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PUNITIVE DAMAGES SENSU STRICTO IN AUSTRALIA

1. Introduction

Punitive damages sensu stricto (also known as 'exemplary' and 'vindicative') are awarded as part of a civil claim for damages in tort. This chapter outlines the position of common law punitive damages in the context of civil punishments as they exist in the present-day Australia. The Commonwealth of Australia is a Federation comprising of six States (New South Wales, Victoria, Tasmania, South Australia, Western Australia and Queensland) and two Territories (the Australian Capital Territory and the Northern Territory). In general, the Commonwealth of Australia Constitution Act 1900 (UK), vesting the Federal Parliament with an exclusive Commonwealth power to make laws with respect to powers specified under the Constitution as well as enumerated concurrent federal and State powers; States are also vested with exclusive State power to enact laws within the fields of their legislative competence. These fields include the law of torts, which until 2002 was mainly governed by case law.

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2 Whitfeld v. De Lauret (1920) 29 CLR 71, per Isaac J. at p. 81.
3 The Australian law of contract does not recognise punitive damages; however, punitive damages for a breach of contract may be awarded under the law of torts if the defendant's conduct also amounts to a tort which sounds in such damages.
4 As well as subsequent enabling statutes.
5 Under the Commonwealth of Australia Constitution Act, s. 122, the Federal Parliament may make laws for the government of any territory.
6 Concurrent powers of the Commonwealth Government are enumerated in s. 51 of the Commonwealth of Australia Constitution. Commonwealth of Australia Constitution, s. 107, 108 and 109. While the Commonwealth and the States have the power to make laws within their respective fields of exclusive power; States are precluded from enacting valid legislation where the Commonwealth has 'covered the field': Victoria v. The Commonwealth ('the Payroll Tax Case') [1971] HCA 16; (1971) 122 CLR 353; New South Wales v. Commonwealth (2006) 229 CLR 1.

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Punitive damages were developed by the English common law judiciary in the 18th century. The High Court of Australia has affirmed the institution of punitive damages. However, some judicial decisions relating to punitive damages have been overcome by statutory provisions, though the process of legislative intervention is still continuing. In order to elucidate the uneasy relationship between the common law approach to punitive damages and legislative responses to this institution within modern Australian torts jurisprudence, I shall briefly examine:

(a) Conceptual and taxonomic differences between compensatory and punitive damages ($2);
(b) The most notable English historical precedents ($3);
(c) Common law punitive damages within the modern Australian legal framework ($4);
(d) Statutory compensation and restitution orders under criminal law ($5);
(e) Distinction between punitive and aggravated damages ($6);
(f) The place of common law Punitive Damages in contemporary Australian jurisprudence ($7).

The sole purpose of punitive damages is punishment and deterrence. Yet, they are awarded within the context of the law of torts – a civil jurisdiction, the primary aim of which is compensation.

2. Difference in the Law of Torts between Compensatory & Punitive Damages

As a general rule, Australian courts award two categories of damages for tortiously inflicted harm: compensatory and punitive. Each category reflects a different conception of the law of torts: (1) as the quintessentially private law of compensation through monetary redress and (2) as a judicial mechanism for setting normative standards within society by way of deterrence through monetary punishment.

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1 In *Garcia v. National Australia Bank Ltd* (1998) 194 CLR 395 Gaudron, McHugh, Gummow and Hayne J.J. stated at p. 403 [at 17]: 'It should be emphasised that it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled'.

9 I shall refer to this head of damages as 'punitive damages'.

10 In certain actions, for example nuisance, the equitable remedy of injunction may be granted. *Whitfeld v. De Lauret* (1920) 29 CLR 71, Knox C.J. at p. 77: 'Damages may be either compensatory or exemplary. Compensatory damages are awarded as compensation for and are measured by the material loss suffered by the plaintiffs. Exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights'.

11 For a general discussion see: Goldberg, 2004. See also, e.g.: *Aristocrat Technologies Australia Pty Ltd and Another v. DAP Services (Kempsey) Pty* (2007) 157 FCR 564, per Black C.J. and Jacobson J. at p 570 [43]: 'The objectives of an award of additional damages include deterrence: *Copyright Act 1968* (Cth), s 115(4)(b)(a). An element of penalty is an accepted factor in the remedy: *Autodesk v. Yee* (1996) 68 FCR 391 at p. 384'.
Compensatory damages are based on the principle of *restitutio in integrum* as articulated by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* [13]

'where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong'. [14]

These damages include fair compensation [15] for past and future economic loss; any needs created by the wrongful conduct that would not otherwise have existed; [16] and non-economic or non-pecuniary loss such as pain and suffering. [17] However, where the plaintiff's harm involves 'injury to the plaintiff's feelings caused by insult, humiliation and the like' [18] the court, particularly in actions for intentional torts, may also award aggravated damages, which form part of compensatory system. The High Court of Australia in *New South Wales v. Ibbett* [19] emphasized that:

'Aggravated damages are a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing.' [20]

When awarding aggravated damages, the court assesses monetary value of the 'intangible' emotional harm (shame, degradation, dishonour, etc) sustained by the plaintiff, while treating it as compensable loss.

