THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

VOL. XLVIII SEPTEMBER 1970 SEPTEMBRE NO. 3

PUNITIVE DAMAGES IN TORT

G. H. L. FRIDMAN*
Edmonton

I

Prior to the decision of the House of Lords in 1964 in *Rookes* v. *Barnard*[1] there was a long and respectable history of the award of punitive or exemplary damages in tort cases both in England and in Canada.[2] The speech of Lord Devlin in that case, whatever its effects upon the law in England, which is not altogether certain, in that subsequent decisions have been faced with the task of interpreting and applying his lordship's words, has produced no little confusion and uncertainty in Canada. At a time when the law of tort in Canada might be said to be undergoing, in Shakespearian terms, a "sea-change", partly by reason of the increased attention which it is receiving from academic lawyers, partly from the growth of the feeling among the judiciary that independence from English attitudes and doctrines may not be completely undesirable, it is a matter of some interest and importance to consider the narrower question whether Canadian courts must and should accept Lord Devlin's approach. Consideration of this question involves not only the doctrinal issue—whether Canadian courts are or are not free to exercise any choice in this matter—but also the broader issue of policy, in other words what is the desirable attitude for the law. Analysis of the cases is therefore necessary to expose the present position in Canada. Comparison with other jurisdictions and the way they have viewed this problem is required to determine the proper course for the law in Canada to adopt.

*G. H. L. Fridman, of the Faculty of Law, University of Alberta, Edmonton.

[1] [1964] A.C. 1129.

[2] In these Provinces where the basic law is the English common law. For the situation in Quebec, see *infra*, footnote 47.

II

The English development was traced by Lord Devlin in his masterly and illuminating speech in the *Rookes* case.[3] It would seem that the notion that "exemplary" damages, representing the insult or humiliation suffered by the plaintiff, at the same time enabling the jury to castigate the defendant for the enormity of his conduct, could legitimately be awarded over and above a sum to compensate the plaintiff for the actual loss inflicted on him by the defendant's conduct, began to be manifested about the middle of the eighteenth century.[4] An early illustration is the case of *Huckle* v. *Money*,[5] part of the litigation which arose from the activities of John Wilkes.[6] Even though the plaintiff in that case, who was complaining of false imprisonment, had suffered no harm, having been treated with the greatest courtesy by his gaoler, punitive or exemplary damages were awarded. In upholding this award Lord Camden C.J. referred to the relevance of the state, degree, quality, trade or profession of the party injured and the party doing the injury.[7] Three years later, in 1766, the relative social positions, and comparative financial situations of the parties clearly underlay the acceptance by a strong court (Lord Mansfield C.J., Wilmot and Aston JJ.) of an award of £150 exemplary damages, a large sum for that period, to a militiaman whose colonel had ordered him to be flogged. The defendant in this case, *Benson* v. *Frederick*[8] was a man of substance, able to afford such damages. Once again the cause of action was trespass to the person, though, in this instance, considerable physical damage and hurt had been inflicted, apart from the affront to the plaintiff's personal dignity. Not long afterwards, in *Tullidge* v. *Wade*,[9] an award of £50 damages for the seduction of the plaintiff's daughter was upheld, even though this amount did not represent the true loss sustained by the plaintiff. Clearly this was an award of punitive or exemplary damages. Equally clearly, the court regarded an action of this kind as being akin to trespass to the person.

In the nineteenth century on a number of occasions the validity of awards of such damages was approved. Indeed the categories of conduct in respect of which punitive damages were recoverable

---

[3] *Supra*, footnote 1, at pp. 1221-1231.

[4] Although there are earlier cases in which large awards of damages by juries were left unaffected by courts, even though they had a power "to set aside flagrantly excessive verdicts in personal tort actions": Note (1957), 70 Harv. L. Rev. 517, at pp. 518-519 referring to *Wood* v. *Gunston* (1655), Style 466; *Ash* v. *Lady Ash* (1696), Comb. 357; *Chambers* v. *Robinson* (1726), 2 Stra. 691.

[5] (1763), 2 Wils. 205.

[6] See *Wilkes* v. *Wood* (1763), Lofft. 1.

[7] *Huckle* v. *Money*, *supra*, footnote 5, at p. 206.

[8] (1766), 3 Burr. 1846; *cf. Bruce* v. *Rawlins* (1770), 3 Wils. 61.

[9] (1769), 3 Wils. 18.

seemed to have been extended. Trespass to land was involved in the leading case of *Merest* v. *Harvey*,[10] in which Gibbs C.J. pronounced the afterwards-famous statement that punitive damages were recoverable because the defendant had disregarded "every principle which actuates the conduct of a gentleman". £500 damages were awarded because the defendant had insisted on entering the plaintiff's land, to shoot on it, despite the plaintiff's requests that he refrain. What was to restrain such conduct save large damages?, was the rhetorical question put by the judge. In this case two distinct bases for such damages may be seen to have been suggested. First of all, the "ungentlemanly" conduct of the defendant, in other words, the need to mete a severe punishment upon him for his behaviour. Secondly, the necessity for deterring other would-be trespassers from pursuing such a line of activity. Granted that there may have been a change in the value of money between 1766 and 1814, it would still seem unreasonable to award £50 for the seduction of a daughter, and £150 for a grave assault upon the person of the plaintiff, but £500 for a merely ungentlemanly, even if technically unlawful act of trespass which caused no real damage to the plaintiff, but merely injured his pride (and the sanctity of his shooting rights).

Another factor is to be found in cases of the same vintage. This is the idea that the intent or motive of the defendant is relevant. Was the defendant's conduct designed by him to cause harm to the plaintiff: or was it actionable on technical grounds, even though no intent to harm was manifested? This becomes clear in the direction of Abbott J. to the jury in *Sears* v. *Lyons*,[11] in which £50 damages were awarded to the plaintiff when the defendant threw poisoned barley on the former's premises to poison the plaintiff's poultry. So, too, in *Eliot* v. *Allen*,[12] damages were reduced on the ground that the defendants had manifested no sinister or malignant motive. In certain circumstances, however, the relation of the parties might suffice, as, for instance, in *Williams* v. *Currie*,[13] where the trespassing defendant was the landlord of the plaintiff, and the extra £100 damages were upheld, presumably on the ground that trespass by a landlord against his tenant was worse, and even less forgiveable, than trespass by a stranger. This attitude crystallised into the proposition that it is the "high-handedness" of the defendant which justifies an award of punitive damages. For example, persistence in a plea that the plaintiff had committed a felony, so as to justify an imprisonment in respect

[10] (1814), 5 Taunt. 442. But in *Bracegirdle* v. *Orford* (1813), 2 M. & S. 77, the larger damages given on the grounds of the implied *slander* were treated as *aggravated*, not exemplary damages. Is there a difference?

[11] (1818), 2 Starke 317.

[12] (1845), 1 C.B. 18, at p. 40.

[13] (1845), 1 C.B. 841.

of which the plaintiff was suing, was enough in *Warrick* v. *Foulkes*[14] to support exemplary damages. Even in a negligence case, where it would hardly be thought that punishment or deterrence were relevant, it was stated that the defendant's conduct was so *wilful*, he had acted with such a "high hand", intending by his demolition of a building in such a fashion as to cause it to fall on the plaintiff's stable to turn the plaintiff out of possession, that exemplary or punitive damages were rightly awarded. This expression and application of the law in *Emblen* v. *Myers*[15] accords with an earlier dictum of Martin B. in *Crouch* v. *G.N.R.*,[16] on the subject of wilful disregard of the law, and a later statement by Willes J. in *Bell* v. *Midland Railway Company*,[17] to the effect that a defendant who commits a grievous wrong, with a high hand, in plain violation of an Act of Parliament, persisting in his misconduct for the purpose of destroying the plaintiff's business and seeking gain for himself, was a proper person from whom punitive or exemplary damages should be obtained.

On the other hand, there are some indications in nineteenth century cases that the scope of punitive damages is limited to trespass actions, or cases akin to trespass, such as wrongful acts by a tenant *vis-à-vis* a reversioner.[18] Strongest of all these suggestions is the dictum of Lord Halsbury L.C. in *The Mediana*.[19] It would seem, however, that later decisions re-affirmed the earlier trend in favour of the wide application of the doctrine that punitive or exemplary damages could be awarded where serious insult was undergone by the plaintiff, the defendant had abused his position, or had perpetrated a deliberate and serious violation of the plaintiff's rights, to damage the plaintiff or benefit the defendant.

Thus in libel actions, the possibility of punitive or exemplary damages was clearly stated more than once. Indeed judges pointed out that to calculate the "real" loss to the plaintiff was so impossible a task that juries were entitled to assess a sum more by way of a penalty than for the purposes of compensation.[20] Not only was trespass to the person accepted as a wrong in respect of which

---

[14] (1844), 12 M. & W. 507; *cf. Bracegirdle* v. *Orford, supra*, footnote 10.

[15] (1860), 6 H. & N. 54.

[16] (1856), 11 Ex. 742, at p. 759.

[17] (1861), 10 C.B. (N.S.) 287, at p. 307.

[18] *Whittam* v. *Kershaw* (1885), 16 Q.B.D. 613, at p. 618, per Bowen L.J.; *Wennhak* v. *Morgan* (1888), 20 Q.B.D. 635, at p. 638, per Huddleston B.; *Hodsoll* v. *Taylor* (1873), L.R. Q.B. 79.

[19] [1900] A.C. 113, at p. 118.

[20] *Ley* v. *Hamilton* (1935), 153 L.T. 384, at p. 386, per Lord Atkin; *Rooke* v. *Fairie*, [1941] 1 K.B. 507, at p. 516, per Greene M.R. Hence the character and conduct of the plaintiff could be relevant: even to the extent of reducing damages to one farthing: *cf. Kelly* v. *Sherlock* (1866), L.R. 1 Q.B. 686.

punitive damages could be awarded "by way of punishment of the defendant or as a deterrent example", in the words of Scott L.J. in *Dumbell* v. *Roberts*,[21] a case of false imprisonment. Trespass to goods or to land were also included, *obiter*, by Scrutton and Maugham L.JJ. (without the assent of Greer L.J.) in *Owen & Smith* v. *Reo Motors*.[22] This recognition was endorsed by the Court of Appeal in *London* v. *Ryder*,[23] ironically (as it turned out) approving a direction by Devlin J. to a jury that punitive damages could be given in a trespass case (of a particularly bad nature), and that such damages were like imposing a fine on the defendant. Similarly, Cassels J. awarded punitive damages in a case in which the defendants enticed away the plaintiff's daughter, even though no element of seduction in the normal sense was involved.[24] Breach of copyright was another situation in which such damages could be awarded, even apart from the provisions of the Copyright Act, 1956, as Sellers L.J. considered in *Williams* v. *Settle*.[25] By way of contrast, it is only correct to point out that the older distinction between a "high-handed" or insulting trespass and one that contained no such degrading elements, was repeated and applied in *Cruise* v. *Terrell*.[26] Moreover, in the famous case of *Constantine* v. *Imperial Hotels Ltd.*,[27] in which the plaintiff (now Lord Constantine) was refused admission to a hotel and claimed damages for breach of the innkeeper's duty to accept *bona fide* visitors, since no real or substantial damage had been suffered by the plaintiff, his claim in effect was for punitive damages. These Birkett J. refused to allow, even though it might be argued that the gravamen of the plaintiff's charge against the defendants was not that he had been denied accommodation to his detriment, in that he had been provided with nowhere to stay, but that the defendant's conduct had been insulting towards him and had been based upon the fact that he was colored. Of course in modern English law the Race Relations Act, 1968 takes care of such a situation, by preventive rather than punitive measures (though the latter are not entirely absent). In 1944, however, when the *Constantine* case was heard, only the common law could provide a suitable remedy. Yet Birkett J. refused to extend the undeniable precedents on punitive or exemplary damages to the instant case. Such a decision confirmed, rather than denied, the power to award such damages. Before discussing this more closely, it is

[21] [1944] 1 All E.R. 326, at p. 330. Hence the relevance of evidence to aggravate or mitigate damages; *Walter* v. *Alltools Ltd.* (1944), 61 T.L.R. 39.

