He noted that "[e]ven in *Gray* , the Court left for another occasion the meaning of 'substantial punishment' particularly if only a nominal penalty for reasons personal to the accused or other reasons had been imposed in the criminal proceedings."

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Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

40. It is apparent from *Gray* (at [46]) that if criminal proceedings are to be relied upon to defeat a claim for exemplary damages, the defendant must prove the criminal charges, alleged the same conduct as alleged in the civil proceedings. That is what happened in *Gray* by the tender of the certificate of conviction of the wrongdoer and the sentencing remarks relating to him as evidence of the truth of their contents .

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

43. The plurality concluded in *Gray* (at [40]) that exemplary damages may not be awarded where, as in that case, the criminal law had been brought to bear upon the wrongdoer and substantial punishment inflicted. It was not difficult to conclude in *Gray* that substantial punishment had been inflicted upon the wrongdoer who had been convicted of causing grievous bodily harm with intent to cause grievous bodily harm to the plaintiff and was sentenced to seven years imprisonment. Moreover the Court was able to discern whether the facts which formed the basis for the wrongdoer's conviction and sentence were those relied on in the civil proceedings because, as i have said, the certificate of his conviction and the sentencing remarks relating to him were tendered by consent of the parties as evidence of the truth of their contents: *Gray* (at [2]) . Because there was no doubt about the severity of the wrongdoer's punishment, the plurality did not (at [44]) find it "necessary to decide whether the bar arises only where the punishment is 'substantial' or how close must be the similarity between the conduct that is the subject of the two proceedings." However it is clear that to raise the bar the plurality judgment contemplated (at [40]), it must be possible to determine the wrongdoer has suffered "substantial punishment" and that there is " 'substantial identity' between the conduct that is the subject of the criminal and civil proceedings": *Gray* (at [45]).

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Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
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Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Carter v Walker [2010] VSCA 340 -
Alishah v Gunns Ltd [2010] TASFC 6 -
Alishah v Gunns Ltd [2010] TASFC 6 -
Noye v Robbins [2010] WASCA 83 -

Noye v Robbins [2010] WASCA 83 -
Couch v Attorney-General (No 2) [2010] NZSC 27 (24 March 2010)

[15] In Australia there are judgments which refer with apparent approval to the Privy Council approach. The reasons of Kirby J in the High Court of Australia in *Gray v Motor Accident Commission* [35] (with which the majority did not express disagreement) and the judgment of Spigelman CJ in the Court of Appeal of New South Wales in *State of New South Wales v Ibbett* [36] (which was not on this point directly addressed by the High Court) indicate the view that awards of exemplary damages should not be confined to cases where the defendant intended to cause harm or was consciously reckless as to the risks involved. Kirby J in *Gray* considered that exemplary damages were available "whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world". [37] In *Gray* (where the question whether conscious recklessness is a condition for exemplary damages in negligence did not have to be resolved) the majority of the High Court considered that "'conscious wrongdoing in contumelious disregard of another's rights' describes at least the greater part of the relevant field", [38] a position consistent with the approach of the Privy Council in *Bottrill* . In the High Court in *New South Wales v Ibbett* ,[39] it is the case that in a footnote[40] the Court indicated that it considered the views of the Privy Council in *Bottrill* and the Supreme Court of Canada in *Whiten v Pilot Insurance Co* [41] were to be contrasted with the statement in *Gray* that "there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff". [42] And it may be that the position in Australia in relation to negligence will yet move to requiring subjective recklessness in the sense of conscious assumption of risk of harm to the plaintiff. The Court of Appeal in New South Wales in *State of New South Wales v Delly* ,[43] a decision decided after *Ibbett*, was however prepared to allow that subjective advertence to harm is not always necessary for an award of exemplary damages. But neither *Ibbett* nor *Delly* were cases where the cause of action was in negligence. [44] Further cases in Australia will no doubt require consideration of the general approach indicated by the High Court in *Lamb v Cotogno* [45] that exemplary damages express the Court's condemnation of objectively reckless behaviour. [46] *Lamb v Cotogno* suggests that callousness provides sufficient justification for exemplary damages. [47] As things stand, it is drawing a rather long bow to maintain that the present decision brings New Zealand law into line with Australian law.

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[165] Recently, however, a line of cases has developed in New South Wales based on an apparently contradictory sentence in the joint judgment in *Gray* whereby their Honours said that conscious wrongdoing in contumelious disregard of the plaintiff's rights described "at least the greater part of the relevant field". [250] In another passage in the joint judgment their Honours said that the remedy of exemplary damages was exceptional as it arose "chiefly if not exclusively" in cases of contumelious disregard. [251] I consider, with respect, that their Honours were correct in their first statement when they said that conscious wrongdoing was a necessary ingredient. The view represented by this more recent line of authority builds also on Kirby J's dissenting judgment in *Gray* . The most significant case is *State of New South Wales v Ibbett* [252] which involved a claim against police officers for assault and trespass. [253] Hence the issue of the test for negligence did not strictly arise.

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[166] *Ibbett* was appealed to the High Court of Australia. [254] In a unanimous judgment the High Court in reference to *Gray* 's case said "[m]oreover, in this Court, it has been said that there may be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff". [255] Significantly the Court also implied disagreement with the decision of the Privy Council in *Bottrill* by saying, after its reference to *Gray* in a footnote, "cf *A v Bottrill* [2003] 1 AC 449 at 463-464 ".[256] This seems to confirm that in Australia conscious appreciation of wrongdoing, ie subjective recklessness, is a necessary ingredient in cases framed in negligence.

