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TAN, M. W. Should exemplary damages be awarded for actions in negligence

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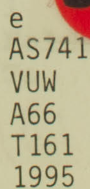

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1) INTRODUCTION

The issue at the crux of this legal writing is whether awards for exemplary damages may be awarded in actions for negligence. New Zealand courts have recently developed a trend indicating an extension of awarding exemplary damages for actions where there has been an absence of consciousness on the part of the wrongdoer. Traditionally because of the focus on the defendant's state of mind, exemplary damages have only been awarded in actions in intentional torts. In the New Zealand case of *Taylor* v *Beere*[1], Cooke J stated that malice was an essential ingredient in awarding exemplary damages. In Australia, the position is similar where Windeyer J in *Uren* v *John Fairfax & Sons Pty. Ltd.*[2] required a "conscious wrongdoing in contumelious disregard of another's rights." Where the defendant has not turned his mind to the act in question or has turned his mind but disregards the consequences of his actions and therefore fails to reach the appropriate duty of care, are exemplary damages justified? If the defendants acted so recklessly that a dangerous situation is created but yet because they lack intent or malice, exemplary damages are not awarded.

Case law in New Zealand has pointed towards a developing idea that exemplary damages may arise for actions not quite amounting to malice. Recently exemplary damages have been awarded in other tortious actions such as nuisance, conversion and conspiracy. Therefore the next step is to explore the possibilities to allow for an award of exemplary damages in action for negligence.

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[1] *Taylor* v *Beere* [1982] 1NZLR 81.

[2] *Uren* v *John Fairfax & Sons. Pty. Ltd.* (1965-1966) 117 C.L.R. 118.

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An analogy to help would be the recent Cave Creek situation. Would surviving victims[3] be able to claim form the Department of Conservation for exemplary damages if it was established that DOC were grossly negligent in constructing the platform at Cave Creek? If the accident had taken place in other Commonwealth jurisdictions such as Canada, Australia and the USA, exemplary damages would be awarded assuming the proper threshold of negligence was attained. Exactly how negligence is required is still a matter of debate in those jurisdictions. In the Cave Creek situation, exemplary damages may be seen as a source of remedies due to the possible inadequacies in the ARCIA[4] legislation[5]. This is similar to other cases such as work place accidents.

While case law in New Zealand, as with Canada and Australia, has indicated that actions for negligence will no longer be seen as an automatic bar for exemplary damages it is important to analyse the policy issues that may arise if the role of exemplary damages was broadened in New Zealand. Those issues and the standard of negligence threshold required to award exemplary damages in negligence and other consequences will be examined further on.

A) Exemplary Damages

Rookes v *Barnard*[6] serves as the authority for exemplary damages in England. In that case Lord Devlin drew a distinction between exemplary damages and aggravated damages. The latter being to compensate the victim for aggravated injury to "the plaintiff's proper feelings

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[3] Exemplary damages can only be claimed by the person who has suffered the damages because they are so personal in nature. Law Reform Act 1936 & *Re Chasse* [1989] 1NZLR 325.

[4] Accident, Rehabiliatation, Compensation and Insurance Act 1992.

[5] Since the 1992 Act, lump sum payments have been removed and the availability and quantum of compensation available has been reduced.

[6] *Rookes* v *Barnard* [1964] A.C. 1129.

of dignity and pride"[7] whilst exemplary damages were damages which were awarded to punish the defendant and vindicate the strength of the law.

It may be gathered that unlike aggravated and compensatory damages, exemplary damages are of a punitive rather than a compensatory nature. As stated by Lord Devlin "[t]he object of exemplary damages is to punish and deter.[8]" There are a variety of words used to describe a situation where exemplary damages are awarded such as "wanton, reckless, willful conduct" or a "contumelious disregard for the plaintiff's rights" but often they are awarded to show the judge's disapproval of conduct which "was marked by vindictiveness, arrogance and complete disregard for the plaintiff's rights"[9]. Therefore it is important to remember that exemplary damages focuses on the wrongdoer's conduct and not what the plaintiff has suffered.

Drawing back to the English decision of *Rookes* v *Barnard*[10], Lord Devlin deemed an award of exemplary damages as an anomaly and restricted its award to three categories.

1. Where there has been an oppressive, arbitrary or unconstitutional action by servants of the government.
2. Where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.
3. And finally in cases expressly authorized by statues.

These categories were later reaffirmed by the House of Lords in *Cassel & Co. Ltd.* V *Broome*[11].

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[7] Above n.6.

[8] Above n.6.

[9] S M D Todd *The Law of Torts in New Zealand* (The Law Book Company, Sydney, 1991) 872.

[10] See n.6.

However these categories imposed by Lord Devlin have not been so widely accepted in other Commonwealth jurisdictions. In New Zealand, more importantly, the case of *Taylor* v *Beere*[12] allowed for exemplary damages to be awarded in New Zealand and disregarded the categories laid down by *Rookes* v *Barnard*[13].

B) Accident Compensation Scheme

It is important in New Zealand to briefly take into account the ARCIA[14] legislation alongside exemplary damages. This is because section 4 of the Act created a statutory bar whereby any common law proceedings arising directly or indirectly out of any personal injuries covered under the Act are barred in any court in New Zealand. In *Donselaar* v *Donselaar*[15], Cooke allowed exemplary damages to be claimed for personal injury on the basis that the ACC legislation had no punitive purpose. Therefore in "moulding damages to meet social needs"[16], Cooke J asked for moderation in making these awards and identified and accepted the following considerations laid down by Lord Devlin in *Rookes* v *Barnard*[17].

1.That the plaintiff can not recover exemplary damages unless s/he is the victim of that punishable behaviour.

2.That the power to award exemplary damages is a weapon that should be used with restraint and

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[11] *Cassel & Co. Ltd.* V *Broome* [1972] A.C. 1027.

