

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

DONALD GRAY

APPELLANT

AND

MOTOR ACCIDENT COMMISSION
(Formerly State Government Insurance
Commission)

RESPONDENT

*Gray v Motor Accident Commission (A36/1997) [1998] HCA 70
17 November 1998*

ORDER

- 1. Appeal allowed with costs.*
- 2. Set aside the order of the Full Court of the Supreme Court of South Australia. In lieu thereof, order that the appeal to that Court be allowed with costs and there be a new trial on the issue of damages, other than aggravated and exemplary damages.*
- 3. The costs of the new trial be in the discretion of the judge at that trial.*

On appeal from the Supreme Court of South Australia

Representation:

S W Tilmouth QC with G A Britton for the appellant (instructed by
Aboriginal Legal Rights Movement Inc)

S Walsh QC with M F Newell for the respondent (instructed by Finlaysons)

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CATCHWORDS

Donald Gray v Motor Accident Commission (formerly State Government Insurance Commission)

Damages - Personal injuries - Exemplary damages - Whether trial judge precluded from awarding exemplary damages where tortfeasor already punished in criminal proceedings.

Damages - Personal injuries - Exemplary damages - Where tortfeasor insured under a scheme of compulsory insurance.

Damages - Personal injuries - Economic loss.

Words and Phrases - "substantial punishment".

- 1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. The appellant, then aged 16 years, was seriously injured in September 1988 when he was struck by a motor car driven at him deliberately by Darren James Bransden. In March 1991, Bransden was convicted of causing grievous bodily harm with intent to cause grievous bodily harm to the appellant and was sentenced to seven years' imprisonment. The sentencing judge described the attack on the appellant as "brutal and cowardly" and one for which there was "no mitigating factor at all".
- 2 In 1993, in the District Court of South Australia, the appellant commenced an action against Bransden claiming damages for personal injury. The action was framed (at least principally) as a claim for damages for negligence. In January 1995, pursuant to certain provisions of the *Motor Vehicles Act* 1959 (SA) the respondent, the compulsory third party insurer of Bransden, was substituted as defendant in the action. Although the respondent did not admit liability, there seems to have been no real dispute about that issue at trial. A certificate of the conviction of Bransden and the sentencing remarks relating to him were tendered by consent of the parties as evidence of the truth of their contents.
- 3 The trial judge (Judge Pirone) assessed the appellant's damages at \$72,206 comprising \$15,000 for past economic loss, \$30,000 for future economic loss, \$18,190 for what is called in s 35A of the *Wrongs Act* 1936 (SA) "non-economic loss" and \$9,016 for special damages. The trial judge made no award of exemplary damages. He held that if the appellant were otherwise entitled to such an award, the fact that the respondent (the compulsory third party insurer) was defendant to the action, not Bransden, the tortfeasor, was no bar to making an award but, Bransden having already been punished in the criminal court, it was not appropriate to award exemplary damages. He indicated that if he had decided to award exemplary damages he would have assessed those damages at \$10,000.
- 4 The appellant appealed, unsuccessfully, to the Full Court of the Supreme Court of South Australia¹. By special leave he now appeals to this Court.
- 5 Two issues arise. First, should exemplary damages have been awarded? Secondly, was the award of compensatory damages manifestly inadequate?

1 *Gray v State Government Insurance Commission*, unreported, 10 September 1996.

Exemplary and aggravated damages

- 6 The distinction between aggravated and exemplary damages is often drawn. In *Uren v John Fairfax & Sons Pty Ltd*², Windeyer J noted that it is a distinction that is "not easy to make in defamation, either historically or analytically and in practice it is hard to preserve"³. Nevertheless, in the present context, it is a distinction which it is as well to bear in mind, if only to attempt to ensure greater accuracy of expression. In *Uren*, Windeyer J described the difference as being:

"that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment - moral retribution or deterrence."⁴

- 7 The present case is concerned with exemplary damages, not aggravated damages. Although counsel for the appellant sought to contend that aggravated damages might have been awarded in this case, no such claim was pleaded, no evidence was given in support of such a claim and accordingly the respondent was neither called on nor given the opportunity to make any answer to such a claim. Plainly, it is too late to raise that claim now⁵.

The power to award exemplary damages

- 8 Exemplary damages have been awarded since at least the 18th century. Windeyer J⁶ doubted "whether the famous cases concerning Wilkes and the *North Briton* should be regarded as the origin of the idea" conveyed by the expression "exemplary damages". Rather, the matter depended upon "how far

2 (1966) 117 CLR 118.

3 (1966) 117 CLR 118 at 149.

4 (1966) 117 CLR 118 at 149.

5 *Coulton v Holcombe* (1986) 162 CLR 1.

6 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 152.

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you wish to go back and how much certainty you demand in the connecting links". In *Wilkes v Wood*⁷ Lord Chief Justice Pratt said⁸:

"I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

9 This Court has long recognised the power to award such damages. So, in *The Herald and Weekly Times Ltd v McGregor*⁹ it was assumed that "penal or vindictive damages"¹⁰ or "exemplary damages"¹¹ might be awarded in a proper case. Several other examples are given in the judgments in *Uren*¹².

10 Neither party invited us to reconsider *Uren* or the considerable body of authority in this Court that lies behind it and to which effect was given in the later decisions of the Court in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*¹³ and *Lamb v Cotogno*¹⁴. Notwithstanding, then, what are sometimes seen as the anomalies and difficulties that attend the awarding of exemplary damages, this appeal concerns when such an award may be made, not whether any anomalies are such as to invite some radical change to the law.

7 (1763) Lofft 1 [98 ER 489].

8 (1763) Lofft 1 at 18-19 [98 ER 489 at 498-499].

9 (1928) 41 CLR 254.

10 (1928) 41 CLR 254 at 262 per Knox CJ, Gavan Duffy and Starke JJ.

11 (1928) 41 CLR 254 at 266 per Isaacs J.

12 Taylor J refers ((1966) 117 CLR 118 at 139) to *Willoughby Municipal Council v Halstead* (1916) 22 CLR 352, *Triggell v Pheeney* (1951) 82 CLR 497, *Williams v Hursey* (1959) 103 CLR 30 and *Fontin v Katapodis* (1962) 108 CLR 177. Menzies J refers ((1966) 117 CLR 118 at 145) also to *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71.

13 (1985) 155 CLR 448.

14 (1987) 164 CLR 1.

Gleeson CJ
McHugh J
Gummow J
Hayne J

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- 11 It is as well, however, to say something about some of those apparent anomalies. As Windeyer J said in *Uren*¹⁵:

"Compensation is the dominant remedy if not the purpose of the law of torts today. But fault still has a place in many forms of wrongdoing. And the roots of tort and crime in the law of England are greatly intermingled. Some things that today are seen as anomalies have roots that go deep, too deep for them to be easily uprooted."

- 12 Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of case: ranging from abuse of governmental power exemplified by *Wilkes v Wood* and its associated cases¹⁶, through defamation cases of the kind considered in *Uren*, to assault cases such as *Fontin v Katapodis*¹⁷. And the examples could be multiplied¹⁸.

- 13 In *Butler v Fairclough*¹⁹, Griffith CJ observed:

"The motive or state of mind of a person who is guilty of a breach of contract is not relevant to the question of damages for the breach, although if the contract itself were fraudulent the question of fraud might be material²⁰. A breach of contract may be innocent, even accidental or unconscious. Or it may arise from a wrong view of the obligations created by the contract. Or it may be wilful, and even malicious and committed with the express

15 (1966) 117 CLR 118 at 149-150.

16 *Huckle v Money* (1763) 2 Wils KB 205 [95 ER 768]; *Benson v Frederick* (1766) 3 Burr 1845 [97 ER 1130].

17 (1962) 108 CLR 177.

18 Nicholas McBride in his essay "Punitive Damages" in Birks (ed), *Wrongs and Remedies in the Twenty-First Century*, (1996) at 175 seeks to classify common law wrongs into five "families" and to demonstrate that non-English common law courts have awarded punitive damages in all but the fifth of those families - breach of undertakings, including contracts.

19 (1917) 23 CLR 78 at 89.

20 *Bain v Fothergill* (1874) LR 7 HL 158 at 206-207 per Lord Chelmsford.

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intention of injuring the other party. But the measure of damages is not affected by any such considerations."

The position is put somewhat differently in *Restatement (Second) of Contracts*²¹:

"Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."

The reasons underlying the apparent rule excluding an award of exemplary damages, even in cases of intentional or malicious breach of contract, were discussed by Friendly J in *Thyssen, Inc v SS Fortune Star*²². That case also is authority that an admiralty court does not award exemplary damages for a deviation or other breach of contract²³.

14 Because the kinds of case in which exemplary damages might be awarded are so varied, it may be doubted whether a single formula adequately describes the boundaries of the field in which they may properly be awarded. Nevertheless, the phrase adopted by Knox CJ in *Whitfeld v De Lauret & Co Ltd*²⁴ of "conscious wrongdoing in contumelious disregard of another's rights" describes at least the greater part of the relevant field²⁵.

15 In considering whether to award exemplary damages, the first, if not the principal, focus of the enquiry is upon the wrongdoer, not upon the party who was wronged. (The reaction of the party who is wronged to high-handed or deliberate conduct may well be a reason for awarding aggravated damages in further compensation for the wrong done. But it is not ordinarily relevant to whether exemplary damages should be allowed.) The party wronged is entitled to whatever compensatory damages the law allows (including, if appropriate, aggravated damages). By hypothesis then, the party wronged will receive just compensation

21 (1979), §355; cf *Denison v Fawcett* (1958) 12 DLR (2d) 537 at 543; *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085 at 1106, 1107.

22 777 F 2d 57 at 63 (1985); cf *Hawkins v Clayton* (1988) 164 CLR 539 at 584 per Deane J.

23 777 F 2d 57 at 63-66 (1985).

24 (1920) 29 CLR 71 at 77.

25 See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 per Brennan J.

for the wrong that is suffered. If exemplary damages are awarded, they will be paid in addition to compensatory damages and, in that sense, will be a windfall in the hands of the party who was wronged. Nevertheless, they are awarded at the suit of that party and, although awarded to punish the wrongdoer and deter others from like conduct, they are not exacted by the State or paid to it.

16 There is an appearance of tension between using civil proceedings to compensate a party who is wronged and using the same proceedings to punish the wrongdoer. But there is a tension only if it is assumed that "... a sharp cleavage between criminal law on the one hand and the law of torts and contract on the other is a cardinal principle of our legal system"²⁶. As Windeyer J points out in *Uren*, the "roots of tort and crime" are "greatly intermingled"²⁷. And it is not only the roots of tort and crime that are intermingled. The increasing frequency with which civil penalty provisions are enacted²⁸, the provisions made for criminal injuries compensation²⁹, the provisions now made in some jurisdictions for the judge at a criminal trial to order restitution³⁰ or compensation to a person suffering loss or damage (including pain and suffering) as a result of an offence³¹ all deny the existence of any "sharp cleavage" between the criminal and the civil law. The tension we have mentioned may therefore be more apparent than real.

17 We do not mention these matters so that we might attempt to resolve any tensions that are thus identified; it is not necessary to do so in this appeal. But they are matters that may well bear upon when exemplary damages may be awarded.

26 Street, *Principles of the Law of Damages*, (1962) at 34. See also McGregor on *Damages*, 16th ed (1997), par 430.

27 (1966) 117 CLR 118 at 149. See also *Prosser and Keeton on The Law of Torts*, 5th ed (1984) at 7-9.

28 See, for example, Corporations Law, Pt 9.4B.

29 See, for example, *Criminal Injuries Compensation Act* 1978 (SA).

30 See, for example, *Criminal Law (Sentencing) Act* 1988 (SA), s 52; *Sentencing Act* 1991 (Vic), Pt 4, Div 1.

31 See, for example, *Criminal Law (Sentencing) Act* 1988 (SA), s 53; *Sentencing Act* 1991 (Vic), Pt 4, Div 2.

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18 In *Uren* this Court declined to adopt the limitations on the award of exemplary damages stated by the House of Lords in *Rookes v Barnard*³². In *Rookes v Barnard* it was held that exemplary damages could be awarded only in three kinds of case³³:

- oppressive, arbitrary or unconstitutional acts by government servants;
- where the defendant's conduct had been calculated to make a profit which might well exceed the compensation payable to the plaintiff; and
- where expressly authorised by statute.

It was said that there are three considerations that should always be borne in mind when awards of exemplary damages are being considered³⁴:

- they can be awarded only if the plaintiff was the victim of the punishable behaviour;
- the power to award exemplary damages is not only a weapon that can be used in defence of liberty, it is a weapon that can be used against liberty; and
- the means of the parties, and all matters which aggravate or mitigate the conduct are relevant to the assessment of such damages.

19 The limitations on the availability of exemplary damages stated in *Rookes v Barnard* have been criticised in England and elsewhere³⁵. The United Kingdom Law Commission, in its report *Aggravated, Exemplary and Restitutionary Damages*³⁶, concluded that the boundaries set in *Rookes v Barnard* were not

32 [1964] AC 1129.

33 [1964] AC 1129 at 1226-1227 per Lord Devlin.

34 [1964] AC 1129 at 1227-1228 per Lord Devlin.

35 In Australia, reference need be made only to *Uren*. In Canada, see, for example, *Vorvis v Insurance Corporation of British Columbia* [1989] 1 SCR 1085. In New Zealand, see, for example, *Fogg v McKnight* [1968] NZLR 330; *Taylor v Beere* [1982] 1 NZLR 81; *Donselaar v Donselaar* [1982] 1 NZLR 97.

36 United Kingdom, Law Commission No 247, (1997).

"consistent with either sound principle or sound policy"³⁷. It said that its recommendations (for expanding the availability of exemplary damages) were guided by five aims which, it may be assumed, the Commission thought were not fulfilled by application of *Rookes v Barnard*³⁸:

"First, exemplary damages should be an exceptional remedy, rarely-awarded and reserved for the most reprehensible examples of civil wrongdoing which would otherwise go unpunished by the law. Secondly, their availability (and assessment) must be placed on a clear, principled basis. Thirdly, although flexibility is necessary, unnecessary uncertainty as to the availability and assessment of the remedy must be avoided. Fourthly, defendants must not be unfairly prejudiced. Fifthly, the impact on the administration and funding of civil justice should not be adverse."

The last four of those aims are not controversial (although the way in which they are to be implemented may be). The first may excite more debate but it will serve as a useful framework for considering some of the issues that arise in this case.

