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TO PUNISH OR NOT TO PUNISH: A COMPARATIVE ANALYSIS OF THE LEGISLATIVE TREATMENT OF EXEMPLARY DAMAGES IN COMMONWEALTH JURISDICTIONS

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I Introduction

Exemplary damages are an exceptional and controversial civil remedy.[1] Though private litigation generally falls under the radar, exemplary damages often draw public interest due to the highly charged nature of the cases that concern this award.[2] This paper outlines the different legislative approaches that the Commonwealth jurisdictions of New Zealand, Australia, Canada and the United Kingdom take to exemplary damages in the areas of personal injury, property, intellectual property, trade and commerce, media, employment and miscellaneous areas. This paper does not address the availability of exemplary damages in procedural legislation. The research process involved finding legislative references to exemplary damages in these jurisdictions and categorising these references. Relevant parliamentary materials and commentary have also been included. This paper concludes that exemplary damages should be awarded in New Zealand and that New Zealand's current generous approach towards awarding exemplary damages in legislation is appropriate.

II Overview of Exemplary Damages

Exemplary damages, sometimes called punitive damages, are damages that courts may award against defendants for egregious conduct towards the plaintiff. [3] The plaintiff must establish a successful cause of action before courts will make this award; if a statute does not condone the award, a civil wrong, which will more often than not be an intentional tort, must be proved.[4]

Exemplary damages are distinguishable from compensatory damages, which compensate plaintiffs for harms incurred, and aggravated damages, which are a subset of compensatory damages.[5] Exemplary damages are also different to civil pecuniary penalties, which are statutory monetary penalties enforced by the civil law and are generally referred to in statutes as penalties.[6] In New Zealand, exemplary damages may be additional to compensatory

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[1] Bevan Marten "Exemplary Damages" Sir Peter Blanchard (ed) *Civil Remedies in New Zealand* (Thomson Reuters, [12.3].
[2] Stephen Todd "Exemplary Damages" (1998) 18 NZULR 145 at 146.
[3] Bevan Marten, above n 1 at [12.1].
[4] Ibid.
[5] Bevan Marten , above n1, at [12.1].
[6] Law Commission *Civil Pecuniary Penalties* (NZLC 1P33, 2012) at 8.

damages; however, exemplary damages may also be awarded to punish the defendant where there is no compensatory award.[7]

In New Zealand, the leading authority of *Couch v Attorney-General (No 2)* named punishment as the main purpose of exemplary damages.[8] Punishment is hoped to have the subsidiary effect of individual and general deterrence by discouraging both the particular defendant and other potential offenders from committing the same crime.[9] Because punishment is the primary focus, courts focus on the defendant's behaviour in determining whether exemplary damages should be awarded and the amount.[10]

However, not all Commonwealth jurisdictions list punishment as the primary purpose of exemplary damages. The United Kingdom courts are split between the purposes of punishment and deterrence.[11] Conversely, Australian and Canadian courts view deterrence as the key object of exemplary damages.[12] The problems with deterrence as a primary purpose include that it may result in large, arbitrary awards against defendants as the amount of damages required to achieve deterrence are evasive.[13] Moreover, its effectiveness is questionable.[14]

Courts, not legislatures, have led the evolution of exemplary damages in Commonwealth jurisdictions since their introduction into the common law in the eighteenth century.[15] However, in New Zealand, successive Parliaments have readily incorporated the award into legislation and two New Zealand Court of Appeal cases have affirmed that only Parliament could abolish exemplary damages.[16] Canadian legislatures also incorporate exemplary damages into legislation often. Conversely, over time Australian legislatures have reduced the instances in which exemplary damages may be awarded.[17] Similarly, United Kingdom

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[7] Bevan Marten, above n 1, at [12.1].
[8] *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149 at [238].
[9] Ibid, at [94-[95] and [238].
[10] Ibid, at [115] per Tipping J at [239] per McGrath J.
[11] See for example *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122 at [51]. Nicholls; *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395 at [26] per Lord Bingham.
[12] *Lamb v Cotogno* (1987) 164 CLR 1 (HCA); *Whiten v Pilot Insurance Co* (2002) 209 DLR (4th) 257 (SCC) at [68]; *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129 (SCC) at 177-178.
[13] A Beever "The Structure of Aggravated and Exemplary Damages" (2003) 23 OJLS 87 at 101-102.
[14] Stephen Todd , above n 2, at 146.
[15] Bevan Marten , above n 1, at [12.2].
[16] *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA) at 107 per Cooke J; *Taylor v Beere* [1982] 1 NZLR 81 (CA) per Richardson J.
[17] *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) 56 NSWLR 298 at [296].

statutes seldom reference exemplary damages.[18] The following discussion will expand upon these different legislative approaches.

III Arguments For and Against Exemplary Damages

Exemplary damages are a controversial award and courts generally regard the award as an oddity of the common law.[19] Arguments in favour of the award include that the civil law is an appropriate vehicle to punish defendants with as it already concerns matters other than compensation.[20] Moreover, awarding only nominal or compensatory damages may be an inadequate response to some wrongs, so exemplary damages can be a useful tool to fill this gap.[21]

The award may also have a "therapeutic and vindicatory" role for victims: in contrast to a criminal action, in a civil action it is the victim, not the state, that initiates a trial and the penalty is often damages payable to the victim, as opposed to a prison sentence or fine.[22] However, this victim focus is inconsistent with the focus of exemplary damages on the offender's wrongdoing.[23]

Exemplary damages arguably also support the criminal law's operation.[24] This is because the award offers punishment where criminal proceedings are improbable and victims cannot pursue compensatory damages due to insufficient loss[25] or a statutory bar.[26] Further, exemplary damages may denounce behaviour contrary to the public interest[27] and constrain wealthy defendants from meddling with a plaintiff simply because they can afford to pay compensation if the plaintiff incurs loss.[28]

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[18] See H McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at [11-030]-[11-032].
[19] *Rookes v Barnard* [1964] AC 1129 (HL), at 1221 and 1226.
[20] Stephen Todd, above n 2, at 148. Todd notes that the civil law is concerned with matters other than compensation in the area of torts which are actionable per se, irrespective of damage or harm.
[21] Ibid.
[22] A Beever, above n 13, at 98.
[23] Ibid.
[24] Stephen Todd, above n 2, at 149.
[25] Ibid.
[26] Accident Compensation Act 2001, s 317(1).
[27] Stephen Todd, above n 2, at 149.
[28] Stephen Todd, above n 2, at 149.

The main argument against exemplary damages is that the private law is structurally unsuited to punishment.[29] To be liable under the civil law, the defendant must breach a duty owed to the plaintiff.[30] However, exemplary damages instead arise from a "wrong to the public at large".[31] Similarly, some argue punishment should be confined to the criminal law as the criminal process has evidential and procedural safeguards for defendants which the civil law lacks.[32] Moreover, an award of exemplary damages may result in double jeopardy if another punishment is imposed for the same conduct, as occurs in some of the examples below.[33] Moreover, plaintiffs may receive a windfall,[34] especially where exemplary damages are awarded to deter offenders: as the plaintiff has no entitlement to the damages, the court arguably takes from one person and gives to another person that which does not belong to them.[35] The award is further criticised for the quantum of damages often being unclear, indefinite and high.[36]

In response, Todd counters that civil safeguards are sufficient for the award as the defendant has not been charged with a crime; there is no double jeopardy concern as criminal punishment prevents additional civil penalties; and, the amount of the awards can be controlled with more stringent controls.[37] The above arguments often form the basis for legislatures to either include or exclude the award of exemplary damages in legislation.

IV Exemplary Damages in Statute

Given the controversial nature of exemplary damages, it is valuable to compare how different common law jurisdictions have approached the issue of exemplary damages in legislation.[38] The statutes in which these different jurisdictions examples of where these different jurisdictions have either incorporated or excluded this award are difficult to group; however, these examples have been sorted into the areas of personal injury, property, intellectual property, trade and commerce, media, employment and other miscellaneous areas.

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[29] A Beever, above n 13, at 105.
[30] Ibid.
[31] Ibid, at 106-107.
[32] Stephen Todd, above n 2, at 150; *Daniels v Thompson* [1998] 3 NZLR 22 (CA).
[33] Ibid.
[34] Stephen Todd, above n 2, 145 at 150.
[35] "The Theory of Exemplary Damages" 7 CLR Vol. 7 122, at 122.
[36] Stephen Todd, above n 2, at 150.
[37] Ibid.
[38] Bevan Marten, above n 1at [12.3].