[12] The case was an action in defamation where the plaintiff's photograph had been used without her consent in a sex manual. The photograph had been used even though the plaintiff had objected.

[13] Here the plaintiff brought an action against the defendant's under the tort of intimidation. The defendants had threatened to withdraw their labour or get the corporation to fire the plaintiff unless the plaintiff joined their union.

[14] See n.4.

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

[16] Above n.15, 107.

[17] See n.6.

3.That the parties' means are relevant in the assessment of the size of the award.

2) CASE LAW IN NEW ZEALAND

The issue in New Zealand as to whether exemplary damages may be awarded in areas of negligence has only ever risen in a theoretical and academic framework. The case law has come to addressing the issue has been the recent case of *Akavi v Taylor-Preston*[18]. The plaintiff was employed by the defendant as a scalper on the mutton chain. Due to a work accident, the plaintiff suffered severe head injuries and was permanently partially incapacitated. The case considered the point in law as it was a strike-out action at the High Court level. The two main issues in that case were:

1. Whether exemplary damages may be awarded for an action in negligence and
2. whether awarding exemplary damages in the civil courts when the defendant had already been criminally punished would constitute double punishment under s26(2) of the New Zealand Bill of Rights Act.

The former issue is identical to that of this note and the law surrounding it in New Zealand was well presented by counsel for the plaintiff. His main submission was "that exemplary damages were governed not by the nature of the tort but by the conduct of the wrongdoer [19]." This would be consistent with the purpose of exemplary damages since its objective is to punish and deter. It would be wrong to focus on the adequacies of damages already awarded to the plaintiff but the main focus by the court should be on the circumstances surrounding the wrongdoer's actions. As is the trend in New Zealand, the defendant's actions had to be "a conscious wrongdoing" or with "intention" or with "malice". Whilst this is the traditional view of the exemplary damages, the courts have shown an increasing

[18] *Akavi* v *Taylor-Preston Ltd* [1995] NZAR 33.

[19] Above n.18, 39.

flexibility in awarding exemplary damages in cases where the required consciousness or malice is not met.

A) Traditional Case Law

Case law in New Zealand has only ever awarded exemplary damages in actions grounded in the intentional torts. In *Donselaar* v *Donselaar*[20], it was an action of assault brought by a John Donselaar against his brother, Andrew Donselaar. Andrew had struck John on the head although the trial judge found that John had been the principal irritant in the affair. Decided on the same day as *Taylor* v *Beere*[21] in the Court of Appeal, the case mainly deals with the availability of exemplary damages in the common law notwithstanding s5(1) of the ACC act 1982. The majority decided that the exemplary damages arose not out of the loss sustained by the plaintiff but from the "outrageous and high handed manner" in which the defendant had conducted himself.

However the two main cases of *Taylor* v *Beere*[22] and *Donselaar* v *Donselaar*[23] deal only with the availability of exemplary damages in the common law in New Zealand. No reference was made to the availability of exemplary damages in negligence as the cases were based on libel and assault respectively. Both being actions which would have easily contained the requisite malicious or conscious element. If anything, the indication that there be a conscious or malicious requisite would indicate that exemplary damages were not available for negligence but it is important to take note of the judge's policy arguments for granting exemplary damages in New Zealand.

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[20] See n.15.

[21] See n.1.

[22] Above n.21.

[23] See n.15.

Cooke J in *Donselaar* v *Donselaar*[24] said that because of the lack of compensation and aggravated damages in the common law to impose punishment due to ACC, "punitive damages would have to do some of the work originally done by the other heads of damages."[25] It would seem that in "consciously moulding the law of damages to meet social needs"[26], an extension of exemplary damages to actions in negligence would seem to be perfectly in accordance with Cooke's reasoning. It indicates that New Zealand courts should be willing to develop the law of damages in New Zealand rather than allow it to remain stagnant as has been the case in England.

Taylor v *Beere*[27] is the leading case in New Zealand as it made exemplary damages available in New Zealand. It made no mention of excluding exemplary damages for actions in negligence. It followed the decision laid down by the Australian case of *Uren* v *John Fairfax & Sons Pty. Ltd.*[28] in deciding that the categories for awarding exemplary damages as laid down by *Rookes* v *Barnard*[29] did not apply in New Zealand. Like *Donselaar* v *Donselaar*[30], both cases refer basically to the availability of exemplary damages in New Zealand which the judges have managed to define as "high-handed" or "conscious disregard for the plaintiff's rights". It must be noted however that both cases signal the start of exemplary damages as "a new weapon in the legal armoury"[31] of New Zealand courts.

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[24] See n.15.
[25] See n.15, 107.
[26] Above n.25.
[27] See n.1.
[28] See n.2.
[29] See n.1.
[30] See n.15.
[31] See n.15, 107.

B) Recent Case Law

Since then, claims for exemplary damages in New Zealand have flourished. The case of *Green* v *Matheson* [32] arose from the 1988 Cartwright report on the Cervical Cancer enquiry at the National Women's Hospital in Auckland. The plaintiff had been a patient of the defendant's research program and as a result contracted cancer of the cervix. The case affirmed *Donselaar* v *Donselaar*[33] by stating that claims for exemplary damages were not barred by the ACC legislation. The Court of Appeal ruled that her claim for exemplary damages in negligence should be allowed to stand. This case presented the New Zealand Court of Appeal with a chance to limit the role of exemplary damages only to actions in intentional torts but instead the claim was allowed to stand.

The case of *Tucker* v *Bell* [34] (another case of medical negligence) was again a claim for exemplary damages for an action in negligence. There Temm J noted the difficulty in that, on the facts, there was no reference "to any intention to harm, nor to wanton disregard of her right, nor to any high-handed conduct, nor to any of the other general allegations usually to be found in claims for exemplary damages.[35]" However he also went on to state that "it may turn out that the plaintiff is able to establish that there has been such poor advice by the defendant that there has been bungling or incompetence of a kind so bad as to justify some measure of punitive relief.[36]"

Whilst the decision concerned an application to strike out, Temm J refused to strike out the application. He went on to note that whilst there was a possibility for exemplary damages on the facts here, any amount awarded would be far less than the claim.(100 000).

