Punitive Damages: Time for Re-examination

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While punitive damages have been known to the common law for a long time, their position as a remedy within the non-criminal law has always been precarious, given their clearly criminal overtones. While at one time they might have been justified, at a time when criminal law was undeveloped and when the state was seeking to encourage individuals to use the courts as a means of resolving disputes rather than resorting to self-help, arguably developments in our legal system and society more broadly have rendered them an anachronism. Not surprisingly, the English courts sought to wind them back, though they did not feel they could abandon them altogether. Today, they retain an awkward place in the civil law, straddling the civil-criminal divide which our legal system traditionally supports. It is highly doubtful they provide any deterrent effect, given the likelihood that a defendant would be insured against such a loss. When punitive damages are imposed as part of vicarious liability, their justification further weakens. Alternative solutions to the problems said to be addressed by punitive damages are readily available. The author argues it would be more intellectual coherent for punitive damages to exit the civil realm altogether.

INTRODUCTION

Punitive damages, also known as exemplary damages,[1] have enjoyed a long, if somewhat precarious, position in the common law. They were recognised in the *Code of Hammurabi* and in Roman and Biblical times.[2] The English common law recognised the availability of such awards by the late 18th century. The statutory tort reforms in Australia of the early 21st century limited the availability of punitive damages awards in some cases, but punitive damages continue to be available in all Australian jurisdictions, at least to some extent. The Australian common law has resisted the past efforts of the United Kingdom House of Lords, as it then was, to "rein in" the availability of such damages.

Despite their continued existence in the law, punitive damages remain contentious. They occupy a somewhat odd position in the common law of tort. They do not fit the general concern with damages awards to compensate a wronged plaintiff. Their purpose is not to compensate. In this regard, they are distinguishable from most kinds of damages, including aggravated damages, which are designed to compensate the victim. They can appear to resemble more closely a criminal law remedy, focusing on the defendant's behaviour, as opposed to the plaintiff's loss, but without the due process protections that would typically apply to a truly criminal proceeding. In that respect, they form part of a broader debate in the law, between the proper boundaries, if any, between criminal and civil law. This debate has occurred elsewhere, for instance in relation to so-called civil forfeiture laws, and preventive detention laws that are said to be civil in nature, rather than criminal. I have written elsewhere about both of those contexts,[3]

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[1] For ease of reference, I will refer to such damages in this article as "punitive damages". However, some of the references to which I will refer use the phrasing "exemplary damages" rather than punitive damages.

[2] David Seipp, "The Distinction between Crime and Tort in the Early Common Law" (1996) 76 *Boston University Law Review* 59, 85: "texts of Roman law gave far more attention to proceedings leading to payments to victims than to proceedings leading to capital or corporal punishment or fines to the state … many passages explained in elaborate detail the actions for theft, insult, fraud and damage to property in which a victim ordinarily recovered money from a wrongdoer, often a multiple of the loss, conceived as a private penalty"; Michael Alexander, "Compensation in a Roman Criminal Law" (1984) *University of Illinois Law Review* 521, 536–537.

[3] Anthony Gray, "Forfeiture Provisions and the Civil/Criminal Divide" (2012) 15 *New Criminal Law Review* 32; Anthony Gray, "Preventive Detention in New Zealand: A Critical Comparative Analysis" (2015) 26 *New Zealand Universities Law Review* 557.

and will not repeat the arguments in those contexts here, except to the extent necessary to properly discuss the role and continued future, if any, of punitive damages in the law of tort. It will be necessary to critically consider their true purpose/s. Other major issues to be considered include the possible liability of employers for punitive damages through the principle of vicarious liability, and the relevance, if at all, of the fact that insurance is apparently readily available in respect of the liability for punitive damages.[4]

This article seeks to determine the future, if any, of punitive damages in the Australian law of tort. Can their existence be rationalised and justified in terms of the corpus of Australian tort law going forward, or do the historical reasons and explanations for their existence no longer apply, such that they should now be discarded, on the basis that they sought to solve a legal problem that, by and large, no longer exists? Or do they belong, if at all, in the criminal law, and should the boundaries between the civil and the criminal jurisdiction be carefully monitored and maintained?

History and Development of Punitive Damages in the United Kingdom

The concept of punitive damages is apparent in the *Code of Hammurabi* of 2000 BC. The Twelve Tables provide for multiple, non-compensatory damages in a range of circumstances.[5] The Bible refers to multiple damages.[6] They appear in statutes in England during the reign of Edward I in the late 13th century.[7] The obvious questions are why the law would order such damages to be payable, and in what circumstances it would do so.

Contemporaneous developments in the law of tort, and the law more broadly, should also be noted, because they help us to understand some of the historical basis for the recognition of punitive damages. Readers will be aware that the criminal law as we know it today did not exist until at least the 18th century and was still developing well into the 19th century. For instance, the Twelve Tables in Roman times identified as delicts (only) what today we would regard as serious crimes, including theft, robbery and assault. They were not considered to be crimes against the State.[8] Thus, for much of the history of the common law, it was the civil law that provided the main (if not only) means by which wrongs committed by a defendant would be addressed. For much of its history the common law recognised that a wrongdoer could make good their wrong by paying an amount of money to the plaintiff or their family.[9] At one time these amounts were strictly regulated by the law, in terms of *wit*, *bot* and *wergild*, standard amounts set by the State for particular wrongs.[10] However, as the common law evolved, amounts could be tailored more closely to provide compensation to the injured plaintiff. Pollock and Maitland explain that the

[4] *Lancashire CC v Municipal Mutual Insurance Ltd* [1997] QB 897.

[5] WW Buckland, *A Textbook of Roman Law* (University Press, 1966) 581–584; David Owen, "A Punitive Damages Overview: Functions, Problems and Reform" (1994) 39 *Villanova Law Review* 363, 368.

[6] Exodus 22:1 ("if a man shall steal an ox, or a sheep, and kill it, or sell it, he shall restore five oxen for an ox, and four sheep for a sheep"); Exodus 22.9: "for all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or any manner of lost thing … the judge … (shall) pay double unto his neighbour".

[7] *Statute of Westminster*, 3 Edw I, c 1 (Eng); Frederick Pollock and Frederic Maitland *The History of English Law Vol 2 Before the Time of Edward I* (Liberty Fund, 1895) 521: "under Edward I a favourite device of our legislators is that of giving double or treble damages to the party grieved".

[8] Norman T Braslow, "The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience" (1999) 16 *Arizona Journal of International and Comparative Law* 285, 316–319; Michael Rustad and Thomas Koenig, "The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers" (1999) 42 *American University Law Review* 1269, 1286.

[9] "The slightest crimes could always be compounded for money; some of the graver ones also, not excluding killing, except where especially aggravated": Hampton L Carson, "Sketch of the Early Development of English Criminal Law as Displayed in Anglo-Saxon Law" (1916) 6 *Journal of Criminal Law and Criminology* 648, 656.

[10] Hampton L Carson, "Sketch of the Early Development of English Criminal Law as Displayed in Anglo-Saxon Law" (1916) 6 *Journal of Criminal Law and Criminology* 648, 656 uses the word "wergild" to mean payment to the kinsmen of the victim (in the case of death), "bote" being financial compensation to a surviving victim and "wite" for payment to the Crown for the public wrong. Any implement used in the commission of the wrong was also liable to forfeiture to the Crown as a deodand.

law permitted awards of multiple damages to provide an incentive for private citizens to bring disputes to court for resolution, at a time when alternative enforcement of community standards and rules (ie, through what we today know as the criminal law) was often lacking, or haphazard and arbitrary.[11]

The other important development at this time was that the law was striving to discourage the kind of self-help, vengeance and blood feud that had characterised medieval times. In order to discourage these kinds of "remedies", it was imperative that the fledgling legal system develop a system through which an injured party could obtain compensation for injuries. In such a case, the theory was that they would be assuaged and would not seek to impose private vengeance. Thus, the system of compensation that the common law developed would play an important social role in preserving the peace.[12] As such, a reasonably generous compensation scheme, featuring the possibility of multiple damages and strict, rather than fault-based liability, is not a complete surprise.

The other important common law development was the introduction of the jury trial. Juries were hearing common law disputes involving an injured plaintiff seeking compensation from an alleged wrongdoer. Obviously, at one time juries were drawn from the local community from which probably both the plaintiff and wrongdoer were drawn, and the disputed events occurred within that community. As locals, it was expected that juries would have specialised knowledge of the events that were in dispute and would bring this to bear in assisting in its resolution.[13]

The use of juries was an important part of the development of punitive damages, because juries would sometimes award damages that were at a level beyond that necessary to compensate the plaintiff for the losses they claimed to suffer. Many of the early English cases in which punitive damages had been awarded actually concerned appeals from jury verdicts which had ordered that the plaintiff receive generous compensation, well beyond their proven losses. Defendants would often appeal these verdicts. History records that the courts were usually reluctant to interfere with these jury verdicts, on the assumption that the jury which had ordered the large payout may well have had local knowledge of the relevant events which the appeal court lacked. Thus, the practice of awarding damages that were beyond a level that would compensate the plaintiff victim became established in the common law.

The two leading cases usually cited in support of the practice of awarding punitive damages, *Huckle v Money*[14] and *Wilkes v Wood*,[15] both fit this category of courts dismissing an appeal against a jury verdict which awarded supra-compensatory damages. Obviously, we do not have the jury's reasons for making such an award. However, we do have the judges' attempts to rationalise and explain it. In *Huckle v Money* a jury's verdict for the plaintiff of 1,000 pounds, very significant in that day, was upheld on appeal, though it was admitted the plaintiff's actual loss was about 20 pounds. In *Wilkes v Wood* Pratt CJ noted that juries

> have it in their power to give damages for more than the injury received. Damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.[16]

[11] Pollock and Maitland, n 7: "a favourite device of our legislators is that of giving double or treble damages to the party grieved. They have little faith in communal accusation or in any procedure that expects royal officials or people in general to be active in bringing malefactors to justice. More was to be hoped from the (person) who had suffered. (They) would move if they (the legislators) made it worth (the victim's) while".