[22] [1934] 1 All E.R. Rep. 734, at pp. 740, 742, 743.

[23] [1953] 2 Q.B. 202.

[24] *Lough* v. *Ward* [1945] 2 All E.R. 338.

[25] [1960] 1 W.L.R. 1072.

[26] [1922] 1 K.B. 664, at p. 673, per Scrutton L.J.

[27] [1944] K.B. 693.

helpful to examine how Canadian courts treated this question prior to *Rookes* v. *Barnard*.

III

Various trends are discernible in the Canadian decisions down to 1964.[28] There is the willingness on the part of some judges to apply the rationale of punitive or exemplary damages to situations outside the scope of earlier English decisions, so as to create a wider field of operation for the doctrine that non-compensatory damages may be awarded. On other occasions, even in the same jurisdiction, it is possible to see a reluctance to permit punitive damages in cases not strictly within the earlier canon, and a desire to put some limit upon the circumstances in which such damages can legitimately be claimed. This latter trend is most clearly observable in assault or trespass cases, which, in Canada as in England, were the prime instances of awards of punitive damages being made and being upheld.

To go no earlier than the present century, in 1911 Macdonald C.J.A. of British Columbia stated that the jury should consider facts in mitigation of damages in an assault case, as well as those which tended to aggravate the damages, such as the publication in newspapers of the occurrence in that particular case, which was a horsewhipping of the plaintiff by the defendant for supposed interference with the defendant's daughter, "and all acts of the defendant which the jury might consider ought to be visited with punitive damages".[29] In a Manitoban case in 1962,[30] the serious nature of the plaintiff's injuries was grounds for an award of $500.00 exemplary damages. A similar sum by way of such damages was upheld in an earlier case from Saskatchewan,[31] on the ground of the nature of the assault, which took the form of a further, but unprovoked attack on the plaintiff while he was on the ground, the first attack having been provoked by him. Martin J.A.[32] referred to the fact that the jury could give vindictive damages if the assault were *wanton*. However he went on to mention two different grounds upon which the award of such damages was based: the first was by way of punishment of the defendant and to deter him and others from committing similar assaults; the second was by way of being compensatory, since the plaintiff in such cases suffers from a sense of wrong and is entitled to a solatium for that mental pain.

This ambivalence in the explanation of the rationale of punitive damages is not unusual. It explains or underlies the inherent

[28] See footnote 2, *supra*.
[29] *Slater* v. *Watts* (1911), 16 B.C.R. 36, at p. 43.
[30] *Sakowski* v. *Rusiecki* (1962), 67 Man. L.R. 256.
[31] *Guillet* v. *Charlebois*, [1935] 3 W.W.R. 438.
[32] *Ibid.*, at pp. 442-443.

confusion to be found in the cases between exemplary, punitive, or vindictive damages (which are not given for compensatory purposes or reasons) and aggravated damages, which, albeit heavier than the amount which would represent the true loss suffered by the plaintiff in financial terms, are nonetheless based upon an estimate of the actual suffering, physical, mental or otherwise, which has been inflicted upon the plaintiff.[33] Such damages are *true* damages, in the sense of being genuinely awarded to reinstate the plaintiff in the situation he was before the misconduct of the defendant, and not, what might be called, *fictional*, or *judicial* damages, designed to indicate the displeasure of the court, whether judge or jury, at the heinousness of the defendant's conduct. That is what exemplary, punitive or vindictive damages are in character. This is brought out, it may be suggested, in cases which exemplify the situations in which an assault will not justify or support an award of punitive damages, as well as in cases in which such damages have been awarded even where the cause of action was something other than an assault.

Thus exemplary damages were denied in a case from British Columbia where the defendant committed what was a technical assault only, not involving the slightest injury to the plaintiff's person, clothing or reputation.[34] Such damages have also been denied in British Columbia where there was provocation which produced the assault.[35] In Manitoba, Williams C.J.Q.B. refused exemplary or punitive damages in two cases of assault, for two quite distinct reasons. In one case, *Phillips* v. *Soloway*,[36] this was because the assault was committed by an insane man, who was liable even though insane, but only for actual damages. In the other *Radovskis* v. *Tomm*,[37] insanity was not involved: the defendant clearly knew what he was doing when he raped the five year old plaintiff. But because the defendant had been sentenced to a long term of imprisonment for his crime, punitive damages were not apposite, for their imposition would mean that the defendant was being punished twice for the same act. This raises an important point in relation to punitive damages, which will be discussed in due course. For the moment, however, the relevance of this decision is in respect of the limitation upon awards of punitive damages which is spelled out in the judgment. The case shows that one way of differentiating inappropriate instances for the award of

[33] See, *e.g.*, the decision of the Supreme Court of Canada in *Knott* v. *Telegram Printing Co. Ltd.*, [1917] 3 W.L.R. 335.

[34] *Hodgkinson* v. *Martin*, [1928] 3 W.W.R. 763; *cf.* a Saskatchewan case of accidental trespass, *Berezowski* v. *Reimer*, [1927] 3 D.L.R. 232.

[35] *Niptod* v. *McPhee*, [1941] 1 W.W.R. 118; *cf. Natonson* v. *Lexier*, [1939] 3 W.W.R. 289.

[36] (1956), 6 D.L.R. (2d) 570.

[37] (1957), 65 Man. L.R. 61.

punitive damages is on the ground that the defendant has been punished adequately by other means. This is quite distinct from the main idea, found in the pre-1964 English cases, and in the Canadian ones, that there is a distinction between deliberate wrongdoing, in the sense of causing injury from a malicious, spiteful, wilful intent (even though the cause of action is not one that involves the intent to injure as an ingredient), and causing injury in a manner that involves technical liability. Hence the denial of punitive damages in a Saskatchewan case[38] concerning the wrongful filing of a caveat, where there was no proof of malice or improper motive. As was stated by Aikins J. of the Supreme Court of British Columbia in a more recent case, in which punitive damages were not allowed in respect of damage caused by a vicious dog kept to prevent the theft of golf balls, the defendant not having deliberately incited the animal to inflict the injury: "In general the authorities show that in order to attract exemplary damages the act of the wrongdoer must have been consciously directed against the person, reputation or property of the plaintiff."[39]

In all these instances the attitude of the court seems to have been that the situations would not justify an award of "inflamed" damages because there was nothing about them which suggested that the conduct of the defendant could be treated as involving an aggravated commission of the particular type of wrong concerned. An exception could be made of the *Radoviskis* case (where the conduct of the defendant was certainly outrageous): here, however, another factor, already referred to, and giving rise to complicating considerations, underlay the reluctance of the court to make an award of punitive damages. By way of contrast, reference may be made to a number of decisions in which awards of punitive damages have been made in circumstances indicating an extension of the earlier English cases. Thus, not only were such damages granted where the defendant trespassed, despite requests from the plaintiff to desist, and was violent and abusive.[40] They were also awarded where the defendant was guilty of breach of copyright;[41] where the defendant deliberately withdrew support from the plaintiff's land causing loss to the latter;[42] where the

[38] *Lundy & McLeod* v. *Powell* (1922), 70 D.L.R. 659.

[39] *Kaytor* v. *Lion's Driving Range Ltd.* (1962), 35 D.L.R. (2d) 426, at p. 430.

[40] *Spencer* v. *Grant*, [1928] 1 D.L.R. 280; *cf.* the suggestion that such damages could be awarded in a case of "illegal entry": *Re Socony-Vacuum Oil Co. of Canada Ltd.* v. *Atz* (1955), 15 W.W.R. 411, at pp. 414-415, per Brown C.J.Q.B. of Saskatchewan; *cf.* also *Starkman* v. *Delhi Court. Ltd.*, [1961] O.R. 467.

[41] *Hay & Hay Construction Ltd.* v. *Sloan*, [1957] O.W.N. 445, at p. 450, per Stewart J.

[42] *Carr-Harris* v. *Schacter*, [1956] O.R. 995, at pp. 1005-1006, per Wilson J., on the ground that there was need to protect an owner of land and deter wrongdoers.

defendant was guilty of conspiracy and fraud;[43] where there was a particularly broad and malicious publication of a libel;[44] and where the defendant was guilty of a wilful and deliberate, not negligent, act of conversion in respect of the plaintiff's turkeys.[45] The Canadian viewpoint on punitive damages before 1964 was well summarised in this passage from the judgment of Schroeder J. A. in the Ontario case of *Denison* v. *Fawcett*,[46] which was concerned with a conspiracy and fraudulent conduct in respect of the sale of a partnership. Speaking of exemplary *or* aggravated damages (and the assimilation of the two may be noted in view of earlier comments), the learned judge said that they could be awarded "in actions of tort such as assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution and false imprisonment. If in addition to committing the wrongful act, the defendant's conduct is 'high-handed malicious conduct showing a contempt of the plaintiff's rights, or disregarding every principle which actuates the conduct of a gentleman' . . . his conduct is an element to be considered as a circumstance of aggravation which may, depending upon its extent or degree, justify an award to the injured plaintiff in addition to the actual pecuniary loss which he has sustained. I do not think it can be stated with any precision what may be classed as aggravating circumstances, but malice, wantonness, insult and persistent repetition have always been regarded as elements which might be taken into account".

By 1964, therefore, cases in several Canadian common law jurisdictions[47] had adopted, even extended, the scope of the English authorities by virtue of which punitive damages could be awarded. Indeed the reasoning of Canadian courts was couched in

[43] *Denison* v. *Fawcett*, [1958] O.R. 312.

[44] *Ross* v. *Lamport*, [1957] O.R. 402.

