THE CONSTITUTIONALITY OF EXEMPLARY DAMAGES

Should exemplary damages have criminal procedural protections under the Bill of Rights?

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I INTRODUCTION

The Court of Appeals decision in *S v G*[1], dealing with the availability of exemplary damages following a criminal trial, suggests that the award of exemplary damages may invoke criminal procedural protections under the New Zealand Bill of Rights (NZBOR) Act 1990. This essay investigates whether or not the award of exemplary damages should invoke these protections. It is split into two parts, with the first half investigating whether s 26(2) of the NZBOR Act, which protects against double punishment, can indeed be applied to applications for exemplary damages following a criminal trial. This will be done by investigating the judgment in *S v G*[2] which saw the protection against double jeopardy being extended to the award of a civil remedy. I shall assess this decision, and see if this and other protections in the Bill of Rights should be applicable when awarding exemplary damages.

The second half of the paper will determine whether exemplary damages can be classified as a criminal sanction. If they are, it follows that they would invoke not only the double jeopardy protection but also the protections contained in sections 25 and 26 of the NZBOR Act.

II THE AVAILABILITY OF EXEMPLARY DAMAGES AT COMMON LAW

i) The reasons for their availability

Exemplary damages came into New Zealand law from English Law. The principal reason for its availability in New Zealand was punishment and deterrence which are the traditional reasons for its existence at common law[3]. The early case of *McComb v Low* illustrates not only the adoption of English case law to justify awarding punitive damages, but also how their main purpose is to punish the wrong-doer, and to deter others from repeating their acts[4]. These were the reasons outlined by Lord Camden in the early exemplary damages case of *Huckle v Money*[5], and this was the main reason for exemplary damages entering New Zealand.

Further reasons for their availability at common law are apparent however. More than simply a deterrent or a punishment, exemplary damages serve further purposes within our law. For instance, they encourage private plaintiffs to bring an action that is publicly beneficial, and consequently act as an incentive to sue[6]. This is illustrated by cases where the level of wrong-doing is high, but the level of injury is low. The plaintiff will get little compensation, but has felt a gross wrong has been done to them. Unless there is an award for damages that punishes the illegality of the defendant's actions then these cases will not be brought to court because the level of compensation would be nominal. This, in fact, was the scenario in the early English cases that act as the

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1 *S v G* [1995] 3 NZLR 681.
2 Above n 1.
3 *Wilkes v Wood* (1763) 2 Wils. K.B. 205.
4 (1873) 1 NZ Jur 49.
5 95 Eng. Rep. 768 (C.P 1763).
6 Clay R Stevens *Split Recovery: A Constitutional Answer to the Punitive Damages Dilemma* 21 Pepp. L. Rev. 857, 862 (1994).

precedents for their award[7], cases where an individual's liberty has been infringed but little harm has been done to them. Punitive damages, as McGregor puts it then, serve a "social good by punishing those smaller criminal acts that the police have not had the time to investigate"[8]

Exemplary damages can also be seen as taking the role of aggravated damages, compensating non-pecuniary injury. It has been argued that an award of exemplary damages not only punishes the defendant, but also compensates all those damages that are hard to ascertain, and not usually recoverable through usual compensation[9]. Dicta from *Donselaar v Donselaar*, has been relied on in support of this proposition.[10]

> [A]s compensatory damages can no longer be awarded [due to the A.R.C.I Act] exemplary damages will have to take over the later's former role. [E]xemplary damages will have to do... the work previously done by other heads of damage.

In response, it has been said that the use of exemplary damages for compensatable purposes may undermine the purpose of the Accident Rehabilitation Compensation and Insurance (A.R.C.I) Act 1992 that removes the court's ability to give compensation for personal injuries. Heron J. in a recent judgment illustrates this concern:[11]

> [T]here seems to be little justification for providing a peripheral compensation mechanism in the form of exemplary damages which are designed not to compensate but to punish.

Heron J.'s remarks concerned using exemplary damages for pecuniary compensation. The A.R.C.I Acts of 1972, 1982 and 1992 have never intended to remove the right to gain compensation for non-pecuniary injury. As Cooke P. said in *Donslaar*, it is quite plausible then that exemplary damages should take over the role of aggravated damages in order that this right is protected.[12] Instead of being added to claims for compensation, it is quite viable that aggravated damages can now be grafted onto a claim for exemplary damages.

ii) The threats to their availability

The first major threat to the availability of exemplary damages in New Zealand came from England. In 1964 the Privy Council banned exemplary damages in all but a small

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[7] Especially *Wilkes v Wood* (1763) 2 Wils. K.B 205.

[8] H McGregor *McGregor on Damages* (15ed, Sweet & Maxwell, London, 1988) para 406

[9] Injured plaintiffs often "Suffer damage to emotional tranquillity, family harmony and employment security that is particularly difficult to prove and generally not compensatable anyway." David G. Owens *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257 (1976)

[10] *Donselaar v Donselaar* [1982] 1 NZLR 97, 107.

