A Theory of Non-Compensatory Damages

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ABSTRACT

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This thesis is about non-compensatory damages (NCD) which include the awards of exemplary, nominal, contemptuous, vindicatory, and disgorgement damages. In contrast with existing scholarship, which tends to look at the various types of NCD individually, it analyses all NCD collectively. I conduct this analysis mainly from a philosophical point of view. I aim to show that the law of NCD is unclear and incoherent and that no one has yet offered a satisfactory definition of NCD. The problem that I seek to resolve is whether NCD are a mere collection of disparate types of award or whether there are any commonalities amongst them. It is argued that NCD can be analysed as a unitary category because they have common justificatory grounds. Such understanding casts new light both on the law of NCD and the law of damages generally.

There are three main original contributions in this thesis. First, NCD is not and cannot be currently conceptualised as a reductionist doctrinal concept. Instead, it can be scrutinised as a meaningful philosophical category. Second, NCD may be collectively justified by recourse to damage to societal rights (as opposed to the claimant's rights). These justificatory underpinnings are best explained as non-correlative justifying reasons. NCD pursue non-correlative justifying goals of punishment, declaration, prevention, and restitution, which may be collectively explained as distributive justice goals. In support of these claims, the thesis offers an original conceptual and ethical analysis of NCD and provides an original analytical framework for justifying damages awards. Third, it is argued that NCD, to be clearly and systematically distinguished from compensatory awards, are best described as 'distributive damages' and a coherent theory of these awards is offered. The theory also shows how these awards may be justified and why they should be treated as exceptional types of remedies.

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1 INTRODUCTION

1.1 The problem posed by NCD

Damages are a monetary award for a civil wrong and it is widely accepted that they are the most important private law remedy.[1] According to Lord Nicholls, '[l]eaving aside the anomalous exception of punitive damages, damages are compensatory.'[2] His Lordship understood this position to be 'axiomatic'.[3] However, if we look at present English law, it quickly emerges that there are, in fact, many more categories of damages that are clearly not compensatory. These additional awards include, besides punitive damages, categories such as disgorgement, nominal, contemptuous, and, most recently, vindicatory damages.[4]

Accordingly, the axiom rather should be restated as follows: *Leaving aside the anomalous exception of non-compensatory damages, damages are compensatory*.[5] At first glance, such claim seems attractive because it offers a simple and clear insight into this area of law. Moreover, it seems uncontroversial because it is a conceptual truth that all

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1 Eg, WE Peel and J Goudkamp (eds), *Winfield & Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) para 23–001; WE Peel (ed), *Treitel: The Law of Contract* (14th edn, Sweet & Maxwell 2015) para 20–002.

2 *AG v Blake* [2001] 1 AC 268 (HL) 282.

3 ibid.

4 For an explanation of these categories, see Chapter 2.

5 This is perfectly in line with *AG v Blake* (n 2) that uses the term *non-compensatory damages* in a similar, though slightly narrower sense: 'if some more extensive principle of awarding non-compensatory damages for breach of contract is to be introduced into our commercial law the consequences will be very far reaching and disruptive' (ibid 299). See also H McGregor, *McGregor on Damages* (19th, inc 2nd supp edn, Sweet & Maxwell 2016) para 14–003, where the exceptionality of non-compensatory damages in relation to compensatory awards is generally advocated.

damages must be either compensatory or non-compensatory. But what do we actually mean by the term 'non-compensatory damages' (NCD)? Is it a meaningful concept? Are there any unifying features of all NCD? Are NCD, overall, a single category that can ultimately be justified by recourse to the same set of reasons and goals? Are these reasons and goals clearly distinct from those justifying compensatory awards? And should NCD be treated as an exceptional remedy? Once we start asking these questions, the foregoing restatement of Lord Nicholls's axiom loses its attractiveness and turns out to be a plain conjecture that awaits further exploration.

1.2 Originality

Surprisingly, no one has yet seriously inquired into NCD *as a unitary category*. Judges are often concerned with disparate types of non-compensatory award, such as exemplary, restitutionary or vindicatory damages. Yet, they do not develop the concept of NCD alone. In fact, only a handful of primary legal sources, by which I mean case law and statutory law, has explicitly addressed NCD—none of them providing definition or analysis of NCD.[6] More often, legal authorities seem to rely on our implicit understanding of the term and they use NCD as a proxy for various, presumably exceptional, subcategories of

[6] As at 10 April 2017, it was eleven UK courts' decisions, five judgments by the CJEU and five opinions of AG, one ECtHR decision, namely *Cyprus v Turkey* (2014) 59 EHRR 16, a series of legislations prohibiting non-compensatory damages awards in claims against air carriers, and European Parliament and Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40. This data was retrieved from Westlaw UK, Nexis UK, BAILII and EUR-Lex databases of UK, English and EU law. There are several other cases (not legislations) using just the adjective 'non-compensatory' but only five of them do so when discussing damages or compensation. In more detail, see section 2.1.

damages, rather than as an expression for a single doctrinal category. To simplify the message, in the black-letter law there is neither a sound and coherent theoretical framework that would underline all non-compensatory types of damages, nor is there any lucid account of the NCD term itself.

The situation is no better in the academic literature. If we look at recent trends in the area, it is much easier to see why legal theorists have paid little attention to the concept of NCD. Scholarly writings regarding remedies have been preoccupied with analysing individual categories of damages[7] whereas theorising about NCD at large has been woefully neglected.[8] Sometimes, scholars put all (or some of) these other-than-compensatory types of damages under an umbrella heading 'non-compensatory damages', but even then, further investigation of their common features is missing.[9] In their writings

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7 See, eg, S Steel, 'False Imprisonment and the Fetch of Hypothetical Warrant' (2011) 127 LQR 527; J Goudkamp, 'Punitive Damages' in G Virgo and S Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017). See also nn 9 and 10.

8 A slight exception in this regard can be found in, eg, P Cane, 'Exceptional Measure of Damages: A Search for Principles' in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1996), although this work does not address NCD explicitly. I discuss Cane's work in more detail in Section 6.1.

9 See, eg, AI Ogus, *The Law of Damages* (Butterworths 1973) ch 2; A Burrows, *Remedies for Torts and Breach of Contract* (1st edn, Butterworths 1987) 236; A Burrows, *Remedies for Torts and Breach of Contract* (2nd edn, Butterworths 1994) 269; AS Burrows, 'Reforming Non-Compensatory Damages' in W Swadling, GH Jones and RG Goff of Chieveley (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (OUP 1999); G Samuel, *Law of Obligations and Legal Remedies* (2nd edn, Cavendish Publishing Ltd 2001) 204–07; A Kramer, *The Law of Contract Damages* (Hart Publishing 2014) ch 23; J Varuhas, *Damages and Human Rights* (Hart Publishing 2016) 116–17; McGregor (n 5) paras 12–001 to 16–015, who all have a separate chapter on 'Non-compensatory damages'. Other authors, though, simply put them in the 'other' category—eg, T Dorgan and P McKenna, *Damages* (Thomson Reuters Ireland Limited 2015) ch 2, entitled 'Awards of damages other than ordinary damages'.

on NCD, these scholars typically observe that several types of award can be distinguished from compensatory damages (CD) on the basis that compensation is not their main goal. These types of award are then dubbed NCD, and several examples of these awards are listed. Subsequently, the analysis rather is piecemeal again, for it only focuses on those examples.[10]

In short, there is something of a gap here in our understanding of private law and my research offers a new way of looking at what we generally conceive of as disparate types of damages. Unlike previous scholarly analysis, which has focused on individual heads of NCD, I canvass them *as a coherent whole*. My objective is to examine NCD as a unitary and coherent concept. The analysis and theory I want to provide are thus fundamentally NCD-centric which gives me a wide scope for original research because, for the time being, there is virtually no theory of NCD as such.

I meet this challenge by providing a novel framework for analysing and justifying NCD collectively and by conducting an original conceptual and ethical analysis of these awards. This helps me to develop a unitary theory of NCD which casts new light on our understanding of them as well as of damages generally because by scrutinising NCD I also offer a better account of what CD are not.

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[10] This fragmentary approach can be illustrated not only by literature mentioned in the preceding footnote but also by, eg, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) that attempts to highlight how the goals of three 'exceptional' (ibid para 1.5) non-compensatory remedies, namely, aggravated, exemplary, and restitutionary damages, differ.

1.3 An overview of the thesis

The main ideas of my thesis are threefold. First, I show that NCD are not clearly defined by positive law or by doctrine, although they both use the term (Chapters 2 and 3). Then I argue, that, under present law, there cannot be a reductionist doctrinal definition of NCD (Chapter 4) and that we may only understand NCD as a freestanding philosophical (or juridical) category (Section 5.1). I use the term 'juridical' in a Weinribian sense to mean 'a normative idea' to which the present law may not fully to conform.[11] Also, I argue that such juridical concept of NCD shall be best explored and designed by recourse to reasons that justify NCD (Sections 5.2 and 5.3).

Second, I argue that all NCD are a bastion of distributive justice, which explains why they should be treated as an exceptional remedy. In my view, NCD may be collectively analysed as remedies that are justified by damage which does not occur within the juridical relationship between a claimant and a defendant. In other words, NCD are justified by non-correlative reasons. This idea is examined in Chapter 6 by way of analysing the ethics of NCD, ie by canvassing the ethical framework of NCD (Section 6.1), by collectively analysing justificatory reasons and normative underpinnings behind particular types of NCD and behind their goals (Section 6.2), and by connecting these reasons with distributive justice objectives (Section 6.3).

Third, I offer a novel theory of NCD that interprets them as a juridical category of distributive damages. I start by refocusing my analysis on what is actually being justified

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[11] EJ Weinrib, 'The Juridical Classification of Obligations' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) 37.

by the reasons and goals, ie on NCD, and I explore ethical principles of NCD (Section 7.1). This helps me to explain why, in an NCD-centric theory, the distributive damages account of NCD permits them to be better distinguished from CD than under alternative accounts (Section 7.2).

It is also necessary to point out what my thesis is not about. I do not argue that there *should* be a distinctive law of NCD with specific rules compliant to my theory. Although the concept of NCD and my research topic is grounded in English law of obligations, I am not trying to resolve inconsistencies in the present law or doctrines. Nor am I trying to offer a better doctrinal explanation of the current law of obligations, although I offer theoretical explanations regarding large parts of the law of NCD. Instead, I provide an analytical framework for thinking normatively about NCD by looking at philosophical foundations of the juridical concept of NCD. As such, my arguments are not doctrinal, and they could potentially translate into other jurisdictions or models of law.

2 THE LAW OF NCD

This chapter sets out the doctrinal scope of my analysis by providing an overview of the law of NCD. It shows that black-letter law does not define NCD explicitly (Section 2.1) and that there are several heads of damages that may potentially be understood as NCD (Section 2.2). Since I expect my reader to be familiar with all the individual types of damages to which I refer throughout this thesis, I will be brief. Yet, since many of these types have been heavily contested in the scholarly literature, it seems necessary to provide at least a minimum black-letter grounding from which we may then systematically analyse the—so far rather intuitive—category of NCD.

2.1 The unclear black-letter concept of NCD

In English law, the term 'non-compensatory damages' was first mentioned in a dissenting opinion in *AG v Blake*[12] fewer than two decades ago. Here, Lord Hobhouse used this term to warn about the danger in introducing 'some more extensive principle … [of awarding account of profits, explicitly described by him as] non-compensatory damages … [,] for breach of contract … [in] commercial law'.[13] What he probably had in mind, though, was that we should be aware of awarding any damages that do not represent 'a *substitute* for performance'[14] that should rightfully have been performed under the contractual terms. According to his Lordship, account of profits (restitution) was 'the enforced performance

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12 n 2.

13 ibid 299.

14 ibid 298.

of an obligation … not some monetary substitute for it'.[15] Thus, Lord Hobhouse considered the restitutionary monetary remedy to be non-compensatory as far as it recovers of some monetary obligation that the claimant 'is actually entitled to'.[16] In short, he used the term NCD as a synonym for some type of *non-substitutive* damages. This meaning of the term NCD (without any further elaboration) was then plainly repeated and approved in two more cases.[17]

In another case, the expression 'non-compensatory damages' was used to describe a vindicatory award which was supposed 'to mark the abuse of power'[18] by the state.[19] In the relevant passage,[20] Walker J referred to *Lumba*[21]—a case where two claimants, Mr Lumba and Mr Mighty, were unlawfully detained by the secretary of state. This representative of

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15 ibid 297.

16 ibid.

17 *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086; [2009] 3 WLR 198 [149] (Longmore LJ); *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch) [54] (Roth J). Indirectly, the same understanding of the adjective 'non-compensatory' was adopted in *Less v Hussain* [2012] EWHC 3513 (QB); [2013] Med LR 383 [179]–[180].

18 *R (Anam) v Secretary of State for the Home Department (No 2)* [2012] EWHC 1770 (Admin) [30] (Walker J) (*Anam* case).

19 Alternatively, see *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch); [2016] FSR 12 [127] (Mann J): 'It is plain that this was using "vindicatory" in the sense of non-compensatory, intended to mark "the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter future breaches"' (referring to *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 (*Lumba* case)). See also *Ashley v Chief Constable of Sussex* [2008] UKHL 25; [2008] 1 AC 962 [28] (Lord Scott): 'vindicatory damages, although not punitive in intent, are, in common with exemplary damages, extra-compensatory in character [and] … essentially non-compensatory.'

20 *Anam* (n 18) [30].

21 n 19.

the state authority issued a detention decision which was based on an unpublished policy documents. The decision was thus made contrary to public law duties in exercising the power of detention. However, as was concluded in *Lumba*, 'had the decision-makers applied the published, lawful policy [which existed at that time] rather than the unpublished, unlawful policy, they would inevitably have reached the same conclusion'[22] and detained the claimants. As a result, the claimants 'suffered no loss or damage for which compensatory damages could be awarded'[23] because 'damages for false imprisonment are meant to compensate for the loss of liberty … [ie] the loss of something which … [they] would never have enjoyed.'[24] Trespass to person (here false imprisonment) is a tort actionable per se and so nominal damages could have been awarded no matter the loss. However, the important question of damages in *Lumba* was, according to Walker J, whether the claimants were entitled to more than nominal damages, which the minority would have awarded, but not punitive or exemplary damages, which all members of the court refused to award.[25] This non-nominal, but also non-exemplary and non-punitive award was then depicted by Walker J as NCD remedying the abuse of power.[26]

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22 ibid 211.

23 *Anam* (n 18) [30] (Walker J).

24 *Lumba* (n 19) 212.

25 *Anam* (n 18) [30].

26 ibid.

In a third group of cases, the term NCD was used to describe mainly punitive or exemplary damages.[27] These cases relate to art 29 of the Montreal Convention 1999 on air carrier liability[28] which has effect in the UK by virtue of both national[29] and EU law.[30] Article 29 of the Montreal Convention 1999 constitutes a general limitation on damages claims '[i]n the carriage of passengers, baggage and cargo' by prohibiting recovery of 'punitive, exemplary or any other non-compensatory damages … [in] any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise'.[31] The meaning of NCD pursuant to art 29 has been anticipated as problematic since early days of the Convention's existence[32] and it has not advanced much since because the relevant English case law only repeats the phrase that punitive, exemplary or

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27 *Hall v Heart of England Balloons Ltd* [2010] 1 Lloyd's Rep 373 (CCt (Birmingham)) [35]; *Hook v British Airways Plc* [2011] EWHC 379 (QB); [2011] 1 All ER (Comm) 1128 [5]; *Hook v British Airways Plc* [2012] EWCA Civ 66; [2012] 2 All ER (Comm) 1265 [2]; *Hook v British Airways Plc* [2014] UKSC 15; [2014] AC 1347 [31]; *Caldwell v easyJet Airline Co Ltd* [2015] SCEDIN 64; [2015] ScotSC 64 [7]. In another two cases, the adjective 'non-compensatory' was associated with punitive aspect of multiple damages awards (*British Airways Board v Laker Airways Ltd* [1985] AC 58 (HL) 89; *Pace Europe Ltd v Dunham* [2012] EWHC 852 (Ch); [2012] BPIR 836 [17]–[18]).

28 Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) 1999.

29 Carriage by Air Act 1961, s 1 and sch 1B, art 29 of this act. See also Carriage by Air Acts (Implementation of the Montreal Convention 1999) Order 2002, SI 2002/263, sch 1, art 29; Carriage by Air Acts (Application of Provisions) Order 2004, SI 2004/1899, sch 1, pt 2, art 29, which all copy the text of art 29 of the Montreal Convention 1999.

30 Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, art 3(1), in conjunction with s 2 of the European Communities Act 1972 and art 288 of the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU).

31 Montreal Convention 1999, art 29.

32 TJ Whalen, 'The New Warsaw Convention: The Montreal Convention' (2000) 25 Air & Space Law 12, 20.

any other non-compensatory damages shall not be recoverable.[33] It is only a Scottish decision in *O'Carroll v Ryanair* that elaborates on the wording of art 29.[34] Here punitive, exemplary, and non-compensatory damages, were distinguished from damages compensating for 'stress, inconvenience, frustration and disruption to [the claimant's] … holiday … [ie from damages which] were not intended by the sheriff either to punish the defenders or to make an example of them. Nor were they non-compensatory.'[35] It is however far from obvious what types of award (alongside punitive and exemplary damages) the term NCD is meant to describe.

Finally, we may understand NCD to be an EU law concept as well. This applies to the air carrier liability as set out in the respective EU regulation,[36] and to the wording of recital (32) of Rome II Regulation which states that 'non-compensatory exemplary or punitive damages of an excessive nature … [may be] contrary to the public policy'. Possibly, the term NCD should be thus interpreted, in line with the doctrine of indirect effect, compliant to EU law.[37] However, the Court of Justice of the European Union

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33 See n 27.

34 *O'Carroll v Ryanair* [2009] SCLR 125; [2008] ScotSC 23 [2], [8], [10], [12], [16] and [17].

35 ibid [10].

36 Council Regulation (EC) No 2027/97 (n 30). This regulation does not use the term NCD but refers to the Montreal Convention 1999 in art 3(1). See also European Parliament and Council Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/01 which refers to the Montreal Convention 1999 in recital (14).

37 For legal basis of this doctrine, see, in particular, C–106/89 *Marleasing* EU:C:1990:395; [1990] ECR I–4135, para [8]; joined cases C–397/01 to C–403/01 *Pfeiffer and Others* EU:C:2004:584; [2004] ECR I–8835, para [114]; joined cases C–378/07 to C–380/07 *Angelidaki and Others v Organismos*

(CJEU) would first need to offer some guidance on how to interpret the concept, and although NCD have been explicitly addressed several times by the CJEU and Advocates General,[38] there is only one case that currently gives us relevant evidence—*Nelson v Deutsche Lufthansa AG*.[39] Here the CJEU accepted that damages could be termed non-compensatory as far as they serve as a remedy for some substantive right that the claimant was originally not guaranteed to have.[40] Yet this ruling remains open to various interpretations.

To summarise, the black-letter law uses the term NCD but its treatment of it is unclear and rather intuitive. Neither judges nor legislators have defined the concept of NCD and they do not seem to be using it systematically in the legal materials they publish. Thus, I cannot limit the scope of my inquiry to the black-letter law and to its textual analysis. Instead, I need to explore and define the concept of NCD systematically.

Nomarchiakis Autodioikisis Rethymnis EU:C:2009:250; [2009] ECR I–3071, paras [197] and [198]; C–555/07 *Kücükdeveci* EU:C:2010:21; [2010] ECR I–365, para [48].

