The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

ON

AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES

(LRC 60-2000)

IRELAND

The Law Reform Commission

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THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20th October, 1975, pursuant to section 3 of the *Law Reform Commission Act, 1975.*

The Commission's Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in January, 1977. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published fifty-nine Reports containing proposals for reform of the law; eleven Working Papers; fifteen Consultation Papers; a number of specialised Papers for limited circulation; and twenty one Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in an Annex to this Report.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

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Part-time Commissioners	Dr Hilary A Delany, B.L., Lecturer in Law, Trinity College, Dublin;
	Ms. Patricia T Rickard-Clarke, Solicitor, Partner - McCann FitzGerald Solicitors;
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NOTE

This Report was submitted on 26 May, 2000 to the Attorney General, Mr Michael McDowell, S.C., under section 4(2)(c) of the *Law Reform Commission Act, 1975*. It embodies a review, carried out at the request of the former Attorney General, Mr Dermot Gleeson, S.C., of the principles governing the present law relating to aggravated, exemplary and restitutionary damages and their effectiveness as a remedy. After extensive research and consultation with interested parties including the publication by the Commission of a Consultation Paper in April 1998, the Commission puts forward its proposals for reform of the law as requested by the Attorney General.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made to the relevant Government Departments by persons or bodies with special knowledge of the subject.

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INTRODUCTION

Background to this Report

1. This Report has been prepared in response to an Attorney General's Reference, pursuant to section 4(2)(c) of the *Law Reform Commission Act, 1975*. On 13 January 1997, the then Attorney General, Mr Dermot Gleeson, SC, asked the Law Reform Commission to examine, and make recommendations regarding "the principles governing the present law relating to aggravated, exemplary and restitutionary damages and their effectiveness as a remedy."

2. In particular, the Commission was requested to examine certain specific points of detail:[1]

> "the exclusion of exemplary damages from any claim under section 7 (1) of the *Civil Liability Act, 1961* ... and to report as to whether aggravated or restitutionary damages are also excluded from any such claim and to review the absence of any statutory provision enabling a court to award exemplary, aggravated or restitutionary damages in a claim brought for the benefit of the dependants of the deceased, where the death of such a person is caused by the wrongful act of another ... and to submit ... proposals for any reform in respect of such law ... as the Law Reform Commission considers appropriate."

Issues Arising in this Report: Damages, Compensation, and Punishment

3. One notable feature of the Attorney General's Reference is that the Commission has been asked to look both at the principles that govern the law, and at the practical question of the efficacy of these categories of damages as remedies. Therefore, the first objective of the Commission in analysing the law and in making recommendations in this Report must be to ensure that the categories of damages concerned operate on a principled basis that is legitimate, logical and consistent. What are the goals of an award of aggravated, exemplary or restitutionary damages? Are these goals legitimate and desirable? These questions will be at the core of the Commission's consideration of this topic.

4. Secondly, the Commission has been asked to look at the efficacy of awards of aggravated, exemplary, and restitutionary damages. To what extent does the present law of aggravated, exemplary and restitutionary damages allow these remedies to achieve their goals? Are such awards sufficiently moderate,

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[1] For discussion of these points see Chapter 2 at paras. 2.103-2.109, Chapter 5 at paras. 5.33-5.36 and Chapter 6 at paras. 6.51-6.54.

proportionate and appropriate? Questions of the assessment of quantum are relevant here.

5. The Attorney General's Reference highlights the categories of damages that are outside the traditional compensatory pattern of the civil law. In doing so, it asks broad questions. First, it raises issues concerning the purposes and functions of damages law as a whole. Secondly, it calls into question the nature of the boundary between the civil and criminal laws, and the role of punishment and compensation on either side of the divide.

6. Although the traditional concept of civil law damages is that they are purely compensatory, this is not always reflected in the practice of the courts. In fact, as will be discussed in this report, there is a long, though until recently relatively unremarked, common law tradition of courts awarding "substantial", "punitive" and "exemplary" damages. A more recent tendency is to award damages based on restitutionary principles in some cases. There is a sometimes-blurred distinction between damages intended to compensate for non-pecuniary loss and those intended to punish, as evidenced in some judicial remarks about aggravated damages. Finally, some large and apparently disproportionate compensatory awards raise questions as to whether damages that are ostensibly designed to compensate, do not in fact contain some punitive elements, on occasion.

The Consultation Process

7. As an initial step in examining this topic, the Commission published its *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages* in April 1998.[2] The paper made a series of detailed provisional recommendations regarding the availability and the regulation of the three categories of damages. On a number of issues, there were differing views within the Commission as to the necessary reforms to the law, and alternative provisional recommendations for reform were put forward as a basis for consultation. Alternative recommendations were proposed, for example, on the question of whether, and for what causes of action, exemplary damages should be available in Irish law.

8. Following the publication of the Consultation Paper, the Commission requested written submissions from interested parties, and held a seminar to discuss the issues raised by the Attorney General's Reference on 28 January 1999. The seminar was attended by judges, academics and legal practitioners, as well as other interested parties. In making the final recommendations, the Commission has benefited from the views of those who assisted in consultation, and we would like to express our thanks to all those who attended the seminar, and in particular to those who put forward written submissions.[3]

9. The Commission's final recommendations on aggravated, exemplary and restitutionary damages are contained in this Report.

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2 SEE ANNUAL REVIEW OF IRISH LAW 1998 at p.659.

3 See Appendix 2.

Structure of the Report

10. We commence with exemplary damages as they take up a preponderant amount of the discussion in this Report. **Chapter 1** of the Report considers whether and in what circumstances exemplary damages should be awarded. It evaluates the arguments of principle for and against the availability of exemplary damages, and the place of punitive and deterrent purposes within the civil law. Recommendations are made regarding the range of causes of action for which exemplary damages should be available, and regarding the threshold of misconduct which should ground an award of exemplary damages.

11. Further issues regarding the operation of exemplary damages are considered in **Chapter 2,** including the regulation of quantum and the assessment of exemplary damages by juries. Chapter 2 also addresses, under the heading "Split Recovery", the question of whether a portion of exemplary damages awards should be recovered by the State, and assesses the options for regulating cases where there are large numbers of plaintiffs claiming exemplary damages awards. Various amendments to the *Civil Liability Act, 1961* are also discussed. **Chapter 3** considers the propriety of insurance against exemplary damages, vicarious liability for exemplary damages awards and the standard of proof required in exemplary damages awards.

12. **Chapter 4** of the Report looks at damages for equitable wrongs, breach of statute and European Union law. **Chapter 5** turns to the category of aggravated damages, and examines their place as a distinct category within the law of damages as a whole. The compensatory and punitive elements within an award of aggravated damages are dissected, and a new definition of aggravated damages is proposed. Various amendments to the *Civil Liability Act, 1961* are also discussed.

13. The emerging category of restitutionary damages is considered in **Chapter 6**. The Irish and English case law concerning damages based on the profit to the defendant are considered, and the place of restitutionary damages within damages law as a whole is assessed. Various amendments to the *Civil Liability Act, 1961* are also discussed.

14. A brief summary of all the Irish cases concerning aggravated, exemplary and restitutionary damages from the last three decades is set out in **Appendix 1**. As will be seen, aggravated and exemplary damages have been awarded in only a very small number of cases. It is also notable that, in many of the cases summarised, the quantum of damages awarded is not supported by any detailed reasoning.

Recommendations

15. This Report makes a number of recommendations for clarification and reform of the law. Although some legislative provisions are proposed, the general approach of the recommendations is that legislation should not interfere unduly to restrict the development of this area of the common law. It would, of course, be possible for us to recommend legislation to more clearly establish certain elements of the law of aggravated, exemplary and restitutionary damages. However, we believe that this task would be more appropriately achieved through the development of jurisprudence in the courts. No doubt there will be those who will be disappointed

that we have not recommended legislation for some of these matters. We believe, however, that to do so would be to fail to take sufficient account of a number of facts: that the law is in a state of development through jurisprudence; that, having regard to case law in other common law jurisdictions, the course of its development on these matters, when they come before our courts, seems likely to lead to results which we consider to be correct; and that to attempt to intervene by statute at this stage would be to risk imposing undue rigidity on the natural development of the law. We believe that in the circumstances this approach fully accords with the mandate contained in the Reference of the Attorney General under section 4(c) of the 1975 Act. A **Summary of Recommendations** is included after Chapter 6.

16. Our core recommendation in this Report is that exemplary damages should continue to be available for appropriate cases of tort and breach of constitutional rights, subject to the development of the law in the courts. We also recommend the retention of aggravated damages, defined as compensatory, and the availability of restitutionary damages in appropriate cases. But we emphasise the qualifications contained in each of these recommendations, for our aim is to ensure that where large amounts of damages are awarded, they are awarded only against the most appropriate defendants, namely those who have engaged in the most reprehensible conduct that is damaging to individual rights and to society. We do not intend to endorse or encourage a "compensation culture", in which large unreasoned awards of damages are made in a substantial number of tort cases. In addition, elements of punishment or deterrence should not colour awards of compensatory damages, but should be confined to awards of exemplary damages, where there will be stringent regulation of both the availability of the damages and of their quantum.

CHAPTER 1: SHOULD EXEMPLARY DAMAGES BE AVAILABLE AND IF SO, WHEN?

A. The Purpose of Exemplary Damages

1.01 The aim of exemplary damages is two-fold: to punish the defendant and to deter both the defendant and others from engaging in conduct that is extremely malicious or socially harmful, in Lord Devlin's own words "to teach a wrongdoer that tort does not pay". [1] An exemplary damages award may also be intended to vindicate the rights of the plaintiff, or, as Lord Devlin stated in *Rookes v Barnard*,[2] to vindicate the strength of the law. It has the additional, incidental effect of providing compensation and satisfaction to the plaintiff. In the context of the Constitution, the particular purpose of exemplary damages is to vindicate and defend individual constitutional rights, to punish the defendant's disregard of them and to deter their breach.

1.02 Dicta of the Irish courts refer to punishment and deterrence as equal and inter linked purposes of an exemplary damages award. In *Conway v INTO*,[3] the Supreme Court found that the aim of exemplary damages was:

> "to punish the wrongdoer for his outrageous conduct, to deter him and others from any such conduct in the future, and to mark the court's ... detestation and disapproval of that conduct."[4]

1.03 In *Cooper v O'Connell*[5], Keane J noted that in developing the law of exemplary damages, the courts had been concerned with principles of public policy and with the need, in accordance with these principles, to make an example of the defendant.[6]

1.04 A clear definition of the purpose of exemplary damages may restrain their quantum. If it is clear that the purpose of exemplary damages should be confined to punishing a defendant effectively and deterring the defendant and others from engaging in similar conduct in the future, then the quantum of damages must not exceed the amount necessary to do this in all the circumstances of the case.

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1 *Rookes v Barnard* [1964] 1 All ER 367 at p.411.

2 *Ibid.*

3 [1991] 2 IR 305.

4 *Ibid.* at p.509, *per* Griffin J. See also the *US Restatement (Second) on the Law of Torts*, which sees punitive damages as aiming "to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future."

5 Unreported, Supreme Court, 5 June 1997. See Appendix 1.

6 *Ibid.* at p.21.

1.05 The purposes of deterrence and punishment are not always convergent: in some cases a purely punitive purpose could result in larger awards than would be the case if the purpose behind the award was purely deterrent. An award that has a deterrent purpose will address the possible future conduct of the defendant and of others. It will be measured not purely against the defendant's conduct, but according to the sum necessary to prevent or discourage the defendant and other similar parties from engaging in such conduct again. However, as we recommend below,[7] each award should be made with reference to the wealth of the defendant in the particular case. The quantum of the award will therefore be the amount necessary to deter that particular defendant.

1.06 It is also important to consider the role of exemplary damages in deterring highly reprehensible conduct, including violations of constitutional rights. In a case where there has been a serious breach of constitutional rights, which the court considers warrants exemplary damages, there is a public interest in calculating an award that will effectively deter such a breach in the future.

B. Exemplary Damages in Tort: Punishment and the Civil Law: the Civil / Criminal Divide

1.07 The debate on exemplary damages raises a question of principle: can a remedy, the aim of which is punitive and deterrent, have a legitimate presence in the civil law, or should such aims be confined to the criminal law alone? The non-compensatory categories of damages, and most notably exemplary damages, disturb the traditional theoretical concept of a clear civil/criminal divide, in which the civil law delivers solely compensation, and the criminal law solely punishment. On this theory, the civil law is seen as being limited to regulating relations between individuals, and exemplary damages are considered to be an anomaly.

1.08 The branding of exemplary damages as anomalous avoids the question of whether punishment and deterrence are exclusively the business of the criminal law. Historically, the idea of a strict divide between the civil and criminal laws is a relatively recent one[8] and there is a long tradition of including some punitive remedies within the civil law.[9] In the present law, it remains difficult to separate out the purposes of the civil and criminal law so as to exclude entirely all punitive elements from civil law remedies. There is arguably some public purpose to the law of tort, which renders it appropriate that it should aim to deter extremely harmful and outrageous conduct and to vindicate personal rights by means of exemplary damages. It has been argued that even within ostensibly compensatory awards, non-compensatory elements exist and should not be abolished.

1.09 It should also be noted, as an analogy, that just as punishment is not exclusive to the criminal law, so compensation is not exclusive to the civil law. Increasingly, the criminal law, in seeking to include victims of crimes within the

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7 See paras. 2.07-2.010.

8 Law Reform Commission, *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages*, April 1998 at paras. 3.04-3.05.

9 *Ibid.* at paras. 3.01-3.10.

criminal process, has incorporated compensatory elements. Although the primary aim of the criminal law remains punishment and deterrence, the criminal law does increasingly contain measures designed to compensate victims of crime.[10]

1.10 In the interests of a more rational organisation of the law, it is also desirable that punitive and deterrent elements should be recognised and labelled as such, rather than hidden within large "compensatory" or "substantial" damages awards. If civil law punishment is to be regulated, limited where necessary and used to its greatest effect where this is desirable, then it should be acknowledged in the law. Labelling such elements as "anomalous" is an inadequate response.

1.11 The political and social utility of exemplary damages should also be considered. Exemplary damages are a means of deterring abhorrent behaviour and breach of constitutional rights not only on the part of the State,[11] but also on the part of increasingly powerful non-state actors, against whom there might otherwise be no effective deterrent. In the United States, for example, punitive awards have most commonly been made against large corporations which have abused their very considerable power.[12] Trade unions, also capable of wielding considerable power, have likewise been the subject of exemplary damages awards.[13] As increasingly significant power comes to reside in non-state entities, it is important that the law should have available to it the means to ensure that these private wielders of power respect the rights of relatively vulnerable individuals. Indeed, it is relevant to mention a historical point. As far as the abuse of power by public authorities is concerned, exemplary damages as a form of control developed because there was, for some centuries, a lack of specific machinery to deal with either problem. By now, with the development of a mature system of administrative law with a range of controls over public authorities, (judicial review of administrative action, tribunals, the Ombudsman etc.), the need for exemplary damages – an auxiliary from the private law field which had once done Trojan service - is no longer great. Nevertheless, as used sparingly by the courts to counter malign and oppressive misconduct, exemplary damages remain an effective tool.

C. Arguments against Exemplary Damages

1.12 Aside from the question of principle relating to the civil/criminal divide, there are a number of arguments which may be made for and against the award of exemplary damages. The objections to exemplary damages set out below are principally procedural ones, and are concerned with preserving the rights of the defendant and preventing the plaintiff from gaining an undeserved windfall at the defendant's expense. The arguments in favour of exemplary damages emphasise the utility of such damages and point to their important role in supplementing the criminal law and in ensuring that the rights of the individual are respected.

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10 *Ibid.* at para. 3.04.

11 See *Hanahoe v. Hussey* [1998] 3 IR 69. See also Appendix 1.

12 See para. 2.012.

13 *Conway v INTO* , *op. cit.* fn. 3, discussed at paras. 1.34-1.36; *Rookes v Barnard*, *op. cit.* fn. 1, discussed at para. 1.41 (jury award of exemplary damages against a trade union overturned by the House of Lords). See P. KEIR, CONSTITUTIONAL HISTORY.

(i) The defendant may be exposed to double punishment where an exemplary damages award is made in addition to the imposition of a criminal sanction

1.13 There will be cases where a wrongdoer will be subjected to trial, and possibly penalties, in both the civil and the criminal systems. This state of affairs would appear to conflict with the principles of '*autrefois convict*' and '*autrefois acquit*', which stipulate that someone who has already been acquitted or convicted should not be subjected to a second prosecution for the same offence.

1.14 In response, it can be argued that the risk of double punishment can be averted by effective co-ordination between the civil and the criminal justice systems. Provisions which would exclude exemplary damages where there had been a prior conviction or criminal penalty, or which would require any prior criminal penalty to be taken into account in the assessment of exemplary damages, would effectively address this issue. Such measures have been put in place in some other jurisdictions, and the possibility of similar legislation in this jurisdiction is discussed further below.[14]

(ii) An award of exemplary damages will result in a 'windfall' to the plaintiff

1.15 A key difficulty with exemplary damages is that they result in plaintiffs receiving a large sum of money to which they have no real entitlement. For, whereas compensatory and aggravated damages are related to the injury or loss suffered by the plaintiff, exemplary damages are made with reference to the behaviour of the defendant alone, and a large award of exemplary damages may accrue to a plaintiff even where he or she has suffered relatively little injury.

However, some commentators question whether the 'windfall' to the plaintiff is unjustified. They point out that, although exemplary damages do not compensate for loss, they have to go to someone. The plaintiff "can only profit from the windfall if the wind is blowing his way". [15] Since it is the plaintiff who has gone to the trouble and expense, and has taken the risk of bringing the case against the defendant and of making a claim for exemplary damages, thereby upholding an important public interest or, possibly, vindicating constitutional rights,[16] the plaintiff is the most appropriate person to recover them. Seen in this light, exemplary damages are not a 'windfall' but rather a 'bounty'.

1.16 Alternatively, if the argument from the notion of a 'windfall' is accepted, the situation may be addressed by legislation stipulating that a portion of the exemplary award should not go to the plaintiff, but should be recovered by the State. Legislation to this effect has been put in place in a number of US states, a point considered below. [17]

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[14] See paras. 3.01-3.16.

[15] *Broome v. Cassell* [1972] 1 All ER 801 at p.868, *per* Diplock LJ.

[16] Gregory S Pipe, *Exemplary Damages after Camelford,* (1994) 57 MLR 91.

[17] See paras. 2.47-2.50.

(iii) The defendant should have the protection of the procedural safeguards and higher standard of proof, which are available in the criminal law

1.17 Exemplary damages are awarded by a court without any of the safeguards which are afforded to a defendant in the criminal process.[18] The plaintiff seeking exemplary damages in a civil case does not have to satisfy the higher criminal standard of proof; the normal civil standard of the balance of probabilities applies. Despite this, an award of exemplary damages may impose a harsh burden on the defendant. The civil law, it is argued, is procedurally unsuited to the imposition of such harsh punitive measures, and is inadequate to protect the rights of the defendant.

1.18 Against this, it can be argued that the safeguards present in the criminal law are necessitated by the severity of the punishment it may impose, a severity that may not be matched by exemplary awards in civil cases. Criminal charges may result in the loss of liberty, but the consequences of an award of exemplary damages are purely financial. Furthermore, it is arguable that the stigma associated with an award of exemplary damages is not so great as that attached to a criminal conviction and that, therefore, the same stringent procedural safeguards are not warranted.

1.19 Alternatively, the problem can be addressed through legislation, to provide, for example, for a higher standard of proof to apply in relation to exemplary damages than normally applies in civil cases.[19]

(iv) Constitutional objections

1.20 The Irish Constitution's guarantees of due process and fair procedures may place constraints on the operation of exemplary damages. The constitutional guarantee of trial in due course of law, in Article 38, applies solely to criminal trials. It can apply to exemplary damages only if they are characterised as criminal, and this, as discussed below,[20] would be contrary to the case law on the necessary ingredients of a criminal case.

1.21 In regard to this issue of principle as to whether exemplary damages should be characterised as criminal, it is interesting to note the dicta of the Supreme Court in *O'Keeffe v Ferris*,[21] a case relating to the constitutionality of section 297 of the *Companies Act, 1963*, which imposed certain punitive sanctions. The case suggests that some punitive elements are acceptable within the civil law. The section allowed for shareholders to lose the protection of limited liability in circumstances where a company was being wound up and they were shown to have acted fraudulently. It also provided for a wrongdoer to repay a sum, which could amount to more than the sum he had earned from his wrongdoing. Counsel for the plaintiff argued that the section contained a disguised criminal sanction, and was thus contrary to the stipulation in Article 38 (1) of the Constitution that no person should be tried on a criminal charge save in due course of law. This construction of section 297 was rejected by the Court, which held that the section did not create a criminal offence,

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18 See for example the *dicta* of Lord Reid in *Broome v. Cassell, op. cit.* fn. 15 at p.837.

19 See paras. 3.38-3.47.

20 See paras. 1.21-1.24.

21 [1997] 2 ILRM 161.

even though the sanction it imposed did have a punitive element. It was therefore constitutional.

1.22 The Court pointed out that several of the indicia of a criminal offence were not present in the section: there was no prosecutor; there was no offence expressly created; the mode of trial was not that of a criminal offence, and there was no criminal sanction imposed. The Court was prepared to tolerate some punitive element to the section without this raising any questions as to its civil law status. Significantly for the present purposes, the Court's reasoning was expressly based on an analogy with exemplary damages and with the leading Irish cases on exemplary damages: *Conway v INTO*,[22] *McIntyre v Lewis*,[23] and *Dillon v Dunnes Stores*.[24]

1.23 The Supreme Court held that the section was:

> "clearly within the policy entitlement of the Oireachtas to enact; it is designed to protect creditors and others who may fall victim of people engaged in fraud. It is true that fraud is an ingredient in many criminal offences, but it is also an ingredient in various civil wrongs ... While much stress has been laid by counsel for the plaintiff on the need to protect the citizen from injustice in the course of proceedings, the entitlement of victims of wrongdoing to be safeguarded is something to which the court must also have regard and the court, therefore, upholds the paramount objective of this legislative provision, which is to protect those who may have been wronged."

1.24 This case suggests that the Supreme Court is willing to take a flexible approach to the presence of some punitive elements within the civil law, at least where these are important for the protection of individual rights. It is true that further rights of fair procedures derive from Article 40.3 of the Constitution. The right to fair procedures has been described as an "evolving concept" of Irish constitutional law.[25] However, exemplary damages are awarded only following a conventional civil trial regulated by rules and procedure which certainly constitute a detailed version of constitutional justice and, as is argued in the Consultation Paper,[26] it would seem unlikely that additional procedural safeguards would be required in exemplary damages cases.

(v) Ireland's international obligations: the European Convention on Human Rights

1.25 Fair process standards are also contained in Article 6 of the European Convention on Human Rights, but the majority of these guarantees apply to criminal trials only and it is likely that they would not affect exemplary damages cases.[27]

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22 *Op. cit.* fn. 3. See Appendix 1.

23 [1991] 1 IR 121.

24 Unreported, Supreme Court, 20 December 1968.

25 *State (Healy) v O'Donoghue* [1976] IR 325.

26 Consultation Paper at para. 7.14.

27 Consultation Paper at paras. 7.15 - 7.22.

1.26 However, exemplary damages awards which interfere with rights guaranteed by the Convention, such as freedom of expression, may run the risk of being struck down. Although there is no authority to this effect, in *Tolstoy Miloslavsky v United Kingdom*,[27A] the European Court of Human Rights found an exceptionally large award of compensatory damages in a defamation case to be contrary to the right of freedom of expression enshrined in Article 10. This right is limited in two respects: first, it must be "prescribed by law" and secondly, it must " be necessary in a democratic society". The Court accepted that "national laws concerning the calculation of damages for injury to reputation must make allowance for an open-ended variety of factual situations."[28] It was held that the stipulation that a limitation on freedom of expression should be "prescribed by law" did not require that a defendant would be able to "anticipate with any degree of certainty the quantum of damages that could be awarded in his particular case."[29] The Court also noted that the discretion of the jury in assessing damages was not an unfettered one; they were obliged to abide by certain principles and to take certain factors into account. The Court accordingly concluded that the award was prescribed by law.

1.27 On the issue of whether the award was "necessary in a democratic society", the Court noted that "perceptions as to what would be an appropriate response by society to speech which does not or is not claimed to enjoy the protection of Article 10 of the Convention may differ greatly from one Contracting State to another." There should therefore be a wide margin of appreciation on this point. However, the Court held that, although it was acceptable for a jury to make a very substantial award of damages in appropriate circumstances, under the Convention, the award must bear a reasonable relationship of proportionality to the injury to reputation suffered by the defendant in the case. The Court considered that the scope of judicial control over the award of damages did not offer adequate or effective safeguards against a disproportionately large award. Accordingly, it was held that there had been a violation of Article 10.

1.28 In making this determination, the Court noted that the express purpose of the award had been to compensate and not to punish. It also noted that the award was not comparable to any compensatory awards that had been made before or since – it was much larger. The Court considered that the award was especially open to question since there was no requirement in the national law that the award be proportionate to the injury.

1.29 This case is a limited authority since it refers only to cases where the right to freedom of expression contained in Article 10 is impinged upon. It does not affect awards of damages, either compensatory or exemplary, that do not interfere with the exercise of this right. Awards similar to those made in the *McIntyre* or the *Conway* cases, for example, would not be affected. Nevertheless, the case may have implications for the compatibility of certain exemplary awards with the Convention, and possibly also, by analogy, with the protection of freedom of expression under the Constitution. It is possible, though not certain, that, where there was a large punitive

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[27A] 20 EHRR 442.

[28] *Ibid.* at p.469.

[29] *Ibid.*

damages award made in respect of a tort such as defamation, the award could be considered, on an analogy with *Tolstoy*, not to be "proportionate" to the legitimate aim of protecting reputation. However, the aim of an award of exemplary damages is clearly different to that of a compensatory award, and the need for exemplary damages awards in order to defend rights might be an additional factor which would render an exemplary award acceptable, even where it interfered with Article 10.

D. Arguments Supporting the Retention of Exemplary Damages in Irish Law

(i) The criminal law is not always adequate to deter outrageous or socially harmful conduct

1.30 One argument for tolerating a punitive and exemplary element within the civil law is that the criminal law does not always have the capacity to effectively punish and deter all harmful or outrageous conduct.[30] Exemplary damages complement the criminal law. In areas where extremely harmful conduct has not been made criminal, or where a wrong is criminal but a decision is taken not to prosecute, exemplary damages may prevent a wrongdoer escaping with complete impunity.

(ii) Exemplary damages provide a means by which the individual can vindicate his or her rights, including constitutional rights

1.31 Related to the argument made above in (i) is the significance of exemplary damages in vindicating the personal rights contained in the Constitution, and deterring breaches of those rights either by the State or by other powerful non-state actors. The importance of exemplary awards in this respect has been stressed by the Supreme Court in the *Conway v INTO*[31] case. In England, in a very different constitutional context, the English Law Commission has also emphasised the role of exemplary damages in protecting civil liberties.[32]

1.32 In the Irish courts, exemplary damages have been clearly defined as punitive and deterrent in nature and distinct from aggravated damages. The current Irish law allows for the recovery of exemplary damages across a wide range of torts and actions for breach of constitutional rights. It is the action for breach of constitutional rights which gives a distinct aspect to the Irish law of exemplary damages.[33] The need to vindicate individual rights guaranteed by the Constitution has given an added dimension to the role of exemplary damages, since their punitive and deterrent powers have been identified by the courts as crucial to the defence of constitutional rights.[34]

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30 Consultation Paper at para. 2.22.

31 *Op. cit.* fn. 6.

32 English Law Commission, *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages*, No. 132, August 1993 at para. 6.8; *Report on Aggravated, Exemplary and Restitutionary Damages*, No. 247, December 1997 at para. 5.27.

33 On the action for breach of constitutional rights see generally KELLY, THE IRISH CONSTITUTION. (3rd edition) at pp.702-705; W. Binchy, *Constitutional Remedies and the Law of Torts*, in JAMES O'REILLY, ED., HUMAN RIGHTS AND CONSTITUTIONAL LAW (1992); MCMAHON AND BINCHY, THE IRISH LAW OF TORTS (2nd ed. 1990) at pp.9-16.

34 *Conway v INTO, op. cit.* fn. 3 at pp.325-326.

This role in regard to the Constitution distinguishes the Irish law of punitive damages from that of England and would seem to ensure and indeed necessitate their retention, at least to some extent, in Irish law, as a means of protecting individual rights under the Constitution.

1.33 To date, exemplary damages have not been awarded in a large number of cases, and the topic has been discussed by the Supreme Court on only a few occasions. The rarity of exemplary damages awards, and their relatively modest quantum, is demonstrated by the cases set out in Appendix 1 of this Report.

1.34 The two leading cases are *McIntyre v Lewis*[35] and *Conway v Irish National Teachers' Organisation (INTO)*.[36] In *McIntyre v Lewis*, the Supreme Court did not conclusively either accept or reject the limitations set out in *Rookes v Barnard*.[37] Exemplary damages were awarded for malicious prosecution by police officers, a wrong which would have come within the test set out by Lord Devlin in *Rookes v Barnard*. Hederman J's justification of the award was based on the need to prevent abuses of power by the State:

> "In cases like this, where there is an abuse of power by the State, the jury is entitled to award exemplary damages. One of the ways in which the rights of the citizen are vindicated, when subjected to oppressive conduct by the employees of the State, is by an award of exemplary damages."[38]

McCarthy J appeared to envisage a broader scope of recovery for exemplary damages, however, and rejected Lord Devlin's dicta on the basis that the restrictions he imposed were contrary to the dynamism of the common law.[39]

1.35 In *Conway*, exemplary damages were awarded for breach of constitutional rights, which was the issue which arose on the facts of the case. The Supreme Court did endorse a broad scope for exemplary damages. In his judgment, Finlay CJ distinguished the various categories of damages, identifying aggravated damages as distinct from exemplary or punitive damages, and confirming that 'punitive damages' was purely a synonym for exemplary damages. Exemplary damages, he held, "mark the court's particular disapproval of the defendant's conduct ... and its decision that it should publicly be seen to have punished the defendant for such conduct."[40]

1.36 The most significant aspect of the case is the very strong statements by Finlay CJ and McCarthy J which place a high value on exemplary damages as a necessary means of vindicating constitutional rights. Finlay CJ stated:

> "it seems to me that the court could not be availing of powers as ample as the defence of the Constitution and of constitutional rights requires unless, in the

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35 *Op. cit.* fn. 23.

36 *Op. cit.* fn. 3.

37 *Op. cit.* fn. 1. See Consultation Paper at para. 7.30.

38 *Op. cit.* fn. 23 at p.134.

39 *Ibid.* at p.121.

40 *Op. cit.* fn. 3 at p.317.

> case of breach of those rights, it held itself entitled to avail of one of the most effective deterrent powers which a civil court has, the awarding of exemplary or punitive damages."[41]

McCarthy J stated:

> "Every member of the judiciary has made a public declaration to uphold the Constitution; it would be a singular failure to do so if the courts did not, in appropriate cases such as this, award such damages as to make an example of those who set at nought the constitutional rights of others."[42]

Although in the non-constitutional field, it is unclear whether the Court as a whole rejected the *Rookes v Barnard* categorisation, Griffin J considered that there was "no valid reason, in logic or common sense"[43] for Lord Devlin's limitations. McCarthy J also rejected the categorisation.[44] It is unclear whether the Supreme Court in *Conway* envisaged a complete rejection of the *Rookes v Barnard* limitations, or whether it envisaged their modification solely to allow for recovery in cases of breach of constitutional rights.

1.37 The Supreme Court once more considered exemplary damages in *Dawson v Irish Brokers Association*.[45] The case was one of defamation, and it was accepted by the court that both exemplary and aggravated damages were available to the plaintiff. O'Flaherty J, delivering judgment, reviewed the definitions of aggravated and exemplary damages and reiterated the law as set out in *McIntyre*, noting that:

> "while aggravated damages are distinct, they are still meant to compensate the plaintiff and so they should be regarded as a sub-head of compensatory damages awarded to the plaintiff. On the other hand, exemplary (or punitive) damages are a separate category. They are not compensatory at all." [46]

1.38 In *Todd v Cincelli*,[47] Kelly J refused to award exemplary damages on the facts, but did not raise any principled objection to the award of exemplary damages in what was a purely tortious cause of action. Citing *Conway*, he held that the facts before him did not justify an award of exemplary damages as described in that case. He held that, even if the circumstances had merited an exemplary award, the principle that exemplary damages should not be awarded where compensatory damages constituted sufficient punishment and expression of disapproval would, in this case, exclude exemplary damages. The awards of compensatory and aggravated damages together constituted a sufficient expression of public disapproval of the defendant's actions.

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41 *Ibid.* at p.320.

42 *Ibid.* at p.326.

43 *Ibid.* at p.324.

44 *Ibid.* at p.326.

45 Unreported, Supreme Court, 27 February 1997. See Appendix 1.

46 *Ibid.* at p.8.

