

# *An Empirical Study of Punitive Damages*

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**Abstract:** This article reports and discusses the results of an empirical study of punitive damages. It examines 146 claims that were decided in all parts of the UK (save for Scotland, which does not recognise punitive damages) by first instance courts in the first sixteen years of the twenty-first century. The study is the first of its kind to be conducted in the UK. In the morass of data, important evidence is uncovered regarding punitive damages. This evidence supports certain widely-held views regarding punitive damages and casts doubt on others.

**Keywords:** punitive damages; exemplary damages; tort; remedies

## *1. Introduction*

This article addresses one of private law's most controversial remedies: punitive damages.<sup>1</sup> It comprises an empirical study of this type of award. The two central questions addressed are the rate at which punitive damages are awarded and the quantum of punitive damages awards. The study also assesses the relationship between those variables and (1) the *Rookes v Barnard*<sup>2</sup>

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<sup>1</sup> Punitive damages are 'encased in controversy': Ernest Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 Chi-Kent L Rev 55, 84.

<sup>2</sup> [1964] AC 1129 (HL).

category within which a case falls; (2) the cause of action in which the claimant sues; (3) the type of defendant (natural person, corporation or public body); and (4) the mode of trial (judge only or judge and jury). In addition, the article explores the extent to which punitive damages are associated with aggravated and compensatory damages.

This article is the first time that the award of punitive damages has been explored empirically in the UK<sup>3</sup> or elsewhere in the Commonwealth, with the sole exception of a modest and dated study in Canada.<sup>4</sup> Accordingly, it addresses a major gap in understanding regarding the remedy. Punitive damages have, of course, been exhaustively analysed empirically in the US.<sup>5</sup> However, the US research is of limited usefulness when it comes to understanding the law of punitive damages in the UK given the distinctiveness of English law on the subject.<sup>6</sup>

Empirical evidence regarding punitive damages in the UK is needed if we are to know whether frequently made claims about punitive damages are true. For example, it is often said that awards of punitive damages ‘are virtually uncontrollable and that they reach levels which

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<sup>3</sup> As Jonathan Morgan observes, ‘the data have never been collected’: Jonathan Morgan ‘Reflections on Reforming Punitive Damages in English Law’ in Lotte Meurkens and Emily Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Intersentia 2012) 183, 194.

<sup>4</sup> See Neil Vidmar and Bruce Feldthusen, ‘Exemplary Damages Claims in Ontario: An Empirical Profile’ (1990) 16 CBLJ 262. Punitive damages have not been investigated empirically in Australia (see the remarks in Rachael Mulheron, ‘Exemplary Damages and Tort: An International Comparison’ (2000) 2 University of Notre Dame Australia L Rev 17, 51) although it is unsurprising that this is the case given that, since approximately 2001, the award of punitive damages has been rendered effectively extinct in Australia as a consequence of statutory intervention: see, eg, Civil Liability Act 2002 (NSW) s 21.

<sup>5</sup> Leading studies include Neil Vidmar and Mary Rose, ‘Punitive Damages by Juries in Florida: In Terrorem and in Reality’ (2001) 38 Harv J on Legis 487; Theodore Eisenberg and others, ‘Judges, Juries, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data’ (2006) 3 JELS 263; Theodore Eisenberg and others, ‘The Decision to Award Punitive Damages: An Empirical Study’ (2010) 2 JLA 577; Alison Del Rossi and Kip Viscusi, ‘The Changing Landscape of Blockbuster Punitive Damages Awards’ (2010) 12 Am Law Econ Rev 116; Neil Vidmar and Mirya Holman, ‘The Frequency, Predictability, and Proportionality of Jury Awards of Punitive Damages in State Courts 2005: A New Audit’ (2010) 43 Suffolk University Law Review 855.

<sup>6</sup> ‘The American approach to awards of exemplary damages has diverged markedly from the English’: Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (Law Com CP No 132, 1993) 102.

are excessive’<sup>7</sup> and that ‘defamation cases ... represent an important source of awards of [punitive damages]’.<sup>8</sup> However, as things stand there is no way of knowing if these claims are accurate. Empirical evidence is also required if reform of the law in this area is to be fully informed. To date, all changes that have been made to the law governing punitive damages have been effected in the absence of any systematically collected data regarding the remedy.

This article reveals important information about punitive damages. One key finding is that punitive damages are awarded rather more frequently than appears to be conventionally thought. Punitive damages were awarded in 39.7 per cent of the occasions when they were sought in sampled cases. Another significant finding is that the level of punitive damages awards has been rather modest. If outliers are disregarded, the range of awards in the sample was £588 to £33,851.<sup>9</sup> This result contrasts sharply with the perception that punitive damages awards are unpredictable and frequently excessive.<sup>10</sup> A third important conclusion is that punitive damages are rarely awarded in defamation cases. As we will discuss, this finding is contrary to textbook gospel.

This article unfolds as follows. In the next section, we briefly describe the law governing punitive damages. In Part 3, we explain our methodology. Part 4 sets out the results of our analysis. Those results are discussed in Part 5. Our principal conclusions are summarised in Part 6. At the outset, we should say a word about our terminology. In the UK, the terms ‘punitive’ and ‘exemplary’ damages are used interchangeably by both legal scholars and

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<sup>7</sup> *ibid* 82, 113 (footnotes omitted).

<sup>8</sup> *ibid* 61 (footnote omitted).

<sup>9</sup> The full distribution of all punitive damages awards are discussed later: see section 4A, below.

<sup>10</sup> Regarding this perception, see the text accompanying n 7.

judges.<sup>11</sup> In 1997, the Law Commission for England and Wales stated that the language of ‘punitive damages’ more accurately described the nature of the remedy.<sup>12</sup> This article follows the Law Commission’s preference.

## 2. *The Law of Punitive Damages in Outline*

Punitive damages, which can only be awarded if an entitlement to them is pleaded,<sup>13</sup> are extra-compensatory damages the aim of which is to punish the defendant for his wrongful conduct and to deter him and others from acting similarly in the future.<sup>14</sup> The history of the award dates back to 1763, with the earliest examples being found in *Huckle v Money* (false imprisonment)<sup>15</sup> and *Wilkes v Wood* (trespass to land).<sup>16</sup> It was established at a relatively early stage that certain other causes of action also had the potential to yield punitive damages, such as assault,<sup>17</sup> defamation<sup>18</sup> and trespass to goods.<sup>19</sup> In 1964, the law changed dramatically when the House of Lords decided the appeal in *Rookes*.<sup>20</sup>

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<sup>11</sup> ‘[T]he terms are synonymous’: *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 [55] (Lord Nicholls).

<sup>12</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 104. Cf *Broome v Cassell* [1972] AC 1027 (HL) 1034, 1073 (Lord Hailsham LC preferring the term ‘exemplary damages’).

<sup>13</sup> CPR 16.4(1)(c); Crime and Courts Act 2013, s 34(5).

<sup>14</sup> *Rookes v Barnard* [1964] AC 1129 (n 2) 1221; *Broome* (n 12) 1034.

<sup>15</sup> (1763) 2 Wils KB 205, 95 ER 768.

<sup>16</sup> (1763) Lofft 1, 98 ER 489.

<sup>17</sup> See, eg, *Benson v Frederick* (1766) 3 Burr 1845, 97 ER 1130.

<sup>18</sup> See, eg, *Rook v Fairrie* [1941] KB 507 (CA).

<sup>19</sup> See, eg, *Williams v Currie* (1845) 1 CB 841, 135 ER 774.

<sup>20</sup> *Rookes* (n 2).

A. The *Rookes* categories

*Rookes* severely restricted the availability of punitive damages.<sup>21</sup> Lord Devlin (speaking for the House of Lords on this point) disapproved of the award but felt that precedent prevented him from abolishing it altogether.<sup>22</sup> Accordingly, his Lordship confined their scope to just three categories of case. Those are (1) cases of ‘oppressive, arbitrary or unconstitutional actions’ by servants of the government acting in that capacity; (2) cases where the defendant calculated that he would make a profit by his conduct which may exceed the compensation payable to the claimant; and (3) cases in which the award of punitive damages is authorised by statute. Lord Denning MR tried to outflank this limitation of the law of punitive damages in *Cassell v Broome*<sup>23</sup> but was rebuffed by the House of Lords on appeal.<sup>24</sup>

Lord Delvin sought to justify the first category on the ground that because the ‘servants of the government are also the servants of the people’, ‘the use of their power must always be subordinated to their duty of service.’<sup>25</sup> Cases falling within this category have included actions against the police,<sup>26</sup> immigration authorities<sup>27</sup> and local councils.<sup>28</sup> In order for a case to fall into this category, the wrongdoer must be a servant of the government who acted in that capacity at the relevant time.<sup>29</sup>

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<sup>21</sup> Other jurisdictions have refused to follow *Rookes*: *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 aff’d by the Privy Council in (1967) 117 CLR 221; *Vorris v Insurance Corporation of British Columbia* [1989] 1 SCR 1085; *Taylor v Beere* [1982] 1 NZLR 81.

<sup>22</sup> *Rookes* (n 2) 1125–26.

<sup>23</sup> [1971] 2 QB 354 (CA) 380–84. Denning LJ audaciously wrote at 384: ‘I think the difficulties presented by *Rookes v Barnard* are so great that the judges should direct the juries in accordance with the law as it was understood before *Rookes v Barnard*. Any attempt to follow *Rookes v Barnard* is bound to lead to confusion’.

<sup>24</sup> *Broome* (n 12) 1054, 1084, 1132.

<sup>25</sup> *Rookes* (n 2) 1226.

<sup>26</sup> See, eg, *Copeland v Commissioner of Police of the Metropolis* (High Court, 2 May 2013).

<sup>27</sup> See, eg, *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453.

<sup>28</sup> See, eg, *Bradford City Council v Arora* [1991] 2 QB 507 (CA).

<sup>29</sup> Thus, in *AB v South West Water Services Ltd* [1993] QB 507 (CA) 525 the defendant which supplied

The second category comprises cases in which the defendant calculated that the profit that he expected to make from his wrong would exceed the compensation that might be payable to the claimant. It is unnecessary that the defendant engaged in a precise balancing process in this regard.<sup>30</sup> A general awareness on the defendant's part that what he was planning to do was contrary to the law coupled with a hope that the expected benefits would outweigh the possible loss is sufficient.<sup>31</sup> Causes of action for which punitive damages have been awarded within this category include conversion,<sup>32</sup> trespass to land,<sup>33</sup> unlawful means conspiracy,<sup>34</sup> false imprisonment,<sup>35</sup> battery,<sup>36</sup> statutory competition torts,<sup>37</sup> deceit<sup>38</sup> and defamation.<sup>39</sup>

There are just two clear examples of statutory authorisation to award punitive damages.<sup>40</sup> The first is section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, which states that punitive damages may be awarded in an action for damages for 'conversion or other proceedings which lie by virtue of' a failure to observe restrictions for which the Act provides regarding the interference with the interests of servicepersons. The other example lies in sections 34–39 of the Crime and Courts Act 2013. Those provisions

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contaminated water to inhabitants of surrounding areas was not considered to have acted as a servant of the government due to its commercial operations and was not liable to pay punitive damages as a result.

<sup>30</sup> *Broome* (n 12) 1044; *John v MGN Ltd* [1997] QB 586 (CA) 619.

<sup>31</sup> *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA) 269–70.

<sup>32</sup> See, eg, *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197, [2005] Po LR 1.

<sup>33</sup> See eg, *Ramzan v Brookwide Ltd* [2010] EWHC 2453 (Ch), [2011] 2 All ER 38.

<sup>34</sup> See, eg, *AT v Dulghieru* [2009] EWHC 225 (QB).

