IN THE SUPREME COURT OF NEW ZEALAND SC 49/2006

BETWEEN **SUSAN COUCH**

Appellant

AND **ATTORNEY-GENERAL**

Respondent

Hearing:	23 March 2009
Court:	Elias CJ Blanchard J Tipping J McGrath J Wilson J
Appearances:	B P Henry for the Appellant Solicitor-General with J C Pike and R Kirkness for the Respondent

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CIVIL APPEAL

MR HENRY:

Henry for the appellant, Your Honour.

ELIAS CJ:

Yes, thank you Mr Henry.

SOLICITOR-GENERAL:

Mr Pike and Mr Kirkness are with me for the respondent, Your Honours.

ELIAS CJ:

Thank you Mr Solicitor, Mr Pike, Mr Kirkness. Now, Mr Henry, we think you'd be assisted by hearing from the Crown first because as we've indicated earlier really it seems to us that it's for the Crown to make the running on this argument. Do you have any problem with that?

MR HENRY:

I'm pleased to hear that, I've prepared on that basis.

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

Thank you very much Your Honours. I have a two-page synopsis which outlines the course of the argument which the Crown proposes to run and I'll make that available to the Court now. Can I just indicate there are eight topics which we wish to traverse and if the Court permits, Mr Pike will deal with the last of those topics and it's my intention to deal with the first seven.

The state of law Your Honours in New Zealand concerning exemplary damages has been accurately described by Professor Todd as being haphazard.

ELIAS CJ:

Is there any country where it is not?

SOLICITOR-GENERAL:

I think, with respect Your Honour, this case provides an opportunity for this Court to introduce a high degree of principle and practicality, two claims for exemplary damages thereby significantly reducing any possibility of haphazardness continuing in this area of the law.

ELIAS CJ:

But in fact it was a serious question –

SOLICITOR-GENERAL:

Yes, I appreciate that.

ELIAS CJ:

Are you saying that there is some jurisdiction that has got it right and which we should be looking to?

SOLICITOR-GENERAL:

I respectfully submit that the Courts of England and Wales have certainly since *Broome v Cassell, Rookes v Barnard* introduced a very high level of principle to awards of exemplary damages, and as the Court will appreciate, of course, they are very restricted.

ELIAS CJ:

So are you going to be suggesting that we go back to *Rookes v Barnard*?

SOLICITOR-GENERAL:

I'm going to be suggesting Your Honours that you don't need to go so far as *Rookes v Barnard* but there are two options in the Crown's submission which are available, one is to recognise the true scope of exemplary damages, namely to punish for intentional wrongs and that negligence can never be an intentional wrong but if the Court doesn't want to go that far, then the basis upon which an award for exemplary damages in negligence can be awarded has to be confined to instances of conscious wrongdoing, subjective recklessness.

TIPPING J:

Is it going to be suggested, Mr Solicitor, that what you're aptly calling subjective recklessness is a species of negligence? Because there are views

that once you uplift, if you like, to advertence or its moral equivalent, it's no longer apt to call it negligence.

SOLICITOR-GENERAL:

Yes, but subjective recklessness I recognise is a – is potentially a subspecies of a form of negligence.

ELIAS CJ:

So you're inviting us to reject the Privy Council majority in *Bottrill*?

SOLICITOR-GENERAL:

I most certainly am, Your Honour.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

So the starting point from the Crown's perspective is that exemplary damages should not, as a matter of principle, be available for negligence, rather exemplary damages should only be awarded as additional punishment for trespassory Courts where compensatory damages do not sufficiently punish the wrongdoer, and this, it is submitted, is wholly consistent with the purpose and principle under exemplary damages and with the predominance of academic commentary. As I have already indicated, if the Court isn't willing to go that far, then exemplary damages should be restricted to instances where it can be established that the tortfeasor has consciously done wrong or been subjectively reckless.

As to the ACC bar, section 317 acts as a code in relation to actions for damages arising directly or indirectly out of personal injury and exemplary damages sought for negligence necessarily flow directly or indirectly from the personal injury and are therefore barred. Nothing in section 319 in the Crown's submission, alters that position.

ELIAS CJ:

Is this a subset of your second point?

SOLICITOR-GENERAL:

Yes it is.

ELIAS CJ:

So that – or is it, maybe it's a subset of your first point but in the case of personal injury by accident negligence exemplary damages is not available because of the statute?

SOLICITOR-GENERAL:

Correct, yes.

ELIAS CJ:

Leaving possibility of negligent loss to property being able to receive exemplary damages?

SOLICITOR-GENERAL:

Yes, yes. Provided that test of conscious wrongdoing, subjective recklessness is met. Can I just elaborate a little further on the submission that exemplary damages are genuinely quite haphazard? There are two reasons for this. One the anomalous nature of exemplary damages and secondly the way in which the law relating to exemplary damages has evolved in New Zealand in recent years.

Now there are four reasons why it can be submitted that exemplary damages are anomalous. First, civil punishment is itself anomalous and I can give you authority as we go, *Broome v Cassell*, at page 1087, Todd, on the "Law of Torts" at page 989, and the reason why civil punishment is anomalous is because of the fundamental problems that arise from the lack of evidential and procedural safeguards that are found in the criminal law where punishment is imposed as its primary objective.

The second reason why exemplary damages are anomalous are because they are not compensatory and there is no connection between the damages that are awarded and the plaintiff and in this sense it has been correctly said that damages simply act as a windfall to the plaintiff in the form of a fine that goes to the plaintiff. That point was also made in *Broome v Cassell* at page 1086 and also by Beever, in his article, "The Structure of Aggravated and Exemplary Damages" which is in volume 2 of the Crown's bundle of authorities at page 107.

The third reason why it is submitted that exemplary damages are anomalous is because the basis upon which punishment by way of exemplary damages is imposed lacks any objective foundation and is undesirably uncertain. And this point has been made very forcefully by Professor Todd in his article, "A New Zealand Perspective on Exemplary Damages" which is also in volume 2 and I'm referring to page 265 of that article.

The fourth reason why exemplary damages are anomalous is because damages representing pure punishment are necessarily indeterminate and raise real problems when it comes to assessing quantum. The *Bottrill* case would be a classic example of that where if it had gone to trial, where there had been multiple claimants, the Court would have been in quite a difficult position, if not impossible position, to try and assess quantum.

Accordingly, given the anomalous nature of exemplary damages it is the Crown's submission that there are strong reasons of principle and legal policy for adopting the Crown's approach and to restrict the basis upon which exemplary damages may be awarded. The more expansive an approach to such awards, the greater the uncertainty that is introduced in to this already troubled area of the law.

WILSON J:

Isn't the logic of this part of your argument, we shouldn't have them at all?

SOLICITOR-GENERAL:

If we are to have them, they have to be confined to the purpose for which they were developed, namely to punish those who have consciously done wrong.

ELIAS CJ:

But you are arguing that we shouldn't have them?

SOLICITOR-GENERAL:

For negligence?

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes, that's the first point. In the haphazard nature of the way in which our highest Courts have dealt with cases involving exemplary damages is classically illustrated by looking at the approach which the Privy Council has taken when first it dealt with *Daniels v Thompson* and then with *Bottrill*. In *Daniels v Thompson* the Privy Council correctly recognised that the New Zealand Court of Appeal had settled the law of New Zealand and in doing so had put in place legal policies best suited to New Zealand. Less than 33 months later, a differently constituted board again recognised that the Court of Appeal had adopted a policy based decision but nevertheless by a majority overturned the New Zealand Court of Appeal's policy decision. In the meantime, Parliament had an enacted section 319 of the Injury Prevention, Rehabilitation and Compensation Act, a section which was rushed through Parliament at extremely short notice and Professor Todd has accurately described that section as being ill considered, at page 276 of his article.

So, by way of general introduction, the Crown submits it is appropriate and timely for this Court to introduce some logic and principle to the law of exemplary damages in this country. In doing so, it is necessary to be mindful of the anomalous nature of exemplary damages and the resulting need to

adopt a restrictive approach if any certainty in this area of the law is to be achieved.

So, what should be the threshold for exemplary damages? The Crown suggests that in attempting to identify the correct test as to when exemplary damages should be able to be awarded, the correct approach is first to define the purpose of exemplary damages and then to define the circumstances which need to be established before a claim for exemplary damages can succeed. As to the first point, I doubt there will be any contest. Most contemporary judicial and academic authorities recognise the purpose of exemplary damages is to punish a wrongdoer. For the Court's assistance, I will just quickly go through the authorities so that they are available for the Court. A convenient starting point on this point is Lord Devlin's speech in *Rookes v Barnard* which is in volume 1 of the Crown's bundle of authorities at tab 15 and in that judgment His Lordship drew a distinction between compensatory and punitive damages. The same theme was reaffirmed in *Broome v Cassell*, also volume 1, tab 16 and in particular the speech of Lord Reid at page 1089 at lines D to E, affirms this point. In *Donselaar* Justice Cooke as he then was, relying on *Rookes v Barnard* and *Broome v Cassell*, recognised the role of exemplary damages was confined to punishing a defendant and a similar point was made by His Honour Justice Richardson, at page 109, line 30 of that judgment. Similarly in *Blundell*, President Cooke as he had then become, in his model summing up forgeries in relation to exemplary damages referred to the role of exemplary damages as to punish for acts of bad faith, deliberate use of force, or for high handed contemptuous behaviour. In *W v W* which was the *Daniels v Thompson* appeal to the Privy Council, Lord Hoffmann succinctly observed that the main purpose of exemplary damages is to punish the defendant –

ELIAS CJ:

The main purpose?

SOLICITOR-GENERAL:

Yes, the main purpose. Justice Thomas, perhaps the most forceful advocate for exemplary damages serving the wider functions ascribed to the law of torts, he also recognises that the primary function of exemplary damages and he uses the word primary, is to punish, and in *Bottrill,* page 648, paragraph 95 is sufficient authority from Justice Thomas' point of view for that point.

ELIAS CJ:

I don't think there's any – could be any dispute that the primary purpose has been recognised in the cases as to punish. The area of dispute is whether it is the only purpose and the most significant articulation of the view contrary to you is surely that of Lord Nicholls in *Bottrill.*

SOLICITOR-GENERAL:

And when I say and focus upon Justice Thomas, Your Honour, I do so with considerable respect, because and I hope this isn't construed or misconstrued because with the greatest of respect to the judgment of the majority of the Privy Council, I do firmly believe that actually Justice Thomas put the case a lot stronger and in a more compelling way than did the majority of the Privy Council in *Bottrill*. So if I focus upon Justice Thomas, it is only out of respect for the way in which he actually has articulated the point that is contrary to the one that I'm arguing.

TIPPING J:

Is there any mileage here in endeavouring to distinguish between purpose and effect?

SOLICITOR-GENERAL:

Yes, we will come on to that very point. I call it the consequences consideration and I believe that those who take the position contrary to the one that the Crown is submitting inadvertently focus upon consequences rather than upon the culpability of the conduct of the person who is the subject of the claim of exemplary damages. Now I think that's the same point that

Your Honour is making to me in your question, and it is certainly a point that I propose to emphasise later in the submissions.

And Your Honour, the Chief Justice very correctly points to the true issue in this case, not what the purpose of exemplary damages is although in the Crown's submission, one should never lose sight of the fact that they're there to punish, the real question is who should be punished?

And once it's established that the function of exemplary damages is to punish, two camps emerge. One camp in which is the exchanges I've established, that's Justice Thomas and the majority of the Privy Council in *Bottrill*, they suggest that those who deserve to be punished are those whom the Court believes have acted in such an outrageous way that they deserve to be punished. In short, those who ought to be punished are those whom the Court believes deserves punishment and I will return to that body of thought in a few moments.

The second camp considers that exemplary damages should only be awarded to punish those who have consciously done wrong or who have been subjectively reckless as to the consequences of their conduct, and as a matter of principle and policy, the Crown submits that exemplary damages should be confined to those trespassory torts where it can be established that the defendant has consciously done wrong, advertently committed damage, or has been subjectively reckless.

BLANCHARD J:

Would you include misfeasance in public office?

SOLICITOR-GENERAL:

Yes, yes, that is for misfeasance in public office to succeed, you have to have advertent behaviour, or at the very least, subjective recklessness.

ELIAS CJ:

That of course is not before us, but I suppose there is question if you are not right in the submissions that you're advancing whether that position should be followed. In other words, you're arguing for consistency with the approach taken to misfeasance in public office that does entail adhering to those authorities on misfeasance in public office?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Are you, Mr Solicitor, in the concept of trespassory torts where the intention, if you like, of the wrongdoer is to achieve the outcome, equating subjective recklessness in moral terms, if you like, with intention?

SOLICITOR-GENERAL:

Yes. Yes I am. Now, this is really, in my respectful submission, the gravamen of the issue that is before the Court and I would like to develop the Crown's argument –

ELIAS CJ:

Sorry, just pausing there on that point because I may not be sufficiently understanding it. The intention required in a trespass situation is a long way from the sort of trespass – the sort of intention that would make negligence outrageous?

SOLICITOR-GENERAL:

Correct Your Honour.

ELIAS CJ:

So in fact the standard of intention will be quite – or the gravity of the conduct will be quite different in case of trespass and negligence applying the intentional recklessness standard that you are urging on us?

SOLICITOR-GENERAL:

In most instances I would say without hesitation, yes, although consequences might flow from intentional recklessness or, sorry, intentional advertent behaviour and subjective recklessness which are just as horrific as –

ELIAS CJ:

Yes I understand that but I'm just thinking about it in terms of culpability and wondering why exemplary damages should have such a lower threshold in the cases of the intentional torts than in the case of negligence. It does seem to be following through on the forms of action rather than concentrating on culpability.

SOLICITOR-GENERAL:

I'm sure the fault is entirely mine and I hope I don't cause any further confusion. I would struggle with the concept that the threshold is lower for establishing exemplary damages for an intentional tort. You've still got to establish the existence of a determination or a conscious desire on the part of the defendant to harm the plaintiff and that –

ELIAS CJ:

No, no, to physically interfere with them.

SOLICITOR-GENERAL:

Yes. That's still nevertheless a very high threshold Your Honour.

TIPPING J:

The legislature makes this very point in murder where it equates culpability of intentional killing, means to kill, with a meaning to cause bodily injury and reckless as to whether death ensues or not.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

It's the exact same equation?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

In that context?

SOLICITOR-GENERAL:

Yes indeed.

TIPPING J:

And morally it's seen as having equal gravity or equal culpability. That I think, Mr Solicitor if I may, is the parallel you're seeking to draw?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

It's the parallel that was rejected by Lord Nicholls?

SOLICITOR-GENERAL:

It is indeed.

TIPPING J:

It was.

SOLICITOR-GENERAL:

It is indeed and I do not shy away from saying I propose to take on the majority head on without skirting away from that.

ELIAS CJ:

But I'm just thinking about the epithets and I suppose one of the things that you will be urging on us is to come up with a principled approach which means that there's less need to rely on the epithets but looking at it in terms of outrageousness, there may not be a necessary condition of outrageousness in the circumstances of a trespass.

SOLICITOR-GENERAL:

Yes, that is true Your Honour.

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

Yes I agree with that.

ELIAS CJ:

So that if one is looking simply at culpability the difference between the availability of exemplary damages in terms of trespass and in terms of negligence, is the form of action?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

They still rule us from their graves.

TIPPING J:

I wonder if I may re-enter the debate. Is it necessarily the forms of action ruling us from the grave or is it not a perception at least that there has to be a line drawn somewhere and the line is drawn, if your argument is correct, at intention or its moral equivalent rather than and above inadvertence –

SOLICITOR-GENERAL:

Yes.

TIPPING J:

– but below – so as to exclude inadvertence, however gross, and above that.

SOLICITOR-GENERAL:

Which is what the, as my understanding, is exactly what actions in the case actually were designed to achieve and remedy in those circumstances.

TIPPING J:

Well I don't know, it obviously did, a lot of thought. There is an analogy with the forms of action but the forms of action were designed, or developed if you like, so as to recognise the direct and indirect, if you like, concept. I can see at least some equation between that and the difference between intention and negligence.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

But try not to get too sort of esoteric about it I suppose.

SOLICITOR-GENERAL:

One of the reasons why this area of the law has become unsatisfactorily haphazard is because perhaps there hasn't been enough attempt made to actually focus upon the most fundamental underlying principles and the

rationale for exemplary damages. Once you get to that point, once you actually have agreement as to what the true purpose of exemplary damages is, I think that the next step actually does become quite an easy step to take in terms of both logic and principle, and this the very point that I just want to elaborate upon now, because it's at this point that I do wish to take on both Justice Thomas and Lord Nicholls. In Daniels and Thomas –

BLANCHARD J:

Thompson.