Punitive damages are different – the Australian High Court in *XL Petroleum (NSW) Pty. Ltd v. Caltex Oil (Australia) Pty Ltd,* [21] a case involving trespass to land, emphasised the acceptability of punishment [22] and deterrence as legitimate goals of civil actions:

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[17] Trespassory torts are actionable per se: damages are awarded for infringement of the claimant’s dignitary interests (sense of dignity, honour and decorum) through battery, assault, false imprisonment, and trespass to land.

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'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 ...'

Consequently, these damages are aimed at the defendant, and the court does not determine their quantum by reference to the plaintiff's injury, but on the basis of whether the defendant's conduct calls for a judicial retribution in the name of deterrence.

The dichotomy between punishment and compensation goes back to the distinction drawn by Aristotle in his *Nicomachean Ethics*. Aristotle distinguished rules and forms governing distributive justice, from the principles of 'corrective' justice. The position of punishment within this paradigm has been a matter of controversy ever since the time of rediscovery of Aristotelian works in the 12th century, and is still unsettled. Lee argued that criminal law is not part of corrective justice, even though it 'might seem at first sight its most natural interpretation'. This is because 'a crime is usually committed on the person or property of an individual'; however, 'criminal law is not concerned with the offence as an offence against the individual or with the adjustment of individual rights; it is concerned with the offence ... against public order, against the regulations laid down to ensure an orderly social life.'

Offences against public order attract punishment, and as such, they are the bailiwick of public, not private, law. This is particularly true of common law, which since the 14th century has developed two independent jurisdictional streams – criminal and civil – to adjudicate wrongful conduct. According to Sir William Blackstone's *Commentaries on the Laws of England*, private wrongs involve 'an infringement or privation of the private or civil rights belonging to individuals, considered as individuals', whereas public wrongs are based on 'a breach and violation of public rights and duties, which affect the whole community'. Civil proceedings for damages in tort focus on determining defendant's liability and assessment of compensation for the harm sustained by the individual claimant. In criminal proceedings, however, the Crown in the right of State takes over from the victim of the crime, focusing on the question whether the defendant has committed an offence against public law and the appropriate punishment for this transgression. Consequently, criminal and civil proceedings differ markedly in aims, rules and procedures. For example, the standard of proof beyond reasonable doubt governs criminal prosecutions, whereas outcomes in civil litigation are determined on

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24 *Whitfeld v. De Lauret* (1920) 29 CLR 71 at p. 81: 'From a very early period exemplary damages have been considered by very eminent Judges to be punitive for reprehensible conduct and as a deterrent'.
25 Aristotle 1934, ch ii, p. 113lb. Corrective justice has also been referred to as 'rectificatory' or 'commutative' justice'.
26 Lee, 1937.
28 *Ibid*.
29 Blackstone 1768, p. 2. Blackstone's definition reflected the Roman law's approach to the division of unlawful conduct.
the basis of the civil standard of proof (the balance of probabilities);\textsuperscript{30} limitation of actions periods are quite different, as is the admissibility of evidence,\textsuperscript{31} etc.

However, the line separating private from public wrongs is not always clear; contingent as it is on the hierarchy of moral values and socio-political preferences of a society at a given time: under common law, the same incident can give raise to criminal prosecution and civil litigation. In his Commentaries, Blackstone provided an example of criminal conversation with a man's wife (adultery), which at the time was both, a public crime enforced in ecclesiastical courts and a tort, 'wherein the damages recovered [from the adulterer] are usually very large and exemplary'.\textsuperscript{32}


Blackstone referred to 'exemplary' damages twice (in relation to the now obsolete wrong of criminal conversation, and in cases where creators of nuisance do not remove or abate nuisance after the initial verdict against them).\textsuperscript{33} However, he avoided any discussion of their nature, and did not comment on the case of \textit{Wilkes v. Wood},\textsuperscript{34} with which, given its importance and fame,\textsuperscript{35} he would have been familiar. In \textit{Wilkes v. Wood} Richard Pratt, the Chief Justice of the Court of Common Pleas thus distinguished compensatory from punitive damages:

'A jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise 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'.

