DAMAGES—PUNITIVE OR EXEMPLARY DAMAGES—A CANADIAN VIEW OF *ROOKES* V. *BARNARD*

The recent case of *Wasson* v. *California Standard Co.*[1] has given the Alberta Appellate Court its first opportunity to consider that part of the recent decision by the House of Lords in *Rookes* v. *Barnard*[2] which deals with exemplary or punitive damages. In order to properly evaluate the *Wasson* decision, it is, therefore, necessary to examine the principles laid down in *Rookes* v. *Barnard.*

The plaintiff in *Rookes* v. *Barnard* had been a member of the defendant trade union and had resigned. The union had a closed-shop agreement with the plaintiff's employer, B.O.A.C. It was a term of each employee's contract of employment that there were to be no strikes; but, after the plaintiff's resignation from the union, the union threatened B.O.A.C. with a strike unless the plaintiff's employment was terminated. In consequence of this threat, the employer suspended and later discharged the plaintiff; whereupon the plaintiff brought an action against members of the union claiming damages against them for using unlawful means to induce B.O.A.C. to terminate its contract of service. The House of Lords held that the defendants had committed the tort of intimidation; and, perhaps, it is the discussion of this tort to which the case owes its greatest significance. The case also presented the House with its first opportunity to address its mind to the question of exemplary damages, and it is this aspect of the decision which is the concern of the present article.

The decision on the question of exemplary damages was rendered by Lord Devlin, whose judgment is particularly authoritative, in view of the fact that it was expressly concurred in by Lords Reid, Evershed, Hodson, and Pearce. Lord Devlin first pointed out the distinction between the compensatory nature of ordinary damages, and the penal or deterrent nature of exemplary damages. His Lordship recognized that exemplary damages serve a useful purpose in vindicating the strength of the law, and that there were "powerful, though not compelling," authorities allowing such damages a wide range. His Lordship then embarked upon an extensive historical review of the cases in which exemplary damages had been awarded, starting with the historic *John Wilke's* case[3] in 1763, and concluding with the 1953 decision of the Court of Appeal in *Loudon* v. *Ryder.*[4] This latter case he completely overruled.

As a result of his analysis, Lord Devlin concluded that there are three categories of cases in which exemplary damages can properly be awarded. In the first category are cases of oppressive, arbitrary, or unconstitutional action by servants of the government. This category is restrictive, and does not extend to similar acts by powerful groups outside the government—for example, corporations or trade unions. The second category includes those cases in which "the defendant's conduct has been

1 [1965] 47 D.L.R. (2d) 71.
2 [1964] 1 All E. R. 367.
3 *Wilkes* v. *Wood* (1763), Lofft. 1, 98 E.R. 489.
4 [1953] 1 All E.R. 741.

calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." Of this group Lord Devlin said:

> Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will propably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to money-making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which either he could not obtain at all or could not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.[5]

It is this quotation from Lord Devlin's judgment which is most relevant in a consideration of the *Wasson* case. His Lordship's third category deals with the obvious situation in which exemplary damages are expressly authorized by statute.

Having thus categorized those cases in which exemplary damages could be awarded, Lord Delvin then went on to state three factors which should be considered before making such an award. Firstly, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behavior. He is not to be allowed to obtain a windfall. Secondly, the power to award exemplary damages constitutes a weapon that can be used in the defense of liberty, as in the *Wilkes* case, or as an abuse of liberty; and, in the latter case, without the safeguards provided by the criminal law. Thirdly, the means of the parties are to be considered in the assessment of exemplary damages. "Everything which aggravates or mitigates the defendant's conduct is relevant."

Besides exemplarly damages, Lord Devlin recognized aggravated damages as a species of damages at large. He said:

> . . . in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved . . . [The plaintiff] can invite the jury to look at all the circumstances, the inconvenience caused to him . . . and the unhappiness . . . In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved. Moreover, . . . *where the damages are at large the jury . . . can take into account the motives and conduct of the defendant* where they aggravate the injury done to the plaintiff. *There may be malevolence or spite or the manner of commiting the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride.* [Emphasis added.][6]

It was Lord Devlin's opinion that aggravated damages are clearly distinct from punitive damages. He regarded large awards in such actions as seduction or defamation as being compensatory only; they are damages "at large" precisely because the "real" damage cannot be ascertained and established. Aggravated damages are intended only to compensate the plaintiff for actual damage incurred; punitive damages are intended to punish the wrongdoer, and are an assessment of damages in excess of the actual damage suffered by the plaintiff.

