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CHASE V THE ATTORNEY GENERAL: AN EXAMINATION OF THE DECISION AND ITS IMPACT ON THE DOCTRINE OF EXEMPLARY DAMAGES IN NEW ZEALAND.

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CONTENTS

I INTRODUCTION:

On 18 April 1983, Paul Chase was shot and fatally wounded by police officers after they had forcibly entered his home.

As a result of this incident, relatives of the deceased have brought an action against the police seeking to recover exemplary damages.

This paper will examine the decision in Chase v the Attorney General[1] and provide a discussion of the impact it will have on the scope of the doctrine of exemplary damages in New Zealand.

II CHASE v THE ATTORNEY GENERAL:

In this case, the action for exemplary damages which arose stemmed from the conduct of the police officers involved in the fatal shooting of Paul Chase. It was claimed on behalf of the deceased's estate that the police plan to enter the premises and the entry and shooting was an "irresponsible and/or neglectful and/or high handed and/or oppressive use of police powers"[2] and that the police shooting of the deceased was an "unwarranted and/or unlawful trespass or assault on the deceased".[3]

These allegations are tortious in their nature and involve negligence, trespass and assault. At common law, damages could not be recovered in tort for the death of another, and in cases involving personal injury to the deceased caused by tort, no claims could survive to the executor. Similarly with trespass: any cause of action which arose prior to the death of the deceased did not survive the death, and no cause of action could arise from the death itself.[4]

This position, however, was altered by the introduction of the Law Reform Act 1936 and the Deaths by Accidents Compensation Act 1952. It is these two enactments and the Court of Appeal decision in Donselaar v Donselaar[5] which are the focus of Mr Justice Heron's judgment when resolving the question of whether the doctrine of exemplary damages requires that it is the victim of the wrongdoing who must bring the action or whether it extends to allow claims to be brought by the victim's estate where death has resulted from the wrongdoing complained of.

He concludes that the Law Reform Act 1936 and the Deaths by Accidents Compensation Act 1952 clearly prohibit an award of exemplary damages where the action is brought by the deceased's estate rather than the victim himself, and that the decision of the Court of Appeal in Donselaar v Donselaar gives no authority for extending the doctrine of exemplary damages to include situations like the present.

The judgment of Mr Justice Heron needs to be examined, for in reaching these conclusions he seems to overlook the strong policy considerations which have played such a predominant role in previous cases, and which have sought to preserve the remedy of exemplary damages at a time when New Zealand society is becoming "more vocal, factional and discordant".[6]

Therefore it is necessary to consider Mr Justice Heron's treatment of the relevant statutory provisions and the effect which he considered the Donselaar decision ought to have on their interpretation.

A. The Law Reform Act 1936:

The Law Reform Act 1936 provides in section 3(1) for the survival of causes of action after death for the benefit of the estate of the deceased in certain circumstances. However any damages recoverable may not include "exemplary damages" for they are expressly prohibited under the statute.[7]
An ambiguity arises in relation to section 3(2)(a) of the Law Reform Act 1936 with doubt being cast on the meaning of exemplary damages in that particular statutory context. Indeed it is upon the interpretation to be accorded to exemplary damages within the framework of the 1936 Act that the decision of the case must be, and is in fact, based.

Mr Justice Heron does not think that a consideration of what the statute meant in 1936 when it used the words "exemplary damages" is necessary, stating that they mean "no more or less than the meaning given to them in Donselaar v Donselaar."[8] He thus accepts an interpretation of exemplary damages within the statutory scheme of the Law Reform Act 1936 which will not permit the estate of Paul Chase to succeed in their claim.

The reasoning behind this is crucial, for by failing to canvass the possibility of an alternative interpretation of section 3(2)(a) Mr Justice Heron sets a precedent which will effectively limit the scope of exemplary damages and their application in New Zealand.

A reading of the Law Reform Act 1936 prima facie prohibits any claim for exemplary damages being brought by the deceased's estate, and this is accepted by Mr Justice Heron as the correct interpretation of the section. In reaching this conclusion he looks at the clear words of the section and examines the Deaths by Accidents Compensation Act 1952.

B. The Deaths by Accidents Compensation Act 1952.

This statute can be seen as an exclusively compensatory enactment, with section 7 providing for damages to be proportioned between persons

> "in respect of the amount of actual pecuniary benefit which the person or persons might reasonably have expected to enjoy if death had not occurred."

