

# Rethinking Punitive Damages



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## **ABSTRACT**

### **RETHINKING PUNITIVE DAMAGES**

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Punitive damages are a species of non-compensatory damages. Their principal purpose is to punish the defendant for his or her wrongful conduct. This thesis is the first monograph-length treatment dedicated exclusively to this contentious remedy. Through empirical, historical and doctrinal analysis, it illuminates the practical operation of the remedy and assesses its appropriateness. The thesis is divided into three parts. Part I explores the relevant law and its normative underpinnings. Part II provides an empirical survey of nearly 600 decisions on punitive damages delivered by courts at first instance and on appeal between 1964 and 2020 in all parts of the UK (with the exception of Scotland which does not recognise the remedy). The empirical analysis examines various assertions made in the case law and academic literature regarding the operation of the remedy by treating them as testable hypotheses and reveals the extent to which these assertions conform with the empirical evidence. Part III assesses the main limitations on the availability of punitive damages in English law in light of the normative basis of the remedy, its history and the empirical findings. The two limitations examined are the confinement of punitive damages awards to specific categories of case (the ‘categories test’) and to specific types of wrongs (‘cause of action restrictions’). It is argued that these restrictions are unjustified and should be abolished. The thesis concludes that the circumstances in which punitive damages are currently available should be expanded and that their availability should depend on an assessment of the defendant’s conduct rather than the case category or the formal classification of the wrong in which the claimant sues.

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## LIST OF ABBREVIATIONS

7th Cir	United States Court of Appeals for the 7th Circuit
AC	Law Reports, Appeal Cases (3rd Series)
A-G	Attorney General
AJ	Alberta Judgments
AJPS	American Journal of Political Science
All ER	All England Law Reports
All ER Rep	All England Law Reports Reprint
Anglo-Am LR	Anglo-American Law Review
ANOVA	Analysis of Variance
ANZJ Crim	Australian and New Zealand Journal of Criminology
App Cas	Law Reports, Appeal Cases (2nd Series)
B&Ald	Barnewall & Alderson's King's Bench Reports
BCCA	British Columbia Court of Appeal
BCJ	British Columbia Judgments
BCLR	British Columbia Law Reports
BCSC	British Columbia Supreme Court
Bl R	William Blackstone's King's Bench Reports
Burr	Burrow's King's Bench Reports tempore Mansfield
Bus LR	Business Law Reports
California LR	California Law Review
Can B Rev	Canadian Bar Review
CB	Common Bench Reports
CBLJ	Canadian Business Law Journal
CBNS	Common Bench Reports New Series
CC	Chief Constable
Ch D	Law Reports, Chancery Division (2nd Series)
Chicago-Kent LR	Chicago-Kent Law Review
CJ	Chief Justice
CJLJ	Canadian Journal of Law and Jurisprudence
CJQ	Civil Justice Quarterly
Cleveland LR	Cleveland Law Review
CLJ	Cambridge Law Journal
CLR	Commonwealth Law Reports
CLY	Current Law Year Book
Cmd	Command Paper
CMLR	Common Market Law Reports
cmt	comment
col / cols	column / columns
Comp AR	Competition Appeal Reports
CP	Consultation Paper
CPR	Civil Procedure Rules
CPR (4th)	Canadian Patent Reporter, 4th Series
C&P	Carrington & Payne's Nisi Prius Reports
CPM	Commissioner of Police for the Metropolis
CP Rep	Civil Procedure Reports
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
CRU	Compensation Recovery Unit
CUP	Cambridge University Press

## LIST OF ABBREVIATIONS

DLR	Dominion Law Reports
Duke LJ	Duke Law Journal
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ed / eds	editor / editors
Edin LR	Edinburgh Law Review
edn	edition
EGD	Estates Gazette Digest of Cases
EMLR	Entertainment and Media Law Reports
Emory LJ	Emory Law Journal
ER	English Reports
Exch	Exchequer Reports
F.3d	Federal Reporter, Third Series
FCA	Federal Court of Canada, Appeal Division
ff	and following
F&F	Foster & Finlaysons' Nisi Prius Reports
Florida State University LR	Florida State University Law Review
FLR	Federal Law Reports
fn	footnote (external to the work)
FSR	Fleet Street Reports
Harv LR	Harvard Law Review
HCA	High Court of Australia
HC Deb	House of Commons Debate (Hansard)
HKCA	Hong Kong Court of Appeal
HKLRD	Hong Kong Law Reports & Digest
HL Deb	House of Lords Debate (Hansard)
HJL	Harvard Journal on Legislation
HLR	Housing Law Reports
H&N	Hurlstone & Norman's Exchequer Reports
HRA	Human Rights Act
ICLQ	International & Comparative Law Quarterly
ICR	Industrial Cases Reports
IJ	Irish Jurist
Iowa LR	Iowa Law Review
IR	Irish Reports
IRLR	Industrial Relations Law Reports
J	Mr/Mrs Justice
JELS	Journal of Empirical Legal Studies
JETL	Journal of European Tort Law
JLA	Journal of Legal Analysis
JLH	Journal of Legal History
JLS	Journal of Legal Studies
JML	Journal of Media Law
JPE	Journal of Political Economy
JPIL	Journal of Personal Injury Law
KB	Law Reports, King's Bench
KBD	King's Bench Division
LC	Lord Chancellor
LCP	Law and Contemporary Problems

## LIST OF ABBREVIATIONS

LJ	Lady/Lord Justice
Lofft	Lofft's King's Bench Reports
Loy LA Int'l & Comp LJ	Loyola of Los Angeles International & Comparative Law Journal
LRC	Law Reports of the Commonwealth
LR Ch App	Law Reports, Chancery Appeal Cases
LQR	Law Quarterly Review
LS	Legal Studies
LSG	Law Society's Gazette
LT	Law Times Reports
Ltd	Limited
Mac LR	Macarthur Law Review
Minnesota LR	Minnesota Law Review
MLR	Modern Law Review
MLJ	Malayan Law Journal
Mon LR	Monash University Law Review
MR	Master of the Rolls
MULR	Melbourne University Law Review
n / nn	footnote / footnotes (internal to the work)
NI	Northern Ireland Law Reports
NIHC	Northern Ireland High Court
NIJB	Northern Ireland Judgments Bulletin
NLJ	New Law Journal
NSJ	Nova Scotia Judgments
NSWCA	New South Wales Court of Appeal
NSWLR	New South Wales Law Reports
NSWSC	New South Wales Supreme Court
NYULR	New York University Law Review
NZCA	New Zealand Court of Appeal
NZFLR	New Zealand Family Law Reports
NZLR	New Zealand Law Reports
NZLRev	New Zealand Law Review
NZSC	New Zealand Supreme Court
Ohio St LJ	Ohio State Law Journal
OJ	Ontario Judgments
OJLS	Oxford Journal of Legal Studies
Ont CA	Ontario Court of Appeal
ONS	Office for National Statistics
Ord	Order
OUP	Oxford University Press
para / paras	paragraph / paragraphs
P&CR	Property, Planning and Compensation Reports
PD	Practice Direction
PILJ	Personal Injury Law Journal
plc	public limited company
Po LR	Police Law Reports
Prison LR	Prison Law Reports
PSNI	Police Service of Northern Ireland
pt / pts	part / parts
PTA	Permission to Appeal
R	The Queen

## LIST OF ABBREVIATIONS

r	rule
RLR	Restitution Law Review
RSC	Rules of the Supreme Court
RTR	Road Traffic Reports
s / ss	section / sections
SC	Session Cases
SCC	Supreme Court of Canada
sch / schs	schedule / schedules
SCR	Supreme Court Reports, Canada
SGCA	Singapore Court of Appeal
SLR	Singapore Law Reports
SJ	Saskatchewan Judgments
SKCA	Saskatchewan Court of Appeal
SLT	Scots Law Times
Southern California LR	Southern California Law Review
Stark	Starkie's Nisi Prius Reports
Syd LR	Sydney Law Review
Taunt	Taunton's Common Pleas Reports
Texas LR	Texas Law Review
TLJ	Torts Law Journal
TSO	The Stationary Office
UILR	University of Illinois Law Review
VCC	Victoria County Court
vol / vols	volume / volumes
Washington LR	Washington Law Review
Widener LJ	Widener Law Journal
Wils KB	Wilson's King's Bench and Common Pleas Reports
WLJ	Western Law Journal
WLR	Weekly Law Reports
WTLR	Wills & Trusts Law Reports
WULQ	Washington University Law Quarterly
WWR	Western Weekly Reports
Yale LJ	Yale Law Journal

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## CHAPTER 1: INTRODUCTION

### 1.1 WHAT ARE PUNITIVE DAMAGES?

Damages are normally concerned with compensating the victim of a wrong. They are awarded to put the party who has been injured as nearly as possible in the same position as (s)he would have been if (s)he had not suffered the wrong.<sup>1</sup> In contrast, punitive (or exemplary) damages are a species of non-compensatory damages. Their primary purpose is to punish the defendant for his or her wrongful conduct. They also aim to deter the defendant from repeating the same unlawful conduct and others from acting similarly.

English courts have been awarding punitive damages for over 250 years. The first reported cases in which an award was made date from 1763.<sup>2</sup> However, the modern English law of punitive damages began in 1964 when *Rookes v Barnard*<sup>3</sup> was decided. In that case, the House of Lords reworked the relevant law and limited the availability of the remedy to specific case categories. These are cases of (1) oppressive, arbitrary or unconstitutional actions by government servants; (2) profit-seeking wrongdoing; and (3) statutory authorisation of the remedy. This restriction is known as the ‘categories test’.

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<sup>1</sup> *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 (HL) 39.

<sup>2</sup> *Huckle v Money* (1763) 2 Wils KB 205, 95 ER 768; *Wilkes v Wood* (1763) Lofft 1, 98 ER 489.

<sup>3</sup> [1964] AC 1129 (HL).

## INTRODUCTION

### 1.2 THE CONTROVERSIAL NATURE OF PUNITIVE DAMAGES

Punitive damages are one of the most controversial remedies (if not the most controversial remedy) in English private law.<sup>4</sup> The controversy stems from the fact that the usual function of damages is to compensate the victim of a wrong rather than punish the wrongdoer. Because punitive damages are concerned with punishment, they are considered by many as an anomaly that ought to be expelled from private law.<sup>5</sup> Yet others have pointed out that there is nothing odd with the notion that punishment is a purpose of private law.<sup>6</sup> Although the presence of punitive damages in English law has ‘provoked a wide range of strongly-held views’,<sup>7</sup> these views are often based on pre-existing theoretical commitments or ideas concerning the role of private law, and have been formed in the absence of a comprehensive investigation of the remedy. In particular, very little is known about the history of punitive damages in England as well as the relevant litigation conducted before UK courts in the modern era. Prompted by this lack of knowledge about the roots and modern functioning of the doctrine, this thesis provides, among other things, a historical and an empirical investigation of punitive damages.

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<sup>4</sup> *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1 [43].

<sup>5</sup> Eg, *Rookes* (n 3) 1221, 1226 (Lord Devlin): ‘[Punitive damages are] an anomaly [in] the law of England ... [they] admit into the civil law a principle which logically to belong to the criminal’. See, also, Ernest Weinrib, *Corrective Justice* (OUP 2012) 97: ‘The standard justifications for punitive damages ... are one-sided ... The place of such considerations is not private law but criminal law ...’.

<sup>6</sup> Eg, *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) 1114 (Lord Wilberforce): ‘It cannot lightly be taken for granted ... that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages ...’. See, also, Andrew Burrows, *Remedies for Torts and Breach of Contract* (4th edn, OUP 2019) 376: ‘There is no logical reason why punishment should not be a response available to the civil law’.

<sup>7</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 2. The ‘diversity of views’ expressed during the consultation process led the Law Commission to take ‘the unusual step of issuing a supplementary consultation paper’ (ibid).

## INTRODUCTION

### 1.3 THE AIM OF THE THESIS

The overarching aim of the thesis is to analyse comprehensively and critically the English law of punitive damages. An expansion of the circumstances in which the remedy is currently available is also proposed. However, it should be clarified at the outset that this thesis does not seek to answer the higher order and logically prior (philosophical) question of whether punishment is justifiable. Nor does it seek to answer the theoretical question of whether punishment is a justifiable goal for the civil law to pursue. Rather, it assumes that the judicially endorsed goals of punitive damages are suitable objectives for private law to pursue.<sup>8</sup>

A great deal has been written about punitive damages, including numerous articles<sup>9</sup> and book chapters<sup>10</sup> as well as the Law Commission's Consultation Paper<sup>11</sup> and Report<sup>12</sup> on *Aggravated, Exemplary and Restitutionary Damages*. However, there is no monograph concerned exclusively with the English law of punitive damages. Articles and book chapters naturally address only specific aspects of the field. As for the Law Commission's Consultation Paper and Report, these examined punitive damages

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<sup>8</sup> The Law Commission (ibid at 99) accepted the proposition that 'it is coherent to pursue the aims of punishment (retribution, deterrence, disapproval) through the civil law ...'.

<sup>9</sup> Eg, Nicholas McBride, 'A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract' (1995) 24 *Anglo-Am LR* 369; Benjamin Zipursky, 'A Theory of Punitive Damages' (2005) 84 *Texas LR* 105; Solène Rowan, 'Reflections on the Introduction of Punitive Damages for Breach of Contract' (2010) 30 *OJLS* 495.

<sup>10</sup> Eg, Andrew Burrows, 'Reforming Exemplary Damages: Expansion or Abolition?' in Peter Birks, *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1996); Nicholas McBride, 'Punitive Damages' in Peter Birks, *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1996); James Edelman, 'In Defence of Exemplary Damages' in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2008).

<sup>11</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (Law Com CP No 132, 1993).

<sup>12</sup> (n 7).

## INTRODUCTION

alongside other remedies and were published more than two decades ago. Accordingly, the thesis provides the first extensive and exclusive consideration of the English law of punitive damages.

At the heart of the thesis is an empirical survey of 593 decisions on punitive damages handed down by courts in all parts of the UK<sup>13</sup> at first instance (478 decisions) and on appeal (115 decisions). The purpose of the empirical analysis is to provide the best possible assessment of the practical operation of the remedy in modern English law. Thus, the thesis examines all electronically available decisions on punitive damages delivered by first instance and appellate courts across the UK between 1964 (when *Rookes* was decided) and 2020.<sup>14</sup> Although this kind of research is well-established in the US, it is still relatively novel in this jurisdiction and elsewhere in the Commonwealth.<sup>15</sup>

The results of the empirical analysis inform normative debates about punitive damages. For example, a major aspect of the controversy surrounding the remedy concerns its assessment. Because punitive damages have no natural ceiling there is a danger of disproportionate awards.<sup>16</sup> However, the empirical analysis presented in this

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<sup>13</sup> With the exception of Scotland which does not recognise the award of punitive damages, see *Black v North British Railway Co* 1908 SC 444, 453.

<sup>14</sup> The doctoral thesis builds on my MPhil thesis which was the first empirical study of punitive damages in the UK, see Eleni Katsampouka, ‘An Empirical Study of the Law of Exemplary Damages’ (MPhil thesis submitted in October 2016). That thesis examined first instance decisions on punitive damages delivered between 2000 and 2015. A revised version of the MPhil thesis was published in 2018 (see James Goudkamp and Eleni Katsampouka, ‘An Empirical Study of Punitive Damages’ (2018) 38 OJLS 90). The study was then replicated in Australia (see Felicity Maher, ‘An Empirical Study of Exemplary Damages in Australia’ (2019) 43 MULR 694).

<sup>15</sup> Empirical projects have been undertaken in other areas of private law including contributory negligence (see James Goudkamp and Donal Nolan, *Contributory Negligence in the Twenty-First Century* (OUP 2019)) and personal injury litigation (see Per Laleng, ‘Winners and Losers in the Court of Appeal: An Empirical Study of Personal Injury Cases (2002–2016)’ [2018] JPIL 36).

<sup>16</sup> Eg, *Broome* (n 6) 1114 (Lord Wilberforce): ‘[An] argument against the existence of the principle [of] punitive damages in English law ... [is] that it leads to excessive awards ...’.

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this thesis suggests that arguments against the liberalisation of the jurisdiction to award punitive damages based on the danger of excessive and uncontrollable awards are probably overstated. The empirical evidence reveals that, contrary to prevailing perceptions, the quantum of awards is rather modest on the whole. Even outlier awards are often not extravagant when compared with the resources of the defendants who were liable to pay them.

The thesis also assesses whether the current restrictions on recovery of punitive damages are justified. In particular, I argue that English law took a wrong turn in *Rookes v Barnard* when it confined punitive damages to certain prescribed categories of case. Both the precedential and the normative basis for these categories is feeble. I also argue that punitive damages should be available across the entire range of civil wrongs, including for equitable wrongs, breach of contract, and the tort of negligence.

## INTRODUCTION

### 1.4 THE STRUCTURE OF THE THESIS

The thesis is divided to three parts. Part I comprises two chapters. Chapter 2 offers an overview of the rules governing the award of punitive damages in English law. It details the numerous restrictions that limit the power of courts to award punitive damages, beginning with the ‘categories test’, and then moving on to other constraints. Chapter 3 then explores the justifications for punitive damages and assesses the extent to which each of these justifications is consistent with the positive law. It is concluded that the law of punitive damages does not conform entirely with any of the commonly proffered justifications. However, I argue that what is potentially lost in terms of coherence is made up for in the enhanced support provided by multiple justifications.<sup>17</sup> Punishment involves the intentional infliction of pain on others and so ‘patently needs all the justificatory help it can get’.<sup>18</sup>

Part II turns to the empirical analysis which is split into four chapters. Chapter 4 outlines previous empirical studies and explains how they differ from the present project. Chapter 5 describes the methodology of the empirical analysis. The results of the empirical analysis are reported and discussed in Chapter 6 (first instance study) and Chapter 7 (appellate study). The first instance study (Chapter 6) explores 478 decisions delivered by trial courts across the UK since *Rookes* was decided. The aim is to clarify the practical operation of punitive damages by looking at the circumstances in which these awards are made and their quantum. An examination of first instance decisions

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<sup>17</sup> Cf Ernest Weinrib, *The Idea of Private Law* (OUP 2012) 42 who argues that ‘private law is normatively inadequate if it is understood in terms of independent [and] mutually frustrating goals’.

<sup>18</sup> John Gardner, *Offences and Defences* (OUP 2007) 214–215.

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alone would not, however, capture the full impact of judicial decisions and it is primarily for this reason that appellate judgments are explored in Chapter 7. The appellate study examines 115 appellate decisions handed down by appellate courts across the UK over the same period. It explores similar questions as the first instance study, namely, the post-appeal rate at which punitive damages are awarded and the post-appeal quantum of awards. The separate examination of case outcomes at first instance and on appeal enables the reader to see how the courts at different levels of the judicial hierarchy deal with the relevant issues. As well as considering case outcomes, the appellate study also explores the extent to which appellate courts interfere with the determinations of first instance courts on punitive damages. This analysis supplements the first instance study and provides useful information which may assist in the settlement of disputes related to punitive damages in the future.

Part III critically assesses the main restrictions on the availability of punitive damages in English law. Chapter 8 examines the ‘categories test’ which was established by the House of Lords in *Rookes v Barnard*.<sup>19</sup> It explores the law before 1964, which is when *Rookes* was decided, and evaluates the extent to which the ‘categories test’ is based on precedent. An analysis of whether the ‘categories test’ is justified normatively is also provided. It is ultimately suggested that the ‘categories test’ cannot be defended on the basis of adherence to prior authority or to sound policy and that the law would be better without it. Chapter 9 analyses the survival of ‘cause of action restrictions’ in the law of

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<sup>19</sup> (n 3).

## INTRODUCTION

punitive damages after the demise of the ‘cause of action test’<sup>20</sup> which confined the availability of the remedy to causes of action in respect of which it had been awarded before 1964 (when *Rookes* was decided). By the term ‘cause of action restriction’ I mean the prohibition of punitive damages awards for certain wrongs simply on the basis that the remedy is not available for the cause of action in which the claimant sues. In particular, I examine whether punitive damages are, and should be, available for equitable wrongs, breach of contract and the tort of negligence. I argue that precluding the award of punitive damages for certain causes of action is inconsistent with the rationales for the remedy (which primarily concern retribution and deterrence) and that there is no compelling argument in support of an absolute prohibition of punitive awards for these causes of action. Punitive damages should thus be available for all civil wrongs irrespective of their origin (tort, contract or equity). This is what a genuine abolition of the ‘cause of action test’ requires.

Chapter 10 summarises my central conclusions and offers remarks regarding the future of punitive damages.

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<sup>20</sup> This was established in *AB v South West Water Services Ltd* [1993] QB 507 (CA). It was abolished by the House of Lords in *Kuddus v CC Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122.

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### 1.5 TERMINOLOGY AND SCOPE

The terms ‘punitive’ and ‘exemplary’ damages are synonymous. In other common law jurisdictions, in particular, the US and Canada, the term ‘punitive damages’ has prevailed. In 1997, the Law Commission stated that the term ‘punitive damages’ was preferable and proposed that it should be adopted in English law as well.<sup>21</sup> However, in recent years, courts have overwhelmingly used the term ‘exemplary damages’<sup>22</sup> and this term has also been used in statutes.<sup>23</sup> This thesis adopts the Law Commission’s preference. The term ‘exemplary damages’ emphasises the deterrent function of the remedy (ie, making an example of someone) but this constitutes only one of the rationales for the award. In contrast, the term ‘punitive damages’ is more general and embraces all of the different functions that have been attributed to the award by the judiciary. Thus, the term ‘punitive damages’ describes the remedy more accurately.

As for the jurisdictional scope the thesis, the analysis is primarily concerned with English law although there are periodical references to the law in other jurisdictions. In particular, Chapter 8 discusses briefly the ostensible contrast with civil law jurisdictions which refuse to include punitive damages in their list of private law remedies. And Chapter 9 discusses the law in other Commonwealth jurisdictions which have rejected many of the limitations that English courts have placed on the award of punitive damages. Cases from Canada, New Zealand and Australia are used to illustrate that there

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<sup>21</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 7) 104.

<sup>22</sup> Eg, *Broome* (n 6) 1073 (Lord Hailsham LC): ‘I prefer [the term] “exemplary” ...’.

<sup>23</sup> Eg, Crime and Courts Act 2013, ss 34–39.

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may be a practical need for punitive damages in circumstances where the remedy is not presently available under English law.

**PART I: THE LAW AND ITS  
NORMATIVE UNDERPINNINGS**

## CHAPTER 2: THE ENGLISH LAW OF PUNITIVE DAMAGES

This section briefly describes the law of punitive damages. Punitive damages are extra-compensatory damages the aim of which is to punish the defendant for his or her wrongful conduct and to deter him or her and others from committing the same wrong.<sup>1</sup> Awards of this kind date back to 1763 with the earliest examples being found in the false imprisonment case of *Huckle v Money*<sup>2</sup> and the trespass to land action in *Wilkes v Wood*.<sup>3</sup> Since then, punitive damages have been awarded for a variety of other actions, including assault,<sup>4</sup> defamation<sup>5</sup> and trespass to goods.<sup>6</sup> In 1964, the House of Lords set the law of punitive damages on a new track in *Rookes v Barnard*.<sup>7</sup>

### 2.1 THE *ROOKES* CATEGORIES

As of 1964, the availability of punitive damages has been severely restricted. In *Rookes v Barnard*<sup>8</sup> Lord Devlin (with whom the other Law Lords agreed) remarked that the remedy ‘confuses the civil and criminal functions of the law’<sup>9</sup> and held that only three categories of cases permitted an award of punitive damages. These are (1) cases of ‘oppressive, arbitrary or unconstitutional actions’ by servants of the government (‘Category 1’); (2) cases where the defendant aimed to extract a profit from his or her

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<sup>1</sup> *Rookes v Barnard* [1964] AC 1129 (HL) 1221; *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) 1034.

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

<sup>3</sup> (1763) Lofft 1, 98 ER 489.

<sup>4</sup> Eg, *Benson v Frederick* (1766) 3 Burr 1845, 97 ER 1130.

<sup>5</sup> Eg, *Rook v Fairrie* [1941] KB 507 (CA).

<sup>6</sup> Eg, *Williams v Currie* (1845) 1 CB 841, 135 ER 774.

<sup>7</sup> (n 1).

<sup>8</sup> *ibid.*

<sup>9</sup> *ibid* 1221.

## THE ENGLISH LAW OF PUNITIVE DAMAGES

wrong that would exceed the compensation payable to the claimant ('Category 2'); and (3) cases in which the award of punitive damages is authorised by statute ('Category 3').<sup>10</sup> Lord Denning MR tried to outflank this limitation of the law of punitive damages in *Broome v Cassell & Co Ltd*<sup>11</sup> but his decision was overturned by the House of Lords, which affirmed the restrictive approach of *Rookes*.<sup>12</sup> Two further recent attempts to challenge the *Rookes* categories before the English courts have been unsuccessful<sup>13</sup> but the matter has not been authoritatively considered at the ultimate appellate level since *Broome*.<sup>14</sup>

### 2.1.1 Category 1

This category is based on three 18th century cases from which punitive damages originated.<sup>15</sup> Lord Devlin justified this category on the basis that the servants of the government are also the servants of the people so the use of their power must always be

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<sup>10</sup> A case must fall within one or more of these categories before punitive damages can be awarded. There have been instances of punitive damages being claimed under two categories simultaneously (eg, *R (Deptka) v Secretary of State for the Home Department* [2019] EWHC 503 (Admin) [67] in which it was argued that the defendant's policy of detaining rough sleepers satisfied the two common law categories) but no such claim has been successful so far.

<sup>11</sup> [1971] 2 QB 354 (CA) 380–384.

<sup>12</sup> *Broome* (n 1) 1054, 1084, 1132 (although Viscount Dilhorne and Lord Wilberforce favoured the pre-*Rookes* position (at 1098, 1116)).

<sup>13</sup> Both cases arose from IRA bombing attacks: *Breslin v McKeivitt* [2011] NICA 33 [135], [139] (Higgins LJ): '[T]he essence of the plaintiffs' submissions is that the categories ... classification for the award of exemplary damages should now be superseded ... [G]iven the anomalous nature of the remedy and its longstanding restriction to very limited types of case ..., we do not consider that it would be appropriate for this court to embark upon the radical extension sought'; *Young v Downey* [2020] EWHC 3457 [38] (Spencer J): '[E]ven assuming that ... this is an appropriate case to extend the categories of recovery for exemplary damages, such an extension would be for either Parliament or the higher courts, and probably the Supreme Court'.

<sup>14</sup> For criticism of the *Rookes* categories in obiter dicta, see *Kuddus v CC Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 [66] (Lord Nicholls): 'I am respectfully inclined to doubt the soundness of th[e] distinction between oppressive acts by government officials and similar acts by companies or individuals'; *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449 [41] (Lord Nicholls): 'England [is] still toiling in the chains of *Rookes v Barnard*'.

<sup>15</sup> *Huckle* (n 2); *Wilkes* (n 3); *Benson* (n 4).

## THE ENGLISH LAW OF PUNITIVE DAMAGES

subordinated to their duty of service.<sup>16</sup> Another commonly proffered justification is that punishment through the civil courts is preferable in circumstances where there might otherwise be no state punishment due to the fact that a public body defendant (eg, the police) may not be easily exposed to the processes of the criminal law.<sup>17</sup> In this category, awards have been made in respect of misconduct by police officers<sup>18</sup> and prison officers<sup>19</sup> as well as in cases of unlawful detention by immigration authorities.<sup>20</sup> Some decisions have also involved misconduct by local authorities.<sup>21</sup> In these cases it is usually the state that will be liable to pay punitive damages.<sup>22</sup>

A case will fall into this category when two requirements are met. The first is oppressive, arbitrary *or* unconstitutional conduct. If this is satisfied, there is no need for the conduct in question to disclose additionally ‘malice, fraud, insolence, cruelty [and] similar specific conduct’.<sup>23</sup> Full effect must be given to the word ‘or’ and so the Court of Appeal has held that the three adjectives (‘oppressive, arbitrary or unconstitutional’) are

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<sup>16</sup> *Rookes* (n 1) 1226.

<sup>17</sup> See, eg, Andrew Burrows, ‘Reforming Exemplary Damages: Expansion or Abolition?’ in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (OUP 1996) 168.

<sup>18</sup> Eg, *Copeland v CPM* (QBD, 2 May 2013) (malicious prosecution by police officers).

<sup>19</sup> Eg, *Burke v Home Office* (Clerkenwell County Court, 24 July 1996) (assault by prison officers).

<sup>20</sup> Eg, *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453, (2010) 107(19) LSG 24.

<sup>21</sup> Eg, *Bradford City Council v Arora* [1991] 2 QB 507 (CA) (unlawful discrimination during interviews for a senior post in a local authority college).

<sup>22</sup> Cf *Makanjuola v CPM* (QBD, 31 July 1989) (no vicarious liability for the policeman’s misconduct (sexual assault by threatening to report the victim so that she would be deported) which could not be regarded as an improper mode of doing something that he had been authorised to do).

<sup>23</sup> *Muuse* (n 20) [71] (Thomas LJ). See, also, *Derbyshire v Lancashire County Council* (1983) 133 NLJ 65 (QBD) 70 (Skinner J) (punitive damages awarded for conversion where ‘the police officers concerned were genuine though misguided’); *Barbara v Home Office* (1984) 134 NLJ 888 (NIHC) (Leggatt J): ‘malice is only one of the states of mind which may motivate a tortfeasor whose acts warrant exemplary damages’.

## THE ENGLISH LAW OF PUNITIVE DAMAGES

to be read disjunctively.<sup>24</sup> However, in most cases these three terms have been treated as synonymous with each of them underlying the idea of ‘outrageous use of executive power’.<sup>25</sup> This appears to set a ‘high threshold’<sup>26</sup> and many punitive damages claims have failed because the defendant’s conduct could not be described as sufficiently oppressive or outrageous.<sup>27</sup>

The second requirement is that the wrongdoer must be a servant of the government who acted in that capacity.<sup>28</sup> The term ‘servant of the government’ has been interpreted liberally. It extends ‘to all those who by common law or statute are exercising functions of a governmental character’.<sup>29</sup> The determining criterion is whether the defendant carried out activities of an executive or governmental nature.<sup>30</sup> Provided that this is satisfied, the legal personality of the defendant is unimportant.<sup>31</sup> Thus, punitive damages were recently awarded against a private corporation which provided

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<sup>24</sup> Therefore, a case can fall within this category if it involves unconstitutional action even if there is no element of oppressive behaviour: *Holden v CC Lancashire* [1987] QB 380 (CA) 388.

<sup>25</sup> *Kuddus* (n 14) [75] (Lord Hutton). See, also, *Muuse* (n 20) [72] (Thomas LJ) (the defendant’s conduct was not ‘merely unconstitutional but an arbitrary exercise of executive power which was outrageous’).

<sup>26</sup> *R (Ilori) v Secretary of State for the Home Department* [2017] EWHC 3355 (Admin) [89] (Ms Mulcahy QC).

<sup>27</sup> Eg, *Van Hout v CC Royal Ulster Constabulary* (NIHC, 28 June 1984) p 17; *Fox v CC Royal Ulster Constabulary* (NIHC, 5 October 1987) p 5; *Davey v CC Royal Ulster Constabulary* [1988] NI 139 (CA) 148–151; *Raw v Croydon LBC* [2002] CLY 941 (Bodmin County Court) 941; *Pelling v Johnson* [2004] EWHC 492 (QB) [47]; *Re Organ Retention Group Litigation* [2004] EWHC 644 (QB), [2005] QB 506 [263]; *R (J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin) [49]; *AXD v Home Office* [2016] EWHC 1617 (QB) [51]; *Coker v Secretary of State for the Home Department* (QBD, 29 July 2016) p 2; *R (Ilori)* (n 26) [89].

<sup>28</sup> *Rookes* (n 1) 1025–26.

<sup>29</sup> *Broome* (n 1) 1077 (Lord Hailsham LC).

<sup>30</sup> *AB v South West Water Services Ltd* [1993] QB 507 (CA) 507.

<sup>31</sup> It is, of course, clear that a private entity not exercising executive functions is automatically excluded from this category: eg, *Metcalfe v Collett-Ward* (CA, 1 December 1976) (the defendant owner of a car assaulted and threatened the claimant that he would break his legs if the car was not repaired).

## THE ENGLISH LAW OF PUNITIVE DAMAGES

immigration escort services under contractual arrangements with the Home Office.<sup>32</sup> And in *Columbia Pictures Industries Inc v Robinson*, Scott J remarked that solicitors executing an Anton Piller order could be covered by the first *Rookes* category because in doing so they act ‘as officers of the court’.<sup>33</sup> By contrast, in *AB v South West Water Services Ltd*<sup>34</sup> the defendant which supplied contaminated water to inhabitants of surrounding areas was not considered to have acted as a servant of the government due to its commercial operations.<sup>35</sup> And in *Shendish Manor Ltd v Coleman* the leader of a council in a local authority committee had not acted in her capacity as member of local government in making slanders ‘off the cuff to individual councillors after official meetings’.<sup>36</sup>

Causes of action for which punitive damages have been awarded within this category include false imprisonment,<sup>37</sup> assault and battery,<sup>38</sup> malicious prosecution,<sup>39</sup> misfeasance in public office,<sup>40</sup> trespass to land,<sup>41</sup> trespass to goods,<sup>42</sup> conversion,<sup>43</sup> unlawful discrimination<sup>44</sup> and breach of EU law.<sup>45</sup>

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<sup>32</sup> *Wamala v Tascor Services Ltd* [2017] EWHC 1461 (QB).

<sup>33</sup> [1987] Ch 38 (Ch) 87.

<sup>34</sup> (n 30) 525.

<sup>35</sup> Lord Nicholls ‘doubt[ed] the soundness’ of the exclusion of non-governmental bodies from this category: *Kuddus* (n 14) [66]. See, also, *McCarrick v Norweb plc* (CA, 25 November 1993) p 3 (Steyn J): ‘[T]he distinction between a privatised corporation ... and a government agency is, perhaps, unreal’.

<sup>36</sup> [2001] EWCA Civ 913 [55] (Keene LJ).

<sup>37</sup> Eg, *Patel v Secretary of State for the Home Department* [2014] EWHC 501 (Admin).

<sup>38</sup> Eg, *Wamala* (n 32).

<sup>39</sup> Eg, *Isaac v CC West Midlands* [2001] EWCA Civ 1405, [2001] Po LR 280.

<sup>40</sup> Eg, *Rees v CPM* [2021] EWCA Civ 49.

<sup>41</sup> Eg, *R v Reading Justices (ex p South West Meat Ltd) (No 2)* [1992] Crim LR 672 (QBD).

<sup>42</sup> Eg, *Thakrar v Secretary of State for Justice* (Milton Keynes County Court, 31 December 2015).

### 2.1.2 Category 2

This category includes situations where the defendant calculated that the expected profit from his or her wrong would exceed the compensation payable to the claimant. The rationale of awards under this category is to teach the wrongdoer that tort does not pay.<sup>46</sup> In relation to the ‘calculation’ element, it is not necessary that the defendant engaged in a precise balancing process;<sup>47</sup> it suffices that (s)he was aware that what (s)he was planning to do was contrary to the law but nonetheless proceeded hoping that the expected material benefits would outweigh the possible material loss.<sup>48</sup> Profit-seeking conduct ‘is not confined to moneymaking in the strict sense’<sup>49</sup> and one scholar has even suggested that the concept of profit in this context includes any type of gain such as the prospect of political gains.<sup>50</sup> However, the Court of Appeal has held that a defendant who is not ‘commercially motivated for profit’<sup>51</sup> would not be captured by this category.

Punitive damages can and have been awarded against a defendant who failed to profit from the wrongdoing.<sup>52</sup> In other words, a mere *aim* to make a gain suffices to

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<sup>43</sup> Eg, *Derbyshire* (n 23).

<sup>44</sup> Eg, *Arora* (n 21).

<sup>45</sup> Eg, *R (Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin), [2016] CMLR 10.

<sup>46</sup> *Rookes* (n 1) 1227. For criticism, see *Broome* (n 1) 1088 (Lord Reid): ‘suppose [t]he [defendant] commits the tort not for gain but simply out of malice, why should [(s)]he not also be punished? I freely admit there is no logical reason’.

<sup>47</sup> *Broome* (n 1) 1044; *John v MGN Ltd* [1997] QB 586 (CA) 619.

<sup>48</sup> *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA) 269–270.

<sup>49</sup> *Rookes* (n 1) 1227 (Lord Devlin).

<sup>50</sup> Jason Varuhas, *Damages and Human Rights* (Hart 2016) 124.

<sup>51</sup> *Breslin* (n 13) [140] (Higgins LJ) (emphasis added).

<sup>52</sup> Eg, *Archer v Brown* [1985] 1 QB 401 (QBD) 423; *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324 (Ch), [2005] 1 WLR 1 [144]–[145]; *Axa Insurance UK plc v FCS Ltd* [2018] EWCA Civ 1330, [2019] RTR 1 [36].

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trigger an award under ‘Category 2’. This is because the need for punishment and deterrence is not confined only to those who managed to realise a profit. It is for this same reason that if the defendant did profit from his or her wrong, the amount of punitive damages can exceed the amount of the defendant’s profit.<sup>53</sup>

Even though the usefulness of this category has been doubted in recent years due to the development of the law of restitution<sup>54</sup> it is still frequently utilised by courts to justify awards. In particular, since the decision in *Rookes* punitive damages have been awarded commonly against landlords for unlawful eviction of tenants and violations of landlord and tenant legislation.<sup>55</sup> Insurance fraud cases constitute the second major source of punitive damages awards within this category although this is a relatively recent trend in the case law<sup>56</sup> resulting from the demise of the ‘cause of action test’ which barred punitive damages awards for the tort of deceit prior to 2001.<sup>57</sup> Both unlawful eviction cases and insurance fraud cases involve wrongdoing which ordinarily also constitutes a criminal offence and it has been observed that criminal prosecutions are uncommon in these areas.<sup>58</sup>

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<sup>53</sup> Eg, *McMillan v Singh* (1985) 17 HLR 120 (CA) 125–126.

<sup>54</sup> *Kuddus* (n 14) [109] (Lord Scott): ‘Restitutionary damages are available now in many ... actions ... The profit made by a wrongdoer can be extracted from him without the need to rely on the anomaly of exemplary damages’.

<sup>55</sup> Eg, *Drane v Evangelou* [1978] 1 WLR 355 (CA); *Ramdath v Daley* (1993) 25 HLR 273 (CA); *Design Progression* (n 52); *Ruby Triangle Properties Ltd v Jesus Sanctuary Ministries Ltd* [2020] EWHC 2247 (Ch).

<sup>56</sup> The first publicly available judgment in which punitive damages were awarded for insurance fraud was delivered in 2008: *Axa Insurance UK plc v Jensen* (Birmingham County Court, 10 November 2008). Numerous similar cases have been reported since: eg, *Liverpool Victoria v Ghadhda* (Central London County Court, 29 June 2010); *Joynson v Joynson* (Chester County Court, 2 November 2016).

<sup>57</sup> For a detailed discussion of the ‘cause of action test’, see the text to nn 76–98 below.

<sup>58</sup> Local authorities are reluctant to prosecute landlords for the unlawful eviction of tenants and prosecutions for insurance fraud also appear to be rare: eg, *Mehta v RBS plc* (2002) 32 HLR 45

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Causes of action for which punitive damages have been awarded within this category include conversion,<sup>59</sup> trespass to land,<sup>60</sup> private nuisance,<sup>61</sup> inducing a breach of contract,<sup>62</sup> unlawful means conspiracy,<sup>63</sup> false imprisonment,<sup>64</sup> battery,<sup>65</sup> assault,<sup>66</sup> statutory competition torts,<sup>67</sup> deceit<sup>68</sup> and defamation.<sup>69</sup>

### 2.1.3 Category 3

There are only three clear examples today of statutory authorisation of punitive damages.<sup>70</sup> The first is section 13(2) of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 stating that punitive damages may be awarded in an action for damages for the conversion of servicemen's goods. The second example lies in sections 34–39 of the Crime and Courts Act 2013. These provisions allow punitive damages to be

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(QBD) 66 (Mr Richard Southwell QC) (unlawful eviction): 'Though criminal proceedings were threatened ... by the local authority, they were not brought'; *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016) [2] (Flaux J) (nine actions for insurance fraud): '[D]ue to limited resources for the City of London Police, it has not been possible to bring any prosecutions in any of these cases'.

<sup>59</sup> Eg, *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1.

<sup>60</sup> Eg, *Ramzan v Brookwide Ltd* [2011] EWCA Civ 985.

<sup>61</sup> Eg, *Guppys (Bridport) Ltd v Brookling* (1984) 14 HLR 1 (CA).

<sup>62</sup> Eg, *Warner v Clark* (CA, 29 July 1983).

<sup>63</sup> Eg, *AT v Dulghieru* [2009] EWHC 225 (QB).

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*

<sup>66</sup> Eg, *Reid v Andreou* [1987] CLY 2250 (Edmonton County Court).

<sup>67</sup> Eg, *2 Travel Group plc v Cardiff City Transport Services Ltd* [2012] CAT 19, [2012] Comp AR 211.

<sup>68</sup> Eg, *Hassan v Cooper* [2015] EWHC 540 (QB), [2015] RTR 26.

<sup>69</sup> Eg, *John* (n 47).

<sup>70</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 controversial. According to Lewison LJ, the remedy is 'sui generis': *Phonographic Performance Ltd v Ellis* [2018] EWCA Civ 2812, [2019] Bus LR 542 [36]. For a summary of the debate on the proper classification of 'additional damages', see Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th edn, OUP 2019) 367–368.

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awarded against members of the press who have not agreed to be regulated by an approved independent press regulator and have shown an outrageous disregard for a claimant's rights.<sup>71</sup> Since the passage of the Act, there has been only one approved regulator with a relatively small number of members.<sup>72</sup> The most recent statute authorising punitive damages awards is section 51(10) of the High Speed Rail (London-West Midlands) Act 2017 providing that the remedy can be granted for breach of certain environmental covenants. To the best of my knowledge, there has never been an award (or even a claim) for punitive under any of these three statutes.

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<sup>71</sup> For further analysis of the relevant provisions, see Normann Witzleb, 'Exemplary Damages for Invasions of Privacy' (2014) 6 JML 69, 81; Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 763–764.

<sup>72</sup> According to the regulator's latest annual report a total of 80 publishers were regulated by IMPRESS on 31 March 2020: The Independent Monitor for the Press (IMPRESS), *Annual Report 2019–20* p 27 <<https://www.impress.press/downloads/file/impress-annual-report-2019-20.pdf>> accessed 30 July 2021.

## 2.2 OTHER RESTRICTIONS

Even if a case falls within one of the above categories, punitive damages will not automatically be awarded.<sup>73</sup> There are several additional rules limiting the availability of the remedy. In any event, the award of punitive damages is discretionary in the sense that even if all requirements are satisfied, the court can still refuse to grant them.<sup>74</sup>

### 2.2.1 The ‘cause of action test’

It is important to address this restriction even though it no longer applies following the decision in *Kuddus v CC Leicestershire Constabulary*.<sup>75</sup> This is because the thesis examines the entire period of the modern English law of punitive damages which starts in 1964 with the decision in *Rookes*.

In 1993, the Court of Appeal established the ‘cause of action test’<sup>76</sup> (also known as ‘pre-1964 test’) which restricted the scope of punitive damages even further than Lord Devlin’s ‘categories test’. According to this test, punitive damages could be awarded only in causes of action for which they had been available prior to 1964, when *Rookes* was decided. As a result, punitive damages were unavailable for wrongs such as negligence,<sup>77</sup>

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<sup>73</sup> *Broome* (n 1) 1081–82 (Lord Hailsham LC): ‘[T]he mere fact that the case falls within the categories does not of itself entitle the jury to award damages purely exemplary in character.’

<sup>74</sup> *ibid* 1060 (Lord Hailsham LC): ‘the award of a punitive element in damages, if it is ever permissible, must ... remain discretionary’.

<sup>75</sup> (n 14).

<sup>76</sup> *AB* (n 30) relying on obiter dicta by Lord Diplock in *Broome* (n 1) 1131. Traces of the ‘cause of action test’ existed even before it was officially adopted by the Court of Appeal in *AB*: eg, *Catnic Components v Hill & Smith Ltd* [1983] FSR 512 (Ch) 541 (Falconer J): ‘the claim to exemplary damages is not open to the plaintiffs in the absence of any authority that exemplary damages had been awarded for infringement of patent prior to the decision in *Rookes v Barnard*’; *Datasolve Ltd v Butterworth (Eurolex) Ltd* (QBD, 19 March 1990) p 13 (inducing breach of contract).

<sup>77</sup> *AB* (n 30).

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public nuisance,<sup>78</sup> misfeasance in public office,<sup>79</sup> discrimination<sup>80</sup> and deceit.<sup>81</sup> Following this, and in the face of great disagreement about how the law of punitive damages should be properly understood and developed, the Law Commission started a consultation process and, in 1997, published its Report on *Aggravated, Exemplary and Restitutionary Damages*.<sup>82</sup> The Law Commission's central recommendations were that the 'categories test' and the 'cause of action test' should be abolished and that punitive damages should be available for any wrong (except for breach of contract) where the defendant deliberately and outrageously disregarded the claimant's rights.<sup>83</sup> In 1999, the government announced that it did not intend to implement the Law Commission's proposals and that the development of the law should be left in the hands of the courts.<sup>84</sup> In 2001, the opportunity was taken up by the House of Lords which unanimously abolished the 'cause of action test' in *Kuddus*.<sup>85</sup> Echoing the author of the fifteenth edition of *Winfield and Jolowicz on Tort* Lord Scott remarked that the test "commit[ted] the law to an irrational position in which the result depend[ed] not on principle but upon the accidents of litigation" and 'encourage[d] a tedious trawl through ancient authority'.<sup>86</sup>

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<sup>78</sup> *ibid.*

<sup>79</sup> *Thomas v Secretary of State for the Home Office* [2000] Prison LR 188 (QBD) [23].

<sup>80</sup> *Deane v Ealing LBC* [1993] ICR 329 (EAT) 335.

<sup>81</sup> *Broome* (n 1) 1045 (Lord Hailsham LC): 'There is no reported case where an action for deceit was made a subject of exemplary damages ...'.

<sup>82</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997).

<sup>83</sup> *ibid* 107–121.

<sup>84</sup> HC Deb 9 November 1999, vol 337, col 502.

<sup>85</sup> (n 14).

<sup>86</sup> *ibid* [117].

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Despite the formal abolition of the ‘cause of action test’ punitive damages remain unavailable for certain causes of action today.<sup>87</sup> For example, the remedy cannot be awarded for breaches of the Human Rights Act 1998.<sup>88</sup> It has also been repeatedly held that an action for breach of contract cannot yield punitive damages<sup>89</sup> although the recent statutory authorisation of the remedy for breach of certain environmental covenants<sup>90</sup> casts doubt on this absolute prohibition. Similarly, English courts have held that punitive damages cannot be awarded for equitable wrongs<sup>91</sup> but, again, the recent statutory authorisation of punitive damages awards in certain claims for breach of confidence<sup>92</sup> calls this prohibition into question. Punitive damages are also unavailable in competition proceedings relating to loss suffered on or after 9 March 2017 as a result of an infringement of competition law that takes place on or after that date.<sup>93</sup>

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<sup>87</sup> For detailed discussion, see chapter 9.

<sup>88</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]; *X v West Sussex County Council* (Brighton Family Court, 23 February 2016) [60]. See, also, Andrew Burrows, ‘Damages and Rights’ in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart 2011) 293.

<sup>89</sup> Eg, *Perera v Vandiyar* [1953] 1 WLR 672 (CA) 676–677.

<sup>90</sup> See chapter 2.1.3. For arguments in support of the availability of punitive damages in contract, see, eg, Nicholas McBride, ‘A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract’ (1995) 24 Anglo-Am LR 369. See, also, chapter 9.5.2.