Before leaving Lord Devlin's judgment, it is necessary to consider to what extent that judgment represented the law as generally understood prior to the decision in *Rookes* v. *Barnard*. Exemplary damages had been recognized by English law since the eighteenth century, and it is submitted that the effect of *Rookes* v. *Barnard* was to drastically diminish the area in which it had previously been believed that these damages

5 *Ante*, n. 2, at 410-11.
6 *Id.* at 407.

could be awarded. Of the previous state of the law, Halsbury states that exemplary damages may be awarded by reason of the malicious or insulting or oppressive conduct of the defendant in cases of defamation, conspiracy, malicious prosecution, false imprisonment, assault, and trespass to the person or to property.[7] Exemplary damages had been recognized as having a wide scope in a multitude of English decisions, and in at least three cases before the Court of Appeal. This line of authorities may be said to have culminated in, and the wide range of punitive damages expressly recognized by, the overruled Court of Appeal decision in *Loudon* v. *Ryder*. *Loudon* v. *Ryder* was an action for trespass and assault in which the defendant had climbed a ladder and forced his way into the plaintiff's apartment. He then beat the female plaintiff and dragged her downstairs before they were separated by a third party. Although the plaintiff's physical injuries were negligible, the jury awarded £2500 damages for the trespass and assault and £3000 exemplary damages. This award was upheld by the Court of Appeal; but their decision was overruled in 1964 by Lord Devlin, who categorically stated that the case was not one in which exemplary damages could properly be awarded. In his Lordship's opinion, the £2500 awarded for aggravated damages was adequate compensation to the plaintiff; and the defendant, in those circumstances, should not have been penalized without enjoying the safeguards provided by the criminal law.

Although punitive damages had been granted ample recognition and a wide scope in English law prior to *Rookes* v. *Barnard,* the precise area in which they could properly be awarded had not been satisfactorily defined. Courts often made awards in which it was quite impossible to determine whether exemplary or aggravated damages were being awarded. In fact, it seems uncertain whether a distinction between the two types was recognized at all. English law was in a state of confusion as to what was the precise scope of the various types of damages. This confusion is demonstrated by Halsbury, which states that damages "at large" have also been called exemplary, vindictive, penal, punitive, aggravated, or retributory.[8]

It is submitted that the judgment of Lord Devlin in *Rookes* v. *Barnard* was intended to clear away this confusion. That this was His Lordship's intention is borne out by the statement in the judgment at page 412 where he said:

> This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject.[9]

It is further submitted that the decision in *Rookes* v. *Barnard,* while it drastically narrowed the scope of exemplary damages, was not intended to greatly impair the ability of a court to award damages which may previously have been regarded as exemplary. This contention is supported by the two sentences immediately following the above quotation, where Lord Devlin said:

> Otherwise, it will not, I think, make much difference to the substance of the law, or rob the law of the strength which it ought to have. Aggravated damages in

7 3rd ed. Vol. II, 253.
8 *Id.* at 223.
9 One of the "learned commentators" is Street, whose opinions as expressed in *Principles of the Law of Damages* are reflected in Lord Devlin's judgment.

this type of case can do most, if not all, of the work that could be done by exemplary damages.

It may now authoritatively be said that there is a distinction between aggravated and exemplary damages in the law of England; that the former purport to measure and compensate the plaintiff for harm (however intangible), while the latter are intended as punishment for the defendant's conduct. If *Rookes* v. *Barnard* is to be followed, awards of exemplary damages should be strictly confined to cases falling within one of the three categories laid down by Lord Devlin. Considerations of the pride and dignity of the plaintiff, or the malevolence or spite of the defendant, may properly be made in assessing aggravated damages. Aggravated damages being a species of damages at large, their award is not restricted to the pecuniary loss that can be specifically proved.

The Canadian position must now be briefly analyzed. It can hardly be denied that exemplary damages in Canada have been regarded as having the same wide scope as they were believed to have had in England prior to *Rookes* v. *Barnard*. In *Guillet* v. *Charlebois*[10] the Saskatchewan Court of Appeal awarded exemplary damages in an assault action. The same court allowed exemplary damages for trespass to land.[11] The British Columbia Court of Appeal upheld an award of punitive damages in an action for trespass to goods.[12] In *Westhaver* v. *Halifax and S.W. Ry.*[13] the Nova Scotia Court of Appeal granted punitive damages in a negligence action; and in *Klein* v. *Jenoves*[14] the Ontario Court of Appeal indicated its willingness to allow exemplary damages in an action for inducing breach of contract. The Alberta Court of Appeal in *Northern Agency Limited* v. *Army and Navy Department Stores Limited*[15] indicated that in a proper case it would award exemplary damages for malicious interference with an easement. Many more Canadian decisions indicate the ready acceptance in Canada of exemplary damages which may be awarded in a wide variety of circumstances.[16]

