Lamb v Cotogno - [1987] HCA 47

Cited by:

FitzGerald v Foxes Lane (NSW) Pty Ltd [2025] NSWCA 212 -
FitzGerald v Foxes Lane (NSW) Pty Ltd [2025] NSWCA 212 -
The Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd [2025] FCAFC 104 (13 August 2025) (Burley, Jackman and Horan JJ)

> 50. In my view, there is no error in any of the primary judge's reasoning in relation to the amount of exemplary damages, and nor is that amount excessive, let alone manifestly excessive. I do not regard the declaration of a constructive trust over the copyright in the 14-minute Footage, together with the injunctive and other relief flowing from that declaration of a constructive trust, as having any material bearing on the award of exemplary damages. The constructive trust and injunction pertain to the actual circumstances of the present matter. There is no basis in the evidence or otherwise to think that the grant of that relief will have a material bearing on FTI's avowed intention to engage in similar conduct in the future. Moreover, FTI does not challenge the reasoning of the primary judge to the effect that the deterrent effect of exemplary damages should be directed not only to FTI but also to others like it: PJ [262]. That reasoning is expressly supported by the unanimous High Court in *Lamb v Cotogno* (at 10). Accordingly, the cross-appeal should be dismissed.

The Game Meats Company of Australia Pty Ltd v Farm Transparency International Ltd [2025] FCAFC 104 (13 August 2025) (Burley, Jackman and Horan JJ)

> 47. One matter advanced by FTI may be readily disposed of. FTI submits that an award of exemplary damages usually should not exceed the amount of compensatory damages, which in the present case were assessed as $30,000. Contrary to FTI's submission, there is no such principle. There is no necessary proportionality between the assessment of exemplary and compensatory damages: *Lamb v Cotogno* [1987] HCA 47; (1987) 164 CLR 1 (***Lamb v Cotogno***) at 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) , approving *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 (***XL Petroleum***) at 471 (Brennan J). As Brennan J explained in that passage in *XL Petroleum* , an award of exemplary damages is

intended to punish the defendant and deter similar conduct, and thus the relevant considerations are different from those which govern the assessment of compensatory damages.

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

62. The respondents submitted that it would be unrealistic to consider the appropriateness of the award for exemplary damages confined only to the deployment of CS gas, and that the episode must be viewed "holistically", including post-exposure conduct such as handcuffing the respondents and the method of decontamination employed. Although it can be accepted that other conduct may be taken into account in awarding exemplary damages, an award of that type can only be made to punish the tortious conduct. The decision in *Lamb v Cotogno* does not stand for any broader proposition . Although the award of exemplary damages in that matter took into account that the defendant had left the plaintiff by the roadside after the tortious act of causing injury by the use of a motor vehicle, that act formed part of the compensable wrong. Having caused the plaintiff's injuries through a tortious act, the defendant was under a duty to take reasonable steps to alleviate the effect of his wrongdoing. The defendant's cruel and reckless disregard for the welfare of the plaintiff, and the indifference to his plight, meant that the tort was committed in circumstances amounting to insult to the plaintiff. [34]

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)

94. They are not matters which may be inferred simply on the basis that he had no warning that the CS gas was going to be deployed and no assurance that his exposure would be brief. It is not enough that the court considers the conduct deserves condemnation. There must be evidence of injury to the plaintiff's feelings caused by the insult or humiliation of the conduct. [56] That distinction is encapsulated in the saying that aggravated damages are payable where the defendant's conduct shocks the plaintiff, while exemplary damages are payable where the defendant's conduct shocks the court.

via

[56] *Lamb v Cotogno* (1987) 164 CLR 1 at 8 ; *Lackersteen v Jones* (1988) 92 FLR 6 at 41.

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

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via

[34] *Lamb v Cotogno* (1987) 164 CLR 1 at 13.

Northern Territory of Australia v Austral [2025] NTCA 3 -
Northern Territory of Australia v Austral [2025] NTCA 3 -
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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)

State of New South Wales v Zreika [2012] NSWCA 37; *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47 ; *State of New South Wales v Radford* (2010) 79 NSWLR 327; [2010] NSWCA 276, 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 -
State of New South Wales v JR; State of New South Wales v Dickens; State of New South Wales v Jensen [2024] NSWCA 308 -
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State of New South Wales v JR; State of New South Wales v Dickens; State of New South Wales v Jensen [2024] NSWCA 308 -
El Assaad v Al Haje [2024] NSWCA 306 -
Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 (08 November 2024) (Beach and Orr JJA; J Forrest AJA)

Australian Consolidated Press Ltd v Uren (1967) 117 CLR 221; *Australian Iron and Steel Ltd v Greenwood* (19 62) 107 CLR 308; *Backwell v AAA* [1997] 1 VR 182; *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 ; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211; *David Syme & Co Ltd v Mather* [1977] VR 516; *Gray v Motor Accident Commission* (1998) 196 CLR 1; *L amb v Cotogno* (1987) 164 CLR 1 ; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208; *Swain v Waverly Municipal Council* (2005) 220 CLR 517; *Triggell v Pheeney* (1951) 82 CLR 497; *Tzouvelis v Victorian Railways Commissioners* [1968] VR 112; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, referred to.

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 -
Care A2 Plus Pty Ltd v Pichardo [2024] NSWCA 35 -
Jay v Petrikas [2023] NSWCA 297 -
State of New South Wales v Spedding [2023] NSWCA 180 -
State of New South Wales v Spedding [2023] NSWCA 180 -

Ikosidekas v Glenis [2023] VSCA 134 -
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)

247. The primary judge acknowledged that although it was very difficult to assess the comparative seriousness of B and D's psychiatric injuries, the evidence indicated that D had demonstrated significant resilience in her recovery, to the extent that there was "no immediate concern about her overall state of health": PJ [729]. Having taken into account the necessity for a component of aggravated damages (*Lamb* at [8]), the primary judge awarded $260,000 to D for non-economic loss.

Clancy v Plaintiffs A, B, C and D; Bird v Plaintiffs A, B, C and D [2022] NSWCA 119 -
John XXIII College v SMA [2022] ACTCA 32 -
John XXIII College v SMA [2022] ACTCA 32 -
Osei v P K Simpson Pty Ltd [2022] NSWCA 13 (14 February 2022) (White and McCallum JJA, Garling J)

66. In the Court of Appeal, Campbell JA who gave the leading judgment said:

> "[65] Mr Simpkins SC, counsel for the Appellant, accepted that not only was there a reference to false imprisonment in the heading to para 7 of the Statement of Claim, but also that it was plain:
>
> > 'from the drafting of the statement of claim that intermingled with those allegations [of serious assaults] were allegations essentially related to him being deprived of his liberty at least for some period of time. I think I have to accept that. So we end up with an intermingled claim ...' (T 11)
>
> [66] Mr Simpkins submits that where there is a claim of false imprisonment, as part of which it is contended that the plaintiff has, in consequence of the false imprisonment, sustained some effect on his or her mental state, that claim is for personal injury damages. I do not accept that claiming that one of the consequences of a false imprisonment is the suffering of a personal injury, is sufficient to characterise the entire claim for false imprisonment as one for '*personal injury damages*'.
>
> [67] I recognise that, to the extent to which the Respondent claimed compensatory and aggravated damages for the alleged false imprisonment, by reason of developing psychological impairment, there may be room for argument whether such damages, if ultimately awarded, would have been '*personal injury damages*' within the meaning of the *Civil Liability Act* . The extension of the ordinary meaning of '*injury*' to (relevantly) '*impairment of a person's mental condition*' effected by s 11 *Civil Liability Act* could arguably have the effect that damages for anxiety and distress can be '*personal injury damages*' within the meaning of s 11 : cf, eg, *Ibbett* [2005] NSWCA 445 at [124]-[125] per Ipp JA, [212], [216] per Basten JA; *State of NSW v Corby* [2010] NSWCA 27; (2010) 76 NSWLR 439 at [41] per Basten JA (Beazley and Tobias JJA agreeing). It seems more doubtful that damages for humiliation and injured feelings, not amounting to a psychological injury or something that caused the plaintiff's body or mind to operate less well, would if awarded be '*personal injury damages*'. An argument might also be available to the effect that exemplary damages, if awarded, were also '*personal injury damages*'. That argument seems doubtful, given that exemplary damages are awarded not as compensation but for other purposes (including punishment of the defendant for a high-handed disregard of the plaintiff's rights, deterrence of the defendant to prevent him or her from repeating such conduct, and marking the condemnation of the court for the defendant's conduct: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 ; *Lamb v Cotogno* (1987) 164 CLR 1 at 8-9). It is unnecessary to decide those questions, because the claim the Respondent brought sought damages, at least in part, for having been wrongfully deprived of his liberty, and loss of dignity. It is not

