

EXEMPLARY OR PUNITIVE DAMAGES

This article examines the availability of exemplary or punitive damages in Singapore. The position at common law is examined, together with relevant statutory provisions. The law in England on punitive damages is not logical and has not been followed in major common law jurisdictions. It seems to have been followed here without detailed argument. It is argued that it should not be followed in Singapore, and that the law should not only operate to provide compensation after damage has been suffered. Punitive damages can play a useful role in protecting some rights and interests by deterring some types of conduct.

I. INTRODUCTION

THE general rule that damages should compensate is uncontroversial. The ordinary meaning of “damages” is a sum to compensate for “damage” or loss suffered. The position that any loss suffered as a result of wrongdoing should be compensated hardly needs any argument. What is not so clear is whether a court that is awarding damages for a civil wrong should stop at compensation and not increase an award beyond the loss suffered; to express its disapproval of the defendant’s conduct, to punish the defendant for having done wrong, and to discourage such conduct in the future by making an example of the defendant.

In principle, arguments can be made for such damages, which are referred to as punitive, exemplary, retributory or vindictive damages. In terms of usage, “exemplary damages” and “punitive damages” are most commonly used today. English cases tend to use “exemplary”, but “punitive” is a more direct term that better describes the award. An award is exemplary mainly because it is punitive. For the purposes of this article, the two terms are interchangeable.

Punitive damages are distinguished from compensatory damages in that they are not defined and limited by the loss suffered by the plaintiff. They are also different from restitutionary damages in that they are not defined by and restricted to the gain enjoyed by the defendant from the wrongdoing.

As a matter of definition, it is necessary to first define punitive damages as non-compensatory damages that are intended to punish and deter. They should be distinguished from compensatory damages (which are based on the loss of the plaintiff) that may have the *effect* of punishing or hurting.

This is a distinction between “objective” and “effect”. A compensatory award can have the effect of punishment if it is of a large amount in excess of the means of the defendant. But if the *objective* of the award is to compensate, the damages awarded is compensatory because it is based on the loss of the plaintiff, rather than what the defendant ought to pay.

There are arguments against the award of punitive damages in a civil action. One major argument is that punishment is not a function of the common law. However, under Singapore law, as in English law and the law of many Commonwealth jurisdictions, it is clear a judge can award punitive or exemplary damages in some situations. In Singapore, there is section 7(2)(a) of the Civil Law Act¹ which expressly states that exemplary damages cannot be awarded for the benefit of an estate. This implicitly accepts the existence of exemplary damages in some other situations.² The aim of this article is to set out the existing law in Singapore, and to suggest the direction that it should take in the future.

II. ENGLISH COMMON LAW REFORM

At one stage in the history of the common law, punitive damages could be awarded in favour of a plaintiff in a civil action when the conduct of the defendant was such as to merit a punitive award.³ The House of Lords changed the law of England in *Rookes v Barnard* (hereafter “*Rookes*”).⁴ It will be shown that this was achieved by artificially and severely restricting the situations where exemplary damages can be awarded.

In *Rookes*, there was a clear stand against the existence of exemplary damages. However, as it was not possible to ignore prior authorities altogether, some prior authorities were reinterpreted as having awarded aggravated damages (which are in theory compensatory), rather than exemplary damages. Some prior cases where exemplary damages had been awarded were effectively re-classified as exceptions to a new general rule that prohibited

¹ Cap 43, 1994 Rev Ed.

² The provision is based on s 1(2)(a) of the UK Law Reform (Miscellaneous Provisions) Act 1934. There is a view that the provision also prevents the award of aggravated damages (see Lord Kilbrandon in *Cassell v Broome* [1972] 1 All ER 801, at 876), but this is not a generally accepted view. There is no obvious reason why the availability of punitive damages should depend on the plaintiff being alive.

³ Eg, *Rendall v Hayward* 5 Bing NC 424, 132 ER 1162; *Forsdike v Stone* 1868 LR 3 CP 607. There are statements to the effect that a jury may consider how much the defendant ought to pay as opposed to how much the plaintiff has lost. See also *Loudon v Ryder* [1953]

⁴ 1 All ER 741, which has been overruled in England by *Rookes v Barnard*, *infra*, note 4. [1964] 1 All ER 367.

the award of exemplary or punitive damages. Lord Devlin set out three situations where punitive damages can be awarded. The first is when there is oppressive, unconstitutional or arbitrary actions of servants of the government. The second is when the conduct of the defendant has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff. The third exception is when legislation provides for a non-compensatory award.⁵

A. Aggravated Damages

Although punitive damages cannot generally be awarded under English law, damages can nevertheless be increased to take into account the conduct of the wrongdoer in terms of how it may have affected the plaintiff. In theory, this is to compensate for additional damage, including hurt feelings, and is therefore compensatory in nature. A classic example of this will arise with the repetition of a libel to an extended audience, followed by the pursuit of a hopeless defence of justification at the trial, with aggressive cross-examination of the plaintiff on irrelevant matters. The end result is that damages can be increased on account of the additional hurt to the plaintiff caused by the conduct of the defendant. While it is conceptually compensatory, it is also based on the conduct of the defendant. Additional acts on the part of the defendant can increase the harm and hurt, and therefore the damages. In this sense, they can appear to a lay person to be similar to punitive damages, even though the objective is to compensate rather than to make an example of the defendant.

When damages are decided by a jury, the presiding judge has to be very careful in explaining the nature of aggravated damages as opposed to punitive damages. An appeal may be based on misdirections by a judge. However, even with a correct summary of the law, a lay jury may still not appreciate the technical distinction between aggravated damages and punitive damages. Those that do understand the distinction may sometimes award a larger sum even though the situation does not warrant punitive damages,⁶ by indirectly awarding punitive damages under the guise of compensatory or aggravated damages.

⁵ *Ibid*, at 410-1. For the arguments against punitive damages, see 407-8.

⁶ See *eg*, *Sutcliffe v Pressdam* [1991] 1 QB 153, at 185 and 191, where the plaintiff did not even seek an exemplary award, but two judges in the Court of Appeal thought that the jury must have included a punitive element in their supposedly compensatory award of £600,000.

B. *The Three Exceptions*

Leaving aside any statutory provisions, which will have their own policy justification, there are two common law exceptions to the rule that punitive damages are not available for civil wrongs.

The exception based on wrongdoing calculated to produce a profit even after paying damages can be defended. It is not necessary for the defendant to have done detailed calculations as to expected profits and damages to be within this exception.⁷ Without this exception, wrongdoing could be profitable, especially when the actions involved do not constitute a criminal offence. An approach based on the restitution of the benefits from the wrongdoing is an alternative, but restitution will only ensure that the wrongdoer is no worse off, since he only loses what he gained. Punitive damages on the other hand could, if set at a level higher than the gain, operate much more effectively to punish and deter.

The exception based on arbitrary, oppressive or unconstitutional actions of servants of the State may seem archaic in any society with public accountability and a developed system of administrative law. One view is that this exception serves no purpose today because there are now other checks and controls. The typical case where this will be invoked in England today will usually involve police officers who are accused of wrongful imprisonment, assault, and even the fabrication of evidence in order to secure a conviction. If any of these were to be the case, there would be every reason for a strong response. However, it is questionable whether this should be in the form of punitive damages against the State. Large awards are usually beyond the means of the rogue officers involved, and the damages will usually be borne by the State. Substantial punitive damages against the police may mean less money will be available for fighting crime.

The most appropriate response would be in the form of criminal or disciplinary proceedings against those involved. However, it may be difficult for the public in some jurisdictions to accept the abolition of punitive damages for such wrongdoing. It will be difficult, from a political point of view, to remove this exception in England, particularly in view of the large amount of damages that have been paid in recent years by police authorities in London,⁸ and some very sensational miscarriage of justice cases involving police misconduct.

⁷ *Cassell v Broome*, *supra*, note 2, especially at 830, 831 and 843.

⁸ Awards and costs for civil actions since 1986 have cost the Metropolitan Police a staggering total of £20 million. Source: The Times (Internet Edition), Feb 20 1997.

Even if the exceptions can be justified, it is far from obvious why punitive damages should not be available in other situations. For example, a tortfeasor who intended to profit after paying damages may be made to pay punitive damages, but not a tortfeasor who intended to inflict maximum damage to the plaintiff.

C. Precedent for Type of Claim

In *AB Waterworks v South West Water Services*⁹ (hereafter *AB Waterworks*) it was held that as *Rookes* intended to limit rather than expand the availability of punitive damages, a plaintiff is not entitled to claim punitive damages merely by showing that one of the *Rookes* common law exceptions is applicable. The cause of action upon which the claim is based must also be shown to be one that the courts had, prior to *Rookes*, allowed punitive damages.

This makes a further distinction to *Rookes* that leads to more difficulties. For example, it is not enough to show that the defendant had calculated to profit from his tort even after paying damages. It must also be shown that prior to *Rookes*, punitive damages had been awarded for the commission of such a tort. If this qualification is accepted, then any tort which was unknown prior to *Rookes* can never result in punitive damages even if the conduct in question is far more reprehensible than a tort for which punitive damages had been awarded before.

There is also practical difficulty in researching case law prior to *Rookes*. *Rookes* declared that some cases which seemed to award punitive damages were actually cases of aggravated damages. So besides the practical problem of finding pre-1964 secondary sources on the English law of damages, there is also the problem of interpreting pre-1964 case law, to see if they are really cases of punitive damages rather than of aggravated damages. This will be a difficult exercise since the distinction was not drawn in such clear terms before 1964.