[11] *O v U* (Unreported, High Court, Hamilton Registry, Heron J., 22 July 1996, CP 64/95)

[12] Above n 10.

class of exceptions[13]. The Privy Council saw exemplary damages as fulfilling a compensatory purpose within the common law rather than serving to deter or to punish: "It is not easy at all to say whether the idea of compensation or the idea of punishment has prevailed"[14]. They consequently placed a general ban on exemplary damages except in cases where they were authorised by statute, where the action concerns oppressive force by the government, or where the defendant's wrong-doing was calculated to make a profit.

Despite its strength as precedent New Zealand and the rest of the Commonwealth did not take their lead. This different approach within the commonwealth was subsequently endorsed by the Privy Council[15], allowing exemplary damages in New Zealand to survive the English banning them.[16]

The second threat to exemplary damages was the A.C.C scheme, introduced through the first Accident Rehabilitation Compensation and Insurance Act 1972, and updated in 1982. This removed an injured party's right to sue for compensation for personal injury. It was argued that the granting of exemplary damages was an action for damages and was therefore banned under s 14 of the A.R.C.I Act 1982. The Court of Appeal disagreed, with Cooke P. giving the leading judgment in *Donselaar v Donselaar* saying:[17]

> I think we should try to meet a problem occasioned by the Accident Compensation Act by consciously moulding the law of damages to meet social needs. The only feasible way of doing so, without intruding into the field of compensation which the Act has taken over, appears to be to allow actions for damages for purely punitive purposes.

Exemplary damages were upheld then through *Donselaar v Donselaar*[18] despite the new A.C.C scheme. Unlike other jurisdictions, New Zealand allowed actions solely for punitive purposes, without grafting them on to an action for compensation, and without taking notice of whether or not compensation was granted by the Accident Compensation Commission.

The next threat to exemplary damages comes from The New Zealand Bill of Rights Act 1990 and attacks punitive damages on the grounds that it infringes upon the rights of the defendant. The case of *S v G*[19] is the most recent of these, witholding leave for an action for exemplary damages following a criminal trial on the grounds that it would punish someone twice for the same offence, and thus infringe s 26(2) of the Bill of Rights. I will look in depth at this argument, and determine the validity of not only

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[13] *Rookes v Barnard* [1964] A.C 1129.
[14] Above n13, 1221.
[15] *Australian Consolidated Press Ltd v Uren* [1969] 1 A.C 590.
[16] *Fogg v McKnight* [1968] NZLR 330, upholds exemplary damages despite the ruling in *Rookes v Barnard* four years earlier.
[17] *Donselaar v Donselaar* [1982] 1 NZLR 97, 107.
[18] Above n 17.
[19] Above n 1.

applying s 26(2) to actions for exemplary damages, but also the protections in s 25 and s 26.

III THE DECISION IN *S v G*

i) The facts

This case was an appeal from the judgment of Blanchard J. in the High Court[20] allowing leave under s 4(7) of the Limitation Act 1950 to bring an action for exemplary damages. The respondent was sexually abused at the Centerpoint Community from 1978 when she was aged 14 until she was 16. The appellant had been tried and convicted for this, albeit relatively lightly due to a time bar on the more serious offence of sexual intercourse with a girl under the age of 16 due to s 134(7) of the Crimes Act 1961. In October 1990 the respondent realised the psychological and emotional problems she had were a result of the abuse she had received when she was at the community. Consequently she asked for leave under the Limitation Act 1950 to bring an action for exemplary damages that would punish the appellant's acts.

ii) The judgment

The majority of the decision discusses issues concerning the Limitation Act 1950, trying to ascertain when the cause of action accrued. *S v G* decided that the cause of action accrues when the plaintiff discovers that their personal injury is linked to the defendant's wrongful acts, or when it was reasonably discoverable as having been the cause of the defendant's acts or omissions[21]. This issue has now been settled and is not in issue here[22].

The real issue, for us, in the case concerns the court's decision to use s 26(2) of the Bill of Rights to deny the action for leave. The section that protects people against double jeopardy or double punishment was extended to deny an action for exemplary damages where there has been a previous conviction on the same facts.

> **s26** **Retroactive penalties and double jeopardy** - (1) ...
> (2) No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

The Court saw exemplary damage's role of punishment and deterrence in the civil law arena as being sufficient to invoke the protection of the Bill of Rights, which prior to this decision was not considered relevant to actions for exemplary damages[23]. Gault J.

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[20] *G v S* (Unreported, High Court, Auckland Registry, Blanchard J, 22 June 1994, CP 429/94)

[21] Above n 1, 689.

[22] *G D Searle v Ceri-Ann Gunn* (Unreported, Court of Appeal, Wellington Registry, Henry J, 24 April 1996, CA 41/95)

[23] See *Akarvi v Taylor Ltd* [1995] NZAR 33, which despite being decided differently still looked at exemplary damages from a policy point of view and did not make a conclusive decision on the Bill of Rights.

decided to give a broad interpretation to s 26(2). Unfortunately, he did not refer to either Canadian case law on the Canadian Charter of Human Rights, which has an almost identical section, nor at any International Law on the International Covenant on Civil and Political Rights, which also influenced the drafting of the Bill of Rights, and nor at any New Zealand statutes which may require a reading down of s 26(2). With respect, these are relevant considerations which I will use to determine an appropriate interpretation for this section.

iii) The two arguments against exemplary damages

The case against exemplary damages has two branches under the Bill of Rights, one based on a broad interpretation of the protections in sections 25 and 26, the other requiring only a narrow definition. The first branch, which appears in this judgment of Gault J., sees s 26(2) of the Bill of Rights Act being given a wider scope.[24]

> To permit this [claim for exemplary damages] would require a reading down of s 26(2) of the Bill of Rights Act to confine the second punishment to that of a criminal nature. We are not persuaded that we should do that...