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[32] *Green* v *Matheson* [1989] 3NZLR 564.

[33] See n.15.

[34] *Tucker* v *Bell* Unreported, 5 September 1991, High Court Auckland Registry CP 1909/90.

[35] Above n.34, 3.

These cases have indicated that the New Zealand courts have taken a broadening perspective to the area of exemplary damages. Since the late 1980s, there have been cases indicating that it is possible for exemplary damages to be awarded in negligence.

In *McKenzie* v *A-G*[37] , the plaintiff brought a claim for damages after having been negligently exposed to asbestos during his course of employment. Cooke in obita said

> "while claims for damages from personal injury caused by negligence in breach of a duty of care relating to personal safety or a fiduciary duty or other duty so relating, or by assault or battery or rape, are barred if arising after 1 April 1974... The Act never bars, however, a claim for exemplary damages, although the effect of the Law Reform act 1936 is that the conduct must be towards a living claimant. This freedom to claim exemplary damages remains whether the conduct occurred before or after the inception of the accident compensation scheme."[38]

The claim for exemplary damages were allowed even though it was based on negligence. It may also be argued that in that context, it would imply that a claim in negligence would not prevent exemplary damages being awarded if a proper case was made out. *Boustridge* v *A-G*[39] expanded more on the notion of the availability of exemplary damages in negligence. Here the plaintiff alleged that the defendant had breached his duty of care by causing the plaintiff to reasonably believe that he had been exposed to the HIV virus. The District Court judge stated that "a remedy of exemplary damages does not lie in relation to non-intentional torts or those of omission rather than commission."[40] Blanchard J however stated that availability for exemplary damages in negligence was an open question and that

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[36] Above n.35.

[37] *McKenzie* v *Attorney-General* [1992] 2 NZLR 14.

[38] Above n.37, 15.

[39] *Boustridge* v *Attorney-General* Unreported, 29 September 1993, High Court Auckland Registry H.C. 54/93.

[40] Above n.39, 11.

it would be "very rare for exemplary damages to be awarded where a claim is made in negligence only. For this reason, it may be thought unlikely on the facts that the plaintiff would succeed in obtaining exemplary damages, but the theoretical possibility exists."[41]

C) Comment

In conclusion, the case of *Akavi* v *Taylor-Preston*[42] is the most recent case in New Zealand concerning the availability of exemplary damages in negligence. Master Thompson essentially summarized the position in New Zealand by holding that "reduced availability and quantum of ACC legislation may lead the courts to extend the concept of negligence to permit common law damages to be awarded.[43]" In this case it would be exemplary damages.

It is important to remember that the case was only a strike-out application and based on case law, it would seem that the next step would possibly be to broaden the scope of exemplary damages, however I submit that before exemplary damages be extended to include actions in negligence, closer consideration be made as to its practical application and the policy implications that arise.[44]

Whilst most of the cases in New Zealand indicate a trend to extend exemplary damages to negligence, no actual award has been made. Therefore while it is theoretically possible for exemplary damages to be awarded, and it would seem to be the right step forward, there are questions to be asked regarding it s practical application in the courts. The New Zealand courts have adopted the approach laid down by Cooke in *Donselaar* calling for exemplary damages to be moulded to meet social demands. Therefore in New Zealand, several points may be taken form current case law, that awarding exemplary damages in

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[41] Above n.40.

[42] See n.18.

[43]Above n.42, 33.

[44] Allowing exemplary damages for negligence would seem to be contrary to the intentions of *Donselaar* and the ARCIA legislation. See chapter on Policy.

New Zealand is theoretically possible, the situations where they may be awarded are rare and exemplary damages should take on a more developed role in common law actions. Exactly how and in what circumstances they would be awarded will be analyzed later. Decisions from other commonwealth jurisdictions where exemplary damages have actually been awarded for negligence will hopefully help assess the practical application of exemplary damages in negligence.

3) CASE LAW IN AUSTRALIA

A) Exemplary Damages in Australia

The two main commonwealth jurisdictions that will be examined are Australia and Canada. Our nearest neighbor has adopted a more liberal interpretation of the role of exemplary damages. The case of *Uren* v *John Fairfax & Co. Pty. Ltd.* [45]describes the type of behaviour which may lead to a general award of exemplary damages as a "conscious wrongdoing in contumelious disregard of another's rights"[46]. The High Court of Australia here chose not to follow the decision of *Rookes* v *Barnard*[47] in restricting the award of exemplary damages the three categories laid down by the English case. On appeal to the Privy council, it had chosen not to change the decision of the High Court because based on policy, "such a matter should be fashioned by the judiciary in the country concerned, it being a matter of local opinion."[48]

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[45]See n.2.

[46]Above n.45, 129.

[47] See n.6.

[48] *Australian Consolidated Press* v *Uren* (1966) 117 C.L.R. 118.

B) Lamb v Cotogno

The two most important cases in Australia are *Lamb* v *Cotogno*[49] and *Coloca* v *BP Australia Ltd*[50]. The former arose where the plaintiff having had an argument with the defendant, threw himself onto the bonnet of the defendant's car. The defendant drove off and then braked suddenly, throwing the plaintiff onto the ground causing him injury. The defendant then drove off leaving the plaintiff injured on the side of the road where he was later discovered. The main argument for the defendant was that there was a lack of intent, malice or reckless indifference by the defendant and therefore it was seen not to deserve an award of exemplary damages. The court adopted the test, which has also been widely accepted in New Zealand of whether there has been a "contumelious disregard of the plaintiff's rights." The trial judge had previously held that whilst there was nothing malicious in the defendant's actions, "callously abandoning him on the road made it appropriate for exemplary damages to be awarded."[51] He was of the view that under the circumstances, exemplary damages were justified. The Supreme Court of New South Wales on appeal held that "whilst there can be no malice without intent, the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or not being aptly so described."[52] Therefore it would seem that there is no need for a "conscious wrongdoing" or "intent" by the defendant but where the circumstances reflect contumelious behaviour, exemplary damages should be deemed necessary and justified. Whilst the case was not actually made in negligence but trespass tot the person, it is important since it calls for the courts to be willing to draw an inference of intent or recklessness from the circumstances surrounding the case. This indicated a departure from the strict notion that exemplary

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[49] *Lamb* v *Cotogno* (1987) 164 C.L.R. 1.

