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Helmut Koziol
Vanessa Wilcox (eds.)

Punitive Damages: Common Law and Civil Law Perspectives

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Punitive Damages:
Common Law and Civil Law Perspectives

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This book is dedicated to

Ulrich Magnus

on the occasion of his 65th birthday

Preface

Punitive damages remain one of the most controversial areas in the history of tort law. With the growing literature on the subject, the consensus is that it seems worthwhile and even necessary to discuss, thoroughly and on a comparative basis, the nature, role and suitability of such damages in tort law and private law in general. This is especially so in light of the attempts to reform and unify continental European legal systems and the recent seminal judgments and consultations in this field of law.

The Institute for European Tort Law thus decided to embark on a comprehensive study on punitive damages. The study, which began in 2007, covers jurisdictions that explicitly allow the award of punitive damages, in particular, England, South Africa and the United States as well as those jurisdictions which purport (sometimes emphatically) to deny their existence (although some of them covertly incorporate punitive damages into the framework of their tort systems). The position in France, Germany, Hungary, Italy, the Scandinavian countries, Spain as well as EU law is thus considered. This book also includes reports on punitive damages from an insurance, law and economics and private international law perspective. A report on aggravated damages precedes a comparative report and conclusions. This book follows a conference held in November 2008 that was chaired by Sir Henry Brooke, whose chairmanship of the Law Commission for England and Wales coincided with the start of the Commission's consultation on punitive damages, and Prof. Ken Oliphant, the newly appointed Director of the Institute for Tort and Insurance Law.

We would like to thank the Institute staff, in particular, Mag. Lisa Zeiler and Thomas Thiede LL.B, LL.M for their help in making the Conference a success. We would also like to thank Mag. Christian Jöllinger, Mag. Kathrin Karner-Strobach and JUDr. Petra Pipkova for their valuable and varied assistance in producing this publication.

Helmut Koziol and Vanessa Wilcox
Vienna/Strasbourg, April 2009

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A Brief Introduction: The Origins of Punitive Damages

Sir Henry Brooke*

1 The primary purpose of an award of damages is to compensate the claimant for the harm that has been done to him: to put the claimant back, so far as money can do it, in the position in which he would have been if the wrong had not been done to him. In addition to purely compensatory damages, under English law, the award may also contain an element of aggravated damages, arising perhaps from the way the defendant behaved when committing the original wrong, or how he has continued to behave after the claim was made against him. Punitive or exemplary damages, as we prefer to call them in England and Wales, are quite different. They may be awarded in cases where it is felt that mere compensation is insufficient: cases where the defendant's conduct has been so outrageous as to merit punishment as well.

2 Exemplary damages first made their appearance on the legal scene in England in the 1760s. This happened during a series of cases in which the government of the day was trying to suppress the publication of a paper known as the North Briton with which a notorious politician called John Wilkes was associated. Individuals suffered wrongful interference with their liberty at the hands of public officials and, in the absence of a code, the English common law judges awarded non-compensatory damages – or told juries that they might award such damages – if the defendant's behaviour seemed bad enough, without troubling too much to classify these damages under any particular heading. There were plenty of cases in the law reports in which awards of what we now call exemplary damages were made at levels lower than the House of Lords. There followed similar awards, made in different contexts, and over the next 200 years exemplary damages were awarded from time to time not only in cases of assault, false imprisonment, defamation, seduction and malicious prosecution, but also in cases of trespass to land, and eventually trespass to goods.

* Sir Henry Brooke is a retired British judge. He was chairman of the Law Commission from 1993–1995 and was appointed Lord Justice of Appeal in 1996. He was Vice President of the Court of Appeal (Civil Division) from 2003–2006, is chairman of the Trustees of BAILII (the free access legal website) and was until February 2009 a member (formerly chairman) of the Board of Editors of the White Book. Sir Henry now sits occasionally as a member of the Judicial Committee of the Privy Council.

3 In the fullness of time countries that were formerly English colonies developed their own versions of the common law, and sometimes these diverged in significant respects from the way in which the common law was being developed in England. In particular, after the House of Lords, England's highest court, had endeavoured to rationalise the law and place curbs on its continuing development in the mid-1960s, the High Court of Australia refused to accept these curbs. In those days there was still an avenue of appeal from the highest Australian court to the Judicial Committee of the Privy Council, and in their capacity as Australia's highest court the Privy Council refused to interfere, recognising the right of Australian judges to develop the common law in the manner they thought most appropriate for that jurisdiction. Canada and New Zealand have also declined to follow the modern English approach. Today, exemplary damages still continue to form a part of the law of these jurisdictions, and, prolifically, that of the U.S.A. They also form part of the law of Northern Ireland, Ireland and Wales but they have never formed part of the law of Scotland.

4 Exemplary damages have, since their beginning, been an extremely controversial topic among judges, lawyers, legislators and academics alike. I was Chairman of the Law Commission in the early 1990s, when we published a consultation paper inviting people's views on the appropriateness of retaining exemplary damages as a remedy available in English law. We also asked them, if it were to be retained, what reforms were needed, and whether these reforms could be achieved by judicial development or whether statutory intervention was required to put the law back on the rails. I remember that the Commissioner who took over responsibility for this project half way through its course embarked on it with a frame of mind which was intellectually opposed to them, because they constituted such an illogical anomaly. Opinion on consultation was so polarised that before I left the Commission in December 1995 we took the unusual step of publishing a supplementary consultation paper, outlining three possible models for reform. A considerable majority of consultees then favoured the retention of exemplary damages.

5 Those who support the availability of exemplary damages in appropriate cases say that they provide a suitable means of punishing minor criminal acts which are in practice ignored by the criminal system. The police, they say, should be principally concerned with the pursuit of serious crime.

6 The opponents of exemplary damages say that they are an anomaly, and that they confuse the civil and criminal functions of the law. They say that it is particularly anomalous that the claimant in the particular action should recover a financial windfall. They feel that any award imposed by way of punishment should be paid to the state.

7 While jurisdictions which admit punitive damages into their legal systems continue to grapple with their oddities and inconsistencies and question whether it is appropriate for them to retain, legislate, reform or abolish exemplary damages altogether, other jurisdictions – in particular, those on the continent – have

recently begun to support the idea of exemplary damages, or at least elements of them, in appropriate cases, with the hope that the awards of such damages might help to buttress their laws.

This book thus explores how exemplary damages have developed in key jurisdictions since their origin over 200 years ago, as a means of deterring the torts of our times. Reports from England and the United States describe their aims, their scope, their application, their strengths and their shortcomings and outline doctrinal debates on the controversies surrounding them while the South African report offers an insight into its unique, mixed tort system. Just as an important part of the Anglo-Saxon temperament is to distrust codes of law, so too, an important part of the continental temperament is to distrust punitive damages. However, just as codification exists in one form or another in Anglo-Saxon jurisdictions, it would be unsurprising if some courts and legislatures on the continent impliedly or covertly award exemplary damages to deter behaviour that is sufficiently outrageous. The reports from Denmark, France, Germany, Hungary, Italy, Norway, Spain, Sweden and also on EU law seek to ascertain the extent to which this proposition is true.

Country Reports

Punitive Damages in England

Vanessa Wilcox[*]

I. Introduction

The history of punitive or exemplary damages, the terms are synonymous, is rooted in 18th century English case law though it was not until 1964, in the case of *Rookes v Barnard*[1] that such damages were specifically identified as "punitive" or "exemplary". Punitive damages are damages which are awarded over and above what is necessary to compensate a claimant. In granting an award of punitive damages, in addition to marking their disapproval of his behaviour, the judge or jury primarily seek to punish the defendant and deter him and others from similar outrageous conduct. Under English law, punitive damages are distinguishable from non-pecuniary damages awarded to reflect the harm caused to a victim because of the reprehensible manner in which a defendant committed a wrong. Notwithstanding their possible deterrent or punitive effect, such aggravated damages, which form the subject of a separate report,[2] are compensatory in nature. It is to be noted that an award of punitive damages may only be made if the amount to be awarded by way of compensation (including aggravated damages) is insufficient to serve as punishment as well as compensation. 1

Even under English law, punitive damages are a controversial topic and have been so for many years. In *Rookes*, as well as distinguishing punitive damages from aggravated damages, the House of Lords, or Lord Devlin to be precise, established three categories under which the former were to be available (the categories test). As a result of the Court of Appeal's decision in *AB v South West Water Services Ltd*.,[3] a claimant seeking punitive damages also had to satisfy the cause of action test. This test illogically restricted the availability of punitive damages to causes of action for which prior to 1964 (i.e. when *Rookes* was decided) such an award had been made. In the midst of the controversy 2

[*] Vanessa Wilcox, PgD, LLM (Cantab.) is based at the Institute for European Tort Law of the Austrian Academy of Sciences in Vienna. I am extremely grateful to Prof. Ken Oliphant for his guidance in the drafting of this report.

[1] *Rookes v Barnard* [1964] 1 All England Law Reports (All ER) 367.

[2] *See A.J. Sebok/V. Wilcox*, Aggravated Damages (contained in this publication) no. 1 ff.

[3] *AB v South West Water Services Ltd.* [1993] Queen's Bench (QB) 507.

following the *AB* decision, the Law Commission for England and Wales issued a consultation paper on Aggravated, Exemplary and Restitutionary Damages in the autumn of 1993, the results of which formed the subject of its 1997 report of the same title.[4] In the report, the Law Commission reviewed the law as it stood, inter alia, on exemplary damages and made far-reaching recommendations which were all rejected by the government in November 1999.[5] Shortly after this, in May 2000, the Irish Law Reform Commission produced a report also on Aggravated, Exemplary and Restitutionary Damages.[6] The historical course of the law on punitive damages was to take a further turn in 2001 when the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary*[7] overruled *AB*. As a corollary, only the categories test need now be satisfied. The government welcomed this move in its May 2007 consultation paper, The Law on Damages[8] and also confirmed that it did not intend to extend the availability of exemplary damages in civil proceedings. Both the above reports and the 2007 consultation paper will be considered in this report to the extent that they are relevant.

3 Punitive damages have long formed the jurisprudence of other common law jurisdictions. In particular, the concept of punitive damages in the United States, Canada, Australia and New Zealand is rooted in English law. However, the laws on punitive damages in these countries have developed differently from those in England – principally, on the categories test so that in general, any highly reprehensible civil wrongdoing may warrant a punitive award. The practice in these jurisdictions, save that in the United States, will be considered in brief. This report is divided as follows: Part II The Three Categories; Part III The Cause of Action Test Abolished; Part IV Factors Relevant to an Assessment of Punitive Damages; Part V The Case against Punitive Damages; Part VI Alternative Remedies; Part VII Other; and Part VIII Conclusions.

II. The Three Categories: The Categories Test

4 As aforesaid, before *Rookes v Barnard* the law with regard to aggravated and exemplary damages was confused and fraught with anomalies. The House of Lords trawled through the authorities and from the single nebulous class proceeded to reclassify the lot into two categories so that punitive or exemplary damages acquired – at least in theory – a separate and mutually exclusive meaning from aggravated damages. Having done this, the House of Lords, through the speech of Lord Devlin, laid down categories under which exemplary damages would be appropriate. Two common law categories were established and a further, self-evident statutory category was acknowledged. The

[4] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997).
[5] Hansard, HC Debates, 9.11.1999, col. 502.
[6] Irish Law Reform Commission, Aggravated, Exemplary and Restitutionary Damages, LRC 60–2000 (2000).
[7] *Kuddus v Chief Constable of Leicestershire* [2002] 2 Appeal Cases (AC) 122.
[8] Department for Constitutional Affairs (DCA), The Law on Damages CP 9/07, May 2007.

position under English law today therefore is that punitive damages can only be awarded if the facts can be brought within one of the said categories: (a) oppressive, arbitrary or unconstitutional action by servants of the government; (b) conduct calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant; and (c) express statutory authorisation. As will be seen below, the significance of the last category is likely to be diminished as a result of government intervention.

A. Oppressive, Arbitrary or Unconstitutional Action by Servants of the Government

Lord Devlin in *Rookes* felt incapable of diminishing the use of exemplary damages in this type of case where they serve a valuable purpose in restraining the arbitrary and outrageous use of executive power.[9] It is perhaps not surprising that this category relates to some of the earliest reported decisions in England involving exemplary damages namely, *Wilkes v Wood*,[10] *Huckle v Money*[11] and *Benson v Frederick*.[12] As the title suggests, the requirements for a case to fall within this category are twofold: first, the conduct complained of must be "oppressive, arbitrary or unconstitutional" and secondly, such misconduct must have been actioned by a "servant of the government". 5

1. Oppressive, Arbitrary or Unconstitutional Conduct

a) Disjunctive terms

The epithets "oppressive, arbitrary *or* unconstitutional" fall to be read disjunctively. In the wrongful arrest case of *Holden v Chief Constable of Lancashire*,[13] attention was drawn to the use of the preposition "or" in the terms. The facts were that the claimant was arrested and detained for 20 minutes by a member of the defendant's police force and sought damages for wrongful arrest. The judge withdrew consideration of the question of exemplary damages from the jury on the ground that there was no suggestion of oppressive behaviour on the part of the police. However, the Court of Appeal ruled that as false imprisonment was unconstitutional, the wrongful arrest by a police officer fell within 6

[9] *Rookes v Barnard* [1964] 1 All ER 367, 408 per Lord Devlin: "Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages."

[10] *Wilkes v Wood* (1763) Lofft's King's Bench Reports (Lofft) 1.

[11] *Huckle v Money* (1763) 2 Wilson's Reports (Wils.) 205.

[12] *Benson v Frederick* (1766) 3 Burrow's King's Bench Reports (Burr.) 1845.

[13] *Holden v Chief Constable of Lancashire* [1986] QB 380.

this category regardless of the absence of oppressive behaviour. In support of this conclusion, reference was made to *Huckle v Money* where punitive damages were awarded for false imprisonment notwithstanding the claimant was in custody for only six hours and had been used "very civilly by treating him with beefsteaks and beer".

7 More recently, the trial judge in *Rowlands v Chief Constable of Merseyside Police*[14] had withdrawn from the jury consideration of an award of exemplary damages on the ground that there was nothing "extraordinary" about the case. On appeal, Moore-Bick L.J. referred to *Holden* where wrongful arrest per se was sufficient to fall under the first category regardless of whether it had been accompanied by conduct of an overtly oppressive nature. This was a far cry from the facts in *Rowlands* where the unjustified arrest had been carried out in an arrogant and abusive manner. Whether the judge considered the case to be exceptional was beside the point.

b) Unconstitutionality

8 An appreciation of what amounts to "unconstitutional" conduct is fundamental for a claimant seeking to bring their case within this category in the absence of oppressive or arbitrary conduct. Will the infraction of a "constitutional right" necessarily warrant a punitive award for unconstitutional conduct? The Court of Appeal in *Watkins v Secretary of State for the Home Department and Others*[15] thought so. The claimant brought proceedings against, inter alia, the Home Office alleging that his correspondence with his legal advisers had been opened in breach of the Prison Rules. The court held that if there was a right which may be identified as a "constitutional right", then there may be a cause of action in misfeasance in public office for infringement of that right without proof of damage. On the facts, it decided that the claimant's constitutional right to have unimpeded access to the courts and to legal advice had been interfered with. It awarded Watkins nominal damages and remitted the matter to the county court for consideration of whether punitive damages should be awarded. Counsel for the defendants ventured so far as to submit that the only reason the Court of Appeal would rule as it did was so it could expand the tort of misfeasance in public office (so that it was made out despite no finding of special damage) with the sole practical effect of expanding the availability of exemplary damages.

9 On appeal, the House of Lords held that special (or material) damage in the form of financial loss or physical or mental injury was an essential ingredient of the tort of misfeasance in public office. Whereas even the most trifling

[14] *Rowlands v Chief Constable of Merseyside Police* [2006] England and Wales Court of Appeal (Civil Division) (EWCA Civ) 1773.

[15] *Watkins v Secretary of State for the Home Department and Others* [2006] United Kingdom House of Lords (UKHL) 395. See *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) no. 40 ff.

and transient physical assault would undoubtedly have given the respondent a cause of action in private law for trespass to the person, sounding in damages (and if appropriate aggravated and/or exemplary damages), the tort of misfeasance in public office is actionable only where the claimant has suffered loss or damage which was caused by the tortious conduct of a public officer.[16] *Watkins* confirms therefore that breach of a "constitutional right" does not automatically expose the defendant tortfeasor to liability for punitive damages. An actionable tort must first be made out and this may require physical, mental or financial damage.[17]

2. Servants of the Government

As forementioned, the second requirement is that the tortfeasor must have been a servant of the government at the time of the tort. In a string of cases, the courts have concurred that "servants of the government" is to be widely construed. It corresponds to all those wielding *functions of an executive nature* derived from government, central or local. It is neither useful to enquire whether a body is one whose decisions can be judicially reviewable in public law, nor whether a body is an emanation of the state for the purposes of European Community law if such a body does not exercise functions of an executive or governmental nature.[18] It is to be noted that Lord Devlin in *Rookes* was not in favour of extending this category to comparable conduct on the part of private individuals or corporations. On the facts in *Rookes* the defendants, who were trade union officials, did not qualify as "servants of the government". In *R. v Reading Justices Ex p. South West Meat Ltd. (No. 2)*,[19] the court held that officers of the Intervention Board for Agricultural Produce were servants of the government and in *Columbia Picture Industries Inc. v Robinson*[20] it was suggested that solicitors executing an Anton Piller (search) order, since they act as officers of the court, would also fall under this category. As will be seen below, police misconduct has generated most of the awards under this category. 10

[16] See *Holden v Chief Constable of Lancashire* [1986] QB 380.

[17] Incidentally, there was no challenge to the judge's finding that the prison officers' conduct had not caused Watkins "material damage" so it was not necessary for the House to decide precisely what would amount to "material damage". In *Karagozlu v Commissioner of Police of the Metropolis* [2006] EWCA Civ 1691, the Court of Appeal considered that loss of liberty as a result of misfeasance was sufficient "material damage" to support a cause of action. Accordingly, *Watkins* may simply be an invitation to ensure that loss and damage are fully pleaded in the particulars of claim. See *S. Simblet*, Recent Developments in Claims against the Police: Damages >http://www.gardencourtchambers.co.uk<

[18] *AB v South West Water Services Ltd.* [1993] QB 507, 531.

[19] *R. v Reading Justices Ex p. South West Meat Ltd. (No. 2)* [1992] Criminal Law Review (Crim LR) 672.

[20] *Columbia Picture Industries Inc. v Robinson* [1987] Law Reports, Chancery Division (Ch) 38.

B. Conduct Calculated by the Defendant to Make a Profit for Himself which May Well Exceed the Compensation Payable to the Claimant

11 Lord Devlin, who founded this category on a sequence of cases beginning with *Bell v Midland Railway Co*.,[21] *Williams v Currie*[22] and *Crouch v Great Northern Railway*,[23] explained the reasoning behind his second category in the following way: "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."[24] Cases under this category commonly come under defamation and unlawful eviction.

1. Defamation Cases

12 It was once argued that to allow punitive damages under the second category "would hamper publishers or limit their freedom to conduct their business because it can always be inferred that publishers publish any book because they expect to profit from it."[25] Nevertheless, the mere fact that a tort, and particularly a libel, is committed in the course of a business carried on for profit is not sufficient to bring a case within the second category. What is necessary in addition is: (a) *knowledge* that what is proposed to be done is against the law or a *reckless* disregard whether what is proposed to be done is illegal or legal; and (b) a decision to carry on doing it because the prospects of material advantage outweigh the prospects of material loss.[26] There is no question of curtailing the freedom of a reputable publisher.[27]

a) State of the defendant's mind

13 It is for the claimant to satisfy (a) above on the balance of probabilities. Little difficulty arises in the straightforward but relatively rare case in which it can be shown that the defendant actually *knew* that he was committing a tort when he published an article. Where *recklessness* (mere carelessness or negligence will not do) is in issue, the jury must be satisfied that the publisher had "no genuine belief in the truth of what he published. In *John v Mirror Group Newspapers Ltd*.[28] Sir Elton John sought, inter alia, punitive damages against Mirror Group Newspapers Ltd., after it ran an article claiming that he was on a diet which constituted a form of bulimia and was potentially fatal. The author of

[21] *Bell v Midland Railway Co*. (1861) 10 Common Bench Reports, New Series (CBNS) 287.
[22] *Williams v Currie* (1845) 1 Common Bench Reports (CB) 841.
[23] *Crouch v Great Northern Railway* (1856) 11 Exchequer Reports (Exch.) 742.
[24] *Rookes v Barnard* [1964] 1 All ER 367, 410 f.
[25] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1088 f. per Lord Reid.
[26] Ibid. at 1079 per Lord Hailsham. See also *Manson v Associated Newspapers Ltd.* [1965] 1 Weekly Law Reports (WLR) 1038; *McCarey v Associated Newspapers Ltd.* [1965] 2 WLR 45; *Broadway Approvals Ltd. v Odhams Press Ltd. (No. 2)* [1965] 1 WLR 805.
[27] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1089 per Lord Reid.
[28] *John v Mirror Group Newspapers Ltd.* [1997] QB 586.

the article was not present at the party where John was apparently seen to be chewing and spitting out his food. The Court of Appeal held that the evidence met the test of recklessness. It held that it was almost beyond argument that it was necessary to check the veracity of the story, for which purpose the obvious reference point was the host or, if he was unavailable, members of his staff, and be able to confirm or deny whether or not the claimant had in fact been present at the party, and if so, how he had behaved. Recklessness was apparent as: (a) the newspaper itself regarded such an enquiry as requisite; (b) the one undoubted check which was made to John's representatives gave a clear warning that it seemed unlikely that the allegation was true, and advised the enquirer to be very careful; (c) there was no urgency about the article, which was not news which would lose all interest if it was deferred a week or more to the next or subsequent issue of the newspaper; and (d) it was an obviously damaging story about an extremely well known public figure.[29]

b) The defendant's conduct

14 The claimant must also prove that the defendant acted with the hope or expectation of material gain. The requisite conduct is not intended to be limited to the kind of mathematical calculations to be found on a balance sheet.[30] If a claimant had to prove that, it would be seldom that he would be in a position to do so.[31] The defendant may calculate that the claimant will not sue at all because he does not have the money or because he may be physically or otherwise intimidated.[32] The requisite conduct may equally take the form of an expense saved, as where a newspaper is informed of a possible libel after going to press but decides not to recall the issue with the costs that would involve.[33] Perhaps the most helpful authority on the practical application of the requirements of the conduct calculated by the defendant to make a profit for himself is to be found in *Riches v News Group Newspapers Ltd*.[34] The facts were that a Sunday newspaper published an exclusive article based on a letter received from a mentally disturbed hostage-taker making serious allegations against police officers of a criminal investigation department. There the Court of Appeal held that there was evidence fit to be left to the jury on calculation, including the fact that the article had an eye-catching headline, an "exclusive" caption and was positioned on the front page of an edition distributed nationwide. The facts in *John v Mirror Group Newspapers Ltd.* were said to be a precise counterpart of those in *Riches*' case insofar as publicity was concerned. Moreover, it was said that the newspaper had calculated that having regard to John's "self-confessed 17 years of drug and dietary abuse and his possession of drugs," he was very unlikely to sue.

[29] Ibid. at 622 f.
[30] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1078 f. per Lord Hailsham L.C.
[31] Ibid. at 1101 per Viscount Dilhorne.
[32] Ibid. at 1079 per Lord Hailsham L.C.
[33] *Maxwell v Pressdram Ltd. (No. 2)* (1986) Times, 22 November. See *A. Tettenborn*, The Law of Damages (2003) no. 2.50.
[34] *Riches v News Group Newspapers Ltd.* [1986] QB 256.

15 The classic example satisfying requirements a) and b) is *Cassell & Co. Ltd. v Broome*.[35] Here, the publication not only reeked of defamation but also involved a deliberate trading on it. This was an action in which the claimant, a distinguished retired captain of the Royal Navy, alleged libellous conduct by the author, one Mr. Irving and the publishers, Cassell & Co. Ltd., in a book which imputed to him responsibility for ill-fated naval disasters of the Second World War. The defendants had been cautioned by the claimant that the manuscript was "unquestionably libellous", high ranking naval experts considered that manifest libels lay in the book and the first of several publishers who turned down the book rejected it as being too dangerous. That Cassell & Co. Ltd. took these threats seriously can be seen from their reaction: "In that case we will tighten up the indemnity clause in Mr. Irving's agreement."[36] Following publication of proof copies with only minor modifications, a writ and statement of claim were issued by the claimant but Cassell & Co. Ltd. went on and published a hardback edition. The House concluded that the facts came well within the purview of Lord Devlin's second category. The author prided himself on being able to say "some pretty near the knuckle things"[37] and the publishers went ahead with the most cold-blooded and clear sighted appreciation of what they were doing.[38] Viscount Dilhorne thought that the jury were entitled to draw the inference that Cassell & Co. Ltd. had "decided to publish the book, despite Captain Broome's threats of action, knowing that passages in the book were libellous of Captain Broome and not caring whether those passages were true or false and on the footing that it was worth their while to run the risk of an action being brought by him and of his obtaining damages in order to make a profit on the book."[39] The punitive award was upheld.

2. Landlord/Tenant Cases

16 Notwithstanding Lord Devlin's express recognition that libellous conduct would fall under the second category and his view that "one man should not be allowed to sell another man's reputation for profit",[40] exemplary damages have been more commonly sought and awarded for wrongful eviction as opposed to defamation. As with defamation cases, what is required to be shown is that the defendant made a decision to proceed with the conduct, knowing it to be wrong or reckless as to whether or not it was wrong, because the advantages of going ahead outweighed the risks involved.

17 In formulating the scope of the second category, Lord Devlin explained that it 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 claimant some object – perhaps some *property which he covets* – which either he could not

[35] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027.
[36] Ibid. at 1102.
[37] Ibid. at 1057 per Lord Hailsham L.C.
[38] Ibid. at 1057 per Lord Hailsham L.C.
[39] Ibid. at 1102.
[40] *Rookes v Barnard* [1964] 1 All ER 367, 410.

obtain at all or not obtain except at a price greater than he wants to put down."[41] *Drane v Evangelou*[42] is illustrative at this point: A rent officer reduced the claimant's rent, in line with the Rent Acts, to the dissatisfaction of his landlord. While the claimant was out, three associates of the defendant landlord entered the former's premises, put his belongings outside in the back yard and prevented him from entering the flat. The landlord's relatives were installed instead and despite injunctions to restore the claimant to the property, the latter only regained possession of the flat after being kept out of occupation for a period of ten weeks. Such conduct was said to be sufficiently serious to warrant an award of punitive damages under this category. Similarly, in *Reid and Reid v Andreou*,[43] the unlawful eviction was motivated by the landlord's desire to gain the premises for his family's use.

Unlike *Drane v Evangelou* and *Reid and Reid v Andreou*, where the landlord wanted the flats for their relatives' occupation, in other unlawful eviction cases, e.g. *Guppy (Bridport) v Brookling and James*,[44] *McMillan v Singh*[45] and *Daley v Mahmood*,[46] the landlord's focus was squarely on pecuniary gain. In *McMillan v Singh* the landlord, taking advantage of the tenant's temporary absence, seized the room and obtained a higher rent. The county court judge declined to award exemplary damages on the ground that the tenant's rent had been in arrears from time to time and he had not therefore "come to court with clean hands".[47] The Court of Appeal viewed this as an inadequate attempt to provide an escape route for the defendant and stated that the "clean hands" maxim was restricted to equity. It proceeded to award punitive damages. *Perry v Scherchen*[48] and *Bhatnagar and Elanrent v Whitehall Investments*[49] are also authorities for the proposition that rent arrears are no bar to a claim for punitive damages. Eviction in such cases ought to be done through lawfully established channels. It is to be noted that the initial eviction need not be forced. Exemplary damages were awarded

18

[41] Ibid. at 411. Emphasis added.
[42] *Drane v Evangelou* [1978] 2 All ER 437.
[43] *Reid and Reid v Andreou* [1987] Current Law Yearbook (CLY) 2250. The landlord also based his claim on rent arrears.
[44] *Guppy (Bridport) v Brookling and James* (1983) 14 Housing Law Reports (HLR) 120.
[45] *McMillan v Singh* (1985) 17 HLR 120.
[46] *Daley v Mahmood* [2006] Property & Compensation Reports 1 (P & CR) DG 10.
[47] *McMillan v Singh* (1985) 17 HLR 120, 124 per Sir John Arnold: Clean hands is "…a conception that is familiar in equity cases where one is seeking the intervention of the court by the award of an equitable remedy and it is held that the plaintiff has behaved in the transaction out of which the claim for damages arises, or some very closely associated transaction, so badly that he is not in a position to complain about the defendant's conscience, and so in the classical language of equity he fails to come into equity, as it is said, with clean hands…All that this man did was to fall into arrears from time to time with his rent. It seems to me remote altogether from the conception, but apart from that this is a common law claim, and it is no defence in a common law claim that you have failed in the transaction, or any associated transaction, to behave with that propriety which enables you to be a successful plaintiff in equity; nor, so far as I know, has the conception ever been applied to the quantification of damage. It goes to the establishment of liability. So that I do not think that the judge approached the case in the right way."
[48] *Perry v Scherchen* [2002] 1 P & CR DG 8.
[49] *Bhatnagar and Elanrent v Whitehall Investments* [1996] CLY 3790.

in *Collier v Burke*[50] where the tenant agreed to move temporarily from his room to another room in the house to enable repairs to be carried out. The landlord refused subsequently to allow him back into his room.

19 Exemplary damages may also be sought against anyone who *acts on behalf of* the landlord. What is required is evidence that such an agent committed the tort in a way that indicates he directed his mind to the mercenary advantages to be gained by his conduct. In *Sampson and Another v Wilson and Others*,[51] it was established that an agent of the landlord behaved like a man who must have been reckoning there was money to be made within the definition of *Rookes*. Thus notwithstanding *Daley & Another v Ramdath*[52] – a case where a landlord's agent was held not liable for exemplary damages because he could not have made any money out of it – the landlord and *agent* were said to be jointly and severally liable for exemplary damages under the facts in *Sampson*.

20 Punitive damages have also been awarded for breach of statutory duty by a landlord who failed to consent to an application for a licence to assign (or underlet) within a reasonable time: *Design Progression Limited v Thurloe Properties*.[53] It was held there that the landlord sought to make a profit by abusing the procedures under the Landlord and Tenant Act 1988 in order to see off an assignee with a view to recovering the premises and extracting a higher rent on the open market.

21 In summation, exemplary damages under this category have been awarded not merely to reverse or extract the defendant's undeserved gain (the functions of restitutionary and disgorgement damages respectively) but to teach the wrongdoer that "tort does not pay".[54] The extent to which gain-based damages can usurp the role of this category will be evaluated infra no. 116 ff.

C. Punitive Damages Expressly Authorised by Statute[55]

22 Lord Devlin in *Rookes* thought that punitive damages could properly be awarded in instances foreseen by parliament.

[50] *Collier v Burke* [1987] CLY 1143. Notably, the tenant's determination to remain in this property was astounding considering the landlord had pushed a door into his face in March 1984 thereby breaking his glasses. In November 1984, the landlord had assaulted the claimant with a hammer and knife causing a number of injuries including lacerations to the head, and had stabbed through his right chest puncturing his lung. The landlord was however convicted of malicious wounding in respect of this last assault.

[51] *Sampson and Another v Wilson and Others* (1994) 26 HLR 486.

[52] *Daley & Another v Ramdath* (1993) 25 HLR 273.

[53] *Design Progression Limited v Thurloe Properties* [2005] 1 WLR 1.

[54] *Rookes v Barnard* [1964] 1 All ER 367, 411.

[55] Note that exemplary damages are also mentioned in one other statute, the Law Reform (Miscellaneous Provisions) Act 1934. The Act does not provide for an award of punitive damages hence its exclusion from the section. Rather s.1(2)(a) of the Act provides that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable *shall not* include any exemplary damages. See infra no. 98.

1. Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951

Until recently, the less contentious of the two statutes which purportedly authorise such an award was the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951. The Act protects individuals who serve in the armed forces by restricting the enforcement of various civil judgments against them, except with the leave of an appropriate court. Under s.13 of the Act, exemplary damages may be awarded to the disadvantage of anyone who omits to obtain such leave. 23

Despite the express mention of exemplary damages under s.13, Lord Kilbrandon in *Broome* turned his attention to the practice in Scotland where the said damages are not recognised. He noted that, "Section 13 (2) applies, by virtue of section 13 (6), to Scotland, and since I can hardly believe that this Act introduced for the first time, as it were by a side-wind, the doctrine of punitive damages into the law of Scotland, I conclude again that 'exemplary' really means 'aggravated.'"[56] As mentioned above, in May 2007, the Department of Constitutional Affairs, whose duties have now been taken over by the Ministry of Justice, issued a consultation paper on a series of previous Law Commission reports including that on Aggravated, Exemplary and Restitutionary Damages 1997. Under the consultation paper, it is the government's view that s.13 Auxiliary Forces (Protection of Civil Interests) Act 1951 is "clearly anomalous". It proposes to replace the term "exemplary damages" with "aggravated damages" which would accord with the view of the Act expressed by Lord Kilbrandon in *Broome.*[57] 24

2. Copyright, Designs and Patents Act 1988

The second example, that under the copyright provisions, is less clear in that no express reference to exemplary damages is mentioned. Rather, s.97 enables the court, in an action for infringement of copyright, to award such "additional damages" as the court may consider appropriate. Despite support for the proposition that "additional damages" under s.97(2) Copyright, Designs and Patents Act 1988 are intended to be "punitive" in nature,[58] the government 25

[56] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1133.

[57] The Law on Damages CP 9/07, May 2007, par. 199. See also, *K. Oliphant*, England and Wales, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 1 ff.

[58] See Whitford Committee Report on the Reform of Copyright and Designs Law (1977) Cmnd. 6732, par. 704; *Collins Stewart Ltd. v The Financial Times Ltd.* [2005] England and Wales High Court (EWHC) 262 (QB): "Besides, it appears to me that damages recoverable under s.97 have more in common with exemplary damages than they do with aggravated damages in the senses in which those terms are used at common law." per Gray J. at [34]. See also The Report of the Copyright Committee (1952) Cmnd. 8662, par. 294 and *Williams v Settle* [1960] 1 WLR 1072 though in respect of s.17(3) which preceded s.97(2). For authority against the proposition see *Redrow Homes Ltd. v Bett Brothers plc* [1999] 1 AC 197, 209 per Lord Clyde; *H. McGregor*, McGregor on Damages (17th ed. 2003) par. 11:031. See also *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1080 f. per Lord Hailsham; *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1133 f. per Lord Kilbrandon; *Beloff v Pressdram* [1973] 1 All ER 241, 265

proposed to settle the matter in line with Pumfrey J.'s ruling in *Nottinghamshire Healthcare NHS Trust v News Group Newspapers Ltd.*,[59] i.e. that s.97 authorises an award of aggravated and restitutionary damages.[60]

3. Patents Act 1977

26 Additional damages are also mentioned in schedule A1 Patents Act 1977. Par. 12 of the schedule directs the court to award such additional damages as the justice of the case may require where a person knowingly provides false information relating to biotechnological innovations. This provision does not seem to have generated any reported case law.

4. Reform Proposals

27 Notwithstanding the ambiguity surrounding the copyright provisions, what is unequivocally certain is that since *Rookes v Barnard*, parliament has not deemed it necessary to expressly authorise an award of punitive damages in the course of enacting new legislation. In the recent consultation paper, the government has said that it does not intend any further statutory extension of exemplary damages in civil proceedings.[61] It considered the term "additional damages" in both schedule A1 Patents Act 1977 and under the 1988 Act as anomalous and its use as unhelpful and proposed that "additional damages" be replaced with "aggravated and restitutionary damages". These changes would not affect the potential availability under the common law of exemplary damages in cases where the tortfeasor's conduct was calculated to make a profit which might well exceed the compensation payable to the claimant.[62]

28 The decision in *Collins Stewart Ltd. and another v Financial Times Ltd.*[63] poses an obstacle to the proposed changes in that the Court of Appeal there decided that aggravated damages were in principle not available to a corporate claimant because a company has no feelings to injure and cannot suffer distress. In view of the fact that most claims under the 1977 and 1988 Acts are likely to be brought by corporate claimants, in amending the Acts, the government also proposed to clarify that aggravated and restitutionary damages can be awarded to corporate claimants under the Acts.[64]

per Ungoed Thomas J.; *Rank Film Distributors v Video Information Centre* [1980] Fleet Street Reports (FSR) 242, 266 per Templeman L.J. who all doubted whether s.17(3), which did not use the phrase "exemplary damages", authorised an award of such damages. See *C. Michalos*, Copyright and Punishment: The Nature of Additional Damages, European Intellectual Property Review (EIPR) 2000, 22(10), 470.

[59] *Nottinghamshire Healthcare NHS Trust v News Group Newspapers Ltd.* [2002] Entertainment and Media Law Reports (EMLR) 33, at [51].

[60] DCA, The Law on Damages CP 9/07, May 2007, par. 211 and 216.

[61] Ibid. at par. 198 and 209.

[62] Ibid. at par. 211.

[63] *Collins Stewart Ltd. v The Financial Times Ltd.* [2005] EWHC 262.

[64] DCA, The Law on Damages CP 9/07, May 2007, par. 212.

These changes, together with that under the Auxiliary Forces (Protection of Civil Interests) Act 1951, would mean that exemplary damages are no longer available under statute and thus entirely a matter for the common law.[65] 29

III. The Cause of Action Test Abolished

A. The Law Post-Kuddus

Before the House of Lords' decision in *Kuddus v Chief Constable of Leicestershire Constabulary*,[66] the legal landscape was such that in order to qualify for exemplary damages, the claimant had to satisfy: (a) the categories test; and (b) the cause of action test. The latter was introduced following the Court of Appeal's decision in *AB v South West Water Services Ltd*.[67] which seriously limited the types of cases in which punitive damages were awardable. It was said that the combined effect of *Rookes v Barnard* and inferences to be drawn from the majority of the speeches in *Cassell & Co. Ltd. v Broome* was that the claim must be limited to torts (or causes of action) in respect of which it could be established that there had been an award of exemplary damages prior to 1964. As a corollary, exemplary damages could only be awarded for malicious prosecution, false imprisonment, assault and battery, defamation, trespass to land or to goods, private nuisance and tortious interference with business as these torts were ones for which exemplary damages had been awarded before *Rookes v Barnard*.[68] 30

Having applied the cause of action test, the Court of Appeal in *AB* decided that exemplary damages were not available in claims arising out of the contamination of drinking water supplies for public nuisance and negligence. Other wrongs which failed the cause of action test included deceit, breach of European Community law, patent infringement and unlawful discrimination on the grounds of sex, race or disability.[69] Interestingly, *Bradford City Metropolitan Council v Arora*[70] was a case authorising exemplary damages for an applicant for a post at a local authority college who suffered sex and race discrimination – a cause of action for which prior to 1964, no such an award had been made. However Stuart-Smith L.J. in *AB* held that the only issue before the Court of Appeal in that case was whether the officers were servants of the government and the case therefore proceeded on the assumption that exemplary damages could be awarded for a statutory tort created after 1964. As the cause of action point formed no part of the *Arora* ratio, the court in *AB* treated it as having been decided per incuriam.[71] 31

[65] Ibid. at par. 199.
[66] *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122.
[67] *AB v South West Water Services Ltd.* [1993] QB 507.
[68] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part IV par. 1.108.
[69] Ibid. at par. 1.109.
[70] *Bradford City Metropolitan Council v Arora* [1991] 2 QB 507.
[71] *AB v South West Water Services Ltd.* [1993] QB 507, 522.

32 Such a restrictive approach in relation to the pre-1964 test justified the comments of Lord Mackay in *Kuddus* who noted: "The genius of the common law is its capacity to develop and it appears strange that the law on this particular topic should be frozen by reference to decisions that had been taken prior to and including *Rookes v Barnard*."[72] In the same way, Professor W.V.H. Rogers commented that this decision "commits the law to an irrational position in which the result depends not on principle but upon the accidents of litigation (or even of law reporting) before 1964, at a time, moreover, when the distinction between exemplary and aggravated damages was by no means so clearly drawn as it is now."[73]

33 The House in *Kuddus* ruled that exemplary damages could in principle be awarded where the conditions for the newly developed (or newly discovered) tort of misfeasance in public office were established and concluded that the Court of Appeal in *AB* erred in holding that the cause of action test must be applied.[74] The government welcomed the decision in *Kuddus* in its May 2007 consultation paper as representing "a sensible change removing an arbitrary restriction on claims."[75]

B. Continuing Restrictions

1. Negligence?

34 Punitive damages were not available in the law of negligence as a result of the cause of action test.[76] However, the *Kuddus* judgment appears to open the door for such damages in negligence actions, on the proviso that the conduct in question falls within one of the common law categories.[77] Indeed, other common law jurisdictions award punitive damages in negligence actions[78] and this approach has even been confirmed (for the law of New Zealand) in the Privy Council.[79] It is thought there that the court's discretionary jurisdiction may be expected to extend to all cases of tortious wrongdoing where the defendant's conduct satisfies the criterion of outrageousness. Any departure from this principle needs to be justified otherwise the law lacks coherence.[80]

[72] *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, 136.
[73] *W.V.H. Rogers*, Winfield & Jolowicz on Tort (15th ed. 1998) 746.
[74] See also *Borders (UK) Ltd. v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197: "This court, for its part, has therefore to approach the question on the footing that exemplary damages are legitimately available to a claimant wherever one of Lord Devlin's categories is shown to be fulfilled." per Sedley L.J. at [22].
[75] DCA, The Law on Damages CP 9/07, May 2007, par. 198.
[76] *Kralj v McGrath* [1986] 1 All ER 54.
[77] This is by no means a favoured view. See Lord Scott's opinion in *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, at [122]. Cf. no. 39.
[78] See, for example, *Coloca v BP Australia Ltd.* (1992) Australian Torts Reports (A. Torts Rep.) 81–153; *McLaren Transport Ltd. v Somerville* [1996] 3 New Zealand Law Reports (NZLR) 424. For the position in the U.S. see *A.J. Sebok*, Punitive Damages in the United States (contained in this publication) no. 1 ff.
[79] *A v Bottrill* [2002] United Kingdom Privy Council (UKPC) 44.
[80] Ibid. at [22].

35 One justification for refusing to extend punitive damages to deter negligent conduct is that the latter is, by definition, not calculated. Such a conclusion is thought groundless however because the essence of negligent conduct is failure to take reasonable precautions against foreseeable risks, and this may be done in a deliberate and indeed callous way.[81] The Law Commission in its 1997 report considered that only the more culpable forms of negligent conduct should warrant exemplary damages so that "mere" and even "gross" (non-advertent) negligence would be excluded. The recommendation was that punitive damages should only be awarded if the conduct which constitutes the tort of negligence (or relevant subsequent conduct) also satisfies the additional test of "*deliberate* and outrageous disregard of the plaintiff's rights".[82] In November 1999, the government rejected all the Commission's recommendations on exemplary damages.

2. Breach of Contract?

36 It has been said that "The availability of a tort upon which to hang a claim for punitive damages may be fortuitous but assumes importance in view of the principle that such damages appear not to be available for a breach of contract."[83] Indeed, the traditional view is that punitive damages are not available for breach of contract. Lord Atkinson in *Addis v Gramophone Co. Ltd*.[84] said that "In many cases of breach of contract there may be circumstances of malice, fraud, defamation, or violence, which would sustain an action of tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may, no doubt, recover exemplary damages…".[85] This is exemplified by the unlawful eviction cases supra. Lord Atkinson continued, "…but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action: *Thorpe v Thorpe* (1832) 3 B & Ad 580. One of these consequences is, I think, this: that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more."[86]

37 Although *Addis* is said to be the leading authority for the proposition that exemplary damages are unavailable in a claim for breach of contract, this has not gone unchallenged.[87] Indeed, following *Kuddus*, there is arguably room for an award of punitive damages for breach of contract. This is certainly the case in other jurisdictions and is exemplified by *Royal Bank of Canada v W Got &*

[81] *P. Cane*, Atiyah's Accidents, Compensation and the Law (7th ed. 2006) 174.
[82] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part V par. 1.51.
[83] *L.J. Anderson*, An Exemplary Case for Reform, Civil Justice Quarterly (CJQ) 1992, 233, 245.
[84] *Addis v Gramophone Co. Ltd.* [1909] AC 488. See also *Perera v Vandiyar* [1953] 1 All ER 1109.
[85] Ibid. at 496.
[86] Ibid. at 496.
[87] *R. Cunnington*, Should Punitive Damages be Part of the Judicial Arsenal in Contract Cases? (2006) 26 Legal Studies 369. See also *W.S. Dodge*, The Case for Punitive Damages in Contracts, 48 Duke L.J. 629, 697.

Associate Electric Ltd.[88] where exemplary damages were upheld by the Supreme Court of Canada where an insurer contested a fire insurance claim in bad faith. The insurer alleged that the family had torched its own home, even though the local fire chief, the insurer's own expert investigator, and its initial expert all said there was no evidence whatsoever of arson. Reference was made to *Vorvis v Insurance Corp. of British Columbia*[89] where it was held that "the circumstances that would justify punitive damages for breach of contract in the absence of actions also constituting a tort are rare."[90] Rare they may be, but the clear message is that such cases do exist. The court thus confirmed that punitive damages can be awarded in the absence of an accompanying tort. In *Royal Bank of Canada* Binnie J. concluded that compensatory damages were manifestly insufficient to deter the defendant and others from repeating the same outrageous, opportunistic and exploitative conduct and the punitive award was upheld.

3. Breach of Privacy?

38 There is at present no English authority which establishes that exemplary damages are recoverable for breach of privacy – a newly developed form of action. Such a claim was brought before the High Court in the 2008 case of *Mosley v News Group Newspapers Ltd*.[91] In the earlier case of *Douglas v Hello Ltd.*,[92] the court was prepared to make the assumption that such an award was possible. Yet, in the result, it made no such award. Having considered the authorities before him, Eady J. also refused to award punitive damages in *Mosley*.

39 Firstly, he doubted whether it would be correct to classify the invasion of privacy as a "tort".[93] The cause of action derives historically from the law of "old-fashioned breach of confidence". This, in turn, derives historically from equitable principles and has been extended in recent years under the stimulus of the Human Rights Act 1998 which incorporates the European Convention on Human Rights into English law. Notwithstanding the abandonment of the cause of action test in *Kuddus*, Eady J. believed it to be significant that their Lordships' remarks in *Kuddus* were confined to *categories of tort*. He concluded that it was not suggested by the House of Lords that the end of the cause of action test would result in an extension of punitive damages which would go so far as to embrace breach of confidence or any other equitable or restitutionary claim. See infra no. 89 for Eady J.'s primary reason for not extending the scope of exemplary damages into this new form of action.

[88] *Royal Bank of Canada v W Got & Associate Electric Ltd.* [1999] 3 Supreme Court Reports (S.C.R.) 408.
[89] *Vorvis v Insurance Corp. of British Columbia* [1989] 1 S.C.R. 1085, 1107.
[90] *Whiten v Pilot Insurance Co. Ltd.* [2002] 1 S.C.R. 595 per McIntyre J. Cf. no. 39.
[91] *Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (QB).
[92] *Douglas v Hello! Ltd.* [2003] 3 All ER 996.
[93] The following authorities suggest not: *Kitetechnology v Unicor* [1995] FSR 765, 777 f.; *Douglas v Hello! Ltd.* [2006] QB 125, at [96]; *Wainwright v Home Office* [2004] 2 AC 406, at [31]–[35]. However, textbooks dealing with the law of tort such as *P. Milmo/W.V.H. Rogers* (eds.), Gatley on Libel and Slander (10th ed. 2004) and *A. Dugdale/M. Jones* (eds.), Clerk & Lindsell on Torts (19th ed. 2005) address the subject as being within their remit.

4. European Community Law

40 The *Kuddus* judgment appears to open the door for courts to award damages for breaches of Community law which are actionable by individuals in English courts. In *Factortame II*,[94] the European Court of Justice ruled that certain requirements of the Merchant Shipping Act 1988 as to nationality, residence and domicile, which prevented Spanish fishermen from fishing in United Kingdom waters, were contrary to the provisions of the EC Treaty and accordingly unlawful and invalid in Community law. The applicants thus claimed damages, including exemplary damages, and a reference was made to the ECJ enquiring, inter alia, whether Community law required the national court to award exemplary damages. The ECJ answered this question in *Factortame III*.[95] It held that "it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law." This has more recently been reiterated by the ECJ in its *Manfredi*[96] judgment and is in accordance with the *principle of equivalence*.[97]

41 Accordingly, the applicants in *R. v Secretary of State for Transport Ex p. Factortame Ltd. (No. 5)*[98] sought exemplary damages at domestic level averring that *Factortame III* had decided that exemplary damages were recoverable if they would have been recoverable in similar claims or actions founded on English law. The High Court held that they were bound by the *AG v South West Water* case and therefore the claim failed under the first category – discrimination not being a cause of action recognised pre-*Rookes*. Further, the court held that the state liability claim was best understood as an action for breach of statutory duty. However, exemplary damages can only be awarded if statute expressly provided so. The European Communities Act 1972 did not so provide.[99] Exemplary damages were therefore not awarded. The applicants

[94] ECJ C-221/89, *The Queen v Secretary of State for Transport, ex p. Factortame Ltd. and others* [1991] ECR I-3905.

[95] ECJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex p.: Factortame Ltd. and others* [1996] ECR I-1029, par. 89 ff.

[96] ECJ joined cases C-295/04 to C-298/04, *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni SpA and Others* [2006] ECR I-6619, par. 93.

[97] See *M. Józon/V. Wilcox*, Non-Compensatory Remedies in: A. Fenyves/E. Karner/H. Koziol/E. Steiner (eds.), Human Rights and Tort Law (forthcoming).

[98] *R. v Secretary of State for Transport Ex p. Factortame Ltd. (No. 5)* [1998] 1 All ER 736.

[99] The court in *R. v Secretary of State for Transport Ex p. Factortame Ltd. (No. 5)* [1998] 1 All ER 736, also held that "For English law to give the remedy of penal damages for breaches of Community law would decrease the move towards uniformity, it would involve distinctions between the practice of national courts and the liabilities of different Member States and between the United Kingdom and the Community Institutions, and would accordingly in itself be potentially discriminatory since litigants in England would be treated differently from those elsewhere. The arguments of the Applicants under this head need to be considered with great caution. Their acceptance would risk introducing into the law of Community obligations anomalies and conflicts which do not at present exist and would not serve a useful purpose."

appealed to the Court of Appeal and then to the House of Lords. However, the claim for exemplary damages was not pursued further. As aforesaid, the effect of *Kuddus* in this area of law is yet to be seen.

5. The European Convention on Human Rights, The Human Rights Act 1998

42 Punitive damages are not awardable under the European Convention on Human Rights: see par. 9 Practice Direction on Just Satisfaction Claims, 28 March 2007. This has been consistently demonstrated by the case law of the European Court of Human Rights.[100] In *B.B. v the United Kingdom*, for example, the Court expressly articulated that "it does not award aggravated or punitive damages."[101]

43 In *Watkins v Secretary of State for the Home Department and Others*,[102] the House of Lords considered that constitutional rights were better protected elsewhere rather than through punitive damages. The House observed that the Convention, through the Human Rights Act 1998, provides a rough equivalent of a written code of constitutional rights. Thus, it is to be inferred that parliament intended infringements of the core human (and constitutional) rights protected by the Act to be remedied under it. A prisoner in a similar position to Watkins could be expected to invoke his remedy under s. 6, 7 and 8 of the 1998 Act by reference to both art. 6 and 8 of the Convention. But, if so, in considering whether to award damages, s.8(4) of the 1998 Act directs the courts to take into account the principles which the Strasbourg Court applies under art. 41 of the Convention. As exemplary damages form no part of the existing jurisprudence of that Court, their Lordships, Lord Roger to be precise, held that it would be wrong to develop the common law so as to create a situation where exemplary damages could be awarded under domestic law when they would not be available in equivalent proceedings for breach of the relevant Convention right.[103]

[100] See, e.g., ECtHR *Gaygusuz v Austria*, 16.9.1996, no. 17371/90; *Akdivar and Others v Turkey* [GC], 1.4.1998, no. 21893/93; *Selçuk and Asker v Turkey*, 24.4.1998, no. 23184/94 and 23185/95; *Menteş and Others v Turkey* [GC], 24.7.1998, no. 23186/94; *Loizidou v Turkey* [GC], 28.7.1998, no. 15318/89; *Cable and Others v The United Kingdom* [GC], 18.2.1999, no. 24436/94, 24582/94, 24583/94, 24584/94, 24895/94, 25937/94, 25939/94, 25940/94, 25941/94, 26271/95, 26525/95, 27341/95, 27342/95, 27346/95, 27357/95, 27389/95, 27409/95, 27760/95, 27762/95, 27772/95, 28009/95, 28790/95, 30236/96, 30239/96, 30276/96, 30277/96, 30460/96, 30461/96, 30462/96, 31399/96, 31400/96, 31434/96, 31899/96, 32024/96 and 32944/96; *Hood v The United Kingdom* [GC], 18.2.1999, no. 27267/95; *Ludescher v Austria*, 20.12.2001, no. 35019/97; *Orhan v Turkey*, 18.6.2002, no. 25656/94; *Tepe v Turkey*, 9.5.2003, no. 27244/95; *İkincisoy v Turkey*, 27.7.2004, no. 26144/95; *Wood v The United Kingdom*, 16.11.2004, no. 23414/02. See also *Józon/Wilcox* (fn. 97) (forthcoming).

[101] *B.B. v the United Kingdom*, 10.2.2004, no. 53760/00, § 36; *Wainwright v the United Kingdom*, 26.9.2006, no. 12350/04, § 60. In *Aiouaz v France*, 28.6.2007, no. 23101/03, § 36, the Court explicitly held that there is no right to base compensation claims so as to secure a deterring effect.

[102] *Watkins v Secretary of State for the Home Department and Others* [2006] UKHL 395. See no. 8 ff.

[103] Ibid. at 420 per Lord Roger. In *Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (QB) at [196], Eady J. thought the same: "since a claim for invasion of privacy nowadays involves direct application of Convention values and of Strasbourg jurisprudence as part of

IV. Factors Relevant to an Assessment of Punitive Damages

Lord Devlin in *Rookes* expressed three considerations which he thought should always be borne in mind when awards of exemplary damages are being considered. Consequently, the courts will bear these and other factors in mind when examining whether it is appropriate to make an award and when assessing quantum. Thus, the mere fact a claim satisfies the categories test is no guarantee of a punitive award. 44

A. The Claimant must be the Victim of the Punishable Behaviour

The first of these considerations was that a claimant cannot recover exemplary damages unless he is the victim of the punishable behaviour. Lord Devlin noted that "the anomaly inherent in exemplary damages would become an absurdity if the claimant, totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence."[104] 45

B. The Principle of Moderation

The second consideration is that judges/juries must adhere to the principle of moderation i.e. an award of exemplary damages should be *the minimum* necessary to meet the public purpose underlying such damages, that of punishment and deterrence.[105] This is so as the power to award exemplary damages constitutes a weapon and while it can be used in defence of liberty, it can also be used against liberty.[106] 46

C. The Defendant's Means

"If you make an award which might badly hurt the ordinary man in the street it might be laughable to a large company with very great means."[107] Thus the last of Lord Devlin's three considerations was that "The means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages."[108] However, it is presumed that the means of the claimant can only exceptionally (if ever) be relevant: that is, where they affect the culpability of the defendant's behaviour.[109] The focus has thus tended to be on the means of the defendant.[110] 47

English law…it would be somewhat eccentric to graft on to this Convention jurisprudence an alien anomaly from the common law in the shape of exemplary damages – not apparently familiar in Strasbourg."

104 *Rookes v Barnard* [1964] 1 All ER 367, 411.

105 Ibid. at 411 per Lord Devlin.

106 Ibid. at 411 per Lord Devlin.

107 *John v Mirror Group Newspapers Ltd.* [1997] QB 586, 625.

108 *Rookes v Barnard* [1964] 1 All ER 367, 411.

109 Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part IV par. 1.153 and fn. 450.

110 In *John v Mirror Group Newspapers Ltd.* [1997] QB 586, it was not disputed that the defendant's great wealth was a relevant consideration. See also *Asghar v Ahmed* (1985) 17 HLR

48 Although the idea is to take the profit out of wrongdoing, in reality, evidence of the defendant's means is hardly brought forward.[111] The reason for this was explained in *McCartney v Sunday Newspapers Ltd.*[112] The court ruled that detailed evidence of the defendant's financial position should not be permitted as it would not give the jury any useful information to assist them in assessing exemplary damages. Moreover, it would occupy an enormous amount of time and be potentially burdensome to the defendant. Indeed, claimants could abuse the rights to discovery in order to "oppress and to pressurise defendants."[113] Rather, the practice is to put to the jury in a general way, the newspaper's size, circulation and resources.[114]

49 In *Thompson v Commissioner of Police of the Metropolis*, the court thought it wholly inappropriate to take into account the means of the individual wrongdoer in vicarious liability cases except where the action is brought against the latter.[115]

D. The 'If, But Only If' Test

50 Having enumerated the three considerations, Lord Devlin set out the if, but only if, test: "In a case in which exemplary damages are appropriate, a jury should be directed that *if, but only if*, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum."[116] This test has since been reiterated in countless cases and underlines the punitive

25, 30. The defendant argued that the judge failed to give any or any sufficient regard to the fact that his sole income was Invalidity Benefit and to the fact that he was granted legal aid with a nil contribution. Cumming-Bruce L.J. noted, "The judge decided quite clearly that the defendant had successfully deceived the legal aid authorities when it came to assessment of his means because the tale that he told to the judge about his means was so wildly improbable that it was obviously a complete cock and bull story. As a matter of inference, there was abundant evidence on which the judge could hold, as he did, that there was plenty of money about under the control of the defendant if and when he chose to disclose it."

111 See, e.g., *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1119 f. per Lord Wilberforce: "For if the profit motive is essential for the recovery of punitive damages, one would expect the damages given to bear some relation to the supposed profit and/or to the means of the offender: the idea (if there is any logic in the requirement) must be to take the profit out of wrongdoing. Yet there was not, and in many such cases cannot be, any real consideration of the likely profit or of the offender's means." See also *John v Mirror Group Newspapers Ltd.* [1997] QB 586, 625.

112 *McCartney v Sunday Newspapers Ltd.* [1988] Northern Ireland Law Reports (NI) 565.

113 Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages Law Com. No. 247 (1997) Part V par. 1.135.

114 *Milmo/Rogers* (fn. 93) par. 9.18.

115 *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 517 per Lord Woolf M.R.

116 *Rookes v Barnard* [1964] 1 All ER 367, 412. Emphasis added; see *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1089 per Lord Reid; see also *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 517.

effect inherent in compensatory damages so that "compensatory damages are always part of the total punishment".[117] It also exposes punitive damages as being a top-up award. The "if, but only if" direction is thus said to be vital for the avoidance of double counting.[118] Hence in *KD v Chief Constable of Hampshire, John Hull*, the court ruled that an award of exemplary damages was not justified on the facts as the compensatory sum awarded was sufficient to compensate the claimant and punish the defendant.[119] It should be noted that while assessing the adequacy of compensatory damages as serving the purpose of punishment/deterrence, no account can be taken of the costs burden which the unsuccessful defendant will have to bear.[120] This is so notwithstanding costs could in themselves have a punitive and deterrent effect.[121]

The "if, but only if," test does not dictate that in every case where punitive damages are awarded aggravated damages must also be awarded simply because the latter are compensatory. This novel issue was raised in *Isaac v Chief Constable of the West Midlands Police*[122] where the claimant cross-appealed against the jury's failure to make an award of aggravated damages despite their having made an award of exemplary damages of £ 5,000. Longmore L.J. held that "if it were to be the law that aggravated damages had to be awarded in a case where exemplary damages are awarded, the conclusion in this case could easily be that, aggravated damages not having been awarded, the award of exemplary damages would have to be set aside."[123] That of course was not the claimant's submission. The latter averred that exemplary damages having been awarded, he was entitled as of right to an award of aggravated damages. The court concluded that it was open to the jury, despite awarding exemplary damages, to make no award of aggravated damages especially considering that the aggravated element was, on the facts, minimal. Since aggravated and punitive 51

[117] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1089 per Lord Reid. See *R. Cunnington*, The Border between Compensation, Restitution and Punishment, Law Quarterly Review 122 (2006) 382. Cunnington discusses the Court of Appeal's ruling in *Borders (UK) Ltd. v Commissioner of Police of the Metropolis* where exemplary damages were awarded against a street trader who had been selling stolen books. He argues that the exemplary award, which was calculated by reference to quantifiable losses, was neither compensatory nor punitive. Rather, the defendants pleaded exemplary damages, the court purported to award compensatory damages (under the heading of exemplary damages) but actually awarded gain-based damages. He concludes therefore that the crucial prerequisite for exemplary damages was not met: compensatory damages were not shown to be inadequate.

[118] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1049; *Borders (UK) Ltd. v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197, at [38].

[119] *KD v Chief Constable of Hampshire, John Hull* [2005] EWHC 2550, at [193] per Tugendhat J. See also *Sallows v Griffiths* [2001] FSR 188. In *John v Mirror Group Newspaper* [1997] QB 586, the "if, but only if" test, was expressly applied however, the sum which was awarded for compensatory damages was deemed insufficient to punish the newspaper and deter it and others. An award of exemplary damages was therefore deemed necessary to meet these two requirements. On appeal however, the exemplary sum was set aside on the grounds of excessiveness and the Court of Appeal substituted a lower award.

[120] *John v Mirror Group Newspapers Ltd.* [1997] QB 586, 619 per Sir Thomas Bingham M.R.

[121] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1114 f. per Lord Wilberforce.

[122] *Isaac v Chief Constable of the West Midlands Police* [2001] EWCA Civ 1405.

[123] Ibid. at [22].

damages serve entirely different, though related purposes, it follows that there is no reason why punitive damages should not be awarded even if aggravated damages are denied.[124] See the report on aggravated damages for more details on the nature of such damages.[125]

E. The Defendant has Already Been Punished by a Criminal or other Sanction

52 Just as punitive damages are redundant where the compensatory sum is sufficient to punish and deter, they may not be appropriate if the defendant has already been punished for his wrongful conduct through the imposition of a criminal sanction or disciplinary proceedings.

1. Imprisonment

53 In *Archer v Brown*, punitive damages were denied as the defendant had been convicted of two offences in respect of fraud and imprisoned. Peter Pain J. concluded that since the defendant had undoubtedly been punished, he would not enrich the claimant by punishing the latter again.[126] In *Borders (UK) Ltd. v Commissioner of Police of the Metropolis* however, the appellant, Ronald Jordan, described as a "literary Fagin", was convicted of conspiracy to steal books and for handling stolen books and sentenced to 30 months' imprisonment. Notwithstanding so, the book retailers were awarded a sum of £ 100,000 as exemplary damages. The appellant argued in light of his sentence that insofar as it was truly punitive – which is what it purported to be – the award of £ 100,000 subjected him to a double penalty. The Court of Appeal ruled that the double jeopardy argument was not a sound one. Indeed, the convictions were a legitimate part of the evidence in support of the civil claim, but there was no duplication of penalty. This was so as the tortious conduct relied on included *but went well beyond* the subject matter of the conspiracies of which the appellant had been convicted.[127]

2. Fines

54 Clearly, a sum of money imposed for an offence also constitutes punishment. Thus in *AB v South West Water Services Ltd.*,[128] the existence of a conviction and fine, inter alia, persuaded Stuart Smith L.J. that there would be a serious risk of injustice to the defendants if exemplary damages were to be made against them. In *KD v Chief Constable of Hampshire, John Hull*,[129] a case alleging sexual harassment by a police officer, punitive damages were also denied as the officer was found guilty and fined five days' pay in the course of disciplinary proceedings.

[124] *Tettenborn* (fn. 33) no. 2.21.
[125] *Sebok/Wilcox* (fn. 2) no. 1 ff.
[126] *Archer v Brown* [1985] QB 401, 423.
[127] *Borders (UK) Ltd. v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197, at [15].
[128] *AB v South West Water Services Ltd.* [1993] QB 507.
[129] *KD v Chief Constable of Hampshire, John Hull* [2005] EWHC 2550, at [193] per Tugendhat J.

Just as a prison sentence is no automatic bar to an award of punitive damages, the existence of a fine is but a factor which the court will take into account in considering whether further punishment is warranted on the facts. The case of *Asghar v Ahmed* is illustrative here. Acts of harassment and/or peremptory eviction by a landlord may constitute a criminal offence under the Protection from Eviction Act 1977. A tenant may also bring civil proceedings by virtue of s.1(5) of the Act. In *Asghar*, the defendant argued that the County Court judge failed to give sufficient regard to a fine of £ 750 imposed by the Crown Court for unlawful eviction and £ 250 costs with the effects that a subsequent award of £ 1,000 in exemplary damages punished him twice for the same activity. Cumming-Bruce L.J. upheld the exemplary damages award noting that: "The learned judge expressly directed his mind to the fact that the Crown Court had fined him for the offence of eviction…and said so; but there was a great deal more to the outrageous conduct which followed the eviction which justified the judge's finding that it was an absolutely outrageous example of persecution by a landlord of a tenant."[130] An exemplary award may also be made where the subject matter of the criminal penalty is different from the subject matter of the civil proceedings.[131] 55

3. Confiscation Proceedings

As part of the criminal process in *Borders (UK) Ltd. v Commissioner of Police of the Metropolis*, confiscation proceedings were initiated in the Crown Court under the Criminal Justice Act 1988. However, the latter proceedings stood adjourned pending the civil appeal before the Court. The appellant argued that the punitive award of £ 100,000 subjected him to excessive punishment because the Crown was about to decide how much of his substantial assets it would confiscate. He continued that confiscation, while not in itself punishment, was an integral part of the penal process, and it exhausted the law's power to impose penalties on him. 56

Sedley L.J. considered however that if the £ 100,000 award of exemplary damages stood, "the appellant's available assets would be depleted by that amount by the time the matter returned to the Crown Court for completion of the confiscation proceedings. If confiscation does not reach all his assets, while this court cannot dictate what is to happen, it can confidently anticipate that Mr. Jordan will not be mulcted in the same sum twice."[132] Thus the probable practical relevance of the appeal was to decide whether the £ 100,000 went to the victims under the civil judgment or to the state under the confiscation order.[133] The exemplary award was upheld. 57

[130] *Asghar v Ahmed* (1985) 17 HLR 25, 29.
[131] See *Tettenborn* (fn. 33) no. 2.58.
[132] *Borders (UK) Ltd. v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197, at [17].
[133] Ibid. at [46] per May L.J.

4. Disciplinary Proceedings

58 Disciplinary proceedings may also secure punishment and deterrence. In *Thompson v Commissioner of Police of the Metropolis*, Lord Woolf M.R. ruled that where: (a) there is clear evidence that disciplinary proceedings are intended to be taken in the event of liability being established; and (b) there is at least a strong possibility of the proceedings succeeding, the court or jury are entitled to take these into account when considering whether the case is one which warrants the award of exemplary damages.[134] The court in *KD v Chief Constable of Hampshire, John Hull* considered it was not a case in which exemplary damages could be awarded as there had already been disciplinary proceedings in respect of part of the conduct complained of and the wrongdoer had been punished in those proceedings.[135]

F. The Existence of Multiple Claimants

59 The existence of multiple claimants poses assessment and apportionment problems. In calculating the appropriate punitive award, the direction of the appellate court in *Riches v News Group Newspapers*, a libel case involving 10 claimants, is to be followed: (a) aggregate the amount of compensatory damages to be awarded to each claimant; (b) if that sum is an insufficient penalty, then add to the total compensatory damages a sum that is sufficient; and (c) having found the total sum to be awarded, the amount of the difference between that sum and the total compensatory damages is to be divided equally between the number of claimants.[136] This is the punitive element.

G. The Existence of Multiple Defendants

60 Only one sum can be awarded by way of exemplary damages where the claimant elects to sue more than one defendant in the same action, and this sum must represent, the *lowest* sum for which any of the defendants can be held liable on this score.[137] If that were not the case, an innocent party or a less guilty party who is liable on a joint and several basis might have to pay a sum far in excess of that which he ought to pay.

H. The Claimant's Conduct

61 In the joint appeals of *Thompson v Commissioner of Police of the Metropolis* and *Hsu v Commissioner of Police of the Metropolis*, though in the context of false imprisonment and malicious prosecution cases, Lord Woolf M.R. made clear that in an appropriate case the jury should also be told that "even though the plaintiff succeeds on liability, any improper conduct of which they find

[134] *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 518.
[135] *KD v Chief Constable of Hampshire, John Hull* [2005] EWHC 2550, at [193] per Tugendhat J.
[136] *Riches v News Group Newspapers* [1986] QB 256, 288.
[137] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1063 per Lord Hailsham L.C.

him guilty can reduce or even eliminate any award of exemplary damages if the jury consider that this conduct caused or contributed to the behaviour complained of."[138] Everything which *aggravates* the defendant's conduct is relevant.[139] Thus in *Clark v Chief Constable of Cleveland Police* the jury did not make an award of exemplary damages and it was held to follow that on the balance of probabilities the jury considered that the appellant himself had been guilty of improper conduct both by urging his dogs to attack the police and by attempting to punch one of the police officers.[140]

62 The court cannot however reduce an exemplary damages award merely because the claimant is a man with serious criminal convictions. In *Treadaway v Chief Constable of West Midlands Police*,[141] a substantial sum by way of exemplary damages was payable where the claimant had been assaulted by police officers, in a manner which amounted to torture, in order to obtain his signature to a fabricated confession. The claimant with all his faults had been placed in a position where he was entitled to expect that he would be given the protection of the law, and that he was certainly not given.[142]

I. The Defendant's Good Faith

63 As noted above, notwithstanding the claimant in *Huckle v Money*[143] had been used "very civilly by treating him with beefsteaks and beer," punitive damages were awarded for false imprisonment. In recent cases however, the good faith of the defendant has been regarded as a bar to the award of exemplary damages or at least a factor which has reduced the award. Indeed, in *Holden v Chief Constable of Lancashire*, Purchas L.J. said that the absence of aggravating circumstances is a feature which the jury might be asked to consider in deciding whether or not to award exemplary damages.[144] Thus everything which *mitigates* the defendant's conduct is relevant.[145] "This seems, with respect, more in accordance with the principle that punitive damages can be awarded in the first place only if the court is convinced that compensatory damages are insufficient to punish the defendant."[146]

[138] *Thompson and Hsu v Commissioner of Police of the Metropolis* [1998] QB 498, 517.
[139] *Rookes v Barnard* [1964] 1 All ER 367, 411 per Lord Devlin.
[140] *Clark v Chief Constable of Cleveland Police* [1999] EWCA Civ 1357, at [3.20] per Peter Gibson L.J.: "I agree with Roch L.J. that the probable reason for this was because the jury took the view that the appellant's improper conduct deprived him of any aggravated or exemplary damages." See also *O'Connor v Hewitson* [1979] Crim. LR 46.
[141] *Treadaway v Chief Constable of West Midlands Police* (1994) Times, October 25.
[142] See *A. Reed*, Exemplary Damages: A Persuasive Argument for their Retention as a Mechanism of Retributive Justice, CJQ 1996, 130, 133.
[143] *Huckle v Money* (1763) 2 Wils. 205.
[144] *Holden v Chief Constable of Lancashire* [1987] QB 380, 388.
[145] *Rookes v Barnard* [1964] 1 All ER 367, 411 per Lord Devlin.
[146] *Tettenborn* (fn. 33) no. 2.56.

64 In a vicarious liability setting, the defendant's good faith has been held to be a relevant factor. In *Goswell v Commissioner of Police for the Metropolis*,[147] Simon Brown L.J. felt that exemplary damages on the facts presented particular conceptual difficulties, inter alia, because the constable's misconduct was something which the defendant Commissioner himself "tried to punish". He thoroughly investigated Goswell's complaint, took appropriate disciplinary proceedings, and dismissed the constable from the force. Simon Brown L.J. noted that the Commissioner deserved "credit for that conduct when it comes to deciding the question of exemplary damages" and this was taken into consideration in setting the final award. A similar conclusion was reached in *KD v Chief Constable of Hampshire, John Hull*.[148]

V. The Case against Punitive Damages

65 It is beyond doubt that exemplary or punitive damages are one of the most controversial aspects of the tort system and their retention has, with some likening to Henry Ford's immortal phrase "any colour, as long as it's black," been said to be justified on the proviso that "they are no longer punitive."[149] Even more trenchant, one judge opined that exemplary damages are "a monstrous heresy…an unsightly and unhealthy excrescence, deforming the symmetry of the body of law…out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous when classed among civil remedies."[150] A number of recognisable objections to the concept exist:

A. Confusing the Function between Criminal and Civil Law

66 The foremost censure that has religiously accompanied any criticism of punitive damages is that they confuse the function of the civil law, which is to compensate, with the function of the criminal law, which is to inflict deterrent and punitive penalties.[151] Accordingly, the existence of exemplary damages is necessarily unprincipled, ad hoc, and does violence to the coherence of the private law.[152]

67 The argument goes that the punishment of wrongdoers today is regarded as the function of the state.[153] Exemplary damages in essence amount to a *fine*,[154]

[147] *Goswell v Commissioner of Police for the Metropolis* [1998] EWCA Civ 653.
[148] *KD v Chief Constable of Hampshire, John Hull* [2005] EWHC 2550, at [193] per Tugendhat J. "I have considered whether there should be an award of exemplary damages in this case. I have decided that there should not…The Chief Constable has behaved properly throughout. Once the complaint was made in July 1998 it was taken seriously and addressed with the same sensitivity on the part of himself and his officers as has been demonstrated in the conduct of his case before me."
[149] *H. Koziol*, Punitive Damages – A European Perspective (2008), 26 Louisiana Law Review 3, 741, 744.
[150] *Fay v Parker*, 53 New Hampshire Reports (NH) 342 (1873) 382 per Foster J.
[151] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1086 per Lord Reid. DCA, The Law on Damages CP 9/07, May 2007, par. 198.
[152] *A. Beever*, The Structure of Aggravated and Exemplary Damages, 23 Oxford J. Legal Stud. 87, 106.
[153] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1127 per Lord Diplock.
[154] Ibid. at 1110 per Viscount Dilhorne.

yet a defendant against whom such damages are sought stands stripped of procedural safeguards which would be his right were he arraigned before a criminal court.[155] In criminal cases: (a) stricter rules on admissibility of evidence apply; (b) the standard of proof is higher: "beyond reasonable doubt", as opposed to "on the balance of probabilities"; (c) the defendant benefits from the presumption of innocence; (d) the jurisdiction of a jury is limited to determining guilt and not punishment. Further, judges are guided by the creation of maximum penalties for offences. With punitive damages, juries dictate the size of the award. In civil cases: (e) the right to trial by jury is increasingly restricted; and (g) there are increased barriers to legal aid. In Lord Reid's words, to say we need not waste sympathy on vicious criminals when we insist on proper legal safeguards for them is to support palm tree justice.[156]

One may of course argue that there are significant differences between the consequences for the defendant of a criminal prosecution and a civil action where exemplary damages may be awarded – the risk of imprisonment, the stigma attaching to a criminal record and the consequential damaging effect on employment prospects being present in the former but lacking in the latter.[157] These severe consequences thus justify more robust procedural safeguards for criminal proceedings. On the other hand, it is also true that the rules of criminal procedure and evidence are not only applicable in cases where the defendant may be imprisoned.[158] 68

Another view would simply be to insist that private law has whatever function we choose to give it and that there is no reason, prima facie, why the criminal and private law ought to have exclusive functions.[159] The simple fact is, as revealed by the "if, but only if" test, that even compensatory civil awards serve a penal function. Finally, that compensation is not the sole concern of damages is evident through the recognition of nominal damages and gain-based damages which, like punitive damages, are calculated other than by reference to the claimant's loss.[160] Recourse to punishment or disgorgement implies that private law has legitimate remedial purposes that compen- 69

[155] Ibid. at 1110 per Lord Kilbrandon.
[156] Ibid. at 1087 per Lord Reid.
[157] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part V par. 1.23.
[158] *D. Allen*, Damages in Tort (2000) 132.
[159] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1114: "It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be, an issue of large social import, or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages, or, conversely, that the criminal law, rather than the civil law, is in these cases the better instrument for conveying social disapproval, or for redressing a wrong to the social fabric, or that damages in any case can be broken down into the two separate elements. As a matter of practice English law has not committed itself to any of these theories: it may have been wiser than it knew." per Lord Wilberforce.
[160] *J. Edelman*, Gain-Based Damages (2003) 5 ff.

sation alone cannot fulfil and this it has been said is not necessarily objectionable.[161]

B. Criticism of the Scope and Rationale of the Categories

70 Some have viewed with distrust the seemingly arbitrary delineation of the two common law categories. Indeed, this seems part of the reason why the English conception of exemplary damages has been shunned by other commonwealth jurisdictions that recognise such damages. The resultant oddity was unreservedly acknowledged. By the time of *Cassell & Co. Ltd. v Broome* Lord Reid, who also sat in *Rookes v Barnard* and was in full agreement with Lord Devlin's treatment of the subject at the time, noted "We had to choose between confining [the scope of exemplary damages] strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with *an illogical* result than to allow any extension."[162] The scope and rationale behind this very considerable "pruning operation"[163] merit consideration:

1. Oppressive, Arbitrary or Unconstitutional Action by Servants of the Government

71 Lord Devlin, in taking to heart the proposition that an anomaly ought to be closely confined, clearly articulated – at the price of creating other anomalies and illogicalities – that a line was to be drawn such as to exclude oppressive action by private corporations or individuals from falling within the first category.[164] His Lordship felt that in the case of the government, a difference was identifiable, "…for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service."[165] He went on to explain that bullies who were not "servants of the government" would meet their deserts in terms of aggravated damage.[166] One is therefore entitled to doubt that his Lordship's distinction is unblemished

[161] See *E.J. Weinrib*, Punishment and Disgorgement as Contract Remedies, 75 Chicago-Kent Law Review 2003, 55, at 55.

[162] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1089 per Lord Reid. Emphasis added.

[163] Ibid. at 1098 per Lord Morris.

[164] *Rookes v Barnard* [1964] 1 All ER 367, 410 per Devlin. This decision was not taken lightly for it was necessary for Lord Devlin to overrule his earlier decision in *Loudon v Ryder* [1953] 1 All ER 741. See *Anderson*, CJQ 1992, 233, 238. For the same reason, the oppressive conduct in *Rookes* was said not to be the sort of oppression that came within the first category, the case having no connection with "servants of the government".

[165] *Rookes v Barnard* [1964] 1 All ER 367, 410. Lord Wilberforce in *Cassell & Co. Ltd. v Broome* [1972] AC 1027, 1120 identified with the soundness of this distinction and added by quoting a principle stated in 1703 that, "if public officers will infringe men's rights, they ought to pay greater damages than other men to deter and hinder others from the like offences."

[166] *Rookes v Barnard* [1964] 1 All ER 367, 410 per Lord Devlin: "It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages."

because aggravated damages do not aim to punish! In fact, as Lord Nicholls pointed out in *Kuddus v Chief Constable of Leicestershire Constabulary*, the validity of the dividing line drawn by Lord Devlin when formulating his first category was somewhat undermined by his second category, where the defendants are not confined to, and normally would not be, government officials or the like.[167] It is the defendant's conduct, not his status, that should determine liability.[168]

The truth behind this forlorn distinction was that by 1964 the cases showed 72
that it was firmly established with regard to "servants of the government" that damages could be awarded against them beyond any sum justified as compensation, whereas there was no case except one that was overruled where damages had been awarded against a private bully or oppressor to an amount that could not fairly be regarded as compensatory.[169] Thus the idea was that the undesirable anomaly could only be permitted in a class of case where its use was already covered by authority.

2. *Conduct Calculated by the Defendant to Make a Profit for Himself which may well exceed the Compensation Payable to the Claimant*

By the time of *Broome*, and with the benefit of hindsight, Lord Reid again in- 73
dicated a difference of opinion from Lord Devlin's second category by noting that it was "not happily phrased".[170] Suppose an ill disposed person deliberately commits a tort in contumelious disregard of another's rights *not for gain but simply out of malice*, why should he not also be punished? Lord Nicholls in *Kuddus* opined that he was not wholly persuaded by Lord Devlin's formulation of his second category: "There is no obvious reason why, if exemplary damages are to be available, the profit motive should suffice but a malicious motive should not."[171] This was especially since in the first category, Lord Devlin is conscious of the need to sanction the irresponsible, malicious or oppressive use of power.[172] Lord Devlin's opinion has been understood as laying down that, unless the "profit motive" is present, the case cannot be treated as a case for punitive damages but only as a case for aggravated damages. The perplexity, as Lord Wilberforce pointed out, is that "if 'aggravated damages' are 'to do the work of punitive damages' and if it is to be supposed that juries, or judges, will continue giving damages much as before, then nothing has been gained by changing the label and we are indulging in make belief and encouraging fictional pleading."[173]

[167] *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, 145 per Lord Nicholls.
[168] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1108 per Viscount Dilhorne.
[169] Ibid. at 1088 per Lord Reid.
[170] Ibid. at 1108 per Viscount Dilhorne who agreed.
[171] *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, 145 per Lord Nicholls.
[172] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1119 per Lord Wilberforce.
[173] Ibid. at 1121.

74 The reason for excluding such a case from the category was again, simply that firmly established authority did not require them to go further.[174] H. McGreggor submits the attractive synthesis that the real purpose behind this second common law category is not the punishment of the defendant but the prevention of his unjust enrichment.[175] This alternative remedy is considered more fully in no. 116 ff. infra.

3. Wider Scope?

75 Following the *Kuddus* decision, perhaps the time has come for the limitations caused by the arbitrary scope of the categories to now be abolished. Indeed in the recent case of *Mosley v News Group Newspapers Ltd*. counsel for the claimant argued, though unsuccessfully, that Lord Devlin's categories had served whatever purpose they may have had in the past and were on the verge of being abandoned. He suggests that now all that is required is conduct characterised as "outrageous".[176] This is the case in Commonwealth quarters (Canada, Australia and New Zealand), where the categories test has been ignored so that generally speaking any highly reprehensible civil wrongdoing may warrant a punitive award. The Law Commission in its 1997 report had suggested that the categories test should be replaced with a general test of "deliberate and outrageous disregard of the plaintiff's rights."[177] This was rejected in November 1999 and it continues to be the government's position that exemplary damages in civil proceedings should not be extended beyond the limited instances in which they are currently available under the common law.[178]

C. Undeserved Windfall

76 A further criticism on the merits of punitive damages is that the claimant, by being given more than on any view could be justified as compensation, is being given a pure and undeserved windfall at the expense of the defendant.[179] This follows neatly from the observation above in that whereas the primary function of tort law is compensation and there is ample justification for the claimant's retention of the proceeds, the anomaly of punitive damages is such that the fine (being of criminal law) is paid as a bonus to the private individual and does not contribute to the rates or to the revenues of central government.[180] The ultimate conclusion is that the claimant is placed in a better position than she or he was before the actual wrong was committed.[181] This is especially poignant consid-

[174] Ibid. at 1088 per Lord Reid.
[175] *McGregor* (fn. 58) no. 11-027.
[176] The argument was based on some general observations of Lord Nicholls in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122.
[177] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part V par. 1.14.
[178] DCA, The Law on Damages CP 9/07, May 2007, par. 196.
[179] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1086 per Lord Reid.
[180] Ibid. at 1082 per Lord Hailsham L.C.
[181] *A. Reed*, Exemplary Damages: A Persuasive Argument for their Retention as a Mechanism of Retributive Justice, CJQ 1996, 130, 131.

ering that under certain facts, in particular, where an action is brought against a servant of the government, vicarious liability may result in the windfall being met out of public funds, with the probable consequence of reducing sums available for their intended purpose.[182]

77 It has been argued per contra that the claimant "can only profit from the windfall if the wind is blowing his way".[183] Since it is the claimant who has gone to the trouble and expense of bringing a claim, thereby upholding an important public interest, the claimant is the most appropriate person to recover the exemplary damages.[184] Seen in this light, exemplary damages are not a "windfall" but rather a "bounty".[185] Further, "[o]ne may, of course, argue that once exemplary damages have been exacted, the social purpose of deterrence has been fulfilled and it is immaterial whether the claimant receives the benefit of them or whether they are applied for the benefit of some wider social cause."[186] In certain U.S. states, split-recovery statutes attempt to tackle the windfall problem by requiring part of the claimant's punitive award to be diverted to the state or some public fund.[187] The Law Commission in its 1997 report addressed this possibility but concluded that no proportion of a claimant's punitive damages award should be "diverted" to a public fund. The main reason for this conclusion was that, since moderate punitive damages awards were anticipated,[188] the benefits of diversion would be outweighed by the costs involved. Moreover, the practice may result in tactical distortions in settlements.[189]

D. The Use of Juries

78 In civil cases, the right to trial by jury is limited under s.69(1) Supreme Court Act 1981 to fraud, defamation, false imprisonment and malicious prosecution. Notwithstanding their limited jurisdiction those advocating the abolition of punitive damages blame juries, who are said to be inherently "roused to indignation by partisan advocacy,"[190] for the excessive sizes of punitive awards. Further, it has been argued that no coherent framework of awards emerges in cases routinely tried by juries.[191]

[182] *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 517 per Lord Woolf M.R.
[183] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1126 per Lord Diplock.
[184] Irish Law Reform Commission, Aggravated, Exemplary and Restitutionary Damages, LRC 60–2000 (2000) par. 1.15.
[185] Ibid. at par. 1.15.
[186] Ibid. at par. 2.046.
[187] *Sebok* (fn. 78) no. 48 ff.
[188] In line with the principle of moderation (see supra no. 46) and the guidelines and brackets given by way of direction (see infra no. 83 ff.).
[189] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part V par. 1.156.
[190] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1128 per Lord Diplock.
[191] *John v Mirror Group Newspapers Ltd.* [1997] QB 586, 608 per Sir Thomas Bingham M.R.

79 Prior to 1990, it was sensible for appellate courts not to interfere with the awards of damages by juries as there was no effective appeal against quantum. All that a reviewing court could do was to quash the jury's decision if it thought the punishment awarded was more than any twelve reasonable men could award. The court could not substitute its own award. The punishment would then be decided by another jury and if they too awarded heavy punishment, the court was virtually powerless.[192] This position was fundamentally changed by s.8(2) of the Court and Legal Services Act 1990 which empowered the legislator to set rules providing for the Court of Appeal, in place of ordering a new trial, to substitute for the sum awarded by the jury such sum as appears to the court to be proper. The right to order a new trial on the ground that damages awarded by a jury are excessive or inadequate is retained. However, the courts tend to substitute an award rather than put the parties to the expense of a new trial. The discretion given in s.8 is laid down in the Civil Practice Rules, in particular, CPR r.52.10(3). Naturally, the House of Lords also has discretion to substitute for a sum of damages awarded by the jury such sum as appears to it to be proper instead of ordering a new trial.[193]

80 To curb any excessive awards, the Law Commission had recommended in its 1997 report that, rather than juries, judges should determine whether punitive damages should be awarded and assess the amount due.[194] In *Thompson v Commissioner of Police of the Metropolis*, Lord Woolf M.R. thought thus: "Very difficult issues of credibility will often have to be resolved. It is desirable for these to be determined by the plaintiff's fellow citizens rather than judges, who like the police are concerned in maintaining law and order. Similarly the jury because of their composition, are a body which is peculiarly suited to *make the final assessment* of damages, *including deciding whether* aggravated or *exemplary damages are called for* in this area of litigation and for the jury to have these important tasks is an important safeguard of the liberty of the individual citizen."[195]

E. Excessive Amounts

81 Exemplary damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved.[196] In *Rookes*, Lord Devlin was concerned that some of the awards that juries had made in the past seemed to

[192] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1087 per Lord Reid.

[193] s.4 Appellate Jurisdiction Act 1876.

[194] A jury's jurisdiction would be limited to determining liability (i.e. whether a relevant civil wrong has been committed) and assessing compensatory damages. As with all its other recommendations on exemplary damages, this was also rejected by the government in 1999.

[195] *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 513. Emphasis added. Likewise, the Irish Law Reform Commission in their report on Aggravated, Exemplary and Restitutionary Damages concluded that "…in particular, having regard to the jury's superior knowledge of the facts grounding the finding of liability, the law should not be altered to allocate the function of the award and assessment of exemplary damages to the judge rather than the jury." Irish Law Reform Commission, Aggravated, Exemplary and Restitutionary Damages, LRC 60–2000 (2000) par. 2.042.

[196] *Rookes v Barnard* [1964] 1 All ER 367, 407.

amount to a greater punishment than would be likely to be incurred if the conduct were criminal and moreover a punishment imposed without the safeguard which the criminal law gave to an offender.

82 As noted in no. 44 ff. supra, when awards of exemplary damages are being considered, the courts take several factors into consideration. These are designed to moderate a punitive award. Lord Devlin's prognostication in *Rookes*, was that "Exhortations to be moderate may not be enough".[197] He duly anticipated that "the House may find it necessary to place some arbitrary limit on awards of damages that are made by way of punishment."[198] Guidelines have since been formulated to this effect.

1. Guidelines for False Imprisonment and Malicious Prosecution in Police Cases

83 In *Thompson v Commissioner of Police of the Metropolis*, Lord Woolf M.R. issued general guidance and brackets for the purpose of determining the punitive element in false imprisonment or malicious prosecution by police cases. These would also minimise the undesirably frequent number of occasions that the appellate court would be called to intervene to substitute excessive awards.

84 When punitive damages are at issue the following guidelines which the trial judge should explain to the jury were set:

a) the plaintiff has already been compensated for his or her injuries and any award of compensatory and aggravated damages includes, from the defendant's viewpoint, a measure of punishment;
b) the jury should award punitive damages only if, in their view, the basic and aggravated damages are inadequate to punish the defendant for oppressive, arbitrary, or unconstitutional behaviour;
c) a punitive damages award provides a windfall to the plaintiff and an award of such damages may mean that that amount may not be available to be spent by the police for the benefit of the public; and
d) the amount of punitive damages should be no greater than the minimal amount needed to mark the jury's disapproval of the defendant's behaviour.

85 The brackets set forth were that:

a) where exemplary damages are appropriate they are *unlikely* to be less than £ 5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all;
b) the conduct must be particularly deserving of condemnation for an award of as much as £ 25,000 to be justified and the figure of £ 50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent; and

[197] Ibid. at 411.
[198] Ibid. at 411.

c) it will be unusual for the exemplary damages to produce a result of more than three times the basic damages being awarded (as the total of the basic aggravated and exemplary damages) except where the basic damages are modest.[199]

86 Although conceived in the context of juries, both the guidelines and brackets are just as relevant to trial by judge.

a) Awards made post-Thompson

87 The question is whether the *Thompson* guidelines have had a sufficient impact on the amount of punitive damages awarded in cases of false imprisonment or malicious prosecution. The table below lists cases against the police where the issue of exemplary damages arose post-*Thompson*.

Cases[200]	**Amount Awarded**			**Adjustments post-*Thompson* Guidelines/Brackets**		
	Compensatory	**Aggravated**	**Punitive**	**Compensatory**	**Aggravated**	**Punitive**
Thompson 1997	£ 1,500	(incl. in compensatory award)	**£ 50,000**	£ 10,000	£ 10,000	**£ 25,000**
Hsu 1997	£ 20,000	(incl. in compensatory award)	**£ 200,000**	£ 20,000	(incl. in compensatory award)	**£ 15,000**
Goswell 1998	£ 132,000	(incl. in compensatory award)	**£ 170,000**	£ 22,600	£ 10,000	**£ 15,000**
Gerald 1998	£ 25,000	(incl. in compensatory award)	**£ 100,000**	£ 20,000	£ 10,000	**£ 20,000**
Isaac 2001	£ 4,350	None	**£ 5,000**	£ 4,350	None	**£ 5,000**

[199] *Thompson and Hsu v Commissioner of Police of the Metropolis* [1998] QB 498, 514 ff. In *Darren Watson v Chief Constable of Cleveland Police* [2001] EWCA Civ 1547, the Chief Constable appealed against the jury's verdict of £ 21,500. If the jury were given the *Thompson* direction, the result would have been different. He argued that the basic damages for assault and malicious prosecution were £ 4,000. Three times that is £ 12,000. Aggravated damages of £ 1,500 were awarded, which would mean that the exemplary damages should not have exceeded £ 6,500 i.e. £ 12,000 – £ 4,000 – £ 1,500 in line with point c) above of the *Thompson* brackets. In fact, the amount awarded by way of punitive damages was £ 16,000. The court thought that the jury might well have taken a poor view of the police behaviour and in the case at hand, it might be reasonable to exceed the £ 6,500 figure. It considered however, that £ 16,000 was very substantial indeed and substituted a final exemplary damages figure of £ 9,000. This shows that the guidelines are not rigid and rightly so.

[200] *Goswell v Commissioner of Police for the Metropolis* [1998] EWCA civ 653; *Commissioner of Police of the Metropolis v Gerald* [1998] Westlaw Transcripts (WL) 1042364; *Isaac v Chief Constable of West Midlands Police* [2001] EWCA Civ 1405; *Darren Watson v Chief Constable of Cleveland Police* [2001] EWCA Civ 1547.

Cases	Amount Awarded			Adjustments post-*Thompson* Guidelines/Brackets		
	Compensatory	**Aggravated**	**Punitive**	**Compensatory**	**Aggravated**	**Punitive**
Watson 2001	£ 4,000	£ 1,500	**£ 16,000**	£ 4,000	£ 1,500	**£ 9,000**
Manley 2006	£ 10,000	None	**None**	£ 12,500	£ 10,000	**None**
Rowlands 2006[201]	£ 6,350	None	**None**	£ 6,350	£ 6,000	**£ 7,500**

88 It is fair to say that for the most part the *Thompson* direction has been successful in restraining large punitive awards. In *Rowlands v Chief Constable of Merseyside Police*,[202] Moore-Bick L.J. considered that it was right to adjust Lord Woof M.R.'s brackets for inflation, and that rather than £ 5,000, the minimum amount which justifies an award of exemplary damages today should be £ 6,000.[203] A cautionary word was also implicit in Waller L.J.'s dicta in *Manley v Commissioner of Police for the Metropolis*,[204] who commented that the *Thompson* guidance was applicable to "a straightforward case", and that it was not to be used in a "mechanistic manner". That there is "no formula which is appropriate for all cases," was acknowledged by Lord Woolf M.R. himself in *Thompson* and indeed, the guidelines should not be taken as a rigid statutory provision.

2. Guidelines in Defamation Cases

89 In *John v Mirror Group Newspapers Ltd.*,[205] the defendant argued, inter alia, that the jury's excessive punitive award had a chilling effect on freedom of speech and expression and that on the facts, it amounted to a restriction or penalty on the defendant's freedom of expression contrary to art. 10 of the European Convention on Human Rights, now transposed under s.10 Human Rights Act 1998.[206] The argument had already been successfully raised in *Rantzen v*

[201] As mentioned in no. 7 supra, the trial judge in *Rowlands v Chief Constable of Merseyside Police* had withdrawn from the jury consideration of an award of exemplary damages on the ground that there was nothing "extraordinary" about the case. On appeal, Moore-Bick L.J. held that whether the judge considered the case to be exceptional was beside the point. Having specifically taken the *Thompson* guidelines into account, he proceeded to make a punitive award of £ 7,500.

[202] *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773.

[203] *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 517. Lord Woolf M.R. in *Thompson* had himself anticipated that the "…figures given will of course require adjusting in the future for inflation."

[204] *Manley v Commissioner of Police for the Metropolis* [2006] EWCA Civ 879, at [20]. See no. 104 f. infra.

[205] *John v Mirror Group Newspapers Ltd.* [1997] QB 586, 622 f.

[206] Art. 10(1) provides that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." This is subject to art. 10(2) which

Mirror Group Newspapers Ltd.[207] though in respect of compensatory damages. The court in *John* emphasised that "principle requires that an award of exemplary damages should never exceed the minimum sum necessary to meet the public purpose underlying such damages, that of punishing the defendant, showing that tort does not pay and deterring others. The same result is achieved by the application of article 10. Freedom of speech should not be restricted by awards of exemplary damages save to the extent shown to be strictly necessary for the protection of reputations." Similarly, in the recent case of *Mosley v News Group Newspapers Ltd*.,[208] the judge refused to extend the scope of exemplary damages into the new area of breach of privacy citing primarily that such a step could not be justified by reference to the matters identified in art. 10(2) of the Convention. "I was not satisfied that English law requires, in addition to the availability of compensatory damages and injunctive relief, that the media should also be exposed to the somewhat unpredictable risk of being 'fined' on a quasi-criminal basis. There is no 'pressing social need' for this. The 'chilling effect' would be obvious."

a) Awards made in defamation cases

90 As mentioned above, one of the factors relevant in assessing an award of punitive damages is a general consideration of the defendant's means. Thus in defamation cases where newspapers are defendants, awards have been high. In *Broome*, £ 25,000 exemplary damages (worth over £ 245,000 today) and £ 15,000 compensatory damages were awarded against both defendants. In *Riches v News Group Newspapers Ltd*.,[209] the jury awarded each of the ten claimants £ 300 compensatory damages and £ 25,000 (worth ca. £ 650 and £ 55,000 today) as exemplary damages. On appeal, the court ordered a new trial on the issue of exemplary damages as the latter sum was disproportionate to the compensatory sum probably owing to the serious omissions and errors in the directions to the jury. In *John v Mirror Group Newspapers Ltd.*, the jury awarded the claimant £ 75,000 in compensatory damages and £ 275,000 in punitive damages which were reduced on appeal under s.8 of the Courts and Legal Services Act and CPR r.52.10(3) to £ 25,000 and £ 50,000 respectively. The Court of Appeal determined that £ 50,000 would be sufficient to "ensure that justice is done to both sides" and to "fully secure the public interest involved."

3. Awards made in Landlord/Tenant Cases

91 Amounts awarded in unlawful eviction cases have tended to be more consistent and less significant than in defamation cases. Sums have ranged from hundreds of pounds to exceptionally, tens of thousands of pounds. Indeed, an

reads: "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society…for the protection of the reputation or rights of others…".

[207] *Rantzen v Mirror Group Newspapers Ltd.* [1994] QB 670.

[208] *Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (QB).

[209] *Riches v News Group Newspapers Ltd.* [1986] QB 256.

award of £ 7,500 (worth nearly £ 14,000 today) in *Mehta v Royal Bank of Scotland*[210] was said to be "substantial"[211] though recently, the same award was made in favour of each of four defendants in *Daley v Mahmood.*[212] A similarly high award of £ 5,000 was made in *Bhatnagar and Elanrent v Whitehall Investments*, *Collier v Burke*[213] and *Perry v Scherchen*[214] though this was held to include an element of aggravated damages. Other awards have ranged from £ 1,500 as in *Daley & Another v Ramdath*[215] to even less than £ 1,000 as was the case in *McMillan v Singh* (£ 250)[216] and *Hume v Pratt* (£ 100).[217] Outside unlawful eviction, and no doubt in light of the facts of the case, awards have varied e.g. in *Design Progression Limited v Thurloe Properties*,[218] £ 25,000 was awarded for breach of statutory duty in failing to consent to an application for a licence to assign (or underlet) within a reasonable time.

