Exemplary damages: A useful weapon in the legal armoury?

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In 1964, Lord Devlin in the case of Rookes *v.* Barnard[1] *wanted to restrict the award of exemplary damages. He considered that previous case-law prevented the total abolition of this head of damages.*[2] *In 1982 the New Zealand Court of Appeal in* Donselaar *v.* Donselaar[3] *considered that "a useful weapon in the legal armoury should not be sacrificed without compelling reason."*[4]

This article examines the decision in Rookes *v.* Barnard *and its reception in New Zealand courts. Concentrating on the decision in* Donselaar *and subsequent case law the approach of the courts to the award of exemplary damages is questioned. Although not advocating the acceptance of the categories outlined by Lord Devlin, it is asserted that because of their rejection the present state of the law restricts the usefulness of exemplary damages. A new approach is suggested which will allow for the development of a useful and effective weapon in the legal armoury.*

I. THE DECISION OF THE HOUSE OF LORDS IN ROOKES v. BARNARD.

> There is not any decision of this House approving an award of exemplary damages and your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the Law of England.[5]

Exemplary damages, which are designed to punish the defendant for his/her conduct and to vindicate the strength of the law, were regarded as anomalous for two reasons.[6] Firstly, the primary object of an award of damages is to compensate the plaintiff for the injury caused to him/her by the conduct of the defendant. Exemplary damages, although designed to vindicate the strength of the law, result in a certain 'windfall to the plaintiff. Secondly, the award of exemplary damages confuses the civil and criminal functions of the law. Since they are designed as punishment for the defendant (hence

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1 [1964] A.C. 1129.

2 Ibid. 1221-1228. Lord Devlin speaking for the other Law Lords on the question of exemplary damages.

3 [1981] 1 N.Z.L.R. 97.

4 Ibid 107 per Cooke J.

5 Supra n.1, 1221.

6 See H. Street *Principles of the Law of Damages* (1962, Sweet and Maxwell, London), 33-34.

the various titles of vindictive, retributory and punitive) exemplary damages punish the defendant although he/she has not been found guilty beyond a reasonable doubt.

By offering an alternative explanation for over two hundred years of case law (i.e. that the cases were examples of the award of aggravated damages instead of exemplary damages) Lord Devlin restricted the future award of exemplary damages to three categories of cases.[7] These were:

(a) Oppressive, arbitrary or unconstitutional action by the servants of government.
(b) Cases in which "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff";[8] and finally
(c) Cases expressly authorised by statute.

The first category of cases above allowed for the retention of those eighteenth century cases which had introduced the award of exemplary damages.[9] It is important to note that this category is confined to the actions of "servants of government". The rationale for this limitation is that as well as being servants of government, they are also servants of the people. As Lord Devlin noted "the use of their power must always be subordinate to their duty of service."[10] So, the oppressive and/or arbitrary actions of private individuals or corporations do not come within the scope of this category and as Lord Hailsham intimated in *Broome* v. *Cassell* it is unlikely that such actions will ever come within the scope of the first category.[11]

However, such actions by private individuals or corporations may come within the scope of the second category identified by Lord Devlin, since this category is not confined to[12]

> ... money-making in the strict sense. It extends to cases in which the defendant is seeking to gain some object — perhaps some property which he covets — which he either could not obtain at all or not obtain except at a price greater than he wants to put down.

Although subsequent case-law has interpreted this category as illustrative rather than exhaustive, the limited nature of this and the other categories has been a cause of criticism. As Taylor J. remarked[13]

> I am quite unable to see why the law should look with less favour on wrongs committed with a profit-making motive than upon wrongs committed with the utmost degree of malice or vindictively, arrogantly or high-handedly with contumelious disregard for the plaintiff's rights.

7 Supra n.1, 1226-1227.
8 Ibid, 1226.
9 I.e. *Wilkes* v. *Wood* (1763) Lofft. 1; *Huckle* v. *Money* (1763) 2 Wils. 205; *Benson* v. *Frederick* (1766) 3 Burr. 1845.
10 Supra n.1, 1226.
11 [1972] A.C. 1027, 1078.
12 Supra n.1, 1227.
13 *Uren* v. *John Fairfax and Sons Pty. Ltd.* (1966) 40 ALJR 124, 132.

The High Court of Australia disregarded the categories laid down in *Rookes* v. *Barnard* and on appeal to the Privy Council, their decision was upheld.[14] Although the decision in *Uren's* case was followed in New Zealand by McGregor J. in *Fogg* v. *McKnight,*[15] McCarthy J. in *Huljich* v. *Hall*[16] and Mahon J. in *A* v. *B*[17] preferred the approach advocated by Lord Devlin in *Rookes* v. *Barnard.*

The proper approach of New Zealand courts to the question of exemplary damages was determined by the Court of Appeal in *Taylor* v. *Beere.*[18] As Richardson J. recognised there were two questions to be answered: (i) whether exemplary damages should be awarded in New Zealand courts and (ii) whether the categories of cases in which they could be awarded was limited in the way suggested by Lord Devlin in *Rookes* v. *Barnard.*[19] The decision of the Court of Appeal affirmed the approach of the High Court of Australia in *Uren,* thereby allowing exemplary damages to be awarded.