38 C–344/04 *R (IATA) v Department for Transport* EU:C:2005:530; [2006] 2 CMLR 20, Opinion of AG Geelhoed, para [4]; C–396/06 *Kramme v SAS Scandinavian Airlines Danmark A/S* EU:C:2007:555, Opinion of AG Sharpston, para [6]; C–12/11 *McDonagh v Ryanair Ltd* EU:C:2013:43; [2013] 2 CMLR 32, para [5]; C–240/14 *Prüller-Frey v Brodnig and another* EU:C:2015:325; [2015] 1 WLR 5031, Opinion of AG Szpunar, para [5]; C–240/14 *Prüller-Frey v Brodnig and another* EU:C:2015:567; [2015] 1 WLR 5031, para [5]; C–429/14 *Air Baltic Corporation AS v Lietuvos Respublikos specialiųjų tyrimų tarnyba* EU:C:2016:88; [2016] Bus LR 623, paras [10] and [25].

39 Joined cases C–581/10 and C–629/10 *Nelson v Deutsche Lufthansa AG* EU:C:2012:657; [2013] 1 CMLR 42, paras [8] and [20]. See also joined cases C–581/10 and C–629/10 *Nelson v Deutsche Lufthansa AG* EU:C:2012:295; [2013] 1 CMLR 42, Opinion of AG Bot, paras [6], [21] and [51].

40 *Nelson v Deutsche Lufthansa AG* EU:C:2012:657 (n 39) paras [28] to [40].

2.2 An overview of damages awards that could be termed NCD

To demarcate the scope of NCD systematically, it seems necessary first to explore what particular heads of damages may be analysed as NCD and what categories may be omitted in my analysis. This section answers both questions and thereby sets doctrinal limits of my enquiry.

2.2.1 What awards I address in this thesis and why?

The candidates that could make for an NCD category are those awards (1) that black-letter law mentioned explicitly in relation to NCD and (2) that are clearly distinguished from CD in doctrinal writings. We have already seen that the first group includes punitive (exemplary), nominal, vindicatory, and restitutionary damages. Regarding the second group, all major English academic texts on damages now also recognise punitive (exemplary) and nominal awards as distinct categories with substantially different rationales than the rationale of CD.[41] In this regard, they confirm the non-compensatory nature of punitive and nominal damages. Most of these writings, in addition, doctrinally separate aggravated damages from CD and contemptuous damages from nominal damages, since they presumably rest on different justificatory reasons and pursue slightly different goals.[42] Some authors further separate vindicatory damages from both nominal

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41 J Murphy and C Witting (eds), *Street on Torts* (13th edn, OUP 2012); Peel and Goudkamp (n 1); Kramer (n 9); P Giliker, *Tort* (5th edn, Sweet & Maxwell 2014); NJ McBride and R Bagshaw, *Tort Law* (5th edn, Pearson 2015); R Mulheron, *Principles of Tort Law* (CUP 2016); McGregor (n 5).

42 Murphy and Witting (n 41) 677; Peel and Goudkamp (n 41) paras 23–006 to 23–034; Giliker (n 41) ch 17 (recognising both aggravated and contemptuous damages) or McBride and Bagshaw (n 41) 808 (recognising aggravated damages only). Contemptuous damages have been recognised as a separate

and punitive damages.[43] Finally, the restitutionary damages category (sometimes also termed disgorgement or gain-based damages) repeatedly appears in major doctrinal publications.[44] In sum, this jointly gives us six heads of damages that may potentially be considered NCD: punitive (exemplary), nominal, contemptuous, vindicatory, aggravated, and restitutionary (disgorgement) damages.

Punitive or, as they are also called, exemplary damages seek to punish and deter the defendant.[45] In this sense, they are clearly not compensatory. Exemplary damages may be awarded in three types of case: (1) 'oppressive, arbitrary or unconstitutional action by the servants of the government',[46] (2) 'the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff',[47] and (3) where such award is 'expressly authorised by statute'.[48]

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category even earlier: eg, PH Winfield, *A Text-Book of the Law of Tort* (Sweet & Maxwell 1937) 151; H Street, *The Law of Torts* (Butterworth & Co Publishers 1955) ch 28).

43 McBride and Bagshaw (n 41) 839ff; McGregor (n 5) ch 16. But, for example, Peel and Goudkamp seem to advocate a thesis that 'there is no such thing as an award of "vindicatory damages" in private law' (Peel and Goudkamp (n 41) para 23–035 (footnote omitted)). According to others, vindicatory damages may play the same role as exemplary damages. See, eg, R Stevens, 'Torts, Rights and Losses' (2006) 122 LQR 565, 568; D Pearce and R Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 OJLS 73, 86; ED Ventose, 'Damages for Constitutional Infringements: Compensation and Vindication' (2010) CLB 223, 245.

44 Eg, Murphy and Witting (n 41) 824; Peel and Goudkamp (n 41) para 23-034; Giliker (n 41) ch 17; Kramer (n 9) ch 23; Mulheron (n 41) ch 11; McGregor (n 5) ch 14.

45 See, especially, *Rookes v Barnard* [1964] AC 1129 (HL).

46 ibid 1226.

47 ibid.

48 ibid 1227.

Nominal damages are also not meant to compensate the claimant for loss, but to mark the infringement of a right.

> [Nominal damages] is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.[49]

Contemptuous damages, sometimes also called derisory damages, are awarded to show the contempt by the court for the claim and they are also not compensatory in their nature. The quantum of these damages is very small, just like in the case of nominal damages, but unlike in the case of nominal damages, the aim of contemptuous damages is not to mark the infringement of the claimant's right but to show that there is something wrong with the claim for damages. In effect, contemptuous damages are awarded as a symbolic substitute for CD because the action was brought not to seek remedy but to profit.[50] So, although the claimant could have suffered harm, the derisory sum does not reflect it. It rather expresses the disapproval of the court with the profit-seeking nature of the claim.

The purpose of vindicatory damages, as already set out in Section 2.1 above, is to vindicate claimant's rights that have been infringed and to mark the public outrage against

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[49] *Owners of the Steamship Mediana v Owners of the Lightship Comet Mediana* [1900] AC 113 (HL) 116.

[50] See, eg, *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024 (HL).

the abuse of power (typically in unlawful detention cases).[51] Again, this award is not meant to compensate the victim and it is clearly distinct from CD.

Aggravated damages are treated separately from CD and we may thus be tempted to categorise them as NCD too. Historically, the rationale for aggravated damages was mixed with that of exemplary damages because in both cases the award is 'aggravated' in comparison with ordinary CD. However, it is now clearly established that aggravated and exemplary damages are distinct.[52] As the Law Commission concluded, aggravated damages are awarded

> as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive 'aggravates' the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum.[53]

In short, aggravated damages compensate for aggravated damage, whereas exemplary damages (even though aggravated in their sum) do not respond to claimant's damage—neither to ordinary damage, nor to aggravated damage. Aggravated and compensatory damages are thus indistinguishable from each other, although they are measured differently.[54] For these reasons, aggravated damages are now sometimes called 'mental distress damages',[55] and they were not considered NCD pursuant to art 29 of the Montreal

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51 See, eg, *Lumba* (n 19); *R (O) v Secretary of State for the Home Department* [2016] UKSC 19; [2016] 1 WLR 1717.

52 See *Broome v Cassell & Co Ltd (No 1)* [1972] AC 1027 (HL).

53 Law Commission (n 10) para 2.1.

54 Similarly, eg, Cane (n 8) 305.

55 McGregor (n 5) paras 5–012 to 5–014.

Convention 1999 in *O'Carroll v Ryanair*.[56] Accordingly, I will not analyse them as a potential NCD category.

The last category that scholars treat separately from CD is that of restitutionary damages. This remedy, sometimes also called gain-based or disgorgement damages,[57] is awarded in cases where 'commission of a wrong results in a benefit to the wrongdoer which exceeds and outstrips the loss to the person wronged, who suffers a lesser loss or, frequently, no loss at all'.[58] The claimant may seek disgorgement damages if he or she cannot show loss resulting from a breach of contract and if it is necessary to disgorge any profit gained from the defendant's breach of the contract.[59] Furthermore, these damages can be awarded 'for cynical commission of torts as diverse as trespass, conversion, libel, inducing breach of contract, intimidation, fraud and deceit'[60] as well as for some equitable wrongs where CD are not sufficient to deter the defendant;[61] although they are usually not expressly labelled as disgorgement damages. Unlike CD, gain-based awards do not respond to loss of the claimant but to the defendant's gain and they seek restitution and deterrence, ie not compensation, as their main objective.

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56 n 34.

57 Later, I will show that these labels are not synonymous. See Subsection 6.3.4.

58 McGregor (n 5) para 14–002. See, eg, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

59 *Blue Monkey Gaming Ltd v Hudson* [2014] All ER (D) 222 (Ch) [605], referring to *AG v Blake* (n 2) 285. See also *Blue Sky One Ltd v Mahan Air* [2009] EWHC 3314 (Comm) [320].

60 J Edelman, *Gain-Based Damages: Contract, Tort, Equity and Itellectual Property* (Hart Publishing 2002) 136.

61 ibid 191 and 212ff.

2.2.2 What heads of damages I do not address and why?

A plethora of other heads of damages could be analysed in this thesis because they are not termed CD. As Burrows rightly pointed out, 'the labelling given to different types of damages'[62] has been a dominant feature of the law of damages since 1960s.[63] However, I do not take these remaining labels into account because dealing with individual labels is not my task. Also, I do not consider them to be distinct types of damages that demand separate treatment, for they can be interpreted in terms of some of the preceding doctrinal categories. Let me demonstrate this in relation to some of the 'labels'—and I only mention some of them because the over-labelling makes it practically impossible to identify them all.

The first label is 'flagrancy damages'. In 1992, this term was coined by the judiciary[64] to describe an additional statutory award for copyright infringement that reflects 'the flagrancy of the infringement'.[65] Due to the 'additional' extra-compensatory nature of this award and due to the 'flagrancy' rationale, it is now usually thought that this category is in fact Lord Devlin's category 3 exemplary damages,[66] or, alternatively, that it provides

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62 A Burrows, 'Damages and Rights' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 277.

63 ibid 276.

64 *Banks v CBS Songs Ltd* [1992] FSR 278 (CA) 279.

65 Copyright, Designs and Patents Act 1988, s 97(2)(a). Note that this provision only explicitly allows for 'additional damages' reflecting the 'flagrancy'. Recently, eg, *Technomed Ltd v Bluecrest Health Screening Ltd* [2017] EWHC 2142 (Ch) [147] that also the interprets the statutory provision as allowing for 'flagrancy damages'.

66 *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd (No 1)* [1995] FSR 818 (Ch) 820 and 841 (Laddie J); *Lenric C21 Ltd v Tesco Stores Ltd* [2011] EWPCC 16; [2011] FSR 35 [22]. See also J Laddie,

additional compensation for the aggravating factors of the harm.[67] In 2010, the government considered renaming this additional award as 'aggravated and restitutionary damages' but no action was taken.[68] In any case, it shall be clear that flagrancy damages do not make for a theoretically distinct category.

The second such theoretically indistinct type of award is 'Wrotham Park damages'. In brief, these damages 'ought to be awarded … in the place of mandatory injunctions which would have restored the plaintiffs' rights'.[69] There is an ongoing dispute over the nature of this remedy—whether it is compensatory or restitutionary remedy.[70] Recently, the dominant approach 'emphasise[s] the justification given in Wrotham Park itself for awarding more than nominal damages, namely that the remedy compensated for a lost opportunity to bargain.'[71] Kramer, for instance, states that Wrotham Park damages 'are compensatory';[72] McGregor classifies them as restitutionary.[73] In this thesis, however, we

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'Copyright: over-strength, over-regulated, over-rated?' (1996) 18 EIPR 253, 256; McGregor (n 5) paras 14–030 and 46–062.

67 See, eg, N Caddick, G Davies and G Harbottle (eds), *Copinger & Skone James on Copyright* (17th edn, Sweet & Maxwell 2016) para 21–298; McGregor (n 5) para 14–030.

68 Caddick, Davies and Harbottle (n 67) para 21–298.

69 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch) 815.

70 See, eg, AS Burrows, 'Are "Damages on the *Wrotham Park* basis" Compensatory, Restituionary or Neither?' in D Saidov and R Cunnington (eds), *Current Themes in the Law of Contract Damages* (Hart Publishing 2008).

71 W Day, 'An Application of Wrotham Park Damages' (2015) 131 LQR 218, 218–19. Most recently, see *Morris-Garner v One Step (Support) Ltd* [2016] EWCA Civ 180 that is due to be heard by the Supreme Court in 2017.

72 Kramer (n 9) 547.

73 McGregor (n 5) paras 14–021 to 14–023.

may overcome the debates by pointing out that, as they are either CD or restitutionary damages, they do not need to be considered separately.

Thirdly, I also do not pay special attention to those types of contractual damages which may be interpreted as CD. This group includes liquidated, delay, negotiating, user, reliance, and expectation damages because they all express different measures of claimant's remediable loss. Liquidated damages reflect the value of loss that was previously agreed by the parties to the contract. The sum must be 'a genuine pre-estimate of the damage which would probably arise from breach of the contract',[74] otherwise it would be a penalty. We may thus say that liquidated damages compensate for presumed and contractually posited damage, ie for the contractually agreed monetary value of hypothetical damage stemming from breach of an obligation that is sanctioned by the liquidated damages clause.[75] By the same token, delay damages may be seen as liquidated damages for delay.[76]

The award of negotiating damages is based on 'what reasonable people in the position of the parties would negotiate for a release of the right which has been, is being, and will be breached'.[77] Again, this may be analysed as a special case of CD—an award

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74 ibid para 15–013.

75 cf McGregor (n 5) who puts liquidated damages under the NCD heading mainly because of their close connection with contractual penalties. Although liquidated damages are 'a genuine pre-estimate of damage and the other [ie contractual penalty] a sum fixed in terrorem', it is sometimes hard to distinguish the two in practice (ibid para 15–028).

76 Recently, see, eg, *J Murphy and Sons Ltd v Beckton Energy Ltd* [2016] EWHC 607 (TCC); [2016] BLR 448 [6], [20]; *Vinci Construction UK Ltd v Beumer Group UK Ltd* [2017] EWHC 2196 (TCC) [5].

77 *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430; [2006] 2 EGLR 29 [22].

compensating for a hypothetically negotiated price that represents the value of the infringed right. As Richards J put it: '[i]t is now clearly established that such damages, described as "negotiating damages" … are a form of compensatory damages available in cases of breach of contract, including non-proprietary breaches.'[78]

User damages, in contrast, compensate for loss of profits. It is 'a more modern description of what used to be called mesne profits, [and it] differ[s] from a disgorgement remedy focussed on profits. [User damages] are measured by reference to the reasonable rental value of the converted goods and not the profits made by using them'.[79] Similarly, there are another two labels that are express different measures of putting the claimant in the same position as if the contract had been performed—either reliance damages, which are measured by wasted expenditure resulting from the fact that the claimant relied on the contractual performance, or expectation damages, which are measured by the expected profit that would result from due performance of the defendant's obligation.[80]

Historically, it is possible to find even more categories of damages that are now extinct and therefore do not make for an individual category. For example, parasitic damages, which were dependent on the fact that the main action did not fail,[81] were refused

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78 *Abbar v Saudi Economic & Development Co (SEDCO) Real Estate Ltd* [2013] EWHC 1414 (Ch) [224]. This reasoning was recently approved in *Morris-Garner v One Step (Support) Ltd* (n 71) [80].

79 *Blue Sky One Ltd v Mahan Air, PK Airfinance US Inc v Blue Sky Two Ltd* [2010] EWHC 631 (Comm) [58].

80 In more detail, see McGregor (n 5) paras 4–028ff.

81 For example, in *Campbell v Mayor, Aldermen, and Councillors of the Metropolitan Borough of Paddington* [1911] 1 KB 869 (KB) the tenant sought damages 'for obstructing the view from her windows' (ibid 875) which was a loss (parasitically) resulting from the defendant's public nuisance.

as a separate category in early 1970s,[82] because 'the difference between [parasitic damages] and aggravated damages is possibly no more than verbal'.[83] Similarly, conversion damages,[84] 'which approached the total value of the infringing goods sold by the defendant',[85] lost their effect by virtue of the Copyright, Designs and Patents Act 1988.[86] Neither is it necessary to examine the old labels for CD, such as ordinary and substantial damages,[87] or to revive the expression 'vindictive damages' which was used to describe punitive damages.[88] Possibly, more labels could be added to this obituary, but the point is clear, I hope. None of these categories is now recognised as a separate head of damages.

Overall, the categories mentioned in this subsection need not be analysed individually in the rest of the thesis and we can only focus on the five heads of damages that I presented—by looking at those heads of damages that judges and legislators explicitly assimilated to NCD, by looking at the types of damages that scholars agreed are distinct from CD, and by showing that other doctrinal 'labels' may either be translated into some of the former categories or are extinct—as potential NCD candidates: exemplary

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82 *Spartan Steel and Alloys v Martin & Co (Contractors)* [1973] QB 27 (CA).

83 PS James, *General Principles of the Law of Torts* (Butterworths 1978) 427.

84 Copyright Act 1911, s 7; Copyright Act 1956, s 18.

85 Laddie (n 66) 255.

86 s 31(2).

87 F Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens and Sons 1887) ch 5; H Fraser, *A Compendium of the Law of Torts* (Reeves and Turner 1888) 126; Winfield (n 42) 151.

88 CG Addison, *Wrongs and Their Remedies: Being a Treatise on the Law of Torts* (2nd edn, Stevens and Haynes 1864) 905–07; Winfield (n 42) 151.

(punitive), nominal, contemptuous, vindicatory, and restitutionary (disgorgement) damages.

3 IS THERE A DOCTRINAL CONCEPT OF NCD?

In the previous chapter I showed that there is no clear black-letter concept of NCD and that we may restrict the scope of potentially non-compensatory types of damages to just five classes. That was a question of black-letter law and of where the doctrinal line between CD and NCD *could* be drawn. Let me now examine whether and how doctrinal scholars actually draw the line. The rare scholarship on this topic conventionally defines NCD awards by two, in my view unsatisfactory, strategies: nominal and functional. This chapter explains their pitfalls.

3.1 Nominal definition

According to the nominal strategy, we may say that all other-than-compensatory types of damages fall under the umbrella concept of NCD by their name, ie *nominally*.[89] There are several problems with this approach.

The initial problem is that this definition contradicts the positive law. If we take all the black-letter categories of damages and try to group them nominally into only two categories (CD and NCD), it is hard to see how the nominal definition could work. This is mainly because various essentially compensatory awards are simply *not* denominated as CD (eg aggravated damages or user damages).[90] It does not matter whether we collect all other-than-compensatory heads of damages and define them as NCD, or whether we

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[89] For an example of such approach, see n 9. This strategy is often combined with functional definition (see Section 3.2).

[90] See Section 2.2.

collect compensatory awards by their label and define the residual awards as NCD. Either way, the nomenclature is not decisive of whether a particular award is compensatory or not. In short, the language of the present law and private law doctrines either proves wrong this definition, or, vice versa, the nominal definition proves wrong the labelling.

This strategy is, however, flawed due to more fundamental reasons than its incompatibility with the current law. Had the law been different, we still would not be able analytically to break down all damages into two *meaningful* groups (CD and NCD) simply by their names because such a method does not create the NCD category—it only creates a residual category of damages that may but also may not have common features. There is no guarantee that such a category would bear some positive meaning, for its content is essentially reliant on how we define CD.

