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Punitive Damages in Australian Law

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The *Smith v. MegaFood* hypothetical raises interesting questions for Australian law. Most of these questions relate to MegaFood's liability to Smith rather than to the recovery of damages. Questions relating to punitive damages can arise only if we assume MegaFood's liability to Smith. If we make this assumption, however, the fact situation illustrates the uncertainties of the Australian law of punitive damages. These uncertainties spring from the tension between a hostility toward punitive damages inherited from English law, and a modern tendency to embrace, or at least to concede, the availability of such damages.

Part I sketches the Australian social environment, which may explain to readers unfamiliar with Australian culture why the scenario on which we are asked to comment is unlikely to arise in Australia. Part II makes certain modifications to the hypothetical to reflect the essential differences between the legal environments of Australia and the United States, especially regarding the possible bases of MegaFood's liability. Parts III and IV discuss the substance of punitive damages. Part V addresses the quantum of punitive damages on the assumption that they are available to Smith. Part VI concludes that Australian courts probably would not uphold an award of $3.5 million even if MegaFood were liable.

I. THE SOCIAL SETTING

Since the mid-1970s, Australia has had a universal health insurance scheme known as "Medicare" funded by a Federal Government levy on taxpayers and general revenue.[1] Medicare is supplemented by a highly regulated private hospital insurance system to which a substantial, although diminishing, proportion of the population subscribes. Knowing that they are covered for

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1. Health Insurance Act (1973).

virtually all future hospital and medical expenses, many injured persons are not under pressure to invoke the torts system to provide for their urgent needs. Theoretically, as a matter of law, Medicare and private hospital insurance benefits are not payable where an entitlement exists to damages or compensation. Although provisional payments may be made pending the establishment of any such entitlement, in practice, many injured persons do not take steps to prove their entitlement. Because Medicare and, to a lesser extent, private insurance do not cover ancillary services such as physiotherapy, there remains some incentive to sue in serious cases.

Australia also enjoys a non-contributory, highly targeted and means-tested income support system provided by the Commonwealth (Federal) Government.[2] This system pays benefits such as sickness allowance[3] and disability support pension[4] when the recipient cannot work, irrespective of the cause of the incapacity. The sickness allowance becomes payable after a comparatively short waiting period and is intended for short-term incapacity for work. In the case of long-term incapacity for work, the disability support pension continues until the recipient becomes eligible for the old age pension, which, similarly, is non-contributory and means-tested. The payments represent about twenty-five percent of a single person's average weekly earnings or forty percent of a married couple's average weekly earnings, and are supplemented in many instances by a range of other allowances. Although far from generous, payments such as these ensure that the victims of torts as well as other misfortunes are not left destitute if they are unable to recover damages or compensation. Despite some verbal attacks on "dole-bludgers," the stigma of being dependent on welfare benefits probably is less than in some other countries. Benefits under the Social Security Act of 1991, which are not means-tested, include a child disability allowance[5] and a mobility allowance.[6] Nursing homes are subsidized and the National Health Act of 1973 (hereinafter "Health Act") assists domiciliary

2. *See, e.g.*, Social Security Act (1991); National Health Act (1973); Disabilities Act (1986).
3. Social Security Act § 666 (1991).
4. *Id.* § 94.
5. *Id.*
6. *Id.* § 1035.

nursing care.[7] The Health Act also contains provisions authorizing a Pharmaceutical Benefits Scheme. In addition, the Disability Services Act of 1986 provides for rehabilitation and other services for persons with disabilities.[8] In light of these multiple provisions, the pressure to sue is clearly not the same as in the United States.

Those who nevertheless want to sue face barriers not found in other jurisdictions. Until recently, no contingent fee system existed. The torts of maintenance[9] and champerty[10] effectively prevented lawyers from supporting litigation or sharing in the proceeds. Although some jurisdictions now have legislatively abrogated these ancient torts, legislation maintains as unenforceable agreements to share the proceeds of litigation.[11] Thus, at best, a lawyer can hope to recover only a small percentage above the scale fees on a contingent basis. Legal aid funds are far from plentiful and not readily available to indigent tort victims. Furthermore, the rules for costs require the losing party to pay a large portion of the winner's costs, thus providing a strong deterrent for anyone with a home[12] or other assets to risk the uncertainty of litigation.

Success in litigation does not guarantee wealth. Due to overestimation of the investment benefits of lump sum damages and underestimation of the effects of inflation, the courts traditionally heavily discount damages for lost income and outlays on nursing and other medical expenses. The relatively parsimonious sums so estimated are then further discounted, to an arguably excessive degree, for contingencies or "the vicissitudes of life." No allowance has to be made for attorney contingent fees. As a result, the pain and suffering component will look ludicrously small

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7. National Health Act (1973).

8. Disability Services Act (1986).

9. In the context of lawsuits, maintenance is defined as "[a]n officious intermeddling in a lawsuit by a non-party by maintaining, supporting or assisting either party, with money or otherwise, to prosecute or defend the litigation." BLACK'S LAW DICTIONARY 954 (6th ed. 1990).

10. Champerty is defined as "[a] bargain between a stranger and a party to a lawsuit by which the stranger pursues the party's claim in consideration of receiving part of any judgment proceeds; it is one type of 'maintenance,' the more general term which refers to maintaining, supporting, or promoting another person's litigation." *Id.* at 231.

11. *See, e.g.*, Maintenance and Champerty Abolition Act (1993) (N.S.W.); Wrongs Act § 32 (1958) (Vic.).

12. Most Australians own their own homes.

to U.S. eyes. Punitive damages, as we shall see, are a rarity. Thus, the Australian system contains none of the same incentives to sue as are observed in the United States.[13]

Another factor that affects the volume of tort litigation is that, until recently, personal injury lawyers had little inducement to innovate. Most litigation resulted from motor or industrial accidents because workers' compensation legislation did not provide exclusive remedies against employers. The defendants in such actions were compulsorily insured, even if they were drivers of stolen vehicles. In the rare cases in which the driver was not insured or in which the actual tortfeasor could not be found, the nominal defendants paid the damages out of funds contributed by all licensed insurers. Unlike the United States, such insurance was unlimited. Therefore, there was no need to find some other defendants, such as a dram shop proprietor or social host. Recently, this scenario has begun to change. No-fault motor schemes have high thresholds for tort recovery, and workers' compensation is becoming an exclusive remedy. Some view medical liability as a growing area of litigation, but the cost of protection by medical defense associations still is far below the level of premiums paid to private insurers in the United States, and is indicative of fewer suits and generally lower damages.