[50] *Coloca* v *BP Australia* [1992] Australian Torts Reporter 61, 164.

[51] See n.49, 6.

[52] Above n.51, 2.

damages could only be awarded with evidence of the wrongdoer's intention, *Lamb* v *Cotogno* [53] was a relaxation of the standard of intention required to determine the "contumelious disregard of the plaintiff's rights".

C) Coloca v BP Australia

The second case of *Coloca* v *BP Australia*[54] is a more recent case and arose when the plaintiff brought an action against his employer for negligently exposing him to toxic and noxious fumes during the course of his employment. It stated that whilst this was the first time an Australian court had questioned the recoverability of exemplary damages, in principle, in a negligence action, the High Court in *Lamb* v *Cotogno*[55] had affirmed exemplary damages for an action in trespass but the very same facts would have been admitted to prove a case in negligence. Nothing in that judgment indicated that exemplary damages would not have been recoverable had the claim been brought in negligence. Justice O'Bryan drew an important example which demonstrated the illogicality of the defendant's submission that exemplary damages were not available for actions based in negligence.

> "Assume that a bus owner flagrantly and wantonly ignored brake maintenance despite repeated warnings from his employees. At a point in time the brakes failed and a young child is maimed. Surely logic does not require that in those circumstances the plaintiff could not recover exemplary damages because the action was brought in negligence not trespass."[56]

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[53] Above n.52

[54] See n.50.

[55] See n.49.

[56] See n.50, 168.

It would therefore seem ridiculous to refuse an award for exemplary damages because the claim for damages was grounded in negligence rather than in the intentional torts. Therefore this would seem to a procedural barrier to what should have been a substantive issue. The court thus held that firstly exemplary damages were permitted in an action for personal injuries caused by negligence and secondly, the recovery of exemplary damages was not, in principle, confined to 'intentional' torts. It was governed by the conduct of the wrongdoer and not the nature of the tort. Justice O'Bryan however made a note of caution in saying that such cases were rarer and unusual and went on to clarify the exact description of an award of exemplary damages in negligence by referring to *Mayne and MacGregor on Damages*[57] "they can only apply where the conduct of the defendant merits punishment...or as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights."[58]

D) Comment

Case law in Australia has made several important points. First, that they have made clear that exemplary damages are indeed recoverable in actions based in negligence, secondly, that the lack of intent or malice may still make exemplary damages available where the circumstances justify it and finally, situations where exemplary damages are available for actions in negligence are rare and unusual.

4) CASE LAW IN CANADA

A) Robitaille v Vancouver Hockey Club

The Canadian jurisdiction has made it clear since the early 80s that exemplary damages are indeed available for actions in negligence. The case of *Robitaille* v *Vancouver Hockey*

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[57] *Mayne & McGregor on Damages* 12th ed. (1961)..

Club [59] arose when the plaintiff brought an action against the hockey club for failing to exercise reasonable care in ensuring the safety, fitness and health of one of their players causing him permanent injury and therefore exemplary damages were claimed. This is the leading Canadian case in which exemplary damages were awarded in an action for negligence. The Court held that exemplary damages "may be granted in all cases where the conduct of the defendant has been such as to merit condemnation by the court.[60]" The appellate Court went on to describe the conduct as 'blameworthy'. Therefore it established that intent was not an essential element in awarding exemplary damages. However as with O'Bryan J in *Coloca*[61], the appellate court held that "awards of exemplary damages in negligence are rare because in most cases the conduct of the defendants, apart from lack of care, has not been blameworthy.[62]" However an area of controversy in this case was the substantial sum of $35000 awarded for exemplary damages which seemed to be a composite of both aggravated and exemplary damages since in justifying the amount, the court stressed that pride and dignity had been injured and there had been a loss of reputation.(both elements of aggravated damages).[63]

B) Subsequent Case Law

The case paved the way for claims of exemplary damages based on actions in negligence in Canada. Previously, it has been said that for punitive damages to be awarded, advertent and exceptional conduct is required. However there may be cases in which there has been advertent conduct but the only actionable ground lies in negligence. The case of *McDonald*

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[58] Above n.57, 196.

[59] *Robitaille* v *Vancouver Hockey Club* (1979) 103 DLR (3d) 85.

[60] Above n.59, 251.

[61] See n.50.

[62] See n.59, 250.

[63] It is possible that exemplary damages may theoretically be distinguishable from the other heads of damages, but it would seem that in a practical assessment of the quantum of damages there is no reference point as to what amount would punish and deter the wrongdoer. See Chapter on Policy.

v *Sebastian*[64] was one such case where the landlord, for profit motives, did not notify the plaintiff (his tenants) that water in the building contained excessive amounts of arsenic. The judge did not classify the action as being in either negligence or battery but decided that on the facts both grounds were actionable as "such an award is proper where the conduct of the wrongdoer is so reprehensible that it warrants repudiation"[65]. The judge held that on the facts, there had been a "shocking disregard for the plaintiff's health and safety"[66] and thus allowed an award of exemplary damages.