There is no good reason to adopt the *AB Waterworks* case. The problem arising from this issue is of course created by *Rookes* itself. It is impossible to maintain a logical position on the basis of the difficult distinctions made in *Rookes*. If the court in *AB Waterworks* had taken the converse position, it would also have been criticised for expanding the circumstances that warrant punitive damages when *Rookes* was intended to do the contrary.

⁹ [1993] QB 507.

D. Position in Other Commonwealth Jurisdictions and Policy Considerations

On a policy review, unfettered by authority, it will be difficult to justify the present common law position. If it is not good policy to award punitive damages, then punitive damages should simply not be an option. However, major common law jurisdictions have not abolished punitive damages. The Law Commission in England, in reviewing the law in this area, did not recommend total abolition. It actually took the position that “the purpose of civil law remedies and the law of tort is not exclusively to provide compensation.”¹⁰ In its final recommendations, it actually rejected the artificial distinctions in *Rookes*, and suggested legislation to provide for punitive damages to be available when the defendant “deliberately and outrageously disregarded the plaintiff’s rights”.¹¹

If some situations warrant punitive damages (which is the current common law position), then there should be logical grounds for excluding other situations. If the exceptions in *Rookes* are examined, it will be easy to identify equally deserving or reprehensible situations that do not come within the exceptions. For example, it was said in the High Court of Australia that there is no reason why wrongs committed with a profit motive should be treated differently from those committed with the utmost degree of malice or vindictiveness, arrogance and high-handedness.¹²

The judicial reform in England has produced a position that even the Law Commission in England has described as “unprincipled”.¹³ In such circumstances, there should be great caution in adopting or retaining such a body of case law. The current difficult position arises in part because the reform carried out in *Rookes* was judicial rather than legislative. Instead of eliminating what was considered an undesirable right to punitive damages

¹⁰ First in a Green Paper: “Aggravated, Exemplary and Restitutionary Damages”, Law Commission Working Paper 132 (1993), at § 8.2 (see pp 173-175 generally), and in the final White Paper: Law Commission No 247 (1997).

¹¹ *Supra*, note 10, White Paper, at 184-6.

¹² *Uren v John Fairfax & Sons* (1966) 40 AJLR 142, at 132, *per* Taylor J.

¹³ *Supra*, note 10, Green Paper at § 8.4. The retention of the *status quo* was expressly rejected.

¹⁴ In fairness, it has to be remembered that *Rookes* was decided at a time when the tools for major judicial law reform did not include open and outright overruling of prior House of Lords decisions. Judges were generally restricted to techniques like distinguishing. The well known practice statement on judicial precedent in the House of Lords was not delivered until 1966.

altogether, *Rookes* preserved the right with difficult to defend restrictions.¹⁴

Even in England, there have been judicial signs of disapproval with the *Rookes* position. In *Cassell v Broome*, Lord Denning in the Court of Appeal went to the extent of labelling *Rookes* – a House of Lords decision – as being decided *per incuriam*, as well as being illogical and unworkable.¹⁵ On appeal, there was a quick rebuff by the House of Lords, which reaffirmed *Rookes*.¹⁶ The High Court of Australia has refused to follow the law as stated in *Rookes*.¹⁷ This divergent position was reluctantly left undisturbed by the Privy Council (which still heard appeals from Australia at that time), ostensibly because it was established Australian law.¹⁸ The illogical restrictions in *Rookes* have also not been followed in Canada¹⁹ and New Zealand,²⁰ where punitive damages are available in suitable cases involving reprehensible conduct. Punitive damages are also available in the USA, which is often used as an example of multi-million awards.²¹

Despite the arguments against punitive damages, it is apparent that many “major” common law jurisdictions still retain the right to award punitive damages in appropriate situations. Indeed, in *Eonis v Vorvis*, it was observed by the Canadian Supreme Court that Commonwealth courts outside England had not accepted the limitations placed by *Rookes*.²² This may be an overstatement as there are many more Commonwealth jurisdictions besides Australia, New Zealand and Canada; but they are major common law jurisdictions.

Even under English law, there is scope for punitive damages, albeit in more limited circumstances than say in Australia and Canada. *Rookes* limited but did not eliminate the possibility of punitive damages. The difference between these major Commonwealth jurisdictions is not in the availability of punitive damages, but in the situations where punitive damages can be awarded. If this is the position, then one would rightly expect the law to allow punitive damages on a logical rather than illogical basis.

The arguments in favour of punitive damages include its ability to deter

¹⁵ [1971] 2 All ER 187, at 198-200.

¹⁶ *Supra*, note 2. Lord Hailsham (at 809) said that “it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way...”

¹⁷ *Uren v John Fairfax & Sons*, *supra*, note 12, and *Australian Consolidated v Uren* (1966) 40 ALJR 142. These cases led subsequently to a major test for the Privy Council (in England) in terms of whether it would allow a divergent development of the common law.

¹⁸ [1969] 1 AC 590. Of course, the position was also established in England prior to *Rookes*.

¹⁹ *Eonis v Vorvis* [1989] 1 SCR 1085, at 1105.

²⁰ *Fogg v McKnight* [1968] NZLR 330, at 331.

²¹ *Eg*, see B McConnell, “Star Studded Awards” [1996] NLJ 1438.

²² *Supra*, note 19, at 1105.

undesirable forms of conduct and oppressive behaviour, and to better protect certain rights that cannot be adequately protected with compensatory damages.

In Singapore, the use of the law to deter is not only well known but also widely supported. There is no reason why this should be achieved only with the criminal law. Compensation should not be the only response to wrongdoing in civil law. If this were the case, those who can pay will have a virtual licence to commit torts. Even within the criminal law, there are various shades of wrongdoing, with sanctions commensurate with the seriousness of the acts. There is no reason why punishment should stop at the lowest end of the spectrum within the criminal law, where only simple fines are prescribed. There is good reason to extend this spectrum through to the civil law, and allow "punishment" without the consequence of a criminal record and other stigma.

The argument here is not for punitive damages to be widely available. It is not widely available even in jurisdictions that allow it, including the USA. A deliberate tort *per se* is not sufficient to warrant punitive damages. The necessary conduct has been described in various ways, including: "malicious, high-handed, arbitrary, oppressive, deliberate, vicious, brutal, grossly fraudulent, evil, outrageous, callous, disgraceful, wilful, wanton, in contumelious disregard of the plaintiff's rights, or in disregard of every principle that actuates the conduct of a gentleman."²³

There are several well worn arguments against the award of punitive damages in a civil action. One commonly used argument is based on the proposition that the function of the civil law is not to punish. This is not an indisputable legal principle but a value judgment. Not everyone will agree that the civil law should only compensate. Even *Rookes* does not take this position to its logical limit. An argument can certainly be made for using the civil law to achieve other aims, like protecting certain rights and interests by discouraging some types of conduct.

The common law already takes a moral position in defining civil wrongs, for example in the law of torts. The discouragement of such conduct can be a natural extension of the role of the law. The aim of the civil law cannot only be to ensure that there is compensation after wrongs are committed. While it is true that the criminal law can probably perform such a role much better,²⁴ there is no reason why it should be the exclusive vehicle. Legislation may sometimes be less responsive to changes and new situations than the common law. Also, there can be reprehensible conduct which may not warrant the definition of a corresponding crime that requires State

²³ See Waddams, *Law of Damages* (2nd ed, 1991), at §11.210.

²⁴ See, eg, Burrows, *Remedies for Torts and Breach of Contract* (2nd ed, 1994), at 284.

intervention at an economic cost to the general population.

There can be problems with concurrent liability, for example, when there is a criminal sanction with the potential for further punitive damages in a civil suit. This can be dealt with through rules that require an account of other penalties that have been or may be imposed. If a wrongdoer has been fined or imprisoned for an offence constituted by the same events for which there is civil liability, then punitive damages should simply not be awarded. The argument based on the possibility of double punishment is overstated, as much as the argument that any wrongdoing which does not amount to a criminal offence is acceptable and should not be discouraged.

There is also the objection that punishment should be based on proof of wrongdoing on the criminal standard (*ie*, beyond reasonable doubt), rather than simply on a balance of probabilities. The main strength of this argument lies in a theoretically different burden of proof. In a criminal trial, the burden on the prosecution is to prove the case beyond reasonable doubt; while in a civil trial, the plaintiff only needs to prove his case on a balance of probabilities. The basic problem here has nothing to do with punitive damages. It arises from the fact that there are different burdens of proof. In practice, however, it is not likely that a court will award, for example, \$10 million in damages with less proof than it would require for conviction on an offence involving a fine of \$100. A case like the sensational OJ Simpson case in America, where the defendant was found liable in a civil court for causing death of his wife and her companion – after being acquitted in a criminal trial by a jury – is extremely unusual, and is not likely to occur in Singapore.

There are potential problems with damages assessed by juries. The law may be difficult to summarise for lay jurors, and there is no control over how they may be moved by the conduct of the defendant to make a statement in their award, which may not be in accordance with the law as summarised by the judge. This is however, not an issue in Singapore, where lay juries are part of legal history. In theory, one could argue that a judge could well do the same thing, but this cannot be an argument against punitive damages *per se*.