The *Smith v. MegaFood* scenario does not state from where the 750 prior lawsuits have been brought against MegaFood. For all the reasons spelled out in this part, few would have been launched in Australia. This does not mean that tort law reform[14] is not part of Australia's political agenda. Recently, New South Wales enacted legislation providing for the capping of professional

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13. *Cf.* J. Fitzgerald, *Grievances, Disputes & Outcomes: A Comparison of Australia and the United States*, 1 LAW IN CONTEXT 15 (1983). For a reworking of some of Fitzgerald's data, see Herbert M. Kritzer, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. & SOC'Y 400 (1991). For criticism, see Sally Lloyd-Bostock, *Propensity to Sue in England and the United States of America: The Role of Attribution Processes*, 18 J.L. & SOC'Y 428 (1991).

14. Australians would understand this to include defamation law reform. Lacking an express equivalent to the First Amendment of the U.S. Constitution, Australia has in some eyes become the defamation capital of the world. Very recent decisions of the High Court have found an implied right to political free speech in the Australian Constitution. *See* Theophanous v. Herald & Weekly Times Ltd., 124 A.L.R. 1 (1994) (Austl.); Stephens v. West Australian Newspapers Ltd., 124 A.L.R. 80 (1994) (Austl.). Meanwhile, reform of defamation law has been the subject of inquiry after inquiry and is currently in the forefront of the activities of the New South Wales Law Reform Commission. *See also* Defamation Amendment Act (1994) (N.S.W.).

liability in the context of the adoption of insurance schemes by professional associations.[15] Three other jurisdictions have abolished joint and several liability and provided new fixed limitation periods in the construction industry.[16] A Government-sponsored inquiry has recommended the more general abolition of joint and several liability.[17] A noteworthy feature of these three initiatives, however, is that they exclude liability for personal injury. The main concern is the perceived burgeoning liability for pure economic loss. In personal injury litigation, thresholds, capping, and other measures to limit damages have been introduced almost exclusively in relation to motor and industrial accidents.[18]

II. MODIFICATIONS OF THE HYPOTHETICAL

A. Terminology

In Australian law, we tend to speak of "exemplary" rather than "punitive" damages. At first sight, this seems a mere matter of terminology; it is, however, much more. The distinction points to the origins of our modern law of exemplary damages, and to some of the difficulties occasioned by those origins.

The genesis of modern Australian law of exemplary damages occurred in 1964, in Lord Devlin's speech in *Rookes v. Barnard*.[19] In his speech before the English House of Lords, Lord Devlin did two important things. First, he attempted to impose a uniform terminology on certain areas of the law of damages.[20] Before 1964, the cases speak indiscriminately of "punitive," "exemplary," "vindictive," "aggravated," and "retributory" damages. Lord Devlin pointed out that the purpose of damages in many of these cases was compensatory rather than punitive.[21] He sought to make clear the conceptual distinction between damages aimed at

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15. Profession Standards Act (1994) (N.S.W.).

16. *See* Development Act, §§ 72-73 (1993) (S.A.); Building Act, Pt. 9, Division 2 (1993) (Vic.); Building Act, §§ 155-62 (1993) (N.T.). This is again in the context of compulsory insurance schemes.

17. J.L.R. DAVIS, REPORT OF STAGE TWO OF THE INQUIRY INTO THE LAW OF JOINT AND SEVERAL LIABILITY (1995).

18. *See, e.g.*, Motor Accidents Act, Pt. 6 (1988) (N.S.W.); Workers Compensation Act, Pt. 5 (1987) (N.S.W.).

19. 1964 App. Cas. 1129.

20. *Id.* at 1220-25.

21. *See* Lamb v. Cotogno, 164 C.L.R. 1, 8 (1987).

compensation and those aimed at punishment. Lord Devlin styled the latter "exemplary damages."[22] Compensatory damages seek to restore the plaintiff to its position before the wrong or tort; exemplary damages aim to punish and deter.[23] Lord Devlin's purpose was to clarify that many of the pre-1964 cases purporting to award exemplary damages actually had awarded compensatory damages, and could only be justified as such. Indeed, few cases truly awarded exemplary damages.

The second matter to which Lord Devlin directed his attention was why exemplary damages were recoverable in some cases and not in others. In a magisterial passage in which other members of the House concurred, Lord Devlin restated the circumstances in which exemplary damages were recoverable at common law.[24] He limited recovery to three categories of cases: (1) government servants have acted in an oppressive, arbitrary or unconstitutional action; (2) the defendant has calculated that the profit to be made from a course of conduct is likely to exceed any compensation payable to the plaintiff; and (3) the exemplary damages are awardable by statute. We refer to this second aspect of the decision as Lord Devlin's restatement.

Lord Devlin's restatement proved controversial in England, but was confirmed by the House of Lords in *Broome v. Cassell & Co.*[25] The High Court of Australia firmly rejected it, however, in *Uren v. John Fairfax & Sons Pty. Ltd.*[26] That rejection was remarkable on two scores. First, it came at a time when, as a matter of practice, Australian courts tended to follow the decisions of the English House of Lords.[27] Second, for the purposes of

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22. *Id.*

23. *See* Lamb v. Cotogno, 164 C.L.R. 1, 8 (1987).

24. Rookes v. Barnard, 1964 App. Cas. 1129, 1225-27.

25. 1972 App. Cas. 1027. This was an appeal from the English Court of Appeal under Lord Denning M.R.'s leadership, which had tried to subvert the decision in *Rookes* on the technical ground that it had been reached per incuriam, i.e. by overlooking precedents relevant to the decision of the case. Not surprisingly, the House of Lords was unimpressed with this argument and effectively rebuked the Court of Appeal for its disloyalty.

26. 117 C.L.R. 118 (1966) (Austl.).

27. The reason was often stated to be the achievement of uniformity in the "common law of the British Empire." For statements to this effect from the High Court of Australia, see Webb v. Outtrim, 4 C.L.R. 356 (1906) (Austl.); Piro v. Foster & Co. Ltd., 68 C.L.R. 313 (1943) (Austl.); Ford v. Ford, 73 C.L.R. 524 (1947) (Austl.). *See also* Robins v. National Trust Co., 1927 App. Cas. 515. But the practice began to break down in Australia after the High Court decision in Parker v. The Queen, 111 C.L.R. 610 (1964). Other than the practical force which attaches to it as the historical source of Australian

Australian law, the Privy Council in England endorsed on appeal the Australian High Court's rejection of Lord Devlin's restatement.[28] At that time, the Privy Council was the supreme appellate court in all non-constitutional matters from all Australian jurisdictions.[29]

The Australian rejection of Lord Devlin's restatement, however, did not extend to a rejection either of his terminology or of his analysis of the pre-1964 cases. Indeed, this aspect of *Rookes v. Barnard* was expressly accepted for purposes of Australian law. The new terminology was to be imposed on pre-1964 authorities to determine what they "really" decided. A major problem persists, however, because clearly setting out the circumstances in which exemplary damages were recoverable before 1964 is difficult, if not impossible. The determination of what is presently recoverable in Australian law is equally difficult. Lord Devlin's starting point, namely the hopelessly confused pre-1964 terminology, provides the source of this difficulty. In other words, the clarification of terminology without a restatement does not alleviate the confusion in the absence of any attempt to examine the relevant policy issues.[30] Such a restatement still should be made for purposes of Australian law. Until then, many uncertainties surround the circumstances in which exemplary damages are recoverable in Australian law.