Of greater significance was the decision of each of the judges that the categories of cases in which exemplary damages could be awarded is wider than those recognised by the House of Lords. Discussing the categories established by Lord Devlin, Richardson J. questioned the scope of the first category.[20] Why should exemplary damages be limited to the oppressive, arbitrary or high-handed conduct of public officials? He correctly pointed out that oppressive behaviour should not be limited by the employment status of the defendant; such technicalities would serve as an unsatisfactory basis for determining liability to pay exemplary damages. He questioned the restrictions to the profit motive of the defendant in the second category of Lord Devlin. He concluded by stating[21]

> It is the quality of the conduct which should count. "The oppressor's wrong, the proud man's contumely . . . the insolence of office" are all proper subjects of censure today as they were four hundred years ago. If the exemplary principle is to continue the availability of exemplary damages should not hinge on the occupation of the defendant or on any fine analysis of his motivation.

Despite the rejection of the categories of cases in which exemplary damages could be awarded, the Court of Appeal did approve of certain aspects of Lord Devlin's judgment in *Rookes* v. *Barnard.* In particular they approved of the three considerations which Lord Devlin stated should always be borne in mind when awards of exemplary damages are being contemplated.[22] The first consideration was that a plaintiff cannot recover unless s/he is the victim of the punishable behaviour. This situation has already been provided for in the Law Reform Act 1936 which forbids the award of exemplary

14 *Australian Consolidated Press Ltd.* v. *Uren* [1969] 1 A.C. 590.
15 [1968] N.Z.L.R. 330.
16 [1973] 2 N.Z.L.R. 279.
17 [1974] 1 N.Z.L.R. 673.
18 [1982] 1 N.Z.L.R. 81.
19 Ibid, 87.
20 Ibid, 92.
21 Idem.
22 Ibid, 1227-1228.

damages where the action is brought by the estate of the victim of the defendant's behaviour. Lord Devlin's second consideration reflects the anomaly of exemplary damages. Since they can be used against liberty, as well as in defence of it, awards should be moderate. In light of the fact that the Court of Appeal stated that exemplary damages are designed to punish, it is somewhat anachronistic to assert that damages should be moderate. The damages awarded should be commensurate with the degree of interference with the plaintiff's rights. Moderate awards will be given in those cases where there is a moderate interference, but very high-handed, oppressive conduct demands a high award of exemplary damages. To argue otherwise is to limit the principle.[23] Equally, the third consideration, the means of the parties, can be subjected to the same criticism.

The result of the decision of the Court of Appeal in *Taylor* v. *Beere* has been characterised by Ryan as a disagreement over the scope, not the nature, of exemplary damages outlined by Lord Devlin.[24] If this is so, how did exemplary damages come to be known as a "useful weapon in the legal armoury"? And more importantly, is this characterisation justifiable?

II. THE DECISION OF THE COURT OF APPEAL IN DONSELAAR v. DONSELAAR.

The characterisation of exemplary damages as a "useful weapon in the legal armoury" arose from the interpretation of section 5(1) of the Accident Compensation Act 1972 by the Court of Appeal in *Donselaar*. In so far as it is relevant section 5(1) read

> Subject to the provisions of this section where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered . . . no proceedings for damages arising directly or indirectly out of the injury or death shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

Throughout the 1970s academic and judicial debate of this section focussed on the question of whether or not it excluded an award of exemplary damages.

It was claimed that section 5(1) merely removed a head of damage. So if more than one head of damage flowed from the defendant's behaviour a claim for those other heads of damage (i.e. non-compensatory) would still be available.[25] This academic line of reasoning was supported by O'Regan J. in *Howse* v. *Attorney-General,* who asserted that exemplary damages arose from acts done contrary to law and not from the harm such acts caused to the plaintiff.[26] This reasoning was not supported by other decisions of the

23 See in particular the comments of Clement J.A. in *Paragon Properties Ltd* v. *Magna Investments Ltd* (1972) 24 D.L.R. (ed) 156, 167.

24 "Civil Punishment of the Uncivil: The Nature and Scope of Exemplary Damages in New Zealand" [1984] 5 Auck Univ L Rev 53, 60.

25 See M. Vennell "The Scope of National No-Fault Accident Compensation in Australia and New Zealand". (1975) 49 A.L.J. 22, 26-29. D. Collins "Proceedings for Punitive Damages in the Regime of Accident Compensation" [1978] N.Z.L.J. 158.