[45] *Grenn* v. *Brampton Poultry Co. Ltd.* (1959), 18 D.L.R. (2d) 9, a decision of the Ontario Court of Appeal.

[46] *Supra*, footnote 43, at p. 319.

[47] The situation in Quebec was succinctly explained by the Supreme Court of Canada in *Chaput* v. *Romain*, [1955] S.C.R. 834, where it was stated that the civil law did not award punitive or exemplary damages, only "dommages moraux": at p. 841, per Taschereau J. These would seem to be equatable with general damages in the common law: *ibid.*, at p. 860, per Kellock J. Hence a large sum could be awarded in that case for trespass. This was applied by Scott Assoc. C.J. of Quebec in *Robbins* v. *C.B.C.* (1958), 12 D.L.R. (2d) 35, in respect of an indefinable wrong under arts 1053 and 1054 C.C. of Quebec. This wrong consisted of suggesting that television viewers telephone a doctor who had written a letter critical of a television programme. This they did, to the annoyance and distress of the plaintiff. Compare also, on assessment of damages, *Charron* v. *Piché*, [1960] R.L.N.S. 440. It would seem that the courts in Quebec are achieving by "moral", *i.e.* possibly *aggravated* damages, what common law courts in Canada are doing by punitive or exemplary damages, in that way outflanking the civil law's exclusion of punitive or exemplary damages.

I am indebted to Professor J.-L. Baudouin of the University of Montreal for this insight into the Quebec situation.

English language, and expressed the underlying philosophy or outlook upon which awards of such damages could be based.

IV

The situation in England has been seriously affected by the decision of the House of Lords in *Rookes* v. *Barnard*.[48] The precise relevant question in that case, so far as concerns the present context, was the validity of an award of punitive, exemplary or vindictive damages to a plaintiff who claimed that, because of the defendants' intimidation of his employers, he had been dismissed. The substantive point relating to the law of intimidation, with its ramifications in the law of conspiracy and the immunity of trade union officials, is not now of concern. Suffice it to say that the House held the defendants liable. But they could not be made to pay any damages other than would compensate the plaintiff for his actual loss. The opportunity was taken by Lord Devlin, on behalf of the House, to re-examine the whole area of punitive damages and to re-state the law in England in what was considered to be more modern, and more relevant, as well as more socially acceptable terms.

Lord Devlin[49] began by distinguishing the differing objects of damages in the usual sense and exemplary damages in terms of compensation as opposed to punishment and deterrence. According to Lord Devlin, it was open to the House of Lords to accept or remove what his lordship called an "anomaly" from the law of England, an anomaly, presumably because it tended to confuse the civil and criminal functions of the law. After considering the extent to which, even when awarding "compensatory" damages, a court could take into account the gravity and motives of the defendant, so that, apart from specifically punitive or exemplary damages, the ideas of compensation and punishment may be interwoven, Lord Devlin traced the history of purely exemplary damages, from the days of John Wilkes to the 1960 copyright case of *Williams* v. *Settle*.[50] In consequence, his lordship concluded that precedent and statute alike demanded recognition of the exemplary principle, and that there were even situations in which such damages were useful to vindicate the strength of the law, in his phrase, thereby affording a practical justification for admitting criminal law notions into the civil law. But the previous law permitted such awards in too wide a range of instances. So far from being capable of being granted in any instance in which a court considered it just and reasonable to do so, having regard to the permissible limits within the doctrine of precedent, courts

[48] *Supra*, footnote 1.
[49] *Ibid.*, at pp. 1221-1228.
[50] *Supra*, footnote 25.

should be restricted in the event to which they could legitimately go beyond the compensatory principle. In three, and only three circumstances exemplary or punitive damages could be awarded. These were: oppressive, arbitrary or unconstitutional action by the servants of the government; where the defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; and wherever such damages were expressly authorised by statute. However, it was not sufficient for a case to fall within one of these categories. Other factors had relevancy, namely: the need to show that the plaintiff was the victim of punishable behaviour, which would seem to mean in Lord Devlin's view, "some oppressive conduct"; the need to ensure that the power to award such damages was not wielded in such a way as to be antagonistic to, rather than in defence of liberty; and the need to bear in mind the means of the parties. All these factors indicated that a case for exemplary damages was quite different, and involved different considerations from a case for compensatory damages. But only one award of damages was to be made, even where exemplary damages were appropriate.

Lord Devlin's analysis reveals what was abandoned, jettisoned, or discarded from the older authorities examined earlier. In brief, the House of Lords, through the mouth of Lord Devlin, declared categorically that high-handed, malicious, insolent or arrogant conduct, which involved the commission of a tort, would not found an award of exemplary or punitive damages. Aggravated damages might be awarded in such instances. Such damages would do the work of exemplary damages. If not, then the criminal law could be invoked to punish rather than permit the plaintiff to "inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law".[51]

In considering this judgment it is necessary to bear in mind what it has to say about, and its effect upon, three different matters: the viability of exemplary damages; the extent to which such damages should be available; and the apparent sharpening of the distinction between exemplary and aggravated damages.

It is interesting that the House of Lords did not decide to abolish punitive damages. From what Lord Devlin said, it would seem to have been open to the House to have done so. Indeed the tenor of Lord Devlin's opening remarks in this part of his speech, suggests an inclination to extirpate punitive damages from the law on two main grounds: first, that such damages tended to confuse

[51] *Supra*, footnote 1, at p. 1230. *Cf.* the attitude of Sachs L.J. in the more recent case of *Mafo* v. *Adams*, [1969] 3 All E.R. 1404, at p. 1407, suggesting that exemplary damages should not be awarded in deceit (or trover or detenue) which were not torts in respect of which such damages were awarded prior to 1964. Compare Widgery L.J., *ibid.*, at p. 1410.

civil and criminal law, the objects, and effects of which were different in nature and purpose; secondly, that tort damages, generally speaking, could take into account any features of the plaintiff's loss or the defendant's conduct which merited special consideration, without the necessity for any additional category of damages, designed to impose an extra penalty upon the defendant, or "reward" (if that be the correct word) the plaintiff by reason of any peculiar circumstances. Despite such justifications for the total revision of the law, the opportunity to abolish punitive or exemplary damages was not seized. Why not? As already mentioned Lord Devlin was moved by some respect for precedent and by the realisation that such damages did serve a useful purpose. If, as Lord Devlin acknowledged, the House of Lords was completely free to determine whether or not exemplary or punitive damages could be awarded not only in the instant case but generally, what need was there for the House to follow the precedents? Indeed, some were definitely rejected, even overruled. There is something incongruous about the House of Lords declaring their freedom from precedents in lower courts, and then suggesting how impious and disrespectful it would be to ignore such precedents. As if that were not bad enough, to say that awards of exemplary or punitive damages could be purposeful in some instance "in vindicating the strength of the law", despite their anomalous character and their introduction of a criminal flavour into the civil law, and then to limit the scope of such damages, by pruning the earlier authorities, is an excellent example of "double-think". Either punitive damages serve some fruitful purpose, which cannot be forwarded by ordinary or compensatory damages, or they do not. Either punitive damages can be justified, irrespective of the arguments of double jeopardy, dual punishment, windfalls to the plaintiff, no adequate protection for the defendant, and so on, or these counter-arguments should overcome the strength and persuasion of older authority.[52] If punitive damages are capable of a viable existence in the law, without the need for the succour of the strict doctrine of precedent, then it must be that purely compensatory damages cannot fulfil the policy of the law of torts.

This contention leads to the next point. In what circumstances should such damages be awarded? Lord Devlin would limit these to the categories enumerated and described earlier. So far as the common law position is concerned (statutory provision for awards of punitive damages is a special case which does not require discussion here), the attitude of the House of Lords is ambivalent, insofar as the House was attempting to accept and endorse the need for awards of punitive damages, while at the same time saying that earlier cases went too far in the extent to which they

[52] *Cf.* below, section VII.

permitted such awards to be made. But if awards of punitive damages are acceptable and necessary in the cases Lord Devlin states, for the reason and to uphold the purpose which he sets out, can it not be said that, in the other instances, which Lord Devlin suggests were illegitimate extensions of the categories where punitive damages are permissible, awards of such damages also come within the scope of the justification propounded by Lord Devlin? Lord Devlin distinguishes between governmental and private oppression, thereby excluding many of the cases in which, as seen earlier, courts were moved to make awards of punitive damages. The government is different, says Lord Devlin, not because it is more powerful, but because "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". Fine words, indeed! But, with all respect, may this not be characterised as mere rhetoric? In modern times, even where servants of the government do behave in the kind of way that would bring them within the scope of Lord Devlin's language, it is more than probable that they will be protected from liability of any kind (let alone liability to pay punitive damages) by suitable legislation, either before the fact or *ex post facto*. In truth we have reached a stage of development, which would no doubt horrify many eighteenth century judges and lawyers were they able to visit our civilisation, in which while governments have greater powers and opportunities for oppression, there are fewer circumstances in which they can be made legally liable for what they do. All kinds of legislation, substantive and procedural, such as special provisions with regard to periods of limitation, protect governments and their servants.[53] Many instances have been recorded in which the law has been powerless to come to the assistance of the aggrieved citizen. Perhaps political action has been possible; perhaps the camaraderie of the civil service, politicians, or the other relevant group, has been sufficiently strong to act as a barrier in the way of redress. At the same time, it may be added, non-governmental organisations have developed to such an extent as to be in a very potent situation so far as causing harm to individuals, and undertaking oppressive actions, are concerned. No more illustrative case could be found than *Rookes* v. *Barnard* itself. In more than one decision the great power wielded by trade unions has been referred to, and has been revealed as a source of possible oppression and loss. True it is that trade unions and their officials are invested with certain immunities, in English law at any rate. But there are limits to those immunities; and other organisations may not be similarly privileged, while having the same potentiality for harm and oppression.

[53] In this respect the decision of the House of Lords against State privilege in *Conway* v. *Rimmer*, [1968] 1 All E.R. 874 is to be welcomed.

Why should the law distinguish between one source of arbitrary or oppressive conduct and another? There may even be difficulties about doing so, when governments perform so many functions, in modern times, through the medium of semi-private semi-public corporations, as Taylor J. commented in the Australian High Court in the case of *Uren* v. *John Fairfax & Sons Pty. Ltd.*[54] To the rational mind, it is suggested, there seems no logical justification for any such distinction. Is there any *sociological justification*?

