

## PUNITIVE AND AGGRAVATED DAMAGES IN CANADA

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*The author surveys the law of punitive damages with reference to the conduct of the parties and discusses the types of causes of action giving rise to these damages, their pleading and their assessment. In concluding that punitive damages are a proper consideration for tort law, the author sets out seven propositions which, if followed in defining the limits of punitive damages, would result in more uniformity in this area of the law.*

### I. INTRODUCTION

The Supreme Court of Canada awarded \$10,000.00 as punitive damages, in *H. L. Weiss Forwarding Ltd. v. Omnus et al.*,<sup>1</sup> in an action for breach of contract, conspiracy and inducing breach of contract, overturning the Ontario High Court<sup>2</sup> which had not awarded punitive damages since it was felt that such an application of the law would be so difficult that a reasonable assessment could not be made. The appeal of damages was dismissed without written reasons by the Ontario Court of Appeal, but was increased by a three to two majority of the Supreme Court of Canada. Chief Justice Laskin found the case to be "a very proper case for punitive damages" since it was one of an illegal drawing away of the plaintiff's employees in order to set up a competing business to take away the plaintiff's customers. There was no discussion of the law of punitive damages in Canada by the Supreme Court,<sup>3</sup> nor were any clear principles set out as the basis for such awards. In order to determine the justification for an award of punitive damages one must look at the development and basis of the law in Canada as set out in other cases.

### II. DEFINITION

#### A. Punitive Damages

Punitive damages<sup>4</sup> are also commonly called exemplary damages,<sup>5</sup> and occasionally called vindictive,<sup>6</sup> or retributory<sup>7</sup> damages. The terms punitive and exemplary are legally synonymous<sup>8</sup> and are often used together.<sup>9</sup> Such damages were described in *S. v. Mundy* as:<sup>10</sup>

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1. (1975) 5 N.R. 511 (S.C.C.).

2. (1972) 5 C.P.R. (2d) 142, at 156.

3. In his reasons for judgment Mr. Justice Judson said: ". . . this seems to me to be an inappropriate occasion for an award of punitive damages."

4. The term "punitive damages" will be used in this paper, since it is felt by this writer that the main object of the award is to punish the wrongdoer rather than to make an example of the conduct of the wrongdoer.

5. *Rookes v. Barnard* [1964] A.C. 1129, [1964] 1 All E.R. 367 (H.L.).

6. *E.g. Guillet v. Charlebois* [1935] 3 W.W.R. 438 (Sask. C.A.), *per*, Martin J.

7. *E.g. Denison v. Fawcett* [1958] O.R. 312, 12 D.L.R. (2d) 537 (Ont. C.A.), at 543, *per*, Schroeder J.A.

8. *Unrau v. Barrowman et al.* (1967) 59 D.L.R. (2d) 168 (Sask. Q.B.), at 185.

9. *See Paragon Properties Limited v. Magna Investments Ltd.* [1972] 3 W.W.R. 106 (Alta. C.A.), at 114 where Kane J.A. lists cases that combine various names for the damages awarded and notes that in the appeal under consideration both punitive and exemplary damages were claimed. He said: "For the purpose of this appeal it is not necessary to consider whether there may be circumstances in which a distinction might be drawn between 'exemplary' and 'punitive' damages. I will assume that the claim herein includes both if there is any distinction".

10. *S. v. Mundy* (1969) 9 D.L.R. (3d) 446 (Ont. Co. Ct.), *per*, Cudney, Co. Ct. J. at 449.

It is a well established principle of law that exemplary damages—often referred to as punitive damages—may be awarded, where there is a wanton or intentional act, that is, an act which intended the result. Exemplary damages can be awarded whenever it is necessary to teach the wrongdoer that tort does not pay. They are preventative or deterrent in character and are over and above compensation.

In *Fleming v. Spracklin*,<sup>11</sup> Chief Justice Meredith, described them as follows:<sup>12</sup>

Exemplary damages are not given to a plaintiff as merely a money compensation for the injury he has sustained; they are damages over and above such compensation, and are altogether of a preventive character—to prevent the defendant, and all others, doing such wrong. Unless they are enough for such purpose, they are inadequately awarded, and fail in their purpose.

In *Rookes v. Barnard*,<sup>13</sup> Lord Devlin said:

Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter.

In *Guillet v. Charlebois*,<sup>14</sup> Mr. Justice Martin said:

Exemplary or vindictive damages are awarded over and above the actual loss by the plaintiff, according to some authorities, as a punishment to the defendant and to deter him and others from committing similar assaults. Other authorities however express the view that exemplary damages are consolatory rather than penal upon the principle that the plaintiff in such cases suffers from a sense of wrong and is entitled to a solatium for that mental pain.

There appears, from the above examples, to be no clear definition of punitive damages. The definition is, and must be, based upon the object or purpose of the award, and the authorities are unclear whether this is to punish the defendant, to make an example of him for others, or possibly to pay for the wronged feelings of the plaintiff. This variety of emphasis may be the basis for having a variety of names under which the damages are considered.

The important aspect of the award is that it is not necessarily based on the principle of compensating the victim,<sup>15</sup> but is based as a reaction against the conduct of the wrongdoer. The degree of injury sustained by the victim is of little consequence in the assessment of punitive damages. The award arises from intentional conduct which disregards the legal rights of the plaintiff in a malicious or outrageous manner.

### *B. Aggravated Damages*

Aggravated damages are intended to measure harm<sup>16</sup> or to provide compensation<sup>17</sup> for a wrong committed by an act of high-handed or other reprehensible conduct. This is not an award in itself but is a method whereby the actual award is increased to account for the behavior of the defendant. Lord Devlin described aggravated damages, in *Rookes v. Barnard*, as:<sup>18</sup>

11. *Fleming v. Spracklin* (1922) 64 D.L.R. 382, (1921) 50 D.L.R. 289, 38 C.C.C. 99 (Ont. C.A.).

12. *Id.* at 389-90.

13. *Rookes v. Barnard*, *supra* n. 5 at 1221.

14. *Supra* n. 6 at 442-43.

15. There is some support for the proposition that punitive damages "compensate" the plaintiff for hurt feelings or loss of dignity.

16. Street, Harry, *Principles of the Law of Damages*, Sweet & Maxwell, London, 1962, at 30.

17. Atiyah, P. S., *Vicarious Liability in the Law of Torts*, Butterworths, London, 1967, at 433.

18. *Supra* n. 5 at 1221.

Moreover, it is very well established that in cases where the damages are at large the jury . . . can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.

The act of the defendant was qualified by Lord Devlin as he said: ". . . pig-headedness will not do . . . in a dispute of this sort feelings run high and more than words are needed for aggravated damages."<sup>19</sup>

Aggravated damages can be awarded in cases in which punitive damages are inappropriate, but where the conduct of the defendant "aggravates" the damages.<sup>20</sup> Where such reprehensible conduct exists substantial damages may be recovered and not merely damages arrived at by a calculation of the plaintiff's loss.<sup>21</sup> Aggravated damages, therefore, increase the quantum of a compensatory award to account for any humiliation, loss of dignity or other similar forms of injured feelings caused by the defendant's conduct. Many cases fail to adequately define or explain the concept of aggravated damages. Mr. Justice Dryer, in *Golnik et al. v. Geissinger*,<sup>22</sup> an assault case, has described such damages in the following way:<sup>23</sup>

I feel that the facts of this case are not such as to justify an award of exemplary damages, but that it is a case in which the conduct of the defendant has aggravated the damage to the extent that the plaintiff should be compensated for the humiliation of the assault.

The major purpose of aggravated damages, therefore, is compensation. They are awarded to compensate a plaintiff for humiliation or loss of dignity caused by the outrageous or high-handed conduct of the defendant. It is, however, an unusual form of compensatory damages. Damages which are awarded for a personal injury compensate the plaintiff for the actual physical injury "however caused", for loss of expectation of life "however caused", for nervous shock "however caused". Aggravated damages, on the other hand, which are awarded for a type of personal injury to feelings, can only be awarded when there has been a requisite type of conduct by the defendant. The conduct must be a type which can be classified as high-handed, outrageous, or malicious, and which "aggravates" the injury done by adding insult to injury. This type of award is similar in this respect—that is, by requiring a requisite type of conduct—to awards for actions in defamation, injurious falsehood, conspiracy and intimidation.

Aggravated damages are designed to compensate a victim for injured feelings caused by a malicious intentional act of the defendant. Both the cause and effect must be present to award such damages. Aggravated damages, in their true form, arise in cases such as actions for assault where both elements must be present. This was the case in *Kirisits v. Morrell and Hanson*<sup>24</sup> where Mr. Justice Collins, after describing the beating given the plaintiff by the defendants, said: ". . . in view of the brutal nature of the assault by two loggers against the plaintiff, who is a

19. *Id.* at 1232.

20. *Banks v. Campbell* (1973) 45 D.L.R. (3d) 603, (1976) 14 N.S.R. (2d) 73 (N.S.S.C.).

21. *MacKay v. Canadian Steamship Lines* (1925-26) 29 O.W.N. 334.

22. *Golnik et al. v. Geissinger* (1967) 64 D.L.R. (2d) 754 (B.C.S.C.).

23. *Id.* at 756.

24. *Kirisits v. Morrell and Hanson* (1965) 52 W.W.R. 123 (B.C.S.C.).

man of small stature, and the indignity and humiliation suffered by him in the presence of his roommate, and mental suffering which has been caused to him, I am satisfied that he is entitled to aggravated damages".<sup>25</sup> Other cases have awarded aggravated damages in similar circumstances.<sup>26</sup>

Recent utilization by the court has changed the meaning of aggravated damages in some jurisdictions. In Ontario aggravated damages are not differentiated from punitive damages and the words are used interchangeably.<sup>27</sup> In Nova Scotia aggravated damages are awarded since the court feels it is bound by Lord Devlin's categories in *Rookes v. Barnard* and thus does not often award punitive damages.<sup>28</sup> In British Columbia, on the other hand, a recent case, *Borza v. Banner*,<sup>29</sup> has stated that the courts in that province prefer aggravated damages rather than awards for punitive damages, even though *Rookes v. Barnard* has been rejected by the British Columbia courts.<sup>30</sup>

### III. HISTORICAL DEVELOPMENT OF PUNITIVE DAMAGES

#### A. General Development

Punitive damages originated in the English legal system just over 200 years ago.<sup>31</sup> The early cases awarded damages above that required to compensate for trespass, false imprisonment and assault when done in an arbitrary and unjustifiable action. Punitive damages were allowed in England since these early cases in all levels of the judicial system including the Court of Appeal<sup>32</sup> and the House of Lords.<sup>33</sup> It has been suggested that there have been various trends in the use of punitive damages in Canada,<sup>34</sup> but generally they have been, and continue to be awarded in tort actions to punish a wrongdoer for his outrageous acts.