[12] *De Libellis Famosis* (1605) 77 ER 250; 5 Co Rep 125a; Sir Edward Coke stated that libel "deserves a serious *punishment*, for although the libel be made against one, yet it incites all those of the same family, kindred or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and it may be the cause of shedding of blood, and of great inconvenience"; *Merest v Harvey* (1814) 128 ER 761, 761; 5 Taunt 442, 444: "it goes to prevent the practice of duelling if juries are permitted to punish insult by exemplary damages" (Heath J).

[13] William Holdsworth, *A History of English Law 1* (Sweet & Maxwell Ltd, 1956) 127 notes that this practice of drawing juries from local communities ended in 1705.

[14] *Huckle v Money* (1763) 95 ER 768; 2 Wils KB 205.

[15] *Wilkes v Wood* (1763) 98 ER 489; Lofft 3.

[16] *Wilkes v Wood* (1763) 98 ER 489; Lofft 3.

This succinct explanation in 1763 of the rationale of punitive damages, specifically punishment and deterrence, has underpinned case law development in this area ever since. Cases at this time evidence the award of punitive damages in a broad range of cases involving many different kinds of wrongdoing. No distinction was made between defendants on the basis they were a public body or private enterprise. So, for instance punitive damages were awarded against a private railway company in *Bell v Midland Railway Co*[17] in a case involving the high-handed actions of employees of the railway company in dealing with a passenger. The case also demonstrates the use of punitive damages in conjunction with principles of vicarious liability, an issue which will be revisited later in this article.

Courts would express using a variety of terms the circumstances in which an award of punitive damages might be considered. For example, Lord Hobhouse for the Privy Council in *McArthur and Co v Cornwall* referred to conduct that was unlawful, wilful, persistent and unlawful as the kind of conduct that would warrant the award of such damages.[18] Obviously, by this time in the late 19th century, criminal law had been fully developed. A police force existed to apply and enforce the law. Civil law was no longer the means, or the main means, by which wrongs would be righted. Hundreds of offences were prescribed and policed. One of the main purposes of the now-established criminal law was to punish and deter offenders and would-be offenders. On one view, the raison d'etre of punitive damages in the civil law had been superseded. Yet they persisted in the common law. It should also be borne in mind that at this time the House of Lords would not over-rule its past decisions.

There matters rested until the landmark decision of *Rookes v Barnard* (*Rookes*) in 1964.[19] There the House of Lords took the opportunity to significantly change the law relating to punitive damages. The relevant speech was delivered by Lord Devlin, with whom all other Law Lords agreed on the relevant issues regarding punitive damages. There Lord Devlin emphasised that in some past cases, there had been confusion and mixing between aggravated damages and punitive damages. The two were conceptually distinct, the former being compensatory in nature and focused on the plaintiff, the latter being non-compensatory in nature and focused on the defendant. The object of punitive damages was to punish and deter.[20] It would be relevant to consider the defendant's motives for doing what they did.[21]

Lord Devlin sought to express limits on the Courts' power to impose punitive damages. In doing so, he acknowledged that what he was saying was, literally, unprecedented.[22] The three categories he nominated were:

(a) Oppressive, arbitrary or unconstitutional action by servants of the government (this does not include similar behaviour by private enterprise or representatives of private enterprise);
(b) Cases where the defendant had calculated that the wrongful behaviour would provide greater benefit than any damages they may be ordered to pay an injured plaintiff; and
(c) Cases where legislation expressly contemplated the imposition of punitive damages.[23]

I will refer to these as the "three categories of case" or "categories of case" subsequently, to avoid confusion.

He suggested other limits, including that the plaintiff could not claim punitive damages unless they had been the victim of the wrongful behaviour, that the award of punitive damages should be made sparingly, that the means of the parties were relevant in assessing them, that everything which aggravated or mitigated the defendant's conduct was relevant, and that they should not be awarded unless the decision-maker was convinced the award of compensatory damages would not be sufficient to provide required punishment and deterrence.[24]

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[17] *Bell v Midland Railway Co* (1861) 142 ER 462; 10 CB (NS) 287.

[18] *McArthur and Co v Cornwall* [1891] AC 75, 88 (Lord Hobhouse, for the Court).

[19] *Rookes v Barnard* [1964] AC 1129.

[20] *Rookes v Barnard* [1964] AC 1129, 1221.

[21] *Rookes v Barnard* [1964] AC 1129, 1221.

[22] *Rookes v Barnard* [1964] AC 1129, 1226–1227.

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

[24] *Rookes v Barnard* [1964] AC 1129, 1227–1228.

Interestingly, Lord Reid subsequently in *Broome v Cassell and Co Ltd (No 1)* (*Broome*)[25] sought to explain the decision in *Rookes*, which had attracted significant controversy. He had been a member of the Bench in *Rookes*. He suggested in *Broome* that the Lords in *Rookes* were presented with legal principles in an unsatisfactory state, with confused and overlapping use of concepts of aggravated and punitive damages, and "serious abuses" of the Courts' power to award punitive damages.[26] Thus *Rookes* should be seen as an attempt by the House of Lords to remedy such confusion and abuse, and to carefully limit the categories of case in which punitive damages could be awarded. The Lords did not feel they could over-rule many years of precedents which had clearly recognised the possibility of punitive damages.[27] For his own part, Lord Reid frankly admitted in *Broome* that some of the distinctions in *Rookes* were arbitrary – there was no logical reason, he admitted, why the first category only permitted such damages in the case of oppression etc by a public body, as opposed to a private body.[28] He admitted there was no logical reason for distinguishing cases where the defendant calculated likely gain from wrongdoing, and cases where the defendant simply acted maliciously.[29]

More generally Lord Reid acknowledged difficulties with the whole concept of punitive damages. He said such damages "confus(ed) the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties".[30] He acknowledged that to allow punishment via punitive damages "contravene(d) almost every principle which has been evolved for the protection of offenders. There was no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like";[31] he criticised the vagueness of such. He dismissively referred to some awards of punitive damages as "palm tree justice".[32]

Having said that, Lord Reid did not favour a change to the law of punitive damages as it was expressed in *Rookes*, and nor did any other member of the Court in *Broome*. Lord Morris expressed some criticism of it,[33] as did Viscount Dilhorne,[34] but Lord Wilberforce expressed support for a broader conception of the availability of such damages.[35]

At one time it was thought that the causes of action for which punitive damages might be available was limited to those causes of action, for example defamation or false imprisonment, in which such damages had been recognised as a possibility prior to the *Rookes* decision.[36] The Law Commission called for an expansion of the causes of action in which punitive damages could be awarded beyond these limits,[37] and the House of Lords subsequently accepted the position of the Law Commission, that the causes in which punitive damages could be awarded were not confined to those which had been recognised immediately prior to the *Rookes* decision.[38] In so doing, the House did not abandon the three categories of the case specified by the House in *Rookes* as setting out the parameters within which punitive damages claims should be considered.

Three further points should be made by way of summary of the United Kingdom law in relation to punitive damages. First, the Court of Appeal accepted that it was generally possible to insure against

[25] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027.

[26] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1086.

[27] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1087.

[28] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1088.

[29] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1088.

[30] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1086.

[31] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1087.

[32] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1087.

[33] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1100.

[34] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1108–1109.

[35] *Broome v Cassell and Co Ltd (No 1)* [1972] AC 1027, 1114.

[36] *AB v South West Water Services Ltd* [1993] QB 507.

[37] Law Commission of England and Wales, *Aggravated, Restitutionary and Exemplary Damages* (1997).

[38] *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122.

liability to pay punitive damages.[39] Second, the question of an employer's possible vicarious liability to pay punitive damages based on the wrongful behaviour of their employee has only lightly been considered, with two members of the House of Lords expressing opposing views on the matter in one case,[40] and the Court of Appeal seemingly accepting the possibility in another.[41] Third, the question of the inter-relation between the civil proceeding for punitive damages and a criminal action, if any, based on the alleged wrongful conduct, has again been only lightly considered. The suggestion has been that while the fact of such proceedings may be relevant in calculations, it was not a complete bar to the award of punitive damages against the wrongdoer.[42]

Developments in Australia Regarding Punitive Damages

It will be no surprise to note that, initially at least, the High Court of Australia followed the approach of the House of Lords in relation to the possibility of punitive damages. For about half of the duration of its existence, the High Court considered itself bound by decisions of the House of Lords. It was in 1963 that the High Court announced it no longer regarded itself as being bound by decisions of the House of Lords,[43] perhaps fortuitously (or presciently, depending on one's perspective), the year prior to the United Kingdom decision of *Rookes*.

From an early time the High Court accepted the possibility that punitive damages could be payable. In *Whitfield v De Lauret & Co Ltd* Knox CJ stated that such damages could be ordered where the defendant had acted in a way involving "conscious wrongdoing in contumelious disregard of another's rights".[44] Isaacs J stated such damages were available for conduct that was reprehensible, with a view to deterring it.[45] Later cases would emphasise the motivation of the defendant as being of relevance in assessing punitive damages.[46] Any behaviour of the plaintiff which mitigated or explained the defendant's actions would also be relevant.[47]

Two years after the House of Lords rendered its decision in *Rookes*, the High Court reconsidered the issue of punitive damages in *Uren v John Fairfax & Sons Pty Ltd*.[48] In this case, the High Court pointedly refused to accept the narrowing of the availability of punitive damages heralded by *Rookes*, and in particular the three categories of case in which punitive damages were said to be available. This occurred just three years after the High Court had announced itself to be no longer bound by House of Lords decisions. In so doing, Taylor J, typical of the sentiment of the Court, emphasised that such damages were available in cases where a defendant had acted in a "high-handed, insolent, vindictive or malicious (way) or had in some other way exhibited a contumelious disregard of the plaintiff's rights".[49]

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[39] *Lancashire CC v Municipal Mutual Insurance Ltd* [1997] 1 QB 897.