Canada

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[164] The general position in Australia supports the need for subjective recklessness. It does so, at least indirectly, by reason of the general test of contumelious disregard of the plaintiff's rights. [245] The most significant authorities in Australia are still the decisions of the High Court in *Whitfeld v De Lauret & Co Ltd* [246] and *Gray v Motor Accident Commission* . In their joint judgment in *Gray* four members of the Court [247] said that exemplary damages could not properly be awarded in a negligence case if there was "no conscious wrongdoing by the defendant". [248] Their Honours went on to say that ordinarily questions of exemplary damages would not arise in negligence cases, but there could be cases "framed in negligence" in which the defendant might have acted in contumelious disregard for the plaintiff's rights. They thereby equated contumelious disregard with conscious wrongdoing in the form of deliberately running a known risk of causing harm to the plaintiff. Subsequent cases in Australia have applied this principle as laid down by the High Court. [249]

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[236] In *Bottrill* , the Privy Council majority said that *Gray* provided an instance of its view that, while other jurisdictions place emphasis on the presence of intentional misconduct or conscious recklessness, they "invariably qualify their remarks by leaving open the possibility of an award of exemplary damages in other cases". [329] It is true that in *Gray* the majority's judgment[330] observes that the phrase "conscious wrongdoing in contumelious disregard of another's rights" describes "at least the greater part of" the field and that the remedy is said to arise "chiefly, if not exclusively" in such cases.[331] But these observations are respectively made in the course of a general discussion of the kinds of cases in which exemplary damages are awarded and the exceptional nature of the remedy. The judgment then identifies as a different and narrower issue whether exemplary damages are available for negligence, rather than some intentional wrong, on which it concludes: [332]

> [E]xemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case. But there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff. Cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer, well knowing of an extreme danger thus created, persisted in employing the unsafe system might, perhaps, be of that latter kind. No doubt other examples can be found.

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> [147] After the *Bottrill* litigation, Professor Todd wrote another article in which he observed that the majority in the Court of Appeal and the minority in the Privy Council had appropriately put the focus squarely on the defendant's conduct.[234] The plaintiff should be required to show intentional or consciously reckless misconduct. The Professor referred in support of this proposition to the decision of the High Court of Australia in *Gray v Motor Accident Commission* , [235] which I will discuss later, and said that there were a number of reasons for preferring the view of the majority in the Court of Appeal to that of the majority in the Privy Council which ultimately prevailed. He too made the point that the reasoning of the majority in the Privy Council seemed to suffer from assuming what they were seeking to prove.

via

[235] *Gray v Motor Accident Commission* [1998] HCA 70, (1998) 196 CLR 1 at [22] .

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Giller v Procopets [2008] VSCA 236 (10 December 2008) (Maxwell P, Ashley and Neave JJA)

> 219. In the event, what was said by the majority in *Gray v Motor Accidents*

> *Commission* [154] applies in respect of the criminal proceeding arising out of the assault. Further, although the prosecution for breach of the intervention order would not seem

to squarely fall within *Gray* , I think that the order and its sequelae may and should also be brought to account in deciding whether the appellant has been sufficiently punished for his disgraceful conduct on 10 November 1996.

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via

[154] (1988) 196 CLR 1 .

Giller v Procopets [2008] VSCA 236 -
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Giller v Procopets [2008] VSCA 236 -
R v. Jenkins, Rollason & Brophy [2008] QCA 369 (28 November 2008) (McMurdo P, Jones and Daubney JJ,)

33. Mr A Hoare, on behalf of Rollason, made the following submissions. Rollason's cumulative sentence of 12 years imprisonment was manifestly excessive. Rollason pleaded guilty. He trafficked in MDMA over a two month period. Because the present offence was committed whilst he was on parole, s 156A *Penalties and Sentences Act* requires the present sentence to be served cumulatively on the earlier sentences. Rollason's previous sentence does not expire until 6 January 2009. He will not be eligible for parole until serving 80 per cent of the 12 year sentence commencing on 6 January 2009, that is, 11 August 2018. His full-time release date is not until 6 January 2021. This means that he will not become eligible for parole on the present offences until more than 13 and a half years after his arrest. If he remains in custody until his full-time release date he will have served over 16 years imprisonment from the time of his arrest. The total cumulative sentence for his 1998 convictions and the present convictions is 22 years imprisonment. The combined effect of these sentences is so harsh that it offends the principle of totality discussed in *Mill v The Queen* . [27] In these

circumstances, the sentence imposed on Rollason for the present offence was manifestly excessive.

R v. Jenkins, Rollason & Brophy [2008] QCA 369 -
Imbree v McNeilly [2008] HCA 40 -
Imbree v McNeilly [2008] HCA 40 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 (19 February 2008) (Spigelman CJ at 1; Beazley JA at 97; Hodgson JA at 98)

26. His Honour's consideration of the issue of exemplary damages commences with extensive quotations from the judgments of this Court in *Anning* at [180]-[188] and the joint judgment of the High Court in *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1 at [15] . His Honour also referred to the identification by Heydon JA of the applicable principles in *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 56 NSWLR 298 at [241]-[246] . In his judgment at [946], after the extensive quotations from *Anning* and *Gray* and reference to *Digital Pulse,* S mart AJ states "I have applied those principles".

TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9 -
Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)
Gray v Motor Accident Commission [1998] HCA 70 ; (1998) 196 CLR 1
Hadid v Redpath

Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 (21 December 2007) (Spigelman CJ at 1; Beazley JA; Basten JA)

273. I have already referred to his Honour's reliance on *Gray v Motor Accident Commission.* That case involved an appeal from a refusal to award exemplary damages to a young man who was seriously injured in a motor accident in circumstances where the driver of the car was sentenced to seven years imprisonment for intentionally causing grievous bodily harm. Relevantly, in considering the power of a court to award exemplary damages, Gleeson CJ, McHugh, Gummow and Hayne JJ stated:

> "[12] Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found.
>
> ...
>
> [14] Because the kinds of case in which exemplary damages might be awarded are so varied, it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. Nevertheless, the phrase adopted by Knox CJ in *Whitfeld v De Lauret & Co* (1920) 29 CLR 71 of 'conscious wrongdoing in contumelious disregard of another's rights' describes at least the greater part of the relevant field.
>
> [15] In considering whether to award exemplary damages, the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged." (citations omitted)

See also *James v Hill* [2004] NSWCA 301 at [66]-[68] ; *State of New South Wales v Ibbett* [2005] NSWCA 445 per Spigelman CJ at [35] ff and Basten JA at [221] ff for a discussion of the underlying basis for the making of an award of exemplary damages.