#### B. The *Rookes v. Barnard* Restrictions

In 1964 Lord Devlin in the House of Lords restricted the categories for which punitive damages could be awarded. This now famous decision in *Rookes v. Barnard* has been both criticized and praised in legal

25. *Id.* at 126.

26. See *Golnik et al. v. Geissinger*, *supra* n. 22. For a case in defamation see: *Bartrop v. Canadian Broadcasting Corporation* (1978) 5 C.C.L.T. 88 (N.S.S.C.).

27. In *S. v. Mundy*, *supra* n. 10, Cudney Co. Ct. J. said, at 450: "In Ontario the courts have not differentiated between aggravated damages and exemplary damages. The words "aggravated" and "exemplary" have been used interchangeably by our Ontario courts and means one and the same type of damages". He refers to *Denison v. Fawcett*, *supra* n. 7, and *Grenn v. Brampton Poultry Co. Ltd.* (1959) 18 D.L.R. (2d) 9 which follow the same principle.

28. In *Banks v. Campbell*, *supra* n. 20, Chief Justice Cowan of the Nova Scotia Supreme Court, Trial Division felt he was bound by Lord Devlin's categories in *Rookes v. Barnard* and could not award punitive damages for assault. He considered the circumstances of the case which aggravated the damages when making the award; also see *MacDonald v. Hees* (1974) 46 D.L.R. (3d) 720 (N.S.S.C.).

29. Unreported, January 29, 1975, B.C.C.C.

30. *Rookes v. Barnard* was rejected by *Eagles Motors (1958) Ltd. v. Makoff* [1971] 1 W.W.R. 527 (B.C.C.A.), and *Parkes et al v. Howard Johnson Restaurants Ltd. et al.* (1970) 74 W.W.R. 255 (B.C.S.C.).

31. See *Rookes v. Barnard*, *supra* n. 5 at 1221, *per* Lord Devlin, where he outlines the historical development of punitive damages.

32. *Id.* at 1224.

33. *Id.* at 1223.

34. See *Fridman, G. H. L., "Punitive Damages in Tort"* (1970) 48 *Can. Bar Rev.* 373, where the historical development of punitive damages in England and Canada is set out.

writings;<sup>35</sup> and has been both rejected and accepted by the courts of various Commonwealth jurisdictions.<sup>36</sup>

*Rookes v. Barnard* was a case of intimidation. One of the issues the House of Lords was required to decide was if punitive damages were a proper form of damages for such a cause of action. The House decided that punitive damages were not allowed for such an action. Lord Devlin carefully examined the history and purpose of punitive damages and set up three categories for which punitive damages could be awarded, thereby restricting their future use. These categories are best expressed in Lord Devlin's own words:<sup>37</sup>

These [earlier] authorities convince me of two things. First that your Lordships could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognize the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what those two categories are; . . .

The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category—I say this with particular reference to the facts of this case—to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be the source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages.

Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff . . . . Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which either he could not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

To these two categories which are established as part of the common law must of course be added any category in which exemplary damages are expressly authorized by statute.

After setting these categories for the use of punitive damages, which were suited for these special situations only, Lord Devlin explained why he felt they did not completely close the door to remedies for a plaintiff. He saw that other remedies were available in the place of punitive damages. Aggravated damages, which Lord Devlin felt in the past had been mistakenly awarded under the title of punitive damages, would compensate a plaintiff for humiliation caused by the malice, insolence or

35. Rogers, W. P., "Trends in Damages" (1967) *Special Lectures L.S.U.C.* 431; Buglass, R. B., "Some Thoughts on Exemplary Damages" (1969) 34 *Sask. B.R.* 325; Fridman, G. H. L., "Punitive Damages in Tort" (1970) 48 *Can. Bar Rev.* 373; McGregor, Harvey, "In Defence of Lord Devlin" (1971) 34 *Mod. Law Rev.* 520; Stone, Julius, "Double Count and Double Talk: The End of Exemplary Damages?" (1972) 46 *Aust. L.J.* 311; Hodgin, R. W., and Veitch, E., "Punitive Damages—Reassessed" (1972) 21 *I.C.L.Q.* 119.

36. See next section below.

37. *Supra* n. 5 at 1225-1227.

arrogance of the defendant. In those cases in which aggravated damages would not be adequate the criminal law sanctions could be sought. This is set out clearly in Lord Devlin's words: "Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes."<sup>38</sup>

Looking at the whole of Lord Devlin's reasoning, it appears that he felt that his restriction of punitive damage awards to three categories of actions did not prohibit plaintiffs from receiving adequate awards, nor did it remove all possibilities of penal sanction against defendants. This restriction of punitive damages has been criticized, however, by the Court of Appeal in England,<sup>39</sup> by legal authors,<sup>40</sup> by courts in Canada<sup>41</sup> and in other Commonwealth countries.<sup>42</sup> Despite this criticism the categories in *Rookes v. Barnard* are still good law in England.

### C. Treatment of *Rookes v. Barnard* in Canada

*Rookes v. Barnard* enjoyed only a limited application in Canada. The categories were applied for a brief period throughout Canada after the *Rookes* decision was handed down. In 1964 in Alberta the Appellate Division applied the categories in *Wasson v. The California Standard Company et al.*,<sup>43</sup> when it found that a trespass for the financial benefit of the defendant and which was contrary to a provincial regulation was within the categories set out by Lord Devlin, and awarded punitive damages. The British Columbia Supreme Court refused to award punitive damages in two cases in 1965 when the cause of action did not fall within the categories of *Rookes v. Barnard*.<sup>44</sup> Lord Devlin's categories are still applied in Nova Scotia where the court prefers to apply aggravated damages to situations outside of the categories.<sup>45</sup> In two cases before the British Columbia Supreme Court in recent years the court held that it did not have to decide whether or not Lord Devlin's categories applied in that jurisdiction.<sup>46</sup>

38. *Id.* at 1230.

39. *Broome v. Cassell & Co. Ltd.* [1971] 2 All E.R. 187, [1971] 2 W.L.R. 853 (C.A.) reversed on damages by [1972] 1 All E.R. 801, [1972] 2 W.L.R. 645 (H.L.).

40. See n. 35 *supra*; also see: Veitch, Edward, "Manifest Slips and Errors" (1972) 23 *N.I.L.Q.* 501; A.L.G. "Precedent in the Broome and Herrington Cases" (1972) 88 *L.Q.R.* 305; A.L.G. "Punitive Damages in Libel Cases" (1972) 20 *Chitty's L.J.* 65; Jones, D. P., "*Broome v. Cassell & Co. Ltd.*" (1973) 19 *McGill L.J.* 121.

41. See section below.

42. *Australian Consolidated Press, Ltd. v. Uren* [1967] 3 All E.R. 523 (P.C.).

43. *Wasson v. The California Standard Company et al.* (1964) 48 W.W.R. 513 (Alta. C.A.).

44. *Schuster v. Martin* (1965) 50 D.L.R. (2d) 176 (B.C.S.C.); *Kirisits v. Morrell and Hanson*, *supra* n. 24, where aggravated damages were awarded.

45. *Banks v. Campbell*, *supra* n. 20.

46. In *Golnik et al. v. Geissinger*, *supra* n. 22, Dryer J. after mentioning the cases that reject *Rookes v. Barnard* said, at 756: "I do not think that I have to decide that question here", and awarded aggravated damages to the victim of an assault. In *Lawson v. Burns, Succamore and Jim Pattison Broadcasting Ltd.* [1975] 1 W.W.R. 171 (B.C.S.C.), a defamation action, Aikins J. said at 189-90: "... assuming that *Rookes v. Barnard* sets out the law to be applied in Canada, I am unable to find that the defendant's conduct falls within any of the three categories stated by Lord Devlin as giving rise to entitlement to exemplary or punitive damages. . . . I am aware that the applicability of *Rookes v. Barnard* in Canada has been questioned at the highest level by Spence J. in his dissenting judgment in *McElroy v. Cowper-Smith*, [1967] S.C.R. 425, 60 W.W.R. 85, 62 D.L.R. (2d) 65 at 71. In the present case I do not propose to award punitive or exemplary damages".

Most Canadian courts which consider *Rookes v. Barnard* do not find themselves bound to allow punitive damages only within Lord Devlin's categories. The courts either expressly deny that the categories apply in Canada,<sup>47</sup> or they ignore the categories and award punitive damages whenever it appears necessary to teach a wrongdoer that tort does not pay.<sup>48</sup> Lord Devlin, at the end of his discussion on his second category, said that exemplary damages could properly be awarded whenever it was necessary to teach a wrongdoer that tort does not pay. Because it was included in the discussion of the second category, which applied when a defendant made a profit for himself against the plaintiff's rights, it appears that Lord Devlin intended this remark to apply only to those situations that fell within this category. Many Canadian courts have taken this statement out of this context and have applied it in any situation where it was felt that the defendant's conduct warranted the awarding of punitive damages. This application of the statement has allowed the Canadian courts to apply punitive damages widely, and to expand the law where it was felt necessary. This application of Lord Devlin's statement is not an acceptance of *Rookes v. Barnard*, but is merely the utilization of a well stated principle.