47 Unreported, High Court, 5 March 1998 at p.20. See Appendix 1.

E. Comparative Perspectives

1.39 Our research found a wide divergence in the approach of different jurisdictions to the presence of punitive and deterrent elements in damages. This ranged from the complete rejection of all punitive elements to damages, which is the norm in civil law countries,[48] to the very well established (and often controversial) tradition of punitive damages in the United States.[49] Between these two poles, many common law jurisdictions, including Ireland, traditionally accept the availability of some measure of punitive or exemplary damages, but only in exceptional cases of extreme wrongdoing. This tradition of non-compensatory damages was cast into doubt by the 1964 judgment of the House of Lords in *Rookes v Barnard*,[50] but has since re-asserted itself in many common-law states.[51]

Exemplary damages in the common law

1.40 Exemplary damages have a long history in the English and in the Irish common law. Their recovery is recorded in a series of English cases of the seventeenth century, in which exemplary awards were used to deter heavy-handed action by the Government. For instance, two such exemplary damages awards arose out of the Government's suppression of John Wilkes' *The North Briton*.[52] The first arose in *Wilkes v Wood*,[53] where "large damages" for trespass were awarded for the search of the plaintiff's home on foot of a general warrant. Pratt LJ stressed the punitive and deterrent functions of the damages award. The second is *Huckle v Money*,[54] where a journeyman printer was awarded large damages of £300 after he was taken into custody during the raid on the newspaper. Although the court accepted that the plaintiff had been "treated very civilly... with beef-steaks and beer" during his time in custody, the damages were nevertheless awarded on the basis that the defendant's conduct had constituted "a most daring public attack upon the liberty of the subject".

1.41 In the English courts, the common law of exemplary damages was clarified but also significantly restricted by the 1964 House of Lords decision in *Rookes v Barnard*.[55] In that case, Lord Devlin distinguished exemplary and aggravated damages. He stated that whilst aggravated damages were a species of compensatory damages awarded for increased mental distress caused by the manner in which the defendant had committed the wrong, exemplary damages were punitive in nature.[56] Lord Devlin made it clear that he regarded exemplary damages as an anomaly within the civil law, which he viewed as having a solely compensatory purpose.

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48 See Consultation Paper, Chapter 6.

49 See Consultation Paper, Chapter 5.

50 *Op. cit.* fn. 1; discussed *infra* at para. 1.41 and in the Consultation Paper at paras. 3.12-3.16.

51 Consultation Paper, Chapter 4 at paras. 4.03, 4.06, 4.15, 4.20.

52 See Consultation Paper at paras. 3.06-3.07.

53 (1763) Lofft 1.

54 (1763) 2 Wills 205.

55 *Op. cit.* fn. 1. See generally Consultation Paper at paras. 3.12-3.16.

56 See *infra* Chapter 5 at paras. 5.10-5.16.

Nevertheless, Lord Devlin stopped short of eradicating exemplary damages from the English law completely, for two reasons. First, he found that through their long history, exemplary damages had become so well entrenched in the English law that the House of Lords did not have the power to abolish them.[57] Secondly, exemplary damages had an important role in "vindicating the strength of the law".[58] Bearing this in mind, the course taken by Lord Devlin was to restrict the award of exemplary damages to three types of cases: where there had been "oppressive, arbitrary or unconstitutional action by the servant of the government"; where the defendant had calculated that he could make a profit from his wrong in excess of any compensation that might be payable; and where exemplary damages were authorised by statute.[59]

1.42 The first category listed above is essentially that of *Wilkes v Wood* and the other *North Briton* cases which have been central to the development of exemplary damages in English law. The second category uses exemplary damages for what is akin to a restitutionary purpose:[60] to strip the defendant of ill-gotten profits. Exemplary damages awarded under these circumstances could, however, be potentially much larger than restitutionary damages available in the same case. In *Broome v Cassell*,[61] the House of Lords adopted a broad interpretation of this second category, ruling that the defendant did not have to have made a precise financial calculation in order for exemplary damages to be awarded. The hope of profit was sufficient. The breadth of this category was also made clear in the case of *Drane v Evangelou*,[62] where the defendant landlord had sought to profit from a trespass against his tenant by removing the tenant from the apartment and thereby gaining a home for some relatives. The profit gained was not directly financial, but was nonetheless judged sufficient for exemplary damages to be awarded. The third category - exemplary damages authorised by statute - does not have a very wide scope in what is largely a common-law remedy. Thus, the scope for recovery of exemplary damages as envisaged by *Rookes v Barnard* is a limited one.

1.43 The availability of exemplary damages in English law has been further limited by subsequent cases. Although the House of Lords in *Broome v Cassell* adopted a broad interpretation of the categories set out by Lord Devlin, the Court of Appeal, in the later case of *AB v South West Water Services*,[63] confined the range of torts in respect of which exemplary damages could be recovered. The Court held that exemplary damages were excluded for all those torts for which they had not already been awarded prior to the decision of the House of Lords in 1964. This was based on the assumption that the intention of the House of Lords in *Rookes v Barnard* had been to restrict the award of exemplary damages, and therefore the categories it established

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57 *Rookes v. Barnard, op. cit.* fn. 1, see fn. 50 at p.410.

58 *Ibid.*

59 See *ibid.* at pp.410-411.

60 See MCGREGOR ON DAMAGES, (15th ed.), S.422; and Lord Diplock in *Broome v Cassell, op. cit.* fn. 15.

61 *Op. cit.* fn. 15. The House of Lords overturned the decision of Lord Denning in the Court of Appeal, where he departed from the limitations imposed by *Rookes v Barnard*, describing them as "hopelessly illogical and inconsistent." See Consultation Paper at paras. 3.17-3.20.

62 [1978] 1 WLR 455.

63 [1993] 1 All ER 609. See Consultation Paper at paras. 3.21-3.22.

should not be used to increase the number of cases where such damages were available. The decision in the *South West Water* case has been widely criticised, however, as placing an arbitrary limitation on exemplary damages. The English Law Commission has taken the view that the present unprincipled state of the English law of exemplary damages is unsatisfactory, and has recommended that exemplary damages should be recoverable on a principled basis for all torts.[64]

1.44 The majority of common law jurisdictions allow for a broader recovery of exemplary damages than is the case in England. The limitations set out in *Rookes v Barnard* have been expressly rejected by the courts of Canada, Australia and New Zealand. In Canada, the courts have accepted the award of exemplary damages in respect of a range of torts, including, in exceptional cases, negligence.[65] Exemplary damages have also been awarded in relation to breach of fiduciary duty and for failure to obey an injunction.[66] Although exemplary damages are generally not available for breach of contract, the Canadian Supreme Court, in *Vorvis v Insurance Corporation of British Columbia*,[66A] suggested that exemplary damages could be awarded for breach of contract in "very unusual cases."[67] McIntyre J observed:

> "In my view, while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award".[68]

1.45 The Canadian courts have stressed that exemplary awards should be confined to cases where there is extreme misconduct on the part of the defendant, meriting particular condemnation or punishment.[69]

1.46 The Australian courts have taken a similar approach to that of Canada, relying on a requirement of exceptional misconduct to limit the number of exemplary damages awards, rather than confining their recovery to particular torts. The *Rookes v Barnard* limitations were rejected by the Australian High Court in 1968[70] and the courts have since gone on to recognise that exemplary damages may be awarded in negligence cases, though exemplary damages awards for negligence are likely to be "unusual and rare".[71] In the recent case of *Gray v Motor Accident Commission*,[72] the

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64 English Law Commission, Report on *Aggravated, Exemplary and Restitutionary Damages*, op. cit. fn. 31 at para. 5.44.

65 Exemplary damages will be awarded by the Canadian courts for negligence only where the plaintiff has been deliberately exposed to a risk without justification, *i.e.* where the defendant's conduct has been reckless. See S M WADDAMS, THE LAW OF DAMAGES, (3rd ed. 1997) at para. 11.230.

66 *Ibid.* at paras. 11.240 & 11.230 .

66A 58 DLR (4th) 193.70.

67 *Ibid.* at p.224.

68 *Ibid.* at p.207.

69 *Vorvis v Insurance Corporation of British Columbia*; op. cit. fn. 66A; *Robitaille v Vancouver Hockey Club* [1981] 3 WWR 481. See WADDAMS, THE LAW OF DAMAGES, op. cit. fn. 65 at para. 11.210.

70 *Uren v John Fairfax & Sons* (1968) 117 CLR 118; *Australian Consolidated Press v Uren* (1968) 117 CLR 185.

71 *Coloca v BP Australia* [1992] 2 VR 441. See also *Lamb v Cotongo* (1987) 164 CLR 1.

Australian High Court held that, although the issue of exemplary damages would not arise in the vast majority of negligence cases, "there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff." The Court gave as an example cases where an employer provided unsafe working conditions, knowing that they resulted in extreme danger to his employees. Kirby J, in his concurring judgment, cited the view of Fleming that what mattered was "the conduct of the wrongdoer, not the nature of the tort". [73]

1.47 In the case of *Taylor v Beere*,[74] the New Zealand courts have also rejected the restrictions enunciated in *Rookes v Barnard*. The court stressed the importance of exemplary damages as a means, complementary to the criminal law, of achieving social control in an increasingly diverse and multi-value society.

F. Exemplary Damages for Breach of Contract

1.48 It seems plain then that exemplary damages are available for constitutional or non-constitutional torts. As to whether exemplary damages may be awarded for breach of contract, the position is uncertain. Traditionally, at common law, exemplary damages were not available for breach of contract, a situation which reflected the law's emphasis on freedom of contract and the exclusively private law nature of contractual obligations.[75] One High Court decision, that of *Garvey v Ireland*,[76] may suggest that exemplary damages may be available in some contract cases, though the issue was not specifically addressed. In *Garvey*, an award of exemplary damages was made against the State for the arbitrary and wrongful dismissal of the plaintiff, who had been Commissioner of An Garda Síochána. The award was justified on the basis of Lord Devlin's first category in *Rookes v Barnard*, since the dismissal of the plaintiff could be characterised as oppressive or arbitrary action on behalf of the government. No distinction was made between tortious conduct and breach of contract by a governmental authority. Although the case may not be sound authority for extending the availability of exemplary damages in all contract cases, it does suggest that the prohibition on exemplary damages for breach of contract may not be absolute.

1.49 Where a breach of contract also constitutes a tort, it is likely that exemplary damages are available. This is established by *Kennedy v Allied Irish Banks Ltd.*[77] In that case, Hamilton CJ, relying on the English case of *Henderson v Merrett Syndicates Ltd*,[78] held that where there was both a tortious duty of care and an obligation created by contract, the plaintiff was:

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72 158 ALR 485.

73 Fleming, The Law Of Torts (9th ed. 1998).

74 [1982] 1 NZLR 81. See also Consultation Paper at para. 4.15.

75 *Addis v Gramaphone Co.* [1909] AC 488.

76 [1979] ILRM 266. See Appendix 1.

77 Unreported, Supreme Court, 29 October 1996 at p.46.

78 [1994] 3 All ER 506. *Henderson* distinguished and limited the earlier authority of *Tai Hing Cotton Mill Ltd v Lieu Chong Hing Bank Ltd* [1986] 1 AC 80, where the Privy Council had held that in cases of concurrent liability, contractual liability should be paramount, stating that there was not

"entitled to take advantage of the remedy which is most advantageous to him subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."[79]

1.50 Although exemplary damages were not specifically referred to in the case, these dicta indicate that where there were claims in both tort and breach of contract, and exemplary damages were available for the tortious cause of action, the plaintiff could elect to sue in tort and recover such damages.

G. Options for Reform

1.51 In our Consultation Paper, we set out a number of basic options for reform with regard to the availability of exemplary damages.[80] Each of these five alternative options presupposes the retention of a category of aggravated damages (which would be redefined as purely compensatory), a matter which is discussed fully below. It is intended that exemplary damages should only be awarded in cases of the most exceptional misconduct,[81] and where the incidental punitive effect of compensatory and aggravated damages is judged insufficient.[82] The principal options for reform are:

1. exemplary damages to be available for all torts, for breach of constitutional rights and for breach of contract;

2. exemplary damages to be available for all torts and for breach of constitutional rights, but not for breach of contract;

3. exemplary damages to be available for breach of constitutional rights and for some specified torts, for example, defamation;

4. exemplary damages to be restricted along the lines of *Rookes v Barnard*; and

5. the abolition of exemplary damages (within the constraints of the Constitution, *i.e.* exemplary damages could not be abolished in respect of constitutional torts).

Of these, we do not favour restrictions along the lines of *Rookes v Barnard* as suggested in option 4. Given the hostile reception of the case internationally, and more particularly the need to allow for exemplary damages in constitutional cases, there are no compelling reasons for favouring this option.

1.52 Option 1, which would extend the availability of exemplary damages to cases of breach of contract, would considerably expand the availability of exemplary

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"anything to the advantage of the law's development in searching for liability in tort where the parties are in a contractual relationship", *per* Lord Scarman at p.107.

79 *Op. cit.* fn. 77 at p.48.

80 See Chapter 9.

81 *Ibid.* at paras. 9.25-9.33.

82 *Ibid.* at paras. 9.55-9.77.

damages from the present legal position. To date, there is a dearth of Irish case law which has fully considered the award of exemplary damages in contract cases. Although, as has been mentioned above, some common law jurisdictions may allow for exemplary damages to be recovered in highly exceptional cases, the norm in the majority of jurisdictions is to exclude exemplary awards in contract cases. [83]

1.53 The argument can be made against the award of exemplary damages in contract cases that a contract is quintessentially a matter of private law, which concerns only the parties to it, and that in the breach of a contract there is no public element which would justify a deterrent measure such as exemplary damages. Given the private nature of the contractual arrangement, it is argued, one party to a contract should be free to break the contract in the knowledge that the only consequences will be to compensate the other party to the contract for any loss.

1.54 On the other hand, it may be argued that there are exceptional cases of breach of contract in which the award of exemplary damages would be warranted. This is the approach often taken by the United States courts,[84] and by the *US Restatement (Second) of Contracts*, which allows for punitive damages in cases where the breach of contract is also a tort for which punitive damages would be recoverable.[85]

1.55 However the Commission considers that an extension of exemplary damages to contract cases would be at odds with the traditional concept of contract law as having an exclusively private law character. We do not favour such a radical extension of the availability of exemplary damages.

1.56 The Commission does not, however, recommend that exemplary damages for breach of contract should be prohibited by legislation; rather, any possible development of the law on this matter should be left to the courts where it can be judged on a case by case basis.

1.57 Option 2, the retention of exemplary damages for all torts and breach of constitutional rights, (but their exclusion in cases of breach of contract) approximates to the present common law position. The Irish courts have not to date expressly excluded recovery of exemplary damages for any particular torts, and there has been no indication that they would favour such a restriction. We return to option 2 below.

1.58 Option 3, the restriction of exemplary damages through legislation, to cases of breach of constitutional rights and to certain particular torts, was favoured by some of the Commissioners at the Consultation Paper stage. The provisional recommendation of those Commissioners was that exemplary damages should be confined to constitutional cases and to cases of defamation. In consultation, there was some objection to this approach as discriminatory. Legislation to confine exemplary damages to defamation alone amongst torts would, it was felt, single out defendants in defamation actions unfairly.

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83 See *ibid.* at paras. 9.10 - 9.12.

84 SCHLUETER AND REDDEN, PUNITIVE DAMAGES, (3rd ed.) s.7.3(A).

85 Consultation Paper at para. 5.16.

1.59 The Law Reform Commission has already considered the availability of exemplary damages for defamation in the *Report on the Civil Law of Defamation* published in 1991.[86] In that Report, the Commission recommended that exemplary damages should continue to be available in defamation actions. Although our enquiries with practitioners have shown that exemplary damages are rarely allowed to go to the jury in libel cases and are therefore only rarely explicitly awarded,[87] there will remain the possibility of an exemplary award in exceptional cases.

1.60 Both option 5, which restricts exemplary damages to constitutional cases, and option 3, which confines them to constitutional torts and other particular torts, would raise the concern that, as a means to claim exemplary damages, plaintiffs would claim for breach of constitutional rights where they would formerly have claimed in tort. It may, in other words, encourage a tendency towards a 'constitutionalisation' of the law of torts, in order to circumvent limitations on exemplary damages recovery.

1.61 It will be noted that we do not include the outright abolition of exemplary damages as an option for reform. This reflects the dicta of the Supreme Court in *McIntyre* and in *Conway*, which place a premium on the use of exemplary damages awards as essential means to vindicate the constitutional rights of individuals. To abolish exemplary damages for actions involving breach of constitutional rights would be to deny plaintiffs this vital means to vindicate and defend their rights, and therefore would seem not to be open to the legislature under the Constitution.

1.62 Returning to option 2 as has been specified above, it is recommended that exemplary damages should be awarded only where compensatory and aggravated damages have an insufficient punitive and deterrent effect, and where there has been exceptional misconduct on the part of the defendant. However, given this context, we do not advocate restricting the scope of exemplary damages as regards the causes of action for which they may be awarded. We consider that restricting exemplary damages according to the quality of the defendant's misconduct would limit them to cases where compensatory damages would be an insufficient deterrent, and would also require moderation in the quantum of exemplary damages. We consider that this would constitute a sufficient restriction of exemplary damages. These methods of restriction are more principled and less arbitrary than a restriction of exemplary damages based on the cause of action.

1.63 The remaining issue is whether the range of actions in which exemplary damages are available should be set out in legislation. In the consultation process, we noted the concern that was expressed that a legislative provision stating the wide availability of exemplary damages might lead to a flood of claims.

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86 Law Reform Commission, *Report on the Civil Law of Defamation* (1991) at para. 8.16.

87 The rarity of exemplary damages awards in defamation cases reflects the distinct nature of compensatory damages in defamation actions. Unlike personal injuries cases, general damages in defamation have the purpose of offering vindication to the plaintiff for the wrong done to his reputation by the initial libel and also –this is a significant point- by the repetition of the libel in the course of the trial. The recent case of *de Rossa v Independent Newspapers* (Unreported, Supreme Court, 30 July 1999) confirmed that compensatory damages in libel cases have a vindicatory function and can also reflect the behaviour of the defendant at trial.

1.64 We do not favour, at this stage in the development of the law, a statutory provision which would state that exemplary damages are to be available in all tort cases. We consider that the present common law position, which leaves open the recovery of exemplary damages for a wide range of tort cases, should be retained, and that the further development of the law regarding the availability of exemplary damages should be left to the courts, informed by the circumstances of each case. Although, as has been made clear above, we do not consider that there is any reason why exemplary damages should be excluded in relation to particular torts, we nevertheless are of the opinion that it is unnecessary to state this in legislation, as it might make the law rigid.

1.65 The Commission recommends that the present common law position, which does not exclude the availability of exemplary damages for breach of constitutional rights, or for any torts, should be retained.

1.66 The Commission recommends that the availability of exemplary damages should not be extended to cases of breach of contract.

1.67 The Commission recommends that both the punitive and deterrent purposes of an award of exemplary damages should be recognised, but the primary purpose of an award of exemplary damages should be the deterrence of conduct similar to the defendant's in the future.

1.68 The Commission does not recommend that legislation is necessary in any of the areas covered in the three preceding paragraphs.

H. Standard of Culpability

1.69 We have already considered some of the broad arguments as to the acceptability of exemplary damages as a civil law remedy and have concluded that they are acceptable. These arguments also inform and direct the debate on the extent to which exemplary damages should be available. If it is accepted that exemplary damages should be available to some extent, how should this be controlled?

1.70 We do not recommend a solution of limiting the availability of exemplary damages by restricting the range of torts for which they may be awarded. A second, and perhaps more principled method of limitation, is to impose a high standard of culpability on the part of the defendant, short of which exemplary damages cannot be awarded. The effect of this is that, although exemplary damages will be available in respect of all torts, they will be awarded only in rare and exceptional cases under each of these tortious causes of action.

1.71 It is crucial that exemplary damages should only be awarded in cases where punishment and deterrence are clearly warranted.

1.72 The courts have in general insisted on a high standard of misconduct as a prerequisite for an exemplary award. In *Conway v INTO*, Griffin J referred to the need to show "wilful and conscious wrongdoing in contumelious disregard of

another's rights." [88] In *Cooper v O'Connell*,[89] Keane J also emphasised that exemplary damages should be confined to cases where there had been exceptional misconduct.[90] The Australian courts have also referred to "contumelious disregard for the rights of the plaintiff".[91] In the Canadian case of *Vorvis v Insurance Corporation of British Columbia*,[92] it was required, to ground an exemplary award, that the defendant should have a "harsh, vindictive, malicious motive." United States courts have employed standards of outrageousness and reprehensibility.[93] In *Rookes v Barnard*, Lord Devlin considered that even "wilful and wanton" wrongdoing was an insufficient standard for the award of exemplary damages. Instead, the court should ascertain whether the injury to the plaintiff "has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied".[94]

1.73 The definition of the misconduct necessary to ground exemplary damages should be strict enough to confine exemplary damages to the most exceptional of cases. It should not, however, be such as to exclude completely the award of exemplary damages in any particular tort. In particular, although awards of exemplary damages in negligence cases are likely to be extremely rare, the requirement of exceptional misconduct should not be such as to exclude exemplary damages for negligence. As the court in the Australian case of *Lamb v Cotongo*[95] held, "the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious."

1.74 We favour a clear requirement that, before exemplary damages are awarded, the exceptional misconduct of the defendant should have been established.[96] This is sufficiently important and clear-cut to warrant legislation.

1.75 The Commission recommends legislation to the effect that exemplary damages should be awarded only where it has been established that the conduct of the defendant in the commission of a tort or breach of a constitutional right has been high-handed, insolent, vindictive or exhibiting a gross disregard for the rights of the plaintiff.

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88 *Op. cit.* fn. 3. 'Contumelious' is defined in the Shorter Oxford English Dictionary as: "superciliously insolent, disgraceful, reproachful".

89 *Op. cit.* fn. 5.

90 On the facts of the case, exemplary damages were not awarded.

91 *Uren v John Fairfax and Sons* (1968) 117 CLR 118.

92 (1989) 58 DLR (4th) 193.

93 *US Restatement on the Law of Torts (Second)*, S.908. See also Consultation Paper at para. 9.22 .

94 *Op. cit.* fn. 1 at p.412.

95 (1987) 164 CLR 1.

96 Our recommendation follows the provisional recommendation in the Consultation Paper at para. 9.25, and the recommendation made in the Law Reform Commission, *Report on The Civil Law of Defamation*, 1991 at para. 14.31.

I. Terminology and Identification of Awards

1.76 The terminology used to describe the categories of damages has caused confusion in the case law.[97] In the earlier Irish cases, the terminology used to describe such damages varied: damages with a punitive or deterrent purpose are categorised as "punitive damages"; "exemplary damages"; "aggravated damages"; "vindictive damages"; or "substantial damages".[98] Today, the terms "exemplary damages" and "punitive damages" are used interchangeably. The term "punitive damages" prevails in the United States, and "exemplary damages" is the more common term in most other common law states. In the interests of clarity, it is desirable that a single term should be employed consistently. Given that we have recommended an emphasis on the deterrent purpose of this category of damages, which involves "making an example of the defendant", the term "exemplary damages" would seem to be the more appropriate.

1.77 To ensure that the quantum of both compensatory and exemplary damages are appropriate and moderate, it is of course necessary to identify and categorise each award that is made. Where elements of both compensatory and exemplary damages exist in a single award of 'general damages', it will not be possible to judge with any accuracy whether the quantum is appropriate. (There is another view that there is at present a tacit understanding between all those concerned that made possible the recovery of 'general damages' and discouraged exemplary awards.) The recent practice in the Irish courts has generally been to make separate and expressly labelled awards of exemplary and compensatory damages. The Commission considers that it is important that this practice should be continued. It is, of course, also important that where awards of aggravated or of restitutionary damages are made, they are separately identified. The Commission does not consider that there is any need for legislation on this matter, but that it should be left to the courts to categorise the award made.

1.78 The Commission recommends that the term "exemplary damages" should be adopted as the most appropriate term to describe an award of damages with both a deterrent and a punitive purpose.

1.79 The Commission considers that the courts should continue their practice of separately identifying awards of compensatory, exemplary, aggravated and restitutionary damages.

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97 Consultation Paper at paras. 7.27-7.29 and 9.34-9.35.

98 *Reeves v Penrose* (1890) 26 LR Ir 141; *Worthington v Tipperary (SR) County Council* [1920] 2 IR 233; *Dillon v Dunnes Stores Ltd, op. cit.* fn. 24; *Kennedy v Ireland* [1987] IR 587. See generally Consultation Paper at paras. 7.25-7.29.

CHAPTER 2: REGULATING EXEMPLARY DAMAGES

2.001 Aside from the core issue of whether and in what circumstances exemplary damages should be awarded, there arise many issues concerning the subsidiary regulation of exemplary damages. Despite their detailed nature, many of these questions are of crucial importance. It is the adequate and principled regulation of matters such as the quantum of exemplary damages, their regulation in multiple plaintiff actions and their interaction with the criminal law that justifies their retention. As we have made clear above, the recommendation in this Report that exemplary damages should be available across a range of actions in tort and for breach of constitutional rights is based on the presumption that the quantum of such damages will be moderate and appropriate to the circumstances of each case. Below, we consider a number of principles and mechanisms which can be used to regulate the quantum of exemplary damages.

A. Restrictions on the Quantum of Exemplary Damages

2.002 The Irish courts have not to date been faced with the exorbitant awards which have caused such controversy in the United States. Nevertheless, there is a clear need to establish guidelines and restrictions to ensure that awards of exemplary damages are of a quantum appropriate to the wrongdoing and to the parties involved. Exemplary damages must not be uncontrolled or arbitrary; they must be of an amount that is the minimum necessary to achieve their purpose in the context of the particular case.

2.003 The fact that, in the majority of tort cases, damages are no longer assessed by juries has lessened the likelihood that the quantum of exemplary damages will spiral out of control.[1] The jury has repeatedly been blamed for the unpredictability of exemplary damages quantum. In *Cassell & Co v Broome*,[2] Lord Reid objected to the fact that in the case of exemplary damages, in contrast to sanctions in criminal law, punishment was inflicted "not by a judge who has experience and at least tries not to be influenced by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind."[3]

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1 Section 1 of the *Courts Act, 1988* abolished jury trial for all High Court personal injury actions. Other High Court civil actions, for example defamation actions, may still be heard by a judge and jury. See the discussion of the role of the jury *infra* at paras. 2.026 – 2.043.

2 [1972] 1 All ER 801.

3 *Ibid.* at p.838. See also the comments of Lord Woolf MR in *Thompson v MPC* [1997] 3 WLR 403 at p.415.

2.004 Following the principles developed in the English common law and enunciated by Lord Devlin in *Rookes v Barnard*,[4] the Irish courts have applied the requirements that: the plaintiff must be the victim of the punishable behaviour involved; there must be restraint in the assessment of damages; the means of the defendant must be taken into account; and exemplary damages should be proportionate to the compensatory damages awarded.[5]

2.005 In *Rookes v Barnard*,[6] Lord Devlin set out three basic principles for the assessment of quantum in exemplary damages cases. He held, first, that in order to recover damages, the plaintiff must have been the victim of the punishable behaviour involved. This stipulation was necessary since "the anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence."[7] Secondly, Lord Devlin specified that exemplary damages should be assessed with restraint and, thirdly, that the means of the parties should be taken into consideration. In addition to these rules, Lord Devlin also stipulated that exemplary damages should be awarded "if but only if" the sum of compensatory (including aggravated) damages to be awarded had an insufficient punitive or deterrent effect.

2.006 The principle of moderation was again stressed in *John v MGN Ltd*:[8] the quantum of an exemplary damages award should be the minimum "necessary to meet the public purpose" of the damages. These principles of the assessment of quantum were accepted by the Irish Supreme Court in *McIntyre v Lewis*,[9] and were once more endorsed by Griffin J in *Conway v INTO*. [10]

B. The Means of the Defendant

2.007 In our Consultation Paper,[11] we raised the issue of the extent of the investigation into the defendant's wealth that should be involved. Clearly, it is desirable to avoid unnecessary intrusions into the defendant's privacy. For this reason, we provisionally recommended, at that stage, that the means of the defendant should be taken into account only on the application of the defendant to the court, where the defendant adduces evidence to the effect that he or she would be unable to pay the sum of exemplary damages imposed, or that such a sum would impose undue hardship.

2.008 This recommendation does not, however, allow a court to impose a particularly large award where there is a particularly wealthy defendant who would be unscathed by an award which would normally be considered large. For this reason,

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4 [1964] 1 All ER 347.

5 *McIntyre v Lewis* [1991] 1 IR 121.

6 *Op. cit.* fn. 4.

7 *Ibid* at p.411.

8 [1997] QB 586.

9 *Op. cit.* fn. 5.

10 [1991] 2 IR 305 at p.325.

11 Paras. 9.52-9.54.

we are of the opinion that the provisional recommendation should be revised to allow for a consideration of the defendant's means in a broader range of cases.

2.009 Given that the focus of exemplary damages is the behaviour of the defendant, we see it as one of the advantages of an exemplary damages award that it can be calibrated to impose effective deterrence on either a poor or (more often) a rich defendant. Commercial strategies which factor in the possibility of compensation to those they harm, or of fixed criminal penalties, are best undermined by exemplary damages. As the court noted in one recent US case, a large exemplary damages award may be the only means by which the court can "attract the attention" of a large corporate defendant.[12] At the other end of the spectrum, care should be taken not to make an award which would be so severe as to bankrupt a less wealthy defendant. It is therefore important that the wealth of the defendant should be taken into account so that a sum can be assessed which is appropriate to that defendant's means.

2.010 The Commission recommends that, in assessing exemplary damages, the court should be permitted to take into account the means of the defendant. We do not consider that there is any reason to take into account the means of the plaintiff.[13]

C. The Principle of 'Moderation' or 'Restraint'[14]

(i) United States law

2.011 In the United States, it is now established that very large punitive damages awards may be held to be unconstitutional, as being contrary to the due process guarantees in the Constitution. One of the principles of moderation which has been enunciated by the Supreme Court as indicative of whether a punitive award is constitutionally acceptable as not being excessive, is whether the award is proportionate to the harm suffered by the plaintiff, and therefore to the sum awarded in compensatory damages in the same case.[15] In *BMW v Gore*,[16] the US Supreme Court for the first time struck down an award of punitive damages on the grounds that it was excessive and therefore unconstitutional.[17] The Supreme Court established three "guideposts" by which to judge whether an award of punitive damages was excessive. These were: the degree of reprehensibility of the defendant's conduct; the disparity between the harm to the plaintiff and the damages awarded; and the difference between the exemplary damages imposed and the civil penalties imposed in comparable cases.

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12 *Johansen v Combustion Engineering Inc.* 170 F.3d 1320.

13 ANNUAL REVIEW OF IRISH LAW 1998 at p.670.

14 See Lord Devlin in *Rookes v Barnard, op. cit.* fn. 4; cited by O'Flaherty J in *McIntyre v Lewis, op. cit.* fn. 5 at p.140.

15 *BMW v Gore* (1996) 116 S Ct 1589.

16 *Ibid.*

17 *BMW v Gore, ibid.* was foreshadowed in the two earlier cases of *Pacific Mutual Life Insurance v Haslip* (1991) 499 US 1 and *TXO Production Corporation v Alliance Resources* (1993) 509 US 443, where these issues were considered but the awards under examination were not in fact struck down. See Consultation Paper at paras. 5.04-5.06.

2.012 Since *BMW*, the US courts have struck down awards as excessive in a number of cases.[18] A case which is interesting for its application of the rules on quantum set out in *BMW v Gore*[19] is *Johansen v Combustion Engineering Inc*,[20] recently decided by the Eleventh Circuit. Applying *BMW*, the court upheld as constitutional a punitive damages award of $4.35 million (previously reduced from $15 million). The award was against a large multinational mining company in respect of water pollution caused to streams flowing through property adjoining one of its mines. The award had been challenged on the grounds that it was disproportionate (at a ratio of about 100:1) to the relatively small compensatory damages awarded in the case. However, the Court rejected this line of argument on the particular facts of the case. It held that the strength of the State's interest in deterring environmental pollution justified the large award, irrespective of the relatively minor economic loss suffered by the plaintiffs. In the light of the State's interest in deterrence, "ratios higher than might otherwise be acceptable are justified." In addition, the court held that "in promoting deterrence, the economic wealth of a tortfeasor may be considered." The court noted that CE was an extremely wealthy international corporation, and that anything less than the sum awarded would be unlikely to "attract its attention". The court concluded that:

> "the 100:1 ratio of the punitive to the actual damage is at the upper limits of the Constitution, but is justified by the need to deter this and other large organisations from a 'pollute and pay' environmental policy."

2.013 *BMW* has been applied in a series of other cases in the State and Federal courts. The courts have been flexible in their application of the *BMW* "guideposts" and have resisted any strict rules as to ratios between compensatory and punitive damages, considering instead the facts of each case, the wealth of the defendant and the public interest involved in deterring the defendant's conduct. They have emphasised that the three guideposts set out in *BMW* are the primary but not the only factors to be taken into consideration. The social function of exemplary damages awards has been emphasised. For example, in *US v Big D Enterprises*,[21] the US Court of Appeals for the Eighth Circuit upheld an award of punitive damages for acts of intentional racial discrimination, citing the need to vindicate the rights of citizens and to ensure that those who engaged in racial discrimination "receive society's full rebuke and condemnation."

(ii) Irish law

2.014 In the Consultation Paper, it was tentatively concluded[22] that, in contrast with the position in the United States, awards of exemplary damages would not be contrary to any of the due process standards set out in Article 38(1) of the Irish Constitution, and would not offend the principles of fair procedures and constitutional justice as developed by the Irish courts. To date, no awards of exemplary damages made in the Irish courts have been challenged as unconstitutional on the grounds that

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18 See Consultation Paper at para. 5.07.