Thus concepts such as exemplary damages can be seen as foreign to section 7 of the Deaths by Accidents Compensation Act, and indeed to the whole philosophy of the Act itself. This, coupled with the clear prohibition on exemplary damages contained within section 3(2)(a) of the Law Reform Act 1936 makes it clear, according to Mr Justice Heron, that actions for exemplary damages do not survive the death of the deceased.

In addition to this, under the Accident Compensation Act 1982 proceedings for damages arising directly or indirectly out of personal injury or death are barred. Whilst this does not include exemplary damages it clearly embraces compensatory damages. Thus it is said that the combined effect of section 3(2)(a) of the Law Reform Act 1936 and section 27 of the Accident Compensation Act 1982 serves to prohibit the recovery of exemplary damages and compensatory damages in respect of any cause of action relating to personal injury to and vested in the deceased before death.

Therefore the question of whether or not the estate of Paul

Chase can sue for exemplary damages can be seen to turn on the interpretation ascribed to "exemplary damages" within the context of section 3(2)(a) of the Law Reform Act 1936.

C. "Exemplary Damages" for the purposes of section 3(2)(a):

There are two alternative interpretations which are possible namely:

i the meaning to be attributed to "exemplary damages" in the context of section 3(2)(a) is the same meaning attached to them in Donselaar v Donselaar (i.e. damages awarded to punish and deter the wrongdoer).

ii the damages referred to in the 1936 Act are not exemplary damages per se but merely aggravated damages.

This second view has received judicial recognition, being expressed by Lord Kilbrandon in Cassell & Co. Ltd. v Broome[9] when interpreting the English equivalent of the 1936 Act, that is, section 1(2)(a) of the Law Reform (Miscellaneous Provisions) Act 1934. Thus it is plausible that section 3(2)(a) of the Law Reform Act 1936 did not have exemplary damages, strictly so-called in its contemplation, and this too is supported by Lord Kilbrandon who doubted that any statutory recognition of the doctrine of exemplary damages was to be found.

Yet despite the availability of this second interpretation, Mr Justice Heron does not regard it as necessary to even consider it as a possible option. He holds that the clear words speak for themselves and that no more or less could be intended by "exemplar damages" in the Law Reform Act 1936 than in Donselaar v Donselaar.

It is considered unnecessary to canvass any other practicable interpretation on the basis that, whilst Donselaar is a policy decision, it does not affect the essential meaning and purpose of exemplary damages thereby giving no authority for extending the doctrine in the way suggested. Furthermore, developments in the law since 1936 have restricted rather than widened the meaning to be given to exemplary damages.

In the respectful opinion of the writer, the grounds on which Mr Justice Heron has based his decision are erroneous. He states that the doctrine of exemplary damages has narrowed in its scope since 1936, and cites Rookes v Barnard[10] and

Cassell & Co. Ltd. v Broome[11] as authority for such a proposition. However, a detailed examination of these cases and the development of the doctrine of exemplary damages in New Zealand will reveal that such a statement can no longer be supported, for the law as stated in those two foremost decisions of the House of Lords has been extended by the New Zealand courts.

Moreover, the brevity with which Mr Justice Heron deals with Donselaar v Donselaar requires a careful analysis of the case. He states that the inherent meaning and purpose of exemplary damages is not lost by virtue of the decision, despite the fact that it is one based on considerations of policy. Yet these policy factors, which had such an all-important role to play in Donselaar are largely disregarded and thus a discussion of them will be necessary.

However in order to understand fully the significance of the decision in Donselaar, the effect it had on previous case law and what it sought to achieve, it is essential to gain an understanding of the nature and scope of exemplary damages, and this requires that they be viewed in both their historical and present contexts.

III THE DOCTRINE OF EXEMPLARY DAMAGES:

Exemplary damages differ from compensatory and aggravated damages in both their nature and application.

Compensatory damages are awarded as compensation to the plaintiff for material loss suffered. A corollary of this is that the yardstick used to measure the award will be the loss suffered.

Distinct from this is aggravated damages which may be awarded when the motives and conduct of the defendant aggravate the injury to the plaintiff.

Aggravated damages may be seen as an extension of compensatory damages, for although different, both forms of damages are closely linked in that they are plaintiff orientated - focusing on the plaintiff and his/her loss.