TIPPING J:

Daniels and Thomas?

SOLICITOR-GENERAL:

I'm sorry.

TIPPING J:

Do you see him as a defendant Mr Solicitor?

SOLICITOR-GENERAL:

I can assure you that was totally inadvertent.

ELIAS CJ:

You know our transcripts go on the web?

SOLICITOR-GENERAL:

Yes I am aware, yes I have this image of a phone call coming tomorrow. In *Daniels v Thompson*, His Honour placed considerable emphasis on the wider functions of the law of torts and he specifically referred to the role of the law of torts as including vindicating and appeasing the victim. Those were the words that he used, vindicating and appeasing the victim, that's at page 69, line 20 of the judgment. He then also used those words as part of what he described as the therapeutic function of the law of torts. Now, I do not disagree with

His Honour that the law of torts can, in some circumstances, perform functions which are broadly therapeutic for a victim. Appeasement and vindication of the victim are in some cases a legitimate function of the law of torts and in the New Zealand scene for example, claims in defamation sometime serve a therapeutic function for the plaintiff. His Honour Justice Thomas correctly referred to the writings of Professor Feldthusen in the Ottawa Law Review which is in volume 1, tab 6, of the Crown's authorities, to support the proposition that actions and tort can serve a therapeutic role for the plaintiff. However, in my respectful submission, Justice Thomas and also Lord Nicholls, when he agrees with Justice Thomas on this point, takes a step too far when he reasons that the broad therapeutic function of tort proceedings can be achieved through expanding the scope of exemplary damages to permit such awards to be made whenever the Court believes that a tortfeasor deserves punishment.

The reason why I'm submitting that Justice Thomas' reasoning goes one step too far is because he merges the wider functions of tort law with awards of exemplary damages. None of the authorities actually relied upon by His Honour actually says that exemplary damages can be used to serve the broader therapeutic objectives of tort proceedings. Professor Feldthusen certainly doesn't draw that connection and nor did His Honour Justice Cooke in *Donselaar*, one of the authorities which Justice Thomas relied upon.

It is important I think, just to pause for a moment and reflect exactly what it was that Justice Cooke said in *Donselaar*. In that case, His Honour was saying nothing more than at common law, aggravated damages also serve a punitive role and that in the New Zealand context exemplary damages would need to be the sole medium by which punishment could be achieved. That is to say, His Honour was saying that exemplary damages would take over part of the function previously discharged by aggravated damages, that is to say that element of aggravated damages which served a punitive function and so therefore, what Justice Cooke was saying was that in the New Zealand context, only exemplary damages would serve a punitive function and in doing

so, would take over part of the role previously discharged by aggravated damages.

ELIAS CJ:

Well that really was an incoherent distinction, so wasn't that really simply recognising that instead of dancing on those definitions, it should just be frankly acknowledged?

SOLICITOR-GENERAL:

Yes, and it needed to be acknowledged in the New Zealand scene of course, because it was clear that whatever helps the bar to claim for damages arising directly or indirectly from personal injury meant, it meant that you couldn't bring a claim that was under the heading of compensatory damages which aggravated damages did fall, but they also served a punitive function. And that becomes very, very clear when one looks at the speech of Lord Devlin in *Rookes v Barnard* where he makes the point that exemplary damages are going to be reserved for those cases where the Court believes that awards of aggravated damages do not serve a sufficiently – do not sufficiently punish the defendant and if a defendant's not sufficiently punished by an award of aggravated damages, only at that point do you go on to consider whether or not exemplary damages should be able to be awarded in the three limited classes which *Rookes v Barnard* permitted exemplary damages –

TIPPING J:

Actually I think what Lord Devlin was saying was that you've got to look at the whole of the compensatory damages to see whether they represent aggravated – adequate punishment, so you look at compensatory and any uplift through aggravation and then it doesn't destroy the point –

SOLICITOR-GENERAL:

Yes, it's not confined just to aggravated damages although conceptually it's far easier to understand when you just think about aggravated damages.

TIPPING J:

Precisely. Although they are of course designed to be compensatory, and this is – I tend to agree with the Chief Justice and I've actually had something to say in previous cases about the whole idea of aggravated damages but – and I also have some hesitation with great respect, at the proposition that aggravated damages had any punitive purpose. They were to give extra compensation on account of the circumstances of aggravation, if you like, in which the tort was committed, but I just mention that, but let's –

SOLICITOR-GENERAL:

Well the only reason I was actually embarking on that little side step was to explain as clearly as I could what it was that Justice Cooke was actually saying in *Donselaar.*

TIPPING J:

Indeed, the point still runs.

SOLICITOR-GENERAL:

Yes. So the approach which Lord Nicholls and Justice Thomas take, it is, with respect, not supported by the authorities, it is also not supported when one examines the proper role of exemplary damages and I want to elaborate on this point a little further by reasoning that exemplary damages –

ELIAS CJ:

Sorry, what point is not supported by the authorities?

SOLICITOR-GENERAL:

The point that exemplary damages –

ELIAS CJ:

Is available for other than punishment?

SOLICITOR-GENERAL:

Yes, that they've conserved this therapeutic role which Justice Thomas refers to.

TIPPING J:

I think, if I may again, is this point you're making Mr Solicitor that what has happened, arguably, with Justice Thomas' analysis is that he's confused the purpose of tort law generally with the purpose of exemplary damages?

SOLICITOR-GENERAL:

Precisely sir, yes. And my analysis was to look at the authorities that he relied upon, the true purpose of exemplary damages and then to look at how his approach actually has some challenges in the New Zealand context given our ACC regime. So the first point is that the approach taken by His Honour and by Lord Nicholls is not actually supported by the authorities.

ELIAS CJ:

Well no authority goes as far.

SOLICITOR-GENERAL:

Yes. Now the next point I wanted to really emphasise was the proper role of exemplary damages and by reasoning that exemplary damages can perform the wider functions of tort law, His Honour and His Lordship concluded that exemplary damages conserve that broader function which goes beyond punishment. So when we look at *Daniels v Thompson*, His Honour suggests that exemplary damages conserve the functions of vindication, of education, of appeasement, and of symbolism. Those are four descriptions that can be found at paragraph 11 to 20 of *Daniels v Thompson*. Page 79 of *Daniels v Thompson* in volume 1, tab 6. Now whilst His Honour went to some lengths to emphasise that he was not confusing those concepts, that is vindication and appeasement and symbolism with concepts of compensation. The reality is that His Honour was plainly focusing on the consequences of a tortfeasor's behaviour upon the plaintiff. And by looking for therapeutic relief

for the plaintiff through the mechanism of exemplary damages His Honour was plainly and unashamedly looking to assist the plaintiff rather than simply to punish the tortfeasor.

Now at common law, and here I perhaps need to just address the point that His Honour Justice Tipping raised with me a few moments ago, at common law, aggravated damages were a legitimate mechanism for assisting a plaintiff who may have been particularly adversely affected by a defendant's conduct and the authorities which support that are very orthodox. I found the following in Salmon and Heuston, the 12th edition which is in our bundle of authorities under tab 9, aggravated damages are given for conduct which shocks the plaintiff exemplary damages for conduct which shocks the jury.

An article in the Tort Law Review by Witzleb and Carroll which is under our supplementary bundle of authorities at tab 8, exemplary damages on the other hand focus on the defendant's conduct in order to assess the quantum required for punishment and deterrence.

The good judgment of, not often cited these days, but will be well remembered by members of the bench, *Fogg v McKnight*. Where there has been insult and the natural result is injury to the feelings of the innocent party, damages maybe awarded by way of compensation to the respondent for the injury to his feelings. As has been said, they can be regarded as a solacium for wounded dignity and feelings. In this respect I do not think such damages fall into the category of exemplary or punitive damages.

In *A v B* which is in the supplementary bundle under tab 3, the essential distinction in this context between aggravated and compensatory damages and exemplary or punitive damages is that the former represent a solacium to the plaintiff, the latter a punishment of the defendant.

And in *Uren v John Fairfax*, Justice Windeyer, and this is in supplementary bundle of authorities under tab 4, page 149, "Aggravated damages are given

to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done, exemplary damages on the other hand are intended to punish the defendant and presumably to serve one or more of the objects of punishment."

The reality is, when one looks at those authorities to see what the true distinction is between exemplaries and aggravated, that reality is that His Honour Justice Thomas and Lord Nicholls fell into the same trap has really transplanted part of the solacium functions of aggravated damages and placed them under the heading of exemplary damages and in doing so has failed to give proper recognition to the true role of exemplary damages.

ELIAS CJ:

They quite clearly don't regard it as solacium. They are very careful to say that it's not. The issue surely is whether through tort law, punishment can be pursued by a plaintiff and the vindication and the appeasement are only in that context.

SOLICITOR-GENERAL:

Yes. I'm very conscious that Justice Thomas in particular went to some lengths to say that he was not introducing a compensatory element.

ELIAS CJ:

So did Lord Nicholls.

SOLICITOR-GENERAL:

And so did Lord Nicholls. Justice Thomas I think was very, very clear in his approach but when one is looking for ways to assist the plaintiff, rather than to punish the defendant, in my respectful submission, once you're focused, or you have an intention of trying to assist the plaintiff, you have moved from punishing the defendant into the area which was traditionally covered by aggravated damages.

ELIAS CJ:

Well I just flag that I'm not sure –

SOLICITOR-GENERAL:

I understand Your Honour's position.

ELIAS CJ:

– that I understand the distinction that you are drawing. It seems to me who may pursue punishment is the issue and to date, the cases have said that the plaintiff in civil actions, including for negligence, can pursue that objective.

SOLICITOR-GENERAL:

Yes and I'm very aware of that position Your Honour but I still think that I am able to make the submission in good conscience that when one actually analyses the reasoning process, which His Honour Justice Thomas and Lord Nicholls followed, it is subject to the legitimate criticism that notwithstanding their protestations that they were not attempting any form of compensation, they were indeed finding a way to assist the plaintiff rather than punish the defendant, and when their concern was to assist the plaintiff, they fell into that category of providing a form of benefit for the plaintiff which is, technically speaking, a form of compensation that's there to assist the plaintiff and not to punish the defendant.

TIPPING J:

Your argument is, I think, they had a purpose of assisting the plaintiff. They should have simply left it to the effect of punishing the defendant.

SOLICITOR-GENERAL:

Yes. And if they hadn't gone down that road, clearly I wouldn't be able to make the submission that I'm making now. The following submission is that if one accepts the proposition that I have just advanced, then in the New Zealand context, we run into that difficulty that if there is some form of assistance to the plaintiff being achieved through an award of exemplary

damages, then you are running up against the bar in the Accident Compensation legislation and indeed, you are actually undermining one of the most fundamental premises in the Accident Compensation legislation, namely that you forgo your right to sue in order to have the entitlements that are granted by the legislation.

ELIAS CJ:

Mr Solicitor, in the overseas jurisdictions, it's acknowledged that tort law serves ends other than the ends of compensating the plaintiff.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Other jurisdictions haven't had to grapple with what aspects of damages address those different ends because they don't have the compensatory system, statutory system that we have. Is there any authority that you can point to that says that exemplary damages are not – do not further the general ends of tort law?

SOLICITOR-GENERAL:

That's the underlying premise of both *Rookes v Barnard* and *Broome v Cassell* Your Honour.

ELIAS CJ:

Well they are to punish, principally.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

But this is quite a fine distinction you draw which is necessary in New Zealand because of the ACC legislation but which hasn't been necessary in other

jurisdictions, is there anything that suggests in the absence of that reason this very narrow focus beyond *Rookes v Barnard* and *Broome v Cassell*?

SOLICITOR-GENERAL:

No, and it was certainly something that I observed when reading the overseas authorities that there was frequently a high degree of confusion as to what was the function of exemplary damages in a particular case and indeed some took solace in the fact that while there's only one award of damages, we don't really need to get too finite in what it is that we're trying to achieve by making an award of exemplary damages and it is perhaps uniquely because of the New Zealand Accident Compensation scheme that we, in New Zealand, are forced to adopt a far more principled approach by ascertaining what is the true role of exemplary damages and then asking who should then be punished that causes us to have to undertake this analysis in a case such as the present.

Now the approach which the Crown urges upon the Court –

ELIAS CJ:

Sorry, in other jurisdictions where they have been talking about the wider ends of tort law, have they confined those ends to compensatory damages?

SOLICITOR-GENERAL:

Can I answer the question this way, Your Honour, by saying I have not found a single authority which says that the wider objectives of tort law can be achieved through awards of exemplary damages.

ELIAS CJ:

No but have you found indications that the wider ends of tort law are achieved through the mechanism of compensatory damages? As opposed to the package of remedies that are available?

SOLICITOR-GENERAL:

I don't believe I've found an authority that expresses the proposition in the way that Your Honour has put to me and fairly put to me but I do retort that the only things they say is they do not draw that extra step, take that extra step of saying exemplary damages form part – that the rationale for exemplary damages is achieved by recognising the wider functions of tort law. I haven't found a single authority that says that other than Justice Thomas and Lord Nicholls.

ELIAS CJ:

No but my point is –

SOLICITOR-GENERAL:

Yes I understand your point.

ELIAS CJ:

– that your argument would be much stronger if there were cases saying that the compensatory damages achieve those other ends?

SOLICITOR-GENERAL:

Yes and *Rookes v Barnard* and *Broome v Cassell* is probably the case – are the two cases which come the closest to that.

ELIAS CJ:

Yes, thank you.

WILSON J:

Mr Solicitor I realise that we will be coming to section 319 later in the argument –

SOLICITOR-GENERAL:

Yes of course, yes.

WILSON J:

But isn't your point about undermining the principles of ACC answered by subsection (1) of section 319?

SOLICITOR-GENERAL:

Well the – you're right that we're going to be addressing that point and we'll be addressing it head on later because we say that when you look at 319 and understand it's legislative history, the purpose of it is confined to claims for intentional torts or actions which equate to a crime.

WILSON J:

Yes.

SOLICITOR-GENERAL:

I wanted to elaborate on the more principled approach which the Crown submits this Court –

ELIAS CJ:

I'm sorry just dealing with it as a matter of general principle like that, that would then leave a gap because there are cases which have been recognised as deserving of punishment which fall short of being crimes and on your argument it's only if a tort also constitutes a crime that there would be exemplary damages available, is that right?

SOLICITOR-GENERAL:

Well we could actually move the boundary slightly further by saying intentional conduct/subjective recklessness.

ELIAS CJ:

I'm just thinking of your argument based on section 319.

SOLICITOR-GENERAL:

Yes, yes, no I understand that, and we will be addressing that and developing it a lot further later.

ELIAS CJ:

Yes, thank you.

SOLICITOR-GENERAL:

I wanted to spend some time on what the Crown submits is the more principled approach which the Crown says is entirely consistent with the rationale for punitive damages. Secondly, that it is easily understood and complied with and thirdly, that it cannot invite any form of undermining of ACC.

I'll deal with those three points individually. First, the logical consequences of a punitive rationale. Historically the direct infliction of harm, especially bodily harm, was actionable under the rubric of trespass to the person. Such wrongs were and continue to be actionable without proof or allocation of damage. All are now criminal wrongs. In a jurisdiction invoked by those claiming an intentional wrong such as assault or battery or the innominate wrong such as *Wilkinson v Downton* that was an intentional infliction of nervous shock, damages maybe awarded on an amalgam of considerations that logically include punishment and it is neither rational nor logical however to allow punitive damages to be added to the general, special and aggravated damages that can be recovered for damage or loss caused by a negligent act or omission. The problem with the rule that a defendant may recover exemplary damages for harm or damage negligently caused by the plaintiff, is that the tort of negligence, as it has developed, neither grew from nor needed any element of punishment to affect its legal and its social policies. The essential difficulty with grafting exemplary damages on to the remedies for negligently causing loss or harm, is that it overlooks the point that remedies arise from the perceived need to right a particular wrong and should be rationally connected to the wrong in any case. Furthermore, the

basis for awarding exemplary damages should reflect the concepts underpinning punishment in modern western democracies. In that regard, in modern western democracies we say that before there is a punishment, the conduct has to be declared wrong either by Parliament or by the Courts in advance of the conduct occurring. We don't tolerate retrospective offences. Therefore, defendants have prior notice that if they commit a prohibited act they risk being sued through the Courts and punished. It follows therefore, that an offender who exercises free choice and commits a prohibited act must accept the punishment consequences that follow. This is all totally orthodox –

ELIAS CJ:

It is an argument that proves rather a lot because it means that there shouldn't be exemplary damages at all.

SOLICITOR-GENERAL:

Except for where there is conscious wrongdoing on the part of the defendant. This argument does accommodate that –

ELIAS CJ:

But that's a different argument. You were taking some very high ground there in saying it's not – there are protections for punishment which aren't available in the civil process, therefore punishment is not an object of the civil process. It's a bit late in the day for that.