Admittedly, perhaps by way of alleviation, Lord Devlin includes the second category, of profitable wrongdoing, as it might be termed, and does not confine its scope of moneymaking in the strict sense, but extends it to "cases in which the defendant is seeking to gain at the expense of the plaintiff some object . . . which either he could not obtain at all or not obtain except at a price greater than he wants to put down". In such situations exemplary or punitive damages may be necessary "to teach a wrongdoer that tort does not pay".[55] Does this category sufficiently supplement the first? If it does not, then why should the lesson that tort does not pay be necessary only in the limited group of cases which fall within Lord Devlin's second category? In the light of subsequent English decisions, where the plaintiff has attempted to rely on this passage to be found a claim for punitive damages, it would appear that the courts have construed this category very narrowly. In an early case, *McCarey* v. *Associated Newspapers*,[56] where a jury awarded a doctor £9,000 for a libel which alleged that he had been negligent in performing an operation, the Court of Appeal, holding that this was excessive, decided that the circumstances did not bring the case within Lord Devlin's second category. There was no pecuniary loss to the plaintiff, no social damage, no profit by the defendants, a newspaper, no insulting or high-handed behaviour by them. Neither exemplary nor aggravated damages could be awarded. Subsequently, in *Broadway Approvals* v. *Odhams Press*[57] the Court of Appeal said that just because a newspaper was published for profit this did not mean that all libellous publications were made at the expense of the plaintiff, so as to make a profit out of his misery and anguish. In the words of Sellers L.J.,[58] "a more direct pecuniary benefit would have to be shown to make a newspaper or any other defendant liable for punitive damages". Following this lead, Widgery J., directing the jury in *Manson* v. *Associated Newspapers*[59] said that "where a defendant has published a scurrilous and defamatory statement, either knowing it be untrue or quite reckless whether it is true or not and with full

[54] [1967] Argus L.R. 25, at p. 33.
[55] *Supra*, footnote 1.
[56] [1964] 3 All E.R. 947.
[57] [1965] 2 All E.R. 523.
[58] *Ibid.*, at p. 537. [59] [1965] 2 All E.R. 954, at p. 958.

knowledge that it is going to hurt somebody, but he publishes the statement after a cold and cynical calculation of profit and loss", then, and only then a case for punitive damages was made out. Such a defendant was the only man against whom an award of exemplary damages could be made. Without going into this question, the Court of Appeal in the later case of *Fielding* v. *Variety Inc.*[60] held that the defendant's failure to apologize for his libel of the plaintiff was not a ground for awarding exemplary damages—even though it was before 1964 according to cases which have been referred to earlier. The tenor of these cases, it is suggested, is that only in very special instances of libel where there was a possible profit for the defendant to be obtained out of ruining the plaintiff's reputation, such that the compensatory damages the latter could obtain would be derisory compared with the gain to the former, can a court now award punitive damages under Lord Devlin's second category. If this is correct, there will be little protection for injured parties, little deterrence to tortfeasors in general, to be gleaned from the attenuated doctrine of punitive damages which is to be found in Lord Devlin's speech.[60A]

The third feature of Lord Devlin's speech was the distinction between exemplary and aggravated damages. A comment has been made earlier upon the confusion to be found on occasion in the pre-1964 cases between true exemplary damages and compensatory damages swelled to proportions greater than might be commensurate with the damage actually suffered by the plaintiff in order to highlight the excessive nature of the wrong committed by the defendant or the harm suffered by the plaintiff. As long as the law recognized the possibility of awards of both exemplary and aggravated damages, it might not have been necessary to differentiate the two either in theory or in practice. Once the House of Lords decided that exemplary damages, if recoverable at all, were only recoverable in very limited situations, as already seen, it is obviously necessary to make sharp the difference between such damages on the one hand and aggravated damages, which are a variety of compensatory damages, on the other. The legitimacy of aggravated damages was recognized, and indeed emphasized by Lord Devlin in various passages in his speech. Some of the subsequent cases which have been referred to above have sustained and repeated this point, and have approached the problem of assessment of damages in terms of both aggravated and exemplary damages. For example, in the *McCarey* case it was held that neither aggravated nor exemplary damages could be awarded since the facts did not support a case for either. On the other hand, in

[60] [1967] 2 All E.R. 497, especially at p. 502, per Salmon L.J.

[60A] *Cf.* the indecisive debate in *Mafo* v. *Adams, supra,* footnote 51, as to whether exemplary damages may be awarded in the case of deceit.

the *Fielding* case, while exemplary damages were not recoverable, the compensation awarded to the plaintiff was more than his actual loss because of the character of the libel: in other words what was being given were aggravated damages. To the extent to which such aggravated damages clearly bear some relation to the harm suffered, or insult sustained by the plaintiff, aggravated damages may be said to be a variety of compensatory damages. However, judging by the language of Lord Devlin in the *Rookes* case and by the comments in subsequent decisions, it would seem that there is an aspect of aggravated damages which relates to the degree or quality of culpability on the part of the defendant, in other words the seriousness or other unpleasant feature of the defendant's conduct which deserves some extra penalization in the form of damages so as to reveal the extent of the law's abhorrence of what he has done. Is this not exemplary damages under another rubric? In awarding aggravated damages on such ground are the courts not really punishing the defendant because of the view the courts take of his conduct? And even if the award of aggravated damages is said to be based not so much upon the nature of the defendant's conduct as upon the quality of the plaintiff's injury, can it not still be said that the extent of a plaintiff's injury, in the terms in which it has been referred to in the cases, relates significantly to the characteristics of the defendant's conduct? What, then, has been achieved, let alone gained, by the restrictive attitude of the House of Lords?

V

There can be no doubt, as Johnson J.A. of the Court of Appeal of Alberta said recently in the case of *McKinnon* v. *F. W. Woolworth Co. Ltd.*,[61] that *Rookes* v. *Barnard* substantially reduced, as far as English law is concerned, the number of instances in which exemplary damages can be given. Are Canadian courts bound by this decision? Before attempting to answer that question, it is interesting to note that the High Court of Australia, after an exhaustive examination of earlier Australian cases and of the reasoning of Lord Devlin in the *Rookes* case, came to the conclusion in two libel decisions[62] that the approach of Lord Devlin did not represent what the law was in Australia. When one of these cases reached the Privy Council, the Board refused to apply the English doctrine but maintained the supremacy of Australian de-

[61] (1968), 70 D.L.R. (2d) 280, at p. 289. *Cf.* Widgery L.J. in *Mafo* v. *Adams*, *supra*, footnote 51, at p. 1411: ". . . the number of cases hereafter where exemplary damages are properly to be awarded will in fact be very few."

[62] *Uren* v. *John Fairfax & Sons Pty. Ltd.*, *supra*, footnote 54; *Australian Consolidated Press Ltd.* v. *Uren*, [1967] Argus L.R. 54 (H.C.), see *infra*.

cisions in this area. In the case in question, *Australian Consolidated Press* v. *Uren*,[63] Lord Morris, after discussing some criticisms of the *Rookes* decision, said[64] that it was not necessary to give any opinion with regard to the various contentions that had been raised in this regard. The present case related only to the law of Australia and raised the question whether the High Court of Australia was wrong in deciding not to change the law in Australia in the light of the *Rookes* case. Lord Morris went on to say the following:[65] "There are doubtless advantages if, within those parts of the Commonwealth (or indeed of the English speaking world) where the law is built on a common foundation, development proceeds along similar lines; but development may gain its impetus from any one, and not from one only, of those parts. The law may be influenced from any one direction. The gain that uniformity of approach may yield is, however, far less marked in some parts of the law than in others. In trade between countries and nations the sphere where common acceptance of view is desirable may be wide. . . . But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling. Furthermore a decision on such a question as whether there may be a punitive element in an assessment of damages for libel must be affected by the fact, if fact it be, that in a particular country the law is well settled." The succeeding pages of this opinion reveal that the Australian development was regarded by the Privy Council as sufficiently well settled to be incapable of eradication or alteration in consequence of the *Rookes* decision. The law in Australia was not developed by processes of faulty reasoning, nor had it been founded on misconceptions, therefore it was not necessary to change it.[66] It would seem possible to contend that the Privy Council tacitly, if not overtly accepted the criticisms voiced in the High Court of Australia in this and the other *Uren* case of the speech of Lord Devlin in *Rookes* v. *Barnard*, generally and in the light of the earlier Australian decisions, and did not regard it as being essential that the law in this particular area should be the same in Australia as in England. If this is an acceptable situation where there is a system of law in which the final court of appeal is the Privy Council, how much more so is it likely to be where there is a system of law in which the final court of appeal is not outside the system itself. There would seem to be even less reason for Canadian courts to adopt the reasoning and approach of *Rookes* v. *Barnard* than courts in Australia. The question really is whether, prior to 1964, Canadian decisions had built up an approach to the prob-

[63] [1967] 3 All E.R. 523 (P.C.).
[64] *Ibid.*, at p. 536.
[65] *Ibid.*
[66] *Ibid.*, at p. 538.

lem of punitive damages that was individual and independent and had no need to rely upon English law for its life and its content. The earlier consideration of the relevant Canadian cases, it is suggested, reveals that Canadian courts had developed an approach of their own to this question, albeit that they did so by reference to the reasoning and authority of older English cases. It is possible to argue that the Canadian authorities, at the highest level at any rate, had not gone into such great detail as the authorities in Australia. Nevertheless it is suggested that there is a sufficient catena of authority in Canada to establish a Canadian outlook on punitive or exemplary damages. The original common law props for this doctrine were no more necessary in Canada in 1964 than in Australia.[67] Consequently the opinion is put forward with some confidence that by 1964 the Canadian situation had developed to such an extent as to render Canadian courts no longer necessarily bound by what the House of Lords said in this particular area. In the light of this view it is interesting to see what in fact Canadian courts have said since 1964.[67A]

There may be a significant difference in respect of the decisiveness of the cases between British Columbia and other Provinces. In 1965 Collins J. and McFarlane J. of the Supreme Court of British Columbia followed Lord Devlin's approach and reasoning in two cases of assault. The first case, *Kirisits* v. *Morrell & Hanson*,[68] concerned a humiliating assault of a serious kind, unprovoked by any act of the plaintiff. Because the defendant had been sent to prison for the crime which was involved in the assault and had served his sentence by the time the civil action came up for trial, Collins J. refused to award exemplary damages, though he did allow the plaintiff aggravated damages. The other case, *Schuster* v. *Martin*,[69] arose out of an unprovoked and vicious assault, the effect of which was to render the plaintiff a paraplegic for life. Again exemplary or punitive damages were refused, on the ground that the defendant had been convicted and imprisoned for the crime which the assault involved. Two years later, in 1967, in *Golnik* v. *Geissinger*,[70] the defendant struck the plaintiff, pushed the plain-

[67] Or, indeed, the United States, which has developed its own doctrine of punitive damages out of the 18th and 19th century English precedents: Note, *op. cit.*, footnote 4; Morris, Punitive Damages in Tort Cases (1931), 44 Harv. L. Rev. 1173; Morris, Punitive Damages in Personal Injury Cases (1960), 21 Ohio St. L.J. 216. Indeed the doctrine in the U.S.A. has been extended, not without the incursion of academic criticism: Note (1955), 64 Yale L.J. 610; E.E.Z., Punitive Damages and Their Possible Application in Automobile Accident Litigation (1960), 46 Va. L. Rev. 1036: Brandwen, Punitive-exemplary Damages in Labour Relations Litigation (1962), 29 U. Ch. L. Rev. 460.

