

(5) DAMAGES NOT FOUNDED ON COMPENSATION

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(a) GENERALLY

[135-485] **Damages only exceptionally non-compensatory**
 Compensation is the cardinal concept of the law of damages.¹ One implication of the principle is that the plaintiff should, generally, recover no more than loss suffered.² Exceptionally, a plaintiff may recover, in an award of damage

- v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 471; 57 ALR 639; BC8501117 per Brennan J; *Lamb v Cotogno* (1987) 164 CLR 1; 74 ALR 188; [1987] HCA 47; BC8701807; *Gray v Motor Accident Commission* (1998) 196 CLR 1; 158 ALR 485; 73 ALJR 45 at [15] per Gleeson CJ, McHugh, Gummow and Hayne JJ. See, for example, *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584; [1969] ALR 533; (1968) 42 ALJR 280; *Johnstone v Stewart* [1968] SASR 142; *Pearce v Hallett* [1969] SASR 423; *Pollack v Volpato* [1973] 1 NSWLR 653; *Midalco Pty Ltd v Rabenalt* [1989] VR 461; (1988) Aust Torts Reports ¶80-208; *Coloca v BP Australia Ltd* [1992] 2 VR 441; (1992) Aust Torts Reports ¶81-153; *Backwell v AAA* [1997] 1 VR 182; (1996) Aust Torts Reports ¶81-387; *Hamer-Matthew v Gulabrai (No 2)* (1995) Aust Torts Reports ¶81-334; *Pargiter v Alexander* (1995) 5 Tas R 158; Aust Torts Reports ¶81-349.
2. *Costi (formerly Constantinou) v Minister of Education* (1973) 5 SASR 328 at 332 per Hogarth J.
 3. *Dymocks Book Arcade Ltd v McCarthy* [1966] 2 NSWLR 411 at 415-16 per Jacobs JA, CA(NSW); *Johnstone v Stewart* [1968] SASR 142 at 143 per Bray CJ; *Schumann v Abbott* [1961] SASR 149 at 157 per Reed J. See also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 122 per McTiernan J, at 129 per Taylor J, at 143 per Menzies J; [1967] ALR 25; BC6600040.
 4. *Lamb v Cotogno* (1987) 164 CLR 1; 74 ALR 188; [1987] HCA 47; BC8701807; *Johnstone v Stewart* [1968] SASR 142 at 145 per Bray CJ; *Sanders v Snell* (1997) 73 FCR 569; 143 ALR 426; Aust Torts Reports ¶81-425. See also *Williams v Hursey* (1959) 103 CLR 30 at 83; [1959] ALR 1383; (1959) 33 ALJR 269 per Fullagar J.
 5. *Schumann v Abbott* [1961] SASR 149 at 159-60 per Reed J. See also *Lamb v Cotogno* (1987) 164 CLR 1; 74 ALR 188; [1987] HCA 47; BC8701807. Compare *Proprietary Schools of Western Australia Ltd v Crown* (1943) 46 WALR 37.

[135-505] Actions in which exemplary damages are awardable Since the recovery of exemplary damages is not, in principle, limited to defined categories of cases,¹ such damages are recoverable in practice in a wide variety of actions, including:

- (1) trespass to the person;²
- (2) trespass to land;³
- (3) trespass to chattels;⁴
- (4) malicious prosecution;⁵
- (5) abuse of process;⁶
- (6) conspiracy;⁷
- (7) inducing breach of contract;⁸
- (8) interference with trade or business by unlawful means;⁹
- (9) detinue;¹⁰
- (10) conversion;¹¹
- (11) deceit;¹²
- (12) breach of confidence;¹³
- (13) nuisance;¹⁴ and
- (14) negligence¹⁵ (except for personal injuries in the Northern Territory, New South Wales and Queensland).¹⁶

By contrast, exemplary damages are not recoverable in Lord Campbell's Act claims,¹⁷ in actions for breach of contract,¹⁸ defamation,¹⁹ breach of fiduciary duty²⁰ or where their award is proscribed by statute, as in claims surviving for the benefit of an estate.²¹

