CHARLOTTE ANN CUNNINGHAME

EXEMPLARY DAMAGES AND SECTION 5(1): DONSELAAR v. DONSELAAR

Submitted for the LL.B (Honours) Degree

at the Victoria University of Wellington

1 September, 1982

CHARLOTTE ANN CUNNINGHAME

EXAMPLARY DAMAGES AND SECTION 5(1): DONSELAAR v. DONSELAAR

Submitted for the LL.B. (Honours) Degree
at the Victoria University of Wellington

1 September, 1982

TABLE OF CONTENTS

+ + + + + + +

1. INTRODUCTION

The Court of Appeal in the recent case of Donselaar v. Donselaar[1] settled an issue which had been the subject of some debate when it held that actions for exemplary damages could still be brought in New Zealand following an assault or battery, notwithstanding the provisions of the Accident Compensation Act 1972.

This decision has clearly determined that exemplary damages do not fall within the scope of s.5(1) of the Accident Compensation Act 1972 and is of further significance in that it provides some rationale for the way in which s.5(1) will be interpreted in other contexts.

It is also of interest in that it deals with an anomalous head of damages which has been viewed with a certain amount of distrust in the past.

It is proposed therefore to look firstly at the New Zealand position on exemplary damages and then to see how the Court of Appeal in this case deals with the question of whether such damages can be awarded without the traditional foundation of an award of compensatory damages. Following this the practical problems of calculation of exemplary damages will be adverted to.

Next the statutory provision will be focussed on to see how it has been interpreted with respect to the question of the availability of exemplary damages. This will involve a consideration of the approach taken by earlier cases on the subject and a discussion of the response of the three judges of the Court of Appeal.

Finally it is proposed to look at the wider implications of the judges' interpretation of s.5(1) and to discuss what proceedings might be still available to a plaintiff at Common Law.

2. SECTION 5(1) AND EXEMPLARY DAMAGES

(a) Introduction

The Court of Appeal decision of Donselaar v. Donselaar is important in that it provides an authoritative interpretation of s.5(1) in the context of exemplary damages.

It is also of interest in that in reaching their decision the Court of Appeal made some valuable statements about the remedy of exemplary damages. A limited mention of these damages would be necessary in any event in order to understand the judges' reasoning in the case, but as this is an area of the law which has only been recently settled in New Zealand by this case and the contemporaneous judgment delivered in Taylor v. Beere[2], it is proposed to deal with the New Zealand position on exemplary damages in some depth. Following this the approach to s.5(1) taken by the Courts in relation to the question of the award of exemplary damages will be discussed.

(b) Nature and Scope of Exemplary Damages

Exemplary damages differ from both compensatory and aggravated damages and constitute an anomaly in the law. As Lord Devlin states in Rookes v. Barnard[3], "the object of damages in the usual sense is to compensate. The object of exemplary damages is to punish and deter." [4]

Whereas compensatory damages are awarded as compensation to the victim for the harm suffered by him, and aggravated damages represent extra compensation for injury to the plaintiff's feelings caused by the way the defendant acted, exemplary damages are quite different in focus and are concerned solely with the punishment of the defendant for his outrageous conduct.

Because they involve what is apparently a criminal function (namely punishment of the wrongdoer) exemplary damages have not met with whole-hearted approval. Thus the law in England as contained in the decisions of Rookes v. Barnard[5] and Broome v. Cassell & Co. Ltd[6] shows that exemplary damages are only accepted with certain narrowly defined categories. However the New Zealand stand on exemplary damages as contained in Taylor v. Beere[7] reflects a much more liberal position.

The Court of Appeal in Taylor v. Beere canvassed the policy arguments against exemplary damages. These are, in summary form[8], that the law of torts and the criminal law should be kept separate, and only the latter should deal with punishment; that the intrusion of a criminal element into the civil law deprives the defendant of the safeguard of the criminal procedure; that the award of exemplary damages unjustly enriches the plaintiff.[9] However the Court countered

these arguments by explaining inter alia that there is no historical or policy basis for saying that damages are to be purely compensatory and that the roots of tort and criminal law are intermingled.[10]

The judges consider there is a felt need for this kind of civil remedy and that the award of exemplary damages is in the public interest in that it " make[s]an example of the person responsible thereby demonstrating society's disapproval of his behaviour and deterring others in future."[11]

In line with the view that exemplary damages have a valuable role to play in the law enforcement of the country, the New Zealand Court of Appeal has ruled in Taylor v. Beere that such damages are to be available in a wider range of situations than is possible at English law.

The House of Lords in Rookes v. Barnard restricted the circumstances in which exemplary damages could be awarded to three narrowly defined categories. These are, to adapt the words of Lord Devlin,[12] where there has been oppressive,arbitrary conduct by government servants; where the defendant's conduct has been actuated by the profit motive; where there is statutory authority for the award of exemplary damages.

The judges in Taylor v. Beere however, adopting the approach authorised by the Privy Council in Australian Consolidated Press v. Uren[13], held that as the award of exemplary damages was an area of social policy, it was up to the New Zealand Courts to decide what New Zealand's policy should be.

