

THE LAW COMMISSION

Item 2 of the Sixth Programme of Law Reform: Damages

AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES

To the Right Honourable the Lord Irvine of Lairg, Lord High Chancellor of Great Britain

PART I INTRODUCTION

1. THE SCOPE OF THIS REPORT

- 1.1 Damages are normally concerned to compensate the victim of a wrong. They are designed to make good, so far as possible, the pecuniary or non-pecuniary loss suffered by the victim by putting him or her into as good a position as if no wrong had occurred. In this paper we are, in contrast, primarily concerned with exemplary damages, which aim to punish the wrongdoer. We shall be confronting some major questions of policy for our civil law system. Should we continue to recognise punishment, as well as compensation, as a legitimate aim of awards for civil wrongs? If exemplary damages are to continue, in what circumstances should they be available and how should they be assessed? We have had the opportunity to face these difficult issues of policy afresh, with the considerable benefit of the views of consultees, and unconstrained, as the courts have been, by precedent.
- 1.2 The modern boundaries of the remedy of exemplary damages were fashioned by the courts on the assumption that they are an ‘anomalous’ civil remedy, and must be limited as far as precedents permit.¹ Few, whether opposing or in favour of exemplary damages, would argue that the boundaries so set are consistent with either sound principle or sound policy. Later in this Introduction² we give some examples of cases in which, we, in agreement with many consultees, consider that there is a practical need for exemplary damages to be available, but for which they are, at present, denied. These include, in particular, cases in which a victim’s claim will fail, however outrageous the defendant’s wrongdoing, and however inadequate the available alternative sanctions, simply because:
- (1) it does not fall within one or other of two limited categories of case (abuse of power by public servants and wrongdoing which is calculatedly profit-seeking);³
 - (2) it is for a wrong, such as unlawful sex discrimination, for which no pre-1964 authorities can be discovered in which exemplary damages were awarded for the wrong in question;⁴ or

¹ See, in particular, the discussion of *Rookes v Barnard* [1964] AC 1129 and *AB v South West Water Services Ltd* [1993] QB 507 at paras 4.2-4.4 below.

² See para 1.24 below, examples (5)-(10).

³ See para 1.24 below, examples (5), (6) and (9).

- (3) the wrongdoer's conduct has affected a large number of people, and so caused a large number of claims to be made in respect of it.⁵
- 1.3 Even if the law were not open to objection on the above ground, reform would still be required, we suggest, due to the unsatisfactory manner in which exemplary damages are assessed.⁶ Although reasoned, consistent and proportionate awards are vital, there are few clear principles to guide courts towards this result. And, indeed, such awards are almost impossible to achieve if, as at present, juries may have the task of deciding the quantum of exemplary damages.
- 1.4 We shall also be considering the two other major types of 'exceptional' damages recognised in English law: aggravated damages, which have often been confused with exemplary damages; and restitutionary damages, which are damages which aim to strip away some or all of the gains made by a defendant from a civil wrong.
- 1.5 Although we call these three types of damages (exemplary, aggravated and restitutionary) 'exceptional', we do not thereby seek to minimise the importance of this topic. Very few would seek to defend the present law. Reform, especially of the law on exemplary damages, is widely agreed to be essential.⁷ As Lord Justice Stephenson stated in *Riches v News Group Newspapers*,⁸ the present state of the law "... cries aloud for Parliamentary intervention".⁹ Publication of this report provides a unique opportunity to rationalise and clarify the aims and purposes of the English law of damages.

2. THE CONSULTATION PROCESS

- 1.6 Our consultation paper on these damages, *Aggravated, Exemplary and Restitutionary Damages*,¹⁰ was published in Autumn 1993. The topic of exemplary damages, in particular, provoked a wide range of strongly-held views from consultees. Although it appeared that a clear majority favoured the retention of exemplary damages, the diversity of views left us in some doubt as to where the consensus of opinion lay as regards the future of exemplary damages. We therefore took the unusual step of issuing a supplementary consultation paper in August 1995. That paper outlined three models for reform and asked consultees to express their preference. The process confirmed that a considerable majority of consultees favoured the retention of exemplary damages. We describe the three models and the results of the process in more detail in Part V.¹¹ A list of those who responded to the two papers appears in Appendices B and C. Although the decision to have two consultation exercises led to a long delay in formulating our final proposals, we

⁴ See para 1.24 below, examples (5), (7), (8), (9) and (10).

⁵ See para 1.24 below, example (9). See also the discussion of multiple plaintiff claims and *AB v South West Water Services Ltd* [1993] QB 507 at para 4.47 below.

⁶ See, in particular, the discussion at paras 4.56-4.60, 4.86-4.98 and 5.81-5.98 below.

⁷ See para 1.14 below.

⁸ [1986] QB 256.

⁹ [1986] QB 256, 269C.

¹⁰ (1993) Consultation Paper No 132.

¹¹ See paras 5.13-5.15 below.

should emphasise at the outset that we have derived enormous assistance from the responses of the consultees to the two consultation papers.

3. OVERVIEW OF OUR RECOMMENDATIONS AND REASONING

(1) Aggravated damages

- 1.7 In Part II of this Report we review the present law on aggravated damages, and in particular, the confusion that has surrounded their aims. Are they a punitive measure of damages, like exemplary damages, or are they compensatory?
- 1.8 Our conclusion is that aggravated damages compensate the victim of a wrong for mental distress (or ‘injury to feelings’) in circumstances in which that injury has been caused or increased by the manner in which the defendant committed the wrong, or by the defendant’s conduct subsequent to the wrong.¹² There is no justification for the law recognising a punitive civil remedy that is both additional to exemplary damages, and unconstrained by the severe constraints which the law imposes on the availability of the latter.¹³ The difficulties which uncertainty in this area has caused in practice were recently highlighted in the Court of Appeal’s decision in *Thompson v MPC*.¹⁴ We discuss that decision in detail in Part II.
- 1.9 We think it vital to dispel such confusion once and for all. Our recommendations aim to do so. We recommend that statute should clarify that aggravated damages are concerned to compensate and not to punish the wrongdoer,¹⁵ and further that, wherever possible, the label ‘damages for mental distress’ should be used instead of the misleading phrase ‘aggravated damages’.¹⁶ Once it is appreciated that aggravated damages are concerned with circumstances in which the victim of a civil wrong may obtain compensation for mental distress which he or she has suffered, a more coherent perception, and so development of, the law on damages for mental distress should be possible.¹⁷

(2) Restitutionary damages

- 1.10 In Part III of this Report we review the present law relating to the availability of restitution for a wrong. We shall see that restitution is well-recognised for some types of wrong,¹⁸ but that its availability is disputed in relation to several others.¹⁹ We shall also see that, where recognised, restitution will currently be effected by

¹² See paras 2.1-2.2 and 2.40 below.

¹³ See para 2.40 below.

¹⁴ [1997] 3 WLR 403.

¹⁵ See paras 2.41-2.42, recommendation (1), and draft Bill, clause 13, below.

¹⁶ See paras 2.41-2.42, recommendation (2), and draft Bill, clause 13, below.

¹⁷ See, in particular, para 2.43 below.

¹⁸ See Part III: section 2(1)(a) (proprietary torts, excluding intellectual property torts), at paras 3.10-3.18 below; section 2(1)(b) (intellectual property torts), at paras 3.19-3.22 below; and section 2(2) (equitable wrongs), at paras 3.28-3.32 below.

¹⁹ See Part III: section 2(1)(c) (non-proprietary torts), at paras 3.23-3.27 below; and section 2(3) (breach of contract), at paras 3.33-3.37 below.

means of one or more of several different remedies: an action for ‘money had and received’; an ‘account of profits’; and (restitutionary) ‘damages’.

- 1.11 Our conclusion is that development of the law on restitution for wrongs is, in general, most appropriately left to the courts.²⁰ No attempt should be made to state comprehensively in legislation which civil wrongs can trigger restitution, or when they should do so.²¹ This position had the support of a large majority of consultees.
- 1.12 Nevertheless, it would be desirable if the law were to develop towards having a single, restitutionary remedy for wrongs, rather than the range of remedies which currently fulfil that role.²² More importantly, we recommend that a limited measure of legislative reform is required as a result of our recommendations relating to exemplary damages. Restitutionary damages are a less extreme remedy than exemplary damages. We recommend that they should be available (at least) where exemplary damages could be awarded.²³

(3) Exemplary damages

- 1.13 It is in relation to the remedy of exemplary damages that reform of the law is most needed. It is also in relation to this remedy that we make our most far-reaching recommendations. We shall see in Part IV that the availability of exemplary damages under English law is, at present, artificially restricted.²⁴ In broad terms, an award can only be made for a limited set of civil wrongs (‘the cause of action test’)²⁵ and in only a limited set of circumstances in which those wrongs are committed (‘the categories test’).²⁶

(a) What direction should reform of exemplary damages take?

- 1.14 Almost without exception, consultees considered that the current legal position could not be justified; the status quo should not be maintained. We agree. But in what direction should the law develop? A number of consultees (including senior judges, practitioners and academics) considered that rationalisation entailed abolition.²⁷ But a significantly higher number (also including senior judges,

²⁰ See Part III: section 3(1), paras 3.38-3.47 below.

²¹ See Part III: section 3(1), paras 3.38-3.47, and recommendations (4)-(6), below.

²² See paras 3.82-3.84 and recommendation (14) below.

²³ See paras 3.48-3.53, recommendations (7)-(8), and draft Bill, clauses 12(1)-12(3) (and 12(5)), below.

²⁴ See generally Part IV, but in particular, paras 4.2-4.4 below.

²⁵ See *AB v South West Water Services Ltd* [1993] QB 507, and see, in particular, paras 4.4 and 4.24-4.28 below.

²⁶ See *Rookes v Barnard* [1964] AC 1129, *per* Lord Devlin, and see, in particular, paras 4.3 and 4.6-4.23 below.

²⁷ Just over one quarter (28%) of those responding to the Supplementary Consultation Paper (1995) favoured total abolition, in preference to the two other alternatives of expansion and partial retention. See paras 5.13-5.15 below.

practitioners and academics) considered that rationalisation entailed a principled, statutory expansion of the availability of exemplary damages.²⁸

- 1.15 In favouring retention and expansion, rather than abolition, we have been most influenced by two considerations. First, there is a practical need for exemplary damages. Our attention was drawn by large numbers of consultees to what are, or would be, 'gaps' in the law - areas in which other remedies or sanctions are inadequate, in practice, to punish and to deter seriously wrongful behaviour. These ranged from providing sanctions against abuses of power by the police, to deterring unlawfully discriminatory conduct by employers or persons generally, to discouraging deliberate violations of health and safety legislation. In general terms, one can regard the gaps as flowing from the fact that the criminal law and criminal process do not work perfectly (and inevitably so). Substantial numbers of consultees considered that exemplary damages do or could have a useful role to play in filling these gaps. They fulfil a practical need. We agree.
- 1.16 Secondly, we believe that, provided exemplary damages are a 'last resort' remedy which are subject to significant limitations, and provided that the availability and assessment of exemplary damages are determined by judges and not juries, exemplary damages are a legitimate way of meeting that practical need.
- 1.17 In formulating our recommendations, our guiding aims have been five-fold. First, exemplary damages should be an exceptional remedy, rarely-awarded and reserved for the most reprehensible examples of civil wrongdoing which would otherwise go unpunished by the law. Secondly, their availability (and assessment) must be placed on a clear, principled basis. Thirdly, although flexibility is necessary, unnecessary uncertainty as to the availability and assessment of the remedy must be avoided. Fourthly, defendants must not be unfairly prejudiced. Fifthly, the impact on the administration and funding of civil justice should not be adverse.
- 1.18 We believe that, if legislative reform is guided by those aims, the remedy of exemplary damages can emerge as a useful and legitimate, rather than anomalous, civil remedy, which may be expected to command support from all but the strongest proponents of abolition.

(b) Our recommendations for reform of exemplary damages

- 1.19 Our central recommendations are that the 'cause of action' and 'categories' tests should be replaced with a general principled test of availability, but that that expansion of liability should be subject to major limitations.
- 1.20 A judge (and never a jury)²⁹ should award exemplary damages (or as we prefer to call them, 'punitive damages')³⁰ for any tort or equitable wrong, as well as for

²⁸ Just under one half (49%) of those responding to the Supplementary Consultation Paper (1995) favoured a principled expansion, broadly along the lines which we recommend in Part V, in preference to the two other alternatives of total abolition and partial retention. Just under a quarter (23%) supported partial retention; 72% were therefore in favour of retaining exemplary damages in some form. See paras 5.13-5.15 below.

²⁹ See paras 5.81-5.98, recommendation (17), and draft Bill, clause 2, below.

³⁰ See para 5.39 and recommendation (15) below.

statutory wrongs if an award would be consistent with the policy of the statute under which the wrong arises.³¹ However, an award should be made only if the defendant's conduct showed a deliberate and outrageous disregard of the plaintiff's rights³² and the other remedies awarded would be inadequate to punish the defendant for his conduct.³³ Furthermore, no award should usually be made, where the defendant has already been convicted of an offence involving the conduct which founds the claim to punitive damages.³⁴ And the court should be required to take into account any other sanctions which may have been imposed, when deciding whether punitive damages are necessary, and therefore available.³⁵ The court will retain a 'safety-valve' discretion to refuse punitive damages, where an award would otherwise be available under the above tests, if some exceptional factor exists which makes it proper in the circumstances to refuse an award.³⁶

1.21 The decision about how much to award as punitive damages, where they have been held to be available, should also always be for a judge, never a jury.³⁷ An award should not exceed the minimum necessary to punish the defendant for his conduct, and should be proportionate to the gravity of his wrongdoing.³⁸ The judge should also be guided by a non-exhaustive statutory list of relevant factors.³⁹ We anticipate that a body of precedent, judicial tariffs and/or guideline judgments would offer further guidance, in time.⁴⁰ If a defendant would not be able to pay an award which is assessed in this way without undue hardship, then the court should select a lower, appropriate sum.⁴¹

1.22 Apart from these central recommendations, we make a number of additional ones. A claim to punitive damages should be specifically pleaded.⁴² The standard of proof should remain the civil standard of proof on the balance of probabilities.⁴³ Liability to punitive damages should, in general, be 'several' only.⁴⁴ However, vicarious liability should apply⁴⁵ and insurance should be permitted.⁴⁶ A claim for

³¹ See paras 5.49-5.65, recommendation (19), and draft Bill, clause 3(3)-3(5), below.

³² See paras 5.46-5.48, recommendation (18), and draft Bill, clause 3(6), below.

³³ See paras 5.99-5.102, recommendation (20), and draft Bill, clause 3(7), below.

³⁴ See paras 5.103-5.115, recommendation (21)(a), and draft Bill, clause 4(1), below.

³⁵ See paras 5.116-5.117, recommendation (21)(b), and draft Bill, clause 4(2), below.

³⁶ See paras 5.118-5.119 below.

³⁷ See paras 5.81-5.98, recommendation (17), and draft Bill, clause 2, below.

³⁸ See paras 5.120-5.122, recommendations (22)(a) and (22)(b), and draft Bill, clause 5(1)(a) and 5(1)(b), below.

³⁹ See paras 5.123-5.128, recommendation (23), and draft Bill, clause 5(2), below.

⁴⁰ See, in particular, our reasoning at paras 5.91-5.98 below; see also paras 4.86-4.98 below.

⁴¹ See paras 5.135-5.141, recommendations (26)-(28), and draft Bill, clause 6, below.

⁴² See paras 5.133-5.134, recommendation (25), and draft Bill, clause 3(2), below.

⁴³ See paras 5.231-5.233, recommendation (41), and draft Bill, clause 10, below.

⁴⁴ See paras 5.186-5.203, recommendation (34), and draft Bill, clause 8(1), below. Cf paras 5.204-5.205.

⁴⁵ See paras 5.209-5.230, recommendations (37)-(40), and draft Bill, clauses 8(2)(a) and 11 below.

punitive damages should survive for the benefit of the estate of the victim,⁴⁷ but not against the estate of the wrongdoer.⁴⁸ Where a defendant's conduct constitutes wrongs against two or more persons (a 'multiple plaintiff' case) punitive damages should only be awarded to the first of those persons to claim them successfully,⁴⁹ and where they are so awarded, the court should ensure that the aggregate award does not constitute excessive punishment.⁵⁰

- 1.23 We should emphasise that, in our view, if the above package of reforms were accepted, the impact on the administration and funding of civil justice would not be significantly adverse. Successful claims should be rare if, as we propose, punitive damages are reserved for cases of seriously wrongful conduct which has not been dealt with adequately (or at all) by another means. The legislative scheme which we propose, coupled with case law interpretation, should provide a set of clear, and restrictive, principles governing when awards may be made. And the prospects of a substantial increase in litigation to obtain a new financial 'windfall' should be further reduced, if, as we would expect, judicial assessment of punitive damages would lead to moderate, as well as consistent and reasonably predictable, awards in the rare cases in which they were made.

4. SOME PRACTICAL EXAMPLES

- 1.24 It may prove helpful at this stage to provide some practical examples of situations in which, applying our proposals, punitive damages would be an available remedy (subject to there being no criminal conviction or adequate other remedy). These are, in other words, situations which illustrate the practical need for the last resort remedy of punitive damages. Examples (1)-(4) are all cases in which exemplary damages are probably currently available. Examples (5)-(10) are all cases in which exemplary damages could not be claimed under the present law.⁵¹

- (1) Police officers arrest and detain a man without grounds for suspecting that he has committed any offence. In the course of his arrest and detention, manifestly unnecessary and excessive force is used against him. The officers involved then fabricate evidence against the man. A prosecution is brought, but fails. The man claims damages for false imprisonment, assault and malicious prosecution.
- (2) A local newspaper publishes a sensationalist story, knowing it to be false, about a local school-teacher who had a sexual relationship with and caused to become pregnant a pupil under the age of consent. The newspaper does so in the expectation that the teacher will be unlikely to wish to sue for defamation, and that even if he does so, the general boost to the paper's

⁴⁶ See paras 5.234-5.273, recommendation (42), and draft Bill, clause 9(1), below. Cf also recommendation (43) and draft Bill, clause 9(2), below.

⁴⁷ See paras 5.274-5.275, recommendation (44), and draft Bill, clause 14(1)-14(3), below.

⁴⁸ See paras 5.276-5.278, recommendation (45), and draft Bill, clause 14(1) and 14(3), below.

⁴⁹ See paras 5.159-5.185 (especially paras 5.162-5.167), recommendations (30) and (31), and draft Bill, clause 7(1) and 7(4), below.

⁵⁰ See paras 5.168-5.171, recommendation (32), and draft Bill, clause 7(3), below.

⁵¹ See para 1.2 above and in particular paras 4.2-4.28, 4.47, below.

circulation figures will earn the paper a profit significantly in excess of the damages likely to be payable. The school-teacher claims damages for defamation, but is unable to prove that his story led to any measurable increase in the newspaper's profits.

- (3) A medical practitioner carries out large-scale, intrusive and unnecessary surgery on a private patient. He deliberately withheld the information from the patient, who he was aware placed complete trust in him, because he knew that the patient would not have consented, had the patient known of the true position, and because he would obtain a sizeable sum as payment for the surgery. The patient claims damages for trespass to the person.
- (4) A photographer takes photographs at a wedding. Some time later, the father of the groom is murdered in horrific circumstances which attract a large amount of publicity. The photographer sells copies of the wedding photographs to the national press. The photographs feature prominently on the pages of several national newspapers. The groom-son of the murder victim seeks damages from the photographer for infringement of copyright.
- (5) An employee is subjected to a campaign of racial harassment by a group of fellow employees over a long period, ranging from taunting, ostracism, and false accusations of misconduct, to violent physical abuse. Though she makes a formal complaint to her employer, no proper investigation is conducted and no further action is taken. The harassment continues. The employee claims damages for unlawful discrimination contrary to the Race Relations Act 1976 against the fellow employees.
- (6) A private store detective accuses a shopper of shoplifting, without basis for the accusation and purely vindictively. He detains the shopper, forces her to undergo an intrusive bodily search and then proceeds to fabricate evidence against her. As a result, the shop initiates a private prosecution against the shopper, which fails. The shopper claims damages from the store detective and his employers for assault and false imprisonment.
- (7) An employer carries out a manufacturing process which produces a large amount of dust in the workplace. Regular complaints have been made to the employer by employees who have started to develop respiratory problems as a result of persistent exposure to the dust. Although the employer is aware of the substantial risk of serious injury to which its employees are being exposed, it decides not to install an effective extraction system, and takes no other steps, at any time, to address the problem. Instead, in blatant and knowing disregard of the health and welfare of its workforce, it chooses to use its capital expenditure on profit-increasing capital items. An employee who has developed particularly severe respiratory problems, and has been forced to leave work, claims damages for negligence and for breach of statutory duty.
- (8) An ex-employee of a company designing computer software sets up a rival business. Using information which he obtained in confidence during his employment with the company, the ex-employee's business thrives. Whilst the ex-employee knows that his use of the information is wrongful, he considers that it is worth committing the wrong because, even if found out

and sued, he will, at worst, be made to give up his net profits. His former company sues him, the ex-employee, for breach of confidence.

- (9) A source of drinking water is contaminated by substantial quantities of a pollutant which is harmful to humans. Many customers complain to the water authority which has responsibility for the contaminated source. The authority knowingly misleads them as to the true state of affairs, informing them that the water is safe to drink. No tests have in fact been carried out. Many customers continue to drink the water as a result. Even once the authority has carried out its own investigation, accurate information is still withheld by it as to what happened and as to the state of the water. No proper information is given to the local public health authorities, hospitals, doctors, pharmacists or customers as to what precautions should be taken to minimise the ill effects. No steps are taken by the authority to provide an alternative, safe water source. Many customers suffer ill-effects as a result of drinking the contaminated water. A group of them claims damages for negligence and public nuisance.
- (10) A solicitor dishonestly assists a company director in laundering company funds in a way which would make it impossible in practice to establish that any criminal offence had been committed. The company sues the solicitor for dishonestly assisting in a breach of fiduciary duty.

5. THE STRUCTURE OF THIS REPORT

- 1.25 This Report is arranged as follows. Part II deals with aggravated damages. Part III deals with restitution for wrongs. Part IV looks at the present law relating to exemplary damages and Part V at reform of exemplary damages.

6. ACKNOWLEDGMENTS

- 1.26 We would like to thank the participants at the Society of Public Teachers of Law Seminar on 'Exceptional Measures of Damages' held at All Souls College, Oxford, on 1 July 1995, and chaired by the then Chairman of the Law Commission, Mr Justice (now Lord Justice) Brooke. That seminar was extremely helpful and informative. We would also like to thank Lord Justice Brooke, the Lord Chancellor's Department, the Department of Trade and Industry, the Home Office, Professor Jack Beatson, and Professor Peter Birks, who each commented on drafts of this paper; Sir Brian Neill, Desmond Browne QC, Jeremy Gompertz QC, and Charles Gray QC, whom we consulted on the role of juries in deciding claims to exemplary damages; Mr Justice Jacob, Mr Justice Laddie, Geoffrey Hobbs QC, and Aidan Robertson, whom we consulted on intellectual property issues.

PART II

AGGRAVATED DAMAGES

1. THE PRESENT LAW

- 1.1 Although the precise meaning and function of ‘aggravated damages’ is unclear, the best view, in accordance with Lord Devlin’s authoritative analysis in *Rookes v Barnard*,⁵² appears to be that they are damages awarded for a tort as compensation for the plaintiff’s mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive ‘aggravates’ the injury done to the plaintiff, and therefore warrants a greater or additional *compensatory* sum. Unfortunately, there is a continuing confusion in the case law, reflected in some of the substantive and procedural preconditions of an award of aggravated damages, about whether they in fact serve a different function, which is punitive in nature.
- 1.2 Aggravated damages were not recognised as a separate category of damages until *Rookes v Barnard*.⁵³ Prior to Lord Devlin’s analysis in that case, aggravated damages were not differentiated from punitive awards. The courts had used the terms ‘punitive’,⁵⁴ ‘exemplary’,⁵⁵ ‘aggravated’,⁵⁶ ‘retributory’,⁵⁷ and ‘vindictive’,⁵⁸ interchangeably when referring to such awards. Although, as we shall see in Part IV, Lord Devlin believed that the punitive principle “ought logically to belong to the criminal [law]”,⁵⁹ he nevertheless felt constrained by precedent from abolishing punitive damages altogether and, therefore, sought instead to narrow their ambit. In his analysis, Lord Devlin extracted those awards which were explicable in compensatory terms and renamed them ‘aggravated damages’.⁶⁰ His Lordship observed that the previous failure to separate the compensatory element from the punitive element of supposedly punitive awards, or to recognise that many such awards were explicable without reference to punitive principles, was a “source of confusion”⁶¹ which his analysis was intended to eliminate.
- 1.3 It is regrettable that Lord Devlin’s analysis has not dispelled the confusion between the two functions of compensation and punishment. The continuing relevance of the

⁵² [1964] AC 1129.

⁵³ [1964] AC 1129.

⁵⁴ *Lavender v Betts* [1942] 2 All ER 72, 73H-74A.

⁵⁵ *Huckle v Money* (1763) 2 Wils KB 205, 95 ER 768; *Emblen v Myers* (1860) 6 H & N 54, 158 ER 23; *Merest v Harvey* (1814) 5 Taunt 442, 128 ER 761.

⁵⁶ *Lavender v Betts* [1942] 2 All ER 72, 74B.

⁵⁷ *Bell v Midland Railway Co* (1861) 10 CB (NS) 287, 308; 142 ER 462, 471.

⁵⁸ *Emblen v Myers* (1860) 6 H & N 54, 158 ER 23; *Cruise v Terrell* [1922] 1 KB 664, 670; *Whitham v Kershaw* (1886) 16 QBD 613, 618.

⁵⁹ [1964] AC 1129, 1226.

⁶⁰ [1964] AC 1129, 1230.

⁶¹ [1964] AC 1129, 1230.

‘exceptional’⁶² conduct or motive of the defendant, not just to the assessment but in addition to the availability of aggravated damages, has led some to doubt their compensatory character.⁶³ The fact that aggravated damages are, by both their name and by the conditions of their availability, conceptually separated from ordinary (compensatory) damages for mental distress, may encourage the same conclusion. And although the courts have, in form at least, proceeded on the assumption that aggravated damages are compensatory in nature, the residual perception is arguably that they retain a quasi-punitive quality. This may explain why the courts have declined to award aggravated damages in claims based on negligence and breach of contract, where compensatory principles are perceived to be paramount and punitive considerations inappropriate.⁶⁴

(1) The availability of aggravated damages

(a) General pre-conditions of availability

1.4 There seem to be two basic preconditions of an award of aggravated damages:

- (1) exceptional or contumelious conduct or motive on the part of a defendant in committing the wrong,⁶⁵ or, in certain circumstances, subsequent to the wrong;⁶⁶ and
- (2) mental distress sustained by the plaintiff as a result.

1.5 This analysis, which we offered in our Consultation Paper,⁶⁷ has been accepted by a court at first instance as a summary of the preconditions of an award of aggravated damages.⁶⁸

(i) ‘Exceptional conduct’

1.6 In *Rookes v Barnard*⁶⁹ Lord Devlin said that aggravated awards were appropriate where the manner in which the wrong was committed was such as to injure the plaintiff’s proper feelings of pride and dignity,⁷⁰ or gave rise to humiliation,⁷¹ distress,⁷² insult or

⁶² We use the phrase ‘exceptional’ to indicate that the manner of commission or motive or subsequent conduct of the defendant must be such as to upset or outrage the plaintiff.

⁶³ See eg *Uren v John Fairfax & Sons Pty* (1966) 117 CLR 118, 151-152, per Windeyer J; Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 3.24-3.32; J Stone, “Double Count & Double Talk: The End of Exemplary Damages?” (1972) 46 ALJ 311.

⁶⁴ See paras 2.10 and 2.26-2.36 below.

⁶⁵ See para 2.6 below.

⁶⁶ See paras 2.7-2.8 below.

⁶⁷ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, para 3.3.

⁶⁸ *Appleton v Garrett* [1996] PIQR P1, P4 (Dyson J). See also *Ministry of Defence v Meredith* [1995] IRLR 539 in which the EAT was “content to accept” our summary (at 542, para 29).

⁶⁹ [1964] AC 1129.

⁷⁰ [1964] AC 1129, 1221.

⁷¹ [1964] AC 1129, 1226, 1233.

pain.⁷³ He thought that conduct which was offensive,⁷⁴ or which was accompanied by malevolence,⁷⁵ spite,⁷⁶ malice, insolence or arrogance,⁷⁷ could lead to recoverable intangible loss. In *Broome v Cassell*⁷⁸ the House of Lords referred to mental distress,⁷⁹ injury to feelings,⁸⁰ insult,⁸¹ indignity,⁸² humiliation⁸³ and a heightened sense of injury or grievance.⁸⁴ Examples of 'exceptional conduct' include wrongful eviction of a tenant in circumstances of harassment and abuse,⁸⁵ police misconduct,⁸⁶ and malicious libel.⁸⁷ In *Thompson v MPC*,⁸⁸ Lord Woolf MR gave as examples in cases involving wrongs⁸⁹ committed by police officers:

... humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution.⁹⁰

(ii) ... which includes conduct subsequent to the wrong

1.7 Conduct subsequent to the wrong may give rise to aggravated damages.⁹¹ This is particularly well-established in defamation, where the subsequent conduct of the

⁷² [1964] AC 1129, 1233.

⁷³ [1964] AC 1129, 1231.

⁷⁴ [1964] AC 1129, 1232.

⁷⁵ [1964] AC 1129, 1221, 1232.

⁷⁶ [1964] AC 1129, 1221, 1232.

⁷⁷ [1964] AC 1129, 1229, 1232.

⁷⁸ [1972] AC 1027.

⁷⁹ [1972] AC 1027, 1085E.

⁸⁰ [1972] AC 1027, 1089C-D, 1124G.

⁸¹ [1972] AC 1027, 1089C-D.

⁸² [1972] AC 1027, 1089C-D.

⁸³ [1972] AC 1027, 1121H.

⁸⁴ [1972] AC 1027, 1124G.

⁸⁵ See eg *McMillan v Singh* (1985) 17 HLR 120; *Asghar v Ahmed* (1985) 17 HLR 25; *Jones & Lee v Miah & Miah* (1992) 24 HLR 578. See also *Arden & Partington on Quiet Enjoyment* (3rd ed, 1990) pp 31-45.

⁸⁶ See eg *White v MPC*, *The Times* 24 April 1982; *Thompson v MPC* [1997] 3 WLR 403. See also R Clayton and H Tomlinson, *Civil Actions Against the Police* (2nd ed, 1992) pp 385, 387-389, and R Clayton and H Tomlinson, *Police Actions* (1997) pp 41-42 and Appendix 2.

⁸⁷ See eg *Ley v Hamilton* (1935) 153 LT 384, as interpreted by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1230-1231; *Broome v Cassell* [1972] AC 1027, 1079F-H

⁸⁸ [1997] 3 WLR 403.

⁸⁹ The torts in question were wrongful arrest/false imprisonment and malicious prosecution.

⁹⁰ [1997] 3 WLR 403, 417B-C.

⁹¹ Conduct prior to the wrong may also be put forward as an aggravating feature, but here its relevance may be as evidence of malice: *Prince Ruspoli v Associated Newspapers plc* 11 December 1992 (unreported, CA).

defendant or his legal advisers permits an increase in the level of damages. In *Sutcliffe v Pressdram Ltd*⁹² Nourse LJ gave the following examples:

... failure to make any or any sufficient apology and withdrawal; a repetition of the libel; conduct calculated to deter the plaintiff from proceeding; persistence, by way of prolonged or hostile cross-examination of the plaintiff or in turgid speeches to the jury, in a plea of justification which is bound to fail; the general conduct either of the preliminaries or of the trial itself in a manner calculated to attract further wide publicity; and persecution of the plaintiff by other means ...⁹³

In cases of defamation, later conduct of this sort is closely bound up with the wrong itself; indeed, it can be seen as an extension or prolongation of the libel.

- 1.8 The conduct of the defendant in the process of litigation and at trial has also been considered relevant to aggravated damages in cases of malicious prosecution,⁹⁴ false imprisonment⁹⁵ and discrimination.⁹⁶ Where, in such cases, the defendant persists in making damaging allegations calculated to sully the plaintiff's reputation, that conduct can be viewed as analogous to defamation.⁹⁷ In discrimination cases, further victimisation of the plaintiff following the discriminatory treatment has attracted an award of aggravated damages,⁹⁸ as has the wholly inadequate manner in which an employer investigated an applicant's complaints of discrimination.⁹⁹

(iii) ... causing injury to the plaintiff's feelings

- 1.9 The requirement of injury to feelings means that a plaintiff who is unaware of the defendant's exceptional conduct or motive cannot claim aggravated damages, although the conduct might otherwise excite outrage or offence.¹⁰⁰ One would also expect that a corporate plaintiff should have no entitlement to aggravated damages, because it cannot experience feelings of outrage or offence.¹⁰¹ Nevertheless, in *Messenger Newspapers Group Ltd v National Graphical Association*¹⁰² it was held that a limited

⁹² [1991] 1 QB 153.

⁹³ [1991] 1 QB 153, 184E-F.

⁹⁴ *Marks v Chief Constable of Greater Manchester*, *The Times* 28 January 1992 (CA); *Thompson v MPC* [1997] 3 WLR 403.

⁹⁵ *Warby v Cascarino*, *The Times* 27 October 1989; *Thompson v MPC* [1997] 3 WLR 403.

⁹⁶ *Duffy v Eastern Health & Social Services Board* [1992] IRLR 251; *Alexander v Home Office* [1988] 1 WLR 968, 978B-D.

⁹⁷ The wrongs referred to have been said to involve a defamatory element. For example, "[a] false imprisonment does not merely affect a man's liberty; it also affects his reputation ... " (*Walter v Alltools Ltd* (1944) 61 TLR 39, 40, per Lawrence LJ).

⁹⁸ *Duffy v Eastern Health & Social Services Board* [1992] IRLR 251, 257, para 15.

⁹⁹ *Prison Service v Johnson* [1997] ICR 275, 287G-H.

¹⁰⁰ *Alexander v Home Office* [1988] 1 WLR 968, 976C-D; *Ministry of Defence v Meredith* [1995] IRLR 539, 542-543, paras 30-36. Cf H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed, 1990) p 71, para 1.7.14.

¹⁰¹ *Columbia Pictures Industries Inc v Robinson* [1987] Ch 38, 88H, per Scott J.

¹⁰² [1984] IRLR 397, 407, paras 77-78.

company could be awarded aggravated damages, although such awards would be lower than those which a human being, who has feelings, could receive. Caulfield J reached this conclusion by concentrating on the defendant's conduct and by not emphasising the nature of the damage to the plaintiff.

(b) Which Wrongs?

1.10 Aggravated damages cannot be awarded for the tort of negligence or for breach of contract.¹⁰³ They have, however, been awarded for many other causes of action, including assault/battery,¹⁰⁴ false imprisonment,¹⁰⁵ malicious prosecution,¹⁰⁶ defamation,¹⁰⁷ intimidation,¹⁰⁸ discrimination,¹⁰⁹ trespass to land,¹¹⁰ deceit,¹¹¹ nuisance¹¹² and unlawful interference with business.¹¹³ They have also been awarded pursuant to

¹⁰³ *Kralj v McGrath* [1986] 1 All ER 54, 60-61.

¹⁰⁴ Eg *Ansell v Thomas*, *The Times* 23 May 1973; *Flavius v MPC* (1982) 132 NLJ 532; *Ballard v MPC* (1983) 133 NLJ 1133; *W v Meah* [1986] 1 All ER 935. See R Clayton and H Tomlinson, *Civil Actions Against the Police* (2nd ed, 1992) pp 396-7, and now R Clayton and H Tomlinson, *Police Actions* (1997) Appendix 2.

¹⁰⁵ Eg *White v MPC*, *The Times* 24 April 1982; *Smith v MPC* [1982] CLY 899; *Warby v Cascarino*, *The Times* 27 October 1989; *Barnes v MPC* [July 1992] Legal Action 14; *Thompson v MPC* [1997] 3 WLR 403. See R Clayton and H Tomlinson, *Civil Actions Against the Police* (2nd ed, 1992) pp 400, 401, and now R Clayton and H Tomlinson, *Police Actions* (1997) Appendix 2.

¹⁰⁶ Eg *White v MPC*, *The Times* 24 April 1982; *Marks v Chief Constable of Greater Manchester*, *The Times* 28 January 1992; *Thompson v MPC* [1997] 3 WLR 403. See R Clayton and H Tomlinson, *Civil Actions Against the Police* (2nd ed, 1992) p 404, and now R Clayton and H Tomlinson, *Police Actions* (1997) Appendix 2.

¹⁰⁷ *Ley v Hamilton* (1935) 153 LT 384, as interpreted by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1230-1231; *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 QB 86, 107D; *Broome v Cassell* [1972] AC 1027. Cf *AB v South West Water Services Ltd* [1993] QB 507, 533A, per Sir Thomas Bingham MR, referred to at para 2.33 below.

¹⁰⁸ *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397; *Godwin v Uzoigwe* [1992] TLR 300. This is implicit in *Rookes v Barnard* [1964] AC 1129, 1232-1233.

¹⁰⁹ *Prison Service v Johnson* [1997] ICR 275 (race discrimination, contrary to the Race Relations Act 1976); *Duffy v Eastern Health & Social Services Board* [1992] IRLR 251 (religious discrimination, contrary to the Fair Employment (Northern Ireland) Act 1976). The same principles should apply to sex discrimination contrary to the Sex Discrimination Act 1975, and to disability discrimination contrary to the Disability Discrimination Act 1995: the statutory torts are in all relevant respects identical. See, in particular, *Ministry of Defence v Meredith* [1995] IRLR 539, 542, para 24 (availability of aggravated damages for sex and race discrimination conceded by counsel) and *Prison Service v Johnson* [1997] ICR 275, 287D-F (EAT satisfied that aggravated damages are available in sex and race discrimination cases).

¹¹⁰ *Merest v Harvey* (1814) 5 Taunt 442, 128 ER 761; *Sears v Lyons* (1818) 2 Stark 317, 171 ER 658; *Williams v Currie* (1845) 1 CB 841, 135 ER 774; *Emblen v Myers* (1860) 6 H & N 54, 158 ER 23, as interpreted by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1223, 1229; *Drane v Evangelou* [1978] 1 WLR 455, 461H, 462E.

¹¹¹ *Mafo v Adams* [1970] 1 QB 548, 558D-E; *Archer v Brown* [1985] QB 401, 426D-G.

¹¹² *Thompson v Hill* (1870) LR 5 CP 564, which after *Rookes v Barnard* [1964] AC 1129 must be interpreted as a case of aggravated damages, since the defendant does not appear to have been motivated by profit.

¹¹³ *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397. But see our comments at para 2.9 above.

an undertaking in damages which was given by a plaintiff when obtaining an *Anton Piller* order, because of the plaintiff's shoddy conduct when obtaining the order, and the oppressive manner in which the order was executed.¹¹⁴

- 1.11 It is hard to discern any common thread linking these 'wrongs'.¹¹⁵ Most, though not all, are actionable *per se*.¹¹⁶ They involve interference with various types of interest: for example, a dignitary interest (assault and battery, false imprisonment, malicious prosecution, defamation, intimidation and unlawful discrimination), a proprietary interest (trespass to land and nuisance) or a commercial interest (unlawful interference with business). In most, though not all, the primary damage is likely to be non-pecuniary. All that can be said with any measure of confidence is that they are all torts, and, moreover, torts for which damages tend to be 'at large'.¹¹⁷ But this is not a sufficient definition, since not all wrongs where damages are 'at large' in this sense attract aggravated damages.¹¹⁸

(2) The assessment of aggravated damages

- 1.12 If, as clear and high authority has stated, aggravated damages are compensatory in nature, and they compensate a plaintiff for (broadly) the mental distress which he or she suffered owing to the manner in which the defendant committed the wrong, they should be assessed in a similar way to other forms or 'heads' of damages for non-pecuniary or 'intangible' losses.
- 1.13 Particular problems have arisen where aggravated damages are assessed by juries.¹¹⁹ This is so primarily in claims arising in respect of the torts of false imprisonment, malicious prosecution, fraud and defamation. As a result of startling variations in jury-assessed awards of damages, which included aggravated damages, against the police for false imprisonment and for malicious prosecution, the Court of Appeal in *Thompson v MPC* considered that:

¹¹⁴ *Columbia Picture Industries Inc v Robinson* [1987] Ch 38.

¹¹⁵ But note that damages awarded pursuant to an undertaking in damages cannot as such be characterised as damages 'for a wrong', let alone for a 'tort'.

¹¹⁶ It should be noted that, although malicious prosecution requires actual damage in order to be actionable, the fiction is observed that certain types of damage will inevitably flow.

¹¹⁷ Ie "not limited to the pecuniary loss that can be specifically proved": *Rookes v Barnard* [1964] AC 1129, 1221, *per* Lord Devlin. In *Broome v Cassell* [1972] AC 1027, 1073G-H, Lord Hailsham took the view that:

The expression 'at large' should be used in general to cover all cases where awards of damages may include elements for loss of reputation, injured feelings, bad or good conduct by either party, or punishment, and where in consequence no precise limit can be set in extent. It would be convenient if ... it could be extended to include damages for pain and suffering or loss of amenity. Lord Devlin uses the term in this sense in *Rookes v Barnard* ... But I suspect he was there guilty of a neologism. If I am wrong, it is a convenient use and should be repeated.

¹¹⁸ Aggravated damages are not available in personal injury actions based on negligence, where the plaintiff has sustained non-pecuniary harm in the form of pain, suffering and loss of amenity: *Kralj v McGrath* [1986] 1 All ER 54. See paras 2.26-2.36 below.

¹¹⁹ On the problems of assessing damages for non-pecuniary loss in personal injury claims, see *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140.

... a more structured approach to the guidance given to juries in these actions is now overdue.¹²⁰

Apart from being relevant to the assessment of exemplary damages,¹²¹ that “more structured approach” to jury guidance included several propositions of relevance to assessments of aggravated damages, at least for the torts of false imprisonment and malicious prosecution.

- 1.14 These propositions were as follows. Aggravated damages compensate a plaintiff for injury to his feelings, in circumstances where there are “aggravating features” about the case¹²² which would result in the plaintiff “not receiving sufficient compensation for the injury” if the award were restricted to a ‘basic’ (compensatory) award.¹²³ Where a jury awards aggravated (compensatory) damages as well as basic (compensatory) damages, it should usually make separate awards.¹²⁴ Where it is appropriate to award aggravated damages, the figure is “unlikely to be less than” £1,000. But it is also unlikely to be as much as twice the basic (compensatory) damages “except perhaps where, on the particular facts, the basic damages are modest”.¹²⁵ In total, the figure for basic and aggravated damages should “not exceed ... fair compensation for the injury which the plaintiff has suffered”.¹²⁶

(3) Are aggravated damages purely compensatory?

- 1.15 Although Lord Devlin clearly analysed aggravated damages in compensatory terms in *Rookes v Barnard*,¹²⁷ there has remained some confusion about whether aggravated damages have a punitive or quasi-punitive function.
- 1.16 Every award of damages which is paid out of a defendant’s own pocket, whether it is, for example, an award of compensatory damages or restitutionary damages,¹²⁸ is

¹²⁰ [1997] 3 WLR 403, 415E.

¹²¹ See generally paras 4.44-4.66, 4.69-4.72, 4.73-4.76, 4.84 and 4.90-4.95 below.

¹²² We call this “exceptional conduct” on the part of the defendant: see paras 2.4 and 2.6 above.

¹²³ [1997] 3 WLR 403, 417A-C.

¹²⁴ [1997] 3 WLR 403, 417C-D. Although this was “contrary to the present practice” it would result in “greater transparency as to the make up of the award” (*per* Lord Woolf MR).

¹²⁵ [1997] 3 WLR 403, 417D-E. It was not possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the “circumstances will vary from case to case”: *Thompson v MPC* [1997] 3 WLR 403, 417D-E, *per* Lord Woolf MR. In *Appleton v Garrett* [1996] PIQR P1, in which aggravated damages were claimed for the tort of trespass to the person (non-consensual dental treatment), and the case was tried by judge alone, Dyson J assessed aggravated damages at 15% of the sum awarded as general damages for pain, suffering and loss of amenity. A formula of this sort was chosen because (a) “broadly speaking, the greater the pain, suffering and loss of amenity, the greater the likely injury to a plaintiff’s feelings as a result of the trespass”, and (b) although plaintiffs who sustain the same pain, suffering and loss of amenity may suffer injuries to their feelings “in differing degrees for many reasons”, the evidence did “not permit [the judge] realistically to draw distinctions of that kind” (P7).

¹²⁶ [1997] 3 WLR 403, 417E.

¹²⁷ [1964] AC 1129.

¹²⁸ See Part III below.

likely adversely to affect him or her. In a loose sense, this effect can be, and often is, described as ‘punitive’. This is recognised by the courts, which may not award exemplary damages¹²⁹ unless any compensatory damages which defendants must pay will be inadequate to punish them for their conduct (the ‘if, but only if’ test).¹³⁰ As any award of damages may have such an adverse (or, loosely, ‘punitive’) effect on a defendant, the fact that an award of aggravated damages may do so is not a reason for viewing such an award as anything other than compensatory in nature.¹³¹

1.17 Nevertheless, several aspects of the present law, which we consider below, do arguably support the view that aggravated damages are ‘punitive’ in a meaningful sense, and not compensatory. That is, they suggest that aggravated damages are awarded in order to punish the defendant for his or her conduct, and therefore are assessed on the basis of what is required to achieve this end, rather than on the basis of what is necessary fully to compensate the plaintiff for his injuries. These aspects are:

- the ‘exceptional conduct’ requirement
- the co-existence of a concept of ‘aggravated damages’ alongside a concept of ‘damages for mental distress’
- the outright refusal to award aggravated damages for breach of contract or the tort of negligence, even where mental distress damages are available
- inconsistencies between the County Court and Supreme Court Rules as to the pleading of aggravated damages

(a) *The ‘exceptional conduct’ requirement*

1.18 The ‘exceptional conduct’¹³² test requires the court to focus its attention primarily on the nature of the defendant’s conduct rather than the extent of the plaintiff’s injury,

¹²⁹ See Parts IV and V below.

¹³⁰ See paras 4.31-4.33 and paras 5.99-5.102 below.

¹³¹ In *Thompson v MPC* [1997] 3 WLR 403 the Court of Appeal clearly accepted that (i) aggravated damages are compensatory; (ii) that an award of compensatory damages (which includes aggravated damages) will, incidentally, have some adverse (or ‘punitive’) effect on the defendant who must pay the award; and (iii) that this incidental adverse (or ‘punitive’) effect should be taken into account when deciding whether exemplary damages should be awarded (the ‘if but only if’ test). Hence juries should be told that:

... if [they] are awarding aggravated damages those damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant’s point of view.

... exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic or aggravated damages is in the circumstances an inadequate punishment for the defendants ...

([1997] 3 WLR 403, 417G-H).

¹³² This terminology derives from *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132: see para 2.4 above. In *Thompson v MPC* [1997] 3 WLR 403

and marks such conduct out as meriting an enhanced award of damages. In the Consultation Paper we observed that:

Aggravated damages ... serve to *increase* the damages that could otherwise be awarded; and they increase awards *because of* the defendant's conduct. This looks like punishment.¹³³

- 1.19 Yet one can argue, on the other hand, that the exceptional conduct test is perfectly compatible with compensation, on the ground that exceptional conduct *necessarily* gives rise to increased injury to feelings. The offensiveness of the defendant's conduct and the seriousness of the plaintiff's injury are linked. If the loss that the plaintiff has actually suffered is exacerbated or aggravated by the conduct of the defendant, he or she should be compensated for it. To do so is simply to compensate in full measure. That this may appear to punish the defendant does not make aggravated damages punitive, rather than compensatory, in aim.
- 1.20 In the recent case of *Appleton v Garrett*¹³⁴ Dyson J adopted our analysis of the circumstances in which aggravated damages could be awarded.¹³⁵ He apparently saw no inconsistency between the proposition that such damages could be awarded where the defendant's exceptional conduct caused injury to the plaintiff's feelings, and the proposition that aggravated damages were compensatory, not punitive, in aim. The link between exceptional conduct and increased (compensatable) injury was also expressly recognised by the Court of Appeal in the guidance which it formulated in *Thompson v MPC*.¹³⁶ Aggravated damages are awardable where there are:

... aggravating features about the case which would result in the plaintiff *not receiving sufficient compensation* for the injury suffered if the award were restricted to a basic award.¹³⁷

(b) The co-existence of damages for mental distress and aggravated damages

- 1.21 The Consultation Paper¹³⁸ regarded the co-existence and conflicting availability of mental distress damages and aggravated damages as further evidence that aggravated damages are not purely compensatory. It argued that aggravated damages do not merely duplicate compensatory damages for mental distress,

the Court of Appeal used the label "aggravating features" (causing injury to feelings) to refer to the circumstances in which an aggravated damages award was justified in addition to a 'basic' compensatory award.

¹³³ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, para 3.29.

¹³⁴ [1996] PIQR P1.

¹³⁵ [1996] PIQR P1, P4.

¹³⁶ [1997] 3 WLR 403.

¹³⁷ [1997] 3 WLR 403, 417A-B (emphasis added).

¹³⁸ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, para 3.29.

noting the concession by the respondents in *Deane v Ealing LBC*¹³⁹ that aggravated damages and damages for injury to feelings were separate issues.

1.22 We do consider that the co-existence of the two heads of claim within the law is a source of unnecessary confusion concerning the function of ‘aggravated damages’, which it is desirable to avoid. That confusion is arguably evident where aggravated damages are claimed in addition to damages for mental distress. What role is there for an award of aggravated damages in that case? Of course, the bare co-existence of the two heads of claim does not, inevitably, mean that aggravated damages are punitive rather than compensatory. Indeed, lawyers are quite accustomed to categorising compensatory damages in a range of ways, for the reason that this *facilitates, because it clarifies, the task of assessment*. That conclusion would only be necessary if the damages which could be claimed under the head of ‘damages for mental distress’ fully compensated the plaintiff for his or her mental distress - that is, if they took account of any increased injury that might be due to the defendant’s conduct. If so, there would be no independent compensatory role for aggravated damages.

1.23 Some courts, when faced with claims to (broadly) damages for mental distress and to aggravated damages, have treated both as compensatory and have awarded both without it being plausible to view the award of aggravated damages as ‘punitive’. For example, in *Thompson v MPC*,¹⁴⁰ having acknowledged that aggravated damages are compensatory in aim, albeit that they may have some incidental punitive effect, the Court of Appeal stated that:

[aggravated] damages can be awarded where there are aggravating features about the case which would result in the plaintiff *not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award*¹⁴¹

and that the total sum of basic compensatory damages plus aggravated damages,

should not exceed what [the jury] consider[s] is *fair compensation for the injury* which the plaintiff has suffered.¹⁴²

1.24 In *Appleton v Garrett*,¹⁴³ Dyson J awarded both aggravated damages and damages for mental distress, but the award of aggravated damages addressed losses which were not covered by the award of damages for mental distress. The plaintiffs were awarded damages for pain, suffering and loss of amenity caused by the trespass (non-consensual dental treatment), but also aggravated damages for the distress (anger, indignation or “heightened sense of injury or grievance”) caused by the realisation that the treatment had been unnecessary, that this had been known to

¹³⁹ [1993] ICR 329, 335C.

¹⁴⁰ [1997] 3 WLR 403.

¹⁴¹ [1997] 3 WLR 403, 417A (emphasis added).

¹⁴² [1997] 3 WLR 403, 417E (emphasis added).

¹⁴³ [1996] PIQR P1.

the defendant, and that the defendant had deliberately concealed the true facts from them for financial gain.¹⁴⁴

- 1.25 But notwithstanding such ‘enlightened’ authorities, we are far from confident that, in other cases in which damages for mental distress *and* aggravated damages have been awarded by a court, aggravated damages have not been treated as punitive, rather than as an essentially compensatory sum addressing losses not covered by the award of damages for mental distress.

(c) *The refusal to award aggravated damages for breach of contract and negligence*

- 1.26 Further evidence of confusion is provided by the fact that aggravated damages have been held to be unavailable for some forms of wrongful conduct, for which mental distress damages can be awarded. If aggravated damages are truly only compensatory in aim, this discrepancy is difficult to understand. For on this view, aggravated damages constitute a ‘subset’ of damages for mental distress: they refer to the part of any sum which is awarded as compensation for mental distress which is intended to compensate the plaintiff for any increased distress he or she may have suffered due to the nature of the defendant’s conduct. The discrepancy could be explained, however, on the basis that the courts retain a residual opinion that aggravated damages have punitive or quasi-punitive function. And as we shall see, the categories of wrongful conduct for which aggravated damages cannot be awarded, but damages for mental distress can, are those where compensatory principles are considered paramount, and punitive considerations inappropriate.
- 1.27 In *Kralj v McGrath*¹⁴⁵ aggravated damages were held to be irrecoverable in a claim for the tort of negligence or for breach of contract. They were held to be irrecoverable even though damages for mental distress are in certain circumstances recoverable in such claims, and, indeed, even though in *Kralj v McGrath* Woolf J was willing to award some mental distress damages to the plaintiff. We shall now examine this central case in depth, in an attempt to isolate the reasons for this discrepancy.
- 1.28 *Kralj v McGrath* concerned liability in tort and contract¹⁴⁶ for the negligent conduct of an obstetrician, Mr McGrath, during delivery of one of Mrs Kralj’s two twin babies. The second of her twins was discovered to be in a ‘transverse’ position - an inappropriate position for the ‘ordinary’ delivery of a child. The obstetrician had therefore sought to correct this by internally rotating the child. It was this treatment which was described in expert evidence, accepted by Woolf J, as “horrific” and as “completely unacceptable”: it involved the manual manipulation of the second child, without any anaesthetic having been administered to Mrs

¹⁴⁴ See also *Prison Service v Johnson* [1997] ICR 275 in which the Employment Appeal Tribunal made an award of damages for injury to feelings as a result of race discrimination, as well as an award of aggravated damages for the additional injury suffered as a result of, in particular, the employer’s failure properly to investigate the complaint.

¹⁴⁵ [1986] 1 All ER 54, 61e-g, approved by the Court of Appeal in *AB v South West Water Services Ltd* [1993] QB 507, 527H-528E; *Levi v Gordon* 12 November 1992 (unreported, CA). Cf *Barbara v Home Office* (1984) 134 NLJ 888.

¹⁴⁶ Mrs Kralj was treated privately.

Kralj, which was an “excruciatingly painful experience”.¹⁴⁷ The child subsequently died from severe injuries which had been sustained during the delivery by Mr McGrath. Mrs Kralj brought an action in tort and in contract against the hospital and Mr McGrath claiming damages for negligence. In the actions the only disputed issue was the quantum of the damages.

- 1.29 Counsel for Mrs Kralj argued, *inter alia*, that *aggravated* damages ought to be awarded to the plaintiff because the conduct of Mr McGrath was so outrageous.¹⁴⁸ Woolf J was referred to a number of learned authorities by the respective counsel:

[Counsel for the defendants referred] me to a passage in *Clerk and Lindsell on the Law of Torts (15th edn, 1982)* pp 242-243 which distinguishes aggravated damages from exemplary damages.

‘Where the damages are at large the manner of commission of the tort may be taken into account and if it was such as to injure the plaintiff’s proper feelings of dignity and pride may lead to a higher award than would otherwise have been justified. Such aggravated damages, as they are known, can be awarded in any class of action, but they have featured most typically in defamation cases and are further considered in that context. From the defendant’s point of view the award may appear to incorporate an element of punishment imposed by the court for his bad conduct, but the intention is rather to compensate the plaintiff for injury to his feelings and the amount payable should reflect this. Aggravated damages are thus, at least in theory, quite distinct from exemplary or punitive damages which are awarded to teach the defendant that ‘tort does not pay’ and to deter him and others from similar conduct in the future. Nevertheless, the two kinds of damages are not always easy to keep apart from one another in practice, and in many older cases large awards have been given without its being made clear whether this was done on the compensatory or the punitive principle. Now, however, that it has been made clear that exemplary damages may be awarded only in certain classes of case the maintenance of the distinction has come to be important and, despite Lord Devlin’s opinion that in general aggravated damages can do most if not all the work that could be done by exemplary damages, it has to be borne in mind that, except where exemplary damages are permissible, every award of damages, including aggravated damages where appropriate, must be justifiable on the basis of compensation; if it is not, the inference will be that an improper element of punishment of the defendant or of simple bounty for the plaintiff has entered into the assessment and the award will, accordingly, be struck down on appeal.’

In addition counsel for the plaintiffs referred me to the decision in *Cassell & Co v Broome* ... In the course of his speech Lord Hailsham LC deals with the question of terminology, and he says:

¹⁴⁷ [1986] 1 All ER 54, 57-58.

¹⁴⁸ [1986] 1 All ER 54, 60f.

‘... a similar ambiguity occurs in actions for defamation, the expressions ‘at large’, ‘punitive’, ‘aggravated’, ‘retributory’, ‘vindictive’ and ‘exemplary’ having been used in, as I have pointed out, inextricable confusion. In my view it is desirable to drop the use of the phrase ‘vindictive’ damages altogether ... In awarding ‘aggravated’ damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and as the result of the conduct exciting the indignation demands a more generous solatium.’

That speech was, of course, dealing with damages in the context of an action for defamation.¹⁴⁹

1.30 Woolf J’s response was to reject the argument for the plaintiffs:

It is my view that it would be wholly inappropriate to introduce into claims of this sort, for breach of contract and negligence, the concept of aggravated damages. If it were to apply in this situation of a doctor not treating a patient in accordance with his duty, whether under contract or in tort, then I would consider that it must apply in other situations where a person is under a duty to exercise care. It would be difficult to see why it could not even extend to cases where damages are brought for personal injuries in respect of driving. If the principle is right, a higher award of damages would be appropriate in a case of reckless driving which caused injury than would be appropriate in cases where careless driving caused identical injuries.¹⁵⁰ Such a result seems to me to be wholly inconsistent with the general approach to damages in this area, which is to compensate the plaintiff for the loss that she has actually suffered, so far as it is possible to do so, by the award of monetary compensation and not to treat those damages as being a matter which reflects the degree of negligence or breach of duty of the defendant ...¹⁵¹

... What I am saying is no more than that what the court has to do is to judge the *effect on the particular plaintiff* of what happened to her ...¹⁵²

Accordingly, the nature of Mrs Kralj’s experience was relevant to the damages she was awarded only in so far as it served to increase the distress she suffered.¹⁵³

1.31 In the unreported landlord and tenant case of *Levi v Gordon*¹⁵⁴ the Court of Appeal adopted the same approach in relation to an action for breach of contract.¹⁵⁵ The

¹⁴⁹ [1986] 1 All ER 54, 60g-61d.

¹⁵⁰ [1986] 1 All ER 54, 61e-g.

¹⁵¹ [1986] 1 All ER 54, 61f-g (emphasis added).

¹⁵² [1986] 1 All ER 54, 61j (emphasis added).

¹⁵³ Mrs Kralj was awarded damages for, *inter alia*, the very distressing, if short, experience of Mr McGrath attempting to rotate the child, but Woolf J did not consider it to be helpful to identify any precise sum corresponding to the period: [1986] 1 All ER 54, 62j.

¹⁵⁴ 12 November 1992 (unreported, CA).

two of their lordships who gave judgments¹⁵⁶ were clear that aggravated damages could not be awarded in such actions:

... I do not believe that the judge would have been entitled to award aggravated damages in respect of breach of contract ...¹⁵⁷

... [it] was not a proper claim to add to an action for damages for breach of covenant. Aggravated damages play a part in claims based on tort, as do exemplary damages. But ... I have never heard of such a claim in an action for breach of contract ...¹⁵⁸

1.32 The approach of Woolf J in *Kralj v McGrath* was subsequently approved by the Court of Appeal in *AB v South West Water Services*.¹⁵⁹ In that case the court struck out claims for aggravated damages based on indignation at the defendant's conduct following a negligently committed public nuisance. It was held that any greater or more prolonged pain or suffering and "real anxiety or distress" which were suffered as a result of the defendant's subsequent conduct were compensatable by way of general damages for pain and suffering.¹⁶⁰ In the Court of Appeal's view, feelings of anger and indignation were not a proper subject for compensation¹⁶¹ and could not attract an award of aggravated damages, since they were neither damage directly caused by the defendant's tortious conduct¹⁶² nor damage which the law had ever previously recognised.¹⁶³

1.33 On the other hand, aggravated damages would appear still to be available for causes of action where anger and indignation *are* a recognised head of recoverable loss:¹⁶⁴ indeed, Sir Thomas Bingham MR expressly accepted that indignation aroused by a defendant's conduct could serve to increase a plaintiff's damages in defamation cases,

¹⁵⁵ The breach was by the landlord of the covenant to repair. The tenants brought an action claiming, *inter alia*, aggravated damages. The allegation was that, by reason of the failure to repair, the defendant landlord had sought to harass the tenants and to induce them to leave. Judgment for £15,000 having been given in favour of the plaintiffs at first instance, the application before the Court of Appeal concerned whether the defendants were entitled to adduce new evidence as regards the existence of any harassment by them of the plaintiffs. The application was refused. The grounds were: first, that because the judge had in fact ignored the allegations of harassment made by the plaintiffs, and so the claims to aggravated damages, any such evidence was not relevant; second, aggravated damages would not have been available in any case.

¹⁵⁶ *McCowan and Scott* LJJ; *Purchas* LJ agreeing.

¹⁵⁷ *Per* *McCowan* LJ.