[67A] *Cf.* also Atrens, International Interference with the Person, in Linden, Studies in Canadian Tort Law (1968), p. 378, at pp. 406-414.

[68] (1965), 52 W.W.R. 123.

[69] (1965), 50 D.L.R. (2d) 176.

[70] (1967), 64 D.L.R. (2d) 754.

tiff's wife and trod on her hand, after a collision between the plaintiff's car and the defendant's. This was an unprovoked assault by the defendant, which justified an award of aggravated damages, so as to compensate the plaintiff and his wife for the humiliation they had suffered: but, on any test, it was not a case for punitive damages. Dryer J. stated that he did not have to decide whether awards of punitive damages were limited in the manner outlined by Lord Devlin.[71] In *Sharkey* v. *Robertson*,[72] another judge of the Supreme Court awarded aggravated not exemplary damages for an assault. There was no humiliation suffered by the plaintiff, who was not surprised by the conduct of the defendant.

More recently, in *Bahner* v. *Marwest Hotel Co.*,[73] Wilson C.J.S.C. also preferred to use the term "aggravated" in respect of the damages he was awarding for the arrogant behaviour of the defendant hotel, and the humiliation and degradation suffered by the plaintiff when he was falsely imprisoned after his refusal to pay for an untouched bottle of wine (the incident arising out of his ignorance of local law, the plaintiff being a German immigrant). The learned judge did suggest that *Rookes* v. *Barnard* was not applicable in Canada—in the light of dicta in a case in the Supreme Court to which reference is made later. And he did say that the damages he was allowing as aggravated damages could be considered "punitive", if such appellation was necessary to support the amount. But the judgment does not contain any reasoned discussion of the point: and can be sustained on the ground that the court was awarding aggravated, not punitive damages, that is by way of compensation rather than condemnation. Still more recently, in *Amos* v. *Vawter*,[74] Wootton J. refused to allow a claim for exemplary damages against defendants who stole the plaintiff's car and totally wrecked it in a collision. They had been convicted in criminal proceedings and no order for compensation had been made as the court had power to do under section 628 of the Criminal Code.[75] On the particular facts, namely, the punishment of the defendants, who were infants, by the criminal law, and the lack of evidence that the plaintiff had suffered damage in addition to his actual loss, the learned judge refused to award exemplary damages. Without deciding the issue, he intimated that perhaps in appropriate cases a person affected by a criminal act might be awarded exemplary damages. But his remarks were limited to torts arising out of *criminal* acts: and even in this respect his lordship was far from dogmatic or certain. In-

[71] *Ibid.*, at p. 756.
[72] (1969), 3 D.L.R. (3d) 745.
[73] (1969), 69 W.W.R. 462, at pp. 469-470.
[74] (1969), 69 W.W.R. 596, especially at p. 602.
[75] S.C., 1953-54, c. 51, as am.

deed it is noticeable that he raised, without answering, the interesting and important question, which involves a point to which reference will be made in greater detail at a later stage, whether the crime of theft, punishable in the criminal courts, was also punishable by an award of vindictive or exemplary damages against the thief. As will be seen, this problem of double punishment is a thorny one that has caused much difficulty. The situation in British Columbia, therefore, seems far from clear.

In striking contrast there are decisions from Saskatchewan, Ontario and Alberta[75 A] which support the contention of this article that Canadian courts are not restricted by the Devlin approach. *Unrau* v. *Barrowman*[76] is a good illustration from Saskatchewan. The plaintiffs were originally squatters, then leaseholders on land which was subsequently forfeited by the Crown and sold to the defendants, who proceeded to oust the plaintiffs by burning and damaging the plaintiffs' crops, gardens and buildings, despite the plaintiffs' argument that the lease had not been terminated. It was held that this gave rise not only to an action for damages against the defendants, but to a claim for exemplary or punitive damages. Davis J.[77] said that the conduct of the defendants morally justified the granting of such damages. There was a dispute between the parties about ownership, yet, rather than resort to the courts to decide their conflicting claims, the defendants decided to destroy the plaintiffs' livelihood and drive them off as a simpler and cheaper expedient. Their course of conduct was deliberately planned and by any standard of morality was cruel and heartless.[78] It verged on the criminal. On the effect of the *Rookes* case Davis J. took the view that the limitations therein laid down did not represent the law in the Province of Saskatchewan.[79] It is interesting to note in passing that the judge did not think that the House of Lords in the *Rookes* case intended that the categories specified as being those in which exemplary damages could be awarded should in all cases be exclusive but rather that they should be regarded as a useful guide for general application. In the light of what has been said earlier, this would not seem to be a tenable view. But the learned judge was perfectly entitled to refuse to accept that the statement of the law in the *Rookes* case should apply dogmatically to the law in the Province in which he exercised jurisdiction.

Moving on to Ontario, we find that in 1966 the High Court, in a judgment of Mr. Justice Brooke which was affirmed by the Court of Appeal, held that, in the event of an arrogant and high-

[75 A] And Manitoba, *infra*, footnote 80.
[76] (1966), 59 D.L.R. (2d) 168.
[77] *Ibid.*, at pp. 185-186.
[78] *Ibid.*, at p. 188.
[79] *Ibid.*, at p. 187.

handed trespass to land involving a callous disregard for the plaintiffs and their rights, punitive damages could be awarded in order to deter other wrongdoers and to point out that such trespassing would not produce profit for the tortfeasor.[80] In coming to this conclusion the learned High Court Judge followed earlier Ontario authority to which reference has been made previously,[81] thereby indicating, if not expressly at least tacitly, that despite the intervening decision in *Rookes* v. *Barnard* Ontario law was still as it had been before 1964. Subsequently, in a libel action *Gouzenko* v. *Lefolii,*[82] the Ontario Court of Appeal stated categorically that the law of punitive damages as it had been before 1964 was still operative in the Province. At one point the comment is made that it was to be said of the instruction to the jury that in recent times the tendency was to depart from awarding punitive or aggravated damages in libel actions (and the reference to punitive or aggravated damages is interesting), that whatever might be the law in England it was not the law of the Province of Ontario.

In Alberta several cases between 1964 and 1968, including one which went to the Supreme Court of Canada, make it quite clear that punitive damages may be awarded in situations not necessarily coming within the scope of the categories propounded by Lord Devlin in the *Rookes* case. Thus in *Wasson* v. *California Standard Company*[83] in 1964, which involved a trespass to land, the appellate division of the Supreme Court of Alberta held that exemplary damages could be awarded not on the basis of the need to counteract the defendant's profit from his wrong but on the basis that the defendant had wilfully, wantonly and improperly invaded the rights of the plaintiff. As the judgment of Kane J.A. shows, the defendants ignored the representations of the plaintiff's wife and wilfully failed to get the plaintiff's consent to open a seismic line on the plaintiff's property.[84] While Kane J. A. seems to place his decision on the ground that the information to be obtained by this improper act was more valuable to the defendants than the amount of damages payable to the plaintiff on the compensatory principle, the judgments of Smith C.J.A. and Macdonald J.A. seem to suggest that it was the quality of the defendant's act which justified greater damages than would simply compensate the plaintiff in respect of the actual damage suffered by him.[85] Now it could be

[80] *Pretu* v. *Donald Tidey Co. Ltd.*, [1966] 1 O.R. 191. *Cf.* the attitude of Matas J. of the Court of Queen's Bench in Manitoba in *Fraser* v. *Wilson* (1969), 70 W.W.R. 134, a case involving a bailiff using "undisciplined force" and riding roughshod on the sensibilities and personal dignity of a tenant.

[81] *Carr-Harris* v. *Schacter, supra,* footnote 42; *Starkman* v. *Delhi Court. Ltd., supra,* footnote 40.

[82] (1967), 63 D.L.R. (2d) 217.

[83] (1964), 48 W.W.R. 513.

[84] *Ibid.*, at pp. 528-529.

[85] *Ibid.*, at pp. 521, 522.

argued on a reading of the judgments in this case that, despite the assertions just made, the decision could be justified fairly and squarely on the reasoning and authority of Lord Devlin's speech.[86] However, in a later case in the Supreme Court of Canada on appeal from Alberta, *McElroy* v. *Cowper-Smith and Woodman*,[87] Hall J. speaking for the majority, suggested that defamation of a professional man could be visited by an award of substantial damages, including punitive or exemplary damages. Moreover, there is a dictum by Spence J.,[88] dissenting but apparently not on the point in question, to the effect that in Canada the jurisdiction to award punitive damages in tort actions is not so limited as Lord Devlin outlined in *Rookes* v. *Barnard*. Admittedly this is only a dictum and a dictum by dissenting judge. However, the authority would seem to be very persuasive. In the context in which it was made, a discussion of the amount of damages payable in respect of the defamation of a professional man even though the facts did not raise the issue decisively, since the majority of the court took the view that reasonable business men would take no notice of the defendant when he defamed the plaintiff, it would seem that it is a dictum upon which reliance can be placed. This assertion is supported by the judgment of Johnson J.A. in the Court of Appeal in Alberta in the more recent case of *McKinnon* v. *F. W. Woolworth Co. Ltd.*,[89] in which the learned judge relied upon the dictum of Spence J. in order to establish that punitive damages were payable in the case in question even if the situation did not fall within the second of Lord Devlin's three categories of permitted punitive damages. This was a case in which the plaintiff was employed by the defendant company as manager of one of its departments and as the result of an investigation by a private agency he was accused of stealing from the company. In order to force the plaintiff to confess and to pay money to the company directly, and the agency indirectly, threats of gaol, of family disgrace, and other forms of coercion were hurled at him by the employees of the company and the agency. An employee of the latter was convicted of extortion, and as a result an action for conspiracy was brought by the plaintiff against the company, the agency and its employees. In these circumstances the court held that punitive or exemplary damages were properly awarded to the plaintiff. In the language of the learned judge "in cases such as the present, where the conduct of the defendants was so high-handed, abusive and insulting, ex-

[86] See, *e.g.*, *ibid.*, at pp. 521, per Macdonald J.A., 529, per Kane J.A.; *cf.* the reference by Smith C.J.A. to the case being one for aggravated damages: *ibid.*, at p. 521.

[87] (1967), 62 D.L.R. (2d) 65.

[88] *Ibid.*, at p. 71.

[89] *Supra*, footnote 61.

emplary damages may still be awarded in this province".[90]

All of these cases clearly indicate to me that there is a strong trend in Canadian cases after 1964 revealing that the older law on punitive damages is being maintained at the present time. Having seen that the adoption of such a view is a choice that is open to Canadian courts, it remans to be considered whether it is one which they should adopt. This is particularly important in view of the possible difference between the courts of British Columbia and those of other Provinces. At some stage the Supreme Court of Canada will have to determine the law for all the Provinces. While the indications are that the Supreme Court can and will reject Lord Devlin's approach, the question should be investigated whether the Supreme Court ought to do so.