Two reasons were given for not adopting a narrow English approach. The first was that to confine exemplary damages was to "restrict the general principle that tort does not pay",[14] the second was that the limitations established by Rookes v. Barnard were arbitrary.[15]

The result of Taylor v. Beere is to establish that exemplary damages in New Zealand are not limited to any specified narrow category. Rather the types of circumstances where exemplary damages may be awarded are those where the defendant has engaged in outrageous and reprehensive conduct, oppressive behaviour, or has acted wantonly

with "contumelious disregard... of the plaintiff's rights."[16]

Note that exemplary damages are still somewhat limited in scope. Thus in Donselaar v. Donselaar[17] where the facts were that in the context of an ongoing dispute one brother assaulted the other, a claim for exemplary damages was not allowed. One reason for this was that the plaintiff's claim for damages for indignity, disgrace and humiliation showed he was in fact claiming aggravated damages. More importantly though, the history of wrangling and the fact that there was provocation involved in the assault meant the defendant's act did not fall within the category of 'oppressive conduct' necessary before an award of exemplary damages could be considered.

Having discussed what the New Zealand Court of Appeal considers the nature and scope of exemplary damages to be, one may now look to another point concerning exemplary damages on which the Court has recently given a ruling:

(c) Can Exemplary Damages be Awarded on their Own?

This point arose in the context of the Accident Compensation Act 1972, the argument being that if exemplary damages required the foundation of an award of compensatory damages, then as the latter were expressly barred by the words of s.5(1) (set out below) it must inevitably follow that exemplary damages would also be barred.[18]

Certainly if one takes at face value the words of Lord Devlin in Rookes v. Barnard regarding the assessment of exemplary damages, it would appear that exemplary damages are inextricably linked to compensatory damages. Lord Devlin states that where exemplary damages are appropriate,[19]

> a jury should be directed that if, but only if, the sum which they have in mind to award as compensation... is inadequate to punish him for his outrageous conduct... then it can award some larger sum.

However the Court of Appeal in Donselaar v. Donselaar[20] unanimously determined that exemplary damages could stand on their own.

This decision was reached on the basis of existing case law, American authorities and policy factors but it is submitted that it was the latter which had the most decisive role to play in the judges' determination. It is suggested that a belief in the merits of exemplary damages meant that once the judges found no authority specifically requiring the award of compensatory damages, they were quite prepared, in the name of the public interest, to decide that exemplary damages could stand alone.

The judges distinguish Rookes v. Barnard on the grounds that in that case a foundation of compensatory damages existed, thus the House of Lords was not called upon to consider whether exemplary damages could be awarded in isolation. Richardson J. also refers to the trilogy of English cases decided in the 1760 s[21] relating to exemplary damages and which were discussed in Rookes v. Barnard. He points out that in these cases a single lump sum was awarded and that it was the defendants' high-handed conduct and abuse of power which the judges were concerned with in granting/upholding the award. From the judges' absence of comment on a compensatory award he deduces that they do not consider this a significant factor in a decision to award exemplary damages.

Richardson J. and Cooke J. both refer to the American case law on the matter and Richardson J. develops this point in order to show how exemplary damages can stand alone under the Accident Compensation Act 1972. Adopting an American view that nominal damages are a sufficient base for the award of exemplary damages, he explains that s.5(1) does not preclude recognition of the existence of nominal damage but only bars proceedings for recovery. Alternatively he argues along the lines of another American viewpoint that provided one can prove compensatory damage has been suffered, an award of such damages is not necessary for exemplary damages.[22] He points out that under s.5(1) the plaintiff is not barred from proving he suffered compensable loss, he is merely precluded from recovering such damages.

These arguments, while rather ingenious, can undoubtedly be supported in terms of strict logic.

However it is on the wider grounds of policy that all three judges agree that an award of exemplary damages should be able to stand on its own: Richardson J. sees no reason in principle why a plaintiff should not select the particular remedy he wishes to pursue. Cooke J. concedes that an award of exemplary damages unaccompanied by even nominal damages might look "something of an oddity"[23] but regards this as of no great moment when balanced against the fact that exemplary damages are an effective sanction and deterrent against the oppressive use of power. He focusses on the more turbulent nature of society today and argues that this shows that this is no time to withhold "remedies for high-handed or illegal conduct, public or private, if it is reasonably possible to provide them....[A] useful weapon in the legal armoury should not be sacrificed without compelling reason."[24]

Somers J. sees that the difficulty with allowing exemplary damages to stand on their own is that this would be to alter their nature[25] somewhat and would mean a different system of assessment from that laid down in Rookes v. Barnard would be necessary. However he too concludes that the policy factors in favour of exemplary damages outweigh these problems, "[T]he fact that no other sanction in the form of compensatory damages exists affords no sufficient reason to dispense with an objective which is still capable of serving a useful social purpose."[26]

Thus all three judges are prepared to declare that exemplary damages can be awarded without the foundation of an award of compensatory damages. This disposes of what would otherwise have been an insuperable obstacle to the recovery of exemplary damages under the Accident Compensation Act 1972 and is of general significance in that it illustrates the Court's positive attitude towards this anomolous head of damages.