F. Multiple Defendants

The practice of making one award in respect of compensatory damages against joint defendants is said to stem from *Heydon's Case.*[219] In the case of such damages, any injustice to the less guilty of joint tortfeasors in making the sum recoverable against all arises from the necessity of ensuring that the claimant shall recover for the whole of his injury. It has been argued that once one gets outside that sphere, and into the sphere of exemplary damages, there is no reason to support the injustice. The basis of this concern is that a defendant who is wholly innocent or one who bears a lesser degree of blameworthiness might be forced to pay the whole sum of exemplary damages and, if he could get contribution against his joint (and more blameworthy) tortfeasor, he would be left to take his chance of so recovering it. The moral, as Salmon L.J. put it, is that "you must be as careful in choosing your companions in tort as you are in choosing your companions when you go out shooting."[220] 92

[210] *Mehta v Royal Bank of Scotland* [1997] Landlord and Tenant Reports (L & TR) 240.
[211] *McGregor* (fn. 58) no. 11-025.
[212] *Daley v Mahmood* [2006] 1 P & CR DG 10.
[213] *Bhatnagar and Elanrent v Whitehall Investments* [1996] CLY 3790.
[214] *Perry v Scherchen* [2002] 1 P & CR DG 8. In *Richardson v Holowkiewicz* [1997] CLY 328 the landlord changed the locks of his tenant's property while the tenant and her 3 children were away on holiday. An exemplary damage award of £ 1,750 (worth about £ 2,300 today) was made.
[215] *Daley & Another v Ramdath* (1993) 25 HLR 273. See also *Brown v Mansouri* [1997] CLY 3287; *Sharma v Kirwan and Coppock* [1995] CLY 1850; *Burke v Berioit* [1995] CLY 1572 and *Farthing Hughes v Colisanti* [1994] CLY 1769 where the same amount was awarded. £ 1,000 was awarded in *Drane v Evangelou* [1978] 2 All ER 437; *Bain v Stimpson* [1994] CLY 1451; *Nwokorie v Mason* (1994) 26 HLR 60; *Morris v Synard* [1993] CLY 1399 and *Amrani v Oniah* [1984] CLY 1974. The claimant in *Guppys (Bridport) Ltd. v Brookling* was awarded £ 1,000 which was held to include both exemplary and special damages. Evidently, an adjustment would have to be made to take account of inflation: >http://www.bankofengland.co.uk/education/inflation/calculator/flash/index.htm<
[216] *McMillan v Singh* (1985) 17 HLR 120, 124 per Sir John Arnold.
[217] *Hume v Pratt* [1980] CLY 1647.
[218] *Design Progression Limited v Thurloe Properties* [2005] 1 WLR 1.
[219] *Heydon's Case* (1612) 11 Coke's King's Bench Reports (Co. Rep.) 5a.
[220] *Broome v Cassell & Co. Ltd.* [1971] 2 QB 354, 393.

93 Having noted that only one sum (being the lowest sum for which any of the defendants can be held liable) was to be awarded by way of exemplary damages against multiple tortfeasors, Lord Wilberforce in *Cassell & Co. Ltd. v Broom* continued that claimants who wished to differentiate between the defendants can do so in various ways, for example, by electing to sue the more guilty only or by commencing separate proceedings against each. The problem with this is that commencing separate proceedings may discourage joinder of actions with an attendant increase in costs.[221] Further, as the defendant can adduce evidence of his means, suing the more blameworthy defendant alone e.g. a police officer rather than his employer would invariably result in a reduced award. The (perverse) incentive is thus to pursue employers instead.

94 In Commonwealth jurisdictions, separate punitive awards are made against individual tortfeasors where the degree of culpability differs.[222] The court can take the good faith of an individual tortfeasor into account as well as the fact that one of the wrongdoers may have previously been punished, without exculpating the rest. In such a case, a cautious approach would require that a larger windfall does not accrue to the claimant by awarding him as many punitive awards as there are defendants. The aggregate amount should be limited by the culpability of the defendants' conduct. The Law Commission endorsed this several liability approach coupled with a further recommendation that the right to recover contribution laid down in s.1 of the Civil Liability (Contribution) Act 1978 shall not extend to a liability to pay punitive damages.[223] However as aforesaid, the government decided not to take forward the Law Commission's proposals for legislation on exemplary damages. Rather, it thought that further judicial development of the law in this area might help clarify the issues.

G. Multiple Claimants

95 A single act may affect a series of claimants. What emerges from the judgment in *Riches v News Group Newspapers Ltd.*, where the wronged claimants brought a joint action against a defendant, is that once a compensatory award is determined, the judge or jury must establish whether the facts warrant an additional punitive element. If so, this additional sum is the punitive award which is then to be apportioned equally between the claimants. The *Riches* collective apportionment approach does not address other multiple claimant scenarios which, inter alia, prompted Stuart Smith L.J in *A.B. v South West Water Services Ltd.*, to brand the case unsuitable for an award of exemplary damages. Yet it is precisely such cases where deterrence is paramount.

[221] *Anderson*, CJQ 1992, 233, 256.

[222] See the Australian case *XL Petroleum (NSW) Pty Ltd. v Caltex Oil (Aust) Pty Ltd.* (1984–5) 155 Commonwealth Law Reports (CLR) 448.

[223] These recommendations did not apply to partnerships (who were to remain jointly and severally liable for the acts of their partners) or to vicarious liability cases.

Whereas *Riches* was a consolidated action by all affected victims against the tortfeasor, the facts in *A.B. v South West Water Services* were such that there were 180 claimants with several other potential litigants with causes of actions accruing successively. Thus, if "the assessment is made separately at different times for different plaintiffs, how is the court to know that the overall punishment is appropriate?"[224] Uncertainty of the number and extent of prospective claims makes a fair award of punitive damages difficult to assess. A second question raised in *A.B. v South West Water Services Ltd*. was whether the global sum should be divided equally or according to the gravity of the personal injury suffered – some claimants may have been affected by the alleged behaviour, others not.[225] Related to this is how a case is to be handled where one of the claimants' conduct is such as to merit a reduction or exclusion of an award. In both cases, victim-specific assessments could be complex and the defendant's costs alone may suffice as punishment – though as we have seen, these are not taken into account in assessing the punitive award.[226] 96

H. Claimant Victim of Punishable Behaviour

As aforesaid, Lord Devlin in *Rookes* noted that the claimant cannot recover exemplary damages unless he is the victim of punishable behaviour.[227] A. Beever argues that if exemplary damages are a bribe to encourage claimants to pursue the public goal of deterring and punishing wrongdoers, then there is no reason to insist that the claimant should be the one who was injured by the defendant. "We do not allow the victims of criminal wrongdoing to determine whether a prosecution should be brought and, given this rationale, we should not leave exemplary damages in the hands of the victim either. The point remains that if a wrongdoer merits punishment he should receive it even if his victim cannot afford to fund civil litigation or has other reasons for letting the matter lie."[228] 97

I. Survival of Claims

1. Death of the Victim

The requirement that the claimant of punitive damages must be the victim of punishable behaviour is in line with s.1(2)(a) of the Law Reform (Miscellaneous Provisions) Act 1934 which provides that where a cause of action survives *for the benefit of* the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include exemplary damages. It is not obvious however, why a highly culpable tortfeasor should escape civil punishment for fortuitously finishing his victim off. "Death as a result of a tort seems to provide the strongest case for punishment and to allow 98

[224] *AB v South West Water Services Ltd.* [1993] QB 507, 527 per Stuart Smith L. J.
[225] Ibid. at 527.
[226] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1114; *John v Mirror Group Newspapers Ltd.* [1997] QB 586, 619. See no. 50 supra.
[227] *Rookes v Barnard* [1964] 1 All ER 367, 411.
[228] *Beever*, 23 Oxford J. Legal Stud. 87, 103. See also *McGregor* (fn. 58) no. 11-046.

recovery on behalf of the deceased victim's estate would presumably further the deterrence objective."[229]

2. Death of the Tortfeasor

99 In s.1(1) Law Reform (Miscellaneous Provisions) Act 1934, provision is made for causes of actions subsisting *against* the estates of deceased persons. The effect of the wordy provisions is that the estate of a dead man must pay punitive damages in order to indemnify the living. Since punitive damages are punitive or deterrent against the author of the damage, it would have been understandable if the statute had refused to allow them against a dead man.[230] It is contended that "there is no need to visit the sins of the parents on the children and their heirs."[231] The thought of a posthumous trial turns the criminal law on its head.

100 Such is the oddity of the section that Lord Kilbrandon in *Broome* was driven to suppose that by the phrase "exemplary damages" under the 1934 Act, parliament was referring to "aggravated damages". Whatever parliament's intention was, the Act seems in step with other Commonwealth jurisdictions.[232]

J. Exemplary Damages must be Specifically Pleaded

101 CPR r.16.4(1)(c) provides that particulars of claim must include, if the claimant is seeking an award of punitive damages, a statement to that effect and his grounds for claiming them.[233] Thus punitive damages must be specifically pleaded. As the case of *Millington v Duffy*[234] illustrates, a claimant is not obliged to claim punitive damages nor once obtained are they obliged to execute such an award. This was an unlawful eviction case which fell well within the purview of Lord Devlin's second category. Having issued proceedings, inter alia, for exemplary damages, the claimant for one reason or another expressly abandoned the claim. Sheldon J. held, "That being so, as counsel has very fairly admitted, a claim under that head of damages is not now open to the appellant in this court."[235] He proceeded to observe that "had the claim for exemplary damages been maintained, the award would have been very considerably higher."[236] Moreover, a court cannot of its own motion raise the issue of exemplary damages nor

[229] *Anderson*, CJQ 1992, 233, 256 f.
[230] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1133 per Lord Kilbrandon.
[231] A response given by Professor Tettenborn during the Law Commission consultation for Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part V par. 1.276.
[232] See Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) fn. 535.
[233] See also par. 2.10(2) Practice Direction 53 CPR on Defamation Claims.
[234] *Millington v Duffy* (1984) 17 HLR 232: This was an action, inter alia, for trespass. A minor dispute arose between landlord and tenant resulting in the harassment and removal of the latter who slept rough for a protracted period. The landlord proceeded to re-let the claimant's room at a 55% mark up.
[235] Ibid. at 236.
[236] Idid. at 236.

can the Attorney-General. This said, particulars of claim may be amended for that purpose, as was the case in *Cassell & Co. Ltd. v Broome*.

Why should a claim for exemplary damages be specifically pleaded? This leaves punishment at the claimant's discretion. A fundamental reason for this requirement is that the defendant is entitled to know that he is being charged with matter which justifies them,[237] and ought not to be taken by surprise.[238] Exemplary damages call for the highest degree of discovery.[239] A related question is why the enforcement of such damages is discretionary. Even if criminal punishment is sought by an individual through a private prosecution rather than, as is normally the case, by the state through a public prosecution, that individual has no discretion to waive the punishment once a court has decided to impose it. The individual is seen as acting on behalf of the state rather than in his or her own interests.[240] 102

K. Vicarious Liability

Employers are liable under common law for the torts committed by their employees in the course of employment: Chief Constables are vicariously liable for the torts of their officers committed in performance of their functions under s.88 Police Act 1996[241] and the Crown is vicariously liable for the torts of its servants or agents (e.g. prison officers) by reason of being their employer under s.2(1) Crown Prosecution Act 1947. Should an award of exemplary damages in a vicarious setting rightly be made against an employer? In *Kuddus v Chief Constable of Leicestershire Constabulary*,[242] Lord Scott observed that "silently and without any proper or principled justification for it, a system of vicarious punishment of public employers, via an award of exemplary damages, has crept into the English civil law."[243] He opined that vicarious punishment, through exemplary damages, was contrary to principle and should be rejected. 103

As with most cases before it, the court assumed in *Kuddus* that an award of exemplary damages could be made against Chief Constables or Commissioners and the latter did not seek to argue to the contrary. In a string of recent cases 104

[237] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1040.
[238] Ibid. at 1083 per Lord Hailsham L.C.
[239] Ibid. at 1040.
[240] *A. Burrows*, Reforming Exemplary Damages, in: P. Birks (ed.), Wrongs and Remedies in the Twenty-First Century (1996) 163.
[241] Until the passing of the Police Act 1964 a claim in respect of a tort alleged to have been committed by a police officer could be made only against the officer personally. However, s.48 of the 1964 Act (now re-enacted without any significant change to the wording to s.88 of the Police Act 1996) effected a change in the law by making Chief Constables liable in respect of torts committed by their officers. It provides as follows: s.88(1) The chief officer of police for a police area shall be liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and accordingly shall in respect of any such tort be treated for all purposes as a joint tortfeasor.
[242] *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122.
[243] Ibid. at 163.

however, the question of the appropriateness of punitive damages in vicarious settings has been expressly raised and addressed. In *Manley v Commissioner of Police of the Metropolis*, the claimant brought an action for assault, false imprisonment and malicious prosecution by police officers for whom the defendant Commissioner was vicariously liable. He appealed against the jury's decision not to award exemplary damages. The Court of Appeal held that "where the defendant is the employer of the police officers involved the [*Thompson v Commissioner of Police of the Metropolis*] judgment makes clear that exemplary damages are unlikely to have a role."[244] It concluded that the case was not one for exemplary damages.

105 Per contra, punitive damages were awarded against the Chief Constable of Merseyside Police in the subsequent case of *Rowlands v Chief Constable of Merseyside Police* – a case in which damages for assault, false imprisonment and malicious prosecution were sought. The Chief Constable sought to rely on *Thompson*, *Manley* and Lord Scott's disapproval in *Kuddus* in favour of the conclusion that it was contrary to principle to punish a person whose behaviour was not in any way blameworthy. However, Moore-Bick L.J. in *Rowlands* felt at liberty to reach his own decision on the matter. He held that what was said in *Thompson* was that it was *rare* for senior officers to be implicated in that way and *Kuddus* was distinguishable on the grounds that the issue before the House of Lords was the validity of the cause of action test. Their Lordships did not hear arguments on the question whether an award of exemplary damages could properly be made against a Chief Constable whose liability was only vicarious and none of them apart from Lord Scott expressed a view on the question.

106 Moore-Bick L.J. thus concluded that notwithstanding the undoubtedly strong arguments of principle in favour of limiting the application of an avowedly punitive award to those who are personally at fault, the courts should, as a matter of policy, be able to make punitive awards against those who are vicariously liable for the conduct of their subordinates without being constrained by the financial means of those who committed the wrongful acts in question. "Only by this means can awards of an adequate amount be made against those who bear public responsibility for the conduct of the officers concerned."[245]

107 It is appropriate to note here that vicarious liability is limited to conduct which takes place in the course of employment so that in *Makanjuola v Metropolitan Police Commissioner*[246] where the police officer went on an adventure of his own, the Chief Officer of police was not subject to vicarious liability. The claimant had been sexually assaulted by a police officer after he threatened that he would otherwise make a report which would lead to her deportation. The

[244] *Manley v Commissioner of Police for the Metropolis* [2006] EWCA Civ 879, at [21].
[245] *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773, at [47].
[246] *Makanjuola v Metropolitan Police Commissioner*, The Times, 8 August 1989.

policeman himself was held personally liable, inter alia, for exemplary damages under the first category.

Two further cases deserve mention here: *Commissioner of the Police for the Metropolis v Goswell* and *Commissioner of the Police for the Metropolis v Gerald*.[247] Both cases were appeals by the respective Commissioners from awards made against them for damages for assault, false imprisonment and, in the latter case, malicious prosecution. In *Goswell*, exemplary damages were said to present particular conceptual difficulties in that conduct of the appellant Commissioner's junior officers was something which the Commissioner himself tried to punish. He thoroughly investigated Goswell's complaint, took appropriate disciplinary proceedings and dismissed an officer from the force. It was no fault of his that the officer was ultimately reinstated. Although the Commissioner was said to deserve credit for his conduct when it came to deciding the question of exemplary damages, less credit would be given than had he not "put forward police officers whom he himself had disbelieved on the central issue in the case as witnesses of truth, adducing from them in evidence in chief what he thought to be a false account of the incident."[248] The exemplary award was reduced. In *Gerald*, there was *no* blameworthy conduct of the Commissioner, either in his leadership and supervision of his force beforehand, or in his defence of the civil proceedings, or in not seeking to discipline the officers concerned. Although he defended the proceedings, it was not shown, as was the case in *Goswell*, that he disbelieved his officers. Indeed, he was entitled to continue to rely on their account of the matter and to seek their vindication in the civil proceedings. The Court of Appeal referred to the joint appeals of *Thompson* and *Hsu* and observed that there was no complaint of any personal failure by the Commissioner or other senior officers above the rank of inspector responsible to him for the conduct of the matter at its various stages, yet the court there took the view that an award of exemplary damages in each case was appropriate. The court in *Gerald* concluded that a modest award of exemplary damages was appropriate.[249] 108

In light of the authorities cited, it can safely be concluded that exemplary damages are awardable in vicarious liability cases under the first category. In respect of the second category, the learned editors of Gatley on Libel and Slander note that "In most libel cases the defendant, or the principal defendant, will be a media corporation but the state of mind of the journalist and a fortiori of any higher officer such as an editor will, of course, be imputed to the corporation and it is irrelevant that the intended gain will come to the corporation rather than the individual."[250] Some consideration has indeed been given to the question of vicarious liability under this category or at least an assumption 109

[247] *Commissioner of Police of the Metropolis v Gerald* [1998] WL 1042364.
[248] *Goswell v Commissioner of Police for the Metropolis* [1998] EWCA Civ 653.
[249] See also *KD v Chief Constable of Hampshire, John Hull* [2005] EWHC 2550, at [193] per Tugendhat J.
[250] *Milmo/Rogers* (fn. 93) at par. 8.16 and 9.18

has been made in that respect, by the Court of Appeal in *Maxwell v Pressdram Ltd*.[251] and in *Riches v News Group Newspapers Ltd*. As Eady J. said in *Mosley v News Group Newspapers Ltd*., any ruling to the contrary can only be made by the House of Lords. The government did not tackle the matter in the 2007 consultation paper. Although exemplary damages can be awarded on a vicarious basis, where the wrongdoers "engaged in a misguided and unauthorised method of performing their authorised duties or were engaged in what was tantamount to an unlawful frolic of their own",[252] the employer will not be liable.

L. Insurability

110 A consequence of imposing vicarious liability on employers has been that insurance has to be sought to cover any liability arising from their employees' misconduct. One contention is that if the ability to insure frustrates the goal of punishment and deterrence, public policy should accordingly preclude anyone liable for such an award from being entitled to an indemnity against it.

111 *Lancashire County Council v Municipal Mutual Insurance Ltd*.[253] concerned an insurer who refused to reimburse, inter alia, a local authority which was liable for two awards of exemplary damages. In both cases, the liability of the local authority for exemplary damages arose vicariously. The authority sought a declaration that its insurance policy included cover for exemplary damages and the court agreed. Simon Brown L.J. accepted the general proposition that a person cannot insure against liability consequent on the commission of a crime. He saw no grounds, however, for extending the principle to deny insurance to those whose liability arose, as in the present case, solely on a vicarious basis.

112 He reasoned firstly that whilst allowing an indemnity would undoubtedly reduce the deterrent and punitive effect of the order upon the defendant, it will greatly improve the claimant's prospects of recovering the sum awarded. He noted that it was this consideration – the interests of those harmed by the tortfeasor – which has prompted the law in certain circumstances to require compulsory insurance. In response to this, A. Beever correctly opines that the argument is inconsistent with "…the punitive and non-compensatory nature of exemplary damages. Concern for the claimant cannot provide a justification for exemplary damages. Any such validation must focus on the defendant. Accordingly, any argument in favour of exemplary damages that concentrates on the plight of the claimant is necessarily misguided."[254]

[251] [1987] 1 WLR 298, 309 per Kerr L. J., with whom Parker L. J. agreed.
[252] *Racz v Home Office* [1994] 2 AC 45, 53.
[253] *Lancashire County Council v Municipal Mutual Insurance Ltd*. [1997] QB 897, 909. See *L. Loucas*, Exemplary Damages: Policy Terms, International Insurance Law Review (Int. ILR 1996) 4(7), 131, 132 f.
[254] *Beever*, 23 Oxford J. Legal Stud. 87, 96.

Secondly, Simon Brown L.J. felt that even though the defendant's liability is insurable, an exemplary damages award is still likely to have a punitive effect: (a) there may well be limits of liability and deductibles under the policy; and (b) the insured is likely to have to pay higher premiums in future and may well, indeed, have difficulty in obtaining renewal insurance. Thirdly, he noted that there was a separate public interest in holding parties to their contracts, particularly where it was open to the insurers to exclude liability for exemplary damages. If insurers take the premium, they should meet the risk. Fourthly, he accepted that if the damages are held recoverable against insurers, the burden falls onto the general public by way of a rise in premiums. If, however, the damages are not thus recoverable, then in some cases the burden falls not onto an individual tortfeasor but rather onto the local body of ratepayers. Fifthly, contracts should only be held unenforceable on public policy grounds in very clear cases. 113

Further arguments not advanced in *Lancashire County Council* but supportive of the insurability of punitive damages are that: (a) claimants are unlikely to claim punitive damages where defendants do not have the financial capacity to pay any substantial damages and costs which may be awarded against them. Such capacity may be afforded, however, by liability insurance;[255] and (b) denying the possibility of insuring against punitive damages produces an inconsistency and injustice where other defendants are able to accept gifts to meet their liability for punitive damages.[256] 114

The *Lancashire County Council* case gives clear guidance and approval to the insurance of exemplary damages where the liability is vicarious.[257] There is still some doubt, however, as to the position where the person against whom the exemplary damage award has been made personally seeks indemnity under his own insurance policy. In such cases, the considerations of public policy would be of greater strength and might persuade the courts to deny coverage.[258] 115

VI. Alternative Remedies – Gain Based Damages

Referring to Lord Devlin's second category in *Rookes v Barnard*, Lord Nicholls in *Kuddus v Chief Constable of Leicestershire Constabulary* considered that the law of unjust enrichment had developed apace in recent years.[259] It is argued that restitutionary damages are available now in many tort actions as 116

[255] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part V par. 1.237.

[256] Ibid. at par. 1.247.

[257] Cf. *Financial Services Authority*, The Prohibition of Insurance against Financial Penalties Imposed by the FSA: >http://www.fsa.gov.uk/pubs/policy/ps191.pdf>. Regulated firms and individuals are not able to use insurance to pay FSA fines (civil fines) under rules which came into effect from 1 January 2004. These were intended to ensure that anyone who is fined must pay the fine themselves rather than claim it against insurance.

[258] *Loucas*, Int. ILR 1996, 4(7), 131–133, 133.

[259] *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, 145 per Lord Nicholls.

well as those for breach of contract. The profit made by a wrongdoer can be extracted from him without the need to rely on the anomaly of exemplary damages.[260] H. McGreggor was also prompted to note that "It is true that the awarding of exemplary damages is a somewhat makeshift and arbitrary method of preventing a tortfeasor's unjust enrichment, especially as it is dependent on the motivation of profit rather than its achievement. It may be that the emergence of restitutionary damages, particularly since *Attorney General v Blake*, will take us beyond waiver of tort and account of profits to allow claimants a more direct recovery without the need to resort to, in this context, the rather clumsy device of exemplary damages."[261]

117 Exemplary damages are said to be a "blunt instrument to prevent unjust enrichment"[262] because they are at large. They might not strip the precise amount of profit made; the award could be less or more.[263] Per contra, disgorgement damages are "swift and sure"[264] as the remedy reaches only funds attributable to the breach. They focus on what the defendant has gained through the wrong in an attempt to strip that gain. This function is also tailored to deter. Although there is some overlap between exemplary and disgorgement damages, there are differences which mean that the former are not altogether obsolete:

118 Firstly, the obligation to disgorge only arises where there is an economic gain to be skimmed off. Under the second category, punitive damages operate whenever the defendant *made a decision* to proceed with the conduct, knowing it to be wrong or reckless as to whether or not it was wrong, because the advantages of going ahead outweighed the risks involved. Crucially, punitive damages may be awarded under the second category even if no profit eventuates.

119 Secondly, exemplary damages are not merely concerned with stripping the benefit from the guilty party, the role of disgorgement damages. A is not only required merely to surrender something that A has no right to keep and that rightly belongs to B.[265] Exemplary damages can go beyond the level disgorgement damages would ordinarily reach to punish the wrongdoer. Hence Lord Diplock in *Broome* opined: "…to restrict the damages recoverable to the actual gain made by the defendant if it exceeded the loss caused to the plaintiff, would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose to balance against the chance that the plaintiff might never sue him or, if he did, might fail in the hazards of litigation. It is only if there is a prospect that the damages may exceed the defendant's gain that the social purpose of this category is achieved – to teach a wrongdoer that tort does not pay."[266]

[260] Ibid. at 157 per Lord Scott.
[261] *McGregor* (fn. 58) no. 11-028.
[262] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1130 per Lord Diplock.
[263] *Edelman* (fn. 160) 17.
[264] *Attorney General v Blake and Another*, [2001] 1 AC 268 per Lord Nicholls.
[265] *Beever*, 23 Oxford J. Legal Stud. 87, 100 f.
[266] *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1130 per Lord Diplock. See *Edelman* (fn. 160) 250.

Thirdly, restitutionary remedies are limited to the extent that they will not be available where one cannot link profits to a particular wrong.[267]

Admittedly disgorgement damages are wider than punitive damages in that whereas the latter are restricted to the requirement under the second category (intentional or reckless wrongdoing), the former may be available, e.g., against innocent exploiters of another's property.[268] That said, disgorgement damages are subjected to similar criticism as punitive damages owing to their non-compensatory nature and the "windfall" that accrues to the claimant. 120

VII. Other

Several other objections to punitive damages have been rehearsed over the years. These include that they encourage litigation, the only deterrence objective they serve is the incentive to settle cases and as P. Cane notes, they are "objectionable in personal injury cases because they overcompensate and encourage vindictive gold-digging. It would be better to find ways of forcing enterprises to invest their 'ill-gotten gains' in safety than to divest such resources to tort claimants who have already been fully compensated."[269] 121

VIII. Conclusions

Notwithstanding their illogicalities and in light of the recent consultation paper, it appears that the scope, in civil law, to go beyond purely compensatory damages and to award "exemplary" damages will remain a part of English law for a while to come. It is however hoped, in light of the welcome abolition of the cause of action test and the government's proposition to do away with the confusion that "additional damages" pose under the Copyright provisions, that the last major remaining anomaly with punitive damages under English law, the categories test, will soon be removed. If exemplary damages are to remain, if they are to continue to further punishment, deterrence and reprobation, if logic is to prevail, then the scope of the categories test should be clarified. This would satify the pleas of notable judges, e.g. Lord Nicholls in *Kuddus*, and academics. To date, the government has decided not to disturb the common Law categories. As Sir Henry Brooke noted in his speech, The Origins of Punitive Damages and Judicial Attitudes Towards Punitive Damages,[270] "for any such whole sale review we have to wait for a case in which parties are brave enough to want to litigate the issue all over again in our highest court." 122

[267] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part V par. 1.27.

[268] *P. Cane*, The Anatomy of Tort Law (1997) 115.

[269] *Cane* (fn. 81) 174. Under English law, the effect of the categories rule out punitive damages in the typical personal injury case.

[270] Given at the Conference on Punitive Damages, Vienna, Austria organised by the Institute of European Tort Law of the Austrian Academy of Sciences and held on 17 November 2008.

Punitive Damages in France

Jean-Sébastien Borghetti[*]

I. Introduction

At first sight, there is not much to say or write about punitive damages under French law. Understood as damages which are awarded in excess of the proven harm suffered by the plaintiff, in order to punish or deter the defendant and similar persons from pursuing a course of action such as that which caused damage to the plaintiff, punitive damages do not officially exist under the French legal system. They are totally unknown to the Civil Code and to French legislation in general, which neither explicitly provide for nor prohibit such kind of damages.[1] Furthermore, French courts have never allowed themselves to award punitive damages, at least not officially. In matters of extra-contractual liability, the Cour de cassation, France's highest court, has constantly stuck to the "réparation intégrale" (full compensation) principle, according to which damages awarded to the plaintiff must compensate the harm he suffered, without him getting any poorer or richer from it.[2] As French lawyers often put it, damages must compensate damage in full and nothing but damage ("tout le dommage, mais rien que le dommage"). The same principle applies in public law.[3] 1

Punitive damages are thus apparently absent from French law. It can be argued, however, that defendants or debtors sometimes have to pay damages in excess of the damage they caused. In addition, for some time now, there have been calls for an official introduction of punitive damages into French law and this 2

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[1] With the possible exception of art. L. 331-1-3 Code de la propriété intellectuelle: see infra no. 13. In contractual matters, art. 1149 of the Civil Code provides: "Damages due to a creditor are, as a rule, for the loss which he has suffered and the profit which he has been deprived of, subject to the exceptions and modifications below." (The English version of the Civil Code is borrowed from Prof. G. Rouhette and Dr. A. Rouhette-Berton's translation, accessible on the French law official website Legifrance www.legifrance.gouv.fr). Art. 1149 only sets a general rule, however, and cannot be interpreted as an explicit or as an absolute prohibition of punitive damages.

[2] See, e.g., Cass. 2e civ., 8 July 2004, Bulletin des arrêts de la Chambre civile de la Cour de Cassation (Bull. civ.) II, no. 393: "Les dommages-intérêts alloués à une victime doivent réparer le préjudice subi sans qu'il résulte pour elle ni perte ni profit".

[3] See, e.g., *J. Rivero/J. Waline*, Droit administratif (21st ed. 2006) no. 471.

idea has recently been endorsed by a Civil Code Reform project. It is thus worth taking a look at the possible hidden presence of punitive damages in French law (Part II) and at the proposals for reform (Part III).

II. A Hidden Presence of Punitive Damages?

3 Although punitive damages do not officially exist as such under French law, some mechanisms do exist which bear some resemblance to them (no. 4 ff.). Furthermore, it is widely believed that courts sometimes covertly award punitive damages (no. 22 ff.).

A. Mechanisms which Resemble Punitive Damages

4 French lawyers generally agree that the purpose of civil liability is not only to compensate damage. Deterrence and punishment are two other possible functions of civil liability[4] and it is not disputed that some mechanisms, which technically speaking belong to the law of liability or at least have some links to it, do not principally aim at compensating damage but are mostly intended to punish the tortfeasor. Civil liability then acts as a form of "peine privée" (private punishment),[5] rather than as a compensatory mechanism. There are many examples of this peine privée function in French law, most of which bear no resemblance to punitive damages. In some cases, however, the tortfeasor finds himself bound to pay damages which exceed the size of the harm he caused, as if he had been condemned to pay punitive damages. This result can be achieved through various mechanisms. An attempt at ordering them can be made by distinguishing: (1) those which are mostly contractual mechanisms; from (2) those which belong specifically to intellectual property law; and (3) those which have a more general field of application.

1. Contractual Mechanisms

5 The question of punitive damages, at least under French law, is usually considered as arising only in matters of extra-contractual liability. A few words must be said, however, about mechanisms which apply in the field of contract law – where the réparation intégrale principle does not apply as such.[6]

[4] See, e.g., *M. Fabre-Magnan*, Droit des obligations. 2 – Responsabilité civile et quasi-contrats (2007) no. 13 ff.

[5] On the subject, see especially *S. Carval*, La responsabilité civile dans sa fonction de peine privée, foreword *G. Viney* (1995); *A. Jault*, La notion de peine privée, foreword. *F. Chabas* (2005); *B. Mazabraud*, La peine privée. Aspects de droit international, thèse Paris 2 (2006).

[6] Art. 1150 Civil Code provides: "A debtor is liable only for damage which was foreseen or which could have been foreseen at the time of the contract, where it is not through his own intentional breach that the obligation is not fulfilled." ("Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée.")

a) Clauses pénales

"Clauses pénales", which are usually considered equivalent to penalty clauses under common law, are clauses which set in advance the sum of compensation due should a party to a contract breach its terms. They bear some resemblance to punitive damages, since they can result in a debtor paying damages in excess of the harm he caused. Besides, such clauses are very often intended to punish the debtor should he fail to fulfil his duties, just like punitive damages. The main difference with punitive damages, however, is that damages which fall due as a result of the application of such a clause are not awarded by a court, but are set in advance by the parties themselves. 6

Clauses pénales are valid under French law, but only in contract law, and not under tort law. The first paragraph of art. 1152 of the Civil Code sets this out: "Where an agreement provides that he who fails to perform it will pay a certain sum as damages, the other party may not be awarded a greater or lesser sum." As some creditors imposed excessive clauses pénales on their debtors in the past, the legislator decided to provide an exception to the sanctity of contract principle and added a second paragraph to art. 1152 in 1975: "Nevertheless, the judge may even of his own motion moderate or increase the agreed penalty, where it is obviously excessive or ridiculously low. Any stipulation to the contrary shall be deemed void." Courts do not seem to snort at this faculty. However, they resort to it mostly in order to moderate excessive penalties, in which case they are not allowed to award the creditor less than the amount of the loss which he actually suffered.[7] Moreover, when the courts do increase penalties which are ridiculously low, they cannot set them at a level which would exceed the loss suffered by the plaintiff.[8] 7

Art. 1152 of the Civil Code bears witness to the fact that, under French law, damages can do more than compensate the harm suffered by the person to whom they are owed. However, the validity of clauses pénales is restricted to contractual matters and as they are not awarded by the courts, which moreover have the power to moderate them, they cannot be fully likened to punitive damages. 8

b) Astreinte

Astreinte is a periodic penalty payment which can be imposed by a court on a debtor who has not executed his duty. The latter has to pay, in addition to his initial debt and possible damages set by the court, a certain sum (usually calculated on a daily basis) until he fulfils his duty. Astreinte must only be paid to 9

[7] See, e.g., Cass. 1re civ., 24 July 1978, Bull. civ. I, no. 280, Revue trimestrielle de droit civil (RTD civ.) 1979, 150, obs. *G. Cornu*; Cass. com., 9 June 1980, Bull. civ. IV, no. 245; Cass. com., 3 February 1982, Bull. civ. IV, no. 44.

[8] *F. Terré/Ph. Simler/Y. Lequette*, Droit civil. Les obligations (9th ed. 2005) no. 627; *Ph. le Tourneau*, Droit de la responsabilité et des contrats (6th ed. 2006) no. 1221.

the creditor once it has been liquidated by the court.[9] Once paid, astreinte bears a close resemblance to punitive damages since the monies paid by the debtor to the creditor exceed the size of the harm which was actually caused to the latter, who receives more than the amount of his loss. Further, at least in theory, astreintes can reach very substantial amounts.

10 There remain some differences, however, between astreinte and punitive damages, the first one being that the legislator has explicitly distinguished astreinte from damages.[10] Besides, astreinte is usually imposed when the debtor is in breach of a contractual duty or of an explicit statutory duty. One hardly sees how astreinte could apply in matters of extra-contractual liability, except where a tortfeasor refuses to pay a victim damages which he has already been condemned to pay by a court or which he has agreed to pay under a settlement.

2. Mechanisms Belonging to Intellectual Property Law

11 New provisions have recently been introduced into the Code de la propriété intellectuelle (Intellectual Property Code) by Law no. 2007-1544 of 29 October 2007, which purports to translate Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights into French law. Although this Directive does not explicitly provide for the possibility to award punitive damages,[11] some provisions come quite close to establishing such damages.

a) Seizure of illegal profits

12 The seizure of goods or illegal profits is a fairly common sanction in criminal matters, in which case it has little to do with punitive damages. But in the case of an illegal reproduction of a work protected by intellectual property law, art. L. 331-1-4 Code de la propriété intellectuelle provides that a *civil* court can order the confiscation of the whole or part of the revenue obtained through counterfeiting, which shall be handed over to the aggrieved party.[12] Insofar as this revenue can be handed over to the victim, this means that the latter may obtain monies in excess of the actual loss he suffered through the illicit behaviour of the defendant. Art. L. 331-1-4 therefore introduces a sanction which strongly smells of punitive damages.[13] These "punitive damages", however, if

[9] The general rules relating to astreinte are set out in art. 33 to 36 Loi no.°91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution.

[10] Cf. art. 34 Law no.°91-650 of 9 July 1991: "L'astreinte est indépendante des dommages-intérêts."

[11] But the first draft of the Directive did allow the Member States to introduce punitive damages: *A. Girardet*, Entre deux mondes, Cahiers de droit de l'entreprise (Cah. dr. entr.) 4 (2007) 29.

[12] Art. L. 331-1-4, al. 4, Code de la propriété intellectuelle*:* "La juridiction peut également ordonner la confiscation de tout ou partie des recettes procurées par la contrefaçon, l'atteinte à un droit voisin du droit d'auteur ou aux droits du producteur de bases de données, qui seront remises à la partie lésée ou à ses ayants droit."

[13] Admittedly, this looks very much like gain-based or disgorgement damages under English law. French law, however, does not have a typology of damages as precise as that which exists in English law. No explicit distinction is made, therefore, between punitive damages and disgorgement damages, even though the idea under this distinction can be found here and there.

they can be called so, cannot exceed the amount of the illicit profits made by the tortfeasor.[14] Besides, art. L. 331-1-4 was introduced very recently into the Code de la propriété intellectuelle and its practical effects remain to be seen.

b) Art. L. 331-1-3 Code de la propriété intellectuelle

Among the provisions of the Code de la propriété intellectuelle is art. L. 331-1-3, which sets out to transpose art. 13 of the Directive regarding the setting of damages in the case of an infringement of an intellectual property right. It provides: "When setting damages, the courts should take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and the moral prejudice caused to the right holder by the infringement. However, as an alternative and on the request of the injured party, the court may set the damages as a lump sum which cannot be less than the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question."[15] 13

The second paragraph of art. L. 331-1-3 does not really stray from the normal way of setting damages, since it can be interpreted as a way of approximating the loss of profits suffered by the right holder.[16] Even before the adoption of art. L. 331-1-3, French courts sometimes set damages for the infringement of an intellectual property right by calculating the fees which would have fallen due if a licence had been entered into.[17] The first paragraph is more surprising in the context of French law, since it provides that damages can be set by taking into account not only the loss of the claimant, but also the profits made by the infringer. Of course, these profits are not said to be the measure of damages. They are only one among several elements which are to be taken into account. Yet, it is quite obvious that this provision could be used in such a way that 14

[14] To that extent, they bear some similarity to unjust enrichment. In French law, however, in a claim based on unjust enrichment, the impoverished party may not get more than the lower of the amount of his loss or the amount of the enriched party's gain. Unjust enrichment cannot therefore be a way for the plaintiff to be awarded more than he could get under the réparation intégrale principle.

[15] Art. L. 331-1-3 Code de la propriété intellectuelle: "Pour fixer les dommages et intérêts, la juridiction prend en considération les conséquences économiques négatives, dont le manque à gagner, subies par la partie lésée, les bénéfices réalisés par l'auteur de l'atteinte aux droits et le préjudice moral causé au titulaire de ces droits du fait de l'atteinte.
Toutefois, la juridiction peut, à titre d'alternative et sur demande de la partie lésée, allouer à titre de dommages et intérêts une somme forfaitaire qui ne peut être inférieure au montant des redevances ou droits qui auraient été dus si l'auteur de l'atteinte avait demandé l'autorisation d'utiliser le droit auquel il a porté atteinte."

[16] This paragraph can also be seen as an example of a claim based on the idea of unjust enrichment: the defendant has saved the fees he would have had to pay had he properly concluded a contract and he must therefore be condemned to pay them. For another interpretation, see *P.-Y. Gautier*, Fonction normative de la responsabilité: le contrefacteur peut être condamné à verser au créancier une indemnité contractuelle par équivalent, Recueil Dalloz (D.) 2008, 727.

[17] See, e.g., Cass. 1re civ., 30 March 2004, Bull. civ. I, no. 105. Also: *Girardet*, Cah. dr. entr. 4 (2007) 30.

damages paid to the plaintiff could amount to more than the harm suffered. To that extent, these damages could be seen as a legally recognised case of punitive damages.[18]

15 Art. L. 331-1-3 Code de la propriété intellectuelle therefore appears as the first officially recognised occurrence of punitive damages in French law. Albeit it has not received much attention so far, it is certainly important from a symbolic point of view. However, its practical importance remains limited, if only because it applies in very special circumstances and by no way sets a general rule in matters of civil liability. Then again, it might betoken future legislative evolutions.

3. More General Mechanisms

16 There are two other mechanisms, which bear strong resemblances to punitive damages and which theoretically could have a very wide field of application but which have scarcely been used by the French legislator so far.

a) Multiple damages

17 Multiple damages are an exceptional figure in French law. With the exception of an 1810 provision relating to the damages owed by the operator of a mine to the owner of the land on which work is to be done,[19] multiple damages seem to be found mainly in art. L. 211-13 Code des assurances (Insurance Code), which provides that an insurance company which is late in making a compensation offer, which it is bound to make to the victim of a traffic accident under the compulsory traffic accident compensation scheme, shall pay the victim double the interest rate from the date when the offer ought to have been made.[20] This seems a case of multiple damages. However, though multiple damages are a variety of punitive damages in many legal systems, it is not really the case here since it is only the interest payment which is doubled and the amount of extra-damages which are liable to be paid is therefore fairly small.

[18] See fn. 13.

[19] Art. 10 of Loi du 21 avril 1810, modified by Loi du 27 juillet 1880 and art. 14 of Décret-loi no. 55-888 du 20 mai 1955 concernant la recherche et l'exploitation des substances minérales.

[20] Art. L. 211-13 Code des assurances: "Lorsque l'offre n'a pas été faite dans les délais impartis à l'article L. 211-9, le montant de l'indemnité offerte par l'assureur ou allouée par le juge à la victime produit intérêt de plein droit au double du taux de l'intérêt légal à compter de l'expiration du délai et jusqu'au jour de l'offre ou du jugement devenu définitif. Cette pénalité peut être réduite par le juge en raison de circonstances non imputables à l'assureur." ("When the offer was not within the time limit prescribed by art. L. 211-9, the amount of the compensation offered by the insurer or awarded by the court to the victim shall bear interest ipso jure at double the legal interest rate from the expiry of the time limit until the date of the offer or the final judgment. This penalty can be reduced by the court for circumstances not attributable to the insurer.")

b) Civil fines

In certain circumstances, French law provides that the defendant can be condemned to pay what is called a "civil fine" (amende civile). A civil fine is a fine which is provided for in a civil statute (as opposed to a criminal one) and to which one can be sentenced by a civil court (as opposed to a criminal one).[21] Civil fines are paid to the Treasury. They are usually intended as a sanction for trying to avoid a public or civic duty (such as tutorship of an orphan: cf. art. 395, 412 and 413 Civil Code) or for abusing one's right to sue (cf. art. 581 Nouveau code de procedure civile). 18

Civil fines are often low and can hardly be compared to punitive damages. It does happen, however, that the law provides for a civil fine of a substantial amount which, furthermore, is to be paid in circumstances where the debtor's behaviour has caused damage to someone. The main hypothesis is to be found in art. L. 442-6 Code de commerce (Commercial Code). This text sets out a certain number of prohibited practices and allows competitors who suffer as a result of such practices to ask for damages. In addition, art. L. 442-6-III provides that when such practices exist, an action can also be brought before a civil or commercial court by the Public Prosecutor or an agent of the Ministry of Economy, who can ask that the defendant be condemned to pay a civil fine not exceeding € 2 million. This civil fine has often been compared to punitive damages, as it sanctions illicit and harmful behaviour, is of a civil (as opposed to criminal) nature and is likely to exceed the harm which has actually been caused. The only difference seems to be that the fine is to be paid to the Public Treasury and not to the enterprise that was harmed by the prohibited practices.[22] 19

Art. L. 442-6-III has recently come under the scrutiny of the courts. Two appellate courts ruled that it violated art. 6(1) of the European Convention on Human Rights since it did not sufficiently protect the rights of the defendant.[23] However, the Cour de cassation took an opposite view.[24] Despite the judicial endorsement of art. L. 442-6-III, it must be said that civil fines sit uneasily be- 20

[21] See *M. Behar-Touchais*, L'amende civile est-elle un substitut satisfaisant à l'absence de dommages et intérêts punitifs? in: G. Viney, Faut-il moraliser le droit français de la réparation du dommage? Les Petites Affiches (LPA) 232 (2002) 36.

[22] Another civil fine which ought to be mentioned is that set out in art. L. 651-2 Code de la construction et de l'habitation (Construction and Housing Code), which provides that persons who turn housing premises into commercial premises without authorisation will be fined € 20,000. In such a case, it is possible that the illicit behaviour will cause damage to competitors and the civil fine can therefore have an effect akin to punitive damages. These are however exceptional circumstances and art. L. 651-2 appears to be of limited significance.

[23] CA Versailles, 3 May 2007, D. 2007.1656, obs. *E. Chevrier*; CA Angers, 29 May 2007, D. 2007.2433, note *M. Bandrac*. It is actually not the existence of a civil fine in itself which has been criticised by the courts.

[24] Cass. com., 8 July 2008, D. 2008.2067 obs. *E. Chevrier* and 3046, note *M. Bandrac*, quashing CA Versailles, 3 May 2007 (fn. 23).

tween civil and criminal law.[25] They appear more flexible than criminal fines, but since their aim is to punish the tortfeasor, just as a criminal sanction would, they are bound to be increasingly subjected to the requirements applicable to criminal sanctions, at least when they reach a certain amount. This is especially so given the extensive conception of criminal charges and criminal offences which applies under art. 6 and 7 of the European Convention on Human Rights.[26] It is therefore uncertain whether France will be able to maintain the practice of awarding civil fines of an amount substantial enough to be compared to punitive damages and yet not falling within the realm of criminal law.

21 Even though French law does not officially accept punitive damages, the foregoing examples show that there exist a certain number of mechanisms which bear some resemblance to the concept of punitive damages. This means that the prohibition of punitive damages is not as strict in practice as it is in theory. This conclusion is consistent with the generally admitted fact that French courts sometimes award punitive damages, albeit covertly.

B. Covert Punitive Damages

22 It is a widely shared belief among French lawyers and academics that French courts sometimes set damages not only on the basis of the harm suffered by the plaintiff, but also by taking into account the behaviour of the tortfeasor, with the aim of punishing him when he appears to have been guilty of a deliberate contempt of the plaintiff's interests.[27] The problem is that the French rules regarding the setting of damages make it: (1) difficult to verify the truth of this assertion; (2) near impossible to assess the size, if any, of these punitive damages; and (3) the factors which influence it.

1. Basic Rules which Apply to the Setting of Damages

23 French judges do not have to give justifications or explanations when they set damages. The evaluation of damage and the setting of damages is a matter of discretionary appreciation by first and second instance courts. The Cour de cassation does not control this discretion and can only reverse a decision on that count if it appears that the lower courts have violated the réparation intégrale principle.[28] This, however, very seldom happens as the lower courts usually do not give any indications as to how they measured damage and set damages. They can afford to remain silent on that point since a declaration that the harm suffered will be adequately compensated by the damages which they set suffices.

[25] *Behar-Touchais*, LPA 232 (2002).

[26] See *Engel v Netherlands*, 8.6.1976, no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72; *Bendenoun v France*, 24.2.1994, no. 12547/86.

[27] *P. Jourdain*, Rapport introductif, in: G. Viney, Faut-il moraliser le droit français de la réparation du dommage? LPA 232 (2002) 3, no. 7.

[28] See, e.g., Cass. 2e civ., 8 May 1996, Bull. civ. II, no. 358, quashing a first instance decision which had explicitly taken into account the defendant's fault in setting damages.

Furthermore, the réparation intégrale principle is understood as demanding that damage be assessed in concreto, i.e. on the facts of the case, and this forbids the courts from resorting to standardised amounts of damages (barèmes). It is not possible for a judge to say that a certain type of damage should normally be compensated by the allocation of a pre-determined sum. In fact, it is well known that such barèmes do exist (and actually do vary from one appellate court to another) for certain types of damage, especially bodily injuries. However courts cannot officially acknowledge that they resort to such barèmes, lest their decision should be quashed by the appellate court or the Cour de cassation, for not having set damages on the basis of the actual harm suffered by the plaintiff and for having thus violated the réparation intégrale principle.[29] Of course, if the use of barèmes were officially recognised, it might be possible to spot the existence of punitive damages and to measure them by comparing the damages actually awarded to the plaintiff in a given case to the "normal" amount of damages which he or she should have received according to the barème, given the type of harm he or she suffered. This, however, is not possible in the current state of the French legal system since the courts, even if they do resort to barèmes, do not say so and of course do not indicate which barème, if any, they have used. 24

2. The Main Occurrences of Covert Punitive Damages Awards

It is therefore impossible to measure the size of punitive damages which French courts covertly award. However, it seems quite clear that the courts do sometimes award damages which are not measured solely on the basis of the harm suffered, but are also intended to punish the tortfeasor. Several elements can be mentioned, which tend to prove this point. First of all, it has been demonstrated, albeit some years ago and on the basis of a rather small number of decisions, that damages awarded in order to compensate moral harm flowing from the death of a relative are on average higher when this death was caused by the defendant's fault than when the defendant is sued on the basis of a no-fault liability regime.[30] 25

From a more general point of view, it is quite clear that compensation of extra-patrimonial damage is an easy way to award punitive damages. As is well known, French law adopts a very liberal stance as far as extra-patrimonial damage is concerned. As a matter of principle, this type of damage, often called dommage moral (moral damage) can always be compensated and French law recognises an increasing number of heads of damage within the more general category of extra-patrimonial damage.[31] But, obviously, in most cases, it is totally impossible to measure this kind of damage in monetary terms.[32] There- 26

[29] *G. Viney/P. Jourdain*, Les effets de la responsabilité (2nd ed. 2001) no. 64.

[30] *M. Bourrié-Quenillet*, L'indemnisation des proches d'une victime décédée accidentellement. Étude d'informatique judiciaire, thèse Montpellier 1 (1983) 97–100. The study does not, however, give precise figures on the average amounts of damages awarded in the different cases.

[31] *Viney/Jourdain* (fn. 29) no. 265.

[32] Ibid. no. 152; *L. Boré*, La défense des intérêts collectifs par les associations devant les juridictions administratives et judiciaires (1997) no. 317.

fore, the setting of damages meant to compensate this kind of damage does not and cannot follow any precise rules – all the more so since French law does not accept the use of barèmes, even in this case. As a consequence, courts are in effect free, when they set damages meant to compensate extra-patrimonial damage, to take into account not only the harm suffered by the plaintiff, but also the culpable behaviour of the defendant or the profits he made out of this behaviour.[33]

27 This is especially so when a so-called "personality right" (honour, reputation, privacy, etc.) has been infringed. In such cases, it is widely believed that courts will set damages at a higher level when it appears that the tortfeasor has deliberately infringed this right in order to make money.[34] The classic example is when a newspaper decides to publish information which they know will violate a person's right to privacy, in order to attract more readers.[35] Unfortunately, though it is not doubted that in such cases courts often set damages at a higher level than they would otherwise have done had there not been a deliberate fault,[36] it is not possible to measure the share of damages which exceeds actual harm and has a punitive dimension.[37] The Cour de cassation has also ruled that when the right to privacy, which is protected by a special Civil Code provision,[38] has been violated, the mere finding of an infringement entitles the victim to be compensated.[39] This apparently means that damages

[33] *Terré/Simler/Lequette* (fn. 8) no. 712.

[34] See, e.g., *Carval* (fn. 5) no. 256; *P. Kayser*, Remarques sur l'indemnisation du dommage moral dans le droit contemporain, in: Études offertes à Jean Macqueron (1970) 411, no. 17–18; *J. Ravanas*, La protection des personnes contre la réalisation et la publication de leur image, foreword *P. Kayser* (1978) 396.

[35] *R. Lindon*, Commentaire sous CA Paris, 13 February 1971, La Semaine Juridique: Juris Classeur Périodique (JCP éd. G.) 1971.II.16774.

[36] See, e.g., Tribunal de Grande Instance (TGI) Paris, 17 December 1986, Gazette du Palais (Gaz. Pal.) 1987.1.238, awarding F 200,000 (ca. € 30,000) to the heir of the French throne in order to compensate damage which he had suffered because of a newspaper article accusing him of squandering his family's fortune. As *L. Boré* (fn. 32) puts it, such an amount grossly overestimates whatever damage the plaintiff may have suffered in this case and can only be explained as an attempt to deprive the tortfeasor of the profit he had made and to deter him from publishing any such articles in the future. Not all decisions take such a stance, however, and some explicitly restate the rule according to which damages are only meant to compensate damage and should not be measured according to the profits made by the defendant or the gravity of his fault: see, e.g., TGI Paris, 5 May 1999, CA Versailles, 4 May 2000, CA Paris, 31 May 2000, cited by *D. Fasquelle*, L'existence de fautes lucratives en droit français, in: G. Viney, Faut-il moraliser le droit français de la réparation du dommage? LPA 232 (2002) 27, no. 25. See also *E. Dreyer*, La faute lucrative des médias, prétexte à une réflexion sur la peine privée, JCP éd. G. 2008.I.201, no. 3.

[37] One might actually try to carry out a study in order to compare the average amount of damages when the infringement has been deliberate and when it results from mere negligence, but such a study would require an enormous amount of data crunching and has never been done so far.

[38] Art. 9 Civil Code sets out: "Everyone has the right to respect for his private life" ("Chacun a droit au respect de sa vie privée").

[39] Cass. 1re civ., 5 November 1996, Bull. civ. I, no. 378, JCP éd. G. 1997.II.22805, note *J. Ravanas*, ibid. at I.4025, no. 1, obs. *G. Viney*, RTD civ. 1997.632, obs. *J. Hauser*; according to this decision "selon l'article 9 du Code civil, la seule constatation de l'atteinte à la vie privée ouvre droit à réparation."

must be awarded even if no harm can be proved or even if it appears that the infringement has caused no damage at all. In the latter case, damages do not compensate any harm and therefore have a mere punitive function – at least if they are not purely nominal, as is normally the case if the infringement appears not to have been deliberate.

Punitive damages can also be awarded under the guise of damages intended to compensate dommage moral suffered by legal persons. Strange though it may seem, French courts accept that legal persons, such as companies or non-profit organisations, can claim compensation for extra-patrimonial harm.[40] Some authors consider that legal persons can indeed suffer extra-patrimonial harm, in which case they certainly deserve compensation when they suffer this kind of harm.[41] As far as the author is concerned, however, one can hardly understand how legal persons can experience extra-patrimonial harm, at least when they are purely profit-seeking organisations.[42] Such organisations can only suffer harm insofar as their possessions or incomes are being hurt or reduced. Therefore, whenever they are awarded damages meant to compensate dommage moral, these damages in fact either compensate a patrimonial loss or have the nature of punitive damages, intended to punish the defendant whose behaviour has been found culpable by the court.[43] And even when the claimant is not a profit-seeking organisation, damages awarded in order to compensate dommage moral sometimes have a distinctly punitive flavour. For example, in the Erika case, the court awarded € 100,000 to the Ligue de protection des oiseaux (Bird Protection League) in order to compensate dommage moral which the organisation suffered due to the harm which the Erika disaster had caused to sea birds.[44] Even though the Ligue's commitment to protecting birds is undisputed, it is hard to see exactly what dommage moral means for such an organisation and it seems to the author that these damages have a clearly punitive function. 28

Another field where it is widely believed that French courts resort to punitive damages is that of unfair competition.[45] Although there is no hard data 29

[40] See the many examples given by *Ph. Stoffel-Munck*, Le préjudice moral des personnes morales, in: Mélanges en l'honneur de Philippe le Tourneau (2008) 959, no. 6.

[41] See, e.g., *Stoffel-Munck* (fn. 40).

[42] See also *Ph. le Tourneau*, De la spécificité du préjudice concurrentiel, Revue trimestrielle de droit commercial (RTD Com.) (1998) 90.

[43] See, e.g., TC Paris, 12 January 2004, D. 2004.335, note *A. Couret*, which awarded € 30 million to LVMH in order to compensate dommage moral allegedly suffered because an analyst had given an erroneous opinion about the company. But this decision was reversed by CA Paris, 30 June 2006, D. 2006.2241, obs. *X. Delpech*. See also CA Paris, 8 September 2004, Communication commerce électronique (Comm. com. élec.) 2004, comm. 136, obs. *G. Decocq*, awarding € 1 million to compensate dommage moral suffered in a case on counterfeit goods.

[44] TGI Paris, 16 January 2008, no. 9934895010, D. 2008.351 and 2681, note *L. Neyret*, JCP éd. G. 2008.II.10053, note *B. Parance*, 251.

[45] Unfair competition is usually dealt with under the clausula generalis of art. 1382 Civil Code: "Any act whatever of a man, which causes damage to another, obliges the one by whose fault it occurred, to pay compensation." ("Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer.").

in that field either,[46] most authors agree that in matters of unfair competition, when the courts set damages, they sometimes take into account not only the harm actually suffered by the plaintiff but also the profits which the defendant reaped from his culpable behaviour[47] or the gravity of his fault.[48] Although in certain cases, it is quite obvious that damages awarded to the plaintiff exceed the losses suffered,[49] it is not possible to know exactly what part of these damages are meant as punishment and not as compensation.[50]

30 Another point which must be mentioned is that French law allows non-profit organisations, under certain conditions, to seek compensation for the harm which is caused to the collective interests which they seek to advance or protect. When the courts award damages to these non-profit organisations because of these collective interests which have been harmed, these damages do not really compensate damage which has been caused to the organisations. To that extent, at least when they are not purely nominal, these damages have a function which appears to be quite akin to that of punitive damages.[51]

3. The Incertitude Regarding the Quantum of Punitive Damages and the Criteria used to Set Them

31 It is therefore quite clear that despite the existence of the réparation intégrale principle, French courts, in setting damages, do not only have regard to the harm which has actually been suffered by the plaintiff. Sometimes, they also take into account the culpable behaviour of the defendant and to that extent the damages which are awarded have a punitive dimension. Most often, these covert punitive damages come under the guise of damages awarded in order to compensate

[46] See however *Cl. Alexandre-Caselli*, La concurrence déloyale et l'effacement de la clientèle – Compte-rendu d'une analyse jurisprudentielle, in: Y. Chaput (dir.), Clientèle et concurrence. Approche juridique du marché (2000) 109. The article analyses around 200 decisions relating to unfair competition and reaches the conclusion that damages are often set to punish the defendant; but no estimate is given of the quantum of punitive damages.

[47] See, e.g., *Carval* (fn. 5) no. 129; *D. Fasquelle*, Concurrence déloyale: amendes civiles ou 'dommages punitifs', in: Conquête de la clientèle et droit de la concurrence, Gaz. Pal. 313–314 (2001) 1681, 1684; *le Tourneau* (fn. 8) no. 47. See also, e.g., CA Bastia, 15 November 2006, Revue Lamy droit de l'immatériel (RLDI) 2006, no. 685, note *L. Grynbaum*.

[48] See, e.g., Cass. com., 17 November 1998, Revue de jurisprudence de droit des affaires (RJDA) 3/99, no. 358, which upheld an appellate court's decision which took the defendant's fault into account in setting an award of damages.

[49] According to some authors, the existence of punitive damages was made even more obvious when the Cour de cassation decided that the mere violation of a non-competition clause entitles the creditor to receive damages, without him having to demonstrate the existence of damage: see esp. Cass. 1re civ., 31 May 2007, no. 05-19.978, Revue des contrats (RDC) 2007.1118, obs. *Y.-M. Laithier*.

[50] See, e.g., Cass. com., 16 June 1992, Bull. civ. IV, no. 241, maintaining a decision whereby the owner of a famous Parisian restaurant had been awarded FRF 800,000 (ca. € 120,000) because the name of this restaurant had been used by another restaurant. See also CA Paris, 10 July 1986, JCP éd. G. 1986.II.20712, taking into account the profits made by the tortfeasor.

[51] This opinion has been expressed most convincingly by *Boré* (fn. 32). For some examples of decisions awarding generous damages to non-profit organisations purporting to defend collective interests, see no. 319.

dommage moral or extra-patrimonial harm, since the impossibility of measuring this type of harm with any precision grants the courts great liberty in setting damages. Unfortunately, it is near impossible to assess exactly which part, within the damages awarded in any given case, has a punitive rather than compensatory function. If the existence of punitive damages under French law cannot be denied, their quantum can therefore not be measured. One can only say that as a general rule, these punitive damages are of limited size, since damages awarded for dommage moral are usually quite low. One can therefore doubt that these covert punitive damages are really efficient in deterring illicit behaviour.[52]

32 It is not possible to assess the quantum of punitive damages under French law. However, is it possible to determine more precisely the criteria which the courts take into account when awarding such damages? Once again, unfortunately, the opacity of French court decisions when it comes to the setting of damages makes it very difficult to know exactly what elements the courts do consider when they decide to award damages which, in their opinion, exceed the harm actually suffered by the plaintiff. Of course, they certainly have regard to the behaviour of the defendant: the more culpable this behaviour, the higher the damages, or so it must be. Apart from this, judges probably look at the profit which the defendant made out of his culpable behaviour. This is certainly so especially in cases where a newspaper has infringed somebody's right to privacy in order to sell more copies, as well as in unfair competition cases.[53] Even though courts do not seem to measure damages solely by the size of the illicit profits which have been made (in which case damages awards would on average probably be significantly higher than they are now), it is widely believed that they very often try to deprive the tortfeasor of at least part of his profits, in the hope that he and his likes might be deterred from engaging in this sort of illicit behaviour again.

33 Given the rules which currently apply to the setting of damages in French law, the existence and quantum of punitive damages awarded by the courts, as well as the criteria which the latter take into account, are bound to remain hidden, at least to a large extent. It seems that this state of things cannot change unless punitive damages are officially recognised and introduced into French law by the legislator. However, whether such a move will take place remains uncertain.

III. Towards the Official Introduction of Punitive Damages?

34 The idea of officially introducing punitive damages into French law has been in the air for some time. Lawyers are divided on the subject, however, and although a recent draft proposes the incorporation of punitive damages into French law, the future of this proposal is extremely uncertain.

[52] *S. Carval*, Vers l'introduction en droit français de dommages-intérêts punitifs?, RDC 2006, 822 f.

[53] But as *Dreyer*, JCP éd. G. 2008.I.201, no. 8, points out, measuring the precise amount of profits reaped from an infringement of the right to privacy is nearly impossible in most cases.

A. Divided Opinions

35 The existence of punitive damages in some countries, especially the United States, has attracted much attention in France and has been a source of inspiration and discussion. Despite the widespread fears among French lawyers of an "Americanisation" of French law,[54] and the notorious example of some delirious punitive damages awards in America, many authors have expressed the opinion that punitive damages should be introduced into French law.[55] The main benefit to be expected from such a move, according to them, is that this would enhance two functions of civil liability i.e., punishment and deterrence, which are often overlooked because of the priority given to the function of compensation. Although it is usually undisputed that compensation should be the first aim of civil liability, and that criminal law is there to punish and deter anti-social behaviour, many believe that criminal law is not an adequate tool to fight against all such behaviour and that civil liability also has a role to play. It can do so through its peine privée function, which was highlighted a long time ago but has recently received increased attention.[56]

36 Punitive damages would of course fit in well in this peine privée function. Their proponents believe that they are the best way to fight against what academics call fautes lucratives.[57] Fautes lucratives are voluntary infringements of legal rules or duties which their authors know will subject them to less liability than the profit they are likely to make. In such cases, the prospect of being made liable and of having to compensate the victim will not deter the potential tortfeasor from acting to the victim's detriment since he knows that he will still benefit from it.[58] According to some authors, fautes lucratives can only be eradicated by introducing punitive damages and having the tortfeasor pay damages amounting to the profit he made, and not just the loss he caused. Such calls for the introduction of punitive damages have been voiced especially by lawyers concerned with consumer law, environmental law, competition law or the protection of personality rights.[59]

[54] *L. Engel*, Vers une nouvelle approche de la responsabilité. Le droit français face à la dérive américaine, Esprit 192 (1993) 5; *S. Schiller*, Hypothèse de l'américanisation du droit de la responsabilité, Archives de philosophie du droit (Arch. philo. dr.) 2001, 177.

[55] See, amongst others, *Boré* (fn. 32) no. 312 ff.; *Carval* (fn. 5); *M. Chagny*, Droit de la concurrence et droit commun des obligations, foreword. *J. Ghestin* (2004) no. 692 ff.; *Fasquelle*, Gaz. Pal. 313–314 (2001) 1681; *G. Maître*, La responsabilité civile à l'épreuve de l'analyse économique du droit, foreword. *H. Muir-Watt* (2005) no. 303 ff.; *le Tourneau* (fn. 8) no. 45; *G. Viney*, Rapport de synthèse, in: id., Faut-il moraliser le droit français de la réparation du dommage? LPA 232 (2002) 66.

[56] See fn. 5.

[57] See *Fasquelle*, LPA 232 (2002); *D. Fasquelle/R. Mésa*, Les fautes lucratives et les assurances de dommages, Revue générale du droit des assurances (RGDA) 2005, 351.

[58] Unless other sanctions apply, such as criminal ones: see, e.g., *Fasquelle*, LPA 232 (2002) no. 5.

[59] For authors advocating the introduction of punitive damages in one of these fields, see, e.g., *P. Kamina*, Quelques réflexions sur les dommages et intérêts punitifs en matière de contrefaçon, Cah. dr. entr. 4 (2007) 35; *Lindon*, JCP éd. G. 1971.II.16774, *in fine*; *Fasquelle*, LPA 232 (2002) no. 3; *D. Fenouillet*, Loteries publicitaires: pour un droit efficace!, RDC 2007, 788, 792.

37 The movement supporting the introduction of punitive damages seems to have been growing over the last two decades. However, many lawyers are still opposed to them or take a very cautious stance on the question.[60] The main reason seems to be that they do not want the réparation intégrale principle, which they consider to be at the heart of French liability law, to be forsaken. Punishment, in their opinion, is not what civil liability should be about.[61] Some are also wary of how such punitive damages could be implemented in order to preserve the defendants' rights and to limit the courts' discretion. It seems that their concerns have at least partially been heard by the authors of a recent draft advocating the introduction of punitive damages into French law.

B. The Avant-Projet de Réforme du Droit des Obligations and its Future

38 A group of distinguished French academics, led by Professor Pierre Catala, took the occasion of the 200th anniversary of the Civil Code to draft a project which purports to update the part of the Civil Code dedicated to the law of obligations which has remained largely untouched since 1804. This Avant-projet de réforme du droit des obligations, often called Avant-projet Catala, was presented to the French Minister of Justice in September 2005. Although the then government declared it was very interested in the draft, the hopes of its submission to parliament have faded and it now seems that the proposals under the Avant-projet will never be legislated. However, it has renewed the interest in civil law reform and unleashed heated debates on a certain number of questions, including punitive damages. Furthermore, it is likely that any future legislative change in the field of the law of obligations will be assessed in the light of the Avant-projet, or at least compared to it. It is therefore interesting to say a few words about the Avant-projet's stance on punitive damages and the reactions it has stirred.

1. Punitive Damages in the Avant-Projet

39 The part of the Avant-projet devoted to civil liability has been drafted by a group of scholars placed under the supervision of Professors Geneviève Viney and Georges Durry. As far as damages are concerned, the Avant-projet starts by solemnly affirming the réparation intégrale principle: "Subject to special regulation or agreement to the contrary, the aim of an award of damages is to put the victim as far as possible in the position in which he would have been if the harmful circumstances had not taken place. He must make neither gain

[60] See, e.g., *M. Bacache-Gibeili*, Les Obligations. La responsabilité civile extracontractuelle (2007) no. 486–487; *Dreyer*, JCP éd. G. 2008.I.201, no. 3; *Ph. Brun*, Responsabilité civile extracontractuelle (2005) no. 12-14; *J. Flour/J.-L. Aubert/E. Savaux*, Les obligations: quasi-contrats, responsabilité délictuelle. 2. Le fait juridique (12th ed. 2007) no. 387; *R. Saint-Esteben*, Pour ou contre les dommages et intérêts punitifs, LPA 14 (2005) 53.

[61] *Mazabraud* (fn. 5) no. 811, 831; *S. Piedelièvre*, Les dommages et intérêts punitifs: une solution d'avenir? Responsabilité civile et assurances (RCA) (hors-série June 2001) 68.

nor loss from it":[62] art. 1370.[63] However, art. 1371 immediately introduces an exception to that principle by allowing for the payment of punitive damages in certain circumstances: "A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned, in addition to compensatory damages, to pay punitive damages, part of which the court may at its discretion allocate to the Public Treasury. A court's decision to order the payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance."[64]

40 This provision has probably been partly inspired by the position in Québec. The new Civil Code of Québec incorporates punitive damages[65] and this has probably convinced many French lawyers, including the drafters of the Avant-projet, that this mechanism, though it originates from the common law, can be reconciled with the principles of the civil law tradition. Art. 1371 also draws a clear link between faute lucrative and punitive damages. Along with the authors who have been advocating punitive damages recently, the Avant-projet obviously views such damages as a way to fight against fautes lucratives and to deter anti-social but profitable behaviour. This also explains why the last sentence of art. 1371 declares punitive damages uninsurable. The idea is that some tortfeasors can only be deterred from committing fautes lucratives if they pay the full price for them, without the possibility of passing this penalty onto their insurer.

41 In order to address one criticism often levelled against punitive damages, i.e. that they enrich the plaintiff without his deserving it and sometimes disturb competition between economic agents by so doing, art. 1371 further provides that part of the punitive damages may be allocated to the Public Treasury. The Avant-projet also sets some procedural guarantees aimed at reducing the discretion given to the courts. While the traditional rule according to which judges do not have to explain their damages awards remains untouched,[66] art. 1371 sets out that an order to pay punitive damages must be supported by specific

[62] The translation of the Avant-projet provisions is borrowed from John Cartwright and Simon Whittaker, who have translated the whole draft into English. Their work is published in *J. Cartwright/S. Vogenauer/S. Whittaker* (eds.), Reforming the French Law of Obligations (2009).

[63] Art. 1370 "Sous réserve de dispositions ou de conventions contraires, l'allocation de dommages-intérêts doit avoir pour objet de replacer la victime autant qu'il est possible dans la situation où elle se serait trouvée si le fait dommageable n'avait pas eu lieu. Il ne doit en résulter pour elle ni perte ni profit."

[64] Art. 1371 "L'auteur d'une faute manifestement délibérée, et notamment d'une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public. La décision du juge d'octroyer de tels dommages-intérêts doit être spécialement motivée et leur montant distingué de celui des autres dommages-intérêts accordés à la victime. Les dommages-intérêts punitifs ne sont pas assurables."

[65] Cf. art. 1621 Code civil du Québec; see, e.g., *J.-L. Baudouin/P. Deslauriers*, La responsabilité civile (6th ed. 2003) no. 350.

[66] However, art. 1374 provides: "The court must assess distinctly each of the heads of damages claimed of which it takes account. Where a claim concerning a particular head of damage is rejected, the court must give specific reasons for its decision."

reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages clearly appear as a distinct category of damages following their own separate rules.

2. Reactions to the Avant-Projet

42 The endorsement of punitive damages by the Avant-projet has been praised by many academics.[67] But it has also attracted widespread criticism, some of which was directed at the very idea of punitive damages,[68] and some at the way in which art. 1371 purports to regulate such damages. In a report on the Avant-projet drafted by the Paris Chamber of Commerce and Industry, the idea of introducing punitive damages into French law has unsurprisingly been heavily criticised.[69] According to the report, punitive damages would give an excessively punishing flavour to civil liability and this would create confusion with criminal liability, whereas civil liability should abide with the réparation intégrale principle. Furthermore, the reporters are of the opinion that the courts can already efficiently sanction tortfeasors through a generous award of compensatory damages.[70]

43 The introduction of punitive damages has also been criticised in the report drafted by a working group set up by the Cour de cassation to study the Avant-projet and chaired by Pierre Sargos, a former president of the Chambre sociale de la Cour de cassation.[71] In this group's view, the definition of the type of fault which would enable the courts to award punitive damages is too imprecise and paves the way for judicial bickering and uncertainty. The group also criticises the possible allocation of punitive damages to the Public Treasury, which allegedly makes the finality of the institution unclear and blurs the difference with amende civile and astreinte. The group finally expressed the opinion that French liability law should stick to the réparation intégrale principle and that punishment of culpable behaviour should be sought through the development of adequate criminal and administrative sanctions.

44 Attention must of course be paid to the opinions expressed by these two groups. It does not seem to the author, however, that the arguments which they formulate against punitive damages are totally convincing, if only because, as this article has tried to demonstrate, réparation intégrale is not as absolute a principle as is it seems under French law. Furthermore the idea of punishing tortfeasors

[67] See, e.g., *Fabre-Magnan* (fn. 4) no. 158.

[68] See, e.g., *Y. Lambert-Faivre*, Les effets de la responsabilité (les articles 1367 à 1383 nouveaux du Code civil), RDC 2006, 163, 164.

[69] *D. Kling*, Pour une réforme du droit des contrats et de la prescription conforme aux besoins de la vie des affaires. Réactions de la CCIP à l'avant-projet 'Catala' et propositions d'amendements (2006) 119 (the Rapport can be found at http://www.etudes.ccip.fr/archrap/pdf06/reforme-droit-des-contrats-kli0610.pdf).

[70] One might ask if this second argument does not run counter the first one.

[71] Rapport du groupe de travail de la Cour de cassation sur l'avant-projet de réforme du droit des obligations et de la prescription, 15 June 2007, no.°91 (the Rapport can be found on the website of the Cour de cassation at: www.courdecassation.fr).

has never been totally absent from French civil liability, even though compensating victims has, of course, always been the priority. That said, the opinions expressed in the aforesaid reports are mostly interesting because they demonstrate the reluctance on the part of both businesses and at least some higher court judges towards the idea of introducing punitive damages into French law.

45 Other authors, who approve of the introduction of punitive damages, have nevertheless expressed doubts about the way in which the Avant-projet conceives them.[72] First of all, should criteria not be given which courts could use in order to set punitive damages, such as the gravity of the tortfeasor's fault, the profits he made out of his wrongdoing or his capacity to pay?[73] And should the courts' discretion not be limited by the setting of a maximum amount of punitive damages that can be awarded in specific scenarios? The question must also be asked whether the condemnation to pay punitive damages could be combined with a criminal sanction. Would that not run contrary to the non bis in idem rule? More generally, one might wonder if punitive damages ought not to fall under the category of criminal sanctions as understood by the European Convention and the European Court of Human Rights, at least in certain cases.[74] The fact that art. 1371 provides that part of the damages can be paid to the Public Treasury outlines the proximity of such damages to criminal fines. This means that the regime of punitive damages probably should take into account the requirements set by the European Convention on Human Rights regarding criminal sanctions, more than the Avant-projet does.

46 It is therefore doubtful whether the way in which the Avant-projet incorporates punitive damages is really convincing. This question, however, has lost most of its pertinence since, as has already been said, the prospect of the Avant-projet being submitted to parliament seems to have vanished. More generally, it seems unlikely that the legislator will officially introduce punitive damages into French law in the coming years. The reactions to the Avant-projet have shown that not only business circles but also many lawyers, judges and academics are hostile to this institution. Further, the opposition to punitive damages has also expressed itself very clearly in the ongoing discussion about the possible introduction into French law of class actions, in the field of consumer law. However, the Mission Lepage, which was commissioned to investigate necessary reforms in French environmental law, has recently made public its report,[75]

[72] See, e.g., *A. Constantin*, Causalité et régulation économique, Revue Lamy droit civil (RLDC) (2007, no.°spéc. sur "les distorsions du lien de causalité en droit de la responsabilité") 47, *in fine*.

[73] *Carval*, RDC 2006, 825; *M. Chagny*, La notion de dommages et intérêts punitifs et ses répercussions sur le droit de la concurrence, JCP éd. G. 2006. I.149, no. 11; *P. Jourdain*, Présentation des dispositions de l'Avant-projet sur les effets de la responsabilité, RDC 141 (2007) no. 15; *Kamina*, Cah. dr. entr. 4 (2007) 39. On the contrary, art. 1621 Code civil du Québec lists criteria which the courts must take into account when setting punitive damages.

[74] *D. Fasquelle/R. Mésa*, La sanction de la concurrence déloyale et du parasitisme économique et le Rapport Catala, D. 2005, 2666.

[75] The report was published in February 2008 and can be found on the website of the French Environment Ministry: www.medad.gouv.fr.

in which it advocates the introduction of punitive damages where a wrongdoer acting with intentional fault has caused damage to the environment.[76] The debate regarding the opportunity to officially introduce punitive damages into French law is thus bound to go on.

[76] The report (proposal no. 71, at 74) suggests the introduction of the following provision in the Civil Code:
"Tout professionnel ou toute personne morale qui commet une faute intentionnelle entraînant un dommage à l'environnement peut être condamné, sans préjudice des autres dispositions relatives à sa responsabilité, à des dommages et intérêts punitifs distincts de ceux éventuellement accordés à la victime.
La décision du juge d'octroyer de tels dommages-intérêts doit être spécialement motivée et tenir compte des ressources du responsable.
Ces dommages et intérêts, qui ne sont pas assurables, sont versés:
1° – soit à une association agréée de protection de l'environnement ou reconnue d'utilité publique qui s'engage à en affecter au moins les trois-quarts à une action proposée par le juge et acceptée par elle.
2° – soit au Fonds de Garantie des Assurances obligatoires de dommages.
Le non respect, dans les dix-huit mois du versement des fonds, de l'affectation déterminée en application de l'alinéa 3 1° engage la responsabilité du bénéficiaire des dommages et intérêts punitifs qui, sans préjudice d'éventuelles poursuites, est tenu de verser au Fonds de Garantie des Assurances obligatoires de dommages l'intégralité de la somme reçue."

Punitive Damages in Germany

Nils Jansen and Lukas Rademacher[*]

I. Introduction

A. The Doctrinal Framework

The German law of damages is governed by the concepts of compensation and restitution. According to § 249(1) of the German Civil Code (BGB, Bürgerliches Gesetzbuch), a person who is liable in damages must primarily[1] restore the injured person or damaged property to the position that would have existed had the wrong not occurred (Naturalrestitution, restoration of the status quo ante). If the victim has suffered bodily injury or damage to his property, § 249(2) BGB allows the latter to demand the required monetary amount in lieu of restitution. Only where genuine restitution is impossible or unreasonable (for the injured party or the tortfeasor) does the tortfeasor have to make good the resulting economic loss in money instead: § 250 s.1, 251 BGB. Furthermore, monetary indemnification for non-economic loss presupposes an injury to the body or health, or an infringement of the victim's freedom or sexual self-determination, § 253 BGB. 1

At the same time, the German law of damages fosters a widespread belief that the injured party may not be enriched as a result of the damages awarded.[2] Thus, it is a common assumption that the sole functions of the German law of damages are the reparation of injury and the compensation of resulting 2

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[1] With the predominance of restitution and compensation, German law takes an extreme position within European law: *H. Stoll* in: A. Tunc et al. (eds.), International Encyclopedia of Comparative Law, vol. XI/8, Consequences of Liability: Remedies (1986) no. 64 ff.; *id.*, Haftungsfolgen im bürgerlichen Recht (1993) 151 f.; U. Magnus (ed.), Unification of Tort Law: Damages (2001) 188 f.

[2] *H. Lange/G. Schiemann*, Schadensersatz (3rd ed. 2003) 10, 250 f.; *H. Oetker* in: K. Rebmann/F.J. Säcker/R. Rixecker (eds.), Münchener Kommentar zum BGB (MüKo) (5th ed. 2007) § 249, no. 20, both with further references (ref.). During the 20th century, this principle gained a nearly axiomatic status and is used, rather excessively, as an argument against compensation in a broad range of circumstances. For more detailed information, see *N. Jansen* in: M. Schmoeckel/J. Rückert/R. Zimmermann (eds.), Historisch-kritischer Kommentar zum BGB (HKK) vol. II (2007) §§ 249–253, 255. Schadensrecht, no. 59 ff., 80, 94 ff., 98, 101, 105, 158.

losses, while punishment of the wrongdoer is strictly reserved for criminal law. Moreover, punitive damages raise constitutional rights concerns: According to art. 103(2) of the German constitution, penalisation is only permitted if the threat of punishment is explicitly codified and its conditions are precisely described. Also, an award of punitive damages against a convicted tortfeasor is seen as possibly leading to double punishment which is ruled out by art. 103(3) of the German constitution. Consequently, the widely prevailing opinion sees no place for punitive damages under German law.[3]

3 The rejection of penal elements in civil law has also motivated the courts to refuse the enforcement of foreign, notably American, judgments which impose punitive damages on defendants in Germany. While foreign rulings are not revised in their entirety by German courts before enforcement, § 723, 328(1) no. 4 of the German Code of Civil Procedure (ZPO, Zivilprozessordnung) prohibit the recognition of judgments that are evidently incompatible with fundamental principles of German law, in particular with constitutional rights. Such a violation of ordre public was assumed by the Federal Court of Justice (BGH, Bundesgerichtshof) for an American punitive damages award of roughly $ 750,000 for sexual abuse. The BGH stated that non-compensatory damage awards are inconsistent with the constitutional principle of proportionality and illegitimately concatenate private and criminal law.[4] The state, so the BGH held, has a monopoly on penalisation and its actors, the public prosecution as well as the criminal courts, are bound by the culprit's constitutional and procedural rights, such as the principle of in dubio pro reo, which would be neglected if punishment was pursued under private law.[5]

II. The Debate on Punitive Damages

4 Despite this clear legislative and doctrinal framework, punitive damages have long been the subject of debate in Germany, and increasingly so during the last 20 years.[6] Whereas arguments favouring the introduction of punitive damages into German law for public policy reasons[7] are not relevant in the present re-

[3] BGHZ (Entscheidungen des Bundesgerichtshofs in Zivilsachen, Judgments by the German Federal Court of Justice in Private Law Matters) (4 June 1992 – IX 149/91) 118, 312, 338 ff., 343 ff.; *Lange/Schiemann* (fn. 2) 12 f.; *G. Wagner* in: MüKo (4th ed. 2003) vor § 823, no. 36 ff.

[4] BGHZ (4 June 1992 – IX 149/91) 118, 312, 338 ff., 343 ff.

[5] Ibid. at 344.

[6] Specifically in the area of damages for pain and suffering. See *K. Nehlsen-v. Stryk*, Schmerzensgeld ohne Genugtuung, Juristenzeitung (JZ) 1987, 119 ff. with further ref.; some call it a "love-hate relationship", see *J. Mörsdorf-Schulte*, Strafschadensersatz – eine deutsche Hassliebe? Neue Juristische Wochenschrift (NJW) 2006, 1184 ff. Recently, punitive damages were discussed at the 66th Deutscher Juristentag (Forum of the Association of German Jurists): Ständige Deputation des Deutschen Juristentages (ed.), Verhandlungen des Sechsundsechzigsten Deutschen Juristentages (2006) vol. I, A 11 ff. (report by *G. Wagner*); vol. II, L 7 ff.

[7] *B. Großfeld*, Die Privatstrafe (1961); *P. Müller*, Punitive Damages und deutsches Schadensersatzrecht (2000) especially (esp.) 311 ff.; *I. Ebert*, Pönale Elemente im deutschen Privatrecht (2004) 576 ff. and passim, each with further ref. Furthermore, a recent expert opinion by the German Monopolies Commission has called for "punitive damages" in antitrust cases in order to deter parties from engaging in anti-competitive behaviour: Das allgemeine Wettbewerbsrecht in

port, because they have not found their way into legislation or more concrete legislative projects,[8] arguments stating that punitive damages are already part of the German law of damages as it presently stands will be examined in more detail in the following analysis. Indeed, there are authors who argue that courts frequently award damages on the basis of § 249 ff. BGB that cannot seriously be considered as purely compensatory.[9] Furthermore, these writers point to provisions in the BGB and other codes that intend to prevent unwanted behaviour and supposedly contain elements of punishment. Thus, they conclude that German private law is not unacquainted with notions of prevention and deterrence and that the awarding of exemplary damages should explicitly be admitted into legal reasoning.

Much of the debate concerns questions of definition. For the following analysis, only such damages that do not correspond to an actual loss of the victim and that cannot be explained within a restitutionary framework shall be considered as "punitive". As a matter of fact, the borderlines between restitutionary and compensatory awards are sometimes blurred in the actual practice of the courts. This is especially the case where the victim of a wrong is allowed to seek disgorgement of the profits resulting from the defendant's violation of his rights (see infra sections B and C). Yet, even if this state of German case law may be criticised for blurring the borderline between compensation and restitution, it cannot adequately be interpreted as introducing elements of punishment into the German law of delict. German courts are not guided by the aim of laying an additional burden on the defendant in order to impose a sufficiently heavy sanction for the wrong in question. Instead, they aim at restoring the disturbed equality between the parties which is, in principle, totally independent of the idea of punishing wrongs. 5

A. Damages for Pain and Suffering (Schmerzensgeld)

Damages for pain and suffering are the traditional battlefield for debates on punitive damages in German law.[10] According to § 253(2) BGB, which substantially corresponds to the former § 847(1) BGB of 1900, indemnification can 6

der Siebten GWB-Novelle. Sondergutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 4 GWB (2004) no. 75 ff. It has to be noted, however, that the suggested doubling of damages awards is mainly motivated by the shortcomings of antitrust litigation and substantially remains within the compensatory framework of German law. Thus, on the one hand, the doubling of damages is meant to "compensate" the claimant for the high risks and the extra costs incurred in such litigation. On the other hand, it aims at making antitrust tortfeasors fully responsible for all losses caused by their wrongful behaviour: ibid. no. 75 f., 82.

[8] If the legislator should decide to enact genuine punitive damages in the future, it is generally assumed that such claims should be separated systematically from the purely restitutive law of damages and will have specific and precisely described requirements: cf. *H. Stoll*, Schadensersatz und Strafe, in: E. v. Caemmerer (ed.), Ius privatum gentium. Festschrift für Max Rheinstein, vol. II (1969) 569, 572 ff.

[9] Esp. *Müller* (fn. 7) 101 ff., 260 ff.; *Ebert* (fn. 7) 576 ff., both with further ref.

[10] *Nehlsen-v. Stryk*, JZ 1987, 119 ff.; *S. Göthel*, Zu den Funktionen des Schmerzensgeldes im 19. Jahrhundert, Archiv für die civilistische Praxis (AcP) 205 (2005) 36 ff.

be demanded for intangible loss that originates from injury to the body, health, freedom or sexual self-determination. Before the enactment of the BGB, influential authors had refused to consider the payment of money as a possible compensation for immaterial loss: Money and pain (or honour, respectively) were widely considered incommensurable.[11] Accordingly, for these authors, Schmerzensgeld was understood as a means of punishment under private law.[12]

7 However, this was neither the position of the German legislator[13] nor of German courts[14] and writers[15] during the most part of the 20th century. What is more, underlying social values underwent significant changes during the 20th century.[16] Whereas at the end of the 19th century, it was regarded as improper, at least for members of the upper classes, to ask for pecuniary compensation for pain or suffering,[17] money today is generally considered an adequate reconciliation of pain and other immaterial losses. It is awarded, therefore, even absent wrongful conduct on the part of the tortfeasor and especially in cases of strict liability (Gefährdungshaftung).[18] Physical and psychological harm is to be counterbalanced by the possibility for the injured party to enjoy other amenities.

8 Yet, despite the prima facie plausibility of this compensatory explication of damages for pain and suffering, it faced severe problems during the 20th century. First, it is difficult to assess such compensation adequately because there is no objective measure of pain and no one can feel someone else's pain.[19] At the same time it appears unreasonable that the amount of damages owed can depend on the sensitivity of the injured party. What is more, in extremely tragic

[11] *F. Mommsen*, Beiträge zum Obligationenrecht. Zweite Abtheilung: Zur Lehre von dem Interesse (1855) 122 ff.; *R. Cohnfeld*, Die Lehre vom Interesse nach Römischem Recht mit Rücksicht auf neuere Gesetzgebung (1865) 71, 73, 76; *B. Windscheid*, Lehrbuch des Pandektenrechts II/1 (1865) 303 (§ 455, no. 31); for further ref. see *Jansen*/HKK (fn. 2) §§ 249–253, 255, no. 53 f.

[12] See esp. *C.J. Seitz*, Untersuchungen über die heutige Schmerzensgeldklage (1860) 101 ff. (hence, favouring the abolishment of damages for pain and suffering: ibid. at 142 ff.); see also *G.F. Puchta* in: A.F. Rudorff (ed.), Pandekten (9th ed. 1863) 571 (§ 388); *Windscheid* (fn. 11) 302 f. (§ 455).

[13] Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, vol. II, 1899, 17 f. (B. Mugdan (ed.), Die gesammten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich, vol. II [1899] 10); BT-Drucks. (Bundestagsdrucksache, printed paper of the Bundestag) 14/7752, appendix 1, 14 f.

[14] BGHZ (29 November 1952 – III 340/51) 7, 223, 224; BGHZ (6 June 1955 – GSZ 1/55) 18, 149, 151; BGHZ (29 November 1994 – VI 93/94) 128, 117, 120 ff.

[15] *G. Planck* in: id. (ed.), Bürgerliches Gesetzbuch nebst Einführungsgesetz, vol. II (1900) § 847, no. 2 b; *E. Lorenz*, Immaterieller Schaden und 'billige Entschädigung in Geld' (1981) 36 ff. and passim; *K. Larenz*, Lehrbuch des Schuldrechts, vol. I, Allgemeiner Teil (14th ed. 1987) 476 ff.; *Lange/Schiemann* (fn. 2) 435 ff.; *Oetker*/MüKo (fn. 2) § 253, no. 13.

[16] *Jansen*/HKK (fn. 2) §§ 249–253, 255, no. 54 with further ref.

[17] Protokolle der Kommission für die zweite Lesung des Entwurfs des Bürgerlichen Gesetzbuchs, vol. II (1897) 1247 (Mugdan [fn. 13] 517).

[18] See *N. Jansen*, Tagespolitik, Wertungswandel und Rechtsdogmatik – Zur Reform des Schadensersatzrechts 2002, JZ 2002, 964, 967 f. for further details.

[19] Cf. *H.A. Fischer*, Der Schaden nach dem Bürgerlichen Gesetzbuche für das Deutsche Reich (1903) 299 f.

cases, where persons become incapable of any perception or sensation as a result of their severe injuries, this approach does not work at all, because there can be no compensation for pain absent pain. Thus, it became doubtful whether any compensation for pain and suffering should be awarded in these cases.[20] In fact, in a decision of 1975, the BGH held that a "genuine" Schmerzensgeld was impossible in such cases: instead the victim was awarded a comparatively little "symbolic" payment.[21] Yet this was generally regarded as outrageous and since the 1990s therefore, the courts have assessed the victim's damage from an objective point of view. Accordingly, the loss of personality is regarded as an immaterial damage in itself, requiring compensation regardless of whether or not the victim is aware of the impairment.[22]

Finally, the idea of enabling the victim to buy compensatory pleasures arguably fails where the injured victim is immensely wealthy. In 1955, such a case motivated the BGH to rethink the nature of Schmerzensgeld.[23] In its remarkably unclear judgment, the BGH held that Schmerzensgeld serves two purposes: alongside the compensation of pain, Schmerzensgeld takes account of the tortfeasor owing Genugtuung[24] (satisfaction) to the victim. The meaning of this term has always remained obscure, however,[25] and although the court had emphasised that damages for pain and suffering are not an instrument of punishment, many authors understood the idea of satisfaction as introducing a penal element into the law of damages.[26] Yet, such interpretations do not take the possibility of the compensation of a normative interest into account. Such interests have a firm place within the German law of damages.[27] Therefore, damages should only[28] be referred to as genuinely punitive if they cannot be understood as compensation for an infringement of the victim's rights and in this sense, make good a personal wrong sustained by the same.[29] While the BGH explicitly does not recognise a desire for vengeance,[30] the court accepts the normative

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[20] *E. Lorenz*, Schmerzensgeld für die durch eine unerlaubte Handlung wahrnehmungs- und empfindungsunfähig gewordenen Verletzten? in: P. Hanau/E. Lorenz/H.-C. Matthes (eds.), Festschrift für Günther Wiese (1998) 261, 269 ff.; *C.-W. Canaris*, Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts, in: H.-J. Ahrens/C. von Bar/G. Fischer (eds.), Festschrift für Erwin Deutsch (1999) 85, 102 f.

[21] BGH (16 December 1975 – VI 175/74) NJW 1976, 1147, 1148; the sum of DM 30,000 was far below the amounts usually awarded in cases of severe injuries, such as paraplegia.

[22] BGHZ (13 October 1992 – VI 201/91) 120, 1, 4 ff., 7; see also *Lorenz* (fn. 15) esp. 32 ff., 67 ff., 93 ff., 104, and passim.

[23] Cf. BGHZ (6 June 1955 – GSZ 1/55) 18, 149, 157, 159; see also BGHZ (29 November 1994 – VI 93/94) 128, 117, 120 ff.

[24] On the similar concept of satisfaction see *Stoll* (fn. 1) Remedies, no. 10, 92 ff.

[25] *U. Stein* in: MüKo (3rd ed. 1997) § 847, no. 3 f.; *E. Deutsch*, Allgemeines Haftungsrecht (2nd ed. 1995) no. 907.

[26] *Stoll* (fn. 1) Haftungsfolgen, 199 ff., 206 ff.; *Müller* (fn. 7) passim; *B.-R. Kern*, Die Genugtuungsfunktion des Schmerzensgeldes – ein pönales Element im Schadensrecht? AcP 191 (1991) 247 ff.

[27] *Larenz* (fn. 15) 476 ff.; *Oetker*/MüKo (fn. 2) § 253, no. 13.

[28] The debate is afflicted with terminological vaguenesses; see *Wagner*/MüKo (fn. 3) vor § 823, no. 37.

[29] Similarly, BGH (16 December 1975 – VI 175/74) NJW 1976, 1147, 1149.

[30] BGHZ (29 November 1994 – VI 93/94) 128, 117, 124.

interest in the preservation of subjective rights as an autonomous injury requiring compensation.[31] This argument remains within the boundaries of the idea of preserving equality between the tortfeasor and the victim. Thus, it has nothing to do with the imposition of punishment. In the terminology of the English common law, these damages can be understood as "aggravated": they are not given, as would be punitive damages, for "conduct which shocks the *jury*", but "for conduct which shocks the *plaintiff*".[32] More recent jurisprudence on the relationship between public punishment and private satisfaction has made this point even clearer: Whereas some courts had held until the late 1980s that the victim's satisfaction could also be achieved by criminal punishment,[33] the BGH has now made clear that the victim's right to satisfaction under private law must not be reduced for the reason that the wrongdoer had been sentenced under criminal law.[34]

B. Infringements of Personality Rights

10 This normative interest in the preservation of subjective rights also forms the conceptual basis for understanding the case law on damages for the invasion of personal privacy. Here, the BGH has always held that satisfaction is more important than the compensation of financial losses.[35] Yet, satisfaction should again not be understood as an objective sanction detached from the idea of compensation. To the contrary, the award of such damages again forms a means to restore the infringed right.[36] Consequently, the sum of damages owed is assessed in accordance with the reconciliatory interest of the victim, particularly the injured party's social rank and the intensity of the invasion of personal privacy.[37]

11 However, since the *Caroline I*-judgment[38] of 1994, the BGH has applied a different method of calculating damages in cases where the yellow press have infringed a prominent victim's personality interest with economic motives. The

[31] The court always refused to divide Schmerzensgeld into separate heads of damages though, see BGHZ (6 June 1955 – GSZ 1/55) 18, 149, 157; BGH (6 December 1960 – VI 73/60) Versicherungsrecht (VersR) 1961, 164 f.; BGHZ (29 November 1994 – VI 93/94) 128, 117, 123 f. Possibly, the BGH wanted to obviate the misinterpretation of damages for pain and suffering being understood as punitive. For more detailed information see *Jansen*/HKK (fn. 2) §§ 249–253, 255, no. 149.

[32] Cf. *J. Fleming*, The Law of Torts (9th ed. 1998) 274.

[33] OLG (Oberlandesgericht, Appellate Court) Celle (12 June 1968 – 9 U180/67) JZ 1970, 548; OLG Düsseldorf (12 March 1974 – 4 U 120/73) NJW 1974, 1289; OLG Stuttgart (6 October 1988 – 14 U 2/88) VersR 1989, 1150, 1151.

[34] BGHZ (29 November 1994 – VI 93/94) 128, 117, 122 ff.; confirmed in BGH (16 January 1996 – VI 109/95) NJW 1996, 1591.

[35] BGHZ (14 February 1958 – I 151/56) 26, 349, 353 (*Herrenreiter*); BGHZ (18 March 1959 – IV 182/58) 30, 7 17 f. (*Catarina Valente*); BGHZ (19 September 1961 – VI 259/60) 35, 363, 366 ff. (*Ginseng*); BGHZ (15 November 1994 – VI 56/94) 128, 1, 15 (*Caroline I*).

[36] BGH (5 March 1974 – VI 228/72) VersR 1974, 756, 757 (*Rauschmittel I*); BGHZ (15 November 1994 – VI 56/94) 128, 1, 13 (*Caroline I*).

[37] BGHZ (14 February 1958 – I 151/56) 26, 349, 356 ff. (*Herrenreiter*); BGH (1 December 1981 – VI 200/80) NJW 1982, 635, 636 f. (*Böll/Walden*); BGH (22 January 1985 – VI 28/83) NJW 1985, 1617, 1619; BGHZ (13 October 1992 – VI 201/91) 120, 1, 6 f.; BGHZ (30 January 1996 – VI 386/94) 132, 13, 27 f. (*Lohnkiller*).

[38] BGHZ (15 November 1994 – VI 56/94) 128, 1 ff.

court held that the traditional method would not be able to ensure sufficient prevention of such wrongs because the damages awarded by courts were far below the typical profits resulting from such an infringement of personality rights. Yet, although this new emphasis on prevention has been interpreted as punitive,[39] again, it does not change the compensatory approach: rather it aims at restoring the disturbed equality between the parties. This is so, because the amount of damages awarded is measured by the profits resulting from the infringement of the injured party's rights. Here, compensation is a counterpart of the wrongdoer's financial gains that were incurred at the expense of the victim's rights.[40] A person who knowingly uses another person's rights for the purpose of making a profit must not assume that he will be allowed to keep these gains. Therefore, these claims can be explained within the framework of compensation and/or restitution. Indeed, leading scholars have argued that restitutionary claims, such as § 812(1) 1, 2nd alt. BGB[41] and especially § 687(2) BGB,[42] provide a better explanation for these decisions than the law of delict.[43]

C. The "Threefold Assessment of Damages" for the Infringement of Intellectual Property Rights

According to German law, the owner of intellectual property rights (copyrights, patents, registered designs and trademarks) is entitled to recover damages for their violation, using one of three different methods of calculation.[44] Instead of asserting his actual loss, which includes lost profits that are typically difficult to estimate, the victim may claim an adequate licence fee for the use of the right, and this so even if he would not have been willing to grant a licence in the first place. Alternatively, the victim may seek a disgorgement of the profit resulting from the defendant's illegitimate infringement of his right.[45] These rules, which were originally based on case law going back to the 19th century,[46] are largely codified today.[47] 12

[39] *Müller* (fn. 7) 266 ff., 277 ff.; *Ebert* (fn. 7) 496 ff.

[40] BGHZ (15 November 1994 – VI 56/94) 128, 1, 16 (*Caroline I*); similarly before BGHZ (19 September 1961 – VI 259/60) 35, 363, 369 f. (*Ginseng*).

[41] Translation: "A person who obtains something at the expense of another without legal grounds is under a duty to make restitution."

[42] Adapted translation: "If a person treats the business of another as his own although he knows that he is not entitled to do so, he is inter alia obliged to return everything he obtains from carrying out the transaction to the principal."

[43] *Canaris* (fn. 20) 85 ff.; *H.P. Westermann*, Geldentschädigung bei Persönlichkeitsverletzung – Aufweichung der Dogmatik des Schadensrechts, in: I. Koller/J. Hager/M. Junker (eds.), Einheit und Folgerichtigkeit im Juristischen Denken (1998) 125, 134 ff., 144 f.; detailed *U. Amelung*, Der Schutz der Privatheit im Zivilrecht (2002) 192 f., 226 ff., 289 ff. with further ref.