SOLICITOR-GENERAL:

Yes but what I'm saying is that the approach which the Crown urges upon the Court is entirely consistent with western democratic precepts as to what the rationale of punishment is. That's all I'm saying.

ELIAS CJ:

I understand.

SOLICITOR-GENERAL:

The second point I wanted to make was that the Crown's approach is comparatively, I will volunteer, comparatively easily understood and complied with. It has the advantage of objective certainty, thus tortfeasors who commit trespassory torts know they risk punishment through an award of exemplary damages. That, with respect, is preferable to the approach taken by His Honour Justice Thomas and the majority in *Bottrill*, who say that punishment can be imposed on someone solely because of the consequence of their behaviour, regardless of whether they knew the nature of their wrongdoing.

ELIAS CJ:

Well, it has to be outrageous however, so it's not just the consequences.

SOLICITOR-GENERAL:

It's consequence as viewed by the plaintiff and ultimately by the Court.

ELIAS CJ:

In fact, do they use the word consequences, do they tie it to consequences? I don't think they do.

SOLICITOR-GENERAL:

It has to be a consequence though Your Honour because if it – one has to understand the consequence when one assesses the conduct as being outrageous.

ELIAS CJ:

Well, I don't think that follows at all. Do they say outrageousness is to be judged according to consequences? Because that isn't my understanding of what is said in those judgments.

SOLICITOR-GENERAL:

I will have to have someone check the exact wording Your Honour.

ELIAS CJ:

Yes, thank you. That's all right, you can come back to it.

SOLICITOR-GENERAL:

But I contrast that approach with the objective qualities of the approach taken by the majority of the Court of Appeal in *Bottrill* and say that that is preferable to the subjective reaction of the Courts in deciding that conduct is deserving of the punishment by way of an award of exemplary damages. The approach taken by the majority of the Privy Council in *Bottrill* really does blur at a fundamental level the nature of the role of exemplary damages with the consequences which flow from the defendant's conduct. When punishment is being inflicted, it is respectfully submitted, the focus should be upon the level of the defendant's culpability, not how one perceives or reacts to the events which have occurred.

ELIAS CJ:

Well I don't think anyone would quarrel with that, which is really why I'm questioning your attribution of that – the contrary view to Lord Nicholls and to Justice Thomas. It's the outrageousness of the conduct. The question is rather whether that is to be objectively assessed, or whether it's subjective recklessness or advertent conduct, that's the area of dispute.

SOLICITOR-GENERAL:

Yes, and I certainly wasn't endeavouring to construct straw men arguments, I do believe that this explanation for why the approach taken by the majority is fully supported by respectable academic authority, and in particular Professor Todd, who is very critical –

TIPPING J:

Is it Professor Todd who makes the point which, it may not be in these words, that it's better to focus on the state of the defendant's mind than on the state of the Judge's mind?

SOLICITOR-GENERAL:

Yes he does say something – he does convey that.

ELIAS CJ:

One really wonders how he imagines that Courts make objective decisions and you do have to answer the criticism made by Lord Nicholls that the subjective intent is almost always objectively assessed from what happens.

SOLICITOR-GENERAL:

Yes, I don't doubt that at all, that is the way of course the Court functions.

TIPPING J:

But that wasn't the Professor's point, I don't think. The Professor's point, as I recall it, was that if you – you have to objectively assess the state of the defendant's mind, of course, but it's better to focus on what was going on in the defendant's mind and have it needed to be at the level of deliberate intention to cause harm or recklessness as to risk of causing harm than the reaction the conduct makes on the Court or the reaction of the Court to the conduct.

SOLICITOR-GENERAL:

And the Crown's submission is that that analysis is entirely consistent with the fundamental precepts of what it is that we're trying to achieve here, namely the punishment of people who have done wrong, and the class of persons who should be punished are those who have consciously done wrong or who have been subjectively reckless as to the consequences of their conduct.

TIPPING J:

Because outrageousness is, to some extent, in the eye of the beholder.

SOLICITOR-GENERAL:

Exactly.

TIPPING J:

Where as the state of the defendant's mind is a matter of fact.

SOLICITOR-GENERAL:

Yes, objectively assessed.

TIPPING J:

Objectively assessed. I think that's all, there's nothing more subtle in the point than that, whether it's a good or a bad point I put aside.

SOLICITOR-GENERAL:

Yes. And the approach which I have been urging upon the Court is entirely consistent with the fundamental concepts that underline ACC, if a person is injured in New Zealand, as we know, through a defendant's negligence, then they get a series of entitlements that are conferred without any need to prove fault on the part of the person who has inflicted the physical personal injury. The Crown's approach restricting exemplary damages to punishing the conduct of defendants in committing trespassory wrongs or who have been objectively – who have been subjectively reckless or have intentionally committed wrongs ensures that exemplary damages are not drawn to what it's trying to fulfil, what Justice Thomas described as the therapeutic functions achieved by awards of exemplary damages. The therapeutic functions which Justice Thomas said could be fulfilled by exemplary damages really do undermine the basic principle of ACC. If you are injured, as I said a few moments ago, you will be entitled to a range of entitlements, treatment, rehabilitation, weekly compensation, lump sum compensation and various other grants, depending on the individual circumstances. In exchange for that comer, we have relinquished our previous common law right to sue for any form of compensatory damages, and the Crown's approach to confining exemplary damages to trespassory torts or where there has been advertent subjective recklessness compliments entirely the fundamental premise upon which that part of ACC is based. That is to say, you do not invite any form of

exemplary damages to be awarded which would undermine the entitlements which one gets from ACC.

WILSON J:

And again this is where I see section 319 as squarely intruding.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

And you will come on to talk about the incentives for better action that are looked to by ACC because the wider aspects of tort law don't necessarily go against those.

SOLICITOR-GENERAL:

Yes, that is true Your Honour.

ELIAS CJ:

If gross negligence is not able to be the subject of exemplary damages there is no mechanism, there is no civil mechanism to encourage the others?

SOLICITOR-GENERAL:

Well that is a consequence of the ACC regime and it was an argument of course which was put forward by many who have opposed the introduction of ACC saying that if you didn't have the ability to sue people who have caused harm to others, there would be no incentive to act safely. Well I think that we've moved well beyond that concern in the 35 years that we've had ACC.

BLANCHARD J:

I don't know whether it was one of the objects of ACC but certainly one of the consequences is that you don't need to carry insurance cover against causing personal injury. How does Privy Council *Bottrill* line up with that?

SOLICITOR-GENERAL:

A prudent person would need to have some form of cover now in New Zealand which might not be obtainable because insurance companies are quite adverse to trying to provide cover for exemplary damages but if you could get it you'd be well advised to do so because you don't know when your conduct is going to be assessed as being deserving of punishment.

BLANCHARD J:

So you might be exposed to a claim for damages against which you'd be uninsured?

SOLICITOR-GENERAL:

Possibly uninsurable.

BLANCHARD J:

Well you'd certainly be uninsurable where it was intentional.

SOLICITOR-GENERAL:

Correct.

BLANCHARD J:

But at the very high end of negligence.

SOLICITOR-GENERAL:

Yes, I haven't gone through and worked out if there are any public liability policies which would cover gross negligence giving rise to a claim for exemplary damages. If you could get that cover you'd be well advised to get it.

ELIAS CJ:

And we've lived under that regime for a few years.

SOLICITOR-GENERAL:

Yes. So in summary applying the outrageousness standard, with respect, lacks an objective content and has the potential to undermine one of the basic premises of ACC and the lack of determinacy and the standard which favoured – found favour with the majority in *Bottrill*, does provide an incentive for potential claimants to try their luck in seeking to remedy perceived inadequacies in the ACC compensation system through trying to get the Courts to award exemplary damages.

TIPPING J:

Could I just pick up a point my brother Blanchard raised, if you drove when you were manifestly drunk, someone could well find that was outrageous conduct when you killed someone but almost every policy there is would exclude the cover because you were outrageously drunk so you could end up, presumably, facing a claim. Of course if you had subjectively appreciated the risk and nevertheless gone on willingly to run it, then on your fallback position you would be liable, but without cover, but there would be that gap, if you like, where it wasn't up at that level but it was up enough to be outrageous?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Objectively.

SOLICITOR-GENERAL:

Yes. Such conduct may also – well it constitutes a criminal offence of course and hopefully the criminal justice process then deals and punishes, deals to and punishes the wrongdoer.

TIPPING J:

But you might not get monetary compensation, if you like, under the – well, that's a matter that perhaps is still uncertain.

SOLICITOR-GENERAL:

The final point I want to –

ELIAS CJ:

Just thinking about and it may just be that you were carried away, in the way it was put, of your point, I think you just said then that what you are contending for provides an objective standard.

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Of course, there would always be an objective standard. It would just have to be case specific. It seems to me that instead of an object of standard, what you are saying is that what you propose would mean that there was a recognisable test and confined test, intention or subjective restlessness.

SOLICITOR-GENERAL:

Yes and that's why I say and I think it's a legitimate submission, that it is a comparatively easily understood test and likely to be –

ELIAS CJ:

Subjective recklessness?

SOLICITOR-GENERAL:

Comparatively.

TIPPING J:

We wrestle with it daily in the criminal Court.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Jurors have to understand and apply it in most murder trials.

ELIAS CJ:

To a standard beyond reasonable doubt.

TIPPING J:

Well, that's the difference.

SOLICITOR-GENERAL:

The final point I wanted to make, just on this aspect of the submissions, is that the submissions that the Crown have been advancing fit very neatly into section 86 of the State Sector Act which is relevant to the proceeding before the Court –

ELIAS CJ:

What's the purpose of the State Sector – I'm sorry, I haven't looked. Do we have the Act here?

SOLICITOR-GENERAL:

Yes.

ELIAS CJ:

Isn't it internal –

McGRATH J:

There's a lot of them.

ELIAS CJ:

There's a lot of them is there? I just wondered whether it wasn't perhaps internal to government organisation?

SOLICITOR-GENERAL:

Ah, no, with respect –

ELIAS CJ:

It's not?

SOLICITOR-GENERAL:

No. Sorry, we've only got the section 86 here Your Honour. I could actually ask someone to get it from the library –

ELIAS CJ:

No, I will get the volume, thank you.

SOLICITOR-GENERAL:

The very succinct point that can be made is that the approach which we are advocating does have perfect symmetry with section 86 which holds that employees of government departments cannot be personally liable if they have acted in good faith. That is also entirely consistent with what Justice Cooke said in his classic statement of the function of exemplary damages in *Blundell*, where he specifically refers to the role of exemplary damages as being to punish public officials, who in bad faith use force against a citizen.

McGRATH J:

Are you really saying in section 86 that it removes the tortious character of wrongful acts by public servants?

SOLICITOR-GENERAL:

Yes. Unless they have acted in bad faith, they cannot be personally liable in a claim for tort.

McGRATH J:

Another way of reading it, would be to say that it gives protection to public servants from being liable for acts that other public servants commit and that might be related to chief executives who assumed under the State Sector Act greater responsibilities weren't going to be liable personally for acts of those in their charge or other public servants acts. So, it would have a lesser ambit.

SOLICITOR-GENERAL:

If one were to go down that route Your Honour, one would then have to rationalise how section 6(1) of the Crown Proceedings Act applies in the circumstances of the case such as this, for as Your Honour –

ELIAS CJ:

There would be no conflict on the basis that's being put to you?

SOLICITOR-GENERAL:

Well, with respect, if the individual cannot be held liable, ultimately the Crown cannot be held liable under section 6(1) of the Crown Proceedings Act.

McGRATH J:

But section 86 may not be saying that the individual's not held liable for his or her own acts at all, it may simply be saying they can't be held to be liable on the basis that the liability of others is attributed to.

SOLICITOR-GENERAL:

The interpretation which I have urged is entirely consistent with the proviso in section 6(1) of the Crown Proceedings Act though, which again emphasises that if the individual can't be held liable, then the Crown can't be held liable.

McGRATH J:

I would need some satisfying that such a major change to the liability of the Crown in tort, because that's what we're talking about here, was intended

when a measure which was giving Chief Executives greater responsibility and therefore potentially exposing them, and that's one of the purposes I think in the multi-purpose provisions in the State Sector Act you'll find, and I think it's difficult to see that this was part of Parliament's purpose, to actually deal so sweepingly to tortious conduct.

SOLICITOR-GENERAL:

Well of course Parliament had already very carefully considered the scope of Crown liability in tort in 1950 and when one looks at the legislative history of the Crown Proceedings Act, one understands why it is that the Crown can make the submission that the proviso to section 6(1) of the Crown Proceedings Act is entirely consistent with section 86 of the State Sector Act.

ELIAS CJ:

They seem to me to be dealing with entirely different matters, and on your argument, section 86, a very odd place for that provision to be located, makes the Crown immune from tortious claims, whereas section 6 seems to be saying entirely the opposite.

SOLICITOR-GENERAL:

Section 6 permitted the Crown to be sued in certain circumstances, but not where the individual who is alleged to have committed the wrong cannot themselves be held liable.

ELIAS CJ:

Yes, and that's entirely understandable.

SOLICITOR-GENERAL:

Right.

ELIAS CJ:

But section 86 first would be a very odd place to find such a sweeping immunity granted to the Crown and secondly, can be read quite sensibly as

has been suggested to you by Justice McGrath as making it clear that Chief Executives who have substantial responsibilities under this legislation aren't personally liable. Nothing to do with the Crown's liability.

SOLICITOR-GENERAL:

Well as I've said I think that you can put sections 86 alongside section 6(1) of the Crown Proceedings Act and reach the conclusion which I have put before the Court.

ELIAS CJ:

Is there any authority for this startling submission?

SOLICITOR-GENERAL:

Well there is no other provision that I'm aware of anywhere else.

ELIAS CJ:

No, but has any case ever considered –

SOLICITOR-GENERAL:

No, no.

TIPPING J:

Mr Solicitor, I don't think I've ever had the pleasure of looking at section 86 of the State Sector Act before –

ELIAS CJ:

Why would you?

SOLICITOR-GENERAL:

It was the first thing I looked at.

TIPPING J:

I'm sure. Not even before we sat, but I have to say it reads to me and I'll put it to you, I may be quite wrong, as though it's dealing with secondary liability as opposed to primary liability. In other words, you're not liable on any guise for what someone else has done in good faith, but it doesn't touch on your own personal liability. It's very uneasily worded, is there any force in that? It seems – it doesn't seem to be focused on your own personal liability, it seems to be focused on the premise that you might be liable for someone else. It may be saying no more than what Justice McGrath said, but in tort terms, if you like, it's designed to exclude secondary liability as opposed to primary liability.

SOLICITOR-GENERAL:

Can I come back on that point?

McGRATH J:

I think at the end I'd be helped by some consideration of how the purpose of the State Sector Act could support your view, because it does seem to me that the purpose of the State Sector Act would support the alternative view that's being put to you.

SOLICITOR-GENERAL:

I understand entirely what Your Honour is saying, and perhaps too much has been made of section 86. The point I was trying to make is that the Crown's submission that claims for exemplary damages be confined to those who consciously do wrong or who are subjectively reckless, is consistent with section 86 where liability, regardless of who's liable, but liability can only be triggered in the event of there being bad faith or absent good faith.

TIPPING J:

You could hardly be liable for the bad faith of someone else. This whole thing is a mystery to me Mr Solicitor, I have to say. But I take your point. You're equating subjective recklessness with bad faith?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Aren't you? That's really your point?

SOLICITOR-GENERAL:

Yes.

TIPPING J:

Never mind the mysteries of how far this section goes.

SOLICITOR-GENERAL:

Yes. Now Mr Pike was going to be dealing with the next part of the Crown's submissions. It maybe that Your Honours, and I'm entirely in your hands, but I wondered if before we asked Mr Pike to come –

ELIAS CJ:

Would you like us to take the adjournment now?

SOLICITOR-GENERAL:

It might be and then I can just give some further thought to that point that's been made and deal with that over the morning tea break.

ELIAS CJ:

Yes, thank you.

COURT ADJOURNS: 11.21 AM

COURT RESUMES: 11.40 AM

SOLICITOR-GENERAL:

Can I just make a couple of points? One to reiterate that I raise section 86 of the State Sector Act saying that the submission that the Crown was making that liability for exemplary damages should be confined to those who intentionally do wrong or were subjectively reckless is merely consistent with the provisions of section 86 which appear to say that a chief executive or employee can only be liable if they do not act in good faith.