In \textit{Wilkes v. Wood}, John Wilkes, controversial Member of Parliament and a political journalist, successfully claimed damages for trespass to land. He was charged with seditious libel over the Editorial in the (1763) 45 \textit{The North Briton} (his weekly publication devoted to political polemics and satire), which attacked George III's speech to the Parliament on the Paris Peace Treaty of 1763. Mr. Wood, as the King's messenger (he was accompanied by a constable and four other messengers), acting under a general warrant issued by Lord Halifax, the Secretary of State, entered Wilkes' house, 'breaking his locks,
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and seizing his papers, &c.' Pratt C.J. found the general warrant to be invalid (it did not include inventory 'of the things thus taken away' and no offenders names were specified in the warrant); jury awarded Wilkes £1000 (a very considerable sum at the time).

While historically, juries were known to award damages that were sufficiently large to suggest an element of punishment, Wilkes v. Wood was the first case in which the court adopted punitive (exemplary) awards as a separate head of damages. Though the doctrine was formulated by the Court of Common Pleas rather than the Court of King's Bench, by the end of the 18th century, punitive damages came to be frequently awarded in actions for intentional torts (assault, battery, false imprisonment), as well as torts (for example, libel) in which malice had to be established.

Punitive damages formed part of the English law, and were received into the Colony of New South Wales in 1828. Until the enactment of the Privy Council (Limitation of Appeals) Act 1968 (Cth); the Privy Council (Appeals from the High Court) Act 1975 (Cth) and the decision in Kirmani v. Captain Cook Cruises Pty Ltd [No. 2], it was a judicial practice in Australia to follow precedents from the English appellate courts. It is not surprising therefore that according to Isaacs J. of the High Court of Australia, in The Herald and Weekly Times Ltd v. McGregor (a defamation case), punitive damages were 'a special doctrine of substantive law which was gradually evolved', allowing:

'damages by way of retribution as contrasted with compensation, representing what Pollock calls 'indignation at the defendant's wrong rather than a value set upon the plaintiff's loss' (Torts, 12th ed., p. 189').

Isaacs J. cited the statement of Heath J. in the English case of Merest v Harvey that juries were 'permitted to punish insult by exemplary damages'.

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36 In Huckle v. Money (1763) 95 Eng. Rep. 768 (CP 1763); 2 Wils KB 205 Pratt C.J. found general warrants to be invalid; on appeal Lord Mansfield determined that only general warrants not authorised by statute should declared invalid.


38 Grey v. Grant (1764) 2 Wils 251; 95 English Reports 794; Merest, Esq v. Harvey (1814) 128 English Reports 761; 5 Taunton 442.

39 Beardmore v. Nathan Carrington (1764) 2 Wils 244 95 English Reports 791; Edgell v. Francis (1840) 133 English Reports 315.

40 Bramley v. Chesterton (1857) 2 C B (N S) 592; 140 English Reports 548.

41 Kirmani v. Captain Cook Cruises Pty. Ltd. [No. 2] (1985) 159 CLR 461.

42 The Herald and Weekly Times Ltd v. McGregor (1929) 41 CLR 254 at p. 266.

43 Ibid., at p. 266.

44 Merest v. Harvey (1814) 5 Taunton 442 at p. 444.

45 The Herald and Weekly Times Ltd v. McGregor (1929) 41 CLR 254 at p. 266. Isaacs J. also referred to Wilmot L.C.J. in Tullidge v. Wade (1769) 3 Wils 18 (action in trespass for loss of services by a father against a man who seduced his daughter was described by Wilmot L.C.J. at p. 19 as 'brought for example's sake', with the jury having the right to give 'liberal damages').
4. Common Law Punitive Damages within the Modern Australian Legal Framework

One of the most important cases discussing punitive damages is Gray v. Motor Accident Commission. In Gray, the defendant Bransden deliberately drove his motor car into a group of people, injuring the plaintiff, Mr. Gray. Bransden was convicted of intentionally causing grievous bodily harm, and sentenced to seven years’ imprisonment. Gray successfully sued in negligence for damages for personal injury, but the trial judge dismissed his claim for exemplary damages on the basis that Bransden had already been punished by the criminal court. The High Court of Australia affirmed this decision. Gleeson C.J., McHugh, Gummow and Hayne J.J. observed that:

'The increasing frequency with which civil penalty provisions are enacted, the provisions made for criminal injuries compensation, the provisions now made in some jurisdictions for the judge at a criminal trial to order restitution or compensation to a person suffering loss or damage (including pain and suffering) as a result of an offence all deny the existence of any ‘sharp cleavage’ between the criminal and the civil law'.