[44] For what follows, see *Jansen*/HKK (fn. 2) §§ 249–253, 255, no. 116 ff., further ref. within.

[45] *Lange/Schiemann* (fn. 2) 356 ff. with further ref.

[46] Entscheidungen des Reichsgerichts in Zivilsachen (RGZ, Judgments by the Supreme Court of the German Reich in Private Law Matters) (8 June 1895 – I 13/95) 35, 63, 70 (*Ariston*); RGZ (11 April 1896 – I 446/95) 37, 41, 45 f.; RGZ (11 January 1902 – I 303/01) 50, 111, 114 f.; RGZ (21 March 1934 – I 165/33) 144, 187, 189 f.; BGHZ (12 January 1966 – Ib 5/64) 44, 372, 374; BGHZ (6 March 1980 – X 49/78) 77, 16, 18; BGHZ (17 June 1992 – I 107/90) 119, 20, 23.

[47] See § 97(1) Urheberrechtsgesetz (Copyright Act); § 42(2), 45 Geschmacksmustergesetz (Design Act); § 139(2) Patentgesetz (Patent Act); § 24(2) Gebrauchsmustergesetz (Utility Model Act).

13 The BGH sees the three methods of calculation as different ways to liquidate a single claim for damages.[48] Of course, this view may be regarded wrong because the last two calculations are obviously not consistent with the Differenztheorie (difference theory),[49] which is the conventional method of assessing damages.[50] According to this theory, the amount of damages owed is the difference between the injured party's assets before and after the wrong. Although the present law thus entitles the victim to claim a sum of money that may go far beyond his actual losses, it would be mistaken to hence draw the conclusion that such claims for damages would be punitive.[51] Rather, case law suggests that the victim's pecuniary loss has to be evaluated normatively: Even without an effective subtraction in the victim's balance sheet, he has suffered damage if he was deprived of an allocated proprietary right.[52] While it can be said that these rules concatenate damages, the law of unjustified enrichment and negotiorum gestio against the distinct concepts of the BGB,[53] the owner's claim maintains a non-punitive, restitutionary character. As long as a claim can be explained as the restoration of the equality of the parties, it does not serve a punitive purpose.

D. Liability without Causation?

14 In the 20th century, courts frequently had to decide cases where, under the facts, it seemed just to make the tortfeasor liable even for damage he had not caused. The case law on GEMA[54] provides a paradigmatic example of this approach. GEMA is a copyright collecting agency that represents the interests of its members (composers, lyricists and publishers of music) and collects royalty payments for these copyright holders. According to these judgments, the infringer of musical copyrights has to pay a 100% extra amount in addition to the damages he owes GEMA.[55] The reasoning behind this jurisprudence, as stated by the courts, is that the violator shall bear a proportion of the expenses

[48] BGHZ (8 October 1971 – I 12/70) 57, 116, 118 (*Wandsteckdose II*); BGHZ (22 April 1993 – I 52/91) 122, 262, 264 ff. (*Kollektion Holiday*).

[49] Consequently, the BGH describes this as a modification of the Differenztheorie through judge-made or customary law: BGHZ (8 May 1956 – I 62/54) 20, 345, 353 (*Paul Dahlke*); BGHZ (14 February 1958 – I 151/56) 26, 349, 352 (*Herrenreiter*); BGHZ (8 October 1971 – I 12/70) 57, 116, 119 (*Wandsteckdose II*).

[50] On the Differenzhypothese: see *Jansen*/HKK (fn. 2) §§ 249–253, 255, no. 104 ff.

[51] But see *Müller* (fn. 7) 101 ff.

[52] RGZ (8 June 1895 – I 13/95) 35, 63 (head note), 71 (*Ariston*). On the concept of allocated subjective rights and that their deprivation means an immediate economic loss see: *N. Jansen*, Die Struktur des Haftungsrechts. Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz (2003) 476 ff., 516 ff. with further ref. See also *R. Neuner*, Interesse und Vermögensschaden, AcP 133 (1931) 277, 283 f., 307 ff.

[53] *F. Schulz*, System der Rechte auf den Eingriffserwerb, AcP 105 (1909) 1, 66 f.

[54] Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (Society for Musical Performing and Mechanical Reproduction Rights).

[55] KG (Kammergericht, Appellate Court for Berlin) (2 September 1937 – 27 U 1911/37) Archiv für Urheber- und Medienrecht (Ufita) 11 (1938) 55, 57; KG (19 January 1939 – 27 U 3233/38) Ufita 12 (1939) 194, 196; BGHZ (24 June 1955 – I 178/53) 17, 376, 383; BGHZ (10 March 1972 – I 160/70) 59, 286.

that GEMA incurs for its costly monitoring activities to protect its members' copyrights. That the violator did not cause these expenses by his behaviour is not seen as an obstacle.[56] In contrast, it is considered inequitable for legitimate users to pay these costs. Despite various proposals,[57] the BGH has refused to extend this argument into other areas.[58] Thus, stores and supermarkets may not shift their expenses for preventive surveillance on shoplifters.[59]

Furthermore, there is case law on precautionary measures taken to mitigate damage. According to this case law, apart from his or her actual damage, the victim may recover any expenses paid in advance to remedy harm of the kind which was caused by the tortfeasor.[60] The leading case concerned a tram-company that was not only entitled to indemnification for one of its damaged vehicles but was also allowed to recover the expenses incurred for a replacement tram that was held ready in the event of a traffic accident.[61] According to this jurisprudence, it should make no difference, from a normative point of view, whether such expenses were incurred before or after the damaging event. 15

In all these cases, the defendant is also liable for damage he did not cause.[62] Prima vista, this is not only inconsistent with the principle of compensation but also with the idea of individual responsibility, i.e. the idea that requires the tortfeasor's behaviour to be a conditio sine qua non for the damage sustained. Yet, a punitive interpretation[63] would again be misguided. Instead, the courts have always emphasised that from an economic approach such costs have to be regarded as directly connected to the reparation of the damage in question.[64] The reasons for making the defendants liable in these cases were always based on corrective justice: Either the defendants were regarded as being – at least indirectly – responsible for the measures in question, or they had ultimately profited from the expenses incurred by the claimant and should therefore bear an equitable portion. 16

[56] For a critique see *U. Loewenheim*, Schadensersatz in Höhe der doppelten Lizenzgebühr bei Urheberrechtsverletzungen? JZ 1972, 12, 14 f. with further ref.

[57] Esp. *C.-W. Canaris*, Zivilrechtliche Probleme des Warenhausdiebstahls, NJW 1974, 521, 523 ff.

[58] This case law has not been extended to the violation of other copyrights: BGH (9 March 1966 – Ib 36/64) Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1966, 570, 572; BGHZ (22 January 1986 – I 194/83) 97, 37, 49 ff. (*Filmmusik*); *Oetker*/MüKo (fn. 2) § 249, no. 192 ff., 196 ff. with further ref.

[59] BGHZ (6 November 1979 – VI 254/77) 75, 230, 231 ff., 233 f. (also on the differences to the GEMA case law).

[60] RGZ (30 November 1910 – I 433/09) 74, 362, 364 f.; BGHZ (10 May 1960 – VI 35/59) 32, 280 ff.

[61] BGHZ (10 May 1960 – VI 35/59) 32, 280 ff.

[62] A thorough explanation, however, has not yet been found: *H. Niederländer*, Schadensersatz bei Aufwendungen des Geschädigten vor dem Schadensereignis, JZ 1960, 617 ff.; *Lange/Schiemann* (fn. 2) 299 ff. Nevertheless, the rationale of these judgments intuitively appears equitable; they are accepted throughout Europe: *Stoll* (fn. 1) Remedies, no. 24; *Magnus* (fn. 1) 5 f., 216 f. with further ref.

[63] *Müller* (fn. 7) 130 ff.; see also *Lange/Schiemann* (fn. 2) 297; *Loewenheim*, JZ 1972, 12, 15.

[64] BGHZ (10.5.1960 – VI 35/59) 32, 280, 284 f.

E. Default Interest

17 For the purpose of encouraging faster payment behaviour,[65] all monetary debtors must pay interest during any periods of delay under § 288(1) BGB. The default rate of interest per year is five percentage points above the basic rate of interest.[66] If no party to the legal transaction is a consumer, the rate of interest, according to § 288(2) BGB, is eight percentage points above the basic rate of interest. The legislative motivation for this rule is easy to understand: it shall not be more favourable for debtors to owe money to their commercial partners than to obtain credit from a bank.[67]

18 As long as the default interest does not exceed the usual market rate of interest, it can easily be considered a standardised way of compensation for the precluded use of capital by the creditor – relieving the latter from the obligation to calculate the loss he suffered as a result of the late payment. If, however, the default interest is higher than the average interest banks demand, it goes beyond what is actually needed for compensation.[68] The legislator presumed, however, that this would not happen.[69] The formulation was chosen because a regulation requiring the debtor to pay the usual market rate would have led to legal uncertainty. Thus, although § 288 BGB certainly has a regulatory purpose, which is owed to European law,[70] it is based on the restitutionary idea to take away benefits from the debtor that do not appertain to him.

F. Damages for Discrimination

19 The picture would not be complete, however, without looking at damages for discrimination, particularly in labour law. According to § 15(1)1, (2)1 Equal Treatment Act (AGG, Allgemeines Gleichbehandlungsgesetz), an employer has to pay damages for material and immaterial loss to prospective employees who were refused a job position for illegitimate reasons such as on racial or ethnic grounds, gender, religion or ideology, disability, age or sexual identity. The AGG as well as its predecessor, § 611a BGB, were enacted in order to implement secondary EC legislation.[71] Yet, § 611a BGB had to be amended twice because the ECJ regarded earlier regulations as insufficiently implementing the Directives' aims.[72] In particular, the original position was that applicants

[65] Cf. BT-Drucks. 14/1246, 5.
[66] The basic rate of interest, specified in § 247 BGB, is adjusted twice a year in accordance with the most recent main refinancing operation of the European Central Bank. At the time of writing, it was 1.62%.
[67] BT-Drucks. 14/1246, 5; see, before, *U. Huber*, Leistungsstörungen, vol. II (1999) 70 ff. with further ref.
[68] For the conclusion that § 288 BGB hence imposes a form of punitive damages see *C. Schäfer*, Strafe und Prävention im Bürgerlichen Recht, AcP 202 (2002) 397, 413 f.
[69] BT-Drucks. 14/1246, 5.
[70] This provision is an implementation of Directive 2000/35/EC on combating late payment in commercial transactions.
[71] Directives 76/207/EEC, 2000/43/EC and 2000/78/EC.
[72] See the reference in *G. Thüsing* in: MüKo (5th ed. 2007) § 15 AGG, no. 3.

who had been discriminated against could only recover their costs of postage and other application expenses incurred before the discrimination. The ECJ called for higher sums of damages to be awarded: The possible liability should be truly deterrent and must go beyond a mere symbolic payment.[73]

As a result, damages for discrimination, as awarded in today's practice, cannot be explained by the concept of compensation for loss suffered.[74] Attempts to explain these damages within the traditional compensatory framework as the compensation of a lost chance[75] or as compensation of immaterial damage[76] are not fully convincing. According to EC law requirements, even barely qualified applicants, who never had a serious chance of employment, are entitled to substantial damages that go far beyond what is usually awarded in the case of an infringement of personality rights, if they were rejected for discriminatory reasons. Thus, this sanction primarily serves a regulative purpose: it punishes the employer for his unsocial behaviour. This, however, has to be regarded as an insignificant exception from the fundamental principle of compensation underlying the German law of damages. It is an exceptional rule that was extrinsically brought into German private law by the European legislator and by the ECJ. 20

III. Conclusions

The German law of damages is not unfamiliar with the idea of prevention.[77] In fact, every possible liability in the broadest sense can have a preventive effect.[78] Regulation and even deterrence, thus, may be aims of the German law of damages, but they are achieved by means of fair compensation. True, there are claims that go beyond the actual financial loss of the injured party. However, these claims are not based on punitive considerations. If these claims were to be understood as punitive, for the sole reason that they are not limited by the victim's loss, even claims under the law of unjustified enrichment would often have to be qualified as punitive, although these claims do not even presuppose a wrong on the defendant's part. What can be seen here, instead, is that the concepts of compensation and restitution in a broader sense also incorporate the protection of normative interests, the infringement of which are not directly perceivable in the injured party's pocket. This holds true, in particular, for damages for pain and suffering, for the infringement of personality rights and 21

[73] Esp. ECJ 14/83, *von Colson and Kamann* [1984] ECR (European Court Reports) 1891 ff.

[74] See *M. Volmer*, 'Punitive Damages' im deutschen Arbeitsrecht? Betriebsberater (BB) 1997, 1582, 1583 among others.

[75] Cf. *G. Wagner/N. Potsch*, Haftung für Diskriminierungsschäden nach dem Allgemeinen Gleichbehandlungsgesetz, JZ 2006, 1085, 1095 f.

[76] BAG (Bundesarbeitsgericht, Federal Labour Court) (14 March 1989 – 8 AZR 447/87) NJW 1990, 65 ff.; BAG (14 March 1989 – 8 AZR 351/86) NJW 1990, 67 f.

[77] *G. Wagner*, Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe? AcP 206 (2006) 352 ff. with numerous examples and further ref.

[78] Cf. *Jansen* (fn. 52) 521 ff.: Thus, the allocation of subjective rights already has a preventive implication. For a detailed analysis see also: *T. Dreier*, Kompensation und Prävention (2002) 122 ff., 149 ff., and passim.

for the violation of immaterial property rights. All in all, apart from the exception of damages for discrimination, there are no punitive damages in German law.

Punitive Damages in Hungary

Attila Menyhárd[*]

I. Introduction

Punitive damages as such are not recognised in Hungarian tort law: neither on a regulatory level nor in court practice. It follows from this that the analysis provided here could only be founded on a special method of looking for parallel legal instruments and identifying underlying principles of regulation, theory and practice, then analysing punitive damages as a special form of sanction of civil liability in this context. From this point of view this analysis will necessarily be a somewhat theoretical one performed on the basis of a functional approach. Hungarian legal theory and legal literature touch upon punitive damages only in a very marginal way, avoiding complex analyses; neither pros nor cons are correctly supported by arguments in this legal literature. Moreover, one could hardly find any legal instruments of foreign private laws which are surrounded by more misunderstandings than punitive damages in Hungary. There has been only one detailed analysis published so far in Hungary but this study also follows an approach which is primarily a descriptive one. The absence of any contextual analysis in Hungary makes the analysis of punitive damages from a perspective of Hungarian private law even more complicated. 1

It is this lacuna that determines the structure of this study too. Legal institutions with the same or similar functions will be found and analysed in the law of obligations and these legal institutions and punitive damages also will be analysed in the context of underlying policies which might provide a regulatory and policy framework for punitive damages in Hungarian private law. As a result an answer could be given to the question of how punitive damages should be assessed under Hungarian private law, whether and under what conditions punitive damages should be considered compatible with the principles and regulation of Hungarian tort law and what the limits of such compatibility may be. In order to fix the starting point of such an analysis, punitive damages shall be defined first then the regulatory and policy context provided by Hungarian law shall be considered and after that, private law sanctions which are functionally similar to punitive damages shall be analysed. This may lead 2

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to conclusions regarding the compatibility of punitive damages in the context of Hungarian private law.

II. Definition of Punitive Damages

3 Normally, the function of damages is to provide compensation to the victim and to make good the loss she suffered. In some legal systems, courts may award damages exceeding the amount which is needed in order to compensate the plaintiff for the civil wrong the tortfeasor was found liable for. Payment obligations awarded as damages but calculated independently from the loss suffered or established and in excess of the loss actually caused may take different shapes and appear in different forms. Non-compensatory damages may be contemptuous, nominal, exemplary (or punitive) or restitutionary. Contemptuous and nominal damages do not have a punitive or exemplary character: their aim is not to punish the defendant or to make an example of her but to express contempt[1] or to declare that a legal wrong arose. Under punitive damages, a monetary award is given for a civil wrong with the primary purpose being to punish the defendant "and to create an example to deter the defendant and other potential defendants from similar conduct."[2] Sometimes, however, it is very hard to make a clear distinction between damages with a punitive character and compensatory damages. If the civil wrong resulted in a harm which was not of a pecuniary character, the compensatory and preventive functions of damages are almost indistinguishable. This seems to be the case with aggravated damages in English law;[3] just like the double – compensatory and redress – function attributed to non-pecuniary damages in Hungarian tort law. These types of damages are primarily of a compensatory character but the absence of clearly established loss in property (mental distress or injury to feelings in the case of aggravated damages and interference with personality rights in case of non-pecuniary damages in Hungary) means that the calculation of their amount cannot be established as being equal to a suffered loss.

4 Courts – where the legal system so accepts – award punitive damages in order to punish the tortfeasor where compensatory damages do not seem to provide deterrence and a sufficient preventive effect. Punitive damages are damages which are to be paid above (i.e. in addition to) compensatory damages; in other words, punitive damages are "damages given to the plaintiff as a way of punishing the defendant."[4] Punitive damages may either be a statutorily fixed multiple sum of the loss caused (multiple damages) or undetermined and left to the discretionary power of the judge. Their character is like that of an *accessory* as punitive damages are always attached to a wrongfully committed tort establishing the defendant's liability and where *aggravating circumstances*, such as deliberate or grossly negligent wrongdoing exist.[5]

[1] *W.V.H. Rogers*, Winfield & Jolowicz on Tort (17th ed. 2002) par. 22.6–22.7.
[2] *J. Edelman*, Gain-based Damages: Contract, Tort, Equity and Intellectual Property (2002) 5.
[3] See *M. Lunney/K. Oliphant*, Tort Law: Text and Materials. (3rd ed. 2003) 864 f.
[4] *R. Cooter/T. Ulen*, Law and Economics (5th ed. 2007) 394.
[5] *P. Müller*, Punitive Damages und deutsches Schadensersatzrecht (2000) 9.

III. Function and Rationality of Punitive Damages

The primary function of punitive damages – as is the main function of punishment in general – is deterrence and prevention of oppressive, malicious, fraudulent behaviour (or other forms of behaviour with a similar character). As far as punitive damages are concerned, there are two basic questions legal systems have to face. The first is whether awarding damages in a sum exceeding the compensatory or restitutionary interests shall be accepted and applied in general. If answered affirmatively, the second is how the sum of punitive damages shall be computed. Except statutorily regulated forms of fixed multiple damages, there is no coherent system of determining the sum of punitive damages in legal systems where they are accepted. Starting from the principle that the main purpose of punitive damages might be the correction of failure of private law enforcement, it has been suggested in the law and economics literature that, when punitive damages are awarded, the punitive multiple should equal the inverse of the enforcement error.[6] 5

Punitive damages seek to make the wrongdoing more expensive for the tortfeasor than avoiding it and they create incentives for the prevention of harmful behaviour. Thus, punitive damages may be seen as an important element of the "social engineering" function of tort law.[7] In the U.S., they also provide redress to the victim for the injury to her human dignity and they create incentives for the victim to turn to the court which helps in the enforcement of the law. Punitive damages have restitutionary aspects too: they shift the profit gained by the wrongful behaviour from the tortfeasor to the victim. In legal systems where lawyer's fees are not fully reimbursed as litigation costs, they act as a form of legal assistance to a plaintiff who turns to the court, reimbursing her for such costs.[8] 6

IV. Regulatory and Policy Context

A. Punitive Damages as a Private Law Sanction with a Criminal Character

One of the main theoretical arguments against punitive damages may be that they have a criminal law character which makes them incompatible with private law and does not enable them to fit into the system of tort law; punishment as a function of law and the legal system should be left to criminal law. The history and development of tort law may be put in the context of the separation of criminal law and private law. A possible construction of this development is that an important role has been assigned to private law in social engineering. However, private law, now separated from criminal law, was not only a result of this development but an inherently logical and structural element for the legislator too. This development made private law – and especially tort law – clear 7

[6] *Cooter/Ulen* (fn. 4) 397.
[7] *Müller* (fn. 5) 13.
[8] Ibid. at 11. ff.

from ethical evaluation which was left to criminal law.[9] Distinguished scholars influencing contemporary legal theory e.g. Jhering from Germany, were very strongly of the opinion that private law must be made and kept clear from criminal elements.[10] The theoretical and policy argument for keeping private law clear from criminal law elements may not sound convincing. On the one hand, the logical clearness is not a prerequisite of an efficient and properly working system of private law. On the other hand, this development itself is testament to the fact that criminal elements were always a part of private law without any functional problem and this is so even today. Not only has private law been living together with elements of criminal law but actually private law never really became free from them.[11] Inherent elements of private law in continental legal systems, like the astreinte in French law, Schmerzensgeld in German law, penalty clauses permissible in contract under the laws of continental legal systems or non-pecuniary damages in tort law illustrate that even today, elements of an inevitably criminal law character exist under private law.[12]

B. Punitive Damages and the Enrichment of the Victim

8 Awarding punitive damages necessarily results in a benefit being given to the victim at the expense of the tortfeasor without a loss to be compensated or a counter-performance thereby enriching the victim without a justification normally accepted by the law. However, the principle that damages shall not result in a gain to be earned by the victim or in the enrichment of the victim is an important part of the tort law of continental legal systems. This principle rests on the axiom that damages are awarded to compensate the victim by restoring the latter to her original state and to provide commutative justice in society. This, however, shall not be seen as an inherent logical necessity of law and is much more a conceptual problem and a policy question rather than an inner contradiction of the structure of private law.

C. Punitive Damages and Functions of Liability and Tort Law

9 Accepting or rejecting punitive damages may depend on what the functions of private liability law and tort law are in a legal system and how private law could directly strive at realising these functions. The choice for theoretical and structural clearness and consistency would necessarily result in rejecting punitive damages as they are of a criminal character being inconsistent with the philosophy and dogmatic structures of private law. Accepting the active role of private law in social engineering, however, implies a functional approach that should lead to the acceptance of punitive damages as an effective tool of prevention and private law enforcement.

[9] *B. Grossfeld*, Die Privatstrafe (1961) 14.
[10] *R. von Jhering*, Der Kampf um's Recht (13. Aufl. 1897) 90.
[11] For this development, see the comprehensive analysis in *I. Ebert*, Pönale Elemente im deutschen Privatrecht (2004) esp. 574 ff.
[12] A detailed comparative analysis was made in *Grossfeld* (fn. 9).

V. No Punitive Damages in Hungarian Tort Law

10 In the Hungarian system of tort law, the concept of damages is tightly linked with the concept of damage. According to § 355[13] of the Hungarian Civil Code, the tortfeasor responsible for the damage shall be liable for restoring the victim to her original state, or, if this is not possible or if the aggrieved party refuses restoration on a reasonable ground, the tortfeasor shall compensate the aggrieved party for any pecuniary and non-pecuniary damage suffered by the latter. Compensation must be provided for any depreciation in value of the property belonging to the aggrieved person (damnum emergens) and any pecuniary advantage lost due to the tortfeasor's conduct (lucrum cessans) as well as compensation of the costs required for the attenuation or elimination of the pecuniary and non-pecuniary loss suffered by the victim. These provisions not only dictate the principle of full compensation but they also draw the limits of liability as they define damages as compensation for compensable loss.

11 The draft of the new Hungarian Civil Code,[14] neither in its structure of regulation nor in its regulatory method (i.e. in its definition of damage and its definition of damages as compensation for damage), suggests changes or amendments to the previous provisions and – with the exception of small clarifications and the abandonment of the concept of non-pecuniary damages replacing it with a special form of indemnity for unlawful interference with personality rights – keeps the same regulatory system.[15] None of the amendments submitted to parliament address the problem of punitive damages so far. As aforementioned, one of the most significant amendments that has been suggested in the draft of the new Civil Code to the existing law is the abolition of non-pecuniary damages and the replacement of this special kind of damages with a special indemnity as a direct monetary sanction of wrongful interference with personality rights (similar to the German Schmerzensgeld).[16] There are opinions expressed in the tabloid press that this new form of indemnity should be understood as an introduction of punitive damages into Hungarian tort law but this opinion is a gross oversimplification and comes from the misunderstanding of the function, nature and application area of punitive damages.[17] This new form of indemnity to be introduced would cover, in its function and criteria of application, the function and applicability criteria of non-pecuniary damages and would not exceed the limits – neither in the criteria of an award nor in the sum and nature – of non-pecuniary damages.

[13] Subpar. (1) and subpar. (4).

[14] The draft of the new Hungarian Civil Code was submitted to the Hungarian parliament in June 2008. Parliament started general discussions of the draft in September. After referring to the low quality of the draft and the unreasonable dissolution of the expert preparatory committee, the draft was taken off the agenda for some days and after approximately two weeks of interruption the debate was restarted. The general discussions continued again from the middle of October. The draft is expected to become law in the spring of 2009.

[15] § 5:478 and § 5:480 of the draft. http://www.parlament.hu/irom38/05949/05949.pdf (available only in Hungarian). In the following report, referred to as "Draft".

[16] Draft § 2:90.

[17] This suggestion identifies punitive and non-pecuniary damages. http://www.mediakutato.hu/cikk/2006_03_osz/06_kozszereplok_szemelyisegvedelme/05.html.

VI. Punitive Elements in Hungarian Private Law

A. Public Penalty for Interference with Personality Rights

12 In establishing the private law consequences of unlawful interference with personality rights, § 84 subpar. (1)(e) of the Hungarian Civil Code provides that the aggrieved person shall be entitled to claim damages according to the general rules of civil liability law. § 84 subpar. (2) of the Civil Code also provides that if the defendant wrongfully interfered with the plaintiff's personality (or inherent) rights and the sum to be awarded as damages would not be proportionate to the gravity of the wrongfulness of the tortfeasor's conduct, the court may impose a fine on the defendant to be devoted to public purpose. The Civil Code was amended with this special sanction for wrongful interference with personality rights under a comprehensive revision in 1977 in order to provide a more effective protection of personality rights with proper preventive effect. The underlying policy of introducing this repressive sanction was the recognition of the fact that in cases of gross infringement of the plaintiff's personality rights, damages may not properly transmit the social evaluation of the wrongful conduct and this would not result in a proper level of protection of personality rights and prevention.[18]

13 The prerequisites for imposing such public fine on the defendant are that:

1. a wrongful interference with the plaintiff's personality (inherent) rights exists;
2. the defendant would be liable for damages for the wrongful interference with the plaintiff's personality rights according to the general rules of liability (§ 339 ff. of the Hungarian Civil Code); and
3. the damages awarded would not be proportionate to the gravity of the wrongfulness of the defendant's conduct.

14 The public fine is not be paid to the plaintiff but to the state and is to be imposed ex officio even in the absence of a claim for such a fine[19] and even in the absence of a claim for damages too. In a relatively recent decision, the Supreme Court established that if the aggrieved party to the court procedure does not make a claim for damages but the court recognises that: (a) the interference with the plaintiff's personality rights was wrongful; (b) the wrongful interference was unreasonably gross; (c) it cannot be excluded that damages would have been awarded had a claim been submitted for that interference; and (d) the prerequisite that any damages actually awarded would have been disproportionate to the gravity of wrongfulness is satisfied, the public fine could be imposed.[20]

[18] Explanatory memorandum to the draft of Act no. IV of 1977 on the amendment of the Hungarian Civil Code. (4th 1988) 455. Explanatory note to § 84 of the Hungarian Civil Code.
[19] Supreme Court, Legf. Bír. Pfv. IV. 20.555/1994. sz. – BH 1995. 395. sz.
[20] Supreme Court, Legf. Bír. Pfv. IV. 20.822/2001. sz. – BH 2003. 150. sz.

Thus, the public fine to be imposed under the provisions for the protection of personality rights in the Hungarian Civil Code, especially § 84 subpar. (2) of the Civil Code is not a form of damages, even though the prerequisites for imposing it are the same as the prerequisites for establishing liability for damage. This binds them – in spite of their different nature – together. It is remarkable that a similar solution has been suggested by Grossfeld with the main difference that according to him, the imposed penalty should be paid primarily to the plaintiff who may ask that the penalty be paid to an institute which functions in the public interest.[21] In the Hungarian Civil Code system, the public penalty cannot be paid to the plaintiff but to the state or an organisation which functions in the public interest. 15

There are, however, only very few court decisions establishing the court practice on the imposition of the public fine as a special consequence of wrongful interference with personality rights. Most of these decisions, moreover, are from the first half of the nineties addressing wrongful interference with personality rights by the press. The fact that there existed a parallel statutory public fine system for sanctioning wrongful interference with rights by the press makes the evaluation of these decisions from the point of view of this report questionable in its results. The case law established on a very low number of published decisions in general – most of which address primarily procedural questions – does not lead to any far-reaching conclusions. 16

It was already established at the onset of the drafting of the new Hungarian Civil Code that the public penalty provided in § 84 subpar. (2) of the existing Hungarian Civil Code should be abolished. This decision was led by the consideration that this sanction would not really be compatible with private law and actually had not been applied much in practice. According to the Principles and Proposals for a new Hungarian Civil Code, the new indemnity sanction of wrongful interference with personality rights to be introduced in the new Civil Code, in order to take over the function of non-pecuniary damages, should provide a sufficient sanction and make the application of a public penalty superfluous.[22] 17

The draft of the new Hungarian Civil Code has accordingly abandoned the public penalty provision, leaving its functions to the new indemnity compensation which provides a special sanction of wrongful interference with another party's personality rights. Moreover, the draft also suggests that the sanctions of unlawful interference with personality rights shall be amended with a new restitutionary sanction (as a special form of unjust enrichment) allowing the courts to deprive the defendant of the benefit she gained at the "price" of the wrongful interference with the plaintiff's personality rights. According to § 2:88 of the draft of the new Hungarian Civil Code, in a case of unlawful 18

[21] *Grossfeld* (fn. 10) 125 f.

[22] Principles and Proposals for a new Hungarian Civil Code Part 6, 2.4. (Published as an appendix to the Official Journal of the Hungarian Republic 2002. 15/II).

interference with the plaintiff's personality rights, the plaintiff shall be entitled to claim that the benefit which the defendant gained as a result of the unlawful interference should be assigned to her. This restitutionary sanction – modelled after similar solutions for sanctioning unlawful interference with intellectual property rights – shall be applied as an objective (or strict) one, i.e. the plaintiff shall have a claim for restitution even if the defendant was not at fault in the unlawful interference.

B. Non-pecuniary Damages and Indemnity for Interference with Personality Rights

19 According to the current law in Hungary, in the case of a wrongful interference with personality rights, the aggrieved person shall be entitled to claim non-pecuniary damages. Non-pecuniary damages are primarily of a compensatory character[23] but they imply a redress too which helps to prevent, in general, unlawful behaviour in the future and helps to avoid interferences with the human dignity of others in society.[24] This function, of providing redress beyond basic compensation, has been stressed in a decision of the Hungarian Supreme Court establishing that the victim shall be entitled to non-pecuniary damages even if she was in a coma which prevented her from enjoying any kind of reparation that non-pecuniary damages could have brought to her.[25] The new form of indemnity as a special sanction of wrongful interference with personality rights proposed to be introduced into the draft of the new Hungarian Civil Code in order to replace non-pecuniary damages would not change the functions of non-pecuniary damages. The idea behind this amendment of the Civil Code, and the introduction of an indemnity instead of non-pecuniary damages, was to relieve the plaintiff of the burden of proving some form of detriment suffered as a result of the defendant's wrongful conduct and in this way, it makes access to indemnification easier for the plaintiff. This, however – according to the underlying policy of the suggested amendment – would not deprive the sanction of its compensatory function although it may inevitably put an emphasis on its repressive character.[26]

[23] Constitutional Court of the Hungarian Republic, decision of 34/1992. (VI. 1.) AB hat. on the revision of § 354 of the Hungarian Civil Code from the point of view of its compatibility with the Constitution.

[24] *T. Lábady*, A nem vagyoni kártérítés újabb bírói gyakorlata (1992) 40.

[25] Supreme Court P. törv. III. 20 703/1989. sz. – BH 1990. 15. sz. The compensatory function has been stressed. However, in another decision, the Supreme Court subordinated the repressive and preventive function of non-pecuniary damages to the compensatory function of civil law liability. Supreme Court Legf. Bír. Pfv. IV. 20.419/2006. sz. – BH 2006. 318. sz. (EBH 2006. 1398. sz.).

[26] Explanatory memorandum to the draft of the new Hungarian Civil Code. Explanatory note to § 2:90.

C. Penalty Clauses

Continental legal systems – like the French, German or Hungarian ones – generally allow penalty clauses. Penalty clauses have a dual function:[27] they provide lump sum compensation to the aggrieved party and they also provide a repressive sanction in the case of a breach of contract even in absence of damage in order to force the party to perform if breach would be less efficient for her. Thus, penalty clauses inevitably seek to ensure deterrence and special prevention and may be qualified as a form of contractual punishment. This may be one of the reasons why English and American courts do not enforce penalty clauses (the rule against penalty) while they accept and enforce liquidated damages clauses. The basis of the distinction is whether the clause is "a payment of money stipulated as in terrorem of the offending party"[28] which is an unenforceable penalty clause or whether it is "a genuine attempt by the parties to estimate in advance the loss which will result from the breach" [29] which is a liquidated damages clause capable of being enforced. The "rule against penalty" makes the clear distinction between penalty and liquidated damages clauses necessary in Anglo-American court practice. A stipulated sum to be paid as a consequence of the breach of the other contracting party shall be qualified as liquidated damages (not penalty) if the parties intended to provide for damages rather than a penalty, if the injury caused by the breach was – at the time of concluding the contract – uncertain or difficult to quantify and if the stipulated sum had been a reasonable pre-estimation of the probable loss.[30] The "rule against penalty" makes further distinctions necessary which can hardly be solved correctly by court practice. There are cases where a very fine distinction is to be made between payment triggered by breach and payment which is conditional on an event other than breach.[31] 20

Penalty in Hungarian contract law is an accepted secondary contractual obligation. According to § 246 of the Civil Code, under a penalty clause stipulated in the contract, the obligor has to pay a certain sum of money if she fails to perform the contract or her performance was not in conformity with the contract for reasons attributable to her (default penalty). The payment of penalty does not relieve the party of her obligation to perform, because, according to § 246 subpar. (2) of the Civil Code, the obligee shall be entitled to claim compensation for the damage she suffered as a result of the other party's breach exceeding the default penalty as well as other rights resulting from the breach of contract. The obligee shall be entitled – in accordance with the relevant regulations – to demand compensation for the damage caused by the breach of contract, even if she has not enforced her claim for default penalty. 21

[27] See, e.g., *F. Terré/Ph. Simler/Y. Lequette*, Droit civil – Les obligations (9th ed. 2005) Dalloz 2005. no. 623–625.

[28] *Dunlop Pneumatic Tyre Co. Ltd. v New Garage & Motor Co. Ltd.* [1915] A.C. 79 at 87.

[29] *G.H. Treitel*, The Law of Contract (12th ed. 1999) 20-122.

[30] This latter criterion is generally determinative. See *J.D. Calamari/J.M. Perillo*, The Law of Contracts (4th ed. 1998) 590 f.

[31] *L. Gullifer*, Agreed Remedies, in: A. Burrows/E. Peel (eds.), Commercial Remedies (2003) 191–219, 191 ff.

22 Even if the punitive character of penalty clauses seems obvious, it is very questionable whether one could draw any conclusions from the recognition of penalty clauses in contract law to possible acceptance of punitive damages in tort or otherwise find any further parallel between them. The function and nature of penalty clauses as a contractual remedy make any kind of comparison doubtful: penalty clauses are much closer to contractual guarantees[32] than measures aiming at general prevention of harmful behaviour and "social engineering" where punitive damages belong.

D. Confiscation in Favour of the State

23 If a contract is invalid and one of the parties – at least partially – performed the contract, the performing party, as a general rule, shall be entitled to restitution of the performance. A general problem of contract law is whether the (performing) party, whose conduct under the contract was contrary to public policy (i.e. unlawful conduct or conduct contra bonos mores), should be denied restitution. In cases of illegality, there are special policy issues which would be against the allowance of restitution. Firstly, as a traditional and general principle of private law, no one should be left to gain a profit from their own wrongdoing (nemo auditur suam turpitudinem allegans); secondly, allowing restitution would not have a preventive effect against conduct contra bonos mores and even if prevention or deterrence are not general underlying policies of contract law or unjust enrichment, it is widely accepted that it is desirable to deter persons from illegal or immoral conduct; thirdly, enforcing restitutionary claims arising from performance of an illegal contract makes it necessary for the courts to go into the detail of the case in evidence to decide the legal ground of the claim which may offend the dignity of the courts.[33]

24 It seems that even if rejecting the restitutionary claims of parties being in pari delicto may protect the dignity of the courts and may provide enough deterrent and preventive effects, the result of allowing the other party to keep the benefits of the performance – even if she also was in pari delicto – cannot be claimed satisfactory at all. If the parties are equally at fault owing to their mutual contract for an illegal purpose, it is a very questionable result that the transferee may keep the transferred benefit even if by entering into the contract, she acted equally or more wrongfully than the plaintiff did. The Hungarian Civil Code solved the problem by introducing a new sanction of invalidity into the Hungarian law. According to this new, purely repressive sanction, the court shall be entitled to award to the state the performance that is due to a party who has concluded a contract which is contrary to good morals, who has deceived or illegally threatened the other party, or who has otherwise proceed-

[32] Penalty clauses, in themselves, may even be seen as a special type and regulated form of guarantees. *K. Schmidt*, Unselbständige und selbständige Vertragstrafeversprechen, in: Festschrift für Helmut Heinrichs zum 70. Geburtstag (1998) 529–542.

[33] It was very colourfully expressed by Wilmot C.J. in the case of *Collins v Blantern* in 1767, that "no polluted hand shall touch the pure fountains of justice." Cf. *J. Beatson*, Anson's Law of Contract (27th ed. 1998) 389.

ed fraudulently (§ 237 subpar. (4) of the Civil Code).[34] A similar rule shall be applied for confiscation of the restitutionary value to the state under the unjust enrichment regime according to § 361 subpar. (3) of the Hungarian Civil Code.

25 One weak point of this solution lies in its procedural aspects: it is not obvious at all how courts can award the benefit to the state in a procedure between two parties who will surely not propose such a decision. To award the benefit to the state without a claim would be incompatible with the nature of civil law litigation. This procedural problem has been overcome by giving the right to the public prosecutor to claim that the state be awarded the benefit which would otherwise have been passed to the transferee (§ 237 (4) of the Hungarian Civil Code). According to the present procedural rules, if in a civil law litigation a possibility that an award could be made to the state arises, the court is obliged ex officio to notice it and to notify the public prosecutor of the possibility of applying this sanction in order to make it possible for the public prosecutor to step in. The restitutionary benefit can then be awarded to the state on the claim of the Public Attorney. This claim is a procedural precondition of such a decision.

26 The draft of the new Civil Code[35] would abandon this special sanction of private law confiscation. The main arguments for this proposal are the punitive character of it which has been held incompatible with the structure and nature of the civil law and that its application has also been very rare and unsuccessful.[36] It is, however, remarkable that a similar solution was introduced in English Law by the Proceeds of Crime Act 2002 with confiscation of the benefit obtained by unlawful conduct even in absence of the party being declared guilty by a criminal court. The confiscation shall be ordered on a private law basis if "any matters alleged to constitute unlawful conduct have occurred" or "any person intended to use any cash in unlawful conduct."[37] The confiscation shall be awarded on the request of the Assets Recovery Agency.

[34] The idea was not new as even before the Second World War, it had already been suggested that the transferee should not keep the benefit she received but that restitution should also be denied, and the benefit should be confiscated and paid to the state or otherwise diverted to any public activity (helping the poor, orphans, etc.). *Beck Salamon*, Turpis causa – követelési jog? Jogtudományi Közlöny 1922. no. 7., 52 f., *Almási Antal,* commenting on the presentation of Rudolf Schuster. Magyar Jogászegyleti Értekezések X. 1914., 23.

[35] Explanatory note to § 5:84 ff. of the Draft. The note stresses that such repressive sanction would not only be incompatible with the internal logic of private law, but neither practical nor conceptual arguments would support keeping it.

[36] According to an analysis and report of the Public Attorney's department issued in 1998 on the Public Attorney's practice in this field, between 01.09.1995 and 01.12.1997, the Public Attorney made claims for awards to the state in 5 cases for a total amount of HUF 24,520.000 (about £ 66,000). Claims worth HUF 19,000.000 in total were rejected by the courts which awarded only HUF 5,000.000 (a little more than £ 1,300) in total. This result is not only very poor but also shows that the confiscation in favour of the state simply does not work in practice. The report in question is Ig. 96/1998.

[37] Proceeds of Crime Act 2002, s.241(3).

VII. Policy Aspects of Punitive Damages in Hungarian Tort Law

A. Prevention as the Main Function of Tort Law

27 According to the prevailing theories of Hungarian tort law, the main function, of civil law liability are reparation and prevention. They have been the underlying policies of the current system of tort law too.[38] The main theorist of the current tort law regulation and philosophy, Gyula Eörsi[39] and other authors also[40] emphasise the preventive function of private law sanctions, especially private law liability. Besides reparation, the draft of the new Hungarian Civil Code also emphasises prevention as a main function of liability.[41] From this follows that the acceptance of punitive damages shall be held compatible with the core policies underlying Hungarian tort law and would fit into the basic frames provided by private law theory.

B. Prohibition of Making Profit on Damages

28 A general principle of Hungarian tort law – which is similar to other continental tort law systems – is that no one shall be enriched by her own damage. It seems that restitutionary damages or claims for the benefit gained to be shifted from the tortfeasor to the victim thus depriving the tortfeasor of the profit she gained from the wrongful conduct (Gewinnabwehr) should be held compatible with the principles and policies underlying tort law.[42] It is, however, a generally accepted principle that the victim should be prevented from making a profit from her own loss. The principle is generally accepted but not expressly declared in the current Civil Code, although it clearly follows from the concept of damage (i.e. that damage includes the actual loss, lost profits and the costs of prevention and avoidance of the loss) and restitution of unjust enrichment. According to this principle, in the course of calculating the sum of damages to be awarded, the amount of damages shall be reduced by the sum the victim earned or saved as a result of the damage (e.g. payments under a national health care system[43] or an increase of value in the property of the victim as a result of the event which caused damage). In line with the principle of full compensation, the plaintiff shall be compensated for all the losses she suffered but cannot be paid more.[44]

[38] Explanatory memorandum to the Civil Code of 1959. Explanatory note to § 339 ff.

[39] *G. Eörsi*, A jogi felelősség alapproblémái – a polgári jogi felelősség. (1961) 169 ff., 360 ff.

[40] *L. Asztalos*, A polgári jogi szankció (1966) 359 f. Géza Marton also regards prevention as the prevailing principle and theoretical basis of private law sanctions including civil law liability. *G. Marton*, A polgári jogi felelősség (1993) no. 28 f., 97 f.

[41] Explanatory note to § 5:472.

[42] *Marton* (fn. 40) no. 117. § 2:88 of the draft of the new Hungarian Civil Code (deprivation of the profit gained through wrongful interference with personality rights).

[43] Supreme Court Legf. Bír. Mfv. I. 10.244/2002/3. sz. – EBH 2002. 695. sz.; Supreme Court Legf. Bír. Mfv. I. 10.744/2006. sz. – BH 2007. 354. sz.; Supreme Court Legf. Bír. Mfv. I. 10.697/2006. sz. – BH. 2007. 274. sz.

[44] G. Gellért (ed.), A Polgári Törvénykönyv Magyarázata (7th ed. 2007). Comments to § 355. of the Hungarian Civil Code no. 4.

The draft of the new Hungarian Civil Code also rests on a similar concept of the prohibition of making a profit from a loss suffered and – with the aim of strengthening the principles already accepted in theory and practice – proposes that this principle be expressly declared. § 5:477 subpar. (1) of the draft provides that the victim shall be fully compensated but the damages to be awarded for the loss she suffered are to be reduced to eliminate any unjust enrichment, except where it would not be reasonable under all the given circumstances of the case. 29

Although punitive damages, as a form of enrichment, would surely not be unjust as they are awarded by a court and on this ground they could not be qualified as unjust enrichment, they conceptually would not seem to be compatible with this principle. Recognising punitive damages would necessarily lead to conceptual inconsistencies within both the current and future system of Hungarian tort law. This inconsistency could be avoided if they were paid not to the plaintiff but to a public body for a public purpose.[45] Such a structure may, however, result in losing one of the main advantages of punitive damages, namely creating private incentive for sanctioning wrongful behaviour in society and may question the grounds for maintaining such a system of damages. Experiences in Hungary with the public penalty – now in danger of being lost through desuetude – would suggest that this is a real possibility. 30

The prohibition from making a profit from one's own loss in this context is, however, not a principle which necessarily comes from the internal logic of tort law or private law as a whole but a choice of policy at least in the form in which it is presented in the draft of the new Civil Code or in prevailing theory. The real content of the principle lies in the prohibition of unjust enrichment and in the concept of damage. If, however, a normative ground had been provided for awarding it, it would be clear that they are not to compensate a loss (so there is nothing to do with the concept of damage in this context) and they are not unjust enrichment (as they are awarded by the court). A choice for introducing punitive damages may make reconsidering the axiomatic principles of private law necessary. As a result of this reconsideration, a new coherent system could be established. If it is acceptable that deterrence, prevention and the creation of incentives to private law enforcement are important functions of tort law – and prevailing theories do not seem to deny this today – the principle of prohibition from making a profit in consequence of damage which is suffered may be proven to be an unnecessary axiom or at least one that should be revised. 31

C. Compatibility with Constitutional Principles

As far as the compatibility of punitive damages with constitutional principles are concerned, there are possibly three main doubts in this context: one of them 32

[45] Like the public penalty. In some of the states of the U.S.A. such solutions have been introduced (State Sharing Acts). *D. Brockmeier*, Punitive damages, multiple damages und deutscher ordre public (1999) 16.

is whether it would be contrary to the principle that there is no crime without a law; the second is whether an award of punitive damages, as a private law sanction with a criminal law character, would not amount to double punishment of the same wrongful conduct; and the third is whether the absence of statutory limits on punitive damages would not be incompatible with the requirement that punishment shall be definite and predictable.

33 Art. 57 subpar. (4) of the Hungarian Constitution explicitly provides that no one shall be declared guilty and subjected to punishment for an offense that was not a criminal offense under Hungarian law at the time such an offense was committed. The predictability of law is an important constitutional principle implied in requirement of the rule of law declared in § 2 subpar. (1) of the Hungarian Constitution[46] and this principle may imply predictability of punishment or legal sanctions in general too. Compatibility of punitive damages with constitutional principles has not yet been tested at the Constitutional Court of the Hungarian Republic but in a decision from 2001 the Constitutional Court addressed the problem of whether the public penalty as a special sanction of wrongful interference with personality rights shall be held compatible with the Constitution of the Hungarian Republic. The case concerned a suggested amendment of the Hungarian Civil Code submitted as a draft and passed in parliament but sent by the President of the Hungarian Republic to the Constitutional Court requesting preliminary constitutional control. The passed draft – among other things – suggested the amendment of § 84 subpar. (2) of the Hungarian Civil Code on public penalty as follows: "if the amount of damages that may be imposed is disproportionate to the gravity of the actionable conduct, the court shall also be entitled to impose a public fine on the wrongdoer. If the violation of rights was performed through a daily newspaper, a magazine (periodical), a radio or television broadcast, the court shall also order the wrongdoer to pay a public fine. The amount of the public fine shall be fixed at a level suitable to prevent the wrongdoer from committing further acts of violation."[47] The request for constitutional control resulted in revising whether the last sentence of suggested § 84 subpar. (2) of the Hungarian Civil Code is compatible with the Constitution. Even if the decision did not address the revision of the public penalty in general in the context of compatibility with the Constitution, it sheds light on some important aspects of the problem.

34 In its decision, the Constitutional Court took as a starting point that the principles of nullum crimen sine lege and nulla poena sine lege are constitutional obligations binding the state and that they imply that the conditions of the exercise of the state's punitive power must be determined in advance by law. Today this requirement means that criminal liability, sentencing and punishment must all be based on an Act of parliament. The predictability and the

[46] § 2 subpar. (1) of the Constitution provides that the Republic of Hungary is an independent, democratic constitutional state. The principle of predictability of law is derived from the principle of constitutionality. See, e.g., Constitutional Court, 43/1995 (VI.30.) AB hat.

[47] Constitutional Court, 57/2001 (XII. 5.) AB hat.

foreseeability of the whole of the law and of the specific statutes for the addressees of the norm are deemed a significant component of the meaning of legal certainty. Legal certainty requires not only an unambiguous wording of the statutory norm, but the predictability of the realisation of legal institutions as well. However, predictability and foreseeability do not exclude the possibility of the legislature and the authorities applying the law having discretionary powers. It has also been pointed out by the Constitutional Court that abstract and too general statutory definitions may be incompatible with the principle of legal certainty, as such wordings may result in subjective decisions on the part of the authorities applying the law, in the development of differing practices by the various authorities applying the law, and absence of unity of law.

35 The Constitutional Court established that the court orders the payment of a public fine in the course of the civil procedure, together with making a decision on damages, taking into account the amount of damages. Although the public fine is not identical with damages, the unusual legal consequence applied in the regulation of civil law relations does not result in the violation of inherent rights being classified as an administrative infraction. In Hungarian law, the amount of damages to be paid in general is not defined in advance by an Act in respect of either material or immaterial damages. Even the conditions of liability for damages are only specified in a general manner. The unforeseeable and indefinite nature of the sanction applied is related to the inherent features of the legal consequence, the violation of the principle of the rule of law cannot be established on this ground. The public fine as provided for in the text in force of § 84 subpar. (2) of the Civil Code is in line with constitutional principles, as it may be awarded by the court if the amount that can be awarded as damages is disproportionate to the gravity of the actionable conduct. Consequently, the suggested provision may not be regarded as violating the principle of the rule of law on the ground of the fact that the maximum amount of the fine usable for public purposes, adjusted to the regulation on damages, is not determined even in the last sentence. The Constitutional Court established that every sanction has, to a certain degree, the effect of preventing the commission of similar acts by way of the disadvantage caused. Therefore, the sanctions of civil law may not be deemed unconstitutional, and the same is true for the public penalty, which cannot be regarded as a usual civil law sanction but serving to a certain degree the function of civil law sanctions. Accordingly, the Constitutional Court has not established the unconstitutionality of the last sentence in § 84 subpar. (2) of the Hungarian Civil Code.[48]

36 From this follows that as far as public penalty is concerned, the Hungarian Constitutional Court did not share the doubts specified above and this approach may be anticipated regarding punitive damages too. This is also in line with the answers provided in German legal literature to the same problem. From all of this it may be established that their repressive character should not make punitive damages incompatible with the Hungarian Constitution as

[48] Constitutional Court, 57/2001 (XII. 5.) AB hat.

far as awarding them rests on the provisions of an Act (even if this Act is the Civil Code) already in force at the time of the wrongful conduct. The problem of double penalty has not been addressed in the decision of the Constitutional Court. This argument against punitive damages (or private penalty) has already been answered convincingly by Grossfeld stressing that criminal law sanctions never excluded civil law claims and this should hold true for punitive damages too. The fact that the same conduct is sanctioned in criminal law does not mean that it cannot be sanctioned also under the private law regime; the construction of the prohibition of double punishment should be restricted to the field of criminal law.[49]

VIII. Conclusions

37 Even if punitive damages are not accepted and applied in Hungarian tort law, they would not be incompatible with the theoretical framework of delictual liability in Hungarian private law or the underlying policies of tort law. There are, however, some axioms (primarily the suggested axiomatic principle of preventing victims from gaining profits on their loss) which could be a source of inconsistency if any forms of punitive damages were introduced into Hungarian tort law. It seems, however, that the legislator and legal theorists are reluctant to accept and introduce sanctions with a criminal law character in private law. The main sources of this reluctance may be that sanctions of such a nature in the existing private law (public penalty and private law confiscation in favour of the state) did not work properly and their existence has been seen as a relict of socialist state intervention in private law relationships (although this view may not be correct). The strong aversion to repressive sanctions in private law seems to overwrite their utility and their preventive role. The origin of this aversion seems to be at least partly a mainly theoretical demand for a private law which is clear of public law elements and sacrifices the role of private law in "social engineering" for the sake of conceptual clarity. This seems to be a wall built of bad experiences of socialist ideologies, failure of repressive legal institutions in private law and efforts to make a clear private law system which is very hard to break through. The European tendency seems to strengthen the reluctance of accepting punitive damages and if this is true, the Hungarian approach seems to fit into this trend. The Commission White Paper on Damages Actions for Breach of the EC antitrust rules adopted on 2 April 2008[50] explicitly abandoned the idea of introducing multiple damages which was suggested in the Commission Green Paper on Damages actions for breach of the EC antitrust rules[51] as a result of consultancy because under the consultancy procedure most of the respondents suggested that damages should be regarded as a compensatory instrument.[52]

[49] *Grossfeld* (fn. 9) 120 ff. Also *Müller* (fn. 7) 19 ff.
[50] COM(2008) 165, 2.4.2008.
[51] COM(2005) 672, 19.12.2005.
[52] Commission Staff Working Paper SEC(2008) 404, 2.4.2008 no. 182.

Punitive Damages in Italy

Alessandro P. Scarso[*]

I. Introduction

Punitive damages are commonly understood as damages awarded to the victim of somebody else's misconduct, exceeding actual damage suffered, in order to punish the wrongdoer.[1] 1

From a perspective aimed at investigating the hidden ways in which either courts or legal systems award punitive damages, both the relationship between the amount of damages awarded and the blameworthiness of the conduct of the wrongdoer and, more generally, whether tort law has a deterrent purpose have to be addressed. 2

The possible correlation between the blameworthiness of the tortfeasor's conduct and the amount of damages awarded also plays a role when courts appear to tacitly "sanction" outrageous conduct by granting a particularly "generous" indemnity, despite formally refusing to countenance the practice of awarding damages in excess of actual damage suffered (especially in legal systems where punitive damages conflict with ordre public). 3

In tort law, a deterrent purpose exists when the defendant's conduct is assessed either as a factor affecting the imposition of liability or the amount of damages awarded or in cases where the benefits gained through the damaging event are taken into account in determining the amount of damages to be awarded.[2] 4

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[1] See *W.V.H. Rogers*, Winfield and Jolowicz on Tort (17th ed. 2006) 939 ff.; *M. Lunney/K. Oliphant*, Tort Law – Text and Materials (2nd ed. 2003) 798 ff.; *J. Murphy*, Street on Torts (11th ed. 2003) 579 f.; *P. Cane*, The Anatomy of Tort Law (1997) 114 f.

[2] *C. Scognamiglio*, Danno morale e funzione deterrente della responsabilità civile, Responsabilità civile e previdenza (RCP) 2007, 2485 ff. The author points out that, for that reason, the statement that "Damages also serve the aim of preventing harm" (art. 10:101 PETL) is not sufficient to conclude that tortious liability has a deterrent purpose. According to the author, the PETL seem to be slightly inconsistent, namely with reference, on the one hand, to the statement that "The

II. Compensation for Damage in Personal Injury Cases

5 Not surprisingly, the question of whether punitive damages may be awarded has been explicitly addressed in Italian jurisprudence with particular focus on non-pecuniary damages (danno non-patrimoniale) in personal injury cases, i.e. with reference to damages which – intrinsically – cannot be precisely quantified in money terms.[3]

6 According to Italian jurisprudence, in the case of a personal injury due to an unlawful act, apart from pecuniary loss (danno patrimoniale), i.e. loss of income and medical expenses arising from the injury, *at least* two[4] different types of non-pecuniary loss are recoverable: danno biologico[5] (i.e. injury to the victim's personal integrity) and danno morale (i.e. the pain and suffering experienced as a result of the harmful event. It refers to the "psychological suffering" of the injured party: damage to their "internal sphere").

scope of protection may also be affected by the nature of liability" (art. 2:102(5) PETL), in the sense that "an interest may receive more extensive protection against *intentional harm* than in other cases"; on the other hand, as far as non-pecuniary damages are concerned, the PETL state that "in the assessment of such damages, all circumstances of the case, including the gravity, duration and consequences of the grievance have to be taken into account", with the specification that "The degree of the tortfeasor's fault is to be taken into account only *where it significantly contributes* to the grievance of the victim", therefore by explicitly qualifying the relevance of the subjective element as exceptional. See also *E. Navarretta*, Funzioni del risarcimento e quantificazione dei danni non patrimoniali, RCP 2008, 502 f.

[3] See *W.V.H. Rogers*, Death and Non-Pecuniary Loss, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) 54 f.; *B. Koch*, Wrongful Death: How much Does It Cost to Kill Someone? 61 f. As far as compensation for the non-pecuniary loss for personal injury in Italy is concerned, see: *P.G. Monateri*, La responsabilità civile, in: R. Sacco (ed.), Trattato di diritto civile (1998) 389 ff.; U. Izzo (ed.), Dialoghi sul danno alla persona (2006) 57 ff.; *G. Cricenti*, Il danno non patrimoniale (2006); *id.*, Persona e risarcimento (2005) 169 ff., spec. 187; *M. Franzoni*, Il danno risarcibile, in: M. Franzoni (ed.), Trattato della responsabilità civile (2004) 562 ff.; *P. Pardolesi*, Profitto illecito e risarcimento del danno (2005) 153 ff.; *G. Afferni*, La riparazione del danno non patrimoniale nella responsabilità oggettiva, RCP 2004, 870.

[4] The issue of whether the so-called danno esistenziale, which relates to the necessary change of the victim's everyday habits as a consequence of the harmful event and therefore refers to the "external sphere", is a distinct (from danno biologico and danno morale) and *autonomous* type of non-pecuniary loss is currently being debated among Italian legal scholars and in the jurisprudence. See, most recently, Corte di Cassazione (Cass.) (Joint Sections) – 11 November 2008, no. 26972, RCP 2009, 38 ff., with commentaries by *P.G. Monateri*, *E. Navarretta*, *D. Poletti* and *P. Ziviz*; Cass. (3rd Section) 20 April 2007, no. 9510, Giustizia civile Massimario (GCM) 2007, 4, which explicitly excluded its autonomous nature. *Contra*: Cass. (Labour Section) 16 May 2007, no. 11278, GCM 2007, 5, according to which "danno esistenziale represents an autonomous theoretical category within art. 2059 Codice civile" (Civil Code, CC) (for the content of art. 2059 CC, cf. fn. 31). For an outline of danno esistenziale, see Cass. 24 March 2006, no. 6572, in: Foro italiano (FI) 2006, I, 2334; Giurisprudenza italiana (GI) 2006, 1359; RCP 2006, 1041 and 1477; Giustizia civile (GC) 2006, 1443; Danno e responsabilità (DR) 2006, 852; Corriere giuridico (CG) 2006, 787; Corriere del merito 2006, 1165; Guida al diritto 2006, no. 16, 64; Rivista critica del diritto del lavoro 2006, 473 and, more recently, Cass. 12 June 2006, no. 13546, RCP 2006, 1439; DR 2006, 843; CG 2006, 1382.

[5] The commonly accepted doctrine of danno biologico states that damages have to be awarded in the case of physical or psychological injury regardless of the victim's ability to earn. On danno biologico, see *E. Navarretta*, Diritti inviolabili e risarcimento del danno (1996) passim.

Compensation for danno biologico and for "pain and suffering aim at different purposes, inasmuch as [they] refer to different aspects of personal life, with the result that damages set for pain and suffering could well be higher than for a disability or an illness."[6] According to the Supreme Court,[7] pain and suffering constitutes a prejudice to the "moral integrity of the person, protected by art. 2 and 3 of the Constitution (with reference also to the social dignity of a person, in joint position with 'health' as a fundamental value for the biological and genetic identity)." 7

Whilst danno biologico is compensated with reference to standardised economic reference values,[8] based on a point system (the so-called calcolo a punti),[9] the assessment of non-pecuniary losses other than danno biologico, i.e. mainly damages for pain and suffering (danno morale and, if its conceptual autonomy is recognised, danno esistenziale),[10] to a great extent contemplates the subjective situation of the victim.[11] 8

Recent decisions of the Corte di Cassazione confirm the courts' extended discretion when setting damages for the latter forms of non-pecuniary loss.[12] On 9

[6] Cass. 23 May 2003, no. 8169, RCP 2003, 1342, with a commentary by *G. Facci*; Archivio della Circolazione (AC) 2004, 42.

[7] Cass. 4 March 2008, no. 5795 (forthcoming).

[8] For this reason, i.e. due to its objectively determinable amount, some legal scholars hold that danno biologico should be considered as being a pecuniary loss (instead of a *non-pecuniary* loss): see *F.D. Busnelli*, Il danno biologico – Dal "diritto vivente" al "diritto vigente" (2001) passim; *E. Bargelli*, Danno non patrimoniale e interpretazione costituzionalmente orientata dell'art. 2059 c.c., RCP 2003, 702 ff. The question has been explicitly addressed by the Corte di Cassazione, which stated in no uncertain words that danno biologico constitutes a non-pecuniary loss: see Cass. 4 November 2005, no. 16525, FI 2004, I, 779, with a commentary by *M. Bona*.

[9] The Code of Private Insurances (CPI = Decreto legislativo (Legislative decree – D.lgs.) 7 September 2005, no. 209) distinguishes between the amount of danno biologico to be awarded depending on the "seriousness" of the injury. For slight injuries (i.e. injuries up to 9%), compensation for the "first point" is currently € 720,95 for permanent disability (permanent danno biologico) and € 42,06 for every day of absolute disability in the case of temporary danno biologico (see Decree of the Ministry of Economic Development 24 June 2008). Compensation for every single point of disability increases more than proportionately by applying "disability coefficients" according to the age of the victim and the seriousness of the injury (art. 139 CPI, applies if danno biologico arises from road accidents or vessels). For injuries exceeding 9% (or which, if below 9%, are not from road accidents), the liquidation of (permanent and temporary) danno biologico is attributed to the discretionary evaluation of the judge. Often however standardised tables are adopted by the courts.

[10] See fn. 4.

[11] Recent decisions attest to the difficulties in the assessment of non-pecuniary losses in general, and of the different types of pain and suffering in particular. See, for instance, the jurisprudence relating to so-called "terminal damages, i.e. personal injuries leading to the death of an injured person within a short time: jurisprudence holds that, in calculating damages it becomes essential "to evaluate the pain and suffering actually suffered by the victim, the seriousness of the offence and all the other elements of the case, in order to precisely quantify the compensation to be awarded in the specific case." See the recent contribution of *G. Facci*, La Cassazione ed il risarcimento del c.d. danno terminale, RCP 2003, 1060.

[12] It is noteworthy that despite providing objective criteria to award damages (and, thus, to limit judicial discretion), the CPI did not completely withdraw judicial discretion but left a margin of fair assessment in the settlement which is entrusted to the court in its evaluation of the specific

the one hand, in order to prevent diverging assessments of damages, it is argued that non-pecuniary loss should be determined as a fraction of the compensation awarded as danno biologico.[13] On the other hand, the Supreme Court has stated that the assessment of pain and suffering cannot automatically be reduced "to a mere fraction [of the danno biologico]".[14] Therefore, a *mere* mathematical assessment of damages is not permitted.[15] Judges are not allowed to state – for instance – that moral integrity "is worth" only half the amount of physical integrity.[16] To assess damages it thus becomes essential "to evaluate the pain and suffering actually suffered by the victim, the seriousness of the offence and all the other elements of the case that have been submitted, in order to precisely quantify the compensation to be awarded in the specific case."[17]

III. Punitive Damages under the Italian Legal System

10 The issue of whether punitive damages can be awarded in the case of non-pecuniary loss for personal injury has been explicitly addressed in a recent decision by the Corte di Cassazione.[18] The significance of the decision for present purposes is further increased by the fact that the Supreme Court explicitly tackles the question of whether punitive damages, in general, are consistent with Italian ordre public.

11 The facts of the case related to the enforcement, in Italy, of a U.S. court decision which had ordered an Italian safety helmets buckle manufacturer to pay damages amounting to U.S. $ 1 million as punitive damages to a road accident victim who suffered lethal injuries as a consequence of the defective working of the helmet buckle.

12 In the previous decision,[19] the Court of Appeal had refused to enforce the judgment, holding that punitive damages violate Italian ordre public.

case, in view of the subjective condition of the victim, having recourse to its "equitable power". Specifically, a court is allowed to increase the amount of danno biologico awarded within 20% of the basic value, as long as it lays down the reasons for the increase (art. 139, par. 3, CPI).

[13] See Cass. 14 July 2003, no. 11003, RCP 2003, 1049, with a commentary by *G. Facci*; Diritto di famiglia (DF) 2003, 643; Cass. 16 May 2003, no. 7632, RCP 2003, 1049; Cass. 9 January 1998, no. 1030, DR 1998, 351.

[14] Cass. 4 March 2008, no. 5795; Cass. 23 May 2003, no. 8169 (cf. fn. 6).

[15] See Cass. 14 July 2003, no. 11003 (cf. fn. 13).

[16] Cass. 4 March 2008, no. 5795, therefore, since danno morale affects the dignity of any human being, its assessment "has to strive to grant a satisfactory, and not *merely* a symbolic compensation". Similarly, Cass. 11 January 2007, no. 394, Nuova giurisprudenza civile commentata (NGCC) 2007, I, 960, with a commentary by *G. Sganga*; Guida al diritto 2007, 6, 22, with a commentary by *G. Comandè*; AC 2007, 239.

[17] See the recent contribution of *Facci*, RCP 2003, 1060.

[18] Cass. 17 January 2007, no. 1183, GI 2007, 12, 2724, with a commentary by *V. Tomarchio*; RCP 2007, 2100, with a commentary by *A. de Pauli*; RCP 2007, 1890, with a commentary by *L. Ciaroni*; FI 2007, V, 1460, with a commentary by *G. Ponzanelli*; Europa e diritto privato 4 (2007) 1129, with a commentary by *G. Spoto*; NGCC 2007, I, 981, with a commentary by *R. Oliari*.

[19] App. Venice 15 October 2004, NGCC 2002, I, 765, with a commentary by *G. Campeis* and *A. de Pauli*; Foro padano 2002, I, 525, with a commentary – again – by *G. Campeis* and *A. de Pauli*; Rivista di diritto internazionale privato e processuale 2002, 1021. According to art. 64,

13 In upholding the Court of Appeal's decision, the Supreme Court pointed out that "tort law aims at re-establishing the economic integrity of persons who sustained a loss."[20] "It does so by granting victims an amount of money directed at eliminating the consequences of the loss suffered."[21] According to the Corte di Cassazione, "[t]he objective of punishment and of sanction is alien to the system and for that purpose, the examination of a wrongdoer's conduct is irrelevant."[22] "Punitive damages cannot even be referred to as compensation for non-pecuniary damage or pain and suffering (danno morale)."[23] Therefore, "any identification or even a partial setting of compensation for pain and suffering on an equal footing with punitive damages is erroneous."[24] In the case of compensation for pain and suffering, the amount of damages awarded corresponds to a loss sustained by the claimant, whilst the essential feature of punitive damages is their lack of correspondence between the amount of damages granted and the actual loss sustained.[25]

14 Unlike danno biologico, the compensation of non-pecuniary damage in personal injury cases "is always subject to the assessment of pain and suffering and the prejudice caused by the unlawful act, and cannot be considered as being 'in re ipsa'."[26] "In compensating non-pecuniary damage, emphasis is placed on the victim's sphere, and not on the wrongdoer's: thus, in order to determine the appropriate amount, both the victim's financial situation [on the one hand] and the conduct of the wrongdoer or his wealth/financial status [on the other hand] are irrelevant."[27]

statute 31 May 1995, no. 218 (Statute on International Private Law), foreign court decisions are recognised in Italy without the need to have recourse to any procedure as long as certain requirements are met: as long as, among other considerations, they do not "produce effects which are contrary to ordre public." Disputes related to the enforcement of foreign court decisions in Italy are governed by art. 796–805, Code of Civil Procedure.

[20] Cass. 17 January 2007, no. 1183 (cf. fn. 18).

[21] Ibid.

[22] Ibid.

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] Ibid. The requirement to provide evidence of the alleged non-pecuniary loss suffered has also been stated by: Cass. 7 November 2006, no. 23719, in http://0-bd46.leggiditalia.it.lib.unibocconi.it/cgi-bin/FulShow?NAVIPOS=1&DS_POS=0&KEY=46SE0000369314&FT_CID=40295&OPERA=46; La responsabilità civile 2007, 1646, with a commentary by *N. Coggiola*: the Supreme Court denied compensation for pain and suffering (danno morale) and for danno esistenziale due to the awareness of being exposed to an increased risk of developing a disease as a consequence of prolonged asbestos exposure, stating that the claimants will have to provide evidence of the seriousness ("rilevante gravità") of the prospective illness, of their pain and suffering (danno morale) and/or of the loss implicit in the change of everyday habits (danno esistenziale), and of the causal connection between their "emotional distress" and the prospectively harmful event. See Cass. 14 February 2000, no. 1633, GCM 2000, 331; Cass. 21 December 1998, no. 12767, GCM 1998, 2637; Cass. 14 October 1997, no. 10024, GCM 1997, 1932.

[27] See Cass. 7 November 2006, no. 23719 and Cass. 14 February 2000, no. 1633 (both fn. 26).

15 The Supreme Court concluded that "so-called 'punitive damages' are not eligible as compensation, since they conflict with fundamental principles of state law, which attribute to tort law the function of restoring the economic sphere of persons suffering a loss".[28] Therefore, a foreign court decision ordering a tortfeasor to pay punitive damages, thereby seeking to punish the wrongdoer, is not enforceable in Italy.[29]

16 The Corte di Cassazione's decision is consistent with the recently established rule on the eligibility for compensation of *any* non-pecuniary loss, as long as it is in respect of an infringement of fundamental rights laid down in the Constitution.[30] Previous to this judicial revirement, art. 2059 Codice civile (Civil Code, CC), which establishes that compensation of non-pecuniary damage "shall be awarded only in cases provided for by law",[31] was interpreted as restricting compensation for non-pecuniary losses exclusively to cases where the harmful event constituted a criminal offence (see art. 185 Codice penale (Criminal Code, CP)).[32] Clearly, such a restriction *was* consistent with a lato sensu "punitive" purpose of compensation for non-pecuniary damage, attributing specific importance both to the wrongdoer's conduct and their wealth/financial status.[33]

17 Following changes to the statutory framework[34] and changes in jurisprudential orientation,[35] art. 2059 CC – as the Constitutional Court has explicitly pointed out[36] – no longer has a "punitive" purpose, but rather it has the exclusive function of enumerating (individual) cases where compensation for non-pecuniary loss is granted.

[28] Ibid.
[29] Ibid.
[30] Both the Corte costituzionale (Constitutional Court, Corte cost.) 11 July 2001, no. 233, RCP 2003, 1036; FI 2003, I, 2201, with a commentary by *E. Navarretta*; DR 2003, 939 (with commentaries by *M. Bona*, *G. Cricenti* and *G. Ponzanelli*) and the Corte di Cassazione (Cass. 31 May 2003, no. 8828, RCP 2003, 675) have indeed stated that the *renvoi* contained in art. 2059 CC has to be read as also comprising the infringement of inalienable rights – particularly the right to health (art. 32 Cost.) – laid down in the Constitution. Not surprisingly, the most recent *doctrine* confirms the opinion that more recent jurisprudence has in effect withdrawn the limitations on the compensation of non-pecuniary losses set down in art. 2059 CC (see the following fn.), which actually ceases to have any prescriptive content. See *P. Cendon*, Anche se gli amanti si perdono l'amore non si perderà. Impressioni di lettura su Cass. 8828/2003, RCP 2003, 685; *P. Ziviz*, E poi non rimase nessuno, RCP 2003, 710.
[31] According to art. 2059 CC, "non patrimonial damages shall be awarded only in cases provided for by law."
[32] Art. 185 Codice penale (Criminal Code, CP) provides that "The person responsible for a crime has to pay pecuniary and non-pecuniary damages."
[33] See *G. Bonilini*, Danno morale, in Dig. Disc. Priv. (sez. civ.) vol. V (1989) 88.
[34] The Corte cost. mentions art. 2, statute 13 April 1988, no. 117, which deals with claims flowing from the wrongful deprivation of personal liberty as well as art. 2, statute 24 March 2001, no. 89, which provides for tortious liability (of the state) for damages suffered as a consequence of the excessive duration of judicial proceedings.
[35] Cass. 31 May 2003, no. 8828 (cf. fn. 30).
[36] Corte cost. 11 July 2003, no. 233 (cf. fn. 30).

Legal scholars agree with the rejection of punitive damages in the Italian legal system.[37] They highlight the many "aberrations"[38] to which the acceptance of a punitive purpose of non-pecuniary damages, in particular, and of tort law – in general – would lead: for instance, identical injuries would be compensated in (at times significantly) dissimilar manners, whilst significantly different types of damage would lead to an identical award. Indeed, significantly different amounts of money would have to be awarded as compensation to two different people suffering the same injuries following a road accident: a very low sum, where the claimant was run over by an unemployed person who momentarily lost attention, whilst a plaintiff who was run over by a very wealthy, drink-driving businessman would be granted a "generous" indemnity.[39] 18

Similarly, if non-pecuniary damages had a punitive purpose, the same amount of money would have to be awarded to two different patients, in a case where they were victims of exactly the same medical malpractice, even though, due to their different ages and states of health, one suffers minor consequences whilst the other's health is seriously prejudiced.[40] 19

In addition, a punitive purpose would be incompatible with certain provisions under the law of succession and contract law: for instance, transferring an obligation to pay punitive damages to the heirs of the wrongdoer and allowing the insurability of punitive damages (especially in cases of deliberate misconduct), would obviously frustrate its intended inflictive purpose.[41] 20

Finally, a punitive purpose of tort law would conflict with the current standardised economic values which Italian courts apply in awarding danno biologico since they are based on the degree of damage to persons and on the age of the injured person, rather than taking into account the standard of the wrongdoer's conduct or their wealth.[42] 21

IV. Statutory Provisions and the Punitive Purpose of Tort Law

Legal scholars have inferred a punitive purpose from a few statutes. For instance, art. 125, par. 1 Code of Industrial Property (CIP),[43] explicitly provides that in awarding compensation for damage, the negative economic consequences which the victim suffers, including lost profits, the benefits gained by the wrongdoer through the damaging event, as well as the pain and suffering experienced by the victim shall be taken into account. Legal scholars have pointed out that the deviation from the principle of correspondence (i.e. 22

[37] *Navarretta*, RCP 2008, 502 f.; *Scognamiglio*, RCP 2007, 2485 ff.; *G. Miotto*, La funzione del risarcimento del danno non patrimoniale, RCP 2008, 196.
[38] *Miotto*, RCP 2008, 196 f.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] D.lgs.10 February 2005, no. 30.

of damages awarded to actual damage) in art. 125, par. 1 CIP, as is especially implicit in taking the benefits gained by the wrongdoer into account, clearly indicates that the article has a punitive purpose.[44]

23 Different considerations apply where the legal system provides guidelines for assessing damages, with the aim of facilitating the assessment of damage suffered.

24 This is true with regard to environmental liability, where art. 314, par. 3, Code of the Environment[45] provides that, if restoration to the original state should not be possible, and the misconduct constitutes a crime for which a jail sentence has been given, damages have to awarded to the claimant at € 400 for every day the defendant is imprisoned.[46] Similarly, art. 4, par. 1, statute 20 November 2006, n. 281, which applies to illegal tapping, awards damages according to the geographical extension and circulation of mass media reporting the data illegally acquired.

25 Even though both provisions have been considered as importing punitive damages,[47] doubts as to their punitive purpose appear to be well-founded, as long as the assessment methods constitute a reasonable pre-estimate of damage suffered (if not a mitigation of compensation for damage due, as compared to overall actual damage). If this is conceded, rather than pursuing a punitive purpose, those provisions relieve the plaintiff from the burden of proving the amount of damage suffered.

[44] *Scognamiglio*, RCP 2007, 2494; *Navarretta*, RCP 2008, 505–508.

[45] D.lgs. 3 April 2006, no. 152.

[46] According to *F. Giampietro*, La responsabilità per danno all'ambiente in Italia: sintesi di leggi e di giurisprudenza messe a confronto con la direttiva 2004/35/CE e con il T.U. ambientale, Rivista giuridica dell'ambiente 2006, 33, art. 314, par. 3, Code of the Environment (CE) constitutes a "punitive damages" provision, given that, contrary to art. 313, par. 2, CE (which provides for an amount of damages corresponding to actual damage suffered, if the wrongdoer fails – whether partly or entirely – to restore the damaged good to its original state), it does not require the claimant to provide any proof of the existence of the loss (*an*) allegedly suffered and of its amount (*quantum*).

[47] See the previous fn. (with regard to environmental liability) and, with reference to illegal tapping, see *Scognamiglio*, RCP 2007, 2495, who points out that the "purity of its punitive purpose" is ensnared by art. 4, par. 4, statute 281/2006, according to which "should the victim bring an action for damages in relation to the same damaging events provided for in paragraph 1, the judge, in compensating damage, shall take into account the amount of money paid pursuant to paragraph 1." The contributor compares art. 4, statute 281/2006, to art. 1371 of the *Avant projet de réforme du droit des obligations*, which provides for punitive damages in case of "*une faute manifestement déliberée, et notamment d'une faute lucrative*", stating that their amount, should they be granted, has to be differentiated from other damages awarded to the victim. See also *E. Bargelli*, Italy, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2006 (2008) 300, who holds that art. 4, statute 20 November 2006, no. 281, "constitutes a form of punishment", since the "provision does not require any proof of the damage the victim has suffered."

V. Compensation for Damage and the Standard of the Wrongdoer's Conduct

Although Italian law rejects punitive damages, there are some cases where the courts *tacitly* impose tortious liability only when the tortfeasor's conduct fails to meet a predetermined standard, thereby assigning – to some extent – a deterrent purpose to tort law.[48] 26

This feature of Italian tort law reflects the belief that "intent" not only constitutes a subjective qualification of the (wrongdoer's) conduct, as can be inferred from the lack of distinction between intent and fault in art. 2043 CC,[49] but is also a factor which leads to the qualification of a damage as "unfair" (according to art. 2043 CC), thus giving rise to tortious liability). In other words, liability only arises inasmuch as the wrongdoer acted either intentionally or, in other cases, where his conduct was grossly negligent and not in cases of *mere* negligence.[50] 27

A concrete example of tortious liability being imposed solely in the case of intentional harm pertains to disputes involving a conflict of values entrenched in the Constitution, typically in the case of tortious liability within family relations: for instance, in the case of a breach of marital duties. A breach of the duty of fidelity, for example, could result in the imposition of tortious liability "solely in cases where the conduct constitutes – due to *its intrinsic gravity* – an offence to the fundamental rights of a person."[51] The immunity from liability for a *mere* breach of marital duties flows from the fact that, from the point of view of the spouse committing the breach, an "extramarital affair", for example, 28

[48] See no. 4 supra: a deterrent purpose of tort law exists when the defendant's conduct is assessed either as a factor affecting the imposition of liability or the amount of damages awarded or in cases where the benefits gained through the damaging event are taken into account in determining the amount of damages.

[49] According to art. 2043 CC, "Any fraudulent, malicious or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages."

[50] Cf. *Monateri* (fn. 3) 464; *P. Cendon*, Il dolo nella responsabilità extracontrattuale (1976) 435 ff. and 464 ff.; *id*., Danno imprevedibile e illecito doloso, in: G. Visintini (ed.), Risarcimento del danno contrattuale ed extracontrattuale (1984) 23 ff.; *P. Cendon/L. Gaudino*, Il dolo, in: G. Alpa/M. Bessone (eds.), La responsabilità civile I (1987) 82. *P. Widmer*, Liability based on Fault, in: European Group on Tort Law (ed.), Principles of European Tort Law – Text and Commentary (2005) no. 10, observes that "It is widely accepted that fault, especially intent and gross negligence should be a factor which has an important weight for the decision and evaluation as to whether a certain conduct should entail liability and to what extent." As the author points out (in no. 16), a link exists between the rules dealing with fault as a basis of liability and the provision on "Reduction of Damages" (art. 10:401 PETL) insofar as the basis of liability is certainly one of the most important factors to be taken into account for the decision whether and to which extent a reduction of damages should take place. The author concludes that "A reduction will probably not be conceded to a person who has acted with intent or with gross negligence."

[51] Cass. 10 May 2005, no. 9801, RCP 2005, 598 ff., with a commentary by *G. Facci*; DR 2006, 37 ff., with a commentary by *F. Giazzi*; Famiglia, Persone e Successioni 2005, 308 ff., with a commentary by *A.P. Scarso*; CG 2005, 925 ff., with a commentary by *G. De Marzo*; Famiglia e diritto (FD) 2005, 370 ff., with a commentary by *M. Sesta*. See also Tribunal of Milan 24 September 2002, RCP 2003, 468, with a commentary by *G. Facci*.

represents a way of expressing the constitutional right to personality development (art. 2 Const.),[52] which has to be "balanced" with the values of equality and solidarity, from which the commitments of cohabitation and fidelity arising from marriage follow.[53]

29 Similarly, art. 81 CC provides for immunity in the case of a breach of wedding vows, except for the expenses incurred in preparing for the marriage and other commercial commitments entered into on the basis of the vows. The provision clearly aims at giving the couple the freedom to renege on their vows. Again, jurisprudence states (and scholars agree[54]) that conduct directed at causing *intentional* harm excludes the application of art. 81 CC, leading to the imposition of tortious liability (thus, for example, comprising compensation for pain and suffering).

30 A significant example of an imposition of a liability in tort exclusively in the case of *gross negligence* pertains to the liability of Regulatory Authorities. According to jurisprudence,[55] the Italian Financial Market Supervisor, Commissione nazionale per la società e la borsa (CONSOB), is liable for misleading or false information contained in prospectuses.[56]

31 Some scholars believe that relevant decisions indicate that the liability of administrative agencies in general should be restricted to *grossly* negligent mis-

[52] See Cass. 10 May 2005, no. 9801 (cf. previous fn.); Cass. 26 May 1995, no. 5866, GI 1997, I, 843, with a commentary by *A. Amato*; DF 1997, 87, with a commentary by *T. Montecchiari*; Cass. 14 April 1994, no. 3511, FD 1994, 527, with a commentary by *G. Servetti*, and Cass. 4 December 1985, no. 6063, CG 1986, 284; GC 1986, I, 159; GI 1987, I, 118.

[53] Cass. 10 May 2005, no. 9801 (cf. fn. 51). See *A.P. Scarso*, Violazione dei doveri coniugali prima del matrimonio ed estinzione del vincolo coniugale, Famiglia, persone e successioni 2005, 308–324; *id*., Il dovere di fedeltà coniugale, Famiglia, persone e successioni 2005, 242–251; *R. Partisani*, Sulla risarcibilità del danno cagionato in violazione dell'obbligo di fedeltà coniugale, Responsabilità – comunicazione – impresa 2003, 122.

[54] See *Monateri* (fn. 3) 463; *G. Ferrando*, Il matrimonio, in: Trattato Cicu/Messineo (2002) 272; *Cendon/Gaudino* (fn. 50) 82; *F. Finocchiaro*, Del matrimonio, in: Commentario del Codice Civile Scialoja-Branca, sub art. 79–83 (1971) 188, fn. 15. The issue has been addressed with reference to the – somehow outdated – seduction in consequence of wedding vows. For bibliographical references to jurisprudence, see *A.P. Scarso*, Danno non patrimoniale e "responsabilità prematrimoniale", RCP 2006, 1016 ff.

[55] Cass. 3 July 2001, no. 3132, FI 2001, I, 1139; RCP 2001, 571; GC 2001, 913; NGCC 2001, I, 161; Diritto ed economia dell'assicurazione 2001, 1093; CG 2001, 880; Consiglio di Stato 2001, 2, 1829; GI 2001, I, 2269; Le società 2001, 576; DR 2001, 509; Giornale di diritto amministrativo 2001, 1135; Contratto e impresa (CI) 2001, 953; Banca, borsa e titoli di credito 2002, II, 19; Giurisprudenza commerciale (Giur. comm.) 2002, II, 12. See also Court of Appeal of Milan 21 March 2003, FI 2004, I, 584. See *G. Santucci*, Responsabilità della CONSOB per omessa vigilanza, Contratti 2004, 329; *A. Tina*, Responsabilità della CONSOB per omessa vigilanza sulla veridicità delle informazioni contenute nel prospetto informativo, CG 2004, 938; *C. Mignone*, Vigilanza CONSOB e responsabilità: brevi osservazioni sul tema, GI 2004, 800, who welcomed the principles affirmed by the *Corte di Cassazione*. The trial judges entered a judgment in favour of the investors who suffered damage.

[56] For details, see *A.P. Scarso*, Tortious Liability of Regulatory Authorities, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2005 (2006) 94 ff.; *F. Rossi*, Prospectus Liability: Implementing Art. 6 of the European Community Directive 2003/71/EC in Italy, European Business Law Review 2005, 1565 ff.

conduct.[57] In their opinion, a restriction of liability to cases of *gross* negligence allows regulatory authorities to execute their statutory duties in a reasonable and proper manner (i.e. without being exposed to the risk of incurring excessive costs in defending actions while discharging their duties), thus promoting consumer protection as well as transparency and the stability of financial markets.[58]

Even though, with reference to both the "balancing" of conflicting constitutional values in family law and to the liability of regulators, jurisprudence does not explicitly mention intent and *gross* negligence, respectively, there can be few doubts that, with reference to the cases considered, conduct characterized by such subjective qualifications to a great extent overlaps (if not coincides) with the imposition of tortious liability. 32

VI. Conclusions

As a general rule,[59] Italian (tort) law does not award punitive damages. Both legal scholars and the jurisprudence agree that the coincidence between actual damage and the compensation awarded flows from ordre public. 33

The refusal to award punitive damages, i.e. damages intended to punish or deter the defendant from exhibiting outrageous conduct, also applies to non-pecuniary losses for personal injury. 34

Individual statutory provisions which lay down criteria to assess damage suffered do not seem to have a punitive purpose,[60] at least inasmuch as they provide for a reasonable pre-estimate of actual damage. If this turns out to be the case, their main purpose is to facilitate the assessment of damage, rather than to punish the wrongdoer. 35

Nevertheless, the Italian legal system knows of remarkable cases that allow for a deterrent purpose of tort law by imposing tortious liability solely in cases where the behaviour which causes harm meets a predetermined standard of conduct. 36

[57] *L. Scotti*, Diffusione di informazioni inesatte e tutela degli investitori: configurazione della responsabilità della CONSOB per omessa vigilanza, GC 2002, II, 12 ff.; *B. Andò*, Responsabilità della CONSOB per inadeguato controllo di prospetto falso alla luce della l. n. 216/1974, NGCC 2001, I, 161; *M. d'Auria*, La responsabilità civile della CONSOB. Profili civilistici, GI 2001, I, 2269 ff.; *G. Vignocchi*, Sulla responsabilità dello Stato e della Pubblica amministrazione per l'esercizio del controllo sugli enti bancario-creditizi, in: Scritti in onore di Massimo Severo Giannini III (1988) 1003.

[58] For details, see *Scarso* (fn. 56) 100 ff.

[59] An exception is – as has been briefly outlined – art. 125, par. 1, Code of Industrial Property (CIP). See above § 5.

[60] With the exception of art. 125, par. 1, CIP (see above § 4).

Punitive Damages in Scandinavia

Bjarte Askeland*

I. Introduction

Scandinavian tort law has historically put heavy weight on the concept of full compensation: no more, no less. This concept has, to a large extent, been geared towards values that are possible to measure in *economic* or *pecuniary* units. Hence, the concept of damage in Scandinavian tort law as a main rule requires that the loss connected to the damage is economic or pecuniary. The prevailing view has been that non-pecuniary loss may be compensated only where parliament has enacted a special legal basis for such compensation.[1] 1

Accordingly, there are only narrow possibilities to reflect the blameworthiness of the defendant's act in the assessment of compensation. Generally, the pecuniary loss stemming from a certain event is the same, whether the defendant has acted with slight negligence or with cruel intentions. Only on the basis of certain special rules is there a possibility to take into consideration factors which under common law would be constitutive of punitive damages. These special rules will be presented in the following report. 2

It should be clarified beforehand that "punitive damages" are a head of damages that simply have no tradition under Scandinavian law. Moreover, the concept of "punitive damages", or equivalent terms, does not commonly feature in Scandinavian legal discourse. The closest concept may be where one refers to a provision having a "penal function". This only means, however, that the preventive effects of the provision were very important grounds for its enactment. 3

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[1] This view is articulated in various textbooks, see, for instance, for Norwegian law, *J. Øvergaard*, Norsk erstatningsrett (2nd ed. 1951) 285 and for Swedish law, *J. Hellner/M. Radetzki*, Skadeståndsrätt (7th ed. 2006) 366. Hellner/Radetzki refer to the German rule in § 253 Bürgerliches Gesetzbuch (BGB) in which a similar principle is expressed. For Danish law see *S. Jørgensen*, Erstatning for personskade og tab af forsørger (1972) 25.

The courts have never expressly added an award of strictly punitive damages on top of a conventional compensatory award.

4 Sometimes, however, there is a correlation between the gravity of the tortfeasor's fault and the amount of damages awarded. For deterrent purposes, as well as on the basis of justice, the courts attempt to reflect the gravity of the defendant's violation of the victim's rights in the award. Sometimes the courts even put weight on the severity of a related penal sentence when deciding the appropriate amount of damages to award.[2] In this report, this practice will be referred to as incorporating "an element of punitive damages". The expression merely indicates that the gravity of the tortfeasor's fault is reflected in the award though the damages awarded do not exceed compensatory damages. This is the closest Scandinavian law comes to punitive damages.

5 There are many factors which indicate that there is, to some extent, wider room for elements of punitive damages under Norwegian tort law than under the laws of the other two Scandinavian nations (Denmark and Sweden). On the basis of this observation, I have chosen to present the rules in the three countries separately (Part II–IV), before finally summing up the salient findings on the subject (Part V).

II. Elements of Punitive Damages under Norwegian Tort Law

A. The Theoretical Basis

6 Oppreisning is a remedy for various types of non-pecuniary loss, such as pain, suffering and bereavement. Historically, Norwegian rules on oppreisning had a penal function.[3] At the beginning of the 20th century, one could only get oppreisning provided that the Penal Code was applicable to the case at hand. This prerequisite was abandoned in 1912.[4]

7 The remedy of oppreisning had a legal basis in straffelovens ikrafttredelseslov, 22 May 1902, no. 11 (an appendix to the Norwegian Penal Code), § 19 and § 21, two provisions which in 1969 were incorporated into Skadeserstatningsloven (the Norwegian Compensation Act, NCA), 13 June 1969, no. 26, § 3(5).

8 Fredrik Stang, a Norwegian theorist who worked in the first half of the last century, was very influential in Norwegian, as well as Scandinavian tort law.[5] Stang elaborated on whether the degree of culpa should, in principle, be a decisive factor in the assessment of compensation.[6] In this respect, he drew a

[2] See, for example, the case in Norsk Retstidende (Rt.) 2006, 961 and *N. Nygaard*, Skade og ansvar (6th ed. 2007) 165.
[3] *J. Skeie*, Den norske civilprocess, vol. 1 (1929) 121.
[4] Act of 26 July 1912 no. 37 (on changes to the Act on the enforcement of the Penal Code of 22 May 1902).
[5] See *B. Dufwa*, Flera skadeståndsskyldiga (1993) no. 3201.
[6] *F. Stang*, Erstatningsansvar (1927) 372–380.

distinction between erstatning (which can be translated as "economic compensation"), and oppreisning. Stang particularly emphasised that oppreisning – as mentioned above – first and foremost had a *penal* function.[7] He compared the institute of oppreisning to the historical institute of private punishment and mentioned that part of the reason for awarding oppreisning was so the plaintiff obtained the satisfaction of seeing that the defendant had to pay for his misdeeds.[8] He also clearly expressed that the degree of culpability was an important parameter when deciding the extent of the award.[9] One should, however, take note that at the end of his discussions on oppreisning, Stang warned against the possibility of letting a jury decide the extent of the award. He held that there should be a cap on this kind of compensation.[10]

Stang also elaborated on whether the amount of erstatning should be decided by the degree of the wrongdoer's fault. In this respect, he referred to penal considerations as an important factor behind tort law rules. He started his analysis by recapitulating the central European opinions on this matter. Stang illustrated, however, how unsound the results would be if a plaintiff got less compensation for damage to his goods or property where the defendant was only slightly culpable and more compensation where there was gross negligence. 9

Stang found that the degree of culpability was decisive only in certain contexts: namely in connection with contributory negligence and contributory conduct between joint and several tortfeasors.[11] This view holds true even today. Both the current statutory provisions that deal with the aforementioned rules refer to the degree of culpability as an important parameter for determining the amount which the parties are to pay.[12] 10

In short, the influential theoretical discussions in Norwegian tort law resulted in historically important choices being made: Firstly, consideration of the degree of the defendant's culpability, an element of punitive damages, is only acceptable within the frame of compensation for non-pecuniary loss, such as oppreisning. Secondly one has to prescribe modest awards in this respect. 11

Under Norwegian law, NCA, § 3(5), as aforementioned, now constitutes a possible legal basis for such compensation. This rule prescribes compensation for serious pain and for krenkelse, a word that connotes a sort of "humiliating infringement". Furthermore, the paragraph provides for compensation for bereavement: see the second section of the provision. One should, however, note that the provision requires that the defendant *personally* injured the plaintiff (or the deceased, in case of bereavement) *and* that he had intent or was grossly negligent in doing so. There exists an element of punitive damages in this 12

[7] Ibid. at 366–368.
[8] Ibid. at 367.
[9] Ibid.
[10] Ibid. at 368.
[11] Ibid. at 378.
[12] NCA § 5-1 and § 5-3.

requirement in that only where the wrongdoer's blameworthiness exceeds a certain threshold may one be compensated for non-pecuniary loss. In addition, the structure of the rule allows a slight possibility for the courts to take the gravity of the defendant's conduct into consideration (see below).

13 For the sake of completion, one should also add that there is a legal basis for oppreisning where the conduct in question consists of various forms of sexual assault: see NCA, § 3(6) with reference to § 3(3). Moreover, § 3(6) provides a legal basis for oppreisning to be awarded as a remedy for defamation and for intruding on one's private sphere. These provisions are not of particular interest though when it comes to elements of punitive damages. One exception will, however, be mentioned below: the distinction between intentional and negligent rape, a distinction which is based on the same rationality that applies to punitive damages.

B. Modern Developments

14 In modern Norwegian court practice, the courts have acknowledged that the degree of blameworthiness on the part of the defendant should be reflected in an award of damages.[13] Standardised compensation tables for oppreisning have been established. Thus, today it is commonly recognised that the institute of oppreisning rests on both penal *and compensatory* grounds. This has been expressed quite articulately in several Supreme Court cases.[14] Hence, one might say that a regime that historically was quite unfriendly towards punitive damages has in the last few years become even more reluctant to accept this approach to tort law. As a result of this development, the ability to incorporate punitive elements in an assessment of oppreisning has become more and more difficult over the past few years.

15 Still there is room to indirectly put weight on the same factors that are decisive when awarding punitive damages. Even though some types of cases (e.g. rape and homicide) have standardised economic values for compensation, the courts will always put weight on the gravity of the harmful act. Furthermore, the Supreme Court has stated, in several cases, that the level of punishment under the Penal Code will be of guidance when it comes to assessing the appropriate level of compensation to be ordered.[15] At least these aspects, which may be relevant in jurisdictions that allow punitive damages, play a part in the assessment of oppreisning under Norwegian law.

16 Attempts to standardise awards of compensation are also influenced by the degree of culpability shown by a defendant.[16] This approach is illustrated by the fact that the level of compensation for grossly negligent rape is higher than that of deliberate rape.[17]

[13] *P. Lødrup*, Lærebok i erstatningsrett (4th ed. 1999) 509.
[14] See Rt. 1999, 1363, 1378 and Rt. 2005, 289, no. 42.
[15] Rt. 2005, 1749; Rt. 2006, 743.
[16] See Rt. 2000, 96.
[17] See *P. Lødrup*, Oppreisning – et praktisk rettsinstitutt, Tidsskrift for Erstatningsrett (TfE) 2006, 211–237, 226.

The tendency to differentiate on the basis of the gravity of the wrongdoer's conduct is also evident in cases where one *departs* from the standardised levels of compensation. When the Supreme Court decided to standardise the levels of compensation, it presupposed that standardisation would not apply in special cases – particularly where the special circumstances of the case were extremely horrifying. In such cases, one should determine the award on the basis of the appalling facts of the case: an approach which very much resembles the approach when assessing punitive damages. An example of such a case is referred to in Rt. 2002, 481: 17

A man poisoned his wife to death. Between 1992–1998, the couple had an on-and-off relationship and in May 1998 the woman decided to end it permanently. In June 1998, the man added thallium sulfate to the woman's glass of coke with the intention of harming her. She drank the coke and immediately became ill. She suffered severe pain, hair loss, panic attacks and depression and was out of work for 11 weeks before she recovered. After her condition had improved, the man again added thallium sulfate to her drink of coke. Her suffering was even worse than the first time and she could not work for 16 weeks. At Christmas 1998, the man broke into the woman's house and added thallium sulfate to a bottle of cognac, a bottle of sparkling water and a carton of red wine. On 24 January 1999, she was admitted to hospital with unbearable pains having drunk some of the liquor. She eventually died on 17 February 1999. In connection with the trial against the man, the deceased's two daughters, born in 1986 and 1989, claimed compensation for non-pecuniary loss. 18

The Supreme Court had, in an earlier case, established a standard award for compensation for non-pecuniary loss for parents who lost their children due to deliberate violence: approximately € 15,000.[18] The Supreme Court found that the case at hand should by no means be subject to a standardised award. The special circumstances of the case should be reflected in the award. In this respect, the court pointed to the fact that the claimants were children, that their mother had suffered unbearable pain over a long period of time (8 months) and that the children had witnessed her suffering. In light of these factors, the Supreme Court found that a sum of € 37,500 for each of the children was appropriate. 19

Where the misdeeds of the defendant are less cruel than the facts in the above case were, there probably will be a possibility to reflect the latter's reduced level of blameworthiness in the award. 20

When it comes to unjust enrichment based on the wrongful exploitation of another man's material or immaterial objects, a Norwegian theorist, Erik Monsen, has suggested that the assessment of compensation should take into consideration the gravity of the harmful act. The need for preventive measures 21

[18] Rt. 2001, 274.

through pecuniary sanctions has been emphasised.[19] Monsen maintains that a guideline for the assessment should be that the award should be so high that it represents an effective, deterrent sanction. He does not, however, advocate the establishment of a pure punitive rule.[20] The courts have so far been reluctant to move in this direction.

III. Elements of Punitive Damages under Swedish Tort Law

22 As for Sweden, the same reluctance regarding punitive damages exists. An expressed attitude is that a system that makes an award of damages proportionate to the degree of fault on the part of the defendant is "unfamiliar" to Swedish law and a step backwards to the conditions which prevailed during medieval times.[21] Knowing that this view prevailed in the preparatory works to the Swedish Compensation Act (SCA), it comes as no surprise that room for punitive damages or similar ways of assessing damages is quite narrow.

23 Under Swedish law, the basic rule is that pecuniary loss is to be compensated, whereas non-pecuniary loss is compensated only in certain situations and if a legal provisions expressly so provides. The most important such legal provision to our subject is 2 chap. 3 § SCA. This provision deals with the infringement of physical personal integrity and infringements that affect the psychological well-being of the victim as well as his honour. A prerequisite for this kind of compensation is that the infringement is considered "serious" or "grave". In assessing the appropriate award, there exists a special provision in 5 chap. 6 § which lists five different factors to be considered. The courts may, for example, put weight on whether the harmful act caused serious fear for life or bodily well-being or whether the harmful act represented a misuse of trust.