An exceptional remedy

- 20 If, as we have earlier suggested, the remedy is exceptional in the sense that it arises (chiefly, if not exclusively) in cases of conscious wrongdoing in contumelious disregard of the plaintiff's rights, at least two further questions arise: are exemplary damages available where the plaintiff's claim is for damages for negligence rather than some intentional wrong, and is the award of exemplary damages a matter of right or does it depend on the exercise of a discretion informed by some identifiable criteria?

37 United Kingdom, Law Commission No 247, *Aggravated, Exemplary and Restitutionary Damages*, (1997), par 1.2.

38 United Kingdom, Law Commission No 247, *Aggravated, Exemplary and Restitutionary Damages*, (1997), par 1.17.

Negligence and exemplary damages

- 21 Provoked by differing limitation periods for claims for damages for personal injury caused by negligence and other torts, there was a deal of debate in the 1960s about whether trespass to the person could be committed negligently³⁹.
- 22 We do not think it necessary to revisit that debate. No question arises here of an intentional wrong being committed by inadvertence. For present purposes it is enough to note two things. First, exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case. But 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. Cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer, well knowing of an extreme danger thus created, persisted in employing the unsafe system might, perhaps, be of that latter kind⁴⁰. No doubt other examples can be found.
- 23 In many jurisdictions in the United States reckless indifference to the rights of others and other culpable conduct short of malicious intent is sufficient for the issue of an award of exemplary damages to be left to a jury⁴¹.
- 24 Secondly, the present proceeding, although said to have been framed as an action in negligence, appears to have been conducted at trial as if it were a claim in trespass. The allegation made in the appellant's statement of claim, and pursued at trial, was that Bransden drove his vehicle "deliberately towards [the appellant] without regard for the safety of [the appellant]" and such evidence of the events as was given at trial was all directed to showing Bransden deliberately inflicted injury on the appellant. Whatever may be the true characterisation of the pleading, the case was conducted as one of conscious wrongdoing by the tortfeasor.

39 See, for example, *Kruber v Grzesiak* [1963] VR 621; *Letang v Cooper* [1965] 1 QB 232.

40 See, for example, *Midalco Pty Ltd v Rabenalt* [1989] VR 461; *Coloca v BP Australia Ltd* [1992] 2 VR 441; *Trend Management Ltd v Borg* (1996) 40 NSWLR 500.

41 *Smith v Wade* 461 US 30 at 44-48, 52 (1983).

A "discretionary" remedy?

25 Reported cases usually speak of a "discretion" to award exemplary damages⁴². Standing alone, such a description, even if followed by the expression "to be exercised judicially" is of little assistance. At best, it invites attention to what are the criteria that are to inform the exercise of that discretion.

26 Because exemplary damages are awarded to punish, it is not surprising that their quantification should be treated as a matter for the discretion of the tribunal assessing damages. And for so many years that was a task for the jury, not the judge. Yet there is little to be found in the cases which would identify the proper instructions to a jury for performing this part of its function. Rather, it seems to be treated in a way not very different from what is called the jury's "constitutional right" to return a verdict of manslaughter notwithstanding proof of the elements of murder. That is, it is treated as if it is a power of the jury that is not to be hedged about by any more precise criterion for its use than the jury's intuitive conclusion that the defendant's conduct was sufficiently reprehensible to warrant punishment. Yet it is clear that there are thought to be limits on the power.

27 That reliance on the intuitive reaction of a jury may prove an insufficient restraint on the power to award exemplary damages is amply demonstrated by recent decisions of the United States Supreme Court about whether particular jury awards of exemplary damages have contravened the constitutional requirement for due process⁴³.

28 Exemplary damages have long been recognised in the United States⁴⁴. In

42 See, for example, *Lamb v Cotogno* (1987) 164 CLR 1 at 12-13; *Trend Management Ltd v Borg* (1996) 40 NSWLR 500 at 505.

43 See, for example, *Pacific Mutual Life Insurance Co v Haslip* 499 US 1 (1990); *TXO Production Corp v Alliance Resources Corp* 509 US 443 (1993); *BMW of North America Inc v Gore* 517 US 559 (1996).

44 *The Amiable Nancy* 16 US 546 at 558 (1818) per Story J.

*Uren*⁴⁵, Windeyer J set out with evident approval the following statement by Grier J, writing in 1851 for a unanimous Supreme Court in *Day v Woodworth*:

"It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. ... *This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.*"⁴⁶ (Emphasis added)

It seems that little guidance is given to juries in the United States about how that discretion should be exercised. In at least some jurisdictions in that country, juries are given instructions about the awarding of exemplary damages. The instructions have two principal elements: first, that the purpose of an award of exemplary damages is to punish the defendant and to protect the public by deterring the defendant and others from doing such wrong in the future and, second, that in making its assessment the jury must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrong⁴⁷. (Sometimes, juries may also be told to consider the wealth of the defendant.)

- 29 The instructions given to juries are therefore very general. In some jurisdictions, where only general instructions of the kind we have described are given to juries, appellate courts will review the findings of juries about exemplary damages by reference to a more elaborate set of criteria⁴⁸. Nevertheless, O'Connor J (in her dissenting opinion in *Pacific Mutual Life Insurance Co v*

⁴⁵ (1966) 117 CLR 118 at 136-137.

⁴⁶ 54 US 362 at 371 (1851).

⁴⁷ cf the instructions to the jury considered in *Haslip* 499 US 1 at 6, 19 (1990).

⁴⁸ See, for example, the list of factors derived from *Green Oil Co v Hornsby* 539 So 2d 218 223-224 (1989) discussed in *Haslip* 499 US 1 at 51-52 (1990).

Haslip) could say that "[o]ur cases attest to the wildly unpredictable results and glaring unfairness that characterise common-law punitive damages procedures."⁴⁹

30 What has happened in the United States might well be thought to suggest that describing the power to award exemplary damages as a discretionary power to be exercised having regard to purposes of punishment and deterrence and the character and degree of the wrongdoing gives insufficient guidance about how the power should be exercised. Nor is the problem resolved by attempting to analyse the question in terms of "rights" or "claims" rather than discretionary powers. To do so may do little more than provoke an unproductive debate about jurisprudential classifications. What is important is to consider what it is that entitles a plaintiff to an award of exemplary damages or (to put it in the language of power or discretion) permits or requires the making of an award.

31 No doubt the conduct of the wrongdoer is central to that enquiry: for exemplary damages are concerned to punish the wrongdoer and deter others from like conduct, not to compensate the party that was wronged. But there are other factors which must be considered. In this case, attention was directed to the fact that the defendant was a third party insurer, and that the tortfeasor had been convicted and punished for a criminal offence.

Insurance and exemplary damages

32 In *Lamb v Cotogno* the Court rejected the contention that "since the object of exemplary damages is to punish and deter, it is inappropriate that they should be awarded where the wrongdoer is insured under a scheme of compulsory insurance against liability to pay them"⁵⁰. The Court reached that conclusion for a number of reasons including that the deterrence intended by an award "extends beyond the actual wrongdoer and the exact nature of his wrongdoing"⁵¹ and that their award appeases the victim and assuages any urge for revenge felt by the victim⁵².

33 At the end of his submissions, counsel for the respondent sought leave⁵³ to reopen the decision in *Lamb v Cotogno*. That application might properly be

49 499 US 1 at 49 (1990).

50 (1987) 164 CLR 1 at 9.

51 (1987) 164 CLR 1 at 9.

52 (1987) 164 CLR 1 at 9-10.

53 *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311.

described as belated. But even if it had been made earlier, we would have declined to reopen the decision. It is a recent judgment of the Court in which the five Justices who heard the matter gave a single set of reasons. Those are matters which may themselves be sufficient reason for refusing to reopen *Lamb v Cotogno*. But in addition to those considerations, it is as well to recall that no application was made to reopen and reconsider the logically anterior questions about the availability of exemplary damages that were decided in *Uren* and the other cases we have mentioned. The leave sought should be refused.

34 It follows that the fact that the tortfeasor was insured under a compulsory scheme of insurance against any liability for exemplary damages would not bar the award of such damages.

35 In this case, of course, the defendant was the compulsory insurer, not the tortfeasor, and any award would be made against it, not the tortfeasor. Nevertheless, in this case that would have been no bar to an award of exemplary damages.

36 The parties accepted that the effect of s 125A(3)(a) of the *Motor Vehicles Act* (introduced to the Act in 1983) was to make the respondent liable to the appellant in whatever respects Bransden would have been liable. Section 125A(3)(a) provides:

"Where, in pursuance of this section, an insurer has been joined as a defendant to an action -

- (a) the insurer will be taken to have directly assumed the liability (if any) of the insured person upon the claim in respect of death or bodily injury and, where such a liability is found to exist, judgment upon that claim will be given not against the insured person but against the insurer"

It follows that nothing turns on the substitution of the respondent as defendant in place of Bransden.

37 Secondly, if, as is now the case under the relevant South Australian legislation, the compulsory insurer is entitled to "recover from the insured person any money paid or costs incurred by the insurer" in respect of the liability the insurer incurred where the insured person drove a motor vehicle with the intention of causing the death of, or bodily injury to, a person or another's property⁵⁴ there

54 *Motor Vehicles Act* 1959 (SA), s 124A(1)(aa).

would seem to be powerful reason to think that the interposition of the insurer's liability should not affect the power to award exemplary damages. (There may be serious doubt, however, whether the respondent has any right of recovery from the insured person in this case. The Act was amended to deal with cases of intentional conduct by the insured only in 1993⁵⁵ and the events giving rise to the present claim happened in 1988.) It is, however, not necessary to resolve these questions in order to dispose of the present appeal.

Significance of criminal punishment

38 The factor which weighed most heavily with the primary judge in considering whether to award exemplary damages was that Bransden had been sentenced to a substantial term of imprisonment for the actions which gave rise to the appellant's claim.

39 The first aim adopted by the Law Commission spoke of reserving the award of exemplary damages for cases of wrongdoing "which would otherwise go unpunished by the law"⁵⁶. What significance should be attached to the fact of earlier criminal punishment?

40 Where, as here, the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted, we consider that exemplary damages may not be awarded. We say "may not" because we consider that the infliction of substantial punishment for what is substantially the same conduct as the conduct which is the subject of the civil proceeding is a bar to the award; the decision is not one that is reached as a matter of discretion dependent upon the facts and circumstances in each particular case.

41 There are at least two reasons in principle why that is so.

42 First, the purposes for the awarding of exemplary damages have been wholly met if substantial punishment is exacted by the criminal law. The offender is punished; others are deterred. There is, then, no occasion for their award.

55 *Statutes Amendment (Motor Vehicles and Wrongs) Act 1993 (SA).*

56 United Kingdom, Law Commission No 247, *Aggravated, Exemplary and Restitutionary Damages*, (1997), par 1.17.

43 Secondly, considerations of double punishment would otherwise arise. In *R v Hoar*⁵⁷ Gibbs CJ, Mason, Aickin and Brennan JJ said that there is "a practice, if not a rule of law, that a person should not be twice punished for what is substantially the same act"⁵⁸. That practice or rule would be breached by an award of exemplary damages in the circumstances described.

44 Because, in this case, substantial punishment was imposed on the tortfeasor for the conduct which was in issue in the civil proceedings, it is not necessary to decide whether the bar arises only where the punishment is "substantial" or how close must be the similarity between the conduct that is the subject of the two proceedings.

45 No doubt references to "substantial punishment" and to the need for "substantial identity" between the conduct that is the subject of the criminal and civil proceedings may lead to difficult questions of fact and degree. What is substantial punishment? Does it matter if the prosecuting authorities and the offender reach some arrangement about what will be charged and, if charged, admitted? Does it matter if for reasons personal to the accused (or for other reasons) only a nominal penalty is imposed in the criminal proceedings? Does it matter if the criminal offence charged is an offence of strict liability?

46 These, too, are not questions that fall for decision in this case. At first sight, however, if criminal charges, alleging the same conduct as is alleged in a civil proceeding, have been brought and proved, it would be a most unusual case in which it was open to a civil court to conclude that the outcome of those criminal proceedings did not take sufficient account of the need to punish the offender and deter others from like conduct. There seems to be much to be said in favour of the views reached by a majority of the Court of Appeal of New Zealand in *Daniels v Thompson* that for a civil court to revisit a sentence imposed in a criminal court for the purpose of deciding whether the criminal received his or her just deserts is "contrary to principle" and must "undermine the criminal process"⁵⁹.

57 (1981) 148 CLR 32.

58 (1981) 148 CLR 32 at 38 citing *Connolly v Meagher* (1906) 3 CLR 682. See also *Pearce v The Queen* (1998) 156 ALR 684.

59 [1998] 3 NZLR 22 at 48 per Richardson P, Gault, Henry and Keith JJ; cf 76-77 per Thomas J.

47 Other considerations may well arise if relevant criminal proceedings ended in the accused's acquittal. But again those questions do not now arise and we do not deal with them⁶⁰.

48 No doubt difficult questions may also arise where it is possible or probable that criminal proceedings will be brought but those proceedings have not been brought or, if started, have not been finished. The rule in *Smith v Selwyn*⁶¹ no longer applies in some jurisdictions⁶². Thus it is possible for civil proceedings to be brought and concluded without there being any clear indication about whether criminal proceedings will follow. It may be doubted, however, that the mere possibility of later criminal prosecution is reason enough not to award exemplary damages in a proper case. More difficult questions might arise if it were clear that such proceedings were probable or had been begun but it is likely that in such circumstances trial of the civil proceedings may, in any event, be delayed until conclusion of the criminal proceedings. But again these questions do not arise here: Bransden had been prosecuted and sentenced.

49 Although we consider the two matters of principle that we have mentioned (satisfaction of the purposes for an award and consideration of double punishment) are sufficient reason for the conclusion we have expressed, we consider that nothing in cases decided in this country or in other common law jurisdictions would suggest the adoption of a contrary view.

50 First, it is a conclusion consistent with such authority as there is on the point in this country⁶³.

60 cf *Daniels v Thompson* [1998] 3 NZLR 22 at 50-52 per Richardson P, Gault, Henry and Keith JJ; cf 77 per Thomas J.

61 [1914] 3 KB 98.

62 *Supreme Court Act* 1986 (Vic), s 41; *Criminal Code Act* 1924 (Tas), s 9. *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26; *P T Garuda Indonesia Ltd v Grellman* (1994) 48 FCR 252.

63 See particularly *Watts v Leitch* [1973] Tas SR 16. *Lamb v Cotogno* is not to the contrary. Although the defendant in that case was convicted of an offence arising out of the incident the subject of the civil suit (see *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 573) no point was made of that fact on appeal to this Court.