> submitted that such damages, if awarded, were bound to be negligible, and thus could be ignored for the purpose of deciding whether the Respondent's claim was one for '*personal injury damages*'.
>
> [68] The judgment in the court below was for a single sum of money, not allocated as between the different causes of action on which the Respondent sued, or the different heads of damage that he claimed. Because he claimed at least some damages that were not '*damages for personal injury*', it is not possible to characterise the settlement sum that he received as an '*amount recovered on a claim for personal injury damages*'... "

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

636. At common law, exemplary damages are awarded against a wrongdoer who is guilty of reprehensible conduct representing, as it is often said, a "contumelious disregard of another' s rights". [385] Importantly, they are not intended to compensate. Exemplary damages are intended to punish. They are intended "to serve one or more of the objects of punishment – moral retribution or deterrence". [386] Importantly, as Brennan J explained in *XL Petroleum (NSW) Pty Ltd* : [387]

> 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.

via

[386] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 (Windeyer J); *Lamb v Cotogno* (1987) 164 CLR 1, 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) .

Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
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] .

Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

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via

[144] *Lamb* (1987) 164 CLR 1 at 10.

Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

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via

[142] McGregor, *Mayne and McGregor on Damages*, 12th ed (1961) at 196, quoted in *Lamb* (1987) 164 CLR 1 at 8.

Lewis v Australian Capital Territory [2020] HCA 26 -
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Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Brighten v Traino [2019] NSWCA 168 (08 July 2019) (Basten, Gleeson and Brereton JJA)

48. Lamb v Cotogno (1987) 164 CLR 1 at 8 ; [1987] HCA 47 , cited in McMaster at [298] .

Brighten v Traino [2019] NSWCA 168 -
Brighten v Traino [2019] NSWCA 168 -
Lewis v Australian Capital Territory [2019] ACTCA 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)

(1987) 164 CLR 1 at 8 ; [1987] HCA 47 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) .

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

164. The High Court has described the circumstances in which exemplary damages may be awarded as being where:

1. the defendant has been guilty of "conscious wrongdoing in contumelious disregard of another's rights": *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71; [1920] HCA 75 at 77 ;

2. the defendant has committed a particularly flagrant violation of the plaintiff's rights: *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185; [1966] HCA 37 at 212 ;

3. the defendant by his or her conduct shows a cruel and reckless disregard of the plaintiff thereby demonstrating the defendant's callousness and indifference towards the plaintiff in committing the wrong: *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47 at 12–13 .

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

It should be stated that there is no error as such in making an award of damages in a single sum for both aggravated and exemplary damages. In Uren v John Fairfax & Sons, Taylor J pointed out that the same set of circumstances may justify an award of either. See also Lamb v Cotogno (1987) 164 CLR 1 at 8 ; [1987] HCA 47 ; XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd ; State of New South Wales v Ibbett at [33] . In State of New South Wales v Ibbett , the court stated, at [35] :

"[35]In cases where the same circumstances increase the hurt to the plaintiff and also make it desirable for a court to mark its disapprobation of that conduct, the court may choose to award one sum which represents both heads of damages and no element more than once."

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

Lamb v Cotogno (1987) 164 CLR 1 at 9 ; [1987] HCA 47 per curiam.

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

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State of New South Wales v Cuthbertson [2018] NSWCA 320 -
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Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316 -
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The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 (23 November 2018) (Buss P, Murphy JA, Pritchard JA)

Lamb v Cotogono [1987] HCA 47 ; (1987) 164 CLR 1

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 -
Jones (Liquidator) v Matrix Partners Pty Ltd, in the matter of Killarnee Civil & Concrete Contractors Pty Ltd (in liq) [2018] FCAFC 40 -
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3 (14 February 2018) (Kiefel CJ, Gageler, Keane, Nettle and Gordon JJ)

117. The idea that *Lamb v Cotogno* implies the contrary is misplaced. To acknowledge that a deterrent effect of exemplary damages exists despite the fact that a defendant may be insured against them is to recognise that the quantum of exemplary damages, as opposed to the fact of their personal payment, provides a measure of the court's disapproval of the defendant's conduct. That is one object of an award of exemplary damages [98] . But it is facile to suppose that the context of exemplary damages says much, if anything at all, as to the specific and general deterrent effects of pecuniary penalty orders, which, it is accepted, are closely related to the sting or burden that such orders impose on the contravener.

Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] HCA 3 (14 February 2018) (Kiefel CJ, Gageler, Keane, Nettle and Gordon JJ)

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via

[98] See *Lamb v Cotogno* (1987) 164 CLR 1 at 7-10 ; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7-8 [14]-[16], 9 [22], 12-13 [32]-[34] per Gleeson CJ, McHugh, Gummow and Hayne JJ, 29 [87], 35 [101] per Kirby J; [1998] HCA 70 ; *New South Wales v Ibbett* (2006) 229 CLR 638 at 648-649 [35], [38]-[39] ; [2006] HCA 57.

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 -
Amaca Pty Ltd v Latz [2017] SASCFC 145 (30 October 2017) (Blue, Stanley and Hinton JJ)
Cullen v Trappell (1980) 146 CLR 1; *Johnson v Perez* (1988) 166 CLR 351; *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; *Hush er v Husher* (1999) 197 CLR 138; *Kars v Kars* (1996) 187 CLR 354; *Metropolitan Water Board v London, Brighton, and South Coast Railway Co* [1910] 1 KB 804; *Metropolitan Water Board v Colley's Patents Ltd* [1 911] 2 KB 38; *Lamb v Cotogno* (1987) 164 CLR 1 ; *Uren v John Fairfax and Sons Pty Ltd* (1966) 117 CLR 118, considered.

Amaca Pty Ltd v Latz [2017] SASCFC 145 -
State of New South Wales v Smith [2017] NSWCA 194 (04 August 2017) (McColl and Leeming JJA, Sackville AJA)

"[61]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 [198 7] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: Lamb v Cotogno , at 6 [12] . Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is 'conscious wrongdoing in contumelious disregard of another's rights': Gray v MAC, at 7 [14].

State of New South Wales v Smith [2017] NSWCA 194 (04 August 2017) (McColl and Leeming JJA, Sackville AJA)

167. As Sackville AJA explained in *State of New South Wales v Zreika* : [124]

> "[61] 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] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno* , at 6 [12] . Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is 'conscious wrongdoing in contumelious disregard of another's rights': *Gray v MAC*, at 7 [14].
>
> [62] Exemplary damages may be awarded against the State in respect of the conduct of police officers for whose torts the State is responsible: *NSW v Ibbett*; *NSW v Landini*, at [114]. The assessment of exemplary damages in a case of conscious and contumelious disregard of the plaintiff's rights by the police:
>
> > 'should indicate ... that the conduct of the [police] was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses ... do not happen.'
>
> *Ibbett*, at 653 [51], citing *Adams v Kennedy* (2000) 49 NSWLR 78, at 87, per Priestley JA."