24 Apart from this, Swedish legal theory emphasises that an award should be decided by an objective evaluation of the effect which the infliction of the harmful event typically has, with ethical and social values being considered.[22] Consequently, one may not put direct weight on the degree of the tortfeasor's fault or apply reasoning that is typical for punitive damages. The courts may, however, indirectly take into consideration elements that are relevant to the graveness of the harmful act. They may, for example, look at certain objective characteristics of the case, such as the duration of the harmful act and the act's potency of humiliation. By taking such factors into consideration, the courts may indirectly reflect the blameworthiness of the tortfeasor in an award of damages. This seems to be as close as one gets to punitive damages in Swedish tort law.

[19] *E. Monsen*, Berikelseskrav (2007) 303–330.
[20] Ibid. at 330.
[21] See, for example, the preparatory works to the Swedish Compensation Act (Skadeståndslagen (1972/207), hereinafter SCA), SOU 1992: 84, 234 and Proposition (prop.) 2000/01: 68, at 51. See also *B. Bengtsson/E. Strömbäck*, Skadeståndslagen – En kommentar (2008) 299.
[22] SOU 1992: 84, 233–234, prop. 2001/01: 68, at 51–52 and *Bengtsson/Strömbäck* (fn. 21) 298–302.

As for the size of the awards, they are comparable to the level described under the part on Norwegian law. However, the awards are not standardised. 25

There are also other provisions that constitute a legal basis for non-pecuniary loss. Firstly one may claim compensation for permanent personal injuries such as loss of amenities and for special disadvantages (särskilda olägenheter) under 5 chap. 1 § second sec. no. 3. This kind of non-pecuniary damages is standardised.[23] 26

Secondly, there is the provision on compensation for temporary pain and suffering (sveda och värk) under 5 chap. 1 § second sec. no. 3. The level of compensation is standardised for this kind of non-pecuniary damage.[24] Accordingly, there is no room for assessments that resemble punitive damages. 27

Sweden also has a rule on compensation for distress following the loss (bereavement) of a kinsman under 5 chap. 2 § first sec. no. 3. This provision applies, however, only where the claimant is actually proved to be ill in a medical sense. Mere feelings and reactions of sorrow do not qualify. This rule on bereavement applies regardless of the degree of blameworthiness shown by the defendant. The preparatory works to the statutory provision explicitly make clear that the degree of suffering experienced by the next of kin is the same, regardless of whether the defendant acted in culpa or dolus.[25] This statement may, in principle, be perceived as a general attitude that disregards or rejects the idea of punitive damages.[26] 28

IV. Elements of Punitive Damages under Danish Tort Law

Under Danish law, one may be awarded compensation for non-pecuniary loss on the basis of various statutory provisions in the Danish Compensation Act (DCA).[27] Firstly, one may be awarded compensation for temporary physical pain and suffering (DCA § 3) and for permanent disadvantages, a sort of loss of amenities (DCA § 4). Both these heads of damages are standardised and there is no scope for elements of punitive damages.[28] 29

Secondly, there is legal basis for compensation for a "tort" (see DCA § 26). "Tort" is a Danish expression which may best be translated as a "humiliating infringement". In the case of very serious attacks on another person's life or liberty, there is also a legal basis for a certain kind of compensation (see DCA § 26, sec. 3) even if there is no "tort" in the ordinary, Danish sense of the word. This rule was enacted in 1997 to provide a legal basis for compensation in the case of violent harmful acts. 30

[23] See *Bengtsson/Strömbäck* (fn. 21) 197 ff.
[24] See ibid. at 199 ff.
[25] Prop. 2000/01: 68, at 34.
[26] Cf. the general attitude stated supra, no. 22.
[27] Bekendtgørelse av Lov om erstatningsansvar LBK no. 750 af 4 September 2002 (The Danish Compensation Act, hereinafter DCA).
[28] See *B. von Eyben/H. Isager*, Lærebog i erstatningsrett (6th ed. 2007) 307 f., 308 ff.

31 Finally, one may get compensation for bereavement under DCA § 26(a). In assessing bereavement damages, the courts generally put weight on the character of the harmful act as well as the suffering which the plaintiff faced.[29] In the works preparatory to the Act, it was suggested that the award should not exceed DKR 100,000 (€ 13,000) for intentional homicide.[30] Where the tortfeasor has only acted with gross negligence, the award is considerably lower. In extraordinary cases, the award may be higher than that mentioned above.

32 These observations indicate that there is only a small possibility to indirectly take into consideration the gravity of a tortfeasor's act when assessing damages. Hence, there are only very slight elements of punitive damages within Danish tort law.

V. Conclusions

33 As one can observe, when it comes to elements of punitive damages in Scandinavia, the same pattern seems to emerge in all three jurisdictions: Elements of punitive damages may only come into play in connection with non-pecuniary loss in the case of personal injury. In this area, the assessment of damages is partly standardised in all three jurisdictions. This fact leaves only a narrow room for weight to be put on factors that are decisive for punitive damages in the jurisdictions which accept them. It is fair to say that there are no examples of real punitive damages under Scandinavian tort law.[31] There is only an indirect possibility for an assessment based on the same kind of reasoning that justifies punitive damages. See the remarks above on "elements of punitive damages".[32]

34 In Norway and Denmark, the severity of the harmful act is the most important criterion for the assessment of damages. In Sweden, the focus is more on the impact the harmful act typically has on the victim. The punitive element therefore only comes into play indirectly by emphasising the gravity of the harmful act or the severity of its impact. The results presented of the three jurisdictions suggests that there may be slightly more room for this kind of reasoning in Norwegian law than in the other two Scandinavian jurisdictions.

[29] Ibid. at 326.
[30] See "Betænkning V: Betænkning no. 1412/2002 om godtgjørelse til efterladte ved dødsfall", 85.
[31] See also supra no. 3.
[32] See supra no. 4

Punitive Damages in South Africa

Johann Neethling*

I. Introduction

In South African law, the topic of punitive damages may be relevant in terms of the law of delict, the law of contract and copyright law. The Bill on the Protection of Personal Information[1] also provides that a court may, apart from compensatory damages for patrimonial and non-patrimonial loss, award aggravated (punitive) damages that are just and equitable for any breach of the provisions of the Bill. 1

II. Law of Delict

A. Introduction

Under South African law, a distinction is made in principle between delicts that cause patrimonial damage (damnum iniuria datum) and those that cause injury to personality. These two, in fact, ground the actions which form the three pillars of the law of delict, namely the actio legis Aquiliae in terms of which compensatory patrimonial damages may be claimed, the action for pain and suffering aimed at compensating non-patrimonial damage for bodily injuries, and the actio iniuriarum directed at satisfaction or sentimental damages for any injury to personality (iniuria).[2] Since the first two actions have a purely compensatory function, punitive damages are completely out of the question.[3] But not so in the case of the actio iniuriarum. 2

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1 Draft 7 of 2008-11-14 of Project 127 on Privacy and Data Protection of the South African Law Reform Commission s.94, under the heading "Civil action for damages".

2 See *J. Neethling/J.M. Potgieter/P.J. Visser*, Law of Delict (5th ed. 2006) 5; *J. Neethling*, Troosgeld en kompensasie vir persoonlikheidsnadeel in Suid-Afrika, in: G.E. van Maanen (ed.), De Rol van het Aansprakelijkheidsrecht bij de Verwerking van Persoonlijk Leed (2003) 163.

3 See *Fose v Minister of Justice* 1997 3 SA 786 (CC) 822; *Dippenaar v Shield Insurance Co. Ltd.* 1979 2 SA 904 (A) 917; see also *P.J. Visser/J.M. Potgieter/L. Steynberg/T.B. Floyd*, Visser and Potgieter's Law of Damages (2nd ed. 2003) 174–176; *J.C. van der Walt/J.R. Midgley*, Principles of Delict (3rd ed. 2005) 217.

B. Actio Iniuriarum

3 Traditionally solatium (solace money) or (personal) satisfaction may be claimed with the actio iniuriarum for an iniuria,[4] that is, the wrongful and intentional[5] infringement of an interest of personality.[6]

1. Roman-Dutch Law

4 In Roman law, the action was an actio vindictam spirans (action breathing punishment) – it therefore had a penal character.[7] The action also had the character of an actio aestimatoria (action for assessment), its formula being that the monetary award must be seen to be just and good.[8] From this it is clear that in the assessment of the sum awarded for an iniuria, the punishment of the perpetrator was the exclusive object.[9] In *Salzmann v Holmes*[10] Innes ACJ stated the position at common law as follows: "If we have regard to the historical growth of the action for compensation for defamation under Roman-Dutch law (amende profitable), it is clear that the sum awarded was originally in the nature of a penalty…But the penalty was…necessarily apportioned to the extent to which the plaintiff suffered from the injury inflicted; and that depended upon the circumstances of each case. According to *Grotius*...the Court might

[4] See in general *J. Neethling/J.M. Potgieter/P.J. Visser*, Neethling's Law of Personality (2nd ed. 2005) 3–4, 39 ff.; *Neethling/Potgieter/Visser* (fn. 2) 5, 11–15, 297 ff.; *Neethling* (fn. 2) 163–164; *J.M. Burchell*, Principles of Delict (1993) 149 ff.; *J.M. Burchell*, Personality Rights and Freedom of Expression. The Modern Actio Iniuriarum (1998) 133–135; *J.M. Burchell*, The Law of Defamation in South Africa (1985) passim; *N.J. van der Merwe/P.J.J. Olivier*, Die Onregmatige Daad in die Suid-Afrikaanse Reg (6th ed. 1989) 15, 389 ff.; *van der Walt/Midgley* (fn. 3) 1, 11–13, 110 ff.; *W.A. Joubert*, Grondslae van die Persoonlikheidsreg (1953) passim.

[5] However, in certain instances of iniuria, negligence liability and even strict liability have been recognised (see *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 58–59, 119–120, 185; *Neethling/Potgieter/Visser* (fn. 2) 304–305, 317–318, 320.

[6] See, e.g., *Hofmeyr v Minister of Justice* 1993 3 SA 131 (A) 154; *Marais v Groenewald* 2001 1 SA 634 (T) 645; *Jackson v NICRO* 1976 3 SA 1 (A) 11; *SAUK v O'Malley* 1977 3 SA 394 (A) 402–403; *Ramsay v Minister van Polisie* 1981 4 SA 802 (A) 806; *Jansen van Vuuren v Kruger* 1993 4 SA 842 (A) 849; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) 258; see also *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 39–40, 57; *Neethling/Potgieter/Visser* (fn. 2) 5, 13–14.

[7] D. 47.10.7.1 states that the conduct complained of should be punished by the actio iniuriarum (see also *Joubert* (fn. 4) 99–100; *T.J. Scott*, Die Geskiedenis van die Oorerflikheid van Aksies op grond van Onregmatige Daad in die Suid-Afrikaanse Reg (1976) 13, 31, 161, 169; *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 65–66; *Burchell*, Defamation (fn. 4) 7, 140. In Roman-Dutch law the actio iniuriarum was replaced by, inter alia, the corresponding amende profitable (see *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 48), which similarly had a penal function (see *Salzmann v Holmes* 1914 AD 471, 480; *Die Spoorbond*; *Van Heerden v SAR* 1946 AD 999, 1005; *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 14 fn. 137; cf. *Scott* (supra, 161).

[8] See *Joubert* (fn. 4) 99–100; *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 65–66.

[9] According to *M. de Villiers*, The Roman and Roman-Dutch Law of Injuries (1899) 180, the penalty was necessarily apportioned to the extent to which the plaintiff suffered from the iniuria inflicted, and this depended on the circumstances of each case (see also *Salzmann v Holmes* 1914 AD 471, 480).

[10] 1914 AD 471, 480; see also *Bruwer v Joubert* 1966 3 SA 334 (A) 337–338; *Burchell*, Defamation (fn. 4) 290; *Burchell*, Personality Rights (fn. 4) 454; *P.J. Visser/J.M. Potgieter*, Law of Damages through the Cases (3rd ed. 2004) 553.

adjudge the amount at its discretion, carefully taking into account the circumstances of both parties and of the case generally."

2. South African Case Law

a) General approach of the courts

While punishment was regarded as the primary object of the actio iniuriarum at common law, nowadays the action has a compensatory as well as a penal function. Apart from the fact that the awarding of satisfaction under the actio iniuriarum provides solace (compensation) for injured feelings, the courts also confirmed its punitive function to neutralise the plaintiff's feelings of injustice for the (intentional) invasion of his interests of personality.[11] In *Masawi v Chabata*[12] the court put it as follows: "As regards *quantum*, it must be borne in mind that the primary object of the *actio injuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings.[13] The Court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim…" 5

[11] See *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 464; *Neethling* (fn. 2) 174; *J. Neethling*, Protection of personality rights against invasions by mass media in South Africa, in: H. Koziol/A. Warzilek (eds.), Persönlichkeitsschutz gegenüber Massenmedien/The Protection of Personality Rights against Invasions by Mass Media (2005) 285; *J. Neethling*, Personality rights: a comparative overview, [2005] Comparative and International Law Journal of Southern Africa (CILSA) 222; *V.V.W. Duba*, Additional damages and section 24(3) of the Copyright Act 1978, [1998] South African Law Journal (SALJ), 468; cf. *Burchell*, Personality Rights (fn. 4) 474–475. See also *H.J. Erasmus/J.J. Gauntlett* (revised by P.J. Visser), Damages, [1995] 7 The Law of South Africa (LAWSA), 74 who opine that a punitive element in damages for defamation is still present, but that punishment is no longer the exclusive object, as was the case with the Roman-Dutch actio vindictam spirans.

[12] 1991 4 SA 764 (ZH) 772; see also *Steele v Minister of Safety and Securiby* 2009-02-27 case no. 10767/2005 (C) par. 125–129; *Salzmann v Holmes* 1914 AD 471, 480, 483; *Gray v Poutsma* 1914 TPD 203, 211; *Bruwer v Joubert* 1966 3 SA 334 (A) 338; *Potgieter v Potgieter* 1959 1 SA 194 (W) 195; *Mhlongo v Bailey* 1958 1 SA 370 (W) 373; *Buthelezi v Poorter* 1975 4 SA 608 (W) 615–616, 617, 618; *Pauw v African Guarantee and Indemnity Co. Ltd.* 1950 2 SA 132 (SWA) 135; *SA Associated Newspapers Ltd. v Yutar* 1969 2 SA 442 (A) 458; *Gelb v Hawkins* 1960 3 SA 687 (A) 693; *Brenner v Botha* 1956 3 SA 257 (T) 262; *Kahn v Kahn* 1971 2 SA 499 (RA) 500, 501–502 (punitive/exemplary damages); *Chetcuti v Van der Wilt* 1993 4 SA 397 (Tk) 399–401 (punitive and exemplary damages); *Africa v Metzler* 1997 4 SA 531 (Nm) 538, 539 (exemplary/punitive damages); see *Burchell*, Defamation (fn. 4) 290 fn. 8, and *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 464 fn. 265 for further cases on defamation; see also the discussion of Ackermann J in *Fose v Minister of Justice* 1997 3 SA 786 (CC) 822–823 on punitive or exemplary damages under South African law generally, and specifically on punitive damages for assault where authority appears to be scant. See further infra no. 13 as to the meaning of and distinction between punitive and exemplary damages.

[13] Although the primary object of the actio iniuriarum in Roman-Dutch law was certainly punishment, nowadays the action has a compensatory as well as a penal aim (see fn. 11). In *Pauw v African Guarantee and Indemnity Co. Ltd.* 1950 2 SA 132 (SWA) 135, for example, the court expressed it thus: "Under the *actio injuriarum* damages are given in the form of a *solatium* for injured feelings and as a punishment of the defendant in order to assist in salving the injured feelings of the plaintiff." See also *Salzmann v Holmes* 1914 AD 471, 483.

6 A few examples from case law will demonstrate this approach. The leading case in this regard is *Salzmann v Holmes*.[14] Here the defendant on three occasions published libellous materials about the plaintiff, imputing to him the crimes of rape and murder. The court found for the plaintiff and in assessing the damages, took into account especially the continued malice and ill-feeling of the defendant towards the plaintiff over a period of six years, as well the grave nature of the slander:[15] "It is difficult to imagine one more gross, for the plaintiff was said to be guilty of the two most serious crimes known to the law…Under these circumstances, the Court should have awarded a very substantial sum by way of compensation to the plaintiff for the *contumelia*[16] inflicted, and by way of penalty upon the defendant for his aggravated and malicious defamation."

7 As is also illustrated by the following two cases, the need for punitive damages has come to the fore especially in cases dealing with defamation. In *Buthelezi v Poorter*[17] the plaintiff, a politician, had been accused in a daily newspaper of hypocrisy and dishonesty, and had been pictured as a man who had misled his friends and followers – according to the court a "more vicious piece of character assassination it would be hard to imagine."[18] The defendants raised the defence of justification but abandoned it on the afternoon before trial. The court held that this fact seriously aggravated the damage, and this is even more so where the defendants then for the first time admitted that the offending article was false, defamatory and malicious.[19] Williamson AJ continued:[20] "I would have expected that anyone with any sense of decency who on discovering that he had wrongly cast so grave and hurtful a slur would make haste to apologize or at the very least to explain that he had acted in good faith. No such attempt was made by any one of the defendants and they maintained an unrepentant attitude throughout. I regard their attitude as scandalous and deserving of the gravest censure."

8 The court held[21] that "the appropriate way of impressing upon all concerned that attacks of the kind to be found in this case are not to be lightly made is by awarding substantial damages"; that "the penal element in the damages to be awarded" should not be affected by the success or failure of the defendants' attempt to ruin the plaintiff; that "it is well recognised that the court is justified in awarding exemplary damages in an appropriate case"; and that "the present case is indeed an appropriate case for such an award" – "[o]ne finds only aggravating features in the conduct of the defendants."

[14] 1914 AD 471; see *Fose v Minister of Justice* 1997 3 SA 786 (CC) 822 fn. 165.
[15] Ibid. at 482.
[16] Two meanings have been ascribed to the concept of contumelia: iniuria in the broad sense of intentional injury to personality, and violation of dignity or insult in a narrow sense. The former is to be preferred (see *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 44–45).
[17] 1975 4 SA 608 (W) 615–616. For analogous cases, see *Kahn v Kahn* 1971 2 SA 499 (RA) 500, 501–502; *Chetcuti v Van der Wilt* 1993 4 SA 397 (Tk) 399–401; *Africa v Metzler* 1997 4 SA 531 (Nm) 538–539.
[18] 1975 4 SA 608 (W) at 614.
[19] Ibid. at 615, 616.
[20] Ibid.
[21] Ibid. at 617–618.

In *SA Associated Newspapers Ltd. v Yutar*[22] the Appeal Court described an imputation that the plaintiff (the Deputy Attorney-General) deliberately misled the court, as "one of the most humiliating insults which could have been offered to any person in [such a] position." Having found that there were "highly persuasive indications of a purposeful attempt [on the part of the defendants] to inflict injury" on the plaintiff, Steyn CJ continued: "[It] is something so disgraceful, so much at variance with an elementary fundamental duty, as to be unpardonable. If discovered, it could not possibly be countenanced or overlooked. To ascribe such conduct to the respondent was defamatory in the highest degree, and calls for punitive damages."[23] 9

The next two decisions concern damages for adultery. A case in point is *Bruwer v Joubert*[24] where Rumpff JA stated that in appropriate circumstances there is a penal element ("strafelement") in the assessment of damages involved and that, with reference to *Viviers v Kilian*,[25] "it is only right that profligate men should realise that they cannot commit adultery with married women with impunity." In this regard, the attitude of the perpetrator after the iniuria plays an important role in determining the amount of solatium or penalty to be paid – an honest apology acts like a balm on the wound while persistence burns like salt on it, tending to amplify and aggravate the injury.[26] 10

Another case on adultery is *Potgieter v Potgieter.*[27] Here the adulterous third party (defendant) added insult to injury by treating the innocent spouse (plaintiff) afterwards with contempt, whereupon the latter shot and seriously wounded him. The court[28] held that there "is a penal element in this form of damages" and that the defendant "certainly deserves to be penalised". But Hiemstra J opined that the assault on the defendant must have a negative effect on the amount of damages:[29] "The money is awarded to the claimant to assuage his injured feelings. He has however in a more robust way richly obtained balm for his wounded soul. The cry of pain, the writhing form of his adversary…have given the plaintiff intense satisfaction in some primitive manner." Accordingly, his damages were substantially reduced. 11

[22] 1969 2 SA 442 (A) 458.

[23] In *Gelb v Hawkins* 1960 3 SA 687 (A) 693 a similar situation came before the court. Here a long-standing attorney of impeccable integrity was falsely accused of the "grave and ugly thing" that he deliberately deceived the court. Holmes AJA, in the assessment of damages, apart from contumelia (insult) and loss of reputation, also took the element of penalty as a "proper consideration" into account.

[24] 1966 3 SA 334 (A) 338.

[25] 1927 AD 449.

[26] For example, where the defendant relentlessly continued with the adulterous relationship, even, to add insult to injury, in the plaintiff's home (see *Bruwer v Joubert* 1966 3 SA 334 (A) 339; cf. *Valken v Berger* 1948 3 SA 532 (W) 536).

[27] 1959 1 SA 194 (W).

[28] Ibid. at 195.

[29] Ibid.

12 Finally, *Brenner v Botha*[30] involved insult or infringement of dignity. In this case, a store manager addressed a store assistant (plaintiff), who had made a mistake, as follows: "Clear out, you bloody bitch, before I throw you out." Boshoff AJ[31] found that the words were certainly offensive and intended to humiliate the plaintiff. As far as the assessment of damages was concerned, he remarked that in cases founded upon iniuria which involves insult, substantial damages are awarded by the courts. The damages, which are difficult to assess, are "primarily compensation for wounded feelings", but are "to some extent punitive in cases such as this."[32]

b) Punitive, exemplary and aggravated damages

13 Since the expressions punitive (penal) damages and exemplary ("bestraffende") damages are often used interchangeably and confusingly[33] by the courts[34] and jurists,[35] for purposes of clarity it should be noted that they connote the same meaning, namely damages awarded to punish the defendant. But the same cannot be said of aggravated damages. Aggravated damages may include punitive damages but may basically only be compensatory damages and may therefore differ from punitive damages. However, as stated by Ackermann J in *Fose v Minister of Justice*,[36] "it is not always easy to draw the line between an award of aggravated but still basically compensatory damages, where the particular circumstances of or surrounding the infliction of the *injuria* have justified a substantial award, and the award of punitive damages in the strict and narrow sense of the word." In fact, according to Burchell[37] it is difficult to determine whether in certain cases the court was considering aggravated damages or punitive damages. So, in these cases an award of aggravated damages may substantially be the same as an award of punitive damages,[38] making the distinction between the two a purely semantic difference.[39]

[30] 1956 3 SA 257 (T).
[31] Ibid. at 262; see *Visser/Potgieter* (fn. 10) 603.
[32] 1956 3 SA, 257 (T) at 262; see *Visser/Potgieter* (fn. 10) 603. Reference can also be made to *Mhlongo v Bailey* 1958 1 SA 370 (W), where the court held (at 373) that the publication of facts and photographs of the plaintiff constituted an invasion of his *privacy* which was deliberately designed without having regard to his feelings, and that in cases such as this "the damages are to some extent punitive".
[33] See *Fose v Minister of Justice* 1997 3 SA 786 (CC) 822.
[34] See, e.g., *Kahn v Kahn* 1971 2 SA 499 (RA) 500, 501–502; *Chetcuti v Van der Wilt* 1993 4 SA 397 (Tk) 399–401; *Africa v Metzler* 1997 4 SA 531 (Nm) 538, 539.
[35] See, e.g., *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 464; *Burchell*, Defamation (fn. 4) 290; cf. *P.J. Visser*, Toekenning van "exemplary damages" in 'n geval van laster, [1998] Tydskrif vir Hedendaagse Romeins-Hollands Reg (THRHR) 150 ff.
[36] 1997 3 SA 786 (CC) 822; see also *Visser*, [1998] THRHR, 153; *Burchell*, Defamation (fn. 4) 291.
[37] *Burchell*, Defamation (fn. 4) 291, esp. fn. 15, 293–294.
[38] Cf. also *van der Walt/Midgley* (fn. 3) 217 (cited infra fn. 90).
[39] But see *Burchell*, Defamation (fn. 4) 293–294 as to the importance of whether the goal of damages is (or should be) compensation or punishment.

c) Assessment of damages

14 There is no fixed formula for the determination of the quantum of damages or satisfaction obtainable through the actio iniuriarum.[40] The court assesses the amount, which is completely in arbitrio iudicis (in the discretion of the judge), by taking into account all relevant factors and circumstances ex aequo et bono (according to what is just and good).[41] The factors that may legitimately be taken into consideration in aggravating or mitigating damages will be considered next. As said,[42] some of the factors may relate to the punitive element of damages, while others may be indicative of compensation (solatium) for injured feelings, although, in many instances, it will be difficult to determine whether a factor relates to compensation or to punishment. In any case, the courts do not distinguish between the amount of compensation and the amount added as punitive damages, but make a lump-sum award.[43] The factors influencing the amount of damages with regard to defamation will be used as illustration.[44]

15 Generally, malice on the part of the defendant, for example, where he was aware of the untruth of his defamatory assertions,[45] is an aggravating factor.[46] Other factors which may have a similar result[47] are the particularly drastic or insulting nature of the defamation,[48] reckless or irresponsible conduct on the

[40] See generally *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 448 ff.; *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 60; *Neethling* (fn. 2) 175–176.

[41] See, e.g., *Jonker v Schultz* 2002 2 SA 360 (O) 367; *Skinner v Shapiro (1)* 1924 WLD 157, 167; *Kritzinger v Perskorporasie van SA (Edms) Bpk* 1981 2 SA 373 (O) 389; *Smith v Die Republikein (Edms) Bpk* 1989 3 SA 872 (SWA) 875; *Sandler v Wholesale Coal Suppliers Ltd.* 1941 AD 194; *Protea Assurance v Lamb* 1971 1 SA 530 (A); see also *de Villiers* (fn. 9) 153. In *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd.* 2001 2 SA 242 (SCA) 260 (see also *Mineworkers Investment v Modibane* 2002 6 SA 512 (W) 527) Smalberger JA said: "The award in each case must depend upon the facts of the particular case seen against the background of prevailing attitudes in the community. Ultimately a Court must, as best it can, make a realistic assessment of what it considers just and fair in all the circumstances. The result represents little more than an enlightened guess."

[42] Supra no. 13.

[43] See *Duba* [1998] SALJ, 468.

[44] See generally *Burchell*, Defamation (fn. 4) 294 ff.; *Burchell*, Personality Rights (fn. 4) 435–436; *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 449 ff.; *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 169–170; *Neethling* (fn. 2) 176–177; *van der Merwe/Olivier* (fn. 4) 442.

[45] See *Geyser v Pont* 1968 4 SA 67 (W) 76; *Gelb v Hawkins* 1960 3 SA 687 (A) 693.

[46] See, e.g., *Salzmann v Holmes* 1914 AD 471, 481, 483; *Sutter v Brown* 1926 AD 155, 171, 172–173. The court may well award exemplary or punitive damages in these circumstances (see, e.g., *Buthelezi v Poorter* 1975 4 SA 608 (W) 616, 618; *Salzmann v Holmes* 1914 AD 471, 483; *SA Associated Newspapers Ltd. v Yutar* 1969 2 SA 442 (A) 458; *Kahn v Kahn* 1971 2 SA 499 (RA) 500, 501–502. See also *Burchell*, Defamation (fn. 4) 303; *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 462–463, 464.

[47] See also *Burchell*, Defamation (fn. 4) 303; *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 461–464.

[48] See, e.g., *Pont v Geyser* 1968 2 SA 545 (A) 552, 558; *SA Associated Newspapers Ltd. v Yutar* 1969 2 SA 442 (A) 458; *Buthelezi v Poorter* 1975 4 SA 608 (W) 614; *Smith v Die Republikein (Edms) Bpk* 1989 3 SA 872 (SWA) 876–877; *Iyman v Natal Witness Printing & Publishing Co. (Pty) Ltd.* 1991 4 SA 677 (N). Again, such conduct may justify punitive damages (see *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 464).

part of the defendant,[49] the wide distribution of the publication concerned,[50] the position and esteem of the plaintiff,[51] the fact that the defamatory remarks were repeated,[52] the injurious[53] or damaging consequences of the defamation,[54] and the defendant's perseverance in denying liability.[55] In this regard, it may be stated that aggravating factors directly relating to the reprehensible conduct or attitude of the defendant, may perhaps be more prone to punishment than those not so related, although watertight compartments can obviously not be made. On the other hand, factors that relate directly to the personality harm suffered by the plaintiff are more susceptible to compensation.

16 Mitigating factors (circumstances reducing the amount of compensatory or punitive damages),[56] on the other hand, include the bad reputation, character or behaviour of the plaintiff,[57] the truth of the defamatory assertions,[58] provocative conduct on the part of the plaintiff,[59] the limited or negligible extent of the publication,[60] an apology by the defendant,[61] unnecessary delay by the plaintiff

[49] *Buthelezi v Poorter* 1975 4 SA 608 (W) 615–616; cf. the previous fn.

[50] See, e.g., *Buthelezi v Poorter* 1975 4 SA 608 (W) 615; *Geyser v Pont* 1968 4 SA 67 (W) 75; *SA Associated Newspapers Ltd. v Samuels* 1980 1 SA 24 (A) 43; *Smith v Die Republikein (Edms) Bpk* 1989 3 SA 872 (SWA) 877–878; *Iyman v Natal Witness Printing and Publishing Co. (Pty) Ltd.* 1991 4 SA 677 (N) 686. Aggravated damages may be awarded as compensation or punishment, depending on the circumstances.

[51] See, e.g., *SA Associated Newspapers Ltd. v Yutar* 1969 2 SA 442 (A) 458; *SA Associated Newspapers Ltd. v Samuels* 1980 1 SA 24 (A) 43; *Buthelezi v Poorter* 1975 4 SA 608 (W) 614; *Gelb v Hawkins* 1960 3 SA 687 (A) 693; *De Flamingh v Pakendorf* 1979 3 SA 676 (T) 686; *Smith v Die Republikein (Edms) Bpk* 1989 3 SA 872 (SWA) 878. This factor is perhaps more conducive to compensation.

[52] See, e.g., *Sachs v Werkerspers Uitgewersmaatskappy (Edms) Bpk* 1952 2 SA 261 (W) 284; *Pont v Geyser* 1968 2 SA 545 (A) 558; *Kahn v Kahn* 1971 2 SA 499 (RA) 500, 501–502; *Moolman v Slovo* 1964 1 SA 760 (W) 762–763; *Buthelezi v Poorter* 1975 4 SA 608 (W) 615. This may be indicative of malice (cf. supra fn. 46).

[53] Such as injurious telephone calls and experiences which can be attributed to the defamation (see *Smith v Die Republikein (Edms) Bpk* 1989 3 SA 872 (SWA) 878).

[54] Such as ruining the plaintiff (see *Buthelezi v Poorter* 1975 4 SA 608 (W) 618; *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 463–464).

[55] See also *Smith v Die Republikein (Edms) Bpk* 1989 3 SA 872 (SWA) 879; *Iyman v Natal Witness Printing & Publishing Co. (Pty) Ltd.* 1991 4 SA 677 (N) 687.

[56] See also *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 458–461; *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 169–170; *Burchell*, Defamation (fn. 4) 301–303.

[57] See, e.g., *Sutter v Brown* 1926 AD 155, 172; *Black v Joseph* 1931 AD 132, 146; *Geyser v Pont* 1968 4 SA 67 (W) 77–78; *Klisser v SA Associated Newspapers Ltd.* 1964 3 SA 308 (C).

[58] See, e.g., *Sutter v Brown* 1926 AD 155, 172; *Hairman v Wessels* 1949 1 SA 431 (O) 435; *Subramani v Mohideen* 1945 NPD 296–297; *Jeftha v Williams* 1981 3 SA 678 (C) 684; *Iyman v Natal Witness Printing & Publishing Co. (Pty) Ltd.* 1991 4 SA 677 (N) 686.

[59] See *Iyman v Natal Witness Printing & Publishing Co. (Pty) Ltd.* 1991 4 SA 677 (N) 687 (where an assault by the plaintiff was considered to be "partial justification" for the defamation); *Sachs v Werkerspers Uitgewersmaatskappy (Edms) Bpk* 1952 2 SA 261 (W) 284.

[60] See, e.g., *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd.* 2001 2 SA 242 (SCA) 259–260; *Jeftha v Williams* 1981 3 SA 678 (C) 684; *Jasat v Paruk* 1983 4 SA 728 (N) 735; *Simpson v Williams* 1975 4 SA 312 (N) 315–316.

[61] Cf. *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd.* 2001 2 SA 242 (SCA) 260. In order to be taken into consideration, the apology has to be unconditional and accompanied by a complete retraction of the defamatory allegations (e.g. *Norton v Ginsberg* 1953 4 SA 537 (A) 539–540);

to institute the action for defamation,[62] the absence of intent or malice on the part of the defendant;[63] and the fact that the defamation has been in circulation for a considerable time.[64]

3. Dogmatic Viewpoints

Three dogmatic viewpoints can be discerned amongst South African writers: 17

Visser and his co-authors[65] fully support and propagate the view that the idea of punishment is inherent in the concept of satisfaction for personality infringement. Although the term satisfaction is found in Roman law (as indicated by the term satisfactio), the juridical concept of satisfaction ("Genugtuung" in German terminology; "genoegdoening" in Afrikaans) is derived from Swiss law.[66] Satisfaction has no fixed content and the following meanings have been given to it: penance, retribution, reparation for an insulting act, or balm poured on a plaintiff's inflamed emotions or feelings of outrage at having to suffer an injustice. In a wide sense, satisfaction refers to an upholding of the law, while its narrowest meaning relates to the psychological gratification obtained by the victim of a wrongful act. In practice, satisfaction operates by neutralising a plaintiff's feelings of outrage and revenge through the infliction of punishment on the defendant in the sense that the latter is condemned to pay an amount of money to the plaintiff.[67] This represents a more refined form of the old talio principle (an eye for an eye and a tooth for a tooth) and implies that an aggrieved person may not take the law into his own hands but has to use the legal process to obtain what is due to him. The granting of damages as satisfaction is the law's reaction to an injury to personality which has no "natural" monetary equivalent and where a type of factual or financial restitution is impossible.[68] 18

it also has to be made as soon as reasonably possible (ibid.; *SA Associated Newspapers Ltd. v Samuels* 1980 1 SA 24 (A) 43); and the same prominence has to be given to the apology as was originally enjoyed by the defamatory publication (e.g. *Dymes v Natal Newspapers Ltd.* 1937 NPD 85, 97). Nevertheless, a failure to make an apology is not necessarily an aggravating factor (*Norton v Ginsberg* 1953 4 SA 537 (A) 550; but see *Marais v Groenewald* 2001 1 SA 634 (O) 649). See generally *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 458–459; *Burchell*, Defamation (fn. 4) 299–300.

[62] *Pienaar v Pretoria Printing Works Ltd., Reno and Stent* 1906 TS 805, 816.

[63] See generally *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 460; *Burchell*, Defamation (fn. 4), 301–302; see also *SA Associated Newspapers Ltd. v Samuels* 1980 1 SA 24 (A) 41–42; *Gray v Poutsma* 1914 TPD 203, 207.

[64] *Graham v Odendaal* 1972 2 SA 611 (A) 615.

[65] See generally *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 190.

[66] See *P.J. Visser*, Genoegdoening met betrekking tot nie-vermoënskade, [1983] Tydskrif vir die Suid-Afrikaanse Reg (TSAR) 55; *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 59–60.

[67] See also *Masawi v Chabata* 1991 4 SA 764 (ZH) 772 (cited supra no. 5).

[68] See *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 190; cf. *Minister of Safety and Security v Seymour* 2006 6 SA 320 (SCA) 326 where Nugent JA said: "Money can never be more than a crude *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss."

19 Visser et al.[69] opine that the true concept of satisfaction is impossible and meaningless without the idea of somehow punishing the perpetrator. Although, as Visser[70] states, "this vindictive element of the actio iniuriarum is often understated, ignored or even denied, the action has to a certain extent retained its character as an actio vindictam spirans." According to Visser et al.,[71] the action displays all the characteristics which are relevant in satisfaction: animus iniuriandi (intent) is generally a requirement[72] which highlights the moral blameworthiness of the defendant; its penal nature obliges the defendant to pay an amount of money as a private penalty in favour of the plaintiff;[73] and precisely as a result of its penal nature, it is neither actively nor passively transmissible before litis contestatio (closing of the pleadings)[74] since it cannot serve its purpose after the death of the victim or the perpetrator.[75] But these authors do not exclude the idea that satisfaction may also have an element of compensation in the sense that the receipt of money assuages the plaintiff's wounded feelings and thus makes him happy. Seen thus, satisfaction maintains a position somewhere between compensation and punishment.[76]

20 However, serious criticism by academics[77] and the courts[78] has been levelled against awarding punitive damages under the actio iniuriarum.[79] Van

[69] *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 190–193, 464.

[70] See *P.J. Visser*, Damages – wrongful arrest and detention – quantum of damages, [2008] THRHR, 176.

[71] See *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 191–192.

[72] See *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 57.

[73] See *Masawi v Chabata* 1991 4 SA 764 (ZH) 772 (cited supra no. 5); see also the cases referred to supra fn. 12.

[74] See *Scott* (fn. 7) 13–16, 31, 161–163, 169, 190–191, 198–199; *Burchell*, Defamation (fn. 4) 137; *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 78.

[75] Ibid.; cf. also *van der Merwe/Olivier* (fn. 4) 239.

[76] *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 190, 192; see also on the compensatory function of satisfaction *van der Merwe/Olivier* (fn. 4) 245; *Burchell*, Defamation (fn. 4) 293.

[77] See *J.C. van der Walt*, Delict: Principles and Cases (1979) 6; *van der Merwe/Olivier* (fn. 4) 245 fn. 6, 246; *Neethling/Potgieter/Visser* (fn. 2) 6 fn. 27; *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 58 fn. 208; *Burchell*, Defamation (fn. 4) 291–294; *Burchell*, Delict (fn. 4) 187; *Burchell*, Personality Rights (fn. 4) 448; cf. *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 192, 464.

[78] See *Innes v Visser* 1936 WLD 44, 45; *Lynch v Agnew* 1929 TPD 974, 978; *Esselen v Argus Printing and Publishing Co. Ltd.* 1992 3 SA 764 (T) 771; *Collins v Administrator, Cape* 1995 4 SA 73 (C) 94. In *Dikoko v Mokhatla* 2006 6 SA 235 (CC) 263 Mokgoro J put it thus: "Equity in determining a damages award for defamation is therefore an important consideration in the context of the purpose of a damages award, aptly expressed in *Lynch* [1929 TPD 974, 978] as solace to a plaintiff's wounded feelings and not to penalise or deter people from doing what the defendant has done. Even if a compensatory award may have a deterrent effect, its purpose is not to punish. Clearly, punishment and deterrence are functions of the criminal law. Not the law of delict…In our law a damages award therefore does not serve to punish for the act of defamation. It principally aims to serve as compensation for damage caused by the defamation, vindicating the victim's dignity, reputation and integrity. Alternatively, it serves to console." See also *Mogale v Seima* 2008 5 SA 637 (SCA) 641–642; *Seymour v Minister of Safety and Security* 2006 5 SA 495 (W) 500. In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 823–828 the Constitutional Court (per Ackermann J) appeared to favour a total rejection of punitive damages in private and constitutional matters (see *Burchell*, Personality Rights (fn. 4) 461, 474; but see 474–475 as to the judgments of Didcott and Kriegler JJ).

[79] See *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 823 fn. 171.

der Walt[80] expresses it as follows: "The historical anomaly of awarding additional sentimental damages as a penalty for outrageous conduct on the part of the defendant is not justifiable in a modern system of law. The basic purpose of a civil action in delict is to compensate the victim for the actual harm done. In the case of impairment of personality by wrongful conduct it may be difficult to determine the amount of the *solatium* which will confer personal satisfaction or compensation for the injury, but in principle all factors and circumstances tending to introduce penal features should be rigorously excluded from such an assessment. The aim of discouraging evil and high-handed conduct is foreign to the basic purposes of the law of delict. It is for criminal law to punish and thereby discourage such conduct."

In order to cater for this view, Van der Merwe and Olivier[81] suggest that the penal character of the actio iniuriarum should be relinquished. They argue that this action can hardly still have a punitive function in the light of the distinction between private and criminal law. However, Visser et al.[82] contend that the action can then no longer be seen as providing true "satisfaction" since without an element of penance this concept is empty and meaningless. Although they concede that the concept of a private penalty violates the dogmatic distinction between private and public law, "it appears that there is at present no viable alternative to the retention of the actio iniuriarum with its penal element."[83] 21

A third view opts for a reconciliation of these two diametrically opposed viewpoints: the one that the actio iniuriarum with its penal element should be retained, and the other that this action should be rigorously cleansed of all penal characteristics so that only its compensatory function remains. The following considerations appear to open the door for a reconciliatory approach: it is very often extremely difficult to separate the punitive and compensatory elements in damages for an iniuria;[84] even punitive or exemplary damages may (sometimes) be seen as part of compensation;[85] (aggravated) compensation may 22

[80] See *van der Walt* (fn. 77) 6; see also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) 823; *van der Walt/Midgley* (fn. 3) 3–4.

[81] *Van der Merwe/Olivier* (fn. 4) 238 fn. 72, 245 fn. 6, 246; cf. *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 192.

[82] See *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 192; *P.J. Visser*, Genoegdoening in die deliktereg, [1988] THRHR, 487–488.

[83] *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 193; see further *Visser*, [1988] THRHR, 488–489 for further arguments.

[84] *Burchell*, Defamation (fn. 4) 290–294; see also supra no. 13). In *SA Associated Newspapers Ltd. v Samuels* 1980 1 SA 24 (A) 48 Viljoen AJA also remarked that it is extremely difficult ("uiters moeilik") to distinguish the penal element ("strafelement") or punitive damages (that is, that part of the damages aimed at punishment ("straf")) from compensatory damages, and consequently to separate the two elements. But see *van der Walt/Midgley* (fn. 3) 3–4.

[85] *Burchell*, Defamation (fn. 4) 292; *van der Walt/Midgley* (fn. 3) 217 (cited infra fn. 90). In *Gray v Poutsma* 1914 TPD 203, 211 the court expressed it thus: "[E]xemplary damages may be awarded as punishment of the defamer with the view of satisfying the injured feelings of the plaintiff, and not so much with a view to preventing the commission of similar torts". Similarly in *Masawi v Chabata* 1991 4 SA 764 (ZH) 772 the court held that the pecuniary penalty under the actio iniuriarum is "payable to plaintiff as a *solatium* for the injury to his feelings".

have a deterrent effect, even though deterrence is mainly a function of criminal law;[86] and a judge, not a jury, has control over the extent of damages in our law.[87] Burchell[88] seems to favour such an approach when he says: "In essence, the controversy surrounding punitive damages is one of emphasis. The critics of punitive damages rightly stress that the court in a civil case must not make an award of damages (or a portion of that award) purely to penalize the defendant for his conduct or to deter people in future from doing what the defendant has done: punishment and deterrence are functions of criminal law, not delict. But even the critics of 'punitive' damages would…accept that factors[89] aggravating the defendant's conduct may serve to increase the amount awarded to the plaintiff as compensation, either to vindicate his reputation or to act as a solatium. The emphasis must therefore be on compensating the plaintiff, not on making an example of the defendant."

23 Keeping this in mind, aggravating damages may be made to do the work of punitive damages,[90] and in this way provide for a disguised penal element that will still do justice to the true concept of satisfaction.[91]

4. Conclusion

24 In conclusion it may be stated that although at common law the actio iniuriarum had a penal character, under the courts it developed a dual function, namely to claim satisfaction, firstly as compensation (solatium) for injured feelings as a result of an intentional violation of personality rights, and secondly as a punishment (punitive damages) to assuage the plaintiff's feelings of outrage for the injustice he suffered. However, because of the extreme difficulty in practice to distinguish between the compensatory and penal elements, and in light of the valid criticism levelled against awarding punitive damages

[86] *Dikoko v Mokhatla* 2006 6 SA 235 (CC) 263. Punitive damages for intentional or grossly negligent violations of the personality may indeed act as a deterrent and thus promote the preventive function of the law of delict. There is already a tendency in Europe to revive civil punishment for grave violations of the personality (see *J. Neethling*, Personality rights, in: J.M. Smits (ed.), Elgar Encyclopedia of Comparative Law (2006) 534). The deterrent effect has also been mentioned by South African courts (see *Africa v Metzler* 1997 4 SA 531 (Nm) 539; *Buthelezi v Poorter* 1975 4 SA 608 (W) 717; see also *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 464). But see *Burchell*, Defamation (fn. 4) 292–293 who considers the attempt to justify punitive damages on this basis as not convincing; cf. also *van der Walt/Midgley* (fn. 3) 217.

[87] *Burchell*, Defamation (fn. 4) 293.

[88] Ibid.; see also *Burchell*, Personality Rights (fn. 4) 454–455, 474.

[89] Such as the blameworthy attitude of the defendant (see *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 193).

[90] See *Burchell*, Defamation (fn. 4) 293; cf. *van der Walt/Midgley* (fn. 3) 217: "Damages which are referred to as 'exemplary' or 'punitive' should not necessarily be regarded as punishment for the defendant's conduct. Instead, where defendants behave maliciously, or where other aggravating circumstances are present, a larger *solatium* – 'aggravated damages' – is required to assuage the plaintiff's feelings. The size of the award is the same, but the focus is properly on the plaintiff, not the defendant."

[91] See *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 192. As indicated, according to them, a true concept of satisfaction is impossible and meaningless without the idea of somehow punishing the perpetrator.

in a civil action, it is submitted that aggravating compensatory damages may be made to do the work of punitive damages so that the latter is not regarded as punishment for the defendant's conduct, but rather also as compensation for outraged feelings, and in this way still do justice to the true concept of satisfaction.

III. The Law of Contract

In general, our common law does not warrant a punitive assessment of damages for breach of contract.[92] The penalties in terms of the Conventional Penalties Act[93] are also primarily aimed at compensation and not at punishment.[94] A brief discussion of the provisions of the Act, which concerns penalties agreed to by contractual parties for breach of contract is nevertheless relevant, since, according to Visser et al.,[95] a secondary punitive function may exist where the defendant experiences the penalty he has to pay as a punishment. Under the terms of the Act,[96] such penalties are enforceable, but, and this is important, subject to a reduction by the court to such an extent as it may consider equitable in the circumstances, if it appears that the penalty is out of proportion to the prejudice suffered by the creditor.[97] The penalty may nevertheless be more than the creditor's actual patrimonial loss because prejudice is clearly greater than such loss. In fact, under the terms of the Act the court must take into consideration every rightful (and not only proprietary) interest of the creditor that may be affected by the breach of contract.[98] This provision is widely interpreted by the courts, as "everything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor in his property, his person, his reputation, his work, his activities, his convenience, his mind, or in any way interferes with his rightful interests"[99] as a result of the breach of contract. In order to ascertain whether a penalty is out of proportion to the prejudice suffered, the extent of the prejudice is compared with the penalty and where the penalty is markedly out of proportion to the prejudice,[100] the court has a duty to intervene and reduce the penalty.[101] This new equitable penalty should reasonably reflect

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[92] See *Woods v Walters* 1921 AD 301, 310; see also *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 174 fn. 91. Of course, where the breach of contract also constitutes an iniuria, satisfaction (including compensatory solatium and punitive damages where applicable) may be claimed with the actio iniuriarum (see *Neethling/Potgieter/Visser*, Law of Personality (fn. 4) 64–65; *Neethling* (fn. 86) 543–544; *Visser/Potgieter/Steynberg/Floyd* (supra) 176 fn. 98).

[93] 15 of 1962; see for discussions of the Act, *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 175, 342 ff.; *J. Jamneck*, Strafbedinge in die Suid-Afrikaanse reg – Deel 1, 2, 3, [1998] THRHR, 61 ff., 229 ff., 463 ff.

[94] See *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 175.

[95] Ibid.

[96] s.1; see *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 343.

[97] s.3; see *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 347–350.

[98] See s.3; see *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 349.

[99] See *van Staden v SA Central Lands and Mines* 1969 4 SA 349 (W) 352; see also *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 349.

[100] See *Western Credit Bank Ltd. v Kajee* 1967 4 SA 386 (N) 391.

[101] See *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 350.

the full extent of the loss,[102] and can therefore be regarded as compensation only and not, in any case not primarily, as punitive damages.

IV. Copyright Law

26 In terms of the Copyright Act,[103] a court may award "additional damages" it may deem fit for the infringement of copyright if the court is satisfied, having regard to all material considerations, the flagrancy of the infringement and any profit that has accrued to the defendant as a result of the infringement, that effective relief would otherwise not be available to the plaintiff. The interpretation of "additional damages" is controversial. In *Priority Records (Pty) Ltd. v Ban-Nab Radio and TV*[104] Page J held that a court may award any form of damages recognised by South African law, and that such damages may, "in appropriate circumstances, include damages of the nature claimable by the *actio iniuriarum*". This means that an award of punitive or exemplary damages, perhaps in the form of aggravated damages, may therefore also be in place.[105] In contradistinction, in *CCP Record Co. (Pty) Ltd. v Avalon Record Centre*[106] Conradie J opined that it is not helpful "to call the 'additional damages' 'punitive' or 'exemplary'. Too much imported confusion and controversy surround these terms". However, in light of the conclusion with regard to the actio iniuriarum,[107] the approach adopted in the *Priority Records* decision[108] should be followed.[109]

[102] Ibid.
[103] 198 of 1978 s.24(3); see for discussions of this section *Visser/Potgieter/Steynberg/Floyd* (fn. 3) 175 fn. 94, 388 fn. 138; *Duba*, [1998] SALJ, 477–471.
[104] 1988 2 SA 281 (D) 292–293.
[105] See the discussion supra no. 24.
[106] 1989 1 SA 445 (C) 449–450; see for a discussion *Duba*, [1998] SALJ, 467–471.
[107] See supra no. 24.
[108] 1988 2 SA 281 (D), discussed supra.
[109] See also *Duba*, [1998] SALJ, 467–471.

Punitive Damages in Spain

Pedro del Olmo*

I. Introduction

A. The Traditional Theory

In the last decade, Spanish legal scholars have held debates on the functions of non-contractual liability in our legal system. In fact, the question of what the functions of non-contractual liability (compensatory, preventive, etc) are, was raised back in the eighties but it was some years later when the debate became more popular. The debate became generalised when it was presented in works in which one can easily trace the double influence of the common law and of the economic analysis of law approach.[1] These works tried to push forward the limits of the traditional compensatory function of non-contractual liability rules, as they underscored that one should not neglect the preventive function of these rules. In this debate, one of the main questions was whether or not punitive damages existed or could exist in Spain. 1

The main part of Spanish legal doctrine currently adheres to the traditional theory, which supports the thesis that non-contractual rules do not play a punitive role as it confines these rules to a merely compensatory function.[2] The point of departure for the majority of legal writers is that the legal system deploys criminal law (and sometimes, also administrative law) to punish individuals with the aim of correcting their behaviour and it uses civil law to make good the harm suffered by them. With few exceptions, in the main part of the legal doctrine, one can find the best and most renowned experts writing on non-contractual liability. As to case law, it is also clear that this orthodox view is still upheld.[3] 2

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1 F. Pantaleón's unpublished thesis contains the first appearance of a functional analysis of Spanish tort law. See, id., Del concepto de daño. Hacia una teoría general del Derecho de daños (1981) 742 ff. (Universidad Autónoma de Madrid). As *L. Díez-Picazo*, Derecho de daños (1999) 43 explains, some years later, the question was raised again by *P. Salvador Coderch*/*M.T. Castiñeira Palou*, Prevenir y castigar (1997).

2 See *F. García Serrano*, El daño moral extracontractual en la jurisprudencia civil, Anuario de Derecho Civil (ADC) (1972) 834 ff. to confirm that, at least since then, legal writers tend to deny that the Spanish legal system contains punitive damages.

3 See, for example, STS (Supreme Court decision) 7 November 2000 (Repertorio de Jurisprudencia Aranzadi-Westlaw (RJ) 9911), 7 December 1995 (RJ 9268) or SSTS 8-V-1999. To confirm

3 Following the path of those works inspired by the common law and the economic analysis of law approach, another smaller part of the legal doctrine holds that the Spanish legal system of non-contractual liability contains some punitive elements and that it should perform a preventive function more readily. Nevertheless, it is difficult to give a definite diagnosis of the situation as some of the opinions that one encounters are somewhat confusing, perhaps because – as one legal expert put it – when one abandons the *consistency* of the traditional theory, things usually become a play on words.[4]

4 Professor F. Pantaleón, one of the most influential legal writers on the Spanish law of torts, has made a special effort to vindicate the traditional theory and to explain that the compensatory function is the only *normative* function of non-contractual liability.[5] Professor Pantaleón, as many other legal writers, acknowledges that non-contractual liability may influence the behaviour of individuals, as one can hardly tell whether he is paying a fine or is paying damages and, in this sense, the only thing the payer knows is that he is losing money. But Professor Pantaleón insists that this is a secondary function, almost a meaningless (and improbable) by-product of non-contractual liability and in no way a normative function of this part of the legal system.[6] Therefore, it may be true that the fear of being held liable and the fear of having to pay damages may have an influence on the behaviour of individuals, but Spanish non-contractual rules do not allow courts to impose an additional amount of damages in cases when it is thought that the defendant's behaviour should be discouraged nor, vice versa, do they allow courts to impose less damages when it is thought that the defendant's behaviour is to be encouraged.[7]

5 Contrary to the compensatory function of civil liability rules, criminal rules aim to punish the individual and to teach him (and the rest of society) not to do it again. As Professor Pantaleón explains, this is distilled in the following principles that, at first glance, seem difficult to rebut.[8]

(a) It is not possible to impose criminal liability without negligence or intent (nulla poena sine culpa), whilst it is obviously possible to impose civil li-

this trend of case law in legal scholarship, see *F. Reglero Campos*, Conceptos generales y elementos de delimitación, in: F. Reglero Campos (ed.), Tratado de responsabilidad civil (3rd ed. 2006) 75 or *P. Grimalt Servera*, La protección civil de los derechos al honor, a la intimidad y a la propia imagen (2007) 146.

[4] See *R. de Ángel*, Intromisión ilegítima, antijuridicidad, culpabilidad, daño y su resarcimiento, in: Consejo General del Poder Judicial, Honor, intimidad y propia imagen (1993) 261. Years later, this author's opinion was somewhat different. See *R. de Ángel*, Algunas previsiones sobre el futuro de la responsabilidad civil (1995) 16 f. and 231.

[5] His contributions on the question are contained in *F. Pantaleón*, Cómo repensar la responsabilidad civil extracontractual (También la de las Administraciones Públicas), in: J.A. Moreno Martínez (ed.), Perfiles de la Responsabilidad civil en el nuevo milenio (2000) 439–465 and in *F. Pantaleón*, Comentario al artículo 1902, in: C. Paz-Ares et al., Comentario del Código civil (1991) 1971–2003.

[6] See *Pantaleón* (fn. 5) Cómo repensar la responsabilidad, 443 and *M. Martín-Casals*, Notas sobre la indemnización del daño moral en las acciones por difamación de la LO 1/1982, in: Asociación de profesores de Derecho civil, Centenario del Código civil II (1990) 1246.

[7] *Pantaleón* (fn. 5) Cómo repensar la responsabilidad, 444.

[8] Additional ideas in *Pantaleón* (fn. 5) Comentario, 1971.

ability without fault (i.e. strict liability). Further criminal law operates with a subjectively understood concept of fault, whilst in our legal system civil fault is usually understood objectively (this is the meaning of the bonus pater familia standard that is applicable in civil liability).

(b) Criminal liability depends basically on the conduct of the defendant, while civil liability depends on the harm actually caused. Therefore, there are cases of criminal liability without actual harm, but there are no cases of civil liability without harm.

(c) Criminal liability is personal (so that, for example, a defendant's heirs do not inherit the obligation to pay a criminal fine), is not insurable and the law does not allow infractions to be settled through the use of compromise. The contrary occurs with civil liability.

Along with these principles that condense the different points of departure of both criminal and civil law, the traditional theory is also supported by some other arguments. Some of them are as follows: 6

(a) Citizens have the constitutional right to due process when it comes to imposing a criminal sanction. The same guarantees that are applicable when a fine is to be paid to the state are also to be applied when punitive damages (also a kind of a fine) are to be paid to fellow citizens.[9] Furthermore: (i) the facts that give raise to the obligation to pay a certain amount of money as a form of punishment must have been previously specified by the legal system regardless of whether we are speaking of a criminal fine or civil punitive damages (nulla poena sine lege); (ii) the rule that provides for the fine or for the punitive damages, as they share a punitive nature, cannot be applied retrospectively; (iii) it is not possible to be punished (irrespectively of whether it is a criminal or a civil sanction) twice for the same wrong (non bis in idem); and (iv) the constitutionally established presumption of innocence must also be applied to a so-called civil sanction.[10]

(b) If the plaintiff finally receives a payment of damages that is bigger than the amount of harm actually inflicted on him, it is not easy to overcome the objection that he has been unjustly enriched.[11]

(c) Legal writers who support the traditional position usually underscore that the Spanish Criminal Code (art. 139) provides that the benefits obtained through the commission of a crime are to be confiscated. Furthermore, some of these legal writers also make clear that this provision should be more readily used in our legal system.[12]

(d) When a relatively big award is imposed on a defendant that has personally harmed the plaintiff with intent, there is no need to explain this fact

[9] *Pantaleón* (fn. 5) Cómo repensar la responsabilidad, 441.
[10] *Pantaleón* (fn. 5) Comentario, 1971, *Martín-Casals* (fn. 6) 1258 ff.
[11] *Pantaleón* (fn. 5) Cómo repensar la responsabilidad, 441; *Martín-Casals* (fn. 6) 1256.
[12] *Pantaleón* (fn. 5) Comentario, 1972; *X. Basozabal*, Método triple de cómputo del daño: la indemnización del lucro cesante en las leyes de protección industrial e intelectual, ADC (1998-III) 1297. Cf. *F. Herrero-Tejedor*, Honor, intimidad y propia imagen (2nd ed. 1994) 304.

as a punitive feature of the non-contractual liability rules, thinking, for example, that the big award is imposed because of the more reprehensible nature of the defendant's behaviour. On the contrary, one can perfectly say that harm intentionally inflicted causes more (non-pecuniary) loss to the plaintiff than the non-pecuniary loss caused by unintentional fault.[13] The underlying idea here is that the mental pain and suffering caused to the plaintiff is greater when he knows that he has been intentionally harmed. In my opinion, this can also be explained by saying that intentionally caused non-pecuniary loss affects another personal good of the defendant, i.e. his sense of justice.

(e) Another general argument raised in the debate on punitive damages in Spain is based on art. 1107 of the Civil Code (CC). This article is included among the general provisions of the law of obligations and many Spanish legal writers think that it can also be applied to tort law. Pursuant to this article, in the case of non-performance, the so-called *good faith debtor* (the one that infringes his obligation with unintentional fault) is liable for "the harm foreseeable or foreseen at the moment when the obligation was contracted", whilst the debtor who intentionally failed to perform the obligation is liable for "all the harm that knowledgeably derives from his non-performance." Some legal scholars have argued that, as art. 1107 CC shows, the extent of the debtor's liability depends on whether he breached his obligation intentionally. Likewise, the extent of non-contractual liability also depends on the moral blameworthiness of the defendant's behaviour. In their opinion, this fact would reveal some punitive features of our legal system. Nevertheless, this in not an irrefutable conclusion: To begin with, it is not easy, nor is it indisputable, to use art. 1107 CC in a non-contractual setting.[14] On the other hand, it is also possible to explain the rule contained within art. 1107 CC by saying that legal causation is established in a more far fetched way when one speaks of intentionally caused harm.[15] This is so because this kind of harm is always undesirable in itself, while negligently caused harm is usually an involuntary by-product of the freedom to act.

II. Specific Legally Based Arguments

7 In the debate among Spanish legal writers, some legally based arguments have been proposed to show that there are some punitive elements in Spanish tort law. Most of these arguments have been proposed by authors who somehow support the idea of a punitive or at least preventive function of the law of

[13] *Martín-Casals* (fn. 6) 1266; *Pantaleón* (fn. 5) Comentario, 1971; *M. Martín-Casals/J. Feliú*, The Protection of Personality Rights against Invasions by Mass Media, in: H. Koziol/A. Warzilek (eds.), Persönlichkeitsschutz gegenüber Massenmedien (2005) 332.

[14] See *F. Pantaleón*, El sistema de responsabilidad contractual, ADC (1991-III) 1023 ff., who explains that art. 1107 CC can only be applied to contractual settings.

[15] *M. Martín-Casals*, Indemnización de daños y otras medidas judiciales por intromisión ilegítima contra el derecho al honor, in: P. Salvador Coderch (ed.), El mercado de las ideas (1990) 394; *Martín-Casals/Feliú* (fn. 13) 332.

torts.[16] In this section, these arguments will be exposed in contrast to the other understanding of these legal provisions offered by the scholars who defend the thesis that the only *normative* function of non-contractual liability rules is merely compensatory.

Therefore, this part begins by exploring some special legal rules on how to assess damages that are contained in the Spanish regulation of the invasion of personality rights, on the one hand, and on the other hand, damages for the infringement of copyright and intellectual property rights. Later on, this part will explain the new French-like "corrective compensation" system introduced in the last version of the Trademarks Act to combat the delayed performance of cessation orders. Finally, it will set out a specific social security law provision called the "surcharge of benefits" (recargo de prestaciones) that is applicable when a labour accident is caused by an employer's non-performance of his legal duties concerning security at the workplace. 8

A. Special Rules on Damages

In this section, special rules on how to assess damages will be presented. As will become evident from the following, in these special rules there are sometimes two underlying problems: how to put a price on non-pecuniary losses and how to distinguish between non-contractual liability rules and the law of unjust enrichment. 9

1. The Protection of Honour, Privacy and Personal Image

One of the provisions used in arguments usually raised by authors who support the preventive or punitive function of non-contractual liability rules is art. 9.3 of the Organic Act 1/1982, of 5 May for the Civil Protection of Honour, Personal and Family Privacy and Image.[17] Pursuant to art. 9.3, "The existence of harm will be presumed whenever an illegitimate invasion is proved. Compensation will extend to non-pecuniary losses. These losses will be assessed by having regard to the circumstances of the case and the gravity of the actual damage caused, taking into account for this purpose the circulation or audience of the media through which it has taken place, if this is the case. The profit that the person who caused the damage has obtained will also be taken into account." 10

The last sentence of this article is the part which is of most interest to us at this stage. Initially, in the first few years after the publication of art. 9.3, there were some legal authors who understood it as meaning that the lawmaker had wanted to introduce a kind of a civil sanction or even punitive damages for the il- 11

[16] See *Reglero* (fn. 3) 83 f. for a minority view.

[17] In Spanish, Ley Orgánica 1/1982 de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen.

legitimate invasion of personality rights into Spanish law.[18] These opinions are sometimes prematurely advanced and without a detailed study of their implications. I think that somehow these authors correctly underscored something new and rather strange (from the point of view of the compensatory function of tort law) in the text of art. 9.3, but I also think that they did not reach the right conclusion. In my opinion, it is remarkable that the author who proposed, in the most detail, the idea that art. 9.3 contained an element of punitive damages immediately felt the need to correct and to limit the text of art. 9.3.[19]

12 Now that legal scholars have overcome the initial surprise, the last sentence of art. 9.3 is seen as a place where the law of torts converges with the law of unjust enrichment.[20] This opinion is based on the following arguments:

(a) Art. 9.3 mentions the "gravity of the damage" as one of the criteria that must be taken into account in the assessment of the amount of damages. As has been pointed out, this element stresses the compensatory character of the award of damages, as it makes the amount dependant on the damage actually sustained by the victim and not on the gravity of the defendant's conduct.[21]

(b) When art. 9.3 mentions the profits obtained by the person who illegitimately invades the claimant's personality rights, it is trying to prevent the tortfeasor from retaining any profits from his wrongful conduct after having paid the judgment to the victim. The lawmaker is trying to make the former refund any profit he could have gained from his wrongful behaviour to the latter. That does not necessarily mean that art. 9.3 creates a private sanction. What art. 9.3 does is try to restore to the victim, the unjust

[18] *J.J. López Jacoiste*, Intimidad, honor e imagen ante la responsabilidad civil, in: Homenaje a J.B. Vallet de Goytisolo, IV (1988) 618; *A. Asúa*, La tutela jurídica del honor. Consideraciones político criminales en relación a la LO 1/1982, in: Estudios penales en memoria del profesor A. Fernández-Albor (1989) 24; *de Ángel* (fn. 4) 261; *X. O'Callaghan*, Libertad de expresión y sus límites: honor, intimidad e imagen (1991) 127; *A. Romero Coloma*, Los bienes y derechos de la personalidad (1985) 117; *M. Yzquierdo Tolsada*, Aspectos civiles del nuevo Código penal (1997) 125 and 371; *S. Muñoz Machado*, Información y derecho al honor: la ruptura del equilibrio, Revista Española de Derecho Administrativo (REDA) 1992, 175.

[19] *Asúa* (fn. 18) 39 and 41. Professor A. Asúa, who, by the way, is a Criminal Law Professor, understood that art. 9.3 aimed to punish the defendant. She immediately felt the need to add to its text that it is only applicable when the defendant acted intentionally; and she also said that art. 9.3 is not applicable to damages assessed in criminal proceedings for injurious falsehood or criminal libel, as she thinks that otherwise the outcome would run against the non bis in idem principle. *Reglero* (fn. 3) 83 f. has a similar opinion. This author thinks that art. 9.3 poses problems owing to the requirement of intent and the need for a specified punishable conduct.

[20] See *Martín-Casals* (fn. 6) 1272 (among others); *Martín-Casals* (fn. 15) 391; *Martín-Casals/Feliu* (fn. 13) 336; *Grimalt* (fn. 3) 146; *T. Vidal Marín*, El derecho al honor y su protección desde la CE (2000) 224; *Herrero-Tejedor* (fn. 12) 304; *M. Yzquierdo Tolsada*, Daños a los derechos de la personalidad, in: F. Reglero Campos (ed.), Tratado de responsabilidad civil (3rd ed. 2006) 1395; *V. Guilarte Gutiérrez*, La superación del empobrecimiento de la víctima como medida indemnizatoria frente a la responsabilidad extracontractual, Revista de Derecho Privado (RDP) 1991, 1030. See a somewhat confusing opinion in *Reglero* (fn. 3) 84 and 93.

[21] *Martín-Casals/Feliú* (fn. 13) 331; *Martín-Casals* (fn. 15) 391; *Vidal Marín* (fn. 20) 224.

enrichment obtained by the tortfeasor at the former's expense.[22] Art. 9.3 can also be explained by the fact that in the Spanish legal system a sanction consisting of the confiscation of profits of corporations and other bodies, similar to the one created for individuals in art. 138 of the Criminal Code, does not exist.[23]

(c) In addition to the problems relating to the constitutional right to due process, if one thinks that art. 9.3 creates a private sanction, one will find quite a few obstacles in his way. The main obstacle is that the law cannot punish anyone who has not acted with fault (nulla poena sine culpa). This could be the outcome if art 9.3 is applied to a case in which an agent infringes a victim's personality rights: in that case, the principal – without necessarily being at fault himself – would be punished for the agent's wrongdoing. On the other hand, the same outcome could be reached if art. 9.3 is applied to a case where the law considers two or more persons jointly and severally liable, as there is no reason to consider that all of them always share the personal fault incurred by the one who invaded the victim's personality rights.[24]

(d) If art. 9.3 aims at prevention, one would have to acknowledge that it is not a very well-designed rule. This is so because an illegitimate invasion of someone's personality rights committed intentionally by the defendant's highly reprehensible conduct will not necessarily mean that the latter will have to pay a big amount of damages, as a well-designed punitive rule should produce. In art. 9.3, highly reprehensible conduct can give rise to a relatively small judgment, because the amount of damages is dependant on the benefits obtained by the tortfeasor, not on the gravity of his conduct.[25]

(e) Furthermore, a well-designed punitive rule should take into account how rich the tortfeasor is – as this would better influence his behaviour – and that is not the case with art. 9.3.[26]

As for the case law, the Supreme Court decisions on art. 9.3 are in agreement with the arguments contained in the previous points and support the view that non-contractual liability rules are compensatory.[27] It must be underscored that the Supreme Court even explained on one occasion that art. 9.3 tries to prevent 13

[22] *Martín-Casals/Feliú* (fn. 13) 336; *M. Yzquierdo*, Sistema de responsabilidad civil (2001) 178; *Yzquierdo* (fn. 20) 1394; *Vidal Marín* (fn. 20) 222; *Herrero-Tejedor* (fn. 12) 305; *Guilarte* (fn. 20) 1030.

[23] *Pantaleón* (fn. 5) Comentario, 1972.

[24] *Martín-Casals* (fn. 6) 1261–1263. See also *Vidal Marín* (fn. 20) 223.

[25] *Martín-Casals* (fn. 6) 1272.

[26] *Martín-Casals* (fn. 15) 393.

[27] See *Grimalt* (fn. 3) 146 to confirm the point. See SSTS of 7 December 1995 (RJ 9268) and of 8 May 1999 as examples of court decisions consistent with the compensatory view of Spanish non-contractual liability rules. *Martín-Casals/Feliú* (fn. 13) 331 underscored that STS 21-5-57 (RJ 1133), a court decision prior to LO 1/1982, considered that damages for non-pecuniary losses aimed to compensate the victim and to punish the tortfeasor simultaneously. Nevertheless, these ideas were obiter dicta and the Supreme Court did not use them after SSTS. See *Herrero-Tejedor* (fn. 12) 304 for the debate in first instance court decisions.

the tortfeasor's unjust enrichment and that a hypothetical judgment in equity to prevent the tortfeasor from repeating the wrongful conduct would be contrary to art. 9 of the aforementioned Organic Act 1/1982.[28]

2. Assessment of Damages in Industrial Property Cases

14 Up until June 2006, a special regime for assessing damages in industrial property law existed in the Spanish legal system. This regime deployed a so-called "triple method for the assessment of damages" that was inspired by the German idea of dreifache Schadensberechnung. It was contained in the Patent Act and the Trademarks Act which were passed in the eighties (LP and LM are their Spanish acronyms).[29] Years later, the triple method for the assessment of damages was also included in the more recent Act for the Legal Protection of Industrial Design (LPJDI is its Spanish acronym).[30] These Acts employed this specific method for the assessment of damages to calculate the amount of money due to the plaintiff as loss of income.

15 In June 2006, these three Acts on industrial property (LP, LM and LPJDI) were reformed to abrogate the so-called triple method for the assessment of damages as is set out infra. Notwithstanding the fact that this triple method is no longer in force in our legal system, we will consider it in some detail, as it has been used by legal experts in the debate on non-contractual liability functions.

16 The so-called triple method for the assessment of damages introduced into our legal system in the 1980s by the LP and the LM consisted of a method to measure the lost profits (lucrum cessans) sustained by the owner of protected rights (a patent or a trademark). He could of course claim for all the losses he had suffered, but the law did not provide any special method to assess the harm already sustained (damnum emergens). As for the lost profits, the triple method entitles the plaintiff to calculate his claim using one of the following three criteria:

(a) The profits that the patent (or trademark) owner would have obtained if the tortfeasor had not used the former's industrial property right.
(b) The profits that the tortfeasor actually obtained through the use of the said right.

[28] STS 7 December 1995 (RJ 9268).

[29] The Patent Act was Act 11/1986, of 20 March (Ley de Patentes; see art. 66). The Trademarks Act was initially Act 32/1988, of 20 November (Ley de Marcas; see art. 38). Both were inspired by the distinction between non-contractual liability and unjust enrichment contained in art. 18 of the Unfair Competition Act (Ley de Competencia Desleal), but it should be highlighted that this Act did not mix the two regulations as the other two Acts did. See *Pantaleón* (fn. 5) Comentario, 1971; *P. Portellano*, La defensa del derecho de patente (2003) 77 ff. The 1988 Trademarks Act was replaced by a new Act in 2001, Act 17/2001, of 7 December (Ley de Marcas), but the method of assessment of damages survived in art. 43 of the new regulation (see *M. Lobato*, Comentario a la Ley 17/2001 de marcas (2002) 703, to confirm this point).

[30] It was the Act 20/2003, of 7 July (Ley de protección jurídica del diseño industrial). Its art. 55 regulated the assessment of damages.

(c) The price that the tortfeasor would have been obliged to pay, had he sought authorisation from the right holder to use the patent (or trademark).

The first criterion is simply the usual definition of lucrum cessans and therefore pertains unquestionably to the domain of the law of non-contractual liability. On the contrary, the other two criteria are completely foreign to the law of torts. It is almost unanimously held that the lawmaker brought them into the method used to assess lost profits because of the difficulty of proving this kind of loss in an industrial property rights setting and because of the Spanish Supreme Court's stringent attitude towards awarding damages for lost profits.[31] 17

As many legal experts assert, the last two options electable in the assessment of lost profits in the LP and LM pertain to the unjust enrichment domain of the law.[32] The same can be said of the case law, notwithstanding the fact that court decisions are not always able to make a sharp division between this part of the legal system and the law of non-contractual liability.[33] In any case, it has to be highlighted that the rules contained both in the LP and LM have caused a huge debate on what the prerequisites for and the consequences of their application are. For example, it is not clear whether fault or intent play a role, whether the Acts are compatible with the application of the general rule that forbids unjust enrichment and so on.[34] This confusion is not surprising at all if we recall that the triple method of damages assessment was created by German case law at a time when the frontier between non-contractual liability and unjust enrichment 18

[31] See *Portellano* (fn. 29) 55 to confirm that point. See also *J. Pedemonte Feu*, Comentarios a la ley de patentes (2nd ed. 1995) 184 and 186; *S. Ferrandis González* et al., Comentarios a la Ley de Marcas (2002) 201; *C. González Bueno*, Comentarios a la ley y al reglamento de marcas (2003) 435; *Lobato* (fn. 29) 696; *C. Fernández-Nóvoa*, Tratado sobre Derecho de marcas (2nd ed. 2004) 503 and 505; *J. Martí Miravalles*, Los presupuestos de la acción indemnización por daños y perjuicios en la ley 17/2001, de 7 de diciembre, de Marcas, Revista Jurídica de Cataluña (RJC) 2007-III, 72; *V. Guix Castellví*, Propiedad industrial. Teoría y práctica (2001) 65, to confirm again that way of thinking among the legal experts writing on patent law and on trademarks law. As for the case law, see, for example, a very restrictive decision in STS 22 June 1967 and, on the contrary, a much more flexible holding in STS 8 July 1996.

[32] Professor L. Díez-Picazo was probably the first scholar to perceive the LP and LM as using criteria extracted from the law of unjust enrichment. See in this sense, *L. Díez-Picazo/M. de la Cámara*, Dos estudios sobre el enriquecimiento sin causa (1988) 125. In the same line of thinking, *Pantaleón* (fn. 5) Comentario, 1973; *Massaguer*, "Acciones por violación del derecho de marca" in Enciclopedia Jurídica Básica EJB (1995) 117; *Portellano* (fn. 29) 77, and among others, *Lobato* (fn. 29) 699 and 701, *Fernández-Nóvoa* (fn. 31) 514, *R. Gimeno-Bayón Cobos*, Las acciones por violación del derecho de marca en la ley 17/2001. Especial consideración de la indemnización por daños y perjuicios, in: Consejo General del Poder Judicial (CGPJ), Ley de Marcas (2004) 63. For his part, *Basozabal* (fn. 12) 1297 has underscored that the third option of both the LP and LM is an alternative way of measuring an unjust enrichment that somehow has a punitive nature, as the usual way of measuring unjust enrichment does not always allow the extraction of gains obtained by a party who unjustly uses another's rights.

[33] See *M. Baylos/P. Merino*, Doctrina jurisprudencial sobre indemnización de daños y perjuicios en propiedad industrial e intelectual, in: Homenaje a A. Bercovitz. Estudios sobre propiedad industrial e intelectual y derecho de la competencia (2005) 117. See, for example, STS 21 February 2003.

[34] See *Basozabal* (fn. 12) 1292 ff. and *Portellano* (fn. 29) 68 for more on the debate.

was not yet well established. The dreifache Schadensberechnung was – even in Germany – considered a practical mechanism that could be comfortably useful for judges, but that was dogmatically not well constructed at all.[35]

19 As well as the LP and LM, Spanish legal writers have often underscored that the Literary Property Act (LPI is its Spanish acronym) also contains a special method for assessing the loss of profits caused by a violation of literary property rights. In the successive texts that the amended versions of the LPI devoted to that question, the right holder, when it came to calculating his claim, could always make a choice between the benefits that he himself could have obtained if the defendant had not infringed his right and the price that the former would have received if he had given authorisation to the latter to use the right.

20 Legal doctrine underscores that in literary property law the triple method of assessing damages was only − what we can call − a double method.[36] Some legal writers argued that in the LPI the hypothetical licence price was an abstract assessment of damages: something that probably is not consistent with the idea of a general clause as the basis of our system of non-contractual liability.[37] The most frequent comment on this LPI option was that it was aimed at fighting against the restrictive approach of the Spanish courts when it came to awarding lost profits as damages and, in the second place, to help the plaintiff to shoulder the burden of proof of that harm.[38] The closeness of this rule with the German dreifache Schadensberechnung was also stressed in the doctrine.[39]

3. The Current Situation in Industrial and Literary Property Law

21 The rules for assessing damages in the case of a violation of industrial and literary property rights were changed by Act 19/2006, of 5 June (passed to implement the 2004/48/EC Directive of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights). Now the rules devoted to the assessment of damages are basically the same

[35] *Basozabal* (fn. 12) 1272, 1282, 1286, 1295 f. For his part, *Portellano* (fn. 29) 76, explains that the triple method of damages assessment is completely discredited nowadays.

[36] *L. Díez-Picazo*, Comentario al art. 125, in: R. Bercovitz (ed.), Comentarios a la Ley de propiedad intelectual (1989) 1695; *R. Bercovitz*, Manual de propiedad intelectual (2001) 267 and *M. Yzquierdo/V. Arias Máiz*, Daños y perjuicios en la propiedad intelectual (2006) 79. Even under the new LPI, *M. Clemente Meoro*, Comentario al art. 140, in: J.M. Rodríguez Tapia (ed.), Comentarios a la Ley de propiedad intelectual (2007) 811. Notwithstanding the differences between the triple method used in the LP and LM and the double method used in the LPI, claimants sometimes opt for the profits made by the infringer. See STS 2 December 1993 (RJ 9483), STS 29 December 1993 (RJ 10161), STS 23 October 2001 (RJ 8660).

[37] For that line of thinking see *A. Carrasco*, Comentario al art. 135, in: R. Bercovitz, Comentarios a la Ley de propiedad intelectual (2nd ed. 1997) 1790 (see also p. 1693 of the 2007 ed.); *Yzquierdo/Arias Máiz* (fn. 36) 80; *J.A. Vega Vega*, Protección de la propiedad intelectual (2002) 399.

[38] *J.M. Rodríguez Tapia*, Comentario al art. 135, in: J.M. Rodríguez Tapia/F. Bondía, Comentarios a la Ley de propiedad intelectual (1997) 515; *Carrasco* (fn. 37) 1792.

[39] *Yzquierdo/Arias Máiz* (fn. 36) 237; *Carrasco* (fn. 37) 1790.

both in the industrial property rights setting and in the literary property rights setting. Pursuant to the new texts of the LP, LM, LDJDI and LPI introduced by the said Act 19/2006, when it comes to assessing damages (in general, not only for lost profits) caused through an infringement of intellectual property rights, the right holder has to make a choice between:

(a) The negative economic consequences, including lost profits suffered by the injured party and any profits made by the infringer through the unfair infringement.
(b) The amount of money that the injured party would have received if the infringer had requested authorisation to use the intellectual property right in question.

Spanish legal writers say that option (a) allows recourse to the profits made by the infringer of the right in question in order to help the plaintiff prove the loss of profits that he sustained. The idea is that, if the infringer has made some profits through the use of the infringed intellectual property right, the right holder himself could have also made them.[40] Such an understanding of the rule is consistent with the compensatory function of non-contractual liability and, secondly, it attends to a problem almost unanimously underscored as very significant in industrial and literary property, i.e. the difficulty of proving the harm sustained by the right holder caused by the infringement of his rights. 22

Option (b) of the Act is again a criterion that pertains to the unjust enrichment domain of the legal system. Hence, the comments that were stated in the section devoted to the so-called triple method for damages assessment could be reproduced here. 23

Notwithstanding the fact that we do not have many legal writers who have studied the new provisions yet, it seems that the debate on the functions of non-contractual liability rules has no reason to change now, as the new texts still permit us to defend the more frequently upheld compensatory nature of these rules.[41] 24

B. Two Special LM Provisions

In the 2001 reform of the Trademarks Act, two special provisions were introduced both of which can be related to the debate on the functions of non-contractual liability rules. 25

[40] *Clemente Meoro* (fn. 36) 812. For his part, *Carrasco* (fn. 37) 1699 also believes that this is probably the intended meaning of the rule. In any case, the idea that the text mixes two of the three criteria previously used by the LP and the LM together (i.e. the profits that the owner would have obtained and the profits already earned by the infringer) should be abandoned. A literal interpretation of the legal texts show that this idea is not defensible. Nevertheless, see *E. Galán Corona*, Notas de urgencia sobre las recientes modificaciones legislativas que afectan a las patentes, Actas de Derecho Industrial y Derecho de Autor, vol. 26 (2005–2006) 473.

[41] *Clemente Meoro* (fn. 36) 813 thinks that the new text introduced in the LPI does not mean to change the compensatory function of civil liability.

(a) Pursuant to art. 43.5 of the LM, "The right holder of a trademark which the court considers has been infringed has, without providing any proof of harm, the right to claim damages of up to 1% of the profits made by the infringer through the use of the illegally marked goods. Additionally, the said right holder can also claim a greater award of damages if he proves that the trademark infringement caused him greater harm." In general, legal experts have justified this subparagraph of art. 43 by the need to ease the right holder's burden of proving lost profits.[42]
(b) Pursuant to art. 44 of the LM, whenever a court decision prohibits a trademark infringement, the court will award damages for any delay in the cessation of infringement of up to € 600 per day. The LM itself calls that figure "coercitive damages" and legal experts have underscored that it is a sanction, but that the money is paid to an individual and not the state.[43]

C. The Surcharge of Benefits

26 The authors who maintain that Spanish civil liability has some punitive or at least preventive features have also proposed an argument based on a social security law device called the surcharge of benefits.[44] Art. 123 of the General Act on Social Security (LGS is its Spanish acronym) provides as follows:

> **Art. 123: Surcharge of benefits**
>
> 1. All benefits paid out following a labour accident or professional illness will be increased by 30–50%, depending on the gravity of the wrongdoer's fault, whenever the said harm was caused: by engines, machines and pieces of equipment; in centres and workplaces that do not have precautionary devices established by regulatory law; or where these devices are in a unusable state; or when the safety and hygiene practices or the elementary salubrity or the adequacy between employee and his position have been violated.
>
> 2. The employer is directly accountable for the liability that arises under the previous section. He cannot insure against it and any contract made to transfer or set it off will be deemed void.
>
> 3. The liability provided for in this article is independent from and may be imposed in addition to any other liability, whether criminal or otherwise, that may arise from the same wrong.

[42] *Lobato* (fn. 29) 704 f.; *Fernández-Nóvoa* (fn. 31) 515; *Gimeno-Bayón* (fn. 32) 86; *Baylos/Merino* (fn. 32) 115. En contra, *M.M. Naveira Zarra*, La Ley de Marcas de 2001, RDP 2003, 400. For his part, *Martí Miravalles*, RJC 2007-III, 81 ff. believes that harm has to be proved in any case.

[43] *Fernández-Nóvoa* (fn. 31) 510, *Lobato* (fn. 29) 705 and, less clear, *Ferrandis Gonzales* (fn. 31) 206 y *González Bueno* (fn. 31) 442–444. On the contrary, *Naveira Zarra*, RDP 2003, 401–407 thinks that art. 44 of the LM is a crowbar that can change the functions of non-contractual liability.

[44] See *P. Salvador*, Punitive Damages, InDret 2000, 4.

The figure established in art. 123 LGS consists of a surcharge that an employer has to pay and it increases the benefits that an employee receives because of an accident. In practice, the employer makes a lump sum payment to the social security fund and this sum is calculated so as to ensure the increased periodical payments of benefits to the injured worker.[45] 27

This surcharge of benefits seems to have dual characteristics since it seems compensatory if one looks at the fact that the payment is received by the victim,[46] but it seems punitive if one takes into account: (a) the fact that it is the government that imposes the sanction – hence the figure resembles the administrative sanctions that exist in Spanish law; (b) the fact that the surcharge is not insurable; and (c) the fact that the surcharge may end in the victim receiving a payment of an amount of money that is greater than the harm he has sustained.[47] 28

Those contradictory features have led labour law scholars to a lengthy and detailed debate and they have not yet arrived at a clear outcome.[48] Hence, some of them believe that the surcharge of benefits is a punitive sanction, some believe that it is a compensatory calculation (this opinion is especially held by authors who consider the said surcharge to be a statutorily created penalty clause) and some believe that it is ambiguous.[49] 29

As for the case law, court decisions were also affected by the debate for a long time, but recently the Supreme Court decision of 2 October 2000 (RJ 9673) has 30

[45] As *J. Mercader Uguina*, Indemnizaciones derivadas del accidente de trabajo. Seguridad social y Derecho de daños (2001) 141, states.

[46] As explained by *A. Desdentado/A. de la Puebla*, Las medidas complementarias de protección del accidente de trabajo a través de la responsabilidad civil del empresario y del recargo de prestaciones, in: B. Gonzalo González/M. Nogueira Guastavino, Cien años de Seguridad Social (2000) 655. The same idea is stated in *J. López Gandía/J.F. Blasco Lahoz*, Curso de prevención de riesgos laborales (3rd ed. 2003) 215.

[47] On this, see *Desdentado/de la Puebla* (fn. 46) 655. It should be noted that, according to some legal writers, a recent Act (Ley de prevención de riesgos laborales) has repealed the prohibition on insuring against the surcharge of benefits. Nevertheless, they represent the minority. See *A. Desdentado*, El recargo de prestaciones de la seguridad social y su aseguramiento. Contribución a un debate, 21 Revista de Derecho Social (RDS) 2003, 18 for more information.

[48] See *Mercader Uguina* (fn. 45) 137 to confirm this point. The debate has reached the Spanish Constitutional Court. Initially, the STC 158/1985 decision considered that the surcharge of benefits was of a punitive nature; from a more conservative perspective, the STC 81/1995 decision provides that it is not necessary to decide whether the surcharge is an administrative sanction or not.

[49] See *Mercader Uguina* (fn. 45) 142 and *Desdentado/de la Puebla* (fn. 46) 652 f., who confirm the point. Nevertheless, probably the majority of labour law experts believe that the surcharge has a mixed nature. See *M. Luque Parra*, El aseguramiento del recargo de prestaciones por incumplimiento del deber de prevención de riesgos laborales, Revista Española de Derecho del Trabajo, no. 96/1999, 541, to confirm that point. One can also find this conclusion in many legal texts. See *M. Alonso Olea/M.E. Casas Baamonde*, Derecho del trabajo (24th ed. 2006) 282; *J. López Gandía/Blasco Lahoz* (fn. 46) 216; *M.B. Fernández Docampo*, Seguridad social y salud laboral en las obras de construcción: obligaciones y responsabilidades (2003) 252.

changed the scenario.[50] This decision provides that the goal of art. 123 LGS is to encourage employers to adopt the safety measures to which the LGS refers. Therefore, the paid surcharge should not be discounted from the amount of money awarded to the victim because of the accident. This court decision has been criticised by many legal experts.[51] It is clear that it was heavily debated – if one considers that it was decided by a majority of nine to seven judges and that it contains a dissenting opinion.

31 To understand the nature of the surcharge of benefits correctly, one should take into account historic data which reveals that the surcharge was initially created to play a compensatory role.

32 As with many other European systems, the social security scheme was conceived as a compensation scheme that worked irrespectively of the employer's fault but with a cap on the damages finally awarded to employees and with an exclusion of the ordinary civil action for damages.[52] These ideas were balanced on top of each other so that employees could benefit from the relatively quicker and easier payments due to the strict liability (or even no-fault) scheme and, for their part, employers could benefit from limited liability and from the fact that workers could not resort to the common civil action for damages (ex art. 1902 CC). The 1890 Labour Accidents Act introduced a similar scheme to the one just mentioned. However, the surcharge of benefits established under the Act made the awards closer to the amount of damage suffered in the case of an accident negligently caused by machines used without safety devices.[53] It is also worth noting that the aforementioned 1890 Act did not provide for administrative sanctions for accidents caused by unsafe machines. Therefore, in those days there was no problem with the non bis in idem principle.[54]

33 Things were more or less clear and balanced in those days, but things began to change as time moved on. Slowly but steadily, the Spanish law of non-contractual liability developed more statutes imposing strict liability (and compulsory insurance) and more and more court decisions imposing a de facto strict liability regime arose.[55] In that new setting, the limited liability applicable to employers began to be seen as a privilege without justification.[56] That is why the Articulated Social Security Act (Ley articulada de la Seguridad Social) 21 April 1966, following the precedents of some statutes passed in the 1930s,

[50] As *Desdentado*, 21 RDS 2003, 13 explains.
[51] *Mercader Uguina* (fn. 45), passim.
[52] This is explained by *Desdentado/de la Puebla* (fn. 46).
[53] *A. Desdentado*, El recargo de prestaciones y el complejo de Robin Hood, Diario La Ley (January 2008); *Reglero* (fn. 3) 85. For an older opinion, *H. González Rebollar*, La Ley de accidentes de trabajo. Estudio crítico de la española de 30 de enero de 1900, de su reglamento y disposiciones concordantes comparadas con las principales legislaciones extranjeras (1903) (quoted by *J. Mercader Uguina* (fn. 45) at 138).
[54] Pointed out by *Mercader Uguina* (fn. 45) 138.
[55] On those developments, the best quotation in Spanish legal doctrine is still *S. Cavanillas Múgica*, La transformación de la responsabilidad en la jurisprudencia (1987), passim.
[56] See *Desdentado/de la Puebla* (fn. 46) 642.

made the surcharge of benefits compatible with the common non-contractual civil action. In that way, the initial compensatory nature of the surcharge became increasingly hidden and its punitive features became more visible.[57]

34 In any case, if one decides to accept the punitive nature of the surcharge of benefits, one has to also acknowledge the very bizarre way it works as a punishment. As Professor A. Desdentado has highlighted, the surcharge of benefits is somehow aleatory and somehow disproportionate.[58] It is aleatory, in the first place, because it can only work when there are benefits to be paid by the social security scheme. If there is no payment of social security benefits, the reprehensible character of the employer's conduct will have no consequences because the (supposed) punishment is calculated as a surcharge of benefits that simply do not exist. Secondly, the surcharge is disproportionate because it is dependant on how great the benefits are and not on the gravity of the employer's conduct. If the injured worker is entitled to benefits of a considerable amount, the surcharge will also be considerable even if the accident was caused by slight fault. Conversely, if the injured worker is only entitled to a small amount of benefits, the surcharge will also be small, even if the accident was caused by the employer's gross negligence. It is true that the oscillation between 30–50% foreseen in art. 123 LGS can help to correct this, but it is also certain that the system would have been better designed if it had been initially conceived as punitive (which is not the case, as we have already seen).

III. Other Arguments

35 Along with the legally based arguments explored supra, another set of arguments have been put forth by authors with opinions from an economic analysis of law perspective. Their arguments can be summed up as follows:

(a) Every penalty imposed by the law aims to punish the criminal and to deter him (and the rest of society) from repeating his crime, but not every legal measure imposed to teach the tortfeasor is of a punitive nature.[59]
(b) The preventive function of the law of torts is not unknown in our legal system. The fact that the negligence test, usually employed in non-contractual liability, pays attention to what a reasonable person in the same circumstances would have done, indicates that the ex-ante view of events – which is a typical facet of preventive rules – is not alien to tort law. As one legal writer put it, "one who was not careful enough will have to pay damages (and therefore he will be careful from then on)."[60]
(c) These authors, who may be adopting an implicit common law point of view about non-pecuniary harm, also insist on what they call the *symbolic*

[57] See *Mercader Uguina* (fn. 45) 160 and *Reglero* (fn. 3) 85. In spite of the statutory declaration of compatibility, the debate grew on the question of whether or not to discount the surcharge of benefits from damages paid to the victim. For that, *Mercader Uguina* (fn. 45) 152–157.
[58] *Desdentado*, Diario La Ley 2008.
[59] *Salvador/Castiñeira* (fn. 1) 161.
[60] Ibid. at 106, fn. 20.

function of non-contractual liability. They explain that under the common law, punitive damages are said to perform a punitive, preventive and symbolic function and they believe that one can reject their punitive aspects – as civilians usually do – without neglecting their preventive and symbolic aspects.[61]

(d) These authors also underscore the different tools that the legal system can invoke to enforce the law. From this point of view, sometimes it is better to equip the victim with the tools to make the legal system work: for example, if the victim can easily identify the tortfeasor and collect, as damages, all the social harm caused, a private mechanism of law enforcement would be advisable and would avoid social costs.[62]

IV. Difficulties and Plays on Words

36 In the debates held by Spanish legal writers on the functions of non-contractual liability, a set of easily identifiable problems have played a significant role on the one hand and on the other hand, a "play on words" has also obscured the debate. Let us postpone the latter and begin with the real difficulties:

(a) The difficulty of measuring non-pecuniary losses plays a considerable role in the debate. The fact is that one can more or less easily assess the pecuniary harm sustained by a victim and therefore try to fully restore them to the position they were in before the harm occurred but, on the contrary, it is more difficult to quantify harm sustained by the victim to his personality or other non-pecuniary harm. When dealing with this kind of non-pecuniary harm, the best thing to do is to acknowledge its special nature and to look for what can be called a *reasonable* compensation. It has long been settled, and is even expressly stated in some European Civil Codes, that the full restoration principle that is applicable to pecuniary losses (restitutio in integrum) should be considered as a principle of reasonable compensation when speaking of non-pecuniary harm. Things being such, it seems apparent that, when the exact price of assets damaged by a tortfeasor cannot be ascertained, it is also impossible to tell whether an award of damages is larger (and, thus, of a punitive nature) than the harm sustained by the victim. In the case of physical harm, another additional difficulty may arise: namely, the problem of how to measure long-term loss of earnings.[63]

(b) The obscure distinction between unjust enrichment and non-contractual liability may also play a role in the debate, as we have seen in no. 14 ff. supra on intellectual property rights. Hence, a relatively large damages award

[61] *P. Salvador*, InDret 2003, 14.

[62] *P. Salvador*, InDret 2003, 19. The same line of thinking can be seen in *Reglero* (fn. 3) 82. See criticisms in *Pantaleón* (fn. 5) Cómo repensar la responsabilidad, 441 f.

[63] In the specific field of the so-called surcharge of benefits, in addition to the problems of how to asses non-pecuniary losses and how to assess the loss of earnings in the long-term, some other questions make even more difficult the understanding of the problems that it poses; namely, the problem of the competence of civil law or labour law courts and the problem of distinguishing between contractual and non-contractual liability.

can be justified not only because liability rules perform a punitive function but also because rules which seek to avoid the unjust enrichment of the tortfeasor are applied.

(c) The difficult – and ill-examined – question of how the problem of wrongfulness in our civil liability system is understood also plays a role in this debate.[64]

Alongside the real difficulties posed when it comes to discussing non-contractual liability functions, some other problems of minor importance may also arise. One can underscore the following problems that sometimes look like real plays on words: 37

(a) Every civil liability rule is punitive in nature if we call every unfavourable legal consequence a "private or civil sanction" (sanción civil).[65]
(b) The law of damages is not only called to perform a compensatory function, if we call it the "law of accidents": therefore, non-contractual liability rules are combined with other branches of the legal system (e.g. regulatory law) that obviously perform a preventive function.[66]
(c) Some legal writers thought that it was necessary to support the preventive function of non-contractual liability rules so as to introduce the economic analysis of law perspective into Spanish legal culture.[67]
(d) It is not easy to know whether it is a cause or an effect of the difficulties or the choise of words used in this debate, but it is true that one can find arguments by authors who support the compensatory function of the civil liability rules mixed with conclusions supported by the preventive way of thinking.[68]

V. Conclusions

After a period of intense debate, in Spain, most legal experts believe and the jurisprudence currently suggest that the only *normative* function that non-contractual liability rules perform is a compensatory one. They do not doubt that these rules can have a practical influence on the behaviour of individuals, but they understand this as a secondary and indirect (as opposed to normative) function. In Spanish legal doctrine, there are also some authors who support the preventive function of civil liability, but they are in the minority. 38

The legally based arguments that have been proposed in this debate (see supra no. 7 ff.) are based on abrogated rules in some cases and all of them are of a marginal character. Hence, it seems hard to believe that one can base a reflec- 39

[64] As *Pantaleón* (fn. 5) Cómo repensar la responsabilidad, 440 points out. Compare to *J.M Pena López*, Función, naturaleza y sistema de la responsabilidad civil aquiliana en el ordenamiento jurídico español, RDP 2004, 181–182.
[65] As *Pena López* (fn. 64) 180 ff. does.
[66] Compare to *de Ángel* (fn. 4) 231.
[67] *Salvador/Castiñeira* (fn. 1) 9.
[68] See *Reglero* (fn. 3) 82 and 94 and *Naveira Zarra*, RDP 2003, 377, among others.

tion on the functions of non-contractual liability on such special rules instead of basing it on the system's general rules. Also, the difficulties of measuring non-pecuniary losses – or the difficulties of distinguishing between civil liability and unjust enrichment – do not seem to justify abandoning the traditional (and compensatory) view of Spanish civil liability law. On the other hand, considering that the best part of Spanish legal doctrine has spent years trying to help the judiciary justify their court decisions and keep the general clause that is the basis of our civil liability system (art. 1902 CC) under control, to allow Spanish judges the possibility of taking the morally reprehensible nature of a defendant's conduct into account does not seem advisable at all.

40 Other arguments that favour the use of civil liability rules for preventative purposes seem to be of more weight, namely arguments on the inadequacy of current enforcement provisions and their underlying legal policies.[69] In a way, those arguments can be summarised by saying that "if criminal law does not work at all and administrative sanctions do not work properly, something must be done in private law."[70]

41 It is not easy to know what private law can and should do once it is seen as a law enforcement measure. In any case, it should be highlighted that the idea that the only normative function of civil liability is compensatory does not mean that it is something dependant on natural law and something that the lawmaker cannot change. Within the limits set by the Constitution, the lawmaker can of course do what it wants. Hence, if the lawmaker wanted to introduce private sanctions in Spanish law, it should be careful to avoid problems that may arise (e.g. the problems associated with the triple method of damages assessment or the surcharge of benefits) due to the fact that the whole system has been designed with the compensatory function of non-contractual liability in mind. Otherwise, if a new legislative instrument does not take this into account, it will probably not fit in with the other parts of the legal system. This is probably what justifies the idea that the only normative function of civil liability is compensatory.