(d) Practical Problem of Calculation

One final point, which arises out of the decision in Donselaar v. Donselaar that exemplary damages can stand on their own and on which the Court of Appeal offers a solution, is how exemplary damages are to be calculated in situations where there is no award of compensatory damages on which to base assessment.

Cooke J. does not see the calculation of exemplary damage simpliciter as posing any great problem, though he recognises that these damages will have to serve a somewhat different role in circumstances where there is no compensatory award to work from. He states,[27]

> [A]s benefits under the Act are in no sense punitive, exemplary damages will have to do not only the work assigned to them by Broome v. Cassell[28] but also some of the work previously done by the other heads of damages.

It is submitted that Cooke J. is not suggesting that exemplary damages in some way take over part of the compensatory aspect of an award of compensatory damages. Rather he is adverting to the idea that an action for assault and battery automatically contains a censuring element towards the conduct concerned. Whereas this was previously included in an award of compensatory damages it will now have to be contained in the award of exemplary damages.

Cooke J. counters the argument about the plaintiff receiving a windfall by pointing out that the courts will be very wary of giving exemplary damages and simply because of a belief that compensation under a statute is insufficient[29] and that in any event not many cases will be suitable ones for the award of exemplary damages.[30] His final point is that if unmeritorious claims do succeed then it is up to Parliament to abolish exemplary damages in certain classes of case, a point also made by Somers J.[31]

Richardson J.'s proposal for the calculation of exemplary damages is simply to tell the jury they must exclude anything by way of compensation when they determine the amount of exemplary damages.

However it is Somers J.'s proposal which is the most practical one. He realises the old form of calculation of exemplary damages is no longer appropriate because it would mean the jury would have to return to pre-Accident Compensation Act procedures. In place of this unreal mode of assessment Somers J. suggests an approach quite divorced from any discussion of compensatory damages, namely to consider whether the circumstances as a whole merit punishment, and

and if they do, to award a sum that will achieve this end. As he points out, the means of the parties will be material in this respect,[32] a consideration which is irrelevant with regard to compensatory damages.

This approach is grounded in common sense and is both practical and uncomplicated and should therefore provide a good working base from which to calculate in any given case the amount of exemplary damages to be awarded to the victim of an assault or battery.

The above discussion of exemplary damages shows that the New Zealand Court of Appeal considers exemplary damages to have a valuable role to play in today's society in the punishment of high-handed conduct. Moreover their decision that exemplary damages can stand alone, together with their proposal of a practical way to calculate these damages, indicate their positive attitude to exemplary damages and their desire not to limit them unnecessarily.

In the light of the Court's attitude to exemplary damages, one can understand why the judges in Donselaar v. Donselaar favoured the idea that exemplary damages be available where the plaintiff had suffered personal injury and was covered by the Accident Compensation Act 1972.

However policy reasons alone do not justify such an interpretation if the clear words of the Act show a different approach must be taken. Thus the various interpretations of s.5(1) in the context of the availability of exemplary damages will now be discussed in order to see how it was that s.5(1) was ultimately interpreted in such a way as to allow proceedings for exemplary damages.

(e) Interpretation of s.5(1) as regards Survival of Exemplary Damages

(i) History of the Legislation and Aims and Purposes of the Accident Compensation Act 1972

Before entering into a discussion of s.5(1) of the Accident Compensation Act 1972 in relation to exemplary damages, and of the wider implications of the decision in Donselaar v. Donselaar, it is useful to place the subsection in its statutory

setting and to see what the Act as a whole aimed to achieve.

The Accident Compensation Act 1972 was passed as the result of the recommendations contained in The Report of the Royal Commission of Inquiry, Compensation for Personal Injury in New Zealand (1967).[33]

The Commission examined the existing methods of compensation for accidents at Common Law and determined that the fault principle and the costly Common Law trial process which was fraught with inconsistencies and was an impediment to rehabilitation, should be abolished. In its place a scheme was proposed which would achieve a more equitable system of compensation, overcome the delays in receiving compensation and encourage the complete rehabilitation of the victim of the personal injury.

These aims are clearly reflected in both the Long Title and s.4 of the Accident Compensation Act 1972 wherein the legislature's intention is expressly stated to be the promotion of safety and the rehabilitation of people who suffer personal injury by accident, together with the compensation of such people and certain of their dependents. The Long Title further states that the Act is to make provision for "the abolition as far as practicable of actions for damages arising directly or indirectly out of personal injury by accident....".

The fact that the policy of the Act is one of compensation for personal injury and rehabilitation of victim indicates that areas falling outside these themes will not be afffected by the Act.

As will be seen below, this policy argument is used to show the limitation of s.5(1) and is an important consideration in the decision that exemplary damages fall outside s.5(1).