A Personal Injury

Both New Zealand and Australian legislatures expressly deal with the role of exemplary damages in personal injury cases. However, while the New Zealand Parliament has allowed the award in most personal injury cases,[39] the Australian legislature prevents awards of exemplary damages for personal injury cases in certain trade contexts.[40] Conversely, Canada and the United Kingdom have not addressed the issue of exemplary damages in personal injury legislation.

In New Zealand, the Accident Compensation Act 2001 allows an award of exemplary damages for personal injury.[41] This Act creates a comprehensive no-fault compensation scheme for personal injury by accident.[42] As the scheme itself is intended to provide compensation,[43] the Act bars any other proceedings for compensatory damages for personal injury as defined in the Act.[44] However, the Accident Compensation Act expressly states that this bar does not prevent a person from claiming exemplary damages for personal injury that is covered by the Act or former Acts.[45] Moreover, exemplary damages may be awarded for conduct for which the defendant has already been charged with an offence.[46] This means that, like the Residential Tenancies Act 1986,[47] the Accident Compensation Act allows for double punishment.

Section 319 is based on section 396 of the repealed Accident Insurance Act 1998. Though New Zealand passed its first accident compensation statute in 1972,[48] which was amended in 1982,[49] the 1998 Act was the first accident compensation statute to expressly allow an award of exemplary damages.[50] Moreover, the 1998 Act, like the current Accident Compensation Act, was intentionally vague as to the circumstances in which exemplary damages can be

[39] Accident Compensation Act 2001, s 319.
[40] Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004, s 87ZB.
[41] Accident Compensation Act 2001, s 319.
[42] Ibid, s 3.
[43] Royal Commission to Inquire into and Report upon Workers Compensation *Report of the Royal Commission of Inquiry* (R. E. Owen, 1967) at 107.
[44] Accident Compensation Act 2001, s 317(1).
[45] Ibid, s 319.
[46] Ibid, s 319(2).
[47] Residential Tenancies Act 1986, s 109(4A).
[48] Accident Compensation Act 1972.
[49] Accident Compensation Act 1982.
[50] There is no mention of exemplary damages in the Accident Compensation Act 1972 or the Accident Compensation Act 1982.

awarded.[51] This shows the large amount of deference that Parliament offers the courts to award exemplary damages in the personal injury context.

Prior to this clarification of whether exemplary damages could be awarded in personal injury cases, it was hotly debated whether the Accident Compensation Act 1972 prevented a claim for exemplary damages: though courts had ruled that these damages were available where there was no physical injury,[52] the position where physical injury was present was unclear.[53] The Court of Appeal in *Donselaar v Donselaar* later clarified that the statutory bar only applies to damages that compensate the injury and therefore arise out of the injury, whereas exemplary damages are available for personal injury as these damages do not arise out of the injury.[54] The Supreme Court in *Couch v Attorney-General (No 2)* upheld *Donselaar* in regard to the 2001 Act, finalising the position.[55]

Tipping J in *Couch* interpreted Parliament's omission to overturn *Donselaar* in the 2001 Act as legislative approval that "the policy of the accident compensation legislation is not undermined by permitting exemplary damages to be claimed in circumstances defined by the courts".[56] The position is consistent with the main purpose of exemplary damages in New Zealand being punishment: an award of exemplary damages does not conflict with the statutory bar on compensatory damages.[57]

The Health and Disability Commissioner Act 1994 also provides for an award of exemplary damages. This Act strives to "promote and protect the rights of health consumers and disability services consumers, and, to that end, to facilitate the fair, simple, speedy, and efficient resolution of complaints relating to infringements of those rights".[58] Section 57(1)(d) of the Act allows an award of damages against the defendant for "any action of the defendant that was in flagrant disregard of the rights of the aggrieved person". Section 52(2) of the Act clarifies that these damages are punitive damages.[59]

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[51] Accident Insurance Bill: Departmental Report at 121.
[52] *Lucas v Auckland Regional Authority* Supreme Court Auckland A 1003/79, 24 March 1980.
[53] K I Bullock "Exemplary Damages and the Accident Compensation Act" 10 NZLJ 215 at 217.
[54] *Donselaar v Donselaar,* above n 16, at 109 per Richardson J, at 115 per Somers J.
[55] *Couch v Attorney-General (No 2)*, above n 8.
[56] Ibid, at [87].
[57] *Couch v Attorney-General (No 2),* above n 8, at [238].
[58] Health and Disability Commissioner Act 1994, s 6.
[59] Punitive damages are the same as exemplary damages. See Bevan Marten , above n 1, at [12.1].

Exemplary damages awards under this Act have included an award of $5,000 for inappropriate touching[60] and an award of $6,500 for the exposure of patients' private body parts.[61] Higher awards have been made against medical practitioners who form sexual relationships with patients[62] and even greater awards have been made in physical and sexual abuse cases.[63] This Act shows that the New Zealand Parliament considers that though this exploitative conduct is short of criminal behaviour, it still deserves punishment in the form of exemplary damages. This Act therefore provides an example of how exemplary damages may fill perceived gaps in the law.

Conversely, in Australia, section 87ZB of the Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004[64] amends the Trade Practices Act 1974 (TPA)[65] to provide that:

> (1) A court must not, in a proceeding to which this Part applies, award exemplary damages or aggravated damages in respect of death or personal injury.
>
> (2) This section does not affect whether a court has power to award exemplary damages or aggravated damages:
>
> (a) otherwise than in respect of death or personal injury; or
>
> (b) in a proceeding other than a proceeding to which this Part applies.

The amendment legislation states the aforementioned Part VIB applies to specified proceedings under the original TPA where the plaintiff is seeking an award of personal injury damages and where the proceedings do not concern claims in regard to the death of or personal injury to a person due to smoking.[66] These specified proceedings are: Part IVA (unconscionable conduct), Division 1A (product safety and product information) or 2A

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[60] *Director of Proceedings v DG* Human Rights Review Tribunal HRRT23/04, 25 February 2005.
[61] *Director of Proceedings v A* Human Rights Review Tribunal HRRT15/02, 22 November 2004.
[62] *Director of Health and Disability Proceedings v Peters* Human Rights Review Tribunal HRRT34/04, 25 September 2006 ($8000); *Director of Proceedings v Mogridge* Human Rights Review Tribunal HRRT27/07, 21 December 2007 ($20,000, $10,000 and $8000); *Director of Proceedings v O'Malley* Human Rights Review Tribunal HRRT81/07, 2 February 2009 ($10,000).
[63] *G v G* (1996) 15 FRNZ 22 (HC) ($85,000); *M v L* [1998] 3 NZLR 104 (HC) ($100,000); *A v M* [1991] 3 NZLR 228 (HC), also reported as *E v M* (1991) 7 CRNZ 146 (HC) ($20,000); *AB v CD* HC Timaru CP53/89, 11 March 1992 ($20,000 and $10,000); *H v R* [1996] 1 NZLR 299 (HC) ($20,000); *B v R* (1996) 10 PRNZ 73 (HC) ($35,000); *L v Robinson* [2000] 3 NZLR 499 (HC) ($10,000); *R v Eade* DC Auckland NP3604/97, 12 May 2000 ($27,500); *M v J* [2003] DCR 619; ($40,000); *H v H* HC Auckland AP20/SW02, 24 July 2002 ($25,000); *AGS v KES* HC Rotorua CIV-2006-463-523, 8 February 2007 ($20,000).
[64] Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004 (Cth).
[65] Trade Practices Act 1974 (Cth).
[66] Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004, s 87E.

(actions against manufacturers and importers of goods) of Part V, or to Part VA (liability for defective goods).[67] The TPA applies to the business and commercial activities of most corporations, certain sole traders and partnerships and the commercial activities of the Commonwealth.[68]

The TPA was amended after a concern that "the award of damages for personal injuries had become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another".[69] Therefore, "it was desirable to examine a method for the reform of the common law with the objective of limiting liability and the quantum of damages from personal injuries and death".[70] Thus experts reviewed the law of negligence and recommended amending the TPA to limit the quantum of damages concerning personal injury and death claims in regard to the Parts listed in section 87E.[71] The Minister responsible for the 2004 amendment legislation that implemented this recommendation affirmed that the reforms "are aimed at providing a national benchmark for the limitation of actions and quantum of damages in personal injury and death claims".[72] Thus, where the New Zealand Parliament has allowed courts an almost unfettered discretion as to the circumstances in which exemplary damages can be awarded in personal injury cases, the Australian legislature has completely removed the courts' discretion in regard to this area of personal injury.