[69] See *P. Salvador/J. Piñero/A. Rubí*, InDret October 2003, passim.

[70] As *Yzquierdo/Arias Máiz* (fn. 36) 182 put it, in the context of infringements of literary property rights.

Punitive Damages in the United States

Anthony J. Sebok[*]

I. Introduction

A. General Themes

According to black letter doctrine, punitive damages "are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."[1] A jury (or judge, under some circumstances) may, in its discretion, render punitive damages in cases in which the defendant is found to have injured the plaintiff intentionally or maliciously, or in which the defendant's conduct reflected a conscious, reckless, wilful, wanton, or oppressive disregard of the rights or interests of the plaintiff. No state allows punitive damages on a showing of simple or mere negligence. Punitive damages may be assessed against an employer vicariously for the misconduct of its employees, although some states restrict such awards to instances where a managing officer of the enterprise ordered, participated in or consented to the misconduct. The amount of a punitive damages award is determined by the jury upon consideration of the seriousness of the wrong, the seriousness of the plaintiff's injury, and the extent of the defendant's wealth. 1

Five states prohibit common law punitive damages: Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington. Louisiana is a Civil Code jurisdiction that refused to recognise punitive damages, except as statutorily authorised. Nebraska and New Hampshire are common law jurisdictions that refused to adopt the remedy of punitive damages entirely. Massachusetts and Washington are common law jurisdictions that do not recognise punitive damages except as may be recovered under specific statutory authorisation (see Annex). In recent years there has been such a flurry of limitations on punitive damages in individual states that the form and content of punitive damages varies tremendously from state to state.[2] 2

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[1] Restatement (Second) of Torts § 908 (1979).

[2] See *M.L. Rustad*, The Closing of Punitive Damages' Iron Cage, Loyola of Los Angeles Law Review (Loy. L. A. L. Rev.) 28 (2004–05) 1297.

3 Punitive damages are currently one of the most controversial features of American tort law. How punitive damages are awarded under state and federal laws has been the subject of eight U.S. Supreme Court decisions since 1989, and the latest decision by the Court, *Philip Morris v Williams*, has left unanswered certain key questions about the rules under which the states are constitutionally required to operate.[3] Furthermore, punitive damages are cited by some as one of the chief reasons why defendants – corporate defendants in particular – view the American tort system as capricious and hostile.[4] On the other hand, punitive damages are often also cited by some as a signal virtue of the American tort system and a necessary and unique mechanism to protect its citizenry (especially against the risk of corporate malfeasance).[5]

4 There are four important features about the American system of punitive damages which should be kept in mind when looking at the details of the doctrine. First, although American punitive damages doctrine has grown out of the common law, it has developed independently of other Commonwealth nations and it has experienced significant change within the history of American law.[6] Second, the federal system of the United States – with fifty state jurisdictions and a parallel system of federal statutes – has produced remarkable diversity within the United States.[7] Third, despite the diversity produced by the various state jurisdictions, the federal constitution has the potential to significantly limit the range of experimentation that states might produce, and this potential has been increasingly realised in recent years.[8] Finally, punitive damages are awarded quite rarely and predictably – typically in amounts that are modest compared to the compensatory damages upon which they are based.[9] This introduction will conclude with a statistical picture of the "real world" of contemporary punitive damages.

B. A Statistical Overview

5 Despite criticisms that have been mounting over the past twenty-five years, there is little reason to believe that punitive damages are awarded frequently, in large amounts, or randomly.[10] Judges and juries awarded punitive damages

[3] See infra Part V.

[4] *V.E. Schwartz* et al., Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures, Brooklyn Law Review (Brook. L. Rev. 65) (1999) 1003, 1004 (describing punitive damages in many states as "[j]ackpot justice").

[5] See, e.g., *T. Koenig/M.L. Rustad*, In Defense of Tort Law (2001) 176–201.

[6] See *A.J. Sebok*, What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today, Chicago-Kent Law Review (Chi.-Kent L. Rev.) 78 (2003) 163.

[7] See *L.L. Schlueter*, Punitive Damages (5th ed. 2005) (two volume comprehensive survey of fifty state jurisdictions and punitive damages under federal statute).

[8] See *M.L. Rustad*, Happy No More: Federalism Derailed by the Court That Would be King of Punitive Damages, Maryland Law Review (Md. L. Rev.) 64 (2005) 462.

[9] See *A.J. Sebok*, Punitive Damages: From Myth to Theory, Iowa L. Rev. 92 (2007) 957.

[10] See *TXO Prod. Corp. v Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting); *Pac. Mut. Life Ins. Co. v Haslip*, 499 U.S. 1, 61 (1991) (O'Connor J., dissenting); and Vice President *D. Quayle*, Civil Justice Reform, American University Law Review (Am. U. L. Rev.) 41 (1992) 559, 564.

infrequently in the recent past, and there is no evidence that this frequency has recently increased. Major surveys reviewing punitive damages since 1985 reveal that, on an absolute basis, factfinders have awarded punitive damages in 1%–5% of all cases in which a verdict was rendered.[11] Furthermore, no study has reported an increase in the rate of punitive damages awards in litigated cases in recent years.[12] Punitive damages are not typically very large.[13] Studies in the 1980s and 1990s placed the median for punitive damages awards between $ 38,000 and $ 52,000 per award.[14] The mean awards were, of course, very different from the median: For example, according to a Department of Justice study, the median punitive damages award in 1992 was $ 50,000, and the mean award was $ 735,000.[15] This illustrates the effect of the rare multi-million dollar award.[16] Nor have punitive damages awards dramatically increased in recent years. Median punitive damages awards have not grown over time and the rate of increase of mean punitive damages awards has not been increasing relative to the growth in damages overall.[17] The only area where damages seem to have increased over time is in the area of financial-injury torts, where a RAND Corporation study reported an increase in median awards from $ 196,000 to $ 364,000 between the periods of 1985 to 1989 and 1990 to 1994.[18] Furthermore, the ratio between compensatory and punitive damages is not especially

[11] See *Sebok*, Iowa L. Rev. 92 (2007) 964 n.19 (collecting sources) and see *E. Moller*, Trends in Civil Jury Verdicts Since 1985 (1996) 33–35; *S. Daniels/J. Martin*, Myth and Reality in Punitive Damages, Minnesota Law Review (Minn. L. Rev.) 75 (1990) 1, 31; *T. Eisenberg* et al., Juries, Judges, and Punitive Damages: An Empirical Study, Cornell L. Rev. 87 (2002) 743, 749; *B.J. Ostrom* et al., A Step Above Anecdote: A Profile of the Civil Jury in the 1990s, Judicature 79 (1996) 233, 238–39; *T.H. Cohen*, U.S. Dep't of Justice, Doc. No. NCJ-208445, Punitive Damages Awards in Large Counties, 2001 (2005) 3; *C.J. DeFrances/M. F.X. Litras*, U.S. Dep't of Justice, Doc. No. NCJ-173426, Civil Trial Cases and Verdicts in Large Counties, 1996 (1999) 9; *C.J. DeFrances* et al., U.S. Dep't of Justice, Doc. No. NCJ-154346, Civil Jury Cases and Verdicts in Large Counties (1995) 6.

[12] *Moller* (fn. 11) 34; *E.K. Moller* et al., Punitive Damages in Financial Injury Jury Verdicts, Journal of Legal Studies (J. Leg. Stud.) 28 (1999) 283, 306–08; *N. Vidmar/M.R. Rose*, Punitive Damages by Juries in Florida: In Terrorem and in Reality, Harv. J. on Legis. 38 (2001) 487, 492.

[13] Absent a theory of what amounts are justified or warranted by the law, it may be the case that punitive damages awards of any amount might be considered too high, but this is a specious argument.

[14] *DeFrances/Litras* (fn. 11) 9 tbl.8; *DeFrances* et al. (fn. 11) 8 tbl.8; *S. Daniels/J. Martin*, Minn. L. Rev. 75 (1990) 42; *Eisenberg* et al., Cornell L. Rev. 87 (2002) 749; *B. Ostrom* et al., Judicature 79 (1996) 239. In 2001, the median had fallen to $ 50,000. See *Cohen* (fn. 11) 4 tbl.2.

[15] *DeFrances* et al. (fn. 11) 8 tbl.8. In 1996, the median punitive damages award was $ 40,000 (no data was given for mean award). See *DeFrances/Litras* (fn. 11) 9 tbl.8.

[16] *DeFrances* et al. (fn. 11) 8 tbl.8. 79% of all the punitive damages awards were less than $ 250,000 in 1996. See *DeFrances/Litras* (fn. 11) 9 tbl.8.

[17] *M. Peterson* et al., Rand Corp. Inst. For Civil Justice, Punitive Damages: Empirical Findings (1987) 18 fig.2.2; *Daniels/Martin*, Minn. L. Rev. 75 (1990) 52, 59–60; *T. Eisenberg*, Engle v. R.J. Reynolds Tobacco Co.: Lessons In State Class Actions, Punitive Damages, and Jury Decision-Making Damage Awards in Perspective: Behind the Headline-Grabbing Awards in Exxon Valdez and Engle, Wake Forest L. Rev. 36 (2001) 1129, 1138–39; *N. Vidmar/M.R. Rose*, Harv. J. on Legis. 38 (2001) 494.

[18] *Moller* et al., J. Leg. Stud. 28 (1999) 308. In the same period the median ratio of punitive damages to compensatory damages declined, which means that the compensatory awards were increasing faster than punitive awards in these suits.

large. Although there were reports of certain cases with extraordinarily high ratios between the punitive and compensatory awards, these cases were very rare and courts often reduced them on appeal.[19] As recent research has shown, the size of punitive damages awards, while not invariably fixed, is predictably determined by the size of the compensatory award.[20] This research has shown that the vast majority of awards for punitive damages cluster, in which the ratio (mean or median) is between 0.88 and 0.98 punitive to compensatory – that is, roughly a 1:1 ratio.[21]

6 Punitive damages awards are somewhat predictable. Punitive damages are awarded much more often in certain types of torts than others. For example, in recent years, medical malpractice and products liability cases have exhibited the lowest frequency of punitive damages among all types of civil actions for which punitive damages are available.[22] The highest frequency of punitive damages awards have occurred in intentional torts (battery, assault, etc.), defamation, and what many refer to as "financial torts" (fraud, insurance, employment, real property, contract, and commercial and consumer sales).[23] Financial tortfeasors have been the second most frequently punished defendants, after intentional tortfeasors.[24] All in all, according to the RAND Corporation, 85% of all punitive damages verdicts have arisen from two kinds of cases: intentional torts and financial injury.[25] Personal injury due to gross negligence, products liability, or medical malpractice have played a very small role in the frequency of punitive damages overall.[26]

7 Within case categories, studies have correlated punitive damages amounts to a number of factors.[27] The most significant factor is the compensatory award,

[19] See *BMW of N. Am., Inc. v Gore*, 517 U.S. 559, 583 (1996) (reducing punitive damages where the ratio to compensatory damages was 500:1).

[20] *T. Eisenberg* et al., The Predictability of Punitive Damages, J. Leg. Stud. 26 (1997) 623, 639. Furthermore, as Daniels and Martin have shown, if anything, the ratio of punitive damages to compensatory damages has been declining over the years. *Daniels/Martin*, Minn. L. Rev. 75 (1990) 59–60.

[21] *Eisenberg* et al., Cornell L. Rev. 87 (2002) 754; *Eisenberg* et al., J. Leg. Stud. 26 (1997) 652; see also *D. Myers/M. Kaplan*, Group-Induced Polarization in Simulated Juries, Personality & Soc. Psychol. Bull. 2 (1976) 63, 63 (showing ratios between 1.0 and 3.0).

[22] See *Sebok*, Iowa L. Rev. 92 (2007) 966 n. 24 (collecting sources).

[23] Intentional torts and defamation are more likely to generate punitive damages than any other type of civil action. According to RAND, 31.8% of all plaintiff verdicts (16.7% of all verdicts) have resulted in punitive damages in cases involving battery, assault, and false imprisonment. *Moller* et al., J. Leg. Stud. 28 (1999) 301. Punitive damages were awarded in 29.8% of defamation cases. *DeFrances* et al. (fn. 11) 8 tbl.8.

[24] See *Moller* et al., J. Leg. Stud. 28 (1999) 301; see also *E. Moller* et al., RAND Corp. Inst. for Civil Justice, Punitive Damages in Financial Injury Jury Verdicts (1997) 20. RAND's results are consistent with other attempts to measure the frequency and nature of punitive damages in business torts. See, e.g., *D. Jones Merritt/K.A. Barry*, Is the Tort System in Crisis? New Empirical Evidence, Ohio St. L.J. 60 (1999) 315, 388.

[25] *Moller* et al., J. Leg. Stud. 28 (1999) 301; see *Eisenberg* et al., J. Leg. Stud. 26 (1997) 633.

[26] See, e.g., *Peterson* et al. (fn. 17) 11–12 tbl.2.4 (1987) (noting that juries awarded punitive damages in only 1%–2% of cases involving personal injuries).

[27] *Eisenberg* et al., J. Leg. Stud. 26 (1997) 647–49.

which one might argue serves as a proxy for the damage caused by the defendant's tortious act, thus anchoring punishment to harm.[28] Other factors include the type of the case category, the identity of the plaintiff and defendant, and the locale.[29] It is debatable whether these factors should play a dominant role in determining the punishment received by the defendant. However, this is a separate issue from that of predictability. The practice of awarding punitive damages may be based on factors with which the defendant may disagree, but at least the outcome produced by those factors is relatively predictable.

II. The Three Eras of American Punitive Damages

A. The First Period: Punishment for Insult and Humiliation

1. British Foundations

Punitive damages clearly were a part of English law by the 18th century.[30] According to McCormick, "historically, oppressive conduct by public officers was the situation where early judges were most prone to sanction exemplary damages."[31] This impression may be due to the fact that one of the earliest (and certainly most infamous) cases establishing the use of punitive damages involved suits against the Crown on account of the false imprisonment of the printer of a newspaper that had criticised King George III.[32] 8

A survey of other 18th and early 19th century cases in England reveals that, in the main, cases in which punitive damages were awarded often involved not just the abuse of official authority, but acts in which the defendant used his social power to abuse the plaintiff, usually in public. In *Benson v Frederick*[33] a colonel whipped a common soldier, and in *Forde v Skinner*[34] the employee of a poor house maliciously cut off the hair of a female pauper. In *Tullidge v Wade* the plaintiff's daughter was seduced by the defendant.[35] In *Merest v Harvey* a member of the House of Lords asked the plaintiff, a banker and a Member of Parliament, if he could join the plaintiff's hunting party.[36] The plaintiff did not extend an invitation, at which point the defendant publicly insulted the plaintiff, and threatened to sue the plaintiff in trespass. In *Warwick v Foulkes*, the 9

[28] Ibid. at 628.
[29] Ibid. at 646.
[30] See *D.F. Partlett*, Punitive Damages: Legal Hot Zones, Louisiana Law Review (La. L. Rev.) 56 (1996) 781, 784–88.
[31] *C.T. McCormick*, Some Phases of Exemplary Damages, North Carolina Law Review (N.C. L. Rev.) 8 (1929–30) 129, 137. See also *M. Rustad/T. Koenig*, The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, Am. U. L. Rev. 42 (1993) 1269, 1288.
[32] *Huckle v Money*, 95 English Reports, King's Bench (Eng. Rep.) 768 (K.B. 1763). The printer suffered no injury; in fact the Crown kept him "very civilly by treating him with beef-steaks and beer." *T. Street*, The Foundations of Legal Liability vol. 1(1906) 484.
[33] 97 Eng. Rep. 1130 (K.B. 1766).
[34] 172 Eng. Rep. 687 (Horsham Assizes 1830).
[35] 95 Eng. Rep. 909 (K.B. 1769).
[36] 128 Eng. Rep. 761 (C.P. 1814).

defendant attempted to justify his false imprisonment of the plaintiff by publicly and knowingly inventing a story that the plaintiff had committed a felony.[37] In *Emblem v Myers* the defendant, who was apparently wealthy, desired to purchase a small freehold next to some old houses he had just purchased. The defendant had his servant trespass on the freehold, and then do work on the houses in such a way calculated to annoy the plaintiff and injure his meagre property. The court instructed the jury that exemplary damages could be granted if they found that the defendant had acted "with a high hand."[38] The common thread in these early English cases is that the motivating or aggravating factor upon which exemplary damages depend is not just the *intentional* nature of the defendant's wrong, but the insulting or humiliating way in which the defendant caused the intentional wrong.[39]

2. The 18th and 19th Centuries

10 Like the early English cases, the early American cases seemed to focus on the insulting and humiliating character of the tortfeasor's act. America's first case involving punitive damages was *Genay v Norris*, in which the defendant, a doctor, put a large dose of a drug into the wine glass of the plaintiff, a man with whom the defendant had been feuding.[40] This caused the plaintiff to collapse in public and forfeit his duel with the defendant. Another early case, *Coryell v Colbaugh*, involved a breach of promise by the defendant to marry the plaintiff.[41] According to a treatise written in 1864, punitive damages were awarded where injury or trespass was accompanied by personal insult or cruel and oppressive conduct.[42] As one modern commentator noted, the American cases carried forward the idea, established in 18th century England, that exemplary damages were designed to punish defendants whose actions injured

[37] 12 Meeson & Welsby's Exchequer Reports (M & W) 507 (1844).

[38] Quoted in *Street* (fn. 32) 486.

[39] In *Emblem*, for example, Pollock C.B., on appeal, upheld the damage award, saying: "there is a difference between that which is purely the result of accident, the party who is responsible being perfectly innocent, and the case where he has accompanied the wrong, be it wilfulness or negligence, with expressions *that make the wrong an insult* as well as an injury." (emphasis added). As Street noted, in the same case, Channell, B., agreed that "in consequence of *insulting* circumstances" *damage beyond actual injury* may be awarded. (emphasis added). On the other hand, one case that does not seem to turn on the insulting or humiliating effect of the intentional injury is *Sears v Lyons*, 2 Stark. 317 (1818), where the defendant simply fed the plaintiff's chickens poisoned barley, and the judge instructed the jury that they could award non-compensatory damages if they found that the defendant intentionally destroyed the chickens.

[40] 1 South Carolina Law Reports (S.C.L.) (1 Bay) 6 (1784) (the plaintiff suffered "extreme and excruciating pain").

[41] 1 New Jersey Law Reports (N.J.L.) 77 (1791).

[42] See *C.G. Addison*, Wrongs and Their Remedies: A Treatise on the Law of Torts (2nd ed. 1864) 905 f. The American Supreme Court first acknowledged the practice of punitive damages, which had been practiced by the states since the Revolution, in 1851 in *Day v Woodworth*, 13 Howard's Supreme Court Reports (How.) 363 (1851). The Court noted that despite some criticism, it was well established in America that "men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages inflicted by way of a penalty or a punishment, given to the party injured."

honour or expressed an attitude of humiliation and insult towards the plaintiff: "The reported cases from roughly the first quarter of the seventeenth century through the first quarter of the nineteenth century…included cases of slander, seduction, assault and battery in humiliating circumstances, criminal conversion, malicious prosecution, illegal intrusion into private dwellings and seizure of private papers, trespass onto private land in an offensive manner, and false imprisonment. *Diverse as they may have been, all of these cases share one common attribute: they involved acts that resulted in affronts to the honour of the victims*."[43]

11 This is not to say that there was no controversy over punitive damages during their early history in America. In the middle of the 19th century two of America's leading scholars, Theodore Sedgwick (a practicing lawyer and an editor) and Harvard's Professor Simon Greenleaf, fought keenly over punitive damages. Professor Greenleaf argued that punitive damages were a mistake because they confused public and private law functions. Thus, in his very influential Treatise on the Law of Evidence, Greenleaf categorically rejected punitive damages.[44] Sedgwick, who wrote an equally influential treatise entitled A Treatise on the Measure of Damages, rejected Greenleaf's methods and conclusions.[45] The law, Sedgwick argued in 1847, "permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender."[46]

12 While Sedgwick was right (although a handful of courts opposed punitive damages[47]) a closer examination of the commentaries reveals a bit of ambiguity in the theories that supported them. As Sedgwick noted, there was a tendency among some states, such as West Virginia, to call damages for pain and suffering "exemplary" damages.[48] Conversely, the treatise author Thomas Street, who took Sedgwick's side in the debate with Greenleaf, argued that it really made no difference who was right, since "damages which in one jurisdiction are recoverable as exemplary damages are, in another jurisdiction, recovered under the guise of compensatory damages for mental suffering, in-

[43] *D. Ellis*, Fairness and Efficiency in the Law of Punitive Damages, Southern California Law Review (S. Cal. L. Rev.) 56 (1982) 1, 14 f. (emphasis added) (citations omitted). See *Rustad/Koenig*. Am. U. L. Rev. 42 (1993) 1291 ("In these early American punitive damages cases, courts frequently premised awards on conduct that smacked of wilful and wanton indignities." (fn. omitted)).

[44] *S. Greenleaf*, A Treatise on the Law of Evidence vol. 2 (16th ed. 1899) 240, no. 2.

[45] Sedgwick considered Greenleaf to be an academic formalist and a "logic chopper". See *P. Miller*, The Legal Mind in America (1962) 184 (quoting Sedgwick).

[46] *T. Sedgwick*, A Treatise on the Measure of Damages (reprinted by Arno Press 1972) (1847) 39.

[47] At various times between 1860 and 1920, Massachusetts, Colorado, Connecticut, Louisiana, Nebraska, Washington, Michigan, and New Hampshire had rejected punitive damages. See *T. Sedgwick*, A Treatise on the Measure of Damages vol. 1 (9th ed. 1913) (A.G. Sedgwick/J.H. Beale, eds.) 703 and *Rustad/Koenig*, Am. U. L. Rev. 42 (1993) 1302.

[48] See *Sedgwick* (fn. 47) 705 (noting that Nevada and Wyoming follow the same practice).

sult, or outrage."[49] The problem that Street identified was that sometimes the *amount* of pain and suffering experienced by the plaintiff was a function of the defendant's motive, and so it sometimes seemed as though exemplary damages were functionally identical to punitive damages.

13 Thus, as the Wisconsin Supreme Court noted, in an intentional tort there likely will be compensatory damages for "injuries to the feelings…[for] the insult, the indignity, the public exposure and contumely, and the like…[which] unlike those for mere personal and bodily injury…can only be recovered when the aggressor is animated by a malicious motive "when there is an intention on his part to outrage the feelings of the injured party. [Yet] *the right to recover exemplary damages rests upon precisely the same grounds.*"[50]

14 Sedgwick insisted that the fact that compensatory damages for pain and suffering and exemplary damages might be measured against the same thing – the wrongdoer's motive – did not mean that they would be equal in scale or were the same thing.[51] However Street was not so sure. He argued that if there were a theory of compensation of sufficient subtlety to capture all the injuries caused by insult, exemplary damages would not be necessary: "What seems really to have happened here, is that in the course of legal development the law of damage has outstripped the conception of legal wrong…If it had been practicable for the judges to analyse and define for the jury with precision all the elements of legal harm which enter into every case, there would have been no necessity for the recognition of the idea of punishment as a proper end in the administration of the law of civil wrong…As our theory of wrong catches up with the law of damage, the idea of punishment will appear more and more out of place in the civil system, and it may possibly in time altogether disappear."[52]

15 The reason Americans were beginning to question the distinction between pain and suffering and punitive damages was not because there was a weakening of support for punitive damages, but rather because the theory of *compensatory* damages became more sophisticated. As courts became more willing to take

[49] *Street* (fn. 32) 480. He noted that in Wisconsin, the same intentional tort was tried three times, twice with jury instructions permitting exemplary damages, and once without, and that the verdict awarded in each trial was the same. Id., citing *Bass v Chicago, etc. R. Co.*, 36 Wisconsin Reports (Wis.) 450 (1875), 39 Wis. 636 (1878), 42 Wis. 654 (1881).

[50] *Wilson v Young*, 31 Wis. 574, 582 (1872) (citing *Sedgwick* (fn. 46) 33) (emphasis added). In another case, the court upheld the doctrine of exemplary damages, but in doing so, implied that it could not really see a difference between pain and suffering and punitive damages: "[Of course] mental suffering, vexation and anxiety are subject to compensation in damages. And it is difficult to see how these are to be distinguished from the sense of wrong and insult arising from injustice and the intention to vex and degrade…But if there be a subtle, metaphysical distinction which we cannot see, what human creature can penetrate the mysteries of his own sensations, and parcel out separately his mental suffering and his sense of wrong, so much for compensatory, and so much for vindictive damages?…If possible, juries are surely not the metaphysicians to do it." *Craker v The Chicago & Northwestern Railway Co.*, 36 Wis. 657, 678 (1875).

[51] *Sedgwick* (fn. 47) 703.

[52] *Street* (fn. 32) 488.

seriously the costs associated with emotional distress, the fact that the scale of punitive damages awards was linked to the experience of insult and humiliation naturally made some wonder about the similarity in structure between punitive damages and damages for pain and suffering.[53]

B. The Second Period: Punishment for Abuse of Power

16 Punitive damages entered a second phase in American law at the beginning of the 20th century. Litigants began to ask, and courts began to allow, punitive damages in suits involving railroads and commercial transactions.[54] This was the result of a few changes in American law. First, as in other areas of tort law, courts were increasing the scope of corporate liability under the doctrine of respondeat superior.[55] Second, as the result of changes in American political culture, especially the rise of the labour movement and progressivism, courts became increasingly willing to scrutinise private transactions and to look behind the terms of labour and consumer agreements. As a result, punitive damages began to be awarded in cases in which commercial relationships were used as a vehicle for the exercise and abuse of economic power. For example, railroads and trolley companies were held liable for, among other things, wrongfully ejecting passengers, carrying passengers past their stations, insulting passengers, failing to stop when signalled, allowing insults and fights, wilfully delaying passengers, refusing to carry the blind, and failing to care for known sick passengers.[56] It was still very important for courts that awarded punitive damages in these cases that the corporate defendant knew of or ratified the acts of their employees.[57] That is why I suggest that these are *abuse* of power cases – the victim was harmed not just by the defendant's employee abusing his position, but, as many courts noted, the defendant corporation's knowing tolerance of the employee's abuse of position was the abuse of power for which the punitive damages was awarded.[58] Rarely in abuse of power cases is the defendant's motivations rooted in the same sort of human animus that we saw in the "insult" or "humiliation" cases. No one imagined that the management of the railroads had a personal interest in assaulting or humiliating the plaintiffs through their employees.

17 The root of the abuse of power cases arose not from a desire to humiliate or insult, but from the defendant's unequal or unfair treatment of the plaintiff. The plaintiff's complaint was that the defendant had, for no good reason, ignored the misconduct of his employees. Of course, one could imagine that the real reason the defendant did not act to correct the actions of his agents (and there-

[53] See *Sebok*, Chi.-Kent L. Rev. 78 (2003) 188.
[54] See *Rustad/Koenig*, Am. U. L. Rev. 42 (1993) 1294–96.
[55] See *S.D. Thompson*, Liability of Corporations for Exemplary Damages, Central Law Journal (Cent. L.J.) 41 (1895) 308, 309.
[56] See *A.G. Nichols, Jr.*, Comment, Punitive Damages in Mississippi – A Brief Survey, Mississippi Law Journal (Miss. L.J.) 37 (1965) 131, 138.
[57] See *Sedgwick* (fn. 47) 742.
[58] See *A.G. Sedgwick*, Elements of the Law of Damages (2nd ed. 1909) 91.

fore ratified their acts) was because they felt that it was not to their advantage to act; that it was costly to respond to the plaintiff's complaint; and (hopefully) cost-free to ignore the complaint.[59] To the extent that the defendant's size or market position meant that it felt no need to take the plaintiff's original complaint seriously, their failure to respond to the plaintiff was an *abuse* of their power.

18 Another set of "abuse of power" cases that began to generate punitive damages were cases in which someone's greed led them to take advantage of a weaker party in a negotiated, arm's length deal. Typical of these sorts of cases were torts based on fraud of a seller towards a buyer.[60] The courts did not view the wrong by the defendant in these cases as rooted in animus or a specific desire by the defendant to harm the plaintiff, but rather in the specific desire by the defendant to use the power he had over the victim – usually knowledge of the true state of things, which, if the defendant had shared with the victim, would have led the victim to walk away from the fraudulent deal. Here again, as with the railway cases, although the ultimate source of the defendant's motive might have clearly been simple greed, simple greed was not enough to support punitive damages: there had to be some additional exercise of power over the victim, which the court usually referred to as "oppression".[61] Furthermore, it should also be noted that, as a matter of relative importance, the railroad and common-carrier cases appear to have been a far more important part of punitive damages doctrine in the early 20th century than the fraud cases: an inspection of the treatises of the time reveals many pages of citations to the former, and (typically) a short paragraph concerning the latter.[62]

19 Nonetheless, one can see that the railway cases and the fraud cases form a bridge between insult and humiliation cases and the abuse of power cases. Clearly the railway employees who abused customers could be said to have intended the humiliation of their victims when they acted. Whether or not the railway corporations intended the humiliation of the abused customers when

[59] As one commentator noted, although criminal law tended to treat wrongdoing motivated by "the red slayings of hate" more harshly than the "pale slayings of greed," tort law had begun to treat the latter more like the former through the institution of exemplary damages. See *E.A. Ross*, Social Control: A Survey of the Foundations of Order (1901) 106 ff.

[60] *Huffman v Moore*, 115 South Eastern Reporter (S.E.) 634 (S.C. 1923) (recovery of punitive damages in action for fraudulent sale of used car); *Hays v Anderson*, 57 Alabama Reports (Ala.) 374 (1876) (recovery of punitive damages where remedy of garnishment was vexatiously used against plaintiff's property); *Greene v Keithley*, 86 Federal Reporter, Second Series (F.2d) 238 (8th Cir. 1936) (recovery of punitive damages where defendants conspired to sell plaintiff valueless oil property); *Southern Bldg. & Loan Ass'n v Dinsmore*, 144 So. 21 (Ala. 1932) (recovery of punitive damages where defendant sold fraudulent stock in a private corporation); *Hobbs v Smith*, 115 P. 347 (Okla. 1911) (recovery of punitive damages for knowing sales of infected cattle).

[61] "[To award exemplary damages] we are inclined to the opinion that this should not be done except in those cases where the misrepresentation has been attended by malicious or oppressive conduct." *C.C. Williams v Detroit Oil & Cotton Company*, et al., 52 Texas Civil Appeals Reports (Tex. Civ. App.) 243, 249 (1908) (defendant employer took money from plaintiff employee with the promise that he would buy accident insurance and kept the money).

[62] See, e.g., *Sedgwick* (fn. 47) 722.

they ratified their employees' acts is more difficult to say. However to the customer, the failure to address a known act of humiliation when it could have been stopped by the railway corporation exercising its power in a responsible way communicated a certain attitude towards the customer of conscious disdain. It is a further step from the disdain showed by the failure of a railway corporation to exercise control over its employees to the "disdain" contained in an act of fraud. Especially in cases where the parties engaged in face-to-face negotiations, as many of these early cases were, the defendant's failure to take the plaintiff into account when setting up the fraud suggested a conscious disdain of the victim, especially when, as the courts noted, there were differences in social and/or economic power between the parties.

C. The Third Period: The Allure of Efficient Deterrence

20 The third doctrinal transformation of punitive damages was the expansion of punitive damages into products liability and business torts. This has taken place during the post-war period. The doctrine of punitive damages in products liability and business torts appeal to very different audiences, and they have been treated as separate phenomenon by American scholars. Nonetheless, I want to conclude this section by drawing a connection between them. I will look at products liability first.

21 American products liability law has been governed under a "strict liability" standard ever since the early 1960s.[63] It was assumed by many that an action in products liability, which does not require proof of negligence, was incompatible with a claim for punitive damages, which requires at least proof of gross negligence or reckless disregard.[64] Yet by the late 1970s, a number of courts had held that a plaintiff could ask for punitive damages in a products liability suit if he or she were able to prove that the product's defective state was the result of a "wilful or reckless disregard" of the plaintiff's rights.[65]

22 Courts first thought that the "wilful and reckless" threshold would relegate punitive damages to a very small group of products liability cases, but they were wrong: Punitive damages have turned out to be the tail that wags the dog in products liability.[66] They are still awarded rarely, but they are almost universally requested, and despite the rarity with which they are awarded, punitive damages may have a significant "shadow effect" in settlements.[67] The

[63] See Restatement (Second) of Torts § 402A.

[64] See, e.g., *Roginsky v Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967).

[65] *Gryc v Dayton-Hudson Corp.*, 297 North Western Reporter, Second Series (N.W.2d) 727, 739 (Minn. 1980), *cert. denied*, 449 U.S. 921 (1980) and see *D.G. Owen*, Punitive Damages in Products Liability Litigation, Michigan Law Review (Mich. L. Rev.) 74 (1976) 121.

[66] See *R.C. Ausness*, Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, Kentucky Law Journal (Ky. L.J.) 1, 10-18 74 (1985) 1, 10–18 (collecting cases).

[67] See *S. Garber*, Product Liability, Punitive Damages, Business Decisions and Economic Outcomes, Wis. L. Rev. 1998, 237.

reason they are frequently requested by plaintiffs is quite simple: since almost all products liability cases are about either product design or product warning labels, the issue in the case is always a "conscious design choice". But a design choice that was made consciously is always made against the background of choices consciously rejected. In most businesses, all conscious design choices about safety are debated against a background of cost and benefit; that is to say, most products disasters are not the result of inattentive manufacturers, but manufacturers who are very attentive while making very wrong choices.[68] As a result, almost every products liability claim can be framed as alleging at least conscious indifference to the victim. That is why when people think about famous product liability cases, they think about cases in which punitive damages were awarded in response to the jury's disgust with the defendant's conscious design choices – for example, the *Ford Pinto* case, or the famous McDonald's coffee cup case.[69]

23 The relatively rapid acceptance of punitive damages in products liability is a result of the confluence of two distinct kinds of arguments. The first is the "abuse of power" justification for punitive damages that was developed in the first half of the century. The fit is obvious: It is a combination, in a way, of the railway cases and the fraud cases. In a products case one has a powerful defendant choosing not to exercise his power (that is, make a certain conscious design choice) in order to make more money. The thread of insult and humiliation falls away from these cases, and is replaced entirely by a concern with the special wrong that comes from the impersonal exercise of corporate power. The evil that punitive damages are supposed to address is more accurately seen as the indifference that the corporation displays towards society rather than any disdain or disrespect towards the victim. Unlike in the early railroad cases, there isn't even an original act of humiliation to which the corporate actor's indifference can be connected. Obviously, the abstract, impersonal design choices of corporations are very different in their expressive content from the insults and abuses for which punitive damages were awarded in earlier times. As the court in the *Pinto* case noted, consumers have come to rely on punitive damages for their protection, since neither the threat of paying full compensation nor government regulation will induce a corporation to act in the public interest.[70] In *Grimshaw* it was alleged that Ford did not believe that it would be sued for the defect alleged by the plaintiff, or, if sued, it would not be found liable.[71] It was further alleged that Ford had determined that if it were sued and found liable for the deaths caused by its defective product, that it would still be cheaper to pay all of

[68] See *M. Green*, The Schizophrenia of Risk/Benefit Analysis in Design Defect Litigation, Vanderbilt Law Review (Vand. L. Rev.) 48 (1995) 609, 624.

[69] *Grimshaw v Ford Motor Co.*, 174 California Reporter (Cal. Rptr.) 348 (Cal. 1981) (plaintiff awarded $ 4.5 million in compensatory and $ 125 million in punitive damages for defective design of gas tank; trial judge reduced punitive award to $ 3.5 million); *Liebeck v McDonald's Restaurants*, *P.T.S., Inc.*, CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994) (plaintiff awarded $ 160,000 in compensatory and $ 2.7 million in punitive damages for burns caused by scalding coffee; trial judge reduced the punitive award to $ 480,000).

[70] *Grimshaw*, Cal. Rptr. at 382.

[71] Ibid. at 388.

the compensatory damages than to reduce its profit by modifying its product.[72] Ford's managers intended to treat their probable victims as means, not ends, and by this instrumental attitude, failed to treat them with equal respect.[73]

The second kind of argument that has motivated support for punitive damages in products liability is a straightforward deterrence argument. This argument is the opposite of the humiliation and insult argument that provided the first foundation for punitive damages 150 years ago. This argument, in its most simplified form, is that the choices made by actors in business cannot be characterised through the language of human emotions like disdain, humiliation, or abuse of power. Businesses are motivated by profits, which is neither good nor bad in itself. Business decisions are bad, from society's point of view, if they do not maximise society's net wealth, even if they do maximise the business's profit. As a number of scholars have pointed out, punitive damages are perfectly suited to create incentives ex ante to produce conformity with the tort law.[74] The key point, these scholars argue, is that punitive damages are an extension of the Hand Test used in negligence.[75] 24

Under the economic view, punitive damages should be applied in those cases where the defendant knew ex ante that there was a probability that his tortious conduct would not be detected: "the total damages imposed on an injurer should be equal [to] the harm multiplied by the reciprocal of the probability that the injurer will be found liable when he ought to be."[76] This approach has the consequence that, in general, the moral reprehensibility of the defendant's conduct *is irrelevant* to the determination of whether, and how much, punitive damages should be awarded.[77] Furthermore, the economic approach entails that punitive damages are not justified in those cases where the defendant could not have reasonably expected to escape detection, such as where he punches someone in public or builds a defective product that fails openly and notoriously.[78] This argument makes no assumptions whatsoever about the atti- 25

[72] See *G. Schwartz*, The Myth of the Ford Pinto Case, Rutgers L. Rev. 43 (1991) 1013, 1019–22 (on the perception Ford had decided before it produced the Pinto that it would be "less expensive to absorb the cost of tort judgments than to incorporate safety modifications into the Pinto") and see *Wangen v Ford Motor Co.*, 294 N.W.2d 437, 451 (Wis. 1980) (in a case with similar facts, Ford apparently thought "it cheaper to pay damages or a forfeiture than to change a business practice").

[73] See *M. Galanter/D. Luban*, Poetic Justice: Punitive Damages and Legal Pluralism, Am. U. L. Rev. 42 (1993) 1393.

[74] See *R.D. Cooter*, Economic Analysis of Punitive Damages, S. Cal. L. Rev. 56 (1982) 79, 94–97; *K.N. Hylton*, Punitive Damages and the Economic Theory of Penalties, Georgetown Law Journal (Geo. L.J.) 87 (1998) 421; and *C.M. Sharkey,* Punitive Damages as Societal Damages, Yale L.J. 113 (2003) 347.

[75] *A.M. Polinsky/S. Shavell*, Punitive Damages: An Economic Analysis, Harv. L. Rev. 111 (1998) 870, 880.

[76] Ibid. at 889.

[77] Ibid. at 905.

[78] Ibid. at 903 (Discussing the *Exxon Valdez* disaster). Professors Polinsky and Shavell later filed a series of briefs on behalf of Exxon in its efforts to have its $ 5 billion punitive damages award reduced.

tude of the defendant towards his victim. It simply says that if the legal system is not 100% effective in identifying inefficient actors, then it must award punitive damages to make sure that no future actor will ever try to take advantage of the legal system's less-than-perfect efficacy.

26 The deterrence argument for punitive damages in products liability was urged by two quite disparate communities: first, by theorists associated with the law and economics movement, and second, with the consumer movement. The two groups certainly had different views about the desirability of a state of affairs in which the only reason a corporation changes its conduct is to maximise its profit.[79] It is likely that consumer groups believed that the very attitude that makes the deterrence model work – the desire to minimise costs – was itself a symptom of corporate wrongdoing.[80] Consumer advocates and plaintiff's lawyers may have believed that, in addition to promoting social efficiency, punitive damages in products liability also allow victims to address the immorality of corporate conduct, but they did not need to convince others of this view as long as they could use the deterrence argument to build a broad base of support for punitive damages in products liability.

27 As the economically-grounded theories of deterrence began to get support from liberal consumer advocates as well as its traditional allies in the more conservative wings of the academy, punitive damages awards became salient in business torts involving insurance, employment, real property, contract, and commercial and consumer sales.[81] According to recent statistics, business torts, which make up 13% of all tort cases in America, produce 50% of all punitive damages verdicts. The increasing frequency of punitive damages in business torts seems to be a recent phenomenon (although it is difficult to get good historical data).[82] The degree to which punitive damages dominate financial torts can be measured in other ways, too: 60 cents out of every dollar awarded in a financial tort verdict were for punitive damages, a far higher amount than any other tort.[83] In fact, according to a Department of Justice study, 64% of *all dollars* awarded for punitive damages in 1992 were awarded in cases involving financial injury.[84] Although the amount of money, in real terms, awarded in punitive damages has increased in all types of suits over the past thirty years, the increase in business torts has been dramatic.

[79] See *T. Koenig/M. Rustad*, "Crimtorts" as Corporate Just Deserts, University of Michigan Journal of Law Reform (U. Mich. J.L. Ref.) 31 (1998) 289, 315.

[80] See *C.T. Bogus*, Why Lawsuits Are Good for America 203–09 (2001) and *T.C. Galligan, Jr.*, Disaggregating More-Than-Whole Damages in Personal Injury Law: Deterrence and Punishment, Tennessee Law Review (Tenn. L. Rev.) 71 (2003) 117, 128.

[81] See *Moller* et al., J. Leg. Stud. 28 (1999) 308.

[82] According to another RAND study, the percentage of punitive damages awarded in "business/contract" verdicts (a slightly different set than that used in the Moller study) increased by 75% and 81% (respectively) in Cook County, Illinois and San Francisco between 1960–84. *Peterson* et al. (fn. 17) 11.

[83] *Moller* et al., J. Leg. Stud. 28 (1999) 301.

[84] *DeFrances* et al. (fn. 11) at 8 tbl.8.

To conclude this section, then, the history of punitive damages in American law has been that of a movement from actions in which the main concern of the courts was to allow victims of insult and humiliation to find recourse through the private law. While insult and humiliation did not disappear from the law's set of concerns, the cause of punitive damages expanded at the end of the 19th century to include cases where commercial transactors, especially corporations, would be punished for engaging in anti-social conduct that expressed itself through an abuse of position or power. The last expansion of the law of punitive damages occurred in the last 25 years. Although the law retained its concern for insult and humiliation and abuse of power, in some cases it added to this an independent concern to promote social efficiency. Punitive damages could now be awarded where commercial transactors acted anti-socially simply because they chose to act inefficiently. 28

III. The Purposes of Punitive Damages in American Tort Law

In contrast to the public rationale underlying criminal law, civil law involves actions brought forth to protect against and redress individual, private wrongs.[85] A tort action is grounded on the legal conclusion that the defendant's act has produced a wrongful loss, and the remedies stage of a tort action seeks to repair that wrongful loss by requiring the defendant to make the victim whole again.[86] In cases where only actual and compensatory damages are awarded, the trier of fact determines a monetary amount that approximates the extent of the damages proven at trial. Such determinations are often the result of concrete findings, i.e. the value of one's destroyed property, medical expenses, the loss of future earnings or pain and suffering due to physical trauma or mental distress. There are often instances, however, where such an award cannot effectively address the defendant's wrong, such as where the wrong was produced by an evil or anti-social motive. Courts have permitted punitive damages in such cases. Though these damages arguably succeed in making the plaintiff feel more complete, it begs the question whether our civil system is simply using the occasion of a certain type of civil wrong to permit the imposition of a criminal sanction.[87] 29

An early criticism of the idea that tort law could ever be a ground for punishment was Justice Foster's opinion in *Fay v Parker*, which roundly attacks punitive damages as a "deformity" on "the sound and healthy body of the law."[88] Foster's objection was not that he thought that a jury should not hear evidence of a defendant's proven malice in determining damages. Foster, an avowed opponent to punitive damages, thought it was obvious that sometimes the amount of pain and suffering experienced by the plaintiff was a function of the defen- 30

[85] See, e.g., *Bopst v Williams*, 287 Missouri Reports (Mo.) 317, 229 S.W. 796, 798 (1921) (a "civil action" implies adversary parties and an issue, and is designed for the recovery or vindication of a civil right or the redress of some civil wrong).

[86] See *B.C. Zipursky*, Rights, Wrongs, and Recourse in the Law of Torts, V and. L. Rev. 51 (1998) 1.

[87] See *Boldt v Budwig*, 19 Nebraska Reports (Neb.) 739, 28 N.W. 280, 283 (1886) (citing *Boyer v Barr*, 8 Neb. 68, 1878 WL 3937 (Neb.), 30 Am. Rep. 814 (1878)).

[88] 53 New Hampshire Reports (N.H.) 342, 397 (1872).

dant's motive. His opposition to punitive damages stemmed from the fact that they were an impermissible form of "double counting": "[I]f A plunges his knife into B and burns his house and accuses him of forgery, and the person and property and reputation of B are injured thereby, such injuries to person, property, and reputation are not spoken of as injuries to the spirit, or soul, or mind. The knife causes pain, but the pain is always taken in the *sense of bodily pain only*; and if we have reference to the mental suffering, the sense of disgrace, the wounded honour, etc., we always go on to describe it by other words than 'injuries to person, property, and character'."[89]

31 Foster thought that to add a third category of damages – "punitory" in addition to "pain and suffering" – was unnecessary and could only be justified by a desire to import a criminal function into the tort system.

32 In 2001, the United States Supreme Court, in *Cooper Industries, Inc. v Leatherman Tool Group, Inc.*, implicitly adopted Foster's analysis, except that it took his criticism and turned it into a virtue.[90] Justice Ginsburg took it as obvious that, between the 19th century and the 20th century, the function of punitive damages had changed, so that now they clearly are a quasi-criminal punishment imposed in the context of a civil tort suit: "[P]unitive damages have evolved somewhat…Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time…As the types of compensatory damages available to plaintiffs have broadened…the theory behind punitive damages has shifted towards a more purely punitive (and therefore less factual) understanding."[91]

33 Scholars have argued that both Foster and Ginsburg are wrong, and that the functions of punitive damages have been more continuous across the history of American law than their accounts permit.[92] For example, in *Newell v Whitcher*, the plaintiff was a young blind woman who was the target of threatening sexual demands.[93] The Supreme Court of Vermont held that the defendant's conduct (leaning over the plaintiff "with the proffer of criminal sexual intercourse") was actionable assault and upheld the jury verdict of $ 225 compensatory damages for mental suffering and $ 100 punitive damages without comment.[94] If, as Ginsburg argued, punitive damages were needed to make up a gap in the court's ability to recognise and compensate mental suffering, why were the courts able to recognise, measure, and compensate the injury resulting from assault in a case like *Newell*?

34 Nonetheless, as evidenced by extensive litigation on the issue, courts have certainly struggled to determine what merits such an award in addition to compen-

[89] Ibid. at 359 (emphasis added).
[90] 121 Supreme Court Reporter (S. Ct.) 1678 (2001).
[91] Ibid. at 1686 n.11 (citations omitted).
[92] See *Sebok*, Chi.-Kent L. Rev. 78 (2003).
[93] 53 Vermont Reports (Vt.) 589, 590–91 (1880).
[94] Ibid. at 589–91 (1880).

satory damages. It has proven impossible, however, to ban punitive damages altogether, at least in 45 of the 50 United States.[95] Since the large majority of the country's courts and legislatures believe punitive damages have a necessary place in the legal system, and since the issue is becoming more contentious as such damages are applied more frequently, one must ask, for what purpose? Are courts still concerned with redressing the plaintiff's injury and making her whole, or does a punitive damages award represent an expansion on that concept, a further desire to punish and make an example of the defendant?

Notable is the fact that, at first glance, the vast majority of states seem to attribute punitive damages awards to punishment and deterrence. This would lead one to believe that the purpose is quite settled and uniform across the country. The application of punitive damages is more nuanced however, and such sloganeering proves inadequate when one delves into the case law the various states have provided. The words "punishment" and "deterrence" represent different meanings in different jurisdictions. Further analysis is thus required to determine what role punitive damages actually play in American society. 35

A. Redress for the Plaintiff

1. Compensation

As was mentioned above, certain injuries do not seem to be fully redressed by an award of merely compensatory damages. It would seem logical that an award of punitive damages would be aimed at achieving this purpose when compensatory damages fall short, and perhaps additional costs to the defendant, such as attorney and court fees, might return the plaintiff back to her original state. Nonetheless, the vast majority of states have extended the purpose of punitive damages much further, and such damages are no longer geared toward a plaintiff's needs (aside from those of retribution), but rather at the defendant. Virtually every state that permits punitive damages has maintained, however, that actual damage, even if only nominal, must be shown to merit an award of punitive damages.[96] This implies that courts and legislatures intend punitive damages awards to remain somewhat grounded in theories of private redress. 36

A number of 19th century courts cited compensation for insult as the rationale for the award of punitive damages. One of the clearest explanations for this conception of compensation was set out by the Supreme Court of Michigan in *Detroit Dailey Post v McArthur*.[97] The case involved the award of punitive 37

[95] See generally, *Schlueter* (fn. 7), Vol. 2 147–472. The author surveyed current punitive damages law in all fifty United States and the District of Columbia and determined that all but five states allow punitive damages as a matter of common law. Louisiana, Massachusetts, Nebraska, New Hampshire and Washington permit them only where authorised by statute, with various degrees of restriction. Connecticut permits punitive damages in order to compensate the plaintiff for his/her legal expenses. Ibid. at Vol. 2, 193.

[96] See ibid. at Vol. 1, 359; e.g., *Hamerly v Denton*, 359 Pacific Reporter, Second Series (P.2d.) 121 (1961).

[97] 16 Mich. 447 (1868).

damages in a libel case.[98] The court argued that vindictive or exemplary damages (the expression at the time for punitive damages) were awarded by the jury in proportion to evidence of "evil motives" which instantiate the "moral guilt of the perpetrator".[99] The court acknowledged that, although punitive damages varied in direct proportion to the "blameworthiness chargeable on wrongdoers," it would be misleading to say that the damages award was therefore based on the "wrong intent" of the defendant: the award "is to make reparation for the injury to the feelings of the person injured."[100] The feelings to which the court referred were not, however, independent of the moral blameworthiness of the defendant's act.[101] The court argued that our "instincts of common humanity" recognise that an injury inflicted voluntarily is "often the greatest wrong that can be inflicted, and injured *pride and affection* may, under some circumstances, justify very heavy damages."[102]

38 Other states followed Michigan's view that the function of punitive damages was to compensate for the losses resulting from insult. Minnesota, for example, explicitly adopted the expression "insult" to explain the source of the wounded feelings for which "punitory" or "exemplary damages" could be awarded.[103] Under the "compensation for insult" conception of punitive damages, punitive damages were not punishment, so there was no double counting. The Court of Appeal of Kentucky noted that nothing barred a widow from suing for the death of her husband, even though the killer might be indicted for a felony: "[t]he recovery, in one case, is for the private injury, and in the other, the punishment is inflicted for the public wrong."[104] The court defended the jury's punitive damages award against the defendant's argument that the judge's instructions did not follow the principle that punitive damages were not supposed to compensate.[105] The judge had charged the jury thus: "by punitive damages is meant exemplary damages, by way of smart money, as well as those given by way of compensation."[106] This view was also adopted by the Supreme Courts of Iowa and California.[107]

[98] Ibid. at 450.
[99] Ibid. at 452.
[100] Ibid. at 452–453.
[101] For this reason, the Michigan Supreme Court believed that it followed from their view that if the plaintiff was morally blameworthy for having provoked the defendant's intentional tort, the plaintiff could not claim compensation for wounded feelings *even if* the defendant's conduct was nonetheless tortious and extremely insulting. The plaintiff would be limited to compensation for bodily pain and suffering only. See *Johnson v McKee*, 27 Mich. 471 (1873).
[102] *Detroit Daily Post Co.*, 16 Mich. at 453–54 (emphasis added).
[103] Minnesota, for example, explicitly adopted the expression "insult" to explain the source of the wounded feelings for which "punitory" or "exemplary damages" could be awarded. *Lynd v Picket*, 7 Minn. 184, 200–201(1862); *McCarthy v Niskern*, 22 Minn. 90, 90–91 (1875).
[104] *Chiles v Drake*, 59 Ky. (2 Met.) 146, 151 (1859).
[105] Ibid. at 153–154.
[106] Ibid. at 153.
[107] *Wardrobe v Cal. Stage Co*., 7 Cal. 118 (1857); *Hendrickson v Kingsbury*, 21 Iowa 379 (1866). But see *Turner v North Beach and Mission R.R. Co.*, 34 Cal. 594 (1868).

Of these states, only Michigan presently limits punitive damages unless authorised by statute[108] because "the purpose of compensatory damages is to make an injured party whole for losses actually suffered, [so] the amount of recovery for such damages is limited by the amount of the loss."[109] The narrow application of punitive damages appears to focus on the notion that such damages compensate the plaintiff for indignity suffered by reason of the defendant's reprehensible conduct,[110] but not to punish the defendant directly. Puerto Rico does not recognise the theory of punitive damages, and instead awards "moral damages" upon a showing of significant psychic impairment of health, welfare, and happiness.[111] Finally, Connecticut has limited the recovery of punitive damages to litigation expenses, less taxable costs.[112] 39

These three jurisdictions are clearly minorities in comparison to the trend which the majority of the United States follows. The larger trend seems to imply that the imposition and amount of damages in addition to compensatory damages need not and cannot be limited by the desire to redress the plaintiff's injury. Instead, such damages are framed from the perspective of the defendant, where the goal is to appropriately condemn the magnitude of his wrongdoing, either through punishment or deterrence.[113] Though various courts and legislatures have expressed incredible caution and a need to narrowly award punitive damages for such purposes,[114] the fact remains that such awards have become increasingly common. 40

2. Vindication of the Plaintiff's Private Right

One of the common expressions for punitive damages in the 19th century was "vindictive damages". Vindication is obviously not the same thing as compensation although one could imagine how, under certain circumstances, the act of vindication might provide compensation for feelings wounded through insult at the same time.[115] From an etymological perspective, the word "vindicate" places the act of imposing punitive damages in a very different posture than the act of pursuing compensation. The Latin "vindicare" means to claim, to 41

[108] See *McAuley v General Motors Corp.*, 457 Mich. 513, 519, 578 N.W.2d 282, 285 (1998).

[109] *Rafferty v Markovitz*, 461 Mich. 265, 271, 602 N.W.2d 367, 369–70 (1999). The Court held that since the statute provided for the defendant's payment of attorney's fees, the fact that litigants who represent themselves may not recover attorney fees as an element of costs or damages reinforces the notion that a party may not make a profit or obtain more than one recovery.

[110] See *Clark v Cantrell*, 332 S.C. 433, 442, 504 S.E.2d 605, 610 (S.C. App. 1998) (citing *Kewin v Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 419, 295 N.W.2d 50, 55 (1980)).

[111] See *Cooperativa De Seguros Multiples De Puerto Rico v San Juan*, 289 Federal Supplement (F. Supp.) 858, 859 (D.C. Puerto Rico 1968).

[112] See *Venturi v Savitt, Inc*., 191 Conn. 588, 592, 468 Atlantic Reporter, Second Series (A.2d) 933, 935 (1983) (citing *Collens v New Canaan Water Co.*, 155 Conn. 477, 489, 234 A.2d 825, 832 (1967)).

[113] See *Mosing v Domas*, 830 Southern Reporter (So.)2d 967, 974 (La. 2002).

[114] See *Great Divide Ins. Co. v Carpenter*, 79 P.3d 599, 614 (Alaska 2003) (citing *Alaska Placer Co. v Lee*, 553 P.2d 54, 61 (Alaska 1976)); see also *Williams v Bone*, 74 Idaho 185, 189 259 P.2d 810, 812 (1953) (citing 15 American Jurisprudence (Am. Jur.) 704).

[115] See *Sebok*, Iowa L. Rev. 92 (2007) 1013–27.

set free, or to punish.[116] The Oxford English Dictionary notes that early uses of the word "vindicate" include "to avenge," "to make or set free" or "rescue," and "to clear from censure".[117] All these senses of the word suggest that punitive damages, when used to "vindicate" the plaintiff, allowed the plaintiff to actively address the defendant, and in doing so, recover or "rescue" his or her honour. In this sense, punitive damages had a slightly different emphasis than in the sense of compensation. First, the implication in the word "vindicate" is that the money received does not replace a loss, but is a means by which the plaintiff's lost honour is returned. Second, it implies that the payment of the money *to* the plaintiff is less important than the imposition of the monetary penalty *on* the defendant. That is why, of course, punitive damages in their vindictive form seem to be as much about punishing the defendant as compensating the plaintiff.

42 The United States Supreme Court adopted the personal vindication rationale for punitive damages in *Day v Woodworth* in 1851.[118] The case involved a trespass by a mill owner against the downstream dam erected by another mill owner.[119] There was no personal injury and, in modern terms, no credible claim for emotional distress. Yet the Court allowed the claim for punitive damages.[120] The Court, after noting the controversy surrounding "what are called exemplary, punitive, or vindictive" damages, argued that it is the very intangibility of wrong that results from lawless action which explains why such damages are set apart from compensatory damages: The wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed…vindictive rather than compensatory.[121]

43 The Supreme Court of Illinois explained vindictive damages as awarded "for the malice and insult" attending the wrong where the "jury is not bound to adhere to a strict line of compensation."[122]

B. Punishment of the Defendant

1. Vindication of the State's Public Rights

44 Closely related to personal vindication is the rationale that punitive damages are awarded to vindicate the insult to the state that the defendant expressed

[116] Oxford English Dictionary 19 (2nd ed. 1989) 641.
[117] Ibid.
[118] 54 U.S. (13 How.) 363 (1851).
[119] Ibid. at 363.
[120] Ibid. at 370.
[121] Ibid. at 371. Similar reasoning was adopted by the Supreme Court of Louisiana in *Black v Carrollton Railroad Co.*, 10 Louisiana Annual Reports (La. Ann.) 33, 40 (1855).
[122] *City of Chic. v Martin*, 49 Ill. 241, 244 (1868). It should be noted that the court gave a number of rationales for vindictive damages, including "to make an example to the community" and "to deter [the defendant] and others."

through his immoral and intentional tortious conduct. The meanings and implications drawn from the etymology of the word "vindicate" are left undisturbed when one reads this rationale expressed by the courts, but the interest that is recovered by the act of imposing damages must naturally be restated. As this trial judge in San Francisco put it in his jury charge: "Where a duty imposed by law is wilfully and maliciously refused to be performed, or performed in such a way as to wound the feelings of the person to whom it is owing, the injury partakes more or less of a public character, and extends beyond the mere pecuniary damage sustained by the party against whom it has been committed."[123]

In its simplest form, the word "punitive" means punishment.[124] It logically follows that thirty-eight states mention that punitive damages, at least in part, serve to punish the defendant for certain especially offensive acts.[125] Perhaps more interesting, however, is the fact that only four states have liberal policies toward awarding punitive damages for such purposes: North Dakota,[126] South Carolina, Texas and Wyoming. South Carolina maintains that such punishment serves to vindicate private rights through extra payment to the plaintiff for her injuries;[127] however, Wyoming and Texas recognise punishment as serving the good of society at large.[128] New York also recognises the purpose of punitive damages as vindicating public rights and not private wrongs.[129] This idea has been referred to as "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine."[130] Such a proposition certainly extends the reach of punitive damages outside the widely accepted limits of private redress. "Civil fines" of this sort assume a quasi-criminal form,[131] as the defendant's conduct is punished for offending society generally.[132] 45

Seven states[133] have recognised that an award of punitive damages to punish the defendant on the community's behalf may have some direct overlap with criminal sanctions. Indiana, for example, has longstanding case law which prohibits the imposition of punitive damages in instances where the defendant is also subject to criminal sanctions.[134] Though the Court clarifies that the 46

[123] *Turner v North Beach and Mission R.R. Co.*, 34 Cal. 594, 598 (1868) (quoting the trial judge).
[124] Black's Law Dictionary (8th ed. 1999) 1270.
[125] See generally, *Schlueter* (fn. 7) Vol. 2, pp. 147–472.
[126] See generally, North Dakota Century Code (N.D. Cent. Code) § 32-03.2-11 (1999).
[127] See *Clark*, 332 S.C. (fn. 110) 3.
[128] See *Condict v Hewitt*, 369 P.2d 278, 280 (1962); and *Hammerly Oaks, Inc. v Edwards*, 958 S.W.2d 387, 391 (1997).
[129] See *Trudeau v Cooke*, 2 New York Supreme Court Appellate Division Reports (A.D.)3d 1133, 1134, 769 N.Y.S. 2d 322, 322 (A.D.3d 2003) (citing *Home Ins. Co. v American Home Prods. Corp*., 75 N.Y. 2d 196, 203, 551 N.Y.S. 2d 481, 550 N.E.2d 930 (1990)).
[130] See *Home Ins. Co.*, at 75 N.Y.2d at 203.
[131] See *Cheatham v Pohle*, 789 N.E.2d 467, 471 (In. 2003).
[132] See generally, *Ex parte Lewter*, 726 So.2d 603, 606 (Ala. 1998); see also *Darcars Motors of Silver Spring, Inc. v Borzym*, 150 Maryland Appeal Reports (Md. App.) 18, 818 A.2d 1159 (2003).
[133] Indiana, Maine, Minnesota, Nebraska, New Jersey, Vermont, and Washington.
[134] See *Eddy v McGinnis*, 523 N.E.2d 737, 740 (Ind. 1988) (citing *Taber v Hutson*, 5 Indiana Reports (Ind.) 323, 323 (1854)).

determination neither relies directly on the United States Constitution's Fifth Amendment,[135] protections against double jeopardy nor Indiana's double jeopardy clause,[136] the Court reasoned that punitive damages in this instance were not in accordance with the fundamental common law principles of the state.[137] The 1989 holding by the United States Supreme Court that punitive damages are reviewable under the Eighth Amendment's prohibition against excessive criminal penalties confirmed this position.[138]

47 It has been postulated that the association between criminal sanctions and punitive damages in tort law has been grossly misconstrued.[139] The fact remains that many modern courts have explicitly provided that punitive damages serve as punishment for public wrongs, and the Supreme Court has repeatedly upheld their constitutionality.[140] "The modern consensus is that, although punitive damages serve criminal law ends, they have…been afforded a complete exemption from the special procedural rules designed to ensure fairness in the punishment of public wrongs."[141] By sanctioning the plaintiff for a violation of a private right (as opposed to a violation of public law) and requiring that the award of punitive damages be founded on a showing of compensatory damages, many courts hold to the positions that punitive damages are distinguishable from criminal sanctions.[142]

2. Split-Recovery Statutes

48 There are eight states that seriously call into question the requirement, due to their statutory provisions, that claimants pay a portion of their punitive damages award to the state.[143] Georgia, Indiana and Iowa require that the plaintiff give 75% of the award to state funds.[144] Georgia's requirement only applies in product liability cases, in order to avoid a windfall gain for the plaintiff and for the benefit of all citizens who could be harmed by the defective product.[145] Indiana and Iowa, along with the four other states, do not limit this requirement solely to products liability, but in Iowa, awards are only directed to the Civil Reparations Trust Fund if the defendant's conduct was not directed specifically at the plaintiff.[146] Alaska, Missouri and Utah require that 50% of the award be placed in state trust funds, Missouri's being the Tort Vic-

[135] See U.S. Const. Amend. V.
[136] See Ind. Const. art. 1, § 14.
[137] See *Eddy*, at 523 N.E.2d, at 740.
[138] *Browning-Ferris Indus. of Vt., Inc. v Kelco Disposal, Inc.*, 492 U.S. 257 (1989).
[139] See *T.B. Colby*, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, Minn. L. Rev. 87 (2003) 583, 602.
[140] Ibid. at 606 (citing *Curtis Publ'g Co. v Butts*, 388 U.S. 130, 159 (1967)).
[141] Ibid.
[142] See *Jemison v Nat'l Baptist Conv., U.S.A., Inc*., 720 A.2d 275, 286 (D.C. 1998).
[143] Alaska, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon and Utah.
[144] See Ind. Code Ann. § 34-51-3-6(c)(1)-(2) (2007)**;** GA. CODE ANN. § 51-12-5.1(e)(1)(2) (1987); Iowa Code Ann. § 668A.1(2)(b) (1986).
[145] See Ga. Code Ann. § 51-12-5.1(e)(1)(2).
[146] See Iowa Code Ann. § 668A.1(2)(b)

tim's Compensation Fund.[147] Oregon requires that 40% of the award go to the plaintiff with up to 20% of that portion being paid to attorney fees and costs, and 60% directed to the Criminal Injuries Compensation Account.[148] In Illinois the amount taken from the plaintiff is left entirely to the discretion of the trial court, which apportions the punitive award among the plaintiff, his attorney, and the State of Illinois Department of Human Services.[149]

In addition to the current eight states, four additional states – Colorado, Flor- 49
ida, Kansas, and New York – had such statutes on their books at one time. Kansas and New York had split-recovery schemes, after which the enabling legislation was allowed to expire. Kansas allowed its statute, which applied only to punitive damages awards in medical malpractice cases, to expire in 1989.[150] New York likewise allowed its statute to expire in 1994.[151] Florida repealed its statute in 1995.[152] Its previous legislation provided that, in actions involving personal injury or wrongful death, 60% of an award of punitive damages was payable to the Public Medical Assistance Trust Fund.[153] Colorado is the only state in which the legislation was struck down as unconstitutional. Under the old law one-third of punitive damages were paid to the state.[154] In 1991 the Colorado Supreme Court concluded that this statute amounted to an unconstitutional taking under the state and federal constitutions.[155] The Colorado Supreme Court thus far stands alone among state courts in having struck down split-recovery legislation.

The stated purpose of split-recovery statutes has varied. Sometimes, as in the 50
case of Illinois and Alaska, it is to discourage frivolous litigation. Sometimes, as in the case of Iowa, it is to deny the plaintiff "windfall" gains. A third purpose is to raise revenue: This was the justification for Florida's (now repealed) statute, as well as Georgia, Utah, and Missouri, according to commentary.[156] One final purpose may simply follow from the fact that, if awarded in response to a violation of a public right, the penalty ought to go, at least, in part, to the public fisc.[157] A variation of this argument is Professor Catherine Sharkey's argument that, where the defendant's wrong may have harmed mul-

[147] See Mo. Ann. Stat. § 537.675 (2001); Utah Code Ann. § 78-18-1(3)(a) (1989); Alaska Stat. Ann. § 09.17.020(j) (1986).
[148] See Or. Rev. Stat. Ann. § 31.735(1)(a)–(b) (1997).
[149] 735 Ill. Comp. Stat. Ann. 5/2-1207 (West 2003).
[150] See *Kan. Malpractice Victims Coalition v Bell*, 757 P.2d 251, 264 (Kan. 1988).
[151] Act of 10 April 1992, 1992 N.Y. Laws, ch. 55, 427(dd) (expired 1 April 1994).
[152] Act of 24 May 1997, 1997 Fla. Laws, ch. 97-94, 16, at 574.
[153] Fla. Stat. Ann. 768.73(2)(b) (West 1986), quoted in *Gordon v State*, 585 So.2d 1033, 1035 n.1 (Fla. Dist. Ct. App. 1991). In all other actions, 60% of the award was directed to the state's General Revenue Fund.
[154] Colo. Rev. Stat. 13-21-102(4) (1989) (repealed 1995).
[155] *Kirk v Denver Publishing Co*., 818 P.2d 262 (Colo. 1991).
[156] See *A.F. Daughety/J.F. Reinganum*, Found Money? Split-Award Statutes and Settlement of Punitive Damages Cases, Am. L. & Econ. Rev. 5 (2003) 134, 137.
[157] See *J.D. Long*, Punitive Damages: An Unsettled Doctrine, Drake L. Rev. 25 (1976) 870, 886 ("If a punitive award is a punishment by society of the errant defendant, something is to be said for paying the penalty to society rather than to some third party beneficiary").

tiple victims, punitive damages taken by the state under a split-recovery statute provide reimbursement for damage suffered by society as a result of the wrongdoing.[158]

51 As Professor Sharkey has noted, the Ohio Supreme Court created an *ad hoc* split-recovery rule in a case where it upheld a large punitive damages award against an insurer.[159] The jury had found that the insurer had denied coverage of the plaintiff's (now deceased) wife's cancer treatments and had awarded $ 2.5 million in compensatory damages and $ 49 million in punitive damages. The court remitted the punitive award to $ 30 million on the grounds that it was excessive under Ohio (but not federal) law and added an explicit condition to its remittitur order: that the plaintiff would receive only one-third of the punitive award and the remainder of the award would be directed to a cancer research fund established by the court.[160]

C. Deterrence

52 Given the ubiquity of deterrence as an explicit rationale for punitive damages in contemporary doctrine and scholarship, it is a little surprising that it does not appear more often in the 19th century cases. Despite the availability (as described above) of other rationales for awarding punitive damages other than just compensation for mental distress, courts did in fact adopt deterrence as the rationale for punitive damages. Deterrence can be justified on two levels. Specific deterrence is aimed at the defendant individually with the goal of dissuading him from committing the same wrongful conduct in the future.[161] General deterrence extends to society at large, and punitive damages are awarded not only to deter the initial wrongdoer's conduct, but also to set an example and serve as a warning to others.

1. Specific Deterrence

53 In Maine, for example, both the majority and the dissent in *Goddard v The Grand Trunk Railway of Canada* agreed that the purpose of awarding punitive damages was specific deterrence.[162] The majority thought that this explained why punitive damages should be awarded against a railway corporation for the intentional torts of its employee: "[w]hen it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before."[163]

[158] *Sharkey*, Yale L.J. 113 (2003).
[159] *Dardinger v Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121 (Ohio 2002).
[160] Ibid. at 146.
[161] Black's Law Dictionary (fn. 124) 481; see e.g., *Seltzer v Morgan*, 336 Mont. 225, 273, 154 P.3d 561, 597 (2007); *Wheeler Motor Co. Inc. v Roth*, 315 Ark. 318, 327, 867 S.W.2d 446, 450 (1993).
[162] 57 Maine Reports (Me.) 202 (1869).
[163] Ibid. at 224.

While it is true that the goal of punitive damages is to have an impact on a defendant in an effort to deter him from repeat offenses,[164] the likelihood of this happening has not proven to be that frequent. It follows that the overwhelming majority of states that recognise deterrence as a central goal in punitive damages awards have extended deterrence effects to the conduct of others in addition to the initial wrongdoer. 54

2. General Deterrence

A good example of the justification for punitive damages based on general deterrence can be seen from the 19th century New York case upholding a judgment for punitive damages: "[i]t is only in cases [of] moral wrong, recklessness or malice that this public consideration applies. In such cases the law uses the suit of a private party as an instrument of public protection, not for the sake of the suitor but for that of the public."[165] 55

Typically, when punitive damages were defended in the 19th century on the basis of general deterrence, they were referred to as "exemplary damages". "Exemplary" is rooted in the Latin for "example," and according to the Oxford English Dictionary, the early usage of the word included both "serving for an illustration" as well as "a penalty such as may serve as a warning".[166] When used by courts, it is clear that exemplary damages were not designed to ensure either compensation or vindication, although certainly either or both could have been benefits of exemplary damages. Exemplary damages were primarily designed for the instruction of the public.[167] In *Freidenheit v Edmundson*, the Supreme Court of Missouri suggested that in a case of trespass to chattels, the court properly instructed the jury to give more than the value of the goods and interest, because "such [additional] damages as would be a good round compensation…might serve for a wholesome example to others in like cases."[168] The awarding of exemplary damages would of course comfort the plaintiff, but they were not necessarily portrayed as compensation for either emotional distress or insult: "[a]llowing damages for wounded feelings, humiliation, and the like is not equivalent to exemplary damages."[169] 56

There is some temptation to say that exemplary damages served a specific deterrence rationale, and obviously there is a great deal of overlap between the concept of specific deterrence and punishment for example's sake. However this would be too crude and hasty a picture of the meaning of exemplary dam- 57

[164] See *Seltzer* (fn. 161) 273 (maintaining the necessity of taking defendant's wealth into account in order to adequately impact defendant's future behaviour).
[165] *Hamilton v Third Avenue R.R. Co.*, 53 N.Y. 25, 30 (1873).
[166] Oxford English Dictionary 5 (2nd ed. 1989) 525.
[167] "[T]he jury are authorised, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages." *Milwaukee and St. Paul Ry. Co. v Arms*, 91 U.S. 489 (1875).
[168] 36 Mo. 226, 230 (1865).
[169] *T.G. Sherman/A.A. Redfield*, A Treatise on the Law of Negligence vol. 3 (6th ed. 1913) 1949.

ages. For example, in the 1791 case *Coryell v Colbaugh* (a case on seduction), the defendant argued that the punitive damages assessed against him (if any) should be very small since he was poor, and, presumably, the compensatory damages alone would be enough to punish and deter him.[170] The court rejected this reasoning, arguing that, because the reason to give exemplary damages was to "prevent such offences in [the] future," the jury was "bound to no certain damages, but might give such a sum as would mark [its] disapprobation, and be an example to others" regardless of the defendant's wealth.[171] This use of exemplary damages is clearly a rejection of *specific* deterrence.

58 In 1996 the United States Supreme Court held in *BMW of North America v Gore* that "a state may permit punitive damages to further its legitimate interests in punishing unlawful conduct and deterring its repetition."[172] The vast majority of states incorporate this principle into their statutory and/or common law authority, especially with the rise of products liability cases, where harm to the plaintiff could likely harm the greater society as well. Today's courts have not found fault with the extension of deterrence purposes to society at large for similar reasons that punishment for the greater good of society has not been deemed unconstitutional.[173]

IV. Rules for Juries (Or Other Factfinders)

59 Whether a defendant must pay punitive damages, and how much, is decided by a jury or a judge acting in the capacity of the finder of fact.[174] The rules which determine how these determinations are made are the result of a combination of common law, statute, and state and federal constitutional law. Given that the federal constitutional limitations on the awarding of punitive damages will be discussed separately in Part V., this part will focus on the source of the rules for the decision at trial that the defendant ought to pay the plaintiff punitive damages that are not themselves required by the federal constitution.

60 The United States is a diverse country offering an extensive history of punitive damages in tort law. At first glance, the states seem to proffer overwhelmingly similar policies and stipulations regarding punitive damages awards. With careful scrutiny, however, the nuances among the different states become clear, and one is able to see the varying applications of punitive damages emanating from different areas of the country.

61 In this section, each state's position on the issue may be analysed under three main sections: (A) the intent required; (B) the standard of proof; and (C) the

[170] 1 N.J.L. 77 (1791).
[171] Ibid. at 78.
[172] 517 U.S. 559, 568 (1996).
[173] See *Colby*, Minn. L. Rev. 87 (2003) 583.
[174] The distinction between findings of fact and findings of law was complicated by the United States Supreme Court in *Cooper* (fn. 90) when it held that a punitive damages award in federal court would be reviewed under a *de novo* as opposed to an 'abuse of discretion' standard.

amount of the damages. These sections illustrate, through the states' statutory and common law rules, how America has approached punitive damages awards in the past decades, and will help to illuminate the true differences adopted by the various regions across the country.

A. Requisite Culpability

62 Various states' requisite levels of culpability required to merit a punitive damages award further suggest the varying policies across the country. Every state that recognises punitive damages encompasses some variation of a showing of malice, reprehensible conduct, and conscious indifference in their statutory or common law schemes. Whether courts and legislatures utilise the words "outrageous", "egregious", or "reprehensible" to describe a defendant's conduct does not seem to make too much of a difference. Nonetheless, there are some ways in which standards differ among the states, mainly in the areas of malice and negligence.

1. Intent

63 Every state that allows punitive damages permits them to be awarded when there is a showing of an intentional injury. The definition of "intent" in all state and federal jurisdictions follows Section 8A of the Second Restatement of Torts, which sets out a two part test. An act is intentional if it was done with either the purpose of bringing about the result or if the actor was substantially certain that his or her action would bring about the result.[175]

2. Recklessness

64 According to Section 500 of the Second Restatement of Torts, all forms of recklessness are distinguished from mere carelessness by the fact that the acts in question not only pose an unreasonable risk of physical harm to another, "but also that such risk is substantially greater than that which is necessary to make his conduct [careless]."[176] Granting that the notion of unreasonable conduct posing particularly grave dangers to others forms the core of recklessness, it will nonetheless be helpful to distinguish two different forms of reckless conduct. The first consists of *reckless disregard* for others' physical well-being. The second involves *deliberate indifference* to others' physical well-being. As these labels suggest, the central distinction between the two forms of recklessness is the degree to which the actor is cognisant of the risks posed by his conduct.

65 Section 500 of the Second Restatement states in part that a person acts with reckless disregard when his unreasonable conduct poses a grave danger of harm to others and when he has "reason to know of facts which would lead a

[175] Restatement (Second) of Torts § 8A (1965).
[176] Restatement (Second) of Torts § 500 (1965).

reasonable man to realise [that those dangers attend his conduct]."[177] It thus permits a factfinder to conclude that an actor has acted recklessly even though he was not actually aware of the dangers posed by his conduct at the time of acting. By doing so, the clause aims to bring under the heading of reckless disregard the conduct of an actor who fails to appreciate the dangers his actions pose because of his "reckless temperament, or [because of] the abnormally favourable results of previous conduct of the same sort."[178] This branch of reckless disregard is often called implied malice or wanton disregard.

66 The employment of wanton disregard/deliberate indifference as a separate ground for punitive damages dates back at least to the mid-19th century.[179] With the advent of the automobile in the early 20th century, instances of injury resulting from dangerous driving by intoxicated motorists would provide a common instance of the sort of "aggravated" negligence that permits the imposition of punitive damages.[180] Twenty-six states require the plaintiff to prove that the defendant's culpability is implied malice.[181] For example, the predicate for Alabama punitive damages is "oppression," "fraud," "wantonness," and "malice".[182] It defines implied malice as "the intentional doing of a wrongful act without just cause or excuse under such circumstances that the law will imply an evil intent."[183]

67 Wanton disregard forms one prong of Section 500's concept of reckless disregard. The other prong consists of conduct undertaken by a person who is *aware* both that his conduct creates an unreasonable risk of physical harm to another, and that such risk is substantially greater than that which is necessary to make his conduct careless. Montana, for example, requires a showing of actual malice, defining the term as conduct which the defendant "has knowledge of facts or intentionally disregards the facts that create a high probability of injury to the plaintiff and deliberately proceeds in disregard of it."[184] Twelve states now require proof that a defendant was acting maliciously in order to recover punitive damages.[185]

[177] Ibid.
[178] Ibid. cmt. c.
[179] See e.g., *Brooke v Clark*, 57 Texas Supreme Court Reports (Tex.) 105 (1882) (upholding, upon rehearing, an award of punitive damages against a doctor for gross malpractice evincing indifference).
[180] See *Ross v Clark*, 274 P. 639 (Ariz. 1929).
[181] Ibid. at 164–66. The states are: Alabama, Alaska, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Minnesota, Missouri, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.
[182] Ala. Code § 6-11-20(1)(b)(ii) (1975).
[183] Ibid. at § 6-11-20(1)(b)(ii)(2).
[184] Mont. Code Ann. § 27-1-221 (2003).
[185] *R.L. Blatt* et al., Punitive Damages: A State-By-State Guide To Law And Practice (4th ed. 2000) 162 f., 472. The states are: Arizona, California, Delaware, Kentucky, Maine, Maryland, Montana, Nevada, North Dakota, Ohio, Rhode Island, and Virginia.

This is not the same as "intent" under Section 8A, since deliberate indifference is not the same thing as substantial certainty, since one need not be certain of one's result, just indifferent to a substantial risk. However, because deliberate indifference "requires a *conscious choice of a course of action*…with knowledge of the serious danger to others involved," it thus stands in sharp contrast to those forms of negligence that involve inadvertence – momentary lapses, slip-ups, etc.[186] It also differs from instances of *advertent* (conscious) carelessness in that for "the actor to be reckless [he] must recognise that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent."[187] 68

For example, in *National By-Products, Inc. v Searcy House Moving Co.*, the Arkansas Supreme Court overturned a jury verdict of punitive damages because it held that the facts did not support the conclusion that the defendant had "consciously risked great danger and with indifference to the consequences."[188] The defendant's driver, for whose acts it was responsible, drove an 80,000 lb loaded truck above the speed limit downhill while approaching a bridge at which traffic was stopped because of a stuck vehicle. The driver could see that traffic had been stopped and reduced to one lane and yet he did not slow down. Notwithstanding these facts, the court held that punitive damages were not warranted because the facts did not show that the driver was *consciously* indifferent to the fact that his negligence "was about to cause damage".[189] 69

3. Recklessness and Drunk Driving

As noted above, many jurisdictions allow punitive damages in cases in which the defendant has caused an accident while operating a vehicle with a blood alcohol level above the limit set by criminal statutes. Some defendants have tried to persuade courts to bar the award of punitive damages in these cases on the ground that drunk drivers who are already drunk when they enter their cars do not knowingly choose to engage in highly risky conduct. This argument has been regularly rejected: If the decision to begin drinking is made in the knowledge that driving may soon follow, the whole series of decisions leading up to the erratic driving is deemed reckless.[190] 70

Should liability for compensatory or punitive damages attach if an intoxicated driver *who is driving reasonably* collides with and injures the plaintiff? After all, many car accidents do not involve erratic or otherwise abnormal driving on anyone's part, and assume that a defendant might, with some credibility contend that, even if drunk, he was not driving in an abnormal or erratic manner. With respect to *compensatory damages*, it is conceivably open to a drunk-yet- 71

[186] Restatement (Second) of Torts § 500 cmt. g (1965) (emphasis added).
[187] Ibid.
[188] 731 S.W.2d 194, 195 (Ark. 1987) (quoting *Ellis v Ferguson*, 238 Ark. 776 (1964)).
[189] Ibid. at 197.
[190] See *Taylor v Superior Court*, 598 P.2d 854 (Cal. 1979).

competent driver who is involved in an accident to argue that he should not be held liable because his competent driving would suggest that the tortious aspect of his conduct – driving while drunk – played no role in producing the plaintiff's injury. In *Ingram v Pettit* the Florida Supreme Court seemingly rejected such an argument, imposing punitive damages on a drunk driver whose drunkenness appears not to have contributed to the accident resulting in the plaintiff's injuries.[191]

B. Standard of Proof

72 Typically the standard of proof required for factfinding in a civil case in the United States is the standard of "preponderance of the evidence". The standard of proof required for a criminal conviction is the standard of "beyond a reasonable doubt". Although historically punitive damages have been treated no differently than any other finding of fact in civil litigation, there has been a movement to adjust the standard of proof required for the imposition of punitive damages to meet an intermediate standard called "clear and convincing evidence."

73 In *Masaki v General Motors Corp.*,[192] the Hawaii Supreme Court explained its choice of the clear and convincing evidence standard by noting that the intermediate standard had been developed in the context of civil penalty cases and civil cases involving fraud: "clear and convincing" evidence may be defined as an intermediate standard of proof greater than a preponderance of the evidence, but less than proof beyond a reasonable doubt required in criminal cases. It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable.[193]

74 Thirty-five states have adopted the clear and convincing standard in one form or another.[194] Colorado has adopted the higher standard of "beyond a reasonable doubt."[195] Although there is no empirical data that demonstrates whether changes in the standard given to juries makes a difference in outcomes, it is clear that the intended effect of changing from the preponderance of the evidence standard is to make it harder for defendants to be found liable for punitive damages.[196]

C. Amount of Punitive Damages Awards and Factors Relevant to their Determination

75 Perhaps the most varied aspect of punitive damages awards in America surfaces in the area of the amount of the award the factfinders may issue. There

[191] 340 So.2d 922 (Fla. 1976).
[192] 71 Hawaii Reports (Haw.) 1 (1989).
[193] Ibid. at 14.
[194] *Schlueter* (fn. 7) Vol. 1, 313–15.
[195] Colo. Rev. Stat. § 13-25-127(2) (2001).
[196] *J.K. Robbennolt*, Determining Punitive Damages**:** Empirical Insights and Implications for Reform*,* Buffalo L. Rev. 50 (2002) 103, 176.

are roughly seven different methods or principles used in determining the award, each of which grant the trier of fact a certain level of discretion. The most broad approach is to give the jury complete discretion in determining the amount of the award. Eight different states follow this approach. Rhode Island, South Carolina and Vermont each provide the trier of fact with unrestricted power to determine the award. For example, the South Carolina Court in *Gilbert v Duke Power Co*. held that "no formula for the measurement of punitive damages … is possible, and the amount to be awarded is peculiarly within the judgment and discretion of the jury."[197]

The aforementioned states illustrate the broadest approach to punitive damages award determinations. There are many other utilised approaches, each of which narrows the jury's discretion more. For instance, Maine allows the jury leeway in its determination, but gives some minimal guidance.[198] Kentucky, Louisiana, Minnesota, Mississippi, South Dakota and Tennessee courts likewise avoid limiting the jury's discretionary finding for punitive damages, but provide the jury with a detailed list of factors to consider. Kentucky, Minnesota, Mississippi enacted provisions in their state statutes to guide the determination of damages, while the other two states have developed similar lists, but through common law. 76

South Dakota, for example, allows great latitude for the jury, but developed a five-factor test if the award is later reviewed for excessiveness. In *Grynberg v Citation Oil & Gas Corp*., the Court held that the initial jury determination for a punitive damages award is wholly discretionary, but upon review, the judge must consider five factors: (1) the wealth of the wrongdoer; (2) the ratio of compensatory damages to punitive damages; (3) the nature and enormity of the wrong; (4) the degree of the wrongdoer's intent; and (5) all other relevant factors.[199] This test is expanded upon in Louisiana,[200] Minnesota,[201] Mississippi[202] and Tennessee[203] to include the duration of the defendant's conduct, financial gain resulting from the misconduct and whether the defendant took remedial action.[204] 77

[197] 255 S.C. 495, 500, 179 S.E.2d 720, 723 (1971) (citing *Hicks v Herring*, 246 S.C. 429, 436, 144 S.E.2d 151, 154 (1965)).

[198] See *Hanover Insurance Co. v Hayward*, 464 A.2d 156, 159 (Me. 1983) (explaining that fact finder must weight "all relevant and mitigating factors" presented, including the egregiousness of the defendant's conduct, the ability of the defendant to pay such an award, and any criminal punishment imposed for the conduct in question).

[199] 573 N.W.2d 493, 504-07 (S.D. 1997) (citing *Flockhart v Wyant,* 467 N.W.2d 473, 479 (S.D. 1991)).

[200] See *Mosing v Domas*, 830 So.2d 967, 974 (La. 2002) (citing Restatement (Second) of Torts § 908 cmt. e (1979) ("determination of the proper amount of exemplary damages…is an intensely fact-sensitive undertaking, and the jury must consider not merely the act, but all of the circumstances…including the extent of harm or potential harm caused by the defendant's misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved recklessly or maliciously, and…the wealth of the defendant").

[201] See Minn. Stat. Ann. § 549.20(3) (1978).

[202] See Miss. Code Ann. § 11-1-65(1)(e) (1993).

[203] See *Hodges v S.C. Toof & Co*., 833 S.W.2d 896, 902 (Tenn. 1992).

[204] Ibid.

1. Wealth

78 It is important to note what significance the defendant's wealth bears on the amount of award. Colorado and North Dakota are two of the only states that do not permit evidence of the defendant's wealth to be considered.[205] Contrastingly, the majority of states allow the defendant's wealth to be considered[206] as one potential factor in determining punitive damages, while other states require it as being central to the principle behind such an award. Maine, for example, holds that the punitive damages award must take into account the defendant's wealth in order to adequately affect the defendant and fulfil the award's punishment and deterrent purposes.[207]

79 A growing number of states have adopted tort reforms limiting the use of a defendant's wealth or financial condition in setting the amount of punitive damages. Iowa's tort reform statute does not permit the discovery of the wealth of the defendant until the plaintiff proves there is "sufficient admissible evidence" for punitive damages.[208] Some courts restrict access to the parent corporation's wealth if a subsidiary is charged with punitive damages.[209] Some jurisdictions do not permit the admission of evidence of the defendant's wealth until a supportable case for punitive damages is proven.[210] An Oregon statute provides that: "during the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover."[211] This is true for Arkansas and Wisconsin as well.[212]

80 On the other hand, a few states require the factfinder to consider wealth when setting the amount of punitive damages. California requires evidence of the defendant's financial condition as critical to the punitive damages formulation, but such evidence is inadmissible in wrongful death actions.[213] Ohio's tort reform statute for punitive damages requires the factfinder to consider the wealth of the defendant in cases involving nursing home or residential facilities.[214]

[205] See Col. Rev. St. Ann. § 13-21-102(6) (1986); N.D. Cent. Code § 32-03.2-11(3) (1987).
[206] E.g., Alaska, Delaware, Iowa, Utah, and Wisconsin.
[207] See *Hanover*, 464 A.2d 156, 159 (Me. 1983).
[208] Iowa Code Ann. 668A.1(3) (1998).
[209] See *Gearhart v Uniden Corp. of America*, 781 F.2d 147 (8th Cir. 1986).
[210] A minority of states restrict evidence of a defendant's wealth until the jury determines punitive liability: Alabama*: So. Life & Health Ins. Co. v Whitman*, 358 So.2d 1025, 1026–27 (Ala. 1978); California: Cal. Civ. Code 3295(d) (West 1997); Maryland: Md. Code Ann., Cts. & Jud. Proc. 10-913(a) (2002); Montana: Mont. Code Ann. 27-1-221(7) (2003); Nevada: Nev. Rev. Stat. Ann. 42.005(4) (Michie 2002); Oregon: Or. Rev. Stat. 30.925(2) (2003); Tennessee: *Hodges v S.C. Toof & Co*., 833 S.W.2d 896, 901 (Tenn. 1992); and Utah: Utah Code Ann. 78-18-1(2) (2002 & Supp. 2004).
[211] Or. Rev. Stat. 30.925(2) (2003).
[212] Ark. Code Ann. 16-55-211(b) (Supp. 2003).Wis. Stat. Ann. 895.85(4) (1997).
[213] *Adams v Murakami,* 813 P.2d 1348 (Cal. 1991) (ruling that evidence of defendant's financial condition is required in setting punitive damages).
[214] 2004 Ohio Laws 144 (effective 7 April 2005).

2. Ratios and caps

81 The amount of punitive damages can also be dependant upon the defendant's level of intent in committing the wrongdoing, the amount of compensatory damages awarded, or the injury which the plaintiff sustained or others would likely sustain. Hawaii maintains that "the measure of exemplary damages should be the degree of malice, oppression, or gross negligence…and the amount of money required to punish the defendant, considering his financial condition. These factors bear no necessary relationship to the actual damages awarded."[215] In contrast, many states require that punitive damages bear some reasonable relationship to the award of compensatory damages. Such a rule seemingly hinges on concepts of fundamental fairness.[216] Colorado, for instance, prohibits punitive damages to exceed the amount awarded for compensatory damages.[217] Otherwise, states that recognise the rule that punitive damages should resemble the compensatory damages seem to interpret the rule broadly. A Vermont Court recently held that a compensatory damages award of $ 10,000 and a punitive damages award of $ 100,000 (10 to 1 ratio) was not excessive because the jury felt the need to fashion a punitive damages award that would deter the defendants' ongoing illegal conduct and prevent further harm to others.[218] The Court pointed out that the U.S. Supreme Court along with courts in Idaho, South Dakota and Maine had upheld much higher ratios in order to fulfil the purposes of punishment and deterrence for future potential injuries.[219]

82 This trend toward liberally construing the ratio between compensatory and punitive damages seems to stem from the weight placed on punishing the defendant for the extent of the actual injury or future potential injuries, and not so much on the actual determination of compensatory damages. The West Virginia Court in *Boyd v Goffoli* held that punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred.[220] Some states approach punitive damages awards even more narrowly, allowing such awards only for specific injuries the plaintiff has sustained. These damages do not serve any

[215] *Mock v Castro*, 105 Hawaii 374, 393, 98 P.3d 245, 264 (2004) (citing *Howell v Associated Hotels Ltd*., 40 Haw. 492, 497 (1954)); see also *Jordan v Clayton Brokerage Co. of St. Louis*, Not Reported in F.Supp., 1987 WL 6999, *3 (W.D. Mo. 1987).

[216] See *TXO Production Corp. v Alliance Resources Corp*., 509 U.S. 443, 459 (citing *Garnes v Fleming Landfill, Inc*., 188 W.Va. 656, 668, 413 S.E.2d 897, 909 (1991)).

[217] See Col. Rev. St. Ann. § 13-21-102(1)(a).

[218] See *Sweet v Roy*, 173 Vt. 418, 446, 801 A.2d 694, 714–15 (2002).

[219] Ibid. (citing *TXO Production Corp.* at 509 U.S. 443, 460; *Harris v Soley*, 756 A.2d 499, 509 (Me. 2000); *Walston v Monumental Life Ins. Co*., 129 Idaho 211, 923 P.2d 456, 467–68 (1996); *Schaffer v Edward D. Jones & Co*., 552 N.W.2d 801, 815–17 (S.D. 1996)); see also *Ferraro v Pacific Fin. Corp*., 8 Cal. App.3d 339, 353, 87 Cal. Rptr. 226, 234–35 (Cal. App. 3d 1970) (upholding a punitive damages award for $ 25,000 more than a compensatory damage award in a case involving wrongful repossession of an automobile because the jury deemed the award necessary for punishment and deterrence purposes).

[220] See 216 West Virginia Supreme Court Reports (W.Va.) 552, 565, 608 S.E.2d 169, 180 (2004).

deterrent or punitive purposes and instead allow the plaintiff to recover for injury to feelings and for the sense of indignity.[221]

83 Over the past two decades, a large handful of states have enacted statutes to dictate and sometimes limit the amount of punitive damages in tort law. There are currently eighteen states that have set limits to such awards.[222] In 1999, the Alabama legislature enacted a statute which established that no punitive damages award shall exceed three times the compensatory damages or $ 500,000, whichever is greater, with lower limits for small business owners, higher limits for physical injury and no limits for class actions, wrongful death and intentional infliction of physical injury.[223] States such as Alaska, Arkansas, Florida, and North Dakota have similar damages caps in place, though some vary with maximums of two times the compensatory damages and/or $ 250,000 as the maximum. New Jersey provides for five times the compensatory damages or $ 350,000, but sets no limit for bias crimes, discrimination, HIV testing disclosure, sexual abuse, or driving while under the influence of a controlled substance.[224]

84 Some other states such as Kansas, Mississippi and Montana set limits based on the defendant's net worth so as to appropriately punish but not financially destroy him.[225] Additionally, Oklahoma establishes its punitive damages award limits based on the defendant's level of intent in committing the act, ranging from $ 100,000 or an amount equal to compensatory damages for reckless disregard for the rights of others, to $ 500,000, two times the compensatory damages, or the financial benefit the defendant incurred from the act for conduct that is intentionally malicious, to no limit for intentionally malicious conduct that is life threatening.[226] Though these statutory limits vary in detail by state, the recent changes reflect today's trend in America to engage in tort reform and to scrutinise jury damages awards.

85 Every state provides that jury awards may be reviewed for excessiveness if they seem unreasonable in light of the evidence or if they do not comport with the statewide standards to which the jury is supposed to adhere. Nonetheless, many states do not favour overturning jury determinations, most likely out of respect for the jury's important role of representing the community in America's legal system. It is interesting to note, however, that in almost all of the statutes which set limits to punitive damages awards, there are provisions in the statutes providing that the jury must not be instructed or advised of the limitations on the amount of a punitive damages award.[227] It seems counterin-

[221] See, e.g., *Aubert v Aubert*, 129 N.H. 422, 429 (1987).
[222] Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Mississippi, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Texas and Virginia.
[223] Ala. Code § 6-11-20.
[224] N.J. Stat. Ann. § 2A:15-5.14(b)-(c) (1995).
[225] See, e.g., Mont. Code Ann. § 27-1-220(3) (2003); Miss. Code Ann. § 11-1-65(3)(a) (2002); Kan. Stat. Ann. § 60-3701(e)(1)-(2) (1987).
[226] See Okla. Stat. Ann. tit. 23, § 9.1 (1995).
[227] See, e.g., Nev. Rev. Stat. Ann. § 42.005 (1989).

tuitive and contrary to policies of efficiency not to tell the jury whatever limits are in place, as a higher award would just mean that a judge would have to amend the award to comply with statutory limits. However, in some cases, it might be argued that this method provides a check on the jury's verdict, avoiding excessive and prejudiced awards.

V. Constitutional Constraints

86 Over the past eighteen years, the Supreme Court has acted increasingly unsure about the constitutional grounds of punitive damages and has acted with increasing energy to limit the power of the states to regulate punitive damages under their state municipal and constitutional law. The Court's movement has occurred over the course of six cases. In the first case, the Court rejected the claim that a large punitive damages award could violate the common law or could be the basis for an appeal under the Eighth Amendment's Excessive Fines Clause.[228] Justice O'Connor tried to persuade the Court that it should apply the Eighth Amendment to punitive damages in tort suits, since she believed that the Clause protected civil as well as criminal defendants.[229] The Court closed the door to an Excessive Fines challenge but left open the possibility that it might entertain other constitutional grounds for appeal.[230] O'Connor lost the battle in *Browning-Ferris*, but the Court soon recognised that defendants had a due process right in *Haslip*, the next case in which it considered the constitutionality of punitive damages.

87 In *Haslip*, the Court rejected the defendant corporation's argument that it had been denied due process when an Alabama jury determined a punitive damages award that was "more than 4 times the [plaintiff's] amount of compensatory damages [and] more than 200 times [her] out-of-pocket expenses."[231] At least, one could say, the Court tethered its analysis to the Due Process Clause. Justice Blackmun, writing for the majority, applied the Due Process Clause to what he called the "common law method" of determining punitive damages.[232] The common law method consists of a jury determining the sum of money the defendant ought to pay, based on "the gravity of the wrong and the need to deter similar wrongful conduct," and then both the trial court and appellate courts review the award.[233] Blackmun conceded that, although courts used the common law method for years, he could not guarantee that its results were presumptively compatible with the Due Process Clause. Nevertheless, he held that the methods used to determine the award in *Haslip* satisfied the Due Process Clause because it "did not lack objective criteria".[234]

[228] *Browning-Ferris Indus. of Vt., Inc. v Kelko Disposal, Inc.*, 492 U.S. 257, 280 (1989).
[229] Ibid. at 287 (O'Connor, J., concurring in part and dissenting in part).
[230] Ibid. at 280 (Brennan, J., concurring).
[231] *Pac. Mut. Life Ins. Co. v Haslip,* 499 U.S. 1, 23 (1991).
[232] Ibid. at 15–17.
[233] Ibid. at 15.
[234] Ibid. at 17–18, 23.