26 (1977) Unreported Palmerston North Registry, A 132/75.

High Court. Jeffries J. in *Betteridge* v. *McKenzie* felt certain that section 5(1) did not allow "injured persons the right to impose private fines on wrongdoers".[27] Furthermore it was claimed that to allow an action for exemplary damages would disturb the social equity which lay at the heart of the Accident Compensation scheme.[28] Having considered the academic debate and the judicial division on the proper interpretation of section 5(1), the Court of Appeal, by a unanimous decision, held that section 5(1) did not bar an award of exemplary damages.

However, because of the existence of the Accident Compensation scheme and the consequential unavailability of compensatory damages, the law of damages would have "to be consciously moulded to meet social needs".[29] The means to achieve this end was the award of exemplary damages, which was described by Cooke J. as "a useful weapon in the legal armoury."[30] An analysis of the judgments in *Donselaar* reveals the range of situations in which an award may be made and the factors which will govern these awards.

A. The Range of Exemplary Damages

The primary concern of the Woodhouse Report was the common law action for negligence and the inadequacies of this remedy as a means of securing compensation for personal injury. No criticism was directed against the intentional torts. However, section 5(1) of the 1972 Accident Compensation Act barred *all* actions for recovery of damages arising out of personal injury by accident. Henceforth, compensation would be payable to anyone who had suffered personal injury by accident irrespective of the cause of such injury. During the academic debate of the 1970s it was asserted that if an action for exemplary damages remained, it was in the intentional tort area that they should lie.[31] For example, Palmer in his book *Compensation for Incapacity* stated[32]

> The range of situations in which the action for punitive damages survives in a personal injury situation will not be great. The conduct will need to be wanton, so that it is unlikely that anything but an intentional tort would be involved.

In using this extract of Palmer's, Cooke J. maintained that it was a "fair inference" that the legislation did not deliberately set out to abolish the action for exemplary damages in cases of assault and battery.[33] Although Cooke J. seemed to limit the award of exemplary damages to cases of assault and battery, Richardson J. believed that all of the intentional torts could be the basis for the award.[34]

27 (1978) Unreported, Wellington Registry, A 103/77.
28 R. McInnes "Punishing the words of section 5(1). The Other School of Thought Replies" [1979] N.Z.L.J. 8, 10-11.
29 Ibid, 107.
30 Idem.
31 Collins supra n.25, 162.
32 (1979 OUP Wellington), 276.
33 Supra n.3, 106.
34 Ibid, 109.

Having established that an award of exemplary damages can be made in cases of the intentional torts without disturbing the social philosophy behind the 1972 Act, each of the judges outlined the grounds on which the awards would be made. Somers J. believed exemplary damages should be granted whenever the defendant acted in a "high-handed and contumelious" manner.[35] Richardson J. agreed.[36] Cooke J., who discussed this question at greater length, thought that exemplary damages should be awarded in cases where there had been an "irresponsible, malicious or oppressive use of power"[37] and where the defendant's actions were accompanied by "insult or contumely".[38] None of the members of the Court of Appeal were prepared to draw the distinction made by Lord Devlin in *Rookes* v. *Barnard* between the acts of public servants and the acts of private citizens or corporations.

This distinction should have been addressed by the Court because of the obvious merit it has. Lord Devlin after establishing the first category — oppressive, arbitrary or unconstitutional action by the servants of government — stated that he was unwilling to extend the category. He gave as his reason[39]

> Where one man is more powerful than another it is inevitable that he will try to use his power to gain his ends: and if his power is much greater than the other's, he might be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful.

The literal interpretation of the categories of Lord Devlin over-emphasises the importance of particular words whilst ignoring the context in which they were spoken. It is unlikely that the first category merely includes servants of the government; Lord Hailsham believed that it could extend to abuse of power by persons purporting "to exercise legal authority". He continued[40]

> What it will not include is the simple bully, not because the bully ought not to be punished in damages for he manifestly ought, but because an adequate award of compensatory damages by way of solatium will necessarily have punished him.

If this is correct, and it is the author's belief that it is, then, since the decision in *Donselaar* allows only for exemplary damages and not aggravated damages, it goes too far by including the actions of private individuals or corporations as grounds for the award of exemplary damages. The net result of this is that the courts will be awarding aggravated damages and since these are compensatory in nature jurisdiction to award such damages belongs to the Accident Compensation Corporation (A.C.C.), not the

35 Ibid, 115.
36 Ibid, 109. Richardson J. incorporated the decision in *Taylor* v. *Beere* into his discussion of exemplary damages in cases of personal injury.
37 Ibid, 106.
38 Idem.
39 Supra n.1, 1226.
40 *Broome* v. *Cassell* supra n.11, 1078.

courts.[41] This would clearly be against the social philosophy of Accident Compensation and would threaten the integrity of the system.