There are other practical considerations that support the exclusion of punitive damages altogether. Some of these arise from the fear of awards (particularly by juries) rising to unrealistic and unhealthy levels. Unlike the practice of providing expressly for maximum penalties in criminal law, there is no such ceiling for punitive damages. Legislation can prescribe a ceiling, but there is no such legislation in Singapore. Recently, with ever rising jury awards of punitive damages against the police in England, the

English Court of Appeal took the unusual initiative to judicially set limits to awards of punitive damages, very much in the fashion of legislation.²⁵ Under these guidelines, £5,000 was identified as the very minimum for a punitive award, with an absolute maximum being set at £50,000.²⁶ These judicial tariffs are not binding in Singapore, but the case shows that quantitative ceilings can be set judicially. Even without such judicial tariffs, it is difficult to argue that the same judges who may sit as judges in criminal courts are not capable of setting realistic and suitable levels of punitive damages while sitting in a civil court. In fact, there have been various other judicial statements calling for moderation in punitive awards.²⁷ Judges are well aware of the dangers of excessive awards.

III. SINGAPORE CASE LAW

A. General

There are few cases on the common law position of punitive damages in Singapore. Current case law in Singapore and Malaysia follow the English position of artificially limited punitive damages, as defined by *Rookes*. However, there has not been any detailed judicial analysis of the crucial issue, namely whether it is wrong in principle to have an element of punishment

²⁵ *Thompson v Commissioner of Police for the Metropolis*; and *Hsu v Commissioner of Police for the Metropolis* [1997] 3 WLR 403, part of a long line of cases against the police in London, with allegations of unjustified physical abuse, falsification of records and fabrication of evidence by police officers. Such allegations, if true, would bring the exception of oppressive, arbitrary or unconstitutional acts of servants of the Crown into play, thereby allowing the jury to award exemplary damages. In the two cases, the allegations were accepted by the juries, which meant not only that the police had abused their powers, but also lied to protect themselves.

²⁶ *Ibid*, at 418. A sharp rising trend in awards was checked by the Court of Appeal, which laid down £50,000 as an absolute maximum in any case, with a suggestion that the conduct must be particularly deserving of punishment to warrant an award of £25,000. This was necessary in part because it is not easy to overturn a jury award on the basis that it is too high alone. With this ruling, the direction will be part of the judge's summary for the jury. Such cases are in some ways *sui generis*, in that the officers themselves will not be bearing the cost of the damages. In economic terms, the award will be borne by other innocent taxpayers.

²⁷ *Eg*, see Lord Devlin in *Rookes*, *supra*, note 4, at 411; *Eonis v Vorvis*, *supra*, note 19, at 1131.

²⁸ *Eg*, *Cheng Hock Guan v Perumahan Farlim (Penang) Sdn Bhd* [1993] 3 MLJ 352, at 423, where the Penang High Court followed *Rookes*. Exemplary damages was awarded against a plaintiff who used bulldozers to clear tenants from land. See also *Roshairree bin Abdul Wahab v Mejar Mustafa bin Omar* [1996] 3 MLJ 337, which accepted *Rookes*, but did not award exemplary damages in respect of ragging with physical assault in a military institution.

in a civil remedy. *Rookes* has been cited and applied in several Malaysian cases.²⁸

In contrast, there have been very few claims for punitive damages in Singapore. In *Saleha Bibi v Abdul Ghani*²⁹ the marriage of the plaintiff and defendant was dissolved by a Syariah Court. The defendant was ordered to sell the matrimonial home, but did not do so. As with many such separations, there were ill feelings on both sides. The plaintiff sued for trespass, and asked for mesne profits and punitive damages. The judge remarked that aggravated damages [sic] would be rare in such matrimonial cases; and that exemplary damages are awarded to teach a defendant that tort does not pay (citing Lord Hailsham in *Cassell v Broome*),³⁰ but that such objective could be achieved by the award of the net proceeds of the sale of the property, having regard to the amounts the parties will receive.³¹ With respect, the reasoning for the refusal to award punitive damages is difficult to follow. The reasoning may be interpreted to mean that an award of what the applicant was entitled to could act as a disincentive to commit civil wrongs. Since the husband was bound to sell the property under the original order, it is far from clear how the sale would have achieved the objective of teaching him that tort does not pay. The judge seemed to hold the position, citing *Rookes*, that the law could award punitive damages on the facts of such a case (which suggest a simple trespass at best), and which does not come within any of the exceptions in *Rookes*. On the whole, the *Saleha Bibi* case does not support any clear proposition of law on punitive damages.

A case that does address the law more fully is the unreported case of

In *ICM (UK) v New Straits Times* [1993] 1 MLJ 408, the plaintiff did not succeed in his claim for exemplary damages because he failed to show that the defendant had calculated to make a profit after paying damages, but the case implicitly accepts *Rookes*. In *MGG Pillai v Tan Sri Dato Vincent Tan Chee Yioun* [1995] 2 MLJ 493, *Rookes* was expressly accepted. None of these cases involve a detailed discussion of whether *Rookes* should be followed. The only case with a more detailed discussion of *Rookes* is *Alfred Templeton v Low Tat Holdings* [1992] 2 MLJ 202, where *Australian Consolidated v Uren* (*supra*, note 17) was actually cited. But the facts warranted an exemplary award under an exception in *Rookes* anyway (based on calculated profit), so the point was not in issue. There is however, a case where exemplary damages was awarded with reference to pre-*Rookes* English case law: *Janaki v Cheok Chuan Seng* [1973] 2 MLJ 96, where the defendant entered the plaintiff's land without permission to dig a canal and widen a drain. This was despite the plaintiff's protests. The court awarded exemplary damages citing (at 100) Lord Devlin in *Loudon v Ryder* [1953] 2 QB 202, whose position was that damages should hit the defendant to show that such conduct does not pay.

²⁹ [1995] 2 SLR 621.

³⁰ [1972] AC 1027, at 1073.

³¹ *Supra*, note 29, at 627.

³² 1993, unreported.

Abdul Mutaif bin Sultan v Surya Abbas Syauta.³² A new land owner wanted to obtain vacant possession for the purpose of developing the land. The plaintiff was a sub-tenant on the premises who operated a food stall. He was a protected tenant, and expected compensation for vacating the premises. Being in possession, he was also entitled to sue for trespass. Professionals were brought in by the new owner, who gave them a \$250,000 budget to “clear” the tenants of the premises that the plaintiff was in. The chief tenant, who was the plaintiff’s landlord, made an agreement with the professionals for a sum of \$210,000. Both of them did not negotiate with the plaintiff, who returned to his stall one day to find all his utensils missing. Later, without any notice or warning, the whole building was demolished. The result was a substantial saving in the cost of clearance. The professionals were, under the contract, entitled to a bonus on any savings from the budget, and had to pay the owners liquidated damages if the building was not cleared within a certain time. The chief tenant also stood to benefit in not having to share the payment with the plaintiff.

Compensatory damages for the trespass was assessed at \$90,000, being the amount the plaintiff would have obtained for his rights. The judge then cited *Rookes* where it was 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 probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category [of cases in which exemplary damages may be awarded] is not confined to moneymaking 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 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.³³

In the court’s view, both the chief tenant and the professional clearers were liable to punitive damages under this principle. The judge then added 10% of the compensatory award against each of the two as punitive damages. The overall award for punitive damages was therefore 20% of the compensation, with each liable to pay 10%.

The punitive award was quite appropriate in the circumstances. No crime

³³ *Rookes v Barnard*, *supra*, note 4, at 410-1. This is from Lord Devlin’s speech, but it was attributed to Lord Diplock, who did not sit in *Rookes*.

would seem to have been committed, except perhaps the theft of utensils by an unknown party. If only compensation were payable for such a convenient method of obtaining vacant possession, then developers will be encouraged to do the same, instead of trying to negotiate. It may then be commercially sensible to simply demolish and pay compensation, thereby saving time and effort.

The 10% uplift here was, however, probably not sufficiently high to have a serious deterrent effect. It was not based on the expected gain or savings for the wrongdoers. The most effective penalty would be in excess of compensation and restitution, as it will mean that the wrongdoer will be worse off as opposed to being better off or no worse off after paying damages.

B. Defamation

The law of defamation merits separate treatment. This is one area with a significant number of local cases. The position here is complicated by the concept of “aggravated damages”, which are compensatory in that they reflect the additional harm to the plaintiff’s pride and feelings caused by the defendant’s conduct. In addition, compensatory damages for defamation can be substantial, even in the absence of actual pecuniary loss to the plaintiff. This is possible especially in cases of defamation of public figures because the reputation of public figures can be seriously affected by allegations of corruption and the abuse of power and position.

The level of defamation awards in Singapore has increased significantly in the last decade, with a recent record total award of \$3.63 million in several suits by several leading public figures including the Prime Minister, two deputy Prime Ministers and a former Prime Minister.³⁴ In *Lee Kuan Yew v Tang Liang Hong*,³⁵ leading members of the government were called liars and conspirators at an election rally. The defendant had also suggested, months earlier, that there should have been a more formal investigation into property purchases by two of the Ministers at discounts. The defendant also made a police report against some of the plaintiff politicians. The defendant was sued for defamation. The defendant was subsequently found liable for defamation, and it was held that he had express malice in making and repeating the defamatory statements. Besides repetition to the world media on several occasions from Johor Bahru, some members of the government

³⁴ *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 (CA). The total award is the sum of many separate claims based on different libels. The total award at the trial was more than \$7 million: *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR 91. On appeal, the Court of Appeal reduced many of the individual awards.

³⁵ *Ibid.*

were accused of behaving criminally. In terms of aggravation, this case is unprecedented.