Their Honours’ statement needs further elucidation. Penalties, whether physical or economic, are at the core of every criminal law system; however, it was only in the final three decades of the 20th century, that Australian legislatures begun to routinely insert civil penalties (whether expressed in terms of penalty units or penalties specified in monetary amounts) into civil statutes. These civil penalties may be relatively minor or run into hundreds of thousands of dollars. For example, Medical Treatment Act 1988 (Vic), s. 5 allows adults with full mental capacity (‘sound mind’) to execute a ‘refusal of treatment certificate’ relating to medical treatment generally or of a particular kind for the patient’s current condition. The legislation has also created an offence of medical trespass to punish registered medical practitioners who ‘knowing that a refusal of treatment certificate applies to a person, undertake or continue to undertake any medical treatment to which the certificate applies’. The punishment is 5 penalty units (US$ 597.25).

At the other end of penal monetary spectrum, Corporations Act 2001 (Cth), s. 1317G provides for civil pecuniary penalties of US$ 200,000 for an individual; or US$ 1 million for a body corporate for contraventions of its provisions listed in s. 1317E. Pecuniary penalties are defined under s. 1317G as ‘a civil debt payable to ASIC [Australian Securities and Investments Commission] on the Commonwealth’s behalf’. The legislation specifies in s. 1317H (2) that ‘ASIC or the Commonwealth may enforce the order as if it were an

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46 Gray v. Motor Accident Commission (1998) 196 CLR L
47 See e.g. Corporations Law Act 1989 (Cth), Pt 9.4B; since replaced by Corporations Act 2001 (Cth).
48 See e.g. Criminal Injuries Compensation Act 1978 (SA).
49 See e.g. Criminal Law (Sentencing) Act 1988 (SA), s. 52; Sentencing Act 1991 (Vic), Pt 4, D 1.
50 See, e.g., Criminal Law (Sentencing) Act 1988 (SA), s. 53; Sentencing Act 1991 (Vic), Pt 4, D 2.
51 Ibid., at pp. 7–8 [16].
order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt'.

Just like criminal fines, civil penalties are meted out as punishment for the defendant's breach of a statutory prohibition (rather than the damage suffered by the plaintiff); and, just like fines; they are collected by the Crown (Federal, State or Territory treasury). Yet, unlike criminal fines, civil penalties are imposed on defendants whose liability is determined on the balance of probabilities. The proof on the balance of probabilities is also a feature of common law punitive damages, though they are awarded for the benefit of the individual plaintiff, not the State.

Defendants who are tried, convicted and punished in a criminal court, as well as being found liable in civil proceedings on facts arising from the same incident, have to pay compensatory, and if applicable, aggravated, but not exemplary damages. In Gray the High Court of Australia observed that that since the object of awarding exemplary damages is to punish the wrongdoer in 'an emphatic and a public way', the court should take into consideration the fact that this was already achieved by criminal conviction, or that conviction is likely to follow. Though the issue was not discussed at the time, it is arguable that compensatory, but not punitive damages should be awarded where the court orders the defendant to pay a civil penalty.

5. Statutory Compensation and Restitution Orders under Criminal Law

Though it did not pertain to Gray, in tandem with legislation vesting civil courts with power to impose civil penalties in certain cases, in some States, criminal courts' jurisdiction has been extended to include (in addition to imposition of prison sentences, community orders, and fines), the power to make orders requiring the offender to make restitution or pay compensation to the injured victim of the offence. For example, in Victoria, by virtue of the Sentencing Act 1991, s. 85B, persons who had suffered an injury as a direct result of the offence of which the offender has been found guilty or convicted, may ask the sentencing court to order:

'the offender to pay compensation of such amount as the court thinks fit for ...(a) pain and suffering experienced by the victim as a direct result of the offence; (b) ... any expenses actually incurred, or reasonably likely to be incurred, by the victim for reasonable counselling services as a direct result of the offence; (c) ... any medical expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim as a direct result of the offence; (d) any other expenses actually and reasonably incurred, or reasonably likely to be incurred, by the victim as a direct result of the offence, not including any expense arising from loss of or damage to property'.
In cases where the victim has suffered loss, destruction, or damage to property as a result of the offence, under s. 86(1), the court may order that the offender ‘pay any compensation ... that the court thinks fit’. Where a person has been found ‘guilty or convicted of an offence connected with the theft’, s. 84 of Sentencing Act 1991 (Vic) enables the court to make restitution orders. These curial powers are not new. Provisions of Lex Riburia, a 7th century collection of the laws of the Ripuarian Franks from Colonge in Germany, mandated that the fine imposed on the wrongdoer should not be collected until compensation was paid to the private victim of the injury. This ancient principle is preserved in the Sentencing Act, which provides that where the offender pleads insufficient means to pay both, a fine and restitution or compensation, ‘the court must give preference to restitution or compensation, though it may impose a fine as well’.58