State of New South Wales v Smith [2017] NSWCA 194 -
State of New South Wales v Randall [2017] NSWCA 88 -

Gore v Australian Securities and Investments Commission [2017] FCAFC 13 -
Cheng v Farjudi [2016] NSWCA 316 (21 November 2016) (Beazley P, Ward JA and Harrison J)

BHP Billiton Ltd v Parker (2012) 113 SASR 206 ; [2012] SASCFC 73 Brockway v Pando (2000) 22 WAR 405 ; [2000] WASCA 192 Browne v Dunn (1893) 6 R 67 (HL) Carter v Walker (2010) 32 VR 1 ; [2010] VSCA 340 Channel Seven Sydney Pty Ltd v Mahommed (2010) 278 ALR 232 ; [2010] NSWCA 335 Cotogno v Lamb (No 3) (1986) 5 NSWLR 559 Cramer v Geraldton Building Co (2004) 29 WAR 410 ; [2004] WASCA 289 Daniels v Thompson [1998] 3 NZLR 22 ; [1998] NZCA 3 De Reus v Gray (2003) 9 VR 432 ; [2003] VSCA 84 Farjudi v Cheng [2015] NSWDC 297 Fernando v Commonwealth of Australia (2014) 231 FCR 251 ; [2014] FCAFC 181 Giller v Procopets (2008) 24 VR 1 ; [2008] VSCA 236 Gray v Motor Accident Commission (1998) 196 CLR 1 ; [1998] HCA 70 Herald & Weekly Times Ltd, The v Popovic (2003) 9 VR 1 ; [2003] VSCA 161 House v The King (1936) 55 CLR 499 ; [1936] HCA 40 Lamb v Cotogno (1987) 164 CLR 1 ; [1987] HCA 47 McFadzean v Construction, Forestry, Mining & Energy Union (2007) 20 VR 250 ; [2007] VSCA 289 Niven v SS [2006] NSWCA 338 Noye v Robbins [2010] WASCA 83 R v Mauger [2012] NSWCCA 51 Rookes v Barnard [1964] AC 1129 S v The Queen [2004] WASCA 113 State of New South Wales v McMaster (2015) 91 NSWLR 666 ; [2015] NSWCA 228 State of Victoria v Horvath (2002) 6 VR 326 ; [2002] VSCA 177 Tilden v Gregg [2015] NSWCA 164 Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 ; [1966] HCA 40 Vaysman v Deckers Outdoor Corporation Inc (2014) 222 FCR 387 ; [2014] FCAFC 60 W v W [1999] 2 NZLR 1 Whitbread v Rail Corporation NSW [2011] NSWCA 130 Whitfeld v De Lauret and Company Ltd (1920) 29 CLR 71 ; [1920] HCA 75 Wilson v Horne (1999) 8 Tas R 363 ; [1999] TASSC 33 XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448 ; [1985] HCA 12

Cheng v Farjudi [2016] NSWCA 316 -
Cheng v Farjudi [2016] NSWCA 316 -
Paciocco v Australia and New Zealand Banking Group Ltd [2016] HCA 28 (27 July 2016) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

254. Courts of common law have long exercised the power to award exemplary damages to punish a tortfeasor in certain circumstances [282] ; but the courts have consistently refused to countenance the enforcement of attempts to impose punishment by contract as a sanction for nonperformance or to threaten such punishment [283] . As Lord Hoffmann said in *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [284] :

> "the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance."

via

[282] *Fontin v Katapodis* (1962) 108 CLR 177; [1962] HCA 63; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; [1966] HCA 40; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; [1985] HCA 12; *Lamb v Cotogno* (1987) 164 CLR 1; [1987] HCA 47 .

Bragdon v Director of the Fair Work Building Industry Inspectorate [2016] FCAFC 64 -
HD v State of New South Wales [2016] NSWCA 85 (26 April 2016) (Gleeson and Leeming JJA, Emmett AJA)

131. Exemplary damages are punitive and intended as a deterrent of similar conduct in the future, and to reflect "detestation" for the action: *Lamb v* Cotogno [1987] HCA 47 ; 164 CLR 1 at 8. Given the favourable credit findings, there was nothing about the conduct of any of the police officers which could be described as "a conscious wrongdoing in contumelious disregard of [the appellant's] rights" so as to justify an award of exemplary damages: *State of New South Wales v Zreika* at [61] .

HD v State of New South Wales [2016] NSWCA 85 (26 April 2016) (Gleeson and Leeming JJA, Emmett AJA)

> 132. Aggravated damages are compensatory for injury to the appellant's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* at 8. The appellant acknowledged in this Court that the application for the ADVO was not malicious. The main source of aggravation relied upon by the appellant concerned the circumstances in which the police came to his house with guns and served that order on the evening of 11 May 2012. This cannot be relied upon as an aggravating factor justifying the award of damages for injury to the appellant's feelings.

Sahade v Bischoff [2015] NSWCA 418 -
MacDougal v Mitchell [2015] NSWCA 389 -
Commonwealth v Director, Fair Work Building Industry Inspectorate [2015] HCA 46 -
Bulsey v State of Queensland [2015] QCA 187 (06 October 2015) (Fraser JA and Atkinson and McMeekin JJ,)

(1987) 164 CLR 1; [1987] HCA 47 , cited

Bulsey v State of Queensland [2015] QCA 187 -
Bulsey v State of Queensland [2015] QCA 187 -
Bulsey v State of Queensland [2015] QCA 187 -
State of New South Wales v McMaster [2015] NSWCA 228 -
Tilden v Gregg [2015] NSWCA 164 (16 June 2015) (McColl, Macfarlan and Meagher JJA)

> 57. The appellant sought aggravated and exemplary damages. The relevant principles are sufficiently summarised by Sackville AJA in *State of New South Wales v Zreika* [2012] NSWCA 37 at [60] – [61] :
>
> > ... Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are awarded to punish and deter the wrongdoer: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118, at 129-130, per Taylor J, cited with approval in *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, at 646-647 [31], [33] . Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *NSW v Ibbett*, at [34]; *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1, at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: *NSW v Ibbett*, at 647 [33]. [34].
> >
> > 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] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno* , at 6 [12] . Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "*conscious wrongdoing in contumelious disregard of another's rights*": *Gray v MAC*, at 7 [14].

Tilden v Gregg [2015] NSWCA 164 (16 June 2015) (McColl, Macfarlan and Meagher JJA)

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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] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno* , at 6 [12] . Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is " *conscious wrongdoing in contumelious disregard of another's rights*": *Gray v MAC*, at 7 [14].

Tilden v Gregg [2015] NSWCA 164 -
Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 -
Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 -
State of New South Wales v Abed [2014] NSWCA 419 -
State of New South Wales v Abed [2014] NSWCA 419 -
Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 (22 May 2014) (Dowsett, Siopis and Besanko JJ)
Lamb v Cotogno (1987) 164 CLR 1
Law Institute of Victoria Ltd v Nagle

Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 -
Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 -
Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 -
Dean v Phung [2004] NSWCA 223 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 (18 June 2012) (Doyle CJ; Gray and White JJ)

206. In *Lamb v Cotogno* ,[27] the High Court spoke of the punitive function of exemplary damages when citing the following passage from the judgment of Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* : [28]

> 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.

The Court went on to say, however, that punishment was not the sole purpose served by an award of exemplary damages.

> 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 selfhelp likely to endanger the peace: ... This consideration probably had more force when exemplary damages were in their infancy, but it nevertheless remains as an aspect of them. ... 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 nonetheless present. [29]

via

[29] (1987) 164 CLR 1 at 9.

BHP Billiton Ltd v Parker [2012] SASCFC 73 (18 June 2012) (Doyle CJ; Gray and White JJ)
Czatyrko v Edith Cowan University [2005] HCA 14; (2005) 79 ALJR 839; *Lamb v Cotogno* (1987) 164 CLR 1 ; *Roads and Traffic Authority of New South Wales v Dederer* [2007] HCA 42; (2007) 234 CLR 330; *State of New South Wales v Fahy* [2007] HCA 20; (2007) 232 CLR 486; *The Council of the Shire of Wyong v Shirt* [1980] HCA 12; (1980) 146 CLR 40, discussed.