Nationwide News Pty Ltd v Naidu [2007] NSWCA 377 -
McFadzean v Construction, Forestry, Mining and Energy Union [2007] VSCA 289 (13 December 2007) (Warren CJ, Nettle and Redlich JJA)

145. An award of exemplary damages involves the exercise of a discretion. In *Gray v Motor Accident Commission* , [191] Gleeson CJ, McHugh, Gummow and Hayne JJ commented that it 'is of little assistance' to describe the award of exemplary damages as a discretion to be exercised judicially. [192] But the fact that the remedy is discretionary remains of significance for the role of an appellate Court in reviewing a decision with respect to exemplary damages

McFadzean v Construction, Forestry, Mining and Energy Union [2007] VSCA 289 -
State of New South Wales v Delly [2007] NSWCA 303 (06 November 2007) (Ipp JA 1; Tobias JA ; Basten JA)

Gray v Motor Accident Commission [1998] HCA 70 ; (1998) 196 CLR 1
Lamb v Cotogno

State of New South Wales v Delly [2007] NSWCA 303 (06 November 2007) (Ipp JA 1; Tobias JA ; Basten JA)

88. In *Riley* Hodgson JA, after referring (at 529 [136]) to the appellant's submission that exemplary damages were an exceptional remedy which was rarely awarded and then only where there is "*high-handed, insolent, vindictive or malicious conduct*" amounting to or exhibiting a "*conscious wrong-doing in contumelious disregard of another's rights*", observed as follows (at 530 [138]):

> "138 In my opinion, as made clear in *Gray* [*Gray v Motor Accident Commission* [1998] HCA 70; (1998) 196 CLR 1], while "conscious wrong-doing in contumelious disregard of another's rights" describes the greater part of the field in which exemplary damages may properly be awarded, it does not fully cover that field. Similarly, malice is not essential: *Lamb v. Cotogno*. Conduct may be high-handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrong-doing. However, ordinarily conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express the court's disapproval or (in cases where the defendant stood to gain more than the plaintiff lost) demonstrate that wrongful conduct should not be to the advantage of the wrong-doer."

State of New South Wales v Delly [2007] NSWCA 303 -
State of New South Wales v Delly [2007] NSWCA 303 -
State of New South Wales v Delly [2007] NSWCA 303 -
CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 (10 August 2007) (Mason P; Hodgson JA; Santow JA)

> *Grey v Motor Accident Commission* (1998) 196 CLR 1 ; *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298; referred to.

CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 (10 August 2007) (Mason P; Hodgson JA; Santow JA)

> 73 Australian law has thus far not accepted exemplary damages for breach of contract (see ***Grey v Motor Accident Commission*** (1998) 196 CLR 1 at 6 , ***Harris v Digital Pulse Pty Ltd*** (2003) 56 NSWLR 298 at 307 [28], 333 [181], 361 [294]). This embargo and the policies it reflects, many of them clustering around the label of "efficient breach", offer strong arguments against creation of a novel tort that would overstep this outcome in an area where a contract - and a statutory one at that - occupies centre stage. I do not feel justified in entering the field of exemplary damages by the back door.

CGU Workers Compensation (NSW) Ltd v Garcia [2007] NSWCA 193 -
Zorom Enterprises Pty Ltd v Zabow [2007] NSWCA 106 -
Zorom Enterprises Pty Ltd v Zabow [2007] NSWCA 106 -
Zorom Enterprises Pty Ltd v Zabow [2007] NSWCA 106 -
New South Wales v Ibbett [2006] HCA 57 (12 December 2006) (Gleeson CJ; Gummow, Kirby, Heydon and Crennan JJ)

47. Shortly thereafter, in *S v Attorney-General* [44] , the New Zealand Court of Appeal held that, if not as a matter of power, then at least as a prudential consideration, an award of exemplary damages against the Crown should not be made in respect of the tortious acts of foster parents against children placed in their care by the Superintendent of Child Welfare; this was because the Department was not "directly at fault" [45] . However, Blanchard J, who gave the principal reasons in *S v Attorney-General* , reserved the position where a police officer deliberately or recklessly directly inflicted personal injury on the plaintiff [46] . Moreover, in this Court, it has been said that there may be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff [47] .

via

[47] *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 910 [22] , 2729 [84]-[87] ; cf *A v Bottrill* [2003] 1 AC 449 at 463464 ; *Whiten v Pilot Insurance Co* [2002] 1 SCR 595 at 634635 .

New South Wales v Ibbett [2006] HCA 57 -
New South Wales v Ibbett [2006] HCA 57 -
New South Wales v Ibbett [2006] HCA 57 -
Niven v SS [2006] NSWCA 338 (30 November 2006) (Beazley, Giles and Tobias JJA)

49 It is noteworthy, and it would appear to be the case, that no submission was put to the primary judge of the nature of that now advanced. No doubt this was because it was considered that the principle in *Gray* to which I have referred had no application to the present case as the criminal trial of the appellant had not yet occurred, whereas in *Gray* the civil trial occurred after the criminal trial at which the accused had already been punished.

Niven v SS [2006] NSWCA 338 (30 November 2006) (Beazley, Giles and Tobias JJA)
Gray v Motor Accident Commission (1998) 196 CLR 1
Halabi v Westpac Banking Corporation

Niven v SS [2006] NSWCA 338 -
Niven v SS [2006] NSWCA 338 -
Niven v SS [2006] NSWCA 338 -
Batistatos v Roads and Traffic Authority of New South Wales [2006] HCA 27 -
Neilson v City of Swan [2006] WASCA 94 -
Dalton v NSW Crime Commission [2006] HCA 17 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
R v Ronen [2006] NSWCCA 123 -
Paper Reclaim Ltd v Aotearoa International Ltd Ca70/04 [2006] NZCA 27 -
State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

45 This was the conclusion of Hodgson JA, with whom Sheller JA and Nicholas J agreed, at [9] and [147] in *New South Wales v Riley* (2003) 57 NSWLR 496, when his Honour said at [138] :

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

I note that his Honour did not refer to the passage at [20] of *Gray* quoted above. Nevertheless, I agree with his Honour's reasoning.