Section 85L of the Sentencing Act 1991 (Vic) vests in the victims of an offence the right ‘to recover damages for any expense or other matter so far as it is not satisfied by payment or recovery of compensation under’ the provisions of the Sentencing Act. However, given the expense of civil litigation and the impecunious state of most offenders, for the vast majority of victims this option is theoretical rather than practical. Statutory language of the Sentencing Act refers to compensatory and restitutionary ‘orders’ with the implication that the orders form part of the punishment. In substance, however, these orders cross the boundary from criminal law to private law, and indeed, under Sentencing Act 1991 (Vic), s. 85M ‘a compensation order, including costs ordered to be paid by the offender on the proceeding for that order, must be taken to be a judgment debt due by the offender to the person in whose favour the order is made and payment of any amount remaining unpaid under the order may be enforced in the court by which it was made’.59 The writ of debt is one of the oldest common law Forms of Action, and the notion of debt as civil institution goes back to Aristotle. However, offender-debtors can only repay a debt if they are capable and/or have the means of doing so. In the great majority of cases, imposition of restitutionary and compensatory orders as part of sentencing process is not realistic. In these cases, to alleviate financial hardships suffered by victims of crime, since the 1970s,
all Australian States and Territories have enacted statutory schemes which enable victims and their close relatives to obtain capped statutory compensation for personal injury. The availability of statutory compensation does not affect a person’s right to commence or maintain common law proceedings, though again, the award of punitive damages would be contingent on whether the defendant has been or is likely to be sentenced.

The expanded the power of the civil courts to impose civil penalties and the criminal courts to make compensatory and restitutionary orders has meant that in the 21st century, punitive damages are no longer the sole institution through which judges in civil proceeding can express their condemnation of the particular defendant’s egregious conduct. The question then arises, what is the place and function of punitive damages in modern Australian law?

6. Distinction between Punitive and Aggravated Damages

In their reluctance to draw a firm and principled line between aggravated and punitive damages, the courts have not made the answer to this question easy.

Historically, until mid-18th century, heads of damages for personal injury were generally undifferentiated. Plaintiffs suing in tort would claim (lay) a single sum in damages with the determination of the final amount left to the court’s discretion. For example, in Fabrigas v. Mostyn, Mr. Fabrigas, a native Minorquin, sued General Mostyn, the Governor of Minorca, for trespass and false imprisonment. In 1771, while in Minorca, Mostyn without a legal cause, but on suspicion that Fabrigas may be fomenting unrest, having seized and imprisoned the plaintiff for six days, banished him for 12 months to Carthagena (which was under Spanish rule). The plaintiff claimed £10,000 in damages. On the facts in Fabrigas, though unarticulated, the jury’s award of £3000 and £90 in costs was punitive. However, De Grey C.J. observed that it was:

‘very difficult [for the court] to interpose with respect to the quantum of damages [awarded by juries] in actions for any personal wrong. Not that it can be laid down, that in no case of personal injury the damages can be excessive. Some may be so monstrous and excessive, as to be in themselves an evidence of passion or partiality in the jury’.

Even after punitive damages were doctrinally distinguished from aggravated, the judiciary did not insist that the distinction be observed. The difficulty of observing the

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61 Victims Support and Rehabilitation Act 1996 (NSW), s. 18, 19; Crimes (Victims Assistance) Act 1989 (NT), s. 13; Victims of Crime Act 2001 (SA), s. 20; Criminal Injuries Compensation Act 1976 (Tas), s. 6; Victims of Crime Assistance Act 1996 (Vic), s. 8, 8A, 10, 10A, 12, and 13; Criminal Injuries Compensation Act 2003 (WA), s. 31–34; Victims of Crime (Financial Assistance) Act 1983 (ACT), s. 10 and 19; Criminal Offence Victims Act 1995 (Qld), s. 25. See also: In the matter of an application under the Criminal Injuries Compensation Act 1983 [2004] ACTSC 60. For a discussion see Mendelson 2010, p. 89–93.