Most Canadian courts have, at one time, rejected *Rookes v. Barnard*, including the courts in British Columbia,<sup>49</sup> Alberta,<sup>50</sup> Saskatchewan,<sup>51</sup> Manitoba,<sup>52</sup> Ontario,<sup>53</sup> New Brunswick,<sup>54</sup> and Newfoundland.<sup>55</sup> The Supreme Court of Canada has considered this matter on only two occasions. In *McElroy v. Cowper-Smith and Woodman*,<sup>56</sup> the majority of the court did not consider the question, but Mr. Justice Spence, in his dissenting judgment, rejected *Rookes v. Barnard* when he stated: "Moreover, I am of the opinion that in Canada the jurisdiction to award punitive damages in tort actions is not so limited as Lord Devlin outlined in *Rookes v. Barnard*.<sup>57</sup> In *H. L. Weiss Forwarding Ltd. v. Omnus et al.*<sup>58</sup> a majority of the court, in an action for conspiracy and including breach of contract, upheld the award of damages and added a large award of punitive damages. There was no discussion of whether or not the categories in *Rookes v. Barnard* applied in Canada. It is arguable that this cause of action could be included in Lord Devlin's second category, but if the court felt bound to be restricted in this manner it is likely they would have expressed this and thus bound the rest of Canada. The

47. *E.g. The University of New Brunswick v. Strax* (1969) 1 N.B.R. (2d) 112 (N.B.S.C.); *Fraser v. Wilson et al.* (1969) 70 W.W.R. 134, 6 D.L.R. (3d) 531 (Man. Q.B.); *McKinnon v. F. W. Woolworth Co. Ltd. et al.* (1968) 70 D.L.R. (2d) 280 (Alta. C.A.); *Turnbull v. Calgary Power Ltd.* [1975] 3 W.W.R. 354 (Alta. C.A.).

48. *Holowaty and Holowaty v. Ford Motor Credit Company of Canada Limited and Cooke* [1974] 1 W.W.R. 225 (Alta. D.C.); *Karpow et al. v. Shave* [1975] 2 W.W.R. 159 (Alta. S.C.); *Canadian Ironworkers Union No. 1 v. International Association of Bridge Structural & Ornamental Ironworkers Union, Local No. 97* (1972) 31 D.L.R. (3d) 750 (B.C.S.C.).

49. *Eagle Motors (1958) Ltd. v. Makooff*, *supra* n. 30; *Parkes et al. v. Howard Johnson Restaurants Ltd. et al.*, *supra* n. 30.

50. *McKinnon v. F. W. Woolworth Co. Ltd. et al.*, *supra* n. 47; *Turnbull v. Calgary Power Ltd.*, *supra* n. 47; *Dalsin v. T. Eaton Co. Canada Limited* (1975) 63 D.L.R. (3d) 565 (Alta. D.C.).

51. *Unrau v. Barrowman et al.*, *supra* n. 8.

52. *Fraser v. Wilson et al.*, *supra* n. 47.

53. *Gouzenko v. Lefolii et al.* (1967) 63 D.L.R. (2d) 217 (Ont. C.A.); *S. v. Mundy*, *supra* n. 10.

54. *Roundall v. Brodie* (1974) 7 N.B.R. (2d) 486 (N.B.S.C.); *The University of New Brunswick v. Strax*, *supra* n. 47.

55. *Mayo v. Hefferton et al.* (1973) 3 Nfld. & P.E.I.R. 236 (Nfld. S.C.).

56. *Supra* n. 46.

57. *Id.*, at 71.

58. *Supra* n. 1.

Supreme Court of Canada had the opportunity to restrict the awarding of punitive damages in Canada to Lord Devlin's categories but it did not do so. It appears, therefore, that the awarding of punitive damages in Canada is not limited to Lord Devlin's categories, but they may be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

#### *D. Recent Developments*

Generally, Canadian courts have not felt bound by the categories in *Rookes v. Barnard*. If these have not been followed, what then, has been the application of punitive damages in Canada? From the large number of reported decisions in recent years in which punitive damages have been awarded, there has not been a limitation in their application, but, there has been a clear acceptance of their usefulness. The majority of such awards have come from three provinces—British Columbia, Alberta and New Brunswick.

In British Columbia substantial punitive damages have been awarded for the intentional torts,<sup>59</sup> for breach of a lease agreement,<sup>60</sup> restraint of trade practice,<sup>61</sup> and abuse of process.<sup>62</sup> When punitive damages were awarded it generally was in a substantial amount to deter similar conduct in the future. Punitive damages were not awarded in cases where the plaintiff provoked the conduct of the defendant,<sup>63</sup> nor where the defendant was punished by the criminal law for his conduct.<sup>64</sup> There has been some support for the proposition that aggravated damages be used rather than punitive damages, but it is not clear whether this is indicative of a new trend, or merely the courts making use of aggravated damages when the conduct of the defendant does not clearly warrant punishment.<sup>65</sup>

In Alberta punitive damages have been awarded for intentional torts,<sup>66</sup> wrongful seizure,<sup>67</sup> trespass and conversion.<sup>68</sup> They are awarded whenever the facts warrant it<sup>69</sup> and are to punish and deter the type of conduct which has been punished.

In New Brunswick high awards of punitive damages have been given in cases of assault<sup>70</sup> and trespass.<sup>71</sup> In some cases, on the other hand, the quantum of punitive damages has been moderate where the court felt no real damage occurred<sup>72</sup> or that the plaintiff had been adequately compensated.<sup>73</sup> This may show that the courts do not feel there is a clear

59. *E.g. Bahner v. Marwest Hotel Co. Ltd. et al.* (1970) 12 D.L.R. (3d) 646 (B.C.C.A.).

60. *Parkes et al. v. Howard Johnson Restaurants Ltd. et al.*, *supra* n. 30.

61. *Canadian Ironworkers Union No. 1 v. International Association of Bridge Structural & Ornamental Ironworkers Union, Local No. 97*, *supra* n. 48.

62. *Guilford Industries Ltd. v. Hankinson Management Services Ltd., Gibraltar Contractor Ltd. and Smith* [1974] 1 W.W.R. 141 (B.C.S.C.).

63. *Manhas v. Smythe*, unreported, Sept. 30, 1970, (B.C.S.C.).

64. *Loomis v. Rohan* (1974) 46 D.L.R. (3d) 423 (B.C.S.C.).

65. *E.g. Borza v. Banner*, *supra* n. 29.

66. *Karpow et al. v. Shave*, *supra* n. 48.

67. *Can-Alta Carriers Ltd. v. Ford Motor Credit Co. of Canada Ltd.* (1974) 49 D.L.R. (3d) 319 (Alta. C.A.).

68. *Holowaty and Holowaty v. Ford Motor Credit Company of Canada Limited and Cooke*, *supra* n. 48.

69. *Turnbull v. Calgary Power Ltd.*, *supra* n. 47.

70. *E.g. Roundall v. Brodie*, *supra* n. 54.

71. *E.g. Irving Pulp & Paper Ltd. v. McBrine et al.* (1973) 9 N.B.R. (2d) 194 (N.B.S.C.).

72. *Cash & Carry Cleaners Ltd. v. Delmas et al.* (1973) 44 D.L.R. (3d) 315 (N.B.C.A.).

73. *Johnston v. Burrett and Kinney* (1973) 8 N.B.R. (2d) 499 (N.B.S.C.).



distinction between punitive and aggravated damages, or it may be an attempt by the courts to merge the two forms of damages into one.

#### IV. CONDUCT WHICH GIVES RISE TO PUNITIVE DAMAGES

##### A. *Intentional*

Punitive damages are awarded to punish a defendant for his behavior and to make an example of the behavior to deter the defendant, and others, from performing similar acts in the future. Because of this, the actions punished must be intentional acts, performed deliberately by the defendant.

While the intentional nature of the act must be established, two other factors are also important—the manner of performing the act, and the motive behind the act. Manner which merits punishment has been described by such terms as: culpability;<sup>74</sup> deliberate, vicious and brutal;<sup>75</sup> wilful and wanton;<sup>76</sup> insolent conduct which was unprovoked and unjustified;<sup>77</sup> “a wanton or intentional act, that is, an act which intended the result”.<sup>78</sup> The act must be deliberate and a mistake reasonably made or an “ordinary”<sup>79</sup> trespass are not reason enough to warrant such an award.<sup>80</sup>

The motive of the defendant is important. Punitive damages may be awarded when the defendant acted from malicious motives.<sup>81</sup> This was set out in *Klein v. Jenoves & Varley*,<sup>82</sup> by Mr. Justice Riddell, as follows: “It is, of course, elementary that evil intent or motive may be considered in aggravation of such damages; and logically it should follow that absence of actual evil intent to injure . . . should be considered in mitigation”.<sup>83</sup> A case in which an evil motive led to an award of punitive damages was *Denison v. Fawcett*,<sup>84</sup> in which Mr. Justice Schroeder said:<sup>85</sup>

The defendant's motive was grossly fraudulent and evil, and he consciously and deliberately manifested such a callous disregard of the rights of his partner towards whom he stood in a position of trust and confidence, that his conduct can properly be described as wilful and wanton. The learned Chief Justice rightly awarded aggravated damages. . . . (It will be remembered that in Ontario the words “aggravated” and “punitive” are used interchangeably.)

If the defendant does not act from an evil motive<sup>86</sup> or does not act wilfully<sup>87</sup> there probably will not exist conduct deserving of punishment.

74. *Carr-Harries v. Schacter and Seaton* (1957) 6 D.L.R. (2d) 225, [1956] O.R. 994 (Ont. H. Ct.), per Wilson J.

75. *Guillet v. Charlebois*, supra n. 6.

76. *Wasson v. The California Standard Company et al.*, supra n. 43, per Macdonald J.A.

77. *Irving Pulp & Paper Ltd. v. McBrine et al.*, supra n. 71, per Stevenson J.

78. *S. v. Mundy*, supra n. 10, per Cudney Co. Ct. J.

79. *Starkman et al. v. Delhi Court Ltd. and Diamond & Mogil Builders Ltd.* (1961) 28 D.L.R. (2d) 269, 1961 O.R. 467 (Ont. C.A.), per McGillivray J.A.

80. *Berezowski v. Reimer et al.*; *Berezowski v. Dyck* [1927] 3 D.L.R. 232 (Sask. C.A.), per Martin J.A.