Using the *Tang Liang Hong* case as a guide, it can be said that the case law now support a compensatory award (with aggravated damages) of two to three hundred thousand dollars for a single serious aggravated libel against a leading political figure like the Prime Minister.³⁶ This is, for practical purposes, the current top of the scale. Even an opposition politician who is not in government has been able to obtain substantial damages.³⁷ It has been held that such awards need not bear any relationship with damages for personal injuries,³⁸ with the result that a person's reputation can theoretically be valued in money terms at a higher level than life and limb.³⁹ This has recently been questioned before the Court of Appeal, where the court reaffirmed the position that personal injury awards are not relevant in assessing damages for defamation as "the factors relevant in the consideration of the measure of damages ... are quite different".⁴⁰

Under the exceptions in *Rookes*, it is possible to award punitive damages against those who publish defamatory material if the publication is calculated to produce a nett profit after paying any damages. This would often involve commercial publication in the form of a book, newspaper or other periodical, with increased sales (and therefore profits) being the motive for the publication.⁴¹ The experience in Singapore has not been with such cases. Many of the defamation cases involve political figures making statements in the

³⁶ See the awards of the Court of Appeal in the *Tang Liang Hong* case, *supra*, note 34, at 159-60. A summary of awards in past cases can be found at 148-9.

³⁷ *Chiam See Tong v Xin Zhang Jiang Restaurant Pte Ltd* [1995] 2 SLR 196: \$50,000 against a restaurant for using the photograph Mr Chiam, an opposition Member of Parliament (MP) in an advertisement, thereby suggesting that he had consented to it, with the implication that he was abusing his position as an MP. In *Chiam See Tong v Ling How Doong* [1997] 1 SLR 648, \$120,000 was awarded in favour of Mr Chiam (from the Singapore Democratic Party (SDP)) for being libelled in terms of being supportive of the ruling party (the People's Action Party) in attacking his own party, and thereby almost destroying his own party. The award was against members of the SDP's Central Executive Committee, which Mr Chiam had once led himself.

³⁸ *Lee Kuan Yew v JB Jeyaretnam* [1979] 1 MLJ 281, at 287. In 1979, a \$130,000 award was made against Mr JB Jeyaretnam for suggesting in an election rally speech that the then Prime Minister had managed his fortunes well, and that his wife and brother had done well because of him. It was said that the Prime Minister's brother had obtained a banking licence that others had found difficult to obtain. The Prime Minister did not ask for punitive damages, but did ask for aggravated damages. The judge found malice on the part of the defendant. The award was upheld by the Privy Council (see [1982] 1 MLJ 239).

³⁹ Damages for loss of amenities seldom approach \$100,000.

⁴⁰ *Tang Liang Hong v Lee Kuan Yew*, *supra*, note 34, at 142-144 (§128-30).

⁴¹ *Eg, Cassell v Broome*, *supra*, note 2.

course of election campaigning. In such cases, the exception based on calculated profit will not be applicable unless “profit” is liberally interpreted to cover any political gain rather than monetary gain. Such statements would not be made with a view to financial gain but to win support and votes. It would be logical to extend the exception in *Rookes* based on calculated profit to such situations, but to do so would not be in spirit of *Rookes*.

Even if it were possible to extend *Rookes* this way, the intention to profit in such a situation will be more difficult to prove. In addition, the high level of damages for defamation makes it less likely that anyone will think that the political capital from an unjustified defamatory statement would be worth more than the damages payable.

In the Singapore defamation cases, the issue of aggravated damages has proved to be more important than the issue of whether there can be punitive damages for libel. This is because the aggravation in many of these cases cannot be described as anything but grave, so that substantial increases in the damages were justified under such a heading. The practice in Singapore is not to separate an award into identifiable components of damages and aggravated damages. This makes it difficult to identify the aggravation element in any such award of damages. Usually, a lump sum is awarded, which is stated to include aggravated damages.⁴² With the large overall awards made in defamation actions here, there is no practical need for punitive damages in such actions.

Many judges have in fact made it a point to state that the damages awarded for injury to reputation are compensatory rather than punitive.⁴³ Large compensatory awards have the effect of discouraging unjustified libellous conduct. There can be no doubt, with the wide publicity given to such cases, that the public is fully aware of the consequences of unjustified and malicious libel. To the lay public, there is little difference between a compensatory award coupled with aggravated damages, and a compensatory award coupled with punitive damages. The existing law is therefore already effective in discouraging unjustified defamation.

Finally, there is an offence of criminal defamation in the Penal Code.⁴⁴

⁴² An exception is the case of *Goh Chok Tong v JB Jeyaretnam* [1998] 1 SLR 547, where the judge awarded \$10,000 compensatory damages with \$10,000 aggravated damages. The aggravation in the case was mainly in the cross-examination of the Prime Minister on irrelevant matters. Counsel for the defendant even suggested, without foundation, that the Prime Minister was economical with the truth in his answers from the witness box.

⁴³ *Eg*, the High Court in *Lee Kuan Yew v Tang Liang Hong*, *supra*, note 34, made this point three times at 112 and 118 and 119.

⁴⁴ Cap 224, 1985 Rev Ed. See ss 499 and 500.

⁴⁵ *Harbans Singh v PP* [1973] 1 MLJ 41, where the then Prime Minister was defamed as a scoundrel, gangster and kidnapper by the accused, who was then convicted of criminal defamation and sentenced to 6 months in prison.

This law has been used in the past, but not in recent years.⁴⁵

C. Contract

Among proponents of punitive damages, there is a generally more passive attitude towards its use against breach of contract.

In *Addis v Gramophone Co*⁴⁶ the plaintiff manager sued for constructive dismissal. Although he was not actually dismissed, he was effectively relieved of responsibilities, and his “replacement” was hired and assigned his duties. The court rejected the notion that damages should be increased to take the insulting conduct into account. It would seem that punitive damages are not available for breach of contract in English law,⁴⁷ although this is not the law in Canada, where punitive damages in contract are possible, albeit only in very unusual cases.⁴⁸

It has been held in Singapore that one cannot get around the bar against punitive damages in contract by bringing an action in tort rather than in contract. In *Harun Mudir v Singapore Amateur Athletic Association*⁴⁹ the court held that plaintiff with a right to sue for a breach of contract cannot get a better measure of damages by suing in tort instead. In the case, a sprinter was “suspended” by the relevant sporting association after disciplinary proceedings that breached natural justice. The suspension was therefore legally flawed. The athlete alleged malice on the part of the officials involved. The court refused to award punitive damages. This strict approach can be criticised as leading to anomalies. If a company were to release a consumer product that it knows is unsafe, third parties who suffer personal injuries (for example, passengers in unsafe cars) may be able to sue in tort and claim punitive damages, if they can show that the company calculated it would cost them more to rectify the defects than to pay damages. However, those who bought the car directly from the company (*ie*, made a contract with the company) will be unable to ask for punitive damages because they are effectively barred from seeking punitive damages in tort.

⁴⁶ [1909] AC 488, esp Lord Loreburn LC at 491. See also *Jarvis v Swan Tours* [1973] QB 233; and *Malik v Bank of Credit and Commerce International SA* [1997] 2 WLR 95.

⁴⁷ See also *Perera v Vandiyar* [1953] 1 WLR 672; *Kenny v Presen* [1963] 1 QB 499. *Cf Mcmillan v Singh* (1985) 17 HLR 120, where £250 exemplary damages were awarded against a landlord for the wrongful eviction of a tenant. Burrows has interpreted the award as being based on the tort of trespass or nuisance (*supra*, note 24, at 271).

⁴⁸ See *Vorvis v Insurance Corporation of British Columbia* [1981] 58 DLR (4th) 193, at 207, which suggests that it should be available in very unusual cases; and Waddams, *The Law of Damages* (2nd ed, 1991), at § 11.250 to 11.270.

⁴⁹ [1992] 1 SLR 18.

If punitive damages are available for breach of contract cases, there may be a high economic cost. The free exchange and allocation of resources may be hindered. However, there can be situations in contract where an argument can nonetheless be made for punitive damages. The answer to the economic arguments is simple. Punitive damages need not be awarded in straightforward situations of preferred allocation, for example, when a party decides to breach a contract simply because he can get a higher value elsewhere even after paying damages. The issue is whether the criteria for the award of punitive damages in contract can be developed in a manner that does not stifle the free flow of resources. One can certainly justify a stricter criterion for punitive damages in contract, but the arguments used would not justify a total bar. One practical problem here lies in the fact that common law development in this area will be difficult. The common law exceptions in *Rookes* are inappropriate for breach of contract. Since there are no relevant English case law, the exact position in Singapore law will be difficult to identify, let alone develop.

It is however, possible to identify situations in contract law where punitive damages may play a useful role. These include fraudulent breaches of contract; cynical, high-handed and malicious breaches of consumer contracts and contracts involving monopolies.

In *Attorney General v Blake*,⁵⁰ the English Court of Appeal paved the way for the development of restitutionary principles in the context of breach of contract. Lord Woolf MR, in delivering the judgment of the court, said that “[i]f the court is unable to award restitutionary damages for breach of contract, the law of contract is seriously defective. In our opinion, the time has come to accept [the] ... view that the law is now sufficiently mature to recognise a restitutionary claim for profits made from breach of contract in appropriate circumstances.”⁵¹ The exact scope of the principle was left open for judicial development, but two situations where restitution would be justified were expressly identified:

- (1) where the defendant saves expenses by not doing exactly what he promised to do (“skipped performance”); and
- (2) where the defendant makes a profit by doing exactly what he

⁵⁰ [1998] 1 All ER 833.

⁵¹ *Ibid*, at 845. Earlier cases have been less positive about restitution for breach of contract. See *Surrey County Council v Brodero Homes* [1993] 1 WLR 1361; *Ruxley Electronics v Forsyth* [1995] 3 WLR 118 and *Halifax Building Society v Thomas* [1995] 4 All ER 673 (HL).

