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Exemplary Damages and Vicarious Liability
Judge McGill SC

In this paper I want to say something about two areas of law which are not often contentious in practice, but which can be sometimes for various reasons. I shall address the two areas separately, and then at the conclusion mention the overlap of them.

Exemplary Damages

The basic principle of damages is one of compensation or restitution; that is to say, the plaintiff is to be put in the same position as if the wrong, whether it is a tort or breach of contract or whatever, had not occurred. No doubt, in cases where the harm suffered by the plaintiff was significant, an award of damages may well be a severe detriment to the defendant, depending on who the defendant is and whether or not the defendant has insurance covering the loss. The exception, however, is that it is well recognised that in some circumstances a court may award what are described as exemplary damages (sometimes described as punitive damages[1]) where the function of the award is expressly to punish the defendant for the conduct the subject of the proceeding.

It appears that the term exemplary damages was first applied to this sort of award in the latter part of the 18th century.[2] This occurred in the context of litigation arising out of the attempts by the government to suppress the writings of John Wilkes which were being published in the newspaper "North Britain".[3] A secretary of state had issued a warrant, pursuant to which a king's messenger had taken into custody an employed printer for a short time. The warrant was subsequently held to be illegal, so that the imprisonment was unlawful and actionable, and the printer sued in the case of *Huckle v Money* (1763) 2 Wils KB 205, 95 ER 768. A jury awarded £300 damages, which was a lot of money in those days.[4] A motion for a new trial on the ground of excessive damages was rejected, for various reasons.

The Lord Chief Justice began his judgment by asserting essentially that it was not possible in a case in tort for the court to interfere with an award of damages assessed by a jury because "the law has not laid down what shall be the measure of damages in actions of tort." It since has. He went on to say that in various cases of tort "the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be and generally are considered by a jury in giving damages." That also does not reflect the modern law, at least in relation to compensatory damages. However, he went on to wax lyrical about the infamy of the defendant's conduct, or rather the conduct of the government, as it may have appeared to the jury:

> "They saw a magistrate over all the king's subjects exercising arbitrary power, violating Magna Carta, and attempting to destroy the liberty of the

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1 In *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1124, per Lord Diplock, for example.

2 The authorities indicate that it was the term rather than the practice of awarding such damages which arose then: *Uren v John Fairfax & Sons Pty Ltd* (1996) 117 CLR 118 at p 152.

3 I will not go into the details, but Wilkes was a writer who was very critical of the government of the day, evidently something less common in those days, and the government used various legal and illegal means to attempt to suppress him.

4 The wage of the plaintiff was 1 Guinea per week.

> kingdom by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Carta, which is pointed against arbitrary power, was violated."

It may I think be generally observed that propositions derived in the heat of the moment in order to deal with notorious cases which excite strong emotions in a judge's heart are unlikely to be based on a careful consideration of legal principle.[5] Notwithstanding this inauspicious beginning, however, the term exemplary damages caught on, and became a feature of at least certain causes of actions in tort.[6] In England the House of Lords in *Rookes v Barnard* [1964] AC 1129 attempted to rein in awards of exemplary damages by confining them to four particular categories of case. It is unnecessary to discuss the details of this because it was not followed in Australia in *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118. The High Court judges made a careful analysis of the earlier authorities and essentially declined to follow *Rookes v Barnard* because it amounted to a change in the law. It may be that the intention of the House of Lords was to change the law, but in the 1960s the High Court was less enthusiastic about changing the law than it has since become, and that was regarded as a good reason not to follow it.[7]

It is important to distinguish between exemplary damages and aggravated damages. In *Gray v Motor Accident Commission* (1988) 196 CLR 1, the High Court at [6] quoted with approval the statement of Windeyer J in *Uren (supra)* at 149 that:

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

Aggravated damages are therefore essentially compensatory in nature, whereas exemplary damages are not intended to be compensatory, but punitive. This distinction is a matter of some importance in circumstances where there has been legislative intervention in relation to exemplary damages, but not aggravated damages.

The High Court has said[8] that there is no single formula which adequately describes the boundaries of the field in which exemplary damages may properly be awarded, but that at least the greater part of the field is covered by the phrase "conscious wrongdoing in

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5 There has been much principled objection to the availability of exemplary damages: Luntz, "Assessment of Damages for Personal Injury and Death" (4th Ed. 2002), pp 81-2.

6 The remedy was (at least traditionally) never found in cases for breach of contract: McGregor on Damages (15th ed., 1988) p 255. The discussion in *Gray v Motor Accident Commission* (1988) 196 CLR 1 at [13] does not clearly close off exemplary damages in contract, but the High Court otherwise spoke only of damages for tort.

7 The court was also critical of the formulation of the categories.

8 *Gray v Motor Accident Commission (supra)* at [14].

contumelious disregard of another's rights."[9] A claim for exemplary damages must be specifically pleaded; and contain particulars of the matters relied on in support of the claim: UCPR r 150(1)(b); 158(2).

It has been said that exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant.[10] That does not mean, however, that there will be no cases in which exemplary damages can be awarded in respect of an action for negligence, since it may be that in such a case the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff, or persons in the position of the plaintiff. The High Court in *Gray (supra)* gave as an example "cases of an employer's failure to provide a safe system of work for employees in which it is demonstrated that the employer, well knowing of an extreme danger thus created, persisted in employing the unsafe system might, perhaps, be of that latter kind."

Since *Uren*, there have been various other High Court decisions which have uniformly endorsed the general principle of awards of exemplary damages, even allowing them in *Lamb v Cotogno* (1987) 164 CLR 1 in a motor vehicle accident case in circumstances where the damages were to be met by a compulsory insurer. In this case, the High Court rejected the argument that exemplary damages were no use in circumstances where it was not the defendant personally who would have to pay them, so they would not punish the defendant, which was supposed to be the whole point of the exercise. The court in a joint judgment said at p 9:

> "The object, or at least the effect, of exemplary damages is not wholly punishment and the deterrence which is intended extends beyond the actual wrong-doer and the exact nature of his wrongdoing. It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self help likely to endanger the peace.[11] This consideration probably had more force when exemplary damages were in their infancy, but it nevertheless remains as an aspect of them. It should, perhaps, be interpolated that exemplary or punitive damages are not without their critics who assert generally that they are both anachronistic and anomalous. They nevertheless remain as part of the law. When exemplary damages are awarded in order that the defendant shall not profit from his wrongdoing or even where they are described as a windfall to the plaintiff – a description which a plaintiff is unlikely to accept – the element of appeasement, if not compensation, is nonetheless present.
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> So far as the object of deterrence is concerned, not only does it extend beyond the defendant himself to other like-minded persons, but it also extends generally to conduct of the same recompensable kind. Whilst an award of exemplary damages against a compulsorily insured motorist may have a limited deterrent effect upon him or upon other motorists also

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9 Quoting from *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 per Knox CJ.

