

13 Whether the enhanced award of damages is constituted by aggravated or exemplary damages may be thought to be academic, but it is important to remember that they are different in principle. Aggravated damages are by way of compensation for increased levels of hurt to the claimant. Exemplary damages are unique to the common law and are expressly designed to punish the defendant. Lord Devlin in his speech in *Rookes v Barnard* made it clear that he regarded exemplary damages as entirely exceptional and to be confined within moderate limits. At 1227-8 he made the following instructive comment:

"the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *White* case, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred in the conduct were criminal and, moreover, a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint.

In a case in which exemplary damages are appropriate, a jury should be directed that it is not only 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 in the plaintiff's regard) to punish him for his outrageous conduct, to mark their disapproval of such conduct, and to deter him from repeating it, then it can award some larger sum."

It seems clear that Lord Devlin at least envisaged that awards of exemplary damages would be likely to be made only in cases where aggravated damages were also awarded and that, in such cases, a relatively modest uplift to the aggravated damages should be given. My researches have not (yet) found any more recent cases in which this approach has been doubted. However, whilst this principle is easy to state, its application to the present case is fraught with difficulty and uncertainty.

14 It is also clear that Lord Devlin was alert to the risks inherent in imposing a punishment on a defendant without the safeguards of the criminal law. Such risks are all the greater where the conduct is in fact criminal and the defendant has either been prosecuted and therefore punished already or has not been prosecuted at all. It seems to me to be at the very least arguable that exemplary damages ought not to be awarded in such cases. The relevant prosecuting authorities have already considered the facts and brought the charges they considered appropriate in the circumstances. The appropriate criminal defendants have been punished to the appropriate extent. No further punishment is justifiable. I propose, nevertheless, to proceed on the basis that exemplary damages may be awarded in this case. In doing so, I shall adopt Lord Devlin's approach and take it that they are likely to represent a relatively small uplift on any aggravated damages awarded.

15 The starting point for assessment of damages in this case is that Mr Taylor has suffered no apparent financial loss or special damage. The damages to be assessed are general damages for the hurt he and those around him have suffered as aggravated by the wickedness of Mr Mulcaire's and NGN's conduct. Damages are

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