[40] *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, where Lord Hutton supported possible vicarious liability for punitive damages (149) while Lord Scott criticised it (160–162).

[41] *Rowlands v Chief Constable of Merseyside* [2007] 1 WLR 1065.

[42] *Thompson v Commissioner of Police of the Metropolis* [1997] 3 WLR 403, 418–419.

[43] *Parker v The Queen* (1963) 111 CLR 610, 632 (Dixon CJ, for the Court).

[44] *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 77; this phrasing was implicitly approved of via reuse in *Gray v Motor Accident Commission* (1998) 196 CLR 1, 9: "there can be cases … in which the defendant can be shown to have acted in contumelious disregard of the rights of the plaintiff" (Gleeson CJ McHugh Gummow and Hayne JJ).

[45] *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71, 81.

[46] *Williams v Hursey* (1959) 103 CLR 30, 83 (Fullagar J, with whom Dixon CJ and Kitto J agreed).

[47] *Williams v Hursey* (1959) 103 CLR 30, 109–110 (Taylor J), 132 (Menzies J); *Fostin v Katapodis* (1962) 108 CLR 177, 184 (McTiernan J), 187 (Owen J, with whom Dixon CJ agreed); *Lamb v Cotogno* (1987) 164 CLR 1, 13 (Mason CJ Brennan Deane Dawson and Gaudron JJ).

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

[49] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 129; McTiernan J to like effect (123); "reckless and arrogant" behaviour that was malicious, wilful and reprehensible (143, Menzies J), Windeyer J to like effect (154); Owen J emphasised the question of abuse of power, malice and high-handed action in disregard of the rights of others (160–161); an appeal to the Privy Council was dismissed: *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221.

In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*[50] the High Court considered whether, in respect of joint tortfeasors, punitive damages could be awarded against one, but not the other, or whether one could be required to pay punitive damages at a different level than another. This was contentious, because the House of Lords in *Broome* had applied the common law rule that only one judgment could be awarded against joint tortfeasors, and punitive damages could only be obtained against any of them to the extent to which the one of them least liable for punitive damages was liable. At common law, one joint tortfeasor could not be liable for a different level of punitive damages than another. The High Court interpreted a State statute, common in Australia, to mean that the old common law rule was not applicable. Thus, different levels of punitive damages could be awarded against different (joint) tortfeasors. Brennan J emphasised there was no necessary proportionality between the level of compensatory damages and the level of punitive damages, since the latter, designed to punish and to deter, were unrelated to compensating the plaintiff for their injuries.[51]

The High Court considered the relevance, if any, of the question of the defendant's insurance to the question of punitive damages in *Lamb v Cotogno* (*Lamb*).[52] The defendant was found to have driven at the plaintiff deliberately, injuring him. The question was whether the defendant should be ordered to pay punitive damages. He would not be required to personally pay any such award, given that he had motor vehicle insurance which applied to the punitive damages amount.

The High Court found that punitive damages could still be awarded although the defendant might not be personally liable to pay them given they were insured.[53] This was because the Court found that the object of such damages was not wholly punishment, and extended to deterrence beyond the specific wrongdoer being considered in the case.[54] The Court referred to the fact that an award for punitive damages was designed to assuage the plaintiff's need for revenge and to engender the peace, citing the early 19th century decision of *Merest v Harvey*.[55] It also reflected the Court's general condemnation of the defendant's behaviour.[56] The Court also confirmed that punitive damages were available even absent a finding of actual malice against the defendant; there it was sufficient that the defendant acted in a humiliating manner, in "wanton disregard" of the plaintiff's rights and interests.[57]

In cases where the wrongdoer has been convicted and "substantially punished", to use the words of the High Court, by the criminal law, the Court has found that punitive damages "may not" be awarded.[58] This is because the purposes of punitive damages are wholly met if substantial punishment has already been meted out through criminal law processes. In the words of the Court, "the offender is punished; others are deterred".[59] Thus no award would be appropriate. The Court acknowledged that if a convicted offender were then to be subject to a punitive damages award in a subsequent civil proceeding, issues of double punishment would arise.[60] The Court acknowledged difficult questions arising where the alleged wrongdoer had been acquitted of the criminal charge, and where they had not, or not yet, been the subject of a criminal proceeding. However, it was not necessary to resolve these scenarios on the facts of

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

[51] *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 470–471.

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

[53] *Lamb v Cotogno* (1987) 164 CLR 1; likewise, *Gray v Motor Accident Commission* (1998) 196 CLR 1.

[54] *Lamb v Cotogno* (1987) 164 CLR 1, 9–10 (Mason CJ Brennan Deane Dawson and Gaudron JJ).

[55] *Lamb v Cotogno* (1987) 164 CLR 1, 9 (Mason CJ Brennan Deane Dawson and Gaudron JJ).

[56] *Lamb v Cotogno* (1987) 164 CLR 1, 10 (Mason CJ Brennan Deane Dawson and Gaudron JJ).

[57] *Lamb v Cotogno* (1987) 164 CLR 1, 13 (Mason CJ Brennan Deane Dawson and Gaudron JJ).

[58] *Gray v Motor Accident Commission* (1998) 196 CLR 1, 14 (Gleeson CJ McHugh Gummow and Hayne JJ); the other justices said it would be a relevant factor (Kirby J (34) and Callinan J (50)); [1998] HCA 70.

[59] *Gray v Motor Accident Commission* (1998) 196 CLR 1, 14 (Gleeson CJ McHugh Gummow and Hayne JJ); [1998] HCA 70.

[60] *Gray v Motor Accident Commission* (1998) 196 CLR 1, 14 (Gleeson CJ McHugh Gummow and Hayne JJ), 31–32 (Kirby J); [1998] HCA 70.

Gray v Motor Accident Commission (*Gray*). More generally, the Court noted increasing overlap between civil and criminal processes, such that it was no longer appropriate to refer to a sharp distinction between the civil and the criminal.[61]

The High Court found that an employer could be vicariously liable to pay punitive damages for the wrongful conduct of their employees in *New South Wales v Ibbett* (*Ibbett*).[62] With respect, the Court did not articulate its reasoning at great length. However, it quoted with express approval statements by two judges at lower court level to the effect that punitive damages in such cases could represent the Court's view that the employee's conduct was reprehensible, and that the Court disapproved of it. Such an award could bring home to management of the employer that employees had to be appropriately trained.[63]

Various State statutes limits the right to obtain punitive damages in particular cases. For example, the *Civil Liability Act 2002* (NSW) excludes the possibility of punitive damages in an action for personal injuries based on negligence.[64] The *Civil Liability Act 2003* (Qld) excludes the possibility of punitive damages in personal injury cases, unless the relevant conduct was:

(a) an unlawful intentional act done with intent to cause personal injury; or
(b) unlawful sexual assault or other unlawful sexual misconduct.[65]

All jurisdictions exclude the possibility of punitive damages only in relation to defamation.[66] The Northern Territory legislation excludes them with respect to any personal injuries claim.[67] Some States exclude the possibility of punitive damages with respect to motor vehicle[68] and work-related injuries.[69] In other States insurers are specifically protected from having to pay such damages.[70]

Having explained the development of and current status of punitive damages in our law, I turn now to consider whether such a remedy should remain as part of the civil law.

A. The Distinction between Civil Law and Criminal Law

Generally, at least, our law traditionally distinguishes between civil law and criminal law.[71] Fundamentally, their purposes differ. It is typically considered that the purpose of a criminal law proceeding is to punish the wrongdoer,[72] if the allegation against them is proven. It is typically considered that the purpose of a

[61] *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7–8; [1998] HCA 70.

[62] *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57.

[63] *New South Wales v Ibbett* (2006) 229 CLR 638, 653 (Gleeson CJ Gummow Kirby Heydon and Crennan JJ); [2006] HCA 57. In contrast, courts at lower levels had indicated that an employer should not automatically be deemed responsible vicariously for punitive damages; rather that it would need to be shown that the employer themselves was guilty of conduct warranting punishment (though this would not truly be vicarious liability, but direct liability): *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* (1993) Aust Torts Reports 81-246, 62, 554 (Giles AJA).

[64] *Civil Liability Act 2002* (NSW) s 21.

[65] *Civil Liability Act 2003* (Qld) s 52(2).

[66] *Defamation Act 2005* (NSW) s 3; *Defamation Act 2005* (Vic) s 37; *Defamation Act 2005* (Qld) s 37; *Defamation Act 2005* (SA) s 35; *Defamation Act 2005* (WA) s 37; *Defamation Act 2005* (Tas) s 37; *Civil Law (Wrongs) Act 2002* (ACT) s 139H; *Defamation Act* (NT) s 14.

[67] *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19.

[68] *Motor Accidents Compensation Act 1999* (NSW) s 144; *Transport Accident Act 1986* (Vic) s 93(7)(c).

[69] *Workers Compensation Act 1987* (NSW) s 151R; *Accident Compensation Act 1985* (Vic) s 134AB(22)(c).

[70] *Motor Accident Insurance Act 1994* (Qld) s 55; *Workers Compensation and Rehabilitation Act 2003* (Qld) s 309; *Motor Vehicles Act 1959* (SA) s 113A.

