HIGH COURT OF AUSTRALIA

Lamb

Vs.

Cotogno

(Mason C.J.(1), Brennan(1), Deane(1), Dawson(1) and Gaudron(1) JJ.)

13 October 1987

MASON C.J., BRENNAN, DEANE, DAWSON AND GAUDRON JJ.

1. In this matter the plaintiff claimed damages against the defendant for injuries which he received in 1979 in an incident involving a motor car driven by the defendant. Both damages and exemplary damages were claimed. The trial took place before a master of the New South Wales Supreme Court who awarded the plaintiff damages for trespass to the person in the total sum of $203,570, which included an amount of $5,000 by way of exemplary damages. The plaintiff appealed to the New South Wales Court of Appeal against the inadequacy of the award and the defendant cross-appealed upon the question of exemplary damages. By a majority (Glass and McHugh JJ.A.; Kirby P. dissenting) the Court dismissed the cross-appeal. The appeal was allowed and the general damages were increased so that the total amount awarded, including an amount for interest, was $236,070.

2. By special leave the defendant has brought this appeal against the judgment of the Court of Appeal. It is confined to the award of exemplary damages. The plaintiff died before the appeal could be heard and the administratrix of his estate has been substituted as the respondent to the appeal. It is convenient to continue to refer to the deceased as the plaintiff and the appellant as the defendant.

3. The facts as found by the master establish that the defendant went to a property owned by the plaintiff at about 7.00 or 7.30 in the evening for the purpose of serving a summons. He was accompanied by his girlfriend. There was some dispute over the summons and the plaintiff refused to accept service. The defendant began to walk back to his car, which was parked at the end of the driveway leading to the plaintiff's house. On the way, the defendant dropped the summons on the ground. When he reached the car, the defendant pointed to the summons and said to the plaintiff: "There is a summons on the ground for you."

4. The defendant got into his car and backed it out of the driveway. The plaintiff ran towards it, shouting that he would kill the defendant. The plaintiff was "raging and very angry". At first he stood in front of the car but then approached the driver's side. By this time the windows of the car were wound up and all doors were locked. The defendant put the car into first gear and began to drive away. The plaintiff threw himself across the bonnet of the car and held on to the guttering at

the sides of the windscreen. The defendant drove along the road at a speed of 35 to 40 kilometres an hour veering from side to side in an attempt to dislodge the plaintiff. After travelling about 400 metres, the defendant braked sharply and the plaintiff was propelled at a 45 degree angle across the bonnet. He fell to the roadway. The defendant drove off. About half an hour later a neighbour found the plaintiff lying on the road, bloodied and screaming with pain. He was taken to hospital, where he was found to suffer from fractures in the bones of both feet and other injuries of a less serious nature.

5. At the time of these occurrences the defendant was recovering from an operation for osteomyelitis upon his left leg and had dispensed with crutches only three weeks before. The wound from the operation, which had not been stitched, was not then healed. The defendant gave evidence that he feared injury to his leg which may have broken it and resulted in its amputation. The master found that the defendant would quite properly have wished to avoid any confrontation involving physical contact. In dealing with the question of exemplary damages he said:

"The plaintiff also seeks exemplary damages as
a mark of opprobrium for the callous manner in
which the defendant treated the plaintiff. As
indicated earlier, I have come to the conclusion
that the defendant commenced his action out of fear
and continued them with a lack of prudence. I am
of the view that there is nothing malicious in the
defendant's action. However, the defendant did
callously abandon the plaintiff on the road and
sped off in the night leaving him lying on a
darkened road.
appropriate to award the sum of $5,000 by way of
exemplary damages."

6. The award of exemplary damages was primarily attacked upon the basis that it failed to punish the defendant for his actions or to deter him or others from like conduct. This was said to be so because of the compulsory insurance provisions of the Motor Vehicles (Third Party Insurance) Act 1942 (N.S.W.). The scheme of that Act is to make compulsory the insurance of the owner of a motor vehicle or any other person driving it against all liability that may be incurred in respect of the death or bodily injury of third parties arising out of its use: ss.7(1), 10(1). An authorized insurer issuing a third-party policy under the Act is required to indemnify the owner or such other person against such liability: s.10(7). If judgment is obtained in any court in respect of the death of or bodily injury to any person caused by or arising out of the use of an insured motor vehicle, and the third-party policy insures the judgment debtor against liability in respect of such death or bodily injury and the judgment is not satisfied in full within thirty days, the court or a judge of the court shall, upon the application of the judgment creditor, direct that the judgment be entered against the authorized insurer: s.15(1)(a). When a direction is given, the judgment must be entered as a judgment against the insurer and may be enforced accordingly: s.15(1)(b). The authorized insurer who has issued a third-party policy may take over, during such period as he thinks proper, the conduct on behalf of any person insured by that authorized insurer of any proceedings taken or had to enforce a claim against any person in respect of a liability against which he is insured under the third-party policy and he may defend or conduct such proceedings in the name and on behalf of such person: s.18(1)(b) and (c).