⁵² *Supra*, note 50, at 845-6.

promised not to do.⁵²

The acceptance of a non-loss based measure of damages is an acceptance of the view that compensation should not be the only consideration for redressing a breach of contract. In the two identified situations, to award compensatory damages only will allow the defendant to profit from the breach of contract if the gain from the breach is greater than the plaintiff's loss. An argument along the same lines could be made for punitive damages for breach of contract. Punitive damages would, however, be more effective than restitutionary damages in discouraging such forms of conduct, in order to adequately protect the rights of some promisees.

IV. SINGAPORE STATUTORY EXCEPTIONS

There are two statutory exceptions in Singapore law under which non-compensatory damages may be awarded. The first involves trespass by tenants who hold over after the expiry of a lease, and the second involves flagrant breach of copyright.

A. *Double Rent or Double Value*

Under section 19(4) of the *Civil Law Act*,⁵³

Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

This statutory right existed well before *Rookes* was decided.⁵⁴ Notice of this punitive rule is normally given by lawyers acting for landlords who are seeking to recover possession, even though it is not necessary under the provision. The provision basically allows the landlord the option of receiving double the rent he has been entitled to, or double the market rent

⁵³ *Supra*, note 1.

⁵⁴ This approach is traceable to s 1 of the English Landlord and Tenant Act and s 18 of the English Distress for Rent Act 1737. In Singapore, the relevant provision is s 435 of the Criminal Procedure Ordinance 1868, although the double value reference was introduced in 1930 by the Civil Procedure Code Amendment Ordinance. These changes are traced in W Woon, "Mesne Profits, Double Rent and Double Value in Singapore", [1985] 1 MLJ lxiv.

for the same premises. “Value” must refer to the value enjoyed by the trespasser, which points to market value or rent for the period of the trespass. Also, since “rent” is an alternative to “value”, the latter must refer to something other than the original contract rent, which can only mean the prevailing market rent.⁵⁵ This ensures – assuming a rational landlord who would maximize his entitlement – that the higher of contract rent or market rent would be used as the base. So if the market has fallen, the original rent will be used. If the market has risen, the prevailing market rent will be used. Under this formula, the base rent (*ie*, the first 100%) will be compensatory, and the next 100% will be punitive.

The approach of section 19(4) should be contrasted with the position at common law. At common law, a tenant who does not have a right to be on the premises (for example, because the lease has expired or has been terminated lawfully), would be technically liable for trespass. On general compensation principles, the damages payable for the trespass would be based on the loss to the landlord. Such damages are historically referred to as *mesne profits*.⁵⁶

Merely awarding such compensatory damages may not be satisfactory. If, for example, the landlord does not want to renew the lease, a tenant can nonetheless effectively extend it by simply not vacating the premises for as long as possible. This is because his civil liability in doing so will, at most, be the market value of the rental. Even though the landlord is not required to show an actual loss of rental (*ie*, because he would have let the property and there was a prospective tenant),⁵⁷ the damages payable will be the market rental value of the premises. Even with a broad acceptance of restitutionary principles, the plaintiff will only be able to claim the benefit enjoyed by the trespasser. This will be the value enjoyed, namely the market rental. The trespasser would therefore also be effectively paying rent under a restitutionary approach. If the landlord were to be confined to compensatory or restitutionary damages, the trespasser would have no incentive to vacate the premises as soon as possible.

⁵⁵ *Cf* W Woon, *supra*, note 54, at lxvii, who is not as confident about this interpretation. The alternative meaning of “value” considered is the full market value of the property, rather than the rental value. This alternative is not at all likely to be accepted. Under this alternative meaning, the punitive damages payable will have no relationship with the period of the trespass, and a delay of one day or one year will both result in punitive damages equal to twice the full market value of the property.

⁵⁶ *Syed Ahmad Al-Junied v Reshty* (1965) 31 MLJ 77, at 80.

⁵⁷ *Penarth Dock Engineering v Pounds* [1963] Lloyd’s LR 359; *Swordheath Properties v Tabet* [1979] 1 WLR 285. These cases can be seen as representing a very liberal approach to “loss” which favours the plaintiff, or as disguised cases of Restitution. They are probably so decided because pure compensation would not be satisfactory.

Under the *Rookes* approach to punitive damages, a tenant who is holding over will not be liable to pay punitive damages unless it can be shown that the trespass is calculated to be beneficial after paying damages. In most situations, this will be unlikely as most tenants will not expect to profit from the occupation after paying damages.

A provision like section 19(4) of the Civil Law Act raises the stakes for the trespasser, and helps to protect the landlord's rights by encouraging the tenant to move out. It is a matter of perspective whether it is primarily intended to punish the tenant for the trespass alone, or whether it is intended to help reinforce and protect the ownership rights of the landlord.

It has been pointed out that the double rent or double value available here is not the same thing as the common law right to mesne profits, even though many lawyers tend to treat them as being similar.⁵⁸ There will almost always be a claim for the highest possible award, which will be double rent or value.⁵⁹

This is a situation where a punitive element is justified. It is clear and straightforward, and there is no problem in quantifying the punitive element. A straight doubling of the loss is prescribed.

One possible criticism of this approach is the fact that it is technically independent of the conduct of the tenant. The landlord is entitled to double rent or value once there is holding over. There is no requirement for proof of a *wilful* holding over.⁶⁰ A former tenant who has not found an alternative place to rent, or who did not realise the actual date for the expiry of the lease, would be liable in the same amount as the most cynical and calculating trespasser. In this sense, it is wider than what would be argued for in a common law rule for punitive damages. However, in the context of holding over by a tenant, the introduction of a subjective element would greatly reduce the effectiveness of the provision.

Without section 19(4), the criminal law may have to be considered as a means of protecting the landlord's rights effectively. However, it is doubtful

⁵⁸ W Woon, *supra*, note 54. See also *Southport Tramways v Gandy* [1879] 2 QB 66, at 69; *Raja's Commercial College v Gian Singh* [1975] 1 MLJ 54, [1976] 2 MLJ 41 (PC).

⁵⁹ There are procedural differences, like in pleading and limitation period. See W Woon, *supra*, note 54, at lxix. The most important is s 6(4) of the Limitation Act (Cap 163, 1985 Rev Ed) which prescribes a 1 year limitation period: "An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any Act or other written law shall not be brought after the expiration of one year from the date on which the cause of action accrued: Provided that for the purposes of this subsection, "penalty" shall not include a fine to which a person is liable on conviction for a criminal offence."

⁶⁰ *Gracie Teo v Tay Leng Hong* [1987] 2 MLJ 434, at 440. The wording here is different from the English equivalent in s 1 of the Landlord and Tenant Act 1730. *Cf French v Elliot* [1959] All ER 866.

whether the State should be expected to play an active role in all such disputes. The level of moral disapproval may also not be high enough for any effective criminal sanction to be legislated. This type of situation provides a good illustration of a scenario where the criminal law is not appropriate, but a civil law based form of disincentive can serve a useful purpose.

As far as the criminal law is concerned, trespass *per se* is not an offence. Trespass can be committed unintentionally, and there can be no justification for making it a criminal offence, especially when there is no intention to trespass or do any damage. To be criminal, there must at the very least be “criminal trespass”, which requires the trespasser to have committed trespass with the intention to either commit an offence, or to intimidate, insult and annoy. Section 441 of the Penal Code⁶¹ states:

Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit “criminal trespass”.

If the land involved is a building, tent or vessel used as a human dwelling, then there can be “house-trespass” under section 442 of the Penal Code. In the present context, the focus is not on trespassers who intend to commit offences, but those who may be seen to “intimidate, insult or annoy”. It has been held that it is not enough to show that someone in possession would be angered by the trespass.⁶² The offence is not made out unless the intention (or *mens rea*) is to produce such a result. It is not sufficient

⁶¹ Cap 224, 1985 Rev Ed.

⁶² A landlord would literally be unhappy with such a situation. See *Sinnasamy Selvanayagam v King* 52 Cr LJ 173 (Privy Council). Anger and unhappiness are not enough to establish an offence.

⁶³ *Ahmad bin Ali v PP* [1967] 1 MLJ 211; *Ong Eng Guan v PP* [1956] MLJ 44. In recent years, this has sometimes been more widely interpreted. For example, a trespasser in the hostel room of a female undergraduate hostel has been convicted of criminal trespass because he intended to annoy her: *PP v Seah Soon Keong* [1993] 3 SLR 442. In *PP v Ker Ban Siong* [1992] 2 SLR 938, a man who was barred from the Turf Club was convicted of criminal trespass because he was subsequently found on the club premises. The conviction was on the basis that he had the express intent to annoy the management of the club (a finding of fact by the High Court), even though his presence was more likely for the obvious purpose of participating in the races. In *Leong Mun Kwai v PP* (unreported, Magistrate’s Appeal no 40/95/01), the accused was convicted of criminal trespass on the premises of the Ministry of Labour. The accused was unhappy with the Ministry’s restrictions on foreign labour,

if the effect of the trespass is to infuriate the relevant person, although there have been some more recent unreported cases that come close to this.⁶³ The offence of criminal trespass would be too widely defined if trespass is criminal simply because the owner is annoyed. It is unlikely that a tenant who holds over would be guilty of criminal trespass because his intention would usually not be to “intimidate, insult or annoy”. In addition, the offence is made out only if the trespass is committed with the relevant intention against a person in possession of the property. This does not include the person who is entitled to immediate possession. So a landlord who would like to invoke a prosecution on this basis will need to take possession first. In any case, it is doubtful whether the police or the Public Prosecutor should be mobilised on such disputes, which are often tenancy disputes, for examples, those concerning the right to terminate a tenancy, and the existence of a tenancy as opposed to a licence.⁶⁴

The existing criminal law therefore does not provide a solution. It is also questionable whether it should. Although such trespass would easily be identified as wrong, the wrong would not be of such a degree that the State should contemplate effective sanctions, to which it must then devote resources to police and prosecute. Section 19(4) of the Civil Law Act, on the other hand, is both useful and effective. It places the burden of “enforcement” on interested parties directly.