Gault J. sees exemplary damages as a civil remedy, and interprets this section of the Bill of Rights as being broad enough to have civil actions for damages within the ambit of its protection. The second argument against exemplary damages under the Bill of Rights works on giving s 26(2) and the protections in s 25 and s 26(1) a narrow interpretation; confining their protections to criminal punishments. This argument, however, turns on defining exemplary damages as a criminal punishment, albeit given in a civil court. Although the protections in sections 25 and 26 are confined to criminal sanctions, exemplary damages still invokes their protection as they are, by nature, a criminal sanction.

I will deal first with establishing a suitable interpretation of the Bill of Rights, and by doing so deal with the first branch of the argument. I will then establish whether or not exemplary damages are a criminal sanction, sufficient to invoke not only the double jeopardy protection, but other constitutional safeguards as well.

IV FURTHER STATUTORY PROTECTIONS OF DOUBLE JEOPARDY.

i) Rationale

The importance of the double jeopardy rule is immediately obvious. To be able to repeatedly prosecute someone until a conviction is gained would not only make individuals afraid of ever being suspected of a crime, but also make a mockery of a justice system that purports to be just. Friedland sees it as a "fundamental or all-pervasive" doctrine[25], one that is certainly unquestionable in regard to the criminal law. The United States similarly sees the the doctrine as vital, protecting the individual from the larger powers of the state, and saving them from "embarrassment, expense

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[24] Above n 1, 689

[25] ML Friedland *Double Jeopardy* (Clarendon Press, Oxford, 1969) 3.

and ordeal", the removal of which would "enhance the possibility that even though innocent [you] may be found guilty"[26]

ii) Overseas provisions

The New Zealand Bill of Rights Act was passed in 1990, after Geoffrey Palmer drafted 'The White Paper', the first draft of the Bill of Rights which included the Treaty of Waitangi, and aimed for entrenchment[27]. In the drafting of the Bill of Rights attention was paid to The International Covenant of Civil and Political Rights, and The Canadian Charter, and consequently very similar sections can be found in these documents as appear in the Bill of Rights[28].

In regard to section 26(2), art. 14.7 of The International Covenant, and section 11(h) of the Canadian Charter directly mirror the right contained in the section, and use almost identical wording.[29] Consequently, it can be inferred that the intention of Parliament in passing the Bill of Rights would be to uphold the same right that has been enshrined in these two pieces of legislation. The decisions then from the bodies that interpret these documents would be highly influential in determining the scope of the protection contained in section 26(2).

iii) The New Zealand provisions

The central idea behind the double jeopardy provision is not a new one to New Zealand law, and consequently the Bill of Rights does develop from New Zealand statutory origins as well[30]. To protect against an individual being unfairly prosecuted a number of times in order to gain a conviction is of key importance to a justice system that aims to be fair and impartial. Aside from International law and before the Bill of Rights, New Zealand already had statutory protection from double jeopardy under the Crimes Act 1961 which preserves the protection in two ways:

(a) **s10. Offence under more than one enactment -**

...

(4) No one shall be liable, whether on conviction on indictment or on summary conviction, to be punished twice in respect of the same offence.

(b) **s357** Special Pleas - (1) The following special pleas, and no others, may be pleaded according to the provisions hereafter contained - that is to say, a plea of previous acquittal, a plea of previous conviction, and a plea of pardon.

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[26] *Green v United States* 355 US 184, 187 (1957).

[27] *A Bill of Rights for New Zealand: A White Paper* (Wellington: Department of Justice, 1985)

[28] See approach of Cooke P in *R v Goodwin* [1993] 2 NZLR 390 using the International Covenant of Civil and Political Rights to interpret the Bill of Rights.

[29] See appendix for the specific wording of these sections.

[30] *Simpson v Attorney-General* [1994] 3 NZLR 667.

The special pleas can only be used in respect to criminal proceedings[31] and consequently do not apply to any civil actions for exemplary damages. The protection contained in s10(4) is limited to statutory offences as well, and consequently cannot be invoked to counter an action for exemplary damages either[32]. In short, double jeopardy protection under the Crimes Act in New Zealand, and before the decision in *S v G*, has always been restricted to further criminal prosecutions, and has never been extended so as to impinge on any civil right to sue for either compensatory or exemplary damages.[33]

In addition, the Criminal Justice Act 1985 protects the right for civil damages following criminal conviction. Sections 28(4) and 24(f) of that act illustrate again that the double jeopardy provision, before the Bill of Rights Act 1990, has always been confined to double criminal punishment.[34]

> An award of compensation under this section shall not affect the right of the person entitled to it. . . [t]o recover by civil proceedings damages in excess of the amount recovered under the award."