10 *Gray (supra)* at [22].

11 Citing *Merest v Harvey* (1814) 5 Taunt 442, 128 ER 761, at 444: per Heath J: "It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages." Quoted by Windeyer J in *Uren (supra)* at p 153.

> compulsorily insured, the deterrent effect is undiminished for those minded to engage in conduct of a similar nature which does not involve the use of a motor vehicle. Moreover, while the smart or sting will obviously not be the same if the defendant does not have to pay an award of exemplary damages, it does serve to mark the court's condemnation of the defendant's behaviour and its effect is not entirely to be discounted by the existence of compulsory insurance."

Confronted by this sort of logic, the legislatures have responded. They did not abolish exemplary damages generally, but they restricted their applications and provided that the indemnity under compulsory insurance does not extend to any award for exemplary damages.

The prospect of insurers having to carry awards of exemplary damages in such circumstances, even in the relatively rare cases where they might be awarded, led during the era of tort reform to legislative restrictions in Queensland, first in the *Personal Injuries Proceedings Act* 2002 s 50, and subsequently the *Civil Liability Act* 2003 s 52. The latter provides:

> "(1) A court cannot award exemplary, punitive or aggravated damages in relation to a claim for personal injury damages.
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> (2) Subsection (1) does not apply to a claim for personal injury damages if the act that caused the personal injury was—
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> (a) an unlawful, intentional act done with the intent to cause personal injury; or
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> (b) an unlawful sexual assault or other unlawful sexual misconduct."

It follows that for a claim for exemplary damages (or for that matter aggravated damages) now to succeed in a personal injury action, it is necessary to come within one of the exceptions in subsection (2). This has the effect of overruling the approach in *Lamb v Cotogno* that the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour falling short of being malicious: p 13.

In practice therefore the issue is likely to be whether it is possible to prove the action of the defendant was done with intent to cause personal injury, which may be much more difficult to prove. Nevertheless, it is not the case that s 52 generally abolishes exemplary damages; it does not touch claims for sexual matters, and even in other matters involving personal injury it simply makes the test a more rigorous one. Presumably if that test is satisfied, the approach adopted at common law otherwise applies.

It is also important to bear in mind that this will apply only in a matter where s 52 of the *Civil Liability Act* applies.[12] Section 5(1) of the Act excludes its application from deciding awards of damages for personal injury if the harm resulting from the breach of duty is or includes … (c) an injury that is a dust-related condition; or (d) an injury

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[12] There is a similar provision in the *Workers Compensation and Rehabilitation Act* 2003 s 306A, but it does not exclude the operation of s 306B, see below n 15, as that section is in Division 2.

resulting from smoking or other use of tobacco products or exposure to tobacco smoke. Subsection (3) provides that this extends to a dependency claim, although the wording of the legislation giving rise to such a claim would suggest that exemplary damages are not available in such a situation.[13]

An example of a "dust-related" case is the decision in New South Wales in *Trend Management Ltd v Borg* (1996) 40 NSWLR 500 where it was held that an award of exemplary damages may be made in a claim by an employee against an employer where the claim was based on negligence if the employer showed a conscious and contumelious disregard for the employee's health and when the employer knew what could and should have been done but failed to do it. In Queensland the same would apply, but any exemplary damages would be payable by the employer personally.[14] Otherwise, that position would appear to be excluded by s 52 of the *Civil Liability Act* where it applies, since it confines in the case of a claim for personal injury exemplary damages to a situation where the act that caused the personal injury was done with intent to cause personal injury. It would not be enough to show that the defendant had disregarded a serious risk, unless the facts were so compelling as to justify an inference that there was intent to cause the personal injury. That would be both unlikely (hopefully) and difficult to prove.

The compulsory insurers, motor vehicle insurers and WorkCover, are further protected in Queensland by their legislation, to the effect that if an award is made of exemplary damages which falls within the limits still allowed by s 52, the insurer is not liable to indemnify the insured in respect of that part of the judgment.[15] That may in practice be a more effective restriction to prospective plaintiffs than the terms of s 52, since no doubt in practice it would be difficult in many cases to enforce an award of damages against the insured personally.[16]

This gives rise to a difficult problem in relation to the conduct of the trial. The legislation provides that the conduct of the trial is to be in the hands of the insurer,[17] but ordinary principles of procedural fairness would dictate that the court could not make an order against the insured without giving the insured the opportunity to be heard. Accordingly, if the issue arose it would be resolved by giving both parties the opportunity to be heard, so that the insured would have a proper opportunity to resist a personal award of exemplary damages.[18]

That might add a further hazard to a claim for exemplary damages in these circumstances, in that, if it did not succeed, the plaintiff would be exposed to an order to

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13 *Supreme Court Act* 1995 s 18(1): "… damages … proportioned to the injury resulting from such death to the parties … ." The *Civil Liability Act* 2011 s 64(3) is similar. See also *Reindel v James Hardy & Co Pty Ltd* [1994] 1 VR 619.

14 *Workers Compensation and Rehabilitation Act* 2003 s 306A does not exclude the operation of s 306B from a claim for a dust related condition, but s 306B excludes the liability of Workcover for the exemplary damages,

15 *Workers Compensation and Rehabilitation Act* 2003 s 306B; *Motor Accident Insurance Act* 1994 s 55 (which also applies to aggravated damages). Both provide for a separate judgment against the insured for the excluded amount.

16 That was after all the whole point of compulsory insurance.

17 *Workers Compensation and Rehabilitation Act* 2003 s 300(5); *Motor Accident Insurance Act* 1994 s 44(1).