What further undermines the plausibility of the nominal definition is the inconsistency with which jurists use the term NCD and other damages labels. In fact, I suspect that jurists only worry about the precision of their language to the extent that they anticipate problems arising on account of its being imprecise.[91] An extreme example of this loose language might be the case of *Swindle v Harrison*.[92] Here Evans LJ discussed the issue of 'damages' and 'compensation',[93] albeit essentially having in mind restitutionary damages, ie damages which nominally are non-compensatory.[94] Neither courts nor

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91 Thanks is due to Roderick Bagshaw for his suggestion on this point.

92 [1997] 4 All ER 705 (CA).

93 ibid *passim*.

94 A similar critique of this judgment is presented eg in SB Elliott, 'Restitutionary Compensatory Damages for Breach of Fiduciary Duty?' (1998) RLR 135.

practising lawyers are, however, legally bound to use any fixed terminology and so rationalising NCD solely by their labels may be nothing more than a proxy.

3.2 Functional definition

The *functional* approach is probably even more common definitional strategy. Functionally, we may say that NCD are damages that do not have the compensation of the claimant as their main objective, although they may have compensation as their side-effect.[95] Yet this definition goes awry as well.

Firstly, the functional approach may not be an adequate method for explaining the law of NCD because it explains and describes the functions of remedies and not the legal rules in question.[96] Therefore, such definition cannot be NCD-centric simply because it is focused in a different direction and despite the benefits of our knowing the functions of various legal institutes and instruments, it does not explain nor describes the law of NCD, which is a problem for a doctrinal theory of NCD.

Secondly, the functional approach could be a viable strategy had we known the *distinctive* objectives and functions of NCD. However, this question remains completely unanswered by functionalists. In fact, their approach blurs the line between compensatory

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[95] For instance, in *Street on Torts* we read that '[a]lthough the vast majority of damages awards in English tort law are intended to compensate the claimant … occasionally other forms of award are made' (Murphy and Witting (n 41) 677). See also, eg, Kramer (n 41) where non-compensatory damages are defined as '[d]amages awards not based on compensation' (ibid 557) or McGregor (n 5) where non-compensatory damages are viewed as constituting a departure from 'the compensatory principle' (ibid para 1–010).

[96] The functional approach is contested by, eg, EJ Weinrib, *The Idea of Private Law* (rev edn, OUP 2012) 3–8 and R Stevens, *Torts and Rights* (OUP 2007) 36.

and non-compensatory goals since it does not treat them as being mutually exclusive. The problem is that functional theorists allow for compensation as a side-effect of NCD and there is thus little to be said about NCD and the functions that would be genuinely 'non-compensatory'. We may try to meet this objection by pointing out that NCD do not have compensation as their *main* aim. But how do we decide which function is primary and which is not? I am not aware of any literature providing a convincing criterion or method of distinguishing main and side functions of remedies.

Another difficulty comes from the concept of a function. We may say that damages have various functions but the meaning of a function itself remains unclear. In his book *The Anatomy of Tort Law*, Cane, for instance, wrote that functions are purposes.[97] Still, how we measure a purpose? Are there any objective measuring criteria? Or do we just intuitively locate the purpose in the range of factual outcomes that relate to a particular remedy and then attach a label to it? Is the purpose what a judge aims to achieve by awarding damages? Is the purpose what a claimant seeks to obtain by filing a claim? Unless we say that it is law's own purpose (posited authoritatively by a judge, legislator or by contractual parties), it is hard to find any objective (in this sense observer-neutral) conception of a function.

This introduces a further complication, namely the issue of semantic relativism. The functional approach seems deeply locked in subjectivism and this makes our understanding of the functions of damages semantically relative. By 'subjectivism' I mean

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[97] P Cane, *The Anatomy of Tort Law* (Hart Publishing 1997) 206.

that the functions to which we refer (eg compensation or punishment) are most often observer-relative. What one sees as punishment (relative to his epistemic perspective), another person may understand as compensation and vice versa. It makes thus no sense to argue in a theoretical (ie observer-neutral) account of NCD whether someone, from his or her own perspective, sees the award of damages as punishment or compensation, just as it makes no sense to argue as to whether someone likes stewed carrot or not. *De gustibus non set disputandum*. Without an external, neutral assessment of these functions, our thinking gets easily lost between objective and subjective meanings of the goals.

Moreover, the functionalist strategy is trapped in multiple, often overlapping categories and labels.[98] In the typical line of functional reasoning about damages, the goals of compensation, restitution, punishment, preventing a wrong, and declaring rights are considered,[99] but it remains unclear how these five objectives relate to each other, why or when they are compatible, etc. So, the functionalist strategy does not add much to the coherence and objectivity of our theoretical understanding of the law of damages, I think. It may be a pragmatic strategy, but why, for example, could not we construct some overarching function of all damages, such as Stevens's substitutive function—damages as a next-best substitute for the infringed right of the claimant?[100] Or why could not we

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98 See more in P Birks, 'Definition and Division: A Meditation on *Institutes* 3.13' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) who argues that '[i]ntersecting categories cause chaos and injustice' (ibid 23).

99 See, eg, AS Burrows, 'Judicial Remedies' in AS Burrows (ed), *English Private Law* (3rd edn, OUP 2013) 1257.

100 Stevens (n 96) ch 4.

completely reclassify damages according to new types of distinctive function, such as Zakrzewski who suggested creating just two main groups of remedies: replicative and transformative?[101] Also, why cannot we stick with fewer than five goals, such as Birks?[102] Or why should we be committed to only those five functions mentioned above, while omitting, say, deterrence that is advocated by law-and-economics theories? These questions rather undermine the credibility and usefulness of the functional approach to NCD.

Finally, it seems to me that the functional strategy faces very similar problems as the nominal strategy, even though it operates at a different level of abstraction. If we accept that the functional strategy, regardless of my first objection against it, is just an alternative way of describing the law of damages, we may then consider said functions to be merely alternative labels for individual heads of damages. In this sense, it does not make much of a difference whether we say that the basic award of damages is either nominally or functionally compensatory and that all other awards are either nominally or functionally non-compensatory. Both strategies may be then subjected to the same type of criticism.

3.3 Interim conclusion

As we have seen, neither the nominal nor the functional approach is sufficient doctrinally to distinguish NCD from CD and to draw a clear line that would help us to understand

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[101] See R Zakrzewski, *Remedies Reclassified* (OUP 2005) ch 5.

[102] Birks, thought that there are only three goals, namely compensation, restitution, and punishment (PBH Birks, 'The Law of Restitution at the End of an Epoch' (1999) 28 UWAL Rev 1, 13 and 17).

what NCD *are*. Doctrinal 'nominalists' and 'functionalists' cannot provide a list of exclusively NCD awards because, under present law, they cannot convincingly argue that some awards *are* non-compensatory. If we think about it more generally, such an approach, if it were to succeed, could only be premised on some non-doctrinal pre-understanding of NCD, because the present law is neither nominally nor functionally framed around the CD and NCD distinction. At best, both definitions may thus only be used as a proxy. In other words, they are only able to demarcate NCD by identifying damages that *are not* compensatory. This is a Pyrrhonic victory because it does not advance our understanding of NCD and their doctrinal underpinnings in comparison to the end of the previous chapter where I presented a list of five potential NCD types of damages (ie awards that are doctrinally not CD).

4 CAN THERE BE A DOCTRINAL CONCEPT OF NCD?

The foregoing indicates that if we try to define NCD analytically, ie if we claim NCD to be not CD, we may fall into further intellectual fallacies and misconceptions, just like in the cases of nominal and functional definitions where NCD is a residual and doctrinally meaningless category. In Section 4.1, I examine this problem at a meta-level by asking whether there *can be* an analytic doctrinal definition of NCD. My answer is negative. Subsequently, since the evidence also shows that the concept of NCD have not yet doctrinally been defined in positive terms, ie non-analytically, I pose a more general question as to whether it is at least conceptually possible to define NCD in doctrinal terms. In Section 4.2, I argue that it is not. It is interesting that in legal scholarship none of these questions has ever been asked, although both of them are absolutely crucial if want to think about the doctrinal concept of NCD seriously.

4.1 Threat of circularity

Any analytic definition of NCD faces one principal obstacle, namely, how we can differentiate between CD and NCD so that NCD can be put to the test without circularity. Analytically, it is true that NCD are not CD, but this definition must be either circular or empty. All damages must be analytically either CD or NCD, *tertium non datur*. Had there been a third or further options, it would not be analytically true. Similarly, for example, it is not true that all humans must be either males or females because androgyny (or, more generally, genderqueer category) also exists. In analytical sense, therefore, we may only

assert that both feminine and androgynous individuals are not males, or that male and androgynous individuals are not females. Analogically, in the said analytic definition of NCD, we only know what NCD are not, just as we know that non-males are what males are not. And there is the circularity. In order to define NCD analytically, we must presuppose an analytic concept of damages at large—a concept where damages are either CD or NCD. But then CD are what NCD are not, and NCD are what CD are not—which is a circular definition.[103]

To step out of the circle of analyticity, some positive (not merely conceptual) evidence is needed. So, for example, 'non-males' could positively be defined by reference to females and androgynous subjects. In this case, 'non-males' would be a non-empty class. But unlike the position in relation to females and androgynous people (who can both be considered non-males), we yet do not know what NCD are in relation to the positive law, for there is no clear black-letter definition of them.

At this point we can only conclude that NCD *cannot* be defined merely analytically, for otherwise it would make for an empty (meaningless) doctrinal class. The analytic definition of NCD only gives us a name but not a meaning of NCD. In other words, if defined analytically as a mere privation of CD, the term NCD does not directly refer to any positive law (doctrinal) damages award or to a non-compensatory collective of awards. Instead, it primarily refers to CD, and thus only makes for an empty definition.

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[103] This argument is grounded in Quine's critique of analytic statements presented in WVO Quine, 'Two Dogmas of Empiricism' (1951) 60 The Philosophical Review 20.

This implies that we need a non-circular, non-analytical and non-empty definition of NCD. Yet the Lord Nicholls's statement (set out at the beginning of this thesis) which I rephrased as '[l]eaving aside the anomalous exception of non-compensatory damages, damages are compensatory,[104] seems both analytically circular and empty. This applies to nominal and functional strategies as well. Moreover, we have also seen that it is also insufficient to define NCD by combining either various black-letter names or doctrinal functions of these remedies. In fact, there has been no doctrinal account of NCD to date. On the other hand, I suspect that everyone who understood the opening paragraph of this thesis must have some intuitive grasp of NCD. And thus, before we start the ball rolling in terms of searching for a unitary NCD concept by conducting doctrinal analysis of all potential NCD candidates one by one, it seems reasonable to ask whether such endeavour—which no one has yet successfully completed—can be completed at all.

4.2 The conceptual impossibility of a doctrinal definition of NCD

The best method how to solve present question involves *conceptual analysis*—'pursuit of clear expression of things we feel we know intuitively'[105]—precisely because we know NCD intuitively but we do not know them clearly enough. Thus, we need to examine the notion of NCD in relation to legal doctrines at a conceptual level. This will help us to see that a *doctrinal* definition of NCD cannot be achieved.

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[104] See Section 1.1.

[105] Y Oono, *The Nonlinear World: Conceptual Analysis and Phenomenology* (Springer Japan 2013) 35.

The key point in analysing the feasibility of any doctrinal concept of NCD is what we mean by a doctrinal definition and by a doctrinal concept of NCD. I argue that the preceding evidence demands us to understand NCD as a 'reductionist' doctrinal category. Let me explain what I mean by this. By 'doctrinal definition', in general, I mean a definition that describes, explains or clarifies what the law *is*. In relation to NCD, however, this understanding needs to be restricted. We have already seen that a doctrinal definition of NCD cannot be merely analytical, for it would be a circular and empty concept. Instead, the doctrinal definition of NCD, if it can be provided, needs to be constructed by putting smaller doctrinal pieces of information together. In other words, it must be based on some positive evidence such as on the collective doctrinal analysis of the five heads of damages that I mentioned as the potential NCD candidates. If we can find some commonalities amongst them, it would be possible to construct an umbrella NCD category. This implies that, as a doctrinal concept, NCD would need to be a *reductionist* category, ie a collection of individual doctrinal (sub)categories to which the concept can be reduced.

Our intuitive understanding of NCD as a reductionist doctrinal category seems justified, in the first instance, by the fact that there undoubtedly are some positive examples of damages that are not compensatory in the nominal or functional sense. Moreover, black-letter law and doctrinal writings explicitly use the concept of NCD,[106] which suggests that we may possibly build our definition of NCD on such positive fragments. This fragmentary evidence is, I think, a driving force of our intuition. Yet this

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[106] See, eg, art 29 of the Montreal Convention 1999; *AG v Blake* (n 2) 282; EJ Weinrib, 'Illegality as a tort defense' (1976) 26 UTLJ 28, 42; Burrows, 'Reforming Non-Compensatory Damages' (n 9).

intuitive grasp of NCD still opens the question whether the evidence allows for NCD as a reductionist category or not. In short, the conceptual problem is whether we can reduce the concept of NCD to any set of existing categories of damages.

If we formulate our question in preceding terms, the answer seems almost self-evident: no reductionist doctrinal approach can explain the law of NCD. The reasons for this are very simple. As I showed earlier, the present law of NCD, whatever that means, is incoherent because various black-letter and doctrinal heads of damages are unsystematically overlapping and there is no pre-existing structure in the law of damages that clearly separates CD from all other damages awards, neither from NCD. Damages (in the positive law sense) are incoherent both nominally and functionally, as we have seen, which is a sufficient premise for the claim that any collection of several existing damages categories (eg, exemplary damages, disgorgement damages, etc.) cannot be doctrinally classified as NCD, ie as a reductionist category that is clearly distinct from CD.

In simple terms, any analysis claiming that NCD are a distinct doctrinal category would contradict the present black-letter law because the individual heads of damages from which NCD would be constructed are not clearly distinct from CD, neither from each other. We may seek solace from this doctrinal incoherence in dividing damages analytically, but that has already been proved—in relation to NCD—a blind route. All of this suggests that NCD are irreducible to individual types of non-compensatory monetary award. At this point, thus, I hope to have convinced the reader that NCD cannot be analysed as a doctrinal concept.

5 CAN THERE BE A PHILOSOPHICAL (JURIDICAL) CONCEPT OF NCD?

The fact that there is no room for a doctrinal concept of NCD does not mean we cannot have a philosophical concept of NCD, ie a concept in relation to which we would be able to evaluate and to organise our present laws, legal categories, or legal thinking. This chapter shows, again by the method of conceptual analysis, that NCD can be analysed as a philosophical concept. In Section 5.1, I present three arguments in support of the view that NCD can be a philosophical (juridical) category. I use the term 'juridical' because it better explains the normative, as opposed to factual, nature of this legal concept.

From a philosophical point of view, we could design the concept of NCD in almost every possible way. It is useful, however, that it is designed in line with our intuitions, for otherwise it would be a mere fiction that does not relate to our intuitive understanding of how things stand in this part of legal domain. In this regard, I argue that NCD can be best designed by collectively analysing the ethical underpinnings of the potential NCD candidates because such concept is non-empty and it does not violate our intuitions (Section 5.2).

5.1 Reasons for philosophical (juridical) understanding of NCD

The first argument for a philosophical concept of NCD is based on a more elaborate version of the *reductionist* understanding of these awards. I borrow the term 'reduction' from philosophy where it represents

> the idea that if an entity *x* reduces to an entity *y* then *y* is in a sense *prior to x*, is *more basic than x*, is such that *x fully depends upon* it or is *constituted by*

> *it.* Saying that *x* reduces to *y* typically implies that *x* is *nothing more than y* or *nothing over and above y*.[107]

Thus, if NCD were a reductionist doctrinal category, then every claim about NCD would need to be analytically (necessarily) true about all NCD subcategories of damages. For example, if we say that NCD do not have compensatory functions, then exemplary damages, nominal damages, etc. cannot (necessarily) have compensatory functions as well. In other words, any claim about NCD would need to be capable of being translated in a claim about all existing NCD subcategories *salva veritate*.

However, NCD fall short of such comprehension not only due to black-letter evidence but also in principle. As Quine showed in his famous attack on empirical reductionism, 'our statements about the external world face the tribunal of sense experience not individually but only as a corporate body.'[108] Therefore, no doctrinal assertions about NCD can be verified by recourse to *individual* statements about the black-letter evidence.[109] If reductionist account of NCD was true, then every meaningful (non-empty) statement about NCD would be translatable into a set of statements about positive laws, but, as a matter of fact, it is not.

The key point is that a person who understands a meaning of a certain general claim about NCD does not necessarily need to know what positive legal examples would verify

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[107] R van Riel and R van Gulick, 'Scientific Reduction' in EN Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter edn, 2016) <https://plato.stanford.edu/archives/win2016/entries/scientific-reduction/> accessed 12 August 2017.

[108] Quine (n 103) 38.

[109] See ibid 34–39.

or falsify the statement. In fact, we may have (and we do have) meaningful hypotheses about what NCD *are* even without such evidence. For example, the legislator clearly expressed his view that exemplary or punitive damages are NCD in art 29 of the Montreal Convention 1999. Such a view must have necessarily relied on some non-doctrinal pre-understanding of NCD, ie on purely theoretical non-verifiable statements. Accordingly, these theoretical statements could be verified or falsified only as part of a bigger theory of NCD, which implies that the concept of NCD need to be a self-contained *philosophical* concept that can be verified only as part of a larger theory of NCD, not by recourse to individual positive or doctrinal types of award.

Secondly, we may defend the philosophical approach to NCD by an eliminative argument. The idea of this argument is simple: there are two options—doctrinal or philosophical conception of NCD—and since the doctrinal option failed, we are left with the philosophical one. Alternatively, we may eliminate doctrinal approaches to NCD because they represent an exercise in *classification* whereas philosophical mode of thinking can be understood as *qualifying* endeavour.[110] Doctrinally, we describe how NCD stand in the positive law by creating doctrinal *classes* and their relations. Yet in the philosophical sense, we are concerned with how NCD stand in an ideal world of legal norms and this ideal world helps us to *qualify* the positive law and doctrines as either correct or defective reflections these philosophical ideals.

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[110] The idea of distinguishing between classifying and qualifying criteria comes from R Alexy, *The Argument from Injustice: A Reply to Legal Positivism* (B Paulson Litchewski and SL Paulson tr, Clarendon Press 2002) 26.

To 'classify' means to give a label. To 'qualify' means to ascribe a quality. So, something can be doctrinally classified as NCD (eg liquidated or aggravated damages) but if it does not satisfy philosophically qualifying criteria, it may be qualified as a defective type of NCD. I think that this qualifying layer is precisely what Weinrib had in mind when he proposed to introduce the *juridical classification* of obligations. In his view, the juridical classification 'reflects the distinctive moral rationality that is implicit in private law and that animates it from within … [T]he juridical is a normative idea to which the common law may not in all particulars conform'.[111] The philosophical approach is thus necessary because it helps us to redesign and advance our system of law. As Jansen put it, '[i]t would be misleading to take doctrinal categories as a given, pre-existing structure, into which legal rules and policies can then be placed. Doctrine must respond to the law's normative [philosophical] structure, to its basic principles and rules, and not vice versa.'[112]

Thirdly, the philosophical (or juridical) approach to NCD can collectively explain the exceptionality of NCD, whereas doctrinal theories cannot. The black-letter review showed that the term NCD is addressed as some *exceptionally acceptable but otherwise not desirable award* (even though it remained unclear what the category means). Theoretically, we may describe this exceptionality either by providing a list of individual doctrinal exceptions or as a juridical exception to the principle of compensation. Yet by

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111 Weinrib (n 11) 37.