With reference to a quote from Palmer to the effect that exemplary damages should be limited to official conduct because "private vengeance is not an admirable trait to encourage",[42] Cooke J. stated that the distinction is simplistic.[43] No further comment is offered. If the philosophy behind allowing a right to claim exemplary damages in those cases where personal injury is suffered, is that it will deter similar conduct in the future, then the distinction is not simplistic. While this deterrence theory is appropriate to cases involving government servants (i.e. those people who exercise legal authority) it is not appropriate to the private situation. In such cases the primary motivation of the law of torts is not the deterrence of aberrant behaviour but the appeasement of the plaintiff's feelings. This safety-valve function of the law of tort, according to Glanville Williams, is assuming a less significant role.[44] Moreover, the appeasement of the plaintiff's feelings would be better achieved through the criminal law by the use of private prosecutions and the power of the courts to award fines under section 28 of the Criminal Justice Act.[45]

The attraction of this approach is twofold. Firstly, proposed amendments to section 28 will increase its effectiveness by allowing the court to award the whole fine or that portion of the fine which it thinks just, to the victim to compensate him/her for the physical and emotional harm suffered as a consequence of the defendant's actions.[46] This compensation is not barred by the provisions of the Accident Compensation Act.[47] Secondly, and more importantly, it will allow for an expanded role for exemplary damages. No longer constrained by the need to cover both public and private actions, the factors which govern the award of exemplary damages may be reconsidered to allow this weapon to become an effective weapon.

B. Factors Governing the Award of Exemplary Damages

> "To set about assessing exemplary damages without the possibility of saying that aggravated damages are enough punishment would be travel into terra incognita on a course never contemplated by their Lordships."[48] [in *Rookes* v. *Barnard*].

Cooke J. confronting the problem that compensation (compensatory and aggravated damages) will now be provided under the Accident Compensation scheme, maintained that in awarding exemplary damages the courts should not trespass into the jurisdiction of the A.C.C..[49] Hence the need to mould the law of damages.

41 See Vennell supra n.26 and her case comment on *Donselaar* and *Taylor* v. *Beere* (1982) 10 N.Z.U.L.R. 165 for a discussion of the possibility that actions for exemplary and aggravated damages are not barred by the provisions of the Accident Compensation Act.

42 Ibid, 276.

43 Supra n.3, 105.

44 "The Aims of the Law of Tort" (1951) 4 C.L.P. 137, 138.

45 See McInnes supra n.28, 11-12 for a discussion of the problems of imposing exemplary damages on private individuals and the consequent infringement of the rights of the defendant in such cases.

46 Violent Offences Bill (1987) Clauses 12-14.

47 s.28(2) Criminal Justice Act 1985.

48 *Donselaar* v. *Donselaar* [1982] 1 N.Z.L.R. 97, 106.

49 Ibid, 107.

He believed that exemplary damages should take part of the role formerly occupied by compensatory and aggravated damages since compensation under the Act, unlike common law, had no punitive purpose. However, exemplary damages should not be awarded merely because the jury considered the statutory benefits inadequate. Recalling the advice of Lord Devlin, Cooke J. called for moderation, because immoderate awards may lead to the abolition of exemplary damages by Parliament.[50] The considerations which were identified by Lord Devlin were implicitly accepted by Cooke J., so the plaintiff must be the victim of the punishable behaviour and the means of the parties will be relevant in the assessment of the size of the award. "Proper cases" for the awards of exemplary damages would have to be made out.

Richardson J. dealt with the problem of statutory compensation by stating that it was possible to have an award of exemplary damages without needing to assess compensatory damages.[51] The only qualification mentioned is that the plaintiff should be the victim of the punishable behaviour.[52] Somers J. dealt with the problem at greater length since he was more troubled by it than either Cooke J. or Richardson J. Unlike Richardson J., he viewed exemplary damages as parasitic. As a result Somers J. anticipated a return to the pre-1972 situation when the jury would assess compensatory and aggravated damages.[53] To this now hypothetical figure, the courts would have to add exemplary damages. The problem is that previously exemplary damages were awarded whenever the jury considered the amount of compensatory damages to be insufficient to punish or deter the defendant. Since compensation is now statutory, how can the jury award exemplary damages without infringing on this compensation and the jurisdiction of the A.C.C.? In agreeing with the comments of Cooke J., Somers J. called for restraint and moderation in the award of exemplary damages in case immoderate awards lead to the abolition of the remedy.[54]

The criticism made earlier of the considerations identified by Lord Devlin can be repeated here: why should the award of exemplary damages be moderate when the interference with the plaintiff's rights is serious? Although this request for moderation may be appropriate in cases where exemplary damages are awarded against private actions, it is totally inappropriate whenever the infringement is perpetrated by a public official.

