

資 料

Exemplary Damages, Not Punitive Damages

——A Japanese Perspective——*

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1. Introduction

There are many great differences in legal systems between the common law countries and the civil law countries. Needless to say, Australia and New Zealand belong to the former, and Japan the latter. One of these differences is said to be the availability of exemplary damages in civil proceedings. For historical reasons, common law countries have enjoyed the availability of exemplary damages, although they are considered to be an “anomaly”⁽¹⁾. On the other hand, Japan as well as other civil law countries have no idea of exemplary damages or punitive damages in civil proceedings.

In this paper I will first describe exemplary damages, especially focusing on recent developments in Australia and New Zealand. I will then turn to the Japanese situation. And finally, I will show you a tentative conclusion which incorporates some proposals and remaining questions.

※ This paper was presented at the symposium held at the University of Melbourne on 17 March 2000.

(1) *Rookes v Barnard* [1964] AC 1129 at 1221 per Lord Devlin.

It is true that differences in legal systems between Australia and New Zealand on the one hand and Japan on the other hand are so great that it may be useless and futile or even harmful to make a comparison between these legal systems. However, as Professor Patrick Atiyah pointed out that “it is one of the functions of the academic lawyer from time to time to think the unthinkable”⁽²⁾, I will consider the role of the courts in settling disputes by examining the availability of exemplary damages in civil proceedings.

2. The Background

When tort law was less principled, it was not considered unusual to punish a wrongdoer as well as compensate a victim. In the famous case of *Wilkes v Wood*⁽³⁾, Pratt CJ directed the jury that:⁽⁴⁾

Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

In modern times, however, the primary object of tort remedies has been considered to be compensation to a victim. The availability of exemplary damages was extensively examined by the House of Lords in *Rookes v Barnard*⁽⁵⁾, in which Lord Devlin said that:⁽⁶⁾

Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages

(2) Patrick S. Atiyah, “Personal Injuries in the Twenty First Century: Thinking the Unthinkable” in P. Birks (ed), *Wrongs and Remedies in the Twenty-first Century* (Clarendon Press, Oxford, 1996) at 1.

(3) (1763) Lofft 1; 98 ER 489.

(4) Ibid at 18-19; 498-499.

(5) [1964] AC 1129.

(6) Ibid at 1221.

is peculiar to English law.

After examining the authorities in order to see how far and in what sort of cases the exemplary principle was recognised, Lord Devlin listed three famous categories in which exemplary damages may be allowed. Those categories are: 1) cases of oppressive, arbitrary or unconstitutional action by the servants of the government₍₇₎, 2) cases in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff₍₈₎, and 3) cases in which exemplary damages are expressly authorised by statute₍₉₎.

Lord Devlin in *Rookes v Barnard* also expressed three considerations which he thought should always be borne in mind when awards of exemplary damages are being considered. Firstly, the plaintiff cannot recover exemplary damages unless he is the victim of punishable behaviour₍₁₀₎. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, can also be used against liberty₍₁₁₎. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant₍₁₂₎. Examining these considerations and reviewing authorities referred to by the appellant, Lord Devlin concluded that a source of confusion between aggravated and exemplary damages could be removed from the law₍₁₃₎.

After *Rookes v Barnard* exemplary damages are strictly limited to these three categories in England₍₁₄₎. It does not mean that other common law

(7) Ibid at 1226.

(8) Ibid.

(9) Ibid at 1227.

(10) Ibid.

(11) Ibid.

(12) Ibid at 1228.

(13) Ibid at 1230.

(14) In *Broome v Cassell & Co Ltd*, the English Court of Appeal led by Lord Denning MR defied the decision of the House of Lords in *Rookes v Barnard* ([1971] 2 QB 354). But the House of Lords reversed the decision of the

countries follow the English approach.