<sup>35</sup> *ibid.*

<sup>36</sup> *ibid.*

<sup>37</sup> See, eg, *2 Travel Group Plc (in liq) v Cardiff City Transport Services Ltd* [2012] CAT 19, [2012] Comp AR 211.

<sup>38</sup> See, eg, *Hassan v Cooper* [2015] EWHC 540 (QB), [2015] RTR 26.

<sup>39</sup> See, eg, *John* (n 30).

<sup>40</sup> Section 97(2) of the Copyright, Designs and Patents Act 1988 authorises the court to award 'additional damages' in 'an action for infringement of copyright'. The nature of this award is hotly contested. Some argue that 'additional damages' are aggravated or restitutionary damages, while others contend that they are punitive damages or a *sui generis* remedy. For discussion, see *Nottinghamshire Healthcare NHS Trust v News Group Newspaper Ltd* [2002] EWHC 409 (Ch), [2002] RPC 49 [51]; Christina Michalos, 'Copyright and Punishment: The Nature of Additional Damages' (2000) 22 EIPR 470.

authorise the court to award punitive damages against members of the press who are not regulated by an approved independent press regulator and who disregard outrageously the claimant's rights.

## B. Other restrictions

Even if a case falls within one of the *Rookes* categories, punitive damages may still not be awarded as there are three additional limitations on their availability. First, it is well established that punitive damages may not be awarded if other remedies are sufficient to achieve the goals of punishment and deterrence or if other sanctions have already been imposed on the defendant for the conduct concerned.<sup>41</sup> Punitive damages are a remedy of 'last resort'.<sup>42</sup> Second, the claimant must have been the victim of the punishable behaviour.<sup>43</sup> A claimant cannot rely in this regard on conduct that was directed at a third-party in order to secure a punitive damages award. Third, a court may also refuse to award punitive damages in light of the claimant's own conduct.<sup>44</sup>

Until 2001, a further, major restriction existed: the cause-of-action test.<sup>45</sup> That test meant that punitive damages could be awarded only in causes of action for which they had been held to be available prior to 1964, that being the year in which *Rookes* was decided. This restriction on the law was (rightly) removed by the House of Lords in *Kuddus v Chief Constable of*

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<sup>41</sup> *Rookes* (n 2) 1228; *Broome* (n 12) 1126; *Archer v Brown* [1985] 1 QB 401 (QB) 423. Cf *Borders* (n 32) [17]; *AT* (n 34) [68]–[72]. See, also, the Crime and Courts Act 2013, s 35(2) ('The court must have regard to the principle that exemplary damages must not usually be awarded if, at any time before the decision comes to be made, the defendant has been convicted of an offence involving the conduct complained of').

<sup>42</sup> *Kuddus* (n 11) [63] (Lord Nicholls).

<sup>43</sup> *Rookes* (n 2) 1227.

<sup>44</sup> *Russell v Home Office* [2001] Po LR 29 (QB) [204]–[206].

<sup>45</sup> Established in *AB* (n 29) relying on the *obiter dicta* of Lord Diplock in *Broome* (n 12) 1131.

*Leicestershire Constabulary*.<sup>46</sup> However, despite the demise of the cause-of-action test, punitive damages remain unavailable in certain proceedings. For example, they are unavailable in respect of breaches of the Human Rights Act 1998<sup>47</sup> and in proceedings for breach of contract.<sup>48</sup> It is unclear if punitive damages may be awarded for breach of an undertaking.<sup>49</sup>

### C. Quantification

In *Rookes*, Lord Devlin emphasised that the assessment of punitive damages should be based on the principle of moderation.<sup>50</sup> His Lordship highlighted the relevance of the defendants' means to that exercise<sup>51</sup> along with the gravity of the wrong.<sup>52</sup> When punitive damages are awarded against multiple defendants who are jointly and severally liable, the defendants will be jointly obliged to pay a single sum the quantum of which will be fixed according to that which is necessary to punish the least blameworthy defendant.<sup>53</sup> When a defendant is liable to pay

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<sup>46</sup> *Kuddus* (n 11). See, also, *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449, in which the Privy Council held that punitive damages were available against a tortfeasor who was unaware that he was acting wrongfully provided that the wrongdoer's behaviour was nonetheless so outrageous that punishment was deserved.

<sup>47</sup> *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 [55]; *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395 [26].

<sup>48</sup> The decision in *Addis v Gramophone Co Ltd* [1909] AC 488 (HL) 496 is widely regarded as having established that punitive damages cannot be awarded in proceedings for breach of contract. It is arguable that *Addis* has been misread and that it establishes no such thing; see James Goudkamp, 'Exemplary Damages' in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (Cambridge University Press 2017). However, even if *Addis* has been misunderstood, subsequent authorities put it beyond doubt that punitive damages are irrecoverable in contract: see, eg, *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518 [15].

<sup>49</sup> In *Al Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB) [54], Jack J said (*obiter dicta*) that 'if a litigant misleads the court into granting him an order with the intention of enabling himself to steal a march in the litigation, he should be treated as falling within [the] second category in *Rookes* ...'. However, the issue remains controversial: see Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 12) 121; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (3rd edn, Sweet & Maxwell 2013) para 10-140.

<sup>50</sup> *Rookes* (n 2) 1127–28 (encouraging the courts to award lower, rather than higher, awards).

<sup>51</sup> *ibid*.

<sup>52</sup> *ibid*. See, also, *Loudon v Ryder (No 1)* [1953] 2 QB 202 (CA) 207; *Ramzan* (n 33) [71]–[74].

<sup>53</sup> *Broome* (n 12) 1063. However, s 38(1) of the Crime and Courts Act 2013 provides that prescribed media defendants are severally liable to pay punitive damages.



punitive damages in respect of wrongs committed against multiple claimants, the claimants will share equally the punitive damages component of the award.<sup>54</sup>

### 3. *Methodology*

#### A. Temporal, institutional and jurisdictional scope of the study

This study captures every decision in which punitive damages were sought that was delivered between 1 January 2000 and 31 December 2015<sup>55</sup> that we could access electronically. We focused on that period because we are interested in the contemporary operation of the law of punitive damages and because a sixteen-year study period enabled us to obtain a sample that is large enough to permit us to draw meaningful conclusions about this area of the law. We also concentrated on this period because there was a dramatic increase from around 2000 in the number of English decisions that were made publicly available, which meant that the task of collecting data was significantly easier than would otherwise have been the case. The cause-of-action test, which we discussed above,<sup>56</sup> was abolished on 7 July 2001. However, that restriction on recovering punitive damages did not affect the determination of any the cases in our sample.

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<sup>54</sup> *Riches* (n 31) 261, 289.

<sup>55</sup> It may be queried why data from 2016 have not been gathered. The reason is that there is often a significant time lag between the date on which judgment in a case is given and the date on which the reasons are published online. See, eg, *Vasile v Pop Loan* (Willesden County Court, 17 November 2015), in which judgment was given on 17 November 2015 but the reasons were not published online until 24 May 2016. Were 2016 data included in the study, it would have been necessary to wait until the end of 2017 in order to be fairly confident that no new decisions from 2016 would become available.

<sup>56</sup> See the text accompanying n 45.

This study examines only first instance decisions. Neither the decisions of appellate courts nor tribunals<sup>57</sup> were sampled. We see value in concentrating on first instance decisions given that academic writings regarding punitive damages tend to focus on appellate decisions. The study is also confined to first instance decisions because cases that are the subject of an appeal may sometimes be atypical. Tribunal decisions have not been examined primarily because tribunals are fundamentally different creatures from courts and there is consequently reason to suspect that tribunals and courts might diverge in terms of how they apply the law governing punitive damages.

In terms of jurisdictional scope, the study extends to England, Wales and Northern Ireland. Decisions from Northern Ireland have been included because the law of punitive damages in that legal system is essentially the same as English law on the subject.<sup>58</sup> The same is true of tort law in Northern Ireland more generally.<sup>59</sup> The study does not extend to Scotland. That is because punitive damages are not recognised in that jurisdiction.<sup>60</sup>

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<sup>57</sup> We countered several occasions on which tribunals ordered the defendant to pay punitive damages: see, eg, *Ministry of Defence v Fletcher* [2010] IRLR 25 (EAT); *2 Travel Group* (n 37) (CAT).

<sup>58</sup> ‘The modern law on exemplary damages stems from the decision of the House of Lords in *Rookes* ...’: *Crawfordsburn Inn Ltd v Graham* [2013] NIQB 79 [6]. There are some statutory differences between the jurisdictions that concern punitive damages. See, eg, the Defamation Act 2013, s 17(2) and the Crime and Courts Act 2013, s 61(13)(d), which provisions do not extend to Northern Ireland. These differences are unimportant for the purposes of this article.

<sup>59</sup> ‘In Northern Ireland tort law is ... virtually identical to that in England and Wales. On some matters there are separate pieces of legislation for the two jurisdictions, but these are usually worded in ways that are indistinguishable ... As far as case law is concerned there are no significant variations. Indeed, tort cases from Northern Ireland have occasionally gone as far as the House of Lords and are still cited in English courts as binding precedents’: Brice Dickson, *Law in Northern Ireland* (2nd edn, Hart Publishing 2013) 301.

<sup>60</sup> ‘I find no authority for any distinction between damages and “exemplary damages” in the law of Scotland. The very heading under which it is treated in our older books “Reparation” excludes the idea’: *Black v North British Railway Co* 1908 SC 444 (IH) 453 (Lord Guthrie).

## B. Accessing the data

In order to find the cases, the terms ‘exemplary damages’ and ‘punitive damages’ were entered into the full-text search box of Westlaw. The results were organised by date. A cross-check was then run with LexisNexis, Bailii, Lawtel, Casetrack and Justis and additional cases that did not appear in the search results on Westlaw were included in the sample. The search results contained approximately 650 decisions. Each of these was reviewed. To be included in the sample, a case had to satisfy the following criteria: (1) punitive damages were sought by the claimant; and (2) the claimant succeeded in establishing liability on the part of the defendant (if liability was disputed).

We did not consider cases in which the judge entered a verdict for the defendant and then proceeded to address how he would have decided the claim for punitive damages had the claimant succeeded in establishing liability.<sup>61</sup> Such cases were not sampled because we felt that, in this situation, judges often gave cursory treatment to the issue of punitive damages.<sup>62</sup> There was a danger, in other words, that they were less careful in their consideration of the punitive damages claim than they would have been had the claim been ‘live’ with the result that including the cases concerned may have distorted the sample.

We excluded from the sample cases in which there was only a passing reference to punitive damages<sup>63</sup> and cases in which no final determination was reached in relation to the punitive

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<sup>61</sup> See, eg, *Wellbarn Shoot Ltd v Shackleton* [2002] 18 EG 151 (CS) (Ch) [53].

<sup>62</sup> Consider, eg, *Ryan v Shropshire Council* [2013] LLR 429 (QB) 446 (judge disposing of punitive damages issue in a single sentence). Judges who entered a verdict for the defendant sometimes refused to address punitive damages on a hypothetical basis: see, eg, *Assad v Secretary of State for the Home Department* [2015] EWHC 2281 (QB) [90].

<sup>63</sup> See, eg, *Re T&N Ltd* [2005] EWHC 2990 (Ch), [2006] 1 WLR 1792 [53]; *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) [127].

damages claim.<sup>64</sup> Despite the downfall of the cause-of-action test,<sup>65</sup> several cases were encountered that were concerned with whether the award of punitive damages was in principle available in the cause of action in which the claimant sued. In some of those cases, the court rejected the claim on the basis that the cause of action in question did not admit of the award of punitive damages.<sup>66</sup> These cases were not added to our sample because the court did not examine the substance of the claim for punitive damages but rejected it on the ground that the law precluded the award in the type of action in issue in all cases.