The decision of the Court of Appeal in *Donselaar* to allow awards of exemplary damages to be made in cases where personal injury was suffered and the defendant needed or deserved to be punished for his/her actions ended the judicial and academic debate of the 1970s. One of the reasons identified by Cooke J. for allowing the award of exemplary damages was that[55]

50 Idem.
51 Ibid, 110.
52 Ibid, 111.
53 Idem.
54 Ibid, 106.
55 Ibid, 106.

> It is a matter of everyday observation that New Zealand society has become more vocal, factional and discordant. There is scepticism about established institutions. Allegations of misuse of power by the police and other authorities seem quite common. Individuals and groups are readier to pursue their goals by protests and similar actions, sometimes on or beyond the fringes of the law, no doubt because rightly or wrongly they feel driven to such courses.

Whilst the court provided a new weapon to fight high-handed and illegal conduct, the nature of the weapon is problematic. The distinction between public and private acts identified by Lord Devlin, and supported by Palmer, has been ignored. Whilst extending the range of situations in which an award of exemplary damages may be made, the impact of this new weapon is severely restricted because of the call for moderation.

III. POST-DONSELAAR CASES

In her comment on the nature and scope of exemplary damages in New Zealand, Ryan raises two questions:[56]

(i) How do you apply the contumelious disregard test? and
(ii) How do you direct a jury on the factors governing the award of exemplary damages.

While the first question remains largely unanswered, the Court of Appeal in the case of *Auckland City Council* v. *Blundell and Thompson*[57] has fully answered the second question.

In *Blundell and Thompson* the plaintiffs claimed exemplary damages alleging they had been assaulted, battered, wrongfully arrested and falsely imprisoned by servants of Auckland City Council (traffic officers). On appeal from the judgment of Vautier J. the Court of Appeal, consisting of Cooke P. and Somers and Casey JJ., reaffirmed the decision in *Donselaar* and explained some of the comments made in the case. Delivering the judgment of the Court, Cooke P. stressed that general or aggravated damages cannot now be claimed where the plaintiff suffers personal injury by accident.[58] Only an action for exemplary damages is available but since the benefits under the Accident Compensation legislation do not have any punitive purpose, exemplary damages have "a somewhat wider practical scope in New Zealand" than in other countries.[59] This does not mean that the jury can award exemplary damages merely because they consider the statutory benefits to be inadequate. If damages are awarded it must be because the conduct of the defendant merits punishment and so the damages must be "fairly and reasonably commensurate with the gravity of the conduct being thus condemned."[60]

56 Supra n.24, 63 and 70.
57 (1986) Unreported, CA 182/85.
58 Ibid, 10.
59 Ibid, 12.
60 Ibid, 15.

To quash any lingering doubts on the scope of exemplary damages, the Court provided a model direction to help trial judges explain the essential points of exemplary damages to a jury. The direction emphasises the point that compensatory damages cannot be awarded, these can only be obtained from the A.C.C.. Exemplary damages may be awarded[61]

> If a jury is satisfied on the evidence that the officer acted in bad faith, deliberately using more force than he had to, or high-handedly or contemptuously, that would be an abuse of his public position.

Such conduct must be 'outrageous' and deserving of punishment.[62] The award of damages should be a sum appropriate as punishment and "fair and reasonable to match the gravity of the officer's conduct".[63] Once again the need for moderation is stressed, so that the sum awarded should not be so large as to give the impression that the plaintiff is being compensated for his/her injuries. If the award gives this impression it will be overturned as contrary to the Accident Compensation Act.[64]

Cooke P. concluded by stressing the need to ensure that the award of exemplary damages should not be abused, if exemplary damages are "to fill the legitimate role left for them by the *Donselaar* decision".[65] Although recognising that the model direction was tailored to the facts of this case and will have to be adapted to the circumstances of different cases, it can be criticised. For the purposes of the present discussion there seems to be a certain incongruity between the direction to award a fair and reasonable sum and the direction to be moderate. Cooke P. classified the claim by the first plaintiff for $500,000 exemplary damages for assault as "in all probability grossly excessive".[66] Equally the claims for $50,000 (wrongful arrest and false imprisonment) were characterised as a misconception of the function of exemplary damages. Although Cooke P. concedes that "much depends on the evidence",[67] it is difficult to see why these claims are excessive if exemplary damages have a legitimate role to play. The purpose of the award as stressed by the Court in *Donselaar* and *Blundell* is to deter high-handed, oppressive or unconstitutional action; such action may not be sufficiently deterred by the constant need for moderation.

If there has been a gross violation of the plaintiff's rights, the award of exemplary damages should be commensurate with the extent of the violation. If it is no time for the law to be withholding constitutional remedies for high-handed and illegal conduct, it is no time for the law to be restricting the nature of the remedy which will punish that high-handed and illegal conduct. If a weapon is being created, it must be capable of being a useful and efficient weapon.