18 As provided by *Motor Accident Insurance Act* 1994 s 52(4).

pay the costs of the insured of the proceedings even if the plaintiff otherwise succeeded in the claim. My initial reaction is that there would be no justification in such circumstances for an order that the plaintiff's costs of the proceedings payable by the insurer include any costs payable to the insured.[19] This is on the basis of general principles, leaving aside any difficulty which might exist anyway in relation to the plaintiff's costs because of the operation of the statutory provisions dealing with costs as between the parties, restricting the costs recoverable by the plaintiff from WorkCover or the licensed insurer. Accordingly, even if the plaintiff otherwise had a good claim, including a claim for exemplary damages against an insured who had to be separately represented may well be a risky business even if the insured would be able to satisfy an award for such damages if it were made.

One issue which can arise, bearing in mind the nature and purpose of exemplary damages, is a difficulty when the conduct of the defendant relied on constitutes a criminal offence. The position arises most acutely if the defendant has in fact already been convicted and sentenced for that criminal offence, but in that situation the answer is clear. In *Gray v Motor Accident Commission* (1988) 196 CLR 1 the High Court confirmed that no award of exemplary damages should be made in circumstances where the defendant has already been subject to substantial punishment as a result of the application of the criminal law. The court held that this was not a matter of discretion, though it occurs to me that there may be some element of judgment involved in determining whether the penalty already imposed amounted to "substantial punishment": [40].

The High Court did not enlarge upon what was meant by substantial punishment in this context,[20] and it is difficult to know just how much punishment would be substantial. Perhaps if the defendant had been discharged absolutely under s 19(1)(a) of the *Penalties and Sentences Act* 1992 substantial punishment would not have been imposed,[21] but apart from that the presumption would surely be that whatever punishment was imposed was one which was appropriate in all the circumstances of the case. The High Court said there was much to be said in favour of the proposition that for a civil court to revisit a sentence imposed in a criminal court for the purpose of deciding whether the criminal received his or her just desserts was contrary to principle and must undermine the criminal process: *Gray* at [46]. The proposition that an award of exemplary damages after a sentence had been imposed in a criminal court would be contrary to principle and must undermine the criminal process would seem to apply just as much in that situation as when a relatively heavy sentence was imposed.[22]

In *Gray*, the sentence imposed was imprisonment, which would have to be a substantial punishment, but if it is wrong for a civil court to be reconsidering the sentence imposed in a criminal court, that must apply even if the sentence is quite lenient, either for offences generally, or for that category of offence, or even in the particular circumstances of that matter. No doubt in time the issue will be clarified, but I suspect that it is likely that almost anything which would count as an actual punishment which was in fact imposed would qualify as "substantial punishment" for this purpose.

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19 The decision of a trial judge not to make such an order was upheld by the Court of Appeal in *Whitbread v Rail Corporation NSW* [2011] NSWCA 130.

20 Luntz, op cit , p 74.

21 But see *Whitbread (supra)* at [246] – [250] per Whealy JA.

22 See *W v W* [1999] 2 NZLR 1 at 3.

What if the defendant had been sentenced, and the Attorney-General had brought an appeal to the Court of Appeal, which was dismissed although the court in the course of delivering its reasons had commented to the effect that "although no substantial punishment was imposed upon the respondent, in the particular circumstances of this case and bearing in mind the very compelling mitigating factors, we are not persuaded that the discretion of the sentencing judge miscarried."[23] In such a situation, it might be difficult for the defendant to argue persuasively that there really had been a substantial punishment imposed for the purposes of *Gray*.

It was said in *Gray* that the purposes of the award of exemplary damages have been wholly met if substantial punishment is exacted by the criminal law: [42]. Presumably it is assumed that the punishment under the criminal law will be sufficient to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help or to breach the peace.[24] Experience shows that many victims do not feel assuaged even if the criminal law results in conviction and sentencing, because of a feeling that the sentence imposed was inadequate, but it could hardly be said that an additional punishment by way of award of exemplary damages would be proper in such circumstances. In any event, the High Court has said it is not, for that reason, and also because considerations of double punishment would otherwise arise: [43].

What happens if the defendant has been tried but was acquitted? In *Gray* at [47] the High Court referred, without further comment, to a decision of the New Zealand Court of Appeal that in these circumstances as well it was inappropriate, essentially on public policy grounds, for a civil court to award exemplary damages: *Daniels v Thompson* [1998] 3 NZLR 22 at 50-52. An appeal to the Privy Council[25] was dismissed, essentially on the basis that the issues were policy matters which were for the New Zealand courts, although there was some approval of this approach: p 5.

These decisions were not followed in New South Wales in *Niven v SS* [2006] NSWCA 338, or by one member of the court in *Whitbread v Rail Corporation NSW* [2011] NSWCA 130. In the former case it seems to me strictly speaking the issue did not arise, since the civil action was tried first and exemplary damages awarded, and it was only after the later criminal trial ended in acquittal that the appellant sought to set aside the award of exemplary damages. Nevertheless, the court expressed a clear preference against the New Zealand approach: [63] per Tobias JA, with whom the other members of the court agreed. In *Whitbread (supra)* McColl JA agreed: [58]. This however was a dissenting judgment, and even there it was dicta because her Honour said that it had not been shown that there was a substantial identity in the subject matter of the civil and criminal proceedings. The majority dismissed the appeal on the ground that the trial judge was correct in not awarding exemplary damages at all: Whealy JA at [226], with whom Giles JA agreed: [1]. They also expressed the view that an acquittal could be taken into account as a relevant factor even if it did not operate as a bar to the award.

What if the criminal proceedings have not been brought, or have been brought but have not been concluded? The High Court in *Gray* also mentioned this situation, without the

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23 Or whatever the current test is for Attorney-General's appeals; that is not a matter within my area of expertise. This is a hypothetical quote.

24 To quote *Lamb v Cotongo (supra)*.

25 *W v W* [1999] 2 NZLR 1.

majority expressing any definite conclusion, although it did comment that it is doubtful that the mere possibility of later criminal prosecution was reason enough not to award exemplary damages in a proper case: [48]. Presumably, in such a situation, if the defendant were ultimately successfully prosecuted, for the purposes of sentencing the fact that an award of exemplary damages had already been made against the defendant would be a relevant consideration, as another adverse consequence of the offending apart from any sentence imposed by the court.[26] It would obviously be of greater significance if the damages had actually been paid by him. The court also noted that it was likely that, if criminal proceedings were probable or had been begun, any civil proceedings would be delayed until the conclusion of the criminal proceedings.[27]

Hence, if you want to bring a civil action for damages in respect of a sexual offence, where the defendant has already been convicted (the usual case), it will almost inevitably be the case that exemplary damages will not be open, because it is highly likely that the criminal proceedings would have concluded with the imposing of substantial punishment. If the defendant was tried and acquitted, you could try and you may end up making some new law.