3. Australia⁽¹⁵⁾

In 1966 the High Court of Australia refused to follow the decision of the House of Lords in *Rookes v Barnard*. Taylor J in *Uren v John Fairfax & Sons Pty Ltd* held that:⁽¹⁶⁾

I agree that there was, perhaps, some room for a more precise definition of the circumstances in which exemplary damages might be awarded. But with great respect, I do not feel as Lord Devlin did, that such a far-reaching reform as he proposed, and in which the other Lords of Appeal engaged in the case agreed, was justified by asserting that punishment was a matter for the wrongs which are not at one and the same time crimes, and in both types of cases the courts of this country, and I venture to suggest the courts of England, had admitted the principle of exemplary damages as, in effect, a penalty for a wrong committed in such circumstances or in such manner as warrant the court's signal disapproval of the defendant's conduct.

After considering the authorities which were reviewed by Lord Devlin in *Rookes v Barnard*, Taylor J went on to say that:⁽¹⁷⁾

To my mind—and I say this with the greatest respect—the attempt, expressly made in *Rookes v Barnard* “to remove an anomaly from the law” did not achieve this result. Nor, in my view, was such an attempt justified by the assertion that it was not the function of the civil law to permit the award of damages by way of penalty.

Court of Appeal and supported the decision in *Rookes v Barnard* by a mere majority of four to three ([1972] AC 1027).

- (15) I greatly owe my understanding of the Australian position to Professor Michael Tilbury, especially his works, *Civil Remedies* (Butterworths, Sydney, 1990) vol 1 and “Regulating ‘Criminal’ Conduct by Civil Remedy: The Case of Exemplary Damages” 1 *Waseda Proceedings of Comparative Law* 80 (1999). Of course any misunderstandings and errors are mine.

(16) (1966) 117 CLR 113 at 131.

(17) Ibid at 137.

He continued:⁽¹⁸⁾

....the measure of research disclosed by the observations in *Rookes v Barnard* takes no account of the development of the law in this country where frequently this Court has recognized that an award of exemplary damages may be made in a much wider category of cases than that case postulates.

Eventually, the High Court of Australia did not follow the House of Lords and maintained the position established by the decision in *Whitfeld v De Lauret & Co Ltd*⁽¹⁹⁾. In this case, Knox CJ held:⁽²⁰⁾

Damages may be either compensatory or exemplary. Compensatory damages are awarded as compensation for and are measured by the material loss suffered by the plaintiffs. Exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights.

As these cases indicate, it can be said that exemplary damages are awarded in Australia in a less restricted way than in England. However, there are factors which are relevant to the question of whether or not exemplary damages ought to be awarded. One of these factors is said to be the capacity of exemplary damages to fulfil their purpose in all the circumstances of the case⁽²¹⁾. There are at least three occasions where exemplary damages seem not to have their capacity to fulfil their purpose of punishment and deterrence. These occasions are: 1) cases where the defendant's conduct is covered by insurance, 2) cases where the plaintiff's compensatory award is so high that it is, in itself, a sufficient punishment and deterrence, and 3) cases where the defendant has already been punished.

As to the first occasion, an earlier authority in Australia was *Lamb v Cotogno*⁽²²⁾. In this case, the High Court of Australia held that exemplary

(18) Ibid at 138.

(19) (1920) 29 CLR 71.

(20) Ibid at 77.

(21) Michael Tilbury, "Regulating 'Criminal' Conduct by Civil Remedy: The Case of Exemplary Damages" 1 *Waseda Proceedings of Comparative Law* 80 at 90 (1999).

damages were available against a defendant whose outrageous conduct causing personal injury to the plaintiff was covered by compulsory third party motor insurance. It is clear that exemplary damages in such a case do not punish the plaintiff. But it may be said that they will deter others from similar conduct in the future. Another reason for allowing exemplary damages in *Lamb* is that their award assuaged the plaintiff's urge for revenge⁽²³⁾. The decision in *Lamb v Cotogno* is now upheld by the High Court of Australia in *Gray v Motor Accident Commission*⁽²⁴⁾. The decision in *Gray* not only upholds the decision in *Lamb*, but also extends the availability of exemplary damages in one respect. For the defendant in *Gray* is not the wrongdoer who caused personal injury to the plaintiff, but the compulsory third party insurer. The tortfeasor in *Gray* stepped out of the proceedings, because of statutory provisions. I will return to this case shortly after.