VI

It is useful to consider the criticisms of Lord Devlin's speech voiced in the High Court of Australia in 1967 in the case of *Uren* v. *J. Fairfax & Sons Pty. Ltd.*[91] (which were endorsed in the other case decided about the same time by the High Court, *Australian Consolidated Press Ltd.* v. *Uren*[92]). Both of these actions arose out of libels published in Sydney newspapers in which the plaintiff was accused of various kinds of misconduct in relation to a Russian spy. There was no question at any rate in the *Fairfax* case, about liability for what had been written. The sole question was as to the amount of damages. In the *Fairfax* case the appeal to the High Court was based on the inappropriateness of an award of exemplary damages of the value of £13,000 to the plaintiff by the jury. This raised fairly and squarely for the High Court of Australia the question whether the speech of Lord Devlin in *Rookes* v. *Barnard* should be taken as stating the law for Australia as well as the law for England.

McTiernan J.[93] said that the evidence nearly but did not quite bring the case within Lord Devlin's second category because there was no evidence that the defendant newspaper had made any calculation with regard to the money to be made out of the wrongdoing by comparison with the damages at risk. This involved deciding whether Lord Devlin's second category was exhaustive in relation to defamation actions at any rate. In the view of the learned judge "the test for bringing libel within the second category imposed an undue burden on the plaintiff". That was sufficient in the judge's view to justify an Australian court in rejecting Lord Devlin's category and not restricting the scope of exemplary dam-

[90] *Ibid.*, at p. 290.
[91] *Supra*, footnote 54.
[92] *Supra*, footnote 62.
[93] *Supra*, footnote 54, at p. 28.

ages. Even apart from this, Australian cases before 1964 stated the law differently, and justified the jury in this case in taking the view that there was wanton conduct involving a contumelious disregard for the plaintiff's reputation as a man and a member of Parliament such as to entitle them, in order to express their disapproval or "detestation"[94] to award exemplary damages.[95]

A more detailed criticism of Lord Devlin's speech is to be found in the judgment of Taylor J. While agreeing with Lord Devlin that there was room for some more precise definition of the circumstances in which exemplary damages might be awarded, the learned judge did not feel that the far-reaching reform of Lord Devlin was justified by asserting that punishment was a matter for the criminal law.[96] Exemplary damages were permitted by the common law in order to signify the court's disapproval of the defendant's conduct, not on the basis of the defendant's character but on the basis of the quality of his acts. The attempt to review the classes of cases in which it was appropriate to permit an award of exemplary damages was really not justified in theory. The actual classification of Lord Devlin presented some difficulty for Taylor J. So far as the first category was concerned, that is wrongful acts committed by servants of the government where such acts were oppressive, arbitrary or unconstitutional, his Lordship found difficulty in deciding who was to be a servant of the government for this purpose. At a time when governmental participation in forms of trade or commerce is well known and widespread, it would be difficult and even irrational to differentiate between strictly governmental organizations and quasi-governmental organizations which were in a sense private. Moreover, even admitting such a distinction, what was the point, and where was the line to be drawn, in distinguishing between quasi-governmental organizations and truly private organizations doing exactly the same sort of thing, for instance banking, aerial transport, shipping or insurance.[97] An examination of the eighteenth and nineteenth century cases by the learned judge suggested to him that there was no such distinction between what might be called public or governmental acts and private acts as Lord Devlin seemed to suggest. There was no basis for distinction between a governmental servant and a private individual seeking to make a profit out of his wrongdoing.[98] Moreover, the use of the word "unconstitutional" presented peculiar difficulties especially in a federal system: and it might be pointed out in this context that a remark of this kind

[94] The words come from the judgment of Pratt C.J. in *Wilkes* v. *Wood*, *supra*, footnote 6.
[95] *Supra*, footnote 54, at p. 30.
[96] *Ibid.*, at p. 33.
[97] *Ibid.*, at pp. 33-34.
[98] *Ibid.*, at p. 34-35.

made *à propos* Australia would be very relevant in relation to Canada. Mr. Justice Taylor then moved on to the difficulties occasioned by Lord Devlin's second category, particularly in the case of defamation by a newspaper. These were brought out by the post-1964 cases in England of this kind, to which reference has already been made. It has been seen that the attempt to differentiate cases of exemplary damages within Lord Devlin's principle and cases of aggravated damages leads to tremendous problems of analysis and application, and one may respectfully submit that Taylor J. was justified in adverting to the impracticality of Lord Devlin's second category. The learned judge concluded his criticism by suggesting that the judgment of Lord Devlin in *Rookes* v. *Barnard* did not effectively remove any anomaly from the law. Nor was the attempt to do so justified by the assertion that it was not the function of the civil law to make an award of damages by way of penalty. Indeed as Taylor J. pointed out,[99] Lord Devlin's statement of the two categories conceded that in some cases it might well be the function of the civil law to permit an award of damages by way of punishment. On this basis Taylor J. was quite unable to see why the law should look with less favour on wrongs committed with a profit-making motive than upon wrongs committed with the utmost degree of malice or vindictively, arrogantly or high-handedly with a contumelious disregard for the plaintiff's rights.[100] For this reason, and even apart from the authoritative nature of pre-1964 Australian cases, Taylor J. took the view that the attempted restriction of the categories of exemplary damages by Lord Devlin should not be followed and accepted in Australia.

The judgment of Menzies J. seems to proceed entirely on the basis that the Australian cases before 1964 were not to be upset in order to make Australian law conform to what was stated to be English law in *Rookes* v. *Barnard*. Conceding that a line must be drawn somewhere, said Menzies J., what the House of Lords had done was to draw a different line from that drawn previously by lower courts in England.[101] But he did not think that the decision of the House of Lords should force the High Court of Australia to conclude that the law in Australia was other than what it had for so long been taken to be, namely that where an action was based upon a personal wrong and the defendant had acted arrogantly, mindful only of his own interests and in contumelious disregard of the rights of the plaintiff, damages may be given of a vindicative and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner for his outrageous conduct.[102] There was a useful purpose

[99] *Ibid.*, at p. 37.
[100] *Ibid.*
[101] *Ibid.*, at p. 43.
[102] *Ibid.*, at p. 44.

to be served in vindicating the strength of the law in Australia by protecting people's reputations through curbing the malice and arrogance of some defamatory publications.

The main tenor of the judgment of Windeyer J.[103] was that in relation to actions of defamation Lord Devlin's second category was too narrow: and that the law relating to damages for defamation should not be such as to restrict awards of exemplary damages to cases of profit-making by the defendant. On the contrary, courts had always acknowledged that damages in defamation took account of the excessive nature of the intrusion. The law had taken the view that damages in actions of defamation should bear some relation to the character of the defendant's conduct and the degree of harm inflicted upon the plaintiff. Perhaps for this reason there was some confusion between aggravated and exemplary damages in the pre-1964 cases: and a result of Lord Devlin's judgment was the clarification of the distinction between these two classes of damages. To quote Windeyer J.:[104] "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." The learned judge suspected that, in seeking to preserve the distinction, "we shall sometimes find ourselves dealing more in words than ideas". In other words, despite the attempt by Lord Devlin to differentiate aggravated damages, which were permissible, from exemplary damages, which were not, except in very special circumstances, the reality of the matter was that courts and more particularly juries would go on making the same awards whether they were termed aggravated or exemplary damages. This is precisely the point that has been made earlier in this essay in light of the post-*Rookes* v. *Barnard* cases in England. Mr. Justice Windeyer refused to accept Lord Devlin's statement of the second category as if it were exhaustively definitive. It was not really possible to differentiate between cases of defamation where the defendant calculated profit and loss and other cases of defamation. Despite the attempt made in the English cases after *Rookes* v. *Barnard*, the Australian view was that the sharp distinction suggested by Lord Devlin was unworkable. Mr. Justice Windeyer was prepared to accept the emphasis in *Rookes* v. *Barnard* that exemplary damages must always be based upon something more substantial than a jury's mere disapproval of the conduct of a defendant. But this did not mean treating the decision as excluding exemplary damages from any of those forms of wrongdoing for which in the past the courts have said they might be given.[105]

[103] *Ibid.*, at pp. 45-47.
[104] *Ibid.*, at p. 47. [105] *Ibid.*, at pp. 48-49.

Finally Owen J., after reviewing Lord Devlin's two categories, expressed his inability to agree with the imposition of such narrow limits upon the power of juries to award punitive damages. If the idea was to remove an anomaly from the law, then that should have been done by the legislature rather than the courts. The propositions laid down by Lord Devlin were not in accord with the common law as it had always been understood in Australia, and there was no good reason why such limits should be placed upon the right of a jury to award punitive damages in appropriate cases, bearing in mind that this right was subject always to a considerable measure of control by judges and appellate courts. There was no need to worry about an abuse of this right in view of the way in which courts in England and Australia had in the past regulated and controlled the way juries had exercised that right.[106]

All of these views were reiterated succinctly, and without any further elaboration, by the same members of the High Court in the case of *Australian Consolidated Press* v. *Uren*,[107] and it is now quite clear that, for the reasons discussed above, Australian courts will not accept the view of Lord Devlin. It has already been shown that the Privy Council, when the *Uren* case came before it, accepted that Australian law could be different from English law. It is respectively suggested by the present writer that the reasoning of the members of the High Court of Australia, on the basis of which they rejected Lord Devlin's attempt to revise and reform English law relating to punitive damages, is well founded and basically correct, and that the same reasoning could legitimately lead Canadian courts into refusing to accept Lord Devlin's attempt at revision of the law, but, instead, continuing in effect the principles of the law as they obtained in Canada prior to 1964. Only if some good practical, moral, or other reason can be brought forward against the pre-1964 law could it be argued that Canadian courts should adopt the narrow view of Lord Devlin rather than the broader, more liberal attitude of the High Court of Australia. It must be considered, therefore, whether there are any arguments militating against the acceptance of a broad doctrine of punitive damages.

VII

The rationale and justification of exemplary damages are matters which have caused more agitation and discussion in the United States than in England. Having received the doctrine from the English common law, many jurisdictions in the United States have developed the doctrine of exemplary damages in great detail,[108]

[106] *Ibid.*, at p. 53. [107] *Supra*, footnote 62.