### C. Coding the cases

100 cases satisfied our inclusion criteria. Data from each were added to a spreadsheet. Importantly, separate entries were made in the spreadsheet for each *claim* rather than for each case. Thus, for example, if a case involved a claim for punitive damages by two claimants against a single defendant, two entries were added.<sup>67</sup> Similarly, if a case entailed a claim for punitive damages by a single claimant against two defendants, two entries, again, were added.<sup>68</sup> This approach was subject to two (overlapping) exceptions. First, we ignored the existence of multiple claimants or defendants where there was only a single claimant or defendant in substance (as occurred, for example, where both an employee and vicariously liable employer were sued). The second exception concerned situations where there were multiple defendants

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<sup>64</sup> See, eg, *R (Karas) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin), (2006) 103(18) LS Gaz 31 [98].

<sup>65</sup> See the text accompanying n 45.

<sup>66</sup> See, eg, *R (Guntrip) v Secretary of State for Justice* [2010] EWHC 3188 (Admin) [34] (Human Rights Act 1998); *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20 [197] (privacy).

<sup>67</sup> See, eg, *Mohidin v Commissioner of Police of the Metropolis* [2015] EWHC 2740 (QB).

<sup>68</sup> See, eg, *Hassan v Cooper* (n 38).

who were held jointly and severally liable for the same wrong.<sup>69</sup> In such situations, the defendants were treated as a single defendant and only one entry was added on their account. We proceeded in this way because in such cases there is only a single punitive damages award that has to be paid only once.<sup>70</sup>

Counting claims rather than cases had several advantages. It allowed us to describe more accurately what actually happened in cases involving multiple claimants or defendants. It made it possible, for example, for account to be taken of differences in the way in which the court disposed of the claim for punitive damages in respect of each pair of litigants.<sup>71</sup> It also increased considerably the size of the sample, as the 100 cases entailed 146 claims.<sup>72</sup> However, counting claims introduced an issue of significant complexity. As explained above,<sup>73</sup> where multiple claimants in a single proceeding are entitled to punitive damages, the award will be divided equally between them. For example, if C1 and C2 recover an award of £10,000 in punitive damages from D, C1 and C2 will both be entitled to £5,000. Accordingly, if claims are counted, the amount *received* by each claimant in such a case can be accurately captured, but the same is not true of the amount that the defendant had to *pay*. We dealt with this issue by recording in the spreadsheet two ways of measuring the amount of punitive damages awarded in claims involving multiple claimants: we recorded both the amount of punitive damages that each claimant was entitled to *receive* and the total amount of punitive damages that the defendant was required to *pay*. As things turned out, the different ways of measuring the

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<sup>69</sup> See, eg, *AT* (n 34); *Churchill Insurance v Shajahan* (11 September 2015, Birmingham County Court).

<sup>70</sup> Regarding the rules governing punitive damages awards made against multiple defendants, see section 2C, above.

<sup>71</sup> See, eg, *Hassan v Cooper* (n 38), in which the first defendant was ordered to pay £7,250 in punitive damages and the second defendant £60,000.

<sup>72</sup> The appendix contains a list of all of the claims.

<sup>73</sup> See text accompanying n 54.

quantum of punitive damages awards was unimportant in the context of this study. That is because, by and large, the results of the statistical analyses that we carried out were very similar regardless of which measure was used.

142 claims (97.3 per cent) were decided by the courts of England and Wales and four (2.7 per cent) by the courts of Northern Ireland. 101 claims (69.2 per cent) were accessed ‘directly’, by which we mean that the full text of the decision in question was available to us. We gleaned the details of the remaining 45 claims in the sample (30.8 per cent) ‘indirectly’ via the reasons of an appellate court that heard an appeal against the decision.<sup>74</sup> We included cases that we could access only indirectly in the sample as doing so boosted its size and because the information regarding the first instance decision was very likely to be accurate. An appellate court is unlikely to make errors in recounting features of the first instance decision in relation to matters that are as basic as whether punitive damages were awarded and, if they were, the quantum of the award.

The following information was extracted for each claim and the columns of the spreadsheet were populated accordingly.<sup>75</sup>

Column A: Name of the case.

Column B: Citation.

Column C: Date of decision. The date of the judgment was entered where this information was available. For indirectly accessed cases, if the appellate court did not indicate the date of

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<sup>74</sup> The details for one claim (*Raw v Croydon LBC* [2002] CLY 941 (Bodmin County Court)) were obtained from a case summary.

<sup>75</sup> All of the cases were coded and read by us personally rather than by research assistants. Each entry in the spreadsheet was checked multiple times, often by both of us working independently.

the first instance decision, the date was estimated by taking account of the number of days that passed in relation to claims in which this information was known.

Column D: Court of first instance. The entries in this column were either ‘High Court’ or ‘County Court’ (and the name of the County Court).

Column E: Claim category. Claims were classified according to the *Rookes* category within which they fell. Judicial remarks in this regard were considered although the classification did not turn mechanically on the judge’s description.

Column F: Cause of action. Claims were coded according to the cause of action in which the claimant sued as follows. (Where a claim could plausibly be associated with more than one of the following groups, a judgment call was made as to the classification that seemed most appropriate.)

(1) *Interference with the person.* This group comprised claims brought in assault, battery, false imprisonment, discrimination and harassment.

(2) *Interference with property.* This group included claims in trespass to land, trespass to goods, conversion, private nuisance and intellectual property torts.<sup>76</sup>

(3) *Defamation and privacy invasions.*<sup>77</sup> This group included claims in defamation, breach of confidence (privacy)<sup>78</sup> and under the Data Protection Act 1998.

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<sup>76</sup> As to our decision to include within this group intellectual property torts, consider s 96(2) of the Copyright, Designs and Patents Act 1988, which provides: ‘In an action for infringement of copyright all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of *any other property right*’ (emphasis added).

<sup>77</sup> Many tort textbooks treat defamation alongside invasion of privacy, see, eg, Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin’s Tort Law* (7th edn, OUP 2013) 633ff; Jenny Steele, *Tort Law: Text, Cases, and Materials* (3rd edn, OUP 2014) 739ff.

<sup>78</sup> As far as breach of confidence is concerned, there are today ‘two distinct causes of action, protecting two different interests: privacy, and secret (“confidential”) information’: *Douglas v Hello! Ltd* [2007] UKHL 21,

(4) *'Abuse of power torts'*. This group comprised actions in malicious prosecution and misfeasance in public office.

(5) *Economic torts*. This group included claims in the economic torts (in particular, conspiracy, inducing a breach of contract and deceit<sup>79</sup>). Breach of statutory duty as a result of competition law infringements was also included in this group.<sup>80</sup>

(6) *Miscellaneous*. This group included claims in causes of action that did not fit within any of the above categories (such as, negligence and breach of commercial confidence<sup>81</sup>).

Column G: Defendant liable to pay punitive damages?

Column H: Amount of punitive damages awarded. The figures were adjusted for inflation.<sup>82</sup>

Column I: Defendant liable to pay aggravated damages? One of the issues that this study examines is what, if any, relationship there is between punitive damages and aggravated damages. Accordingly, this column reports whether the defendant was liable to pay aggravated damages.

Column J: Amount of aggravated damages awarded. The figures were adjusted for inflation.

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[2008] 1 AC 1 [255] (Lord Nicholls). Group (3) includes only actions for breach of confidence that concern privacy.

<sup>79</sup> These actions are commonly grouped together. See, eg, JD Heydon, *Economic Torts* (2nd edn, Sweet & Maxwell 1978) 14, 81; Hazel Carty, *An Analysis of the Economic Torts* (2nd edn, OUP 2010) 123, 184; Nicholas McBride and Roderick Bagshaw, *Tort Law* (5th edn, Pearson 2015) 707, 712.

<sup>80</sup> Regarding the close connection between competition law infringements and the economic torts, see Cristian Banfi, 'Defining the Competition Torts as Intentional Wrongs' (2011) 70 CLJ 83, 87–94.

<sup>81</sup> '[T]he action should properly be regarded as *sui generis*': Tanya Aplin and others, *Gurry on Breach of Confidence: The Protection of Confidential Information* (OUP 2012) para 4-02 (footnote omitted).

<sup>82</sup> We used in this regard a calculator provided by the Bank of England: <[www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/default.aspx](http://www.bankofengland.co.uk/education/Pages/resources/inflationtools/calculator/default.aspx)> accessed 9 April 2017.



Column K: Amount of compensatory damages awarded. We treated aggravated damages as part of the total amount of compensatory damages awarded on the basis that aggravated damages are a sub-type of compensatory damages.<sup>83</sup> Again, inflation was taken into account.

Column L: Type of defendant. We coded for the following types of defendant: (1) natural person; (2) corporation; and (3) public body.

Column M: Type of trial. This column reports whether there was a judge-only trial or a judge and jury trial.

Column N: What was the defendant's wrongful conduct? The defendant's behaviour was briefly described in this column.

Column O: Notes. Other useful information was recorded in this column (such as the reason for choosing a 'dominant' cause of action in relation to claims that could be associated with more than one of the groups in Column F).

#### D. Limitations

Our methodology has three main limitations. The first concerns our sample size. Our sample (146 claims) strikes us as sufficiently large to draw meaningful conclusions about the law governing punitive damages. However, the number of claims that pertained to certain of the variables for which we coded was small. For example, the sample comprises only eight claims

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<sup>83</sup> Section 39(2) of the Crime and Courts Act 2013 provides that '[a]ggravated damages may be awarded against the defendant *only to compensate for mental distress* and not for purposes of punishment' (emphasis added). Although this provision applies only to prescribed media defendants, it reflects the nature of the relationship between aggravated and compensatory damages more generally. According to *Clerk & Lindsell on Torts*, aggravated damages '*compensate the claimant for injury to his feelings ...*' (emphasis added): Mark Simpson, Michael Jones and Anthony Dugdale (eds), *Clerk and Lindsell on Torts* (21st edn, Sweet & Maxwell 2015) para 28-133. See, further, John Murphy, 'The Nature and Domain of Aggravated Damages' (2010) 69 CLJ 353.

that fall within the defamation and privacy invasions group. Where this issue occurs, we draw the reader's attention to it and advise that the results be interpreted cautiously.

Second, the study was affected by a selection bias on account of the fact that the sample comprises only decisions that could be accessed online. The difficulty here is that County Court decisions are often not made available online. Accordingly, the sample contained more decisions of the High Court (88 claims (60.3 per cent)) than of the County Courts (58 claims (39.7 per cent)). This bias may be important given that the County Courts awarded punitive damages more frequently than the High Court<sup>84</sup> while the quantum of awards was lower in the County Courts.<sup>85</sup> Statistical analysis suggests that it is very unlikely that these differences were attributable to chance.<sup>86</sup> However, this selection bias was partially offset by our decision to include within the sample claims that we could access only indirectly via appellate court decisions. This reduced the selection bias because most indirectly accessed claims emanated

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<sup>84</sup> The claim for punitive damages succeeded 26.1 per cent of the time in the High Court and 60.3 per cent of the time in the County Courts.

<sup>85</sup> When punitive damages awards were measured by reference to the amount received by claimants, the mean and median awards of punitive damages made by the High Court were £26,764 and £18,464 respectively while the mean and median awards made by the County Courts were £6,240 and £4,207 respectively. When awards were measured from the viewpoint of the amount that defendants were required to pay, the same four figures were £42,966, £34,538, £7,165 and £4,207. Regarding these two ways of measuring punitive damages, see section 4C, above.