As to the second occasion, what I would like to say is that normal compensatory remedy of tort law may work as punishment and deterrence in a certain case, even when exemplary damages are not awarded, because of a huge award of compensatory damages.

As to the third occasion, it can be said that the most important decision is the decision of the High Court of Australia in *Gray v Motor Accident Commission*⁽²⁵⁾. Mr Gray (plaintiff, appellant in this case) was injured when stuck by a motor vehicle driven by Mr Bransden. Mr Bransden drove directly at a group of Aboriginal youths, including the appellant, doing so with the intention of running the appellant down and seriously hurting him. The motor vehicle was insured under the compulsory third party provisions of the Motor Vehicles Act (SA). Mr Bransden was charged with the criminal offence of intentionally causing grievous bodily harm to the appel-

(22) (1987) 164 CLR 1.

(23) Ibid at 9.

(24) (1998) 158 ALR 485; 73 ALJR 45. See Jane Swanton and Barbara McDonald, "The High Court on Exemplary Damages" 73 *Aust L J* 402 (1999), and James Edelman, "Exemplary Damages Revisited" 7 *Tort L J* 87 (1999).

(25) (1998) 158 ALR 485; 73 ALJR 45.

lant₍₂₆₎. He was convicted of this offence by a jury₍₂₇₎ and sentenced to seven years imprisonment₍₂₈₎.

The appellant brought proceedings in the District Court of South Australia, initially against Mr Bransden, claiming damages against him for negligence. At trial, liability for negligence was not disputed. Amongst the damages claimed was a specific claim for exemplary damages. In 1995 the proceedings were amended to substitute State Government Insurance Commission as the Defendant₍₂₉₎.

The judgment at first instance was entered in favour of the plaintiff. On the claim for exemplary damages, however, the primary judge concluded that no award of exemplary damages should be made, because he took into account the fact that Mr Bransden had already been punished by being sentenced to a substantial period of imprisonment in respect of the same conduct for which exemplary damages were claimed. The plaintiff, complaining that exemplary damages should be awarded and that the amount of compensatory damages was too low, appealed to the Supreme Court of South Australia. The Full Court of the Supreme Court of South Australia denied both claims. Then, Mr Gray appealed to the High Court of Australia.

Although the High Court accepted the appellant's submission on compensatory damages that they were too low, the Court rejected his submission on exemplary damages. The Court held that:⁽³⁰⁾

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

(26) S 21 of the Criminal Law Consolidation Act 1935 (SA).

(27) *R v Bransden*, unreported, Supreme Court of South Australia, 26 February 1991.

(28) *R v Bransden*, unreported, Supreme Court of South Australia, 14 March 1991.

(29) The substitution of the Commission for Mr Bransden was effected pursuant to s 125A of the Motor Vehicle Act.

(30) (1998) 158 ALR 485 at 494; 73 ALJR 45 at 52.

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

In addition to these points, there are some important opinions expressed in the *Gray* case. First, as I have already shown, the Court upheld the decision in *Lamb v Cotogno*⁽³¹⁾, and held that exemplary damages may be available in a suitable case for conducts covered by insurance, even if the wrongdoer is not the party in the proceedings. Secondly, the Court expressed the possibility of awarding exemplary damages in cases for negligence by saying 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. Thirdly, the Court upheld the decision of the Supreme Court of Tasmania in *Watts v Leitch*⁽³²⁾. Kirby J said that:⁽³³⁾

...the component of exemplary damages was not a right but an element of the damages which the jury could elect to provide or to withhold. In *Broome v Cassell & Co* Lord Hailsham described an award of punitive damages as “discretionary”. There are similar descriptions in Canadian and Australian authority. Indeed, the existence of a discretion has been described as a “safety valve” permitting the tribunal of fact to decline the award of exemplary damages if some factor makes it proper to refuse them.

4. New Zealand

As is well known, the law of tort in New Zealand is quite unique, because of the abolition of a right of action for personal injury under the accident compensation scheme since 1974.

In New Zealand exemplary damages were awarded in cases of malicious prosecution and defamation before the English decision in *Rookes v Bar-*

(31) (1987) 164 CLR 1.