B. The Body Awarding Damages

In the hypothetical, the jury awards $100,000 in compensatory damages, and $3.5 million in punitive damages. In most Australian jurisdictions, judges rather than juries award both compensatory and exemplary damages. South Australia endorses this practice by legislative mandate abolishing the jury in all civil actions. In other Australian jurisdictions, legislation tends to allow the parties to opt

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law, English precedent is now, theoretically, treated no differently than other foreign precedent in Australia. Its force in any case resides in the cogency of its reasoning. Cook v. Cook, 162 C.L.R. 376, 390 (1986) (Austl.). *See* Harold Luntz, *Throwing Off the Chains: English Precedent and the Law of Torts in Australia*, *in* THE EMERGENCE OF AUSTRALIAN LAW, ch. 4 (M.P. Ellinghaus et al. eds., 1989).

28. Australian Consolidated Press Ltd. v. Uren, 117 C.L.R. 221 (1967) (Austl.), [1969] 1 App. Cas. 590.

29. The Australian Act § 11 (1986) finally abolished appeals from Australian courts to the Privy Council.

30. *See* HAROLD LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH 62-63 (3d ed. 1990).

for trial by jury in civil actions, but maintains the court's discretion to control that choice.[31] In practice, the incidence of jury trials in civil actions varies from jurisdiction to jurisdiction. Except in Victoria, however, the majority of civil actions do not use juries.

C. The Basis of the Defendant's Liability

Because of the uncertainties surrounding the recovery of exemplary damages, the basis of the defendant's liability is a factor of some importance. The purpose of this section, therefore, is to examine the possible bases of MegaFood's liability to Smith under Australian law.

1. The Importance of the Basis of the Defendant's Liability

There are two reasons for accurately defining the plaintiff's cause of action in this case. First, under one view of Australian law, the nature of the plaintiff's cause of action is crucial to determining the availability of exemplary damages.[32] Second, and more fundamental, no question of exemplary damages exists unless the defendant is liable to the plaintiff on some recognized basis. Australian law does not provide independent action for exemplary damages, considering such damages "parasitic"[33] on compensatory damages.[34] Thus, in the context of this case, if MegaFood is not liable to Smith for compensatory damages, it cannot be liable for exemplary damages even if the court wished to punish and deter MegaFood's conduct.[35]

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31. *See* B.C. CAIRNS, AUSTRALIAN CIVIL PROCEDURE 461 (3d ed. 1992).

32. See *infra* Part III.B. for a discussion on this point.

33. They were so described by Justice Brennan in the High Court of Australia in XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Austl.) Pty. Ltd., 155 C.L.R. 448, 468 (1985) (Austl.).

34. But the suggestion by Justice Brennan that exemplary damages are always parasitic on compensatory damages is too narrow because it ignores the fact that such damages are competent even where there is an award of nominal damages. *Id.* at 468-69. *See* MICHAEL J. TILBURY, 1 CIVIL REMEDIES 264 (1990).

35. In New Zealand, where statute abolishes the common law for personal injury, an independent action in exemplary damages survives for such injury. Donselaar v. Donselaar, [1984] 2 N.Z.L.R. 66. Where statute restricts or alters common law rights to damages in Australia, rights to exemplary damages may be abolished. *E.g.*, Motor Accidents Act § 81A (1988) (N.S.W.) (personal injury in the context of motor accidents compensation); Workers Compensation Act § 151R (1987) (N.S.W.) (personal injury in the context of workers' compensation law).

2. Particular Difficulty in Victoria

Since January 1, 1987, the State of Victoria has had in operation a successful no-fault transport accident scheme[36] that severely restricts common law rights to sue for transport accidents.[37] In particular, except as otherwise provided, section 93(1) of the Transport Accident Act prohibits the recovery of any damages for the injury or death of a person as the result of a transport accident.[38] This section does not provide recovery for medical expenses paid under the no-fault scheme for an unlimited time and to an unlimited extent or exemplary or punitive damages. The definition of "transport accident"[39] has narrowed. Originally, the phrase was based on the standard formula used in Australia for compulsory motor vehicle insurance ("an incident caused by or arising out of the use of a motor car"), but some felt decisions of the courts gave too broad a compass to this formula.[40] As a result, the definition changed to an incident directly caused or directly arising out of the driving of a motor car. Despite the introduction of "directly" and the substitution of "driving" for "use," however, the courts continued to reach decisions that the legislature considered too favorable to claimants for no-fault benefits.[41] The most recent amendment defines a transport accident as "an incident directly caused by the driving of a motor car . . . ."[42] Although the earlier definitions almost certainly would have covered Smith's incident, it is possible that this last definition will still apply to Smith's mishap. If the incident is covered by the definition, a court could not lawfully award damages for medical expenses or punitive damages.

3. Product Liability in Australian Law

In the United States, Smith has brought his case, and succeeded before the jury, on a product liability theory. As in the

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36. Transport Accident Act (1986) (Vic.).
37. *Id.* § 93.
38. *Id.*
39. *Id.* § 3(1).
40. *See* Dickinson v. Motor Vehicle Insurance Trust 163 C.L.R. 500 (1987) (father covered against liability to own children burned as a result of playing with matches while left in the car).
41. *See* Transport Accident Commission v. Treloar, 1 V.R. 447 (1992) (A.D.).
42. Transport Accident Act (1986), *as amended by* Act of 84, § 5 (1994) (Vic.).

United States, no Australian jurisdiction retains the common law forms of action. The plaintiff's claim must, however, state a cause of action. "Product liability" is not, by itself, a cause of action in Australian law.[43] Its context may, however, indicate the liability of the plaintiff on some recognized basis. In the hypothetical, there are only two such bases: (1) a liability at common law, either in contract or in tort, including terms implied by the sale of goods legislation of the State in which the incident occurred; and (2) a liability under statute, specifically, the federal Trade Practices Act.[44]

4. Liability at Common Law

MegaFood's liability at common law is founded either in contract or in tort. In this case, as in so many product liability cases, it may be possible to erect a concurrent duty in both contract and tort. Under the contract theory, there could be a breach of implied warranty of merchantability. But although the liability for such a breach is strict,[45] it is by no means clear that any such breach has occurred. Even if a breach has occurred, under the conventional view, exemplary damages are not available for breach of contract.[46] Success in a claim for breach of a strict contractual duty offers Smith a very considerable advantage because contributory negligence would not be a defense.[47] This, however, might tempt a court to hold that Smith is the author of his own injury.[48]

The potential tortious liability in this case rests in negligence or in MegaFood's failure to adequately warn its customers,

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43. In product liability cases, Australian common law has not adopted the strict liability approach to the basis of obligation that emerged in American law after Greenman v. Yuba Power Products Inc., 377 P.2d 897 (Cal. 1963). *See* RESTATEMENT (SECOND) OF TORTS § 402A.