<sup>86</sup> A Pearson's chi-squared test with the null hypothesis that liability for punitive damages is independent of the court which decided the claim yielded a p-value of < 0.001. An ANOVA test on the null hypothesis that the mean amount of punitive damages is the same for the County Courts and the High Court yielded a p-value of < 0.001 ( $F = 24.646$ ) (as received measure) and a p-value of < 0.001 ( $F = 15.189$ ) (as paid measure) These p-values indicate that the null hypothesis should be rejected. (In hypothesis testing, the null hypothesis is the assumption that the two variables under investigation are independent. The p-value indicates the probability of finding values as extreme as, or more extreme than, the one actually observed in the sample if the null hypothesis were correct. If the p-value is  $\leq 0.05$ , it is conventional to reject the null hypothesis. For discussion in a legal context, see Neil Cohen, 'Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge' (1985) 60 NYU L Rev 385, 412; David Kaye, 'Is Proof of Statistical Significance Relevant?' (1986) 61 Wash L Rev 1333, 1342-45; Douglas Vick, 'Statistical Significance and the Significance of Statistics' (2000) 116 LQR 575.)

from the County Courts. Specifically, 31 indirectly accessed claims were County Court decisions while only 13 were High Court decisions.

While our decision to include within the sample claims that we could access only indirectly reduced the significance of the second limitation, it introduced a third weakness. The difficulty is that data for indirectly accessed claims were obtained via the decisions of appellate courts and such claims, because they were subject of an appeal, might be atypical. However, it is unlikely that this issue is problematic within the context of this study. For one thing, most of claims in the sample were accessed directly (101 out of a total of 146 (69.2 per cent)). Furthermore, statistical analysis suggests that the results of this study are not affected by whether the claim was accessed directly or indirectly.<sup>87</sup>

#### E. Statistical analysis

Professional statisticians carried out the statistical analysis for this study. They performed Pearson's chi-squared tests in order to test for independence of categorical variables. In order to account for the fact that not all of the claims in our sample were independent of each other (as mentioned above, we counted claims rather than cases and our sample comprised 146 claims that were clustered within 100 cases), hierarchical regression models were fitted to the data with clustering set at the level of the case. ANOVA tests were then conducted on the hierarchical models and regression analysis to identify the strength of relationship as appropriate. Control variables were not included in any of the regression models.

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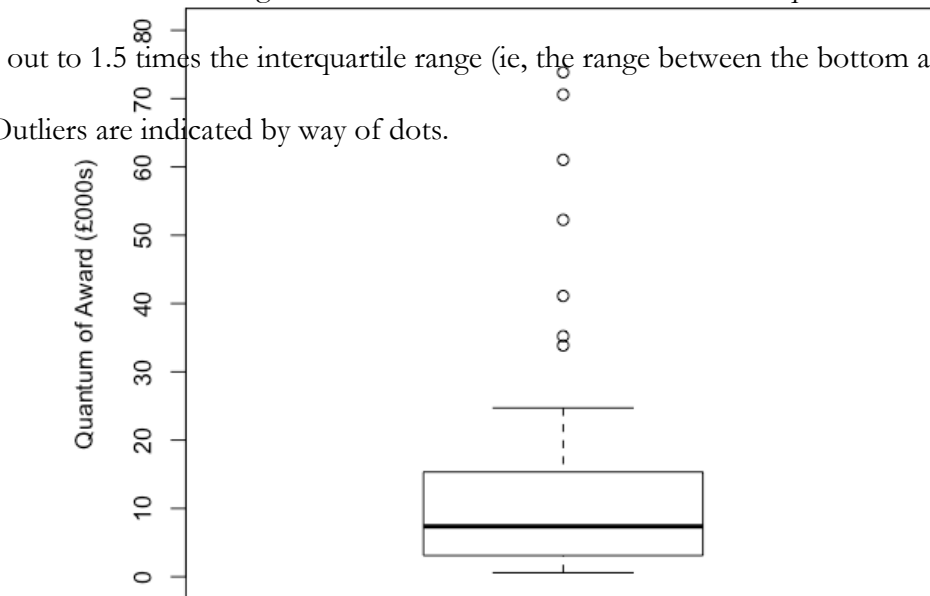
<sup>87</sup> A Pearson's chi-squared test with the null hypothesis that liability for punitive damages is independent of the mode in which the case was accessed yielded a p-value of 0.266. An ANOVA test yielded a p-value of 0.165 ( $F = 2.038$ ) (as received measure) and a p-value of 0.96 ( $F = 0.003$ ) (as paid measure).

#### 4. Results

In this section, we describe the results of the analysis of our sample. Detailed discussion of the results is postponed until Part 5. All of the monetary figures reported are inflation-adjusted. We report both the amount of punitive damages that each claimant received and the sum paid by each defendant so that the reader can assess the size of awards in light of both ways of measuring punitive damages.<sup>88</sup> The latter figure is given in parentheses.

##### A. Generally

Punitive damages were awarded in 39.7 per cent of the claims in our sample. The mean award of punitive damages was £12,625 (£18,181), while the median was £7,630 (£7,376). The smallest award was £588 (£588) and the largest £70,600 (£140,896). Figure 1 shows the distribution of all awards in the sample.<sup>89</sup> The thick black line in the middle of the box denotes the median award. The edges of the box show the first and third quartiles.<sup>90</sup> The whiskers extend out to 1.5 times the interquartile range (ie, the range between the bottom and top of the box). Outliers are indicated by way of dots.



<sup>88</sup> Regarding the two ways of measuring punitive damages awards, see section 4C, above.

<sup>89</sup> Figure 1 is based on the 'as received' measure. It would look almost identical if constructed using the 'as paid' measure.

<sup>90</sup> A quartile is one of four equal parts into which a population of data can be divided.

Figure 1: Distribution of punitive damages awards

### B. The *Rookes* categories

Out of the 146 claims within the sample, 60 (41.1 per cent) fell within the ‘oppressive, arbitrary or unconstitutional conduct by government servants’ *Rookes* category (‘Category 1’ claims)

while 86 (58.9 per cent) pertained to the ‘profit-seeking conduct’ category (‘Category 2’ claims).

As shown by Figure 2, the success rate of claims in Category 2 (54.7 per cent) far exceeds the success rate of Category 1 (18.3 per cent).<sup>91</sup> Statistical analysis suggests that this difference is unlikely to be attributable to chance.<sup>92</sup>

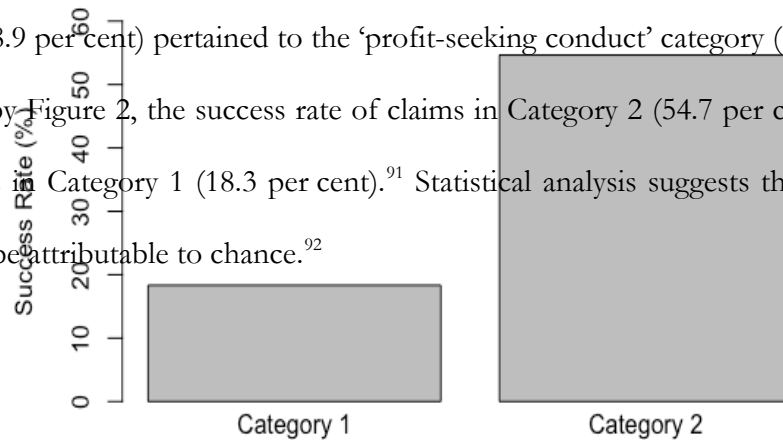


Figure 2: Rate of punitive damages awards by *Rookes* category

As for the quantum of punitive damages awards by *Rookes* category, Table 1 shows the mean and median awards. The mean award was similar for both categories while the median

<sup>91</sup> Our sample did not include any ‘Category 3’ cases (ie, cases of statutory authorisation of punitive damages).

<sup>92</sup> A Pearson’s chi-squared test with Yates’ continuity correction yielded a p-value of < 0.001.

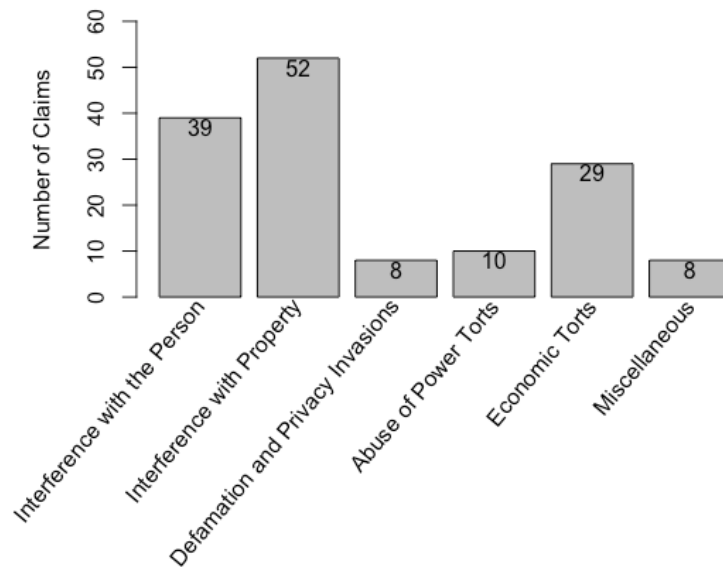
award in the case of Category 1 claims was roughly double that of Category 2 claims. However, statistical analysis suggests that the difference between the average awards of punitive damages might well be down to chance.<sup>93</sup>

Table 1: Awards by *Rookes* category

	<i>Category 1 claims</i>	<i>Category 2 claims</i>
Mean award	£14,799 (£14,799)	£12,082 (£19,195)
Median award	£10,882 (£10,882)	£5,158 (£4,563)

### C. Cause of action

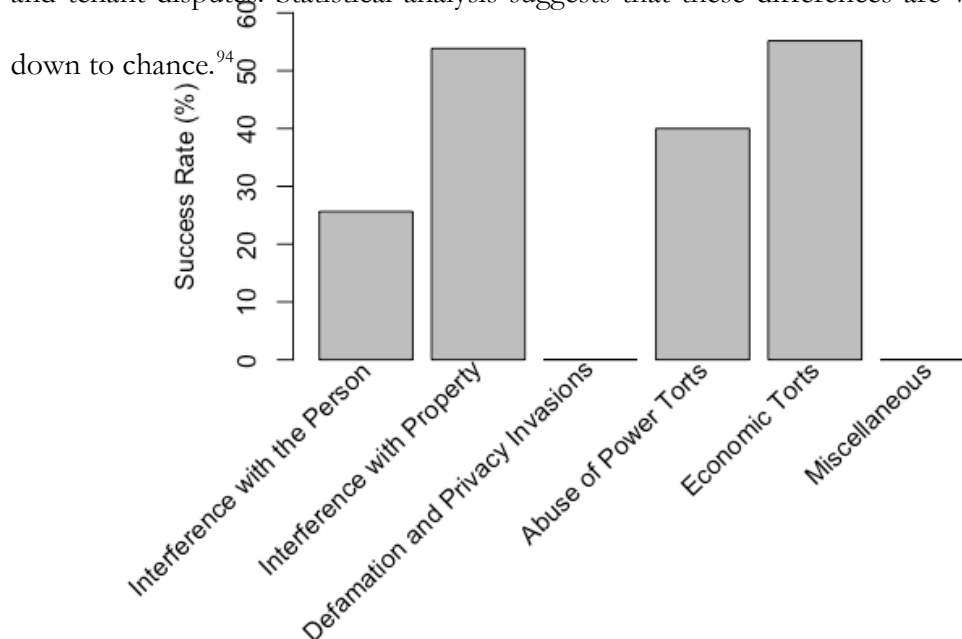
Figure 3 shows that most of the punitive damages claims in the sample pertained to the interference with property group (35.6 per cent), interference with the person group (26.7 per cent) and economic torts group (19.8 per cent). Far fewer claims related to the abuse of power torts group (6.9 per cent) and the defamation and privacy invasions and miscellaneous groups (both 5.5 per cent).