Exemplary damages on the other hand are directed not towards the plaintiff but towards the defendant. They are awarded to punish the defendant and vindicate the strength of the law.[12]

The distinction between compensatory forms of damages and exemplary damages, though clear in theory, is sometimes difficult to apply in practice. Historically such a distinction was relatively insignificant for it was thought that exemplary damages, like compensatory and aggravated damages could be awarded in any case in tort.[13] This view, however, is no longer acceptable in light of House of Lords' decisions in Rookes v Barnard and Cassell & Co. Ltd. v Broome which restated the law regarding exemplary damages and severely limited their scope.

It was laid down in Rookes v Barnard that exemplary damages could only be awarded in actions of tort and only in three categories of cases. The first category is oppressive, arbitrary or unconstitutional action by servants of the government.[16] This category, however, is not limited to crown servants, but includes within its ambit persons who are exercising functions of a governmental character such as the Police.[17]

Cases in the second category are those in which the defendant's conduct has been calculated by him/her to make a profit for him/herself which may well exceed the compensation payable to the plaintiff.[18]

The third category will be where exemplary damages are expressly authorized by statute.[19]

Where exemplary damages may be awarded the court should look at the sum it proposes to award as compensatory damages (which may include an element of aggravated damages) and ask itself whether such an award is adequate not only for the purpose of compensating the plaintiff but also for the purpose of punishing and deterring the defendant.[20] It is only if it is inadequate for the latter purpose that the court should consider an award of exemplary damages.[21] The following considerations should be borne in mind:

i that the plaintiff cannot recover exemplary damages unless he/she is the victim of the punishable behaviour;

ii that the power to award exemplary damages is a weapon

that should be used with restraint;

iii the parties' means are relevant.[22]

The policy reasons behind these restrictions are significant for they provide the only justification for what may be seen as somewhat arbitrary limitations.

Lord Devlin viewed exemplary damages as being objectionable in principle because they confused the criminal and civil functions of the law. He considered that the law of torts and the criminal law should be kept separate, with only the latter dealing with punishment. Further policy arguments against the award of exemplary damages are that they import the possibility of punishment into civil litigation without the safeguards of the criminal process and provide an unmerited windfall for the plaintiff.

Thus the law relating to exemplary damages as stated in Rookes v Barnard and Cassell & Co. Ltd. v Broome restricts their award to very narrowly defined categories. However the application of the decisions in these two leading English cases to New Zealand has been modified by events in our system which both restrict and diminish their authority, that is, the presence of the Accident Compensation Act 1982 and the decisions of the New Zealand Court of Appeal in Donselaar v Donselaar and Taylor v Beere.[23]

A THE ACCIDENT COMPENSATION ACT 1982:

The introduction of the Accident Compensation scheme in 1972 marked the beginning of a new epoch in the New Zealand legal system. It sought to abolish existing methods of compensation for accidents, namely the costly common law trial process, considered to be fraught with inconsistencies and an impediment to rehabilitation.[24] In its stead it introduced a scheme which would achieve a more equitable system of compensation, encouraging the complete rehabilitation of the victim of the personal injury.

These goals are clearly encompassed within section 26 of the Accident Compensation Act 1982 which states the purposes of the Act as:

i the promotion of safety;[25]

ii the rehabilitation of persons who suffer personal

injury by accident;[26]

iii the compensation of persons who suffer personal injury by accident and certain dependants of those persons where death results from the injury.[27]

To achieve these ends the Act was established as a code with section 27 placing a bar on all proceedings for damages, arising directly or indirectly out of the injury or death, being brought in any court in New Zealand independently of the Act.

The precise ambit of section 27 has been the subject of much debate, especially in relation to the issue of exemplary damages. The issue of whether a person who suffers personal injury by accident may commence proceedings for exemplary damages has received both academic and judicial attention. In both these spheres two schools of thought emerged, each one representing an opposite standpoint.

B. The Academic Debate:

The expressions of opinion reflected in legal writings on this issue are diverse in their nature, yet arguments which are both cogent and convincing exist in support of each view.

The primary arguments espoused in favour of the contention that the Accident compensation Act 1982 does not abolish the right to commence proceedings for exemplary damages are canvassed by D B Collins in his article "Proceedings for Punitive Damages in the Regime of Accident Compensation".[28] In that writing the author presents a careful consideration of the issue, which involves looking at the law relating to exemplary damages, the language of section 5(1) of the Accident Compensation Act 1972,[29] and the policy factors involved.