88 The problem with Blackmun's reasoning, as Justice Scalia noted in his concurrence, is that the majority opinion did not say anything about the content of the due process right that protected Pacific Mutual Insurance.[235] As both Justices Scalia and O'Connor pointed out for very different reasons, it is not clear what "objective criteria" Blackmun found in Alabama's procedures other than the jury receiving general instructions that they should base the award on the "character and degree of the wrong…and [the] necessity of preventing similar wrong."[236] O'Connor, in her second dissent in this series of cases, noted that the jury received no guidance as to what "relation, if any, should exist between the harm caused and the size of the award, nor how to measure the deterrent effect of a particular award…[nor] information…about criminal fines for comparable conduct or the range of punitive damages awards in similar cases."[237] She would have held that "such broad and unlimited power" puts jurors in the position of lawmakers, not factfinders.[238]

89 In the third case, *TXO Production Corp. v Alliance Resources Corp.*, the defendant, hoping to exploit the Supreme Court's invocation of "objective criteria" in *Haslip*, suggested a set of "objective criteria" under which the Court ought to review the plaintiff's award.[239] The test proposed by TXO would have examined "(1) awards of punitive damages upheld against other defendants in the same jurisdiction; (2) awards upheld for similar conduct in other jurisdictions; (3) legislative penalty decisions with respect to similar conduct; and (4) the relationship of prior punitive awards to the associated compensatory awards."[240] Despite the fact that this test resembles the test ultimately adopted by the Court in *BMW*, the Court rejected TXO's suggestion. Instead, the Court held that, after a review of the common law method under the Due Process Clause, the process contained in the *Haslip* test was the most precise, and upheld a $ 10 million punitive damages award arising from a suit in which only $ 19,000 in actual damages were awarded.[241] As Justice Scalia waggishly noted, the test the Court seemed to be endorsing for the future was that it would uphold a punitive damages award if it were "no worse than *TXO*".[242]

90 The fourth case, *BMW*, represents only a partial victory for Justice O'Connor. Justice O'Connor concluded *Haslip* by noting that it was her opinion that one could not satisfy due process by state punitive damages practice if the court informed *juries* of the seven "Green Oil factors" that Alabama required for appellate review.[243] In *BMW*, the Court adopted a version of the petitioner's proposal in *TXO* that appellate courts scrutinise jury verdicts under an "objective

[235] Ibid. at 24–25 (Scalia, J., concurring).
[236] Ibid. at 48 (O'Connor, J., dissenting).
[237] Ibid.
[238] Ibid. at 46 (quoting *Gaccio v Pennsylvania,* 382 U.S. 399, 403 (1966)).
[239] *TXO Prod. Corp. v Alliance Res. Corp.,* 509 U.S. 443, 455–56 (1993).
[240] Ibid. at 455–56.
[241] Ibid. at 446, 453, 457.
[242] Ibid. at 472 (Scalia, J., concurring).
[243] Ibid. at 51 (citing *Green Oil Co. v Hornsby*, 539 So. 2d 218, 223–24 (Ala. 1989)).

test". The three "guideposts" developed by Justice Stevens eschewed historical comparisons between compensatory and punitive awards and instead called on courts to examine the "reprehensibility" of the defendant's conduct.[244] Missing from *BMW* was the idea that the Constitution required that the process give juries, as opposed to appellate courts, any specific kind of guidance outside of the traditionally vague instructions that the Court approved in *TXO* and *Haslip*. Some observers correctly see the battle from *Browning-Ferris* to *State Farm* as a battle between those on the Court who sought a constitutional hook for review of state punitive damages proceedings (led by Justice O'Connor) against those, such as Justice Scalia, who opposed such a move because it seemed to open the door to yet another island of substantive due process.[245]

What is left out of the story is the battle that Justice O'Connor lost on the way 91
to winning the war. She wanted to make punitive damages more like civil fines or penalties. This meant more than limiting their size by creating a boundary above which they could not reach; which is, in the end, what the Court tried to do in *State Farm*. In a comment that would become known as the "single-digit" rule, Justice Kennedy stated that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due-process" (at least in cases involving financial harm).[246]

It seemed to many observers, however, that it was the concern that Utah courts 92
had subjected the defendant to punitive damages for actions outside of the state, and of which it had no notice, that motivated the reversal in *State Farm*. State Farm argued that a Utah jury based the punitive damages it awarded in a suit alleging bad faith failure to settle partially on the company's conduct outside of Utah – conduct that, even had it occurred, the state would not punish.[247] The plaintiff's references to State Farm's out-of-state conduct related to a vast array of practices, some of which would be illegal in any state in which they occurred and some of which may not have been illegal in all states. However the plaintiff had introduced that evidence in order to help the jury ascertain the reprehensibility of the defendant's conduct, as required by *BMW*.[248] Furthermore, the Court held that conduct either within or outside of Utah should have been excluded from the jury if it failed to bear a certain "relation" to the plaintiff's injury.[249] Justice Kennedy, writing for the Court, said: "For a more fundamental reason, however, the Utah courts erred in relying upon this

[244] *BMW of N. Am., Inc. v Gore*, 517 U.S. 559, 575 (1996). The other two guideposts were the ratio between punitive and non-punitive damages and comparable civil penalties. Ibid. at 580–85.
[245] See, e.g., *B.C. Zipursky*, A Theory of Punitive Damages, Tex. L. Rev. 84 (2005) 105, 118–24.
[246] *State Farm Mut. Auto. Ins. Co. v Campbell,* 538 U.S. 408, 425 (2003).
[247] Ibid. at 420–23.
[248] See *BMW of N. Am.*, 517 U.S., supra note 244 at 576–77. The plaintiff introduced the following evidence: "Dr. Gore contends that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car formed part of a nationwide pattern of tortious conduct. Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."
[249] *State Farm Mut. Auto. Ins.*, 538 U.S., supra note 246 at 422.

and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no *relation* to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavoury individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here."[250]

93 The Court could have meant "relation" in two different ways. First, it could have meant that juries ought not to base their punitive damages decisions on reasons having to do with bad acts that the defendant did, but which lacked the proper connection to the plaintiff's standing – e.g., the suit brought by the Campbells.[251] The second is that the jury ought not to use the punitive damages decisions to disgorge from the defendant the cost of injuries resulting from bad acts similar to those suffered by the plaintiff but which occurred to other people.[252] Justice Kennedy was not clear about which he meant. It would take yet another case to clear up the confusion.

94 In the sixth case, *Philip Morris U.S.A. v Williams*, the Supreme Court answered the question of what Justice Kennedy meant by "relation" but it left open the question of whether the single-digit rule was a real rule, and if it was, whether it applied to personal injury cases.[253] In *Philip Morris*, the plaintiff's estate sued for the wrongful death of a smoker and won a $ 821,000 compensatory damages award and a $ 79.5 million punitive damages award. The Supreme Court reversed the punitive damages in this case, but not because the ratio between the compensatory award and the punitive damages award was constitutionally excessive. It reversed it on completely separate grounds relating to the possibility that the trial judge's instructions impermissibly allowed the jury to punish the defendant tobacco company for having caused death and injury to smokers in the state where the plaintiff lived.[254] The Court did not discuss whether the award was constitutionally suspect because of the ratio between the compensatory and punitive award, which exceeded single digits by a very large degree. More ominously, the decision to reverse was 5-4, and the author of *BMW*, Justice Stevens, voted to affirm the $ 79.5 million punitive damages

[250] Ibid. at 422–23 (emphasis added). The portion of the Utah Supreme Court decision that prompted this comment was: "Even if the harm to the Campbells can be appropriately characterised as minimal, the trial court's assessment of the situation is on target: 'The harm is minor to the individual but massive in the aggregate.'" *Id.*, at 1149.

[251] Under this approach, the jury could not (hypothetically speaking) have heard evidence that State Farm breached its contracts in its real-estate dealings, or had been sued by the Equal Employment Opportunity Commission (EEOC) for race discrimination.

[252] Under this approach, the amount of punitive damages State Farm ought to have paid could not have been based on evidence of the value of the injuries caused by State Farm when it breached its insurance contracts with other customers in bad faith, whether inside or outside of Utah.

[253] 127 S. Ct. 1057 (2007).

[254] Ibid. at 1063.

award, leaving one to wonder whether the ratio prong in the test that he devised possessed much force in cases involving conscious indifference to human life – a factor which played a large role in the reasoning of the underlying state courts which had upheld the award notwithstanding both *BMW* and *State Farm* (Justice Stevens had voted with the majority in *State Farm* as well).

95 It is possible to take the Supreme Court at face value and to assume that they approached the problem of punitive damages in *Philip Morris* with the goal of deciding the case on the narrowest grounds possible. Even if it were possible for the Court to adequately adjudicate the case before it by using only some of the tests it had previously developed, it is not clear why it would want to do so. The practicing bar had interpreted *State Farm* to have set out a hard cap. Numerous state courts had taken this to be the message of *State Farm*, even in personal injury cases.[255] One might think that the Supreme Court ought to take up the opportunity to articulate and develop a test that it had so recently developed.

96 One reason why the court avoided the ratio rule in *Philip Morris* might be, as suggested above, that at least one Justice who had voted in *State Farm* had second thoughts about the durability or strength of the rule, at least when it came to extremely culpable conduct in the context of personal injury litigation. Another reason might be that the court is beginning to realise that the rule is not really worth fighting to defend. One of the most notable features of punitive damages in the state courts and the lower federal courts is how malleable the compensatory damages figure is in the hands of a judge intent on producing a ratio that stays within the magic single-digit field.

97 For example, in *Willow Inn, Inc. v Public Serv. Mut. Ins. Co.,* the district court and the Court of Appeals found that a $ 2,000 compensatory damages award and a $ 150,000 punitive damages award in a bad faith insurance suit bore a "single-digit" ratio to one another, albeit for different reasons.[256] The trial court looked at the *potential* harm that could have been suffered by the plaintiff had it not spent money to enforce its claim in the face of the bad faith denial of its insurance coverage.[257] The court argued the $ 150,000 punitive damages award ought to be compared to the potential loss of $ 125,000, for a ratio of close to 1:1. The appellate court rejected this reasoning, holding instead that the proper comparison of the $ 150,000 punitive damages award was with the legal fees paid by the plaintiff to enforce its rights, which totalled close to $ 135,000, also for a ratio of 1:1.[258] Other courts have come up with other, equally creative accounting tricks. In *Seltzer v Morton*, the Montana Supreme Court rejected the contention that the *State Farm* ratio required a comparison of the punitive

[255] See, e.g., *Romo v Ford Motor Co*., 6 Cal. Rptr. 3d 793, 797–98 (Ct. App. 2003).
[256] 2003 U.S. Dist. LEXIS 9558 (E.D. Pa., 21 July 2003) and 399 F.3d 224 (3th Cir. 2005).
[257] 2003 U.S. Dist. LEXIS 9558 at *8.
[258] 399 F.3d at 235. See also *Action Marine, Inc. v Continental Carbon Incorporated*, 481 F.3d 1302 (11th Cir. 2007) for a similar argument.

damages award with the compensatory award.[259] The court held, instead that the proper comparison was with the company's net worth. Despite ultimately overturning the punitive damages award of $ 20 million in a case involving a $ 1.1 million compensatory award, it insisted on comparing the punitive damages award with the figure of $ 260 million.[260]

98 It is not clear what purpose or value the ratio rule has at this point. The rule itself has very shallow roots in the history of punitive damages jurisprudence. It is easy to manipulate and does not really provide greater certainty or much of a constraint on a creative judge. It was not defended by the Supreme Court in a case in which it could have been invoked easily and crisply. Despite the superficial attraction of the rule – it promised the same swift effects of a legislative cap without the legislation – it seems that the Supreme Court has chosen not to expend its capital defending it. Unless the court chooses to bring it up again in a decision of importance, it is very likely that the ratio rule will be abandoned by the courts, to the point where they will not even need to invent fictions to justify ratios higher than single-digits.

99 On January 31, 2008 the Oregon Supreme Court issued its opinion in the remand of *Williams v Philip Morris Inc.*[261] The Oregon Supreme Court upheld the original jury verdict of $ 79.5 million in punitive damages.[262] There was every reason to believe that, after the U.S. Supreme Court's decision in *Philip Morris*, the Oregon Supreme Court would remand the case to the trial court with orders to conduct a new trial for damages. It would have been less likely to have ordered a remittitur of the punitive damages. The latter option was, after all, chosen by the Alabama Supreme Court after the United States Supreme Court reversed and remanded its decision in *BMW*.[263] Of course, *BMW*, unlike *State Farm*, did not pretend to erect a numerical hard cap; it is interesting to note that the Alabama Supreme Court applied to the U.S. Supreme Court's three guideposts (plus its own state law guideposts) by awarding an amount which was greater than ten times the compensatory damages awarded ($ 50,000 v. $ 4,000).

100 In any event, the Oregon Supreme Court followed a very different path. It held that, notwithstanding the United States Supreme Court's endorsement of Philip Morris's argument that the jury instructions adopted by the trial judge were sufficiently constitutionally suspect that the jury's award was likely to have violated the due process rights of the defendant, it held that the jury verdict should not be disturbed.

[259] 154 P.3d 561 (Mont. 2007).
[260] Ibid. at 613.
[261] 176 P.3d 1255 (Ore. 2008)
[262] The unadjusted compensatory damages award was $ 821,485.50. Ibid. at 1258.
[263] After the U.S. Supreme Court held that the $ 2 million punitive damages was constitutionally excessive the Alabama Supreme Court remanded to the trial court with orders to offer the plaintiff a choice between accepting a reduction of the punitive damages award to $ 50,000 or to submit to a new trial on damages. (*BMW of N. Am. v Gore,* 701 So. 2d 507, 514 (Ala. 1997)).

101 The Oregon Supreme Court's argument was based on the relatively uncontroversial point that a state court decision should not be disturbed if, notwithstanding its violation of the federal constitution, there are independent and adequate state grounds to uphold the decision.[264] In this case, the independent and adequate state grounds are that the instructions requested by Philip Morris at trial violated Oregon law.[265] This is an issue that the U.S. Supreme Court did not take up in *Philip Morris*, and one over which they have neither jurisdiction nor competency.

102 Of course, the U.S. Supreme Court was not only reviewing the jury instructions requested by Philip Morris, it was also reviewing the jury instructions that the trial judge actually gave. One cannot help but think that the Supreme Court thought that it was holding that the instructions that were given were unconstitutional. To be fair, the majority opinion in *Philip Morris* is not as clear as it might have been on this point. Because of the posture of the appeal from the lower court – a point that will be discussed further below – the United State Supreme Court chose to discuss the Oregon's Supreme Court's rejection of Philip Morris's argument that the trial court should have adopted its instructions.[266]

103 The United States Supreme Court explicitly weighed the reasons the Oregon Supreme Court gave in the opinion from which Philip Morris had appealed, and these reasons said nothing about independent and adequate state grounds; they were, instead, that the due process clause allowed the punishment of Philip Morris for acts that it had done to non-parties, and since the instructions that were given to the jury had been based on this position, it is hard to see how a rejection of the Oregon Supreme Court's reasoning vis-à-vis the instructions requested by Philip Morris was not also a declaration by the U.S. Supreme Court that the instructions that had been given violated the due process clause of the federal constitution.

104 The Oregon Supreme Court did not actually deny that the U.S. Supreme Court said that the instructions that were given to the jury were unconstitutional. Its view is that this conclusion is mere dicta, since that issue was not before the court.[267] It should be obvious that the Oregon Supreme Court's reading of *Philip Morris*, even if technically correct, is extremely formalistic and will probably come as a surprise to virtually every lawyer connected with the case, including the judges on the United State Supreme Court, who struggled to answer a question which the Oregon Supreme Court now reveals was moot all along. However taking it at face value, does the latest move by the Oregon Supreme Court have any significance for the question posed by this chapter?

[264] *Williams* (fn. 260) 1260 (citing *Osborne v Ohio*, 495 U.S. 103, 123 (1990).
[265] Ibid. at 1262–64.
[266] "The instruction that Philip Morris said the trial court should have given…" Ibid. at 1260 (quoting *Philip Morris*, supra fn. 253 at 1064).
[267] "The defendant did not preserve any issue as to the instructions that the trial court did give." Ibid. at 1260, n. 3.

105 The short answer is: no. The question posed by *Philip Morris* is whether the "hard cap" proposed by the Court in *State Farm* means what it seemed to say. Regardless of which jury instructions the jury should have been given, its verdict – $ 79.5 million in punitive damages – could have been seen by the United State Supreme Court to have violated the single-digit ratio indicated by *State Farm*. The fact that the court chose not to invalidate the award on those grounds is significant. In fact, given the fact that, according to the Oregon Supreme Court, the question decided by the U.S. Supreme Court had not been part of the defendant's latest appeal in the state courts, the explicit refusal by the Court to entertain the ratio question is doubly significant, since now it seems that it was the *only* federal question properly raised by *Philip Morris*.

Punitive Damages in European Law

Bernhard A. Koch*

I. Introduction

"The position of the European Union regarding punitive damages is not only ambivalent, but also clearly self-contradictory."[1] This statement by one commentator perfectly describes the status quo of European law regarding penal elements in the field of tort law remedies. 1

When looking at EU tort law within the narrow meaning of the body of law dealing with compensation claims against EU institutions, punitive damages "are probably not available at all" in light of art. 288 par. 2 ECT, which only employs language aiming at compensation.[2] 2

In a broader perspective, the image gets less clear as indicated, and the blurriness is due to the ambiguous use of terminology, coupled with political efforts in individual legislative projects to at least stimulate the discussion (if seen in an optimistic light) or to introduce non-compensatory awards as tools of private law enforcement despite clear and unanimous opposition by most Member States (which is probably a less euphemistic way of seeing the developments particularly in the more recent past). 3

II. Conflicts of Concepts in Legislative Drafts

A microcosm exemplifying the rather ambivalent attitude of the EU towards punitive damages was the drafting process of the Rome II Regulation.[3] 4

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[1] "Die Haltung der EU zum Strafschadensersatz ist nicht nur ambivalent, sondern evident widersprüchlich." *G. Wagner*, Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten für den 66. Deutschen Juristentag, in: Verhandlungen des 66. Deutschen Juristentages Stuttgart 2006, vol. I, Part A (2006) A 71.

[2] *K. Oliphant*, The Nature and Assessment of Damages, in: H. Koziol/R. Schulze (eds.), Tort Law of the European Community (2008) 241 (no. 11/8).

[3] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, 40–49.

5 In the original draft,[4] the Commission had planned to include a separate article dealing with "non-compensatory damages", following a more general rule on ordre public. The proposed art. 24 read as follows:

> "The application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy."

6 In the Explanatory Memorandum thereto, this was justified by alleged widespread concern raised by "many contributors" during the consultation phase who were said to have argued that an open public policy exception without the express exclusion of non-compensatory damages would be too weak a tool against the risk of having to apply such a concept in a forum to which it was alien.[5] Arguably, by including such an express rule in the draft, the Commission suggested that punitive damages and the like violated some Community ordre public thereby defined.

7 The Wallis report,[6] however, recommended that the proposal be softened by rephrasing it to a mere option of the forum (and thereby reducing it to the status quo), even though the rapporteur expressed "sympathy" with the original proposal.[7] The Commission succumbed to this plea by Parliament and adjusted the wording accordingly, merging it with the article on public policy:

> "The application of a rule of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum. In particular, the application under this Regulation of a law that would have the effect of causing non-compensatory damages to be awarded that would be excessive may be considered incompatible with the public policy of the forum."

8 Instead of imposing a uniform strict standard, the new wording was meant to leave it purely optional for the courts whether or not they deem non-

[4] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), COM(2003) 427 final, 22.7.2003 (hereinafter the "Rome II Draft").

[5] This seems to have been a German demand primarily; cf., e.g., the contributions to the consultation by the German Ministry of Justice (http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/minist_just_allem_de.pdf), the German Federal Bar (http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/bundesrechtsanwaltskammer_en.pdf), or the German Insurance Association (http://ec.europa.eu/justice_home/news/consulting_public/rome_ii/gesamtverband_deutschen_v_de.pdf), all demanding a rule equivalent to art. 40 par. 3(1) EGBGB (which does not refer to punitive damages specifically itself, however, but rather excludes the enforcement of awards which "significantly exceed the adequate compensation of the victim".

[6] Draft Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), 2003/0168 (COD), available at http://www.dianawallismep.org.uk/resources/sites/82.165.40.25-416d2c46d399e8.07328850/Rome%20II/Final+Draft+Rome+II+Report.doc.

[7] Draft Report (fn. 6) 33.

compensatory damages in violation of the forum's public policy ("may be considered").

But even this compromise was subsequently smashed by the Council with its Common Position,[8] arguing that it was "difficult for the time-being to lay down common criteria and reference instruments for the purposes of defining public policy."[9] The above-mentioned article was consequently cut back to its first sentence only, which now forms art. 26 of the Regulation. Any express reference to punitive damages within the Rome II draft was thereby abolished in the ultimate Regulation's main text. However, a reminder of this discussion was retained in its preamble, which cautiously states that: 9

> "the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum."[10]

This manœuvre did not change the interim version of the amended draft in substance, however, as each forum naturally retains the right to hold punitive damages in violation of its ordre public even without explicitly restating the obvious in the Regulation's text. 10

Retaining at least an indication of some Community general attitude towards non-compensatory damages as the Commission had proposed would still have been a political signal, despite its lack of legal force. However, it would have been a blow in the face of those Member State jurisdictions who do acknowledge at least some form of punitive awards, though the strike would not have been as brutal as the original proposal. The latter would have led to the absurd result that jurisdictions such as England or Ireland would have had to refuse applying the respective other's law granting exemplary damages for reasons of some Community public policy and necessarily replace it by its own (forum) law, which allows such awards itself. The original proposal is therefore yet another example of how legislation is being prepared on the Commission level apparently without the slightest concern for comparative backup checks in the Member States' laws. 11

A similar attempt to ban punitive damages in a piece of EC legislation was launched a few years before, when the Commission first proposed a Council Regulation on the Community patent. Art. 44 of that proposal explicitly said in 12

[8] Common Position adopted by the Council on 25 September 2006 with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II") (EC) No. 22/2006, 25.9.2006, OJ C 289/3, 28.11.2006, 68.

[9] Statement of the Council's Reasons, 2003/0168 (COD), 25.9.2006, 11.

[10] Recital 32 of the preamble to the Rome II Regulation.

its par. 2 that damages awarded under this instrument "shall not be punitive".[11] As the whole project has come to a standstill, with the debate focusing on more central aspects of the patent as such rather than remedies, it is unlikely that this point will ever see the end of the legislative pipeline in which it is currently stuck, despite the fact that the quoted phrase continues to appear in the latest version of the draft, which dates back to 2004.[12]

13 Another explicit exclusion of punitive damages can be found in a completed piece of legislation, i.e. in the 26th recital of the preamble to the IPR Enforcement Directive,[13] which reads in relevant part: "The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion…".

III. "Effective, Proportionate and Dissuasive"

14 In contrast to this uprising of opponents in the first stage of the Rome II drafting process, the supporters of punitive damages also seem to run occasional attempts to sneak the concept into EU law. Such misunderstandings arise in particular with Community legislation providing for sanctions that seem to include or at least allow for such non-compensatory damages.

15 However, such confusion is caused primarily by a somewhat carefree use of boiler-plate language, apparently inspired by the ECJ in its Greek Maize decision.[14] The magic formula employed there which reoccurs like a mantra in legislation and court decisions ever since is that all sanctions shall be "effective, proportionate and dissuasive".

16 Whereas probably most reoccurrences of this formula in Community legislation explicitly address "penalties" as in the Greek Maize case[15] and therefore

[11] Proposal for a Council Regulation on the Community patent, COM(2000) 412 final, 1.8.2000, OJ C 337E, 28.11.2000, 278–290.

[12] See http://register.consilium.europa.eu/pdf/en/04/st07/st07119.en04.pdf.

[13] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 195, 2.6.2004, 16–25.

[14] ECJ C-68/88, *Commission v Hellenic Republic* [1989] ECR 2965. In this case, the Court relied upon (what was then) art. 5 (now art. 10) ECT to circumscribe the measures Member States have to take in order to respond to infringements of Community law. The Court declared that "whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive" (no. 24).

[15] E.g. art. 13 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, 54–63; art. 46 Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive), OJ L 263, 9.10.2007, 1–160;

do not imply that it extends to private law remedies, some provisions speak more broadly of "sanctions" without any further qualification.[16] Of the latter, at least some include the caveat that this should be "without prejudice to Member States' civil liability regimes", thereby distinguishing private law remedies from the administrative or other "sanctions" they have in mind.[17]

art. 30 Directive 2007/59/EC of the European Parliament and of the Council of 23 October 2007 on the certification of train drivers operating locomotives and trains on the railway system in the Community, OJ L 315, 3.12.2007, 51–78; art. 16 Council Directive 91/477/EEC on control of the acquisition and possession of weapons as amended by Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008, OJ L 179, 8.7.2008. 5–11; art. 30 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008. 1–44.

[16] E.g. art. 16a of Council Directive 83/477/EEC on the protection of workers from the risks related to exposure to asbestos at work, as amended by Directive 2003/18/EC of the European Parliament and of the Council of 27 March 2003, OJ L 097, 15.4.2003, 48–52; art. 14 of Council Directive 1999/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations, OJ L 85, 29.3.1999, 1–22; art. 20 of the E-Commerce Directive (Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, 1–16); art. 8 of Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 23.3.2002, 29–34; art. 25 of Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5.8.2002, 10–27; art. 11 of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJ L 271, 9.10.2002, 16–24; art. 3 of Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002, 17–18; art. 17 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30.4. 2004, 12–23.
See also art. 8 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, 10–19, whose wording distinguishes between sanctions and remedies and attaches the qualification "effective, proportionate and dissuasive" only to the former.
While art. 4 of Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data, OJ L 261, 6.8.2004, 24–27, only speaks of "sanctions", it seems obvious that it actually means penalties, since its par. 1 quotes minimum amounts of such sanctions that shall be imposed for infringements.

[17] See, e.g., art. 25 of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ L 345, 31.12.2003, 64–89, or art. 30 of Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC OJ L 157, 9.6.2006, 87–107.
Cf. also art. 5 of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJ L 320, 28.11.1998, 54–57, which speaks of "sanctions" without further qualifications in general in its first paragraph and of "appropriate remedies" in the second paragraph, which according to its wording include, inter alia, "bringing an action for damages". The 23rd recital in the preamble to this Directive states, however, that "Member States' provisions for actions for damages are to be in conformity with their national legislative and judicial systems."

17 Yet a few others, however, specifically address civil law remedies in general or compensation payments in particular which shall be measured by the said tripartite standard. A sample wording reads, for example:

> "The sanctions, which may comprise the payment of compensation to the victim, must be effective, proportionate and dissuasive…".[18]

18 Furthermore, few pieces of legislation speak of civil law remedies as penalties, such as art. 28 of Directive 2004/109/EC, which reads in relevant part:

> "Member States shall ensure, in conformity with their national law, that at least the appropriate administrative measures may be taken or civil and/or administrative penalties imposed in respect of the persons responsible, where the provisions adopted in accordance with this Directive have not been complied with. Member States shall ensure that those measures are effective, proportionate and dissuasive."[19]

19 The 2002 proposal for a new Consumer Credit Directive[20] would have required Member States in its draft art. 31 to "lay down penalties for infringements of national provisions adopted in application of this Directive", and suggested as one example thereof to "provide for the loss of interest and charges by the creditor and continuation of the right of repayment in instalments of the total amount of credit by the consumer." In the course of the legislative bargaining process, the latter explicit suggestion was dropped, and the final text of the new Directive in what is now art. 23 no longer gives such concrete advice, but resorts to the by far more innocuous vague phrase mentioned before: "The penalties provided for must be effective, proportionate and dissuasive."[21]

IV. Equal Treatment of Damages Awards

20 Language aiming at a deterrent function of compensation payments as cited above can be found, inter alia, in the current versions of directives combating

[18] Art. 15 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, 22–26; art. 17 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, 16–22.

[19] Art. 28 par. 1 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, 38–57.

[20] Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM(2002) 443 final, 11.9.2002, OJ C 331, 31.12.2002, 200–248.

[21] Directive 2008/48/EC of the European Parliament and of the Council of 23. April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJ L 133, 22.5.2008, 66–92. The original wording specifying the kinds of penalties the Commission had in mind was actually already dropped right after the rejection of said draft art. 31 by the European Parliament and was no longer included in the amended proposal published immediately thereafter: COM(2004) 747 final, 28.10.2004, as further amended by COM(2005) 483 final, 23.11.2005.

discrimination.[22] The Equal Treatment Directive,[23] for example, as amended,[24] at present provides (emphasis added):[25]

> "Art. 6 par. 2 Member States shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination contrary to art. 3, in a way which is *dissuasive and proportionate to the damage* suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit, except in cases where the employer can prove that the only damage suffered by an applicant as a result of discrimination within the meaning of this Directive is the refusal to take his/her job application into consideration."
>
> "Art. 8d. Member States shall lay down the rules on sanctions applicable to infringements of the national provisions adopted pursuant to this Directive, and shall take all measures necessary to ensure that they are applied. The *sanctions*, which *may comprise* the payment of *compensation* to the victim, must be effective, proportionate and *dissuasive*…"

In the original version of the Directive, sanctions were only foreseen in the following provision: 21

> "Art. 6. Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of art. 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

This article was replaced by the above-mentioned current text in 2002 in reaction to rulings of the ECJ, which had been called on several occasions before to evaluate sanctions introduced by the Member States on the basis of the original wording. In these decisions, the Court had regularly pointed at punitive aspects of damages awards.[26] 22

[22] See supra fn. 18.

[23] Council Directive No. 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, 40–42.

[24] Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269, 5.10.2002, 15–20.

[25] A consolidated version of the Directive is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:01976L0207-20021005:EN:NOT.

[26] A more elaborate presentation of the following case law can be found, inter alia, at *D. Kelliher*, Aims and Scope, in: H. Koziol/R. Schulze (eds.), Tort Law of the European Community (2008) 1, no. 1/41 ff.; *Oliphant* (fn. 2) no. 11/20 ff.; *G. Wagner*, Prävention und Verhaltenssteuerung durch Privatrecht, Archiv für die civilistische Praxis (AcP) 206 (2006) 389 ff.

23 One of the seminal cases in this respect was *Von Colson*.[27] While acknowledging that Member States are free to choose appropriate measures in response to violations of the Equal Treatment Directive based on its art. 6, the Court insisted that

> "if a Member State chooses to penalize *[sic!]* breaches … by the award of compensation, then in order to ensure that it is effective and that it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application."[28]

24 The ECJ thereby blew hot and cold towards the unbiased reader inasmuch as these words offer a rollercoaster ride between compensatory and non-compensatory language. The core message nevertheless apparently continues to be that "compensation must … be adequate in relation to the damage", despite preceding indications that this may have a deterrent "effect" and that it may thereby help to "penalize" sex discrimination. Therefore, damages awards under the *Von Colson* doctrine continue to remain within the realm of classic tort law remedies, and the case may hardly be cited as being in favour of punitive damages (within the meaning of going beyond mere indemnification of the victim).[29]

25 This is also true for subsequent cases building upon *Von Colson* and clarifying further which Member State's measures to implement the Equal Treatment Directive had and which lacked "deterrent effect": In *Marshall* and *Draempaehl*,[30] the ECJ, inter alia, found ex ante caps on damages to be in violation of the Directive. While the Court criticised that such limits may discourage victims from bringing suit altogether, which may have less of a dissuasive effect on the employer, the Court's prime argument against that consequence seems to have been in both cases that claimants will thereby not receive compensation adequate to the losses sustained.[31]

[27] ECJ C-14/83, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891. See also a corresponding case decided on the same day, C-79/83, *Dorit Harz v Deutsche Tradax GmbH* [1984] ECR 1921.

[28] *Von Colson* (fn. 27) no. 28. See also ECJ C-271/91, *M. Helen Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367; C-180/95, *Nils Draehmpaehl v Urania Immobilienservice OHG* [1997] ECR I-2195. The Court also demands that the sanctions imposed (such as damages awards) must be in line with and correspond to similar remedies on a national level: Apart from the afore-mentioned cases, see e.g. C-460/06, *Nadine Paquay v Société d'architectes Hoet + Minne SPRL* [2007] ECR I-8511.

[29] *W. Wurmnest*, Grundzüge eines europäischen Haftungsrechts (2003) 104 f.

[30] Supra fn. 28. In *Draehmpaehl*, the Court also insisted that violations of the Directive as implemented by national law should trigger the sanctions foreseen per se, without a further requirement of fault on the side of the employer.

[31] Cf. also ECJ C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941, where the Court held exemptions from liability to be incompatible with the Directive.

The bottom line of this jurisprudence is therefore *not* that the ECJ wants to promote punitive damages and to impose them upon jurisdictions against their will, which has often been criticised in reaction to these cases.[32] As can be seen in other circumstances,[33] the court is not even concerned with categories of tort law developed in the Member States at all. Its ultimate goal is to enforce community law and to sanction deviations from the boundaries the latter imposes upon Member States. While the Equal Treatment Directive itself at least in its original version presented above (which the Court had to deal with) did not express how its goals should be achieved by the Member States apart from requiring that they should do at least something, the *Von Colson* Court pointed at the general rule of (then) art. 189 (now art. 249) ECT which underlines the need for Member States to adopt "measures which are sufficiently effective to achieve the objective of the Directive and to ensure that those measures may in fact be relied on before the national courts by the persons concerned."[34] The Court continues to concede that "such measures may include, for example, … giving the candidate adequate financial compensation, backed up *where necessary* by a system of fines" (emphasis added), and that Member States are "free to choose between the different solutions." If a country such as Germany opts for sanctions only in the form of compensation, and if the latter is so nominal that it does not even make good the losses sustained by the victims, the goals set by the Directive may indeed be missed. 26

More generally speaking, it is not easy to analyse the case law of the ECJ from a tort law perspective, however, particularly with an eye to the remedies awarded, since the Court traditionally does not seem to view the law of delict as a purely private law matter, but looks beyond such categories by applying a predominantly functional approach. Seen from that point of view, tort law is yet another path leading defendants towards the proper application of European law, and damages awards are signposts along that way just as fines and other sanctions are in administrative or criminal law,[35] and as long as such signs are not being clearly distinguished in the language of the Court opinions, misunderstandings will also continue to arise when reading ECJ case law. 27

V. Punitive Damages by Way of Import

Punitive damages may effectively be ordered by a court applying Community law if the latter requires indemnification to be paid in line with the legal sys- 28

[32] See the citations in *Wagner*, AcP 206 (2006) 392 f.

[33] See *B.A. Koch*, Nationales Deliktsrecht vor dem EuGH – Irrungen und Wirrungen, in: *G.H. Roth/P. Hilpold* (eds.), Der EuGH und die Souveränität der Mitgliedstaaten. Eine kritische Analyse richterlicher Rechtsschöpfung auf ausgewählten Rechtsgebieten (2008) 481, for examples.

[34] *Von Colson* (fn. 27) no. 18.

[35] Cf. *G. Wagner* (fn. 26) A 19: "Das Schadensersatzrecht dient als Instrument zur praktischen Durchsetzung des EG-Rechts, weil es wirtschaftliche Anreize zur Einhaltung gemeinschaftsrechtlicher Verhaltensnormen setzt. Folgerichtig sieht es der EuGH als Äquivalent zu anderen Instrumenten der Verhaltenssteuerung aus den Arsenalen des Straf-, Ordnungswidrigkeiten- und Verwaltungsrechts." Similarly idem, AcP 206 (2006) 398 ff., 413, 421.

tem of the Member States. As the ECJ has clarified in *Brasserie du Pêcheur and Factortame*, "it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law."[36]

29 In such cases, however, the non-compensatory element of the overall award as such is not founded in EU law, but continues to be a purely national peculiarity respected at European level.

30 Oddly enough, such respect is occasionally not even granted by the national system called upon: In a follow-up decision to one of the joined cases cited above, the English Divisional Court in what became *Factortame IV* turned down the claim for exemplary damages permitted earlier by the ECJ, interestingly by using that Court's very arguments against such an award:

> "For English law to give the remedy of penal damages for breaches of Community law would decrease the move towards uniformity, it would involve distinctions between the practice of national courts and the liabilities of different Member States and between the United Kingdom and the Community Institutions, and would accordingly in itself be potentially discriminatory since litigants in England would be treated differently from those elsewhere. The arguments of the Applicants under this head need to be considered with great caution. Their acceptance would risk introducing into the law of Community obligations anomalies and conflicts which do not at present exist and would not serve a useful purpose."[37]

31 Another ECJ case recognising the availability of punitive awards for breaches of Community law if granted by the national legal system for domestic claims is *Manfredi*, dealing with an infringement of art. 81 ECT.[38] The Court in essence repeated its *Brasserie du Pêcheur and Factortame* ruling and stated that

> "in accordance with the principle of equivalence, if it is possible to award specific damages, such as exemplary or punitive damages, in domestic actions similar to actions founded on the Community competition rules, it must also be possible to award such damages in actions founded on Community rules. However, Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by

[36] ECJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Federal Republic of Germany and Reg. v Secretary of State for Transport, Ex parte Factortame Ltd. (No. 4)* [1996] ECR I-1029, no. 89 f.

[37] *Reg. v Secretary of State for Transport, Ex parte Factortame Ltd.* [1998] 1 All England Law Reports (All ER) 736, [1997] European Law Reports (Eu LR) 475, (1998) 10 Administrative Law Reports (Admin LR) 107, [1998] 1 Common Market Law Reports (CMLR) 1353, [1997] England and Wales High Court (EWHC) Admin 756 (Q.B.D.), no. 186 ff. (including this quotation in no. 189). This question was not pursued by *Factortame* on appeal.

[38] ECJ joined cases C-295/04 – C-298/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

> Community law does not entail the unjust enrichment of those who enjoy them."[39]

32 The ECJ further added at the same time that "compensation for harm suffered as a result of the infringement of Community law should be appropriate to the harm suffered."[40]

VI. Competing for a New Standard

33 The *Manfredi* decision just mentioned is currently being (ab)used by the Commission to pretend that punitive damages have turned into an *acquis communautaire* through the backdoor. By selectively quoting from the Court's opinion, a working paper accompanying the antitrust damages white paper[41] insidiously tries to lure the reader into believing that punitive damages are almost common standard all around Europe, while the contrary is true. The sand table for this is competition law, where the Commission wants to introduce private enforcement measures through individual claimants, preferably by way of multiple (and therefore to that extent punitive) damages awards.[42]

34 The paper starts off by highlighting that "the Court did not consider punitive damages to be contrary to European public order"[43], which is true, but this does not mean that the contrary is valid either. A bold print box that follows then summarizes:

> "*Acquis communautaire:* Victims of an EC competition law infringement are entitled to particular damages, such as exemplary or punitive damages, if and to the extent such damages may be awarded pursuant to actions founded on the infringement of national competition law."

35 The Commission continues to fog the state of the law by stating "that there is no absolute principle of Community law that prevents victims of a competition law infringement from being economically better off after a successful damages claim than the situation they would be in 'but for' the infringement". The authors underline this by completely distorting the *Manfredi* ruling on the unjust enrichment aspect quoted above:[44] While the Court had indeed insisted that national courts should be cautious to prevent (!) unjust enrichment of claimants by way of damages awards, the Commission claims that this merely allows (!) national courts to curtail such awards if concerned about their excessiveness, and therefore it comes to the conclusion that private claimants seeking revenge for antitrust measures may be unjustly enriched by a punitive damages award.

[39] Ibid. no. 99.
[40] Ibid. no. 69.
[41] Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC(2008) 494, 2.4.2008.
[42] See http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html for all background documents.
[43] Ibid. no. 190.
[44] See the indented quotation supra no. 31.

36 This tendentious document is particularly appalling in light of the main document that it is meant to support, where punitive damages are not mentioned at all. Instead, the latter insists that "full compensation is … the first and foremost guiding principle."[45]

37 The working paper itself acknowledges that the "majority of respondents" to the earlier Green Paper on this matter[46] "argued that damages should be regarded as a compensatory instrument", and that all therefore strongly "oppose a system that would result in damages that are higher than the loss suffered by the victim."[47] Not surprisingly, the same is true for the reactions to this new document.[48] It remains to be seen which tricks the Commission will use next to take in the stakeholders in the further legislative process.

VII. Conclusions

38 Despite constant rumours to the contrary, punitive damages do not seem to be of any significance in EU law yet. While language aiming at such non-compensatory awards reappears occasionally in documents of the European legislator or judiciary, it can hardly be interpreted as a serious plea for expanding this concept throughout Europe.

39 The most frequent source of misunderstanding is the apparent struggle of legal staff employed by the European institutions with expressing the scope of sanctions foreseen by EU law. In their strive to emphasise that violations must be prevented to the extent possible, words like "dissuasive" or "deterrent" reoccur also in the context of tort law remedies available under European law, even though they are hardly ever meant to promote payments exceeding indemnification.

40 More recent bits of legislation instead rather seem to take a stand *against* punitive awards, even though hardly any attempt has ever survived the drafting process in light of the fact that such remedies are available in at least some Member States, and before that diversity between European legal systems remains to be unresolved, it is unlikely that we will see either European institution take a clear stand in favour of or against punitive damages.

41 This does not mean that there are no sightings of punitive awards in Community legislation at all. One such provision can, for example, be found in a 1995 regulation, whose scope of application is admittedly not extremely extensive,[49]

[45] White Paper on Damages actions for breach of the EC antitrust rules, COM(2008) 165 final, 2.4.2008, 3.

[46] Green Paper – Damages actions for breach of the EC antitrust rules, COM(2005) 672 final, 19.12.2005.

[47] Commission Staff Working Paper (fn. 41) no. 182.

[48] See http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments.html.

[49] See art. 18 of Commission Regulation (EC) No. 1768/95 of 24 July 1995 implementing rules on the agricultural exemption provided for in art. 14 par. 3 of Council Regulation (EC) No. 2100/94 on Community plant variety rights, OJ L 173, 25.07.1995, 14–21 (emphasis added):

and more may follow if, say, the Commission's plans materialise to boost private law enforcement of antitrust rules by way of non-compensatory damages.

In light of the strong and passionate opposition against such efforts by a clear majority of stakeholders in the Member States, it is unlikely, however, that these singular attempts, if successful at all, will lead to a shift of dogmas in the nearest future. 42

"1. A person referred to in Article 17 may be sued by the holder to fulfill his obligations pursuant to Article 14 (3) of the basic Regulation as specified in this Regulation.
2. If such person has repeatedly and intentionally not complied with his obligation pursuant to Article 14 (3) 4th indent of the basic Regulation, in respect of one or more varieties of the same holder, the liability to compensate the holder for any further damage pursuant to Article 94 (2) of the basic Regulation shall cover *at least a lump sum calculated on the basis of the quadruple average amount charged for the licensed production* of a corresponding quantity of propagating material of protected varieties of the plant species concerned in the same area, without prejudice to the compensation of any higher damage."
Awarding a multiple of a given loss overcompensates the victim and therefore only serves punitive goals: *Wurmnest* (fn. 29) 106.

Special Reports

Punitive Damages and Liability Insurance

Ina Ebert*

I. Introduction

A. The Relevance of Punitive Damages for Insurers

The relevance of punitive damages for insurers is frequently overestimated. 1
The reason for this is not so much that punitive damages are usually excluded in insurance contracts: Such exclusions only apply if there is a verdict that awards a certain amount of money as punitive damages. However, verdicts are rare, especially in the U.S., and settlements, which tend not to distinguish between punitive and compensatory damages, are by far the rule (in the U.S. roughly 97% of all cases that are brought to court end in a settlement). The most significant factor that limits the impact of punitive damages for insurers is the fact that punitive damages are mostly a U.S. phenomenon,[1] with a few, usually quite restricted exceptions in other common law markets. Moreover, even in the U.S., only about 6% of all successful claims lead to punitive damages. In many cases, these will be awarded for intentional torts or other acts that are usually not insured (e.g. defamation cases).[2] Finally, it is not always legal to insure punitive damages: About half of all U.S.-states prohibit the insurance of punitive damages for various reasons.[3] Therefore, if anything, it is rather the fear of the possible imposition of punitive damages that makes defendants and their insurers likely to accept higher settlements, than actual punitive damages awards, that can be expensive for insurers. This makes it impossible to give any exact estimates of what punitive damages cost insurers at the end of the day.

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[1] For more about punitive damages see *A. Sebok*, Punitive Damages in the United States (contained in this publication) no. 1 ff.

[2] Most recent and comprehensive data on punitive damages awards can be found in the Civil Justice Survey of State Courts by the U.S. Department of Justice, Punitive Damage Awards in Large Counties (2001), edited by Thomas J. Cohen (about 58% of all successful plaintiffs in slander/libel cases received punitive damages, 36% in intentional tort cases and 26% in false arrest/imprisonment cases, while only about 4% in product liability cases and 5% in medical malpractice cases).

[3] For more about this, see infra no. 7 ff.

B. *Affected Lines of Business*

2 Punitive damages have to be taken into consideration by insurers for many lines of business. However, the most likely lines of business to be affected are those where courts assume gross negligence on a frequent basis or where someone other than the insured commits the incriminating act, sometimes intentionally. Therefore punitive damages are of special interest to EPLI (Employment Practices Liability Insurance) insurers, since usually employees commit acts of discrimination and moral or sexual harassment intentionally, while it is the employer who is insured. Punitive damages are also of special interest to PI (Professional Indemnity), medical malpractice, D&O (Directors and Officers) and product liability insurers.

3 For punitive damages in connection with product liability, the recently much discussed problem of pre-emption is highly relevant: If it is already doubtful that the manufacturer of a product that was approved by a federal authority can be held liable for any damage later caused by the design of that product, it is even more doubtful whether it can be a case of gross negligence justifying the award of punitive damages if such a product that has won the approval of a federal authority is brought to the market.[4]

II. The Insurability of Punitive Damages

A. *Arguments in Favour of the Insurability of Punitive Damages*

4 There are mainly three arguments in favour of the insurability of punitive damages: The first is that the insured, who trusts that his liability risks are covered, should be protected, even if he is found guilty of gross negligence and punitive damages are awarded. This argument is especially valid in the context of product liability where the line between negligence and gross negligence can be quite unclear and the award of punitive damages, often far exceeding the compensatory damages, can come as a surprise to the insured. The second argument is that the freedom of contract should not be restricted and that if there is a demand for insurance coverage of punitive damages it should be possible to provide such coverage. The third argument in favour of the insurability of punitive damages is that it helps to prevent the defendant from bankruptcy, while making it more likely that the punitive damages are actually paid out. If you take into consideration, however, that the main purpose of punitive damages is not the compensation of damage (for which insurance coverage is certainly often a necessity) but deterrence,[5] the risk of the defendant's bankruptcy should punitive damages be awarded may not seem completely negative or counter-productive.

[4] One of the pending pre-emption cases dealing with these arguments is the *Vioxx*-case *McDarby v Merck*, Superior Court of New Jersey, A-0076-07T1 (29 May 2008).

[5] For more about the objectives of punitive damages see *Sebok* (fn. 1) no. 29 ff. A recent summary of the objectives of punitive damages by the U.S. Supreme Court is included in *Philip Morris U.S.A. v Williams*, 549 U.S. 346 (2007).

B. Arguments against the Insurability of Punitive Damages

5 The primary argument against the insurability of punitive damages is that since punitive damages are supposed to have a deterrence effect, it would ridicule this aim if the insurer, instead of the insured, has to pay them: The insured is neither deterred nor is he punished for his severe misconduct while the enrichment of the plaintiff caused by the punitive damages lacks any justification.[6] In fact, the insured might even feel encouraged to embark on risky behaviour, feeling safe in the knowledge that all the possible consequences of his deeds, including an obligation to pay punitive damages, will be settled by someone else. This moral hazard cannot be sufficiently prevented by adjusting the premiums according to the individual risk of each insured since verdicts which include punitive damages are too rare. It is therefore difficult to estimate this individual risk with any certainty. Rather, premiums are usually determined by more general considerations.

6 The second argument against the insurability of punitive damages is the close – even though often denied – connection between coverage and liability:[7] "Insurance breeds claims", meaning that the fact that insurance coverage has to be disclosed in pre-trial discovery encourages the plaintiff to adjust the amounts he claims to the limits of the defendant's insurance coverage, even if any compensatory damages would be far below this threshold. This argument might be especially valid if plaintiff and defendant know each other, e.g. in medical malpractice cases: A reluctance of the plaintiff to ruin his doctor by claiming punitive damages, e.g., is more likely than any desire to spare his doctor's insurer the expense. The deep-pocket argument might also lead to higher punitive damages verdicts since juries are also more likely to hand out big awards if they know that it is an insurer who will have to pay up at the end.

C. Legal Aspects of the Insurability of Punitive Damages

1. U.S.A.

7 About half of all U.S.-states prohibit any insurance coverage of punitive damages, usually on the grounds of a conflict between such coverage and public policy.[8] However, in some cases, state laws distinguish between insurance contracts that only provide coverage for the misconduct of the insured himself and insurance policies that also protect the insured from being held liable for the

[6] For more on these arguments and U.S.-jurisdictions concerned with these matters see the article by *E.M. van Meir*, Insurability of punitive damages: Who really gets punished, in findlaw: http://library.findlaw.com/2001/Jun/18/130803.html.

[7] For an intense discussion on this aspect see: Ch. Lahnstein/I. Ebert (eds.), Tort law and liability insurance: An intricate relationship, Munich Re (2007); based on: G. Wagner (ed.), Tort Law and Liability Insurance (2005).

[8] An overview of the insurability of punitive damages is given by *P.A. Banker* in The Risk Management Letter, Vol. 23, Issue 5 (2003) or, more recently, under: www.mcandl.com/puni_frame.html.

consequences of other persons' gross negligence or even intent. Such states therefore allow the coverage of punitive damages in the context of employer's liability, liability of parents or guardians for minors and under D&O policies or other forms of vicarious liability.[9] Other states prohibit the coverage of punitive damages for intentional acts of the insured but allow it in gross negligence cases.[10]

2. The Rest of the World

8 Few legal systems outside the U.S. provide the option of awarding punitive damages. However, at least for some torts, e.g. defamation, the violation of intellectual property rights, discrimination or bad faith claims, some jurisdictions quite frequently award damages that contain certain punitive elements, without distinguishing them from the compensatory damages awarded. If no such distinction is made, the punitive elements of the damages are for obvious reasons included in the insurance coverage. Some non-U.S. jurisdictions also take a more liberal stand when it comes to insuring U.S. insureds against punitive damages awards. To avoid the restrictions on providing insurance coverage for punitive damages upheld by numerous U.S.-states,[11] it is therefore not unusual to seek coverage for such risks elsewhere, especially in London or in Bermuda ("Bermuda-wordings", "wrap-around policies").

D. Options for Insurers

9 The most comprehensive way for insurers to avoid problems connected with punitive damages would be through an exclusion clause. However, coverage that completely excludes punitive damages is hard to sell, especially in those lines of business where punitive damages are most likely to be awarded. Therefore, there are several options for covering punitive damages, either by separate provisions in a "side letter" or "silent" i.e., by simply not mentioning coverage or exclusion in the contract.[12] This coverage is frequently limited – though not necessarily so – to the same amount as the coverage for compensatory damages. A third option, even though rather rare, is to explicitly cover punitive damages. Important examples of this can be seen in the wordings of Bermuda carriers or "wrap-around policies" that avoid the restrictions concerning insurance coverage for punitive damages which some U.S.-states impose.

10 If insurers decide to cover punitive damages at least to some degree, they will usually make sure the contract includes limits or caps. The inclusion of punitive damages leads to higher premiums. Further, to avoid moral hazard, the insurer is likely to include deductibles in the contract.

[9] This distinction is made, e.g., in California, Florida, Illinois, Indiana, Kansas, Maine, New Jersey, Oklahoma and Pennsylvania.

[10] See arguments for this distinction e.g. in the Texas Supreme Court decision, *Fairfield Insurance v Stephens Martin Paving*, 04-0728 WL 400397 (Tex. S. Ct. Feb. 15, 2008).

[11] See supra no. 7 ff.

[12] See options in Standard ISO Commercial General Liability (CGL)-Policy.

In reinsurance contracts, it is quite common to silently cover punitive damages. However, punitive damages awarded in the context of bad faith claims against the primary insurer are only covered if such coverage is explicitly provided for. 11

III. Conclusions

Insurers rarely openly cover punitive damages. However, the demand from the U.S.-market for the coverage of punitive damages makes it, in many cases, unavoidable to grant coverage at least on a silent basis. Either way, since verdicts in civil trials in the U.S. are the exception and verdicts including punitive damages are even rarer, it is more the fear of punitive damages than punitive damages that are actually awarded that drive up the amounts of damages that have to be paid out by insurers. The more punitive damages are restricted by tort reforms and U.S.-Supreme Court decisions, the more foreseeable and therefore insurable they become. However, even then, the political question of whether punitive damages should be insurable remains. 12

Economic Analysis of Punitive Damages

Louis T. Visscher*

I. Introduction

A. Economic Goals of Tort Law and the Law of Damages

Many lawyers regard compensation as the most important goal of tort law. 1
However, in the words of Williams, "this…does not look below the surface of things. Granted that the immediate object of the tort action is to compensate the plaintiff at the expense of the tortfeasor, why do we wish to do this?…An intelligent approach to the study of law must take account of its purpose, and must be prepared to test the law critically in the light of its purpose."[1] Keeton argues that the primary function of tort law is not to compensate the losses, but to determine when compensation is required.[2] A similar argument is made by Fleming and Rogers.[3] Losses of the victim are only shifted to the tortfeasor if there are reasons to do so. These reasons can be found in the goals of tort law.

In the economic analysis of tort law, minimisation of total accident costs is 2
regarded as the paramount goal. These costs are subdivided into primary accident costs (the costs of precautionary measures and the losses that still occur), secondary accident costs (the costs of having to bear a certain loss) and tertiary accident costs (the administrative costs of the legal system dealing with the accident losses).[4] The reduction of primary costs is achieved by deterrence and the reduction of secondary accident costs by loss spreading. Tertiary costs decrease if the costs of administering the treatment of accidents are reduced. Hence, in the economic analysis of tort law, compensation is not regarded as a goal, but as a means with which the goal of cost reduction is striven for.[5]

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1 *G. Williams*, The Aims of the Law of Tort, Current Legal Problems (CLP) 4 (1951) 137.

2 *W.P. Keeton* et al. (eds.), Prosser and Keeton on the Law of Torts (5th student ed. 1984) 20.

3 *J.G. Fleming*, The Law of Torts (8th ed. 1992) 3; *W.V.H. Rogers*, Winfield and Jolowicz on Tort (17th ed. 2006) 4.

4 *G. Calabresi*, The Cost of Accidents: A Legal and Economic Analysis (5th printing 1977) 27 ff.

5 For an extensive overview of empirical literature regarding the question whether tort law achieves deterrence, compensation and corrective justice, see *D. Dewees/D. Duff/M. Trebilcock*,

3 While engaged in their activities, people may create negative externalities, i.e. a probability for others to suffer losses as a result of the activity. Tort law is seen as an instrument that can provide behavioural incentives to the actors, so that they internalise these externalities. The threat of being held liable induces the actors to incorporate the possible losses of others into their decision on how much care to take and how often to engage in the activity. Taking more care and/or reducing the activity level can lower the probability of an accident and thereby the expected accident losses.[6] Optimal care and optimal activity are taken when the marginal costs of taking more care or further reducing the activity level equal the marginal benefits thereof in the sense of a reduction in the expected accident losses.[7]

4 This economic line of reasoning implies that damages should be high enough for the injurer to internalise the externalities he has caused. Under a rule of strict liability, this in essence means that damages should fully compensate the victim for his losses. Under a rule of negligence, damages should be high enough to make taking due care, which from an economic point of view should equal optimal care, more attractive than applying a lower care level. In situations where both the injurer and the victim can influence the accident probability, no rule is able to provide both parties with the correct activity incentives. Only the residual risk bearer will incorporate all relevant costs in his activity decisions. Under strict liability this is the injurer, under the negligence rule, the victim (because the injurer who takes due care is not liable and hence does not bear the expected accident losses).

B. Economic Goals of Punitive Damages

5 In much legal literature, deterrence and punishment are seen as the main goals of punitive damages. Several country reports in this book mention the

Exploring the Domain of Accident Law. Taking the Facts Seriously (1996). For more recent empirical literature on the prevention goal, see e.g. *J.D. Cummins*/*R.D. Phillips*/*M.A. Weiss*, The Incentive Effects of No-Fault Automobile Insurance, The Journal of Law and Economics (J. L. & Econ.) 44 (2001) 427–464; *A. Cohen*/*R. Dehejia*, The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities, J. L. & Econ. 47 (2004) 357–393 and *D.P. Kessler*/*D.L. Rubinfeld*, Empirical Study of the Civil Justice System, in: A.M. Polinsky/S. Shavell (eds.), Handbook of Law and Economics, Vol. 1 (2007) 343–402.

[6] *A.P. Scarso* in no. 4 of his report Punitive Damages in Italy (contained in this publication) states that "a deterrent purpose exists when the defendant's conduct is assessed either as a factor affecting the imposition of liability or the amount of damages awarded or in cases where the benefits gained through the damaging event are taken into account in determining the amount of damages to be awarded." This is contrary to the Law and Economics' point of view. After all, a strict liability rule, where the conduct of the tortfeasor is not assessed, can also provide correct care and activity incentives to the tortfeasor.

[7] See, among many others, *R.A. Posner*, A Theory of Negligence, Journal of Legal Studies (JLS) 1 (1972) 29–96; *S. Shavell,* Strict Liability versus Negligence, JLS 9 (1980) 1–25; *S. Shavell*, Economic Analysis of Accident Law (1987); *W.M. Landes*/*R.A. Posner*, The Economic Structure of Tort Law (1987); *S. Shavell*, Foundations of Economic Analysis of Law (2004) 178 ff.; *H.-B. Schäfer*/*C. Ott*, Lehrbuch der ökonomischen Analyse des Zivilrechts (4th ed. 2005) 129 ff.; *R.D. Cooter*/*T.S. Ulen*, Law and Economics (5th ed. 2008) 336 ff.

same,[8] as does Geistfeld regarding the opinion of the U.S. Supreme Court.[9] This opens the question how this viewpoint fits in the economic framework. After all, if the injurer has to pay higher damages than the losses he has caused, a risk of over-deterrence might be created. In such a situation, the injurer takes too much care and/or engages too little in his activity, as compared to the socially optimal care and activity level. Given that the prevention goal aims at *optimal* levels, this goal is then not reached. Furthermore, economic literature regarding "optimal enforcement" deals with the question of when tort law is the preferable legal instrument, and when criminal law is. These insights are relevant in discussing the punishment goal of punitive damages.

In the following sections, I will discuss the economic arguments in favour of punitive damages, both from a deterrence point of view as well as from a punishment perspective. Where relevant, I will connect the economic insights to the country reports in this book to put the economic analysis of punitive damages into perspective. It is important to realise that tort law and criminal law do not operate in a vacuum, but are different legal instruments which are both concerned with undesirable behaviour. In order to keep the analysis focussed on the topic of punitive damages, which is embedded in tort law, my analysis also centres on tort law. Hence, I will not fully discuss the possibilities of criminal law to address the issues that tort law also faces.[10] I do, however, in infra no. 31 ff. explain that in Law and Economics, both tort law and criminal law are primarily regarded as instruments which may deter undesirable behaviour. Hence, the view that tort law aims at compensation while criminal law aims at punishment and deterrence, is not shared. Given the focus on tort law, I do not discuss the possibilities of the so-called *act-based* sanctions from e.g. administrative law and criminal law, where the sanction is based on a mere wrongful act. Tort damages are so-called *harm-based* sanctions, which can only be applied after harm has occurred. The strengths and weaknesses of act-based

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[8] *A.J. Sebok*, Punitive Damages in the United States (contained in this publication) no. 1 ff.; *V. Wilcox*, Punitive Damages in England (contained in this publication) no. 1 ff.; *J.-S. Borghetti*, Punitive Damages in France (contained in this publication) no. 4 and 35; *N. Jansen/L. Rademacher*, Punitive Damages in Germany (contained in this publication) no. 4; *B. Askeland*, Punitive Damages in Scandinavia (contained in this publication) no. 4; *A. Menyhárd*, Punitive Damages in Hungary (contained in this publication) no. 4 ff. *B.A. Koch* in his report on European Law (contained in this publication) explains in no. 14 ff. that legislation and ECJ decisions require sanctions to be "effective, proportionate and dissuasive". This phrasing suggests that the deterrent function of tort damages is taken seriously and may result in supra-compensatory damages. However, Koch makes clear in no. 39 that, even though violations should be prevented to the extent possible, terminology such as "dissuasive" or "deterrent" are not intended to promote supra-compensatory damages. In no. 41 Koch mentions the possible exception of private enforcement of antitrust rules by way of non-compensatory damages, a topic which I will discuss in no. 15 infra.

[9] *M. Geistfeld*, Punitive Damages, Retribution, and Due Process, Southern California Law Review (S. Cal. L. Rev.) 81 (2008) 269. In the recent decision *Exxon Shipping Co. et al. v Baker et al.*, the Supreme Court again clearly states this, where it considers in p. 19 that "regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."

[10] This topic is discussed in the Law and Economics literature on "optimal enforcement", see fn. 52 ff. below.

and harm-based sanctions, as well as of *preclusionary* measures which make the behaviour impossible in the first place, is extensively discussed in the economic literature. Hence, it would not be correct to assume that the economic analysis of tort law has to conclude that mere risk-creating activities should already be regarded as torts and should open the possibilities of damages. In cases where it is better to attach the sanction to the act than to the harm, tort law is not the suited instrument.[11]

7 To be sure, I do not consider compensation to be a goal of punitive damages. First, compensation is not regarded as an independent goal in the economic analysis of tort law to begin with.[12] Second, even if compensation were regarded as a goal of tort law, the fact that punitive damages exceed compensatory damages already shows that compensation cannot be the goal of punitive damages.[13]

II. Economic Reasons for Punitive Damages: Deterrence

A. Probability of Being Held Liable is Below 100%

8 The above explained economic line of reasoning that actors derive behavioural incentives from the tort system implicitly assumed that if a tortfeasor causes losses for which he should be liable, he will indeed be held liable. He then faces the full negative externalities he has caused. However, many reasons exist why the probability of being held liable falls below 100%.

9 First, it might be difficult or even impossible for the victim to prove negligence (if required) or causation on the side of the tortfeasor. Polinsky and Shavell provide the example of an individual who develops a form of cancer that could have developed naturally, but also due to exposure to a man-made carcinogen.[14] The same would obviously hold true if not only the tortfeasor, but also the victim himself might be the cause of the losses, for example an employee of an asbestos processing company who smokes and later develops lung cancer. It could also be the case that the victim does not know the identity of the

[11] *R.J. Van den Bergh*/*L.T. Visscher*, Optimal Enforcement of Safety Law, in: R.V. de Mulder (ed.), Mitigating Risk in the Context of Safety and Security. How relevant is a rational approach? Erasmus University Rotterdam (2008) 47 ff. A clear example of the different types of measures is the following: Losses due to traffic accidents as a result of speeding can be targeted by preclusionary measures (e.g. Intelligent Speed Adaptation (ISA) which limits the vehicle to the maximum speed at that location), act-based sanction (fines for speeding) or harm-based sanctions (liability in cases where speeding has caused an accident).

[12] This sharply contrasts with the Spanish report (contained in this publication), where *P. del Olmo* explains in no. 4 that in Spain compensation is regarded as the *only* normative goal and that prevention is at best seen as a by-product of non-contractual liability. *Menyhárd* (fn. 8) in the Hungarian report, on the other hand, mentions in no. 27 that prevention is regarded as a main function of civil liability.

[13] See, e.g., *A. Duggan*, Exemplary Damages in Equity: A Law and Economics Perspective, Oxford Journal of Legal Studies (OJLS) 26 (2006) 308.

[14] *A.M. Polinsky/S. Shavell*, Punitive Damages, in: P. Newman (ed.), The New Palgrave Dictionary of Economics and the Law (1998) 193.

tortfeasor in the first place, for instance if he was involved in a hit-and-run accident in which the identity of the tortfeasor remains unknown.

Second, the victim might suffer from what is known in the economic analysis of law as "rational apathy". This means that the victim might find it too expensive to bring a suit against the tortfeasor, when comparing the costs to the expected outcome of the trial. This problem might occur especially in situations where the losses are scattered over many victims. The total losses however might be substantial so that it would be socially advantageous if the tortfeasor would be held liable after all. 10

Third, the injurer might take steps to avoid detection in cases where he intentionally committed the tort.[15] This obviously lowers the probability of being held liable. 11

In all these situations, a tort has been committed and the tortfeasor should be liable for the resulting losses. However, if the victim does not bring a suit, the tortfeasor does not face liability. If not all the victims bring suits, or if they sue but fail because they cannot prove all the required elements, the probability of the tortfeasor being held liable falls below 100%. Hence, the tortfeasor no longer correctly weighs the costs of precautionary measures against the decrease they cause in the total losses, but only the decrease they cause in his expected liability. Given that the losses exceed the expected liability, the tortfeasor does not take adequate precautions and/or engages in the activity too often. 12

Punitive damages can ameliorate this situation.[16] After all, if the probability of being held liable lies below 100%, but the damages to be paid *if* held liable exceed the losses, expected liability can again have the correct size. The factor with which compensatory damages should be multiplied is the reciprocal of the probability of being held liable. So, if the probability of being held liable is 50%, compensatory damages should be doubled to provide the correct incentives. Polinsky and Shavell term this reciprocal the "total damages multiplier".[17] Punitive damages then consist of total damages minus compensatory damages. Sebok's remark that "the size of punitive damages awards…is predictably determined by the size of the compensatory award"[18] is in my view consistent with this idea of punitive damages as a multiple of compensatory damages. 13

An early example of the idea that the sanction should be more severe if the probability of "being caught" is lower, can be found in the law of the Eshnunna (about 2000 B.C.): someone who was caught in the house or in the field of 14

[15] *Landes*/*Posner* (fn. 7) 160.

[16] See, e.g., *D.D. Ellis*, Fairness and Efficiency in the Law of Punitive Damages, S. Cal. L. Rev. 56 (1982) 25, 26; *R.D. Cooter*, Punitive Damages for Deterrence: When and How Much? Alabama Law Review (Ala. L. Rev.) 40 (1989) 1148 ff; *A.M. Polinsky/S. Shavell*, Punitive Damages: An Economic Analysis, Harvard Law Review (Harv. L. Rev.) 111 (1998) 887 ff.

[17] *Polinsky/Shavell* (fn. 14) 193.

[18] *Sebok* (fn. 8) no. 5.

a palace or temple hierarch during daytime had to pay ten shekels of silver; someone who was caught at night was sentenced to death.[19] A contemporary example is that a person who causes a traffic accident and leaves the scene to escape sanctioning not only may have committed a tort in causing the accident, but has also committed a crime in leaving the scene. The possible applicable sanctions now become higher. Economically speaking, this makes sense to counter the decreased probability of conviction. The fact that punitive damages, if they are allowed, are often possible in settings of intentional torts[20] where the tortfeasor may try to avoid being caught is consistent with this economic line of reasoning. Hence, punitive damages and criminal law both may improve the incentives which tort law provides through compensatory damages.

15 The idea that punitive damages also serve to overcome the problem of rational apathy is present in the concept of treble damages in American antitrust law[21] and in the erstwhile European debate on the possibility of double damages in EC antitrust law.[22] The prospect of being able to collect more than just compensatory damages might induce victims of law infringements to bring a suit, even though the costs outweigh the expected compensatory damages. Sebok in his report on the United States mentions that punitive damages can serve the goal of compensating costs which might not be covered by compensatory damages.[23] This statement fits well into the idea of overcoming the rational apathy problem, by increasing the expected benefits of a lawsuit. It should be noted that, in as far as punitive damages are indeed able to ameliorate this problem, the probability of being held liable increases, and the damage multiplier should be reduced proportionally to avoid over-deterrence.

16 A different way of putting the argument is this: Victims who claim damages in essence serve the social goal of deterrence. However, starting a lawsuit entails costs, which are privately borne. This might lead to too few lawsuits being

[19] *M.H. Fried*, The State, the Chicken, and the Egg: or, What Came First? in: R. Cohen/E.R. Service (eds.), Origins of the State: the Anthropology of Political Evolution, 44. This reference was found through the Dutch publication of *H.O. Kerkmeester*, Punitive damages ter compensatie van een lage veroordelingskans (Punitive damages to offset a low probability of being convicted), Nederlands Juristenblad (NJB) 73 (1998) 1808.

[20] *Sebok* (fn. 8) no. 6 and 63; *Wilcox* (fn. 8) no. 63 ff.; *Borghetti* (fn. 8) no. 46; *Askeland* (fn. 8) no. 12; *del Olmo* (fn. 12) no. 6(d).

[21] See, e.g., *W.P.J. Wils*, Should Private Antitrust Enforcement Be Encouraged in Europe? World Competition (W. Comp.) 26 (2003) 476.

[22] See the Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC(2008) 404. Also see *R. Van den Bergh*/*W. van Boom*/*M. van der Woude*, The EC Green Paper on Damages Actions in Antritrust Cases – An Academic Comment (2006) 14 <ec.europa.eu/comm/competition/antitrust/actionsdamages/files_green_paper_comments/erasmus_university.pdf>.

[23] *Sebok* (fn. 8) no. 36. The relevance of this factor is obviously influenced by the applicable rule regarding recovery of legal expenses. Given that under the English rule, as opposed to the American rule, a prevailing plaintiff can recover (part of) those costs from the defendant, punitive damages are not required to cover these costs. On this issue, also see e.g. *V. Behr*, Punitive Damages in American and German Law – Tendencies Towards Approximation of Apparently Irreconcilable Concepts, Chicago-Kent Law Review (Chi.-Kent L. Rev.) 78 (2003) 122 ff.

brought. Increasing the expected damages of victims by awarding punitive damages may solve this problem. Wilcox explicitly mentions this line of reasoning in her report on England.[24] Polinsky and Shavell however warn against the idea that punitive damages may be used to induce parties to bring suits. After all, lawsuits entail litigation costs. From that perspective, it is better that the damage multiplier is high enough to offset the low probability of being held liable, without actually increasing the number of lawsuits.[25]

B. Underestimation of Harm

If there is a risk that compensatory damages fall short of the true losses of the victim, the injurer does not receive adequate behavioural incentives. This risk especially exists in situations where the losses are difficult to assess, for instance in cases of immaterial losses, or if the subjective valuation of the negative externality as experienced by the victim is difficult to determine.[26] In cases where certain types of losses are excluded from compensation, this problem also occurs.[27] 17

Including such losses in punitive damages, however, might be problematic in itself because in order to determine the correct amount of punitive damages, the same measurement problems that caused these losses to be excluded from compensatory losses reappear.[28] Polinsky and Shavell argue that *if* certain types of losses should be included in damages, they should be included in compensatory damages. After all, punitive damages are measured less accurately than compensatory damages and they are applied much less often. Hence, the problem of incomplete compensatory damages is no good reason to include these losses in punitive damages instead.[29] 18

If the risk of underestimating the harm of the victim is realistic, could it then make sense to base the damages of the injurer on his gains, if these are higher, instead of on the harm? In absence of the problem of underestimation of harm, economic theory prefers damages to be based on harm rather than on gains. After all, if the injurer compensates the harm he has caused, he internalises the externality and receives the correct incentives. Basing damages on the assumedly higher gains would provide excessive behavioural incentives. Only if the gains can be labelled socially illicit, does the literature see a reason to remove them.[30] Obvi- 19

[24] *Wilcox* (fn. 8) no. 77. Also see *Menyhárd* (fn. 8) no. 6.
[25] *Polinsky/Shavell* (fn. 14) 197.
[26] It therefore should come as no surprise that punitive damages frequently occur in cases of defamation, where immaterial losses are important. See *Sebok*, no. 6.
[27] *Ellis*, S. Cal. L. Rev. 56 (1982) 27. If the legal system has deliberately excluded certain types of losses from compensation, it remains to be seen if they should be included in the punitive damages, as this would boil down to a circumvention of the exclusion. The relevant question from a Law and Economics point of view then is, whether these losses are rightfully excluded from compensation.
[28] *Ellis*, S. Cal. L. Rev. 56 (1982) 31; *Polinsky/Shavell*, Harv. L. Rev. 111 (1998) 940.
[29] *Polinsky/Shavell*, Harv. L. Rev. 111 (1998) 940, 941; *Polinsky/Shavell* (fn. 14) 194.
[30] *Polinsky/Shavell*, Harv. L. Rev. 111 (1998) 919.

ously, in countries where "unjustified enrichment" constitutes a separate legal action, this may be the indicated instrument. However, in debates regarding the goals of tort law, avoiding unjustified enrichment of the tortfeasor is often mentioned as a separate goal of this body of law as well.[31] An additional reason why economic literature prefers to base damages on harm instead of gains is that an underestimation of those gains would still make the tort worthwhile to the tortfeasor. This would lead to a decrease in social welfare in situations where these gains are lower than the harm.[32] However, given that the problem of underestimating the harm of the victim provides the injurer with inadequate incentives, removing the profits of the injurer may be a good solution after all, because it induces the injurer not to act in the first place. The English category "conduct calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant", nicely fits into this idea.[33] If the risk of underestimating losses is not present, the fact that the defendant yields higher gains is not enough to warrant punitive damages from an economic point of view.[34]

20 Several country reports discuss the possibility of basing damages on gains rather than losses. Wilcox quotes Lord Diplock, who argues that damages might even have to exceed the actual gain of the defendant, even if these gains already outweigh the losses of the victim. After all, if the damages equal the gains, the defendant has nothing to lose from committing the act, while in situations where the plaintiff does not sue or does not succeed in his claim, the injurer keeps his gains.[35] Borghetti in contrast states that in France, damages regarding illegal reproduction of a work protected by intellectual property cannot exceed the amount of the illicit profits made by the tortfeasor.[36] Also in cases of unfair competition, French courts sometimes take the profits of the defendant into account.[37]

C. Socially Unaccepted Costs or Benefits

21 A further argument mentioned in economic literature regarding punitive damages is the situation where an injurer derives certain benefits from his tort which are regarded as socially unacceptable or alternatively, taking due care would create certain additional costs for the injurer, which are regarded as socially irrelevant. For instance, if I derive pleasure from causing someone else pain, merely having to compensate his losses might not deter me from my act, because after compensating the losses, I still have experienced my pleasure. Alternatively if, e.g., keeping to the speed limit does not only cost me time and efforts, but in addition I lose an unexceptionally large thrill of speeding in a populated area, the mere threat of liability might not adequately deter me from speeding.

[31] See, e.g., *Behr*, Chi.-Kent L. Rev. 78 (2003) 137 ff.
[32] *A.M. Polinsky/S. Shavell*, Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer? Journal of Law, Economics & Organization (J.L. Econ. & Org.) 10 (1994) 427–437.
[33] *Wilcox* (fn. 8) no. 11 ff.
[34] However, also see infra no. 50 ff.
[35] *Wilcox* (fn. 8) no. 119.
[36] *Borghetti* (fn. 8) no. 12.
[37] Ibid. no. 29.

If the utility the injurer derives from the act is regarded as socially illicit, the act should be deterred completely. Damages then should be so high that they deter even the injurer who yields these unaccepted benefits or bears these unaccepted costs.[38] According to Polinsky and Shavell, this reason for punitive damages is limited in scope, because many socially undesirable acts do not seem to be associated with social illicit utility, since they are not aimed at causing harm.[39] 22

In addition to this relativization, the idea of labelling costs or benefits as socially illicit is criticised by Friedman, among others. Labelling certain activities as socially unacceptable, even if they would yield more benefits to the injurer than losses to the victim, *assumes* the conclusion that such acts are undesirable, instead of *proving* it.[40] However, given that with such intentional torts, the gains (if they exist at all) are often outweighed by the losses,[41] they will often indeed be socially undesirable because they lower social welfare. It therefore makes economic sense that in cases of intentional torts, punitive damages occur relatively frequently.[42] 23

D. Induce Voluntary Transfers

In situations where transaction costs are low enough for parties to be able to negotiate with each other about the price to pay to transfer an entitlement, economic theory has a preference for voluntary transfers over involuntary transfers. In economic terms, entitlements in such situations are protected by *property rules*, where the only accepted way of transfer is a voluntary transaction. In situations of high transaction costs, on the other hand, entitlements are protected by *liability rules*, where the entitlement can also be taken without the consent of the owner. The taker subsequently has to pay an objectively determined amount to the owner of the entitlement, i.e. damages.[43] Property rule protection in situations of high transaction costs could effectively hinder a desirable reallocation of resources from taking place, because it is too expensive for the parties involved to achieve a transaction. 24

[38] *Ellis*, S. Cal. L. Rev. 56 (1982) 32; *R.D. Cooter*, Economic Analysis of Punitive Damages, S. Cal. L. Rev. 56 (1982) 87 ff.; *Polinsky/Shavell* (fn. 14) 194.

[39] *Polinsky/Shavell* (fn. 14) 194. Also see *Sebok* (fn. 8) no. 29.

[40] *D.D. Friedman*, An Economic Explanation of Punitive Damages, Ala. L. Rev. 40 (1989) 1128 ff. and *D.D. Friedman*, Law's Order: What Economics Has to Do with Law and Why it Matters (2000) 230 ff. Also see *D.D. Haddock*/*F.S. McChesney*/*M. Spiegel*, An Ordinary Economic Rationale for Extraordinary Legal Sanctions, California Law Review (Cal. L. Rev.) 78 (1990) 12; *S. Marks*, Utility and Community: Musings on the Tort/Crime Distinction, Boston University Law Review (B.U. L. Rev.) 76 (1996) 215 ff; *K.N. Hylton*, Punitive Damages and the Economic Theory of Penalties, The Georgetown Law Journal (Geo. L.J.) 87 (1998) 464 ff.

[41] *D.D. Ellis,* An Economic Theory of Intentional Torts: A Comment, International Review of Law and Economics (Int. Rev. Law and Econ.) 3 (1983) 50.

[42] *Sebok* (fn. 8) no. 6.

[43] See, among others, *G. Calabresi/A.D. Melamed*, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, Harv. L. Rev 85 (1972) 1089–1128; *J.E. Krier/S.J. Schwab*, Property Rules and Liability Rules: The Cathedral in Another Light, New York University Law Review (N.Y.U. L. Rev.) 70 (1995) 440–483; *L. Kaplow/S. Shavell*, Property Rules versus Liability Rules: An Economic Analysis, Harv. L. Rev 109 (1996) 713–790.

25 Property rules are preferred in settings of low transaction costs because the parties involved are assumed to know their own preferences better than a judge does. Hence, the price that results in a voluntary transfer is a better assessment of the valuations of the parties involved than the damages that are set after a tort. In the words of Landes and Posner: "When the costs of voluntary market transactions are low, the property approach is economically preferable to the liability approach because the market is a more reliable register of values than the legal system."[44] In addition, the assessment of losses, which is necessary under liability rules, can be very costly.[45] Furthermore, even though parties could also negotiate in a setting of low transaction costs if entitlements were protected by liability rules, such a form of protection would cause several problems: (a) if the owner successfully has fought off a potential infringer, another possible injurer might try to take away the entitlement after all; (b) the owner and potential infringers may invest resources to avoid/enable the infringement (e.g. a burglar alarm and instruments to circumvent the alarm), which is socially undesirable; and (c) the owner may, after his entitlement is taken from him, try to take it back from the infringer, who then tries again, etc.[46] Finally, if owners have to accept infringements of their entitlements, they might have fewer incentives to invest in acquiring property.

26 Punitive damages may induce a potential injurer to seek a voluntary transfer rather than to commit the tort if liability including punitive damages is more costly than seeking the voluntary transfer. Without these punitive damages, the injurer could decide to commit the tort after all if compensatory damages fall short of his private gain. Given the difficulties in correctly assessing damages, the private loss to the victim, however, might exceed the gains to the injurer, so that the involuntary transfer lowers social welfare. If only a voluntary transfer would have been possible, this problem would not occur, because the transfer then only takes place if the potential buyer values the entitlement higher than the potential seller.

27 Polinsky and Shavell mention an additional problem. If injurers know that compensatory damages fall short of true losses, they might spend resources to look for property which they can take without having to compensate its full value and victims invest in avoiding this. Both expenditures lower social welfare. The authors provide the example of copyright infringements.[47] Here again, the construction of basing damages on the profits of the infringer may be a good solution to avoid this problem. Several country reports show that infringements of intellectual property are indeed situations in which punitive damages can be granted, or at least where damages may be based on the gains of the infringer rather than the losses of the victim.[48]

[44] *Landes/Posner* (fn. 7) 31.
[45] *Krier/Schwab*, N.Y.U. L. Rev. 70 (1995) 440–483; *Kaplow/Shavell*, Harv. L. Rev 109 (1996) 713–790.
[46] *Kaplow/Shavell*, Harv. L. Rev 109 (1996) 766 ff.
[47] *Polinsky/Shavell* (fn. 14) 195.
[48] *J. Neethling*, Punitive Damages in South Africa (contained in this publication) no. 26; *Wilcox* (fn. 8) no. 116 ff.; *Borghetti* (fn. 8) no. 11 ff.; *Jansen/Rademacher* (fn. 8) no. 12 ff.; *del Olmo* (fn. 12) no. 15 ff.

The line of reasoning that a higher sanction induces voluntary transfers is also an important argument in the economic theory of criminal law. The idea then is that, even if the probability of being held liable is 100%, mere damages would not be an adequate remedy against certain acts. After all, if an injurer in a setting involving low transaction costs takes an object without consent and, with a 100% certainty, has to pay damages, in essence he converts a property rule protection into a liability rule protection. In order to avoid this, the sanction has to outweigh the losses. The prospective injurer will then choose to acquire the entitlement in a voluntary transfer instead of through an involuntary taking. 28

For example, suppose that I value my neighbour's car higher than its market value, but that the subjective valuation of my neighbour for his car is only known to him. If I *buy* the car from my neighbour in a voluntary transaction, it is certain that I value the car higher than he does, because the price I was willing to pay was high enough for him to sell the car. Our transaction hence has improved our situation. However, were I to *steal* his car and subsequently only have to pay the market value, our joint situation may worsen. After all, even though my personal valuation of the car was higher than the market value so that I was willing to pay the objective price, it is possible that it is lower than the subjective valuation of my neighbour. Hence, the amount I have to pay in the case of theft should be higher than the value of the car. 29

This higher sanction than the value of the entitlement is known as a "kicker".[49] Punitive damages likewise may serve to avoid the injurer from converting a property rule into a liability rule.[50] Disgorging all gains the injurer yielded by committing the tort fits into this idea. 30

III. Economic Reasons for Punitive Damages: Punishment

A. Tort Law and Criminal Law

In the economic analysis of crimes and criminal law, maximisation of social welfare is often regarded as the most important goal.[51] Hence, both tort law and criminal law serve the same goal: deterrence. In the literature on the topic of "optimal enforcement", several arguments are developed as to why criminal law is needed as a deterrence mechanism alongside tort law.[52] 31

[49] *Calabresi/Melamed*, Harv. L. Rev 85 (1972) 1126; *A.K. Klevorick*, On the Economic Theory of Crime, in: J.R. Pennock/J.W. Chapman (eds.), Criminal Justice, NOMOS XXVII (1985) 289–309; *J.L. Coleman*, Crime, Kickers and Transaction Structures, in: J.R. Pennock/J.W. Chapman (eds.), Criminal Justice, NOMOS XXVII (1985) 311–328.

[50] *Haddock*/*McChesney*/*Spiegel*, Cal. L. Rev. 78 (1990) 17 ff.

[51] See, e.g., *G.S. Becker*, Crime and Punishment: An Economic Approach, Journal of Political Economy (J.P.E.) 76 (1968) 169–217; *R.A. Posner*, Economic Analysis of Law (6th ed. 2003) 217 ff; *Shavell* (fn. 7) 543 ff.; *Cooter*/*Ulen* (fn. 7) 510.

[52] See, e.g., *S. Shavell*, The Optimal Structure of Law Enforcement, J. L. & Econ. 36 (1993) 255–287.

32 First, if the probability of being held liable in tort law is below 100%, the expected sanction is not high enough to deter potential injurers. Above, this same topic is presented as an argument if favour of punitive damages. However, in countries where punitive damages are not permissible, criminal law may be used to increase the expected sanction.[53]

33 Second, if the injurer is judgment proof, a financial sanction might not adequately deter him. Criminal law can apply non-monetary sanctions, which may be able to provide the necessary incentives. Obviously, the use of punitive damages might suffer from this same problem: if the injurer cannot pay the punitive damages, he might not be deterred by them. Applying criminal law could then be a necessary step.

34 Third, and related, criminal law stigmatises the convict. The fear of this stigma may provide behavioural incentives to the potential wrongdoer, where financial sanctions might not have been enough.[54]

35 Fourth, the use of criminal law solves the rational apathy problem. After all, it is no longer the victim who has to initiate the procedure, but the state.[55] Also in situations where the victim does not have enough information regarding the identity of the wrongdoer or about the existence of an infringement in the first place, the fact that the state initiates the procedure is an advantage of the criminal law system. The state can make use of investigative methods and information systems such as fingerprint and DNA databases, which the victim cannot apply.[56]

36 The drawback of criminal law is that the administrative costs generally outweigh those of the tort system. After all, the severity of the sanction and the fact that criminal law does not shift an existing loss but rather adds another loss calls for procedural safeguards to avoid wrongful convictions.[57] In addition, non-monetary sanctions (i.e. imprisonment) are much more expensive to execute than monetary sanctions (i.e. fines and damages). Hence, criminal

[53] See, e.g., *Shavell*, J. L. & Econ. 36 (1993) 266, 276 ff.

[54] For economically oriented literature on stigmatisation, see, e.g., *E. Rasmusen*, Stigma and Self-Fulfilling Expectations of Criminality, J. L. & Econ. 39 (1996) 519–543; *D.M. Kahan/E.A. Posner*, Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines, J. L. & Econ. 42 (1999) 365–391; *P. Funk*, On the Effective Use of Stigma as a Crime-Deterrent, European Economic Review (E.E.R.) 48 (2004) 715–728.

[55] Due to limited resources, the state will not be able to respond to all contraventions, so that some violations will go undeterred. It is important to realise that the idea of optimal enforcement does not aim at maximum deterrence, but at optimal deterrence, where the costs and benefits of additional enforcement measures are weighed. See, e.g., *A.M. Polinsky/S. Shavell*, Enforcement Costs and the Optimal Magnitude and Probability of Fines, J. L. & Econ. 35 (1992) 133, 138.

[56] *Shavell*, J. L. & Econ. 36 (1993) 269, 278.

[57] From an economic point of view, this is a crucial difference with punitive damages, which are intended to offset the problems which frustrate the preventive potential of tort law. Punitive damages hence do not add another loss, but compensate for the too low probability of being held liable, the underestimation of losses, etc.

law should be used as an ultimum remedium. The fact that criminal law up to a certain degree may be "self-enforcing" (in the sense that most people do not want to be associated with crimes) strengthens the ultimum remedium character. After all, if too many acts are criminalised, the self-enforcing character is weakened.

B. Punitive Damages and Punishment

Given the abovementioned economic approach to criminal law, most punishment arguments for punitive damages are actually deterrence arguments in disguise. The punitive character is, at least from an economic point of view, intended to strengthen the preventive functioning of tort law, where compensatory damages are not sufficient. Increasing total damages is then necessary to offset the too low probability of being held liable, to counterbalance socially illicit costs or benefits or to induce voluntary transfers. 37

The advantage of using punitive damages rather than criminal law is that the high administrative costs of criminal law are avoided, and that its ultimum remedium character is maintained. The judgment proof problem poses limits to the possibility of punitive damages to solve the problem of the too low probability of being held liable. The non-monetary sanctions of criminal law are then needed to provide the correct incentives.[58] 38

Analysed like this, punishment is not a goal in itself, but it serves the goal of prevention. Polinsky and Shavell however also analyse the separate goal of punishment, where the punishment objective is derived from the desire of individuals to have blameworthy parties appropriately punished. The correct level of punishment then depends on the reprehensibility of the party's actions. If the defendant is a firm, it is difficult to punish the blameworthy individuals within the firm through punitive damages. First, it might be difficult for the firm to find the culpable employee. Second, it remains to be seen if the internal sanction that the firm applies is influenced by the punitive damages. Third, especially in cases of dispersed responsibility, it is doubtful whether a culpable employee exists. In the end, it is often the shareholders and the customers who get "punished", not the blameworthy employee.[59] 39

The correct amount of punitive damages for the goal of punishment is determined by the reprehensibility of the wrongdoer's actions. The punishment goal implies that the culpable injurer should suffer a utility loss that corresponds to the blameworthiness of his behaviour. This entails that the level of wealth of the defendant is assessed, because the utility decrease that is caused by the duty to pay damages depends, inter alia, on his wealth. Hence, the wealthier the defendant, the higher punitive damages should be to reach the punishment 40

[58] Also see *Haddock*/*McChesney*/*Spiegel*, Cal. L. Rev. 78 (1990) 48 ff.
[59] *Polinsky/Shavell*, Harv. L. Rev. 111 (1998) 948 ff.

goal.[60] Wealth of the defendant is a relevant factor in the United States and in England.[61]

IV. Tension between the Goals of Deterrence and Punishment

41 After having discussed both the deterrence goal and the punishment goal of punitive damages, it is possible to highlight a few tensions that exist between both goals.

A. When Should Punitive Damages be Awarded?

42 The deterrence objective of punitive damages dictates that they are awarded if the probability that the injurer is held liable is below 100%, if certain costs or benefits from the injurer are regarded as socially illicit, if compensatory damages systematically under-compensate the victim and if the injurer should be induced to seek a voluntary transfer. The punishment goal, in as far as it does not serve the deterrence goal, states that punitive damages should be awarded if the behaviour of the injurer was reprehensible.

43 Reprehensibility of the behaviour is not directly relevant for the deterrence goal. In cases where reprehensible behaviour almost certainly leads to liability, punitive damages are not required to adequately deter the tortfeasor. The *Exxon Valdez* case is regarded in the economic literature as an example of this, because the probability of a tort suit following the accident was close to 100%.[62] The reprehensibility of the captain regularly being drunk while on duty then is irrelevant. On the other hand, irreprehensible behaviour with a low probability of being held liable might require punitive damages after all. Only if the reprehensibility is connected to the social illicitness of gains or costs, might it be a relevant factor for the deterrence goal.[63]

44 The U.S. Supreme Court itself states that the problem of a low probability of being detected and the problem of rational apathy do not play a role in the *Exxon Valdez* case and hence cannot justify high punitive awards: "Heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it)…or when the value of injury and the corresponding compensatory award are small (providing low incentives to sue)." (p. 20). "We know, for example, that Congress devised the treble damages remedy for private antitrust actions with an eye to supplementing official enforcement by inducing private litigation, which might otherwise have been too rare if nothing but compensatory damages were available at the end of the day…That concern has no traction here, in this case of staggering

[60] *Polinsky/Shavell*, Harv. L. Rev. 111 (1998) 953.
[61] *Sebok* (fn. 8) no. 78 ff.; *Wilcox* (fn. 8) no. 47.
[62] *Polinsky/Shavell*, Harv. L. Rev. 111 (1998) 904. For a critical view, see *Hylton*, Geo. L.J. 87 (1998) 452 ff.
[63] *Polinsky/Shavell* (fn. 14) 196.

damage inevitably provoking governmental enforcers to indict and any number of private parties to sue." (p. 39). "In a well-functioning system, we would expect that awards at the median or lower would roughly express jurors' sense of reasonable penalties in…cases (again like this one) without the modest economic harm or odds of detection that have opened the door to higher awards" (p. 40).

B. Wealth of the Defendant

45 Above it became clear that the wealth level of the defendant is relevant for the punishment goal, because it influences the utility loss experienced by the injurer when having to pay a certain amount of damages. For the deterrence goal, however, wealth is in principle irrelevant, besides the above-discussed topic of judgment proof.[64] Liability serves the goal of internalising the externalities caused by the injurer. By compensating the losses, multiplied by a factor to offset the too low probability of being held liable, this internalisation is reached. Further increasing damages on the basis of the level of wealth would lead to over-deterrence. However, if injurers cannot insure against punitive damages and they are risk-averse, expected liability need not be full in order to provide adequate behavioural incentives. In such a situation, the poorer the injurer is, the lower the punitive damages award can be to still be able to offset the too low probability of being held liable.[65]

C. Insurance Against Punitive Damages

46 If punitive damages are intended to offset the too low probability of being held liable, injurers should be able to insure against punitive damages. It is well established in the economic literature that the availability of liability insurance increases social welfare, provided that the problems of adverse selection and moral hazard can be adequately tackled.[66] Injurers should hence be able to cover liability for the expected losses. Given that punitive damages serve to increase expected liability to the level of expected losses, they should be insurable.[67] Ellis argues that the problem of moral hazard is a reason not to allow insurance against punitive damages.[68] The same is mentioned by Ebert in her report on Liability Insurance. She states that the moral hazard problem cannot be adequately addressed because there are too few verdicts to estimate the individual risk.[69] However, given that the economic approach favours a more regular use of punitive damages, which is far better predictable than the current practice and which is strongly connected to compensatory damages, this problem in my view is rather limited.

[64] See, e.g., *Cooter*, Ala. L. Rev. 40 (1989) 1176, 1177.
[65] *Polinsky/Shavell*, Harv. L. Rev. 111 (1998) 913.
[66] *Shavell* (fn. 7) 257 ff.
[67] *Cooter*, Ala. L. Rev. 40 (1989) 1182 ff.; *Polinsky/Shavell*, Harv. L. Rev. 111 (1998) 932 ff.; *Polinsky/Shavell* (fn. 14) 197.
[68] *Ellis*, S. Cal. L. Rev. 56 (1982) 74.
[69] *I. Ebert*, Punitive Damages and Liability Insurance (contained in this publication) no. 5. However, in no. 10 she mentions the use of deductibles as a possible way to avoid moral hazard.

47 The story obviously is completely different from the punishment perspective. In order for punitive damages to be able to punish the injurer, he should experience the negative utility that is caused by the duty to pay. Insurance against punitive damages would frustrate this objective, so that insurance against punishments should not be allowed.[70] However, it remains to be seen if the injurer, especially if it is an individual, would be able to pay the punitive damages without insurance.[71] If the injurer is judgment proof, punitive damages would not be able to punish adequately. As is already explained in supra no. 33, the judgment proof problem forms an argument for criminal law as an addition to tort law, because it can make use of non-monetary sanctions.

48 Cooter and Ulen argue, based on the judgment proof problem and the need for non-monetary sanctions that arise from it, that insurance against criminal fines can make economic sense. In order to combat the possible problem of moral hazard, the insurance company would want to monitor policy-holders to deter them from committing crimes. Private enforcement by insurance companies would then supplement public enforcement by the police.[72] The same line of reasoning could be followed with respect to punitive damages. However, as Shavell has pointed out, insurance against the financial consequences of wrongful behaviour will not be bought, because it is too expensive. It is cheaper for the potential wrongdoer not to commit the wrong than to commit it and collect the insurance benefits. The premium for such insurance outweighs the benefits.[73] Be this as it may, Cooter and Ulen's argument is based on the deterrence goal of criminal law, not on the goal of punishment in itself. In my view, this latter goal still cannot be reconciled with insurance against fines or punitive damages, because insurance would bar the negative consequences of the sanction from fully reaching the wrongdoer.

49 Faure and Heine also argue that insurance of fines as such is not to be considered undesirable. It can increase social utility, provided that the insurance company can monitor the insured so that the preventive function of the criminal sanction is shifted to the insurer.[74] Here again, the authors regard the sanction as an instrument of deterrence. The argument that insurance cannot be reconciled with the goal of punishment as such, therefore in my view still holds true.

[70] Also see *A.M. Polinsky/S. Shavell*, The Optimal Trade off between the Probability and Magnitude of Fines, The American Economic Review (A.E.R.) 69 (1979) 885 ff.

[71] It is not clear from the reports on the United States and England whether this problem is a reason for considering the wealth of the defendant. Sebok's remark in no. 78 that in Maine, "the punitive damages award must take into account the defendant's wealth in order to adequately affect the defendant and fulfil the award's punishment and deterrent purposes" rather pertains to the opposite situation, where the defendant is so wealthy that damages may be too low to have a real effect. Wilcox's remark in no. 48 that "the idea is to take the profit out of wrongdoing" suggests the same.

[72] *Cooter/Ulen* (fn. 7) 514.

[73] *Shavell* (fn. 7) 264 ff.

[74] *M. Faure/G. Heine*, The Insurance of Fines: the Case of Oil Pollution, The Geneva Papers on Risk and Insurance – Issues and Practice (G.P.R.I.I.P.) 16 (1991) 47.

D. Should Punitive Damages be based on Gains or Losses?

Besides the points already discussed in supra no. 19, the differences between the goals of prevention and punishment are also relevant for answering the question whether punitive damages should be based on the gains to the wrongdoer or the losses of the victim(s). Hylton discusses the possible goals of loss internalisation (i.e. confronting the injurer with the losses he has caused) and gain elimination (removing the benefits the injurer obtains from his behaviour) and he distinguishes the situation where the gains are smaller than the losses from the opposite situation.[75] 50

It has been argued that the internalisation approach is the better option, because: (a) if gains exceed losses, basing damages on the losses compensates the victim while still enabling the injurer with high enough gains to perform the behaviour;[76] and (b) if gains are smaller than the losses, the behaviour is undesirable and any sanction that exceeds the gains would be able to deter the injurer. However, Hylton challenges this pro-internalisation view. 51

According to Hylton, if the gains are smaller than the losses, the optimal sanction might differ from the loss-internalisation level. If due to excessive discounting some people would not be deterred by the mere elimination of gains, higher sanctions might be required, even higher than the loss-internalisation level. If, on the other hand, higher sanctions would lead to more violent behaviour (e.g. to avoid detection), a lower sanction might be optimal. Another reason why the sanction should not always be based on loss-internalisation is that the losses are sometimes more difficult to assess than the gains, e.g. in antitrust cases. 52

In situations where the gains exceed the losses, this does not necessarily mean that the loss-internalisation level is the correct basis for the sanction. After all, there are more social losses than the mere losses of the victim (e.g. costs of law enforcement and litigation and the losses of others than the direct victim). Basing the sanction on the gains instead of on the losses might then be a good solution, because it deters the behaviour altogether. Especially in cases where the possible losses due to over-deterrence are small (e.g. in cases of theft, where the potential thief who values the good higher than the owner still has the option of buying it from the owner), this is a good solution.[77] 53

In order to determine the correct amount of punitive damages, it is therefore important to assess the gains to the injurer and the social losses of his behaviour.[78] Reprehensibility of the conduct might serve as an indication that the 54

[75] *Hylton,* Geo. L.J. 87 (1998) 423 ff.

[76] It is interesting to note that it is exactly this possibility of the tortfeasor to continue behaving improperly because his gains exceed the losses of the victim, that is sometimes regarded as an argument for punitive damages. See *Wilcox* (fn. 8) no. 119 ff.; *Borghetti* (fn. 8) no. 36; *Jansen/Rademacher* (fn. 8) no. 11.

[77] *Hylton,* Geo. L.J. 87 (1998) 438.

[78] Ibid. at 441.

gains do not exceed the social losses, because the gain only materialises at the expense of a loss of the victim.[79] The choice between loss-internalisation damages and gain-removing damages ultimately boils down to the question whether the goal is to induce the potential injurer to choose an optimal level of care and activity, or to completely deter his behaviour. In the first scenario, losses should be internalised, in the second, gains should be eliminated. According to Hylton, in many cases of punitive damages, gain-elimination is preferable and the risk of over-deterrence is not relevant, because the behaviour should be deterred completely.[80]

V. Conclusions

55 In the economic analysis of law, prevention and spreading of losses are regarded as the most important goals of tort law. Damages are the instrument with which these goals can be reached. The economic analysis of criminal law focuses on deterrence as well. Punitive damages are therefore primarily regarded as an instrument which can, when necessary, improve the deterrent function of tort law. They may be required in this respect to offset the fact that the probability of being held liable falls short of 100%, to respond to the problem that the harm is sometimes underestimated, to correct socially unaccepted costs or benefits of the tortfeasor or to induce the latter to seek a voluntary transfer with the victim rather than to commit the tort.

56 Given the focus on deterrence, the goal of punishment in itself does not play a major role in the economic analysis of law in general, or in the economic analysis of punitive damages specifically. If both goals are treated separately, nonetheless, some tensions prove to exist. They regard the role of reprehensibility, the wealth level of the defendant, the question whether insurance against punitive damages is allowed and the question whether damages should be based on harm to the victim or gains of the tortfeasor.