V INTERPRETATION OF THE BILL OF RIGHTS

i) International authorities.

When looking at overseas authorities, not much help can be gained from the interpretation of art. 14.7 of the International Covenant of Civil and Political Rights by the Human Rights Commission or by the International Court of Justice. Although this article has been persuasive in individual jurisdictions, international law is yet to make a decision on whether a claim for exemplary damages following a criminal conviction is allowed under The International Covenant.[35]

ii) Canadian authorities

Canada offers the best range of authorities on this issue. Like New Zealand's Bill of Rights, the Canadians have the Canadian Charter which contains a similar provision.

> 11. Any person charged with an offence has the right
> *h)* If finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried and punished for it again.

The Canadian Charter has been interpreted by the Supreme Court of Canada as not protecting an individual against a claim for exemplary damages. Wilson J. giving the

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[31] *In Re a Medical Practitioner* [1959] NZLR 785.
[32] *R v Moore* [1974] 1 NZLR 417.
[33] Bruce Corkill *Exemplary Damages and the Bill of Rights: Double Jeopardy?* (1996) 2 N.Z Bill of Rights Bulletin 22, 23.
[34] Section 28(4) of the Criminal Justice Act 1985.
[35] Christine Gray *Judicial Remedies in International Law* (Clarendon Press, Oxford, 1987) 28.

leading judgment in *R v Wigglesworth* gave an in-depth analysis of s 11(h) deciding that:[36]

> The rights guaranteed by s 11 of the charter are available to persons prosecuted by the state for public offences involving punitive sanctions, i.e criminal, quasi-criminal and regulatory offences, either federally or provincially enacted.

This decision was in keeping with the judgment in *R v Mingo*[37] which also saw the protections in s 11 as restricted to criminal matters[38]. *R v Wigglesworth*[39] offers a strong precedent in determining how to interpret s 26 of the New Zealand Bill of Rights. Wilson J dismissed the argument that taking a civil action after a criminal one means that the defendant is being prosecuted for the same offence. She says that "a single act may have more than one aspect, and it may give rise to more than one consequence"[40]. She goes on to give an example very similar to the facts in *S v G*.[41]

> For example a doctor who sexually assaults a patient will be liable, at one and the same time, to a criminal conviction at the behest of the state; to a judgment for damages, at the instance of the patient; and to an order of discipline on the motion of the governing council of his profession.

Put briefly, the protection offered in the Canadian Charter is restricted to the criminal sphere, with Wilson J's judgment on this point offering a powerful argument against New Zealand expanding its Bill of Rights protections into the civil law. There are further arguments against a broad interpretation of s 26(2) as well.

iii) Further New Zealand case law.

To support an argument restricting s 26(2) of the Bill of Rights to criminal matters one can turn to New Zealand case law that has looked specifically at interpreting this section. In the case *Quensell v Immigration Dept* Doogue J. say that s 26(2) "merely states what is the law"[42]. This section enshrines the double jeopardy provisions in the Crimes Act 1961 then, and under Doogue J.'s analysis, it is confined to the criminal law.

His approach was endorsed by Gault J in *Simpson v Attorney-General*[43] a little over a year before he, with respect, decided *S v G*[44] in a contrary way. Gault J decided in this case that "section 26 is covered by existing principles of criminal law relating to

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[36] *R v Wigglesworth* [1988] 1 WWR 193, 206.
[37] (1982), 2 CCC (3d) 23.
[38] Above n 37, at p36.
[39] Above n 36.
[40] Above n 36, at p214.
[41] Above n 36, at p214.
[42] *Quensell v Immigration Department* (Unreported, High Court, Rotorua Registry, Doogue J, 21 February 1992, AP 59/91.)
[43] *Simpson v Attorney-General* [1994] 3 NZLR 667.
[44] Above n 1.

retroactivity, autrefois acquit and autrefois convict"[45]. The Bill of Rights under New Zealand case law prior to *S v G* added nothing to the already established principle of double jeopardy

iv) Statutory Context

Section 26's predecessor, section 25, deals exclusively with rights when criminally charged. The section uses the phrase 'offence' just like section 26, but in this instance it is obvious that 'offence' refers exclusively to a criminal offence, as the rights contained in that section are established rights in a criminal trial but not in civil ones[46]. Wilson J in reference to the similar provisions in the Canadian Charter says:[47]

> It is beyond question that those rights are accorded to those charged with criminal offences, to those who face the prosecutorial power of the state and who may well suffer a deprivation of liberty as a result of the exercise of that power.

She goes on to adopt the reasoning of the Supreme Court of Canada in *Canada v Schmidt* which held that 'offence' "must have a consistent meaning throughout [the Charter], one that harmonises with the various paragraphs of the section."[48].

New Zealand's Bill of Rights is drafted in a similar way, the key exception is that the protections of double-jeopardy and retroactivity are in a different section to the sections regulating criminal procedure. However, the context of the section still implies that 'offence' as used in s 26(2) relates only to criminal matters as it does in s 25, and that the double-jeopardy protection is thus restricted to criminal proceedings.

v) Statutory restrictions on the Bill of Rights

Section 4(a) of the Bill of Rights reads:

> **s4** **Other enactments not affected -**
> No court shall in relation to any enactment ...
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective;

This section means that the Bill of Rights will be over-ruled by contrary legislation passed either before or after it[49]. There are several legislative indications which show that Parliament intended to preserve an individual's right to civil proceedings following a criminal trial, and which conflict with the interpretation the Court of Appeal has given to s26(2). One of these indications is the Criminal Justice Act 1985 which,

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[45] Above n 43, at p 710.