Collins states that the focus of section 5(1)[30] is on the nature of the harm and therefore any prohibition contained therein only serves to bar proceedings for damages relating to personal injury caused by accident. He suggests that Section 5(1) is not directed to causes of action and does not necessarily prohibit proceedings for damages directly related to the accident itself but which exist independently of

claims for personal injury which might result from the same accident. Therefore proceedings for exemplary damages are not barred by section 5(1) for, because of their very nature, such damages are awarded to punish the wrongdoer for his/her actions and not as a means of providing compensation for a victim who has suffered personal injury by accident.

However this interpretation has not been unanimously accepted, and many have adopted the view that proceedings for damages arising from an accident and not directly from the personal injury are nevertheless proceedings for damages arising indirectly from the injury. Consequently it is argued that claims for exemplary damages cannot be brought by those who suffer personal injuries by accident. This is the line taken by R D McInnes in his article "Punishing the Words of Section 5(1), The Other School of Thought Replies."[31]

He states that exemplary damages punish the defendant, but they arise from the fact that the plaintiff has been affected (usually injured) by the defendant's conduct. Thus they arise "directly or indirectly out of the injury." By placing the emphasis of the section on the source of the damages rather than the purpose, it becomes possible to conclude that section 5(1) bars proceedings for the recovery of exemplary damages.

This view represents a total departure from the opinion expressed by other writers, such as Collins. Yet such differences in opinion are not confined to academic debate, with equally disparate views being expressed in case law on the subject.

C. The Judicial Debate:

In 1977, the precise ambit of section 5(1) came under judicial scrutiny on three separate occasions, resulting in a conflict of opinion which left the law far from settled.

In the Supreme Court decision in Donselaar v Donselaar[32] Mr Justice Quilliam held that a claim for exemplary damages was barred under the terms of section 5(1). The reasoning behind this was based on the fact that the foundation for the claim of exemplary damages in that case was an assault which caused the injury. He thus concluded that the proceedings arose directly out of the injury and were therefore prohibited.

In Koolman v the Attorney General,[33] a case involving the tort of trespass to the person, Mr Justice White applied the decision from Donselaar v Donselaar[34] thereby affirming the interpretation of section 5(1) advocated by Mr Justice Quilliam.

This, however, was not the view adopted by Mr Justice O'Regan in Howse v the Attorney General[35] where he held that proceedings for exemplary damages, in the case of personal injury by accident did not arise directly or indirectly out of the injury and were therefore not prohibited by section 5(1).

Thus the judgments delivered in these cases give expression to two distinct interpretations of section 5(1), resulting in a great deal of uncertainty in the law.

The problem arose again in Stowers v Auckland City Council[36] where it was concluded by Mr Justice McMullin that, despite the compensatory nature of the Accident Compensation Act, claims for exemplary damages could not be brought because of section 5(1). He bases this on the fact that, even though exemplary damages are aimed at punishing the defendant, they cannot be awarded unless there is a victim who has suffered as a result of the defendant's acts. It is this which leads the Judge to resolve that proceedings for exemplary damages must arise directly or indirectly out of the injury.

From the arguments propounded by writers on the subject in support of and in detraction from the contention that section 5(1) permits proceedings for exemplary damages to be brought, and from the similar debate which has occurred amongst the judiciary, it becomes clear that an ambiguity exists in relation to the section with two practicable and viable interpretations possible.

The air of uncertainty surrounding the issue of which interpretation of section 5(1) was to prevail was settled by the landmark decision of the New Zealand Court of Appeal in Donselaar v Donselaar,[37] where a restatement of the law held that section 5(1 of the Accident Compensation Act 1972 could be validly interpreted so as to exclude exemplary damages from its ambit.

D. Donselaar v Donselaar:

The decision in Donselaar v Donselaar is based on a careful analysis of section 5(1) and convincing policy considerations in

favour of allowing a claim for exemplary damages to be brought.

The function of section 5(1) is clear and its scope limited according to Mr Justice Richardson. It is concerned with remedies and does not serve to abolish causes of action, leaving them intact. This analysis is supported by reference to section 5(2) which, by expressly abolishing certain causes of action, shows that section 5(1) is concerned with remedies.