In contrast to New Zealand's statutory regime, the United Kingdom compensates personal injuries with a common law framework.[73] The only statutory reference to exemplary damages in the personal injury context is inconsequential.[74] The only Canadian statutory reference to the award in the personal injury context is the Criminal Injury Compensation Act 1996, which allows an award of additional compensation, excluding punitive or exemplary damages, to a victim of a crime.[75]

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[67] Ibid.
[68] Review Panel *Review of the Law of Negligence Report* (2 October 2002) at [5.3].
[69] Trade Practices Amendment (Personal Injuries and Death) Bill (No. 2) 2004 (Cth), Explanatory Memorandum, at [1.2].
[70] Ibid.
[71] (19 February 2004) APD 25236.
[72] Ibid.
[73] Joanna Manning "Reflections on Exemplary Damages and Personal Injury Liability in New Zealand" [2002] 2002 NZ L Rev 143 at 180.
[74] General Chiropractic Council (Professional Indemnity Insurance) Rules Order 1999 (UK), s 3(1).
[75] Criminal Injury Compensation Act RSBC 1996 c 85, s 2. This section also defines a victim of a crime as "a person injured or killed" in certain cases where compensation may be recovered at law.

B Property

New Zealand law specifically mentions exemplary damages in regard to property rights in three different statutes. However, other jurisdictions have not been so heavy handed with exemplary damages in this area. Australia and the United Kingdom have no statutory references to exemplary damages in this area. Nevertheless, some repealed United Kingdom statutes previously allowed an award of exemplary damages in this area of law. In Canada, only the Civil Code of Québec refers to punitive damages in regard to property rights.[76]

In New Zealand, the Crown Pastoral Land Act 1998 amends the Land Act 1948 provisions that concern the administration of Crown pastoral land tenure.[77] This Act incorporates an award of exemplary damages because the Land Act did not provide an effective legal remedy for the Crown against lessees and licensees who breached the Act or their lease or licence.[78] While some breaches carried legal consequences, others slipped through the cracks and highlighted the limited powers that the Crown had in this regard.[79]

Now a court can order the holder of a reviewable instrument to pay exemplary damages for a breach of a statutory or contractual provision.[80] Section 2 of the Act states that a reviewable instrument is a reviewable lease[81] or an occupation licence.[82] A court may award exemplary damages for a breach if: the holder fails to take actions specified by the court to remedy the breach; it is "impossible, impracticable, or otherwise inappropriate" to remedy the breach; the breach has already been remedied; or, if the instrument is declared forfeit, the court may award the lower of $50,000 and the probable costs of remedying the breach or exemplary damages under $50,000 for the breach.[83] The Act caps an award of exemplary damages at $50,000.[84]

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[76] Civil Code of Québec LRQ c C-1991.
[77] Primary Production Committee *Crown Pastoral Land Bill* (1998) at (ii).
[78] Office of Crown Lands *Briefing Note for the Primary Production Select Committee* (1998) at 7.
[79] Ibid.
[80] Crown Pastoral Land Act 1998, s 19.
[81] A reviewable lease is a lease under section 66(1) or section 67 of the Land Act 1948, but it is not a lease over land all of which has been vested in a State enterprise under the State-Owned Enterprises Act 1986 or a lease under section 67 of the Land Act 1948 over land all of which is conservation area or reserve.
[82] An occupation licence a means licence granted under section 66AA of the Land Act 1948 or section 14(7) of the Crown Pastoral Land Act 1998.
[83] Ibid, s 19(2).
[84] Ibid.

Secondly, the Residential Tenancies Act 1986 allows an award of exemplary damages for certain unlawful acts.[85] Schedule 1A contains a complete list of these acts, most of which relate to the collection and administration of rent, bond and other payments from tenants. The exemplary damages awardable under the Act are additional to any compensation payable.[86] Section 109 states that:

> (1) [a] landlord or a tenant, or the chief executive acting on behalf of a landlord or a tenant, or the chief executive acting as the person responsible for the general administration of this Act, may apply to the Tribunal for an order requiring any other person to pay to the applicant an amount in the nature of exemplary damages on the ground that that other person has committed an unlawful act.
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> ...
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> (3) If, on such an application, the Tribunal is satisfied that the person against whom the order is sought committed the unlawful act intentionally, and that, having regard to—
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> (a) the intent of that person in committing the unlawful act; and
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> (b) the effect of the unlawful act; and
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> (c) the interests of the landlord or the tenant against whom the unlawful act was committed; and
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> (d) the public interest,—
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> it would be just to require the person against whom the order is sought to pay a sum in the nature of exemplary damages, the Tribunal may make an order accordingly.

Notably, section 109(4A) allows an award of exemplary damages despite the fact that the person has already been charged, convicted or acquitted of the conduct forming the unlawful act under section 109A(4).[87] Thus the Residential Tenancies Act, like the Accident Compensation Act,[88] allows for double punishment, a result which is one of the reasons why critics of exemplary damages dislike the award.

Section 109(4) of the Act states that Schedule 1A caps the amount of exemplary damages payable. Section 109(4) has been amended twice and both amendments have increased the amount of exemplary damages awardable under Schedule 1A.[89] The original section allowed

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[85] Residential Tenancies Act 1986, s 109.
[86] Ibid, s 109(5).
[87] Residential Tenancies Act 1986, s 109(4A).
[88] Accident Compensation Act 2001, s 319(2).
[89] Residential Tenancies Amendment Act 1996, s 43(2) and s 71.

awards between $100 and $2,000 for different unlawful acts.[90] Though the original draft Residential Tenancies Bill 1986 allowed an award of up to $3,000, this was lowered after 38 submissions on the Bill considered that this penalty was too high, even though another 29 submissions articulated worries that this award was not severe enough.[91] Parliament disagreed that this amount not high enough: clause 104(4) of the original Bill stated that exemplary damages would be in addition to compensatory damages so if there was loss, additional damages would be awarded.[92] However, the latter submissions have been adhered to more recently: the first amendment provided for awards between $150 and $3,000[93] and the second amendment raised the maximum award to $4,000.[94]

The Minister responsible for the Residential Tenancies Amendment Act 2010 explained that the amount of exemplary damages awardable was increased to "encourage landlords and tenants to comply with their obligations under the Act".[95] Another MP supported the award of exemplary damages for tenants' breaches as this award provides an alternative punishment to eviction, and eviction is undesirable as it is important for tenants to become established in a community.[96] Thus this Act shows that Parliament uses exemplary damages to deter potential offenders as well as to punish offenders where other means of punishment is undesirable. This is consistent with the idea that exemplary damages may fill a gap in the law where an offender's conduct falls short of criminal activity but Parliament still desires to punish it.

The caps on the amount of exemplary damages awardable under the Crown Pastoral Land Act and the Residential Tenancies Act show that Parliament has constrained the power of the courts in making the award. There are no other legislative examples of caps on the award in New Zealand. Moreover, the only examples of legislative caps on the award in other jurisdictions are three Canadian statutes.[97] This shows that Parliaments generally trust courts to set the appropriate amount of damages. The legislative caps on the award in New Zealand may reflect that the awards under the Residential Tenancies Act and the Crown Pastoral Land Act are determined by the Tenancy Tribunal and the District Court respectively. As these two

[90] Residential Tenancies Act 1986, s 109(4).
[91] Advisory Officer, "Submission to the Social Services Committee: Summary of Submissions on the Residential Tenancies Bill" at 16-17.
[92] Ibid, at 303.
[93] Residential Tenancies Amendment Act 1996, s 43(2).
[94] Residential Tenancies Act 1986, s 109(4).
[95] (8 December 2009) 659 NZPD 8364.
[96] (2 June 2009) 654 NZPD 4084.
[97] Public Service Act, RSNWT 1998, c P-16, s 40.6(1); Engineers and Geoscientists Act, RSBC 1996, c 116, s 26; Architects Act, RSBC 1996, c 17, s 66(2).