(ii) Section 5(1)

Against the background of the general aims of the Act the particular provision which is the subject of discussion may be set out.

Section 5(1), the critical parts of which are italicised, provides as follows:

> Subject to the provisions of this section, where any person suffers personal injury by accident in New Zealand or dies as a result of personal injury so suffered, or where any person suffers outside New Zealand personal injury by accident in respect of which he has cover under this Act or dies as a result of personal injury so suffered, no proceedings for damages arising directly or indirectly out of the injury or death[34] shall be brought in any Court in New Zealand independently of this Act, whether by that person or any other person, and whether under any rule of law or any enactment.

The provision is obviously intended to bar certain proceedings for damages but its precise ambit is not immediately clear. However by looking at the way Donselaar v. Donselaar has interpreted s.5(1) in relation to the question of an award of exemplary damages, one can see that the scope of s.5(1) is somewhat limited and does not bar all proceedings at common law where a personal injury has been sustained.

(iii) Position before Donselaar v. Donselaar

The issue of whether exemplary damages are recoverable where a plaintiff has suffered "personal injury by accident" was dealt with in several cases[35] before Donselaar v. Donselaar, all but one of which decided exemplary damages were not available under s.5(1).

In the High Court decision of Donselaar v. Donselaar[36] Quilliam J. dismissed the claim for exemplary damages on the ground that the foundation for the right to claim exemplary damages was an assault and battery, that is a personal injury by accident. Because of

this, proceedings for exemplary damages arose at least indirectly out of the injury and thus were barred by s.5(1).

This argument was later adopted in Koolman v. Attorney-General[37] and Betteridge v. McKenzie & Others.[38]

A policy argument for the exclusion of exemplary damages made by Quilliam J. in Donselaar v. Donselaar and adverted to in Betteridge v. McKenzie & Others is that the means of punishing assaults is maintained by prosecution and, though he does not refer to it by name, by s.45A of the Criminal Justice Act 1954. However, as will be seen below, s.45A may be interpreted to indicate a presumption that exemplary damages are recoverable under the Accident Compensation Act 1972.

McMullin J. in Stowers v. Auckland City Council[39] canvassed the arguments relating to the issue of the recoverability of exemplary damages under the terms of s.5(1) in some detail but concluded that, despite the compensatory thrust of the Act, s.5(1) clearly barred exemplary damages. His reasoning is, in summary form, that while exemplary damages aim at punishing the defendant they cannot be awarded in vacuo - a victim is necessary. As the plaintiff cannot recover exemplary damages unless he is the victim of punishable behaviour, it follows that if his claim for exemplary damages arises because he has suffered personal injury at the hands of the defendant, proceedings for exemplary damages must arise directly or indirectly from the injury.[40]

While the argument that exemplary damages need a victim is a valid one, it does not necessarily follow that the exemplary damages arise out of the injury suffered by the victim. As will be shown below, it is possible to argue that the act and the injury are quite separate and that the exemplary damages arise out of the act alone.

The words "directly or indirectly" have also been interpreted to show exemplary damages are barred by s.5(1). Thus A.A.P. Willy's[41] interpretation is that these words show,[42]

> the Act is to be the sole source of compensation for personal injury... and that injured persons are now prevented from bringing any proceedings to recover losses suffered as a consequence of the accident but for which the Act provides no compensation.

He regards exemplary damages as coming within this interpretation but it is submitted that these words can be true and yet not exclude exemplary damages: One can interpret them as referring rather to the situation where the accident victim has potential earnings losses not covered under the Act.

The one High Court case in which it was decided that exemplary damages could be awarded consistently with the Act was Howse v. Attorney-General[43]. O'Regan J. held that punitive damages, unlike compensatory damages, arise from acts done contrary to the law and not from the harm to the plaintiff caused by such acts.

His argument is that the definition of injury describes harm flowing from an act as distinct from an act itself.[44] Thus as it is the act contrary to law which is punished, exemplary damages do not arise out of the injury and a claim is maintainable (emphasis mine). A similar approach is adopted by Richardson J. in Donselaar v. Donselaar and it is to this case that discussion will now turn.

(iv) Donselaar v. Donselaar[45]

In Donselaar v. Donselaar the Court of Appeal reversed the trend of earlier cases and settled the law by holding that s.5(i) could validly be interpreted so as to exclude exemplary damages from its ambit. The way in which the three judges reach this decision will now be examined:

Cooke J.'s judgment is based almost entirely on policy considerations. He argues that to allow exemplary damages would not be to go against the compensatory aims of the Act as set out in the Long Title and s.2 and adverts to the fact that the Woodhouse Report did not

concern itself in any way with the question of exemplary damages.

He also gains indirect support for the notion that Parliament did not intend to abolish exemplary damages under the Act by taking up the oblique reference to s.45 A of the Criminal Justice Act 1954 made by Quilliam J. in the High Court decision[46] of Donselaar v. Donselaar[47]. This section, which was enacted in 1975 and which provides for payment of compensation to the victim of an assault of up to one half of the fine imposed on the offender, states that the award shall not affect the person's right to receive compensation under the Accident Compensation Act 1972 and to recover by civil proceedings damages in excess of the award. Cooke J. deduces that this creates a legislative assumption that exemplary damages may be recovered where personal injury has been sustained.