This interpretation gains impetus from the fact that section 5 talks in terms of compensatory damages and bars actions only for that which the Act provides, namely compensation. A further argument put forward by the Court of Appeal in Donselaar v Donselaar is that whilst the cause of action arises out of the injury, the exemplary damages do not: the focus in claims of exemplary damages is on the defendant's conduct and not on the harm suffered by the plaintiff.

This analysis of section 5(1) is conclusive in supporting the proposition that claims for exemplary damages are not statute barred by virtue of the Accident Compensation Act 1972. However section 5(1) is nonetheless an ambiguous provision with equally strong arguments which exist in favour of holding that it does indeed abrogate the right to bring proceedings for exemplary damages.[38]

Why the Court of Appeal in Donselaar v Donselaar preferred the interpretation which it did (an interpretation out of step with most of the previous case law) is perhaps due largely to considerations of policy which can be seen to tip the balance in favour of the interpretation chosen.

Mr Justice Cooke expressed the view that "there is a need to have effective sanctions against the irresponsible, malicious or oppressive use of power,"[39] and it is this feeling which pervades much of the reasoning in his judgment. It is seen as justification for allowing claims of exemplary damages to be brought, even in situations where there has been personal injury by accident. This alone would not be sufficient to support such an assertion. However, when coupled with other considerations of policy in favour of such an interpretation it becomes obvious that the door allowing recovery of exemplary damages remains open.

Exemplary damages do not fail to grasp the social philosophy represented by the Accident Compensation Act, for it is clear from the long title, section 4 and the provisions of Part VI of the Act (headed "Compensation") that it does not have any punitive purpose. Whether or not this excludes exemplary damages is not an easy question, but it was considered by Mr Justice Cooke to be in the public interest to leave the Courts free to recognize and develop exemplary damages as an independent remedy.

Support is also gained from section 45A of the Criminal Justice Act 1954.[40] The section, which was enacted in 1975, provides for compensation of the victim of an assault. However it carries with it the important qualification that the award shall not affect the person's right to receive compensation under the Accident Compensation Act 1972 and to recover, by way of civil proceedings, damages in excess of the award. This is seen by Mr Justice Cooke as creating a legislative assumption in favour of the contention that exemplary damages may be recovered, notwithstanding any personal injury suffered.

This same argument is made by Mr Justice Richardson, who goes on to state that a bar on the recovery of exemplary damages in a situation involving personal injury by accident would be anomalous in relation to other cases of intentional torts where recovery of exemplary damages is allowed merely because there has been no physical injury.

Mr Justice Somers states that exemplary damages are not inconsistent with the purposes of the Act, and sees them as "capable of serving a useful social purpose."[41] Because of this the ambiguity in the Act should be construed in favour of their recovery, and any decision to change the law should be left to Parliament.

Thus the decision reached by the Court of Appeal in Donselaar v Donselaar preserves the right to claim exemplary damages in cases where personal injury has been suffered, notwithstanding the provisions of the Accident Compensation Act. The issue involved an ambiguity within section 5(1) of the Act, where two interpretations were equally viable and possible. Policy considerations were used to justify the construction chosen,

therefore the decision in Donselaar v Donselaar can be seen as one which is based in policy. Indeed the very essence of the reasoning in the case is encapsulated in the words of Mr Justice Cooke when he states: "this is no time for the law to be withholding constitutional remedies for high-handed and illegal conduct, public or private, if it is reasonably possible to provide them."[42]

IV CHASE V THE ATTORNEY GENERAL VIEWED IN THE LIGHT OF THE PREVIOUS AUTHORITIES:

In Chase v the Attorney General Mr Justice Heron is faced with a similar problem to that addressed by the Court of Appeal in Donselaar v Donselaar, namely an ambiguous provision which allowed for two possible and conflicting interpretations. However, unlike the Court in Donselaar which considered both alternatives in detail, Mr Justice Heron fails to canvass the second available option. As mentioned earlier in the paper, his reasoning for this is two-fold:

i exemplary damages have not lost their essential meaning and purpose by virtue of the Donselaar decision

ii the scope of the doctrine of exemplary damages has narrowed rather than widened since 1936.

Whilst it cannot be argued that the essential meaning and purpose of exemplary damages has been lost because of the decision in Donselaar v Donselaar, it must be said that the case provides a clear statement on the scope of the doctrine. It is a decision based in policy and one which seeks to preserve the remedy of exemplary damages in New Zealand. It sets a precedent for authorizing policy factors to be considered when reaching a decision, and it is this which seems to have been disregarded by Mr Justice Heron.