51 Secondly, in Canada, courts have declined to award punitive damages where the defendant has been imprisoned⁶⁴. (It may be that different considerations arise in some Canadian jurisdictions where some criminal punishment other than imprisonment is imposed.) We note, however, that the Ontario Law Reform Commission recommended⁶⁵ that the fact of prior criminal prosecution should not be a bar to an award of punitive damages but that in determining the extent, if any, to which punitive damages should be awarded, the court should be entitled to consider the fact *and adequacy* of any prior penalty imposed.

52 As might be anticipated, no single view of these questions has been uniformly adopted in the many jurisdictions of the United States⁶⁶. But in some of those jurisdictions the question is put in terms like those put forward by the Ontario Law Reform Commission namely: exemplary damages should not be awarded if the defendant has been *sufficiently* punished by the criminal justice system.

53 Putting the question in these terms emphasises the importance of addressing the underlying question of principle. How are the civil courts to set about a task of punishing a defendant when the criminal courts have already done so? In particular, how is the civil court to assess the adequacy of the punishment inflicted as the result of a criminal prosecution? If the criminal process has taken its course, why should it be open to a plaintiff in a civil proceeding to contend that the punishment inflicted is inadequate? Is it enough (as the Ontario Law Reform Commission suggest⁶⁷) that the victim of a crime may bring forward at a civil trial matters that go to punishment but are not brought forward at a criminal trial? How does that proposition fit with provisions made for sentencing courts to consider victim impact statements?

64 See Waddams, *The Law of Damages*, 2nd ed (1991), par 11.470; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada*, (1981) at 699; Ontario Law Reform Commission, *Report on Exemplary Damages*, (1991) at 43.

65 *Report on Exemplary Damages*, (1991) at 46.

66 Compare on the one hand: *Jackson v Wells* 35 SW 528 (1896); *Wirsing v Smith* 70 A 906 (1908); *King v Nixon* 207 F 2d 41 (1953); *Browand v Scott Lumber Co* 269 P 2d 891 (1954); *White v Taylor* 277 SE 2d 321 (1981) and on the other: *Redden v Gates* 2 NW 1079 (1879); *Bundy v Maginess* 18 P 668 (1888); *Luther v Shaw* 147 NW 18 (1914); *Morris v MacNab* 135 A 2d 657 (1957); *Shelley v Clark* 103 So 2d 743 (1958); *E F Hutton and Co Inc v Anderson* 596 P 2d 413 (1979); *Coppinger Color Lab Inc v Nixon* 698 SW 2d 72 (1985).

67 *Report on Exemplary Damages*, (1991) at 45.

54 No doubt, if the punishment inflicted by a criminal court is properly regarded as substantial (and a term of imprisonment would seem always to be so) no question of inadequacy should arise. But what if a financial or other non-custodial penalty is exacted? How is the adequacy of that penalty to be judged⁶⁸?

55 Again, none of these questions arises here. On any view, substantial punishment has been inflicted on the wrongdoer in this matter. But to express the rule to be applied by a civil court in deciding whether exemplary damages may be awarded, simply as a discretion to be exercised according to whether, having regard to the nature of the defendant's conduct and the need to punish it and deter others from repeating it, exemplary damages should be awarded, may very well obscure deep-seated and difficult questions of principle.

56 Here, however, because substantial punishment was imposed on Bransden for the conduct that was the subject of this action exemplary damages could not be awarded.

Compensatory damages

57 For the reasons given by Kirby J, the damages awarded to the appellant were manifestly inadequate.

Proposed orders

58 The appeal should therefore be allowed with costs, the order of the Full Court dismissing the appeal to that Court be set aside, in lieu there should be orders that the appeal be allowed with costs, and there be a new trial on the issue of damages (other than aggravated and exemplary damages). The costs of the new trial should be in the discretion of the judge at that trial.

68 See *Daniels v Thompson* [1998] 3 NZLR 22 at 52-53 per Richardson P, Gault, Henry and Keith JJ; cf 73 per Thomas J.

59 KIRBY J. This appeal from the Full Court of the Supreme Court of South Australia⁶⁹ raises two questions. The first concerns a suggested error on the part of the Full Court in failing to correct the decision of the primary judge (Pirone DCJ) who refused to award exemplary (or punitive) damages in the circumstances of the case. The second concerns a complaint that the Full Court should have held that the amount allowed for pre-trial economic loss and future loss of earning capacity was manifestly inadequate, so as to authorise and require the recalculation of the damages.

60 Special leave was granted primarily to permit examination, yet again⁷⁰, of the vexed question of exemplary damages. The quantification of damages in this case, a matter which would not normally attract the attention of the Court, was doubtless left open in case it might require reconsideration in the light of the outcome of the claim for exemplary damages. Whilst I am of the opinion that the claim for exemplary damages was rightly dismissed, the examination of the other components of the damages, occasioned by the appeal, demonstrates error which required correction by the Full Court. The only acceptable solution is a retrial of the question of damages. However, such damages must exclude the exemplary damages claimed.

The facts

61 Mr Donald Gray (the appellant) is an Aboriginal Australian. On 9 September 1988 at Salisbury, a suburb of Adelaide, he was injured when struck by a motor vehicle driven by Mr Darren Bransden. The motor vehicle was insured under the compulsory third party provisions of the *Motor Vehicles Act 1959* (SA) ("the MV Act")⁷¹. The insurer was the State Government Insurance Commission now renamed the Motor Accident Commission ("the Commission").

62 The primary judge found that the appellant was injured when Mr Bransden drove directly at a group of Aboriginal youths, including the appellant, doing so with the intention of running the appellant down and seriously hurting him. At trial, liability for negligence was not disputed. Nor was it contested that Mr Bransden's conduct was deliberate, evidencing a want of regard for the safety

69 *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996.

70 See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Fontin v Katapodis* (1962) 108 CLR 177; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448; *Lamb v Cotogno* (1987) 164 CLR 1.

71 Pt IV of the Act.

and person of the appellant. Contributory negligence was not shown. The case was therefore one for the assessment of damages.

63 Mr Bransden was charged with the criminal offence of intentionally causing grievous bodily harm to the appellant⁷². He was convicted of this offence by a jury⁷³ and sentenced to seven years imprisonment⁷⁴. The sentencing judge described his conduct as inexcusable, with no mitigating factor at all. It was, he said, a "blatant breach of the law" that was "brutal and cowardly". The primary judge in these proceedings took a similar view of Mr Bransden's conduct.

64 The background of the appellant was explained in the evidence. He was abandoned by his parents soon after birth. He was brought up by an aunt and uncle. He attended public schools but, because he was one of only two Aboriginal students at the secondary school, he was continuously picked on. He played various sports at school and was chosen for successful Australian Rules football teams in his local area. He enjoyed long distance running. He was visited occasionally by his natural father and when, in 1987 his aunt and uncle died, he went to live with a cousin in Salisbury. He commenced a course at a college there which specialises in Aboriginal education. However, he left the college to take a six month job at a local school earning \$250 a week net. The work involved building school facilities. Necessarily, it required the appellant to engage in squatting, lifting materials and bending. The primary judge accepted that the appellant liked the work, that he did it well and that his performance was satisfactory. This was his situation at the time he was deliberately run down and injured.

65 As a result of the impact, the appellant suffered organic and psychological injuries. The former included fractures of the tibia and fibula of both legs and multiple contusions to his face and head. As found by the primary judge, the injury to the appellant's head resulted in initial confusion, disorientation, incomprehensible verbalisation and retrograde amnesia. He was left with a cognitive impairment.

66 Between the injury and the trial the appellant was admitted to hospital on three occasions for various procedures. He came under the care of Dr Anthony Ingman. He did not return to work or to college. He began drinking alcohol to excess. He claimed that after his injuries he turned to drinking "full on".

72 *Criminal Law Consolidation Act 1935 (SA)*, s 21.

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

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

He also became involved in a variety of criminal offences⁷⁵, most of them relatively minor. He was sentenced to various terms of imprisonment between 1990 and 1993, usually for several days but on one occasion for five months. At the trial of his action in June 1995, he told the primary judge that he had given up drinking alcohol altogether after his last term of imprisonment. However, his natural father, to whom he had gone after his release from custody, contradicted this statement. He said that the appellant had been drinking alcohol, although not every day, whilst staying at his home and had been drunk "[o]n a couple of occasions".

- 67 The appellant brought proceedings in the District Court of South Australia, initially against Mr Bransden, claiming damages against him for negligence. The claim was not framed in terms of trespass to the person. Amongst the damages claimed was a specific claim for exemplary damages. In 1995 the proceedings were amended to substitute State Government Insurance Commission as the defendant⁷⁶. The substitution of the Commission for Mr Bransden was effected pursuant to s 125A of the MV Act. That section provides that the Court may, on the application of the insurer, join it as a defendant to the action. Where it is so joined the insurer is taken to have "directly assumed the liability (if any) of the insured person upon the claim in respect of ... bodily injury and, where such a liability is found to exist, judgment upon that claim will be given not against the insured person but against the insurer"⁷⁷. Although provision is made for the insured person to remain a party for purposes of defending, in effect, a property claim or prosecuting a counter-claim, neither of these was relevant. In accordance with the MV Act, Mr Bransden "cease[d] to be a party to the action"⁷⁸. Provision is made in certain circumstances for the insurer to recover from the insured in respect of its liability where the insured has contravened or failed to comply with a term of the policy of insurance⁷⁹. The appellant submitted that this possibility,

75 Before the subject injuries were inflicted upon him, the appellant had once been convicted of larceny. However, he was fined \$50 and placed on a six month good behaviour bond. No conviction was recorded.

76 By order of a Master of the District Court on 23 January 1995 on the application of the Commission.

77 MV Act, s 125A(3)(a).

78 MV Act, s 125A(3)(b).

79 MV Act, s 124A(1).["Where an insured person incurs a liability against which he or she is insured under this Part and the insured person has contravened or failed to comply with a term of the policy of insurance ... by driving a motor vehicle ... with the intention of causing ... bodily injury to ... a person ... the insurer may ... recover from the insured person any money paid or costs incurred by the insurer in respect of that liability."]

although not yet carried into effect, continued to expose Mr Bransden to the possibility of recovery at the suit of the Commission, for example for any exemplary damages which the Commission was ordered to pay by reason of Mr Bransden's deliberate driving.

Decision of the primary judge

68 The primary judge assessed the appellant's damages at \$72,206. Judgment was entered in his favour in that sum together with an amount for interest. The components of the judgment were \$15,000 for past economic loss; \$30,000 for future economic loss; and \$18,190 for non-economic loss (calculated in accordance with the *Wrongs Act* 1936 (SA), s 35A(b)⁸⁰). The out-of-pocket expenses were agreed at \$9,016. The appellant complained that this judgment was "manifestly inadequate". Specifically, he argued that the judge had erred on failing to include a sum for exemplary damages. More generally, he complained that the amounts provided for economic loss, past and future, were erroneous, being arrived at by faulty reasoning which should be corrected on appeal. He submitted that such correction was available, notwithstanding several references by the judge to credibility findings which were adverse to him.

69 On the claim for exemplary damages, Pirone DCJ accepted that exemplary damages were legally available in a case such as this, notwithstanding the fact that the appellant had not expressly framed his case in terms of trespass to the person and that the defendant before the Court was not the tortfeasor himself but his compulsory third party insurer. The judge found that, if the appellant was entitled to an award of exemplary damages, it should be in the sum of \$10,000. However, after reference to a decision of the Supreme Court of Tasmania in *Watts v Leitch*⁸¹, Pirone DCJ accepted that he had a discretion to award, or refrain from awarding, exemplary damages. Although he was not bound by the Tasmanian decision, it accorded with his own opinion. Taking into account the fact that Mr Bransden had already been punished by being sentenced to a substantial period of imprisonment in respect of the same conduct, the judge concluded that no award of exemplary damages "should" be made.

70 As to the claim for economic loss, the appellant presented himself at trial as totally and permanently unemployable. Essentially, this perspective of the facts was based upon the contention that he had been progressing reasonably, despite adversity, until the deliberate wrong done to him by Mr Bransden. He had regular

80 That section provides that in such cases non-economic loss is to be assigned a numerical value on a scale rising from 0 to 60. The primary judge assigned the number 17. At the relevant time, this produced the component of the judgment of \$18,190. See the definition of "prescribed amount" in s 35A(6)(b).

81 [1973] Tas SR 16 at 20 per Nettlefold J.

work, was a keen sportsman, had attended college for a time and hoped to begin a career working on an oyster or abalone farm by the age of 20. After the injury his life was dislocated.

- 71 The primary judge accepted that the appellant's earning capacity had been diminished as a result of the subject injuries, both in relation to the past and with respect to the future. In measuring the extent of his loss, he recorded his preference for the evidence of Dr Ingman. That witness had testified that:

"[I]n work that involved heavy lifting and carrying [the appellant] would be restricted, and also in work requiring squatting or bending ... He could do this work intermittently and more slowly than the average person."

Dr Ingman concluded:

"The reality is that, unless he happened to be in a situation where someone wanted a person who worked more slowly, he would be better employed in something else."

- 72 Although accepting that the injury to the head was "significant and severe" and although generally accepting the evidence of Mr Mark Reid, a neuropsychologist, that the appellant had suffered cognitive impairment which Mr Reid, as to approximately 75%, attributed to the accident, the primary judge concluded that the appellant had a pre-existing short-term memory impairment. He therefore found that the short-term memory problems were not related to the subject incident.

- 73 The reasons advanced to support this conclusion, vital to the calculation of past and future economic loss, were two. The first involved consideration of a number of comments on the appellant's scholastic performance at secondary school when he was in his early teens. The second related to the judge's assessment of the appellant as a witness and his observations of him whilst he was in the witness box. The judge also seems to have been affected by the fact that the appellant's natural father deposed, contrary to the appellant's own testimony, that he was still drinking alcohol. Taking these considerations into account, as well as the disadvantages inevitably flowing from the appellant's criminal record, Pirone DCJ concluded that the appellant had "evinced no intention or genuine desire to make use of his residual earning capacity" in the past and that "the same may be true of him at other times in the future". He therefore reached the monetary allocations already mentioned after "wielding the broad axe". Essentially, his Honour concluded that the "obvious lack of motivation" which the appellant displayed after injury, and demonstrated during his evidence, had its roots not in the trauma and dislocation of the wrong done to him by Mr Bransden but in personality traits already obvious when he was at high school. He did not accept the appellant's evidence that he could not play pre-injury sports; although he was prepared to concede that long distance running might now be beyond him.