He then states his view that it would be in the public interest to develop the remedy of exemplary damages. In view of the turbulent nature of society he feels one should uphold remedies which are an effective sanction against "irresponsible, malicious or oppressive use of power."[48]

While these general considerations in favour of allowing exemplary damages under the Act are valid ones, arguably they do not go to the root of the problem which must be the words of the Act itself.

Admittedly Cooke J. does not ignore the wording of s.5(1) but what is respectfully questioned is the brevity with which he deals with this point. He recognizes the argument against exemplary damages as being a strong one but decides that, as two different semantic interpretations are possible, "the point is ...not...decisive if one thinks...Parliament did not have the problem of exemplary damages in mind."[49]

Though he does not expressly refer to it, what Cooke J. does is to adopt the approach authorized by s.5(j) of the Acts Interpretation Act 1924 and construe the Act according to the general intention of Parliament.

It is interesting to note that McMullin J. in Stowers v. Auckland City Council[50] would have liked to have adopted a similar approach but felt the general policy of the Act could not overcome "the plain and very embracing words of s.5(1)."[51]

It is submitted that in view of this, Cooke J. might have given more detailed reasons why he felt the Act was ambiguous, that is, he might have put forth with some conviction the alternative statutory interpretation before deciding the issue on wide policy grounds.

In contrast to Cooke J.'s broad approach, Richardson J's approach is more analytical. His reasoning is that s.5(1) does not abolish causes of action and only bars suits for damages where these arise directly or indirectly out of an injury. He contrasts s.5(1) with s.5(2), which expressly abolishes causes of action, to show the focus of s.5(1) is on remedies alone.[52]

Next he reasons that while the battery, the cause of action, arises from the injury, the exemplary damages do not. This is because when determining liability for exemplary damages one looks at the defendant's conduct[53] (that is at the 'act') and not at "whether the plaintiff has suffered a particular type of harm"[54] (that is not at the 'injury').

Having established that the focus of s.5(1) is on personal injury and that exemplary damages arise out of the act and do "not...arise even indirectly out of personal injury",[55] he mentions some policy arguments in favour of exemplary damages under the Act. One is the legislative assumption created by s.45 A of the Criminal Justice Act 1954, the other is the anomaly it would create to bar the recovery of exemplary damages here, yet allow them in other cases of intentional torts where there had not been a physical injury.

It is interesting to note that McMullin J. in Stowers v. Auckland City Council[56] made the same point (at p.20) but felt unable to overcome the anomaly because of what he considered to be the clear meaning of the Act.

It is submitted that Richardson J.'s approach, grounded as it is in a cogent and lucid argument of the focus of s.5(1) and of the basis on which actions for exemplary damages lie, provides a compelling analysis of the way in which exemplary damages can stand consistently with the provisions of the Act.

Somers J.'s approach to the issue is similar to Richardson J.'s in that he looks closely at the words of the statute,but his analysis is slightly different for he focusses on the nature of the damages in s.5(1) rather than on the base out of which exemplary damages arise.

Looking at the general aims of the Accident Compensation Act 1972 he argues that in view of s.4, s.5 can be read as intended to bar proceedings to recover that which the Act provides,namely,compensation.

He also finds support for this conclusion in the specific words of the section: He explains that the word "injury" is referable to the defined words "personal injury by accident" which is "suffered". It would appear that what he is saying here is that the "physical and mental consequences of any...injury"[57] though only indirect, (as in inconsequential on an injury) are still things for which one will be compensated because of the injury. The focus of the Act is on compensation for the injury and its consequences and as one is compensated for these, s.5(1) is aimed at barring proceedings for recovery for this type of damage.

Somers J. also briefly refers to the words "directly or indirectly" but does not consider them to be of any great significance, regarding them as merely intended to cover incidentals such as funeral expenses which might otherwise be recoverable.

In view of the fact that judges in earlier cases held that exemplary damages were caught by the Act precisely because of these words, it is submitted that Somers J. could valuably have spent more time on this point.

Having determined that s.5(1) refers to compensatory (including aggravated compensatory) damages only, Somers J. also points out that an injury is not necessary for the award of exemplary damages, thus where there is an injury, any exemplary damages do not arise therefrom.

His third reason for allowing exemplary damages to stand under the Act is one based on policy. He regards the Act as ambiguous, therefore holds that as the remedy of exemplary damages is not inconsistent with the objects of the Act, it should be allowed to remain and any decision to change the law should be left to Parliament.

Thus all three judges in Donselaar v. Donselaar interpret s.5(1) in such a way as to allow exemplary damages. The judges in their approach show a concern with broader policy considerations insofar as they concentrate on the general aims of the Act and the social desirability of exemplary damages. However they also look to the particular words of the statute in reaching their decision and their examination of s.5(1) leads them to conclude that the subsection has a limited scope, referring only to compensatory damages and only to such compensatory damages as arise out of the personal injury suffered.