Secondly, I accept that section 86 presents some challenges in the way in which it is worded in trying to ascertain precisely what Parliament's intention was. There was no equivalent provision in the State Services Act of 1962. We did search through *Hansard* to see if we could find any reference to what was meant when section 86 was passed and went to the Select Committee Report, we could find nothing that assisted –

ELIAS CJ:

It really follows on, I've just been looking at the statutes, but the Act itself really doesn't lend any support to the interpretation that you're suggesting Mr Solicitor. That provision, which is a startling provision as you would have it read, appears in the miscellaneous provisions under the subheading superannuation. The legislation is concerned really with setting up chief executives of government departments and dealing with employment matters and in that context makes perfectly good sense if read in the restricted way that Justice McGrath put to you.

SOLICITOR-GENERAL:

Well all I can say is that I looked at the words, no individual employee shall be liable unless they act in bad faith.

ELIAS CJ:

Yes.

TIPPING J:

It's sad not to be simple.

SOLICITOR-GENERAL:

Unless I can assist you further, Mr Pike will now address the section 319 and its inter-relationship with section 317 and its particular application in this case.

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

And thank you for the opportunity to have a look at that during the morning break.

ELIAS CJ:

Yes Mr Pike.

MR PIKE:

Yes, may it please the Court, the principal issue here is the question of whether the general proceedings bar in the – or I'll call it the brevity purpose, the ACC legislation, whether the general bar to bringing proceedings for any injury arising directly or indirectly out of personal injury, is in any way modified by section 317. The theory of the plaintiff's case really and this has always been, that if anything section 319 authorises the action in exemplary damages that she seeks to bring and our case in response to that has always been that it doesn't go that far, the section doesn't go that far at all. What it does do has been a matter of some little mystery certainly to the academic commentators, again involving Professor Todd who have criticised it for its really quite opaque language and certainly in subsection (1). But section 319 we say which has the effect that nothing – or reads that nothing in this Act and no rule of law prevents, we underscore that perhaps, prevents any person from bringing proceedings in any Court in New Zealand for exemplary damages.

Then it goes on to say, for conduct by the defendant that has resulting in personal injury covered by this Act or former such enactments. Subsection (2) of course goes on to provide a code, or a mini code as it were, as to what to do in cases where the person whose conduct has caused the personal injury has indeed been punished by the criminal Courts, or might have been punished by them. What our case is in a nutshell, is that this enactment was brought in to being in a process of amending the Accident Compensation legislation generally and it was inarguably a response and a rather response to the decision of the New Zealand Court of Appeal in *Daniels v Thompson*, a case which incidentally still has some resonance in itself because there's nothing wrong, if I can put it that way, with its determination that essentially if we are talking exemplary damages we are talking punitive damages and so we need to start thinking about the criminal concepts and what criminal law protections and procedures might apply. I would submit that that reasoning in itself hasn't been upset, it's simply that Parliament has modified the strictness for which the Court of Appeal would have applied the double jeopardy rule and essentially said that you cannot because exemplary – an action in punitive damages arising from essentially a rape, or any other form of sexual assault, is essentially in substance another prosecution, has all the hallmarks of it –

ELIAS CJ:

Has there been any litigation in the UK under the Human Rights Act on this point, as to whether exemplary damages need to take into account the provisions of the Act? I had some vague recollection there has been some litigation.

MR PIKE:

Sorry, of what Act Your Honour, I'm just –

ELIAS CJ:

The UK Human Rights Act?

MR PIKE:

They generally, as I understand it – well, I mean, the answer is I cannot give you a precise answer and I –

ELIAS CJ:

No, that's all right, there probably isn't any.

MR PIKE:

I understand Strasbourg is rather against exemplaries generally and the British Courts have noticed that and I suspect that under the Human Rights Act they've done much what our Courts have done which is to say that you vindicate the right in round terms, you don't specify out particular forms of badness, there's no need too because they are not injury based, they are conduct based –

ELIAS CJ:

In what case has Strasbourg considered exemplaries?

MR PIKE:

I'll have to get a reference, I'm sorry –

ELIAS CJ:

No that's all right. Yes, I would like that.

MR PIKE:

Yes, I will, we will do that.

TIPPING J:

Mr Pike, is your point this, that section 319 says nothing about the circumstances in which you can get exemplary damages?

MR PIKE:

No, if anything it's a reference to the existing law, whatever that might be. I would go so far as to submit that essentially it's put in as a hook from which to swing this heavy load of the overall, in the double jeopardy rule. It was unnecessary in itself but it would look quite silly and indeed I think it would be contrary to standing orders to have the, only subsection (2) which is all that Parliament ever needed. All Parliament wanted to do was to overrule *Daniels v Thompson* to the effect that the double jeopardy rule applied to exemplary damages but that would be irrelevant to the Act if you moved it in an SOP as this was, it would be irrelevant to the Act to do that and so to get it in context of standing orders, one would put some reference to the very enactment that one was amending –

TIPPING J:

The first step is to say that nothing prevents it. The fact that it is personal injury doesn't prevent it. The next step is to say you can give them even though but when is at large, I would have thought?

MR PIKE:

Certainly the when is still at large, I would say that with respect the law doesn't – one does no more than say there is a – we recognise there's a law – exemplary damages are awarded in New Zealand courts. We recognise – they have been awarded in cases where there's been personal injury covered by the Act. What we go on to say is that, to paraphrase it, is that no such actions are barred by reason only of the fact that the person that the damages are sought from conduct which has resulted in personal injury covered by this Act. So I would read the reference in what would have been an older style of drafting but I would submit one that's often more clear, is to say that there's nothing in this Act by reason only of the fact that there's been personal injury from some – a form of conduct forbids a Court from entertaining a claim for exemplary damages. It certainly doesn't say anything along the lines that exemplary damages maybe awarded by any Court in relation to personal injury by accident, no matter how arising.

WILSON J:

Isn't that the obvious inference though in subsection (1)?

MR PIKE:

No with respect Your Honour I would say that firstly Parliament didn't turn its mind to it and we have the parliamentary material –

WILSON J:

Before we get to that I suggest to you it's these quite unambiguously section 319 and there's not only no need for but no basis to resort to parliamentary materials?

MR PIKE:

Well for section 5 with respect of the Interpretation Act really enjoins the Court to look at the purposes of legislation –

ELIAS CJ:

The meaning?

MR PIKE:

Sorry?

ELIAS CJ:

The purpose?

MR PIKE:

The meaning and that purpose and the context in which it was enacted. It doesn't rely on the literal rule that if it makes sense in itself – well it never did, that the Courts can – must apply the literal words without reference to the purposes and the circumstances of the enactment. So I would say with respect that first 319(1) is simply a part of 319. The enactment must be reads as a whole.

WILSON J:

I accept that but if we could just pause and just assume for a moment that 319 comprised only subsection (1), on that hypothesis, which is clearly contrary to the *Hetchell* situation, would you agree that section 319(1) would clearly carry the implication that proceedings can be as a matter of law be brought in New Zealand seeking exemplary damages for the consequences of personal injury?

MR PIKE:

Well I would still, with respect, see a doubt in it because of the language of 319 which is a little bit off the language of personal injury by accident or by – sorry. Personal injury per se. It actually talks about conduct. Now I immediately interpolate my own – into my own submission that conduct is a wide word and could just simply mean behaviour, it simply can be that, to be that wide. But the point is that the Court – the Parliament nevertheless has talked about something which is unusual in the Act, in the Accident Compensation Legislation, it talks about brining proceedings for conduct by the defendant that has resulted in personal injury that happens to be covered by the Act and one would see that as a suggestion that can't be – there's no magic meaning that can be given to conduct that puts it above a suggestion that what Parliament had in mind was simply the run of the – the ordinary run of trespassory wrongs. One is focusing not on consequences of personal injury but conduct and Parliament might have been minded to make something of a distinction.

ELIAS CJ:

Well isn't that really a rather dangerous submission for you to be making because on that argument Parliament seems to be recognising that one can get damages, exemplary damages, for conduct as a stand alone thing?

MR PIKE:

It would have to be in the –

ELIAS CJ:

Which is contrary to the –

MR PIKE:

– context of the law.

ELIAS CJ:

Well, well then I –

MR PIKE:

No, with respect Your Honour I think that would be taking it further than could be reasonably read into Parliament's words because Parliament is simply doing no more than saying there is a common law of exemplary damages which were recognised. It's not adding to it, it's possibly not subtracting from it.

ELIAS CJ:

I agree with that, but I'm just picking you up on your emphasis on the word conduct, which seemed to be rather to, well a bit bold, but –

MR PIKE:

Yes, well as a matter of interpretation in this, I would certainly say that to the extent any submission of counsel differs from the submission from the Solicitor-General and the Solicitor-General's submission –

ELIAS CJ:

Mr Pike, you say that section –

TIPPING J:

You might be in section 86 Mr Pike.

ELIAS CJ:

He might. You say that section 319(1) is a hook for what follows, but isn't section 319 necessary to prevent any argument based on section 317(1) or section 317 as a whole, that she can't claim exemplary damages?

MR PIKE:

Well I would submit not because the Court, the Parliament already had *Donselaar* which is really the starting point in modern times I suppose, the post-ACC –

ELIAS CJ:

Well doesn't that then affirm *Donselaar*, section 319?

BLANCHARD J:

Isn't that the rule of law that's being referred to in section 319(1)?

MR PIKE:

Yes, well *Donselaar* of course was a trespass case and we want to be very thorough in that, we are –

BLANCHARD J:

But they could have narrowed it, they could, to use your word a moment ago, have subtracted something from whatever the general law was and on an ordinary reading, they didn't.

MR PIKE:

No, they've – no, as I say, the worst position for the Crown is it's neutral, the section neither advances the plaintiff's case or diminishes the –

BLANCHARD J:

Well frankly Mr Pike, that would be the view I would take, it's neutral.

MR PIKE:

So what we do say is that it's – it cannot be seen as locking in to New Zealand law a proposition that exemplaries are available in negligent conduct.

TIPPING J:

That's the key issue, and I'm inclined, subject to hearing more, that it is neutral. As I said you before, it doesn't say anything of the circumstances that the law permits them, it just says these things don't oust them.

ELIAS CJ:

It is not neutral however in respect of the argument that's being put to us that the Accident Compensation regime requires a different approach, because here is the Accident Compensation legislation specifically recognising that where there are personal injuries, you can get exemplary damages in whatever circumstances the law permits exemplary damages to be given.

BLANCHARD J:

Yes, I think that's a fair point.

TIPPING J:

We couldn't rule them out altogether.

MR PIKE:

No, well I mean that's subject again to the Court saying that exemplary damages ought not, as a matter of law, to be awardable because there was nothing in 319 that would prevent that. You could quite legitimately take that position, 319 doesn't lock them in in any way, as I say, to a particular set of conducts.

BLANCHARD J:

But it doesn't say anything about the ambit of them.

MR PIKE:

No, it doesn't say anything about the ambit, but my case or our case, with respect to this, is that it is a mistake to read 319 as really saying anything about exemplary damages in the sense that would assist the Court.

BLANCHARD J:

Other than that in some undefined circumstances, they can be awarded.

MR PIKE:

Yes, because the Parliamentary material to which I think, which I submit, it is right to refer the Court to because of the specificity of the debate on the point was that the purpose was clearly to remove the double jeopardy rule. The speeches, all of them, refer only, only, to the fact that it wasn't a wrong that a person who was accused of rape and had been dealt with by the criminal Courts for rape –

ELIAS CJ:

But that's what you'd expect if the reform intended was concerned with subsections (2) and following, and section 319(1) was simply declaratory of existing law.

MR PIKE:

That's right, which it is.

ELIAS CJ:

Yes.

MR PIKE:

That's what we say, but that tells us nothing about the negligence argument, that's the narrow point.

WILSON J:

No, exactly.

BLANCHARD J:

I think we're all agreed on that.

MR PIKE:

But it also would be one would say further, that Parliament certainly would not be seen as giving any let at all, or contemplation that exemplary damages would lie in negligence, simply because of the obvious consequence would be that the examples that have been given this morning earlier, that all people outraged by bad driving would be able to sue in exemplary damages, or people who are outraged by industrial accidents where enormous fines are now imposed, or can be imposed, would nevertheless bring an action in exemplary damages and one –

ELIAS CJ:

But if the conduct of the defendant is outrageous –

MR PIKE:

Yes.

ELIAS CJ:

Someone might bring a claim. That's the area, when you say that, someone outraged, that seems to me to be a different point. It is the conduct that must be outrageous. The question is whether it is objectively assessed or whether it has to require subjective recklessness.

MR PIKE:

Yes I –

ELIAS CJ:

Or advertence.

MR PIKE:

Certainly one theme that's running along parallel with this Your Honour. But what I'm, the point I am making with respect is that it could scarcely be thought that Parliament would contemplate routinely that there would be actions for personal injury by accident where the – whether the conduct was outrageous or not in road accidents and the main areas of mayhem in New Zealand outside the criminal wrongdoing, the road ones are as well, but in terms of our industrial law and in road traffic law.

ELIAS CJ:

Why not if exemplary – why not if it's advertent?

MR PIKE:

Simply I would suggest because it would bring in the lottery element into the ACC, into the personal injury claims in New Zealand that Justice Woodhouse was so anxious and the reformers were so anxious to drive out of it.

TIPPING J:

I'm not sure where you're heading here. You seem to be semi-underminig the proposition that's been advanced before you?

MR PIKE:

Well I'm sorry I – the proposition is that –

TIPPING J:

You need section 86 even more now. I maybe entirely wrong, not being at all fair, but that was the impression I got. Mr Solicitor has said that they are available, if the first proposition fails, that they are available for subjective recklessness and that has to be across the board. You can't sort of start picking it out and saying we won't have it because it's personal injury. That's not the argument.

ELIAS CJ:

Or because it's motor driven or whatever.

TIPPING J:

Or because it's a circular saw or something.

MR PIKE:

Yes well the argument with respect is to the subjective – the intentional wrongdoing part of it is that they are – these are inevitable pleaded in negligence but the gravamen of the wrong is far from negligence, it's beyond negligence. If one has subjective wrongdoing, I intend to harm somebody or I know I'm going to and I don't care either way that I do, do it, there's not a negligent state of mind or a positive negligence. It's a positive intentional wrongdoing. What I think we're saying, well I hope I'm not now transecting our case, is that these are inevitably pleaded in negligence. The damages are given in negligence but the wrong is above and beyond negligence. It is something quite different.

ELIAS CJ:

But sometimes a crime is based on a negligence standard and the driving cases are one of those and that was a point made in one of the, I don't know whether it was in the Privy Council or by Justice Thomas.

MR PIKE:

Yes that's true and Lord Nicholls makes the –

ELIAS CJ:

Yes, Lord Nicholls makes the point.

MR PIKE:

The point that, that is – of course the end answer to that or response is that, that is true but those are Parliamentary choices, they're not necessarily choices that ought to bind the Court.

ELIAS CJ:

But aren't they policy choices which the Court should take into account because on the argument that's being put to us, if you had a case of gross motor negligence you could be convicted criminally –

MR PIKE:

Yes.

ELIAS CJ:

You could have reparations ordered against you under the Sentencing Act, but you couldn't get exemplary damages in civil claims?

MR PIKE:

Yes that would be the proper –

ELIAS CJ:

So what's the reason for that difference?

MR PIKE:

Well the reason is, as I say, that our case was and as I've said I'm very conscious of the fact that there seems to be now a certain ambiguity which I've introduced into what the Solicitor-General has said and I will need to clear that up rapidly. But what we do –

TIPPING J:

Why don't you leave it to him in reply Mr Pike?

MR PIKE:

Yes, what we do do is –

ELIAS CJ:

Replying to Mr Pike?

TIPPING J:

No, no, no.

MR PIKE:

What we recognise, or what the Crown recognises is that it is too much to ask the Court today, or in this era now, to abolish exemplary damages across the board. So, the real question is then how are they defined when they do arose and we're plumped for the purely, the subjective, the aimed at wrongdoing which is really a trespassory standard of wrongdoing. The fact that they are claimed in negligence is nothing to the point, we say because the real gravamen of the wrong is not negligence at all, it is something else that has been pleaded which can stand alone and to which damages could be awarded but if it's for the purely negligent conduct, then they ought not to be given.

BLANCHARD J:

This doesn't have much to do with section 319.

MR PIKE:

No, it doesn't have anything to do with it at all.

BLANCHARD J:

You seem to be re-arguing –

MR PIKE:

Yes and I'm conscious of that because yes, I don't want it –

ELIAS CJ:

But I am interested in these parallels because I conceive one of the functions of the Courts is to make statutes and common law work together. So, you do look to clues in other legislation and if the Crimes Act makes negligence a

crime and punishes it, I'm wondering what is the overarching policy that would say that exemplary damages aren't available for gross negligence?