[46] For instance s 25(d) The right not to be compelled to be a witness; s 25(c) Right to be presumed innocent etc.

[47] *R v Wigglesworth* [1988] 37 CCC (3d) 385, 400.

[48] *Canada v Schmidt* [1987] 1 SCR 500, at 519.

[49] *Noort v MOT; Curran v Police* [1990-92] 1 NZBORR 97. Shows how the Bill of Rights is restricted by other statutes.

through s24(f), preserves the right to claim damages where previous reparation has been given. Section 28(4)(b) of the same act also preserves an individual's right to sue for civil damages despite being awarded part of a fine through a previous trial[50]. Finally, s 405 of the Crimes Act 1961 allows an individual to sue despite the same facts amounting to a criminal offence[51].

These statutory protections would appear to be inconsistent with s26(2) of the Bill of Rights as interpreted by the Court of Appeal. The Criminal Justice Act 1985 was passed after the ACC legislation removed the right to sue[52], and after the Court of Appeal decided to allow exemplary damage claims in the courts[53]. These sections of the Criminal Justice Act must relate to exemplary damages then, as that was the only form of damages available to claim through civil proceedings when the Act was passed. Moran J in *P v P*[54] says that the Criminal Justice Act 1985 refers to compensatable damages only, and is thus not inconsistent with a broad interpretation of the Bill of Rights. The section, however, refers exclusively to 'civil proceedings', exemplary damages were available through 'civil proceedings' in 1985, unlike compensatable damages, and so the act must be referring to a right to claim them[55].

Although the Bill of Rights has the power to extend the law, it cannot do so when it conflicts openly with another statute. The other statute, due to s 4(a), would prevail over the Bill of Rights. This is what has happened here, in trying to develop a protection in the Bill of Rights that has previously been restricted to criminal proceedings[56], the Court of Appeal has, with respect, contradicted existing statutes.

vi) Summary

The Court of Appeal has always given the Bill of Rights as wide an interpretation as possible[57]. However, for s 26(2), the statutory context, previous decisions and conflicting statutes construct a powerful argument against it being extended to exclude exemplary damages following a criminal trial. By analysing s 26(2) it can be seen that the procedural protections within the Bill of Rights Act 1990 are not intended to be applied to actions for exemplary damages in a civil court. The evidence suggests that these procedural protections (including s 26(2)) are confined to awards of criminal sanctions only. Consequently the second branch of the argument has to now be addressed. It has to be determined whether exemplary damages are, by their nature, a criminal sanction which should require these criminal procedural protections in the Bill of Rights to be applied in the instance of their award.

VI ARE EXEMPLARY DAMAGES A CRIMINAL PUNISHMENT?

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[50] See Appendix for specific wording.
[51] Crimes Act 1961, s405 replicated in the appendix.
[52] The first Accident Compensation Act was passed in 1972; updated 1982 and 1992
[53] *Donselaar v Donselaar* [1982] 1 NZLR 97.
[54] *P v P* [1993] DCR 843.
[55] This view is supported in *Akavi v Taylor Preston Ltd* [1995] NZAR 33.
[56] Crimes Act 1961 s10, s357.
[57] *Ministry of Transport v Noort* [1992] 3 NZLR 260, 277.

i) Introduction to the argument

Unlike the argument that Gault J. uses, that exemplary damages are a civil remedy and the Bill of Rights is wide enough to exclude those damages[58], this argument is based on a narrow interpretation of the Bill of Rights. Its proposition is that although sections 25 and 26 of the Bill of Rights may only apply to criminal punishments, exemplary damages by their nature are criminal and consequently invoke these protections anyway[59].

If it is proved then that exemplary damages are in fact within the sphere of criminal law then they will have not only the protection of double jeopardy, but also the protections in s 25 that would require a changing of the trial procedure when granting them. Proof beyond reasonable doubt will have to be shown instead of on the balance of probabilities[60], the defendant (or accused) will have the right not to take the stand as a witness[61], as well as having the normal rights of a fair and impartial trial[62] and rights to appeal[63].

There has not been any argument against these rights being confined only to the criminal sphere. The section is titled "Minimum Standards of Criminal Procedure", and there is also overseas precedent limiting similar rights to the criminal law[64]. There is no room for the contention that these protections should be extended to the civil law, and consequently it must be shown that exemplary damages are a criminal punishment before they can be applied.

ii) The nature of exemplary damages

To determine whether exemplary damages could be classed as criminal, its nature and its purpose must be examined. Elements that make it analogous to the criminal law are that it proposes to punish the defendant for a wrong done[65], and that it also aims to deter other people from repeating the act[66]. These are widely recognised as its fundamental purposes[67] which are very similar to the criminal law which also aims to punish and deter. In fact, an award for exemplary damages can be seen as akin to a

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[58] *S v G*, above n 1.