C) Recklessness or Conscious Direction

An area of contention in the Canadian courts however has been that to justify an award of exemplary damages in negligence, the conduct must also "have been consciously been directed against the person, reputation or property of the plaintiff.[67]" This was the view followed by the New Brunswick Court of Appeal in *C.N.R. Co.* v *di Domenicantonio*[68] where the majority held that "exemplary damages should not be awarded in negligence cases unless in the most extreme circumstances or when the act of the wrongdoer was consciously directed against the injured party.[69]" That was a case where passengers in a car collided with a train at a grade crossing. The Court found that Canadian Railways has allowed sight lines to the crossing to be obstructed by trees and bushes and failed to sound the whistle as was required by statute and the train had been operated at an excessive speed. Canadian railways had been continually aware of the dangers surrounding the crossing but had done nothing to correct them. Justice Stevenson in the High Court said that because Canadian Railway's failure to provide a proper standard of care was not directed at the plaintiff, then no exemplary damages could be awarded. He followed the

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[64] *MacDonald* v *Sebastian* (1987) 43 DLR (4the) 371.

[65] Above n.63, 372.

[66] Above n.65.

[67] *Kaytor* v *Lion's Driving Range Ltd.* (1962) 35 DLR (2d) 426, 430.

[68] *C.N.R. Co* v *di Domenicantonio* (1988) 49 DLR (4the) 342.

authority of *Kaytor* v *Lion's Driving Range Ltd.*[70] which stated that "punitive or exemplary damages should not be awarded in the negligence cases unless the act of the wrongdoer was consciously directed against the injured party."[71]

This reasoning has since been criticized by various writers and judges. *Vlchek* v *Koshel*[72] is a product liability case. There the plaintiff suffered personal injury caused by a defect in a motor cycle. Callaghan J said that there was no proper reason as to why it was necessary that the negligence of the wrongdoer be consciously directed against the plaintiff and gave the example that "if A in attempting to injure B but injured C instead, C would be prohibited from recovering exemplary damages form A since the act was not intentionally directed against him/her, the injured person, even though the act by itself would merit punishment.[73]" He went on to state that malice or recklessness that indicated indifference to the final consequence would warrant punitive damages. "In other words, intention to cause the injury need not be present, it will suffice if there was an intention to do the act which eventually caused the injury."[74]

D) Comment

It seems to be that the Canadian courts have been confused by the line between intentional torts and negligence. A reluctance to award exemplary damages for negligence has caused a development in the "conscious direction" element. Still the Canadian Courts have indicated clearly, as with the Australian Courts, that exemplary damages are recoverable for actions in negligence.

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[69] Above n.68..

[70] See n.67.

[71] See n.69, 359

[72] *Vlchek* v *Koshel* (1988) 52 DLR (4th) 371.

[73] Above n.72, 375.

[74] See n.72, 371.

5) STANDARD OF NEGLIGENCE REQUIRED

A) Introduction

Following the current trend of cases in New Zealand and other Commonwealth jurisdictions, it would seem most likely that should the appropriate circumstances arise in New Zealand, a case for exemplary damages in negligence may be awarded. However an important question to be answered in its practical application is exactly what standard of negligence is required to warrant an award of negligence.

A set standard or threshold that should be required is important so as to establish a consistent pattern for the courts to follow in awarding damages. Only with a set standard as to the wrongdoer's state of mind or the circumstances surrounding the action, can the objectives of exemplary damages be properly achieved. It would serve no deterrence purpose if the public were uncertain as to the type of conduct that would result in punishment. This is clear in the area of intentional torts whereby the tortfeasor must have intentionally committed the act. In the area of negligence however, a breach of a duty owed is not sufficient to warrant an award of exemplary damages. Case law in other jurisdictions where such awards have been made have indicated that something more heinous is required, such as a situation where the tortfeasor was reckless to the consequences of his actions or if he were grossly negligent. As well as that any inconsistencies in the standard applied by the courts would make awards of exemplary damages seem arbitrary and unfair.

There are a variety of standards of conduct which have to be satisfied before exemplary damages may be awarded. However the difficulty is that there are no clear distinctions between the varying standards. At one extreme is intentional conduct where it is clear that the act causing the harm was intended by the wrongdoer. This is an absolute standard and exemplary damages have always been available in cases of intentional conduct. At the other

extreme is negligence as laid down by *Donoghue* v *Stevenson*[75] and this would be inadvertent conduct which would not justify exemplary damages. In between these two extremes however is a quagmire of terms and descriptions such as 'recklessness', 'gross negligence' and the 'criminal standard for manslaughter'.

The standard of negligence required to award exemplary damages is still a source of debate in jurisdictions where the law has already firmly established the principle that exemplary damages are available for actions in negligence. In this section, I will try and analyze the various options in the Commonwealth jurisdictions.

In New Zealand, because of the lack of case law regarding the actual awards of exemplary damages for negligence, the only standards of negligence that have been set are those which may be inferred from the judgments that have discussed their availability.

There has been no actual award of exemplary damages in New Zealand for negligence, however it would be fair to assume that the courts would adopt a case by case analysis to decide if 'contumelious disregard for the plaintiff's rights had been shown.' This is because of the need to focus on the particular facts of the wrongdoer's conduct in each case. As well as that, the courts must take into account all policy considerations of allowing exemplary damages in the circumstances.

B) The Standard in Australia

To conceptualize for New Zealand courts as to what would be an appropriate standard of negligence, it is important to look at the other Commonwealth jurisdictions for guidance. In Australia, the case most relevant to the issue of the standard of negligence required is that of *Midalco* v *Rabenalt*[76]. The facts here are similar to *Coloca*[77] and *McKenzie*[78]. The

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[75] *Donoghue* v *Stevenson* [1932] A.C. 562.

[76] *Midalco* v *Rabenalt* (1988) Australian Torts Reports 80, 208.

[77] See n.50.