MR PIKE:

What I would answer and it possibly has to be a personal answer and I'm not sure, on reply will have to nail that down but a policy answer is that the Courts now, with respect, have no business, if I can put it that crudely, in creating circumstances where individual citizens are punished for wrongdoing. It's a separation of the powers sort of argument essentially, nowadays –

ELIAS CJ:

That's long overtaken in terms of the provision of exemplary damages and indeed, section 319 to get back too, your part of the argument in fact accepts that.

MR PIKE:

It accepts the status quo on exemplary damages, I accept –

ELIAS CJ:

It certainly doesn't run a constitution or separation of powers argument, Mr Pike.

MR PIKE:

No, it doesn't but it's silent. The point is that too much is being read in to it. The point, what we say of 319, read as a whole, in the context of its purpose, as explained very carefully by the supplementary audit paper itself, was that it was designed simply to overrule the *Daniels v Thompson* case, nothing more. There was no suggestion anywhere that the Parliament had in mind the provision for exemplary damages outside the very matter before it which was the very case where there was a grave sexual assault, put it in those terms.

WILSON J:

Mr Pike, staying with the text of 319 and having taken you away earlier from subsections (2) and (3), could I come back to them briefly and suggest to you first that subsection (2) is permissive in its terms?

MR PIKE:

Yes, it's certainly permissive, yes, it allows exemplaries or not as the case may –

WILSON J:

Yes, exactly and subsection (3), would you agree with me that the wording of that subsection makes clear that the imposition of a penalty is not a prerequisite to the award of exemplary damages for personal injury?

MR PIKE:

It's not a prerequisite, no, it's far from it, it's possibly a bar.

ELIAS CJ:

It is not a bar though, that's what the provision makes clear.

MR PIKE:

It may possibly, no, I said possibly a bar because the wrongdoing is hard enough. Presumably in the tragic case that we've just had reported on Friday, the Edmund Hillary exemplary, the award for the fine imposed for the deaths of the students in the canyon in the central North Island, the Court will see that $440,000 was the fine imposed to be paid to the victims by the families of the deceased. So, in that sense we can see the potential for exemplary damages in these sorts of areas if that – we can say little about it because presumably there will be an appeal but that is the sort of area that one does not presume Parliament had seen as reasonably open, that there would be, the Court would be stepping in in terms of creating, looking for a further punitive opportunity, we've talked about the separation of the power, I'm mindful of the fact that of course exemplary damages have been with us for at least the

1700s, possibly a lot earlier, but the negligence one remains unsettled and controversial and that's what we're talking about today, not the other. We've excluded that simply because it is too wide a topic and the Court would not be minded to go into that depth on it. So what we do say, with respect, is that 319, to come back to it, simply allows exemplary damages – the Court's to continue to award exemplary damages as they have done in the past. Now it has to be immediately noticed that that would include for the *Bottrill* case where they've been awarded for, well not only *Bottrill* but others, where they've been awarded for "outrageous" conduct in the context of a negligence action. But one can only say it's unlikely -

BLANCHARD J:

Well they weren't actually awarded were they?

MR PIKE:

In *Bottrill*? Oh sorry, no they weren't. I think it was *McLarens Transport* was one of the seminal cases where they were awarded but what we say with respect to section 319 is be that as it may the section could not be seen as a signal for the Courts to extend or to lock into place, or to settle the controversy over how you approach them in the law of negligence simply because it was dealing with a trespassory case, an obvious trespass and nothing else, and nothing in the rest of the section makes the slightest sense when you apply it to the wider principle. They are a complete mismatch unless you take into – unless you look at the purpose of the Act to say that certainly so far as exemplary damages are concerned, the practice of the Courts in this country for awarding them, in the sorts of instances that Parliament has in mind, are not estopped by anything in this –

TIPPING J:

Mr Pike, would you settle for the proposition that what you're arguing is that in the question directly which we face, it doesn't either help you or Mr Henry? This section?

MR PIKE:

Well that is the position which we could, we would say is our base line position and if we could –

TIPPING J:

Yes well, isn't that where you begin and end?

BLANCHARD J:

Are you back to base yet?

MR PIKE:

Can we get above it or can we not?

ELIAS CJ:

Are you trying to get above it?

TIPPING J:

If I were you I'd stop at base camp, not try and ascend the summit.

MR PIKE:

No well certainly –

BLANCHARD J:

It might be reckless to try and do that.

MR PIKE:

Yes, maybe. But as I say one has to simply allow point as that in the context of section 5 of the Interpretation Act. What this section does is quite clear. It's not clear if you look at its text in isolation, certainly worse so if you take its text in 1 in isolation from 2 and 3. So our position really with respect to the exemplary damages point here is that – is the mover of this enactment, the Honourable Derek Quigley said, and we've cited what he said. That he simply

gives a civil remedy in the form of punishment, in the form of deterrence, in expressing society's abhorrence of the crime. So that's –

ELIAS CJ:

Wow, that's very helpful. That is, but it is helpful, it's not very helpful for you though I don't think.

MR PIKE:

Well I'm sorry obviously we're – you're in a different dimension at the moment, one I'm struggling to reach.

ELIAS CJ:

Well I'm thinking more of the Solicitor-General's argument because that's an indication that the purposes go beyond punishment, I would have thought, but…

MR PIKE:

Well no, with respect, the punishment, abhorrence and punishment are cognate concepts. The idea that exemplary damages go beyond the punishment with respect is unsustainable in our submission because abhorrence and condemnation are all issues that go with punishment. They don't arise in any other way. The point that is overlooked in the debate where people focus – where the plaintiff might focus on that, is essentially that these are crimes against the state and if there's one thing that's clear in exemplary damages, and nothing else, it is that aggravated damages deal with the plaintiff's wrong position and the second position beyond that, is that we go to exemplaries when it is necessary for the Courts acting for and on behalf of the state to punish the offender but to – which is a defendant, but to order that the fine is payable to the plaintiff, which is an oddity, an historical oddity in which the Courts have fluctuated on over the centuries, but now it has to be said –

ELIAS CJ:

And which Parliament's endorsed in the Sentencing Act.

MR PIKE:

Yes it certainly has endorsed the payment of additional monies – sorry, has not again excluded the possibilities, but the, but one thing does stand clear that they are punitive and they are on behalf of the state and so the conduct has to be such that the state would be deemed to wish to punish, which is something which the earliest Courts thought was wrong, and the Courts in the 1700s by a side wind reinstated and they've been with us ever since. But our primary position on 319 is that, given the context of the enactment, we will have to settle in the debate on the fact that it is strictly neutral and that Parliament could be taken to have also seen these exemplary damages in negligence as continuing to be payable, but there's nothing in the statute which tells us that and there is the most powerful public policy argument that it did not, or it would not, has to be that if we do in fact set out on the road that we're now embarked on and saying that exemplaries shall be awardable on the basis of a criminal type state of mind in personal injury cases, then we do undermine, as I think was warned against in Ellis and against L, we do start to undermine the Accident Compensation scheme and that we have classes of plaintiffs whose fortunes are determined, not by their injuries however horrible and long-term, but by the state of mind of the person who caused them, the serendipity, if I can call it that, of somebody who can be awarded damages for a road accident because of the state of mind of motorist A as against the next accident where it was simply bare negligence and no exemplaries could reasonably lie. And that then we build up and lock in a distorting effect into an Accident Compensation that does not come from the crime based cases. Certainly wouldn't come in any significant social way from the *Daniels v Thompson* sort of litigation. There is a distortion, but it could hardly be seen to be such that it is likely to undermine the scheme. But we do, with respect, say that where negligence becomes the gravamen and the special negligent state of mind, the special criminal state of mind within negligence is proved,

then litigation would re-erupt, one would have thought with anxious plaintiffs suing for additional recompense, especially –

ELIAS CJ:

Just interrupting and it's just a yes/no answer really, but are you saying that exemplary damages are available for personal injury only when it amounts to a crime?

MR PIKE:

No I'm sorry, when it's that state of mind which is that direct intentional which I'd called for short circuiting a criminal state of mind, that's probably confusing, I'll come back to what it is, a state of mind which has – goes with a direct infliction or an intention subjectively to do harm.

TIPPING J:

Do you differ from your learned leader in any respect whatever on this point?

MR PIKE:

No, I don't. I've explained what appears to be the difference and I hope it doesn't have the Court becoming necessarily concerned as to a split between us and –

TIPPING J:

Well I don't know why you're going on about it, frankly, if you're not adding anything.

MR PIKE:

Simply because there was a confusion and I had explained that we had the same view but I'd expressed it in a different way, that's all. But I will add nothing further. The other difficulty, as I say, we had fleshed out in our written brief as to the problems with exemplary damages in relation to personal injury and in relation to the negligence claims was that it did have run of the difficulty adumbrated by the *Watkins* case in the House of Lords, which is something

that we raised but it may again be one of those instances where you come back to what Lord Cooke said and just say well yes, there is a – there is something possibly illogical or novel about a cause of action in exemplary damages where you cannot sue for the underlying injury, and of course our case in the written materials is that *Watkins*, in the House of Lords, that is an important decision because it indicates that in a matter based on case, if you cannot prove damage, you don't have a justiciable claim, so in a sense, one could say that under Accident Compensation legislation –

ELIAS CJ:

There's no doubt in this case that there's damage.

MR PIKE:

But you can't sue for it.

TIPPING J:

I think you mean actionable damage.

MR PIKE:

Yes, sorry, okay yes I do.

ELIAS CJ:

Yes, actionable damage.

TIPPING J:

I think that's what your – the submission wasn't very precise in that respect.

BLANCHARD J:

But on any view of it, section 319(1) deals to that argument.

TIPPING J:

Absolutely.

MR PIKE:

Certainly while that is an argument, if it was dealt to it, I submit, to our submission is it doesn't necessarily deal with it because it didn't address it.

BLANCHARD J:

Well what's the rule of law that it's referring to if it isn't that one?

MR PIKE:

It was before *Watkins* I think sir, I doubt it was that one, yes it was before *Watkins*, so it certainly isn't the rule of law as to the fact you cannot bring an action, there's nothing actionable if you're covered by the Act you have no action before a Court, you cannot commence proceedings –

TIPPING J:

Well that again is contrary to what your leader was submitting, he accepts that recklessness for this purpose is a species of negligence. Negligence was an action on the case, your argument is, damage was of the essence. Your learned leader's proposition can't be right if this proposition is right.

MR PIKE:

We come back and say that we have to now accept that what Cooke J said in *Donselaar* is the answer to that, which is simply that it might be seen as novel but you can, and Justice Richardson of course agreeing you can bring an action in exemplary damages. That has to be the answer for it. The foundation for it will be that subject of wrongdoing, but given that we've got a section on *Watkins*, it had to be dealt with and we have to now put it into context, and that way it has to be made consistent in our case.

However, there's really nothing I can add to the written material on this point.

ELIAS CJ:

Thank you Mr Pike. Yes, Mr Henry.

MR HENRY:

The starting point Your Honours is, I will not be discussing until after lunch how you can be acting in good faith yet also commit outrageous behaviour because they do appear to be mutually exclusive. One of the key points that is being discussed is what do we do with crime? We punish every day people for unintentional crimes. The majority of the cases that go through our Courts every day are strict liability crime and to turn around and say you can't have punitive damages or exemplary damages unless there is a intentional crime is nonsense. We punish every day by monetary penalty for unintentional crimes, and the comparison of mens rea and the criminal mentality into exemplary damages, in my submission, is a huge, in principle, red herring, because it is entirely accepted by our community that there are standards that are set and if they're breached, there is a consequence. All we are asking for in the present case is to be able to come to the Court and say, here there has been a gross negligence and it is so gross, a Court will find it has been outrageous and for that we say the people involved should be condemned and punished.

ELIAS CJ:

You are also alleging, are you not, I forgot to check the amended statement of claim, which I don't know whether it's been filed yet in any event, but you are also alleging intentional recklessness, are you? Subjective recklessness?

MR HENRY:

Absolutely. This is not a case where –

ELIAS CJ:

So the case is going to be pursued on that basis irrespective of where this Court ends up on gross negligence, you're just also wanting to run gross negligence?

MR HENRY:

We will run the negligence as being gross negligence that is at a level where a Court will find it has been outrageous behaviour and ought be punished.

TIPPING J:

But you're also, sorry to be very pedantic about this, you are also saying that if that is not the test, you would and have alleged satisfaction of the higher test of subjective recklessness on these facts?

MR HENRY:

Yes.

TIPPING J:

So all we really need to know on this point is which of those two you have to meet.

MR HENRY:

Well if the Privy Council test's adopted, all I have to meet is satisfying the Judge that the conduct's outrageous.

TIPPING J:

I know what the two tests are Mr Henry. I'm just saying, the only significance for present purposes is which of those you have to persuade the trial Judge is the correct standard in law?

MR HENRY:

I'm saying I'm definitely over the top in the highest so…

TIPPING J:

We're not into that.

BLANCHARD J:

Mr Henry can you just help me with a point of clarification, in your written submission at page 15, you say that it's a case pleaded against the respondent, the Attorney-General, and it's employee that their behaviour was either knowingly negligent or was subjectively reckless or a combination of both. Is there in fact any difference between knowing negligence, which I think is your term, it's not one I'm familiar with, and subjective recklessness?

MR HENRY:

They're just simply words Sir, the concept's the same.

BLANCHARD J:

But you're actually saying, there was negligence which may have been unknowing, but you're also alleging it was, in your words, knowing, or in my words, subjectively reckless, is that correct?

ELIAS CJ:

And in 8.2, you say "This case does not plead and in no way involves an inadvertent wrongdoer."

MR HENRY:

Absolutely. Just working back through where Justice Blanchard is coming from, no Sir, the case is subjective recklessness.

BLANCHARD J:

So you're not actually alleging any form of negligence other than subjective recklessness, assuming that that is a form of negligence?

MR HENRY:

No, there's two steps. The first step is negligence which is the ordinary duty of care. We say the breach is a flagrant breach and we say that the breach and the conduct as a whole is outrageous. We do not take it from the duty,

we take it from the breach, the nature of the breach and the overall factual scenario that resulted from the breach to reach outrage.

BLANCHARD J:

But are you saying that this was unconscious negligence or are you putting it on the basis of being conscious negligence? *Bottrill* was a case of unconscious negligence. No one suggested that Dr Bottrill knew what he was doing and meant to do it or was reckless about it.

MR HENRY:

We say that they knew what they were doing so we are in the conscious realm and the contention in the statement of claim that a contention at trial will always be that this was a conscious breach, they knew they weren't supervising him, they knew he wasn't reporting, they knew he wasn't doing these various things and they knew he was at high risk.

BLANCHARD J:

That sounds very like a claim for misfeasance in public office?

MR HENRY:

You struck that out in the Court of Appeal.

TIPPING J:

But do you seek to have the fallback position, assuming the law is a la Privy Council –

MR HENRY:

If I get to the point Your Honour where it is – I'm falling back on inadvertence.

TIPPING J:

Sorry, I didn't quite get that?

MR HENRY:

If I get to the point where I'm having to fall back and say this was all inadvertent, I have got a major failure in the pleading and that is not what I am contending. And frankly, if we get to the point you're arguing that it's inadvertent, if that was what this case was about we wouldn't be here. I have a real problem with the distinction between the two *Bottrill* decisions because in my submission Sir I simply would always want to go back to Your Honour's own earlier decision, which is *McLaren*, and you said it at page 434, "After carefully reviewing the various authorities and seeking to bring together the relevant factors, I would approach the matter as follows. Exemplary damages for negligence causing personal injury may be awarded if, but only if, the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety meriting condemnation and punishment."

Now as a matter of general principle, what we're now trying to do is engraft definitions into what is in legal terms a reasonably clear summary of where we're going too. We're now trying to get in and say well outrageous may be this, it maybe this, it maybe that.

TIPPING J:

Well I think I recanted to some extent from that approach in –

MR HENRY:

You did Sir.

TIPPING J:

– *Bottrill* and I'm a little surprised to hear you say you have difficulty understanding the difference between Court of Appeal and Privy Council *Bottrill*?

MR HENRY:

The reason I have a problem sir is that in practical senses in a trial, the test is outrageous. What we're arguing about is do we come to it and prove it this

way, do we come to it and prove it that way. We're trying to define outrageous and in my submission the principle should stay clearly at outrageous and when a Judge is faced with a set of facts, why are we limiting him if he thinks it's outrageous? We can certainly review it in appeal later as to whether or not the later Court thinks it's outrageous but –

TIPPING J:
It all depends then on what you mean then by "outrageous"?

MR HENRY:
Absolutely.

ELIAS CJ:
And who's outraged.

MR HENRY:
At the end of the day it is one of these objective/subjective tests the Court applies. The Judge determines what is outrageous behaviour by the standard of society.

TIPPING J:
Do you think Mr Henry there is actually no difference between Court of Appeal *Bottrill* and Privy Council *Bottrill*?