<sup>91</sup> *Perotti v Garrett* (CA, 12 June 1998) p 4 (Millett LJ): Punitive damages were unavailable for breach of fiduciary duty which is not ‘a common law claim’; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20 [190] (Eady J): ‘It is not suggested ... by [the House of Lords in *Kuddus*] that the [abolition of the ‘cause of action test’] would go so far as to embrace breach of confidence or any other equitable ... claim’.

<sup>92</sup> Crime and Courts Act 2013, ss 34 and 42(4)(c). Burrows, *Remedies* (n 70) 536 argues that after *Kuddus* there is no reason why punitive damages should not be available for equitable wrongs. See, also, chapter 9.5.1.

<sup>93</sup> Competition Act 1998, sch 8A, para 36. However, the remedy remains available in respect of infringements which occurred prior to 9 March 2017.

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Punitive damages have never been awarded for breach of an undertaking and there is no consensus about their availability in respect of this cause of action.<sup>94</sup> The same is true about actions in the tort of negligence and under the Fatal Accidents Act 1976.<sup>95</sup> Since the demise of the ‘cause of action test’<sup>96</sup> English courts have assumed that punitive damages are available in negligence<sup>97</sup> but no such award has ever been made and academic writings have sometimes rejected the proposition that such an award is possible in principle.<sup>98</sup>

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<sup>94</sup> An undertaking in damages is usually given to the court as a condition for granting interlocutory relief. On one view, damages are awarded to compensate the other party for losses suffered as a result of the wrongly issued interlocutory relief, see *Uzor v Chinye* [2004] EWHC 827 (Ch) [35]; Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 82) 119–121. On another view, an undertaking in damages can operate as a response to the litigant who acted reprehensibly in obtaining or executing the interlocutory relief, see *Digital Equipment Corporation v Darkcrest Ltd* [1984] Ch 512 (Ch) 516; *Columbia Pictures Industries* (n 33) 87. In *Al-Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB) [54] Jack J remarked 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 Lord Devlin’s second category ...’. The language of CPR PD 25A para 5.1(1) does not preclude an award of punitive damages: ‘Any order for an injunction, unless the court orders otherwise, must contain ... an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay.’ However, the issue remains controversial, see Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 82) 121; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) paras 10.193–10.194.

<sup>95</sup> *Abdullah v Yusuf* [2005] EWHC 737 (QB) [19] (Treacy J): ‘This present claim ... is brought under the Fatal Accidents Act ... [A] claim for exemplary damages cannot succeed in these present proceedings’.

<sup>96</sup> Authorities pre-dating *Kuddus* rejected the proposition that punitive damages could be awarded in a negligence claim: eg, *R v East Birmingham Health Authority* (CA, 20 June 1997) p 6 (Judge LJ): ‘professional negligence d[oes] not provide the appropriate basis for litigating [a claim for punitive damages]’. Cf *Munro v Ministry of Defence* (QBD, 21 November 1984) p 6 (Wright J): ‘I find myself constrained by authority to say that a claim for exemplary damages is not open to a plaintiff who [makes] ... a serious allegation of negligence against the defendants, leading to personal injury’.

<sup>97</sup> *Re Organ Retention Group Litigation* [2004] EWHC 644 (QB), [2005] QB 506 [263]; *Sharma v Noon Products Ltd* (QBD, 7 April 2011) [13]. Cf *Inglis v Ministry of Defence* [2019] EWHC 1153 (QB), [2020] PIQR P2 [228]: Mr Peter Marquand made ‘no additional award or uplift [for] exemplary damages’ in a hearing loss claim because he ‘was not referred to any authority for making such an uplift’ and because the conduct ‘was not sufficiently bad to justify’ such an award.

<sup>98</sup> Eg, James Edelman, *McGregor on Damages* (21st edn, Sweet & Maxwell 2021) para 13.015. Cf Michael Jones (ed), *Clerk and Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020) para 27.143; McBride and Bagshaw (n 71) 761–762.

### 2.2.2 Additional restrictions

Several additional restrictions exist upon the jurisdiction to award punitive damages.

Each restriction is discussed in turn:

#### (1) Punishment-worthy conduct

Even if the ‘categories test’ is satisfied punitive damages will not be awarded unless the court considers that the defendant’s wrongful conduct is sufficiently reprehensible to warrant a punitive response. This seems to overlap with the requirement of ‘oppressive, arbitrary or unconstitutional conduct’ in the first *Rookes* category (because these adjectives essentially denote that the defendant’s conduct must be deemed worthy of punishment) so, in practice, this condition has mostly barred claims that would normally fall under the second *Rookes* category.<sup>99</sup> There is no specific test dictating what amounts to sufficiently reprehensible conduct meriting punishment. The courts have used various terms to describe such conduct including the following: ‘high-handed’,<sup>100</sup> ‘outrageous’,<sup>101</sup> ‘monstrous’;<sup>102</sup> ‘atrocious’;<sup>103</sup> ‘wicked’;<sup>104</sup> ‘callous’;<sup>105</sup> ‘arrogant’;<sup>106</sup> ‘deplorable’;<sup>107</sup>

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<sup>99</sup> Eg, *Morton-Norwich Products Inc v Intercen Ltd (No 2)* [1981] FSR 337 (Ch) 353 (Graham J): ‘there was no ... high-handedness or anything else which ... would justify exemplary damages’; *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch) [273] (Lindsay J): ‘I do not find it possible to describe my judicial reaction to the conduct of the Hello! Defendants as one of outrage’.

<sup>100</sup> *Muuse* (n 20) [74] (Thomas LJ).

<sup>101</sup> *Kuddus* (n 14) [67] (Lord Mackay).

<sup>102</sup> *Drane* (n 55) 457 (Lord Denning MR).

<sup>103</sup> *ibid.*

<sup>104</sup> *Manson v Associated Newspapers Ltd* [1965] 1 WLR 1038 (QBD) 1043 (Widgery J).

<sup>105</sup> *ibid.*

<sup>106</sup> *Warner* (n 62) p 3 (Waller LJ).

<sup>107</sup> *Design Progression* (n 52) [146] (Smith J).

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‘disgraceful’;<sup>108</sup> ‘insolent’;<sup>109</sup> ‘cruel’;<sup>110</sup> ‘unscrupulous’;<sup>111</sup> ‘pompous’;<sup>112</sup> ‘contemptuous’;<sup>113</sup> ‘scornful’;<sup>114</sup> ‘shameful’;<sup>115</sup> ‘egregious’;<sup>116</sup> ‘exceptional’;<sup>117</sup> ‘insulting’;<sup>118</sup> ‘cynical’;<sup>119</sup> ‘flagrant’;<sup>120</sup> ‘utterly unacceptable’;<sup>121</sup> ‘appalling’;<sup>122</sup> ‘odious’<sup>123</sup> and ‘contumelious’.<sup>124</sup> These characterisations (which are not exhaustive) convey the idea that the conduct in question must represent a marked departure from ordinary standards of decent behaviour.

### (2) The ‘if but only if test’

It has also been held that punitive damages will not be awarded if other types of damages are adequate to achieve punishment and deterrence.<sup>125</sup> This is echoed in the oft-repeated statement that punitive damages are a remedy of ‘last resort’.<sup>126</sup> This has come to be

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<sup>108</sup> *Jones v Miah* (CA, 29 January 1991) p 3 (Russell LJ).

<sup>109</sup> *Pickin v CPM* (CA, 20 July 2000) [13] (Ward LJ).

<sup>110</sup> *ibid.*

<sup>111</sup> *Knight v Gormley* (NIHC, 21 March 1997) p 2 (Master Ellison).

<sup>112</sup> *Reynolds v CPM* (CA, 18 May 1992) p 4 (Waller LJ).

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> *White v CPM* (QBD, 23 April 1982) p 18 (Mars-Jones J).

<sup>116</sup> *R (Lamari) v Secretary of State for the Home Department* [2013] EWHC 3130 (QB) [85] (HHJ Cotter QC).

<sup>117</sup> *Kuddus* (n 14) [89] (Lord Hutton).

<sup>118</sup> *Thompson v CPM* [1998] QB 498 (CA) 517 (Lord Woolf MR).

<sup>119</sup> *FCS* (n 52) [25] (Flaux LJ).

<sup>120</sup> *Wamala* (n 32) [556] (Walker J).

<sup>121</sup> *ibid.*

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

<sup>123</sup> *Jennison v Baker* [1972] 2 QB 52 (CA) 66 (Edmund-Davies LJ).

<sup>124</sup> *Kuddus* (n 14) [63] (Lord Mackay).

<sup>125</sup> *Rookes* (n 1) 1228.

<sup>126</sup> *Kuddus* (n 14) [63] (Lord Nicholls). See, also, *Borders* (n 59) [42] (Rix LJ).

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known as the ‘if but only if test’, and it has been a major control mechanism on punitive damages awards as many claims have been rejected because the test was not satisfied.<sup>127</sup>

### (3) Prior punishment

The imposition of other sanctions for the conduct which constitutes the subject matter of the punitive damages claim must be taken into account in deciding whether an award is appropriate. This is in order to avoid the risk of excessive punishment. If other sanctions have been imposed this will usually lead to the dismissal of the claim for punitive damages.<sup>128</sup> The first modern decision addressing this matter was *Devonshire v Jenkins* in which Ormrod LJ found that punitive damages were inappropriate because ‘a substantial fine ha[d] been inflicted for substantially the same misconduct’.<sup>129</sup> Since then, courts have refused to award punitive damages in instances where the defendant had already been subjected to a prison sentence,<sup>130</sup> a fine,<sup>131</sup> or disciplinary proceedings.<sup>132</sup> However,

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<sup>127</sup> Eg, *McVeigh v CC Royal Ulster Constabulary* (NIHC, 26 February 1988) p 8; *Brenyah v CPM* (QBD, 15 June 1989) p 11; *Toye v CC Royal Ulster Constable* (NIHC, 20 May 1991) p 7; *The Upjohn Co v Oswald* (QBD, 27 May 1994) p 213; *Intercapital Debt Trading Ltd v Fitzgerald* (QBD, 17 May 1997) p 58; *Copeland v Ministry of Defence* (QBD, 19 May 1999) p 10; *Mohidin v CPM* [2015] EWHC 740 (QB) [387]; *Quinn v Ministry of Defence* [2018] NIQB 82 [77]; *Tuke v Hood* [2020] EWHC 2843 (Comm) [193].

<sup>128</sup> Eg, *Asda Stores v Croke* [2000] CLY 1493 (Brighton County Court) 1493 (Merrick J) (no punitive damages where the defendant’s conduct ‘had been dealt with ... by the criminal courts’). It has been suggested that an acquittal by a criminal court should also bar the award of punitive damages: *W v W* [1999] 4 LRC 260 (PC) 266.

<sup>129</sup> (CA, 28 April 1978) p 9. The fine was £8,799 in today’s terms. Values have been adjusted for inflation by using this online inflation calculator tool: <<https://www.officialdata.org/UK-inflation>> accessed 30 July 2021.

<sup>130</sup> Eg, *Archer* (n 52) 426; *Axa Insurance UK plc v Thwaites* (Norwich County Court, 8 February 2008) [12].

<sup>131</sup> Eg, *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637 [52].

<sup>132</sup> Eg, *KD v CC Hampshire* [2005] EWHC 2550 (QB), [2005] Po LR 253 [193]. Cf *Makanjuola* (n 22) (Henry J): ‘I do not regard the principle [of excessive punishment] ... as applying to disciplinary proceedings alone. I do not regard the fact that there have been disciplinary proceedings as rendering the award of exemplary damages either unfair or pointless.’

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the infliction of other sanctions for the same wrong will not automatically preclude an award of punitive damages. Rather, it is a factor to consider in deciding whether an award should be made. This is because the goals of punishment and deterrence may not have been fully met where the prior sanction is not substantial.<sup>133</sup> This position is further reinforced by section 35(2) of the Crime and Courts Act 2013 which provides that '[t]he 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>134</sup>

In recent years there has been confusion about the proper application of the prior punishment rule and courts have awarded punitive damages against defendants who had been subjected to heavy sanctions by the criminal law. In *AT v Dulghieru*<sup>135</sup> punitive damages were awarded even though the defendants had been sentenced to long terms of imprisonment. And more recently, in *FCS*<sup>136</sup> the Court of Appeal awarded punitive damages against a defendant who had been sentenced to three years and eight months' imprisonment. Flaux LJ surprisingly said that 'it [wa]s nothing to the point that criminal proceedings ... were brought against the [defendant]'.<sup>137</sup> Both decisions have been subjected to criticism for failing to consider properly the problem of prior punishment.<sup>138</sup>

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<sup>133</sup> Thus, punitive damages were awarded in *Jensen* (n 56) [7] where according to Mr Recorder Lochrane 'the imposition of a caution on the defendant's record d[id] not amount to punishment of any significant nature at all'.

<sup>134</sup> Emphasis added.

<sup>135</sup> (n 63).

<sup>136</sup> (n 52).

<sup>137</sup> *ibid* [33].

<sup>138</sup> McBride and Bagshaw (n 71) 764–765 (criticism of *AT*); Eleni Katsampouka, 'Exemplary Damages and Insurance Fraud' (2019) 135 LQR 380, 382 (criticism of *FCS*).

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### (4) Who can sue?

Even if the above conditions are satisfied the claimant will not be entitled to punitive damages unless (s)he can prove that (s)he was the victim of the punishable behaviour.<sup>139</sup>

This means that when the defendant's conduct constitutes a wrong against the claimant and against a third party, the claimant can only recover punitive damages if the conduct towards him/her (and not only against the third party) constitutes the punishment-worthy behaviour. The purpose of this is to avoid windfalls to unvictimized claimants by ensuring that only a victim of punishment-worthy conduct will be favoured by the award.

Another restriction is that punitive damages cannot be claimed for the benefit of the estate of a deceased person.<sup>140</sup> This means that only a victim who is alive at the time of the trial can recover punitive damages.

Finally, Lord Dyson said in *Lumba* that 'where ... there is potentially a large number of claimants and they are not all before the court, it is not appropriate to make an award of exemplary damages'.<sup>141</sup> Thus, the existence of a large number of claimants will usually mean that punitive damages will be withheld. Such claims are barred because of the difficulties they raise as regards the quantification and apportionment of punitive damages at different times for different claimants. Relatedly, punitive damages are

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<sup>139</sup> *Rookes* (n 1) 1227. See, also, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 82) 65.

<sup>140</sup> Law Reform (Miscellaneous Provisions) Act 1934, s 1(2)(a)(i). For illustrations, see *Wise v Swami* (QBD, 21 March 1983) p 4; *R (Deptka) v Secretary of State for the Home Department* [2019] EWHC 503 (Admin) [13].

<sup>141</sup> *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 [167]. See, also, *AB* (n 30) 527, 531; *Devenish Nutrition* (n 131) [68]; *Quinn* (n 127) [70]–[71]; *Holownia v Secretary of State for the Home Department* [2019] EWHC 794 (Admin), [2019] ACD 59 [77].

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expressly prohibited in collective proceedings for competition law infringements, even where they might otherwise be available in individual claims.<sup>142</sup>

### (5) Who can be sued?

Another limitation operates where there are multiple defendants sued in joint proceedings. In this scenario, punitive damages can only be awarded if all defendants are guilty of punishment-worthy conduct. In other words, if a claimant sues several defendants who are jointly liable for the same wrong, punitive damages cannot be awarded unless there is a need for punishment in relation to each and every one of these defendants.<sup>143</sup>

In contrast with the rule about deceased victims, the defendant's death will not bar a claim for punitive damages.<sup>144</sup> Although it is possible to award punitive damages against the estate of a deceased wrongdoer, to the best of my knowledge, no reported case exists in which an award was made in such circumstances.

A claim can also be brought against a defendant who is only vicariously liable for the wrong committed. This has been the practice of English courts in virtually all of the cases falling within the first *Rookes* category.<sup>145</sup> Even though the appropriateness of punishing an 'innocent' wrongdoer has been doubted,<sup>146</sup> in 2006 the Court of Appeal

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<sup>142</sup> Competition Act 1998, s 47C(1); Consumer Rights Act 2015 sch 8, Pt 1, para 6.

<sup>143</sup> *Broome* (n 1) 1090.

<sup>144</sup> Law Reform (Miscellaneous Provisions) Act 1934, s 1(1) (defamation claims are an exception to this rule).

<sup>145</sup> See the text to n 22.

<sup>146</sup> Eg, *Kuddus* (n 14) [95]–[139] (Lord Scott).

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decided authoritatively in favour of vicarious liability for punitive damages.<sup>147</sup> As for insurers, they too can, in principle, be liable to pay punitive damages provided that the insurance contract covers liability for such an award.<sup>148</sup>

### (6) Provocation

The claimant's own reprehensible conduct may also prevent punitive damages from being granted.<sup>149</sup> This principle applies only if the claimant's reprehensible conduct is related to the event that triggers the punitive damages award.<sup>150</sup> For example, in *O'Connor v Hewitson* 'an arrogant, noisy, drunken [and] aggressive' claimant was disentitled to punitive damages where he had 'sorely provoked' a police officer who in return struck one blow in his face.<sup>151</sup> By contrast, in *McMillan v Singh* the fact that the claimant was in arrears with his rent was not considered to be provocative conduct barring an award of punitive damages.<sup>152</sup>

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<sup>147</sup> *Rowlands v CC Merseyside Police* [2006] EWCA Civ 1773, [2007] 1 WLR 1065 [35]–[49].

<sup>148</sup> *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897 (CA) 909–911.

<sup>149</sup> *Lane v Holloway* [1968] 1 QB 379 (CA) 381 (Salmon LJ): '[P]rovocation by a plaintiff ... is relevant to the question of whether or not exemplary damages should be awarded ...'.

<sup>150</sup> *Adams v CC Royal Ulster Constabulary* (QBD, 18 February 1998) p 23 (Kerr J): 'It does not appear to me ... that reprehensible conduct on the part of the plaintiff which is unrelated to and does not provoke the assault will mitigate the award of exemplary damages'.

<sup>151</sup> (CA, 6 October 1978) p 24 (Megaw LJ). See, also, *Allen v CPM* (QBD, 25 March 1980) p 9 (punitive damages were ruled out where the claimant was resisting arrest); *Clark v CC Cleveland* [2000] CP Rep 22 (CA) [19] (Roch LJ): '[the claimant] had behaved improperly both by urging his dogs to attack the police and by attempting to punch one of the police officers.'; *McAleer v CC PSNI* [2014] NIQB 53 [8]–[9], [35] (Gillen J) (claimant not entitled to punitive damages for being struck by a police baton after joining a hostile crowd subjecting officers to 'vile abuse'); *Russell v Home Office* [2001] Po LR 29 (QBD) [204]–[206] (no punitive damages where the claimants had injured a police officer in an attempted escape from prison).

<sup>152</sup> (n 53) 124. See, also, *Adams* (n 150) p 23 (punitive damages awarded to a claimant who was apprehended and later convicted for planning a terrorist attack; although the claimant did not resist to his arrest, the police officers subjected him to a series of assaults after they had apprehended him).

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### (7) A requirement to suffer loss?

A question arises as to whether punitive damages can be awarded without any compensatory damages in cases where the claimant did not suffer a loss from the defendant's wrong. Lord Bingham suggested in *Watkins*<sup>153</sup> that in the absence of loss a court should refrain from awarding punitive damages. By contrast, in *Cumber v CC Hampshire*<sup>154</sup> Nourse LJ was willing to leave the door open to this possibility even though he considered it to be very remote. He observed that 'it must be extremely rare, if not unique ... to make an award of exemplary damages and not to couple it with an award of compensatory damages as well'.<sup>155</sup> It is also noteworthy that section 51(11) of the High Speed Rail (London – West Midlands) Act 2017 provides that punitive damages may be awarded 'whether or not another remedy is granted' which also suggests that there is no requirement of suffering a loss before punitive damages can be awarded. There have been at least two instances in which punitive damages were granted by an English court without any compensatory damages.<sup>156</sup> It thus follows that a court can, in principle, award punitive damages alone<sup>157</sup> although such cases will be rare in practice.

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<sup>153</sup> (n 88) [26]: 'I would not ... develop the law of tort to make it an instrument of punishment in cases where there is no material damage for which to compensate.'

<sup>154</sup> (CA, 23 January 1995).

<sup>155</sup> *ibid*, p 8.

<sup>156</sup> *Derbyshire* (n 23); *Akhtar v Ball* (Walsall County Court, 10 July 2015).

<sup>157</sup> This would apply only to claims for wrongs actionable per se.

### 2.3 QUANTIFICATION

There are well-accepted principles governing the quantification of punitive damages awards. First, as Lord Devlin emphasised in *Rookes v Barnard*, the assessment of punitive damages should be based on the principle of moderation<sup>158</sup> which dictates that the sum awarded must always be the minimum required to achieve punishment and deterrence.

Second, the defendant's wealth is relevant to the exercise of quantification.<sup>159</sup> This is because in order to punish and deter effectively, the penalty imposed needs to be felt by the wrongdoer and this is possible only if his or her means are taken into account.<sup>160</sup> Thus, in *Hassan v Cooper*,<sup>161</sup> a case involving a dishonestly exaggerated insurance claim for damages arising out of a road traffic accident, £60,000<sup>162</sup> were awarded as punitive damages against the claims management company which had promoted and supported the claim and a much smaller punitive award of £7,250<sup>163</sup> was

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<sup>158</sup> *Rookes* (n 1) 1127–28.

<sup>159</sup> *ibid.* See, also, *Thompson* (n 118) 517: when the defendant is vicariously liable for punitive damages the court will not take into account the financial situation of the primary wrongdoer which may only become relevant in contribution proceedings under the Civil Liability (Contribution) Act 1978.

<sup>160</sup> In *John* (n 47) 596, the claimant's counsel noted that '[i]n the case of a big corporation, exemplary damages must be substantial' and Sir Thomas Bingham MR took into account that the defendant was 'a national newspaper with a circulation running into millions' (at 625). See, also, *Francis v Brown* (1998) 30 HLR 143 (CA) 152 (Simon Brown LJ): A punitive damages award of £40,000 (£78,334 in 2021) was quashed because, *inter alia*, 'it took no account of the defendant's means'.

<sup>161</sup> (n 68) [80]–[92].

<sup>162</sup> £67,759 in 2021.

<sup>163</sup> £8,188 in 2021.

## THE ENGLISH LAW OF PUNITIVE DAMAGES

ordered against Mrs Cooper, who had initially brought the dishonestly exaggerated claim and whose financial situation was fragile.<sup>164</sup>

Third, the gravity of the wrong also affects the assessment of punitive damages. Thus, Widgery J noted in *Manson v Associated Newspapers Ltd* that the jury must award a sum which ‘represent[s] a fair punishment for the offence which they [a]re seeking to mark’.<sup>165</sup> Courts have repeatedly affirmed that instances of more serious wrongdoing tend to justify higher punitive damages awards.<sup>166</sup>

Fourth, when multiple claimants are awarded punitive damages in proceedings issued against a single defendant, the court must determine a single amount which is then split equally between the successful claimants.<sup>167</sup> Parker LJ explained this rule on the basis that ‘where there are multiple plaintiffs, the exemplary element has got to be distributed somehow, and since in the case of each plaintiff whatever he gets is a windfall, equal distribution is the simple and reasonable way to deal with the matter’.<sup>168</sup>

Fifth, according to *Broome v Cassell & Co Ltd*, when punitive damages are sought against multiple defendants the amount awarded must be limited to what is

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<sup>164</sup> *Hassan* (n 68) [88]: Butler J emphasised that ‘on a consideration of the claimant’s means, it was clear that she had the ability to pay’ that sum.

<sup>165</sup> (n 104) 1046.

<sup>166</sup> *Thompson* (n 118) 517 (Lord Woolf MR): ‘the conduct must be particularly deserving of condemnation for an award of as much as £25,000 (£46,350 in 2021) to be justified’; *Jensen* (n 56) [10] (Recorder Lochrane): ‘accepting that this is conduct of a relatively severe kind ... a more appropriate figure would be an additional 50 per cent (of the amount of compensatory damages)’; *Ramzan* (n 60) [77], [82] (Arden LJ): ‘[T]he sum of [punitive damages] must be ... proportionate ... I bear in mind that ... the judge’s judgment expresses criticisms of [the defendant’s] conduct in very strong terms’.

<sup>167</sup> *Riches* (n 48) 261, 289. There is one case predating *Riches* in which the High Court apportioned a different amount of punitive damages to each claimant: *Devonshire* (n 129).

<sup>168</sup> *Riches* (n 48) 289.

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necessary to punish the defendant who is the least blameworthy for the tort.<sup>169</sup> This rule, which was criticised in *Mehta v RBS plc*,<sup>170</sup> does not allow the court to tailor the amount of punitive damages in order to achieve either deterrence based on each defendant's individual circumstances or retribution based on the gravity of each defendant's wrong. In subsequent cases, a slow shift away from the rule established in *Broome* has been observed. The courts sometimes opted for a several liability rule instead.<sup>171</sup> Similarly, section 38(1) of the Crime and Courts Act 2013 establishes several liability for punitive damages in relation to claims against media defendants.

Sixth, if the court takes the view that the claimant provoked the defendant this is another factor to be considered in deciding the appropriate amount of punitive damages. In other words, if the claimant's provocative conduct does not result in the dismissal of the punitive damages claim<sup>172</sup> it will most likely lead to the reduction of the sum awarded as punitive damages.<sup>173</sup> The reason for this is that the claimant's provocation may diminish the impropriety of the defendant's reaction and thus the court's assessment of whether, and to what extent, the defendant deserves to be punished.<sup>174</sup>

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<sup>169</sup> *Broome* (n 1) 1063.

<sup>170</sup> (n 58) 67 (Mr Richard Southwell QC): 'I respectfully observe that the Commonwealth jurisdictions which take a different approach, and make separate awards of exemplary damages (if appropriate, of different amounts) against each tortfeasor, have adopted a wiser course, and one more consonant with the principles underlying awards of exemplary damages'.

<sup>171</sup> Eg, *Ramdath* (n 55) 274; *Hassan* (n 68) [80]–[92].

<sup>172</sup> See the text to nn 149–152.

<sup>173</sup> *Lane* (n 149) 39; *Holden* (n 24) 388; *Bishop v CPM* (CA, 29 November 1989) p 7 (Glidewell LJ): 'the [court is] entitled to take into account the conduct of the plaintiff. If they take the view that it provoked the defendant, ... it is a relevant factor to be taken into account ... in deciding how much damages the plaintiff should receive, in order to punish the defendant for his conduct.'

<sup>174</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 82) 81.

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Seventh, the courts have laid down guidelines for the quantification of punitive damages in specific types of cases. For example, in *Thompson v CPM* the Court of Appeal provided the following guidance for police misconduct actions:

Where exemplary damages are appropriate they are unlikely to be less than £5,000.<sup>175</sup> Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action, the conduct must be particularly deserving of condemnation for an award of as much as £25,000<sup>176</sup> to be justified and the figure of £50,000<sup>177</sup> should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.<sup>178</sup>

English courts have followed the Court of Appeal's instructions in this area.<sup>179</sup> Similarly, in the field of insurance fraud it is common for the court to calculate the quantum of punitive damages by reference to the amount that the defendant sought to obtain by his or her fraud.<sup>180</sup>

Finally, a question arises as to whether the quantum of punitive damages must bear a proportionate relationship with the quantum of compensatory damages. In *Riches*

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<sup>175</sup> £9,270 in 2021.

<sup>176</sup> £46,350 in 2021.

<sup>177</sup> £92,701 in 2021.

<sup>178</sup> (n 118) 517 (Lord Woolf MR).

<sup>179</sup> For instances of English courts applying the *Thompson* guidelines see, eg, *Hill v CPM* (CA, 4 November 1998) p 9; *Watson v CC Cleveland* [2001] EWCA Civ 1547, [2001] Po LR 359 [54]. To the best of my knowledge, in the post-*Thompson* era, there has been no police misconduct case in punitive damages were awarded in excess of these brackets.

<sup>180</sup> Eg, *Jensen* (n 56) [10] (50 per cent of the profit was awarded as punitive damages); *Axa Insurance UK plc v Shaikh* (Birmingham County Court, 9 February 2010) [7] (50 per cent of the attempted profit was awarded as punitive damages); *Vasile v Pop Loan* (Willesden County Court, 17 November 2015) [4] (punitive estimated at approximately one third of the attempted fraud). In *Axa Insurance UK plc v Thwaites* (n 130) [9] Darroch HHJ cited further unreported county court cases in which 'one third of the attempted fraud' was awarded as punitive damages.

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Parker LJ concluded that the jury's punitive damages award of '£250,000<sup>181</sup> for the infliction of £3,000<sup>182</sup> of injury on the plaintiffs'<sup>183</sup> could not be justified because, among other reasons, it was '83 times the amount of the compensatory award'.<sup>184</sup> In *Thompson*, Lord Woolf MR said that 'it will be unusual for the exemplary damages to produce a result of more than three times the basic damages being awarded'.<sup>185</sup> Following this, in *Watson v CC Cleveland*, Chadwick LJ reduced an award of punitive damage which was 'four times the amount of the basic compensatory damages'.<sup>186</sup> These statements suggest that courts have, sometimes, found the quantum of compensatory damages as a useful comparator in determining the appropriate sum of punitive damages<sup>187</sup> but there is no prescribed ratio between punitive and compensatory damages that must strictly be adhered to.<sup>188</sup>

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<sup>181</sup> £818,578 in 2021.

<sup>182</sup> £9,823 in 2021.

<sup>183</sup> *Riches* (n 48) 284.

<sup>184</sup> *ibid* 282.

<sup>185</sup> *Thompson* (n 118) 518.

<sup>186</sup> (n 179) [48].

<sup>187</sup> In any event, the quantum of compensatory damages is relevant in light of the 'if but only if test' which dictates that punitive damages should only be awarded to the extent that other remedies are inadequate to achieve the goals of punishment and deterrence, see the text to nn 125–127.

<sup>188</sup> Such a rule exists in the US, see *Exxon Shipping Co v Baker* 554 US 471 (2008) (the Supreme Court held that in the general maritime law, punitive damages cannot exceed a 1:1 ratio with compensatory damages).

## 2.4 PROCEDURAL ISSUES

As of 26 April 1999 (when the CPR came into force) punitive damages must be specifically pleaded.<sup>189</sup> The court cannot make such an award on its own motion. The pre-CPR regime was similar. Although there was no need specifically to plead punitive damages in claims heard by county courts, it was still required to plead the facts disclosing the punishment-worthy conduct.<sup>190</sup>

The claimant must also prove that the requirements for making a punitive damages award are satisfied.<sup>191</sup> As for the standard of proof applicable to claims for punitive damages this is the ordinary standard applied in all civil cases (ie, the balance of probabilities). It has been suggested that a higher evidentiary threshold must be met before punitive damages can be awarded.<sup>192</sup> In *John v MGN Ltd* the Court of Appeal expressly rejected this proposition although, at the same time, it highlighted that '[a]n inference of reprehensible conduct ... should not be lightly drawn'<sup>193</sup> and that '[where] the charge is grave ... the proof should be clear'.<sup>194</sup>

In relation to the mode of trial, most claims for punitive damages have been decided by judges without a jury. The availability of trial by jury in civil cases has been

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<sup>189</sup> CPR 16.4(1)(c).

<sup>190</sup> Rules of the Supreme Court 1965 (SI 1965/1776) Ord 18, para 8(3). See, also, *Drane* (n 55) 458–459; *McMillan* (n 53) 120.

<sup>191</sup> *Broome* (n 1) 1081 (Lord Hailsham LC): 'the burden of proof rests on the plaintiff to establish the facts necessary [for an award]'.  
<sup>192</sup> *Mafo v Adams* [1970] 1 QB 548 (CA) 556 (Sachs LJ): 'In cases where exemplary damages are being claimed, the court must be careful to see that the case for punishment is as well established as in other penal proceedings'.

<sup>193</sup> (n 47) 619 (Sir Thomas Bingham LJ).

<sup>194</sup> *ibid.* See, also, *Treadaway v CC West Midlands Police* (QBD, 25 October 1994) (McKinnon J) p 31: 'I am satisfied to a high degree of probability ... that the Plaintiff was assaulted ... by five police officers ...'.

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restricted severely over the last years.<sup>195</sup> However, it is still possible for claims in false imprisonment and malicious prosecution as well as claims involving a charge of fraud to be determined in a judge and jury trial.<sup>196</sup>

Finally, if the court grants punitive damages, these must be paid to the claimant. The court cannot order that they be paid to a third party or the state. Thus, in *Riches* when the jury asked if they could give the punitive damages to a charity (rather than the claimants), the judge answered in the negative.<sup>197</sup>

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<sup>195</sup> Eg, Crime and Courts Act 2013, s 34(8).

<sup>196</sup> Senior Courts Act 1981, s 69(1); County Courts Act 1984, s 66(3). See, eg, *Copeland* (n 18).

<sup>197</sup> *Riches* (n 48) 279.

## CHAPTER 3: THE NORMATIVE UNDERPINNINGS OF PUNITIVE DAMAGES

### 3.1 INTRODUCTION

This chapter discusses the normative underpinnings of punitive damages. Odd as it may seem, English courts have been awarding punitive damages for over 250 years but they have never squarely addressed the justifications for their award in any detail. Judges often contend that the object of punitive damages is ‘to punish and deter’<sup>1</sup> but this statement is enigmatic because, as Posner notes, ‘deterrence is a goal of punishment, rather than, as the formulation implies, a parallel goal, along with punishment itself, for imposing the specific form of punishment that is punitive damages’.<sup>2</sup> The task of ascertaining the rationales for punitive damages is difficult not only because the courts do not usually explain in sufficient detail why they make such awards but also because there is significant imprecision about the meaning of concepts such as ‘punishment’ and ‘deterrence’ in discussions about punitive damages. Thus, I begin my analysis in section 2 by examining the different meanings of these terms.

In section 3, I explore the justifications for punitive damages. The principal justifications identified by the courts and commentators are: (1) retribution; (2) deterrence; (3) appeasement of the victim’s desire for revenge; (4) reparation (corrective justice or vindication of rights); and (5) denunciation. My goal is to explain briefly the meaning of each of these concepts, to consider the extent to which each

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<sup>1</sup> *Rookes v Barnard* [1964] AC 1129 (HL) 1221 (Lord Devlin); *Kuddus v CC Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 [50] (Lord Nicholls).

<sup>2</sup> *Kemezy v Peters*, 79 F.3d 33 (1996) (7th Cir) 34 (Posner CJ).

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justification has been endorsed by the courts and to assess the degree to which each is consistent with the rules on punitive damages.

In section 4, I conclude that because punitive damages seek to effect various goals simultaneously, a common feature of all justifications is that there is a mismatch with the rules governing their award. Thus, the law of punitive damages does not conform entirely with any of the justifications. However, this is not necessarily a weakness.<sup>3</sup> The retention of a multifunctional doctrine is valuable because, despite its inevitable inconsistencies, it enables the courts to serve the many different purposes that private law pursues<sup>4</sup> and because it provides multiple justificatory bases for the imposition of punishment in order to outweigh its onerousness for those on whom it is inflicted.

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<sup>3</sup> Cf Ernest Weinrib, *The Idea of Private Law* (OUP 2012) 40–42 (arguing that pursuing multiple goals which are mutually frustrating leads to incoherence).

<sup>4</sup> Cf *ibid* 5–11 (rejecting a functionalist understanding of private law).

### 3.2 TERMINOLOGY

It is commonly claimed that punitive damages can be justified on the basis of ‘punishment’<sup>5</sup> and ‘deterrence’.<sup>6</sup> However, judges and academics have attributed different meanings to these concepts. This section explores the different senses in which these words are used.

#### 3.2.1 Punishment

Judges have invariably used the term ‘punishment’ without clarifying its meaning.<sup>7</sup> For example, it is often stated that punitive damages are ‘awarded ... in cases in which the defendant’s conduct was such as to merit punishment’<sup>8</sup> and that ‘the object of [punitive] damages is to punish ...’.<sup>9</sup> It is ambiguous what the term ‘punishment’ means in this context. Stevens observes that ‘[p]unishment can be justified on a number of possible grounds [and s]tating that punitive damages are made in order to punish does not necessarily tell us which of these possible goals is being pursued’.<sup>10</sup>

The term ‘punishment’ is sometimes used to describe simply a judicial act pursuing *any* punitive goal (eg, retribution or deterrence). The statement by Lord Devlin in *Rookes v Barnard* that ‘in cases where the damages are at large ... it is not at all easy

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<sup>5</sup> *Rookes* (n 1) 1221 (Lord Devlin). See, also, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 99.

<sup>6</sup> *Kuddus* (n 1) [108] (Lord Scott). See, also, Law Commission (n 5) 94.

<sup>7</sup> For detailed discussion of the different meanings of ‘punishment’, see Kit Barker, ‘Private Law and Punishment: No Such Thing (Any More)’ in Elise Bant and others (eds), *Punishment and Private Law* (Hart 2021) 41–43.

<sup>8</sup> *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) 1128 (Lord Diplock).

<sup>9</sup> *Rookes* (n 1) 1221 (Lord Devlin).

<sup>10</sup> Robert Stevens, *Torts and Rights* (OUP 2007) 85.

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to say whether the idea of compensation or the idea of punishment has prevailed'<sup>11</sup> is probably an illustration of this. However, on other occasions the word 'punishment' denotes a very particular punitive goal, namely retribution. For example, Lord Devlin said in *Rookes v Barnard* that 'the object of [punitive] damages is to punish and deter'.<sup>12</sup> And Lord Nicholls in *Ramanoop* referred to 'punishment in the strict sense of retribution'<sup>13</sup> as an object of punitive damages. It is evident from these quotes that, when used in this sense, the term 'punishment' refers to *a specific punitive rationale* and not to a punitive judicial act which could be based on *many different punitive rationales*.

It follows that when 'punishment' is referred to *as a specific goal* of punitive damages, the term can be synonymous with retribution.<sup>14</sup> Punishment as a goal of punitive damages is often contrasted with other punitive goals such as deterrence and denunciation. For example, in the course of oral argument in *A v Bottrill* it was said that '[p]unishment is not the sole rationale of [punitive] damages. Other rationales [include] deterrence, vindication, condemnation and education ...'.<sup>15</sup> This also reinforces the conclusion that 'punishment' as a specific goal of punitive damages is the same thing as

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<sup>11</sup> *Rookes* (n 1) 1221. See, also, *ibid* 1227 (Lord Devlin): '[Punitive damages constitute] a punishment imposed without the safeguard [of] the criminal law ...'; *Mehta v RBS plc* (2000) 32 HLR 45 (QBD) 64 (Southwell J): '[Punitive damages] are to be awarded ... as punishment [rather than] compensation'.

<sup>12</sup> *Rookes* (n 1) 1221.

<sup>13</sup> *A-G of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, [2006] 1 AC 328 [19].

<sup>14</sup> See, also, Thomas Colby, 'Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs' (2003) 87 Minnesota LR 583, 609 fn 86: 'Most courts refer to the twin purposes of punitive damages as "punishment" and "deterrence", rather than "retribution" and "deterrence".'

<sup>15</sup> *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449, 451 (counsel's argument). See, also, *Kuddus* (n 1) [51].

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‘retribution’.<sup>16</sup> It is submitted that it would be better, for the sake of clarity, if judges stopped using the word ‘punishment’ and, instead, used more precise language (ie, ‘retribution’) when they refer to the justifications for punitive damages.

### 3.2.2 Deterrence

At first sight, ‘deterrence’ may appear to be a more straightforward concept than ‘punishment’. However, when one looks at the case law and the relevant academic literature it becomes clear that judges and commentators have different things in mind when they refer to ‘deterrence’ as a goal of punitive damages.<sup>17</sup>

Law-and-economics scholars commonly contend that punitive damages should be awarded in order to achieve optimal deterrence. Richard Posner’s analysis illustrates this school of thought. In his *Economic Analysis of Law* Posner contends that ‘we want to make the [wrongdoer], in deciding whether to commit the wrong, to compare the gain to him with the loss to everyone hurt by the wrongdoing. To make him do that we have to set damages equal to the total ... costs of the [wrongdoing]’.<sup>18</sup> Compensatory damages may not suffice for the wrongdoer to internalise the total costs of their wrongdoing due to problems of under-detection and under-enforcement. So, for example, if a wrongdoer is likely to be detected and be held liable only one out of the ten times (s)he commits the wrong then compensatory damages (which compensate in respect of the harm that has

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<sup>16</sup> Commentators also sometimes use the terms ‘punishment’ and ‘retribution’ interchangeably to denote a specific goal of punitive damages, see, eg, Catherine Sharkey, ‘Punitive Damages as Societal Damages’ (2003) 113 Yale LJ 347, 356.

<sup>17</sup> Maria Martínez Alles, ‘Punitive Damages: Reorienting the Debate in Civil Law Systems’ (2019) 10 JETL 63, 79 highlights ‘the complexity stemming from the multiplicity of overlapping conceptions of ... deterrence at work’.

<sup>18</sup> Richard Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) 394. The formulation was originally developed by Gary Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 76 JPE 169.

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been inflicted this particular time) should be multiplied by ten to ensure that the total cost of the wrongdoing will be internalised.<sup>19</sup> On this view, the probability of the defendant being held liable is central to the quantification of punitive damages. Importantly, the ‘law-and-economics deterrence model’ dictates that *any type of inefficient conduct (even non-reprehensible conduct)* must be deterred in order to achieve wealth maximisation. Thus, punitive damages should be awarded whenever there are problems of under-detection and under-enforcement and such problems may exist irrespective of whether the defendant’s conduct was reprehensible.<sup>20</sup> Nevertheless, reprehensibility becomes important in cases where the wrongful conduct is socially illicit (ie, it produces no social gain).<sup>21</sup> Such malicious acts do not promote efficiency and should always be deterred, hence punitive damages are desirable even if there is no chance that the defendant will escape liability.

By contrast, the ‘judicial concept of deterrence’ denotes the desire to deter *serious* wrongdoing, a goal pursued in a rough and ready way rather than through the use of multipliers. When courts award punitive damages, they usually have in mind the complete (rather than optimal) deterrence of *exceptional, reprehensible conduct* which society generally condemns.<sup>22</sup> Punitive damages target socially illicit conduct (ie, conduct which is highly detrimental to overall well-being, such as defrauding or assaulting another) and seek not to achieve a socially optimal level of activity, but to discourage a

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<sup>19</sup> Posner (n 18) 242.

<sup>20</sup> Mitchell Polinsky and Steven Shavell, ‘Punitive Damages: An Economic Analysis’ (1998) 111 Harv LR 869, 906.

<sup>21</sup> *ibid* 909 (the authors provide as an example of such conduct someone who punches another out of spite so that the pleasure is solely derived from causing the claimant harm).

<sup>22</sup> Law Commission (n 5) 53 (emphasis added): Punitive damages aim ‘to deter the defendant from repeating the *outrageously wrongful conduct* and others from acting similarly ...’.

## THE NORMATIVE UNDERPINNINGS OF PUNITIVE DAMAGES

particular activity altogether. Thus, the law-and-economics and judicial notions of deterrence differ. Deterrence is a commonly recognised goal of punitive damages but the courts try to achieve this goal in a vague, intuitive manner, not by engaging in sophisticated calculations to find the appropriate deterrence gross up.

The usage of the term by law-and-economics scholars is not adopted here because it does not correspond with the practice of English courts in deciding punitive damages issues and because, more generally, the law-and-economics deterrence approach fits in better with US than with UK traditions and points of view.<sup>23</sup> Thus, except where otherwise indicated, the term ‘deterrence’ is used in the judicial sense in the rest of this thesis.

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<sup>23</sup> Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, CUP 2018) 432.

### 3.3 THE RATIONALES FOR PUNITIVE DAMAGES

Having clarified terminological issues, I now turn to the theoretical underpinnings of punitive damages. This remedy constitutes a specific instance of legal punishment and so the rationales commonly advanced for punishment have also been used to justify punitive damages. Without embarking upon an exhaustive examination of the aims of punishment, one can say that when English courts award punitive damages, they seek to effect the following purposes: (1) retribution; (2) deterrence; (3) appeasement of the victim's urge for revenge; (4) reparation (corrective justice or vindication of rights); and (5) denunciation of wrongs.<sup>24</sup>

All that will be attempted here is an overview of the principal justifications for punitive damages and an assessment of the extent to which each of them is consistent with the positive law. I will not evaluate the merits of these justifications (ie, whether, irrespective of the positive law, each of the justifications provides a good reason for recognising the institution of punitive damages). There have been centuries of debate regarding whether, and in what circumstances, punishment is justifiable. It is beyond the scope of this chapter to reach final conclusions on this question which is essentially philosophical rather than legal. I am willing to accept that the judicially endorsed goals of

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<sup>24</sup> These were also identified by the Law Commission (n 5) 53 as the goals of punitive damages: 'exemplary damages seek to effect retribution, as well as being concerned to deter the defendant from repeating the outrageously wrongful conduct and others from acting similarly, and to convey the disapproval of the jury or court. Exemplary damages may also serve as a satisfaction, and may assuage any urge for revenge felt by victims, thereby discouraging them from taking the law into their own hands'.

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punitive damages are plausible reasons in favour of such awards and I will not attempt to justify the law's acceptance of these aims in this thesis.<sup>25</sup>

It should be noted that there have been efforts to combine two or more of the afore-mentioned justifications into a mixed theory of punitive damages. An example of this approach is Zipursky's conceptualisation of punitive damages as a hybrid of elements of subjective and objective punitiveness. Zipursky argues that punitive damages have a civil aspect insofar as they enable the claimant to be punitive because of the manner in which (s)he was wronged (subjective punitiveness) and a public aspect insofar as they serve the goals of deterrence and retribution (objective punitiveness).<sup>26</sup> Zipursky's theory essentially embraces retribution, deterrence and appeasement of the desire for revenge as the justifications for punitive damages. Another example of a mixed approach is Sharkey's theory of punitive damages as societal damages. Sharkey argues that punitive damages combine the goals of economic deterrence and corrective justice (in that they redress harms caused by defendants to victims who are not before the court).<sup>27</sup> Space precludes a thorough examination of these mixed theories.<sup>28</sup> I will only look at their

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<sup>25</sup> Law Commission (n 5) 95: '[P]unishment, deterrence and the marking out of conduct for disapproval are legitimate functions of the civil law, as well as the criminal law'. See, also, Nicholas McBride, 'Punitive Damages' in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (OUP 1996) 193–194: '[A]wards of punitive damages are made in order to remedy the inevitable failures of the criminal justice system in fulfilling its object of punishing ... This is why there is good enough reason to make awards of punitive damages ...'.

<sup>26</sup> Benjamin Zipursky, 'A Theory of Punitive Damages' (2005) 84 Texas LR 105, 154.

<sup>27</sup> Sharkey, 'Punitive Damages as Societal Damages' (n 16) 450: '[T]he societal damages theory provides a unique opportunity to combine the efficiency-based goal of economic deterrence with the "equitable fairness" goal of just compensation (for absent plaintiffs)'.

<sup>28</sup> It can briefly be said that Sharkey's theory is not consistent with the English law of punitive damages (a fact which she openly acknowledges, see Catherine Sharkey, 'Punitive Damages Transformed into Societal Damages' in Elise Bant and others (eds), *Punishment and Private Law* (Hart 2021) 163). By contrast, Zipursky's theory (which relies on retribution, deterrence and appeasement) accords with English law to a large extent because these three rationales have been endorsed by English courts.

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individual components (ie, the monist justifications that the courts have identified for punitive damages).