<sup>93</sup> An ANOVA test yielded a p-value of 0.858 ( $F = 0.032$ ) (as received measure) and a p-value of 0.467 ( $F = 0.544$ ) (as paid measure).

Figure 3: Number of claims for punitive damages by cause of action

An examination of the success rate of claims for punitive damages by cause of action (Figure 4) reveals that punitive damages were awarded in 25.6 per cent of interference with the person claims, 53.8 per cent of interference with property claims, 40 per cent of abuse of power claims and 55.2 per cent of economic tort claims. Significantly, no claim for punitive damages in the harm to reputation or privacy invasions group succeeded. Neither were there any successful claims in the miscellaneous group, which comprised mainly negligence claims. It is noteworthy that the high success rate in the economic torts group derives exclusively from claims in respect of insurance fraud and that many of the punitive damages awards for claims in the interference with property group, which also had a high success rate, related to landlord and tenant disputes. Statistical analysis suggests that these differences are very unlikely to be



<sup>94</sup> A Pearson's chi-squared test yielded a p-value of 0.001.

Figure 4: Rate of punitive damages awards by cause of action

Table 2 shows the mean and median amounts of punitive damages awarded by cause of action. The awards that were made in claims in the interference with the person group were the highest overall. The awards in the interference with property group were also high while the level of awards in the abuse of power torts group was rather modest. The economic torts group had the lowest mean and median awards. However, statistical analysis suggests that these differences between the mean awards of punitive damages might well be down to chance.<sup>95</sup>

Table 2: Awards by cause of action

	<i>Interference with the Person</i>	<i>Interference with Property</i>	<i>Abuse of Power Torts</i>	<i>Economic Torts</i>
Mean award	£16,901 (£25,351)	£14,707 (£28,939)	£13,736 (£13,736)	£7,862 (£7,862)
Median award	£18,464 (£13,147)	£8,215 (£6,155)	£11,252 (£11,252)	£3,681 (£3,681)

#### D. Type of defendant

Punitive damages were sought from natural persons in 56 claims (38.3 per cent), from corporations in 30 claims (20.6 per cent) and from public bodies in 60 claims (41.1 per cent). The results show that punitive damages were awarded more frequently against natural persons (67.9 per cent) than against corporations (30 per cent) and public bodies (18.3 per cent)

<sup>95</sup> An ANOVA test yielded a p-value of 0.763 ( $F = 0.388$ ) (as received measure) and a p-value of 0.448 ( $F = 0.913$ ) (as paid measure).



(Figure 5). Statistical analysis suggests that it is highly unlikely that these differences are attributable to chance.<sup>96</sup>



Figure 5: Rate of punitive damages awards by type of defendant

Turning to the level of punitive damages awards, the mean and median awards in claims where the defendant was a corporation were much higher than where the defendant was a natural person or public body (Table 3). Statistical analysis suggests that these differences between the average awards of punitive damages are unlikely to be attributable to chance.<sup>97</sup>

Table 3: Awards by type of defendant

	<i>Natural person</i>	<i>Corporation</i>	<i>Public body</i>
Mean award	£8,609 (£15,967)	£29,447 (£35,337)	£14,799 (£14,799)
Median award	£5,158 (£4,207)	£19,726 (£35,224)	£10,882 (£10,882)

<sup>96</sup> A Pearson's chi-squared test yielded a p-value of < 0.001.

<sup>97</sup> An ANOVA test yielded a p-value of < 0.001 ( $F = 1466.669$ ) (as received measure) and a p-value of < 0.001 ( $F = 773.876$ ) (as paid measure). The small number of claims on which these results are based means that they should be read cautiously.

## E. Mode of trial

Most claims in the sample were tried by judges. Judges decided 134 claims (91.8 per cent), with juries determining only 12 (8.2 per cent). The number of claims that were tried by judge and jury is probably too small to permit meaningful conclusions to be drawn about the relationship between punitive damages and the type of trial. Nevertheless, it is interesting to observe that the success rate of punitive damages claims was essentially the same for judge-only (39.6 per cent) and judge and jury trials (41.7 per cent). The mean awards were also very similar (Table 4). Unsurprisingly, statistical analysis suggests that it is likely that these differences are attributable to chance.<sup>98</sup> The highest and lowest awards in a judge-only trial were £70,600 (£140,896) and £588 (£588) respectively, while the corresponding figures for judge and jury trials were £24,715 (£24,715) and £7,589 (£7,589). There was considerably greater variability in the awards made by judges, with the standard deviation in judge-only trials being £16,100 as compared with £8,411 in judge and jury trials.

Table 4: Awards by mode of trial

	<i>Judge-only trial</i>	<i>Judge and jury trial</i>
Mean award	£12,676 (£18,875)	£12,110 (£12,110)
Median award	£7,376 (£5,592)	£8,069 (£8,069)

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<sup>98</sup> A Pearson's chi-squared test with Yates' continuity correction testing the probability that liability for punitive damages is related to the mode of trial yielded a p-value of 1. An ANOVA test yielded a p-value of 0.811 ( $F = 0.058$ ) (as received measure) and a p-value of 0.529 ( $F = 0.406$ ) (as paid measure).

## F. Punitive damages and other types of damages

In 84 of the 146 claims in the sample, both aggravated and punitive damages were sought.<sup>99</sup> As Figure 6 shows, both types of damages were awarded in 21 claims. Aggravated damages were awarded alone in 20 claims and in just four claims punitive damages only were awarded. Statistical analysis suggests that it is very unlikely that the decision to award punitive damages and the decision to award aggravated damages are unrelated.<sup>100</sup>

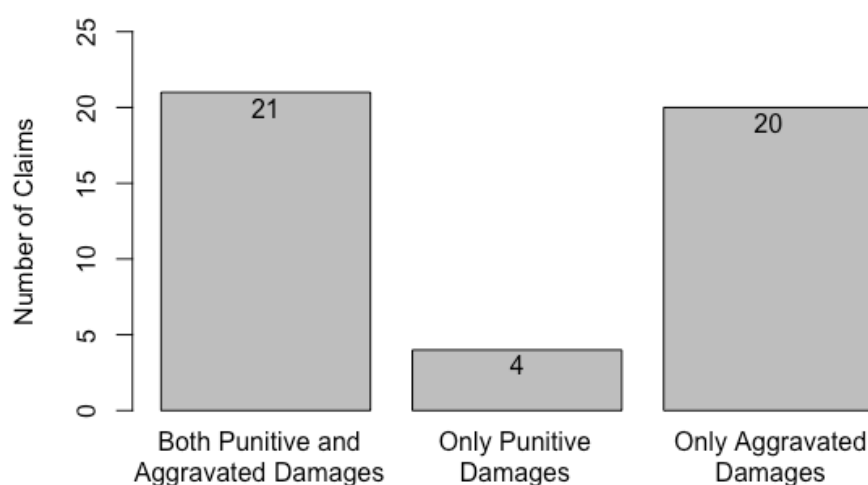


Figure 6: Type of damages awarded when both punitive and aggravated damages were sought

As Table 5 shows, the mean awards of punitive and aggravated damages did not differ particularly substantially from each other, although the median award of punitive damages was roughly double the median award of aggravated damages. Statistical analysis suggests that there may be a loose relationship between the size of punitive damages and aggravated damages awards.<sup>101</sup>

<sup>99</sup> Regarding the distinction between aggravated and punitive damages, see n 83.

<sup>100</sup> A Pearson's chi-squared test with Yates' continuity correction yielded a p-value of < 0.001.

<sup>101</sup> Linear regression analysis yielded a p-value of 0.044 ( $t = 2.27$ , beta coefficient < 0.001, marginal and conditional  $R^2$  of 25 per cent and 100 per cent respectively) (as received measure) and a p-value of < 0.001

Table 5: Punitive and aggravated damages

	<i>Punitive damages</i>	<i>Aggravated damages</i>
Mean award	£12,370 (£18,079)	£13,032 (£19,047)
Median award	£10,277 (£10,517)	£5,481 (£4,207)

Table 6 shows the mean and median awards of compensatory damages and punitive damages where both amounts were known (ie, in 34 claims). Both measures of central tendency were much lower for punitive damages awards. Statistical analysis suggests that there may be a loose relationship between the size of punitive damages and compensatory damages awards.<sup>102</sup> It is possible, therefore, that the extent of the loss suffered by the claimant plays a role in explaining the amount of punitive damages awarded.

Table 6: Punitive and compensatory damages

	<i>Punitive damages</i>	<i>Compensatory damages</i>
Mean award	£13,510 (£21,437)	£68,152 (£98,826)
Median award	£10,276 (£8,069)	£29,843 (£22,004)

## 5. Discussion

Some of our results comport with common perceptions regarding punitive damages while others do not. In this section, we discuss the results in light of the relevant academic literature and case law.

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( $t = 5.184$ , beta coefficient  $< 0.001$ , marginal and conditional  $R^2$  of 13 per cent and 89 per cent respectively) (as paid measure). However, relatively little should be made of this as the number of claims for which both the amounts of punitive damages and aggravated damages were known was small (19 claims).

<sup>102</sup> Linear regression analysis yielded a p-value of 0.013 ( $t = 3.33$ , beta coefficient  $< 0.001$ , marginal and conditional  $R^2$  of 5 per cent and 97 per cent respectively) (as received measure) and a p-value of  $< 0.001$  ( $t = 4.471$ , beta coefficient  $< 0.001$ , marginal and conditional  $R^2$  of 27 per cent and 100 per cent respectively) (as paid measure). A positive linear relationship seems to exist between the two variables and the very low p-values indicate that there is almost certainly some sort of relationship between them. However, when the two variables are plotted against each other, the data do not fit very closely the line of best fit.

A. The rate at which punitive damages are awarded

According to conventional wisdom, punitive damages are rarely awarded in the UK.<sup>103</sup> Presumably, this perception developed because *Rookes* ushered in a restrictive approach,<sup>104</sup> and in view of the courts having stressed frequently that punitive damages are a remedy of ‘last resort’.<sup>105</sup> However, in our sample punitive damages were awarded in 39.7 per cent of claims (which result was *higher* than that reported in some contemporary US studies<sup>106</sup>). This rate seems relatively high in view of the perception to which we have just referred. Nevertheless, it should be recalled that this study used a highly-filtered sample.<sup>107</sup> It is important to bear this factor in mind when interpreting this result. If the sample had included, for example, claims in which the judge had proceeded to address the issue of punitive damages even though he had entered a verdict for the defendant, the success rate of the punitive damages claim would have been much lower. The success rate should also be understood in light of the fact that in the great preponderance of cases, punitive damages are simply not sought.

It would have been worthwhile and interesting to compare the success rate of punitive damages claims with the total number of claims for damages commenced in England, Wales and Northern Ireland generally. Unfortunately, that comparison is difficult to make. That is because the relevant data are, by and large, not available. For example, there is no way of knowing how many claims are commenced in any particular cause of action with a view to comparing that figure with the number of punitive damages awards made in that action in our

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<sup>103</sup> ‘[The] award [of punitive damages] is rare’: Jonathan Wheeler, ‘Mohidin v Commissioner of Police of the Metropolis: Damages, Torts, Police Officers’ [2016] JPIL 148, 152.

<sup>104</sup> See the text accompanying n 20.

<sup>105</sup> See the text accompanying n 42.

<sup>106</sup> A relatively recent major US study reported a success rate of 35.5 per cent, see Eisenberg and others, ‘The Decision to Award Punitive Damages: An Empirical Study’ (n 5) 579.