Notes

1. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 122 per McTiernan J, at 129 per Taylor J, at 143 per Menzies J; [1967] ALR 25; BC6600040.
2. *Lamb v Cotogno* (1987) 164 CLR 1; 74 ALR 188; [1987] HCA 47; BC8701807.
3. *XL Petroleum Pty Ltd v Esso Australia Ltd* (1968) 121 CLR 584; [1969] ALR 533; (1968) 42 ALJR 280.
4. *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584; [1969] ALR 533; (1968) 42 ALJR 280.
5. *Brooke v Groves* (1968) 42 ALR 349. See also *CA(NSW)*; [1967] ALR 25; BC6600040.
6. *Hamer-Matthew v Gulabrai (No 2)* (1995) Aust Torts Reports ¶81-334.
7. *Williams v Hursey* (1959) 103 CLR 30 at 83; [1959] ALR 1383; (1959) 33 ALJR 269 per Fullagar J.
8. *Whitfield v L* (1997) 73 FCR 569; 143 ALR 426.
9. *Ansett Transport Industries (Aust) Pty Ltd v Australian Tourist Commission* [1991] 2 VR 441.
10. *Egan v State Transport Authority* [1991] 2 VR 441.
11. *Private Park Pty Ltd v Dymocks Book Arcade Ltd* (1966) 117 CLR 118 at 122 per McTiernan J, at 129 per Taylor J, at 143 per Menzies J; [1967] ALR 25; BC6600040.
12. *Musca v Ast* (1999) 19 IPR 527.
13. *Aquaculture* (1999) 19 IPR 527.
14. See *Municipal Councils (Vic) v Grampian Regional Council* (1992) Aust Torts Reports ¶453; 165 ALR 487; ATPR.
15. (NT) Per (NSW) Civ 1999 s 144 (QLD) Civ.
16. *Reindel v Ja* (1953) 1 All.
17. *Addis v Gray* [1953] 1 All.
18. *Columbia* [1953] 1 All.
19. (ACT) Civ (NT) De