44. Trade Practices Act (1974).

45. *See, e.g.*, Sale of Goods Act §§ 19, 64 (1923) (N.S.W.) (stating that such implied warranty of merchantability is not excludable in a consumer sale); *see also* Trade Practices Act §§ 66(2), 68, 71 (1974) (stating that the similar unexcludable terms are implied into consumer contracts).

46. *See* Addis v. Gramophone Co., 1909 App. Cas. 488. *Cf.* Baltic Shipping Co. v. Dillon, 176 C.L.R. 344 (1993) (recognizing only limited exceptions to the rule that no damages for distress or other non-pecuniary loss may be recovered for breach of contract). Justice McHugh, however, foresaw the possible reconsideration of Addis.

47. *See* Barclays Bank Plc. v. Fairclough Building Ltd., [1994] 3 W.L.R. 1057 (Eng. C.A.).

48. *See* March v. E. & M.H. Stramare Pty. Ltd., 171 C.L.R. 506, 512-14, 520 (1991).

including Smith, of the nature and risk of spilled coffee served at 180 degrees Fahrenheit. A claim of negligence is competent in Australian law where: (1) the defendant owes the plaintiff a duty of care in the sense that the defendant stands in a proximate relationship to the plaintiff to whom injury is reasonably foreseeable; (2) the defendant has breached that duty; (3) the plaintiff suffers damage; and (4) the defendant's breach of duty is the cause of the plaintiff's damage.[49] In the case at hand, of course, no doubt exists that Smith has suffered damage. Other aspects of Smith's cause of action, however, are not so clear.

Does MegaFood owe Smith a duty of care that it has breached? The answer is probably in the affirmative. First, in light of the 750 prior lawsuits and MegaFood's acknowledgment that customers may not be aware of the risk of spilled coffee served at 180 degrees Fahrenheit, MegaFood clearly could foresee personal injury to Smith with whom it stands in a proximate relationship. Second, in view of the very serious potential consequences, such as a third degree burn resulting from spilled coffee served at 180 degrees Fahrenheit, MegaFood is at least under a duty to warn customers of the potentially harmful consequences of spillage. After all, the duty to warn is not an onerous one. Compliance, for example, could take the form of a sufficiently prominent notice in its retail outlets. Nevertheless, MegaFood will not likely be prevented from serving coffee at 180 degrees Fahrenheit unless evidence indicates that warnings would be ineffective despite the serious risk involved with serving hot coffee.

Assuming that MegaFood has breached a duty of care to Smith, will that breach be treated as the cause of Smith's loss? Applying the "but for" test, MegaFood's breach is clearly a cause of Smith's loss.[50] Yet, Smith's own action of placing the coffee cup between his legs and attempting to remove the lid while driving may break the chain of causation between MegaFood's breach of duty and Smith's damages on the basis of a *novus actus interveniens* or new intervening force. A new intervening force breaks the chain of causation between the defendant's conduct and the plaintiff's damage where the defendant cannot foresee that

49. *See* R.P. BALKIN & J.L.R. DAVIS, THE LAW OF TORTS, chs. 7-9 (1991).
50. *March*, 171 C.L.R. at 515-16.

force and where it is not a part of the ordinary course of events.[51] Here, Smith's conduct amounts to a lack of care for his own safety and, thus, is not part of the ordinary course of things. Clearly, the plaintiff's own "negligence" in this sense may constitute a new intervening force.[52] The legal argument against this view is that MegaFood's duty of care extended to guarding Smith against the very conduct in which he engaged.[53] MegaFood served coffee at 180 degrees Fahrenheit when it was aware of the risks attendant upon spillage but its customers were not.

Even if Smith's conduct does not constitute a new intervening force, it still remains relevant in the assessment of damages. Undoubtedly, Smith's conduct is "negligent" in the sense that he failed to take reasonable care for his own safety. In all Australian jurisdictions, such pre-injury contributory negligence operates by statute to reduce the compensatory damages recoverable by Smith.[54] This means that if the court, having regard for notions of causality and moral blameworthiness,[55] determines that Smith is thirty percent, fifty percent or eighty percent responsible for the damage that he suffered, the court will reduce Smith's damages by that percentage. This is true even of damages given solely for the purpose of compensating for medical and hospital expenses attributable to the injury.

5. Liability Under the Trade Practices Act

An alternative basis for MegaFood's liability is found in Part VA of the Trade Practices Act of 1974 ("TPA"), which deals inter alia with the liability of manufacturers for defective goods.[56] Section 75AD of the TPA imposes liability on a corporation for injuries suffered as a result of defective goods manufactured and supplied to individuals. "Supplied" encompasses the sale of goods,[57] while "manufactured" includes "extracted," "produced,"

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51. *Id.* at 517-18.

52. Caterson v. Comm'n for Railways, 128 C.L.R. 99 (1972).

53. March v. E. & M.H. Stramare Pty. Ltd., 171 C.L.R. 506, 518-19 (1991).

54. BALKIN & DAVIS, *supra* note 49, at 337-58.

55. *See* Pennington v. Norris, 96 C.L.R. 10 (1956) (Austl.); Podrebersek v. Australian Iron & Steel Pty. Ltd., 59 A.L.R. 529 (1985) (Austl.).

56. Part V.A. was added to the Trade Practices Act by the Trade Practices Amendment Act (1992), which commenced on July 9, 1992. It thus is relatively new, and no significant case law has yet developed around it.

57. Trade Practices Act § 4(1) (1974).

and "processed,"[58] and seems to cover the making of a cup of coffee. For the purposes of the provision in question, goods are "defective" if "their safety is not such as persons are generally entitled to expect."[59] Thus, the test focuses on the objective knowledge and expectations of the community rather than the injured party's subjective knowledge and expectations.[60] In applying the test, the TPA specifies that all relevant circumstances must be considered,[61] including the manner and the purposes of the marketed goods,[62] their packaging,[63] any instructions or warnings in relation to the goods,[64] and what might reasonably be expected to be done with or in relation to the goods.[65] In our hypothetical case, it clearly is arguable that, in light of the serious and known consequences of spilled coffee, MegaFood's failure to warn of the dangers of coffee served at 180 degrees Fahrenheit[66] and the hazards of misuse[67] constitute, for the purposes of section 75AD of the TPA, "instructional defects"[68] in the goods supplied.