81. *Lundy and McLeod v. Powell* (1922) 70 D.L.R. 659, [1922] 3 W.W.R. 991, 16 Sask. L.R. 166 (Sask. C.A.), per Martin J.A.

82. [1932] 3 D.L.R. 571, O.R. 504 (Ont. C.A.).

83. *Id.* at 576.

84. *Supra* n. 7.

85. *Id.* at 547. This case uses the term “aggravated” damages but it should be remembered that in Ontario the courts use the terms “aggravated” and “punitive” interchangeably.

86. *Bell v. Foley Bros.* (1917) 34 D.L.R. 391, 51 N.S.R. 1 (N.S.C.A.), per Graham C.J.

87. *Frisen et al. v. Forest Protection Ltd.* (1978) 22 N.B.R. (2d) 146 (N.B.S.C.).

### B. Not For Negligent Acts

Punitive damages cannot be awarded for acts which can be described as accidents, or which are brought within the law of negligence. There must be some intention on the part of the defendant to perform the act.<sup>88</sup>

### C. Course of Conduct

In order to obtain an award of punitive damages the defendant's conduct must be of such a nature that it warrants punishment. The courts have declared that such conduct includes: a flagrant trespass, which was a wilful and unlawful invasion against protest and in violation of the law, and a reckless disregard of the rights of others;<sup>89</sup> "Wanton conduct [that] must disclose fraud, malice, violence, cruelty, insolence or the like, or contumelious disregard for the plaintiff's rights";<sup>90</sup> where conduct has been violent or insulting;<sup>91</sup> when a party takes the law into his own hands and trespasses and destroys property without justification;<sup>92</sup> acts which are contrary to law, calculated to discredit the plaintiff and to bring about a breach of the peace, and are done in a high-handed manner;<sup>93</sup> acts which are performed maliciously,<sup>94</sup> cruel, heartless and verge on the criminal,<sup>95</sup> outrageously,<sup>96</sup> or are callous and disgraceful.<sup>97</sup>

To obtain an award of punitive damages, therefore, the defendant's conduct must be, in some manner, malicious, high-handed, or with complete disregard for the rights of the plaintiff. Lord Devlin, in *Rookes v. Barnard*, expressed a concern that such descriptive words cannot be used exclusively. He said:<sup>98</sup>

The courts have used numerous epithets—wilful, wanton, highhanded, oppressive, malicious, outrageous—but *these sorts of adjectives are used in the judgments by way of comment on the facts of a particular case. It would, on any view, be a mistake to suppose that any of them can be selected as definitive.* . . . (emphasis added)

In Canada punitive damages will be awarded only where the conduct merits punishment and not in circumstances where there was no malicious motive,<sup>99</sup> or where the defendant reasonably believed he was acting within his legal rights.<sup>100</sup>

88. See section "Negligence" *infra*.

89. *Wasson v. The California Standard Company et al.*, *supra* n. 43.

90. *Kaytor v. Lion's Driving Range Ltd., Baxter and Anderson* (1962) 35 D.L.R. (2d) 426, 40 W.W.R. 173 (B.C.S.C.), at 430, *per Aikins J.*; *Borza v. Banner*, *supra* n. 29.

91. *Lundy and McLeod v. Powell*, *supra* n. 81, *per Martin J.A.*

92. *Marshall v. Rural Municipality of Woodlands and Lillies* [1947] 2 W.W.R. 97, 55 Man. R. 269, [1948] 1 D.L.R. 351 (Man. C.A.), *per McPherson C.J.M.*

93. *Pollard v. Gibson* (1923-24) 55 O.L.R. 424 (C.A.), *per Ferguson J.A.*; *Pretu et al. v. Donald Tidey Co. Ltd.* (1966) 53 D.L.R. (2d) 504, [1966] 1 O.R. 191 (Ont. H. Ct.), *Per Brooke J.*

94. *Hopper v. Clark et al.* (1910-11) 40 N.B.R. 568, *per White J.*; *Parkes et al. v. Howard Johnson Restaurants Ltd. et al.*, *supra* n. 30.

95. *Unrau v. Barrowman et al.*, *supra* n. 8, *per Davis J.*

96. *Canadian Ironworkers No. 1 v. International Association of Bridge Structural & Ornamental Ironworkers Union, Local No. 97.*, *supra* n. 48, *per Munroe J.*

97. *Griffiths v. Fordyce Motors Limited* [1930] 2 W.W.R. 698 (B.C.C.A.), *per McPhillips J.A.*

98. *Supra* n. 5 at 1229.

99. *Postluns v. Toronto Stock Exchange and Gardiner* (1965) 46 D.L.R. (2d) 210, [1964] 2 O.R. 547, *affd.* [1966] 1 O.R. 285, 53 D.L.R. (2d) 193.

100. *Bell v. Foley Bros.*, *supra* n. 86; *Townsvlew Properties Ltd. et al. v. Sun Construction and Equipment Co. Ltd. et al.* (1974) 7 O.R. (2d) 666 (C.A.).

## V. CAUSES OF ACTION WHICH GIVES RISE TO PUNITIVE DAMAGES

Since the conduct which gives rise to punitive damages must be intentionally directed against the plaintiff's rights, the causes of action arising from such conduct are limited. Basically the causes of action include only the intentional torts and breaches of some statutory provisions.

### A. Intentional Torts

Punitive damages can be awarded in Canada for assault,<sup>101</sup> trespass to land,<sup>102</sup> trespass to goods and conversion,<sup>103</sup> inducing breach of contract,<sup>104</sup> defamation,<sup>105</sup> false arrest and false imprisonment,<sup>106</sup> abuse of legal process,<sup>107</sup> infringement of copyright,<sup>108</sup> breach of promise to marry,<sup>109</sup> conspiracy,<sup>110</sup> breach of collective agreement,<sup>111</sup> and malicious prosecution.<sup>112</sup> Punitive damages cannot be awarded in an action for trover or detinue,<sup>113</sup> and possibly not in an action for alienation of affections.<sup>114</sup> Provocation in an assault may reduce or extinguish punitive damages.<sup>115</sup>

101. *Check v. Andrews Hotel Co. Ltd. and Ross* [1975] 4 W.W.R. 370 (Man. C.A.); *Karpow et al. v. Shave*, *supra* n. 48; *Delta Hotels Ltd. et al. v. Magrum et al.* (1975) 59 D.L.R. (3d) 126 (B.C.S.C.); *Kingsmith v. Denton* (1977) 3 A.R. 315 (Alta. S.C.); *Pettis v. McNeil* (1979) 8 C.C.L.T. 299 (N.S.C.S.); *Gebauer v. Bourassa and Highlander Motor Hotel Ltd.* (1978) 5 Alta. L.R. (2d) 398 (Alta. D.C.).
102. *E.g. Townsview Properties Ltd. et al. v. Sun Construction and Equipment Co. Ltd. et al.*, *supra* n. 100; *Irving Pulp & Paper Ltd. v. McBrine et al.*, *supra* n. 71; *Sulisz v. Flin Flon and Government of Manitoba* [1979] 3 W.W.R. 728 (Man. Q.B.); *Jeans v. Carl B. Potter Ltd.* (1976) 24 N.S.R. (2d) 106; *Pitts v. Moyer* (1977) 30 A.P.R. 290 (N.B.S.C.); *Dempsey v. J.E.S. Developments Ltd.* (1976) 15 N.S.R. (2d) 448 (N.S.S.C.).
103. *E.g. Holowaty and Holowaty v. Ford Motor Credit Company of Canada Limited and Cooke*, *supra* n. 48; *Connors v. Doak and Landry* (1978) 24 N.B.R. (2d) 85; *Barth et al. v. Narratil* [1975] W.W.D. 123 (Alta. S.C.); *Wilcox v. Hammond* (1977) 17 Nfld. & P.E.I.R. 316 (Nfld. D.C.).
104. *E.g. H. L. Weiss Forwarding Ltd. v. Omnus et al.*, *supra* n. 1; *Klein v. Jenoves & Varley*, *supra* n. 82; *Gershman v. Manitoba Vegetable Producers' Marketing Board* [1976] 2 W.W.R. 432 (Man. Q.B.).
105. *E.g. McElroy v. Couper-Smith and Woodman*, *supra* n. 46; *O'Neal v. Pulp, Paper & Woodworkers of Canada, Mullin, Gin, Dircks and Sloan* [1975] 3 W.W.R. 92 (B.C.S.B.); *Drost v. Sunday Herald Ltd.* (1976) 22 A.P.R. 342 (Nfld. S.C.); *Roberge v. Tribune Publishers Ltd.* (1977) 20 N.B.R. (2d) 381 (N.B.S.C.); *McCain Foods Limited v. Agricultural Publishing Company Limited et al.* (1978) 22 N.B.R. (2d) 30 (N.B.S.C.); *Paletta and Palmont Packers Ltd. v. Lethbridge Herald Company Limited et al.* (1976) 4 Alta. L.R. (2d) 97 (Alta. S.C.); *Booth et al. v. B.C. Television Broadcasting System et al.* [1976] W.W.R. 78 (B.C.S.C.).
106. *E.g. Eagle Motors (1958) Ltd. v. Makaoff*, *supra* n. 30; *Hopper v. Clarke et al.*, *supra* n. 94; *Bahner v. Marwest Hotel Co. Ltd. et al.*, *supra* n. 59; *Butt v. Dominion Stores Ltd.* (1978) 53 A.P.R. 276 (Nfld. D.C.); *Sharpe v. Woolco Dept. Stores* (1978) 53 A.P.R. 283; *Hayward v. F. W. Woolworth Co. Ltd. et al.* (1979) 8 C.C.L.T. 157 (Nfld. S.C.); *Tanner v. Norys* [1979] 5 W.W.R. 724 (Alta. S.C.).
107. *E.g. Paragon Properties Limited v. Magna Envestments Ltd.*, *supra* n. 9.
108. *E.g. Zamacois v. Douville and Marchand* [1943] 2 D.L.R. 257, 3 Fox, P.C. 44, [1944] Ex. C.R. 208, 2 C.P.R. 270 (Ex. Ct.).
109. *E.g. Ewart v. Tetzloff* (1959) 28 W.W.R. 124, 18 D.L.R. (2d) 539 (B.C.S.C.); *Denison v. Fawcett*, *supra* n. 7 at 542.
110. *E.g. Dogniez v. Calder et al.* [1947] 2 W.W.R. 61 (Sask. D.C.); *McKinnon v. F. W. Woolworth Co. Ltd. et al.*, *supra* n. 47.
111. *New Brunswick Electrical Power Commission v. International Brotherhood of Electrical Workers Local 1733* (1978) 22 N.B.R. (2d) 364 (N.B.S.C.).
112. *Tedford et al. v. Nitch* (1976) 13 O.R. (2d) 471 (Ont. Co. Ct.); not awarded in *Flame Bar-B-Q. Ltd. v. Hoar's Estate et al.* (1978) 22 N.B.R. (2d) 595 (N.B.S.C.).
113. *Campbell v. Northern Crown Bank* (1914-15) 7 W.W.R. 321, 24 Man. R. 725, 18 D.L.R. 187 (Man. C.A.).
114. *Marangos v. Harold* (1922) 52 O.L.R. 395 (C.A.); *Evans v. Evans* [1899] P. 195; but see *Metcalf v. Roberts* (1893) 23 O.R. 130.
115. *Reeves v. Pollard* (1977) 10 A.R. 349 (Alta. S.C.); *Shaw v. Gorter* (1977) 2 C.C.L.T. 111 (Ont. C.A.); *Landry v. Patterson* (1978) 7 C.C.L.T. 202 (Ont. C.A.).