7. It was accepted upon both sides that the practical effect of the legislation was that the damages, including the exemplary damages, awarded against the defendant would be paid by the authorized insurer. Nor was it contemplated as a practical possibility that it would be necessary for the plaintiff to attempt to execute his judgment against the defendant before recovering against the authorized insurer. It may be remarked in passing that in 1984 s.14 of the Motor Vehicles (Third Party Insurance) Act was amended to require all proceedings to be taken against the Government Insurance Office and not against the owner or driver of the motor vehicle, but those amendments did not affect the proceedings in this case.

8. It was not disputed before us that the plaintiff's injuries arose out of the use of a motor vehicle nor was it suggested that a court was precluded from having regard to the part played by the authorized insurer in the proceedings. See Quinn v. Government Insurance Office of New South Wales (1961) SR(NSW) 497; McCann v. Parsons [1954] HCA 70; (1954) 93 CLR 418. The argument was, therefore, conducted upon the basis that the defendant was fully indemnified against any liability to the plaintiff and would not have to bear any part of the damages awarded against him.

9. In Uren v. John Fairfax & Sons Pty. Ltd. [1966] HCA 40; (1966) 117 CLR 118, a libel action, this Court affirmed that in actions for tort exemplary damages may be awarded for conduct of a sufficiently reprehensible kind. In so doing it rejected for Australia the restriction placed by the House of Lords in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 upon awards of exemplary damages: Rookes v. Barnard limited exemplary damages to cases of oppressive, arbitrary or unconstitutional acts by government servants, cases where the defendant's conduct had been calculated by him to make a profit which might exceed the compensation payable to the plaintiff and cases where such an award was expressly authorized by statute. See also Broome v. Cassell & Co. [1972] UKHL 3; (1972) AC 1027. In Australian Consolidated Press Ltd. v. Uren [1967] UKPCHCA 2; (1967) 117 CLR 221, also a libel action, the Privy Council accepted the position taken by this Court, saying at p 241:

> "... in a sphere of the law where its policy calls
> for decision, and where its policy in a particular
> country is fashioned so largely by judicial
> opinion, it became a question for the High Court to
> decide whether the decision in Rookes v. Barnard
> [1964] UKHL 1; (1964) AC 1129 compelled a change in what was a
> well-settled judicial approach in the law of libel
> in Australia. Their Lordships are not prepared to
> say that the High Court were wrong in being
> unconvinced that a changed approach in Australia
> was desirable."

10. Notwithstanding that their Lordships confined their remarks to the law of libel, it is plain that what was said by this Court in Uren v. John Fairfax & Sons Pty. Ltd. was not so restricted and that the well-settled judicial approach in Australia extends exemplary damages to a wider range of torts. Indeed, in Fontin v. Katapodis [1962] HCA 63; (1962) 108 CLR 177, this Court clearly proceeded upon the basis that exemplary damages were, in an appropriate case, recoverable for trespass to the person, that being, apparently, the cause of action adopted in the present case. See also Johnstone v. Stewart (1968) SASR 142; Pearce v. Hallett (1969) SASR 423. And in the recent case of XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd. [1985] HCA 12; (1985) 155 CLR

448, this Court upheld a substantial award of exemplary damages for trespass to land.

11. In Rookes v. Barnard, Lord Devlin explained a number of cases of damages at large in terms of aggravated damages rather than exemplary damages. Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, go beyond compensation and are awarded "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself": Wilkes v. Wood [1763] EngR 103; (1763) Lofft 1, at p 19 (98 ER 489, at pp 498-499) per Pratt L.C.J. Whilst in some cases it may be difficult to differentiate between aggravated damages and exemplary damages, no such question arises on this appeal. It appears that the plaintiff neither claimed nor was awarded aggravated damages and an application to the Court of Appeal to amend the grounds of appeal to raise the question of aggravated damages was refused.

12. Mayne and McGregor on Damages, 12th ed. (1961), p 196 contains an oft-cited description of exemplary damages: "Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights." The punitive aspect of exemplary damages was emphasized by Brennan J. in XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Australia) Pty. Ltd. where he said, at p 471:

> "As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In Merest v. Harvey (1814) 5 Taunt 442 [1814] EngR 330; (128 ER 761) substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, Gibbs C.J. saying:
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> 'I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?'
>
> The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in Broome v. Cassell & Co. [1972] UKHL 3; (1972) AC 1027, at p 1130, 'to teach a wrong-doer that tort does not pay'."