Decision of the Full Court

74 In the Full Court, the reasons for rejecting the appellant's appeal were given by Millhouse J⁸². On the complaint concerning the refusal to include exemplary damages, it was recorded that the Commission had conceded that such damages "could have been awarded. It was a matter of discretion"⁸³. Reference was made to *Watts v Leitch* and to the primary judge's consideration of the fact that the driver had already been punished by imprisonment. Millhouse J accepted that the primary judge had a discretion which he had chosen not to exercise in favour of the appellant. He considered that there was no reason why the Full Court should interfere.

75 On the more general complaint concerning the suggested inadequacy of the damages, Millhouse J referred to the "adverse view of the appellant's credibility"⁸⁴ formed by the primary judge, the "appalling" school reports, the resort to drinking alcohol and the appellant's criminal record. He concluded⁸⁵:

"The sad fact is that the appellant's chances of achieving much by way of employment in life have always been small. Although [counsel] argued that the learned judge should not have, nor should we, set store by those school reports I cannot see why not. They don't shew much promise ... The learned judge had ... found the reports pointed to the appellant's lack of motivation: he found that this lack of motivation had gone on. There is no reason for us to review these findings."

76 Whilst accepting that the assessment for non-economic loss in this case was "quite low", the Full Court declined to intervene. As to the economic loss, on the footing that the appellant's future "given his lack of skills and motivation" was never a good one and that he had been left with "little permanent disability"⁸⁶, those sums were also left undisturbed. The result was that the Full Court dismissed the appeal.

82 Bollen and Williams JJ concurring.

83 *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 4.

84 *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 3.

85 *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 4.

86 *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 4.

Common ground

77 Upon some questions raised by the appeal there was common ground between the parties:

1. The Commission accepted that it was liable to the appellant for any exemplary damages that might be awarded in the proceedings arising out of the conduct of Mr Bransden. No point was taken that liability for such damage would fall outside the policy. I shall assume that this is so whatever might be the subsequent rights of the Commission, as insurer, to recover the whole or any part of the damages from Mr Bransden⁸⁷. Had it been otherwise, or had the matter been in doubt, it would have been necessary to join Mr Bransden once again as a party so that he could be given the opportunity to be heard before any such damages were ordered affecting him. Neither party suggested that Mr Bransden should be afforded notice of the hearing to protect his contingent interests in its outcome. In light of the conclusion to which I have come, it is unnecessary to explore this problem.
2. The references to the criminal proceedings, made by the primary judge, arose out of the tender of part of the transcript of those proceedings, including the remarks on the sentencing of Mr Bransden⁸⁸. This tender was received by consent of the parties. It served simply to confirm the conclusions independently reached by the primary judge so that no question arises as to such use. The case was conducted on the basis that there was no, or no sufficient, provocation on the part of the appellant to justify or explain Mr Bransden's conduct⁸⁹. A defence of contributory negligence, although pleaded, was not pressed.
3. Whilst contesting the adequacy of the primary judge's quantification of pain and suffering, the appellant concentrated his attack on the judgment in terms of the omission of exemplary damages and the alleged errors in the calculation of the allowances for economic loss. The appeal was conducted on the footing that the quantification of the potential exemplary damages by the primary judge was accepted. The appellant therefore asked that \$10,000 be added to his judgment if he were to succeed on that ground of appeal alone. If he succeeded on the complaint about economic loss, the appellant asked that there be a general retrial as to damages. This represented a departure from the relief initially sought in the grounds of appeal where the appellant

⁸⁷ Pursuant to MV Act, s 124A.

⁸⁸ The certificate of conviction was admitted pursuant to the *Evidence Act* 1929 (SA), s 34A.

⁸⁹ In this respect the case was different from *Lamb v Cotogno* (1987) 164 CLR 1.

had asked that the proceedings be returned to the Full Court for assessment of damages or that this Court should substitute its own assessment.

78 Although not specifically pleaded, the appellant sought, under the claim for compensatory damages, to argue that allowance ought to have been made for aggravated damages. At the very close of the hearing, the Commission, for its part, asked the Court to reconsider the authority of its decision in *Lamb v Cotogno*⁹⁰. This is where the common ground ran out. The Commission objected to any allowance for aggravated damages. It relied, to support its objections, upon the formulation of the grounds of appeal and argument, and the way in which the proceedings had been conducted in the courts below. The appellant did not expressly object to this Court's reopening *Lamb v Cotogno*, but stated his strong support for that decision.

The issues

79 The issues raised by the appeal are:

1. Should the authority of this Court in *Lamb v Cotogno* be reopened to permit the Commission, as a compulsory insurer, to contest the applicability to it of the law entitling a plaintiff to recover exemplary (or punitive) damages on the grounds of the conduct of the tortfeasor whom it is obliged to indemnify? (The reopening issue).
2. If not, is the holding in *Lamb v Cotogno* inapplicable to the facts of this case on the footing either (a) that the claim in *Lamb v Cotogno* was framed in terms of trespass to the person, whereas in this case the sole cause of action pleaded by the appellant was negligence? or (b) on the basis that in *Lamb v Cotogno* the defendant was the tortfeasor, whereas in this case the sole defendant was, by statute, the Commission, punishment of which was said to be neither rational nor fair. (The scope of exemplary damages issue).
3. If the Commission is prima facie liable to the appellant under the holding in *Lamb v Cotogno*, is that liability affected in any way by the provisions of the *Wrongs Act*, s 35A limiting recovery of damages in the case of motor vehicle accidents? (The *Wrongs Act* issue).
4. If exemplary damages may be recovered, is the award of such damages discretionary and, if so, did the discretion miscarry by reference to the way in which the prior criminal conviction and punishment of Mr Bransden was treated? (The criminal punishment issue).

90 (1987) 164 CLR 1.

5. Having regard to the pleadings and the conduct of the proceedings, is the appellant entitled to aggravated damages in addition, or in the alternative, to the exemplary damages claimed? (The aggravated damages issue).
6. In respect of the remainder of the appeal, the question is whether the award of damages for economic loss, past and future, is manifestly inadequate and whether, having regard to the reasons given by the primary judge (including his references to his assessment of the credibility of witnesses) the Full Court was authorised and required to intervene to correct the misassessment. (The economic loss issue).

The reopening issue

80 This Court in *Lamb v Cotogno* decided that there was nothing in the language or scheme of the *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) which prohibited the award of exemplary damages to a plaintiff injured as a result of the driving of a vehicle insured under that Act. In the New South Wales Court of Appeal, I concluded, by reference to the legislation and my understanding of its purposes, that exemplary damages were inappropriate and unavailable in such circumstances⁹¹. Such an award would, as a matter of practicality, neither punish nor deter the driver responsible nor motorists generally. I considered that it would produce absurd results⁹². I suggested that realism required that the role of the insurer should be taken into account, at least where its obligations arose from a statutory scheme providing for compulsory insurance⁹³. Upon one view, the decision of this Court, in *Kars v Kars*⁹⁴ (decided since *Lamb v Cotogno*) suggests a greater willingness, on the part of this Court to consider the scope and applicability of common law entitlements where they arise for elucidation in the context of a compulsory statutory scheme for universal insurance. However, nothing said in *Kars* casts doubt on the authority of *Lamb v Cotogno*⁹⁵. In some Australian jurisdictions, legislation has been introduced to overcome the effect of *Lamb v Cotogno*⁹⁶. No such provision has been enacted in South Australia.

⁹¹ *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 570.

⁹² (1986) 5 NSWLR 559 at 568 referring to Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed (1983) at 68.

⁹³ (1986) 5 NSWLR 559 at 571.

⁹⁴ (1996) 187 CLR 354.

⁹⁵ See especially (1996) 187 CLR 354 at 381-382.

⁹⁶ See eg *Motor Accidents Act 1988* (NSW), s 81A and *Motor Accident Insurance Act 1994* (Q), s 55(1). Under s 55(2) of the Queensland Act it is provided that a court
(Footnote continues on next page)

81 Until the holding in *Lamb v Cotogno* is displaced by legislation or overruled by this Court, it must be applied to the same or analogous circumstances. The suggestion that the rule in *Lamb v Cotogno*, if applicable, should not be followed was unavailable to the Commission in the courts below. Unless the decision could be distinguished, it was the duty of all Australian courts to conform to the principle which that decision established⁹⁷. In its written submissions, the Commission, rather tentatively, suggested that the Court might wish to depart from its holding in *Lamb v Cotogno* or to alter or modify the principle which that decision established⁹⁸. It submitted that there was no policy or other justification for an award of exemplary damages against it, as the compulsory statutory insurer substituted in accordance with the legislation, for the tortfeasor who was no longer a party to the action.

82 Outside Australia, a body of judicial and other legal writing exists which lends support to the view that shifting the burden of exemplary damages to an insurer, at least in the case of statutory schemes of compulsory insurance, insufficiently serves the purposes of punishment, deterrence and disapprobation for which the common law provided the remedy of exemplary damages. Cases where the tortfeasor is privately insured and where the insurer is held liable to indemnify the insured which is vicariously liable for highhanded conduct on the part of an employee can be readily distinguished⁹⁹. But where the damages are defrayed not by the wrong-doer but by an insurer pursuant to a statutory obligation,

may enter a separate judgment against an insured person for exemplary or punitive damages. An insured person is not entitled under a statutory policy to indemnity against such an award: s 55(3). There is no reference to exemplary damages for motor vehicle accidents under any other Australian statute. See MV Act, *Transport Accident Act* 1986 (Vic); *Motor Vehicle (Third Party Insurance) Act* 1943 (WA); *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas); *Motor Accidents (Compensation) Act* 1979 (NT); *Motor Traffic Act* 1936 (ACT).

97 *Garcia v National Australia Bank* (1998) 72 ALJR 1243 at 1246; 155 ALR 614 at 619.

98 Respondent's written submissions, par 7.

99 *Ohio Casualty Insurance Co v Welfare Finance Co* 75 F 2d 58 at 59 (8th Cir, 1934); Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 200.

judges¹⁰⁰ and other commentators¹⁰¹ have questioned the applicability of exemplary damages as fulfilling the objects for which such damages are ordinarily provided. Some have even questioned whether, in the case of private insurance, an obligation to indemnify an insured for the consequences of criminal conduct might not be unenforceable, as contrary to public policy¹⁰². One United States judge questioned the point of publicly punishing an insurer since "it has done no wrong"¹⁰³. In the case of a compulsory statutory insurer, and particularly where (as in the present case) the Commission was then the sole insurer licensed to issue policies under the MV Act, by punishing it "society would then be punishing itself for the wrong committed by the insured"¹⁰⁴. Arguably, doing this would defeat or undermine the achievement of the objects of the legislation.

83 Whatever weight these arguments might be thought to have, they cannot, as a matter of authority, affect the outcome of these proceedings whilst *Lamb v Cotogno* stands. Some day it may be necessary to reconsider the correctness of that decision¹⁰⁵. However, it is a relatively recent and unanimous holding of the Court. It was arrived at with acknowledgment that the contrary arguments had "strength"¹⁰⁶. In the present appeal, the Commission's application to reargue the point was not clearly signalled either at the special leave hearing or in the written submissions. It was not even raised in the oral arguments for the Commission until the very close of its submissions and then only as a result of direct questioning by the Court. This Court may have been differently constituted had a clear indication

100 For example *Wisdom J* (with whom *Jones J* concurred) in *Northwestern National Casualty Co v McNulty* 307 F 2d 432 at 440-441 (5th Cir, 1962); *Affiliated FM Insurance Co v Beatrice Foods Co* 645 F Supp 298 at 303-305 (ND Ill, 1985).

101 For example *McGregor on Damages*, 16th ed (1997) at par 466 n 1; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981) at 702.

102 Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981) at 709.

103 *Northwestern National Casualty Co v McNulty* 307 F 2d 432 at 440 (5th Cir, 1962).

104 *Northwestern National Casualty Co v McNulty* 307 F 2d 432 at 440-441 (5th Cir, 1962).

105 In *Daniels v Thompson* [1998] 3 NZLR 22, the New Zealand Court of Appeal (by majority) departed from the approach taken in *Lamb v Cotogno*. The Court of Appeal held that all claims for exemplary damages in relation to conduct that has been, or was likely to be, the subject of a criminal prosecution were inadmissible. See also Smillie, "Exemplary damages and the criminal law" (1998) 6 *Torts Law Journal* 113.

106 (1987) 164 CLR 1 at 9.

been earlier given that the Commission sought to challenge the correctness of its earlier authority. In these circumstances, it is not appropriate to permit the Commission to reargue the holding in *Lamb v Cotogno*¹⁰⁷. This appeal must be approached in conformity with the law as there stated.

The scope of exemplary damages issue

- 84 The Commission accepted that the restrictive approach to the recovery of exemplary damages in England¹⁰⁸ had not been followed in Australia. In this country, awards of exemplary damages were available to a wider catalogue of causes of action than English law now provides. Thus, such damages have been recovered in actions framed in terms of trespass to chattels¹⁰⁹, trespass to land¹¹⁰, trespass to the person¹¹¹, deceit¹¹², reckless negligence¹¹³ and defamation¹¹⁴, unless expressly excluded by statute¹¹⁵. Although there was no holding of this Court on the point, the Commission urged that the purposes for which exemplary damages were awarded were inapplicable to a cause of action framed in negligence. Its argument went thus: where the only wrong pleaded and proved was breach of a duty of care, it was inappropriate to award exemplary damages in order to make an example of the defendant or to mark the court's strong disapproval or to punish the defendant or to provide a remedy which would discourage revenge and self-help. Because the appellant had not conducted his case on the footing that it involved a trespass to the person, he was confined to the damages available for the wrong of negligence. This meant compensatory damages (including

107 The appellants did not refer to the then recent decision of the New Zealand Court of Appeal in *Daniels v Thompson* [1998] 3 NZLR 22. Indeed, neither party referred to that decision in argument.

108 *Rookes v Barnard* [1964] AC 1129 at 1226-1227.

109 *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584.

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

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

112 *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251.

113 *Midalco Pty Ltd v Rabenalt* [1989] VR 461 (the trial in that case appears to have been conducted on the assumption that exemplary damages were available, and the Court of Appeal did not disturb the finding).

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

115 Luntz, *Assessment of Damages for Personal Injury and Death*, 3rd ed (1990) at par 1.7.4, n 4 and 5.

aggravated damages). It did not extend to exemplary or punitive damages. In so far as the evidence suggested deliberate wrongdoing against the appellant by Mr Bransden, that was merely the factual background upon which the cause of action was to be considered. The remedies provided by law were defined by the cause of action, not the evidence.