¹⁵⁸ *Per* *Scott* LJ.

¹⁵⁹ [1993] QB 507.

¹⁶⁰ [1993] QB 507, 527H, 528E-F, 532F-G. See paras 2.34-2.35 below for other instances of recoverable mental distress for the tort of negligence.

¹⁶¹ [1993] QB 507, 527H-528E, 528E-F, 532H.

¹⁶² See paras 2.7-2.8 above. Thus it seems that only the conduct constituting the wrong itself, or subsequent conduct so closely associated with it that it could be said to be an extension of the wrong, are relevant to aggravated awards.

¹⁶³ [1993] QB 507, 533B, *per* Sir Thomas Bingham MR.

¹⁶⁴ Eg defamation, false imprisonment, malicious prosecution, assault and battery and discrimination.

because in such cases “injury to the plaintiff’s feelings and self-esteem is an important part of the damage for which compensation is awarded”.¹⁶⁵

- 1.34 In contrast to aggravated damages, mental distress damages (although unavailable for grief, anguish, worry, upset or strain arising from personal injury to the plaintiff’s spouse or child,¹⁶⁶ or, apart from the tort of assault, for the mental distress of being frightened for one’s own safety)¹⁶⁷ are recoverable for wrongfully inflicted personal injury under the head of general damages for pain and suffering.¹⁶⁸ And it is now well-established that damages for mental distress can be recovered in an action for breach of contract in two main situations. As Bingham LJ said in *Watts v Morrow*:

But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead ... In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort.¹⁶⁹

- 1.35 Moreover, in *Perry v Sidney Phillips & Son*,¹⁷⁰ in an action for both negligence and breach of contract, the plaintiff was awarded damages for mental distress consequent on the physical inconvenience of living in a house with serious defects which the defendant surveyors had failed to report.

- 1.36 In our view *Kralj v McGrath*,¹⁷¹ *Levi v Gordon*,¹⁷² and *AB v South West Water Services Ltd*¹⁷³ stand as modern authorities to the effect that aggravated damages are unavailable for the tort of negligence and for breach of contract. And this is so irrespective of what the law is on the recovery of damages for mental distress. As we indicate above,¹⁷⁴ it is unfortunately not easy to understand the justification for

¹⁶⁵ [1993] QB 507, 533A.

¹⁶⁶ *Hinz v Berry* [1970] 2 QB 40; *McLoughlin v O’Brian* [1983] 1 AC 410, 418D; *Whitmore v Euroways Express Coaches Ltd*, *The Times* 4 May 1984; *Kralj v McGrath* [1986] 1 All ER 54, 62a-c; *Bagley v North Herts Health Authority* [1986] NLJ 1014; *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, 401, 409-410, 416; *Kerby v Redbridge Health Authority* [1993] 4 Med LR 178. Cf *Whitmore v Euroways Express Coaches Ltd*, an action against a holiday firm for negligent driving, in which the plaintiff’s wife was awarded damages for ‘ordinary shock’ (as opposed to ‘nervous shock’) suffered at seeing her husband’s injuries.

¹⁶⁷ *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1; *Hicks v Chief Constable of the South Yorkshire Police* [1992] 2 All ER 65, 69; *Nicholls v Rushton*, *The Times* 19 June 1992.

¹⁶⁸ *AB v South West Water Services Ltd* [1993] QB 507, 527H (per Stuart-Smith LJ), 532F-G (per Sir Thomas Bingham MR).

¹⁶⁹ [1991] 1 WLR 1421, 1445G-H.

¹⁷⁰ [1982] 1 WLR 1297.

¹⁷¹ [1986] 1 All ER 54.

¹⁷² 12 November 1992 (unreported, CA).

¹⁷³ [1993] QB 507.

¹⁷⁴ See para 2.26 above.

such a restriction, unless one takes the view that aggravated damages are in reality, and contrary to Lord Devlin's view, a form of punitive damages. Viewed as compensatory damages, we cannot detect any good reason why aggravated damages should not be available for the tort of negligence or for breach of contract, at least where mental distress damages of some sort are available for those causes of action on the facts in question. These cases reveal all too clearly the continued confusion over the role of aggravated damages.

(d) Inconsistencies between pleading rules

- 1.37 We shall see that both the County Court and Supreme Court Rules state that claims to "exemplary damages" must be specifically pleaded.¹⁷⁵ In contrast, only the County Court Rules require the same for claims to "aggravated damages".¹⁷⁶ This discrepancy between the County Court and Supreme Court Rules is difficult to justify.
- 1.38 It is exceptional, rather than usual, for court rules expressly to require a claim to damages to be specifically pleaded. As exemplary damages are one remedy which is singled out for special treatment, it is possible to view the discrepancy as yet another manifestation of the confusion between aggravated damages and exemplary damages, and between the functions of 'compensation' and 'punishment'. But this does not inevitably follow. The County Court Rule in question was drafted more recently than the Supreme Court Rules. The extension of the requirement of specific pleading to 'aggravated damages' may be an oversight. Or it may reflect a recent policy choice in favour of requiring specific pleading of a broader range of claims, including claims to aggravated (compensatory) damages.¹⁷⁷

2. REFORM

- 1.39 The Consultation Paper provisionally concluded¹⁷⁸ that aggravated damages should be assimilated within a strictly compensatory model, by means of the removal of the exceptional conduct requirement. It raised for consideration the question whether intangible personality interests can be protected by a strict compensatory model of redress.¹⁷⁹ Consultees' views were also sought on the following questions:

¹⁷⁵ See para 4.113 below.

¹⁷⁶ CCR, O 6, r 1B. Cf RSC, O 18, r 8(3). But cf *Prince Ruspoli v Associated Newspapers plc* 11 December 1992 (unreported, CA) discussed in *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, para 3.18.

¹⁷⁷ Lord Woolf MR's draft civil proceedings rules (*Access to Justice, Draft Civil Proceedings Rules* (July 1996)) require aggravated damages and exemplary damages to be specifically claimed. Rule 7.4(5) provides: "If the claimant is seeking aggravated damages or exemplary damages, he must say so expressly on the claim form".

¹⁷⁸ *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, paras 6.48 and 8.18.

¹⁷⁹ *Ibid*, paras 6.48 and 8.18.

- (1) what problems of assessment and proof, if any, might be raised by the abolition of aggravated damages;¹⁸⁰
 - (2) whether aggravated damages should be available in respect of all wrongs or only some;¹⁸¹ and
 - (3) whether the proposed abolition of aggravated damages and the adoption of a purely compensatory model would have to be carried out in conjunction with the reform of the law of exemplary damages, to ensure that any gaps are closed.¹⁸²
- 1.40 We consider that aggravated damages should be viewed as purely compensatory - a view supported by the majority of consultees. They are assessed with reference to what is necessary to compensate certain losses suffered by plaintiffs; they are not assessed with reference to what is necessary to punish a defendant for his or her conduct. To suggest otherwise would require an assumption that the law is starkly incoherent. Punishment has been a controversial aim of the civil law of damages, and exemplary damages, which are aimed to punish, are viewed as an exceptional remedy, the availability of which should be tightly constrained. We shall see in Part IV that the availability of the punitive remedy of exemplary damages has been strictly constrained by the 'categories test' and the 'cause of action test'. We recommend in Part V that the availability of exemplary damages should be expanded, but at the same time, subjected to significant limitations. There can be no room within the law of damages, as it presently stands, or as we propose it should be, for another 'punitive' remedy ('aggravated damages') which is not subject to such limitations.
- 1.41 What follows from our acceptance that aggravated damages are compensatory? We are no longer persuaded that legislative abolition of 'aggravated damages' (and with it, the 'exceptional conduct' requirement) is desirable. This is because it may tend to limit the availability of damages for mental distress. It is not the case that losses which are compensated by an award of aggravated damages could always be compensated under another, already-recognised head of damages for a particular tort. Some losses may only be compensated once it is found that the defendant has acted in a particularly bad manner; abolishing aggravated damages would prevent recovery for such losses. Of course, this difficulty could be solved by legislation, which states and expands the circumstances in which mental distress damages should be recovered. But we do not consider that it would be sensible for us to attempt this course of action. On the contrary, we believe that, once one has clarified the role of aggravated damages, the availability of damages for mental distress should be left to incremental judicial development.
- 1.42 What we therefore propose is legislation which will clarify the true role of so-called aggravated damages, and at the same time, aim to sweep away the terminology of 'aggravated damages' which has been so misleading. Accordingly, we recommend that:

¹⁸⁰ *Ibid*, paras 6.50-6.52 and 8.18.

¹⁸¹ *Ibid*, paras 6.53 and 8.18.

¹⁸² *Ibid*, paras 6.54 and 8.18.

- (1) legislation should provide that so-called ‘aggravated damages’ may only be awarded to compensate a person for his or her mental distress; they must not be intended to punish the defendant for his conduct. (Draft Bill, clause 13)**
- (2) wherever possible the label ‘damages for mental distress’ should be used instead of the misleading phrase ‘aggravated damages’. (Draft Bill, clause 13)**
- (3) recommendations (1) and (2) are not intended to restrict the circumstances in which damages for mental distress are recoverable other than as ‘aggravated damages’ (for example, compensation for pain and suffering in personal injury cases or contractual damages for a ruined holiday).**

1.43 This clarification will enable ‘aggravated damages’ to be seen for what they are: as part of the law on damages for mental distress. Once so seen, a more coherent perception, and therefore development, of damages for mental distress should be possible. By way of illustration of what we mean by “a more coherent perception, and ... development” of the law, take the present rule that aggravated damages are unavailable for the tort of negligence. We have suggested that one reason for this limitation may have been the misconception that aggravated damages are punitive in nature. By clarifying that aggravated damages are in fact compensatory, this reason for the limitation is revealed to be a false one. But courts may have other, sound reasons for imposing such a limitation; our legislative clarification is not intended to prevent courts from so holding in the future.

PART III

RESTITUTION FOR WRONGS

1. THE LAW OF RESTITUTION

- 1.1 In *Lipkin Gorman v Karpnale Ltd*,¹⁸³ the House of Lords accepted for the first time that there is an English law of restitution based on the principle against unjust enrichment. There is now a wide measure of consensus among commentators that the law of restitution has two main divisions: unjust enrichment by subtraction (or autonomous unjust enrichment) and unjust enrichment by wrongdoing (or dependent unjust enrichment).¹⁸⁴ The difference between those two divisions is that the latter depends on the commission of a wrong by the defendant to the plaintiff (whether that wrong is a tort or a breach of contract or an equitable wrong, such as breach of a fiduciary duty or breach of confidence). The enrichment is 'at the expense' of the plaintiff in the sense that the defendant has committed a wrong to the plaintiff. Restitution, concerned to strip away the gains made by the defendant by the wrong, is only one of several possible remedial responses, of which the most common is compensation. In contrast, in unjust enrichment by subtraction, no wrong needs to have been committed by the defendant and the enrichment is 'at the expense' of the plaintiff in the more obvious sense that the gain to the defendant represents a loss to, or a subtraction from the wealth of, the plaintiff. The grounds for restitution in unjust enrichment by subtraction tend to comprise factors vitiating or qualifying the plaintiff's true consent to a transfer of his or her wealth to the defendant: for example, mistake, duress, undue influence, and failure of consideration.
- 1.2 In this paper we are essentially concerned with unjust enrichment by wrongdoing (that is, restitution for wrongs).¹⁸⁵ We are concerned to identify when a plaintiff is entitled, or ought to be entitled, to a stripping of the gains made by a civil wrong.

¹⁸³ [1991] 2 AC 548. For further acceptance and application of the principle against unjust enrichment by the House of Lords, see *Woolwich Equitable Building Society v IRC* [1993] AC 70; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669.

¹⁸⁴ See P Birks, *An Introduction to the Law of Restitution* (revised ed, 1989) pp 23-24, 40-44, 313-315, 346-355; A Burrows, *The Law of Restitution* (1993) pp 16-21, 376. For judicial recognition of this division, see *Halifax Building Society v Thomas* [1996] 2 WLR 63 and *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, per Mason CJ. See also the central division in Lord Goff of Chieveley and G Jones, *The Law of Restitution* (4th ed, 1993) between "Section One: Where the Defendant has Acquired a Benefit from or by the Act of the Plaintiff" and "Section Three: Where the Defendant has Acquired a Benefit through his own Wrongful Act". J Beatson, *The Use and Abuse of Unjust Enrichment* (1991) pp 206-243 is not convinced of the validity of the Birksian divide; nor is P Cane, "Exceptional Measures of Damages", in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996) pp 312-323.

¹⁸⁵ For discussions of this area see, eg, Lord Goff of Chieveley and G Jones, *The Law of Restitution* (4th ed, 1993) chs 33, 36, 38, and pp 414-417; P Birks, *An Introduction to the Law of Restitution* (revised ed, 1989) pp 39-44, ch 10; A Burrows, *The Law of Restitution* (1993) ch 14; A Burrows, *Remedies for Torts and Breach of Contract* (2nd ed, 1994) ch 6; J Beatson, *The Use and Abuse of Unjust Enrichment* (1991) pp 206-243; I Jackman, "Restitution for Wrongs" (1989) 48 CLJ 302; P Birks, *Civil Wrongs: A New World* (Butterworth Lectures 1990-91) pp 94-98.

- 1.3 Historically, a number of differently labelled remedies have performed the role of stripping away gains made by a civil wrongdoer: for example, the award of money had and received (especially in the so-called ‘waiver of tort’ cases), an account of profits, and ‘restitutionary’ damages (where the damages are assessed according to the gains made by the wrongdoer rather than the loss to the plaintiff).
- 1.4 It is only comparatively recently - with the recognition of, and increased interest in, the law of restitution - that it has come to be appreciated that the law often is concerned to strip away gains made by a wrong. No-one would pretend that restitution in this context is as well-established and uncontroversial as compensation. And there are cases (sometimes analysed as awarding restitution) where one can realistically argue that the plaintiff has suffered a loss, in the extended sense that the plaintiff has not been paid what he or she would have charged for permitting the defendant’s conduct.¹⁸⁶ But to deny that the law does award restitution for some civil wrongs, and to argue that all past decisions have in reality been awarding compensation, would, in our view, be to distort the truth.

2. RESTITUTION FOR WRONGS: PRESENT LAW

- 1.5 It is convenient to divide the present law on restitution for wrongs into three parts: restitution of enrichments gained by a tort; restitution of enrichments gained by an equitable wrong; and restitution of enrichments gained by a breach of contract.

(1) Enrichments gained by a tort

- 1.6 A word first needs to be said about ‘waiver of tort’. This is a confusing concept and it carries more than one meaning. It is normally used to refer to a situation in which a plaintiff seeks a restitutionary remedy for a tort rather than compensatory damages. So, for example, in the leading case of *United Australia Ltd v Barclays Bank Ltd*¹⁸⁷ the plaintiff initially brought an action for money had and received by conversion of a cheque. This was a claim for restitution of the gains made by the tort of conversion and the plaintiff was described as ‘waiving the tort’. Yet this did not mean that the plaintiff was excusing the tort, so that, when that claim was abandoned prior to judgment, the plaintiff was nevertheless entitled to bring an action claiming compensatory damages for conversion of the cheque by another party. Viscount Simon LC said:

When the plaintiff ‘waived the tort’ and brought assumpsit,¹⁸⁸ he did not thereby elect to be treated from that time forward on the basis that no tort had been committed; indeed, if it were to be understood that no tort had been committed, how could an action in assumpsit lie? It lies only because the acquisition of the defendant is wrongful and there

¹⁸⁶ That is, the damages can be viewed as compensating the plaintiff’s loss of opportunity to bargain. See R J Sharpe and S M Waddams, “Damages for Lost Opportunity to Bargain” (1982) 2 OJLS 290. For differing judicial views as to the usefulness of the notion of loss of opportunity to bargain, see the interpretations of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 by Steyn LJ in *Surrey CC v Bredero Homes Ltd* [1993] 1 WLR 1361 and by the Court of Appeal in *Jaggard v Sawyer* [1995] 1 WLR 269. See para 3.36 below.

¹⁸⁷ [1941] AC 1.

¹⁸⁸ That is, the action for money had and received.

is thus an obligation to make restitution ... The substance of the matter is that on certain facts he is claiming redress either in the form of compensation, ie damages as for a tort, or in the form of restitution of money to which he is entitled, but which the defendant has wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress. At some stage of the proceedings the plaintiff must elect which remedy he will have.¹⁸⁹

1.7 There are two other meanings of the phrase 'waiver of tort'. One refers to a principle of agency law whereby the victim of a tort can choose to give up his right to sue for a tort by treating the tortfeasor as having been authorised to act as the plaintiff's agent and then relying on standard remedies against an agent to recover the profits made. In this situation, the tort is truly extinguished.¹⁹⁰ The other meaning refers to where the plaintiff chooses to ignore the tort and instead rests his or her claim to restitution on unjust enrichment by subtraction; for example, a plaintiff, who has been induced to transfer money to the defendant by the defendant's fraudulent misrepresentation, may ignore the tort of deceit and seek restitution of the payment from the defendant within unjust enrichment by subtraction on the basis that it was paid by mistake.¹⁹¹

1.8 In this paper we are essentially concerned with 'waiver of tort' in its first, and usual, sense. That is, we are concerned with restitution *for* a tort. One must be careful to ensure, however, that one does not cite, as supporting restitution for a tort, cases that rest on 'waiver of tort' in one of its other two senses.

1.9 In examining restitution for torts, it is helpful to divide between:

- proprietary torts, excluding the protection of intellectual property
- intellectual property torts
- other torts

(a) *Proprietary torts, excluding the protection of intellectual property*

1.10 Restitutory remedies have long been granted for proprietary torts, such as conversion,¹⁹² trespass to goods,¹⁹³ and trespass to land.¹⁹⁴ Their appropriateness in

¹⁸⁹ [1941] AC 1, 18-19.

¹⁹⁰ For a rare example of this, see *Verschures Creameries Ltd v Hull and Netherlands SS Co Ltd* [1921] 2 KB 608.

¹⁹¹ See para 3.23 below.

¹⁹² *Lamine v Dorrell* (1705) 2 Ld Raym 1216, 92 ER 303; *Chesworth v Farrar* [1967] 1 QB 407.

¹⁹³ *Oughton v Seppings* (1830) 1 B & Ad 241, 109 ER 776; *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246, 254-255, *per* Denning LJ (cf Somervell and Romer LJJ, who analysed the award as compensatory).

¹⁹⁴ *Powell v Rees* (1837) 7 Ad & E 426, 112 ER 530; *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359; *Bracewell v Appleby* [1975] Ch 408; *Ministry of Defence v Ashman* (1993) 66 P & CR 195.

nuisance¹⁹⁵ has also been recognised. The restitutionary remedies in these cases have included both awards of money had and received and damages (where the assessment of the damages was more concerned with stripping away some or all of the defendant's gains than compensating the plaintiff's loss). In some cases the plaintiff has been awarded all the profits made by the defendant (for example, from the sale of the plaintiff's goods). In other cases the plaintiff has been held entitled to a proportion of the profits derived from the use of the property or a reasonable charge for the use of the property. These awards have been made irrespective of whether the plaintiff would itself have made those profits or would have charged for the lawful use of its property.

- 1.11 It is also noteworthy that by sections 27 and 28 of the Housing Act 1988 a remedy of a restitutionary character has been created for "unlawful eviction": the damages awarded under these sections are measured according to the increase in the value of the landlord's property resulting from the eviction.¹⁹⁶
- 1.12 One of the clearest judicial acceptances of restitution as an appropriate remedy for a property tort was made by Hoffmann LJ in the trespass to land case of *Ministry of Defence v Ashman*.¹⁹⁷ He said:

A person entitled to possession of land can make a claim against a person who has been in occupation without his consent on two alternative bases. The first is for the loss which he has suffered in consequence of the defendant's trespass. This is the normal measure of damages in the law of tort. The second is the value of the benefit which the occupier has received. This is a claim for restitution. The two bases of claim are mutually exclusive and the plaintiff must elect before judgment which of them he wishes to pursue. These principles are not only fair but ... well established by authority. It is true that in earlier cases it has not been expressly stated that a claim for mesne profit for trespass can be a claim for restitution. Nowadays I do not see why we should not call a spade a spade.¹⁹⁸

- 1.13 A significant feature of restitution for proprietary torts is that it is not a precondition that the defendant was acting dishonestly or in bad faith or cynically. While it may be said that the proprietary torts normally require intentional conduct (for example, the tort of conversion normally requires that the defendant intended to deal with the goods in question), it is no defence to the tort, including a restitutionary remedy for the tort, that the defendant honestly and reasonably believed that the property was his rather than the plaintiff's. So if the defendant sells the plaintiff's goods, the plaintiff is entitled to restitution of the sale profits even though the defendant honestly believed them to be his own. Similarly, if the defendant uses another's goods, it would seem that the owner is entitled to

¹⁹⁵ *Carr-Saunders v Dick McNeill Associates Ltd* [1986] 1 WLR 922 (although, as there was no evidence of profit, no award was made).

¹⁹⁶ See, eg, *Jones v Miah* (1992) 24 HLR 578, 587.

¹⁹⁷ (1993) 66 P & CR 195. *Ashman* was followed and applied by the Court of Appeal in *Ministry of Defence v Thompson* [1993] 2 EGLR 107. See generally, E Cooke, "Trespass, Mesne Profits and Restitution" (1994) 110 LQR 420.

¹⁹⁸ (1993) 66 P & CR 195, 200-201.

damages assessed according to a reasonable hiring charge, even though the defendant honestly believed them to be his own.

- 1.14 The Court of Appeal's decision in the trespass to land case of *Phillips v Homfray*¹⁹⁹ has traditionally been regarded as hampering the recognition of restitution for torts. The deceased had trespassed by using roads and passages under the plaintiff's land to transport coal. In an earlier action the plaintiff had been granted 'damages' to be assessed for the use of the land against the (then living) tortfeasor. The question at issue was whether this action survived against the deceased's executors despite the *actio personalis* rule then barring the survival of tort claims. The majority (Baggallay LJ dissenting) held that it did not survive on the ground that for a restitutionary remedy (at least, for one that is to survive against a deceased's executors) the gain made by the tortfeasor must comprise the plaintiff's property or the proceeds of that property. Therefore no award survived in respect of the expense which the deceased had saved by his wrongful use of the plaintiff's land.
- 1.15 On one view, the decision was inextricably tied up with the *actio personalis* rule and has no validity now that that rule has gone.²⁰⁰ On another view, the decision was concerned with unjust enrichment by subtraction because restitution for the tort of trespass to land was barred by the *actio personalis* rule.²⁰¹ On yet another view, the decision is simply wrong, in drawing an arbitrary distinction between types of benefit and in confusing personal and proprietary rights, and should be overruled.²⁰²
- 1.16 Whichever view is taken the same essential conclusion is reached, namely that the majority's approach should not today be regarded as restricting the availability of restitution for trespass to land or any other tort. It is therefore unsurprising that in recent times restitutionary remedies have been awarded for torts, including in trespass for land cases²⁰³ which, if the decision were of general validity, would contradict *Phillips v Homfray*.²⁰⁴
- 1.17 One modern decision of the Court of Appeal is inconsistent with the law's recognition of restitution for proprietary torts. In *Stoke-on-Trent City Council v W & J Wass Ltd*²⁰⁵ the defendant had committed the tort of nuisance by operating a Thursday market from 12 April 1984 within a distance infringing the plaintiff council's proprietary market right (that is, within 6 2/3 miles of the plaintiff's same

¹⁹⁹ (1883) 24 ChD 439.

²⁰⁰ S Hedley, "Unjust Enrichment as the Basis of Restitution - An Overworked Concept" (1985) 5 Legal Studies 56, 64; W Gummow in PD Finn (ed), *Essays on Restitution* (1990) pp 60-67.

²⁰¹ P Birks, *An Introduction of the Law of Restitution* (revised ed, 1989) p 323.

²⁰² Lord Goff of Chieveley and G Jones, *The Law of Restitution* (4th ed, 1993) p 719; A Burrows, *The Law of Restitution* (1993) p 391.

²⁰³ See, eg, *Penarth Dock Engineering Co Ltd v Pounds* [1963] 1 Lloyd's Rep 359; *Bracewell v Appleby* [1975] Ch 408; *Ministry of Defence v Ashman* (1993) 66 P & CR 195.

²⁰⁴ But *Phillips v Homfray* (1883) 24 ChD 439 was applied in *AG v De Keyser's Royal Hotel* [1920] AC 508. See also *Morris v Tarrant* [1971] 2 QB 143.

²⁰⁵ [1988] 1 WLR 1406.

day market). At first instance, Peter Gibson J granted the plaintiff, from 4 March 1987, a permanent injunction to restrain further infringement of its right. He also awarded substantial damages, not on the basis that the plaintiff had suffered any loss of custom, but on the basis of an appropriate licence fee that the plaintiff could have charged the defendant for lawful operation of its market from 12 April 1984 to 4 March 1987. The defendant company successfully appealed against the award of substantial damages, the Court of Appeal holding that the plaintiff was entitled merely to £2 nominal damages.

- 1.18 On the facts, the plaintiff would not have granted the defendant the right to hold the market and therefore Peter Gibson J's award at first instance is better viewed as restitutionary (stripping away part of the defendant's wrongfully acquired gains) rather than compensatory. In the Court of Appeal the whole question was approached as if only compensatory damages could be awarded. Indeed it was only at the very end of Nourse LJ's judgment that there was any reference to restitution. He said,

It is possible that the English law of tort, more especially of the so-called 'proprietary torts' will in due course make a more deliberate move towards recovery based not on loss suffered by the plaintiff but on the unjust enrichment of the defendant - see Goff and Jones *The Law of Restitution*, 3rd ed (1986), pp 612-614. But I do not think that that process can begin in this case and I doubt whether it can begin at all at this level of decision.²⁰⁶

The approach in *Wass* has been heavily criticised by commentators.²⁰⁷

(b) Intellectual property torts

- 1.19 These are civil wrongs which are now either statutory torts (for example, infringement of a patent, infringement of copyright, infringement of design right) or common law torts (for example, infringement of trade mark and passing off). The reason why it is convenient to treat them separately from other proprietary torts is that restitution for these torts, through the equitable remedy of an account of profits, is very well-established and no doubt historically reflects the fact that these torts started life as equitable wrongs.
- 1.20 So an account of profits may be ordered for the torts of passing off²⁰⁸ or infringement of trade mark,²⁰⁹ although it appears that dishonesty is here a precondition of the restitutionary remedy,²¹⁰ albeit not of a claim for compensation.²¹¹

²⁰⁶ [1988] 1 WLR 1406, 1415.

²⁰⁷ See, eg, P Birks, *Civil Wrongs - A New World* (Butterworth Lectures 1990-91) esp pp 57-77; A Burrows, *The Law of Restitution* (1993) pp 392-393; Lord Goff of Chieveley and G Jones, *The Law of Restitution* (4th ed, 1993) pp 722-723.

²⁰⁸ *Lever v Goodwin* (1887) 36 ChD 1; *My Kinda Town Ltd v Soll* [1982] FSR 147, reversed on liability [1983] RPC 407.

²⁰⁹ *Edelsten v Edelsten* (1863) 1 De G J & S 185, 46 ER 72; *Slazenger & Sons v Spalding & Bros* [1910] 1 Ch 257; *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 (HCA).

²¹⁰ See especially the decision of Windeyer J in the High Court of Australia in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25.

The classic statement in an English case of the purpose of an account of profits was made by Slade J in *My Kinda Town Ltd v Soll*,²¹² in which the plaintiffs claimed that the defendants were passing off their chain of restaurants as the plaintiffs'. Slade J said, "The purpose of ordering an account of profits in favour of a successful plaintiff in a passing off case ... is to prevent an unjust enrichment of the defendant".²¹³

- 1.21 In *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*,²¹⁴ an infringement of trade mark case, Windeyer J said the following:

The distinction between an account of profits and damages is that by the former the infringer is required to give up his ill-gotten gains to the party whose rights he has infringed: by the latter he is required to compensate the party wronged for the loss he has suffered. The two computations can obviously yield different results, for a plaintiff's loss is not to be measured by the defendant's gain, nor a defendant's gain by the plaintiff's loss. Either may be greater, or less, than the other. If a plaintiff elects to take an inquiry as to damages the loss to him of profits which he might have made may be a substantial element of his claim ... But what a plaintiff might have made had the defendant not invaded his rights is by no means the same thing as what the defendant did make by doing so ... [T]he account of profits retains the characteristics of its origin in the Court of Chancery. By it a defendant is made to account for, and is then stripped of, profits he has made which it would be unconscionable that he retain. These are profits made by him dishonestly, that is by his knowingly infringing the rights of the proprietor of the trade mark. This explains why the liability to account is still not necessarily coextensive with acts of infringement. The account is limited to the profits made by the defendant during the period when he knew of the plaintiff's rights. So it was in respect of common law trade marks. So it still is in respect of registered trade marks ... I think that it follows that it lies upon a plaintiff who seeks an account of profits to establish that profits were made by the defendant knowing that he was transgressing the plaintiff's rights.²¹⁵

- 1.22 Turning to the statutory intellectual property torts, it is laid down in statute that an account of profits may be ordered for infringement of a patent,²¹⁶ infringement of copyright,²¹⁷ infringement of design right,²¹⁸ and infringement of performer's property rights.²¹⁹ Statutory provisions further lay down that the standard of fault

²¹¹ *Gillette UK Ltd v Edenwest Ltd* [1994] RPC 279.

²¹² [1982] FSR 147, reversed on liability [1983] RPC 407.

²¹³ [1982] FSR 147, 156. See also *Potton Ltd v Yorkclose Ltd* [1990] FSR 11 (infringement of copyright).

²¹⁴ (1968) 122 CLR 25 (HCA).

²¹⁵ (1968) 122 CLR 25, 32, 34-35.

²¹⁶ Patents Act 1977, s 61(1)(d)

²¹⁷ Copyright, Designs and Patents Act 1988, s 96(2).

²¹⁸ Copyright, Designs and Patents Act 1988, s 229(2).

²¹⁹ Copyright, Designs and Patents Act 1988, s 191I(2).

required to trigger an account of profits for patent infringement is negligence,²²⁰ whereas for infringement of copyright,²²¹ primary infringement of design right,²²² and infringement of performer's property rights,²²³ an account of profits may be ordered on a strict liability basis (that is, it is not a defence that the defendant did not know, and had no reason to believe, that copyright or design right existed in the work or design to which the action relates). As we have seen, a strict liability approach to restitutionary remedies for a tort is applied in respect of other proprietary torts.²²⁴ However, it clashes with what appears to be the approach in respect of the common law intellectual property torts.

(c) Non-proprietary torts

1.23 When one moves to examine the non-proprietary torts, it is much more difficult to find examples of cases illustrating the award of restitution for a tort. In particular, 'waiver of tort' cases that are sometimes cited as illustrations²²⁵ turn out on closer inspection to be better (or, at least, equally well) interpreted as cases within unjust enrichment by subtraction (that is, 'waiver of tort' is being used in the third sense set out above).²²⁶

1.24 It is also significant that in *Halifax Building Society v Thomas*²²⁷ the Court of Appeal has recently denied a plaintiff a restitutionary claim to the gains made by the tort of deceit. After earlier pointing out that counsel for the plaintiff had accepted that "there is no English authority to support the proposition that a wrongdoing defendant will be required to account for a profit which is not based on the use of the property of the wronged plaintiff", Peter Gibson LJ said:

There is no decided authority that comes anywhere near to covering the present circumstances. I do not overlook the fact that the policy of law is to view with disfavour a wrongdoer benefiting from his wrong, the more so when the wrong amounts to fraud, but it cannot be suggested that there is a universally applicable principle that in every case there will be restitution of benefit from a wrong.²²⁸

²²⁰ Patents Act 1977, s 62(1). The same approach applies to damages.

²²¹ Copyright, Designs and Patents Act 1988, s 97(1). A different approach applies to damages.

²²² Copyright, Designs and Patents Act 1988, s 233(1). A different approach applies to damages.

²²³ Copyright, Designs and Patents Act 1988, s 191J(1). A different approach applies to damages.

²²⁴ See para 3.13 above.

²²⁵ On deceit see, for example, *Hill v Perrott* (1810) 3 Taunt 274, 128 ER 109; *Billing v Ries* (1841) Car & M 26, 174 ER 392; *Kettlewell v Refuge Assurance Co* [1908] 1 KB 545, affirmed [1909] AC 243. On intimidation see, for example, *Astley v Reynolds* (1731) 2 Str 915, 93 ER 939; *Universe Tankships Inc of Monrovia v ITWF* [1983] 1 AC 366. On inducing breach of contract see, for example, *Lightly v Clouston* (1808) 1 Taunt 112, 127 ER 774; *Foster v Stewart* (1814) 3 M & S 191, 105 ER 582.

²²⁶ See para 3.7 above.

²²⁷ [1996] Ch 217.

²²⁸ [1996] Ch 217, 227G-H.

1.25 Yet, as we shall see below,²²⁹ Lord Devlin's second category of *exemplary* damages is concerned to punish those who cynically commit torts with a view to making profits. If the law is prepared to award exemplary damages against the cynical profit-seeking tortfeasor, it must be willing to go to the less extreme lengths of awarding restitution against such a tortfeasor. This is particularly obvious when one realises that a restitutionary remedy need not strip away all the gains made by the tortfeasor; rather the remedy can be tailored to remove a fair proportion of the gains, taking into account, for example, the skill and effort expended by the defendant.

1.26 In *Broome v Cassell*³⁰ Lord Diplock recognised the interplay within the second category of exemplary damages between restitution and the more extreme remedial response of punishment when he said the following:

[The second category] may be a blunt instrument to prevent unjust enrichment by unlawful acts. But to restrict the damages recoverable to the actual gain made by the defendant if it exceeded the loss caused to the plaintiff, would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him, or if he did, might fail in the hazards of litigation. It is only if there is a prospect that the damages may exceed the defendant's gains that the social purpose of this category is achieved - to teach a wrongdoer that tort does not pay.²³¹

1.27 It therefore seems to us that the true reason why restitution was inappropriate in *Halifax Building Society v Thomas*²³² was the same reason why exemplary damages would also have been inappropriate (had they been pleaded): namely, that the defendant was the subject of a criminal conviction and confiscation order which was sufficient to reverse his unjust enrichment and to punish him for his fraud.

(2) Enrichments gained by an equitable wrong

1.28 It is a surprising fact, which reflects the unfortunate influence still exerted by the common law/equity divide, that when one turns one's attention from torts to equitable wrongs, such as breach of fiduciary duty and breach of confidence, the availability of restitution, through the remedy of an account of profits, is both well-established and uncontroversial. While compensation (whether through the remedies of equitable damages or equitable compensation) may also be available, the account of profits is in no sense regarded as unusual or difficult to justify.

1.29 The account of profits is, therefore, standardly used to ensure that a fiduciary does not make secret unauthorised profits out of his or her position,²³³ and to ensure the

²²⁹ See the discussion of the 'categories test' formulated in *Rookes v Barnard* [1964] AC 1129, and especially of 'category 2', paras 4.3 and 4.9-4.20 below.

²³⁰ [1972] AC 1027.

²³¹ [1972] AC 1027, 1130C-D.

²³² [1996] Ch 217.

²³³ *Eg Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46.

disgorgement to principals of bribes made to their fiduciaries.²³⁴ It is noteworthy that the account of profits may be awarded even if (as shown in the secret profit cases) the fiduciary was not acting dishonestly or in bad faith.

- 1.30 Similarly, it is well-established that an account of profits can be awarded for breach of confidence. In *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd*²³⁵ an account of profits was ordered where the defendants had manufactured and sold brassieres knowingly using confidential information obtained from the plaintiffs. And in the leading case of *Attorney-General v Guardian Newspapers Ltd (No 2)*²³⁶ the Sunday Times was held liable to an account of profits, for breach of confidence to the Crown, in publishing extracts of Peter Wright's book, "Spycatcher", at an early stage before the information had reached the public domain. Lord Goff said the following:

The statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case. That there are groups of cases in which a man is not allowed to profit from his own wrong, is certainly true. An important section of the law of restitution is concerned with cases in which a defendant is required to make restitution in respect of benefits acquired through his own wrongful act - notably cases of waiver of tort; of benefits acquired by certain criminal acts; of benefits acquired in breach of a fiduciary relationship; and, of course, of benefits acquired in breach of confidence. The plaintiff's claim to restitution is usually enforced by an account of profits made by the defendant through his wrong at the plaintiff's expense. This remedy of an account is alternative to the remedy of damages, which in cases of breach of confidence is now available, despite the equitable nature of the wrong, through a beneficent interpretation of the Chancery Amendment Act 1858 (Lord Cairns' Act), and which by reason of the difficulties attending the taking of an account is often regarded as a more satisfactory remedy, at least in cases where the confidential information is of a commercial nature, and quantifiable damage may therefore have been suffered.²³⁷

- 1.31 In the context of breach of confidence, it may be that the courts will award damages (whether restitutionary or compensatory), rather than an account of profits, if the breach of confidence was committed without dishonesty. This is one explanation for *Seager v Copydex Ltd*²³⁸ in which the defendants had manufactured a carpet grip, honestly and unconsciously making use of confidential information given to them by the plaintiff. The Court of Appeal ordered damages to be assessed (apparently on a restitutionary basis). Lord Denning MR said,

²³⁴ Eg *Reading v AG* [1951] AC 507.

²³⁵ [1964] 1 WLR 96.

²³⁶ [1990] 1 AC 109.

²³⁷ [1990] 1 AC 109, 286B-E.

²³⁸ [1967] 1 WLR 923. See also *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809. The other explanation is that the court awarded damages, rather than an account of profits because, as a matter of factual causation, the contribution of the confidential information to the profits made was relatively minor.

It may not be a case for injunction or even for an account, but only for damages, depending on the worth of the confidential information to him in saving him time and trouble.²³⁹

- 1.32 Restitution for breach of fiduciary duty and breach of confidence is so well-established that the area of debate focuses, not on whether restitution rather than compensation should be awarded, but rather on whether restitution should be effected by merely a personal remedy (account of profits) or by a proprietary remedy (constructive trust). Despite *Lister v Stubbs*,²⁴⁰ which denied that a proprietary remedy should be awarded in respect of a bribe and sought to maintain a clear divide between obligation and ownership, the law appears to be moving towards recognising that a proprietary restitutionary remedy (through a constructive trust) is appropriate for all instances of (at least dishonest) breach of a fiduciary duty and breach of confidence. Particularly important was the Privy Council's decision in *Attorney-General for Hong Kong v Reid*²⁴¹ in which it was decided that, contrary to *Lister v Stubbs*,²⁴² a bribe was held on constructive trust. This had the result that the principal was entitled to trace through to land bought with the bribe.

(3) Enrichments gained by a breach of contract

- 1.33 An innocent party who has rendered part-performance before the contract was discharged may claim a restitutionary award as an alternative to the normal compensatory remedies for breach of contract by seeking a *quantum meruit* or, where there has been a total failure of consideration, the recovery of money paid to the defendant. These, however, are not remedies awarded *for* a wrong, but rather are generated by independent restitutionary claims for failure of consideration that are consequent on the contract being discharged for breach.²⁴³
- 1.34 The gain to a defendant from a breach of contract is generally irrelevant to the quantification of damages for that breach. The defendant will be liable to compensate the plaintiff for his expectation (or reliance) interest, but not to disgorge any profit the defendant may have gained from his breach of contract, nor to account for any expense saved thereby. As Megarry V-C said in *Tito v Waddell (No 2)*:

... it is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong. The question is not one of making the defendant

²³⁹ [1967] 1 WLR 923, 932A.

²⁴⁰ [1890] 45 ChD 1.

²⁴¹ [1994] 1 AC 324. See also *AG v Blake* [1996] 3 WLR 741, 750C-G (breach of confidence); *LAC Minerals Ltd v International Corona Resources Ltd* (1989) 61 DLR (4th) 14 (breach of confidence).

²⁴² [1890] 45 ChD 1.

²⁴³ See A Burrows, *The Law of Restitution* (1993) pp 397-398; P Birks, *An Introduction to the Law of Restitution* (revised ed, 1989) p 334; P Birks, "Restitution and the Freedom of Contract" (1983) 36 CLP 141, 149-159.

²⁴⁴ *Tito v Waddell (No 2)* [1977] Ch 106.

disgorge what he has saved by committing the wrong, but one of compensating the plaintiff.²⁴⁵

1.35 Similarly, in the leading case of *Surrey County Council v Bredero Homes Ltd*²⁴⁶ the Court of Appeal declined to award restitutionary damages for a breach of contract where the defendant, to whom the plaintiff had sold land for a housing estate, had built more houses on the site than they had covenanted to build, thereby making a greater profit. Nominal damages were awarded on the ground that the plaintiff had suffered no loss. Restitutionary damages were held to be inappropriate because this was an action for ordinary common law damages for breach of contract: it involved neither a tort nor an infringement of proprietary rights nor equitable damages.

1.36 One exception to the rule denying restitution for breach of contract is *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,²⁴⁷ where the defendants had built houses on their land in breach of a restrictive covenant in favour of the plaintiffs' neighbouring land. A mandatory injunction was refused, since it would cause economic waste. At the trial of the action, Brightman J said:

If, for social and economic reasons, the court does not see fit in the exercise of its discretion, to order demolition of the 14 houses, is it just that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing? Common sense would seem to demand a negative answer to this question.²⁴⁸

Brightman J concluded that "a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from [the defendants] as a *quid pro quo* for relaxing the covenant".²⁴⁹ The plaintiffs would clearly never have granted such a relaxation.²⁵⁰ Moreover, in deciding what was a reasonable price, substantial weight was given to the fact that the defendants had made £50,000 profit from the development, and damages were assessed at 5% of that profit. It would seem, therefore, that the damages were not compensating any losses suffered by the plaintiffs and are more appropriately viewed as restitutionary damages reversing the defendants' unjust enrichment. The quantum is explicable as representing a fair proportion of the profits made by the defendants. Reference to what the parties would themselves have agreed was subsequently dismissed as "a fiction" by Steyn LJ in *Surrey County Council v Bredero Homes*,²⁵¹ although Steyn LJ's comments were in turn criticised, and a

²⁴⁵ *Tito v Waddell (No 2)* [1977] Ch 106, 332E.

²⁴⁶ [1993] 1 WLR 1361. For notes or articles on this case see, eg, O'Dair [1993] RLR 31; Birks (1993) 109 LQR 518; Burrows [1993] LMCLQ 453; Smith (1994) JCL 164.

²⁴⁷ [1974] 1 WLR 798.

²⁴⁸ [1974] 1 WLR 798, 812H.

²⁴⁹ [1974] 1 WLR 798, 815D.

²⁵⁰ [1971] 1 WLR 798, 815.

²⁵¹ [1993] 1 WLR 1361, 1369G.

compensatory analysis of the *Wrotham Park* case favoured, by the Court of Appeal in *Jaggard v Sawyer*.²⁵²

- 1.37 The conclusion to be reached, therefore, is that, in contrast to many torts and equitable wrongs, there is no tradition of awarding restitution for breach of contract - with the probable exception of a breach of a restrictive covenant. It should further be noted that, in contrast to torts, exemplary damages cannot be awarded in England for breach of contract.²⁵³ Of course, this is not to deny that restitution (or exemplary damages) may be awarded for a tort or equitable wrong that constitutes a concurrent cause of action alongside the breach of contract. Breach of fiduciary duty is a particularly important example.²⁵⁴

3. RESTITUTION FOR WRONGS: REFORM

- 1.38 Our basic position, which we elaborate below, is that development of the law on restitution for wrongs is most appropriately left to the courts. The changes which we propose to effect by statute are limited to those which are necessitated by our proposals for an expanded, if constrained, remedy of exemplary damages.²⁵⁵

(1) Our basic position: development of the law is best left to the courts

(a) Restitution of enrichments gained by a tort

- 1.39 While to some it is odd to think of restitution, as opposed to compensation, being awarded as a remedy for a tort, careful examination of the law shows, as we have seen, that the courts have long been willing to award restitution for torts, especially for proprietary torts. This does not mean to say that the precise scope of torts for which restitution will be awarded is settled.
- 1.40 The justification for restitution for a tort - as for other civil wrongs - is at root to be found in the notion that 'no man shall profit from his own wrong'. And while some might object to restitution on the ground that it gives the plaintiff a windfall, it is most important to emphasise that the effect of denying restitution is to leave the defendant with a wrongfully obtained windfall.
- 1.41 In the Consultation Paper we asked if the development of restitutionary damages should be left to the courts or effected by statutory provision.²⁵⁶ The view of over two-thirds of consultees was that this area should be left to be developed by the courts.²⁵⁷ This was particularly because it is an area which, until the relatively recent interest in the law of restitution, had been little explored or understood, and

²⁵² [1995] 1 WLR 269.

²⁵³ See para 4.28 below.

²⁵⁴ See, eg, *Reid-Newfoundland Co v Anglo-American Telegraph Co Ltd* [1912] AC 555; *Lake v Bayliss* [1974] 1 WLR 1073; *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR 41.

²⁵⁵ See generally Part V below.

²⁵⁶ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, para 7.10.

²⁵⁷ 69% of those responding on this question favoured leaving development of restitutionary damages to the courts.

there is no consensus among commentators as to which torts should trigger restitution; incremental judicial development would therefore seem especially appropriate.

1.42 We agree. Accordingly, we recommend that:

(4) no attempt should be made to state comprehensively in legislation the situations in which torts should trigger restitution; subject to recommendation (7), the development of the law of restitution for torts should be left to common law development.

(b) Restitution of enrichments gained by an equitable wrong

1.43 We have seen that the focus of controversy is somewhat different in respect of restitution for equitable wrongs than for torts - that is, the controversy is not about whether restitution is available in respect of enrichments gained by an equitable wrong (which is well-accepted), but about the appropriate remedy for effecting restitution (personal or proprietary?). But we again believe, in line with the views of consultees,²⁵⁸ that this area is best left to the courts to develop, and that, in general, statutory intervention would be inappropriate.

1.44 Accordingly, we recommend that:

(5) no attempt should be made to state comprehensively in legislation the situations in which equitable wrongs should trigger restitution; subject to recommendation (7), the development of the law of restitution for equitable wrongs should be left to 'common law' development.

(c) Restitution of enrichments gained by a breach of contract

1.45 Several suggestions have been made to the effect that restitutionary damages ought to be more widely available for breach of contract.²⁵⁹ For example, Birks has argued that restitutionary damages are appropriate where the breach of contract is cynical;²⁶⁰ whilst Maddaugh and McCamus have argued that restitution may be appropriate where compensatory damages are inadequate.²⁶¹

1.46 In the Consultation Paper our provisional view was that, in general, restitutionary damages should not be awarded for breach of contract, but that they should be, and arguably already are, available where a contract is specifically enforceable²⁶² and where the contract is made between fiduciaries. We isolated four arguments

²⁵⁸ See para 3.41 above.

²⁵⁹ For a general survey, see A Burrows, *The Law of Restitution* (1993) pp 401-403.

²⁶⁰ "Restitutionary Damages for Breach of Contract" [1987] LMCLQ 421.

²⁶¹ *The Law of Restitution* (1990) pp 432-438.

²⁶² See also J Beatson, *The Use and Abuse of Unjust Enrichment* (1991) pp 15-17; S M Waddams, "Restitution as Part of Contract Law", in A Burrows (ed), *Essays on the Law of Restitution* (1991) pp 208-212.

that have been made against the general availability of restitutionary awards.²⁶³ First, many breaches of contract are made for commercial reasons and it is difficult to draw the line between ‘innocent’ breach, for which there would be only compensation, and ‘cynical’ breach, in which there would also be the option of restitution in the way suggested by some commentators. This would lead to greater uncertainty in the assessment of damages in commercial and consumer disputes. Secondly, in seeking restitution the plaintiff might be evading the requirements of the duty to mitigate. Thirdly, a restitutionary award is in reality a monetized form of specific performance but not all contracts are specifically enforceable. Fourthly, there may be difficulties of attribution. The making of a profit in excess of that which the plaintiff might have made had the contract been performed may require skill and initiative which should not be taken from the defendant save in exceptional cases.

- 1.47 Most consultees considered that the case for restitutionary (and exemplary) damages was less powerful in respect of breach of contract than for torts and equitable wrongs. And over two-thirds thought that, in any event, the extent to which restitutionary damages should be available should be left to development by the courts.²⁶⁴ We agree that it would be dangerous to attempt to ‘freeze’ in legislative form the extent to which, if at all, restitutionary damages should be available for breach of contract. Accordingly, we recommend that:

(6) no legislative provision should deal with whether (and if so, when) restitutionary damages may be awarded for breach of contract; the development of the law of restitution for breach of contract should be left to common law development.

(2) Exception: legislative reform required by our proposals on exemplary damages

- 1.48 Our basic position, which we describe above, is that the law of restitution for wrongs is most appropriately left for common law development. This extends to central questions, such as which wrongs should attract a restitutionary remedy. It also extends to less central questions, which we consider in the next section, such as the quantum of restitution, the relationship between compensation and restitution for wrongs, and the method for dealing with claims to restitution for wrongs by multiple claimants, or against multiple defendants.
- 1.49 Nevertheless, we do believe that a limited measure of legislative reform is required by our recommendations for a new approach to exemplary (or, as we propose to label them, ‘punitive’) damages. This limited reform has two elements:

²⁶³ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, para 7.18.

²⁶⁴ See para 3.41 above.

(a) Restitutionary damages should be available where a defendant has committed a tort, an equitable wrong or a statutory civil wrong, and his conduct showed a ‘deliberate and outrageous disregard of the plaintiff’s rights’

1.50 In Part V we recommend that punitive damages should not be available unless the defendant has committed a tort,²⁶⁵ an equitable wrong,²⁶⁶ or a civil wrong that arises under a statute,²⁶⁷ and his conduct showed a ‘deliberate and outrageous disregard of the plaintiff’s rights’.²⁶⁸ We also recommend that punitive damages should never be available for breach of contract.²⁶⁹

1.51 In our view it would be unacceptable for legislation to lay down situations in which punitive damages can be awarded, if it did not also recognise that the less extreme remedy of restitution for a wrong (stripping away some or all of the gains acquired as a result of the wrong) should also be available in those situations.²⁷⁰ We therefore recommend that:

(7) legislation should provide that restitutionary damages may be awarded where:

(a) the defendant has committed:

(i) a tort or an equitable wrong, or

(ii) a civil wrong (including a tort or an equitable wrong) which arises under an Act, and an award of restitutionary damages would be consistent with the policy of that Act, and

(b) his conduct showed a deliberate and outrageous disregard of the plaintiff’s rights. (Draft Bill, clause 12(1)-12(3)).

²⁶⁵ See recommendation (19)(a) and paras 5.49-5.56 below.

²⁶⁶ Defined as breach of fiduciary duty, breach of confidence and procuring or assisting breach of statutory duty. See recommendation (19)(a) and para 5.56 below.

²⁶⁷ Defined as any wrong which arises under an Act, for which a person may recover compensation or damages, provided that the availability of punitive damages would be consistent with the policy of the Act under which the wrong arises. See recommendation (19)(b) and paras 5.57-5.65 below.

²⁶⁸ See recommendation (18) and paras 5.46-5.48 below.

²⁶⁹ See recommendation (19) and paras 5.71-5.73 below.

²⁷⁰ There is one theoretically possible difference. Where restitutionary damages are being considered for a civil wrong which arises under a statute (which we define in clause 12(2) of the draft Bill), the court may only award them if an award of restitutionary damages would be consistent with the policy of the statute in question: recommendation (7)(a)(ii) above. Where punitive damages are being considered for a civil wrong which arises under a statute, the court may only award them if an award of punitive damages would be consistent with the policy of the statute in question: recommendation (19)(b) below. It is theoretically possible (but almost inconceivable in practice) that a statute could be held to be consistent with an award of punitive damages, but not restitutionary damages (in the same circumstances).

Full discussion of the above conditions can be found in the relevant passages in Part V of this Report.²⁷¹

1.52 It is important to emphasise that we do not thereby intend to cast doubt on other situations in which restitution may be awarded for wrongs. For example, it appears that restitutionary damages can be awarded for proprietary torts, such as trespass to land or conversion, without ‘deliberate and outrageous’ wrongdoing: the basis of the restitutionary liability is ‘strict’.²⁷² We also do not intend to cast doubt on the availability of restitutionary remedies which are historically distinct from restitutionary damages, such as an account of profits for intellectual property torts,²⁷³ or for breach of fiduciary duty.²⁷⁴ And nor do we wish to limit future common law development of restitution for wrongs, including breach of contract. Thus, for example, courts will be left free to decide, in the future, that restitutionary damages may be obtained for a ‘deliberate and outrageous’ breach of contract, or on some other (narrower or wider) basis.

1.53 We therefore recommend that:

(8) recommendation (7) should not prejudice any other power to award restitutionary damages for a wrong, nor remedies which also effect restitution for a wrong but which are historically distinct from restitutionary damages (eg an account of profits for an intellectual property tort). (Draft Bill, clause 12(5))

(b) Where restitutionary damages and punitive damages are claimed in the same proceedings, the judge alone should decide whether the defendant’s conduct was in ‘deliberate and outrageous disregard of the plaintiff’s rights’

1.54 In Part V we recommend that, in a jury trial, the judge, not the jury, should decide whether punitive damages are available. The judge, not the jury, would therefore decide, *inter alia*, whether the defendant’s conduct showed a ‘deliberate and outrageous disregard of the plaintiff’s rights’.

1.55 To allow juries to continue to decide, for the purposes of deciding claims to restitutionary damages, whether the defendant’s conduct showed a ‘deliberate and outrageous disregard ...’, would produce procedural complexity where a plaintiff claims both (i) restitutionary damages, and (ii) punitive damages. The reason is that one precondition of both claims is the same (did the defendant’s conduct show a deliberate and outrageous disregard of the plaintiff’s rights?), but the question of whether it is satisfied would fall to be decided by two different decision-makers within the same action. The jury would decide the question for

²⁷¹ See paras 5.49-5.56 below (punitive damages available for any tort or certain equitable wrongs); paras 5.57-5.65 below (punitive damages available for statutory civil wrongs, but only where an award of punitive damages would be ‘consistent with the policy of the Act’ under which the wrong arises); paras 5.46-5.48 below (‘deliberate and outrageous disregard of the plaintiff’s rights’).

²⁷² See para 3.13 above.

²⁷³ See paras 3.19-3.22 above.

²⁷⁴ See paras 3.28-3.29 above.

the purposes of the claim to restitutionary damages; the judge would decide the question for the purposes of the claim to punitive damages. This is obviously unsatisfactory.

1.56 In order to avoid such unsatisfactory complexity and the potential for conflict, we recommend that:

(9) the judge, and not the jury, should decide whether the defendant's conduct showed a 'deliberate and outrageous disregard of the plaintiff's rights' for the purposes of a claim to restitutionary damages, where both restitutionary damages and punitive damages are in issue in the same proceedings. (Draft Bill, clause 12(4))

This recommendation would entail that that common question is decided by one decision-maker only: the judge.

1.57 It is important to emphasise that we do not otherwise seek to alter the respective responsibilities of judge and jury when restitutionary damages are in issue. In particular, the jury will retain its present role in deciding whether a wrong (for example, defamation) has been committed, and in deciding the quantum of restitution. And, indeed, the division of responsibility between judge/jury will be entirely unaffected where restitution for wrongs is claimed on a basis other than that the defendant 'deliberately and outrageously disregarded the plaintiff's rights'.

4. FOUR FURTHER ISSUES RELATING TO CLAIMS TO RESTITUTION FOR WRONGS

1.58 In this Part, we have essentially been looking at the question, when should there be restitution for a civil wrong? In this section, we turn to four further questions that arise *if* restitution is available for a particular wrong:

- What should be the quantum of restitution?
- Can one recover both restitution and compensation for a wrong?
- How should one deal with multiple defendants?
- How should one deal with multiple plaintiffs?

In accordance with our basic approach of leaving development of the law on restitution for wrongs to the courts, we do not recommend legislation on any of these four questions.

(1) The quantum of restitution

1.59 The starting-point in determining the quantum of restitution is to identify all the gains that the defendant has made by the wrong. This is a factual causation inquiry, which essentially requires the application of a 'but for' test: the gain is attributable to the wrong if the defendant would not have made that gain but for the wrong. So, for example, in *My Kinda Town Ltd v Soll*,²⁷⁵ where the defendants

²⁷⁵ [1982] FSR 147, reversed on liability [1983] RPC 407.

were alleged to be liable for passing off by using a name similar to the plaintiffs' for their own chain of restaurants, the profits to be accounted for were only those additional profits caused by the public's confusion in thinking the defendants' restaurants were the plaintiffs', and not all the profits made by the defendants from those restaurants. Similarly in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*,²⁷⁶ an infringement of trade mark case, the profits to be accounted for were not all those gained from the sale of infringing goods but only those made because the goods were sold under the trade mark.

1.60 In some cases the factual causation enquiry will indicate that the defendant could have lawfully made the profits in question if it had paid for the property, or use of the property, from which those profits have been derived. On such facts, the measure of restitution (whether through an account of profits or restitutionary damages) should be the expense saved by the defendant in not paying for the property (or use of the property).

1.61 It is clear that in some cases the factual causation enquiry is an extremely difficult one and may ultimately lead to the conclusion that none of the alleged wrongfully acquired profits is attributable to the wrong. Take, for example, libel by a newspaper. It will often be extremely difficult to establish that particular sales of the newspaper are attributable to the particular libel.

1.62 Even if one has established that gains are factually attributable to the wrong, the courts still have a discretion to award a part, rather than the whole, of those gains. One may regard this as being analogous to the legal causation or remoteness restriction in the realm of compensation for a factually caused loss. This is most clearly illustrated by the allowance given in equity for the skill and effort expended by the defendant to make the profit, at least where the wrong has not been committed dishonestly.²⁷⁷

1.63 We do not propose to make any changes to the principles used by courts to assess the quantum of restitution. We therefore recommend that:

(10) our proposed legislation should not deal with how the quantum of restitution is determined.

(2) Can one recover both restitution and compensation for a wrong?

1.64 If compensation can be claimed for losses caused by wrongdoing, and restitution can be claimed of benefits gained as a result of wrongdoing, does this mean that plaintiffs can claim both compensation and restitution for wrongs if defendants have both caused losses and made gains by their wrongdoing?

1.65 This question has been most commonly discussed in relation to whether a plaintiff can be awarded both an account of profits and (compensatory) damages for an intellectual property tort. The law is clear: a plaintiff cannot be awarded both an

²⁷⁶ (1968) 122 CLR 25.

²⁷⁷ See, eg, *Boardman v Phipps* [1967] 2 AC 46; *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109, 132. Cf *Guinness plc v Saunders* [1990] 2 AC 663.

account of profits and damages but must choose between them.²⁷⁸ Similarly, we have seen that in *United Australia Ltd v Barclays Bank Ltd*²⁷⁹ Viscount Simon LC considered that the plaintiff must at some stage of the proceedings elect between the remedies, for the tort in question, of restitution (in that case, the action for money had and received) and compensatory damages. Again, in *Mahesan v Malaysia Government Officers' Co-op Housing Society Ltd*,²⁸⁰ the agent of a housing society, in return for a bribe, caused the society to buy land at an overvalue. The society sued the agent for both the amount of the bribe (\$122,000) and damages for the tort of deceit for the loss sustained by the society (assessed at \$443,000). The Federal Court of Malaysia awarded both the amount of the bribe and the damages. On appeal, this was overturned by the Privy Council, which held that the society was bound to elect between its claims under the two heads. Since the society would obviously have elected to take damages, judgment was entered for \$443,000.

- 1.66 Perhaps the clearest analysis of this issue is contained in the Privy Council's judgment in *Tang Min Sit v Capacious Investments Ltd*,²⁸¹ which concerned a breach of trust. Lord Nicholls relied on a distinction between alternative and cumulative remedies and said:

The law frequently affords an injured person more than one remedy for the wrong he has suffered. Sometimes the two remedies are alternative and inconsistent. The classic example, indeed, is (1) an account of the profits made by a defendant in breach of his fiduciary obligations and (2) damages for the loss suffered by the plaintiff by reason of the same breach. The former is measured by the wrongdoer's gain, the latter by the injured party's loss ... Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both.²⁸²

- 1.67 It is therefore clear law that a plaintiff cannot be awarded both compensation and restitution for a wrong; he must elect between them. But the justification for this is far from obvious. It has been criticised by, for example, Professor Birks²⁸³ and Professor Tettenborn.²⁸⁴ In his case note on *Tang Min Sit*, Professor Birks says:

If a plaintiff is entitled to recover the defendant's gains when he has suffered no loss at all, it is not clear why there should be any inconsistency in his asking, where he has suffered loss, that the

²⁷⁸ *Neilson v Betts* (1871) LR 5 HL 1; *De Vitre v Betts* (1873) LR 6 HL 319; *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25; *Island Records Ltd v Tring International plc* [1996] 1 WLR 1256. Section 61(2) of the Patents Act 1977 reads: "The court shall not, in respect of the same infringement, both award the proprietor of a patent damages and order that he shall be given an account of the profits".

²⁷⁹ [1941] AC 1, 18-19. See the citation at para 3.6 above. See similarly the citation at para 3.12 above from *Ministry of Defence v Ashman* (1993) 66 P & CR 195, 200-201.

²⁸⁰ [1979] AC 374.

²⁸¹ [1996] AC 514.

²⁸² [1996] AC 514, 521B-D.

²⁸³ (1996) 112 LQR 375.