Acts are the only Acts that specify that a lower court or Tribunal will make the award, Parliament may have wanted to provide more guidance to these decision-making bodies.

Parliament further amended the original Residential Tenancies Bill 1986 to make it more partial to exemplary damages by making the test for these damages more lenient. The original test in clause 104(2) of the Bill, the predecessor to the current section 109, was that the unlawful act was "so reprehensible in intent and effect that, having regard to the public interest, it would be just to order that person to pay a sum in the nature of exemplary damages". However, Parliament removed the reference to "reprehensible" conduct and replaced it with the four factors now seen in section 109 as it was feared this word would make it "almost impossible to obtain an order under clause 104".[98] This amendment shows Parliament's steady fondness for the award in practice.

Thirdly, section 256(1) of the Property Law Act 2007 allows for an award similar to exemplary damages. Section 256(1) holds that a court may grant relief, including damages, for the cancellation, or proposed cancellation, of a lease under section 253. Thus, though the Act does not explicitly refer to exemplary damages, it permits a court to award a penalty against the defendant that is payable to the plaintiff.[99] This Act is yet another example of Parliament using exemplary damages to punish conduct that is short of criminal conduct; as can also be seen from the Residential Tenancies Act and the Crown Pastoral Land Act, Parliament places a high value on upholding certain property rights.

Conversely, the New Zealand Parliament has removed the ability to claim exemplary damages twice. The New Zealand Parliament does not appear to have a principled approach to excluding exemplary damages in legislation. However, the fact that Parliament has only excluded exemplary damages in two instances is further evidence of its fondness for the award. First, the Unit Titles Act 2010 precludes a Tenancy Tribunal from awarding exemplary damages in the determination of a unit title dispute because the Act excludes the application of section 109 of the Residential Tenancies Act 1986 to such disputes.[100] It is possible that exemplary damages are available under the Residential Tenancies Act and not the Unit Titles Act because the former Act only allows the Tribunal to order an offender to

[98] Advisory Officer, "Submission to the Social Services Committee: Summary of Submissions on the Residential Tenancies Bill" at 303.
[99] Bevan Marten, above n 1, at 542.
[100] Unit Titles Act 2010, s 176.

pay up to $50,000,[101] and therefore Parliament may have considered the award necessary as a supplementary punishment. On the other hand, the Unit Titles Act allows the High Court to award amounts in excess of $200,000 in a unit title dispute on appeal and Parliament may consider that this Act provides enough flexibility for courts to adequately punish an offender.[102]

The second instance in which Parliament has removed the ability to claim exemplary damages is under the Walking Access Act 2008. Section 66 provides that a landholder is not liable for exemplary damages for loss or damage suffered by a person using walking access or a walkway on the landholder's land, unless that loss or damage is caused by the landholder's deliberate act or omission. The predecessor of section 66 is section 10 of the New Zealand Walkways Act 1990, which excluded all occupiers' liability but did not expressly mention that there was no liability for exemplary damages. The clarification in the later Act shows that Parliament has placed importance on the presence of the landholder's fault in regard to the loss or damage and does not wish to impose punishment in its absence. However, given that the test for exemplary damages is the "outrageousness" of the defendant's conduct, it is likely that courts would not award exemplary damages in the absence of fault anyway.[103]

Turning to other jurisdictions, Australia and the United Kingdom have no statutory references to exemplary damages. However, in the United Kingdom the repealed Distress for Rent Acts of 1689 and 1737 and the Landlord and Tenant Act of 1730 allowed a court to award double damages[104] and treble damages[105] to a claimant.[106] These damages were equivalent to exemplary damages.[107] However, the United Kingdom Parliament has since repealed this legislation and has seldom allowed the award in recent years.

In Canada, the Civil Code of Québec 1968 makes three references to the award of punitive damages to protect lessee rights. Under the Code, a lessee may apply for punitive damages

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[101] Residential Tenancies Act, 1986, s 77(5). Sections 117-120 of the Residential Tenancies Act 1986 also restrict the powers of an appeal court to make orders that the Tribunal could have made.
[102] Unit Titles Act 2010, s 173.
[103] *Couch v Attorney-General (No 2),* above n 8, at [68] per Blanchard J, [150]-[151] and [178] per Tipping J, [246] per McGrath J, [259] per Wilson J.
[104] Distress for Rent Act 1689 (UK), s 4; Landlord and Tenant Act 1730 (UK), s 1; Distress for Rent Act 1737 (UK).
[105] Distress for Rent Act 1689 (UK), s 3.
[106] H McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009) at 439.
[107] Ibid.

where: a person has repossessed the dwelling or evicted him in bad faith;[108] a lessor refuses to either enter into a lease with, maintain the rights of, or imposes more onerous conditions on a person solely because that person is pregnant or has children;[109] or, the lessee suffers harassment that affects his enjoyment of the dwelling or causes him to leave.[110] The Code also indicates that damages under the Code are aimed at deterrence: it provides that the amount of any punitive damages "may not exceed what is sufficient to fill their preventive purpose".[111] Lastly, the assessment of the amount of punitive damages under the Code must include consideration of "the gravity of the debtor's fault."[112]

Similarities can be drawn between the way exemplary damages are assessed under the Code and under some New Zealand statutes in terms of fault. Under both the Code[113] and several New Zealand statutes[114] fault is relevant to the assessment of exemplary damages. Though some New Zealand Acts that allow an award of exemplary damages do not refer to fault on the part of the defendant,[115] courts are likely to take into account the extent of the defendant's fault in assessing whether to award exemplary damages regardless of whether the authorising statute specifically states fault must be considered. Thus, in reality, whether a statute mentions fault or not is likely to have little practical effect and the way damages are assessed under the Code is likely to be similar to the manner in which all exemplary damages in New Zealand are assessed.

C Intellectual Property

All four jurisdictions allow awards of exemplary damages for certain breaches of intellectual property rights. This widespread protection may partially stem from the fact that all of these jurisdictions are parties to the international Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 1996,[116] which requires members' copyright legislation

[108] Civil Code of Québec LRQ c C-1991 s 1968.
[109] Ibid, s 1899.
[110] Ibid, s 1902.
[111] Ibid, s 1621.
[112] Ibid.
[113] Ibid.
[114] Plant Variety Rights Act 1987, s 17(4); Residential Tenancies Act 1986, s 109(3); Defamation Act, s 28; Layout Designs Act 1994, s 25(3); Copyright Act 1994, s 121(2), Walking Access Act 2008, s 66.
[115] Commerce Act 1986, s 82A; Accident Compensation Act 2001, s 319; Crown Pastoral Land Act 1998, s 19; Residential Tenancies Act 1986, s 109.
[116] "Members accepting amendment of the TRIPS Agreement" (20 August 2013) World Trade Organization <http://www.wto.org>.

to have "criminal procedures and penalties sufficient to provide a deterrent in cases of copyright piracy on a commercial scale".[117]

In New Zealand, the Plant Variety Rights Act 1987 allows an award of exemplary damages for the infringement of the rights of a grantee under a grant.[118] A grantee is a holder of a grant of plant variety rights under this Act.[119] The Act justifies allowing an award of exemplary damages with the affirmation that "the rights of a grantee under a grant are proprietary rights, and their infringement shall be actionable accordingly".[120] In granting relief, the court must consider: the loss or likely loss suffered by the grantee; any benefits other persons derived from the infringement; and, the flagrancy of the infringement.[121]

Other New Zealand legislation that allows awards of exemplary damages in this area of law include the Layout Designs Act 1994 and the Copyright Act 1994, which both protect certain designs. Section 25(3) of the Layout Designs Act provides that "additional damages" may be awarded for an infringement of layout design rights if the court considers that it is appropriate to do so, taking into consideration: the flagrancy of the infringement; any benefit the defendant derived from the infringement; and, any other pertinent matters. Section 25(3) is derived from and is essentially identical to section 27(4) of the Circuit Layouts Act 1989 in Australia.

Similarly, section 121 of the Copyright Act 1994 is based on section 97(2) of the United Kingdom Copyright, Designs and Patents Act 1988, with only minor deviations in drafting.[122] Section 121 of the Copyright Act 1994 provides that:

> (1) Where, in proceedings for infringement of copyright, it is proved or admitted that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright existed in the work to which the proceedings relate, the plaintiff is not entitled to damages but, without prejudice to the award of any other remedy, is entitled to an account of profits.