This issue has been discussed in fair detail to show that arguments against punitive damages in the civil law can be answered. There is no doubt that not all civil wrongs should be criminal, and the fact that a wrong should not be made criminal does not mean that there should not be any form of disincentive or punishment. There would be a gap in the law if acts that do not warrant criminal sanctions cannot be discouraged by the common law.

The obvious consequence of this discussion is in analogy. First, the “double rent” rule is not based on reprehensible conduct: it is far broader. But if non-reprehensible conduct can generate a penalty, then one could easily make an *a fortiori* argument for punitive damages on the basis of reprehensible conduct. It is certainly difficult to defend the position that only tenants who are holding over are deserving of such a penalty, or that

and handed leaflets in the building wearing a plastic handcuff on his left hand. Not surprisingly, the building management were annoyed by the accused’s act, and called the police. The accused was convicted of criminal trespass, and imprisoned for five weeks. The accused in these cases were effectively found to have intended to annoy the occupants of the land.

⁶⁴ Eg, see *Mount Elizabeth Health Centre Pte Ltd v Mount Elizabeth Hospital Ltd* [1993] 1 SLR 1021.

only landlords should have the benefit of such a powerful disincentive. It would not be difficult to argue that the protection would more logically be defined to protect land rights. For example, section 19(4) does not apply to a cynical trespasser who was never a tenant of the premises. In principle, there is no reason why a former tenant should be made to pay punitive damages, but not a trespasser who had never been a tenant. This would lead to an argument that perhaps all land rights should be so protected. However, if land rights are so protected, it will be difficult not to extend it to all property rights (*ie*, corporeal and incorporeal); and then, without further much argument, to other rights.

Section 19(4) is often seen as an exception to the law. In reality, it was made an exception by *Rookes*. Prior to *Rookes*, it would be best described as a special situation where a fixed formula was prescribed by legislation for the punitive award. The existence of such a provision can be used to support the rejection of the artificial restrictions imposed by *Rookes*. Since punitive damages have been provided for by legislation, it is an indication of the acceptance of such damages by the legislature. In such a context, it is wrong for the common law to make it an exception, especially when the statutory approach is not *sui generis*, and cannot be distinguished easily from other situations.⁶⁵

B. Copyright Infringement

Section 119(1) of the *Copyright Act*⁶⁶ states that when there is an infringement of copyright, the owner of the copyright may obtain an injunction and either damages or an account of profits. Section 119(4) goes on to state that when an infringement of copyright is established, and the court is satisfied that it is proper to do so, having regard to –

- (i) the flagrancy of the infringement;
- (ii) any benefit shown to have accrued to the defendant by reason of the infringement; and
- (iii) all other relevant matters,

the court may, in assessing damages for the infringement, award such *additional damages as it considers appropriate in the circumstances*. Since

⁶⁵ A situation where judges have refused to change a common law rule because legislation had been drafted on the basis of the common law can be found in *La Pintada v President of India* [1985] AC 104.

⁶⁶ Cap 63, 1988 Rev Ed.

compensatory damages or an account of profits have already been provided for by section 119(1), it is difficult to see how the “additional” damages can be anything other than punitive damages, especially in the light of the direct references to flagrant infringement, and the benefits derived by the defendant by reason of the wrongdoing. However, if exemplary damages were intended, it is not clear why “additional” was used rather than “exemplary”. After all, “exemplary damages” is used in the Civil Law Act.⁶⁷ The explanation for this may however, lie in the fact that the wording is based on foreign legislation.

(i) *Punitive Damages or Aggravated Damages*

In Australia, where there is a similar provision, it has been held that the provision does indeed provide for non-compensatory damages, including punitive damages.⁶⁸ This is based on a literal reading of the provision.

There is less certainty in England, which also has similar but not identical provisions. In *Williams v Settle*⁶⁹ (which predates *Rookes*) the Court of Appeal held that section 17(3) of the Copyright Act 1956 specifically provided for punitive damages.⁷⁰ On a loss of £15, an award of an additional £100 in punitive damages was upheld, which is equivalent to more than six times the loss. However, in the later case of *Beloff v Pressdam*⁷¹ it was suggested that *Williams v Settle* was decided before a clear distinction was drawn between exemplary damages and aggravated damages. Ungood-Thomas J took the view that the UK provision “excludes exemplary damages for infringement of copyright and replaces any aggravated damages that might otherwise have been obtainable for infringement of copyright.”⁷² *Williams* could however, be influenced by the spirit of *Rookes*, in that it could be explained as a case of aggravated damages.

If the scope of additional damages is only for aggravated damages, then the usefulness of the additional damages provision will be greatly diminished.

⁶⁷ *Supra*, note 1.

⁶⁸ *Wellington Newspapers v Dealers Guide* [1984] 4 IPR 417, accepted in *Autodesk Australia v Cheung* [1990] 17 IPR 69 (Federal Court). On the facts of the *Autodesk* case, compensatory damages of \$50,000 was awarded, with additional damages of \$35,000, which is equivalent to 70% of compensatory damages. See also *Concrete Systems v Devon Symonds Holdings* (1978) 20 ALR 677, and G Wei, “Intellectual Property Rights in Singapore: Developments from 1990-1995 and Future Trends” in *Review of Judicial and Legal Reforms in Singapore Between 1990 and 1995* (1996), 447, at 465-6.

⁶⁹ [1960] 2 All ER 806.

⁷⁰ *Ibid.*, at 816.

⁷¹ [1973] 1 All ER 241.

⁷² *Ibid.*, at 266.

Additional injury to feelings, which form the crux of aggravated damages, do not mean very much in the context of corporate bodies, who are likely to be the relevant parties in most cases involving significant sums of money. There is however, at least one case (albeit not in copyright) where aggravated damages was awarded to a corporate entity. In *Messenger Newspapers Group v National Graphical Association*⁷³ Justice Caulfield took the view that since aggravated damages could be awarded against a non-human legal entity, there was no reason why it could not be awarded in favour of one.⁷⁴ The judgment does not address the issue of how a company can be said to feel the additional harm from the acts of aggravation. On the facts, the defendant union embarked on a course of intimidation, with illegal industrial action including violent mass picketing and other actions in breach of a court injunction. Even though the union had been fined substantial sums for contempt of court, the court nonetheless awarded £10,000 by way of aggravated damages, as well as £25,000 in exemplary damages.⁷⁵ The aggravated damages award in the case can be explained as being based on the additional pecuniary harm suffered by the company subject to the industrial action, rather than in terms of hurt feelings. If not, then the award may simply be punitive damages disguised as aggravated damages.

It has been argued that there are differences in wording between the relevant UK provisions and the Australian provisions which can be seen as giving a broader discretion to Australian courts to award damages that may not be compensatory, and that the Singapore provisions are similar to the Australian provisions in this respect.⁷⁶ The crucial difference highlighted is the requirement in the UK that “effective relief” should not be otherwise available before additional damages could be awarded.⁷⁷ There is no such requirement in the Singapore and Australian provisions. The lack of effective relief requirement can however, also be used to support the view that punitive damages are prescribed in the UK as well. The requirement for the lack of “effective relief” before additional damages can be awarded actually provides an even stronger argument for equating “additional damages” with punitive damages. This is because that is precisely why

⁷³ (1984) IRLR 397.

⁷⁴ *Ibid*, at 407.

⁷⁵ The court took the view that there was no double punishment because the fines were for contempt of court, whilst exemplary damages were to teach the defendant that tort did not pay. The total award including compensatory damages was £125,051.20.

⁷⁶ G Wei, *The Law of Copyright* (1989), at § 8.11.

⁷⁷ Section 17(3) of the UK Copyright Act 1956, c 74 states that additional damages may be awarded for copyright infringement if the court is “satisfied that effective relief would not otherwise be available to the plaintiff.”

⁷⁸ *Contra*, the view of Ungood Thomas J in *Beloff v Pressdam Ltd*, *supra*, note 71, at 265.

punitive damages may be necessary and desirable: when compensatory damages are not adequate or *effective*.⁷⁸

The present UK legislation for such additional damages is found in section 97(2) of the Copyright, Designs and Patents Act 1988,⁷⁹ which replaces the provision in the Copyright Act 1956. The provision allows a court to “award such additional damages as the justice of the case may require” in a claim for infringement of copyright. The lack of “effective relief” requirement has been replaced by a requirement that additional damages would serve “the justice of the case”. Recent English cases do not even attempt to decide whether such additional damages mean aggravated or punitive damages. Additional damages are simply awarded, with due regard for the listed considerations.⁸⁰

The issue has been judicially settled in Singapore, although without detailed consideration. The High Court and Court of Appeal have both accepted the view that additional damages under section 119(4) of the Copyright Act are indeed punitive damages. In *Lotus Development Corporation v Ong Seow Pheng*⁸¹ the court had to deal with a large scale commercial software piracy operation. The first defendant was an accountant by training who claimed to be a major supplier of pirate software in the region, with an 80% share of the pirate software manual market in Singapore, Malaysia and Indonesia. The practical problem for the plaintiff copyright owner was that although the accountant was the root source of thousands of infringing copies, most of the actual copying was done by third parties who obtained the master copies from the accountant. The accountant was found to have only dealt with less than 50 copies of software and almost 6,720 copies of unauthorised manuals for various software. The main arguments in the case focused on whether the accountant should be liable for authorising the making of thousands of copies of the software (rather than just less than 50 copies), and how the loss of profit for the manuals should be computed.