²⁸⁴ (1979) 95 LQR 68.

defendant should both disgorge his own gains and make good the plaintiff's loss ... The premiss of election is inconsistency. If there is no inconsistency, there need be no election, though care must necessarily be taken against the danger of double recovery.²⁸⁵

- 1.68 We consider that the law reaches the right result, in that it ensures that a plaintiff cannot recover both *full* restitution and *full* compensation for a wrong. This seems the right result because to award full restitution and full compensation for a wrong would be to award a sum in excess of the minimum necessary to achieve either of the aims of compensating loss or disgorging gain. A full award of either changes the position of both defendant and plaintiff, and makes it impossible *just* to reverse the defendant's (D's) unjust enrichment or *just* to compensate the plaintiff's (P's) losses. So, for example, if D has received a bribe of £1000 and has caused loss to P of £2,000, the effect of requiring D to pay P £3000 would be that P is neither *just* compensated for its loss (but instead receives a windfall of £1000) and nor is D *just* stripped of its unjust enrichment (but rather has an extra £2000 stripped away).
- 1.69 This is not to deny that a combination of compensation and restitution might be justified as a punitive measure. However, if punishment is required, that should be addressed openly and directly by considering whether the criteria for exemplary damages are satisfied, and what the appropriate quantum of exemplary damages should be.²⁸⁶
- 1.70 But while we consider that the present law reaches the right result, in avoiding an award of both full restitution and full compensation, we are far from convinced that the means currently chosen to achieve this - the 'election' requirement - is satisfactory. Provided that the one takes account of the other, we agree with Professor Birks that there is no 'inconsistency' or 'double recovery' in allowing both restitution and compensation to be awarded. In the example above, the correct result should be that D is required to pay P £2,000. This might be justified as full compensation alone, but it could also be justified as full restitution (£1,000) plus partial compensation (£1,000).
- 1.71 The best that can be said of a requirement of election is that it conveniently saves the courts from having to get embroiled in the issue, to what extent would an award of restitution and an award of compensation entail 'double-recovery'? And justice will normally be done because a plaintiff will almost inevitably elect to claim the remedy with the higher measure of recovery on the facts. But ultimately the law is requiring an 'election' where it is not really necessary; the two remedies are not inevitably inconsistent. The 'principled' approach would be to recognise this, to remove any mandatory requirement of election, to allow a plaintiff to claim compensation and restitution, and for the court to resolve the problem of double recovery at the stage of assessing quantum.
- 1.72 But notwithstanding our reservations about the current law on this point, we do not feel it appropriate in this project to recommend any legislative changes in this

²⁸⁵ (1996) 112 LQR 375, 378.

²⁸⁶ These are matters which we discuss at length in Part V.

area. The problem of ‘election of remedies’ goes beyond the remedies with which we are here concerned and the adoption of the ‘principled’ approach would make little practical difference. We therefore recommend that:

(11) our proposed legislation should not deal with the question whether (and if so, when) both compensation and restitution may be obtained for a wrong.

(3) Multiple defendants

- 1.73 So far as we are aware, and in contrast to exemplary damages, the ‘multiple defendants’ problem has not been addressed in relation to restitutionary awards for wrongs. The ‘problem’ arises in relation to such claims wherever two or more defendants have made benefits from committing a wrong against the same plaintiff.²⁸⁷ Is such a defendant only liable to restitution in respect of the benefits which he or she has personally and wrongfully made? Or can a defendant be made liable to restitution in respect of benefits which another party has wrongfully made?
- 1.74 We would expect that a wrongdoer would personally have had to receive a benefit before an action for restitution could lie against him or her. This may already be the law,²⁸⁸ and certainly we think it unlikely that the problems which have arisen in relation to exemplary damages would arise in relation to restitution.²⁸⁹ For the basis of a claim to restitution is that the defendant from whom restitution is sought has been ‘unjustly enriched’ - and in the area of restitution for wrongs, this ought to mean that the defendant has received a benefit from his wrong against the plaintiff.
- 1.75 Whether or not this view is correct, we do not think that the regime which we propose to apply to punitive damages (several liability, with exceptions for vicarious liability and partnerships)²⁹⁰ can simply be applied to claims to restitutionary damages. In particular, the concept of vicarious liability may not apply to restitutionary damages. Can one say that an employee who personally receives a benefit by committing a tort in the course of employment renders his employer liable for the benefit he received? Moreover, if two tortfeasors, acting as part of a joint enterprise, make a gain of £1,000 from a single tort, it is not obvious what ‘several liability’ would entail. Should they each be liable to pay £500 or £1,000?

²⁸⁷ The defendants may have committed, in law, separate wrongs by their independent acts, or, in law, a joint wrong.

²⁸⁸ But we are aware that the law on agents receiving ‘unjust enrichments’ may make the *principal* liable, even if he has not personally gained thereby. See, for example, A Burrows, *The Law of Restitution* (1993) pp 478-486.

²⁸⁹ These have, in particular, arisen from efforts to constrain the otherwise problematic effects of the law’s recognition of joint or joint and several liability to exemplary damages. See paras 4.77-4.80 and paras 5.186-5.191, below.

²⁹⁰ See, in particular, paras 5.192-5.208 and 5.209-5.230, and recommendations (34)-(40) below.

1.76 For these reasons, as well as the considerations that this area of the law is largely unexplored, that the issue was not raised with consultees, and that a solution in this area would have to be evolved for all claims to restitution for wrongs (and not just those under our Act), we consider that this issue is one best left for future courts to resolve, for all instances of restitution for wrongs. We recommend that:

(12) our proposed legislation should not deal specifically with the problems raised by claims to restitution for wrongs committed by two or more defendants against one plaintiff ('multiple defendant cases').

(4) Multiple plaintiffs

1.77 The same conduct or course of conduct of one person may constitute a separate wrong to two or more others. If the wrongdoer has obtained a benefit by committing those wrongs, and more than one person can establish an entitlement to restitution in respect of them, it is not easy to determine what their individual entitlements to restitution should be. Say, for example, a defendant has made gains by allowing its factory to discharge noxious fumes constituting the tort of private nuisance to a large number of plaintiffs. Or say the defendant publishes an article which makes defamatory remarks about a group of people. This problem does not yet appear to have arisen in relation to restitutionary awards for wrongs.

1.78 It shall be seen in Part V that we do consider that special legislative provision is required to deal with multiple claims to exemplary damages.²⁹¹ But for several reasons we consider that the problem of multiple claims to restitution for wrongs is one that is best left for the courts to resolve.

1.79 First, for reasons of coherence, any legislative provision for multiple plaintiff cases ought to apply to all claims to restitution for wrongs - that is, to claims under the statute which we propose, as well as to claims arising outside of the statute. Since we consider that such a legislative change would go too far, the only coherent alternative is to leave multiple plaintiff problems to be resolved for all claims to restitution for wrongs by the courts. The 'minimalist' approach to statutory intrusion in the developing common law on restitution for wrongs which we propose - legislative reform only so far as is necessarily required by reform of the law of exemplary damages - does not require us to go any further.

1.80 Secondly, we believe that multiple plaintiff claims to restitutionary damages do not produce the same difficulties as those which justify 'special provision' for multiple plaintiff claims to punitive damages. In particular, the law of restitution for wrongs should, as it already stands, have an in-built limitation on the number of actions in which restitution may be awarded in respect of the gains made by a defendant from a particular course of conduct. The defendant's liability to restitution for a wrong or wrongs must be limited to the benefits which the defendant obtained as a result of the wrong or wrongs; accordingly, if the defendant is made liable to restitution to the full extent of those benefits in one action, there should be no question of any later claim to restitution in respect of some or all of those benefits being permissible. Contrast the law of exemplary damages. It is precisely because

²⁹¹ See paras 5.159-5.185 below.

there is no such in-built limitation, and as a result a risk of ‘excessive punishment’, that we have found it necessary to impose the ‘first past the post takes all’ restriction.²⁹² For the reason just given, there should be no analogous risk of ‘excessive restitution’ - that is, of a liability to restitution which exceeds the value of the benefits derived from the wrong.

1.81 To the extent that multiple plaintiff claims to restitution do raise other issues (such as how a restitutionary damages award should be divided amongst multiple claimants), we believe that these are issues which should be capable of practical solution by the courts, or by the relevant procedural rule-making bodies, for all instances of restitution for wrongs, if and when they arise. We therefore recommend that:

(13) our proposed legislation should not deal specifically with the problems raised by claims to restitution for wrongs by two or more plaintiffs from one defendant (‘multiple plaintiff cases’).

5. A NOTE ON TERMINOLOGY

1.82 One of the most needlessly confusing aspects of the law of restitution is the host of differently labelled remedies that are concerned to effect restitution. Even if we confine ourselves to restitution for wrongs (that is, unjust enrichment by wrongdoing) we have seen that an action for money had and received, an account of profits, and ‘restitutionary’ damages (where the damages are assessed according to the gains made by the defendant rather than the loss of the plaintiff), are all concerned to effect restitution.²⁹³ Moreover, all three of those remedies are personal, and not proprietary, remedies. We think that much would be gained in terms of simplifying the law, and nothing would be lost, if one replaced those three separately labelled remedies by a single remedy. Although this must be a matter for the judges, perhaps with guidance from a Practice Direction, and could not sensibly be imposed by legislation, we recommend that:

(14) in the context of restitution for wrongs, it would be appropriate for judges - and so practitioners - to abandon the labels ‘action for money had and received’ and ‘account of profits’ in favour of the single term ‘restitutionary damages’ (or at a higher level of generality, ‘restitutionary award’ or ‘restitution’).²⁹⁴

1.83 Two substantive advantages would flow from this simplification of terminology. First, the new label would be seen as fusing common law and equitable remedies and would therefore remove the historically-based and wholly arid discussion as to whether an account of profits (as an equitable remedy) can be awarded for a common law cause of action or whether damages (as a common law remedy) can be awarded for an equitable cause of action. The newly-labelled remedy would be

²⁹² See, in particular, paras 5.161-5.167, and more generally, paras 5.159-5.185, below.

²⁹³ See paras 3.3, 3.5-3.32 above.

²⁹⁴ It will be apparent that we do not agree with Millett LJ’s comment in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286, 306D that the term ‘restitutionary damages’ is a misnomer.

available for common law and equitable wrongs alike. Secondly, it has traditionally been thought that an account of profits requires a very precise calculation of the relevant profits, with an actual account having to be drawn up, showing gains and losses,²⁹⁵ whereas it has been accepted that often damages can be calculated in a rough and ready manner. In fact in recent years some judges have accepted that an account of profits need not be any more precisely calculated than damages.²⁹⁶ This is to be welcomed but a replacement of the label 'account of profits' would be even better in severing the link with the needless and historically-based requirement of precision in calculation.

- 1.84 Some may consider that there are insuperable problems in abandoning long-accepted remedial labels. For example, it may be argued that an action for money had and received and an account of profits are 'debt' actions or liquidated claims, whereas 'restitutionary damages' implies an unliquidated claim. But any distinctions that do turn on whether a claim is for a debt or liquidated claim, or an unliquidated claim, are either irrational in the context of restitution for wrongs, or could equally well be applied to 'restitutionary damages' depending on whether the damages are for a certain sum or require assessment by the courts. More problematically it may be thought that the term 'restitutionary damages' means that the courts would lose the general discretion that they have to refuse to award the equitable remedy of an 'account of profits' - for example, on the grounds of the plaintiff's 'unclean hands' or hardship to the defendant. While we accept that there are difficulties here, we do not regard them as insuperable. Equitable remedies share with common law remedies that they are awarded, or refused, in accordance with well-established rules and principles. Moreover, there are common law doctrines - such as those of illegality or public policy - which mirror in nature, if not in scope, the so-called 'discretionary' defences in equity. It may therefore be that a move to the single label 'restitutionary damages' would not involve any significant loss of judicial discretion to refuse the remedy.

²⁹⁵ See, eg, *Price's Patent Candle Co Ltd v Bauwen's Patent Candle Co Ltd* (1858) 4 K & J 727.

²⁹⁶ See, eg, *My Kinda Town Ltd v Soll* [1982] FSR 147, 159; *Potton Ltd v Yorkclose Ltd* [1990] FSR 11.

PART IV

EXEMPLARY DAMAGES: PRESENT LAW

1.85 Exemplary damages are damages which are intended to punish the defendant. Without entering into an exhaustive examination of the aims of punishment, one can say that exemplary damages seek to effect retribution, as well as being concerned to deter the defendant from repeating the outrageously wrongful conduct and others from acting similarly, and to convey the disapproval of the jury or court. Exemplary damages may also serve as a satisfaction, and may assuage any urge for revenge felt by victims, thereby discouraging them from taking the law into their own hands.²⁹⁷

1. AVAILABILITY

1.86 Under English law exemplary damages can only be awarded where the facts satisfy the categories test and the cause of action test.²⁹⁸ Even if both tests are satisfied, the court has a discretion to refuse an award.

1.87 The categories test was enunciated by the House of Lords in *Rookes v Barnard*.²⁹⁹ In the leading speech, Lord Devlin stated that exemplary damages were anomalous, for the reason that they confuse the civil and criminal functions of the law.³⁰⁰ Even so, he considered himself to be constrained by precedent from abolishing them altogether, and so instead sought to restrict the extent of their availability. He did so by reclassifying some apparently punitive past awards as in fact compensatory - though what was being compensated was not pecuniary loss but the plaintiff's mental distress caused by the defendant's tort. These were 'aggravated damages', and Lord Devlin envisaged that they could do most, if not all, of the work done by exemplary damages awards; where they could not do so, the tort would generally be punishable as a crime.³⁰¹ But this still left three categories of case, which were not susceptible to similar reclassification. In Lord Devlin's view these should continue, exceptionally, to attract exemplary damages awards for torts. They were:

- (1) oppressive, arbitrary or unconstitutional action by servants of the government;
- (2) wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the plaintiff; and
- (3) where such an award is expressly authorised by statute.

²⁹⁷ Cf *Merest v Harvey* (1814) 5 Taunt 442, 128 ER 761. The importance of this aspect has, arguably, diminished over time.

²⁹⁸ However, where exemplary damages are expressly authorised by statute (category 3), there is no need to satisfy the cause of action test.

²⁹⁹ [1964] AC 1129.

³⁰⁰ [1964] AC 1129, 1221, 1226.

³⁰¹ [1964] AC 1129, 1230.

The categories test therefore entails that exemplary damages will not be available unless the case falls within one of the above three categories.

- 1.88 The cause of action test, which further restricts the availability of exemplary damages, was formulated more recently by the Court of Appeal in *AB v South West Water Services Ltd.*³⁰² The test requires that the causes of action for which exemplary damages are claimed are causes of action for which such damages had been awarded before *Rookes v Barnard*.³⁰³ Accordingly, exemplary damages were held to be unavailable on the facts in *AB v South West Water Services Ltd*, for even if the categories test had been satisfied, the torts in question were not ones for which exemplary damages had been awarded before 1964.³⁰⁴ Subsequent cases have accepted that this test forms part of English law.³⁰⁵
- 1.89 The application of these two tests by English courts clearly distinguishes English law from the common law of major Commonwealth jurisdictions. In place of the restrictive categories-based approach of *Rookes v Barnard*, Canadian, Australian and New Zealand authorities all apply a general test of availability, which, though formulated in a variety of colourful words and phrases, is essentially intended to catch any example of highly reprehensible civil wrongdoing. They have specifically considered, and specifically declined to follow, *Rookes v Barnard* in this respect.³⁰⁶ And rather than limiting the availability of exemplary damages to causes of action for which they had been awarded before *Rookes v Barnard*, authorities have tended towards a position in which, with the possible exception of breach of contract, exemplary damages are available for any civil wrong.³⁰⁷ Certainly the fact

³⁰² [1993] QB 507. The test was formulated in the absence of authority to the contrary (or at least, after treating any opposing cases as having been decided *per incuriam*) and in reliance on dicta of Lords Hailsham and Diplock in *Broome v Cassell* [1972] AC 1027, 1076, 1130H-1131A, to the effect that Lord Devlin's intention had been to restrict, and not to widen, the availability of exemplary damages.

³⁰³ [1964] AC 1129.

³⁰⁴ The torts considered by the Court of Appeal were public nuisance, negligence and breach of statutory duty (imposed by Part I of the Consumer Protection Act 1987 and the Water Act 1945).

³⁰⁵ See, in particular, *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)*, *The Times* 11 September 1997 (QBD, Divisional Court), in which the court accepted that it was bound by *AB v South West Water Services Ltd* [1993] QB 507 to hold that English law imposed a cause of action test: the decision was a "decision of the Court of Appeal arrived at after a full consideration of the relevant authorities".

³⁰⁶ For Canadian authority, see, in particular, *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) (SCC). See generally, S MWaddams, *The Law of Damages* (2nd ed, 1991) ch 11. For Australian authority, see, in particular, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (HCA), affirmed in *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590 (PC). But some state legislatures (mainly New South Wales) have abolished claims to exemplary damages in specific types of case: motor accident and industrial injury claims (eg Motor Accident Act 1988 (NSW), s 81A; Workers' Compensation Act 1987 (NSW), s 151R) and defamation (Defamation Act 1974 (NSW), s 46(3)(a)). See generally, M Tilbury, *Civil Remedies* (1990) vol 1, ch 5. For New Zealand authority, see, in particular, *Taylor v Beere* [1982] 1 NZLR 81. See generally, S Todd et al, *The Law of Torts in New Zealand* (2nd ed, 1997) pp 1129-1237.

³⁰⁷ On Canada, see S MWaddams, *The Law of Damages* (2nd ed, 1991) paras 11.230-11.270. On Australia, see M Tilbury and H Luntz, "Punitive Damages in Australian Law" (1995) *Loyola LA Intl & Comp LJ* 769, 783-785; see also notes by M Tilbury in (1996) 4 *Tort L*

that exemplary damages were not awarded for a particular type of wrong before 1964 is not considered a good reason as such for refusing to award them for that wrong today.

(1) Lord Devlin's three categories: the categories test

(a) Category 1: oppressive, arbitrary or unconstitutional action by servants of the government

1.90 In *Broome v Cassell*³⁰⁸ it was made clear that 'servants of the government' is to be widely construed.³⁰⁹ Nevertheless, the tortfeasor must be exercising 'governmental power'. In *AB v South West Water Services Ltd*³¹⁰ the defendant was a body set up under statute to supply water for profit. The Court of Appeal held that the defendant-body fell outside this category because in conducting its commercial operations it was not discharging governmental functions,³¹¹ nor was it acting as an instrument or agent of the government.³¹² The Court of Appeal also rejected the plaintiffs' argument that, since the defendant was a body through which the United Kingdom performed its obligations under European Community law, and as such was an 'emanation of state' for the purpose of enforcing Community directives in national courts, it therefore followed that it was exercising executive power.³¹³ Sir Thomas Bingham MR also found it unhelpful to inquire whether the defendant was a body against whose decisions judicial review was available.³¹⁴

1.91 The terms 'oppressive, arbitrary or unconstitutional' must be read disjunctively.³¹⁵ In *Holden v Chief Constable of Lancashire*³¹⁶ the plaintiff had been wrongfully arrested and detained for about twenty minutes by a police officer, but there was no allegation or any finding that the officer had acted oppressively or violently. The plaintiff appealed against the trial judge's refusal to leave the question of an award of exemplary damages to the jury. He sought to argue that every case of unconstitutional action by a servant of the government necessarily fell within Lord Devlin's first category. The Court of Appeal was unhappy with the width of this formulation.³¹⁷ Even so, it accepted that, in at least some cases, unconstitutional

Rev 167, 168, and (1997) 5 Tort L Rev 85, 87. On New Zealand, see S Todd et al, *The Law of Torts in New Zealand* (2nd ed, 1997) p 1233; see also A Beck, "Claiming Exemplary Damages" [December 1996] NZLJ 451. See further paras 5.50-5.53 (tort of negligence) and 5.54-5.56 (equitable wrongs) below.

³⁰⁸ [1972] AC 1027.

³⁰⁹ [1972] AC 1027, 1077H-1078C, 1088A-B, 1130B-C.

³¹⁰ [1993] QB 507.

³¹¹ [1993] QB 507, 525E-F, *per* Stuart-Smith LJ.

³¹² [1993] QB 507, 532A-B, *per* Sir Thomas Bingham MR.

³¹³ [1993] QB 507, 525H-526A, 531G-H.

³¹⁴ [1993] QB 507, 531G-H.

³¹⁵ *Huckle v Money* (1763) 2 Wils KB 205, 95 ER 768; *Broome v Cassell* [1972] AC 1027, 1128H, 1134D-E; *Holden v Chief Constable of Lancashire* [1987] QB 380, 388C-D, 388H.

³¹⁶ [1987] QB 380.

³¹⁷ Purchas LJ said (at 385F) that it seemed "an overbroad and simplistic approach", and Sir John Arnold P said (at 388H-389A) that he shared those misgivings.

action that was neither ‘oppressive’ nor ‘arbitrary’ could give rise to an exemplary damages award. The plaintiff’s appeal was therefore allowed and a new trial ordered.

- 1.92 The availability of exemplary damages under category 1 has played a significant role in buttressing civil liberties in claims for false imprisonment, assault and battery, and malicious prosecution, arising from police misconduct.³¹⁸ Until the decision in *AB v South West Water Services Ltd*, category 1 had also been held to be applicable to claims arising from race and sex discrimination by public employers.³¹⁹

(b) Category 2: wrongdoing which is calculated to make a profit

- 1.93 Where a tortfeasor’s conduct was calculated to make a profit which might well exceed the compensation payable to the plaintiff, compensatory damages are likely to be inadequate to deter the tortfeasor from committing the tort. As a result:

[e]xemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.³²⁰

In other words, an exemplary damages award should be available to punish the wrongdoer for such conduct, by making it unprofitable so to act.

- 1.94 There are two initial questions. The first is, what is a ‘profit’? In *Rookes v Barnard*³²¹ Lord Devlin considered that this category extended beyond money-making in the “strict sense” to include cases where the defendant seeks to make any gain by committing the wrong.³²²
- 1.95 A second initial question is, what state of mind of the defendant constitutes the required element of ‘calculation’? It is clear that the fact that the wrongful conduct occurred in a business context is insufficient *per se* to bring the matter within category 2.³²³ Rather, it must additionally be shown that the defendant made a decision to proceed with the conduct knowing it to be wrong, or reckless as to whether or not it was wrong, because the advantages of going ahead outweighed the risks involved.³²⁴ However, category 2 “is not intended to be limited to the kind of mathematical calculations to be found on a balance sheet”.³²⁵

³¹⁸ See generally on such claims R Clayton and H Tomlinson, *Civil Actions Against the Police* (2nd ed, 1992) and R Clayton and H Tomlinson, *Police Actions* (1997).

³¹⁹ Exemplary damages are no longer available for such torts because they fail the cause of action test. See para 4.25 below.

³²⁰ *Rookes v Barnard* [1964] AC 1129, 1227, *per* Lord Devlin. Cf *Broome v Cassell* [1972] AC 1027, 1130D, *per* Lord Diplock.

³²¹ [1964] AC 1129.

³²² [1964] AC 1129, 1227.

³²³ For example, if defamatory material appeared in a newspaper published for profit. See *Broome v Cassell* [1972] AC 1027, 1079B-C, 1101C-D, 1121D, 1133A.

³²⁴ *Broome v Cassell* [1972] AC 1027, 1079C-E, 1088G-1089A, 1094C-E, 1101D-G, 1121D, 1130D-F.

³²⁵ *Broome v Cassell* [1972] AC 1027, 1078H-1079A, 1094C, 1101B-C, 1130D-F.

1.96 These questions were recently considered by the Court of Appeal in *John v Mirror Group Newspapers Ltd*,³²⁶ in an action for defamation brought against a newspaper publisher. It was said that:

[B]efore [exemplary] damages can be awarded the jury must be satisfied that the publisher had no genuine belief in the truth of what he published. The publisher must have suspected that the words were untrue and have deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty ... Secondly, the publisher must have acted in the hope or expectation of material gain. It is well established that a publisher need not be shown to have made any precise or arithmetical calculation. But his unlawful conduct must have been motivated by mercenary considerations, the belief that he would be better off financially if he violated the plaintiff's rights than if he did not, and mere publication of a newspaper for profit is not enough.³²⁷

1.97 Exemplary damages are in fact seldom sought in libel actions. This is for several reasons. First, it is difficult, in the context of defamation by the press, to prove that a defendant calculated that a particular libel was likely to boost sales of the publication. Secondly, a plaintiff pleading exemplary damages will bear the burden of such proof. This effectively reverses the burden of proof in defamation actions, so that there is a tactical disadvantage in seeking exemplary damages. Thirdly, practitioners may often perceive a punitive element in awards of (supposedly compensatory) 'aggravated damages' by juries in defamation actions; they therefore feel that little is to be gained by claiming exemplary damages in addition.³²⁸

1.98 However, the effect of *John v MGN Ltd*³²⁹ may be that exemplary damages will be more often sought in the future in defamation actions. In that case the Court of Appeal held for the first time that a jury should be referred to the scale of compensatory damages for pain, suffering and loss of amenity awarded for personal injury.³³⁰ Potential plaintiffs will therefore be faced with the prospect of a reduced compensatory award, and so may well seek to supplement such awards by pleading exemplary damages in addition.

1.99 In the past, most cases in category 2 have related to wrongful evictions of tenants, typically in circumstances of harassment,³³¹ in order to free the property for more profitable use.³³² In contrast to defamation, however, this type of case has not

³²⁶ [1997] QB 586.

³²⁷ [1997] QB 586, 618G-619A.

³²⁸ This was the view of some leading libel silks to whom we have spoken.

³²⁹ [1997] QB 586.

³³⁰ See further paras 4.91-4.93 below.

³³¹ Such conduct also usually gives rise to an award of aggravated damages; see Part II above, and para 2.6.

³³² See *Drane v Evangelou* [1978] 1 WLR 455, which has led to many subsequent awards of exemplary damages in housing cases. In *Broome v Cassell* [1972] AC 1027, 1079E-F, Lord Hailsham indicated that the unlawful eviction of a tenant by harassment was a prime example of a case falling within category 2.

attracted high levels of award. One reason may be that juries are not involved; another is that jurisdictional limits have until recently prevented county courts from making a total award in excess of £5,000.³³³

- 1.100 An important issue for the purposes of this paper is the difference between exemplary damages under category 2 and restitutionary damages: how far, if at all, are category 2 exemplary damages essentially restitutionary damages? There are at least three major differences which lead us to the view that the two forms of damages cannot be equated.
- 1.101 The first difference is that the focus of category 2 is on the wrongdoer's improper *motive*: the calculation that he or she would profit from the wrong. In contrast, the focus of restitutionary damages is on the *actual making of a profit*. Thus, there is no objection in principle to an award of exemplary damages where the tortious conduct was calculated to yield a profit in excess of any likely compensation, *but did not in fact produce any or any such profit*.³³⁴ This means that exemplary damages may be awarded even though restitutionary damages are unavailable.
- 1.102 The second difference is that exemplary damages may be awarded even though they exceed the amount of the gain made by the tortfeasor. The effective pursuit of punishment may *require* awards of exemplary damages to exceed the restitutionary measure: they are concerned with punishment and not simply with stripping away the fruits of the defendant's wrongdoing. As Lord Diplock said in *Broome v Cassell*,

[T]o restrict the damages recoverable to the actual gain made by the defendant if it exceeded the loss caused to the plaintiff, would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him or, if he did, might fail in the hazards of litigation. It is only if there is a prospect that the damages may exceed the defendant's gain that the social purpose of this category is achieved - to teach a wrong-doer that tort does not pay.³³⁵

Even so it is not easy to identify actual cases where the quantum of exemplary damages clearly exceeded the measure of the defendant's unjust enrichment. This may be because the quantification of exemplary damages is rarely a precise exercise: awards are often assessed by a jury; it is very rare for evidence of the tortfeasor's profit to be adduced in court; and such profit may in any case be impossible to quantify.

- 1.103 A final difference is that many of the overriding principles which structure the discretion to award exemplary damages, and which govern their assessment, seem

³³³ See the County Courts Jurisdiction Order 1981, SI 1981 No 1123.

³³⁴ In *Archer v Brown* [1985] 1 QB 401, 423F-G, Peter Pain J said that the fact that the defendant could not have profited from his wrong did not take him outside category 2, provided that he had weighed the risk of loss against the chance of getting away with his wrongdoing.

³³⁵ [1972] AC 1027, 1130C-D.

to be irrelevant to, and even inconsistent with, a remedy which is directed to the recovery of profits.³³⁶

- 1.104 It is helpful to emphasise at this stage that category 2 has been criticised on the ground that it is too narrow. The reason given is that those who commit torts intentionally and maliciously should not escape liability for exemplary damages merely because they were not motivated by the desire to profit from their wrong. The case where a defendant commits a tort, not for gain, but simply out of malice, was considered by Lord Reid in *Broome v Cassell*:

The reason for excluding such a case from [category 2] is simply that firmly established authority required us³³⁷ to accept this category however little we might like it, but did not require us to go farther. If logic is to be preferred to the desirability of cutting down the scope for punitive damages to the greatest extent that will not conflict with established authority then this category must be widened. But as I have already said I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already clearly covered by authority.³³⁸

(c) Category 3: where expressly authorised by statute

- 1.105 Parliament has rarely thought it necessary to authorise exemplary damages by a statutory provision. The only clear example is the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, section 13(2), which expressly authorises the award of “exemplary damages”.³³⁹ In *Rookes v Barnard*³⁴⁰ Lord Devlin specifically cited this provision as an example of express statutory authorisation. The other example, arguably, is in the field of the protection of copyright and related rights, where the remedy of “additional damages” is available for infringement of copyright,³⁴¹ design right³⁴² and performer’s property rights.³⁴³ The correct analysis of additional damages has been, and remains, controversial.³⁴⁴

³³⁶ These principles include, in particular, those relating to moderation and joint liability. See paras 4.68 and 4.77-4.80 below.

³³⁷ In the House of Lords in *Rookes v Barnard* [1964] AC 1129.

³³⁸ [1972] AC 1027, 1088E-F.

³³⁹ Section 13(2) provides:

In any action for damages for conversion or other proceedings which lie by virtue of any such omission, failure or contravention, the court may take account of the conduct of the defendant with a view, if the court thinks fit, to awarding exemplary damages in respect of the wrong sustained by the plaintiff.

³⁴⁰ [1964] AC 1129, 1225. Cf Lord Kilbrandon in *Broome v Cassell* [1972] AC 1027, 1133H-1134A, who regarded this as an example of the older usage of the term exemplary damages, which would now be considered to be aggravated damages.

³⁴¹ Copyright, Designs and Patents Act 1988, s 97(2).

³⁴² Copyright, Designs and Patents Act 1988, s 229(3).

³⁴³ Copyright, Designs and Patents Act 1988, s 191J, as inserted by the Copyright and Related Rights Regulations 1996, SI 1996 No 2967.

³⁴⁴ The statutory formulation of the remedy is identical in each case (s 97(2); s 191J; s 229(3)):

1.106 The controversy surrounding additional damages has hitherto arisen only in the context of claims for infringement of copyright.³⁴⁵ In the two recent decisions of *Cala Homes (South) Ltd v McAlpine Homes East Ltd (No 2)*³⁴⁶ and *Redrow Homes Ltd v Bett Brothers plc*,³⁴⁷ Laddie J and the Court of Session (Inner House), reached opposite conclusions.³⁴⁸ Reviewing, *inter alia*, the legislative history of section 97(2), Laddie J inclined to the view that additional damages were a form of financial relief which could be likened to exemplary damages.³⁴⁹ The Court of Session held that they were aggravated damages. The predecessor to section 97(2), section 17(3) of the Copyright Act 1956, had not generally been thought in the case law to authorise exemplary damages.³⁵⁰ Instead it was said to authorise awards of aggravated damages,³⁵¹ or compensation which would otherwise be irrecoverable under the ordinary rules about remoteness and proof of damage.³⁵² In contrast, the Whitford Committee, reporting in 1977, considered that section 17(3) gave the courts power to award exemplary damages,³⁵³ and indeed, that the provision should be strengthened.³⁵⁴

The court may in an action for infringement of [copyright or design right or performer's property rights] having regard to all the circumstances, and in particular to -

- (a) the flagrancy of the infringement, and
 - (b) any benefit accruing to the defendant by reason of the infringement,
- award such additional damages as the justice of the case may require.

For discussion of additional damages, see, in particular: Laddie, Prescott and Vitoria, *The Modern Law of Copyright* (2nd ed, 1995) vol 1, paras 24.30-24.31; *Copinger & Skone James on Copyright* (13th ed, 1991) paras 11.66-11.67; W Cornish, *Intellectual Property* (3rd ed, 1996) para 11.61.

³⁴⁵ Copyright, Designs and Patents Act 1988, s 97(2).

³⁴⁶ [1996] FSR 36.

³⁴⁷ [1997] SLT 1125.

³⁴⁸ The question immediately before both courts was whether additional damages could only be claimed in addition to 'damages' (as was held in *Redrow Homes*), or whether they could be claimed in addition to an account of profits also (as was held in *Cala Homes*). The proper characterisation of additional damages was a very important part in the reasoning of each court to their respective conclusions.

³⁴⁹ [1996] FSR 36, 43. Cf also *Brugger v Medicaid* [1996] FSR 362 and *ZYX Music GmbH v King* [1997] 2 All ER 129, 148g-149g, in which Hirst LJ found it inappropriate to express a view on whether exemplary damages could be awarded under s 97(2).

³⁵⁰ The express statements are found in *Broome v Cassell* [1972] AC 1027, 1134A, *per* Lord Kilbrandon, and *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 264j-266b, *per* Ungood-Thomas J. The one clear authority to the contrary, which was reinterpreted as an aggravated damages case by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1225, is *Williams v Settle* [1960] 1 WLR 1072.

³⁵¹ See, in particular, *Beloff v Pressdram* [1973] 1 All ER 241, 264j-266b, *per* Ungood-Thomas J, and *Broome v Cassell* [1972] AC 1027, 1134A, *per* Lord Kilbrandon.

³⁵² *Mondaress Ltd v Bourne & Hollingsworth Ltd* [1981] FSR 118, 122, *per* Buckley LJ.

³⁵³ Copyright and Designs Law (1977) Cmnd 6732, paras 697-705. The Report of the Copyright Committee (1952) Cmd 8662 (the Gregory Committee Report), on which the 1956 Act was apparently based, advocated the introduction of a power to award "something equivalent to exemplary damages in cases where the existing remedies give inadequate relief" (para 294). Although the distinction between 'aggravated damages' and 'exemplary

1.107 Consistently with the apparent rarity of clear statutory authorisation of exemplary damages, it is of interest that, when the Protection from Eviction Act 1977 was amended by the Housing Act 1988, a new regime of restitutionary rather than exemplary damages was introduced in order to supplement the inadequate regime of compensatory damages then available to an unlawfully evicted tenant.³⁵⁵

(2) The cause of action test

(a) Wrongs which satisfy the cause of action test

1.108 Wrongs satisfying the cause of action test - because they are wrongs for which exemplary damages had been awarded before *Rookes v Barnard* - are malicious prosecution, false imprisonment, assault and battery, defamation, trespass to land or to goods, private nuisance, and tortious interference with business.³⁵⁶ Where committed by servants of government, the torts of malicious prosecution, and assault and battery, have fallen within category 1. Where committed for gain, the torts of defamation, trespass to land or goods, private nuisance, and tortious interference with business, have fallen within category 2.

(b) Wrongs which fail the cause of action test

1.109 Wrongs failing the cause of action test - because they are wrongs for which there is no pre-*Rookes v Barnard* authority for an award of exemplary damages - include the tort of negligence,³⁵⁷ public nuisance,³⁵⁸ deceit,³⁵⁹ patent infringement,³⁶⁰

damages' was only fully developed in *Rookes v Barnard* [1964] AC 1129, there is evidence that the Committee meant what it said: the title of the section in which additional damages are considered is "Extent of Penalties".

³⁵⁴ Section 17(3) was limited by the condition that additional damages could not be awarded unless "effective relief" would not otherwise be available to the plaintiff. Section 97(2) does not limit the availability of additional damages in this way.

³⁵⁵ See para 3.11 above.

³⁵⁶ See Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 3.57-3.64.

³⁵⁷ See *AB v South West Water Services Ltd* [1993] QB 507, 523C-D, 528E-F, 530H. An unresolved question is whether torts which satisfy the cause of action test, but which are committed merely negligently, can give rise to exemplary damages: cf *Barbara v Home Office* 134 NLJ 888.

³⁵⁸ This was one of the torts on which the claim to exemplary damages in *AB v South West Water Services Ltd* was based; the claim was struck out ([1993] QB 507, 523H, 528E-F, 531B). However, the Court of Appeal gave additional reasons why public nuisance ought not to give rise to exemplary damages: especially at 531B-E, *per* Sir Thomas Bingham MR.

³⁵⁹ *Broome v Cassell* [1972] AC 1027, 1076C-F (*per* Lord Hailsham), 1130H-1131A (*per* Lord Diplock).

³⁶⁰ *Catnic Components Ltd v Hill & Smith Ltd* [1983] FSR 512, 541.

unlawful discrimination on grounds of sex, race or disability,³⁶¹ and wrongs consisting of breach of Community law which English law conceptualises as civil liability for breach of statutory duty.³⁶² Indeed, any wrong which arises under an Act coming into force after *Rookes v Barnard* must inevitably fail the cause of action test, so that exemplary damages will be unavailable unless they are expressly authorised by statutory provision.³⁶³ And notwithstanding recent dicta,³⁶⁴ it would seem that the tort of misfeasance in a public office also fails the cause of action test.

1.110 There is no clear authority as to whether exemplary damages are available where the defendant has committed an equitable wrong, such as breach of fiduciary duty or breach of confidence. Damages of any sort, as opposed to the equitable remedies of compensation or an account of profits, are unusual in equitable actions.³⁶⁵ In the absence of any authority prior to *AB v South West Water Services Ltd*,³⁶⁶ it would seem that it is not presently possible to recover exemplary damages for an equitable wrong.

1.111 There are some cases in which the courts have suggested that exemplary damages might be awarded under an undertaking in damages given by a plaintiff to the court as a condition of the granting of interlocutory relief. In *Digital Equipment Corporation v Darkcrest*³⁶⁷ Falconer J suggested that if an injunction was obtained fraudulently or maliciously, the defendant might be awarded exemplary damages under the undertaking. And in *Columbia Picture Industries Inc v Robinson*³⁶⁸ Scott J thought that solicitors executing an *Anton Piller* order would be officers of the court, and could come within category 1 if they acted in an oppressive or excessive

³⁶¹ The Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995, were obviously not enacted before 1964. Cf, in particular, *Bradford City Metropolitan Council v Arora* [1991] 2 QB 507, in which exemplary damages were awarded for sex and race discrimination, and no point was taken that such damages could be given because the statutory torts were created after 1964. In *AB v South West Water Services Ltd* [1993] QB 507 the *Bradford* case was treated as having been decided *per incuriam*. See now *Deane v Ealing LBC* [1993] ICR 329.

³⁶² This is the characterisation currently preferred by English courts of a liability to pay damages for breach of a directly effective provision of Community law (such as Article 86 EC), and a Member State's liability to pay damages for breach of Community law (eg failure to implement a directive, or defective implementation of a directive) under the principles of state liability laid down by the European Court of Justice: see paras 4.52 and 5.66 below. See, in particular, *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)*, *The Times* 11 September 1997 (QBD, Divisional Court), which is discussed at paras 4.52-4.54 and 5.69 below.

³⁶³ Accordingly, if and when the European Convention on Human Rights is incorporated into domestic law by an Act of Parliament, exemplary damages will not be available (in the absence of express statutory authorisation) for any wrong which the incorporating Act creates.

³⁶⁴ See *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)*, *The Times* 11 September 1997, criticised in para 4.54, n 120 below.

³⁶⁵ Cf the position in Commonwealth jurisdictions, discussed at para 5.54 below.

³⁶⁶ [1993] QB 507.

³⁶⁷ [1984] Ch 512, 516G-H, citing *Smith v Day* (1882) 21 ChD 421, 428, *per* Brett LJ.

³⁶⁸ [1987] Ch 38, 87D-F.

manner. As shall be seen below, it is not entirely clear how the recovery of exemplary damages can be analysed as recovery pursuant to the undertaking - at least as that undertaking is conventionally viewed.³⁶⁹ But in any case, undertakings in damages were not mentioned in *Rookes v Barnard*, and it would appear that the suggestions made in the two modern cases cannot stand in the light of *AB v South West Water Services Ltd*.³⁷⁰

1.112 Exemplary damages are clearly unavailable in a claim for breach of contract. The leading authority is *Addis v Gramophone Co Ltd*.³⁷¹ In that case the House of Lords refused to award any damages - including mental distress damages let alone exemplary damages - for the harsh and humiliating manner of the plaintiff's wrongful dismissal.

(3) Additional factors which limit the availability of exemplary damages

1.113 In addition to the cause of action and categories tests, the jury or judge retains an overriding discretion to refuse to award exemplary damages.³⁷² Thus, even if the plaintiff can show that the case falls within one of Lord Devlin's three categories and that the wrong in question satisfies the cause of action test, it is still open for the court or jury to decide in its discretion that exemplary damages are inappropriate.³⁷³ The exercise of this discretion in the case law has led to the identification of a number of factors which further limit the availability of exemplary damages; several of these factors may, alternatively, be relevant to the assessment of such awards.³⁷⁴

1.114 These factors are:

- the 'if, but only if' test
- the plaintiff must be the 'victim of the punishable behaviour'
- the defendant has already been punished by a criminal or other sanction
- the existence of multiple plaintiffs
- the plaintiff's conduct

³⁶⁹ See paras 5.74-5.77 below.

³⁷⁰ [1993] QB 507.

³⁷¹ [1909] AC 488. *Addis* remains good law on this point, notwithstanding that it has been disapproved in relation to its denial of damages for injury to reputation by the House of Lords in *Mahmud v BCCI* [1997] 3 WLR 95. See also *Perera v Vandiyar* [1953] 1 WLR 672 and *Kenny v Preen* [1963] 1 QB 499.

³⁷² Indeed, according to Lord Hailsham in *Broome v Cassell* [1972] AC 1027, 1060B, a punitive award, if it is ever permissible, must always be discretionary.

³⁷³ See, for example, *AB v South West Water Services Ltd* [1993] QB 527B-E, 528E-F, 533F, in which the Court of Appeal identified two further grounds for striking out the plaintiffs' claims (in addition to failure to satisfy the cause of action test and/or the categories test). The grounds are discussed at paras 4.37-4.43 and 4.47 below.

³⁷⁴ See paras 4.56-4.85, and in particular, 4.81-4.83, 4.84 and 4.85, below.

- the defendant's good faith

We now consider each in more detail.

(a) The 'if, but only if' test

1.115 Exemplary damages are available to a court if, but only if, the sum which it seeks to award as compensation is inadequate to punish the defendant for his outrageous conduct, to deter him and others from engaging in similar conduct, and to mark the court's disapproval of such conduct. Thus in *Rookes v Barnard*³⁷⁵ Lord Devlin stated that, when assessing damages in a case in which exemplary damages are available, the jury should be directed that:

... if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.³⁷⁶

The importance of this principle was further emphasised by the House of Lords in *Broome v Cassell*.³⁷⁷

1.116 The 'if, but only if' test therefore entails that exemplary damages are a remedy of 'last resort' and that they are, in one sense, a 'topping-up' award.³⁷⁸ It recognises that even awards of compensatory damages may have an incidental punitive effect, and that the need for an award of exemplary damages is correspondingly reduced where this is so. Thus the test makes the availability of exemplary damages conditional on compensatory awards being inadequate to achieve the ends of punishment, deterrence and disapproval. Such awards represent the balance between, on the one hand, any compensatory sum, and, on the other hand, the sum that the court considers to be appropriate to achieve those ends.

³⁷⁵ [1964] AC 1129.

³⁷⁶ [1964] AC 1129, 1228.

³⁷⁷ [1972] AC 1027, 1060A-D, 1082A-B, 1089B-F, 1104D, 1116C, 1121G-1122A, 1126C-D. See, in particular, Lord Diplock (at 1126D):

... it is only if what the defendant deserves to pay as punishment exceeds what the plaintiff deserves to receive as compensation, that the plaintiff can also be awarded the amount in excess.

³⁷⁸ Nevertheless, exemplary damages and compensatory damages can be (and generally are) itemised. This is apparent from *John v MGN Ltd* [1997] QB 586, 619C-D in which it was said that:

... it is only where the conditions for making an exemplary award are satisfied, and only when the sum awarded to the plaintiff as compensatory damages is not itself sufficient to punish the defendant, show that tort does not pay and deter others from acting similarly, that an award of exemplary damages *should be added to the award of compensatory damages* (emphasis added)

See also *Thompson v MPC* [1997] 3 WLR 403, in which the Court of Appeal recommended that awards of 'basic' compensatory damages and 'aggravated' compensatory damages

1.117 Major Commonwealth jurisdictions which have rejected the *Rookes v Barnard* categories test have nonetheless accepted and applied the ‘if, but only if’ test.³⁷⁹

(b) *The plaintiff must be the ‘victim of the punishable behaviour’*

1.118 In *Rookes v Barnard* Lord Devlin said:

[T]he plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.³⁸⁰

1.119 This proposition requires further explanation. It is presumably not making the obvious point that a person must have an independent cause of action, usually a tort, before he or she has any possible claim to exemplary damages. Rather it seems to refer to a case in which the defendant’s conduct constitutes a wrong against the plaintiff and a wrong against a third party, but it is only the wrong *vis-à-vis* the third party which constitutes the punishment-worthy behaviour.³⁸¹

(c) *The defendant has already been punished by a criminal or other sanction*

1.120 The defendant’s conduct may leave him or her vulnerable to criminal proceedings, or else to disciplinary proceedings by his or her employer or professional body. If such proceedings have been brought and concluded, against or in favour of the defendant, can the victim of the defendant’s wrongdoing still claim exemplary damages? If such proceedings have not yet been concluded, or are likely or merely possible when the victim claims exemplary damages, how (if at all) is the victim’s entitlement to claim exemplary damages affected?

(i) *The relevance of criminal proceedings*

1.121 The possibility that a defendant has been or will be punished by a criminal penalty poses the risk, if an exemplary damages award is also available, that the defendant will be punished twice for the same conduct.

1.122 Where an adverse criminal determination has already been made, and civil proceedings subsequently reach court, existing case law leaves a critical issue unclear. This is whether the existence of such a criminal determination automatically precludes an exemplary damages award, or, alternatively, will be merely one factor - however weighty - that is relevant to either the availability or assessment of an award. In other words, can a civil court award exemplary damages where it considers that the defendant has not been adequately punished by the criminal law?

should be itemised (at 417C-D), and clearly took the view that exemplary damages should be separately itemised also.

³⁷⁹ See para 5.99, n 137 below.

³⁸⁰ [1964] AC 1129, 1227.

³⁸¹ See, for a similar view, S M Waddams, *The Law of Damages* (2nd ed, 1991) para 11.390.

1.123 In *Archer v Brown*³⁸² the punishment already exacted by the criminal courts was very arguably treated as sufficient alone to bar an exemplary award. Peter Pain J decided not to award exemplary damages against a defendant who had already been convicted and imprisoned in respect of a corresponding criminal offence. The proposition on which the judge relied, in the absence of authority, was a very broad one which did not raise any question as to the sufficiency of the criminal punishment. This was that a “man should not be punished twice for the same offence”:

[W]hat seems to put the claim [to exemplary damages] out of court is the fact that exemplary damages are meant to punish and the defendant has been punished. Even if he wins his appeal he will have spent a considerable time in gaol. It is not surprising that there is no authority as to whether this provides a defence, since there is no direct authority as to whether exemplary damages can be given in deceit. I rest my decision on the basic principle that a man should not be punished twice for the same offence. Since he has undoubtedly been punished, I should not enrich the plaintiff by punishing the defendant again.³⁸³

1.124 Nevertheless, *Archer v Brown* is not an unassailable authority for the proposition that a court will refuse an award of exemplary damages whenever a defendant has already been punished by a criminal court for the conduct in question. In *Archer v Brown* the defendant had already spent a “considerable time” in prison, and would spend even more time in prison if an appeal against his sentence failed. Imprisonment is obviously a very severe form of punishment. Accordingly it is possible that *Archer v Brown* is consistent with the court having a discretion to refuse an award of exemplary damages, which Peter Pain J exercised in the circumstances, because, in view of the severity of the criminal punishment exacted, no further civil punishment was necessary or fair.

1.125 Another important decision is *AB v South West Water Services Ltd.*³⁸⁴ The Court of Appeal gave as one, albeit secondary, reason for striking out the claim to an award of exemplary damages, the “conviction and fine” of the defendants. No reference was made to the size and sufficiency of the fine: the Court of Appeal appeared to be content that the defendant had been criminally punished. And because the proceedings were striking out proceedings, the court must have been convinced that it was a “clear and obvious” case, or one which was “doomed to fail”.³⁸⁵ If so, it is arguable that the court considered that there was no scope for argument about the sufficiency of the punishment that was exacted by the criminal law. The relevant passage proceeds as follows:

³⁸² [1985] 1 QB 401.

³⁸³ [1985] 1 QB 401, 423G-H.

³⁸⁴ [1993] QB 507.

³⁸⁵ [1993] QB 507, 516C-E. See also *Devonshire & Smith v Jenkins*, noted at pp 31-32 of *Arden & Partington on Quiet Enjoyment* (3rd ed, 1990), in which the court declined to award exemplary damages on the grounds, *inter alia*, that the defendant already had to pay a fine for substantially the same deeds.

In the present case there is the further complication to which I have already referred of the conviction and fine of the defendants. These problems persuade me that there would be a serious risk of injustice to the defendants in this case if an award of exemplary damages were to be made against them. There is no injustice to the plaintiffs in refusing to permit such an award ...³⁸⁶

- 1.126 The risk of 'double punishment' does not arise where the conduct in respect of which an exemplary damages award is sought is materially different from that for which the defendant has already been punished in criminal proceedings. Accordingly, there can be no objection to an exemplary damages award in such a case.³⁸⁷ In *Asghar v Ahmed*³⁸⁸ the conduct in respect of which exemplary damages were awarded occurred after the unlawful eviction in respect of which the defendants had been convicted. The Court of Appeal upheld the award, observing that the trial judge had expressly directed his mind to the fact that the defendant had been fined in the Crown Court for the eviction, and that:

... there was a great deal more to the outrageous conduct which followed the eviction which justified the judge's finding that it was an absolutely outrageous example of persecution by a landlord of a tenant.³⁸⁹

- 1.127 Where both criminal and civil proceedings are brought, the criminal disposition will usually occur prior to the decision in the corresponding civil proceedings. A civil court has the discretion to stay proceedings if it appears that justice between the parties so requires.³⁹⁰ This appears to enable a civil court, in an appropriate case, to suspend civil proceedings until the criminal proceedings have been concluded, or until such time as it is clear that they will end before the civil proceedings come to trial. It should therefore be unusual for a civil court to have to determine the availability or quantum of exemplary damages prior to the conclusion of criminal proceedings. If they do, the civil court would generally have to proceed on the basis that there will be no criminal conviction. But by analogy with the Court of Appeal's approach to the relevance of disciplinary proceedings, it is arguable that a civil court might not do so, if:

there is clear evidence that such proceedings are intended to be taken in the event of liability being established and that there is at least a strong possibility of the proceedings succeeding.³⁹¹

³⁸⁶ [1993] QB 507, 527D-E. Cf 516A-C.

³⁸⁷ *Asghar v Ahmed* (1985) 17 HLR 25.

³⁸⁸ (1985) 17 HLR 25.

³⁸⁹ (1985) 17 HLR 25, 29, *per* Cumming-Bruce LJ.

³⁹⁰ See, in particular, section 49(3) of the Supreme Court Act 1981, which preserves the inherent jurisdiction of the Court of Appeal or the High Court to stay proceedings before it. For an example of a case considering the use of this jurisdiction where the concurrent existence of civil and criminal proceedings could produce some form of unfairness - though not the unfairness of 'double punishment' - see *Jefferson Ltd v Bhetcha* [1979] 1 WLR 898 (civil proceedings eroding the defendant's 'right of silence' in criminal proceedings).

³⁹¹ *Thompson v MPC* [1997] 3 WLR 403, 418H-419A.

If the court awards exemplary damages, it will be for the criminal courts to determine the relevance of this in the event that the defendant is subsequently convicted of a criminal offence for the same conduct.

(ii) The relevance of disciplinary procedures or proceedings

1.128 Criminal and civil proceedings are not the only possible responses to wrongdoing; an obvious and important alternative is disciplinary proceedings. These may be conducted by the organisation by which the defendant is employed, or by the professional organisation of which the defendant is a member. How far does the fact that disciplinary proceedings have, or may be, brought affect a claim to exemplary damages?

1.129 In the recent case of *Thompson v MPC*³⁹² it was argued that the jury should be invited to take account of disciplinary procedures which are available against police officers, when considering whether the case is one which warrants the award of exemplary damages.³⁹³ The Court of Appeal suggested that this would only be appropriate if two conditions were met:

... where there is clear evidence that such proceedings are intended to be taken in the event of liability being established and that there is at least a strong possibility of the proceedings succeeding.³⁹⁴

But even if, in these circumstances, the prospect of disciplinary proceedings is a consideration which may persuade a court to refuse to make any award of exemplary damages, whether it should be so persuaded should depend upon, in particular, the nature and efficacy of the disciplinary proceedings.³⁹⁵

1.130 No reported English case has considered the relevance of disciplinary proceedings which have been brought successfully prior to civil proceedings for exemplary damages. It is therefore unclear whether an English court would hold this to be an automatic and absolute bar to a subsequent award of exemplary damages for the same conduct, or would examine the nature and adequacy of the disciplinary sanction (if any) in order to decide whether, and to what extent, an additional award of exemplary damages is necessary to punish the defendant.

(d) Multiple plaintiffs

1.131 The existence of a class of plaintiffs may provide a reason for refusing to make any exemplary award at all. In *AB v South West Water Services Ltd*³⁹⁶ the Court of Appeal considered that the large number of plaintiffs affected by the nuisance was

³⁹² [1997] 3 WLR 403.

³⁹³ [1997] 3 WLR 403, 418H-419A.

³⁹⁴ [1997] 3 WLR 403, 418H-419A.

³⁹⁵ The disciplinary body may, for example, have very potent sanctions, such as the power to strike the defendant off the list of persons legally permitted to practise a particular profession, which, if awarded, would very arguably make an (additional) exemplary damages award unnecessary or otherwise inappropriate. But it is possible that the sanctions available and/or awarded could be less potent.

³⁹⁶ [1993] QB 507, 527B-D, 528E-F, 531D-E.

an aspect of the case which made exemplary damages inappropriate. The underlying reason is that where there is a class of plaintiffs, practical problems arise with regard to the assessment and apportionment of exemplary damages. If existing actions have not been consolidated, or potential causes of action have not yet accrued, the court is faced with the question of how to assess exemplary damages if it is not aware of the full extent of the defendant's wrongdoing or of how many other claims will be made, in other proceedings, for exemplary damages in respect of the defendant's conduct. The court is also faced with the question of how to apportion the exemplary award between the plaintiffs and potential plaintiffs. These may, however, be regarded simply as raising problems of assessment, and not as problems which completely rule out exemplary damages awards in multiple plaintiff cases.³⁹⁷

(e) The plaintiff's conduct

- 1.132 The plaintiff's conduct may serve to exclude exemplary damages altogether. A good example is where the plaintiff provoked the wrongful action by his or her own conduct.³⁹⁸ Or alternatively, as we shall see below, such conduct may be a reason for reducing any sum that is awarded.³⁹⁹

(f) The defendant's good faith

- 1.133 The 'good faith' of the defendant may be a reason which justifies a court refusing to make any exemplary damages award at all. Or alternatively, as we shall see below, it may be a reason for awarding a lower sum than would otherwise be awarded.⁴⁰⁰
- 1.134 It is a necessary precondition of category 2 cases that the defendant should have acted in the knowledge that, or reckless as to whether, what he or she was doing was wrongful. As a result, there is no scope for 'good faith' as a factor relevant to the availability or the assessment of exemplary damages awards. In contrast, it would appear that the defendant's behaviour in committing the wrong need not be 'exceptional' in order to bring the case within category 1.⁴⁰¹ In *Huckle v Money*⁴⁰² the court refused to upset an award of £300 where the plaintiff had been kept in custody for about six hours, but the defendant "used him very civilly by treating him with beef-steaks and beer". It would appear, therefore, that the wrongful arrest by the defendant servant of government was thought sufficient in itself to justify an exemplary award.

³⁹⁷ See paras 4.81-4.83 below. See, analogously, paras 3.77-3.81 above.

³⁹⁸ See, eg, *Ewing v Vasquez* 7 May 1985 (unreported, CA) (tenant being difficult to live with); *Holden v Chief Constable of Lancashire* [1987] QB 380, 388D-E (plaintiff acting suspiciously, leading to wrongful arrest).

³⁹⁹ See para 4.84 below.

⁴⁰⁰ See para 4.85 below.

⁴⁰¹ Cf aggravated damages. See paras 2.4 and 2.6 above.

⁴⁰² (1763) 2 Wils KB 205, 95 ER 768.

1.135 On the other hand, it has been said in *Holden v Chief Constable of Lancashire*⁴⁰³ that the absence of ‘aggravating factors’ in the defendant’s conduct is relevant within category 1 in deciding “whether or not to award such damages, and, if so, how much”.⁴⁰⁴ The Court of Appeal considered this to be an important limitation on the otherwise overbroad proposition that *any* unconstitutional act by a servant of government made an exemplary damages award possible in law. Sir John Arnold P emphasised that:

... the circumstance that a case comes within a category does not make it follow as night the day that exemplary damages will be awarded. It merely leaves it open to the jury to award exemplary damages in such cases ...⁴⁰⁵

Accordingly, if the defendant acted on the basis of an honest or mistaken belief or in good faith, the jury or the court might exercise its discretion to decline to make an exemplary damages award.⁴⁰⁶

(4) The remedial requirements of European Community law

1.136 English courts have occasionally, albeit rarely, faced arguments that European Community law requires them to award exemplary or punitive damages for breaches of Community law which are actionable by individuals in national courts.⁴⁰⁷ The traditional starting-point has been that in the absence of Community provision, the nature and extent of remedies which are available for such infringements are generally matters for national law to decide.⁴⁰⁸ However, national courts and legislatures are not entirely free to award whatever remedies (if any) they wish. The European Court of Justice has laid down several general principles which national remedies are required to observe, which can significantly constrain (or sometimes even dictate) a national legal system’s choice of remedies.⁴⁰⁹ In particular, the national remedies available for breach of a Community law right must not be less favourable than those available for similar claims or causes of action founded on domestic law, and must secure effective protection for the Community law right.

⁴⁰³ [1987] QB 380.

⁴⁰⁴ [1987] QB 380, 388D-E, *per* Purchas LJ.

⁴⁰⁵ [1987] QB 380, 389B-C, *per* Sir John Arnold P.

⁴⁰⁶ See, eg, *Simper v MPC* [1982] CLY 3124; *Kay v James*, 21 April 1989 (unreported, CA). Cf *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 135, 159.

⁴⁰⁷ Those are breaches of directly effective provisions of Community law (such as Article 86 EC) and breaches of Community law by Member States which attract an obligation to pay compensation under the principles of ‘state liability’ formulated in, in particular, C-6 & 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I 5357 and C-46 & 48/93 *Brasserie du Pêcheur SA v Germany*; *R v Secretary of State for Transport, ex p Factortame Ltd* [1996] QB 404.

⁴⁰⁸ See, for example, C-33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.

⁴⁰⁹ See generally C Lewis, *Remedies and the Enforcement of European Community Law* (1996) Chapter 5, contrasting the “traditional approach” of the European Court of Justice with the current approach.

- 1.137 The ‘non-discrimination’ or ‘comparability’ requirement was recently considered in relation to the remedy of exemplary damages by the Divisional Court in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 5)*.⁴¹⁰ In *Brasserie du Pêcheur SA v Germany*⁴¹¹ the European Court of Justice stated that an award of exemplary damages “cannot be ruled out” in a claim founded on Community law, “if such damages could be awarded pursuant to a similar claim or action founded on domestic law”. In that case the ECJ was dealing with the principle of ‘state liability’ for breach of Community law recognised in *Francovich and Bonifaci v Italy*.⁴¹² In *ex parte Factortame Ltd (No 5)* the Divisional Court had to apply the ECJ’s ruling to this category of claim.
- 1.138 The Divisional Court indicated that the state liability claim was best understood as an action for breach of statutory duty.⁴¹³ It was apparently accepted that, under domestic law, exemplary damages could never be awarded for such a claim.⁴¹⁴ But did Community law require exemplary damages to be available? The applicants’ argument was that exemplary damages could be awarded for the tort of misfeasance in a public office;⁴¹⁵ that this is a “similar claim or action founded on domestic law”; that to refuse to award them for state liability claims would infringe the principle of ‘non-discrimination’; and that, as a result, exemplary damages had to be available as a matter of Community law. The Divisional Court rejected these arguments. Community law did not require exemplary damages to be available for the simple reason that the tort of misfeasance in a public office was not a ‘similar claim or action’.⁴¹⁶
- 1.139 Arguments that Community law (the Equal Treatment Directive) requires exemplary damages to be available for unlawful discrimination on grounds of sex have been similarly unsuccessful. It is now reasonably clear that exemplary damages are not available, as a matter of domestic law, for unlawful discrimination on grounds of sex, contrary to the Sex Discrimination Act 1975, because such

⁴¹⁰ *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)*, *The Times* 11 September 1997.

⁴¹¹ C-46 & 48/93 *Brasserie du Pêcheur SA v Germany*; *R v Secretary of State for Transport, ex p Factortame Ltd* [1996] QB 404 (ECJ).

⁴¹² C-6 & 9/90 *Francovich & Bonifaci v Italy* [1991] ECR I 5357.