MR HENRY:
In –

TIPPING J:
Or is that – sorry I shouldn't ask you what you think. Is that your proposition?

MR HENRY:
In my submission Sir there is a definite difference in the test you're proposing but what I'm submitting is, the actual test is what is outrageous. Why are we

trying to limit it? Why should we try and limit, in advance, what may or may not be outrageous? Why are we trying to say that we have to have A, B, C before it's outrageous and if a case comes along later where you have A, B and D, but it's outrageous, then say well we can't because the earlier case has limited us.

ELIAS CJ:

Never say never as Lord Nicholls said.

MR HENRY:

Never say never. It strikes me Your Honour as something where, like negligence and duties of care, the door is always open for what is outrageous.

TIPPING J:

Well I have to say, speaking purely for myself, I think there is a major difference in principle between consciously being appreciative of a risk and deliberately running it and not seeing the risk at all.

MR HENRY:

I fully accept Your Honour that in 99 percent of the cases that will be what my learned friend was arguing, someone who's acting bona fide, that can't be outrageous surely.

ELIAS CJ:

Sorry what are you saying on it?

MR HENRY:

What I'm saying is that if you get to a position where someone has done something and they are 100 percent bona fide, how can it be outrageous? The two are mutually exclusive terms.

ELIAS CJ:

If they are stupid.

MR HENRY:

Not bona fide then?

ELIAS CJ:

Not bona fide –

MR HENRY:

The moment they're stupid, they're not bona fide –

ELIAS CJ:

This is very strange use of language Mr Henry, or legal concepts.

MR HENRY:

What we're saying Your Honour, is the test is satisfying a Judge on the standards at the time, that the conduct is outrageous.

ELIAS CJ:

I think your submission seems to be a Privy Council majority *Bottrill* and that is not what you put in paragraph 8.2 –

BLANCHARD J:

Or in paragraph 7.

ELIAS CJ:

Or in paragraph 7 and that's why we are pressing you on this because we want to be quite clear we are understanding your argument.

MR HENRY:

I am putting, in those paragraphs, a case that we are going to run a trial. What we're saying is, this is not a case where the issue of inadvertence will arise.

BLANCHARD J:

But if a Judge disagrees with you on that and says, this was pretty bad but it wasn't advertent, what then happens to your exemplary damages?

MR HENRY:

Oh look, I fully accept Your Honour that we will continue to keep arguing *Bottrill* in the Privy Council, we're not resiling away from the position. What we submit the law should be, is absolutely as the Chief Justice said, we are supporting *Bottrill* in the Privy Council, we don't resile from that but in my submission we should go back even further. We should go back to simply leaving it as its outrageous and flagrant disregard for the plaintiff's safety, meriting condemnation and punishment and we'll leave that as the test for Judges and let the passage of time work its way through. In the *Bottrill* case, it never got to Court for a final determination as to whether or not this man who was an expert supposedly reading slides and he was wrong 52 percent of the time, had got to the point where what he was doing was outrageous and flagrant. If he can put his hand up and say look, I had no clue I was doing it wrong, I thought I was up to all the modern standards, I did everything right, we say leave that then for the Judge to apply to the facts.

WILSON J:

Mr Henry, I am a little unclear, are you contending for *Bottrill* in the Privy Council as the test, or are you contending, whether in the alternative or otherwise, for some other test?

MR HENRY:

No, we contend for the *Bottrill* Privy Council test. We also contend that this Court should play great heed to where the law is left by the earlier *McLaren* decision and it should be left at a high level and Courts simply apply that to the facts that they are faced with. It comes to a submission of this, in my submission, the majority of the Privy Council which has simply said, we don't want to hamper the remedy and our submission is, don't hamper the remedy. Yes, we will come back here in cases in the future and there will be an

argument as to whether or not conduct is outrageous but fact by facts is how it has got to be done.

ELIAS CJ:

So, what are you asking this Court to do? Are you asking the Court to say anything about the circumstances in which exemplary damages is available?

MR HENRY:

All I want this Court to do is to allow the appeal and let me go to trial without any further comment on this issue.

ELIAS CJ:

Without comment on this issue?

BLANCHARD J:

I think it's the Crown that's seeking the clarification.

ELIAS CJ:

Yes, yes.

MR HENRY:

This is really a Crown –

ELIAS CJ:

No, I understand that. So, you say that we should decline the Crown's invitation to clarify this on the basis that it is best left until trial, is that your position?

MR HENRY:

Yes, yes, that's our position.

TIPPING J:

But you could go to trial on an erroneous premise and then have all sorts of further appeals. Isn't it much – we've had this debate before Mr Henry and you are entitled to change your position on the matter.

MR HENRY:

I'm very content Your Honour to go to trial and if I end up in a position where I have to rely on the distinction between the Court of Appeal and the Privy Council and *Bottrill*, I'll come and argue it with you on the actual facts. I don't believe for a moment that's going to happen but as Justice Blanchard says, a Judge may disagree with me and I might be back but as far as –

TIPPING J:

The Judge is bound to apply Privy Council *Bottrill*, unless this Court rules otherwise.

MR HENRY:

Yes.

TIPPING J:

So we all know what's going to happen at trial on that premise as to the law but it has all sorts of possible downstream difficulties in it. Why do you not want to get the law clarified before you go to trial? I mean I would have thought, with great respect, that was something that was to your client's advantage so that she knows exactly what the law is and can present her case accordingly?

MR HENRY:

We're quite happy to deal with the argument Your Honour. I'm not going to shy from it. But I am certainly and I will be contending here, that the approach is not to restrict the definitions of outrageous but to leave it and it becomes a trial by trial issue rather than trying to come up with formulations that just take

us past the concept of outrageous which is assessed by a Judge at the time, having regard to the status of society.

TIPPING J:

Well I think really what it comes down to is you want the test to be left at outrageousness but if it's changed if you like to this subjective recklessness you can meet it too?

MR HENRY:

Yes.

TIPPING J:

No harm done.

MR HENRY:

That's right. Either way we're not struck out. We're quite content to argue it and I certainly fully intend after lunch to take the argument up very directly and we will deal with it.

TIPPING J:

Well that's nice and clear for me anyway.

McGRATH J:

Mr Henry can I just ask you this? Do you see in the decision of *McLaren* you've referred to a position that's in some respects more advantageous to you than the Privy Council's judgment in *Bottrill*?

MR HENRY:

I see a very clear proposition that everybody can work towards.

McGRATH J:

So is that your best case and the case you'd prefer us in, if we do articulate a standard here, are you saying we should go back to *McLaren*?

MR HENRY:

Yes, that's what we invite you to do.

McGRATH J:

Just explain to me how *McLaren* differs then from *Bottrill* in the Privy Council?

MR HENRY:

It essentially doesn't because what's happened in my submission in the Privy Council with *Bottrill* is they said no, we are not going to in any way restrict the test of outrageous. The reason I go to *McLaren* is simply the proposition and the way it's put out is a very clear, simple standard to apply in the trial and I – the plaintiff submits that the formulation that it's illation if, but only if the level of negligence is so high that it amounts to an outrageous and flagrant disregard for the plaintiff's safety meriting condemnation and punishment, that is a proposition that is very readily appliable by us at trial.

TIPPING J:

For what it's worth my recollection is that the issue of conscious recklessness wasn't on the table in *McLaren*?

MR HENRY:

No it wasn't.

TIPPING J:

So it doesn't really speak much about that dichotomy but I'm flattered to think you think it's a nice simple, helpful test Mr Henry.

MR HENRY:

It is. The thing is Sir we are, in my submission in this case, in one again where we are not in inadvertence. If I get a finding of inadvertence I would be very surprised in this trial and the same with the man blowing up the tyre, if you approach that trial you would not be expecting to end up with an

inadvertence argument when he had the thing heading off down the road in whatever state it was in.

ELIAS CJ:

Is the position that *McLaren* represents the pre-Court of Appeal *Bottrill* position in the law, that *Bottrill* in the Court of Appeal represented a conscious shift which the Privy Council declined to endorse?

MR HENRY:

Yes Your Honour.

ELIAS CJ:

And the Crown now invites us to go back to Court of Appeal majority *Bottrill*?

MR HENRY:

Yes. What I propose to do is deal back into the actual questions as was formulated by the Court and if I go through my written synopsis, in there I reviewed the cases that apply to the proposition that exemplary damages are available for negligence and the leading authority on that is in fact the Court of Appeal decision of *Bottrill* and that's at tab 7 of my learned friend's first bundle. Their Honours reviewed the law commencing at paragraph 37 of the decision and they considered the cases of *Taylor v Beere*, *Donselaar* and the others that had occurred. Paragraph 38 they talked about the breadth of the formulation, of the scope of exemplary damages in those decisions and that it would not justify the confining exemplary damages to intentional torts and the oral decisions of three Judge Courts in Allison and Harris and McIntosh appropriately assume without deciding that in some cases negligence, exemplary damages may be awarded. They then quote from Allison which makes the point that it's a rare type of litigation and we fully accept it's a rare type of litigation.

Over the page in paragraph 39 they considered Harris and the Court there observed that negligence failure by medical or dental caregiver to investigate

a suspected cause of persistent pain or discomfort would be likely to attract an award of exemplary damages only where shown to have been accompanied by improper motive, recklessness, disregard for the patient's health or safety or some special flagrancy reflecting conduct of a kind that amounts to an affront to the community. It's not enough to allege simply that the caregiver is high-handed.

There is too a number of negligence cases in the High Court discussed in *McLaren* and following *McLaren*, for example *L v Robinson*, where exemplary damages have been considered an available remedy. That is the position too in Australia. They went to *Grey v Motor Accident Commission* and Canada which they went to Wadhams, the law of damages. At paragraph 41, "Now that the point is clearly before us, it is appropriate to confirm that in those necessarily rare cases where the stringent requirements of the remedy are satisfied, exemplary damages may be awarded where the cause of action is in negligence. The crucial question is whether such damage may be awarded only where the negligent conduct is deliberate or reckless and not merely inadvertent." That I will come back to after the lunch break.

In my submission Your Honours, it is very clear on the authorities that we have a position in New Zealand where the law has accepted exemplary damages are available for negligence and my learned friends to succeed on the first question, must invite you to in fact overrule that aspect of *Bottrill*. In *Donselaar* –

ELIAS CJ:

It's quite a, I was going to say naked, that probably sounds pejorative, but it's quite a stark policy choice that's adopted in para 42, isn't it? I mean, there's no authority cited in support of it?

MR HENRY:

Yes, in my submission this case moves into a new area once it gets past the passages where I just read to Your Honours. I want to go to page 6 of my written synopsis, this is the end part of my dealing with the first question and refer to Justice Cooke in *Donselaar* because His Honour there went to quite some length to discuss why exemplary damages should continue in the face of the Accident Compensation Act. In my submission it gives also a very good policy guide as to the position he saw for the future of this jurisdiction and it starts at page 106 of the decision. He talks about *Rookes v Barnard* and *Broome v Cassell* and having discussed those cases in some depth at page 107 he says, starting line 3, "All in all in a situation where the right course for this Court is far from self-evident, I think that we should try to meet a problem occasioned by the Accident Compensation Act by consciously moulding the law of damages to meet social needs. The only feasible way of doing this without intruding into the field of compensation which the Act has taken over, appears to be allow actions for damages for purely punitive purposes and to accept that as compensatory damages, aggravated or otherwise, can no longer be awarded. Exemplary damages will have to take over part of the latter's former role. In other words, as benefits under the Act are in no sense punitive, exemplary damages will have to do not only the work assigned to them by *Broome v Cassell* but also some of the work previously done by the other heads of damage."

He then proceeds to make policy discussions about keeping it in tight reins, the position of how it will be kept under control by the judiciary. Then he says at line 25, "If such precautions notwithstanding unmeritorious claims are successfully bought in any numbers, the remedy of abolishing exemplary damages for certain classes of case is in the hands of Parliament. The present case is also an example in my opinion of a claim for exemplary damages that should not be entertained. The way in which the plaintiff's first case was pleaded and his evidence led at the trial suggests that despite the use of the words exemplary or punitive in the prayer for relief, in substance what were being sought were damages for physical injury and

injured feelings." So *Donselaar* in fact cut down the proceedings but certainly as a matter of policy left the door open for actions that are purely seeking punishment as part of an exemplary damages claim.

Donselaar leads me quickly into the second question which is whether or not section 319 of the Accident Compensation Act in any way helps or hinders the position of the appellant. In my submission the section is not neutral. It actually adopts the law as it was, at the time the section was passed, and in doing so it actually applied the law as declared by Justice Richardson in *Taylor v Beere* because in *Taylor v Beere* he very clearly spelt out that the tort of negligence not having damages per se, could still be sued upon, or any tort not requiring damages per se could be sued upon, as they can show – so long as they can show damage that arises directly or indirectly out of personal injury. All section 319(1) was aiming to do was to formulate the law as per *Taylor v Beere* and *Donselaar* and to make it very clear that this Act doesn't prevent the bringing of proceedings for exemplary damages for conduct by the defendant that has resulted in personal injury. All the plaintiff needs to show is there is personal injury and then the tort can proceed on for exemplary damages.

My learned friend is relying on the English case of *Watkins*. *Watkins* was totally anticipated by Justice Richardson in *Taylor v Beere*. In the *Watkins* case it was a letter being mailed out of prison that was read by prisoners which was a breach of constitutional rights, but there's no damage. They said in that tort there has to be a proof of damage, not damages per se and there, there was absolutely no damage. So had we had a situation where this particular offender had misbehaved but he had not injured the appellant, we would not be here. So we say that section 319 very clearly has adopted the law as per Justice Richardson and we're in a position where the Act is not neutral. It in fact assists and clarifies that the law as set out by Justice Richardson in *Taylor v Beere* is to be applied and we're entitled to apply it in this particular case.

BLANCHARD J:

Are you going to take us to *Taylor v Beere?*

MR HENRY:

I'm happy to Your Honour. I'm conscious I've only got three minutes left.

ELIAS CJ:

It's in your bundle is it?

MR HENRY:

It's in my bundle. Page 8 in my bundle Your Honours.

TIPPING J:

Are you – your point as I understand you Mr Henry is that 319 makes it quite clear, consistently with *Taylor v Beere*, that the fact that there is no actionable damage doesn't prevent a claim for exemplary damages?

MR HENRY:

Precisely.

TIPPING J:

Precisely.

MR HENRY:

The word actionable would have to be there to prevent us from proceeding and that, if it assists Your Honours, at page 10 of my synopsis –

ELIAS CJ:

I haven't worked out the numbering system of this volume.

MR HENRY:

It's page 8 and the number is at the very bottom right hand corner Your Honour.

ELIAS CJ:

And what page am I looking at?

MR HENRY:

Page 8.

ELIAS CJ:

Sorry, yes I see.

MR HENRY:

Taylor v Beere.

BLANCHARD J:

But you're only citing it for the proposition that there doesn't have to be an actionable claim for compensatory damages?

MR HENRY:

Yes Sir. We're citing it on the basis that –

BLANCHARD J:

I wouldn't need any further assistance from the case then.

MR HENRY:

It's been cited to simply say that section 391 has co-defined and stated the existing law as per what Justice Richardson spelt out in that judgment because it's very clear that he's made that point and that's what he's dealing with.

In respect of the two questions, I'm quite content to rely on the written submissions and the discussion I've had. I'm mindful of the time, if it suits Your Honours I'm happy to return after the break and deal with the test for exemplary damages which I suspect is going to be the real argument here.

ELIAS CJ:

Yes, thank you. We'll take the adjournment now.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.15 PM

ELIAS CJ:

Thank you. Yes, Mr Henry.

MR HENRY:

I said to Your Honours I was going to deal with the test after the break and as indicated, the appellant submits the test should be as set out in *McLaren* at page 434 of the judgment. The first case to deal with of course is *Bottrill* in the Court of Appeal because that is where the law in our submission moved towards trying to define a little bit more clearly what was meant by outrageous and flagrant. Our essential –

McGRATH J:

Which page of your casebook are you at?

ELIAS CJ:

Twenty nine, *McLaren.*

McGRATH J:

Thirty nine?

ELIAS CJ:

Twenty nine.

McGRATH J:

Yes I've got that, but you gave us a page reference to McLaren I think, did you?

MR HENRY:

Yes Sir, page 434 which is page 42 of the casebook.

McGRATH J:

434, that's the page in New Zealand Law Reports is it?

MR HENRY:

Yes Sir.

McGRATH J:

We don't, I think, don't think we have that do we?

MR HENRY:

It's page 42 of the appellant's casebook Sir.

McGRATH J:

Thank you.