The Registrar found that the accountant had not authorised the making of a few thousand copies, even though he knew it was likely that the third party would have done so. He then assessed compensatory damages at

⁷⁹ 1988, c48.

⁸⁰ *ZYX Music GmbH v Chris King* [1995] FSR 567; *Cala Homes (South) Limited v Alfred McAlpine Homes East Ltd* [1995] FSR 818; [1996] FSR 36 (CA). It has been decided by the House of Lords that the current wording of s 97(2) of the Copyright, Designs and Patents Act allows an award of additional damages only if there is an award of damages, and additional damages are not possible if there is an account of profits: see *Redrow Homes Ltd v Bett Brothers Plc* [1998] 2 WLR 198.

⁸¹ [1997] 1 SLR 484. The Copyright infringement was established earlier: see [1993] 2 SLR 700.

US\$173,157.35 and awarded additional damages under section 119(4) in the sum of US\$20,000, which is about 11% of the compensation.

On appeal, the High Court took a different view of the authorization issue, and increased the compensatory damages very substantially to US\$1,658,169.17. *Lotus* asked for \$750,000 in additional damages, but this was considered too high. Instead, the court awarded \$200,000 “as a penalty which in fact is the nature of the additional damages award.”⁸² Although the quantum of the additional damages was increased tenfold, it was mathematically equivalent to about 12% of the compensation award. This is almost the same as the additional 11% award by the Registrar. Considering the round figures used (ie, \$20,000 and \$200,000) it could be said that the Registrar and the High Court judge both probably worked on the basis of a 10% uplift of the loss. This is notably also in the same region as the 10% uplift in *Abdul Mutaif bin Sultan v Surya Abbas Syauta*.⁸³

The first observation about the *Lotus* case up to this stage, is a relatively modest 12% uplift. There is no basis for criticizing this as being wrong, but it can be questioned whether such a modest uplift is effective in terms of either punishment or deterrence. The award is clearly conservative. Although it would be wrong to maintain that the right approach is to always base it on a percentage uplift of the loss, it is a useful starting point, from which other relevant factors can then be taken into account. These can include the usual considerations like reprehensibility of the conduct, the overall size of the award, the means of the defendant, and any other penalties (like criminal fines) that he may be liable for. This can be seen in section 119 itself, which expressly requires a judge to consider “other relevant matters”. In principle, unless the uplift were to be of a significant amount, the deterrent effect would be nonexistent. As a rough guide, one would have thought that an uplift of at least 50 to 100% would better serve the objective of the additional damages award. The additional damages award of the High Court in the *Lotus* case is unlikely to even momentarily distract potential infringers from thinking about the profits that can be made.

When the *Lotus* case was appealed, the Court of Appeal accepted the approach of the Registrar in quantifying the compensatory award, and the original compensatory award of US\$173,157.35 was reinstated. This was because a person is liable for infringement of copyright only if he does or authorises the doing of the infringing act.⁸⁴ There was no evidence that the accountant had made a few thousand copies himself, or that he had

⁸² [1997] 1 SLR 484, at 496.

⁸³ *Supra*, note 32.

⁸⁴ S 31(1) Copyright Act, *supra*, note 66.

“authorised” a third party to do the same, even if it were obvious what a third party with such “master” copies would have done. The Court of Appeal did not disagree with the penal nature of the award under section 119. In fact, it was said:⁸⁵

Here, we do not think that the learned assistant registrar attached sufficient weight to the flagrancy of the infringements and the deplorable conduct of the appellants. The sum of US\$20,000 awarded was far too low. The learned judge increased the award to US\$200,000. Although we agree with her reasoning for this award ... it seems to us that the learned judge in making this award must have taken into consideration the extent of the infringement which she found committed by the appellants, namely, that the appellants infringed the respondents’ copyright by authorising Lur and other retailers to make copies of the respondents’ software programmes. As we have held, the appellants committed the infringement in dealing with 6720 infringing copies of the manuals and 31 infringing copies of the programmes, it follows that the amount awarded should in fairness be reduced. Having regard to all the relevant facts, we are of the opinion that a sum of US\$100,000 would be an appropriate sum. We therefore set aside the award of US\$20,000 made by the learned assistant registrar and also the award of US\$200,000 made by the learned judge, and award a sum of US\$100,000.

The additional damages award under section 119 was reduced from US\$200,000 to US\$100,000. The result is extremely interesting because although it was a reduction in absolute terms, there was actually a large increase in percentage terms. As a percentage of the loss (or compensatory award), the section 119 award increased from 12% to 58%. Lotus had in fact asked for US\$750,000 as additional damages in the High Court, which is about 45% of the US\$1.6 million compensation award. In percentage terms, *Lotus* actually received more than they asked for.

One legal question that arises from the Court of Appeal decision is the basis for deciding on the quantum of the additional damages. While factors like flagrancy are relevant, it must be that in most cases involving litigation, there will be an organized large scale “pirate” operation, with all the necessary steps and precautions to avoid detection and liability. Seen in this light, the most important factor would be the magnitude of the infringement, which

⁸⁵ [1997] 2 SLR 137, at 154 (§ 56). However, the court did not expressly address the issue of whether such additional damages was punitive in nature. In particular, *Rookes* was not discussed.

is indicated by the size of the compensation award or an account of profits as the case may be. This is supported by the judgment of the Court of Appeal, which expressly stated that the High Court judge, “in making this award must have taken into consideration the extent of the infringement which she found committed by the appellants.” As the compensation award was reduced, so was the award of additional damages. There is implicit acceptance of the view that the section 119 award should follow the extent of the infringement.

In practical terms, the additional damages award should usually be an uplift from the loss or profits involved. On the Court of Appeal’s decision, a rough figure would seem to be in the region of 50%. While this cannot be seen as a rigid rule of law, the various rulings do suggest that under section 119, an uplift of 10% would be the very minimum and that it may even be in the 50% region. The Court of Appeal expressly found the Registrar’s award, which was an uplift of 10%, to be inadequate. In principle, a 10% uplift is unlikely to have any significant impact. The same can be said of any moderate increase from 10%.

In view of the *Lotus* case, an award under section 119 of the Copyright Act in Singapore is a punitive award. An interesting observation that can be made here is that Australia, which has not followed *Rookes*, has been prepared to interpret the provision as providing for punitive damages. In England, which is bound by the restrictions imposed by *Rookes*, the opposite position has (not surprisingly) been taken. Singapore, which seems to follow *Rookes* rather than *Australian Consolidated v Uren*,⁸⁶ chose drafting that is closer to the Australian provisions. Finally, the fact that a punitive provision was introduced in Singapore after *Rookes* was decided in England indicates legislative acceptance of the view that punitive damages have a valuable role to play outside of the criminal law.

(ii) *Relationship with criminal law*

One interesting aspect of section 119(4) of the Copyright Act is the existence of criminal offences for breach of copyright.⁸⁷ Although a breach of copyright *per se* is not criminal, there are various offences that can broadly be described as covering commercial scale infringement. In fact, the defendant in the *Lotus* case was imprisoned and fined for copyright offences.⁸⁸ This

⁸⁶ *Supra*, note 12.

⁸⁷ *Eg*, s 136, Copyright Act, *supra*, note 66.

⁸⁸ *Supra*, note 81. It is not clear if the acts on which the charge was based related to the same infringements that were the subject of the civil suit.

brings into consideration the issue of double punishment and separation of functions, with criminal law being responsible for punishment and deterrence, and civil law confined to compensation or account of profits. The traditional argument is that there should not be punishment in two instances. There will be no problem if one forum were to order compensation, and other punishment. But if both also consider punishment, then there is a danger of double punishment.

In the context of section 119(4), there is a ready solution. The judge can consider any other penalties, fines or punishment under the “all other relevant matters” provision. The only practical problem that will arise is when the civil trial precedes the criminal proceedings (if any). This can however, be easily dealt with by postponing the assessment of additional damages if necessary. This issue does not seem to have been argued in the *Lotus* case. This potential problem is not sufficient to warrant the removal of the power to award additional damages altogether, especially since there may not always be a criminal prosecution. Not all breaches of copyright are criminal, and there may not even be a criminal issue in some cases.

The enactment of section 119(4) when the common law is dominated by *Rookes*, with other provisions that can lead to concurrent criminal liability, shows clearly that the legislature does not consider punitive damages in civil law to be archaic or out of place, and that potential criminal liability is not an impediment to a *power* to award punitive damages in appropriate cases.

(iii) *Relevant conduct for punitive damages*

Although the power to award additional damages is widely drafted, it is important to consider the type of conduct that will justify an award of additional damages. In principle, it is wrong to take the view that any copyright infringement would suffice. This would be too wide, and if it were the intended position, every case involving a breach would be an appropriate case for additional damages. However, as drafted, the listed considerations are not requirements, so that it is arguable that additional damages can be awarded even in the absence of flagrancy of infringement, or benefit from the infringement.