⁴¹³ *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)*, *The Times* 11 September 1997.

⁴¹⁴ See para 4.25 above.

⁴¹⁵ This would almost certainly fall within category 1: see paras 4.3 and 4.6-4.7 above. Moreover, the Divisional Court appeared to decide that the cause of action test was satisfied, in the case of the tort of misfeasance in a public office, because the tort was known to the law pre-1964. That is obviously a necessary condition, but it should not be sufficient to satisfy the cause of action test, as conventionally viewed: see paras 4.4 and 4.25 above. The court should have gone on to ask whether there were authorities which had awarded exemplary damages for that tort pre-1964.

⁴¹⁶ The Divisional Court was extremely reluctant to conclude that Community law required punitive damages to be available for breaches of Community law. It observed that the United Kingdom was almost unique amongst Member States in recognising a civil remedy of punitive damages. If English law made that remedy available for breaches of Community law, the pursuit of “uniformity” in the remedies available for such breaches across the Community would be undermined.

claims fail the cause of action test.⁴¹⁷ In *Ministry of Defence v Meredith*⁴¹⁸ the Employment Appeal Tribunal rejected the argument that exemplary damages nonetheless had to be available in this context as a matter of Community law. The decision of the European Court of Justice in *Marshall v Southampton and South West Hampshire Health Authority (No 2)*⁴¹⁹ that any “sanction” for unlawful discrimination had to have a “real deterrent effect” was held to require no more than that where (as in this country) a Member State had chosen to remedy unlawful discrimination by the award of compensation, that compensation had to be “full”.⁴²⁰ Nor were exemplary damages required by the principle of non-discrimination or comparability, as they are not available for the ‘comparable’ domestic cause of action: the statutory tort of sex discrimination under the Sex Discrimination Act 1975.⁴²¹

2. ASSESSMENT

- 1.140 The assessment of exemplary damages awards is essentially indeterminate and has also often been criticised for ‘unpredictability’ and virtual ‘uncontrollability’.⁴²² One reason for the indeterminacy is the very large number of factors that are considered relevant to assessment, as well as the inherent subjectivity of some of those factors. Assessment requires a court to determine the culpability or punishment-worthiness of the defendant’s conduct, and according to Lord Devlin in *Rookes v Barnard*,

[e]verything which aggravates or mitigates the defendant’s conduct is relevant.⁴²³

- 1.141 Another, and probably more important reason for the indeterminacy, is the fact that exemplary damages awards are commonly assessed by juries. The reason is that some of the principal torts for which exemplary damages are available are those for which trial by jury is generally available under section 69(1) of the Supreme Court Act 1981: false imprisonment, malicious prosecution and defamation. Even a ‘best’ view of jury assessment would point to the fact that jury awards are unreasoned, that, in the past, the extent of guidance which trial judges have been allowed to give has been very limited, and also that the extent of *ex post facto* appellate scrutiny has been sparing. And even judges who apparently favour jury assessment have been worried by the inconsistent amounts of exemplary damages awarded by different juries. Thus in *Thompson v MPC* Lord Woolf MR observed that:

⁴¹⁷ See para 4.25 above.

⁴¹⁸ [1995] IRLR 539 (EAT).

⁴¹⁹ C-271/91 *Marshall v Southampton and South West Hampshire Health Authority (No 2)* [1994] QB 126 (ECJ).

⁴²⁰ [1995] IRLR 539, 541, paras 18-19. See also *Ministry of Defence v Cannock* [1994] IRLR 509, 524, para 144.

⁴²¹ [1995] IRLR 539, 542, para 22.

⁴²² See, eg, *Broome v Cassell* [1972] AC 1027, 1087D-F, *per* Lord Reid; P Birks, *Civil Wrongs: A New World* (Butterworth Lectures 1990-91) pp 79-82.

⁴²³ [1964] AC 1129, 1228.

We have ... been referred to a number of cases in which juries have made awards ... and the variations in the range of figures which are covered is striking. The variations disclose no logical pattern. These examples confirm our impression that a more structured approach to the guidance given to juries in these actions is now overdue.⁴²⁴

A rather less accommodating view was voiced by Lord Reid in *Broome v Cassell*:

[The] objections to allowing juries to go beyond compensatory damages are overwhelming. To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence, except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like - terms far too vague to be admitted to any criminal code worthy of the name. There is no limit to the punishment except that it must not be unreasonable. The punishment is not inflicted by a judge who has experience and at least tries not to be influenced by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind ... It is no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them? The right to give punitive damages is so firmly embedded in our law that only Parliament can remove it. But I must say that I am surprised by the enthusiasm of Lord Devlin's critics in supporting this form of palm-tree justice.⁴²⁵

1.142 Notwithstanding these forceful criticisms, some people may perceive that positive benefits flow from the indeterminacy of exemplary awards, at least in relation to category 2 cases. The argument is that it would only frustrate the underlying purpose of making awards in these cases if potential tortfeasors could undertake precisely the kind of cost-benefit analysis which category 2 is designed to thwart. The very unpredictability of exemplary awards prevents newspaper editors, for example, from calculating that the benefits of publishing a libel will outweigh the costs - for it is impossible to estimate what those costs might be.

1.143 In any event, despite the basic indeterminacy of awards of exemplary damages, it is possible to identify certain principles or factors which the courts have considered to be relevant to their assessment. These are:

- 'principles' deriving from the European Convention on Human Rights
- the principle of 'moderation'
- the wealth of the defendant
- a 'windfall to the plaintiff' which may divert funds from public services
- the existence of multiple defendants

⁴²⁴ [1997] 3 WLR 403, 415D-E.

⁴²⁵ [1972] AC 1027, 1087C-F.

- the existence of multiple plaintiffs
- the plaintiff's conduct
- the defendant's good faith

1.144 Moreover, in a succession of recent cases, the Court of Appeal has departed from past practice, by permitting increasingly detailed guidance to be offered to juries by trial judges as to how they should reach an appropriate sum, and by exercising a closer degree of *ex post facto* control over 'excessive' jury awards.⁴²⁶ These crucial developments have been designed to meet understandable concerns about uncontrolled, unpredictable, inconsistent and potentially excessive jury awards.

(1) Article 10 of the European Convention on Human Rights

1.145 Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without public authority and regardless of frontiers.

Article 10(2) states that:

The exercise of these freedoms ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others ...

1.146 At present,⁴²⁷ the European Convention on Human Rights is not itself part of English domestic law; English courts thus have no power to enforce Convention rights directly. Nevertheless, in *Rantzen v Mirror Group Newspapers Ltd*⁴²⁸ the Court of Appeal recognised that:

[w]here freedom of expression is at stake ... recent authorities lend support to the proposition that article 10 has a wider role⁴²⁹ and can properly be regarded as an articulation of some of the principles underlying the common law.⁴³⁰

⁴²⁶ The most important of these are: *Rantzen v MGN Ltd* [1994] QB 670; *John v MGN Ltd* [1997] QB 586; *Thompson v MPC* [1997] 3 WLR 403.

⁴²⁷ The Government has signalled its intention to incorporate the Convention into domestic law.

⁴²⁸ [1994] QB 670.

⁴²⁹ It has long been accepted that the Convention could be used, in particular, for the purpose of resolving ambiguity in English primary or subordinate legislation, and that where there is an ambiguity the courts will presume that Parliament intended to legislate in conformity with the Convention and not in conflict with it.

⁴³⁰ [1994] QB 670, 691C-D, *per* Neill LJ, referring to, *inter alia*: *AG v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283, *per* Lord Goff; *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551, *per* Lord Keith, agreeing with Lord Goff in *AG v*

Thus it has been suggested that the legitimacy of any limitation on the right to freedom of expression under English domestic law is governed by principles which closely resemble those which are expressed in Article 10(2) of the Convention. In *Attorney-General v Guardian Newspapers Ltd (No 2)*⁴³¹ Lord Goff stated that:

I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under this treaty. The exercise of the right to freedom of expression under article 10 may be subject to restrictions (as are prescribed by law and are necessary in a democratic society) in relation to certain prescribed matters, which include 'the interests of national security' and 'preventing the disclosure of information received in confidence'. It is established in the jurisprudence of the European Court of Human Rights that the word 'necessary' in this context implies the existence of a pressing social need, and that interference with freedom of expression should be no more than is proportionate to the legitimate aim pursued. *I have no reason to believe that English law, as applied in the courts, leads to any different conclusions.*⁴³²

1.147 Accordingly, in two recent cases the Court of Appeal has considered the particular implications of these 'constraints' on legitimate derogations from the right to freedom of expression for jury-assessed damages awards in defamation actions. The "almost limitless discretion" of the jury when it assesses damages in defamation cases,⁴³³ as well as the excessive size of the awards which often result, have given rise to substantial judicial concern about how far this is consistent with due regard for the right to freedom of expression, and for the various constraints on legitimate derogations therefrom. As a direct result, in both cases the Court of Appeal found it necessary to modify previous approaches to jury-assessed damages awards.

1.148 In *Rantzen v Mirror Group Newspapers Ltd*⁴³⁴ the Court of Appeal said:

[I]t seems to us that the grant of an almost limitless discretion to a jury fails to provide a satisfactory measurement for deciding what is 'necessary in a democratic society' or 'justified by a pressing social need'.⁴³⁵

Accordingly, in order to ensure that the restriction on freedom of expression constituted by defamation damages was 'legitimate', courts had to subject large awards of damages to "more searching scrutiny than [had] been customary in the past", and the barrier against appellate intervention in jury awards should be

Guardian Newspapers Ltd (No 2); R v Wells Street Stipendiary Magistrate, ex p Deakin [1980] AC 477.

⁴³¹ [1990] 1 AC 109.

⁴³² [1990] 1 AC 109, 283G-284A (emphasis added).

⁴³³ *Rantzen v MGN Ltd* [1994] QB 670, 692G, per Neill LJ.

⁴³⁴ [1994] QB 670.

⁴³⁵ [1994] QB 670, 690G.

“lowered”.⁴³⁶ Appellate courts should thus be more ready to find a jury award “excessive”, and so more often exercise their statutory power to substitute for that award a lower award of their own.

- 1.149 The lack of guidance which could be given to juries by trial judges on the assessment of damages also caused concern in *Rantzen*. Article 10(2) of the Convention requires that any restrictions on the exercise of the right to freedom of expression should be “prescribed by law”. The European Court of Human Rights has held that:

a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct.⁴³⁷

The unguided discretion of the jury to assess damages in actions for defamation arguably breached this requirement, and the Court of Appeal in *Rantzen* clearly considered that Article 10(2) did require that the jury should be given concrete guidance in assessing those damages. Only then would the restriction on freedom of expression - created by jury-assessed defamation awards - be ‘prescribed by law’. It was therefore held that trial judges could refer juries to previous awards made by the Court of Appeal in the exercise of its powers under section 8 of the Courts and Legal Services Act 1990 and Rules of the Supreme Court, Order 59, rule 11(4).⁴³⁸ It is unclear how far this approach can also be applied to ‘substitute’ exemplary damages awards; the matter was not expressly considered by the court.⁴³⁹ No reference is, however, to be made to awards made by juries in previous cases: no norm or standard to which future reference could be made had been established by that category of awards, for they were themselves assessed with only minimal judicial guidance.⁴⁴⁰

- 1.150 In *John v Mirror Group Newspapers Ltd*⁴⁴¹ the Court of Appeal also elaborated a limitation, which it applied specifically to exemplary damages, with reference to Article 10 of the Convention. Exemplary damages are “analogous to a criminal penalty” so that:

... principle requires that an award of exemplary damages should never exceed the minimum sum necessary to meet the public purpose

⁴³⁶ [1994] QB 670, 690G-H. According to the Court of Appeal, the question became: “Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to reestablish his reputation?”. Previous formulations were higher. For example: “the damages are so excessive that no twelve men could reasonably have given them” (*Praed v Graham* (1889) 24 QB 53, 55, *per* Lord Esher MR); “it is out of all proportion to the facts or such that twelve reasonable men could not have made such an award” (*Lewis v Daily Telegraph Ltd* [1963] 1 QB 340, 380, *per* Holroyd Pearce LJ).

⁴³⁷ *The Sunday Times v The United Kingdom* (1979-80) 2 EHRR 245, 271, para 49.

⁴³⁸ [1994] QB 670, 694B-C.

⁴³⁹ See further paras 4.96-4.97 below.

⁴⁴⁰ It is unclear whether this will change, even if the additional guidance which may be given to juries after *John v MGN Ltd* [1997] QB 586 (see para 4.91 below) succeeds in reducing, and increasing consistency between, jury awards for defamation: see *John v MGN Ltd* [1997] QB 586, 611H-612B, *per* Sir Thomas Bingham MR.

⁴⁴¹ [1997] QB 586.

underlying such damages, that of punishing the defendant, showing that tort does not pay and deterring others. The same result is achieved by the application of article 10 ...⁴⁴²

- 1.151 The validity of these concerns about (non-)conformity with the Convention was confirmed by the decision of the European Court of Human Rights in *Tolstoy Miloslavsky v United Kingdom*,⁴⁴³ which was heard before *Rantzen* reached the Court of Appeal. The Court held that an award of £1.5 million in compensatory damages, in conjunction with the lack of adequate judicial safeguards at trial and on appeal against disproportionately large awards at the relevant time, amounted to a violation of the defendant's rights under Article 10. It is unclear how far the power of 'substitution' of jury awards introduced by section 8 of the Courts and Legal Services Act 1990,⁴⁴⁴ as well as the approach in *Rantzen* to the exercise of that power by the Court of Appeal, have rectified these deficiencies. If they have, then arguably even a substantial award of exemplary damages by a jury would not, *per se*, infringe Article 10, because of the potential for 'substitution' on an appeal. However, the question of the legitimacy of exemplary damages awards as such - large or small - did not arise in *Tolstoy*, and the European Court of Human Rights was not called upon to consider whether they are "necessary in a democratic society ... for the protection of the reputation of others".⁴⁴⁵

(2) Moderation

- 1.152 In *Rookes v Barnard*⁴⁴⁶ Lord Devlin emphasised that exemplary awards are governed by a principle of 'moderation' or 'restraint'.⁴⁴⁷ This was essentially an exhortation to courts to award lower, rather than higher, awards. Commonwealth authorities have similarly emphasised the need for caution.⁴⁴⁸ But it would appear that Lord Devlin was not wholly confident that the principle would sufficiently curb excessive awards:

It may even be that the House may find it necessary to ... place some arbitrary limit on awards of damages that are made by way of punishment. Exhortations to be moderate may not be enough.⁴⁴⁹

(3) Wealth of the defendant

- 1.153 When calculating the appropriate exemplary sum, it has been laid down that the court or jury should take into account the defendant's capacity to pay.⁴⁵⁰ It would

⁴⁴² [1997] QB 586, 619F-G.

⁴⁴³ (1995) 20 EHRR 442.

⁴⁴⁴ See further paras 4.87-4.89 below.

⁴⁴⁵ Article 10(2) of the European Convention on Human Rights.

⁴⁴⁶ [1964] AC 1129.

⁴⁴⁷ [1964] AC 1129, 1227-1228. See also para 4.66 above.

⁴⁴⁸ See, for example, *Donselaar v Donselaar* [1982] 1 NZLR 97, 107, *per* Cooke J.

⁴⁴⁹ *Rookes v Barnard* [1964] AC 1129, 1228.

⁴⁵⁰ *Rookes v Barnard* [1964] AC 1129, 1228, *per* Lord Devlin. Lord Devlin spoke of the "means of the parties", but presumably the means of the plaintiff can only exceptionally (if ever) be relevant: that is, where they affect the culpability of the defendant's behaviour.

seem that either party may give evidence of the defendant's resources, but that in practice evidence of the defendant's means is rarely, if ever, adduced.

1.154 Until the recent case of *Thompson v MPC*⁴⁵¹ it was unclear how this consideration should be applied in a vicarious liability case, where a plaintiff seeks to make an employer liable for the wrongful conduct of his employee. One possibility was that any sum which an employer is liable to pay as exemplary damages could be subject to deduction on account of the employee's lack of means. Another, contrasting, possibility was that the means of the wrongdoing employee are irrelevant to the size of the sum which the employer is vicariously liable to pay.

1.155 In *Thompson v MPC* the Court of Appeal finally endorsed the second approach. It was said that where the action is brought against the chief police officer, and damages are paid on the basis of vicarious liability for the acts of his officers,⁴⁵²

it [is] ... wholly inappropriate to take into account the means of the individual officers except where the action is brought against the individual tortfeasor.⁴⁵³

There seems to be no good reason why this approach should not apply generally to vicarious liability to exemplary damages.

1.156 The Court of Appeal recognised that this approach might cause problems, in the event of the chief police officer seeking an indemnity or contribution from one or more of the individual wrongdoing officers. The fear is that those individuals could, indirectly, be made liable to pay a sum in excess of what they would have had to pay, directly, if they themselves had been sued. Lord Woolf MR's solution to this problem, if it ever was to arise, was through a sensitive use of the court's power to order contribution under sections 2(1) or 2(2) of the Civil Liability (Contribution) Act 1978.⁴⁵⁴ That is, the court should exercise its power to order that:

... exemplary damages should not be reimbursed in full or at all if they are disproportionate to the officer's means.⁴⁵⁵

(4) A 'windfall to the plaintiff', which may divert funds from public services

1.157 The theme underlying the two principles of 'moderation' stated in *John v MGN Ltd*⁴⁵⁶ and by Lord Devlin in *Rookes v Barnard*⁴⁵⁷ is that 'restraint' is necessary for

⁴⁵¹ [1997] 3 WLR 403.

⁴⁵² See now s 88 of the Police Act 1996, and para 4.102, n 229, below.

⁴⁵³ [1997] 3 WLR 403, 418E.

⁴⁵⁴ Section 2(1) of the Civil Liability (Contribution) Act 1978 provides that the amount of contribution recoverable from any person:

... shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question ...

Section 2(2) provides that the court may order contribution amounting to a complete indemnity or exempt a person altogether from liability to make contribution.

⁴⁵⁵ [1997] 3 WLR 403, 418F.

reasons of fairness to defendants: *inter alia*, 'excessive' awards might otherwise constitute an unjustifiable infringement of the defendant's civil liberties;⁴⁵⁸ they may constitute a greater punishment than would be likely to be incurred, if the conduct were criminal;⁴⁵⁹ and they are a punishment imposed without the safeguards which the criminal law affords an offender.⁴⁶⁰

1.158 But there are other reasons for 'restraint', which have a rather different focus. One of these is that the plaintiff may receive 'too much'. Exemplary damages awards are a 'windfall' to a plaintiff, and, it would appear from the Court of Appeal's decision in *Thompson v MPC*,⁴⁶¹ that a separate reason⁴⁶² for 'restraint' is the concern to avoid giving a plaintiff too excessive a windfall. This consideration was stated as part of the guidance which the Court of Appeal formulated for use in jury-tried claims to exemplary damages;⁴⁶³ however, it should be no less relevant where a judge, rather than a jury, decides what award is appropriate.

1.159 In *Thompson v MPC*⁴⁶⁴ the 'windfall' concern was expressed alongside another: that an award may be a windfall to the plaintiff at the *general public's expense*. Where a public service-provider is liable to pay exemplary damages out of its own funds, and the liability is not met by insurers, the money so paid will not be available to finance the publicly beneficial activities of that body. *Thompson v MPC* indicates that this is a reason for exercising restraint when determining the liability of, for example, a police authority to pay exemplary damages, in the event that the claim is not met by insurers. Thus a jury should be told that, *inter alia*:

... an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public (this guidance would not be appropriate if the claim were to be met by insurers);⁴⁶⁵

1.160 This direction embodies a reason for 'restraint' which should also be borne in mind by a judge, when he alone determines a defendant's liability to exemplary damages.

⁴⁵⁶ [1997] QB 586, 619F-G, referred to at para 4.66 above.

⁴⁵⁷ [1964] AC 1129, 1228, referred to at para 4.68 above.

⁴⁵⁸ *John v MGN Ltd* [1997] QB 586, 619F-G; *Rookes v Barnard* [1964] AC 1129, 1227, *per* Lord Devlin.

⁴⁵⁹ *Rookes v Barnard* [1964] AC 1129, 1227, *per* Lord Devlin.

⁴⁶⁰ *Rookes v Barnard* [1964] AC 1129, 1227, *per* Lord Devlin.

⁴⁶¹ [1997] 3 WLR 403.

⁴⁶² The guidance given in *Thompson* referred to the 'windfall' and 'resources for public services' concerns together. But the 'windfall' concern should arguably be a reason for restraint where it alone applies - in particular, where the defendant has no role in delivering services to the public.

⁴⁶³ [1997] 3 WLR 403, 417H.

⁴⁶⁴ [1997] 3 WLR 403.

⁴⁶⁵ [1997] 3 WLR 403, 417H (emphasis added).

(5) Multiple defendants⁴⁶⁶

- 1.161 In *Broome v Cassell*⁴⁶⁷ the House of Lords held that where two or more joint tortfeasors are sued together, only one sum can be awarded by way of exemplary damages, and this sum is limited to what is necessary to punish the defendant who bears the least responsibility for the tort.⁴⁶⁸
- 1.162 This restriction aims to avoid the over-punishment which may occur owing to the operation of the doctrines of joint or joint and several liability. The risk is that a tortfeasor could be made liable to pay an award which was assessed with reference to the greater fault of another of the tortfeasors, and that the burden of such an award could not be transferred to those tortfeasors by a claim to contribution or to an indemnity.⁴⁶⁹ In such a case the award of exemplary damages borne by the less culpable tortfeasor would inevitably exceed that which was proportional to his or her fault, and necessary to punish him or her for it.
- 1.163 This restriction does mean, however, that where no exemplary award is warranted by the conduct of one of the joint tortfeasors, no award can be made against any of the others, however culpable their conduct may have been. Plaintiffs can only avoid the risk of under-punishment of the latter if they are able to identify and to bring separate proceedings against the most culpable of the joint tortfeasors.
- 1.164 Commonwealth courts appear not to follow the English approach on this matter, and prefer instead to impose what can be called 'several liability' for exemplary or punitive damages.⁴⁷⁰ Separate awards of exemplary damages, for different amounts, may be made against each individual joint tortfeasor. Accordingly, if an award is justified by the conduct of only one of the joint tortfeasors, judgment for punitive damages will be entered against only that joint tortfeasor, and the sum awarded will be that which is appropriate to that joint tortfeasor's conduct. Similarly, if an award is justified by the conduct of two or more joint tortfeasors, separate judgments for punitive damages will be entered against each of them, for such sums as are warranted by their personal conduct.

⁴⁶⁶ See, for further consideration of the existing law and its defects, paras 5.186-5.192 below.

⁴⁶⁷ [1972] AC 1027.

⁴⁶⁸ *Broome v Cassell* [1972] AC 1027, 1063D-1064A, 1090E, 1096F-G, 1105D-G, 1118G-1119A, 1122B.

⁴⁶⁹ See, in particular, the Civil Liability (Contribution) Act 1978. In *Thompson v MPC* [1997] 3 WLR 403 the Court of Appeal assumed that the Act can apply to a liability to pay exemplary damages (at 418F). See further paras 5.206-5.208 below.

⁴⁷⁰ For the position in Canada, see the discussion in S MWaddams, *The Law of Damages* (2nd ed, 1990) paras 11.410-11.420 and Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) pp 58-59, citing, *inter alia*, *Townsvie Properties Ltd v Sun Construction & Equipment Co Ltd* (1974) 56 DLR (3rd) 330 (Ontario CA). For the position in Australia, see *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1984-5) 155 CLR 448 (HCA) and the discussion in M Tilbury, *Civil Remedies* (1990) vol 1, [5014]. For a similar view of the likely approach of New Zealand courts, see S Todd et al, *The Law of Torts in New Zealand* (2nd ed, 1997) p 1235.

(6) Multiple plaintiffs

- 1.165 Very little attention has been paid by English and Commonwealth courts⁴⁷¹ to solving the difficult problems that are raised by ‘multiple claimants’ to exemplary damages - in particular the potential for ‘multiple punitive liability’ arising out of a single act or course of conduct. It has already been seen that on at least one occasion an English court considered these problems to be so serious as to constitute a valid reason for refusing to make any exemplary award at all.⁴⁷²
- 1.166 In *Riches v News Group Newspapers Ltd*⁴⁷³ it was decided that, if two or more plaintiffs are to be awarded exemplary damages in joint proceedings against a single defendant, the court must determine a single sum of exemplary damages which is appropriate punishment for the defendant’s conduct. This sum should then be divided equally amongst the successful plaintiffs. Although the fact that the conduct affects more than one person may justify an increase in the punishment inflicted, the limiting factor on the award is the culpability of the defendant’s conduct.
- 1.167 The courts do not yet seem to have considered what should happen if one or more plaintiffs do not participate in the first case to be adjudicated; the joint proceedings in *Riches* look to have involved all potential ‘multiple claimants’. One possible view is that no further exemplary award is possible, and, further, that any plaintiffs who do not participate in the first such case to be adjudicated have no legal entitlement to share in any award that was made (a ‘first past the post takes all’ rule).

(7) The plaintiff’s conduct

- 1.168 The conduct of the plaintiff may be taken into account when deciding what sum to award as exemplary damages.⁴⁷⁴ A judge is entitled to direct the jury to this effect.⁴⁷⁵ The plaintiff’s conduct is relevant, however, only if it was a cause of the offending behaviour.⁴⁷⁶ Thus provocative conduct which results in a wrongful arrest may lead to a reduced award of exemplary damages. The reason is that such conduct will usually reduce the impropriety of the defendant’s reaction.⁴⁷⁷ In contrast, the plaintiff’s non co-operation with a complaints procedure is no ground for making a reduced award.⁴⁷⁸

⁴⁷¹ S M Waddams, *The Law of Damages* (2nd ed, 1991), para 11.430. Cf the position in the United States of America: see D B Dobbs, *Law of Remedies* (2nd ed, 1993) § 3.11(8), pp 336-341 and para 5.160, nn 177 and 178 below.

⁴⁷² See the discussion of *AB v South West Water Services Ltd* [1993] QB 507 at para 4.47 above.

⁴⁷³ [1986] QB 256.

⁴⁷⁴ See also para 4.48 above.

⁴⁷⁵ *Bishop v MPC*, *The Times* 5 December 1989. It is arguable that the Law Reform (Contributory Negligence) Act 1945 applies to such cases.

⁴⁷⁶ *Thompson v MPC* [1997] 3 WLR 403, 419C.

⁴⁷⁷ S M Waddams, *The Law of Damages* (2nd ed, 1991) para 11.450.

⁴⁷⁸ In *Thompson v MPC* [1997] 3 WLR 403, 419B-C, the Court of Appeal opposed any reduction in the award of exemplary damages made to a plaintiff on the grounds of his or her refusal to co-operate in the police complaints procedure:

(8) The defendant's good faith

- 1.169 The absence of 'aggravating features' is relevant to the quantum of an exemplary award under category 1, as well as to the question whether such an award should be made at all - as we have already seen.⁴⁷⁹ Accordingly, a wrong committed in good faith or under an honest mistake may justify a reduced award of exemplary damages.

(9) Control and guidance of the jury

- 1.170 Where the trial is by jury,⁴⁸⁰ awards of exemplary damages are assessed by the jury. The jury has traditionally been given little guidance as to how to reach an appropriate exemplary sum.⁴⁸¹ But in an effort to curb excessive jury damages awards, the Court of Appeal has increasingly moved away from this position, and has displayed a greater readiness to exercise control over jury assessment of damages in two distinct forms. The first is by intervening and substituting for the jury award an award of its own. The second is by permitting trial judges to give guidance to juries on the assessment of damages, compensatory and exemplary; such guidance may be formulated by the Court of Appeal, or derived from some other source.⁴⁸² These developments warrant close scrutiny.

(a) Appellate control of jury awards

- 1.171 The first set of developments concerns the extent of appellate court intervention in jury assessments. Prior to 1990 appellate court intervention was very limited, but this was to some extent justified by the limited powers of the appellate court. Such a court could only quash an excessive award, and could not substitute one of its own; it would then be left to yet another jury to determine the appropriate sum.⁴⁸³ But this position was changed in 1990 by section 8(2) of the Courts and

It is highly desirable that complainants should co-operate in disciplinary investigations but they are not legally obliged to do so. If they are not sufficiently public-spirited to do so, this cannot be held against them in law so as to reduce the amount payable when assessing the compensation to which they are entitled. Exemplary damages are awarded so as to punish the defendant. We have already referred to the circumstances in which the existence of disciplinary proceedings is relevant in determining whether to make any award of exemplary damages. If the jury decide an award is necessary then the amount is assessed on a consideration of the conduct for which the defendants are responsible which makes the award of exemplary damages appropriate. The plaintiff's conduct is here relevant only if it was a cause of the offending behaviour.

⁴⁷⁹ *Holden v Chief Constable of Lancashire* [1987] QB 380, 388D-E. See paras 4.49-4.51 above.

⁴⁸⁰ Supreme Court Act 1981, s 69, and para 4.57 above.

⁴⁸¹ In *John v MGN Ltd* [1997] QB 586 Sir Thomas Bingham MR observed that "[t]he authorities give judges no help in directing juries on the quantum of exemplary damages" (at 619E). And more recently, in an extended consideration of the developing law on guidance to juries, Lord Woolf MR described the amount of guidance which could be given in the past as "extremely limited": *Thompson v MPC* [1997] 3 WLR 403, 409E.

⁴⁸² For example, the Judicial Studies Board, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (3rd ed, 1996).

⁴⁸³ See, in particular, Lord Reid's criticisms in *Broome v Cassell* [1972] AC 1027, 1087E-F, which were cited by Lord Woolf MR in *Thompson v MPC* [1997] 3 WLR 403, 411C-D:

... [there is] no effective appeal against sentence. All that a reviewing court can do is to quash the jury's decision if it thinks the punishment awarded is more than any twelve reasonable men could award. The court cannot substitute its

Legal Services Act 1990 and Rules of the Supreme Court, Order 59, rule 11(4). These provisions give the Court of Appeal the power to substitute its own award (“such sum as appears [to it] to be proper”) for that of the jury, where it considers that the jury’s award was “excessive”.

1.172 These powers extend to both compensatory and exemplary damages awards; they also apply irrespective of the cause of action which founds the jury award. Thus in *Rantzen v MGN Ltd*⁴⁸⁴ the Court of Appeal exercised this power to replace a jury award for defamation of £250,000 with an award of £110,000. In *John v MGN Ltd*⁴⁸⁵ it substituted an exemplary damages award for defamation of £275,000 with an award of £50,000. And in *Thompson v MPC*⁴⁸⁶ an exemplary damages award of £15,000 was substituted for an award of £200,000 made in respect of false imprisonment and assault.⁴⁸⁷

1.173 It is also apparent after *Thompson v MPC*⁴⁸⁸ that the court’s powers to intervene and substitute a damages award are to be given a uniform interpretation “across the board” - that is, irrespective of the cause of action in question.⁴⁸⁹ This means that the very liberal interpretation which the powers were given in the context of the tort of defamation in *Rantzen v MGN Ltd*⁴⁹⁰ applies equally to, for example, false imprisonment and malicious prosecution.⁴⁹¹ And this is so even though the principal justification for a liberal interpretation of section 8, and so for closer scrutiny of large awards, was one which has relevance to defamation actions only: that is, the need to have regard for the right to freedom of expression.⁴⁹² In future, therefore, the question for an appellate court appears to be whether the award was one which a “reasonable jury” would have thought necessary to punish the defendant and to deter him and others.⁴⁹³

own award. The punishment must then be decided by another jury and if they too award heavy punishment the court is virtually powerless.

⁴⁸⁴ [1994] QB 670.

⁴⁸⁵ [1997] QB 586.

⁴⁸⁶ [1997] 3 WLR 403.

⁴⁸⁷ The original award in the case of Mr Hsu comprised £20,000 compensatory damages and £200,000 exemplary damages. The Court of Appeal did not interfere with the award of compensatory damages, but it did substitute an award of £15,000 exemplary damages for the award of £200,000.

⁴⁸⁸ [1997] 3 WLR 403.

⁴⁸⁹ Lord Woolf (at 413B) said that once section 8 of the Courts and Legal Services Act 1990 had been given an interpretation for the purposes of one category of cases, that interpretation had to apply across the board, for:

[i]t is difficult to see how the same words can have different meanings depending upon the type of action to which they are being applied.

⁴⁹⁰ [1994] QB 670. See paras 4.61-4.64 above.

⁴⁹¹ See *Thompson v MPC* [1997] 3 WLR 403.

⁴⁹² See generally paras 4.61-4.67 above, and in particular 4.64.

⁴⁹³ This can be inferred from *Rantzen v MGN Ltd* [1994] QB 670, 692H, in which Neill LJ stated that, the barrier against intervention in jury damages assessments by appellate courts having been lowered, the ‘test’ (of when such intervention was permitted) became:

(b) Guidance for juries

1.174 The second set of developments concerns the guidance of juries by trial judges. This has, in the past, been “extremely limited”.⁴⁹⁴ But there have been extensive developments in recent years. Guidance has increasingly been permitted, in a variety of forms, in relation to compensatory damages (for non-pecuniary loss) as well as exemplary damages:

- guideline compensatory damages ‘brackets’, which are consistent with judicial ‘brackets’ for pain, suffering and loss of amenity in personal injury cases
- guideline exemplary damages ‘brackets’
- ‘substitute’ awards made by the Court of Appeal in previous cases

(i) ‘Brackets’ & ‘personal injuries comparisons’: assessing compensatory damages

1.175 In *John v MGN Ltd*⁴⁹⁵ the Court of Appeal for the first time permitted trial judges to refer juries to ‘comparable’ compensatory awards for pain, suffering and loss of amenity in personal injury cases, when assessing compensation for defamation.⁴⁹⁶ Counsel in their submissions, and the trial judge in his directions to the jury, were also permitted to suggest appropriate figures (or brackets) to the jury.

1.176 *Thompson v MPC*⁴⁹⁷ has subsequently applied an analogous approach to the torts of false imprisonment and malicious prosecution. A trial judge should suggest an ‘appropriate bracket’ to the jury, which includes an approximate ‘basic’ figure, as well as an approximate ‘ceiling’.⁴⁹⁸ This approach differs in two key respects from that advocated for defamation actions in *John v MGN Ltd*.⁴⁹⁹ First, *Thompson v MPC* decides that the appropriate ‘bracket’ should be decided by the judge, after hearing submissions on the matter from counsel in the absence of the jury; only once the judge has determined the appropriate ‘bracket’ should it be put before the jury.⁵⁰⁰ In contrast, *John v MGN Ltd* permits both counsel and the trial judge *each* to suggest appropriate figures.⁵⁰¹ Secondly, in *Thompson v MPC* Lord Woolf

Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?

See also para 4.64 above.

⁴⁹⁴ *Thompson v MPC* [1997] 3 WLR 403, 409E, *per* Lord Woolf MR.

⁴⁹⁵ [1997] QB 586.

⁴⁹⁶ This was one of our provisional recommendations in Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140.

⁴⁹⁷ [1997] 3 WLR 403.

⁴⁹⁸ [1997] 3 WLR 403, 415H-416H.

⁴⁹⁹ [1997] QB 586.

⁵⁰⁰ [1997] 3 WLR 403, 416A-B.

⁵⁰¹ [1997] QB 586. In *Thompson v MPC* [1997] 3 WLR 403, 416A-B, Lord Woolf noted that this was not what was proposed in the case of a defamation action in *John v MGN Ltd* [1997] QB 586, but suggested that submissions by counsel in the absence of the jury are likely to have advantages, for two reasons:

MR himself suggested figures to assist trial judges in determining an appropriate bracket of compensatory damages for the torts of malicious prosecution⁵⁰² and false imprisonment,⁵⁰³ albeit subject to the caveat that:

circumstances can vary dramatically from case to case and ... these ... figures which we provide are not intended to be applied in a mechanistic manner.⁵⁰⁴

1.177 But however they are determined, the 'brackets' endorsed in *Thompson v MPC* and *John v MGN Ltd* will be no more than 'guidelines': the jury should be told that everything depends on their assessment of the gravity of the injuries, that they are no more than guideline figures, and that it is for it alone to select an actual appropriate sum. It might be thought, however, that the existence of guidelines will facilitate *ex post facto* appellate control of jury awards. Even if the guideline brackets are not binding on a jury, they will represent figures which are perceived by the Court of Appeal or the trial judge to be proper in the general run of cases. It should therefore be easier to determine whether or not the sum awarded by the jury is excessive.⁵⁰⁵

(ii) *'Brackets' & guiding principles: assessing exemplary damages*

1.178 Very much more important for this paper is the fact that in *Thompson v MPC*⁵⁰⁶ the Court of Appeal formulated detailed guidance for juries assessing *exemplary* damages. It is sufficient to observe that it includes not only guiding principles,⁵⁰⁷ but also approximate minimum and 'ceiling' figures for use in actions against the police for false imprisonment and malicious prosecution. Thus,

[w]here exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be

... because of the resemblance between the sum to be awarded in false imprisonment and ordinary personal injury cases, and because a greater number of precedents may be cited in this class of case than in a defamation action.

⁵⁰² [1997] 3 WLR 403, 416G-H.

⁵⁰³ [1997] 3 WLR 403, 416D-G.

⁵⁰⁴ [1997] 3 WLR 403, 416H.

⁵⁰⁵ See *Thompson v MPC* [1997] 3 WLR 403, 414G-H.

⁵⁰⁶ [1997] 3 WLR 403.

⁵⁰⁷ Apart from well-established guidance such as the 'if, but only if' test, two important 'new' principles of 'restraint' were stated by Lord Woolf MR. The first points out that, to the extent that 'aggravated damages' have already been given, they will have compensated the plaintiff for the injury he has suffered due to the oppressive or insulting behaviour of the defendant, and in doing so, inflicted a measure of punishment - albeit incidentally - on the defendant ([1997] 3 WLR 403, 417G). This proposition really just reinforces what is implicit in the 'if, but only if' test. The second states two important reasons for restraint: that is, that an award of exemplary is a 'windfall', and that where damages are payable out of police funds, the sum awarded may not be available to be expended (for example) by the police in a way which would benefit the public ([1997] 3 WLR 403, 417H). See paras 4.73-4.76 above.

regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.⁵⁰⁸

1.179 It is not clear what the broader impact of *Thompson v MPC* will be. The guidance was expressly directed only at the torts of false imprisonment and malicious prosecution, and more particularly, to claims where those torts are committed by the police. It was an understandable response to the proliferation of actions against that category of defendant, which involved, where successful, ever-increasing sums of damages. But given this precedent, one might anticipate similar guidance being offered in the future, in categories of claim where similar ‘pressures’ arise.

(iii) *The relevance of ‘substitute’ awards*

1.180 A final possible source of guidance is appellate ‘substitute’⁵⁰⁹ awards. At present it is not wholly clear how far this category of award can be utilised by a trial judge, in guiding juries.

1.181 Although reference to previous jury awards remains impermissible at present, it has been said that ‘substitute’ awards made by the Court of Appeal under section 8(2) of the Courts and Legal Services Act 1990 and Rules of the Supreme Court, Order 59, rule 11(4), “stand on a different footing”.⁵¹⁰ Those awards can be referred to juries. But *Rantzen v MGN Ltd*⁵¹¹ only involved a compensatory award. Thus it is unclear how far the same reasoning also extends to ‘substitute’ *exemplary* damages awards. One difficulty is that a ‘substitute’ exemplary award cannot reliably be viewed in isolation as an indication of the sort of sum which a court has thought to be appropriate to punish a defendant. An exemplary award must necessarily represent the balance, on a particular set of facts, between the compensatory sum and the minimum sum necessary to punish the defendant; as a result, it cannot be considered independently of the compensatory sum. Nevertheless, it would be surprising if ‘substitute’ exemplary awards, of the sort made by the Court of Appeal in *John v MGN Ltd*⁵¹² or *Thompson v MPC*,⁵¹³ are not taken by practitioners at the very least to establish a benchmark for exemplary awards in the future.

1.182 However, section 8 ‘substitute’ awards will only be truly useful as guidance if there is a substantial body of appellate decisions making them,⁵¹⁴ and if the approach in

⁵⁰⁸ [1997] 3 WLR 403, 418A-B.

⁵⁰⁹ It seems that reference may be made, not just to awards which the Court of Appeal in fact substitutes for jury awards, but also to jury awards which are approved by the Court of Appeal: see *John v MGN Ltd* [1997] QB 586, 612C, *per* Sir Thomas Bingham MR, agreeing with the ruling in *Rantzen v MGN Ltd* [1994] QB 670 that “reference may be made to awards *approved* or made by the Court of Appeal” (emphasis added).

⁵¹⁰ [1994] QB 670, 694B.

⁵¹¹ [1994] QB 670.

⁵¹² [1997] QB 586.

⁵¹³ [1997] 3 WLR 403.

⁵¹⁴ For similar observations on the utility of ‘substitute’ awards in defamation actions, see *John v MGN Ltd* [1997] QB 586, 612C-E, *per* Sir Thomas Bingham MR, observing that a framework of substitute awards will “not be established quickly” and that in the five years

Thompson v MPC achieves its aims, that development will be much less likely. The reason is that *Thompson*-type guidance is designed to reduce the number of jury awards which are appealed against, by avoiding the risk of 'excessive' jury awards. And if the number of appeals decline, so should the number of awards which are 'substituted' on appeal. Lord Woolf MR observed:

To not provide juries with sufficient guidance to enable them to approach damages on similar lines to those which this court will adopt will mean that the number of occasions this court will be called on to intervene will be undesirably frequent. This will be disadvantageous to the parties because it will result in increased costs and uncertainty. It will also have adverse consequences for the reputation of the jury system. It could be instrumental in bringing about its demise.⁵¹⁵

3. MISCELLANEOUS ISSUES

(1) Standard of proof

- 1.183 In *John v MGN Ltd*⁵¹⁶ the Court of Appeal stated that the standard of proof which applies to claims to exemplary damages is the civil and not the criminal standard.⁵¹⁷ *Prima facie* the civil standard is a different, lower standard: *viz*, proof on the balance of probabilities. However, it has long been apparent that, especially in cases involving allegations of criminal conduct in civil proceedings, clearer proof may be required before a court or jury is entitled to find that proof on the balance of probabilities has been established.⁵¹⁸ This might be regarded as an inherent and inevitable flexibility which exists whatever standard of proof is formally chosen. *Cross & Tapper on Evidence* states:

... there are no more than two standards of proof recognised by the law, though allowance must be made for the fact that some occurrences are antecedently more probable than others, and the consequences of some decisions are more serious than others ... For these reasons prosecutors on the more serious criminal charges or those carrying graver consequences, and plaintiffs in some civil cases, have higher hurdles to surmount than when they are making less serious allegations or those with more trivial consequences.⁵¹⁹

- 1.184 In *John v MGN Ltd* Sir Thomas Bingham MR appeared to accept this sort of analysis:

But a jury should in our judgment be told that as the charge is grave, so should the proof be clear. An inference of reprehensible conduct and cynical calculation of mercenary advantage should not be lightly

since the power had come into force, there had been only three cases in which the Court of Appeal had itself selected the appropriate level of award.

⁵¹⁵ [1997] 3 WLR 403, 414G-H.

⁵¹⁶ [1997] QB 586.

⁵¹⁷ [1997] QB 586, 619B.

⁵¹⁸ See, in particular, *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 (CA) and, in a different context, *Khawaja v Secretary of State for the Home Department* [1984] AC 74.

⁵¹⁹ *Cross & Tapper on Evidence* (8th ed, 1995) p 159.

drawn. In the *Manson* case [1965] 1 WLR 1038, 1044G, Widgery J directed the jury that they could draw inferences from proved facts if those inferences were 'quite inescapable', and he repeatedly directed, at p 1045, that they should not draw an inference adverse to the publisher unless they were sure that it was the only inference to be drawn.⁵²⁰

And in the earlier decision in *Treadaway v Chief Constable of the West Midlands*,⁵²¹ McKinnon J expressly applied the approach in *Hornal v Neuberger Products Ltd*⁵²² to a claim to exemplary damages for assault and malicious prosecution. The jury was directed that:

... the more serious the allegation, the higher degree of probability required to prove it.

- 1.185 Major Commonwealth jurisdictions apply the civil standard of proof to claims to exemplary or 'punitive' damages; the flexibility of this standard seems to have been recognised in those jurisdictions also.⁵²³

(2) Vicarious liability

- 1.186 Under the doctrine of vicarious liability, an employer is liable for wrongs⁵²⁴ committed by its employees 'in the course of their employment'.⁵²⁵ Courts have

⁵²⁰ [1997] QB 586, 619B-C.

⁵²¹ *The Times* 25 October 1994, discussed by A Reed in "Exemplary Damages: A Persuasive Argument for their Retention as a Mechanism of Retributive Justice" (1996) 15 CJQ 130.

⁵²² [1957] 1 QB 247.

⁵²³ See, for example, *Backwell v AAA* (1996) Aust Torts Reps 81-387, noted by M Tilbury, "Exemplary Damages for Medical Negligence" (1996) 4 Tort L Rev 167, 171.

⁵²⁴ The doctrine is generally expressed in terms of a liability for torts committed by employees. Equity texts contain no specific discussion of the doctrine, and whether it also applies to equitable wrongs. Nevertheless, in the recent case of *Agip (Africa) Ltd v Jackson* [1992] 4 All ER 385, 408, upheld at [1992] 4 All ER 451, 469g-h (CA), Millett J held, without reference to any authority, that a partner could be (and was) vicariously liable for the equitable wrong of knowing assistance by an employee of the partnership.

⁵²⁵ See, for example, *Clerk & Lindsell on Torts* (17th ed, 1995), para 5.20. This is a general principle of common law origin, but it is sometimes formulated (and extended or otherwise modified by) statute in specific instances. Statutory provisions apply the same concepts to the Crown. By virtue of s 2(1)(A) of the Crown Proceedings Act 1947, the Crown is vicariously liable for the torts of its servants (eg prison officers). In the case of the police, statutory provisions effectively treat the chief officer of a particular force as if he were the 'employer' of the employee, for the purposes of the doctrine of vicarious liability. By virtue of s 88(1) of the Police Act 1996, the 'chief officer' of a particular police force (in London, the Metropolitan Police Commissioner) is liable:

... in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment.

Sections 42(1) and 86(1) of the Police Act 1997 now establish a similar liability for the Director General of the National Criminal Intelligence Service and the Director General of the National Crime Squad, respectively. Other examples of (modified) statutory formulations of the doctrine of vicarious liability can be found in the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995.

proceeded on the basis that the doctrine applies to liability to exemplary damages, and in the same form as for a liability to compensatory damages.⁵²⁶ But there is no reported English case which goes beyond mere assumption, and specifically considers the question whether, and if so how, the doctrine *should* apply.

- 1.187 In *Racz v Home Office*,⁵²⁷ for example, the plaintiff brought an action in tort⁵²⁸ against the Home Office alleging that he had suffered ill-treatment by prison officers whilst he was a remand prisoner. The question directly before the House of Lords was whether the Home Office could be vicariously liable for the acts of prison officers which amounted to misfeasance in a public office; it was held, reversing the Court of Appeal, that it could. In *Racz* the plaintiff claimed both compensatory damages and exemplary damages, and there was no suggestion in either the Court of Appeal or the House of Lords that the same doctrine of vicarious liability should not apply to each. Whether the Home Office was *in fact* vicariously liable to either award therefore depended on whether, at the time of the wrongful acts, the officers were engaged in a misguided and unauthorised method of performing authorised duties, or whether the unauthorised acts of the prison officers were so unconnected with their authorised duties as to be quite independent of, and outside, those duties.
- 1.188 Even though conduct giving rise to an exemplary damages award will generally be of a highly culpable nature, the courts rarely find that police officers were acting ‘outside the course of their employment’ when they acted wrongfully. Vicarious liability is usual, not exceptional, in civil actions against the police. One case in which exemplary damages were awarded against a police officer, but the Chief Constable was not held vicariously liable to pay them, is *Makanjuola v Metropolitan Police Commissioner*.⁵²⁹ In *Makanjuola* the plaintiff had submitted to a sexual assault by a police officer after he threatened that he would otherwise make a report which would lead to her deportation. Henry J held that the plaintiff could not hold the Metropolitan Police Commissioner vicariously liable for the policeman’s tort, since it was a course of conduct of his own and could not be regarded as merely an improper mode of doing something he was authorised to do. Thus the policeman himself was held liable in damages, including category 1 exemplary damages.
- 1.189 Notwithstanding that the doctrine of vicarious liability, in so far as it applies to a claim to exemplary damages, is of substantially the same scope as when it applies to a claim to compensatory damages,⁵³⁰ there may be some differences between the two. In particular, it appears that the sum of exemplary damages to which a vicariously liable employer may be held liable may exceed that which an employee would have been liable to pay for his wrongdoing. The reason is that the former

⁵²⁶ Cf para 4.105 below, and paras 4.69-4.72 above.

⁵²⁷ [1994] 2 AC 45.

⁵²⁸ The torts alleged included assault and battery, false imprisonment, negligence and misfeasance in a public office.

⁵²⁹ *The Times* 8 August 1989.

⁵³⁰ In particular, in that it applies essentially to torts committed ‘in the course of employment’ of an ‘employee’.

may not argue that his liability should be reduced on the basis of his *employee's* lack of means, whereas this argument would clearly be open to the employee himself.⁵³¹

(3) Survival of claims

(a) For the benefit of the victim's estate

1.190 No claim for exemplary damages survives for the benefit of a deceased person's estate.⁵³² This rule is adopted in the great majority of major Commonwealth jurisdictions.⁵³³

(b) Against the wrongdoer's estate

1.191 Exemplary damages may be claimed from a deceased wrongdoer's estate.⁵³⁴ The same rule applies in major Commonwealth jurisdictions.⁵³⁵

(4) Insurance

1.192 It appears that it is contrary to public policy to allow an individual to enforce an insurance policy which indemnifies him or her against a fine or other punishment imposed for committing a criminal offence, at least where the offence involved deliberate misconduct.⁵³⁶ Is an insurance policy insuring a person against civil liability for exemplary damages also contrary to public policy? The argument

⁵³¹ *Thompson v MPC* [1997] 3 WLR 403, 418D-F. See paras 4.69-4.72 above.

⁵³² Section 1(2)(a)(i) of the Law Reform (Miscellaneous Provisions) Act 1934.

⁵³³ In Canada, seven jurisdictions specifically exclude punitive damages from their legislation on survival of actions, and one has reached that conclusion through interpretation: see S M Waddams, *The Law of Damages* (2nd ed, 1991) para 12.150. Similarly, every state jurisdiction in Australia, as well as New Zealand, has legislation modelled on the Law Reform (Miscellaneous Provisions) Act 1934 (UK), which specifically provides that claims to exemplary damages do not survive for the benefit of the victim's estate: H Luntz, *Assessment of Damages for Personal Injury & Death* (3rd ed, 1990) para 9.1.13 (Australia); *Re Chase* [1989] 1 NZLR 325 and the Law Reform Act 1936 (NZ), s 3 (New Zealand).

⁵³⁴ But a cause of action for defamation does not survive against or for the benefit of the estate of a deceased person: s 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

⁵³⁵ In Canada, the cases appear to be divided: see S M Waddams, *The Law of Damages* (2nd ed, 1991) paras 11.440 and 12.150, citing *Flame Bar-B-Q Ltd v Hoar* (1979) 106 DLR (3rd) 438 (NBCA) (exemplary damages awarded against estate of wrongdoer) and *Breitkreutz v Public Trustee* (1978) 89 DLR (3rd) 442 (Alta SCTD) (exemplary damages refused). In Australia, every state jurisdiction has legislation providing for the survival of causes of action which is modelled on the Law Reform (Miscellaneous Provisions) Act 1934 (UK): H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed, 1990) Ch 9, para 9.1.1. All provide that a claim to exemplary damages survives against the estate of the wrongdoer: para 9.1.13. In New Zealand, *B v R* (15 February 1996, HC Auckland, Morris J) held that exemplary damages may be awarded against the estate of the wrongdoer.

⁵³⁶ See generally eg J Birds *Modern Insurance Law* (4th ed, 1997) pp 234-243; *Chitty on Contracts* (27th ed, 1994) para 39-019; M A Clarke, *The Law of Insurance Contracts* (2nd ed, 1994) ch 24, especially 24-4A. For unequivocal statements, see eg *Lancashire CC v Municipal Mutual Insurance Ltd* [1996] 3 WLR 493, 502B-G; *Askey v Golden Wine Co* [1948] 2 All ER 35, 38C-E.

would be that to allow insurance would frustrate, or at least limit, any punitive or deterrent effect which such liability might have on the defendant.⁵³⁷

- 1.193 The leading case on this question, *Lancashire County Council v Municipal Mutual Insurance Ltd*,⁵³⁸ suggests that it is not. In that case a local authority was vicariously liable to pay awards of exemplary damages for torts committed by its employees. The authority had an insurance policy which covered it for “all sums which the insured shall become legally liable to pay as compensation”. The insurers were only prepared to pay the compensatory damages and disputed their liability in respect of the exemplary damages awarded. The local authority brought an action against the insurers.
- 1.194 At first instance Judge Michael Kershaw held that it was not *per se* contrary to public policy for a person to be indemnified by insurance against their liability for exemplary damages. This was upheld by the Court of Appeal, but on slightly different grounds.⁵³⁹ Having held that the insurance policy did, on its proper construction, cover the awards of exemplary damages, the court decided that public policy did not require that the local authority should be prevented from insuring against the consequences of its *vicarious* liability. It was not necessary for Simon Brown LJ to go further to consider the position of a wrongdoer seeking indemnification against exemplary damages arising from his or her personal liability. However, the clear suggestion in Simon Brown LJ’s judgment is that the court’s approach would be the same: insurance would be permitted even in relation to a *personal* liability to pay an exemplary damages award.⁵⁴⁰
- 1.195 Simon Brown LJ considered the argument that category 1 exemplary damages cases would involve conduct which would “almost inevitably be criminal”, and that given the principle that a person “cannot insure ... against liability for committing a crime”, insurance against conduct falling within category 1 should be contrary to public policy.⁵⁴¹ He responded:

For my part I unhesitatingly accept the principle that a person cannot insure against a liability consequent on the commission of a crime, whether of deliberate violence or otherwise - save in certain circumstances where, for example, compulsory insurance is required and enforceable even by the insured. I further recognise that in many cases where the question of liability for exemplary damages is likely to arise for consideration under this policy the police officer concerned will have acted criminally. Conspicuously this will be so in cases of assault ...⁵⁴²

But there was:

⁵³⁷ For a very clear and forceful expression of this argument, see Denning J in *Askey v Golden Wine Co* [1948] 2 All ER 35, 38C-E.

⁵³⁸ [1996] 3 WLR 493.

⁵³⁹ [1996] 3 WLR 493.

⁵⁴⁰ See, in particular, Simon Brown LJ’s reasoning at [1996] 3 WLR 493, 503B-504D.

⁵⁴¹ [1996] 3 WLR 493, 501H-502F.

⁵⁴² [1996] 3 WLR 493, 502F-G.

... nothing either in the authorities or in logic to justify extending this principle of public policy so as to deny insurance cover to those whose sole liability is one which arises *vicariously* ...⁵⁴³

- 1.196 The decision and reasoning of Simon Brown LJ in this case suggest that the key distinction in the existing law may not be between personal and vicarious liability. Rather, it may lie between insurance against the personal or vicarious liability of defendants in circumstances where their conduct would amount to criminal conduct, and insurance against personal or vicarious liability for conduct not amounting to criminal conduct.

(5) Exemplary damages must be specifically pleaded

- 1.197 A claim for exemplary damages:

... must be specifically pleaded together with the facts on which the party pleading relies.⁵⁴⁴

- 1.198 Accordingly, the plaintiff, and only the plaintiff, must decide to seek an exemplary damages award; even if it would otherwise be appropriate to award exemplary damages, a court is not permitted to add one of its own motion.

⁵⁴³ [1996] 3 WLR 493, 502H (emphasis added).

⁵⁴⁴ RSC, O 18, r 8(3). The County Court Rules (O 6, r 1B) provide that:

Where a plaintiff claims aggravated, exemplary or provisional damages, his particulars of claim shall contain a statement to that effect and shall state the facts on which he relies in support of his claim for such damages.

PART V

EXEMPLARY DAMAGES: REFORM

1. THE NEED FOR REFORM

- 1.1 The decision in *Rookes v Barnard*⁵⁴⁵ was a compromise, being the furthest the House of Lords felt it could go within the confines of precedent in ridding the law of exemplary damages, which it regarded as anomalous.⁵⁴⁶ The first two of Lord Devlin's three categories are essentially historically-based and represent situations where exemplary damages had been awarded prior to *Rookes v Barnard* and where reclassification of the damages as compensatory aggravated damages was not thought possible. It is debatable whether Lord Devlin would have felt constrained from abolishing exemplary damages following the Practice Statement of 1966.⁵⁴⁷ It is equally debatable whether his Lordship would have felt the need to formulate his second category had the notion of restitutionary damages been current in 1964.⁵⁴⁸
- 1.2 The interpretation given to *Rookes v Barnard*⁵⁴⁹ by the Court of Appeal in *AB v South West Water Services Ltd*,⁵⁵⁰ limiting exemplary damages to wrongs in respect of which they had been held to be available before the decision in *Rookes v Barnard*,⁵⁵¹ has meant that the availability of exemplary damages is now yet further dictated by what are arguably the accidents of precedent, rather than sound principle.
- 1.3 Although it is not inconceivable that the House of Lords could reformulate the law in a way that is more satisfactory, it is surely correct that the present state of the law "cries aloud ... for Parliamentary intervention".⁵⁵² The overwhelming majority of our consultees agreed that the current law is in an unsatisfactory state. One consultee spoke for many in stating that the "result of *AB v South West Water Services Limited* is intolerable in terms of justice, logic and certainty."⁵⁵³
- 1.4 We regard some reform of the present law to be essential in order to restore rationality. We have the opportunity to recommend reform, unconstrained, as the courts have been, by precedent. The very difficult question is what form the reform should take. In particular, should exemplary damages be abolished altogether?

⁵⁴⁵ [1964] AC 1129.

⁵⁴⁶ "These authorities convince me ... that your Lordships could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle ...": *Rookes v Barnard* [1964] AC 1129, 1225-1226, *per* Lord Devlin.

⁵⁴⁷ *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

⁵⁴⁸ But see the discussion of whether category 2 is susceptible to restitutionary analysis at paras 4.16-4.20 above.

⁵⁴⁹ [1964] AC 1129.

⁵⁵⁰ [1993] QB 507. See paras 4.4 and 4.24-4.28 above.

⁵⁵¹ [1964] AC 1129.

⁵⁵² *Riches v News Group Newspapers Ltd* [1986] QB 256, 269C, *per* Stephenson LJ.

⁵⁵³ Professor Rogers.

2. OUR CONSULTATION EXERCISES

(1) Consultation Paper No 132

(a) The main arguments considered in the Consultation Paper

1.5 The following arguments, for and against exemplary damages, were considered in Consultation Paper No 132:⁵⁵⁴

(i) Against exemplary damages

- the aim of the law of civil wrongs is to provide compensation for loss;
- punishment is not a legitimate function of the law of civil wrongs and should take place only within the context of the criminal law;
- now that non-pecuniary harm is more freely compensatable exemplary damages are no longer necessary;
- the quantum of exemplary damages is uncertain and indeterminate;
- exemplary damages constitute an undeserved windfall to the plaintiff;
- levels of exemplary damages are too high.

(ii) In favour of exemplary damages

- punishment, deterrence and the marking out of conduct for disapproval are legitimate functions of the law of civil wrongs;
- exemplary damages alert plaintiffs to a method for the effective private enforcement of important rights;
- criminal, regulatory and administrative sanctions are inadequate;
- in some situations, compensation is inadequate or artificial, or does not effectively remedy the infringement of certain important interests.

1.6 Our provisional view was that exemplary damages should be retained, but put on a principled basis.⁵⁵⁵ This was supported by the majority of consultees, although a wide variety of different views were expressed.

(b) Some of the main arguments put forward by consultees

(i) Against exemplary damages

1.7 The main arguments against exemplary damages focused on two issues: the divide between the criminal and civil law and the appropriateness of other remedies.

⁵⁵⁴ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 5.4-5.38.

- 1.8 As regards the divide between the criminal and the civil law, it was claimed that, if an act warranted punishment, this was a matter for the criminal law or some other regulatory system. It was argued that deficiencies in the regulatory systems should be dealt with directly, by the amendment of those systems; they should not be patched up through the civil law. A further concern was that a person could be acquitted of a criminal offence, yet still be subjected to punishment by an award of exemplary damages.
- 1.9 The arguments focusing on the greater appropriateness of other remedies pointed to a range of other remedies which could perform at least some of the functions which exemplary damages might be expected to perform. One of these arguments was that 'restitutionary' damages should be available to deal with any case where a defendant acted wrongfully with a view to making a profit. A second was that 'compensatory' damages are adequate to take account of a plaintiff's outraged feelings, insult and humiliation in the case of torts such as defamation, false imprisonment, malicious prosecution, assault and intimidation. A third and alternative argument was that a 'non-monetary' remedy, such as a published declaration, could more appropriately serve to vindicate 'personality' rights: there is no connection between the desire to vindicate such rights and the institution of punishment.