BHP Billiton Ltd v Parker [2012] SASCFC 73 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 -
PGA v The Queen [2012] HCA 21 (30 May 2012) (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

241. There is a more fundamental difficulty with the submission that the Court should hold that a substantive rule of law affecting liability for a serious criminal offence has simply disappeared because of a perception that changed conditions of society no longer provided a justification for it. The powerful reasons against an ultimate court of appeal varying or modifying a settled rule or principle of the common law [456] apply with particular force to a variation or modification which has the effect of extending criminal liability. It is for the parliament to determine that a rule of exemption from criminal liability is no longer suited to the needs of the community.

via

[456] *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633 per Mason J (Stephen and Aickin JJ agreeing); *Zecevic v Director of Public Prosecutions (Vict)* (1987) 162 CLR 645 at 664 per Wilson, Dawson and Toohey JJ, 677-678 per Deane J; [1987] HCA 26 ; *Lamb v Cotogno* (1987) 164 CLR 1 at 11 per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ; [1987] HCA 47 .

PGA v The Queen [2012] HCA 21 -
State of New South Wales v Zreika [2012] NSWCA 37 -
State of New South Wales v Zreika [2012] NSWCA 37 -
Facton Ltd v Rifai Fashions Pty Ltd [2012] FCAFC 9 -
Facton Ltd v Rifai Fashions Pty Ltd [2012] FCAFC 9 -
Darcy v State of New South Wales [2011] NSWCA 413 -
Darcy v State of New South Wales [2011] NSWCA 413 -
Gacic v John Fairfax Publications Pty Ltd [2011] NSWCA 362 -
State of New South Wales v Williamson [2011] NSWCA 183 -
State of New South Wales v Williamson [2011] NSWCA 183 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

216. In *Lamb v Cotogno* , at 8 , the High Court cited with approval the following passage from *Mayne and McGregor on Damages,* 12 th ed (1961) Sweet & Maxwell:

> "[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."

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

20. Exemplary damages are awarded rarely. Something more must be found than a mere finding of fault: *Gray* (at [12]). 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: *Gray* (at [20]). 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: *Lamb v Cotogno* (at 13).

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

28. Conduct which attracts the epithet "high-handed" falls within that class described as demonstrating a contumelious disregard of the plaintiff's rights which would attract an award of exemplary damages: *Lamb v Cotogno* (at 3); *Fontin v Katapodis* [1962] HCA 63; (1962) 108 CLR 177 (at 187) per Owen J; *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 (at 130) per Taylor J; (at 146) per Menzies J; (at 161) per Owen J. It is not to point that the primary judge attached that description to Schofield's conduct when considering the aggravated damages claim. The same circumstances might justify either an award of exemplary or aggravated damages: *Uren v John Fairfax & Sons Pty Ltd* (at 130) per Taylor J; referred to with approval in *New South Wales v Ibbett* (at [33] - [34]). The same facts may be relevant to both heads of damage because of the different focus of each award: *State of New South Wales v Ibbett* (at [83]) per Spigelman CJ.

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)
Lamb v Cotogno [1987] HCA 47; (1987) 164 CLR 1
Maricic v Dalma Formwork (Aust) Pty Ltd [No 2]

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
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Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Carter v Walker [2010] VSCA 340 (14 December 2010) (Buchanan, Ashley and Weinberg JJA)

284. Exemplary damages are damages over and above those necessary to compensate the plaintiff. They are awarded to punish the defendant. They are intended to act as a deterrent to the defendant, and to others minded to behave in a like manner. [238] They are also intended to demonstrate the Court's disapprobation and denunciation of such conduct. [239] Such damages may be awarded in respect of any tort that is committed in circumstances involving a deliberate, intentional, or reckless disregard of the plaintiff's rights. Often, they are sought in cases involving allegations against the police of assault and battery. [240]

via

[239] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 ; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448, 471 ; *Lamb v Cotogno* (1987) 164 CLR 1, 9-10 ; and *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 .

Alishah v Gunns Ltd [2010] TASFC 6 (01 December 2010) (Evans, Blow and Tennent JJ)

9. In this case the defendants' contention that they are entitled to claim in aid penalty privilege is based solely on the ground that the remedies sought against them by the plaintiffs include a claim for exemplary damages. (It is of no consequence that the plaintiffs also seek relief other than exemplary damages, *Birrell v Australian National*

Airlines Commission (1984) 1 FCR 526 at 529 – 530 .) The defendants contend that a claim for exemplary damages is a claim for a penalty and this entitles them to rely on penalty privilege. At issue is whether exemplary damages are a penalty for penalty privilege purposes. It is beyond question that there is a penal aspect to exemplary damages. In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, Brennan J said at 471 :

> "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* 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 principle 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*, 'to teach a wrong-doer that tort does not pay'. The purpose of restraint looms large in the present case."

See also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 131, 137, 149 and 152, *Lamb v Cotogno* (1987) 164 CLR 1 at 9, and *Gray v Motor Accident Commission* (1998) 196 CLR 1 at par[26]. It must be said, however, that it is overly simplistic to label exemplary damages as a penalty which is analogous to a penalty imposed for criminal conduct or a statutory offence. The obligation to pay exemplary damages arises from the commission of a tort in circumstances that justify an award of such damages. Whilst compensation is the dominant remedy, if not the purpose of the law of torts, fault still has a place in many forms of wrongdoing, *Uren* (supra) at 149, and amongst the purposes served by an award of exemplary damages is easing the instinct of the victim of a tort to take revenge and thereby discouraging resort to self-help, *Lamb* (supra) at 9.

Alishah v Gunns Ltd [2010] TASFC 6 -
New South Wales v Radford [2010] NSWCA 276 -
New South Wales v Radford [2010] NSWCA 276 -
State of New South Wales v Landini [2010] NSWCA 157 (09 July 2010) (Tobias and Macfarlan JJA, Sackville AJA)
Lamb v Cotogno [1987] HCA 47; (1987) 164 CLR 1
Martin v Watson

State of New South Wales v Landini [2010] NSWCA 157 -
State of New South Wales v Landini [2010] NSWCA 157 -
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] (w hich 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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via

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

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

[23] It is not accurate to characterise the difference between the Privy Council and the Court of Appeal in *Bottrill* as turning on "whether the negligence was outrageous". [84] The jurisdiction to award exemplary damages arises where the conduct of the defendant is "so outrageous as to call for condemnation and punishment". [85] The conduct may however be in the "manner or circumstances" in which the tort was

committed and which make it "particularly appalling".[86] The distinction is illustrated by *Lamb v Cotogno* where the High Court of Australia accepted that callous conduct following commission of the tort and not itself comprising an actionable wrong could occasion an award of exemplary damages if outrageous. [87] In *Rookes v Barnard* Lord Devlin had taken the view that everything which aggravates or mitigates the defendant's conduct is relevant to a claim for exemplary damages.[88] So in defamation cases it is established that the relevant conduct continues until judgment. [89] In *Vorvis* , there was disagreement between the members of the Supreme Court of Canada about whether exemplary damages for breach of conduct could be awarded if the conduct relied on did not constitute in itself an actionable wrong. The majority suggested that exemplary damages might, unusually, be awarded in cases of breach of contract, although in such cases the misconduct would also amount to an actionable wrong.[90] Wilson J, joined by L'Heureux-Dubé J, took a broader approach, considering rather that the task of the Court was simply "to assess the conduct in the context of all the circumstances and determine whether it is deserving of punishment because of its shockingly harsh, vindictive, reprehensible or malicious nature":[91]

> In his dissent in the Court of Appeal in the present case Anderson JA applied the principles set out by Linden J in *Brown v Waterloo Regional Board of Commissioners of Police* and concluded that the conduct of the defendant both before and after the wrongful dismissal should be considered. I agree. This broader approach is required if the court's purpose is to punish highhanded, vindictive or otherwise shocking and reprehensible conduct by the defendant.
>
> ...
>
> Undoubtedly some conduct found to be deserving of punishment will constitute an actionable wrong but other conduct might not.