112 N Jansen, 'The Concept of Non-Contractual Obligations: Rethinking the Divisions of Tort, Unjustified Enrichment, and Contract Law' (2010) 1 JETL 16, 33.

providing a descriptive list of exceptions, we do not explain the exceptionality. As Cane correctly suggests, exceptionality may be understood descriptively or prescriptively, but there are no convincing reasons, at the descriptive level, why CD should be treated as ordinary and NCD as extraordinary.[113] The individual cases may (or may not) descriptively differ in their frequency or in the quantum awarded, but these are only random and unconvincing criteria for exceptionality. On the contrary, it seems plausible to conceptualise NCD as a juridical and normative exception in the law of damages.

Overall, it shall now be clear that NCD can be scrutinised as a philosophical category and that a self-contained juridical understanding of NCD promises to offer a solid grounding for an NCD-centric theory. Yet before we start building this theory, it makes sense to ask whether the juridical concept of NCD is not an empty category by definition just like the concepts 'married bachelor' and 'round square' which are oxymoronic and meaningless. How about NCD? Is it an oxymoron and thereby a necessarily empty term?

5.2 The juridical concept of NCD as a meaningful category

The word oxymoron originates from Greek *oksús* (meaning pointed) and *mōros* (meaning foolish). Oxymoron thus is something pointedly foolish.[114] The problem with NCD, in this regard, is that many jurists may consider it such pointedly foolish expression. Damages (in general) could analytically be defined as a monetary award that

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[113] Cane (n 8) 303–04.

[114] See the term *ὀξύμωρος* in HG Liddell and RA Scott, *A Greek-English Lexicon* (Clarendon Press 1940) < http://www.perseus.tufts.edu/hopper/> [https://perma.cc/M6EK-7H5F].

counterbalances damage. Cane argues, for instance, that 'on this view, the word "compensatory" in the phrase "compensatory damages" is tautologous'.[115] Also semantically, counterbalancing and compensation may be regarded as synonyms because the word compensation stem from Latin *compensāre* which means to weigh (one) against another, counterbalance.[116] Damages respond to damage: it is a way of replying back (re-) to a promise or an obligation (-spond).[117] By paying damages, a wrongdoer allocates back[118] what we may figuratively say he or she promised not to take from the sufferer. Also, in a comparative perspective, the term NCD does not have an analogue in other legal systems.[119]

Intuitively, there is thus no room for non-compensation in the sense of counterbalancing,[120] and the self-contained concept of NCD may seem oxymoronic, if not perverse. Yet, my goal is to suggest otherwise, namely that NCD may have a positive

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115 Cane (n 8) 301.

116 See 'compensate' in TF Hoad (ed), *The Concise Oxford Dictionary of English Etymology* (OUP 1996).

117 From Latin words *re-* and *spondeo*. See, eg, PGW Glare (ed), *Oxford Latin Dictionary* (Clarendon Press 2006) 1633–35 and 1809.

118 For the idea of allocating back in relation to corrective justice, see J Gardner, *Law as a Leap of Faith* (OUP 2012) 238.

119 See, eg, U Magnus and FD Busnelli, *Unification of Tort Law: Damages* (Kluwer Law International 2001); N Cohen and E McKendrick (eds), *Comparative Remedies for Breach of Contract*, vol 5 (Hart Publishing 2005); M Bussani and M Infantino, 'Tort Law and Legal Cultures' (2015) 63 Am J Comp L 77; AI Caggiano, *Disgorgement, Compensation and Restitution: A Comparative Approach* (2016) 16 Global Jurist 243.

120 Similarly, eg, in *Stoke on Trent City Council v W&J Wass Ltd (No 1)* [1988] 1 WLR 1408 (CA) 1413, LJ Nourse wrote that 'where no loss has been suffered no substantial damages of any kind can be recovered.' In support of the exclusive compensatory nature of tort law, see eg BA Koch, 'Why Tort Law Seems to Fail Sometimes' in H Koziol and U Magnus (eds), *Essays in Honour of Jaap Spier* (Jan Sramek Verlag 2016) 142–49.

meaning if we understand them as a juridical rule for the exceptional damages awards. If my argument is correct, then it should be possible to describe the concept of NCD clearly by reasons which justify the exceptionality rule.

5.2.1 Reasons why NCD is not an empty (oxymoronic) category

If it was analytically true that all damages were compensatory, it would be a truth of very little value, just like saying that every circle is round, or that every bachelor is unmarried, because it would be uninformative. Nietzsche expressed the idea clearly when he wrote, that '[i]f someone hides something behind a bush, looks for it in the same place and then finds it there, his seeking and finding is nothing much to boast about'.[121] Analytical truths are uninformative precisely in this sense since they do not convey nor invent new meaning, but only discover what was already contained in the original information.

In an ideal world of philosophical constructions, all damages could analytically be compensatory. From a doctrinal perspective, this could be a juridical rule to which our law may or may not completely conform. Under this rule, all black-letter damages *could* necessarily be compensatory which would demand us to think that they *should* be compensatory. This view is actually not too far from our understanding of CD as the axiomatic award of damages. It is a well-established rule that damages which we expect to find behind the virtual 'bush' will be compensatory. This may be why CD are often seen as unitary category at both doctrinal and philosophical level. If we classify an award under

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[121] F Nietzsche, 'On Truth and Lying in a Non-Moral Sense' in R Geuss and R Speirs (eds), *The Birth of Tragedy and Other Writings* (R Speirs tr, CUP 1999) 147. cf also n 115.

the doctrinal CD heading, we are also willing to qualify the award as compliant with the philosophical CD category, and vice versa.

However, saying that all damages are compensatory is at odds with what we can actually find behind the imaginary bush. The black-letter evidence clearly disproves the necessary analytical connection between damages and compensation and the oxymoronic clash thus appears mainly between the doctrinal evidence of NCD and juridical idea of CD, for these two stand in direct opposition. From this point of view, we may say that the black-letter evidence of NCD refers to somewhat defective types of damages because, as a rule, we expect these awards to be compensatory as well.

Another source of our doubts about NCD as a meaningful category might originate from our thinking of NCD as of a mirror image of CD. In this perspective, it may seem that if CD are unitary at both the doctrinal and juridical level (the claim that damages are compensatory and should be compensatory) then NCD must be unitary at both levels as well (the claim that damages are non-compensatory and should be non-compensatory). But that would be a mistake, for it confuses rational and positive features of NCD, for as I have shown earlier, NCD are not a unitary doctrinal category. They can only be unitary at the juridical level. The pointed foolishness then stems from our saying that damages are (doctrinally) and should be (juridically) both compensatory and non-compensatory.

If we reject this mode of thinking and if we realise that NCD only is a juridical category, we should be able to escape the unease. In doing so, we need to look at NCD as a juridical qualification for something to be exempted from the compensatory rule. As an exceptionality rule, NCD cannot be oxymoronic. On the contrary, in this view, NCD

conveys a meaningful information, a novel insight into the law of damages, namely to reasons for the exceptionality rule of NCD. Accordingly, we need to ask what this exceptionality rule looks like and what reasons justify the exception.

5.2.2 Reasons for the rule of exceptionality as a positive meaning of the juridical NCD category

Looking back at the conventional definitional strategies (nominal and functional) we may say that NCD are neither exceptional by their name, nor by their functions, because these could be only reasons for the fact of exceptionality (not for the rule of exceptionality) of NCD at large. More generally, I also argued that the exceptional nature of NCD cannot be explained descriptively and that it must be prescriptive or normative—in this case juridical. But what are the juridical types of reason for which we are looking?

First, these reasons shall be *observer-neutral*. In Section 3.2, when analysing the functional definition, I encountered the problem of semantic relativism. The idea there was that purposes and goals of damages are generally observer- or participant-relative and as such they cannot serve as fixed and clear criteria for defining NCD. Yet there was another perspective by which, I claimed, we may look at functions of damages. We may relate the functions to the law itself, ie to see them as *law's own* goals. Through this prism, the functional relativity shall no longer obscure our understanding of damages. The law's own purpose shall be, by definition, observer- and participant-neutral and may thus serve as a sound grounding for our claims about the goals of damages, CD, and NCD respectively.

Second, it must be a *justifying* type of reason. All damages, both CD and NCD are judicial remedies that we have created and posited ourselves. It is a construct because there is no natural right to monetary payment. Looking back at Aristotle, he already thought that 'this is why money is called *nomisma* (customary currency), because it does not exist by nature but by custom (*nomos*)'.[122] Therefore, there must be some legitimising and legal reasons why we could have done this. NCD cannot be seen as a product of some schizophrenic evil judge or a legislator who did not know what he was doing or who wanted to cause the legal system to collapse. On the contrary, the exceptionality rule for NCD must comply with the rule of law and principles of justice. Otherwise, it would not be qualified as a serious legal category but as a mistake or as a series of such individual failures. Since I want to explore a constructive interpretation of NCD, I need to look at them as a juridical category that respects some underlying principles of justice.

Third, these reasons must be part of a logically *coherent and complete* design of justice. These justifying observer-neutral reasons for the exceptionality rule of NCD need to be verifiable in relation to both damages at large as well as to the CD category. Only such a comprehensive approach can efficiently, meaningfully, and non-circularly distinguish between CD and NCD. These reasons must therefore not discriminate between CD and NCD in why they are undoing injustice, but only in what generally justifies NCD as an exception.

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[122] Aristotle, *Nicomachean Ethics* (H Rackham tr, rev edn, Harvard UP 2014) 1133a.31–33.

Finally, these reasons must aspire to be consistent with the *holistic* approach to NCD and not to detach completely from the positive evidence on NCD. This evidence fuels the importance and meaningfulness of my theory of NCD and it cannot be ignored either. As a juridical category, the concept of NCD must seek to explain the underlying reasons behind the black-letter evidence that gave rise to our intuitions about NCD. However, this by no means implies that the juridical concept of NCD will coherently, completely, and observer-neutrally justify, neither explain the present law of NCD. In previous text, I argued that this is impossible. It can only justify and explain the theoretical justificatory underpinnings behind the heteronomous body of the law of NCD, which is something different.

5.3 Concluding remarks: The need for an ethical analysis of NCD

Chapters 3, 4 and 5 gave us quite clear general limits on how we may and may not define NCD, but they still did not define the very idea of NCD. Let me thus put forth a final argument of this chapter. The law's own observer-neutral purpose is to maintain justice. 'By failing to be just, it fails to be law.'[123] This look as an uncontroversial premise. The law of remedies, then, has a more specific observer-neutral goal. The function of remedies is to remedy (undo) injustice, ie justly to respond to injustice. If we take the argument one step further, then all damages may be said to have one collective function—a single ultimate goal—that is of their own. The ultimate goal of remedial rights in damages is to

[123] NJ McBride and S Steel, *Great Debates in Jurisprudence* (Palgrave Macmillan 2014) 64 (in a section on Alexy's argument form injustice). See also ibid 82ff.

restore justice by monetary means. Accordingly, the ultimate justifying reason for the exceptionality rule of NCD must be an exceptional type of injustice. This means that I need to flesh out the very own purpose and justification of the juridical NCD category—a purpose and justification that acknowledge the presumed mutual exclusivity of CD and NCD, but that also respects their belonging to damages at large. From such a neutral ground, it is possible successfully to eliminate circularity, incompleteness, incoherence, and relativity of the distinction.

Overall, my question in the rest of this thesis need to be this: What is the *goal of NCD of their own*? A tentative answer to this simple, yet original question could be that the aim of NCD is justly to make a monetary award to the claimant under some reasons of exceptional injustice. This will be my working definition of NCD. Some of the obvious benefits of this understanding of NCD are that it is non-circular, non-empty, and that it promises to help us to solve hard cases by understanding the legitimacy of NCD awards.[124] Nonetheless, it still needs to be explained when exactly this non-compensatory goal is justified, ie what the justifying reasons for this exceptional (re)allocation of money are, why these reasons are sound and why they are just. In short, I have to explore the ethics of NCD.

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[124] In more detail on this feature of goals in relation to legal rights, see SC Coval and JC Smith, 'Rights, Goals, and Hard Cases' (1982) 1 L&Phil 451.

6 THE ETHICS OF NCD

The main idea of this chapter is that NCD are best ethically analysed as damages of distributive justice, ie damages that are justified by non-correlative distributive reasons, that seek to restore distributive justice, and that instantiate distributive justice via money (re)allocation between the conflicting parties. In this sense, NCD are underlined by the ethics of distribution, rather than by the ethics of correction.

My argument begins with showing that all damages awards can be justified by just two types of ethical reason—correlative and non-correlative reasons (Section 6.1)—and that non-correlative reasons underline the juridical category of NCD as well as justify the individual subheads of damages that are were identified in Chapter 2 of this thesis as potential NCD candidates (Section 6.2). To speak of NCD in terms of non-correlative reasons also means that, as the aim of their own, these exceptional awards seek to achieve non-correlative justice. This NCD's own objective can be expressed in positive terms as distributive justice which may be also seen as an external or public goal (Section 6.3).

6.1 Ethical reasons

Private law scholars often seek to explain normative foundations of damages, yet only rarely do they do so in terms of *ethics*. One of these rare writings is Peter Cane's work on the 'ethical underpinnings' of the law of damages.[125] According to Cane, the ethics of

[125] Cane (n 97) 115–21. In American law, see, eg, H Dagan, *The Law and Ethics of Restitution* (CUP 2004). Generally, tough, legal scholars seem to avoid the term *ethics* in their writings.

damages is rooted in the reasons that justify these awards.[126] This view calls for a lot of careful unpacking and refinement in relation to NCD. To explain the ethics of NCD, one needs to show what distinctive types of *justifying reason* can translate into the specific legal rules on NCD (as opposed to the rules on CD) which is an uneasy task. Luckily, Cane coined and explored a similar problem in relation to the exceptional *measure* of damages in private law.[127] Although the ethics he offers is not focused on NCD,[128] his analysis into the justifying reasons for the exceptional measure provides a fruitful background for thinking about NCD ethically. To begin from an intellectually coherent position, I need a complete ethical framework. Thus, I aim to refine and advance Cane's *structural framework* that he wanted to 'contribut[e] towards establishing'.[129]

Cane opens his argument with terminological clarifications regarding 'basic measures of damages'.[130] He stipulates that there are, descriptively, four basic measures (not types) of damages: 'compensation for losses, restoration of gains, disgorgement of gains, and (civil) fines'.[131] Then he clarifies the phrase 'the exceptional measure of damages'.[132] To understand why a measure is exceptional, it is necessary to know which of

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126 Cane (n 97) 115.

127 Cane (n 8).

128 Note that Cane's study on the exceptional measure of damages was published in 1996, ie before *AG v Blake* (n 2) which first used the term in the black-letter law.

129 Cane (n 8) 304.

130 ibid 302.

131 ibid.

132 ibid 303.

the basic measure are ordinary (unexceptional), he writes.[133] As I showed earlier, Cane favours a prescriptive approach ('the law *ought* only exceptionally to award damages in any other than the ordinary measure, whatever that is'),[134] because he cannot see why, for example, loss-based damages *are* treated as ordinary and gain-based awards as extraordinary.[135] This understanding of exceptionality is very similar to my earlier conclusion about the juridical nature of NCD, albeit Cane runs his argument from a different position. We may thus assume that Cane's search for the exceptionality principle overlaps with the objective of this chapter.

Now the key point is that, on Cane's view, the unexceptional (ordinary) measure of damages in private law is embedded in a correlative type of justifying reasons. He argues that there are two ordinary types of damages: compensatory damages that are justified by correlative loss of the claimant, and restorative damages that are justified by correlative gain of the defendant.[136] Supposedly, these ordinary measures are juridical in a sense that they prescribe when the law ought to award them. Cane, however, did not take his argument one step further to claim that the law ought exceptionally to award damages if they are justified by non-correlative gain or loss. Instead, Cane offered another idea, namely that, by allowing the exceptional measure of damages—which for him is primarily disgorgement of gains and civil fines—the law expresses bigger 'degree of disapproval of

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133 ibid.

134 Cane (n 8) 304 (emphasis added).

135 See the text to n 113.

136 ibid 311–12, 325.

particular conduct and give[s] deterrent signals of [bigger] strengths in relation to such conduct'.[137]

I suspect Cane did not elaborate the idea of non-correlativity for he did not see how we may fruitfully use this abstract principle in legal practice. It seems that Cane dislikes thinking about loss and gain in purely normative terms.[138] In his review of Weinrib's *Idea of Private Law*, he wrote that the 'translation of corresponding gain and loss into corresponding normative gain and loss robs the idea of all its power'.[139] For this reason, Cane was probably not willing to enter the normative language of (non)correlativity because if there is no factual gain or loss, there is also nothing to compare. So, Cane only held the view that the exceptional measure is *not* justified by correlative reasons. Yet saying that the juridical principle of exceptional measures of damages is justified by (1) *non-correlative* gain or loss, or (2) *no correlative* gain or loss, are two very different things. Contrary to Cane, I use the normative language of non-correlative reasons as I see it fit for the present purposes.

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137 ibid 304.

138 Similarly, other authors highlight explanatory problems that are associated with normative accounts of damage (eg, Burrows (n 62) 278–90; J Edelman, 'The Meaning of Loss and Enrichment' in R Chambers, C Mitchell and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 218–21).

139 P Cane, 'Corrective Justice and Correlativity in Private Law' (1996) 16 OJLS 471, 483. Note that Cane analyses the concept of loss (harm) and gain in factual and black-letter terms (Cane (n 8) 310, 313). cf Weinrib (n 96) 115–26.

6.2 Correlative vs non-correlative reasons

This section explains what I mean by normative gain and loss and introduces the concept of constituting and consequential damage. I advocate a slightly unusual position that both gain and loss may be conceptualised as a normative type of damage. Normative damage represents an infringement of claimant's legal right that may be remedied monetarily by virtue of either correlative or non-correlative justifying reasons. I am concerned with the correlation between a defendant's liability in damages and a claimant's damage and I argue that non-correlative justifying reasons are at the heart of exceptional NCD awards.

6.2.1 Damage and damages: a normative interpretation

In private law discourse, the term 'damage' has been subjected to various interpretations and analyses. Stevens, for instance, thinks that '[t]he slippery language of "damage" elides the distinction between injury and consequential harm'.[140] Nolan, in contrast, claims that '"injury" is the slippery word here, not "damage".'[141] Both authors then propose different terminological conventions: what Stevens calls injury, Nolan calls damage; what Stevens call harm, Nolan calls loss. Both authors, however, seem to offer what may be considered a normative account of damage. Therefore, it seems problematic to theorise about NCD without explaining my own usage of the term.

By 'damage' I mean every legally recognised and prohibited type of harm or enrichment. For me, it is conceptually impossible to have damage without it also being

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[140] R Stevens, 'Rights and Other Things' in D Nolan and A Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 121.

[141] D Nolan, 'Rights, Damage and Loss' (2016) 36 OJLS 1, 5.

harm or enrichment. On the other hand, I find it perfectly plausible to have harm or enrichment without damage. '[T]he world is full of harm for which the law furnishes no remedy', as Lord Rodger said.[142] Present English law, for example, does not recognise 'liability for seducing another person's husband, wife or partner'.[143] The unfortunate occurrence of loss and harm or someone's unlawful gain and enrichment (no matter what we call it) only stands for damage if it frustrates someone's legal right. If we adopt such an expansive understanding of damage—as a frustration of a legal right—then all damages are a remedial response to damage. I call it normative damage, for such damage primarily frustrates a right-protective 'norm', and I prefer the term 'normative damage' (or simply 'damage') over terms 'normative gain' and 'normative loss', for both normative gain and normative loss are liability generating events. Since I am concerned with liability in damages, it seems straightforward to call the liability generating event merely 'damage'.

The normative concept of damage can be split into two subcategories: liability establishing damage ('constituting damage'), meaning injury in the sense of Latin *injuria*,[144] and liability implementing damage ('consequential damage'), meaning

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142 *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 AC 373 [100]. On the same note, see, eg, Birks (n 98) 26.