(ii) In favour of exemplary damages

- 1.10 The main arguments in favour of exemplary damages responded, to a significant extent, to the same concerns, namely the divide between the civil and criminal law and the appropriateness of exemplary damages.
- 1.11 Many consultees were not prepared to accept that any sharp distinction exists between the goals that may legitimately be pursued by the criminal law and the civil law: punishment, deterrence and the marking out of conduct for disapproval are legitimate functions of the civil law, as well as the criminal law.
- 1.12 Many consultees also considered that exemplary damages perform useful and important functions. On the one hand, some pointed to its value as essentially a supplementary device: *viz*, as a remedy for perceived deficiencies in the criminal law, the civil law and other regulatory systems. A deficiency in the criminal law was identified in relation to police cases: in such cases it is the civil law that bears the brunt of maintaining the rule of law; retribution and punishment must therefore, of necessity, have a part to play in this area also. Likewise some consultees pointed to public concern over the failure to bring criminals to trial, or to secure convictions. A deficiency in the civil law was identified in a different set of cases, in particular those in which powerful defendants are unaffected by the normal level of damages. Another was identified in the specific area of libel law: it was observed that media libels were often deliberately perpetrated for profit or hate, and self-regulation in this area had clearly failed. On the other hand, it was also thought that exemplary damages may have a distinctive role. In particular, individuals were thereby given an effective weapon with which they themselves can

⁵⁵⁵ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 6.8 and 8.7.

enforce their rights; in contrast, victims may have little or no control over public prosecutions.

(2) Supplementary Consultation Paper

- 1.13 After the responses to the Consultation Paper were analysed, we found that the range of responses was so varied that we were left unclear as to where the consensus of opinion lay regarding the future of exemplary damages. We therefore decided to issue a supplementary consultation paper, primarily to those who had already submitted responses.
- 1.14 The Supplementary Consultation Paper asked consultees to choose between three approaches to reform. These were as follows:

Option 1: the 'Expansionist Model'

The availability of exemplary damages would be expanded so that they could be awarded for any tort or equitable wrong (but not for any breach of contract) that is committed with, or accompanied or followed by conduct which evinces, a deliberate and outrageous disregard of the plaintiff's rights.

Option 2: the 'Abolitionist Model'

Exemplary damages would be abolished, but this reform would be accompanied by provisions designed to:

- (a) ensure full compensation for the plaintiff's mental distress and for any injury to his or her feelings; and
- (b) achieve full recognition of 'restitutionary damages', requiring the defendant to give up gains made through a tort or equitable wrong committed with a deliberate disregard of the plaintiff's rights.

Option 3: the 'Hybrid Model'

This would be the same as option 2, except that exemplary damages would continue to be available for torts which are committed with a deliberate and outrageous disregard of the plaintiff's rights by servants of the government in the purported exercise of powers entrusted to them by the state, and which are capable in addition of amounting to crimes.

- 1.15 There were 146 responses to the Supplementary Consultation Paper, of which 17 (11.6%) favoured none of the options. These were re-allocated to the option which most closely fitted their views. After re-allocation, the distribution of responses was:

Option 1	('Expansionist Model')	49%
Option 2	('Abolitionist Model')	28%
Option 3	('Hybrid Model')	23%

It can be seen from this that, adding together the responses favouring options 1 and 3, 72% of consultees favoured the retention of exemplary damages.

3. THE CASE FOR AND AGAINST EXEMPLARY DAMAGES

(1) The central issue of principle

- 1.16 In articulating a principled answer to the question whether exemplary damages should be retained or abolished, we consider that one fundamental issue has to be resolved: do exemplary damages confuse the civil and criminal functions of the law? The Consultation Paper stated:

The range of views on the question of the availability of exemplary damages is at heart a product of radically different perceptions of the role of the law of civil wrongs, in particular tort law, and of its relationship to criminal proceedings. The opposing views are best summarised in the speeches of Lord Reid and Lord Wilberforce in *Broome v Cassell* ... It will almost certainly be impossible to achieve a consensus on the acceptability of exemplary damages in the absence of agreement as to which of these perceptions is correct.⁵⁵⁶

- 1.17 Lord Reid in *Broome v Cassell*⁵⁵⁷ stated that he regarded exemplary damages as “highly anomalous” and continued:

It is confusing the function of the civil law, which is to compensate, with the function of the criminal law, which is to inflict deterrent and punitive penalties. Some objection has been taken to the use of the word ‘fine’ to denote the amount by which punitive or exemplary damages exceed anything justly due to the plaintiffs. In my view the word ‘fine’ is an entirely accurate description of the part of any award which goes beyond anything justly due to the plaintiff and is purely punitive.⁵⁵⁸

- 1.18 On the other hand, Lord Wilberforce thought that it could not be assumed

... that there is something inappropriate or illogical or anomalous ... in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories ...⁵⁵⁹

- 1.19 We now need to consider in more detail this central issue of principle.

(a) *The principled case for abolishing exemplary damages*

- 1.20 The principled case for abolition is that, given the existence of the criminal law, the *raison d’être* of which is punishment, it confuses and complicates matters to punish civil wrongdoers. Wherever punishment is warranted, it ought to be pursued through the

⁵⁵⁶ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, para 5.28.

⁵⁵⁷ [1972] AC 1027.

⁵⁵⁸ [1972] AC 1027, 1086C-D.

⁵⁵⁹ [1972] AC 1027, 1114C-D.

criminal law. The practical consequence of abolishing exemplary damages would be that a sharper, cleaner distinction could be drawn between the civil law and the criminal law.

1.21 On this view, exemplary damages are in truth a form of fine and several distinctive features of civil, as opposed to criminal, punishment appear as deficiencies:

- (1) The defendant against whom exemplary damages are awarded is deprived of the various evidential and procedural safeguards which are ordinarily afforded to defendants in jeopardy of criminal punishment.⁵⁶⁰ In particular:
 - (a) the rules as to the admissibility of evidence are less restrictive in civil cases;
 - (b) it is unheard of in criminal cases, and contrary to all attempts to produce consistency in sentencing, for the jury not only to determine guilt but also the appropriate punishment;
 - (c) the standard of proof in civil cases is the lower standard of proof on the 'balance of probabilities'.
- (2) The monetary punishment for the anti-social behaviour should be payable to the state and not to the individual plaintiff; thus exemplary damages, which are payable to the individual plaintiff, are often criticised for leaving an undeserved windfall in the hands of the plaintiff.⁵⁶¹ It is significant that in *Riches v News Group Newspapers Ltd*⁵⁶² the jury sent the judge a note to say that they had in mind to award exemplary damages but wished to know whether it was possible to award them otherwise than to the plaintiffs, for example to charity. The judge, of course, replied in the negative.⁵⁶³
- (3) Defendants should not be placed in jeopardy of double punishment in respect of the same conduct, yet this would be the result if a defendant could be liable to pay both a criminal fine following conviction in the criminal courts and an exemplary damages award after an adverse decision in the civil courts.
- (4) One cannot generally insure against liability to pay a criminal fine. Likewise one ought not to be able to insure against liability for exemplary damages, yet it appears that one can do so.

⁵⁶⁰ See Lord Reid's objections to the assessment by juries of exemplary awards in *Broome v Cassell* [1972] AC 1027, 1087C-F, quoted at para 4.57 above.

⁵⁶¹ See, eg, *Broome v Cassell* [1972] AC 1027, 1086B-C (*per* Lord Reid), 1126D, (*per* Lord Diplock); *AB v South West Water Services Ltd* [1993] QB 507, 527E-F, 529A; *Thompson v MPC* [1997] 3 WLR 403, 417H. See the discussion of the windfall argument at paras 4.73-4.76 above.

⁵⁶² [1986] QB 256.

⁵⁶³ See the Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (1991) ch IV, para 9.

- (5) The criminal approach to vicarious liability, being narrower than the approach in tort, ought also to apply to exemplary damages. Yet the same rules appear to apply to exemplary as to compensatory damages.⁵⁶⁴
- (6) The defendant's criminal record probably ought to be, but appears not to be, relevant to decisions about both the availability and assessment of exemplary damages awards.
- (7) It appears objectionable that exemplary damages are only available if the plaintiff has pleaded them, as well as that plaintiffs have a discretion as to whether to execute a judgment for exemplary damages. It is difficult to see why a civil court should not be entitled to make an award of its own motion and should not have some way of enforcing an award, either of its own motion, or at the instance of another body with a public enforcement role, or by compelling plaintiffs to execute judgments.
- (8) In fixing the amount of exemplary damages, the court or jury should not award a sum which exceeds the statutory maximum fine for the same or similar conduct. And yet exemplary damages awards are assessed without any, or any overt, reference to the range of possible fines.
- (9) The 'rule of law' principle of legal certainty dictates that the criminalisation of conduct is in general properly only the function of the legislature in new cases; it further dictates that there is a moral duty on legislators to ensure that it is clear what conduct will give rise to sanctions and to the deprivation of liberty. Broadly-phrased judicial discretions to award exemplary damages ignore such considerations.

(b) *The principled case for retaining exemplary damages*

- 1.22 The principled case for retention begins with the proposition that civil punishment is a different type of punishment from criminal punishment; the conclusion drawn from this is that it is coherent to pursue the aims of punishment (retribution, deterrence, disapproval) through the civil law, in addition to the criminal law, and in a civil 'form' which does not necessarily have to mimic the criminal 'form'.
- 1.23 Two distinctive features of civil punishment are relied on. The first concerns the *locus standi* or entitlement to sue of complainants. Civil punishment is sought and enforced by individual victims of wrongdoing. In contrast, criminal punishment is sought by or on behalf of the state: even though an individual can bring a private prosecution, he or she will be regarded as acting on behalf of the state. The second concerns the stigma associated with criminal punishment. Criminal punishment carries a stigma that civil punishment does not: a crime is viewed by society as more serious, and one corollary of criminal punishment is a criminal record - with all the potential consequences for, for example, employment prospects, which that entails. Consequently, £10,000 exemplary damages for assault would be less drastic than a £10,000 fine and criminal record for the same assault.

⁵⁶⁴ See paras 4.102-4.103 above.

1.24 It follows from the view that civil punishment is distinctive in these ways that the objections outlined in para 5.21 above *fall away as necessary objections*. It is always an open question, which has to be addressed in respect of each ‘objection’ in turn, whether awards of exemplary damages should be governed by the same rules as exist in the criminal law.

(c) Conclusion

1.25 After much deliberation we have concluded that the principled case for retaining exemplary damages is to be preferred to the principled case for abolition. In other words, we believe that civil punishment can be adequately distinguished from criminal punishment, and has an important and distinctive role to play. At a deeper level the different approaches to the central issue of principle seem to reflect differences in the precision with which one wishes to divide different branches and functions of the law. The argument of principle for abolishing exemplary damages seeks to draw a bright line between the civil law and criminal law. The argument of principle for retaining exemplary damages is content rather with a ‘fuzzy’ line, with a range of punishments from civil punishment, through criminal fines, to imprisonment.

1.26 We should emphasise, however, that we have not found this central issue of principle easy to resolve and we regard the arguments as finely balanced. In the circumstances we think it most important that our preference for the retention of exemplary damages is supported by arguments of general policy, to which we now turn.

(2) General policy arguments

(a) Arguments of policy for retaining exemplary damages

1.27 We regard the following general policy arguments to be the central ones in favour of the retention of exemplary damages:

- (1) If civil punishment has some deterrent effect, and we consider that it must have, the abolition of exemplary damages would remove one means of protecting potential victims of wrongdoing.
- (2) While aggravated and restitutionary damages may go a long way towards properly protecting plaintiffs, lacunae will be left if one abolishes exemplary damages. The most blatant examples will occur where one cannot link profits to a particular wrong, so that restitutionary damages will not be available: *viz*, where a defendant deliberately committed a wrong in order to make money, yet one cannot identify the particular profit that has been made from the wrong.
- (3) The criminal law and criminal process do not work perfectly; civil punishment can go some way towards making up for their defects. This is so even though, in an ideal world, such defects would be removed by reform of the criminal law and criminal process themselves. General ‘defects’ include the following: that the state does not have sufficient resources to apprehend all criminals; that the state may not wish to prosecute, or to continue prosecutions which it has begun; that the substantive scope of the criminal law may not extend to all wrongs which merit punishment. At a more specific level, it may be thought

particularly unsatisfactory to rely on the criminal law where it is the state itself - through its officers - that has committed the crime. Civil punishment may therefore be particularly useful, even if merely to ensure that justice is seen to be done, in respect of wrongs by police and other officers of the state.

- (4) To abolish exemplary damages would be to fly in the face of the traditions of the common law, for common law judges have long found exemplary damages to be useful.

(b) Arguments of policy against retaining exemplary damages

1.28 We regard the following policy arguments to be the central ones against the retention of exemplary damages:

- (1) The availability of exemplary damages may encourage litigation: some potential litigants may be enticed by the availability of large awards to bring ill-founded claims.
- (2) There is concern that the question whether to award exemplary damages, and if so, in what amount, depends too much on judicial discretion and the application of 'subjective' concepts; outrage, for example, is a subjective idea.
- (3) If exemplary damages awards should be moderate, and the circumstances in which they will be awarded should be fairly predictable, they are unlikely to act as much of a deterrent.

(3) Conclusion

1.29 Our view is that, in contrast to the central policy arguments for retaining exemplary damages, the central policy arguments against retaining exemplary damages are unfounded or surmountable:

"Large awards produce incentives to unfounded litigation"

1.30 We do not agree that the availability of exemplary damages significantly increases unfounded litigation. First, the high cost of litigation, coupled with the prospect of having to bear the costs of the opposing and successful side in any litigation, is likely in any case to be a significant deterrent to any plaintiffs who are considering whether to bring unfounded claims. Secondly, plainly 'bad' cases - and *a fortiori* cases whose only motivation is to oppress a particular defendant - can be struck out by the civil courts (or be otherwise dealt with, for example, by civil liability for the tort of abuse of process, or liability for costs). Thirdly, a number of limiting principles or devices already apply, or could be introduced, so as to limit the size and frequency of awards, and thereby limit any incentive to bring unfounded claims. In particular, we consider (and will explain in more detail below)⁵⁶⁵ that:

- (1) Exemplary damages awards should continue to be 'moderate', meaning the minimum necessary to achieve the aims of punishment, deterrence and disapproval, and 'proportional' to the gravity of the defendant's conduct.

⁵⁶⁵ See paras 5.81-5.98 below (judicial role), 5.99-5.117 below (last resort remedy), and 5.120-5.122 below (principles of moderation and proportionality).

- (2) The judge, and not the jury, should determine the availability and quantum of exemplary damages.
- (3) Exemplary damages should be a remedy of 'last resort'. This means that even where a defendant has 'deliberately and outrageously disregarded the plaintiff's rights', a judge should only award exemplary damages if he considers that any other remedy available is insufficient (alone) to punish and deter the defendant. It also means that a court should only rarely (if ever) award exemplary damages where the defendant has already been convicted of an offence involving the conduct which is alleged to justify the award, and that a court should not award exemplary damages if any other sanction which has been imposed on the defendant (for example, in disciplinary proceedings) is adequate to punish and deter him or her.

"The availability and assessment of awards is too discretionary"

- 1.31 We recognise that the discretionary element in exemplary awards is substantial. However, legislation on exemplary damages would have the effect of 'clarifying' the law, and this would be further enhanced by case law interpretation. In any event, an element of discretion is warranted in order to retain the flexibility necessary to achieve justice and to ensure that the award is tailored to the nature of the defendant's conduct and its consequences, and so to the degree of retribution, deterrence and disapproval which an exemplary award must achieve.
- 1.32 The risk of excessive uncertainty in the assessment of exemplary damages can be minimised in several ways:
 - (1) The allocation of the role of assessment to judges, rather than to juries, can promote a greater measure of consistency between awards of exemplary damages. Judicial development of tariffs in respect of compensation for personal injury, and the promulgation of guideline judgments by the Court of Appeal within the field of criminal sentencing, are two approaches which civil courts might follow in order to achieve greater consistency between exemplary awards.
 - (2) A non-exhaustive statutory list of factors that ought always to be considered by the courts, when assessing exemplary damages awards, should help to minimise any risk of arbitrariness. Such a list should encourage judges to rationalise the size of such awards rather than leaving them to select figures in an unreasoned way.
 - (3) A guiding principle of 'proportionality of punishment' should likewise serve to promote consistency and rationality in the assessment of awards. The concept inevitably requires an explanation of the connection between the gravity of wrongdoing and the punishment exacted in respect of it.

"Moderate awards will not be effective deterrents"

- 1.33 The force of this objection varies according to one's interpretation of the concept of 'moderation'. Two different usages of the term can be found in the present law.

- 1.34 On the first interpretation an award of exemplary damages is 'moderate' if it does not exceed the minimum necessary to achieve the purposes of such an award. The objection made above has little force if this interpretation is adopted: it does not entail that awards will not be effective deterrents, or that the effective pursuit of the aims of exemplary damages will be prejudiced in any other respect. Rather, the concept is intended simply to avoid awards which are 'excessive' in the sense of being larger than is absolutely necessary in order effectively to achieve their aims.
- 1.35 On the second interpretation awards of exemplary damages are 'moderate' if they are 'lower' rather than 'higher'; accordingly, judges should prefer lower awards, rather than higher awards (even if this may mean some loss in efficacy). The objection made above may have more force if this is the chosen interpretation. Nevertheless, we do not regard the objection to be a decisive one. We do not accept that the fact that an aim cannot be performed in an 'ideal' or a 'perfect' manner is a good reason without more for declining to pursue that aim at all. Even if awards do not reach a level such that they achieve the maximum degree of retribution, deterrence and disapproval, 'moderate' awards may still substantially achieve those aims, and so be of a valuable sanction available to civil courts. Indeed, the 'secondary' aim of disapproval - or of signifying society's refusal to tolerate outrageously wrongful behaviour - is an aim that could still be pursued, successfully, even if awards were 'low'. And because many factors influence the punitive efficacy of awards, even comparably low awards can have a significantly punitive effect. In this respect the wealth of the defendant, which includes the presence or absence of insurance, will be especially important.⁵⁶⁶

"Predictable awards will not be effective deterrents"

- 1.36 We do not accept that if exemplary damages awards are predictable, this will serve unjustifiably to impair their efficacy. The underlying assumption seems to be that predictability enables defendants to engage in cost-benefit calculations, such that in at least certain circumstances they will be able to conclude that, because the benefits which are likely to accrue to them from specific wrongful conduct are likely to exceed the sums payable as damages for that conduct, it is 'worth' them acting in a wrongful way. We challenge this. On the one hand, consistent and predictable awards are required for reasons of fairness to defendants and potential defendants. This is also recognised within the criminal law. On the other hand, we envisage that a restitutionary award should be considered by a judge ahead of an exemplary award and that the gain which the defendant derived or expected to derive from his or her wrongdoing should be a relevant factor in the assessment of exemplary damages. If it is clear that a defendant acted wrongfully after calculating that an award of exemplary damages would be less than the profit which he or she expected to flow from the wrong, he or she could be punished accordingly by an (unexpectedly) larger award.
- 1.37 For all of these reasons we consider that the main policy objections to exemplary damages are unfounded or surmountable, and that it is therefore hard to see any practical advantage in their abolition. The case against exemplary awards appears

⁵⁶⁶ For example, if the defendant is not financially very well off, and is not insured against exemplary damages, the sum that is required to punish and deter may be low.

to us to be essentially theoretical, rather than practical - *viz*, concerned to establish the 'neatness' of a sharp divide between the civil and the criminal law.

- 1.38 Our conclusion is that policy considerations support our preference in principle for the retention of exemplary damages. We have also been heavily influenced by the fact that a substantial majority of consultees concluded that exemplary damages should be retained.⁵⁶⁷ Of the three options set out in our Supplementary Consultation Paper, we therefore reject option 2 (the 'Abolitionist Model') as a model for reform and recommend that:

(15) exemplary damages should be retained.

- 1.39 In the light of this recommendation, this is an appropriate point to consider whether exemplary damages should be re-named. In *Broome v Cassell*⁵⁶⁸ Lord Hailsham said that he preferred the term 'exemplary damages' over the alternatives because:

... [it] better expresses the policy of the law ... It is intended to teach the defendant and others that 'tort does not pay' by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done ...⁵⁶⁹

Nevertheless, in the Consultation Paper we sought views as to whether exemplary damages should be re-named.⁵⁷⁰ A suggested title was 'extra damages', but this was unpopular with most consultees. We still consider that a change of terminology would be clearer and more straightforward. Along with a number of consultees,⁵⁷¹ we prefer the pre-*Broome v Cassell* terminology of 'punitive damages' and we do not accept Lord Hailsham's view that this label deflects attention from the deterrence and disapproval aims of such damages. When one uses the term 'punishment' in the criminal law, one does not thereby indicate that deterrence is not an important aim.⁵⁷² Accordingly, we recommend that:

(16) our draft Bill should reflect our preference for the term 'punitive damages' rather than 'exemplary damages'. (Draft Bill, clause 1(2))

⁵⁶⁷ See para 5.15 above. We regard the law in other jurisdictions as cancelling each other out on this question; see Part IV of *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132. On the one hand, civil law jurisdictions have managed without exemplary damages, at least overtly. On the other hand, in other common law jurisdictions, in particular Australia, New Zealand, Canada and the United States, exemplary damages have continued to flourish: especially instructive cases include *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; *Lamb v Cotogno* (1987) 164 CLR 1; *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193.

⁵⁶⁸ [1972] AC 1027.

⁵⁶⁹ [1972] AC 1027, 1073F.

⁵⁷⁰ *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, paras 6.23 and 8.13.

⁵⁷¹ Cf *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)*, *The Times* 11 September 1997, in which the Divisional Court recently proposed that 'exemplary damages' is a "misleading" phrase, and that the appropriate one is 'penal damages', on the basis that "[i]t is a means of using civil proceedings to punish and deter certain classes of wrongdoer".

4. OUR CENTRAL REFORM PROPOSALS

(1) Expansion combined with important restrictions

- 1.40 We take the view, as we did in the Consultation Paper,⁵⁷³ that if exemplary (or 'punitive') damages should be retained, their availability must be placed on a principled footing. Of the two remaining options set out in the Supplementary Consultation Paper, option 3 (the 'Hybrid Model') was expressly formulated as a pragmatic solution that would restrict the general availability of exemplary damages while retaining them in those circumstances where they seem to have a particularly important role to play.
- 1.41 We reject option 3 because it lacks the coherence which ought to be a major aim of any reform of this area of the law. Adopting option 3 would mean that the law would be tied to an approach that focuses on a defendant's status, as a servant of the government, rather than on the degree of culpability of his or her wrongful conduct. As a result, it would leave gaps in the legal protection offered to plaintiffs, without there being any convincing justification for the omission - for there appears to be no sound reason why outrageously wrongful conduct should not attract a punitive award even if it is not committed by a servant of the government. For example, no punitive damages could be awarded for deliberate discrimination or libel by a defendant that is not a servant of the government. For these reasons, and also because it found favour with substantially fewer consultees than did option 1 (the 'Expansionist Model'), we reject option 3 (the 'Hybrid Model').
- 1.42 We therefore favour the 'Expansionist Model'. Punitive damages should be available for any tort or equitable wrong which is committed with conduct which evinces a deliberate and outrageous disregard of the plaintiff's rights. Punitive damages should not, however, be available for breaches of contract. We believe that this model affords a principle of general application upon which to base the availability of punitive damages. Such 'expansion' is consistent with the common law relating to exemplary or punitive damages in major Commonwealth jurisdictions, even after *Rookes v Barnard*.⁵⁷⁴
- 1.43 But whilst we seek to expand the range of situations in which exemplary damages can in principle be awarded, and thereby ensure that the law has a rational basis, we are also anxious to ensure that exemplary damages are treated by the judiciary as a 'last resort' remedy, and that there is consistency, 'moderation', and proportionality, in the assessment of such damages. Accordingly, whilst we are expanding the availability of exemplary damages, we are also imposing important restrictions on their availability and quantum. We believe that 'expansion combined with important restrictions' is a policy which can appeal to both supporters, and critics, of exemplary damages.

⁵⁷² See para 4.1 above.

⁵⁷³ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 6.8 and 8.7.

⁵⁷⁴ See para 4.5 above, para 5.46 below (general test of availability), and paras 5.49, 5.53 and 5.54 below (wrongs for which available).

(2) Our central recommendations

1.44 We recommend that:

(17) the judge, and not a jury, should determine whether punitive damages should be awarded, and if so, what their amount should be. (Draft Bill, clause 2)

(18) punitive damages may only be awarded where in committing a wrong, or in conduct subsequent to the wrong, the defendant deliberately and outrageously disregarded the plaintiff's rights; (Draft Bill, clause 3(6); for 'conduct' see clause 15(3)); and the narrower 'categories' test of *Rookes v Barnard* should be rejected. (Draft Bill, clause 3(9))

(19) the 'cause of action' test of *AB v South West Water Services Ltd* should be abandoned; instead:

(a) punitive damages may be awarded for any tort or equitable wrong; (Draft Bill, clause 3(3))

in this context an equitable wrong comprises a breach of fiduciary duty, a breach of confidence, or procuring or assisting a breach of fiduciary duty; (Draft Bill, clause 15(4))

(b) punitive damages may be awarded for a civil wrong which arises under an Act (including a tort or an equitable wrong), but only if such an award would be consistent with the policy of that Act; (Draft Bill, clause 3(4) and 3(5))

however, punitive damages must not be awarded for breach of contract or under an undertaking in damages.

(20) punitive damages may be awarded in addition to any other remedy which the court may decide to award; (Draft Bill, clause 3(8)) but may only be awarded if the judge considers that the other remedies which are available to the court will be inadequate alone to punish the defendant for his conduct (the 'if, but only if' test); (Draft Bill, clause 3(7))

for these purposes the court may regard deterring the defendant and others from similar conduct as an object of punishment. (Draft Bill, clause 3(10))

(21) in deciding whether to award punitive damages, the court must have regard to:

(a) the principle that punitive damages must not usually be awarded if, at any time before the decision falls to be made, the defendant has been convicted of an offence involving the conduct concerned; (Draft Bill, clause 4(1))

when applying this principle a court must ignore section 1C of the Powers of Criminal Courts Act 1973. (Draft Bill, clause 4(3))

(b) any other sanctions that have been imposed in relation to the conduct concerned. (Draft Bill, clause 4(2))

(22) in deciding the amount of punitive damages the judge must have regard to the principles that any award:

(a) must not exceed the minimum needed to punish the defendant for his conduct; (Draft Bill, clause 5(1)(a))

(b) must be proportionate to the gravity of the defendant's wrongdoing; (Draft Bill, clause 5(1)(b))

for these purposes the court may regard deterring the defendant and others from similar conduct as an object of punishment. (Draft Bill, clause 5(3))

(23) in deciding the amount of punitive damages, the judge must consider, where applicable, the following matters:

(a) the state of mind of the defendant;

(b) the nature of the right or rights infringed by the defendant;

(c) the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause by his conduct;

(d) the nature and extent of the benefit that the defendant derived or intended to derive from his conduct;

(e) any other matter which the judge in his or her discretion considers to be relevant (other than the means of the defendant). (Draft Bill, clause 5(2))

(3) Aspects of our central recommendations

1.45 We now proceed to explain the major elements of our central recommendations set out above.

(a) *Deliberate and outrageous disregard of the plaintiff's rights*

1.46 We reject the existing, and overly restrictive, categories test, in favour of a single, general test which seeks to isolate especially culpable and punishment-worthy examples of wrongful conduct. We have selected the phrase 'deliberate and outrageous disregard of the plaintiff's rights' as the clearest of the multitude of similar phrases which were used in England before *Rookes v Barnard*,⁵⁷⁵ and which

⁵⁷⁵ For an excellent summary of the law pre-*Rookes v Barnard*, see *Mayne & McGregor on Damages* (12th ed, 1961) paras 207-208. See also *Clerk & Lindsell on Torts* (12th ed, 1961) ss 354-358; Salmond, *Law of Torts* (13th ed, 1961) pp 737-739; Street, *Principles of the Law*

have continued to be used in Australia, Canada and the United States,⁵⁷⁶ to describe when exemplary or punitive damages are available.

- 1.47 The minimum threshold is that the defendant has been subjectively reckless - to use criminal law terminology. The notion of 'outrage' imports the element of judicial discretion that we believe is inevitable, and essential, in this area. Factors that will no doubt be relevant in deciding whether conduct is not merely reckless but outrageous will include whether the wrong was intentionally committed, the extent and type of the potential harm to the plaintiff, and the motives of the defendant.
- 1.48 The extent to which conduct subsequent to the wrong is relevant has perplexed us a great deal. Ultimately we are content that the need for the conduct to be relevant to a disregard of *the plaintiff's rights* is a sufficient controlling principle. It ensures that the conduct, even if subsequent, is causally linked to the wrong and is not wholly independent of it. The facts alleged in *AB v South West Water Services Ltd*,⁵⁷⁷ are particularly in point.⁵⁷⁸ There the defendants admitted liability for, *inter alia*, the torts of public nuisance, negligence and breach of statutory duty in supplying contaminated water to inhabitants of Camelford in Cornwall. But the initial commission of the wrongs would not in itself have satisfied the 'deliberate and outrageous disregard of the plaintiff's rights' test. What would have brought the defendants within that test was the allegedly arrogant and high-handed way in which they had ignored the complaints made by their customers and the allegedly misleading comments they had made as to the safety of the water.

(b) The civil wrongs in respect of which an award may be made

- 1.49 We propose that punitive damages be available for any tort, for (most)⁵⁷⁹ equitable wrongs, and for civil wrongs which arise under statutes where such an award would be consistent with the policy of the statute in question. But they should *not* be available for breach of contract; nor should they be available pursuant to an undertaking in damages. This would entail a general rejection of the rationally

of Damages (1962) pp 28-34. Also of particular assistance is Lord Denning's judgment in the Court of Appeal in *Broome v Cassell* [1971] 2 QB 354.

⁵⁷⁶ See para 4.5 above. Particularly helpful is the American Law Institute's *Restatement of the Law of Tort* (2d) (1979), section 908, which reads:

- (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
- (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

⁵⁷⁷ [1993] QB 507.

⁵⁷⁸ Other cases raising the relevance of subsequent conduct include *Asghar v Ahmed* (1985) 17 HLR 25 and *Lamb v Cotogno* (1987) 164 CLR 1.

⁵⁷⁹ Breach of fiduciary duty; breach of confidence; and procuring or assisting in a breach of fiduciary duty. See para 5.56 below, recommendation (19)(a) above, and draft Bill, clause 15(4).

indefensible position which the common law reached following *AB v South West Water Services Ltd*,⁵⁸⁰ according to which specific causes of action are selected solely on the basis of the existence or absence of pre-1964 precedents for awards of exemplary damages. That position has found no support in other Commonwealth jurisdictions; those jurisdictions have, indeed, also tended to the view that exemplary or punitive damages ought to be available in respect of any civil wrong, with the one significant possible exception of breach of contract.⁵⁸¹

(i) *Why include the tort of negligence?*

- 1.50 A large number of consultees favoured the inclusion of the tort of negligence within the category of civil wrongs for which exemplary damages would be awardable. There was particular support for their availability in situations where the defendant's conduct, though within the tort of negligence, goes beyond 'mere' negligence, and is grossly negligent or even reckless.
- 1.51 We do not consider that 'mere' or even 'grossly' negligent conduct should give rise to an award of punitive damages. Such conduct is not so serious that our society does or indeed should generally seek to *punish* such a wrongdoer, rather than, in particular, demand that he or she make reparation for the loss so caused to the plaintiff. This intuition is confirmed by a comparison with the criminal law, in which offences can only very exceptionally be satisfied by 'mere' negligent conduct.⁵⁸² Nevertheless, we recognise that the tort of negligence may well be committed with a degree of culpability significantly in excess of that of the 'merely' or 'grossly' negligent defendant.
- 1.52 These considerations can be accommodated by our test of 'deliberate and outrageous disregard of the plaintiff's rights'. This captures the more culpable forms of conduct, but serves to exclude 'mere' and even 'gross' (non-advertent) negligence. The result is that it is wrong to say that we are advocating the awarding of punitive damages for the tort of negligence *per se*. Rather, we propose that they may only be awarded if the conduct which constitutes the tort of negligence (or relevant subsequent conduct) also satisfies the additional test of 'deliberate and outrageous disregard of the plaintiff's rights'. We therefore anticipate that the recovery of punitive damages for the tort of negligence will be exceptional.
- 1.53 This position derives substantial support from the approaches adopted in Canada, Australia and New Zealand. Courts in all three of these jurisdictions have held that exemplary or punitive damages are available for unintentional torts (including the tort of negligence),⁵⁸³ and yet also clearly consider that such awards will be

⁵⁸⁰ [1993] QB 507. See para 4.4 above.

⁵⁸¹ See para 4.5 above.

⁵⁸² See, in particular, the offences of careless or inconsiderate driving (s 3, Road Traffic Act 1988) and causing death by careless or inconsiderate driving (s 3A, Road Traffic Act 1988).

⁵⁸³ Australian authorities on exemplary damages for the tort of negligence are: *Midalco Pty Ltd v Rabenalt* (1988) Aust Torts Reps 80-208; *Coloca v BP Australia Ltd* (1992) Aust Torts Reps 81-153; *Backwell v AAA* (1996) Aust Torts Reps 81-387; *Trend Management Ltd v Borg* (1996) 40 NSWLR 500. But some state legislatures have excluded exemplary damages from actions for negligence in eg motor vehicle injury cases (eg Motor Accidents Act (NSW), s 81A). The central New Zealand authority is *McClaren Transport v Somerville* [1996] 3 NZLR 424. See S Todd et al, *The Law of Torts in New Zealand* (2nd ed, 1997) pp 92-93 and pp 1231-1232. The general position in Canada seems to be that exemplary

rare.⁵⁸⁴ Thus reported cases in which exemplary or punitive damages have been awarded or contemplated seem to involve rather more than ‘simple’ negligence,⁵⁸⁵ or conduct that is aggravated by the defendant’s high-handed behaviour.⁵⁸⁶

(ii) *Why include equitable wrongs?*

1.54 It could be argued that a reformed law of exemplary damages should be confined to torts and should not be extended so as to include equitable wrongs.⁵⁸⁷ No English case has awarded exemplary damages for an equitable wrong, whereas such damages are available for many causes of action in tort. In contrast, authorities in major Commonwealth jurisdictions have awarded exemplary damages for equitable wrongs.⁵⁸⁸

1.55 But despite the absence of English authorities for awarding exemplary damages for an equitable wrong, we can ultimately see no reason of principle or practicality for excluding equitable wrongs from any rational statutory expansion of the law of exemplary damages.⁵⁸⁹ We consider it unsatisfactory to perpetuate the historical divide between common law and equity, unless there is very good reason to do so. Professor Waddams argues,

damages will not be awarded for the tort of negligence, unless the defendant’s conduct could be said to amount to recklessness or high-handed conduct: S M Waddams, *The Law of Damages* (2nd ed, 1991) para 11.210. In New Zealand, exemplary damages have recently been held to extend to the tort of negligence: *McLaren Transport v Somerville* [1996] 3 NZLR 424 (HC).

⁵⁸⁴ See, for example: *Coloca v BP Australia Ltd* (1992) Aust Torts Reps 81-153 (“unusual and rare”) and *McClaren Transport v Somerville* [1996] 3 NZLR 424 (“rare and exceptional”).

⁵⁸⁵ See, for example, *McClaren Transport v Somerville* [1996] 3 NZLR 424 (HC).

⁵⁸⁶ See, for example, *Backwell v AAA* (1996) Aust Torts Reps 81-387 (Vic, CA) and *Trend Management Ltd v Borg* (1996) 40 NSWLR 500 (NSW, CA).

⁵⁸⁷ The Ontario Law Reform Commission, in its *Report on Exemplary Damages* (1991), was unable to agree about whether punitive damages should be available for equitable wrongs: pp 71-74 (majority); pp 74-75 (dissent by Commissioner Earl A Cherniak QC). See further n 48 below.

⁵⁸⁸ In Canada, it appears to be well-established that exemplary or punitive damages may be awarded for equitable wrongs, such as breach of fiduciary duty. See, in particular, *Norberg v Wynrib* (1992) 92 DLR (4th) 440, 505-507 (*per* McLachlin J) (SCC). More recent cases include *McDonald Estate v Martin* [1995] CCL 1142 (Man CA) and *Gerula v Flores* [1995] CCL 8583 (Ont CA). In New Zealand, exemplary damages have been held to be available for breach of confidence (*Aquaculture Corporation v NZ Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA majority)) and breach of fiduciary duty (*Cook v Evatt (No 2)* [1992] 1 NZLR 676 (HC)). The position in Australia is less clear. See, in particular, *Bailey v Namol Pty Ltd* (1994) 12 ALR 228, 238 (FCA, GD), doubting the availability of exemplary damages in equity, without deciding the point, and P McDermott, “Exemplary Damages in Equity” (1995) 69 ALJ 773-774. Cf eg Spry, *Equitable Remedies* (4th ed, 1990) p 621, and M Tilbury and H Luntz (1995) 17 Loyola LA Intl & Comp LJ 769, 783-785, identifying a “trend [in Australian common law] towards the recovery of exemplary damages independently of the plaintiff’s cause of action”.

⁵⁸⁹ See the Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) pp 71-74 (majority), which reached similar conclusions.

... the availability of exemplary damages should not be determined by classification of the wrong as a common law tort or as a breach of an equitable obligation ...⁵⁹⁰

Indeed, we can see good reason for allowing punitive damages to be recovered against, for example, the dishonest trustee who acts in breach of his fiduciary duty or the person who dishonestly abuses another's confidence. Thus if, as we propose, punitive damages are awardable in respect of the (common law) tort of deceit, it would be anomalous if analogously wrongful conduct could not also give rise to an award, just because the cause of action originated in equity. Moreover, 'deterrence' is an aim that is not alien to courts of equity. For example, it is a clear aim of the commonplace equitable remedy of an account of profits awarded for breach of fiduciary duty or breach of confidence.⁵⁹¹ To the extent that such remedies already achieve the aims of a punitive damages award in full or in part, and intentionally or incidentally, this will be a legitimate reason for refusing to make an award under the 'last resort' test, or for making a lower award than would otherwise be necessary.⁵⁹² Finally, it is not an argument against making punitive damages available *by statute* for equitable wrongs that damages for equitable wrongs are not otherwise straightforwardly available.⁵⁹³

- 1.56 By recommending that 'equitable wrongs' should be included in our proposed legislation, it does of course become incumbent on us to clarify what we mean by that phrase. Professor Birks argues that a wrong means:

conduct ... whose effect in creating legal consequences is attributable to its being characterised as a breach of duty ...⁵⁹⁴

A practical indicator of whether the law characterises particular conduct as constituting such a breach of duty is that compensation must be an available remedial measure for the conduct in question if loss is caused to the plaintiff by that conduct. Applying this approach, the common law civil wrongs are torts and

⁵⁹⁰ S M Waddams, *The Law of Damages* (2nd ed, 1990) para 11.240, criticising an Ontario Court of Appeal decision that exemplary damages should not be available for breach of fiduciary duty, because the action was equitable, not tortious.

⁵⁹¹ See paras 3.28-3.32 above.

⁵⁹² The key argument put by the dissenting member of the Ontario Law Reform Commission was that there was no need to provide a remedy of punitive damages for equitable wrongs because, in particular, a wide range of equitable remedies already existed which could be used, if necessary, to achieve the same ends as the 'common law' remedy of punitive damages; there was therefore no need to add to this armoury by extending the 'common law' concept of punitive damages. But Earl A Cherniak QC's preferred solution was to leave the issue to be considered on a case-by-case basis, "whereby it can be determined if there is in fact a lacuna in the law such that there is a need to award punitive damages" (p 75). This case-by-case consideration of whether punitive damages are *in fact* required, or whether other remedies already achieve their aims, is precisely what our 'last resort' test achieves.

⁵⁹³ Lord Cairns' Act of 1858 gave the Court of Chancery power to award damages in addition to or in substitution for an injunction or specific performance, although it appears that the court had a residual discretion to award damages prior to the Act, which it rarely exercised: *Hanbury and Martin, Modern Equity* (15th ed, 1997) p 724. See now the Supreme Court Act 1981, s 50.

⁵⁹⁴ P Birks, *An Introduction to the Law of Restitution* (revised ed, 1989) p 313.

breach of contract, and the equitable civil wrongs are breach of fiduciary duty, breach of confidence, and intermeddling by dishonestly procuring or assisting a breach of fiduciary duty.⁵⁹⁵ There are also a large number of civil wrongs which arise under statutory provisions.⁵⁹⁶ One could also include as an equitable wrong proprietary estoppel; nevertheless, because we consider that breach of contract should not trigger punitive damages,⁵⁹⁷ and because proprietary estoppel is closely linked to breach of contract in that the essence of the wrong is the failure to fulfil the promisee's expectations, we propose that proprietary estoppel should not constitute an equitable wrong for the purposes of our draft Bill.

(iii) *Why include civil wrongs arising under statutes, subject to fulfilment of a consistency test?*

- 1.57 We do not think that punitive damages can be refused for a civil wrong, merely because it arises under an Act rather than at common law. Our starting-point is therefore that punitive damages should *prima facie* be available for any wrong which arises under an Act for which the victim of the wrong may recover compensation or damages.⁵⁹⁸ But this proposition is subject to one important qualification. Punitive damages should only be available for such a wrong if an award of punitive damages would be consistent with the policy of the statute under which the wrong arises ('the consistency test').⁵⁹⁹ Given the importance of clarity about what wrongs may attract an award of punitive damages, it is proper that we explain these recommendations in some detail.
- 1.58 There is little discussion in either case law or academic works about how civil wrongs which arise under an Act should be characterised. In many, but by no means all cases, liability is characterised as liability 'for a tort'. In *Breach of Statutory Duty in Tort*,⁶⁰⁰ Professor Stanton offers a valuable three-fold classification of tort liabilities which arise under statutes: "statutory torts",⁶⁰¹ "the inferred tort of breach of statutory duty"⁶⁰² and "the express tort of breach of statutory duty".⁶⁰³

⁵⁹⁵ See *Royal Brunei Airlines v Tan* [1995] 2 AC 378, noted by C Harpum (1995) 111 LQR 545.

⁵⁹⁶ For example, infringement of copyright (see the Copyright, Designs and Patents Act 1988) infringement of patent (see the Patents Act 1977) and unlawful discrimination on grounds of sex, race or disability (see, respectively, the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Disability Discrimination Act 1995). See, for our proposals regarding this category of civil wrong, paras 5.57-5.65 below.

⁵⁹⁷ See paras 5.71-5.73 below, and recommendation (19) above.

⁵⁹⁸ See recommendation (19)(b) above, and draft Bill, clause 3(4)(a).

⁵⁹⁹ See recommendation (19)(b) above, and draft Bill, clause 3(4)(b).

⁶⁰⁰ K Stanton, *Breach of Statutory Duty in Tort* (1986) pp 8-12. See also K Stanton, *The Modern Law of Tort* (1994) pp 41-45.

⁶⁰¹ These are statutes which "specifically create a detailed scheme of civil liability of a tortious character"; the law created is "generally regarded as falling within the mainstream of tort liability" and the rules so enacted are "often modelled closely on common law principles": K Stanton, *Breach of Statutory Duty in Tort* (1986) p 8. Professor Stanton gives as examples the Occupiers' Liability Act 1957 and the Animals Act 1971.

⁶⁰² This refers to a "common law liability inferred by the courts in order to allow an individual to claim compensation for damages suffered as a result of another breaking the provisions of a statute which do not explicitly provide a remedy in tort": K Stanton, *Breach of Statutory*

But these concepts are inadequate, even in combination, for our purposes. First, they do not sufficiently cover the field. In at least one case, a statute classifies liability for a wrong arising under it as liability for an ‘equitable wrong’.⁶⁰⁴ It is also far from clear that every example of a statutory civil liability would generally be viewed as a ‘statutory tort’, in the absence of express statutory classification, rather than as a *sui generis* statutory liability. And secondly, the concept of a ‘statutory tort’ is not currently in regular use, in either the case law or academic works, so that to employ it in an Act might have unforeseen consequences and might encourage needless debate about what makes a statutory civil liability a ‘tort liability’. We therefore prefer the concept of a ‘wrong which arises under an Act for which [the victim] can recover compensation or damages’. We consider that this is broad enough to extend to all wrongs to which it is appropriate to apply the consistency test, and plain enough to minimise unmeritorious debate.

1.59 It should be clear from the previous paragraph that many wrongs which arise under an Act must or can also be regarded as ‘torts’ - whether as ‘statutory torts’, or as examples of the inferred or express torts of breach of statutory duty. We have also noted that at least one wrong which arises under an Act is characterised by the Act itself as an ‘equitable wrong’.⁶⁰⁵ This requires us to qualify our earlier recommendation that punitive damages must be available for *any* tort or equitable wrong (as defined).⁶⁰⁶ Rather, where a wrong arising under an Act is also a tort or an equitable wrong, the consistency test should apply.⁶⁰⁷

1.60 The consistency test constitutes a vital limitation on the availability of punitive damages for wrongs arising under an Act. Parliament has created many civil wrongs by statute. Sometimes it has taken great care to specify in the statute what remedy or remedies should be available for the wrong. In a number of instances it is reasonable to infer that Parliament intended that those remedies should be the sole remedies for that wrong, and further, that to permit punitive damages to be awarded would conflict with the policy or policies which Parliament was seeking to advance by creating the wrong and prescribing particular remedies for it. Without purporting to offer an exhaustive account of situations of ‘inconsistency’, we note that conflict exists where the statute which creates the wrong limits the amount of compensation available for it, and, further, provides that there should be no liability for the particular acts in question other than that laid down in the statute.

Duty in Tort (1986) pp 8-9. Although in such cases the courts purport to be discovering Parliament’s intention (see, in particular, *Lonhro Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173; *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58; *X (minors) v Bedfordshire County Council* [1995] 2 AC 633), the general view of academics is that the search is for an intention which does not exist.

⁶⁰³ This refers to statutes which expressly make civilly actionable breaches of particular statutory duties by one or other of a range of formulas, such as “[breach of the duty] shall be actionable” or “shall be actionable ... as a breach of statutory duty”: K Stanton, *Breach of Statutory Duty in Tort* (1986) pp 9-12. The details of the civil remedy or remedies available in such cases are left to be filled out by the courts.

⁶⁰⁴ Section 309 of the Companies Act 1985.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ See recommendation (19)(a) and para 5.49 above.

⁶⁰⁷ See recommendation (19)(b) above, and draft Bill, clause 3(5).

A number of statutes that implement international liability conventions fall into this category.⁶⁰⁸ Conflict is also almost inevitable when a statute lays down a detailed and structured remedial regime, particularly one that is administered outside the ordinary court system (for example, by industrial tribunals). One of the best examples of this sort of conflict is the wrong of unfair dismissal.⁶⁰⁹

- 1.61 We should stress, however, that in our view, cases of inconsistency, of the sort we have identified above, are unlikely to be common. Many of the better known statutes under which statutory civil wrongs arise do not specify expressly what remedies are available, or may do so in only the most general terms.⁶¹⁰ Parliament is often content to provide that a wrong should be civilly actionable, or actionable as a tort⁶¹¹ or an equitable wrong,⁶¹² without stipulating the remedial implications of that proposition.⁶¹³ It is a reasonable inference that at least compensatory damages are available for the civil wrong so created. And we think that, in general, the availability of punitive damages would be consistent with the policy of such Acts.
- 1.62 We have given thought to the possibility of formulating an exhaustive statutory list of wrongs which arise under an Act for which punitive damages should be available (or, perhaps, should not be available). The list would be formulated on the basis of our view as to which wrong-defining statutory schemes are, or are not, inconsistent with the availability of punitive damages. But to deal with this, divorced from the particular facts, would be an exceedingly difficult task, and would inevitably leave gaps. We therefore think that the better solution is a general statutory provision which prevents an award of punitive damages from being made

⁶⁰⁸ See, for example, the Nuclear Installations Act 1965 (liability for nuclear occurrences), s 12(1), and the Merchant Shipping Act 1995, Ch III (liability for oil pollution), s 156.

⁶⁰⁹ See the remedial scheme established by what is now Chapter II of the Employment Rights Act 1996. It is notable that that scheme already includes elements which can loosely be described as having a 'punitive' (rather than primarily compensatory) purpose. But of the remedies available for unlawful discrimination on grounds of sex, race or disability in the employment field, which we consider at paras 5.63-5.65 below.

⁶¹⁰ For example, the Occupiers' Liability Act 1957; the Occupiers' Liability Act 1984; the Animals Act 1971; the Copyright, Designs and Patents Act 1988; the Defective Premises Act 1972; the Consumer Protection Act 1987. See also numerous examples of the 'inferred' and 'express' torts of breach of statutory duty.

⁶¹¹ Examples are: "may be made the subject of civil proceedings in like manner as any other claim in tort" (eg s 66(1) of the Sex Discrimination Act 1975) and "in an action for ... all such relief ... is available to the plaintiff as is available in respect of the infringement of any other property right" (eg s 96(2) of the Copyright, Designs and Patents Act 1988). See now the statutory wrong created by the Protection from Harassment Act 1997, which that statute expressly classifies as a tort.

⁶¹² Section 309 of the Companies Act 1985.

⁶¹³ Examples of typical forms of words are "shall be liable" (for "damage" or "injury" or "loss") or "shall be actionable". In some other cases, such as the Occupiers' Liability Acts 1957 and 1984, and the Defective Premises Act 1972, civil actionability, though undoubtedly intended, may be less clearly indicated. And in yet other cases, which are regarded as examples of the 'tort of breach of statutory duty', Parliament may have given no thought to whether a particular breach of statutory duty should be civilly actionable, and it is left to the courts to decide whether or not that should be so (though the courts themselves rationalise what they do as an attempt to discover an implied legislative intention).

for a wrong which arises under an Act, where the court considers that such an award would be inconsistent with the policy of the Act. We have so recommended.⁶¹⁴

- 1.63 We would like to make clear our views on the wrongs of unlawful discrimination on grounds of sex, race or disability, which arise under the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995. Many consultees thought that there was a pressing need for punitive damages to be available for these wrongs. Yet unlawful discrimination provides a 'hard case' for the consistency test. We therefore think it important to spell out why, in our view, punitive damages should indeed be available for such discrimination and would not fall foul of the consistency test. While we shall focus on sex discrimination, the same reasoning applies to race and disability discrimination.
- 1.64 So far as unlawful discrimination *outside the employment field* is concerned, section 66(1) of the Sex Discrimination Act 1975 provides that such a complaint "may be made the subject of civil proceedings in like manner as any other claim in tort". This appears to mean, *inter alia*, that the remedies which are typically available for torts are also available for this form of unlawful discrimination. Thus if punitive damages are available for torts, section 66(1) would seem to authorise an award thereof for the tort of unlawful sex discrimination, on the same basis as for other torts. Indeed, we have already seen that English courts did, at one time, award damages for unlawful discrimination under section 66 in exactly this way.⁶¹⁵ The reason why those decisions have since been undermined is not because an award of exemplary damages was held to be inconsistent with these provisions of the Sex Discrimination Act, but because of an independent common law rule (the cause of action test).⁶¹⁶
- 1.65 The conclusion that punitive damages should be available is more difficult to justify, but, we think, still the correct one, in relation to complaints of unlawful discrimination *in the employment field*. The provisions which deal with the enforcement of this category of complaint⁶¹⁷ differ substantially from section 66, and *prima facie* militate against an award of punitive damages. Section 65 establishes a detailed and exhaustive⁶¹⁸ remedial regime;⁶¹⁹ complaints are adjudicated and enforced by industrial tribunals, and therefore fall outside the ordinary court system;⁶²⁰ and the only pecuniary award available is described as

⁶¹⁴ See recommendation (19)(b) above, and draft Bill, clause 3(4) and 3(5).

⁶¹⁵ See para 4.25 above.

⁶¹⁶ See para 4.25 above.

⁶¹⁷ Sex Discrimination Act 1975, ss 63-65.

⁶¹⁸ Sex Discrimination Act 1975, s 62(1) provides that "[e]xcept as provided by this Act, no proceedings, whether civil or criminal, shall lie against any person in respect of an act by reason that the act is unlawful by virtue of a provision of this Act".

⁶¹⁹ Sex Discrimination Act 1975, s 65(1) provides that the industrial tribunal shall award one or more of three remedies as it "considers just and equitable": a declaratory order (s 65(1)(a)), an order for compensation (s 65(1)(b)), and a recommendation (s 65(1)(c)).

⁶²⁰ Sex Discrimination Act 1975, s 63(1).

“compensation”.⁶²¹ But section 65(1)(b) provides that the sum should be the same as ‘any damages’ which could be awarded for discrimination outside the employment field. If damages awarded for discrimination outside the employment field can include punitive damages (as we think), then despite the terminology of compensation, the pecuniary award under section 65(1)(b) should also be capable of including a sum by way of punitive damages.⁶²² Indeed, to refuse to award punitive damages under section 65, whilst awarding them under section 66, would create an unjustified and anomalous distinction between English law’s protection of individuals from unlawful discrimination within and outside the employment field. Section 65(1)(b) provides no sound basis for that distinction.⁶²³ And until English law ruled out exemplary damages for all cases of unlawful discrimination, English courts had awarded exemplary damages without distinction between claims arising within and outside the employment field.⁶²⁴

(iv) *The problem of ‘European Community law wrongs’*⁶²⁵

- 1.66 The question of how English law analyses a breach of European Community law which gives rise to an action for damages against an individual or the State (for breach of a ‘directly effective’ provision of Community law, or under the principles of Member State liability) is a difficult one. It seems that the claim to damages will be treated as based on a tort, and in particular, the tort of breach of statutory duty, with the statutory duty in question arising by virtue of the European Communities Act 1972.⁶²⁶
- 1.67 Applying that analysis, our recommendations would mean that such breaches of Community law could trigger an award of punitive damages if the courts took the

⁶²¹ Until a recent statutory amendment, necessitated by the ECJ’s ruling in *C-271/91 Marshall v Southampton and South West Hampshire Health Authority (No 2)* [1994] QB 126 (ECJ), the sum payable as compensation was also subjected to a statutory limit.

⁶²² In this particular context “compensation” seems to be used in a non-technical sense, to refer to a pecuniary remedy received by the victim of the unlawful discrimination. Cf *Stuart-Smith LJ in AB v South West Water Services Ltd* [1993] QB 507, 522D-E.

⁶²³ *A fortiori* now that claims to compensation for unlawful discrimination in the employment field are no longer subject to a statutory limit.

⁶²⁴ See para 4.25 above.

⁶²⁵ We do not discuss in this paper the question of whether punitive damages might be available for breach of the European Convention on Human Rights, if this were to be incorporated into national law. The Government has recently announced its intention to incorporate the Convention. Under the present law it would seem that exemplary damages would be unavailable because of the cause of action test. If our recommendations were implemented, the availability of punitive damages would presumably turn on the consistency test.

⁶²⁶ English judicial statements that an action for damages for breach of directly effective provisions of Community law constitutes, in English law, an action for breach of statutory duty, include those of Lord Diplock in *Garden Cottages Foods Ltd v Milk Marketing Board* [1984] AC 130. And recently, in *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)*, *The Times* 11 September 1997 (QB, Divisional Court) the Divisional Court characterised the action for damages against a Member State, under the conditions formulated by the European Court of Justice in *C-6 & 9/90 Francovich & Bonifaci v Italy* [1991] ECR I-5357 and *C-46 & 48/93 Brasserie du Pecheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd* [1996] QB 404 (ECJ).

view that such an award would be consistent with the policy of the European Communities Act 1972. That is, the cause of action would be a tort, but it would also be a wrong 'arising under an Act' (the European Communities Act 1972) and so the court would be required, by clause 3(4)(b) of our Bill,⁶²⁷ to consider whether such an award would be consistent with the policy of that Act.⁶²⁸

- 1.68 It is therefore the consistency test which provides the primary means for ensuring that our Bill conforms with Community law, in relation to this category of wrong. The 1972 Act was intended to bring national law into line with Community law in the United Kingdom,⁶²⁹ or to provide facilities for doing so.⁶³⁰ In our view, it does not unduly strain the consistency test⁶³¹ to say that it cannot be consistent with that policy for punitive damages to be available under our Act for a wrong which arises under the 1972 Act, if such an award would be inconsistent with Community law.
- 1.69 We would not seek to provide a definitive answer here to the question of whether an award of punitive damages would, or would not, be consistent with Community law. The arguments seem finely balanced. On the one hand, the Divisional Court in *R v Secretary of State for Transport, ex p Factortame Ltd (No 5)*⁶³² was hostile to the notion of punitive damages being awarded for breach of Community law. It stressed that the United Kingdom is almost unique amongst Member States in recognising a civil remedy of punitive damages, and that, as a result, it would detract from attempts to achieve 'uniformity' in the remedies available for wrongs across the Community, if English law awarded punitive damages. On the other hand, Community law requires national courts not to discriminate against claims that are founded on Community law as compared with claims founded on domestic law.⁶³³ It may be argued that, in the absence of clear indications to the contrary in the 1972 Act, or in specific Community legislation, or in general principles of Community law, punitive damages should be available (provided the other criteria in our Bill are satisfied).
- 1.70 Distinct from these types of 'Community law wrong' are wrongs which are expressly created by a national statute in circumstances where Community law

⁶²⁷ Clause 3(5) has the effect that, if a 'tort' is also a 'wrong arising under an Act', the courts must apply the 'consistency test' in clause 3(4)(b) to the tort.

⁶²⁸ English courts could take the view that Community law wrongs are *sui generis* wrongs, deriving from the 1972 Act, and not 'torts'. But they would still be 'wrongs arising under an Act' under our Bill. Similarly, we think that even if the relevant tort is, for example, misfeasance in a public office rather than breach of statutory duty, the tort can still be linked back for its operative force to the European Communities Act 1972. It is therefore a 'wrong arising under an Act' under our Bill. If this were not so, and punitive damages were thought to be inconsistent with Community law, the courts would need to refuse punitive damages under the 'safety-valve' discretion preserved in clause 3 of our Bill.

⁶²⁹ Section 2(1) has the effect that directly effective principles of Community law are, without more, available to be applied and enforced in national courts; section 2(4) has the effect that those directly effective principles take precedence over conflicting rules of national law.

⁶³⁰ Section 2(2) confers powers on Ministers to make subordinate legislation solely for the purpose of implementing the United Kingdom's Community law obligations.

⁶³¹ As embodied in clause 3(4)(b) of the draft Bill.

⁶³² *The Times* 11 September 1997.

⁶³³ See paras 4.52-4.55 above.

requires a wrong to exist. Many of these statutes are enacted in order to implement Community law.⁶³⁴ Others may pre-date the relevant Community provisions, but in fact be the means by which Community law is implemented (if at all). The effect of our proposals is that punitive damages will be available for such wrongs, provided that such an award is consistent with the policy of the Act.⁶³⁵ Where such an Act pre-dates the relevant Community law, it will be more difficult to conclude that it would be inconsistent with the policy of *that* statute to award punitive damages even though to do so would infringe the relevant Community law. Nevertheless, even in this situation the courts will still be likely (and perhaps obliged) to construe and apply the particular Act in question, as well as the consistency test under our Act, so as to conform, so far as possible, with the requirements of Community law. We suggest that it would generally be open to them to find that the consistency test is not satisfied, and thus that punitive damages are unavailable under our Act, if to award them would breach Community law.⁶³⁶

(v) *Why exclude breach of contract?*

1.71 In the consultation paper, we provisionally recommended that there ought to be no reform of the present law whereby exemplary damages are not available for breach of contract.⁶³⁷ A majority of consultees supported that provisional view, which we now confirm as a final recommendation.

1.72 A range of reasons cumulatively lead to that recommendation. First, exemplary damages have never been awarded for breach of contract. Second, contract primarily involves pecuniary, rather than non-pecuniary, losses; in contrast, the torts for which exemplary damages are most commonly awarded, and are likely to continue to be most commonly awarded, usually give rise to claims for non-pecuniary losses. Thirdly, the need for certainty is perceived to be greater in relation to contract than tort and, arguably, there is therefore less scope for the sort of discretion which the courts must have in determining the availability and quantum of exemplary damages. Fourthly, a contract is a private arrangement in which parties negotiate rights and duties, whereas the duties which obtain under the law of tort are imposed by law; it can accordingly be argued that the notion of state punishment is more readily applicable to the latter than to the former. Fifthly, the doctrine of efficient breach dictates that contracting parties should have available the option of breaking the contract and paying compensatory damages, if they are able to find a more remunerative use for the subject matter of

⁶³⁴ See, for example, the Consumer Protection Act 1987, which implements the Product Liability Directive, and, indeed, expressly states that it is so doing.

⁶³⁵ See paras 5.57-5.65 and recommendation (19)(b) above.

⁶³⁶ Cf if the statute in question expressly provides for a punitive remedy. If courts considered that it would be contrary to Community law to award punitive damages, but they were unable to use 'failure to satisfy the consistency test' as the reason for refusing to award them, the courts would need to refuse punitive damages under the 'safety-valve discretion' which is preserved by clause 3 of our draft Bill, and discussed in paras 5.118-5.119 below. See also n 84, above.

⁶³⁷ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 6.21 and 8.11.

the promise. To award exemplary damages would tend to discourage efficient breach.

- 1.73 A counter-argument to our approach is that the potential for concurrent liability⁶³⁸ means that it would be anomalous and odd to allow punitive damages for a tort (or equitable wrong) which arises on the same facts as a breach of contract, while denying the availability of such damages in an action for the breach of contract. But the acceptance of concurrent liability does not seek to deny that the bases of the causes of action in contract and tort are different. And the recognition of concurrent liability can be presented as supporting, rather than undermining, our recommendation, in that there is now no impediment to a plaintiff claiming damages for *both* breach of contract and a tort (and an equitable wrong) and then electing to take judgment on the cause of action most favourable to him or her. The prospects of plaintiffs being denied punitive damages merely because they have incorrectly pleaded their case as one for breach of contract rather than tort (or, for example, breach of fiduciary duty) are therefore significantly reduced.