Wilson J then adopted the statement of Clement JA in *Paragon Properties Ltd v Magna Envestments Ltd* [92] set out above at [22]. In the subsequent case of *Whiten* the Supreme Court of Canada maintained the position that exemplary damages must depend on an actionable wrong in addition to breach of contract, but found it in that case in breach of the additional obligation of good faith to which the insurer was subject. [93]

Couch v Attorney-General (No 2) [2010] NZSC 27 -
Couch v Attorney-General (No 2) [2010] NZSC 27 -
Couch v Attorney-General (No 2) [2010] NZSC 27 -
Couch v Attorney-General (No 2) [2010] NZSC 27 -
New South Wales v Corby [2010] NSWCA 27 (03 March 2010) (Beazley, Tobias and Basten JJA)

44 Her Honour, correctly, dealt separately with aggravated and exemplary damages. In the context, that was necessary because there is a plethora of statements of the highest authority to support the proposition that aggravated damages are compensatory. The State referred to passages in *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 at 129-130 (Taylor J), at 149 (Windeyer J); *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1 at 8 and *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, where the following appeared in the judgment of the Court at [31] :

> "Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing."

New South Wales v Corby [2010] NSWCA 27 -
Giller v Procopets [2008] VSCA 236 (10 December 2008) (Maxwell P, Ashley and Neave JJA)

498. The distinction between the two was clearly explained by the High Court in *Lamb v Cotogno* ,[512] as follows:

> Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, 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'. [513]

via

[513] Ibid 8.

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it is because aggravated damages are awarded for the increased hurt to the plaintiff caused by the manner in which the defendant has committed the wrong that Windeyer J was constrained to acknowledge in *Uren v John Fairfax & Sons Pty Ltd* that there is an element of the punitive in aggravated damages. This is particularly so in defamation cases where the extent of the defendant's malice is relevant to an award of aggravated compensatory damages. As McHugh J pointed out in *Carson v John Fairfax & Sons Ltd*:

"To say that no element of punishment enters into the assessment of aggravated compensatory damages and that the effect of such an award is merely to compensate the plaintiff for the increased harm which that person suffers is to resort to fiction in many cases."'

106. Seventh, the difficulty of which the High Court and Winneke P spoke is not, I think, limited to defamation cases. According to Batt J in *Private Parking Services (Vic) Pty Ltd and ors v Huggard*, a case of detinue and conversion, the element of punishment which lay within 'a combined award of general and aggravated damages', needed to be considered when reviewing an award of exemplary damages.

107. Eighth, the approach commended in *Private Parking* is compatible with principles later expounded in *Backwell v AAA* con cerning exemplary damages. There the Court of Appeal concluded that, in a jury trial, the jury should be instructed to display restraint or moderation in relation to an award of such damages. No doubt the same approach should be applied by a judge sitting alone.

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111. In *Lamb* , the High Court identified punishment and deterrence as relevant objects. As to the punitive aspect, their Honours referred to what had been said by Brennan J in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd:*

'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.'

As to the deterrent aspect, their Honours said that

'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.'

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'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.'

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Imbree v McNeilly [2008] HCA 40 (28 August 2008) (Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ)

153. *Opinions in this Court*: The closest that this Court has come to considering the issue was *Lamb v Cotogno* [195] . The question there was whether, having regard to the system of compulsory insurance under the then *Motor Vehicles (Third Party Insurance) Act* 1942 (NSW) , it was legally appropriate to re-express the common law governing the liability of the driver (or owner) of an insured motor vehicle to pay exemplary damages to a person injured because of the high-handed driving of a driver.

via

[195] (1987) 164 CLR 1 . See also eg *Harriton v Stephens* (2006) 226 CLR 52 at 95-96 [139]-[140]; [2006] HCA 15.

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154. In the Court of Appeal of New South Wales, in a dissenting opinion, I expressed the view that the enactment of universal compulsory insurance statutes in Australia rendered it anomalous to burden the insurance fund with liability for exemplary damages awarded for a purpose of punishment [196] . However, this Court was unpersuaded of the need to re-express the common law in that respect [197] . The essential holding of the Court in the case is found in the Court's conclusion [198] :

> "[T]here is no principle or trend to be discerned in the *Motor Vehicles (Third Party Insurance) Act* or any other legislation concerning the measure of damages to be applied in cases of compulsory insurance. Clearly the Act is drafted against the background of the common law and if any inference is to be drawn from it upon the admittedly contentious question of exemplary damages, it is that there was no intention to disturb the existing situation."

via

[198] *Lamb* (1987) 164 CLR 1 at 12 ; cf *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25 [80]; [1998] HCA 70.

Imbree v McNeilly [2008] HCA 40 -
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114. In *Lamb v Cotogno* (1987) 164 CLR 1 at 9, Mason CJ, Brennan, Deane, Dawson and Gaudron JJ said that the object, or at least the effect, of exemplary damages is not wholly punishment and that the deterrence which is intended extends beyond the actual wrongdoer and the exact nature of the wrongdoing. And they said:

> *'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 a plaintiff is unlikely to accept – the element of appeasement, if not compensation, is nonetheless present.'* (*Lamb* 164 CLR at 9-10)

Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd [2007] FCAFC 40 -
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Australian Broadcasting Corporation v O'Neill [2006] HCA 46 -
Harriton v Stephens [2006] HCA 15 -
State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

234 Thirdly, although the phrase "conscious wrong-doing in contumelious disregard of another's rights" involves a number of conceptual elements, to break it down into constituent parts may tend to obscure the composite meaning. Thus, in *Lamb* , the Court stated at 13 :

> "That act [of abandoning the plaintiff] was described by the master as callous and although it was submitted that mere callousness, involving no element of intent or recklessness, would not support an award of exemplary damages, the use of the word is, we think, sufficient in its context to indicate that the Master saw the defendant as having behaved in a humiliating manner and in wanton disregard of the plaintiff's welfare."

No word from the classical formulation is contained in the last part of this sentence, but the meaning is clearly intended to be the same. It follows that the reference in the classical phrase to "conscious wrong-doing" does not require consciousness of each of

the elements of a crime or tort, nor does disregard of a person's "rights" require identification of a particular legal right.

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

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> *Lamb v Cotogno* (1987) 164 CLR 1 ; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australasia) Pty Ltd* (1985) 155 CLR 448; *Commonwealth v Murray* [1988] Aust Torts Reports ¶80-217 and *Backwell v AAA* [1997] 1 VR 183 referred to.

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

259 When dealing with the question of aggravated damages in respect of the trespass to the land, his Honour noted that such damages are "compensatory in nature and are awarded for injury to the plaintiffs' feelings caused by insult or humiliation" – referring to *Lamb v Cotogno* and *Hunter Area Health Service v Marchlewski* (2000) 51 NSWLR 268. The reference to *Hunter Area Health Service* does not greatly assist in this discussion. In that case, Mason P was concerned with the question whether aggravated damages should be awarded for mental distress or injured feelings, in a negligence claim. His Honour held that such an award was inappropriate, a conclusion now reflected in s 21 of the *Civil Liability Act* . One reason for adopting that view was that, at least when parasitic or consequential upon other types of damage, compensation for mental distress, vexation or annoyance is available in a negligence action, according to principles identified in *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1 at 37-39, referring at 38G to *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 359-360 . As Mason P continued in *Hunter Area Health Service* at [110]:

> "To speak of aggravated damages as a separate component can only have the capacity to confuse and run the risk as to double compensation ... ."

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

270 Care should be taken to avoid reliance on a perception of incompatibility with a statutory scheme, eliding into an argument based on 'the equity of the statute' or 'statutory analogy'. The latter form of reasoning has been rejected more than once as a basis for developing general law principles: see Finn P "Statutes and the Common Law: The Continuing Story" in Corcoran S and Bottomley S (eds) (2005, Federation Press) pp 57-62. In this particular context, in *Lamb v Cotogno* , the joint judgment stated (at p 11):

> "Even if it were possible for a court to go beyond what a statute actually enacts and to draw from it some principle to be applied by way of analogy in fashioning the common law, it would not assist the defendant's argument in this case. Such an approach was first suggested by Pound in 1907, but it has never really gained general acceptance, at all events in that simple form ... ."