[117] Copyright Bill 1994, Explanatory Note.
[118] Plant Variety Rights Act 1987, s 17(4).
[119] Ibid, s 2.
[120] Ibid, s 17.
[121] Ibid, s 17(4).
[122] Copyright Bill 1994, Explanatory Note.

> (2) In proceedings for infringement of copyright, the court may, having regard to all the circumstances and in particular to—
>
> (a) the flagrancy of the infringement; and
>
> (b) any benefit accruing to the defendant by reason of the infringement,—
>
> award such additional damages as the justice of the case may require.

Section 121 of the Copyright Act 1994 is also similar to its predecessor, section 24 of the Copyright Act 1962. The main difference between the two sections is that the later 1962 Act does not require the court to be "satisfied that effective relief would not otherwise be available to the plaintiff".[123] The removal of this obstacle may indicate that the New Zealand Parliament is increasingly trusting of the courts to make appropriate awards open towards the award of exemplary damages.

In the United Kingdom, copyright legislation shows Parliament becoming fractionally more open to the award of exemplary damages. Though the repealed Copyright Act 1911[124] did not specifically allow for an award of exemplary damages, the later Copyright Act 1956 and the Copyright, Designs and Patents Act 1988 both allow an award of exemplary damages for copyright infringements.[125] The addition of exemplary damages may be partially due to the need of the later legislation to comply with TRIPS.

In Australia, the Circuit Layouts Act 1989, the Copyright Act 1968, the Designs Act 2003 and the Patents Act 1990 all allow awards of exemplary damages in the respective areas of infringements of intellectual property, copyright, designs and patents. The Circuit Layouts Act 1989 requires the court to determine the amount of additional damages by considering the flagrancy of the infringement, any benefit the infringement conferred on the defendant and any other matters.[126] Similarly, section 115(4) of the Copyright Act 1968 provides:

> (4) Where, in an action under this section:
>
> (a) an infringement of copyright is established; and
>
> (b) the court is satisfied that it is proper to do so, having regard to:

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[123] Copyright Act 1962, s 24(3).
[124] Copyright Act 1911 (UK).
[125] Copyright Act 1956 (UK), s 17(3); Copyright, Designs and Patents Act 1988 (UK), s 97(2).
[126] Circuit Layouts Act 1989 (Cth), s 27(4).

> (i) the flagrancy of the infringement; and
>
> (ia) the need to deter similar infringements of copyright; and
>
> (ib) the conduct of the defendant after the act constituting the infringement or, if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff's copyright; and
>
> (ii) whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form; and
>
> (iii) any benefit shown to have accrued to the defendant by reason of the infringement; and
>
> (iv) all other relevant matters;

the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.

Section 115(4)(ia) is notably consistent with the approach of Australian courts to exemplary damages, which view deterrence as the main purpose of the award.

The Designs Act 2003 allows an award of exemplary damages for the infringement of a registered design.[127] Section 75(3) states that "the court may award such additional damages as it considers appropriate, having regard to the flagrancy of the infringement and all other relevant matters". In the second reading of the Designs Bill 2002, the Parliamentary Secretary to the Minister for Industry, Tourism and Resources noted that the Bill's aim was to give designers "more enforceable rights".[128] Thus Parliament intends to use the award of exemplary damages to bolster the rights of designers. Moreover, as the predecessor of this Act,[129] made no specific mention of additional damages, the latest Designs Act shows that the Australian Parliament has become more partial to exemplary damages in copyright legislation.[130]

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[127] Designs Act 2003 (Cth), s 75(3).
[128] (11 December 2002) APD 10080.
[129] Designs Act 1906 (Cth).
[130] Ibid, s 32B.

Turning to the Patents Act 1990, the Intellectual Property Laws Amendment Act 2006 amended this Act by inserting section 122(1A).[131] Section 122(1A) is almost identical to section 115(4) of the Australian Copyright Act 1968. This similarity stems from the Advisory Council on Intellectual Property's recommendation in the *Review of Enforcement of Industrial Property Rights* to insert a section allowing an award of exemplary damages similar to that in section 115 of the Copyright Act 1968.[132]

In the second reading of the Intellectual Property Laws Amendment Bill, the Parliamentary Secretary to the Minister for Industry, Tourism and Resources explained that allowing exemplary damages to be awarded under the Patents Act was hoped to "serve as a deterrent against patent infringement, which in turn will strengthen patent rights" and "bring the Patents Act into line with the Designs Act and the Copyright Act 1968, under which exemplary damages may also be awarded".[133] Another parliamentary member noted that "Australian innovators and creative people need to have their creativity protected by strong patent laws".[134] Thus the Australian Parliament is willing to award exemplary damages where the award is needed to reinforce rights by deterring offending conduct.

Canadian copyright legislation only briefly mentions exemplary damages in section 38.1(7) of the Copyright Act 1985.[135] This section holds that "[a]n election under subsection (1) does not affect any right that the copyright owner may have to exemplary or punitive damages".[136]

D Trade and Commerce

The New Zealand Parliament is open to awarding exemplary damages in trade and commerce, although notably the Fair Trading Act 1986 does not permit the award.[137] Canadian legislatures tend to allow the award for discriminatory business practices. Conversely, Australian and United Kingdom law does not make any references to exemplary damages in this area.

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[131] Intellectual Property Laws Amendment Act 2006 (Cth), Schedule 5.
[132] Ibid, Explanatory Memorandum.
[133] (30 March 2006) APD at 14.
[134] (22 June 2006) APD at 152.
[135] Copyright Act RSC 1985 c C-42, s 38.1(7).
[136] Section 38.1(1) of the Copyright Act RSC c C-42 1985 allows a copyright owner to elect for statutory damages as opposed to damages for the copyright owner's suffering due to the infringement and an account of profits.
[137] Section 43(2) of the Fair Trading Act 1986 does not expressly allow an award of exemplary damages for loss or damage due to a breach of Parts 1 to 4 of that Act.

In New Zealand, section 82A of the Commerce Act 1986 allows for an award of exemplary damages against a person who has engaged in conduct referred to in section 82(1) of the Act. Section 82(1) lists the various types of conduct that contravene Part 2 of the Act, which concerns restrictive trade practices.[138] In deciding whether to award exemplary damages, and the sum of these damages if they are awarded, courts must consider whether the defendant's conduct has already attracted a pecuniary penalty and, if so, the sum of that penalty.[139] The Commerce Act is therefore another example of where a defendant may be punished twice for the same conduct, although Parliament does require courts to turn their minds to the possibility of double punishment and its extent in a certain case.

Though Parliament has not explicitly indicated so,[140] the economic rationale for the award under the Commerce Act and the history of section 82A may suggest that a liberal approach should be taken to the award under the Act, even where there is no outrageous conduct on the defendant's part.[141] The economic rationale for awarding exemplary damages under the Commerce Act is to deter those who may otherwise participate in anti-competitive conduct as exemplary damages will require them to disgorge their gains.[142] The history of section 82A is the Ministry of Commerce's discussion paper, "Penalties, Remedies and Court Processes under the Commerce Act 1986".[143] This paper noted compensatory damages are insufficient to deter potential offenders: courts cannot compensate every victim of anti-competitive conduct as there are often many victims, only a few of whom will sue.[144] The Ministry of Commerce recommended addressing this problem by inserting a pecuniary penalty for anticompetitive conduct.[145] However, on the suggestion of the Minister for Enterprise and

[138] Section 82(1) of the Commerce Act 1986 reads: "Every person is liable in damages for any loss or damage caused by that person engaging in conduct that constitutes any of the following— (a) a contravention of any of the provisions of Part 2: (b) aiding, abetting, counselling, or procuring the contravention of such a provision: (c) inducing by threats, promises, or otherwise the contravention of such a provision: (d) being in any way directly or indirectly, knowingly concerned in, or party to, the contravention of such a provision: (e) conspiring with any other person in the contravention of such a provision".
[139] Commerce Act 1986, s 82A(2).
[140] John Land "Exemplary Damages Under the Commerce Act" (2012) NZLJ 3 at 82. There has been no suggestion that courts should take a more heavy handed approach to exemplary damages under the Commerce Act in the New Zealand parliamentary debates.
[141] Ibid, at 82.
[142] Ibid.
[143] Ibid.
[144] Ministry of Commerce *Penalties, Remedies and Court Processes under the Commerce Act 1986: A Discussion Document* (New Zealand Government, Ministry of Commerce, Trade Remedies Group, 1998) at 33-36.
[145] John Land, above n 140, at 82.