(vi) *Why exclude damages under an undertaking in damages?*

- 1.74 The device of an undertaking in damages is presently used in different contexts, where it is required to perform rather different purposes.⁶³⁹ This makes it far from easy to resolve the question, should it be possible for a court to make an award of exemplary damages pursuant to an undertaking? Two views can be identified.
- 1.75 One view is that it is very surprising that exemplary damages have ever been thought to be awardable under an undertaking.⁶⁴⁰ The purpose of an undertaking, on this view, is to ensure that if a court wrongly grants interlocutory relief, the financial or other detriment that is suffered by the defendant as a result of the issuing of the relief can be adequately compensated. If such compensation were unavailable, the awarding of interim relief would be severely impeded by concerns that unrepaired and unjustified harm might be caused to the defendant.⁶⁴¹ On this view, the undertaking enforced is typically one to indemnify the defendant, in the event of an interlocutory injunction subsequently being discharged, for the loss he

⁶³⁸ In *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 the House of Lords authoritatively accepted that there can be concurrent liability for breach of a contractual duty of care and the tort of negligence causing pure economic loss. Cf *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91.

⁶³⁹ The multiple purposes of undertakings in damages have been recognised in the helpful article by A Zuckerman, "The Undertaking in Damages - Substantive and Procedural Dimensions" [1994] CLJ 546. The distinction which we draw between the two conceptions of an undertaking in damages is close to, but not exactly the same as, the distinction which Zuckerman draws between the undertaking as (i) a protection for 'substantive rights' of defendants (pp 548-555) and (ii) a protection for 'procedural rights' of defendants (pp 555-566).

⁶⁴⁰ For recent judicial doubts, see *Berkeley Administration Inc v McClelland* 18 February 1994 (unreported, CA), per Hobhouse LJ, cited in S Gee, *Mareva Injunctions and Anton Piller Relief* (3rd ed, 1995) p 132.

⁶⁴¹ See, for example, *Hoffman-La Roche v Trade Secretary* [1975] AC 295, 361A-C, per Lord Diplock. See also the general accounts of undertakings in damages in, in particular, Spry, *Equitable Remedies* (4th ed, 1990) pp 472-478 and Appendix A, and S Gee, *Mareva Injunctions and Anton Piller Relief* (3rd ed, 1995) ch 9.

or she has suffered as a result of being restrained from doing what he or she could otherwise have done. The claim to 'damages' is really a claim to payment of an agreed sum, the measure of which is the defendant's loss; the 'damages' are not available for the breach of any duty in the undertaking, contractual or otherwise. By definition an 'indemnity' will only extend *to losses* suffered by the indemnified;⁶⁴² the use of an undertaking for the purposes of *punishment* is, on this reasoning, contrary to principle.⁶⁴³

1.76 A different view is evident from two authorities to which we have already referred.⁶⁴⁴ This is that an undertaking in damages is validly viewed as a means of responding to reprehensible behaviour arising in connection with the obtaining or execution of interlocutory injunctions or related orders - such as *Anton Piller* orders and *Mareva* injunctions.⁶⁴⁵

1.77 In our view the better analysis of the role of an undertaking is the first. This does not mean that we do not consider that the aims which are advanced by the second conception, particularly the protection of what Zuckerman has called 'procedural rights',⁶⁴⁶ are not legitimate aims.⁶⁴⁷ It simply means that a liability (if any) to exemplary or punitive damages in these situations⁶⁴⁸ is better analysed as arising from a civil wrong - especially a tort. The forms of reprehensible conduct which were alleged to found claims to exemplary damages in the two modern cases in which such claims were made and contemplated (but not upheld on the facts) certainly appear to be analogous to torts. And if analysed carefully, they may, or

⁶⁴² The 'usual form' of an undertaking in damages is worded in terms which indicate that its sole purpose is to operate by way of an *indemnity*. This has also been noted by S Gee in *Mareva Injunctions and Anton Piller Relief* (3rd ed, 1995) p 132.

⁶⁴³ It is theoretically possible that a court could require a plaintiff seeking interlocutory relief to undertake to pay what amount to 'punitive damages', should it subsequently appear that he or she has acted in a reprehensible manner, either in the course of obtaining the interlocutory relief, or in the course of its execution. In this case the 'agreed sum' would be an 'agreed punitive sum'. We note, however, that courts refuse to enforce 'penalty clauses' payable by one party to a contract on breach.

⁶⁴⁴ See *Digital Corporation v Darkcrest Ltd* [1984] Ch 512; *Columbia Pictures Inc v Robinson* [1987] 1 Ch 87, discussed at para 4.27 above.

⁶⁴⁵ Thus it appears that in *Digital Corporation v Darkcrest Ltd* [1984] Ch 512, exemplary damages had earlier been sought pursuant to an undertaking in damages on the ground that the *Anton Piller* order had been sought and obtained for an ulterior or improper object. The claims to damages immediately before Falconer J were based on one or more torts (including abuse of process), but Falconer J indicated that the plaintiffs were claiming no more than what they could have obtained pursuant to the undertaking. In *Columbia Pictures Inc v Robinson* [1987] 1 Ch 87, Scott J considered that exemplary damages could be claimed for the excessive and oppressive manner in which the *Anton Piller* order was executed - in particular by removing property, the removal of which was not authorised by the order.

⁶⁴⁶ See para 5.76, n 95, above.

⁶⁴⁷ We note the recommendation of the Lord Chancellor's Department in *Anton Piller Orders, A Consultation Paper* (1992), that a summary remedy should be made available to the courts, which includes the power to award a punitive sum if a plaintiff has behaved in a reprehensible manner in the course of obtaining or executing an *Anton Piller* order: para 3.13.

⁶⁴⁸ The same reasoning applies to compensation.

else should, actually constitute independent torts.⁶⁴⁹ Presenting such claims as claims under an undertaking is an invitation to loose analysis and tends to discourage the legitimate development of tort law.⁶⁵⁰ Denying punitive damages here should not lead to any significant ‘gaps’ in the law on punitive damages, precisely because a tort-based claim will be available or else could (and should, if necessary) be developed.⁶⁵¹ We have accordingly recommended⁶⁵² that punitive damages should not be awardable under an undertaking in damages.

(c) Major limitations on the expansion

- 1.78 Our central recommendations extend the existing scope of the law on punitive damages in two major respects. The first ‘expansion’ involves the replacement of the categories test with a general test of ‘deliberate and outrageous disregard of the plaintiff’s rights’.⁶⁵³ The second involves an extension of the category of civil wrongs in respect of which punitive damages are awardable significantly beyond the present scope of the cause of action test. Punitive damages will be awardable in respect of any tort, (most) equitable wrongs, and civil wrongs which arise under statutes where such an award would be consistent with the policy of the statute in question.
- 1.79 Nevertheless we recognise the need to constrain this expansion, in line with some of the arguments advanced against punitive damages, and so as to ensure that proper concern is shown for, *inter alia*, the efficient administration of justice and the risk of unfairness to defendants.
- 1.80 The restrictions which we propose will take several different forms; we explain each in detail below:
- giving the task of deciding the availability and assessment of punitive damages to judges only, and not to juries
 - making the availability of punitive damages conditional on the other remedies which the court awards being inadequate to punish and deter the defendant

⁶⁴⁹ These could include: torts committed on the bringing of an action out of malice or for some other ulterior purpose (especially abuse of process), or on the breach of the terms of an *Anton Piller* order in the course of executing it (trespass to land or property, or negligence).

⁶⁵⁰ See the restrictive approach taken to the tort of abuse of process in *Digital Equipment v Darkcrest Ltd* [1984] Ch 512.

⁶⁵¹ An alternative would be a specially-created remedy which is directed at abuses associated with certain forms of interlocutory relief: see, in particular, the Lord Chancellor’s Department, *Anton Piller Orders, A Consultation Paper* (1992), referred to at para 5.77, n 103 above.

⁶⁵² See para 5.44, recommendation (19), above.

⁶⁵³ It should be emphasised, however, that *if*, under the present law, Lord Devlin’s first category can include ‘innocent’ wrongdoing, our ‘expansionist’ model is to that limited extent more restrictive than the present law. See para 4.7 above.

- requiring the court to refuse to award punitive damages where the defendant has been convicted of a criminal offence involving the conduct for which punitive damages are claimed, unless there are exceptional reasons why an additional award of punitive damages is still necessary and appropriate
- requiring the court to take into account the fact that other sanctions may already have been imposed (for example, in disciplinary proceedings) in respect of the conduct for which punitive damages are claimed, which make an additional award of punitive damages unnecessary or otherwise inappropriate
- preserving a residual, ‘safety-valve’ discretion to refuse to make a punitive damages award in exceptional cases, even where the tests of availability are otherwise satisfied
- statutory structuring of the court’s assessment of awards, by means of overriding principles of ‘moderation’ and ‘proportionality’, and by a non-exhaustive list of factors which are relevant to such assessments

(i) *Determination of availability, and assessment, by judges not juries*

- 1.81 We recommend that the availability and assessment of punitive damages should always be decided by the trial judge and never by a jury.⁶⁵⁴ Where trial is otherwise by jury, and punitive damages have been pleaded, the jury will continue to determine liability⁶⁵⁵ and to assess compensatory damages⁶⁵⁶ and restitutionary damages. However, the judge would then decide whether punitive damages are available,⁶⁵⁷ and would assess the quantum of those damages. We would envisage that the judge would direct the jury that, whilst liability and the amount of compensation (or restitution) are matters for them, the questions as to whether, exceptionally, punitive damages should be awarded, and their quantum, are matters for the judge alone to decide.
- 1.82 This recommendation will mean that, where trial is at present by judge and jury, and punitive damages are claimed, the jury’s role will be reduced.⁶⁵⁸ Nevertheless, we consider that this reallocation of responsibility is justified in principle, and essential if ‘consistent’, ‘moderate’ and ‘proportionate’ awards are to be a reality. Cases have demonstrated a disturbing arbitrariness and excess in the sums

⁶⁵⁴ In *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, para 6.33, we provisionally rejected the option of judges taking over the role of juries in assessing damages. But the majority of consultees disagreed with that provisional view. See also *Damages for Personal Injury: Non-Pecuniary Loss* (1995) Consultation Paper No 140, paras 4.82-4.104, especially para 4.84.

⁶⁵⁵ ‘Liability’ here refers to the issue of whether a relevant civil wrong has been committed.

⁶⁵⁶ This includes damages for mental distress.

⁶⁵⁷ See, in particular, the test of ‘deliberate and outrageous disregard of the plaintiff’s rights’, at paras 5.46-5.48 above.

⁶⁵⁸ An incidental effect of our proposals may be that there will be fewer applications for jury trials in civil cases.

awarded as damages (including exemplary damages) to plaintiffs by juries.⁶⁵⁹ As Lord Woolf MR said of awards for the torts of false imprisonment and malicious prosecution made against the police:

We have ... been referred to a number of cases in which juries have made awards, both cases which are under appeal and cases which are not and the variations in the range of figures which are covered is striking. The variations disclose no logical pattern ...⁶⁶⁰

Similarly, the Neill Committee's *Report on Practice and Procedure in Defamation*,⁶⁶¹ which proposed the *abolition* of exemplary damages for the tort of defamation, was heavily influenced by the arbitrariness of the sanction,⁶⁶² in the hands of juries:

... the decision whether to award [exemplary] damages and, if so, what the size of the award should be is left to a lay jury with no guidance on quantum and inevitably no possibility of a decision in accordance with any kind of tariff. This at a time when, in sentencing policy generally, consistency and predictability are goals constantly striven for both by means of statutory intervention and by way of judicial sentencing conferences and seminars.⁶⁶³

- 1.83 It could be argued that the change which we propose is now unnecessary, because of recent common law developments dealing with jury damages awards. We have already discussed at length the recent line of cases which (i) permit and state more detailed guidance for juries on how to assess exemplary damages, and (ii) extend appellate court control of jury-assessed awards.⁶⁶⁴ The argument may be made that these developments substantially reduce the risks of 'arbitrariness' and 'excess' which provide a primary justification for judicial, rather than jury, assessment.
- 1.84 That argument is, so far, contradicted by experiences after *John v MGN Ltd*⁶⁶⁵ in libel cases. Even where a judge has specifically followed the recommendations of the Court of Appeal in that case, very substantial damages awards for libel have still been made.⁶⁶⁶

⁶⁵⁹ One argument provided by the Ontario Law Reform Commission in favour of retaining the jury's role in assessing exemplary damages was that there was no evidence that Ontario juries had made arbitrary and excessive awards: *Report on Exemplary Damages* (1991) p 49.

⁶⁶⁰ *Thompson v MPC* [1997] 3 WLR 403, 415D-E.

⁶⁶¹ Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991).

⁶⁶² Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) ch IV, para 11: "[a]t least in criminal proceedings plaintiffs would be ... subject to far less arbitrary sanctions".

⁶⁶³ Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) ch IV, para 8.

⁶⁶⁴ The main cases are: *Rantzen v MGN Ltd* [1994] QB 670; *John v MGN Ltd* [1997] QB 586; and *Thompson v MPC* [1997] 3 WLR 403. They have been discussed at length in Part IV, paras 4.61-4.67 and 4.86-4.98 above.

⁶⁶⁵ [1997] QB 586.

⁶⁶⁶ J Scott Bayfield, *The Lawyer*, 29 April 1997, p 18, discussing a case decided last March in which three plaintiffs were awarded £250,000 (Richard Wilmot Smith QC), £100,000 (his

- 1.85 But even if, in the long-term, recent developments have the effect intended, we remain convinced that universal *judicial* assessment is the best way forward. The ‘remedies’ offered by recent cases are palliatives, and not cures, for defects in the process of jury assessment. In particular, it remains a fundamental principle, unaffected by recent developments, that a jury gives no reasons for its decision. This has two unfortunate implications. The first is to inhibit *ex post facto* appellate control of jury awards in particular cases, even though the criteria for appellate court intervention are less strict now than was formerly the case, following *Rantzen v MGN Ltd.*⁶⁶⁷ The second is that unreasoned awards are much less likely to be consistent, moderate and proportionate awards; yet all three qualities are essential if punitive damages are to be a legitimate legal remedy. Accordingly, even if it could be shown that jury awards had become consistent, moderate and proportionate, this outcome would be largely a matter of chance.
- 1.86 Unlike juries, judges *are* expected, and generally required, to give reasons for their decisions. Many of the limits which we impose on our expansion of the availability of punitive damages can be fully effective only on the assumption that the body with responsibility for deciding claims to punitive damages gives reasons. As a result, and because we take very seriously indeed the need to constrain our ‘expansion’, that decision-maker should be a judge. Previous decisions can only be truly useful to future courts and to future litigants, because of the diversity of circumstances relevant to awards of punitive damages, if they are reasoned decisions. A tariff is realistic only on the assumption that there are reasoned decisions out of which it can be constructed. The flexible concepts used in our tests of availability (for example, ‘deliberate and outrageous disregard of the plaintiff’s rights’) can be given content only if decision-makers can and do explain what, in the case before them, made the defendant’s conduct ‘outrageous’. The ‘last resort’ discretion can only function as it should if the court makes known what very exceptional reason led it to refuse to award punitive damages, even though all of the tests of availability were satisfied and a substantial award was *prima facie* merited. The discretion as to the amount of punitive damages can only be ‘structured’ by the principles of moderation and proportionality, and by the statutory list of relevant factors, if the award not only takes into account those principles and factors, but is also justified by reference to them. And if the court takes into account a ‘relevant factor’ not specified in the (non-exhaustive) statutory list, it must at the very least specify what that factor was.
- 1.87 We therefore consider that the arguments of principle for judicial determination of the availability and assessment of punitive awards are very strong. Nevertheless, there are two arguments that the functional ‘split’ which we propose between jury and judge (with the jury continuing to decide on liability and the quantum of compensation and restitution) is an unworkable one.

wife), and £80,000 (Richard Kirby), respectively. She suggests that libel damages awards “remain as unpredictable as ever, despite legislative and judicial attempts to bring them into line with personal injury awards”; her explanation is the “source of the award”: “[w]hen juries decide the amount of damages, they are likely [to] give verdicts which may run contrary to the guidelines, with or without evidence from an expert witness”.

⁶⁶⁷ [1994] QB 670. See paras 4.64 and 4.87-4.89 above.

- 1.88 The first argument is that it would be impossible in practice to prevent the jury from being influenced, when it assesses compensation, by facts which are relevant only to the availability and assessment of a punitive award, and which should not affect the level of any compensatory award. An appropriately worded direction to the jury, or an appropriate division in the arguments presented before the court, obviously cannot guarantee that this will not occur. Nevertheless, we believe that our 'last resort' test already offers a remedy for this problem. It would be open to a court which is faced with a quasi-punitive, jury-assessed 'compensatory' award, to conclude that this award alone was adequate to punish, deter and disapprove, or that a smaller award of punitive damages is necessary than would otherwise have been the case.
- 1.89 The second argument is that there are certain facts which the jury must have decided at the stage of determining whether a wrong has been committed, which are also relevant to the issues which the judge must decide, but which are *not apparent from the jury's verdict*, without more.⁶⁶⁸ This argument would be that since the judge cannot know what the jury decided, he does not have the factual basis before him on the basis of which he can decide whether punitive damages are available, and if so, what the appropriate sum should be.⁶⁶⁹ But a similar problem - of ascertaining the factual basis for sentencing from the jury's verdict on liability - arises in the context of the criminal law, and is not considered insurmountable. In that context it is entirely a matter for the discretion of the judge, where the jury's verdict is consistent with two or more possible factual bases, whether the jury is asked to indicate the factual basis on which they proceeded.⁶⁷⁰ Where the jury does not resolve the doubt,⁶⁷¹ the judge must always proceed, when sentencing an offender, on a basis of fact that is consistent with the jury's verdict. However, if more than one view of the facts could have founded the jury's verdict on 'liability', the judge is entitled to reach his own conclusion as to which of those views is the proper one, in the light of the evidence he has heard.⁶⁷² *Archbold* states:

⁶⁶⁸ This argument was raised by leading libel silks during the consultation process preparatory and subsequent to Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, in relation to proposals for a 'split' between liability and quantum in actions for defamation. The problem arises where a defendant unsuccessfully pleads justification. Even if he or she fails with the plea, and is liable for defamation, facts may have been established which will nevertheless serve to reduce the damages which he or she must pay (some of the charges may have been true) See *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 and Consultation Paper No 140, paras 4.98-4.100.

⁶⁶⁹ Strong objections were raised to one solution to this problem, discussed in Damages for Personal Injury: Non-Pecuniary Loss (1995) Consultation Paper No 140, para 4.99, which was that a judge should be entitled to ask the jury questions framed so as to elicit the jury's findings of fact in relation to the libel.

⁶⁷⁰ *R v Cawthorne* [1996] 2 Cr App R (S) 445, 450-451.

⁶⁷¹ In particular, if the jury is not asked to indicate the basis for its verdict, or though asked, refuses to do so.

⁶⁷² A recent illustration of this approach is provided by the Court of Appeal's decision in *R v Cawthorne* [1996] 2 Cr App R (S) 445. Where a defendant is charged with murder, and there is an alternative verdict of manslaughter open to the jury, there are often different bases on which they can have reached that alternative verdict (for example, unlawful killing without intent to kill or cause really serious injury; provocation; gross negligence). This was the case in *Cawthorne*. The jury's verdict of manslaughter was consistent with more than

If the verdict of the jury can be explained only on one view of the facts, that view must be adopted as the basis of the sentence, but if more than one view of the facts would be consistent with the verdict, the sentencer may form his own view in the light of the evidence, and pass sentence on that basis ...⁶⁷³

We anticipate that the civil courts, faced with a similar dilemma, could follow this approach.

- 1.90 We have therefore concluded that the availability and assessment of punitive damages should always be determined by a judge, and not a jury.
- 1.91 On the basis that the judiciary is to assess punitive damages, we support, *inter alia*, two judicial (or non-statutory) techniques for maximising consistency in assessments of punitive damages awards. These are techniques which, to a significant extent, mirror those employed by the Court of Appeal in *Thompson v MPC*⁶⁷⁴ in relation to assessments of both compensatory and exemplary damages for false imprisonment and malicious prosecution. The main difference is that, at present, those techniques have been thought necessary only in jury trials. We would support their application even if, as we suggest, only judges should determine the appropriate sum of punitive damages.
- 1.92 The first technique would involve judicial development of a tariff for punitive damages analogous to that for compensatory damages for personal injury and death. Once a tariff has emerged - as we anticipate that it is likely to, in time - the assessment of punitive damages might be no more unpredictable than the assessment of damages for, say, personal injury. The second technique would involve an attempt to structure judicial discretion through the promulgation of guideline judgments by the Court of Appeal. This is a technique that is used to secure greater consistency in the field of criminal sentencing. For example, the Court of Appeal might set out benchmark figures together with aggravating and mitigating factors. Such guidelines would serve to structure the court's discretion in a more sophisticated and flexible manner than could be achieved by any statutory test, and might cover matters such as:
- (1) the relationship, if any, between the harm suffered and the size of the award;

one view of the facts. The jury was asked to indicate the basis for its verdict, but it refused to do so. The judge sentenced the appellant on the facts as they appeared to him to be. Appealing against sentence, counsel for Mrs Cawthorne argued *inter alia*, that if a vital issue of fact had not been resolved, and could be resolved, it had to be resolved by the jury, not the judge; and that if the jury has not resolved the issue, the judge should proceed on the factual basis which is most favourable to the defendant. The Court of Appeal rejected these arguments. It was entirely for the judge to decide whether the jury should be asked to indicate the basis of its verdict. In many cases the judge would not wish to do so; indeed, there might be "grave dangers" in judges asking juries how they have reached particular verdicts: [1996] 2 Cr App R 445, 450. Where the jury had not resolved the issue of fact, the judge was entitled to sentence the accused on the basis of the facts as they appeared to him to be from the evidence he had heard: [1996] 2 Cr App R 445, 451.

⁶⁷³ *Archbold, Criminal Pleading, Evidence & Practice 1997*, para 5-9.

⁶⁷⁴ [1997] 3 WLR 403.

- (2) the relationship between (on the one hand) the principles of retribution and deterrence and (on the other) the size of awards;
- (3) the weight, if any, to be given to previous awards of punitive damages in similar circumstances.

It would, however, be for the courts to decide what form the tariff or guidelines might take.

1.93 One possible objection to the establishment of tariffs is that they produce an undue rigidity and lack of flexibility in assessments of punitive damages. It is quite true that the circumstances in which punitive damages will become awardable will be extremely varied, in particular because the court's attention is directed more to the nature of the defendant's actions than to the plaintiff's injury. Nevertheless, we do not accept that tariffs will lead to undue rigidity. The need for consistency between awards does place a limit on the degree of indeterminacy which can be tolerated in the assessment of individual awards. A tariff, in the form we envisage, would be developed by the courts and would not be merely the equivalent of a set of fixed awards (which are certainly productive of undue rigidity).⁶⁷⁵ Rather, it would take the form of a set of benchmark figures together with a range of aggravating and mitigating factors. In this way flexibility and sensitivity to the particular characteristics of an individual case will be substantially preserved.

1.94 We have considered, but reject, as we did in the Consultation Paper,⁶⁷⁶ three other techniques for limiting the size of punitive damages awards. Those (legislative) techniques are: statutory maxima, fixed awards and multiples (of compensatory damages). No such constraints exist on the assessment of exemplary or punitive damages in any major Commonwealth jurisdiction, although an increasing number of states in the United States of America have resorted to one or more of those devices, in an effort to curtail the massive awards which have been made there.

1.95 As regards statutory maxima, the majority of consultees were against their introduction, although strong arguments were marshalled in favour.⁶⁷⁷ We consider that the stronger arguments support the majority view. The first is that they are arguably unnecessary. Judges are less likely to make 'excessive' awards than juries, and we anticipate that a tariff system will develop which would operate to narrow judicial discretion and to constrain the size of awards in a more flexible fashion than would be possible under a system of one or several statutory maximum sums. The principle of 'moderation' should also offer some constraint on awards. The second argument is that any maxima are impractical. In particular, it would be extremely difficult to decide, in a non-arbitrary fashion, whether there should be one cap or several, and if several, whether they should be applied by reference to the type of wrongful behaviour or to the wrong that is in question. The third argument is that statutory maxima could lead to undesirable consequences. One is that the underlying purpose of making a

⁶⁷⁵ See para 5.95 below for our rejection of 'fixed awards'.

⁶⁷⁶ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 6.34-6.35.

⁶⁷⁷ One of these was that the setting of limits to punishment is assumed to be of value in the criminal sphere, and that there is therefore a strong *prima facie* case for capping exemplary damages.

punitive damages award would be frustrated in any case where the wrongdoer calculated that the profit which he or she would derive from the wrongdoing would exceed the statutory maximum sum. The aim of the award would be to punish the wrongdoer for such a calculation, yet statutory maxima facilitate just these sorts of calculation; they also prevent any possibility of punishment being made more severe, in a particular case, in order to 'frustrate' the calculations. Another is that maxima would 'look' bad in any case in which an award was made against the state: the state would appear to be seeking to limit its liability, which would tend to compromise the rationale for the availability of punitive awards in these cases. We therefore do not recommend that statutory maxima be imposed on punitive awards.

- 1.96 The arguments against the use of either fixed awards or multiples of compensatory damages are even stronger. At the level of principle, these are objectionable for two connected reasons. The first is that they lack flexibility - minimising or even eliminating the scope for judicial discretion. Yet such flexibility is a precondition of effective and fair awards. It is a precondition of 'effective' awards because flexibility enables an award to be tailored to the precise nature of the defendant's conduct, and so more closely to the extent of punishment, deterrence and disapproval which that conduct makes necessary. In contrast, fixed awards will almost inevitably either over- or under-punish. It is a precondition of a 'fair' award because fixed awards might, in some or even many cases, infringe the principle of 'moderation'. This is because a court would have to make an award of a certain sum, even if it exceeded the 'minimum necessary' to punish, deter and disapprove. The second objection is that 'multiples' penalise disproportionately harshly the wrongdoer who causes substantial loss; they also wrongly assume that there is a direct relationship of proportionality between the heinousness of the wrongdoing and the seriousness of the harm caused thereby, and that the loss caused is the only factor relevant to judgments of the heinousness of the wrongdoing. Finally, the choice and the use of fixed awards or multiples is essentially arbitrary. The choice is arbitrary because it is very difficult to decide, in any rational way, what should be the level of the fixed award, or what multiple or even multiples should be used. The use of fixed awards will become increasingly arbitrary, unless the fixed sums are constantly updated in order to take account of changing social factors and of inflation. We therefore do not recommend the adoption of fixed awards or multiples in the assessment of punitive damages.
- 1.97 For the avoidance of doubt, we would emphasise that our rejection of statutory 'fixed awards', 'maxima' and 'multiples' should not be taken to imply criticism of the very valuable formulation of 'guidance' by the Court of Appeal in the recent case of *Thompson v MPC*.⁶⁷⁸ This is for two main reasons. First, *Thompson v MPC* involves judicially-formulated 'guideline' 'ceilings', rather than absolute statutory limits to awards; secondly, to the extent that 'multiples' are used, they are merely to suggest a 'ceiling' for exemplary damages - that is, a maximum, rather than the always-appropriate sum.
- 1.98 As the *Thompson* ceilings are only 'guidelines', if a case was so exceptional as clearly to require a punitive damages award in excess of the 'ceiling', on the basis that such appalling conduct had not been anticipated at the time when that ceiling

⁶⁷⁸ [1997] 3 WLR 403. See paras 4.94-4.95 above.

was determined, the court could make that higher award. Moreover, because ceilings rather than ‘fixed awards’ are used, then even if the court feels itself to be constrained by the ceiling, it remains able to reflect the varying culpability of the defendant through an award which approaches, or falls some way short of, the ‘ceiling’. Nor can it be objected to the use of ‘ceilings’ that they in fact entail the crude technique of ‘multiple damages’ which we have so firmly rejected. For the ‘multiple’ which was suggested in *Thompson* - three times compensatory damages - did not entail that, thereafter, any exemplary award would have to equal three times compensatory damages. Rather, the ‘multiple’ was being used to calculate a guideline ceiling. The court is never compelled to award that multiple, but should award a sum, which is usually less than that maximum, which is appropriate to the culpability of the wrongdoer. The ‘ceiling’ sum would be awarded in the very worst cases; cases falling short thereof would merit lesser sums.

(ii) *A ‘last resort’ remedy (1): remedies ‘available’ to the court*

1.99 In our view, punitive damages must be a ‘last resort’ remedy. This proposition has several implications. The first, which we consider in this section, is that a court should not award punitive damages unless it believes that the other remedies which are available to it are inadequate to punish the defendant for his conduct, and to deter him and others from similar conduct (what we call the ‘if, but only if’ test).⁶⁷⁹ In effect we adopt, but adapt, the ‘if, but only if’ test which is currently used at common law in order to determine whether exemplary damages should be available.⁶⁸⁰ All of the major Commonwealth jurisdictions appear to apply this ‘test’,⁶⁸¹ notwithstanding that they have otherwise refused to follow the decision in *Rookes v Barnard*,⁶⁸² in which it was first formulated.

⁶⁷⁹ In this paragraph, and in the rest of this report, we use the phrase ‘punish and deter’ as a shorthand for the aims of an award of punitive damages. Previous judicial formulations of the ‘if, but only if’ test have referred, in addition, to ‘disapproval’ of the defendant’s conduct. We agree that this is an important aim of punitive damages: see para 4.1 above. However, it proved excessively difficult, and unnecessary, to draft a statutory provision which could state the test in its wider form (referring to punishing the defendant, deterring him and others, and expressing disapproval of his conduct). If a court considers that an award of punitive damages is necessary to punish the defendant (or in addition) to deter him and others from similar conduct, it will, by that award, necessarily also be expressing ‘disapproval’ of the defendant’s conduct.

⁶⁸⁰ See para 4.31-4.33 above.

⁶⁸¹ The test forms part of Canadian law: see *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129, 186 (SCC). It is also “reasonably clear” that the test forms part of Australian law, after its endorsement in *Backwell v AAA* (1996) Aust Torts Reps 81-387 (Vic, CA) and *Commonwealth v Murray* (1988) Aust Torts Reps 80-207 (NSW, CA), and the dicta of French J in *Musca v Astle Corporation Pty Ltd* (1988) 80 ALR 251, 269 (FCA, GD): M Tilbury, “Exemplary Damages in Medical Negligence” (1996) 4 Tort L Rev 167, 169-70. See also H Luntz, *Assessment of Damages for Personal Injury and Death* (3rd ed, 1990) para 1.7.9. Although it will often be difficult to apply the test in New Zealand, because of the state compensation scheme, the test nevertheless forms part of the law in that jurisdiction: see eg *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301-302, per Cooke P, and *Auckland City Council v Blundell* [1986] 1 NZLR 732, 738, per Cooke P. The Ontario Law Reform Commission considered that the test was “sound in principle”, but decided not to apply it for practical reasons: *Report on Exemplary Damages* (1991) pp 53-54. The concern of the majority was that the test would not constitute a significant limit on the availability of exemplary damages, because of the availability of insurance against liability to pay compensation. If, in practice, most awards

- 1.100 The existing ‘if, but only if’ test, as formulated in *Rookes v Barnard*, is based on the idea that even a compensatory award may have an incidental ‘punitive’ effect. To the extent that this is so, the justification for an award of punitive damages is correspondingly reduced or even eliminated. But clearly other remedies which a court may award in respect of a wrong (other than punitive damages) may have similar incidental effects. A good example is an award of a restitutionary remedy.⁶⁸³ If punitive damages are truly to be made a remedy of ‘last resort’, a court must be entitled to take into account the effect of *any* remedy which it awards, in judging whether an additional sum of punitive damages is necessary to punish and deter.⁶⁸⁴
- 1.101 It is appropriate at this point to emphasise that a minimum condition of the availability of an award of punitive damages is that the court must want to punish the defendant for his conduct. It should also be a sufficient condition, in the sense that the court need only want to punish the defendant (and need not want to do anything else). But we recognise that the court may also, in punishing the defendant, properly seek to deter the defendant and others from similar conduct. Our recommendations⁶⁸⁵ clarifying that an object of punishment may be to deter the defendant and others from similar conduct are intended to deal with this issue.
- 1.102 The basic question for the judge will therefore always be, “Are the remedies which are available to me inadequate to punish and deter?”. If the plaintiff has only established an entitlement to compensation, the judge should proceed to ask himself whether the compensation which he is minded to award will be inadequate to punish and deter. If the plaintiff has only established an entitlement to restitution, the judge should proceed to ask himself whether the restitution which he is minded to award will be inadequate to punish and deter. And if the plaintiff has established an entitlement to both compensation *and* restitution - and it is a controversial question whether there can ever be an entitlement to both, as we have discussed in Part III - the judge should proceed to ask himself whether the total sum which he is minded to award as compensation and restitution is inadequate to punish and deter.

of compensation were paid by an insurer, “any punitive effect otherwise inherent in such a compensatory award would be rendered ineffective” (pp 53-54). We consider, however, that a last resort test which makes *any* remedy - and in particular the availability of restitutionary damages - relevant to the question ‘is a punitive award required?’, can have a substantial role in limiting the availability of exemplary damages.

⁶⁸² [1964] AC 1129.

⁶⁸³ Other remedies might include an injunction, or delivery up for destruction (see *Mergenthaler Linotype Co v Intertype Co Ltd* (1926) 43 RPC 381).

⁶⁸⁴ Notwithstanding the Ontario Law Reform Commission views on the relevance of compensatory damages to the availability and/or quantum of punitive damages (see para 5.99, n 137 above), it recognised that restitutionary remedies should be taken into account: *Report on Exemplary Damages* (1991) pp 73-74.

⁶⁸⁵ See para 5.44, recommendations (20) and (22), and draft Bill, clauses 3(10) and 5(3) above.

(iii) *A 'last resort' remedy (2): the relevance of conviction in criminal proceedings*

1.103 The principle that punitive damages must be a 'last resort' remedy has other implications. A defendant may already have been convicted by a criminal court of an offence involving the conduct for which punitive damages are claimed and punishment may have been exacted from him or her. It would be unacceptable if a defendant could be punished twice over for the same conduct - once by the criminal law and once by the civil law through an award of punitive damages. The more difficult question is how double punishment can best be avoided, where punitive damages are claimed in a civil court. This raises three issues:

- (1) how should we identify the conduct which has already been the subject of criminal proceedings, for which punitive damages should not also be available?
- (2) is the mere fact of 'conviction' in a criminal court sufficient to bar an award of punitive damages, or should only certain types of punishment upon conviction have this effect?
- (3) should a punitive damages award, directed at 'identical' conduct that has already given rise to a conviction in a criminal court, automatically be barred by the fact of that conviction, or should the court only have a discretion to bar any award on this ground?

What concept of 'identity' of conduct or wrongdoing do we use?

1.104 There is an obvious difficulty in formulating an adequate concept of conduct that is 'identical' for the purposes of the 'double punishment' concern. In particular, one cannot use 'same offence' or 'same wrong'. As the concept is not for use solely within the criminal law or the civil law, respectively, but rather across the boundary of the criminal and civil law, one cannot employ terms which are unique to, or have particular (different) meanings within, each sphere.

1.105 A better concept would refer instead to a common factual basis. This means that conduct is the 'same' where the facts which are alleged in support of the claim to punitive damages are substantially the same as those on the basis of which the defendant was convicted of a criminal offence. The draft Bill uses the phrase "an offence involving the conduct concerned". We are confident that this will be construed and applied sensibly, and not restrictively.⁶⁸⁶

⁶⁸⁶ We are particularly concerned to avoid the conclusion that the offence for which the defendant was convicted does not 'involve' the 'conduct concerned' (ie that which supports the claim to punitive damages), simply because the plaintiff is able to prove in civil proceedings some additional fact which had not been sufficiently proved in the criminal proceedings, and which entails that the defendant's conduct was more culpable than it appeared to the criminal court which convicted him or her of the offence. For example, the defendant may have been convicted of the offence of inflicting grievous bodily harm (s 20 of the Offences Against the Person Act 1861), but a civil court may be satisfied that the defendant in fact intended to cause the plaintiff grievous bodily harm - a mental state which could, if proved in the criminal proceedings, have led to conviction for the rather more serious offence under s 18 of the Offences Against the Person Act 1861.

Are we concerned about 'conviction' or particular punishments?

- 1.106 A criminal court is likely to have a large range of possible methods of dealing with a particular offender, following his or her conviction for an offence. They may include an absolute or conditional discharge, binding over, a community service order, a fine or a prison sentence. In our view, the discretionary or absolute bar to an award of punitive damages must apply whatever method of disposition has been selected by the criminal court. The important point should be that the defendant has been convicted for the conduct which is alleged to justify an award of punitive damages.
- 1.107 Some may argue that where a defendant has been absolutely discharged following conviction, there is no risk that he or she will be 'doubly punished' if he or she is subsequently held liable to pay punitive damages for the same conduct. And, so the argument would run, if he or she will not be doubly punished, there should be no bar to an award of punitive damages. We disagree. As we shall see, the justification for a bar to a claim to punitive damages following a criminal conviction is not just that it avoids the risk of 'double punishment'; it is also that a civil court should not generally be permitted to reopen the question, which has been answered by the criminal court, of what is an appropriate response to the offender/wrongdoer's conduct. This is an argument for respecting the criminal court's choice of response, regardless of its nature.
- 1.108 We would point out that, in any case, this point is never likely to be problematic in practice. An absolute discharge will usually reflect the triviality of the offence, or the low culpability of the offender, or that he or she had good reason (not amounting to a legal defence) for behaving as he or she did. In those circumstances it will be difficult, if not impossible, for a plaintiff successfully to demonstrate that the same conduct showed a 'deliberate and outrageous disregard' of his or her rights. And if he or she cannot do so, no award of punitive damages can be made.
- 1.109 One practical problem is that section 1C(1) of the Powers of Criminal Courts Act 1973 provides that, subject to specified exceptions, where an offender has been absolutely or conditionally discharged following conviction for an offence:
- ... [the] conviction ... shall be deemed not to be a conviction for any purpose ...
- 1.110 Without more, s1C(1) could mean that any principle in our draft Bill which is expressed to apply where the defendant has 'been convicted of a criminal offence' would not apply if the defendant was absolutely or conditionally discharged. This would be unfortunate. We have therefore recommended⁶⁸⁷ that section 1C of the Powers of Criminal Courts Act 1973 must be ignored by a court when it applies the principle stated in recommendation (21)(a), which we explain below, that punitive damages must not usually be awarded if, at any time before the decision falls to be made, the defendant has been convicted of an offence involving the conduct for which the punitive damages are claimed.

⁶⁸⁷ See para 5.44, recommendation (21)(a), above.

A discretionary or an absolute bar to punitive damages awards?

- 1.111 Should a court ever be entitled to assess whether any prior criminal punishment in respect of the 'same' conduct is 'adequate' to punish and deter, and if it considers that it is not, be entitled to make a punitive damages award in order to make up the 'shortfall'? Although this approach purports to avoid the problem of double punishment, we have serious reservations about its practicability, as well as its justification as a matter of principle. For wherever a defendant has already been convicted and punishment (or no punishment) has been exacted by the criminal courts, there are a number of cogent reasons why this should be treated as a complete and automatic bar to any punitive award in respect of the same conduct. In other words, there are strong reasons why a civil court should not even be permitted to address the question of whether the criminal punishment is adequate. The most important of these reasons are:
- (1) It is very difficult accurately to assess what level of punitive damages is the 'equivalent' of the various forms and levels of criminal punishment; such an estimate would, however, be required in every case, in order to see if a 'top up' punitive award should be awarded by the civil law.
 - (2) It would arguably challenge the authority and integrity of criminal courts, if civil courts were to make 'topping up' punitive awards; the implication would be that the criminal courts had wrongly judged what was necessary in order to punish and deter. Nor can it be desirable to permit victims, who are dissatisfied with what they consider are 'lenient' criminal punishments, the opportunity to obtain more severe punishments by means of the civil law. If they are dissatisfied, then an appeal within the criminal court structure is the appropriate route - rather than what amounts to an appeal by the sidewind of the civil justice system.
 - (3) Criminal courts are likely to engage in a far more extensive, and possibly expert, assessment of an offender's circumstances; it would be dangerous for a civil court to make a judgment about the sufficiency of any criminal punishment, on the basis of different and less complete information.
- 1.112 Nevertheless, we have come to the conclusion that it would be inappropriate to advocate a complete and automatic bar; rather a court should have a discretion to refuse to consider or make an award of punitive damages, where a defendant has already been convicted by a criminal court. 'Hard' cases could well arise, in which it might, exceptionally, be appropriate for a court to proceed to the 'assessment' stage. For example, a newspaper may publish an article which is both defamatory and in contempt of court. It does so in the knowledge that its circulation increase is so large as to more than exceed the damages that it might have to pay. It cannot be right for the court to refuse to award punitive damages merely because there has been a fine for contempt of court. Yet this is what, on a straightforward interpretation and application, the 'same conduct' concept seems to require.
- 1.113 Accordingly, whether a claim to punitive damages is unavailable because of prior criminal punishment in respect of the same conduct ought to be a matter of discretion for a civil court. But because of the very strong arguments for barring a punitive damages claim in such circumstances, we would hope that the courts would only exceptionally find that punitive damages could be awarded, in a case

where the defendant had already been convicted in a criminal court for the same conduct. A clear statement of principle as to the relevance of criminal conviction is essential, but it is questionable whether existing case law provides such a statement.⁶⁸⁸ We have therefore recommended that a statutory provision should state that, in deciding whether to award punitive damages, the court must have regard to the principle that they must not usually be awarded if, at any time before the decision falls to be made, the defendant has been convicted of an offence involving the conduct which is alleged as the basis of the claim to punitive damages.⁶⁸⁹

1.114 This recommendation would operate in two main categories of situation: that is, where,

- (1) the criminal determination was made before civil proceedings were commenced
- (2) the criminal determination was not made before civil proceedings were commenced, but the civil proceedings were stayed until the criminal determination was made

1.115 We do not think it necessary to propose any specific statutory elaboration and structuring of civil courts' powers in relation to staying proceedings and/or striking out of claims, in order to ensure that the policy which is embodied in our recommendations is consistently and effectively applied. Civil courts already have an inherent discretionary jurisdiction to stay proceedings and to strike out claims. We are confident that they will exercise that jurisdiction in a manner which respects the strong reasons which we identify as reasons for refusing, except in exceptional circumstances, to make a punitive award where a defendant has already been convicted by criminal court for conduct which is alleged in support of a claim for punitive damages.⁶⁹⁰

(iv) A 'last resort' remedy (3): the relevance of other sanctions imposed for the conduct

1.116 The defendant may already have been subjected to some other sanction (that is, other than a criminal conviction), such as dismissal from his or her employment following disciplinary proceedings. If the remedy of punitive damages is truly to be a 'last resort', it ought not to be awarded where a sanction has already been imposed on the defendant for his or her conduct, and that sanction is adequate to punish him or her for it.

⁶⁸⁸ See paras 4.36-4.43 above.

⁶⁸⁹ See para 5.44, recommendation (21)(a), above, and draft Bill, clause 4(1).

⁶⁹⁰ If the defendant is convicted, the principle which we propose requires that any punitive damages claim in respect of the same conduct must, in the absence of exceptional circumstances, be struck out. However, there is unlikely to be any objection to the plaintiff proceeding with his or her other claims (eg for compensatory damages). A stay on such civil proceedings ought normally to be removed. If, in contrast, the defendant is acquitted or the proceedings against him or her end before the conclusion of the criminal trial, then a plaintiff should normally be permitted to proceed with his or her civil claims (including a claim to punitive damages in respect of the conduct concerned).

1.117 We have therefore recommended that, when deciding whether to award punitive damages, the court must have regard to any other sanctions which have been imposed in relation to the conduct concerned.⁶⁹¹ One would expect the court to decide whether the defendant has been sufficiently punished by those sanctions; if he or she has, then no award is appropriate.

(v) *A 'safety-valve discretion'*

1.118 Both the 'if, but only if' test and the test of 'deliberate and outrageous disregard of the plaintiff's rights' offer the courts significant flexibility in deciding whether to award punitive damages. In particular, when considering whether there has been an '*outrageous* disregard' of the plaintiff's rights, the judge should take account of *any* factor which bears on the culpability, and so punishment-worthiness, of the defendant's conduct - whether as a mitigating⁶⁹² or aggravating⁶⁹³ factor. Even if such a disregard exists, however, it would be open to a court (under the 'if, but only if' test) to refuse to make any punitive award, or a low award, on the ground that compensation and/or restitution and/or any other remedy which the court is minded to grant are adequate or broadly adequate.

1.119 Nothing in our proposed legislative framework *compels* a court to award punitive damages, even if those two threshold tests are satisfied. Nevertheless, where a defendant has acted in 'deliberate and outrageous disregard of the plaintiff's rights' *and* the remedies which the court is minded to grant will not be adequate to punish and deter, *and* the provisions concerning criminal conviction and the relevance of other sanctions do not apply to bar an award, there should be a presumption that a punitive damages award is appropriate. For to find these hurdles to be surmounted entails a conclusion that the defendant's conduct is sufficiently culpable to merit punishment, that other civil remedies which the court is minded to award will not be sufficient to achieve that end, and that no other sanction has been imposed which makes a punitive damages award unnecessary or otherwise inappropriate. Accordingly, whilst nothing *requires* a court to make an award in this situation, some exceptional circumstance would have to exist before a court could, we believe, legitimately refuse to make a punitive damages award in these circumstances. This ultimate discretion, which our proposals preserve, should properly be conceived as a residual, 'safety valve' discretion.

(vi) *The principles of 'moderation' and 'proportionality'*

1.120 We consider that assessments of punitive damages must be constrained by two overriding principles: the principles of 'moderation' and 'proportionality'.

1.121 The principle of 'moderation' reflects the approach adopted by the Court of Appeal in *John v MGN Ltd*⁶⁹⁴ where it held that an award of exemplary damages

⁶⁹¹ See para 5.44, recommendation (21)(b), above.

⁶⁹² For example, that the defendant acted under some form of mistake, or was provoked by the plaintiff.

⁶⁹³ For example, that the defendant knowingly acted wrongfully in the expectation that he or she would obtain a profit thereby.

⁶⁹⁴ [1997] QB 586. See para 4.66 above.

should never exceed the minimum “necessary to meet the public purpose” underlying such damages: namely, punishing the defendant for his or her outrageously wrongful conduct, deterring him or her and others from similar conduct in the future, and marking the disapproval of the court of such conduct. This constraint is required by fairness to defendants: it aims to restrict, to what is strictly justifiable by reference to the effective pursuit of the aims of punitive awards, any actual or threatened interference with *their* civil liberties due to such awards.⁶⁹⁵

- 1.122 The principle of ‘proportionality’ is justified by the consideration that no absolute pecuniary value can be ascribed to the sum which is required to advance the aims of retribution, deterrence and disapproval. Because of this, it is essential, if there is to be consistency between punitive awards, for the particular sum which must be paid by a defendant to be proportional to the gravity of his wrongdoing. More heinous wrongdoing will thereby be punished more harshly, and less heinous wrongdoing, less harshly.

(vii) The non-exhaustive list of factors relevant to the discretionary assessment of awards

- 1.123 We recognise the need for flexibility in the assessment of punitive awards. This is needed as a matter of efficacy and as a matter of fairness to defendants. The reason is that flexibility enables awards to be tailored to the nature of the defendant’s conduct and its consequences, and so to the degree of retribution, deterrence and disapproval which a punitive award must achieve.
- 1.124 Flexibility should not, however, be purchased at the price of arbitrariness. We have therefore sought to structure the discretion to award punitive damages by the inclusion of a non-exhaustive list of factors which should be considered, where relevant, in assessing awards. This list should encourage judges to rationalise the size of awards, rather than leaving them to select figures in an unreasoned way; it should also aid consistency between awards, by encouraging them to articulate the particular aspects of cases which call for lower or higher awards.
- 1.125 The factors listed in our recommendation⁶⁹⁶ are as follows:

“the state of mind of the defendant ...”

- 1.126 A defendant’s conduct has to attain a high degree of seriousness before an award of punitive damages is available to a court: he or she must show a ‘deliberate and outrageous disregard for the plaintiff’s rights’. But clearly there may be substantial gradations in the culpability of a defendant’s state of mind, even within this category of serious conduct. Accordingly, this factor is intended to permit

⁶⁹⁵ Thus, for example, where freedom of expression is at stake, courts should subject large jury-assessed awards of damages to more searching scrutiny (*Rantzen v MGN Ltd* [1994] QB 670) and awards of punitive damages must never exceed the minimum necessary to meet the public purposes underlying such damages (*John v MGN Ltd* [1997] QB 586): see paras 4.64-4.67 above. Our chosen formulation consciously resembles those which govern the extent of permissible derogations from rights ‘guaranteed’ by the European Convention on Human Rights.

⁶⁹⁶ See para 5.44, recommendation (22), above.

discrimination between, for example, cases where the defendant was more or less calculating in his or her behaviour.

“the nature of the right or rights infringed by the defendant ...”

- 1.127 This factor is intended to reflect the fact that our society accords different value to different ‘rights’ possessed by individuals; we judge conduct which interferes with or disregards individuals’ rights more or less severely according to the value which our society attaches to those rights. For example, invasions of bodily integrity might be considered to be more serious than the invasion of a property right.

“the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause by his wrongdoing ...”

“the nature and extent of the benefit which the defendant derived or intended to derive from his wrongdoing ...”

“any other matter which the court in its discretion considers to be relevant ...”

- 1.128 Examples of “any other matter” might be conduct of the plaintiff that mitigates the outrageousness of the defendant’s conduct, such as provocative conduct resulting in a wrongful arrest, or conduct of the defendant, such as an apology.

5. ADDITIONAL REFORM ISSUES AND PROPOSALS

- 1.129 A significant number of additional reform issues arise. In dealing with them we confirm our provisional view, expressed in the Consultation Paper and agreed with by all consultees who responded on the point, that a detailed legislative scheme, codifying the law on exemplary damages, should be attempted.⁶⁹⁷

- 1.130 It is important to recognise that the ‘codification’ which we propose is codification only in the sense that it places punitive damages on a statutory basis, and defines the most important characteristics and incidents of the remedy. The scheme is not intended to be an exhaustive statement of the applicable law. There are a significant number of rules which *affect* claims to exemplary or punitive damages which we do not seek to amend, which should continue to apply to punitive damages, but which we do not think it appropriate to state or refer to in our statutory scheme. Rules which fall into this category include: rules defining any wrong which founds a claim to punitive damages; rules relating to a person’s capacity to be sued or to sue for a wrong;⁶⁹⁸ rules on limitation of actions;⁶⁹⁹ rules relating to the discharge of wrongs;⁷⁰⁰ rules about a person’s ability to limit or exclude his or her liability;⁷⁰¹ rules of private international law;⁷⁰² rules about

⁶⁹⁷ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 6.9 and 8.8. See also paras 6.14 and 8.9.

⁶⁹⁸ See eg *Clerk & Lindsell on Torts* (17th ed, 1995) ch 4.

⁶⁹⁹ See on torts, *Clerk & Lindsell on Torts* (17th ed, 1995) ch 31; generally, see A McGee, *Limitation Periods* (2nd ed, 1994).

⁷⁰⁰ See eg *Clerk & Lindsell on Torts* (17th ed, 1995) ch 30.

assignment of claims to damages;⁷⁰³ rules governing the awarding of interest on,⁷⁰⁴ and taxation of,⁷⁰⁵ awards of damages; rules relating to the deductibility of damages paid when calculating taxable profits;⁷⁰⁶ rules relating to the ability of a person to prove an unliquidated claim to, or judgment debt for, damages upon the insolvency of a wrongdoer,⁷⁰⁷ and as to the ranking of such a claim or debt.⁷⁰⁸

1.131 It is also important to emphasise at this point that nothing in our Act should be construed as stopping further common law development of the law relating to punitive damages, to the extent that such development would be consistent with our draft Bill. Nor should our draft Bill be construed as taking a particular view of the principles which currently apply at common law. For example, the fact that we have chosen to state expressly in a statutory provision that insurance against the risk of liability to punitive damages is not contrary to public policy, should not be taken to cast doubt on whether that may or may not be the current position at common law.⁷⁰⁹

1.132 In the light of the above, we recommend that:

⁷⁰¹ See eg *Clerk & Lindsell on Torts* (17th ed, 1995) paras 3.33-3.56; on contractual limitation or exclusion clauses generally, see *Chitty on Contracts* (27th ed, 1994; first cumulative supplement, 1996).

⁷⁰² See *Dicey & Morris on The Conflict of Laws* (12th ed, 1993; fourth cumulative supplement, 1997) vols 1 and 2.

⁷⁰³ See eg *Clerk & Lindsell on Torts* (17th ed, 1995) para 4.42.

⁷⁰⁴ See eg *Clerk & Lindsell on Torts* (17th ed, 1995) para 27.25; *McGregor on Damages* (15th ed, 1988) ch 14.

⁷⁰⁵ See eg *Clerk & Lindsell on Torts* (17th ed, 1995) para 27.16; *McGregor on Damages* (15th ed, 1988) ch 13.

⁷⁰⁶ See *Simon's Direct Tax Service*, B3.12.

⁷⁰⁷ See eg I F Fletcher, *The Law of Insolvency* (2nd ed, 1996) ch 9 (personal insolvency) and ch 29 (corporate insolvency).

⁷⁰⁸ See eg I F Fletcher, *The Law of Insolvency* (2nd ed, 1996) pp 288-299 (personal insolvency) and pp 606-613 (corporate insolvency). We have given some thought to the question whether unliquidated claims to, or judgment debts for, punitive damages should be capable of being proved on personal or corporate insolvency, and if so, how such claims should rank. At present they rank as ordinary unsecured claims, and can be proved in the same way as any other claim to damages, whether liquidated or unliquidated. At first sight, it might be thought unfair to other (innocent) unsecured creditors if they were to receive less because the defendant's assets also had to be used to satisfy what many regard as 'windfall' claims to punitive damages. But on reflection, we do not think it appropriate to consider this issue further in this Report. It was not raised in Consultation Paper No 132 and no consultees alerted us to any problems with the current law in this area. (We would also observe that, in any case, a claim to punitive damages merely ranks as an ordinary unsecured claim; it ranks alongside other such claims, and does not take priority over them). Although we say nothing further on this issue, we do draw it to the attention of the Lord Chancellor, who has statutory responsibility for making rules as to *inter alia* what debts are provable on personal or corporate insolvency and how those debts rank, and to the specialist bodies (in particular the Insolvency Service and the Insolvency Rules Committee) which assist him in this task. Cf US law: L Schleuter and K Redden, *Punitive Damages* (3rd ed, 1995) § 19.5 indicate that under the Bankruptcy Code, exemplary or punitive damages can be proven on bankruptcy, but are subordinated to the payment of all other types of claim.

⁷⁰⁹ See paras 4.108-4.112 above.

(24) our draft Bill should lay down (in some instances by amending, and in other instances by restating previous law) the main elements of the remedy of punitive damages; but subject to this, the law relating to punitive damages should continue to apply and be open to future common law or statutory development. (Draft Bill, clause 1(1))

(1) The pleading of punitive damages

1.133 We consider the existing approach to the pleading of exemplary (or, as we prefer to call them, punitive) damages⁷¹⁰ to be the appropriate one. A claim to punitive damages should be specifically pleaded, together with the facts on which the party pleading them relies. Neither the court of its own motion, nor any other person or body, should be entitled to raise the issue if the plaintiff does not do so. And a plaintiff's failure specifically to plead punitive damages should prevent such an award from being made. The reason is that suggested in *Broome v Cassell* by Lord Hailsham:

... a defendant against whom a claim of this kind is made ought not to be taken by surprise.⁷¹¹

1.134 We therefore recommend that, as at present:

(25) punitive damages should not be awarded unless they have been specifically pleaded by the plaintiff, together with the facts on which the party pleading them relies. (Draft Bill, clause 3(2))

(2) The relevance of the means of the defendant

(a) How should the defendant's wealth be relevant?

1.135 Inevitably the wealth of a particular defendant must significantly affect the extent of the punitive and deterrent impact of a punitive award. Nevertheless, we do not support inquiry into the financial position of the defendant in every case in which punitive damages are awarded, and as a precondition of such awards.⁷¹² An inquiry of this sort could involve questions of great complexity (for example, in the case of corporate defendants) and discovery may involve substantial expense. Moreover, there is a risk of abuse by plaintiffs of rights to discovery, in order to oppress and to pressurise defendants.

1.136 We believe that the focus of the assessment of what is required in order to punish and deter the defendant's 'outrageous' conduct should, initially, be on the nature of that conduct, but that a defendant should have the opportunity to show that, in his or in her particular financial circumstances, an apparently and otherwise fair

⁷¹⁰ RSC, O 18, r 8(3); CCR, O 6, r 1B. See paras 4.113-4.114 above.

⁷¹¹ [1972] AC 1027, 1083F, *per* Lord Hailsham. Lord Hailsham proposed, in the same passage, to refer the pleading issue to the "Rule Committee"; the resulting reference appears to have been the source of the present rule.

⁷¹² In *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, para 6.47, we provisionally supported the view that, as at present, no detailed inquiry into the defendant's finances should be undertaken. There was a mixed response to this from consultees.

punishment would cause him or her undue hardship, if he or she had to discharge it. We therefore recommend that:

- (26) the defendant should be allowed to show that he does not have the means, without being caused undue hardship, to discharge the punitive damages award which the court has decided to grant; where the defendant satisfies the court that this is so, the court must award a lower sum which it considers avoids that hardship.** (Draft Bill, clause 6(2))

What this amounts to is a rebuttable presumption of ability to meet a punitive award without undue hardship, with the burden of rebuttal (obviously) falling on the defendant.

- 1.137 We would add, however, that we do not anticipate defendants seeking to rebut the presumption in very many cases: plaintiffs are unlikely to sue defendants who are obviously not able to satisfy an award made against them.

(b) The relevance of insurance against liability for punitive damages

- 1.138 We consider that the definition of the ‘means’ of the defendant should be left for the courts to flesh out, except to the extent of making one point clear. We recommend that:

- (27) our draft Bill should provide that the ‘defendant’s means’ include the fruits of any contract of insurance against the risk of liability to pay punitive damages.** (Draft Bill, clause 6(4))

- 1.139 In our view, if a liability to pay punitive damages will be fully satisfied by sums paid under a contract of insurance, there should be no room for defendants (or their insurers) to argue that the award which would otherwise be appropriate punishment would cause them ‘undue hardship’, and so ought to be reduced. Of course, if a liability to pay punitive damages is only partially covered by a contract of insurance, then the defendant would have to show that paying the unsatisfied part (the total award less any sum payable by the insurers) will cause him or her ‘undue hardship’.

(c) The requirement to record the sum which would have been awarded

- 1.140 Where a court does reduce an award on the basis of the defendant’s incapacity to pay an otherwise appropriate sum, we consider that it would be desirable if the court not just found *but also recorded* the sum it would have awarded, but for the deduction. We therefore recommend that:

- (28) where a court has decided to award punitive damages, it must indicate the amount which it is minded to award, irrespective of the defendant’s means; (Draft Bill, clause 6(1)); and if the court has reduced an award of punitive damages on account of undue hardship to the defendant (under recommendation (26)) the court should record what sum would have been awarded, but for that reduction.** (Draft Bill, clause 6(3))

1.141 In our view, this is necessary to facilitate comparisons and so consistency between punitive damages awards. There is also a statutory precedent in the Law Reform (Contributory Negligence) Act 1945: section 1(2) requires a court to “find and record the total damages which would have been recoverable” if they had not been reduced because of the plaintiff’s contributory negligence.

(3) The destination of punitive damages awards

(a) The problem of the destination of punitive damages awards

1.142 An objection regularly made to punitive damages awards is that they result in a plaintiff receiving a windfall benefit. One possible answer to this objection is to dismiss it as wholly misconceived. The civil law is not concerned only with compensation, as shown by restitutionary awards. Once plaintiffs have established that their rights have been infringed, they have established an entitlement to a range of remedies, which include, in certain circumstances, non-compensatory punitive damages. Once one accepts that civil punishment is legitimate (as we do) there is no necessary objection to the victim of a wrong keeping the punishment exacted.

1.143 But while we reject the ‘compensation-only’ dogma, we recognise the force of the view that punitive damages are a ‘hybrid’. Although they are awarded in respect of an identified civil wrong against a private individual, they nonetheless include a significant (even primary) public element - that is, the public interest in the punishment and deterrence of outrageously wrongful conduct. On this approach, it is arguable that the ‘windfall’ objection would be most appropriately met by making either all, or a percentage (say 33%), of any punitive award payable to the state or some other public fund.

1.144 Of these two, we do not find at all attractive the suggestion that all of the punitive award should be payable to the state (or other public fund). This would normally remove any incentive for a plaintiff to claim punitive damages and would therefore normally nullify the point in retaining punitive damages.⁷¹³ A plaintiff who stands to receive nothing from an award of punitive damages normally has no reason to claim them and, given the costs involved in establishing that they are merited, a clear financial disincentive to do so. If, as we believe, punitive damages play a valid role in ensuring that the civil law is properly upheld, it must follow that, even if one does not wish to go to the lengths of encouraging plaintiffs to sue who would otherwise not have sued, one should at least ensure that those who do sue for compensation (or restitution) are not discouraged from also seeking punitive damages.

1.145 Much more attractive, therefore, is the compromise position whereby the state or some other public fund would receive a percentage (say 33%) of any punitive damages award.⁷¹⁴ This would reduce the size of any ‘windfall’ obtained by

⁷¹³ We do not rule out the possibility that some plaintiffs may wish to bring an action simply to have their rights vindicated.