In that case, no incompatibility was held to exist between compulsory third party insurance legislation and the award of exemplary damages. Speaking generally, there is a difference between expanding the operation of a statutory principle into areas where the Parliament has not ventured, and accommodating general law principles to give effect to an enacted principle within its prescribed area of operation. The

argument of the State may have crossed this boundary between permissible and impermissible principles of construction.

State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
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State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
State of New South Wales v Ibbett [2005] NSWCA 445 -
New South Wales v Bryant [2005] NSWCA 393 (16 November 2005) (Beazley, McColl and Basten JJA)

Hollis v Vabu Pty Ltd (2001) 207 CLR 21, *Gray v Motor Accident Commission* (1998) 196 CLR 1 and *Lamb v Cotogno* (1987) 164 CLR 1 discussed.

New South Wales v Bryant [2005] NSWCA 393 -
New South Wales v Bryant [2005] NSWCA 393 -
Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 (27 September 2004) (Giles, Santow and Ipp JJA)

Gray v Motor Accident Commission (1998) 196 CLR 1 followed, *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, *Lamb v Cotogno* (1987) 164 CLR 1 , *State of New South Wales v Riley* (2003) 57 NSWLR 496 considered.

Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 (27 September 2004) (Giles, Santow and Ipp JJA)
Lamb v Cotogno (1987) 164 CLR 1

Port Stephens Shire Council v Tellamist Pty Ltd [2004] NSWCA 353 -
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)

68 In *Harris v Digital Pulse Pty Limited* (2003) 56 NSWLR 298 at 311 [55] , Spigelman CJ referred to the first of these additional objectives as "vindication" and to the second as "denunciation". As his Honour observed (at 312 [56]), each of the purposes so identified by the High Court in *Lamb* is primarily, if not exclusively, a public purpose.

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

84 Thus in *Digital Pulse* , Heydon JA observed (at 342 [254]) in a paragraph cited by this Court in *Am algamated Television Services Pty Ltd v Marsden (No 2)* (2003) 57 NSWCA 338 at 345[23]:

"If exemplary damages are to fulfil their threefold purpose, they must not merely irritate, they must sting. It is the gravity and character of the defendants' conduct which guides the Court's discretion as to the proper amount to award by way of exemplary damages. That is why there is 'no necessary proportionality' between the amount awarded as compensation for the damage suffered by the plaintiff and the amount of exemplary

damages awarded against the defendant ... [*XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 271 ; *Lamb v Cotogno* (1987) 164 CLR 1 at 9]. A minimal amount of damage inflicted on a plaintiff may, if the wrongdoing was outrageous, nevertheless require heavy exemplary damages to be visited upon the defendant. (Other citation omitted.)"

James v Hill [2004] NSWCA 301 -
James v Hill [2004] NSWCA 301 -
James v Hill [2004] NSWCA 301 -
James v Hill [2004] NSWCA 301 -
Cran v State of New South Wales [2004] NSWCA 92 -
Cran v State of New South Wales [2004] NSWCA 92 -
Herald & Weekly Times Ltd v Popovic [2003] VSCA 161 (21 November 2003) (WINNEKE, A.C.J, GILLARD and WARREN, A.JJ.A.)

418. In *Caltex v. XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd,* [205] Brennan, J.[206] summarised the law as follows –

> "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 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 and the two categories. In *Merest v. Harvey* substantial exemplary damages were awarded for trespass of a high handed kind which occasioned minimal damage, Gibbs, C.J. saying:
>
> > 'I wish to know, in a case where a man disregards every principle 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 and Co.* 'to teach a wrong doer that tort does not pay'."
>
> Quoted with approval by the High Court in *Lamb v. Cotogono*. [207]

via

[207] (1987) 164 C.L.R. 1 at 9.

State of New South Wales v Riley [2003] NSWCA 208 -
State of New South Wales v Riley [2003] NSWCA 208 -
State of New South Wales v Riley [2003] NSWCA 208 -
State of New South Wales v Riley [2003] NSWCA 208 -
Gifford v Strang Patrick Stevedoring Pty Ltd [2003] HCA 33 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 (07 February 2003) (Spigelman CJ Mason P Heydon JA)

Lamb v Cotogno (1987) 164 CLR 9

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 (07 February 2003) (Spigelman CJ Mason P Heydon JA)
55 The joint judgment in Lamb v Cotogno (1987) 164 CLR at 9-10

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 (07 February 2003) (Spigelman CJ Mason P Heydon JA)

In his reasons for holding that "exemplary damages" were able to be awarded in equity, Palmer J relied on the full range of purposes which had been identified in *Lamb v Cotogno* . The traditional hostility of equity to penalties is not a complete answer to the Respondent's case. Nevertheless, each of the purposes identified by the High Court is primarily, if not exclusively, a public purpose. None, in my opinion, involve a balancing exercise *inter partes.* The closest is the element of vindication but that, as explained in *Lamb v Cotogno* is designed to preserve the peace.

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 -
Chen v Karandonis [2002] NSWCA 412 -
Chen v Karandonis [2002] NSWCA 412 -
Chen v Karandonis [2002] NSWCA 412 -
Dow Jones & Co Inc v Gutnick [2002] HCA 56 -
State of Victoria v Horvath [2002] VSCA 177 -
Finesky Holdings Pty Ltd v Minister For Transport For Western Australia [2002] WASCA 206 (02 August 2002) (Wallwork, Steytler and Parker JJ)

Lamb v Cotogno (1987) 164 CLR 1

Delta Corporation Ltd v DAVIES [2002] WASCA 125 -
R v MJR [2002] NSWCCA 129 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 (25 March 2002) (Spigelman CJ, Mason P and Grove J)
Lamb v Cotogno (1987) 164 CLR 1
Lee v Kennedy

TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
Conway v The Queen [2002] HCA 2 (07 February 2002) (Gaudron ACJ,McHugh, Kirby, Hayne and Callinan JJ)

[135] *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 2527 [81][83], 4647 [129][130] ; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 5963 [18][29], 86 [97] ; cf *Lamb v Cotogno* (1987) 164 CLR 1 at 1112 .

Commonwealth v Yarmirr [2001] HCA 56 (11 October 2001) (Gleeson CJ,Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ)

257. There is a further reason that reinforces this conclusion. The common law of Australia may not defy, or conflict with, the Constitution [334] . Neither may it be inconsistent with valid federal legislation [335] . The common law adapts itself to the Constitution and to such legislation [336] . The residue of the common law may be re-expressed, deleting any former parts that cannot stand with the constitutional or legislative provisions or the assumptions inherent in them. So much follows, if from nothing else, from the requirement of the Constit ution that there is but one law applicable to, and binding upon, all the people of Australia. The content of that law may occasionally be in doubt. It may sometimes require the application of legal reasoning to discover the rule to be observed and to exclude laws that are invalid. But, ultimately, a single governing law is discoverable and enforceable, if necessary in this Court.

via

[336] eg *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25 [80], 4647 [129][130] ; cf *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12 ; *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570572 .

Pilmer v Duke Group Ltd (In Liq) [2001] HCA 31 -
Tan v Benkovic [2000] NSWCA 295 (26 October 2000) (Mason P, Stein and Heydon JJA)