Commerce, Parliament opted to insert exemplary damages into the Act in order to deter offenders, showing its fondness for the latter remedy to regulate trade and commerce.[146]

The Commerce (Cartels and Other Matters) Amendment Bill 2011 would amend section 82A of the Commerce Act 1986 to prevent a court order of exemplary damages for an offence under the proposed section 82B.[147] Section 82B would be inserted into the Commerce Act by this Bill[148] and it states that offences relating to cartel prohibition may attract a fine of $10 million or greater[149] so that any civil penalty actually represents the harm done.[150] Thus this Bill is another example of Parliament avoiding double jeopardy.

The Credit Contracts and Consumer Finance Act 2003 regulates credit contracts, consumer leases and buy-back transactions of land. Under section 94(1)(c) of the Act, a court can order a person who has committed or assisted in a breach of any of the provisions of sections 17 to 82 to pay exemplary damages to a person who has suffered loss or damage due to that conduct.[151] However, the court can only award exemplary damages under section 94(1)(c) if the same conduct has not attracted a penalty under section 103, which outlines a number of fines for different offences, some of which are capped at $30,000 and others at $200,000.[152] Thus here, as in the Commerce (Cartels and Other Matters) Amendment Bill, Parliament does not want there to be a risk of double jeopardy where exemplary damages may also punish the defendant.[153]

However, successive New Zealand Parliaments have been inconsistent as to whether exemplary damages can be awarded if an award would result in double punishment. Though the Commerce (Cartels and Other Matters) Amendment Bill[154] and the Credit Contracts and Consumer Finance Act 2003[155] exclude double punishment, the Accident Compensation Act,[156] the Residential Tenancies Act[157] and the Commerce Act allow it.[158]

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[146] (CAB (98) 965 at [21]).
[147] Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2), cl 17.
[148] Ibid, cl 18.
[149] Ibid.
[150] (24 July 2012) 682 NZPD 3868.
[151] Credit Contracts and Consumer Finance Act 2003, s 93.
[152] Ibid, s 94(2).
[153] (16 September 2003) 611 NZPD 8653.
[154] Commerce (Cartels and Other Matters) Amendment Bill 2011 (341-2).
[155] Credit Contracts and Consumer Finance Act 2003.
[156] Accident Compensation Act 2001, s 319(2).
[157] Residential Tenancies Act, s 109(4A).

Thus Parliament appears to be more reluctant to condone double punishment in commercial cases: the two Acts that exclude double punishment both concern commerce and, though the Commerce Act allows double punishment, it requires courts to consider whether an award of exemplary damages would be additional to a pecuniary penalty.[159] Moreover, though the Residential Tenancies Act allows double punishment, Parliament may consider this to be less harsh on an offender as the maximum amount of exemplary damages that can be awarded under that Act is capped at $4,000.[160] Lastly, though the Accident Compensation Act does not cap an award of exemplary damages and it still allows double punishment,[161] it is likely that Parliament has simply made a policy decision that conduct resulting in personal injury warrants more serious punishment. Similarly, the law in the United Kingdom recognises that double punishment is possible, although not desirable. The Crime and Courts Act states that one of the considerations for courts in awarding exemplary damages should be the rule that exemplary damages should not usually be awarded if the defendant has already been convicted of an offence for the conduct in question.[162]

Turning to Canada's treatment of exemplary damages in legislation concerning trade and commerce, various Canadian legislatures have addressed whether exemplary damages may be awarded for discriminatory and unfair business practices. Most of these legislatures allow the award.[163] Moreover, a series of Canadian Acts, mostly concerning loan and trust companies, allow awards of exemplary damages as the court sees fit where a prohibited investment or transaction occurs.[164] Thus while legislatures in New Zealand and Canada have considered that exemplary damages are an appropriate award in the realm of lending, only

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[158] Commerce Act 1986, s 82A(2).
[159] Ibid.
[160] Residential Tenancies Act 1986, s 109(4).
[161] Accident Compensation Act 2001, s 319(2).
[162] Crime and Courts Act 2013 (UK), s 35(2).
[163] Discriminatory Business Practices Act RSO 1990 c D.12, s 9(1); Discriminatory Business Practices Act CCSM 2002 c D80, s 12; Business Practices Act CCSM c B120 2012, s 23(4); Consumer Protection Act SS 1996, c C-30.1, s 16(1)(b) and s 65(1); Business Practices Act RSPEI 1988, c B-7, s 2; Consumer Protection and Business Practices Act SNL 2009, c C-31.1, s 10(2)(b); Consumer Protection Act 2002, SO 2002, c 30, Sch A, s 11 and s 100(3); Fair Trading Act RSA 2000, c F-2, s 7.2(1) and s 13(1(b) and s 99.
[164] Insurance Act RSA 2000 c I-3, s 449(1); Loan and Trust Companies Act SNB 1987, c L-11.2, s 185; Trust and Loan Companies Act SNS 1991, c 7, s 187; Loan and Trust Corporations Act RSA 2000, c L-20, s 179(1); Trust and Loan Corporations Act SS 1997, c T- 22.2, s 52(3); Cost of Credit Disclosure Act SNWT 2010, c 23, s 48; Credit Union Act RSA 2000, c C-32, s 220(1); Financial Institutions Act RSBC 1996, c 141, s 150(2)(c); Payday Loans Act 2008, SO 2008, c 9, s 45(3).

Canadian legislatures also allow exemplary damages for discriminatory and unfair business practices.[165]

Media

Both New Zealand and the United Kingdom use exemplary damages to regulate the media, with Australian and Canadian legislatures preferring to regulate the media in other ways. In New Zealand, section 28 of the Defamation Act 1992 allows an award of punitive damages in defamation proceedings "only where that defendant has acted in flagrant disregard of the rights of the plaintiff".

All seven submissions to Parliament on the Defamation Bill that mentioned clause 20, which became section 28 of the Defamation Act, supported the inclusion of exemplary damages.[166] Moreover, the Explanatory Note to the Defamation Bill noted that the award of punitive damages in this statute implemented the recommendations of the Committee on Defamation to insert the award.

In the United Kingdom, the Crime and Courts Act 2013 allows an award of exemplary damages against a publisher for the publication of news-related material,[167] as long as the court is satisfied under section 34(6) that:

> (a) the defendant's conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights,
>
> (b) the conduct is such that the court should punish the defendant for it, and
>
> (c) other remedies would not be adequate to punish that conduct.

The Leveson Report inspired this section.[168] The Leveson Report was produced after an inquiry into the practices and ethics of the United Kingdom media following allegations of criminal activity in the form of phone hacking.[169] This Report recommended a voluntary, self-regulated regulatory framework for the press, which would be bolstered with incentives

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[165] As above, section 43(2) of the Fair Trading Act 1986 does not expressly allow an award of exemplary damages for loss or damage due to a breach of Parts 1 to 4 of that Act.
[166] Department of Justice "Submission to the Justice and Law Reform Select Committee on the Defamation Bill 1989" at 13.
[167] Crime and Courts Act 2013 (UK), s 34(1).
[168] Ibid, c. 22, Explanatory Notes, at [56].
[169] "FAQs" The Leveson Inquiry <www.levesoninquiry.org.uk>.

to join, such as certain exemptions from liability for exemplary damages.[170] Thus exemplary damages cannot be awarded against a defendant who was a member of an approved regulator at the relevant time,[171] unless that regulator either imposed or decided not to impose a penalty on the defendant and the court considers that decision was "manifestly irrational".[172] The relevant considerations for the award are not closed.[173] These considerations include: the rule that exemplary damages should not usually be awarded if the defendant has already been convicted of an offence for the conduct in question;[174] whether the defendant could become a member of an approved regulator and any reasons for the defendant not being a member;[175] deterring the defendant and others from the conduct;[176] and, whether the defendant had suitable internal compliance procedures to govern the conduct in question and whether these procedures were complied with.[177]

The amount of exemplary damages awardable is governed by section 36 of the Act:

> ...
>
> (2) The court must have regard to these principles in determining the amount of exemplary damages—
>
> > (a) the amount must not be more than the minimum needed to punish the defendant for the conduct complained of;
> >
> > (b) the amount must be proportionate to the seriousness of the conduct.
>
> (3) The court must take account of these matters in determining the amount of exemplary damages—
>
> > (a) the nature and extent of any loss or harm caused, or intended to be caused, by the defendant's conduct;
> >
> > (b) the nature and extent of any benefit the defendant derived or intended to derive from such conduct.
>
> (4) The court may regard deterring the defendant and others from similar conduct as an object of punishment.