⁷¹⁴ This option was briefly discussed, without a provisional view being reached, in *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, para 6.38. We have chosen 33% rather than a higher percentage - which might make ‘diversion’ more cost-effective - because we are concerned about the potential implications for the pleading of

plaintiffs, whilst arguably preserving the financial incentive to claim punitive damages. Several American states have adopted this course of action. While neatly reflecting the 'hybrid' nature of civil punishment, this compromise does carry with it some serious difficulties, which we must now consider.

(i) *The cost of diversion to the state or public body*

- 1.146 Applying our recommendation that awards be 'moderate' in size, we fear that the costs of administering such a scheme might be disproportionate to the amounts being recovered. There are several possible responses to this fear.
- 1.147 The first response would involve confining state 'diversion' to 'large' awards. However, this would involve a cut-off point which might be vulnerable to abuse by more powerful parties and to accusations of arbitrariness.⁷¹⁵ A second and more general response would be to challenge whether the cost of diversion would be significant. For reasons stated below, only if the court makes an award in such an action, and the defendant fails to satisfy the part that is to be diverted to the public fund, will the significant costs of enforcement by the body in charge of the public fund arise.⁷¹⁶

(ii) *The enforcement of the punitive damages award*

- 1.148 If the state or some other public body was to be entitled to a percentage of the punitive damages awarded, how would *that* part of the award be enforced? In a civil action, the victim of a wrong has the entitlement to sue and to bring further proceedings to enforce the award. However, he or she would have no incentive to bring further proceedings for the enforcement of any part of the award that is to go to the state. And certainly we would not favour a system whereby the claim of the victim-plaintiff is rendered secondary to that of the state or of a public fund. On the contrary, the claims of victim-plaintiffs should be the first to be satisfied from any sums received from defendants or their insurers.
- 1.149 However, while unusual, we see no objection to giving the state (or public fund) a right to enforce that part of the punitive damages award to which it is entitled. A possible analogy is with the role of the Attorney-General, who possesses the legal power to institute private law proceedings in his capacity as the guardian of the public interest. In our view, therefore, there would be no objection (other than cost, to which we have referred above), to conferring the right to enforce part of

punitive damages of 50% diversion. We believe that only the plaintiff should be able to plead punitive damages - and not, for example, in addition some person or body like the Attorney-General acting on behalf of the general public. To choose a 50-50 division might have the unfortunate effect of suggesting that the victim and the public have *equal stakes* in punitive damages awards, so that *both* should be capable of pleading or claiming them.

⁷¹⁵ Arbitrariness is particularly inevitable, given that what is cost-effective cannot be determined without knowing what the likely number and scale of awards will be; such information will not be ascertainable with accuracy until any scheme has been in place for some time; and the degree to which any figure fixed upon is arbitrary will depend on the very variable behaviour of litigants.

⁷¹⁶ See paras 5.148-5.149 below.

the punitive damages award on the Attorney-General (on behalf of the state) or on the trustees of the relevant public fund.⁷¹⁷

(iii) Settlements

- 1.150 Perhaps the most serious difficulty with the 33% diversion suggestion would be the tactical incentives created by such a scheme. In order to catch all punitive awards it would be necessary for the scope of the scheme of diversion to include settlements. The primary difficulty is that where damages are settled by means of agreement between the parties, rather than by a court, the true nature of such damages can be distorted. In particular the incentive is likely to be for the parties to overstate the size of the compensatory (or restitutionary) damages award, so as to avoid diversion of any relevant part of the punitive damages award. On the other hand, one can argue that, as a counter-balance to the expansion of the scope of punitive damages, it is desirable to provide plaintiffs with an incentive to settle out-of-court.

(b) Some further problems of principle & policy raised on consultation

- 1.151 Three further problems with awarding part or all of punitive damages to the state were put to us by consultees. We consider that each is plainly surmountable.

(i) "If the state takes part of a punitive damages award, it is imposing a fine"

- 1.152 Some consultees objected that for the state to take part of a punitive damages award is tantamount to imposing a fine at the instigation of an individual; this would constitute an unsatisfactory confusion of the criminal law and the civil law.
- 1.153 We are unconvinced by this. The first, essentially presentational concern, can be met by using the award in support of a valuable social cause. An often used justification for the availability of punitive damages is that they are necessary to enable plaintiffs fully to vindicate their rights which the defendant has infringed. It would be consistent with this, for example, to utilise any part of the award diverted by the state in the advice and even the financial assistance of other victims of civil wrongs. The second is to concede the analogy, but to deny its significance. All punitive damages, whether payable to the state or not, can be regarded as a type of fine.

(ii) "It infringes the rule that plaintiffs can do what they want with their damages"

- 1.154 It is a fundamental rule underlying the awarding of damages within the civil law that plaintiffs are entitled to use any damages they are awarded as they wish; this is infringed, it is argued, by requiring plaintiffs to pay all or any part of their award to a public fund.
- 1.155 However, this argument fails to recognise the distinctive, hybrid nature of a punitive damages award, and in any case is somewhat circular.⁷¹⁸ To assert that

⁷¹⁷ A possible approach (which we do not prefer) would be to leave the enforcement of punitive damages to the court of its own motion, by, for example, appointing a court officer to supervise compliance.

⁷¹⁸ The principle is not even of universal application in relation to *compensatory* damages: see, for example, *Hunt v Severs* [1994] 2 AC 350. In that case the House of Lords held that a

plaintiffs must be permitted to do what they like with *their damages* leaves unexplained when and why the damages are to be characterised as *theirs*, apart from the fact that they have sued to claim them. In the case of a compensatory damages award the explanation is clear and strong: the damages award is the plaintiff's because it represents the plaintiff's loss. It is, in a sense, an entirely private award. In contrast, in the case of a punitive award, which is inherently a non-compensatory award, the position is different. Here the award has a significant *public* element - corresponding to the function of the award in punishing and deterring the defendant and others minded to act in a similar way. It does not seem to us, therefore, that the normal rule for compensatory damages necessarily has to apply.

(iii) *"It is unsatisfactory that the state should both pay and receive an award"*

- 1.156 Some consultees observed that, where an organ of the state is made liable to pay punitive damages, one would be left with the unsavoury sight of the state being the beneficiary of the award which it had paid by way of punishment.
- 1.157 However, this argument could be dealt with, in two different ways. One response would be to exempt successful punitive damages claims against state organs from the category of awards where all or part of the punitive damages should be paid over to the state. To make this concession, however, would really render pointless - because even less cost-effective⁷¹⁹ - any form of diversion. A second response would be to use any diverted sum, not in some general way for the benefit of the state, but instead for the benefit of individuals in a similar position to the plaintiff.

(c) Conclusion

- 1.158 In common with the views of a bare majority of consultees, we would recommend, albeit with some hesitation, that:

(29) no proportion of a plaintiff's punitive damages award should be 'diverted' to a public fund.

Our main reason is that, since we anticipate punitive damages being moderate in size, we consider that the benefits of diversion would be outweighed by the costs involved and the tactical distortions in settlements that it might produce.

(4) Multiple plaintiffs

- 1.159 Multiple plaintiff cases raise very difficult practical problems, as well as problems of principle, for any framework of liability to punitive damages. Indeed, the fact that a case involves multiple claims to punitive damages, arising out of the same course of wrongdoing, has been considered a good reason for precluding *any* claim

plaintiff in an action for personal injuries could recover damages in respect of the loss that a *third party* had suffered in caring without reward for the injured plaintiff; however, any such damages recovered by the plaintiff would be held by him or her on trust, for the benefit of the third party.

⁷¹⁹ Such diversion would be most unlikely to be cost-effective, given that awards against the state may be anticipated to be the greatest single category.

to that remedy.⁷²⁰ Yet this means that some grave instances of wrongdoing - *inter alia*, in terms of the numbers of persons harmed - must go unpunished by the law. We are extremely reluctant to accept this result, unless compelled to do so by the clear absence of any practicable solution.

1.160 Very little assistance can be obtained from existing English and Commonwealth jurisdictions in resolving this issue. Nor does an awareness of the various approaches adopted in the USA,⁷²¹ where ‘multiple plaintiff’ issues regularly arise, do other than reinforce the perception that this is an intensely difficult area.⁷²² We have therefore found it necessary to devise our own scheme.

(a) The nature of, and difficulties caused by, ‘multiple plaintiff’ claims

1.161 One course of conduct may constitute or involve wrongs against more than one person; each victim may have a separate cause of action. Where the course of conduct is not just ‘wrongful’, but also ‘punishment-worthy’, then the apparent corollary is that each plaintiff should have a claim to punitive damages. In such circumstances there is a real risk that the defendant may be excessively punished.

(b) Our basic principle: ‘first past the post takes all’

1.162 We consider that the plaintiffs who are ‘first past the post’ must ‘take all’. This has several implications. The first action in which punitive damages are awarded to one or more ‘multiple plaintiffs’ will be the only action in which they can be awarded by a court (the ‘first successful action’). The defendant’s liability to pay punitive damages for the conduct that is punished in that action is thereafter extinguished,⁷²³ thus no ‘multiple plaintiff’ has any right to claim any further sum of punitive damages in respect of it. Furthermore, even if other multiple plaintiffs have well-founded claims to punitive damages, they will have no right to any part of the award(s) made in the first successful action.

⁷²⁰ See, in particular, para 4.47 above, discussing *AB v South West Water Services* [1993] QB 507. See also S M Waddams, *The Law of Damages* (2nd ed, 1991) para 11.430; having considered some of the problems raised, he concludes that “[t]hese considerations tend against the award of any exemplary damages in such cases”. Professor Waddams expressed similar views on consultation.

⁷²¹ Legislative intervention, proposed or enacted, has included: ‘caps’; a ‘first comer gets all’ rule; a rule which ‘credits’ a defendant with prior punitive payments; a rule which permits punitive damages class actions at the instance of a defendant; the consolidation of all multiple punitive claims; the use of an injunction against the enforcement of individual punitive judgments until they could all be consolidated for a single administration in a single court; and the bifurcation or trifurcation of trials, to separate liability and damages issues from punitive proof. The courts have generally recognised multiple punitive liability.

⁷²² See, for example, D B Dobbs, *Law of Remedies* (2nd ed, 1993) § 3.11 (8), pp 337-341, in which he concludes that “it seems safe to say that none of the solutions so far provided by either courts or legislatures seem satisfactory”. Most legislative intervention, proposed and enacted has, he suggests, “so far failed to recognise the complexities of the problem of multiple punitive awards”. The courts have meanwhile seemed “rather casual in their willingness to inflict repeated punishments for a single act”, a possibility which we reject, on grounds of unfairness to defendants (that is, the unfairness of ‘excessive’ punishment).

⁷²³ There will obviously be no bar to claims to punitive damages which are founded on conduct other than that which was the basis for the claim in the ‘first successful action’.

1.163 We explain the scheme by which we propose to implement the ‘first past the post takes all’ principle in the next section. We then defend what may, at first sight, appear to be an objectionable approach.

(c) Our scheme implementing the ‘first past the post takes all’ approach

1.164 Although the core of our approach is aptly expressed by the principle that the ‘first past the post takes all’, the practical implementation of this approach raises several difficult questions. Who are ‘multiple plaintiffs’ to whose claims to punitive damages we seek to apply the ‘first past the post takes all’ principle? How should courts approach the issue of the availability of punitive damages if they are faced with claims by ‘multiple plaintiffs’? And, having decided that punitive damages are available to one or more ‘multiple plaintiffs’, how should those damages be assessed?

(i) The concept of a ‘multiple plaintiff’ case

1.165 We consider that special provisions are necessary wherever conduct of a defendant constitutes torts, equitable wrongs or statutory wrongs against two or more persons.⁷²⁴ The reason is that it is in this situation that the risk of excessive punishment, described above, is at its most severe. It is irrelevant that the wrongs which have been committed may be legally different; what is important is that certain conduct of the defendant may give rise to allegations by two or more people, in a single action or in a succession of separate actions, that a wrong has been committed against them. The potential for multiple claims to awards of exemplary damages in respect of the same conduct of the defendant is the same, whether that conduct is alleged to constitute, for example, the tort of trespass *vis-à-vis* A and B, or the tort of trespass *vis-à-vis* A and the tort of nuisance *vis-à-vis* B. We therefore recommend that:

(30) our special multiple plaintiffs scheme should apply where conduct of a defendant involves torts, equitable wrongs or statutory wrongs against two or more persons. (Draft Bill, clause 7(1))

(ii) The availability of punitive damages

1.166 In order to be entitled to an award of punitive damages, a ‘multiple plaintiff’ will need to satisfy all the conditions which must be satisfied by an ordinary claimant to such a remedy.⁷²⁵ However, in order to deal with the rather difficult problems that are raised by ‘multiple plaintiff’ claims, we propose an additional limitation. The limitation which we recommend is as follows:

⁷²⁴ The question of whether the conduct alleged by P1 as the basis for a claim to punitive damages from D is ‘the same as’ conduct alleged by P2 (or P3 ...), is, we believe, one best left to courts to resolve.

⁷²⁵ For example, each ‘multiple plaintiff’ must show that the defendant committed a tort, equitable wrong (as defined) or statutory wrong (as defined) against him or her, and that the defendant’s conduct in so doing, or subsequent to the wrong, showed a deliberate and outrageous disregard for that plaintiff’s rights.

(31) once punitive damages have been awarded to one or more ‘multiple plaintiffs’ in respect of the defendant’s conduct, no later claim to punitive damages shall be permitted for that conduct by any ‘multiple plaintiff’. (Draft Bill, clause 7(4))

1.167 This provision means that a ‘multiple plaintiff’ will need to satisfy one additional condition if his or her claim is to succeed: there must have been no previous action brought by one or more other ‘multiple plaintiffs’ in which punitive damages have been awarded in respect of the defendant’s conduct.

(iii) The assessment of punitive damages

1.168 We consider that a court should make a separate assessment of punitive damages for each multiple claimant. That is, the court should decide upon an appropriate sum by reference to the circumstances of the particular plaintiff before it. One plaintiff may have provoked the defendant to act in such a way that he or she committed a wrong against the provoking plaintiff and several others. If so, it is likely that the award (if any) which is made to the provoking plaintiff will be significantly less, in the light of his or her responsibility for the wrongful conduct, than any which is made to the other, non-provoking plaintiffs. Where the defendant’s conduct *vis-à-vis* the plaintiffs is essentially the same, it would obviously be open to a court to make identical ‘individually-assessed’ awards to each of the plaintiffs.

1.169 Nevertheless, we do consider that a ‘special’ approach must be taken to assessments of punitive damages in ‘multiple plaintiff’ cases. It should be laid down in statute that the *aggregate award* of punitive damages to two or more multiple plaintiffs should conform to what we call the principles of ‘moderation’ and ‘proportionality’, which apply to limit the assessment of *individual* punitive damages awards. In other words, the aggregate award should not punish the defendant ‘excessively’ for his conduct. We therefore recommend that:

(32) if the court intends to award punitive damages to two or more multiple plaintiffs in the same proceedings, the aggregate amount awarded must be such that, while it may properly take account of the fact that the defendant has deliberately and outrageously disregarded the rights of more than one person, it does not punish the defendant excessively for his conduct. (Draft Bill, clause 7(3))

1.170 This express limitation on the total level of punitive damages awards in multiple plaintiff cases is, in effect, an application of the principles of moderation or proportionality (which are expressed in clause 5(2) of the draft Bill).⁷²⁶ But for two reasons, we think that such a special statutory limitation is still required. The first is that our assessment provisions (in particular, clause 5 of the draft Bill) are otherwise directed only at individual assessments. As a result, the principles of proportionality and moderation (in clause 5(1)) *prima facie* only apply to require that the award which the court is making for the defendant’s conduct *vis-à-vis* a particular individual be proportionate and moderate. Without further provision they do not furnish a separate limitation - the requirement that the *aggregate* of a

⁷²⁶ See paras 5.120-5.122 above.

number of awards made in one action to a number of plaintiffs be moderate and proportionate (or 'not excessive'). The second reason is that, for the reasons discussed above, the risk of excessive punishment is especially acute in 'multiple plaintiff' cases. A special, express provision against excessive punishment should better direct courts to this risk.

- 1.171 What will this limitation require in practice? It may happen that the individually-assessed punitive damages awards, if they are added together, constitute excessive punishment for the defendant's conduct. In order to avoid that 'excess', the court will obviously have to decide what an appropriate (lower) total liability is; it will then need to reduce each successful plaintiff's punitive damages award, so as to ensure that the aggregate is equal to that 'appropriate' sum. We consider that a form of *pro rata* deduction from each individual punitive damages award would be the best solution. That deduction could proceed as follows:

Example:

A, B, & C are given punitive damages of £10,000, £10,000 and £20,000, in one action.

Applying clause 6(3) of our draft Bill, the court decides that the 'aggregate amount' (£40,000) punishes the defendant excessively for his or her conduct; £30,000 would be sufficient. The 'aggregate amount' is therefore £10,000 too much.

The awards are reduced by £10,000, preserving the proportion which they bore to the aggregate sum: A (1/4); B (1/4); C (1/2), or ratio 1(A) : 1(B) : 2(C). Accordingly, A's award is reduced by £10,000/4 (£2,500); B's award is reduced by £10,000/4 (£2,500) and C's award is reduced by £10,000/2 (£5,000).

This leaves the final judgment as £30,000 in total, consisting of £7,500 (A); £7,500 (B); and £15,000 (C).

(iv) The relevance of 'settlements' with one or more multiple plaintiffs

- 1.172 Where there are multiple plaintiffs or potential plaintiffs, the otherwise desirable practice of out of court settlement raises particular problems. A defendant may settle with some, but not all, potential multiple claimants. Unless there is at least the chance that this will be taken into account by a court, when deciding the defendant's liability to punitive damages to plaintiffs who have not settled, the law could give a strong disincentive to defendants to seek to settle out of court, except where the defendant could be sure of securing a settlement with all potential claimants. This is because such a defendant will owe or have paid the settlement sum, but in addition will be liable to pay, *inter alia*, a sum of punitive damages which ignores the fact that he or she has settled with one, some or many potential claimants. The defendant's total liability (settlement sums + court award) could be an excessively punitive sum.
- 1.173 In order to avoid this risk, we suggest that, in deciding whether punitive damages should be awarded and/or how much should be awarded in a multiple plaintiff case, the court should take account of any settlement which the defendant has made with other multiple plaintiffs in relation to the conduct. But this should only

be so where the defendant consents to the court doing so. Were it otherwise, problems could arise because of the confidentiality of settlements. In practice, therefore, the onus would be on the defendant to bring any settlement to the attention of the court if he or she wishes it to be taken into account.

1.174 We therefore recommend that:

(33) provided the defendant consents to this, a court should take into account any settlement which the defendant may have reached with multiple plaintiffs in deciding:

(a) whether punitive damages are available, or

(b) if so, how much should be awarded

to multiple plaintiffs with whom the defendant has not reached a settlement. (Draft Bill, clause 7(2))

1.175 This proposal will mean that settlements may be a reason, depending on the circumstances, for a court to refuse punitive damages to multiple plaintiffs; or, in the alternative, for awarding a lower amount than would otherwise be appropriate (because, in particular, the aggregate of the settlement sums and the sums which the court is minded to award will excessively punish the defendant for his or her conduct).

(d) Some potential objections to our scheme and our response to those objections

1.176 The ‘first past the post takes all’ principle may, at first sight, appear objectionable. We now review, and then respond to, likely objections.

(i) “It is unfair to deny punitive damages to multiple plaintiffs who are not parties to the first action in which a claim to punitive damages succeeds”

1.177 The first objection is that it is ‘unfair’ to deny an award of punitive damages to a multiple plaintiff for the sole reason that one or more other multiple plaintiffs have already been awarded punitive damages in respect of the (same) conduct of the defendant. If they can establish an otherwise good claim, do they not have a ‘right’ to an award of punitive damages, or if not, to some share in the awards that have previously been made? Were they not equally (or conceivably, more) wronged by the defendant’s conduct?

(ii) “The first successful claimants could receive a massive windfall”

1.178 The second objection is to ‘excessive windfalls’. By restricting the entitlement of multiple plaintiffs to receive punitive damages to those of their number who are ‘successful’ in the first action in which punitive damages are successfully claimed by multiple plaintiffs, ‘first successful claimants’ may be left with very substantial awards of punitive damages. If, as we accept, an award of punitive damages is always a windfall to a plaintiff who receives it, does that ‘vice’ not increase as the size of the award to individual plaintiffs increases?

(iii) “The ‘first past the post takes all’ approach encourages multiple plaintiffs to race to court”

1.179 A third objection is that the ‘first past the post takes all’ approach encourages a ‘race to court’. If the aggregate award made to ‘successful’ multiple plaintiffs will not be substantially greater merely because the court has more multiple plaintiffs before it, then is there not a financial incentive for multiple plaintiffs to proceed alone, or in as small a group as possible? The fewer the people to whom punitive damages are awarded, the larger the likely entitlement of any particular ‘successful’ individual to punitive damages.

(iv) “Defendants could still end up over-punished by your scheme”

1.180 A fourth objection is that the ‘first award(s) bar’ and the principle of avoiding ‘excessive punishment’ will not always be adequate to prevent defendants from being excessively punished in multiple plaintiff cases. Nothing in our proposals affects the entitlement of multiple plaintiffs to claim *other* remedies. Accordingly, even if a multiple plaintiff, who was not a party to the first action in which a punitive damages award was made, could not claim punitive damages in any later action, his or her claim to, *inter alia*, compensatory damages is not affected. Such subsequent claims arguably pose a risk of excessive punishment, because they could falsify the basis on which the award was made in the first action.

1.181 This problem relates to the ‘if, but only if’ test. This will have to have been satisfied in the ‘first successful action’ (because it is a pre-condition of any award of punitive damages). In other words, the court will have to have considered that the other remedies available to it were inadequate to punish and deter. The sum it awarded as punitive damages would reflect the extent of the inadequacy of the other remedies *then available to it*. But, of course, the defendant’s liability is not limited to a liability to those victims of his wrongdoing who are before the court in the ‘first successful action’; it also includes a liability to any other person who can subsequently show that the defendant’s conduct constituted a wrong against them - and in particular, a liability to pay compensation.⁷²⁷ Accordingly, the defendant’s total liability for wrongs which he or she committed by one course of conduct may subsequently (that is, after the first successful action) be found to exceed that which the court had assumed as a basis for deciding whether punitive damages were necessary in the ‘first successful action’.

1.182 We are not persuaded that any of these four ‘objections’ fatally undermine the ‘first past the post takes all’ approach. In particular, a plaintiff cannot assert as strong an ‘entitlement’ to punitive damages as to compensatory damages, because punitive damages are always a windfall to plaintiffs who receive them. Indeed, we have seen that it is a controversial question whether *any* plaintiff should receive punitive damages (rather than, for example, the state); our justifications for plaintiff-receipt were practical, rather than doctrinal ones.⁷²⁸ The ‘first past the post takes all’ principle does not affect a plaintiff’s right to other remedies.

⁷²⁷ Indeed, it also includes a liability to multiple plaintiffs who were awarded, eg, compensation, in an action *before* the ‘first successful action’.

⁷²⁸ See paras 5.142-5.148 above.

- 1.183 We also think that any ‘adverse’ effects of the ‘first past the post takes all’ principle can be removed or diminished, if necessary. Underlying each of the above concerns is the assumption that, in practice, the ‘bar’ will lead to punitive damages being awarded to only a very small proportion of potential (and potentially successful) claimants. We are not persuaded that this assumption is generally a correct one. Procedures for joinder or consolidation already exist which can be used by parties/courts to ensure that actions in which punitive damages are claimed by multiple plaintiffs include at least a substantial number of likely claimants.⁷²⁹ Incentives to use those procedures may well be present. For example, a potential claimant has an incentive to join an action which has already been initiated by other victims of the defendant’s conduct, and which is likely to reach judgment before any action which the former subsequently initiates could do so. If that earlier action turns out to be the ‘first successful action’, any potential or actual claimant who was not a party to that action will be barred from claiming punitive damages. A court which is aware that two or more actions are in progress, arising out of one incident, may well be able (and willing) to consolidate the actions, on its own initiative or on an application - particularly because of similarity between the issues of fact and law raised, and because of the adverse effect of not being party to the one action in which punitive damages are awarded (that is, loss of the right to claim punitive damages). Indeed, in mass tort cases, the incentives for plaintiffs to join together, pooling information, resources and costs, may be sufficiently great that, even with the enticement of a large(r) award of punitive damages, a ‘race to court’ is unlikely. This may *a fortiori* be the case, given the difficulty in such cases of establishing (at least) reckless wrongdoing, which is outrageous in character.
- 1.184 Even if practice reveals this belief to be misguided, we believe that it is a problem that can be dealt with, if and when it arises, without requiring any alteration to the ‘first past the post takes all’ principle expressed in our statutory scheme. For example, the Rules Committee could develop procedures and powers for courts to deal with problems which are revealed in practice. These might include, for example, a notice-giving procedure, whereby a court, considering that there are multiple plaintiffs (present or potential) who are not parties to the action before it, could order that notice be given, in order to alert those others to the action before the court, and offer them an opportunity to obtain joinder or consolidation. Such a reform could be tied in with Lord Woolf’s reforms (if and when implemented),⁷³⁰ and with any general initiative on reforming procedure for multi-party actions generally.⁷³¹

⁷²⁹ See, in particular, RSC O 15, r 4(1) (joinder of parties) and RSC O 4, r 9 (consolidation); see for guidance on the use of these powers in group actions, the Supreme Court Procedure Committee’s *Guide for Use in Group Actions* (May 1991), especially ch 3. Successful resolution of group claims is likely to require active judicial case management. We note that a central theme in Lord Woolf MR’s recent proposals for reform of the civil justice system (*Access to Justice, Final Report* (1996)) similarly requires courts to assume such a role.

⁷³⁰ See, in particular, Lord Woolf MR, *Access to Justice, Final Report* (1996).

⁷³¹ See, for recent proposals for reform of the law relating to group actions, *inter alia*, Lord Woolf MR, *Access to Justice, Final Report* (1996) ch 17; The Law Society, *Group Actions Made Easier* (September 1995).

1.185 Some palliative could, if necessary, also be provided by the ‘safety-valve discretion’.⁷³² A court might, if it was aware that the plaintiff or group of plaintiffs before it represented only a small proportion of present (or perhaps also, likely) litigants, refuse to make any award in that action by exercising the last resort discretion. That a court had exercised the discretion to prevent an award going to the first individual or group of successful claimants in one case should not prevent an award being made to a subsequent (substantial) group of claimants in a later action. Indeed, such a later award would be entirely consistent with the justification for exercising the ‘safety-valve discretion’ to preclude an award in the earlier action. If this became established judicial practice, then ‘first’ plaintiffs would have a much reduced financial incentive to race to court to claim punitive damages.

(5) Multiple defendants

1.186 The law may regard the liability of two or more persons as either ‘joint’ or ‘joint and several’ in a number of different circumstances. For example, two or more people may independently act in a wrongful manner, and thereby cause the same indivisible damage to another. In law they are ‘jointly and severally liable’ to compensate the plaintiff for that indivisible damage. Alternatively, two or more people may be regarded by the law as ‘joint wrongdoers’ because they have taken concerted action to a common (wrongful) end. In law they are ‘jointly liable’ to compensate the plaintiff for the injury which he or she suffers as a result of the joint wrong. Employers are vicariously liable for the torts of their employees (or ‘servants’). In law they are ‘jointly liable’ with their wrongdoing employee to compensate the plaintiff for injury which he or she suffers as a result of those torts. Similarly, partners are ‘jointly and severally’ liable by statute⁷³³ for the wrongs of their co-partners. What should be the individual liabilities to pay punitive damages (if any) in each of the above cases, where not all of the wrongdoers acted in a punishable, or similarly punishable, manner?

1.187 For reasons which we explain below,⁷³⁴ we consider that vicarious liability, as well as the liability of partners for the wrongs of their co-partners, should be treated somewhat differently from other examples of multiple defendants. Accordingly, the discussion which follows deals only with the other examples of multiple defendants.

(a) The problems of the existing approach

1.188 In principle, one would expect that punitive damages should be payable, but only payable, by those who have acted in a manner which warrants punishment, and only to the extent necessary to punish them for what they have done. The existing law in England does not reflect this principled conclusion.

1.189 The English common law attempts to fit liability to punitive damages within the framework of joint and joint and several liability (hereafter simply ‘concurrent

⁷³² See paras 5.118-5.119 above.

⁷³³ Partnerships Act 1890, s 10; see also ss 11-12.

⁷³⁴ See paras 5.204-5.205 and 5.213-5.224 below.

liability’) which applies to any compensatory damages to which joint or joint and several tortfeasors (hereafter simply ‘concurrent tortfeasors’) may be liable.⁷³⁵ But this is a very poor ‘fit’. What works satisfactorily for compensatory damages produces anomalous results when applied to non-compensatory damages.

1.190 In *Broome v Cassell*⁷³⁶ it was held that where a plaintiff brings a single proceeding against two or more concurrent tortfeasors:

- (1) only one sum of punitive damages can be awarded against the joint defendants; but
- (2) that sum must not exceed the sum which is necessary to punish the least culpable of the joint defendants.

1.191 The consequences are objectionable. The limitation represented by proposition (2) is clearly required in order to avoid the risk of over-punishment or even of punishment where none is justified. Without it a concurrent tortfeasor might be made liable to pay an award which was available because of, and/or was assessed with reference to, the greater fault of another concurrent tortfeasor. If so, the punitive award would inevitably exceed that which was proportional to his or her fault, and necessary to punish him or her for it. And if the other concurrent tortfeasors were insolvent, so that contribution would not be possible, he or she would have to bear the full burden of that inappropriate award. However, by avoiding the risk of over-punishment by proposition (2), the present approach may leave concurrent tortfeasors under-punished or even unpunished. Where two or more of such tortfeasors are jointly sued, the liability of any will at most be that of the least culpable of their number;⁷³⁷ the logical corollary of this principle is that if no award is warranted by the conduct of that tortfeasor, the maximum liability of each will be nil.⁷³⁸ Highly culpable tortfeasors are fortuitously benefited for no better reason than that they happen to be associated with less culpable tortfeasors.

(b) The preferable, principled approach: ‘several liability’

1.192 A number of Commonwealth courts have refused to follow the English approach. Australian and Canadian courts recognise (in effect) ‘several liability’ to punitive damages.⁷³⁹ Separate awards of punitive damages, for different amounts, may be

⁷³⁵ See paras 5.77-4.80 above.

⁷³⁶ [1972] AC 1027.

⁷³⁷ Cf the effects of contribution. If contribution is possible, because there are one or more other concurrent tortfeasors who are solvent and similarly culpable, this will only further reduce the likely liability of each of those tortfeasors.

⁷³⁸ This point was recognised by Viscount Dilhorne in *Broome v Cassell*[1972] AC 1027, 1105F:

The result of this conclusion appears to be that if three defendants are sued for writing, printing and publishing a libel, if the publisher and author are held liable to pay exemplary damages and the printer is not, the plaintiff will not be awarded exemplary damages and the publisher and author will avoid liability for such damages.

⁷³⁹ See, on Australia, M Tilbury, *Civil Remedies* (1990) vol 1, [5014], citing *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448. See, on Canada, eg S M Waddams, *The Law of Damages* (2nd ed, 1991) para 11.410 referring to, *inter alia*,

made against each individual joint tortfeasor. This means that if only one joint tortfeasor's conduct justifies an award of punitive damages, judgment for such damages will be entered against that wrongdoer only, and the sum awarded will be that which is appropriate to his or her conduct alone. It also means that, if an award of punitive damages is justified by the conduct of two or more joint tortfeasors, separate judgments for punitive damages will be entered against each of them, for such sums as are warranted by their personal conduct. The position adopted by these courts has wide support from *inter alia*, Commonwealth academics⁷⁴⁰ and authorities,⁷⁴¹ and the Ontario Law Reform Commission.⁷⁴²

1.193 We consider that the only principled and workable way forward is to follow the example of other Commonwealth jurisdictions, and introduce 'several liability' to punitive damages.⁷⁴³ Our provisional view to this effect⁷⁴⁴ was supported by the overwhelming majority of consultees. A wrongdoer should be liable to a punitive damages award only where such award is available because of, and is assessed with reference to, his or her personal conduct. Separate punitive awards would be made against each individual wrongdoer; there will be no prospect of contribution.⁷⁴⁵ This is the only way in which it can be ensured that a wrongdoer is made liable to pay a sum which is simultaneously 'effective', but not 'excessive', and which is 'moderate' and 'proportionate' to the gravity of his or her wrongdoing. We therefore recommend that:

(34) 'several liability', rather than joint or joint and several liability, should apply to punitive damages (subject to recommendation (35) below); (Draft Bill, clause 8(1))

Townsvlew Properties Ltd v Sun Construction & Equipment Co Ltd (1974) 56 DLR (3rd) 330 (Ont CA) and *Gillett v Nissen Volkswagen Ltd* (1975) 58 DLR (3rd) 104 (Alta SCTD).

⁷⁴⁰ See eg S M Waddams, *The Law of Damages* (2nd ed, 1991) para 11.410; M Tilbury, *Civil Remedies* (1990) vol 1, [5014]; S Todd et al, *The Law of Torts in New Zealand* (2nd ed, 1997) p 1235.

⁷⁴¹ See eg the references at n 195 above.

⁷⁴² Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) pp 58-59. Glanville Williams, *Joint Torts & Contributory Negligence - A Study of Concurrent Fault* (1951) considered that there was "nothing in the theory of the matter to preclude a court from awarding or withholding exemplary damages according to the particular defendant who is sued", and that the "trend of authorities" bore out this view (§23, p 76). His work did, of course, precede consideration of this issue by the House of Lords in *Broome v Cassell* and he earlier conceded that the court had "not yet finally determined the problem of punitive damages in connection with concurrent tortfeasors" (§23, p 75).

⁷⁴³ Cf *Broome v Cassell* [1972] AC 1027, 1090B-C, in which Lord Reid rejected on grounds of impracticality a form of several liability to exemplary damages:

The only logical way to deal with the matter would be first to have a judgment against all the defendants for the compensatory damages and then to have a separate judgment against each of the defendants for such additional sum as he should pay as punitive damages. I would agree that that is impracticable.

⁷⁴⁴ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, paras 6.45 and 8.17(f), proposing the Irish Civil Liability Act 1961 as a model for reform. Our clause (8(1) of the draft Bill) aims to achieve the same result.

⁷⁴⁵ The availability of contribution in respect of a liability to compensate will be unaffected. See paras 5.206-5.207 and recommendation (36) below.

(c) Implications of the adoption of ‘several liability’

1.194 The implications of our recommendation that the liability to punitive damages should be ‘several’, rather than joint or joint and several, can be illustrated by two examples.

1.195 The first illustration is where:

Two concurrent tortfeasors cause (the same) damage to the plaintiff, but only one of them acts ‘outrageously’ in the sense required before a punitive award is available to a court.

In this case, both of the tortfeasors will be jointly and severally liable to pay the compensatory award; however, only the one (highly culpable) defendant will be liable to pay the punitive award - in full and without the prospect of contribution.

1.196 A second illustration is where:

Two concurrent tortfeasors cause (the same) damage to the plaintiff, and both of them act ‘outrageously’ in the sense required before a punitive award is available to a court.

In this case, both tortfeasors will be jointly and severally liable to pay the compensatory award; each could also be liable to pay separate punitive awards, assessed by reference to the personal conduct of each - which will be payable in full and without the prospect of contribution. It will be open to a court to decide that one of the ‘outrageous’ tortfeasors should not be punished by a punitive damages award. This might be because, for example, he or she has already been convicted in criminal proceedings for an offence which involves the conduct alleged to be outrageous, whereas the other tortfeasor has not been subjected to criminal proceedings. Or it might be because, for example, the court intends to award a remedy to the plaintiff against him or her, but not against the other tortfeasor (such as a substantial award of restitutionary damages), which is adequate to punish him or her for his or her conduct.

(d) Some complications arising from the adoption of ‘several liability’

1.197 Whilst we consider that several liability is the most justifiable general approach to cases involving multiple defendants, several complications arise:

(i) The increased potential for substantial ‘windfalls’ to plaintiffs

1.198 If several liability is adopted, the ‘windfall-to-plaintiffs’ objection which is raised against punitive damages awards may appear to apply with substantially greater force. Several liability has the effect that each defendant may be made liable to pay a separate sum which is made necessary by his or her personal conduct alone. The potentially problematic implication is that the plaintiff in such an action could receive as many punitive awards as there are defendants.

1.199 On reflection, however, we do not consider this to be a decisive objection to several liability for punitive damages awards. Take the following example:

A person (P) is assaulted by two people (D1 & D2), acting independently of one another. In case A, D1 and D2 both choose to kick P in the

abdominal region, cumulatively breaking P's ribs. In case B, D1 kicks P in the same region, breaking P's ribs, but D2 kicks P in the head, putting him into a coma.

In case A, D1 and D2 are joint and several tortfeasors; in case B, they are not. No objection can surely be raised to two punitive awards being made and received in case B, but on the view expressed above,⁷⁴⁶ objections will be raised to the plaintiff receiving two awards in case A. Yet the only factual distinction between cases A and B is an immaterial one as far as punishment (as opposed to compensation) is concerned: namely, that D1 and D2 have independently acted to cause the *same* (case A) or *different* damage (case B) to the plaintiff. In cases A and B alike, two very grave wrongdoers require punishment for the deliberate and outrageous disregard of the plaintiff's rights which each has respectively shown.

1.200 The absence of any sound basis for the initial objection that several liability will leave a plaintiff with an unjustified windfall can be further appreciated if one compares the scenarios outlined above with a different situation, in which it will be uncontroversial that two awards should be made and received by the plaintiff: that is, where the independent acts of D1 and D2 occur a significant time apart from each other.

(ii) *The impact of our 'last resort' approach*

1.201 The 'last resort' nature of the punitive award (whereby an award is permitted only where any other remedy or remedies which the judge is minded to award will be insufficient to punish and deter) means, in particular, that the size of a punitive award will vary as the size of the compensatory award varies. Thus, if the compensatory award is small, a higher punitive award may be necessary in order effectively to punish and deter.

1.202 The source of the complication here is that joint or joint and several liability must continue to operate in respect of the compensatory part of any award. As a result, the size of such award could fluctuate substantially, depending upon whether the defendant was able, or unable, to obtain contribution from the other wrongdoers. This poses a risk of over or under-punishment of defendants. The problem is that the court, in deciding whether to make an award, and if so, at what level, must inevitably make some assumption about the defendant's chances of obtaining contribution. If the court makes an award on the basis of an erroneous assumption that the defendant will get contribution, then the defendant will be punished and deterred to a greater extent than the court thought to be both necessary and proportional to the outrageousness of his conduct. For having underestimated the ultimate size of the compensatory award, the court will have assessed the punitive award at too high a level.

1.203 However, we anticipate that, if there was any doubt about the matter, a court would assess a punitive award on the basis that the defendant will be liable for the whole of the compensatory award (that is, irrespective of the availability of contribution). Under-punishment and under-deterrence are less undesirable than leaving a defendant over-punished and over-deterred. The core principles of

⁷⁴⁶ See para 5.198 above.

‘moderation’ and of ‘proportionality’, which are each a vital part of the law’s protection of the rights of wrongdoers, require this.

(iii) Exceptions to the general principle of several liability to punitive damages: vicarious liability and partnerships

1.204 We consider that two exceptions are required to the principle that liability to punitive damages should be ‘several’, rather than joint or joint and several. The first is the doctrine of vicarious liability. The second is the liability of partners for wrongs of their co-partners. We therefore recommend that:

(35) recommendation (34) (‘several liability’, rather than joint or joint and several liability shall apply to punitive damages) is without prejudice to:

(a) our recommendation that vicarious liability to pay punitive damages should be retained; (Draft Bill, clause 8(2)(a))

(b) the liability of a partner for the wrongs of his co-partner. (Draft Bill, clause 8(2)(b))

We explain the exception for vicarious liability below,⁷⁴⁷ but it is convenient at this point to explain the exception for the liability of partners for co-partners.

1.205 Partners are jointly and severally liable to any persons who are not themselves partners for the wrongs committed by any partner acting in the ordinary course of the business of the ‘firm’ or with the authority of his co-partners.⁷⁴⁸ That liability is expressed to include a liability for “penalties” imposed as a result of the wrongful conduct.⁷⁴⁹ *Prima facie* section 10 of the Partnership Act 1890 also makes partners jointly and severally liable to pay punitive damages in respect of the wrong of a co-partner. We have been unable to discover any case in which partners have been held to be so liable, or in which the point is even discussed. But we do consider that this could properly occur. Accordingly, our proposal that any liability to punitive damages should be several (rather than joint, or joint and several) is subject to the qualification that it should not affect the (joint and several) liability of ‘innocent’ partners to pay punitive damages in respect of the wrongs of a co-partner.

(iv) The right to contribution under the Civil Liability (Contribution) Act 1978

1.206 The Civil Liability (Contribution) Act 1978 provides that any person who is “liable in respect of any damage” suffered by another may recover contribution

⁷⁴⁷ See paras 5.209-5.230 below.

⁷⁴⁸ Section 10 of the Partnership Act 1890 provides:

Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

⁷⁴⁹ Partnership Act 1890, s 10.

from any other person who is “liable in respect of the same damage”.⁷⁵⁰ A person is “liable in respect of any damage” if the person who suffered the damage is entitled to recover compensation from him or her in respect of it, whatever the legal basis of the liability.⁷⁵¹

- 1.207 In general, it would be inappropriate for the statutory right to contribution to operate in respect of a liability to punitive damages. We recommend above that,⁷⁵² subject to two specific exceptions, the liability to pay punitive damages should be ‘several’ only.⁷⁵³ Where this is the case, there should be no right to contribution under the 1978 Act. For the avoidance of doubt,⁷⁵⁴ we accordingly recommend that:

(36) our draft Bill should ensure that the right to recover contribution laid down in section 1 of the Civil Liability (Contribution) Act shall not extend to a liability to pay punitive damages that is ‘several’.
(Draft Bill, clause 8(3))

- 1.208 Where a liability to punitive damages is *other* than ‘several’, however, any right to claim contribution conferred by the 1978 Act should continue to exist. This means that where a person is held vicariously liable to pay punitive damages, or is a partner who is held ‘jointly and severally’ liable to pay punitive damages in respect of the wrongs of a co-partner,⁷⁵⁵ he or she should not be prevented from claiming contribution from his or her employee, agent or co-partner, when the 1978 Act currently entitles him or her to do so.

(6) Vicarious liability

- 1.209 The questions we address here are whether, and if so, when, a person should be held vicariously liable to pay punitive damages in respect of another’s wrongful

⁷⁵⁰ Civil Liability (Contribution) Act 1978, s 1(1).

⁷⁵¹ Civil Liability (Contribution) Act 1978, s 6(1).

⁷⁵² See para 5.193 and recommendation (34) above.

⁷⁵³ The proposition that a liability to punitive damages should be ‘several’ means that punitive damages should only be awarded where they are available because of, and are assessed by reference to, the defendant’s conduct. The corollary is that any award so available and assessed should be payable only, and in full, by *that defendant*.

⁷⁵⁴ This may be sufficiently clear from the general proposition in our draft Bill (clause 8(1)) that a liability to pay punitive damages is ‘several’ only. Nevertheless, subject to this, the wording of s 1(1) and s 6(1) of 1978 Act is broad enough to entitle a person to claim contribution in respect of a liability to pay punitive damages *wherever* he or she is liable to pay compensation for the “same damage” as the person from whom contribution is claimed. In some cases so included (ie where liability is vicarious) this is acceptable, because such cases constitute exceptions to our recommendation that the liability of a person to pay punitive damages should be ‘several’ only. But in many other cases so included (eg where two or more persons are liable as participants in a joint enterprise, or have independently acted wrongfully so as to cause the same indivisible damage to the defendant) it is not acceptable that they should have a right to contribution under the 1978 Act in respect of any punitive sums that are awarded.

⁷⁵⁵ Partnership Act 1890, ss 10 and 12. See para 5.205 above.

conduct.⁷⁵⁶ Although it has consistently been assumed that vicarious liability extends to exemplary or punitive damages on the same basis as compensatory damages,⁷⁵⁷ we cannot find any case in which the application of vicarious liability has been challenged in an English court. Existing authorities therefore offer little assistance in resolving this difficult issue. Several strong objections can in fact be raised to recognising vicarious liability to punitive damages.

(a) The problems caused by the recognition of vicarious liability

- 1.210 The first objection is that vicarious liability imposes a burden on employers that is unfair, because it imposes the cost of an award on an ‘innocent’ employer, whilst leaving the ‘guilty’ employee unpunished by law. *Prima facie* this is objectionable for precisely the same reasons as require that several liability to punitive damages be introduced in relation to joint and several tortfeasors. As the award will not be made against the primary wrongdoer-employee,⁷⁵⁸ it will not be ‘effective’; and as the award will be exacted from an ‘innocent’ employer, it will necessarily infringe the principles of ‘moderation’ and ‘proportionality’ which we consider constitute vital limiting principles on the scope of liability to punitive damages.
- 1.211 The second objection is that recognising vicarious liability for punitive damages imposes a burden on employers that is not warranted by the policies which serve to justify the law’s recognition of claims to punitive awards. A similar objection has been raised against insurance against such awards.⁷⁵⁹ The immediate practical effect of insurance and of vicarious liability is that the burden of liability is transferred from the ‘primary’ wrongdoer to another party - whether the employer or the insurer. As a result, the direct punitive, deterrent or symbolic efficacy of the punitive award is at best substantially diluted. The ‘primary’ wrongdoer does not ‘feel’ the punitive award in his or her pocket.
- 1.212 We acknowledge the force of these arguments. Together they appear to entail that one should refuse to recognise vicarious liability to punitive damages. But for the reasons which we elaborate below, and in agreement with the majority of consultees, we nevertheless consider it to be correct to recommend that:

(37) our draft Bill should clarify that a person may be vicariously liable to pay punitive damages in respect of another’s conduct; (Draft Bill, clause 11(1))

(b) The reasons for recognising vicarious liability to punitive damages

- 1.213 Our reasons for preferring to recognise vicarious liability, which we elaborate fully below, can be summarised as follows:

⁷⁵⁶ The question was discussed in *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, paras 6.42-6.44, without any provisional view being reached.

⁷⁵⁷ See paras 4.102-4.105 above.

⁷⁵⁸ Whether directly, by initial proceedings against the employer, or less directly, by way of contribution or indemnity claims between employer and employee.

⁷⁵⁹ See generally paras 5.234-5.268 below.

- (1) 'Vicarious liability' arguably produces unfairness and gives rise to problems of justification even in relation to compensatory damages.
- (2) In practice the objection that, by permitting vicarious liability, punitive damages are rendered ineffective, pointless and so unjustified, is not as strong as it may initially appear. Vicarious liability in respect of punitive damages may further the aims of such damages. And in some cases such liability may be the only way of furthering those aims.
- (3) The situation of joint and several tortfeasors is materially different from that of employer-employee joint tortfeasors, so that the unfairness which is clear in joint and several liability to punitive damages is less clearly present in cases of vicarious liability.

1.214 We now elaborate these reasons.

(i) *The general problem of the 'justification' of vicarious liability*

1.215 It is notoriously difficult to find a convincing, comprehensive justification of the doctrine of 'vicarious liability'.⁷⁶⁰ As a result, the 'unfairness' objection stated above is not unique to vicarious liability to awards of punitive damages - a rather similar objection could be raised even against vicarious liability to compensatory damages. As P S Atiyah observes:

Vicarious liability is one of the most firmly established legal principles throughout the common law world, but generations of lawyers have felt in some uneasy way that there is something so odd or exceptional about vicarious liability that it needs justification; and they have been hard put to it to justify the doctrine though almost unanimous in admitting that it is a laudable and necessary part of the law of torts.⁷⁶¹

Atiyah proceeds to suggest that:

The reasons for this unease are probably two-fold. Vicarious liability seems at first sight to run counter to two principles of the law of torts, namely that a person should only be liable for loss or damage caused by his own acts or omissions, and secondly that a person should only be liable where he has been at fault. These principles are so deeply rooted in legal thinking that any departure from them seems at first sight impossibly unjust.⁷⁶²

1.216 The objection of 'unfairness' to vicarious liability to punitive damages is that 'innocent' employers are punished for the wrongful acts of their employees. Yet as Atiyah recognises, vicarious liability to compensatory awards may also entail that an employer can be held liable even in circumstances in which he or she has not been at fault. Accordingly, there is one central similarity: a defendant-employer is

⁷⁶⁰ For a thorough consideration and criticism of the many different arguments which have been advanced in support of vicarious liability, see P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) Ch 2.

⁷⁶¹ P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) p 12.

⁷⁶² *Ibid.*

liable to pay *a sum of money which is not required to rectify any wrongful loss which he or she has caused or any wrongful gain which he or she has made, nor to punish him or her for any wrongful conduct of his or her own.*

- 1.217 In relation to vicarious liability in respect of compensatory damages, many would consider that the law rightly tolerates any perceived unfairness at least partly because, by allowing plaintiffs to proceed against solvent employers, their chances of having any claim to compensation satisfied are significantly improved. As a result, the primary compensatory aim of such damages is furthered, rather than frustrated, by the recognition of vicarious liability.
- 1.218 On careful consideration we believe that, although contrary to what one might at first think, the same reasoning applies to awards of punitive damages. In other words, the primary punitive aim of such damages can be furthered, rather than frustrated, by the recognition of vicarious liability. If so, then this provides at least some reason why any perceived ‘unfairness’ in vicarious liability ought to be tolerated. We explain this point below.

(ii) *Furthering the purposes of punitive damages by means of vicarious liability*

- 1.219 The immediate impact of vicarious liability is clearly that the primary wrongdoer escapes punishment *by the law*.⁷⁶³ Nevertheless, vicarious liability may offer a wider, if indirect, method for pursuing the aims of punitive damages.⁷⁶⁴
- 1.220 Employers who are so liable, or who are potentially so liable, will have an incentive to control and educate their workforces. The development by employers of some form of ‘wrong-preventing’ educative process might be particularly beneficial, for example, in cases of sex or race discrimination. Employers also possess a range of disciplinary powers which will enable them to penalise and deter individual guilty employees, or to discourage potential wrongdoers. Indeed, the loss of employment, coupled with impaired employment prospects,⁷⁶⁵ may be a more severe form of sanction for wrongdoing by employees than a punitive damages award could directly provide.
- 1.221 In two categories of case, moreover, vicarious liability may provide the only method for pursuing the aims of punitive damages. These are, firstly, where employees are unlikely to be able to satisfy a punitive damages award of any significant size; and secondly, where a plaintiff has problems identifying the culpable member of the employer’s workforce.⁷⁶⁶

⁷⁶³ Cf the potential impact of rights of contribution or indemnity.

⁷⁶⁴ For economic theory supporting this conclusion, see A Ogus, “Exemplary Damages and Economic Analysis” in K Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (1997) p 99.

⁷⁶⁵ An employee dismissed for such a reason would be most unlikely, for example, to be able to obtain favourable references from his or her former employer.

⁷⁶⁶ In this respect it is interesting to observe that the statement of claim in *Racz v Home Office* [1994] 2 AC 45 (see para 4.103 above) only identified one of the officers concerned by name, and that in *Flavius v MPC* (1982) 132 NLJ 532 (see para 2.10, n 53 above), an “unknown” police officer broke the leg of the plaintiff. We appreciate that some practical difficulties will arise in proving that the unidentified individual employee’s conduct showed

(iii) *Joint and several liability is distinguishable, and more clearly 'unfair'*

1.222 So far we have assumed that vicarious liability is prima facie 'unfair' to employers; we have then suggested that this unfairness could be tolerated to the extent that, by recognising vicarious liability to punitive damages, the aims of punitive damages are furthered, rather than frustrated. We now seek to deny that there is, on closer examination, anything intolerably unfair about vicarious liability in respect of punitive damages. Our argument is that 'joint and several liability' and 'vicarious liability' are distinguishable in two important ways which indicate that the 'unfairness' that we have identified in the former does not so clearly exist in the latter case.

1.223 The first difference is that an employee forms part of the employer's enterprise and that that enterprise generally 'profits' from his or her employment. In most cases there will be no similar relationship between joint and several tortfeasors. This element of 'benefit' to the employer is one justification which has been offered for vicarious liability to compensatory damages. This justification is founded on a moral imperative that one who derives a benefit - in particular a financial profit - from certain acts, should also bear the risk of loss therefrom. Jane Stapleton has recently offered a more sophisticated formulation of this argument, which she terms "moral enterprise liability".⁷⁶⁷ Such an argument does not appear to be any less applicable to vicarious liability in respect of punitive damages than to vicarious liability in respect of compensatory damages. Moreover, as Jane Stapleton observes, this argument does successfully explain key features of the doctrine of vicarious liability within the civil law. In particular, it explains the restriction of the liability of employers to liability for the acts of their 'employees' within 'the course of their employment'. Current tests used to determine whether a person is an 'employee' or an 'independent contractor' have at their core the question "who has the chance of gain and bears the risk of loss?" - or in a slightly different form, "is he or she in business on his or her own account?"⁷⁶⁸ The 'course of employment' criterion also generally restricts the scope of liability of employers to those cases in which the employee is acting for the employer.

a 'deliberate and outrageous disregard of the plaintiff's rights'. To hold an employer vicariously liable assumes that facts can be proved to exist which would sustain the primary liability of the employee which is to be attributed to the employer by means of the doctrine of vicarious liability. The plaintiff will usually be able to prove that his or her rights have been invaded in some way, by an employee of the employer; however, it may be more difficult to prove that this disregard was 'deliberate and outrageous', given that this will depend, to a significant extent, on *what was the state of mind of the defendant*. This can clearly only be a matter of inference. On particular facts it might be difficult to infer that the really culpable sort of state of mind, which is needed before an award of punitive damages is justified, did exist. But a person's state of mind is always a matter of (more or less problematic) inference from 'external' facts.

⁷⁶⁷ J Stapleton, *Product Liability* (1994) pp 190-191, and more generally Ch 8. This rationalisation is distinct from well-established theories of enterprise liability which rest on economic arguments. General discussion of economic theories of this sort in relation to vicarious liability can be found in, *inter alia*, P S Atiyah, *Vicarious Liability in the Law of Torts* (1967) pp 22-27.

⁷⁶⁸ See, in particular: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance* [1968] 2 QB 497; *Market Investigations Ltd v Minister of Social Security* [1968] 2 QB 173; *Lee Tin Sang v Chung Chi-Keung* [1990] 2 AC 374 (PC).

1.224 The second difference is that, in very many cases, joint and several tortfeasors have neither the moral nor legal responsibility (or power) to control or influence the past and future behaviour of fellow joint and several tortfeasors. Nor, in most cases, will they have any practical ability to do so. Making a joint and several tortfeasor liable to sums awarded in respect of the conduct of others will therefore do little to advance the aims of punitive damages. The position of employers is precisely the reverse - as we indicate in argument (ii) above. Moreover, the 'control test' was traditionally regarded as *the* criterion by which the legal status of 'employee' was to be distinguished, thereby defining the category of persons for whose acts employers can be vicariously liable. And even today, when the 'control test' has been replaced by a 'multiple factor' approach, 'control' remains one such important and relevant factor.⁷⁶⁹

(c) *When should a person be vicariously liable for wrongs of another?*

1.225 When the doctrine of vicarious liability is discussed in cases and texts on the law of tort, those discussions are first and foremost about a person's vicarious liability to pay compensatory damages. Nevertheless, we, consider that if, as we have argued above, vicarious liability to punitive damages can be justified, it should apply subject to the same conditions as apply generally⁷⁷⁰ to the wrong in question. Several considerations support this view. First, to apply two different concepts to different parts of the same claim⁷⁷¹ may promote excessive complexity in argument and adjudication. In particular, it could produce extensive debate as to the precise distinctions between the ordinary and the new (and narrower) concept. Secondly, this complexity would be unwarranted because, we believe, the concept of vicarious liability, as generally formulated, adequately defines the category of case within which it is fair (or at least not unfair) to make employers liable for the wrongs of their employees.⁷⁷² Thirdly, it would be unfortunate if our Act made a person vicariously liable to pay punitive damages for a wrong committed by another if the concept of vicarious liability has never been recognised in relation to (or deliberately excluded from) the wrong in question.

1.226 At common law, employers are vicariously liable to pay compensatory damages for the torts of their employees, committed within the course of their employment.⁷⁷³ In our view, the same concept should generally define when an employer is liable to pay punitive damages for its employees' torts. However, statutes occasionally expressly formulate the doctrine of vicarious liability for the purposes of a particular wrong (such as unlawful discrimination on grounds of sex, race or disability),⁷⁷⁴ or extend the doctrine to apply to persons who are not, strictly, the

⁷⁶⁹ See, in particular: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions & National Insurance* [1968] 2 QB 497; *Lee Tin Sang v Chung Chi-Keung* [1990] 2 AC 374 (PC). See *Clerk & Lindsell on Torts* (17th ed, 1995) para 5-09.

⁷⁷⁰ That is, to the liability to pay compensatory damages for the wrong.

⁷⁷¹ One concept would apply to the claim to compensation for the wrong; another concept would apply to the claim for punitive damages.

⁷⁷² See paras 5.219-5.224 above.

⁷⁷³ See para 4.102 above.

⁷⁷⁴ Sex Discrimination Act 1975, s 41; Race Relations Act 1976, s 32; Disability Discrimination Act 1995, s 58. The phrase "in the course of employment" is to be

‘employers’ of the employee in question.⁷⁷⁵ In either case, it is the concept so formulated which should define the extent of vicarious liability to pay punitive damages. And if a certain person,⁷⁷⁶ or persons generally,⁷⁷⁷ can never be vicariously liable for a particular wrong (apart from our Bill), our Bill should not make such a person or persons liable to pay punitive damages for that wrong.

1.227 We therefore recommend that:

(38) our draft Bill should not define the circumstances in which one person may be vicariously liable for the wrongs of another; instead, it should assume the boundaries of the concept of vicarious liability as it exists at common law, or by statute, for the particular tort, equitable wrong or statutory wrong in question. (Draft Bill, clause 11(1) and 11(2))

(d) *What should the vicariously liable person be liable to pay?*

1.228 What sum of damages should a person, who is vicariously liable for the wrong of another, be liable to pay? The nature of vicarious liability should generally entail that the sum should be that which that other is or would be liable to pay. Thus, if faced with an employer who (it is alleged) is vicariously liable for the wrong of his or her employee, the court should determine what punitive damages the employer is liable to pay by applying the tests of availability and the principles of assessment to the conduct of the *employee* for whom the employer is vicariously liable.⁷⁷⁸

1.229 There is, however, one important reason why a person who is vicariously liable to pay punitive damages for the wrongs of another may have to pay a different sum from that which the other is or would be liable to pay. We have recommended that defendants should be permitted to argue that they will suffer undue hardship if they must satisfy the award of punitive damages which the court proposes to make against them,⁷⁷⁹ and that, if this argument is accepted by the court, a lower award must be made. On this basis, employee-defendants will be liable to pay a reduced

construed less technically and restrictively (see *Jones v Tower Boot Co Ltd* [1997] 2 All ER 406 (CA), interpreting s 32 of the Race Relations Act 1976), and the employer has a defence if he can prove that he took such steps as were reasonably practicable to prevent the (wrongdoing) employee from doing the wrongful act, or doing, in the course of his employment, acts of that description.

⁷⁷⁵ In particular, the Crown Proceedings Act 1947, s 2(1)(a) (Crown); Police Act 1996, s 88(1) (chief officer of police); Police Act 1997, s 42(1) (Director General of the National Criminal Intelligence Service), s86(1) (Director General of the National Crime Squad).

⁷⁷⁶ The statutory provisions which extend the doctrine of vicarious liability to (eg) the Crown or to chief officers of police (referred to above), only deal with vicarious liability for *torts*.

⁷⁷⁷ There is little authority for vicarious liability for equitable wrongs: see para 4.102, n 228 above.

⁷⁷⁸ In particular: (i) did the employee commit a wrong for which punitive damages may be awarded?; (ii) did the employee’s conduct demonstrate a deliberate and outrageous disregard of the plaintiff’s rights?; (iii) are other remedies or sanctions inadequate to punish the employee for his conduct?; (iv) what sum of punitive damages should be awarded in order to punish the employee for his or her conduct, taking account of the various principles and factors which our Bill requires a court to take into account?

⁷⁷⁹ See paras 5.135-5.137 and recommendation (26) above.

award if they succeed in persuading the court that they have insufficient means to satisfy the proposed liability. In our view, vicariously liable defendants should also be permitted to advance the argument that they (the employers) have insufficient means, but not the different argument that what they must pay should be reduced on account of their employees' insufficient means.⁷⁸⁰ On this limited basis it is quite conceivable that employers could be liable to pay sums of punitive damages in excess of those which their employees are or would be liable to pay: primarily because an employee is much more likely than his or her employer to succeed with an argument that the proposed award is too high for him or her to pay.

1.230 We therefore recommend that:

(39) subject only to recommendation (40), the sum of punitive damages which a person is vicariously liable to pay for the wrong of another should be that which that other would be liable to pay, and should be determined on that basis. (Draft Bill, clause 11(2))

(40) where the court is assessing the sum of punitive damages which an employer is vicariously liable to pay for the wrongs of its employee:

(a) the award payable by the employer may be reduced (in accordance with recommendations (26)-(28)) if the court considers that the employer's means are such that it would cause it undue hardship to be required to pay such sum as would otherwise be appropriate, (Draft Bill, clause 11(3)) **and**

(b) the award payable by the employer must not be reduced on the ground that the employee's means are such that it would cause the employee undue hardship if he or she was to be required to pay such sum as would (disregarding the means of the employee) otherwise be appropriate. (Draft Bill, clause 11(3))

(7) Standard of Proof

1.231 We are content, in agreement with the majority of consultees, to continue to apply the civil standard of proof to claims to punitive damages.⁷⁸¹ That this is the existing legal position was recently confirmed by the Court of Appeal in *John v MGN Ltd*.⁷⁸² We therefore reject any view that the criminal standard of proof is appropriate, in order to replicate the evidential safeguards that are offered by the criminal law, and in recognition of the quasi-criminal nature of the activity which may give rise to a punitive damages award. We also reject an intermediate standard, such as 'clear and convincing evidence', which has been adopted in some American states. Accordingly, we recommend that:

⁷⁸⁰ This is the approach taken in *Thompson v MPC* [1997] 3 WLR 403. See above, paras 4.70-71.