### 3.3.1 Retribution

Under the retributive rationale the defendant is punished because they deserve to have pain inflicted upon them for committing the wrong. Punishment is justified by virtue of its relationship to the wrongdoing that was committed. Retribution thus looks to the past to determine whether the defendant deserves to be punished for what they did and, if so, the measure of punishment deserved. The seriousness of the defendant's conduct is measured by reference to the defendant's culpability and the harm done or risked by the defendant's conduct.<sup>29</sup> By contrast, factors beyond the particular wrongdoing (eg, the need to prevent future wrongdoing) are irrelevant under this rationale.

English courts have repeatedly stated that the primary goal of punitive damages is retribution.<sup>30</sup> For example, Lord Nicholls said in *A v Bottrill* that '[t]he primary function [of punitive damages] is to punish'.<sup>31</sup> Similarly, according to Lord Hoffmann in *W v W* 'the main purpose of ... punitive damages is to punish the defendant'.<sup>32</sup> The literature on punitive damages also acknowledges retribution as a central goal of the remedy. For example, Peter Cane contends that punitive damages 'are unarguably retributive'.<sup>33</sup>

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<sup>29</sup> David Dolinko, 'Punishment' in John Deigh and David Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (OUP 2011) 406; Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester UP 1986) 64.

<sup>30</sup> Although they confusingly use the word 'punishment' to denote retribution, see the text to nn 11–16.

<sup>31</sup> *Bottrill* (n 15) [29].

<sup>32</sup> *W v W* [1999] 4 LRC 260 (PC) 263.

<sup>33</sup> Peter Cane, 'Retribution, Proportionality and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon 1998) 169 who uses retribution as a criterion to evaluate the fairness of various tort law doctrines,

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Similarly, according to the Law Commission punitive damages ‘seek to effect retribution’.<sup>34</sup>

If retribution is indeed the main purpose of the remedy, several features of the law of punitive damages are explicable. For example, it is sensible that punitive damages are only reserved for punishment-worthy wrongdoing.<sup>35</sup> An award will not be made unless it is established that the defendant’s conduct is sufficiently outrageous to merit a punitive response. Consistently with the retributive rationale, the gravity of the wrong is also relevant to the assessment of punitive damages: more reprehensible conduct justifies higher awards.<sup>36</sup> Also consistent with the retribution function of punitive damages is the rule that the defendant’s means are relevant to the assessment of the award.<sup>37</sup> Although the gravity of the wrong does not depend on the defendant’s wealth, the penalty imposed needs to be felt by the wrongdoer and this is possible only if their means are taken into account. Retributive considerations may also explain the courts’ tendency to reject punitive damages claims when the claimant provoked the wrong by their own conduct<sup>38</sup>

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including punitive damages. Neil Vidmar, ‘Retribution and Revenge’ in Joseph Sanders and V Lee Hamilton (eds), *Handbook of Justice Research in Law* (Kluwer 2000) 32 also recognises the importance of retribution as a theoretical basis of parts of private law.

<sup>34</sup> Law Commission (n 5) 53.

<sup>35</sup> Eg, *Thompson v CPM* [1998] QB 498 (CA) 516 (Lord Woolf MR): ‘it is ... possible to award damages with the object of punishing the defendant ... where there has been conduct ... which deserves the exceptional remedy of exemplary damages’; *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453, (2010) 107(19) LSG 24 [65] (Thomas LJ): ‘the conduct of [the defendants] had been so bad that it was worthy of punishment’. See, also, chapter 2.2.2(1).

<sup>36</sup> Eg, *Thompson* (n 35) 517 (Lord Woolf MR): ‘the conduct must be particularly deserving of condemnation for an award of as much as £25,000 [£46,350 in 2021] to be justified’. See, also, chapter 2.3.

<sup>37</sup> *Rookes* (n 1) 1227–28; *Hassan v Cooper* [2015] EWHC 540 (QB), [2015] RTR 26 [80]–[92]. See, also, chapter 2.3.

<sup>38</sup> *Russell v Home Office* [2001] Po LR 29 (QBD) [204]–[206]. See, also, chapter 2.2.2(6).

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on the basis that the circumstances under which the wrong occurred might mean that the defendant does not deserve to be punished for what they did.

However, the idea that retribution is the primary goal of punitive damages is in tension with many of the relevant rules. For example, restricting the availability of punitive damages only to cases which fall within the *Rookes* categories or to specific causes of action is absurd considering that the need for retribution might extend to factual situations not captured by these restrictions.<sup>39</sup> Additionally, according to section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 punitive damages may be claimed from a deceased defendant's estate. This clashes with the retribution objective because the punishment is not imposed on the wrongdoer who deserves it but on the innocent heirs of that wrongdoer. The rule that a claim for punitive damages dies with the claimant is also problematic because retributive theories focus on the intrinsic value of punishment which is unaffected by the fact that the claimant has died and cannot see the defendant receive their just deserts. Finally, the possibility of holding a defendant vicariously liable for punitive damages is also inconsistent with the retributive rationale for the simple reason that an innocent defendant never deserves to be punished.<sup>40</sup> That said, some judges have expressed doubts about the appropriateness of punitive damages awards against vicariously liable defendants.<sup>41</sup>

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<sup>39</sup> Although the types of conduct captured by the *Rookes* categories might merit punishment, the need for retribution is not confined only to those types of conduct. For a more detailed discussion of these restrictions, see chapters 8 and 9.

<sup>40</sup> This analysis applies under the servant's tort theory which has been adopted by the courts. By contrast, a vicariously liable defendant may deserve punishment if (s)he is imputed with the wrongdoer's act rather than the wrongdoer's liability, see Stevens (n 10) 87, 254.

<sup>41</sup> Eg, *Kuddus* (n 1) [123]–[137] (Lord Scott).

### 3.3.2 Deterrence

In contrast with retribution which is a backwards-looking rationale, deterrence looks to the future. The aim is to deter the defendant and others like him or her from engaging in the same or similar wrongdoing.

As mentioned above, the judiciary's conception of deterrence is somewhat different from that of law-and-economics scholars.<sup>42</sup> According to the latter, punitive damages are simply a means of achieving optimal deterrence. An award of punitive damages ensures that those who engage in risky activities are made to internalise the full cost of harm caused by their conduct. The probability of the defendant being held liable is central to the quantification of punitive damages under this conception. By contrast, the defendant's reprehensibility is generally<sup>43</sup> an irrelevant factor because punishment may be required to deter even conduct which is not reprehensible when there is a low probability of enforcement.

Deterrence features very prominently as a justification for punitive damages in the case law. Indeed, the label 'exemplary' envisages an example being made out of the defendant and thus suggests that deterrence is the ultimate goal. English courts have used the term 'deterrence' to denote both specific deterrence (ie, preventing the particular defendant from engaging in the same or similar conduct)<sup>44</sup> and general deterrence

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<sup>42</sup> See the text to nn 17–23.

<sup>43</sup> An exception to this is the situation where the defendant engages in socially illicit conduct, see the text to n 21.

<sup>44</sup> Eg, *Axa Insurance UK plc v Shaikh* (Birmingham County Court, 9 February 2010) [6] (Lewis J): 'the fraud ... is something that needs to be punished ... because the Defendant has to realise that if she commits a fraud there is a risk. ... She needs to realise that such action cannot be tolerated ...'.

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(ie, preventing others from engaging in the same or similar conduct).<sup>45</sup> However, references by English courts to deterrence as a goal of punitive damages cannot be taken as evidence of judicial support for the law-and-economics deterrence model.

Sophisticated as it may be, the law-and-economics deterrence rationale for punitive damages has very limited explanatory value. Prominent law-and-economics scholars openly recognise this.<sup>46</sup> Although the low probability of enforcement is central to the economic analysis, there is no evidence that the courts systematically pay attention to enforcement problems<sup>47</sup> nor do they use the multiplier model for quantifying punitive damages.<sup>48</sup> Judges rarely focus on the injurer's chance of escaping liability in determining punitive damages issues. Rather, they focus on the outrageous character of the wrongdoing.

There are additional limitations on the explanatory value of the deterrence rationale (even if it is understood in the sense in which judges use that term). The rule that no claim for punitive damages survives for the benefit of a deceased claimant's

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<sup>45</sup> Eg, *Hassan* (n 37) [31] (Butler J): Exemplary damages 'are intended ... to deter others who might be similarly minded ... in a future situation'.

<sup>46</sup> Polinsky and Shavell (n 20) 896–897: '[Although] achieving proper deterrence is an avowed goal of courts ... [their] determinations of punitive damages do not reflect in any clear manner the formula that achieves optimal deterrence'. The authors refer to US courts but the same is true about English courts.

<sup>47</sup> Certain cases indicate that judges pay attention to under-enforcement problems however, this happens sporadically and the judges do not engage in sophisticated calculations based on the probability of escaping liability, see, eg, *Axa Insurance UK plc v FCS* [2018] EWCA Civ 1330, [2019] RTR 1 [16] (Flaux LJ) (emphasis added): '[T]his was wilful and fraudulent conduct which was ... *difficult to detect* ...'. As regards insurance fraud, it has been observed that '[c]riminal prosecutions ... are relatively rare, so the burden of providing an effective deterrent lies with the civil law', see 'Reforming Insurance Law: Fraudulent Claims' (2015) <[www.out-law.com/topics/insurance/insurance-law-and-liability/reforming-insurance-law-fraudulent-claims-](http://www.out-law.com/topics/insurance/insurance-law-and-liability/reforming-insurance-law-fraudulent-claims-)> accessed 30 July 2021.

<sup>48</sup> This also seems to be the prevalent judicial practice in Canada and the US, see Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) 34–35; Polinsky and Shavell (n 20) 897–898.

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estate<sup>49</sup> is in tension with the idea that deterrence justifies punitive damages. This tension exists because the fact of the claimant's death is irrelevant to the need to deter the defendant and others from acting similarly in the future and therefore should not affect the fate of a punitive damages claim. Similarly, it is difficult to reconcile the rule about multiple defendants established in *Broome v Cassell & Co Ltd*<sup>50</sup> with an understanding of punitive damages as a means of deterrence. When punitive damages are sought from multiple defendants the amount awarded is limited to that which is necessary to punish the defendant who is the least blameworthy for the wrong but this is patently not a suitable deterrent for all the wrongdoers involved. By contrast, the recent shift towards a several liability rule for multiple defendants<sup>51</sup> coheres with the deterrence rationale because it allows the court to adapt the amount of punitive damages in order to achieve deterrence based on each defendant's individual circumstances. Additionally, if punitive damages were truly about deterrence, it should not be necessary for them to be specifically pleaded.<sup>52</sup> The interest in deterring inefficient conduct dictates that punitive damages should be available irrespective of whether the claimant has requested them and so a rule enabling the court to award punitive damages on its own motion would be more efficient. Finally, the restriction of punitive damages awards to specific causes of action or to the circumstances prescribed by the *Rookes* categories is also difficult to reconcile with the deterrence rationale because the need for deterrence is not confined to these situations.

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<sup>49</sup> Law Reform (Miscellaneous Provisions) Act 1934, s 1(2)(a)(i). See, also, chapter 2.2.2(4).

<sup>50</sup> (n 8). See, also, chapter 2.3.

<sup>51</sup> Eg, Crime and Courts Act 2013, s 38(1). See, also, chapter 2.3.

<sup>52</sup> CPR 16.4(1)(c). See, also, chapter 2.4.

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The deterrence rationale is however in line with the rule about multiple claimants being required to share equally a single punitive award.<sup>53</sup> This rule focuses on the defendant's conduct rather than on the interests of the claimants affected. Similarly, the 'if but only if test'<sup>54</sup> and the relevance of prior punishment to the decision whether or not to award punitive damages<sup>55</sup> also cohere with the deterrence justification because, if applied correctly, they assist in avoiding over-deterrence. The deterrence objective also dictates that an action for punitive damages against a deceased defendant should be allowed<sup>56</sup> because a wrongdoer might be deterred by the threat of having the value of their estate reduced by a punitive award<sup>57</sup> and others may also be deterred by observing the imposition of punishment. That punitive damages accrue to the claimant (rather than the state) can also be defended on deterrence grounds. Punitive damages can incentivise claimants to seek an award and to bring to light wrongdoing which may have not been detected otherwise. Thus, making the claimant the recipient of the award increases the probability of enforcement<sup>58</sup> and this is especially desirable in areas where adequate levels of enforcement are unlikely to occur (eg, insurance fraud).<sup>59</sup> Finally, the relevance of the defendant's means to the assessment of punitive damages<sup>60</sup> makes sense from a

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<sup>53</sup> *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA). See, also, chapter 2.3.

<sup>54</sup> *Rookes* (n 1) 1228. See, also, chapter 2.2.2(2).

<sup>55</sup> *Archer v Brown* [1985] 1 QB 401 (QBD). See, also, chapter 2.2.2(3).

<sup>56</sup> Law Reform (Miscellaneous Provisions) Act 1934, s 1(1). See, also, chapter 2.2.2(5).

<sup>57</sup> Richard Posner, 'Retribution and Related Concepts of Punishment' (1980) 9 JLS 71, 87: 'In threatening his descendants one is threatening the man himself'.

<sup>58</sup> However, there is arguably no reason why the whole of the punitive damages assessed should be awarded to the claimant. All that is needed is a sum sufficient to incentivise the claimant to step in and aid in law enforcement, see Guido Calabresi, 'The Complexities of Torts: The Case of Punitive Damages' in Stuart Madden (ed), *Exploring Tort Law* (CUP 2005) 338.

<sup>59</sup> For the problem of systematic under-enforcement in the area of insurance fraud, see n 47.

<sup>60</sup> See n 37.

deterrence perspective because, in order to deter effectively, the punishment needs to be tailored to each defendant's individual circumstances.<sup>61</sup>

### 3.3.3 Appeasement

The appeasement justification focuses on the satisfaction that the victim might derive from seeing a wrongdoer being punished. There is a vengeful component in our genetic makeup and by assuaging the desire for revenge, punitive damages serve as a way of avoiding confrontational outcomes. In contrast with retribution and deterrence, which focus exclusively on the defendant's activities in justifying punishment, this rationale connects the act of punishment with the activities of victims.

English courts have occasionally endorsed this justification. For example, according to Lord Hoffmann in *W v W* '[t]he prosecution of an action for exemplary damages enables the victim ... to inflict punishment, even revenge, in ways which a criminal prosecution may not satisfy'.<sup>62</sup> Further support for this justification can be found in cases from the 19th century.<sup>63</sup> Some theorists also accept this as a central pillar of the justification of punishment.<sup>64</sup> The idea that punitive damages appease the urge for vengeance is also an aspect of Zipursky's theory of punitive damages.<sup>65</sup> Zipursky regards a claim for punitive damages as an avenue that the state provides to the claimant so that

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<sup>61</sup> However, law-and-economics scholars are divided as to whether the defendant's wealth should be relevant in deciding punitive damages issues, see Polinsky and Shavell (n 20) 911; Keith Hylton, 'A Theory of Wealth and Punitive Damages' (2008) 17 *Widener LJ* 927.

<sup>62</sup> *W v W* (n 32) 264.

<sup>63</sup> Eg, *Merest v Harvey* (1814) 5 *Taunt* 442, 444; 128 *ER* 761, 761 (Heath J): 'It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages'.

<sup>64</sup> Eg, John Gardner, *Offences and Defences* (OUP 2007) 220; Calabresi (n 58) 345.

<sup>65</sup> Zipursky (n 26).

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(s)he can be punitive because of the manner in which (s)he was wronged.<sup>66</sup> This right of the victim to be punitive clearly echoes vengeful instincts.<sup>67</sup>

Several features of the law are consistent with the idea that the function of punitive damages is to satisfy the victim's desire for vengeance. For example, the 'outrageous conduct' requirement seems logical because only exceptional conduct may justifiably trigger a desire for revenge. This rationale can be reconciled especially with cases involving wrongs that insult the victim's dignity (eg, insults to oneself or one's family). Such wrongdoing may arouse stronger feelings of anger<sup>68</sup> which in turn triggers a desire to react against the violator.<sup>69</sup> And indeed, the appeasement rationale features prominently in cases where the victim has been insulted.<sup>70</sup> This rationale is also consistent with the requirement that punitive damages must be specifically pleaded<sup>71</sup> and with the rule that the award is paid to the claimant (rather than, for example, to the state). If punitive damages appease the desire to make the wrongdoer pay for what (s)he did to

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<sup>66</sup> *ibid* 159. Note however that Zipursky endorses a mixed (or in his words 'hybrid') theory of punitive damages because he also recognises retribution and deterrence as legitimate goals of the award.

<sup>67</sup> *ibid*: '[P]unitive damages are partly about permitting ... plaintiffs to be punitive, ... because they desire to see the defendant endure an unpleasant consequence. Indulging vengeful and punitive instincts is not something most of us are proud of ... [But] we cannot make sense of the reality of punitive damages ... without giving substantial attention to this ... civil, aspect of punitive damages'.

<sup>68</sup> Psychologists have argued that insult is the primary component in the arousal of anger. It is thus understandable that the rationale features in cases involving dignitary injuries. There is a close relationship between the concept of self-worth and the need to act on a perceived insult to honour in order to maintain that self-worth, see Vidmar (n 33) 41.

<sup>69</sup> By contrast, the appeasement justification does not feature at all in cases involving financial losses (eg, insurance fraud cases).

<sup>70</sup> Eg, *Grey v Grant* (1764) 2 Wils KB 252, 95 ER 794 (the Court): In an action for assault and battery the Court of King's Bench upheld the jury's award of punitive damages because 'when a blow is given by one gentleman to another, *a challenge and death may ensue ...*' and the defendant had behaved in a way which 'tend[ed] to provoke [the claimant] *to seek his revenge in another way than by law ...*').

<sup>71</sup> See n 52.

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the victim, then it is for the victim to initiate the process that will alleviate that desire. There is a personal tie between the wrongdoer and the victim and thus a special point in the victim being involved in the process of inflicting punishment. Similarly, if punitive damages are aimed at assuaging the victim's desire for revenge, then the award should be paid to the claimant. Furthermore, the relevance of other sanctions to the decision of whether or not to award punitive damages<sup>72</sup> is consistent with the idea that the desire for revenge should diminish when the victim sees that the defendant is adequately punished.<sup>73</sup> The appeasement theory also explains the rule that punitive damages can only be awarded to the 'victim of punishable behaviour'.<sup>74</sup> Punishable wrongdoing will naturally trigger the desire to retaliate. Finally, the non-survival of a claim for punitive damages after the claimant's death<sup>75</sup> arguably matches with this rationale. If the victim dies, so does their desire for revenge which is a personal matter.<sup>76</sup>

However, several rules are impossible to reconcile with the appeasement justification. The survival of punitive damages claims against deceased defendants<sup>77</sup> is a good illustration. If the wrongdoer dies there is no one against whom the claimant could justifiably take revenge. Furthermore, this rationale cannot explain the courts awarding punitive damages to corporate claimants (a prominent phenomenon in insurance fraud

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<sup>72</sup> See n 55.

<sup>73</sup> However, this is a statement about human nature/psychology, and it is thus hard to assess.

<sup>74</sup> *Rookes* (n 1) 1227. See, also, chapter 2.2.2(4).

<sup>75</sup> See n 49.

<sup>76</sup> However, one could say that the desire for revenge of the deceased's family would be placated if the claim survived in these circumstances.

<sup>77</sup> See n 56.

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cases which represent a significant chunk of punitive damages awards nowadays).<sup>78</sup> It is difficult to understand how a corporation could be driven by a desire for revenge. It is also doubtful whether the victim's desire to be vengeful will be assuaged if a vicariously liable (ie, innocent) defendant or an insurer pays the award of punitive damages but the present law allows both of these possibilities.<sup>79</sup> Lastly, the limitation of the jurisdiction to award punitive damages to particular case categories and causes of action does not accord with the appeasement idea which dictates that punitive damages should be available whenever the character of the defendant's wrongdoing triggers the desire for revenge.<sup>80</sup>

### 3.3.4 Reparation (vindication of rights or corrective justice)

Although it is a counterintuitive proposition, some scholars contend that the goal of punitive damages is to effect reparation or corrective justice.<sup>81</sup> They argue that punitive damages compensate for discrete private injuries<sup>82</sup> or that they operate as a substitute for the outrageous infringement of a claimant's right.<sup>83</sup> The view that punitive damages serve

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<sup>78</sup> Recent examples of punitive damages awards for insurance fraud include *Hassan* (n 37); *Joynson v Joynson* (Chester County Court, 2 November 2016); *FCS* (n 47).

<sup>79</sup> *Rowlands v CC Merseyside Police* [2006] EWCA Civ 1773, [2007] 1 WLR 1065 [35]–[49] (vicarious liability for punitive damages); *Lancashire County Council v Municipal Mutual Insurance Ltd* [1997] QB 897 (CA) 909–911 (insurability of punitive damages). See, also, chapter 2.2.2(5).

<sup>80</sup> Although the situations covered by the *Rookes* categories may trigger a vengeful reaction they are not the only situations which can provoke such a reaction. See, also, chapter 8.5.4.

<sup>81</sup> It is odd to say that the purpose of punitive damages is reparation or corrective justice because the conventional understanding of punishment is that it goes beyond reparation.

<sup>82</sup> Allan Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis' in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2006) 295; Richard Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 30 San Diego LR 1425, 1431. This conception of punitive damages was first articulated by Simon Greenleaf, 'The Rule of Damages in Actions ex Delicto' (1848) 5 WLJ 289.

<sup>83</sup> *Stevens* (n 10) 85.

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as an ‘emphatic vindication of the [claimant]’s rights’ was also endorsed as a subsidiary rationale for the remedy by Lord Nicholls in *A v Bottrill*.<sup>84</sup>

A variation of the theme that punitive damages are aimed at reparation or corrective justice is Ernest Weinrib’s attempt to re-characterise punitive damages awards for profit-seeking wrongs as restitutionary damages. In developing his corrective justice theory, he argues that ‘the common law jurisdiction whose attitude regarding punitive damages comes closest to conformity to corrective justice is England ...’ and that explaining the second category of *Rookes v Barnard* in terms of unjust enrichment ‘would make this category, at least, consistent with corrective justice’s treatment of illegitimate gains’.<sup>85</sup> These theories essentially seek to reinterpret punitive damages as a different species of damages (ie, compensatory or restitutionary damages) and put forward reparation, substitution of infringed rights or corrective justice as the purpose of the remedy.

Corrective justice accounts superficially accord with numerous rules concerning punitive damages awards. For example, this justification explains why a claim for punitive damages must be specifically pleaded<sup>86</sup> and why the amount of punitive damages is awarded to the claimant (rather than the state or an independent fund). The victim of a wrong is the appropriate person to seek and receive compensation for the infringement of his/her rights from the defendant. This conforms with the correlativity of doing and suffering harm. ‘Reparation’ theories can also be reconciled with the rules on

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<sup>84</sup> (n 15) [29]. His Lordship further remarked (ibid) that ‘the primary function [of punitive damages] is to punish’ and that they also serve ‘as a deterrent’.

<sup>85</sup> Weinrib (n 3) 135.

<sup>86</sup> See n 52.

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survival of punitive damages claims.<sup>87</sup> If the remedy is substitutive or reparative, punitive damages claims should survive the defendant's death and die with the claimant (assuming that the outrageous infringement of a right is somehow personal to the claimant). Finally, the rules about vicarious liability and the insurability of punitive damages seem logical under the reparation model.<sup>88</sup> If punitive damages are a species of compensatory or restitutionary damages the same rules should apply to both.

However, a number of elements of the law of punitive damages are inconsistent with the notion that they are awarded in order to achieve reparation. Despite sporadic judicial statements acknowledging the vindication of rights as a subsidiary justification for the remedy,<sup>89</sup> the courts have overwhelmingly rejected the view that punitive damages are compensatory or restitutionary.<sup>90</sup> Importantly, judges commonly emphasise the distinction between punitive damages and other remedies such as compensatory<sup>91</sup> and restitutionary damages.<sup>92</sup> The reparation model is further contradicted by explicit judicial

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<sup>87</sup> See nn 49 and 56.

<sup>88</sup> Stevens (n 10) 87. However, it may be objected that it is contradictory for the insurer to pay compensation because the core idea of corrective justice is that the injurer (rather than a third party) must be liable for the loss (s)he causes, see Louis Kaplow and Steven Shavell, 'Fairness Versus Welfare' (2001) 114 Harv LR 961, 1066.

<sup>89</sup> *Bottrill* (n 15) [29].

<sup>90</sup> Although there are isolated judicial statements to the effect that punitive damages can sometimes be equated with restitutionary damages, see, eg, *AT v Dulghieru* [2009] EWHC 225 (QB) [68] (Treacy J): 'The rationale behind the second category [of *Rookes v Barnard*] is not the punishment of the Defendant, but the prevention of his unjust enrichment'. For criticism, see Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 764–765.

<sup>91</sup> *Rookes* (n 1) 1221 (Lord Devlin): 'Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter'; *Kuddus* (n 1) [4] (Lord Slynn): 'an award of exemplary damages ... being punitive in nature, ... is inconsistent with the principle that damages are intended to be compensatory'.

<sup>92</sup> *Broome* (n 8) 1130 (Lord Diplock): 'to restrict the damages recoverable to the actual gain made by the defendant ..., would leave a defendant contemplating an unlawful act with the certainty that he had nothing to lose .... It is only if there is a prospect that the damages may exceed the defendant's gain that the social purpose of this category is achieved'; *Ramzan v Brookwide Ltd*

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statements to the effect that retribution and deterrence are the fundamental goals of punitive damages. In particular, references to the need for deterrence and to problems of under-enforcement are frequent in insurance fraud cases<sup>93</sup> which constitute an active source of punitive damages awards today.<sup>94</sup> These cases simply cannot be accommodated by corrective justice theories.

It is also difficult to understand why punitive damages would be awarded to rectify dignitary losses when there is another damages head, aggravated damages, reserved specifically for this purpose today.<sup>95</sup> If we accept that corrective justice is a valid interpretive theory of the English law of punitive damages then it follows that the courts are using two theoretically distinct remedies to perform the same function which seems odd. It is more plausible to think that punitive damages sometimes performed this reparative function in the pre-*Rookes* era, when there was no clear distinction between the terms ‘aggravated’, ‘exemplary’ and ‘punitive’ damages.<sup>96</sup> But even then, punishment was clearly acknowledged as a distinct component of inflated damages awards<sup>97</sup> so that even pre-*Rookes* cases cannot ultimately be explained in terms of corrective justice.

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[2011] EWCA Civ 985, [2011] 2 P&CR 22 [81] (Arden LJ): ‘it would not ... be right ... [t]o award exemplary damages by reference to the profits for which a claim could have been made’.

<sup>93</sup> See n 47.

<sup>94</sup> See the cases cited in n 78.

<sup>95</sup> This has led some scholars to argue for the abolition of punitive damages, see Allan Beever, ‘The Structure of Aggravated and Exemplary Damages’ (2003) 23 OJLS 87.

<sup>96</sup> Eg, *Tullidge v Wade* (1769) 3 Wils KB 18, 19; 95 ER 909, 910 (Bathurst J): Inflated damages awarded in a seduction claim because ‘it [wa]s a greater insult to be beaten upon the Royal Exchange, than in a private room’.

<sup>97</sup> *ibid* 19, 909 (Wilmot LCJ): ‘Actions of this sort are brought for example’s sake; and although the plaintiff’s loss in this case may not really amount to the value of twenty shillings ... [the defendant] ought to be punished ...’.

## THE NORMATIVE UNDERPINNINGS OF PUNITIVE DAMAGES

Additionally, this theory fails to explain the relevance of the defendant's wealth to the assessment of punitive damages<sup>98</sup> as well as the relevance of prior punishment to the decision whether or not to make an award.<sup>99</sup> These considerations are entirely unrelated to the victim's restoration. Further difficulties arise when one looks at the rules about multiple claimants<sup>100</sup> and multiple defendants.<sup>101</sup> An award of punitive damages should not be split equally between all claimants if the goal is to restore the balance in the claimant-defendant relationship. Third parties (ie, other claimants) are irrelevant to corrective justice and the division of a single award between many claimants is impermissible as it looks beyond the correlative relationship between the parties. It is equally puzzling that when multiple defendants are sued in a single set of proceedings the amount of punitive damages must be limited to the minimum necessary to punish the defendant who is the least blameworthy for the wrong. Rather, a several liability rule seems suitable because it allows the court to examine separately the impact of the conduct of each defendant upon the claimant.

### 3.3.5 Denunciation of wrongs

English courts commonly refer to the denunciation of wrongs in discussing punitive damages. For example, according to Lord Devlin in *Rookes* punitive damages are awarded 'to mark the [court's] disapproval of [the defendant's] conduct'.<sup>102</sup> Similarly, Lord Hutton said in *Kuddus* that outrageous conduct calls for punitive damages 'to mark

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<sup>98</sup> See n 37.

<sup>99</sup> See n 55.

<sup>100</sup> See n 53.

<sup>101</sup> See nn 50–51.

<sup>102</sup> *Rookes* (n 1) 1228.

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disapproval ...'.<sup>103</sup> Despite the frequency of such references in the case law, judges have not explained in any detail what the purpose of denunciation is. One possibility is to treat denunciation as a special aspect of deterrence<sup>104</sup> or retribution.<sup>105</sup> If denunciation serves one of these goals then it collapses into one of the other justifications for punitive damages and has no distinct value of its own.<sup>106</sup>

Another possibility is that denunciation is a freestanding rationale. This would explain why the courts mention it separately alongside the other rationales when justifying punitive damages awards. A court may want to denounce a given wrong in order to benefit the person who experiences the punishment, to give them moral reasons for not repeating the wrong and to bring about a form of moral growth to the defendant. This comes close to identifying a rehabilitative rationale for punitive damages. However, there are no judicial statements to support this interpretation. Alternatively, the concept of denunciation may denote a distinct messaging function. Punitive damages convey a message about the importance of rights and thus 'vindicate the strength of the law'.<sup>107</sup> However, again, a question arises about why we want to convey that message.

If denunciation is treated as part of retribution or deterrence then the preceding discussion about the explanatory value of those rationales also applies here. Conversely,

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<sup>103</sup> *Kuddus* (n 1) [91].

<sup>104</sup> Ontario Law Reform Commission (n 48) 17: 'by expressing its condemnation of socially intolerable behaviour ... the court attempts to deter the wrongdoer and others from engaging in similar conduct in the future'. See, also, *Broome v Cassell & Co Ltd* [1971] 2 QB 354 (CA) 387 (Salmon LJ): '[if the jury] came to the conclusion that [the defendant] had behaved outrageously they might, as a deterrent, reflect their disapproval of the defendant's conduct in the amount of the damages'.

<sup>105</sup> Punishment is deserved only if the defendant has behaved in a way that the court clearly disapproves of.

<sup>106</sup> *Barker* (n 7) 58.

<sup>107</sup> *Kuddus* (n 1) [91] (Lord Hutton). See, also, *Barker* (n 7) 56–59.

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if it is understood as a distinct rationale of conveying a message about the importance of rights, it is difficult to evaluate the law's consistency with that rationale given that the purpose of conveying this message is still unknown. The difficulty in ascertaining the precise meaning of 'denunciation' should not be overstated because this is a subsidiary goal of punitive damages<sup>108</sup> which the courts have not translated into concrete guidance when deciding the relevant issues.

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<sup>108</sup> Lord Millett and Lord Hutton went so far as to reject this rationale in *Bottrill* (n 15) [77]: 'we consider that the rationale of exemplary damages is not to mark the court's disapproval of outrageous conduct by the defendant, rather the award is made to punish the defendant for his outrageous behaviour'.

### 3.4 CONCLUSION

This chapter explored the main rationales for punitive damages. It identified five justifications for this remedy: (1) retribution; (2) deterrence; (3) appeasement of the victim's desire for revenge; (4) reparation (corrective justice or vindication of rights); and (5) denunciation. The courts have singled out two of these justifications (retribution and deterrence) as the primary goals of punitive damages. They have also referred to the remaining three theories as subsidiary rationales.

The present law of punitive damages is not entirely consistent with any of these justifications. It is not surprising that a doctrine which has been developing for more than two centuries cannot be understood fully through the prism of a single rationale.<sup>109</sup> The gap between each of the theoretical bases for punitive damages and the current punitive damages doctrine can be bridged by accepting that the remedy reflects a mixed view of punishment which gives some weight to fairness and some weight to consequences. Each of the different goals that the remedy can perform carries its own justificatory importance and provides a good reason for a court to award punitive damages. If and to the extent that punitive damages 'annul' the wrongdoing and restore balance in society by giving the wrongdoer what (s)he deserves, this is one argument in favour of them. If and to the extent that punitive damages deter wrongdoing, that is another good reason for awarding them. If and to the extent that they eliminate the desire of a victim for retaliation, that also counts in their favour. This can be seen as a strength, not a shortcoming of the

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<sup>109</sup> For argument to the effect that this is true of tort law more generally, see John Murphy, 'Contemporary Tort Theory and Tort Law's Evolution' [2019] CJLJ 413, 440.

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doctrine.<sup>110</sup> John Gardner observed that ‘the rivalry between different justifications for [punishment] is illusory. [Punishment] ... patently needs all the justificatory help it can get ... Each [theory] must be called upon to make whatever justificatory contribution it is capable of making’.<sup>111</sup> Besides, there is no pressing need for the doctrine to focus exclusively on one particular rationale. Private law pursues many different goals and so does the institution of punitive damages. Rather than being a bad thing, the maintenance of a multifunctional doctrine enables courts to pursue the many different aims of our legal system. To concentrate on a single justification would make it difficult to further the remaining functions that can be served.

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<sup>110</sup> Calabresi (n 58) 347: ‘One attribute of punitive damages, as they grew up in the common law, was precisely that they fulfilled many different – and, at times, contradictory – functions ... and did so at the same time. Cf Weinrib (n 3) 40–42.

<sup>111</sup> Gardner (n 64) 214–215.

## **PART II: EMPIRICAL ANALYSIS**

## CHAPTER 4: PREVIOUS EMPIRICAL STUDIES

Part 2 of the thesis provides the first empirical analysis of punitive damages in English law.<sup>1</sup> This chapter briefly reviews previous empirical studies on punitive damages from the US, Canada and Australia and explains how they differ from the present project. Even though the studies discussed add substantially to our understanding of the doctrine of punitive damages around the world, they cannot be relied upon in this jurisdiction because of the distinctiveness of English law.

### 4.1 UNITED STATES<sup>2</sup>

Empirical studies on punitive damages have been conducted in the US, most notably by Professor Eisenberg and his colleagues.<sup>3</sup> These studies have focused on various aspects of

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<sup>1</sup> For the part of the present study which was undertaken during the MPhil, see Eleni Katsampouka, 'An Empirical Study of the Law of Exemplary Damages' (MPhil thesis submitted in September 2016) (examining punitive damages claims decided by first instance courts in England, Wales and Northern Ireland between 2000 and 2015). For the revised published version of that thesis, see James Goudkamp and Eleni Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 OJLS 90.

<sup>2</sup> The term 'US law' is misleading because every state has its own laws. Despite differences between state laws, the term 'US law' is used for convenience.

<sup>3</sup> Eg, Theodore Eisenberg and others, 'The Predictability of Punitive Damages' (1997) 26 JLS 623; Theodore Eisenberg and Martin Wells, 'The Significant Association Between Punitive and Compensatory Damages in Blockbuster Cases: A Methodological Primer' (2006) 3 JELS 175; 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; Theodore Eisenberg and Michael Heise, 'Judge-Jury Differences in Punitive Damages Awards: Who Listens to The Supreme Court?' (2011) 8 JELS 325. For studies by other authors, see, eg, Mark Peterson, Syam Sarma and Michael Shanley, 'Punitive Damages: Empirical Findings' (1987) RAND Institute for Civil Justice <[www.rand.org/pubs/reports/R3311.html](http://www.rand.org/pubs/reports/R3311.html)> accessed 30 July 2021; Neil Vidmar and Mary Rose, 'Punitive Damages by Juries in Florida: In Terrorem and in Reality' (2001) 38 HJL 487; Benjamin McMichael and Kip Viscusi, 'Taming Blockbuster Punitive Damages Awards' (2019) UILR 171.

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this field of law such as the frequency and size of awards in various states<sup>4</sup> and their relationship with compensatory damages.<sup>5</sup>

Common findings from the various studies include that awards of punitive damages are rare<sup>6</sup> and, despite the widespread perception to the contrary, modest in the overwhelming majority of cases.<sup>7</sup> Such awards are infrequent in product liability and medical malpractice cases but much more common in cases of intentional wrongdoing.<sup>8</sup> The findings suggest that there is a strong and significant relationship between compensatory and punitive damages.<sup>9</sup> Furthermore, the levels of awards do not seem to have increased in recent years.<sup>10</sup> Very large awards do not usually remain intact because there are mechanisms and processes within the US legal system that result in their disturbance, such as appellate review and settlements.<sup>11</sup> Certain studies suggest that such

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<sup>4</sup> Eg, Vidmar and Rose (n 3).

<sup>5</sup> Eg, Eisenberg and Wells (n 3).

<sup>6</sup> Eisenberg and others, 'The Predictability of Punitive Damages' (n 3) 633; Vidmar and Rose (n 3) 492. An important factor which is not taken into account by many studies is whether punitive damages were sought by the claimant. The frequency of punitive damages awards is higher when this factor is considered, see Eisenberg and others, 'The Decision to Award Punitive Damages: An Empirical Study' (n 3) 577 reporting that punitive damages are awarded in about 30 per cent of cases in which they are sought and in only three to five per cent of all cases won by claimants (ie, including cases in which punitive damages are not sought).

<sup>7</sup> Peterson and others (RAND Report) (n 3) 17, 65; Vidmar and Rose (n 3) 494; Eisenberg and others, 'Judges, Juries, and Punitive Damages' (n 3) 270.

<sup>8</sup> Peterson and others (RAND Report) (n 3) 65; Eisenberg and others, 'The Predictability of Punitive Damages' (n 3) 623, 633; Vidmar and Rose (n 3) 494; Eisenberg and others, 'The Decision to Award Punitive Damages: An Empirical Study' (n 3) 598.

<sup>9</sup> Eisenberg and others, 'The Predictability of Punitive Damages' (n 3) 637–638, 647; Vidmar and Rose (n 3) 500; Eisenberg and Wells (n 3) 182; Eisenberg and others, 'Judges, Juries, and Punitive Damages' (n 3) 273–274; Eisenberg and Heise (n 3) 340.

<sup>10</sup> Vidmar and Rose (n 3) 496–497; Eisenberg and others, 'Judges, Juries, and Punitive Damages' (n 3) 278; Eisenberg and Heise (n 3) 325.

<sup>11</sup> Peterson and others (RAND Report) (n 3) 26–28; Vidmar and Rose (n 3) 506.

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awards have a compensatory dimension as they cover losses which would otherwise be left uncompensated.<sup>12</sup>

It is of course important to bear in mind that there are major differences between English law and ‘US law’ regarding punitive damages. The ‘categories test’ established in *Rookes* has been ignored in the US.<sup>13</sup> Another difference is that punitive damages are not available for breach of contract in English law.<sup>14</sup> However, they have been awarded for breach of contract in some states where ‘elements of fraud, malice, gross negligence or oppression mingled into the breach ...’.<sup>15</sup> Also, due to local variations within the US any general conclusions about this legal system should be drawn with caution.<sup>16</sup> Accordingly, the results of these studies cannot be relied upon as evidence about the position in English law.

Differences in the substantive law of each legal system inevitably affect the content of empirical projects as well. For example, this study investigates the frequency and size of punitive damages awards based on the *Rookes* category in which the claim falls. The absence of this restriction in the US means that there is no empirical investigation of these issues in the US studies.

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<sup>12</sup> Robert Lande, ‘Are Antitrust “Treble” Damages Really Single Damages?’ (1993) 54 Ohio St LJ 115, 119; John Connor and Robert Lande, ‘Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages’ (2015) 100 Iowa LR 1997, 2015–16.

<sup>13</sup> Second Restatement of Torts, s 908.

<sup>14</sup> *Perera v Vandiyar* [1953] 1 WLR 672 (CA). See, also, chapter 2.2.1.

<sup>15</sup> Allan Farnsworth (updates by Zachary Wolfe), *Farnsworth on Contracts* (4th edn, Wolters Kluwer 2019) para 12.73 discussing cases from various states. See, also, Restatement (Second) of Contracts, s 355 cmt a.

<sup>16</sup> See n 2. Nationwide US studies also stress that locale influences the frequency and level of awards, see, eg, Eisenberg and others, ‘The Decision to Award Punitive Damages: An Empirical Study’ (n 3) 592.

## PREVIOUS EMPIRICAL STUDIES

### 4.2 CANADA

Empirical research regarding punitive damages has also been carried out in Canada. The first systematic study on the quantum of punitive damages awards was published almost 40 years ago by Cherniak and Morse.<sup>17</sup> The authors found that assault and battery cases traditionally attracted modest punitive damages awards ranging from C\$200 (C\$656 in 2021)<sup>18</sup> to C\$7,500 (C\$29,312 in 2021)<sup>19</sup> while most awards in trespass to property cases did not exceed C\$10,000 (C\$23,041 in 2021).<sup>20</sup>

The second empirical study of punitive damages in Canada was conducted by the Ontario Law Reform Commission.<sup>21</sup> This study showed that punitive damages were awarded infrequently and in modest amounts.<sup>22</sup> The findings did not uncover evidence of punitive damages awards becoming more common or excessive.<sup>23</sup> Similarly, lawyers who were interviewed for the Ontario study saw punitive damages claims as harmless and were unconcerned by the frequency and quantum of such awards.<sup>24</sup>

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<sup>17</sup> Earl Cherniak and Jerome Morse, 'Aggravated, Punitive and Exemplary Damages in Canada' in Law Society of Upper Canada Special Lectures, *Torts in the 80s* (De Boo 1983) 216–218.

<sup>18</sup> *Pettis v McNeil* [1979] NSJ No 560 (Nova Scotia Supreme Court). All amounts have been adjusted for inflation to reflect 2021 values using this online inflation calculator: <<https://www.officialdata.org/Canada-inflation>> accessed 30 July 2021.

<sup>19</sup> *Dodge v Bridger* [1977] OJ No 1044 (Ontario Supreme Court).

<sup>20</sup> Cherniak and Morse (n 17) 217.

<sup>21</sup> Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) 21ff.

<sup>22</sup> The largest award was C\$50,000 (C\$120,495 in 2021) in a slander of title case and the median award was 20 per cent of the compensatory award, see Neil Vidmar and Bruce Feldthusen, 'Exemplary Damages Claims in Ontario: An Empirical Profile' (1990) 16 CBLJ 262, 264–265; Ontario Law Reform Commission (n 21) 23, 25.

<sup>23</sup> Ontario Law Reform Commission (n 21) 25.

<sup>24</sup> *ibid* 24; Vidmar and Feldthusen (n 22) 267.

## PREVIOUS EMPIRICAL STUDIES

Finally, an empirical analysis of punitive damages claims in the defamation context was recently undertaken in Canada.<sup>25</sup> That study examined reported decisions on defamation claims between 1973 and 1983 and between 2003 and 2013. Although it largely addressed issues which are not relevant to the present study (eg, the frequency of establishing liability for defamation) one of the project's main questions was the operation of the law of punitive damages in defamation actions during the study period.<sup>26</sup> The results showed that punitive damages were awarded to approximately 25 per cent of cases in both periods;<sup>27</sup> that the average punitive damages award was C\$18,164 (C\$20,466 in 2021) in the 1973–1983 period and C\$13,824 (C\$15,576 in 2021) in the 2003–2013 period;<sup>28</sup> that corporate claimants were awarded punitive damages more frequently and in higher amounts than individual claimants;<sup>29</sup> and that during the 2003–2013 period punitive damages were often awarded alongside aggravated damages.<sup>30</sup>

It should be stressed again that the findings of these studies are of limited importance for English law. The law of punitive damages differs considerably between the two countries. For example, in Canada the *Rookes* categories have been expressly

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<sup>25</sup> Hilary Young, 'The Canadian Defamation Action: An Empirical Study' (2017) 95 Can B Rev 591, 618–19, 621–25.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid* 618.

<sup>28</sup> *ibid.* Young's reported figures reflect 2013 values (*ibid* 596).

<sup>29</sup> *ibid* 621–622.

<sup>30</sup> *ibid* 618–619.

## PREVIOUS EMPIRICAL STUDIES

rejected.<sup>31</sup> Furthermore, Canada permits punitive damages for breach of contract<sup>32</sup> while no such award has been made under English law.<sup>33</sup>

The present thesis differs from the Canadian studies in many ways. For example, Cherniak and Morse's study focused only on the quantum of punitive damages awards. The Ontario study addressed questions which are not examined here, such as how frequently punitive damages are requested, what the reasons that lawyers request such damages are and if such claims play a role in settlement negotiations. The methodology used for the Ontario study was very different from the methodology employed for this thesis. The nature of the questions that the Ontario project looked into required a qualitative approach (eg, interviewing lawyers to find out the reasons for requesting punitive damages) and this approach is not used in the present study. Similarly, Hilary Young's study differs in that its primary focus is the application of general defamation law in Canada (rather than the law of punitive damages).

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<sup>31</sup> *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085.

<sup>32</sup> *Whiten v Pilot Insurance Co* [2002] SCC 18, [2002] 1 SCR 595.

<sup>33</sup> See n 14.

## PREVIOUS EMPIRICAL STUDIES

### 4.3 AUSTRALIA

The first and only empirical study of the law of punitive damages in Australia was published in 2019.<sup>34</sup> It largely replicated the empirical project which formed the basis of the MPhil.<sup>35</sup> The Australian study examined electronically accessible punitive damages decisions delivered between 2000–2016 in all Australian jurisdictions, at all levels of court. It reported an overall success rate of punitive damages claims of 47.43 per cent with an average award of just over A\$105,059 (A\$111,000 in 2021) and a median award of A\$26,854 (A\$28,394 in 2021).<sup>36</sup> Punitive damages claims in Australian courts succeeded frequently in cases involving abuse of power torts, economic torts and interference with the person.<sup>37</sup> The study demonstrated that concerns about excessive punitive damages awards in Australia have been overstated.<sup>38</sup>

These findings shed light on the contemporary operation of punitive damages in Australia but, again, they cannot provide guidance about the position in English law. Significant differences exist between the relevant law in the UK and in Australia. As Maher notes ‘the Australian approach to exemplary damages is much less restrictive than the “parsimonious” *Rookes* approach still followed in the UK’.<sup>39</sup> Additionally, the ‘cause of action test’ never formed part of Australian law. A final important difference is that statutory intervention in Australia has rendered punitive damages unavailable in

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<sup>34</sup> Felicity Maher, ‘An Empirical Study of Exemplary Damages in Australia’ (2019) 43 MULR 694.

<sup>35</sup> See n 1.

<sup>36</sup> Maher’s reported figures were adjusted for inflation to the year 2017, see Maher (n 34) 709.

<sup>37</sup> The study (at 717) also reports a 100 per cent success rate in cases of interference with the person combined with interference with property based on a sample size of only three claims so it is questionable whether this result is meaningful.

<sup>38</sup> Maher (n 34) 738.

<sup>39</sup> *ibid* 735 (footnote omitted).

## PREVIOUS EMPIRICAL STUDIES

defamation claims,<sup>40</sup> in claims for negligence resulting in death and personal injury,<sup>41</sup> and (in certain states) in claims against vicariously liable defendants in respect of police misconduct.<sup>42</sup>

The differences between the relevant law in the UK and Australia inevitably affect the research questions of both studies. For example, in contrast with the present study, the Australian project does not investigate whether judges and juries differ in deciding punitive damages issues<sup>43</sup> nor does it examine whether the abolition of the ‘cause of action test’ led to a higher success rate of punitive damages claims after 2001.

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<sup>40</sup> Eg, Defamation Act 2005 (NSW), s 37; Defamation Act 2005 (Vic), s 37.

<sup>41</sup> Civil Liability Act 2002 (NSW), s 21; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 19; Civil Liability Act 2003 (Qld), s 52(1).

<sup>42</sup> Eg, Police Act 1892 (WA), s 137(6).