[59] Redden, KR *Punitive Damages* (The Mitchie Company, Virginia, 1980) 603.

[60] s 25(c) of the Bill of Rights.

[61] s 25(d)

[62] s 25(a)

[63] s 25(h) as well as the rights contained in s 24 and the remainder of s 25.

[64] *R v Wigglesworth* [1987] 37 CCC (3d) 385.

[65] *Huckle v Money* 2 Wils. K.B 205, 95 Eng. Rep. 768 (C.P. 1768) is one of the earliest examples showing how exemplary damages are important to punish a wrong to society.

[66] *Wilkes v Wood* 2 Wils. K.B 205, 95 Eng. Rep. 768 (C.P. 1768) stresses deterrence as well.

[67] See H McGregor *McGregor on Damages* (15ed, Sweet & Maxwell, London, 1988) para 406.

judgment for an accused to pay a criminal fine[68]. The fact that the defendant is required to pay the money to the plaintiff rather than the state has little significance on the overall effect of the award to the defendant.

There are significant differences between the criminal law and exemplary damages, despite the fact that they might have similar objectives. Firstly, unlike a finding of guilty in a criminal trial, being made to pay exemplary damages does not result in a criminal record[69]. Consequently, it could be said that there is no social stigma without a criminal record, meaning that exemplary damages are of a lower standard than a criminal punishment. However, it is immediately obvious that in some cases being made to pay exemplary damages will have the same social stigma as being found guilty of a serious offence. A finding that a defendant is liable for exemplary damages for sexual abuse for instance, would have just as great an effect socially as a guilty verdict in a criminal case.

The corollary to this argument is that with exemplary damages having an equally severe effect as a criminal conviction (although, admittedly, never resulting in imprisonment) then they should invoke the same protections at trial as a criminal case would. In practice however the jury is quite aware of the implications of making a defendant liable for punitive damages. Consequently they could, sub-consciously, raise the standard of proof to a level comparable to beyond reasonable doubt despite the actual level being at balance of probabilities.

The second aspect of exemplary damages that could distinguish it from the criminal law is that it was created in the civil law, and traditionally was granted over and above the compensation given[70]. It was not until *Donselaar v Donselaar*[71] that New Zealand allowed exemplary damage claims independent of a claim for compensation (due to the ACC Act), an act that is unparalleled in other countries.

Since exemplary damages are usually added to compensation, it would not only be logically inconsistent, but also logistically impossible for a court to implement one set of standards (i.e usual civil court procedures) for the compensation, but criminal standards for any adjoining exemplary damages. The court would have to be both a civil and a criminal court at the same time. Exemplary damages, it is argued then, were created to supplement compensatory damages[72], and were never intended to be defined as criminal. New Zealand however has separated claims for compensation from claim for exemplary damages, and consequently it would be quite plausible for a court to implement criminal standards when they are claimed without any 'logistical problems', that may occur overseas.

Finally, exemplary damages are actions taken by an individual, unlike a criminal trial which is taken by the crown. Exemplary damages are subject to out of court

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[68] As Redden says, above n 59, p603.
[69] Above n 59, p604.
[70] *Earl v Tupper* 45 Vt. 274 (1873).
[71] [1982] 1 NZLR 97.
[72] H McGregor *McGregor on Damages*, above n 8.

settlements then, unlike usual criminal sanctions which, at best, can only be subject to plea bargaining. Exemplary damages, although sharing some characteristics with criminal sanctions, have many differences as well. Although it would be logically possible to implement criminal procedual protections for an exemplary damages claim, it is certainly unclear, after investigating its nature, whether exemplary damages should be allowed such protections. I turn now to what the courts have decided on the issue.

iii) Court recognition of exemplary damages as criminal

Leading up to the decision in *S v G*[73] New Zealand courts have been willing to consider exemplary damages as having a criminal nature. The district court decision in *P v P*[74] which denied an action for exemplary damages following a criminal conviction saw Moran J. hold that "In any event a claim for exemplary damages, while civil in form, is criminal in nature"[75]. His decision was based on the principles of exemplary damages being to punish and to deter[76]. Somers J in *Donselaar v Donselaar* also recognises the criminal nature of exemplary damages he says:[77]

> They [punitive damages] are not compensatory but intended to punish the defendant and their award seeks to achieve recognised objects of the criminal law - deterrence and retribution.

The Court of Appeal went on in this case to allow exemplary damages in their civil law form, rather than modifying them with criminal law protections. They felt then, that despite the criminal aspects of exemplary damages, it was not enough to invoke the further protections of normal criminal procedure.

iv) Summary

There is no doubt that exemplary damages intend to punish and to deter, and that these purposes are akin to those of the criminal law. Opinion is divided over whether this is enough to call exemplary damages a criminal punishment. The arguments on both sides appear to be quite balanced on the issue. One can conclude from the above information then that exemplary damages are quasi-criminal, being a creation of the civil law with similar aspects to the criminal law[78]. The final consideration then is to look at the policy implications on both sides, and to decide from that whether or not exemplary damages should be called 'criminal'.

VII THE POLICY CONSIDERATIONS

A Arguments for calling exemplary damages criminal.