### B. Contracts

Punitive damages are not recoverable for a breach of contract.<sup>116</sup> This was set out by Mr. Justice Schroeder, in *Denison v. Fawcett*, as follows:<sup>117</sup>

Exemplary or aggravated damages are not, broadly speaking, awarded in actions for breach of contract, since damages for breach of contract are in the nature of compensation, and the motive and conduct of the defendant are not considered relevant to the assignment of damages. The action for breach of promise of marriage and an action upon a contract against a banker for wrongfully refusing to pay his customer's cheques constitute exceptions to this rule.

In actions for breach of contract the object of the damage award is to put the plaintiff into the same position he would have been had the contract been fulfilled. This is the only purpose of the damage award and the motivation of, or means whereby the defendant broke the contract are irrelevant to this assessment.

### C. Negligence

Generally punitive damages will not be awarded against a defendant for a cause of action framed in negligence.<sup>118</sup> It is possible, however, that a defendant's actions, while negligent, verge on being intentional because they are done wilfully or with indifference to the probable outcome. In other cases negligent and wilful acts may be committed at the same time.

*Jackson v. Canadian Pacific R. Co.*<sup>119</sup> sets out the general rule regarding the awarding of punitive damages in cases of negligent behavior. Mr. Justice Beck, of Alberta Appellate Division, outlined the law as follows:<sup>120</sup>

In the case of personal injuries occasioned by negligence, exemplary, vindictive, retributory, or punitive damages cannot be recovered unless there was such entire want of care as to raise a presumption that the defendant was conscious of the probable consequences of his carelessness and was indifferent, or worse, to the danger of the injury to other persons.

The essence of an award of punitive damages for a negligent act rests, not on the negligence itself, but on the indifference of the defendant to the probable injurious consequences of his act. Thus, when a person performing a skilled activity, such as a doctor, who shows an extreme lack of skill and injures another person, his conduct will not warrant censure by punitive damages unless he was "indifferent, or worse, to the danger" of injury.<sup>121</sup> Although some negligent conduct may appear to merit punishment, punitive damages cannot be awarded in the complete absence of some element of intent on the part of the defendant to cause injury, or, to do the act which results in the harm.<sup>122</sup> Thus, acts which may be termed "accidents" cannot be punished by punitive damages, but those in which the defendant's conduct was "indifferent, or worse to the danger of injury", such as appears in cases of negligent misstatement,

116. See *Street*, *supra* n. 16, at 236-40; *Guilford v. The Anglo-French Steamship Company* (1885) 9 S.C.R. 303; *Turner and Turner v. Jatko* (1978) 9 B.C.L.R. 1 (B.C. Co. Ct.); *G. E. Cox Limited v. Adams* (1978) 24 N.B.R. (2d) 65 (N.B.S.C.).

117. *Supra* n. 7.

118. *Cosgrove v. Canadian National Railways* [1923] 3 W.W.R. 1152, 19 Alta. L.R. 739 (Alta. C.A.). For negligent manufacture of goods see: *Blacquiére's Estate v. Canadian Motor Sales Corporation Limited* (1975) 10 Nfld. & P.E.I.R. 178 (P.E.I.S.C.).

119. (1915) 24 D.L.R. 380, 9 A.L.R. 137, *affd.* 27 D.L.R. 86, 52 S.C.R. 281.

120. *Id.* at 389.

121. *Gray et al. v. LaFleche et al.* [1950] 1 D.L.R. 337, [1950] 1 W.W.R. 193 (Man. K.B.).

122. *Kaytor v. Lion's Driving Range Ltd., Baxter and Anderson*, *supra* n. 90.

may very well warrant, and be within the limits of conduct deserving punitive damages.

An old case, *Emblen v. Myers*,<sup>123</sup> allowed punitive damages for a cause of action brought in negligence. The defendant, while having his condemned building torn down, negligently caused a large beam to fall onto the plaintiff's land causing damage to his buildings, chattels and a horse and cart. After complaints from the plaintiff, the defendant instructed his workers to continue, and they threw bricks onto the plaintiff's buildings causing further injury. The defendant appealed the award of punitive damages which was awarded at trial, since the cause of action was negligence and did not include trespass. The judgment was allowed to stand. The court generally felt that since the defendant allowed the introduction of evidence as to the manner of his actions at trial, he should not now succeed by a complaint as to the named cause of action. Channell B. thought such awards should be allowed for something he called "wilful negligence"; Wilde B. thought such an award should be allowed since the defendant had acted in a high-handed manner. The court, however, was not in support of allowing damages for pure negligence as Pollock CB said:<sup>124</sup>

It is universally felt, by all persons who had occasion to consider the question of compensation, that there is a difference between an injury which is the mere result of such negligence as amounts to little more than accident, and an injury, wilful or negligent, which is accompanied with expressions of insolence. I do not say that in actions of negligence there should be vindictive damages, such as are sometimes given in actions of trespass, but the measure of damages should be different according to the nature of the injury and the circumstances with which it is accompanied.

This case was decided at a time when the law of negligence was first emerging as a cause of action, and set out the test as to when punitive damages could be awarded in cases involving some aspect of negligence. The case is difficult since it is based on an initial act of negligence by the defendant which was followed by an intentional trespass, and was brought under the name of negligence. The court looked beyond the naming of the action, to the conduct of the defendant, and decided that punitive damages should be awarded because there was a wilful injury (hence the term "wilful negligence"?) accompanied by insolent conduct. It is a relatively small step from this case to the test set out in the *Jackson* case which appears to allow an award of punitive damages in cases of negligence where the defendant was conscious of the probable consequences of his carelessness and was indifferent to the resulting injury.

The law, therefore, appears to be that where an act includes both wilful and negligent disregard for others and injury results, punitive damages may be awarded, but they may not be awarded for "simple" negligence.<sup>125</sup>

#### D. Statutory Provisions

There are some statutory provisions for allowing an award of punitive damages in Canada. Most of these provisions protect property interests. Recovery of damages, which could include punitive damages, is allowed by the appropriate statutes for infringements of copyright,<sup>126</sup>

123. (1860) 6 H. & N. 54, 158. E.R. 23.

124. *Id.* at 25.

125. For a contrary view see Buglass, R. B. "Some Thoughts on Exemplary Damages" (1969) 34 *Sask. B.R.* 325, at 327-28.

126. *Copyright Act*, R.S.C. 1970, c. C-30, s. 20(1).

trade marks,<sup>127</sup> patents,<sup>128</sup> and industrial designs,<sup>129</sup> if such infringement is accompanied by fraud or malice.<sup>130</sup> In some jurisdictions consumers may be awarded punitive damages where they have suffered damage or loss due to an unfair trade practice.<sup>131</sup> Punitive damages may also be awarded under The Protection of Privacy Act,<sup>132</sup> which has been incorporated into the Criminal Code,<sup>133</sup> against persons who intercept, or disclose intercepted communication otherwise than in accordance with the act.<sup>134</sup>

Statutory provisions for punitive damages are limited, but in respect to consumer protection and the protection of privacy they cover areas where such damages, or any damages would not otherwise be available.

## VI. PLEADING PUNITIVE DAMAGES

### A. No Requirement to Specifically Plead

Punitive damages are generally considered to be a part of general damages and therefore it is not required that they be specifically or separately set out in the pleadings.<sup>135</sup> Mr. Justice Kane, in *Paragon Properties Limited v. Magna Investments Ltd.*,<sup>136</sup> said: ". . . although exemplary or punitive damages are not claimed in the prayer for relief in the counterclaim, they may be properly awarded in answer to a claim for general damages"<sup>137</sup> This may arise from the fact that general damages are often awarded "at large" and often it is not the practice of the court to allow a separate and distinct sum for punitive damages, but to take it into account in the overall assessment.<sup>138</sup> In recent cases, however, a specific sum has been awarded as punitive damages to be added to the general damages, but it is probable, relying on Mr. Justice Kane's remark in *Paragon Properties Limited v. Magna Investments Ltd.*, that there is still no requirement to specifically plead any other head of damages.<sup>139</sup>

### B. No Requirement to Attach to General Damages

In *S. v. Mundy*<sup>140</sup> the plaintiff commenced an action for assault, claiming special and exemplary damages but not general damages, and later abandoned the claim for special damages. The court found that punitive

127. Trade Marks Act, R.S.C. 1970, c. T-10, s. 53.

128. Patent Act, R.S.C. 1970, c. P-4, s. 57.

129. Industrial Designs Act, R.S.C. 1970, c. I-8, s. 15.

130. *Zamacois v. Douville and Marchand*, *supra* n. 108.

131. *E.g.* The Unfair Trade Practices Act, S.A. 1975, c. 33, s. 11(2)(c).