State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

37 The joint judgment in *Gray* made it clear that the case before the Court involved an allegation of "conscious wrongdoing" (at [24]) and that "No question arises here of an intentional wrong being committed by inadvertence" (at [22]).

State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

221 In *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [14] the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ noted:

> "Because the kinds of case in which exemplary damages might be awarded are so varied, it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. Nevertheless, the phrase adopted Knox CJ in *Whitfel d v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 of 'conscious wrongdoing in contumeliously disregard of another's rights' describes at least the greater part of the relevant field."

As their Honours noted, similar language was adopted by Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471, where his Honour referred to "conduct showing a conscious and contumelious disregard for the plaintiff's rights". In *Gray* after the passage cited above, the joint judgment continued at [15] :

> "In considering whether to award exemplary damages, the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged."

State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

Gray v Motor Accident Commission (1998) 196 CLR 1
Harris v Digital Pulse Pty Ltd

State of New South Wales v Ibbett [2005] NSWCA 445 -
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State of New South Wales v Ibbett [2005] NSWCA 445 -

24 This last consideration involves acceptance that the function of tort liability is not merely to compensate the victims of tortious conduct, but also to deter potential tortfeasors. In that sense, the awarding of exemplary damages need not be seen as an anomalous addition to tort law, but may rather be seen as providing an augmented element of deterrence, in the circumstances where such damages are available. Thus, in *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [11] the joint judgment of four members of the Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) commented on the view that there were apparent anomalies involved in the availability of exemplary damages, noting at [11]:

> "As Windeyer J said in *Uren* [*v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118 at 149-150]:
>
> > 'Compensation is the dominant remedy if not the purpose of the law of torts today. But fault still has a place in many forms of wrongdoing. And the roots of tort and crime in the law of England are greatly intermingled. Some things that today are seen as anomalies have roots that go deep, too deep for them to be easily uprooted.'"

The joint judgment in *Gray* continued, at [12] :

> "Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of case: ranging from abuse of governmental power exemplified by *Wilkes v Wood* and its associated cases, through defamation cases of the kind considered in *Uren* , to assault cases such as *Fontin v Katapodis* (1962) 108 CLR 177."

New South Wales v Bryant [2005] NSWCA 393 (16 November 2005) (Beazley, McColl and Basten JJA)

27 The conclusion that the *Vicarious Liability Act* , in imposing vicarious liability on the State for exemplary damages, is not at odds with the policy of the general law, also obtains support from comments made in the judgment of the High Court in *Lamb v Cotogno* (1987) 164 CLR 1. That case was concerned, like *Gray* , with the power to award exemplary damages arising from a tort involving the use of a motor vehicle. Because the injury occurred from the use of a vehicle, in respect of which the driver held compulsory cover under the *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW) , it was the insurer, rather than the driver which would bear ultimate responsibility for paying the exemplary damages. The Court stated (at p 7):

> "It was accepted upon both sides that the practical effect of the legislation was that the damages, including the exemplary damages, awarded against the defendant would be paid by the authorised insurer. Nor was it contemplated as a practical possibility that it would be necessary for the plaintiff to attempt to execute his judgment against the defendant before recovery against the authorised insurer."

After considering authorities relating to liability for exemplary damages, their Honours further noted (at p 9):

> "It was argued on behalf of the defendant that, since the object of exemplary damages is to punish and deter, it is inappropriate that they should be awarded where the wrongdoer is insured under a scheme of compulsory insurance against liability to pay them. Clearly there is

strength in that submission, but in our view it cannot succeed. The object, or at least the effect, of exemplary damages is not wholly punishment and the deterrence which is intended extends beyond the actual wrongdoer and the exact nature of his wrongdoing ... . It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace ... ."

After noting that the deterrent effect upon the particular driver would have been diminished by the fact that he did not have to pay the damages, their Honours continued (at p 10):

"... the deterrent effect is undiminished for those minded to engage in conduct of a similar nature which does not involve the use of a motor vehicle. Moreover, whilst the smart or sting will obviously not be the same if the defendant does not have to pay an award of exemplary damages, it does serve to mark the court's condemnation of the defendant's behaviour and its effect is not entirely to be discounted by the existence of compulsory insurance."

New South Wales v Bryant [2005] NSWCA 393 -
New South Wales v Bryant [2005] NSWCA 393 -
New South Wales v Bryant [2005] NSWCA 393 -
New South Wales v Bryant [2005] NSWCA 393 -
New South Wales v Bryant [2005] NSWCA 393 -
New South Wales v Bryant [2005] NSWCA 393 -
New South Wales v Bryant [2005] NSWCA 393 -
Stevens v The Queen [2005] HCA 65 -
Roberts v The State of Western Australia [2005] WASCA 37 (08 March 2005) (Templeman J, McLure J, Jenkins J)

Gray v Motor Accident Compensation (1998) 196 CLR 1
Hollington v F Hewthorn & Co Ltd

Roberts v The State of Western Australia [2005] WASCA 37 -
Roberts v The State of Western Australia [2005] WASCA 37 -
Cramer v Geraldton Building Co [2004] WASCA 289 (03 December 2004) (McLure J, EM Heenan J, LE Miere J)

Gray v Motor Accident Commission (1998) 196 CLR 1
Hall v Busst

Cramer v Geraldton Building Co [2004] WASCA 289 -
Cramer v Geraldton Building Co [2004] WASCA 289 -
Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 (27 September 2004) (Giles, Santow and Ipp JJA)