[78] See n.37.

plaintiff claimed that whilst in the defendant's employ, he was negligently exposed to asbestos. The trial judge in that case assumed the availability of exemplary damages for negligence and directed the jury as to what standard of negligence was required. He adopted a standard of recklessness which he characterized as being "either a deliberate act with knowledge, not caring about the consequences, or deliberate failure to inform oneselves, in other words, deliberate ignorance, deliberate blindness."[79]

The trial judge's definition however was clarified and restated on appeal to the Supreme Court of Victoria. It raised the standard of negligence required by the court to that of "negligent conduct [involving] a carelessness of consequences which had the additional characteristic of behaving in a humiliating manner and in wanton disregard of the plaintiff's welfare.[80]" The additional requirement of flagrant misconduct would seem to push the standard closer to that of a criminal manslaughter standard which would be that of intentional misconduct. However the author submits that in taking into account the wrongdoer's act of 'behaving in a humiliating manner' would seem to be compensating for any injuries to pride or dignity which is the domain of aggravated damages.

C) The Standard in Canada

In Canada, the courts have struggled with this problem. As was previously mentioned, Canadian courts have utilised two different standards of negligence to decide if exemplary damages should be awarded. Cases such as *Robitaille*[81], *McDonald*[82] and *Vlchek*[83] have established the standard of recklessness is to be satisfied before exemplary damages may be awarded. In *Robitaille*[84], exemplary damages were to be granted in cases where the

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[79] See n.76, 461.

[80] Above n.79, 462.

[81] See n.59.

[82] See n.64.

[83] See n.72.

[84] See n.59.

conduct of the defendant deserved punishment. *Vlchek* v *Koshel*[85] stated the requirement as being that "the act must be malicious or reckless to such a degree as to indicate complete indifference to the consequences that might flow therefrom, including the welfare and safety of others.[86]" Therefore the recklessness standard is one where the wrongdoer knew or ought to have known that his conduct created an unreasonable risk.[87]

There have been other Canadian cases which have imposed a further condition on the wrongdoer's recklessness in that the conduct must "have been consciously directed against the person, reputation or property of the plaintiff." This extra condition moves the standard required closer to that of an intentional act. It requires in essence a relationship between the wrongdoer and the victim, and in those circumstances, the recklessness would seem to be even more exceptional misconduct. This extra requirement also puts a subjective element into analyzing the wrongdoer's intent as opposed to an 'objective fault' theory which requires the court or jury to decide as to what the defendant "ought to have known". This is how the characteristic differs from the forseeable plaintiff element that is established in basic negligence. The additional requirement as laid down by *Kaytor*[88] and affirmed in *C.N.R. Co.* v *di Domenicantonio*[89] was negated by *Vlchek*[90] later in 1988 which held that it was not necessary that the act of the wrongdoer be consciously directed against the plaintiff.

An example demonstrating the difference in standards used in Canada may be as follows. Supposing if X were the supervisor in charge of the construction of the platform at Cave Creek. If during the construction, X was aware of the inadequacies in the platform but did nothing about them, it would be established that X was reckless and exemplary damages

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[85] See n.72.

[86] Above n.85, 375.

[87] This is similar to the trial judge's judgement in Coloca.

[88] See n.67.

[89] See n.68.

would be awarded under the rule as laid down by *Vlchek* v *Koshel.*[91]. However if the extra condition as imposed by *Kaytor*[92] was required, then it would be necessary to show that X was aware that the group of students from Greymouth Polytech was going to be on the platform. This extra requirement requires a further sense of directness or relationship between the tortfeasor and the victim. In the same vein, it is difficult to distinguish the 'directness' requirement in *Kaytor*[93] with that of the appellate judge's standard in *Midalco*[94]. The additional characteristic of 'behaving in a humiliating manner[95]' indicates an element of directness which requires a tortfeasor's behaviour to be directed at someone in a 'humiliating manner'.

The Ontario Law Reform Commission in a report on exemplary damages in 1990[96] adopted the standard of recklessness or the 'ought to have known' standard. The Commission accepted that exemplary damages were ordinarily only available for advertent conduct and negligence involved inadvertent conduct. The Commission adopted the recklessness standard as opposed to the 'gross negligence' standard because on a matter of degree, it was more likely that a gross negligence standard would intrude into the area of inadvertent conduct. They also decided that a victim did not have to be specifically targeted since there was no reason in theory to adopt a standard which was too difficult to satisfy and thus "immunize a great deal of advertent wrongdoing from punitive damages"[97].

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[90] See n.72

[91] Above n.90.

[92] See n.67.

[93] Above n.92.

[94] See n.76.

[95] Above n.94, 462.

[96] Ontario Law Reform Commission *Report on Exemplary Damages* (Ontario,1991).

[97] Above n.96, 69.

From the example above and the Law Reform Commission's report, it would simply be an impracticable standard of proof if the victim had to show the wrongdoer's reckless misconduct was directed at the victim.

D) Comment

Upon review of the cases in Australia and Canada, it would seem that should New Zealand allow exemplary damages for actions in negligence, it would be best to adopt the 'recklessness' approach used in Canada. This is because

1. The additional characteristic of behaving in a 'humiliating manner and in wanton disregard of the plaintiff's' rights in *Midalco* [98] would be an inconsistent standard to apply. The test would not be able to be applied independently as it would require a wealth of precedent to determine the precise requirements of the test.
2. The standard in Canada is also preferred over the Australian approach because there has been greater discussion and more cases have been decided in the Canadian jurisdiction.
3. The 'recklessness' approach has received majority support by the courts in Canada over the conscious direction requirement in *Kaytor*[99].

There is no practical reason to the adopt additional characteristic of a 'conscious direction' and there would seem to be no distinction between that and the 'reasonably forseeable plaintiff' requirement in establishing a duty of care.

In addition to the recklessness standard, I would also recommend that a factor of the degree of risk be added. This is in following with the American Restatement of Torts[100] which defined conduct as reckless and suitable for exemplary damages if :

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[98] See n.76.
[99] See n.67.

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1. It created a strong probability of harm and
2. the actor knows or has reason to know of this risk.