132. Bill C-176.

133. R.S.C. 1970, c. C-34, s. 178.21(1).

134. See Manning, Morris, *The Protection of Privacy Act, Bill C-176*, Butterworths, Toronto, 1974.

135. *Grenn v. Brampton Poultry Co. Ltd.* (1959) 18 D.L.R. (2d) 9 (Ont. C.A.), *per* Gibson J.A.

136. *Supra* n. 9.

137. *Id.* at 113; also see *Holowaty and Holowaty v. Ford Motor Credit Company of Canada Limited and Cooke*, *supra* n. 48.

138. *Starkman et al. v. Delhi Court Ltd. and Diamond & Mogil Builders Ltd.*, *supra* n. 79.

139. It may be advantageous in some instances to specifically plead punitive damages. If an action, for example, the removal of the wrong organ by a doctor during surgery, was framed in alternative causes of action such as assault or in the alternative, negligence, punitive damages could only be possible if the defendant was liable in the international tort. If general damages were asked for in the amount of \$50,000 and liability was found in negligence, the defendant may argue to reduce the damages for the following reason. If liability was found for assault, part of the \$50,000 could have been punitive damages, therefore the whole amount was not required for compensatory damages. Since liability is for negligence, and punitive damages are not available, only that part of the amount which was for compensatory damages could now be awarded.

140. *Supra* n. 10; also see *Ross v. Lamport* (1957) 9 D.L.R. (2d) 585, [1957] O.R. 402 (Ont. C.A.).

damages may be awarded for an intentional act whenever it is necessary to teach the wrongdoer that tort does not pay. It held that punitive damages are deterrent in character and are awarded over and above compensation. It is not, therefore, necessary to award general damages to compensate, and then to raise this award by the aggravating conduct of the defendant. In this case, an award of punitive damages was made in the absence of any other damage award, in order to punish the defendant for his conduct. This would allow a plaintiff a remedy against a wrongdoer when only little or no actual damage was suffered,<sup>141</sup> such as in cases of false imprisonment. It appears however, that the pleadings must show a cause of action that would permit a general damage award.<sup>142</sup>

### C. *Survival of Actions*

At common law, if an injury was done to the person or property of another, for which damages only could be recovered, the action died with the person who suffered or who committed the wrong.<sup>143</sup> This common law position has been changed by statute, for example, in Alberta, The Administration of Estates Act<sup>144</sup> includes the following sections:

51.(1) The legal representative of the estate of a deceased person may maintain an action for any tort or injury to the person or to the real or personal estate of the deceased except in cases of defamation, in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do.

53. Where any deceased person committed a wrong to another in respect of his person or of his real or personal property, except in cases of defamation, the person so wronged may maintain an action against the legal representative of the estate of the deceased person who committed the wrong.

Other provinces have similar provisions.<sup>145</sup> These statutory provisions allow tort actions to be brought when either the plaintiff or defendant has died.<sup>146</sup> The damages recoverable under such actions are damages in their true sense and are not property passing because of the death of the deceased.<sup>147</sup>

These statutes permit actions for which punitive damages may be awarded to survive the life of either the plaintiff or defendant. They permit recovery of damages and do not specifically by their wording restrict recovery to any particular type of damages. It can be assumed, therefore, that punitive damages could be awarded, where there is conduct which warrants such damages, either for or against a deceased's estate. It may be questionable whether or not punitive damages would be awarded in such circumstances. It is impossible to punish or to deter a deceased defendant, and punitive damages would serve no useful purpose other than any deterrent effect that may be vested on society at large. Aggravated damages, on the other hand, since they are designed to compensate a plaintiff for his wronged feelings would be appropriate. If

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141. See *Holowaty and Holowaty v. Ford Motor Company Credit Company of Canada Limited and Cooke*, *supra* n. 48.

142. *Guaranty Trust Co. of Canada v. Public Trustee et al.* (1978) 20 O.R. (2d) 247 (Ont. H. Ct.).

143. Williston, W. B. and Rolls, R. J., *The Law of Civil Procedure*, Butterworths, Toronto, 1970, at 159-61.

144. R.S.A. 1970, c. 1.

145. *E.g.* Trustee Act, R.S.O. 1970, c. 470, s. 38.

146. *E.g.* for breach of promise to marry see *Smallman v. Moore* [1948] S.C.R. 295, [1948] 3 D.L.R. 657.

147. See *Re Ross* [1954] O.R. 778, [1954] 4 D.L.R. 478 (H.C.J.).

the plaintiff was deceased, punitive damages awarded against the defendant would still serve their purpose, while aggravated damages would be of little use to the plaintiff.<sup>148</sup>

#### *D. Right to Set-off*

In *Natonson v. Lexier*<sup>149</sup> the defendant assaulted the plaintiff for allegedly having sexual relations with the defendant's wife. Mr. Justice Taylor said, in an obiter comment, that if punitive damages had been awarded, they could not be set-off against any award for criminal compensation. The reason for this refusal of set-off may arise from the fact that punitive damages are not compensatory, but are designed to punish, and it would be contrary to that principle to reduce them by having a set-off against a compensatory award.

### VII. ASSESSMENT OF PUNITIVE DAMAGES

The courts consider many factors when assessing the quantum of punitive damages. It goes without saying that there must first be a finding of conduct deserving of punishment by the defendant, the cause of action must be one of punishment by the defendant, the cause of action must be one for which punitive damages are allowed, and the plaintiff must ask for punitive damages at trial. In arrival at a quantum that the court feels is suitable to the parties and situation, the court may consider any number of factors including the purpose of the award, the conduct of the plaintiff, the means of the parties, and related or subsequent actions by the parties.

#### *A. Purpose to Punish and Deter*

Punitive damages are awarded to punish the defendant by requiring him to pay money to the plaintiff, and to act as a deterrent for the defendant and others. The punishment to the defendant, therefore, should act as a deterrent example.<sup>150</sup> This general principle has been stated in *Canadian Ironworkers Union No. 1 v. International Association of Bridge Structural & Ornamental Ironworkers Union, Local No. 97*,<sup>151</sup> by Mr. Justice Munroe, as follows: "This is clearly a case where it is necessary for the Court to mark its disapproval of the defendant's outrageous and high-handed conduct with a view to deterring a repetition thereof by the defendant and others of like mind."<sup>152</sup>

It is not without difficulty that courts arrive at a quantum for punitive damages which will suit the case. Mr. Justice Haddad, of the Alberta District Court, expressed this in *Holowaty and Holowaty v. Ford Motor Credit Company of Canada Limited and Cooke*,<sup>153</sup> a case of trespass to land and conversion, when he said: "Assessing damages in a case of this kind [where there is no actual damage] is difficult. The award must be such that it is meaningful and effective as it must reflect the deterrent

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148. In England, punitive damages can be recovered against, but not for the benefit of an estate. See discussion of the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. g. c. 41), s. 1, in Street, *supra* n. 16.

149. [1939] 3 W.W.R. 289 (Sask. K.B.).

150. *Reid v. Davidson* (1972) 7 N.S.R. (2d) 563 (N.S.S.C.); *S. v. Mundy*, *supra* n. 10.

151. *Supra* n. 48.

152. *Id.* at 753.

153. *Supra* n. 48.



and punitive aspects for which punitive damages are awarded."<sup>154</sup> The amount awarded should be substantial so that others will know it is not profitable to engage in similar conduct.<sup>155</sup> To award a nominal amount as punitive damages would be an invitation to the defendant to continue to engage in the conduct complained of.<sup>156</sup> The reasoning behind the quantum assessment for punitive damages was set out clearly by Mr. Justice Macdonald, of the Alberta Appellate Division, in *Wasson v. The California Standard Company et al.*,<sup>157</sup> in his following remarks:<sup>158</sup>

In the case at bar the flagrant trespass of the appellant was a wilful, wanton and unlawful invasion of the property of the respondent, against protest and in known violation of the law, and was a reckless disregard of the rights of the respondent.

To allow a corporation to trespass as in the case at bar and to maintain that it is only liable for the pecuniary losses sustained by the respondent, would, in my opinion, be a mockery of justice. Corporations, like individuals, must respect the rights of others . . . .

When a trespass is committed, as it was in the case at bar, it seems to me that a substantial sum by way of exemplary or punitive damages should be awarded, for the general benefit of society, against the trespasser, to demonstrate that the Court affords protection to an individual against the violation of his personal rights, and also to serve as a warning and example to deter others from committing similar offences. The imposition of such damages should discourage the wilful and wanton invasion or disregard of the rights of others.

### B. Protect Rights of Others

Commensurate with the object of punishing a wrongdoer is the protection of the legal rights of other persons. Deterrence has the effect of preventing a wrongdoing, and, thus, the resulting effect is that other persons are free from interference with their legal rights.<sup>159</sup> This consideration may affect the quantum of punitive damages awarded.

### C. Not a Mere Licence Fee

In order for an award of punitive damages to be an effective deterrent, it must make it unprofitable to violate another's rights. To assess damages at a small figure would amount to only a licence fee.<sup>160</sup> This consideration is usually made in cases of trespass to land. It has been expressed well in two cases. Mr. Justice McGillivray, in *Starkman et al. v. Delhi Court Ltd. and Diamond & Mogil Builders Ltd.*,<sup>161</sup> said: ". . . a nominal amount added to the actual damages in such a case would be but an invitation to contractors to violate property rights for what would amount to an insignificant licence fee and that a substantial amount for punitive damages should be added to the actual damage suffered by the plaintiff".<sup>162</sup> Mr. Justice Puddester, in *Mayo v. Hefferton et al.*,<sup>163</sup> said: "The measure of damages should, I think, make it clear that one is not at liberty to expropriate another's land merely for a nominal purchase price, and the damages must be such as would deter such actions in defiance of

154. *Id.* at 230.

155. *Pretu et al. v. Donald Tidey Co. Ltd.*, *supra* n. 93; *Carr-Harris v. Schacter and Seaton*, *supra* n. 74.

156. *Parkes et al. v. Howard Johnson Restaurants Ltd. et al.*, *supra* n. 30.

157. *Supra* n. 43.

158. *Id.* at 522.