Notes

1. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; [1967] ALR 25; BC6600040; *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 [1968] ALR 3; (1967) 41 ALJR 66; BC6700070. PC (rejecting the approach of the House of Lords in *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367; [1964] 2 WLR 269); *Coloca v BP Australia Ltd* [1992] 2 VR 441; (1992) Aust Torts Reports ¶81-153.
2. *Lamb v Cotoqno* (1987) 164 CLR 1; 74 ALR 188; [1987] HCA 47; BC8701807; *Pearce v Hallett* [1969] SASR 423; *Watts v Leitch* [1973] Tas SR 16; *Costi (formerly Constantinou) v Minister of Education* (1973) 5 SASR 328.
3. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448; 57 ALR 639; BC8501117; *Gazzard v Hutchesson* (1995) Aust Torts Reports ¶81-337; *Johnstone v Stewart* [1968] SASR 142; *Pollack v Volpato* [1973] 1 NSWLR 653.
4. *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584; [1969] ALR 533; (1968) 42 ALJR 280; *Pargiter v Alexander* (1995) 5 Tas R 158; Aust Torts Reports ¶81-349. See also *Dymocks Book Arcade Ltd v McCarthy* [1966] 2 NSWLR 411, CA(NSW); *Private Parking Services (Vic) Pty Ltd v Huggard* (1996) Aust Torts Reports ¶81-397.
5. *Brooke v Grimpel* (1987) Aust Torts Reports ¶80-108.
6. *Hamer-Matthew v Gulabrai (No 2)* (1995) Aust Torts Reports ¶81-334.
7. *Williams v Hursey* (1959) 103 CLR 30; [1959] ALR 1383; (1959) 33 ALJR 269; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2)* [1991] 2 VR 636.
8. *Whitfeld v De Lauret and Co Ltd* (1920) 29 CLR 71; 21 SR (NSW) 398; 27 ALR 249.
9. *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2)* [1991] 2 VR 636.
10. *Egan v State Transport Authority* (1982) 31 SASR 481; *Private Parking Services (Vic) Pty Ltd v Huggard* (1996) Aust Torts Reports ¶81-397.
11. *Private Parking Services (Vic) Pty Ltd v Huggard* (1996) Aust Torts Reports ¶81-397; *Dymocks Book Arcade Ltd v McCarthy* [1966] 2 NSWLR 411 at 412 per Wallace P. at 414 per Jacobs JA. at 418 per Holmes JA; *Egan v State Transport Authority* (1982) 31 SASR 481 at 531 per White J.
12. *Musca v Astle Corp Pty Ltd* (1988) 80 ALR 251.
13. *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299; (1991) 19 IPR 527, CA(Wellington).
14. See *Municipal Council of Willoughby v Halstead* (1916) 22 CLR 352.
15. *Trend Management Ltd v Borg* (1996) 40 NSWLR 500; *Backwell v AAA* [1997] 1 VR 182; (1996) Aust Torts Reports ¶81-387; *Coloca v BP Australia Ltd* [1992] 2 VR 441; (1992) Aust Torts Reports ¶81-153; *Midalco Pty Ltd v Rabenalt* [1989] VR 461; (1988) Aust Torts Reports ¶80-208. See also *Nixon v Philip Morris (Aust) Ltd* (1999) 95 FCR 453; 165 ALR 515; ATPR ¶41-707 (exemplary damage not available under (CTH) Trade Practices Act 1974 but may be available for claims under negligence) (reversed on different grounds in *Philip Morris (Aust) Ltd v Nixon* (2000) 170 ALR 487; ATPR ¶41-759, Fed C of A, Full Court).
16. (NT) Personal Injuries (Liabilities and Damages) Act 2003 s 19
(NSW) Civil Liability Act 2002 s 21; (NSW) Motor Accidents Compensation Act 1999 s 144
(QLD) Civil Liability Act 2003 s 52.
17. *Reindel v James Hardie & Co Pty Ltd* [1994] 1 VR 619.
18. *Addis v Gramophone Co Ltd* [1909] AC 488; [1908-10] All ER Rep 1; *Perera v Vandiyar* [1953] 1 All ER 1109; [1953] 1 WLR 672. Compare *Vorris v Insurance Corp of British Columbia* [1989] 1 SCR 1085; (1989) 58 DLR (4th) 193.
19. (ACT) Civil Law (Wrongs) Act 2002 s 139H
(NT) Defamation Act 2006 s 34

- (NSW) Defamation Act 2005 s 37
 (QLD) Defamation Act 2005 s 37
 (SA) Defamation Act 2005 s 35
 (TAS) Defamation Act 2005 s 37
 (VIC) Defamation Act 2005 s 37
 (WA) Defamation Act 2005 s 37.
20. *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 310, 312 per Spigelman CJ, at 422 per Heydon JA.
21. (ACT) Civil Law (Wrongs) Act 2002 s 16(2)
 (NT) Law Reform (Miscellaneous Provisions) Act 1956 s 6(1)(a)
 (NSW) Law Reform (Miscellaneous Provisions) Act 1944 s 2(2)(a)(i)
 (QLD) Succession Act 1981 s 66(2)(b)
 (SA) Survival of Causes of Action Act 1940 s 3(1)(b)
 (TAS) Administration and Probate Act 1935 s 27(3)(a)
 (VIC) Administration and Probate Act 1958 s 29(2)(a)
 (WA) Law Reform (Miscellaneous Provisions) Act 1941 s 4(2)(a).

[135-510] Exemplary damages generally parasitic Exemplary damages are normally parasitic on compensatory damages¹ and are, therefore, aimed at punishing and deterring conduct which is also the subject of compensatory damages, from which the exemplary award ought to be separated.² However, there does not appear to be any reason in principle why an award of exemplary damages should not stand on its own.³

Notes

1. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 469; 57 ALR 639; BC8501117 per Brennan J.
2. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 470-1; 57 ALR 639; BC8501117 per Brennan J; *Rookes v Barnard* [1964] AC 1129 at 1228; [1964] 1 All ER 367; [1964] 2 WLR 269 per Lord Devlin.
3. See *Donselaar v Donselaar* [1982] 1 NZLR 97.