61 Ibid, 16.
62 Ibid, 17.
63 Idem.
64 Idem.
65 Ibid, 18.
66 Idem.
67 Idem.

Although decided before *Blundell* and *Thompson* the case of *Craig* v. *Attorney-General*[68] throws some light on the application of the "contumelious disregard" test. The facts of *Craig* are as follows. The plaintiff refused to pay the entire bill for a meal he had received at a restaurant, alleging that since he had only received half the service he would pay only half the bill, even though he had more than enough money to meet the bill. The police were called for and when the plaintiff refused their request to leave his full name and residential address with the owner he left. Shortly thereafter, a police van arrived and stopped the plaintiff and some friends as they were walking to their cars. The plaintiff was asked to supply his full name and residential address again, as a result of the attitude of the police towards his wife, he refused and was arrested. He was placed against the side of the police van and searched. He was charged with obtaining food by means of a false pretence or other fraud, the charge was later withdrawn.

The plaintiff claimed exemplary damages for wrongful arrest and false imprisonment. The A.C.C. decided that no personal injury by accident had been suffered.[69] The plaintiff had only suffered embarassment, humiliation and degrading treatment. (Given the wider definition of mental consequences in *Blundell,* the approach of the A.C.C. may be changed in future). In his judgment, Tompkins J. found that the arrest was unlawful and unjustified since the plaintiff's actions did not provide reasonable and probable grounds for a belief that an offence had been committed.[70] The plaintiff told the arresting officer that the owner of the restaurant had his surname and home telephone number, moreover the plaintiff had more than enough money to pay the bill. The reason why the full bill was not paid was a civil matter between the plaintiff and the restaurant owner. The arresting officer, who had been inadequately briefed by one of the constables who had been called to the restaurant, did not attempt to verify this information by asking either the police constables or members of the plaintiff's party. As Scott L.J. stated[71]

> The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the police function of arrest — in a very modified way, it is true, but at least to the extent of requiring them to be observant, receptive and open-minded and to notice any relevant circumstance which points either way, either to innocence or to guilt.

Adopting this statement Tompkins J. held that the arrest was unlawful and unjustified. The arresting officer had over-reacted to the unco-operative and aggressive attitude of the plaintiff and had failed to make reasonable inquiries from other persons who could have verified the plaintiff's story. The next question facing the court was whether or not the search was justified. Tompkins J. decided that at common law the police have the right to search a person on his/her arrest but this right should only be exercised with good reason since "a search involves an infringement of a person's right

68 (1986) Unreported Auckland Registry, M 609/85.
69 Ibid, 17-18.
70 Ibid, 13.
71 *Dumbell* v. *Roberts* [1944] 1 All E.R. 326, 329.

to freedom and privacy."[72] The fact that the plaintiff had been searched merely because he was arrested rendered the search unwarranted and unlawful.

In assessing the level of general and exemplary damages Tomplins J. contrasted the duty of the police to the public and the right of each citizen to personal freedom. As Myers C.J. noted[73]

> The police are charged with the preservation of order and peace within the country and it is their duty to carry out that charge with moderation, fairness and discretion and within the law. So long as they do that they are entitled to and should receive the support of the courts and of every good citizen. If they carry out their duties unfairly and immoderately the court would not hesitate to express its condemnation of their action and would see that no person suffered by reason thereof.

Since the arrest and search had been declared unlawful, Tompkins J. awarded damages to the plaintiff ($5000)[74] despite some doubts about the nature of the plaintiff's conduct in the situation.[75] The decision in *Craig* is interesting because although the "contumelious disregard" test is not mentioned, exemplary damages were awarded. The basis for this decision being the invalid exercise of the legal authority of the police in terms of the Crimes Act and the Common Law. The rights of the individual referred to in the "contumelious disregard" test appear to be those guaranteed by statute law and common law. The defendant in Craig had interfered with the liberty of the individual as guaranteed by the Crimes Act and the right to freedom and privacy as guaranteed by the Common Law, hence the award of exemplary damages.

IV. A BETTER WEAPON

In rejecting the restrictive categorisation of exemplary damages, New Zealand has opted to continue applying the "contumelious disregard of the plaintiff's rights" as the test for the award of exemplary damages. In those cases where personal injury by accident occurs, the Accident Compensation Act does not bar the recovery of exemplary damages. However, the presence of statutory benefits complicates the assessment of exemplary damages and juries (and judges) have been warned to be moderate in case excessive awards of exemplary damages are interpreted as interfering with the jurisdiction of the A.C.C.

Throughout this article the scope of exemplary damages and the factors governing the award of such damages have been criticised. The scope of the award of these damages has been criticised because it includes both public and private actions. The inclusion of the latter results in the call for moderation and the need to take the means of the defendant into account when assessing the level of damages.[76] The net result of this

72 Supra n.69, 25-26.

73 *Burton* v. *Power* [1940] N.Z.L.R. 305.