85 Because this point is not decided by authority, it is necessary to decide it as a matter of principle. Originally, the language used in most cases where exemplary damages were awarded suggested that the feature of the cause attracting such damages was the existence of an intent on the part of the tortfeasor to harm the victim¹¹⁶ or some form of conscious wrongdoing in contumelious disregard of the victim's rights¹¹⁷. It was for that reason that exemplary damages were provided in cases of intentional torts. Sometimes such damages were refused where intentional injury could not be established¹¹⁸. However, even in some of the older cases, exemplary damages were occasionally awarded where wilful negligence was shown followed by high-handed conduct towards the victim¹¹⁹. Although punitive damages would not be awarded for acts properly described as accidents, framed in terms of the tort of negligence¹²⁰, proof that the wrong went beyond mere negligence and could be characterised as wanton, reckless or outrageous would attract exemplary damages¹²¹.

86 In Canada, the proposition that such damages were not available to a cause of action framed in negligence has been rejected¹²². It is recognised that, depending on the circumstances, a claim framed in negligence can attract such damages¹²³. Professor Fleming acknowledged that awards of exemplary damages

116 Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 173-174.

117 cf *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77.

118 See eg *Kaytor v Lion's Driving Range Ltd* (1962) 35 DLR (2d) 426 at 431-432.

119 See eg *Emblen v Myers* (1860) 6 H & N 54 [158 ER 23].

120 Hawley, "Punitive and Aggravated Damages in Canada" (1980) 18 *Alberta Law Review* 485 at 496.

121 *Blacquiére's Estate v Canadian Motor Sales Corporation Ltd* (1975) 10 Nfld & PEIR 178 at 207.

122 *Robitaille v Vancouver Hockey Club Ltd* (1979) 19 BCLR 158 at 179.

123 *Denison v Fawcett* [1958] OR 312 at 319; McBride, "Punitive Damages" in Birks (ed) *Wrongs and Remedies in the Twenty-First Century* (1996) 175 at 179 n 8; cf *Kaytor v Lion's Driving Range Ltd* (1962) 35 DLR (2d) 426 at 432.

in actions for negligence were comparatively rare¹²⁴. However, he noted that such damages had been recovered in product liability cases¹²⁵ and cases involving unsafe working conditions¹²⁶. What mattered, he said, was "the conduct of the wrong doer, not the nature of the tort"¹²⁷. I agree. Punishment for deliberate wrongdoing is certainly a consideration in deciding the applicability of exemplary damages. But it is not the sole reason for the award of such damages. The more recent cases on the subject, including in this Court, have accepted that such damages may be recovered whatever the subjective intention of the tortfeasor if, objectively, the conduct involved was high-handed, calling for curial disapprobation addressed not only to the tortfeasor but to the world. The first objection therefore fails.

- 87 What of the complaint that, of their nature, exemplary damages do not apply where the defendant is the Commission and where the actual tortfeasor is no longer a party to the action? Certainly, these features distinguish the present case from *Lamb v Cotogno* where the wrongdoer (and not the insurer) was the defendant on the record. However, the distinction is an insubstantial one. It is not sufficient to distinguish *Lamb v Cotogno* from this case. By the MV Act, where the insurer has been joined as defendant it is "taken to have directly assumed the liability (if any) of the insured person"¹²⁸. If the liability of the insured extends to exemplary damages, judgment for such damages must be given "not against the insured person but against the insurer"¹²⁹. Because, by *Lamb v Cotogno*, the insured is liable for exemplary damages, the Commission, by the Act, steps into his shoes. It assumes his liability. Considerations of its entitlement to recover from the insured are irrelevant to the obligations which the Act imposes on the insurer. To the objection that it is the Commission, an insurer, and not the tortfeasor personally which has to foot the bill, the answer must be that this is precisely what *Lamb v Cotogno* countenanced. The second objection likewise fails.

124 Fleming, *The Law of Torts*, 9th ed (1998) at 273.

125 *Vlchek v Koshel* (1988) 52 DLR (4th) 371.

126 *Trend Management Ltd v Borg* (1996) 40 NSWLR 500; *Coloca v BP Australia Ltd* [1992] 2 VLR 441.

127 Fleming, *The Law of Torts*, 9th ed (1998) at 273 citing *Coloca v BP Australia Ltd* [1992] 2 VLR 441 at 445.

128 s 125A(3)(a).

129 s 125A(3)(a).

The *Wrongs Act* issue

88 The Commission next suggested that the award of exemplary damages was subject to significant restrictions because of the terms of the *Wrongs Act* and particularly the provisions of s 35A limiting recovery of damages for "non-economic loss". The legislative scheme contained in s 35A of the *Wrongs Act* is unique to South Australia. The section, as applicable at the relevant time, provided that "where damages are to be assessed for or in respect of an injury arising from a motor accident" its provisions apply. There was no dispute that the appellant's claim fell well within the section. The contest was whether the terms of the section included exemplary damages within the damages that may be "awarded for non-economic loss"¹³⁰. If they were so included, the common law was excluded and the damages had to be assessed by reference to a scale "running from 0 to 60"¹³¹ and by reference to a "prescribed amount"¹³².

89 The issue raised by this objection is the subject of authority in South Australia. In *Andary v Burford*¹³³, the Supreme Court, with reference to earlier decisions of the Local and of the District Court of South Australia, concluded that s 35A was not intended to exclude the recovery of exemplary damages; nor did such damages fall within its terms. I agree. In order to abolish a civil right to exemplary damages by statutory implication (no express abolition appearing) a clearer indication of the parliamentary purpose would be required. "Non-economic loss" is defined in s 35A(6) to mean:

- "(a) pain and suffering;
- (b) loss of amenities of life;
- (c) loss of expectation of life;
- (d) disfigurement".

90 Although exemplary damages are "non-economic" in the generality of that expression, they do not fall within any of the stated paragraphs of the definition. They are not, therefore, controlled by the assessment prescribed by s 35A. They remain to be assessed, where applicable, according to common law principles. The

130 *Wrongs Act*, s 35A(1)(b).

131 s 35A(1)(b)(i).

132 s 35A(1)(b)(ii).

133 [1994] Aust Torts Reports ¶81-302 (Millhouse J).

statement that the purpose and application of the section is to impose a cap on general damages¹³⁴ is irrelevant in this instance.

- 91 In New Zealand, where a similar problem arose under the *Accident Compensation Act* 1972 (NZ), the Court of Appeal reached a like conclusion¹³⁵. It held that the general language of the Act excluding defined entitlements to damages at common law did not prohibit recovery of exemplary damages having regard to their special features and purposes. If the recovery of such damages were to be abolished, the abolition would have to be effected by clear legislation, specifically addressed to that objective¹³⁶. I would reach the same conclusion here. Accordingly, the *Wrongs Act* issue also fails.

The criminal punishment issue

- 92 The appellant then objected that the courts below had treated the award of exemplary damages as discretionary and had erred in their approach to providing them. Specifically, he argued that *Watts v Leitch* was incorrectly decided and that it was erroneous to approach the question by reference solely to the fact that the tortfeasor had suffered criminal punishment. The Commission supported the decisions below and contested the suggestion that the discretion had miscarried.

- 93 Two preliminary questions are presented by this issue. The first is whether the liability of the tortfeasor to punishment is relevant. The second is whether, if it is, taking it into account is properly described as discretionary. Both of these questions were answered in the affirmative by the courts below.

- 94 Turning to the first question, it is impossible to contest, in the face of authority, the relevance of the fact of criminal punishment of the tortfeasor. The essential argument against doing so is that criminal proceedings are outside the control of the person injured and are designed to achieve the purposes of the State. If the injured party has suffered in an additional way, such as would ordinarily attract an entitlement to exemplary damages, why should such entitlement be lost simply because of the operation of the criminal law? This approach has found favour in some jurisdictions in the United States of America¹³⁷. Authority exists in that country supporting the refusal of a request to instruct the jury to consider a

134 *Packer v Cameron* (1989) 54 SASR 246 at 251.

135 *Donselaar v Donselaar* [1982] 1 NZLR 97.

136 [1982] 1 NZLR at 105 per Cooke J. See now *Daniels v Thompson* [1998] 3 NZLR 22. See also Smillie, "Exemplary damages and the criminal law" (1998) 6 *Torts Law Journal* 113 at 118-120.

137 Gustafson, "Damages - Punitive Damages and Double Jeopardy" (1946) 21 *Notre Dame Lawyer* 206 at 208.

criminal fine imposed on the defendant in reduction of his civil liability to the plaintiff¹³⁸. Where there are multiple plaintiffs, a particular problem arises for treating criminal punishment as relevant. How, then, is the criminal punishment of the defendant to be apportioned in assessing the several civil claims? This consideration, and the fact that what is at stake are the damages to which the plaintiff is entitled, has caused some courts to conclude that the fact that a tortfeasor has been punished criminally, or is liable to be so punished, is not material to the question of the plaintiff's entitlement to the exemplary damages which belong to the plaintiff¹³⁹.

- 95 The foregoing opinions are outside the mainstream of applicable legal authority. They are, moreover, inconsistent with basic principle. The rule that a person shall not be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law is a fundamental principle of human rights¹⁴⁰. There is no reason for excluding its operation in this area of discourse except for the inter-position of compulsory insurance, which authority holds is not reason enough. That is why liability to criminal punishment, and more especially the imposition of such punishment (and particularly that of imprisonment) have been repeatedly held in Australia¹⁴¹,

138 *Redden v Gates* 2 NW 1079 (1879). See Gustafson, "Damages - Punitive Damages and Double Jeopardy" (1946) 21 *Notre Dame Lawyer* 206 at 208.

139 *Jefferson v Adams* 4 Del 321 (1845); *Redden v Gates* 2 NW 1079 (1879); *Irby v Wilde* 46 So 454 (1908); *Dubois v Roby* 80 A 150 at 154 (1911).

140 International Covenant on Civil and Political Rights, Art 14.7. See also *Pearce v The Queen* (1998) 72 ALJR 1416; 156 ALR 684.

141 For example *Watts v Leitch* [1973] Tas SR 16 and *O'Reilly v Hausler* (1987) 6 MVR 344.

England¹⁴², Canada¹⁴³, New Zealand¹⁴⁴ and in many jurisdictions of the United States¹⁴⁵, as relevant to the provision of exemplary damages (and even aggravated compensatory damages). Courts commonly take into account the fact and severity of any criminal punishment imposed or to which the tortfeasor is liable. Particular exceptions have been suggested where the criminal punishment imposed on the defendant, or to which the defendant may be liable, is regarded as insubstantial. An example is where the tortfeasor was conditionally discharged in the criminal proceedings¹⁴⁶. Adopting this approach may appear to breach the rule against double punishment by permitting a civil court to add, in effect, to the punishment imposed on the wrongdoer by the criminal court acting within its powers¹⁴⁷. Because, generally, a criminal trial is heard and determined before a civil action, the practical problems of reconciling the two systems are ordinarily avoided. But they can arise when the criminal punishment is unknown or delayed¹⁴⁸. However, complaints of this kind are really addressed to the fundamental problem of retaining exemplary damages in civil cases where the

142 *Rookes v Barnard* [1964] AC 1129; *Archer v Brown* [1985] QB 401 at 423; *AB v South West Water Services Ltd* [1993] QB 507 at 516. See also The United Kingdom Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No 247, 1997, p. 135.

143 *Natonson v Lexier* [1939] 3 WWR 289 at 291; *Loedel v Eckert* (1977) 3 CCLT 145 at 150-151; *Kenmuir v Heutzelmann* (1977) 3 CCLT 153 at 158; *Norberg v Wynrib* [1992] 4 WWR 577; Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 197; Hawley, "Punitive and Aggravated Damages in Canada" (1980) 18 *Alberta Law Review* 485 at 503-504; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981) at 699. See also the report of the Ontario Law Reform Commission, *Report on Exemplary Damages*, 1991, at 43-46.

144 *Taylor v Beere* [1982] 1 NZLR 81; *Donselaar v Donselaar* [1982] 1 NZLR 97. In *Daniels v Thompson* [1998] 3 NZLR 22, the imposition of, or likely liability to criminal punishment was held to be a complete bar to the recovery of exemplary damages.

145 See eg *Borkenstein v Schrack* 31 Ind App 220; 67 NE 547 (1903); Gustafson, "Damages - Punitive Damages and Double Jeopardy" (1946) 21 *Notre Dame Lawyer* 206 at 207.

146 *Connors v Doak* (1978) 24 NBR (2d) 85; Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 197-198.

147 Waddams, *The Law of Damages*, 2nd ed (1991) at ¶11.470.

148 Waddams, *The Law of Damages*, 2nd ed (1991) at ¶11.480.

tortfeasor is also liable to criminal punishment¹⁴⁹. The way that the law has endeavoured to grapple with this problem is by recognising a discretion to award, or to withhold, exemplary damages and, in awarding them, to moderate their amount by reference to considerations of criminal punishment. Exemplary (or punitive) damages are said to be uncommon outside the common law. They certainly present conceptual problems. But they are too deeply embedded in our law to be abolished by a court. They have been accepted by this Court as part of Australian law¹⁵⁰. We must live with, and adapt to, the difficulties. Discretion is the way this is done.

- 96 The notion that a plaintiff's entitlement to a component of damages at common law is a matter of discretion is exceptional. Damages are ordinarily the plaintiff's right, being the remedy devised by the common law to effect its purposes. However, the description of exemplary damages as "discretionary" is embedded in the case law. In *Rookes v Barnard*¹⁵¹, Lord Devlin explained the instruction to be given to the jury where exemplary damages were available. They might award such damages "if, but only if"¹⁵² the compensatory damages were inadequate to mark the court's disapproval of the tortfeasor's conduct and to deter him and others from repeating such conduct. Thus the component of exemplary damages was not a right but an element of the damages which the jury could elect to provide or to withhold. In *Broome v Cassell & Co*, Lord Hailsham described an award of punitive damages as "discretionary"¹⁵³. There are similar descriptions in Canadian¹⁵⁴ and Australian authority¹⁵⁵. Indeed, the existence of a discretion

149 As Lord Devlin commented in *Rookes v Barnard* [1964] AC 1129 at 1230. See also Lord Reid in *Broome v Cassell & Co* [1972] AC 1027 at 1087.

150 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Lamb v Cotogno* (1987) 164 CLR 1.

151 [1964] AC 1129.

152 [1964] AC 1129 at 1228.

