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JURISPRUDENTIAL SUPPORT FOR EXEMPLARY DAMAGE AWARDS: A DICHOTOMY BETWEEN ENGLAND AND OTHER COMMON LAW JURISDICTIONS

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I. INTRODUCTION

Damages are, in their fundamental character, compensatory. Whether the cause of action sounds in contract or tort, the primary theoretical notion is to place the plaintiff in as good a position, so far as money can do it, as if the wrong complained of had not occurred. In contrast, exemplary damages go beyond mere compensation between the parties in order to teach the defendant and others that tort does not pay.[1] The award of such damages was considered in *Rookes v Barnard*[2] where Lord Devlin stated that, in his view, there are two categories of cases in which exemplary damages are awarded: where there has been oppressive, arbitrary or unconstitutional action by the servants of the government, and where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff.[3] It was also established that when assessing damages in a case in which exemplary damages are appropriate, the jury should be directed that

> [i]f, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their

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1 Rookes v. Barnard, [1964] 1 All E.R. 367, 411.

2. *Id.* at 410.

3. The third category of cases where exemplary damages are awarded, when authorized by statute, is mentioned in *Rookes*. *Id.* at 411. Lord Kilbrandon in *Cassell v. Broome* doubted whether there were any real examples of this. *See* William v. Settle [1960] 2 All E.R. 806. Although not exemplary damages as such, Section 28 of the Housing Act 1988 now measures damages for wrongful eviction of a residential tenant on the basis of gain to the Landlord in having vacant possession.

> disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.[4]

The whole tenor of exemplary damage awards demands critical scrutiny in light of the important Court of Appeal decision of *AB v. Southwest Water Services Ltd.*[5] and also the most recent judgment of *Treadaway v. Chief Constable of West Midlands.*[6] *Treadaway* manifestly illustrates both the vitality and necessity of such awards as a deterrent to contumelious conduct by public officials, especially police officers. As the Law Commission has stated, such awards can serve deterrent, symbolic and retributory functions.[7] In deterring and condemning undesirable behavior, exemplary damages can also serve the distinct purpose of vindicating an individual's rights and the strength of the law. They can protect the weaker party from abuse and infringement.

Despite the perceived advantages of exemplary awards, critics of the continued existence of patent non-compensatory damages tend to focus on three main objections. First, the punitive and retributive nature of exemplary damages fails to draw a clear dichotomy between the civil and criminal functions of our law. The essence of this criticism is that any form of punishment should be unique to the criminal law system, and compensation, not punishment is the legitimate ambit of the civil law. An adjunct to this main disapproval is that punishment in a civil action will be inimical to the special safeguards and protections consistent with criminal prosecutions. Unfavorable comparisons made with criminal punishment are: the higher standard of proof, the presumption of innocence, the right to silence and the wider availability of legal aid in criminal prosecutions.[8] The supposed dangers in overreaching the criminal with civil law were addressed by Lord Reid in *Broome v. Cassell*[9] when he stated:

> There is no definition of the offense except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like—terms far too vague to be admitted to any criminal code worthy of the name. There is no limit to the punishment except that it must not be unreasonable. The punishment is not inflicted by a judge who has experience and at least tries not to be influenced

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4. [1964] 1 All E.R. 411 (per Lord Devlin).
5. [1993] 1 All E.R. 609.
6. THE TIMES, October 25, 1994 (Eng.).
7. Aggravated, Exemplary and Restitutionary Damages (1993) Law Com. Consultation Paper No. 132 ¶ 1.15.
8. *Id.* ¶ 5.6.
9. [1972] 1 E.R. 801.