[170] Crime and Courts Act 2013 (UK) c. 22, Explanatory Notes, at [56].
[171] Ibid, s 34(2).
[172] Ibid, s 34(3).
[173] Ibid, s 35(6).
[174] Ibid, s 35(2).
[175] Ibid, ss 35(3)(a)-35(3)(b).
[176] Ibid, s 35(5).
[177] Ibid, s 35(3)(c).

> (5) This section is not to be read as limiting the power of the court to take account of any other matters it considers relevant to its decision.

Thus, in contrast to the detailed regime in the United Kingdom, the New Zealand Parliament only requires that the defendant act in "flagrant disregard" of the plaintiff's rights.[178] Furthermore, courts would be likely take into account the "outrageousness" of the defendant's conduct in the assessment of exemplary damages anyway.[179] Entrusting more power in the courts reflects the New Zealand Parliament's partiality towards exemplary damages, whereas the United Kingdom's detailed approach to the award shows its cautious approach towards the award.

E Employment

Parliaments in New Zealand, Australia and the United Kingdom are largely silent on the question of exemplary damages in employment law. In New Zealand, this is because exemplary damages are prohibited in contract law.[180] In Australia, the Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000 proposed to amend the Human Rights and Equal Opportunity Commission Act 1986 to permit an award of exemplary damages where there is unlawful discrimination in regard to a pregnancy or potential pregnancy.[181] However, the Bill did not pass the first reading.

Conversely, Canadian legislatures allow the award in employment cases. Unlike in New Zealand, Canada allows exemplary damages to be awarded in contract law.[182] The Labour Standards Act 1990 permits exemplary damages to be paid to an employee where a person tries to get an employer to fire an employee because that employee was previously fired by that first person.[183] The Public Service Act also allows an award of exemplary damages for an amount not exceeding $10,000 where an arbitrator determines that "an employer has acted wilfully or maliciously, or has repeatedly contravened" the equal pay provision in section 40.1.[184]

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[178] Defamation Act 1992, s 28.
[179] *Couch v Attorney-General (No 2),* above n 8, at [68] per Blanchard J, [150]-[151] and [178] per Tipping J, [246] per McGrath J, [259] per Wilson J.
[180] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA); *Prins v Tirohanga Group Ltd* [2006] ERNZ 321 (EC).
[181] Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000, Schedule 1.
[182] *Whiten v Pilot Insurance Co* (2002) 209 DLR (4th) 257 (SCC).
[183] Labour Standards Act RSNL 1990, c L-2, s 78.
[184] Public Service Act RSNWT 1998, c P-16, s 40.6(1).

Other Canadian statutes that permit the award in employment cases are those that govern certain professions. For example, section 27(2) of the Engineers and Geoscientists Act 1996 allows an award of exemplary damages of up to $25,000 against an individual or legal entity that holds themselves out to be a professional engineer or geoscientist[185] or tries to fraudulently register as such under the Act.[186] The Architects Act 1996 also permits an award of exemplary damages of up to $25,000 for certain breaches of the Act concerning prohibitions on the practice of architecture by non-registered architects.[187] However, these four Canadian statutes only allow an award of exemplary damages in very specific circumstances. Thus exemplary damages in employment law are not prolific in Canada and are non-existent in other Commonwealth jurisdictions.

G Miscellaneous

All the Commonwealth jurisdictions have some miscellaneous legislative references to exemplary damages. In Canada, the Ticket Sales Act 2010 allows a court to award exemplary damages against a person who commits certain offences in regard to the on-selling of tickets, unless that person "took reasonable precautions and exercised due diligence" to avoid contravening the Act.[188] Furthermore, the Gaming and Liquor Act 2000 bars an action for exemplary damages in regard to specified conduct, such as removing gaming terminals and cancelling agreements with retailers, by certain parties.[189] In the United Kingdom, the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 also allows the award "in any action for damages for conversion or other proceedings which lie by virtue of any such omission, failure or contravention".[190]

V What Conclusions Can Be Drawn From This Research?

The above discussion shows that while the New Zealand Parliament is extremely partial to the award of exemplary damages, other Commonwealth legislatures are not as heavy handed

[185] Engineers and Geoscientists Act RSBC 1996, c 116, s 22.
[186] Ibid, s 26.
[187] Architects Act RSBC 1996 c 17, s 66(2).
[188] Ticket Sales Act SS 2010 c T-13.1, s 10.
[189] Gaming and Liquor Act RSA 2000 c G-1, s 47. These specified parties are Crown, a Minister or a Minister of the Crown, the Alberta Gaming and Liquor Commission, the board or its members, and the chief executive officer.
[190] Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 (UK).

with the award. However, this contrast does not indicate New Zealand is taking the wrong approach to the award.

In New Zealand, exemplary damages fill a gap in law where Parliament desires to punish conduct that falls short of criminal behaviour and where nominal or compensatory damages are an inappropriate response. This is evidenced by the Accident Compensation Act as the bar on compensatory damages for personal injury means that, in the absence of an award for exemplary damages, courts would have no avenue to punish or deter offenders.[191] Other examples of where exemplary damages fill a gap in the law are the Health and Disability Act and the Residential Tenancies Act, which allow Parliament to punish offenders who have exploited possible vulnerable parties, whether they be disability patients, tenants or landlords.

Moreover, consistent with New Zealand's heavy handed approach to exemplary damages, successive Parliaments have largely trusted courts to set the amount of the award. Only the Crown Pastoral Land Act and the Residential Tenancies Act cap the amount of exemplary damages awardable; courts have a free rein as to the amount of exemplary damages awarded under all the other New Zealand statutes. Further, the considerations that Parliament often requires judges to turn their minds to in awarding exemplary damages are often minimal requirements that courts would be likely to consider without guidance from Parliament, such as the "flagrancy" of the defendant's conduct[192] or the defendant's intent.[193] This minimalist approach allows the courts to effectively fulfil the punishment function that exemplary damages are intended to perform in New Zealand; Parliament has recognised that the common law is better suited to adjusting the award to take into account all of the possible circumstances.

Thus the countless proponents against the award of exemplary damages have not managed to convince the New Zealand Parliament that the award should be abolished. Far from abolishing the award, the numerous statutes that allow the award instead suggest that the New Zealand Parliament is extremely fond of the award. Though Cooke J rightly held that this age-old debate can only be contributed to,[194] this paper concludes that Parliament's approach is correct in the New Zealand context for the significant reason that exemplary damages fill a

[191] Accident Compensation Act 2001, s 317(1).
[192] Defamation Act 1992, s 28.
[193] Residential Tenancies Act, s 109(3)(a).
[194] *Taylor v Beere* [1982] 1 NZLR 81 (CA) at 85.

useful gap in the law, especially in the personal injury context. More importantly, the New Zealand Parliament appears to place more weight on the arguments for the award. Therefore, as Parliament ultimately has the final say in this lengthy debate, exemplary damages are likely to continue to thrive in New Zealand law, whether critics like it or not.

Bibliography

A Cases

1 New Zealand

A v M [1991] 3 NZLR 228 (HC).

AB v CD HC Timaru CP53/89, 11 March 1992.

AGS v KES HC Rotorua CIV-2006-463-523, 8 February 2007.

B v R (1996) 10 PRNZ 73 (HC).

Couch v Attorney-General (No 2) [2010] NZSC 27, [2010] 3 NZLR 149.

Daniels v Thompson [1998] 3 NZLR 22 (CA).

Director of Health and Disability Proceedings v Peters Human Rights Review Tribunal HRRT34/04, 25 September 2006.

Director of Proceedings v A Human Rights Review Tribunal HRRT15/02, 22 November 2004.