In *Wasson* v. *California Standard Co.*, servants of the appellant oil company entered upon and cut a seismic line across lands of the respondent, thereby damaging timber and fences and allowing cattle to escape. The appellants had sought the permission of the respondent farmer before entering the property, but he was not home and his wife had refused them permission. It appears that the appellants had made some attempt to contact the farmer; but, having been unsuccessful, they proceeded with the seismic line without having obtained permission to do so. The appellants apparently proceeded in the hope that they would be able to settle with the respondent after the line had been cut. Attempts by the farmer to obtain settlement from the oil company having failed, he brought an action in trespass claiming, *inter alia,* exemplary damages.

10 [1935] 3 W.W.R. 438.

11 *Lundy* v. *Powell*, [1922] 3 W.W.R. 991.

12 *Griffiths* v. *Fordyce Motors Ltd*, [1930] 2 W.W.R. 698.

13 (1913), 14 D.L.R. 633.

14 [1932] 3 D.L.R. 571.

15 [1939] 1 W.W.R. 21.

16 Further awards of exemplary damages by Canadian courts have been made in *Starkman* v. *Delhi Court Ltd.* (1961), 28 D.L.R. (2d) 269 (Ont. C.A.) for trespass to land; and *Culp* v. *Township of East York* (1957), 9 D.L.R. (2d) 749 (Ont. C.A.) for nuisance. See, also, *Graham* v. *Saville*, [1945] 2 D.L.R. 489; *Karas* v. *Rowlett*, [1944] S.C.R. 1. In *Hubert* v. *De Camillis*, [1963] 44 W.W.R. 1, 20-21, Aikins, J., discussed the problems of exemplary and aggravated damages and made an alternative award of exemplary damages in a defamation action.

Kirby, J., at trial, awarded the plaintiff five hundred dollars in exemplary damages, an award which was upheld by the Appellate Court after consideration of the judgment of Lord Devlin in *Rookes* v. *Barnard*. Smith, C.J.A., justified the award on the basis that the appellant's conduct fell within Lord Devlin's second category of cases in which exemplary damages could be awarded—the category in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. The Chief Justice also upheld the award of damages as one coming within Lord Devlin's classification of aggravated damages. Both Kane and McDonald, J.J.A., agreed with the Chief Justice that five hundred dollars could be upheld as an award of exemplary damages within Lord Devlin's second category. With all respect, it is submitted that, as between exemplary and aggravated damages, the latter is the preferable basis for upholding an award in the circumstances of the *Wasson* case. The case is, indeed, on the borderline between the two areas; but it is submitted that, if the principles laid down in *Rookes* v. *Barnard* are to be adhered to, the defendant must be shown to have *calculated* that the advantage to be gained is worth more than the compensation payable. Lord Devlin was concerned with the punitive nature of exemplary damages and with the fact that, since the civil law does not provide the safeguards of the criminal law, civil awards of a penal nature should be strictly limited. The element of calculation is to Lord Devlin's punitive damages as the element of intent is to criminal punishment.

The learned Chief Justice, in upholding the award of exemplary damages, referred to two cases which Lord Devlin had indicated to be properly within his second category. The first was *Bell* v. *Midland Ry. Co.*[17] in which the defendants obstructed access to the plaintiff's wharf. Exemplary damages were properly awarded because the defendant's conduct was calculated to destroy the plaintiff's trade and secure a resultant pecuniary benefit for themselves. Smith, C.J.A., sought to derive support from the case, but it is respectfully submitted that the two cases are not analogous. The conduct of the defendants in *Bell* v. *Midland Ry. Co.* was "calculated to make a profit which may well exceed the compensation payable to the plaintiff" (to use Lord Devlin's words); whereas, the conduct of the defendants in the *Wasson* case does not appear so to have been calculated. The second case cited by the Chief Justice is *Williams* v. *Currie*,[18] in which Maule, J., awarded exemplary damages because the defendant's trepass was ". . . done for the pecuniary profit of the defendant" and was "not only detrimental to the plaintiff, but profitable to the defendant." It is submitted that here, again, the defendant's conduct was wilful and calculated; and was properly a matter for exemplary damages as defined by Lord Devlin.