> by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations which every judge would put out of his mind .... It is no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them?[10]

Additionally, awards of exemplary damages are vilified on the basis that the plaintiff receives an undeserved windfall—a sum obtained beyond compensation itself. The ultimate conclusion is that the plaintiff is placed in a better position than she or he was before the actual wrong was committed. A corollary to this argument is that awards of exemplary damages, commonly decided by jury determination, are inherently uncertain and suffer from the problem of indeterminacy. Some commentators again stress an unfavorable parallel with the criminal law wherein punishment is placed in the hands of judges guided by the creation of maximum penalties for many offenses.[11]

This Article aims to demonstrate that objections to exemplary damages do not override the clear need for and benefit of such awards. In the vast majority of cases the objections are rendered nugatory. Far more important is the necessity for such awards as a mechanism of retributive justice to act as a deterrent to future abhorrent conduct. There can be no more compelling rationale for such a view than the decision recently in *Treadaway*. It is unfortunate that the development of exemplary damages was ossified by the Court of Appeal in the *AB* case.

II. THE DECISION IN *TREADAWAY V. CHIEF CONSTABLE OF WEST MIDLANDS*

The alleged police conduct in *Treadaway* fell within the first category identified by Lord Devlin in *Rookes v. Barnard,* focusing on oppressive, arbitrary or unconstitutional action by servants of the government. The derivation of such a category is from a series of eighteenth century authorities[12] which aimed to protect the liberties of the subject from egregious state power and was regarded by Lord Devlin as too important to be deleted.[13]

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10. *Cassell v. Broome,* [1972] 1 All E.R. 801, 837-38 (1972) (Eng.) (per Lord Reid).

11. Law Com. No. 132 ¶ 5.10.

12. *Wilkes v. Wood* [1763]Lofft. 1, 98 E.R. 489 (trespass to land); *Huckle v Money* [1763] 2 Wils K.B. 205, 95 E.R. 768 (trespass to the person); *Benson v. Frederick* [1766] 3 Burr. 1845, 97 E.R. 1130 (trespass to the person).

13. [1964] A.C. 1129, 1223.

The facts before Judge McKinnon in the Divisional Court in *Treadaway* present a distasteful picture of police conduct. The plaintiff was arrested in March 1982 on suspicion of armed robbery and was interviewed on a number of occasions. He alleged that after being assaulted by police officers he signed a fabricated statement under caution which amounted to a confession. In March 1983, he was convicted and sentenced to 15 years imprisonment, which he has now served. At the trial, the prosecution relied on the allegedly fabricated confession and upon the evidence of two accomplices. Because there was no voir dire, there was no determination whether the confession was fabricated and had been improperly obtained. The plaintiff had in his background a number of serious convictions for dishonesty. The allegation subsequently made by the plaintiff was that he signed the confession only after he had been handcuffed behind his back and a succession of plastic bags had been placed over his head causing him to struggle and, at one point, pass out. After the fourth plastic bag was held over his head he signed the confession.

Judge McKinnon had no doubt that the plaintiff was cynically denied access to a solicitor when he wanted one. He asked for a solicitor and was told that he was not going to get one. The medical evidence involved a remarkable combination of injuries to the plaintiff. The minor injuries to the wrists, the petechial hemorrhages to the shoulder and sternum and the minor abrasions inside the mouth were not explained by the police account. However, the injuries were entirely consistent with the plaintiff's account and, taken together, provided rather more than slight reinforcement of it.

Like all civil actions, the standard of proof applicable where exemplary damages are claimed is the balance of probabilities test. Relying on the rule in *Hornal v. Neuberger Products Ltd.*,[14] Judge McKinnon was satisfied that the plaintiff had been assaulted by the four police officers. Judge McKinnon believed the plaintiff, fully appreciating that credibility was the vital issue in the case. Consequently he did not believe the evidence of four long-serving police officers who, he found, played various parts in the serious assaults upon the plaintiff. Judge McKinnon thus held that the court should not reduce the exemplary damages because simply the plaintiff had been convicted of serious crimes. The plaintiff had been placed in a position where he was entitled to expect that he would be given the protection of the law, and that he was certainly not given. In

14. [1957] 1 Q.B. 247 (stating that a jury, even in civil cases, should be directed that the more serious the allegation, the higher the degree of probability required to prove it).

essence, the conduct inflicted upon him amounted to torture which was unacceptable everywhere. The plaintiff received an award, inter alia, of £40,000 for exemplary damages.