There are other principles which are established in relation to the award of exemplary damages. The means of the parties and all matters which aggravate or mitigate the conduct are relevant to the assessment of such damages;[28] for example, provocation may operate to prevent an award or to reduce the amount which might otherwise be awarded.[29] It is also necessary for the court to show some restraint in the awarding of exemplary damages (particularly when this is by a jury), so as to avoid the risk that exemplary damages might amount to a punishment greater than would be likely to be imposed if the conduct were criminal, and the jury should be made fully aware of the danger of an excessive award: *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 463. In the same case, Brennan J said at p 471 that there was no necessary proportionality between the assessment of exemplary and compensatory damages because the considerations that enter into the assessment of them are quite different.

Although in *Gray (supra)* it was said that exemplary damages were rarely awarded,[30] probably the most common case where they were at least claimed, and not infrequently awarded, was in actions for defamation. That has now ceased. The *Defamation Act* 2005 provides expressly in s 37:

> "A plaintiff cannot be awarded exemplary or punitive damages for defamation."

That is quite specific, and the little authority that exists in relation to the section indicates that it means what it says.[31] There are in the Act other provisions dealing with the assessment of damages for defamation, but they are outside the scope of this paper.

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26 *James v Hill* [2004] NSWCA 301 at [82]; *Niven v SS (supra)* at [50].

27 But in *Niven v SS* (supra) the Court of Appeal upheld the trial judge's refusal of a stay.

28 Unlike compensatory damages.

29 *Lamb v Cotogno (supra)* at p 13; Luntz, op cit, pp 78-9.

30 *Gray (supra)* at [12].

31 For example, *NSW v Ibbett* (2006) 81 ALJR 427 at [2].

This was an important and valuable victory for those who are disposed to look unkindly on the whole concept of exemplary damages.[32]

There is one other limitation on awards for exemplary damages which perhaps has not received the attention it deserves. In *Backwell v AAA* [1997] 1 VR 182 it was held that in the process of assessing exemplary damages the court should not disregard the amount of any compensatory damages when determining what sum should fulfil the requirements of an award of exemplary damages, but rather that the court should take into account the compensatory damages already awarded and award an additional amount by way of exemplary damages only if and to the extent that the award of compensatory damages would not be enough to stand as an appropriate level of punishment of the defendant. In other words, when it was appropriate for damages to perform the function of punishing the defendant as well as compensating the plaintiff, it was necessary to look at the whole amount awarded as the effective punishment of the defendant, rather than just an amount additional to the compensatory damages. This is in my view sensible enough, since from the defendant's point of view what takes effect as punishment is the whole amount of the judgment, not just any extra bit added on.

That decision was followed by the New South Wales Court of Appeal in *Amalgamated Television Services Pty Ltd v Marsden (No. 2)* (2003) 57 NSWLR 338 at [24].[33] I will not enlarge on the arguments to and fro, since in circumstances where it appears that the Courts of Appeal of New South Wales and Victoria are in agreement, I suspect the matter can be regarded as settled. In *Backwell* special leave to appeal to the High Court was refused.[34] I am not aware of any Queensland authority on the subject. I recently followed those cases though I am told my decision is under appeal, so it may be that there will be some Queensland authority in the not too far distant future. Nevertheless, I will be surprised if my decision is overturned on this ground.[35]

It will sometimes be the case that an award of exemplary damages will be appropriate in circumstances where the compensatory damages are actually quite small; see for example *Huckle v Money (supra)*. Similar considerations appear to have motivated the High Court in *XL Petroleum (supra)*: see p 461 per Gibbs CJ, p 471 per Brennan J. In some cases, however, the compensatory damages can be quite large; this is perhaps particularly likely to be the case in a claim for damages for sexual assault where the assault leads to serious and lasting psychiatric injury. Commonly, of course, there will be other reasons to exclude an award of exemplary damages, as discussed earlier, but there seem to be examples of cases where awards of exemplary damages were open and were made where attention was not paid to the *Backwell* principle. Presumably that was because such cases are commonly decided in circumstances where the defendant either does not appear or is not legally represented.

Vicarious Liability

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32 There is in my view not much which is worth having about that Act, which has made defamation law in Queensland must more complicated than it used to be, but for some people at least this provision is a step forward.

33 Followed in *State of New South Wales v Zreika* [2012] NSWCA 37 where the appeal was allowed on this ground.

34 (1996) 187 CLR 691.

35 Still, I have been surprised in the past by decisions of the Court of Appeal.

The point about vicarious liability is that it arises in a situation where one party is liable not because of any personal wrong on the part of that party, but because the plaintiff is entitled to recover damages against another party for whom the first party is responsible. If a plaintiff is entitled to recover against A, and B is vicariously liable for the torts of A, then the plaintiff is also entitled to recover damages against B.[36] It is necessary to distinguish between vicarious liability, which requires proof of the cause of action against the party at fault and the existence of the necessary relationship, from a situation where the defendant other than the immediate wrongdoer is personally at fault,[37] or a situation where a party owes a non-delegable duty of care,[38] so that the party is personally responsible even though the operative breach was by the act or omission of another. In both of these situations, there is a direct liability of B to the plaintiff.

The classic case of vicarious liability is in a relationship of employer and employee. This may be contrasted with the position where there is an independent contractor, where there is no vicarious liability. Accordingly, one issue which can arise in relation to whether a party is vicariously liable is whether the relationship was one of employment, or whether the wrongdoer was an independent contractor. There has been some willingness on the part of the High Court to look behind something which is dressed up as a relationship of independent contractor if for practical purposes the relationship functions in the same way as a contract of employment. If the relationship really is one of employer and employee, then the employer will almost certainly be vicariously liable, unless the wrongdoing of the employee is something which is distinctly outside the course of his employment. The classic example is the case of an employee who commits a criminal offence for his own benefit, where there will ordinarily not be vicarious liability.