The Chief Justice was concerned to ensure that one cannot do an act wrongfully for the same price as if it had been done lawfully—that is, in the *Wasson* case, that the defendant's trespass should be more costly than obtaining the permission of the plaintiff to enter his land. But this purpose may be realized as well by an award of aggravated damages as by an award of exemplary damages; and the former award is more

17 (1861), 10 C.B. (N.S.) 287, 142 E.R. 462.
18 (1845), 1 C.B. 841, 135 E.R. 774.

consistent with the principles laid down by Lord Devlin. For these reasons it is submitted that, if *Rookes* v. *Barnard* is to be followed in Alberta, the Chief Justice was correct in upholding the award in the *Wasson* case as an award of aggravated damages, and that this basis is preferable to upholding the damages as being exemplary.

In that portion of his judgment dealing with exemplary damages, Kane, J.A., after succinctly and carefully analyzing the principles laid down by Lord Devlin, stated:

> I think it must be necessarily inferred that they [the appellants] calculated to obtain information which they considered would exceed the compensation which the respondent might recover by reason of the wilful trespass. This is a case in which exemplary damages were properly awarded. . . .[19]

If this interpretation of the facts is correct—if indeed the appellants had calculated that the value of the information would exceed the compensatory damages payable—then the case would be a proper one for the award of exemplary damages. In deference to the Appellate Division, it must be pointed out that the above interpretation of the facts is a feasible one. There is, however, a paucity of evidence to indicate any such calculation by the respondents; and, in view of the fact that the award was only five hundred dollars, it is respectfully submitted that it could better have been upheld as an award of aggravated damages. The somewhat cavalier disrespect of the plaintiff's property rights by the defendant surely falls within Lord Devlin's statement, in relation to aggravated damages, that "the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride."

With respect to exemplary damages, Macdonald, J.A., simply stated that, in his opinion, "an award for exemplary or punitive damages for trespassing may be given within the principles of Lord Devlin's judgment in *Rookes* v. *Barnard.*" But it is implicit in the judgment of Macdonald, J.A., that, even if the defendant's conduct had not fallen within the principles enunciated in *Rookes* v. *Barnard,* the learned judge would have been prepared to award exemplary damages. He stated, at page 79, that:

> As far as I have been able to ascertain it is settled law in Canada that exemplary or punitive damages for trespassing may be given under certain circumstances.

Mr. Justice Macdonald then cited two Canadian decisions and a decision of the Supreme Court of the United States in which punitive damages were awarded for trespass. At page 80, he explained the rationale behind the award of punitive damages in the following words:

> When a trespass is committed, as it was in the case at bar, it seems to me that a substantial sum by way of exemplary or punitive damages should be awarded, for the general benefit of society, against the trespasser, to demonstrate that the Courts afford a protection to an individual against the violation of his personal rights, and also to serve as a warning and example to deter others from committing similar offences. The imposition of such damages should discourage the wilful and wanton invasion or desregard of the rights of others.

It is submitted that, in the opinion of Mr. Justice Macdonald, the Canadian law with respect to exemplary damages is sufficiently well-established that it is not restricted by the decision in *Rookes* v. *Barnard.*

The judgment of Macdonald, J.A., points out the basic problem raised by the *Wasson* case—namely, is *Rookes* v. *Barnard* good law, and should

19 (1965), 47 D.L.R. (2d) 71, 86.

it be followed? Clearly, Canadian courts are no longer bound by a decision of the House of Lords; and, since there are no decisions by the Supreme Court of Canada on point, it follows that the Alberta Appellate Court was free either to accept or reject the decision in *Rookes* v. *Barnard.* Lord Devlin's judgment offers a definition and classification of aggravated and exemplary damages, the former being compensatory and the latter penal in nature. But this distinction is one which has not heretofore been drawn or recognized; and it is respectfully submitted that the distinction is, in fact, an artificial one. It is true that the power to award exemplary damages is capable of being abused, as has been demonstrated by jury decisions in the United States. But used with restraint, the power is worthy of being retained by the Canadian legal sytem in its old form. Aggravated damages are but compensation; and, although they were adequate to cover the five hundred dollars award in the *Wasson* case, they may prove inadequate in subsequent cases of flagrant, wilful, and wanton unlawful conduct. The advantages offered by *Rookes* v. *Barnard* are indeed hollow if acceptance of the decision in any way curtails the ability of the courts to redress wrongs. In view of the fact that damage awards are almost wholly made by judges in Alberta, and in view of the abundance of Canadian authority allowing exemplary damages a wide scope, it is submitted that *Rookes* v. *Barnard* need not be followed. It is further submitted that Alberta courts are still free to reject *Rookes* v. *Barnard;* for, although the Appellate Division said that the *Wasson* case fell within the principles enunciated by Lord Devlin, it did not indicate a ready acceptance of *Rookes* v. *Barnard,* and a rejection of that decision is implicit in the judgment of Macdonald, J.A.

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