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[73] Above n 1.
[74] *P v P* [1993] DCR 843.
[75] Above n 74, p851.
[76] Above n 74, p846.
[77] Above n 10, p 113.
[78] Redden takes this view in *Punitive Damages*, above n 59, p 603.

i) Civil court taking the role of a criminal court

The main policy argument that those opposed to exemplary damages rely on is that a claim for exemplary damages can make a civil court take on the role of a criminal court. This argument strikes at the heart of the availability of punitive remedies, being "an objection to the whole concept of exemplary damages"[79]

The criminal court is designed to punish and to deter, the civil court it is argued is there primarily to compensate. As McGregor says exemplary damages "provide a suitable means for the punishment of minor criminal acts"[80], which although good in principle, does mean that the civil court is usurping its role. If the civil court does, as McGregor claims, 'punish minor criminal acts' then surely the same protections that apply in the criminal court should apply here when the civil court takes on a criminal role. In short, allowing exemplary damage claims would result in a civil court achieving criminal court aims, a purpose it was not set up for.

ii) Undermining the criminal court's decision

In the instance that there has been a criminal trial, followed by the victim taking a civil action for exemplary damages, it appears the civil court will have to sit in judgment of the criminal court's decision. Moran J saw this as a persuasive argument against exemplary damages:[81]

> I venture to opine that it is wrong in principle for another tribunal, be it a Judge or jury, to sit in judgment on the adequacy of a penalty imposed by another Court in its criminal jurisdiction. That is precisely what would occur if a claim for exemplary damages were entertained in respect of conduct for which a defendant has already been sentenced.

Blanchard J. also recognised this problem in *G v S* saying the civil court would be "marking the exam paper of the sentencing judge"[82]. Since the level of proof required in the civil court is lower than that required in a criminal court, it is quite plausible that someone who has been acquitted of an offence in a previous trial could be made to pay exemplary damages by a latter court. In practice it is hard to get evidence before a civil court for an exemplary damages claim where a criminal court has acquitted the defendant[83].

iii) Criminal courts consider reparation in all cases

In *S v G* Gault J. says that:[84]

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[79] *Herbert v Misuga* 1 WWR 457, 480.
[80] Above n 8.
[81] *P v P* [1993] DCR 843, 848.
[82] *G v S*, above n 20, p 48.
[83] Sir Rupert Cross, *Cross on Evidence* (Butterworths, New Zealand, 1996) para 11.19.
[84] Above n 1, p 697.

> "We are not persuaded that we should do that [allow an exemplary damages claim], particularly since the criminal court is required to consider reparation in all cases.

This makes the award of exemplary damages unnecessary as its purposes of punishment and deterrence have already been fully considered. The three policy arguments against exemplary damages overlap considerably, and are all based on the proposition that exemplary damages are unnecessary following a criminal conviction. Put briefly, excessive punishment and undermining of the criminal court are the two concerns at the heart of the argument that exemplary damages should not be available.

B Arguments against calling exemplary damages criminal.

i) In response to the argument against exemplary damages.

Once the underlying concerns that are the basis of the argument against exemplary damages are discovered then it is easier to respond to them. The argument rests heavily on the proposition that exemplary damages are made solely to punish and to deter. In all cases in which exemplary damages are sought after a criminal trial these aspects are stressed. The purpose of exemplary damages however is to punish civil offences, not criminal offences. There must be shown that there has been a tortious act for exemplary damages to be considered, not that there has been a criminal act. The problems occur because most tortious acts are also criminal - assault, battery, etc., and are thus punished in two courts. The purpose of exemplary damages can be seen as punishing a different offence then, and consequently its aims differ from the criminal law. As Wilson J says "[Criminal Offences] are to be distinguished from private, domestic, or disciplinary matters"[85].

ii) Further purposes of exemplary damages

The argument against exemplary damages does not focus on the further purposes of exemplary damages outside punishment and deterrence. Exemplary damages also act as an incentive to sue when plaintiffs have not incurred a large injury, but have felt that they have been severely wronged[86]. Exemplary damages act as a benefit to society then by deterring people from tortious acts[87].

Furthermore, exemplary damages do have a compensation aspect to them taking over the role of aggravated damages as well. From the defendant's point of view exemplary damages punish and deter, but for the plaintiff they compensate, not the injury, but the insult for a wrong done to them[88]. Cooke P saw this in *Donselaar* when

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[85] *R v Wigglesworth*, above n 36, p 401.
[86] Above n 6.
[87] Above n 8.
[88] Above n 9.

he said "exemplary damages will have to take over part of [compensatory damages'] former role."[89]

This forms an important distinction between a criminal fine and exemplary damages, as a criminal fine is paid to the state and does not carry any compensatable purposes; it is solely to punish. Removing the right to sue for exemplary damages where the defendant's conduct also constitutes a crime would remove an avenue of compensation for non-pecuniary injury then. If the plaintiff sustains little compensatable physical injury but has had something horrendous done to them (like the case of *S v G*[90]), the victim will receive little reparation, except knowing the criminal is punished and even this may not be certain[91].

iii) Further policy considerations.