The prima facie advantage of Smith's being able to rely on MegaFood's liability under the TPA, rather than under the general law of negligence, is that liability under the TPA is strict. The TPA, however, also makes clear that MegaFood's liability in damages is reducible to the extent to which Smith's loss can be attributable both to the defect in the goods and to Smith's own act or omission.[69] This is similar to the reduction of damages for contributory negligence.[70] Therefore, in light of Smith's own carelessness, Australian courts are likely to reduce any compensation obtainable under the TPA. Indeed, Smith may be seen as the instrument of his own loss and receive no compensation at all.[71]

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58. Trade Practices Amendment Act § 75AA (1992).
59. *Id.* § 75AC(1).
60. Explanatory Memorandum to the Trade Practices Amendment Bill 1992 ¶ 14.
61. Trade Practices Amendment Act § 75AC(2) (1974).
62. *Id.* § 75AC(2)(a).
63. *Id.* § 75AC(2)(b).
64. *Id.* § 75AC(2)(d).
65. *Id.* § 75AC(2)(e) (1974).
66. *See* Explanatory Memorandum to the Trade Practices Amendment Bill 1992 ¶ 18.
67. *Id.* ¶ 19.
68. See *id.* ¶ 14 for the classification of defects for the purposes of Part V.A.
69. Trade Practices Amendment Act § 75AN(1) (1974).
70. BALKIN & DAVIS, *supra* note 49.
71. Section 75AN of the Trade Practices Amendment Act (1974) provides that "the amount of the loss is to be reduced to such extent [which may be to nil] as the court thinks fit having regard to [the injured person's] share in causing the loss."

III. THE RECOVERY OF EXEMPLARY DAMAGES IN AUSTRALIAN LAW

In the absence of any authoritative declaration in Australian law equivalent to Lord Devlin's restatement, an analysis of the cases can only isolate the general factors that courts take into account in deciding whether or not to make an award of exemplary damages.[72] These factors are the defendant's conduct, the plaintiff's cause of action, and the purpose served by an award of exemplary damages under all the circumstances of the case.

A. The Defendant's Conduct

In Australian law, defendants are only liable for conduct that amounts to conscious wrongdoing in contumelious disregard of another's rights.[73] Smith will have no difficulty demonstrating that MegaFood's conduct was conscious because MegaFood did not act under any disability.[74] Smith's real difficulty will be to establish that MegaFood acted in "contumelious disregard" of his rights, since this implies conduct amounting to a high-handed, insolent, vindictive or malicious invasion of his rights.[75] For example, contumelious disregard occurs where the defendant deliberately causes physical injury to the plaintiff and, having done so, remains indifferent to the plaintiff's plight.[76]

If MegaFood's conduct amounts to a breach of duty, either at common law or under the TPA, that breach consists of its failure to warn of the dangers of coffee spilled at 180 degrees Fahrenheit. In light of the 750 lawsuits brought against it in the past ten years, MegaFood clearly was aware of the potential for serious burns

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72. TILBURY, *supra* note 34, at ch. 5.

73. *See* Whitfeld v. De Lauret & Co. Ltd., 29 C.L.R. 71, 77 (1920) (Austl.). *See also* Uren v. John Fairfax & Sons Pty. Ltd., 117 C.L.R. 118, 129, 147, 154 (1966) (Austl.); Australian Consolidated Press Ltd. v. Uren, 117 C.L.R. 221, 232 (1967) (Austl.), [1969] 1 App. Cas. 590, 635; XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Austl.) Pty. Ltd., 155 C.L.R. 448, 471 (1985) (Austl.).

74. TILBURY, *supra* note 34, at 259.

75. Uren v. John Fairfax & Sons Pty. Ltd., 117 C.L.R. 118, 129 (1966) (Austl.).

76. Lamb v. Cotogno, 164 C.L.R. 1 (1987) (Austl.) (defendant liable in exemplary damages where he had deliberately injured plaintiff by driving a motor car into him and then abandoned him in pain at the side of the road). Note that the effect of this decision was reversed by the legislature, which has prohibited the award of exemplary damages in New South Wales in actions against owners and drivers of motor vehicles. Motor Accidents Act § 81A (1988) (N.S.W.).

caused by spilling hot coffee. Because the evidence establishes that MegaFood simply was responding to consumer demand, its persistence in serving coffee at that temperature can hardly be regarded as an arrogant or high-handed disregard of customers' rights. The failure to warn, however, is not so easily dismissed. MegaFood is aware that its customers may not fully apprehend the danger of spilled coffee served at 180 degrees Fahrenheit. Is MegaFood's failure to warn a "contumelious disregard" of its customers' rights? The answer depends on proof of further facts relating to the question of why MegaFood failed to warn its customers. Two possible reasons suggest themselves. On the one hand, MegaFood simply may have failed to address itself to the issue, although this seems implausible in light of the prior 750 claims. If this is true, however, the fact that MegaFood ought to have addressed the issue will not be sufficient to hold it liable in exemplary damages.[77] On the other hand, MegaFood may have addressed the issue and deliberately decided not to issue warnings. If the latter is true, then we need to know the rationale behind the decision. MegaFood, for example, may have been acting on legal advice that warnings were not necessary or that, regardless of the potentially serious injury to customers, warnings would have an adverse effect on sales. Only the latter explanation will bring MegaFood's conduct within the category of "contumelious disregard of another's rights."

B. The Plaintiff's Cause of Action

Assuming that the evidence establishes that MegaFood has acted in "contumelious disregard" of Smith's rights, Smith still may have to show that MegaFood is liable to him in a cause of action that would entitle Smith to exemplary damages. The word "may" in the last sentence must be emphasized because, in this respect, Australian law remains as unclear as English law, notwithstanding the rejection of *Rookes v. Barnard* in Australia.[78]

The difficulty arises in this way. Before *Rookes*, exemplary damages were recoverable in a number of nominate torts, mainly intentional torts. Lord Devlin's restatement in *Rookes* limited the

77. *See* Midalco Pty. Ltd. v. Rabenalt, 1989 V.R. 461 (stating that making the defendant, who ought to have known of risks to the plaintiff, liable in exemplary damages was wrong).