[108] See 25 C.J.S. Damages, §§ 117-127; 22 Am. Jur. 2d., Damages, §§ 236-268.

even though some States have rejected the doctrine of exemplary damages by judicial decisions,[109] while others have restricted the scope of such damages by statute.[110] Where they are permitted, different reasons have been given at various times for allowing such damages: (1) compensation for the plaintiff; (2) vindication by society; and (3) punishment of the defendant and deterrence of others.[111] It would seem that the first two reasons are not widely relied upon as justifying awards of punitive or exemplary damages. To quote from one learned author:[112] "Those who have canonized the doctrine of punitive-exemplary damages as dogma —and they are in the great majority—do so in great part because it has the weight of authority. They also contend that the quantum and severity of admonition or deterrence inherent in compensatory damages are insufficient to assure a stable, secure and law-abiding society. Damages must be supplemented when the defendant's conduct is malicious or wanton. To buttress their position, the supporters of the doctrine cite those situations where the actual damages may be small but the need for admonition great, as when a man wantonly shoots into a crowd but actually injures no one. A prophylactic end is also served in those cases where one may find it economically advantageous to commit a wrong even though obliged to compensate the innocent plaintiff for the damage done. As a subsidiary ground, it is urged that since an injured plaintiff may not recover all his legal expenses a 'malicious' wrongdoer should not be permitted with impunity to impose such a burden on an innocent plaintiff. It is also urged that a plaintiff might not bring suit unless he could claim punitive-exemplary damages as well. However, it is principally for the punitive and deterrent effects that the doctrine is supported as a sound, serviceable legal tool." While not all authorities in the United States would support the reasons other than punishment and deterrence which have been suggested as the justification for awards of punitive damages, the majority of the cases support the punishment-deterrence theory, and writers on the subject seem to stress this as the important explanation of how and why American courts have accepted and applied the English doctrine. Indeed some writers have considered the validity of awards of exemplary damages in situations other than the original common law ones largely on the basis that the punishment-deterrence theory of punitive damages justifies their suggested extensions.[113] Once one accepts the earlier discussion of the difference between aggravated and punitive

[109] Louisiana, Massachusetts, Nebraska and Washington.
[110] *E.g.* Connecticut, Michigan and New Hampshire.
[111] Comment (1960), 46 Va. L. Rev. 1036, at p. 1039.
[112] Brandwen, *op. cit.*, footnote 67, at pp. 464-465. I have omitted the footnotes and the references therein.
[113] Brandwen, *op. cit., ibid.* Comment, *supra*, footnote 111.

damages and accepts also that the need to compensate the plaintiff even beyond the actual measure of his loss, in order to bring home the seriousness of the defendant's conduct, may be satisfied by awards of aggravated rather than punitive or exemplary damages, then it would seem reasonable to agree with the suggestion that the basic purpose of punitive or exemplary damages is to punish the defendant, rather than compensate the plaintiff, and by so doing, perhaps, to deter him and others from performance of similar conduct. As Professor Morris wrote in 1931:[114] "There can be an admonitory function in the law of torts and . . . there should be such a function if it will work well." That was the underlying assumption of his discussion of punitive damages in tort cases, an assumption that was neither concocted from his imagination nor concerned only a future, hypothetical law. It had been recognized in action and words by judges and juries for centuries. And he goes on to say:[115] "The punitive damage doctrine is evidence of an age-old feeling that the admonitory function is sometimes entitled to more emphasis than it receives when judgments in tort actions are limited to compensation." All this raises the question whether punishment and deterrence are legitimately among the objectives of the law of torts. There is another question apart from that theoretical one: for it has been disputed whether, granted that punitive or exemplary damages are designed to deter atrocious conduct, such damages do have that effect. The attack upon punitive damages is two pronged. On the one hand there is the practical criticism that the doctrine does not achieve its alleged theoretical basis; on the other there is the criticism that the whole rationale is wrong and misguided.

Very strong criticism of the practical effect of punitive damages from the point of view of deterrents was expressed by Brandwen in 1962.[116] There would seem to be no evidence that awards of such damages do have any practical effect of this kind. Indeed in 1931 Professor Morris[117] tried to suggest that there should be some investigation of the practical utility of awards of punitive damages, in order to assess the limits and scope of the utility of this doctrine. His point of view was that only on the basis of utilitarian justification could one assess whether or not the doctrine should be retained in the law. To make such an assessment, however, would seem to be virtually impossible. As Brandwen says:[118] "To demonstrate statistically the efficacy of punitive exemplary damages as a deterrent may be as difficult as to demonstrate statistically the efficacy of prayer." What might be said is that the

[114] *Op. cit.*, footnote 67, at p. 1205.
[115] *Ibid.*, at p. 1206.
[116] *Op. cit., supra*, footnote 67, at pp. 465-467.
[117] *Op. cit., ibid.*, at pp. 1206-1207.
[118] *Op. cit., ibid.*, at p. 465, note 32.

continuance of the commission of torts, particularly those torts in respect of which English, Canadian, and, it would seem, some American courts have permitted awards of punitive damages, suggests that the object of deterrence by making such awards has not been achieved. In relation to capital punishment it has been seen on more than one occasion that the penalty of death does not really operate as an effective deterrent against the commission of murder.[119] Is the possibility of deterrence by large awards of damages any more realistic?

This comparison of tort and criminal law is very relevant in the present context in view of the argument that the rationale of punitive damages is the criminal, or a quasi-criminal doctrine of punishment. If deterrence is rejected as a serious candidate for explanation of the granting of punitive damages, that leaves only punishment as a suggested justification: but this brings into sharp focus the whole question of the proper function of the law of torts, in particular, whether that branch of the law should fulfil a punitive function. This has been disputed by several American writers; and the argument against a punitive function for the law of torts has been developed at length in various articles. It is summarised in the following passage:[120] "Punishment should have little place in civil actions which are designed primarily to make whole the injured party . . . [I]n almost all cases in which such damages may be awarded the appropriate criminal action could be taken with more desirable results. Moreover, punitive damages are assessed in civil trials in which the defendant is deprived of the guarantees present in a criminal proceedings. And punitive awards may be imposed in addition to criminal penalties. For all practical purposes this subjects the defendant to double jeopardy for the same offence. Finally, there is no justification for plaintiff's enrichment by an appropriation of damages imposed on the defendant because of 'public policy and not on the ground that the plaintiff has any right to the money'." This passage contains the chief criticisms of the punishment rationale. These are (1) that damages are for compensation; (2) that sufficiently serious conduct should be dealt with by the criminal law; (3) that to treat a tort as a crime is to use the civil process where the criminal process is more appropriate; (4) that a person should not be punished twice for the same wrong; and (5) that plaintiffs should not be given a bonus for the harm done to them. Are these arguments valid? If they are, then, on the basis of the reasoning set out above, the whole foundation for awards of punitive damages would seem to disappear. On the other hand, if they are not valid, the punishment theory of punitive damages remains unaffected and is sufficient

[119] *Cf.* Brandwen, *op. cit., ibid.*, at p. 465, note 33.
[120] Note, *op. cit., ibid.*, at p. 612, footnotes omitted.

to substantiate the legitimacy of the doctrine in any modern legal system. It has already been seen that Lord Devlin in *Rookes* v. *Barnard* took the view that there was no justification for the doctrine largely on the basis of the criticisms which have been enunciated above, but that it was not entirely possible to eradicate the doctrine from the common law. With all respect, this is hardly a logical argument. If the doctrine is unsoundly based and the House of Lords were free to do something about it, as Lord Devlin suggested that they were, then surely the doctrine should have been abolished. Acceptance of the doctrine, even if in the attenuated form stated by Lord Devlin, would appear to denote recognition of its validity, and, at the same time, to be a repudiation of the arguments which are against its continuance in the law. Since, as already argued, it is open to Canadian courts, and particularly the Supreme Court of Canada, to decide whether or not to accept the doctrine, it becomes very relevant to consider the arguments summarised above against its validity.

The distinction between compensation and punishment has been criticised. Admittedly in English cases in modern times the compensatory function of the law of torts has been emphasized,[121] yet in some of these, which were concerned with the quantum of damages to be awarded to a plaintiff who was rendered virtually a vegetable as the result of the defendant's negligence, there has been serious doubt as to the basis upon which damages should be calculated and assessed.[122] Indeed the problem of remoteness of damages, particularly in relation to liability for negligence, which has received much attention in recent years in England and elsewhere, may be said to be implicated with the fundamental issue of the basis and function of the law of torts. Despite judicial and other assertions to the effect that compensation is the true ideology of tort law, it may be questioned whether compensation adequately represents the fundamental purpose of this part of law. Another possible theory of liability in tort is that the function of the law is to lay down certain standards of conduct which the community is expected to observe since without the observance of such standards civilized life could not be carried on satisfactorily. This might be termed the social purpose of the law of torts, and in some respects, for instance where strict or vicarious liability is concerned, it may be said that this social purpose is well to the fore. At the same time it might be argued that there is a moral purpose in the law of torts, in that the observance of standards is not only required to enable life to be lived reasonably happily but also in

[121] Fridman, Modern Tort Cases (1968), pp. 406-416: McGregor, Compensation Versus Punishment in Damage Awards (1965), 28 Mod. L. Rev. 629.

[122] See, *e.g.*, *H. West & Son Ltd.* v. *Shepherd*, [1964] A.C. 326, *cf.* the Australian case of *Skelton* v. *Collins*, [1966] Argus L.R. 449.

order to raise the general standard of behaviour on the part of the community. If these purposes of the law of torts are accepted, then the notion of compensation must be regarded as very secondary in importance. Moreover, the function of the law of torts then draws closer to the function of the criminal law. Once that is admitted, the distinction between compensatory and punitive damages becomes less and less important and less and less relevant. Instead, awards of punitive damages may be regarded as fulfilling the purpose and function of the law of torts, in that such awards may well indicate the displeasure of the law that its standards are not being fulfilled and may assist the law in the imposition of those standards. What is more, if damages are awarded on the basis of compensation this may not adequately represent the true response of the law to the quality of the defendant's conduct. Awards of punitive damages, on the other hand, may promote one of the purposes of the law of tort, by allowing flexibility for admonition, so that the punishment may be roughly adjusted to the offender.[123]

This leads to a second point. If the conduct of the defendant is regarded as sufficiently grave and serious by the law, should it not be treated as criminal conduct and dealt with by the criminal law rather than by the law of torts? Indeed some of the situations in which at common law punitive damages have been awarded do involve criminal acts, for which the law creates a penalty. Should not the punishment of these acts be left to the criminal courts rather than the law of torts? There is a strong measure of justice about this argument, but it may lead to the non-involvement of the criminal law in such instances if the injured party does not wish to invoke the criminal process and if there is no other way in which such process may be invoked, with the result that the defendant may never be punished adequately for the serious conduct of which he is guilty. The desire for vindication, revenge, or punishment may move some parties, but others, perhaps the majority, may not wish to become involved in legal proceedings unless they feel that there is a chance that they will be suitably rewarded by the courts by an award of damages. At a time when, possibly, the sentences which are passed by criminal courts upon certain kinds of offenders may not meet with the entire approval of the community, it could be said to be quite reasonable on the part of an injured party for him to involve the process of the law of torts for punishment purposes rather than go to the criminal courts, where it may well be that what he thinks is a suitable punishment may not be regarded as such by the court. In this respect therefore the law of torts, by providing for an award of exemplary damages, may supplement and assist the criminal law. It is accepted

[123] *Cf.* Note, *op. cit.*, footnote 4, at pp. 522-524.

that, in civil cases, reference may be made to the plaintiff's own conduct in order to assess his damages, not only where he has been guilty of contributory negligence, but also where he has so provoked the defendant as to help bring about the ultimate wrongdoing against himself. Modern cases in England[124] and Australia[125] support and exemplify the statement by Macdonald J.A. in the 1911 British Columbia case of *Slater* v. *Watts*,[126] to which earlier reference has been made, on the subject of the jury's taking into account evidence of the aggravation of the plaintiff's injury by the defendant's conduct and the mitigation of his loss by reference to his own original misdoing. Several Canadian cases, which have been cited earlier, advert to the presence or absence of provocation on the part of the plaintiff as being relevant to whether an award of punitive damages should be made. All this, it is suggested, is a very justifiable and reasonable attitude for the courts to adopt, and it supports the argument that not only the intrinsic wrongfulness of the defendant's conduct must be taken into account, but also the gravity of his wrongdoing, in the sense of the state of mind or attitude of the defendant when committing the wrong in issue in any given case.[127] To say this is not to say that such an attitude should lead to the invocation of the criminal process in any such case: simply that even in the law of torts some distinction should be made between outrageously wrongful conduct, and conduct which is undoubtedly tortious, and therefore a basis for compensation, but not necessarily as heinous as in other instances.