[135-515] Assessment of exemplary damages All of the circumstances of the case are relevant to the assessment of exemplary damages,¹ including the means of the defendant,² the plaintiff's provocation of the defendant's conduct³ and the extent of any punishment which has already been inflicted on the defendant.⁴ In determining the amount of exemplary damages which is appropriate in any case the court must avoid the temptation to be extravagant.⁵

Notes

1. See *Rookes v Barnard* [1964] AC 1129 at 1228; [1964] 1 All ER 367; [1964] 2 WLR 269 per Lord Devlin, HL.
2. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 472; 57 ALR 639; BC8501117 per Brennan J; *Pollack v Volpato* [1973] 1 NSWLR 653 at 657-8 per Hutley JA, CA(NSW).
3. *Fontin v Katapodis* (1962) 108 CLR 177; [1963] ALR 582; *Williams v Hursey* (1959) 103 CLR 30 at 83-4 per Fullagar J, at 110 per Taylor J, at 132 per Menzies J; [1959] ALR 1383; (1959) 33 ALJR 269; *Andary v Burford* (1994) Aust Torts Reports ¶81-302; *Love v Egan* (1970) 65 QJPR 102.
4. *Watts v Leitch* [1973] Tas SR 16.

5. *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 469; 57 ALR 639; BC8501117 per Brennan J.

[135-520] Save damages measure tort committed a Except in so far benefit to the de: are not compens reference to the distinguishable f defendant is, in

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1. See *LJP* 499 at 50
2. See *Bilan* LGRA 1 2 QB 24 [1952] 1 1 WLR
3. See *Stran* 246 at 2 RESTITU
4. As to ac
5. Compare suggests, irrecover [135-525

[135-525] Act available in case temporarily gain with use or enjo for breach of c probably cannot

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2. *Gaba Fe* Torts R Ltd [195 McKenn (NSW)

(A)	AGGRAVATED DAMAGES	
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	Conduct justifying aggravated damages	[13]
	Assessment of aggravated damages	[13]
(B)	VINDICATORY DAMAGES	
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(a) AGGRAVATED DAMAGES

[135-590] **Definition** In actions in which damages (or a substitute of them) are at large in the sense that they protect the plaintiff's dignity, reputation, feelings or liberty,¹ injury to the plaintiff may be caused by the defendant's conduct that, in the circumstances, is high-handed or reprehensible.² Such damages are known, technically, as 'damages at large'.³ They are designed to compensate the plaintiff for increased loss and to punish the defendant,⁴ although their reference to the defendant's conduct means that there is an obvious danger of their confusion with aggravated damages.⁵

Notes

1. See *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1073; [1972] 1 All ER 1027 at 1032; [1972] 2 WLR 645 per Lord Hailsham ('damages at large' is not used in its widest connotation, can include all non-pecuniary losses). As to damages at large in defamation being at large see *DEFAMATION* [145-2630].
2. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 151; [1966] 133 CLR 118 per Windeyer J; *Oldham v Lawson (No 1)* [1976] VR 654 at 655 per J.
3. *Broken Hill Proprietary Co Ltd v Fisher* (1984) 38 SASR 50 at 66.

4. *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149; [1967] ALR 25; BC6600040 per Windeyer J; *Lamb v Cotogno* (1987) 164 CLR 1 at 8; 74 ALR 188; [1987] HCA 47; BC8701807; *Gray v Motor Accident Commission* (1998) 196 CLR 1; 158 ALR 485; 73 ALJR 45 at [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ, [100]-[103] per Kirby J. Compare *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 65-6; 113 ALR 577; [1993] HCA 31; BC9303554 per Mason CJ, Deane, Dawson and Gaudron JJ.
5. See [135-495]. See further DEFAMATION [145-2720].