(32) [1973] Tas SR 16.

(33) (1998) 158 ALR 485 at 510-511; 73 ALJR 45 at 63-64.

nard. The effect of that case was examined by the Court of Appeal in *Taylor v Beere*₍₃₄₎. The Court unanimously refused to follow the restrictive approach to exemplary damages. Richardson J stressed that tort law does not have the sole aim of compensating victims, but must make provision for public interest concerns which go beyond the private interests of the parties₍₃₅₎.

After the Accident Compensation Act 1972 came into force, the courts in New Zealand confronted the question of whether a claim for exemplary damages had been ruled out by the statute. In *Donselaar v Donselaar*₍₃₆₎ the Court of Appeal held that because compensation under the statute had no punitive element, there was good reason to retain the possibility of exemplary damages₍₃₇₎. Accordingly, the Court of Appeal made it clear that the purpose of such awards is to punish the defendant for high-handed disregard of the plaintiff's rights or similar outrageous conduct.

After the passing of the Accident Rehabilitation and Compensation Insurance Act 1992, plaintiffs began to bring claims for exemplary damages in order to obtain some satisfaction for the injury done to them, because the Act removed lump sum compensation and reduced the availability of compensation for personal injury under the accident compensation scheme. Against these backgrounds, the availability of exemplary damages in negligence claims was confirmed by the award of \$15,000 in *McLaren Transport Ltd v Somerville*₍₃₈₎. Tipping J held that the law of New Zealand allows a claim for exemplary damages for personal injury caused by negligence if the defendant's conduct is bad enough₍₃₉₎. After carefully reviewing the various

(34) [1982] 1 NZLR 81.

(35) *Ibid* at 90.

(36) [1982] 1 NZLR 97.

(37) *Ibid* at 107 per Cooke J; 116 per Somers J.

(38) [1996] 3 NZLR 424. See John Smillie, "Exemplary Damages for Personal Injury" [1997] *NZL Rev* 140; Joanna Manning, "Professor's Smillie's 'Exemplary Damages for Personal Injury': A Comment" [1997] *NZL Rev* 176; Goff McLay, "Negligence, ACC and Exemplary Damages..... What's too Bad?" (1996) *NZLJ* 425; and Andrew Beck, "Exemplary Damages for Negligent Conduct" (1997) *Tort L Rev* 90.

(39) [1996] 3 NZLR 424 at 433.

authorities and seeking to bring together the relevant factors, Tipping J approached the matter as follows:⁽⁴⁰⁾

Exemplary damages for negligence causing personal injury may be awarded if, but only if, the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment.

Another important impact on the availability of exemplary damages came from the decision of the Court of Appeal in *Daniels v Thompson*⁽⁴¹⁾. The Court held that because exemplary damages were designed to punish the acts complained of, there should be an absolute bar on exemplary damages in civil proceedings, where there had already been a conviction and sentence for those acts⁽⁴²⁾. The Court also held that a claim for exemplary damages should be struck out as an abuse of process where the defendant had been acquitted of essentially the same acts in the criminal jurisdiction⁽⁴³⁾. Furthermore, the Court concluded that where a criminal prosecution had been commenced or was likely, it would be appropriate to stay proceedings for exemplary damages to prevent an abuse of process⁽⁴⁴⁾.

The decision of the Court of Appeal in *Daniels v Thompson* was upheld by the Privy Council in *W v W*⁽⁴⁵⁾. A twist was made prior to the decision of the Privy Council by the legislature, which made a provision in December 1998. Under s 396 of the Accident Insurance Act 1998, any person can bring proceedings for exemplary damages for conduct by the defendant which resulted in personal injury, even though (a) the defendant has been charged with, and acquitted or convicted of, an offence involving the conduct con-

(40) Ibid at 434.

(41) [1998] 3 NZLR 22. See John Smillie, "Exemplary Damages and the Criminal Law" 6 *Torts LJ*113 (1998); and Joanna Manning, "*Daniels v Thompson*: Double Punishment or Double Trouble?" [1998] *NZL Rev* 721.

(42) [1998] 3 NZLR 22 at 47.