Another relationship where there is vicarious liability is that between principal and agent. It is, however, necessary to bear in mind that what matters here is whether the principal is actually acting by means of the agent in the activity or conduct in the course of which the negligence of the agent occurred. Ordinarily there will be a contract of agency, but so long as there was authorisation in fact for specific conduct on behalf of the principal, it is not necessary to show a contractual relationship of principal and agent for the purposes of vicarious liability in tort. In relation to motor vehicles, there has for a long time been a statutory agency so that, for practical purposes, so long as the vehicle is insured, there will be the statutory indemnity regardless of who was driving it, and judgment will go directly against the insurer.[39]

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[36] It is worth noting that vicarious liability is in addition to rather than in substitution for the liability of the actual wrongdoer. It does not displace the plaintiff's right of recovery from the wrongdoer, but in the ordinary case the plaintiff would prefer to recover from the party vicariously liable, and it is rare for the actual wrongdoer even to be joined. The position of the actual wrongdoer at common law was discussed in *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555.

[37] This distinction was crucial in *Australasian Medical Insurance Ltd v Queensland Medical Laboratory* [2010] QCA 189: see [85]-[88]. This was because of the scope of cover under a policy of insurance.

[38] For a discussion of cases where that arises see *Fitzgerald v Hill* [2008] QCA 283 at [55]-[68]; *Aircraft Technicians of Australia Pty Ltd v St Clair* [2011] QCA 188 at [61]-[76]. In *NSW v Lepore* (2003) 212 CLR 511, the High Court considered vicarious liability and non-delegable duty of care separately.

[39] *Motor Accident Insurance Act* 1994 s 52(4).

There is an interesting analysis of the history and development of vicarious liability in the context of an employment relationship in the judgment of Gummow J in *Scott v Davis* (2000) 204 CLR 333 commencing at [162]. A common theme in this and the other more recent decisions of the High Court has been the difficulty in establishing, at least to their Honours' satisfaction, a clear principled justification for the doctrine of vicarious liability. Whether or not as a result of this, there have been a series of decisions in the High Court in relatively recent times which have looked at the question of vicarious liability, and provided some analysis of its theory and operation, and they suggest a general reluctance on the part of that court to extend the scope of operation of the doctrine. Much of the discussion in these cases is concerned with the sort of theoretical analysis which may well be of little practical use outside the High Court itself, but there are some practical considerations which have been thrown up by these cases. Before referring to them, however, I want to mention an earlier High Court case where there was a somewhat expansive approach adopted to the doctrine of vicarious liability, in the context of agency.

In *Soblusky v Egan* (1960) 103 CLR 215 the plaintiff was a passenger in a motor vehicle and injured as a result of the negligence of the driver of that vehicle. The plaintiff sued the driver, the person who was the registered owner of the vehicle pursuant to a hire purchase agreement, and another person to whom the registered owner had informally transferred his interest in the vehicle. This produced only a relationship of bailee, but the bailee was in the car at the time and had asked the driver to drive it for him. The important issue was whether the bailee was vicariously liable. The trial judge found that the bailee was vicariously liable for the negligence of the driver because the driver drove as his agent at common law. It will be immediately apparent that in this context this would no longer be an issue, because the result under the *Motor Accident Insurance Act* would be that judgment would be given against the licensed insurer.

The High Court held that the bailee, in possession of the vehicle and with full legal authority to direct what was done with it, had appointed another to do the manual work of managing it and to do this on his behalf in circumstances where he could always assert his power of control; this meant that he was at law driving as his agent: p 231. There was an issue as to whether the bailee was asleep at the time of the accident. The High Court said that it was immaterial whether the bailee was asleep, since this simply produced a complete delegation to the agent during his unconsciousness. It did not have the effect of depriving the bailee of control in fact and law.

In *Scott v Davis* (2000) 204 CLR 333 the High Court was asked in effect to extend the application of this decision from a motor vehicle to an aeroplane. In that case, the owner of an aeroplane had allowed another person who was a qualified pilot to fly it for the purpose of providing a boy with a joy ride. Unfortunately, the plane crashed, the pilot was killed and the boy was seriously injured. An action was brought by him (and his parents for nervous shock) against the owner of the aircraft, on the basis that there was personal negligence in allowing the pilot to fly the plane (which failed on the facts), and on the basis that he was vicariously liable for the negligence of the pilot. The position was therefore similar to *Soblusky* except that the owner was not actually in the

plane at the time.[40] The High Court, however, by majority[41] concluded that the decision in *Soblusky* should be confined to the vicarious liability of the owner of a motor vehicle, and should not be applied to chattels generally, or even just other chattels of conveyance.

Gummow J at [253], after a comprehensive analysis of the history of the doctrine, said that in modern times it derives from the notion that a party who engages others to advance that party's economic interests should be placed under a liability for losses incurred by third parties in the course of the enterprise. This was supported by notions of economic efficiency, which have, however, little part to play in supporting any broad principle respecting the bailment of chattels or the imposition of liability on a party in the position of the owner here. In that case the crucial feature which excluded vicarious liability was that the pilot was not performing a task in which the owner had an interest, presumably, in the light of the comments about notions of economic efficiency, an economic interest. His Honour went on to say that *Soblusky* should not be extended beyond the area of motor vehicles: [256]. This involved an endorsement of what was said by Brennan J in *Kondis v State Transport Authority* (1984) 154 CLR 672 at 692, though he would not extend it to the establishment of a more extensive liability: [257].

Essentially the case is concerned with the identification of the nature of the relationship which would give rise to vicarious liability. The case may be explained simply on the basis that the owner had not arranged for the pilot to fly the plane for his (the owner's) purposes, but the pilot had borrowed the plane so that he could use it for his own purposes. That would serve to distinguish *Soblusky*, but only the Chief Justice decided the case expressly on something like this basis, although he put it more in terms of control. Obviously, the judges thought the test was a lot more complicated than this.

The next relevant decision was *Hollis v Vavu Pty Ltd* (2001) 207 CLR 21. The plaintiff was injured when knocked down by a bicycle courier who was wearing a uniform identifying him as associated with the defendant, which operated a courier business. The plaintiff sued the defendant alleging that the courier was riding the bicycle as its servant or agent, but the defendant established at trial and in the Court of Appeal that the cyclist was an independent contractor so that there was no vicarious liability. In the High Court a majority of five judges held that the principle of vicarious liability was confined (relevantly) to an employment relationship, but that when properly characterised the true nature of the relationship here was employer and employee.

