flexibility by means of legislation increasing their remedial options (see for example New Zealand's Contractual Mistakes Act 1977, s. 7). The second potential defect is that the departure from *Solle* reduces the protection afforded to innocent third parties. This is because, whilst equitable mistake only rendered a contract voidable, its common law counterpart renders the contract void: a third party may acquire good title to goods which have passed under a voidable contract, but not under a void contract. The Court of Appeal has recently called for legislation which would increase the protection afforded to third parties in mistake cases by allowing the courts to apportion losses between the various innocent parties (see *Shogun Finance Ltd.* v. *Hudson* [2002] 2 W.L.R. 867). Let us hope that this happens sooner rather than later.

CHRISTOPHER HARE

EXEMPLARY DAMAGES—TWO COMMONWEALTH CASES

THE topic of exemplary damages has often been shrouded in controversy. Indeed, in some jurisdictions (such as England), the very award of such damages is confined to an extremely narrow compass (though *cf.* the recent House of Lords decision in *Kuddus* v. *Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 A.C. 122). Although the jurisdiction to award such damages is broader in other Commonwealth jurisdictions, difficult issues remain, two of which were recently explored by the highest appellate courts in New Zealand and Canada, respectively.

The (New Zealand) Privy Council decision of *A* v. *Bottrill* [2002] UKPC 44, [2002] 3 W.L.R. 1406 raised the interesting (and significant) issue of whether exemplary damages in cases of *negligence* should be restricted to cases of intentional wrongdoing or conscious recklessness (even though the basic criterion of outrageous conduct by the defendant had been established), or whether such damages could be awarded so long as the defendant had been guilty of outrageous conduct. The Board held, by a bare majority of three to two, that exemplary damages could be awarded on the latter broader basis.

In *Bottrill*, the claimant brought an action against the defendant, a pathologist, for negligence in misreading or misreporting four cervical smears taken from her. This led to far more severe treatment than was necessary, resulting in the destruction of the claimant's ovaries (and the opportunity to conceive) as well as leaving her with a weakness in her left leg. She

also suffered depression and was unable to work for some time. Young J. held that, despite the defendant's negligence, an award of exemplary damages was ("by a narrow margin") not warranted. The claimant subsequently discovered fresh evidence of negligence in other situations and applied for a re-trial, which was granted. The Court of Appeal, however, allowed the defendant's appeal (Thomas J. dissenting) on the basis that exemplary damages could only be awarded in cases of negligence where either intentional wrongdoing or conscious recklessness was demonstrated and that, on this more restrictive approach, the new evidence was insufficient to warrant a re-trial (see [2001] 3 N.Z.L.R. 622). A majority of the Privy Council (Lord Nicholls of Birkenhead delivering the judgment) reversed this decision, adopting the wider approach and held that, as a matter of *principle*, exemplary damages centred on outrageous conduct that was "altogether unacceptable to society" (para. [20]); hence a further requirement of intentional wrongdoing or conscious recklessness on the part of the defendant was unnecessary. This would also avoid a lack of coherence in distinguishing between different types of outrageous conduct (paras. [22] and [40]). The majority also pointed to supporting precedents (paras. [41]–[50]). Finally, as a matter of *policy*, the argument about "floodgates" was not persuasive (paras. [58]–[62]).

The minority (comprising Lords Hutton and Millett) was of the view that the punishment that would be inflicted by an award of exemplary damages would not be appropriate unless the defendant had "a guilty mind". It is significant that the minority emphasised "that the rationale of exemplary damages is not to mark the court's disapproval of outrageous conduct by the defendant, rather the award is made to punish the defendant for his outrageous behaviour" (para. [77]). Here, we find the crux of the disagreement between the members of the Board. Before proceeding to consider this, it is interesting to note that the minority dissented only with regard to the law; it held that, *applying* the more restrictive approach, it would (like the majority) also hold that a new trial ought to be ordered.

The majority was obviously viewing the award of exemplary damages as being based wholly on the needs of the community; hence, the defendant's state of mind was immaterial so long as the outrageous conduct (*ex hypothesi* injurious to society) was present. The minority, on the other hand, adopted a wholly different approach, focusing on the individual (here, the defendant) instead. In other words, despite the fact that the conduct was outrageous, the individual defendant ought not to be punished if he had not been guilty of any advertent conduct. Here, we have the classic

(and intractable) clash between utilitarianism on the one hand and (conflicting) individual rights on the other. Far from being merely theoretical, the adoption of one approach or the other has profound implications on the practical plane. It is suggested that because the award of exemplary damages is highly exceptional precisely because of its punitive effect on the defendant, it ought not to be made save where the defendant either knew of or was consciously reckless towards the risk to which his conduct would expose the claimant, such state of mind to be ascertained by an *objective* analysis of the facts and surrounding circumstances (such an objective analysis also at least indirectly incorporating wider communitarian factors as well). Although the majority argues that criminal liability need not always flow from advertent conduct (para. [30]), strict liability is the exception rather than the rule. The minority's approach is also more persuasive because it would, practically speaking, hardly ever be the case that actionable negligence would be established where the defendant had not somehow been guilty of some advertent conduct in the first instance. The majority admits this (para. [23]) but insists that there might be exceptional situations (para. [26]). However, these are likely to be so rare as to be non-existent. Finally, although the majority cites a whole series of precedents and reports, it is submitted that many of them are neutral in effect or actually supportive of the minority's position (see, *e.g.*, the English Law Commission's Report on *Aggravated, Exemplary and Restitutionary Damages* (Law Com. No. 247) at paras. 5.46–5.53). Whilst one can agree with the citation by the majority of many cases establishing that outrageous conduct is necessary, it does not necessarily follow that advertent conduct on the defendant's part ought to be dispensed with.