It was clearly established in *White and Another v. Metropolitan Police Commissioner*[15] that police officers are servants of the government for the purposes of the first category laid down by Lord Devlin in *Rookes v. Barnard.* In *White,* exemplary damages amounting to £20,000 were awarded where police officers had unlawfully entered the home of the colored plaintiffs, assaulted them, seized them without lawful authority or excuse, falsely imprisoned them and brought a malicious prosecution against them. The officers had assaulted a defenseless man in his own home, and beat him in a brutal and inhuman way with intent to inflict pain. It was self-evident that such conduct could do gross damage to race relations.

It is also apparent that tortious assault, actionable per se, is a prevailing cause of action which allows recovery of exemplary damages. This precedent, relied on in *Treadaway,* finds judicial support in *White* and also *Flavius v. Commissioner of Metropolitan Police.*[16] In *Flavius,* the plaintiff's daughter absconded from a special hospital where she had been sent by a local authority charged with her care. A senior social worker applied to the justices for a warrant to search the plaintiff's maisonette where the daughter was suspected to be. The warrant was granted and the police proceeded to execute it. The plaintiff resisted and a scuffle broke out between him and the police. He was subsequently taken in a police van to the police station. It was then discovered that his leg had been broken. The plaintiff succeeded in a claim for exemplary damages for assault against the Commissioner of Metropolitan Police. The injury was caused by an unknown police constable who was under the Commissioner's control and for whom he was responsible. The constable who committed the assault thought that a sharp tap on the shins might have a salutary effect on the plaintiff, but there was no excuse for what he had done. There is now a consistent line of jurisprudence including police misconduct over assault, false imprisonment or malicious prosecution within the potential umbrella of exemplary damages.[17]

The decision in *Treadaway* is an important watershed after the extremely narrow interpretation put on exemplary damages by the Court of Appeal in *AB.* It manifestly demonstrates the importance of such awards as a deterrent against egregious police conduct. If the

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15. THE TIMES, April 24, 1982 (Eng.).

16. [1982] 132 N.L.J. 532.

17. In this regard also note *Holden v. Chief Constable of Lancashire,* [1987] 1 Q.B. 380 and *Ballard v. MPC,* (1983) 133 N.L.J. 1133.

criminal law process itself is fundamentally flawed, as it was on the facts found by Judge McKinnon in *Treadaway*, then it is left to the civil law to fulfill an essential penal and retributive function. The abhorrence society attaches to such conduct can and should be reflected by appropriate civil punishment. If exemplary damages were to be abolished by statute or gradually phased out of existence by judges following *AB*, then a vital safety value would be destroyed. It is instructive here to consider the view of the Law Commission, supporting the continuation of such awards, that punitive damages have been and remain an important means of vindicating or reflecting the intrinsic value of an individual's rights.[18] In a country such as England, with no written constitution, and hence, where the quintessential freedoms which individuals can expect to be protected in their relations with the state necessarily are determined in large part by ordinary tort law, awards of exemplary damages have proved to be an invaluable judicial technique for protecting civil liberties.[19] It is thus regrettable that prior to *Treadaway* the Court of Appeal in *AB* though fit to ossify awards of exemplary damages.

III. THE DECISION IN *AB V. SOUTHWEST WATER SERVICES LTD.*

The decision in *AB v. Southwest Water Services*[20] has further curtailed the award of exemplary damages. Since the effect of this case is to prevent any further development of this area of the law and to preserve it in a curious time warp, it may arguably be the first step towards the abolition of this category of damages. The issues before the Court of Appeal were whether a cause of action in nuisance could found a claim for exemplary damages, and whether before an award of exemplary damages can be made by any court or tribunal the tort must be one in respect of which such an award was made prior to 1964.