But this raises the next criticism, which is that such an attitude leads to the use of the law of tort, and the civil process, to perform the proper function of the criminal law and the criminal process, which, it is argued, is an illegitimate use of the law of torts and deprives an alleged wrongdoer of the protection normally available in criminal trials.[128] This would include such matters as the presumption of innocence, the heavier burden of proof which prevails in criminal trials and trial by jury (where this has become the exception rather than the rule in civil trials—in England and Canada, though not the United States). These are serious charges and must be answered, if the doctrine of exemplary damages is to be justified and maintained.

---

[124] *Lane* v. *Holloway*, [1967] 3 All E.R. 129.

[125] *Fontin* v. *Katapodis* (1962), 108 C.L.R. 177.

[126] *Supra*, footnote 29, at p. 43.

[127] The comparative wealth of the defendant and the plaintiff may also be a relevant factor, in that their respective positions may reflect upon the seriousness of the defendant's tort, both in itself and in relation to its effect upon the plaintiff. This is connected in a way with the discussion of Lord Devlin's first category. Differentials of wealth and position are part of the notion of arbitrary or oppressive conduct which makes the restriction of that category to the conduct of governmental servants too narrow.

[128] *Cf.* Lord Devlin in *Rookes* v. *Barnard*, *supra*, footnote 1, at p. 1230.

The answer which may be given is that, although the torts in respect of which punitive damages may be awarded sometimes, but not necessarily always, involve the commission of conduct which is criminal, this does not mean that a court is to treat the defendant as being a criminal. The defendant is not on trial for the purposes of criminal punishment. He is on trial in respect of the extent of his liability to the plaintiff. The stigma of civil liability is not the same as the stigma of criminal guilt. It may well be that the punishment of a criminal is the payment of a fine, which is the equivalent of the payment of damages, including possibly exemplary or punitive damages. But there is a considerable social and moral difference between guilt of tort and guilt of crime, as well as a distinction of psychological relevance to the defendant and to others with whom he comes into contract. For example, an employer might hesitate before employing a convicted criminal, but commission of torts is not necessarily a bar to gaining employment, unless possibly the tort in question is one which affects the party's ability to perform the task which the employer has in mind. Once it is accepted that there may be conduct of a tortious nature which is sufficiently serious in its effects or surrounding circumstances to merit some extra penalty over and above compensatory damages to the plaintiff, without such conduct necessarily involving criminal liability, the confusion which is raised by the criticism now under consideration may be avoided. The law of torts will not be performing a function of the criminal law: it will be performing its own function, which is to grant a remedy to a plaintiff that is commensurate with the character and gravity of the defendant's wrongdoing and its effects.

This point is relevant also in relation to the further criticism that to "punish" the defendant by an award of punitive damages against him may involve double punishment of the defendant or putting him in jeopardy twice, which is against the basic notions of the common law. Indeed it has been pointed out that the four States of the United States of America that reject exemplary damages base their decisions largely on this ground of double jeopardy.[129] Yet this criticism, it is suggested, is unjustified. In the first place, if the argument is that the defendant is subjected to a two-fold jeopardy, the answer may be given that really two quite distinct legal proceedings of different nature and effects are involved. One of these proceedings is conducted by a private party in a civil suit to recover damages which are not paid to the State and do not involve the possibility of any imprisonment (except in the remote circumstances that the defendant refuses to pay and is therefore in contempt of court). The other proceedings are of a criminal nature in which the prosecutor may well be the State

[129] Note, *op. cit.*, footnote 4, at p. 524, note 59.

rather than a private individual and the penalty of an entirely different character. Moreover the distinctions between the civil and the criminal process are such that it could be possible for a person to be liable civilly but not criminally. The gravamen of the criticism now under consideration is that where a defendant has been subjected to criminal liability and is then sued for damages, to award punitive damages against him, even if his conduct is of a sufficiently serious nature, would be to punish him excessively for the same wrongdoing.[130] Again this possibility in theory has serious consequences. In fact, an examination of the cases, particularly those in Canada which have been looked at earlier, reveals that courts do take into account whether or not the defendant has been subjected to criminal punishment in considering a possible award of exemplary damages where the situation is one that might normally substantiate such an award. Granted that judges are rational creatures and purport to expound and apply the law on the basis of reason and justice, there would seem to be little danger that a court would award any, or any excessive exemplary damages unless the circumstances were so grave that criminal punishment alone would not suffice for the purposes of evidencing the law's displeasure at the defendant's conduct. This is hardly likely to occur. Consequently it may be said with some confidence that, wherever a defendant has been punished criminally for a wrong which also amounts to a tort, there is little likelihood that a civil court would award exemplary damages against him. Indeed the argument in favour of permitting awards of punitive damages which has been developed above is that such awards do fill a gap that may be seen as existing between situations where the criminal law will be invoked and will serve the necessary purpose and those where a party is not likely to invoke the criminal process and there is no one else who may do so. Far from involving the possibility of double punishment or double jeopardy, the doctrine of punitive damages may supply an answer to the situation that can arise where a set of circumstances is of such a character that the incident falls between two stools, namely not being serious enough to merit criminal proceedings and not involving sufficient damage, for compensatory purposes, to merit civil proceedings. On the whole, the double punishment or double jeopardy argument may be rejected as being largely irrelevant.

The fifth and final main argument that has been raised against punitive damages is the "windfall" argument, which is to the effect that such awards provide a bonus to the plaintiff beyond his normal damages and there is no justification for giving more to some plaintiffs than to others. If it is desired to punish a defendant over and above an award of compensatory damages, then such damages

[130] *Ibid.*, at p. 524.

should go to the state as a fine and not to the plaintiff as a windfall. In the words of one author:[131] "It is questionable whether the public interest requires further awards", that is awards to the plaintiff. But exemplary damages also serve to compensate, in the sense of avenge, the plaintiff.[132] And such awards are only made on the ground that the defendant's conduct is sufficiently serious to merit them. Hence the bonus argument would also seem to be irrelevant. The plaintiff in such an instance gets more than the plaintiff who only gets compensatory damages because he deserves more. The suffering he has undergone, according to the rationale now suggested for punitive damages, entitles him to a little bit extra. Furthermore, according to the view which has been developed earlier, if punitive damages went to the State in the form of a fine rather than to the plaintiff, one basis for permitting such awards would disappear, in the sense that there would be no encouragement to plaintiffs to bring the relevant action.

VIII

Most, if not all of the above criticisms are contained in the writings of American commentators on the subject of punitive damages. In the context of American experience and the American legal scene they are pertinent and telling. It is not for me to comment on this, except to the extent to which rejection of such criticisms, in so far as it is obligatory for a discussion on punitive damages in Canadian tort law, necessarily involves some comment upon American views. A different question is raised by all this, namely, how far are American ideas, and particularly American criticism of the doctrine of exemplary damages, relevant in the context of the law of torts in Canada. Some academic lawyers in this country may well be moved—perhaps tempted would be a more appropriate word—to look across the border for inspiration and authority when it comes to the development of the law of tort. It has been argued in this article that the influence of English decisions and the thoughts of English judges is on the wane, and rightly so. That must not be taken to indicate that if a vacuum is thereby left it should be filled by an inrush of American influence. Such a consequence might be just as bad for Canadian legal development, if not worse. For various reasons the situation in Canada is not on all fours with that of the United States. Nor does it entirely resemble that which obtains in England. If anything, however, it is suggested that it is closer to the latter, historically, socially and technically. On that premise an example should be sought for in the English, not the American legal scene, without necessarily involving slavish acceptance of everything English.

[131] *Brandwen, op. cit.*, footnote 67, at p. 471.
[132] Note, *op. cit.*, footnote 4, at p. 525.

The subject of punitive damages provides an excellent opportunity for Canadian courts to strike out on their own, in opposition to English development, without at the same time jettisoning all that has been previously derived from English decisions. One may even hope for a fresh resurgence of the common law's activity in this important sphere of the law of tort. In this respect it may well be necessary for Canadian courts to consider not only the validity of the doctrine of punitive damages but also the scope or extent of that doctrine's operation. It has been urged that Canadian courts should not restrict themselves in the application of the doctrine of punitive damages in the way in which English courts are now restricted by virtue of the judgment of the House of Lords in *Rookes* v. *Barnard*. At its narrowest, this argument means that where Canadian courts would have granted punitive damages before 1964 they should still do so today in appropriate instances, even though the case might not come within Lord Devlin's three categories. An even wider view may be taken in that it could be argued that Canadian courts should extend the scope of the doctrine to instances not hitherto comprehended within the earlier law. Just how far the law should go is clearly a matter for debate. In the final analysis it may well be thought that the law has gone far enough, and that there is no need to increase the breadth of the application of the doctrine even on the basis of the arguments in favour of its continued existence which have been considered in detail in this article. On the other hand it might be thought, as it has been in the United States, that there is scope for the application of the doctrine of punitive damages in other areas of the law, for instance, certain situations involving accidents on the highway or incidents arising out of labour relations. Perhaps this is going too far. Yet justification for such extensions could be found in some of the arguments which have been used earlier to support the rationale of punitive damages. For this result I would not press at this stage. All that is sought here is an acceptance of the validity and viability of the doctrine of punitive damages and its retention in its old form in the modern law of torts in this country.