[71] "Now there is no distinction better known than the distinction between civil and criminal law, or between criminal prosecutions and civil actions": *Atcheson v Everitt* (1775) 98 ER 1142, 1147 (KB) (Lord Mansfield); 1 Cowp 382, 391.

[72] Andrew Ashworth and Lucia Zedner, "Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions" (2008) 2 *Criminal Law and Philosophy* 21, 43 referring to "punishment (as) the consequence and raison d'etre of the criminal law"; Kenneth Mann, 'Punitive Civil Sanctions: The Middleground between Criminal and Civil Law" (1992) 101 *Yale Law Journal* 1795, 1808: "the principal paradigmatic purpose of the criminal law … is punishment".

civil law proceeding is to compensate the victim, if the plaintiff can prove the defendant has committed a legally recognised wrong. Blackstone noted this:

> The law has a double view; not only to redress the party injured, by restoring to him his right, if possible … but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws which the sovereign power has thought proper to establish.[73]

The distinction between the civil and the criminal jurisdictions is ancient, being evident in Roman law. It is apparent in the 12th century work on the common law attributed to Glanvill.[74] It is apparent in the work of Bracton in the 13th century.[75]

An action in the criminal law is brought by the State; an action in civil law is typically by an individual person or organisation. The criminal law has developed significant processes of its own. Specifically, the standard of proof at which an allegation of criminality must be proven is at the level of beyond reasonable doubt, as compared with the balance of probabilities in a civil case. The Australian High Court has recognised that an accused person has the right to a fair trial in the criminal context.[76] It has not done so expressly in the civil context. International legal instruments proceed on the assumption of a sharp distinction between criminal and civil processes. Specifically, Art 11 of the *Universal Declaration of Human Rights*, s 14 of the *International Covenant on Civil and Political Rights* and s 6 of the *European Convention on Human Rights* all make specific provision for the rights of a person charged with a criminal offence. The United States *Bill of Rights* (*Fifth* and *Sixth Amendments*) also contains significant process provisions with respect to criminal proceedings, and s 11 of the *Canadian Charter of Rights and Freedoms*, and ss 24 and 25 of the *New Zealand Bill of Rights Act* proceed in a similar way. In sum, our law generally proceeds on the basis that a sharp distinction is (and, by implication, should be) made between processes that are civil in nature, and processes that are criminal in nature. Special processes applicable to criminal law proceedings are usually justified by the very serious interests, involving liberty and in extreme cases death in some jurisdictions, involved.

It will be obvious how the existence of punitive damages challenges this orthodox legal structure. As their name suggests, their purpose is to punish.[77] Immediately, this raises concerns, because they are part of a *civil* proceeding, yet by definition they exist to achieve a purpose that traditionally characterises a *criminal* proceeding. They also go by the name of "exemplary damages". The word exemplary is taken from the same Latin root as the word "example". In other words, the law with such damages is seeking to make an example of the wrongdoer, perhaps as a warning to others. Again, this is suggestive of a criminal proceeding, rather than a civil proceeding.

Now, on the other hand, it must be recognised that there is a long history involved in the relationship between the civil law and the criminal law. It must be recognised that at one time what we now know as the criminal law did not actually exist, or existed in a much more primitive form, such that there was effectively private enforcement of what we would now see as the criminal law. Often the law relied on wronged individuals to bring alleged wrongdoing to the attention of the court, rather than the State to do so. In some circumstances, there developed a choice for a wronged party whether to proceed in tort or crime, for the same alleged wrongdoing.[78] Someone found to have committed a wrong, including what

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[73] Sir William Blackstone 4, *Commentaries on the Laws of England* (1765–1769) 4–5.

[74] *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (GDG Hall ed and trans, 1965) I, 1,3: "all pleas are either criminal or civil".

[75] *Bracton on the Laws and Customs of England* (George Woodbine ed and Samuel Thorne trans, 1977–1982) 114b, 140b, 145b, 150b, 155, 179, 401b, 406b–407, 439; 2 *Select Cases in the Court of King's Bench Under Edward I* (1938) 57 SS 134; David Seipp, "The Distinction Between Crime and Tort in the Early Common Law" (1996) 76 *Boston University Law Review* 59, 80–81.

[76] *Dietrich v The Queen* (1992) 177 CLR 292.

[77] *Daniels v Thompson* [1998] 3 NZLR 22 where Henry J stated that punitive damages "are punitive in nature – punishment is the aim" (30); from early days, *Merest v Harvey* (1814) 128 ER 761, 761; 5 Taunt 442: "it goes to prevent the practice of duelling if juries are permitted to *punish* insult by exemplary damages" (emphasis added); *Wilkes v Wood* (1763) 98 ER 489, 498–499; Lofft 1 referring to the purpose of exemplary damages being "punishment to the guilty".

[78] David Seipp, "The Distinction Between Crime and Tort in the Early Common Law" (1996) 76 *Boston University Law Review* 59, 83.

we would now view as a crime, even the most serious crimes like murder, could generally settle the issue through the payment of money to the victim or their family,[79] and an amount to the Crown. Thus, some suggest that the law has never completely separated the civil from the criminal realm. This is particularly notable in the relationship between the law of tort and the law of crime. Indeed, overlap continues, with trespass to person both a tort and possibly a crime, and the tort of defamation has to some extent overlapped into the criminal realm. This might be used to negate the criticism of punitive damages as being misplaced in the civil law.

Obviously, there are numerous other examples in our law where this conversation about boundaries between what is civil law and what is criminal law takes place. The question of punitive damages is one, but clearly there are others. For instance, increasingly the State is resorting to systems of "civil detention", by which someone thought to be dangerous is detained involuntarily. These systems of preventive detention are argued to be civil in nature,[80] rather than criminal, so side-stepping arguments about double punishment, or punishing someone for something they have not actually done. In some cases, these arguments have been accepted by the High Court of Australia, and that Court has validated such schemes against constitutional challenge,[81] at least if drafted carefully.[82] I have written about these schemes and will not repeat that discussion here.[83]

Similarly, we have seen the increased use of so-called "civil forfeiture", involving the State seeking to forfeit the assets or unexplained wealth of a person thought to have been involved in wrongdoing. These regimes are not conviction-based. In other words, a person can have property forfeited although they have not been convicted of any crime. No criminal charges need to have been brought against them. Indeed, the fact they were acquitted of criminal wrongdoing is not a bar to civil forfeiture being used against them. Again, I have written about these schemes elsewhere, and I will not repeat that discussion here.[84]

We might also see in the growth of so-called regulatory offence provisions a mixing between what would traditionally be seen as tortious behaviour, for example polluting the environment, with the criminal law. Fines for instance, or in extreme cases, jail, might be imposed by State regulation for polluting activity. Leading theorist in this area Carol Steiker explains that the civil law has been moving towards the criminal law realm, and the criminal law has been moving towards the civil law realm.[85] She explains this on the basis of the rise of utilitarianism, as do others.[86] While once civil law actions were primarily about compensating a wronged individual, utilitarians viewed the result as being important not just for the individual parties but for broader societal goals. As a result, issues like deterrence crept into civil law determination, moving the civil law closer to the criminal law. At the same time, criminal law

[79] In the parlance of the time, crimes were "amerceable" through the payment of an "emendment". See for further discussion Pollock and Maitland, n 7, 449–451.

[80] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 653–658 (Callinan and Heydon JJ); [2004] HCA 46.

[81] *Fardon v A-G (Qld)* (2004) 223 CLR 575; [2004] HCA 46.

[82] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[83] Anthony Gray, "Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventive Detention Laws" (2005) 10 *Deakin Law Review* 2005; Anthony Gray, "Preventive Detention in New Zealand: A Critical Comparative Analysis" (2015) 26 *New Zealand Universities Law Review* 557; Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (Federation Press, 2016).

[84] Anthony Gray, "Forfeiture Provisions and the Civil/Criminal Divide" (2012) 15 *New Criminal Law Review* 32; Anthony Gray, "Presumption of Innocence in Peril" (2017) 42 *Alternative Law Journal* 96; other scholars have found that civil forfeiture is, in substance, punitive in nature, and must be dealt with by the courts as such: Carol Steiker, "Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide" (1997) 85 *Georgetown Law Journal* 775, 817; Donald Dripps, "The Exclusivity of the Criminal Law: Towards a Regulatory Model of, or Pathological Perspective on the Civil-Criminal Distinction" (1996) 7 *Journal of Contemporary Legal Issues* 199, 218: "forfeiture proceeding(s) … should be classified as criminal, notwithstanding the government's protestations. Grave injury is done to individuals, with the effect and probable purpose of stigmatizing them".

[85] Steiker, n 84, 784–785.

[86] Mann n 72, 1846: "with further integration of utilitarianism into legal analysis, economic theories of law came close to eliminating all differences between civil and criminal law".

moved away from simply punishing morally bad behaviour, through the rise of regulatory offences. It moved from the "prohibition" realm to the "pricing" realm.[87] It moved away from a retribution model. In extreme cases, some viewed the criminal law as simply a "backup" for civil law enforcement.[88]

The point to make for current purposes is that the lines between the civil and the criminal have become, or perhaps always were, somewhat blurred. The High Court appears to acknowledge this. For example, in *Gray* the joint reasons observed there was no "sharp cleavage" between the criminal and civil law.[89]

Perhaps then the law has a choice between accepting the complete collapse of the distinction between the civil and the criminal and allow the Parliament to frame the parameters of what it considers to be criminal at its will. On this view, there would be no difficulty with a civil court awarding a criminal law-like remedy such as punitive damages, because there is no essential distinction between the civil and the criminal realm. The alternative is to maintain a strict distinction between the two realms, and not permit parliaments to muddy the waters by resorting to "civil" proceedings to achieve what are essentially criminal law-type ends, when the strictures of the criminal law, particularly due process, prove to be too difficult or too inconvenient for them to meet. Others have accepted the possibility of a "hybrid" third type of proceeding,[90] though this has gained little traction in the courts. Or we could go on as we are, under a legal structure which on the one hand maintains a strict distinction between criminal and civil law, but on the other hand accepts an anomalous bunch of exceptional categories of case (eg, civil detention, civil forfeiture, punitive damages) which are hard or impossible to rationalise or succinctly summarise into a coherent theory in order to justify as exceptions to the general rule. I will share some thoughts on this in the conclusion.