19 Discussed in the Consultation Paper at paras. 5.05-5.08.

20 170 F.3d 1320.

21 199 US App.

22 Paras. 7.11-7.14.

they were excessive. It remains to be seen whether an unusually large exemplary damages award would be open to constitutional challenge under evolving notions of fair procedures or the equality and proportionality principles. [23]

2.015 However, exemplary awards have been reduced by the Supreme Court on a different basis, namely the principles of moderation and restraint.[24] The Irish courts have also held that exemplary damages should be in proportion to the compensatory damages awarded in the same case. In *McIntyre v Lewis*,[25] O'Flaherty J stated this principle and found that the exemplary award made in that case, which was twelve times the compensatory damages, did not bear a sufficient relation to compensation. O'Flaherty J observed:

> "The award of exemplary damages is anomalous and where such damages are awarded ... the judge or jury must keep them on a tight rein. If the compensatory amount awarded includes aggravated damages then I believe if any award is made by way of exemplary damages it should properly be a fraction rather than a multiple of the amount awarded by way of compensatory damages (including aggravated damages)."[26]

Hederman J, in the same case, also stated that the exemplary damages should bear some relation to the damages awarded in compensation, and reduced the exemplary award accordingly.[27]

2.016 The principle that exemplary damages should be in proportion to compensation awarded in the same case is a useful means of preventing exorbitant awards. It is, however, a somewhat arbitrary limitation. Exemplary damages and compensatory damages have, as discussed above, very different purposes. They are assessed according to entirely different principles. There is therefore no natural or necessary correlation between them. There may be cases where extremely malicious behaviour on the part of a defendant has, fortuitously, resulted in relatively minor injury to the plaintiff; the contrary also applies. The facts of the case of *Johanson v Combustion Engineering*[28] provide an illustration of this. Given the emphasis placed by the Irish courts on the use of exemplary damages to defend and vindicate constitutional rights, there could well be cases where the importance of the rights at issue and the extent of the defendant's disregard of them could justify a large exemplary award, irrespective of the actual damage caused.

2.017 It is interesting to note the approach taken by the courts in New Zealand, where, in personal injury cases arising out of accidents, no compensatory damages are available.[29] In such cases it has been held that, despite the absence of any

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23 See *supra*, Chapter 1 at paras. 1.20-1.24; HOGAN & MORGAN, ADMINISTRATIVE LAW IN IRELAND, (3rd ed. 1998).

24 See *McIntyre v Lewis*, *op. cit.* fn. 5 at p.140.

25 *Ibid.* The facts are set out in Appendix 1.

26 *Ibid.* at p.141

27 *Ibid.* at p.135. McCarthy J dissented on this point.

28 170 F.3d 1320.

29 *Accident Compensation Act*, 1972.

compensatory award, exemplary damages remain available.[30] The Canadian courts have also allowed the award of exemplary damages where the plaintiff has suffered no loss.[31]

2.018 To impose a strict correlation between the quantum of exemplary damages and that of compensatory damages in the same case is to introduce a degree of inflexibility into the law and, possibly, to undermine the effective and appropriate deterrent effect of some exemplary awards.

2.019 The Commission does not therefore make any recommendation as to a strict rule of proportion between the two categories of damages. However, we do recommend, in the spirit of existing legislation, a general principle that exemplary damages should bear some reasonable relation to compensatory damages, taking into account the circumstances of the case and the public interest in deterring and expressing condemnation of the wrongdoing involved.

(iii) Caps on exemplary damages

2.020 As noted above, one of the advantages of exemplary damages is that their quantum can be adapted to the circumstances of each case. The quantum of exemplary damages is not fixed, and this allows the courts to achieve a measure of real deterrence even in respect of wealthy corporate defendants.

2.021 We consider that measures to cap exemplary damages across the board are not the most appropriate means of limiting exemplary damages quantum. Caps are a relatively arbitrary and inflexible means of limiting quantum. A cap on exemplary damages quantum would be an effective, but blunt implement with which to ensure that quantum is not excessive. A cap would tend to prevent an award of exemplary damages from perhaps having an appropriate deterrent effect. Since caps will tend to standardise the level of exemplary damages awards, regardless of the financial circumstances of the defendant, they are likely to induce a situation where exemplary damages make only a minimal impact on more wealthy defendants.

2.022 We recognise that the imposition of caps could be necessary in situations where the quantum of exemplary damages was out of control, as is perceived, by some commentators, to be the case in the United States. In this jurisdiction, however, exemplary damages have been awarded in relatively few cases and have not been excessive.[32] In the light of this situation, it is preferable to limit quantum of exemplary damages by more flexible means.

2.023 The Commission does not recommend that statutory caps should be imposed on, aggravated, exemplary or restitutionary damages.

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30 *Donselaar v Donselaar* [1982] 1 NZR 97. See Consultation Paper at paras. 4.13-4.16.

31 WADDAMS, THE LAW OF DAMAGAES, (3rd ed., 1997) at para. 11.360. It should be noted that the plaintiff must, in accordance with the principle enunciated in *Rookes v Barnard, op. cit.* fn. 4, be able to show that he or she has been the victim of punishable behavior.

32 See Appendix 1.

(iv) The relationship with compensatory awards

2.024 As we noted in our Consultation Paper, there is inevitably some overlap in the effects of the various categories of damages, even when their distinct purposes are clearly defined. Compensatory damages, though designed exclusively to compensate, may often have some incidental punitive or deterrent effect (as exemplary damages have an incidental compensatory effect). In cases where there is a relatively large award of compensatory damages, there is no necessity for a further award of exemplary damages. This is well expressed in the dicta of Lord Devlin in his judgment in *Rookes v Barnard*,[33] where he stated that exemplary damages should be awarded "if, but only if" the compensatory award to be made was inadequate to punish the defendant and to mark the court's disapproval of his or her conduct.[34] Again, in cases where a sum for aggravated damages is awarded, it is even more likely to be the case that the (incidental) deterrent effect will be such that there is no justification for an award of exemplary damages.[35]

2.025 The Commission recommends that where compensatory (including aggravated) damages have a sufficiently punitive and deterrent effect, no additional award of exemplary damages should be made. We regard this essential and clear-cut rule as best stated in the form of legislation.

D. Assessment of Exemplary Damages by Juries

2.026 By section 1 of the *Courts Act, 1988*, jury trial was abolished for High Court personal injury actions, subject to some particular exceptions. Actions such as defamation actions, and actions for false imprisonment, intentional trespass to the person and malicious prosecution, often still involve a jury,[36] and, in such cases, it is the jury that assesses the amount of damages, including exemplary damages, to be awarded.

2.027 In defamation cases in particular, the suggested inconsistency of assessments of damages by juries has frequently been blamed for exemplary awards that are disproportionate or excessive.[37] In the absence of limits on the sum of exemplary damages that can be awarded, there is certainly scope for a jury to make an excessive award, disproportionate to the culpability of the defendant. But it must be

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33 *Op. cit.* fn. 4; discussed *supra*, para. 1.41.

34 *Ibid.* at p.411.

35 This point was also noted by Lord Devlin in *Rookes v Barnard*, *ibid.* at p.411, where he observed that aggravated damages could do much of the work of exemplary damages.

36 WHITE, IRISH LAW OF DAMAGES at para. 2.8.01, considers that section 1 may allow for a jury trial in cases of wrongful death where the death was occasioned by assault or battery ("intentional trespass to the person" under the Act) but points out that in such a case, damages would still be assessed by the judge in the case under section 49 of the *Civil Liability Act, 1961*, as amended by section 4 of the *Courts Act, 1988*.

37 See, for example, the *dicta* of Lord Reid in *Cassell & Co v Broome, op. cit.* fn. 2 at p.838, where he was critical of the fact that, in regard to exemplary damages, punishment was inflicted "not by a judge who has experience and at least tries not to be influenced by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind."

remembered, of course, that the jury does not make the award in a legal vacuum: it is subject to the common law constraints of proportionality and moderation described earlier in this Report, and the judge in the case should advise the jury of these constraints as well as of the need to take into account compensatory and aggravated awards, and to consider the means of the defendant. On the other hand, it should be remembered that many jury verdicts come in at sums expected by lawyers involved, and that it is rare that there are outlandish awards which attract notoriety and are often the subject of notable appeal hearings.

2.028 If it is considered that these guidelines, or the rigour with which they are applied, are insufficient, then it is open to either the legislature or the courts to set out more concrete guidelines, for example, setting maximum amounts for exemplary awards in particular torts. However, as we have indicated above, we do not favour this approach, as there may be good reasons why, on the individual circumstances of the case, an exemplary damages award should be considerably higher than other exemplary awards in respect of the same tort.

2.029 There may be a fear that the jury will misunderstand or simply ignore these constraints, and make an excessive award regardless of the judge's advice. The jurors may also fail to comprehend the subtle distinction between aggravated and exemplary damages. (Where a jury does make an exemplary award that appears grossly excessive, there is of course the possibility that the award can be appealed to the Supreme Court where it may be overturned or reduced.) Modern juries, however, are better educated and generally careful and conscientious in following directions clearly given by a presiding judge.

2.030 The primary options for reform in respect of these difficulties, in ascending order of radical change, are:

1. Retention of the present system.

2. Establishment of strict guidelines for juries in the assessment of exemplary damages.

3. The judge in the case to set out a maximum and a minimum sum of damages within which the jury should make an award.

4. A provision that, even where the jury determines compensatory damages the judge, and not the jury, should assess exemplary damages (leaving the jury, however, to determine whether exemplary damages should be awarded).

5. A provision that both the question of whether exemplary damages should be awarded and the assessment of such damages should be a matter for the judge rather than the jury.

2.031 Options 2 and 3 would involve some restriction of the jury's role in assessment, without removing that function from them. On this question, it is useful to consider the recent judgement of the Supreme Court in *de Rossa v Independent Newspapers*,[38] where the majority rejected submissions that guidelines should be

[38] Unreported, Supreme Court, 30 July 1999.

imposed on juries in the assessment of compensatory damages in a libel action. Hamilton CJ considered that if the suggested guidelines[39] were given to the jury:

> "[t]he jury would be buried in figures, figures suggested by counsel for both parties as to the appropriate level of damages, a figure from the judge representing his opinion as to the appropriate level of damages, figures with regard to damages made or approved by the Court of Appeal in previous libel actions and figures with regard to damages in personal injuries actions and at the same time be subject to the direction of the trial judge that it is not bound by such figures and must make up its own mind as to the appropriate level of damages. ... I am satisfied that the giving of such figures, even though only by way of guideline, would constitute an unjustifiable invasion of the province or domain of the jury."[40]

2.032 In relation to options 4 and 5, in the *Report on the Civil Law of Defam*ation, the Law Reform Commission recommended that, in defamation actions, the judge should determine both the categories of damages to be awarded and the quantum of such damages.[41] This revised the earlier provisional recommendation in the Consultation Paper that the category of damages should be determined by the jury, whilst the judge should determine the sum of damages to be awarded. The Commission altered the recommendation on the grounds that "the distinction between the categories of damages is not easy to draw and ... decisions of the courts reflect continuing difficulties in this area."[42]

2.033 Given that the Supreme Court has, in a series of recent cases, set about defining and distinguishing the various categories of damages, the Commission considers that the argument as to the indeterminacy of the categories of damages has less weight now than formerly. Recent judgments of the Supreme Court have clarified the issue of the categories of damages; the distinct nature of each of the non-compensatory categories is set out in this paper.[43] Given the developments in the law, the difficulties mentioned in the *Report on the Civil Law of Defamation* should no longer be of such great importance.

2.034 There is no reason why a jury should be incapable of determining whether the actions of a defendant warrant some measure of exemplary damages. However, there is a distinction (on which the difference between options 4 and 5 is based) between this issue and the much more subtle and difficult task of assessing the precise sum of damages which is appropriate in all the circumstances in order to punish and deter effectively. In this task, the judge has the advantage of experience and training over the jury, and, although exemplary damages will not, of their nature, be easy to calculate precisely, there is likely to be less risk of a grossly disproportionate or unfair award where the quantum is assessed by an experienced judge. The comments of

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39 Based on guidelines given by the English Court of Appeal in *John v MGM, op. cit.* fn. 8.

40 *Op. cit.* fn. 38 at pp.53-54 of the unreported judgment.

41 With the exception that the jury would be able to determine that only nominal damages should be awarded.

42 Para. 10.4 of the *Report on the Civil Law of Defamation* noted that the compensatory/exemplary distinction was especially difficult to draw in defamation cases.

43 *Supra* at paras. 1.01-1.06 and *infra* at paras. 6.01-6.05.

Bingham MR in *John v MGN Ltd*,[44] though they dealt with general damages for defamation, are of relevance here:

> "There could never be any precise, arithmetical formula to govern the assessment of general damages in defamation, but if such cases were routinely tried by judges sitting alone there would no doubt emerge a more or less coherent framework of awards which would, while recognising the particular features of particular cases, ensure that broadly comparable cases led to broadly compatible awards."[45]

2.035 Lord Woolf MR in *Thompson v Commissioner of Police*[46] also pointed to the difficulties associated with jury assessment. Referring to the English Law Commission's provisional conclusion that exemplary damages assessment should continue to be a function of the jury,[47] he said:

> "it is counterproductive to give juries an impossible task. It must at present be very difficult for a jury to understand the distinction between aggravated and exemplary damages when there is such a substantial overlap between the factors which provide the sole justification for both awards. The extent to which juries fluctuate in the awards which they make ... indicates the difficulties which they have."[48]

2.036 Lord Woolf nevertheless noted that there were arguments in favour of the retention of assessment by juries:

> "Very difficult issues of credibility will often have to be resolved. It is desirable for these to be determined by the plaintiffs' fellow citizens rather than judges, who like the police are concerned in maintaining law and order. Similarly the jury because of its composition, is a body which is peculiarly suited to make the final assessment of damages, including deciding whether aggravated or exemplary damages are called for in this area of litigation, and for the jury to have these important tasks is an important safeguard of the liberty of the individual citizen."[49]

In a similar vein, McCarthy J in *McIntyre v Lewis*[50] observed that exemplary damages were "peculiarly appropriate" for assessment by a jury, since they were intended to reflect disapproval.[51]

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44 *Op. cit.* fn. 8.

45 *Ibid.* at p.48.

46 [1997] 2 All ER 762.

47 Consultation Paper of the English Law Commission: *Aggravated, Exemplary and Restitutionary Damages*, No. 132, August 1993 at paras. 6.29-6.33.

48 *Op. cit.* fn. 46 at p.773.

49 *Ibid.*

50 *Op. cit.* fn. 5. See Appendix 1.

51 *Ibid.* at p.138.

2.037 The English Law Commission's final recommendation in its *Report on Aggravated, Exemplary and Restitutionary Damages*, in contrast to its provisional conclusion, was that the assessment of exemplary damages should always be made by a judge rather than a jury.[52] The Law Commission considered that the judge should decide on whether exemplary damages should be awarded at all, as well as assessing the quantum of any exemplary damages. The judge should have this role, in the Law Commission's view, even in cases where the jury was responsible for assessing compensatory and restitutionary damages.

2.038 One of the primary reasons for the English Law Commission's recommendation in favour of judicial assessment of exemplary damages was the fact that juries do not give reasons for their decisions, whilst judges usually do. The Commission considered that the goals of moderation and proportionality in the assessment of exemplary damages would be furthered if the assessment of such damages were regularly accompanied by reasons for the award and the quantum of the award.[53]

2.039 It may be argued that if, as at present, exemplary damages are assessed by a judge in the majority of tort cases and by a jury in cases of non-personal injury torts such as defamation, there is a risk of inconsistency in the levels of exemplary damages as between torts. There is the possibility, under the current law, that a defendant found to have published a defamatory article could be subjected to a much higher award of exemplary damages than a defendant found to have maliciously caused severe physical injury to the plaintiff. Were the assessment function for exemplary damages to be allocated to the judge in all tort cases, these discrepancies would be less likely to arise. This argument has not to date been borne out in practice, however, and there is no history, for example, of frequent or large exemplary damages awards in defamation cases; indeed exemplary damages of any kind in such cases are extremely rare.

2.040 A practical difficulty with allowing for the assessment of exemplary damages (and not compensatory damages) by the judge rather than the jury is that it may not be clear to the judge what are the precise findings of fact on which the jury based its finding of liability and award of compensatory damages. The judge may be able to infer these matters from the determination of the jury and assess exemplary damages accordingly, but he or she does not have the same knowledge of these findings of fact as the jury.[54]

2.041 The system of assessment of compensatory damages is a framework outside the scope of this Report. It is something within which the Law Reform Commission must work, making its recommendation on the assessment of exemplary damages by a

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52 Law Com No. 247, December 1997 at para. 5.82.

53 *Ibid.* at para. 5.86.

54 This problem was given extensive consideration by the English Law Commission, *Report on Aggravated, Exemplary and Restitutionary Damages, op. cit.* fn. 52 at para. 5.89 which, in its consultation process, received submissions from libel lawyers that, where a defendant in a defamation action had unsuccessfully pleaded justification, the defendant may, despite the failure of the plea, have managed to establish some facts which reduce the damages payable. Where this is the case, the jury will have knowledge of the effect of the plea and would be able to take it into consideration in the assessment of any exemplary damages, but the judge would not be able to do so.

judge or jury. It seems that by retaining the jury's ability to award compensatory damages (in certain cases) but abolishing their right to make exemplary awards, the law might be open to the charge of inconsistency. Although the precise quantum of exemplary damages may be difficult for an inexperienced jury to assess, this is surely no less the case in regard to many awards of compensatory damages, where the plaintiff's distress and injury to feelings, or the loss of the plaintiff's reputation, must be given a precise monetary value. In defamation cases in particular, where there have been criticisms of large awards, these awards have usually been expressed as compensatory rather than as exemplary.

2.042 The Commission recommends that, given the current position of the law regarding the assessment of damages generally, and in particular, having regard to the jury's superior knowledge of the facts grounding the finding of liability, the law should not be altered to allocate the function of the award and assessment of exemplary damages to the judge rather than the jury. The Commission does not favour the imposition of detailed guidelines or maximum or minimum limits on the quantum of exemplary damages awards assessed by the jury, but considers that the discretion of the jury in this matter should be retained, subject of course to the general principles of assessment of exemplary damages described in this chapter. In our *Report on the Civil Law of Defamation*, we recommended that in defamation actions, the judge should determine both the categories of damages to be awarded and the quantum of such damages. This recommendation would have covered all kinds of damages, including exemplary. However, we do not intend to qualify the recommendation on damages in defamation cases contained in the Defamation Report. Accordingly, our conclusion in the present Report, which concerns only exemplary damages in cases (of any kind) involving a jury, is without prejudice to the recommendation in our Defamation Report which concerns only defamation in cases involving a jury and applies to all categories of damages.

2.043 The Commission does not recommend any change in the current law by which, in cases involving a jury, exemplary damages are awarded and assessed by the jury rather than the judge.

E. Should it be the plaintiff who receives the exemplary damages?

2.044 Since the purpose of exemplary damages is not to compensate the plaintiff but (primarily) to punish the defendant for his misconduct, and to deter, in the future, similar conduct by the defendant or others, such damages have a social and public policy justification, distinct from the need to compensate the plaintiff. Exemplary damages are imposed on behalf of society. They are awarded, over and above what is necessary to compensate the plaintiff, as a separate indication of society's abhorrence of the defendant's wrongdoing.

2.045 Therefore, it can be seen as contrary to principle that, when the plaintiff has received full compensation (including, where appropriate, aggravated damages) for the injury that has been done to him, any exemplary damages should also accrue to the plaintiff. For, in such a case, the plaintiff would secure a bonus or windfall profit perhaps far above that which was necessary, even on the most generous assessment, in order to compensate him. Yet this is exactly what happens under our present law. The issue which arises is, therefore, whether the law regarding exemplary damages

should be amended in order to provide that exemplary damages - in whole or in part - should accrue not to the plaintiff, but should instead be applied for the benefit of some wider social purpose, so as to mirror, in the application of such damages, the social reason - the deterrence of the defendant's misconduct - for their exaction in the first place.

2.046 One may, of course, argue that once exemplary damages have been exacted, the social purpose of deterrence has been fulfilled and it is immaterial whether the plaintiff receives the benefit of them or whether they are applied for the benefit of some wider social cause. Since the plaintiff has taken the trouble to bring the case to court, has run the risk of failure, and has thereby done a measure of public service in deterring an incidence of socially harmful conduct, it could well be argued that he or she is the appropriate recipient of the exemplary award. Seen thus, the plaintiff's recovery of damages can be seen as a 'bounty' rather than a 'windfall'[55]. But, where an award of exemplary damages occurs solely because of the conduct of the wrongdoer, no moral right to receive the damages would seem to vest in anyone, be it in the plaintiff or some charity or the State. The question therefore becomes rather who is the most appropriate recipient. Before returning to answer this question in paras. 2.064-66, we explore some of the implications of a split recovery regime.

(i) United States split recovery statutes

2.047 In the United States, legislative measures regulating the allocation of punitive damages awards, known as "split-recovery" statutes, have been enacted in a number of states as part of the larger programme of legislative restriction of punitive damages. Put briefly, such a law means that the plaintiff is allowed to take only a proportion of the exemplary damages award, the remainder being allocated to the State or some charity.

2.048 The split recovery measures imposed in US states vary in a number of aspects: the proportion of punitive damages that the State recovers; the manner in which it is recovered; and the range of actions to which split recovery applies. A number of states apply split recovery to all punitive damages awards. Split recovery statutes in Utah and Colorado, for example, apply to all punitive awards, diverting a half and a third respectively of each punitive award to the State. [56] In both of these jurisdictions the State's portion of the award is payable to the central exchequer. In Florida, by contrast, 35 % of a punitive damages award is allocated to a Public Medical Assistance Trust Fund, in cases where the action is one involving personal injury or wrongful death. In all other cases, the same percentage goes to the state exchequer.[57] In Iowa, 75% of a punitive damages award is allocated to a civil reparations trust fund, unless it can be shown that the defendant's outrageous conduct was specifically directed at the plaintiff, in which case, the plaintiff retains the entire award.

2.049 In Oregon and Missouri, statutes provide that legal fees and the plaintiff's expenses should be deducted from a punitive damages award and the remainder of the

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55 See *supra* at paras. 1.15-1.16.

56 Utah Code Ann. 78-18-1(3) (1992); Colo. Rev Stat 13-21-102(4) (1987 & Supp.1994).

57 Fla.Stat. Ann. 768.73 (92) (West Supp.1995).

award split between the plaintiff and the state exchequer.[58] Some states provide for split recovery only in the context of particular torts, where awards of punitive damages are considered to be particularly common, or the quantum especially high. In Georgia, for example, the State claims a portion of punitive awards only in product liability cases[59] and the Kansas split recovery statute applies only to medical malpractice cases.[60]

2.050 These measures have been controversial and have been the subject of constitutional challenges, some of them successful.[61] Split recovery provisions have been challenged on the grounds that they constitute an unfair taking of the plaintiff's property,[62] and on the ground that, since a large sum of money may accrue to the State, there may be a contravention of the US constitutional prohibition on excessive fines, a part of the guarantee of due process.[63] However split recovery provisions remain in force in many US states.

(ii) An Irish split recovery statute? - practical considerations

2.051 If there were to be an amendment of the law to divert a portion of exemplary damages from the plaintiff to some social purpose, then a number of practical, subsidiary questions arise:

(a) Should the whole of the award of exemplary damages or only a proportion of it be so diverted?

(b) If only a proportion, then how should that proportion be calculated?

(c) In so far as exemplary damages should not accrue to the plaintiff, to what fund or purpose should they be applied and how should their application be administered?

(d) What should be the position where the parties settle their litigation, *i.e.* where there is no determination by a court that exemplary damages be awarded, and no assessment of such damages by a court?

(e) How should a split recovery regime for exemplary damages affect the question of lodgements of money in court by defendants?

(f) Would such a system have implications for the award of costs?

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58 Or. Rev. Stat. 18.540 (1) (1991and Supp 1993); Mo. Ann. Stat. 537.675(2) (Verson 1988 and Supp 1994).

59 Ga. Code Ann. 51-12-5.1 (e) (2) (Supp. 1994).

60 Kan. Stat. Ann. 60-3402 (a), (e) (Supp.1992).

61 See Consultation Paper at paras. 5.24-5.28.

62 *McBride v General Motors Corporation* 737 F Supp.1563; *Kirk v Denver Publishing* 818 P.2d. 262; *Janet V Halloran, Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages,* (1995) 26 Loyola U Ch L J 407.

63 Matthew J Klaben, *Split Recovery Statutes: The Interplay of the Takings and Excessive Fines Clauses,* (1994) 80 Cornell Law Review 104.

(g) Would a split recovery system require the joinder of parties who might benefit from the apportionment of the exemplary award?

It is likely that none of the questions raised above constitutes an insurmountable obstacle to a "split recovery" mechanism for exemplary damages. Rather, each of these difficulties may be addressed without undermining the basic justification for a split recovery regime. Below we address each of these practical issues in turn.

(iii) What proportion of the award should be diverted?

2.052 A rule under which no part of an exemplary damages award accrued to the plaintiff, *i.e.* the whole was made available for some public purpose - would be open to the compelling objection that plaintiffs would have no incentive in civil proceedings to initiate and pursue claims for exemplary damages. Thus, there is some public interest in the plaintiff retaining at least a significant portion of an exemplary award, in order to ensure that exemplary damages will be claimed in cases where a defendant has engaged in socially harmful conduct.

2.053 The question then arises, how should this proportion be determined? A number of options would be available. One would be to give the trial judge full discretion. A second would be to provide that a split recovery mechanism would apply to only that proportion of exemplary damages which exceeded a certain limit - either a fixed amount, or perhaps, some proportion of the total amount of compensatory or other damages awarded in the case. Thirdly, and most simply, the split recovery mechanism could be made applicable to a defined percentage of the exemplary damages awards. In the United States these percentages, under the laws of different states of the Union, range from 75% down to 40%. A provision that, for example, 40% of the award should go to the plaintiff and the remainder to a defined public purpose would seem to strike a fair balance between the interests of the plaintiff and the claims of the public interest.

(iv) To whom should the portion of the award be diverted?

2.054 On the question of where the remainder of the award should be allocated, there are several options. One option would be for this to go directly to the central exchequer. However, this approach would be open to particular objection in cases where the award was made against the State or a public authority of some kind.

2.055 Alternatively, a specific public fund could be set up to receive and administer monies representing exemplary damages. Such a fund would have to be independent of the Exchequer and have defined rules and purposes governing its activities. Otherwise, in cases where the State was the defendant, monies received by way of exemplary damages would simply swell the coffers of the Exchequer and the purpose of exemplary damages would be perceived to have been defeated. A more flexible option would be to leave the application of the damages to the discretion of the court, which might be exercised having regard to the nature and circumstances of the case. A set of (indicative) charities or funds could be established by legislation or rule of court to guide the judge. For example, in a case of tort arising out of drunken driving which resulted in the death of an elderly person (for whom the compensatory

damages were relatively slight), the exemplary damages might be split between the plaintiff (the victim's family) and a group campaigning against drunken driving.

(v) Settlements

2.056 There is the additional difficulty of how a split recovery rule would apply to settlements. The English Law Commission has raised this issue, and considered that, in order for a split recovery rule to be effective, it would have to apply to settlements of exemplary damages claims, as well as to actual awards.[64] If the rule did apply to settlements, however, it is possible that the prospect of a portion of an exemplary damages award being diverted away from the plaintiff would distort the terms of the settlements, creating an incentive to settle for larger compensatory and smaller exemplary damages.

2.057 It is indisputable that a split recovery regime would provide an incentive to the parties to settle their litigation on terms which made no specific provision for exemplary damages. In practice, however, this is a situation which would simply have to be accepted.

(vi) Costs and lodgements in court

2.058 The defendant in a civil action (other than a defamation action in which liability is not admitted) may lodge money in court either with or subsequent to his defence. If the award for damages does not exceed the amount of the lodgement, the defendant will normally be entitled to recover from the plaintiff his costs of the action from the date of lodgement. It may be argued that a split recovery regime would complicate the position regarding lodgements and their effect if, for the purpose of determining that effect, one were to separate the damages actually accruing to the plaintiff (including the defined proportion of exemplary damages) from the damages which do not go to the plaintiff. In such a situation it might be argued that the plaintiff would be placed in an invidious position in deciding whether to accept a lodgement or not. Given however that the plaintiff has to undertake the expense (subject to any recovery of costs from the defendant) of pursuing the claim for exemplary damages, it is suggested that there is no compelling reason, for the purposes of calculating the effects of a lodgement, for separating those damages which do accrue to the plaintiff from the proportion of exemplary damages which do not. Such a system would operate as follows: if the decree, including all exemplary and other damages, is sufficient to beat the lodgement, the plaintiff would be entitled to his costs from the defendant under the existing rules; if, on the other hand, it is not sufficient, the existing rule regarding lodgements – that, subject to the judge's discretion, the plaintiff would obtain costs from the defendant only up to the date of lodgement and the defendant would obtain costs incurred thereafter against the plaintiff - would apply.[65]

2.059 A related query concerns the situation in which even with the dispensation suggested in the previous paragraph the plaintiff fails to beat the lodgement, with the result - if the normal rule were followed - that the plaintiff would have to pay the

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[64] See Report No. 247, *op. cit.* fn. 52 at para. 5.50.

[65] Rules of the Superior Courts 1986, Order 22, Rule 6.

defendant's costs as from the date of the lodgement. The question which would arise here is whether, in such a case, the court should be entitled to award the plaintiff costs (whether his own or those recoverable from the plaintiff by the defendant) out of that part of the exemplary damages award which did not accrue to the plaintiff.

2.060 In response to this query, it can be said that a rule which automatically allowed the plaintiff to have resort to the diverted part of the general exemplary damages award for this purpose would seem to be contrary to principle. For if that were permitted, the plaintiff would arguably gain an unfair tactical advantage over the defendant in that he would lose nothing because of an unreasonable refusal to accept a lodgement.

2.061 The correct answer to this problem may be to leave it to the discretion of the court to decide whether, and to what extent, a plaintiff who failed to beat a lodgement would be entitled to have recourse to the proportion of exemplary damages, which otherwise would not have accrued to him or her.

2.062 If matters were treated in the manner just described, it is suggested that all potential issues regarding costs would have been addressed. For, with the sole exception of the plaintiff who failed to beat the lodgement in a case where exemplary damages were awarded (for which a solution is suggested just above), there would be no difference in regard to costs between cases involving exemplary damages and other cases. Therefore, issues of costs and lodgements do not raise any insuperable difficulties to a split recovery mechanism.

(vii) Joinder of parties

2.063 Another question which may arise is whether it may be necessary to join to the action for exemplary damages parties who stand to benefit through the allocation of a portion of the award for a public purpose. If it is clear, for example, that a particular charity will be allocated funds as a result of any exemplary damages award in a tort action, it could be argued that the charity had a sufficient interest in the award of exemplary damages for it to be joined as a party to the action, so that it could make representations supporting an exemplary award. It is not clear, however, whether a potential beneficiary would have an interest sufficiently proximate to be joined in the trial of the action itself; the beneficiary's interest might entitle it solely to be joined as a party at the assessment of damages stage or at the stage when exemplary damages, having been awarded, were being distributed. Clearly, any legislation on split recovery would have to address these issues. Another point which this aspect suggests is that the trial might be distorted by the need to establish facts which would justify the award of exemplary (rather than merely compensatory) damages. To take a simple example, the lung cancer charity which stands to benefit from showing that the defendant tobacco company knew about the causal link between smoking and lung cancer would naturally want to prove that the defendant had actual knowledge. But the plaintiff may have a different interest and may be content to prove only that the defendant ought to have known and so win only compensatory damages, rather than having to burden his case by proving actual knowledge. The addition of another party may also increase costs and complicate procedures, causing lengthier trials.

(viii) Conclusions

2.064 The Commission has given careful consideration to possible split recovery legislation. As has been made clear above, we consider that such a system would be both defensible in principle and workable in practice. However, the Commission considers that legislation in regard to the apportionment of exemplary damages would be premature and, under the prevailing circumstances, is not necessary. It is considered that the tiny number of cases in which, at present, exemplary damages arise, and the relatively modest quantum of exemplary damages awards to date, do not warrant the detailed regulation, administration and cost inherent in any split recovery regime. There is also the possibility that a detailed split recovery regime might place an undue emphasis on exemplary damages within the damages system as it presently functions. Future developments in the law may give rise to a need to apportion exemplary awards as between the plaintiff and funds representing the public interest. However, on balance, the Commission does not, at this time, recommend the enactment of split recovery legislation.

2.065 Clearly, a system that allows for exemplary damages and allocates all of these damages to the plaintiff remains open to the objection that it permits the plaintiff to recover a windfall. However, it is considered that, if adequate restraints on quantum are observed as we have recommended in this Report, the windfall to the plaintiff will not be so significant as to be unacceptable. The considerable risks that may be run by a plaintiff in bringing an action for exemplary damages should also be borne in mind.

2.066 The Commission does not recommend a change in the law regarding the apportionment of exemplary damages awards as between the plaintiff and a public fund, at least in present circumstances.

F. Multiple Plaintiff Cases

2.067 Claims for exemplary damages are peculiarly liable to arise in situations where there are large numbers of plaintiffs. Product liability cases arising from serious injury to large numbers of consumers, or mass disasters or serious accidents, may all result in actions for exemplary damages.