The High Court confirmed the distinction between employees and independent contractors for the purposes of vicarious liability [32], and held that this essentially involved a factual analysis about the practical situation. The court said that bicycle couriers were not in a practical sense running their own business, nor did they have independence in the conduct of their operations: [47]. They were not providing skilled labour and could not generate any goodwill: [48]. They had little control over the manner of performing their work: [49]. They were required to wear jackets which identified them with the defendant, and there was also control over what they otherwise

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40 Gleeson CJ, who agreed in the result, did not agree that *Soblusky* should be confined to motor vehicles, but distinguished it on the facts, because the owner was not on the plane and therefore the pilot was not in fact or in law subject to his direction and control at the critical time: [16].

41 Gleeson CJ and McHugh J dissenting on this, although Gleeson CJ followed the majority by distinguishing *Soblusky*.

wore: [50]. This was essentially for the purpose of advertising the defendant's business. In addition, the defendant superintended the courier's finances: [54]. Finally, there was said to be a policy reason for imposing vicarious liability, as a means of deterring the defendant from a failure to adopt effective means of personal identification and control of the couriers: [53].

The fact that the couriers were required to provide and maintain their own bicycles, and to replace or repair any equipment provided by the defendant that was damaged, was not inconsistent with an employment relationship: [56]. Ultimately, the court held the defendant vicariously liable for the cyclist's negligence, not by extending the concept of vicarious liability to "independent contractors" who were subject to a degree of control which was very like that over employees, but simply by characterising the relationship as truly one of employment. That characterisation was to be done as a matter of substance, rather than as a matter of form in terms of the actual contract between the employer and employee.

In *New South Wales v Lepore* (2003) 212 CLR 511 the High Court was concerned with the circumstances in which vicarious liability for the acts of an employee would not arise because the employee was acting outside the scope of the employment. The decision involved three different cases where the claims for damages were brought against states in respect of injury suffered as a result of physical and sexual misconduct on the part of school teachers against the respective plaintiffs. Gleeson CJ said that the question was whether the relevant act was incidental to the work the employee was employed to do [50], so that unnecessary force by a security guard at business premises when removing a person from the premises may well involve acting in the course of employment, but extreme and unnecessary violence, perhaps when combined with other factors, might lead to a conclusion that it involved purely personal vindictiveness: [54]. Gleeson CJ was not prepared necessarily to exclude vicarious liability for all cases of sexual misconduct by employed teachers, but considered that it would be excluded unless the teacher-student relationship was invested with a high degree of power and intimacy and that that power and intimacy were used to commit the sexual abuse: [74]. It would not be sufficient if the teacher's position provided him with the opportunity to gratify his sexual desires and he took advantage of that: [85].

Gaudron J analysed vicarious liability essentially as a matter of agency [127], and concluded that the issue was whether the actual wrongdoer who did the acts or omissions in question was acting as the servant, agent or representative of the person against whom liability is asserted: [131]. She concluded that deliberate criminal acts could not ordinarily be described as acts done in the course of or within the scope of employment: [129].[42] In a joint judgment, Gummow and Hayne JJ analysed the basis of vicarious liability, in fairly critical terms, from [196], and concluded that the deliberate sexual assault of a pupil is not some unintended by-product of the performance of the teacher's task, no matter whether that task required some intimate contact with the child or not: [241]. They would have held that vicarious liability had not been made out in any of the three cases subject to appeal. Callinan J came to the same conclusion.

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[42] Her Honour actually decided the case on the basis of a breach of a non-delegable duty of care, and did not need to resolve the question of vicarious liability: [163], [166].

In *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 the plaintiff was injured when a door of a refrigerator at a service station and convenience store, where she had gone to purchase some milk, came off when she went to open it and hit her on the head. She brought an action against the owners and operators of the premises, and the company that "maintained or distributed" the refrigerator, which had sent a mechanic to the premises to attend to the door shortly before the injury. The mechanic was not an employee of the respondent, but an independent contractor. In a joint judgment five members of the court said at [12]-[13]:

> "For present purposes there are two [basic propositions] to which it will be necessary to give principal attention. First, there is the distinction between employees (for whose conduct the employer will generally be vicariously liable) and independent contractors (for whose conduct the person engaging the contractor will generally not be vicariously liable). Second, there is the importance which is attached to the course of employment. … It is necessary always to recall that much more often than not, questions of vicarious liability fall to be considered in a context where one person has engaged another (for whose conduct the first is said to be vicariously liable) to do something that is of advantage to, and for the purposes of, that first person. Yet it is clear that the bare fact that the second person's actions were intended to benefit the first or were undertaken to advance some purpose of the first does not suffice to demonstrate that the first is vicariously liable for the conduct of the second."

In that case the plaintiff sought to establish vicarious liability on the basis that the mechanic was the "representative" of the defendant; insofar as this was seen as an attempt to extend the scope of vicarious liability, it was rejected by the court. The court went on to distinguish the facts in that case from the facts in *Hollis (supra)*, emphasising that *Hollis* proceeded on the basis that the negligent person was identified as an employee: [30]. The mechanic in this case was not able to be identified as an employee.

Those decisions were recently considered by the Court of Appeal in *Aircraft Technicians of Australia Pty Ltd v St Clair* [2010] QCA 188. The court noted that in that matter the trial judge had not made an express finding about whether the relevant person was an employee or an independent contractor, and continued at [57]:

> "The trial judge preferred to rest his decision on control. There may be some doubt about the suitability of such a concept as the determinate for vicarious liability but if control is yardstick then the relationship between the parties must be such that the person who was said to be vicariously liable must have the right of control over the way in which the person performed the task it did. By contrast, as Hayne J pointed out in *Scott*, if the relationship between them was only that one would perform the task for the other there would not be vicarious liability."

The court went on to say that it was not sufficient just to designate B as A's agent:

> "There must be something in the relationship between A and B, in the interaction between them, to show that the designation as appropriate and

> apposite. It will not be enough to show that B acted at A's request and that the actions confer the benefit on A. If A's control over B is to be the ingredient which establishes agency the evidence must show what degree of control was, or could have been, exerted; the manner in which control was or could have been exerted; and the matters with respect to which control was or could have been exerted. Without some such analysis the term "control" is devoid of meaning."