143 K Oliphant, 'Basic Questions of Tort Law from the Perspective of England and the Commonwealth' in H Koziol (ed), *Basic Questions of Tort Law from a Comparative Perspective* (Jan Sramek Verlag 2015) 407.

144 In a similar sense, Holt CJ famously wrote that 'surely every injury imports a damage, though it does not cost the party one farthing' (*Ashby v White* (1703) 2 Ld Raym 938 (HL) 955). This type of damage could be dubbed 'delict' or 'wrong' in some contexts but doing so would unnecessarily restrict the scope of the following analysis. I rather adopt a generalist understanding of injury as a legally recognised

consequential loss or gain recognised and prohibited by the law—either pecuniary or nonpecuniary, corporeal or noncorporeal.[145] You might have well noticed that I exploit the distinction between liability establishing causation and liability implementing causation here. In English literature, for instance, Steel describes this difference as of between causation 'establishing the infringement of a right and any liability arising in response to the infringement alone (wrong-constituting causation)' and causation 'determining the extent of consequential liability in respect of a wrong or cause of action (consequential-liability causation)'.[146]

To distinguish between *constituting and consequential damage*, we may ask what types of right may be damaged and, then, remedied by damages. Remember that I have stipulated damages to be a remedy for damage, so it can only be a remedy for either constituting or consequential damage and for anything else. To answer our question, it is useful to adopt the Hohfeldian language of claim-rights and rights.[147] Through this prism, an injury (constituting damage) can be described as the infringement of a claim-right,

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instance of injustice because it can capture the difference 'between doing and suffering injustice' (Aristotle (n 122) 1133b.31–32).

145 cf McGregor (n 5) paras 3–007 to 3–016, that critically discusses the problematic use of the current terms 'normal' and 'consequential' loss.

146 S Steel, *Proof of Causation in Tort Law* (CUP 2015) 38. The distinction between so-called 'haftungsbegründende Kausalität', ie the liability establishing causation, and 'haftungsausfüllende Kausalität', ie the liability implementing causation, plays a pivotal role in German theory. See, in short, U Magnus, 'Causation in German Tort Law' in J Spier (ed), *Unification of Tort Law: Causation* (Kluwer Law International 2000) 63–64.

147 WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Yale LJ 16. In relation to damages, K Barker, '"Damages Without Loss": Can Hohfeld Help?' (2014) 34 OJLS 1.

whereas loss and gain (consequential damage) can be described as infringements of other rights or entitlements. For example, if someone publicly defames me or breaches my contractual rights, this constitutes damage to my claim-right. If the defamation or the breach of contract results in my suffering loss or in the wrongdoer's enrichment, it deserves to be remedied to the extent that it is consequential damage. The straightforward ethics of damages here is that all damage must be undone.

In this sense, my rights-based analysis of damage goes beyond Stevens's theory, for he limits himself by more narrow use of the word 'right'. In *Torts and Rights*, he writes '[i]n this work I shall use "rights" in a restrictive sense to mean either specific claim rights, or the claim rights which arise together for a common reason and which are specific to a larger bundle of different species of rights'.[148] Accordingly, I think that Stevens cannot describe consequential loss as damage to any rights, ie as legally qualified harm or frustration of some rights, which makes it harder to justify the extent to which consequential loss (in Steven's terminology) may be remedied by damages. On the contrary, if we conceptualise consequential loss as damage, it is easier to see the borderline between irremediable loss and remediable consequential damage to legally recognised rights. In other words, qualifying loss as damage helps us to see why the law of damages does not protect persons from all harmful consequences but only from damage. Equally, qualifying gain as damage to legally recognised rights better explains why the law of damages restores only damaging gains.

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[148] Stevens (n 96) 4.

Damages, on the other hand, represent a remedial response to damage. That is axiomatic. The ultimate ground for liability in damages is that the defendant has caused some injustice (constituting damage) that may or may not result in further unjust results (consequential damage). This seems almost self-evident regarding all juridical remedies, including damages, for remedies are meant to respond to injustice by definition. So, it must be the case that damages only can remedy some unjust normative damage.

> The practical difficulty – and a common lawyer cannot help thinking in this way – is that no one would think of *enacting* such a broad principle [as injustice] because it is very much an ultimate source of last resort for the final appellate court.[149]

Yet, because I am examining here liability in NCD at quite a high level of abstraction, I see no confusion in appealing to this broad concept. On the contrary, it helps me to highlight the ethical grounding of damages.

What do damages respond to? Ultimately, they respond to damage as an instance of posited injustice, ie either constituting or consequential damage. Since justice is a relational concept, damage can only be unjust *vis-à-vis* some existing claim-right that meant to prevent such damage. Damage is unjust both from the wrongdoer's perspective, for it represents either a breach of a corresponding duty or gain of a right to which the wrongdoer was originally not entitled, and from the sufferer's perspective, for this damage represents either an infringement of a claim-right or loss of consequential legal rights (entitlements) that the sufferer would have enjoyed had the unjust cause not occurred.

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[149] HVH Rogers, 'Wrongfulness under English Tort Law' in H Koziol (ed), *Unification of Tort Law: Wrongfulness* (Kluwer Law International 1998) 40.

One can thus say that damage is institutionally (legally) recognised injustice, ie an injustice that positive law pronounces to be remediable. This judge-made, statutory, custom or contractual institutionalisation (positing) makes it, as far as legal system can communicate its own content, easier for both the claimant and the defendant to anticipate if and when liability in damages may arise. As we will see later, for NCD—as for an exceptionally justifiable award—it is essential that they are posited this way.[150]

Accordingly, *all* damages should juridically always relate, correlate, and correspond to some damage, for otherwise they would be unjust themselves. In this sense, NCD—just like CD—are also a normative remedial response that is underpinned by some justifying reasons. The difference between CD and NCD must therefore be in *how* they respond to such damage, ie how damage as a justifying reason relate to damages. At this level of abstraction, this important question has not yet been answered, although it seems inevitable for an ethical analysis of NCD. To fill the gap, I seek to explore the relation between damage as justifying reasons and damages as justified remedies and I develop a framework of potential relations between these categories in the next subsection. This framework is based on a question whether the justifying reasons are correlative or non-correlative as of between the claimant and the defendant.

6.2.2 The framework of correlative and non-correlative reasons

Damage in the form of either loss or gain cannot be remedied unless there is some violation of the sufferer's claim-right (constituting damage). This may be said to be

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[150] See Section 6.4.

descriptively true of the present English private law. It by no means imply, however, who the suffering right-holder is. If we begin the analysis from the damages end, we are more likely to search for justifying damage on the claimant's side, for it is the claimant who receives the monetary remedy and therefore we correlate damages obtained with damages suffered by the claimant. If we cannot find such damage—which seems to apply to NCD—we usually look for alternative explanations, such as the one offered by Cane,[151] or we criticise the monetary award as unjustified or anomalous windfall, such as scholars do in relation to exemplary damages.[152] However, we may also run the analysis from the end of damage, regardless of who suffered from this instance of injustice, which leaves room for interpreting damages as justified by damage other than of the claimant, ie by damage that is non-correlative.

To support this claim, let me remind two well established principles of English law as well as Roman law maxims: '*ubi jus, ibi remedium*: where there is a right, there should be a remedy to fit the right',[153] and *ubi remedium, ibi jus*: whether there is a remedy, there should be a right.[154] These two principles are sometimes presented in a form of logical equivalence: 'If there is no remedy, then there is no right; *ubi remedium ibi jus*, and the

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151 See the text to n 137.

152 For an overview of this criticism, see, eg, V Janeček, 'Exemplary Damages: A Genuine Concept?' (2014) 6 EJLS 189, 196–203.

153 *Secretary of State for the Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780 [25] (Lady Hale) (emphasis added).

154 *Watkins v Home Office and others* [2006] UKHL 17; [2006] 2 AC 395. For a detailed analysis of the development and role of these two brocardes in English law, see P O'Callaghan, 'Reversing *Ubi Remedium Ibi Jus* in the Common Law: The Right of Privacy' (2007) 15 ERPL 659.

converse',[155] meaning that rights and remedies must always correlate to each other. Thus, for both CD and NCD there must exist some damaged right, but the right-holder does not need to be the claimant. This is an important insight, as we will see later in this thesis.

Stevens, who seems to focus on the rights-based maxim (*ubi jus, ibi …*) correctly wrote that '[t]he infringement of rights, not the [factual] infliction of loss, is the gist of the law of torts',[156] which applies, in my view, to the law of damages at large. However, unlike Stevens, I suggest conceptualising both consequential loss and gain as normative damage, ie legally recognised and prohibited type of harm or enrichment, and so I am committed to interpret both of them as consequential damage to legal rights. Consequently, this demands me to hold the same position (*ubi jus, ibi …*) with regarding to constitutive as well as consequential damage.[157]

Moreover, in contrast with Stevens, my analysis is not only rights-based but also NCD-centric. My argument is thus additionally driven by the second maxim (*ubi remedium …*). In the suggested framework, damages cannot occur as an independent freestanding duty or right, for they are conceptually tied with rights that they protect. Accordingly, I propose analysing damages—NCD in particular—from both ends, ie by also examining to which pre-existing legal rights do damages respond, and who is the primary beneficiary of these rights.

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155 *R v Commissioner of Police of the Metropolis Ex p Blackburn (No 1)* [1968] 2 QB 118 (CA) 129 (Edmund Davis LJ) (emphasis added).

156 Stevens (n 96) 2.

157 cf ibid 61.

This approach does not explain what exactly these rights are, where they come from or why private law often seems to respond to factual losses or gains rather than to violation of rights. As a *juridical* theory, however, it does not need to. The ethics of damages, ie of money (re)allocation between the conflicting parties simply does not address such questions. To overcome this issue differently, we may think of damages as of rights *in* the law of obligations (as opposed to rights *underlying* the law of obligations).[158] These underlying rights must already be posited, once we start thinking about rights *in* the respective legal domain and the ethics of damages therefore does not need to justify or to explain these underlying rights.[159]

On the other hand, it explains on what grounds the factual loss shall be remedied and why someone should be held liable for such loss. The ethics of NCD must therefore explain *why* monetary rights (damages) should be (re)allocated from the defendant to the claimant.[160] Now, since the law of damages is primarily concerned with allocations, and since damages may be analysed as a response to normative damage, I need to distinguish between different types of damage as potential types of justifying reason for damages.

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158 For example, Jansen argues that '[r]ights *underlying* [private law …] are interests that the law deems worthy of protection … Whereas rights *in* tort law may be analysed as "correlatives of a duty" (non-interference; compliance with safety standards) and partly as "correlatives of a liability", rights *underlying* [private law] are the normative basis of those rights and remedies.' N Jansen, 'The Idea of Legal Responsibility' (2014) 34 OJLS 221, 241 (emphasis in original, footnote omitted).

159 Similarly, McBride and Steel write that '[a]t the doctrinal level, law determines what legal rights and duties people will have, what remedies will be made available when those rights are violated and duties breached, and when and how the violation of a right or breach of a duty will be [sanctioned] … [T]he identification of justice with the proper distribution of benefits and burdens at least explains why we might say that a judge who fails to comply with the law acts unjustly' (McBride and Steel (n 123) 190).

160 cf ibid 184ff.

Analytically, this gives us a framework which covers six possible types of juridical reason that may justify damages award. It may be (1) claimant's constituting or (2) consequential damage, (3) another right-holder's constituting or (4) consequential damage, (5) defendant's committing of injustice (constitutive damage) or (6) defendant's consequential unjust gain (consequential damage) (Fig. 1).

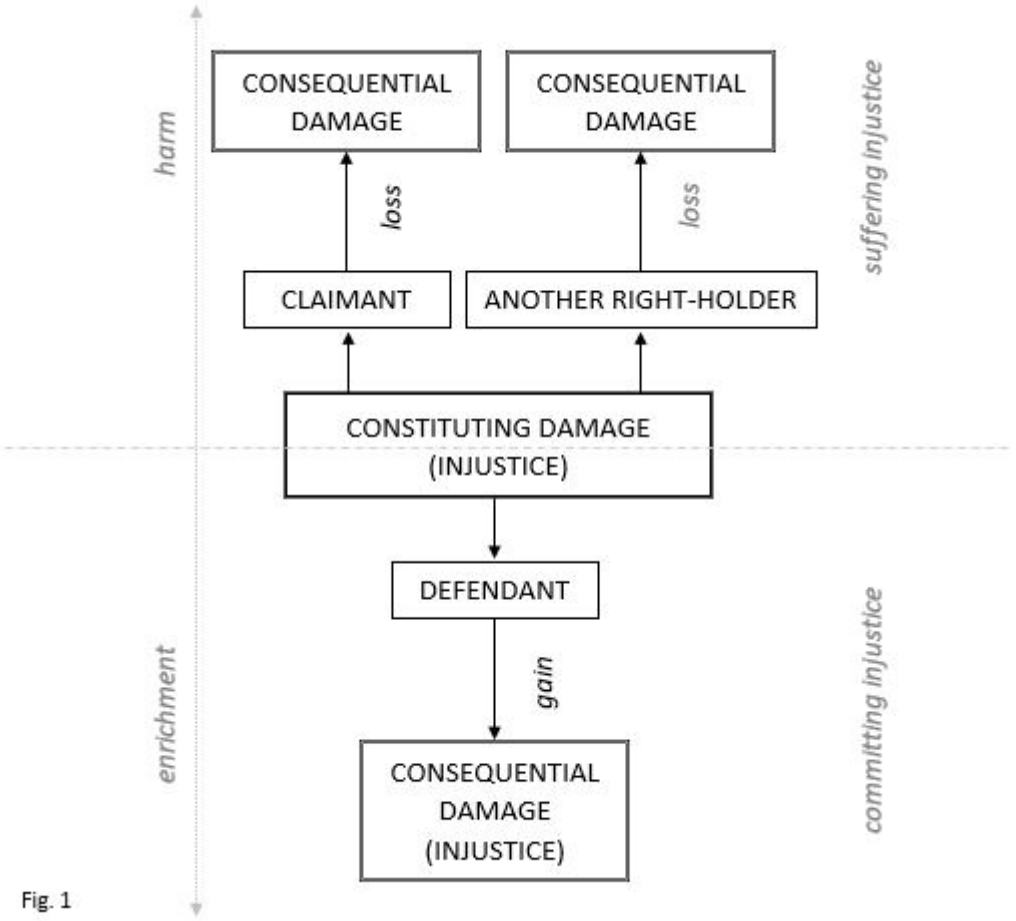

Fig. 1

If we apply this framework of justifying reasons on liability in damages, ie on an obligation of the defendant to transfer a prescribed monetary sum to the claimant, we may see that some of these reasons are correlative, whereas some are not. In an ideal *correlative* scenario, a damages award would equal the value of the claimant's damage. This may be indeed a core case of private law, underpinned by the ideas of corrective justice, the bipolar

structure of private law relationships, etc. that are so famously promoted by Weinrib.[161] In fact, Weinrib even argues against the idea that non-correlativity has a role in private law. My claim, however, is that there may be *non-correlative* reasons in the law of damages, and I think this claim does not contradict Weinrib's analysis, for my research is not a private-law centric, but NCD-centric.[162]

To conclude, if we look at the ethical problem of damages as of between the claimant and the defendant, damages do not need to be fully justifiable by recourse to claimant's damage (either constituting or consequential damage). It may well be the case that non-correlative type of damage underpins some types of damages award. Next section shows that this is true for NCD.

6.3 Non-correlative reasons underlying non-compensatory goals

The key idea of this section is that NCD may be collectively analysed as monetary awards that are always justified by constituting damage suffered by a claimant (which is why this claimant could be the recipient of the award), but that are also always justified by damage suffered by a sovereign or society at large, ie by entities that ultimately guarantee our legal order (which is why the claimant may receive an extra-compensatory award). The second damage—either in form of constituting or consequential damage to the law-guarantor's right is a non-correlative justifying reason. In short, we may conceptualise all NCD as

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[161] See, especially, EJ Weinrib, *Corrective Justice* (OUP 2012); Weinrib (n 139).

[162] Typically, the idea of correlativity is being challenged from the 'rights-based end' (*ubi jus, ibi remedium*), and not vice versa. See, eg, S Steel, 'Private Law and Justice' (2013) 33 OJLS 607, 609.

awards justified by non-correlative reasons. I explore this idea in relation to four types of presumably non-compensatory goals (punishment, declaration, prevention, and restitution) and I demonstrate it by analysing those heads of damages that I identified as potential NCD candidates in Chapter 2.

To narrow my analysis to non-compensatory goals, I set aside the goal of compensation, which may be clearly justified by correlative reasons. This does not mean that compensation and its paradigmatic category of CD cannot be analysed differently. For instance, the law-and-economics approach define CD as a deterrent award. Yet the problem of such approach is that it then does not leave room for distinguishing NCD from CD because they both are pursuing deterrence as their aim. For these reasons, I do not discuss law and economics further in this thesis, and I conceptualise compensation as a correlatively justified juridical goal of damages. Besides CD, I eliminate numerous other types of damages from my analysis, namely aggravated damages and those types of award that do not need to be seen as distinct categories (eg flagrancy, Wrotham Park, liquidated, delay, negotiating, user, reliance, and expectation damages).

The scope of the following analysis is thus limited to the five categories of damages that I identified in Chapter 2, namely exemplary (punitive), nominal, contemptuous, vindicatory, and restitutionary (disgorgement) damages. It shall not surprise us, that each of them appeared in one or another section on NCD in the rare doctrinal writings that address NCD.[163] However, as was already shown, these potential NCD categories and

[163] n 9.

labels may bear different meanings and may overlap. Therefore, I seek to find their justification by analysing them collectively and I group them according to said four goals that most often appear in literature: *punishment, declaration, prevention, and restitution (including disgorgement)*. My selection here is only instrumental since it helps me better to structure my analysis, but it does not preclude that particular types of damages—which I use as paradigms of these juridical goals—cannot be justified in relation to more than one of these functions.

6.3.1 Punishment

In an out-of-court dispute resolution, it is impossible to think that one party could authoritatively impose a punitive monetary obligation (civil fine) on the other. That could be an unlawful move, for individuals cannot fine each other. 'The innocent party can have no proper interest in simply punishing the defaulter',[164] which is why even contractual penalties are not enforceable unless there is a slight correlative justifying reason to do so. In other words, court will not enforce penalty clause 'which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.'[165]

In contrast, courts have the powers and authority to impose a (non-correlatively justified) fine—within the limits of the positive law, of course. So why, then, can someone, by suing a wrongdoer, punish him in court? What is the difference? *Nulla poena sine*

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[164] *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67; [2015] 3 WLR 1373 [32].

[165] ibid.

lege—that could shortly answer our question. There is no punishment without a legal ground. Liability in damages thus needs to be recognised and preferably also posited by either legislation, case law, custom or contract.

On a small scale, if the ground for liability in damages is posited by contract between the conflicting parties, the reasons for recognising liability in monetary payment may be considered correlative, but only to a limited extent. Unlike with liquidated damage (which remedy hypothetical damage),[166] however, there can hardly be seen any correlative consequential damage as a potential justifying reason for a contractual penalty. The activation of a penalty clause, ie the fact of mere breach of respective claim-right, may only respond to constituting damage which in itself does not lessen claimant's wealth and therefore does not cause any consequential damage. The penalty clause only protects the rules of a particular contract and has no justificatory connection to potential damaging consequences of the penalised breach. So, unless we say that mere violation of the penalised contractual obligation lessens claimant's wealth, in which case the penalty would be indistinguishable from liquidated damages, it is clear that a penalty pursues punishment as its sole non-correlative aim. It makes sense, then, to call such punitive award a penalty and not damages, which is exactly what we do in contract law.