159. *Id.*

160. *Carr-Harris v. Schacter and Seaton*, *supra* n. 74. For contra see: *Blanchard v. Cormier and Cormier* (1979) 25 N.B.R. (2d) 496 (N.B.S.C.).

161. *Supra* n. 79.

162. *Id.* at 274.

163. *Supra* n. 55.

another's legal rights; they must be damages rather than a mere licence fee."<sup>164</sup>

#### *D. Conduct of the Plaintiff*

In compensatory damages the conduct of the plaintiff is irrelevant to the assessment of damages for his personal injuries or loss of property. Contributory negligence will cause the amount received by the plaintiff to be reduced by the proportion of his fault, but the actual assessment will not be changed. Punitive damages, on the other hand, since they are not compensatory, can be reduced or eliminated by reason of the conduct of the plaintiff. If the plaintiff provokes another into assaulting him, he can be denied an award of punitive damages, but his compensatory damages cannot be reduced.<sup>165</sup> Provocation by the plaintiff, therefore, can be a complete defence to punitive damages in an assault case.<sup>166</sup> It will not prevent the award, however, if the defendant's response to the provocation so greatly exceeded the provocation that a wanton and intentional assault resulted.<sup>167</sup>

It is not only in assault cases that the plaintiff's conduct can affect the making of an award of punitive damages. In *Shepherd v. Ross*<sup>168</sup> punitive damages were not awarded to a tenant for an eviction by his lessor from demised premises, where all loss might have been avoided if the tenant had acted diligently.

Since punitive damages are awarded to punish the defendant for his wrongful conduct, it would be unjust to allow a plaintiff to receive such an award when he had also engaged in wrongful conduct, and probably caused the defendant to act in such a manner.

#### *E. Not Compensatory*

Punitive damages are not compensatory but are awarded over and above compensation, and can be awarded in the absence of compensatory damages.<sup>169</sup> In some cases courts have awarded punitive or exemplary damages when they have taken into consideration the injured feelings of the plaintiff.<sup>170</sup> This probably occurs when courts do not make a distinction between punitive and aggravated damages, or when the two are combined under one head of damage as punitive damages.<sup>171</sup>

#### *F. Adequacy of Compensation*

In some cases the court considers the adequacy of the compensatory damages as a factor in assessing punitive damages. At times courts have found that the plaintiff would not be adequately compensated for humiliation and loss of dignity, and so awarded punitive damages.<sup>172</sup>

164. *Id.* at 241.

165. *Check v. Andrews Hotel Co. Ltd. and Ross*, *supra* n. 101; *Nystad v. McPhee* [1941] 1 W.W.R. 118; *Manhas v. Smythe*, unreported decision, B.C.S.C., September 30, 1974.

166. *Reeves v. Pollard*, *supra* n. 115.

167. *Roundall v. Brodie*, *supra* n. 54.

168. (1912) 4 D.L.R. 432, 21 W.L.R. 259 (Man. K.B.).

169. *S. v. Mundy*, *supra* n. 10.

170. *Griffiths v. Fordyce Motors Limited*, *supra* n. 97.

171. In British Columbia the courts prefer to award aggravated damages although they may on occasion be called punitive, while in Ontario the courts find no distinction between punitive and aggravated damages and use the terms, and presumably the definitions, interchangeably.

172. See *Johnston v. Barrett & Kinney*, *supra* n. 73.

This would appear to be more properly a factor in assessing aggravated rather than punitive damages. In other cases the court considered that the compensatory damages awarded were sufficient for the plaintiff, and they also sufficiently punished the defendant at the same time.<sup>173</sup> The consideration of adequacy of compensation appears to be closely tied in with the consideration of the means of the parties.

### G. Means of the Parties

In an award of compensatory damages for personal injury or damage to property the means of the plaintiff and defendant are irrelevant.<sup>174</sup> The assessment is made on the actual loss and nothing else. When assessing the quantum of punitive damages, on the other hand, the means of the parties is a very relevant factor. A relatively small award will bring hardship, and thus a punitive effect to a poor man, while it would require a substantial sum to properly punish a wealthy individual or a large corporation. This principle has been applied by the courts.<sup>175</sup> In some cases it may be found that payment of the compensatory damages would by itself create hardship and thus have a punitive effect on the defendant.<sup>176</sup>

### H. Vicarious Liability

Where an agent acting within the scope and terms of his employment for a corporate principal, engages in conduct which warrants punitive damages, the corporate principal, as the directing mind of the act, is liable for the damages, and not the individual who actually performed the acts. The courts have not addressed themselves to any problems of vicarious liability, but, instead, appear to accept it as a fact that corporate entities, and not their human agents, are liable for punitive damages.<sup>177</sup> This would be a factor in assessing quantum. Where an agent acts outside of his authority and scope of employment, it is probable that he would be individually liable for any award of punitive damages awarded because of such acts. This would have the effect of punishing the wrongdoer, the agent, and not an innocent principal. It is important to be careful to ascertain the authority and scope of employment of the agent in a determination of liability to pay punitive damages.<sup>178</sup>

### I. Punishment by Criminal Law

Generally when a defendant has been convicted and sentenced by the criminal law, for the very act for which punitive damages are claimed, no

173. *Zerowinski et al. v. Duke* [1924] 3 W.W.R. 49, 18 Sask. L.R. 618, [1924] 4 D.L.R. 326 (Sask. C.A.); see section "means of the parties" *infra*.

174. *Radovskis et al. v. Tomm*. (1957) 9 D.L.R. (2d) 751 (Man. Q.B.) at 752.

175. In *Borza v. Banner*, *supra* n. 29, Cashman C.C.J. considered the means of the parties, in a case in which the defendant killed the plaintiff's dog, and because they appeared to be of modest means, he awarded only \$500 for aggravated damages. In *H. L. Weiss Forwarding Ltd. v. Omnus et al.*, *supra* n. 1, a case of conspiracy and inducing breach of contract, Laskin C.J.C. said at 512-13: "The business was a modest one in terms of profitability and most certainly in comparison with the giant which the plaintiff had business dealings with the corporate defendant and retained its other major customers. I think substantial justice will be done here by awarding the plaintiff an additional \$10,000 as punitive damages".

176. *Zerowinski et al. v. Duke*, *supra* n. 173.

177. See *Townsvlew Properties Ltd. et al. v. Sun Construction and Equipment Co. Ltd. et al.* (1974) 7 O.R. (2d) 666 (Ont. C.A.).

178. For a discussion of vicarious liability and punitive damages see Atiyah, P. S., *Vicarious Liability in the Law of Torts*, Butterworths, London, 1967, at 433-37.

award of punitive damages will be made. The law was set out in *Natonson v. Lexier*<sup>179</sup> as follows:<sup>180</sup>

The defendant was sentenced to a period of imprisonment and having thus received punishment the imposition of punitive damages for the benefit of the plaintiff would be a double punishment, even on the peculiar circumstances punitive damages ought to be awarded for the benefit of the plaintiff.

The Canadian courts have consistently followed this case, and have refused to award such double punishment by awarding punitive damages after a criminal punishment has been inflicted.<sup>181</sup> This does not say, however, that the courts are prohibited from making such an award, but only that they do not.

There are two other considerations that must be kept in mind when a criminal punishment has been imposed—the sufficiency of the criminal punishment, and the purpose for which criminal punishment was imposed. In *Banks v. Campbell*,<sup>182</sup> an action for assault, Chief Justice Cowan of the Nova Scotia Supreme Court, questioned whether an absolute discharge would be construed as punishment of the defendant and thus disallow an award of punitive damages. The court held that it was not necessary to answer this question since it felt bound by the categories set out in *Rookes v. Barnard*, and thus could not award punitive damages in this instance. An absolute or conditional discharge would not be adequate punishment in some cases, and punitive damages should be imposed. In *Banks v. Campbell* there was some question of provocation, but nevertheless aggravated damages were applied; aggravated damages may be applied when there has been punishment since they are compensatory and not punitive in nature. In *Borza v. Banner*<sup>183</sup> the defendant was punished by the criminal law for discharging a firearm and not for a charge of killing the plaintiff's dog. The court found this reason to distinguish it from other cases and awarded punitive damages for the killing of the dog, which was the cause of action at the civil trial. In *Loedel v. Eckert*<sup>184</sup> punitive damages were awarded in an action for assault, when the defendant received a conditional discharge in the criminal action. It is essential, therefore, that the criminal conviction be for exactly the same named cause of action as the subsequent civil proceeding, and not for merely the same course of conduct. This reasoning could have been applied in the *Banks v. Campbell* situation where the criminal charge was of unlawfully discharging a firearm, and the civil action was for assault.

### *J. Subsequent Conduct by the Defendant*

The court will sometimes take into consideration when assessing the quantum, subsequent acts of the defendant which show that he tried to

179. *Supra* n. 149.

180. *Id.* at 291, *per* Taylor J. This statement has been applied in subsequent cases, *e.g.* *Banks v. Campbell*, *supra* n. 20.

181. *Radovskis et al. v. Tomm*, *supra* n. 174; *Loomis v. Rohan*, *supra* n. 64; in *Kirisits v. Morrell and Hanson*, *supra* n. 24, Collins J. did not allow punitive damages in an assault case since the defendants had been imprisoned, but he did allow aggravated damages because of the brutal nature of the assault which caused the plaintiff mental suffering; *Schuster v. Martin* (1965) 50 D.L.R. (2d) 176 (B.C.S.C.); *Fenwick v. Staples* (1977) 82 D.L.R. (3d) 145 (Ont. Co. Ct.); in *Amos v. Vauter et al.* (1969) 69 W.W.R. 596 (B.C.S.C.) the court did not award exemplary damages since there was no evidence of damage beyond the plaintiff's actual loss.

182. *Supra* n. 20.

183. *Supra* n. 29.

