



HOUSE OF REPRESENTATIVES

# Supplementary Order Paper

Tuesday, 8 December 1998

ACCIDENT INSURANCE BILL

*Proposed Amendments*

Hon. DEREK QUIGLEY, in Committee, to move the following amendments:

*New clause 347A:* To insert, after *clause 347* on page 266, the following clause:

**347A. Exemplary damages**—(1) Nothing in this Act nor any rule of law prevents any person from bringing proceedings in any court in New Zealand for exemplary damages where the conduct of the defendant has resulted in a personal injury covered by this Act or the former Acts.

(2) The fact that the defendant has been charged with, convicted, or acquitted of an offence involving the conduct concerned in a claim for exemplary damages, does not prevent an award of exemplary damages where the conduct of the defendant has resulted in a personal injury covered by this Act or the former Acts.

(3) In determining the extent, if any, to which exemplary damages should be awarded, a court must consider the fact and adequacy of any prior penalty imposed on the defendant for conviction of any offence involving the conduct concerned.

(4) The fact that the defendant has not been charged or prosecuted and that the limitation period for bringing a charge has expired does not prevent a claim for exemplary damages.

(5) This section applies also where a defendant has been discharged without conviction under section 19 of the Criminal Justice Act 1986 or convicted and discharged under section 20 of the Criminal Justice Act 1986.

EXPLANATORY NOTE

This Supplementary Order Paper provides for exemplary damages to be claimed where the conduct of the defendant has resulted in personal injury by accident. In the recent case of *Daniels v Thompson* [1998] 3 NZLR 22 the Court of Appeal had to consider the principles which applied to a number of cases where plaintiffs claimed exemplary damages for acts which constituted serious criminal offending. The court considered that the cases raised important issues of principle and required a balancing of competing rights of a victim and an offender to be considered in the

context of the functions of the criminal law process. The conclusion of the Court of Appeal is that in this particular limited field where the criminal law has intervened or is likely to intervene exemplary damages cannot be justified.

This aspect of the law has recently been considered by the Law Commission for England and Wales in its report *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247) which favoured retention and expansion of exemplary damages. In the area of criminal offending, the Law Commission concluded that it would be inappropriate to advocate a complete and automatic bar; rather a court should have a discretion to refuse to consider or make an award of punitive damages, where a defendant has already been convicted of a criminal charge.

The Ontario Law Reform Commission in its *Report on Exemplary Damages* (1991) also concluded that punitive damages for the purpose of punishment should continue to be available as a supplement to the criminal law. The Commission considered whether a civil court ought to accept a criminal disposition as conclusive, thus making a prior criminal conviction an absolute bar to an award of punitive damages, or, whether a civil court ought merely to take a prior criminal disposition into account, as it invariably did, in determining whether and to what extent punitive damages should be awarded. Rejecting the argument of "double jeopardy" the Commission considered that tort law can supplement the criminal law by compensating for certain limitations inherent in the criminal justice system. Furthermore the symbolic benefits of the preserving a victim's right to commence a civil action for punitive damages and the symbolic benefits of an occasional successful action should not be ignored. The Commission made the following recommendations in respect of the criminal law overlap:

- The fact that there have been or might be criminal or other similar proceedings against the defendant should not operate as a bar to an award of punitive damages.
- In determining the extent, if any, to which punitive damages should be awarded, the court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant.
- The fact that the defendant has not been charged or prosecuted and the limitation period for criminal or other proceedings has expired should not operate as a bar to a claim for punitive damages.

The amendment overrides the effect of the decision in *Daniels v Thompson* by allowing claims for exemplary damages arising out of conduct of the defendant which has resulted in personal injury by accident and involves criminal or similar offending.