153 [1972] AC 1027 at 1060. See also Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) at pars 4.29, 4.40.

154 *Blacquiere's Estate v Canadian Motor Sales Corporation Ltd* (1975) 10 Nfld & PEIR 178 at 205.

155 *Watts v Leitch* [1973] Tas SR 16 at 20.

has been described as a "safety valve" permitting the tribunal of fact to decline the award of exemplary damages if some factor makes it proper to refuse them¹⁵⁶.

97 I accept that describing the process involved as "discretionary" may encourage a certain looseness of thinking. However, to some extent that is inherent in the interaction of criminal punishment and civil damages which are described as being in part punitive. It is a discretion to be exercised in accordance with principle. If one of the reasons for awarding exemplary damages is the punishment of the wrongdoer in an emphatic and public way, it is obviously relevant to take into account the fact that this may already have been done or is likely to follow. Once exemplary damages are seen as supplementary to compensatory damages (an addition that may or may not be appropriate in the particular case) the fact that a plaintiff may lose them (or have them reduced by reference to the actions of others in the criminal courts) does no offence to reason. The primary judge's description of exemplary damages as discretionary was therefore correct.

98 As to the appellant's objection that, a discretion being established, the primary judge erred in exercising it solely by reference to the imprisonment of Mr Bransden, I cannot agree. The language used, as in *Watts v Leitch*¹⁵⁷ was consistent with a recognition that exemplary damages *might* be awarded but *should* not because of the substantial term of imprisonment to which the wrongdoer had been sentenced. No error was therefore shown on this issue in the approach of the primary judge or of the Full Court. It was open to Pirone DCJ to conclude that the imprisonment to which Mr Bransden was sentenced would adequately fulfil all of the purposes for which an award of exemplary damages in this case would otherwise have been appropriate.

The aggravated damages issue

99 Belatedly, the appellant sought to include in his claim for compensatory damages an additional element for aggravated damages, although this had not been pleaded or advanced at trial.

100 The difficulty of distinguishing between aggravated damages and exemplary damages has been acknowledged by this Court¹⁵⁸. To some extent compensatory,

¹⁵⁶ Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) at par 1.20.

¹⁵⁷ [1973] Tas SR 16 at 23-24.

¹⁵⁸ *Uren v John Fairfax & Sons Pty Ltd* (1962) 117 CLR 118 at 149 per Windeyer J.

aggravated and exemplary damages overlap¹⁵⁹. Thus, compensatory damages themselves may, to some degree, fulfil the purposes for which exemplary damages exist. These are ambiguous concepts¹⁶⁰ and, at least in part, anomalous¹⁶¹. However, it is clear that, by Australian law, compensatory damages may be enlarged to include a component for the aggravated circumstances in which a wrong to the plaintiff has occurred¹⁶². It is perhaps because of the lack of complete clarity of the differentiating features of aggravated damages¹⁶³, and doubts as to what they involve, that legal practitioners often fail to claim them and persons wronged often fail to recover them. This is doubtless why it has been proposed that the "misleading phrase", aggravated damages, should be replaced by a specific component of damages for mental distress¹⁶⁴. The danger of double counting in the provision of aggravated damages is an ever present one¹⁶⁵. The differentiation between "aggravated damages" and "exemplary damages" became more marked following *Rookes v Barnard*¹⁶⁶. It assumes critical importance in those jurisdictions where exemplary damages, as such, have been abolished by statute.

159 *Watts v Leitch* [1973] Tas SR 16 at 23; *Cotogno v Lamb (No 3)* (1986) 5 NSWLR 559 at 576; cf Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada" in *Torts in the 80s* (1983) at 196.

160 Fleming, *The Law of Torts*, 9th ed (1998) at 274.

161 See Stone, "Double Count and Double Talk: The End of Exemplary Damages?" (1972) 46 *Australian Law Journal* 311. Professor Stone points out (at 314) that there was an analogy in Roman law designed to buy off plaintiffs and to prevent them taking vengeance into their own hands: the award of quadruple losses (*furtum manifestum*). There appear to be contemporary analogies, for example, in the legal systems of some countries whereby a financial settlement, acceptable to the family of a victim, may avoid or mitigate the criminal punishment of the perpetrator.

162 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129-130, 149; *Justin v Associated Newspapers Ltd* (1966) 86 WN (Pt 1) (NSW) 17 at 42, 44; *Rigby v Associated Newspapers Ltd* (1966) 68 SR (NSW) 414 at 430-432, 438-439.

163 *Thompson v Commissioner of Police of the Metropolis* [1997] 3 WLR 403 at 414; [1997] 2 All ER 762 at 773.

164 Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) at par 1.9.

165 *Thompson v Commissioner of Police of the Metropolis* [1997] 3 WLR 403 at 414; [1997] 2 All ER 762 at 772; cf *Broome v Cassel & Co* [1972] AC 1027 at 1072 per Lord Hailsham of St Marylebone LC.

166 [1964] AC 1129.

101 Aggravated damages are given for conduct which shocks the plaintiff and hurts his or her feelings. Exemplary damages are awarded for conduct which shocks the tribunal of fact, representing the community¹⁶⁷. Obviously the two affronts will often coincide and overlap. But in awarding an additional element in the plaintiff's compensatory damages as aggravated damages for such affront, the attention of the decision-maker must be concentrated upon the impact which the wrong had on the plaintiff and the particular injury done to his or her feelings.

102 In England¹⁶⁸ and Canada¹⁶⁹, authority exists that claims for exemplary damages do not need to be pleaded and, by analogy, the same might be said of aggravated damages, being within a claim for compensatory damages, generally expressed. In Australia, a stricter approach has been taken to the pleading of aggravated damages¹⁷⁰. It was not argued that any special rule or practice of pleading in South Australia governed the question in this case. Whilst each case depends upon its own circumstances, basic principle requires that, if a particular claim has not been in issue, and a case 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 trial¹⁷¹.

103 The last consideration applies here. Had aggravated damages been sought by the appellant, the Commission's case could well have been different. It would have been entitled to explore, test and challenge suggestions of particular hurt to, and affront on the part of, the appellant. As it is, the appellant himself gave little evidence specifically, relevant to such questions. The differential entitlement to aggravated damages just seems to have been overlooked as it was at trial in *Cotogno v Lamb* and in many other cases before and since. To permit the matter

167 Fleming, *The Law of Torts*, 9th ed (1998) at 274; Salmond and Heuston, *Law of Torts*, 21st ed (1996) at 503.

168 *Broome v Cassell & Co* [1972] AC 1027 at 1083. Lord Hailsham proposed that the issue be referred to the Rule Committee and pointed out that there was much to be said for the view that in such a case the defendant should not be taken by surprise. See now Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) (1997) at par 1.22.

169 *Starkman v Delhi Court Ltd* (1961) 28 DLR (2d) 269 at 274; *Paragon Properties Ltd v Magna Investments Ltd* (1972) 24 DLR (3d) 156 at 163-164; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981) at 690.

170 *Cotogno v Lamb* (noted in (1985) 2 MVR 480). On this point see the unreported reasons for judgment: Court of Appeal of NSW, 9 August 1985 at 7-8 per Mahoney JA (McHugh JA concurring).

171 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

to be ventilated for the first time in this Court would involve not only inefficiency and condonation of professional oversight. It would risk procedural unfairness to the Commission. Assuming that such damages were otherwise available to him, the appellant's belated application for an award of aggravated damages in the appeal should therefore be refused.

The economic loss issue

104 The foregoing analysis means that it was open to the primary judge and the Full Court to conclude that the appellant was not entitled to exemplary damages. Their reasoning on this issue was correct. To that extent, the appeal must be dismissed. However, there remains the appellant's complaint about the manifest inadequacy of the award of general damages for economic loss, past and future. Here, I consider that the appellant is on much stronger ground.

105 On the face of things, it might seem (as the Full Court observed) an unpromising case to reopen the primary judge's estimation of the economic impact of the injuries on the appellant. Pirone DCJ said that the appellant had made "an unfavourable impression"¹⁷² upon him and, in several places in his reasons, that he did not believe him¹⁷³. Because the assessment of the economic consequences of an injury, especially in a person who has served various periods of imprisonment, involves evaluation which is difficult and disputable at the best of times, the primary judge's estimate of someone in the position of the appellant is usually of first importance. In such matters, appellate courts exercise restraint out of their respect for the advantages which the trial judge enjoys over the appellate courts in the estimate of the credibility of witnesses¹⁷⁴. Nevertheless, the exercise of such restraint does not necessarily mean that the appeal is "hopeless" or "doomed to failure" as the Full Court suggested¹⁷⁵. Three features of Pirone DCJ's reasons provide the key to unlock the door of appellate intervention which would otherwise be closed by the stated assessments of the credibility of the appellant and his witnesses:

172 *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 34.

173 *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 18, 23, 24, 33, 34.

174 See eg *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178; *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479; *Zuvela Pty Ltd v Cosmarnan Concrete Pty Ltd* (1996) 71 ALJR 29 at 31; 140 ALR 227 at 229-230.

175 *Gray v State Government Insurance Commission*, unreported, Supreme Court of South Australia, 10 September 1996 at 1.

1. Pirone DCJ made it plain that he preferred the evidence of the appellant's medical witnesses, Dr Ingman and Mr Reid. He only rejected the latter's opinion that the appellant's short-term memory problem was causally related to the subject incident "[f]or reasons which I give later"¹⁷⁶. When those reasons are examined they are, with respect, unconvincing. Most especially, they depended, in large part, upon the judge's examination of the appellant's school records. The judge quoted from three school reports¹⁷⁷. He extracted teacher comments to the effect that the appellant was finding it difficult to cope, sometimes lacked concentration, required frequent supervision and encouragement and "constant reminders to return notes from home". From these brief comments by teachers about the appellant, the judge felt able to conclude, despite the unanimous medical opinion, that the appellant's short-term memory problem was not related to the subject accident. He said that, in his opinion, it was "pre-existing and therefore not compensable". A fuller review of the school reports gives no objective foundation for this conclusion. In the case of a young Aboriginal student, who had been abandoned by his natural parents at birth and who was in a school with only one other Aboriginal where he was picked on, the school reports appear unremarkable. Woven through them are various positive comments about the appellant's friendliness, cooperative nature, improvement and effort to work to the level of his ability. To call the school records "appalling" as the Full Court did is unreasonable. To infer from them that the appellant was already stamped with a short-term memory problem appears completely unsafe. To allow them to reinforce an impression which, after injury, the appellant gave in the witness box involves suspect reasoning. It makes inadequate allowance for the fact that, objectively, the appellant had done reasonably well for himself, given his many disadvantages. He had completed school. He had started college. He had secured employment and was performing it satisfactorily until injured by Mr Bransden's driving.
2. Although the foregoing might not, of themselves, be sufficient to permit an appellate court to substitute a different view on the appellant's credibility and prospects from that expressed by the primary judge, a passage in the reasoning of Pirone DCJ shows that the rejection of the appellant's credibility was not an opinion derived from the testimony of the appellant himself. Pirone DCJ indicates expressly that up to a point towards the end of the appellant's cross-examination "I had formed a favourable impression of

¹⁷⁶ *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 3.

¹⁷⁷ *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 4-5, 32-33.

him"¹⁷⁸. What caused him to change was the evidence of the appellant's father, described as "totally inconsistent" with that of the appellant himself. Whilst it was open to the primary judge to be impressed by the appellant's father, the latter's testimony was quite limited, doubtless because of the absence of a long term relationship between them. It seems to have turned, in the mind of the trial judge, upon the appellant's assertion that he had given up drinking alcohol completely and his father's denial of that fact. Such a contradiction seems scarcely sufficient to warrant changing a "favourable" impression of the witness to one of complete disbelief of his testimony and rejection of his evidence.

3. When, in these circumstances, regard is also paid to the testimony of the medical witnesses whose evidence the primary judge said he generally accepted, the impact of the appellant's injuries on his employment capacity take on a different quality. Dr Ingman, for example, said that the appellant was restricted in work requiring squatting or bending, heavy lifting and carrying. He also said that he would work more slowly. These are disabilities of crucial importance to the employability of a young Aboriginal man with no more than school education, effectively with little more to sell in the employment market than his labour. The judge preferred his own estimate of the appellant's prospects in life for that of the two psychologists whose testimony he otherwise said he generally accepted. Very properly, he put his concerns about the school reports to one of the psychologists, Mr Walsh. Although the latter's answers are quoted in the judge's reasons, I do not derive from them any support for the proposition that they demonstrated the kind of defects of intellect and character which the judge thought effectively doomed the appellant to a life much the same as that which had unfolded after injury: long periods of unemployment, interrupted only by periods in prison. On the contrary, Mr Walsh stated that, having reviewed the school reports, his opinion would have been the same. There was no evidence from the latter of any pre-injury brain damage. Instead, there was evidence that the appellant was trying hard at school. His sporting prowess and early quest for employment bear out this conclusion. Whilst further, more detailed, examination of the school history, beyond the brief reports used by the primary judge, might have been useful, Mr Walsh said that he "would still be of the opinion that the problem that I have seen is one which is caused by brain dysfunction"¹⁷⁹, ie caused in large part in the subject accident. The provision of an allowance for future economic loss of an unskilled worker

178 *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 20.

179 Cited by Pirone DCJ: *Gray v State Government Insurance Commission*, unreported, District Court of South Australia, 28 June 1995 at 7.

aged 23 at trial of only twice the sum provided for economic loss to the time to trial and amounting in all to only \$30,000 appears on its face incongruous.

106 The duty of the Full Court was to re-examine the complaints about the suggested serious inadequacy of the damages for economic loss, much as I have done¹⁸⁰. The mention of estimates of credibility in the reasons of the primary judge does not insulate those reasons from proper analysis. When analysed, although correct on the issue of exemplary damages, they display serious errors in the treatment of past and future economic loss. It is not possible for this Court, which has not seen the appellant, to recalculate his damages. That must be done by a court which has those advantages but which does not engage in reasoning which, with respect, was seriously flawed.

Orders

107 I agree in the orders proposed by Gleeson CJ, McHugh, Gummow and Hayne JJ.

180 See *Warren v Coombes* (1979) 142 CLR 531 at 551.

- 108 CALLINAN J. This is an appeal from the Full Court of the Supreme Court of South Australia dismissing an appeal from a judgment of Pirone DCJ of that State.