In this thesis, nonetheless, it is not necessary to conceptualise a penalty as an award justified by non-correlative reasons simply because it is not termed damages, and therefore most of us would not think of it as NCD. If we were to analyse it as a type of NCD, it would

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[166] See the text to n 75.

be possible to offer an interpretation that a penalty protects an abstract right that is common to both parties—a right to an effective and reliable contract. Damage to this kind of right would then count for a non-correlative reason for awarding NCD, for it does not protect the claimant's right but a right of both parties.

How about when a punitive private law award is posited by some external authority (case law, legislation, custom)? The paradigmatic head of damages here is exemplary (punitive) damages. Every legal sanction, including compensatory awards, may be seen as a punishment,[167] but the punitive aim of exemplary damages is distinct. To understand the ethical ground of exemplary damages, we need 'to distinguish between punishment as a subsidiary aim of compensation and punishment as the sole aim being pursued.'[168] So, NCD must be punishing the defendant in a different sense by giving the claimant more than what just compensation demands. Under present law, exemplary damages can be awarded only if compensation payable to a victim is insufficient to punish and deter the defendant,[169] and so their punitive aim seems clear.[170]

Before we start analysing exemplary damages more deeply, it seems necessary to demarcate the doctrinal scope of potential types of right that they sanction. It is clear that

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167 This position was held, eg, by Lord Devlin in *Rookes v Barnard* (n 45) 1221 and PBH Birks, 'Civil Wrongs: A New World', *Butterworth lectures 1990-91* (Butterworths 1992) 80.

168 A Burrows, 'Reforming Exemplary Damages: Expansion or Abolition?' in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1996) 156.

169 *Rookes v Barnard* (n 45) 1227–28.

170 Cane, for instance, talks about the claimant's 'windfall', for there is no correlativity between what is received in damages and what was suffered (damage) (Cane (n 97) 118).

exemplary damages are available in tort law, but some scholars present arguments against non-compensatory exemplary damages in contract law, although they realise that the current law may look different.[171] These scholars offer causative reasoning (*à la* Birks)[172] because they first identify the cause which may give rise to liability in damages. From this perspective, they say, if the cause is a breach of voluntarily assumed obligations, then damages should not allow for non-correlative justification, ie justification by some reasons external to the contractual relationship. For instance, Burrows writes that

> being based on a voluntary undertaking, the courts ought to tailor the remedy in contract to what was voluntary undertaken and should therefore be reluctant to invoke non-compensatory remedies, such as punitive and restitutionary damages. In contrast, where the liability is purely imposed, as in tort, there need be no such reluctance.[173]

Yet, I doubt that this argument is sufficiently persuasive of whether and when NCD should not be available. Moreover, it does not fit the present law. As for example Goudkamp argues, even the conventional understanding of *Addis v Gramophone Co Ltd*[174]—as ruling against availability of punitive damages in contract—is debatable,[175] for it does not

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171 See, eg, AS Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 401–07`; McGregor (n 5) para 22–002.

172 See, eg, Birks (n 98); P Birks, 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1.

173 A Burrows, *Understanding the Law of Obligations: Essays on Contract,Tort and Restitution* (Hart Publishing 1998) 13.

174 [1909] AC 488 (HL).

175 Goudkamp (n 10) 321–29.

expressly forbid looking at some breaches of contractual relationship as at a sufficient cause for awarding punitive damages.[176]

So, in general, we may consider exemplary damages awards to be available for breach of any legal obligation, ie not only for torts, if the breach satisfies the categories test that I presented earlier (1: oppressive, arbitrary or unconstitutional conduct by the servant of the government; 2: conduct that has been calculated by the defendant to make him a profit which may well exceed the compensation payable to the victim; 3: exemplary damages are expressly authorised by statute). The subsequent analysis will thus apply to the law of obligations at large.

Under my justificatory framework, the category 1 exemplary damages may be seen as a remedy for constituting damage suffered by the claimant, for it is the claimant whose claim-right, namely the claim-right not to be subjected to oppressive, arbitrary or unconstitutional action by the state, was infringed. The mere breach of this claim-right is a correlative justificatory reason and explains why it is the claimant who deserves to obtain some damages. It however does not explain the additional exemplary damages award. This award cannot reflect the claimant's consequential damage, for it would be remedied by compensatory or aggravated damages.

Who else, apart from the claimant, is then suffering damage that may ethically underline the extra-compensatory award in category 1? In *Rookes v Barnard*, Lord Devlin

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[176] The availability of punitive damages for breach of contract was explicitly confirmed, for example, in Canadian law (*Royal Bank v W Got & Associates Electric Ltd* [1999] 3 SCR 408 (SCC) [26]; *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085 (SCC) 1107).

argued that '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.'[177] Juridically, we may conceptualise it as a right descending from the principle of legality and the rule of law. As Shapiro observed,

> [f]irst, it enables members of the community to predict official activity and hence to plan their lives effectively. Second, … [it] constrains official behavior and hence protects citizens from arbitrary and discriminatory actions by officials. [And third, it saves us] the enormous cognitive energy … by not having to think about the best way to regulate our lives and to convince others about the rectitude of our judgments.[178]

Mistakes shall not happen, but may happen in public office and there is no doubt that the claimant deserves to be compensated for any correlative damage suffered. However, the entity who may primarily demand it as a juridical right that this does not happen in an oppressive, arbitrary or unconstitutional manner is the sovereign or self-governing society, for it seems to protect an effective system of legality as a whole, ie a system that the sovereign guarantees to work. Therefore, the justifying ground for exemplary damages in category 1 may be analysed as damage to a public and societal right or to the entitlement to an efficient and reliable operation of the principles of legality and rule of law. Looking back at Cane's thesis that, by the exceptional damages award, the law expresses disapproval of particular conduct and deters such conduct,[179] my analysis may be seen as a juridical

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177 *Rookes v Barnard* (n 45) 1226.

178 SJ Shapiro, *Legality* (Harvard UP 2011) 395–96.

179 See the text to n 137.

interpretation of the same underlying idea. In short, exemplary damages in the first category are justified by non-correlative reasons.

Another argument in support of this analysis may rest on the observation that most unlawful acts of public authorities would also be actionable under s 8 of the Human Rights Act 1998. Section 8 allows for damages 'in relation to any act … of a public authority which the court finds is … unlawful'.[180] The award then must be 'necessary to afford just satisfaction',[181] ie to a goal that intellectually originates from art 41 of the Convention for the Protection of Human Rights regulating the monetary remedy of 'just satisfaction'. Since English courts 'must take into account the principles applied by the European Court of Human Rights [ECtHR] in relation to the award of compensation under Article 41 of the Convention',[182] we may argue by a recent case heard before the ECtHR in which the court clearly confirmed that non-compensatory 'punitive damages [under art 41 of the Convention] have been applied in seven types of cases'.[183] The court allowed for non-compensatory just satisfaction, thus making the punishment a deterrent example for other states, on the basis of:

> (1) 'the "absolute character" of the violated right, the "particularly serious character of the violations", the "gravity of the violations", or the "fundamental importance of that right" … [or where] the Court … finds [the award] to be fair in the particular case', (2) 'a "symbolic" or "token indemnity", with the obvious purpose of blaming and shaming the respondent state', (3) only 'the distress caused by the existence of the law itself … [ie] for having legislated in a way incompatible with the Convention', (4) 'for a "potential

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[180] Human Rights Act 1998, s 8(1).

[181] ibid s 8(3).

[182] ibid s 8(4).

[183] *Cyprus v Turkey* (n 6) [13] (footnote omitted).

> violation" of the Convention', (5) 'the possibility that the applicant suffered, as a result of the "potential effects of the violation found", a loss of real opportunities [on which he might have relied and] of which account must be taken, "notwithstanding the fact that the prospects of realisation would have been questionable" … [ie not even] a virtual harm done to the applicant, since it is doubtful that it would ever materialise', (6) 'no evidence of the alleged damage … [when] the award of damages lies entirely at the discretion of the Court … [and] does not remedy a proven damage, which remains speculative', and (7) on the basis of 'general interest … taking into account … exemplary effect'.[184]

Again, these reasons do not reflect constituting correlative damage to claimant's claim-rights. Instead, they seem to reflect damage to some other rights and interest that can be conceptualised as right and interests of society at large. Briefly, they support the view that exemplary damages are justified by non-correlative damage.

Under category 2, exemplary damages may be awarded for defendant's 'cynical disregard for a plaintiff's rights'[185] and for his aware calculation 'that the money to be made out of his wrongdoing will probably exceed the damages at risk'.[186] Also in these cases, it does not seem to be any correlative private right of the claimant that justifies the award, but rather a societal right that people as well as corporations do not treat each other with disrespect, even in the competitive environment.[187] It seems publicly (not privately) troubling if such ignorant profit-seeking conduct occurs, for it may cripple fair competition and human decency in the public sphere. In such cases, 'it is necessary for the

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184 ibid (footnotes omitted).

185 *Rookes v Barnard* (n 45) 1227.

186 ibid.

187 See, eg, *2 Travel Group Plc (in liq) v Cardiff City Transport Services Ltd* [2012] CAT 19; [2012] Comp AR 211.

law to show that it cannot be broken with impunity'.[188] The justifying reason may thus be conceptualised as a damage to non-correlative societal right.

This idea may be well illustrated by the typically British societal habit of queuing. If you jump the queue, most Brits would think you have done so with cynical disregard for their rights and for the societal interest in due queuing. Moreover, I suspect that most of them would also think you have done so for gain which does not need to be monetary. And although there is no case where exemplary damages have been awarded in response to such a scenario, you may be currently fined up to £1,000 if you disobey the queuing rule in London's public transport.[189] Such a penalty for breaking societal interests in respectful queuing has the same rationale as category 2 exemplary damages, albeit with a slight exception that no 'legal' claim-right of proper queuing has yet been recognised in tort law. Otherwise, had there been a tort of pushing in front of queuing people, it would be theoretically possible to protect the non-correlative societal interest by awarding exemplary damages.

At first glance, it may be now better understandable, why Burrows prefers the state (as the representative of public rights) to be, as a matter of principle, 'adequately punishing conduct that merits state punishment'.[190] Yet this is not necessarily a valid argument. It is one problem, who punishes the defendant, but another, who receives the award. Although,

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188 *Rookes v Barnard* (n 45) 1227.

189 See, eg, the TfL Road Transport Premises Byelaws 2011, ss 2 and 14 in conjunction with s 37(2) of the Criminal Justice Act 1982.

190 Burrows (n 168) 173. Burrows also admits that 'a *pragmatic* case can be made for the retention' of exemplary damages (ibid).

only the state (*largo sensu*) can impose the punishment, the public outrage as a driving force for the punishment can often only appear as a consequence of an infringement of some individual's private claim-right. Given that the constituting correlative connection between the claimant and the defendant exists, it is up for a distributive deliberation of the court whether the punitive award will be allocated to the claimant or whether it will be dealt with differently. In my analysis, the individual has a sufficient constituting cause and this cause is a solid juridical ground for awarding exemplary damages to the claimant. The rest seems a matter of policy.

It is well known that Weinrib analyses category 2 exemplary damages as remedies justified on correlative grounds, ie in an opposite way than I do. It is important to note, however, that Weinrib conceptualises category 2 exemplary damages as restitution (disgorgement) of normative (juridical) gain that the defendant obtained at the expense of the claimant. This is where the idea of correlativity comes from. Yet, in my view, such an interpretation neither explains nor justifies (among other things) the fact that the quantum of exemplary damages is not measured by defendant's gain.[191] Moreover, on Weinrib's view, all damages in private law are either justified correlatively or they are not damages in the juridical sense.[192] Such an approach does not leave room for NCD as a distinctive juridical type of damages, which would be a problem for any theory of NCD. We must therefore not forget that we are here in the business of conceptual design and so

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[191] See Weinrib (n 96) 135, 140ff.

[192] See, eg, Weinrib (n 11).

it would be counterproductive to stick with such design of juridical concepts that does not allow for NCD to exist 'normatively'. Weinrib's approach may thus be refused as unfit for analysing NCD.

Finally, the third exemplary damages category refers to statutory provisions that explicitly permit these awards. There are recently two statutory provisions that fall under this category. Section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 allows exemplary damages to be awarded for conversion in respect of goods,[193] ie for infringement of societal (civil) interest, just like in *Borders (UK) Ltd v Commissioner of Police of the Metropolis*[194] that allowed punitive award for conversion under category 2 of exemplary damages. The second example is Crime and Court Act 2013 (ss 34–39) where exemplary damages may be awarded against a publisher of news-related material who is not a member of an approved regulator and whose 'conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights'.[195] So, again, the justifying reason seems very similar to that of category 2 exemplary damages, even though they do not demand the defendant to act necessarily for profit, because in the

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193 Lord Kilbrandon doubted, though, that the expression 'exemplary damages' here means anything else than aggravated damages, for by virtue of s 13(6) of the statute, this only applies to Scotland, where exemplary damages are forbidden. See *Broome v Cassel* (n 52) 1133.

194 [2005] EWCA Civ 197; [2005] Po LR 1.

195 Crime and Courts Act 2013, s 34(6)(a).

world of internet media the magnitude of fake news may cause societal harm in various other ways.[196]

Legislation does not only explicitly permit but, sometimes, also forbids exemplary damages which may help us to analyse NCD here as well. This applies to the Rome II Regulation and to the Montreal Convention 1999, which were first mentioned in Section 2.1. The Rome II Regulation supports non-correlative justification of NCD for it sees exemplary damages as a matter of 'public policy', ie primarily as some kind of public right. Regarding the Montreal Convention 1999, the non-correlativity idea of NCD's ethics was explained in *Nelson v Deutsche Lufthansa AG*[197] where the CJEU gave a preliminary ruling on whether 'the right to compensation [for delayed flights] provided for in Article 7 of Regulation No 261/2004 constitute a claim for non-compensatory damages within the meaning of the second sentence of Article 29 of the [Montreal Convention]'.[198] The CJEU ruled that it does not constitute NCD because art 7 of the EU Regulation No 261/2004 does not fall under the scope of art 29 of the Montreal Convention 1999, and as such it provides for an independent cause of action.[199] Implicitly, in this judgment, the CJEU accepted that, had the award for the delayed flight fallen within the scope of the Montreal

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196 For example, a recent study from the Berkman Klein Center for Internet and Society empirically demonstrates the gross impact of digital media publishers on politics (R Faris and others, 'Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election' (2017) Berkman Klein Center Research Publication 2017-6 <https://ssrn.com/abstract=3019414> [https://perma.cc/NQL3-MGY5]).

197 EU:C:2012:657 (n 39).

198 ibid para 20.

199 ibid paras 28 to 40.

Convention 1999, it could have been interpreted as NCD because it would compensate for a violation of a substantive right that was not itself protected under the Montreal Convention 1999. It thus seems that, according to the CJEU, damages could be termed as non-compensatory as far as they serve as a remedy for some substantive right that the claimant *was originally not guaranteed* by the law. From the perspective of the normative realm of Montreal Convention 1999, such extra-conventional right would represent a non-correlative justifying reason.[200]

6.3.2 Declaration

Given the non-correlative nature of justification behind punitive goals of damages, it shall now be easier to see in what sense declaration is a non-compensatory goal and how non-correlative reasons underpin it. In relation to the goal of declaration, I analyse three heads of damages: nominal, contemptuous, and vindicatory damages.

Nominal damages are awarded for mere infringement of the claimant's legal right. Such constituting damage entitles the claimant to a judgment awarding him or her damages regardless any consequential damage. The nominal award may therefore be analysed as a response to an infringement of an authoritatively posited legal claim-right (this usually, but not exclusively, relates to torts actionable per se) or as a response to breach of a contractually posited claim-right.[201] On this juridical view, it is clear that the

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[200] cf recital (5) of the Montreal Convention 1999 that expresses 'the need for equitable compensation based on the principle of restitution', ie the need for correlative reasons justifying damages awards under the Convention.

[201] For more details, see McGregor (n 5) 12–002.

claimant suffered some constituting damage and therefore deserves a remedy. Such justifying reason is correlative.

However, there is also the non-correlative perspective to nominal damages. It is not only the constituting legal right of the claimant that was frustrated by the defendant, but the same act of frustration also infringes the legal system or the system of a contract, ie systems within which these rights were posited. Damage to a claim-right of the claimant, ie a right which is essential to the respective system of legal obligations,[202] may also be analysed as a constituting damage to society or to the unity of contractual parties, who jointly hold a claim right against such wrongdoing within *their* system of legal rights. Awarding nominal damages then financially responds to the declaratory claim by affirming that the right-positing authority recognises such underlying and therefore somewhat important legal right as a claim-right of its own (worth protecting for the sake of society) as well as a claim-right of the claimant (worth protecting for the sake of the claimant). The nominal non-compensatory award is thus justified by non-correlative types of reason, but unlike with exemplary damages, these juridical reasons are not grounded in consequential societal damage but in *constituting* societal damage only.

Contemptuous damages are also awarded in the form of a minimal sum that demonstrates court's contempt for the immorality of the claim that otherwise would be fully successful (eg when a claimant sues in defamation for allegedly suffered nonpecuniary damage but only to make profit out of the compensation). Some therefore

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[202] In other words, damage to an underlying legal right. See the text to nn 158–159.

believe that '[s]uch damages are in effect nominal damages awarded for the infringement of a right'.[203] If that is true, then contemptuous damages and their declaratory goal are also justified by non-correlative reasons, ie by non-correlative constituting damage. Alternatively, we may analyse it as a punishment of the claimant for his or her causing of consequential societal damage by trying to exploit the system of underlying legal rights. Again, punitive disgorgement of the claimant's hypothetical compensation could be thus justified by non-correlative damage to societal rights.

The last head is vindicatory damages. This category is used in a similar (though not the same) way as nominal damages. In particular, vindicatory damages are meant to mark the abuse of a power by the state,[204] ie they declare some more *qualified* type of breach. In this sense, vindicatory damages do not respond to mere constituting non-correlative damage (like nominal damages), but they also reflect the quality of the breach (like exemplary damages). So, it is not only a question of *what* claim-right has been infringed but also *how* it was infringed. The first question is of constituting damage, the second of consequential damage. Vindicatory damages are then a slightly slippery concept because, under this perspective, they may be analysed as both declaratory and punitive in their aim.[205] Either way, they also may be ethically analysed as being justified by non-correlative type of damage.

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[203] McGregor (n 5) para 12–007 fn 32.

[204] *Anam* (n 18).

[205] Steel, for instance, argues that vindicatory damages may be analysed as protecting 'the value of the rule of law' (Steel (n 7) 528).

Similarly, Varuhas, who has recently offered an interesting and intellectually fruitful 'tort-based approach to human rights damages',[206] defines the conception of vindication in tort law as a signal that judiciary sends to society about the importance of underlying rights and interests in the legal system. In his view, vindicatory damages are meant 'to attest to, affirm, and reinforce the importance and inherent value of particular interest, and by association the overlying rights which afford direct protection to those interests.'[207] He sees vindication as the primary function of damages in cases of human rights breaches, 'so that the compensatory function is put in service of the macro-function of vindication … [T]he macro vindicatory function of the law shapes the nature and range of recoverable heads.'[208] Moreover, he thinks that vindicatory awards have important societal deterrent effects on potential wrongdoers and 'promote public accountability of public defendants'.[209] On the other hand, his analysis is not 'damages-based' but 'tort-based' (as of wrong against the claimant) and therefore he is reluctant to see vindicatory damages as a response to some type of normative damage.[210] Strictly speaking, thus, his framework does not offer room for thinking about damage non-correlatively.

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206 Varuhas (n 9) 7.