<sup>107</sup> See section 3B, above.

sample. It is nonetheless clear that the rate at which punitive damages are awarded is negligible relative to the total number of claims for damages that come before the courts.<sup>108</sup> This, perhaps, suggests the existence of a generally judicious and conservative approach on the part of lawyers to pleading an entitlement to punitive damages: whereas punitive damages are (surely) rarely awarded relative to the total number of claims, when sought, the courts award punitive damages with some regularity.<sup>109</sup>

## B. Defamation

According to the Law Commission, ‘defamation cases ... represent an important source of awards [of punitive damages].’<sup>110</sup> Commentators have often made substantially the same claim. For example, Mark Lunney and Ken Oliphant write that ‘[d]efamation is one of the few areas of law in which awards of exemplary (or punitive) damages are relatively common ...’.<sup>111</sup> While the Law Commission cited some decisions from the 1980s and 1990s to support this proposition, Lunney and Oliphant did not. However, our sample did not include a single claim in which punitive damages were awarded in a defamation action. This result casts some doubt on whether defamation cases actually constitute an important source of punitive damages

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<sup>108</sup> Consider, eg, the fact that in the first quarter of 2017, 37,700 claims for an unspecified sum of money were commenced in England and Wales: Ministry of Justice, ‘Civil Justice Statistics Quarterly, England and Wales, January to March 2017 (provisional) and Royal Courts of Justice 2016’ (2017) at 1 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/616571/civil-justice-statistics-quarterly-jan-mar-2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/616571/civil-justice-statistics-quarterly-jan-mar-2017.pdf)> accessed 3 June 2017. The rate with which such claims have been brought has remained relatively static since 2009 (at 2). Punitive damages were awarded in 58 claims in our sample. It is obvious that this figure is tiny in the big scheme of things.

<sup>109</sup> A similar view has been expressed in the United States: see Eisenberg and others, ‘The Decision to Award Punitive Damages: An Empirical Study’ (n 5) 577.

<sup>110</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 6) 61 (footnote omitted).

<sup>111</sup> Mark Lunney and Ken Oliphant, *Tort Law: Text and Materials* (5th edn, OUP 2013) 752. A similar claim has been made by Deakin, Johnston and Markesinis (n 77) 800: ‘[Profit-seeking conduct sufficient to attract a punitive damages award] is particularly likely to happen in libel cases ...’.

awards. Defamation is also widely cited as a wrong that yields punitive damages pursuant to the Category 2 (profit-seeking conduct) within the *Rookes* taxonomy. For example, Peter Cane writes that ‘Punitive damages under [Category 2] are most commonly awarded in tort actions for defamation ...’ (without citing any cases in support of this assertion).<sup>112</sup> Again, the accuracy of this claim is dubious in light of our results.

The apparently erroneous perceptions to which we have referred regarding punitive damages and defamation claims could be due to the availability heuristic. This is a common cognitive error whereby the relevance of salient or memorable incidents at the expense of base rates is overestimated.<sup>113</sup> Substantial punitive damages awards (such as the sum of £514,083 (as adjusted for inflation) awarded at first instance in *John v MGN Ltd*<sup>114</sup>) often receive considerable media publicity<sup>115</sup> and this publicity may lead to the assumption that such awards are more common than they are in reality.

### C. Category 2 and wrongful eviction claims

Commentators have often contended that landlord and tenant cases constitute an important source of awards in Category 2 cases. According to Andrew Burrows, ‘the main use of this

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<sup>112</sup> Peter Cane, *The Anatomy of Tort Law* (1997 Hart Publishing) 115. To similar effect, see also Andrew Burrows, *Remedies for Torts and Breach of Contract* (3rd edn, OUP 2004) 414; Deakin, Johnston and Markesinis (n 77) 800; Lunney and Oliphant (n 111) 752, 850; Christian Witting, *Street on Torts* (14th edn, OUP 2015) 677. Cf Andrew Tettenborn, David Wilby and David Bennett, *The Law of Damages* (2nd edn, LexisNexis 2010) 48 (footnote omitted) ([Punitive] damages are indeed frequently claimed, though less often awarded, in defamation cases) and Edwin Peel and James Goudkamp, *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) 694 (‘The paradigm [Category 2] case ... is a libel in a newspaper, but in practice it would be a rare case ...’).

<sup>113</sup> Russell Korobkin and Thomas Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2010) 88 Calif L Rev 1053, 1087.

<sup>114</sup> The award was reduced to £88,210 on appeal: [1997] QB 586 (CA).

<sup>115</sup> See, eg, Andrew Gliniecki, ‘Elton John Wins £350,000 for Libel: Punitive Damages Awarded Against “Sunday Mirror” over false claims about diet’ (1993) <[www.independent.co.uk/news/uk/elton-john-wins-pounds-350000-for-libel-punitive-damages-awarded-against-sunday-mirror-over-false-1502134.html](http://www.independent.co.uk/news/uk/elton-john-wins-pounds-350000-for-libel-punitive-damages-awarded-against-sunday-mirror-over-false-1502134.html)> accessed 9 April 2017; Ying Hui Tan, ‘Law Report: Libel Juries Should Be Guided on Awards of Damages’ (1995) <[www.independent.co.uk/news/people/law-report-libel-juries-should-be-guided-on-awards-of-damages-1525802.html](http://www.independent.co.uk/news/people/law-report-libel-juries-should-be-guided-on-awards-of-damages-1525802.html)> accessed 9 April 2017.

second category has been in actions by tenants against landlords for wrongful harassment or eviction founded on the torts of trespass or nuisance'.<sup>116</sup> Similarly, Harvey McGregor asserted that '[unlawful eviction cases] have continued to appear year in, year out. Their reporting is poor but their existence is clear ...'.<sup>117</sup> The Law Commission claimed that 'most cases in category 2 have related to wrongful eviction of tenants ...'.<sup>118</sup> Our study supports this understanding. Many of the claims that fell within the interference with property group related to unlawful eviction. Out of the 52 claims in this group, 19 concerned wrongful eviction (36.5 per cent). Furthermore, the success rate – 78.9 per cent – was high relative to the sample-wide success rate of 39.7 per cent.

Why do so many Category 2 claims concern the wrongful eviction of tenants? One explanation may lie in the idea that '[o]ne of the most important functions of tort law is to protect interests in tangible and intangible property.'<sup>119</sup> Another potential explanation may be that police and local authorities may generally be reluctant to prosecute landlords for unlawfully evicting tenants.<sup>120</sup> If there is a lacuna in enforcement of tenants' property law rights via the criminal law's apparatus, it is perhaps unsurprising that private law might be recruited more frequently in this connection.

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<sup>116</sup> Burrows (n 112) 414.

<sup>117</sup> Harvey McGregor, *McGregor on Damages* (19th edn, Sweet & Maxwell 2015) para 13-025.

<sup>118</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 12) 57.

<sup>119</sup> Cane (n 112) 75.

<sup>120</sup> '[I]t is said to be the case that the police and local authorities are reluctant to prosecute landlords for offences under the Protection from Eviction Act 1977. It may not be wholly unconnected with this that exemplary damages awards seem to be favoured in wrongful eviction cases ...': Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 6) 116 (footnote omitted). See, also, Alex Marsh and others, *Harassment and Unlawful Eviction of Private Rented Sector Tenants and Park Home Residents* (Department of Environment, Transport and the Regions 2000) 85–86, 89–92.



#### D. Police misconduct

A variety of claims have been made about the law of punitive damages in the context of police misconduct. It is frequently asserted that punitive damages awards are common in police misconduct cases. For example, Peter Cane argues that ‘punitive damages are often awarded against the police in actions for wrongful imprisonment or malicious prosecution’.<sup>121</sup> Similarly, according to Richard Clayton and Hugh Tomlinson, in ‘[c]laims brought against the police ... the plaintiff will often receive an award of exemplary or punitive damages’.<sup>122</sup> Our results suggest that this claim is misleading at best. Our sample contains 28 claims for police misconduct pleaded as either trespass to the person or malicious prosecution (ie, 46.7 per cent of Category 1 claims). Punitive damages were awarded in seven of these claims. This produces a success rate of just 25 per cent, which is low compared with the overall success rate of 39.7 per cent.

Relatedly, the Law Commission has claimed that punitive damages function as ‘an important means of controlling and marking the serious disapproval of misconduct by officials, especially by the police’<sup>123</sup> and that one type of case in which punitive damages awards ‘are most commonly found ... [are] cases of police misconduct’.<sup>124</sup> In light of the low rate at which punitive damages are awarded in police misconduct claims, the veracity of this claim is dubious. Furthermore, the quantum of punitive damages in police misconduct is in keeping with the overall trend of modest awards, with the mean and median awards being £12,235 (£12,235) and £9,648 (£9,648) respectively. In these circumstances, it is doubtful whether the

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<sup>121</sup> Cane (n 112) 115.

<sup>122</sup> Richard Clayton and Hugh Tomlinson, *Suing the Police* (Longman 1989) 24.

<sup>123</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 6) 55.

<sup>124</sup> *ibid* 54 (footnote omitted).

threat of punitive damages could significantly influence behaviour in this context.<sup>125</sup> That is especially so given that the actual wrongdoers are unlikely to be required to meet punitive damages awards personally, which may supply one reason why the courts may be cautious both in terms of awarding punitive damages and in relation to the quantum of awards in police misconduct cases.<sup>126</sup>

Finally, it is contended in *Clerk & Lindsell on Torts* that ‘the most common example of exemplary damages being awarded in [Category 1 claims] has been in actions against the police ...’.<sup>127</sup> Our results support this claim. Our sample contains 11 claims that fall within Category 1 in which punitive damages were awarded. Eight of these (72.7 per cent) resulted from actions against the police (the remaining three concerned unlawful detention claims against the Secretary of State for the Home Department).

#### E. Insurance fraud

The study reports a strikingly high success rate of punitive damages claims in relation to actions arising out of insurance fraud. There were 18 claims in the sample in which punitive damages were sought on account of insurance fraud. Out of these, an award was made in 16 claims (a success rate of 88.9 per cent, which is more than double the average success rate of

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<sup>125</sup> When assessing whether or not a punitive damages award of £27,500 by the trial judge in an unlawful detention claim was excessive Thomas LJ found that it was not as ‘£27,500 is miniscule in the context of the Home Office budget ...’: *Munse* (n 27) [84].

<sup>126</sup> ‘The fact that the defendant is a Chief Officer of Police also means that here exemplary damages should have a lesser role to play. Even if the use of civil proceedings to punish a defendant can in some circumstances be justified it is more difficult to justify the award where the defendant and the person responsible for meeting any award is not the wrongdoer, but his “employer.” ... In this category of case the reaction [against exemplary damages] could understandably be stronger since ... awards are being paid out of public money ... and could well result in a reduction in the resources of the police available to be used for activities which would benefit the public’: *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498 (CA) 512–13 (Lord Woolf MR).

<sup>127</sup> *Simpson and others* (n 83) para 28-137.

39.7 per cent across all claims).<sup>128</sup> On the basis of our sample, therefore, it seems that where insurance fraud is proved, the defendant is very likely to be liable to pay punitive damages. The award of punitive damages for insurance fraud, which has been possible only since the demise of the cause-of-action test,<sup>129</sup> constitutes a new trend in the case law which has not yet been discussed extensively in the academic literature.<sup>130</sup> A likely reason for this high success rate may be the perceived need for deterrence in this context on the basis that the existence of fraudulent insurance claims is a 'growing problem'.<sup>131</sup>

#### F. The alleged excessiveness of punitive damages awards

Significant anxiety exists about the supposed excessiveness of punitive damages awards. The Law Commission observed that it has often been 'said that [punitive damages] awards ... are excessive'.<sup>132</sup> In *Thompson*, Lord Woolf MR expressed concerns about 'excessive [punitive damages] awards ... being paid out of public money ...'.<sup>133</sup> In our sample, the mean and median punitive damages awards were £12,625 (£18,181) and £7,630 (£7,376) respectively. In order to determine whether those sums are excessive, a reference point is required. One

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<sup>128</sup> Although insurance fraud claims are pleaded in deceit, the phenomenon that we are observing concerns insurance fraud claims rather than deceit claims more generally. This becomes clear on account of the fact that there were four non-insurance fraud deceit claims in our sample and in none of them was punitive damages awarded.