Proceedings at first instance

- 109 On 9 September 1988 the appellant, a young aboriginal man of 16 years, was walking across a street in Salisbury, South Australia when he was struck by a motor car deliberately driven at him by another man for whose actions the respondent statutory insurer is liable. The appellant suffered personal injuries in respect of which he claimed, and was awarded in the District Court of South Australia, damages of \$72,206.
- 110 The driver of the motor car was convicted of the offence of causing grievous bodily harm with intent to do such harm as a result of the running down of the appellant. He was sentenced to a term of imprisonment of seven years to be served on the expiration of other sentences which he was serving at the time of trial. The trial judge found, indeed it was not contested, that the driver acted maliciously.
- 111 After reviewing a number of cases and rejecting a submission by the respondent that exemplary damages were not available against a statutory insurer such as the respondent, the primary judge resolved to apply a decision of Nettlefold J in *Watts v Leitch*¹⁸¹ in which the latter said:

"The court has a discretion to award or refrain from awarding exemplary damages. This discretion must be exercised judicially and after a consideration of all the relevant evidence.

The fact that the defendant was fined in the Criminal Court must be taken into account when considering the question of exemplary damages."

- 112 In view of the punishment already imposed upon the driver, Pirone DCJ dismissed the claim for exemplary damages, saying, in doing so, that, had he been minded to make an award of them, \$10,000 would have been the appropriate measure.

The appeal to the Full Court

- 113 The appellant appealed to the Full Court of the Supreme Court of South Australia on a number of grounds all of which failed. On the question whether exemplary damages should have been awarded Millhouse J, (with whom Bollen and Williams JJ agreed) said this:

¹⁸¹ [1973] Tas SR 16 at 20.

"The only other matter is exemplary damages. Mr Stratford conceded that on the authority of *Lamb v Cotogno*¹⁸² exemplary damages could have been awarded. It was a matter of discretion. He referred to the third edition of Luntz, *Assessment of Damages* in which the learned author, on the authority of *Watts v Leitch*¹⁸³ says that where a defendant has pleaded guilty to a criminal charge arising out of an incident in which a plaintiff was injured and been sentenced, there should be no exemplary damages, 'since the defendant had already been punished.' Just the situation here. The learned judge was aware of his discretion to award exemplary damages and chose not to exercise it in favour of the appellant. There is no reason why we should interfere."

The appeal to this Court

114 The grounds of appeal to this Court are as follows:

1. The Full Court was in error in failing to find that the appellant was entitled to exemplary damages in circumstances when he had suffered injuries intentionally inflicted by the use of a motor vehicle and in particular misapplied the principles relating to exemplary damages enunciated by the High Court in *Lamb v Cotogno* and in particular was in error in purporting to apply a decision of a single judge of the Tasmanian Supreme Court in *Watts v Leitch* in the context of punishment already suffered by the tortfeasor when assessing exemplary damages.
2. The Full Court was in error in failing to increase the damages for future economic loss to which the appellant was entitled when the amount awarded at first instance of \$30,000 was to compensate a 23 year old man for the rest of his working life when his disabilities of both legs and the effect of a close head injury sustained when he was 16 years of age were significant and severe.
3. The Full Court was in error in its decision by accepting the trial judge's finding that the head injury was significant and severe and the injuries to his legs gave rise to a permanent disability of 10 per cent loss of use of the right leg and 5 per cent loss of use of the left leg and then proceeding, without warrant to find there was little permanent disability.

182 (1987) 164 CLR 1 at 9.

183 [1973] Tas SR 16.

4. The Full Court failed to rectify the error made by the learned trial judge in placing great weight on the content of the appellant's school reports of his two years' secondary school when assessing his loss of earning capacity.

- 115 Ground 1 does not directly raise the question of the role (if any) that exemplary damages should play in this country in the law of damages for which a statutory insurer is responsible but may call for some consideration of the application of *Lamb v Cotogno*¹⁸⁴ in the context of the South Australian motor vehicles insurance legislation.
- 116 The notion that compensation is to be assessed by an independent tribunal appointed and maintained by the state, according, and confined to the damage and loss actually sustained by a victim, evolved with the advance of civilisation over time. Private vengeance, of which the Sicilian vendetta is one example, was widespread until comparatively recent times¹⁸⁵.

184 (1987) 164 CLR 1.

185 In early Roman law there existed the possibility of avoiding retaliation by agreement, to pay compensation. Provision for compensation was made by the Twelve Tables, which were wooden (and bronze) tablets erected in the market place in Rome in 451-450BC. One of their provisions allowed retaliation to be avoided by agreement. The relevant provision has been translated:

"If one person maim another, let there be retaliation unless they come to an agreement" (see Thomas, *Textbook of Roman Law*, (1976) at 349.)

In Justinian's *Institutes*, further reference can be found.

"Under the Twelve Tables the penalty for this delict was, for a damaged limb, retaliation; and for a broken bone a sum of money appropriate to the great poverty of the people of those times. Later the praetors began to allow victims to put their own value on the wrong. ... The penalties of the Twelve Tables have fallen into disuse, while the praetors' system – also called the honorarian – is frequently applied in the courts. The valuation of contempts rises and falls according to the victim's social standing and honour." (Book IV Title 4 from the translation by Birks and McLeod, *Justinian's Institutes* (1987) at 127.)

The Roman law delicts retained until the very end a punitive character, requiring the wrongdoer to pay more than compensation (see Nicholas, *An Introduction to Roman Law*, (1962) at 208).

- 117 As Kirby P points out in *Cotogno v Lamb [No 3]*¹⁸⁶, punitive damages may have originated in England in an attempt by the courts to stamp out duelling.
- 118 Modern civil law systems do not recognise exemplary damages. In Scotland, the leading case is *Black v North British Railway Co*¹⁸⁷. Lord President Dunedin said there was:
- "... no authority for any distinction between damages and 'exemplary damages' in the law of Scotland. The very heading under which it is treated in our older books 'Reparation' excludes the idea."¹⁸⁸
- 119 Similarly, neither French¹⁸⁹ nor German¹⁹⁰ law recognises the concept of exemplary damages.
- 120 In all but limited categories of cases, the House of Lords in *Rookes v Barnard* abolished punitive or exemplary damages¹⁹¹.

186 (1986) 5 NSWLR 559 at 567. See also Lord Diplock in *Cassell v Broome* [1972] AC 1027 at 1127.

187 1908 SC 444.

188 1908 SC 444 at 453.

189 Article 1382 of the French Civil Code contains a general principle of liability to compensate for "damage" occasioned by fault. The availability, however of *dommages moraux* has been rationalised as being punitive in nature: see for example Savatier, *Theorie des obligations*, 3rd ed (1974).

190 Markesinis, *A Comparative Introduction to the German Law of Torts*, 3rd ed (1994) at 921.

191 [1964] AC 1129 at 1226-1227. The three categories in which exemplary damages were held to be available are (i) oppressive, arbitrary or unconstitutional action by servants of the government; (ii) wrongdoing which is calculated to make a profit; (iii) express authorisation by statute.

- 121 The decision in *Rookes v Barnard* was not greeted with universal approval by text writers¹⁹², courts of other jurisdictions¹⁹³, and all judges in the United Kingdom¹⁹⁴.
- 122 In the landmark decision of *Uren v John Fairfax & Sons Pty Ltd*¹⁹⁵, signalling an intention of this Court to depart whenever it might be thought appropriate to do so from decisions of the House of Lords, the High Court decided not to follow or apply *Rookes v Barnard*¹⁹⁶:

"Upon full consideration, I do not think that the decision of the House of Lords [in *Rookes v Barnard*] should force this Court to conclude that the law here is other than what it has for so long been taken to be, viz. that where an action is based upon a personal wrong and the defendant has acted arrogantly, mindful only of its own interests and, to use the phrase of Knox CJ, 'in contumelious disregard' of the rights of the plaintiff, 'damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner' for his outrageous conduct¹⁹⁷."

- 123 In the United Kingdom itself there was division of opinion with respect to the theory and utility of exemplary damages. In *Cassell v Broome*, a case in which exemplary damages were claimed on the basis that a defamatory publication was calculated to make a profit for a publisher in excess of any compensatory damages that might be awarded, Lord Reid said¹⁹⁸:

192 See for example Tilbury, "Factors Inflating Damages Awards" in Finn (ed) *Essays on Damages*, (1992) at 104, where the author refers to the "irrationality" of the Devlin categories.

193 In Canada, see *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193; in Nigeria, see *Eliochin (Nig) Ltd v Mbadiwe* (1986) NWLR (Pt 14) 47 (on appeal to the Supreme Court); New Zealand, *Taylor v Beere* [1982] 1 NZLR 81; Ireland, *Conway v Irish National Teachers Organisation* [1991] ILRM 497.

194 See *Cassell v Broome* [1972] AC 1027 at 1114, 1119.

195 (1966) 117 CLR 118.

196 (1966) 117 CLR 118 at 147 per Menzies J.

197 See *Finlay v Chirney* (1888) 20 QBD 494 at 504 per Bowen LJ.

198 [1972] AC 1027 at 1086.

"It [the concept of exemplary damages] is confusing the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties."

By contrast, Lord Wilberforce said¹⁹⁹:

"It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous ... in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric"

- 124 Defamation cases, in which exemplary damages may turn out to be one of the only effective means of checking excesses of increasing and concentrated media power, and perhaps indispensable for that reason, provide the most frequent occasions for an award of them²⁰⁰. As the majority of the Court of

199 [1972] AC 1027 at 1114.

200 In New South Wales, exemplary damages for defamation were abolished by the *Defamation Act* 1974 (NSW) s 46(3)(a). There is a serious question whether juries, well aware of and anxious to show their disapprobation of the abuse of media power, may not simply have proceeded to award exemplary damages under the guise of aggravated compensatory damages. It is difficult otherwise to understand the magnitude of the awards of \$600,000 in *Carson v John Fairfax and Sons Ltd* (1993) 178 CLR 44 and, on the retrial of the case, before a second jury of \$1.3m (see *Carson v John Fairfax and Sons Ltd*, unreported, Supreme Court of New South Wales, 6 May 1994, Levine J). As Viscount Radcliffe PC, GBE said:

"A man may glitter with new and valuable ideas or burn with wise thoughts or passionate feelings, but if he is to communicate them to any circle wider than that of his own immediate friends he has got to render them acceptable to the real licensors of thought today, the editors, the publishers, the producers, the controllers of radio and television." ("Censors", The Rede Lecture at Cambridge University, 4 May 1961, in Lord Radcliffe, *Not in Feather Beds: Some Collected Papers*, (1968) at 162.)

See also Lewis, *Make No Law: The Sullivan Case and the First Amendment*, (1991) at 207:

"Television is even more of an oracle. Its pervasive reach has made national eminences of the network anchor men and women and the top reporters. To the public, that looks like power – and power sometimes exercised in an unaccountable, even arrogant way. The networks, big newspapers and
(Footnote continues on next page)

Appeal of New Zealand in *Daniels v Thompson*²⁰¹ said:

"Exemplary damages may fulfil a useful role in helping to control deplorable conduct outside the reach of the criminal law, such as in the area of defamation²⁰²."

- 125 In *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd*²⁰³, Brennan J discussed the modern rationale for exemplary damages:

"As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In *Merest v Harvey*²⁰⁴ substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, Gibbs CJ saying:

'I wish to know, in a case where a man disregards every principal which actuates the conduct of gentlemen, what is to restrain him except large damages?'

magazines ask questions and demand answers but when anyone wants to know about their business, they wrap themselves in the First Amendment and refuse to answer. So it often appears to the public."

Exemplary damages have also been abolished in running down cases and master and servant cases by the *Motor Accidents Act* 1988 (NSW) s 81A, *Workers Compensation Act* 1987 (NSW) s 151R, *Motor Accident Insurance Act* 1994 (Qld) s 55, *Accident Compensation Act* 1985 (Vic) s 135A(7)(c) and the *Transport Accident Act* 1986 (Vic) s 93(7).

201 [1998] 3 NZLR 22 at 43.

202 *Taylor v Beere* [1982] 1 NZLR 81 at 90 per Richardson J.

203 (1985) 155 CLR 448 at 471.

204 (1814) 5 Taunt 442 [128 ER 761].

The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in *Broome v Cassell & Co*²⁰⁵, 'to teach a wrongdoer that tort does not pay'."

- 126 Discussing this case in *Lamb v Cotogno*²⁰⁶, Mason CJ, Brennan, Deane, Dawson and Gaudron JJ said:

"It was argued on behalf of the defendant that, since the object of exemplary damages is to punish and deter, it is inappropriate that they should be awarded where the wrongdoer is insured under a scheme of compulsory insurance against liability to pay them. Clearly there is strength in that submission, but in our view it cannot succeed. The object, or at least the effect, of exemplary damages is not wholly punishment and the deterrence which is intended extends beyond the actual wrongdoer and the exact nature of his wrongdoing²⁰⁷. It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace²⁰⁸. This consideration probably had more force when exemplary damages were in their infancy, but it nevertheless remains as an aspect of them. It should, perhaps, be interpolated that exemplary or punitive damages are not without their critics who assert generally that they are both anachronistic and anomalous²⁰⁹. They nevertheless remain as part of the law. When exemplary damages are awarded in order that a defendant shall not profit from his wrongdoing or even where they are described as a windfall to the plaintiff – a description which the plaintiff is unlikely to accept – the element of appeasement, if not compensation, is none the less present.

So far as the object of deterrence is concerned, not only does it extend beyond the defendant himself to other like-minded persons, but it also extends generally to conduct of the same reprehensible kind. Whilst an award of exemplary damages against a compulsorily insured motorist may have a limited deterrent effect upon him or upon other motorists also compulsorily insured, the deterrent effect is undiminished for those minded

²⁰⁵ [1972] AC at 1027 at 1130.

²⁰⁶ (1987) 164 CLR 1 at 9-10.

²⁰⁷ See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 138; Luntz, *Assessment of Damages for Personal Injury and Death*, 2nd ed (1983) at 66-67; Street, *Principles of the Law of Damages*, (1962) at 33-34; cf *Costi v Minister of Education* (1973) 5 SASR 328.

²⁰⁸ cf *Merest v Harvey* (1814) 5 Taunt 442 [128 ER 761].

²⁰⁹ See, generally, Street, *Principles of the Law of Damages*, (1962) at 33-35.

to engage in conduct of a similar nature which does not involve the use of a motor vehicle."