[135-595] **Actions in which available** Aggravated damages are recoverable in:

- (1) trespass to persons,¹ land² and chattels;³
- (2) defamation;⁴
- (3) conspiracy;⁵
- (4) malicious prosecution;⁶ and
- (5) inducing breach of contract and interference with trade or business by unlawful means.⁷

In such cases damages are at large. It is doubtful if there can be a sufficient element of damage at large to support an award of aggravated damages in the torts of nuisance⁸ and deceit.⁹ The absence of any element of damage at large will generally exclude an award of aggravated damages in negligence¹⁰ (except where there is a concurrent liability in trespass)¹¹ or breach of contract.¹²

Notes

1. *Kohan v Stanbridge* (1916) 16 SR (NSW) 576; *Pearce v Hallett* [1969] SASR 423; *Costi (formerly Constantinou) v Minister of Education* (1973) 5 SASR 328 (assault); *Myer Stores Ltd v Soo* [1991] 2 VR 597; (1990) Aust Torts Reports ¶81-077 (false imprisonment); *Spautz v Buttsworth* (1996) 41 NSWLR 1; (1997) Aust Torts Reports ¶81-415 (false imprisonment). Compare *McDonald v Coles Myer Ltd* (1995) Aust Torts Reports ¶81-361 (false imprisonment where factual findings for an award of aggravated damages were missing).
2. *Traian v Ware* [1957] VR 200; [1957] ALR 703; *Greig v Greig* [1966] VR 376; [1966] ALR 989; *Johnstone v Stewart* [1968] SASR 142.
3. *Dymocks Book Arcade Ltd v McCarthy* [1966] 2 NSWLR 411; *Private Parking Services (Vic) Pty Ltd v Huggard* (1996) Aust Torts Reports ¶81-397; *Makryllos v George Laurens (NT) Pty Ltd* (1992) 111 FLR 204.
4. *Herald and Weekly Times Ltd v McGregor* (1928) 41 CLR 254; [1929] VLR 215; [1928] ALR 377; (1928) 2 ALJ 278; *Triggell v Pheeny* (1951) 82 CLR 497; [1951] ALR 453; (1951) 25 ALJ 96; 51 SR (NSW) 173; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211; 99 ALR 252; 65 ALJR 314; Aust Torts Reports ¶81-094; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; 113 ALR 577; [1993] HCA 31; BC9303554; *Justin v Associated Newspapers Ltd* [1967] 1 NSWLR 61; (1966) 86 WN (Pt 1) (NSW) 17; *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348; *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225. See further DEFAMATION [145-2720]-[145-2770].
5. *Williams v Hursey* (1959) 103 CLR 30; [1959] ALR 1383; (1959) 33 ALJR 269; *Jervois Sulphates (NT) Ltd v Petrocarb Explorations NL* (1974) 5 ALR 1; *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots (No 2)* [1991] 2 VR 636.
6. *Commonwealth Life Assurance Society Ltd v Brain* (1935) 53 CLR 343; 35 SR (NSW) 399; [1935] ALR 330; (1935) 9 ALJ 81; *Jervois Sulphates (NT) Ltd v Petrocarb Explorations NL* (1974) 5 ALR 1.

7. *Ansett Tr* [1991] 2
8. *Municipa (No 1)* [
9. Compare *Shelley v* of comp large wa
10. *Kralj v A Hunter A Mason F clear gui negligen See also*
11. *Emblen i*
12. *Addis v*

[135-600] **Co** of each particu reprehensible th: court has regard of the trial to d insulting or con damages that th punishment of defendant's con unjustifiable.⁵ W still be relevant

Notes

1. See *Uren* 25; BC6
2. *Carson v* HCA 3; 41 NSW [145-27
3. *Andrews* per Mal
4. *Uren v J* BC6600 ¶81-417
5. *Triggell i* (NSW) Reports *Newspap* failure t unlikely
6. *Clark v.* not agg compen