<sup>43</sup> Maher (n 34) 710.

## CHAPTER 5: METHODOLOGY

This chapter explains the methodology that was used in the empirical analysis of the data. It starts by setting out the methodology of the first instance study. The methodology of the appellate study is then explained to the extent that it differs from that employed in the first instance study.

### 5.1 FIRST INSTANCE STUDY

#### 5.1.1 Scope of the study

This first instance study examines first instance judgments decided between 22 January 1964 (when *Rookes v Barnard*<sup>1</sup> was decided) and 31 December 2020 of the courts of England, Wales and Northern Ireland in cases in which punitive damages were claimed.

##### (1) Temporal scope

The date when *Rookes v Barnard* was decided has been selected as the starting point of the study because the English law of punitive damages changed significantly on that date and has since been governed by that decision. The study explores the application of the law of punitive damages in the post-*Rookes* era and covers the entire period of the modern English law of punitive damages.<sup>2</sup>

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<sup>1</sup> [1964] AC 1129 (HL).

<sup>2</sup> Felicity Maher, 'An Empirical Study of Exemplary Damages in Australia' (2019) 43 MULR 694, 728: '[i]t would be interesting to undertake further empirical research [on] exemplary damages awards ... over a longer period ...'. The Australian study was limited to the 2000–2016 period 'to keep the number of cases to a manageable size' (at 704).

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### **(2) Institutional scope**

This study examines only first instance judgments. Appellate judgments have been examined separately and comprise a distinct sample.<sup>3</sup> First instance judgments have been separated from appellate judgments due to the different nature of the questions raised in each context. The first instance study addresses two main issues: (1) the frequency with which punitive damages are awarded when they are sought; and (2) the amounts that courts award as punitive damages. By contrast, the appellate study also focuses on the way in which appellate courts interfere with first instance determinations on punitive damages issues.

Tribunal decisions have not been sampled because tribunals are fundamentally different from courts.<sup>4</sup>

### **(3) Jurisdictional scope**

Most of the cases in the sample were decided by the courts of England and Wales. Decisions from Northern Ireland have also been sampled because the law of punitive

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<sup>3</sup> cf *ibid* 704: '[W]here a first instance decision on exemplary damages was appealed, the case on appeal was included, rather than the first instance decision .... In this way, the sample represents the final results in all cases included'. Maher's hybrid approach has the virtue of simplicity but runs the risk of data distortion because appeals are included alongside the first instance decisions when the appeals are likely to be different from first instance decisions. Lumping everything into a single sample means that one is not comparing like with like. Maintaining two separate samples (for the first instance data and the appellate data respectively) has the additional advantage of providing insight into how the courts apply the law of punitive damages at each phase.

<sup>4</sup> Tribunals are set up by legislation to deal with particular types of regulatory, disciplinary or administrative matters and have their own processes and rules. Tribunals often sit as a panel comprising a legally qualified judge and non-legal members who are drawn from relevant professions and have specialist knowledge and experience, see Judicial Office, 'Courts and Tribunals Judiciary: Tribunals' <<https://www.judiciary.uk/you-and-the-judiciary/going-to-court/tribunals/>> accessed 30 July 2021; Michael Zander, *Cases and Materials on the English Legal System* (10th edn, CUP 2007) 402.

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damages in that jurisdiction is virtually identical to that in England and Wales.<sup>5</sup> More generally, tort law is very similar in both jurisdictions.<sup>6</sup> Therefore, even though Northern Ireland has a distinct judicial system from that of England and Wales, the study examines cases from Northern Ireland because the law applied is essentially the same, and because their inclusion increases the sample size and therefore enhances the reliability of the results. The study does not extend to Scotland because punitive damages are not recognised in that jurisdiction.<sup>7</sup>

### 5.1.2 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 and JustisOne and additional cases that did not appear in the search results on Westlaw were included in the sample.

The dataset comprises 478 claims, of which 234 were accessed directly and 244 were accessed indirectly. The full text of the first instance judgment was available for claims accessed directly. In order to boost the sample size, claims that could be accessed indirectly (via appellate court decisions or via reported summaries) were also included. Indirectly accessed cases are the cases for which the full text of the first instance

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<sup>5</sup> There are minor statutory differences between the relevant law of England and Wales and of Northern Ireland (eg, the Defamation Act 2013 and the provisions about damages in the Crime and Courts Act 2013 do not extend to Northern Ireland, see sections 17(2) and 61(13)(d) respectively) but these are unimportant for the purposes of this study.

<sup>6</sup> Brice Dickson, *Law in Northern Ireland* (3rd edn, Hart 2018) para 9.70: ‘In Northern Ireland tort law is virtually identical to that in England and Wales’.

<sup>7</sup> *Black v North British Railway Co* 1908 SC 444, 453: ‘I find no authority for any distinction between damages and “exemplary damages” in the law of Scotland’; *McAnulty v McCulloch* [2018] CSOH 121, 2019 SLT 419 [35] (Lord Uist): ‘[U]nder Scots law ... [u]nlike the law of England, there is no question of punitive damages’.

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judgment could not be retrieved. In these cases, the information about the punitive damages claim was extracted by either the appellate decision or the case summary.

### 5.1.3 Filtering the sample

The search results contained approximately 1,470 judgments. Each of these was reviewed. To be included in the sample, a case had to satisfy the following criteria: (1) punitive damages were sought<sup>8</sup> by the claimant;<sup>9</sup> and (2) the claimant won on primary liability (if liability was disputed).<sup>10</sup>

The following principal categories of case were eliminated from the sample:

1) *Cases in which there was no final judicial determination of the punitive damages claim:* The search results contained several cases in which punitive damages

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<sup>8</sup> The requirement that punitive damages must have been sought means that this project did not use all cases decided within the study period as a reference point for determining the rate at which punitive damages were awarded. It only examines the rate at which punitive damages were awarded for cases in which they were sought. US studies have shown that results differ substantially when this factor (ie, whether punitive damages were requested) is considered, see Theodore Eisenberg and Michael Heise, ‘Judge-Jury Differences in Punitive Damages Awards: Who Listens to The Supreme Court?’ (2011) 8 JELS 325, 332.

<sup>9</sup> Punitive damages claims must be specifically pleaded under the CPR 16.4(1)(c). Prior to the CPR it was not required to plead punitive damages in county courts, see, eg, *Drane v Evangelou* [1978] 1 WLR 355 (CA) 458–459 (Lord Denning MR): ‘[I]t is not necessary in the county court to plead exemplary damages ... It is sufficient for the pleader to state material facts’. This is unimportant for present purposes because punitive damages were clearly sought in virtually all of the sampled claims.

<sup>10</sup> If judgment was entered for the defendant then the punitive damages claim, being secondary and dependent upon the main claim, was also rejected. In these cases, the court did not engage at all with the issue of whether it would be appropriate to award punitive damages; the entire claim was dismissed so that no such question arose. In some cases, even though the court entered judgment for the defendant, it mentioned how it would have assessed damages if it had found for the claimant, see, eg, *Mohidin v CPM* [2015] EWHC 2740 (QB) [385]–[388] (claim by Ahmed Hegazy). Such hypothetical findings on the issue of punitive damages were not included in the dataset for two reasons. First, because such cases do not involve real findings and thus distort the picture by definition. Second, because the reliability of hypothetical findings regarding punitive damages is questionable. There is a danger that judges may not have been as careful in their reasoning in these circumstances because their decision on the claim for punitive damages did not affect the outcome of the case. See, also, James Goudkamp and Donal Nolan, *Contributory Negligence in the Twenty-First Century* (OUP 2019) para 3.11.

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were sought and the court found for the claimant on the issue of liability but adjourned consideration of the remedy.<sup>11</sup> In other cases, the claimant sought punitive damages but later abandoned that claim.<sup>12</sup> These cases have been excluded from the sample.

2) *Cases in which the issue of punitive damages was determined according to foreign law.* In some of the cases in the search results the court referred to punitive damages because this remedy was sought under foreign law in different proceedings between the same parties in another jurisdiction.<sup>13</sup> These cases are not part of the sample.

3) *'Additional damages' for IP law infringements.* Section 97(2) of the Copyright, Designs and Patents Act 1988<sup>14</sup> provides: 'The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to (a) the flagrancy of the infringement, and (b) any benefit accruing to the defendant by reason of the infringement, award such additional damages as the justice of the case may require'. 'Additional damages' claims have not been sampled because the classification of the remedy is highly controversial<sup>15</sup> and it is not universally accepted that 'additional damages' are a species of punitive damages.<sup>16</sup>

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<sup>11</sup> Eg, *R (Karas) v Secretary of State for the Home Department* [2006] EWHC 747 (Admin), (2006) 103(18) LS Gaz [98].

<sup>12</sup> Eg, *Perlman v Rayden* [2004] EWHC 2192 (Ch) [14].

<sup>13</sup> Eg, *Stonehouse v Jones* [2012] EWHC 1089 (Ch) [4], [30] (proceedings in California).

<sup>14</sup> See, also, chapter 2.1.3.

<sup>15</sup> For a summary of the debate on the proper classification of the award, see Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th edn, OUP 2019) 367–368.

<sup>16</sup> *Phonographic Performance Ltd v Ellis* [2018] EWCA Civ 2812, [2019] Bus LR 542 [36] (Lewison LJ): 'Additional damages do not need to be shoehorned into existing general legal taxonomy [and] may be, either in whole or in part, what are now called exemplary damages; or, either in whole or in part, what are now called restitutionary or disgorgement damages'.

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### 5.1.4 Coding the cases

Each judgment was reviewed with the purpose of answering two central questions (did the claim for punitive damages succeed and, if so, what was the quantum of the award?). This information was added to an excel spreadsheet which coded all sampled judgments. The study examines *claims* rather than *cases*. Thus, if a case involved distinct claimants then multiple entries were inserted in the spreadsheet (one for each claimant).<sup>17</sup> Likewise, if there were multiple defendants and the court differentiated between them,<sup>18</sup> then again, a separate entry was created for each defendant.<sup>19</sup> The same approach was taken with judgments which included information about entirely distinct actions (ie, actions arising from different facts and involving different parties).<sup>20</sup> The key principle that was applied in counting claims was whether there were, in reality, separate different claims which were joined together for procedural convenience. If that was the case, separate entries were inserted for each claim.

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<sup>17</sup> Eg, *Devenish Nutrition Ltd v Sanofi Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637 (none of the five claimants succeeded in recovering punitive damages); *AT v Dulghieru* [2009] EWHC 225 (QB) (each of the four claimants was awarded punitive damages). There were two exceptions to this: *Jennison v Baker* [1972] 2 QB 52 (CA) and *Breslin v McKeivitt* [2011] NICA 33. Both judgments were accessed indirectly and clearly involved multiple claimants but the exact number of claimants was not ascertainable. A single entry was thus inserted in respect of them.

<sup>18</sup> There was no differentiation in cases where both a primary wrongdoer and a vicariously liable party were sued (eg, police misconduct cases in which individual police officers were sued alongside the police force: *Kelly v Faulkner* [1973] NI 31 (QBD); *Mohidin v CPM* (n 10)). A single entry was included in respect of these cases.

<sup>19</sup> Eg, *Marriott v CC North Yorkshire Police & British Transport Police* [2010] EWCA Civ 1351 (none of the two defendants was liable to pay punitive damages but each had committed a different wrong and was liable for a separate amount of compensatory damages); *Hassan v Cooper* [2015] EWHC 540 (QB), [2015] RTR 26 (two defendants severally liable for punitive damages).

<sup>20</sup> Eg, *Thompson v CPM* [1998] QB 498 (CA) (a single appellate judgment includes information about two entirely distinct first instance decisions: *Thompson v CPM* (Central London County Court, 12 June 1995, in which the claimant sued for trespass to the person and malicious prosecution) and *Hsu v CPM* (Central London County Court, 28 March 1996, in which the claimant sued for assault and false imprisonment)).

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The following information was extracted from each judgment and the 25 columns of the first instance spreadsheet were populated accordingly:<sup>21</sup>

Column A – Name of the case

Column B – Citation

Column C – Date of decision: The date of the judgment was entered for cases in which this information was available. For indirectly accessed cases, if the appellate court did not indicate the date of the first instance judgment, this was estimated by taking account of the number of days that passed in relation to cases in which this information was known.<sup>22</sup>

Column D – Court name: This column reflects which court decided each claim: the entries were either ‘High Court’ or ‘County Court’ (and the name of the County Court).

Column E – Court of first instance: Claims decided by county courts were coded with (1) and claims decided by the High Court were coded with (2).

Column F – Mode by which data was obtained: Claims for which the full text of the first instance decision was available were coded with (1) and claims which were accessed through a case report or an appellate judgment were coded with (2).

Column G – Case category: The cases were distinguished according to the *Rookes* category within which they fell. Judicial remarks regarding the classification of a case were taken into account for this purpose. Cases which did not fall under any of the

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<sup>21</sup> To ensure the accuracy of the data, the spreadsheet was checked multiple times for errors.

<sup>22</sup> Goudkamp and Nolan (n 10) para 3.08 fn 9.

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*Rookes* categories<sup>23</sup> and cases in which it was unclear under which *Rookes* category the claimant sought punitive damages<sup>24</sup> were coded as ‘Other’. There were no cases in the sample in which punitive damages were sought under the category of statutory authorisation of the award.

Column H – Cause of action: Cases were coded according to the cause of action in which the claimant sued as follows. It should be noted that some of the cases could plausibly be associated with more than one of the following groups.<sup>25</sup> A judgment call was made as to the classification of these cases based on what seemed to be the dominant characteristic in each of them.<sup>26</sup>

*Group (1) Interference with the person:* The following causes of action are included in this group: assault; battery; false imprisonment; discrimination; and harassment.

*Group (2) Interference with property:* This group includes trespass to land; trespass to goods; conversion; private nuisance; intellectual property torts;<sup>27</sup> and most landlord and tenant cases. Various causes of action were in issue in landlord and tenant

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<sup>23</sup> Eg, *Metcalfe v Collett-Ward* (CA, 1 December 1976) (the first instance judge did not consider *Rookes v Barnard* and held that the defendant who had threatened and assaulted the claimant in order to compel him to repair his car could be liable for punitive damages).

<sup>24</sup> Eg, *Patel v Southwark LBC* [1993] CLY 1400 (Lambeth County Court) (punitive damages awarded for unlawful eviction by a local authority).

<sup>25</sup> Eg, *AT* (n 17) a sex trafficking case involving claims in false imprisonment, battery and unlawful means conspiracy.

<sup>26</sup> Thus, *AT* (n 17) was grouped within the ‘interference with the person’ category because this characteristic is prevalent in a sex trafficking case. Similarly, it was common for unlawful eviction cases to be combined with harassment. These cases were listed under ‘interference with property’ instead of ‘interference with the person’ because the element of the unlawful eviction seemed to be dominant.

<sup>27</sup> Copyright, Designs and Patents Act 1988, s 96(2): ‘In an action for infringement of copyright all such relief ... is available to the plaintiff as is available in respect of the infringement of *any other property right*.’ (emphasis added).

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cases<sup>28</sup> but, unless otherwise indicated in the judgment,<sup>29</sup> they were classified under ‘interference with property’ with the aim of being consistent.

*Group (3) Defamation and privacy invasions:*<sup>30</sup> This group includes cases of defamation; breach of confidence (privacy);<sup>31</sup> and violations of data protection legislation.

*Group (4) ‘Abuse of power torts’:* Malicious prosecution and misfeasance in public office were placed in this group.

*Group (5) Economic torts:* This group includes claims for conspiracy, inducing breach of contract and deceit.<sup>32</sup> These torts would be wholly distinct from each other save for the fact that normally they result in the victim suffering pure economic loss.<sup>33</sup> Breach

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<sup>28</sup> ‘[M]ost cases of unlawful eviction will amount to a trespass, or a nuisance, or both, and proceedings may be brought accordingly’, see Andrew Tettenborn, David Wilby and David Bennett, *The Law of Damages* (2nd edn, LexisNexis 2010) 323. In *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324 (Ch), [2005] 1 WLR 1, punitive damages were awarded for breach of statutory duty (breach of the duty to respond within a reasonable time to the tenant’s request to assign the lease). Because statutes vary in purpose, cases in which punitive damages were sought for breach of statutory duty were categorised based on the purpose of the statute rather than the cause of action as such.

<sup>29</sup> Eg, *Collier v Burke* [1987] CLY 1143 (Wandsworth County Court) (landlord and tenant dispute in which the defendant had stabbed the claimant through the chest so that assault was the ‘dominant’ cause of action).

<sup>30</sup> Tort textbooks commonly treat defamation alongside privacy invasions: eg, James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) 341ff. Judges have also drawn an analogy between defamation and privacy invasions: eg, *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20 [214] (Eady J): ‘Because both libel and breach of privacy are concerned with compensating for infringements of Article 8 [ECHR], there is clearly some scope for analogy.’

<sup>31</sup> Breach of confidence traditionally encompassed ‘two distinct causes of action, protecting two different interests: privacy and secret (“confidential”) information’: *Douglas v Hello! Ltd* [2007] UKHL 21, [2008] 1 AC 1 [255] (Lord Nicholls). As a result of this distinction, this group includes only privacy claims. In *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003 [21] it was held that privacy is to be protected via the distinct tort of misuse of private information.

<sup>32</sup> This classification is followed by 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* (6th edn, Pearson 2018) 626ff.

<sup>33</sup> McBride and Bagshaw (n 32) 627.

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of statutory duty as a result of competition law infringements has also been included in this group.<sup>34</sup>

*Group (6) Miscellaneous:* This group includes causes of action which could not fit properly within any of the above categories (eg, negligence;<sup>35</sup> breach of contract;<sup>36</sup> breach of commercial confidence,<sup>37</sup> and breach of EU law<sup>38</sup>).

### Column I – Defendant liable to pay punitive damages?

Column J – Amount of punitive damages awarded: This column reports the quantum of punitive damages (where there was an award and the exact amount<sup>39</sup> was indicated).

Column K – Amount of punitive damages awarded (adjusted for inflation): This column reports the amount of punitive damages awarded in today’s terms. All amounts were adjusted to reflect 2021 values using an online inflation calculator.<sup>40</sup>

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<sup>34</sup> Civil liability for competition law infringements resembles liability under the economic torts in that they both presuppose intentional conduct, see Cristian Banfi, ‘Defining the Competition Torts as Intentional Wrongs’ (2011) 70 CLJ 83, 87–94. Banfi further argues (at 94–95) (footnotes omitted): ‘[A]lthough the economic torts differ from the competition torts in origin and rationales, both categories can be focused on business practices and compensable damage [and] courts are prone to interpret the competition torts with the same prudence with which they handle the economic torts.’

<sup>35</sup> Eg, *Re Organ Retention Group Litigation* [2004] EWHC 644 (QB), [2005] QB 506.

<sup>36</sup> Eg, *Raw v Croydon LBC* [2002] CLY 941 (Bodmin County Court).

<sup>37</sup> Tanya Aplin and others, *Gurry on Breach of Confidence: The Protection of Confidential Information* (OUP 2012) paras 4.01–4.02 (footnotes omitted): ‘The jurisdictional basis of the action for breach of confidence has been a source of lingering uncertainty and controversy. ... [T]he action should properly be regarded as *sui generis*.’

<sup>38</sup> Eg, *R (Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin), [2016] CMLR 10.

<sup>39</sup> In several instances, the court awarded a lump sum as compensatory and punitive damages without allocating a specific amount under each head (eg, *Davies Sons & Co Ltd v Dark* (CA, 28 March 1966) where a lump sum of £150 (£2,959 in 2021) was awarded under both heads). The cell pertaining to the amount of punitive damages was left blank in these cases.

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Column L – Defendant liable to pay aggravated damages?: One of the questions that this study examines is what, if any, relationship there is between punitive damages and aggravated damages. This column reports whether the defendant was liable to pay aggravated damages when aggravated damages were sought.

Column M – Amount of aggravated damages awarded: The amount of aggravated damages was entered, when such damages were awarded and where it was possible to ascertain the quantum.

Column N – Amount of aggravated damages awarded (adjusted for inflation): The inflation adjusted amount of aggravated damages was entered here.

Column O – Total amount of compensatory damages awarded: The study examines if there is a relationship between compensatory and punitive damages. Accordingly, this column records the total amount of compensatory damages (including the amount of aggravated damages)<sup>41</sup> awarded in each case. This information was included only for the cases in which the exact amount of compensatory damages was ascertainable.<sup>42</sup>

Column P – Total amount of compensatory damages awarded (adjusted for inflation): This column reflects the total amount of compensatory damages awarded in today's terms.

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<sup>40</sup> The inflation calculator is available at <<https://www.officialdata.org/UK-inflation>> accessed 30 July 2021.

<sup>41</sup> Aggravated damages are a species of compensatory damages: Crime and Courts Act 2013, s 39(2). See, also, *Rookes* (n 1) 1121.

<sup>42</sup> Thus, the relevant cell was left blank for cases in which the court lumped compensatory and punitive damages in a single sum.

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Column Q – Type of defendant: There were three different types of defendant: (1) natural person; (2) corporation;<sup>43</sup> and (3) public body.

Column R – Type of claimant: The same three types were used as in the previous column.<sup>44</sup>

Column S – Gender of defendant: The defendant's gender was entered in this column for cases in which the defendant was a natural person.

Column T – Gender of claimant: The gender of natural person claimants was reported here.

Column U – Mode of trial: This column records whether there was a trial by 'judge only' or by 'judge and jury'. Where the question of punitive damages was withdrawn from the jury, the case was listed as a 'judge only' trial.<sup>45</sup> 'Unknown' was inserted in the relevant cell in respect of three indirectly accessed claims<sup>46</sup> for which the mode of trial was not ascertainable.

Column V – Were other sanctions imposed?: This column reports whether an additional sanction (other than a punitive damages award) was imposed on the defendant for the conduct that constituted the subject matter of the civil proceedings. The relevant information was extracted either from the court's reasons or from newspaper reports.

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<sup>43</sup> All claims falling within this group were brought against corporations with the exception of *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397 (QBD) in which the defendant was a trade union.

<sup>44</sup> Again, one case in the 'corporations' category did not strictly involve a corporate claimant but was included in this category nevertheless: *Sinn Fein v CC Royal Ulster Constabulary* (NIHC, 11 April 1991) in which the claimant was a political party.

<sup>45</sup> Eg, *Kiam v MGN Ltd* (QBD, 10 March 2000).

<sup>46</sup> *Smith v CPM* [1982] CLY 899 (Bow County Court); *Burke v Home Office* (Clerkenwell County Court, 24 July 1996); *Smith v CC Sussex* [1999] CLY 4852 (Brighton County Court).

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Column W – If other sanctions imposed, what was the sanction?: A brief description of the sanction imposed (eg, fine, prison sentence, disciplinary action) as well as the entity imposing the sanction (eg, criminal court, disciplinary tribunal) was included in this column for cases in which the defendant was subjected to another sanction.

Column X – What was the defendant’s wrongful conduct?: A brief description of the defendant’s behaviour was included in this column.

Column Y – Notes: This column includes other useful information (eg, the global amount of punitive and compensatory damages awarded in cases where the court did not allocate a specific amount under each head).<sup>47</sup>

### **5.1.5 Limitations**

The principal drawbacks in the methodology are described in detail below. In summary, they are: (1) a potential lack of representativeness in relation to cases decided before 2000; (2) the fact that the sample counts claims rather than cases; (3) the fact that the sample is derived exclusively from judgments that are available online; and (4) the inclusion in the sample of decisions for which the full text was not available. Each limitation will be discussed in turn.

It is essential to obtain a representative sample before conclusions can be drawn justifiably about the law of punitive damages. It may be thought that the inclusion of cases predating 2000 affects the representativeness of the sample because it was not until 2000 that the number of English decisions that were made available online increased

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See n 39.

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significantly.<sup>48</sup> The abolition of the ‘cause of action test’ around that time<sup>49</sup> also increased the number of relevant decisions available in the post-2000 era. This means that a comparatively smaller number of cases handed down before 2000 was accessible. However, 249 claims (of the 478 claims in total) in the sample were decided before 2000, which is a sufficient number to enable the reader to draw meaningful conclusions about the application of the law of punitive damages during the period between 1964–1999.<sup>50</sup> Besides, if the start date of the study period was set at 2000 rather than 1964 then the study would tell us nothing about the longer history of punitive damages since *Rookes v Barnard*. Even though an examination of the full time period potentially leads to a less representative sample, it is still useful to have some information (rather than no information at all) about the operation of the law of punitive damages in the pre-2000 era. In any event, statistical analysis suggests that the results of this study do not depend on the date on which each claim was decided.<sup>51</sup>

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<sup>48</sup> Goudkamp and Nolan (n 10) para 3.08.

<sup>49</sup> *Kuddus v CC Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122.

<sup>50</sup> This was confirmed with the professional statisticians who carried out the statistical analysis for this project.

<sup>51</sup> A likelihood-ratio test with the null hypothesis that liability for punitive damages is independent of the date on which the claim was decided gave a p-value=1. An ANOVA test on the hypothesis that the amount of punitive damages is independent of the date on which the claim was decided gave a p-value=0.067. These p-values indicate that the null hypothesis should not 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. It is generally accepted that if the p-value is  $\leq 0.05$  then the null hypothesis probably is not true and should be rejected. The 0.05 level of statistical significance has been adopted by researchers in the physical and social sciences because at this level there is a less than five per cent chance of erroneously rejecting the hypothesis that is being tested. However, legal empirical studies have been criticised for blindly adopting the same level of statistical significance, see, eg, Neil Cohen, ‘Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge’ (1985) 60 NYU LR 385, 412: ‘Unfortunately, the legal system generally has applied, without critical analysis, the conventional but arbitrary test for scientific hypotheses to factual propositions based on empirical data in civil lawsuits’. Accordingly, there may be some reason to question the weight that should be afforded to the 0.05 threshold in empirical legal studies).

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The data were collected from 339 judgments. All 339 cases were reviewed personally by the author. By counting claims rather than cases, the sample size was increased to 478 entries.<sup>52</sup> This approach, however, introduced a difficulty with cases in which multiple claimants were entitled to punitive damages. In these cases, the amount of punitive damages *received* by each claimant did not correspond to the amount of punitive damages *paid* by the defendant, because the defendant was liable cumulatively for all of the awards in question. Therefore, counting claims resulted in an accurate description of what was happening on the claimant side, but it did not accurately reflect the defendant's liability. This situation is a product of the rule in *Riches v News Group Newspapers Ltd*,<sup>53</sup> where it was held that, in cases involving multiple claimants, the award of punitive damages is split equally between all claimants.<sup>54</sup> This discrepancy has been addressed by reporting both the amount of punitive damages awarded in respect of each claim (the 'as received measure'), and the total amount of punitive damages paid by the defendant in each case (the 'as paid measure').<sup>55</sup> In this way, the reader can assess the level of punitive damages awards by reference to both measures.<sup>56</sup>

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<sup>52</sup> All 478 first instance claims are listed in appendix I.

<sup>53</sup> [1986] QB 256 (CA) 261, 289.

<sup>54</sup> Eg, in *AT* (n 17) £81,986 were awarded as punitive damages. Each of the four claimants were therefore entitled to £20,496. However, the defendant was liable for the entire award. Thus, counting claims reflects the exact amount of punitive damages that each claimant received but conceals the reality that all of these awards were paid by the same defendant (who was liable for £81,986 in total).

<sup>55</sup> Henceforth, the 'as paid measure' is reported in a parenthesis with a corresponding note.

<sup>56</sup> An issue arose as to the most appropriate coding of *Riches* (n 53) which involved 10 similarly situated claimants. In light of the large sample size (478 claims) and the complication arising from the two different ways of measuring the award of punitive damages (the 'as paid measure' and the 'as received measure') and in order to be consistent in the approach followed throughout the first instance study (which counts claims rather than cases) 10 entries were added in respect of *Riches*. The existence of 10 entries derived from a single case creates the danger of distorting the results concerning small case groups (in particular, the success rate of the punitive damages claim by

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As discussed earlier, the sample comprises exclusively judgments that were reported online. The main problem here stems from the fact that County Court judgments are often not available online.<sup>57</sup> Accordingly, there are limited data regarding County Court decisions. Furthermore, because most County Court judgments are not accessible online it is possible that the sample of claims decided by the County Court is unrepresentative. The dataset includes 229 County Court claims and 249 High Court claims. The County Court awarded punitive damages at a higher rate than the High Court<sup>58</sup> and the quantum of awards was lower at the County Court.<sup>59</sup> Statistical analysis suggests that the results of this study could be affected by whether the claim was decided by the High Court or by a County Court.<sup>60</sup> However, the alternative of collecting hard copies of judgments so as to sample cases from the different County Courts around England, Wales and Northern Ireland would have been expensive and impractical. Even assuming that free access to the County Courts' files could have been obtained, such an

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cause of action). To address this issue, I have also explained how the specific results would differ if *Riches* was treated as a single entry (see chapter 6.1.3).

<sup>57</sup> An additional issue is that cases which settle are usually not publicly available so the sample does not take into account what happens in settlements. However, this is a ubiquitous issue in empirical legal studies, and, in any event, does not pose a major problem to a study such as mine, as settlement agreements do not create law.

<sup>58</sup> Punitive damages were awarded in 34.9 per cent of the claims decided by the High Court and in 58.9 per cent of the claims decided by the County Court.

<sup>59</sup> The average and median awards of punitive damages made by the High Court were £63,626 (£91,138 'as paid') and £47,211 (£46,308 'as paid') respectively while the average and median awards made by the County Court were £16,310 (£17,879 'as paid') and £3,438 (£3,438 'as paid') respectively. A potential explanation as to why the quantum of punitive damages awards was lower for claims decided by County Courts is that, traditionally, lower value claims have been heard by these courts, see County Courts Jurisdiction Order 1981, SI 1981/1123, art 2 (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, sch 1, pt I, para 1); CPR 16.3(5), PD 7A paras 2.1–2.2; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) para 4.9.

<sup>60</sup> A likelihood-ratio test with the null hypothesis that liability for punitive damages is independent of the court which decided the claim gave a p-value=0.0126. An ANOVA test on the hypothesis that the amount of punitive damages is independent of the court which decided the claim gave a p-value=0.038.

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exercise would not only require visiting the numerous County Courts throughout the country but also finding cases in which punitive damages were sought without having any particular way of tracking them down as they are not indexed by area of law. This methodological weakness has been partially redressed by locating information about County Court judgments through appellate judgments. Furthermore, certain legal databases, such as Lawtel, made available the full text of a number of unreported County Court judgments. A significant volume of data was collected from this source thus, enhancing the representativeness of the sample.<sup>61</sup> Besides, it should be emphasised that the goal of selecting cases for an empirical legal study 'is not a perfect match between sample frame and research conclusions, but only a reasonable connection between the two'.<sup>62</sup>

A final limitation is that the sample includes indirectly accessed cases (ie, cases for which only a summary was available and cases which were appealed but for which the text of the first instance judgment was not accessible). As mentioned above, information about the first instance judgment in relation to the punitive damages issues was extracted from the case summary or from the appellate decision in these cases. Without having access to the text of the first instance judgment there is a danger that the data concerning these decisions may not be accurate. However, these cases were either discussed by a case reporter whose job was to prepare summaries of judgments or by appellate courts whose purpose was to review them and so one should have confidence in the accuracy of the information contained therein.

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<sup>61</sup> 41 County Court claims were accessed directly through Lawtel.

<sup>62</sup> Mark Hall and Ronald Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 California LR 63, 105.

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Another potential objection to obtaining information about first instance cases indirectly is that both reported and appealed cases are atypical. For example, the fact that a case reporter thought that a judgment was worth reporting may be an indication that there was something unusual about it.<sup>63</sup> Similarly, the fact that a case was appealed might mean that it is not representative of the general population of first instance cases.<sup>64</sup> However, even if this is true, about half of the cases in the dataset were accessed directly and this enhances the reliability of the sample. 234 claims were accessed directly and the remaining 244 claims were accessed indirectly. Punitive damages were awarded in 38.5 per cent of directly accessed claims and in 54.1 per cent of indirectly accessed claims. Differences were also observed in the average award granted in decisions that were accessed directly and in those accessed indirectly.<sup>65</sup> However, statistical analysis suggests that these disparities are likely to be down to chance<sup>66</sup> which indicates that the different modes of accessing the data have not affected the results of the study and that the sample of indirectly accessed claims is reasonably representative of the general population of relevant claims. Assuming that these differences are not attributable to chance, the higher rate at which punitive damages were awarded in indirectly accessed claims could be a product of the fact that an appeal on punitive damages is more likely where punitive

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<sup>63</sup> Goudkamp and Nolan (n 10) 581.

<sup>64</sup> *ibid.*

<sup>65</sup> The average and median punitive award was £47,694 (£59,046) and £6,154 (£6,015) for indirectly accessed cases. The corresponding amounts for directly accessed cases were £16,936 (£19,893) and £6,691 (£6,072).

<sup>66</sup> A likelihood-ratio test with the null hypothesis that liability for punitive damages is independent of the mode of accessing the data gave a p-value=0.723. An ANOVA test on the hypothesis that the amount of punitive damages is independent of the mode of accessing the data gave a p-value=0.164.

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damages have been awarded than when the punitive damages claim has been rejected.<sup>67</sup> Similarly, the higher amounts awarded in indirectly accessed claims indicate that an appeal on the assessment of punitive damages is more likely where a substantial amount has been awarded at first instance.<sup>68</sup> It would then follow that the figures on the success rate of punitive damages claims and the quantum of punitive damages awards reported in this study may be a little higher than one would find if one looked at the general population of cases.

In order to address this potential problem with the representativeness of the data consideration was given to the option of removing indirectly accessed claims from the sample. This choice would have two knock-on effects. First, it would drastically reduce the number of County Court decisions available<sup>69</sup> and would thus intensify the problem of representativeness with regards to those latter decisions.<sup>70</sup> Faced with two options, each of which created a potential problem, I decided to choose the route which would produce a larger sample size.<sup>71</sup> Second, the elimination of indirectly accessed claims from the sample would also reduce the number of available decisions handed down between 1964 and 1999.<sup>72</sup> If this route was followed (or, alternatively, if pre-2000 were excluded

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<sup>67</sup> Defendants are more likely to bring appeals on punitive damages than claimants: see the relevant results of the appellate study in chapter 7.1.2 (1)(b) according to which defendants brought about two thirds of the appeals in that sample.

<sup>68</sup> It is reasonable to think that an appeal is more likely to be pursued if larger monetary sums are at stake.

<sup>69</sup> 184 of the total 229 County Court decisions in the sample were accessed indirectly.

<sup>70</sup> This issue is discussed in text to nn 57–62.

<sup>71</sup> Including indirectly accessed claims in the sample substantially increases the number of County Court decisions and hence the entire sample size.

<sup>72</sup> 192 of the total 244 indirectly accessed claims were decided between 1964 and 1999. The small number of directly accessed claims during this period can be explained by the fact that more widespread electronic data became available only after 2000.

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from the sample) then it would not be possible to examine the longer history of the English law of punitive damages. Even though an examination of the full time period potentially leads to a less representative sample, it is still useful to have some information (rather than no information at all) about the operation of the law of punitive damages in the pre-2000 era. For these reasons, it was ultimately decided that the benefits of maintaining indirectly accessed claims in the sample outweighed the potential drawbacks. Accordingly, despite the objections discussed above, the study examines indirectly accessed claims because they constitute a credible source of information about first instance judgments and thus, increase overall the sample size and the reliability of the results. Nevertheless, the reader should bear in mind the selection bias discussed in interpreting the results.

### **5.1.6 Statistical analysis**

A professional statistician carried out the statistical analysis for this study.<sup>73</sup> In order to account for the fact that not all claims in the dataset were independent of each other (because claims rather than cases were counted so that the sample comprised 478 claims that were clustered within 339 cases), the statistician analysed the data through mixed models, treating cases as random effects. She ran likelihood-ratio tests (a likelihood-ratio test is a test based on an approximation of the chi-squared distribution) to test for independence of categorical variables (eg, the differences between the success rate of punitive damages claims by mode of trial). ANOVA tests were run so as to test the significance of differences between numerical variables (eg, the differences between the

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<sup>73</sup> Ms Francesca Panero, DPhil candidate in Statistics, University of Oxford. Large parts of the results were cross-checked by a second independent professional statistician, Mr Simon Vivian, Lecturer in Statistics and Fellow of St Anne's college, Oxford.

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quantum of punitive damages awards by type of defendant). The statistician also conducted linear regression analysis to identify the strength of a relationship between the amounts of punitive damages and the amounts of aggravated damages and total compensatory damages.

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### 5.2 APPELLATE STUDY

This section describes the methodology that was adopted for the appellate study. The appellate study was based on the same methodology as the first instance study. As a result, the temporal, institutional and jurisdictional scope of both studies is the same; the data were accessed in the same manner by the same online legal platforms for both samples; the cases were filtered and coded similarly; and the statistical analysis was conducted in the same way.

In order to avoid repetition this section explains the methodology for the appellate study to the extent that it differs from the methodology employed for the first instance study. The following points are noteworthy.

#### 5.2.1 Filtering the sample

To be included in the appellate sample, a case had to satisfy the following criteria: (1) the claimant won on primary liability following the appeal; and (2) the appellate court was asked to determine whether punitive damages should be awarded and/or the appropriate amount of the award.

A key difference from the first instance study is that the claimant need not have won on primary liability *at first instance* for the case to be included in the appellate sample. Thus, the appellate sample includes cases in which the defendant was entirely absolved of liability at first instance but was then found liable on appeal and the appellate court decided the punitive damages claim.<sup>74</sup> These cases were added to the dataset

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<sup>74</sup> If the first instance court provided a hypothetical determination of the punitive damages issues (ie, it indicated how it would have decided the punitive damages claim had the claimant succeeded on primary liability) then the first instance court's hypothetical findings on punitive damages were

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because they address the question of how punitive damages issues are handled on appeal. For cases in which there was a second appeal, the judgment on the final appeal was included in the sample, rather than the intermediate appellate decision.<sup>75</sup>

The same categories of case that were eliminated from the first instance sample were also eliminated from the appellate sample.

It is important to note three recurrent scenarios encountered during the appellate data collection process and to explain how they were dealt with.

*1) Applications for 'Permission to Appeal' ('PTA'):* Several cases in the search results concerned applications for permission to appeal against the orders of the first instance court regarding punitive damages. A question arose as to whether or not decisions on such applications should be added to the dataset.

It is useful to outline briefly the test governing the determination of applications for PTA in English law. PTA can be granted under the CPR 52.6 only where: (1) the court considers that the appeal would have a real prospect of success; or (2) there is some other compelling reason for the appeal to be heard.<sup>76</sup> All relevant cases in the search

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treated as determinations of the issue in the appellate spreadsheet: eg, *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. If the first instance court absolved the defendant of liability and did not determine hypothetically the punitive damages claim then the case was treated as if there had been no determination on punitive damages by the first instance court (and hence no possibility of the appellate court overturning any such determination): eg, *Costello v CC Derbyshire Constabulary* [2001] EWCA Civ 381, [2000] 1 WLR 1437.

<sup>75</sup> Eg, *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL).

<sup>76</sup> The CPR 1998 entered into force on 26 April 1999 and replaced the Rules of the Supreme Court 1965 ('RSC') (SI 1965/1776) and the County Court Rules 1981 (SI 1981/1687). Out of 21 PTA judgments in the sample, nine were decided under the pre-CPR regime. Courts enjoyed greater discretion in deciding PTA applications under the previous regime, see RSC Ord 59, para 14(2). However, the differences between the two regimes are unimportant for present purposes because all PTA applications in the sample were decided based on whether there were real prospects of the appellate court overturning the first instance determinations on the question of punitive damages.

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results concerned whether a PTA should be granted based on the application of the ‘real prospect of success’ limb of the test.

In cases where PTA was granted, the appellate decision dealing with the merits of the appeal was included in the sample (rather than the PTA decision).<sup>77</sup> In cases where PTA was not granted, the decision refusing permission to appeal was included in the sample. Accordingly, this study treats judgments on PTA applications which were denied as functionally equivalent to appeals. Although decisions on PTA applications are procedurally different from judgments delivered following a full appeal hearing, they are counted for the purposes of this study because, in substance, both address the issue of whether the decision by a lower court on a punitive damages issue (either existence of liability or quantum) should be affirmed on substantive grounds. In other words, although the court is applying a ‘no real prospect of success’ threshold in PTA applications, there is nothing in the reasoning of these cases to distinguish them functionally from appeals where the appeal was dismissed.<sup>78</sup>

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<sup>77</sup> Eg, *Scutt v Lomax* (CA, 4 February 1999) granting permission to appeal followed by *Scutt v Lomax* (2000) 79 P&CR D31 (CA) (dismissing an appeal against the existence of liability for punitive damages).

<sup>78</sup> Compare, eg, *Mundy v Calpe Motors Ltd* (CA, 10 June 1987) with *Wood v Wall* [1967] EGD 9 (CA). In *Mundy* the defendants sought permission to appeal against the decision to award punitive damages against them for deceit. Nichols LJ rejected the application and said (at pp 2–3): ‘When carrying out this fraud ... [the] defendants must have decided that the game was worth the candle ... Quite plainly the judge regarded that ... as outrageous and cynical conduct; in my judgment he was entitled so to do ... I do not see any reasonable grounds for an appeal in this case, and accordingly I shall not grant leave to appeal.’ *Wood v Wall* concerned a full appeal (rather than a PTA) against the decision to award the claimants punitive damages for trespass to land. The defendant alleged that punitive damages should not have been awarded. In dismissing the appeal Harman LJ noted (at p 6): ‘[T]his seems a case where exemplary damages are justified, for the Defendant had been making a profit in his business by means of his own acts of aggression ...’. For a similar comparison of the reasoning in two cases where the refusal to award punitive damages was upheld on appeal, see *Ijaola v Home Office* [2005] EWCA Civ 335 [12] (PTA against the refusal to award punitive damages not granted) and *Durrant v CC Avon and Somerset Constabulary* [2017] EWCA Civ 1808 [27] (appeal against the refusal to award punitive damages dismissed).

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The sample includes 93 appellate judgments (containing 115 punitive damages claims) in total. Out of these, 21 (containing 24 punitive damages claims) concerned PTA applications.<sup>79</sup> In the end, judgments refusing PTA were included in the sample because these cases are essentially indistinguishable from other (non-PTA) appellate decisions both in terms of their substance<sup>80</sup> and in terms of their effect.<sup>81</sup>

2) *Appellate decisions remitting punitive damages questions for a re-trial*: The search results included four cases<sup>82</sup> in which one party appealed on a punitive damages issue and the appellate court overturned the first instance decision and ordered a re-trial. For example, in *Riches v News Group Newspapers Ltd*<sup>83</sup> the defendants appealed against a punitive damages award of £818,578 challenging both liability for punitive damages and the assessment of the award. The Court of Appeal found that the first instance decision on punitive damages could not stand (because the jury had been misdirected and the quantum of the award had been excessive) and ordered a re-trial on the question of punitive damages. These cases have been incorporated into the sample because they provide information about appellate intervention with first instance decisions on punitive damages. Their coding reflects the fact that the appellate court allowed an appeal in

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<sup>79</sup> With one exception (*Regency (UK) Ltd v Albu-Swalin* [2019] EWHC 3713 (QB) where the High Court decided a PTA application from a county court order), all PTA applications in the sample were decided by the Court of Appeal.

<sup>80</sup> Indeed, in some cases, the consideration of the punitive damages issue in the full appellate decision was much more cursory than in most PTA decisions, eg, *Manley v CPM* [2006] EWCA Civ 879, [2006] Po LR 117 [33] (Waller LJ disposed the appeal on punitive damages in one sentence).

<sup>81</sup> A refusal of PTA ‘has the same immediate effect as a permission followed by the dismissal of the appeal in that both put an end to the appellant’s case’: Zuckerman (n 59) para 25.159.

<sup>82</sup> *Riches* (n 53); *Holden v CC Lancashire* [1987] QB 380 (CA); *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd* (CA, 19 March 1987); *Rowland-Jones v City & Westminster Financial plc* (CA, 6 February 1992).

<sup>83</sup> (n 53).

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relation to liability and/or quantum. However, the columns pertaining to the final outcome of the case (ie, existence of liability for punitive and quantum of punitive damages following the appeal) have been coded with ‘Unknown’.

3) *Successful appeals on primary liability affecting punitive damages awards*: A final difficulty arose with appellate cases in which (1) punitive damages had been awarded at first instance and (2) the defendant appealed successfully on the existence of primary liability. As a result of the appeal on primary liability being allowed, the punitive damages award was also effectively overturned in these cases (even though the appellate court did not consider the issue of punitive damages). Five such cases<sup>84</sup> appeared in the search results and they have been excluded from the sample. The reason is that the subject matter of these decisions is not a punitive damages issue (even though these cases have an effect on punitive damages issues).

### 5.2.2 Coding the cases

The appellate study replicates the first instance study in that it examines *claims* rather than *cases*. An additional particularity of the appellate study is that it also examines *appeals* alongside *claims*.<sup>85</sup> It is thus important to explain the distinction between claims and appeals. The term *claim* denotes a legal proceeding by a particular claimant against a particular defendant. For the purposes of this study, an *appeal* is each and every

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<sup>84</sup> *Anderson v Blakey* (CA, 29 June 1987); *Gibbs v Bartlett* (CA, 7 April 1989); *Palomares v CC Thames Valley Police* (CA, 11 October 1996); *Hutt v CPM* [2003] EWCA Civ 1911; *Patel v Secretary of State for the Home Department* [2015] EWCA Civ 645. The search results also included cases involving the following factual pattern (eg, *McCall v Abelesz* [1976] QB 585 (CA)): the claim for punitive damages was rejected at first instance, the defendant appealed on primary liability and the claimant cross-appealed on the refusal to award punitive damages but the appellate court absolved the defendant of liability so that the refusal to award punitive damages was not reviewed on appeal. These cases have also been excluded for the same reason.

<sup>85</sup> The approach of Goudkamp and Nolan (n 10) para 5.03 was adopted in this regard.

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challenge against the determination of the first instance court on either the existence of liability for punitive damages or the quantum of the award. The following illustration elaborates the distinction. Suppose that the first instance court had found the defendant liable for punitive damages and awarded £10,000 under that head. And suppose that in the appellate proceedings the defendant challenged both the finding of liability for punitive damages and the size of the award and that the claimant had cross-appealed on the basis that the amount should have been higher than £10,000. This would be treated as three appeals in total: two by the defendant and one by the claimant.<sup>86</sup> The number of claims is different from the number of appeals in this study because in some of the claims (as in the example just given) there was more than one appeal,<sup>87</sup> while in others the issue of punitive damages was considered for the first time on appeal, so that there was no appeal by either party on the issue.<sup>88</sup>

The following information was extracted from each judgment. The 43 columns of the appellate spreadsheet were populated accordingly (in order to avoid duplication with

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<sup>86</sup> There was one exception to this approach. In *Riches* (n 53) the defendant appealed against the finding of liability for punitive damages and against the assessment of the award which had been divided equally between 10 claimants at first instance. This case was treated as involving two appeals (rather than 20 appeals, 10 on the existence of liability for punitive damages and 10 on the assessment of the award) in order to avoid distorting the data. Given the relatively small sample size, treating *Riches* as involving 20 appeals would give undue prominence to a single case: it would result in 20 out of a total of 144 appeals being derived from one case and thus, would have a distortive effect for almost all of the results related to appellate intervention. By contrast, these difficulties did not arise with *Riches* in the first instance sample (which is significantly larger and counts only claims rather than appeals). For the way in which *Riches* was handled in the first instance sample see n 56.

<sup>87</sup> Eg, *Choudhury v Garcia* [2013] EWHC 3283 (QB) (the defendant appealed against the finding of liability for punitive damages and the claimant cross-appealed against the assessment of punitive damages).

<sup>88</sup> Eg, *Costello* (n 74).