78. Rookes v. Barnard, 1964 App. Cas. 1126.

recoverability of exemplary damages to three situations that he described without reference to the plaintiff's cause of action.[79] Nevertheless, the weight of English authority after *Rookes* has held that exemplary damages are recoverable only in those torts in which exemplary damages were recoverable before *Rookes*.[80] This development gives effect to *Rookes*' underlying policy of narrowly confining the circumstances under which exemplary damages are claimable. It also reflects a particular desire that exemplary damages should not become available in breach of contract cases.[81]

This debate is irrelevant in Australia where the restatement proposed in *Rookes* has been rejected. Yet, the debate sometimes emerges in another form. In the very case that rejected Lord Devlin's restatement, two Justices of the High Court of Australia seem to take the view that exemplary damages are only available in certain classes of torts.[82] If this is correct, it creates an additional barrier for Smith's claim because prior to *Rookes*, no authority existed for awarding exemplary damages in negligence cases. Indeed, the assumption undoubtedly was that such damages were not recoverable in negligence.

The better view, however, is that Australian law does not restrict the availability of exemplary damages based on the plaintiff's cause of action. Other than an unarticulated desire to restrict the availability of exemplary damages, no reason would support such a rule. Rather, restrictions on the recoverability of exemplary damages are found logically in the defendant's conduct. The plaintiff's cause of action is only relevant to the extent that conduct of the requisite type is more likely to manifest itself in intentional torts, rather than negligence or breach of contract.[83]

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79. *See supra* text accompanying note 24.

80. *See* A.B. v. South West Water Services Ltd., 1993 Q.B. 507. *Cf.* ENGLISH LAW COMM'N, AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES 137 (Consultation Paper No. 132, 1993) [hereinafter ENGLISH L. COMM'N].

81. Exemplary damages have been awarded in cases of deceit in Australia. *See* Musca v. Astle Corp. Pty. Ltd., 80 A.L.R. 251 (1988); Broken Hill Proprietary Co. Ltd. v. Fisher, 38 S.A. St. R. 50 (1984). It is a short step from these cases to the award of exemplary damages in contract. *See* Vorvis v. Insurance Corp. of British Columbia, 1 S.C.R. 1085 (1989).

82. *See* Uren v. John Fairfax & Sons Pty. Ltd., 117 C.L.R. 118, 154 (1966) (Austl.) (Windeyer, J.). *See also id.* at 158 (Owen, J.).

83. *See* MAYNE & MCGREGOR ON DAMAGES 197 (12th ed. 1961).

As Justice O'Bryan of the Supreme Court of Victoria recently stated, "the criteria for the award of exemplary damages is [sic] found in the conduct of the wrongdoer and not in the nature of the tort."[84] Indeed, in the case in which this passage appears, Justice O'Bryan held that, as a matter of law, exemplary damages are recoverable in an action for negligence where the conduct of the defendant is of the requisite type. He acknowledged, however, that where negligence is the cause of action, the defendant's conduct would not normally merit an award of exemplary damages. Indeed, cases in which this will occur will be "unusual and rare."[85] A possible example is *Midalco Pty. Ltd. v. Rabenalt*,[86] an earlier decision of the Full Court of the Supreme Court of Victoria. In *Midalco Pty. Ltd.*, the employer negligently exposed the plaintiff employee to asbestos dust over a number of years resulting in the plaintiff contracting mesothelioma. By reason of defendant's concession, the court awarded (in principle) exemplary damages against the employer whose negligence amounted to a wilful blindness.

If these authorities are followed, provided that MegaFood is liable to the plaintiff in negligence and its conduct amounts to conscious wrongdoing in contumelious disregard of Smith's rights, MegaFood will not avoid exemplary damages on the simple basis that Smith's claim is in negligence. On the other hand, if MegaFood's liability is based upon Part VA of the TPA, MegaFood will not be liable for exemplary damages. MegaFood's liability would spring from section 75AD of the TPA, which authorizes only the "compensation" of the plaintiff, thereby excluding exemplary damages. The support for this conclusion is found by analogy in sections 82 and 87 of the TPA, which deal respectively with the award of damages and discretionary damages. These sections refer to the plaintiff recovering for "loss" or "damage," expressions that denote "compensation." Exemplary damages are not recoverable under these sections.[87]

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84. Coloca v. B.P. Australia Ltd., 2 V.R. 441, 445 (1992).
85. *Id.* at 448.
86. 1989 V.R. 461.
87. Musca v. Astle Corporation Pty. Ltd., 80 A.L.R. 251, 262 (1988).

C. The Purpose of Exemplary Damages

In principle, Australian courts will not award exemplary damages where such awards cannot serve the purpose of punishing and deterring.[88] For example, the courts will not award exemplary damages to censure a defendant whose conduct has already been punished by the criminal law.[89] The courts, however, take a liberal view of the ability of exemplary damages to punish and deter. For example, a colorable argument could be made that if MegaFood's liability to Smith is covered under an insurance policy, courts should not award exemplary damages since MegaFood will not feel the sting of an award paid by its insurer. It is clear that Australian courts will not entertain this argument.[90] One may also argue that awarding exemplary damages may not deter because MegaFood will continue to serve coffee at the same temperature as it always has. This argument is irrelevant for two reasons. First, it does not address the breach of duty for which MegaFood may be liable.[91] Exemplary damages may well deter MegaFood from failing to issue warnings to customers in the future. Second, whatever its effect on MegaFood, the award may well have a deterrent effect on those who engage in conduct similar to that of MegaFood.[92]

IV. THE OBJECTIONS TO EXEMPLARY DAMAGES

Although Australian courts are not as hesitant as their English counterparts to award exemplary damages, the recovery of such damages is at least limited to cases where the defendant engages in conscious wrongdoing in contumelious disregard of another's rights.[93] As a consequence of this limitation there have been few claims made for exemplary damages and even fewer awards.[94] While policy reasons for curtailing the availability of exemplary

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88. This is implicit in the decision of the High Court in Lamb v. Cotogno, 164 C.L.R. 1 (1987) (Austl.).

89. Watts v. Leitch, 1973 Tas. S.R. 16. *Cf.* Canterbury Bankstown Rugby League Football Club Ltd. v. Rogers, 1993 Austl. Torts Rep. ¶ 81-246.

90. *See* Lamb v. Cotogno, 164 C.L.R. 1, 8 (1987) (Austl.).

91. *See supra* Part II.C.

92. *See* Lamb v. Cotogno, 164 C.L.R. 1, 8 (1987) (Austl.).

93. *See supra* Part III.A.