The main point which comes through in the recent decisions is that it is not enough just to assert in a general way that the wrongdoer was the agent of the defendant, or even to show that, for some purposes and to some extent, the wrongdoer was the agent of the defendant in the sense that there was a contract of agency between them. The concept of agency in the law of tort, or at least in this area of it, is much more limited and specific. The "agent" has to be someone engaged or appointed to do something on behalf of a defendant for the benefit of the defendant, ordinarily at least for the economic benefit of the defendant. It also appears to be necessary for the context in which that thing is done to be such that the defendant can be said to be acting through the agent in doing whatever it was that the agent did which gave rise to his liability. One is tempted to fall back on the Latin maxim, *que facit per alium facit per se*. In other words, can the situation be understood as one where it is in substance the defendant doing what is being done by means of the "agent".

In the recent cases, however, it seems to be that the High Court is reluctant, because of its inability to identify a principled basis for vicarious liability, to state a precise test to determine whether or not a wrongdoer is an "agent" for the purpose of giving rise to vicarious liability. Rather, the court contents itself with deciding on a case by case basis that particular people are not agents, generally asserting that to hold otherwise would amount to an extension of the concept of vicarious liability. It is clear that the court is not keen to do that. I suppose for practical purposes the point is that, if you want to seek to make someone with deep pockets liable on the basis of vicarious liability for an agent, the position is at least risky unless you have a clear authority supporting vicarious liability in an analogous situation, and you can distinguish the recent cases where allegations of such liability on the basis of agency have failed.

Vicarious liability for exemplary damages

It will be apparent from what I have just said in relation to the limitations on vicarious liability that frequently if the employee or agent is engaged in the sort of conduct which would give rise to an award of exemplary damages, there are reasonable prospects that there will be no vicarious liability at all. Obviously, however, a situation can arise where there is both vicarious liability and a conscious wrongdoing in contumelious disregard of another's rights. There is no difficulty if this applies both to the employee and employer, but sometimes it will not, and in those circumstances, does the employer have to wear the exemplary damages?

Traditionally the short answer was that only a single judgment had to be entered against both of them, because they were joint tortfeasors.[43] As pointed out by Gibbs CJ in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (supra)*, in circumstances where an award of exemplary damages was justified against one tortfeasor and not

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43 *The Koursk* [1924] P 140 at 155-158 per Scrutton LJ.

against the other, there was prior to 1972 some debate about how the rule that only a single judgment against all joint tortfeasors was possible: p 454. In *Broome v Cassell & Co* [1972] AC 1027 the House of Lords held that in such circumstances a single judgment against all joint tortfeasors should be entered for the lowest amount assessed by the jury in respect of any of them.[44] In *XL Petroleum*, however, it was held that the traditional rule that there could only be one judgment in those circumstances, and hence one judgment sum, had been subsequently abrogated by statute, with the result that judgments in different amounts were now possible against joint tortfeasors: p 459. In that particular case there were three defendants, only one of whom was deserving of an award of exemplary damages, but there was no question of any other defendant being liable for those exemplary damages.

One complication in this area is that most of the cases about vicarious liability for exemplary damages are cases involving misconduct by police, where the position is a little unusual. Originally the fact that police were regarded as exercising some independent discretion by virtue of their office caused difficulties in the ordinarily application of vicarious liability: *Irvin v Whitrod (No. 2)* [1978] Qd R 271.[45] More recently the effect of this has been largely reversed by statute. The *Police Service Administration Act* 1990 provides in s 10.5 that the Crown is liable for a tort committed by any officer or other member of the police service acting or purporting to act in the execution of duty as an officer, etc, in like manner as an employer is liable for tort committed by the employer's servant in the course of employment. Subsection (1A) makes the Crown for all purposes a joint tortfeasor, although subsection (2) excludes liability for exemplary damages. There is some limited right of indemnity by the officer from the Crown in certain circumstances under subsection (5), and if damages other than exemplary damages are awarded against an officer the Crown must pay them and the costs: s 10.6(1). However, by subsection (3) the Crown may recover contribution from the officer, in such amount as it is found by the court to be just and equitable in the circumstances: subsection (4).

Effectively therefore as far as plaintiffs are concerned they are generally protected in relation to compensatory damages, but any claim for exemplary damages would depend on the depth of the pocket of the officer involved. If a plaintiff wanted to pursue both the Crown, under the *Crown Proceedings Act* 1980, in respect of the actions of an officer, and the officer personally, for exemplary damages, again there could be problems about the conduct of the trial. Under s 10.7 the Commissioner may provide legal representation on behalf of an officer in such circumstances, but otherwise it would be a matter for the officer to provide legal representation, and if the only need for the presence of the officer was to enable the claim for exemplary damages to be pursued, again the plaintiff could be at risk in relation to the officer's costs if that part of the plaintiff's claim failed.

In other cases, however, if the liability of the employer is solely one of vicarious liability, in circumstances where an award of exemplary damages is appropriate against the employee, in my opinion the employer should not be liable for exemplary damages on the basis of vicarious liability. The ability to give judgment for separate amounts against joint tortfeasors would permit this to occur, and, subject to that, the reasoning in England in *Broome v Cassell* largely implies that there is no vicarious liability for

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44 [1972] AC 1027 at 1063, 1090, 1096F, 1106A; 1135A.

45 See also *NSW v Ibbett* (2006) 81 ALJR 427 at [41].

exemplary damages. That is because, if there were such vicarious liability, in many if not most cases of joint tortfeasors there could be no problem about how to reconcile different degrees of wrongdoing by the different defendants.[46]

Unfortunately, from my point of view, the cases in Australia seem to have established the opposite proposition, and seem to accept, in a broad and fairly unquestioning way, that in cases of vicarious liability where exemplary damages are appropriate against the employee or agent, the employer or principal will also be liable for those exemplary damages; essentially, vicarious liability includes any liability for exemplary damages. Unfortunately, this position seems to have been arrived at as a result of a series of cases, none of which actually involved the particular case I have in mind, where the circumstances which justified an award of exemplary damages involved only the employee or agent, and the employer or principal was innocent.