This interpretation settles the law relating to the possibility of a claim for exemplary damages where personal injury has been suffered, but is also of wider significance as will be shown below.

3. DONSELAAR v DONSELAAR IN RELATION TO OTHER SITUATIONS WHERE SECTION 5(1) FALLS TO BE INTERPRETED.

(a) Introduction

The dicta in Donselaar v. Donselaar relating to the interpretation of s.5(1) gives some valuable indications of how the Court might treat other actions for damages sought to be brought by the victims of personal injury. In this section there will be a discussion of how the dicta may be of assistance in determining both whether an action for false imprisonment or assault may be brought notwithstanding that this has been accompanied by a battery;

and whether it is possible to bring an action for compensatory damages for humiliation where personal injury has also been suffered.

(b) Can an Action for False Imprisonment or Assault be split off from an Action for Battery?

Where
/there has been a battery during a false imprisonment, or where there has been both assault and battery, the victim of the tortious conduct may well want to sue for compensatory and, if the circumstances allow for it, examplary damages.

It is clear since Donselaar v. Donselaar that the plaintiff may sue for exemplary damages in respect of the battery.

It is also clear that he cannot recover compensatory damages for the battery as this constitutes a "personal injury by accident" and falls squarely within the terms of s.5(1) of the Accident Compensation Act 1972.

As regards damages for false imprisonment or assault, the defendant would argue that the false imprisonment/assault could not be separated from the battery, thus proceedings for damages would arise directly or indirectly out of the injury and fall within the scope of s.5(1) too.

However it is submitted that an action for false imprisonment in such circumstances would not be barred by s.5(1) for the following reasons:

An action for false imprisonment does not protect the plaintiff's interest in keeping his body intact but protects his freedom of movement. Thus damages for false imprisonment do not arise "out of the injury" but out of the imprisonment, and as such as are not barred by s.5(1).

Authority for this view is found by making an analogy with the dicta of Richardson J.[58] in Donselaar v. Donselaar where he held that exemplary damages arose out of the act of the defendant, not

out of the "injury" suffered and as s.5(1) only abolished proceedings for damages arising out of an "injury", the plaintiff's right to sue at common law was retained.

Further support for allowing an action for compensatory (and exemplary damages) for false imprisonment is found in the judgment of Somers J.[59]. Allowing recovery of damages for false imprisonment would not be inconsistent with the object of the Act which is concerned with compensation for personal injury. Therefore the Court ought to allow the action and leave it to Parliament to abolish particular actions for damages if that is what is truly intended.

A plaintiff who wanted to sue for assault would adopt a similar approach based on the dicta of Richardson J. and Somers J., and say that the cause of action for assault was separate from the cause of action for battery, because an action for assault was designed to protect the plaintiff's interest in being able to walk about freely without fear of being subject to imminent offensive contact.[60]

The cogent argument against this would be that,unlike battery and false imprisonment,the torts of assault and battery are so closely connected in time,and the apprehension of the injury is so closely linked to the injury itself,that both assault and battery must be subsumed under the heading of "personal injury by accident".

However this argument can perhaps be countered by pointing out that if a person was assaulted and suffered no serious consequences he would not have suffered a "personal injury by accident" and could sue at Common Law, and that it would be strange if this assault should suddenly become a personal injury merely because it happened to be followed by a battery. It is submitted that Richardson J.'s dicta[61]. that there are no good policy reasons for allowing recovery of exemplary damages where there has been no personal injury yet barring exemplary damages where there has been such injury, shows that he might be prepared to interpret s.5(1) in such a way as to prevent an anomalous situation occurring in this instance too.

In sum it is suggested that the dicta in Donselaar v. Donselaar regarding s.5(1) allows an action for false imprisonment or assault to be separated from the non-actionable battery and gives the plaintiff the right to sue for compensatory damages.

(c) Can one sue for Compensatory Damages for Upset and Humiliation?

This possibility is adverted to in an article by Margaret Vennell.[62] She makes the point that the fact that substantial damages may be recovered for an assault without physical injury shows there is a difference between damages awarded for personal injury and those awarded for injury to dignity and feelings.

Adopting this approach one can argue that where an assault is accompanied by a personal injury, one should be able to sue for compensatory damages for humiliation, even though the head of compensatory damages for personal injury is barred by s.5(1).

The argument is that one is suing not in respect of the personal injury but in respect of something quite different, namely, humiliation.[63] The dicta of Somers J.[64] indicates that while the Accident Compensation Act 1972 bars proceedings for compensatory damages, it is only directed to such compensatory damages as arise out of an "injury". As these compensatory damages arise out of upset and humiliation arguably they are not barred by the Act.