In *AB* a group action on behalf of 180 people was brought, *inter alia*, for exemplary damages from the defendants, for illness suffered by drinking water which had been accidentally contaminated. It was alleged in the statement of claim that the defendants acted in an arrogant and high-handed manner by ignoring complaints; willfully misled the plaintiffs in a circular letter which stated that the water was fit to drink; and willfully withheld any accurate or consistent information following the incident, thus causing the plaintiffs to consume the water for longer than they otherwise would have.

18. Law Com. No. 132 at ¶ 2.28.
19. *Id.*
20. [1993] 1 All E.R. 609.

Essentially the first point the Court of Appeal had to determine was whether the range of torts for which exemplary damages could be awarded was restricted to those torts recognized in 1964 when the House of Lords decided *Rookes v. Barnard* as grounding a claim for exemplary damages. It was clear that no such award could be made for breach of contract.[21] However, there were conflicting dicta vis a vis tort causes of action.[22]

The source of the view that *Rookes v. Barnard* had been intended to exclude exemplary damages in those cases where they had not been awarded before 1964, even though the requirements of Lord Devlin's "categories" were fulfilled, is to be found in the speeches in *Cassell v. Broome*, a case of libel. Lord Diplock dealt with this aspect as follows:

> Finally on this aspect of the case I would express my agreement with the view that *Rookes v. Barnard* was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded, such as negligence and deceit. Its express purpose was to restrict, not to expand the anomaly of exemplary damages.[23]

Though the other members of the House in *Cassell v Broome* spoke less directly, the Court of Appeal in *AB v. Southwest Water Services Ltd.* purported to find predominant support for this view and, at least at Court of Appeal level, this matter is now beyond doubt: before an award of exemplary damages can be made by any court or tribunal the tort must be one in respect of which such an award was made prior to 1964. This patently excludes deceit, negligence, racial or sexual discrimination (unless specifically created by statute) and patent infringement.

This took the Court of Appeal to the issue of whether the tort of public nuisance could fall within the relevant categories. It was expressly held that the large number of plaintiffs made the claim unsuitable for the award of exemplary damages. Where a public nuisance affected hundreds or even thousands of plaintiffs the court would be unable to assess the amount of exemplary damages to be awarded to any one of them without knowing at the outset the total award of exemplary damages to punish or deter the defendant, the

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21. *See Addis v. Gramophone Co Ltd.*, [1909] A.C. 488.

22. Note in *Mafo v. Adams* [1969] 3 All E.R. 1014, 1410, Lord Widgery stated that, ". . . the fact that the tort was one which did not formerly attract exemplary damages is a matter of no consequence." In respect of exemplary damages for patent infringement contrast *Morton-Norwich Products v. Intercen* [1981] F.S.R. 337 with *Catnic Components Ltd. v. Hill & Smith Ltd.* [1983] F.S.R. 512.

23. [1972] 1 All E.R. 801, 874 (per Lord Diplock).

number of successful plaintiffs and the extent to which they were individually affected by the defendant's behavior. In *Riches v. News Group Newspapers Ltd.*,[24] a libel case with ten plaintiffs, the court commented that the problem "furnishes yet another complication engendered by the survival of the right to exemplary damages and another argument in favor of abolishing the right."[25]

In any event, the insurmountable obstacle for the plaintiffs in *AB* was that prior to 1964, there was no case of exemplary damages being awarded to a plaintiff who proved particular damage resulting from a public nuisance. The causes of action leading to exemplary damage awards are thus now fixed and immutable—no extension is permissible.