62 Victims Support and Rehabilitation Act 1996 (NSW), s. 43; Criminal Offence Victims Act 1995 (Qld), s. 22; Criminal Injuries Compensation Act 1976 (Tas), s. 9.


distinction was noted by Windeyer J. of the High Court of Australia in *Uren v. John Fairfax Ltd. & Sons*, a defamation case, his Honour noted that:

‘in truth a punitive or vindictive element does lurk in many cases in which the damages were aggravated by the defendant’s conduct... Limiting the scope of terms that often were not distinguished in application makes possible an apparently firm distinction between aggravated compensatory damages and exemplary or punitive damages. How far the different labels denote concepts really different in effect may be debatable. I suspect that in seeking to preserve the distinction we shall sometimes find ourselves dealing more in words than ideas’.

Justice Windeyer’s concerns over the failure to clearly conceptualise aggravated damages were exemplified in *Carson v. John Fairfax & Sons Ltd*, another defamation case determined by the High Court. In *Carson*, McHugh J. observed that common law juries can award aggravated damages when they consider it ‘necessary to provide a proper consolation for the plaintiff’.

He cited with approval Lord Hailsham L.C., who in *Broome v. Cassell & Co* said that juries can ‘inflict an added burden on the defendant proportionate to his conduct’, if ‘the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium’. McHugh J. added that ‘in awarding aggravated damages, the anger or indignation which the jury feels at the way the defendant has treated the plaintiff is a proper reason for making a large rather than a small award to compensate the plaintiff’. Lord Hailsham L.C. and McHugh J. conflated the notion of aggravated damages with extra financial burden as punishment imposed on the defendant (quintessence of the punitive damages doctrine). The reference to aggravated damages as providing ‘consolation’ is baffling, for this is the function of damages for pain and suffering. The institution of ‘solatium’ was rejected in *Blake v. Midland Rly. Co.* and does not form part of the English and Australian common law. Urging juries to express their ‘anger or indignation’ at the defendant’s conduct by compensating the plaintiff for a ‘greater injury’ through ‘large’ rather than ‘small’ awards erases the line between aggravated and punitive damages.

Judicial failure to provide clear distinction between the two, may explain why several legislatures have responded by abolishing outright or placing limitations upon both, exemplary and aggravated damages.

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65 *Uren v. John Fairfax Ltd. & Sons* (1966) 117 CLR 118.
67 *Carson v. John Fairfax & Sons Ltd* (1993) 178 CLR 44.
7. The Place of Common Law Punitive Damages in Contemporary Australian Jurisprudence

In *Lamb v. Cotogno*, a case involving an award of punitive damages for trespass to the person, Mason C.J., Brennan, Deane, Dawson and Gaudron J.J. in a joint judgment, proclaimed that 'exemplary damages may be awarded in Australia for a wide range of torts'.

Indeed, by the late 1990s some State and Territory courts began awarding punitive damages for negligence in addition to battery, assault, false imprisonment, tort of interfering with contractual relations, trespass to land, trespass to goods, misfeasance in public office, malicious prosecution, conversion and trespass to goods, deceit, defamation, libel and slander. At this point the High Court decided to rein in the judicial enthusiasm for this head of damages, and in *Gray v. Motor Accident Commission*, the majority observed that:

'Exemplary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case'.

The High Court in *Gray* provided for an exception involving cases where employees can establish that they suffered harm because the employer-defendant recklessly failed to protect their safety. Such awards of punitive damages could be awarded only if the defendant has not been already punished. For example, punitive damages would be precluded in the case of successful prosecution under the *Occupational Health and Safety Act 2004* (Vic), s. 32, which provides that a 'person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at a workplace in

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83 *Healing (Sales) Pty Ltd. v. Inglis Electrix Pty Ltd* (1969) 121 CLR 584; *42 ALJR* 280.
86 Ibid., at 9 [22].
danger of serious injury’ commits an indictable offence’. The penalty under s. 32(a) and (b) is ‘a term of imprisonment not exceeding 5 years, or a fine not exceeding 1800 penalty units, or both’ for a natural person; and ‘a fine not exceeding 9000 penalty units’ for a body corporate.