321 With those trespasses having just taken place, it is significant that on 16 August 1991 Mr McMahon, having by then been fully apprised of the situation, nevertheless instructed Daracon by letter to re-commence the works in full knowledge of Tellamist's protests (T, 348G-I) but first providing Daracon with an indemnity. As the trial judge points out at [114] whether the letter was drafted before or after the trespasses does not improve the position for Council. It appears that no further incursions took place until the subsequent trespasses in November 1991 (more precisely 18, 27 and 29 November 1991) and 23 December 1991, the latter occurred in breach of the Council's written undertaking to Tellamist of 5 December 1991 not to further trespass on its land. The Council claimed the latter trespass was due to inadvertence on the part of Daracon's employee and the trial judge found that the failure to honour the undertaking was due to a lack of care rather than contumelious disregard (Red, 78B-C). In my view the trial judge was correct in stating that the Council had given the plaintiff a formal undertaking and had an obligation to ensure that such an undertaking was honoured (Red, 77X). In particular, I do not think the Council can hide behind the

negligence of its agents and employees in this respect so far as damages are concerned. However, though close to the line, I would not conclude that these latter trespasses constituted cases "*framed in negligence, in which the defendant can be shown to have acted in contumelious disregard of the rights of the plaintiff*" (*Gray* (supra) at [22]). By that I mean the degree of negligence of the Council came close to being reckless, so as to approach high-handedness; compare *State of New South Wales v Riley* (2003) 57 NSWLR 496 per Hodgson JA at 530 and Kirby J in *Gray* at [p86], the latter concluding:

> "Punishment for deliberate wrongdoing is certainly a consideration in deciding the applicability of exemplary damages. But it is not the sole reason for the award of such damages. The more recent cases on the subject, including in this court, have accepted that such damages may be recovered whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world."

(ii) Amount of exemplary damages (ii) Amount of exemplary damages

Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 (27 September 2004) (Giles, Santow and Ipp JJA)

401 Bergin J, in her reasons, referred to the following remarks of Kirby J in ***Gray*** (at 29):

> "[S]uch damages may be recovered whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world."

It is not clear, with respect, whether the remarks of Kirby J were intended to be a departure from the principle articulated by the majority. In any event, I do not see how conduct – even when objectively measured – can be regarded as "high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world" without having some regard to the knowledge, intention, or recklessness (in other words, the state of mind) of the defendant.

Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 (27 September 2004) (Giles, Santow and Ipp JJA)

321 With those trespasses having just taken place, it is significant that on 16 August 1991 Mr McMahon, having by then been fully apprised of the situation, nevertheless instructed Daracon by letter to re-commence the works in full knowledge of Tellamist's protests (T, 348G-I) but first providing Daracon with an indemnity. As the trial judge points out at [114] whether the letter was drafted before or after the trespasses does not improve the position for Council. It appears that no further incursions took place until the subsequent trespasses in November 1991 (more precisely 18, 27 and 29 November 1991) and 23 December 1991, the latter occurred in breach of the Council's written undertaking to Tellamist of 5 December 1991 not to further trespass on its land. The Council claimed the latter trespass was due to inadvertence on the part of Daracon's employee and the trial judge found that the failure to honour the undertaking was due to a lack of care rather than contumelious disregard (Red, 78B-C). In my view the trial judge was correct in stating that the Council had given the plaintiff a formal undertaking and had an obligation to ensure that such an undertaking was honoured (Red, 77X). In particular, I do not think the Council can hide behind the negligence of its agents and employees in this respect so far as damages are concerned. However, though close to the line, I would not conclude that these latter trespasses constituted cases "*framed in negligence, in which the defendant can be shown to have acted in contumelious disregard of the rights of the plaintiff*" (*Gray* (supra) at [22]). By that I mean the degree of negligence of the Council came

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(ii) Amount of exemplary damages (ii) Amount of exemplary damages

Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 -
Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 -
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Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 -
Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 -
James v Hill [2004] NSWCA 301 (17 September 2004) (Sheller, Hodgson and Tobias JJA)
Gray v Motor Accident Commission (1998) 196 CLR 1

James v Hill [2004] NSWCA 301 (17 September 2004) (Sheller, Hodgson and Tobias JJA)

81 It was then submitted by Mr Brooks that as the primary judge had referred her judgment to the Law Society of New South Wales and the Legal Services Commission of New South Wales, account should have been taken of that fact to ensure that Mr Brooks was not liable to be punished twice for the same conduct: cf *Gray v Motor Accident Commission* (at 14 [40]).

James v Hill [2004] NSWCA 301 -
Rich v Australian Securities and Investments Commission [2004] HCA 42 (09 September 2004) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

108. As McColl JA remarked in the Court of Appeal [173] , much of this background material reflects a rejection of the rigid "bipolar" classification of legislative provisions as "civil" or "criminal". That rejection is harmonious with recent decisions of this Court [174] . However, an understanding of the very significant shift in the design of legislative sanctions and remedies to enforce the Parliament's will makes it important that this Court should avoid superimposing on the graduated statutory pyramid of sanctions and remedies any over-simplification inherent in past common law and equitable principles reflected in the penalty privilege. That privilege developed in an earlier time of less legislation and simpler provisions. To graft it now onto every statutory provision that casts a burden on an individual and to describe that burden as a "penalty" may risk undermining legislative attempts to develop graduated sanctions and remedies that go beyond the strict civil/penal paradigm. In the approach urged for the appellants, I saw no reflection of any appreciation of these major debates about economic and social regulation and differentiated legislative responses. The Act is clearly one such response.

via

[174] See *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 8 ; *Labrador* (2003) 77 ALJR 1629; 201 ALR 1.