74 Supra n.69, 36.

75 Lord Denning M.R. in *Lane* v. *Holloway* [1967] 3 All E.R. 129, 132 stated that ". . . provocation could be used to wipe out the elements of exemplary or aggravated damages . . ."

76 Per Somers J. supra n.48, 116.

over extension of the reach of the law is that the usefulness of exemplary damages is compromised, since calls for moderation will affect the jury's decision to award a large sum of damages for what they consider to be high-handed, oppressive or unconstitutional action. In cases where personal injury by accident has been suffered it was suggested that only in those cases involving public officials should an award of exemplary damages lie. Private situations can be catered for under the criminal law and the criminal justice system. Such an amendment to the scope of exemplary damages would allow them to perform a truly deterrent role and allow for a fair and reasonable award to match the gravity of the defendant's conduct.

The Court of Appeal in *Donselaar* and *Taylor* v. *Beere* dismissed the judgment of Lord Devlin in *Rookes* v. *Barnard* without an adequate discussion of the merits of each category. Indeed each judgment criticised the three-fold categorisation without attempting to interpret the categories in an expansive manner and therefore allow for growth in each of the categories. For example, the first category, criticised by Richardson J. as unduly employment related,[77] could have been interpreted by the Court in a manner similar to that suggested by Lord Hailsham, to allow for exemplary damages in those cases where there had been an abuse by the defendant of the legal authority vested in him/her by the authority of law.[78] Would this unduly restrict the scope of exemplary damages? I do not believe that it would and it would have the advantage of punishing behaviour involving the illegal use of power which may interfere with individual freedom. As Lord Reid stated[79]

> We have too often seen freedom disappear in other countries not only by coups d'etat but by gradual erosion and often it is the first step that counts. So it would be unwise to make even minor concessions.

For a country which has for so long relied on the common law for the protection of its liberties, it is suggested that the limitation of awards of exemplary damages to the actions of those exercising legal authority will stop the first step being taken.

It could be argued that the present law is sufficient to prevent this first step being taken. It is conceded that it is sufficient but whether it is effective is a different question. The award of exemplary damages is designed to deter, to punish the defendant for actions which cause damage to the plaintiff. If the award must be moderate (eg *Craig* $5000)[80] how effective will it be against the institutions of the state whose budgets are measured in millions of dollars rather than thousands of dollars? The claim for $500,000 in *Blundell and Thomson*[81] was characterised by the court as excessive, the claim for $50,000 was likewise characterised as a misinterpretation of the role of exemplary damages and the award of $60,400 in *Duffy* v. *Attorney General*[82] was overturned as excessive. If these claims and awards are commensurate with the feelings of the jury that

77 *Taylor* v. *Beere* supra n.18, 92.
78 *Broome* v. *Cassell* supra n.11, 1078.
79 *S* v. *McC* [1972] A.C. 24, 43.
80 Supra n.71.
81 Supra n.71.
82 (1982) Unreported, Wellington Registry, A 352/82 Eichelbaum J.

the defendant should be punished, why should they be overturned? Are the courts by overturning them sending the wrong message to the defendants in each of these cases? As stated earlier if this is no time to be withholding constitutional remedies for high-handed and illegal conduct, it is no time for the law to be restricting the nature of the remedy designed to punish that conduct.

The award of exemplary damages is designed to punish the defendant for his/her high-handed, oppressive conduct or where the defendant has acted with contumelious disregard for the plaintiff's rights. Since these rights are protected by either Common Law or statutes, it is always possible that Parliament may curtail them. If it does, the basis for an award of exemplary damages will diminish. As the White Paper on *A Bill of Rights for New Zealand* recognised[83] "A community which is subject to an extensive body of law can find that in some area, not anticipated, Parliament has gone too far in imposing limits on fundamental freedoms." An example of legislation which imposed unanticipated limits on fundamental freedoms is the legislation which makes possession of a knife an offence. Section 13A of the Summary Offences Act 1981 makes it an offence, punishable by up to three months imprisonment, to be in possession of a knife in a public place without lawful excuse.[84] During the debates on this offence it was stressed that there was no search power given to the police to detect this offence. This was treated as a significant constitutional safeguard.[85] As a result of public concern over the rising tide of violence, and the subsequent appointment of a Ministerial Committee of Inquiry into Violence (the Roper Committee), it was proposed that knives be classified as offensive weapons.[86] The penalty for possession has been increased to two years imprisonment and because it is now classified as an offensive weapon, the police are given the power to search for it. In the space of six months the penalty for this offence has increased from three months to two years and the constitutional safeguard has disappeared. As one submission on the Violent Offences Bill 1987 stated[87]

> . . . the limited "defences" given by s 13A and s 202A Crimes Act must be proved on the balance of probabilities by the accused — again in breach of basic criminal law principles and contrary to the principles that ostensibly underlie the present Minister's proposed Bill of Rights.