The outcome of *AB* is that a perverse situation now exists over qualifying torts pertaining to exemplary damages. A vivid illustration of the present illogicality is furnished by recovery of damages for racial or sexual discrimination. Prior to *AB*, a growing line of judicial precedents backed awards of exemplary damages in respect of the statutory torts created by the Sex Discrimination Act 1975 and the Race Relations Act 1976.[26] In *Bradford Metropolitan City Council v. Arora*,[27] it was alleged that the council, by their officers, had discriminated against the claimant both on grounds of sex and race. The claimant was a Sikh who applied for a teaching post at a college run by the local authority. After a preliminary biographical interview she was not invited to attend a formal interview. The Court of Appeal, in allowing an award of exemplary damages, determined that the applicant had suffered discrimination at the preliminary interview by the presiding member of the selection panel asking her about her background in a manner designed to highlight the fact that she was from a distinct ethnic and cultural background and by making suggestive, insidious and prejudicial remarks against her. It was expressly stated by Lord Farquharson that regarding exemplary damage awards

> [i]t is well established that such awards can be made where it is appropriate to punish the defendant for his conduct in the commission of the tort. In the area of the law with which we are concerned in this appeal, namely discrimination on grounds of race

24. [1985] 2 All E.R. 845.

25. *Id.* at 856 (per Stephenson, L.J.).

26. *See Wileman v. Minilec Engineering Ltd.*, [1988] I.C.R. 318 and *Alexander v. Home Office*, [1988] 1 W.L.R. 968.

27. [1991] 3 All E.R. 545.

> or sex, one can understand that consideration of an award of exemplary damages may well arise.[28]

It is now clear following *AB* that torts not in existence before the decision in *Rookes* will fail to meet the cause of action test and not warrant exemplary damages. The recovery of such awards for racial or, by implication, sexual harassment, was expressly rejected by the Employment Appeal Tribunal in *Deane v. Ealing London Borough Council*,[29] a decision subsequent to *AB*. At issue was the refusal of the housing department to appoint a white housing officer in an Asian housing borough. The claim was based on the statutory tort created by the Race Relations Act 1976. The court expressly noted that the ratio of *Arora* discussed above, was not held to be binding by the Court of Appeal in *AB*. It had been held therein that exemplary damages were only to be awarded in respect of damages for torts, statutory or common law, which existed prior to 1964. It was therefore decided in *Deane* that *AB* was clearly binding and thus the appeal on exemplary damages had to fail. It is no longer possible for exemplary damages to be awarded for discrimination.

The ossification of causes of action existing prior to 1964 is wholly insupportable. It is eminently uncompelling to deny exemplary damages for discrimination whilst allowing recovery for assault, false imprisonment or malicious prosecution. These wrongs are all infringement of personality rights and impinge upon personal freedoms. Discrimination should be within the umbrella of recovery and is appropriate to the punishment principle. Civil liberties need protecting by retributive justice. It is similarly the apotheosis of absurdity to deny punitive damages for the newly created tort of harassment, which was judicially recognized by the Court of Appeal in *Khorasandjian v. Bush*.[30] In *Khorosandjian*, a majority of the court held that there was jurisdiction to enjoin a known defendant from persistently harassing the plaintiff by unwanted telephone calls. The jurisdiction could be exercised notwithstanding that the parties were not married and had not cohabited or that the recipient of the calls had no proprietary interest in the premises where the calls were received. Since there was an obvious risk that the cumulative effect of continued and unrestrained further harassment would cause the plaintiff to suffer from physical or psychiatric illness, the court was entitled to look at the defendant's conduct as a whole and restrain, on a *quia timet* basis also, those aspects of his campaign of

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28. *Id.* at 553 (per Farquharson, L.J.).
29. [1993] I.C.R. 329, 335.
30. [1993] 3 All E.R. 669.

harassment which could not strictly be classified as threats. But such conduct classified as harassment, a cause of action not existing prior to *Rookes*, could not, following *AB*, allow of an exemplary award. It is a ridiculous conclusion, the more so because if the very same conduct is characterized either as assault or private nuisance, causes of action that pre-date 1964, then case precedents demand recovery.[31]

Overall a somewhat bizarre result has been adopted by the courts in this area. A more logical solution would be to extend exemplary damage awards to all intentional torts where personal rights are infringed. It was clearly established before *AB*, and correctly so, that exemplary damages are not awarded for the tort of negligence or simply where the defendant's conduct is merely negligent.[32] The requisite compensatory principle is apposite to such torts and following *AB* no exemplary award can be made for simple negligence given the pre-existing cause of action requirement.[33] However, intentional torts impacting on personal freedoms demand separate treatment and, following *Treadaway*, the need for such awards seems to be palpable.