57 When connecting the economic insights to the country reports, it became clear that some reports contrast with the economic analysis, e.g. the Spanish report which states that compensation is regarded as the only normative goal of non-contractual liability and the emphasis that some reports put on the punishment goal in itself. In many instances, however, the economic analysis nicely fits the legal treatment of punitive damages, e.g. the connection between the size of compensatory damages and punitive damages, the role of punitive damages in overcoming the problem of rational apathy and the fact that punitive damages are often granted in situations of immaterial losses or with intentional torts.

[79] Ibid. at 456. Also see *M.F. Grady*, Punitive Damages and Subjective States of Mind: A Positive Economic Theory, Ala. L. Rev. 40 (1989) 1214 ff., who argues that courts rightfully distinguish between inadvertent negligence (which often is efficient) and deliberate negligence (which is not).

[80] *Hylton,* Geo. L.J. 87 (1998) 467.

Punitive Damages From a Private International Law Perspective

Marta Requejo Isidro[*]

I. Introduction

There are currently two major civil liability models in Europe: those of Anglo-Saxon origin, and those of the so-called "civil" systems. One of the main differences between them lies in the fact that whereas the latter limit the function of civil liability to repairing or compensating damage, the former admit other purposes: awards must show that the improper conduct in question is not worth the risk (tort does not pay) and discourage its repetition. These objectives can be associated with all civil liability judgments, even those presented as merely compensatory. There is, however, a specific instrument to deter individuals from violating the law:[1] punitive or exemplary damages.[2] These are also called aggravated damages in the U.S.A. For private international law (PIL) purposes – that is, for service of process abroad, or when recognition and execution of foreign decisions are sought – the "label" or term used to designate damages (compensatory, punitive, exemplary, aggravated) in the country of origin is only of minor importance: what matters is their amount. 1

PIL provides an interesting perspective from which punitive damages can be examined. To a great extent, PIL solutions in a given legal system depend on the legal provisions applicable to civil matters in that system. However, a lawyer facing a private international situation has to consider legislative and jurisprudential solutions other than those of his own national system. In doing so, he is forced to consider the principles on which the former system is based. In this respect, it is one thing for an ordinary legislator to rule out a normative 2

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[1] Punitive damages can also act as an incentive for the victim to sue, enabling him to incur costs he would otherwise not recover, out of proportion to the compensation he is claiming.

[2] On the different interpretations of "aggravated damages" in America and the rest of the Commonwealth see *A.J. Sebok/V. Wilcox*, Aggravated Damages (contained in this publication) no. 1 ff.

option because he does not believe it is appropriate for regulating domestic cases, and another for the said option not to be admitted into the system under any circumstances, because it goes against the constitutional parameters on which the system is based. With specific regard to punitive damages: it is one thing for them not to be contemplated in Spanish, Italian or French positive civil law, and another for them to be declared completely unacceptable due to intrinsic and ontological reasons. In PIL we deal with the latter question and, should we decide against punitive damages, the intensity of such a rejection is still to be considered, as it can be graded according to a variety of factors such as the link between the deed and the forum.

3 There are three sets of circumstances in which punitive damages can be considered from a PIL perspective. The first is where a claim is filed abroad, and the national authorities there are asked to cooperate with the process: for example, a national authority based abroad may be asked to serve a defendant who resides in their forum with proceedings. The second is when a judgment has been issued abroad ordering the defendant to pay compensatory and punitive damages and a request is made for the decision to be recognised and executed in the national authority's forum. The third is where a claim sits before a jurisdiction which, pursuant to its rules of conflict, has to apply a foreign law granting punitive damages in the civil liability context. In the following report, each of these aspects will be considered separately with reference to particular countries.[3] Note that in practice, except for Germany, there have been few occasions where an EU Member State has been asked to serve a document or recognise a decision[4] involving punitive damages: this has not, however, diminished the doctrinal debate. The examination of punitive damages from a PIL perspective in European countries shows that the association between civil liability and compensation *alone*, is so deeply rooted that it not only rules out the possibility of awarding punitive damages in domestic cases: the idea goes even further and affects situations with international aspects, especially in relation to the recognition of punitive damages. It also affects, though to a lesser extent, the service of process.

4 Nevertheless, the opposition to punitive damages in the PIL context is by no means unanimous.[5] Rather, some European countries have shown an attitude favourable towards punitive damages. Differences of opinion concerning how to react to a request to serve a lawsuit, or whether to recognise foreign decisions on punitive damages, can be found among academics in the same jurisdictions. In practice, the recognition of punitive damages awards has been denied in Germany and Italy, but such damages have been granted in Spain and, albeit

[3] I.e. countries where actual cases exist or there are published doctrinal studies to which the author had access.

[4] As far as the author is aware, there has yet to be a case in which the problem is considered in terms of applicable law.

[5] See, for example, *G. Cavalier/J.S. Quéguiner*, Punitive damages and French Public Policy, 4–5 October 2007, Electronic copy available at http://ssrn.com/abstract=1174363, last page: "As to whether punitive damages are admitted by French international public policy…we conclude that: *punitive damages* may not be here yet, but they are on their way…."

in lower courts, in Greece. Finally, as the principles guiding "EU international private situations" and "non-EU international private situations" are different, it is questionable whether the answer to the petition for cooperation should be the same for both, or should instead vary depending on whether it comes from a Community State.

II. Service of Claim Seeking Punitive Damages

A. Introduction

A request for service of a foreign lawsuit by a claimant in a European country is covered by the Hague Convention on service abroad of 15 November 1965,[6] if the request for cooperation is made to a non-EU Member State, such as the U.S. and by Regulation (EC) No. 1393/2007,[7] when the addressee is in a jurisdiction which forms part of the EU.[8] 5

Two aspects of punitive damages have generated doubts concerning the cooperation of European authorities: whether the institution belongs to the civil order (as opposed to criminal order) as discussed in infra no. 7 ff.; and whether the said service is contrary to ordre public (infra no. 15 ff.). 6

B. Classification of Punitive Damages: Civil or Criminal?

1. The Hague Service Convention of 15 November 1965

The first impediment to cooperating with a foreign jurisdiction which serves a claim for punitive damages is the failure of the foreign jurisdiction to classify such damages as "civil". 7

With regards to the Hague Convention of 1965, classification is based on an autonomous interpretation of art. 1 – *autonomous* meaning, unrelated to national systems (i.e., there is no cumulative classification: also, one country's classification is not preferred over another's) – in order to provide concepts which are unequivocal and identical for all the signatory states.[9] 8

[6] The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

[7] Official Journal (OJ) L 324, 10.12.07, 79–120, applicable since 13 November 2008.

[8] I.e. in England, Wales, Ireland or Cyprus. Concerning the possibility of obtaining punitive damages in other countries, see the reports in this publication. Note that punitive damages are rarely awarded in England as they have to fall within one of three restricted categories. As shown below, a favourable attitude towards the recognition of foreign decisions cannot be taken for granted (infra no. 31).

[9] Cf. in this respect, *M. Requejo Isidro*, Punitive damages y su notificación en el contexto del Convenio de La Haya de 15 de octubre de 1965, Revista Española de Derecho Internacional (REDI) 1996, 71 ff. Even the decision of *OLG Koblenz*, *27 June 2005*, Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2006, 25 ff., where the court denies the civil nature of the damages and therefore refuses to cooperate by notifying an addressee, confirms that it resorts to an autonomous interpretation.

9 The opinion that punitive damages should be classified as "non-civil" for the purposes of the Hague Convention is rare[10]. The civil nature of punitive damages was affirmed in Germany in *OLG Munich*, *15 July 1992*,[11] following *OLG Düsseldorf*, *19 February 1992*.[12] Both followed the precedent of *OLG Munich*, *9 May 1989* – a decision issued by a German court which held that punitive damages are not a criminal institution. This ruling was based on formal criteria: a punitive damages award does not give rise to a criminal record; punitive damages are awarded irrespective of a possible criminal sanction; the conditions in which they are awarded are those of civil procedural law, that is, none of the guarantees in favour of the defendant that are typical of criminal proceedings apply.[13]

10 An important part of the German doctrine supports the above reasoning.[14] This viewpoint is inspired, and certainly supported, by that of the Special Commission of the Hague. When it met from 17–20 April, 1989, one of its first concerns related to the material scope of application of the Hague Convention, particularly in relation to the Munich Central Authority's refusal to serve proceedings in matters of punitive damages (in fact, the Central Authority changed its mind after this meeting). The report published after the meeting pointed out that the majority opinion favoured a civil or commercial classification, based on the fact that the payment of a punitive award is made to a private person and not to the state requesting the service. Point 8(c) reads: "The discussions showed that a number of experts thought…that, to the extent that it is established by the pleadings that punitive damages are to be paid to the plaintiff, and not to the requesting state, it seems difficult to characterise such damages as other than an element of civil or commercial action."[15] With this statement, the Special Commission of 1989 ratified the liberal position adopted by the Special Commission of November 1977, with regard to the application of the

[10] *D. Coester-Waltjen*, Deutsches internationales Zivilverfahrensrecht und die punitive damages nach U.S.-amerikanischem Recht, in: A. Heldrich/T. Kono (eds.), Herausforderungen des Internationalen Zivilverfahrensrechts (1995) 15 ff., 24 ff., extends the solution in favour of notification to any other request for cooperation during the process. *E.C. Stiefel/R. Stürner/A. Stadler*, The Enforceability of Excessive U.S. Punitive Damages Awards in Germany, American Journal of Comparative Law (AJCL) 39 (1991) 779 ff., 801, remind us that there are other opinions on this issue.

[11] *OLG Munich*, *15 June 1992*, Recht der Internationalen Wirtschaft (RIW) 1993, 70 ff.

[12] *OLG Düsseldorf*, *19 February 1992*, Neue Juristische Wochenschrift (NJW) 1992, 3110 f.

[13] *OLG Munich*, *9 May 1989*, RIW 1989, 483.

[14] *H. Koch*, Zur Praxis der Rechtshilfe im amerikanisch-deutschen Prozessrecht – Ergebnisse einer Umfrage zu den Haager Zustellungs- und Beweisübereinkommen, IPRax 1985, 245 ff., 246 ff.; *R. Greger*, Note to *OLG Munich*, *9 May 1989*, NJW 1989, 3103 ff., 3103; *C. Böhmer*, Spannungen im deutsch-amerikanischen Rechtsverkehr in Zivilsachen, NJW 1990, 3049 ff., 3051; *H. Morisse*, Die Zustellung U.S.-amerikanischer Punitive-damages-Klagen in Deutschland, RIW 1995, 370 ff., 371. Outside Germany, *C. Lenz*, Amerikanische punitive damages vor dem schweizerischer Richter (1992) conclusion no. 2, 176; *L. Fumagalli*, Conflitti tra giurisdizione nell'assunzione di prove civile all'estero (1990) 216, fn. 33 (in relation to the Hague Convention on obtaining evidence, of 18 March 1970); *H. Batiffol/P. Lagarde*, Traité de Droit International Privé (8th ed. 1993) vol. I, fn. 247.

[15] The affirmation leads us to question the outcome of claims for punitive damages when the funds go to the state: infra fn. 18.

Convention, and the statement became a fundamental milestone in the evolution of academic opinions and practice.

Despite the authority of the Hague Commission, some German authors still deny the civil nature of punitive damages: their criminal nature is affirmed on the grounds that they largely serve public interests by punishing and deterring the wrongdoer, and deterring the community in general. The fact that, though more so in the U.S., punitive damages can also be used as compensation for the cost of the proceedings and to remunerate the plaintiff's counsel is a consequence derived from the service rendered by the private plaintiff to the community: i.e. he is compensated for the cost of something which is beneficial to society at large. Furthermore, the amount is not calculated according to the actual damage caused but depends on the defendant's conduct and financial status. Finally, under the laws of some U.S. states, punitive damages are diverted to the state under split-recovery provisions.[16] 11

Although the opinion referred to supra is an old one, and it has gradually weakened, it has actually been supported by a recent judicial decision, *OLG Koblenz*, *27 June 2005*.[17] For various reasons, the refusal of the court to classify the matter as civil or commercial in the sense of the Convention has been subject to severe doctrinal criticisms.[18] However, it has also reminded the doctrinaires of something that was latent in the Hague report: that all cases of punitive damages are not the same, and that the doubts concerning how they should be classified could still be justified when one of the parties is a public authority (or an individual acting, de facto, on behalf of society) and the damages (or part of them) benefit the state.[19] 12

2. Classification in Regulation (EC) No. 1393/07

The author is unaware of any actual cases in which a request for service has been made pursuant to the Community Regulation or its immediate predeces- 13

[16] *E.C. Stiefel*, Discovery-Probleme und Erfahrungen im Deutsch-Amerikanischen Rechtshilfeverkehr, RIW-AWD 1979, 509 ff., 512; *H.H. Hollmann*, Auslandszustellung in U.S.-amerikanischen Zivil- und Verwaltungssachen, RIW 1982, 784 ff., 786, although he believes that notification should not be denied when punitive damages are included in a claim of a non-civil nature. *C. Wölki*, Das Haager Zustellungsabkommen und die U.S.A., RIW 1985, 530 ff., 533, expressly points out that punitive damages are a "classic civil case", nonetheless excluded from the scope of application of the Hague Convention in as much as the idea of punishment prevails over the idea of compensation for damage. The opinion of *R. Greger*, Verfassung und internationale Rechthilfe, in: Erlanger Festschrift für K.H. Schwab (1990) 329 ff., 338 ff.; and the radical opinion of *H. Merkt*, Abwehr der Zustellung von "punitive damages"-Klagen (1995) are also worth mentioning.

[17] IPRax, 2006, 25 ff. The decision related to a class action in the United States where treble damages were claimed. The court classified these damages as a Sonderfall of punitive damages and held that their classification as civil/commercial depended on the respective weight of the interests (public/private) considered.

[18] *A. Piekenbrock*, Zur Zustellung kartellrechtlicher treble damages-Klagen in Deutschland, IPRax 2006, 4 ff., 6.

[19] *Piekenbrock*, IPRax 2006, 8.

sor, Regulation (EC) No. 1348/2000. It is believed that the above conclusions regarding the Hague Convention are largely also valid with regard to this instrument. Nevertheless, the classification of a claim as a civil or commercial matter is more important under the Community system: as we shall see, there is no provision parallel to art. 13 of the Hague Convention, enabling the request for service to be rejected when "compliance [with the service request] would infringe [a country's] sovereignty or security". On the other hand, a justification for failing to comply with a service request is expressly stated as arising when "it is manifestly outside the scope of [the] Regulation" (art. 6(3)).

14 The Regulation defines its material scope in art. 1: "This Regulation shall apply in civil and commercial matters where a judicial or extrajudicial document has to be transmitted from one Member State to another for service there. It shall not extend in particular to revenue, customs or administrative matters or to liability of the state for actions or omissions in the exercise of state authority (acta iure imperii)". Its relationship with other Community regulations in the area of freedom, security and justice – e.g. Regulation (EC) No. 44/2001, on jurisdiction and the recognition and enforcements of judgments in civil and commercial matters, Brussels I;[20] Regulation (EC) No. 864/2007, on the law applicable to non-contractual obligations, Rome II[21] – speaks in favour of a consistent interpretation with them. To start with, claims for punitive damages can surely be classified as civil or commercial, as recital 32 of the preamble to Regulation (EC) No. 864/2007 makes special reference to such damages. Secondly, ECJ jurisprudence qualifies this conclusion by establishing that Community civil proceedings do not include "public law" cases, meaning that they do not include proceedings where one of the parties exercises prerogatives of public power.[22] In the author's opinion, a punitive damages case may be considered a "public" one if the damages are awarded in favour of a state as a party to the litigation. On the contrary, the issue is to be classified as "civil or commercial" in the sense of the Regulation when the plaintiff is a private individual, even if the action of the said plaintiff renders (de facto) a service beyond his own individual interests.[23]

[20] OJ L 12, 16.01.01, 1–23.

[21] OJ L 199, 31.07.07, 40–49.

[22] ECJ, C-172/91, *Sonntag* [1993] ECR I-1963; C-292/05, *Lechouritou* [2007] ECR I-1519, among others.

[23] Supra fn. 15. Although it is not completely conclusive, because the ECJ did not explain the basis of its opinion, this position is supported by another decision of the ECJ, C-167/00, *Henckel* [2002] ECR I-08111. The government of the United Kingdom maintained that the action taken by a consumers' association did not fall within the scope of application of the Brussels Convention. In its opinion, the association should not have been classified as a public authority as its mission was one of public interest. The ECJ, in no. 30, denied that the agent was a public authority and therefore that the claim fell outside Community scope. According to information taken from the conclusions of General Advocate Jacobs' opinion, the consumers' association was a private, non-profit organisation.

C. Contrariety to Ordre Public

1. Contrary to art. 13 Hague Convention on service

15 Pursuant to art. 13 of the Hague Convention of 1965, "Where a request for service complies with the terms of the present Convention, the state addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security." The rule is ordinarily seen as an international public policy clause, of a constitutional nature. Its application in a specific forum depends on the links between the case and the forum in question. Being a rule of conventional origin, its interpretation must be in accordance with the purpose of the instrument to which it belongs: the desire of the Convention signatories to "improve the organisation of mutual judicial assistance…by simplifying and expediting [service abroad]" speaks in favour of a restricted application of the exception.[24]

16 Once again, Germany is the country which provides practical examples of the refusal to serve a claim for punitive damages for being contrary to art. 13 of the Hague Convention. This is clear in several decisions of the Bundesverfassungsgericht (BVerfG) and lower courts. Indeed, the court in *BVerfG*, *3 August 1994* made an order forbidding service and although the position was rejected in *BVerfG*, *7 December 1994*, it was nonetheless followed in another recent decision, *BVerfG*, *25 July 2003*.[25] As for lower courts, we must refer to the aforementioned decision of *OLG Koblenz*, *27 June 2005*.

17 The logic of the decisions which reject service of process for *public policy* reasons is largely based on the anticipation of the outcome of the litigation: it is assumed that the plaintiff will indeed be awarded punitive damages, and that he will attempt to enforce the ruling in Germany. Therefore, the grounds for refusing recognition already exist at the time of service, and cooperation is thus denied.[26] This doctrine has been criticised: operating on such a conviction, i.e. anticipating the outcome of the trial, goes expressly against the Taborda Ferreira Report on the 1965 Hague Convention, which expressly states that service should not prejudge recognition or subsequent enforcement. Along the same lines, it has been pointed out that the aforementioned German decisions are wrong, as they confuse the scope of the ordre public exception, which differs according to the context (i.e. the moment) in which it is used: a narrow and therefore a more restricted application of the ordre public exception should apply for service of process, whereas a wider exception should apply when what is requested is recognition or enforcement of a foreign ruling.[27]

[24] *Merkt* (fn.16) 138 ff.; *Stiefel/Stürner/Stadler*, AJCL 39 (1991) 800 ff.; *B. Bachmann*, Neue Rechtsentwicklungen bei punitive damages? in: B. Bachmann et al. (eds.), Festschrift für Peter Schlosser zum 70. Geburstag (2005) 1 ff., 8.

[25] In relation to the decisions of the BVerfG, see particularly *Bachmann* (fn. 24) 7 ff.; *B. Hess*, Transatlantischer Rechtsverkehr heute: Von der Kooperation zum Konflikt? Juristen-Zeitung (JZ) 2003, 923 ff.; *P. Oberhammer*, Deutsche Grundrechte und die Zustellung U.S.-amerikanischer Klagen im Rechtshilfeweg, IPRax 2003, 40 ff.

[26] See infra no. 24 ff.

[27] *Piekenbrock*, IPRax 2006, 6; *Oberhammer*, IPRax 2003, 41 ff.; *Bachmann* (fn. 24) 8 ff.

18 In another order of things, but also from a critical perspective, some authors maintain that by denying the request for service, the defendant is prevented not only from contesting the substance of the claim, but also from raising procedural exceptions, e.g. forum non conveniens. We should also remember that, from a practical viewpoint, avoiding service through the Hague Convention does not protect the defendant from enforcement against his assets in the U.S. It is also easy to imagine manoeuvres by the plaintiff to obtain service abroad, such as initially limiting the claim for compensatory damages and subsequently including a plea for punitive damages.[28] Also, when service is not possible through the Hague Convention, nothing prevents a repetition of *Schlunk v Volkswagen*:[29] service abroad being denied, it was considered that the case did not require service *abroad*. In view of the lack of collaboration from the respective authority in the foreign state, the American judge resorted to alternative service mechanisms.[30]

19 The above argument is also applicable where cooperation is refused, not to pre-empt a request for the future recognition of an award ordering punitive damages, but to avoid causing damage to the defendant by cooperating with service itself. In *BVerfG*, *25 July 2003*, the court stated that providing the required judicial assistance enabled the U.S. proceedings to continue, thus causing immediate damage to the defendant by affecting both his reputation and his assets. As we have already seen, however, the lack of service in Germany does not prevent the proceedings from continuing in their country of origin.[31]

20 According to the doctrine, refusal to cooperate is also not justified if the courts do so on the basis that cooperation would restrict a defendant's freedom and coerce him into settling his case. In the decision of *25 July 2003*, the *BVerfG* used this argument in relation to art. 2 Grundgesetz (GG). While not refuting the veracity of the BVerfG reasoning, one is entitled to doubt its constitutional significance in a country where settlement strategies exist.[32]

2. Contrary to ordre public and Regulation (EC) No. 1393/2007

21 As already said, there are no examples of the application of this Regulation in respect of punitive damages. However, like other European instruments, it does not contemplate the possibility of refusing to cooperate due to contrariety to the forum's ordre public. The disappearance of the exception corresponds

[28] In this respect, *OLG Frankfurt*, *21 March 1991*, IPRax 1992, 166 ff., expressly points out that the danger of extending a claim of compensatory damages to punitive damages does not prevent service in the context of judicial assistance. With regards to this decision, see *A. Stadler*, Die gerichtliche Überprüfung von Zustellungsverfügungen der Zentralen Behörde nach erfolgte Zustellung, IPRax 1992, 147 ff.

[29] 108 Supreme Court Reporter (S.Ct.) 2104 (1988).

[30] *F.K. Juenger/M. Reimann*, Zustellung von Klagen auf *punitive damages* nach dem Haager Zustellungsübereinkommen, NJW 1994, 3274 ff, 3274 ff.; *Bachmann* (fn. 24) 12 ff. In the *Schlunk* case, a subsidiary of the German defendant was served documents in U.S. territory.

[31] Specifically, *Hess*, JZ 2003, 925.

[32] *Oberhammer*, IPRax 2003, 42 ff.

to the principles of "mutual trust" and "mutual recognition", which overcame the traditional PIL idea of mere respect for foreign legal systems. It is therefore not possible to refuse to serve documents in a case where punitive damages are being sought in a Community country if the request for service comes from another Community country (subject to what is specified above regarding the classification of the matter).

III. Recognition and Enforcement of Punitive Damages Awards

A. Introduction

22 European practice in relation to the recognition and enforcement of decisions awarding punitive damages is more numerous and varied that in relation to service. Again, the largest number of cases is found in Germany, but there are also examples from other European jurisdictions. In all these cases, the requests originated from the U.S. and in all of them, the positive or negative response to the request related to the ordre public exception. Nonetheless, as is the case in relation to judicial assistance for transborder service, the issue of classification could also be relevant for deciding whether to recognise or execute a judgment.[33]

23 The instruments of recognition and exequatur are: the autonomous systems of each of the required countries; or, if the decision comes from a Member State, Regulations (EC) No. 44/2001 (Brussels I) or No. 805/2004, creating a European enforcement order for uncontested claims.

B. Non-Community Decisions: Application of Autonomous Systems

24 A request for the recognition of a non-Community decision in Germany has to meet the conditions laid down in art. 328(1) Zivilprozessordnung (ZPO). Of particular interest is the condition that the request should not run contrary to substantive (as opposed to *procedural*) ordre public.[34] This is why decision *BGH*, *4 June 1992*, which is the first decision of a Supreme Court of a Community country on the matter, denied homologation and it is also the argument supported by most legal scholars. Ordre public is understood in this context as "attenuated ordre public", meaning less intense than ordre public in the conflict of laws context – when the forum's rules on conflicts leads to the applicability of a foreign system's laws which award punitive damages.[35] Besides, for the ordre public exception to apply, "Inlandsbeziehung" (a connection between

[33] Especially in relation to the application of Regulation (EC) No. 805/2004 (OJ L 143, 30.04.04, 15–39), creating a European enforcement order, infra no. 34.

[34] Other conditions laid down in art. 328(1), such as the international jurisdiction of the judge of origin, or respect for procedural ordre public, do not usually raise concerns. See, however, *Coester-Waltjen* (fn. 10) 26 ff., 28, with doubts regarding contingency fees and the principle of equality before the law. *Bachmann* (fn. 24) 16, denies possible contrariety due to the involvement of a jury.

[35] *BGH, 4 June 1992*; *Bachmann* (fn. 24) 13.

the case and the forum) is required: the weaker the connection, the less likely the exception is to apply, so a favourable response to the request for recognition would be more likely. For the purpose of recognition, a connection is said to exist when one of the parties to the litigation resides in Germany, or if the damage occurred in Germany and the enforcement is intended to take place in Germany.[36]

25 The BGH, like many authors,[37] justifies its refusal to recognise/enforce judgments awarding punitive damages awards on the basis that the purpose of these damages is against ordre public and that the disproportionate amount of damages awarded contradicts several constitutionally based principles. The German High Court and academics in this field have reiterated that the purpose of civil liability in Germany is merely compensatory. The principle of strict compensation establishes a division between civil and criminal matters which is fundamental to the German Constitution. To grant awards involving elements of punishment or prevention is a function of the state which requires that strict constitutional principles such as the principle of legality, the prohibition of bis in idem and the principle of legal certainty or security are respected. Some authors also refer to the right to property.[38] In 1992, the BGH added that punitive damages should not be recognised or enforced because of the disproportional nature of awards and lack of equal treatment for creditors (should recognition be granted, foreign creditors would be at an advantage, compared to national creditors). The result is the denial of recognition, either completely or only relative to the part of the foreign award which is not compensatory – provided that the compensatory and punitive elements of the award were designated by the domestic court of origin.

26 It is interesting to note that there is now an emerging doctrinal current in Germany, according to which what is questionable when it comes to recognising requests concerning punitive damages is *not* their criminal function. As national law, albeit exceptionally, recognises instruments that are not merely compensatory,[39] parallels can be drawn with punitive damages so that punitive awards cannot be attacked because of their aims. The important thing is, then, the size of the awards and specifically their disproportion (Unverhältnismäßigkeit) to the desired objective of deterrence or sanction. Consequentially, a decision awarding punitive damages can be recognised: i.e. not only the compensa-

[36] *Bachmann* (fn. 24) 14.
[37] See *Stiefel/Stürner/Stadler*, AJCL 39 (1991) 788.
[38] *Merkt* (fn. 16) 172, with regards to the defendant's property in Germany.
[39] E.g., the contractual penalty clause (clause pénale). See *Coester-Waltjen* (fn. 10) 31. *P. Hay*, Entschädigung und andere Zwecke, in: G. Hohloch/R. Frank/P. Schlechtriem (eds.), Festschrift für Hans Stoll zum 75 Geburstag (2001) 521 ff., 526 ff. In German jurisprudence there is an element similar to punitive damages in decisions awarding moral damages, the purpose of which is not merely compensatory. They are cases in which the pecuniary damage is small and the award is calculated based on aspects such as the defendant's culpability or the socially condemnable facts. *Caroline of Monaco*, 15 November 1994 serves as a prime example. The *BGH* expressly acknowledges that the decision was based on "der Gedanke der Prävention", an idea which was implicitly applied in prior decisions involving personality rights.

tory part but the award in its entirety, after a consideration of the proportional nature of the sum. Inversely, doubts arise concerning the recognition of an award labelled as merely "compensatory", but which is based on a method of calculation which leads to a very high "compensatory" figure.[40]

27 The only known case of a request to recognise punitive damages in Greece confirms the position described in the previous paragraph.[41] The matter, which reached Greece's highest civil court (the Areopag), started with a request for the recognition and enforcement of an American decision awarding $ 1,359,578, about $ 650,000 of which corresponded to punitive damages. In 1996, the Efeteio (Court of Appeal) of Larissa granted the exequatur's appeal applying a restricted notion of ordre public as a formula representing respect for the foreign judgment. The Efeteio's decision was revoked on appeal. It is interesting to note that the reversal was not unanimous, and that the denial of recognition was not based on the punitive nature of the damages but on the disproportionate sum awarded. The Areopag expressly stated that "the award of an additional sum of money in excess of actual damage in order to punish the defendant is not rejected in general…". What was decisive was that the amount involved was much more than the damage sustained. The court reached such a decision after analysing all the aspects of the case. From a PIL perspective, the decision can be criticised in as much as it comes dangerously close to a forbidden révision au fond.[42]

28 In Spain, there is a single case on the recognition of a punitive damages decision from the U.S.:[43] it is a decision issued by the Supreme Court *(ATS)*, *13 November 2001*.[44] In paragraph nine of the legal grounds, the Court accepted that the purpose of the award was not strictly compensatory, "but rather punitive and seeks to prevent future damage". However, it did not oppose the award on ordre public grounds. Indeed, the Court literally expressed itself to the contrary in the same paragraph: "punitive damages cannot be referred to as an entity which attacks ordre public". The Supreme Court justified its decision by referring to the international nature of the case and its relationship with Spain. This is believed to be a reflection of the theory which modulates the intensity of the public order exception, as an impediment to the recognition of foreign judgments, according to the case's proximity to the forum (Inlandsbeziehung).

[40] *Coester-Waltjen* (fn. 10) 30 ff.; *D. Brockmeier*, Punitive damages, multiple damages und deutscher ordre public (1999) 110 ff.

[41] See *C.D. Triadafillidis*, Anerkennung und Vollstreckung von *punitive damages* – Urteilen nach kontinentalem und insbesondere nach griechischem Recht, IPRax 2002, 236 ff.

[42] In this respect see *Triadafillidis*, IPRax 2002, 238.

[43] The Spanish Supreme Court has also been asked to grant recognition in cases seeking very large U.S. awards. However, there is no evidence that they involved punitive damages: see, for example, *(ATS)*, *16 September 1986*, reproduced and discussed in Revista de la Corte Española de Arbitraje (RCEA) 1987, 169 ff.; *ATS*, *27 January 1988*, reproduced and discussed in RCEA 1991–92, 77 ff.

[44] The decision does not come as a surprise: see *M. Requejo Isidro*, Reconocimiento en España de sentencias extranjeras condenando al pago de *punitive damages*, Iniuria (1995) 83 ff., no. 20–32, in particular no. 25, 26 and 30.

On the other hand, the Supreme Court referred to the requirements of substantive ordre public, identifying them with "the internal system's recognition of a given legal figure or institution and the possibility of living in harmony with what it contemplates and regulates." It denied the incompatibility of punitive damages with the Spanish system, stating that "[the values] under which compensation mechanisms work are not entirely unrelated to the idea of prevention…they are also related to other instruments which sanction unwanted behaviour, both in the substantive – specifically, contractual – and procedural spheres." In the Supreme Court's opinion, this is particularly clear when the damages in question are non-pecuniary: "Furthermore, it is not always easy to distinguish compensatory concepts and delimit the amount corresponding to sanction and that corresponding to repairing moral damage."[45] The Spanish Supreme Court even ended with a phrase in favour of punitive damages: "…it also has to be considered that punitive damages are used as an aspect of private law to compensate the inadequacies of criminal law, which is totally in conformity with the doctrine of minimum intervention in the criminal sphere."

29 Italy follows the German practice in denying the recognition of punitive damages because they are seen as being contrary to ordre public. There is only one known example concerning the refusal to recognise a U.S. decision (specifically, a decision from Alabama). The decision was made by *Corte de Cassazione*, *19 January 2007*, and confirms the decision of the Venice Court of Appeal.[46] The Corte de Cassazione expressly stated that "a foreign civil ruling awarding punitive damages would be contrary to ordre public", and "the task assigned to civil liability is that of restoring the patrimonial sphere of the individual who suffered the injury (…)". What is striking about this case is the fact that nowhere does the American decision make reference to the nature of the award, punitive or otherwise. The decision was not fully explained: as the claimant pointed out, it was the Italian court itself which assumed the punitive nature of the damages, purely based on the amount awarded. This refusal to recognise the award is also in contrast with two domestic Italian decisions of 2000, which expressly awarded "danni punitivi."[47]

[45] The Supreme Court is supported by decisions such as *STS, 21 July 1957*, *STS, 7 February 1962; STS, 23 October 1978,* cited and discussed by *F. Pantaleón Prieto*, Comentario al art. 1902 Código Civil, in: Comentario del Código Civil t. II (1991) 1971 ff., 1971. More recently, *STS, 18 November 2002*, cited and discussed by *A. Luna Yerga*, Una rodilla por otra, InDret 3 (2003).

[46] The decision of *Corte d'Appello de Venice, 15 October 2001*, has been translated into English by *L. Osoni*, Translation: Italian Rejection of Punitive Damages in a U.S. Judgment, Journal of Law and Commerce 2005, 245 ff. The appeal court's decision, of 19 January 2007, can be found in Rivista di Diritto Internazionale 2007, 894 ff. See also *M. Lopez de Gonzalo*, Punitive damages e ordine pubblico, Rivista di diritto internazionale privato e processuale 2008, 77 ff.

[47] In both cases, the defendants were insurance companies which, refusing to negotiate a transaction with those affected, forced them to go to court. This was both costly and time consuming. The decisions are discussed by *A.M. Musy*, Punitive damages e resistenza temeraria in giudizio: regole, definizioni e modelli istituzionali a confronto (Tribunale di Torre Annunziata, Sez. stralcio, 24 febbraio 2000; Tribunale di Torre Annunziata, Sez. stralcio, 14 marzo 2000), Danno e responsabilità 2000-5, fasc. 11, 1121 ff.

So far, there is no French practice on the recognition of punitive damages. 30
French doctrine has stated that punitive damages could very well be classified as a civil institution within a civil liability context.[48] This is based on the fact that, according to the case law, a decision awarding more than "réparation intégrale" (full compensation) is not considered to be "ordre public" in France. Also, in view of proposals to introduce (with limits) dommages-intérêts punitifs into the domestic sphere,[49] some authors favour the recognition of punitive damages awards.[50] For others, however, the system is not prepared for this: punitive damages should be rejected both because they are intended as punishment, and because they go against the principle of proportionality.[51]

As for England, surprisingly enough the recognition of foreign decisions 31
awarding punitive damages should not be taken for granted. For example, in antitrust law we should refer to s.5 of the Protection of Trading Interests Act 1980, according to which a foreign judgment awarding multiple damages cannot be recognised or enforced.[52] Should the judgment involve awards other than multiple damages, partial recognition is more than likely.[53] England shows a receptive, but also a cautious, attitude in areas outside antitrust law. The idea of awarding damages in order to deter or sanction bad behaviour is not a novelty in the country:[54] However, an exaggerated amount could be seen as contrary to the forum's ordre public.[55]

C. Recognition under the Community System

When punitive damages are awarded by an EU Member State, their recognition/ 32
execution in another Member State involves one of the instruments foreseen for promoting the free movement of decisions: Regulation (EC) No. 44/2001, Brussels I, or Regulation (EC) No. 805/2004, creating a European enforcement order for uncontested claims. The material scope of these Regulations

[48] *T. Rouhette*, The Availability of Punitive Damages in Europe: Growing Trend or Nonexisting Concept, Defense Counsel Journal (DCJ) 2007, 320 ff., 328.

[49] Rapport Pierre Catala, of 22 September 2005, relating to the reform of the Civil Code, available at http://blog.dalloz.fr/blogdalloz/files/rapport_catala.pdf. An award of this type of damages would depend on evidence of a faute délibérée, notamment d'une faute lucrative, that is an offence whose benefits for the wrongdoer are not neutralised by merely paying damages. Also note that France also has restitutionary damages, which do not correspond to the idea of compensation, in some spheres, such as corporate law, art. L 442-6-III of the Code of Commerce.

[50] *Cavalier/Quéguiner* (fn. 5) at http://ssrn.com/abstract=1174363.

[51] See a summary of opinions, together with his own view, *Rouhette*, DCJ 2007, 331 ff.

[52] For critical opinions of the law and its potential collision with the novelties in Community and national competition laws see *M. Danov*, Awarding Exemplary (or Punitive) Antitrust Damages in EC Competition Cases with an International Element – The Rome II Regulation and the Commission's White Paper on Damages, European Competition Law Review (ECLR) 2008, 430–436, 435, with more references.

[53] This is a possible interpretation of the leading case *Lewis v Eliades*, [2004] All England Law Reports (All E.R.) 1196.

[54] In fact, punitive damages originated from England.

[55] Obiter dicta of Lord Denning in *SA Consortium General Textiles v Sun & Sand Agencies Ltd.*, [1978] Queen's Bench (Q.B.) 279, 300.

is the same and, as mentioned earlier, coincides with that of Regulation (EC) No. 1393/2007 on the service of documents, hence the prior consideration of the scope of instruments is also valid here (supra no. 14). On the contrary, the conditions and procedures for recognition are clearly different in the two instruments. In particular, while a state may refuse to recognise a decision for ordre public reasons under Regulation (EC) No. 44/2001, according to Regulation (EC) No. 805/2004, such a possibility no longer exists when the applicant has obtained a European enforcement order in the country where the judgment was handed down.

33 To date, there have been no requests for the recognition of punitive damages awarded in one Member State by another. Hypothetically, there are two imaginable situations: first, the request could directly come from a Member State court; and second, the decision of a court in one of the European Member States could grant recognition/enforcement of a decision awarding punitive damages made in another (third) country. In the former case, recognition will depend on whether the conditions established in Regulation (EC) No. 44/2001, Brussels I are met. As abovementioned, this instrument contemplates the possibility of opposition, art. 34(1) "if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought." As public policy is the same irrespective of the origin (European or otherwise) of the decision, the conclusions expressed in no. 24 ff. supra are also applicable here: at least *initially*. As the ECJ has said, the ordre public exception in Regulation (EC) No. 44/2001 is deliberately formulated in a strict manner: the conditions of application of the ordre public clause will be set by domestic law. However, they will always be subject to the scrutiny of the ECJ.[56] Based on this, some authors estimate that an English judgment awarding exemplary damages to an English plaintiff presumably would not be denied recognition in another Member State on public policy grounds.[57] This opinion is, of course, questionable, especially if we bear Regulation (EC) No. 864/2007, Rome II, in mind (infra no. 40 ff.). Although this Regulation relates to applicable law and not to recognition, it reflects the general state of mind which prevails in the European Community.[58]

34 Regulation (EC) No. 805/2004, on the other hand, provides the creditor with the option of obtaining a European enforcement order certificate in the same country where the judgment was issued. The certificate is delivered under the control of the state of origin on certain conditions relating to the defendant's right to a defence. Once the order has been obtained, there are practically no arguments for it not to be received in the Member State where its enforcement is sought. In particular, there is no longer a clause of non-contrariety with the forum's ordre public. The disappearance of the ordre public exception is explained in terms of

[56] See, in particular, ECJ C- 7/98, *Krombach* [2000] ECR I-01935.

[57] This is the interpretation of some authors (see http://www.conflictoflaws.net); see *P. Hay*, The Development of the Public Policy Barrier to Judgment Recognition within the European Community, European Legal Forum (ELF) 2007 (6), I-289 to I-294, I-293.

[58] In this respect see *M. Danov*, Awarding Exemplary (or Punitive) Antitrust Damages in EC Competition Cases, ECLR 2008, 434.

Community trust, reinforcing the idea of mutual recognition. However, in view of the position described earlier of countries such as Germany or Italy, probably France and even England in matters of punitive damages, the elimination of the exception could well be somewhat premature. Furthermore, in the same Regulation (EC) No. 805/2004, the suppression of the ordre public exception resulted in the restriction of the Regulation's material scope, in order to leave out certain "sensitive" matters (in particular, those in which a state could have immunity of jurisdiction), in relation to which a Member State's decision would quite probably be considered contrary to ordre public (thus, recognition would be denied) in another Member State. A similar strategy would not be surprising in the case of punitive damages awards; alleging that punitive damages comprise punishment, it could be claimed that as a matter of principle[59] there is no room for such decisions in the Community civil law system. In the author's opinion, this argument represents a step backwards and should not prosper. It may be preferable, even if it is the "best of the worst" solutions, to follow the idea of some authors in the sense that the lack of a rule based on ordre public does not mean that such a rule cannot be applied in the context of Regulation (EC) No. 805/2004, in borderline areas: punitive damages would be one of them.[60]

35 What about the recognition of the judgment of a Member State which, in turn, recognises that of a third state awarding punitive damages? Doctrinal writings on the subject have formulated the question in hypothetical terms, with reference to the English position and its recognition of foreign judicial requests. Indeed, the recognition in England of a decision (American, for instance) in respect of an award of damages does not give rise to a continental-like exequatur, but to a new English judgment, which absorbs the original judgment and orders the defendant to automatically pay his dues. The doctrine states that, in as much as it comes from a Member State, the new decision should come under the Community recognition and enforcement system: to deny the request because the substrate of the English decision is another foreign decision would imply a review of the grounds of the matter, which is forbidden in the Community system (art. 36 Brussels I Regulation).[61] It is opined that the peculiar English system of recognition should not alter the usual solution, which is expressed in the exequatur sur exequatur ne vaut rule. According to this rule, the judgment of a Member State recognising a third state's award of punitive damages should not be recognised in other Member States.

[59] As noted supra in no. 14, it cannot be ruled out that certain claims for punitive damages fall outside the material scope of application of the Community system: those involving a public person exercising prerogative public powers. This is not a characteristic of all claims for punitive damages, so we cannot accept a global exclusion of this possibility. Doctrinaires have decided on a "civil" classification: among others, *J. Rosengarten*, Punitive damages und ihre Anerkennung und Vollstreckung in der Bundesrepublik Deutschland (1994) 124 ff.; *A. Saravalle*, Rivista di diritto internazionale privato e processuale (RDIPP) 867 ff. In the jurisprudence, see *BGH, 4 June 1992,* NJW 1992, 3096 ff., 3103, for Germany; *ATS, 13 November 2001*, for Spain; the nature of the damages is not discussed in the Italian decision *Corte di Cassazione*, *19 January 2007*.

[60] *Hay*, ELF 2007, I-290.

[61] *Hay*, ELF 2007, I-293.

IV. Punitive Damages as Part of the Applicable Law

A. Introduction

36 Until now, the question of whether a continental jurisdiction would award punitive damages through the application of a foreign law (e.g. U.S., English, Canadian, etc.) only had a theoretical answer. Doctrinal opinions have been formulated in light of autonomous (national) conflict of laws rules and, once again, relate to the ordre public exception. The same is true of Regulation (EC) No. 864/2007, Rome II, an erga omnes instrument, which replaces national rules of conflict with rules which are uniform and identical for all EU Member States (except Denmark), in a large number of non-contractual liability cases.

B. National Systems

37 In the opinion of most German doctrinaires, a German court cannot award punitive damages, even applying a foreign legal law.[62] Art. 40. III.2 EGBGB,[63] conceived as a special ordre public clause, provides express grounds confirming that position. However, the inapplicability of the foreign law as regards punitive damages depends on the link between the case and the forum.

38 A minority of scholars have pointed out the inconsistency of this position. If the German system allows domestic courts to award damages other than those which serve a compensatory purposes in some, precisely delimited cases,[64] to reject the foreign law and apply that of the forum is absurd – although legally permissible. The proposed solution is a flexible interpretation of art. 40 EGBGB: in cases where German law allows a pecuniary award to perform a preventive function, foreign laws awarding punitive damages should also be applied.[65]

39 Doctrinal opinion is also divided in France. There is talk of an opening trend in the context of conflict of laws, together with a similar trend in domestic law.[66] In addition, certain judicial practices have refuted the incontestable nature of the principle of *full compensation for losses*: in some cases, it has been said that a foreign law refusing full compensation of the damage is not contrary to public policy. Thus, the application of such a law has been allowed, even if it runs counter to the interests of the victims. Some authors deduce from the above that a law involving punitive damages in favour of the victims should therefore be admitted. This is not, however, a unanimous opinion.[67]

[62] *Bachmann* (fn. 24) 6, and those cited therein.
[63] "Ansprüche, die dem Recht eines anderen Staates unterliegen, können nicht geltend gemacht werden, soweit sie: 2. offensichtlich anderen Zwecken als einer angemessenen Entschädigung des Verletzten dienen."
[64] Supra fn. 39.
[65] *Hay* (fn. 39) 528 ff. In the same respect, although with reference to the Commission's Project for Regulation Rome II, see *P. Huber*, Die Rom-II VO. Kommissionsentwurf und aktuelle Entwicklungen, IPRax 2005, 73 ff.
[66] *Cavalier/Quéguiner* (fn. 5) 5 ff.
[67] In favour of "no" are *B. Audit*, Droit International Privé (4th ed. 2006) par. 802; *Rouhette*, DCJ 2007, 330. For "yes", *Cavalier/Quéguiner* (fn. 5) 5 ff.

C. Regulation (EC) No. 864/2007, Rome II

European Parliament and Council Regulation (EC) No. 864/2007, on the law applicable to non-contractual obligations, of July 11, 2007 (Rome II), came into force on 11 January 2009. The instrument falls into the erga omnes category. It establishes that any system, i.e. not only that of a Community member, can be designated to rule on non-contractual civil liability. The history of art. 26 of the Regulation is of particular interest regarding the question of whether foreign laws which contemplate an award of punitive damages would be inapplicable. 40

The Regulation's history started with a Commission proposal which was published on 3 May 2002. According to art. 20, the application of a law designated by the Regulation could be rejected if the said application was manifestly contrary to the forum's ordre public. In the following proposal, that of 22 July 2003,[68] art. 20 remained (though renumbered), and art. 24 was added to expressly specify that, "The application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory damages, *such as exemplary or punitive damages, is contrary to the public policy of the Community*" (emphasis added). 41

In its Decision of June 2004,[69] the European Economic and Social Committee (EESC) expressed its approval of the proposal, with the sole issue that it prevented the partial recognition of an award of punitive and *also* compensatory damages, in the part relative to the latter. On the other hand, the European Parliament, in a Resolution of 6 July 2005,[70] suggested amendments of considerable interest: art. 24 would not refer to "Community public policy", but to that of the forum; and it recommended that "is contrary" be changed to "could be contrary". In the author's view, these changes are completely reasonable. The Commission's reference to a "Community public policy" was a disturbing one.[71] 42

[68] COM (2003) 427 final, unpublished.
[69] OJ C 241, 28.9.2004, 1–7.
[70] OJ C 157 E, 6.7.2006, 371–382.
[71] Interest groups were very critical of art. 24 as drafted: *G. Wagner*, Internationales Deliktsrecht, die Arbeiten an der Rom II-VO und der Europäische Deliktsgerichtsstand, IPRax 2006, 372 ff., 386. Neither does ECJ jurisprudence support the idea of a Community public policy contrary to punitive damages. In this respect, see ECJ C-295/04, *Manfredi* [2006] ECR I-6619 and ECJ C-180/95, *Draemhpaehl* [1997] ECR I-2195. The former refers to a breach of Community law on competition, specifically art. 81 ECT; the ECJ expressly stated that, Community principles lacking, it falls to national legislation to establish the criteria to determine the scope of repairs of damages caused by collusive practices, always respecting the rule of equivalence, so that if "particular damages such as exemplary or punitive damages, can be granted in the context of national actions similar to those based on Community law on competition, this should also be the case for the latter." The second case relates to the transposition of Directive 76/207/EEC by Germany. The Directive establishes the obligation to sanction discrimination by reason of gender in the labour context, with the states being free to articulate such a sanction. However, the German option of using civil liability limited to a maximum overall amount was rejected by the ECJ. It held that "such a consequence would not correspond to the effective legal protection required by the Directive and would not have the deterrent effect likewise required by the Directive."

43 After Parliament's Resolution, the Commission altered its position and redrafted the proposal in February 2006[72] in such a way that the application of a provision of a law designated by the Regulation would not be applied if it was *contrary to the forum's public policy*. In particular, "the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may…be regarded as being contrary to the public policy (ordre public) of the forum." The formula was positive in that it did not rule out non-compensatory functions on a blanket basis. Rather, it was respectful of all national systems (particularly, that of the common law). Nonetheless, it was not included in the Common Position of the Council approved on 25 September 2006, which was limited to the reference to public policy.[73]

44 In the next phase,[74] the European Parliament returned to the original text (art. 27(2)). The amendment was accepted by the Commission.[75] However, it was not adopted as an article of the final text, but only as recital 32 of the preamble to the Regulation: "Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy…In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary of punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seized, be regarded as being contrary to the public policy (ordre public) of the forum." It has been argued that with this formula the Commission implicitly acknowledges that civil liability can have functions other than compensatory ones. The use of a public policy exception should thus be limited to cases where the amount awarded is excessive.[76]

V. Conclusions

45 The examination of punitive damages from a private international perspective has produced the following results:

46 The request for service of a foreign lawsuit in a Community country is likely to receive a positive answer, whether the claim was initiated in the U.S.A. (under the Hague Convention), or in another Community country (Regulation (EC) No. 1393/2007).

[72] COM (2006) 83 final, OJ C 67, 18.03.2006.
[73] OJ C 289 E, 28.11.2006, 68–83.
[74] Legislative Resolution on the Common Position of the Council, of 18 January 2007, OJ C 244 E, 18.10.2007, 53–55.
[75] Commission Decision, COM (2007) 126 final, of 14.03.2007.
[76] *Danov* (see commentary in fn. 58) ECLR 2008, 432, and fn. 18, cites Beaumont y Tang; his own opinion is that any amount in excess of full compensation of damages can be described as "excessive".

If what is called for is the recognition of a U.S. decision in which punitive damages are granted, the essential factor to bear in mind is the absence of Conventions between the EU Member States and the U.S.A. Therefore, each EU Member State would apply its own autonomous regime. Consequentially, different answers have been reached throughout the European Community. The negative responses based on public policy consideration have nevertheless prevailed. 47

In the case of an application for recognition between EU states, a refusal is possible, although the principles of mutual trust and the disappearance of the public policy clause in some PIL Community Regulations speak in favour of granting recognition. 48

So far there exists no European practice concerning whether an EU Member State would have to apply a foreign law which grants punitive damages, when the application of its own laws would result in a smaller figure. Punitive damages were specifically studied in the preparatory works to the Rome II Regulation. There we can see an interesting development: whilst punitive damages were first said to be contrary to a Community public policy – that is, the Community (or more specifically, the Commission) itself backed the movement against punitive damages – this position was later abandoned and replaced by a nuanced solution. The Community has therefore not taken a position in this regard. Whatever the final answer is depends on each Member State and its particular concept of what is contrary to its public policy. 49

Aggravated Damages

Anthony J. Sebok/Vanessa Wilcox

I. Introduction

A. The Risk of Terminological Confusion

The term "aggravated damages" does not mean the same thing in American law as it does in the rest of the Commonwealth. Today, the term "aggravated damages" is rarely used in the United States, and if it is, it is used as a synonym for punitive damages, that is, for damages that serve a *non-compensatory* function. In England, the term is used to identify a certain type of *compensatory* damages, distinct from punitive damages. The term is used in slightly different ways within the remaining Commonwealth nations, but in all its usages it refers to a species of *compensatory* damages, distinct from punitive damages. The fact that the term "aggravated damages" is a homonym should not produce any difficulties for practitioners or legal scholars, any more than other homonyms shared by the United States, England, and other Commonwealth nations. For example, the term "public school" means a school operated by the state and paid for by taxes in the United States, while the term "public school" in the U.K. refers to a specific set of privately funded and operated schools. Debates over education on either side of the Atlantic are not impaired by this fact; all participants can easily work around the homonym. 1

In this chapter we will do three things. First, after this brief introduction, we will define the meaning of "aggravated damages" in English law. Second, we will define and compare the varied meanings of aggravated damages in other Commonwealth nations and contrast the term with its functional equivalents in civil law systems. Finally, we will define the meaning of aggravated damages in the law of the United States. 2

II. Aggravated Damages under English Law

A. A Brief History

3 Before *Rookes v Barnard*[1] the law with regard to aggravated and exemplary damages was confused and fraught with anomalies. A characteristic example of the confusion which reigned pre-*Rookes* is the paragraph on the subject in Lord Simonds' third edition of Halsbury's Laws of England: "Exemplary damages. Where the wounded feeling and injured pride of a plaintiff, or the misconduct of a defendant, may be taken into consideration, the principle of restitutio in integrum no longer applies. Damages are then awarded not merely to recompense the plaintiff for the loss he has sustained by reason of the defendant's wrongful act, but to punish the defendant in an exemplary manner, and vindicate the distinction between a wilful and an innocent wrongdoer. Such damages are said to be 'at large,' and, further, have been called exemplary, vindictive, penal, punitive, aggravated, or retributory."[2] As can be seen, much like the position in the United States today, "punitive" and "aggravated" damages were used indiscriminately to indicate that damages awarded might be enhanced beyond the basic damages needed to compensate a claimant.

4 In 1964, the House of Lords, confronted with this objectionable state of affairs, set out – at least in theory – to remove from the law a source of confusion between both heads of damages. The House in *Rookes v Barnard*, for the first time ever, bent its mind to seeing where the line was to be drawn; what conduct went to aggravate the injury and what required punitive damages. Having trawled through the reported English authorities over some two hundred years, Lord Devlin proceeded to reclassify the single nebulous class into two categories of cases: "aggravated damages" and "punitive or exemplary damages". The former acquired a separate and mutually exclusive meaning from the latter. From then on, aggravated damages were to reflect what the claimant had suffered in wounded feelings (separate and independent from *pain and suffering*) and punitive damages would be used to mark the jury's (or judge's) view of the defendant's conduct and to punish and deter the latter from similar conduct.

B. The Nature of and Conditions for a Award of Aggravated Damages

5 In many cases of tort, damages are at large. That is to say, the award is not limited to the pecuniary loss that can be specifically proved.[3] The court can take into account the defendant's motives, conduct and manner of committing

[1] *Rookes v Barnard* [1964] 1 All England Law Reports (All ER) 367, 407.
[2] Vol. 11 (1955) Damages, 233, par. 391: per Lord Hailsham in *Cassell & Co. Ltd. v Broome and Another* [1972] AC 1027, 1069.
[3] *Rookes v Barnard* [1964] 1 All ER 407.

the tort, and, where these have aggravated the claimant's damage by injuring his proper feelings of dignity and pride, aggravated damages may be awarded.[4] It is this concept of injury to feelings that runs through cases on aggravated damages, whether caused by the high-handed, arrogant or insulting behaviour of the defendant in committing the wrong, or by the defendant's conduct subsequent to the wrong.[5] Unlike punitive damages under English law, aggravated damages are not limited by a categories test.[6] Like punitive damages however, they must be specifically pleaded.[7] Given that aggravated damages can be awarded for the defendant's behaviour up to and including trial, a claimant can amend his statement of case if the defendant aggravates his tort after pleadings have closed.[8]

Two prerequisite are generally thought necessary for an action to succeed: 6

(a) exceptional or contumelious conduct or motive on the part of a defendant in committing the wrong, or, in certain circumstances, subsequent to the wrong; and
(b) mental distress sustained by the claimant as a result.[9]

Exceptional or contumelious conduct can come in the form, inter alia, of malevolence, spite, malice, insolence or arrogance such as to injure the claimant's proper feelings of dignity and pride.[10] 7

[4] Halsbury's Laws of England, par. 1114.
[5] *Collins Stewart Ltd. and another v Financial Times Ltd.* [2005] England and Wales High Court (EWHC) 262, at [30].
[6] See *V. Wilcox*, Punitive Damages in England (contained in this publication) no. 5 ff.
[7] Civil Procedure Rules (CPR) r.16.4, Pt. 53 par. 2.10(2).
[8] See *D. Kingsley*, Aggravated Damages, 150 New Law Journal (NLJ) 216.
[9] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part II par. 1.4.
[10] *Rookes v Barnard* [1964] 1 All ER 407.

C. Torts in which Aggravated Damages have been Awarded

8 Aggravated damages have been awarded, inter alia, for assault and battery,[11] deceit,[12] intimidation,[13] false imprisonment,[14] malicious prosecution,[15] defamation,[16] malicious falsehood,[17] unlawful discrimination,[18] trespass to

[11] See, for example, *Appleton and Others v Garrett* [1996] Personal Injuries and Quantum Reports (PIQR) P1, P4. The case was a joint action by eight claimants. The defendant carried out large-scale unnecessary treatments on the claimants, deliberately withholding from them the information that the treatment was unnecessary because he knew that they would not have consented had they known the true position. As regards aggravated damages, the first prerequisite was clearly established. The defendant was said to have taken advantage of his patients who placed their trust in him. Moreover, he took advantage of their age (most of them were very young) and abused his position appallingly. As regards the second requirement, the court was satisfied that in addition to having feelings of anger and indignation, the claimants must have suffered mental distress, injured feelings and a heightened sense of injury or grievance when they discovered what the defendant had done to them. Aggravated damages were assessed at 15% of the sum awarded in each case for general damages for pain, suffering and loss of amenity. See, among other authorities, *Ballard v Commissioner of Police of the Metropolis* (1983) 133 NLJ 1133; *Barbara v Home Office* (1984) 134 N.L.J. 888. Cf. *Richardson v Howie* [2004] Court of Appeal, Civil Division (EWCA Civ) 1127.

[12] Aggravated damages were awarded in *Archer v Brown* [1985] Queen's Bench (QB) 401 to a claimant who was induced, by means of fraudulent representations, to conclude two agreements by which the defendant purported to sell all the shares in a company to the claimant. The latter took out two loans in order to pay for the shares but the defendant had in fact owned no shares in the company and as a result of his frauds the claimant became unemployed and heavily in debt, and was deeply upset. An award of £ 500 was said to be appropriate to compensate the claimant for his injured feelings.

[13] See *Messenger Newspaper Group Ltd. v National Graphical Association* [1984] Industrial Relations Law Reports (IRLR) 397 where the claimant newspaper brought an action against the defendant trade union for, inter alia, unlawful picketing with intent to induce the claimant to accept a closed shop. An award of £ 10,000 was made against the defendant which was said to have acted recklessly in pursuit of its intentions and acted, too, in jubilant defiance of the court's orders with an open arrogance with the intention of closing down the claimant's business and/or enforcing a closed shop. Aggravated damages were also awarded under the tort of intimidation in *Godwin v Uzoigwe* [1993] Fam Law 65 to the claimant for the mental distress, indignity and humiliation she suffered while working excessively long hours for the defendants without money and without proper food, clothing and social intercourse.

[14] *Thompson v Commissioner of Police of the Metropolis* [1997] 3 Weekly Law Reports (W.L.R.) 403; *Hsu v Commissioner of Police of the Metropolis* [1997] 3 W.L.R. 403; *Commissioner of Police of the Metropolis v Gerald* [1998] Woodfall Landlord & Tenant Bulletin (WL) 1042364; *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773.

[15] *Thompson v Commissioner of Police of the Metropolis* [1997] 3 W.L.R. 403; *Commissioner of Police of the Metropolis v Gerald* [1998] WL 1042364; *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773.

[16] See, for example, *Cassell & Co. Ltd. v Broome* [1972] Appeal Cases (AC) 1027; *McCarey v Associated Newspapers Ltd. (No 2)* [1965] 2 QB 86.

[17] In *Khodaparast v Shad* [2000] 1 W.L.R. 618, the defendant was involved in the publication or distribution of offensive pictures featuring the claimant who lost her job as a result. The claimant successfully sued for damages in malicious falsehood and was awarded aggravated damages amounting to £ 20,000, which took into account the injury to her feelings caused by the defendant's behaviour; see also *Smith v Stemler* [2001] Current Law Year Book (C.L.Y.) 2309.

[18] See *Alexander v Secretary of State for the Home Department* [1988] 1 W.L.R. 968; in *Ministry of Defence v Meredith* [1995] IRLR. 539, a case on sexual discrimination, the Employment Appeal Tribunal confirmed that an award of aggravated damages can be made provided all the relevant conditions were met; *Armitage Marsden and H.M. Prison Service v Johnson* [1997] IRLR 162; *Zalwalla & Co. v Walia* [2002] IRLR. 697; *British Telecommunications Plc v Reid* [2003] EWCA Civ 1675.

land[19] and unlawful interference with business[20] – but not for negligence, breach of contract[21] nor, seemingly, for violations of Convention rights, transposed by the Human Rights Act 1998. s.8(4) of the 1998 Act provides that in determining whether to award damages, or the amount of an award, the courts must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under art. 41 of the Convention. Aggravated damages are not awardable under the Convention: see par. 9 Practice Direction on Just Satisfaction Claims, 28 March 2007. Crucially, the case law of the Strasbourg Court has consistently supported this view.[22]

1. Assault and Similar Torts

It appears following *Richardson v Howie*[23] that the threshold necessary for an award of aggravated damages in assault and similar torts has increased. The Court of Appeal held there that it was no longer appropriate to characterise the award for damages for injury to feelings as aggravated damages, except possibly in a wholly exceptional case. Rather, a court should bring that element of compensatory damages into account as part of the general damages awarded. What exactly amounts to a "wholly exceptional case" was left open. However, the case has since been applied in *Fuk Wan Hau v Shusing Jim*[24] where the court held that although the assault was very serious the additional distress component should come under the award for pain suffering and loss of amenity as it could not identify any feature which made the case exceptional meriting a separate award for aggravated damages. 9

[19] See, among other authorities, *Douglas Bryant, Brenda Jean Bryant v Frank Harvey MacKlin, Mandy MacKlin* [2005] EWCA Civ 762 where the claimants brought proceedings against their neighbours claiming damages for trespass after the defendants' livestock had broken through a fence on the boundary and damaged mature trees belonging to the claimants. The aggravated damages award was increased on appeal from £ 1,000 to £ 4,000. The latter amount was thought apt to reflect the defendants' deliberate and high handed conduct. This included the use of profane language and the deposition of a large pile of animal droppings against one of the claimants' boundary fence creating a noxious odour.

[20] *Messenger Newspaper Group Ltd. v National Graphical Association* [1984] IRLR 397.

[21] *Kralj v McGrath* [1986] 1 All ER 54.

[22] See, for example, *Wainwright v The United Kingdom* 26.09.06, no. 12350/04, § 60.

[23] *Richardson v Howie* [2004] EWCA Civ 1127. The defendant was convicted of assault and the claimant subsequently brought an action seeking, inter alia, damages for assault and battery. The claimant had received multiple lacerations to her scalp and her body was bruised by her partner, the defendant, who hit her several times with a bottle about the neck and head and slammed her head against the floor. The trial judge gave judgment for the claimant and made an award of £ 10,000 including aggravated damages. The Court of Appeal held that the overall award of £ 10,000 was considered too high and substituted it for an award of £ 4,500 in general damages to cover the scarring, the injured feelings and other matters. That this brutal attack was held not to quality for aggravated damages indicates that the bar has been set very high! See *J. McQuater*, Personal Injury – Assault – Injury to feelings – Scarring, Journal of Personal Injury Law (J.P.I.L.) 2004, 4, C167–169.

[24] [2007] EWHC 3358.

2. False Imprisonment and Malicious Prosecution

10 In 1997, the Court of Appeal in *Thompson and Hsu v Commissioner of Police of the Metropolis*,[25] through the speech of Lord Woolf M.R., issued a number of guidelines and brackets as directions to be given to juries to assist them in the appropriate amount of aggravated damages to be awarded. Although specifically in respect of false imprisonment and malicious prosecution actions, the guidelines have played a broader role in reining the amount of such damages awarded.

11 By way of general guidelines:

(a) If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted.
(b) The jury should then be told that if they consider the case is one for the award of damages other than basic damages then they should usually make a separate award for each category. (This is contrary to the present practice but in our view will result in greater transparency as to the make up of the award.)

12 By way of brackets:

(a) We consider that where it is appropriate to award aggravated damages the figure is unlikely to be less than £ 1,000. We do not think it is possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest.
(b) It should be strongly emphasised to the jury that the total figure for basic and aggravated damages should not exceed what they consider is fair compensation for the injury which the plaintiff has suffered. It should also be explained that if aggravated damages are awarded such damages, though compensatory are not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned.
(c) In an appropriate case, the jury should also be told that even though the plaintiff succeeds on liability any improper conduct of which they find him guilty can reduce or even eliminate any award of aggravated or exemplary

[25] *Thompson v Commissioner of Police of the Metropolis; Hsu v Same* [1997] 3 W.L.R. 403, 514.

damages if the jury consider that this conduct caused or contributed to the behaviour complained of.

The guidelines were subject to the caveat that the figures given would require adjusting in the future for inflation.[26] 13

D. Reform Proposals under the Law on Damages Consultation Paper, 2007

Although a distinction continues to be made between punitive and aggravated damages under English law today, it is admitted that there is some overlap, especially from the defendant's point of view. As Professor Sir Basil S. Markesinis points out, what aggravated and exemplary damages have in common is that they represent a way of enhancing the award of the successful claimant and they also seem to be available largely (but not entirely) for the same areas of tortious liability.[27] The similarities do not end there: both are not available for breach of contract or negligence and like punitive damages, in determining the availability and quantum of aggravated damages, the courts also focus on the defendant's conduct. This follows from the first criterion for an award of aggravated damages – the exceptional conduct requirement.[28] These and other similarities between both heads of damages thus led many to question whether aggravated damages were purely compensatory. 14

In its 1997 report on Aggravated, Exemplary and Restitutionary Damages, the Law Commission highlighted this undesirable confusion over the nature of aggravated damages. It concluded firstly, that legislation was needed to clarify that aggravated damages may only be awarded to compensate a person for his or her mental distress and that they in no way intended to punish the defendant for his conduct.[29] Any consideration of the defendant's conduct in awarding aggravated damages was said to be justifiable. As A. Beever put it, since the claimant's injury lies in the violation of her dignity by the defendant and violation of dignity is not directly observable, to discover the injury, reference to how the defendant acted is crucial. In aggravated damages cases, then, the sole epistemological access to the claimant's injury is through examination of the defendant's actions. This does not show an interest in the defendant's actions per se. Rather the interest in these actions extends only in so far as they impinge on the claimant.[30] Secondly, the Commission took the view that the coexistence of two heads of claim, for mental distress and aggravated damages, was a further source of confusion which was desirable to avoid. 15

[26] *Thompson v Commissioner of Police* [1997] 3 W.L.R. at 517.
[27] *B. Markesinis/M. Coester/G. Alpa/A. Ullstein*, Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline (2005) 3.
[28] Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages, Law Com. No. 247 (1997) Part II par. 1.18.
[29] Ibid. at par. 1.39–1.43.
[30] *A. Beever*, The Structure of Aggravated and Exemplary Damages, 23 Oxford Journal of Legal Studies (O.J.L.S.) 87, 90.

16 In November 1999, the government accepted the Law Commission's recommendations on aggravated and restitutionary damages.[31] Despite its announcement to take action when a suitable legislative opportunity arose, parliament so far has not legislated to take account of either of those recommendations. In May 2007 the Department of Constitutional Affairs, whose duties have now been taken over by the Ministry of Justice, issued a consultation paper, the Law on Damages.[32] The paper sets out for consultation the issues highlighted in a series of reports published by the Law Commission in the late 1990s, including that on Aggravated, Exemplary and Restitutionary Damages, 1997. It looks again at the proposals on, inter alia, aggravated damages in the light of the time that had elapsed since the government's 1999 announcement and the developments and intervening case law that have affected the climate in which the Commission's recommendations were considered.

17 Under the consultation paper, it is the government's view that a statutory definition clarifying that the purpose of aggravated damages is compensatory and not punitive is unnecessary. This, in light of the number of court decisions since the Law Commission's report in 1997 that have explicitly confirmed that the nature of aggravated damages is compensatory and not punitive.[33] The government also addressed the Commission's concerns with respect to the coexistence between damages for mental distress and aggravated damages. The problem is particularly evident where both heads of damages are awarded on the same facts. If the former fully compensate the claimant, an award of the latter would necessarily exceed restitutio in integrum and thus amount to punitive damages. The confusion between the two is heightened further by the substantial overlap of the torts under which aggravated damages and damages for mental distress are available e.g. libel, slander, assault, trespass to property, nuisance, etc. In its consultation paper, the government again took the view that it would not be appropriate to legislate on this point as the Law Commission had recommended. This was for a number of reasons including the fact the proposed changes would not be straightforward to make and that in no case had the courts expressed the view that the use of the term "aggravated damages" in this context was misleading.[34]

18 A noteworthy proposal put forward by the government related to the sphere of intellectual property. In settling the uncertainty over how the term "additional damages" was to be interpreted, the government proposed to replace the term in s.97(2) of the Copyright, Design and Patents Act 1988 and schedule A1 of the Patents Act 1977 with "aggravated and restitutionary damages". However, under the law at present, aggravated damages are in principle not available to a corporate claimant because a company has no feelings to injure and cannot

[31] Hansard, HC Debates, 9.11.1999, col. 502.
[32] Department for Constitutional Affairs (DCA), The Law on Damages CP 9/07, May 2007.
[33] See, for example, *Khodaparast v Shad* [2000] 1 All ER 545; *ICTS (UK) Ltd. v Tchoula* [2000] IRLR 643; *Richardson v Howie* [2004] EWCA Civ 1127. DCA, The Law on Damages CP 9/07, May 2007, par. 203–205.
[34] DCA, The Law on Damages CP 9/07, May 2007, par. 206–207.

suffer distress: *Collins Stewart Ltd. and another v Financial Times Ltd*.[35] As most claims under the 1977 and 1988 Acts are likely to be brought by corporate claimants, in amending the Acts, the government proposes to clarify that aggravated damages under the Acts can be awarded to corporate claimants.[36]

19 In some continental European counties such as France[37] and Portugal,[38] the practice of awarding non-pecuniary damages to companies is nothing extraordinary and is one which the European Court of Human Rights endorsed in *Comingersoll*[39] and subsequent decisions. However, a move to award aggravated damages for companies seems questionable considering their aim is to compensate damage for injury to feelings. Apart from the obvious reason that a company has no feelings to injure and cannot suffer distress, which judging by the aforesaid jurisdictions seems one that can be overlooked, the proposed change would further blur the distinction between punitive and aggravated damages. Aggravated damages cannot be justified on the basis of the defendant's conduct because, as was mentioned above, they are only *indirectly* grounded in the latter's behaviour. So fundamental is the requirement of an injury to the claimant's feelings that even supposing that a defendant behaved with extreme malice towards the claimant in the commission of the tort, aggravated damages would not be recoverable if the claimant had suffered no distress. [40] Rather, it may be a case in which exemplary damages would be recoverable. It must therefore follow that to award aggravated damages in favour of inanimate legal entities, like limited companies, would lead to the further questioning of their proper functions. In Canada, where the courts also distinguish between punitive and aggravated damages, the latter cannot be claimed by a corporation.[41]

20 As part of its proposals, the government also wishes to replace the reference to "exemplary damages" in s.13 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 with aggravated damages.

[35] *Collins Stewart Ltd. and another v Financial Times Ltd.* [2005] EWHC 262.
[36] DCA, The Law on Damages CP 9/07, May 2007, par. 208–212.
[37] *J.S. Borghetti*, Punitive Damages in France (contained in this publication) no. 28.
[38] The Supreme Court of Justice, in a decision handed down in 8 March 2007, awarded non-pecuniary damages to a football club (a legal entity; association). See *A.G. Dias Pereira*, Portugal, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 74. See also *M. Manuel Veloso*, Danos não patrimoniais a sociedade comercial? Cadernos de Direito Privado 18 (2007) 29–45.
[39] *Comingersoll S.A. v Portugal*, 6.4.2000, no. 35382/97, § 34–35: "The Court has also taken into account the practice of the Member States of the Council of Europe in such cases. Although it is difficult to identify a precise rule common to all the member States, judicial practice in several of the States shows that the possibility that a juristic person may be awarded compensation for non-pecuniary damage cannot be ruled out. In the light of its own case-law and that practice, the Court cannot therefore exclude the possibility that a commercial company may be awarded pecuniary compensation for non-pecuniary damage."
[40] The Law Reform Commission, Report on Aggravated, Exemplary and Restitutionary Damages, May 2000, par. 5.11.
[41] See *Walker v CFTO Ltd.* (1987) 37 Dominion Law Reports (DLR.) (4th) 224, 59 Ontario Reports (O.R.) (2d) 104 (C.A.) for the position in Canada. See also *S.M. Waddams*, The Law of Damages (4th ed. 2003) par. 4.180. See infra no. 41 ff.

III. Aggravated Damages in Other Jurisdictions

21 The courts in Canada[42] and those in Australia[43] and Ireland[44] also accept a distinction between punitive and aggravated damages. This may be of some significance considering the rejection by the same courts[45] of the arbitrary limitations which the House in *Rookes v Barnard* placed on exemplary awards in their formulation of the three categories.[46] As in England, the courts in Canada, Australia and Ireland also consider aggravated damages as fulfilling a compensatory function.

22 The position under Scots law is rather unique. Although damages for injury to feelings can include an element which reflects the way the victim was treated, a separate head of damages, which the above countries would term "aggravated damages" cannot be awarded. The practice bears some resemblance to that under a number of continental jurisdictions. Although not labelled "aggravated damages" and although not awarded as a separate head of damages, in substance, damages analogous to aggravated damages under Australian, Canadian, English and Irish law seem to play a remedial role on the continent.

23 Like England, there has also been an active debate in Canada over the question of whether aggravated damages should be abolished since they overlap so much with damages for emotional distress, on the one hand, and punitive damages, on the other.[47] The Ontario Law Reform Commission (OLRC) made this recommendation.[48] The OLRC's argument is that since aggravated damages are compensation for injured pride and dignity, they either already fall under the category of non-pecuniary damages, or the law should be reformed so that it is made clear to judges that they should henceforth fall under this category.[49]

[42] See *Robitaille v Vancouver Hockey Club* [1981] 3 Western Weekly Reports (WWR) 481, where Esson J held that "[a]ggravated damages are not given to punish the defendant but as extra compensation to the plaintiff for the injury to his feelings and dignity, particularly where the injury to him has been increased by the manner of doing that injury." See also *Waddams* (fn. 41) par. 4.180 and 11.10. The three categories in *Rookes* have not received wholehearted support from the Irish judiciary.

[43] See *P. Stewart/A. Stuhmcke*, Australian Principles of Tort Law (2005) chap. 21.4.4.

[44] Irish Law Reform Commission, Aggravated, Exemplary and Restitutionary Damages, LRC 60–2000 (2000) par. 1.15.

[45] For Canada see *Vorvis v Insurance Corporation of British Columbia* (1989) 58 DLR (4th) 193; For Australia see *Uren v John Fairfax & Sons, Pty Ltd.* (1968) 117 Commonwealth Law Review (CLR) 118 and *Australian Consolidated Press v Uren*. (1968) 117 CLR 185. The Irish courts have not in any definitive way endorsed the policy of *Rookes v Barnard* to restrict the award of exemplary damages to the three limited categories. Irish judges seem divided on the position. See *B. McMahon/W. Binchy*, Law of Torts (2000) par. 44. 16 ff. and par. 44. 49.

[46] See *Wilcox* (fn. 6) no. 5 ff.

[47] See *J. Berryman*, Reconceptualizing Aggravated Damages: Recognizing the Dignitary Interest and Referential Loss, 41 San Diego L. Rev. 1521, 1530–31 (2004).

[48] Ont. Law Reform Commission, Aggravated, Exemplary and Restitutionary Damages (1997) 26 ff.

[49] Ibid.

Over the last fifteen years, the Canadian Supreme Court has issued a variety of decisions which directly or indirectly support the view taken by the OLRC. In *Vorvis v Insurance Corporation of British Columbia*, for example, it held that that aggravated damages could not be awarded in a wrongful dismissal case because the law limited damages arising from the breach of an employment contract to losses arising during a reasonable notice period.[50] The court noted that its holding referred to the contract claim of the plaintiff only, and that aggravated damages might be available if the plaintiff had established a separate tort that would underwrite a claim for mental suffering, a position emphasised by Justice Wilson in a separate partial dissent.[51] 24

The position taken by the Court on aggravated damages has brought it into tension with other parts of its law. For example, in *Hill v Church of Scientology*, the court held that, in order to recover aggravated damages in a defamation case, the plaintiff would have to demonstrate that the defendant was motivated by actual malice, since this would indicate that the suffering of the plaintiff was increased, "either by spreading further afield the damage to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff."[52] As Professor Berryman notes, this justification for aggravated damages comes dangerously close to replicating the grounds for awarding punitive damages in defamation cases, with no real explanation why (for example) the depth of dignitary injury should depend solely on the degree to which a slander was "spread afield".[53] 25

The court's position in *Whiten v Pilot Insurance Co.*, its most recent major decision on punitive damages, makes clear that it wants to maintain a clear distinction between punitive damages, which are to punish, and aggravated damages, which "take into account the additional harm caused to the plaintiff's feelings by reprehensible or outrageous conduct on the part of the defendant."[54] The practical import of this distinction, to which the court is now committed, is that evidence concerning a plaintiff's emotional distress is irrelevant to the ascertainment of punitive damages in Canada, since this would create a "danger of 'double recovery' for the plaintiff's emotional stress, once under the heading of compensation and secondly under the heading of punishment."[55] 26

When investigating the covert existence of punitive damages, most contributors to this book focused on non-pecuniary damages. This can be explained on several grounds. Firstly, historically certain jurisdictions restricted the award of compensation for non-pecuniary damage exclusively to cases where the harmful event constituted a criminal offence.[56] Secondly, by taking advantage 27

[50] (1989) 1 Canada Law Reports, Supreme Court (S.C.R.) 1085.
[51] Ibid. at 1103.
[52] (1995) 2 S.C.R. 1130, 1205-06.
[53] *Berryman*, 41 San Diego L. Rev. 1527.
[54] (2002) 1 S.C.R. 595, 653.
[55] Ibid.
[56] See *A. Menyhárd*, Punitive Damages in Hungary (contained in this publication) no. 7; *A.P. Scarso*, Punitive Damages in Italy (contained in this publication) no. 16; *B. Askeland*, Punitive Damages in Scandinavia (contained in this publication) no. 6.

of the difficulty involved in assessing non-pecuniary damage and the accepted imprecision in compensating such damage,[57] it was said that courts could easily get away with awarding an increased amount of such damages if they so wished.[58] This is especially so in those jurisdictions where the courts are not fettered in estimating non-pecuniary damages by quantified and standardised economic reference values. Thus courts in Italy,[59] in Scandinavian countries[60] and Spain,[61] among others, have adopted the practice of reflecting the level of the defendant's wrongdoing in the non-pecuniary damages awarded. While some contributors have denied that this practice necessarily adopts punitive damages into their legal systems, others have termed it an "element" of punitive damages. The paragraphs which follow briefly consider whether such practices are better explained in terms of aggravated damages.

28 What ought to be pointed out at the onset is that to the extent that courts make an award in excess of *basic* compensatory damages with the aim of *compensating* the claimant for injury to feeling caused by the defendant's exceptionally heinous conduct, the award is one of aggravated damages as opposed to punitive damages. From this, and as already pointed out supra, two requirements for an award of aggravated damages can be seen: exceptional conduct by the defendant and injury to the claimant's feeling. del Olmo captures the distinction between punitive and aggravated damages in noting that "When a relatively bigger award is imposed on a defendant that has personally harmed the plaintiff with intent, there is no need to explain this fact as a punitive feature of the non-contractual liability rules, thinking, for example, that the bigger award is imposed because of the more reprehensible nature of the defendant's behaviour. On the contrary, one can perfectly say that harm intentionally inflicted causes more (non-pecuniary) loss to the plaintiff than the non-pecuniary loss caused by unintentional fault. The underlying idea here is that the mental pain and suffering caused to the plaintiff is greater when he knows that he has been intentionally harmed…".[62]

29 Thus a parallel can certainly be drawn between this practice under § 3–5 Norwegian Compensation Act and that of awarding aggravated damages. The sections provide for the compensation for serious pain and "krenkelse" (a word that connotes a sort of "humiliating infringement") where the defendant *personally* injured the plaintiff *and* was grossly negligent in doing so or did so with intent. Only where the wrongdoer's blameworthiness exceeds a certain threshold may one be compensated for this sort of non-pecuriary loss.[63]

[57] *P. del Olmo*, Punitive Damages in Spain (contained in this publication) no. 9; *J.S. Borghetti* (fn. 37) no. 26; *Scarso* (fn. 56) no. 5.
[58] *Borghetti* (fn. 37) no. 26; *N. Jansen/L. Rademacher*, Punitive Damages in Germany (contained in this publication) no.8.
[59] *Scarso* (fn. 56) no. 3.
[60] *Askeland* (fn. 56) no. 4.
[61] *del Olmo* (fn. 57) no. 6. See also *A. Menyhárd* (fn. 56) no. 12–14, 33, 35.
[62] *del Olmo* (fn. 57) no. 6, 10 ff.
[63] *Askeland* (fn. 56) no. 12.

Jansen and Rademacher consider the "Genugtuungsfunktion" (the satisfaction leg) of "Schmerzensgeld" (damages for pain and suffering) as being in line with aggravated damages and this seems to be supported by the section of Neethling's report that deals with the judicial concept of satisfaction or "genoegdoening" in Afrikaans. According to Neethling, "Satisfaction has no fixed content and the following meanings have been given to it: penance, retribution, reparation for an insulting act, or balm poured on a plaintiff's inflamed emotions or feelings of outrage at having to suffer an injustice. In a wide sense, satisfaction refers to an upholding of the law, while its narrowest meaning relates to the psychological gratification obtained by the victim of a wrongful act."[64] Having said that, some authorities in South Africa are of the opinion that the true concept of satisfaction is impossible and meaningless without the idea of somehow punishing the perpetrator[65] and at least one noteworthy English authority agrees: Professor Sir Basil Markesinis has said that "the well-established 'Genugtuungsfunktion' of the 'Schmerzensgeld', whether it is translated as satisfaction or atonement, clearly also conceals a punitive component."[66] 30

The position in South Africa itself with respect to aggravated damages seems analogous to that in the United States in that, barring the occasional attempt at doing so, no real effort seems to be made to distinguish aggravated and punitive damages which both fall under the actio iniuriarum pillar of the law of delict. Indeed, Johann Neethling's report opens with reference to a Bill introducing "aggravated (punitive) damages" and elsewhere it is admitted that the distinction between the two is purely semantic. This is also apparent on an examination of the case law. On a closer reading, it seems safer to conclude however that the compensatory system in South Africa is rather unique especially when considering Neethling's conclusion that "aggravated damages may include punitive damages but may basically only be compensatory damages and may therefore differ from punitive damages."[67] 31

IV. Aggravated Damages under American Law

A survey of modern American cases, treatises and scholarship reveals that no distinction is signified by the use of the term "aggravated" damages instead of the term "punitive damages" or "exemplary damages." These three expressions are used interchangeably, and the choice of one over another by a modern lawyer ought to bear no significance in the meaning drawn from the usage by another lawyer or a court. 32

A. Brief Survey of the Modern Landscape

In 20th and 21st century America the term "aggravated damages" is not found in judicial opinions, treatises and practice materials as often as the terms "exem- 33

[64] *J. Neethling*, Punitive Damages in South Africa (contained in this publication) no. 18.
[65] *Neethling* (fn. 64) no. 19.
[66] *Markesinis/Coester/Alpha/Ullstein* (fn. 27) 210 ff.
[67] *Neethling* (fn. 64) no. 13

plary damages" and "punitive damages". Furthermore among the ten states[68] where the term can be found in judicial opinions, only in four is the term used frequently (Georgia, Illinois, Michigan and Missouri) while in the remaining states the term appears episodically.

1. Georgia

34 Today, in Georgia punitive damages are authorised by a statute which uses the words "aggravating," "exemplary," and "punitive" as synonyms.[69] As the court in *Johnson v Waddell* put it, "It was error for the trial court to charge the jury it could award 'aggravated' damages, which are nothing more than punitive damages…".[70] Before 1987, Georgia used the term "aggravated damages" to refer to what it now calls punitive damages; this was changed by statute in 1987.[71]

35 The conflation of punitive and compensatory purposes for pre-1987 injuries suggests that Georgia courts thought that aggravated damages referred to damages for mental distress caused by certain types of insulting behaviour. However the practical effect of the conflation worked to exclude aggravated damages when punitive damages were excluded by statute. In *Superb Carpet Mills, Inc. v Thomason*, a Georgia court was faced with the question of whether workers who had been injured by their employer's alleged negligence could sue for aggravated damages in separate lawsuits for property damage (since non-personal injury claims are not barred under Georgia's workers' compensation law). The court argued that, since aggravated damages and punitive damages shared the same ground, "the aggravated nature of the defendant's conduct," the plaintiffs could not attach a claim for aggravated damages to their property claims.[72] Thus, even if the measure of compensation entailed by aggravated damages and punitive damages might be, in theory, different, *Superb Carpet* made it clear that the function of the aggravated

[68] Florida, Georgia, Illinois, Iowa, Michigan, Minnesota, Missouri, Vermont, and Washington. New Hampshire is a special case which will be discussed separately.

[69] § 51-12-5.1. Punitive damages
(a) As used in this Code section, the term "punitive damages" is synonymous with the terms "vindictive damages", "exemplary damages", and other descriptions of additional damages awarded because of aggravating circumstances in order to penalise, punish, or deter a defendant.
…
(c) Punitive damages shall be awarded not as compensation to a plaintiff but solely to punish, penalise, or deter a defendant.
O.C.G.A. § 51-12-5.1 (2008).

[70] 193 Georgia Appeals Reports (Ga. App.) 692, 388 South Eastern Reporter, Second Series (S.E.2d) 723, Ga.App. (1989) (emphasis added).

[71] § 51-12-5 Additional damages for aggravating circumstances
(a) In a tort action in which there are aggravating circumstances, in either the act or the intention, the jury may give additional damages to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff.
(b) This Code section shall apply only to causes of action for torts arising before July 1, 1987.
O.C.G.A. § 51-12-5.

[72] *Superb Carpet Mills, Inc. v Thomason*, 183 Ga. App. 554, 555 (1987), quoting *Westview Cemetery v Blanchard*, 234 Georgia Reports (Ga.) 540, 544 (216 S.E.2d 776) (1975).

damages was to allow a plaintiff to condition his claim for additional damages on the defendant's state of mind when the tort was committed.[73]

2. Illinois

36 Illinois's equation of aggravated and punitive damages can be seen in how tort reforms statutes designed to limit punitive damages have been applied to aggravated damages. Punitive damages are permissible in Illinois as a matter of common law. There have been efforts to limit punitive damages in Illinois through statute. For example, punitive damages for the tort of the alienation of affection were abolished in Illinois as early as 1955.[74] Punitive damages in medical malpractice cases were abolished in 1985.[75] In both cases, the language restricting punitive damages was the same: the limit applied to "punitive, exemplary, or *aggravated* damages." While it is possible that the legislature intended to limit punitive and compensatory damages in a single combined reform law, the case law in Illinois does not support this interpretation. The Illinois Supreme Court turned away a constitutional challenge to the statute barring aggravated damages for alienation of affection by noting that the law did not restrict *compensatory* damages: "[T]he act does not affect compensatory damages, but only damages considered in their nature as punitive. The act [permits] actual damages, which term includes both general and special damages."[76]

3. Michigan

37 Almost all of Michigan's references to aggravated damages arise from a statute dating from 1963 which sets out a defence for libraries or merchants to suits for false imprisonment.[77] This statute was created against the background of Michigan's common law, which clearly allows punitive damages. No court that has applied this statute has ever commented on the anomalous use of the term "aggravated damages".[78] The one other reference to "aggravated damages" appears in a case interpreting a statute criminalising the sale of alcohol to minors, permitting a parent to pursue a civil penalty from one in violation of this statute.[79] The statute permitted the recovery of "exemplary damages," which the Michigan Supreme Court described in one part of its opinion as

[73] Ibid.; see *Wimbush v Confederate Packaging, Inc.*, 252 Ga. App. 806, 556 S.E.2d 925 (2001) (same).

[74] Illinois Revised Statutes (Ill. Rev. Stat.) 1955, Ch. 68, § 34 ff.

[75] Ill. Rev. Stat. 1985, Ch. 110, § 2 ff.

[76] *Smith v Hill*, 12 Ill. 2d 588, 598 (Ill. 1958).

[77] MSA 27A.2917.
"[N]o punitive, exemplary or aggravated damages shall be allowed to a plaintiff, excepting when it is proved that the merchant, or his or its agent used unreasonable force or detained the plaintiff for an unreasonable length of time or acted with unreasonable disregard of the plaintiff's rights or sensibilities or acted with intent to injure the plaintiff."

[78] See *Bonkowski v Arlan's Dep't Store*, 383 Mich. 90 (Mich. 1970); *Montgomery v Groulx*, 2006 Michigan Appeals Reports (Mich. App.) LEXIS 2986 (Mich. Ct. App. 2006); and *Tucker v Meijer, Inc.*, 2005 Mich. App. LEXIS 1096 (Mich. Ct. App. 2005).

[79] *Hink v Sherman*, 164 Mich. 352 (Mich. 1911).

"aggravated damages". Given that the court was providing a gloss of statutory language, the most that can be said of this case is that it supports the conclusion that the Michigan courts, if they thought of the distinction at all, would see nothing strange about conflating aggravated and punitive damages.

4. Missouri

38 Missouri courts refer to common law aggravated damages and punitive damages interchangeably.[80] No explanation for this is given. Perhaps a clue can be found in the Missouri Supreme Court's treatment of an early wrongful death statute that it concluded had to be a form of statutory punitive damages because it asked the jury to "aggravate" the damages awarded to surviving family members in the event of an accidental death.[81] The transitive verb "aggravate" is used synonymously with the transitive verb "enhance". Elsewhere in the same opinion the Court refers to the plaintiffs' request for damages above the minimum set out by the statute as a request for additional "punitive damages", as well as an additional "penalty".[82] The statute in question provided that, in the event of a fatal accident due to the carelessness, wantonness, or intentional act of a railway, the railway "shall forfeit and pay as a penalty" a minimum of $ 2,000 and a maximum of $ 10,000 to the surviving family.[83] The Court held that the $ 2,000 to be a penalty, while any sums above that (up to $ 10,000) had to be proved by loss of services.[84] From this we may conclude that the Missouri courts equated "aggravated" damages, "punitive" damages, and civil penalties.

B. The 19th Century

39 The idea that there might be a disjunction between punitive and aggravated damages, as there is in England, is very difficult to maintain in modern American law. However, this idea was discussed in the 19th century, and therefore it is likely that it influenced a certain number of courts at that time.

40 The most important discussion of aggravated damages in American law from this perspective is the vigorous argument made by the New Hampshire Supreme Court in *Fay v Parker*.[85] *Fay* is a powerful and scholarly attack by the court on the idea that punitive damages were non-compensatory, and it was mounted in the midst of a wider debate that was raging among leading treatise writers on tort law such as Simon Greenleaf and Theodore Sedgwick.[86] Green-

[80] See *Lopez v Three Rivers Elec. Coop*., 26 South Western Reporter, Third Series (S.W.3d) 151, 164 Missouri Reports (Mo.) (2000) (dissent); *Boehm v Reed*, 14 S.W.3d 149, 151 (Mo. Ct. App. 2000); *Watson v Terminal R.R. Ass'n*, 876 S.W.2d 722, 723 (Mo. Ct. App. 1994); and *Moreland v Columbia Mut. Ins. Co*., 842 S.W.2d 215, 220 (Mo. Ct. App. 1992).

[81] *State ex rel. Dunham v Ellison*, 278 Mo. 649, 660 (Mo. 1919).

[82] Ibid. at 657.

[83] Ibid. at 655 (quoting Section 5425, Revised Statutes 1909, as amended in 1911).

[84] Ibid. The Court reversed itself on this interpretation in *Grier v Kansas C., C. C. & S. J. R. Co*., 286 Mo. 523 (Mo. 1921).

[85] 53 New Hampshire Reports (N.H.) 342 (1872).

[86] See *A.J. Sebok*, Punitive Damages from Myth to Theory, 92 Iowa L. Rev. 957, 1010-11 (2007).

leaf argued that punitive damages, or exemplary damages, could not be based on the defendant's wrongful motive, since that would impermissibly confuse tort law with criminal law. Sedgwick argued, in response, that when the jury is asked to award "punitory, vindictive, or exemplary damages…[it] blends together the interests of society and the aggrieved individual."[87]

41 The New Hampshire Supreme Court relied heavily on an argument made by Greenleaf that the practice of allowing juries to hear evidence of the defendant's wrongdoing in tort cases was consistent with his view that tort damages were solely awarded for compensatory purposes. Greenleaf noted that wrongful intent can aggravate the dignitary harm suffered by the victim: "Damages," says "Professor Greenleaf, are given as a compensation, recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more, nor less; and this, whether it be to his person or estate. All damages must be the result of the injury complained of. It is frequently said that, in actions ex delicto, evidence is admissible in *aggravation* or in mitigation of damages. But this it is conceived means nothing more than that evidence is admissible of facts and circumstances which go in aggravation or in mitigation of the injury itself."[88]

42 The court also relied heavily on various English sources to support the thesis that damages paid as a result of the aggravation of injury due to insult and humiliation were compensatory, not punitive: "The comparatively recent case of *Emblem v Myers*, decided in 1860, 6 Hurl. & N. 54, forcibly illustrates the ideas which I have endeavoured to express…Pollock, C. B., says damages may be *aggravated* by the contemptuous and insolent manner of doing a wrong to property. Certainly. The contemptuous and insolent manner in which the defendant smashed in the plaintiff's stable over his wife, who was inside, and his horse and his cart, might injure the plaintiff's feelings more than the act itself injured his property."[89]

43 The New Hampshire Supreme Court used the category of aggravated damages to explain an embarrassing development in American law – the emergence of exemplary or punitive damages for the purpose of punishment and deterrence.[90] The strength of its reasoning is not the focus of this chapter. The point that we want to make is only that, in contrast to the 20th century use of the term "aggravated damages", discussed above, the use of the term in the 19th century overlapped with the modern conception adopted by English courts today. Why the conception of "aggravated damages" as compensation for humiliation and

[87] *T. Sedgwick*, A Treatise on the Measure of Damages (1847) 39.

[88] *Fay v Parker*, 53 N.H. at 356 (emphasis added).

[89] Ibid. at 369 (emphasis added). The New Hampshire court cited most if not all of the major 18th century English punitive damages cases in support of its thesis, including *Tullidge v Wade*, 3 Wils. 18, A. D. 1769 and *Huckle v Money*, 2 Wils. 205, A. D. 1763.

[90] For a discussion of the divergent rationales of punitive damages in 19th century American law, see *A.J. Sebok*, What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today, 78 Chicago-Kent Law Review (Chi-Kent L.Rev.) 163 (2003).

dignitary injury "aggravated" by the defendant's anti-social and illegal conduct did not continue as the dominant conception of American punitive damages is a question that requires separate treatment.[91]

44 The conception propounded by the *Fay* was adopted by a number of other state courts, such as California.[92] Iowa,[93] Kentucky,[94] Maryland,[95] Michigan,[96] Minnesota,[97] and New York.[98] In some cases, the possibility of the defendant's responsibility for aggravated damages due to the insulting or degrading nature of his injurious conduct was raised only in the context of mitigation – that is, where the defendant argued that his conduct could not have aggravated the plaintiff's injury, since the plaintiff was dissolute or immoral (this came up especially in the context of the tort of seduction).[99]

[91] One might observe that deterrence-based theories of tort law grew in significance in American tort law during the 20th century; that this would affect academic and judicial theories of punitive damages should not be a surprise. See *Sebok* 92 Iowa L. Rev. 976–77 (on the rise of efficient deterrence as a rationale for punitive damages).

[92] *Wardrobe v Cal. Stage Co.*, 7 Cal. 118 (1857); but see *Turner v N. Beach & Mission R.R.* Co., 34 Cal. 594 (1868).

[93] *Hendrickson v Kingsbury*, 21 Iowa 379 (1866).

[94] *Chiles v Drake,* 59 Kentucky Reports (Ky.) (2 Met.) 146, 151 (1859).

[95] *Rigden v Wolcott*, 6 Gill and Johnson's Maryland Reports (G. & J.) 413 (Md. 1834).

[96] *Detroit Dailey Post v McArthur*, 16 Mich. 447 (1868).

[97] *Lynd v Picket*, 7 Minnesota Reports (Minn.) 184 (1862); *McCarthy v Niskern*, 22 Minn. 90 (1875).

[98] *Johnson v Jenkins*, 24 New York Reports (N.Y.) 252 (N.Y. 1862).

[99] See, e.g., *White v Thomas*, 12 Ohio State Reports (Ohio St.) 312 (1861) and see *Annot.*, Measure and Elements of Damages for Breach of Contract to Marry, 73 American Law Reports Annotated, Second Series (A.L.R.2d) 553 (1960).

Punitive Damages: Admission into the Seventh Legal Heaven or Eternal Damnation?

Comparative Report and Conclusions

Helmut Koziol[*]

I. Introduction

As the country reports show, punitive damages are undoubtedly one of the topics where the common law and continental European civil law seem worlds apart. Like parents who want to make sure that their children will remain on the right moral path by telling them impressive horror stories, continental European law lecturers like to inform their students about American juries which are accustomed to awarding claimants millions of dollars: for example, because the latter suffers pain when she spills coffee – served "too hot" by the defendant – on her own legs. Nevertheless just as, regardless of all parental efforts, the behaviour of some children does not comply with the ideals of the old fairytales, continental European lawyers also do not seem sufficiently shocked by American mannerisms and are inclined to endorse and even support the recognition of punitive damages. As there exist quite some attempts to reform continental European legal systems and as the unification of European law is on the agenda, it seems worthwhile and even an urgency to discuss the pros and cons of punitive damages thoroughly and on a comparative basis so that opposing ideas and arguments are sufficiently taken into consideration. The following lines shall be the first attempt at doing so on the basis of the country reports in this publication. This report[**] will try to build a basis for a decision on whether the American and English examples should be pursued or whether they should deter continental European legal systems from following suit. 1

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2 To begin with, I would like to examine whether the impression one gets at first sight, namely that the common law and civil law are totally opposed, is true. Two cases are significant at this juncture: First, the American case of *BMW of North America, Inc. v Gore* where Dr. Gore discovered that his new BMW had been repainted after it had been scratched during transportation. He brought an action for fraud and recovered $ 4,000 compensation for the difference in value between his repainted car and a brand-new one as well as $ 4 million in punitive damages.[1] The jury calculated the punitive damages award by taking regard of the total harm caused, thus multiplying the approximate number of repainted vehicles sold by BMW – about 1,000 – by the depreciation of each car.

3 In contrast a German case: in 1992, the Supreme Court of Germany (BGH) had to decide on the enforceability by execution of an American decision.[2] In the case of *John Doe*, a U.S. court had adjudicated that a juvenile was to be awarded $ 750,260 for being sexually abused: $ 400,000 of which were punitive damages. The German Court was of the opinion that the part of the American decision regarding punitive damages could not be enforced in Germany: this would be against ordre public as under the German legal system, punishment and deterrence are the responsibility of criminal courts. This decision is also consistent with a recent and highly publicised Italian case, where the Italian Supreme Court refused to enforce a U.S. punitive damages award on the grounds that it was against ordre public.[3]

4 Looking solely at these decisions one would undoubtedly get the impression that the common law and continental European law are totally contradictory. However, this is true only to some extent as usually, they are not diametrically opposed such as to face each other one on a white side and the other on a black one but rather they occupy two grey sides and only the shade of grey differs.[4] This will be demonstrated by a more careful look at the above reports and other materials.