S v The Queen [2004] WASCA 113 -

S v The Queen [2004] WASCA 113 -
S v The Queen [2004] WASCA 113 -
Robinswood Pty Ltd v Deputy Commissioner of Taxation for the Commonwealth of Australia [2003] WASCA 325 (18 December 2003) (Templeman J, Miller J, EM Heenan J)
Gray v Motor Accident Commission (1998) 196 CLR 1; [1998] HCA 70
Green v United States

Robinswood Pty Ltd v Deputy Commissioner of Taxation for the Commonwealth of Australia [2003] WASCA 325 -
Blunden v Commonwealth [2003] HCA 73 (10 December 2003) (Gleeson CJ,Gummow, Kirby, Hayne, Callinan and Heydon JJ)

85. Rules of the common law are stated by judges to apply in the spaces left by the operation of the written law, whether expressed in the Constitution or in, or under, valid legislation. Where statute law applies and is constitutionally valid, it is the first duty of courts in a municipal legal system to give them effect [83] . In the case of ambiguity, the requirements of statute law may sometimes be adapted to conform so far as possible to the international obligations of the state [84] , as for example to comply in that way with any applicable principles of international human rights law [85] . Moreover, there is an inevitable interaction between the provisions of statute law and the decisions of judge-made law [86] , just as equity also developed its approach to the law of limitations by analogy with the statutes of limitations[87]. However, in an Australian court whose jurisdiction is validly invoked, the primary step is to ascertain the requirements of any applicable statute law. If such law exists, is valid, relevant, clear and applicable, it must be applied in conformity with the requirements of the Constitution [88] . It cannot be ignored. Nor can it be overridden by any suggested choice of law doctrine of the common law.

via

[86] *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25-27 [80]-[83] , 46-47 [129]-[130] .

Clairs Keeley (a Firm) v Treacy [2003] WASCA 299 -
Rich v Australian Securities and Investments Commission [2003] NSWCA 342 (26 November 2003) (Spigelman CJ, Ipp and McColl JJA)

371 In his article, Dr Mann criticised the early English and American judges and commentators who, he said, "adopted a language fraught with bipolar images of the law of sanctions ... (who) wrote about the 'criminal law' and 'civil law' in spite of the fact that middleground sanctions, such as punitive damages in tort, always existed."[131] This criticism reflects the remarks made in the High Court in *Gray v Motor Accident Commission* (1999) 196 CLR 1 at 8 and *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Limited* (2003) 77 ALJR 1629, 201 ALR 1.

Abrogation of penalty privilege

Rich v Australian Securities and Investments Commission [2003] NSWCA 342 -
Rich v Australian Securities and Investments Commission [2003] NSWCA 342 -
Rich v Australian Securities and Investments Commission [2003] NSWCA 342 -
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd [2003] HCA 49 -
Whisprun Pty Ltd v Dixon [2003] HCA 48 (03 September 2003) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

98. In *SRA* [51] , I listed a number of cases, illustrated by decisions of this and other courts, in which, despite credibility findings, appellate intervention had occurred and been upheld. As I pointed out in that case, the instances cited were "by no means exhaustive" [52] . They included cases (1) where the primary judge's conclusion, although expressed in terms of

credibility, was "plainly wrong" as demonstrated by incontrovertible facts or uncontested testimony [53] ; (2) where the conclusion was based on evidence wrongly admitted, occasioning a substantial miscarriage of the trial [54] ; (3) where the reasons, going beyond credibility, indicated a consideration at trial of irrelevant matters or a failure to weigh all relevant issues [55] ; (4) where the circumstances in which evidence was given, relevant to credibility, was unsatisfactory [56] ; or (5) where the primary judge had made it plain that credibility considerations or impressions were not determinative for the judgment in question [57] .

via

[55] *Gray* (1998) 196 CLR 1 at 37-38 [105] , 51-52 [149] ; *Watt v Thomas* [1947] AC 484 at 487 per Viscount Simon.

Whisprun Pty Ltd v Dixon [2003] HCA 48 -
Whisprun Pty Ltd v Dixon [2003] HCA 48 -
State of New South Wales v Riley [2003] NSWCA 208 -
State of New South Wales v Riley [2003] NSWCA 208 -
De Reus v Gray [2003] VSCA 84 (27 June 2003) (Winneke, P., Ormiston and Charles, Jj.A)

18. There may be cases where joint tortious conduct will produce different injuries and damage to the same plaintiff, and where the injuries have been caused by discrete conduct which can be described in terms of different causes of action. In such cases, it might be necessary and desirable for the judge to ask the jury to assess the damages separately, particularly if there is a risk that one claim might fail, and the other succeed. *Sadler & State of Victoria v. Madigan [5]* was such a case. The result in this case, however, was not reached because – as I have said – the injury for which the plaintiff claimed damages arose from the one course of conduct, namely the unauthorized strip-search. It was the part played by the individual defendants in that conduct which fell to be considered by the jury when determining whether they, or any of them, should be penalized by an award of exemplary damages. To invite the jury to assess punitive damages by reference to the various causes of action used by the law to describe the conduct was, I think, calculated to distract the jury from its proper task and to produce a total award of punitive damages which was excessive in amount and confusing in its components. In the first place it is curious that the punitive damages awarded against Hatch and De Reus for "negligently" causing the respondent's injury and damage were greater, indeed substantially greater, than the awards made against them for causing the same injury and loss by intentional assault. On the hearing of the appeal, counsel for the respondent submitted that the explanation can be found in the fact that the alleged negligent acts and omissions covered a wider range of conduct than the acts alleged to constitute the assault. "The case", it was put, "was pleaded in such a way as to differentiate the assault and the breach of duty and the particulars of each allegation were discrete ...". For the reasons which I have already given, I do not accept that argument. The respondent's claim was that her injury and loss was caused by the strip-search and the joint participation in it by each of the individual defendants. Indeed, his Honour directed the jury that "the circumstance which is central to these three causes of action is the strip-search". But even if it had been appropriate for the jury to assess punitive damages against Hatch and De Reus in respect of both assault and negligence, the fact that they awarded significantly higher sums for the negligent conduct than for the intentional conduct betrays, in my view, a lack of proper appreciation of their task. In *Gray v. Motor Accidents Commission [6]* , the High Court considered the propriety of an award of exemplary damages made against a motorist who had injured the plaintiff by deliberately driving a motor vehicle at him. Although the proceeding was framed in negligence, the action was conducted at trial as if it were a claim in trespass. Indeed, the defendant had been convicted of intentionally causing grievous bodily harm to the plaintiff and sentenced to seven years' imprisonment. Gleeson, C.J., McHugh, Gummow and Hayne, JJ. [7] noted that:

> "... the remedy [that is, of punitive damages] is exceptional in the sense that it arises (chiefly, if not exclusively) in cases of conscious wrongdoing in contumelious disregard of the plaintiff's rights ..."