⁷⁸¹ This issue was discussed, without any provisional view being reached, in *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, paras 3.111-3.112 and 6.37.

⁷⁸² *John v MGN Ltd* [1997] QB 586. See paras 4.99-4.100 above.

(41) if it is sought to establish a matter relating to the question whether punitive damages should be awarded, or to the question of their amount, the civil, and not the criminal, standard of proof must be satisfied. (Draft Bill, clause 10)

1.232 One reason for accepting the civil standard of proof is that that standard is, in fact, an inherently flexible standard.⁷⁸³ Clearer evidence will be required by the courts, in order for such standard to be satisfied, where the allegations, or the consequences of the decision for one or both of the parties, are serious. Both of these conditions will generally be satisfied by claims to punitive damages. The corollary is that defendants to such claims may be adequately protected even without the criminal standard of proof and within the 'lower' civil standard. *Cross & Tapper on Evidence* deals with the analogous case of allegations of criminal conduct in civil actions in the following way:⁷⁸⁴

... the person against whom criminal conduct is alleged is adequately protected by the consideration that the antecedent improbability of his guilt is 'a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities'.

1.233 A second reason for accepting the civil standard is that it could be impractical for a higher burden of proof to be adopted for only one part of a civil action: all other aspects of liability (especially, for example, the commission of the wrong which founds a claim to compensatory damages) would be determined according to the ordinary civil standard; whereas just one aspect (that is, 'deliberate and outrageous disregard of the plaintiff's rights') would be determined according to the criminal standard.

(8) Insurance against punitive damages

1.234 In this section we mainly deal with the question whether a person should be *permitted* to insure against any liability to punitive damages which they may incur (personal or vicarious). In the final subsection,⁷⁸⁵ we also deal with the rather different question of whether statutes which currently make insurance *compulsory* in certain circumstances require, or should be construed to require, insurance against a liability to pay punitive damages (and not just compensation) for a wrong.

(a) The options for reform

1.235 We have found the issue of whether a person should be permitted to insure against a liability to punitive damages difficult to resolve, not least because consultees put forward a very wide range of opinions. A survey of the approach of other common law jurisdictions to this issue similarly reveals a considerable range of

⁷⁸³ See the discussion at paras 4.99-4.100 above.

⁷⁸⁴ *Cross & Tapper on Evidence* (8th ed, 1995) p 171.

⁷⁸⁵ See paras 5.270-5.273 below.

approaches.⁷⁸⁶ Although it was not expressed in this way in Consultation Paper No 132,⁷⁸⁷ we regard the choice as one between three main options:

- (1) insurance against punitive damages awards is in all cases permitted by legislation;
- (2) there is no general legislative public policy bar on insurance, but insurance is barred in cases involving especially outrageous conduct;
- (3) insurance against punitive awards is in all cases barred by legislation.

1.236 On the balance of arguments of principle, policy and practicality, we reject a bar of any sort on insurance against punitive damages: that is, we favour option 1. We give the decisive reasons for our choice below.

(b) The decisive reasons for preferring option 1: insurance is permitted in all cases

(i) The need for plaintiffs to have a financial reason for claiming punitive damages

1.237 There is a clear public interest in punishing and deterring bad conduct of a nature which merits a punitive damages award, as well as in offering appeasement to the victims thereof. Nevertheless, it is futile to discuss the pursuit of these aims through civil litigation if plaintiffs will not claim punitive damages because the defendant cannot pay them. Plaintiffs are unlikely to claim punitive damages where defendants do not have the financial capacity to pay any substantial damages and costs which may be awarded against them. Such capacity may be afforded, however, by liability insurance.

(ii) The efficacy of the pursuit of the aims of punitive damages

1.238 We do not believe that the aims of punitive damages will be either wholly or substantially frustrated by generally permitting insurance against awards. Although we recognise that any retributive and deterrent purposes of this category of damages may be diluted by our proposed approach to insurance, we do not anticipate that they will be wholly frustrated: in particular, the insurance industry, in controlling the availability and cost of such insurance, is in a position to exert significant pressure on present or potential insured parties.

1.239 Our views on this matter are supported by strong recent judicial statements. In *Lamb v Cotogno*⁷⁸⁸ the High Court of Australia recognised that the purposes of punitive damages are not wholly frustrated by the availability of insurance:

⁷⁸⁶ See the discussion in *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, para 6.39-6.41; see also, on the approach of United States jurisdictions, *inter alia*, L Schlueter and K Redden, *Punitive Damages* (3rd ed, 1995) vol 2, § 17.0-17.2; D B Dobbs, *Law of Remedies* (2nd ed, 1993) § 3.11(7).

⁷⁸⁷ *Aggravated, Exemplary and Restitutionary Damages* (1993) Consultation Paper No 132, paras 6.39-6.41.

⁷⁸⁸ (1987) 164 CLR 1.

The object, or at least the effect, of exemplary damages is not wholly punishment and the deterrence which is intended extends beyond the actual wrongdoer and the exact nature of his wrongdoing.⁷⁸⁹

- 1.240 In the more recent case of *Lancashire County Council v Municipal Mutual Insurance Ltd*,⁷⁹⁰ Simon Brown LJ in the Court of Appeal considered that, owing to the responses of the insurance industry, an exemplary damages award was “still likely to have a punitive effect”:

First, there may well be limits of liability and deductibles under the policy. Second, the insured is likely to have to pay higher premiums in future and may well, indeed, have difficulty in obtaining renewal insurance.⁷⁹¹

- 1.241 Moreover, regardless of the impact of permitting insurance against the possibility of awards of punitive damages on the aims of punishment and deterrence, the aim of satisfaction of the plaintiff can still coherently be pursued even where a defendant is insured. As a significant number of cases in this area could involve the violation of important rights of plaintiffs, yet no or very little compensatable loss, the importance of this aim ought not to be underestimated.

(iii) *Sanctity of contract*

- 1.242 There is a general policy underlying the law of contract that commercial contracts ought not to be lightly interfered with by courts or even legislation. In *Printing & Numerical Registering Co v Sampson*,⁷⁹² for example, Sir George Jessel MR offered a powerful entreaty to courts considering the application of any doctrine of public policy:

... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract.⁷⁹³

- 1.243 Courts have required that the reasons for imposing a public policy be forceful, and not open to doubt, before they will apply or extend a public policy ‘bar’. As Simon Brown LJ stated in *Lancashire County Council v Municipal Mutual Insurance Ltd*⁷⁹⁴ in indicating his opposition to a public policy bar on insurance against awards of exemplary damages:

⁷⁸⁹ (1987) 164 CLR 1, 9.

⁷⁹⁰ [1996] 3 WLR 493.

⁷⁹¹ [1996] 3 WLR 493, 503H-504A.

⁷⁹² (1875) LR 19 Eq 462.

⁷⁹³ (1875) LR 19 Eq 462, 465.

⁷⁹⁴ [1996] 3 WLR 493.

... [c]ontracts should only be held unenforceable on public policy grounds in very plain cases.⁷⁹⁵

1.244 This observation is particularly apt given that, as the diversity of responses which we received demonstrated, the case of insurance against punitive damages is by no means a 'very plain' one.

1.245 Such judicial caution has been demonstrated in relation to both the interpretation and extension of any common law bar *and* the construction of statutes which may have the effect of rendering a contract 'illegal' and so potentially unenforceable.⁷⁹⁶ Thus in *St John Shipping Corporation v Joseph Rank Ltd*⁷⁹⁷ Devlin J dealt with the correct approach to statutory construction where in the performance of a contract statutory provisions have been breached, and it is alleged that the contract is (by that statute) impliedly rendered 'illegal' and unenforceable:

[Without a clear implication of statutory intention, courts should be] very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract.⁷⁹⁸

1.246 At a more specific level we would argue that if insurers accept a premium to cover a certain risk, they should meet it. This point was also made by Simon Brown LJ in *Lancashire County Council v Municipal Mutual Insurance Ltd*.⁷⁹⁹

(iv) *'Self-insurance' and 'gifts': comparisons*

1.247 We were also impressed by two arguments put forward by consultees to the effect that a bar on insurance would be inconsistent or unfair in its effects, owing to some alternative ways in which a liability to pay punitive damages could be met without the need to insure, and even if insurance against such liability was to be barred. The first argument was that a bar on insurance is objectionable because it produces inequality between the impact of punitive damages awards on organisations which are able to 'self-insure' and those which cannot. The second was that no objection is made to allowing another person or organisation to meet a defendant's liability to punitive damages by way of a gift.

(v) *Avoiding conflict between defendant and insurer*

1.248 A final point is that to permit insurance against punitive damages may minimise the number of occasions on which defendants *and their insurers* come into conflict - in the settlement process, or in court. Such conflict might arise in a case where the defendant is insured against the non-punitive part of any award, but did not or could not obtain insurance against the punitive award. In this situation, the

⁷⁹⁵ [1996] 3 WLR 493, 504C.

⁷⁹⁶ More recently, following the lead of Devlin J in *St John Shipping Corpn v Joseph Rank Ltd* [1957] 1 QB 267, courts been more reluctant to bar enforcement of an 'illegal' contract: see eg *Shaw v Groom* [1970] 2 QB 504; *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1; *Howard v Shirlstar Container Transport Ltd* [1990] 1 WLR 1292.

⁷⁹⁷ [1957] 1 QB 267.

⁷⁹⁸ [1957] 1 QB 267, 288.

⁷⁹⁹ [1996] 3 WLR 493, 504A.

defendant may seek to maximise the size of any compensatory or restitutionary award. This would serve to maximise the part of a total award that is covered by insurance. In direct conflict with the interests of the defendant on this issue, however, are the interests of the insurers. This is because their interests would lie in minimising the size of any non-punitive award, the risk of which they must meet, and in maximising the size of any punitive award, the risk of which they need not meet. Undesirable consequences, in particular the need for three sets of legal representation (for defendant, plaintiff and insurers), might ensue.⁸⁰⁰

(c) The reasons for rejecting option 2: a public policy bar in the case of particularly outrageous conduct

1.249 Option 2 was raised in one possible form before the Court of Appeal in *Lancashire County Council v Municipal Mutual Insurance Ltd.*⁸⁰¹ The defendant's counsel argued that there should be a bar on insurance where the conduct which gave rise to the award of exemplary damages was criminal in nature. The Court of Appeal left open what should be the proper approach to cases involving the personal liability of defendants, but it rejected an option 2 approach, and adopted an option 1 approach, in relation to vicarious liability.⁸⁰²

1.250 We consider, however, that option 1, and not option 2, is the correct approach to adopt in relation to both personal and vicarious liability. This is so whether the appropriate characterisation of the cases in which a public policy bar applies is, for example, 'especially outrageous conduct' or 'conduct constituting a criminal offence'. In addition to the five positive reasons given above for favouring option 1, we consider that there are three specific reasons for rejecting option 2.

(i) The greater need to preserve a financial reason for plaintiffs to claim punitive damages in the case of particularly outrageous conduct

1.251 First, and most importantly, the need for plaintiffs to have a financial reason to claim punitive damages has even greater force in the case of the particularly outrageous conduct which would be made the subject of a bar on insurance under option 2. Perversely, a bar on insurance in the case of particularly outrageous conduct would reduce, rather than increase, the prospect of punitive damages being claimed. This would not be in the public interest of securing the punishment of serious wrongdoers.

⁸⁰⁰ We recognise that permitting insurance will not remove this problem: it could arise in any case where defendants did not insure or could not insure, either because the premiums demanded were too high, or because the insurers excluded punitive awards from the scope of their policies. Nevertheless, if insurance is permitted, the conflict is at the very least not inevitable.

⁸⁰¹ [1996] 3 WLR 493. See also *Chitty on Contracts* (27th ed, 1994) 16-005 ("[o]bviously a doctrine of public policy is somewhat open-textured and flexible, and this flexibility has been the cause of judicial censure of the doctrine"); *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 500, *per* Lord Davey ("[p]ublic policy is always an unsafe and treacherous ground for legal decision"); and *Printing & Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465, *per* Jessel MR (above, para 5.242).

⁸⁰² [1996] 3 WLR 493, 501H-503A. See paras 4.108-4.112 above.

(ii) The problems of defining with certainty the range of conduct falling within the public policy bar on insurance

- 1.252 Any concept which is used to define the category of particularly serious conduct which not only warrants a punitive damages award, but also justifies the further step of a public policy bar on insurance, should be capable of precise definition: legal and commercial certainty so require. We do not consider that a concept such as 'particularly outrageous conduct' satisfies this requirement.
- 1.253 A possible response is to adopt instead a concept which draws a parallel with conduct meriting prosecution within the criminal law. One example is 'conduct constituting a criminal offence'. However, although this offers greater conceptual clarity, we consider it to be objectionable in principle.
- 1.254 Our objections are three-fold. The first is that the judgment concerning the criminality of the defendant's conduct would have to be made within a civil court; it cannot be assumed that such court would have the experience in dealing with such matters. The second, and more important, is that to utilise any such concept would involve denying a defendant the procedural and evidential safeguards found within a criminal trial; it is also open to accusations that any adverse or favourable finding could prejudice any subsequent criminal prosecution that may be brought. The third is that 'conduct constituting a criminal offence' will not in fact capture, and capture only, the most outrageous examples of conduct meriting a punitive damages award. The notion of a 'crime' does not include only intentional or even advertent interferences with important interests;⁸⁰³ it also embraces certain forms of grossly⁸⁰⁴ or ordinary negligent conduct,⁸⁰⁵ and, in the case of crimes of 'strict liability', conduct that does not display even this degree of fault. The result is that there is still a need for some additional concept which delineates the most serious forms of crime.

(iii) The range of culpable conduct

- 1.255 We would also question a key assumption underlying option 2. This is that there is an extensive range of conduct which merits a punitive damages award, ranging from the highly to the barely culpable; the corollary, it is argued, is that conduct at the 'lower' end of this spectrum should be capable of being insured against, whilst conduct at the 'higher' end of this spectrum should not.
- 1.256 The critical point is that even though there is such a range of conduct, a basic minimum threshold of bad conduct must have been reached before an award of punitive damages can properly be made by a court. The aim of an award is the same wherever on the spectrum a particular defendant's conduct falls: the conduct is thought to be sufficiently bad to require punishment. If this is so, it is incoherent for the law then to be seen to say: "even though we thought fit to

⁸⁰³ But many more serious crimes do require such a higher degree of fault or culpability.

⁸⁰⁴ See eg the Road Traffic Act 1988, s 1 and s 2 (causing death by dangerous driving; dangerous driving - for the meaning of dangerous, see s 2A).

⁸⁰⁵ See eg the Road Traffic Act 1988, s 3 and s 3A (careless or inconsiderate driving; causing death by careless or inconsiderate driving).

punish you, in reality we are not concerned about whether it will be efficacious, or not, because your conduct was not that bad”.

(d) The reasons for rejecting option 3: a public policy bar in all cases

- 1.257 Option 3 would, in its practical impact, be most closely consistent with what may be the existing judicial approach to insurance against criminal punishment.⁸⁰⁶ The policy which might be thought to justify option 3 was well expressed by Denning J in *Askey v Golden Wine Co Ltd*:

It is, I think, a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment. In every criminal court the punishment is fixed having regard to the personal responsibility of the offender in respect of the offence, to the necessity for deterring him and others from doing the same thing against, to reform him ... All these objections would be nullified if the offender could recover the amount of the fine and costs from another by process of the civil courts.⁸⁰⁷

- 1.258 We anticipate that any conduct satisfying the test of a ‘deliberate and outrageous disregard of the defendant’s rights’ would be conduct which is sufficiently serious to merit a bar within the criminal law, if such conduct were to constitute a criminal offence. Nevertheless, despite this analogy, and the force of the arguments which underlie it, we believe that a more powerful set of counter-arguments (namely, the five reasons set out above for favouring option 1)⁸⁰⁸ entail that a different approach can and must be adopted in relation to punitive damages awarded in civil actions, than is applied to crimes.

(e) Some alternative proposals suggested by consultees

- 1.259 Several consultees made some interesting proposals for dealing with insurance against punitive damages in ways which differed from options 1-3. We think it useful and necessary to describe them, and to give some reasons why we ultimately reject them.

(i) Insurance is permitted only to the extent that there is a shortfall caused by a wrongdoer’s inability to meet his or her liability

- 1.260 One suggestion⁸⁰⁹ was (in effect) that any insurance cover for punitive damages should be limited to such sums as are necessary to meet a shortfall arising due to

⁸⁰⁶ See para 4.108 above. The approach to contracts of indemnity is also applicable to other forms of indemnity (eg by way of a tort action for damages) in respect of fines paid by way of punishment, and even against the adverse financial implications of conviction (eg loss of business profits).

⁸⁰⁷ [1948] 2 All ER 35, 38C-E. *Askey* did not deal with a contract of indemnity, but with the attempt by a wrongdoer to obtain an indemnity by means of an action in tort (conspiracy) against others - *viz*, the suppliers who had knowingly sold *Askey* the products which gave rise to his subsequent criminal liability.

⁸⁰⁸ See paras 5.237-5.248 above.

⁸⁰⁹ Made by the Police Federation.

the insured wrongdoer's inability to pay all or part of any award out of his or her own assets.

- 1.261 The merits of this proposal are two-fold. On the one hand, plaintiffs would be certain of having their claims satisfied, in those cases where a defendant is insured. On the other hand, the punitive effect of a punitive damages award would be preserved in an undiminished, or at least less diminished, form. Defendants would, in a greater number of cases, feel an award directly in their own pockets, rather than indirectly through, for example, increased insurance premiums for the future, or the inability to renew previous cover. This might always be so where the defendant (for example, a large profit-making organisation) has sufficient assets to meet a claim, without recourse to an insurance policy.
- 1.262 However, this superficially attractive argument raises considerable difficulties. The first problem is that it is not easy to see why a potential insured, if properly advised, would want an insurance policy limited in the way proposed. Under our recommendations, wrongdoers will never be required to pay more than they are 'able' (without undue hardship) to pay.⁸¹⁰ Thus to apply this 'insurance against shortfall' suggestion would mean that wrongdoers would be no better off if they obtained insurance (because they would still have to meet any punitive award, out of their own pockets, to the extent that they were able to do so). As a result, if properly advised, no-one would want cover for punitive damages, and the net effect would be the same as if the law prohibited cover against punitive damages.⁸¹¹
- 1.263 The second problem with this proposal is that it is likely to produce the sort of problematic conflict between insurer and insured wrongdoer which we have already identified.⁸¹² Insurers would clearly want to argue that the insured-wrongdoer is 'able' to pay the award, thereby reducing the sums which they are obliged to pay under the policy. In contrast, insured-wrongdoers would want to argue that they are 'unable' to pay the award (in full or in part), thereby reducing the sums which they have to pay out of their own pockets. It cannot be desirable to introduce such conflict, with resulting uncertainties and costs, without good reason. As we have already indicated, we doubt whether such a reason exists.

(ii) *Insurance is only permitted against vicarious liability*

- 1.264 Another suggestion was that insurance should not be permitted, except against vicarious liability.⁸¹³ This might represent the existing common law position, following *Lancashire County Council v Municipal Mutual Insurance Ltd*:⁸¹⁴ insurance was held to be permitted against vicarious liability to pay punitive damages, but no final conclusion was reached on the legality of insurance against a personal liability to pay punitive damages.

⁸¹⁰ See paras 5.135-5.141 above.

⁸¹¹ A similar objection can be raised to the suggestion of (eg the Association of Personal Injury Lawyers) that insurers should be required to meet any liability to pay punitive damages in full, but should be given a right of recourse against the insured.

⁸¹² See para 5.248 above.

⁸¹³ For example: *P Cane*, 1 Pump Court (R Latham), and *Sinclair Roche & Temperley*.

⁸¹⁴ [1996] 3 WLR 493. See paras 4.108-4.112 above.

- 1.265 Underlying this proposal is the view that insurance eliminates the punitive and deterrent effect of punitive damages awards, and is therefore (generally) undesirable. Insured wrongdoers do not feel the immediate impact of any award in their own pockets: the primary burden is borne by the insurer. In contrast, permitting insurance against vicarious liability does not of itself serve to frustrate the punitive function of a punitive damages award. The law does not seek to punish the party who is vicariously, rather than primarily, liable; other considerations justify the doctrine of vicarious liability.
- 1.266 We recognise the logic of this argument, but for several reasons we are unconvinced of its weight. First, we re-emphasise our doubts that the availability of insurance will wholly or even substantially eliminate the punitive and deterrent effects which may typically be expected of awards of punitive damages.⁸¹⁵ Secondly, we consider that the reasoning underlying this proposal is inconsistent: vicarious liability also compromises the punitive function of punitive damages awards. Where awards are paid by a primary wrongdoer's employer, the wrongdoing-employee escapes direct punishment by the law. He or she does not meet the liability out of his or her own pocket, and the direct punitive effect of an award is replaced by indirect pressures in the form of, for example, contribution or indemnity claims by the employer, or disciplinary action. The position is similar where insurance is permitted against the primary liability: the insured-wrongdoer does not feel the impact of an award directly in his or her own pocket. Accordingly, if the possibility of indirect punishment and/or deterrence is held out as one reason why vicarious liability is acceptable, the same argument ought to have at least some weight when deciding whether insurance should be permitted against a primary liability to pay punitive damages.⁸¹⁶ Thirdly, insurance and vicarious liability have in common one important rationale. The single most important reason both for permitting insurance and for recognising vicarious liability is the same: to ensure that judgments for punitive damages can be satisfied and therefore that victims of outrageous conduct have a financial reason for claiming punitive damages. To recognise vicarious liability to punitive damages and permit insurance in respect of it, whilst prohibiting insurance against a primary liability to pay punitive damages, ignores this.

(iii) Insurance is permitted against a fixed percentage of an award

- 1.267 A final suggestion was that insurance would be permitted against only a fixed percentage of an award of punitive damages.⁸¹⁷ The main objections to this proposal are two-fold. The first objection is that it is difficult to select any particular percentage in a non-arbitrary way. This is due to an inherent flexibility in the appropriate balance between ensuring that plaintiffs have a financial reason to claim punitive damages and ensuring effective punishment or deterrence. Whereas the first goal is better served by permitting a higher percentage of an

⁸¹⁵ See, in particular, paras 5.238-5.241 above.

⁸¹⁶ It is possible to argue that by allowing insurance against vicarious liability, one only further weakens the likely indirect pressure on wrongdoing-employees: if the immediate burden of awards which their employers must pay is borne by their insurers, they have less of an incentive to discipline their employees.

⁸¹⁷ M Jones and K Stanton.

award to be covered by insurance, the second is better served by permitting a lower percentage. The second objection is that, accepting that it is essential for plaintiffs to have a financial reason to claim punitive damages, any percentage chosen would have to be high. This means that there would be very little difference between option 2 and this proposal, so far as the punitive efficacy of punitive damages awards is concerned. This is even more clearly the case given our doubts about how far the full availability of insurance will entail any substantial dilution of the punitive and deterrent effects that may typically be expected of punitive awards.⁸¹⁸

(f) Conclusion on whether insurance should be permitted

1.268 We therefore recommend that:

(42) our draft Bill should clarify that insurance against the risk of an award of punitive damages is not against public policy. (Draft Bill, clause 9(1))

1.269 Insurers, of course, remain able to refuse (or in some way limit or impose conditions on) cover for punitive damages awards. In the United States insurers have responded to the availability of exemplary or punitive damages by attempting to exclude them from the scope of their policies.⁸¹⁹ In this country it may already be difficult to obtain cover for certain types of claim for which exemplary damages are currently available.⁸²⁰

(g) Compulsory insurance against punitive damages

1.270 A number of statutes directly or indirectly require liability insurance in certain circumstances.⁸²¹ The areas of activity covered by these schemes are extremely varied. Each clearly requires insurance against a liability to pay compensatory damages in specified circumstances. None expressly requires insurance against a liability to pay exemplary or punitive damages in those circumstances. Could any of these statutes be construed as doing so? Should any of the statutes be so construed?

⁸¹⁸ See paras 5.238-5.241 above.

⁸¹⁹ See Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, para 6.41, referring to research conducted for the Law Commission; for a general overview of the approach of the courts to such attempts, see L Schlueter and K Redden, *Punitive Damages* (3rd ed, 1995) vol 2, § 17(2)(B) and the articles cited therein. A specific exclusion of punitive damages is likely to be required.

⁸²⁰ On consultation, Peter Carter-Ruck observed that most insurance policies for libel exclude liability for publications found to be malicious, and the Association of Chief Police Officers indicated that police officers are finding it difficult to obtain insurance cover for exemplary damages, notwithstanding that in almost every case in which police are involved, there is a risk of an exemplary damages award.

⁸²¹ Road Traffic Act 1988, s 143; Nuclear Installations Act 1965, s 19; Employers' Liability (Compulsory Insurance) Act 1969; Merchant Shipping Act 1995, s 163; Riding Establishments Act 1964, s 1(4A)(d); Civil Aviation (Licensing) Regulations 1964; Insurance Brokers (Registration) Act 1977, s 12, and the rules made pursuant thereto; Dangerous Wild Animals Act 1976, s 1(6)(a)(iv); Solicitors Act 1974, s 37, and the rules made pursuant thereto; Credit Unions Act 1979, s 15; Estate Agents Act 1979, s 16.

- 1.271 It would be very difficult to argue that any of the existing statutory requirements for insurance were intended, when passed, to extend to a liability to pay exemplary or punitive damages. The primary purpose of compulsory insurance is plaintiff-protection: ensuring that defendants are able (via the insurer) to meet judgments against them. Each existing statutory requirement is such that the dominant aim must have been to ensure that defendants could *compensate* plaintiffs for their injuries.⁸²² In some of the statutes, for example, the compulsory insurance provisions are expressed to apply only to a liability which the statute itself establishes, and that statutory liability is a liability to compensate only. In all of the other cases, the compulsory insurance provision applies to an area of activity in which it would be extremely rare (or impossible) on the state of the law, at the time of enactment, for a claim to exemplary damages to succeed.⁸²³ It would in any case require a rather forced interpretation of the aim of plaintiff-protection, for it plausibly to extend to require that insurance against exemplary or punitive damages be compulsory. For, on the face of it, there is injustice to the plaintiff only if he or she cannot obtain compensation - not if he or she is merely unable to obtain the 'windfall' of an exemplary or punitive damages award.
- 1.272 In our view, the fact that the legislature has made insurance compulsory in an area of activity, so as to ensure that claims to compensation can be satisfied, provides no justification for concluding that the relevant statute should in future, in view of the new remedy of punitive damages which we propose, extend to require insurance against liability to that remedy also. Whether this is so must be a matter for the legislature to decide, rather than for resolution on the basis of assumptions about what the enacting legislature might have decided, if the law had then been what we propose it should now be. The decision is pre-eminently a policy decision which is appropriate for the legislature, and not for the courts.
- 1.273 We therefore consider that no Act or subordinate legislation should be construed to require insurance against a liability to pay punitive damages. Statutory clarification of this point is essential for both insurers and insured; it cannot be left to *ad hoc* resolution by courts following litigation. We recommend that:

(43) our draft Bill should ensure that, unless a future enactment expressly or clearly requires insurance against a liability to pay

⁸²² Thus, in many cases, we find parallel compensation funds established (eg Merchant Shipping Act 1995, Ch IV; Nuclear Installations Act 1965, s 18; rules made pursuant to the Insurance Brokers (Registration) Act 1977 (see SI 1987 No 1496 and SI 1990 No 2461); Solicitors Act 1974, s 36); expressly-created direct rights of action for victims against insurers (Merchant Shipping Act 1995, s 165; see also Road Traffic Act, s 153); and terms in the insurance contract being rendered ineffective as against victims (Road Traffic Act 1988, s 148).

⁸²³ For example, exemplary damages have never been awarded for the tort of negligence, yet this would be the main basis for a claim against motorists (covered by the Road Traffic Act 1988) or against employers by their employees (covered by the Employers' Liability (Compulsory Insurance) Act 1969). The same reasoning applies to professional indemnity insurance. Exemplary damages cannot be awarded for negligence, breach of contract, deceit or pre-contractual misrepresentations actionable under s 2(1) of the Misrepresentation Act 1967. In addition to the unlikelihood of there being a cause of action for which exemplary damages could be claimed, there is the difficulty of fitting claims within one of the three *Rookes v Barnard* categories.

punitive damages, no enactment shall be construed to require it.
(Draft Bill, clause 9(2))

This recommendation will preclude any argument that any of the existing compulsory insurance statutes extend to punitive damages: none of those statutes expressly cover a liability to pay punitive damages. But it will not prevent a future Act from requiring insurance against such a liability, should the legislature decide that such a requirement is appropriate, provided that it is made clear (by express words) that that is the intention.

(9) Survival of actions

(a) For the benefit of the victim's estate

1.274 At present no claim for exemplary damages survives for the benefit of the estate of a deceased victim of wrongdoing.⁸²⁴ This rule can be criticised on a number of grounds,⁸²⁵ and repeal was supported by a majority of consultees. We consider that wrongdoers ought to be punished whether or not their victims are alive: a wrongdoer should not escape punishment as a result of a fortuity.⁸²⁶ And crucially, the aims of both retribution and deterrence will be furthered by the survival of a punitive damages claim for the benefit of the estate of the victim.

1.275 We accordingly recommend that:

(44) section 1(2)(a)(i) of the Law Reform (Miscellaneous Provisions) Act 1934 should be repealed and the Act amended so as to allow claims for punitive damages to survive for the benefit of the estate of a deceased victim. (Draft Bill, clause 14(1)-14(3))

(b) Against the wrongdoer's estate

1.276 At present an award of exemplary damages *can* be claimed from the estate of a deceased wrongdoer.⁸²⁷ We think this is the wrong approach.⁸²⁸ Unfortunately we have not benefited from the views of any significant number of consultees on this question. Responses dealing with the 'survival' issue almost uniformly dealt with

⁸²⁴ Law Reform (Miscellaneous Provisions) Act 1934, s 1(2)(a)(i). This is also the prevailing approach in other major Commonwealth jurisdictions: see para 4.106 above.

⁸²⁵ See Consultation Paper No 132, paras 3.108-3.110, 6.36; and see, for similar criticisms, the Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) pp 59-60.

⁸²⁶ The Association of Personal Injury Lawyers pertinently pointed out that only a politician or lawyer would tolerate the suggestion that if a person maims or cripples someone then punitive damages may be awarded against him but, if he goes further and kills the victim, then he is free and no question of punitive damages arises.

⁸²⁷ This is also the prevailing approach in other major Commonwealth jurisdictions: see para 4.107 above.

⁸²⁸ This view is supported by the conclusions of the Ontario Law Reform Commission, in its *Report on Exemplary Damages* (1991) pp 59-60, as well as by practice in the United States. The Commission observes that of United States jurisdictions in which punitive damages may be awarded only for the purposes of punishment and deterrence, every state which has considered the issue has rejected the idea that a claim for punitive damages should be permitted against the estate of a deceased wrongdoer.

survival for the benefit of the victim's estate, and failed specifically to consider the present rules on survival against the wrongdoer's estate.⁸²⁹ Nevertheless, we have been sufficiently persuaded by the arguments in one clear response on this issue, given by Professor Tettenborn, to feel confident that the existing approach should not stand. Professor Tettenborn writes:

On the question of survival against the estate of the defendant ... I disagree with the tentative suggestion that exemplary damages should be assimilated to other causes of action. On the point of principle, we are here dealing with punishment; no question of compensation arises. In such a case there seems no need to visit the sins of the parents on the children and the heirs. Suppose a policeman guilty of brutality subsequently dies; it seems inhumane to tell his widow and children that, even though the victims have been fully compensated, they are liable possibly to lose their home in order to satisfy a judgment for exemplary damages. Note too the analogy of criminal law, where I do not think it has ever been seriously suggested that we should introduce the posthumous trial of dead offenders with a view to levying a fine on their estates.

1.277 Thus where the wrongdoer who is to be punished is dead, the retributive goal of a punitive award cannot be achieved; only the 'innocent' heirs are punished. It can be argued that there is no unfairness in this, because the estate would have been diminished by the same amount even if the wrongdoer had not died. But in our view this argument is refuted by the plausible scenario described by Professor Tettenborn: in such circumstances there may, on the contrary, be very significant unfairness to the defendant's heirs (his family). Furthermore, it is far from clear that a punitive award has any other significant point, and so justification, where the wrongdoer is dead. 'Individual deterrence' offers no argument, for the reason that, having died before the conclusion of an action against him, the wrongdoer cannot act, let alone act wrongfully, in the future. Nor is the argument from 'general deterrence' a strong one. Potential wrongdoers would not usually be any less deterred if the law refused to permit an action to survive against a dead wrongdoer. Such persons will generally expect to be alive, not dead, when an action is brought - and if alive, a claim to punitive damages can be made against them.

1.278 We accordingly recommend that:

(45) the Law Reform (Miscellaneous Provisions) Act 1934 should be amended in order to prevent punitive damages from being available against a wrongdoer's estate. (Draft Bill, clause 14(1) and 14(3))

(10) Statutes currently authorising 'exemplary damages'

1.279 Parliament has, as we have already seen,⁸³⁰ rarely thought it necessary to authorise exemplary or punitive damages by statutory provision. It has expressly done so in

⁸²⁹ Some ambiguity in the question which we put to consultees is very probably to blame for this.

⁸³⁰ See paras 4.21-423 above.

one case,⁸³¹ and arguably done so in another.⁸³² We consider that consequential amendments are required to each of these statutes.

(a) Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s 13(2)

1.280 The first amendment needed is to section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, which authorises an award of “exemplary damages”. It would be undesirable if that power could be construed as authorising the courts to award a ‘punitive’ sum of damages which was governed by principles other than those stated in our draft Bill.⁸³³ We therefore recommend that:

(46) section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 should be amended, so that, in place of ‘exemplary damages’, it authorises an award of ‘punitive damages’ to which our Act applies. (Draft Bill, clause 14(4))

(b) Copyright, Designs and Patents Act 1988, ss 97(2), 191J and 229(3)

1.281 The second set of amendments is to sections 97(2), 191J and 229(3) of the Copyright, Designs and Patents 1988. These sections provide, respectively, for an award of ‘additional damages’ for infringement of copyright, performer’s property rights and design right. We have seen that the proper characterisation of additional damages is controversial.⁸³⁴ In our view the appropriate course is to repeal sections 97(2), 191J and 229(3), and we so recommend:

(47) sections 97(2), 191J and 229(3) of the Copyright, Designs & Patents Act 1988 should be repealed. (Draft Bill, clause 14(5))

1.282 We consider it necessary to take this step for several reasons. Repeal of those sections will eliminate the uncertainty which has surrounded additional damages; the remedy (whatever its proper characterisation) shall thereafter be unavailable. But this will not leave any significant lacunae in the law’s protection of intellectual property rights.

1.283 We have recommended⁸³⁵ that punitive damages should be available for a statutory civil wrong if an award would be consistent with the policy of the statute in question. All of the wrongs which are affected by recommendation (47) fall into this category. And, we firmly believe, it would be consistent with the policy of the Copyright, Designs and Patents Act 1988 if punitive damages could be awarded in

⁸³¹ Reserve & Auxiliary Forces (Protection of Civil Interests) Act 1951, s 13(2).

⁸³² Copyright, Designs & Patents Act 1988, ss 97(2), 191J and 229(3).

⁸³³ For example, the power might not be subject to the requirement that the defendant has shown a ‘deliberate and outrageous disregard of the plaintiff’s rights’, or to the ‘if, but only if’ test, or to the various other principles which govern the availability and assessment of ‘punitive damages’ under our Act.

⁸³⁴ See paras 4.21-4.22 above.

⁸³⁵ See recommendation (19)(b) and paras 5.57-5.65 above.

respect of those wrongs.⁸³⁶ To the extent that additional damages are ‘punitive’ damages, therefore, there will be no legitimate additional role for them, if our recommendations are implemented. For to allow ‘punitive’ additional damages to continue to exist would involve accepting, as we do not, that a punitive award can be made which is not subject to the limitations imposed by our Act.

1.284 Even if additional damages are best viewed as compensatory in nature⁸³⁷ (which we doubt) we can nevertheless see no convincing reason for retaining them. In our Consultation Paper we observed that:

In so far as s 96(2) of the Act provides a general remedy for copyright infringement of damages which are ‘at large’ as well as a remedy of account ... it is difficult to see the role of s 97(2) if exemplary damages are not permitted by it.⁸³⁸

There is, we believe, no reason why ‘aggravated damages’ (that is, damages for mental distress) should not be capable of being awarded, apart from sections 97(2), 191J and 229(3), for infringement of copyright, performer’s property rights or design right. This seems to have been assumed in at least two cases.⁸³⁹ Nor is there any necessary bar to judicial development of exceptions to the usual rules of remoteness as they exist at common law.⁸⁴⁰ In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*⁸⁴¹ Lord Steyn justified the ‘special’ deceit rules in terms which *prima facie* also justify wider rules in relation to intentional wrongdoing generally.⁸⁴² It is surely not beyond the capacity of the

⁸³⁶ Apart from the fact that Parliament apparently did consider that a punitive remedy was necessary for these wrongs (and so expressly provided for the remedy of additional damages), there is also the fact that the Act provides (by ss 96(2), 191J and 229(2)) that in an action for any of these wrongs:

... all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right.

If our proposals are implemented, punitive damages will be available (as indeed exemplary damages already are) for the infringement of other property rights, as property torts such as trespass to land or to goods. In these circumstances, the provisions just referred to would seem to *require* punitive damages to be available for infringement of copyright, performer’s property rights and design right.

⁸³⁷ See the discussion at paras 4.21-4.22 above.

⁸³⁸ Aggravated, Exemplary and Restitutionary Damages (1993) Consultation Paper No 132, para 3.54.

⁸³⁹ In *Rookes v Barnard* [1964] AC 1129, Lord Devlin certainly considered that it was possible to recharacterise *Williams v Settle* [1960] 1 WLR 1072 as a case awarding ‘aggravated damages’ at common law for infringement of copyright. And although *Beloff v Pressdram* [1973] 1 All ER 241 stated that s 17(3) left no place outside its ambit for the award of compensatory or aggravated damages, nor for exemplary damages, it did not decide that aggravated damages could not have been obtained for infringement of copyright before the 1956 Act was passed. Once the exclusive statutory claim (to ‘additional damages’) is removed, the common law claim should be capable of rebirth.

⁸⁴⁰ See, in particular *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 and the tort of deceit.

⁸⁴¹ [1997] AC 254.

⁸⁴² [1997] AC 254, 279F-280C.

common law to hold, if necessary, that ‘flagrant’ infringements of copyright merit an increased measure of compensatory damages.

- 1.285 Nor will the abolition of additional damages lead to any lacunae in restitutionary remedies for these intellectual property wrongs. It is true that a court is specifically directed to take into account “any benefit shown to have accrued to the defendant by reason of the infringement” in deciding whether or not to award additional damages. But this is certainly not a decisive indication that additional damages have a restitutionary rather than a punitive aim.⁸⁴³ And we are unaware of any judicial authority, or of any support in the legislative history of section 97(2), for the view that additional damages are restitutionary in aim.⁸⁴⁴ Even if additional damages could include restitutionary damages, abolition would not leave lacunae because an account of profits will remain available to victims of such wrongs.⁸⁴⁵ Moreover, if the defendant’s conduct has shown a ‘deliberate and outrageous disregard of the plaintiff’s rights’, the victim may be entitled to claim ‘restitutionary damages’ under our Act.⁸⁴⁶
- 1.286 We also think it important that several intellectual property lawyers have emphasised to us how anomalous it is that the special remedy of additional damages is only available for a limited number of intellectual property torts. Our proposals have the merit of making punitive damages available for all such wrongs, (although if an intellectual property tort ‘arises under an Act’, this is only so if such an award would be consistent with the policy of the Act in question).⁸⁴⁷

(11) Commencement of the Damages Act 1997

- 1.287 Insurers have expressed to us the concern that increases in the quantum of punitive damages should not apply in respect of insurance cover which they have already given, and therefore the hope that our Bill will not apply retrospectively. In order to accommodate this concern, we recommend that:

(48) our draft Bill should provide that nothing in it applies to causes of action which accrue before its commencement. (Draft Bill, clause 16(1))

- 1.288 This means that where a cause of action accrued before commencement, the old law of exemplary damages, as defined by (in particular) the ‘categories test’ and the ‘cause of action test’ will continue to apply to a claim for damages in respect of

⁸⁴³ See, in particular, the discussion of category 2 exemplary damages at paras 4.16-4.19 above.

⁸⁴⁴ See the discussion at paras 4.21-4.22, which indicates that judicial disagreement about the characterisation of additional damages has been a disagreement about whether they are best viewed as authorising awards of exemplary damages, or a higher measure of compensation than could be obtained on ordinary principles.

⁸⁴⁵ See para 3.22 above.

⁸⁴⁶ See clause 12 of the draft Bill. ‘Restitutionary damages’ will be available for wrongs which ‘arise under an Act’ for which a person may recover compensation or damages where (i) the defendant’s conduct showed a deliberate and outrageous disregard of the plaintiff’s rights; and (ii) an award of restitutionary damages would be consistent with the policy of that Act.

⁸⁴⁷ See recommendations (19)(a) and (19)(b), at para 5.44 above.

it. Where, however, a cause of action accrues after commencement, the expanded remedy of 'punitive damages', as defined by our Act, will apply.

PART VI

SUMMARY OF RECOMMENDATIONS

Aggravated Damages

1.1 We recommend that:

- (1) legislation should provide that so-called ‘aggravated damages’ may only be awarded to compensate a person for his or her mental distress; they must not be intended to punish the defendant for his conduct. (Draft Bill, clause 13)
- (2) wherever possible the label ‘damages for mental distress’ should be used instead of the misleading phrase ‘aggravated damages’. (Draft Bill, clause 13)
- (3) recommendations (1) and (2) are not intended to restrict the circumstances in which damages for mental distress are recoverable other than as ‘aggravated damages’ (for example, compensation for pain and suffering in personal injury cases or contractual damages for a ruined holiday).

Restitutionary Damages

1.2 We recommend that:

- (4) no attempt should be made to state comprehensively in legislation the situations in which torts should trigger restitution; subject to recommendation (7), the development of the law of restitution for torts should be left to common law development.
- (5) no attempt should be made to state comprehensively in legislation the situations in which equitable wrongs should trigger restitution; subject to recommendation (7), the development of the law of restitution for equitable wrongs should be left to ‘common law’ development.
- (6) no legislative provision should deal with whether (and if so, when) restitutionary damages may be awarded for breach of contract; the development of the law of restitution for breach of contract should be left to common law development.
- (7) legislation should provide that restitutionary damages may be awarded where:
 - (a) the defendant has committed:
 - (i) a tort or equitable wrong, or
 - (ii) a civil wrong (including a tort or an equitable wrong) which arises under an Act, and an award of restitutionary damages would be consistent with the policy of that Act, and

- (b) his conduct showed a deliberate and outrageous disregard of the plaintiff's rights. (Draft Bill, clause 12(1)-12(3))
- (8) recommendation (7) should not prejudice any other power to award restitutionary damages for a wrong, nor remedies which also effect restitution for a wrong but which are historically distinct from restitutionary damages (eg an account of profits for an intellectual property tort). (Draft Bill, clause 12(5))
- (9) the judge, and not the jury, should decide whether the defendant's conduct showed a 'deliberate and outrageous disregard of the plaintiff's rights' for the purposes of a claim to restitutionary damages, where both restitutionary damages and punitive damages are in issue in the same proceedings. (Draft Bill, clause 12(4))
- (10) our proposed legislation should not deal with how the quantum of restitution is determined.
- (11) our proposed legislation should not deal with the question whether (and if so, when) both compensation and restitution may be obtained for a wrong.
- (12) our proposed legislation should not deal specifically with the problems raised by claims to restitution for wrongs committed by two or more defendants against one plaintiff ('multiple defendant cases')
- (13) our proposed legislation should not deal specifically with the problems raised by claims to restitution for wrongs by two or more plaintiffs from one defendant ('multiple plaintiff cases')
- (14) in the context of restitution for wrongs, it would be appropriate for judges - and so practitioners - to abandon the labels 'action for money had and received' and 'account of profits' in favour of the single term 'restitutionary damages' (or, at a higher level of generality, 'restitutionary award' or 'restitution').

Exemplary Damages

1.3 We recommend that:

- (15) exemplary damages should be retained.
- (16) our draft Bill should reflect our preference for the term 'punitive damages' rather than 'exemplary damages'. (Draft Bill, clause 1(2))
- (17) the judge, and not a jury, should determine whether punitive damages should be awarded, and if so, what their amount should be. (Draft Bill, clause 2)
- (18) punitive damages may only be awarded where in committing a wrong, or in conduct subsequent to the wrong, the defendant deliberately and outrageously disregarded the plaintiff's rights; (Draft Bill, clause 3(6); for 'conduct' see clause 15(3)); and the narrower 'categories' test of *Rookes v Barnard* should be rejected. (Draft Bill, clause 3(9))

(19) the 'cause of action' test of *AB v South West Water Services Ltd* should be abandoned; instead:

(a) punitive damages may be awarded for any tort or equitable wrong; (Draft Bill, clause 3(3))

in this context an equitable wrong comprises a breach of fiduciary duty, a breach of confidence, or procuring or assisting a breach of fiduciary duty; (Draft Bill, clause 15(4))

(b) punitive damages may be awarded for a civil wrong which arises under an Act (including a tort or an equitable wrong), but only if such an award would be consistent with the policy of that Act; (Draft Bill, clause 3(4) and 3(5))

however, punitive damages must not be awarded for breach of contract or under an undertaking in damages.

(20) punitive damages may be awarded in addition to any other remedy which the court may decide to award, but may only be awarded if the judge considers that the other remedies which are available to the court will be inadequate alone to punish the defendant for his conduct (the 'if, but only if' test); (Draft Bill, clause 3(7) and 3(8))

for these purposes the court may regard deterring the defendant and others from similar conduct as an object of punishment. (Draft Bill, clause 3(10))

(21) in deciding whether to award punitive damages, the court must have regard to:

(a) the principle that punitive damages must not usually be awarded if, at any time before the decision falls to be made, the defendant has been convicted of an offence involving the conduct concerned; (Draft Bill, clause 4(1))

when applying this principle a court must ignore section 1C of the Powers of Criminal Courts Act 1973. (Draft Bill, clause 4(3))

(b) any other sanctions that have been imposed in relation to the conduct concerned; (Draft Bill, clause 4(2))

(22) in deciding the amount of punitive damages the judge must have regard to the principles that any award:

(a) must not exceed the minimum needed to punish the defendant for his conduct; (Draft Bill, clause 5(1)(a))

(b) must be proportionate to the gravity of the defendant's wrongdoing. (Draft Bill, clause 5(1)(b))

for these purposes the court may regard deterring the defendant and others from similar conduct as an object of punishment. (Draft Bill, clause 5(3))

- (23) in deciding the amount of punitive damages, the judge must consider, where applicable, the following matters:
- (a) the state of mind of the defendant;
 - (b) the nature of the right or rights infringed by the defendant;
 - (c) the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause by his conduct;
 - (d) the nature and extent of the benefit that the defendant derived or intended to derive from his conduct;
 - (e) any other matter which the judge in his or her discretion considers to be relevant (other than the means of the defendant). (Draft Bill, clause 5(2))
- (24) our draft Bill should lay down (in some instances by amending, and in other instances by restating previous law) the main elements of the remedy of punitive damages; but subject to this, the law relating to punitive damages should continue to apply and be open to future common law or statutory development. (Draft Bill, clause 1(1))
- (25) punitive damages should not be awarded unless they have been specifically pleaded by the plaintiff, together with the facts on which the party pleading them relies. (Draft Bill, clause 3(2))
- (26) the defendant should be allowed to show that he does not have the means, without being caused undue hardship, to discharge the punitive damages award which the court has decided to grant; where the defendant satisfies the court that this is so, the court must award a lower sum which it considers avoids that hardship. (Draft Bill, clause 6(2))
- (27) our draft Bill should provide that the 'defendant's means' include the fruits of any contract of insurance against the risk of liability to pay punitive damages. (Draft Bill, clause 6(4))
- (28) where a court has decided to award punitive damages, it must indicate the amount which it is minded to award, irrespective of the defendant's means; (Draft Bill, clause 6(1)); and if the court has reduced an award of punitive damages on account of undue hardship to the defendant (under recommendation (26)) the court should record what sum would have been awarded, but for that reduction. (Draft Bill, clause 6(3))
- (29) no proportion of a plaintiff's punitive damages award should be 'diverted' to a public fund.
- (30) our special multiple plaintiffs scheme should apply where conduct of a defendant involves torts, equitable wrongs or statutory wrongs against two or more persons. (Draft Bill, clause 7(1))
- (31) once punitive damages have been awarded to one or more 'multiple plaintiffs' in respect of the defendant's conduct, no later claim to punitive

damages shall be permitted for that conduct by any 'multiple plaintiff'.
(Draft Bill, clause 7(4))

(32) if the court intends to award punitive damages to two or more multiple plaintiffs in the same proceedings, the aggregate amount awarded must be such that, while it may properly take account of the fact that the defendant has deliberately and outrageously disregarded the rights of more than one person, it does not punish the defendant excessively for his conduct. (Draft Bill, clause 7(3))

(33) provided the defendant consents to this, a court should take into account any settlement which the defendant may have reached with multiple plaintiffs in deciding:

(a) whether punitive damages are available, or

(b) if so, how much should be awarded

to multiple plaintiffs with whom the defendant has not reached a settlement. (Draft Bill, clause 7(2))

(34) 'several liability', rather than joint or joint and several liability, should apply to punitive damages (subject to recommendation (35) below); (Draft Bill, clause 8(1))

(35) recommendation (34) ('several liability', rather than joint or joint and several liability shall apply to punitive damages) is without prejudice to:

(a) our recommendation that vicarious liability to pay punitive damages should be retained; (Draft Bill, clause 8(2)(a))

(b) the liability of a partner for the wrongs of his co-partner. (Draft Bill, clause 8(2)(b))

(36) our draft Bill should ensure that the right to recover contribution laid down in section 1 of the Civil Liability (Contribution) Act shall not extend to a liability to pay punitive damages that is 'several'. (Draft Bill, clause 8(3))

(37) our draft Bill should clarify that a person may be vicariously liable to pay punitive damages in respect of another's conduct. (Draft Bill, clause 11(1))

(38) our draft Bill should not define the circumstances in which one person may be vicariously liable for the wrongs of another; instead, it should assume the boundaries of the concept of vicarious liability as it exists at common law, or by statute, for the particular tort, equitable wrong or statutory wrong in question. (Draft Bill, clause 11(1) and 11(2))

(39) subject only to recommendation (40), the sum of punitive damages which a person is vicariously liable to pay for the wrong of another should be that which that other would be liable to pay, and should be determined on that basis. (Draft Bill, clause 11(2))

- (40) where the court is assessing the sum of punitive damages which an employer is vicariously liable to pay for the wrongs of its employee:
- (a) the award payable by the employer may be reduced (in accordance with recommendations (26)-(28)) if the court considers that the employer's means are such that it would cause it undue hardship to be required to pay such sum as would otherwise be appropriate, (Draft Bill, clause 11(3)) and
 - (b) the award payable by the employer must not be reduced on the ground that the employee's means are such that it would cause the employee undue hardship if he or she was to be required to pay such sum as would (disregarding the means of the employee) otherwise be appropriate. (Draft Bill, clause 11(3))
- (41) if it is sought to establish a matter relating to the question whether punitive damages should be awarded, or to the question of their amount, the civil, and not the criminal, standard of proof must be satisfied. (Draft Bill, clause 10)
- (42) our draft Bill should clarify that insurance against the risk of an award of punitive damages is not against public policy. (Draft Bill, clause 9(1))
- (43) our draft Bill should ensure that, unless a future enactment expressly or clearly requires insurance against a liability to pay punitive damages, no enactment shall be construed to require it. (Draft Bill, clause 9(2))
- (44) section 1(2)(a)(i) of the Law Reform (Miscellaneous Provisions) Act 1934 should be repealed and the Act amended so as to allow claims for punitive damages to survive for the benefit of the estate of a deceased victim. (Draft Bill, clause 14(1)-14(3))
- (45) the Law Reform (Miscellaneous Provisions) Act 1934 should be amended in order to prevent punitive damages from being available against a wrongdoer's estate. (Draft Bill, clause 14(1) and 14(3))
- (46) section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 should be amended, so that, in place of 'exemplary damages', it authorises an award of 'punitive damages' to which our Act applies. (Draft Bill, clause 14(4))
- (47) sections 97(2), 191J and 229(3) of the Copyright, Designs & Patents Act 1988 should be repealed. (Draft Bill, clause 14(5))
- (48) Our draft Bill should provide that nothing in it applies to causes of action which accrue before its commencement. (Draft Bill, clause 16(1))

(Signed) MARY ARDEN, *Chairman*
ANDREW BURROWS
DIANA FABER

CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
11 September 1997

APPENDIX B

Persons and organisations who commented on Consultation Paper No 132

Consultation took place in 1993-1994 and closed on 1 March 1994. The descriptions of consultees may have altered since then.

GOVERNMENT DEPARTMENTS

Lord Chancellor's Department
Treasury Solicitor

JUDICIARY AND PRACTITIONERS

(1) Judiciary

Mr Justice Aldous
Mr Justice Bell
Sir Thomas Bingham MR
Mr Justice Blofeld
Council of Her Majesty's Circuit Judges
Mr Justice Cresswell
Sir Michael Davies
Mr Justice Drake
Mr Justice Dyson
Mr Justice Garland
John Hicks QC, Official Referee
Mr Justice Jacob
Mr Justice Jowitt
Sir Michael Kerr
Lord President, Court of Session
Mrs A B Macfarlane, Master of the Court of Protection
Mr Justice Morland
Sir Nicholas Phillips
Lord Justice Staughton
Lord Justice Stuart-Smith
Mr Justice Swinton Thomas
Mr Justice Tuckey
Mr Justice Wright

(2) Barristers

Nicholas Ainley
Robert Bailey-King
Nicholas Blake
Sir Wilfred Bourne QC
Michael Burton QC
Richard Clayton
David Eady QC
2 Garden Court (Housing Law Practitioners)
Jeremy Gompertz QC
Kenneth Hamer
Robert Hill
Michael Lerego
Jeremy Lewis

Nigel Ley
Harvey McGregor QC
Tim Owen
1 Pump Court (Robert Latham)
14 Tooks Court

(3) Solicitors

Carlos Dabezies, Kensington Citizens Advice Bureau
Peter Carter-Ruck and Andrew Stephenson, Peter Carter-Ruck & Partners
C J S Hodges, McKenna & Co
Lovell White Durrant (A M Dimsdale Gill)
Robert Morfee, Clarke Willmott & Clarke
Keith Schilling, Schilling & Lom
Richard Shillito, Oswald Hickson, Collier & Co
Nigel Taylor, Sinclair Roche & Temperley
Brian Thompson & Partners; Robin Thompson & Partners
P K J Thompson, Solicitor to the Departments of Health and Social Security
A L H Willis, Flint Bishop & Barnett

ACADEMICS

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Dr Darryl Biggar
Professor Margaret Brazier
Professor R A Buckley
A S Burrows
P Cane
B A Childs
Dr Gerhard Dannemann
Professor A M Dugdale
Dr Evelyn Ellis
Professor D J Feldman
Professor M P Furmston
P R Ghandhi
Steve Hedley
Professor J A Jolowicz
Michael A Jones
A P Le Sueur
Professor B S Markesinis
R McCorquodale
R O'Dair
Professor A I Ogus
D L Parry
Professor M Partington
Restitution Section, Society of Public Teachers of Law
Professor W V H Rogers
L D Smith
Keith Stanton
Professor Hans Stoll
A Tettenborn
Tort Lawyers' Discussion Group, King's College, London
G J Virgo
Professor S M Waddams
J A Weir

Celia Wells

ORGANISATIONS

Association of British Insurers
Association of Chief Police Officers
Association of District Secretaries
Association of Insurance and Risk Managers in Industry and Commerce Ltd
Association of Law Teachers
Association of Personal Injury Lawyers
Automobile Association
The City of London Law Society
Commission for Racial Equality
Confederation of British Industry
Equal Opportunities Commission
Equal Opportunities Commission, Northern Ireland
General Council of the Bar, Law Reform Committee
Health & Safety Executive
Holborn Law Society
Housing Law Practitioners' Association
Institute of Legal Executives
The Law Society
Liberty
Lloyd's Law Reform Committee
London Solicitors Litigation Association
National Association of Citizens Advice Bureaux
The Newspaper Society
Patent Solicitors Association
Police Federation of England and Wales
Scottish Law Commission (Lord Davidson)
Trades Union Congress
Young Solicitors Group

INDIVIDUALS

S Bradbury

APPENDIX C

Persons and organisations who commented on the Supplementary Consultation Paper

Consultation took place in 1995. The descriptions of consultees may have altered since then.

GOVERNMENT DEPARTMENTS

P K J Thompson, Solicitor to the Departments of Health and Social Security
Treasury Solicitor

JUDICIARY AND PRACTITIONERS

(1) Judiciary

Mr Justice Aldous
Lord Justice Auld
Judge Michael Baker
Mr Justice Bell
Sir Thomas Bingham MR
Mr Justice Blofeld
Sir Wilfred Bourne
Lord Justice Simon Brown
Mr Justice Buxton
Council of Her Majesty's Circuit Judges
Sir Michael Davies
Sir Maurice Drake
Mr Justice French
Mr Justice Garland
Mr Justice Gatehouse
Lord Justice Peter Gibson
John Hicks QC, Official Referee
Mr Justice Hidden
Lord Justice Hirst
Mr Justice Jacob
Mr Justice Johnson
Mr Justice Jowitt
Mr Justice Kay
Lord Lloyd of Berwick
Sir Michael Kerr
Lord Keith of Kinkel
Mrs A B Macfarlane, Master of the Court of Protection
Lord Justice Millett
Mr Justice Morland
Lord Nicholls
Mr Justice Potts
Lord Justice Stuart-Smith
Lord Steyn
Lord Justice Swinton Thomas
Lord Justice Rose
Sir Richard Rougier
Mr Justice Tuckey
Mr Justice Waller
Mr Justice Wright

(2) Barristers

Nicholas Blake QC
Christopher Clark QC
Richard Clayton
Kenneth Hamer
Robert Hill
Nicholas Lavender
Nigel Ley
Harvey McGregor QC
Paul McGrath
John McLinden
Stephen Moriarty
Tim Owen
David Pannick QC
1 Pump Court (Robert Latham)
Robert Reid QC
Anthony Scrivener QC
Michael Silverleaf
Andrew Smith QC
Marcus Smith
Christopher Symons QC
Nicholas Underhill QC

(3) Solicitors

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Peter Carter-Ruck, Peter Carter-Ruck & Partners
T Cook, Bird & Bird
R G Clinton, Farrer & Co
D S Hooper, Biddle & Co
Derek Lewis, Theodore Goddard
Keith Schilling, Schilling & Lom
R A Schillito, Oswald Hickson Collier
Lovell White Durrant (A M Dimsdale Gill)
A L H Willis, Flint Bishop & Barnett
Nigel Taylor, Sinclair Roche & Temperley
David B Thompson, Brian Thompson & Partners
C Ettinger, Robin Thompson & Partners
Ian Walker, Russell Jones & Walker

ACADEMICS

N H Andrews
Professor H Beale
Professor J Beatson
Professor P Birks
Professor R A Buckley
Hazel Carty
B A Childs
Dr Gerhard Dannemann
Professor A M Dugdale
Dr Evelyn Ellis
Professor D J Feldman
Dr Julian Fulbrook
Professor M P Furmston
P R Gandhi

Steve Hedley
John Hodgson
L Hoyano
Richard James
Professor J A Jolowicz
Michael A Jones
A P Le Sueur
Professor Richard Lewis
Professor B S Markesinis
N McBride
Professor E McKendrick
John Murphy
R O'Dair
Professor A I Ogus
K Oliphant
D L Parry
Professor M Partington
Professor W V H Rogers
Professor F D Rose
Paul Skidmore
Dr L D Smith
Dr Steve Smith
Professor Keith Stanton
Professor Hans Stoll
Professor R Taylor
A Tettenborn
G J Virgo
Professor S M Waddams
J A Weir

ORGANISATIONS

Association of British Insurers
Association of Chief Police Officers
Association of Insurance and Risk Managers in Industry and Commerce Ltd
Association of Personal Injury Lawyers
Automobile Association
Cambridgeshire Constabulary
The City of London Law Society
Equal Opportunities Commission
Equal Opportunities Commission for Northern Ireland
General Council of the Bar, Law Reform Committee
Health & Safety Executive
Holborn Law Society
Housing Law Practitioners' Association
Institute of Legal Executives
Intellectual Property Lawyers Association
The Law Society
Liberty
Lloyd's of London
London Solicitors Litigation Association
Kensington Citizens Advice Bureau
The Newspaper Society
Police Federation of England and Wales
Scottish Law Commission (Lord Davidson)

Scottish Law Commission (Dr E Clive)
Trades Union Congress

INDIVIDUALS

S Bradbury

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J Bourne