94. *See* Flowfill Packaging Machines Pty. Ltd. v. Fytfore Pty. Ltd., 1993 Austl. Torts Rep. ¶ 81-244.

damages in the United States are grounded in economic analysis, Australian courts generally do not rely on such analysis.[95] Rather, policy explanations are found in distinctions between civil and criminal law.[96]

According to this argument, punishment is pre-eminently the function of the criminal law. As such, it is carried out at the insistence of the State, which exacts the appropriate penalty. Because criminal punishment can have devastating consequences for individuals, criminal law has evidential and procedural safeguards to protect the accused.[97] From this perspective, making punishment the objective of an award of civil damages is dangerous because the safeguards designed to protect the accused in criminal trials often do not exist in civil actions. That punishment should be the object of damages is also anomalous for at least two reasons. First, the progressive development of the law of damages has been toward the consolidation and refinement of the principle of compensation,[98] thereby highlighting the distinct functions of the civil and criminal law. Second, it allows punishment to be effected at the insistence of the plaintiff who collects the "fine" imposed by the court. Effectively, the State abnegates its role as the exacter of punishment on behalf of the community, allowing the plaintiff to "profit" from the punishment of the defendant. Australians find this inappropriate.[99]

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95. Sir Anthony Mason, Chief Justice of Australia, has remarked on the difficulties a court has in coping with such evidence. *Law and Economics*, 17 MONASH U. L. REV. 167, 174 (1991). He concludes that he has "serious misgivings" about the application or adoption of economic analysis and finds that it is merely "another voice questioning tentative conclusions and suggesting possible alternatives." *Id.* at 181.

96. The classic statement of this approach is found in Lord Reid's speech in Broom v. Cassell & Co. Ltd., 1972 App. Cas. 1027, 1087. Law Reform bodies in Australia have also tended to put arguments against exemplary damages on this basis. *See* NEW SOUTH WALES LAW REFORM COMM'N, REPORT OF THE LAW REFORM COMMISSION ON DEFAMATION 12-14 (L.R.C. 11, 1971); LAW REFORM COMM'N OF TASMANIA, COMPENSATION FOR VICTIMS OF MOTOR VEHICLE ACCIDENTS 45-46 (Report No. 52, 1987); AUSTRALIAN LAW REFORM COMM'N, PRODUCT LIABILITY 104-106 (ALRC 51, 1989); VICTORIAN LAW REFORM COMM'N, PRODUCT LIABILITY 104-106 (Report No. 27, 1989).

97. Procedural safeguards such as the privilege against self-incrimination, the requirement that the standard of proof be beyond reasonable doubt, and the State's responsibility for ensuring a fair trial of the accused. NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 96, at 12-13.

98. *See* S.M. Waddams, *The Principle of Compensation*, *in* ESSAYS ON DAMAGES ch. 1 (P.D. Finn ed., 1992).

99. NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 96, at 12.

The greater willingness of Australian courts to award exemplary damages in recent cases perhaps will lead to a reappraisal of some of these arguments. Indeed, much will be questioned. First, whatever the theory, it is doubtful that damages are solely compensatory.[100] Similar to the "vindictive" element in defamation damages, damages measured by reference to the defendant's gain, so called "restitutionary damages," are increasingly recognized as falling outside the compensatory principle.[101] Second, the evidentiary protection of criminal law, which the defendant loses in a claim for exemplary damages, is the requirement that the State prove the elements of the wrong beyond reasonable doubt. The fact that proof in a civil claim is on the balance of probabilities, however, does not necessarily mean that the defendant is insufficiently protected. It has long been recognized in Australian law that, while there is no third standard of proof between the civil and criminal standards, evidence that will satisfy the civil standard in any case is dependent on the nature and consequences of the fact or facts to be proved.[102] Thus, where a particular finding would bring grave consequences, it is more difficult to persuade the court to a "reasonable satisfaction" on the balance of probabilities.[103] Third, it must be remembered that courts are ultimately the guardians of their own procedures via their inherent powers. This enables them to regulate proceedings in such a way as to secure a fair trial for both parties.[104] In the context of a claim for exemplary damages, this means that the court can ensure compliance with such procedural safeguards as are necessary to protect the defendant from unjust punishment. Fourth, the stigma associated with a criminal conviction is not usually present when exemplary damages are awarded in a civil action.[105]

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100. Waddams, *supra* note 98, at 13.

101. *See* Michael Tilbury, *Factors Inflating Damages Awards*, *in* ESSAYS ON DAMAGES ch. 5 (P.D. Finn ed., 1992). *See also* Carson v. John Fairfax & Sons Ltd., 178 C.L.R. 44 (1993) (Austl.).

102. Briginshaw v. Briginshaw, 60 C.L.R. 336 (1938) (Austl.).

103. *Id.* at 362-63 (Dixon, J.).

104. *See* Justice Kirby's dissenting judgment in Esanda Finance Corp. v. Carnie, 29 N.S.W.L.R. 382 (1992). The conclusion reached by Justice Kirby recently has been affirmed on appeal in an unreported decision. Carnie v. Esanda Fin. Corp., High Court of Australia, Feb. 23, 1995 (stating courts have power to regulate the procedures applicable to representative actions to authorize what is effectively a class action).

105. *See* ENGLISH LAW COMM'N, *supra* note 80, ¶ 5.32.

V. THE AMOUNT OF EXEMPLARY DAMAGES

In the hypothetical, the jury awarded Smith $3.5 million in exemplary damages. If an award of exemplary damages in this case were made pursuant to Australian law, an appellate court undoubtedly would reverse it regardless of whether that award came from a jury or a judge. The appellate court would interfere with the verdict on the basis of error if such was detectible in the judge's instructions to the jury or otherwise revealed in the judge's own reasoning.[106] Assuming there was no such error, then, in the case of a jury verdict, the amount would be set aside because an award of $3.5 million is so exorbitant as to be regarded as inappropriate under these circumstances.[107] In short, such an award could not reasonably be awarded by a properly instructed jury.[108] In the case of an award by a judge alone, the amount is disproportionate to the circumstances of the case.[109]

Authority provides four guidelines for assessing exemplary damages that would lead to the foregoing conclusions. In the circumstances of this case, however, these guidelines are inconclusive.

First, clearly some award in addition to compensatory damages must be granted to Smith for the purpose of punishing MegaFood. This is so because compensatory damages of $100,000 cannot alone act as a sufficient deterrent to MegaFood. If they could, no exemplary damages would ever be awarded.[110] Second, moderation must be exercised in fixing the amount of exemplary damages.[111] Third, all circumstances aggravating or mitigating the defendant's conduct are relevant to the award.[112] Thus, for example, if Smith had provoked MegaFood's conduct, that provocation would reduce any exemplary award.[113] In this case, a factor that could operate to effect a significant reduction of any

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106. LUNTZ, *supra* note 30, at 529-31, 534-38.

107. *See* Carson v. John Fairfax & Sons Ltd., 178 C.L.R. 44, 61-62 (1993) (Austl.) (awarding compensatory, including aggravated damages, in a defamation case).

108. LUNTZ, *supra* note 30, at 525-28.

109. *Id.* at 534-35.

110. Rookes v. Barnard, 1964 App. Cas. 1129, 1228.

111. *Id.* at 1227-28; *see also* XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Austl.) Pty. Ltd., 155 C.L.R. 448, 463 (1985).