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the first instance methodology, an explanation is provided only in relation to the columns which did not appear in the first instance spreadsheet):<sup>89</sup>

Column A – Name of the case

Column B – Citation

Column C – Date of first instance decision

Column D – Date of appellate decision

Column E – Name of first instance court

Column F – Name of appellate court

Column G – Was the appellate court considering only an application for permission to appeal?: The cases in which the parties were only seeking permission to appeal against the first instance judgment are coded in this column so that they can be distinguished from full appeals.

Column H – Case category: The case categories were the same as in the first instance spreadsheet.

Column I – Cause of action: Cases were coded according to the cause of action in which the claimant sued as in the first instance spreadsheet.

Column J – Defendant liable to pay punitive damages at first instance?: If no determination had been made, ‘N/A’ was entered.

Column K – Amount of punitive damages awarded at first instance: If no determination had been made, ‘N/A’ was entered.

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<sup>89</sup> The spreadsheet was checked multiple times for errors.

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Column L – Amount of punitive damages awarded at first instance (adjusted for inflation)

Column M – Defendant liable to pay aggravated damages at first instance?: If no determination had been made, ‘N/A’ was entered.

Column N – Amount of aggravated damages awarded at first instance: If no determination had been made, ‘N/A’ was entered.

Column O – Amount of aggravated damages awarded at first instance (adjusted for inflation)

Column P – Total amount of compensatory damages awarded at first instance: If no determination had been made, ‘N/A’ was entered.

Column Q – Total amount of compensatory damages awarded at first instance (adjusted for inflation)

Column R – Type of defendant

Column S – Type of claimant

Column T – Gender of defendant

Column U – Gender of claimant

Column V – Mode of first instance trial

Column W – Were other sanctions imposed?

Column X – If other sanctions were imposed, what was the sanction?

Column Y – What was the defendant’s wrongful conduct?

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Column Z – What was the legal personality of the appellant?: The relevant entries were (1) natural person; (2) corporation; and (3) public body.

Column AA – What was the legal personality of the respondent?: The same three groups were used as in column Z.

Column AB – Did the appellate court accede to a request to overturn the determination of the first instance court regarding the existence of liability for punitive damages?: If the existence of punitive damages liability had not been considered at first instance, or if the appellate court had not been asked to disturb the first instance determination of this issue, 'N/A' was inserted. 'No' was therefore entered only if the appellate court was asked to overturn the first instance court's determination of the issue and declined to do so.

Column AC – Did the appellate court accede to a request to overturn the determination of the first instance court regarding the assessment of punitive damages?: Again, if this issue was not considered at first instance or if the appellate court was not asked to disturb the first instance court's findings on the quantum of punitive damages, 'N/A' was entered. 'N/A' was also entered in cases in which the defendant appealed on both the existence of liability for punitive damages and the assessment of the award, and where the appellate court did not have to deal with assessment because it allowed the appeal on the former issue. Accordingly, 'No' was only entered if the appellate court was specifically asked to overturn the first instance court's assessment of punitive damages and declined to do so.

Column AD – Was the defendant liable for punitive damages following the appeal?: If a court remitted the case for a re-trial, 'Unknown' was entered. Accordingly,

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‘Yes’ and ‘No’ were only entered if the appellate court decided the issue of liability for punitive damages following the appeal.

Column AE – Amount of punitive damages awarded following the appeal?:

Again, if a court remitted the case for a re-trial, ‘Unknown’ was entered.

Column AF – Amount of punitive damages awarded following the appeal (adjusted for inflation)?

Column AG – Difference in the punitive damages awarded at first instance and on appeal (inflation adjusted): The figure entered in this column represented the difference between the inflation-adjusted amounts awarded as punitive damages at first instance and on appeal.<sup>90</sup>

Column AH – Did the claimant succeed in an appeal on liability for punitive damages?: ‘N/A’ was entered if there was no such appeal.

Column AI – Did the claimant succeed in an appeal on the assessment of punitive damages?: If there had been no such appeal, ‘N/A’ was entered.

Column AJ – Did the defendant succeed in an appeal on liability for punitive damages?: ‘N/A’ was entered if there was no such appeal.

Column AK – Did the defendant succeed in an appeal on the assessment of punitive damages?: Again, ‘N/A’ was entered if there was no such appeal. ‘N/A’ was also entered in cases in which the defendant appealed on both the existence of liability for punitive damages and the assessment of the award, and where the appellate court did not

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<sup>90</sup> Eg, *Watson v CC Cleveland* [2001] EWCA Civ 1547, [2001] Po LR 359: The first instance court awarded punitive damages in the sum of £27,109 and the appellate court awarded punitive damages in the sum of £14,983. Accordingly, ‘-£12,126’ was entered in the relevant cell.

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have to deal with the assessment because it allowed the appeal on the former issue thus rendering the latter issue moot.<sup>91</sup>

Column AL – Defendant liable for aggravated damages following the appeal?: If a court remitted the case for a re-trial, ‘Unknown’ was entered. Accordingly, ‘Yes’ and ‘No’ were only entered if the appellate court decided the issue.

Column AM – Amount of aggravated damages awarded following the appeal?: Again, if a court remitted the case for a re-trial, ‘Unknown’ was entered.

Column AN – Amount of aggravated damages awarded following the appeal (adjusted for inflation)?

Column AO – Total amount of compensatory damages awarded following the appeal?

Column AP – Total amount of compensatory damages awarded following the appeal (adjusted for inflation)?

Column AQ – Notes: Other useful information was entered in this column (eg, whether the decision concerned both an appeal and a cross-appeal).

### 5.2.3 Limitations

The same limitations discussed in relation to the first instance study largely apply *mutatis mutandis* to the appellate study.<sup>92</sup> An additional limitation of the appellate study relates to

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<sup>91</sup> Eg, *Mafo v Adams* [1970] 1 QB 548 (CA).

<sup>92</sup> The problem of indirectly accessed cases is an exception to this because the full text of the appellate judgment was available for all cases in the appellate sample. Also, the inclusion of pre-2000 cases in the appellate sample is less problematic than their inclusion in the first instance sample because the majority of claims in the appellate sample (ie, 73 out of 115 in total) were

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the relatively small sample size. The data were collected from only 93 judgments which involved 115 claims and 126 appeals.<sup>93</sup> It is natural for the appellate sample to be smaller than the first instance sample because only a portion of the cases that are decided by first instance courts are challenged on appeal. Because of the relatively small size of the appellate sample caution is needed before drawing conclusions from it.

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decided in the pre-2000 era so that their exclusion would mean that an appellate study would not be viable due to the lack of sufficient data.

<sup>93</sup> All 115 claims and 126 appeals are listed in appendix II.

## CHAPTER 6: FIRST INSTANCE STUDY

### 6.1 RESULTS

This section presents the results of the first instance study. All of the monetary figures reported have been adjusted for inflation. The study reports both the amount of punitive damages that each claimant received and the sum that each defendant was liable to pay. The latter figure is given in a parenthesis throughout this section.<sup>1</sup>

#### 6.1.1 General findings

The sample contains 478 claims. The defendant was liable to pay punitive damages in 222 claims. Thus, the overall rate at which punitive damages were awarded was 46.4 per cent. This success rate seems high in view of the general perception that English courts rarely award punitive damages. It should be recalled, however, that the study has used a highly filtered sample. The dataset includes only cases fulfilling the criteria explained in the methodology. If the sample had included, for example, all claims made regardless of whether punitive damages were sought or punitive damages claims in which the claimant failed to establish primary liability, the success rate of the punitive damages claim would have been much lower.

The average award of punitive damages was £33,982 (£41,427). The median was £6,519 (£6,044). The average award is higher due to the presence of outliers in the sample. The lowest award was £104 (£104)<sup>2</sup> and the highest £570,660<sup>3</sup> (£818,578).<sup>4</sup>

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<sup>1</sup> The two ways of calculating the central tendency measurement (ie, based on the total amount that the defendant was liable for and based on the amount that each claimant was entitled to) are introduced in chapter 5.1.5, text to n 53.

<sup>2</sup> *Cumber v CC Hampshire* (CA, 23 January 1995).

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Table 1 reports the 10 highest punitive damages awards made at first instance. The ‘as paid measure’ has been taken into account for this ranking considering that the same defendant was liable for the totality of each of these awards (irrespective of whether the awards were then distributed to multiple claimants<sup>5</sup>).

**Table 1 – Largest punitive damages awards at first instance**

<i>Case name and citation</i>	<i>Year of first instance decision</i>	<i>Punitive damages award</i>
<i>1. Riches v News Group Newspapers Ltd</i> [1986] QB 256 (CA)	1984	£818,578
<i>2. John v MGN Ltd</i> [1997] QB 586 (CA)	1993	£570,660
<i>3. Broome v Cassell &amp; Co Ltd</i> [1972] AC 1027 (HL)	1970	£393,947
<i>4. Thompson (Hsu) v CPM</i> [1998] QB 498 (CA)	1996	£382,438
<i>5. Goswell v CPM</i> (CA, 7 April 1998)	1996	£325,072
<i>6. Gerald v CPM</i> (CA, 10 June 1998)	1996	£191,219
<i>7. Taylor v CPM</i> (QBD, 6 December 1989)	1989	£177,411
<i>8. Borders (UK) Ltd v CPM</i> [2005] EWCA Civ 197	2004	£156,402
<i>9. Rees v CPM</i> [2019] EWHC 2339 (QB)	2019	£154,077
<i>10. Maxwell v Pressdram Ltd (No 2)</i> (QBD, 21 November 1986)	1986	£149,249

Figure 1 shows the distribution of all awards.<sup>6</sup> The largest award<sup>7</sup> is not shown. Excluding extreme outliers,<sup>8</sup> the awards fell within £104 (£104) and £97,918 (£81,986). This produces a range of £97,814 (£81,882).

<sup>3</sup> *John v MGN Ltd* [1997] QB 586 (CA) (‘as received’ measure).

<sup>4</sup> *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA) (‘as paid’ measure). The award was split equally between ten claimants who were entitled to £81,858 each.

<sup>5</sup> This happened in three cases: *Riches* (n 4) (10 claimants); *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1 (eight claimants); and *Rees v CPM* [2019] EWHC 2339 (QB) (three claimants).

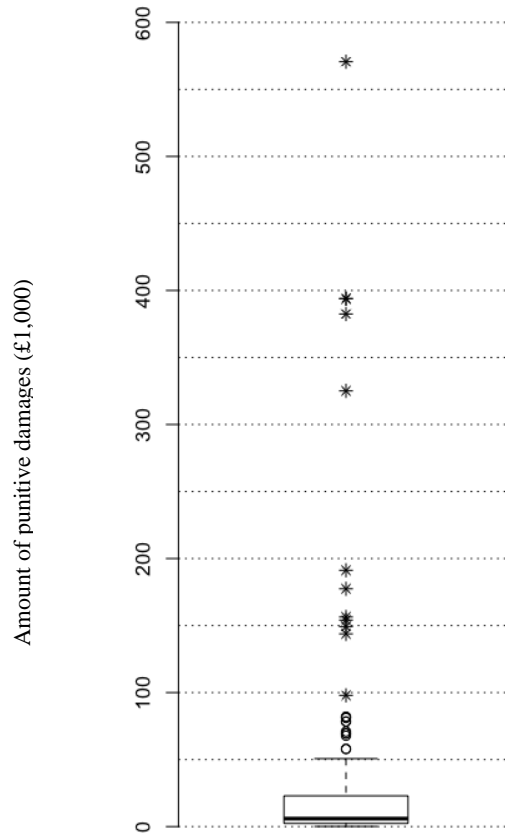
<sup>6</sup> Figure 1 is based on the ‘as paid measure’. It would look similar if constructed using the ‘as received measure’.

<sup>7</sup> *Riches* (n 4) (£818,578 awarded as punitive damages).

<sup>8</sup> An outlier is a data point that is unusually larger or smaller compared with all of the other data points. Data points that are more extreme than Q3 (ie, third quartile) + 3\*IQR (ie, interquartile range) are extreme outliers. The sample contained 11 extreme outliers: the ten awards listed in ‘Table 1’ as well as the award of £143,808 (£143,808) in *White v CPM* (QBD, 23 April 1982).

## FIRST INSTANCE STUDY

*Figure 1 – Range of punitive damages awards*



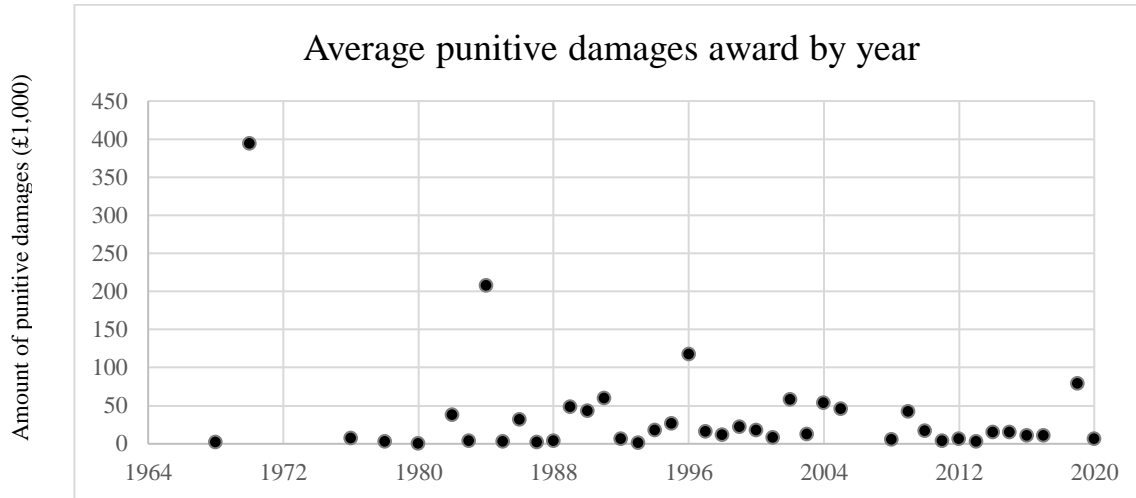
The thick line in the middle shows the median award (£6,044)<sup>9</sup> which was much closer to the lowest value (£104) than the highest value (£818,578 which is not shown). The box plot splits all of the awards into four groups: about a quarter of the awards were between £104 and £2,335 (first quartile); a quarter were between £2,335 and £6,044 (second quartile); a quarter were between £6,044 and £26,695 (third quartile); and the last quarter were between £26,695 and £58,001 (fourth quartile). Overall, more than 80 per cent of all awards were between £104 and £58,001. The remaining awards were outliers. Each dot

<sup>9</sup> Because the sample includes outliers skewing the average award it is preferable to use the median award as the central tendency measurement for this dataset.

## FIRST INSTANCE STUDY

represents an outlier (ie, a data point between 1.5 and three times the interquartile range). And each asterisk represents an extreme case.

Figure 2 – Average punitive damages award by year



As for the average punitive damages award by year (Figure 2),<sup>10</sup> this was below £60,000 throughout the study period with the exception of four years during which outlier awards were made.<sup>11</sup> After the *Thompson* guidelines<sup>12</sup> were issued in 1997, no extreme outliers are observed.

<sup>10</sup> Figure 2 is based on the ‘as paid measure’.

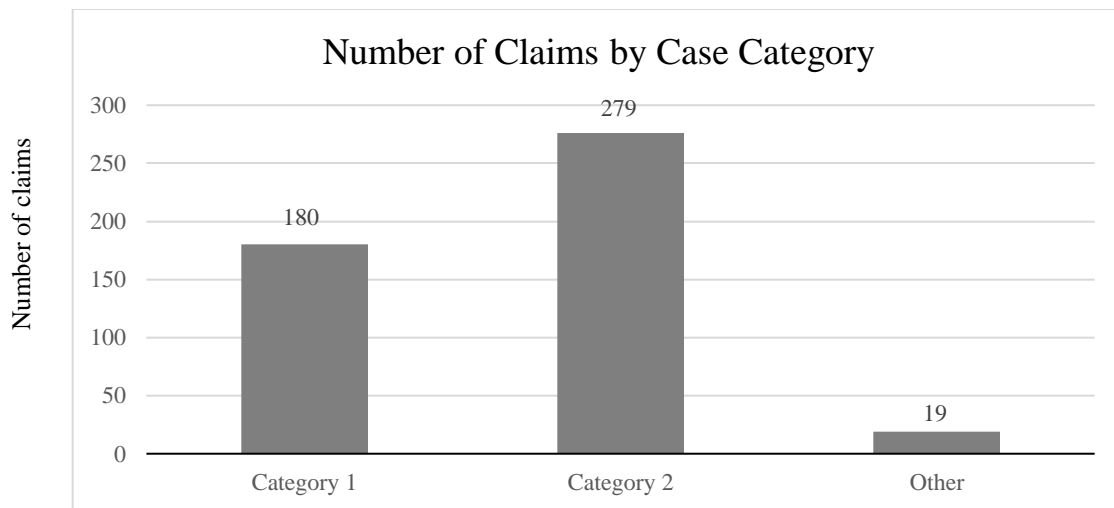
<sup>11</sup> In 1970 the average yearly award was £393,947 (this was the award in *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) which was the only award made in that year); in 1984 the average yearly award of £207,510 was affected by the £818,578 award in *Riches* (n 4); in 1996 the average yearly award of £117,839 was affected by the awards in *Thompson v CPM* [1998] QB 498 (CA) (£382,428), *Goswell v CPM* (CA, 7 April 1998) (£325,072) and *Gerald v CPM* (CA, 10 June 1998) (£191,219); and in 2019 the average yearly award of £79,363 was affected by the £154,077 award in *Rees* (n 5).

<sup>12</sup> *Thompson* (n 11) 517. See, also, chapter 2.3 and the text to nn 170–171 below. Although the *Thompson* brackets apply only to cases of police misconduct there has been no punitive damages award exceeding these brackets (in any type of case) since 1997.

### 6.1.2 The *Rookes* categories

As Figure 3 illustrates, of the total 478 claims, 180 (37.7 per cent) fell within ‘oppressive, arbitrary or unconstitutional conduct by government servants’ (‘Category 1 cases’) and 279 (58.4 per cent) fell within ‘profit seeking wrongdoing’ (‘Category 2 cases’). The remaining 19 claims (3.9 per cent) (‘Other’) fell within the following two groups: 10 claims could not be accommodated under the *Rookes* categories; and 9 claims could either be plausibly associated with both ‘Category 1’ and ‘Category 2’ or were expressly analysed by the court under both of these categories. The sample contained no claims for punitive damages under the category of statutory authorisation of the award.

*Figure 3 – Number of claims by case category*

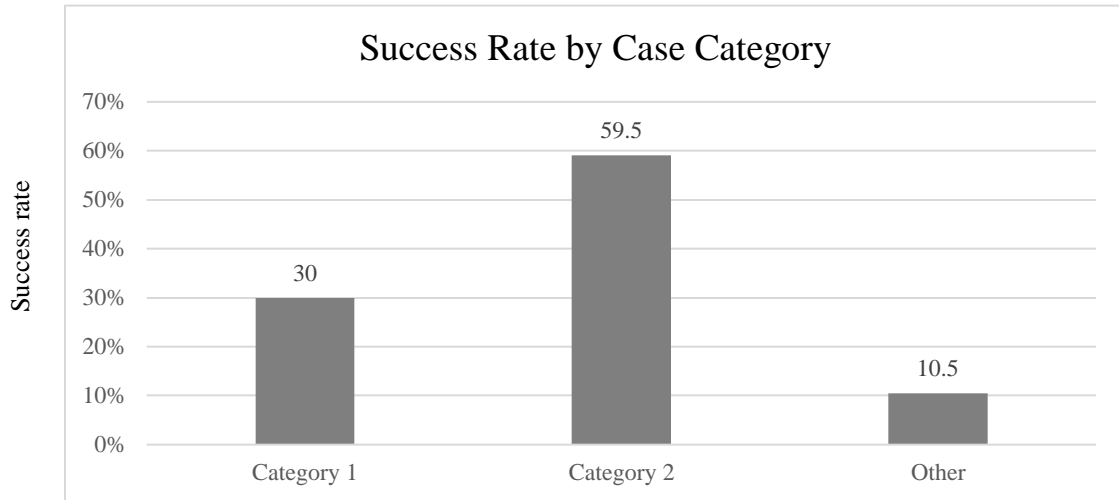


As shown by Figure 4, the success rate of claims for punitive damages in ‘Category 2 cases’ (59.5 per cent) far exceeds the success rate of claims in ‘Category 1 cases’ (30 per cent) while the success rate in cases classified as ‘Other’ was just 10.5 per cent. Statistical analysis suggests that this difference is unlikely to be attributable to chance.<sup>13</sup>

<sup>13</sup> A likelihood-ratio test produced a p-value<0.0001.

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*Figure 4 – Success rate by case category*



As for the quantum of punitive damages, Table 2 shows the average and median<sup>14</sup> award by case category.<sup>15</sup> Both the average award and the middle value were substantially higher for ‘Category 1 cases’, a difference which is likely to be attributable to chance.<sup>16</sup>

*Table 2 – Average and median awards by case category*

	‘Category 1 cases’	‘Category 2 cases’
<b>Average award</b>	£47,003 (£52,599)	£28,840 (£36,639)
<b>Median award</b>	£21,082 (£16,387)	£4,109 (£3,824)

<sup>14</sup> Due to the presence of outliers it is more meaningful to use the median award as the central tendency measurement. The average is liable to be distorted by small sample sizes and outliers (see n 9). However, because the average value is used more frequently in statistics it is also reported in the results of this study.

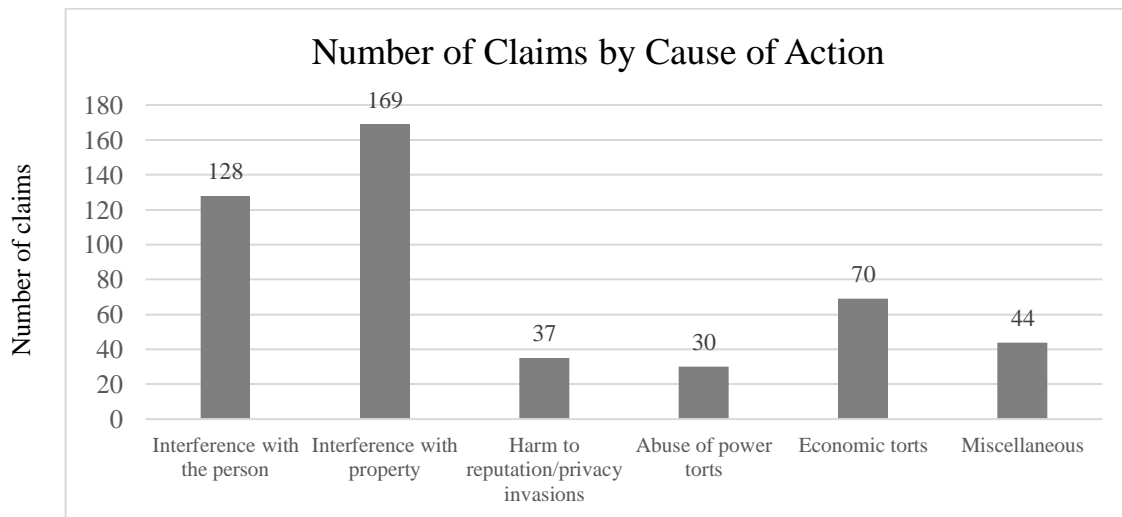
<sup>15</sup> The exact amount of the two awards falling within the ‘Other’ category was not ascertainable because the court lumped compensatory and punitive damages into a single award. However, very modest global awards were made in both cases. In *Metcalfe v Collett-Ward* (CA, 1 December 1976) the judge awarded £4,399 (£4,399) as punitive and compensatory damages against the defendant for assaulting the claimant so as to compel him to repair his car; and in *Patel v Southwark LBC* [1993] CLY 1400 (Lambeth County Court) the judge awarded £3,162 (£3,162) under the head of ‘aggravated and punitive damages’ against a local authority for unlawful eviction.

<sup>16</sup> ANOVA test p-value=0.134.

**6.1.3 The cause of action**

As for the cause of action in which the claimant sued, Figure 5 shows that: in 128 claims (26.8 per cent) punitive damages were sought for interference with the person; in 169 claims (35.4 per cent) for interference with property; in 37 claims (7.7 per cent) for harm to reputation or privacy invasions; in 30 claims (6.3 per cent) for ‘abuse of power torts’; in 70 claims (14.6 per cent) for economic torts; and in 44 claims (9.2 per cent) for various other causes of actions (eg, negligence, breach of contract, breach of EU law).<sup>17</sup>

*Figure 5 – Number of claims by cause of action*



An examination of the success rate of the punitive damages claim based on the cause of action pleaded (Figure 6) reveals that claims which fell within the groups of ‘interference with property’ and ‘economic torts’ succeeded more frequently than claims for interference with the person and harm to reputation. Statistical analysis suggests that this difference is unlikely to be down to chance.<sup>18</sup> The success rate of the claim in economic

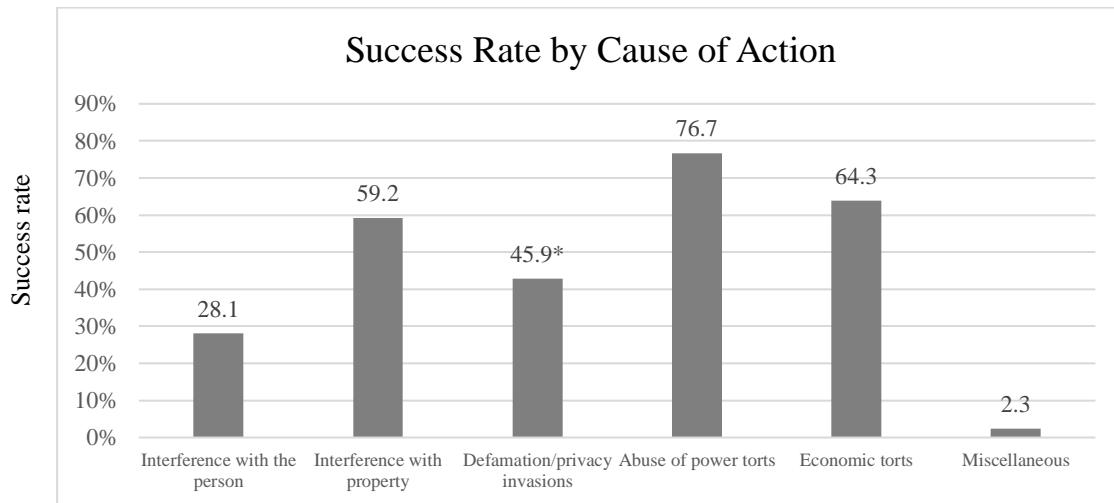
<sup>17</sup> The sample did not include any product liability cases in which punitive damages were sought/awarded.

<sup>18</sup> Likelihood-ratio test p-value<0.0001.

## FIRST INSTANCE STUDY

torts cases (64.3 per cent) and interference with property cases (59.2 per cent) far exceeds the global success rate in the sample which was 46.4 per cent. It should be noted that the high success rate in economic torts cases derives almost exclusively from claims in deceit (in particular, insurance fraud). Similarly, many of the punitive damages awards for interference with property related to landlord and tenant disputes.

*Figure 6 – Success rate by cause of action*



\* The 45.9 per cent success rate of punitive damages claims for defamation/privacy invasions has been affected by the existence of ten claimants in *Riches* (n 4). See the text to n 19.

Punitive damages claims for interference with the person had a success rate of 28.1 per cent. Although it appears that claims within the ‘defamation and privacy invasions’ group succeeded at a rate of 45.9 per cent, it must be stressed that this result has been influenced by the existence of a single defamation case involving 10 claimants<sup>19</sup> in a sample of just 37 defamation/privacy invasion claims. If this is counted as a single entry (rather than 10 separate entries), the success rate drops to 28.5 per cent.

<sup>19</sup> *Riches* (n 4).

## FIRST INSTANCE STUDY

The results also show that ‘abuse of power torts’ claims had the highest success rate (76.7 per cent). This result should be read with caution because this group comprises only 30 claims several of which also involved other causes of action. Claims which also involved other wrongs were classified under the ‘abuse of power’ category because malicious prosecution was identified as the dominant cause of action in them.<sup>20</sup>

Finally, there was only one successful claim (for breach of EU law)<sup>21</sup> in the ‘Miscellaneous’ category.

*Table 3 – Average and median awards by cause of action*

	<i>Interference with the Person</i>	<i>Interference with Property Rights</i>	<i>Defamation/Privacy Invasions</i>	<i>‘Abuse of Power Torts’</i>	<i>Economic Torts</i>
<b>Average award</b>	£40,123 (£47,862)	£9,212 (£13,686)	£147,828 (£314,134)	£52,655 (£61,455)	£8,075 (£8,075)
<b>Median award</b>	£11,877 (£11,405)	£3,917 (£4,013)	£81,858 (£271,598)	£50,689 (£32,881)	£2,335 (£2,335)

Table 3 shows that the highest average and median amounts were awarded for defamation/privacy invasions. This group comprised exclusively successful claims for defamation which may indicate that, when punitive damages are available, they are awarded in higher amounts for this tort. Statistical analysis suggests that the differences between the quantum of punitive damages awards by cause of action are unlikely to be

<sup>20</sup> See chapter 5.1.4. For example, in *Watson v CC Cleveland* [2001] EWCA Civ 1547, [2001] Po LR 359 the claimant established liability for assault and malicious prosecution but the latter was identified as the ‘dominant’ cause of action because (1) a determining factor in awarding punitive damages was that ‘an officer of the rank of inspector had been involved in the alleged cover-up’ (at [52]) and (2) higher compensatory damages were awarded for malicious prosecution (£6,001 (£6,001) as opposed to £857 (£857) for assault).

<sup>21</sup> *R (Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin), [2016] CMLR 10 (£27,751 (£27,751) awarded as punitive damages).

## FIRST INSTANCE STUDY

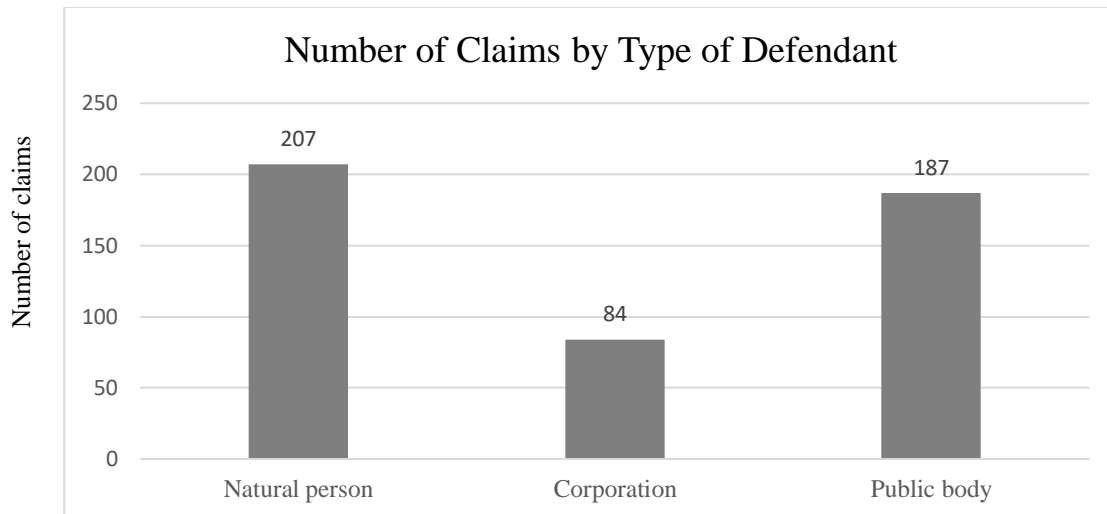
down to chance.<sup>22</sup> The average and median awards for ‘abuse of power torts’ were also among the highest. The level of awards in cases of interference with the person was rather modest. Finally, the lowest average and median amounts were awarded for interference with property and economic torts claims.

### 6.1.4 The type of defendant

#### (1) The defendant’s legal personality

Of the total of 478 claims in the sample, punitive damages were sought from natural persons in 207 claims (43.3 per cent), from corporations in 84 claims (17.6 per cent),<sup>23</sup> and from public bodies in 187 claims (39.1 per cent) (Figure 7).

Figure 7 – Number of claims by type of defendant

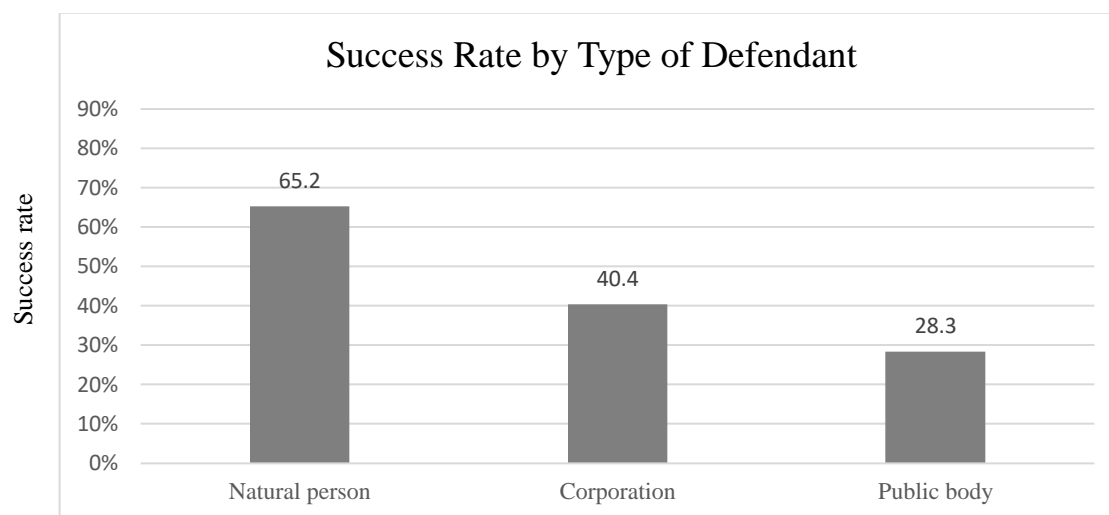


<sup>22</sup> An ANOVA test testing differences in the quantum of punitive damages across each group of cases gave a p-value < 0.0001.

<sup>23</sup> This group comprised claims against corporations with the exception of one case in which the defendant was a trade union: *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397 (QBD).

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*Figure 8 – Success rate by type of defendant*



The results show that punitive damages were awarded more frequently against natural persons than against other defendant types (Figure 8). The success rate of the claim against natural persons (65.2 per cent) is much higher compared with the success rate of the claim against corporations (40.4 per cent) and public bodies (28.3 per cent). Statistical analysis suggests that this difference is unlikely to be attributable to chance.<sup>24</sup>

*Table 4 – Average and median awards by type of defendant*

	<i>Natural person</i>	<i>Corporation</i>	<i>Public body</i>
<b>Average award</b>	£10,743 (£14,222)	£90,293 (£135,567)	£48,742 (£54,834)
<b>Median award</b>	£3,413 (£3,331)	£81,858 (£57,034)	£22,201 (£19,095)

Turning to the level of awards, the average and median punitive awards against corporate defendants were £90,293 (£135,567) and £81,588 (£57,034) respectively. These amounts are much larger than the average and median awards against natural persons (£10,743 (£14,222) and £3,413 (£3,331) respectively) (Table 4). The same pattern is observed with awards against public bodies which were substantially higher than awards against natural

<sup>24</sup> Likelihood-ratio test p-value <0.0001.

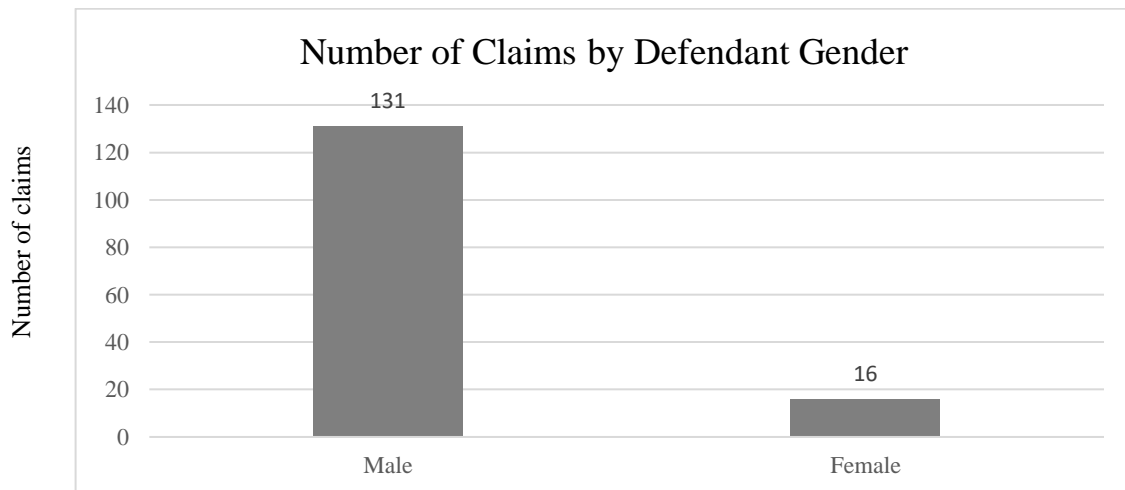
## FIRST INSTANCE STUDY

persons. Statistical analysis suggests that this result is unlikely to be attributable to chance.<sup>25</sup>

### (2) The defendant's gender

With respect to the defendant's gender, the sample included 147 claims against natural person defendants whose gender was ascertainable. 131 (89.1 per cent) of these claims were brought against male defendants while the remaining 16 (10.9 per cent) were brought against female defendants (Figure 9). As for the success rate of the punitive damages claim, this was 58.7 per cent against male defendants and 50 per cent against female defendants (Figure 10). The average and median awards made against both male and female defendants were similar (Table 5). Statistical analysis suggests that the minor differences between the success rate of the claim and the amounts of the awards in each group are very likely to be down to chance.<sup>26</sup>

*Figure 9 – Number of claims by defendant gender*



<sup>25</sup> ANOVA test p-value=0.002.

<sup>26</sup> Likelihood-ratio test p-value=0.862; ANOVA test p-value=0.997.

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*Figure 10 – Success rate by defendant gender*



*Table 5 – Average and median awards by defendant gender*

	<i>Male defendant</i>	<i>Female defendant</i>
<b>Average award</b>	£13,229 (£18,588)	£16,833 (£16,833)
<b>Median award</b>	£3,438 (£3,751)	£5,437 (£5,437)

### 6.1.5 The type of claimant

#### (1) The claimant's legal personality

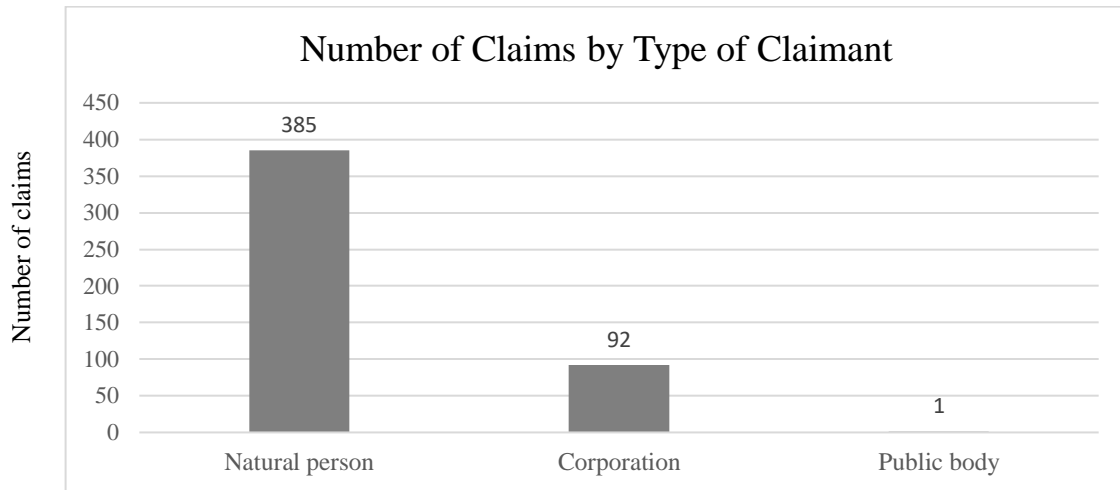
In the vast majority of claims in the sample (385 claims ie, 80.5 per cent of all claims) the claimant was a natural person. The claimant was a corporation in 92 claims (19.3 per cent of all claims)<sup>27</sup> and a public body in just one claim (0.2 per cent) (Figure 11). Figure 12 shows that punitive damages were awarded more frequently to corporations (57.6 per cent success rate) than to human claimants (43.8 per cent success rate). However, statistical analysis suggests that this disparity is likely to be down to chance.<sup>28</sup>

<sup>27</sup> There was one exception to this: *Sinn Fein v CC Royal Ulster Constabulary* (NIQB, 11 April 1991) in which the claimant was a political party.

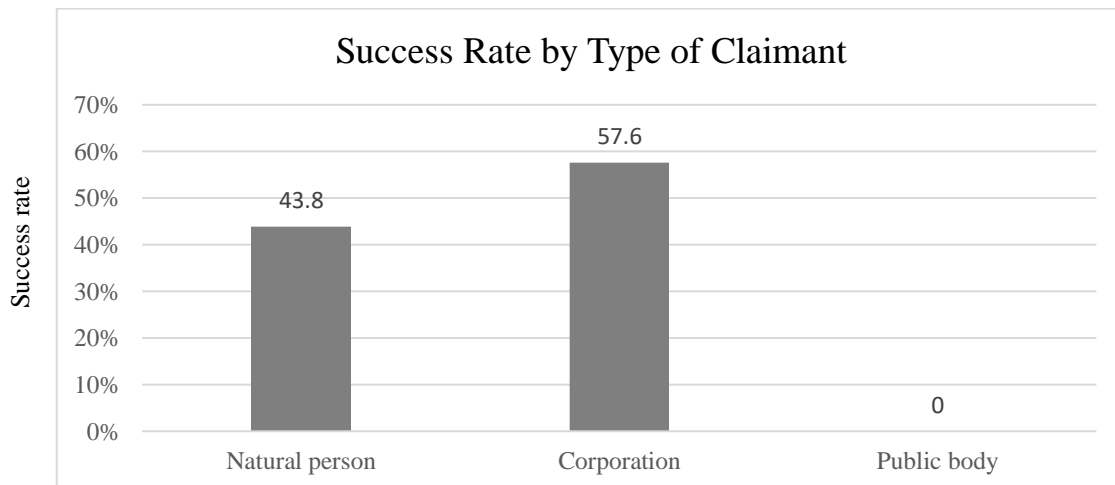
<sup>28</sup> Likelihood-ratio test p-value=0.814.

## FIRST INSTANCE STUDY

*Figure 11 – Number of claims by type of claimant*



*Figure 12 – Success rate by type of claimant*



*Table 6 – Average and median awards by type of claimant*

	<i>Natural person</i>	<i>Corporation</i>
<b>Average award</b>	£40,364 (£50,286)	£9,206 (£13,374)
<b>Median award</b>	£8,784 (£8,105)	£2,335 (£2,335)

The average and median punitive damages awards were higher when the claimant was a natural person as opposed to a corporate entity (Table 6) although statistical analysis suggests that this is also likely to be attributable to chance.<sup>29</sup>

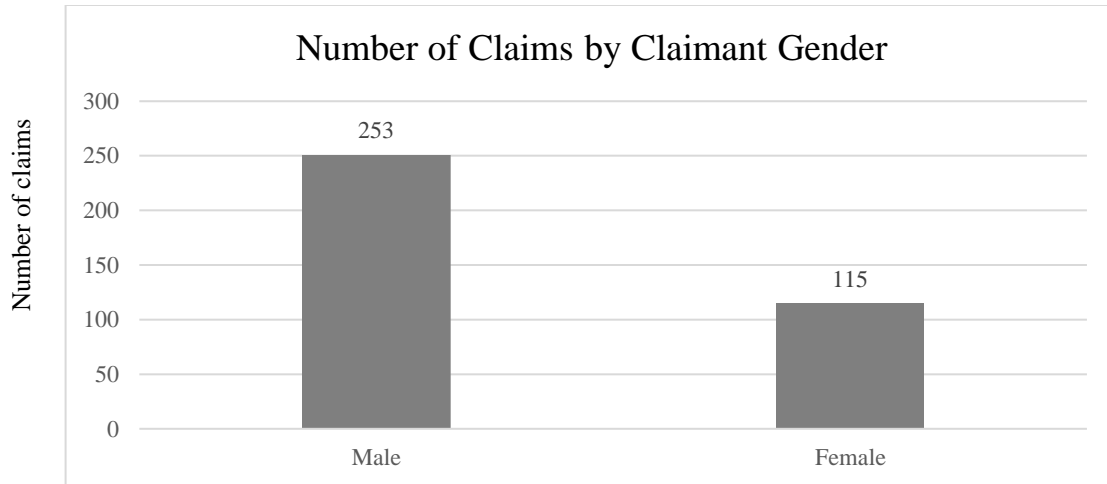
<sup>29</sup> ANOVA test p-value=0.451.

## FIRST INSTANCE STUDY

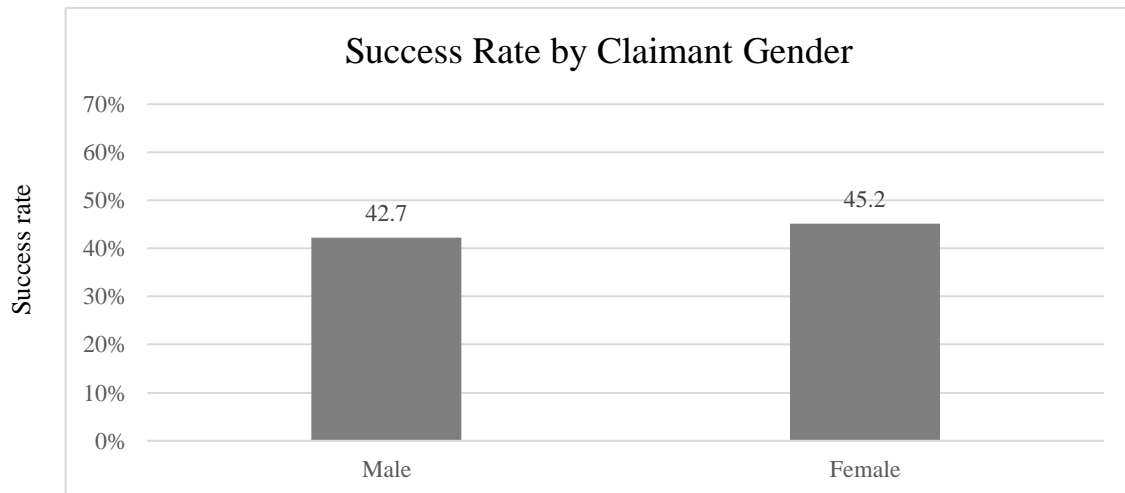
### (2) The claimant's gender

The sample contained 368 claims brought by natural persons in which the claimant's gender was known. 253 of these (68.7 per cent) were brought by male claimants and 115 (31.3 per cent) were brought by female claimants (Figure 13).