207 ibid 17–18.

208 ibid 20–21.

209 ibid 21.

210 ibid 128.

6.3.3 Prevention

Prevention may have two paradigmatically different meanings: prevention in negative and positive sense. Negatively, prevention deters persons from causing damage; it discourages them. In this regard, the law demands that persons omit to do some wrongful damage-causing activity. One may therefore say that practically all damages have some deterrent preventive goals. By imposing damages, the society prevents its own system of legal right from suffering damage. But this goal could be considered as non-compensatory only insofar as damages are primarily meant to prevent damage to the society and the legal system itself, ie not as a side effect. This could, due to the reasons already presented, explain the ethics of exemplary, nominal, contemptuous, as well as vindicatory damages.

Positively, prevention may be achieved by encouraging and motivating individuals to prevent damage. It may be posited in form of a legal duty, but also in form of a legal right to obtain preventive damages, if they actively prevent some damage to occur. That is the case of the theoretical category of 'preventive damages', which is meant to recover expenses (damage) incurred when the claimant tried to avert a risk of damage to the defendant's rights.[211] Preventive damages thus compensate for expenses spent on preventing some other damage to occur, and, as such, they are justified primarily by

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[211] See D Nolan, 'Preventive Damages' (2016) 132 LQR 68 who first examined, from the common law perspective, the idea of preventive damages, so 'neatly captured' (ibid 68) by the Principles of European Tort Law, art 2.104: 'Expenses incurred to prevent threatened damage amount to recoverable damage in so far as reasonably incurred.' A similar rule can be found in the Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another, art 6.302. When explaining preventive damages, Nolan refers to, eg, *Transco Plc v Stockport MBC* [2003] UKHL 61; [2004] 2 AC 1.

correlative reasons. Prevention and preventive damages in this sense, thus, do not belong to the NCD category.

There is yet another way of analysing the ethics of positive preventive damages. We may switch the focus from the claimant's damage to the defendant's gain. Under my analytical framework, positive preventive damages may serve as a means of subtraction of the claimant's normative gain. In this sense, we may say that the claimant suffered unjust enrichment by not spending his own wealth on the preventive measures. Although this seems to be a weird way of putting it, it clearly shows that both subtracting normative gain and compensating normative loss are underpinned by correlative justifying reasons. This brings us to the last function—restitution—which is conventionally associated with subtracting defendant's gain.

6.3.4 Restitution (and disgorgement)

In the English law, restitution is often contrasted with compensation and under the dominant view it is essentially related to the defendant's gain.[212] By restitutionary monetary remedies, we subtract defendant's gain. However, as a juridical goal, the idea of restitution has different meaning than subtraction of gain. One such example can be found in recital (5) of the Montreal Convention 1999 that expresses 'the need for equitable compensation based on the principle of restitution'. '[R]estitution is the return of an asset *in specie*. It reunites one party with the very thing that she lost to the other party, thereby

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[212] See, eg, Pearce and Halson (n 43); Burrows (n 70); G Virgo, *The Principles of the Law of Restitution* (3rd edn, OUP 2015) 4.

extinguishing—in one fell swoop—the one's loss of that thing and the other's gain of it.'[213] The principle of restitution (as a juridical goal) is thus not limited to considerations regarding defendant's gain.[214] Restitution, in this sense, is broadly concerned with restoration of justice, regardless of whether the unjust cause (damage to justice) is identified with gain or loss. In the juridical sense, there seems to be no difference between compensatory damages and restitution of unjust enrichment, as some have recently argued.[215]

This broad understanding of restitution, however, is not much helpful because it does not discriminate between correlative and non-correlative reasons. Even exemplary damages could, under this view, fit the restitutionary principle.[216] Instead, let us stick with the conventional understanding of restitution that only relates to unjustified gain of the defendant.

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213 J Gardner, 'Torts and Other Wrongs' (2011) 39 Fla St U L Rev 43, 48 (referring to *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534 (SCC) 556 (McLachlin J).

214 This principle originates from the scholastic concept of '*restitutio*' that was associated with undoing people's sins. See, especially, Jansen (n 158) 224; J Gordley, 'The Architecture of the Common and Civil Law of Torts: An Historical Survey' in M Bussani and AJ Sebok (eds), *Comparative Tort Law: Global Perspectives* (Edward Elgar Publishing 2015) 186–87. More extensively, see, N Jansen, *Theologie, Philosophie und Jurisprudenz in der spätscholastischen Lehre von der Restitution. Außervertragliche Ausgleichsansprüche im frühneuzeitlichen Naturrechtsdiskurs* (Mohr Siebeck 2013); F Gisawi, *Der Grundsatz der Totalreparation* (Mohr Siebeck 2015).

215 See Gardner (n 213) 50; N Jansen, 'Farewell to Unjustified Enrichment?' (2016) 20 Edin LR 123. See also S Hedley, '"Farewell to Unjustified Enrichment?" – A Common Law Response' (2016) 20 Edin LR 326).

216 This interpretation is supported, for instance, by Weinrib but I refused it earlier. See the text to n 191.

In line with current developments in the law of restitution, [217] I distinguish restitution of gain (enrichment) for unjust enrichment, and restitution of gain (enrichment) for wrongs. To speak of *damages* in relation to unjust enrichment seems problematic. We do not award damages but restitution for unjust enrichment, because 'restitution *strictu sensu* annuls the defendant's gains and the plaintiff's losses in one fell swoop.'[218] The gains and losses are correlative not only normatively but also factually. Restitution here subtracts defendant's enrichment that was gained at the expense of the claimant. So, unjust enrichment, in contrast with wrong, shall not be analysed as a potential cause for NCD.

In contrast, restitution of gain for wrongs may be remedied by damages. To complete the ethical analysis of NCD, it is necessary to distinguish gain-based restitutionary damages by their justifying reasons. This also helps us to avoid entering the highly contested and dense scholarly debate over what is best doctrinal account of restitutionary remedies.[219] As to the ethics of gain-based damages, it has been agreed, that there are two main juridical sub-aims in the law of restitution for wrongs: restitution and disgorgement.[220] Edelman expressed the difference clearly:

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217 This has been a majority view for almost two decades now. See, eg, Edelman (n 60) 33ff; C Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (1st edn, OUP 2016) ch 2.

218 Gardner (n 213) 56.

219 A comprehensive overview of theories of restitutionary damages and scholarly debates can be found in S Harder, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing 2010) ch 12.

220 See, eg, Edelman (n 60) ch 3; Virgo (n 212) 4–6.

> Whilst … restitutionary damages are primarily concerned with corrective justice and reversing transfers between parties, disgorgement damages are concerned with broader notions of deterrence. Restitutionary damages therefore should generally be available but disgorgement damages should only be available where there is an additional interest … [and] a need for additional deterrence of wrongdoing and historically this interest has been recognised in relationships of close trust and confidence and in instances of wrongs committed cynically, that is, deliberately or recklessly with a view to gain.[221]

Under my analytical framework, restitutionary damages are therefore justified by correlative consequential damage (wrongful or unjust gain) and they are ethically indistinguishable from ordinary compensatory damages. 'Compensation and restitution for wrongs have a similar, albeit inverse, function.'[222] 'Restitution [here] is a tool of corrective justice. When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions.'[223] The main difference is on the practical level, ie in how we measure the extent of consequential damage, whether by reference to gain or to loss. In this sense, I would argue that restitutionary damages do not belong to the juridical NCD category.[224]

In the case of disgorgement damages, it is necessary 'to show exceptional circumstances … [or] a legitimate interest in preventing the [d]efendant's profit-making

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221 Edelman (n 60) 86.

222 F Giglio, 'Restitution for Wrongs: A Structural Analysis' (2007) 20 CJLJ 5, 6.

223 *Kingstreet Investments Ltd v New Brunswick (Finance)* [2007] 1 SCR 3 (SCC) [32] (Bastarache J). On the same note, Weinrib wrote, that '[i]n sum, both kinds of rectification—the compensation of loss and the restitution of gain—are available to every kind of private law relationship. … Kinds of rectification therefore play no role in the juridical classification of obligation' (Weinrib (n 11) 51).

224 It is thus no surprise that Burrows devoted a separate chapter to this remedy (next to a chapter on non-compensatory damages) already in the first edition (1987) of his book on remedies in tort and contract (see Burrows, *Remedies for Torts and Breach of Contract* (1st edn) (n 9)).

activity and, hence, in depriving him of his profit.'[225] The justifying reasons here may be analysed similarly to those of other types of NCD, ie as a societal non-correlative damage that supports the need for deterrence, prevention, declaration, as well as some form of punishment. Similarly, Burrows, who wrote extensively on the topic, sees disgorgement damages (in his terminology restitutionary damages) as 'the less extreme remedy … in preference to punitive damages … [and as a] mid-position between compensation and punishment'.[226] Cane also argues that 'disgorgement damages require stronger justification than restorative damages [but only] to the extent that they may relate to gains made by D which do not correspond to the losses suffered by P'.[227] He believes that disgorgement damages mainly express disapproval and that does not belong to civil law.[228]

Overall, disgorgement damages thus may serve as a societal tool for discouraging certain profit-seeking activities. It may be also seen as a form of social engineering in private law that gives the court quite a powerful tool on behalf of the society. The normative type of damage (here defendant's gain) that justifies disgorgement damages is therefore suffered by the society at whose expense the profit-seeking activity was performed. 'What makes the tortfeasor's conduct especially worthy of sanction is not its impact on the interests of the plaintiff as a property owner but its impact on property as a

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225 *Blue Monkey Gaming Ltd v Hudson* (n 59) [605].

226 Burrows, 'Reforming Non-Compensatory Damages' (n 9) 303.

227 Cane (n 8) 321.

228 ibid 322–23.

social institution'.[229] Therefore, disgorgement damages are best analysed as an award justified by a non-correlative type of reason.

6.3.5 Collective analysis of NCD and further issues

At this point, we can look at all NCD collectively and make some claims about their ethical underpinnings. First, we saw that under my analytical framework we conceptualise the ordinary types of damages in private law as awards primarily justified by correlative types of damage (both constituting and consequential damage). From this perspective, most doctrinal heads of damages can be said to compensate the claimant for due to correlative reasons. In Chapter 2, I tried to show that this applies to compensatory, aggravated, parasitic, negotiating, liquidated, user, Wrotham Park, preventive, and also to restitutionary (in a narrow sense) damages. These damages have structurally the same type of justification and none of them, in my view, belongs to the NCD category.

Second, I showed that, under the same analytical framework, exemplary, nominal, contemptuous, vindicatory, and disgorgement damages can be explained as awards that are justified by damage to other-than-claimant's rights (both constituting and consequential). At the same time, however, with regarding to all these types of damages, there must be a constituting damage to the claim-right of the claimant. The occurrence of this correlative legal wrong justifies why it *could* be the claimant who receives the damages award. It is a different, possibly political question, whether it *should* be the claimant who obtains the payment.

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[229] Cane (n 97) 117. See also P Cane, *Responsibility in Law and Morality* (Hart Publishing 2002) 222.

Furthermore, I tried to show these other-than-claimant's rights are of societal origin as they primarily protect interests that benefit some larger social unit and its functioning. Collectively, therefore, they may be explained as a class of damages that allow for non-correlative justifying reasons, for they are not justified by claimant's damage. In this sense, these awards are exceptional in a normative sense, for they require additional reasoning that justifies the economic and juridical imbalance that a particular non-compensatory award creates in the relationship between two juridically equal individuals. All the said subtypes of damages, in my view, belong to the juridical category of NCD.

Considering Cane's fourfold doctrinal distinction of ordinary compensatory and restitutionary damages, and exceptional disgorgement damages and civil fines,[230] my juridical analysis of NCD therefore seems to confirm his findings, but it presents them in completely different light. Moreover, unlike his account of exceptional measures of damages, the completeness and coherence of my juridical framework allows me non-circularly to distinguish NCD from CD.

This analysis has then some important implications for our understanding of judicial discretion. If CD (and other correlatively justified heads of damages) are reasoned by reference to damage to claimant's correlative rights, then these remedies should be awarded as of right. In contrast, NCD are in principle always open to discretion.[231] The underlying idea is that if the claimant holds a juridically correlative right against the

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[230] See Section 6.2.

[231] Similarly, on discretionary remedies, see Zakrzewski (n 101) 97.

defendant, it is presumed that this right is justified by the claimant's interest, whereas with non-correlative rights that are justified by other-than-claimant's interests, this justificatory gap awaits to be fulfilled. Under this reasoning, it makes sense, for instance, why a decision on whether non-correlatively justified exemplary damages will be awarded 'is still one of discretion in which all the surrounding circumstances should be taken into account'.[232] This point, however, is original only in relation to NCD at large, for Gardner already showed that the juridical category of CD (in his terminology reparative damages) should be 'a remedy of first resort … For this is the only remedy against a tortfeasor that the successful plaintiff enjoys *as of right*'.[233] This could apply, in Gardner's view, eg to restitutionary remedies, in contrast with disgorgement, which he analyses as discretionary.[234]

Overall, we have seen that the juridical concept of NCD could be justified by non-correlative reasons and that these reasons can be explained as either constituting damage to societal claim-rights that underline the legal system (such as torts actionable per se or infringements of constitutional rights) or as consequential damage to important societal rights (such as right for human decency in legal transactions or respect to legal system at large). The constituting damage may justify NCD not because of *that* a societal claim-right was infringed, but because of *what* societal claim-right was infringed. If the reason was only *that* the claim-right was damaged, then all unlawful conduct would give rise to NCD,

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232 *Rookes v Barnard* (n 45) 1160.

233 Gardner (n 67) 53 (emphasis in original).

234 ibid 55.

which is plainly false. Next, the consequential damage always demands *that* some societal claim-right was infringed, for otherwise it would not be consequential damage upon resulting from constituting damage. But the consequential damage is not justified because of *that* a societal right was infringed as a consequence of a wrong, but because of *how* the underlying societal right was infringed (eg with disregard, abusively, arbitrarily, recklessly, etc).

The tricky part of this argument is that, on one hand, consequential societal damage (eg infringement of effective and reliable rule of law and legality principle under category 1 exemplary damages) is consequential and non-correlative from the NCD-centric perspective, ie as of remedial obligation between the claimant and the defendant, whereas, on the other hand, from the societal perspective, it looks as if it is a fundamental type of damage, because the rule of law as well as the legality principle (as a societal right) is normatively superior to individual claim-rights posited by the law. In the next section, I will show that we may well explain this paradox of 'consequential yet superior non-correlative reason' in the language of distributive justice.

6.4 Distributive justice as the ethical goal of NCD

So far, I claimed that justice is the ultimate juridical goal of all damages. I also claimed that NCD, in achieving this goal, are collectively justified by non-correlative reasons of societal damage. Now, I will shortly argue that the distinctive juridical goal of NCD, as opposed to CD, is seeking of distributive justice. What I need to show in order to validate this claim is that non-correlative reasons are distinctive reasons of distributive justice.

The division between corrective and distributive justice has a long tradition originating from Aristotle's *Nicomachean Ethics*. Here, Aristotle understands justice as one of virtues, ie ethical goods that we shall pursue in our life. He distinguishes between a complete virtue (meaning universal or legal justice) and a partial virtue (meaning particular or ethical justice). Particular justice, on his view, is justice regarding individual situation or individual juridical relationship.

The illuminating Aristotle's idea was that there are essentially two different types of situation that demand two distinct, yet related, types of particular justice—corrective and distributive justice.[235] The role of these two juridical accounts of justice has been widely debated and contested.[236] For the present purposes it suffices to say that corrective justice is concerned with a relationship between two formally equal persons, whereas distributive justice applies to relations amongst society at large or to a relationship between an individual person and the distributing society.[237] Both corrective and distributive justice

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235 Aristotle (n 122) 1130b.6ff (corrective justice) and 1131a.10ff (distributive justice).

236 A great in-depth analysis, covering historical and modern accounts of these two types of justice can be found in I Englard, *Corrective and Distributive Justice: From Aristotle to Modern Times* (OUP 2009). See also EJ Weinrib, 'Aristotle's Forms of Justice' (1989) 2 Ratio Juris 211; JL Coleman, *Risks and Wrongs* (CUP 1992); J Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (2011) 30 L&Phil 1; A Beever, *Forgotten Justice: The Forms of Justice in the History of Legal and Political Theory* (OUP 2013); J Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (OUP 2014); A Ripstein, *Private Wrongs* (Harvard UP 2016).

237 This interpretation is, of course, very rough and it comes mostly from Aquinas (T Aquinas, *Summa Theologiae*, SS.Q61). In more detail, see, AJ Lisska, 'The Philosophy of Law of Thomas Aquinas' in FD Miller and CA Biondi (eds), *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* (2nd edn, Springer 2015) 305–09. See also Beever (n 236) 85.

are concerned with allocations,[238] which is why they may help us to think about damages allocations.

Corrective justice demands that, as of between two ideally equal parties, unjust losses and gains (ie damage to correlative rights) are (re)allocated back.[239] 'To say a rule is one of corrective justice is to say that it is a rule that allocates in such a way as to correct (put right, undo) some prior injustice or other misallocation.'[240] So, for example, '[t]he rule that a defendant must make restitution of mistaken payments can be identified as a rule of corrective justice.'[241] But as we have seen, NCD are justified by non-correlative reasons between the two conflicting parties and thereby cannot pursue corrective justice as their primary goal. In this sense, NCD do not correct nor allocate back. Instead, as of between the two private individuals, they allocate anew, ie they distribute.

Distributive justice seeks to achieve justice in society at large, according to some distributive criteria, ie to achieve equality based on an external measure of merits and it has its role in the law of obligations as well.[242] Most visibly, from the distributive justice position, we decide how certain goods and rights will be distributed in our legal system

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238 See n 118 and the text accompanying n 160.

239 Aristoteles (n 122) 1132a.2–7 and 1134a.28.

240 Webb (n 217) 56–57 (referring to P Saprai, 'Restitution without Corrective Justice' (2006) 14 RLR 41, 52–54; Gardner, 'What is Tort Law For? Part 1. The Place of Corrective Justice' (n 236) 6–10 and 14–16).

241 Webb (n 217) 56.

242 See *McFarlane v Tyside Health Board* [2000] 2 AC 59 (HL) 83 (Lord Steyn). See also T Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2013); P Shaunessy,'A Matter of Choice: Rethinking Legal Formalism's Account of Private Law Rights' (2017) 37 OJLS 163. For an opposing view, see, eg, Weinrib, *Corrective Justice* (n 161); Weinrib (n 96).

(or in the system of a particular contract) because even the right to damages is a scarce good, just as other rights are, and it may only be distributed when and where there are convincing reasons for such distribution. In distributing rights, a larger social unit, or a law-positing authority on its behalf, must decide which rights and under what circumstances will be protected by a judicial remedy. As Gardner correctly observes, it is a plain fact that there is only a limited number of judgments that may be delivered in one's lifetime and (I would add, because in law we are concerned with mundane justice) thus we carefully need to deliberate which underlying rights we will distribute as worthy of judicial protection, and therefore damage of which rights will serve as a reason for awarding damages.[243] In this sense, both CD and NCD are underpinned by distributive considerations.[244]

The crucial distinction I see here is that of between rights as correlative reasons and rights as non-correlative reasons for the damages award, as was already shown. Correlative justification of damages can be aligned with the ethics of corrective justice and with CD (which may possibly be collectively termed corrective damages), but to justify the

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[243] See more in Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (n 236).