184. (1977) 3 C.C.L.T. 145 (B.C.S.C.).

make restitution for his wrongdoing. This has occurred in assault cases. In *S. v. Mundy*<sup>185</sup> the court took into consideration, in the mitigation of punitive damages, the fact that subsequent to the assault, the defendant joined Alcoholics Anonymous, had taken psychiatric treatment and had stopped drinking. Likewise, in *Radovskis et al. v. Tomm*<sup>186</sup> the court considered the apology and apparent remorse of the defendant in its decision to disallow punitive damages. In *Karpow et al v. Shave*<sup>187</sup> it was held that in assessing the amount of punitive damages the court could take into account the failure of the defendant, at any time before or during the trial, either by himself or by his counsel, to tender any apology to the plaintiff. In *Thompson v. NL Broadcasting Ltd. and Pilz*<sup>188</sup> the court held that the apology of the defendants was not adequate and their retraction not full, and awarded punitive damages.

If the purpose of punitive damages is to punish, in a similar manner to the criminal law, it seems incongruous to allow sorrow by the defendant to go to mitigation of the punishment awarded. An apology to the plaintiff may lessen somewhat his injured feelings, but this is of no consequence since damages are not awarded to compensate for this, but to punish the defendant. If the defendant changes his behavior after the act, this does not lessen in any manner the fact that the act deserving of punishment was committed. If a display of sorrow or remorse shows anything, it may only demonstrate that a threat of an award of punitive damages has some effect once the defendant is cognizant of it, but it should be too late at that point to avoid them. This is one consideration in making the award that goes against the purpose of the award, since it is to punish something that has happened and an apology, which could easily be offered for no purpose other than to escape the award of punitive damages, should have no effect on the making of such an award.

### VIII. CONCLUSION

Harry McGregor,<sup>189</sup> writing immediately after the House of Lords' decision in *Rookes v. Barnard*, foretold of the coming of the final extinction of punitive damages in tort law. This prediction has not come about, but on the contrary, punitive damages are alive and well and living in Canada. This vitality was reaffirmed by the Supreme Court of Canada in *H. L. Weiss Forwarding Ltd. v. Omnus et al.*<sup>190</sup> The Supreme Court of Canada, while accepting punitive damages as a useful instrument of tort law, failed to set out their limits and failed to provide guidelines for the provincial courts in their application of this law. It is important that there be uniformity of the common law throughout the provinces,<sup>191</sup> and that the bounds and application of the law be certain.

In order to determine what the limits of punitive damages should be, some preliminary questions must be dealt with.

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185. *Supra* n. 10.

186. *Supra* n. 174.

187. *Supra* n. 48, *per* D. C. McDonald J.; also see *Louden v. Ryder* [1953] 2 Q.B. 202, [1953] 1 All E.R. 741.

188. (1976) 1 C.C.L.T. 278 (B.C.S.C.).

189. McGregor, Harvey, "Compensation Versus Punishment in Damage Awards" (1965) 28 *Mod. Law Rev.* 629.

190. *Supra* n. 1.

191. The Civil law province of Quebec has a somewhat different principle of law governing this question; see *Fridman, supra* n. 34 at 47, 381.

1. What is the purpose of punitive damages? The major purpose, as set out by the cases, is to punish the wrongdoer for his high-handed conduct against the rights of the plaintiff. To say the object is to punish is merely to voice the superficial reason. One must look beyond this to the purpose of punishment which is to deter such conduct in the future by the defendant or others of like mind. An imposition of punishment on the defendant has the secondary effect of appeasing any vindictive feelings in the plaintiff, and thus eliminates any retaliatory behavior on his part. The real purpose of an award of punitive damages, therefore, is to regulate conduct of persons within the society.
2. Is it a proper function of tort law to punish wrongdoers, or is this more properly a function of the criminal law? Lord Devlin expressed a concern in *Rookes v. Barnard* that the use of punitive damages would remove the safeguards provided by the criminal law system, such as proof beyond a reasonable doubt, and predetermined penalties for specific offences. Many arguments have been presented for and against punitive damages,<sup>192</sup> but the best reason for their inclusion in tort law was expressed in the thesis of an article by Glanville Williams.<sup>193</sup> Williams looked at the purpose and effect of tort law and found that there are four bases of action in tort—appeasement, justice, deterrence and compensation. Appeasement allows the victim to “let off steam within the law rather than outside it”; justice, the ethical component, enforces that the wrongdoer pays for the wrong done; deterrence results from an action in tort being a “judicial parable” designed to control the future conduct of the community in general; compensation requires the one who has done a wrong according to law, to pay for the damage, regardless of culpability. The underlying effect of all these factors is deterrence, which results in regulation of conduct in the community. Punitive damages, therefore, are merely a specific extension of this purpose. Including punitive damages in tort does not place an undue burden on the defendant since in the action the conduct of the plaintiff may be considered and if provocation is present it may provide a complete defence for the defendant. The need for such a punitive effect is recognized in public policy since punitive damages are not generally covered by insurance, which results in the burden being borne by the defendant. Another consideration is that it is not in every instance that a criminal punishment is available since not all acts for which punitive damages are available are also crimes. In such instances where no criminal charges were available there would be no method, without tort law, whereby the defendant could be punished for his malicious acts. Finally, historically tort and criminal law were merged, though, now, in some areas they still overlap. The primary purpose of criminal law is considered to be punishment of criminals, but the criminal law can still order the convicted person to compensate the victim for his loss of property,<sup>194</sup> and crimes compensation boards can compensate a victim for physical injuries.<sup>195</sup> Tort law has as its

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192. See Street, *supra* n. 16 at 34-36.

193. Williams, Glanville, “The Aims of the Law of Torts” (1951) 4 *Current Legal Problems* 137.

194. Criminal Code, R.S.C. 1970, c. C-34, ss. 653, 654, 655.

195. *E.g.* Criminal Injuries Compensation Act, R.S.A. 1970, c. 75.

obvious purpose compensation of victims, but has a second purpose to punish wrongdoers by the payment of punitive damages.<sup>196</sup> Punitive damages are a proper consideration for tort law and are directly in line with the primary effect of the law.

3. Why should there be both punitive damages and aggravated damages? Both punitive and aggravated damages are awarded for similar forms of conduct by defendants and both have an ultimate result of inflicting punishment, but the reason for making an award is essentially different. Punitive damages are directed against the defendant, while aggravated damages are directed for the plaintiff to compensate him for any injured feelings caused by the act of the wrongdoer. Their purpose therefore is different, and it would be possible, although not likely, to have both awards for one cause of action.

It is possible to conclude that punitive damages are designed to regulate conduct and in doing so they do not conflict with either the criminal law or aggravated damages. What then, should the limits of punitive damages be?

First, since punitive damages are to deter certain kinds of conduct they should be expanded to include areas where a special or higher degree of duty of care is owed by the defendant to the plaintiff. It has been set down by courts that punitive damages would be proper in cases where a defendant consciously and deliberately had a callous disregard for another's rights,<sup>197</sup> and in cases of negligence where "there was such entire want of care as to raise a presumption that the defendant was conscious of the probable consequences of his carelessness and was indifferent, or worse, to the danger of injury to other persons".<sup>198</sup> Situations in which one person is within the care and control of another who has special knowledge or skills, create a higher duty than would normally be expected of a reasonable person. These situations, including the treatment by doctors, work of accountants and other professionals, including negligently made statements, should be included in the causes of action for which punitive damages are recoverable. This is not to suggest that a professional should be liable for every act of "mere negligence", but only for those in which he acted in a manner far below his professional standards and consciously disregarded another's rights and was indifferent to the result of his negligence. Also included in this expansion should be that conduct that can be defined as "gross negligence". In most provinces statutes in regards to driving motor vehicles set out that a gratuitous passenger may only sue a driver for harm caused by gross negligence. This has the effect of punishing such a driver for conduct that goes beyond ordinary negligence or accidents. Why not let third parties, who are not passengers and who are injured by gross negligence, punish the wrongdoer (regardless of whether or not a gratuitous passenger was present, since damages to the passengers are covered by insurance). An increasing number of drivers are involved in accidents caused by conduct that may be described as gross negligence, such as drunk driving, falling asleep at the wheel, driving beyond the conditions of the road. The penal sanctions for such conduct are either not

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196. Aggravated damages and compensatory damages may also have a punitive effect.

197. *Denison v. Fawcett*, *supra* n. 7 at 547.

198. *Jackson v. Canadian Pacific R. Co.*, *supra* n. 119 at 389.

employed or not effective, so it is sensible that the use of punitive damages in tort law should be employed to help eliminate this type of conduct. Insurance companies would probably be quick to exclude liability for such damages and the burden would fall directly on those whose conduct was to be controlled.

Second, punitive damages should be paid to the state and not to the plaintiff. The purpose of the award is to regulate conduct, including that of the victim who may have vindictive feelings; but these feelings should be quelled by the fact that the wrongdoer is punished, thus a money windfall should not also be necessary. A logical place that the money could go would be to the crimes compensation board to pay for victims of crime who are injured by unknown or impecunious criminals. It is not suggested that a criminal and civil trial be combined because of the insurmountable problems of burden of proof and evidence, but that the civil trial merely order the punitive damages be paid to the crimes compensation board of the province. This would probably necessitate the inclusion of the state as a third party at the proceedings, and either the victim or the state could ask for punitive damages. Torts would not be treated as common law crimes for which fines are levied; the trial would be similar to the present ones, but the award would be made in favour of some organization other than the injured plaintiff.

Third, the courts in assessing the quantum of punitive damages, once it has been established that they are warranted, should continue to take into consideration the wealth of the defendant. Their purpose would not be served if a standardized or maximum amount was fixed, since it would hurt poor defendants and would have a lessened effect against wealthy ones.

Fourth, an award of punitive damages should be allowed in the consideration of a criminal sentence; and a criminal sentence should be considered in an award of punitive damages. One should not exclude the possibility of the other, but should in some cases, result in a reduction of the second punishment.

Fifth, the sorrow or apology of the defendant should not exclude the possibility of an award of punitive damages. It may be a small consideration in mitigation in some cases, but it should not be an important aspect, since, generally, other forms of conduct by the defendant outside of the actual situation of the case are irrelevant. The allowance of an apology to wipe out punitive damages would make it too easy for insincere defendants to escape punishment.

Sixth, punitive damages should be incapable of being covered by insurance. This would enhance their punitive effect and would not spread the loss over society but would keep it to those who breached the required conduct.

Seventh, a clear distinction should be made between punitive and aggravated damages, and each should be awarded where necessary, even if both are called for in the same case.