2.068 When several plaintiffs claim exemplary damages against the same defendant as a result of the same wrongful action, particular problems arise. From the point of view of the defendant, there is the risk that several exemplary damages awards will be made against him or her. If these awards are made in separate cases, they may be calculated without any reference to the other exemplary awards against the defendant. The defendant would thus, in effect, be punished several times in respect of the same wrong, which would plainly be unjust.

Furthermore, from the point of view of plaintiffs claiming damages, there is the risk that two or three exemplary awards may so deplete the resources of a defendant that subsequent plaintiffs will be unable to recover even in compensatory damages, let alone receive any share of the exemplary awards. The first plaintiff to win or settle a claim may be disproportionately favoured at the expense of other plaintiffs and potential plaintiffs.

(i) United States

2.070 Punitive damages claims involving large numbers of plaintiffs have been relatively common in the United States, and it is in that jurisdiction that the law has made the most sophisticated efforts to address such situations. Procedural mechanisms such as consolidation of trials, class actions and bifurcation have been employed in an attempt to deal with the complexities of "mass tort" punitive claims.

2.071 The problems associated with mass tort cases were recognised by Judge Friendly in the early case of *Roginsky v Richardson-Merrell Inc*,[66] where he observed that:

> "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering ... We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill." [67]

The need to avoid "overkill" and to ensure a fair apportionment of damages between all plaintiffs has preoccupied the courts in many subsequent cases. However, no single mechanism has been entirely satisfactory in addressing these problems.

2.072 The most common means of dealing with a large number of claims where it appears that there are similar allegations against the same defendants is to consolidate the claims. For example, cases against asbestos manufacturers, which have provided some of the biggest mass trials in the US, have often been consolidated or co-ordinated at the preliminary stage of the proceedings. A single judge may be appointed to co-ordinate the pre-trial proceedings in all the cases. These measures are taken in the interests of consistency, efficiency and judicial economy: they obviate the need for the testimony of the same witnesses to be re-heard in several cases. Where there are a very large number of cases, consolidation can avoid serious congestion of the courts, and allows for claims to be settled quickly. However, consolidating a large number of cases does mean that the peculiarities of individual claims may have to be left to one side to be decided in future proceedings; the court will concentrate on what is common to the cases before it.

2.073 One criticism that has been made of the consolidation of claims into mass trials, however, is that individual plaintiffs lose control of their cases.[68] The great complexity of such large trials has also given rise to the fear of legal errors, with the consequent possibility of a ruling for a retrial on appeal. Although this may be seen as unsatisfactory, it should be noted that, if there is an award against the defendant in the first consolidated case, it is more likely that the defendant will be induced to settle in respect of any outstanding issues. Consolidation of cases has the further advantage

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66 378 F2d 832.

67 *Ibid.* at p.839.

68 Roger H Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, (1989) U Ill L Rev 69. See also Mark C Weber, *Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues*, (1998) 48 De Paul Law Rev 463.

of consistency: there is less likelihood of discrepancies between the findings and awards made to plaintiffs with similar claims.

2.074 In many consolidated actions in the US, the courts will attempt to manage the complexity of the case by trying issues separately, leaving some issues to non-consolidated proceedings (a technique known as 'bifurcation'). The trial judge has a discretion as to whether to order the separate trial of any claim or issue and to decide the manner in which the trial will be split.[69] Where issues of liability are tried separately from the issue of damages, there may be disadvantages in terms of justice, convenience and cost.

2.075 The second tool used by the US courts to deal with multiple plaintiff cases is the class action, as provided for in Rule 23 of the *US Federal Rules of Procedure*. Class actions are generally used where there are very large numbers of plaintiffs or potential plaintiffs, more than could easily be accommodated by a joinder of actions.[70] Under this proceeding, the court can certify an action to be a class action. This means that the similar claims before the court are subsumed into a single case, and a small number of plaintiffs are taken as representative of all of the plaintiffs for the purposes of the trial and are authorised to sue on their behalf. In order for a court to certify that a class exists, it must be established that the plaintiffs who will form the class fulfil four criteria: that the class is so numerous that the joinder of the proceedings would be impractical; that there are questions of fact or of law common to the plaintiffs in the class; that the claims of the representative plaintiffs are typical of the claims of the plaintiffs in the class; and that the representative parties will fairly and adequately protect the interests of the class. There is a further requirement that notice be given to potential plaintiffs who may wish to be included in the class action. Potential plaintiffs must be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[71] In the case of certain class actions, under Rule 23(b)(1)(B), a class action, once it has been certified, is mandatory; that is to say, all plaintiffs and potential plaintiffs coming within the certified class are bound by the result of that case.

2.076 The certification of class actions in "mass tort" cases is regarded as unsatisfactory by many commentators in the US. It is argued that a class action is inappropriate in many types of mass tort cases, for example, where an accident has caused widely varying personal injuries to a large number of plaintiffs. The defendant's liability and culpability may vary widely as regards different plaintiffs.[72] In cases where there are very large numbers of plaintiffs, the certification of a class action may, rather than settling the claims more efficiently, result in highly complex

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69 Federal Rule of Civil Procedure 42 (b) provides that "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim ... or of any separate issue or of any number of claims...".

70 This is accepted to be the case where there are more than 40 plaintiffs: see Ryan Kathleen Roth, *Mass Tort Malignancy: In the Search for a Cure, Courts Should Continue to Certify Mandatory Settlement only Class Actions*, (1999) 79 BUL Rev 577.

71 Rule 23 (c) (2) of US Federal Rules of Procedure.

72 Richard A Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control,* (1983) LII Ford L R 37 at p.69.

and cumbersome proceedings, which will delay the recovery of even compensatory damages.[73]

2.077 Another solution suggested in the United States[74] to the problem of mass tort exemplary awards is that a single award of exemplary damages should be made only after all claims for compensatory damages have been settled. This would ensure that all plaintiffs will at least receive the compensatory damages to which they are entitled, and would prevent the defendant being bankrupted by an early exemplary award before all compensatory claims had been settled. Practical problems arise here, however: it will of course not be obvious, in many situations, when or if all compensatory claims have been processed. In a large products liability case, for example, new potential plaintiffs may come to light over a long period.

2.078 In the US case of *Roginsky v Richardson Merrill*,[75] it was further suggested by the court that a single award of punitive damages could be made and then held by the court for later distribution amongst all successful plaintiffs.

(ii) English law

2.079 In recent years, the English courts have developed mechanisms for the regulation of group actions, where a large number of plaintiffs claim in damages against a single defendant.[76] *AB v South West Water Services*[77] was a group action involving 180 plaintiffs, claiming in exemplary damages against a single defendant. In that case, it was held by the English Court of Appeal that the large numbers of plaintiffs involved in the case precluded an exemplary award. Stuart-Smith LJ in his judgment referred to the great difficulties involved in multiple plaintiff exemplary damages cases:

> "There is however one aspect of the case which in my view makes it peculiarly unsuitable for an award of exemplary damages, ... and that is the number of plaintiffs. Unless all their claims are quantified by the court at the same time, how is the court to fix and apportion the punitive element of the damages? Should the court fix a global sum of £x and divide it by 180, equally among all the plaintiffs? Or should it be divided according to the gravity of the personal injury suffered? Some plaintiffs may have been affected by the alleged oppressive, arbitrary, arrogant and high handed behaviour, others not. If the assessment is made separately at different times for different plaintiffs, how is the court to know that the overall punishment is appropriate?"[78]

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73 See for example discussion of the *Dalkon Shield* case in the US, *ibid.*

74 See Consultation Paper at para. 5.31.

75 378 F 2d 832, 839-40 n.11.

76 See the litigation relating to the drug Benzodiazopene: *AB and Others v John Wyeth and Brothers Ltd*, Court Of Appeal (Civil Division) 13 December 1996; also *Ward v Guinness Mahon & Co Ltd* [1996] 4 All ER 112. See generally Jane Winter, *Acting for Classes: Strategies for Representing Group Interests*, (1993) 44 NILQ 276.

77 [1993] 1 All ER 609.

78 *Ibid.* at p.624.

2.080 The courts have also, on occasion, referred to the problems associated with multiple plaintiff exemplary damages cases as an argument against the award of exemplary damages at all. In *Riches v Newsgroup Newspapers*[79] Stevenson LJ thought that the difficulty of apportionment between multiple plaintiffs "furnishe[d] yet another complication engendered by the survival of the right to exemplary damages and another argument in favour of abolishing the right."[80]

2.081 The option for reform favoured by the English Law Commission[81] is as follows: that a single punitive damages award could be made in the first case that comes to court; that the whole of this should be awarded to the plaintiff in that case, and that subsequent plaintiffs could then recover in compensatory damages only. This approach has the virtue of simplicity, and may be further justified on the grounds that the plaintiff taking the initial case has to go to a great deal of trouble, and take risks, especially financial risks, to bring the case to court. Once the first plaintiff has established liability, plaintiffs who take similar subsequent cases can 'piggyback' by relying on the facts established in the initial case. Because of the additional stress, work and risk involved, it is argued, the first plaintiff is most deserving of the exemplary damages award.

2.082 A further argument reinforcing a 'first past the post' approach is the 'windfall' argument mentioned already.[82] An award of exemplary damages is made with reference to the conduct of the defendant, to punish and deter that conduct. It does not refer to the plaintiff's need for compensation or retribution. Therefore, the fact that one plaintiff receives the exemplary damages windfall and others do not is incidental.[83] The single exemplary damages award only impinges on the rights of subsequent plaintiffs where it bankrupts the defendant and thus prevents the recovery of further compensatory awards.

2.083 The English Law Commission also points out that the apparent harshness of the rule can be mitigated to some extent if efforts are made to consolidate proceedings as much as possible by joining other plaintiffs in the first action.[84] The Law Commission notes that courts retain a discretion as to whether to award exemplary damages. Therefore, if the court were concerned that an award of exemplary damages in the case before it would deprive a larger number of plaintiffs in a subsequent case of an exemplary award, it could simply exercise its discretion and refuse to award exemplary damages.[85]

2.084. The English Law Commission also recommended a statutory provision to state that:

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79 [1985] 2 All ER 845.

80 *Ibid.* at p.856.

81 See the English Law Reform Commission, *Report on Aggravated, Exemplary and Restitutionary Damages*, *op. cit.* fn. 52 at paras. 5.164 - 5.175.

82 See *supra* at paras. 1.15-1.16.

83 English Law Reform Commission, *op. cit.* fn. 52 at paras. 5.177-5.178.

84 *Ibid.* at para. 5.183.

85 *Ibid.* at para. 5.185.

"if the court intends to award punitive damages to two or more multiple plaintiffs in the same proceedings, the aggregate amount awarded must be such that, while it may properly take account of the fact that the defendant has deliberately and outrageously disregarded the rights of more than one person, it does not punish the defendant excessively for his conduct."[86]

(iii) Irish law

2.085 Multiple plaintiff cases are not the subject of any detailed regulation in Irish law.[87] However, issues relating to multiple plaintiffs and exemplary damages have arisen before the courts. In *Conway v INTO*,[88] there were 70 claims against the defendant in all. In the High Court, Barron J managed the number of claims by awarding a flat amount of £1,500 damages to each of the plaintiffs. He noted that this made a total of about £105,000. Barron J stated: "in my view the exemplary damages should be measured in an amount to meet the wrongdoing rather than to benefit the wronged. For this reason I would measure damages under this head at £1,500...".[89]

2.086 It is also interesting to note the case of *Tate v Minister for Social Welfare and the Attorney General*,[90] where Carroll J refused to impose exemplary damages. In view of the very large sums involved as compensatory damages, she did not add any element of exemplary damages. This is a rather strange decision: as indicated in the *Conway* case, the focus of exemplary damage should be the "wrong doing rather that the benefit to the wronged".

(iv) Options for reform

2.087 One option for reform, which was considered in the Consultation Paper, is the possibility that a single award of exemplary damages, made in the first case to come to court, should be held in a central fund and subsequently either used to benefit some cause related to the case, such as healthcare or research, or divided between all successful plaintiffs, once all compensatory claims had been settled. The first possibility mentioned above is a form of split recovery, which we do not recommend for the reasons stated above.[91]

2.088 The second possibility considered is of an exemplary award held in a fund and then distributed equally amongst all successful plaintiffs. The defendant's behaviour, as disclosed in the earliest case, may merit an award of some exemplary damages. Facts that come to light in subsequent cases may disclose even more reprehensible behaviour which would justify a larger award. In such cases, there would have to be a judicial discretion to award some additional exemplary damages,

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86 *Ibid.* at para. 5.169.

87 The absence of group or class actions in Irish law is contrasted with the English and US systems in Susan V Lennox, *Toxic Torts Now a Reality in Ireland*, (1997) 15 ILT 236.

88 *Op. cit.* fn. 10.

89 In addition to compensatory damages. See Appendix 1.

90 [1995] 1 ILRM 507 at p.530. See Appendix 1.

91 Paras. 2.064-2.066.

taking into account the first exemplary award made. These "top-up" awards would also be paid into the central fund.

2.089 Difficulties arise with this proposal, however. It may not be clear when all the outstanding claims against the defendant have been brought to court, so that the exemplary award may be distributed. In mass tort cases, for example in cases involving product liability or in situations similar to the army deafness litigation, many cases may arise over an extended period, and the processing of all the litigation may take even longer. The distribution of the exemplary award may have to be deferred for many years, in order to ensure that all those injured by the defendant can benefit from it equally. If the approach is to be adopted whereby a single exemplary award is made and then placed in a fund to be distributed amongst all plaintiffs, several additional questions arise. How is it determined which cases are sufficiently similar to entitle the plaintiff to a portion of the award? Does the portion of the damages allocated to each plaintiff depend on the particular degree of malice shown towards him or her by the defendant? Would it be more efficient to join the actions at least in some cases where there were a relatively manageable number of plaintiffs? Clearly, the regulation of multiple plaintiff cases, in particular where there is a possibility of exemplary damages, is a complex and difficult matter, which would cause expensive administrative problems, particularly in respect of keeping track of costs.

2.090 The Commission has also considered the possibility of deferring the assessment of exemplary damages until all the cases against the defendant have been heard and all compensatory damages have been assessed. Under this proposal, where the judge considered that there were or might be multiple plaintiffs, the issue as to whether exemplary damages should be awarded, and their amount, would be adjourned until, in the opinion of the court, it was possible to assess to its reasonable satisfaction the scope of the claims which were likely to arise. The court would have to decide when to 'close' the issue even if this involved a possibility that further, then unforeseen, claims might arise. This system might seem to provide a workable solution to multiple plaintiff cases. Once again, however, regulation of multiple plaintiff cases in this way would be difficult, complex and costly.

2.091 In multiple plaintiff cases, different solutions may be required depending on the number of potential claimants against a defendant, the nature of the claims, and the likely quantum of damages. In some cases, which do not involve very large numbers of plaintiffs, existing procedures may suffice. Where there is a relatively small number of plaintiffs involved, it would be most appropriate that the cases be consolidated under the joinder of actions procedures already in place under the Rules of the Superior Courts.[92] Where actions are joined and exemplary damages are awarded to all or several of the plaintiffs, the principle of moderation in the assessment of quantum, as it is accepted by the Irish courts, should of course apply as it does in individual cases. In this context, in principle, the sum of the exemplary awards made should not be unduly harsh. It will be for the individual judge in the case to estimate an appropriate sum, perhaps taking into account any likely future claims against the defendant in respect of the same wrong.

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92 Order 49, Rule 5; Order 15, Rules 1, 9, 14, 15; Order 6, Rule 1(12).

2.092 The Commission emphasises that it does not favour the 'first-past-the-post' system, recommended by the English Law Reform Commission,[93] whereby a single award is made only to the first plaintiff whose case comes to court; the inequities as between plaintiffs, which this system would create, make it unacceptable.

2.093 The Commission recognises that, in multiple plaintiff cases, particular problems may arise as regards exemplary damages. A claim for exemplary damages in a situation where there is a large number of plaintiffs or potential plaintiffs further complicates an already involved situation. The question of how multiple plaintiff cases should be regulated, however, is a broad one, and raises issues besides that of exemplary damages. In fact, the question of how multiple plaintiff cases should be regulated, and of the possible introduction of class action or group action structures, deserves detailed and separate consideration, of more depth and range than is possible in the context of this Report. We do, however, hope to return to this issue in another report.

2.094 In taking this approach, the Commission is influenced by the lack, to date, of experience of "mass tort" litigation involving exemplary damages in this jurisdiction. Where there has been the potential for such an action, for example in relation to the Hepatitis C claims, or in the army deafness litigation, the tendency in this jurisdiction has been either to proceed solely by way of compensatory damages, or, as with Hepatitis C, to establish a separate tribunal.[94] It may well be that multiple plaintiff actions that involve exemplary damages will arise in the future. At this point, however, specific legislative provision for such actions may be premature.

2.095 In conclusion, the Commission does not, at this stage, recommend legislation to regulate the award of exemplary damages in cases where there are multiple plaintiffs.

G. Amendments to the Civil Liability Act, 1961

2.096 The *Civil Liability Act, 1961* contains the only general legislative provisions dealing with exemplary and aggravated damages. The Act excludes the award of exemplary damages in survivor actions and in actions for wrongful death. It also regulates the award of exemplary and aggravated damages in cases where there are concurrent tortfeasors, but permits the award of exemplary damages where the defendant is deceased. In any new legislation concerning exemplary damages, several amendments to the 1961 Act may be called for. Certain of these are discussed below. Recommendations for amendment of the Act as they relate to aggravated damages are also referred to in Chapter 5.[95]

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93 See the Report of the English Law Commission, *op. cit.* fn. 52 at paras. 5.162 – 5.163.

94 *Hepatitis C Compensation Tribunal Act*, 1997.

95 *Infra* at paras. 5.27-5.36.

(i) *Causes of action subsisting against deceased persons (section 8 of the* Civil Liability Act, 1961)

2.097 In as much as it impacts on the type of damages which may be recovered, the present law, contained in section 8 of the *Civil Liability Act, 1961*, allows for the survival of an exemplary damages claim, as well as an aggravated damages claim, against the estate of a deceased wrongdoer. Section 8(1) provides as follows:

> "On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) subsisting against him shall survive against his estate."

2.098 The law on this point is open to the criticism that it punishes the defendant's heirs who are likely to have had no part in the wrongdoing. In such circumstances, it may be argued, the object of an exemplary award, punishment and deterrence, cannot be fulfilled. An analogy can be made with a criminal fine which would not be imposed against the estate of a wrongdoer. Based on these arguments, the English Law Commission has recommended that claims for exemplary damages should not survive against the estate of the wrongdoer.[96]

2.099 However, it should also be borne in mind that the aim of an exemplary damages award is not only to punish and deter the defendant, but also to deter others from engaging in similar wrongs in the future. The Commission considers that, in the interests of ensuring that the deterrent impact of exemplary damages is upheld, an exemplary award should continue to be available against a wrongdoer's estate. Such awards would be rare not least because the court would be aware of the need to balance the usefulness of deterrence against the pecuniary needs of the estate.

2.100 However, there is one argument in favour of the survival of an exemplary damages which we do not find cogent. This is the claim that, had the award been made before the defendant's death, his estate would have been diminished and so his heirs would have suffered to the same extent. This, of course, views the amount of the defendant's estate as static. But, in fact the estate might just as well have been diminished by some other cause, for instance the defendant's excessive spending.

2.101 The Commission recommends that section 8 of the Civil Liability Act, 1961, *by which exemplary damages are available against the estate of a deceased wrongdoer, should be retained.*

(ii) *Survivor actions (section 7(1) of the* Civil Liability Act, 1961)

2.102 Section 7(1) of the Act states; "On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) vested in him shall survive for the benefit of his estate."

2.103 Section 7(2) of the Act states; "Where, by virtue of subsection (1) of this section a cause of action survives for the benefit of the estate of a deceased person, the

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[96] English Law Commission, *Report on Aggravated, Exemplary and Restitutionary Damages*, op. cit. fn. 52 at paras. 5. 276-5.278.

damages recoverable for the benefit of the estate of that person shall not include exemplary damages...".[97]

2.104 There would seem to be no principled justification for the exclusion of exemplary damages in cases where the person injured by the defendant's wrong has died. Since the purpose of exemplary damages is to deter and punish the defendant, and not to compensate, the fact that the damages will accrue to the plaintiff's estate rather than to the plaintiff him or herself is not of great importance. Indeed, it would be undesirable to relieve a defendant of the burden of an exemplary damages award, merely on the fortuitous grounds that the plaintiff was now deceased.[98]

2.105 The Commission recommends that section 7(2) of the Civil Liability Act, 1961 *should be amended to allow for the recovery of exemplary damages where a cause of action survives for the benefit of the estate of a deceased person.*

(iii) Wrongful death (sections 48 and 49 of the Civil Liability Act, 1961*)*

2.106 Section 48(1) of the Act states: "Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages of the benefit of the dependants of the deceased."

2.107 But by section 49(1)(a) of the Act, in wrongful death cases exemplary damages are excluded, so that they cannot be recovered by the dependants of the deceased. Although the section does not specifically exclude exemplary damages, it confines the damages available in wrongful death cases to damages "proportioned to the injury resulting from the death to each of the dependants"[99] and to a fixed sum for mental distress, now £20,000.[100]

2.108 As in the case of survivor actions, there seems to be no sound reason in principle to exclude exemplary damages in cases of wrongful death. Since the injury caused is obviously of the utmost gravity, and could involve serious misconduct, exemplary damages might well be appropriate.

2.109 Nevertheless, the practice in many other jurisdictions mirrors the present Irish legislation in excluding exemplary damages in wrongful death cases. Much of the legislation in place in common law jurisdictions derives from *Lord Campbell's Act*, a British Act of 1846, now superseded in English law. *Lord Campbell's Act*, in allowing claims in damages for wrongful death on the part of certain relatives of the deceased, set out for the first time an exception to the common law rule that such damages were not available. The Act was interpreted by the early case law to restrict

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97 See WHITE, IRISH LAW OF DAMAGES at p.440.

98 For this reason, the English Law Commission, in its *Report on Aggravated, Exemplary and Restitutionary Damages, op. cit.* fn. 52 at para. 5.275 recommended that the equivalent provision of English law, section 1(2)(a)(i) of the *Law Reform (Miscellaneous Provisions) Act, 1934*, should be repealed so as to allow claims for punitive damages to survive for the benefit of the estate of a deceased victim.

99 Section 49(1)(a)(i).

100 *The Civil Liability Act, 1996* changed the figure from £7,500 to £20,000.

recovery for wrongful death to pecuniary loss, and this model has been followed by many common law legislatures.[101] The present English Act, the *Fatal Accidents Act, 1976* limits damages for wrongful death to pecuniary loss in most cases.[102] Most Australian, US, and Canadian jurisdictions have also excluded exemplary damages for wrongful death.[103]

2.110 The exclusion of exemplary damages in wrongful death actions is a result more of historical accident than of principle. As a matter of principle, no difference should be made between a defendant whose actions have resulted in injury to another person and a defendant whose actions have resulted in death. Legislation should therefore provide that the monetary limit on damages for mental distress contained in section 49 of the Civil Liability Act, 1961, *does not preclude the award of exemplary damages in wrongful death cases. The Commission recommends that section 49 of the* Civil Liability Act, 1961 *should be amended to allow for the recovery of exemplary damages in wrongful death cases.*

(iv) Concurrent Tortfeasors (Section 14 of the Civil Liability Act, 1961*)*

2.111 Under section 14 of the *Civil Liability Act, 1961*; "Where the court would be prepared to award punitive damages against one of concurrent tortfeasors, punitive damages shall not be awarded against another of such tortfeasors merely because he is a concurrent tortfeasor, but a judgment for an additional sum by way of punitive damages may be given against the first-mentioned." It is clear that given the way in which we have defined exemplary damages as punishment for wrong done by the defendant, they should plainly not be visited on an innocent tortfeasor merely because his/her concurrent tortfeasor had behaved in such a way as to warrant such damages.

2.112 The Commission recommends that the provision requires no change.

H. Amendments to the Companies Act, 1963

2.113 Section 285(2)(f) of the *Companies Act, 1963* states that compensation and damages for uninsured accidents to employees are to be treated as priority debts[104] if a company goes into liquidation. Now damages presumably includes those of an exemplary, aggravated and restitutionary nature. This means that at present for a large number of torts, all these heads of damage are preferential payments. There is obviously a case for going the whole hog and treating all exemplary damages in respect of whatever torts in the same way, since in each case the purpose is to deter

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101 See WADDAMS, THE LAW OF DAMAGES, (3rd ed.) at para. 6.20.

102 Consultation Paper at para. 7.58.

103 Consultation Paper at para. 7.59. In Canada, several statutes expressly state that damages for wrongful death are limited to pecuniary loss. For a discussion of the Canadian law on damages for Wrongful Death, see S M WADDAMS, THE LAW OF DAMAGES (3rd ed.), Chapter 6. Although the majority of US states restrict damages for wrongful death to pecuniary loss, there is legislation also modeled on *Lord Campbell's Act*, in Alabama, which identifies all damages awards for wrongful death as punitive in nature, assessed according to the degree of the defendant's wrongdoing: See SCHLUETER AND REDDEN, PUNITIVE DAMAGES (3rd ed.) s.9. 9A.

104 Under section 12 of the *Unfair Dismissals Act,* 1977, claims for unfair dismissal are also to be given priority.

other defendants from egregious conduct. But against this there is the fact that neither fines nor competition and environmental law penalties have been made preferential payments[105] (and we would not recommend that they should). Should exemplary damages be accorded a higher legal status especially bearing in mind that the more preferential payments that are created, the less funds are left for ordinary creditors? This is a finely balanced and somewhat academic area. In the end we came down in favour of not changing the existing law by stating that priority ought not apply to exemplary, aggravated or restitutionary damages.

2.114 The Commission recommends that section 285(2)(f) of the Companies Act, 1963 *should be retained.*

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105 Under section 275 of the *Companies Act, 1963*, " Subject to the provisions of this Act as to preferential payments the property of a company, shall, on its winding up, be applied in satisfaction of its liabilities, pari passu...".

CHAPTER 3: INCIDENTAL AND PRACTICAL QUESTIONS

A. Relationship with the Criminal Law

3.01 The co-existence of measures of both civil and criminal punishment may, if unregulated, expose wrongdoers to the risk of double punishment. There is naturally some overlap in the scope of the criminal law and exemplary damages, with many of the cases in which exemplary damages are recoverable also giving rise to the possibility of criminal prosecutions. Where that occurs, it is vital for the protection of defendants that some means of co-ordination exists between dealing with the civil case and dealing with the prosecution.

3.02 Some of the questions that arise in this context include the following. Should exemplary damages be awarded where a defendant has already been subjected to a criminal fine, or to imprisonment, or to some other form of criminal punishment, in respect of the same wrong? Should the mere fact of conviction on a criminal charge mean that exemplary damages are not recoverable? Again, if there has been a criminal trial which has resulted in an acquittal, should the possibility of awarding exemplary damages (based on the lower civil burden of proof) still be available to a civil court?

3.03 Situations may also arise where the civil case comes to trial before the criminal. Such cases should be rare, since normal practice in the area of civil – criminal overlap (irrespective of whether exemplary damages are involved) would be to apply for a stay on the civil proceedings pending the conclusion of the criminal case. There may be cases, however, where there is merely the possibility of a criminal prosecution in the future. In such a case, should the court be prevented from awarding exemplary damages? Should the civil proceedings be stayed until the outcome of the prosecution is known? If the award of exemplary damages is made ahead of the criminal case, should the award be taken into account in the imposition of a criminal penalty?

3.04 There is some precedent for co-ordinating criminal and civil measures in Irish law. The *Criminal Justice Act, 1993* allows, in section 9, for a compensation order made in a criminal case to be adjusted where there is an award of compensatory damages made in a parallel civil case. Legislation in respect of exemplary damages could include a similar provision, which would allow criminal fines or other penalties to be taken into account in the assessment of exemplary damages. There is an argument, of course, for a more stringent measure than this to be put in place, and for exemplary damages to be precluded completely where there has been a prior criminal penalty. To allow for exemplary damages to be awarded following a criminal sentence is to allow the court in the civil case to 'second guess' the judgment of the court in the criminal case, or to impliedly criticise and undermine the criminal penalties set out in statute. To award exemplary damages where there has already been a fine suggests that the fine was inadequate or unduly lenient. Once a criminal

penalty has been imposed, it can be assumed, at least in the majority of cases, that any punitive or deterrent objectives have been fulfilled.[1]

3.05 The contrary argument is that where the wrongdoer may have been acquitted on a technicality, or where there has been a plea of guilty on a lesser charge, possibly as a result of an agreement with the prosecution because of some difficulty in establishing the full onus of proof on the more serious charge, the full heinousness of the deed may not be revealed. Furthermore, many statutory offences (particularly those arising under the *European Communities Act*), for some of which there may be a right of action in tort for breach of statutory duty , provide only for summary prosecution. In such cases, imprisonment is not always provided for and even where it is, it may not be appropriate; the fine is considered to be constitutionally limited[2] to £1,500. Again, in certain areas, an old statute (for instance in the public health field) may provide for a maximum fine of £5. In these circumstances, a criminal conviction may not justify the exclusion of an award of exemplary damages in a civil action. Of course, the result of a criminal prosecution and the penalty imposed therefore should always be taken into account by a judge in the subsequent civil action.

3.06 Different issues arise where a defendant has undergone a criminal trial in respect of the wrong that is before the court and has been acquitted. In such a case, the lower burden of proof applicable in a civil case could be adduced as a reason to allow the award of exemplary damages. On the other hand, where a defendant has already been acquitted, the subsequent award of exemplary damages may raise concerns as to infringement of the principle of *autrefois acquit.*

3.07 One option would be to leave it to the discretion of the court whether to award exemplary damages where there has been a criminal trial or penalty imposed. This would allow the court to award exemplary damages in exceptional circumstances, for example, where the defendant had been acquitted on a technicality.

3.08 A strict rule, excluding exemplary damages completely where a fine has been imposed, would not adequately deal with the situation where, for example, a wealthy corporation had had a fine imposed on it in respect of pollution which had caused injury through illness to a large number of people. The fine may have a negligible impact on the corporation; exemplary damages assessed in favour of the plaintiffs could be calculated to have a more appropriate deterrent effect.

3.09 Care should be taken to avoid anomalous situations where conduct that was not criminal might, in effect, be the subject of a greater penalty than criminal conduct, or where there will be a lighter sanction in cases where there is a prosecution than in cases where there is not. This situation would arise, for example, where a small standard fine had been imposed on a wealthy corporation, but where another corporation, which had engaged in the same conduct, had not been subject to a prosecution. Since the second corporation had not been subjected to a criminal

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1 It is suggested, however, that since the award of exemplary damages is not to be regarded as the equivalent of a conviction (on which, see paras. 1.20-1.24), no question of *autrefois acquit* arises and therefore, there would be no possibility of unconstitutionality.

2 By Articles, 38.2 and 38.5 and the definition given by the judges to the category of 'minor offences', which are the only offences which do not carry a right to jury trial . See further KELLY, THE IRISH CONSTITUTION, (3rd ed.), Chapter 8.

penalty, it might be vulnerable to an award of exemplary damages much larger than the fine imposed on the first company. In such circumstances, if a decision is taken not to prosecute, the door might be opened to a more substantial penalty against the wrongdoer.

(i) Australian and New Zealand law

3.10 The recent Australian case of *Gray v Motor Accident Commission*[3] contains some interesting dicta on the interaction of exemplary damages with the criminal law. In *Gray*, the tortfeasor had deliberately and maliciously driven his car at the plaintiff, and had been sentenced to a term of imprisonment in respect of this in earlier criminal proceedings. The High Court held that "substantial punishment" of this type in respect of the same wrong was a bar to the imposition of exemplary damages. The Court found that, where punishment had already been imposed through the criminal law, "the purposes for the awarding of exemplary damages have been wholly met" and there was no occasion for their award. The Court was also of the view that to award exemplary damages in such circumstances would be to impose double punishment. It held that it would be "a most unusual case in which it was open to a civil court to conclude that the outcome of ... criminal proceedings did not take sufficient account of the need to punish the offender and deter others from like conduct." The court did, however, state, *obiter*, that it was doubtful whether "the mere possibility of later criminal prosecution is reason enough not to award exemplary damages in a proper case".

3.11 This issue has also been the subject of recent developments in New Zealand law. The issue was debated in the New Zealand courts in two cases which were ultimately referred to the Privy Council: *W v W* and *J v Bell*.[4] The Privy Council considered whether in cases where there had already been a criminal prosecution, there was any bar to a subsequent civil claim for exemplary damages. In one of the cases before the Privy Council, the defendant had been acquitted, and in the other, convicted. The Privy Council held that, in both cases, awards of exemplary damages were excluded, because of the risk of double punishment where a claim for exemplary damages followed a criminal prosecution. Lord Hoffman pointed out that, where there had been a criminal sanction, "to award exemplary damages at all would imply that the civil court thought that the criminal punishment had been inadequate".

3.12 This decision has now been overtaken by legislation, however. The New Zealand *Accident Insurance Act, 1998*[5] makes provision for the award of exemplary damages where there has already been a criminal trial, or where a criminal case is pending. It states, in section 396:

> "(1) Nothing in this Act, and no rule of law, prevents any person from bringing proceedings in any court in New Zealand for exemplary damages for conduct by the defendant that has resulted in
>
> (a) personal injury covered by this Act; or

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3 158 ALR 485.