Those considerations advanced by the Court of Appeal in Donselaar v Donselaar are equally applicable to the situation in Chase, and in that case would plainly accommodate a claim of exemplary damages. In the opinion of the writer, this provides sufficient justification for an enquiry into the meaning of

"exemplary damages" within the context of the Law Reform Act 1936 and a consideration of the alternative interpretation espoused by Lord Kilbrandon in Cassell & Co. Ltd. v Broome. Yet Mr Justice Heron fails to do this, maintaining that, on the basis of Rookes v Barnard and Cassell & Co. Ltd. v Broome that the scope of exemplary damages has narrowed rather than widened since 1936. This, however, is fallacious and seems to represent a misunderstanding of the New Zealand position.

The right to claim exemplary damages in the event of personal injury has survived the Accident Compensation Act, albeit in limited circumstances, yet the scope of the situations in which an award will be made appear somewhat unclear. The two leading English cases - Rookes v Barnard and Cassell & Co. Ltd. v Broome - have severely restricted the right to claim exemplary damages, allowing their recovery in three narrowly defined categories of cases only.[43]

A more liberal approach has been taken by the New Zealand Court of Appeal in Taylor v Beere.[44]

A. Taylor v Beere:

The judgment delivered by the Court of Appeal in Taylor v Beere was handed down contemporaneously with Donselaar v Donselaar, and in line with the view expressed in that case, namely that exemplary damages have a valuable role to play and perform a useful social purpose, the court adopted a broader range of categories than that permitted in the English system. The authority to do this was gained from the decision of the Privy Council in Australian Consolidated Press Ltd. v Uren[45] which implicitly left open to New Zealand courts the right to determine the occasions on which it would permit an award of exemplary damages.

Two reasons formed the basis of the decision not to adopt the narrow English approach - both can be seen as considerations of policy. The first reason was the preservation of the general principle that tort does not pay - a principle which would be restricted should claims for exemplary damages be confined in their application. The second justification for a more liberal

approach was the view taken of the limitations in Rookes v Barnard as arbitrary. The court in Taylor v Beere held that there was no historical or policy basis for saying that damages are to be purely compensatory, and furthermore that the criminal law and the law of torts are already intermingled thus obviating the arguments propounded in support of the contention that claims for exemplary damages should be rigorously circumscribed.

The right to claim exemplary damages in New Zealand has been maintained, even in situations where there has been personal injury by accident, and the circumstances in which an award will be made will not be narrowly defined. However the precise ambit of situations considered suitable for giving rise to such an action remains unclear. The boundaries of the categories will only become obvious through subsequent case law, however Auckland City Council v Blundell [46] provides some indication of the potential scope of exemplary damages in New Zealand.

B. Auckland City Council v Blundell

In Auckland City Council v Blundell the New Zealand Court of Appeal reaffirmed the line taken in Donselaar v Donselaar stating that exemplary damages had a legitimate role to play and issuing a model direction to juries in order to ensure that the role left for them by that case would be fulfilled.

Exemplary damages have as their purpose punishment of the defendant. In assault cases (i.e. cases where personal injury by accident has been suffered) exemplary damages must take on the role of compensatory damages, but only to the extent that such damages at common law serve a punitive purpose as well. This point was clearly made by the House of Lords in Rookes v Barnard and Cassell & Co. Ltd. v Broome where it was stated that at common law compensatory and exemplary damages are overlapping and cannot be considered in isolation. Exemplary damages can be awarded at common law only insofar as compensatory damages do not themselves sufficiently punish the defendant for his/her outrageous behaviour.

In New Zealand, compensation is awarded under Accident Compensation legislation and therefore it serves no punitive

purpose whatsoever. Thus, unless criminal proceedings are brought, exemplary damages are the only method by which punishment can be achieved. Consequently, exemplary damages have a "somewhat wider practical scope in New Zealand than in countries where general and aggravated damages still serve, wholly or partly, the purposes of punishment."[47]

This echoes the view of the court in Taylor v Beere where a more liberal approach than that of the English courts was taken to the award of exemplary damages. Blundell's case does not state with any degree of preciseness the situations in which an award can be made, but it nevertheless upholds their utility and provides general guidelines for their award.