- 127 Whilst the element of appeasement may be of considerable importance, with respect, for myself, I would doubt whether an award of exemplary damages payable by a statutory insurer of motor vehicle drivers, would be likely to have any deterrent effect upon those who might be minded to engage in conduct of a similar nature not involving the use of a motor vehicle.
- 128 In the New South Wales Court of Appeal in *Cotogno v Lamb [No 3]*²¹⁰, Kirby P wrote a powerful dissenting judgment in which his Honour said:

"Exemplary damages have been awarded in cases of trespass to the person²¹¹. It is therefore necessary to approach the present case on the basis that, under the common law, as applied in Australia, exemplary damages are generally available to the plaintiff suing, as the appellant did, in trespass unless the preconditions for an award of such damages are not made out, a defence is established disentitling the plaintiff or a statute sufficiently indicates the exclusion of the application of exemplary damages in the circumstances of the case."

- 129 Kirby P went on to say²¹²:

"... I am of the opinion that exemplary damages are inappropriate and are not available in cases where the action concerns the death of or bodily injury to a person caused by or arising out of the use of an insured motor vehicle within the meaning of the Act. This conclusion is not inconsistent with the authority of the High Court or of this Court, on the subject of exemplary damages. The precise issue raised in this case has not previously been authoritatively determined. Its determination as I have proposed would at once effect the legislative scheme for compulsory third party insurance in motor vehicle cases, leave untouched the general law on exemplary damages, including in cases of trespass to the person, limit in an acceptable way the availability of anomalous exemplary damages, and avoid the absurd result of levying motorists generally by a derisory amount for the 'punishment or deterrence' to be inflicted on a motorist such as the respondent. Furthermore, it would recognise that the basic social purposes served by exemplary damages are to impose punishment or deterrence on a person whose conduct in the future is likely to be modified by the award of exemplary damages against him and to

²¹⁰ (1986) 5 NSWLR 559 at 568.

²¹¹ *Johnstone v Stewart* [1968] SASR 142; *Pearce v Hallett* [1969] SASR 423.

²¹² (1986) 5 NSWLR 559 at 570-571.

deter members of the public tempted to act in a like manner by the effective public denunciation and punishment of unacceptable behaviour. An award such as is here proposed can fulfil none of these purposes."

130 There is much force in his Honour's observations. I would, with respect for myself, have been minded to adopt and apply his Honour's reasoning if I were free to do so because in my opinion the punitive purpose of exemplary damages is overwhelmingly the predominant purpose. But *Lamb v Cotogno*²¹³ is a recent unanimous decision of five Justices of this Court. Furthermore, I think that the statutory scheme here is a quite different one from that under consideration in *Lamb v Cotogno*, and, in my view this aspect of the case depends for its resolution upon the terms of the particular South Australian statute pursuant to which the damages are recoverable, the *Motor Vehicles Act* 1959 (SA). It is therefore neither necessary nor appropriate to deal with the belated application by the respondent for leave to argue that *Lamb v Cotogno* should be reconsidered.

131 There have been amendments made to the Act since the appellant was injured. It was common ground that the case and the appeals fell to be decided under the provisions in force at the time of the running down of the appellant and this appears to be so²¹⁴.

132 Section 102 imposed on drivers an obligation to drive only insured motor vehicles on a road or wharf.

213 (1987) 164 CLR 1. See also *Kars v Kars* (1996) 187 CLR 354 at 378-382 per Toohey, McHugh, Gummow and Kirby JJ in which their Honours accepted that there will inevitably be anomalies in the assessment and awarding of damages in cases in which the wrongdoer is insured: especially will this be so where the insured is covered under a scheme of compulsory insurance.

214 See s 19 of the *Statutes Amendment (Motor Vehicles and Wrongs) Act* 1993 (SA):

"The amendments made by this Act do not affect a cause of action, right or liability that arose before the commencement of this Act."

133 Section 107 provided as follows:

"Notwithstanding any enactment, an insurer under a policy of insurance (whether under this Part or otherwise) in relation to a motor vehicle is, as from the date of the policy, liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover."

134 Section 112 was in these terms:

"Where-

(a) a person has obtained judgment in an action against an insured person for death or bodily injury caused by, or arising out of the use of, an insured motor vehicle;

and

(b) before the action came on for hearing the insurer knew that the action had been commenced,

the judgment creditor may recover by action from the insurer such amount of the money (including costs or a proportionate part of those costs) payable pursuant to the judgment as relates to death or bodily injury and has not been paid."

135 It seems to me that exemplary damages awarded to a person who has suffered bodily injury as a result of high handed²¹⁵ or malicious conduct prima facie may be said to "relate" to bodily injury within the meaning of s 112.

136 Section 124 required that the owner, person in charge, or driver of a motor vehicle involved in an accident give notice of particulars of it.

137 Section 124A made provision for recovery by the statutory insurer of damages for death or bodily injury caused when an insured has contravened the term of the policy or has driven the vehicle under the influence of a drug or alcohol:

"(1) Where an insured person incurs a liability against which he or she is insured under this Part and the insured person has contravened or failed to comply with a term of the policy of insurance-

215 See Kirby P in *Cotogno v Lamb* [No 3] (1986) 5 NSWLR 559 at 574-575.

56.

- (a) by driving a motor vehicle while so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle;

or

- (b) by driving a motor vehicle while there is present in his or her blood a concentration of .15 grams or more of alcohol in 100 millilitres of blood,

the insurer may, by action in a court of competent jurisdiction, recover from the insured person any money paid or costs incurred by the insurer in respect of that liability.

(2) Where an insured person incurs a liability against which he or she is insured under this Part and the insured person has, to the prejudice of the insurer-

- (a) contravened or failed to comply with a term of the policy of insurance other than one referred to in subsection (1);

or

- (b) contravened or failed to comply with-

- (i) a requirement of section 124;

or

- (ii) a provision of section 126,

the insurer may, by action in a court of competent jurisdiction, recover from the insured person so much of the money paid or costs incurred by the insurer in respect of that liability as the court thinks just and reasonable in the circumstances."

138 In this case the insurer chose to be joined as a defendant in the action pursuant to s 125A:

"(1) Where an action for damages or other compensation has been commenced in a court against an insured person in respect of death or bodily injury resulting from the use of a motor vehicle, the court may, on the application of the insurer, join it as a defendant to the action.

(2) The court may not join an insurer as a defendant to an action under subsection (1) unless the court is of the opinion that-

57.

- (a) there is an actual or potential conflict of interest between the insurer and the insured in relation to the presentation of the defence;

and

- (b) the defence proposed by the insurer in relation to which the actual or potential conflict of interest arises is, in the circumstances of the case, not merely speculative.

(3) Where, in pursuance of this section, an insurer has been joined as a defendant to an action-

- (a) the insurer will be taken to have directly assumed the liability (if any) of the insured person upon the claim in respect of death or bodily injury and, where such a liability is found to exist, judgment upon that claim shall be given not against the insured person but against the insurer;

- (b) the insured person remains a party to the action only for the purposes of-

- (i) defending a claim that is not a claim in respect of death or bodily injury;

or

- (ii) proceeding upon a counterclaim,

and where there is no such claim or counterclaim, the insured person ceases to be a party to the action;

- (c) the insured person may not be joined as a third party to the action;
- (d) the insured person is, notwithstanding paragraphs (b) and (c), entitled to be heard in the proceedings upon any question related to the claim in respect of death or bodily injury;
- (e) for the purpose referred to in paragraph (d), the insured person is entitled to be represented by counsel of his or her own choice, and the insured person's costs must be paid by the insurer unless, in the opinion of the court, there are special reasons for ordering otherwise;

and

- (f) the insurer may apply to call the insured person to give evidence and, in that event, the person will be called, or summoned to appear, as a witness and be liable to cross-examination by the insurer.

(4) No judgment or finding of a court in proceedings in which an insurer has been joined as a defendant under this section is binding in subsequent proceedings against the insured person under section 124A."

139 The language of s 125A(3)(a) is very wide. Here there was no doubt that the insured was potentially liable to pay exemplary damages. That liability was, in my opinion, a liability "upon [a] claim in respect of ...bodily injury" within the meaning of s 125A(3)(a).

140 Unlike some other States, South Australia has not enacted legislation expressly exempting statutory motor vehicle insurers from liability for exemplary damages²¹⁶.

141 Accordingly, on the proper construction of the *Motor Vehicles Act* 1959 (SA), in my opinion if the appellant had been able to make out a case for exemplary damages, he would have been entitled to recover them from the respondent statutory insurer and the fact that they are to be paid by a statutory insurer becomes irrelevant as a discretionary consideration. The insurer was, by the Act, placed in no better or worse a position than the driver with respect to any liability for exemplary damages. A court should therefore look at the conduct of the insured and matters peculiar to him or her and the plaintiff, and not the ultimate liability

216 See for example the following provisions:

Section 81A of the *Motor Accidents Act* 1988 (NSW):

"A court shall not award exemplary or punitive damages to a person in respect of a motor accident".

Section 55 of the *Motor Accident Insurance Act* 1994 (Qld):

"(1) No award of exemplary or punitive damages may be made against an insurer on a motor vehicle accident claim.

(2) However, if the court is of the opinion that the conduct of an insured person is so reprehensible that an award of exemplary or punitive damages is justified, the court may give a separate judgment against the insured person for the payment of exemplary or punitive damages.

(3) An insured person is not entitled, under a CTP insurance policy, to an indemnity against an award of exemplary or punitive damages."

See also *Workers Compensation Act* 1987 (NSW) s 151R; *Accident Compensation Act* 1985 (Vic) s 135A(7)(c); *Transport Accident Act* 1986 (Vic) s 93(7).

of the statutory insurer in deciding whether exemplary damages should be awarded.

142 At first instance Pirone DCJ thought that the fact that the defendant motorist had been punished in the Criminal Court was the decisive discretionary consideration against an award of exemplary damages.

143 The fact of the imposition of punishment and its extent and impact on the defendant will always be relevant factors, probably on most occasions the major and decisive factors²¹⁷. They may not however be conclusive ones for all cases. Other matters will require consideration: for example, the likelihood or otherwise of criminal proceedings in a particular case, the existence and effect of any victims compensation legislation,²¹⁸ the nature of the conduct of the defendant, the extent to which the plaintiff may be entitled to be appeased, and would benefit from being appeased, the means of the defendant, the deterrent effect upon the defendant, any profit derived by the defendant from the wrongdoing and the deterrent effect upon the potential wrongdoing community generally. A court would also be entitled to take into account that lesser punishments may have been, or might be imposed as a consequence of the acceptance of a lesser plea, the availability (for what might be sound policy reasons in and for the purposes of the criminal law) of a small penalty only, the desirability of the less condemnatory process by way of civil rather than criminal proceedings, the need to encourage compliance with the law²¹⁹, and the fact that the possibility of any criminal sanction is illusory²²⁰. These matters are in my view relevant whether the cause of action is in trespass or negligence, although in the latter, particularly in accidental running down cases,

217 cf *A B v South West Water Services Ltd* [1993] QB 507 at 527 per Stuart Smith LJ:

"In the present case there is the further complication to which I have already referred of the conviction and fine of the defendants. These problems persuade me that there would be a serious risk of injustice to the defendants in this case if an award of exemplary damages were to be made against them."

218 For example *Criminal Injuries Compensation Act* 1978 (SA).

219 See Law Commission Consultation Paper No 132, *Aggravated, Exemplary and Restitutionary Damages*, (1993) at 114-127; Law Commission Report No 247, *Aggravated, Exemplary and Restitutionary Damages*, (1997) at 96-97.

220 See *Defamation Act* 1889 (Qld) s 34 which operates to require a prior order of the Supreme Court for a defamation prosecution.

occasions for an award of exemplary damages are likely to be extremely rare indeed²²¹.

144 The trial judge here did make a provisional assessment of exemplary damages of \$10,000 taking the relevant factors into account. However his Honour exercised the power which was undoubtedly available to him not to award any sum under this head of damages because of the criminal penalties imposed on the defendant. The Full Court did not think that the trial judge fell into error in doing so and nor do I.

145 The appellant was given general leave to appeal. His counsel launched an attack upon the trial judge's award of damages for future economic loss assessed at \$30,000. The three principal bases for the attack were that his Honour misused, or in some way misunderstood the school reports on the appellant tendered in evidence; that his Honour overlooked or gave insufficient weight to the fact that the appellant was in employment at the time of his injury; and, that on its face, the sum of \$30,000 is so grossly and manifestly inadequate as to call for increase.

146 These arguments were apparently pressed and rejected on the appeal to the Full Court.

147 It is now submitted that the Full Court fell into error in not accepting these submissions and in two other respects:

- (i) by making a significant factual error in holding that there was "little permanent disability"; and,
- (ii) in not discharging its entire appellate jurisdiction to consider whether there was a "wholly erroneous estimate of the damages": *Precision Plastics Pty Ltd v Demir*²²².

148 It was also said that there was an inexplicable disproportion between the award for pre-trial loss of earning capacity (\$15,000) for a period of 6.75 years (9 August 1988 to 28 June 1995) and \$30,000 for the rest of the appellant's life.

221 In *Daniels v Thompson* [1998] 3 NZLR 22, the Court of Appeal of New Zealand by a majority took the view that there should be an absolute bar on exemplary damages when criminal proceedings have been instituted and whether a conviction or an acquittal has resulted. Thomas J (dissenting), whilst accepting that an award of exemplary damages would be exceptional when criminal proceedings have been taken was opposed to the absolute rules proposed by the majority.

222 (1975) 132 CLR 362 at 369.

The appellant's counsel pointed out that it was proved that the appellant was in fact earning \$250 per week (net) when he was injured.

149 In my view, the primary judge and the Full Court in reviewing his Honour's assessment of damages for future economic loss did fall into error in three respects even though from the school reports the appellant's pre-injury future looked unpromising: in treating the report cards as if they were indicative of an almost complete lack of earning capacity on the part of the appellant, despite the short periods that they covered and the appellant's age when they were made; by awarding an amount which is manifestly inadequate to compensate a relatively seriously injured young man without skills and entirely dependent upon his physical capacity to pursue remunerative employment; and, in failing to give weight to the relevant consideration that the appellant was in paid employment, albeit of limited duration when he was struck by the defendant's motor vehicle. Any impression of inadequacy is heightened by the obvious disparity between the amounts assessed for past and future economic loss.

150 The appellant tried to mount an argument that he was entitled to recover but had not been awarded aggravated damages. A claim for these was neither pleaded nor pursued in the courts below. Such a claim requires specific pleading, particulars and evidence directed to it. For these reasons the Court should not entertain this argument.

151 I would allow the appeal with costs and substitute for the orders of the Full Court an order that the matter be remitted to the District Court for a retrial confined to the issue of general damages for future economic loss. The respondent should also pay the appellant's costs of the appeal to the Full Court and I would order accordingly.