<sup>129</sup> Claims based on insurance fraud are pleaded in deceit, and punitive damages could not be awarded in deceit pursuant to the cause-of-action test. See *Broome* (n 12) 1045.

<sup>130</sup> For brief remarks, see *Parabola Investments Ltd v Brownallia Cal Ltd* [2009] EWHC 901 (Comm), [2009] 2 All ER (Comm) 58 [205] and *Tettenborn and others* (n 112) 48, 52.

<sup>131</sup> In *Hassan v Cooper* (n 38) [35] Butler J considered that 'an epidemic ... of claims of this kind' had to be borne in mind when deciding the issue of punitive damages. Speaking in relation to insurance fraud generally, Lord Sumption in *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] AC 1 [10] wrote: 'Fraudulent insurance claims are a serious problem, the cost of which ultimately falls on the general body of policy-holders in the form of increased premiums'.

<sup>132</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 6) 82.

<sup>133</sup> *Thompson* (n 126) 513.

possible comparator is the level of compensatory damages awards.<sup>134</sup> In our sample, punitive damages were much lower on average than compensatory damages.<sup>135</sup> A second possible reference point is the average annual income of a full-time employee in the UK. The annual average earnings of a full-time employee for the period 2000–2015 (ie, the temporal scope of our study) was £36,952.<sup>136</sup> Again, the mean and median awards of punitive damages were not particularly high compared with the average income. A final comparator is the level of punitive damages awards in other jurisdictions. The mean and median awards in the UK were much lower than in the US. According to one recent major study, the mean and median punitive damages awards in the US<sup>137</sup> were US\$2.4M and US\$103,500 respectively (approximately £1.9M and £83,359).<sup>138</sup> Canada is the only other jurisdiction in which punitive damages has been studied empirically.<sup>139</sup> However, as discussed above, there is only one such analysis available in that jurisdiction and it does not record the average level of punitive damages. Consequently, it is difficult to gain insight as to the contemporary level of awards in Canada. However, it is worth observing that Canadian courts have made some ‘mega-awards’, such as the CAD\$1.3M award (approximately £0.8M) in the landmark decision in *Whiten v Pilot Insurance Co.*<sup>140</sup> By contrast, there was not a single claim in our sample in which the amount of

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<sup>134</sup> The US Supreme Court has considered the ratio between punitive and compensatory damages in determining whether awards are unreasonable and unconstitutional, see *State Farm Mutual Automobile Insurance v Campbell* 538 US 408 (2003). See, also, Eisenberg and others, ‘Judges, Juries, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data’ (n 5) 263, 273.

<sup>135</sup> See section 4F, above.

<sup>136</sup> Office for National Statistics, ‘Data for Earnings and Working Hours’ (2015) <[www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/allemplotypeashtable1](http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/allemplotypeashtable1)> accessed 9 April 2017. This sum has been adjusted for inflation.

<sup>137</sup> Theodore Eisenberg and Michael Heise, ‘Judge-Jury Differences in Punitive Damages Awards: Who Listens to The Supreme Court?’ (2011) 8 JELS 325, 331.

<sup>138</sup> The amounts have been adjusted for inflation using US Department of Labor data <[https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm)> accessed 9 April 2017.

<sup>139</sup> See the text accompanying n 4.

<sup>140</sup> [2002] SCC 18, [2002] 1 SCR 595. The award has been adjusted for inflation using the Bank of Canada

punitive damages even approached a seven-digit number.<sup>141</sup> In summary, according to all three reference points that we have considered, punitive damages awards in the UK are anything but excessive.

#### G. Predictability of the quantum of punitive damages

It has been claimed that the quantum of punitive damages awards is unpredictable. For example, the Law Commission wrote: ‘Concern has been expressed that in the assessment of exemplary damages too much is left to the exercise of discretion according to indeterminate principles’.<sup>142</sup> Similarly, according to Rachel Mulheron, ‘[q]uantifying awards for exemplary damages is highly imprecise’.<sup>143</sup> However, these complaints may be unjustified. In our sample, there was considerable uniformity in punitive damages awards, with most cases falling within a relatively narrow bracket (£588 (£588) to £33,851 (£33,851)).<sup>144</sup> The standard deviation of awards was only £15,508 (£28,140).<sup>145</sup>

#### H. The defendant’s financial resources

In our sample, punitive damages awards were higher on average when the defendant was a corporation or a public body as opposed to a natural person.<sup>146</sup> This result, which has also been reported in US studies,<sup>147</sup> can arguably be explained on the ground that the latter types of

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inflation calculator <[www.bankofcanada.ca/rates/related/inflation-calculator/](http://www.bankofcanada.ca/rates/related/inflation-calculator/)> accessed 9 April 2017.

<sup>141</sup> As to the range of awards in the sample, see section 4A, above.

<sup>142</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 6) 4 (footnote omitted).

<sup>143</sup> Rachael Mulheron, *Principles of Tort Law* (CUP 2016) 577.

<sup>144</sup> See section 4A, above.

<sup>145</sup> The standard deviation is the average amount by which data points diverge from the mean. Thus, the standard deviation of £15,508 (£28,140) indicates that, on average, punitive awards fall that amount above and below the mean award of £12,626 (£18,181).

<sup>146</sup> See section 4D, above.

<sup>147</sup> See, eg, Theodore Eisenberg and others, ‘The Predictability of Punitive Damages’ (1997) 26 JLS 623, 639–40.

defendant are likely to be better resourced. That is important because it is well established that the defendant's wealth is relevant to the assessment of punitive damages.<sup>148</sup> Our study tends to suggest, therefore, that the courts apply that principle.

## I. Civil juries

Civil juries have often been robustly criticised for acting unreasonably in how they award damages generally and punitive damages in particular. For example, according to the Law Commission, 'reasoned, consistent and proportionate awards ... are almost impossible to achieve if ... juries may have the task of deciding the quantum of exemplary damages'.<sup>149</sup> Accordingly, the Law Commission recommended that the task of determining of all questions regarding punitive damages be reallocated to judges.<sup>150</sup> That recommendation was not acted on directly, although the legislature has, of course, gradually restricted the role of civil juries generally to the point where they are now virtually extinct,<sup>151</sup> and restricted in a piecemeal fashion the power of juries to determine punitive damages questions.<sup>152</sup> Today, the last outpost of the civil jury in Britain concerns claims that involve a charge of fraud or a claim in malicious prosecution or false imprisonment. Such proceedings can still be heard by a civil jury with the court's permission.<sup>153</sup>

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<sup>148</sup> See the text accompanying n 51.

<sup>149</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 12) 2.

<sup>150</sup> *ibid* 122.

<sup>151</sup> See, eg, s 11 of the Defamation Act 2013 which removed libel and slander from the causes of action by which a trial by jury is available. For a brief discussion of this provision, see Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77 MLR 87, 106–07. For discussion of the erosion of the civil jury generally, see Sally Lloyd-Bostock and Cheryl Thomas, 'Decline of the "Little Parliament": Juries and Jury Reform in England and Wales' (1999) 62 Law & Contemp Probs 7, 13–14.

<sup>152</sup> See, eg, s 34(8) of the Crime and Courts Act 2013. This provision is part of a suite of changes made to the law concerning punitive damages concerning media defendants: see section 2A, above.

<sup>153</sup> This is the position, in essence, that applies to proceedings in the Queen's Bench Division: Senior Courts Act 1981, s 69. Slightly different rules apply in the County Courts: County Courts Act 1984, s 66.

Due to the very small number of claims in the sample that were heard by juries,<sup>154</sup> limited weight should be placed on the results of this study in as far as the relationship between the mode of trial and the availability and level of punitive damages is concerned. Nonetheless, the results suggest that judges and juries do not differ substantially from each other either in determining whether to award punitive damages or the quantum of such awards.<sup>155</sup> These findings cohere with those reached in other jurisdictions. The Ontario Law Reform Commission in its *Report on Exemplary Damages* recommended that, in view of the absence of any evidence that juries were making excessive or highly variable awards of punitive damages, ‘the power to quantify an award of punitive damages should remain with the jury ...’.<sup>156</sup> Empirical studies from the US also suggest that judges and juries may not differ substantially from each other in deciding punitive damages claims.<sup>157</sup>

## 6. Conclusion

This study is the first empirical investigation of the law of punitive damages in the UK. Perhaps its most important findings are as follows.

- (1) Punitive damages were awarded in 39.7 per cent of the claims in the sample.
- (2) The mean and median awards were £12,626 (£18,181) and £7,630 (£7,376) respectively.

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<sup>154</sup> See section 4E, above.

<sup>155</sup> *ibid.*

<sup>156</sup> Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) 50.

<sup>157</sup> ‘Juries and judges award about the same amount of punitive damages per dollar of compensatory damages. The simplest explanation of this similarity is that judges and juries behave similarly. ... Prior results indicate that judges and juries award punitive damages at similar rates’: Theodore Eisenberg and others, ‘Judges, Juries, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data’ (n 5) 278, 288. Cf Theodore Eisenberg and Michael Heise, ‘Judge-Jury Differences in Punitive Damages Awards: Who Listens to The Supreme Court?’ (n 138) 332.

- (3) Punitive damages were awarded more frequently in Category 2 (profit-seeking claims) than in Category 1 (oppressive, arbitrary or unconstitutional conduct by government servants). However, on average Category 1 claims involved slightly higher awards.
- (4) Punitive damages were awarded more often in claims that fell within the interference with property group (particularly in landlord and tenant cases) and the economic torts group (especially in insurance fraud cases) than in claims in the interference with the person and abuse of power torts groups. The defamation and privacy invasions group contained no claims in which punitive damages were awarded.
- (5) On average, claims for punitive damages against natural persons had a higher success rate than against corporations and public bodies, although when punitive damages were awarded, awards were higher on average when made against the latter types of defendant.
- (6) There seems to be a relationship between the decision to award punitive damages and the decision to award aggravated damages. When punitive damages were awarded, the courts often awarded aggravated damages in tandem. It similarly appears that there is a loose positive relationship between the size of punitive damages awards on the one hand and the quantum of both aggravated damages and compensatory damages awards on the other. Accordingly, the size of the loss suffered by the claimant seems to affect the size of punitive damages awards.

These conclusions challenge several widely-held views about punitive damages. In particular, they cast significant doubt on the accuracy of the perception that punitive damages awards are excessive and that defamation cases are a major source of punitive damages awards.



The law governing punitive damages is vigorously debated. Many argue that the remedy is anomalous and that it should be abolished,<sup>158</sup> while others favour its retention<sup>159</sup> and expansion.<sup>160</sup> In 1962, Harry Street wrote: 'It is believed that in the present state of knowledge, one cannot say whether exemplary damages are desirable. That study of the law in action ... remains to be done.'<sup>161</sup> This article does not provide an answer to the question whether punitive damages are desirable. It did not aspire to do so. It did, however, aim to study the law in action, which will hopefully prove useful for the purposes of the continuing debates.

### *Appendix*

The 146 claims that formed this study's sample are listed below.