*Figure 13 – Number of claims by claimant gender*



*Figure 14 – Success rate by claimant gender*



The success rate of the punitive damages claim was similar in both groups of claimants with females having a slight edge (Figure 14). Statistical analysis indicates that the minor

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difference in the success rates across the two groups is probably attributable to chance.<sup>30</sup>

The average and median punitive damages awards were larger for male claimants (Table 7) with statistical analysis suggesting that this result is unlikely to be down to chance.<sup>31</sup>

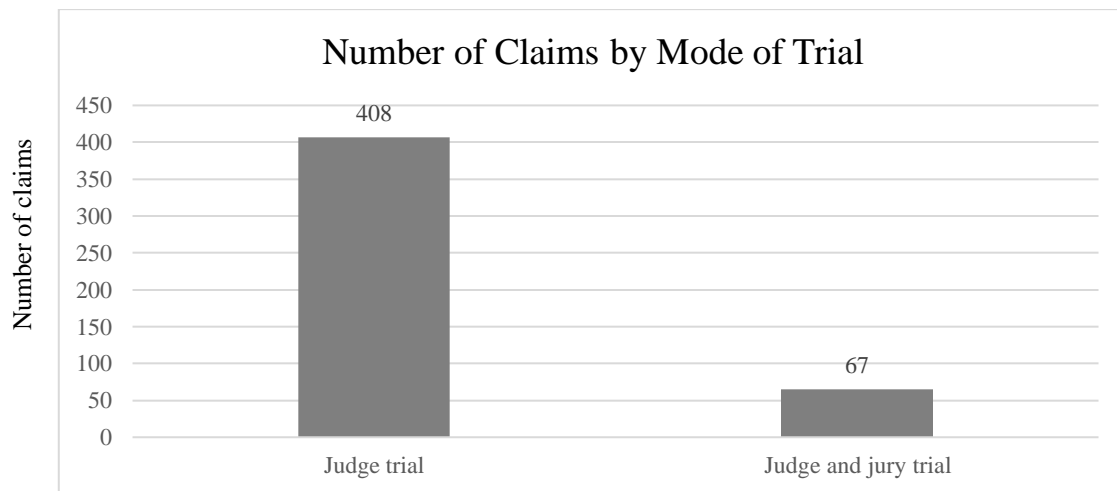
*Table 7 – Average and median awards by claimant gender*

	<i>Male claimant</i>	<i>Female claimant</i>
<b>Average award</b>	£53,013 (£67,324)	£15,398 (£16,119)
<b>Median award</b>	£11,877 (£10,716)	£6,292 (£4,881)

### 6.1.6 The mode of trial

The vast majority of claims in the dataset were tried by judges. Judges decided 408 claims (85.4 per cent) and juries 67 claims (14 per cent) (Figure 15). The sample also included three claims (0.6 per cent) in respect of which the mode of trial was not ascertainable. The dominance of ‘judge-only trials’ in the dataset reflects the gradual decline and restricted use of civil juries during the study period.<sup>32</sup>

*Figure 15 – Number of claims by mode of trial*



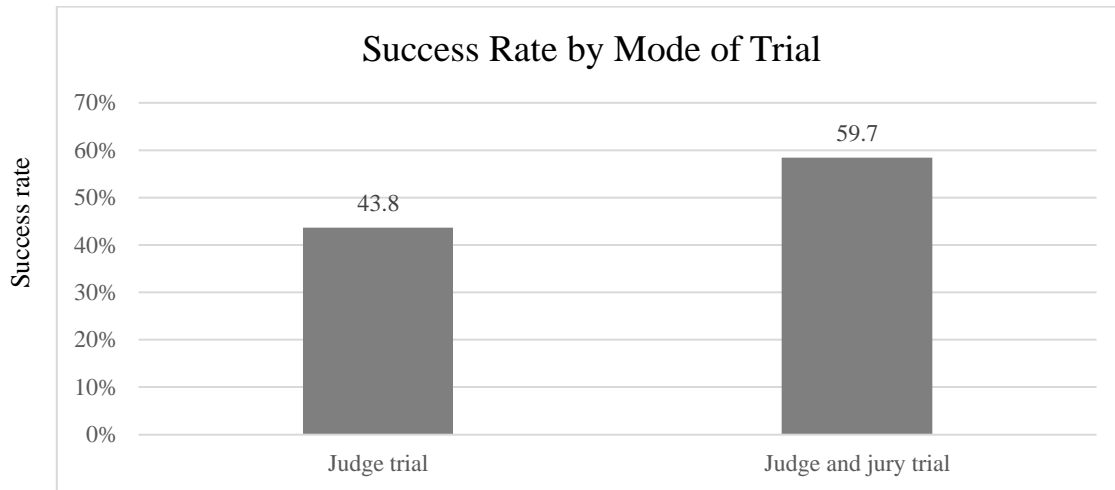
<sup>30</sup> Likelihood-ratio test p-value=0.276.

<sup>31</sup> ANOVA test p-value=0.015.

<sup>32</sup> For discussion of the restriction of civil juries in English law, see the text to nn 195–204 below.

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Figure 16 – Success rate by mode of trial



A disparity is observed between the success rate of the punitive damages claims in ‘judge and jury trials’ (59.7 per cent) and in ‘judge-only trials’ (43.8 per cent) (Figure 16). However, this difference is not statistically significant.<sup>33</sup>

Table 8 shows a remarkable difference between the average and median awards across the two groups. The average and median awards in ‘judge-only trials’ were £12,319 (£15,613) and £4,075 (£4,103) while the respective sums in jury trials were at least eight times higher. Statistical analysis suggests that it is unlikely that the amount of punitive damages awards and the mode of trial are independent.<sup>34</sup> The highest and lowest awards in ‘judge-only trials’ were £360 (£360)<sup>35</sup> and £81,858<sup>36</sup> (£156,402)<sup>37</sup> respectively. The corresponding figures for ‘judge and jury trials’ were £104 (£104)<sup>38</sup> and £570,660<sup>39</sup>

<sup>33</sup> Likelihood-ratio test p-value=0.122.

<sup>34</sup> ANOVA test p-value<0.0001.

<sup>35</sup> *Derbyshire v Lancashire County Council* (1983) 133 NLJ 65 (QBD).

<sup>36</sup> *Messenger* (n 23) (‘as received’ measure).

<sup>37</sup> *Borders* (n 5) (‘as paid’ measure). The award was split between eight claimants.

<sup>38</sup> *Cumber* (n 2).

<sup>39</sup> *John* (n 3) (‘as received’ measure).

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(£818,578)<sup>40</sup> which shows that there was substantial variability in the awards made by juries. It is also noteworthy that the seven highest awards reported in Table 1 were made by a jury (with the next two in the ‘top 10’ having been made in a ‘judge-only trial’ and the last award having also been made by a jury).

*Table 8 – Average and median awards by mode of trial*

	<i>Judge-only trial</i>	<i>Judge and jury trial</i>
<b>Average award</b>	£12,319 (£15,613)	£103,991 (£139,850)
<b>Median award</b>	£4,075 (£4,103)	£70,918 (£50,689)

### 6.1.7 Punitive damages and prior punishment

Naturally, a question arises as to the frequency with which punitive damages are awarded in circumstances where an additional sanction (eg, a fine, prison sentence or disciplinary action) was already imposed. The sample included 128 claims in which it was possible to ascertain with confidence whether a sanction (other than punitive damages) had been imposed on the defendant for the misconduct which constituted the subject matter of the civil claim.<sup>41</sup> In 95 of these claims (74.2 per cent), no sanction had been imposed on the defendant while in the remaining 33 claims (25.8 per cent) the defendant had been already punished by another mechanism (Figure 17).

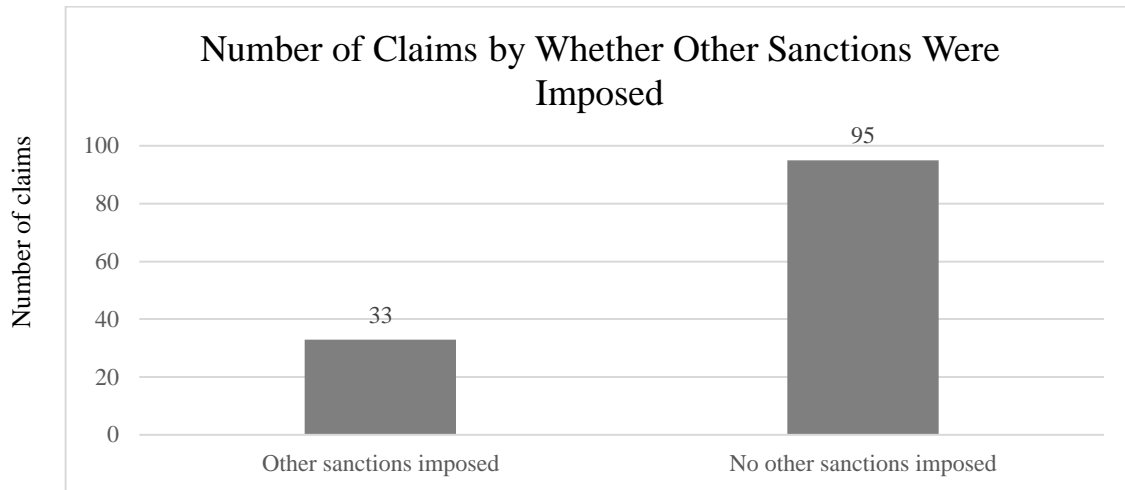
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<sup>40</sup> *Riches* (n 4) (‘as paid’ measure to be split between ten claimants).

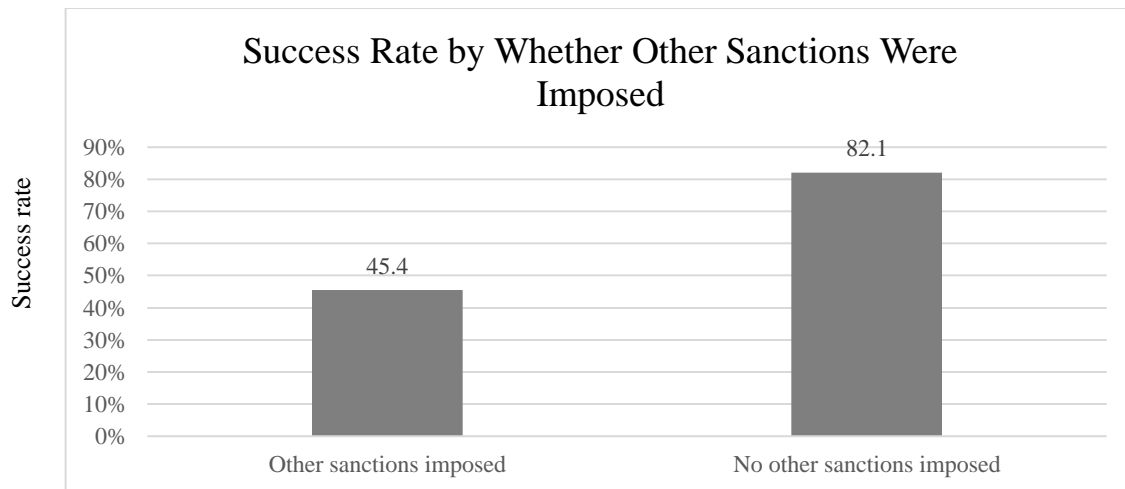
<sup>41</sup> In the remaining 350 claims it was not possible to find any relevant information however, it can be assumed that these claims did not involve other sanctions. It seems unlikely that a judge would fail to mention the imposition of prior punishment considering its relevance to the decision of the punitive damages issues.

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*Figure 17 – Number of claims based on whether other sanctions were imposed*



*Figure 18 – Success rate based on whether other sanctions were imposed*



Punitive damages were awarded in 82.1 per cent of the claims in which no other sanction had been imposed and in 45.4 per cent of the claims in which there had been an additional form of punishment (Figure 18).<sup>42</sup> Although the latter percentage seems high at first sight, it should be borne in mind that the court gave consideration to the issue of double punishment in most of the claims in which it awarded punitive damages in

<sup>42</sup>

This difference does not appear to be statistically significant: likelihood-ratio test p-value=0.894.

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addition to another sanction.<sup>43</sup> It is also useful to report that the sample included 222 successful punitive damages claims in total and that punitive damages were awarded in addition to another sanction in only 15 (6.7 per cent) of these claims. For the remaining 207 awards it was either clear<sup>44</sup> or it can reasonably be inferred<sup>45</sup> that no other sanctions were imposed.

Table 9 shows the average and median awards based on whether other sanctions were imposed. Both amounts were higher when the only sanction imposed was the award of punitive damages although statistical analysis signals that this difference is likely to be attributable to chance.<sup>46</sup>

*Table 9 – Average and median awards based on whether other sanctions were imposed*

	<i>Other sanctions imposed</i>	<i>No other sanction imposed</i>
<b>Average award</b>	£21,771 (£31,448)	£47,320 (£51,237)
<b>Median award</b>	£11,674 (£11,674)	£8,470 (£7,510)

### 6.1.8 Punitive damages and other types of damages

This section reports the relationship between: (1) the decision to award punitive damages and the decision to award aggravated damages; the amount of punitive damages and the amount of aggravated damages; and (2) the amount of punitive damages and the total amount of compensatory damages (including aggravated damages, if such an award was made).

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<sup>43</sup> For further discussion, see the text to nn 241–245 below.

<sup>44</sup> 78 awards (35.2 per cent of all awards) were clearly made in the absence of another sanction.

<sup>45</sup> 129 awards (58.1 per cent of all awards) were made without it being clear whether additional sanctions were imposed. However, it seems unlikely that the court would fail to mention the fact of prior punishment, if such punishment had been imposed, see n 41.

<sup>46</sup> ANOVA test p-value=0.32.

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### (1) Aggravated damages

In 243 of the total 478 claims in the sample both aggravated and punitive damages were sought. As Figure 19 shows, both remedies were awarded in 80 claims. In 54 claims only aggravated damages were granted. In 97 claims neither aggravated nor punitive damages were granted and in only 12 claims punitive damages were granted alone.

In only 4.9 per cent of these claims (12 out of 243) punitive damages were awarded without aggravated damages. Statistical analysis suggests that it is very unlikely that there is no relationship between the decision to award punitive damages and the decision to award aggravated damages.<sup>47</sup> This result is unsurprising considering that the conduct justifying aggravated damages is very similar to that which justifies punitive damages.<sup>48</sup>

*Figure 19 – Punitive and aggravated damages awards (where both remedies were sought)*

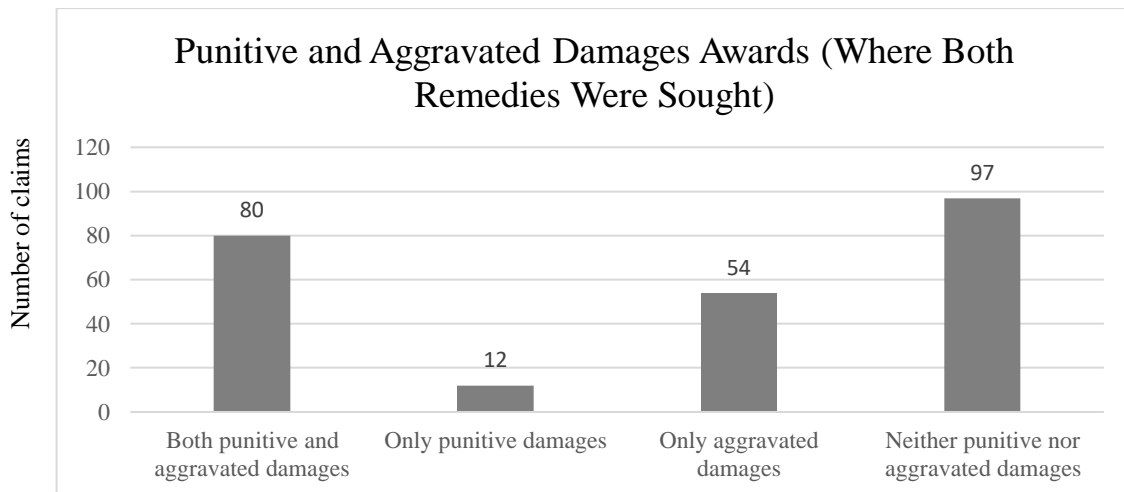


Table 10 shows the average and median awards of aggravated and punitive damages for the claims in which both amounts were known. In both measures, the amount of punitive

<sup>47</sup> Likelihood-ratio test p-value <0.0001.

<sup>48</sup> *Thompson* (n 11) 513.

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damages is almost double the amount of aggravated damages. Statistical analysis suggests that there may be a positive relationship between the amounts awarded as punitive damages and the amounts awarded as aggravated damages.<sup>49</sup>

*Table 10 – Average and median awards of aggravated and punitive damages*

	<i>Aggravated damages</i>	<i>Punitive damages</i>
<b>Average award</b>	£10,912 (£14,185)	£19,513 (£26,060)
<b>Median award</b>	£6,084 (£5,958)	£11,408 (£10,028)

### (2) Total amount of compensatory damages

Table 11 shows the average and median awards of compensatory damages and the average and median awards of punitive damages for the 142 claims in which both amounts were known. The average award of compensatory damages was slightly higher than the average award of punitive damages and the median award of compensatory damages was nearly double the median award of punitive damages.

The results suggest the existence of a positive relationship between the amounts of punitive and compensatory damages.<sup>50</sup> Therefore, it seems that greater harm plays a role in explaining the amount of punitive damages awarded.

*Table 11 – Average and median awards of compensatory and punitive damages*

	<i>Compensatory damages</i>	<i>Punitive damages</i>
<b>Average award</b>	£42,606 (£55,452)	£38,757 (£48,395)
<b>Median award</b>	£14,739 (£16,537)	£8,784 (£7,649)

<sup>49</sup> Linear regression analysis p-value=0.0008.

<sup>50</sup> Linear regression analysis p-value=0.003.

## 6.2 DISCUSSION

Some of the findings reported in the previous section comport with common perceptions regarding punitive damages; others do not. This section discusses the results in light of the relevant academic literature and case law and evaluates their implications. The discussion is divided in two parts. The first part tests the accuracy of common factual assertions about punitive damages which have been made in the absence of comprehensive empirical evidence. The second part explores other useful insights from the results to the extent that these are not considered in the first part.

### 6.2.1 Testing factual assertions about punitive damages

In this subsection, I isolate ten factual claims about punitive damages stated in the absence of empirical evidence and I test their accuracy in light of the results. Some of these assertions are supported by the results but others are not.

#### (1) ‘An award of punitive damages is a “rare bird”’<sup>51</sup>

It is commonly contended that punitive damages are rarely awarded in English law. Thus, Stephenson LJ emphasised in *Riches v News Group Newspapers Ltd* that punitive damages ‘[a]re highly unusual and only to be rarely awarded in civil cases’.<sup>52</sup> Kelly LJ also said in *Davey v CC Royal Ulster Constabulary*: ‘[E]ven when a case ... falls within one of Lord Devlin’s exceptional categories, the courts have been slow to award

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<sup>51</sup> *Riches* (n 4) 274 (Stephenson LJ).

<sup>52</sup> *ibid.* See, also, *Manson v Associated Newspapers Ltd* [1965] 1 WLR (QBD) 1045 (Widgery J): ‘[Punitive damages] are exceptional. Only in rare cases are they awarded’; *Vine v Waltham Forest LBC* [2000] 1 WLR 2383 (CA) 2392 (Roch LJ): ‘[Punitive damages] are rarely awarded today’.

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exemplary damages'.<sup>53</sup> The impression that punitive damages awards are rare may have been triggered by the exceptional nature of the remedy (which is solely aimed at punishing the defendant) and by the many restrictions operating in this area of law (eg, the *Rookes* categories and the reservation of punitive damages as a remedy of last resort).<sup>54</sup>

The accuracy of this claim can be assessed based on two different points of reference. First, it is possible to look at the frequency with which punitive damages are awarded *when they are sought* in order to ascertain if such awards are indeed rare. The second option is to compare the number of (successful) punitive damages claims with *the total number of (successful) civil claims that are decided by English courts*.

Of the 478 claims in the sample punitive damages were awarded in 222 and not awarded in 256, producing a success rate of 46.4 per cent. In other words, punitive damages were awarded in about half of the claims in which they were requested. Thus, the statement that punitive damages are rarely awarded seems to be inaccurate if the focus is on the frequency with which punitive damages are awarded when they are sought. However, the statement is indeed correct if it is intended to convey that successful claims for punitive damages are rare generally – ie, that they are rare when seen in the context of the number of all claims resulting in a civil trial. 222 punitive damages awards and 478 punitive damages claims over a period of 56 years are certainly trivial numbers compared with all private law claims decided by English courts over the same period. To put these numbers in context, during 2020 alone, 45,200 claims went to

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<sup>53</sup> [1988] NI 139 (CA) 147. His Lordship also referred to '[t]he infrequency of exemplary awards ...' (at 149).

<sup>54</sup> *ibid* 149.

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trial in the courts of England and Wales.<sup>55</sup> Although it is unclear how many of these claims succeeded, it can safely be assumed that punitive damages awards constitute an extremely small percentage of the entire population of civil cases in which the claimant establishes liability.<sup>56</sup>

### **(2) ‘[M]ost cases in category 2 have related to wrongful eviction of tenants ...’<sup>57</sup>**

Commentators have repeatedly stressed that landlord and tenant disputes constitute an important source of awards in ‘Category 2 cases’. For example, Edelman observes that ‘cases awarding exemplary damages against evicting landlords ... have continued to appear year in, year out. Their reporting is poor but their existence is clear’.<sup>58</sup> These claims are validated. As can be seen in Figure 5, punitive damages are commonly sought for the protection of property interests. Many of the claims which fell within the ‘interference with property’ category related to the unlawful eviction of tenants. Punitive

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<sup>55</sup> See Ministry of Justice, ‘Civil Justice Statistics 2020’ <<https://data.justice.gov.uk/courts/civil-courts/#courts-civil-claims-trial>> accessed 30 July 2021. Note that the sample contains only five punitive damages claims decided during 2020 (ie, 0.01 per cent of all civil claims that went to trial during 2020).

<sup>56</sup> Studies from the US have reported that punitive damages are awarded in three to five per cent of all cases won by claimants (ie, including cases in which punitive damages are not sought), see Theodore Eisenberg and others, ‘The Decision to Award Punitive Damages: An Empirical Study’ (2010) 2 JLS 577, 578. One might reasonably hypothesise that punitive damages are awarded in an even lower percentage of cases won by claimants in the UK where courts do not tend to depart from the parties’ pleadings that readily (especially when it comes to punitive damages given CPR 16.4(1)(c)).

<sup>57</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 57.

<sup>58</sup> James Edelman, *McGregor on Damages* (21st edn, Sweet & Maxwell 2021) para 13.025. See, also, Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th edn, OUP 2019) 365 (footnotes omitted): ‘[T]he main use of this second category has been in actions by tenants against landlords for wrongful harassment or eviction founded on the torts of trespass or nuisance.’.

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damages were sought in 96 such claims in the sample, and an award was made in 74 of these actions (a success rate of 77 per cent).<sup>59</sup>

The higher frequency of punitive damages awards in landlord and tenant cases (which appears to be a particular characteristic of English law)<sup>60</sup> may be explained by the fact that ‘this kind of conduct is sufficiently serious to be made a criminal offence’.<sup>61</sup> However, it appears that police and local authorities are reluctant to prosecute landlords for unlawfully evicting tenants.<sup>62</sup> If there is a gap in enforcement left by the criminal law then private law can work as a supplementary mechanism to secure an adequate level of punishment and deterrence.<sup>63</sup>

Another potential explanation for the high rate at which punitive damages are awarded in unlawful eviction claims, and more generally in ‘interference with property claims’, may be that property interests are more highly valued by tort law than other interests. Based on the assumption that more highly-prized interests are better protected, Cane argues that ‘[o]ne of the most important functions of tort law is to protect interests in tangible and intangible property.’<sup>64</sup> He further observes that an illustration of this is that ‘property rights have traditionally been ... better protected by tort ..., whereas

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<sup>59</sup> The overall success rate of the claim for punitive damages was 46.4 per cent, see chapter 6.1.1.

<sup>60</sup> Eg, Felicity Maher, ‘An Empirical Study of Exemplary Damages in Australia’ (2019) 43 MULR 694, 736 reports that ‘landlord and tenant disputes did not really figure in [her] study’. Unlawful eviction cases were also absent from the results of empirical studies in Canada and the US.

<sup>61</sup> *Drane v Evangelou* [1978] 1 WLR 455 (CA) 461 (Lord Denning MR). See the Rent Act 1965, s 30; Protection from Eviction Act 1977, s 1.

<sup>62</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (Law Com CP No 132, 1993) 116; Alex Marsh and others, *Harassment and Unlawful Eviction of Private Rented Sector Tenants and Park Home Residents* (Department of Environment 2000) 85–86, 89–92.

<sup>63</sup> Marsh and others (n 62) 91: ‘Prosecution [i]s an ineffective deterrent ...’.

<sup>64</sup> Peter Cane, *The Anatomy of Tort Law* (Hart 1997) 75.

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privacy has not been'.<sup>65</sup> This claim is supported by the results, at least insofar as the protection that the law of punitive damages offers is concerned. Punitive damages are a last resort remedy which go beyond compensation and/or restitution. The results show that they are much more commonly awarded in property cases (where they were awarded at a rate of 59.2 per cent) compared to privacy cases (where punitive damages have never been awarded to date). Meanwhile, property interests are also given robust protection by other rules (eg, actionability per se, strict liability). Therefore, the frequent incidence of punitive damages awards in property cases may be a reflection of a greater concern to protect property interests.

### **(3) '[C]ourts have been awarding exemplary damages in cases of insurance fraud on a regular basis ...'**<sup>66</sup>

The study contains 46 claims for insurance fraud (ie, 9.6 per cent of all punitive damages claims contained in the sample). Punitive damages were awarded in 41 of these claims yielding a success rate of 89.1 per cent. This result clearly supports Flaux J's dictum in the subheading above. More generally, it appears that where insurance fraud is proved, the defendant is very likely to be liable to pay punitive damages. Awards for insurance fraud constitute a relatively recent trend in the case law which has not been explored extensively in the academic literature.<sup>67</sup> The first award in the sample appears in 2008.<sup>68</sup>

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<sup>65</sup> Peter Cane, 'Retribution, Proportionality and Moral Luck in Tort Law' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998) 147.

<sup>66</sup> *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016) [12] (Flaux J).

<sup>67</sup> For short articles by practitioners see, eg, Patrick West, 'Exemplary Damages: Credit Hire, Fraud and QOCS' (2015) 137 PILJ 2, 3; Markus Esly, 'Flauxting the Rules: Punitive Damages in English Law' <<https://www.lexology.com/library/detail.aspx?g=2dc76695-a047-48b4-a6cd-a8304cf5dc0b>> accessed 30 July 2021.

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Since then, punitive damages awards for insurance fraud have increased markedly. This source of awards is undoubtedly a product of the abolition of the ‘cause of action test’ since punitive damages were unavailable for the tort of deceit prior to the decision in *Kuddus v CC Leicestershire Constabulary*.<sup>69</sup> Just as unlawful eviction cases, insurance fraud cases also appear to be a peculiar characteristic of the English law of punitive damages. Empirical studies from other common law countries do not report a similar finding.<sup>70</sup> An interesting contrast can be drawn with Canada and the US where punitive damages awards have been made in respect of misbehaviour by insurance companies (rather than misbehaviour by insured parties).<sup>71</sup>

A potential explanation for the high success rate of these claims is that deceit is a ‘wilful wrong’.<sup>72</sup> It requires fraud, which almost invariably entails a high level of culpability. However, not all the claims pleaded in deceit were successful in the sample. Punitive damages awards in economic torts cases were derived *almost exclusively* from

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<sup>68</sup> *Axa Insurance UK plc v Jensen* (Birmingham County Court, 10 November 2008). This explains why insurance fraud comprises only 9.6 per cent of all sampled claims.

<sup>69</sup> [2001] UKHL 29, [2002] 2 AC 122.

<sup>70</sup> Maher (n 60) 736 reports that ‘[i]nsurance fraud cases did not figure in [her] study’. There is also no discussion of such cases in empirical studies about the law of punitive damages in the US and Canada.

<sup>71</sup> Neil Vidmar and Bruce Feldthusen, ‘Exemplary Damages Claims in Ontario: An Empirical Profile’ (1990) 16 CBLJ 262, 265; 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, 285. Illustrations from Canada include *Whiten v Pilot Insurance Co* [2002] SCC 18, [2002] 1 SCR 595; *Zurich Life Insurance Co Ltd v Branco* [2015] SJ No 286 (SKCA). Illustrations from the US include *Ace v Aetna Life Insurance Co* 139 F.3d 1241 (1998); *State Farm Mutual Automobile Insurance Co v Campbell* 538 US 408 (2003).

<sup>72</sup> Nicholas McBride, ‘Tort Law and Criminal Law in an Age of Austerity’ in Matthew Dyson (ed), *Unravelling Tort and Crime* (CUP 2015) 71: ‘[W]ilful wrongs justifiably occupy a higher place than non-wilful wrongs in our ranking order of basic wrongs that need to be responded to by the state.’

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the area of insurance fraud.<sup>73</sup> Insurance fraud is not only actionable under the tort of deceit but also constitutes a crime,<sup>74</sup> which indicates its anti-social nature. It is, therefore, justified to impose punishment for such serious wrongdoing especially considering that '[c]riminal prosecutions for insurance fraud ... represent the tip of the iceberg of the number of cases'.<sup>75</sup>

Another factor potentially driving the high success rate in insurance fraud cases may be that insurance contracts are contracts of the 'utmost good faith'. Of course, this is only relevant in circumstances where the defendant is sued by his own insurer,<sup>76</sup> and does not apply where liability (as opposed to first party) insurance is concerned. Liability for insurance fraud (where punitive damages are sought against the insured by the insurer) is an example of concurrent liability in contract and tort. Even though the claim is brought under the tort of deceit and not under breach of contract, judges have, at times, referred to the exceptional character of insurance contracts when awarding punitive damages in this area. For example, Recorder Lochrane said in *Axa Insurance (UK) plc v Jensen*: 'It is obviously important ... that the relationship of uberrimae fides between insurers and insured is one that is preserved and enforced by the law'.<sup>77</sup> If the nature of insurance

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<sup>73</sup> Out of 45 awards in total in the 'economic torts' category, 41 (ie, 91.1 per cent) pertained to insurance fraud.

<sup>74</sup> Fraud Act 2006, s 2.

<sup>75</sup> Mark Button and others, 'Explaining "Cash-for-Crash" Insurance Fraud in the United Kingdom' (2017) 50 ANZJ Crim 176, 179. See, also, *Hassan v Cooper* [2015] EWHC 540 (QB), [2015] RTR 26 [35] (Butler J): '[T]here is an epidemic ... of claims of this kind, and ... that has to be borne in mind by the court when ... it can award exemplary damages'.

<sup>76</sup> This was the case in, eg, *Jensen* (n 68); *Liverpool Victoria v Ghadhda* (Central London County Court, 29 June 2010).

<sup>77</sup> (n 68) [8]. See, also, *Tasneem v Morley* (Central London County Court, 30 September 2013) [4] (May J): Insurance fraud 'undermines the openness and honesty which is the foundation for insurance contracts ...'.

contracts as *uberrimae fidei* contributes to the high frequency of punitive damages awards in insurance fraud cases then, arguably, there are grounds to question the appropriateness of the absolute prohibition on punitive damages for breach of contract.<sup>78</sup>

Finally, it is noteworthy that although punitive damages are commonly granted for this type of wrong, the amounts awarded have been rather modest. The average award for insurance fraud was £6,320 (£6,320) while the median award was just £2,335 (£2,335).<sup>79</sup> The reason for this may be the limited financial resources of the individuals who tend to be involved as defendants in this type of litigation.

**(4) One of the types of cases in which punitive damages awards ‘are most commonly found ... (are) cases of police misconduct pleaded as either trespass to the person or malicious prosecution.’<sup>80</sup>**

It has been asserted many times that punitive damages are frequently awarded in respect of misbehaviour by police officers in the exercise of their authority. Thus, according to Peter Cane ‘[p]unitive damages are often awarded against the police in actions for wrongful imprisonment or malicious prosecution.’<sup>81</sup> Similarly, Clayton and Tomlinson have argued that in ‘claims brought against the police ... the plaintiff will often receive an award of exemplary or punitive damages.’<sup>82</sup> The sample includes 102 punitive damages claims (that is 21.3 per cent of all sampled claims) for police misconduct

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<sup>78</sup> For detailed discussion of the appropriateness of punitive damages awards for breach of contract see chapter 9.5.2.

<sup>79</sup> Recall that the average and median punitive awards generally in the sample were £33,982 (£41,427) and £6,519 (£6,044).

<sup>80</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 54.

<sup>81</sup> Cane, *Anatomy* (n 64) 115.

<sup>82</sup> Richard Clayton and Hugh Tomlinson, *Suing the Police* (Longman 1989) 24.

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pleaded as either trespass to the person or malicious prosecution. Punitive damages were awarded in 40 of these claims. This yields a 39.2 per cent success rate which is lower than the overall success rate in the sample (46.4 per cent).<sup>83</sup>

A further breakdown of claims against the police based on the cause of action pleaded is illuminating. Punitive damages were sought from the police for trespass to the person in 75 claims with an award being made in 19 claims (25.3 per cent success rate). As for malicious prosecution, there were 27 police misconduct actions in the sample which included a claim in that tort<sup>84</sup> and punitive damages were awarded in 21 of these actions (a success rate of 77.7 per cent). This far exceeds the 46.4 overall success rate of punitive damages claims in the sample. Thus, a striking result is observed when the group of ‘abuse of power torts’<sup>85</sup> is isolated. It is noteworthy that a recent Australian study reported a very similar result for these cases.<sup>86</sup> The prevalence of successful claims within this sub-group can be justified on the basis of a perceived need to stop public powers being intentionally abused.

An assessment of the proportion of awards for police misconduct against the totality of punitive damages awards in the sample is also revealing. Of the 222 awards in

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<sup>83</sup> If we also count unlawful detention claims against the Secretary of the State or the Home Office and claims for misconduct by prison officers (which resemble police misconduct cases) the picture is similar. Out of the total 139 claims for abuse of power by government servants falling within the groups of interference with the person and malicious prosecution, punitive damages were awarded in 48 (a success rate of 34.5 per cent).

<sup>84</sup> In four of these actions, liability for misfeasance in public office was established in addition to liability for malicious prosecution.

<sup>85</sup> This group comprised malicious prosecution and misfeasance in public office. Some the claims listed in this group also involved claims for assault or false imprisonment but they were listed as ‘abuse of power cases’ because it was malicious prosecution or misfeasance in public office that was recognised as the ‘dominant’ cause of action, see the text to n 20.

<sup>86</sup> Maher (n 60) 716: Punitive damages were awarded in 88.6 per cent of the claims falling in the group of ‘abuse of power torts’. Similarly with the present study, the ‘abuse of power torts’ group primarily comprised police misconduct cases in the Australian study (at 730).

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the sample, 41 (ie, 18.5 per cent)<sup>87</sup> pertained to police misconduct which means that nearly one in every five punitive damages awards was made against the police. These findings provide some support for the assertion that punitive damages are commonly granted in actions against the police although it seems that an award is much more likely to be made when the misconduct involves malicious prosecution as opposed to trespass to the person.

Additional claims have been made in respect of the operation of the law of punitive damages in actions against the police and it is worth assessing these statements briefly. First, it has been argued that punitive damages function as ‘an important means of controlling and marking the serious disapproval of misconduct by officials, especially by the police’.<sup>88</sup> Lord Nicholls also said that ‘[t]he availability of exemplary damages has played a significant role in buttressing civil liberties in claims for false imprisonment and wrongful arrest’.<sup>89</sup> A second argument in support of the usefulness of punitive damages in police cases is that punishment by an independent body is required in this area because it is difficult to trust the state to punish its own employees.<sup>90</sup> Indeed, it appears to be rare

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<sup>87</sup> The sample also contained one award of punitive damages against the police for conversion: *R (Linse) v CC North Wales* [2020] EWHC 3403 (Admin).

<sup>88</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 55.

<sup>89</sup> *Kuddus* (n 69) [63]. See, also, Richard Clayton and Hugh Tomlinson, *Civil Actions Against the Police* (3rd edn, Sweet & Maxwell 2004) 588ff.

<sup>90</sup> See, eg, Andrew Burrows, ‘Reforming Exemplary Damages: Expansion or Abolition?’ in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (OUP 1996) 168–169; Robert Stevens, *Torts and Rights* (OUP 2007) 88.

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for the police to prosecute their colleagues and the Police Complaints system has been criticised as ineffective.<sup>91</sup>

It is difficult to assess, in light of the above findings, whether one can confidently assert that punitive damages actually operate as a meaningful mechanism for sanctioning police misconduct. Even though it is true that ‘the most common example of exemplary damages being awarded in th[e first *Rookes*] category has been in actions against the police’,<sup>92</sup> the overall success rate in police misconduct cases is relatively low compared with other groups of wrongs where similar enforcement problems have been observed (eg, insurance fraud and unlawful eviction).<sup>93</sup> The rate at which punitive damages were awarded in police misconduct cases is also low compared with the corresponding result in the Australian empirical study of punitive damages which reported that awards were made in 69.2 per cent of the police misconduct claims in which punitive damages were sought.<sup>94</sup>

One possible reason why courts may be hesitant to award punitive damages for police misconduct is that, in these cases, the sanction will not be felt by the individual responsible for the wrong but will be paid by the state.<sup>95</sup> A second likely explanation for

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<sup>91</sup> Clayton and Tomlinson, *Civil Actions Against the Police* (n 89) 13: ‘The different complaints systems have been the subject of sustained criticism since 1964. ... In its Final Report the Police Complaints Board stated that there had been a total of 17,245 complaints in 1984, but disciplinary charges were preferred in only 194 cases’; Roger Williams, *Citizens’ Experiences of Mistreatment and Injustice in the Early Stages of Law Enforcement* (Waterside Press 2015) 192: ‘A police officer is nearly three-times less likely to face prosecution than Joe Public’. See, also, the text to nn 244–245 below.

<sup>92</sup> Michael Jones (ed), *Clerk and Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020) para 27.138.

<sup>93</sup> The success rate in police misconduct cases (39.2 per cent) was significantly lower than the corresponding rate in unlawful eviction cases (77 per cent) and insurance fraud cases (89.1 per cent), see the text to nn 59, 66–67.

<sup>94</sup> Maher (n 60) 730.

<sup>95</sup> *Thompson* (n 11) 512–513.

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this outcome is that the police force is capable of faring better in the relevant disputes due to its financial resources and prior litigation experience.<sup>96</sup> By contrast, claimants in this area may lack equivalent advantages.

Turning to the quantum of punitive damages in police misconduct cases, the average and median awards in this group were £52,914 (£59,139) and £18,375 (£15,654) respectively. The amounts are substantially higher than the average and median awards across all of the sampled claims.<sup>97</sup> This result is likely explained by the fact that the state has the deepest pocket of all types of defendant.

### **(5) ‘Exemplary damages are associated primarily with intentional wrongdoing’<sup>98</sup>**

The results clearly show that intentional wrongdoing is where most punitive damages claims and awards are found. The types of wrongs with the highest punitive award rates were insurance fraud,<sup>99</sup> unlawful eviction,<sup>100</sup> and ‘abuse of power torts’.<sup>101</sup> All of the claims falling within these categories involve intentional wrongdoing which proves that the ‘heartland’<sup>102</sup> for punitive damages is intentional wrongdoing. Thus, the observation by Lord Nicholls in the subheading above is accurate. A condition precedent for an award of punitive damages award is ‘outrageous’ conduct, and a defendant who intentionally commits a wrong will satisfy this condition more easily than a defendant who merely acts

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<sup>96</sup> Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 *Law and Society* 95. For further discussion of the ‘party capability theory’, see the text to nn 222–225 below.

<sup>97</sup> These were £33,982 (£41,427) and £6,519 (£6,044) respectively, see chapter 6.1.1.

<sup>98</sup> *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449 [43] (Lord Nicholls).

<sup>99</sup> See the text to nn 66–67.

<sup>100</sup> See the text to n 59.

<sup>101</sup> See Figure 6 and the text to nn 84–86.

<sup>102</sup> Maher (n 60) 727 who reports a similar result in Australia.

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recklessly. As such, the absence of successful punitive damages claims in causes of action such as negligence and employers' liability is unsurprising. Although it is theoretically possible to commit these wrongs intentionally, in practice, conduct which is actionable under these causes of action will usually be insufficiently blameworthy to merit a punitive response.

**(6) 'Punitive damages under [the second *Rookes* category] are most commonly awarded in tort actions for defamation ...'**<sup>103</sup>

A defamation scenario is frequently cited as an illustration of a 'Category 2 case'. For example, Rachael Mulheron contends that 'exemplary damages for the publication of defamatory material are customarily awarded [under the second *Rookes* category]'.<sup>104</sup> Solène Rowan similarly writes: 'Lord Devlin's second category ... targets the wrongdoer who ... has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk. In practice, this has most commonly been makers of defamatory statements ...'.<sup>105</sup> More generally, it has been said widely that defamation is the primary example of the type of wrong which can give rise to an award of punitive damages.<sup>106</sup> The accuracy of this perception is dubious in light of the results which indicate that, despite the existence of some well-publicised awards between the 1970s

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<sup>103</sup> Cane, *Anatomy* (n 64) 115.

<sup>104</sup> Rachael Mulheron, *Principles of Tort Law* (2nd edn, CUP 2020) para 11.10. See, also, Simon Deakin and Zoe Adams, *Markesinis and Deakin's Tort Law* (8th edn, OUP 2019) 796.

<sup>105</sup> Solène Rowan, 'Comparative Observations on the Introduction of Punitive Damages in French Law' in John Cartwright, Stefan Vogenauer and Simon Whittaker (eds), *Reforming the French Law of Obligations* (Hart 2009) 325, 331.

<sup>106</sup> Lesley Anderson, 'An Exemplary Case for Reform' (1992) 11 CJK 233, 244: '[D]efamation cases form a significant proportion of cases in which exemplary damages have been awarded overall.' The Law Commission in its Consultation Paper also referred to defamation as a wrong in respect of which the punitive principle has been employed most often by the courts, see Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 26.

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and the 1990s,<sup>107</sup> punitive damages were awarded less frequently in the defamation context<sup>108</sup> compared with other types of wrongs (such as unlawful eviction or insurance fraud) that commonly fall within the second *Rookes* category. Besides, the sample does not include a single defamation claim in which punitive damages were awarded in the last 25 years.

The sample contains 30 punitive damages claims for defamation and seven claims for privacy invasions. Punitive damages were awarded in 56.6 per cent of the defamation claims in which they were sought (ie, in 17 claims) while the court did not make an award in any of the sampled privacy invasion claims. It must be underlined that 10 of the 17 punitive damages awards for defamation are derived from a single case, namely, *Riches v News Group Newspapers Ltd*<sup>109</sup> which involved 10 claimants. If *Riches* is counted as a single entry, then the success rate of punitive damages claims in defamation cases drops to 38 per cent.<sup>110</sup> Both percentages are lower than the respective success rate

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<sup>107</sup> Eg, *Broome* (n 11); *Riches* (n 4); *John* (n 3).

<sup>108</sup> See Figure 6. Some authors are aware of this reality, see, eg, Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6th edn, OUP 2017) 884: ‘The classic example [in the second *Rookes* category] is of a newspaper that prints a libellous story in order to boost its circulation ... In fact, however, the most common exemplary awards under this head have been in respect of wrongful eviction ...’.

<sup>109</sup> (n 4). See, also, chapter 6.1.3.

<sup>110</sup> Punitive damages were awarded in 54.7 per cent of the defamation claims in which they were sought in a major US empirical study (see Eisenberg and others, ‘The Decision to Award Punitive Damages: An Empirical Study’ (n 56) 598) and in 18.3 per cent of the defamation claims in which they were sought in the Australian empirical study (see Maher (n 60) 716). The success rate reported in the Australian study reflects the fact that, for the largest part of the study period, punitive damages were unavailable in defamation actions by virtue of legislation, see Maher (n 60) 728. There is no information about the rate at which punitive damages are awarded when they are sought in Canada but Young’s study reports that a quarter of defamation damages awards in Canada during 1973–1983 and 2003–2013 included an award of punitive damages (without filtering based on whether punitive damages were sought), see Hilary Young, ‘The Canadian Defamation Action: An Empirical Study’ (2017) 95 Can B Rev 591, 619.

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of punitive damages claims in cases of unlawful eviction (77 per cent) and insurance fraud (89.1 per cent).<sup>111</sup>

Two additional points are noteworthy. First, defamation was one of the least significant sources of punitive damages *claims* in the sample (comprising just 6.3 per cent of all claims).<sup>112</sup> This is partly because many of the cases which appeared in the search results involved defamation claims which were disposed of by a summary judgment or were struck out as an abuse of process so that the question of punitive damages did not arise.<sup>113</sup> Another possible explanation for the merely sporadic presence of punitive damages claims in the defamation context may be that awards of aggravated damages seem to be common in this setting and it has been argued that they also fulfil a punitive function.<sup>114</sup> If aggravated damages have a punitive component to them, then punitive damages may not be required to achieve the goals of retribution and deterrence.<sup>115</sup> The preference for aggravated over punitive damages may also relate to the fact that aggravated damages fall within insurance coverage, whereas punitive damages

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<sup>111</sup> See the text to n 59 (unlawful eviction) and nn 66–67 (insurance fraud).

<sup>112</sup> Thus, the Law Commission rightly observed that ‘[e]xemplary damages are in fact seldom sought in libel actions’, see Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 57.

<sup>113</sup> Eg, *Wallis v Valentine* (QBD, 5 December 2001); *Freer v Zeb* [2008] EWHC 212 (QB). These cases were excluded from the sample because the claimant did not prevail on liability, see chapter 5.1.3. Empirical evidence from Canada has also shown a trend towards more interlocutory matters being litigated over the last years, see Young (n 110) 605, 608.

<sup>114</sup> *Hill v CPM* (CA, 4 November 1998) p 4 (May LJ): ‘Aggravated damages ... carry with them ... an element of punishment for the defendant’; *Goswell* (n 11) p 6 (Simon Brown LJ): ‘[There is an] inevitable overlap between aggravated and exemplary damages ...’.

<sup>115</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 57: ‘[P]ractitioners may often perceive a punitive element in awards of (supposedly compensatory) “aggravated damages” by juries in defamation actions; they therefore feel that little is to be gained by claiming exemplary damages in addition.’

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commonly do not.<sup>116</sup> A final potential explanation for the small number of defamation claims in the dataset may be the effect of a greater concern with freedom of expression over the last years.<sup>117</sup> The very small number of defamation claims in the sample means that it is, by definition, doubtful whether defamation can constitute a significant proportion of punitive damages awards overall. Second, out of the 222 punitive damages awards in total in the sample, only 17 (ie, 7.6 per cent) were made for defamation.<sup>118</sup> It follows that, contrary to conventional wisdom, defamation cases do *not* form a significant proportion of cases in which punitive damages have been awarded overall.

The perception that punitive damages awards are more common in defamation cases than they are in reality could be the result of the availability heuristic which occurs when the relevance of memorable events is overestimated at the expense of base rates. Although such incidents can be memorable due to the fact that they are common, they can also be memorable for entirely different reasons, for example, because they are vivid or well-publicised. These events are often overestimated as being much more common than they actually are.<sup>119</sup> Substantial awards (for example, the awards in *Broome v Cassell & Co Ltd*<sup>120</sup> and *Riches v News Group Newspapers Ltd*<sup>121</sup>) usually receive high publicity and this may lead to the assumption that such awards are more typical than they

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<sup>116</sup> Young (n 110) 618. Although liability for punitive damages is insurable (*Lancashire County Council v Municipal Mutual Insurance* [1997] QB 897 (CA) 909) it is common for insurance contracts to exclude such liability, see John Birds, Ben Lynch and Simon Paul, *MacGillivray on Insurance Law* (14th edn, Sweet & Maxwell 2018) para 30.009 fn 36.

<sup>117</sup> Young (n 110) 608.

<sup>118</sup> This percentage drops to 3.7 per cent if *Riches* (n 4) is counted as a single entry.

<sup>119</sup> Russell Korobkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2010) 88 California LR 1053, 1087–88.

<sup>120</sup> (n 11).

<sup>121</sup> (n 4).