Various academics and courts have articulated the basis upon which a particular provision can be argued to be "punishment".[91] I will not dwell upon these at length, since the phrasing "punitive damages" apparently accepts that such damages are designed to act as a punishment for behaviour. This is supported by original authorities.[92] It is true that they are also justified on the basis of deterrence, which I will deal with below. However, it seems safe to assume that at least one major purpose of the imposition of punitive damages is to punish.

Punitive Damages as Punishment

Again, various theorists have articulated why it is that the criminal law, with its purpose of punishment, insists upon various due process rationales, including the high standard of proof, presumption of innocence

[87] In contrast, traditionally "tort law prices, while criminal law prohibits": John Coffee Jr "Does 'Unlawful' Mean 'Criminal'? Reflections on the Disappearing Tort/Crime Distinction in American Law" (1991) 71 *Boston University Law Review* 193, 194.

[88] Richard Posner, *Economic Analysis of Law* (Aspen Casebook, 3rd ed, 1986): "criminal sanctions generally are reserved, as economic theory predicts, for cases where the tort remedy bumps up against a solvency limitation"; Richard Epstein, "The Tort/Crime Distinction: A Generation Later" (1996) 76 *Boston University Law Review* 1, 14: "the breakdown of the tort remedial system … leads to the creation of the criminal law"; compare Donald Dripps, "The Exclusivity of the Criminal Law: Towards a Regulatory Model of, or Pathological Perspective on, the Civil-Criminal Distinction" (1996) 7 *Journal of Contemporary Legal Issues* 199, 203: "the modern view of criminal law as a purposive institution, designed to fill unfortunate gaps in the remedial system of the civil law, is an aspirational revision".

[89] *Gray v Motor Accident Commission* (1998) 196 CLR 1, 8 (Gleeson CJ McHugh Gummow and Hayne JJ); [1998] HCA 70.

[90] Susan Klein, "Redrawing the Criminal-Civil Boundary" (1999) 2 Buffalo Criminal Law Review 679.

[91] For instance, HLA Hart, Punishment and Responsibility (OUP, 1968) 1, 4–5; the United States Supreme Court provided a list of factors said to be relevant in determining whether a particular provision was in effect punishment: "(a) whether the sanction involves an affirmative disability or restraint; (b) whether it has historically been regarded as a punishment; (c) whether it comes into play only on a finding of scienter; (d) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (e) whether the behaviour to which it applies is already a crime; (f) whether an alternative purpose to which it may rationally be connected is assignable to it; and (g) whether it appears excessive in relation to the inquiry": *Kennedy v Mendoza-Martinez,* 372 US 144 (1963); *United States v Ward*, 448 US 242 (1980); The European Court of Human Rights typically considers three factors: (a) the classification of the proceedings in domestic law (of minor importance only); (b) the nature of the offense; and (c) the nature and degree of severity of the penalty the defendant risked incurring: *Engels v Netherlands* [1979] EHRR 647, [82].

[92] *Merest v Harvey* (1814) 128 ER 761, 761; 5 Taunt 442: "it goes to prevent the practice of duelling if juries are permitted to *punish* insult by exemplary damages" (emphasis added); *Wilkes v Wood* (1763) 98 ER 489, 498–499; Lofft 1 referring to the purpose of exemplary damages being "punishment to the guilty".

etc. Much of this discussion has taken place around notions that the power to punish is awesome in nature. In a liberal state we must accord significant weight to an individual's dignity, autonomy and freedom.[93] Punishment interferes substantially with these interests. It reflects society's condemnation of what the wrongdoer did.[94] It typically attracts significant opprobrium from members of the public. It will typically involve stigma.[95] Obviously, in the most serious cases punishment can involve deprivation of a person's liberty or even death. The point is that we reserve punishment for the criminal law, and we insist upon strong due process protections in the criminal law, because the power to punish a person is awesome in nature and must thus be exercised very carefully.

Obviously, this reasoning is problematic when it comes to justifying punitive damages on the basis of punishment. It involves the use of what almost all would view as a punitive, criminal law remedy, but without the criminal law processes that have typically been held to be required in such cases, due to the very serious consequences for the person found "guilty". Of all the punitive damages cases, the judgment of Lord Reid in *Broome v Cassell and Co* recognises this highly anomalous position best. Referring to past cases where punitive damages had been awarded he said:

> It meant that the plaintiff, by being given more than on any view could be justified as compensation, was being given a pure and undeserved windfall as the expense of the defendant, and that in so far as the defendant was being required to pay more than could possibly be regarded as compensation he was being subjected to pure punishment. I thought and still think that this is highly anomalous. It is confusing the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties.[96]

Lord Reid said that to permit awards of punitive damages was problematic:

> To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence except for the protection of offenders. There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like … it is no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on people when we insist on proper legal safeguards for them (he then referred to punitive damages as a form of "palm tree justice").[97]

Adherents of the status quo in relation to punitive damages have not been able to articulate or defend this philosophical anomaly at the heart of punitive damages practice. Presumably there would be a judicial outcry if the parliament provided for the jailing of a person in breach of contract (obviously, international human rights instruments would generally forbid this, where they are applicable), or the jailing of a person who accidentally hit a cricket ball out of a cricket ground, or whose business accidentally manufactured a defective product such that one of its customers developed a nervous condition after consuming something unexpected in the bottle. There would be an outcry because this would be the Parliament attempting to ascribe criminal consequences (jail) to behaviour that was classically tortious (and not criminal) in nature. However, the courts seem to generally blithely accept the imposition of a criminal penalty (punitive damages) upon a tortfeasor. In principle, the objection should remain.

This willingness of the court to do so has been criticised by multiple commentators. Chapman and Trebilcock point out that

> It is generally accepted among retributivists that the sort of criminal culpability that attracts punishment on a desert-based view is to be distinguished from that kind of fault that might attract liability in a private law tort action.[98]

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[93] Andrew Ashworth and Lucia Zedner, "Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions" (2008) 2 *Criminal Law and Philosophy* 21, 22.

[94] Steiker, n 84, 803.

[95] *R v Oakes* [1986] 1 SCR 103, 120 (Dickson CJ, for Chouinard Lamer Wilson and Le Dain JJ).

[96] *Broome v Cassell and Co* [1972] AC 1027, 1086; on the other hand, Lord Wilberforce expressed that he did not have a conceptual difficulty with this (1114).

[97] *Broome v Cassell and Co* [1972] AC 1027, 1087.

[98] Bruce Chapman and Michael Trebilcock, "Punitive Damages: Divergence in Search of a Rationale" (1989) 40 *Alabama Law Review* 741, 780.

The punishment rationale for punitive damages has also been criticised by Allan Beever,[99] Simon Greenleaf[100] and Sales and Cole.[101]

Of course, the fact that punitive damages are justified as punishment creates the unwelcome spectre of "double punishment" in cases where the defendant's conduct arguably involves a breach of the criminal law. The High Court is aware of this but dismissed the issue quickly in *Gray* by stating that an award of punitive damages was not appropriate when the defendant had already been "substantially punished" in criminal proceedings. Obviously, arguments could arise as to the precise meaning of substantial punishment. Is double punishment conceptually sound, provided the criminal law punishment was not substantial? What if the criminal proceedings have not been commenced, or have not been completed? It is of course possible that criminal proceedings may not be brought until well after the civil proceedings, given that in Australia there are strict time limits within which civil proceedings must be brought, but no time limits for the bringing of criminal proceedings. It may be possible to stay civil proceedings where it is known that criminal proceedings will be brought,[102] but it is not always possible to know this. This creates another complication with punitive damages, the possibility that a wrongdoer might be punished twice for the same wrongdoing, usually admitted to be a breach of an individual's human rights.[103] There is much to be said here for the position of courts in New Zealand, which have found that punitive damages are not available when a wrongdoer has been convicted of a crime,[104] and should be struck out

[99] Allan Beever, "The Future of Exemplary Damages in New Zealand" (2010) 24 *New Zealand Universities Law Review* 197, 213: "the more seriously we take exemplary damages, the more true we are to their nature, the more clearly they pull apart from tort law, and move into the realm of the criminal"; Allan Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 *Oxford Journal of Legal Studies* 87, 109: "punishment belongs to the criminal and not to the private law, not primarily as a matter of procedure, historical accident or convenience, but because of the logic of their structures. It is not possible to bring private law and exemplary damages together into a single legal structure and pretend that that structure makes sense. Exemplary damages in private law are on 'foreign soil'".

[100] Simon Greenleaf, A Treatise on the Law of Evidence (C.C. Little and J. Brown, 16th ed, 1899) Vol 2, 240.

[101] James Sales and Kenneth Cole Jr, "Punitive Damages: A Relic That Has Outlived Its Origins" (1984) 37 *Vanderbilt Law Review* 1117, 1162.