There is support for such a broad view in the English case of *Cala Homes (South) Limited v Alfred McAlpine Homes East Limited*.⁸⁹ In the case, it

⁸⁹ [1995] FSR 818, at 838, following *Nicols Advanced Vehicle Systems Inc v Rees* [1979] RPC 177 (Templeman J), which took the view that the award is not justified by knowledge of infringement alone, and the court can look at all the circumstances.

was argued that the infringer must be aware of the infringement, or at least had a strong suspicion that there would be infringement. This was rejected as not being required by the wording of section 97(2) of the English Copyright, Designs and Patents Act 1988. Under the legislation, flagrancy or benefit are considerations and not requirements. The court accepted that it would be rare for there to be an actual award of additional damages in the absence of flagrancy. It would be difficult to justify a punitive award in the absence of a flagrant breach. There is support for this approach in *Pro Sieben Media AG v Carlton UK Television Ltd*,⁹⁰ where additional damages were not awarded because the editor a program that infringed the copyright of the plaintiffs had believed what she did was permissible and for the public good.

In any case, a significant award of additional damages is unlikely in the absence of flagrant infringement or considerable benefit from the infringement. Also, if the additional damages award is intended to be punitive, it is difficult to see how the conduct of the defendant can be irrelevant in determining whether an award should be made. This statutory rule actually predates *Rookes*, as it can be found as early as 1956 in the section 17(3) of the UK Copyright Act 1956. It therefore existed in a climate that was more willing to award exemplary damages. It may have been thought necessary to make an express provision for punitive damages in the legislation because a statutory right was established by it, and it was intended to make clear that the common law concept of punitive damages applied to the infringement of this statutory right as well.

After *Rookes* was decided, there would have been an even greater need for a statutory rule. This is because at common law, the law based on *Rookes* may not allow punitive damages for copyright infringement. As there is potential liability to account for the profits made from copyright infringement, one can never expect to be better off after accounting for the profits. This makes the only possible exception for punitive damages under *Rookes* inapplicable. Any commercial scale copyright infringer would certainly hope to be better off by not being “caught” at all, or only being “caught” in respect of only a fraction of the infringements, but the calculated gain exception in *Rookes* is not clearly framed to cover this type of calculation. In principle, it may be wrong to expand *Rookes* to cover this type of situation, as it could lead to defendants being made liable for infringements that have not been proved.

In the *Lotus* case, the scale of the infringement was massive. The defendant was well aware of the law, had boasted of his operations, and even warned

⁹⁰ [1998] FSR 43.

his customers to be careful of raids. The court highlighted the fact that he was trained as an accountant and therefore had the means to make a good living. It was found that he made a calculated risk to make money as a software pirate.⁹¹ All these factors justified the award of additional damages. However, these facts are fairly typical of any pirate software business that would concern a copyright owner. It is only to be expected that the infringer will try to avoid detection. Claims to be a leading supplier could be part and parcel of a marketing strategy to instil confidence in potential customers of unauthorised software. The main factor that moved the court towards additional damages was effectively not much more than a deliberate and audacious large scale infringement with a view to a profit. The main consideration must then be the magnitude of the infringement, as indicated by the size of the compensatory award or account of profits.⁹² Other possible factors will include criminal penalties that may be borne, as well as the means of the party in question.

Uncertainty in this area can be avoided by providing a statutory formula for the computation of the additional damages to be paid. This, for example, could be a multiple of one or two against the compensatory or restitutionary award.⁹³ With such a system, there will be greater incentive for copyright owners to pursue civil claims themselves. A fixed formula will also facilitate out-of-court settlements as there will be certainty over the award that a full trial will lead to. The setting of the uplift under the present law will always be subjective, and there will be much to be gained in generally adhering to a fixed percentage uplift. It would be profitable to define the uplift by legislation, as in section 19(4) of the Civil Law Act. Various relevant factors including the conduct of the defendant in individual cases cannot be taken into account with a fixed uplift rule, but this has to be balanced with the advantage of certainty.

(iv) *Analogy with other intellectual property rights*

In Singapore, there is no equivalent “additional damages” provision for the breach of other intellectual property rights like patent rights. In principle, this distinction is difficult to defend. One could make the same point with trade marks and registered designs. It may be that with patent rights it is

⁹¹ *Supra*, note 81, at 495.

⁹² S 119(2) of the Copyright Act (*supra*, note 66) lists the remedies of a copyright owner to include damages or an account of profits.

⁹³ There is no equivalent to a treble civil damages provision in Singapore, but tax evasion can result in a penalty equal to three times the amount of tax undercharged: see s 96, Income Tax Act (Cap 134, 1996 Rev Ed).

possible for a party to unknowingly “invent” and then use an idea that has already been patented by another party. Obviously in such a case, additional damages would not be warranted. Such accidental infringement is less likely with breach of copyright. However, this would not explain why additional damages cannot be awarded in the case of a cynical, deliberate and secretive infringement of a patent for economic gain. In England, additional damages can also be awarded for the infringement of design rights,⁹⁴ but it is also not available for the breach of patent rights. There is no obvious reason to put copyright owners in a better position than other parties with intellectual property rights. In cases not covered by the additional damages power, recourse will have to be made to either criminal offences or the common law, which means *Rookes* if it is accepted as good law. *Rookes* may, however, not be useful when there is potential liability based on an account of profits, which make the exception based on calculation of gain after paying damages inapplicable. The benefit based measure of liability makes it difficult to expect any gain after accounting for profits or paying a benefit based measure of damages.

C. Quantifying Punitive Damages

When punitive damages can be awarded, there is the question of how they are quantified. There are few local cases, and foreign case law is not helpful because most awards are decided by juries. The obvious considerations of conduct, means, amount of profit made and other penalties suffered need not be discussed in detail here.

A more useful and workable approach is to consider the loss suffered, and use an uplift from the compensation as the measure of the appropriate punitive damages. This has already been argued in the context of additional damages for copyright infringement.

The uplift approach will not always be appropriate, for example in defamation cases where the loss may be suffered in largely non-pecuniary terms. But in cases where the loss to the plaintiff is suffered in money terms, or the gain to the defendant from the wrong is also in money terms, such an approach will be an attractive alternative to simply looking at the conduct of the defendant and putting a money figure to it. However, in cases involving relatively small pecuniary losses, it may be necessary to

⁹⁴ UK Copyright, Designs and Patents Act (*supra*, note 79), s 229(3). There is no regime for the protection of design rights in Singapore.

⁹⁵ *Eg, Williams v Settle*, *supra*, note 69, and cases where the actual monetary loss is small, but the right infringed needs protection by way of punitive damages.

use a much larger uplift in order to produce an adequate deterrence.⁹⁵

V. FUTURE DIRECTION

Under the present position in English law, which seems to be law here, there is no scope for the common law to be developed. This is because it is impossible to reason by analogy – a crucial process for common law development – when illogical distinctions are in place.

The *AB Waterworks*⁹⁶ case has not been cited or applied in Singapore. The acceptance of the *AB Waterworks* case will mean another difficult distinction, for example, between public and private nuisance.

On the whole, the acceptance of both *Rookes* and *AB Waterworks* will mean that the law here will be caught in a pre-*Rookes* time-trap. The law cannot be developed to meet new situations and new civil wrongs, even if they involve far more reprehensible conduct than anything presently recognised as sufficient to justify punitive damages.

To avoid these problems, there are several alternatives. The first is to accept *Rookes* but to reject *AB Waterworks*. The second is to reject *Rookes*, and develop the law here accordingly, along the lines of reprehensible conduct and the need to establish disincentives for wrongdoing. The third is to take the argument in *Rookes* to its logical conclusion and bar punitive damages altogether, with a possible exception for statutes. The problem with the last approach is that the statutory exceptions will also need to be rationalised, for example, in terms of why they should warrant punitive damages that are not available in other situations. There could of course be an even more extreme position of no statutory exceptions, but this position can only be obtained through legislation.

The present discussion here leads to the conclusions that there is no reason why deterrence and punishment should be the exclusive province of the criminal law; and that the current statutory exceptions are not archaic. Punitive damages can also play a useful role in influencing conduct. It follows that punitive damages should not be abolished. This then leads to the question of whether punitive damages should then be available on a rational basis rather than an irrational basis. The obvious answer means that *Rookes* should be rejected, and the law should be developed along the lines of reprehensible conduct and the need to establish disincentives for wrongdoing.

One common concern with the use of punitive damages is not in its availability *per se*, but in the fear of how the law may be used too liberally by judges. One concern will be over quantum, for example, in terms of

⁹⁶ *Supra*, note 9.

excessive awards that are oppressive. Another concern will be in the situations where punitive damages can be awarded. The latter arises from the fact that judges will define the conduct and situations where punitive damages will be awarded. The fear is that they may do so too liberally, and include acts involving for example, only negligence as opposed to deliberate and callous wrongdoing.⁹⁷ To argue that punitive damages should be rejected simply because of such experiences in some other jurisdictions is really no different from arguing for the rejection of compensatory damages because multi-million dollar awards have been made in the USA. This danger of over-definition depends ultimately on the judiciary. There is no reason to suppose that the Singapore judiciary will not be able to develop the law rationally and satisfactorily.

As the law now stands, punitive damages are not used in a significant way in Singapore. If punitive damages were to be abolished altogether, there will be minimal immediate impact. Punitive damages can however, play a significant and useful role if it could be employed openly on a rational basis, whether in the form of judicial pronouncements or statutory reform.⁹⁸

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⁹⁷ See Burrows, "The Scope of Exemplary Damages" (1993) 109 LQR 358 at 361, in relation to *Coloca v BP Australia Ltd* [1992] 2 VR 441, where the Supreme Court of Victoria held that punitive damages can be awarded in an action for personal injury caused by negligence. However, it has to be noted that the court stated (at 448) that it would only be in "unusual and rare" cases, and that the conduct of the defendant must merit punishment. This suggests that there must be gross negligence, to the point of shutting the eyes to the obvious.

⁹⁸ *Eg.*, as recommended by the English Law Commission: see *supra*, note 11.

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