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are in reality. In *Broome*, a jury awarded £393,947 as punitive damages to a war-time convoy escort commander in respect of a book about the destruction of ‘Convoy PQ17’ during the second world war. The book alleged that the convoy was destroyed due to the claimant’s conduct. The award was at the centre of media attention for years.<sup>122</sup> The reasons for this were presumably the large size of the award (which remains the highest punitive damages award to have survived on appeal in the UK) but also the Court of Appeal’s notable disobedience of the House of Lords in that case.<sup>123</sup>

In *Riches v News Group Newspapers Ltd* (which also received considerable media coverage)<sup>124</sup> the police officers of a criminal investigation department sued the publishers of a newspaper in respect of a front-page story making allegations of rape against them. The jury awarded the record amount of £818,578 as punitive damages to be split equally between the ten police officer claimants. This remains the largest first instance award in the modern history of the English law of punitive damages. The award did not ultimately survive the Court of Appeal’s scrutiny and the case was eventually remitted for a re-trial.

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<sup>122</sup> Eg, ‘Captain Broome Awarded Damages of £40,000’ *The Times*, 18 February 1970. An online search on FACTIVE revealed that at least 60 newspaper articles dedicated to the *Broome* litigation were published between 1970 and 1974.

<sup>123</sup> Eg, ‘The Judges’ Dilemma’ *The Times*, 12 March 1971. The article discusses the Court of Appeal’s ‘temerity to dissent from the House of Lords which no court in living memory had done in this way’. In *Broome v Cassell & Co Ltd* [1971] 2 QB 354 (CA) the Court of Appeal directed lower courts to disregard the decision in *Rookes v Barnard* because it had been decided ‘per incuriam’.

<sup>124</sup> Eg, ‘Libel Award Record for Policemen’, *The Daily Telegraph*, 10 February 1984. There were at least 10 newspaper articles related to *Riches* published between 1984 and 1986.

**(7) ‘High levels of [punitive damages] awards are often made in [defamation] cases’<sup>125</sup>**

Another common assertion about punitive damages is that they are awarded at a high level in the defamation context. For example, Lesley Anderson wrote that ‘[i]n terms of the amounts awarded, the defamation cases provide the most significant body of case law within the second category’.<sup>126</sup> The large amounts awarded as punitive damages in defamation actions have led to criticism of the remedy in general. Thus, the Law Commission observed in its Consultation Paper: ‘A practical criticism ... arises out of ... the assessment of exemplary awards ... Reference is made to defamation cases, where damages can reach sensational sums’.<sup>127</sup>

Although statements about punitive damages awards being frequent in defamation actions seem to be misplaced, the criticism about large sums awarded in this context appears to be valid.<sup>128</sup> The average and median punitive damages awards for defamation were £147,828 (£314,134) and £81,858 (£271,598) respectively.<sup>129</sup> Additionally, four of the ten highest punitive damages awards ever made in the UK pertained to defamation claims.<sup>130</sup>

The inverse relationship between the success rate of punitive damages claims in defamation actions and the large sums awarded when claims were successful is striking.

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<sup>125</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 113 (footnotes omitted). See, also, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 57: ‘[Defamation has] attracted high levels of [punitive damages] awards’.

<sup>126</sup> Anderson (n 106) 244.

<sup>127</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 68. See, also, *ibid* 61: ‘The high levels of awards which are often made in [defamation] cases mean they have also attracted the greatest attention.’

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A likely explanation for the high amounts of punitive damages awards for defamation is the involvement of juries in such cases.<sup>131</sup> All of the defamation awards in the sample were assessed by juries and the results suggest that when the mode of trial is by judge and jury, the amount of punitive damages tends to be much more substantial than when the trial is conducted by judge alone.<sup>132</sup>

Complaints about the problems that punitive damages awards were causing in the law of defamation were particularly pronounced between the 1970s and 1990s. This is also the period during which all of the defamation awards in the sample were made. Both the Faulks Committee on Defamation<sup>133</sup> and the Neill Committee's Report on Practice and Procedure in Defamation<sup>134</sup> called for the abolition of the remedy in defamation actions, a recommendation which was influenced by the unacceptable difficulties that arbitrary awards of punitive damages were causing in the field.<sup>135</sup> It is difficult to assess

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<sup>128</sup> Of course, the relevant results must be read with caution considering the low number of defamation claims in the dataset.

<sup>129</sup> See Table 3. These sums are higher than the corresponding amounts reported in empirical studies in Australia (see Maher (n 60) 718: A\$32,010 (A\$33,010 in 2021) average punitive award and A\$19,258 (A\$19,859 in 2021) median punitive award) and Canada (see Young (n 110) 618: only average award of C\$15,994 reported (C\$17,993 updated for inflation)). However, they are substantially lower than the average punitive defamation award of US\$3.4 million (US\$5.1 million in 2021) and the median punitive defamation award of US\$300,000 (US\$455,718 in 2021) reported in a US study, see Charles Rothfeld, 'The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures' (2000) 19 Yale Law & Policy Review 165, 192.

<sup>130</sup> *Riches* (n 4); *John* (n 3); *Broome* (n 11); *Maxwell v Pressdram Ltd (No 2)* (QBD, 21 November 1986).

<sup>131</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 58.

<sup>132</sup> See Table 8. For an illustration of a remarkable jury award outside of the defamation context, see *Goswell* (n 11) (£325,072 (£325,072) punitive damages for assault and false imprisonment).

<sup>133</sup> Neville Faulks, *Report of the Committee on Defamation* (Cmd 5909, 1975) 97.

<sup>134</sup> Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (Lord Chancellor's Department 1991) 43.

<sup>135</sup> *ibid* 41–42. Against these calls for the removal of punitive damages from the defamation context, the Law Commission argued that such awards may protect intangible personality interests more

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whether these reform proposals were justified at the time. On the one hand, the perceived problems that punitive damages were causing in the law of defamation seem to have been based on a relatively small number of awards, some of which were set aside on appeal.<sup>136</sup> On the other hand, the amounts awarded in these cases were unusually high and this signals a potential problem in this area.

In contrast with the period between the 1970s and the 1990s, in recent years, the opposite trend has prevailed. The latest proposals have favoured the expansion of punitive damages. In 2012, Sir Brian Leveson argued that defamation damages ‘have become easier to assess and ... were unlikely to be particularly substantial’<sup>137</sup> and that ‘exemplary damages ... were awarded in defamation only where it is established that the defendant’s conduct has been calculated to make a profit which might well exceed the compensation payable ...’.<sup>138</sup> The latest changes brought about by the Crime and Courts Act 2013 moved to expand the availability of punitive damages (although no award has yet been made under this legislation). Section 34 of the Act provides that a court has the power to award punitive damages against defendants who are not members of an approved press regulator if ‘it considers it appropriate to do so in all the circumstances of the case’<sup>139</sup> and is satisfied that ‘(a) the defendant’s conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant’s rights, (b) the conduct is such that the court should punish the defendant for it, and (c) other remedies would not

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effectively, see Law Commission, *Aggravated, Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 131.

<sup>136</sup> Eg, *Riches* (n 4).

<sup>137</sup> Brian Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Report* (TSO 2012) vol 4, 1505.

<sup>138</sup> *ibid.*

<sup>139</sup> Crime and Courts Act 2013, s 34(4)(a).

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be adequate to punish that conduct.’<sup>140</sup> These provisions have been vigorously criticised.<sup>141</sup> More generally, damages awards against media defendants tend to attract attention because they may affect free speech due to fear of litigation. It has thus been assumed that punitive damages may unduly inhibit freedom of speech. However, given that such awards have been virtually non-existent in this field over the last twenty-five years,<sup>142</sup> the only deterrent effect of punitive damages derives from the mere existence of the sanction and from some memorable awards that were made by juries at least thirty years ago. In the absence of evidence about the effects of punitive damages it is hard to tell if the existence of this sanction by itself can have a chilling effect. Besides, the virtual extinction of jury trials in defamation actions<sup>143</sup> means that it is unlikely to see extravagant awards in such cases in the future.

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<sup>140</sup> Crime and Courts Act, s 34(6).

<sup>141</sup> Eg, Alan Rusbridger, ‘We Need Reform and a Free Press. This Will Require Both Time and Openness’ (2013) *The Guardian* <[www.theguardian.com/commentisfree/2013/mar/24/need-reform-free-press-time-openness](http://www.theguardian.com/commentisfree/2013/mar/24/need-reform-free-press-time-openness)> accessed 30 July 2021: ‘[T]he insistence on imposing exemplary, or punitive, damages ... is a seriously bad idea that will create martyrs and is probably incompatible with ... free speech ...’.

<sup>142</sup> Sir Edward Garnier seems to have been alive to this, see HC Deb 18 March 2013, vol 560, col 659: ‘[I]n my experience [exemplary damages] are quite rare in libel actions nowadays, although not unheard of.’

<sup>143</sup> Section 11 of the Defamation Act 2013 provides that a defamation trial is to be ‘without a jury unless the court orders otherwise’.

**(8) Punitive damages awards are ‘virtually uncontrollable and ... reach levels which are excessive’<sup>144</sup>**

One of the major criticisms of punitive damages relates to their assessment. Lord Devlin was clearly concerned about the possibility of excessive awards when he remarked in *Rookes v Barnard* that ‘the House may find it necessary to ... place some arbitrary limit on awards of damages that are made by way of punishment [because e]xhortations to be moderate may not be enough’.<sup>145</sup> Similarly, according to Lord Wilberforce in *Broome v Cassell & Co Ltd* ‘[an] argument against the existence of the principle [of] punitive damages in English law ... [is] that it leads to excessive awards ...’.<sup>146</sup> However, anxiety about extravagant awards may not be wholly justified. Punitive damages awards have generally been moderate in the UK. The average award of punitive damages during the study period was £33,982 (£41,427) while the median was £6,519 (£6,044). Due to the presence of outliers,<sup>147</sup> the median award provides a more accurate description of the central tendency. If outliers are excluded, the range of awards is relatively small (ie, between £104 (£104) and £58,001 (£58,001)). More than 80 per cent of all awards fell within this band.<sup>148</sup>

<sup>144</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 82 (arguments against punitive damages). Cf James Edelman, ‘In Defence of Exemplary Damages’ in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) 247, referring to ‘modest exemplary damages awards’.

<sup>145</sup> *Rookes v Barnard* [1964] AC 1129 (HL) 1227–28. Lord Woolf MR expressed similar concerns in *Thompson* (n 11) 513 when he spoke of ‘excessive [punitive damages] awards’. See, also, Peter Birks, *Civil Wrongs: A New World* (Butterworths 1992) 80–82.

<sup>146</sup> (n 11) 1114.

<sup>147</sup> The average award was significantly affected in particular by one very large award which was set aside on appeal (£818,678 (‘as paid measure’) in *Riches* (n 4)).

<sup>148</sup> Note also that the average punitive award by year was far below £60,000 during most of the study period, see Figure 2. See, also, Law Commission, *Aggravated Exemplary and Restitutionary*

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Several points of reference can be used to determine if punitive damages awards are excessive. The first possible reference point is the level of compensatory damages awards. English courts have, sometimes, resorted to the quantum of compensatory damages as a comparator in determining the appropriate sum of punitive damages.<sup>149</sup> In this study, where both punitive and compensatory damages were awarded and the two amounts were known, the average and median punitive damages awards (£38,757 (£48,395) and £8,784 (£7,649) respectively) were lower than the corresponding compensatory damages awards (£42,606 (£55,452) and £14,739 (£16,537) respectively).<sup>150</sup>

The second possible comparator is the average annual income of a full-time employee in the UK. Again, the average and especially the median punitive damages award against natural persons was not particularly high compared to the average income. The annual average earnings of a full-time employee in the UK for the period 1964–2020 was £31,304.<sup>151</sup> The average and median punitive damages award against human defendants for the same period was £10,743 (£14,222) and £3,413 (£3,331) respectively.<sup>152</sup>

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*Damages: A Consultation Paper* (n 62) 126 arguing that there was little evidence at the time that the level of punitive damages was generally regarded as a problem.

<sup>149</sup> *Riches* (n 4) 282; *Thompson* (n 11) 518; *Watson* (n 20) [48]. The ratio between punitive to compensatory damages has also been used as an indicator for the excessiveness of punitive damages awards in the US, see *State Farm* (n 71).

<sup>150</sup> See Table 11.

<sup>151</sup> ONS, ‘Data for Earnings and Working Hours’ (2021) <[www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/allemployeesashetable1](https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/datasets/allemployeesashetable1)> accessed 30 July 2021; ONS, ‘Data for Mean Gross Weekly Earnings from 1938 to 2020’ (2021) <<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/adhocs/12443earningstimeseriesofmeangrossweeklyearningsfrom1938to2020>> accessed 30 July 2021.

<sup>152</sup> See Table 4.

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A similar comparator for corporate defendants is the annual turnover of the corporation for the year in which punitive damages were awarded against it.<sup>153</sup> This provides a third reference point. The relevant information was not accessible for all corporate defendants who were liable to pay punitive damages in the sample. However, it is clear that, where this information was available, the amounts awarded as punitive damages were anything but excessive relative to the defendant company's turnover. The sample contains 26 successful claims against corporate defendants in which the exact amount awarded as punitive damages was ascertainable. It was possible to retrieve financial statements for the relevant companies in 17 of these claims.<sup>154</sup> The amounts awarded as punitive damages in these claims ranged between 0.007 per cent and 2.8 per cent of the defendant company's annual turnover. If net assets were selected as an alternative comparator<sup>155</sup> the amounts of punitive damages ranged between 0.8 and 5.7 per cent of the defendant company's net assets.

The following examples are revealing. In *Riches v News Group Newspapers Ltd*,<sup>156</sup> £818,578 were awarded as punitive damages. Recall that this was the highest award ever to be made at first instance in the UK. Although the decision was overturned on appeal, the punitive damages awarded by the jury at first instance accounted for 0.08 per cent of the defendant company's annual turnover which (adjusted for inflation) was

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<sup>153</sup> An undertaking's turnover is the yardstick for the calculation of fines for competition law infringements. According to section 36(8) of the Competition Act 1998 'fines may not exceed 10 per cent of the undertaking's turnover'.

<sup>154</sup> These were retrieved from the UK Companies House website: <<https://find-and-update.company-information.service.gov.uk/>> accessed 30 July 2021.

<sup>155</sup> This is useful because the annual turnover was not readily ascertainable from publicly available information for all companies.

<sup>156</sup> (n 4).

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just over £1 billion.<sup>157</sup> Similarly, in *Maxwell v Pressdram Ltd*<sup>158</sup> a jury awarded £149,249 punitive damages, an amount which constituted 2.8 per cent of the defendant company's annual turnover.<sup>159</sup> And more recently, in *Wamala v Tascor Services Ltd*,<sup>160</sup> the judge ordered the defendant company, whose turnover was about £34 million, to pay £10,716 as punitive damages (ie, 0.03 per cent of the defendant's annual turnover).<sup>161</sup> Thus, awards against corporate defendants which may appear to be extreme as standalone sums are often not extravagant when sized up against the wealth of those companies.

A fourth potential reference point is the level of fines imposed by criminal courts. Many judges have drawn an analogy between punitive damages awards and fines.<sup>162</sup> A difficulty here is that comprehensive data about the level of criminal fines in the UK are not publicly available. Average fine amounts for specific offence types have been reported by the Home Office in the past.<sup>163</sup> According to the relevant data, the average

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<sup>157</sup> 'News Group Newspapers Ltd – Accounts (1984-1985)' <<https://find-and-update.company-information.service.gov.uk/company/00679215/filing-history>> accessed 30 July 2021.

<sup>158</sup> (n 130).

<sup>159</sup> The company's annual turnover for 1985 was £4,916,150: 'Pressdram Ltd - Accounts (1985–1986)' <<https://find-and-update.company-information.service.gov.uk/company/00708923/filing-history>> accessed 30 July 2021.

<sup>160</sup> [2017] EWHC 1461 (QB).

<sup>161</sup> 'Tascor Services Ltd – Accounts (2016–2017)' <<https://find-and-update.company-information.service.gov.uk/company/02057887/filing-history>> accessed 30 July 2021.

<sup>162</sup> *Rookes* (n 145) 1227 (Lord Devlin): '[S]ome of the [punitive damages] awards ... amount to a greater punishment than would be likely to be incurred if the conduct were criminal'; *Broome* (n 11) 1123 (Lord Diplock): 'I would approach it in the same way as I should approach a fine ... imposed by a judge in a criminal prosecution'; *Riches* (n 4) 268 (Stephenson LJ): 'the plaintiff who seeks exemplary damages asks [the court] ... to punish the defendant ... by awarding a financial penalty, commonly and inevitably regarded as a fine'; *Scullion v CC Royal Ulster Constabulary* (QBD, 10 June 1988) (Nicholson J): 'I have taken into account the monetary penalties or fines which I would have imposed on the [defendants] ... if they had been brought before me in a criminal court and convicted of the offences which in a civil case I have held them to have committed'.

<sup>163</sup> Home Office, 'Sentencing Statistics 2004' (October 2005). The piece was accessed following a freedom of information request to the Ministry of Justice.

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fine for fraud and forgery for the period from 1994 to 2004 (ie, the period in respect of which information was accessible) was £9,553.<sup>164</sup> This can be compared to the average punitive damages award for insurance fraud which was £6,320 (£6,320). It follows that, on average, the amounts awarded as punitive damages for insurance fraud are not excessive when they are juxtaposed against the average fines imposed by criminal courts for similar offences.<sup>165</sup>

Statutorily prescribed maximum amounts of fines for specific offences can also serve as a useful benchmark. It is arguable that where civil wrongdoing also amounts to a crime, the amount of punitive damages should not exceed the maximum statutory criminal fine. This can be tested in relation to the offence of unlawful eviction. The Protection from Eviction Act ('PEA') 1977 makes the illegal eviction of residential occupiers a criminal offence.<sup>166</sup> If the landlord is convicted in the magistrates' court, (s)he can be fined up to £5,000 and/or sent to prison for up to six months<sup>167</sup> whereas a Crown Court may impose an unlimited fine and/or imprison the defendant for up to two years. The average and median punitive damages awards for unlawful eviction were £5,986 (£7,230)<sup>168</sup> and £3,731 (£3,766). These amounts are very close to the £5,000

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<sup>164</sup> *ibid*, Table 4.8 reporting average fine amounts imposed at the Crown Court and at the magistrates' court for this period.

<sup>165</sup> Such a comparison is useful given that insurance fraud constitutes a major source of punitive damages awards today.

<sup>166</sup> PEA 1977, ss 1(2), 1(3) and 1(3A).

<sup>167</sup> PEA 1977, s 1(4)(a); Magistrates' Courts Act 1980, s 32(9). The cap for magistrates' courts was removed by section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act ('LASPO') 2012 so that no statutory maximum amount applies for a fine for unlawful eviction committed after 13 March 2015.

<sup>168</sup> The average is influenced by an outlier award of £78,334 (£78,334) in *Francis v Brown* (1998) 30 HLR 143 (CA) which was set aside on appeal. If this is disregarded, the average award in unlawful eviction claims drops to £4,801 (£5,836).

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statutory cap of a criminal fine that the magistrates' court can impose for this offence in addition to a prison sentence. Relatedly, most awards in the sample, even when adjusted for inflation, did not exceed the £5,000 cap which is another testament to the tendency of English courts to apply faithfully the principle of moderation. Thus, the Law Commission accurately observed in its Report on *Aggravated, Exemplary and Restitutionary Damages* that 'this type of case [ie, unlawful eviction] has not attracted high levels of award'.<sup>169</sup>

A fifth benchmark against which the size of punitive damages can be assessed is found in the *Thompson* guidelines for the calculation of awards in police misconduct cases. According to these guidelines:

Where exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action, the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.<sup>170</sup>

Adjusted for inflation, these amounts are £9,270, £46,350 and £92,701.<sup>171</sup> It is clear from the results that English courts have adhered to the *Thompson* brackets. The average and median punitive damages awards for police misconduct in the post-*Thompson* era were

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<sup>169</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 57–58. See, also, *Sampson v Wilson* (1994) 26 HLR 486 (Ch) (Cooke J): 'The authority shows ... the sums awarded [as punitive damages for unlawful eviction] are not all that high'.

<sup>170</sup> *Thompson* (n 11) 517 (Lord Woolf MR).

<sup>171</sup> Davis LJ clarified in *Rees v CPM* [2021] EWCA Civ 49 [54] that the guidance given in *Thompson* is 'directed at the paradigm of a single plaintiff. It was not directed at cases where there were several claimants'.

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£24,909 (£29,579) and £22,201 (£16,374).<sup>172</sup> These sums fall within the lower to middle range of the guidelines. In any event, the brackets have never been exceeded since 1997, when *Thompson* was decided.

The level of punitive damages awards in other common law jurisdictions can be used as the sixth and final indicator for the excessiveness of punitive damages awards in the UK. Again, the average and median awards in the UK were lower than the respective awards in the US,<sup>173</sup> Canada<sup>174</sup> and Australia.<sup>175</sup> In addition to this, there was not a single case in the sample in which the amount of punitive damages reached a seven-digit number (in contrast with the situation in the US and Australia).<sup>176</sup>

It is clear from the above that fears about punitive damages awards being excessive are not supported by the empirical evidence. Lord Devlin's lack of confidence

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<sup>172</sup> The average and median awards in police claims in the pre-*Thompson* era were £66,579 (£72,347) and £15,667 (£15,667) respectively. The average has been affected by outlier awards in *Taylor v CPM* (QBD, 6 December 1989) (£177,411); *Thompson* (n 11) (£382,438); *Goswell* (n 11) (£325,072); and *Gerald* (n 11) (£191,219). The 'as paid' and 'as received' measures were the same in these cases. The remaining awards against the police in the pre-*Thompson* era fell between £104 (£104) and £97,918 (£97,918).

<sup>173</sup> The dataset of the Civil Justice Survey of State Courts for 2005 sampling 156 counties from all around the country showed that the average and median punitive damages awards were \$2.3 million (\$3.3 million updated for inflation) and \$96,723 (\$133,939 adjusted for inflation) respectively, see Theodore Eisenberg and Michael Heise, 'Judge-Jury Differences in Punitive Damages Awards: Who Listens to The Supreme Court?' (2011) 8 JELS 325, 331. The study does not report the largest award but the average award is remarkably high.

<sup>174</sup> Empirical studies in Canada do not report average and median punitive damages awards. It is thus impossible to have an overall picture of the level of punitive damages in Canada. Nevertheless, there have been some 'mega-awards' in recent years, eg, the C\$1 million (C\$1.3 million in 2021) award in *Whiten* (n 71) and the C\$1 million (C\$1.17 million in 2021) award in *Airbus Helicopters SAS v Bell Helicopter Textron Canada Ltd* 2019 FCA 29, (2019) 163 CPR (4th) 337.

<sup>175</sup> Maher (n 60) 711: The average award of punitive damages in Australia for the period between 2000–2016 was A\$105,059 (A\$109,196 in 2021). The median award was A\$26,854 (A\$27,912 in 2021). The maximum award reported in that study was A\$4.1 million (A\$4.4 million in 2021).

<sup>176</sup> Adjusted for inflation, the largest award in Canada (see *Whiten* (n 71)) translates to £758,745. The largest punitive damages award for which a defendant was liable in my sample was £818,578 in *Riches* (n 4) but the award was quashed on appeal. The largest award of punitive damages to survive appellate scrutiny in the UK was £393,947 (£393,947) in *Broome* (n 11).

in the ability of lower courts to adhere to the principle of moderation appears to be unjustified.

**(9) Punitive damages awards ‘are indeterminate and unpredictable’<sup>177</sup>**

Another commonly raised concern about punitive damages relates to the supposed indeterminacy and unpredictability of awards. According to the Law Commission’s Consultation Paper ‘[o]ne, if not the major, problem raised by the existing law of exemplary damages is that such awards are unpredictable’.<sup>178</sup> Unlike compensatory damages, punitive damages have no natural limit<sup>179</sup> and this may ‘inject an undesirable uncertainty into the decision-making of potential defendants’.<sup>180</sup> Despite the fact that punitive damages have no inherent ceiling, the results of the empirical analysis show that most awards fell within a relatively narrow range (ie, between £104 (£104) and £58,001 (£58,001)).<sup>181</sup> Admittedly, the standard deviation of all awards<sup>182</sup> was £76,362 (£106,646) but this was significantly affected by the extreme outliers.<sup>183</sup> If extreme outliers are disregarded the standard deviation falls to £25,981 (£22,478). The high degree of uniformity in the vast majority of punitive damages awards renders it possible

<sup>177</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 82 (arguments against punitive damages).

<sup>178</sup> *ibid* 141. See, also, *ibid* 130 (arguments against punitive damages): ‘[E]xemplary damages are unacceptably uncertain. Levels of award are unpredictable and difficult to assess’; Mulheron (n 104) para 11.13: ‘Quantifying awards for exemplary damages is highly imprecise’.

<sup>179</sup> The same is arguably true about compensatory damages for intangible losses. However, there are guidelines for the assessment of such damages in personal injury cases, see Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (15th edn, OUP 2019).

<sup>180</sup> Richard Posner, *Law and Legal Theory in England and America* (Clarendon Press 1996) 53.

<sup>181</sup> See chapter 6.1.1.

<sup>182</sup> The standard deviation is the average amount by which data points deviate from the mean. The more spread out the data, the higher the standard deviation.

<sup>183</sup> Out of 222 punitive damages awards in total, 11 awards were extreme outliers, see n 8.

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to predict with a reasonable degree of confidence the likely award in most cases. Besides, the courts follow clear principles in assessing punitive damages awards in certain contexts (eg, police misconduct).<sup>184</sup> This arguably permits potential litigants to predict the quantum of such awards at least in certain types of cases.

Owing to the alleged unpredictability of punitive damages awards it has also been claimed that they create ‘major impediments’ to the settlement of disputes.<sup>185</sup> This anxiety may have been justified in the defamation context during the period between the 1970s and the 1990s.<sup>186</sup> The results show that punitive damages awards for defamation ranged between £46,308 (£46,308) and £570,660 (£818,578).<sup>187</sup> Thus, the standard deviation of awards in defamation was £151,208 (£280,547) which is notably higher than the standard deviation of all awards in the sample.<sup>188</sup> It is less clear if there is any foundation for this concern today in light of the absence of any electronically available punitive damages award for defamation in the last 25 years.

A related concern has been raised in the product liability context. It has been claimed that the unpredictable level of punitive damages awards can discourage

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<sup>184</sup> The *Thompson* guidelines apply here, see the text to nn 170–171.

<sup>185</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 112 (arguments against punitive damages): ‘The ... uncertainty created by awards of exemplary damages ... [makes it] exceptionally difficult to predict the outcome of such cases. ... [M]ajor impediments are created to the negotiated settlement of claims of this kind.’

<sup>186</sup> Complaints were indeed raised about unpredictable punitive damages awards in defamation during that period, see Supreme Court Procedure Committee (n 134) 42: ‘[There is] no possibility of a decision [assessing punitive damages for defamation] in accordance with any kind of tariff’; Julie Scott-Bayfield, *The Lawyer*, 29 April 1997, p 18 as cited in Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 123 fn 666: ‘libel damages awards “remain as unpredictable as ever ...”’.

<sup>187</sup> All of the defamation awards in the sample were made between the 1970s and the 1990s. The most recent award was made in 1994 (*Rowland-Jones v City & Westminster Financial plc* (CA, 4 April 1995)).

<sup>188</sup> See the text to n 182.

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‘manufacturers ... from putting useful and innovative products onto the market because of fear of the potential liability’.<sup>189</sup> Overall, there is a fear that the risk of paying punitive damages creates uncertainty for businesses and leads to over-deterrence.<sup>190</sup> It is doubtful whether this argument has any force because even though punitive damages awards are normally larger against corporations, they are usually modest relative to the corporations’ annual turnover.<sup>191</sup> Additionally, three quarters of all awards against corporations in the sample fell within a fairly narrow range (ie, £1,376 (£1,376) to £81,856 (£80,986)). Finally, the argument about uncertainty for business planning in the product liability context seems entirely baseless because even though punitive damages are theoretically available in product liability cases,<sup>192</sup> the sample did not include a single product liability claim in which punitive damages were sought.<sup>193</sup> In any event, any argument about over-deterrence needs to be supported by evidence. In the absence of any empirical study on the effects of punitive damages, the fear of over-deterrence is nothing more than speculation.<sup>194</sup>

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<sup>189</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 62) 113 (arguments against punitive damages).

<sup>190</sup> *ibid* 113 (arguments against punitive damages): ‘[T]he risk of having to defend claims and to pay exemplary damages creates considerable uncertainty for business planning and ... this uncertainty may produce an excessive deterrent effect ...’.

<sup>191</sup> See the text to nn 153–161.

<sup>192</sup> cf Jones (n 92) para 10.85: ‘[E]xemplary damages ... are not available under the 1987 Act’.

<sup>193</sup> See n 17. Studies from other jurisdictions reported that punitive damages awards are extremely rare in product liability cases, see Ontario Law Reform Commission, *Report on Exemplary Damages* (1991) 21; Theodore Eisenberg and others, ‘The Predictability of Punitive Damages’ (1997) 26 JLS 623, 637; Neil Vidmar and Mary Rose, ‘Punitive Damages by Juries in Florida: In Terrorem and in Reality’ (2001) 38 HJL 487, 492–500, 512. Product liability cases are not discussed in the Australian study.

<sup>194</sup> For criticism of the assumption, in the absence of empirical evidence, that punitive damages awards have a deterrent effect, see Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 36.

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It follows from the foregoing that, in the vast majority of cases, anxiety about unpredictable awards does not appear to be justified.

**(10) ‘Cases have demonstrated a disturbing arbitrariness and excess in the sums awarded as ... exemplary damages to plaintiffs by juries’<sup>195</sup>**

Civil juries have often been criticised for acting unreasonably in assessing damages (including punitive damages). Thus, Lord Woolf MR remarked in *Thompson*: ‘We have ... been referred to a number of cases in which juries have made awards ... and the variations in the range of figures which are covered is striking. The variations disclose no logical pattern’.<sup>196</sup> This criticism was prominent in two areas of law where trial by jury was available: defamation and police misconduct actions. Sir Thomas Bingham MR echoed disapproval of the performance of juries in assessing defamation damages when he said in *John v MGN Ltd* that ‘the making of grossly excessive awards by libel juries ha[d] become a source of concern’.<sup>197</sup> The quantification of damages by juries in claims against the police also gave rise to fierce criticism during the same period. In the 1990s, fears had been ventilated that jury members comprised people who were often unsympathetic to the police<sup>198</sup> and the Metropolitan Police Commissioner expressed concerns about jurors awarding large damages in police cases.<sup>199</sup>

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<sup>195</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 122–123.

<sup>196</sup> *Thompson* (n 11) 514. See, also, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 127: ‘Judges are less likely to make “excessive” awards than juries’.

<sup>197</sup> *John* (n 3) 613. See, also, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 75 (footnotes omitted): ‘The “almost limitless discretion” of the jury when it assesses damages in defamation cases ... ha[s] given rise to substantial judicial concern ...’.

<sup>198</sup> Jill Sherman, ‘Labour Warns Jury Dodgers’ *The Times* 1, 7 February 1996.

<sup>199</sup> Steward Tendler, ‘Yard Wants Court to Set Limits on Damages Payouts’ *The Times*, 7 May 1996. In response to these concerns, the Court of Appeal set guidelines for the calculation of damages in

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The anxiety caused by arbitrary jury awards was one of the principal factors leading to a series of reforms which gradually restricted the role of civil juries in English law.<sup>200</sup> In 1990, the Court of Appeal was given the power to substitute excessive or inadequate jury awards and determine the sum that it considered appropriate.<sup>201</sup> A few years later, in 1997, the Law Commission recommended the reallocation of the power to decide punitive damages issues from juries to judges.<sup>202</sup> Following this recommendation, section 11 of the Defamation Act 2013 ultimately removed libel and slander from the causes of action for which a jury trial is available.<sup>203</sup> Jury trials remain available in police misconduct actions today. Provided that the court grants permission, civil juries can hear claims for malicious prosecution or false imprisonment.<sup>204</sup>

The gradual erosion of civil juries during the study period explains the prevalence of claims which were decided by a judge alone in the sample. Trials by jury comprised only 14 per cent of the total number of claims in the study. But do the data available justify the angst about the performance of juries in their assessment of punitive damages?

The results indicate that judges and juries differ substantially in the way in which they

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actions against the police, see *Thompson* (n 11) 517.

<sup>200</sup> This reform was also triggered by the high cost of jury trials, see Conor Hanly, 'The Decline of Civil Jury Trial in Nineteenth-Century England' (2005) 26 *JLH* 253, 259.

<sup>201</sup> Courts and Legal Services Act 1990, s 8; CPR 52.20(3). For an illustration, see *John* (n 3).

<sup>202</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 57) 122. Cf Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 106) 143.

<sup>203</sup> Senior Courts Act 1981, s 69(1) (amended); County Courts Act 1984, s 66(3) (amended). See, also, Crime and Courts Act 2013, s 34(8): '[t]he decision on the question of (a) whether exemplary damages are to be awarded ..., or (b) the amount of such damages, must not be left to a jury.' This reform (which concerns punitive damages claims against press defendants) was partly triggered by the perception that in a jury trial '[t]he scale of the damages is not easy to ascertain, so it is more difficult to settle the case than it would be if it was coming before a judge alone': HL Deb 9 July 2010, vol 720, col 467 (Lord Woolf).

<sup>204</sup> Claims that involve a charge of fraud may also be heard by a jury, see Senior Courts Act 1981, s 69(1); County Courts Act 1984, s 66(3).

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decide punitive damages issues. The dataset contained 67 claims which were decided by a jury. Punitive damages were awarded in 40 of these claims (a success rate of 59.7 per cent which is higher than the 43.8 per cent success rate of the claim in judge trials and the 46.4 per cent overall success rate in the sample). As for the quantum of awards, a striking difference is observed. The average and median punitive damages awards in a jury trial (£103,991 (£139,850) and £70,918 (£50,689)) were at least eight times higher than the corresponding awards made by judges (£12,319 (£15,613) and £4,075 (£4,103)).<sup>205</sup> As for the standard deviation of awards, this was £131,853 (£199,846) in ‘judge and jury trials’ and just £19,347 (£30,285) in ‘judge-only trials’. The great variability of jury awards in particular indicates that predicting the quantum of damages in this setting would not be an easy task. This arguably provides some support for the view that juries may not be well-suited to decide punitive damages issues and for the various reforms discussed above which gradually diminished the role of civil juries in English law (at least insofar as they restricted the use of juries in relation to punitive damages litigation).

An interesting comparison can be drawn here with the corresponding results of empirical studies from other jurisdictions. The Ontario Law Reform Commission, in its Report on Exemplary Damages, did not recommend that juries be deprived of the power to determine the availability and quantum of punitive damages due to the absence of evidence about arbitrary and excessive awards.<sup>206</sup> Nevertheless, in recent years,

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<sup>205</sup> See Figure 16 and Table 8.

<sup>206</sup> Ontario Law Reform Commission, *Report on Exemplary Damages* (n 193) 49. As already explained, there is no empirical evidence in Canada about average and median punitive damages awards (including jury awards). The study by Vidmar and Feldthusen (n 71) does not include a discussion of juries. Similarly, the study by Young (n 110) did not report isolated results about jury trials because, as the author observes (at 606) ‘[j]ury decisions ... [we]re underrepresented in the data ...’.

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substantial punitive damages awards have occasionally been made by juries in that country.<sup>207</sup> Empirical studies from the US revealed higher punitive award rates<sup>208</sup> as well as higher amounts of punitive damages awards in jury trials.<sup>209</sup> No evidence exists about the way in which juries have decided punitive damages issues in Australia.<sup>210</sup>

### 6.2.2 Other insights from the results

This subsection briefly sets out further insights which can be derived from the results, with a particular focus on issues not covered by the preceding discussion.

#### (1) The *Rookes* categories

The results show a substantial difference in the success rate of claims by *Rookes* category. Punitive damages were awarded in 59.5 per cent of claims falling under ‘Category 2’ which is nearly double the success rate of claims under the first category (30 per cent).<sup>211</sup> Relatedly, awards in ‘Category 1’ comprised 24.3 per cent of all punitive damages awards in the sample which means that roughly one in four punitive damages awards was made under the first *Rookes* category. This validates Harvey McGregor’s

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<sup>207</sup> Eg, *Whiten* (n 71) (C\$1 million (C\$1.3 million in 2021)); *Laufer v Bucklaschuk* [2000] 2 WWR 462 (Manitoba CA) (C\$500,000 (C\$742,412 in 2021)).

<sup>208</sup> Eisenberg and others, ‘The Decision to Award Punitive Damages: An Empirical Study’ (n 56) 601: Punitive damages were obtained in 43.2 per cent of jury trials and in 25 per cent of judge trials won by claimants in which punitive damages were sought. Cf *Vidmar and Rose* (n 193) 496–497; Eisenberg and others, ‘Judges, Juries, and Punitive Damages’ (n 71) 288 (both are earlier studies indicating that judges and juries did not differ substantially in deciding punitive damages issues).

<sup>209</sup> Eisenberg and Heise (n 173) 331: In a jury trial, the average punitive damages award was \$2.9 million (\$4 million in 2021) while in a judge trial it was \$353,442 (\$489,434 in 2021). The median award was \$75,000 (\$103,857 in 2021) in a jury trial and \$40,625 (\$56,256 in 2021) in a judge trial.

<sup>210</sup> Maher (n 60) 710 reporting that in her study ‘there was only one claim which involved a trial by judge and jury ... [so] that no meaningful analysis of the significance of the mode of trial could be done ...’.

<sup>211</sup> See Figure 4.

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prediction shortly after the decision in *Rookes v Barnard* that ‘it seem[ed] unlikely that in practice there w[ould] be many cases which w[ould] fall within [the first category]’.<sup>212</sup>

A potential explanation for the lower frequency of awards for ‘oppressive, arbitrary or unconstitutional conduct’ by the executive is that the defendant in these cases is usually only vicariously liable and that the award is paid by using taxpayers’ money.<sup>213</sup> Judges have expressly questioned the efficacy of the remedy in this context. Thus, in his discussion of punitive damages awards under the first category in *Thompson*, Lord Woolf MR observed:

[I]t is more difficult to justify the [punitive] 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 punitive 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 [public bodies] available to be used for activities which would benefit the public.<sup>214</sup>

### (2) The ‘cause of action test’

This section discusses the ‘cause of action test’, which operated during part of the study period (1992–2001), as well as the effects of the demise of that test in 2001. The ‘cause of action test’ was established in 1992<sup>215</sup> and restricted the availability of punitive

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<sup>212</sup> Harvey McGregor, *McGregor on Damages* (13th edn, Sweet & Maxwell 1972) para 308.

<sup>213</sup> For an exception, see *Makanjuola v CPM* (QBD, 31 July 1989): the police officer (rather than the police force) was liable for punitive damages.

<sup>214</sup> *Thompson* (n 11) 513.

<sup>215</sup> *AB v South West Water Services Ltd* [1993] QB 507 (CA).

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damages to wrongs in respect of which an award had been made prior to 1964. In 2001, the test was abolished by the House of Lords.<sup>216</sup>

The results suggest that the ‘cause of action test’ had little or no effect on the success rate of punitive damages claims over the period during which it applied. The sample includes 99 claims decided between 2 November 1992<sup>217</sup> and 7 June 2001.<sup>218</sup> Punitive damages were awarded in 47 of these claims (47.4 per cent success rate). This is virtually the same as the success rate of punitive damages claims across the entire study period.<sup>219</sup> Interestingly, punitive damages were awarded at a slightly lower rate in the post-‘cause of action test’ era. The success rate of the 209 claims decided between 7 June 2001 and 31 December 2020 was 42.1 per cent, a finding which is slightly surprising because one would expect the demise of ‘cause of action restrictions’ to have caused punitive damages to be awarded at a higher rate in the post-*Kuddus* era. However, this result should be read with caution. The ostensible decline of the success rate of punitive damages claims after 2001 may be attributable to the fact that the number of publicly available decisions increased significantly just after 2000. This could mean that a larger number of decisions in which punitive damages claims were rejected became available during the 2000–2020 period.

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<sup>216</sup> *Kuddus* (n 69).

<sup>217</sup> The date when the ‘cause of action test’ officially came into force.

<sup>218</sup> The date when the ‘cause of action test’ was abolished.

<sup>219</sup> The overall success rate was 46.4 per cent, see chapter 6.1.1.

**(3) The type of defendant**

Three insights can be gleaned from the results here. The first is that punitive damages claims against vicariously liable defendants (ie, corporations and public bodies)<sup>220</sup> have a relatively low success rate. The sample contained 271 claims against such defendants and 87 of these claims were successful (a success rate of 32.1 per cent). By contrast, claims against natural persons succeeded at an almost double rate (65.2 per cent). This result possibly reveals the skeptical attitude of judges towards vicarious punishment. The appropriateness of vicarious liability for punitive damages has been repeatedly doubted. Lord Scott's remarks in this regard in *Kuddus v CC Leicestershire Constabulary* are illustrative: 'In the absence of any finding of some personal breach of duty by the [defendant], there would ... have been no basis upon which ... exemplary damages, could properly have been visited upon him'.<sup>221</sup>

The 'party capability theory' offers another likely explanation for the lower success rate of punitive damages claims against corporations and public bodies. The theory, originally developed by Galanter,<sup>222</sup> posits that inequalities between parties (in terms of their wealth and frequency of involvement in litigation) affect the outcome of cases. Galanter distinguishes between those actors who recourse to the courts only

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<sup>220</sup> Such defendants are almost exclusively vicariously (as opposed to directly) liable in the relevant disputes. For an example of a corporation being both directly and vicariously liable for punitive damages, see *John* (n 3) 606 (Sir Thomas Bingham MR): the defendant newspaper was liable for its 'own recklessness' in publishing a libellous article and for the 'recklessness of [the author] for whom in any event the newspaper was vicariously responsible'.

<sup>221</sup> *Kuddus* (n 69) [136]. See, also, the text to n 214; *Gerald* (n 11) p 13 (Auld LJ): 'What punitive purpose does it serve, other than as a somewhat unfocused mark of disapproval, to punish the one without blame and to leave unpunished those who are to blame?'; *Parabola Investments Ltd v Browalia Cal Ltd* [2009] EWHC 901 (Comm), [2009] 2 All ER (Comm) [206] (Flaux J): 'I do have serious doubts as to the appropriateness of an award of exemplary damages against a defendant ... where the basis for that defendant's liability is vicarious liability'.

<sup>222</sup> Galanter (n 96).

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occasionally (‘one-shotters’) and those who engage in many similar disputes over time (‘repeat players’).<sup>223</sup> Public bodies (such as the police force) are a good illustration of a well-resourced repeat player in punitive damages litigation.<sup>224</sup> It is plausible to assume that, due to their wealth and litigation experience, public bodies possess strategic advantages enabling them to perform better than their opponents who are overwhelmingly (if not exclusively) natural persons. Such advantages include the employment of permanent legal staff to deal with disputes and litigation, the ability to assess more accurately the strength of claims against them and to take to trial only the cases that they regard as likely to produce advantageous outcomes and, sometimes, the power to advocate in support of rules favourable to them.<sup>225</sup> By contrast, most natural persons are not known for their deep pockets and have only occasional recourse to the courts.

The second interesting result is that the quantum of punitive damages was higher when the defendant was a corporation or a public body.<sup>226</sup> This result, which has also been reported in studies from the US<sup>227</sup> and Australia<sup>228</sup> can be explained on the ground

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<sup>223</sup> *ibid* 97.

<sup>224</sup> Another example of a wealthy repeat player is the insurance company seeking punitive damages for insurance fraud. The finding of a success rate of 89.1 per cent in punitive damages claims for insurance fraud (see the text to nn 66–67) provides further evidence in support of the thesis.

<sup>225</sup> Galanter (n 96) 100. The brackets for punitive damages awards in police cases laid down by the Court of Appeal in *Thompson* (n 11) constitute a potential illustration of this latter advantage since this particular reform was triggered after lobbying efforts by the police, see Tendler (n 199); Sally Lloyd-Bostock and Cheryl Thomas, ‘Decline of the “Little Parliament”: Juries and Jury Reform in England and Wales’ (1999) 62 LCP 7, 14.

<sup>226</sup> See Table 4.

<sup>227</sup> Eisenberg and others, ‘The Predictability of Punitive Damages’ (n 193) 639–640.

<sup>228</sup> Maher (n 60) 729.

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that the defendant's wealth is a relevant consideration in assessing punitive damages.<sup>229</sup> It is natural for wealthier defendants to attract more significant awards in order to ensure that the penalty imposed will have an impact upon them. The findings suggest that English courts have followed this principle.

A final intriguing observation relates to the overwhelming dominance of male defendants in punitive damages claims against natural persons. Recall that punitive damages were sought from male defendants in 131 claims (89.1 per cent of all claims where the defendant's gender was known) as opposed to just 16 claims against female defendants (10.9 per cent of the claims where the defendant's gender was known). The success rate of the claim was similar for both female and male defendants with the latter having a marginal lead.<sup>230</sup> This finding is consistent with empirical evidence from the criminal law which shows that, at least over the last two decades, the vast majority of arrests and criminal prosecutions have concerned men<sup>231</sup> and that the conviction ratio has been similar for male and female offenders.<sup>232</sup>

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<sup>229</sup> See chapter 2.3. For an illustration, see *Hassan* (n 75).

<sup>230</sup> See Figure 10.

<sup>231</sup> Ministry of Justice, 'Criminal Justice Statistics: Women and the Criminal Justice System' (2020) <<https://www.gov.uk/government/collections/criminal-justice-statistics>>, <<https://webarchive.nationalarchives.gov.uk/20050301201852/http://www.homeoffice.gov.uk/rds/pubsstatistical.html>> accessed 30 July 2021: During 1999–2020, on average 77 per cent of all yearly prosecutions were for male defendants with the remaining 23 per cent being for female defendants. An even higher percentage of arrests of men (84.1 per cent on average) as opposed to women (16.9 per cent on average) were made during roughly the same period: Statista, 'Arrests Made in England and Wales from 2002/03 to 2019/20 by Gender' (2021) <<https://www.statista.com/statistics/377412/arrests-england-and-wales-time-series-by-gender/>> accessed 30 July 2021.

<sup>232</sup> The conviction ratio for women (88 per cent on average) appears to be slightly higher than that for men (86 per cent on average), see Ministry of Justice, 'Criminal Justice Statistics: Women and the Criminal Justice System' (n 231).

**(4) The type of claimant**

Turning to the type of claimant, based on the results, punitive damages appear to be sought more frequently by natural persons compared with corporations. However, claims brought by corporations succeeded more often than claims brought by natural person claimants.<sup>233</sup> This finding provides useful insight into the relationship between punitive damages and aggravated damages. Some judges and scholars have contended that the two remedies are ‘indistinguishable’,<sup>234</sup> however, a clear difference between them is that aggravated damages cannot be awarded to corporate claimants.<sup>235</sup> The prevalence of successful punitive damages claims by corporations is suggestive of a practical distinction between the two remedies. Of course, this does not negate the existence of a potential functional overlap between aggravated damages and punitive damages<sup>236</sup> nor does it tell us whether the distinction between the two remedies is justified.<sup>237</sup> It merely points to a feature on the basis of which the two remedies are distinguished in practice.

Another interesting result relates to the claimant’s gender. The difference between the amounts awarded as punitive damages to male and female claimants<sup>238</sup> potentially indicates the existence of a gender bias in the assessment of the award. A similar

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<sup>233</sup> See Figure 12.

<sup>234</sup> Eg, Cane, *Anatomy* (n 62) 114. See, also, *Nwokorie v Mason* (1994) 26 HLR 60 (CA) 67 (Dillon LJ): ‘On the authorities ... aggravated damages and exemplary damages seem to have been regarded as substantially the same thing’.

<sup>235</sup> *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308, [2014] HLR 4 [30].