This would set a more appropriate standard of conduct consistent with the objectives of exemplary damages. Therefore a person would refrain from conduct which he was aware would pose a real or considerable risk to another.

6) POLICY ISSUES

Whilst case law in New Zealand and other common law countries has indicated a willingness to extend the role of exemplary damages to actions in negligence, it is important to consider the policy implications of allowing exemplary damages any wider application.

A) Accident Compensation Scheme

New Zealand's legal environment is unique because of the Accident Rehabilitation, Compensation and Insurance Act 1992(ARCIA)[101].Justice Cooke in *Donselaar* v *Donselaar*[102] stated as one of his reasons for allowing exemplary damages in New Zealand was that ARCIA legislation served no punitive purpose and it was therefore important that 'the courts [were] left free to recognize and develop exemplary damages as an independent remedy[103].' He also stressed that '[t]he only feasible way of doing so, without intruding into the field of compensation which the Act has taken over, appears to be to allow cases for damages for purely punitive purposes; and to accept that, as compensatory damages (aggravated or otherwise) can no longer be awarded[104]'. Therefore it is important that

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[100] *Restatement (Second) of Torts* 500, (1965).

[101] See n.4.

[102] See n.15.

[103] Above n.102, 107.

[104]Above n.103..

exemplary damages, if awarded, would only serve a punitive purpose and not 'intrude' into the field ARCIA[105] and serve a compensatory purpose as well. This intrusion would undermine the integrity of the scheme and could also be seen as the courts overriding Parliament. It is important that the ARCIA[106] scheme maintain its integrity and the courts should not be seen as to top up any compensation made by the scheme through exemplary damages.

B) Jury Direction

It is simpler in theory to draw a line between damages that serve a punitive purpose and damages that serve a compensatory purpose. However should it be decided that exemplary damages may be awarded in actions for negligence, a procedural policy issue of jury direction arises. How would a judge direct a jury upon the application of awarding exemplary damages? In the case of *Auckland City Council* v *Blunder*[107], Justice Cooke delivered a model jury direction:

> "Exemplary damages may be awarded if a jury is satisfied on the evidence that the oficer acted in bad faith, deliberately using more force than he had to, or high-handedly or contemptuously, that would be an abuse of his public position.[108]"

In the area of intentional torts, it is easier for a jury to determine an award of exemplary damages since there is evidence of the wrongdoer's intention or maliciousness. Whereas in a case of negligence, the jury would have to infer from the facts that the wrongdoer had acted in bad faith. As well as that, if a test for the standard of negligence to be breached has

[105] See n.100.

[106] Above n.105.

[107] *Auckland City Council* v *Blundell* [1986] 1 NZLR 732.

[108] Above n.107, 739.

not been established accurately then it is likely that a jury could err in deciding the availability of exemplary damages. Therefore instead of focusing on the wrongdoer's conduct, the jury may instead look at the victim's inadequate compensation provided by the scheme. The Canadian court in *Robitaille* v *Vancouver Hockey Club* [109] failed to distinguish clearly between aggravated and exemplary damages in awarding damages.[110]

C) Double Jeopardy

Another policy issue to be considered is that of double jeopardy. The situation of double jeopardy arises when the wrongdoer has already been criminally punished or tried for the same activity in which the victim is bringing a civil claim for exemplary damages. In New Zealand, Parliament has legislated both in the Crimes Act 1961[111] and the New Zealand Bill of Rights Act 1990[112] that where a person has been tried or convicted of an offence, s/he shall not be tried or convicted for it again. This issue has recently been subject to the scrutiny of the courts. Earlier this year, Master Thompson in *Akavi* v *Taylor-Preston*[113] held that 'there may be good policy reasons for refusing to rule out an exemplary damages claim merely because there has been a prior criminal punishment for the same activity.' Emphasis must be placed on the fact that the case was a strike out application and Master Thompson placed great importance on Justice Blanchard's reasoning in *G* v *S*.[114] It was a case of sexual abuse in the Centrepoint controversy where the victim had brought a civil claim for exemplary damages but the wrongdoer had already been punished for some of the incidents of abuse by the criminal courts. Justice Blanchard concluded that for policy reasons, a victim of abuse should have the opportunity to recover exemplary damages in

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[109] See n.59.

[110] Refer to pg., 15.

[111] Crimes Act 1961.

[112] New Zealand Bill of Rights Act 1990.

[113] See n.18.

[114] *G* v *S* Unreported, 22 June 1994, High Court Auckland Registry CP 576/93.

civil proceedings and that opportunity should not be precluded by the criminal conviction of the abuser.

This issue of double jeopardy in New Zealand would seem to be resolved most recently in the appeal of *G* v *S*.[115] There a unanimous Full Court of Appeal led by Justice Gault, pointed out that Justice Blanchard in the High Court did not make any reference to section 26(2) of the Bill of Rights Act[116] or the reparation provisions in the Criminal Justice Act[117]. He also pointed out that allowing exemplary damages in a situation of double jeopardy would be reading down the provision in the Bill of Rights Act to confine the second punishment to that of a disciplinary nature. The court said 'we are not persuaded that we should do that, particularly since the criminal court is required to consider reparation in all cases.'[118]

Therefore because of these provisions in the Criminal Justice Act[119] which require courts to consider reparations and the unwillingness of the courts to read down section 26(2), it would seem unlikely that a claim for exemplary damages would be allowed where there has been a prior conviction or hearing.

D) Interference with the Criminal Law

Whilst this policy issue of double jeopardy would seem to apply to exemplary damages on the whole, it is still likely that it would arise in actions for negligence since where negligent conduct has taken place resulting in personal injury, Parliament may have legislated provisions for the appropriate standards of conduct to be maintained. The Health and Safety in Employment Act[120] states the required standard of safety to be maintained in a

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[115] *S* v *G* [1995] BCL 888.

[116] See n.111.

[117] Criminal Justice Act 1985.

[118] See n.114, 1006.