#### **2000**

(1) *Welsh v Chief Commissioner for Merseyside Police* (Court of Appeal, 28 July 2000); (2) *Kiam v MGN Ltd* [2002] EWCA Civ 43; (3) *Perry v Scherchen* (High Court, 26 May 2000); (4) *Hichens v General Guarantee Corporation Ltd* 2000 WL 33281305; (5) *Isaac v Chief Constable of the West Midlands* [2001] EWCA Civ 1405; (6) *Kelly v Chief Constable of South Yorkshire (No 1)* [2001] EWCA Civ 1632; (7) *Watson v Chief Constable of Cleveland* [2001] EWCA Civ 1547.

#### **2001**

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<sup>158</sup> 'I regard the remedy as no longer serving any useful function in our jurisprudence': *Kuddus* (n 11) [121] (Lord Scott); 'Exemplary damages are ... an anomaly that should be expunged from the law': Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 110.

<sup>159</sup> See, eg, James Edelman, 'In Defence of Exemplary Damages' in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart Publishing 2008) 247.

<sup>160</sup> Eg, numerous scholars argue that punitive damages should be made available in principle in claims for breach of contract: Burrows (n 112) 429; Nicholas McBride, 'A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract' (1995) 24 Anglo-Am L Rev 369.

<sup>161</sup> Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 36.

(8) *Russell v Home Office* [2001] Prison LR 96; (9) *Russell v Home Office* [2001] Prison LR 96; (10) *Verrechia t/a Freightmaster Commercials v Commissioner of Police for the Metropolis* 2001 WL 825047; (11) *Wainwright v Home Office* [2001] EWCA Civ 2081; (12) *Wainwright v Home Office* [2001] EWCA Civ 2081; (13) *Hepburn v Chief Constable of Thames Valley* [2002] EWCA Civ 1841; (14) *Spencer v West Midlands Police* [2002] EWCA Civ 649; (15) *Baygreen Properties Ltd v Gil* [2002] EWCA Civ 1340; (16) *Baygreen Properties Ltd v Gil* [2002] EWCA Civ 1340; (17) *Hutt v Commissioner of Police of the Metropolis* [2003] EWCA Civ 1911; (18) *Raw v Croydon LBC* [2002] CLY 941.

## **2002**

(19) *Galun v Wright-Bevans* [2002] EWHC 1099 (Ch); (20) *Banks v Cox* [2002] EWHC 2166 (Ch); (21) *Banks v Cox* [2002] EWHC 2166 (Ch).

## **2003**

(22) *Farquharson v Commissioner of Police for the Metropolis* (Central London County Court, 31 January 2003); (23) *Vukelic v Hammersmith and Fulham LBC* [2003] EWHC 188 (TCC); (24) *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch); (25) *Fleming v Chief Constable of Sussex* [2004] EWCA Civ 643; (26) *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch); (27) *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch); (28) *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch).

## **2004**

(29) *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324 (Ch); (30) *Pelling v Johnson* 2004 EWHC 492 (QB); (31) *In re Organ Retention Group Litigation* [2004] EWHC 644 (QB); (32) *Roche v Chief Constable of Greater Manchester* [2005] EWCA Civ 1454; (33) *Luppa v Chief Constable of Thames*

*Valley* [2004] EWCA Civ 1402; (34) *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197; (35) *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197; (36) *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197; (37) *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197; (38) *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197; (39) *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197; (40) *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197; (41) *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197; (42) *Ijaola v Home Office* [2005] EWCA Civ 335; (43) *Avis v Enweje t/a Castle Associates* [2006] EWCA Civ 1313; (44) *London Borough of Lambeth v Cumberbatch* [2005] EWCA Civ 262.

## 2005

(45) *Manley v Commissioner of Police of the Metropolis* [2006] EWCA Civ 879; (46) *Daley v Mahmood* [2006] 1 P&CR DG10; (47) *Daley v Mahmood* [2006] 1 P&CR DG10; (48) *Daley v Mahmood* [2006] 1 P&CR DG10; (49) *Daley v Mahmood* [2006] 1 P&CR DG10; (50) *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB).

## 2006

(51) *Paul v Chief Constable of Humberside Police* [2006] EWCA Civ 1433; (52) *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773; (53) *R (on the application of Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293.

## 2007

(54) *Forsyth-Grant v Allen* [2008] EWCA Civ 505; (55) *Devenish Nutrition Limited v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch); (56) *Devenish Nutrition Limited v Sanofi-Aventis SA* [2007] EWHC

2394 (Ch); (57) *Devenish Nutrition Limited v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch); (58) *Devenish Nutrition Limited v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch); (59) *Devenish Nutrition Limited v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch); (60) *Stankovic v Chief Constable of the Ministry of Defence Police* [2007] EWHC 2608 (QB).

## **2008**

(61) *Axa Insurance UK Plc v Thwaites* (Norwich County Court, 8 February 2008); (62) *Berry v Hayden & Ministry of Defence* [2008] NIQB 134; (63) *Alderson v Slater* [2008] EWCA Civ 1137; (64) *Alderson v Slater* [2008] EWCA Civ 1137; (65) *Field Common Ltd v Elmbridge Borough Council* [2008] EWHC 2079 (Ch); (66) *Magical Marking Limited v Holly* [2008] EWHC 2428 (Ch); (67) *AXA Insurance UK Plc v Jensen* (Birmingham County Court, 10 November 2008); (68) *R (on the application of B) v Secretary of State for the Home Department* [2008] EWHC 3189 (Admin).

## **2009**

(69) *AT v Dulghieru* [2009] EWHC 225 (QB); (70) *AT v Dulghieru* [2009] EWHC 225 (QB); (71) *AT v Dulghieru* [2009] EWHC 225 (QB); (72) *AT v Dulghieru* [2009] EWHC 225 (QB); (73) *Ahmed v Shafique* [2009] EWHC 618 (QB); (74) *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm); (75) *Muuse v Secretary of State for the Home Department* [2009] EWHC 1886 (QB); (76) *R (on the application of MH) v Secretary of State for the Home Department* [2009] EWHC 2506 (Admin); (77) *Marriott v Chief Constable of North Yorkshire Police & British Transport Police* [2010] EWCA Civ 1351; (78) *Marriott v Chief Constable of North Yorkshire Police & British Transport Police* [2010] EWCA Civ 1351; (79) *Islam v Yap* [2009] EWHC 3606 (QB).

## **2010**

(80) *R (on the application of Abdullah) v Secretary of State for the Home Department* [2010] EWHC 259 (Admin); (81) *AXA Insurance UK Plc v Shaikh* (Birmingham County Court, 9 February 2010); (82) *Liverpool Victoria v Ghadhda & Iqbal* (Central London County Court, 29 June 2010); (83) *Liverpool Victoria v Ghadhda & Iqbal* (Central London County Court, 29 June 2010); (84) *Lee v Lasrado* [2013] EWHC 2616 (QB); (85) *Ramzan v Brookwide Ltd* [2010] EWHC 2453 (Ch); (86) *Shayegh v South Eastern Health and Social Services Trust* [2010] NIQB 112.

## 2011

(87) *Alanov v Chief Constable of Sussex* [2012] EWCA Civ 234; (88) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB); (89) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB); (90) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB); (91) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB); (92) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB); (93) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB); (94) *Mogaji v Bilkhu* [2012] EWCA Civ 469; (95) *Clifford v Chief Constable of Hertfordshire* [2011] EWHC 815 (QB); (96) *Sharma v Noon Products Ltd* (High Court, 7 April 2011); (97) *R (on the application of NAB) v Secretary of State for the Home Department* [2011] EWHC 1191 (Admin); (98) *Enfield LBC v Outdoor Plus Ltd* [2012] EWCA Civ 608; (99) *Enfield LBC v Outdoor Plus Ltd* [2012] EWCA Civ 608; (100) *McKeever v Ministry of Defence* [2011] NIQB 87; (101) *Mason v Harrison Enterprises Ltd* [2012] EWCA Civ 1673; (102) *Mason v Harrison Enterprises Ltd* [2012] EWCA Civ 1673; (103) *R (on the application of J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin); (104) *Minio-Paluello v Commissioner of Police of the Metropolis* [2011] EWHC 3411 (QB).

## 2012

(105) *Valmoria v Hynes* [2012] EWHC 193 (QB); (106) *Valmoria v Hynes* [2012] EWHC 193 (QB); (107) *AM v Secretary of State for the Home Department* (Central London County Court, 13 March 2012); (108) *ZH v Commissioner of Police of the Metropolis* [2012] EWHC 604 (QB); (109) *Choudhury v Garcia* [2013] EWHC 3283 (QB); (110) *Alleyne v Commissioner of Police of the Metropolis* [2012] EWHC 3955 (QB); (111) *R (on the application of Bent) v Secretary of State for the Home Department* [2012] EWHC 4036 (Admin); (112) *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2012] EWHC 3354 (Ch).

## 2013

(113) *R (on the application of Shaw) v Secretary of State for the Home Department* [2013] EWHC 42 (Admin); (114) *R (on the application of Shaw) v Secretary of State for the Home Department* [2013] EWHC 42 (Admin); (115) *Copeland v Commissioner of Police of the Metropolis* (High Court, 2 May 2013); (116) *Dutta v Hayes* 2013 WL 6980697; (117) *Dutta v Hayes* 2013 WL 6980697; (118) *Thakrar v Secretary of State for Justice* (Milton Keynes County Court, 27 September 2013); (119) *Tasneem v Morley* (Central London County Court, 30 September 2013); (120) *Tasneem v Morley* (Central London County Court, 30 September 2013); (121) *Tasneem v Morley* (Central London County Court, 30 September 2013); (122) *Tasneem v Morley* (Central London County Court, 30 September 2013); (123) *Tasneem v Morley* (Central London County Court, 30 September 2013); (124) *Tasneem v Morley* (Central London County Court, 30 September 2013); (125) *Tasneem v Morley* (Central London County Court, 30 September 2013); (126) *Tasneem v Morley* (Central London County Court, 30 September 2013); (127) *R (on the application of Lamari) v Secretary of State for the Home Department* [2013] EWHC 3130 (QB); (128) *East England Schools CIC (t/a 4MySchools) v Palmer* [2013] EWHC 4138 (QB).

**2014**

(129) *Saxton v Bayliss* (Central London County Court, 31 January 2014); (130) *Crossey v Chief Constable of the PSNI* [2014] NIQB 54; (131) *Patel v Secretary of State for the Home Department* [2014] EWHC 501 (Admin); (132) *Stratton v Patel* [2014] EWHC 2677 (TCC); (133) *Stratton v Patel* [2014] EWHC 2677 (TCC); (134) *Durrant v Chief Constable of Avon and Somerset* [2014] EWHC 2922 (QB); (135) *Browne v Commissioner of Police of the Metropolis* [2014] EWHC 3999 (QB).

**2015**

(136) *Dawoodi v Zafrani* [2015] EWHC 3168 (TCC); (137) *Hassan v Cooper* [2015] EWHC 540 (QB); (138) *Hassan v Cooper* [2015] EWHC 540 (QB); (139) *Crook v Chief Constable of Essex* [2015] EWHC 988 (QB); (140) *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm); (141) *Akhtar v Ball* (Walsall County Court, 10 July 2015); (142) *Churchill Insurance Co v Shajahan* 2015 WL 8131811; (143) *Mobidin v Commissioner of the Police of the Metropolis* [2015] EWHC 2740 (QB); (144) *Mobidin v Commissioner of the Police of the Metropolis* [2015] EWHC 2740 (QB); (145) *Vasile v Pop Loan* 2015 WL 10663362; (146) *Thakrar v Secretary of State for Justice* (Milton Keynes County Court, 31 December 2015).