IV. CONCLUSION

The present position regarding the award or non-award of exemplary damages is indefensible. However, given the continued necessity and importance of such awards as a protection mechanism for civil liberties, they should not be rendered obsolete. *AB* has clarified the law in that the cause of action must be one in respect of which such an award was made prior to 1964. It appears illogical though that this should be the position, for the law is now fossilized in a form dependent on the accidents of pre-1964 litigation. And it must be remembered that pre-1964 cases are distinguishable in this respect: until *Rookes v. Barnard* the distinction between exemplary and aggravated damages was not always clearly drawn. Exemplary damages should be recoverable for all intentional torts impinging on personal liberties and such rights should be vindicated by retributive justice.

At the outset it was stressed that critics of exemplary damages focus on the distinction between criminal and civil law, the procedural safeguards implicit in the criminal justice process and the undeserved windfall to the plaintiff over non-compensatory awards.

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31. In respect of assault and battery note *Benson v. Frederick* (1776) 3 Burr. 1845, 97 E.R. 1130; as regards private nuisance see *Bell v. Midland Ry. Co* (1861) 10 CB (NS) 287, 142 E.R. 462.

32. *Emblen v. Myers* (1860) 6 H. & N. 54, 158 E.R. 23.

33. *See* Law Com. No. 132 ¶ 3.68.

These arguments can be rejected on a number of different levels. The latter view, an objection based on excessive damages is no longer supportable in the light of recent developments. As the Law Commission notes[34] it is now provided by Section 8 of the Courts and Legal Services Act 1990 that the Court of Appeal is empowered to substitute its own award for that made by the jury where the damages are excessive. This allows the court to give more guidance as to levels of award and consequentially, will generate a stream of awards on quanta to which reference can be made in future cases. An illustration of the application of this appellate control by statute arose in *Rantzen v. Mirror Group Newspapers.*[35] The plaintiff, a well-known television presenter founded the Childline Charity for sexually abused children. At first instance she was awarded £250,000 damages for libel by a jury in respect of articles published by the defendants which suggested that she had both covered up and protected an alleged paedophile teaching at a private school. The Court of Appeal, applying its power derived from Section 8 of the Courts and Legal Services Act 1990 and 0.59, r.11(4) substituted a sum of £110,000. This appellate court discretion will arguably remove the uncertainty and indeterminacy of exemplary damage awards by applying standard guidelines. In any event, it seems harsh to castigate such awards as undeserved given their punitive function in tandem with the appurtenant hazards and vicissitudes of litigation inflicted on plaintiffs bringing such actions.

Is there any substance to the objection that exemplary damage awards fail to delineate a correct dichotomy between criminal and civil law functions? It seems self-evident that such a criticism fails to hold any substance. The simple fact is that even compensatory civil awards serve a penal function. Both criminal and civil law aim to deter wrongdoing. It is an entirely legitimate purpose of the civil law via exemplary damages to punish and stigmatize in appropriate circumstances. The decision in *Treadaway* itself serves as an excellent illustration of the retributive function needed in the civil law. An examination of the facts determined by Judge McKinnon shows a lamentable situation where the criminal justice process itself was seriously defective. In just such a scenario, it is crucial that civil punishment is available to rectify the breach, and to accord with society's need for equitable justice and retributive punishment. There would be a serious lacuna if exemplary damages were to be abolished, and thus no suitable remedy available for intentional

34. *Id.*
35. (1993) 143 N.L.J. 507.

torts. The higher standard of proof laid down in *Hornal*,[36] and applied in *Treadaway*, was eminently appropriate to cover allegations of assault and malicious prosecution.