Support for pursuing this head of damages in isolation may be taken from Richardson J.'s observance in Donselaar v. Donselaar that there is no reason in principle why a plaintiff should not be "entitled to ...pursue a" particular remedy notwithstanding that another remedy is not available, at least where the two remedies serve quite different purposes."[65]

Opponents of the above approach could also use this dicta of Richardson J.s and argue that the two remedies do not serve different purposes since both provide conpensation to the plaintiff and cannot be separated, and that the element of humiliation gives rise only to a claim for aggravated compensatory damages which is barred by s.5(1).

A further possible contention is that proceedings for upset suffered arise "directly or indirectly out of the injury" in that any physical harm and humiliation both arise out of one damaging event. Thus if the plaintiff is knocked unconscious in front of his friends by a young boy and sues for compensation for humiliation, the humiliation arises, at least indirectly, out of the injury.

The Court of Appeal in Donselaar v. Donselaar do not regard the words "directly or indirectly" as being of any crucial significance. This approach is justified in respect of a discussion of exemplary damages because as the words "directly or indirectly" relate to the injury and it is established that exemplary damages do not arise out of any injury, their meaning is not of any direct relevance to the judges. However in this situation it is possible to see the humiliation as arising out of the injury. Thus one could construe the words "directly or indirectly" as meaning an action could not be brought for compensatory damages for humiliation even when the humiliation was only remotely linked to the injury.

Two views are open on the issue of whether a person would be allowed to bring an action solely for compensation for humiliation and upset, but the fact that the Court of Appeal has been willing to allow the head of exemplary damages to stand alone might be taken as an indication that they would be willing to decide the same way in respect of damages for humiliation.

All in all it is submitted that the general statements made by the Court of Appeal in Donselaar v. Donselaar in relation to s.5(1) indicate that the scope of this provision is more limited than might have originally been thought and that the subsection will still allow for a number of actions at Common Law provided these are not inconsistent with the aims of the Act.

The Act bars only proceedings for damages which have arisen directly or indirectly out of an injury. Thus if one can show the damages arise not out of the injury but from something else (such as a desire to protect one's freedom to walk about without fear of battery), or that they are concerned with something different from compensation for personal injury (such as compensation for

humiliation), then it would appear proceedings for such damages may be brought notwithstanding the words of s.5(1).

4. CONCLUSION

Donselaar v. Donselaar contains several points of general interest. The case, in conjunction with Taylor v. Beere, firmly establishes the acceptance of exemplary damages in New Zealand as a valuable remedy.

It also shows the willingness of the Court of Appeal to consider issues on the basis of broad policy considerations and to mould the law according to the felt needs of today's society.

More specifically, Donselaar v. Donselaar establishes that the scope of s.5(1) of the Accident Compensation Act 1972 does not extent to bar proceedings for exemplary damages where personal injury has been suffered. This limitation on the scope of s.5(1) paves the way for a number of other proceedings for damages to be brought where personal injury has been sustained.

The Courts will have to be wary of undermining the function and purpose of the Accident Compensation Act when granting awards and will have to give careful consideration to whether the particular damages arise "out of the injury". However, providing the claim for damages does not come within the scope of s.5(1) as limited by the dicta of the judges in Donselaar v. Donselaar, a victim of personal injury should be able to recover damages at Common Law in addition to receiving compensation under the Accident Compensation Act 1972.

FOOTNOTES

1. Wellington, CA 145/77, 19 March 1982.

2. Wellington, CA 38/80, 19 March 1982.

3. [1964] AC 1129.

4. Ibid, 1121.

5. Supra, n.3.

6. [1972] AC 1027.

7. Wellington, CA 38/80, 19 March 1982. Taylor v. Beere concerned an action for defamation in which exemplary damages were sought following the publication of a photograph of a woman with her grand-daughter in a book about sex. The Court held Mrs Beere was entitled to exemplary damages.

8. For a more detailed discussion on this point see Street, Principles of the Law of Damages, London, Sweet and Maxwell, 1962.

9. This enrichment is not really so unjust, for as Lord Devlin points out in Rookes v. Barnard [1964] AC 1129, 1127, the plaintiff who gains this sum has been the victim of oppressive conduct.

10. For example criminal provisions such as S.45A of the Criminal Justice Act 1954 provide for compensation of the victim, and conversely it is to tort law not criminal law that one must look to find suitable punishments for high-handed defamatory conduct.

11. Taylor v. Beere, Wellington, CA 38/80, 19 March 1982 per Richardson J., 8.

12. [1964] AC 1129, 1226.

13. [1969] 1 AC 590.

14. Taylor v. Beere, Wellington, CA 38/80, 19 March 1982, per Richardson J.8.

15. As Richardson J. points out, p.13, it seems very unsatisfactory to single out one category of persons alone (government servants) or to single out just the profit motive for punishment.

16. Taylor v. Beere, Wellington, CA 38/80, 19 March 1982 per Richardson J.9. Note statements to a similar effect are made in Donselaar v. Donselaar, Wellington, CA 145/77, 19 March 1982.

17. Wellington, CA 145/77, 19 March 1982.

18. This was the line of thought taken by Pritchard J. in Lucas v Auckland Regional Authority, Auckland, A.1003/79, 24 March 1980, thought note he does not give any reasons for his view and his statement is only obiter because this was not a case in which there was any physical injury alleged.