(43) Ibid at 51.

(44) Ibid at 52.

(45) [1999] 2 NZLR 1. See Joanna Manning, "Exemplary Damages and Criminal Punishment in the Privy Council" 7 *Torts LJ*129 (1999).

cerned in the claim for exemplary damages, (b) the defendant has been charged with such an offence, and has been discharged without conviction under s 19 of the Criminal Justice Act 1985 or convicted and discharged under s 20 of that Act, (c) the defendant has been charged with such an offence and, at the time at which the court is making its decision on the claim for exemplary damages, the charge has not been dealt with, or (d) the defendant has not, at the time at which the court is making its decision on the claim for exemplary damages, been charged with such an offence.

Accordingly, a claim for exemplary damages for personal injury can be brought in New Zealand, even if a defendant in civil proceedings is likely to be, or has been, prosecuted for the same conduct as in the civil proceedings, but a claim for exemplary damages for other than personal injury is absolutely barred under the rule of the *Daniels* case, where the defendant is criminally charged.

5. Japan

At least in principle, we have no idea of exemplary damages in civil proceedings. There are, however, some, not many, cases in Japan, in which courts examined the availability of exemplary damages. I will show you four cases concerning the issue of exemplary damages.

In 1997, the Supreme Court, which is the highest court in Japan, denied the recognition and enforcement of a decision by a State Court of California, in which exemplary damages had been awarded⁽⁴⁶⁾. The reason for this is that because exemplary damages are contrary to the fundamental principle or fundamental philosophy of our legal system, public policy in Japan should deny decisions in which exemplary damages are awarded.

The second case I will show you concerned a dispute arising out of

(46) Case No (o) 1762 of 1995, decided on 11 July 1997, 51 (6) *Minshu* 2573. See Norman T Braslow, "The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience" 16 *Arizona Journal of International and Comparative Law* 285 (1999).

construction work. The plaintiffs were people living near a construction site. A compromise about work schedule such as time and date was once made between the plaintiffs and the construction company. There was a penalty clause in the compromise, if the construction company breached terms and conditions. The company faced with a dilemma. If they did not finish the work by a fixed date, they had to pay a penalty to their employer, because of the delay of completion of the work. The company did breach a condition of the compromise, taking it into consideration that it would be more profitable to breach the condition and finish the work by the due date than to pay a penalty to the plaintiffs. The plaintiffs brought an action for exemplary damages as well as compensatory damages for mental distress. The Kyoto District Court held that if the defendant intentionally breaches the condition of the compromise, there may be room for awarding solatium which has nature of punishment or sanction, in addition to normal compensatory damages⁽⁴⁷⁾.

The third case is a claim for personal injury to an inpatient who suffered a minor injury when a door of an elevator closed. The plaintiff submitted that the speed at which doors of elevators in hospitals close should be slower than those of elevators in ordinary places, and explicitly claimed exemplary damages as well as compensatory damages. The Tokyo District Court allowed compensatory damages but denied exemplary damages on its facts⁽⁴⁸⁾. The Court held that it was hard to accept the concept of exemplary damages as an established justiciable norm under the present legal system.

The fourth case is one of the most sensational civil proceedings in 1999. The defendant was the then Governor of Osaka Prefecture. The plaintiff was a girl of 21, a university student. In April 1999, local elections were held nationwide in Japan. The defendant was the Governor who stood for reelection. The plaintiff engaged in this election campaign for the defendant. In the course of campaign, the defendant sexually assaulted the

(47) Case No (wa) 1076 of 1988, decided on 27 February 1989, 1322 *Hanrei Jiho* 125.