With regard to the further question whether exemplary damages are available where the plaintiff's claim is for damages for negligence rather than some intentional wrong, their Honours said (at 9):

> "... exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case."

Their Honours recognized that there may be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff. They instanced a case of an employer's failure to provide a safe system of work for employees in which it can be demonstrated that the employer, well knowing of "an extreme danger" thus created, persisted in employing an unsafe system. In this State, *Midalco Pty. Ltd. v. Rabenalt [8]* , is an instance of such a case. However, if the jury had found, in this case, that there was no assault but that the defendants were negligent in carrying out the strip search, it is difficult to see how they could properly have awarded punitive damages against the defendants.

De Reus v Gray [2003] VSCA 84 -
De Reus v Gray [2003] VSCA 84 -
De Reus v Gray [2003] VSCA 84 -
De Reus v Gray [2003] VSCA 84 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Chapman by his next friend Anthony Chapman v Katheappa [2003] WASCA 50 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 (07 February 2003) (Spigelman CJ Mason P Heydon JA)
Accident Commission (1998) 196 CLR 1 at [15] (exemplary damages are

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
New South Wales v Lepore [2003] HCA 4 -
Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419 (24 December 2002)

1480. The expression *"something more"* comes from *Gray v Motor Accidents Commission* , where it was said (at 6) that exemplary damages are awarded rarely, that they recognise and publish fault but not every finding of fault warrants their award, and that *"[s]omething more must be found"*. His Honour found fault as to a number of the matters on which the respondent relied for exemplary damages, but did not think that the unreasonableness and malice provided the something more.

Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419 (24 December 2002)

1481. The respondent submitted on appeal, in summary, that the fault found did provide the something more, such as to warrant an award of exemplary damages. The respondent said

that it was not necessary that there be conscious wrong-doing by appellant, referring to *Gray v Motor Accidents Commission* at 29.

Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419 (24 December 2002)

1478. Central to whether exemplary damages should have been awarded is whether the respondent established conduct of the appellant in contumelious disregard of the respondent's rights, although that is not essential; in *Gray v Motor Accidents Commission* (1988) 196 CLR 1 Kirby J pointed out (at 29) that exemplary damages may be recovered whatever the subjective intention of the tortfeasor *"if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world"*.

Dow Jones & Co Inc v Gutnick [2002] HCA 56 -
State of Victoria v Horvath [2002] VSCA 177 (07 November 2002) (Winneke, P., Chernov and Vincent, Jj. A)

60. Again we think that there is merit in these contentions. His Honour's reasons for decision up to the point where he came to assess damages appear to us to be an exercise of logic and clarity, pointing to a police exercise which was ill motivated and clumsily conceived and executed. However the assessment of damages - and particularly exemplary damages – against Christensen seems to us to have been governed, not so much by principles which ought to be employed in assessing such damages, but rather as a means through which the plaintiffs could be assured of recovering compensation from the State via the provisions of s. 123 of the Act . Exemplary damages are rarely awarded but, when they are, they are awarded to punish conscious wrongdoing in contumelious disregard of another's rights [22] . "Contu melious" is not a word which enjoys wide currency in modern society but, when used in the context in which the law uses it, is calculated to describe conduct which is disgraceful, humiliating or contemptuous of the rights of others. Although the law of this country recognizes a wider range of circumstances in which exemplary damages can be awarded than is recognized in England [23] , they will rarely be awarded in actions for negligence, and are not appropriate to cases of negligent acts or omissions unaccompanied by conscious wrongdoing [24] . It is, of course, in the nature of a police officer's duty that he or she is constantly in contact with members of the community. As we have previously noted, the officer will frequently be placed in a situation where he or she has to make "on the spot decisions" which will have ramifications for citizens who are affected by that decision. The decision might be such that more time and calmer reflection will, with hindsight, suggest it was wrong or even unreasonable, and give rise to a claim in damages for negligence [25] . However, if the conduct of the police officer is done "reasonably in the course of the officer's duty", and is done in "good faith", it seems to us that such conduct must be the antithesis of conduct which should be punished by an award of exemplary damages; namely conscious wrongdoing in contumelious disregard of the rights of those affected by it. That is why counsel for the State attacked his Honour's findings in relation to Christensen as "contradictory in terms" and as findings "of convenience" made very much with the consequences of s. 123 of the Act in mind. Mr. Wheelahan, who represented Mr. Christensen on this appeal, made "common cause" with counsel for the State on this issue.

via

[24] *Gray v. Motor Accident Commission* (1998) 196 C.L.R. 1 at 9 , per Gleeson , C.J., McHugh, Gummow and Hayne, JJ.

Gondoline Pty Ltd v Hansford [2002] WASCA 214 (14 August 2002) (Murray J, Wheeler J, Miller J)

Earthline Constructions; Gray v Motor Accident Commission (1998) 73 ALJR 45

Gondoline Pty Ltd v Hansford [2002] WASCA 214 -

Finesky Holdings Pty Ltd v Minister For Transport For Western Australia [2002] WASCA 206 -
Delta Corporation Ltd v DAVIES [2002] WASCA 125 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 (25 March 2002) (Spigelman CJ, Mason P and Grove J)

> 180 Exemplary damages are awarded for "conscious wrongdoing in contumelious disregard of another's rights" (*Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77), a phrase which covers "at least the greater part of the relevant field" *Gray v Motor Accident Commission* at [14] . Other expressions used have included "high-handed, insolent, vindictive or malicious" conduct. (*Uren v John Fairfax* at 129 per Taylor J. See also *Gray v Motor Accidents Commission* at [8]-[12].)

TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
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TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
Regie Nationale Des Usines Renault SA v Zhang [2002] HCA 10 -
Regie Nationale Des Usines Renault SA v Zhang [2002] HCA 10 -
Frost v Warner [2002] HCA 1 -
Conway v The Queen [2002] HCA 2 -
Commonwealth v Yarmirr [2001] HCA 56 -
Pilmer v Duke Group Ltd (In Liq) [2001] HCA 31 -
Love v ASC [2000] WASCA 404 -
Love v ASC [2000] WASCA 404 -
Hunter Area Health Service v Marchlewski [2000] NSWCA 294 (26 October 2000) (Mason P, Stein and Heydon JJA)

> 96 Many pre- *Uren* cases referred to aggravated damages in a context where it would now be proper to describe them as exemplary damages. Even today, the formal distinction masks overlapping concepts because aggravated damages may serve punitive and deterrent functions at the same time as providing "aggravated" compensation. In *Uren* itself, Windeyer J doubted whether what he termed the "labels" of "aggravated" and "exemplary" damages denoted different concepts. He suspected *"that in seeking to preserve the distinction we shall sometimes find ourselves dealing more in words than ideas"* (at 152). Not surprisingly, Professor Julius Stone argued that the distinction was largely illusory (Stone, *"Double Count and Double Talk: The end of Exemplary Damages?"* (1972) 46 ALJ 311). The distinction is, however, well accepted in modern Australian law (see *Gray v Motor Accident Commission* (1998) 196 CLR 1). 97 The issue of identifying those wrongs which attract an award of aggravated damages and those wrongs (if any) that do not has received surprisingly little attention. There is a general discussion of the topic in a recent Report of the Law Commission (UK), Aggravated, Exemplary and Restitutionary Damages Law Com No 247, 1997 at pars 2.10-2.11. That Report expresses the firm opinion that aggravated damages are not available in personal injury actions based (solely) on negligence or actions for breach of contract (see pars 2.10-2.11, 2.26-2.36). The more specific issue is considered by Christine McCarthy, "Exemplary and Aggravated Damages in Medical Negligence Litigation" (1998) 6 JLM 187. 98 The case law reveals aggravated damages being awarded in a range of torts including defamation (*Uren*), intimidation (*Rookes*), trespass to the person (*Myer Stores Ltd v Soo* [1991] 2 VR 597) and malicious prosecution (*Thompson v Commissioner of Police of the Metropolis* [1998] QB 498). If it be the law that some torts are incapable of attracting an award of aggravated damages then it will be necessary to search for unifying criteria. The task is not easy, for at least two reasons. First, the distinction between exemplary and aggravated damages was not clearly recognised until comparatively recently, with the result that "aggravated" damages awarded in the past for certain torts may, on analysis, turn out to be exemplary damages. The need to identify the discrimen only appears to have been recognised comparatively recently. Secondly, it is difficult to discern any common thread linking the wrongs for which an award of (non-exemplary) aggravated damages has been made. The Law Commission (UK) concluded *op cit*, (par 2.11, footnotes omitted) that:

Brockway v Pando [2000] WASCA 192 (07 August 2000) (Malcolm CJ, Kennedy J, Murray J)

Gray v Motor Accident Commission [1998] HCA 70 ; (1998) 73 ALJR 45

Brockway v Pando [2000] WASCA 192 (07 August 2000) (Malcolm CJ, Kennedy J, Murray J)

44. Counsel for Mrs Pando submitted that the trial Judge could not have based his orders on a finding of breach of contract because exemplary damages are not available for breach of contract, but only for tort: ***Gray v Motor Accident Commission*** [1998] HCA 70; (1998) 73 ALJR 45 at [13] . In fact the trial Judge concluded his consideration of the breach of contract claim saying:

> "*Leaving aside* the question of damages which may flow from breach of contract, it is clear that Brockway can be liable for such breach." (Emphasis added.)

Esso Australia Resources Ltd v Federal Commissioner of Taxation [1999] HCA 67 -
National Australia Bank Ltd v Maher (No 2) [1999] VSCA 189 (23 November 1999) (WINNEKE, P., CALLAWAY and BATT, JJ.A.)

36. There is one final matter. It has been assumed for many years that exemplary damages may be awarded by a judge sitting alone. Mr. Karkar was disposed to concede that the correctness of that assumption could now be tested only in the High Court. (There was no jury in either *Lamb v. Cotogno* (1987) 164 C.L.R. 1 or *Gray v. Motor Accident Commission* (1998) 73 A.L.J.R. 45.) That concession may well be correct, but it does seem odd that rules under the *Ju dicature Act* 1883 (Vic.) and its successors in this State dealing with "mode of trial" should effect such a fundamental change. (The same is true if the rubric is "practice and procedure", for the issue is different from that decided in *Naughton v. Colonial Provident Life & General Assurance Co. Ltd.* [1928] V.L.R. 533 at 538.) It is one thing to be found deserving of punishment and punished by a jury of one's fellow citizens without the safeguards of a criminal trial; it is another thing to be found deserving of punishment and punished without those safeguards by a judge. For an award of exemplary damages stands in place of both conviction and sentence. The better view of the rules made under the *Judicature Act* may have been that a plaintiff claiming exemplary damages was obliged to secure trial by jury. They preceded the developments referred to in *Gray v. Motor Accident Commission* at [16] and the avowed purpose of exemplary damages, as that case recognizes, is to punish: see especially [26], [40-43] and [95]. There is no need to consider the question further in the present case. As the President's judgment shows, there is a good deal to be said on both sides.

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