The second decision, that of the Canadian Supreme Court in *Whiten* v. *Pilot Insurance Company* (2002) 209 D.L.R. (4th) 257, raised, *inter alia*, the interesting issue of whether or not exemplary damages could be awarded for cynical breaches in a *contractual* (as opposed to the more usual tortious) context. More generally, *Whiten* contains an excellent comparative overview as well as a succinct summary of the law relating to exemplary damages.

This case concerned not only a breach of contract in an insurance context but also conduct by the defendant insurer which the court found (LeBel J. dissenting) merited the restoration of a substantial award of exemplary damages by the trial judge that had been overturned on appeal. The court endorsed the existing Canadian position that exemplary damages may be awarded in a contractual context but such an award would be extremely rare *and*

that the defendant's conduct must *also* constitute a separate and independent actionable wrong (see *Vorvis* v. *Insurance Corp. of British Columbia* (1989) 58 D.L.R. (4th) 193 at 206 and *McKinley* v. *BC Tel* (2001) 200 DLR (4th) 385 at 416–418; cf. *Royal Bank of Canada* v. *W. Got & Associates Electric Ltd.* (1999) 178 D.L.R. (4th) 385 where, however, there was *concurrent* liability in contract and tort). However, the court adopted a broad construction of the latter requirement in holding that it did not necessarily require the commission of a tort but may be satisfied by the breach of an independent *contractual* duty to deal with the claimant policyholders in good faith.

In our view, the special effort taken in clarifying this requirement in *Vorvis* should be welcomed, as a more restricted approach insisting on concurrent liability in tort would create an artificial (and unjustifiable) distinction between contract and tort cases (see *per* Linden J. in *Brown* v. *Waterloo Regional Commissioners of Police* (1981) 136 D.L.R. (3d) 49; varied on appeal, (1983) 150 D.L.R. (3d) 729). And where the independent actionable wrong is itself *contractual* in nature, what is the justification for not providing for the possibility of awarding exemplary damages for breach of the *original* (*also contractual*) obligation provided that the defendant's conduct was sufficiently outrageous, hence avoiding what is, in effect, an arguably even more pronounced artificiality? Admittedly, this is a more liberal approach which has to respond to the concept of efficient breach which allows defendants to breach contracts (even cynically and outrageously) in order to garner a larger profit elsewhere, on the twin bases that the claimant suffers no real loss as it is compensated in damages and society generally benefits by a re-deployment of scarce resources. However, efficient breach is by no means universally accepted and might not in fact result in an increase in social efficiency (particularly in non-commercial situations). Here, again, we encounter a clash between societal and individual concerns. It is suggested, however, that the latter would have, on balance, a stronger call where the award of exemplary damages would actually reinforce the underlying moral conception of promise-keeping which constitutes the very essence of the law of contract itself. One other less ambitious possibility is to confine the liberal approach to specific situations where the award of exemplary damages is clearly justifiable: for instance, in the employment context, where considerations centring on "non-material" factors such as respect, dignity and the like are involved (see, *e.g.*, Venour, (1988) 1 Canadian Journal of Law and Jurisprudence 87 at 98–100). It should also be emphasised that the award of exemplary

damages is the exception rather than the rule. In the circumstances, it would be preferable not to limit severely the possibility of such awards in the first instance.

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PEY-WOAN LEE

A HARSH TWILIGHT

THE *New Shorter Oxford Dictionary* defines heresy as an opinion or doctrine contrary to the accepted doctrine of any subject. In *Pye* v. *Graham* [2002] 3 W.L.R. 221 the House of Lords robustly confirmed the orthodoxy relating to adverse possession and discounted discordant voices as heretical. There is probably general relief that no fireworks have disturbed the established law in its twilight years, but for this writer there is some regret over a wasted opportunity. Yet again in an adverse possession case, a result has been reached that caused some of the judges misgivings about the fairness of the outcome, but there was no serious attempt to try to address this by subjecting the whole area to a fresh scrutiny and considering whether there was any merit in heretical views.

The case concerned 25 hectares of agricultural land with development potential. Pye, a development company, was the registered proprietor of the land, but had no immediate use for it. So, perhaps understandably, and certainly foolishly, the company failed to react when the Grahams continued to farm the land after the expiration of their grazing agreement. The last permission granted to the Grahams expired in August 1984, but it was not until April 1998 that Pye woke up to the dangers of the situation and started proceedings for possession. By that time, of course, it was possible for the Grahams to claim that they had acquired title by adverse possession.

At first instance, Neuberger J. [2000] Ch. 676 held, "with no enthusiasm", that the Grahams had indeed established title by possession. This decision was reversed by the Court of Appeal [2001] Ch. 804, in an understandable but dubious attempt to find for Pye. Pye's relief has proved short-lived, however, because the House of Lords has now unanimously restored the judge's decision. Lord Browne-Wilkinson, who delivered the leading speech, gave a ringing endorsement to Slade J's "remarkable judgment" in *Powell* v. *McFarlane* (1977) 38 P. & C.R. 452, subsequently approved by the Court of Appeal in *Buckinghamshire County Council* v. *Moran* [1990] Ch. 623.