II. The Common Law

A. The Common Law as a Unit?

5 First, it has to be pointed out that the common law does not form a unified whole but consists of a number of quite different systems, although not as varied as

[1] *BMW of North America, Inc. v Gore*, 517 U.S. 559 (1996).
[2] BGHZ (Entscheidungen des Bundesgerichtshofs in Zivilsachen, Decisions of the Supreme Court in Civil Matters) 118, 312.
[3] Cass. 19 January 2007, no. 1183, GI 2007, 12, 2724. See *A.P. Scarso*, Punitive Damages in Italy (contained in this publication) no. 10 ff.; see also *M. Requejo Isidro*, Punitive Damages from a Private International Law Perspective (contained in this publication) no. 29.
[4] See *V. Behr*, Symposium: Private Law, Punishment, and Disgorgement: Punitive Damages in American and German Law – Tendencies towards Approximation of Apparently Irreconcilable Concepts, 78 Chicago-Kent Law Review 2003, 105, 148 ff., who is of the same opinion.

the continental European civil law systems. As Sebok points out in his report, although derived from English law, the law on punitive damages in the United States has developed independently from it. It should therefore come as no surprise that Wilcox's and Sebok's reports show that English courts – and the same is true for Irish courts[5] – award punitive damages much more restrictively than the courts in most of the states in the U.S.A. Furthermore, one must not forget that such damages are not awardable in Scotland.[6] Only two U.S. states do not accept punitive damages at all. Three other states restrict them to statute (see Annex).[7]

B. The U.S.A

I think it instructive for European lawyers and those involved in discussions on punitive damages to listen to some of the critical voices in the U.S.A before pinning themselves down as advocating such damages. It has to be pointed out that quite a number of U.S. scholars raise objections to punitive damages[8] and others have felt it incumbent upon themselves to expose the theoretical misconceptions of the role of such damages. I refer in particular to D.B. Dobbs,[9] and more recently to A.J. Sebok,[10] T.B. Colby[11] as well as to R.W. Wright.[12] 6

Conventionally and theoretically, punitive damages have been said to aim at punishment and deterrence. However, as Sebok notes, the federal system of the United States – with fifty state jurisdictions and a parallel system of federal statutes – has produced remarkable diversity within the United States in this area of law.[13] Thus, and quite understandably, the words "punishment" and "deterrence" constitute different meanings in different jurisdictions.[14] He identifies the following functions of punitive damages in various states: 7

(a) Redress of claimant – states such as Michigan see the role of punitive damages as being one of redress for insult, wounded feelings and any indignity 8

[5] E.g. s.14(4) & 14(5)(b) Competition Act 2002, s.59 Industrial Designs Act, 2001, s.128(1) & (3) and 304(3) Copyright and Related Rights Act, 2000, s.5(3) Hepatitis C Compensation Tribunal Act, 1997.

[6] See also *Kuddus v Chief Constable of Leicestershire* [2002] 2 Appeal Cases (AC) 122, 123.

[7] See also *A.J. Sebok*, Punitive Damages in the United States (contained in this publication) no. 2.

[8] *S. Greenleaf*, A Treatise on the Law of Evidence (16th ed. 1899) 240 (quoted by *A.J. Sebok*, Symposium: Private Law, Punishment, and Disgorgement: What did Punitive Damages do? Why Misunderstanding the History of Punitive Damages Matters Today, 78 Chicago-Kent Law Review 2003, 182); W.P. Keeten et al. (eds.), Prosser and Keeton on Torts (5th ed. 1984) 9 ff.; *D.B. Dobbs*, Law of Remedies (2nd ed. 1993) 355 ff.

[9] *D.B. Dobbs*, Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies, 40 Alabama Law Review 1988/1989, 831.

[10] See ibid. as well as *A.J. Sebok*, Punitive Damages: From Myth to Theory, 92 Iowa Law Review 2007, 957.

[11] *T.B. Colby*, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, 87 Minnesota Law Review 2003, 583.

[12] *R.W. Wright*, The Grounds and Extent of Legal Responsibility, 40 San Diego Law Review 2003, 1425.

[13] *Sebok* (fn. 7) no. 4.

[14] Ibid. no. 35.

suffered by reason of the defendant's reprehensible conduct but not to punish the defendant directly.[15] Such states seem to use the "punitive damages" title to address what under English law are called "aggravated damages". The latter are damages which seek to *compensate* the victim of a wrong for mental distress (or injury to feelings) caused by the manner in which the defendant committed the wrong, or by the defendant's conduct subsequent to the wrong. It comes as no surprise therefore that states such as Michigan view the role of "punitive damages" as compensatory. Seen in this way, the windfall argument does not apply and this is supported by the fact that these states do not countenance split-recovery.

9 (b) In states such as South Carolina, punitive damages are said to vindicate the claimant's *private* rights. The fact that every state, besides a few like Idoho and the District of Columbia, maintains that actual damage must be shown to merit an award of punitive damages would seem consistent with this view.[16] As Sebok points out, "vindication" implies that "the payment of the money *to* the plaintiff *is less* important than the imposition of the monetary penalty *on* the defendant." This is so as the aim of vindication is not to replace a loss but to return the plaintiff's honour.[17] Thus, states such as Illinois which sanction this vindictive role of private rights in an award of punitive damages see no contradiction in equipping judges with the discretion to apportion the punitive award among the plaintiff, his attorney and the State of Illinois Department of Human Services.[18]

10 (c) The role of punishment inherent in *punitive* damages is expressly recognised by thirty-eight states and some of these, e.g. Wyoming, Texas and New York, consider that punitive damages serve as punishment for *public* and not private wrongs.[19] At first blush, it would appear that it is this quasi-criminal role that adds further justification to the practice of split-recovery. However not all the states that assert the "vindication of public rights" role of punitive damages have statutory provisions for split-recovery and vice versa, not all states that endorse split-recovery accept this role. Although split-recovery has indeed been said to provide reimbursement for damage *suffered by society* because of the defendant's wrongdoing, elsewhere it has been said to be justified as a revenue raising exercise.[20]

11 (d) Deterrence of both the wrongdoer (specific deterrence) and society at large (general deterrence) is a further accepted role of such damages. The notion of *exemplary* damages (i.e. to make an example of the defendant) is strongly rooted in the wider scope of this goal.[21]

[15] Ibid. no. 36–40.
[16] Ibid. no. 36: see Annex.
[17] Ibid. no. 41–43. Emphasis added.
[18] Ibid. no. 48.
[19] Ibid. no. 44–47.
[20] Ibid. no. 50.
[21] Ibid. no. 52–58.

Punitive damages are considered an anomalous topic and the reasons for their controversy are well known. As Dobbs points out, they are not subject to measurement and hence not subject to effective limits; punitive damages are criminal punishment and are therefore illegitimate in civil cases or at least should be administered under the protective rules applied in criminal cases; punitive damages are out of control; they may over-deter or under-deter bad conduct; and finally, punitive damages rules operate to create a high risk of unfair application.[22] That is one view. 12

Colby has another view. In his article, Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs, he notes that the idea that punitive damages aim to punish defendants for the wrongs they *commit upon society* is a modern misconception. This misunderstanding, he continues, leads people to erroneously argue, as Dobbs has done, that punitive damages serve the very same goals as criminal law. Based on this idea it makes sense to calibrate them by reference to the total harm done to all of society. This seems to have been the motivation behind the original outcome in *BMW of North America, Inc. v Gore* mentioned above. However, it ought to be stressed that on appeal the Supreme Court of Alabama did not agree with the jury and reduced the punitive damages award to $ 2 million.[23] The U.S. Supreme Court was of the opinion that even this amount was disproportionate as punitive damages have to be in a well-balanced proportion to compensatory damages.[24] Consequentially, the Supreme Court of Alabama reduced the punitive damages to $ 50,000.[25] 13

Colby also criticises the modern theoretical account of punitive damages as punishment for public wrongs as being deeply at odds with the actual doctrine. This role is expressly recognised in states such as Wyoming, Texas and New York. In Colby's mind, if punitive damages truly were punishment for public wrongs it should not be necessary for the plaintiff to prevail on an underlying civil cause of action in order to receive them. Further, if punitive damages were punishment for the full scope of the wrong to society, rather than simply the wrong to the plaintiff, it would make no sense to require a reasonable relationship between the amount of punitive damages and the amount of the individual plaintiff's damages. Nor does it make sense under the conception of punitive damages as punishment for the wrong to society to allow the plaintiff to keep the punitive damages award. Finally, if punitive damages serve the criminal law function of punishing wrongs to society, it is difficult to understand why it is, as Dobbs argues, that the defendant is not permitted to avail himself of the various criminal procedural safeguards the Constitution affords to those accused of public wrongs. Colby, therefore, prefers the "historical conception of 14

[22] *Dobbs*, 40 Alabama Law Review 1988/89, 831.
[23] *BMW of North America, Inc. v Gore*, 646 Southern Reporter, Second Series (So.2d) 619 (Ala. 1994) 629.
[24] *BMW of North America, Inc. v Gore*, 517 Supreme Court Reports (U.S.) 559 (1996) 580–583.
[25] *BMW of North America, Inc. v Gore*, 1997 WL 233910 (Ala. May 9, 1997).

punitive damages", namely that they are intended as punishment for the *wrong to the individual victim*. Since under this conception punitive damages are punishment for a purely *private wrong* and are designed to punish the defendant only for the wrong done to the individual victim, it makes sense to give them to the plaintiff rather than to the government or to society at large.

15 In a similar vein, Wright understands punitive damages as private retribution for a discrete private dignitary injury, which is distinct and separate from any criminal punishment that may be imposed for any non-discrete "public wrong". However, it seems that Wright attaches more importance to the idea of compensation when he says that: "Properly understood and administered, punitive damages in tort law also compensate for discrete private injuries. When a person harms another through a deliberate disregard of the other's rights, then in addition to any non-dignitary harm that was inflicted on the victim, the victim has also suffered a discrete dignitary injury, which can be rectified through the imposition of private retribution in the form of punitive damages in tort law".[26] Wright thus reconciles punitive damages to some extent with *aggravated damages* under English law which serve as additional compensation for mental suffering, wounded dignity and injured feelings.

16 According to Sebok, Colby can be criticised in his understanding of punitive damages as punishment for a private wrong in that he simply transfers the structural relationship between wrong and sanction found in public law to private law. Sebok advances his own opinion on punitive damages:[27] First, punitive damages are grounded on the violation of a certain private right, that has to be distinguishable from the set of private rights whose violation are fully redressed by an award of compensatory damages. Second, punitive damages are personal punishment. He points out that punitive damages vindicate the "dignity" of the private citizen, and therefore the private right whose violation grounds their award is the private right not to have one's dignity violated. Sebok further stresses that in all the cases in which punitive damages have been awarded, the defendant had violated the plaintiff's private right "intentionally, that is to say, without any regard for the fact that the plaintiff was in possession of that right. So in each of these cases, the defendant violated at least two rights: the primary private right (to physical security, property, etc.) *and* the right to be treated as someone deserving to have those primary rights respected by others." He mentions that such lack of respect for another's primary private rights can be called a form of insult. Therefore, Sebok opines that retribution by punitive damages is actually a form of compensation to the victim for moral injury. Like Wright, a conclusion more in line with aggravated damages under English law.

[26] *Wright*, 40 San Diego Law Review 2003, 1431.
[27] *Sebok*, 92 Iowa Law Review 2007, 1007 ff.

C. England

At present, the position under English law is that punitive damages can only be claimed in three instances. In addition, before the court determines whether a claimant is entitled to punitive damages and if so how much, it will consider other crucial factors. The categories test is thus only the first filter.[28] 17

As with all other legal systems that recognise punitive damages, England has not been exempt from criticism. Most of the censures levelled against punitive damages are common to the other jurisdictions which recognise them but one in particular is only relevant to England i.e. the scope of the categories.[29] Unlike other jurisdictions which broadly speaking award punitive damages where there is highly reprehensible civil wrongdoing on the defendant's part, in England, leaving statute aside, punitive damages can only be awarded in two categories of cases. It makes no sense why a claimant who suffers under the hand of a servant of the government should receive punitive damages while one who suffers from the oppressive, arbitrary or unconstitutional conduct of a person, legal or otherwise, should not. If the goal is to punish highly reprehensible conduct and to deter people who pursue the same, then the source of the power accompanying such conduct is irrelevant. If, on the other hand, the primary goal of punitive damages is to punish and deter reprehensible conduct by servants of the government, the first category is inconsistent with the second category where a claimant can seek such damages against private defendants whose conduct is calculated to make a profit for themselves which may well exceed the compensation payable to the claimant. Finally, the requirement for a profit motive under the second category lacks logic. Outrageous behaviour is not solely restricted to the pursuit of a monetary gain. If the goal is to discourage and punish such behaviour, the motive behind the conduct should be irrelevant. 18

Between 1993–2001, in addition to the categories test, another test – the cause of action test – applied. The test was sensibly abolished in 2001. As the recent consultation paper indicates, the government has no intention of abolishing punitive damages and it is not prepared to expand the categories beyond their current limitations. 19

D. The Mixed System of South Africa

Punitive damages are also firmly established as part of South African jurisprudence. They fall under the third pillar of the law of delict – actio iniuriarum. The latter is directed at satisfaction or sentimental damages for any injury to personality[30] and has a penal and admittedly compensatory function.[31] 20

[28] *V. Wilcox*, Punitive Damages in England (contained in this publication) no. 44 ff.
[29] Ibid. no. 70–75. The Irish courts have not in any definitive way endorsed the policy of *Rookes v Barnard* to restrict the award of exemplary damages to the three limited categories. Irish judges seem divided on the position. See *B. McMahon/W. Binchy*, Law of Torts (2000) par. 44. 16 ff. and par. 44.49.
[30] *J. Neethling*, Punitive Damages in South Africa (contained in this publication) no. 5
[31] Ibid. no. 24.

III. Continental European Legal Systems

A. The Fundamental Rejection

21 Continental European scholars[32] very often point out that in principle the continental civil law systems disapprove of punitive damages. This is also true for the country reporters who contributed to this volume.

22 The *French* report opens with the following words: "At first sight, there is not much to say or write about punitive damages under French law. Understood as damages which are awarded in excess of the proven harm suffered by the plaintiff, in order to punish or deter the defendant and similar persons from pursuing a course of action such as that which caused damage to the plaintiff, punitive damages do not officially exist under the French legal system. They are totally unknown to the Civil Code and to French legislation in general, which neither explicitly provide for nor prohibit such kind of damages. Furthermore, French courts have never allowed themselves to award punitive damages, at least not officially."[33] Nevertheless, a more detailed examination reveals that some departures from the official position exist.

23 As to *Spain*, P. del Olmo notes that currently the main part of Spanish legal doctrine adheres to the traditional theory, which supports the thesis that non-contractual rules do not play a punitive role as it confines these rules to a merely compensatory function.[34]

24 According to the *Italian* Supreme Court, the Corte di Cassazione,[35] the objective of punishment and of a sanction of the wrongdoer is alien to the Italian legal system. Therefore, the Supreme Court held that punitive damages are not eligible as compensation, since they conflict with fundamental principles of state law which attribute to tort law the function of restoring the economic sphere of persons suffering a loss. As a result, a foreign court decision ordering the tortfeasor to pay punitive damages and thereby seeking to punish the wrongdoer is not enforceable in Italy. Scarso further points out that legal scholars agree on the rejection of punitive damages in the Italian legal system.[36]

[32] Beside the country reports in this volume, see *Behr*, 78 Chicago-Kent Law Review 2003, 105 ff.; *F. Bydlinski*, Die Suche nach der Mitte als Daueraufgabe der Privatrechtswissenschaft, Archiv für die civilistische Praxis (AcP) 204 (2004) 343 ff.; *P.S. Coderch*, Punitive Damages and Continental Law, Zeitschrift für Europäisches Privatrecht (ZEuP) 2001, 604; *J. Mörsdorf-Schulte*, Funktion und Dogmatik U.S.-amerikanischer punitive damages (1999). But some scholars speak out in favour of punitive damages: *I. Ebert*, Pönale Elemente im deutschen Privatrecht (2004); *D. Kocholl*, Punitive Damages in Österreich (2001) [*B. Steininger*, in: H. Koziol/B. Steininger (eds.), European Tort Law 2001 (2002) 82 f. is critical of this]; *P. Müller*, Punitive Damages und deutsches Schadensersatzrecht (2000) 360 ff.; *K. Schlobach*, Das Präventionsprinzip im Recht des Schadensersatzes (2004); *E. Sonntag*, Entwicklungstendenzen der Privatstrafen (2005).

[33] *J.S. Borghetti*, Punitive Damages in France (contained in this publication) no. 1.

[34] *P. del Olmo*, Punitive Damages in Spain (contained in this publication) no. 2.

[35] Cass. 19 January 2007, no. 1183, in GI 2007, 12, 2724; see *Scarso* (fn. 3) no. 10–15.

[36] *Scarso* (fn. 3) no. 18.

The concept of damages is tightly linked with the concept of damage under *Hungarian* tort law.[37] However, A. Menyhárd is of the opinion that even if punitive damages are not accepted and applied in Hungarian tort law they would not be incompatible with the theoretical framework of delictual liability, although some axioms exist which could be a source of inconsistency if any forms of punitive damages were introduced into Hungarian tort law.[38] However, a strong aversion to repressive sanctions in private law seems to overwrite their utility and their preventive role. The origin of this aversion seems to be a mainly theoretical demand for a private law which is clear of public law elements and sacrifices the role of private law in "social engineering" for the sake of conceptual clarity. 25

The *German* report uses clear words: "Thus, it is a common assumption that the sole functions of the German law of damages are the reparation of injury and the compensation of resulting losses, while punishment of the wrongdoer is strictly reserved for criminal law. Moreover, punitive damages raise constitutional rights concerns: According to art. 103(2) of the German constitution, penalisation is only permitted if the threat of punishment is explicitly codified and its conditions are precisely described. Also, an award of punitive damages against a convicted tortfeasor is seen as possibly leading to double punishment which is ruled out by art. 103(3) of the German constitution. Consequently, the widely prevailing opinion sees no place for punitive damages under German law."[39] 26

The *Scandinavian* report is drafted along the same lines: "It should be clarified beforehand that 'punitive damages' are a head of damages that simply have no tradition under Scandinavian law. Moreover, the concept of 'punitive damages', or equivalent terms, does not commonly feature in Scandinavian legal discourse."[40] 27

In *Austria*, R. Reischauer certainly points out that punitive damages are not covered by the definition of damage in § 1293 ABGB as they are a penalty independent of the existence of an equivalent loss.[41] Nevertheless he is of the opinion that such punitive damages may be reasonable in areas where protection under private law is insufficient.[42] However, on the other hand, there are some scholars who are very reluctant to accept punitive damages[43] and some who are strictly against such remedies.[44] 28

[37] *A. Menyhárd*, Punitive Damages in Hungary (contained in this publication) no. 10.
[38] Ibid. no. 37 ff.
[39] *N. Jansen/L. Rademacher*, Punitive Damages in Germany (contained in this publication) no. 2.
[40] *B. Askeland*, Punitive Damages in Scandinavia (contained in this publication) no. 3.
[41] *R. Reischauer* in: Rummel, ABGB³ II/1 (2002) § 1293 no. 1c.
[42] The following are also in favour of punitive damages: *Kocholl* (fn. 32); *A. Kletecka*, Punitive Damages – Der vergessene Reformpunkt? Österreichische Juristenzeitung (ÖJZ) 2008, 785.
[43] See *H. Koziol*, Patentverletzung und Schadenersatz, Recht der Wirtschaft (RdW) 2007, 200 ff.
[44] *F. Bydlinski*, System und Prinzipien des Privatrechts (1996) 92 ff; *Bydlinski*, AcP 204 (2004) 341 ff. Cf. also *Steininger* (fn. 32) 82 f.

29 Further, it has to be mentioned that some continental European courts, e.g. the German and the Greek Supreme Courts, deem punitive damages awarded by U.S. courts contrary to their ordre public.[45] Recently the Italian Supreme Court expressed the same opinion.[46] On the other hand, the Spanish Tribunal Supremo recently enforced an American judgment that included a punitive award.[47]

B. Hidden Acceptance

30 In spite of the fundamental rejection of punitive damages in continental European countries, the reporters involved in this project call attention to the hidden practices of awarding punitive damages. This is true for *France*:[48] In the case of an illegal reproduction of a work protected by intellectual property law, art. L. 331-1-4 Code de la propriété intellectuelle provides that a civil court can order the confiscation of the whole or part of the revenue obtained through counterfeiting, which shall be handed over to the aggrieved party. Insofar as this revenue can be handed over to the victim, this means that the latter may obtain monies in excess of the actual loss he suffered through the illicit behaviour of the defendant. These "punitive damages" cannot however exceed the amount of the illicit profits made by the tortfeasor. Further, the first paragraph of art. L. 331-1-3 Code de la propriété intellectuelle provides that damages can be set by taking into account not only the loss of the claimant, but also the profits made by the infringer. Although the profits are said not to be the measure of damages but only a factor to be taken into account among several elements, J.S. Borghetti, the French reporter, thinks it "quite obvious" that this provision could be used in such a way that damages paid to the plaintiff could amount to more than the harm suffered. Contrary to this view, it must be stressed that although the final award may go beyond compensatory damages, this does not necessarily mean that such damages are punitive. They seem more in line with gain-based (disgorgement) damages. This is especially so considering that the damages set cannot exceed the illicit profits made by the tortfeasor. The French reporter mentions further examples and also points out that it is a widely shared belief among French lawyers and academics that French courts sometimes set damages not only on the basis of the harm suffered by the plaintiff, but also by taking into account the behaviour of the tortfeasor, with the aim of punishing him when he appears to have been guilty of a deliberate contempt of the plaintiff's interest. To the extent that such damages are compensatory, especially covering dommage moral, they are clearly not punitive.

[45] German Federal Supreme Court in BGHZ 118, 312; Greek Supreme Court (Areios Pagos) (Full Bench) 17/1999, N.o.B. 2000, 461–464.

[46] Cass. 19 January 2007, no. 1183, GI, 2007, 12, 2724. See *Scarso* (fn. 3) no. 10 ff. and also *E. Navarretta/E. Bargelli*, Italy, in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008) no. 7 ff.

[47] *Miller Import Corp. v Alabastres Alfredo*, S.L., STS, 13. November 2001 (Exequátur No. 2039/1999).

[48] *Borghetti* (fn. 33) no. 3 ff.

31 To some extent, similar evidence is given by the *Spanish* reporter.[49] Art. 9.3 of the Organic Act 1/1982, of 5 May for the Civil Protection of Honour, Personal and Family Privacy and Image provides that losses will be assessed by taking into account, among other things, the profit that the person causing the damage has obtained as a result of his wrongdoings. In the first years after the publication of art. 9.3, some authors thought that the lawmaker had wanted to introduce a kind of punitive damages for the illegitimate invasion of personal rights. del Olmo, however, reports that this provision is now seen as a convergence of tort law with the law of unjust enrichment. As to intellectual property rights, according to the new provisions, the damage has to be assessed by taking regard of the negative economic consequences, including lost profits suffered by the injured party and any profits made by the infringer through the unfair infringement. del Olmo stresses that the idea is that if the infringer has made some profit through the use of the infringed intellectual property right, the victim himself could have also made the same profit. He holds that such understanding of the rule is consistent with the compensatory function of tort law and that it attends to a problem almost unanimously underscored as very significant in the area of intellectual property, namely the difficulty of proving the harm sustained by the victim. Further, del Olmo[50] mentions an example under social security law.

32 Scarso assumes that – although *Italian* law rejects punitive damages – there are some cases where jurisprudence *tacitly* imposes tortious liability, especially if the tortfeasors acted with intent or gross negligence thereby assigning – to some extent – a deterrent purpose to tort law.[51] Scarso further points out that some scholars are of the opinion that individual statutory provisions which lay down criteria for assessing damage suffered have a punitive purpose. However, Scarso rightly contradicts these views and feels that these provisions do not seem to have a punitive purpose, at least inasmuch as they provide for a reasonable pre-estimate of actual damage: if this turns out to be the case, their main purpose is to facilitate the assessment of damage, rather than to punish the wrongdoer.[52]

33 § 84 subpar. 2 of the *Hungarian* Civil Code provides that if the defendant interfered wrongfully with the plaintiff's personality rights and the sum to be awarded as damages would not be proportionate to the gravity of the wrongfulness of the tortfeasor's conduct, the court may impose a fine on the defendant.[53] However, the public fine is not to be paid to the plaintiff but to the state and is to be imposed ex officio even in the absence of a claim for such a fine and even in the absence of a claim for damages too. Therefore, the fine is quite different from punitive damages under common law.

[49] *del Olmo* (fn. 34) no. 10 ff.
[50] *del Olmo* (fn. 34) no. 26 ff.
[51] *Scarso* (fn. 3) no. 26.
[52] Ibid. no. 22 ff. and no. 35.
[53] *Menyhárd* (fn. 37) no. 13 ff.

34 As Jansen and Rademacher point out,[54] in *Germany* the BGH argued that Schmerzensgeld serves two purposes: Alongside the compensation of pain, Schmerzensgeld takes account of the tortfeasor owing Genugtuung[55] (satisfaction) to the victim. In a 1955 case, the BGH emphasised that damages for pain and suffering are not an instrument of punishment. Nevertheless, many authors understood the idea of satisfaction as introducing a penal element into the law of damages. Jansen and Rademacher are of the opinion that such an interpretation does not take the possibility of the compensation of a normative interest into account which has a firm place within the German law of damages. They are, therefore, of the opinion that a claim should only be referred to as genuinely punitive if it cannot be understood as compensation of an infringement of the victim's rights and in this sense makes good a sustained personal wrong.[56] Further, the German reporters describe that in the case of invasions of personal privacy, the BGH has always held that satisfaction was more important than the compensation of financial losses. Yet, the reporters explain, that satisfaction should again not be understood as an objective sanction detached from the idea of compensation: to the contrary, the award of damages forms a means of restitution for the infringement of a right. In the *Caroline I*-judgment the court argued that the traditional method would not be able to achieve a sufficient prevention of such wrongs because the damages awarded by courts were far below the typical profit resulting from such an infringement of personality rights. This emphasis on prevention has been interpreted as punitive. Conversely, the German reporters feel that these claims can be explained within the framework of compensation and/or restitution.[57] As to the "Threefold Assessment of Damages" for the Infringement of Intellectual Property Rights, Jansen and Rademacher are also of the opinion that the owner's claim does not serve a punitive purpose because of its restitutionary character.[58] Only in the case of damages for discrimination[59] do the German reporters admit that they cannot be explained by the concept of compensation for loss suffered. Rather they serve to punish the employer.

35 As Askeland points out, in *Scandinavia* elements of punitive damages may only come into play in connection with non-pecuniary loss in the case of personal injury. However in this area, the assessment of damages is partly standardised in all three jurisdictions and, therefore, only narrow room is left for weight to be put on factors that are decisive for punitive damages in the jurisdictions which accept them.[60] In Askeland's words, "there are no examples of real punitive damages under Scandinavian tort law."

[54] *Jansen/Rademacher* (fn. 39) no. 9. Cf. also *Ebert* (fn. 32) 457 ff.
[55] On the concept of satisfaction see *H. Stoll*, Consequences of Liability: Remedies, in: A. Tunc (ed.), International Encyclopedia of Comparative Law, Volume XI/2, no. 10, 92 ff.
[56] For a different opinion see *B.S. Markesinis* et al., Compensation for Personal Injury in English, German and Italian law (2005) 210–211. Cf. also *Behr*, 78 Chicago-Kent Law Review 2003, 146.
[57] Supporting *Ch. Siemes*, Gewinnabschöpfung bei Zwangskommerzialisierung der Persönlichkeit durch die Presse, AcP 201 (2001) 214 ff. with further details.
[58] *Jansen/Rademacher* (fn. 39) no. 12 ff. Differing *Behr*, 78 Chicago-Kent Law Review 2003, 136 ff., 146.
[59] In the same sense see *Behr*, 78 Chicago-Kent Law Review 2003, 139 ff., 146.
[60] *Askeland* (fn. 40) no. 33.

Under *Austrian* law, the extent of compensation depends on the degree of fault (§ 1324 ABGB): If the injurer acted with slight negligence, he has to pay only the "eigentliche Schadloshaltung", which means the "actual loss", but neither lost profits nor non-pecuniary damages. G. Wagner[61] feels that in the end this provision gives an example of punitive damages as the extent of damages depends on the gravity of the wrongdoer's fault. However, this conclusion is wrong as on the basis of § 1324 ABGB, the torfeasor never has to pay more than the damage suffered by the victim and therefore damages are always purely compensatory: the tortfeasor only has to pay less than full compensation in the case of slight negligence. Consequently, the influence of the degree of fault cannot be interpreted as a hidden acceptance of punitive damages. 36

C. Open Support

Punitive damages are openly supported especially in the area of immaterial property:[62] there exists a widespread acceptance of a claim for double the amount of a licence fee in the case of a violation of immaterial property rights,[63] which could be understood in substance as a claim for punitive damages. 37

D. Punitive Damages in Tort Reform Proposals and European Tort Law Principles

Considering the different points of views, not only in common law countries and in continental Europe but also in individual continental legal systems, it seems unsurprising that the drafts of future regulations in Europe also show divided opinions: On the one hand, the *Principles of European Tort Law* stress in art. 10.101 that the aim of damages is to compensate and to prevent harm. By this the European Group on Tort Law wanted to make clear that the Principles do not allow punitive damages at all because these are apparently always out of proportion to the actual loss of the victim.[64] The *Principles of the Study Group on a European Civil Code*, the *Swiss* and the *Austrian* draft[65] tort reform provisions also do not accept punitive damages. 38

[61] *G. Wagner*, Neue Perspektiven im Schadensersatzrecht – Kommerzialisierung, Strafschadensersatz, Kollektivschaden, Gutachten A zum 66. Deutschen Juristentag (2006) 69. Cf. also *Ebert* (fn. 32) 112 ff., 139 ff., although according to her definition (p. 8) "penal" sanctions are only those which go beyond compensation of the damage suffered by the victim.

[62] For further details, see *T. Dreier*, Kompensation und Prävention. Rechtsfolgen unerlaubter Handlung im Bürgerlichen, Immaterialgüter- und Wettbewerbsrecht (2002) 60 ff. Cf. also *P. Fort*, Strafelemente im deutschen, amerikanischen und österreichischen Schadensersatzrecht unter besonderer Berücksichtigung des gewerblichen Rechtsschutzes und Urheberrechts (2001), who is in favour of punitive damages in the area of immaterial property law.

[63] See *Behr*, 78 Chicago-Kent Law Review 2003, 137 ff.; *Dreier* (fn. 62) 293 ff.

[64] Cf. *U. Magnus* in: European Group on Tort Law, Principles of European Tort Law (2005) art. 10.101 no. 4.

[65] See § 1292 section 1 of the Austrian draft on a new liability. See also *H. Koziol*, Grundgedanken, Grundnorm, Schaden und geschützte Interessen, in: I. Griss/G. Kathrein/H. Koziol (eds.), Entwurf eines neuen österreichischen Schadenersatzrechts (2006) 32.

39 On the other hand, the new draft in one prominent country – it is not astonishing that this is *France* – goes in the opposite direction to the other continental legal systems and follows English law in providing for punitive damages.[66] Art. 1371 reads: "One whose fault is manifestly premeditated, particularly a fault whose purpose is monetary gain, may be ordered to pay punitive damages besides compensatory damages. The judge may direct a part of such damages to the public treasury. The judge must provide specific reasons for ordering such punitive damages and must clearly distinguish their amount from that of other damages awarded to the victim. Punitive damages may not be the subject of a contract of insurance."

40 It may also be interesting to cast a glance at the new *Israeli* draft of a Civil Code. It seems to be evidence of the influence of common law thinking that section 462 provides for a claim for punitive or exemplary damages:[67] "The court may award to an injured person damages which are not damage-related, provided it finds that the breach was malicious."

41 In academic circles, one can observe that quite a number of continental European scholars are in favour of punitive damages, although most of them prefer a more restrictive system than the American one.[68]

IV. The European Union

42 EU law is inconsistent in reflecting the contrast between the common law and continental civil law in Europe.[69] As B.A. Koch explains, the ambivalent attitude of the EU towards punitive damages is exemplified in various pieces of legislative drafting including the Rome II Regulation[70] and the carefree use of boiler-plate language with phrases such as "effective, proportionate and dissuasive" by the ECJ and in legislative provisions designed to express the scope of the sanctions foreseen by EU law.[71] However, Koch rightly concludes that the ultimate goal of the ECJ and EU legislators is not to impose punitive damages on Member States against their will but to sanction deviations from Community laws in a manner which ensures that compensation is adequate in relation to damage.[72] Further, the effect of ECJ cases such as *Brasserie du*

[66] Cf. *G. Viney*, Le droit de la responsabilité dans l'avant-projet Catala, in: B. Winiger, La responsabilité civile européenne de demain (2008) 149 ff.

[67] See *H. Koziol*, Changes in Israeli Tort Law: A Continental European Perspective, in: K. Siehr/R. Zimmermann (eds.), The Draft Civil Code for Israel in Comparative Perspective (2008) 142 ff.

[68] Cf. *W.H. van Boom*, Efficacious Enforcement in Contract and Tort (2006) 35 ff.; *Ebert* (fn. 32); *P. Hachem*, Prävention und Punitive Damages, in: S. Wolf/M. Mona/M. Hürzeler, Prävention im Recht (2008) 197; *A. Kletecka*, Punitive damages – Der vergessene Reformpunkt? ÖJZ 2008, 785; *Kocholl* (fn. 32); *Müller* (fn. 32) 360 ff.; *Schlobach* (fn. 32); *J.M. Schubert*, Punitive Damages – Das englische Recht als Vorbild für das deutsche Schadensrecht? Juristische Rundschau 2008, 138; *Sonntag* (fn. 32); *Wagner* (fn. 61) 68 ff.

[69] The inconsistency is rightly pointed out by G. Wagner, among others: *Wagner* (fn. 61) 71.

[70] *B.A. Koch*, Punitive Damages in European Law (contained in this publication) no. 4–13.

[71] Ibid. no. 14–27.

[72] In the same sense, see *K. Oliphant*, The Nature and Assessment of Damages, no. 11/8, 26 and 64 in: H. Koziol/R. Schulze (eds.), Tort Law of the European Community (2008) 244, 254 and 271.

Pêcheur and *Factortame*[73] and more recently, *Manfredi*[74] in stating that punitive damages may effectively be ordered by a court applying Community law if the latter requires indemnification to be paid in line with the legal system of the Member States is not to covertly incorporate punitive damages into the laws of the various Member States. Rather, the non-compensatory element of the overall award continues to be a purely national peculiarity respected at European level.[75] Finally, Koch highlights a further illustration of the EU's ambivalent attitude towards punitive damages. This comes in the form of draft proposals such as the European Commission's Green Paper on damages actions for breach of the EC antitrust rules. However as he correctly concludes, such attempts hardly ever survive the drafting process.[76]

V. Shifting From Punitive to Preventative Damages

43 To say that punitive damages are plagued with shortcomings is no understatement: the case against them is considered below. In a bid to avoid most of the arguments directed at punitive damages, Wagner makes the interesting proposal of accepting "Präventivschadenersatz" (preventive damages) which do not serve the aim of punishment but of prevention.[77] This proposition bears some resemblance to Dobbs' preference for the deterrent as opposed to the punitive element of such damages. Dobbs proposes that extra compensatory damages be triggered when it is shown that deterrence is needed.[78] The measure of such damages should be taken by assessing the amount necessary to deter, not the amount necessary to inflict justly deserved punishment. In Dobbs' opinion, for torts committed in the course of a profit-motivated activity, the deterrence measure should usually be either the profit or gain which the defendant derives from the activity or the plaintiff's reasonable litigation costs, including a reasonable attorney fee. As a result, "punitive damages" would still be extra compensatory, but no longer punitive.

44 According to Wagner, preventive damages have to be awarded if the defendant committed the infringement with the intent of gaining a profit that exceeds the damages he may have to pay and if there is a chance that the claim for damages would be insufficiently enforced. In placing particular emphasis on the preventive function, Wagner's proposal is in conformity with the law and economics approach.[79]

[73] ECJ joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v Federal Republic of Germany and Reg. v Secretary of State for Transport, Ex parte Factortame Ltd. (No. 4)* [1996] ECR I-1029, no. 89–90.

[74] ECJ joined cases C-295/04 – C-298/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

[75] *Koch* (fn. 70) no. 28–32.

[76] Ibid. no. 33–37.

[77] *Wagner* (fn. 61) 77 ff.; *G. Wagner*, Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe? AcP 206 (2006) 471 ff. Cf. also *van Boom* (fn. 68) 35 ff.

[78] In a similar sense see: *G. Wagner*, Schadensersatz – Zwecke, Inhalte, Grenzen, in: E. Lorenz (ed.), Karlsruher Forum 2006 (2006) 18 ff. for the position under German law.

[79] See *L.T. Visscher*, Economic Analysis of Punitive Damages (contained in this publication) no. 37 ff.

45 Even at first glance this rescue operation does not seem very convincing as "preventive damages" in the case of insufficient enforcement of damages claims cause the same problems as punitive damages: Why should the claimant receive damages for the loss suffered by others who do not – for various reasons – claim their damages? When will there be certainty that other claimants will not lodge a claim? Can preventive damages only be awarded after the others' claims are statute barred and how can a judge know when this will be?

46 Further, it is true that theoretically there may be a difference if the judge has to calculate damages by taking regard of the need to prevent similar misconduct instead of punishment. However, one has to bear in mind that penalties do not always serve the aim of retribution alone but also serve the aim of prevention.[80] As these two aims cannot be clearly separated, ultimately there will in most cases exist almost no difference if the judge were to take regard of only the preventive aim. In connection to this it has to be pointed out that in the U.S. today, punitive damages have expanded to ensure what Sebok terms "efficient deterrence"[81] and therefore also aim at prevention.

47 This leads to the decisive, fundamental objection to Wagner's theory: Prevention is not the sole aim of tort law and therefore it is unable, on its own, to justify the obligation of a tortfeasor to pay damages. Nor does it justify the ability for one person to demand damages from another person. Prevention is not even the main aim of tort law: rather, the primary aim is the "Ausgleichsgedanke" (the idea of compensation).[82] This will be discussed in more detail below (no. 66 ff.).

48 Further, tort law would not be in a position to reach the aim of prevention[83] because if prevention were the decisive aim of tort law, it would be unreasonable to require the occurrence of a loss in order to establish liability. Rather, the defendant's misbehaviour alone should warrant an award of damages regardless of whether the claimant suffered any loss. Therefore, the mere attempt of a tortious act or acts preparatory to the commission of such an act[84] would have to be sufficient to trigger an award of punitive damages. It also seems inconsistent, on the one hand, to require the occurrence of damage without limiting punitive damages to the extent of the damage sustained and, on the other hand, to turn down a claim for punitive damages if no damage occurred. To maintain that prevention is the predominant aim of tort law, which by itself is sufficient to justify damages, would therefore in the end not only be a violation of the recognised principles of tort law and its fundamental ideas but be inconsistent

[80] See *Bydlinski* "System und Prinzipien" (fn. 44) 190 ff; *H. Koziol*, Österreichisches Haftpflichtrecht I[3] (1997) no.1/15 and 17.
[81] *Sebok* (fn. 7) no. 20 ff.
[82] See *C. Schäfer*, Strafe und Prävention im bürgerlichen Recht, AcP 202 (2002) 399 ff., 414 ff.
[83] Cf. *E. Deutsch*, Fahrlässigkeit und erforderliche Sorgfalt (2nd ed. 1995) 83; *H.J. Mertens*, Der Begriff des Vermögensschadens im bürgerlichen Recht (1967) 93 ff.
[84] The Law Commission for England and Wales has taken regard of this, cf. Aggravated, Exemplary and Restitutionary Damages, Law com. No. 247 (1997) 58.

in itself. The idea of prevention can, as a result, only be of influence within the borderlines of the fundamental idea of tort law, which is compensation for damage suffered by the claimant.

That prevention is not the decisive or primary aim of tort law in civil law countries is also demonstrated by the rules regarding wrongful death. In cases where the right to life, the highest-ranking right, has been infringed there may be no claim for damages at all if the victim died shortly afterwards, did not suffer pain, did not need medical attention and further, if no relatives exist.[85] This also shows that tort law is not primarily designed for prevention and that the opposite contention does not at all comply with rules on tort law. The deterrent function inherent in punitive damages in themselves is also questionable in wrongful death scenarios considering the restrictions which apply to such damages. Although conduct resulting in death especially warrants deterrence, under English law at least, punitive damages cannot be awarded where the victim dies – an astonishing inconsistency of the rules on punitive damages.[86] 49

Wagner's further argument in favour of preventive damages is not convincing either: He points out that, according to § 339 ff. German BGB – and this is also true in the case of other jurisdictions e.g. Austria, § 1336 ABGB – parties are allowed to agree on the obligation to pay a "Vertragsstrafe" (contractual penalty) which has a preventive function. That said, this discretion is no argument at all for supporting the idea that tort law should provide preventive damages: An agreement between parties to include a contractual penalty is the product of contractual freedom:[87] on the other hand, a legislator has to issue rules which are reasonable and – in private law – take regard of the interest of both parties. To draw a parallel: of course, everyone is allowed to donate € 10,000 to his or her friend or anyone they please but it would be highly problematic if the legislator were to provide that everyone is obliged to do so. 50

By all this, I do not argue that tort law has no preventive aim. I am convinced – as Austrian lawyers have been in the past centuries[88] – that tort law has a preventive effect.[89] I only wish to stress that this aim is secondary in tort law and that it can be taken into account solely within the scope of tort's main aim of compensation. This means that under tort law a victim's claim cannot go beyond his or her loss. Further, I am not of the opinion that remedies with pure *preventive* 51

[85] See *H. Koziol*, Wrongful Death – Basic Questions, 30 ff.; *C. Wendehorst*, Wrongful Death and Compensation for Pecuniary Loss, 36 ff.; *W.V.H.* Rogers, Death and Non-Pecuniary Loss, 53 ff.; all in: H. Koziol/B.C. Steininger (eds.), European Tort Law 2007 (2008).

[86] See s.1(2)(a) of the Law Reform (Miscellaneous Provisions) Act 1934; see also *Wilcox* (fn. 28) no. 98 ff.

[87] See *J.S. Borghetti* (fn. 33) no. 8; and *A. Menyhárd* (fn. 37) no. 22. Cf. *Ebert* (fn. 32) 253 ff.

[88] See *Koziol* (fn. 80) no. 1/15 with further details.

[89] As far as that goes, I fully agree with *Wagner*, AcP 206 (2006) 451 ff. Cf. also *W.H. van Boom*, Compensating and Preventing Damage: Is there any Future Left for Tort Law? Essays in Honour of B. Dufwa I (2006) 287 ff.; *H. Löwe*, Der Gedanke der Prävention im deutschen Schadensersatzrecht (2000) 57 ff.

aims are prohibited under private law.[90] Of course not: as the rules on the application of an injunction show, private law accepts this aim. I only reject the dishonest way in which the departure from tort law in continental European legal systems is disguised[91] and the abuse of tort law against the rules of historical interpretation for a totally different aim to that which it was designed for. In particular, such abuse is perpetrated by hiding the real problems and consequently running the risk of suggesting and accepting solutions which violate the fundamental ideas of tort law, of private law and even of the whole legal system. It has to be emphasised that punitive or preventive damages are different remedies from those provided by tort law and that creating such remedies which are unknown to civil law need special justification. Moreover, such remedies must be accepted only if they comply with the whole legal system and if the legal systems indicate that it accepts such remedies.

52 My endeavour to clearly draw a borderline between tort law, aiming at compensation of the victim or better still at shifting the loss from the victim to another person, and remedies which have a primary preventive aim is not based only on aesthetical or terminological or systematic reasons but on the substantial realisation that different remedies have different prerequisites.[92] For example, the application for an injunction or for a claim directed towards skimming off unjust enrichment needs less weighty factors than a claim under tort law for the compensation of a loss. In particular, no fault is required to establish the action. The reason is that in the two examples above, the burden for the defendant is less onerous than in the case of the compensation of a loss. Therefore, it is dogmatically inadmissible to modify remedies without thoroughly discussing whether the prerequisites for redress should remain the same. The same is true if two remedies are at stake and one of them aims at the compensation of a victim's loss and the other at punishing an offender or at general and special prevention. In weighing all the factors, the victim's interest in the compensation of his/her loss is of course of considerable importance. If punitive or preventive damages are at stake, this reason is of no importance at all as far as the damages go beyond the victim's loss. It is not at all self-evident that the public interest in punishment or prevention are of the same weight and that therefore, the claim has to be established under the same prerequisites. It is further anything but convincing that the same strong reasons which apply in the case of a claim for compensation of loss should also apply to a victim's claim for payments far beyond his loss and thus for a windfall. These difficulties in justifying a victim's claims for punitive or preventive damages are disguised by those who change the aims of tort law and want to establish quite different claims than those for compensation under tort law. As there is without doubt a need to compensate a victim's loss or to shift a victim's loss to another person one should accept that tort law covers this need and should

[90] From that point of view, I am again in consent with *Wagner*, AcP 206 (2006) 363 ff.
[91] For a more open system, see also *Ebert* (fn. 32) 520 ff.
[92] See *H. Koziol*, Gedanken zum privatrechtlichen System des Rechtsgüterschutzes, in: Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag (2007) 631 ff., 654 ff.

try to solve this problem as reasonably as possible. One should not abuse tort law by introducing other aims which, although sensible, are designed for a different branch of law. It is in no way useful to mix up different fields of law because ultimately the rules will no longer be suitable for solving even one of the established aims in a perfect way.

Last but not least, notwithstanding the possibility for "preventive damages" to siphon off gains netted by a tortfeasor's wrongful activity, the rules of unjust enrichment seem more appropriate than tort law where the gain and not the damage is at stake. It is an unreasonable violation of tort law to use it as a basis for gain oriented claims. Again, one should openly say that this is a different claim or a claim somewhere in between tort law and the law on unjust enrichment. There is a rather strange tendency, in these times, to neglect differences, to put the same label on different things and by doing so to feel happy that the world is simple and everything is in such harmony. Of course, the rules on unjust enrichment cannot be helpful in legal systems like France, because under French law the claimant may get only the lower amount either of his loss or of the enriched party's gain. Unjust enrichment therefore can be of no help for the plaintiff who seeks to be awarded more than he could get under the réparation intégrale principle.[93] However, even under such legal systems it should be easier to overcome the restrictions of the law on unjust enrichment than to abuse tort law because tort law is directed at the victim's damage and not at the defendant's gain, but the law of unjust enrichment is directed at the defendant's gain. 53

VI. Arguments in Favour of Punitive Damages and Counterarguments

A. The Need to Supplement Criminal Law with Private Law

One argument in favour of punitive damages is, as the English Law Commission pointed out, that criminal law and administrative law are limited in their sphere of activity and need supplementation by private law. Punitive damages spur every single person to push through the law and by that, public welfare is supported.[94] Wagner argues the same.[95] Further it is true, as Wagner points out, that historically tort law and criminal law are two of a kind and that the strict separation is only the fruit of the modern age.[96] However, it is decisive that the European legislators designed their Civil Codes on the basis of these modern ideas,[97] and lawyers have to take regard of this in accordance with the rules of interpretation. Wagner's remark could only provide an argument in favour of accepting punitive aims as part of private law if the developments of legal science are unreasonable or at least the separation between tort law and criminal 54

[93] See *Borghetti* (fn. 33) fn. 16, but cf. also fn. 13 and 14.
[94] The Law Commission for England and Wales, Aggravated, Examplary and Restitutionary Damages, Law Com. No. 247 (1997) No. 5.5.
[95] *Wagner* (fn. 61) 79 ff.
[96] Ibid. at 73.
[97] Cf. *Ebert* (fn. 32) 8 ff.

law seems unreasonable. This cannot however be said: According to modern opinions, private law has the function of settling legal disputes between private persons and it does not have the authority to punish beings of equal rank.[98] To punish is the authority only of the state. Therefore, the separation between tort law and criminal law is reasonable at its core and these two areas should not be merged: as I. Englard[99] points out, the joining of compensation and punishment in the litigation between private parties generates a number of problems. This also speaks out against the contention, still to be heard under common law, that the aim of punishment is a legitimate function of tort law.[100]

B. The Need for Sufficient Protection and Prevention

55 In continental Europe, one very often hears the argument that tort law even in combination with the law of unjust enrichment is not able to provide sufficient protection for legally accepted interests and to develop the necessary deterrent effect. This supposed insufficiency is pointed out especially in the area of immaterial property[101] and complaints have already had quite some success: the acceptance of a claim for double the amount of a licence fee as punitive damages in the case of a violation of immaterial property rights.[102]

56 One has to question, however, why it should not be possible to extend criminal and administrative law as far as there is a need and whether this approach would not be more reasonable than to burden private law with a function which has been separated from it for centuries. Further, the apprehension that punishment, which criminal law does not feel necessary to impose, comes back in through the private law back door without any restrictions known to criminal law does not seem far fetched as in the end criminal law is eluded in a highly problematic way.

57 As to the argument that the public sector is not in a position to find out all the violations of, for example, immaterial property or of fair competition: why not involve the victims in the criminal or administrative procedure? Those who want to shift sufficient protection and prevention to the area of private law expect the victims to be involved: why not encourage them to litigate in the manner that fits into the system? For example, the possibilities of extending private criminal actions are worth considering. Of course, there has to be some incentive for the victim to undertake all the troubles and expenses of so doing: therefore, part of the fine has to be used to cover his or her expenses as well as the other inconveniences and to pay him a sort of fee for his activity in the public interest.

[98] *Bydlinski* (fn. 44) 77 ff.; *I. Englard*, The Philosophy of Tort Law (1993) 147.
[99] *Englard* (fn. 98) 145.
[100] *Broome v Casell & Co. Ltd.* [1972] AC 1027, 1114, per Lord Wilberforce.
[101] For further details see *Dreier* (fn. 62) 60 ff. Cf. also *Fort* (fn. 62), who is in favour of punitive damages in the area of immaterial property.
[102] See *Behr*, 78 Chicago-Kent Law Review 2003, 137 ff.; *Dreier* (fn. 62) 293 ff.

Even if, in spite of all these possibilities, there should still be an irresistible need to involve private law in the bid to ensure sufficient protection and to deter unwanted behaviour, one has to carefully judge whether punitive damages under tort law are the appropriate tool. In particular, it has to be considered whether in some cases the rules on unjust enrichment, with fewer requirements than tort law, would – at least partly – be a better basis for redress. It seems more reasonable to adapt the law of unjust enrichment, instead of burdening tort law, whose primary aim is compensation, with an outside function, namely siphoning off the defendant's gain through punitive damages. Further, the even stricter "Gewinnabschöpfung" (skimming off profits) is brought into play more and more often.[103] 58

C. The Claimant's Windfall Justified

It is said that by receiving punitive damages the claimant's windfall has to be accepted as being in the public interest.[104] This argument would be convincing only if there really is no other way to support these interests and if the law on punitive damages is designed so that fundamental ideas of private law are violated as little as possible. 59

The difficulties associated with the windfall issue are somehow mitigated by Colby's private harm theory. However, it still leaves some unresolved issues. The position under English law today is that punitive damages are only awarded if the defendant has not already been punished by criminal or other sanctions. If punitive damages are designed to punish the defendant only for the private wrongs done to the individual victim, it seems problematic and inequitable that victims may not receive the "fine" or "windfall" if a criminal action precedes the tort action. 60

Further, the main objection to punitive damages is not refuted by the theory: in the case of a criminal trial, the sanction is very often not imposed only because of a wrong committed upon society but because of the defendant's conduct in violating a private right and thus for a private wrong. Nevertheless, up until now, nobody has taken the initiative to propose, therefore, that the victim is to receive part of the money which is to be paid by the criminal where such a sum has been imposed. Even if there are strong arguments in favour of punishing the defendant for a private legal wrong, nobody has shown convincing reasons why punitive damages are given to the victim: they seem to be a stroke of luck.[105] 61

Of significant help are the ideas of Wright and Sebok as they point out the compensatory function of "punitive damages": they are compensation for the 62

[103] See *Wagner* (fn. 61) 83 ff.
[104] *P. Birks*, Civil Wrongs: A New World, Butterworth Lectures 1990–91, 83; *Wagner*, AcP 206 (2006) 470.
[105] See *Wilcox* (fn. 28) no. 76 ff.

damage caused by insult. Thus, they are no longer punitive but take over the function of aggravated damages in the English sense:[106] what is decisive is no longer whether the defendant's behaviour is punishable but whether the claimant needs compensation. As far as compensation for a loss suffered by the victim is at stake, there exists a convincing reason for awarding damages to the plaintiff. It is also very reasonable that the defendant has to compensate such damage only in the case of intention or recklessness at the very least: Causing harm negligently is not an insult and, further, in the case of the weightiest form of fault, it seems justifiable to award compensation for harm that is disregarded in cases of negligence. Of course, this idea is only able to justify punitive damages as long as they serve as compensation. This means that there has to be a relation to the compensation for immaterial loss in other cases: punitive damages have to fit in the whole system of compensation under tort law – which until recently was not the case in the U.S.A. because of the tremendous discretion given to juries.[107]

VII. Further Arguments against Punitive Damages

A. Punishment – An Alien Element in Private Law

63 The idea of punishment is outside private law as, according to its whole purpose, private law is not aimed at realising this idea.[108] This is even true for tort law, although this certainly is the part of private law for which the idea of sanction could most likely be of relevance. In the area of liability based on fault the legal consequences are attached to the violation of a duty and faulty behaviour: thus it seems obvious to draw a parallel to criminal law which is undoubtedly based on the idea of sanction. Nevertheless, under continental European civil law, punitive damages are – as mentioned before – still rejected by the predominant literature. Further, courts[109] are of the opinion that punitive damages contradict ordre public and, for example, art. 40 section 3 of the EGBGB (Einführungsgesetz zum Bürgerlichen Gesetzbuch, Introductory Act to the Civil Code) provides that claims substantially exceeding appropriate compensation cannot be enforced in Germany.[110]

64 The notion that penalties express public disapproval of certain behaviour, but are imposed on an individual speaks out against punishment under private law. Moreover, they are then awarded to an individual who neither has suffered damage to the extent of the amount given nor has a claim for unjust enrichment against the defendant. Therefore, as noted in no. 61 supra, punitive damages

[106] Cf. *B.S. Markesinis/S.F. Deakin*, Tort Law (4th ed. 1999) 726; *J. Murphy*, Street on Torts (11th ed. 2003) 579 f.
[107] See *Sebok*, 78 Chicago-Kent Law Review 2003, 163.
[108] See *Ebert* (fn. 32) 1 ff., 410 ff.; *Englard* (fn. 98) 145 ff.
[109] German Supreme Court in BGHZ 118, 312 (cf. *Behr*, 78 Chicago-Kent Law Review 2003, 155 ff.); Greek Areios Pagos (Full Bench) 17/1999, NoB 2000. 461–464; Italian Cass. 19 January 2007, no. 1183, GI, 2007, 12, 2724.
[110] Vgl. MüKo/*Junker*, BGB, 4. Aufl. 2006, art. 40 EGBGB no. 214; *Schäfer*, AcP 202 (2002) 429 f.

seem to be a stroke of luck: a windfall for the claimant. Franz Bydlinski has convincingly explained that ordering such punishment is against the structural principle that, under private law, legal consequences need mutual justification.[111] He points out that in the area of private law a rule always concerns the relationship between two or more legal subjects. Therefore, laying down a civil rule always has an effect on persons defined by the statute. Further, every allocation of rights, benefits or chances to certain persons means the imposition of obligations, burdens or risks on other persons. In his opinion, not only should it be justified why one person is conceded a favourable position and a disadvantageous legal consequence is imposed on another person, but also a further justification must be given to explain why this arrangement is reasonable in the relationship between the two persons. In other words: Why one person obtains rights against just one particular person and vice versa why the person is under an obligation just to the obligee has to be well-founded. Therefore, under private law the principle of mutual justification of legal consequences applies. One-sided arguments which only take account of one legal subject – even if very strong – are in no position to justify a private law rule.

Applying this principle to our subject for discussion, we reach the following conclusion: Even if there are very strong arguments for imposing a sanction on the defendant, these arguments alone cannot justify awarding the plaintiff an advantage, although he has suffered no corresponding damage nor has the defendant been unjustly enriched at the claimant's expense.[112] As there is no reason at all to award such payments to the claimant, anyone else seems equally entitled to ask for them. Therefore, the principle of equal treatment would be violated if the law awards such payments solely to the claimant and not to any other person who has been endangered but did not suffer any harm or even to everybody. The same arguments speak out against accepting such claims because of the idea of prevention.[113] If there are only arguments for punishing or preventing one party but not for a claim by the other party, then criminal law is appropriate[114] or – if private law should be applicable – the payment made by the wrongdoer has to flow into a fund serving a public or social purpose. 65

B. The Main Aim of Tort Law – Compensation

A comparative overview shows that under European tort law systems, the primary aim of the law of damages is to compensate the injured persons for the 66

[111] *Bydlinski* (fn. 44) 92 ff.; *Bydlinski*, AcP 204 (2004) 341 ff. In the same sense *C.W. Canaris*, Grundstrukturen des deutschen Deliktsrechts, Versicherungsrecht (VersR) 2005, 579; *Koziol*, (fn. 65) 32; *H.P. Walter*, Recht und Rechtfertigung. Zur Problematik einseitigen Privatrechts, Festschrift für Peter Gauch (2004) 302 ff.

[112] In the same sense *B.S. Markesinis/S.F. Deakin*, Tort Law (3rd ed. 1994) 691; cf. also *G. Gounalakis*, Persönlichkeitsschutz und Geldersatz, Archiv für Presserecht: Zeitschrift für Medien- und Kommunikationsrecht (AfP) 1998, 17.

[113] In favour of such an idea – although cautiously – *Dreier* (fn. 62) 500 ff.

[114] In the same sense, see *Walter* (fn. 111) 305. It has to be pointed out that Austrian law frequently provides administrative penalties and, therefore, public prosecutors and criminal courts are not involved.

loss they have suffered.[115] This was the basic idea of the Civil Code drafters. For example, the German BGB expresses this clearly in § 249 BGB[116] and therefore a claim for damages always requires that the claimant suffered a loss. Damages – according to the rulings on tort law – have to correspond to the loss suffered by the victim. According to the rules on interpretation, in Germany and in all countries with similar provisions, these ideas that were developed by historical lawmakers have to be taken into consideration.[117] According to this unanimous opinion, the Principles of European Tort Law declare in art. 1:101 and 10:101 that tort law aims to compensate the victim, "that is to say, to restore him so far as money can, to the position he would have been in if the wrong complained of had not been committed."[118] The same is true for the draft "Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab. Dam.)" of the Study Group on a European Civil Code which mentions in art. 1:101 that a person who suffers damage has – under certain prerequisites – a right to reparation which is defined in art. 6:101: "Reparation is to reinstate the person suffering the legally relevant damage in the position that person would have been in had the legally relevant damage not occurred."

67 In the commentary to the Principles of European Tort Law, it is explicitly pointed out that, according to these provisions, the Principles are no basis for punitive damages or other payments which are not in correspondence with harm suffered by the victim.[119] The same is true for all tort law systems in civil law countries as long as they accept compensation as the primary aim. Further, it has to be stressed that it is inadmissible for courts and scholars to change the main aim of tort law simply because they are of the – highly problematic – opinion that "Ausgleichsgedanke" (the idea of compensation) is useless.

68 This is indeed the view which Wagner[120] and law and economics scholars[121] hold. They argue that: tort law does not aim at the compensation of each and every damage; that the "Ausgleichsgedanke" does not say anything about the decisive question of when a victim is to receive compensation; and that tort law does not only look at the interests of the victim. Of course, all this is true but nobody expected that the idea of compensation would be able to solve the question of the precise circumstances in which a victim is entitled to make a claim. It is the same as the law of unjust enrichment which aims at skimming off gains: it is impossible to solve the problem of the cases in which the gain has to be skimmed off solely on the basis of this idea. To give such an extensive answer is neither the assignment of the "Ausgleichsgedanke" nor of the idea

[115] See *U. Magnus*, Comparative Report on the Law of Damages no. 2 and 17, in: U. Magnus (ed.), Unification of Tort Law, Damages (2001).
[116] Cf. *Ebert* (fn. 32) 411, 442.
[117] *K. Larenz*, Methodenlehre, 328 ff; *F. Bydlinski*, Methodenlehre, 449 ff.
[118] See the commentaries of *H. Koziol* and *U. Magnus* in: European Group on Tort Law, Principles of European Tort Law (2005) 19 and 151.
[119] *Koziol* (fn. 118) 19.
[120] *Wagner*, AcP 206 (2006) 453 ff.
[121] See *Visscher* (fn. 79) no. 1.

of skimming off wrongful gains. Nevertheless, both ideas express their fundamental aims and in so doing lay down fundamental principles which apply in their respective areas. As to tort law, if its main aim is to grant the victim, of course only under certain conditions, *compensation* for his/her loss, this indicates that the claim cannot, therefore exceed the loss sustained. It is precisely this idea which Wagner disregards. Further, of course tort lawyers, who are in favour of the idea of compensation, do not look only at the interest of the victim. Therefore, they do not favour the compensation of each and every victim's loss. On the contrary, they stress the idea of mutual justification and the necessity to take the interests of both sides into consideration.

69 As the victim's claim for compensation is only established if certain prerequisites are met, perhaps, therefore, it would be better not to talk of the idea of compensation ("Ausgleichsgedanke"). To some, this term seems to give the impression that only the victim's interest in getting compensation is decisive, although – of course – the interests of the tortfeasor are also of importance in solving the question whether the tortfeasor has to compensate the victim's loss. Perhaps it would be better to speak about the idea of "Schadensverlagerung" (shifting of the loss) because by this term it would be better expressed that the loss has not vanished by compensation but has only been shifted to another person and, therefore, one has to take regard of the interests of both parties.

70 Last but not least, if the fundamental idea and aim of tort law, i.e. that of compensation, were to be changed, most of the existing rules – as will be discussed below – would not fit into the new concept. By adjusting existing principles to accommodate new aims, a tort law which is in a position to serve the aim of compensation would no longer exist. This deserves serious thought considering every legal system shows that such a tort system is needed: Every legal system has to answer the question of the conditions under which a victim can claim compensation from another person for the loss they have suffered and in doing so, shift the damage to another person. This shows that punitive damages should on no account be integrated into tort law as it stands. If there should really be a need for punitive damages, a special area with special provisions should be designed.

C. Different Aims – Different Rules

71 In the preceding section, it was mentioned that tort law is designed on the basis of the idea that its main aim is compensation. Therefore, the conditions of liability, the basis of liability and the available remedies in tort law are developed to serve this idea in the best way possible. If this fundamental idea and aim were to be changed, many of the provisions would not fit into the new concept. This is particularly obvious in the area of remedies: as tort law aims at the compensation of the victim's loss the extent of the victim's claim is determined by the extent of the damage that occurred. Were punishment or prevention the main aim, the damage suffered by the victim would no longer be decisive for the amount of his/her claim. However, the same is true for the conditions and

the basis of liability. As the defendant's misbehaviour would be decisive, a claim for punitive or preventive damages would have to be established even if the misbehaviour or the threat of misbehaviour did not cause a loss (cf. no. 48). As to establishing liability, it seems obvious that strict liability, which operates even in the absence of any misbehaviour on the defendant's part, could certainly be a reasonable basis if compensation or prevention were the main aim, but not if punishment is at stake. However, even as far as liability is based on the offender's misbehaviour the different aims would be of importance for establishing liability. In laying down the prerequisites for the offender's liability, the legislator or the court has to weigh all the different interests involved. As far as compensation is at stake, the victim's interest in shifting the loss to the offender is without doubt a weighty factor. If punitive or preventive damages are at stake, this reason is of no importance at all as far as these damages go beyond the victim's loss. It is, further, far from being a matter of course that, e.g., the public interest in punishment or in general prevention is of such weight that the victim's interest in receiving compensation for the loss suffered is negligible. All these points of view indicate that establishing punitive or preventive damages necessitate different requirements than those for compensatory damages. Such necessary considerations seem to be disregarded by implanting punitive or preventive damages into the law of torts instead of designing a new sort of claim which complies with a different (main) aim or instead of fitting them into a more appropriate area of law, e.g. into criminal law.

72 Even if one preferred not to create a new sort of claim, there has to be quite some resistance to the idea of implanting the law on punitive or preventive damages into the tort law of continental civil jurisdictions. According to widespread opinion,[122] protection by criminal law is insufficient at times – and it is said to be the case especially in the area of immaterial property.[123] Nevertheless, tort law must not be reshaped in a manner which contradicts fundamental principles of private law. Rather, criminal law should be improved to the extent that it is capable of complying with all reasonable demands of sanction and prevention. One step in this direction, e.g., seems to be the tendency that not only natural persons but also corporations can be punished: by that, some of the loopholes in sufficient protection can be filled.[124] It has to be pointed out that in respect of corporations, criminal law is more suited to serve the function of prevention because under tort law punitive damages can be covered – at least under some legal systems[125] – by liability insurance and thus the punishment would be shifted to the community of all insured parties[126] whereas penalties under criminal law are not insurable.

[122] *Sonntag* (fn. 32) 223 ff.; *Wagner* (fn. 61) 98; *Mörsdorf-Schulte* (fn. 32) 71 ff.; *Koziol* (fn. 92) 657 f.

[123] See *Dreier* (fn. 62) 523 ff.

[124] This is admitted by *Dreier* (fn. 62) 527 ff.

[125] See, for example, *Wilcox* (fn. 28) no. 110 ff.; according to the French draft (art. 1371) punitive damages cannot be covered by liability insurance. For more details see *I. Ebert*, Punitive Damages and Liability Insurance (contained in this publication) no. 7 ff.

[126] This is rightly pointed out by *Wagner* (fn. 61) 77; see also *Ebert* (fn. 125) no. 5 ff.

D. Problems Associated with Multiple Victims

73 Punitive damages cause unreasonable consequences in cases of more than one victim. For example: A claimant seeks compensation and punitive damages after being severely poisoned by a can of meat, its rotten contents undetected, owing to the recklessness of the defendant company. The claimant is awarded punitive damages and the amount calculated by the court takes regard of the entrepreneur's outrageous conduct. Shortly afterwards another victim claims damages. If the defendant has been punished to an adequate extent by the punitive damages the first claimant received, it would be highly unreasonable to punish him again and again every time a new victim shows up. Colby calls this, "total harm" punitive damages: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment.[127]

74 On the other hand, it seems unjust that only the first victim, who physically recovered more quickly than the others and thus had the opportunity to lodge a claim earlier would, at the stroke of luck, receive some hundred thousand or million dollars in addition to compensation for his damage and the other, even more seriously injured, victims end up with nothing. If the first claimant receives a massive windfall, as was the case initially in *BMW of North America, Inc. v Gore*, this would encourage claimants, including ones with spurious claims, to race to court. As the courts do not know how many victims will choose to litigate, they face a formidable hurdle in adjudicating the appropriate amount of punitive damages for each victim. Hence, in the English case of *AB v South West Water Services Ltd.*[128] where potential causes of action had not yet accrued, the Court of Appeal considered, inter alia, that the large number of plaintiffs was an aspect of the case which made punitive damages inappropriate.

75 In his article, Sebok[129] summarises the effect of the recent U.S. Supreme Court decision of *Philip Morris U.S.A. v Williams*,[130] which addressed assessment and apportionment difficulties in multiple claimant scenarios. It was held there that the evidence of the harm done to other victims can be used to determine the reprehensibility of the defendant's conduct. However, the jury cannot take into account wrongful conduct that affected parties other than the claimant

[127] *Colby*, 87 Minnesota Law Review 2003, 583.

[128] [1993] Queen's Bench (QB) 507, 527, "Unless all their claims are quantified by the court at the same time, how is the court to fix and apportion the punitive element of the damages? Should the court fix a global sum of £x and divide it by 180, equally among the plaintiffs? Or should it be divided according to the gravity of the personal injury suffered? Some plaintiffs may have been affected by the alleged oppressive, arbitrary, arrogant and high handed behaviour, others not. If the assessment is made separately at different times for different plaintiffs, how is the court to know that the overall punishment is appropriate?" per Stuart-Smith L.J.

[129] *A.J. Sebok*, The Supreme Court's Decision to Overturn a $ 79.5 [sic] Punitive Damages Verdict Against Philip Morris: A Big Win, But One With Implications That May Trouble Corporate America, http://writ.news.findlaw.com/sebok/20070227.html.

[130] No. 05-1256. Argued October 31, 2006–Decided February 20, 2007. See decision of March 31, 2009: No. 07-126.

in assessing the amount of punitive damages. Put succinctly, in an individual action, the defendant can only be punished for his harm to that claimant even where other victims exist. As Sebok notes, while this was the majority's opinion, Justice Stevens, the author of *BMW of North America, Inc. v Gore* dissented and his opinion should not be overlooked. Justice Stevens took the view that in awarding punitive damages, juries could take into account wrongful conduct that affected parties other than the plaintiff. It remains to be seen whether the majority decision in *Philip Morris* will stand the test of time. Indeed the objection to this approach is that the defendant's wrongfulness is weightier where more people have been affected by it and an individual-specific award of punitive damages may not punish the defendant to the full extent necessary where other claims are not pursued.

E. Punitive Damages Violate Principles of Penalty Law

76 It has to be pointed out again that awarding punitive damages under tort law is contrary to the separation of criminal law and private law[131] which is thought to be an achievement of modern legal culture. The relapse into the archaic mixture of punishment and compensation also violates fundamental principles of modern penalty law,[132] above all the principle that the punishment should be laid down in the law (nulla poena sine lege):[133] this principle also applies in respect of the measure of the sentence[134] and of criminal procedural safeguards. Therefore, the Law Commission for England and Wales, in referring to the similar "rule of law", rightly points out that: "The 'rule of law' principle of legal certainty dictates that the criminalisation of conduct is in general properly only the function of the legislator in new cases: it further dictates that there is a moral duty on legislators to ensure that it is clear what conduct will give rise to sanctions and to the deprivation of liberty. Broadly-phrased judicial discretions to award exemplary damages ignore such considerations."[135]

[131] For more details of the history of this separation see *R. Zimmermann*, The Law of Obligations (1996) 914 ff., 953 ff.

[132] Cf. *Dobbs*, 40 Alabama Law Review 1988/1989, 837; *Englard* (fn. 98) 145 ff.; *Markesinis/Deakin* (fn. 112) 690; *G. Wagner* in: E. Lorenz (ed.), Karlsruher Forum 2006, 17.

[133] This principle is enshrined in art. 7. European Convention on Human Rights and art. 23 and 24 Rome Statute of the International Criminal Court; http://www.un.org/law/icc/statute/romefra.htm.

[134] *van Boom* (fn. 68) 36 takes regard of this by limiting "incentive damages" to clear cut statutory duties and by providing limited or calculable amounts.

[135] The Law Commission for England and Wales, Aggravated, Exemplary and Restitutionary Damages Law Com. No. 247 (1997) 99. Also see *Markesinis/Deakin* (fn. 106) 729: "…The true objections, therefore, must be sought elsewhere and Lord Reid's judgment provides some good clues. For example, by allowing punitive awards we may be violating such sacred principles as the nullum crimen sine lege rule, especially since such punitive awards can be made for any kind of conduct which can be described as 'high-handed', 'oppressive', or 'malicious'…"

VIII. Additional Observations

A. Differences between European and U.S. Legal Systems

77 It is astonishing that continental European lawyers seem to feel much less need for punitive damages than their colleagues in the U.S.A. The reasons for this phenomenon may be some differences between European civil law systems and the American legal systems: I think it interesting to cast a quick glance at this speculation. It seems possible that, under U.S. law, punishment under *criminal law* is of less importance than in continental Europe:[136] this may be even true to a higher degree for the area of *administrative penalty law*. Thus, there may be a greater need for punitive damages in the U.S.A. than in Europe.

78 One of the main goals and functions of punitive damages under U.S. legal systems seems to be deterrence[137] and as economic gain indicates, deterrence is required. Dobbs recommends that "punitive" damages be measured by the direct and indirect profits the defendant has earned or will earn from the misconduct.[138] Under most of the European legal systems, the law of *unjust enrichment*[139] would be to some extent sufficient to siphon off such gains: therefore, tort law is not as strongly required to reach such a goal. To provide claims under the law of unjust enrichment is even more effective as fault is not a prerequisite.[140] Admittedly however, as a rule, indirect economic gains would not be seized by such claims.

79 If the law of unjust enrichment proves inadequate, it has to be improved. Further, the instrument of "Gewinnabschöpfung" could be developed as a mixture between tort law and the law of unjust enrichment:[141] in the case of a wrongful violation of a protected interest, the victim has a claim which would result in the profit which the defendant gained by his wrongful behaviour being skimmed off. However, the defendant does not have to hand over his whole profit: of course, the defendant's expenses and operating costs have to be deducted, but further only that part of the profits attributable to the claimant's assets are recoverable: so the gain is split.

80 Further, according to the "American rule" and contrary to continental European law, the plaintiff does not receive restitution of the legal costs even if he wins his case. On top of that in many cases, he has to hand over quite a portion of what he wins in the lawsuit to his attorney – up to 40%. Therefore, he

[136] Cf. *Sonntag* (fn. 32) 348 ff.
[137] *Dobbs*, 40 Alabama Law Review 1988/1989, 844 f.
[138] *Dobbs*, 40 Alabama Law Review 1988/1989, 863 ff.
[139] Cf. *P. Schlechtriem*, Restitution und Bereicherungsausgleich in Europa I (2000) II (2001).
[140] According to Austrian law, the defendant has to pay the highest price in cases where he should have known that he was acting in violation of another's right; see § 417 ABGB (Austrian Civil Code).
[141] Cf. *H. Koziol*, Gewinnherausgabe bei schuldhafter Verletzung geschützter Güter, in: Festschrift für Dieter Medicus (2009) (forthcoming). Cf. also *T. Helms*, Gewinnherausgabe als haftungsrechtliches Problem (2007).

needs some incentive to raise a claim and punitive damages are supposed to give such an incentive.[142] Dobbs even proposes that punitive damages should no longer be punitive but that their main goal should be to cover the victim's litigation costs.[143]

81 To some extent punitive damages have the function of filling the loopholes of social security law in the U.S.A., e.g. in the asbestos cases.[144]

82 Last but not least, it appears that punitive damages in the U.S. are supposed to replace compensation for immaterial loss.[145] However, it seems questionable whether there is really a need to invoke punitive damages to compensate for emotional or immaterial loss.[146]

B. The Vulnerability of Immaterial Property Rights

83 In practically all the reports in this publication it is mentioned that punitive damages have been invoked, either openly or covertly to sanction the unauthorised use of immaterial property.[147] This is testament to the fact that the area of immaterial property presents a special situation as such goods are not corporeal. In consequence of their "omnipresent" nature, several people can take advantage of immaterial property at the same time while in different places. This increased vulnerability causes – it is argued – special difficulties in assessing the damage as the use of the immaterial property by the owner is not prevented by the violation of the right and the restriction of the liberty to make arrangements is very difficult to prove. For this reason, it is averred that siphoning off the profits netted by the violation of an immaterial property right does not display strong preventive effects because the defendant only has to hand over the profits gained and thus does not suffer any disadvantage. On top of this, the offender takes a rather insignificant risk of being discovered. Complaints over the insufficiency of tort law in the field of immaterial property[148] have already had quite some success: the acceptance of a claim for double the amount of a licence fee as punitive damages in the case of a violation of immaterial property rights.[149]

84 Although references regarding the vulnerability of immaterial property rights and the lack of preventive effects under tort law and the law of unjust enrichment are quite convincing, one has to point out that a very similar situation can also

[142] See *Dobbs*, 40 Alabama Law Review 1988/1989, 846 f; cf. also *Behr*, 78 Chicago-Kent Law Review 2003, 122 f; *Sonntag* (fn. 32) 345 ff.
[143] *Dobbs*, 40 Alabama Law Review 1988/1989, 856 ff., 888 ff.
[144] Cf. *Sonntag* (fn. 32) 351 ff.
[145] Ibid. at 350.
[146] Cf. *Dobbs*, 40 Alabama Law Review 1988/1989, 853 f.
[147] See, for example, *Borghetti* (fn. 33) no. 13 ff., no. 26; *Jansen/Rademacher* (fn. 39) no. 12 ff.
[148] For further details see *Dreier* (fn. 62) 60 ff. Cf. also *Fort* (fn. 62), who is in favour of punitive damages in the area of immaterial property.
[149] See *Behr*, 78 Chicago-Kent Law Review 2003, 137 ff; *Dreier* (fn. 62) 293 ff.

arise with corporeal goods. One only has to think of mass transportation: They can also be used at the same time by a great number of people. Further, if used without permission or without the payment of a fare, there will be no provable damage to the owner. Last but not least, the owner's claim for reasonable remuneration, based on the law of unjust enrichment,[150] has no preventive effect. The fare dodger has to pay only what he would have paid had he adhered to the rules initially. He further has a great chance of not being discovered.

Therefore, the idea that the offender has to pay double the amount of a reasonable remuneration cannot be restricted convincingly to immaterial property rights, but has to be extended to all those cases of unauthorised use of other people's property where a higher vulnerability exists and where the late payment of the adequate fee would not amount to a sufficient incentive to deter similar behaviour. 85

Of course, all the aforementioned arguments regarding punitive damages seem to speak against doubling the amount of the licence fee. However, I feel it is worthwhile to reconsider whether all the objections against punitive damages apply to such claims. Firstly, at stake is a strictly defined increase of damages and, therefore, one does not have to be afraid that the sanctions are uncertain and will get out of control.[151] Secondly, I see the possibility of qualifying the doubling of the licence fees not as punitive damages which are in contrast to the idea of compensation but to justify them by another idea: The difficulty of finding out and pursuing the offender as well as the enforcement of the claim typically require considerable expenses, which do not arise in the case of a properly contracted licence for use. Regularly the victim suffers loss because of the disturbance of the market by the infringement. One has to also stress that the victim meets great difficulties in proving his loss. Because of these difficulties and the lack of other reference points, the amount of expenses and loss could be equated to the licence fee. The doubling of the licence fee could thus be brought into harmony with tort law's fundamental idea of compensation and the identification with a punishment could be denied.[152] In Scarso's words, such a practice simply entails a reasonable pre-estimate of actual damage.[153] 86

IX. Conclusions

I think that first of all one should try to further develop tort law as well as the law of unjust enrichment to a degree that they meet the demands of reasonable compensation and by this also of prevention. One possibility – which has been mentioned before – is to improve the compensation of emotional loss. For example: Under U.S. law[154] punitive damages are adjudicated in cases of intent or 87

[150] As to claims under private law see *M. Stefula*, ÖJZ 2002, 825 ff. with further details.
[151] This is also pointed out by *Dreier* (fn. 62) 547.
[152] Cf. *Koziol* (fn. 92) 657 ff.
[153] *Scarso* (fn. 3) no. 35.
[154] See *Sebok* (fn. 7) no. 62 ff.

recklessness. One point of departure could be that the intentional violation of another person's private rights shows a lack of respect for such rights and can be qualified as a form of insult.[155] Therefore, compensation for the emotional harm caused by such behaviour should be awarded to the victim, but of course only to such extent as fits into the whole system of non-pecuniary damages. Further, though only to a very limited extent, providing a claim for a lump sum in cases where the proof of damage is extremely difficult seems compatible with the principles of tort law as long as the sum roughly corresponds to the damage that could possibly have occurred.

88 Even if all such measures are ill-equipped to cover all the reasonable demands of prevention I think it necessary to point out that one has to consider the fundamental ideas of private law and come to the conclusion that tort law is not the right area for inserting tools of punishment or prevention such as punitive damages. Therefore, I think the only way out is to consider other possibilities of developing systems of legal protection which are able to provide sufficient preventive effects but do not violate fundamental principles of private law. In my opinion, convinced by the arguments of Bydlinski (supra no. 64), one prerequisite of such tools filling the loopholes of legal protection is indispensable: the claimant must not receive a stroke of luck.

89 Of course, the best solution would be to develop criminal law and administrative penalty law which inherently aim at prevention as well as the respective procedural laws. This approach would include the advantage that all fundamental principles of penalty law would be observed, above all the principle that the punishment should be laid down in the law (nulla poena sine lege), also in regard to the measure of sentence.

90 Against this approach, the objection is raised that public prosecutors and criminal courts would be overloaded. I am no expert in this field but I think that the overload of the public prosecutors could be reduced by the system of private prosecution. As stimulus, one should consider granting these private prosecutors a lump sum for preparing the claim and for doing all the investigations. As to the courts, one has to bear in mind that the purpose of criminal and administrative courts is to hear cases otherwise civil courts will be overloaded.

91 If there are insurmountable hurdles under this approach, there could possibly be, to some extent, a way out which is compatible with the principles of private law. Some European legal systems permit certain associations to pursue applications for injunctions and compensation claims on the injured party's behalf.[156] In continued development of this idea, it seems possible to concede

[155] There has always been a notion under Roman Law that an interference with somebody else's property could potentially affect that person's reputation and so the latter could bring an actio iniuriarum aestimatoria; cf. *R. Zimmermann*, The Law of Obligations – Roman Foundations of the Civilian Tradition (1996) 1057.

[156] Such claims exist in some European countries, cf. for France *S. Kühnberg*, Die konsumentenschützende Verbandsklage, Zeitschrift für Rechtsvergleichung, Internationales Privatrecht und

to associations the right to put forward claims for punitive damages and to deliver the money to public authorities or to social institutions. As a stimulus, one should again consider granting these institutions a lump sum for preparing the claim and for doing all the investigations. Solving the problem in this manner would not violate the fundamental private law principle of mutual justification of legal consequences and it also respects the principle that tort law has to avoid the victim's enrichment by compensation. On the other hand, such a solution would have a preventive effect without overburdening criminal courts and without resulting in a windfall for the wronged party. Further, procedural law has to take into regard that punishment is at stake and, therefore, procedural safeguards similar to those in criminal trials have to be installed and, according to the principle of nulla poena sine lege, there have to be rules determining the extent of punitive damages.

92 That said, I think that careful examinations are still required because such a system may lead to a duplication of claims and thus of all efforts and expenses: the victim's claim for compensation and the association's claim for punitive damages: sometimes in addition, even a criminal trial may be held. Further, I am not so sure whether civil procedural law is capable of managing all the problems that arise with regard to punitive damages. Differences may exist between criminal and civil procedural law regarding procedural safeguards which can operate against awarding punitive damages under civil law. There may exist differences regarding the burden of proof and the required measure of proof under criminal and private law, the permission to accept prima facie proof, the – at least under some legal systems – objectification of fault under tort law, the burden of bearing procedural costs, etc. Because of these differences, it seems doubtful whether private law really is suitable for getting through claims on punitive damages or whether criminal law and the law of administrative punishment are more suitable. Further, one has to bear in mind that punishment under criminal law always requires the statutory definition of the crime as well as the fixing of the measure of punishment. Both requirements are not known to the same extent in private law and thus – as the example of the U.S.A. shows – the assessment of punitive damages tends to be an arbitrary act. Taking all these objections into consideration, I think that it would be by far more preferable to develop private prosecution under criminal law, to design additional criminal law provisions and to extend the law of administrative punishment. Only as far as punitive damages correspond with immaterial loss or to suspected but not provable economic loss and, therefore, in substance serve compensation and are no longer real punitive damages, are they acceptable under private tort law.

93 Last but not least, I think that punitive damages should *not* be adjudicated under tort law but that special rules have to be designed which take regard of

Europarecht (ZfRV) 2005, 106; for Greece *A. Mikroulea*, Verbandsklage auf Schadensersatz im griechischen Verbraucherschutzgesetz, FS Georgiades (2005) 281 ff. Cf. also the proposal by *van Boom* (fn. 68) 29, 33.

the special functions of such damages. As a heavier burden is placed on the defendant than under tort law, the prerequisites for establishing the obligation to pay punitive damages also have to be weightier than those suitable to trigger the obligation to pay compensation. Therefore, I think that – as under U.S. law[157] – in respect of the requisite culpability, intent or recklessness must be shown. Pure strict liability should not be accepted under the law of punitive damages. On the other hand, the field of application has to be broader as the occurrence of loss not misbehaviour is decisive. Therefore, even ineffective attempts have to be sufficient for establishing the liability for punitive damages.

94 All in all, I feel that the question in the title at the beginning of this contribution has to be answered as follows: ***Punitive damages do not have to be admitted into the seventh legal heaven but neither would eternal damnation be appropriate. I think they should be condemned to purgatory and after a due period of purification some may graciously be admitted to the first legal heaven.***

[157] See *Sebok* (fn. 7) no. 62 ff.

Annex

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Alabama	Actual damage, nominal okay	Punishment and deterrence	Legal malice, wilful and wanton conduct, or a reckless disregard of another's rights	Tort reform: $ 250,000 cap in most cases since tort reform	Clear and convincing evidence standard
Alaska	Actual damage, nominal okay	Deterrence and warning	Outrageous, meaning malicious or with bad motives, or in reckless disregard	Allows attorney's fees as additional damage to prevailing party at trial court's discretion	Policy: not favoured, given only under narrow limits; Clear and convincing evidence
Arizona	Actual damage, unclear if nominal are okay	Punishment and deterrence	"Evil-minded conduct", more than gross negligence – evil actions, malicious motives, outrageous, intolerable or oppressive conduct that results in a high risk of harm	Must be reasonably related to amount of actual damage; Wealth may be considered	Reduced if award shows jury prejudice or passion; Clear and convincing evidence
Arkansas	Actual damage	Punishment and deterrence	Malicious, wilful and wanton behaviour in reckless disregard of rights and safety of another	Amount must be reasonable in proportion to actual damage and does not appear to be the result of jury's passion or prejudice	
California	Actual damage; Not allowed for contract action	Punishment and deterrence	From Civil Code: must be guilty of oppression, fraud, or malice, express or implied	Amount must be reasonably proportioned to actual damage	Bifurcated trial; Reviewed if evidence of passion/ prejudice or award is grossly excessive; Clear and convincing evidence

Summary of Punitive Damages Law by State in the U.S.					
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Colorado	Actual damage need not be proven; An award of special damages alone will support an award of PDs	Punishment and deterrence	Malice (express or implied), insult, or a wanton and reckless disregard for rights and feelings	Amount must be reasonably proportioned to actual damage	**Expressly provided by statute;** Reviewed if grossly and manifestly excessive
Connecticut		Compensate P, not punish D	Malicious or wanton, or at least reckless disregard of the consequences that D knew or should have known, express/implied	Actual litigation cost minus taxable costs	
Delaware		Punishment and deterrence	Wanton or malicious, including ill will, hatred, spite or conscious desire to injure	Amount must be reasonably proportioned to actual damage; Wealth may be considered	
Florida	Actual damage must be alleged but not proven	Punishment and deterrence	Fraud, actual malice, deliberate violence, oppression, or wanton disregard of rights through wilful acts or gross negligence	Reasonable relationship to actual damage, but within jury's discretion dependent on circumstances of case and degree of intent	Court decides as a matter of law whether there is a sufficient basis for PDs based upon pleadings; Tort reform: damages exceeding three times compensatory damages are deemed excessive and subject to remittitur unless P shows by clear and convincing evidence that award is not excessive

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Georgia	Actual damage, nominal okay	Deterrence or compensation for P for wounded feelings, but not both	Aggravating circumstances evidencing wanton and wilful misconduct, fraud, malice, oppression or a conscious disregard	No limits in products liability; 75% of award to state; Cap of $ 250,000 with exceptions	Reviewed if evidence of gross mistake or undue bias; Clear and convincing evidence
Hawaii	Actual damage; Not allowed when actual damage is nominal and to vindicate a legal right	Punishment and deterrence	Wilful and wanton acts, oppressive, malice that indicates reckless indifference to consequences of his acts	No cap – degree of malice, oppression, gross negligence is basis for measuring; Wealth may be considered	
Idaho	Expressly declined to adopt rule that PDs may never be awarded if no actual damage	Punishment and deterrence	Wanton, malicious or gross misconduct, or implied malice/oppression	Tort reform: cap at $ 250,000 or 3 times compensatory damages	Policy to award PDs cautiously and within limits
Illinois	Actual damage required	Retribution and deterrence	Wilful wanton, malicious or oppressive conduct	Tort reform: three times economic damage	Civil Justice Reform Amendments of 1995: requires evil motive or reckless indifference; Bifurcates trials; Requires court to reduce awards in excess of the caps

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Indiana	Actual damage required	Promote public safety by punishment and deterrence	Malicious (express/ implied), oppressive, or grossly fraudulent	Tort Reform 1995: $ 50,000 or three times compensatory damages whichever is greater; 75% of PDs goes to state; Wealth may not be considered	If also subject to criminal punishment for same act, no PDs with exceptions for conduct that is reckless disregard of consequences and if statute of limitations has run on criminal charges; Reviewed if jury passion or prejudice; Clear and convincing evidence
Iowa		Deterrence	Only legal malice is required and can be inferred by showing that D's act was illegal or improper and done wilfully and wantonly in reckless disregard of others	Reasonable relationship between compensatory and PDs; wealth should be considered	Clear, convincing, and satisfactory evidence
Kansas	Actual damage must be established	Punishment and deterrence	Malice, fraud, gross negligence, or oppression	No fixed standard for amount but wealth, nature of offense and intent are considered	
Kentucky	Compensatory necessary, nominal is okay	Punishment and deterrence	Malicious, wanton or reckless disregard of consequences	Must be reasonable relationship to the injury, not to the compensatory damages	

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Louisiana	If P has a claim beyond mere compensation for property damage or physical injury and malice is present, he may be able to get some form of PDs	**Not allowed unless expressly authorised by statute**			Some confusion in courts when determining actual damage for mental anguish or suffering distinct from physical damage
Maine	No recent case law about whether actual damage must be established but early case law said nominal damage was not enough; May be recovered with special damage	Deterrence	Malice (sometimes implied sufficient), fraud, insult, or wanton and reckless disregard of rights; Negligence and gross negligence not sufficient; Malice required, not even reckless disregard	Take into account all circumstances in mitigation and aggravation	Prior criminal conviction does not preclude PDs; Clear and convincing evidence
Maryland	Actual damage required; Defamation: P must show D had actual knowledge that defamatory statement was false: no longer reckless disregard for the truth	Punishment and deterrence	Based on heinous nature of D's tortious conduct, actual malice standard, not implied, allowed in strict liability if actual malice is present	Should bear some relationship to compensatory damages, must relate to degree of malicious conduct and D's wealth; Attorney fees appropriate to include in PDs analysis	Reviewable for excessiveness; Clear and convincing evidence
Massachusetts		**No PDs award absent statutory authority**	Wrongful death statue provides for compensatory damages and minimum of $ 5,000 in PDs when death resulted from malicious, wilful, wanton or reckless conduct or gross negligence		Strong policies against PDs

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Michigan	Actual damage must be shown first	Compensation of injury	Humiliation, sense of outrage, and indignity, shame, mental anxiety resulting from injuries maliciously, wilfully and wantonly inflicted, oppressive, grossly negligent, or in reckless disregard	No award if injury is purely monetarily compensable; D's state of mind is part of actual damage so injury is greater if higher state of intent; Wealth irrelevant	Not disturbed if award has some rational basis and is not oppressive or shocks the conscience of reasonable men
Minnesota	For personal injury, not damage to property (has started to change); State is authorised to collect PDs from Ds in actions against its property; Actual damage must be shown (not in defamation)	Punishment and deterrence	Conduct that is malicious (actual/implied), wilful, or in deliberate disregard	Wealth may be considered	Recoverable even if criminal charges for same act; Jury has discretion to set amount, court will rarely overturn unless excessive; Clear and convincing evidence; For joint tortfeasors, separate PDs awards are possible; Corporations and public officers may be liable if conduct is so malicious as to be beyond the scope of their authority and take away protection of sovereign immunity
Mississippi	Actual damage must be shown	Punishment and deterrence	Unlawful, malicious, wanton and reckless conduct, gross negligence equivalent to wilful and wanton mischief	Jury discretion; Wealth may be considered	Not reviewable unless passion and prejudice; Clear and convincing evidence

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Missouri	Actual damage must be proven, even if only nominal	Punishment and deterrence	Actual or implied malice	Reasonable relationship to injury but not compensatory damages – degree of malice, wealth, surrounding circumstances	Court has a history of reducing jury awards on its own readings of the trial record
Montana	Actual damage must be alleged, but not determined	Punishment and deterrence	Malicious, wanton, or oppressive acts which indicate a reckless disregard for P's rights	Reasonable amount based on aggravating circumstances and wealth; For medical malpractice, capped at $ 250,000	Bifurcated trials; Court may adjust if necessary; Clear and convincing evidence
Nebraska		**No PDs allowed**		For worker's compensation, allowed a 50% increase in payments when payments are delinquent	If criminal prosecution is available, would be double jeopardy to award PDs against D, but not allowed even without criminal prosecution
Nevada	Actual damage required	Punishment and deterrence	Oppression, fraud, or malice (express/implied)	Limits – exact numbers unavailable; Award should serve public interest without financially destroying D, whose wealth can be considered	Bifurcated trials; Clear and convincing evidence
New Hampshire		**No PDs allowed unless expressly provided by statute**		If D acts wantonly, maliciously, or oppressively, compensatory damages may reflect aggravating circumstances; Measured by D's state of mind	

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
New Jersey	Actual damage required, Nominal okay; Except false imprisonment – no requirement	Punishment and deterrence	Actual malice, wanton and wilful indifference to the rights of others	5 times compensatory damages or $ 350,000, whichever is greater; Take into account all factors, including wealth; Should bear reasonable relationship to harm and its cause	Criminal Ds still liable for PDs in tort if criminal sanctions also; Bifurcated trials; Environmental torts excluded; Modified if grossly excessive
New Mexico	Actual damage required, nominal okay	Punishment and deterrence	Behaviour that is malicious (actual/implied), oppressive, fraudulent, or a reckless or wanton disregard		Common law more so than statutory
New York	Generally actual damage is required, but sometimes even nominal damage is ignored	Punishment and deterrence; Available to vindicate public rights and not private wrongs, but only limited to public right for contract cases and not in tort	Intentional/deliberate wrongdoing, aggravating or outrageous circumstances, a fraudulent or evil motive, a conscious act that wilfully and wantonly disregards the rights of others, malice (actual or implied)	May include attorney's fees, but wealth may not be considered; No relationship to compensatory damages	Allowed in equity
North Dakota	No award for contract action	Punishment	Oppressive, fraudulent, malicious (express/implied) behaviour; Conduct considered less than intentional is permissive		Liberal policy

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Ohio	Actual damage must be shown	Deterrence	Intentionally malicious acts, generally actual malice		Clear and convincing evidence; Jury decides whether justified, judge decides amount; Sometimes allowed for wilful personal injury and interference with marital relations; Survives P's death; Allowed even if D is punished criminally
Oklahoma	Actual damage must be shown, nominal okay; No PDs for contract unless breach amounts to independent, wilful tort	Punishment and deterrence	Reckless disregard for others, intentionally or maliciously, evil intent required	Limited to compensatory award; Statutory list of factors to consider	Reviewed if grossly excessive or jury influenced by prejudice or passion; Clear and convincing evidence
Oregon	Actual damage must be shown	Deterrence	Malice or reckless and outrageous indifference to a highly unreasonable risk of harm	Wealth considered; 60% goes to state fund, no more than 20% to attorney	Prohibited in original complaint but allowed by amendment once prima facie case for liability established; Clear and convincing evidence; "Rational juror" standard; Court may review award
Pennsylvania	Actual damage must be shown	Punishment and deterrence	Behaviour that is malicious, wilful, or a reckless and wanton disregard; D must know or have reason to know of facts which create a high risk of physical harm and deliberately acts in disregard of facts	Must bear reasonable relationship to amount of compensatory damages	

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Rhode Island		Punishment and deterrence	Conduct that is malicious, wilful, reckless, or in bad faith	Jury's discretion, wealth may be considered	Reviewed if amount is clearly excessive or shows prejudice/passion of the jury
South Carolina	Actual damage must be shown; Nominal damage okay	Punishment and vindication of private rights	Conduct that is wanton, wilful, or malicious	Consider character of tort, mitigating factors, and ability to pay	Reviewed if damages violate due process rights and are excessive; Post-trial hearing normally required to assess award
South Dakota	Not for contract actions; Actual damage must be shown	Punishment and deterrence; **Only by express statutory authorisation**	Malice (express/implied), or in wilful reckless disregard of consequences	Mitigating and aggravating factors; Wealth may be considered	Reviewed if shows jury's passion/prejudice
Tennessee	Actual damage must be found	Punishment and deterrence	Conduct that is aggravated, wilful or malicious, or is a wanton and reckless disregard of P's rights; Must be intentional, fraudulent, malicious, or reckless	Determined by trial court considering mental state of D; May consider wealth	Appeals for abuse of discretion; Clear and convincing evidence
Texas	Not for contract actions or statutory violations; Actual damage must be shown; No nominal damage	Punishment serving good of society	Wilful, malicious, or fraudulent conduct	Jury discretion, $ 200,000 or 2 times economic damages plus an amount equal to any non-economic damages up to $ 75,000; Wealth may not be considered	Clear and convincing evidence; Bifurcated trial upon motion; Allowed for claims of injury to feelings, loss of business, mental suffering, and others usually deemed too remote for a claim of actual damage

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Utah		Punishment and deterrence	Conduct that is intentional, wilful, malicious or in reckless disregard with evidence of a wrongful motive; No award if evidence of good faith or mistake of law	Reasonable relationship with compensatory damages and with nature of misconduct and extent of injury	Reviewed if evidence of passion/prejudice
Vermont	Actual damage must be shown	Punishment and deterrence	Fraud, actual malice, gross negligence, oppression or outrageous conduct	No relationship to compensatory damages, consider all factors including wealth	Still recoverable even if criminal action for same conduct; Reviewed if excessive or evidence of passion/prejudice
Virginia	Actual damage must be shown (one case holding otherwise)	Punishment and deterrence	Fraud, oppression, malice (express/implied), wilful disregard	Limit at $ 350,000; Wealth may be considered	
Washington		**No PDs allowed on public policy grounds; Only if expressly authorised by statute**			Concerns of double jeopardy and similarity to criminal punishment
West Virginia	Actual damage must be shown	Punishment and deterrence	Intentional acts or where facts shown inference of malice or wanton disregard	Reasonably related to compensatory damages; Wealth may be considered	Bifurcated trial to review PDs award for excessiveness
Wisconsin	Not for contract actions unless accompanied by personal tort; Actual damage must be shown; Nominal not sufficient	Punishment and deterrence	Malicious, or intentional disregard of rights	Discretion to consider all related circumstances, degree of intent, wealth	

	Summary of Punitive Damages Law by State in the U.S.				
	Prerequisite	**Purpose**	**Intent**	**Amount**	**Misc**
Wyoming		Punishment and protection of society	Malicious, wilful or wanton conduct		
District of Columbia	Allowed without showing of actual damage	Punishment, deterrence and compensation for legal expenses	Fraud, oppression, recklessness, wilful disregard	Limited to P's litigation expenses	
Puerto Rico		**No PDs allowed**	P must show significant psychic impairment of health, welfare and happiness	"Moral damages" awarded for mental anguish	

Index

In this index, the letters refer to the reports and the numbers refer to the marginal notes: AD for the Aggravated Damages Report, CR for the Comparative Report and Conclusions, D for Germany, E for Spain, EA for the Economic Analysis Report, EN for England, EU for the European Law Report, F for France, H for Hungary, I for Italy, Insur for the Liability Insurance Report, PIL for the Private International Law Report, S for Scandinavia, SA for South Africa and US for the United States of America.

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