4 Unreported, 19 January 1999.

5 Which came into force before the Privy Council's judgment but after the hearing of the case.

(b) personal injury covered by the former Acts.

(2) The court may make an award of exemplary damages for conduct of the kind described in subsection (1) even though:

(a) the defendant has been charged with, and acquitted or convicted of, an offence involving the conduct concerned in the claim for exemplary damages; or
(b) the defendant has been charged with such an offence, and has been discharged without conviction under section 19 of the *Criminal Justice Act, 1985* or convicted and discharged under section 20 of that Act; or
(c) the defendant has been charged with such an offence, and, at the time at which the court is making its decision on the claim for exemplary damages, the charge has not been dealt with; or
(d) the defendant has not, at the time at which the court is making its decision on the claim for exemplary damages, been charged with such an offence; or
(e) the limitation period for bringing a charge for such an offence has expired.

(3) In determining whether to award exemplary damages and, if they are to be awarded, the amount of them, the court may have regard to:

(a) whether a penalty has been imposed on the defendant for an offence involving the conduct concerned in the claim for exemplary damages; and
(b) if so, the nature of the penalty."

This provision is, of course, open to the objection raised by the Privy Council that it allows for double punishment in respect of the same wrong.

(ii) English law

3.13 The English courts have also considered this issue. In *Archer v Brown*,[6] Peter Pain J refused to make an award of exemplary damages where there had already been a criminal conviction. He found that:

> "exemplary damages are meant to punish and the defendant has been punished. Even if [the defendant] wins his appeal he will have spent a considerable time in gaol....I rest my decision on the basic principle that a man should not be punished twice for the same offence. Since he has undoubtedly been punished, I should not enrich the plaintiff by punishing the defendant again".

Archer v Brown may be interpreted as an exercise of a judicial discretion not to award exemplary damages where there has been criminal punishment; this discretion might

[6] [1985] 1 QB 401.

perhaps be dependant on the severity of the punishment. In *AB v South West Water Services Ltd*[7] the defendants had already been convicted and fined in respect of the wrong at issue in the civil proceedings. Although the case did not turn on this point, since the court found that exemplary damages were barred for other reasons, the prior fine and conviction was held to be a further persuasive factor against the award of exemplary damages.[8]

3.14 By way of comparison, it is interesting to note that the English courts have also considered the situation where there have been prior disciplinary proceedings against the defendant in respect of the wrong at issue. In *Thompson v MPC*,[9] the Court of Appeal considered whether it would be appropriate to take the availability of disciplinary proceedings into account, where such proceedings had not yet been taken. It was held that potential disciplinary proceedings should affect the award of exemplary damages only in limited circumstances:

> "where there is clear evidence that such proceedings are intended to be taken in the event of liability being established and...there is at least a strong possibility of the proceedings succeeding."

(iii) Conclusions

3.15 *The Commission recommends that exemplary damages should not be excluded in cases where there has been a prior imposition of a criminal penalty in respect of a crime arising from the same conduct as the civil wrong concerned. Exemplary damages should, however, only be awarded in such cases in exceptional circumstances and the prior criminal penalty and any restitution order should be taken into account in the assessment of the quantum.*

3.16 The Commission recommends that, where a criminal prosecution is pending or possible or where a defendant has been acquitted in criminal proceedings in respect of a crime arising out of the same conduct as that before the court in the civil case, the availability of exemplary damages should be at the discretion of the court.

B. Vicarious Liability

3.17 It is more problematic to justify exemplary damages where liability is vicarious than where they are imposed directly on the wrongdoer. The justification for vicarious liability in respect of compensatory damages, that it is a means of ensuring proper compensation of the plaintiff, does not apply in relation to exemplary damages.

3.18 An award of exemplary damages against a vicariously liable employer or other principal does, however, have some justifiable purpose, that of deterrence. It operates as a deterrent measure against the employer and other employers,

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7 [1993] 1 All ER 609.

8 *Ibid.* at p.624, *per* Stuart Smith LJ.

9 [1997] 3 WLR 403.

encouraging greater supervision of employees and better training. Wrongs by employees may, in many cases, be due to some laxity on the part of the employer.

3.19 Retention of the normal rules of vicarious liability in respect of exemplary damages has the merit of ensuring that someone is held to account for outrageous or highly damaging conduct; without such liability, it is possible that there would be some misconduct, especially in large organisations, for which no one would be held liable. Moreover, the employer might otherwise be encouraged to place all blame on the employee, thus excluding himself from blame.

3.20 One possibility, if retention of the normal rules of vicarious liability is considered undesirable, is that, since deterrence is the sole justification for an award in these circumstances, exemplary damages should only be available against an employer or other principal where he or she has exhibited some recklessness in relation to the actions of the agent, or has authorised the misconduct in some way. This is the proposal put forward in the *US Restatement of Torts*.[10]

3.21 Thus, the principal options are:

1. To apply the same rules of vicarious liability to liability for exemplary damages as apply to compensatory damages;
2. To exclude vicarious liability for exemplary damages; or
3. To provide for vicarious liability on the basis of an intermediate standard which would require some measure of fault, complicity or recklessness on the part of the principal.

3.22 The majority of common law jurisdictions apply the normal rules of vicarious liability to cases involving exemplary damages. In *Racz v Home Office*[11] the House of Lords was prepared to allow a claim for exemplary damages to proceed where the Home Office was being sued as being vicariously liable for the acts of prison officers. Similarly, the Canadian courts have accepted vicarious liability for exemplary damages in some cases. In *Peeters v Canada*, it was held that lack of adequate training was sufficient to justify making an employer pay exemplary damages for the acts of an employee.[12] However, the Ontario Law Reform Commission has recommended that there should be vicarious liability for punitive damages only where an employer has tacitly approved the conduct of an employee.[13]

3.23 In the US, the law in the majority of states is that the normal rules of vicarious liability apply in relation to punitive damages. However, the recent US Supreme Court case of *Kolstad v American Dental Association*[14] applies the more restricted rule of vicarious liability. In that case, the Supreme Court considered the rules of vicarious liability as they applied to punitive damages awards made under the *Civil Rights Act, 1991*. The Court held that the common law rule of vicarious liability

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10 See Consultation Paper at para. 9.85.

11 [1994] 1 All ER 97.

12 WADDAMS, THE LAW OF DAMAGES, (3rd ed. 1997), §11.420.

13 Ontario Law Reform Commission, *Report on Exemplary Damages*, Recommendation 11.

14 119 S. Ct. 2118.

should be modified in relation to punitive damages awards under this statute.[15] It was held that "in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with [the Employment Equality legislation]".

Irish law

3.24 In *McIntyre v Lewis*,[16] the third and fourth defendants, Ireland and the Attorney General respectively, argued that they were not vicariously liable for either the compensatory or the exemplary damages awarded. Their argument was based on the contention that the actions of the defendants were outside the scope of their employment. The defendants were police officers who had been found to have assaulted and falsely imprisoned the plaintiff, and to have pursued a malicious prosecution against him. The Supreme Court held there was vicarious liability for the wrongs committed, since the first two defendants had carried them out in the course of their duties. There was no discussion of whether vicarious liability should be excluded in relation to the exemplary damages in particular.

3.25 In the light of the arguments set out above, and in particular the deterrent value of exemplary damages awards in cases of vicarious liability, and in the interests of avoiding an excessively complex law on exemplary damages, the Commission continues to favour the application of the normal rules of vicarious liability.

3.26 *The Commission recommends the retention of the normal rules of vicarious liability in respect of exemplary damages.*

C. Insurance

3.27 Allowing potential defendants to insure against exemplary damages may be seen as undermining the effect and purpose of an exemplary award. If a defendant can recover the amount of any exemplary damages from his or her insurance company, then, at first sight, the punitive and deterrent impact of the award would appear to be nullified; the burden of the award would merely be passed on to the insurance company. The conclusion is often drawn from these considerations that insurance in respect of exemplary damages should be prohibited as contrary to public policy. In fact, while several US states have legislated against insurance on public policy grounds,[17] the majority of common law jurisdictions continue to permit insurance for exemplary damages.

3.28 The case against insurance for exemplary damages is not so strong as it may first appear. As a matter of principle, the aim of exemplary damages is not solely to punish and deter the defendant, but also to deter others from engaging in similar conduct. This purpose is not at all defeated by insurance to provide for the exemplary award.

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15 Note that the decision is confined to this statute.

16 [1991] 1 IR 121.

17 *Infra* at paras. 3.29-3.31.

3.29 Furthermore, it is not the case that insurance will deprive an exemplary award of all punitive and deterrent effect in respect of the defendant. It is likely that the payment of insurance for exemplary damages would result in an escalation of the insurance premiums paid by the defendant, and it is also possible that, as a result of the award, the defendant might experience difficulty in obtaining insurance in the future.

(i) United States

3.30 Practice in the United States is not uniform. The majority of US states permit insurance for punitive damages. A number of states do, however, prohibit insurance for punitive damages on grounds of public policy.[18] In *Northwestern National Casualty Company v McNulty*, one of the leading cases to hold insurance for exemplary damages void on public policy grounds, it was commented by the judge for the Court of Appeals of the Fifth Circuit that:

> "Where a person is able to insure himself against punishment, he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that damages represent."[19]

3.31 Where there is a prohibition, however, exceptions may be made in cases of vicarious liability.[20] In such cases, the policy considerations which militate against allowing a defendant to pass on the burden of his wrong to a third party do not arise, since the person held vicariously liable is not himself the wrongdoer.

3.32 Although the majority of US states have not prohibited insurance in respect of exemplary damages,[21] a number of states which generally allow for insurance against exemplary awards make an exception in relation to awards which are the result of intentional misconduct.[22]

(ii) English law

3.33 In the English case of *Lancashire Co Co v Municipal Mutual Insurance Ltd*,[23] insurance was permitted against vicarious liability to pay exemplary damages. The case does not, however, resolve the issue of whether insurance is permitted in the case of personal liability for such damages. The case concerned an insurer who

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18 See *Northwestern National Casualty Co v McNulty* 307 F2d. 432 (5th Cir. 1962), discussed in the Consultation Paper at para. 5.35.

19 Quoted in SCHLUETER AND REDDEN, PUNITIVE DAMAGES, (3rd ed.) at p.239.

20 *Ohio Casualty Insurance Co v Welfare Finance Co* 75 F.2d 58 (8th Cir.1934). But in *Guarantee Abstract and Title Co v interstate Fire and Casualty Co* 228 Kan 532, 618 P.2d 1195 (1980), it was held that insurance was prohibited, even where liability arose vicariously.

21 SCHLUETER AND REDDEN, *op. cit.* fn. 19 at §17.2(C) (2).

22 *Ibid.*

23 [1996] 3 All ER 545.

repudiated liability for two awards of exemplary damages made against the local authority. In both cases the liability of the local authority for exemplary damages arose vicariously. The local authority sought a declaration that their insurance policy did include cover for exemplary damages, but the insurance company argued that this would be contrary to public policy since the awards arose out of the oppressive or unconstitutional actions of government servants. The Court defined the term "compensation" in the insurance policy broadly. It was held that the insurance policy at issue insured the local authority for damages awarded in cases of wrongful arrest, malicious prosecution, and false imprisonment, claims for which exemplary damages were available. It followed, therefore, that the term "compensation" should be read as including exemplary damages.

3.34 On the present, broader point, the Court held that it was not contrary to public policy to allow for insurance in respect of awards of exemplary damages. The insurance company had argued that the wrongs for which exemplary damages might be awarded under the contract of insurance were likely to be crimes. Therefore, on an analogy with the rule that a person cannot insure against liability for committing a crime, insurance should be prohibited in these cases. However, Simon Brown LJ found that where, as in the case before him, liability for exemplary damages arose vicariously, there was no policy reason that would exclude insurance. He stated: "I unhesitatingly accept the principle that a person cannot insure against a liability consequent on the commission of a crime, whether of deliberate violence or otherwise." But he then went on to state:

> "In my judgment there is nothing either in the authorities or in logic to justify extending this principle of public policy so as to deny insurance cover to those whose sole liability is one which arises vicariously, whether as employers or, as here, under an equivalent statutory provision."[24]

3.35 Simon Brown LJ considered that it would be inappropriate to impose a blanket rule of public policy prohibiting insurance in respect of exemplary damages. He noted that there were a number of competing policy considerations at play, including the need to ensure that the plaintiff recovered the award made (the prospects of which would be greatly increased by insurance). He also noted the probability that the payment of insurance for an exemplary damages award was likely to result in higher premiums for the defendant and might result in difficulties in obtaining insurance in the future. There was also a public interest in holding parties to their contracts – here, the insurance contract. Furthermore, where the damages were awarded against a public authority, as in the present case, the burden of the award would fall, if not on the insurers, then on the general public as ratepayers.

3.36 One possibility is a middle ground approach, by which insurance would be banned in the case of particularly outrageous conduct or in the case of conduct amounting to a criminal offence. The difficulty is that a judgment as to whether or not the defendant's conduct was criminal would have to be made in the civil proceedings, possibly prejudging a subsequent criminal case, and making the determination without any of the safeguards of a criminal trial. The other option, a standard of "particularly outrageous conduct", begs the question why exemplary

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[24] *Ibid.* at p.654.

damages are being awarded in the first place for conduct that is not "particularly outrageous".

3.37 It is the Commission's view that the public policy considerations in favour of prohibiting insurance for exemplary damages are not sufficiently strong to necessitate legislation in this area. It will of course be a matter for individual insurance companies whether they choose to expressly exclude exemplary damages from contracts of insurance.

3.38 The Commission does not recommend any legislative prohibition on insurance for exemplary damages.

D. The Standard of Proof

3.39 One of the arguments of principle frequently made against exemplary damages is that they impose punitive sanctions without the benefit of the procedural protections available in the criminal law. One way to address these objections would be to impose a higher standard of proof in relation to claims for exemplary damages. Either the criminal standard of proof could be imposed or, as is most frequently suggested, an intermediate standard, such as "clear and convincing evidence", could be applied.

3.40 In the majority of common law jurisdictions, the normal civil standard of proof is applied in relation to exemplary damages. Roughly half of US states,[25] however, apply an intermediate standard of proof.[26] Amongst the arguments cited in the US for the "clear and convincing evidence" standard are that it will ensure that awards of punitive damages are limited to the most egregious cases, and that it will result in closer scrutiny of the evidence. The serious consequences for the defendant of an award of punitive damages are also cited.

(i) Flexibility in the civil standard of proof

3.41 In favour of retaining the normal civil standard of proof for exemplary damages, it can be argued that the civil standard of proof contains an inherent flexibility. Although all issues of liability in civil law are provable on the balance of probabilities, where serious allegations are to be proved, as will always be the case where exemplary damages are at issue, clearer evidence will be required to establish liability. Several English cases establish this principle. In *Hornal v Neuberger Products Ltd*,[27] it was emphasised that the standard of the balance of probabilities was not an absolute standard. Within it, the degree of probability required to establish proof might vary according to the gravity of the allegation to be proved. Denning LJ noted that: "the more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law."[28]And Hodson LJ stated:

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[25] SCHLUETER AND REDDEN, *op. cit.* fn. 19 at §5.3H.

[26] The Supreme Court has held, however, in *Pacific Mutual Insurance v Haslit*, that there is no requirement that a higher standard of proof be imposed.

[27] [1956] 3 All ER 970.

[28] *Ibid.* at p.973.

"There is in truth no great gulf fixed between balance of probability and proof beyond reasonable doubt. Although when there is a criminal prosecution the latter standard is securely fixed in our law, yet the measure of probability is still involved in the question of proof beyond reasonable doubt." [29]

Morris LJ also noted the varying application of the civil standard of proof:

"In some civil cases the issues may involve questions of reputation which can transcend in importance even questions of personal liberty....In truth no real mischief results from an acceptance of the fact that there is some difference of approach in civil actions. Particularly is this so if the words which are used to define that approach are the servants but not the masters of meaning." [30]

3.42 In *Bater v Bater*[31] Lord Denning stated that:

"the difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter." [32]

3.43 In *Treadaway v Chief Constable of West Midlands,*[33] McKinnon J followed *Hornal*, and applied a high standard of proof because of the seriousness of the allegations in the case before him, for which he awarded exemplary damages.

3.44 The English Law Commission justifies retention of the normal civil standard of proof in relation to exemplary damages on the grounds that "it is an inherently flexible standard. Clearer evidence will be required by the courts, in order for such a standard to be satisfied, where the allegations, or the consequences of the decision for one or both of the parties, are serious."[34]

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29 *Ibid.* at p.976.

30 *Ibid.* at p.978.

31 [1950] 2 All ER 458.

32 *Ibid.* at p.459.

33 The Times, October 25 1994.

34 See Report of the English Law Reform Commission, No. 247, December 1997 at para. 5.232.

(ii) Ireland

3.45 The approach of the Irish courts has been similar to that taken in England. In *O'Keeffe v Ferris*, [35] the Supreme Court, in finding constitutional a provision of the Companies Acts which allowed for some punitive-type sanctions within the civil law, discussed the flexibility of the standard of proof to be applied in civil cases. O'Flaherty J noted that: "it is true that the proof of fraud will be to the civil standard, but it is also true that the more serious the allegation made in civil proceedings, then the more astute must the judge be to find that the allegation in question has been proved."[36]

3.46 Therefore, retention of the normal standard of proof does not preclude very careful consideration of liability for exemplary damages, given the seriousness of the issues involved. [37]

3.47 There must also be concern that a distinct standard of proof applicable to exemplary damages may cause unnecessary confusion, as it will result in two differing standards, the ordinary civil and the intermediate, being applied in the same case. This is a most significant practical point. We do not recommend the introduction of such a distinct standard for exemplary damage; we believe that the inherent flexibility within the existing civil standard suffices.

3.48 The Commission recommends that the normal civil standard of proof should apply in exemplary damages cases. That standard of proof should be applied to the question whether it has been shown, with sufficient clarity to satisfy the court, that the defendant has engaged in conduct which has been high-handed, insolent, vindictive, or exhibiting a gross disregard for the rights of the plaintiff.

E. Pleading of Aggravated, Exemplary or Restitutionary Damages

3.49 On two occasions, the Supreme Court has expressed the view that there should be a (flexible) rule, or at least a general practice, according to which exemplary and aggravated damages should be specifically pleaded. Such a requirement is in place under the English Rules of Court.[38]

3.50 In *McIntyre v Lewis*, exemplary damages were claimed despite the fact that they had not been specifically pleaded. Hederman J in his judgment noted that there was no requirement in Irish law that exemplary damages be specifically pleaded. However, he stated that: "I believe it might be desirable if the plaintiff did indicate in advance (even if it does not form part of the formal pleadings) that he does intend to

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35 [1997] 2 ILRM 161.

36 *Ibid.* at p.168.

37 In *Banco Ambrosiano v Ansbacher & Co.* [1987] ILRM 669, it was held that a higher standard of proof than the civil standard is not required in cases involving serious allegations of fraud.

38 RSC O.18, r.8(3); CCR 1981 O.6, r.1B. See Consultation Paper at para. 9.98. The insertion of a pleading requirement into the English rules of court followed the comments of Lord Hailsham in *Cassell v Broome* [1972] 1 All ER 801.

claim exemplary damages. This is to afford a defendant an opportunity to meet such a case."

3.51 In *Conway v INTO*,[39] the question of pleading exemplary damages was once more considered by the Supreme Court. Finlay CJ noted that Irish law differed from English law in this matter since the Irish rules of court did not contain any requirements as to the pleading of exemplary damages; nor was there any standard practice as to pleading. Finlay CJ referred to the importance of giving fair notice to a defendant of the allegations to be made against him, a precept which could be grounded on the principle of constitutional justice. He commented that, in accordance with this basic principle, it would be "desirable that any claim being made for damages over and above ordinary compensatory damages should be notified, and the facts upon which reliance might be placed in support of it, should be indicated to the defendant". He noted that exceptions would have to be made to this general principle, particularly in relation to aggravated damages, where the aggravating behaviour occurred only during the trial of the action.[40]

3.52 The recent Irish High Court case of *FW v BBC*,[41] discussed above, should be referred to in this context. The High Court noted the difference between the Irish and the English law on this point, whereby in English law aggravated damages would have to have been specifically pleaded. The Court applied the settled Irish law, which is to the effect that aggravated damages need not be specifically pleaded, irrespective of whether a claim for such damages could have been anticipated before the trial of the action. The case provides an example of the type of situation where aggravated damages could not have been pleaded at the commencement of the action, since the behaviour which aggravated the wrong, the conduct of an expert psychiatrist employed by the defendant, who asked intrusive questions and threatened the plaintiff, occurred only during the course of the trial.

3.53 On the other hand, in the recent Australian case of *Gray v Motor Accident Commission*,[42] the Australian High Court emphasised the reasons for requiring aggravated damages to be specifically pleaded. In that case (which concerned the deliberate running down of the plaintiff by the defendant, for reasons of racial hatred), the appellant sought, at a late stage in the proceedings, to include a claim for aggravated damages within the claim for compensatory damages which he had already pleaded. Aggravated damages had not been pleaded at first instance. The failure to plead aggravated damages initially appeared to be the result of an oversight on the part of the plaintiff's lawyers. The High Court held that:

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39 [1991] 2 IR 305 at pp.320-321.

40 *Ibid.* at p.321. Given that, in the instant case, the question of exemplary damages had been raised in the course of the trial, and the defendant did not seek an adjournment or ask for an amendment of the pleadings, it was held that the failure to plead exemplary damages did not bar their recovery. A similar view to that expressed by the Irish Supreme Court was put forward by Phillimore LJ in the English Court of Appeal in *Broome v Cassell*. Phillimore LJ considered that such a rule should not be in place because of the possibility that exemplary or aggravated damages could be grounded in the defendant's behaviour in the course of trial.

41 See Appendix 1.

42 *Op. cit.* fn. 3.

> "While each case depends upon its own circumstances, basic principle requires that, if a particular claim has not been in issue, and a case is fought on that basis, a party should not be obliged to meet such a claim for the first time on appeal where the conduct of its case might have been different if notice of the claim had been given before the trial."[43]

3.54 The Australian High Court held that exposing the defendant to the possibility of aggravated damages without these having been specifically pleaded would involve "inefficiency and condonation of professional oversight" as well as procedural unfairness to the defendant. The Court pointed out that, had aggravated damages been pleaded from the beginning, the distinctive nature of those damages might have led the defendant to adduce additional evidence or examine witnesses differently.

3.55 The Commission favours a flexible rule of court as regards, whether the different categories of damages need to be specifically pleaded. The Commission recommends that the rules of court should state that, in general, exemplary, aggravated and restitutionary damages should be pleaded, but that the court should have discretion to admit a claim for such damages, and to allow an amendment through the pleadings, even where it had not been initially pleaded, in circumstances where either: the behaviour grounding the damages had occurred in the course of the proceedings; the behaviour grounding the damages had come to light only in the course of the proceedings; or where, for other reasons, the judge considers an amendment of the proceedings to be appropriate and just in the circumstances.

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[43] *Per* Kirby J.

CHAPTER 4: DAMAGES FOR EQUITABLE WRONGS, BREACH OF STATUTE AND EUROPEAN LAW

A. Availability of Damages for Equitable Wrongs

4.01 To date, the question of whether damages of any kind should be awarded for equitable wrongs in this jurisdiction does not appear to have been considered by the courts.[1] If, however, the Irish courts were to follow the example of other common law jurisdictions on this point, then compensatory damages, and probably also exemplary damages, would be awarded.

4.02 The English courts do award compensatory damages for equitable wrongs,[2] although the basis for the award of damages is not entirely clear, and has been disputed.[3] Historically, because of the separate development of equity in its own independent channel, damages for equitable wrongs were not available prior to 1858. In that year, the enactment of Lord Cairns' Act (the *Chancery (Amendment) Act, 1858*) permitted the Court of Chancery, by section 2, to award damages in all cases where the Court could have issued an injunction "against the commission or continuance of any wrongful act". A procedural fusion of law and equity occurred only in the late nineteenth century by virtue of the Judicature Acts. The *Supreme Court of Judicature (Ireland) Act, 1877* (section 21) transferred jurisdiction to award equitable damages from the Irish Court of Chancery to the High Court.[4] This jurisdiction was then transferred to the Supreme Court by section 39 of the *Government of Ireland Act, 1920*. Lord Cairns' Act therefore remains in force in Ireland and permits common law damages to be awarded for an equitable wrong, in substitution for an injunction. The courts have awarded damages for equitable wrongs such as breach of confidence and breach of fiduciary duty under Lord Cairns' Act, on the basis that an equitable wrong comes within the definition of "wrongful act".[5]

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1 Damages for breach of confidence were claimed in *House of Spring Gardens v Point Blank Ltd.* [1984] IR 611, but there was no decision on the point. In *Private Research Ltd v Paul Brosnan* [1996] 1 ILRM 27 at p.32, McCracken J declined to award damages for breach of confidence on the grounds that, in the circumstances of the case, they would be difficult to calculate accurately and would not be an adequate remedy. The availability of damages for breach of confidence was not discussed and appears to have been assumed.

2 See generally, PAUL LAVERY, COMMERCIAL SECRETS, THE ACTION FOR BREACH OF CONFIDENCE IN IRELAND (Round Hall Sweet and Maxwell, 1996) at pp.244-252; J A Jolowicz, *Damages in Equity – A Study of Lord Cairns' Act*, (1975) 34 Camb L J 224.

3 Lavery, *ibid.* at p.249, notes that in the majority of cases where the courts have awarded damages for equitable wrongs they have not specified the justification for doing so.

4 The extent to which there has been a substantive fusion of law and equity is still a matter of controversy. On the historical development of the relationship between the common law and equity see DELANY, EQUITY AND THE LAW OF TRUSTS IN IRELAND, (2nd ed. 1999) at pp.4-12; HANBURY AND MARTIN, MODERN EQUITY, (14th ed. 1993) at pp.14-25.

5 *Saltman Engineering v Campbell Engineering* [1963] 3 All ER 413; *Malone v Commissioner of Police of the Metropolis* [1979] 1 Ch 344; *Talbot v General Television Corporation Pty Ltd* [1980] VR 224.

However, damages for equitable wrongs awarded on the basis of Lord Cairns' Act will be limited to cases where an injunction would have been available. Where there would be no case for an injunction, for example in a breach of confidence action where the confidential material had already been published, damages would not be available on this basis.[6]

4.03 Alternatively, the award of damages for equitable wrongs may be justified on the wider ground that it stems from a court of equity's inherent jurisdiction. This justification has been relied on by the Australian and New Zealand Courts.[7] It may, however be difficult to justify the award of exemplary, as opposed to compensatory damages, by virtue of equity's inherent jurisdiction. This is because, traditionally, the award under this jurisdiction is not strictly an award of damages (damages being a common law remedy), but is based on the more narrow category of an indemnity of the plaintiff's loss.[8]

4.04 This limitation has not, however, prevented the New Zealand courts from awarding exemplary damages for equitable wrongs, based on equity's inherent jurisdiction. The New Zealand courts have allowed exemplary damages by virtue of the application of common law principles to equitable wrongs, in effect holding that the cultural and historical difference between law and equity has now sufficiently evaporated for the remedies available for equitable wrongs to be based, where appropriate, on common law principles. In the New Zealand case of *Aquaculture Corporation v New Zealand Green Mussel Co*,[9] Cooke P stated briefly that:

> "[t]he practicality of the matter is that in the circumstances of the dealings between the parties the law imposes a duty of confidence. For its breach a full range of remedies should be available as appropriate, no matter whether they originated in common law, equity or statute."[10]

4.05 It is interesting, too, to note that, in *Target Holdings v Redferns*,[11] the House of Lords held that the basic principles of the assessment of damages at common law also applied to the assessment of equitable damages. They referred, in particular, to the basic principle that the plaintiff was to be put in the same position as he would have been in if he had not sustained the wrong for which he was being compensated. However, there was no need on the facts of the case to say anything about exemplary damages.

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6 *Malone v Commissioner of Police for the Metropolis* [1979] 1 All ER 256.

7 *Smith Cline and French v Department of Community Services* [1990] FSR; *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299.

8 See *infra* at para. 4.06.

9 [1990] 3 NZLR 299.

10 *Ibid.* at p.301.

11 [1995] 3 All ER 785.

B. Exemplary Damages for Equitable Wrongs

(i) England

4.06 In England, although the award of compensatory damages for equitable wrongs has been accepted,[12] there have been no exemplary awards. However, the English Law Commission has recommended that exemplary damages should be available for a range of equitable wrongs including breach of fiduciary duty, breach of confidence, and intermeddling by dishonestly procuring or assisting a breach of fiduciary duty.[13] The English Law Commission observed:

> "We can ultimately see no reason of principle or practicality for excluding equitable wrongs from any rational statutory expansion of the law of exemplary damages. We consider it unsatisfactory to perpetuate the historical divide between common law and equity, unless there is very good reason to do so ... Moreover, 'deterrence' is an aim that is not alien to courts of equity."[14]

(ii) Canada

4.07 By contrast to the position here or in England, the issue has been squarely raised before the courts of a number of other common law countries and they have ruled in favour of the award of exemplary damages. In Canadian law, it is well established that exemplary damages may be awarded for equitable wrongs, including breach of confidence and breach of fiduciary duty.[15] In the leading case of *Norberg v Wynrib*,[16] decided by the Canadian Supreme Court, McLachlin J awarded exemplary damages for breach of fiduciary duty. In that case, the defendant, a doctor, was found to have prescribed regularly a brand of painkillers to the plaintiff, his patient, whom he knew was addicted to the drug, in exchange for sexual favours. Although the defendant knew that the plaintiff wished to end her addiction to the drug, he failed to advise her of the steps necessary to overcome her dependency.[17] McLachlin J held that exemplary damages could be awarded for breach of fiduciary duty where the action of the defendant fiduciary had been purposefully repugnant to the plaintiff's best interests and motivated by the fiduciary's own self interest, elements which could each be identified in the present case. She noted that general deterrence was an especially important concern in cases like that before the court, in order to reinforce high standards of conduct in fiduciary relationships such as that between doctor and patient.[18]

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12 Ibid.

13 English Law Commission *Report on Aggravated, Exemplary and Restitutionary Damages*, Law Com No. 247 at para. 5.56.

14 *Ibid.* at para. 5.55.

15 S M WADDAMS, THE LAW OF DAMAGES (3rd ed. 1997) at para. 11.240.

16 92 DLR 4th 449.

17 *Ibid.* at pp.503-504.

18 *Ibid.* at p.506.

(iii) New Zealand

4.08 The New Zealand courts too have awarded exemplary damages for breach of fiduciary duty and breach of confidence. In *Aquaculture Corporation v New Zealand Green Mussel Co Ltd,*[19] the New Zealand Court of Appeal considered the award of exemplary damages for the disclosure of confidential information relating to the development of a therapeutic drug. The award of exemplary damages at first instance had been based on the trial judge's finding that it was not open to him to award compensatory damages for breach of confidence, but that exemplary damages were available. The Court of Appeal held that New Zealand law did allow for the award of compensatory damages for equitable wrongs, and that, since compensatory damages could be awarded, there was no necessity for the additional award of exemplary damages, the incidental punitive effect of the compensatory damages was sufficient. The Court did, however, endorse the award of exemplary damages for breach of confidence in principle.[20]

4.09 In *Cook v Evatt (No 2),*[21] the New Zealand High Court actually awarded exemplary damages for breach of fiduciary duty. The court held that "exemplary damages may be awarded whether the cause of action is founded in law or in equity".[22] The court identified three criteria for the award of exemplary damages: firstly, there must have been punishable conduct amounting to conscious wrongdoing in contumelious disregard of another's rights; secondly, other remedies must fall short of adequate punishment; and thirdly, the case must be serious and exceptional.[23] However, it was noted that:

> "[w]here the successful cause of action is breach of fiduciary duty, the additional step of demonstrating punishable conduct may be a relatively short one compared with most other classes of action. A beneficiary who places his or her trust in a fiduciary is peculiarly vulnerable. To take advantage of that trust will from its very nature be easy to do and difficult to detect. When a case is discovered, deterrence may be warranted."[24]

(iv) Australia

4.10 In Australia, the availability of exemplary damages for equitable wrongs is undecided.[25] The issue was considered by the Federal Court of Australia in *Bailey v Namol Pty Ltd,*[26] but on the facts the court did not find it necessary to make a ruling on this point. In Bailey, the court alluded to the Canadian and New Zealand

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19 [1990] 3 NZLR 299.

20 *Ibid.* at pp.301-302.

21 [1991] 1 NZLR 676.

22 *Ibid.* at p.705.

23 This test is similar to that normally applied in the case of common law torts; see *supra* at paras. 1.72 and 2.024.

24 *Ibid.* at p.706.

25 Peter McDermott, *Exemplary Damages in Equity*, (1995) 69 ALJ 773.

26 125 ALR 228.

authorities but noted, as an aside, that there was "much to be said for the contrary view, that 'equity and penalty are strangers' ".