[244] Other authors put the idea in moderately different terms. Cane, for instance, wrote that 'corrective justice provides the structure of tort law within which distributive justice operates' (P Cane, 'Distributive Justice and Tort Law' (2001) 2001 NZLRev 401, 413). Gardner's aim was 'to develop and finesse' this thesis (Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (n 236) 338). cf Englard (n 236) 210, who shows that historically 'some scholars started from the political thesis that the (absolute) ruler is above the law. Consequently, it was assumed that the violation of distributive justice, as such, does not entail a legal sanction of compensation. The logical result of that view was that in any case where a duty of compensation was to be recognized, its foundation had to be in commutative justice.'

exceptional award of NCD, we have to provide not only a constituting correlative reason (breach of the claimant's claim-right) but also sound non-correlative reasons, ie reasons of distributive justice. Similarly, for instance, Virgo wrote that

> [t]he award of such disgorgement remedies can be justified on a different basis to that of literal restitutionary remedies. Justice demands that the defendant should disgorge gains obtained as a result of breach of a duty because of a fundamental principle of the law of restitution that no defendant should profit from his or her wrongdoing. So disgorgement remedies have a deterrent or distributive function.[245]

To say that non-correlative reasons justify a damages award is, then, simply just another way of expressing that the award is of distributive justice. We may thus conclude that NCD are damages of distributive justice. That also means that NCD are justified primarily by damage to a societal right that was posited to protect some societal interests.

From the perspective of either of the conflicting private individuals this looks as an *externally* distributed right that does not primarily protect their private interest but some *public* values. In this sense, the idea of distributive justice represents an external and public element in private law (as of the particular private law relationship between the parties). It pursues a just distribution of resources in society and thus belongs to the political domain.

This is, however, by no means to say that distributive justice has no role in private law. On the contrary, the constituting damage in cases of all NCD must analytically be a two-sided coin. On one side, it must count for damage to correlative private law claim-

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[245] G Virgo, *The Principles of the Law of Restitution* (OUP 2015) 6 (footnote omitted).

right of the claimant, on the other side, it must also represent damage to the distributive and thereby public right of the society. In the first sense, the positive correlative right is distributed, but not distributive. In the second sense, it is both distributed and distributive. Therefore, it just means that distributive justice is juridically exceptional in private law in a sense that it is not a default justifying position and that it only can play a role in private law when posited as particular legal rights and rules. In short, the juridical aim of NCD is seeking of exceptional justice between the conflicting private individuals.

7 THEORY OF NCD: A LARGER PICTURE AND FURTHER ISSUES

Looking at NCD collectively, it is now possible to formulate ethical principles of these awards and thus also to integrate the working definition of the NCD concept (as coined in Section 5.3) into a theory of NCD.

In previous chapters, I stated that NCD is a juridical concept which must have a distinctive justification that is reducible to reasons underlying exceptional type of injustice. Later, I provided an analytical framework of correlative or non-correlative reasons that underline all types of damages, and I associated these reasons with the concept of normative damage. Then, I showed that all NCD are ethically underpinned by non-correlative reasons, ie as reasons of distributive justice. Distributive justice was presented as a distinctive juridical *goal* of NCD which is grounded in said justifying *reasons*. Lastly, I argued that from the claimant/defendant perspective, distributive justice could be understood as an external, or public justification, and, in this sense, also as an exceptional justificatory strategy.

This thesis is NCD-centric though, and so it is useful to show how these reasons, ie retrospective justificatory grounds, and goals, ie prospective justificatory objectives, combine in the central idea of NCD. In this chapter, I thus complete my reasoning about NCD by explaining their unitary ethical principles (Section 7.1) and by exposing the theory of NCD in a nutshell (Section 7.2). I also distinguish it from alternative scholarly accounts that seek to analyse damages collectively (Section 7.3) and I point out some

further problems of the theory (Section 7.4). The key idea of this last chapter is that NCD may be best analysed as distributive damages.

7.1 The ethics of exceptionality

In this thesis, I proposed a thesis that, as a meaningful juridical concept, NCD may only be understood by reference to their exceptionality. Until now, however, I only showed that NCD have distinctive justificatory reasons and goals, but not that the unitary ethical principles of NCD are exceptional. In this section, I argue that NCD are seen as an exceptional remedy because of its normative exceptionality and because the juridical rule allowing these awards is epistemically extrinsic to the ethics of private law damages. This exceptionality can be to a large extent aligned with publicness or societal legitimisation of such NCD awards.

First, let me address what I mean by the juridical rule of NCD. By 'juridical rule of NCD' I mean a combination of justifying reasons and goals that jointly regulate when NCD are available. In particular, the juridical rule for an NCD award may be roughly formulated as follows:

> NCD may be awarded in those cases where the claimant was wronged by the defendant, and thereby suffered constituting damage to a claim-right that he or she held against the defendant before the wrong occurred, and where, in addition, such claim-right was posited by the law in order to protect an important societal interest and in relation to which the breach resulted in damage to such interest, either in form of constituting damage to societal right which does not correlate with claimant's damage, or in from of consequential damage to further societal right or rights which do not correlate with the claimant's rights. In order to remedy this non-correlative damage, the claimant may be awarded NCD as a means of affirming his constituting claim-right as well as a means of restoring and reinforcing the importance of respective societal rights and preventing them from further violations.

In what sense, then, is this juridical rule of NCD exceptional? The juridical rule may be seen as an abstract norm of the law of damages. Thus, it may be exceptional relative to other norms of damages. Should we accept the idea that the ordinary rule of damages is underpinned by correlative damage only, it is by no doubt exceptional for it rests on non-correlative reasons. Should we accept, that the ordinary rule of damages is ethically underpinned by corrective justice, again, it is by no doubt exceptional for it rests on distributive justice. Furthermore, should we accept that the ordinary rule of damages primarily protects interests of the claimant, then the juridical rule is also exceptional relative to this principle for it primarily protects societal rights and interests. On all these views, the rule of NCD is exceptional *normatively* because the norm (ie the meaning of the rule) is exceptional.

It may be exceptional in another sense as well. The content of the norm is always subjected to epistemic constraints and to semantic relativism, which is a theme I addressed earlier. Our knowledge about the meaning of the rule is always embedded in the epistemic perspective from which we look at it. For example, if we use the term 'normative damage', as I did in my analytical framework, it may denote both gain and loss, depending on our epistemic perspective. With such semantically relative notion of normative damage, it is possible to put restitution for unjust enrichment and compensation for loss under the same roof of corrective justice.[246] Although this intellectual building locks some of the

[246] In more detail on this issue, see the text to nn 215–216.

profound distinctions of the damages doctrine behind a closed door, it does not evict them.

The advantage of this approach is that it creates another room which may be called *epistemic* externality of NCD. This may help us better to understand exceptionality of NCD. As of the epistemic perspectives of both the claimant and the defendant whose dispute is to be resolved by damages award, the rule of NCD (stating that damages are based on distributed rights protecting societal or public interests) is epistemically external. They both may observe and understand it as a rule that is extrinsic to their private law relationship. In this sense, it is also exceptional for it is not rule *in* private law (as ordinary rules of damages are) but a rule that is valid outside, or under their private law.

The reason, in sum, why NCD should be treated as an exceptional remedy in private law is the normative and epistemic exceptionality of non-correlative reasons and distributive goals of NCD, relative to the claimant/defendant perspective and relative to the damages award which in effect correlates the conflicting parties together. NCD awards thus juridically appear as something new, something original. They are externally distributed right to monetary payment that is of societal, public or, more generally, of distributive origin.

7.2 Theory explained

7.2.1 In a nutshell

It is time to revise the main claims of this thesis and to answer the questions I posed in the opening chapter. One of them was already addressed, namely the question why and in

what sense NCD should be treated as an exceptional remedy. In the first chapter, I also asked what we mean by the term NCD, if it is a meaningful concept, whether NCD have some unifying features, whether NCD are a single category that can be justified by the same reasons and goals, and whether these reasons and goals are clearly distinct from those of CD.

This thesis showed that NCD cannot be conceptualised as a doctrinal category and that, as a meaningful category, it should be best understood as a philosophical or juridical concept. I argued that, as a juridical concept, NCD shall capture the idea of damages that are justified by some exceptional reasons. Further, I showed that these reasons could be presented in terms of non-correlative damage. By analysing justifying reasons of NCD, I also focused on explaining how non-correlative reasons translate into specific legal rules on NCD, and I linked the types of reason that underline NCD with distributive injustice. Distributive injustice considerations explained why NCD do not respond to injustice 'as of' between the claimant and the defendant. This showed that even the individual doctrinal subtypes of NCD, ie exemplary, nominal, contemptuous, vindicatory, and disgorgement (not restitutionary[247]) damages, may be analysed as having some unifying features. The key insight of this analysis then was that all NCD can be justified by recourse to the same set of reasons and goals, ie non-correlative types of reason (damage to distributive rights) and distributive goals. Finally, I tried to show that my normative inquiry into NCD can

[247] This is well in line with Lord Nicholls's preference 'to avoid the unhappy expression "restitutionary damages"' (*AG v Blake* (n 2) 284). See also H McGregor, 'Restitutionary Damages' in P Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1999) 203.

bring clarity and coherence to the doctrines of private law damages, for it draws a clear theoretical line between CD and NCD. As such, it may help us better to avoid overlapping justifications of individual heads of damages and to understand the exceptionality principle of NCD.

Overall, we can thus confirm and rephrase the original axiom by saying that with the non-correlatively justified exception of NCD, all damages may be justified correlatively. In other words, with the juridical exception of NCD, all damages may be justified by the juridical idea of correlative damage or corrective justice. This, to my mind, is indeed a meaningful and original claim, although it would be more apt to say that it contrasts distributive damages (as a juridical label for NCD) with corrective damages (as a juridical label of correlatively justified CD and restitutionary damages), rather than NCD with CD. The important lesson to learn here is that damage, by which I mean normative damage to legal rights, may manifest injustice either relative to corrective justice, or relative to distributive justice. In both cases, such damage deserves to be remedied by damages, but in both cases damage does not violate the same type of rights or legally protected interests. Whereas CD are concerned with remedying rights between the conflicting parties, NCD remedy damage to extrinsic, societal, public, or, in general, distributive rights.

7.2.2 Distributive damages as a preferred theoretical account of NCD

Regarding what was just said, NCD could theoretically be described as distributive damages, external damages, or public damages. It could be termed distributive damages

for it relies on considerations of distributive justice; external damages for it rests on considerations that are normatively and epistemically external to the conflicting parties; and it could also be termed public damages since it primarily protects societal or public rights. To my mind, however, the distributive damages theory is a superior type of juridical explanation of NCD which is why I prefer it over the two alternatives.

The first reasons in support of distributive damages theory is that it is better immune to said semantic relativism. There are various types of participant in a legal dispute over damages (typically at least a claimant, a defendant, and a court), and considering the multiplicity of their epistemic perspectives, it is impossible to fix the meaning of NCD by reference to externality, for externality is always relative to someone's perspective. What is external to the claimant, does not need to be external to the defendant or to the court, etc. Similarly, publicness is also semantically relative concept and can be hardly spot on. Public features are public only relative to what is private, and, as Lucy convincingly shows, there is currently no clear-cut approach to the public-private distinction.[248] Distribution, on the other hand, highlights the method and structure of power in relation to the dispute over damages at large. Thus, it shall be clear to all the participant that it is the authority who distributes.

The second reason in favour of the distributive damages theory of NCD is that it better explains the idea that NCD are most often not awarded as of right. The juridical rule of NCD looks different from the one of CD. NCD are in principle always up for

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[248] W Lucy, 'Private and Public: Some Banalities About a Platitude' in C Mac Amhlaigh, C Michelon and N Walker (eds), *After Public Law* (OUP 2013).

distribution, for they protect distributive rights in the first place. Thus, they are discretionary by nature. Conceiving of NCD as being distributive damages helps us to see that it is the juridical rule of distributive damages that protects distributive rights. It also helps us to see that NCD are in principle always up for further distribution and so it may be expected that this area will be developing with the society and its values.

Third, the notion of distributive damages better captures that the idea of NCD as an award that is distributes anew—in this case relative to what private rights and claim rights governed the obligation between the claimant and the defendant. In contrast, externality only explains the idea that rights and damages are distributed to the conflicting parties from the outside. Publicness, then, only focuses on whose interests are distributed. For an NCD-centric theory, they key for understanding the law therefore seems to be in saying that these damages (re)allocate non-correlatively justified damages (not damages for external damage or public damage). That is the idea of distributive damages.

Overall, I therefore suggest that we may replace the concept of NCD with 'distributive damages' term, for it more intuitively delivers the idea that NCD are juridical (non-doctrinal) category. Also, it better captures the essential link between NCD and distributive justice with all the bearings that this may have, especially, that is an exceptional type of damages, that it is primarily based on normatively and epistemically extrinsic rules, that it has public rather than private legitimisation, and, crucially, that it is underpinned by non-correlative reasons and goals.

7.3 Theory distinguished

It is also useful to distinguish my account of NCD from other theories that seek to analyse damages collectively. In English scholarship, there is very little damages-centric theoretical accounts of damages. I have already compared my account with that of Cane.[249] The main difference was that he seeks to offer doctrinal (not philosophical) justifying reasons for the exceptional measures of damages, and therefore his theory is meant to reveal, with a certain degree of abstraction and generalisation, how matters stand (not how they could stand) in the present law. In the same way, it is possible to distinguish my analysis from Harder's work in which this author is searching for harmonised doctrinal principles of damages in the law of obligations at large,[250] or from Stapleton's work in which she also tries to resolve the problem of doctrinal measures of damages and their classification,[251] although these last two authors did not address the problem of NCD.

My juridical account of NCD as distributive damages can, however, be placed on the map of remedies that was offered by Zakrzewski.[252] Regarding his juridical (re)classification of judicial remedies in private law (not only in the law of damages), it may be possible to put my distributive damages under the head of transformative

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249 See Sections 6.2 and 6.4.

250 Harder (n 219).

251 J Stapleton, 'A New "Seascape" for Obligations: Reclassification on the Basis of Measure of Damages' in P Birks (ed), *The Classification of Obligations* (Clarendon Press 1997) 196. She recognised this difference when she writes that her account is in clash with Weinrib's proposition for juridical classification of obligation (ibid 231), that Weinrib offered in another chapter of the same volume (Weinrib (n 11)) and which I endorsed in this thesis.

252 Zakrzewski (n 101).

remedies. In his work, Zakrzewski contrasted transformative remedies with replicative remedies by testing 'whether a remedy is a restatement of a substantive right [ie substitutive] or whether it is substantially different from all such prior rights'[253] that regulate the relationship between the claimant and the defendant, ie transformative. In this sense, NCD (as distributive damages) are not replicating but transforming the pre-existent non-correlative legal rights into seemingly correlative damages awards.

Finally, I agree with Stevens that 'damages [are] awarded as a "next best" substitute for the primary right'[254] as a remedy for normative damage (damage to claim-rights). However, as I showed earlier, his account does not involve the idea of consequential normative damage,[255] and he neither works with the idea of non-correlative damage. More generally, Steven's theory and his broad normative concept of substitutive damages[256] cannot distinguish between CD and NCD as between two distinct categories because, under Steven's account, both CD and NCD are substitutes for an infringed claim-right.

7.4 Further issues

Naturally, this thesis raises further interesting issues that have not, and due to the various limitations even could not have been addressed. Three of them strike me as particularly important. One is whether NCD, are governed by a unitary set of legal rules (or at least by more homogenous rules than those we may find in the present law). It is plausible to think

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253 ibid 82.

254 Stevens (n 96) 60. Critically, in relation to Stevens's substitutive theory of damages, see Burrows (n 62).

255 See the text accompanying n 148.

256 Stevens (n 96) ch 4.

that they might be so governed, if all forms of NCD are underpinned by the same type of non-correlative reasons. In theory, thus, all NCD could be regulated similarly in so far as they protect similar societal interests and rights (as I have demonstrated in Section 7.1) and there could also be a standardised test for the availability and quantum of all NCD remedying the non-correlative constituting and consequential damage. Yet to provide a sufficiently determinate set of NCD rules a lot of work remains to be done. In this regard, it is legitimate to ask why we should bother reforming the present law—the law that has been shaped by myriad cases. A good reason for us to do so could be our belief that NCD *should* be regulated by distributive damages rules. That would require us to show in the first place that a reformed set of legal rules is better suited to explain the distributive nature of NCD awards and that the distributive nature of NCD awards is worth pursuing. This thesis, however, did not make any such normative claims.

Another unexplored issue is the implicit distinction between private and public law. Several times, I have addressed CD as damages that protect correlative private interests and rights, whereas NCD were presented as remedies that protect non-correlative public or societal interests and rights. Still, I have not fully explained what I mean by this private/public divide, and I did not explore whether any such divide is meaningful and what implications it may have for the law of damages (which is generally thought of as belonging to private law). All these issues are closely intertwined, I think. It is a valid objection to my thesis that thinking about NCD in terms of damages for the violation of public (as opposed to private) rights does not help us to solve the problem of NCD unless we already believe that the private/public divide is meaningful and has some implications

in the law of damages. Otherwise, the adjective 'public' would be nothing more than a new linguistic convention regarding how to describe NCD. We may doubt, however, whether this convention has any additional explanatory power than the expression 'non-compensatory'. In this regard, a mere link between the adjectives 'public' and 'distributive' does not help either because the 18th century scholars, for example, already distinguished 'between *public* distributive and commutative justice, and *private* distributive and commutative justice'.[257] Obviously, one has to explore further the meaning of the said link in relation to the private/public divide and the implication this may have eg on the double recovery and double punishment principles or on the methods of interpretation in case of NCD rules.

The third set of questions arises from the epistemic relativism that I also mentioned several times. I argued that if we interpret NCD in terms of 'distributive damages' then our understanding of this category is observer-neutral. This seem to imply that the addressee of a NCD rule may anticipate more easily the precise legal consequences his or her action may have because the interpretation of the rule and the non-correlative justifying reasons should remain fixed regardless the epistemic perspective we may adopt. This induces a controversial claim, namely, that CD are a claimant-relative remedy, restitutionary damages are a defendant-relative remedy, and NCD are a society-relative remedy. On this view, NCD may seem to be more 'objective' than CD or restitutionary damages due to their epistemic neutrality. Yet all damages can theoretically be interpreted

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[257] Englard (n 236) 178 (footnote omitted). Englard traces references to this distinction back to 15th century literature.

in the formal (neutral) language of either corrective or distributive justice—as we have seen in this thesis—and so it remains a mere speculation that NCD are a more 'objective' remedy than other types of damages.

8 CONCLUSION

After the summarising exposition in the previous chapter, the conclusion can be brief. Throughout this work, the Lord Nicholls's axiomatic statement, as well as its reformulation according to which all damages—with the anomalous exception of NCD—are compensatory[258] was challenged and analysed in many ways, yet the essence of the axiom was confirmed. We have seen that NCD truly are an exceptional category, although not in a doctrinal but in a juridical or philosophical sense.

The important original contribution that I hope to have delivered to the reader is that NCD awards, unlike CD, can be clearly analysed by reference to non-correlative justifying reasons of distributive justice, in other words by damage to public or societal rights. Moreover, by understanding NCD as distributive damages, we may draw a clear line between the ethics of these awards and the ethics of CD. This helps to comprehend both the law of NCD and the law of damages in novel and systematic way, mainly thanks to the analytical framework of correlative and non-correlative justifying reasons. Despite the philosophical nature of the 'distributive damages' theory of NCD, I believe that adoption of such theory could improve our justification and understanding of the actual NCD awards, especially in comparison with the current piecemeal approach to these types of damages.

On the other hand, my findings should not be overstated. I claimed that, currently, NCD can only be scrutinised as a juridical or philosophical concept. I presented this

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[258] See Section 1.1.

concept as ‘distributive damages’ that are justified by distinctive reasons and goals. Whether we should adopt this category, that is a question for another day.

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