Director of Proceedings v DG Human Rights Review Tribunal HRRT23/04, 25 February 2005.

Director of Proceedings v Mogridge Human Rights Review Tribunal HRRT27/07, 21 December 2007

Director of Proceedings v O'Malley Human Rights Review Tribunal HRRT81/07, 2 February 2009

Donselaar v Donselaar [1982] 1 NZLR 97 (CA).

G v G (1996) 15 FRNZ 22 (HC).

H v H HC Auckland AP20/SW02, 24 July 2002.

H v R [1996] 1 NZLR 299 (HC).

L v Robinson [2000] 3 NZLR 499 (HC).

Lucas v Auckland Regional Authority Supreme Court Auckland A 1003/79, 24 March 1980.

M v J [2003] DCR 619.

M v L [1998] 3 NZLR 104 (HC).

Paper Reclaim Ltd v Aotearoa International Ltd [2006] 3 NZLR 188 (CA).

Prins v Tirohanga Group Ltd [2006] ERNZ 321 (EC).

R v Eade DC Auckland NP3604/97, 12 May 2000.

Taylor v Beere [1982] 1 NZLR 81 (CA).

2 Australia

Lamb v Cotogno (1987) 164 CLR 1 (HCA).

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10, (2003) 56 NSWLR 298.

3 Canada

Whiten v Pilot Insurance Co (2002) 209 DLR (4th) 257 (SCC).

Hill v Church of Scientology of Toronto (1995) 126 DLR (4th) 129 (SCC).

4 United Kingdom

Kuddus v Chief Constable of Leicestershire [2001] UKHL 29, [2002] 2 AC 122.

Rookes v Barnard [1964] AC 1129 (HL).

Watkins v Secretary of State for the Home Department [2006] UKHL 17, [2006] 2 AC 395.

B Legislation

1 New Zealand

Accident Compensation Act 2001.

Accident Compensation Act 1982.

Accident Compensation Act 1972.

Commerce Act 1986.

Commerce (Cartels and Other Matters) Amendment Bill 2011.

Copyright Act 1994.

Copyright Bill 1994.

Credit Contracts and Consumer Finance Act 2003.

Crown Pastoral Land Act 1998.

Health and Disability Commissioner Act 1994.

Law Reform Act 1936.

Layout Designs Act 1994.

Plant Variety Rights Act 1987.

Residential Tenancies Act 1986.

Residential Tenancies Amendment Act 1996.

Unit Titles Act 2010.

Walking Access Act 2008.

2 Australia

Circuit Layouts Act 1989 (Cth).

Copyright Act 1968 (Cth).

Designs Act 1906 (Cth).

Designs Act 2003 (Cth).

Designs Bill 2002 (Cth).

Intellectual Property Laws Amendment Act 2006 (Cth).

Intellectual Property Laws Amendment Bill 2006 (Cth).

Patents Act 1990 (Cth).

Sex Discrimination Legislation Amendment (Pregnancy and Work) Bill 2000 (Cth).

Trade Practices Act 1974 (Cth).

Trade Practices Amendment (Personal Injuries and Death) Act (No. 2) 2004 (Cth).

3 Canada

Architects Act RSBC 1996 c 17.

Business Practices Act CCSM c B120 2012.

Business Practices Act RSPEI 1988, c B-7.

Civil Code of Québec LRQ c C-1991.

Copyright Act RSC c C-42 1985.

Consumer Protection Act SS 1996 c C-30.1.

Consumer Protection Act SO 2002 c 30.

Consumer Protection and Business Practices Act SNL 2009 c C-31.1

Cost of Credit Disclosure Act SNWT 2010 c 23.

Credit Union Act RSA 2000 c C-32.

Criminal Injury Compensation Act RSBC 1996 c 85.

Discriminatory Business Practices Act RSO 1990 c D.12.

Discriminatory Business Practices Act CCSM 2002 c D80.

Engineers and Geoscientists Act RSBC 1996 c 116.

Fair Trading Act RSA 2000 c F-2.

Fatal Accidents Act SNB 2012 c 104.

Financial Institutions Act RSBC 1996 c 141.

Gaming and Liquor Act RSA 2000 c G-1.

Insurance Act RSA 2000 c I-3.

Labour Standards Act RSNL 1990 c L-2.

Loan and Trust Corporations Act RSA 2000 c L-20.

Loan and Trust Companies Act SNB 1987 c L-11.2.

Payday Loans Act SO 2008 c 9.

Public Service Act RSNWT 1998 c P-16.

Survival of Actions Act RSA 2000 c S-27.

Survival of Actions Act RSNB 2011 c 227.

Survival of Actions Act RSNL 1990 c S-32.

Survival of Actions Act RSPEI 1988.

Survival of Actions Act SS 1990-91 c S-66.1.

Ticket Sales Act SS 2010 c T-13.1.

Trust and Loan Companies Act SNS 1991 c 7.

Trust and Loan Corporations Act SS 1997 c T- 22.2.

4 United Kingdom

Copyright Act 1911 (UK).

Copyright Act 1956 (UK).

Copyright, Designs and Patents Act 1988 (UK).

Crime and Courts Act 2013 (UK).

Distress for Rent Act 1689 (UK).

Distress for Rent Act 1737 (UK).

Landlord and Tenant Act 1730 (UK).

Law Reform (Miscellaneous Provisions) Act 1934 (UK).

Law Reform (Miscellaneous Provisions) Act 1937 (Northern Ireland).

General Chiropractic Council (Professional Indemnity Insurance) Rules Order 1999 (UK).

Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 (UK).

C Books

H McGregor *McGregor on Damages* (18th ed, Sweet & Maxwell, London, 2009).

Sir Peter Blanchard (ed) *Civil Remedies in New Zealand* (Thomson Reuters, New Zealand, 2011).

D Journal Articles

"The Theory of Exemplary Damages" 7 CLR Vol. 7 122.

A Beever "The Structure of Aggravated and Exemplary Damages" (2003) 23 OJLS 87.

K I Bullock "Exemplary Damages and the Accident Compensation Act" 10 NZLJ 215

Joanna Manning "Reflections on Exemplary Damages and Personal Injury Liability in New Zealand" (2002) 2002 NZLR 143.

John Land "Exemplary Damages Under the Commerce Act" (2012) NZLJ 3.

Stephen Todd "A New Zealand Perspective on Exemplary Damages" (2004) 33 CLWR 255.

Stephen Todd "Exemplary Damages" (1998) 18 NZULR 145.

"The Theory of Exemplary Damages" 7 CLR Vol. 7 122, at 122.

E Parliamentary and Government Materials

1 New Zealand

Accident Insurance Bill: Departmental Report.

Advisory Officer, "Submission to the Social Services Committee: Summary of Submissions on the Residential Tenancies Bill".

Department of Justice "Submission to the Justice and Law Reform Select Committee on the Defamation Bill 1989".

Law Commission *Civil Pecuniary Penalties* (NZLC 1P33, 2012)

Office of Crown Lands *Briefing Note for the Primary Production Select Committee* (1998).

Primary Production Committee *Crown Pastoral Land Bill* (1998).

Ministry of Commerce *Penalties, Remedies and Court Processes under the Commerce Act 1986: A Discussion Document* (New Zealand Government, Ministry of Commerce, Trade Remedies Group, 1998).

(16 September 2003) 611 NZPD 8653.

(8 December 2009) 659 NZPD 8364.

(2 June 2009) 654 NZPD 4084.

(24 July 2012) 682 NZPD 3868.

(CAB (98) 965).

2 Australia

Review Panel *Review of the Law of Negligence Report* (2 October 2002).

(11 December 2002) APD 10080.

(19 February 2004) APD 25236.

(22 June 2006) APD.

(30 March 2006) APD.

F Reports

Law Commission *Civil Pecuniary Penalties* (NZLC 1P33, 2012).

Review Panel *Review of the Law of Negligence Report* (2 October 2002).

Royal Commission to Inquire into and Report upon Workers Compensation *Report of the Royal Commission of Inquiry* (R. E. Owen, 1967).

G Internet Materials

"FAQs" The Leveson Inquiry <www.levesoninquiry.org.uk>.

"Members accepting amendment of the TRIPS Agreement" (20 August 2013) World Trade Organization <http://www.wto.org>.