The high court decision of *G v S*[92] saw Blanchard J. give a good account of the contingencies of disallowing exemplary damages for double jeopardy reasons. He outlines the procedural anomalies that would result if a possible plaintiff is aware that a criminal trial would bar them from claiming exemplary damages. They would be uncooperative with the police if they were concerned more with suing for exemplary damages than punishing the accused.

Furthermore, the defendant would be aware that an action for exemplary damages would bar the police from charging them criminally. They could 'buy' their way out of a criminal prosecution then by paying a large exemplary damages sum before the police can take them to trial. Also it is unfair that a victim's civil action would become barred due to the actions of the crown, over which they have no control.

iv) Summary - the Canadian approach

The policy arguments differ on the basis that they see the purposes of exemplary damages in different lights. Those that see it as a criminal punishment unjustified following a criminal trial focus on the punishment and deterrent aspects of it. Those that support them on the other hand see its purpose as wider than that, and that banning them would remove an important right to the victim.

The Canadian approach to this issue offers an important 'middle-ground', that ensures both that the victim retains the right to exemplary damages, and the defendant does not get excessively punished. The Ontario Law Review Commission in their 1991 report[93] saw the need to balance both the victim's right to sue for exemplary damages and the defendant's right against excessive punishment. They recommended that the civil court

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89 Above n 17, p 107.
90 Above n 1.
91 The defendant in *S v G* for instance got a relatively light sentance due to technicalities. See section III.
92 Above n 20.
93 Ontario Law Commission *Report on Exemplary Damages* (1991, Ontario).

in deciding the level of exemplary damages should consider the punishment given in the criminal court.

This approach has been adopted at appellate level firstly by the Quebec court of Appeal in *Papadatos v Sutherland*[94], and then in the Saskatchewan Court of Appeal in *Herbert v Misuga*[95]. The latter court deciding:[96]

> It seems the most rational solution is for the civil court to consider the extent of the criminal punishment and to reduce the exemplary damages that otherwise would have been appropriate.

As yet this concept has not been discussed in New Zealand. The case *D v T*[97] before the Court of Appeal at the present moment may consider this option.

VIII CONCLUSION

I will conclude this analysis by returning to the two branches of the argument against exemplary damages. The first sees the protections in the Bill of Rights Act 1990 as applying to actions for exemplary damages, the second sees exemplary damages as a criminal sanction that envokes the protections of the Bill of Rights. Both arguments would result in exemplary damages being banned in all instances of a prior criminal trial, and the second one would invoke other criminal protections for the defendant in an exemplary damages claim.

The Bill of Rights, as I have shown, is confined to criminal offences which effectively dismisses the first argument. To expand the Bill of Rights to apply to civil remedies would be against the intentions of the drafters, overseas authority, and would conflict with other statutes. The second line of argument is more difficult. Exemplary damages do share characteristics with the criminal law, and are, as Redden says, a 'quasi-criminal sanction'[98]. The policy implications of classifying them as fully criminal however offers a strong argument for allowing exemplary damages to remain a civil remedy. Exemplary damages would be excluded, due to double jeopardy, if made a criminal sanction which would lead to a number of anomalies within the law. Rich defendants would be sued before the police could prosecute, and victims would be unhelpful to police if they preferred money instead of having the accused imprisoned.[99]

The Canadian approach offers a good option to New Zealand courts facing this problem. They have given the civil courts the ability to review the criminal court's punishment, and decide the level of damages accordingly[100]. This would keep the

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[94] *Papadatos v Sutherland* (1987) 40 DLR (4th) 755.
[95] *Herbert v Misuga* [1994] 3 WWR 457.
[96] Above n 95, at p 480.
[97] *D v T* (Unreported, High Court, Auckland Registry, Tompkins J, 14 February 1996, CP 429/94)
[98] Above n 59, p 604.
[99] Both these arguments were persuasive before the court in *O v U*, above n 11.
[100] Above n 95.

defendant's rights against excessive punishment intact, the victim's rights to sue for exemplary damages intact, and would not involve interpreting the Bill of Rights in an excessively broad way. I conclude then by hoping that the Court of Appeal will decide the case *D v T* [101] in such a way as to uphold both the victim's right to exemplary damages, and the defendant's right against excessive punishment, and to put this issue to rest.

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[101] Above n 97.

APPENDIX

A) International Covenant Article 14.7

No one shall be liable to be tried or punished for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

B) Canadian Charter s 11(h)

11. Any person charged with an offence has the right

h) If finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried and punished for it again.

C) The Criminal Justice Act 1985.

s24. Conditions of sentence - Where a court sentences an offender to make reparation the following provisions shall apply:

...

(f) The sentence shall not affect any right that the person who suffered the loss or damage has to recover by civil proceedings any damages in excess of the amount recovered under the sentence.

s28. Part of fine may be awarded to victim of offence suffering physical or emotional harm.

...

(4) An award of compensation under this section shall not affect the right of the person entitled to it -

(a) To recieve compensation under the Accident Compensation Scheme 1982, and

(b) To recover by civil procedings damages in excess of the amount recovered under the award.

D) Crimes Act 1961

s405 Civil remedy not suspended- No civil remedy for any act or omission shall be suspended by such reason that such act or omission amounts to an offence.

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