[119] See n.116.

[120] Health and Safety in Employment Act 1992.

workplace and the Companies Act 1993[121] has provisions for the standard of conduct with which a director in a company must adhere to. The Crimes Act[122] also has provisions for standards of recklessness. There are numerous Acts in New Zealand which have already legislated for the appropriate standard of conduct to be maintained. If by allowing exemplary damages for actions in negligence, the courts would therefore be imposing standards of conduct for criminal punishment. Not only would this be contrary to Parliamentary sovereignty but tort law would also be seen as interfering with the criminal law jurisdiction.[123]

A further question may be asked as to why exemplary damages should be available to victims of criminal behaviour. It would seem that based on *S* v *G*[124], 'justice will be achieved in nearly all cases, and certainly in enough to justify a rule, if separate civil actions for exemplary damages are abolished where the actions complained of amount to criminal conduct.[125]' Therefore it seems unnecessary for judges in civil actions to punish the wrongdoer with damages when the Criminal Justice Act[126] has already called upon the sentencing judges to take reparations into account.

E) 'Floodgates' Effect

It is further submitted that any extension of exemplary damages would most likely have a 'floodgates' effect'. There is a possibility that the New Zealand courts will be flooded with personal injury claims disguised as claims for exemplary damages. This issue has been addressed by the Ontario Law Reform Commission[127] and they concluded that there was

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[121] Companies Act 1993.

[122] See n.110.

[123] This interference with the criminal law has always been a policy argument against the imposition of exemplary damages.

[124] See n.114.

[125] C Hodson "Case and Comment on *S* v G" NZLJ, August 1995, 244..

[126] See n.116.

[127] See n.96.

no empirical data which indicated a 'floodgates crisis' in Ontario. However because of the mean-spirited approach of the 1992 ARCIA legislation[128], inadequacies in the compensation provided may force people to disguise their claims as exemplary damages ones in the hope of 'topping up' their compensation.

F) Abuse of the Settlement Process

It is also possible that broadening the scope of exemplary damages may cause an abuse of the settlement process.[129] "[S]purious claims for exemplary damages may have an undesirable effect on the settlement process, by coercing defendants to settle claims, or settle claims for higher amounts, than they would have otherwise.[130]" The cost and complications of the legal process may force wrongdoers, especially large corporations to settle claims out of court. This would also have the effect of saving the corporation from any possible embarrassment.

G) Claims Driven by Profit Motive

It is therefore possible that a large proportion of these claims will be driven by the profit motive. This was one of the strict restrictions laid down by Lord Devlin in *Rookes* v *Barnard*[131]. It is therefore important to preserve the integrity of exemplary damages so that they are made to punish and deter wrongdoer's conduct, not to satisfy a claimant who views the availability of such damages in negligence to make a 'fast buck' whether it be through the courts or the settlement process.

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[128] This is because the 1992 legislation has eliminated lump sum payments as well as reducing the availability and quantum of damages.

[129] The case of *Akavi* v *Taylor- Preston Ltd.* Was eventually settled out of court.

[130] Above n.125.

[131] See n.6.

7) CONCLUSION

The situation in New Zealand at the moment harks back to that of the early 20th century where due to the inadequate compensation provided by the Worker's Compensation Act, the Courts extended negligence to award common law damages. Since the 1992 ARCIA legislation, there have been many criticisms of the system. The inadequate compensation has left a hole by which it has been sought that the Courts should redress through the broadening application of exemplary damages.

> "It can be argued that a failure by the courts to develop the scope of the remedy of exemplary damages this way would, in the light of the scheme of the 1992 Act, leave too many glaring wrongs without effective remedy. Thus the common law should be permitted to develop so as to ensure the availability to victims of adequate civil redress for serious wrong doing, in accordance with the standards to be expected of the legal system of any civilized society."[132]

Therefore the main purpose for allowing exemplary damages for negligence would be to make up for the inadequacies of the ARCIA legislation.

A) Case Law

Case law in both New Zealand and other common law jurisdictions have all indicated that exemplary damages are indeed available for actions in negligence. Australia through *Midalco* and *Coloca* have established that Australian courts are willing to award exemplary damages where the circumstances justify them. The Canadian jurisdiction has since *Robitaille* in 1979 established their availability. Both jurisdictions have conceded however that cases where such damages are awarded for negligence are rare. Whilst it is decided that they are available, the jurisdictions have encountered problems as to the

[132] R Harrison *Matters of Life and Death*, 45 in *Akavi* v *Taylor-Preston Ltd.* 1995 NZAR 33, 39.

precise test for the conduct required. This has caused confusion as to the threshold of negligent conduct required for an award of exemplary damages.

B) Policy

The policy issues involved in broadening the role of exemplary damages are not to be neglected. This is because of the Accident Compensation scheme that is prevalent throughout the New Zealand legal system. Case law from Australia and Canada are therefore only indicative of the general direction of exemplary damages in those countries. As mentioned in the previous chapter, there stand an overwhelming number of policy issues which must be argued in order to determine the availability of exemplary damages for negligence. The most important of these are that of double jeopardy and the ideal that any award of exemplary damages must not be contrary to the scope and purpose of the Accident Compensation legislation.

It is therefore submitted that any broadening of the scope of exemplary damages must be taken with care and caution as to the consequences involved. Australian and Canadian case law are only persuasive because of the confusion and differences in the test to be applied. It would only undermine the purpose of allowing exemplary damages to supplement the Accident Compensation scheme if the law could not be applied accurately.[133]

If there are any inadequacies in the Accident Compensation system, these would best be solved by the Parliamentary processes. It is doubtful if the courts would find an adequate remedy for these inadequacies by using exemplary damages.

Therefore in conclusion, exemplary damages should not be extended to include actions in negligence unless the policy issues raised in this note are adequately answered.

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[133] It would seem therefore that exemplary damages may only be clearly distinguished form the other heads of damages in a theoretical sense.

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