19. [1964] AC 1129, 1228.

20. Supra, n.1.

21. Wilkes v. Wood (1760) 3 Lofft 1; 98 ER 489.
Huckle v. Money (1763) 2 WUs. KB 205; 95 ER 768.
Benson v. Frederick (1766) 3 Burr 1845; 97 ER 1130.

22. Richardson J. cites Fort Worth Elevators Co v Russell (1934) 70 SW 2d 397 as an example of a case reflecting this viewpoint. Another, more recent example is Nales v State Farm Mutual Automobile Insurance Co, 398 50. 2d 455 (Fla. App. 1981). There it was held that where a plaintiff suffers injury as a result of a car accident and is denied an award of compensatory damages only because of the defendants' immunity under the no-fault legislation, exemplary damages are recoverable.

23. Donselaar v. Donselaar, Wellington, CA 145/77, 19 March 1982, 9.

24. Ibid, 22.

25. This is substantially the same point as is made by Cooke J. and which will be discussed below in Part 2(d).

26. Supra, n. 23, 13.

27. Donselaar v. Donselaar, Wellington, CA 145/77, 19 March 1982, 25.

28. [1972] AC 1027.

29. Cf. Richardson J.'s statement in Taylor v. Beere, Wellington, CA 38/80, 19 March 1982, 14 that judges can be trusted to award the appropriate amount of damages or to direct the jury appropriately.

30. As mentioned in part 2(b) Donselaar v. Donselaar was itself not a suitable case for the award of exemplary damages.

31. Donselaar v. Donselaar, Wellington, CA 145/77, 19 March 1982, 8.

32. Benson v. Frederick(1766) 3 Burr. 1845 is authority for the proposition that the means of the parties may be taken into consideration when assessing exemplary damages.

33. Hereafter referred to as the Woodhouse Report after Woodhouse J. who chaired the Royal Commission of Inquiry.

34. This article focusses only on a discussion of "personal injury" in relation to the interpretation of S.5(1) thus no further reference to the term "death" will be made.

35. Donselaar v. Donselaar, Wellington, A 454/76, 28 July 1977.
Koolman v. Attorney-General, Wellington, A.519/76, 3 October 1977.
Betteridge v. McKenzie & Others, Wellington, A.103/77, 7 December 1978.
Stowers v. Auckland City Council, Auckland, A.1064/77, 2 May 1979.
The only case to decide in favour of exemplary damages was Howse v. Attorney-General, Wellington, A.519/76, 3 October 1977.

36. Wellington, A.454/76, 28 July 1977.

37. Wellington, A.519/76, 3 October 1977.

38. Wellington, A.103/77, 7 December 1978.

39. Auckland, A.1064/77, 2 May 1979.

40. This approach gives judicial approval to the same point made by R.D. McInness in his article, "Punishing the Words of S.5(1) the Other School of Thought Replies", (1978) N.Z.L.J.8.

41. A.A.P. Willy, "The Accident Compensation Act and Recovery for Losses arising from Personal Injury and Death by Accident", 6 N.Z.U.L.R. 250.

42. Ibid, 252

43. Supra, n.37.

44. See his reasoning, Wellington, A.519/76, 3 October 1977, 13.

45. Supra, n.1.

46. Cooke J. and Somers J. cite the earlier High Court cases but give no indication of their relative strengths and weaknesses. Naturally as judges of the Court of Appeal they are not bound in any way to do so, but one might have expected them to indicate they approved of the judgement in Howse v. Attorney-General, Wellington, A.519/76, 3 October 1977 which also approved of the award of exemplary damages.

47. Supra, n.36.

48. Supra, n.1, 23.

49. Supra n.7, 21.

50. Supra n.39.

51. Supra, n.39,16.

52. Cf, D.B. Collins, "Proceedings for Punitive Damages in the Regime of Accident Compensation", (1978) N.Z.L.J. 158, 164.

53. See the discussion on Nature and Scope of Damages, Part 2(b) supra.

54. Donselaar v. Donselaar, Wellington, CA 145/77, 5.

55. Ibid, 6.

56. Supra n.39.

57. Accident Compensation Act 1972, S.2.

58. Donselaar v. Donselaar, Wellington, CA 145/77, 5-6.

59. Ibid, 10-11.

60. Again this is making an analogy with Richardson J's point that exemplary damages arise out of the act not the injury.

61. Supra n. 58, 6.

62. "The Scope of National No-Fault Accident Compensation in Australia and New Zealand", 49 A.L.J. 22, 24.

63. Again this is applying Richardson J.'s dicta regarding the scope of S.5(1).

64. Donselaar v. Donselaar, Wellington, CA 145/77, 10.

65. Ibid, 7.

1 Folder Cu

CUNNINGHAM, C.A. Exemplary damages

1 Folder Cu	CUNNINGHAM, C.A. Exemplary damages and section 5(1)...
Due	Borrower's Name