[102] Law Commission of England and Wales, *Aggravated, Exemplary and Restitutionary Damages* (1997) acknowledged this issue, but said that in many cases, the criminal proceedings (if any) would have been completed prior to the civil proceedings, and that the civil court had the opportunity to stay proceedings in appropriate cases. The Law Commission stated that if the civil matter were heard prior to any criminal proceedings, the civil court should presume there will be no criminal conviction: paragraph 1.127. While the Commission was probably applying the presumption of innocence principle in making this point, and cannot be criticised for so doing, the effect of making that presumption is to permit the possibility of double punishment, since it would be possible for the wrongdoer to pay punitive damages and then subsequently be convicted of a crime. At one time the common law accepted a felony merger rule, which appeared to operate to deny any civil jurisdiction over matters that had been through criminal proceedings: *Higgins v Butcher* (1607) 80 ER 61; Yelv 89 (death); *Wellock v Constantine* (1863) 159 ER 61; 2 Hurl & C 146 (sexual assault). There is a difference of opinion regarding whether the civil claim was "drowned" (permanently) or merely "submerged" until the criminal proceedings were complete: *Midland Insurance Co v Smith and Wife* (1881) 6 QBD 561, 568 (Watkin Williams J). However, the so-called felony merger rule was later abandoned in the 20th century: Peter Handford, "Lord Campbell and the Fatal Accidents Act" (2013) 129 Law Quarterly Review 420, 429–430.

[103] *New Zealand Bill of Rights Act 1990* (NZ) s 26(2); *International Covenant on Civil and Political Rights*, Art 14(7); *Canadian Charter of Rights and Freedoms*, s 11(h); *Fifth* and *Fourteenth Amendments* to the United States *Constitution*; see Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence (CUP, 2002) 585–586: "the existence of this right (against double punishment) is not an absolute bar to a civil claim for exemplary damages, although the latter are punitive in nature and intended to deter repetition of outrageous conduct … the word 'punished' is concerned with the criminal process, preventing the punishment function of that process from being revisited. However, in determining whether such a claim may be brought on the basis of facts which had been the subject of criminal proceedings, a court is required to make a policy decision … where criminal proceedings have resulted in a conviction, there are compelling reasons to hold that there can be no justification for a subsequent civil claim for exemplary damages on the basis of the same facts … although a prosecution which resulted in an acquittal does not operate as a general bar to subsequent civil proceedings arising from the same facts, it will be an abuse of process to allow the same issues to be relitigated for the sole purpose of exacting a punishment in the form of exemplary damages which fulfils broadly the same purpose as criminal sanctions".

[104] John Smillie, "Exemplary Damages for Personal Injury" (1997) *New Zealand Law Review* 140, 163–164: "if punishment and deterrence are indeed the sole purposes of exemplary damages, proof of criminal conviction and punishment should present an absolute bar to a subsequent civil claim in respect of the same conduct".

where the alleged wrongdoer has been acquitted of wrongdoing.[105] In contrast, Canadian courts have permitted subsequent punitive damages claims in civil courts after the wrongdoer has been convicted of criminal wrongdoing.[106]

Unable to justify this conceptual anomaly that strikes at the heart of punitive damages, that of imposing a criminal sanction of punishment for behaviour not assessed as criminal, judges have resorted to other means to try to explain or rationalise such a position.

Too Late to Abandon Punitive Damages?

We are sometimes told that punitive damages have been recognised in the law for so long that it is now "too late" to abandon them. Traces of this are found in Lord Reid's almost apologetic explanation of the *Rookes* decision in his *Broome* judgment, where he expresses that the cases prior to *Rookes* were also anomalous, but the Court felt it could not over-rule those past decisions, given sentiment at that time. As an alternative, they determined to limit the scope of the past precedents as much as possible.

Obviously, since the *Practice Statement* of 1966 the House of Lords is no longer bound by its past decisions, so the reluctance the House may have felt in 1964 in determining *Rookes*, and in not abandoning punitive damages altogether, is no longer relevant. And the High Court of Australia is obviously no longer bound by House of Lords decisions.[107] Further, at least at one time, our High Court was very prepared to make some big calls in the area of tort law in terms of reforms. It subsumed the strict liability doctrine in *Rylands* into the law of negligence,[108] abandoned the different duties of care that occupiers formerly owed to entrants,[109] and abandoned the old public authority immunity for non-feasance,[110] to give three previous examples. All of those decisions involved overturning precedents of many years' standing. Thus, evidently the fact that a precedent and/or practice has stood for a long time does not, for that reason only, guarantee it a future in the law of tort. Nor should it.

This reasoning applies to the practice of awarding punitive damages as "punishment". The original historical basis for it may have been sensible, in the absence of criminal law and State enforcement of a criminal code. However, that rationale was gone by the 19th century. Despite the original raison d'etre for punitive damages having been "overtaken by events", they retain an awkward place in the law of tort. Frankly, they cannot be conceptually justified as being "punishment" and retain a place in the law of tort. The conceptual difficulties are too great. Legal principles must make conceptual sense. We should not support the collapse of the distinction between the civil and the criminal law, or doctrines which clearly straddle and thereby undermine it. We are left with the other claimed rationale for punitive damages, namely that they are an efficient deterrent to undesired activity. This is the rationale to which we now turn.

Punitive Damages as a Deterrent

The other main rationale for punitive damages has been on the basis of deterrence. Thus, it is said that punitive damages are designed to deter the wrongdoer who is required to pay them from future wrongdoing, and/or deter others in future who might otherwise have contemplated such behaviour. The High Court of Australia has accepted the deterrence justification for punitive damages as an alternative

[105] *Daniels v Thompson* [1998] 3 NZLR 22, although it is conceded that the standard of proof differs, and the mere fact that someone has been acquitted of a criminal charge does not of course mean that a plaintiff could not prove the defendant's culpability at the level of balance of probabilities. See for discussion Kelly Wilshire, "Double Jeopardy, Exemplary Damages and Criminal Proceedings" (2000) 9 *Auckland University Law Review* 177. The effect of *Daniels* was later overturned by statute: *Accident Insurance Act 1998* (NZ) s 396(1): Joanne Manning, "Reflections on Exemplary Damages and Personal Injury Liability in New Zealand" [2002] *New Zealand Law Review* 143, 166.

[106] *Joanisse v Y(D)* (1995) 27 CCLT (2d) 278, 280–281 (British Columbia Supreme Court); *Buxbaum (Litigation Guardian Of) v Buxbaum* [1997] OJ No 5166 (Ontario Court of Appeal); see for discussion Bruce Feldthusen, "Punitive Damages: Hard Choices and High Stakes" (1998) *New Zealand Law Review* 741, 757–758.

[107] *Parker v The Queen* (1963) 111 CLR 610.

[108] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520.

[109] *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

[110] *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29.

to notions of punishment.[111] Specifically, though a punitive damages award in a particular case may not be warranted by notions of punishment, it has found that it is, or may be, sufficient to justify punitive damages on the basis of its (assumed) deterrence function.

If we consider this supposed deterrence rationale for the imposition of punitive damages in more detail, there is reason to be respectfully sceptical of the deterrence function that it can carry out. This is on the assumption that it is even legitimate to use language of deterrence in a civil law setting, where again, it is a concept usually applied much more in the criminal law context. For instance, one of the factors relevant to a court in determining a person's sentence following conviction for an offence is the need to deter that offender, and other would-be offenders, from such behaviour in future. Thus, it is traditionally a factor relevant to criminal law, not civil law.[112] The comments made above about the blurring of the civil/criminal divide are also apposite here. The concept of deterrence is much less identifiable in the civil law, concerned as it is with compensation, rather than sending messages to wrongdoers or would-be wrongdoers, though it sometimes may do this indirectly. Notions of deterrence have particular prominence in the law and economics movement, and to the extent that movement has been influential in the development of tort law, deterrence has become more prevalent as an explanation, or purported explanation, for tort principle.

The idea of the deterrence rationale for imposing punitive damages, then, is that damages should be awarded at such level as would deter the wrongdoer from future wrongdoing or would deter others otherwise intent on such behaviour. The aim is optimal, efficient deterrence, rather than absolute deterrence, on the assumption that this can accurately be measured.

However, scepticism is in order. How can the court know at what level to set damages in order to deter undesired behaviour? Many factors affect a person or organisation's decisions about its behaviour. It is considered unlikely that an organisation or individual would carefully consider the risk that they will be liable for punitive damages in making that kind of decision. Many organisations and their representatives are likely to be ignorant about the possibility of being liable for punitive damages. It is considered that the "ordinary person in the street" would likely be unfamiliar with such a concept.

Further, even if the person were aware of it and did attempt to make some kind of calculation as to whether their planned wrongdoing was "worth it", how could they know the likelihood or probability that their wrongful behaviour would be detected? How could they know the likelihood or probability that the person wronged has the means and the inclination to commence legal proceedings to assert their rights, and has the means and resilience to be able to prove their case, and see it through to completion? How could they know what punitive damages they would likely have to pay? With respect, these are all unknown, and unknowable.[113] Yet, according to law and economics scholars seeking to justify the imposition of punitive damages on a deterrence rationale, they are highly relevant to assessments about the extent of such damages in a particular case.[114] This makes it difficult to accept that realistically, a person intent on wrongdoing would attempt to make such a calculation. It thus calls into question the ability of punitive damages to achieve the kind of deterrence its adherents promise.

Just as the person sought to be deterred would have trouble making such calculations, so would a court in working out what level to cast the damages to meet the desired deterrence level.[115] How much should

[111] *Gray v Motor Accident Commission* (1998) 196 CLR 1, 14 (Gleeson CJ McHugh Gummow and Hayne JJ); [1998] HCA 70; *Lamb v Cotogno* (1987) 164 CLR 1, 9 (Mason CJ Brennan Deane Dawson and Gaudron JJ).

[112] Beever, n 99, 221.