(v) United States

4.11 In the United States, the traditional rule is that punitive damages may not be awarded in equity cases.[27] However, more recently, some courts have awarded punitive damages for equitable wrongs.[28] In *Brown v Coates*,[29] for example, punitive damages were awarded for breach of an agent's fiduciary duty. Punitive damages for intentional infliction of emotional distress were awarded in *Estate of Pitzer*.[30]

(vi) Conclusions

4.12 In the first place, although the courts in this jurisdiction appear not to have considered the matter, it seems likely, on the basis of authority from other common law courts, that damages, at least compensatory damages, would be available for equitable wrongs in the Irish courts. Although competing justifications have been put forward for the award of damages in such cases, their availability, if not the basis for it, now appears to be clearly established in a number of common law jurisdictions. Secondly, in regard to exemplary damages the position is less clear, although there is authority from the New Zealand and Canadian courts for the award of exemplary damages for equitable wrongs. Once it is accepted that compensatory damages may be awarded, there seems no sound reason to balk at the award of exemplary damages.

4.13 From a policy perspective, it seems clear that the goals of exemplary damages to punish and deter are as legitimate in cases of equitable wrongs as they are in tort cases. As the New Zealand High Court pointed out in *Cook v Evatt (No 2)*, exemplary damages may be a particularly appropriate remedy in certain cases of breach of fiduciary duty, where the defendant has abused a position of trust. Also, as the Canadian courts have noted, there is a strong public interest in imposing deterrence to ensure high standards of conduct in fiduciary relationships. To exclude exemplary damages for equitable causes of action would be to perpetuate an inconsistency, since exemplary damages would be available for similar tortious causes of action. For example, an action in professional negligence and for breach of fiduciary duty might well arise from the same facts; it would seem illogical not to allow the same remedies in each case.

4.14 The Commission is of the view that, when litigated, this will be found to be the position here, in line with other common law jurisdictions. The development of the law in this area should be left to the courts.

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27 SCHLUETER AND REDDEN, PUNITIVE DAMAGES (3rd Ed.) at §4.1(a)(3).

28 *Ibid.*

29 253 F 2d 36.

30 155 Cal. App. 3d 979.

C. Exemplary Damages for Wrongs Arising Under Statute[31]

4.15 Where legislation provides for liability in damages, the question may arise whether aggravated or exemplary damages may also be awarded for the wrong. The first and easiest point is that a small number of Irish statutes provide expressly for the recovery of exemplary damages. For example, the *Competition Act, 1991* specifies, in section 6(3)(b), that, in an action for damages for anti-competitive practices or abuse of a dominant position brought under the Act, exemplary damages may be awarded. The *Copyright Act, 1963*, in section 22 (4), allows for the award of damages described as "additional" damages, having regard to the "flagrancy" of the infringement and to "any benefit shown to have accrued to the defendant by reason of the infringement." The *Landlord and Tenant (Amendment) Act, 1980*, in section 17(4), also allows for the award of "punitive" damages where a new occupational tenancy is refused to a tenant on the grounds that the landlord intends to develop the property as specified in section 17(2), but where, despite this, the landlord does not, in fact, within a reasonable time, develop the property as he had proposed. Awards of aggravated and exemplary damages are also clearly envisaged by the *Hepatitis C Compensation Tribunal Act, 1997*. Under section 5(1) of the Act, awards of the Tribunal are to be made:

> "on the same basis as an award of the High Court calculated by reference to the principles which govern the measure of damages in the law of tort and any relevant statutory provisions ...and including ... consideration of an award on the basis which reflects the principles of aggravated or exemplary damages."[32]

4.16 A more difficult question arises where, as is often the case, there is no specific provision regarding the award of exemplary damages for a statutory wrong. A provision allowing for the award of "damages" without more is certainly open to the interpretation that compensatory, aggravated, exemplary or restitutionary damages are all available in appropriate cases. So, for example, the provision in section 2 of the *Liability for Defective Products Act, 1991*, that "[t]he producer shall be liable in damages in tort for damage caused wholly or partly by a defect in his product", would not seem to exclude exemplary damages. Neither are exemplary damages excluded from the *Patents Act, 1992*, section 47 (1) of which states: "Civil proceedings for infringement of a patent may be brought in the Court by the proprietor of the patent in respect of any act of infringement ... and ... in those proceedings a claim may be made ... (c) for damages in respect of the alleged infringement ... ". The model of the *Civil Liability Act*, which excludes exemplary damages in particular instances,[33] would seem to suggest that there is a need to exclude exemplary damages for a statutory wrong.

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31 The provisions of the *Civil Liability Act, 1961* are discussed separately, *supra* at paras. 2.096-2.110.

32 The Act provides that where exemplary damages are to be claimed, this should be stated in the application to the tribunal (section 4(6)). There are further provisions regarding the payment of aggravated and exemplary damages to minors (section 5(13)) and for appeal to the High Court by the Minister or other relevant agency in respect of aggravated or exemplary damages (section 5(15)).

33 *Supra* at paras. 2.103-2.110 and 5.31-5.33.

4.17 In most other cases, however, the courts will be faced with a more vague, general statutory provision imposing a statutory duty. In this circumstance, there are two points of difficulty. The first is whether, leaving aside the question of exemplary damages, the court will interpret the provision as creating a statutory cause of action. The existence of a statutory cause of action will often be difficult to discern. An example of this well known problem in the law is *Moyne v Londonderry Port and Harbour Commissioners*,[34] which concerned the statutory duty of the Port and Harbour Commissioners to repair and to keep open a pier under their authority. The plaintiff alleged that the defendants had breached their statutory duty by restricting use of the pier. Costello J inferred that there was a statutory duty borne by the defendants to maintain a pier by virtue of a permissive statutory provision which provided that "it shall be lawful for the Commissioners to make and maintain the following works ...".[35] From this it was inferred that the Commissioners had an obligation to maintain and repair the works, including the pier at issue in the case. It was also held that there was a statutory duty on the Commissioners to keep the pier open for berthing. This could be inferred from the statutory provision that "the Harbour, Dock and Pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers."[36] Reading the two provisions together, the Court found that there was a statutory duty to keep the pier open, subject to the possibility of closing the pier temporarily for repairs where this was reasonably necessary. This did not, however, justify the prolonged closure or restriction of the use of the pier. Since there were no other suitable remedies for breach of the Commissioners' statutory duty, it was held that the legislature could be regarded as having intended that damages should be available.

4.18 Often, as is illustrated by *Moyne v. Londonderry Port and Harbour Commissioners*, where the statute is silent as to the existence of a cause of action giving rise to damages, the court has to perform some creative interpretation so as to impute such an intention to the legislature. The courts have developed a number of very broad guidelines in determining the legislative intent of such statutory provisions. In general, the courts will infer a breach of statutory duty giving rise to damages where the breach has caused the plaintiff loss or injury, the loss or injury was of a type sought to be prevented by the statute, and the plaintiff was a person whom the statute sought to protect.[37]

4.19 The second part of the problem is whether, assuming that it has been held that there is a breach of statutory duty giving rise to damages, there may be an award of exemplary damages in appropriate circumstances. To date, there is a dearth of authority on this. There is English authority for the award of exemplary damages for statutory wrongs, even where the legislation does not specifically provide for exemplary damages. But these awards are in the very particular fields of the *Sex Discrimination Act, 1975* and the *Race Relations Act, 1976*.[38]

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34 [1986] IR 299.

35 *Harbours Docks and Piers Clauses Act, 1847*, section 28.

36 *Ibid.*, section 33.

37 MCMAHON AND BINCHY, THE IRISH LAW OF TORTS, (2nd ed. 1990), Chapter 21.

38 Awards of exemplary damages may no longer be recoverable under this legislation as a result of the cause of action test set out in *AB v South West Water Services* [1993] 1 All ER 609, discussed *supra* at para. 1.43.

4.20 The English Law Commission has recommended that exemplary damages may, in an appropriate situation, be recoverable for wrongs arising under legislation. The availability of exemplary damages is, however, made subject to a "consistency" test under the Law Commission's proposals. This would stipulate that, where an award of exemplary damages would not be consistent with the policy of the statute under which the wrong arises, such an award should not be made.[39] They consider that an award of exemplary damages would not be consistent with the policy of the statute,[40] where the statute creating the wrong sets out a number of specific remedies, which it would be reasonable to consider the sole remedies available, or where the statute specified an upper limit for the sum of damages available for the wrong.

Conclusions

4.21 If exemplary damages are to be available across the spectrum of tortious causes of action in appropriate cases, there would seem to be no reason for their exclusion for the tort of breach of statutory duty and for other wrongs arising under statute.

4.22 There will, however, be cases where the legislature had obviously not intended that exemplary damages should be available for a statutory wrong, or where the award of exemplary damages would be contrary to the spirit or purpose of the legislation. As a matter of standard statutory interpretation, which is the cardinal rule in this area, it would be unlikely in such a case that a court would find that exemplary damages were available.

4.23 As with equitable wrongs, we do not consider it necessary at this point to recommend the enactment of a statutory provision specifying the availability of exemplary damages for statutory wrongs. However, we do not see any good reason why exemplary damages should not, in an appropriate case, be awarded by the court in relation to a statutory wrong.

4.24 The Commission considers that exemplary damages probably are available under the present law for wrongs arising under statute, except in cases where they are excluded by the legislation, and this should be the position. The Commission does not, therefore, recommend that there should be legislation to extend the availability of exemplary damages in respect of such wrongs.

D. Exemplary Damages for European Union Law Wrongs

4.25 There is also the possibility that exemplary damages may be available for breaches of European Union law.[41] In *Tate v Minister for Social Welfare and the Attorney General*[42] Carroll J declined to award exemplary damages[43] on the basis that

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39 Report of the English Law Commission, *op. cit.* fn. 13 at para. 5.57.

40 *Ibid.*

41 *Consultation Paper on Aggravated, Exemplary and Restitutionary Damages* at para. 7.47.

42 [1995] 1 ILRM 507. See Appendix 1.

the sums involved meant that compensatory damages would suffice. The court did, however, appear to accept in principle that exemplary damages could be awarded against the State for a breach of European Union law.

4.26 In the joined cases of *Brasserie du Pecheur v Germany* and *Factortame III*,[44] the European Court of Justice held that damages could be awarded against the State for enacting legislation in breach of European Union law. A state's liability could, it was held, extend to liability for exemplary damages, where such damages were permissible for a similar action founded in the domestic law of the State concerned. This is in accordance with the generally accepted principle of EU law that, where there is a breach by a State of EU obligations, the national courts must provide remedies no less favourable than those that would apply for a similar breach of national law.[45] The court in *Brasserie du Pecheur* held:

> "[a]s regards in particular the award of exemplary damages, such damages are based under domestic law ... on the finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally. In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law."

4.27 The decision of the European Court in *Brasserie* is binding on the Irish courts. It is therefore clear that, subject to the limitations imposed on exemplary damages recovery by Irish law, the Irish courts are required to consider an award of exemplary damages in an appropriate case for breach of European Union law. So, where the defendant's misconduct has been exceptional[46] and the compensatory

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43 Carroll J considered that there would have been grounds for the award of exemplary damages, since the State, in delaying the implementation of an EU directive, had "wriggled for ten years to avoid paying the same rate to women as to men".

44 (1996) 3 ECR 1 –1029.

45 See *Comet BV v Produktschap voor Siergewassen* 45/76 [1976] ECR 2043 at p.2053: "In the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter."

46 *Supra* at para. 1.72.

damages awarded in the case do not have a sufficient incidental deterrent effect,[47] exemplary damages may be awarded. The award of exemplary damages for breach of an EU obligation will also, of course, depend upon a finding by the court that there is a breach of duty by the defendant which gives rise to liability in damages.

4.28 The Commission concludes that exemplary damages are available for breach of European Union law on the same basis as for torts and breach of constitutional rights. The Commission does not consider legislation to be necessary on this point.

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47 *Supra* at para. 2.024.

CHAPTER 5: AGGRAVATED DAMAGES

5.01 In the present law, aggravated damages are generally understood to refer to damages for injury to the plaintiff's feelings caused by the exceptionally heinous or malicious conduct of the defendant, which aggravates the injury to the plaintiff. The nature and purpose of aggravated damages has been the subject of much confusion. Existing uneasily on the border between exemplary and compensatory damages, they have variously been interpreted as being exemplary[1] or compensatory, or as being a hybrid of the two. The confusion arises because an aggravated damages award will only be made in a case where the defendant has engaged in exceptional misconduct. The quantum – and the effect – of an aggravated award may be similar to that which an exemplary award would have had in the same case.

5.02 As we shall see below,[2] when we compare the three categories of damages, the current law, both in this jurisdiction and in England, favours an interpretation of aggravated damages as a species of compensatory damages for injured feelings. Despite this, some doubt persists as to the true nature of aggravated damages, and it may be questioned whether the category is a necessary one at all, given the availability of both exemplary and compensatory damages.

A. Contemporary Law

5.03 While there may be some doubt as to the previous meaning of aggravated damages (a point to which we return), their existence has been well established in recent Irish case law. The category of aggravated damages was recognised and defined by the Supreme Court in *Conway v INTO*.[3] In that case, Finlay CJ identified aggravated damages as compensatory damages which were "in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant."

5.04 Finlay CJ also affirmed that the conduct of the defendant either during the commission of the tort, or subsequent to its commission, for example in the conduct of the trial, may increase the injury to the plaintiff as such and so ground aggravated damages. He held that aggravated damages would be appropriate where the plaintiff's injury was increased by:

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1 Prior to *Conway v INTO* [1991] 2 IR 305, the courts sometimes referred to aggravated damages and exemplary damages as identical. In *Kennedy v Ireland*, [1987] IR 587, for example, "substantial damages" were awarded on the basis that it was "irrelevant whether they should be described as aggravated or exemplary."

2 Paras. 5.10-5.16.

3 *Op. cit.* fn. 1.

"(a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or

(b) conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or

(c) conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action."[4]

5.05 Following *Conway*, the courts have shown a willingness to make aggravated awards. Two recent High Court cases deal with the law of aggravated damages. In *Todd v Cincelli,*[5] Kelly J awarded aggravated damages for the defendant's wrongful demolition of his house which adjoined that of the plaintiffs. The house was demolished without notice to the plaintiffs, and in a sub-standard way, contrary to proper building practice and in such a way as to damage the plaintiff's adjoining premises. The tortious nature of the demolition, and the resultant loss to the plaintiffs, was admitted by the defendants. Relying on *Conway v INTO*, Kelly J held that the plaintiffs were "entitled to a modest sum by way of aggravated damages in recognition of the added hurt or insult to them as a result of the conduct of the defendants."[6] The award of aggravated damages was based on the fact that the demolition of the adjoining property had been carried out suddenly and without warning, and in the face of prior representations of the defendant that there would be no demolition. The fact that the defendant had no entitlement to carry out the demolition and was aware of it was another reason to grant aggravated damages. Aggravated damages of £7,500 were awarded (in addition to £27,000 in compensatory damages).

5.06 The award of aggravated damages for aggravation of the injury in the conduct of a trial is illustrated by the other recent case of *FW v British Broadcasting Corporation.*[7] The case arose out of the broadcast by the defendants of the plaintiff's name in a television programme on child sexual abuse, contrary to undertakings given to the plaintiff that his identity would be protected. In the course of the proceedings for negligence and breach of undertaking, aggravated damages were claimed on the grounds that the defendants' conduct of the case had exacerbated the injury to the plaintiff. This claim was based on the conduct of a psychiatrist engaged by the defendants to assess the plaintiff's psychological state. The Court found that, prior to the trial, the psychiatrist acting for the defendant had subjected the plaintiff to unnecessarily detailed questioning regarding the sexual abuse that he had suffered as a child. The psychiatrist also warned the plaintiff during the interview that he would have to give a similarly detailed account of the abuse in court. This caused the plaintiff serious distress. The Court found that the plaintiff had suffered substantial additional trauma as a result of the "gross professional negligence and incompetence" of the psychiatrist, entitling the plaintiff to aggravated damages of £15,000 (in addition to compensatory damages of £80,000).

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4 *Ibid.* at p.317.

5 Unreported, High Court, 5 March 1998. See also Appendix 1.

6 *Ibid.* at p.19.

7 Unreported, High Court, 25 March 1999. See also Appendix 1.

5.07 It should also be emphasised that an element of aggravated damages may sometimes be included within compensatory awards of "general" damages made in the Irish courts. In defamation cases, for example, it is established that the general damages awarded may take into account the defendant's behaviour subsequent to the publication of the defamatory statement, including the defendant's conduct of the trial. In *Barrett v Independent Newspapers,*[8] it was held that the jury were entitled to take into account, when assessing compensatory damages, the fact that "the justification of the words was maintained by the defendant right up to the time of the verdict and yet was unsupported by any form of evidence."[9] This approach was recently confirmed by the Supreme Court in *de Rossa v Independent Newspapers,*[10] where Hamilton CJ held that, in assessing compensatory damages in a libel action, "a jury is also entitled to take into account the whole conduct of the Appellant from the time when the libel was published down to the very moment of their verdict."[11] In such cases, therefore, the general category of compensatory damages may include compensatory aggravated damages. We return to this problem of possible overlap below.[12]

5.08 Similarly to the finding in *FW*, in *Sutcliffe v Pressdram Ltd,*[13] Nourse LJ confirmed that aggravated damages could be awarded based on the defendant's conduct during the trial. Aggravated damages could, he stated, be awarded for:

> "failure to make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the plaintiff from proceeding; persistence, by way of prolonged or hostile cross-examination of the plaintiff or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct whether of the preliminaries or of the trial itself in a manner calculated to attract further wide publicity; and persecution of the plaintiff by other means."

5.09 Nourse LJ acknowledged the difficulties involved in assessing aggravated damages, and in preserving their compensatory nature, when he remarked that in assessing aggravated damages, "however carefully the judge might seek to protect them against it, it would not be surprising if an element, even a large one, in their award exceeded a due consideration for the plaintiff's feelings and trespassed into punishment of the defendant's conduct."[14] He was of the opinion that some aggravated awards might contain a disguised exemplary element, and that in the case before him, the jury had, "without realising that they were exceeding their function, included a very large exemplary element in their award."[15]

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8 [1986] IR 13.

9 *Ibid.* at p.20.

10 Unreported, Supreme Court, 30 July 1999.

11 *Ibid.* at p.68.

12 Paras. 5.10- 5.16.

13 [1990] 1 All ER 269.

14 *Ibid.* at p.288.

15 *Ibid.* at p.289.

B. Aggravated Damages as a type of Compensatory Damages

(i) English law

5.10 It was in *Rookes v Barnard*[16] that Lord Devlin definitively stated that aggravated damages were compensatory. Distinguishing them from exemplary damages, Lord Devlin envisaged their award where "the injury to the plaintiff has been aggravated by malice or by the manner of doing the injury, that is, the insolence or arrogance by which it is accompanied."[17]

5.11 However clearly aggravated damages are classified as compensatory, some inevitable ambiguity remains. In the first place, the importance of the exceptional wrongdoing or malice of the defendant in regard to the award of aggravated damages makes the distinction with exemplary damages, which also look to these factors, a fine one. The distinction is that whilst exemplary damages are based directly on the misconduct of the defendant, aggravated damages are awarded for the distress caused to the plaintiff as a result of this very misconduct. They are thus only indirectly grounded in the behaviour of the defendant. Even supposing that a defendant behaved with extreme malice towards the plaintiff in the commission of the tort, aggravated damages would not be recoverable if the plaintiff had suffered no distress; but in such a case, exemplary damages would be recoverable. There is, therefore, a real distinction, but this distinction may not always be easily applicable in practice, and there must be some concern as to difficulties experienced by juries in distinguishing between aggravated and exemplary awards. In *Thompson v Commissioner of Police of the Metropolis*,[18] Lord Woolf noted that "[i]t must at present be very difficult for a jury to understand the distinction between aggravated and exemplary damages when there is such a substantial overlap between the factors which provide the sole justification for both awards."[19] He emphasised the importance of standards being set by the higher courts, so that there would be benchmarks against which jury awards could be compared, and which would provide guidance to juries.[20]

5.12 The dicta in a number of cases demonstrate all too clearly that the distinction between aggravated and punitive damages can easily become blurred. In *Broome v Cassell*,[21] for example, although the House of Lords affirmed that aggravated damages were compensatory, Lord Hailsham LC suggested that the award of aggravated damages could legitimately be grounded in "the natural indignation of the court at the injury inflicted on the plaintiff"; but emphasised that this was because the indignation arose from the aggravated injury to the plaintiff[22] In *Kralj v McGrath*,[23] Woolf J held that it would be inappropriate to award aggravated damages for

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16 [1964] 1 All ER 367.

17 *Ibid.* at p.412.

18 [1997] 2 All ER 762.

19 *Ibid.* at p.773.

20 *Ibid.*

21 [1972] 1 All ER 801.

22 *Ibid.* at pp.825-826.

23 [1986] 1 All ER 54.

negligence or breach of contract.[24] This appeared to be based on a conception of aggravated damages as, to some extent, punitive. Woolf J saw aggravated damages as introducing non-compensatory elements into causes of action for which the remedy was, traditionally, exclusively compensatory. He held that if aggravated damages were recoverable in such cases:

> "a higher award of damages would be appropriate in cases where careless driving caused identical injuries. Such a result seems to me to be wholly inconsistent with the general approach to damages in this area, which is to compensate the plaintiff for the loss that she has actually suffered, so far as it is possible to do so, by the award of monetary compensation and not to treat those damages as being a matter which reflects the degree of negligence or breach of duty of the defendant."[25]

5.13 This passage suggests that Woolf J viewed aggravated damages as having at least in part a punitive function, an approach that contrasts with the dicta of Lord Devlin in *Rookes v Barnard*.[26]

5.14 *Kralj v McGrath* was relied upon in *AB v South West Water Services*,[27] where aggravated damages were refused for the plaintiffs' anger and indignation at the wrong committed against them.[28] The court stated that whilst the mental suffering endured by the plaintiffs could be compensated for, within an award of general damages, "anger and indignation is not a proper subject for compensation; it is neither pain nor suffering."[29]

(ii) Irish law

5.15 The Irish courts have also identified aggravated damages as compensatory, but have, in their definition of aggravated damages, included references to the conduct of the defendant which sit uneasily with a compensatory definition. In *Conway v Irish National Teacher's Organisation*,[30] Finlay CJ described aggravated damages as compensatory, and as being "in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant."[31] This direct reliance on the culpability of the defendant as a ground for the assessment of the award is out of character with compensatory awards in general, and therefore suggests a conception of aggravated awards as a compensatory-exemplary hybrid.

5.16 The difficulty in disentangling aggravated and exemplary awards arises from the similarity of their effects, if not their purposes. Aggravated damages may, as Lord

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24 *Ibid.* at p.60.

25 *Ibid.* at p.61.

26 *Op. cit.* fn.16.

27 [1993] 1 All ER 609.

28 *Ibid.* at pp.624-625, *per* Stuart-Smith LJ.

29 *Ibid.* at p.624.

30 *Op. cit.* fn. 1.

31 *Ibid.* at p.503.

Devlin pointed out in *Rookes v Barnard*,[32] "do most, if not all, of the work that could be done by exemplary damages."[33] Although their purpose is compensatory, they naturally, like all compensatory awards, have an incidental punitive and exemplary effect that may be similar to an award of exemplary damages, since both awards would be made with reference to the same exceptional misconduct of the defendant. The desire of the courts, at least in England, to restrict exemplary damages has led to an emphasis on the importance of aggravated damages. In *Rookes v Barnard*, the House of Lords set out the "if, but only if" rule.[34] By this rule, exemplary damages were made secondary to aggravated damages, in that aggravated damages should be awarded first, and an additional award of exemplary damages made only where the punitive effect of the aggravated award was judged insufficient.[35] Undoubtedly, the restriction of the categories of damages expressly based on punishment and deterrence, and the reliance, however inadvertent, on aggravated damages to take their place, has put increased pressure on the category of aggravated damages and exacerbated their ambiguity.[36]

C. Options for Reform

5.17 Aggravated damages can be seen as overlapping either with exemplary or with compensatory damages. The effect of an aggravated damages award is likely to be to punish the defendant, as well as to compensate for insult and injured feelings. Aggravated damages compensate for a particular type or level of injured feelings, that which is caused by the exceptional misconduct or malice of the defendant in the commission of the tort. There is arguably no necessity, however, for damages of this type to be categorised separately as "aggravated damages", a label that may cause confusion and lead to the introduction of punitive elements into what should be a compensatory category.

5.18 With this in mind, the English Law Commission recommended that the category of aggravated damages should be retained, but that aggravated damages should be awarded solely to compensate for injured feelings, and that, wherever possible, they should be labelled "damages for injured feelings" rather than "aggravated damages".[37]

5.19 Given the difficulties associated with the category of aggravated damages, one option for reform would be to abolish the category altogether, and to replace it

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32 *Op. cit.* fn. 16.

33 *Ibid.* at p.411.

34 *Ibid.* at p.411, *per* Lord Devlin. See also the *dicta* of Lord Hailsham LC in *Cassell v Broome* [1972] 1 All ER 801 at p.833.

35 *Supra* at para. 2.024.

36 In New South Wales, legislation prohibits exemplary damages in defamation actions. The Australian High Court has held, however, that aggravated damages remain recoverable in defamation actions under New South Wales Law: *Carson v John Fairfax and Sons Ltd* 113 ALR 577. In that case, the court considered that there was some inevitable punitive and deterrent element in an award of aggravated damages, but that this was necessary to the full compensation and vindication of the plaintiff and did not contravene the legislative prohibition on exemplary damages.

37 English Law Commission Report, No. 247, December 1997 at para. 2.42.

with a combination of damages for injured feelings and exemplary damages. In favour of this option, it can be argued that aggravated damages are superfluous. They do not enable a plaintiff to recover anything which he or she might not otherwise recover, through either a claim in compensatory damages for injured feelings or a claim in exemplary damages.

5.20 However, one factor militating against abolition is the desirability of restraining the award of exemplary damages in cases where their award is not strictly necessary. Aggravated damages have the advantage that they restrict a greater proportion of the total sum of damages to be awarded within the legitimate bounds of compensatory damages. They do this by grounding the award in the effect of the conduct of the defendant on the plaintiff, rather than on the actual conduct of the defendant. Under the present law, it is only where the award of aggravated damages cannot be justified, *i.e.* where the defendant's exceptional misconduct has not caused the plaintiff added distress or where the aggravated damages are insufficient, that exemplary damages become relevant.

5.21 Moreover, it is also significant that the exceptional misconduct requirement assists in determining the quantum for damages for injured feelings which would otherwise be difficult to calculate. The reference to the conduct of the defendant gives the judge or jury a reference point on which to rely in the calculation of quantum; the gravity of the defendant's misconduct can be relied on to quantify the distress caused to the plaintiff. This facilitates a plaintiff in establishing injury to feelings, which might be more difficult to prove if the claim were made in ordinary damages for injured feelings rather than in aggravated damages.

5.22 The principal options for reform are, therefore:

1. The abolition of the category of aggravated damages, and their inclusion within the category of compensatory damages for injured feelings.

2. The retention of aggravated damages, on the basis of a definition which would re-emphasise that they are purely compensatory and contain no punitive element.

5.23 Given that aggravated damages are capable, to a considerable extent, of fulfilling the role of exemplary damages, any abolition or restriction of aggravated damages should be considered in the light of the extent to which exemplary damages are to be available. A very restricted availability of exemplary damages, which would confine them to constitutional actions or to a small number of torts, might be regarded as creating a greater need for aggravated damages. Of course, even if neither aggravated nor exemplary damages were to be available for certain torts (as might be the case, for example, in negligence), then damages for injured feelings should be capable of fully compensating the plaintiff for the full extent of the injury to his or her feelings, whether caused by the exceptional misconduct of the defendant or not.

5.24 We also considered the question of aggravated damages in questions of contract. While we do not consider that there is any merit in the extension of aggravated damages to cases of contract in general, consideration was given to the possibility of recommending this in one particular type of case, namely cases where

the plaintiff has acted as consumer and the defendant has acted in the course of a business. We have decided, however, against recommending a change of the law which would single out one particular type of contract as against all others.

5.25 The Commission recommends that the category of aggravated damages should be retained in Irish law, and that the reference to the conduct of the defendant should also be retained, but that aggravated damages should be defined so as to ensure and emphasise their compensatory nature. It is recommended that aggravated damages should be defined as follows:

Aggravated damages are damages to compensate a plaintiff for added hurt, distress or insult caused by the manner in which the defendant committed the wrong giving rise to the plaintiff's claim, or by the defendant's conduct subsequent to the wrong, including the conduct of legal proceedings.

In implementing a policy of moderation, we believe aggravated damages will only be appropriate where there has been reprehensible, high-handed behaviour on the part of the defendant and such damages should only be awarded in exceptional cases. Both because of this and because the definition given above marks a divergence from at least some of the existing case law, we recommend the incorporation of this definition in legislation.

5.26 The Commission recommends that aggravated damages should not be confined to particular tortious causes of action, but should be available for all torts and for breach of constitutional rights. We take it that this is probably the present state of the law, the development of which should be left to the courts, and accordingly, we do not recommend legislation for this purpose.

D. Amendments to the Civil Liability Act, 1961[38]

(i) Concurrent tortfeasors (section 14 of the Civil Liability Act, 1961*)*

5.27 Under section 14 of the *Civil Liability Act, 1961*, "Where the court would be prepared to award punitive damages against one of concurrent tortfeasors, punitive damages shall not be awarded against another of such tortfeasors merely because he is a concurrent tortfeasor, but a judgment for an additional sum by way of punitive damages may be given against the first-mentioned." The language of the Act is ambiguous. It is unclear whether the term "punitive" is intended to refer to exemplary damages alone, or to both exemplary and aggravated damages.[39] Certainly, the term does not describe aggravated damages as presently understood and as defined in this Report. Assuming that the section refers to exemplary damages only, it would not prevent an award of aggravated damages from being made against two concurrent tortfeasors, despite the fact that only one of them had been responsible for the aggravation of the plaintiff's loss.

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[38] Note that the Commission recommends the retention of s.285(2)(f) of the *Companies Act, 1963*, as it applies to aggravated, exemplary and restitutionary damages. See paras. 2.113-114, *supra*.

[39] WHITE, THE IRISH LAW OF DAMAGES at p.16, considers the term "punitive" to be wider than "exemplary" and to include aggravated as well as exemplary damages. This is contrary, however, to the subsequent authority of *Conway v INTO*, *op. cit.* fn. 1, where Finlay CJ stated that punitive and exemplary damages should be regarded as identical in Irish law.

5.28 Since, under the recommendations made in this report, it is intended that aggravated damages should be defined so as to emphasise their purely compensatory nature, it may seem unnecessary to state that their award against a blameless concurrent tortfeasor is excluded. Despite their compensatory nature, aggravated damages are grounded in the particular misconduct of a defendant, which has aggravated the loss to the plaintiff. Where the aggravation of the loss has been caused by one concurrent tortfeasor only, the allocation of this part of the damages should reflect this.

5.29 In English law (unlike the majority of common law jurisdictions), there is joint liability between concurrent tortfeasors for exemplary or aggravated damages. However, the English Law Commission in their Final Report recommended that the law be altered on this point to allow for punitive awards to be made solely against the tortfeasor responsible for the punishable behaviour. In the United States, the law in the majority of States is that separate awards of punitive damages may be made against joint tortfeasors.[40]

5.30 The Commission recommends that section 14 of the Civil Liability Act, 1961 *should be amended to clarify that aggravated damages should not be awarded against a concurrent tortfeasor who is not responsible for the aggravation of the loss.*

(ii) Causes of action subsisting against deceased persons (section 8 of the Civil Liability Act, 1961)

5.31 Section 8 (1) states: "On the death of a person on or after the date of the passing of this Act all causes of action (other that excepted causes of action) subsisting against him shall survive against his estate." Section 8 imposes no restriction on the type of damages that may be recovered against the estate of the deceased, it allows a claim for aggravated damages to survive against the estate of a deceased wrongdoer.

5.32 The Commission recommends that section 8 of the Civil Liability Act, 1961, *by which aggravated damages are available against the estate of a deceased wrongdoer, should be retained.*

(iii) Survivor actions (section 7(2) of the Civil Liability Act, 1961*)*

5.33 Survivor actions have also been discussed in Chapter 2 paragraphs 2.103-2.105. Section 7(1) states: "On the death of a person on or after the date of the passing of this Act, all causes of action (other than excepted causes of action) vested in him shall survive for the benefit of his estate." Section 7(2) of the Act excludes "exemplary damages, or damages for any pain or suffering or personal injury or for loss or diminution of expectation of life or happiness." The present law draws the distinction between damages to the estate of the deceased/injured person, which may be awarded, and damages which are purely personal to the deceased, such as damages for pain and suffering. The latter may not be awarded. We think this is a sensible distinction and that it should be applied to aggravated damages which, as we argue above, are, mainly, a particular form of compensatory damages and are personal to the

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[40] SCHLUETER AND REDDEN, PUNITIVE DAMAGES, (3rd ed.) §4.4(B)(2)(b)(3).

injured party. We do not advocate amendment of the section in relation to aggravated damages.

5.34 It is not recommended that the section 7 should be amended so as to allow for the award of aggravated damages in survivor actions.

(iv) Wrongful death (Sections 48 and 49 Civil Liability Act, 1961*)*

5.35 Section 48(1) states: "Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased."

We have mentioned above, in Chapter 2[41], that under section 49 (1) (a) of the Act, the recovery of aggravated damages in wrongful death cases is implicitly excluded, as it confines the damages available in wrongful death cases to damages " proportioned to the injury resulting form the death to each of the dependants". The amount of damages available for mental distress is limited to a fixed sum of £20,000.