39 The appellant accepts that there may be cases where negligence attending a medical procedure is so gross as to merit an award of exemplary damages. This is in accord with the authorities. 40 *Lamb v Cotogno* (1987) 164 CLR 1 was an action in trespass. Sometimes a medical professional's non-disclosure is so inadequate as to vitiate the patient's consent, with the result that the ensuing procedure is a battery (see *Appleton v Garrett* [1996] PIQR 1, discussed in "Battery: Exemplary and Aggravated Damages" [1996] Med Law Review 311). 41 Exemplary damages have however been awarded in cases of pure negligence (see, as to the general proposition, *Coloca v BP Australia Limited* [1992] 2 VR 441; and as to exemplary damages in cases of medical negligence, *Backwell v AAA* [1997] 1 VR 182, *B v Marinovich* [1999] NTSC 127, noted (2000) 7(3) JLM 250). 42 I do not think that this case calls for an extensive discussion of the principles relating to exemplary damages. The function and broad parameters of such an award are expounded in *Lamb* and *Coloca* . Speaking generally, what needs to be shown is contumelious disregard of the plaintiff's rights by the defendant. 43 In my view the award of exemplary damages in this case must be set aside. Neither the facts as found nor the evidence in the case support his Honour's conclusion that there was *"an egregious error on the part of the defendant in talking the patient into assenting to a facelift operation"*. Nor was this a case exposing a *"need to stamp the defendant's conduct with a mark of opprobrium"*. Nor was there a *"contumelious disregard for the doctor-patient relationship obligations"* as adverted to in his Honour's reasons for the award of aggravated damages. 44 I have already covered much of this ground. I refer to what I have said about the lack of material in this particular case to sustain any conclusion that the appellant acted improperly in encouraging his eager patient to undergo surgery. 45 There is certainly an entrepreneurial flair about some of the appellant's practices that some would find inappropriate or even offensive. But there was no evidence of excessive charging and it cannot *per se* be wrong for a doctor or any other professional to have the desire of monetary gain as a motivating force. The appellant performed the surgery without negligence. He disclosed a number of the potential risks and, as to those he did not, explained that this was due to oversight. The judge was not bound to accept that explanation, but he did not make findings rejecting it. 46 The appellant's *"blandishments"* and *"promises"*, to the extent that they have any bearing upon the *Rogers v Whitaker* tort, did not convert what remains a negligent failure to alert an eager patient to some fairly unlikely risks which unfortunately came home into a *"conscious and contumelious disregard for the plaintiff's rights"* (cf *Lamb* at 9) meriting a punitive and deterrent award of $60,000. 47 I have not overlooked the findings concerning the way in which the appellant treated and delayed treating the respondent post-operation. It is however unclear to me whether they figured in the reasoning supporting the award of exemplary damages. I do not wish to belittle those findings, but they do not strike me as justifying or sustaining the award when one considers the extent to which the appellant did in fact respond to his patient's litany of complaints. I have no difficulty with the idea that contumelious disregard of a doctor's duty to provide adequate after-care might attract such an award in a proper case (cf *Lamb* at 12-13). 48 The award of exemplary damages should therefore be set aside. 49 This Court was not asked to order a new trial as to damages. Senior counsel for the respondent did however invoke *Robinson v Riley* [1971] 1 NSWLR 403, submitting that the Court should consider whether a sufficient amount was awarded for compensatory damages before taking away the entirety of the aggravated and exemplary damages. Our attention was drawn to the evidence as to the psychological sequelae suffered by this particular respondent (see esp the report of Dr Skinner at Bl 77-8). With some hesitation, I would reject this invitation. After all, the trial judge segregated the three heads of damages. The reasons explaining the *"compensation damage"* address both physical and psychological distress in contrast to the reasons supporting the awards of aggravated and exemplary damages which make no mention of them. There is the further difficulty that we have not seen the respondent. Nor is the confused photographic evidence sufficient to lead this Court to conclude that the award of $30,000 compensatory damages was appealably inadequate. Not all of the respondent's distress as recorded by Dr Skinner could properly be seen as stemming from the appellant's negligence as distinct from the respondent's disappointment about failing in her goal of retarding the visible signs of the aging

process. 50 The parties were agreed that there had been a slip in the calculations of interest agreed at trial. This can be attended to in the necessary recalculations of interest that flow from the order which I propose. These are that the appeal be allowed with costs, the respondent having a certificate under the Suitors' Fund Act (if qualified); and that the amount of the judgment in the respondent's favour be varied by excluding aggravated and exemplary damages and any interest component relating thereto. The parties should file appropriate Short Minutes within 7 days. 51 STEIN JA: I agree with Mason P. 52 HEYDON JA: I agree with Mason P.

Tan v Benkovic [2000] NSWCA 295 (26 October 2000) (Mason P, Stein and Heydon JJA)

39 The appellant accepts that there may be cases where negligence attending a medical procedure is so gross as to merit an award of exemplary damages. This is in accord with the authorities. 40 *Lamb v Cotogno* (1987) 164 CLR 1 was an action in trespass. Sometimes a medical professional's non-disclosure is so inadequate as to vitiate the patient's consent, with the result that the ensuing procedure is a battery (see *Appleton v Garrett* [1996] PIQR 1, discussed in "Battery: Exemplary and Aggravated Damages" [1996] Med Law Review 311). 41 Exemplary damages have however been awarded in cases of pure negligence (see, as to the general proposition, *Coloca v BP Australia Limited* [1992] 2 VR 441; and as to exemplary damages in cases of medical negligence, *Backwell v AAA* [1997] 1 VR 182, *B v Marinovich* [1999] NTSC 127, noted (2000) 7(3) JLM 250). 42 I do not think that this case calls for an extensive discussion of the principles relating to exemplary damages. The function and broad parameters of such an award are expounded in *Lamb* and *Coloca* . Speaking generally, what needs to be shown is contumelious disregard of the plaintiff's rights by the defendant. 43 In my view the award of exemplary damages in this case must be set aside. Neither the facts as found nor the evidence in the case support his Honour's conclusion that there was *"an egregious error on the part of the defendant in talking the patient into assenting to a facelift operation"*. Nor was this a case exposing a *"need to stamp the defendant's conduct with a mark of opprobrium"*. Nor was there a *"contumelious disregard for the doctor-patient relationship obligations"* as adverted to in his Honour's reasons for the award of aggravated damages. 44 I have already covered much of this ground. I refer to what I have said about the lack of material in this particular case to sustain any conclusion that the appellant acted improperly in encouraging his eager patient to undergo surgery. 45 There is certainly an entrepreneurial flair about some of the appellant's practices that some would find inappropriate or even offensive. But there was no evidence of excessive charging and it cannot *per se* be wrong for a doctor or any other professional to have the desire of monetary gain as a motivating force. The appellant performed the surgery without negligence. He disclosed a number of the potential risks and, as to those he did not, explained that this was due to oversight. The judge was not bound to accept that explanation, but he did not make findings rejecting it. 46 The appellant's *"blandishments"* and *"promises"*, to the extent that they have any bearing upon the *Rogers v Whitaker* tort, did not convert what remains a negligent failure to alert an eager patient to some fairly unlikely risks which unfortunately came home into a *"conscious and contumelious disregard for the plaintiff's rights"* (cf *Lamb* at 9) meriting a punitive and deterrent award of $60,000. 47 I have not overlooked the findings concerning the way in which the appellant treated and delayed treating the respondent post-operation. It is however unclear to me whether they figured in the reasoning supporting the award of exemplary damages. I do not wish to belittle those findings, but they do not strike me as justifying or sustaining the award when one considers the extent to which the appellant did in fact respond to his patient's litany of complaints. I have no difficulty with the idea that contumelious disregard of a doctor's duty to provide adequate after-care might attract such an award in a proper case (cf *Lamb* at 12-13). 48 The award of exemplary damages should therefore be set aside. 49 This Court was not asked to order a new trial as to damages. Senior counsel for the respondent did however invoke *Robinson v Riley* [1971] 1 NSWLR 403, submitting that the Court should consider whether a sufficient amount was awarded for compensatory damages before taking away the entirety of the aggravated and exemplary damages. Our attention was drawn to the evidence as to the psychological sequelae suffered by this particular respondent (see esp the report of Dr Skinner at Bl 77-8). With some hesitation, I would reject this invitation. After all, the trial judge segregated the three heads of damages. The reasons explaining the *"compensation damage"* address both physical and psychological distress in contrast to the reasons supporting the awards of aggravated and exemplary damages which make no mention of them. There is the further difficulty that we have not seen the respondent. Nor is the confused photographic evidence sufficient to lead this Court to conclude that the award of $30,000

compensatory damages was appealably inadequate. Not all of the respondent's distress as recorded by Dr Skinner could properly be seen as stemming from the appellant's negligence as distinct from the respondent's disappointment about failing in her goal of retarding the visible signs of the aging process. 50 The parties were agreed that there had been a slip in the calculations of interest agreed at trial. This can be attended to in the necessary recalculations of interest that flow from the order which I propose. These are that the appeal be allowed with costs, the respondent having a certificate under the Suitors' Fund Act (if qualified); and that the amount of the judgment in the respondent's favour be varied by excluding aggravated and exemplary damages and any interest component relating thereto. The parties should file appropriate Short Minutes within 7 days. 51 STEIN JA: I agree with Mason P. 52 HEYDON JA: I agree with Mason P.