13. It was argued on behalf of the defendant that, since the object of exemplary damages is to punish and deter, it is inappropriate that they should be awarded where the wrongdoer is insured under a scheme of compulsory insurance against liability to pay them. Clearly there is strength in that submission, but in our view it cannot succeed. 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. See Uren v. John Fairfax & Sons Pty. Ltd., at p 138; Luntz, Assessment of Damages for Personal Injury and Death, 2nd ed. (1983), pp 66-67; Street, Principles of the Law of Damages, (1962), pp 33-34. Cf. Costi v. Minister of Education (1973) 5 SASR 328.

It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace: cf. Merest v. Harvey [1814] EngR 330; (1814) 5 Taunt 442 (128 ER 761). This consideration probably had more force when exemplary damages were in their infancy, but it nevertheless remains as an aspect of them. It should, perhaps, be interpolated that exemplary or punitive damages are not without their critics who assert generally that they are both anachronistic and anomalous. See generally Street, op.cit., pp33-35. They nevertheless remain as part of the law. When exemplary damages are awarded in order that a defendant shall not profit from his wrongdoing or even where they are described as a windfall to the plaintiff - a description which a plaintiff is unlikely to accept - the element of appeasement, if not compensation, is none the less present.

14. So far as the object of deterrence is concerned, not only does it extend beyond the defendant himself to other like-minded persons, but it also extends generally to conduct of the same reprehensible kind. Whilst an award of exemplary damages against a compulsorily insured motorist may have a limited deterrent effect upon him or upon other motorists also compulsorily insured, the deterrent effect is undiminished for those minded to engage in conduct of a similar nature which does not involve the use of a motor vehicle. Moreover, whilst the smart or sting will obviously not be the same if the defendant does not have to pay an award of exemplary damages, it does serve to mark the court's condemnation of the defendant's behaviour and its effect is not entirely to be discounted by the existence of compulsory insurance.

15. An attempt was made to draw a distinction between compulsory insurance and voluntary insurance on the basis that with the latter there is still the element of punishment and deterrence in an award of exemplary damages. This, it was said, is because of the possibility of the refusal of further insurance or of increased premiums. That does not seem to us to be an adequate distinction and it may be observed that voluntary insurance has never been thought to preclude an award of exemplary damages, notwithstanding that it tends to neutralize the punishment and deterrence of the wrongdoer. That is also the position in the United States, although the weakening effect of insurance upon the objects of exemplary damages has led some courts to hold, upon grounds of public policy, that insurance cannot be effected against liability for exemplary damages, particularly where the damages arise out of intentional wrongdoing. The same approach has not, however, been extended to vicarious liability for exemplary damages. See Ellis, "Fairness and Efficiency in the Law of Punitive Damages", (1982) 56 Southern California Law Review 1, at pp 71-76; Walden, "The Publicly Held Corporation and the Insurability of Punitive Damages", (1985) 53 Fordham Law Review 1383; Redden, Punitive Damages, (1980), ch.9.

16. For these reasons the primary argument relied upon by the defendant encounters difficulty at the outset. There are, however, more fundamental objections to the direction which it takes. Ultimately

what it amounts to is a submission that exemplary damages are not merely inappropriate, but are unavailable as a matter of law in those cases in which the defendant is indemnified against liability under a policy of insurance issued pursuant to the provisions of the Motor Vehicles (Third Party Insurance) Act. That Act, of course, says nothing about exemplary damages and the argument that its provisions effect a restriction upon the availability of the common law remedy was developed along somewhat imprecise lines.

17. The argument bore a strong rememblance to the maxim cessante ratione legis cessat ipsa lex, but from what we have already said it will be apparent that, in our view, whilst the objects of exemplary damages may be less readily achieved where there is compulsory insurance, they are by no means obviated. There could be no justification for imposing a restriction upon the scope of exemplary damages merely because that seems to be a reasonable or desirable course in the light of the provisions of the Motor Vehicles (Third Party Insurance) Act. The extent of the remedy is firmly established. The attempt to limit it in Uren v. John Fairfax & Sons Pty. Ltd. failed. No doubt legislation may expressly or impliedly abrogate a rule of law, but it is not suggested that such was the effect of the Act in question. The maxim cessante ratione cannot be read literally and "in its widest signification, is erroneous and misleading": Trayner, Latin Maxims and Phrases, 2nd ed. (1876), p 72. It goes no further than to reflect the process of legal reasoning whereby previous authority may be distinguished or restricted in its operation. That is to say, it may afford a useful guide in the making of a permissible choice; it does not create the choice itself. The maxim "is not a licence to courts to change the law if it appears to them that the circumstances in which it was framed have changed": Miliangos v. Frank (Textiles) Ltd. (1976) AC 443, at p 476 per Lord Simon of Glaisdale.