MR HENRY:

The majority reasoning of the Court of Appeal in the *Bottrill* case and it's tab 7 of my learned friend's bundle, began where I left off this morning, at the end of paragraph 41. Their Honours worked through a range of issues. They start at paragraph 42 with six intermediate points, which is the purpose of exemplary damages which is to punish and deter, and we do not shirk from that as the purpose of the damage and we take the point that was mentioned in the argument this morning. There are consequences that come from punishment that the appellant or the plaintiff may like, they may feel vindicated, they may feel a whole range of things, but the purpose for the Court is to punish and

deter. It is a punitive action and we fully accept that that is the basis of the remedy.

The second point Their Honours dealt with at paragraph 43 was the defendant's conduct as the focus of the enquiry, and again we accept that this is based on the defendant's conduct, it is the defendant's conduct that must be found to be outrageous and flagrant. Their Honours then proceeded to continue and discuss under this head the need for the defendant to have appreciated the risk and this is where the notion started to grow of the fact that it would need to be a conscious outrageous conduct and the argument leading to trying to restrict the definition of outrageous gains some strength.

Paragraph 34 they then looked at *Rookes v Barnard* and paragraph 45 they looked at the Accident Compensation position. In respect of Accident Compensation, we say it's very important to keep in mind the fact that the remedy of exemplary damages is the only remedy left where someone has the tort of negligence arising out of the damage of personal injury. So if this is restricted, what is happening is we start to cut down the ability of the Courts to supervise the conduct of government departments and people in general life, but you always have to note the rider. This is a rare situation, it's accepted in all the authorities that these cases are rare, so we're not looking at a floodgate where every motor accident is going to suddenly have actions being brought for exemplary damages because it was very flagrant to drive through the red light and the likes.

Paragraph 46, they then discuss the various judicial epitaphs and they say these are used to describe conduct qualifying for an award of exemplary damages. They are not determinative of the scope of the remedy but they give a flavour of the misconduct that is required. We fully support the use of past cases to keep providing the flavour when a Judge is looking to determine if something is outrageous. They then looked at *Taylor v Beere* for example, and the other cases where the various wording is used, outrageous, oppressive, flagrant. It is a situation where you can interchange a whole raft

of words but in our submission, it would be of benefit if it could be confined back to outrageous and flagrant as the words that we adopt. It's a linguistic quibble but it's easier if we can get a set formulation.

The sixth item arose at paragraph 48 and there they talked about a test of subjective recklessness as in harmony with the requirement of subjective recklessness for murder involving conscious risk and the requirement of reckless indifference for the consequences for misfeasance in public office. We make the point, we do punish on strict liability situations in our society and there is no prerequisite for punishment in our criminal law that you should have subjective recklessness, or a conscious risk taken and our –

ELIAS CJ:

So you say that the analogy with murder involving conscious risk taking is an inadequate analogy?

MR HENRY:

Yes.

ELIAS CJ:

And what about the analogy to misfeasance in public office? Because these two analogies are very important in the reasoning of the Court of Appeal.

MR HENRY:

Misfeasance in public office is an intentional tort and it is again one where the flavour and the concept of outrageousness and flagrancy is involved before you even have a breach and in our submission, to look at the criminal law is – has to take into account the fact that the criminal law punishes where there is no intentional behaviour. When you come to the tort of misfeasance in public office, it is an intentional tort so it doesn't compare with the negligence situation. We would distinguish that away from negligence because we are only talking about here when it is the tort of negligence that's the basis of the exemplary damages claim.

Their Honours then, over the page, at paragraph 50, went through three policy considerations. The first is the difficulty of drawing any line between the need for advertence of risk and simple negligence by invoking an epitaph such as gross, wanton, extreme or exceptional. Tort is full of interchangeable words. We have hundreds of law reports where different Judges have formulated the same thing linguistically differently.

Fifty one, secondly they say wherever the line is drawn, the consequences for the public interest would be unacceptably expansive. In our submission, if we stay with the test of outrageous and flagrant, it provides flexibility because what is outrageous and flagrant will shift and will change with time, and it is something that should just be let evolve through the judgments. You take the judgments, you then work forward from there as to what has been accepted in the past.

The third point at paragraph 52 is the economic and social policy implications with the expansion of the scope of exemplary damages, and this brings us into the insurance type argument. Why should someone be allowed to insure themselves against a punishment from the Courts? The idea is to punish. If you can take an insurance policy, it's not a punishment, the insurance company just pays it, there is no bite from the Court's decision. We should not be allowed as a matter of policy to insure against punishment for outrageous and flagrant behaviour. In our submission, the purpose of the punishment is defeated. Insurance was designed to deal with damage with aggravated damage and the likes, but should never, as a matter of policy, be allowed to deal with punishment for outrageous and flagrant disregard.

BLANCHARD J:

Even if the consequence of that is that the defendant goes broke and the plaintiff doesn't get anything?

MR HENRY:

Sir, when the punishment is set, the Court takes cognisance of all those sort of things. This is not a situation where the quantum is just brought down in a vacuum. A punishment where you bankrupt someone, if the Judge decides that is what it should let happen, is the Judge's decision. It comes back Sir to the sentencing policy. A $5 fine for a man who's got $10 is a harsh punishment compared to a $5 fine for a man who's got half a million dollars. The Court must tailor its result, it is a punishment, it is not an oppression. But if a Judge consciously decides to award $10,000 and that bankrupts someone, he does it with that knowledge.

We then get to the point where Mr Justice Tipping, in his judgment, amended the formulation that we wish to go back to and that's at paragraph 174 of *Bottrill*. And His Honour said, "In order to reflect the foregoing with clarity and with the benefit of having given further thought to the issue since I wrote the *McLaren* judgment, I would take this opportunity of amending the test I then adopted in this way. Exemplary damages for negligence causing personal injury may be awarded if, but only if, the negligence is at such a level and is of such a kind that it amounts to a conscious, outrageous and flagrant disregard for the plaintiff's safety meriting condemnation and punishment." In my submission –

TIPPING J:

Perhaps the next sentence needs to be read too, Mr Henry.

MR HENRY:

I was going to go there Sir but I'll read it first and I'll come back. "The concept of conscious disregard means that the defendant consciously appreciated the risk of the plaintiff's safety caused by his or her conduct but nevertheless deliberately chose to run that risk." What we say, Your Honours, is that the word "outrageous" is capable of doing that without the need of the word conscious. All we're doing is what lawyers love to do and we're starting to add more and more words into what should be kept as a very simple, clear

statement as to the test and we just leave it to the Judges, who we must remember sometimes we're leaving it to juries, for example, in defamation cases, to ascertain what is outrageous –

TIPPING J:

And you say that the word outrageous necessarily implies conscious?

MR HENRY:

Ninety nine times out of 100, yes, but what I then say is we support the position of the Privy Council because all the Privy Council, in our submission, has said in the majority decision is, and I'm at paragraph 26 of the judgment which is tab 8, "If the experience in the law teaches anything, it is that sooner or later, the unexpected and exceptional event is bound to occur. It would be imprudent to assume that in the absence of intentional wrongdoing or conscious recklessness, a defendant's negligent conduct will never give rise to a justifiable feeling of outrage calling for an award of exemplary damages. Never say never is a sound judicial admonition." All we are saying Your Honour is that, most of the time, most of the cases absolutely, the word outrageous will involve a deliberate, intentional aspect but we shouldn't legislate. We should let the test grow and develop and it will be a very slow growth and development because it's not an area of law which is going to be bouncing into these Courts every day of the week. Any inhibition at this stage is going to slow off and may prematurely remove outrageous behaviour that the Court should look at and assess, simply because you can get a strikeout because they can say, no, no, Dr Bottrill, right throughout this time, even though he missed 52 percent of the bad slides, did not have any conscious feeling of wrongdoing.

TIPPING J:

Some people could say that it was outrageous that he missed 52 slides, or whatever it was percentage that you mentioned. Others would say well, the normal approach is outrageous means conscious appreciation, as you have indicated but why in this case are we departing from that?

MR HENRY:

Someone else may also say Your Honour, that Dr Bottrill, no matter how often he says he was not conscious of it, is in a position where he was so reckless, so outrageous in what he was doing that punishment should be brought on him. At the end of the day, the Court will weigh all the factors and our submission is, do not stop the case at a pleading stage, let it develop, let all the facts come through and the words outrageous and flagrant will meet the situation for the Court because Judges will look at past cases, they will look at what's happened around the world but those general words should not be cut down simply because of the phrase never say never. It may, at some time in the future, prevent litigation at a strikeout stage that shouldn't be prevented.

TIPPING J:

What do we make of the fact that the English Law Commission has cited in 56 at *Bottrill* Court of Appeal, after a very exhaustive review as I recall, said in paragraph 5.47, sighted there, "The minimum threshold is that the defendant has been subjectively reckless"?

MR HENRY:

I have the greatest of respect for that Law Commission Your Honour but I also submit that, at the end of the day, the tort remedy should be let develop itself naturally and curtailing it by adding to outrageous and flagrant is something that is premature. The policy should be to let the remedy case by case be dealt with and there will be cases where Judges will say, this particular defendant had no conscious understanding of what was happening, therefore it's not outrageous but there may be situations where a Judge feels compelled that even though there's no conscious understanding, it is still so outrageous and so flagrant he wants to give a remedy. All we're doing is shutting that off now instead of waiting for a factual situation where it becomes a fair square issue and in my submission, it would be something that turns on its facts, not on a point of law.

ELIAS CJ:

I wonder whether because of course the cases do say that usually there will be conscious risk taking or something of that nature, is it part of your argument that the cases need to be aware of the sort of case arguably you have here, where it is a department, with statutory obligations which is said to have been negligent and that in those cases, a limitation to advertent risk taking may be a standard that is set too high?

MR HENRY:

We would certainly agree with that Your Honour because we can't tell the future and there may be that one case where the ball has dropped totally between everybody but what happened was outrageous and what we say is the Court shouldn't be in a position where that pleading gets struck out without the facts being gone into and a Judge saying well this one did this, this one did that, there was no minds at work here but this department was totally outrageous.

ELIAS CJ:

In other words, the general approach requiring advertent risk taking is not appropriate for the sort of systemic failings that you are alleging in this case?

MR HENRY:

Correct.

TIPPING J:

What effect would that have when the conduct was that of a large corporation?

ELIAS CJ:

The same.

MR HENRY:

The same Your Honour, because if you get, for example, someone's told to go off and do something and two people walk off thinking the other one's doing it, it doesn't happen and you get an outrageous situation, you get a motorcar built which blows up and kills people because there's some fundamental thing overlooked, for example. You don't have a defendant you can say was consciously acting this way but you do have an outrageous situation, so the dropping of the ball could be a situation where this formulation of concise outrageous and flagrant disregard may prevent the case being brought.

ELIAS CJ:

Though I suppose you could have an institutional shrug which would be the same sort of concept which, in an individual, you would more readily see advertent risk taking.

MR HENRY:

Yes. It is a situation, Your Honour is totally correct, it's a situation where you're looking at a complex organisation rather than one person, where you're going to find the conscious test, in our submission, could limit the use of the remedy with negligence in the future.

TIPPING J:

It's really the addition of the word conscious to the test, isn't it?

MR HENRY:

Totally.

TIPPING J:

That you're taking skilful issue with?

MR HENRY:

That is the only issue we have Sir. We say the word outrageous will handle the situation for Judges and juries in the future, the word conscious will give people a ground to strike out before we get to a trial.

TIPPING J:

Well it won't really because you'll just allege that the defendant would have consciously appreciated the risk, I mean –

MR HENRY:

You do get counsel who have the integrity Sir as was the case in *Bottrill* where, quite properly, she conceded she didn't have that, and that was a matter of integrity on her part.

TIPPING J:

Yes, I accept that.

MR HENRY:

And I would not wish to –

TIPPING J:

But if you can responsibly allege it, you will. If you can't –

ELIAS CJ:

It doesn't take you very far if you get to the end of the day and all you're able to establish is gross institutional incompetence.

MR HENRY:

The problem Your Honour will be one actually for counsel pleading, because when we get a case and look at it, if we're told it's got to be conscious, outrageous and flagrant that we plead, we may be in a situation where, as Her Honour Chief Justice said, there's been an institutional shrug and we can't prove it and we know we can't.

TIPPING J:

Can't prove what, I'm sorry? Consciousness?

MR HENRY:

We can't prove the consciousness. We know it's outrageous, we know it's flagrant, but we just can't get that proof home to someone to a sufficient level and that has shut down something that should come to the Court and the Judge should make the decision, look, this shrug was one where it happened but I'm not going to say it's outrageous or he can say it happened and it was outrageous, there should have been a mechanism to correct this, it's the omission sort of case where this is going to, in my submission, potentially limit the remedy.

If Your Honours had said on the facts, in the case of Mr Bottrill because there is no conscious activity here, that will never make it to outrageous, we would be comfortable with that position. What we're not comfortable with is saying the test for every case in the future is going to be changed. We will never know with *Bottrill* what the result was because of course it settled, but there was a good chance a Judge could have said because he had no conscious involvement, he didn't make the point of being outrageous.

TIPPING J:

The English Law Commission again, I suppose you have to take issue with this too in paragraph 5.51, a little later on in the same page, it really addresses that question. It doesn't make the point that you're making about what you call a multi-party defendant, if you like, but it does seem to be talking about standard settings, length of the concept of punishment.

MR HENRY:

There is a huge academic dislike of torts providing an exemplary damages remedy. Professor Todd would be the classic, and I've not only read his articles, I've had the benefit of his views quite vocally given to me, but in my

submission, Your Honour, there's a big strong public policy reason why we need to keep this. In the past, we had negligence and an award of damages was compensation, and that included a degree of aggravation if that was necessary to pay what ought to be paid, and then when the Court looked back at the compensatory sum, any aggravation and saw the total figure, if they decided that was not enough to mark the outrage of society, then some more could be awarded, and that used to happen in our Courts every day of the week inside the negligence trials. We've now got to a position where that doesn't exist anymore. You're only going to find an appellant who has strong concerns about what's happened inside, in this case, the Corrections Department, who is prepared to say, "I want to find out what happened and I want the ruler run over it by the Court because I believe it was outrageous", and this is the only way the private citizen can actually come to the Courts and ask for a degree of supervision. And that is what this appellant's asking for.

TIPPING J:

I was particularly concerned in *Bottrill* about the rather amorphous concept of outrageousness and I was attracted to the rather more precise and objective. Now, can you give me some help there Mr Henry about how this is actually going to be administered? What, for one Judge might be outrageous, for another might not and the other way of looking at it is more precise and objective in its connotations.

MR HENRY:

What Your Honour is inviting me to do is the very thing in my submission that should not be done. We shouldn't try and qualify the concept of outrage, it will change from year to year, it will change from situation to situation.

ELIAS CJ:

That's not reassuring.

TIPPING J:

That doesn't make me any more comfortable Mr Henry, that proposition.

MR HENRY:

I'm not trying to make you more comfortable Your Honour because this is a remedy which will be rarely sought –

TIPPING J:

If it's going to change from year to year and I mean, then become even more of a lottery than the old personal injury days were.

MR HENRY:

I'll take year to year back, it will change from case to case which will rarely come, it may be 10 yearly it changes. What I'm submitting Your Honour is that the Court, the Judge at the end of the day is the person who at the time of the trial will look at what is outrageous and flagrant disregard for the plaintiff's safety. Now in the *Bottrill* case, what he was doing at the time he did it was up to the standard of what doctors did. By the time it came through the Court of Appeal, you had a situation where medicine had moved on and you had peer reviewing, you had all sorts of different things which he wasn't doing. In that sense, the standard of what a doctor reading cancer slides should do had moved because science had moved and the Judge can take that into account, he has to apply the test of what was outrageous at the time of the conduct. That's what I mean it's got to stay flexible.

TIPPING J:

It will depend on the standards of the day is what you're saying, is it?

MR HENRY:

It's an assessment by the Judge, just as duties of care are, an assessment by the Judge of the accepted behaviour at the time of the misbehaviour.

TIPPING J:

Isn't it implicit in any such discussion as this that there is already negligence? It's the question of whether I rather crudely said in *McLaren* whether it's bad enough.

MR HENRY:

But it always comes back Sir to the concept, is it bad enough? And what we say is the words outrageous and flagrant are a sufficient test to manage it in to the future and the addition of conscious may, under the never say never principle the Privy Council said, may actually enable strike-outs to occur and proceedings will not be brought by counsel that ought actually come to these Courts because the conduct is outrageous and the views of society should be expressed by a High Court Judge.

TIPPING J:

That's not the right test surely, it is whether the conduct is deserving of punishment.