The earliest case relied on was *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584. In this case the defendant retook possession of goods owned by it but in the possession of the plaintiff on a "display plan agreement" in circumstances where this was held to be wrongful because in respect of some of the goods the right to recover them had not arisen. The plaintiff sued on various grounds, but for present purposes what matters is that an award of exemplary damages in tort was recoverable. But the court in this case was concerned with a situation where the behaviour which gave rise to an award of exemplary damages was done by the defendant deliberately, so that the case really was similar to *XL Petroleum v Caltex (supra)*, except that in this case the individual's employees or agents who went onto the plaintiff's land and seized certain goods in the possession of the plaintiff in a way which was held to constitute trespass were not joined; no doubt they were simply acting in accordance with the instructions of the defendant and were not worth suing. The judgments do not consider the situation where the employer or principal was innocent. The analysis proceeded on the basis that it was the defendant which had entered the land and seized the goods wrongfully, acting by its employees or agents who were in effect the physical manifestation of the defendant when effecting the actual entry and seizure.

The High Court considered the situation again in *New South Wales v Ibbett* (2006) 81 ALJR 427. This case suffered the complication, however, that it was an action in respect of misconduct by police, and under the New South Wales statute then applicable[47] a claim for tort allegedly committed by a police officer was to be brought against the Crown instead of the police officer concerned unless the Crown denied that it was vicariously liable for the tort. Ultimately, therefore, the outcome turned on the interpretation of that statute, which was interpreted as transferring the plaintiff's rights which would otherwise lie against the police officer to the Crown including any rights to exemplary damages which would have been awarded against the officer personally.[48]

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46 At least in cases where the actual wrongdoing was by the employee; in cases where the circumstances justifying exemplary damages related to conduct of the employer, the position would be different, but I would expect that to arise only in a case where there was separate wrongdoing on the part of the employer, so that its liability was not only vicarious.

47 *Law Reform (Vicarious Liability) Act* 1983 s 9B.

48 It will be apparent that that situation is different from the situation in Queensland under the *Police Service Administration Act* 1990 referred to earlier.

The High Court noted that the New South Wales legislation was enacted against the background of case law which accepted that a defendant, where liability in tort was vicarious, might suffer an award of exemplary damages: [43]. *Healing (supra)* and *XL (supra)* were referred to, and it was noted in [44] that the decisions "do not canvas any rationale for the making of such awards." The court referred to a number of decisions, including some overseas. It had been submitted on behalf of the State that the focus in determining the liability for and quantum of exemplary damages has to be on the wrongdoers, and the issue was what would be an appropriate award against them, not an appropriate award against the State: [49]. That argument was rejected, principally on the basis, as it seems to me, that the fact that the individual wrongdoers acted so inappropriately reflected adversely on the training and supervision they had received.

In effect the matter was analysed, not by reference to the personal wrongdoing of the individual officers, but taking into account deficiencies in the systemic operation of the police force which had created such a situation or permitted it to continue. There was in that case some evidence to support the proposition that in fact there had been a failure within the police service to take steps which would have been appropriate to prevent such behaviour occurring, so that there was a factual basis for a finding of actual wrongdoing on the part of the state as well as on behalf of the individual officers, although of a different nature. In these circumstances it was said to be legitimate to take into account the financial means of the state rather than the individual officers, although the court went on to say that a further reason for rejecting the State's argument was the statutory position referred to earlier.

That perhaps leaves unclear the question of whether the same approach is appropriate in circumstances not involving the vicarious liability of the state pursuant to that statutory provision. Nevertheless, these difficulties appear to have been glossed over in the later decisions, and the position seems to have been adopted that there will be vicarious liability in respect of an amount assessed appropriately against the individual wrongdoers, or a greater amount bearing in mind any proved (or apparently imputed) wrongdoing by the employer or principal, whether by causing the behaviour or in failing to prevent such behaviour from occurring.

There is a decision of the New South Wales Court of Appeal where an employer was held vicariously liable for exemplary damages because of the conduct of the employee: *Zoron Enterprises Pty Ltd v Zabaw* (2007) 71 NSWLR 354. The difficulty that I have with the decision, however, is that the analysis proceeded entirely on the basis that the question was one of whether or not the employer was vicariously liable at all, so that the case simply applied the tests for whether the employee was acting within the course of his employment It represents an example of one of those cases where there is vicarious liability even though the employee is doing something which he wasn't supposed to be doing at the time; it was a case of a security guard at a hotel who was using excessive violence in connection with the performance of the ordinary function of a security guard of the hotel.

This decision is a helpful and authoritative recent application of the principles about vicarious liability in that context, but it appears to have been assumed that if the employer was vicariously liable at all, it was vicariously liable for the exemplary damages; if the employee was actually acting outside the course of his employment, the employer would not have been liable even for compensatory damages. The court does

not appear to have gone on to address the question of whether, if there were vicarious liability, it carried an award of exemplary damages.

The issue did receive some further attention from the New South Wales court of appeal in *Nationwide News Pty Ltd v Naidu* [2007] NSWCA 377. In that case there was some reference to earlier decisions but the authorities to which I have referred[49] were said [275] to have "decided that a person may be liable for exemplary damages even though their liability for the contumelious act is vicarious."

The position therefore seems to be that there will be vicarious liability for exemplary damages and that the means of the defendant liable vicariously, as well as any personal wrongdoing by way of an act or omission, will be relevant to the assessment of such damages. This in my view still leaves an unsatisfactory situation in relation to the particular example I have postulated where there is no personal wrongdoing on the part of the employer, but the employer is vicariously liable for wrongdoing on the part of the employee against whom exemplary damages would be justified. Perhaps the answer to this is that the case I am postulating is essentially theoretical and my point is academic. It may be that in practice cases which would justify an award of exemplary damages against the employee would not justify a finding of vicarious liability in the absence of some sort of wrongdoing on the part of the employer, even by omission, so that in this situation the employer would not be vicariously liable for any of the damages.[50] Otherwise, it seems to me that there are logical difficulties in the broad brush approach which now seems to be taken on this point, at least in New South Wales.[51] Perhaps ultimately this is simply a manifestation of the point noted by the High Court that there is a lack of principled justification in the whole area of vicarious liability.

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49 *Healing*, *Ibbett*, *Zoron*.

50 See *Howard v State of Queensland* [2001] 2 Qd R 154 at [14].

51 I have not found any Queensland cases dealing with this particular issue, which appears to be relatively rare anyway.