(48) Case No (wa) 10941 of 1991, decided on 28 April 1993, 848 *Hanrei Taimuzu* 269.

plaintiff in a vehicle which was used for the campaign. The plaintiff brought an action for indecent conducts by the defendant. In response to this action, the defendant demanded prosecution, complaining that the action brought by the plaintiff was groundless, and that his reputation was defamed by the action brought by the plaintiff. The defendant did not appear before the court. Instead, he held an interview as Governor with journalists on the first day of trial, and said that the submission by the plaintiff was an outright lie. The Osaka District Court handed down a judgment in favour of the plaintiff⁽⁴⁹⁾. The Court awarded the plaintiff the sum of 2,000,000yen for indecent conducts, the sum of 5,000,000yen for false prosecution, the sum of 3,000,000yen for defamatory remarks after the first day of trial, and the sum of 1,000,000yen for legal costs. The Court did not explicitly say that there was a punitive element in the award of the total sum of 11,000,000yen. But, this amount of damages is considerably higher than that awarded in similar harassment cases. One reason for this can be a detestation by the Court of the defendant's conduct in all the circumstances of the case⁽⁵⁰⁾.

6. Conclusion

It is true that the distinction has been clearly established in common law countries between aggravated damages and exemplary damages. Aggravated damages are categorised as compensatory, while exemplary damages are categorised as non-compensatory. Both damages pay attention to the defendant's conduct.

In Australia, as exemplary damages are available for conduct which is covered by insurance, there may be cases where they do not work as punishment. Mr Gray might have succeeded in recovering aggravated damages, if he had claimed them at an earlier stage of the proceedings, because the conduct by the tortfeasor was so outrageous that it amounted

(49) Case No (wa)8121 of 1999, decided on 13 December 1999.

(50) The defendant was reelected, but resigned after the decision of the Osaka District Court. The defendant was criminally charged and the trial began at the end of March 2000.

to a crime. But exemplary damages were unavailable in that case, because the purpose of awarding them is to punish a wrongdoer and the wrongdoer had been already punished through criminal proceedings. It is quite illogical and unfair that while the purpose of punishment does not work in case of insurance, some plaintiff can recover exemplary damages and others cannot.

In New Zealand, while aggravated damages cannot be awarded in cases for personal injury, they can be awarded in cases other than personal injury. And where a defendant in civil proceedings is criminally charged, exemplary damages can be now awarded only in cases for personal injury, not others.

In Japan, courts have never held that exemplary or punitive damages can be awarded in civil proceedings. All that they can say is that solatium, that is equivalent to aggravated damages, can be awarded in civil proceedings. But as the last of the four Japanese cases indicates, some punitive element can be found in the award of compensatory damages.

Although compensation to a victim is a primary object of tort remedy, compensatory damages may work as punishment and deterrence, especially when the amount of compensatory damages is high. Likewise, exemplary damages works as compensation, especially when the level of compensatory damages is not enough, as in New Zealand. It is often said that the function of exemplary damages is not limit to punishment and deterrence⁽⁵¹⁾. Punishment and deterrence have been the main purpose of exemplary damages, but they are not the exclusive purpose. If exemplary damages are freed from their conventional definition and purpose, they may be used as an effective means in settling disputes. In this sense, unlike the recommendation made by the English Law Commission⁽⁵²⁾, exemplary damages should be called

(51) See Bruce Feldthusen, "The Canadian Experiment with the Civil Action for Sexual Battery" in Nicholas J Mullany (ed), *Torts in the Nineties* (LBC Information Service, Sydney 1997) 274, and *Daniels v Thompson* [1998] 3 NZLR 22, especially dissenting decision per Thomas J.

(52) Law Commission of England and Wales, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) para 6. 3 (16). For an Australian perspective on the Report of the English Law Commission, see

exemplary damages, not punitive damages.

I did not examine in this paper that exemplary damages may be used as a weapon against liberty. I am not able to suggest a practicable approach or test by which exemplary damages are measured in an acceptable manner and restricted to a satisfactory extent. Indeed, there are many more problems concurring with exemplary damages, as exemplified by the experience in the United States which I did not mention in this paper. However, there are merits in awarding exemplary damages in civil proceedings. If there were no merit at all in exemplary damages, they would have disappeared much earlier, even if they were awarded in established authorities. In my opinion, both the High Court of Australia and the Court of Appeal of New Zealand should not take such a restrictive approach as to bar the availability of exemplary damages in principle.

Jane Swanton and Barbara McDonald, "Commentary on the Report of the English Law Commission on Aggravated, Restitutionary and Exemplary Damages" 7 *Torts LJ* 184 (1999).