MR HENRY:

I wasn't purporting to put the test Sir, I was just purporting to put the policy point that, yes, it's got to be outrageous and flagrant and deserving condemnation and punishment, I'm short-handing the full phrase which is disregard for the plaintiff's safety, merit and condemnation and punishment. So wherever I say outrageous and flagrant, I mean all those words as well, because that is, in our submission, a neat encapsulation for a trial Judge, for a jury, for everybody and the word conscious just simply puts in a limitation on outrageousness that may in the future do injustice. It won't in this trial. If I have to fight with the Judge over the word conscious on these facts, I don't – I just don't believe I'd ever win.

TIPPING J:

I'm not sure what you precisely, would you want to develop that or would it be better just keeping that –

ELIAS CJ:

No, I don't think that's a good idea.

MR HENRY:

No Sir, no Sir. I'm just emphasising the point, I'm not conceding that there was no conscious outrageous and flagrant disregard for the plaintiff's safety.

WILSON J:

Mr Henry, I understood you to submit a few minutes ago that failing settlement, Dr Bottrill's conduct may or may not have been held to be outrageous, doesn't that submission of itself demonstrate the uncertainty of using outrageousness as a test?

MR HENRY:

At the end of the day Your Honour, all we have for all tests are different words. People have to work out what we mean by that and one of the quickest ways to put your finger on the fact that this is always going to be one of those situations is paragraph 47 of *Bottrill* where they had high-handed disregard, outrageous, oppressive, flagrant, and on it goes. It's one of those sort of tests where we are never going to get a definition that will meet all situations and it just has to be left for the Courts to determine it and grow it. What we're saying is, adding the word conscious now is stopping that growth.

WILSON J:

You'd really talk about it in terms of flexibility, desirable flexibility rather than undesirable uncertainty?

MR HENRY:

It is a remedy that has to be flexible to do justice because at the end of the day, a plaintiff coming believes they've had an outrageous thing done to them and they're looking for the Courts to form a view and the jurisdiction in this country is now a supervisory one and they will be looking for the Court to

supervise government departments, large corporations, rarely an individual. You're not, in my submission, going to see this going down to traffic law and, "He ran a red light therefore da da dum." This is going to be a jurisdiction rarely used, but will involve complex organs of government, like Corrections is, or complex corporations.

TIPPING J:

Is there anything in the High Court of Australia since Grey's case cited at 57 in *Bottrill* Court of Appeal where the use of the concept of conscious wrongdoing is employed twice?

MR HENRY:

I won't say there isn't Sir but there's certainly nothing that we've found.

TIPPING J:

So we'd be out of line with Australia then if we dropped this consciousness concept?

MR HENRY:

Yes but you'd be in line with the Privy Council in England?

ELIAS CJ:

We'd be in line with existing New Zealand law.

MR HENRY:

Yes. I'm not worried about Australia Your Honour.

TIPPING J:

Yes, well this doesn't deter me Mr Henry. It's just useful to know if there's anything more recent, but you're not aware?

MR HENRY:

Not that we've found Your Honour.

TIPPING J:

Because there's a case called *Cotogno* somewhere in Australia as I recall and I think it went down the same line but I think it was at much the same time as *Grey*, but anyway, that's fine.

ELIAS CJ:

Really what you're doing is in a way adopting the emphasis by counsel for the respondents that this all arises out of an action on the case and it's the facts that determine – that really to strive or strain for tests isn't perhaps in the end very worthwhile?

MR HENRY:

Correct.

TIPPING J:

How much does the result of the conduct help to determine whether the conduct itself was outrageous? Because there's some looseness in the authorities on this. Some seem to think that you can take into account consequences, some tend to suggest that you shouldn't because it's the per se character of the conduct if you like. Are you able to assist on that Mr Henry?

MR HENRY:

I'm not able to assist on that Your Honour because on that particular question I'm afraid I take a bob each way, I simply say it always goes back to the facts and at the end of the day –

TIPPING J:

It's two bob each way, I would suspect.

MR HENRY:

At the end of the day the High Court Judge has to take his factual situation and say in this particular case where do I look? Our submission is, rules saying it can't be this, it can't be that, all you're doing is qualifying and shutting down the supervisory remedy. It's a sparingly granted remedy. Outrageous and flagrant is a very high test and that in itself should be enough.

TIPPING J:

So I should have held the line in *Bottrill* really, shouldn't I, on this submission?

MR HENRY:

Absolutely Your Honour. I don't think this is flattery but it is Sir. The wording you used, outrageous and flagrant disregard for the plaintiff's safety meriting condemnation and punishment, for a jury is simple and clear. The Judge can then talk up and talk down the words but the actual test when they walk out the door is a very simple clear one. As clear as linguistics of the English language can ever get.

Now I don't know if there's anything else Your Honours want me to cover but that is certainly the oral presentation that I want to present unless there's something else?

ELIAS CJ:

Thank you Mr Henry.

SOLICITOR-GENERAL:

I can be relatively brief. When Mr Pike was addressing the Court Your Honour the Chief Justice asked if there were authorities from Strasbourg which might assist the Court in relation to its attitude towards exemplary damages. I'll make available to the Court the case of *Orhan v Turkey*, a 2002 decision of the European Court and the relevant part is to be found in paragraph 447 where in three sentences the Court notes that the applicant had further claimed a violation of four articles and the bad faith

that that implies means his damages should be uplifted by 50 percent. "Such an award would express disapproval for and punish the State's particularly blameworthy conduct. While he recognised that the Court has previously refused to do so he argued the Court gave no reasons. That there was international precedent and that such an award would be the only way to achieve the purposes of the convention. The government disputed this proposition." Next paragraph, "the Court notes that it is rejected on a number of occasions recently and in grand chamber requests by applicants for exemplary and punitive damages the Court therefore rejects this claim."

ELIAS CJ:

That's for breach of convention rights?

SOLICITOR-GENERAL:

Yes and an article by Sir Robert –

ELIAS CJ:

What I was really wondering was, was there any authority saying that a domestic law award of exemplary damages is contrary to any convention right? You haven't found one?

SOLICITOR-GENERAL:

I haven't found one that says that specifically Your Honour.

ELIAS CJ:

No.

SOLICITOR-GENERAL:

There is an article by Sir Robert Carnliff published in the International Comparative Law Quarterly where he, from his standpoint in one sentence says, "The Strasbourg jurisprudence does not support the award of any additional sum by way of constitutional damages or even exemplary damages."

ELIAS CJ:

Yes.

SOLICITOR-GENERAL:

I'll make those available to the Court. The Court has before it, I respectfully submit, a policy choice to make. It is the Crown's position that exemplary damages should, as a matter of principle and policy, only be able to be awarded in circumstances where it can be established that the defendant has consciously acted in a way that causes the plaintiff harm. That the conduct has been advertent or subjectively reckless. And when it is –

ELIAS CJ:

I'm sorry, just a moment. I'm just being quite clear what you're saying here. Consciously acted in a way that causes harm or consciously causes harm?

SOLICITOR-GENERAL:

Consciously causes harm.

ELIAS CJ:

Yes?

SOLICITOR-GENERAL:

Yes. Thank you Your Honour. And when it's distilled to its most basic proposition, the Crown says that the most fundamental principle is that a person may or should only be punished for conduct which they must be able to predict could result in punishment. And that to punish somebody on the basis of a retrospective assessment that the conduct deserves punishment and nothing more, undermines the basic premise upon which in Western democracies, punishment has been developed.

Mr Henry makes a lot by submitting that the criminal courts enable convictions for instances of no mens rea and it is true that strict liability offences do exist

but they are by far a limited exception to the general principle that you are only convicted and punished if you consciously do wrong or are subjectively reckless. Whilst Parliament has the ability, a limited circumstances to create strict liability offences –

ELIAS CJ:

It is not just strict liability offences though, is it? Negligent offences? I can't remember now, is absolute liability and strict liability, negligence is not strict liability, is it?

SOLICITOR-GENERAL:

That is correct Your Honour, it is not strict liability but even now, the Crimes Act provisions relating to negligence have altered since 1994, '95, when section 155 was altered so that the standard that had to be established before there could be liability is one that involves a very significant departure from standards –

BLANCHARD J:

Major departure.

SOLICITOR-GENERAL:

Thank you sir. As I said, that I think it might have been 1996 or 1997 that that amendment was made.

ELIAS CJ:

A major departure from standards?

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

But that can mean inadvertent but major departure.

SOLICITOR-GENERAL:

That can, yes.

TIPPING J:

But it is still a statutory departure from the fundamental rule.

SOLICITOR-GENERAL:

Precisely Sir and that's the point that I have been trying to make. It is a limited exception which Parliament has chosen to create. Now, Mr Henry says that in this particular case he is able to succeed if the test which the Crown puts forward is accepted by this Court. He says that this is a case of advertent behaviour/subjective recklessness. When I read the draft amended statement of claim, I endeavoured to ascertain if I could see in its pleadings subjective recklessness or advertent behaviour. I have to say and it is probably entirely my fault but I struggled to find those elements in the draft amended statement of claim but I recognise of course that if Mr Henry intends that in his pleading and is prepared to say so quite categorically, then that will be the end of the matter. It will be able to proceed on that basis.

BLANCHARD J:

He's really saying he's pleading both.

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

He's saying there's gross negligence but he's also saying that he could attain the higher standard.

SOLICITOR-GENERAL:

Yes, yes and if –

BLANCHARD J:

So, now you know. I wasn't clear either when I read the statement of claim but I thought I saw glimmerings of both.

SOLICITOR-GENERAL:

Yes and I also wasn't certain who the tortfeasor actually was.

BLANCHARD J:

I was uncertain about that as well but I think we've established today that it is both the officer who was supposed to be supervising Mr Bell and it is the probation service generally for their systemic faults.

SOLICITOR-GENERAL:

Yes, well that at least has been a step forward because I was uncertain about that –

ELIAS CJ:

I had understood that from the last hearing. In fact, I think we spent quite a bit of time on that, so that is what I had always understood –

BLANCHARD J:

Yes, I had too, but to be fair to Mr Solicitor, he wasn't at the last hearing and looking just at the amended statement of claim, one might have been uncertain.

SOLICITOR-GENERAL:

Thank you very much Sir.

TIPPING J:

It could benefit from some particularity if that is what is intended. Say no more than that.

BLANCHARD J:

Obviously, on any presentation to a trial Judge or jury if there is to be a jury trial, this will need to be very carefully spelled out.

SOLICITOR-GENERAL:

Yes.

BLANCHARD J:

It's quite fundamental and it is regrettable that we haven't got it clearly spelled out in the statement of claim, even now, despite our having spoken quite strongly about it at two previous hearings.

ELIAS CJ:

And in at least one of the judgments.

SOLICITOR-GENERAL:

Well at least from my part, I think I am better informed.

BLANCHARD J:

No wiser but better informed as someone once said.

SOLICITOR-GENERAL:

So unless I can assist the Court, the issues are very starkly before you. It is, with respect, a very fundamental philosophical decision that this Court is going to have to grapple with. In the Crown's submission, there is strong principle and great merit in the approach adopted by the majority of the Court of Appeal and the minority of the Privy Council in *Bottrill*. It has the great advantage of being focused upon principle, it articulates and understands and gives true effect to the purpose of exemplary damages, it is easily, comparatively easily understood and applied and it does not in any way come close to undermining the fundamental principles of ACC and none of those factors apply to the subjective, indeterminate qualitative assessment that the majority of the Privy Council invites our Courts to make. I come back to the point that I

started with, it is most unfortunate that this area of the law has developed in such a haphazard way. The difference in approach between the Privy Council and the *Daniels v Thompson* appeal and *Bottrill* just really does illustrate how a toss of the coin, quite literally, has set our Courts, our law, in this area on a particular course which is most regrettable and with respect, this Court now has the opportunity to seize the medal, to take advantage of this hearing and to put New Zealand's law on a principled and sound footer.

ELIAS CJ:

I just have a couple of questions. Misfeasance in public office, am I right, I should know this but I don't, is – that's an individual –

SOLICITOR-GENERAL:

Action.

ELIAS CJ:

– action.

SOLICITOR-GENERAL:

It is.

ELIAS CJ:

There is no sort of systemic corporate culpability entailed in that?

SOLICITOR-GENERAL:

I'm looking at His Honour Justice Blanchard's –

ELIAS CJ:

It's all right, I just –

SOLICITOR-GENERAL:

I only looked at him because of his judgment in *Garrett*

ELIAS CJ:

It's just I am thinking about the various principled reasons where we're ending up across the board here and although we've talked about murder and subjective recklessness in that context, I wondered also about the manslaughter cases brought against corporations. In those cases, are they parasitic on individual recklessness or is there a dimension of systemic failure?

SOLICITOR-GENERAL:

Could I just confer with Mr Pike?

ELIAS CJ:

You may not know the answer but these are things that I am going to want to have to consider.

SOLICITOR-GENERAL:

Thank you, Your Honour. Mr Pike reminds me that in relation to misfeasance, a government department or agency could be held vicariously liable for the misfeasance of a –

ELIAS CJ:

I understand vicarious liability.

SOLICITOR-GENERAL:

Rather than direct liability.

ELIAS CJ:

I'm thinking of the direct liability for systemic failure.

SOLICITOR-GENERAL:

And in terms of manslaughter, corporations in New Zealand can't be held liable for manslaughter.

ELIAS CJ:

Thinking about all those construction companies, maybe that's not manslaughter is it, that'll be under specific statutory –

SOLICITOR-GENERAL:

Mr Henry thinks that there has been an instance of a corporation being found guilty of manslaughter but I'm not aware of it.

MR HENRY:

I have a memory of a pharmacy company that was prosecuted in Dunedin and my uncle was the Judge. I'm pretty sure he convicted, I've seen the reports and –

ELIAS CJ:

Yes, all right, I'll look at that. There isn't any other remedy, statutory remedy of exemplary damages is there?

SOLICITOR-GENERAL:

Under the Human Rights Act where, for example, in the health sphere, it's been established that there's been a breach of the code of health and disability consumers' rights, the director of proceedings can bring an action in the Human Rights Review Tribunal and seek exemplary damages in that tribunal for breaches of that code. Now, exemplary damages are not defined in any way whatsoever, but the phrase used in the Health and Disability Commissioner Act, and the Human Rights Act refers specifically to the power to award exemplary damages in that forum.

ELIAS CJ:

No case law on that, that you can remember off the top of your head?

SOLICITOR-GENERAL:

There have been at least three that I personally have been involved in and I just can't recall there being any detailed analysis as to what constitutes exemplary damages.

ELIAS CJ:

Thank you.

TIPPING J:

Mr Solicitor there was one point I would be grateful if you can assist me with, it was Mr Henry's point about the, as I noted it, the difficulty with proving conscious appreciation of risk and deliberate choosing to run the risk in the case of a government department or large corporation or something like that where overall you could say well, this is an absolutely shocking state of affairs but you can't actually pin it on anyone in particular. That seemed to me to be a point that needs very careful reflection. Are you able to add anything on that?

SOLICITOR-GENERAL:

The only thought that was going through my mind when I heard that being said Sir was to suggest to you, individuals could be held to be subjectively reckless in a whole range of situations where through omission they have failed to take action which they know they ought to be taking.

TIPPING J:

But if you can't pin it on any one, that's I think Mr Henry's point, if you can't pin it on any one individual but sort of looking at it more broadly, this is, shall we say, a shocking state of affairs, there would then be no ability to award exemplary damages against the corporate, if you like, defendant. Is that something one just has to –

SOLICITOR-GENERAL:

Accept.

TIPPING J:

– on your submission, just has to accept?

SOLICITOR-GENERAL:

Yes indeed.

TIPPING J:

If it's a natural corollary if you like, of the application of the principle.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

It's just unfortunate, depending on one's point of view.

SOLICITOR-GENERAL:

Of course, yes. That is a consequence.

TIPPING J:

Yes, thank you.

ELIAS CJ:

Thank you.

SOLICITOR-GENERAL:

Thank you very much Your Honours.

ELIAS CJ:

Thank you counsel, we'll reserve our decision.

MR HENRY:

I wonder Your Honour if I can just briefly defend my statement of claim. I'm very aware of the criticisms but I do ask the Court to remember I have not yet had discovery of the departmental files. I've been given access to the file looking after Mr Bell, but the file on its face shows the probation officer had been through it before it was secured by the department, but I've had no access into anything in the department as to what they knew or didn't know in their documents. Until I've got those, I really can't particularise the statement of claim.

ELIAS CJ:

Well the statement of claim we have is a draft and we have to proceed on the basis that if it's capable of amendment to disclose a good course of action, it will be amended.

MR HENRY:

I can say on the question of exemplary damages, it currently follows the Privy Council in *Bottrill* and that is why it doesn't particularise out the matters raised by the Court of Appeal.

ELIAS CJ:

Thank you. Thank you, we'll adjourn.

COURT ADJOURNS: 3.13 PM