5.36 The Commission recommends that aggravated damages should be available in wrongful death cases. The Commission is of the opinion that to ensure proper recovery in wrongful death cases, it is necessary that a statutory provision be included to the effect that the monetary limit in respect of damages for mental distress imposed by section 49 of the Civil Liability Act, 1961, *as amended, not affect the jurisdiction of the court to award aggravated damages, no less than exemplary damages, in a wrongful death case.*

[41] See para. 2.106.

CHAPTER 6: RESTITUTIONARY DAMAGES

A. Introduction

6.01 The category of restitutionary damages has developed as a particular application of the principle of unjust enrichment, whereby the law can strip away profit wrongfully acquired at the expense of another.[1] The aim of such damages is not to restore the position of the plaintiff prior to the wrong, as compensatory damages aim to do, but rather to restore the position of the defendant, by removing the profits earned by the wrong. Where damages are based on profit, the plaintiff will usually receive a larger sum than that which would be available were damages calculated on a compensatory basis. Thus in a restitutionary damages award, there will usually be an element, if not of punishment, then of depriving the defendant of his or her ill-gotten gains. Restitutionary damages do not, therefore, place as onerous a burden on defendants as do exemplary damages, but they may result in the plaintiff receiving an award that is substantially larger than the loss suffered.

6.02 Restitutionary damages aim to restore the position as between the parties, though from the point of view of the defendant rather than the point of view of the plaintiff. Although firmly outside the traditional compensatory pattern of tort and contract damages, they lack the broader social goals, as well as the severity, of exemplary damages. They are, therefore, not necessarily an exceptional remedy in the same sense as exemplary damages and even aggravated damages.

6.03 At this point, we ought to mark a fundamental distinction. In the first place, restitutionary damages may be awarded as a remedy for 'wrongdoing', (namely, a tort, breach of contract or breach of fiduciary duty), where there is a benefit to the defendant which outstrips the loss to the plaintiff; indeed, there may be no loss to the plaintiff. On the other hand, if there is a benefit to the defendant which is matched by loss to the plaintiff, then there is a substantive claim in restitution.[2] One can only give restitution to a plaintiff for that which he has parted with and lost. If the plaintiff has suffered no loss there is nothing to restore to the plaintiff, although the defendant may have been unjustly enriched. Restitutionary damages are the mechanism by which the defendant can be stripped of this unjust enrichment. For there to be a claim in

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1 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; *Dublin Corporation v Building and Allied Trades Union* [1996] 1 IR 468; Eoin O'Dell, *The Principle Against Unjust Enrichment*, (1993) 15 DULJ 27. See Consultation Paper at paras. 8.01-8.06.

2 The principle against unjust enrichment which underlies the law of restitution has been recognised by the Irish courts as far back as *Rochford v Earl of Belvidere* 1770 (1766-1791) Wallis by Lyne 45. Budd J in *The Right Honourable The Lord Mayor, Aldermen and Burgesses of the City of Dublin v. The Ancient Guild of Incorporated Brick and Stone Layers and Allied Trades Union and its Trustees,* Unreported, High Court, 6 March 1996 examines the 'Irish Cases on Restitution for Unjustified Enrichment' at pp.21-38. These cases include: *East Cork Foods Limited v O' Dwyer Steel Company Limited* [1978] IR 103, *Murphy v Attorney General* [1982] IR 241, *Elizabeth Rogers v Louth County Council* [1981] ILRM, *Dolan v Neligan* [1967] IR 245, *Allied Discount Card v Bord Failte Eireann* [1990] ILRM 811, *In re Frederick Inns* [1991] ILRM 582, *N.A.D. v T.D.* [1985] ILRM 153 and *HKN Investoy v Incotrade PVT Limited and Others* [1993] 3 IR 152.

restitution the following conditions must be fulfilled: (i) that the defendant has been enriched, (ii) at the plaintiff's expense, (iii) in circumstances in which the law requires restitution (i.e. the 'unjust' phase of the enquiry); and (iv) in the absence of defences or other policies to deny restitution. This paper is concerned solely with the award restitutionary damages in tort or contract. Accordingly, we shall go no further in examining a substantive claim in restitution.

6.04 The terminology of "restitutionary damages" has emerged relatively recently, coinciding with the renewed interest in the substantive law of restitution[3] generally. The existence of a distinct category of restitutionary damages has not been easily or widely accepted in either English or Irish law.[4] In the English law, a series of cases do give some support to a category of tort damages based on the profit gained by the defendant, rather than the loss to the plaintiff. Although some commentators have sought to explain away these cases as compensatory, as we noted in the Consultation Paper,[5] this theory is difficult to sustain. Recent English case law supports the award of restitutionary damages also in certain cases of breach of contract. In the Irish law, judicial consideration of restitutionary damages is considerably rarer, although in at least one case there has been an endorsement of restitutionary damages in principle.[6] Clearly, however, the development of this area of the law is still in its infancy, and much remains to be explored by the Irish courts as to whether and in what circumstances restitutionary damages may be awarded.

6.05 Below, we consider first the law of restitutionary damages in tort, and secondly, the law of restitutionary damages for breach of contract.

B. The Development of Restitutionary Damages for Tort in English Law

(i) Waiver of tort

6.06 Restitutionary damages for tort originate in early cases of 'waiver of tort' where the plaintiff 'waived' the right to recover in tort damages and instead elected to recover the sum of the defendant's profit through an action in quasi-contract.[7] The plaintiff was in essence waiving not the tort itself but the compensatory remedy for the tort. Waiver of tort provided a means, albeit a convoluted one, of substituting a restitutionary remedy for the remedies available to a plaintiff in tort. The 'waiver of

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3 The term restitution is only the latest in a series of names given to the concept, beginning with the name quasi-contract. Then, because of the equity input, the term unjust enrichment was coined and now it has been accepted that the underlying principle on which the law operates is restitution.

4 The courts of many other common law jurisdictions have not to date developed any law concerning restitutionary damages. For a discussion of the possibility of restitutionary damages in Australian law, see J W Carter and M J Tilbury, *Remedial Choice and Contract Drafting*, 13 (1998) Journal of Contract Law 7.

5 Paras. 8.16-8.18.

6 *Hickey v Roches Stores* [1993] Restitution Law 196, *infra* at paras. 6.32-6.35. See also Appendix 1.

7 Beginning with the case of *Lamine v Dorrell* (1701) 2 Ld. Raym. 1216, see GOFF AND JONES, THE LAW OF RESTITUTION, (5th ed. 1998) at pp.773-774. A plaintiff would often elect to waive a tort for procedural reasons, for example, to gain the benefit of less stringent limitation periods.

tort' doctrine was analysed in *United Australia Ltd v Barclays Bank Ltd.*[8] In that case, where the plaintiff had initially brought an action in restitution[9] and had then abandoned this case and brought an action for compensatory damages for the tort of conversion, it was held that the initial 'waiving' of the tort by the plaintiff to bring an action in restitution did not prejudice the plaintiff's claim that a tort had been committed. Viscount Simon LC held that:

> " [t]he substance of the matter is that on certain facts [the plaintiff] is claiming redress either in the form of compensation i.e. damages as for a tort, or in the form of restitution of money to which he is entitled, but which the defendant has wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress. At some stage in the proceedings the plaintiff must elect which remedy he will have."[10]

6.07 Waiver of tort has been described by Goff and Jones as a "misnomer", since the tort itself is not waived.[11] The reality is that the plaintiff may decide to claim in either restitution, or restitutionary damages, or compensatory damages. Either of the last two claims will be based on the commission of a tort.

(ii) Restitutionary damages in the English case law

6.08 The artificial device of waiver of tort apart, an independent category of restitutionary damages in tort remains controversial in English law. There is disagreement between commentators on the extent to which restitutionary awards have in fact been made, since many awards which could be characterised as restitutionary are not unequivocally expressed to be so by the courts.[12] For example, in several cases the sum of damages is based on the gain made by the defendant in not paying for the use of property taken or retained without authorisation, or for the use of land or property trespassed on or overheld. In such cases, it can and has been argued that damages are really compensatory, based on the loss by the plaintiff of the right to bargain with the defendant to pay such a sum of money.[13] This analysis is a strained one and may sometimes involve a fiction, since it cannot always be assumed that the plaintiff would be willing to make such a bargain – he or she might well have refused to do so. An analysis of these cases on the basis of restitution of the gain by the defendant is undoubtedly more straightforward and realistic.

6.09 The majority of the English cases where damages are measured according to the profit of the defendant are cases of proprietary torts, such as trespass to land[14] and detinue.[15] An early case which suggests a restitutionary assessment of damages is

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8 [1941] AC 1.

9 In an independent claim for restitution by subtraction, in an action for money had and received.

10 *Op. cit.* fn. 8 at p.19.

11 GOFF AND JONES, *op. cit.* fn. 7, at p.773.

12 See Consultation Paper at paras. 8.16-8.32.

13 Sharpe and Waddams, *Damages for Lost Opportunity to Bargain*, (1982) 2 OJLS 290.

14 *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch. 538.

15 [1975] Ch.408; *Strand Electric v Brisford Entertainments Ltd* [1952] 1 All ER 796.

Whitwham v Westminster Brymbo Coal and Coke Co,[16] a case of trespass to land where the defendants had dumped refuse on the plaintiff's land. Since there was no loss to the plaintiff as a result of the defendant's action, it would seem that damages were awarded on the basis of the defendant's gain in not being obliged to pay for the dumping of refuse.

6.10 A key endorsement of restitutionary damages by the English courts was made by Lord Denning in *Strand Electric v Brisford Entertainments Ltd.*[17] In that case, the plaintiffs had hired out theatrical equipment to the defendants, who had then refused to return it at the end of the hire period. The plaintiffs sued in detinue, and it was held that they were entitled to a sum of damages equivalent to the sum they would have received for the hire of the goods for the period in which they were wrongfully retained. Lord Denning applied the principle as regards the wrongful use of land set out in *Whitwham v Westminster Brymbo Coal Company.*[18] He held that:

> "If a wrongdoer has made use of goods for his own purposes, then he must pay a reasonable hire for them, even though the owner has in fact suffered no loss. It may be that the owner would not have used the goods himself, or that he had a substitute readily available, which he used without extra cost to himself. Nevertheless the owner is entitled to a reasonable hire. If the wrongdoer had asked the owner for permission to use the goods, the owner would be entitled to ask for a reasonable remuneration as the price of his permission. The wrongdoer cannot be better off because he did not ask permission. He cannot be better off by doing wrong than he would be by doing right. He must therefore pay a reasonable hire."

6.11 Lord Denning pointed out that as the claim for the hiring charge is based is not on the loss to the plaintiff, but on the fact the defendant has had the benefit of the goods, it "resembles an action for restitution rather than an action of tort". However, he considered it unnecessary to place the award in any formal category. It should be noted that the other judgments in the case purported to take a compensatory approach, while reaching the same conclusion as to the amount of damages. Romer LJ said:

> "the fundamental aim in awarding damages is in general to compensate the party aggrieved ... the question of quantifying the profit or benefit which the defendants have derived from their wrongful action does not arise, for there is no necessary relation between the plaintiff's loss and the defendant's gain. It follows that, in assessing the plaintiff's loss in the present case, one is not troubled by any need to evaluate the actual benefit which resulted to the defendants by having the plaintiffs' equipment at their disposal."[19]

Romer LJ held that the defendants could not argue that the plaintiffs had not suffered any loss because they might not in fact have found another hirer for the equipment,

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16 *Op. cit.* fn. 14.

17 *Op. cit.* fn. 15.

18 *Op. cit.* fn. 14.

19 *Ibid.* at p.802.

since "a defendant who has wrongfully detained and profited from the property of someone else cannot avail himself of a hypothesis such as this."[20]

6.12 Somerville LJ considered that the plaintiff's loss in the case was the value in the market for the use of the equipment.[21] He considered the benefit to the defendant to be "irrelevant".[22]

6.13 Again, in *Penarth Dock Engineering v Pounds*,[23] damages were measured according to the benefit the defendant had obtained in using a berth on the plaintiff's dock without permission, and in *Bracewell v Appelby*,[24] damages were awarded in lieu of an injunction for trespass on a private road. Damages were expressed as an amount equivalent to that which the defendants would have been paid for a right of way over the road.

6.14 In *Carr Saunders v Dick McNeil Associates*,[25] Millett J held that profits made by the defendants could be taken into account in a case of nuisance arising out of interference with an easement of light. Relying on *Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd*, [26] and *Bracewell v Appelby*, he held that the approach taken in those cases should also be applied "where damages are awarded, in lieu of a mandatory injunction, for the interruption of the right of light to ancient windows."[27]

Account should therefore be taken of the bargaining position of the plaintiff, and the profit, which the defendants would gain through the development of their property and the obstruction of the plaintiff's light.

6.15 Further authority for the availability of restitutionary damages is found in *Ministry of Defence v Ashman*,[28] which involved a claim for mesne profits against an overholding tenant. Hoffman J characterised the remedy as in essence a restitutionary one. Damages were measured according to the benefit which the defendant had gained in the particular circumstances of the case. Thus, instead of calculating the benefit according to the market value of the property overheld, he calculated the damages according to a doctrine of subjective devaluation, by which the property was in fact worth less to the defendant in the case than it would have been to others, since the defendant occupied the premises at a reduced rate as a result of her husband's employment with the armed forces and her only alternative was a local authority house. The sum due in restitution was the cost of local authority housing for the period of overholding; on the basis of 'subjective valuation, the amount due was reduced by the particular circumstances of the defendant.

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20 *Ibid.*

21 *Ibid.* at p.799.

22 *Ibid.*

23 [1963] 1 Lloyd's Rep. 359.

24 [1975] Ch 408.

25 [1986] 2 All ER 888.

26 [1974] 2 All ER 321.

27 *Op. cit.* fn. 25 at p.896.

28 [1993] 32 EGLR 102.

6.16 Some English cases have taken a restrictive attitude towards restitutionary damages. The decision of the Court of Appeal in *Stoke-on-Trent City Council v W J Wass Ltd* [29] did not favour restitutionary damages. The Court of Appeal (Nicholls LJ) found that where the holding of an unauthorised market had not caused any loss to the owners of a lawful market, no damages were to be awarded. He held that "there would be no place for awarding, by application of the user principle, damages in a sum greater than the amount of that loss" and that "where no loss has been suffered no substantial damages of any kind can be recovered".[30] Nourse L J expressed a similar opinion in his judgment. He distinguished *Wrotham Park* as a case which "stands very much on its own"[31] since it was a case where, if compensatory damages only had been awarded, there would have been an injustice. He found it determinative that "an unlawful use of the plaintiff's right to hold his own market does not deprive him of the opportunity of holding one himself."[32] Nourse LJ observed that:

> "[i]t is possible that the English law of tort, more especially of the so-called 'proprietary torts' will in due course make a more deliberate move towards recovery based not on loss suffered by the plaintiff but on the unjust enrichment of the defendant ... But I do not think that that process can begin in this case and I doubt whether it can begin at all at this level of decision."[33]

(iii) Availability of restitutionary damages in tort: Irish law

6.18 Authority for the availability of restitutionary damages for tort in Irish law remains slim. At a minimum, however, the willingness of the courts to award exemplary damages in appropriate cases indicates that the Irish courts are not wedded to an exclusively compensatory assessment of damages in tort cases. There have also been some dicta supporting a restitutionary approach to damages. The early case of *Maher v Collins*,[34] though ambiguous, may give some slight support for a restitutionary award in a case where a defendant has made a profit from the commission of a tort. The case concerned the tort of criminal conversion. Giving judgment in the case, O'Higgins CJ held that, although damages for criminal conversion should be compensatory rather than punitive:

> "there may ... be exceptional and particular cases where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed any compensation likely to be payable to the plaintiff. In such rare and exceptional cases other considerations may apply."[35]

6.19 These comments were made in the context of a possible award of exemplary damages in the case. By their reference to 'exceptional and particular cases,' they

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29 [1988] 3 All ER 394.

30 *Ibid.* at p.404.

31 *Ibid.* at p.400.

32 *Ibid.* at p.401.

33 *Ibid.* at p.402.

34 [1975] IR 232.

35 *Ibid.* at p.238.

may support Lord Devlin's second category in *Rookes v Barnard*[36] for the award of exemplary damages more than they support damages based on restitution. In particular, the reference to calculation by the defendant that a profit can be made suggests an element of malice such as would ground exemplary damages. However, O'Higgins CJ's comments do point to the law's acceptance of damages which cancel out profit resulting from tortious action, and to the need to provide a remedy to achieve this.

6.20 The more recent case of *Hanley v ICC Finance*[37] also indicates openness towards restitutionary-based damages awards. Kinlen J, in assessing damages for conversion, referred to the dicta of Denning LJ in *Strand Electric* that conversion:

> "is an action against [the defendant] because he has had the benefit of the goods. It resembles, therefore, an action for restitution rather than an action of tort. But it is unnecessary to place it in any formal category."

Kinlen J stated:

> "I find the proposition by Denning LJ of subsuming these two distinct torts [conversion and detinue] into a claim for restitution very attractive. It seems to me that the trial judge should look at all aspects of the case and decide the relevant periods and the nature of damage having regard to all the particular circumstances of each individual case. The matter should be clarified by statute."

6.21 These comments are ambiguous, however, and it is unclear whether they support the award of restitutionary damages or the creation of a separate action in restitution. In the case before the court, damages based on restitution were not in fact awarded.

6.22 From the cases, it can be seen that the Irish law as regards damages measured on restitutionary principles is, as yet, very unclear. There has been no detailed discussion by the Irish courts of a general category of restitutionary damages. The dicta of Kinlen J, and his citation with apparent approval of a series of English cases which tend towards a restitutionary approach to damages, do suggest a degree of openness towards the establishment of a category of restitutionary damages in this jurisdiction. However, as yet, the law must be regarded as being in the early stages of development.

C. Restitutionary Damages for Breach of Contract

6.23 The award of restitutionary damages for breach of contract has also been the subject of debate in both the Irish and the English courts. After initial caution, the English Court of Appeal has now endorsed the recovery of restitutionary damages in contract, in *Attorney General v Blake*.[38] The Irish High Court, in the much earlier

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[36] [1964] 1 All ER 367.

[37] [1996] 1 ILRM 463.

[38] [1998] 1 All ER 833.

case of *Hickey v Roches Stores*,[39] gave a clear endorsement of the recovery of restitutionary damages for breach of contract in principle, although not awarding such damages on the facts.

(i) English case law

6.24 The English courts' refusal to award restitutionary damages for breach of contract is exemplified by *Surrey Co Co v Bredero Homes Ltd*,[40] where the Court of Appeal refused to make a restitutionary award for a breach of contract, though accepting, obiter, that restitutionary damages could be awarded in some tort cases. The case concerned a contract by which the defendants were to build a specified number of houses on land sold to them by the plaintiffs; in breach of the contract the defendants built a larger number of houses than that specified. Since the plaintiff had suffered no loss through the defendant's building of additional houses, restitutionary damages were claimed, but the court held that only nominal damages could be awarded.[41]

6.25 In an earlier authority, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,[42] an award based on the profit to the defendant had been made by Brightman J in a case of breach of a restrictive covenant. The defendant, in breach of a restrictive covenant for the benefit of the plaintiff, built a number of houses on his land. The plaintiff had suffered no loss from the breach of the covenant, and, therefore, any compensatory damages awarded would have been nominal only. Drawing a comparison with the situation in *Whitwham v Westminster Brymbo Coal and Coke Co*,[43] Brightman J held that it would be unjust that the defendants should "be left in undisturbed possession of the fruits of their wrongdoing" merely because the court considered it wasteful to issue an injunction ordering the demolition of the houses. He therefore awarded damages as a substitute for an injunction. The damages were measured as the amount that might reasonably have been demanded by the plaintiff as payment for relaxing the covenant. Although Brightman J acknowledged that the plaintiff would not in fact have relaxed the covenant, he stated that "for present purposes I must assume that they would have been induced to do so."[44] This supports the interpretation that the damages awarded were compensatory, based on a purely fictional loss of the opportunity to make an agreement relaxing the covenant. However, Brightman J referred with approval to the remarks of Lord Denning in *Strand Electric*, which placed the damages awarded in that case on a clear restitutionary basis. The award has been variously interpreted as restitutionary or compensatory.[45]

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39 *Op. cit.* fn. 6.

40 [1993] 3 All ER 705.

41 But in *Jaggard v Sawyer* [1995] 2 All ER 189 the Court of Appeal noted that the rule *in Surrey Co Co v Bredero Homes*, "may ... not be the last word on that subject", *per* Bingham MR.

42 *Op. cit.* fn. 26.

43 *Op. cit.* fn. 16.

44 *Ibid.* at p.341.

45 See *Surrey v Bredero Homes*, op. cit. fn.40, and *Jaggard v Sawyer*, op. cit. fn. 41; Sharpe and Waddams, op. cit. fn. 13.

6.26 To the extent that *Wrotham Park* is an authority for the calculation of damages according to restitutionary criteria, it had been considered to be limited to cases of breach of covenant, and thus as constituting an exception to the general rule that restitutionary damages are not available for breach of contract. However, the recent case of *Attorney General v Blake*[46] has confirmed that restitutionary damages are available for a wider range of breach of contract cases in English law, albeit still confined to particular circumstances.[47]

6.27 *Blake* concerned the publication of the defendant's memoirs, which described his career as a member of the British Secret Intelligence Service and double agent for the Soviet Union. The Court of Appeal found that the publication of this material was in breach of the defendant's contractual undertaking under the Official Secrets Acts not to disclose official information gained in the course of his employment.[48] No compensatory damages were available, however, since the Crown could not establish any loss as a result of the publication. The defendant had already received substantial royalties for the publication of the book, and was due to receive further sums.[49]

6.28 The Court of Appeal discussed the possibility of an award of restitutionary damages, despite the failure of the Crown to plead such damages. Although the Court acknowledged that its conclusions should be regarded as tentative, since they had been arrived at without the benefit of full discussion, it strongly endorsed the award of restitutionary damages for breach of contract in certain circumstances. The Court endorsed the general rule, which was "beyond dispute", that damages in breach of contract cases are compensatory only. This principle should not, however, in the opinion of the Court, be elevated "into a fundamental principle which admits of no exceptions."[50] On the contrary, it was clear that some flexibility was desirable in measuring contract damages and that "the general rule that damages for breach of contract are compensatory can safely be maintained without denying the availability of restitutionary damages in exceptional cases".[51] The Court noted that judicial opinion did not favour a rigid compensatory rule, citing *Jaggard v Sawyer*[52] and *Wrotham Park*.[53]

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46 *Op. cit.* fn. 38.

47 The Irish case of *Hickey v Roches Stores*, *op. cit.* fn. 6, also allows for recovery of restitutionary damages in breach of contract cases, but probably on a broader basis than that of *Blake*. See *infra* at paras. 6.32-6.35. See also Appendix 1.

48 Although he was a former employee who had disclosed information which had been confidential, he was not in breach of fiduciary duty, since it was no longer confidential.

49 It was also contended that since the Attorney General had a duty to oversee the enforcement of the criminal law, the Court could grant him injunctive relief to restrain a criminal from benefiting as a result of his crime. The Court granted an injunction restraining the defendant from receiving any further royalties from the publication of his book.

50 *Op. cit.* fn. 38 at p.844, *per* Lord Woolf MR.

51 *Ibid.* at p.846, *per* Lord Woolf MR.

52 *Op. cit.* fn. 41.

53 *Op. cit.* fn. 26.

6.29 The Court was unconvinced by the argument that recovery of damages in the restitution measure was limited to proprietary claims, but saw the exception to the compensatory rule as broader than this, considering that:

> "if the court is unable to award restitutionary damages for breach of contract, then the law of contract is seriously defective. It means that in many situations the plaintiff is deprived of any effective remedy for breach of contract, because of a failure to attach a value to the plaintiff's legitimate interest in having the contract duly performed."[54]

In the opinion of the Court, it should be recognised that "the law is now sufficiently mature to recognise a restitutionary claim for profits made from a breach of contract in appropriate circumstances."[55]

6.30 The Court noted the difficulty of determining in which cases restitutionary damages could be recovered for breach of contract. In the view of the Court, awards with a restitutionary basis should be made only in exceptional cases. Lord Woolf rejected the defendant's moral culpability as a suitable basis for awarding restitutionary damages, finding this criterion "irrelevant".[56] He also rejected as a basis for a restitutionary award the mere fact that the defendant's breach of his contract with the plaintiff had allowed him to enter into a more profitable contract with someone else. Lord Woolf identified two circumstances in which the award of restitutionary damages would be appropriate. The first circumstance was where the defendant had provided only "skimped performance" of the contract, where the defendant had failed to provide the full extent of the services that he had contracted to provide and for which he had charged the plaintiff. The second was where defendant had obtained a profit by doing the very thing, which he had contracted not to do. Lord Woolf noted that the second category would enable restitutionary damages to be awarded in the case before him, but in the absence of any claim for "substantial damages",[57] he dismissed the claim in damages for the breach of contract.[58]

6.31 It is important to note that although *Blake* confirms the availability of restitutionary damages for breach of contract, it confines their award to two specific types of cases. Thus, despite the statement that the law of contract would be defective if it did not allow for the award of restitutionary damages, the case represents only a limited endorsement of restitutionary damages in this area. Moreover, this was a case of rather unusual facts.

(ii) Irish case law

6.32 The strongest endorsement of restitutionary damages in this jurisdiction came in the case of *Hickey v Roches Stores*,[59] which is the only case to concern breach

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54 *Op. cit.* fn. 38 at p.845, *per* Lord Woolf MR.

55 *Ibid.*

56 *Ibid.*

57 Which, from the context, can be taken to mean restitutionary damages.

58 The claim, on the public law ground, that an injunction should be granted to the Attorney General restraining the defendant from profiting from his crime, was granted.

59 *Op. cit.* fn. 39. The judgment was given in July 1976.

of contract. The parties to the case had a contract by which the defendants leased space in their store to the plaintiffs, who sold fabrics in the store. The defendants terminated the contract, a termination, which was found by an arbitrator to be without justification. Under the contract, the defendants should, on their termination of the contract, have undertaken not to engage in the sale of fashion fabrics for a year following the termination. In fact, once the contract had been terminated, the defendants took over the sale of fabrics in their own store. Meanwhile, the plaintiffs entered into a similar but less profitable contract with another department store. The question arose in the High Court as to the measure of damages to which the plaintiffs were entitled. The plaintiffs claimed that they were entitled to damages for the profits made by the defendant in carrying on their own trade in fabrics, for the period of one year following the termination of the contract. They also claimed to be entitled to the value of the goodwill of the defendant's trade in fabrics calculated at the date of the arbitrator's determination.

6.33 Finlay P reiterated that the general rule as regards damages, both in tort and in breach of contract, was that the damages should be aimed at putting the injured party, in so far as money could do so, back in the position he or she would have enjoyed had the wrong not been committed. However, he noted that there were exceptions to this general rule in both tort and contract cases. Finlay P considered that, in an appropriate case, damages based on the profit to the defendants could be awarded. He stated that:

> "Where a wrongdoer has calculated and intended by his wrongdoing to achieve a gain or profit which he could not otherwise achieve and has in that way acted *mala fide* then irrespective of whether the form of his wrongdoing constitutes a tort or a breach of contract, the Court should, in assessing damages, look not only to the loss suffered by the injured party but also to the profit or gain, unjustly or wrongly obtained by the wrongdoer. If the assessment of damages confined to the loss of the injured party should still leave the wrongdoer profiting from his calculated breach of the law, damages, should be assessed so as to deprive him of that profit. In extending this measure of damages, which heretofore has been confined to tort, to cases of breach of contract, I have acted upon a conclusion that the protection of a party to a contract, from uncertain or extensive damages, against which he had no opportunity to provide by the terms of the contract, should not apply where he has thus acted *mala fide*."[60]

Applying these principles to the facts of the case, it was held that damages based on profit should not be awarded, since the breach of contract by Roches Stores had not in fact been malicious.[61]

6.34 This case demonstrates openness on the part of the High Court to restitutionary damages in breach of contract cases. It is significant that the scope of recovery of restitutionary damages envisaged by Finlay P is broader than that set out by the English Court of Appeal in *Blake*. However, the confinement of restitutionary

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[60] *Ibid.* at p.208.

[61] *Ibid.* at pp.208-209.

damages to instances where the defendant has acted *mala fide* does represent a significant limitation.

6.35 The discussion of damages awards based on restitutionary principles in *Hickey v Roches Stores* has not, as yet, been built on in subsequent cases. This, together with the fact that restitutionary damages were not in fact awarded in *Hickey*, means that the case does not provide a very satisfactory basis for a comprehensive law of restitutionary damages for breach of contract. The case certainly leaves the door open for the recovery of restitutionary damages for breach of contract in Irish law, but further judicial development is necessary to confirm the place of restitutionary damages and the scope for their recovery.

D. Options for Reform

6.36 Restitutionary damages represent a less extreme alternative to exemplary damages and an effective means of ensuring that a wrongdoer does not profit from the commission of a tort or breach of contract. They aim to strip away the precise amount of the defendant's profit from the wrong so that the defendant (rather than the plaintiff) is put back in the same position as he or she was in prior to the commission of the wrong. A restitutionary award does not go so far as an award of exemplary damages, which would result in an award greater than the profit made by the defendant, in the interests of punishment and deterrence. But it does go further than compensatory damages.

6.37 A restitutionary award effectively serves an interest well recognised by the law of damages: it ensures that a wrongdoer does not profit from his wrong. The importance of preventing such profit was even recognised by Lord Devlin in *Rookes v Barnard*. While there is a substantial element of overlap between the two, restitutionary damages may in many cases provide a more appropriate means of achieving this.

6.38 Restitutionary damages provide an important supplement to compensatory damages in cases where, although the loss to the plaintiff by the defendant's commission of a tort or breach of contract has been so negligible as to result in nothing more than nominal damages, the defendant has made a significant profit through the commission of the wrong. Such cases may only rarely be suitable for the award of exemplary or aggravated damages. With the award of only nominal damages in such a case, the element of vindication, which is a legitimate aspect of compensatory damages, as well as of exemplary damages, will be absent.

6.39 In relation to restitutionary damages, there is particular reluctance to interfere through legislation with the continuing development of the common law. As has been seen in the case law mentioned above, this is an area of law which is in the early stages of development, and which is, on many points, as yet unsettled and unclear. There has been relatively little Irish case law on this topic and there is not, as is the case in relation to exemplary damages, any long tradition of the award of damages calculated on the basis of restitution. Undoubtedly, restitutionary damages will become of increasing significance in the law of damages, but it would seem inappropriate, at this early stage, to crystallise this newly emerging area of law in legislation.

6.40 The Commission does not consider that restitutionary damages recoverable on the basis of tortious liability should be limited to cases involving proprietary torts. We see no reason why such torts merit the protection afforded by restitutionary damages to a greater degree than do others. Restitutionary damages may, for example, be appropriate in a case where the defendant has made a profit through the publication of defamatory material or through harassment. We consider that, subject to the development of the law by the courts, there should be a right to claim damages based on the profit earned by the defendant through the commission of a tort in any appropriate case.

6.41 The Commission also favours the availability of restitutionary damages in appropriate cases of breach of contract. This is the position favoured by Finlay J in *Hickey v Roches Stores*, although the law on the matter is evolving. The award of restitutionary damages in a case of breach of contract does not, in the view of the Commission, compromise the private law character of contract. There is more justification for the award of restitutionary damages in contract cases than for the award of exemplary damages in such cases, since restitutionary damages do not import a public purpose into the damages award, in the same way as do exemplary damages.

6.42 If it is accepted that restitutionary damages should be available for breach of contract, a further question arises as to whether proof of bad faith in the sense of calculation by the defendant of the profit likely to accrue to him from his wrongdoing should be necessary to ground an award of restitutionary damages. The endorsement of restitutionary damages in *Hickey v Roches Stores* was limited by the proviso that they should only be available where the defendant had acted in bad faith in this sense. It was the necessity to show bad faith that had prevented the court from awarding restitution-based damages in that case. It remains to be seen whether the courts in future cases will follow this rather stringent restriction given the essence of restitutionary damages, which is that the defendant should not make a profit from his wrongdoing.

6.43 The Commission does not consider that awards of restitutionary damages should be so limited. In contrast with exemplary damages, the basis of restitutionary damages awards is not in the moral quality of the defendant's behaviour. Rather, it derives from the principle against unjust enrichment and is, therefore, based on the fact that the defendant has made a profit at the expense of the plaintiff through the commission of the wrong.

6.44 One proposal for reform which was made in the course of consultation was that legislation should state the availability of restitutionary damages in appropriate cases of tort and contract.[62] This would have the effect of removing any doubt as to the availability of restitutionary damages in this jurisdiction, and would secure a place for restitutionary damages in the law. Mr Eoin O'Dell argues that, given the relative lack of case law on this point, the courts would benefit from legislative guidance on the availability of restitutionary damages. However, he does not propose a detailed legislative regulation of the law at this stage. His submission states:

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62 Eoin O'Dell, Submission to the Law Reform Commission on Damages in the Restitution Measure for Tort and Breach of Contract.

"The Commission ... in its proposed statutory reform ... should provide, for the avoidance of doubt, that such a measure of damages is available. However, beyond the recognition of the measure the Commission should not tread. There are too many unanswered and unanswerable questions as to when such damages ought to be available, the heads of gain recoverable, and the principles of remoteness of gain applicable. The Commission may choose to highlight the issues, but it should leave the resolution of these difficult issues to the courts, which, as the law matures, will in the future be more able to fashion an appropriate set of rules than the Commission or anyone else could at the moment."