This example could be used not only as support for the need for a Bill of Rights but also as evidence of the need for a new standard/test to decide whether an award of exemplary damages is merited. The application of the "contumelious disregard" test concentrates on whether or not the defendant has acted in an oppressive, high-handed or unconstitutional manner; it does not sufficiently stress the unlawful interference with the rights of the plaintiff. Moreover, since the rights mentioned in the test are those

83 (Government Printer, Wellington, 1985), 30.

84 See Violent Offences Bill 1986 and Cameron N, France S, and Luther G "Law and Order and the Violent Offences Legislation 1986" [1987] N.Z.L.J. 126.

85 Minister of Justice, *Parliamentary Debates,* 18 September 1986, 4433.

86 Crimes Amendment Act 1987, s.2.

87 Submission of Young W (Institute of Criminology VUW) and Cameron N, France S and Luther G (Faculty of Law, VUW), 2.

guaranteed by either the Common Law or by statutes, it is possible that the rights may diminish as a result of legislation directed to a totally different end. (Note, the example given earlier of the carrying of knives). By adopting a Bill of Rights test, (did the actions of the defendant infringe the rights of the plaintiff as guaranteed by the Bill of Rights?), the focus of the inquiry is shifted. The first step will be the determination of the rights of the plaintiff and the second step will be whether the actions of the defendant infringe these rights. The test for an award of exemplary damages will be more comprehensible to the jury and since the urge to moderation will no longer be relevant, the assessment of damages will reflect the jury's disapproval of the interference with the plaintiff's rights and deter the defendant from similar action in the future.

An example of the application of this new test, the inquiry in *Craig* would determine the extent of the plaintiff's rights under Articles 15 (Liberty of the Person) and 19 (Search and Seizure). An award of exemplary damages would be given if the jury decided that the conduct of the police in this case fell below the standards laid down in the Bill of Rights. Under Article 15 everyone has the right not to be arbitrarily arrested or detained. As the comment on Article 15 recognises the crux of this right lies in the word "arbitrarily", which it conceded means more than "unlawfully".[88] The inquiry in *Craig* would determine whether the police acted within the powers they had been given by Parliament or the Common Law. The inquiry would therefore be similar to the inquiry actually conducted in *Craig* on the question of arrest. A similar inquiry would be necessary in the case of *Blundell.*

The real value of the Bill of Rights and its potential application to the award of exemplary damages is that it will enable individuals to know the full extent of their rights and consequently, public officials will be wary of infringing those rights. The adoption of this test is not predicated on the adoption of the Bill of Rights since the rights and freedoms contained in the Bill already exist in law.[89] This new test, to decide if an award of exemplary damages is merited, would not constitute a radical departure from the test reaffirmed in *Donselaar* and *Taylor* v. *Beere.* The major advantage is that as the White Paper on the Bill of Rights recognised it provides a "floor",[90] the life of the state and the conduct of those vested with legal authority "should rise above it".[91] By allowing for awards of exemplary damages, the courts will ensure that the state and all public officials and bodies do rise far above the rights guaranteed to us as members of New Zealand society.

V. CONCLUSION

The major reason behind the Court of Appeal's rejection of the restrictive categorisation of exemplary damages advocated by Lord Devlin in *Rookes* v. *Barnard* was that exemplary damages can and do perform a useful role. However, the role assigned to this useful weapon in the legal armoury has militated against its efficacy.

88 Supra n.83, 89.
89 Ibid, 21.
90 Ibid, 26.
91 Idem.

This article has argued that the test reaffirmed by the Court of Appeal in 1982 should be changed to allow exemplary damages to become a more useful and efficient weapon in the legal armoury. The means to achieve this end are: the adoption of the public-private distinction made by Lord Devlin and the interpretation of this distinction to include all those who exercise legal authority; the removal of the call for moderation in the award of exemplary damages and its replacement by the award of an amount considered to be fair and reasonable, so that the defendant will be punished and the jury can register its disapproval of his/her conduct; and finally the adoption of the Bill of Rights test to ensure that exemplary damages check infringements of individual rights. One of the arguments used in the White Paper on the Bill of Rights was the danger of erosion[92]

> No Government and no Parliament we are likely to have in New Zealand in the foreseeable future are going to attempt to sweep away basic rights. That is not the real point. What is the point is the continual danger — the constant temptation of a zealous Executive — of making small erosions of these rights. In some instances there may be a plausible argument based on expediency. But each small step makes the next small step easier and more seductive.

The award of an appropriate amount of exemplary damages for actions which infringe individual rights and freedoms will provide a useful weapon to ensure that the next step is that much more difficult and far less appealing.

92 Ibid, 27.