Cooke P states that an award of exemplary damages can only be made if there was something outrageous in the defendant's conduct which was deserving of punishment. The amount awarded must be appropriate as punishment, and in deciding this all the circumstances of the case have to be considered. Thus the punishment must fit the crime, with the focus being placed on the defendant and his/her conduct.

Like Taylor v Beere, Blundell represents a widening of the scope of the doctrine of exemplary damages in New Zealand. It rejects the narrowly defined categories and arbitrary limitations of Rookes v Barnard and although decided after Chase v the Attorney General, nevertheless provides some valuable guidance as to the correctness of the decision reached in that case, because it enunciates most clearly those principles advocated in Taylor v Beere and Donselaar v Donselaar.

Indeed in the light of the decisions reached in these cases it can no longer be maintained that there is no justification for conducting an enquiry into what section 3(2)(a) of the Law Reform Act 1936 had in its contemplation when it used the words "exemplary damages."

V CONCLUSION:

In conclusion, therefore, this writer is of the opinion that the justification advanced by Mr Justice Heron in support

of his decision not to consider "exemplary damages" within the context of section 3(2)(a) of the Law Reform Act 1936, cannot be substantiated when viewed in the light of the case law on the subject.

A detailed examination of the development of the doctrine of exemplary damages in New Zealand has shown that it is a remedy which the courts have sought to preserve. The law as stated in Rookes v Barnard and Cassell & Co. Ltd. v Broome has not been strictly followed, with the Court of Appeal decisions in Donselaar v Donselaar and Taylor v Beere extending the application of exemplary damages and adopting a more liberal approach.

The situation which presents itself in Chase v the Attorney General is one in which a claim for exemplary damages should be allowed to be brought. In Chase the actions, which might have led to a situation such as in Donselaar, were in fact morbid. However there seems no logical reason why the reservation of the courts to award exemplary damages should not apply to actions that do result in death.

In light of this, and the many policy considerations enunciated in recent cases, an alternative interpretation of section 3(2)(a) should be adopted for it is one which can be accommodated within the policy of Donselaar and which would more clearly reflect the line that has been taken by the courts in recent decisions.

Footnotes:

1 Unreported Wellington Registry A106/84, 18 September 1986
2 Ibid, 2
3 Idem
4 Rose v Ford [1937] AC 826,833
5 [1982] 1 NZLR 97
6 Donselaar v Donselaar [1982] 1 NZLR 97, 106 per Cooke J
7 See S3(2)(a) of the Law Reform Act 1936
8 Above n1, 10
9 [1972] AC 1027
10 [1964] AC 1129
11 Above n9
12 Rookes v Barnard [1964] AC 1129, 1221 per Lord Devlin
13 Loudon v Ryder [1953] 2 QB 202
14 Above n10
15 Above n9
16 Above n10, 1223/1224
17 Above n9, 1077
18 Above n10, 1226/1227
19 Ibid, 1227
20 Lord Devlin in Rookes v Barnard [1964] AC 1129,1230 stated that aggravated damages could do most of the work of exemplary damages, for an obligation to pay a large sum by way of compensatory damages has within it a punitive element.
21 Above n9, 1059
22 Above n10, 1227
23 [1982] 1 NZLR 81
24 See The Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand (1967)
25 Accident Compensation Act 1982, S26(1)(a)
26 Ibid, S26(1)(b)
27 Ibid, S26(1)(c)
28 [1978] NZLJ 158
29 S5(1) of the 1972 Act is the statutory predecessor of S27(1) of the 1982 Act
30 Idem

31 [1979] NZLJ 8

32 Unreported Wellington Registry A 454/76, 28 July 1977

33 Unreported Wellington Registry A 519/76, 3 October 1977

34 Above n32

35 Unreported Palmerston North Registry A 132/75, 22 December 1977

36 Unreported Auckland Registry A 1064/77, 2 May 1979

37 [1982] 1 NZLR 97

38 For discussion of these contra-arguments see "Punishing the Words of Section 5(1), The Other School of Thought Replies" R D McInnes [1979] NZLJ 8

39 Above n37, 106

40 Now section 28 of the Criminal Justice Act 1985

41 Above n37, 116

42 Above n37, 106

43 See page 6 of this paper for a definition of the categories

44 [1982] 1 NZLR 81

45 [1969] 1 AC 590

46 Unreported CA 182/85, 2 October 1986

47 Ibid, 12 per Cooke P