112. *Rookes*, 1964 App. Cas. at 1228.

113. *See* Fontin v. Katapodis, 108 C.L.R. 177 (1962) (Austl.).

exemplary award is that Smith is largely the instrument of his own wrong.[114] Indeed, such a reduction may be required more directly by reason of the provisions of the contributory negligence statutes in force in all Australian jurisdictions.[115] Those statutory provisions are capable of encompassing exemplary damages,[116] with the effect of reducing the amount of exemplary damages to such an extent as the court thought just and equitable in light of Smith's share in the responsibility for the damage. Fourth, the court must consider the defendant's means since the defendant must pay a sufficiently large amount to ensure its punishment and deterrence.[117] In a case such as this where the defendant is the world's largest fast food chain, this factor would seem to argue for a substantial award to ensure that punishment and deterrence are actually achieved. But, even if the $3.5 million represented only one percent of MegaFood's net operating profit after tax, it would still be excessive. Such an amount could justifiably be seen as allowing Smith to profit from MegaFood's wrong. To the extent to which it is permissible to look at awards in other cases,[118] this conclusion is supported by the High Court's opinion in *XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Austl.) Pty. Ltd.*,[119] in which an award of $150,000 in exemplary damages was upheld. This amount had been substituted by the New South Wales Court of Appeal for a jury verdict of $400,000, which represented one percent of the defendant's operating profit after tax. *XL Petroleum* was a much stronger case for exemplary damages than Smith's case against MegaFood because, in *XL Petroleum,* the defendant deliberately trespassed on the plaintiff's land for the purpose of causing damage to the plaintiff's business and proceeded to do so in a high-handed fashion.

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114. *See supra* Part II.C.

115. *See* BALKIN & DAVIS, *supra* note 49.

116. On the one hand, the statutes speak of "damages," an expression which clearly encompasses "exemplary damages." On the other hand, the reference in the statutes to the defendant's share in responsibility for the damage at issue may be seen as limiting the reference to "damages" to compensatory damages an argument which may be supportable by appealing to the intention of the legislature and the policies underlying the statute. The English Law Commission regards the application of the contributory negligence statutes to exemplary damages as "arguable." *See* ENGLISH LAW COMM'N, *supra* note 80, at 88.

117. Rookes v. Barnard, 1964 App. Cas. 1129, 1228; XL Petroleum (N.S.W.) Pty. Ltd. v. Caltex Oil (Austl.) Pty. Ltd., 155 C.L.R. 448, 472 (1985) (Austl.).

118. *See infra* text accompanying notes 118-24.

119. *XL Petroleum*, 155 C.L.R. at 472.

We have no doubt as to the correctness of our conclusion that any Australian appellate court would reverse an award of $3.5 million in exemplary damages in this case. We have reached our conclusion by directly applying the factors that the courts have spelled out as relevant to the quantum of an award of exemplary damages to the facts and circumstances of this case. It is unrealistic, however, to suggest that our conclusion is not informed by a knowledge of the general level of damages awards, both compensatory and exemplary, that apply in Australia.

Although there is High Court authority against comparing awards in personal injury cases to determine the amount of non-pecuniary damages,[120] a tariff of non-pecuniary loss exists in all Australian jurisdictions.[121] The basis for this assault on the High Court's stance against comparisons with awards in other cases has now been provided by the Court itself. The Court is attempting to set a tariff of sorts in defamation cases by requiring that in assessing damages for non-economic loss, a trial judge and a jury[122] must have regard for awards in personal injury cases. The purpose of this comparison is to ensure that the scale of awards for non-economic loss in cases of serious personal injury will transcend the amounts awarded for injury to reputation.[123]

The highest amount awarded as exemplary damages in negligent personal injury cases is $250,000.[124] In intentional personal injury cases, the awards have been much more modest, usually below $10,000.[125] In defamation cases, exemplary awards are seldom made[126] and tend not to exceed $50,000.[127] Extending the comparison to defamation cases that include an aggravated

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120. Planet Fisheries Pty. Ltd. v. La Rosa, 119 C.L.R. 118 (1968) (Austl.).

121. LUNTZ, *supra* note 30, at 166-68, 507-10.

122. The view espoused in *Carson*, that awards in comparable cases can be put to the jury, is technically *obiter dicta* and was not followed by Justice Levine in the retrial of this action. *See* Carson v. John Fairfax & Sons Ltd. 34 N.S.W.L.R. 72, 59 (1994). In New South Wales, the task of assessment of damages in defamation actions has now been taken from the jury and given to the court. Defamation Act § 7A(4)(b) (1974) (N.S.W.).

123. Carson v. John Fairfax & Sons Ltd., 178 C.L.R. 44, 61-62 (1993) (Austl.).

124. Midalco Pty. Ltd. v. Rabenalt, 1989 V.R. 461.

125. *See, e.g.*, Lamb v. Cotogno, 164 C.L.R. 1 (1987) (Austl.) (awarding $5,000).

126. Most defamation litigation in Australia takes place in New South Wales where exemplary damages cannot be awarded in defamation cases. Defamation Act § 46(3)(a) (1974) (N.S.W.).

127. *See The Quantum of Damages in Australian Defamation Trials*, GAZETTE OF L. & JOURNALISM, Nov. 1993, at 3-19; *see also Table of Quantum Update*, GAZETTE OF L. & JOURNALISM, Nov. 1994, at 2-4.

compensatory element in the damages, an element that provides the nearest analogy to exemplary damages, awards are usually below $100,000.[128]

VI. CONCLUSION

If we were judges sitting on appeal from this award in Australia, we undoubtedly would have to set aside the award of exemplary damages. We would set aside both the exemplary and compensatory damages insofar as Smith failed to establish that he had a case against MegaFood in contract, negligence, or under the Trade Practices Act. If Smith succeeded in establishing MegaFood's liability on any basis, we would set aside the award of exemplary damages if MegaFood's liability were based solely on contract or the Trade Practices Act. If MegaFood's liability were based on negligence, we would need further evidence before satisfying ourselves that MegaFood acted consciously in contumelious disregard of Smith's rights so as to justify the award of exemplary damages.

Even if that evidence were forthcoming, we would, in the end, set aside the award of $3.5 million as perverse because its amount far exceeds what could be reasonably awarded as exemplary damages under Australian law in a case such as this. The facts of Smith's case simply do not merit the highest exemplary damages award ever granted in Australian law.

128. In the past, the High Court has upheld one award of $150,000. Coyne v. Citizen Finance Ltd., 172 C.L.R. 211 (1991) (Austl.). The High Court, however, also has overturned another award of $600,000. Carson v. John Fairfax & Sons Ltd., 178 C.L.R. 44 (1993) (Austl.) (where the award was in respect of two closely related defamatory publications).