The case of Lamb v. Cotogno is both an authority for the modern doctrine of punitive damages at common law, and an example of its jurisprudential and practical shortcomings. In Lamb, Garry James Lamb, the defendant, drove into the driveway of Giuseppe Cotogno’s property and served him with summons. Cotogno refused to accept the service of summons, threatened to kill Lamb; and when Lamb got into his car and began to drive away, Cotogno ‘threw himself across the bonnet of the car and held on to the guttering at the sides of the windscreen’. While driving at speed of 35 to 40 kilometers per hour along the road, Lamb tried to dislodge him; eventually he braked so sharply that Cotogno was thrown from the bonnet onto the road, fracturing bones in both feet. Lamb drove off. The trial judge determined that while Lamb acted without malice, exemplary damages should be awarded against him because he ‘callously abandon[ed] the plaintiff on the road and sped off in the night leaving him lying on a darkened road’.

The High Court acknowledged that under the then relevant legislation any damages, including punitive damages, awarded against Lamb would be paid by his motor vehicle insurer. However, according to their Honours:

‘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’.

Their Honours added:

‘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’.

Presumably, their Honours meant that the case would deter bicycle riders from speeding off in the night leaving their victims unattended. If so, the Cotogno deterrent was ineffective. For example in Hollis v. Vabu, a cyclist collided with a pedestrian, Mr. Hollis, causing the latter to fall and badly injure his knee. The cyclist said ‘sorry mate’

89 Ibid., at 5.
90 Ibid., at 6.
91 Ibid., at 10.
92 Ibid., at 10. This approach was affirmed in Gray v. Motor Accident Commission (1998) 196 CLR at 13 [34]: ‘the fact that the tortfeasor was insured under a compulsory scheme of insurance against any liability for exemplary damages would not bar the award of such damages’.
and left the scene, pushing his bicycle. Mr. Hollis, obtained compensatory (but not punitive) damages from the cyclist's employer.

However, the High Court's approach raises more serious questions. Namely, why should public policy considerations, which are extraneous to the case at the bar, govern recovery of civil damages? Why should Mr. Cotogno get a windfall that is paid for by all compulsorily insured innocent motorists through increased premiums?

It is arguable that if Mr. Lamb's conduct of driving away from Mr. Cotogno was punishable, he should have been tried for it under criminal law. Under criminal law, however, the prosecution would have had difficulty establishing mens rea (the judge found that he acted without malice), and Mr. Lamb would have been able to raise defence of provocation (not available in civil actions except in Queensland).

The Cotongo case was overcome by the Parliaments of New South Wales and Victoria, which prohibited outright any awards of punitive damages under their respective compulsory motor vehicle accident regimes. Legislation in Queensland, Tasmania, and South Australia ensured that such damages are personally payable by the tortfeasor, and cannot be claimed against motor vehicle insurers.

The power of courts to award punitive damages was further constrained in 2002 and 2003. During that period all Australian Parliaments enacted Torts Reform legislation, which, inter alia, codified principles of the cause of action in negligence for personal injury (breach of duty of care, causation and defences), imposed tests on availability of damages and caps on quantum. The Northern Territory Parliament prohibited outright 'awards of aggravated damages or exemplary damages in respect of a personal injury'. Likewise, the Commonwealth legislation prohibits courts from awarding exemplary and/or aggravated damages in respect of product liability relating to claims for death or personal injury under the Trade Practices Act 1974 (Cth). The prohibition applies to both intentionally and negligently occasioned personal injury.

In New South Wales, Civil Liability Act 2002 (NSW), s. 21, which limits 'exemplary, punitive and aggravated damages', provides that: 'In an action for the award of personal injury damages where the act or omission that caused the injury or death was negligence, a court cannot award exemplary or punitive damages or damages in the nature of aggravated damages'. In Queensland, a court cannot award punitive or aggravated damages

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95 Motor Accidents Compensation Act 1999 (NSW), s. 144; Motor Accidents Act 1988 (NSW), s. 81A; Transport Accident Act 1986 (Vic), s. 93; Accident Compensation Act 1985 (Vic), s. 135A(7)(c) and for post 20 October 1999, s. 134AA, s. 134AB(22)(c), s. 134A.
96 Motor Accidents (Liability and Compensation) Act 1973 (Tas), s. 14(6)(b).
97 Motor Accidents Insurance Act 1994 (Qld), s. 55 as amended; WorkCover Queensland Act 1996 (Qld), s. 319; Motor Vehicles Act 1959 (SA), s. 113A.
98 The analysis in this part is mostly based on Chapter 2 in Mendelson 2010 at p. 41–7.
99 Personal Injuries (Liabilities and Damages) Act 2003 (NT), s. 19.
101 Trade Practices Act 1974 (Cth), Pt IVA.
for personal injury, unless 'the act that caused the personal injury was (a) an unlawful intentional act done with intent to cause personal injury; or (b) an unlawful sexual assault or other unlawful sexual misconduct'. This means that in these jurisdictions while punitive and aggravated damages would be available for some, but not all intentional torts; by definition they cannot be awarded for unintentional torts, such as negligence.