[113] Michael Legg, "Economic Guidelines for Awarding Exemplary Damages" (2004) 30 *Monash University Law Review* 303, 314: "one of the criticisms of applying economic analysis to exemplary damages (is) that information quantifying the harm causes, the cost of precautions and the likelihood of detection is seldom available".

[114] Mitchell Polinsky and Steven Shavell, "Punitive Damages: An Economic Analysis" (1998) 111 *Harvard Law Review* 870; Robert Cooter, "Economic Analysis of Punitive Damages" (1982) 56 *Southern California Law Review*; 79; Robert Cooter, "Punitive Damages for Deterrence: When and How Much?" (1989) 40 *Alabama Law Review* 1143.

[115] Bruce Feldthusen, "Punitive Damages: Hard Choices and High Stakes" [1998] *New Zealand Law Review* 741, 753: "even if the courts were to openly embrace a general deterrence rationale, it must be considered whether judges and juries are well positioned to quantify deterrence damages. Just how much is enough? Unless some concrete principles of quantification based on evidence can be developed, no prospective defendant will be able to anticipate the amount of punitive liability it might incur. This is unjust on a punitive rationale and inefficient on a deterrence rationale".

they order? Does it depend on how deep the defendant's pockets are? Individuals and organisations react differently to price signalling. Some are very sensitive to price changes; others are not. Does it depend on cash flow, or year to year profitability of the defendant, or their assets? It is even more difficult to do this when the deterrent effect is said to be on future wrongdoers. Recall that the High Court in *Lamb* has accepted a deterrence rationale on the basis that an award of punitive damages in a particular case will deter *future unknown wrongdoers*, not the *immediate* wrongdoer in front of them. Of course, the Court cannot identify these individuals or organisations today. It cannot know at what level to set punitive damages in this case, in order to deter future wrongdoers of whom it is currently unaware. Again, this compromises the Courts' ability to achieve the kind of deterrence that it maintains an award of punitive damages can provide. I will consider in more detail below the specific further problems when it is sought to make an employer vicariously liable for punitive damages resulting from the wrongful behaviour of an employee.

Other scholars have pointed out the lack of empirical evidence that punitive damages do indeed effectively deter undesired behaviour.[116]

Further, given the availability of insurance against the risk of being liable for punitive damages, any possible deterrent effect of imposing them is likely to be even further diluted.[117] As Smillie notes:

> By shifting the burden of payment from the wrongdoer to the insurer (and ultimately other policy holders) liability insurance defeats the punitive and deterrent function of an award of damages. If punishment and deterrence are indeed the sole objects of exemplary damages, one would expect the courts to hold that this head of damages is uninsurable … it is clearly contrary to public policy to allow a punishment imposed for a criminal offence to be shifted to a third party, and a contract for indemnity in respect of a criminal fine is unenforceable.[118]

Vicarious Liability for Punitive Damages

Difficulties with punitive damages are arguably multiplied when it is sought to impose them upon an employer for the wrongdoing of their employee. As indicated above, both United Kingdom[119] and Australian case law[120] appears to allow the possibility that an employer could be held vicariously liable for punitive damages for the actions of their employee. The Law Commission Report recommended that employers should in some cases be vicariously liable for punitive damages.[121] Such a possibility also exists in the United States case law. While different approaches to the question are evident in that jurisdiction,[122] the *Restatement (Second) of Torts* expressly contemplates the employer's vicarious liability for punitive damages in some circumstances.[123] Early American cases had recognised the likely

[116] Dorsey Ellis, "Fairness and Efficiency in the Law of Punitive Damages" (1982) 56 *Southern California Law Review* 1, 77: "without better empirical evidence, it is impossible definitively to establish that the present law of punitive damages does not promote efficient deterrence. The most that can be said is that there is no empirical basis for believing that it does and that the intuitive arguments supporting the proposition are weaker than those against it"; Anthony Sebok, "Punitive Damages: From Myth to Theory" (2007) 92 *Iowa Law Review* 957, 983.

[117] Andrew Marrero, "Punitive Damages: Why the Monster Thrives" (2017) 105 *Georgetown Law Journal* 767, 798; Allan Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 *Oxford Journal of Legal Studies* 87, 95.

[118] John Smillie, "Exemplary Damages for Personal Injury" (1997) *New Zealand Law Review* 140, 168–169.

[119] *Rowlands v Chief Constable of Merseyside* [2007] 1 WLR 1065.

[120] *New South Wales v Ibbett* (2006) 229 CLR 638; [2006] HCA 57.

[121] Law Commission of England and Wales, n 102, 1.212.

[122] Some States follow the simple "scope of employment" line through which an employer may be vicariously liable for punitive damages for any conduct occurring within the course of employment, while others follow the Restatement line and typically contemplate some complicity by the employer in the employee's wrongdoing in order to render the employer vicariously liable for punitive damages: Michael Sturley, "Vicarious Liability for Punitive Damages" (2010) 70 *Louisiana Law Review* 501.

[123] Restatement (Second) of Torts *1979* s 909 to the effect that an employer may be vicariously liable to pay punitive damages where (1) they authorised the doing of the act; (2) the employee was unfit and the employer negligent in employing them; (3) the employee was employed in a managerial capacity and acting within the scope of employment; or (4) the employer ratified or approved the act.

unfairness involved in making an employer vicariously liable for punitive damages.[124] More recently the possibility has increasingly been accepted, either on the basis of a simple scope of employment test, or if the employer is held to be in some way "complicit" in the wrongful behaviour.[125]

It is beyond the scope of the current article to consider the vicarious liability of an employer for the actions of their employee, and in any event I have considered this matter in detail in other published work.[126] For current purposes it is sufficient to note that an employer will classically be liable for wrongs committed by an employee in the course of their employment.[127] Vicarious liability is imposed upon an employer in the absence of their personal fault or wrongdoing.[128] They are liable for the wrongs committed by their employee, not for their own wrongs. Of course, if the employer has themselves committed wrong, liability would be direct and not vicarious. Vicarious liability applies in the context of wrongs committed *by an employee*, for which in some circumstances, the law recognises *the employer* is liable.

It is stretching this concept to breaking point to seek to make an employer vicariously liable for punitive damages for wrongs committed by an employee.[129] To the extent that punitive damages are rationalised as a punishment for the wrongdoer, it becomes incoherent to impose them upon an employer vicariously since, by definition, they have done nothing wrong. If imposing punishment in a civil context is egregious, it is even more egregious if it is imposed on someone who has, by definition, committed no wrong. What is the law punishing? There is simply no wrong committed by the employer to be punished.[130] Most theorists would suggest that punishment is not justified or defensible when imposed on a person who, or an organisation that, has not done anything deserving of punishment. The law risks losing its moral force when it punishes the undeserving.

A reminder of the language the courts use in describing the circumstances in which a punitive damages award might be appropriate only serves to support this conclusion. Such damages are supposedly reserved for very serious wrongdoing – where the defendant has been engaged in contumelious disregard of the plaintiff's rights, acted in a vindictive and/or high-handed manner, and/or with wanton disregard of the interests of others. Often such conduct will be motivated by ill-will. Clearly, to impose such damages upon an innocent employer is unjust, because they are not guilty of any of this kind of behaviour. The purpose of imposing punitive damages is not furthered by imposing them upon an innocent employer.

Nor is it easy to justify the imposition of punitive damages to an employer vicariously on the basis of a deterrence rationale.[131] Since the employer has done nothing wrong, again it is difficult to articulate

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[124] The Amiable Nancy, 16 US (3 Wheat) 546 (1818); *Lake Shore and Michigan Southern Railway Co v Prentice*, 147 US 101 (1893).

[125] Sturley, n 122.

[126] Anthony Gray, "Liability of Educational Providers for Child Sexual Abuse" (2017) 38 *Sydney Law Review* 167; Anthony Gray, "Why Vicarious Liability Must Be Abandoned" (2011) 39 ABLR 67; Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart Publishing, Oxford, 2018).

[127] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148 (French CJ Kiefel Bell Keane and Nettle JJ); [2016] HCA 37.

[128] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148 (French CJ Kiefel Bell Keane and Nettle JJ); [2016] HCA 37.

[129] James Sales and Kenneth Cole, "Punitive Damages: A Relic that Has Outlived Its Origins" (1984) 37 *Vanderbilt Law Review* 1117, 1141: "punitive damages in a strict liability context … would seem to be plainly illogical because neither punishment nor deterrence of conduct is at issue"; Allan Beever, "The Structure of Aggravated and Exemplary Damages" (2003) 23 *Oxford Journal of Legal Studies* 87, 96.

[130] Sturley, n 122, 516: "if punitive damages punish someone who is not guilty of any misconduct they do not accomplish their stated purpose"; Randy Parlee, "Vicarious Liability for Punitive Damages: Suggested Changes in the Law through Policy Analysis" (1984) 68 *Marquette Law Review* 27, 36: "the most obvious problem with vicarious liability under the scope of employment rule is that the principal does not necessarily share the wrongdoer's evil motive. Where the motive is not shared, punishment of the principal is patently irrational and unethical".

[131] Paul Walker, "Vicarious Liability for Exemplary Damages: A Matter of Strict Liability?" (2009) 83 ALJ 548, 548: "to award exemplary damages indiscriminately against an employer for the wrong of its employees runs counter to the rationale of deterrence which would seem to enable the awarding of exemplary damages in the first place"; John Smillie, "Exemplary Damages for Personal Injury" (1997) *New Zealand Law Review* 140, 164: "if the purpose of exemplary damages is to punish and deter, surely

what the law seeks to deter. In some ways, with respect the law on vicarious liability can seem as if it is speaking with forked tongue.[132] On the one hand, its strict liability basis is lauded on the basis that it will encourage employers to take precautions to avoid liability, and thus has a deterrence rationale.[133] However, given it is a doctrine of strict liability, employers will be liable regardless of any precautions they took. It is hard to accept a doctrine that is at once lauded as one which gives incentives for employers to act, and one which is imposed regardless of what the employer actually did or may do in future.