6.45 The English Law Commission, in its *Report on Aggravated, Exemplary and Restitutionary Damages*, concluded that the development of the law of restitutionary damages should be left to the courts, since the area was still in the early stages of its development, and any general legislative provision would be premature. The Law Commission did, nevertheless, recommend some statutory provisions relating to restitutionary damages, viewing these amendments as necessary consequences of its reform of the law in relation to exemplary damages. The Law Commission was of the view that, in the interests of consistency and for the avoidance of doubt, legislation should provide that restitutionary damages be available, at least in those cases where exemplary damages could be recovered. Therefore, the Law Commission recommended that legislation should provide that restitutionary damages could be recovered, where the conduct of the defendant, in the commission of a tort, an equitable wrong or a statutory civil wrong, showed a "deliberate and outrageous disregard of the plaintiff's rights."[63] The recommendation was stated to be without prejudice to the ability of the courts to award restitutionary damages in other cases where the conduct of the defendant was not of the type described.

6.46 However, the Commission does not favour a legislative provision which would state the availability of restitutionary damages (whether in all cases of contract and tort, or of some). In the first place, such a provision would be out of step with the recommendations made in respect of exemplary and aggravated damages, the intention of which has been to avoid excessive legislative interference with the development of the common law. Secondly, such a provision would call for legislation at a stage when there is a paucity of judicial dicta on the subject to guide the legislature and also a scarcity of cases to highlight the likely issues. Given the absence of detailed discussion on this topic by the Irish courts, it would be necessary for any legislation to set out in some detail the nature and purpose of this still relatively unfamiliar category of damages. There must be concern that this would prejudge the development, by the courts, of restitutionary damages.

6.47 We do not recommend legislation such as that proposed by the English Law Commission in relation to exemplary damages. Moreover, although we do consider that restitutionary damages may be appropriate in many cases where exemplary damages would also be available, we do not favour legislating for this point. Such legislation might have the effect of confining restitutionary damages to exemplary damages type cases, where the conduct of the defendant was such as to ground exemplary damages. Given the substantial overlap between restitutionary and

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[63] Report No. 247 at paras. 3.49-3.50. In regard to whether this standard of conduct is met is to be determined by the judge rather than the jury, see paras. 3.35-3.55.

exemplary damages, however, we do recommend legislation to prevent a plaintiff form recovery 'twice over'. What we propose, along the lines of the analogous recommendation in respect of the overlap between exemplary and aggravated damages,[64] is that no additional award of restitutionary damages should be made where exemplary damages are sufficient to punish the defendant. For example, take a case in which the defendant manufacturer had deliberately avoided providing the necessary safety measures for his employees in order to save money. An accident ensues, though by good fortune the plaintiff is only slightly hurt so that compensatory damages are low. However, because of the overlap between exemplary and restitutionary damages, the plaintiff could, in principle, recover under either head. Our point, here, is that the plaintiff cannot recover both sets of damages, for to permit this would, to a large extent, be to allow him to recover twice for the same category of wrong doing.

6.48 *The Commission concludes in favour of the availability of restitutionary damages in Irish law for all torts and for breach of contract, in cases where the defendant has derived a profit from the commission of the tortious or contractual wrong against the plaintiff. The Commission does not recommend the enactment of legislation regarding restitutionary damages at this point, but considers that the development of the law in this area should be left to the common law. In cases where exemplary damages have a sufficient punitive and deterrent effect, no additional award of restitutionary damages should be made.*

E. Amendments to the Civil Liability Act, 1961[65]

(i) Causes of action subsisting against deceased persons (section 8)

6.49 The present law contained in section 8 of the *Civil Liability Act, 1961* allows for the survival of a restitutionary damages claim against the estate of a deceased wrongdoer. The section provides as follows. "On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) shall survive against his estate." Clearly, this section imposes no restriction on the type of damages that may be recovered against the estate of the deceased. Since the object of restitutionary damages is to remove from the defendant his 'ill-gotten' gains, there seems (in line with the view taken in the case of exemplary damages) no reason to distinguish between a case in which the original plaintiff is taking the case and one in which it is his estate which is bringing the action. There is no policy reason why restitutionary damages should not be recoverable against the estate of the deceased. If such a claim had been awarded before the defendant's death, his estate would have been diminished and so his heirs would have suffered to the same extent.

6.50 The Commission recommends that section 8 of the Civil Liability Act, 1961, *by which restitutionary damages are available against the estate of a deceased wrongdoer, should be retained without amendment.*

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[64] See para. 2.025

[65] Note that the Commission recommends the retention of s.285(2)(f) of the *Companies Act, 1963*, as it applies to aggravated, exemplary and restitutionary damages. See paras. 2.113-114, *supra*.

(ii) Survivor actions (section 7)

6.51 Section 7 of the *Civil Liability Act, 1961*, provides that a cause of action vested in a person before his or her death is, on death, transferred to the deceased's estate and can be pursued by the personal representatives on behalf of the estate.

Section 7(1) states:

> "On the death of a person on or after the date of the passing of this Act all causes of action (other than excepted causes of action) vested in him shall survive for the benefit of his estate."

Section 7(2) states:

> "Where, by virtue of subsection (1) a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include exemplary damages or damages for any pain or suffering or personal injury or for loss or diminution of expectation of life or happiness."

While subsection (2) expressly excludes the possibility of recovering exemplary damages or damages for pain and suffering, it does not prevent the recovery of restitutionary damages. There is no principled justification against allowing the recovery of restitutionary damages by the deceased's estate.

6.52 *The Commission recommends that section 7(2) of the* Civil Liability Act, 1961, *should be amended to allow for the recovery of exemplary and restitutionary damages, but not of aggravated damages, where a cause of action survives for the benefit of the estate of a deceased person.*

(iii) Wrongful death (sections 48 and 49)

6.53 Section 48 (1) states: "Where the death of a person is caused by the wrongful act of another such as would have entitled the party injured, but for his death, to maintain an action and recover damages in respect thereof, the person who would have been so liable shall be liable to an action for damages for the benefit of the dependants of the deceased." Under section 49 (1)(a) of the Act, the recovery of restitutionary in wrongful death cases must be "proportioned to the injury resulting from the death to each of the dependants." This implicitly excludes restitutionary damages. We consider that restitutionary damages should be available in wrongful death cases.

6.54 The Commission recommends that restitutionary damages should be available in wrongful death cases.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

We indicate by the sign **[L]** where we consider legislation (which expression includes rules of court) appropriate. Where this sign is not used, we are indicating that the development of the law is best left to the courts, for reasons indicated at para.14 of the Introduction.

Chapter 1: Should Exemplary Damages be available and if so, when?

1. The Commission recommends that the availability of exemplary damages for breach of constitutional rights, or for any torts, should be retained. The Commission does not recommend that exemplary damages be extended to cases of breach of contract. *(paras. 1.65 - 1.66)*

2. The Commission notes that both the punitive and deterrent purposes of an award of exemplary damages are recognised. The Commission recommends that the primary purpose of an award of exemplary damages should be the deterrence of conduct similar to the defendant's in the future. *(para. 1.67)*

3. The Commission recommends that exemplary damages should be awarded only where it has been established that the conduct of the defendant in the commission of a tort or breach of a constitutional right has been high-handed, insolent, vindictive or exhibiting a gross disregard for the rights of the plaintiff. **[L]** *(para. 1.75)*

4. The Commission considers that the term "exemplary damages" should be adopted as the most appropriate term to describe an award of damages with both a deterrent and a punitive purpose. *(para. 1.78)*

5. The Commission considers that the courts should continue their practice of separately identifying awards of compensatory, exemplary, aggravated and restitutionary damages. *(para. 1.79)*

Chapter 2: Regulating Exemplary Damages

6. The Commission recommends that, in assessing exemplary damages, the court should be permitted to take into account the means of the defendant. We do not consider there is any reason to take into account the means of the plaintiff. **[L]** *(para. 2.010)*

7. The Commission does not make any recommendation as to a strict rule of proportion between the two categories of damages. However, we do recommend a general principle that exemplary damages should bear some reasonable relation to

compensatory damages, taking into account the circumstances of the case and the public interest in deterring and expressing condemnation of the wrongdoing involved. *(para. 2.019)*

8. The Commission does not recommend that statutory caps should be imposed on aggravated, exemplary or restitutionary damages. *(para. 2.023)*

9. The Commission recommends that there should be a stipulation that in cases where compensatory (including aggravated) damages have a sufficiently punitive and deterrent effect, no additional award of exemplary damages should be made. **[L]** *(para. 2.025)*

10. The Commission does not recommend any change in the current law by which, in cases involving a jury, exemplary damages are awarded and assessed by the jury rather than the judge. *(para. 2.043)*

11. The Commission does not recommend a change in the law regarding the apportionment of exemplary damages awards as between the plaintiff and a public fund, at least in present circumstances. *(para. 2.066)*

12. The Commission does not, at this stage, recommend legislation to regulate the award of exemplary damages in cases where there are multiple plaintiffs. *(para. 2.095)*

Amendments to Sections 7, 8, and 49 of the Civil Liability Act, 1961 *and Section 285(2)(f) of the* Companies Act, 1963

13. The Commission recommends that the following two provisions should be retained: section 8 of the *Civil Liability Act, 1961*, by which exemplary, aggravated and restitutionary damages are available against the estate of a deceased wrongdoer; and section 285(2)(f) of the *Companies Act, 1963*, by which each of these heads of damage is to be treated as a priority debt in a company liquidation, but only if awarded in an action arising from an uninsured accident to an employee. *(paras. 2.101, 2.114, 5.32,6.50)*

14. The Commission recommends that section 7 (2) of the *Civil Liability Act, 1961* should be amended to allow for the recovery of exemplary and restitutionary damages, but not aggravated damages, where a cause of action survives for the benefit the estate of a deceased person. **[L]** *(paras. 2.105, 5. 34, 6.52)*

15. The Commission recommends that section 49 of the *Civil Liability Act, 1961* should be amended to allow for the recovery of exemplary, aggravated and restitutionary damages in wrongful death cases. The Commission is of the opinion that a further statutory provision should be included to the effect that the monetary limit in respect of damages for mental distress imposed by section 49 of the *Civil Liability Act, 1961*, as amended, would not affect the jurisdiction of the court to award aggravated or exemplary damages in a wrongful death case. **[L]** *(paras. 2.110, 5.36, 6.54)*

16. The Commission recommends that section 14 of the *Civil Liability Act, 1961*, which provides that an award of punitive damages against one tortfeasor shall not be visited upon a concurrent tortfeasor, requires no change. *(paras. 2.112)*

Chapter 3: Incidental & Practical Questions

17. The Commission recommends that exemplary damages should not be excluded in cases where there has been a prior imposition of a criminal penalty in respect of a crime arising from the same conduct as the civil wrong concerned. Exemplary damages should, however, only be awarded in such cases in exceptional circumstances and the prior criminal penalty and any restitution order should be taken into account in the assessment of the quantum. **[L]** *(para. 3.15)*

18. In cases where a criminal prosecution is pending or possible, or where a defendant has been acquitted in criminal proceedings in respect of a crime arising out of the same conduct as that before the court in the civil case, the availability of exemplary damages should be at the discretion of the court. *(para. 3.16)*

19. The Commission recommends the retention of the normal rules of vicarious liability in respect of exemplary damages. *(para. 3.26)*

20. The Commission does not recommend any legislative prohibition on insurance for exemplary damages. *(para. 3.38)*

21. The Commission recommends that the normal civil standard of proof should apply in exemplary damages cases. That standard of proof should be applied to the question whether it has been shown, with sufficient clarity to satisfy the court, that the defendant has engaged in conduct which has been high-handed, insolent, vindictive, or exhibiting a gross disregard for the rights of the plaintiff. *(para. 3.48)*

22. The Commission favours a flexible rule of court as regards whether the different categories of damages need to be specifically pleaded. The Commission recommends that the rules of court should state that, in general, exemplary, aggravated and restitutionary damages should be pleaded, but that the court should have discretion to admit a claim for such damages, and to allow an amendment of the pleadings, even where such damages had not been initially pleaded, in circumstances where either: the behaviour grounding the damages had occurred in the course of the proceedings; or the behaviour grounding the damages had come to light only in the course of the proceedings; or where, for other reasons, the judge considers an amendment of the proceedings to be appropriate and just in the circumstances. **[L]** *(para. 3.55)*

Chapter 4: Damages for Equitable Wrongs, Breach of Statute and European Law

23. The Commission favours the availability of exemplary damages for equitable wrongs on the same basis as for torts and for breach of constitutional rights. The Commission is of the view that, when litigated, this will be found to be the position here, in line with other common law jurisdictions. *(para. 4.14)*

24. The Commission considers that exemplary damages are and should be available for wrongs arising under statute, except in cases where they are expressly or impliedly excluded by statute. *(para. 4.24)*

25. The Commission concludes that exemplary damages are and should be available for breach of European Union law on the same basis as for torts and breach of constitutional rights. *(para. 4.28)*

Chapter 5: Aggravated Damages

26. The Commission recommends that the category of aggravated damages should be retained in Irish law, and that the reference to the conduct of the defendant should also be retained, but that aggravated damages should be defined so as to ensure and emphasise their compensatory nature. It is recommended that aggravated damages should be defined as follows:

Aggravated damages are damages to compensate a plaintiff for added hurt, distress or insult caused by the manner in which the defendant committed the wrong giving rise to the plaintiff's claim, or by the defendant's conduct subsequent to the wrong, including the conduct of legal proceedings. **[L]**

In implementing a policy of moderation, we believe aggravated damages will only be appropriate where there has been reprehensible, high-handed behaviour on the part of the defendant and such damages should only be awarded in exceptional cases. Both because of this and because the definition given above marks a divergence from at least some of the existing case law, we recommend the incorporation of this definition in legislation. *(para. 5.25)*

27. The Commission recommends that aggravated damages should not be confined to particular tortious causes of action, but should be available for all torts and for breach of constitutional rights. *(para. 5.26)*

Amendment to Section 14 of the Civil Liability Act, 1961

28. The Commission recommends that section 14 of the *Civil Liability Act, 1961* should be amended to clarify that aggravated damages should not be awarded against a concurrent tortfeasor who is not responsible for the aggravation of the loss. **[L]** *(para. 5.30)*

Chapter 6: Restitutionary Damages

29. The Commission concludes in favour of the availability of restitutionary damages in Irish law for all torts and for breach of contract, in cases where the defendant has derived a profit from the commission of the tortious or contractual wrong against the plaintiff. The Commission does not recommend the enactment of legislation regarding restitutionary damages at this point, but considers that the development of the law in this area should be left to the common law. In cases where

exemplary damages have a sufficient punitive and deterrent effect, no additional award of restitutionary damage should be made. *(para. 6.48).*

APPENDIX 1: IRISH CASES ON AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES

Below, we have set out a brief summary of cases concerning exemplary and aggravated damages which have been decided in the course of the past three decades. These are the only cases we have located in which the Irish Superior Courts have dealt with these topics. As will be seen, aggravated and exemplary damages have been awarded in only a very small number of cases. It is notable that in some cases where exemplary damages are awarded, no explanation is given. And in many of the cases, the quantum of damages awarded is not supported by any detailed reasoning.

Dillon v Dunnes Stores [1966] IR 397

The case arose out of an incident at the defendant's store, where a shop assistant was questioned by store detectives and by director of the company, and was accused of pilfering store goods. The plaintiff was detained for several hours in the defendant's offices and questioned about the alleged theft. She was told that she was not free to go until she signed a confession, which she eventually did. The plaintiff claimed damages for false imprisonment, and for conspiracy to imprison unlawfully. At the trial of the action, damages of £5000 were awarded against each of the five defendants: the company, two directors of the company, and the two store detectives involved.

In the Supreme Court, an appeal on liability was allowed in respect of three of the defendants, and a new trial ordered in respect of the other two defendants (the store detectives). O'Dalaigh J, giving judgment for the Court, stated *obiter* that "it is, in our opinion, not open to question that in an action for false imprisonment a jury may award punitive damages."

McDonald v Galvin, Unreported, High Court, 23 February 1976

This case concerned the assault and battery of the plaintiff by the defendant in the plaintiff's drawing room. The defendant moved to have these proceedings remitted to the District or Circuit Courts on the basis that the statement of claim disclosed no injuries, and any award in excess of the Circuit Court's jurisdiction would be set aside as excessive. McWilliam J ordered that the case be remitted to the Circuit Court. In reaching this decision, he accepted that "exemplary damages could well be given in certain circumstances in this case, and without any evidence other than the statement of claim", in view of the possibility of the defendant being a wealthy man in a dominant position as regards the plaintiff, and the incident being most humiliating. However, he did not think that a damages award on the facts of the case could be greater than £2000 since there was no injury other than shock and humiliation, the episode did not take place in the presence of any person whose presence would have increased the humiliation, there were no special damages, and it had taken the plaintiff five years to issue proceedings.

Hickey & Co. Ltd v Roches Stores (Dublin) Ltd, Unreported, High Court, 14 July 1976

The case concerns a breach of contract. Hickey's, the fashion fabric importer, contracted with the departmental store, Roches Stores, to lease floor space at the Henry Street branch. The relevant termination provision provided that for Roches Stores to terminate the agreement without having to pay compensation, six months' notice must be given and Roches must not sell fabrics by the yard for a further twelve months. Neither condition was satisfied. The method of calculating the damages turned on whether the profit accruing to Roches Stores through acquiring the goodwill due to the joint enterprise of selling fashion fabrics could be taken into account. Finlay P. stated that while the general rule of assessment of damages in tort and breach of contract should have as its purpose the putting back of the injured party in to the position he would have been in had the injury not occurred, there are exceptions in both cases.

> "Thus where a wrongdoer has calculated and intended by his wrongdoing to achieve gain or profit which he could not otherwise achieve, and has in that way acted in bad faith, then irrespective of whether his wrong doing constitutes a tort or a breach of contract the court should in assessing the damages look not only to the loss suffered by the injured party but also the profit or gain unjustly or wrongly obtained by the wrongdoer."

Since there was no bad faith in this case, damages were calculated by reference to the loss incurred by the plaintiff.

Garvey v Ireland [1979] IR 266

The case concerned the wrongful dismissal of the plaintiff, who was Commissioner of An Garda Síochána. In addition to compensatory damages, the plaintiff claimed exemplary damages for the arbitrary nature of his dismissal. In the High Court, McWilliam J awarded £1,298.11 in special damages. General compensatory damages were not awarded, since McWilliam J found that the plaintiff had suffered no injury that could be directly related to the unlawful nature of his dismissal. Exemplary damages were awarded, however, on the basis of Lord Devlin's dicta in *Rookes v Barnard* that exemplary damages should be available for "oppressive, arbitrary or unconstitutional action by the servants of the government." Taking into account that the plaintiff would have suffered some injury even had he been lawfully removed from office, McWilliam J awarded £500 in exemplary damages.

Kennedy v Ireland [1987] IR 587

The first and second plaintiffs were prominent journalists whose private telephones had been tapped by order of the Minister for Justice. The third plaintiff was the second plaintiff's wife and a freelance journalist. The Minister had made a statement admitting that he had made such an order, and that there had been no justification for the tapping. The plaintiffs claimed damages for breach of their constitutional right to privacy under Article 40 of the Constitution. Hamilton P held that there had been an actionable interference with constitutional rights. The action of the executive was a serious interference with the plaintiffs' rights and was intolerable in a democratic society. He considered that the injury done to the plaintiffs had been aggravated by

the fact that it had been done by an organ of the State, which was under a constitutional obligation to respect, vindicate and defend individual rights.

Hamilton P noted that the plaintiffs had suffered distress as a result of the tapping, which was accentuated by the realisation that the only justification for the tapping of their phones would be for security reasons or for the investigation of serious crime. The violation of the plaintiffs' rights had been conscious, deliberate and without justification. It was noted that the plaintiffs had not suffered any loss as a result of the tapping.

The first two plaintiffs were awarded £20,000 each, and the third was awarded £10,000. These damages were described by the court as "substantial damages". In Hamilton P's view, it was "irrelevant" whether they be categorised as exemplary or aggravated.

Kennedy v Hearne [1988] ILRM 52

The plaintiff claimed for libel and breach of constitutional rights against the defendants (officials of the Revenue Commissioners) following an allegation by the Revenue Commissioners that the plaintiff's tax had not been paid. In the High Court, Murphy J awarded £500 in compensatory damages and £2,000 in aggravated damages. The aggravated damages were based on the defendant's conduct of the trial. Murphy J noted that the defendants had subjected the plaintiff and two of his employees to extensive and searching cross-examination, with the objective of demonstrating that the plaintiff had attempted to evade tax, and that he was "a cheat" with "no reputation that could be damaged by libel" (p.63). These allegations were unfounded. Murphy J also noted that there had been no apology on the part of the defendants for the initial libel.

The Supreme Court, on appeal, increased the aggravated damages award to £10,000, emphasising the seriousness of the defendant's conduct of the trial. The Court noted that, whilst the original libellous allegations had been made to only a small number of people, the allegations made in the course of trial had been made in open court and had therefore led to far greater harm to the plaintiff's character and professional reputation than the initial libel. In the light of this, it was considered that the original award of aggravated damages was inadequate, and that a higher award should be substituted.

McIntyre v Lewis [1991] 1 IR 121

In an action for assault, false imprisonment and malicious prosecution by the police, exemplary damages were awarded.

The defendants, who were members of the Gardaí, had assaulted the plaintiff on the street and taken him to a Garda Station. The plaintiff was charged with assault and later acquitted. He then brought an action for assault, false imprisonment and malicious prosecution against the gardaí concerned. At the trial of this action, the jury awarded £5,000 damages for assault and false imprisonment, as well as £30,000 in special damages and £30,000 in general damages for malicious prosecution. The report notes that the trial judge then reminded the jury that special damages had been

agreed at £1,787.50, and they then agreed to award this sum in special damages and in addition, £60,000 in general damages.

On appeal to the Supreme Court, the defendants alleged that the sum of £60,000 bore no reasonable relation to the injury suffered and must contain an exemplary element. The Supreme Court held that some exemplary award was appropriate in the case, since

> "[I]n cases like this, where there is an abuse of power by employees of the State, the jury are entitled to award exemplary damages. One of the ways in which the rights of the citizen are vindicated, when subjected to oppressive conduct by the employees of the State, is by an award of exemplary damages" (Hederman J, p.134).

However, Hederman J pointed out that the total damages awarded for the assault and false imprisonment, and the total damages awarded for the malicious prosecution, should bear some resemblance to each other. Hederman J held that in assessing exemplary damages for malicious prosecution, the jury was entitled to have regard to the fact that the defendants in their capacity as Gardaí had brought a false charge against the plaintiff. They could also have regard to the fact that the defendants had given evidence at the criminal trial in support of this false charge and that they had repeated this false evidence in the civil action.

McCarthy J noted that an exemplary damages award should reflect the status of both the abused and the abuser, and that the status of those who had brought the malicious prosecution was particularly relevant in the instant case. The damages awarded should reflect the proper indignation of the public at conduct of this type on the part of members of the Gardaí. O'Flaherty J remarked that the quantum of exemplary damages should be kept "on a tight rein". He stated that

> "if the compensatory amount awarded includes aggravated damages then I believe if any award is made by way of exemplary damages it should properly be a fraction rather than a multiple of the amount awarded by way of compensatory damages (including aggravated damages)." (p.141).

The Supreme Court substituted, for the award of £60,000, an award of general damages of £5,000 and an exemplary award of £20,000.

Conway v INTO [1991] 2 IR 305

The case concerned an interference with the constitutional right to education, arising out of an industrial dispute by teachers at a national school. The defendant trade union issued a directive that no other school was to accept children from the school affected by the dispute. It was alleged that the plaintiff's exclusion from any schooling for the period of the industrial dispute, as a result of the action of the INTO, had affected the plaintiff's subsequent education and career. It was accepted by the court that the plaintiff had not fulfilled her full educational potential, having failed to gain entry to a pharmacy degree course and having obtained only a pass degree in science. In the High Court, Barron J awarded compensatory damages of £11,500. He also awarded exemplary damages, on the grounds of conscious and deliberate interference with constitutional rights. He noted that there were 70 claimants in all

and awarded £1,500 in exemplary damages, noting that this would be a total of £105,000 spread equally amongst all the claimants.

On appeal to the Supreme Court, the defendants contested the award of exemplary damages. The Supreme Court affirmed that both aggravated damages and exemplary damages could be awarded in an appropriate case for breach of a constitutional right. Here, the plaintiff's constitutional rights had been infringed with full knowledge and deliberation. The damages awarded in the High Court were not excessive. The appeal was dismissed and the awards of damages upheld.

Tate v Minister for Social Welfare and the Attorney General [1995] 1 ILRM 507

The case concerned the breach by the State of EU Council Directive 79/7/EEC, which states the principle of equal treatment of men and women in social security matters. As a result of Ireland's delay in implementing the directive, married women were not accorded equal treatment in regard to a number of social welfare entitlements for a period of some years. The plaintiffs, who were married women entitled to social welfare benefits, sought declarations that they were entitled to equal treatment in regard to those benefits as from the date when the directive should have been incorporated. They claimed damages for failure to implement the directive, and for breach of duty of care, breach of statutory duty and breach of constitutional duty.

In the High Court, Carroll J awarded compensatory damages for breach of European Community law. She considered a possible award of exemplary damages on the basis that the State "wriggled for ten years to avoid paying the same to women as to men". However, Carroll J held that, "in view of the very large sums involved" in the case, exemplary damages would not be appropriate.

Cooper v O'Connell, Unreported, Supreme Court, 5 June 1997

Cooper v O'Connell was a case of professional negligence on the part of a dentist. The defendant had undertaken extensive but unsuccessful dental work on the plaintiff. After a long series of visits, lasting several years, the defendant admitted that he could not remedy the unsuccessful work and referred the plaintiff to another dentist. This dentist was also unable to help the plaintiff, and the plaintiff eventually attended a third practitioner in Dublin, who over the course of several years was able to remedy the situation. Nevertheless, the plaintiff suffered continuing pain.

In the High Court, the defendant was found liable in negligence, and exemplary damages were refused. The plaintiff was awarded compensatory damages of £80,000 for past pain and suffering and £25,000 for future pain and suffering. Damages for loss of earnings were also awarded (£50,000). The assessment of damages was appealed by the plaintiff to the Supreme Court.

Keane J, giving judgment for the Supreme Court, quoted extensively from Finlay CJ's judgment in *Conway v INTO*. Keane J held that, on the facts, the conduct of the defendant was not such as to warrant the imposition of exemplary damages, since mere negligence on the part of a professional, without more, did not warrant "making an example of the defendant" or "invoking this drastic, though essential, rule based on public policy".

The Court also refused to make an award of aggravated damages. In this regard, the absence of malice or deliberation on the part of the defendant was crucial. In the present case, although the defendant had been "seriously negligent", there had been no element of oppressiveness, arrogance or outrage in his conduct: nothing to distinguish it from an ordinary case of professional negligence. The fact that the defendant had put liability in issue was also insufficient to ground aggravated damages.

Hanahoe v District Judge Hussey, The Commissioner of An Garda Siochana, Ireland, and The Attorney General [1998] 3 IR 69

This case concerned the issue of a warrant under section 64 of the Criminal Justice Act, 1994 to search the applicant's office. The applicant was the solicitor of the principal suspect of the investigation for which the warrant was acquired. Information of the search was leaked to the press and the event was turned into a 'media circus'. The court was satisfied that, as matter of probability, the information leaked to the media emanated from a Garda source.

In the High Court, Kinlen J. found that the respondents were negligent in allowing this to happen, and irreparable damage was done to the reputation of the applicants. In deciding the amount of damages he stated: "[T]his Court must mark its strong disapproval of this conduct and ... try and make some amends to the applicants for the damage done". He awarded £80,000 to cover damages to date and £20,000 for future damages, and stated " [I] hope this judgment will clarify public perception of the wrong that was done".

Todd v Cincelli, Unreported, High Court, 5 March 1998

Kelly J awarded aggravated damages for the defendant's wrongful demolition of his house, which adjoined that of the plaintiffs. The house was demolished without notice to the plaintiffs, and in a sub-standard way, contrary to proper building practice and in such a way as to damage the plaintiff's premises. The tortuous nature of the demolition and the resultant loss to the plaintiffs were admitted by the defendants. Relying on *Conway v INTO*, Kelly J held that the plaintiffs were "entitled to a modest sum by way of aggravated damages in recognition of the added hurt or insult to them as a result of the conduct of the defendants,"[1] that is, the demolition of the adjoining property, carried out suddenly and without warning, and contrary to the prior representations of the defendant that there would be no demolition. The fact that the defendant had no entitlement to carry out the demolition, and was aware of this, also grounded the aggravated damages. Aggravated damages of £7,500 were awarded (in addition to £27,000 in compensatory damages).

Kelly J refused to award exemplary damages. He held that the facts in the case before him did not justify an award of exemplary damages as described in Conway. He held that, even if the circumstances had merited an exemplary award, the principle that exemplary damages should not be awarded where compensatory damages constituted sufficient punishment and expression of disapproval would apply in this case, and would exclude exemplary damages. The awards of compensatory and aggravated damages together constituted a sufficient expression of public disapproval of the defendant's actions.

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[1] At p.19 of the unreported judgment.

Albert Dawson and Dudley Dawson v Irish Brokers Association, Unreported, Supreme Court, 6 November 1998

The facts of this case, which resulted in two retrials and interlocutory proceedings, concern a letter circulated by the defendant the Irish Brokers Association (I.B.A.), to numerous insurance companies and the Minister for Industry and Commerce to the effect that the plaintiff's membership of the I.B.A. was terminated due to non-compliance with the Insurance Act, 1989. The Supreme Court held that the trial judge was correct in holding that the plaintiffs had been defamed, but that the sum of £515,000 damages awarded by the jury was excessive and therefore there should be a retrial. This retrial came to an abrupt end when the plaintiffs decided not to proceed in light of certain preliminary rulings made by the trial judge in advance of the full hearing.

O' Flaherty J in this case ordered another retrial. He regretted that his reference to the damages award not including aggravated or exemplary damages was interpreted by the trial judge as intending to govern what should take place at the trial. He made the distinction between aggravated damages being compensatory in nature and exemplary damages not being at all compensatory, and emphasised that in this jurisdiction exemplary damages need not be pleaded. Therefore, the plaintiff was entitled to advance a case for exemplary damages, despite them not being pleaded in the first trial.

Noel Kellagher v Liam Walsh, Unreported, High Court, 29 April 1998

The plaintiff at the age of thirteen was the victim of a series of assaults inflicted by the defendant, then probably in his fifties, a person who was exercising authority over the plaintiff and whom the plaintiff trusted. Quirke J noted that as a result of these "vicious and degrading assaults" carried out on the plaintiff at a very vulnerable age, he had been " deprived of the youth he was entitled to expect, full of joy and hope and promise, full of expectation". Instead, his youth was replaced by loneliness, insecurity and depression, for which he requires ongoing treatment.

Quike J awarded compensatory damages of £100,000 based on the permanent injury suffered, the risk of depression, and the problems the plaintiff was likely to encounter in developing and maintaining relationships.

As regards exemplary damages, Quirke J awarded £50,000 and stated " He grossly abused the trust of an innocent child and damaged him permanently in the manner which I have described. His unforgivable reprehensible acts could have cost Noel his life. The community will not tolerate his gross abuse of trust and the exploitation of children." He also stated that had the defendant any means or resources then the award of exemplary damages would have be commensurate with whatever property or resources he had.

FW v British Broadcasting Corporation, Unreported, High Court, 25 March 1999

Barr J awarded aggravated damages in an action arising out of the broadcast by the defendants of the plaintiff's name in a television programme on child sexual abuse, contrary to undertakings given to the plaintiff that his identity would be protected. In the course of the proceedings for negligence and breach of undertaking, aggravated

damages were claimed on the grounds that the defendants' conduct of the case had exacerbated the injury to the plaintiff. Aggravated damages were awarded based on the negligence and professional misconduct of a psychiatrist engaged by the defendants to assess the plaintiff's psychological state. The Court found that, prior to the trial, the psychiatrist acting for the defendant had subjected the plaintiff to an unnecessarily detailed questioning regarding the sexual abuse that he had suffered as a child. The plaintiff was also warned during his interview with the psychiatrist that he would have to give a similarly detailed account of the abuse in court. This caused the plaintiff serious distress. The Court found that the plaintiff had suffered substantial additional trauma as a result of the "gross professional negligence and incompetence" of the psychiatrist, entitling the plaintiff to aggravated damages of £15,000 (in addition to compensatory damages of £80,000).

APPENDIX 2: ACKNOWLEDGEMENTS

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Persons who forwarded written submissions:

Mr Eoin O'Dell, Trinity College Dublin

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Persons present at seminar on 28th January 1999: Aggravated, Exemplary and Restitutionary Damages

1. Mr James McCourt, Chairman
   Litigation Committee, Law Society

2. Mr Owen McIntyre
   Parliamentary and Law Reform Executive
   Law Society

3. Professor Bryce Dickson
   University of Ulster

4. Judge McDonnell
   District Court

5. Her Honour Judge Yvonne Murphy
   Circuit Court

6. The Hon Mr Justice Barr
   High Court

7. The Hon Mr Justice O'Donovan
   High Court

8. The Hon Mr Justice Budd
   High Court

9. Mr David Costello
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10. Mr Peter Murphy
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11. Peter Dargan, Chairman
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