Hunter Area Health Service v Marchlewski [2000] NSWCA 294 -
Tan v Benkovic [2000] NSWCA 295 -
Hunter Area Health Service v Marchlewski [2000] NSWCA 294 -
Tan v Benkovic [2000] NSWCA 295 -
Tan v Benkovic [2000] NSWCA 295 -
Lee v Kennedy [2000] NSWCA 153 (26 June 2000) (Priestley, Sheller and Beazley JJA)

17 It is not completely clear whether the trial judge intended to award exemplary damages in this case. He awarded $15,000 for what he described as aggravated damages in one place and in two other places "*aggravated damages or exemplary*" damages. Then on another occasion, relying on what Brennan J had said in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, which was without any question an exemplary damages case, he said that an award of exemplary damages was appropriate to punish the defendants for their conscious and contumelious disregard for the plaintiff's rights and to deter them from committing such an offence again. 18 It seems to me clear that an amount of $15,000 was completely inadequate for either exemplary damages alone or for the combination of aggravated or exemplary damages which the judge twice mentioned. The sum of $15,000 seems to me to have been possibly appropriate for aggravated damages alone as described in *Cotogno* , see particularly at 164 CLR 8, although even then it seems to me to be too low. A figure of $25,000 would be (moderately) appropriate. 19 For the reasons given by the trial judge, and to mark the extreme seriousness of what was done by the second and third defendants, it seems to me that a substantial award for exemplary damages is required in the present case. Again, as in Mr Adams's case, I see no point in assessing damages separately for each cause of action arising from the facts found by the trial judge, but think it preferable to award one aggregate sum covering all the causes of action. In my opinion an appropriate sum is $120,000. 20 I would therefore propose that the judgment of the trial judge be set aside and that in its place there should be entered a judgment of $170,000, made up of the amount assessed by the trial judge for general damages, $25,000, $25,000 for aggravated damages and $120,000 for exemplary damages. Orders to that effect should in my opinion be made on the day of publication of these reasons, but for the same reasons as explained in Mr Adams's case, the parties should have seven days from that day to file such written submissions as they may wish to put to the court on the question of costs. 21 SHELLER JA: I agree with Priestley JA. 22 BEAZLEY JA: I agree with Priestley JA.

Adams v Kennedy [2000] NSWCA 152 -
Lee v Kennedy [2000] NSWCA 153 -
Lee v Kennedy [2000] NSWCA 153 -
Adams v Kennedy [2000] NSWCA 152 -
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18 (13 April 2000) (Gleeson Cj,gaudron, McHugh, Kirby and Hayne JJ)

101. *Basic principles of liability:* Before considering the maxim *res ipsa loquitur*, it is appropriate to state a number of general propositions, applicable to the present case, which I do not take to be in dispute. First, it is the duty of an employer at common law to take reasonable care to avoid exposing an employee to unnecessary risk of injury [117] . That duty includes the provision of a safe system of work; a safe place of work; and proper plant, equipment and appliances. The duty is not delegable. It is personal to the employer. It extends to taking reasonable steps in accident prevention and not waiting for accidents to happen before

safeguarding the health and safety of employees [118] . The concept of the employer's duty is not a static one. Although the same verbal formulae have been used in the cases, there can be no dispute that the scope of the duty expanded with every decade of the twentieth century. In part, this may reflect an interaction between the common law of negligence and the growing network of statutory duties imposed on employers for the protection of their employees [119] . In part, it may reflect increased awareness of the necessities of accident prevention and an unwillingness to tolerate the imposition of unreasonable burdens on employees injured whilst contributing to the profits of their employers. The relationship between the parties which defines the duty of care applicable in the present case was that of employer and employee. That relationship was uncontested. There was accordingly no need to invoke the maxim of *res ipsa loquitur* either to establish a duty of care or to define its general content [120] .

via

[119] *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570-572 ; *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12 ; cf *Crimmins v Stevedoring Industry Finance Committee* (1999) 74 ALJR 1 at 30-31 per Gummow J; 167 ALR 1 at 40 ; Gummow, *Change and Continuity: Statute, Equity, and Federalism*, (1999) at 11-18.

Hesketh v Joltham P/L [2000] QCA 44 -
Hesketh v Joltham P/L [2000] QCA 44 -
Esso Australia Resources Ltd v Federal Commissioner of Taxation [1999] HCA 67 -
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 *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.

R v Young [1999] NSWCCA 166 (07 July 1999) (Spigelman CJ, Beazley JA, Abadee, James and Barr JJ)
340 In **Cotogno v Lamb** (1987) 164 CLR 1 at 11-12 the Court consisting of Mason CJ, Brennan J, Deane J, Dawson J and Gaudron J said:-

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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."

via

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

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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.

via

[184] (1987) 164 CLR 1 .

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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 *Lamb 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.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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]. Alth ough 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.

via

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

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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 *Lamb v Cotogno* should be reconsidered.

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Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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 *Lam b 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.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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].

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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."

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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 *Lamb v Cotogno* should be reconsidered.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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 *Lamb v Cotogno,* is that liability affected in any way by the provisions of the *Wr ongs 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).

Gray v Motor Accident Commission [1998] HCA 70 -
Gray v Motor Accident Commission [1998] HCA 70 -
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Gray v Motor Accident Commission [1998] HCA 70 -
Kruger v the Commonwealth [1997] HCA 27 -
Parker v The Queen [1997] HCA 15 -
Kars v Kars [1996] HCA 37 -
Minister for Immigration and Ethnic Affairs v Teoh [1995] HCA 20 (07 April 1995) (Mason CJ; Deane, Toohey, Gaudron and McHugh JJ)

10 Lamb v. Cotogno (1987) 164 CLR 1 at 11-12 .

R v L [1991] HCA 48 (03 December 1991) (Mason C.j. Brennan, Deane, Dawson and Toohey JJ)

19. We are concious of the restraints upon the development of the common law underlying decisions such as State Government Insurance Commission v. Trigwell, (1979) 142 CLR 617 ; Public Service Board of N.S.W. v. Osmond (1986) 159 CLR 656 and Lamb v. Cotogno. (1987) 164 CLR 1 . But the situation here is that the respondent invites the Court to give its support to a proposition which, in the terms contended for, does not have the backing of the common law for which he contends. It must be acknowledged that there is support for the proposition in some non-binding judicial statements and in some learned writings tracing back to Hale. But that support has been seriously undermined by the qualifications introduced by the various decisions to which reference has been made in this judgment. In any event, even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage. The notion is out of keeping also with recent changes in the criminal law of this country made by statute, which draw no distinction between a wife and other women in defining the offence of rape. The Criminal Code (Q.), s.347 as enacted by Act No. 17 of 1989; The Criminal Code (W.A.), s.325 was repealed by Act No. 74 of 1985 and see now Ch. XXXIA-Sexual Assaults; The Criminal Code (Tas.), s.185(1), enacted by Act No. 71 of 1987; Crimes Act (N.S. W.), s.61T; Crimes Act (Vic.), s.40 read with s.62. It is unnecessary for the Court to do more than to say that, if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd [1988] HCA 44 (08 September 1988) (Mason C. j., Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ)

12. To cite, as did McHugh J.A., examples of statutes which permit the enforcement of contracts by persons not parties to those contracts does not truly enlighten the development of the common law. Those statutes may amount to no more than acceptance of the need for legislative action because judicial change appears not to be available. It is a considerable step to draw from them "some principle to be applied by way of analogy in fashioning the common law" (Lamb v. Cotogno (1987) 61 ALJR 549 , at p 552 ; 74 ALR 188, at p 194).

Trident General Insurance Co Ltd v McNiece Bros Pty Ltd [1988] HCA 44 -