How can an organisation be expected to take further steps to prevent an employee from engaging in the kind of behaviour that would typically warrant the imposition of punitive damages? Recall this is for egregious, outrageous conduct. If committed by an employee, it is likely to be grounds for the termination of their employment. The employer has already sought to deter such behaviour through appropriate provisions in the employee's contract of employment. It knows it could be held negligent for poor selection, management and supervision of employees. It is unlikely that the possibility of vicarious liability for punitive damages will add anything to the incentives that already exist for an employer to choose employees carefully, train them well and to monitor their behaviour and performance.[134] Thus, I respectfully reject the apparent acceptance by the High Court in *Ibbett* that vicarious imposition of punitive damages upon an employer is justified by the incentives it thus provides employers to properly train their staff.

If the award is against an organisation, who ends up paying the damages? It is unlikely to be the individuals who were the actual wrongdoers. It may be the shareholders, in the case of a listed company, which presents difficulties in that they were not actually guilty of any wrongful behaviour. Organisations typically act through individuals, and while the law might want to deter the wrongdoer, this goal, which may or may not be laudable, is largely thwarted when the wrongdoer is not the one actually paying the damages. If the award is large enough, it might cause the business to fail. In that event, all of the organisation's employees and their families, its customers, and perhaps its creditors, would bear the loss. Again, little deterrence would be achieved. The availability of insurance for vicarious punitive damages further undermines any deterrence rationale.

It may even be argued that any deterrence effect that the imposition of punitive damages upon an employee would otherwise have is further undermined by the possibility of making their employer vicariously liable for such damages. The wronged individual is most likely to pick the deeper pocket of the employer in terms of liability. While at common law that employer (or, more precisely, their insurer) would then have a right to financial recourse against the wrongdoing employee,[135] in many cases that right is statutorily forbidden in Australia.[136]

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the individual wrongdoer must be required to pay the award from his own personal resources. The direct punitive and deterrent effect on the wrongdoer will be lost if he is permitted to avoid personal responsibility for payment, and to punish and innocent person for the wrong of another violates the most fundamental principle of retributive justice"; Alison Todd, "Vicarious Liability for Sexual Abuse" (2002) 8 *Canterbury Law Review* 281, 311: "if exemplary damages are to have a real deterrent effect, they must be imposed on the employee".

[132] Walker, n 131, 560: "if the relevant policy for allowing a vicarious award of exemplary damages is to encourage the employers to take active steps to minimise the risk of their employees acting in a high handed or reprehensible manner, a strict liability approach is potentially counterproductive. This is because, if employers are to be subject to vicarious awards of exemplary damages on a strict or automatic basis, there may be no, or no sufficient incentive for those employers to take any steps to reduce this risk. Such employers will not only have to bear the costs of attempted minimisation of harm, but also the cost of exemplary damages which are imposed even if these steps are taken".

[133] *Bazley v Curry* [1999] 2 SCR 534, 554: "the second major policy consideration underlying vicarious liability is deterrence of future harm. Fixing the employer with responsibility for the employee's wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision" (McLachlin J, for the Court); Law Commission of England and Wales, n 102, 1.220.

[134] Stephen Todd, "A New Zealand Perspective on Exemplary Damages" (2004) 33 *Common Law World Review* 255, 273: "any incentive to take care already exists, and it is difficult to see how a vicarious liability for exemplary damages could have any significant impact in this respect"; Dorsey Ellis, "Fairness and Efficiency in the Law of Punitive Damages" (1982) 56 *Southern California Law Review* 1, 68; John Smillie, "Exemplary Damages for Personal Injury" (1997) *New Zealand Law Review* 140, 166–167; Alison Todd, "Vicarious Liability for Sexual Abuse' (2002) 8 *Canterbury Law Review* 281, 311.

[135] *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555.

[136] *Insurance Contracts Act 1984* (Cth) s 66.

Further, typically when punitive damages are awarded, the awarding court considers the financial position of the defendant. This is said to be relevant, because the court should set the level of punitive damages at a level which will truly deter, and to do that requires an assessment of the defendant's existing resources. How is this to be applied, if at all, against an employer on the basis of vicarious liability? Should their financial resources be taken into account? Or is it the financial resources of the wrongdoer that is relevant? There is no clear answer to this in the limited case law. Presumably it is the financial resources of the employer that will be taken into account, since they are the ones required to pay the punitive damages. However, this is incoherent, since they have done nothing that the imposition of punitive damages against them is designed to deter, and as indicated earlier, they do not deserve to be punished because they have done nothing wrong. And further, it is somewhat bizarre to say the least to consider the defendant's financial means when assessing what punitive damages they must pay, when the possibility (and indeed, probability) is that they are likely to be insured against such losses. If the person or organisation against whom the damages are to be assessed does not actually pay them, why does their financial position matter at all?

Alternative Remedies

It should be noted by way of completeness that other remedies exist that might overlap the circumstances in which punitive damages might otherwise be available. They include an account of profits, and proceedings based on unjust enrichment. These alternative remedies may deal with the second and third of the categories of case in which the House of Lords restricted the availability of punitive damages in *Rookes*. In relation to the first category they espoused, administrative law remedies have grown significantly since that decision, and might well provide a remedy in situations where otherwise a claim may be made on that basis against the government. In so pointing this out, I am not to be taken as suggesting that I agree with the categories of case in which the House of Lords concluded in *Rookes* punitive damages would be limited; rather the point is to note that alternative remedies in the law exist to awards of punitive damages, in demonstrated categories of case in which such damages have historically been awarded. This was, after all, the basis of the recognition of such categories in *Rookes*. Further, obviously aggravated damages continue to be available to plaintiffs, and nothing in this article is designed to change that.

Further, to the extent that the wrongdoing involves proven criminal activity, the criminal court may be able to award compensation to the victim pursuant to victims of crime legislation. If this legislation requires refinement to adequately compensate victims of crime, that is a matter to be considered, and beyond the scope of this article. However, the point is that this is a further alternative form of redress for proven wrongful (criminal) behaviour.

Conclusion

The law must re-consider the extent to which punitive damages may or should be awarded to plaintiffs. The original rationale for their imposition has disappeared given developments in the criminal law, and elsewhere in civil law. The distinction between civil and criminal law is important and must be defended and maintained. The criminal law is characterised by severe incursions on the liberty of a person, shame, stigma and opprobrium. This is why the law traditionally requires strong due process protections for someone accused of criminal wrongdoing, and someone to whom criminal sanctions may be visited. Criminal sanctions must be reserved for those who are worthy of them.

In this light, punitive damages retain an increasingly awkward place in the civil law. They cannot be justified on the basis of punishment, since punishment is reserved for proven criminal wrongdoing, and the moral force of the legal system is imperilled when criminal sanctions are imposed against someone not proven to have breached the criminal law. They contemplate the real, unwelcome spectre of double punishment, where a person might be subject to both criminal sanctions through a criminal law process and the criminal sanction of punitive damages in a civil process. Though the law has not considered this in much detail, the High Court's attempts to deal with such a possibility are, with respect, not convincing. A person convicted of a crime should not *ever* be the subject of a subsequent punitive damages claim

in civil court; nor should someone acquitted of the alleged crime. Insuperable difficulties arise when the person accused of wrongdoing has not yet been charged with a crime, but may be so charged, and a civil claim involving punitive damages is brought against them. This is possible given the very different limitations period issues involved in the civil realm compared with the criminal realm.

While it is apparent that the House of Lords really wanted to get rid of punitive damages in *Rookes*, precedent and their refusal to overturn past precedent precluded this step, explaining their crimping of the remedy. These approaches to precedent have changed. The High Court is free to depart from past principles and case law. Past High Courts have shown real courage in reforming or abandoning long-established tort principle, where they represent an anachronism, or are out of tune with developments elsewhere in the law. The High Court should follow this lead in relation to punitive damages.

Attempts to justify punitive damages on the basis of deterrence are highly problematic. A court would need much greater detail (and, respectfully, economic expertise) in order to calculate the level at which damages should be pitched in order to provide the needed deterrence. It is unlikely someone intent on wrongdoing calculates whether the expected benefit from doing so is worth the risk of being caught and paying some magical punitive damages amount. Such arguments stretch credulity. Evidence that punitive damages in fact do provide deterrence is elusive. The fact that the wrongdoer may well be insured against the possibility of such losses further undermines whatever punishment and deterrence rationale might otherwise support punitive damages. It is even more difficult to assert that an award of punitive damages in one case will deter *future* wrongdoers. At best, this is highly speculative.

Difficulties are exacerbated when it is sought to impose punitive damages vicariously on an employer. By definition, such an employer is innocent of wrongdoing. Simply, the law must not punish the innocent. Further, given they are not guilty of any wrongdoing, there is no behaviour of theirs that is required to be deterred. In any event, they are again likely to be insured against such losses, further weakening any punishment or deterrence rationale. The High Court should not accept that employers can be made vicariously liable for punitive damages. If punitive damages have any role in the law at all, they must be reserved for those whose conduct is truly deserving, not the innocent.

However, given developments elsewhere in the law, including victims of crime legislation, restitutionary remedies, and the increased availability of remedies against government, it is considered to be simplest for the common law to now abandon punitive damages altogether. They are designed to solve a problem that no longer exists, they muddy the distinction between the civil and the criminal, a distinction which is important, and insurance has obviated most of the effect they might otherwise have. At the very least, they must not be applied against employers on the basis of vicarious liability, and they must not be applied against someone against whom criminal proceedings have been completed. However, it would be better to simply remove them from the law altogether.