Legislation in Victoria, South Australia, Tasmania, Western Australia, and the Australian Capital Territory does not refer to punitive damages in relation to either intentionally or negligently inflicted personal injuries, which means that they are governed by common law. In most jurisdictions, punitive damages remain available for injuries and death resulting from smoking or other use of tobacco products. Australian Capital Territory, Northern Territory Queensland, and Tasmania prohibit recovery of aggravated or punitive damages in personal injury proceedings against a deceased estate. Under the Commonwealth, Queensland, Tasmania, the Northern Territory, and the Australian Capital Territory legislation, the Crown (the government) is not liable to pay punitive damages for the conduct of police officers, though the officers found liable can be personally punished in this manner. In contrast, New South Wales has preserved the plaintiff's right to an award of punitive damages from the Crown for torts committed by police officers (New South Wales v Ibbett).

Punitive damages are not available for breach of contract; and, importantly, in 2005 all Australian jurisdictions legislatively abolished punitive damages for defamation. However, with notable exception of defamation, the legislative provisions have been uncoordinated, and usually enacted on ad hoc basis. Thus in some jurisdictions, some torts still sound in punitive damages while others do not; a negligently injured person may claim punitive damages in Victoria but not in New South Wales, Queensland, or the

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103 Civil Liability Act 2003 (Qld), s. 52.
104 In Victoria, punitive damages are specifically available under proportionate liability rule, however, proportionate liability does not apply to personal injury cases; see Wrongs Act 1958 (Vic), s. 24AF(1).
105 Civil Liability Act 1936 (SA). Under Civil Liability Act 1936 (SA), s. 70 (2).
106 Civil Liability Act 2002 (Tas). See however, Administration and Probate Act 1935 (Tas), s. 27(3)(a). See also: Motor Accidents (Liability and Compensation) Act 1973 (Tas), s. 14(6)(b).
107 Civil Liability Act 2002 (WA), s. 6(1); Civil Liability Act 2002 (WA), s. 3A(1)(a) and (b).
108 Civil Law (Wrongs) Act 2002 (ACT). But see: Civil Law (Wrongs) Act 2002 (ACT), s. 16(2), which provides that exemplary damages are not available for a surviving cause of action once a person has died. But see: Public Interest Disclosure Act 1994 (ACT), s. 29(1).
109 Law Reform (Miscellaneous Provisions) Act 1955 (ACT), s. 5; Administration and Probate Act 1935 (Tas), s. 27(3); Law Reform (Miscellaneous Provisions) Act 1956 (NT), s. 6; Succession Act 1981 (Qld), s. 66 (2)(b).
110 Australian Federal Police Act 1979 (Cth), s. 64B(3); Police Service Administration Act 1990 (Qld), s. 10.5(2); Police Administration Act 1978 (NT), s. 163(3); Law Reform (Miscellaneous Provisions) Act 1955 (ACT), s. 5; Administration and Probate Act 1935 (Tas), s. 27(3); Law Reform (Miscellaneous Provisions) Act 1956 (NT), s. 6.
111 New South Wales v Ibbett [2006] HCA 57.
112 Police Legislation Amendment (Civil Liability) Act 2003 (NSW).
113 Defamation Act 2005 (NSW), s. 37; see also: Civil Law (Wrongs) Act 2006 (ACT) Ch. 9; Defamation Act 2006 (NT); Defamation Act 2005 (Qld); Defamation Act 2005 (SA); Defamation Act 2005 (Tas); Defamation Act 2005 (Vic); Defamation Act 2005 (WA). The legislation was enacted partly in response to the High Court's decision in Carson v John Fairfax & Sons Ltd [1993] 178 CLR 44.
Northern Territory. As a result, the law of punitive damages in Australia is a highly unsatisfactory farrago of provisions, rules and case law.

8. Conclusion

If the trend towards legislative abolition of common law punitive damages in torts continues unabated, they are likely to become virtually extinct. Is this trend regrettable? Possibly not, for punitive damages are not a remedy; yet, unlike compensatory damages, the court (judge or jury) is vested with unrestricted discretion in determining their quantum. In Australia, statutory law has developed jurisprudentially more apposite ways of deterring wrongdoers and punishing contumelious conduct through the system of civil penalties. Europe would be wise to give punitive damages a wide berth and explore the notion of civil fines instead.
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