In *Treadaway* the intentional torts were conducted by police officers, clearly servants of the government for the purposes of the first category laid down by Lord Devlin in *Rookes v. Barnard*. It is a consequence of the piecemeal development of exemplary damage awards that illogical distinctions are made here between police officers (servants of the government) and store detectives (not government servants). There is no justifiable rationale why the latter group should not be subject to exemplary awards against them. In either case, their superiors should be vicariously liable, in the case of police officers it will be the Commissioner under whose control the officer is under. However, recent case law developments in this situation, correctly in my view, have distinguished acts done in the course of scope of employment from those done by individuals "on a frolic of their own."[37] In the latter situation only personal liability of the individual is activated. A vivid illustration of just such a development was provided in *Makanjuola v. Commissioner of Police of the Metropolis and Another*.[38] The plaintiff and her boyfriend, both Nigerian students, were in the country with visitors permits, and the plaintiff had taken part-time work here in contravention of the conditions of the permit. Judge Henry found that the defendant police officer had suggested to the plaintiff that he would not make a report leading to deportation in return for sexual favors. As a result, of that the plaintiff submitted to acts of sexual assault including buggery. The question that arose was whether the Commissioner of Police of the Metropolis should be found vicariously liable for the torts committed by the defendant.

Judge Henry held that the Metropolitan Police Commissioner was not vicariously liable for the tort committed by the police officer. It was clearly a course of conduct of his own, and it was not either in the exercise of or so connected with the performance of his duties as a police officer that it could rightly be regarded as a mode, if an improper one, of carrying them out. There was no ostensible authority and the defendant's strategy was clearly an adventure of his own. There has also been a restrictive approach over vicarious liability applied to misfeasance in a public office[39] and torts committed by

36. *See supra* note 14.
37. *Joel v. Morison* (1834) 6 C & P 501, 503 (per Parke, B).
38. THE TIMES, August 8, 1989 (Eng.).
39. *Racz v. Home Office*, [1992] T.L.R. 624.

prison officers.[40] It will be a case of "wait and see" as to the extent of this development. Certainly *Makanjuola* was a rather extreme case vis a vis police officers given that the sexual demand was wholly unconnected to course or scope of employment.

Exemplary damages have long been regarded as anomalous, and in some quarters, some may feel that it may be time following *AB* for parliamentary intervention to end the anomaly once and for all. However, it is to be hoped that the matter will be considered with the utmost care, bearing in mind their continuing vitality in other common law jurisdictions like New Zealand[41] and Australia[42] and of course the United States of America, which have some similarity with us in social and constitutional terms. The importance and function of such awards was accepted by the High Court of Australia in *Uren v. John Fairfax and Sons Pty Ltd.* It was stated therein by Judge Windeyer that:

> . . . 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—moral retribution or deterrence.[43]

It is also vital to consider the role exemplary damages play in controlling executive power and egregious conduct aimed at profit. The lesson from *Treadaway* is that such awards can restrain abuses of power, symbolize the importance of legally protected interests and act as a retributive mechanism of justice to fill a lacuna vacated by the criminal justice process. In respect of contumelious disregard of personal interests then exemplary damages can be seen to fill a void vindicating civil liberties. It would be an extremely retrograde step to curtail their existence any further.

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40. *Weldon v. Home Office,* [1992] 1 AC 58.
41. *See Taylor v. Beere* [1982] 1 N.Z.L.R. 81 (C.A.).
42. *See Uren v. John Fairfax and Sons Pty. Ltd.,* [1966] 117 C.L.R. 118 (Austl.).
43. *Id.* at 149 (per Judge Windeyer).