18. Even if it were possible for a court to go beyond what a statute actually enacts and to draw from it some principle to be applied by way of analogy in fashioning the common law, it would not assist the defendant's argument in this case. Such an approach was first suggested by Pound in 1907, but it has never really gained general acceptance, at all events in that simple form. See Pound, "Common Law and Legislation", (1908) 21 Harvard Law Review 383; Stone, "The Common Law in the United States", (1936) 50 Harvard Law Review 4; Cross, Precedent in English Law, 3rd ed. (1977), pp 169-171; Atiyah, "Common Law and Statute Law", (1985) 48 Modern Law Review 1; Kelly, "The Osmond Case: Common Law and Statute Law", (1986) 60 Australian Law Journal 513. An attenuated version of the same idea is, however, reflected in the view of Lord Diplock expressed in Warnink v. Townend & Sons (Hull) (1979) AC 731, at p 743:

> "Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course."

But in this case there is no principle or trend to be discerned in the Motor Vehicles (Third Party Insurance) Act or any other legislation concerning the measure of damages to be applied in cases of compulsory insurance. Clearly the Act is drafted against the background of the common law and if any inference is to be drawn from it upon the admittedly contentious question of exemplary damages, it is that there was no intention to disturb the existing situation. Had the intention been

otherwise it is likely that the Act would have said so, particularly as it may be conceded that the exemplary damages achieve their objects less readily with the introduction of compulsory insurance.

19. It was also submitted on behalf of the defendant that even if exemplary damages were an available remedy they ought not to have been awarded in this case because there was an absence of malice or reckless indifference and that in any case the defendant's actions were provoked by the plaintiff. Any element of aggravation in the defendant's conduct had, it was said, already been taken into account in the award of compensatory damages. Finally it was submitted that leaving the plaintiff by the roadside, which was said by the master to be the act of the defendant which prompted him to award exemplary damages, constituted no tort and for that reason could not support the award.

20. The final submission may be disposed of shortly. Even if the act of leaving the plaintiff lying on a darkened road, when viewed separately, constituted no compensable wrong, there is no reason why it should be so viewed. Indeed, it is at least arguable that, having caused the plaintiff's injuries through what was held to be a tortious act, the defendant was under a duty to take reasonable steps to alleviate the effect of his wrongdoing. It was open to the master to regard the conduct of the defendant in abandoning the plaintiff in the manner in which he did as displaying a cruel or reckless disregard for the welfare of the plaintiff and an indifference to his plight and as colouring the whole of the conduct of the defendant, including the assault which was found to have been made upon the plaintiff. So regarded, the tort of which the defendant was guilty was committed in circumstances amounting to an insult to the plaintiff. The master, having seen the witnesses and heard their evidence, formed the view that the circumstances justified the exercise of his discretion in favour of an award of exemplary damages. Whilst it is far from clear that this case called for such an award, we are not persuaded that we would be justified in departing from the order of the master in circumstances where his conclusion was essentially based upon an assessment of fact and was confirmed by the Court of Appeal.

21. It is true that the master expressly found the actions of the defendant to be without malice, although it is not entirely clear whether that finding extended to the abandonment of the plaintiff. That act was described by the master as callous and although it was submitted that mere callousness, involving no element of intent or recklessness, would not support an award of exemplary damages, the use of the word is, we think, sufficient in its context to indicate that the master saw the defendant as having behaved in a humiliating manner and in wanton disregard of the plaintiff's welfare. Elsewhere in his reasons he described the whole incident as "horrendous". In those circumstances, the absence of actual malice did not disentitle the plaintiff to exemplary damages. Whilst there can be no malice without intent, the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word: Street, op.cit., pp 30-31. It is clear that the master formed the view that the defendant's conduct warranted an award of exemplary damages to mark the disapprobation of the Court and in so doing it cannot be said that he exceeded the bounds of his function. There is no basis for the submission that any amount was awarded to the plaintiff by way of aggravated damages. Damages under that head were not claimed, they were not adverted to by the master in his reasons for judgment and there is nothing in the amounts awarded to indicate the contrary.

22. With exemplary damages, unlike compensatory damages, provocation may operate to prevent an award or to reduce the amount which might otherwise be awarded: Fontin v. Katapodis, at p 187. In this case, however, the master accepted the defendant's version of events and it is not to be supposed

that he failed to take into account any provocation constituted by the behaviour of the plaintiff. Indeed, in his reasons for judgment the master expressly referred to the pursuit of the defendant by a distraught plaintiff who was threatening to kill him.

23. We would dismiss the appeal.

ORDER

Appeal dismissed with costs.

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