<sup>236</sup> See the cases cited in n 114. For discussion of the existence of a functional overlap between aggravated and punitive damages, see James Goudkamp and Eleni Katsampouka, ‘Punitive Damages and the Place of Punishment in Private Law’ (2021) MLR (forthcoming).

<sup>237</sup> Eg, it has been observed that ‘[t]he distinction between aggravated compensatory damages and exemplary punitive damages tends to elude rational explanation’: *Sallows v Griffiths* [2001] FSR 15 (CA) [25] (Beldam LJ).

<sup>238</sup> See Table 7.

phenomenon is observed in relation to compensatory damages where gender-based tables have been used for the calculation of lost future income.<sup>239</sup> The different treatment of women and men in that context reflects the fact that women are, *ceteris paribus*, likely to earn a lower salary than their male counterparts. This can result in a lower compensatory award because the function of compensatory damages is to place the claimant, as realistically as possible, in the position they would have been but for the defendant's wrong.<sup>240</sup> However, this consideration is irrelevant to the assessment of punitive damages which are primarily concerned with the defendant's characteristics (eg, wealth) and wrongdoing.

#### **(5) Punitive damages and prior punishment**

According to the results, punitive damages were awarded against 82.1 per cent of the defendants who had not been sanctioned by another mechanism and against 45.4 per cent of defendants who had been otherwise punished.<sup>241</sup> Although the latter percentage seems high, a breakdown of all punitive damages awards in the sample based on whether or not other sanctions were imposed is enlightening.

Of the total 222 punitive damages awards in the sample, 78 (35.2 per cent) were made in the absence of another sanction and only 15 (6.7 per cent) were made in addition to another sanction. It was not possible to retrieve any information about whether or not additional sanctions were imposed in the remaining 129 successful claims (58.1 per cent).

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<sup>239</sup> Eg, *Van Wees v Karkour* [2007] EWHC 165 (QB) [137]–[139]; *Woodward v Leeds Teaching Hospitals NHS Trust* [2012] EWHC 2167 (QB) [160].

<sup>240</sup> *Van Wees* (n 239) [139]. See, also, William Norris and others (eds), *Kemp and Kemp: Quantum of Damages* (4th edn, Sweet & Maxwell 2021) para 10.017.

<sup>241</sup> See Figure 18.

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However, it seems more likely that the award of punitive damages was the only punishment imposed in these cases. It would be surprising if a judge failed to consider the imposition of another sanction given its significance for the determination of the punitive damages claim. These results indicate that English courts are reluctant to award punitive damages against defendants who have already been sanctioned by another mechanism. The remedy seems to operate as a last resort option, being reserved for instances of serious wrongdoing which would otherwise go unpunished by the law.

The 15 punitive damages awards which were granted in addition to another sanction merit closer examination. Three of these awards were set aside on appeal because the first instance court had failed to apply properly the double punishment principle.<sup>242</sup> In the remaining 12 claims, the court awarded punitive damages on the basis that the sanction which had already been imposed did not reflect the seriousness of the defendant's wrongdoing<sup>243</sup> so additional punishment was warranted.

A final interesting finding is that in the majority of successful claims for police misconduct no other sanction was imposed. Of the 41 punitive damages awards against the police in the sample, 22 (53.7 per cent) were made in the absence of other sanctions

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<sup>242</sup> *Devonshire v Jenkins* (CA, 28 April 1978) (two punitive awards (of £3,666 and £10,988 respectively (£14,654 'as paid')) for unlawful eviction were quashed because the defendant had already been fined £8,799 for substantially the same misconduct); *Francis* (n 168) (a punitive award of £78,334 for unlawful eviction was quashed because the defendant had been fined under the PEA 1977).

<sup>243</sup> Eg, *Makanjuola* (n 213) p 28 (Henry J): disciplinary proceedings against a police officer who had sexually assaulted an immigrant did not render the punitive damages award 'either unfair or pointless. On the contrary, ... the award ... [was] necessary to mark the gravity of the case'; *Jensen* (n 68) [7] (Recorder Lochrane): 'the imposition of a caution [against the defendant's record] d[id] not amount to punishment of any significant nature at all ... in light of the obvious nature of th[e] offence (ie, insurance fraud)'. It is also noteworthy that most of these cases involved extremely serious wrongdoing, eg, *Collier v Burke* [1987] CLY 1143 (Wandsworth County Court) (assaulting tenant with hammer and knife); *AT v Dulghieru* [2009] EWHC 225 (QB) (coercion to prostitution).

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and only one<sup>244</sup> (2.4 per cent) was made in addition to another sanction. It was not possible to know with certainty if other sanctions were imposed in addition to the remaining 18 (43.9 per cent) punitive damages awards against the police but, for the reasons already explained, it seems more likely that the punitive award was the only punishment imposed in these cases. This result reinforces the perception that courts hesitate to award punitive damages where the defendant has already been otherwise punished and also provides some support for the view that existing mechanisms for combating abuses of power by the police are inadequate.<sup>245</sup>

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<sup>244</sup> *Makanjuola* (n 213).

<sup>245</sup> See the text to nn 90–91.

### 6.3 CONCLUSION

This study examined the application of the law of punitive damages by first instance courts across in England, Wales and Northern Ireland. It provided the best available empirical data on the functioning of punitive damages since *Rookes v Barnard* was decided. The most important findings are as follows:

(1) Punitive damages were awarded in 46.4 per cent of the cases in which they were sought. The average and median punitive damages awards were £33,982 (£41,427) and £6,519 (£6,044). The highest award was £570,660 (£818,578) and the lowest award was £104 (£104).

(2) Claims for punitive damages succeeded far more frequently in ‘Category 2 cases’ than in ‘Category 1 cases’.

(3) The types of wrongs with the highest success rate were those involving the infringement of property rights (especially unlawful eviction), insurance fraud and ‘abuse of power’ torts. Conversely, and contrary to conventional wisdom, punitive damages were awarded less commonly in claims for police misconduct and defamation. There were no successful claims in the tort of negligence.

(4) Punitive damages were awarded more frequently against natural persons compared with corporate and public body defendants. However, the average and median punitive awards against corporations and public bodies were higher than the respective awards against natural persons. This result suggests that English courts consider the defendant’s wealth in assessing punitive damages.

## FIRST INSTANCE STUDY

(5) The vast majority of claims against natural persons involved male defendants but punitive damages were awarded at a similar rate and in similar amounts against male and female defendants.

(6) Claims by corporations succeeded more often than claims by natural persons. By contrast, the average and median awards of punitive damages were higher when the claimant was a natural person than a corporation.

(7) Male claimants were awarded larger amounts as punitive damages compared with female claimants.

(8) Punitive damages were awarded more frequently and in substantially higher amounts when the mode of trial was by 'judge and jury' than when it was by 'judge-only'.

(9) Courts awarded punitive damages more frequently when the defendant had not otherwise been sanctioned than when prior punishment had been imposed. Larger awards were made in cases where the only punishment imposed was the award of punitive damages.

(10) The results suggest the existence of a relationship between the decision to award punitive damages and the decision to award aggravated damages. Many claims involving punitive damages awards also involved aggravated damages awards. There also seems to be a positive relationship between the amount of punitive damages and the amount of compensatory damages which hints that punitive damages awards were generally proportionate to the claimant's injury.

## CHAPTER 7: APPELLATE STUDY

It is useful to explain at the outset the reasons for undertaking an empirical study of appellate decisions. First, this exercise was essential for the sake of providing a complete picture of how the law of punitive damages has been applied by English courts. It is necessary to examine appellate decisions in order to be able to report fully accurate results about the operation of the law in this area. The following example illustrates this point. Suppose that the first instance court awarded £150,000 as punitive damages. And suppose that this award was either set aside or reduced on appeal. Reporting only first instance results accurately describes what happened at first instance but fails to capture the final outcome which is that the defendant was not ultimately liable for the award made at first instance. And concerns about extravagant punitive damages awards have been expressed in the absence of research which holistically assesses the level of those awards by taking into account the effects of appellate intervention. This study attempts to address this gap.<sup>1</sup> Second, a separate study of appellate decisions allows useful comparisons to be drawn between the way in which punitive damages issues are decided by the courts at each level. And third, information about the extent of appellate intervention in this area may facilitate the settlement of disputes by providing useful insight about the likely outcome of a possible appeal on punitive damages.

Conversely, the different nature of the questions that an appellate study addresses (ie, the extent of intervention with first instance decisions) and space constraints operate

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<sup>1</sup> Indeed, the first instance study reports the ten highest punitive damages awards granted since 1964 (see chapter 6.1.1). Five of these awards were either set aside or reduced on appeal (see chapter 7.1.1). This result would be concealed if appellate decisions had not been examined.

## APPELLATE STUDY

as reasons against undertaking an appellate study. However, I decided that the benefits outlined in the previous paragraph (especially that of providing a full picture of how courts at each level apply the relevant law) outweighed these concerns.

### 7.1 RESULTS

This chapter reports the results of the appellate study. These results, read together with those of the first instance study, provide a complete account of the practical operation of the law of punitive damages. The two central issues that this study addresses are: (1) the outcome of punitive damages claims following an appeal (primarily, the rate at which punitive damages are awarded and the quantum of awards); and (2) the extent to which appellate courts interfere with the determinations of first instance courts on punitive damages issues.

The different nature of the two main issues addressed by this study (namely, the outcome of punitive damages claims following an appeal and appellate intervention<sup>2</sup> in this area) means that punitive damages *claims* are examined alongside *appeals* on punitive damages issues. Thus, it is important to revisit the distinction between claims and appeals.<sup>3</sup> For the purposes of this study, a ‘claim’ is an action by a particular claimant against a particular defendant. The term ‘appeal’ denotes each request made in the appellate proceedings to overturn a determination of the first instance court on a punitive damages issue (either the existence of liability for punitive damages or the assessment of

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<sup>2</sup> ‘An intervention occurs when an appellate court alters, reshapes or entirely reverses the decision made by a lower forum’: Burton Atkins, ‘Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States’ (1990) 24 *Law & Society Review* 71, 73.

<sup>3</sup> The distinction between claims and appeals was introduced in chapter 5.2.2.

the award). It should be remembered that the number of claims and appeals differ in this study.<sup>4</sup>

As in the first instance study, all of the monetary figures reported here have been adjusted for inflation. Similarly, the study reports both the amount of punitive damages that each claimant received and the sum that each defendant was liable to pay. The latter figure is given in parentheses.<sup>5</sup>

### **7.1.1 Post-appeal outcomes**

#### **(1) Generally**

The appellate sample comprises 115 punitive damages claims over a study period of 56 years. 103 of these claims also appeared in the first instance sample. The first instance sample included 478 claims for the same period which means that roughly 21.5 per cent of all sampled trial court decisions in which punitive damages were in issue resulted in an appeal.

49 of the 115 claims succeeded and so the rate at which punitive damages were awarded following an appeal was 42.6 per cent. This is marginally lower than the rate at which punitive damages were awarded at first instance (ie, 46.4 per cent).<sup>6</sup>

The average award of punitive damages following an appeal was £41,356 (£45,023). The median award was £8,573 (£9,814).<sup>7</sup> These values are slightly higher than

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<sup>4</sup> The sample comprises 115 claims and 126 appeals.

<sup>5</sup> The issue of the two ways of calculating the central tendency measurement (ie, based on the total amount that the defendant was liable for and based on the amount that each claimant was entitled to) is discussed in chapter 5.1.5, text to nn 53–56.

<sup>6</sup> See chapter 6.1.1.

<sup>7</sup> The difference between the average and median awards is due to outliers, see Table 1 below.

## APPELLATE STUDY

the corresponding first instance results.<sup>8</sup> The reason for this is presumably that appeals may involve higher value disputes which make the pursuit of extended litigation more worthwhile. The lowest award was £859 (£859)<sup>9</sup> and the largest award was £393,947 (£393,947).<sup>10</sup>

*Table 1 – Largest punitive damages awards on appeal*

<i>Case name and citation</i>	<i>Year of appellate decision</i>	<i>Punitive damages award</i>
<i>Broome v Cassell &amp; Co Ltd</i> [1972] AC 1027 (HL)	1972	£393,947
<i>Borders (UK) Ltd v CPM</i> [2005] EWCA Civ 197	2005	£156,402
<i>John v MGN Ltd</i> [1997] QB 586 (CA)	1995	£103,756

Table 1 reports the highest post-appeal punitive damages awards. The ‘as paid measure’ has been used for this ranking because it reflects the defendant’s total liability in each case.<sup>11</sup> The three awards listed below are the only awards in the appellate sample<sup>12</sup> exceeding £50,000. A comparison with the largest punitive damages awards at first instance is useful. An appeal was pursued in relation to eight of the ten highest awards granted at first instance. Three of these awards were upheld on appeal.<sup>13</sup> Four awards were reduced by the Court of Appeal (which exercised its statutory power<sup>14</sup> to substitute

<sup>8</sup> The average award at first instance was 33,982 (£41,427). The median was £6,519 (£6,044).

<sup>9</sup> *McMillan v Singh* (1985) 17 HLR 120 (CA).

<sup>10</sup> *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL). The lowest award at first instance was £104 (£104) and the highest award was £570,660 (£818,578). See chapter 6.1.1.

<sup>11</sup> The same defendant was liable for the total amount awarded as punitive damages in these cases irrespective of whether the award was then split and distributed to multiple claimants. This happened in *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1 (eight claimants).

<sup>12</sup> The decision in *Rees v CPM* [2021] EWCA Civ 49 (upholding a punitive award of £154,077 against the police to be split between three claimants) has been omitted from the sample because the judgment was handed down in 2021 and is not captured by the temporal scope of the study.

<sup>13</sup> *Broome* (n 10); *Borders* (n 11); *Rees* (n 12).

<sup>14</sup> Courts and Legal Services Act 1990, s 8; CPR 52.20(3).

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the first instance award and to determine the sum that it considered appropriate).<sup>15</sup> The highest award made at first instance was set aside on appeal.<sup>16</sup>

*Figure 1 – Range of post-appeal punitive damages awards*

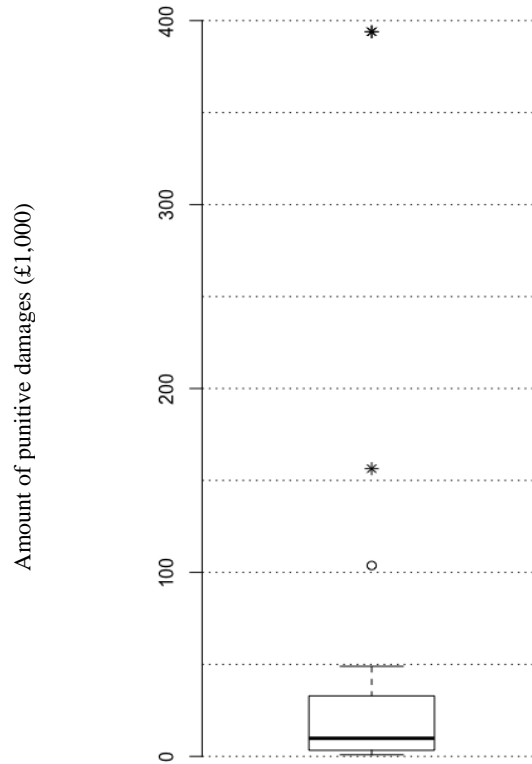


Figure 1 shows the distribution of all post-appeal awards.<sup>17</sup> Excluding extreme outliers,<sup>18</sup> the awards fell within £859 (£859) and £103,756 (£103,756). This produces a range of

<sup>15</sup> *John v MGN Ltd* [1997] QB 586 (CA) (£570,660 substituted with £103,756); *Thompson (Hsu) v CPM* [1998] QB 498 (CA) (£382,438 substituted with £28,683); *Goswell v CPM* (CA, 7 April 1998) (£325,072 substituted with £28,683); *Gerald v CPM* (CA, 10 June 1998) (£191,219 substituted with £38,244). The ‘as paid’ and ‘as received’ measures were the same in these cases.

<sup>16</sup> *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA). The case was remitted for a re-trial but the final outcome is unknown.

<sup>17</sup> Figure 1 is based on the ‘as paid measure’. It would look very similar if constructed using the ‘as received measure’.

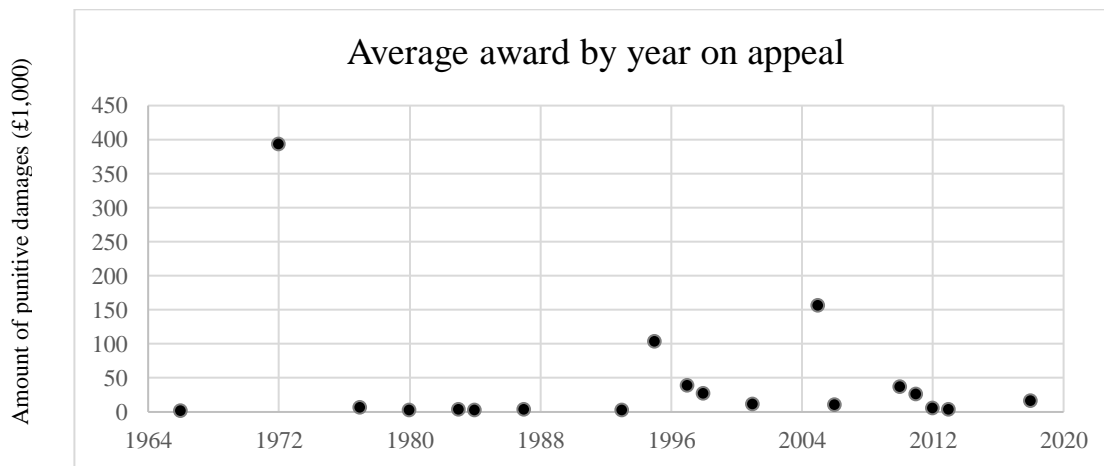
<sup>18</sup> An outlier is a data point that is unusually larger or smaller compared with all of the other data points. Data points that fall beyond  $Q3 + 3 \times IQR$  are extreme outliers. There were two extreme outliers based on the ‘as paid measure’: *Broome* (n 10) and *Borders* (n 11). If the ‘as received measure’ is preferred the only extreme outlier is the award in *Broome* (n 10).

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£102,897 (£102,897). The thick line in the middle denotes the median award (£9,814). The edges of the box show the first (£3,231) and third quartiles (£34,981). The fourth quartile extends to £48,959. The whiskers spread 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 and extreme outliers are indicated by way of asterisks. Consistently with the first instance results, the median post-appeal award (£9,814), was much closer to the lowest value (£859) than the highest value (£393,947). With the exception of outliers, all of the post-appeal awards were between £859 (£859) and £48,959 (£48,959).

Figure 2 shows the average post-appeal award by year. This was below £50,000 throughout the study period with the exception of the three years during which outlier awards were made.<sup>19</sup> This result is consistent with the corresponding finding of the first instance study which showed that the average first instance punitive damages award by year was below £60,000 throughout the study period.<sup>20</sup>

*Figure 2 – Average post-appeal punitive damages award by year*



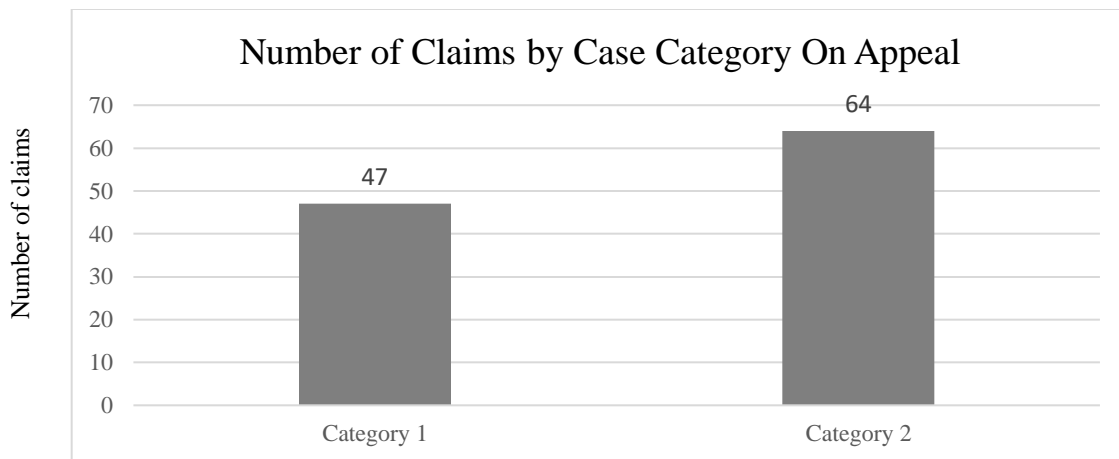
<sup>19</sup> For the details of the three outlier awards, see Table 1.

<sup>20</sup> See chapter 6.1.1.

**(2) The *Rookes* categories**

Figure 3 reports the number of claims by *Rookes* category. 47 (40.8 per cent) of the claims decided on appeal fell with the first category and 64 (55.7 per cent) fell within the second category. As for the remaining four claims which comprised just 3.5 per cent of the sample (‘Other’), three of them did not fall under any of the *Rookes* categories<sup>21</sup> and the fourth could be plausibly associated with both ‘Category 1’ and ‘Category 2’.<sup>22</sup> Due to the very small sample size of claims in the ‘Other’ group, they are not depicted. Consistently with the first instance results, the appellate sample also did not contain any claims for punitive damages authorised by statute.

*Figure 3 – Number of claims by case category on appeal*



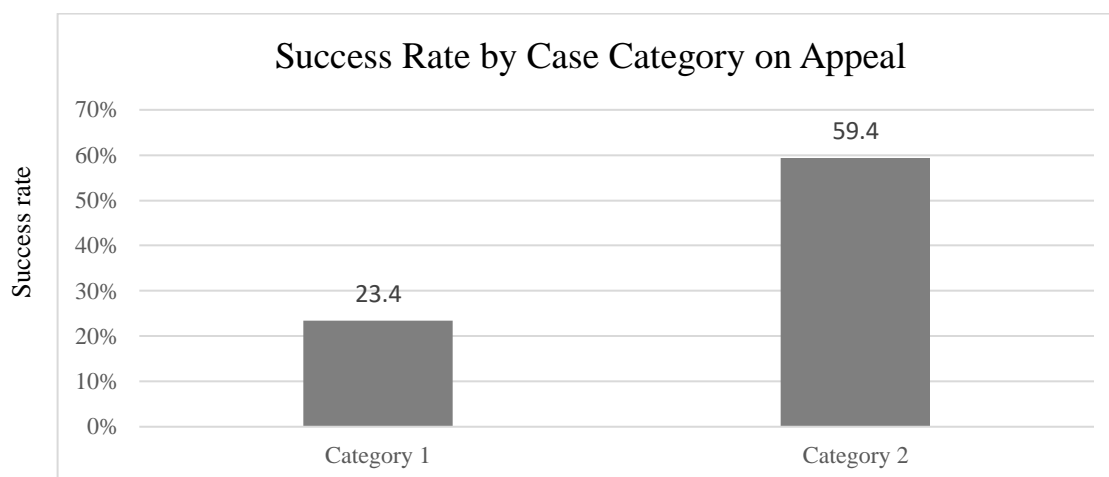
<sup>21</sup> *Metcalf v Collett-Ward* (CA, 1 December 1976) p 9 (the first instance judge did not consider *Rookes v Barnard* and erred in holding that the defendant who had threatened and assaulted the claimant in order to compel him to repair his car could be liable for punitive damages); *Morris v Kwik Save Stores Ltd* (CA, 26 June 1998) p 3 (unsuccessful application for permission to appeal against the refusal to award punitive damages for the wrongful detention of the claimant who was accused by the defendant cashier of a shop of shoplifting); *Nagpal v Rossage* (CA, 5 October 2000) [8] (unsuccessful application for permission to appeal against the refusal to award punitive damages where the defendant had locked the claimant in a room for a short period of time).

<sup>22</sup> *Pickin v CPM* (CA, 20 July 2000) [13] (wrongful removal by the police of the car of the claimant who sought punitive damages under both *Rookes* categories).

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Turning to the success rate by case category, Figure 4 shows that claims pleaded in ‘Category 1’ succeeded much less frequently than claims pleaded in ‘Category 2’.<sup>23</sup> Statistical analysis suggests that this disparity is unlikely to be down to chance.<sup>24</sup> It is noteworthy that the success rate of the punitive damages claim for each case category following an appeal is very similar to that reported at first instance.<sup>25</sup>

*Figure 4 – Post-appeal success rate by case category*



*Table 2 – Post-appeal average and median awards by case category*

	<i>‘Category 1 cases’</i>	<i>‘Category 2 cases’</i>
<b>Average award</b>	£25,944 (£25,944)	£48,696 (£53,695)
<b>Median award</b>	£28,683 (£28,683)	£3,438 (£3,847)

As for the quantum of punitive damages awards, Table 2 reports the post-appeal average and median award by case category. The median award was significantly higher for ‘Category 1 cases’ but the average award was larger in ‘Category 2 cases’. Note that the average has been affected by the presence of three outliers in ‘Category 2’.<sup>26</sup> For this

<sup>23</sup> There were no successful claims in the ‘Other’ category.

<sup>24</sup> A likelihood-ratio test produced a p-value=0.013.

<sup>25</sup> See chapter 6.1.2.

<sup>26</sup> *Broome* (n 10); *John* (n 15); *Borders* (n 11).

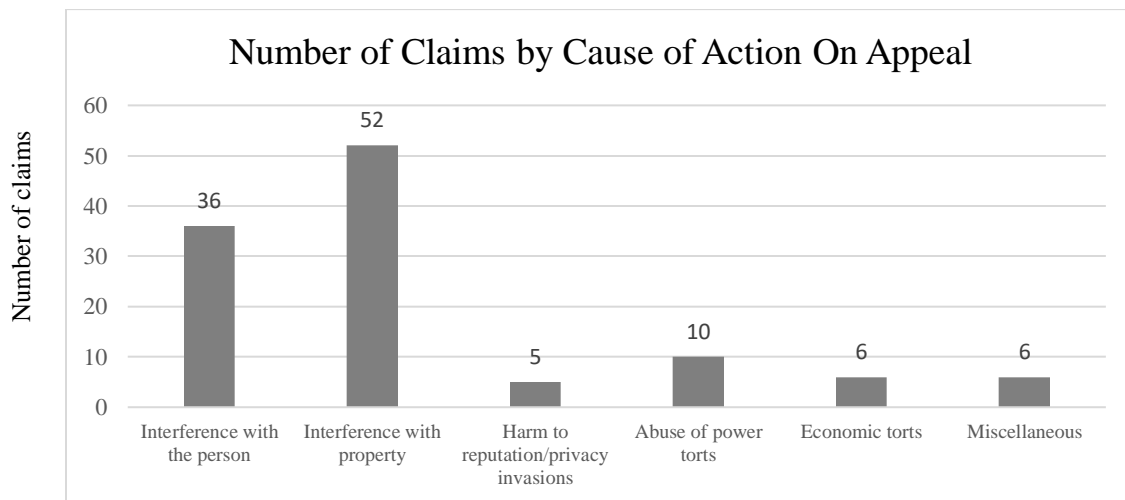
## APPELLATE STUDY

reason, the median award should be preferred as a central tendency measure. Statistical analysis suggests that disparities in the quantum of awards by case category are likely to be down to chance.<sup>27</sup>

### (3) The cause of action

Figure 5 breaks down punitive damages claims by cause of action. Consistently with the picture that emerges in connection with the first instance results,<sup>28</sup> most claims in the appellate study concerned ‘interference with the person’ (31.3 per cent of all claims) and ‘interference with property’ (45.2 per cent of all claims). The number of claims in each of the remaining four groups of wrongs (ie, harm to reputation/privacy invasions (4.4 per cent of all claims), ‘abuse of power torts’ (8.7 per cent of all claims), economic torts (5.2 per cent of all claims) and miscellaneous (5.2 per cent of all claims)) was very small.

*Figure 5 – Number of claims by cause of action on appeal*

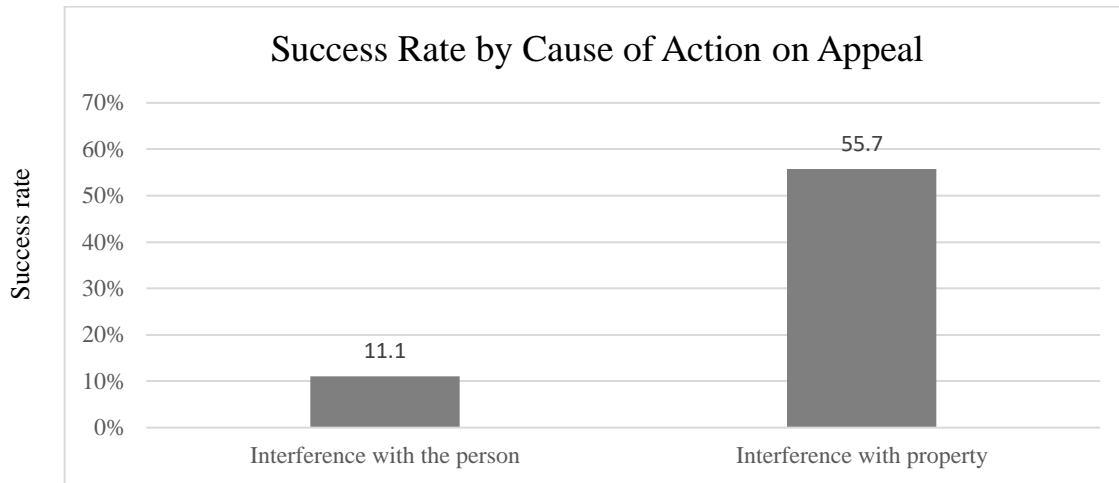


<sup>27</sup> ANOVA test p-value=0.462.

<sup>28</sup> See chapter 6.1.3.

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*Figure 6 – Post-appeal success rate by cause of action*



Turning to post-appeal success rates (Figure 6), the results reveal that, similarly with the findings reported at first instance,<sup>29</sup> claims which fell within the group of ‘interference with property’ succeeded much more often than claims for ‘interference with the person’. Statistical analysis provides evidence of an association between the cause of action and the post-appeal success rate of the punitive damages claim.<sup>30</sup> The success rate of the claim in the remaining four groups is not reported in view of their small sample size. It is worth noting that, consistently with the first instance results, the appellate sample does not include a single award of punitive damages in the tort of negligence.

Table 3 shows the post-appeal quantum of punitive damages by cause of action. The average and median award in claims for ‘interference with the person’ was substantially higher than where the wrong committed fell within the ‘interference with

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<sup>29</sup> *ibid.*

<sup>30</sup> Likelihood-ratio test p-value=0.0001.

## APPELLATE STUDY

property’ group. Statistical analysis suggests that these differences are unlikely to be attributable to chance.<sup>31</sup> The same pattern was observed in the first instance results.<sup>32</sup>

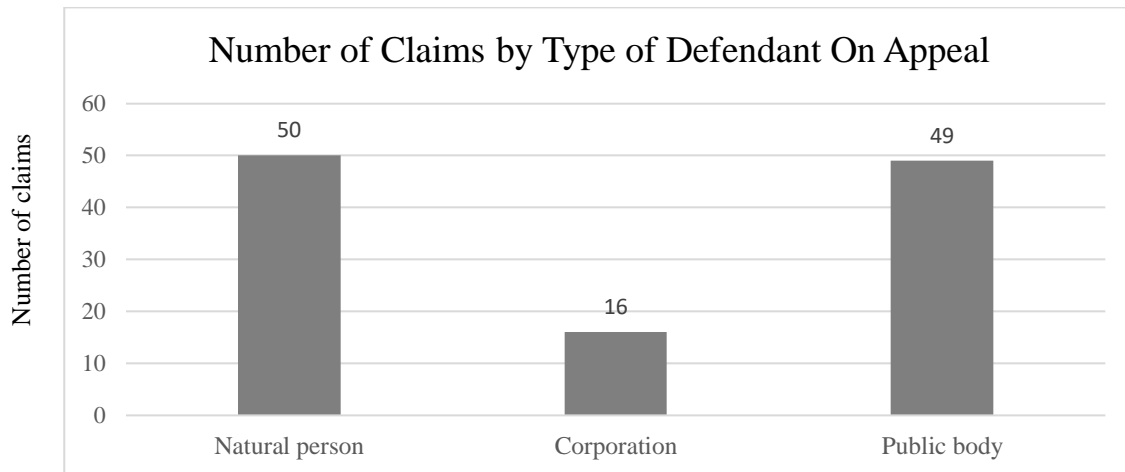
*Table 3 – Post-appeal average and median awards by cause of action*

	<i>Interference with the Person</i>	<i>Interference with Property Rights</i>
<b>Average award</b>	£25,025 (£25,025)	£4,757 (£15,753)
<b>Median award</b>	£28,683 (£28,683)	£3,104 (£3,300)

### (4) The type of defendant

Of the total of 115 claims in the appellate sample, punitive damages were sought from natural persons in 50 claims (43.5 per cent of the sampled claims), from corporations in 16 claims (13.9 per cent of all claims) and from public bodies in 49 claims (42.6 per cent of all claims) (Figure 7).

*Figure 7 – Number of claims by type of defendant on appeal*



As for the relationship between the decision to award punitive damages following an appeal and the type of defendant, Figure 8 reveals that claims against corporations

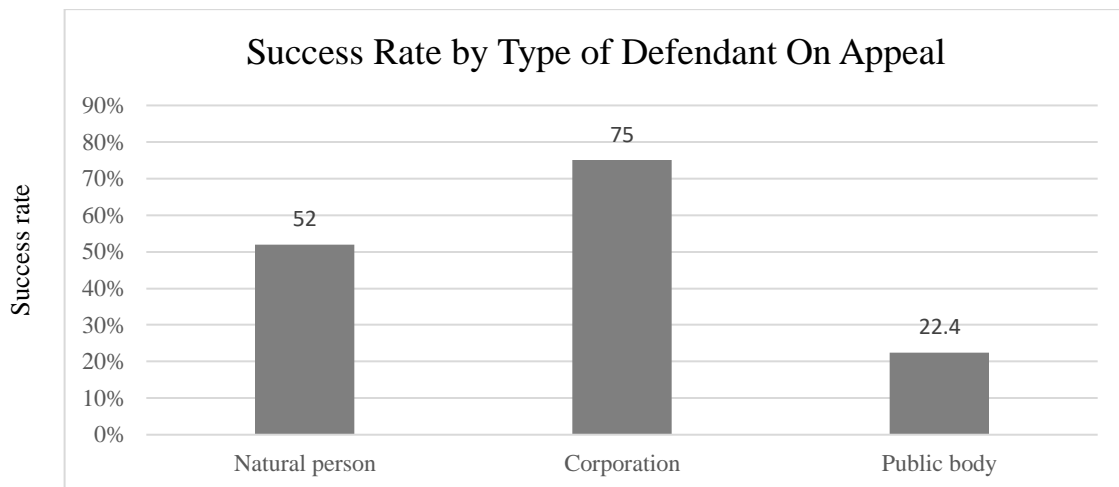
<sup>31</sup> ANOVA test p-value<0.0001.

<sup>32</sup> See chapter 6.1.3.

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succeeded much more frequently than claims against natural persons. This difference does not appear to be statistically significant.<sup>33</sup> The small sample size of claims against corporations means that this result should be read with caution. A contrast is observed here with the first instance study which reported a success rate of 40.4 per cent against corporations and 65.2 per cent against natural persons.<sup>34</sup> However, the low frequency of awards against public body defendants at first instance persists on appeal.<sup>35</sup>

*Figure 8 – Post-appeal success rate by type of defendant*



An examination of the post-appeal quantum of punitive damages awards by type of defendant confirms the tendency of English courts to award larger amounts against corporations compared with natural persons.<sup>36</sup> As for public bodies, virtually all awards

<sup>33</sup> Likelihood-ratio test p-value=0.056 (however, the p-value is very close to 0.05 which could be suggestive of a potential association).

<sup>34</sup> See chapter 6.1.4(1).

<sup>35</sup> Punitive damages were awarded against public bodies at a rate of 28.3 per cent at first instance, see *ibid.*

<sup>36</sup> The same pattern emerged in the first instance results, see chapter 6.1.4(1). However, statistical analysis suggests that the differences in the post-appeal quantum of punitive damages awards by type of defendant are likely to be attributable to chance: ANOVA test p-value=0.37.

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against such defendants concerned police misconduct.<sup>37</sup> The relevant amounts reported in Table 4 fell within the lower bracket of the *Thompson* guidelines<sup>38</sup> according to which the lowest award should be £9,270. The guidelines further dictate that the award can increase up to £46,350 for conduct ‘particularly deserving of condemnation’<sup>39</sup> and the amount of £92,701 should be treated as the absolute maximum figure for misconduct involving officers of high rank. The presence of outliers signals that the median is a more reliable indicator of the central tendency in this sample.

*Table 4 – Post-appeal average and median awards by type of defendant*

	<b>Natural person</b>	<b>Corporation</b>	<b>Public body</b>
<b>Average award</b>	£31,457 (£41,884)	£91,790 (£79,005)	£25,944 (£25,944)
<b>Median award</b>	£3,162 (£3,438)	£23,778 (£21,433)	£28,683 (£28,683)

Finally, due to the small sample size of claims against natural persons whose gender was ascertainable,<sup>40</sup> the appellate study does not report post-appeal outcomes based on the defendant’s gender.<sup>41</sup>

<sup>37</sup> There were two exceptions to this: *Lavery v Ministry of Defence* [1984] NI 99 (QBD) (punitive damages of £5,156 (£5,156) awarded for assault by a member of an army patrol); *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453, (2010) 107(19) LSG 24 (£35,577 (£35,577) awarded as punitive damages for the claimant’s unlawful detention by immigration authorities). It has been held that the *Thompson* guidelines apply in situations resembling police misconduct (see *Muuse* at [80]).

<sup>38</sup> (n 15) 516–517. The *Thompson* guidelines are also discussed in chapters 2.3 and 6.2.1(8).

<sup>39</sup> *Thompson* (n 15) 517.

<sup>40</sup> 46 claims in total of which only three were brought against female defendants and 43 were brought against male defendants.

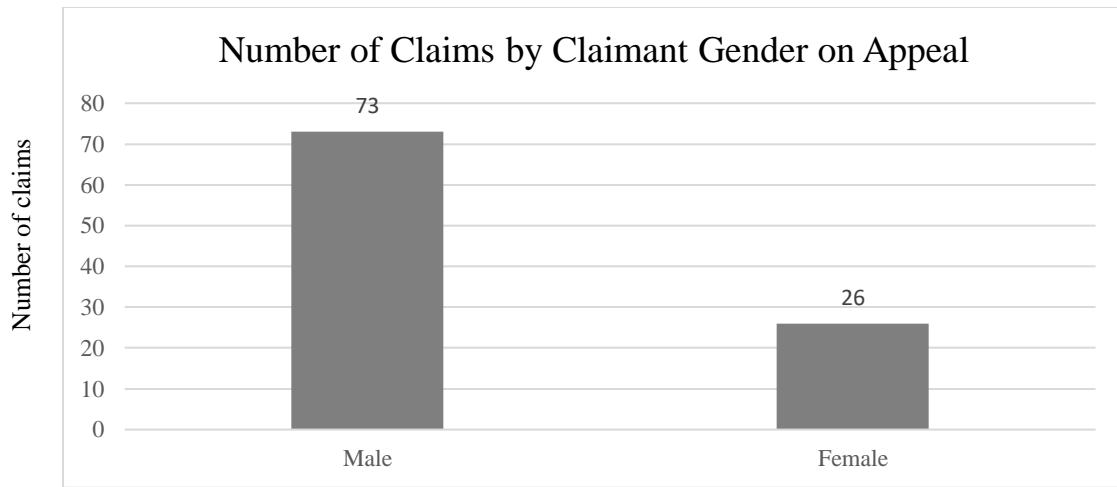
<sup>41</sup> See chapter 6.1.4(2) for the relevant findings at first instance.

**(5) The type of claimant**

It is not meaningful to report in any detail the post-appeal outcome of cases by reference to the claimant’s legal personality because the claimant was a natural person in almost all of the claims that were decided on appeal.<sup>42</sup>

As for the claimant’s gender, most claims were brought by men (Figure 9) but both genders were successful at a very similar rate (Figure 10).<sup>43</sup> However, the amounts awarded as punitive damages to male claimants were far higher than the respective amounts awarded to female claimants (Table 5).<sup>44</sup> A similar pattern is observed in the corresponding first instance results.<sup>45</sup>

*Figure 9 – Number of claims by claimant gender on appeal*



<sup>42</sup> The appellate sample included 103 claims by natural persons, only 12 claims by corporations and no claims by public bodies. Punitive damages were awarded in 36.9 per cent of claims brought by natural persons and in 66.6 per cent of claims brought by corporations. A similar finding emerges in the first instance results, see chapter 6.1.5(1).

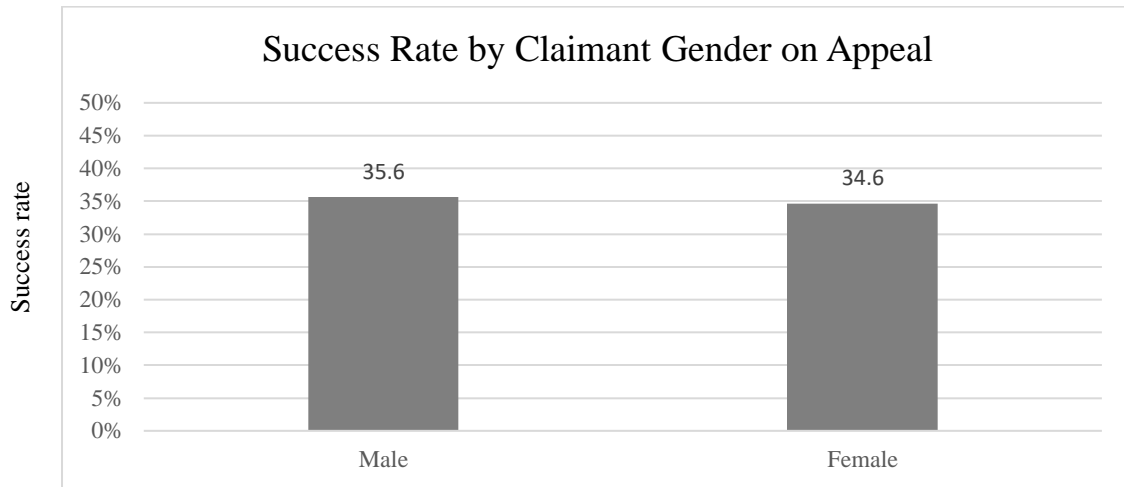
<sup>43</sup> Statistical analysis suggests that this result is likely to be down to chance: likelihood-ratio test p-value=0.871

<sup>44</sup> Statistical analysis suggests that this difference is likely to be down to chance: ANOVA test p-value=0.358.

<sup>45</sup> See chapter 6.1.5(2).

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*Figure 10 – Post-appeal success rate by claimant gender*



*Table 5 – Post-appeal average and median awards by claimant gender*

	<b>Male claimant</b>	<b>Female claimant</b>
<b>Average award</b>	£57,196 (£57,196)	£13,250 (£11,424)
<b>Median award</b>	£12,003 (£12,003)	£2,922 (£2,607)

### **(6) Punitive damages and prior punishment**

The appellate sample included only 34 claims (ie, 29.6 per cent of all claims) in respect of which it was possible to ascertain whether the defendant had been sanctioned for their misconduct prior to the trial in which punitive damages were claimed. No information about prior punishment was available in respect of the remaining 81 claims (70.4 per cent of the sampled claims) but it is plausible to think that these claims did not involve other sanctions since it seems unlikely that a judge would fail to mention the fact of prior punishment given its effect on the availability of punitive damages.<sup>46</sup>

Although the limited amount of appellate data on the issue of prior punishment does not permit a meaningful analysis of the topic it is nevertheless worth briefly setting

<sup>46</sup> See chapters 2.2.2(3) and 6.1.7.

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out these results primarily because they complement the corresponding results reported at first instance.<sup>47</sup> In 28 of the 34 claims in respect of which information about prior punishment was available, no other sanction had been imposed whereas in the remaining six claims the defendant had already been punished (either by a fine<sup>48</sup> or by a prison sentence<sup>49</sup>). Punitive damages were awarded in 22 out of the 28 claims involving no other sanctions. An award was also made against two of the six defendants whose misconduct had already been sanctioned.<sup>50</sup> This accounts for just 7.1 per cent of the claims in the appellate sample in respect of which it was possible to ascertain with confidence whether another sanction was imposed. Finally, just as in the first instance results, the average and median punitive awards were higher against defendants who had not otherwise been sanctioned.<sup>51</sup>

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<sup>47</sup> See chapter 6.1.7.

<sup>48</sup> Eg, *Francis v Brown* (1998) 30 HLR 143 (CA) (fine under the Protection from Eviction Act 1977).

<sup>49</sup> Eg, *Axa Insurance (UK) Ltd v FCS* [2018] EWCA Civ 1330, [2019] RTR 1 (sentence of three years and eight months' imprisonment under the Fraud Act 2006).

<sup>50</sup> Statistical analysis suggests that these differences are likely to be attributable to chance: likelihood-ratio test p-value=0.086. The cases in which punitive damages were awarded in addition to another sanction were *Asghar v Ahmed* (1985) 17 HLR 25 (CA) 29 (Cumming-Bruce LJ): an award of £3,438 (£3,438) for unlawful eviction was upheld in addition to a £2,578 fine by the Crown Court because 'no material [wa]s presented ... defining or describing the scope of the facts in respect of which [the defendant] was fined in the Crown Court' and 'there was a great deal more to the outrageous conduct which followed the eviction which justified [the punitive award]'; *FCS* (n 49) [33] (Flaux LJ): 'it is nothing to the point that criminal proceedings ... were brought against the [defendant]', see criticism in Eleni Katsampouka, 'Exemplary Damages and Insurance Fraud' (2019) 135 LQR 380, 382–383.

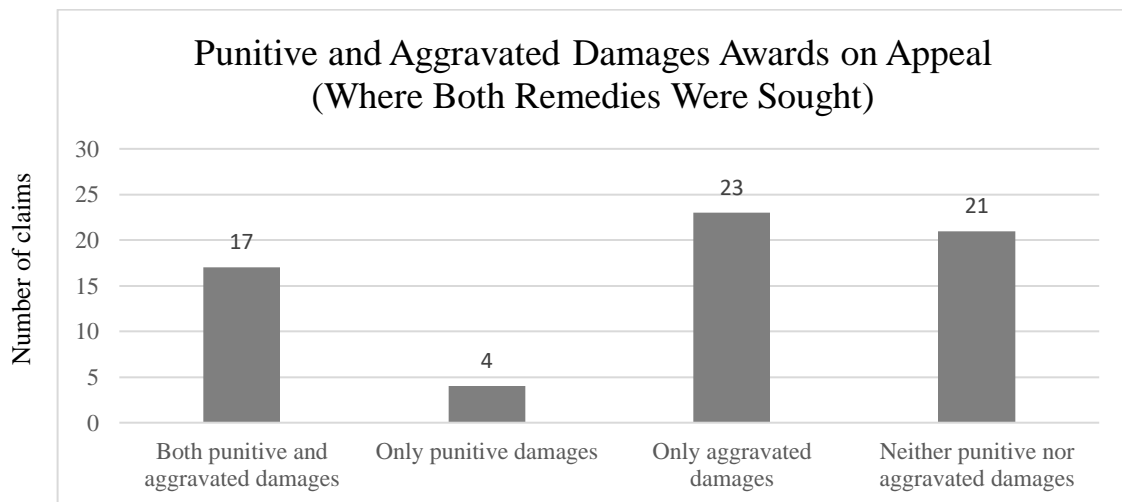
<sup>51</sup> The average and median awards for the claims in which no other sanction was imposed were £28,146 (£37,308) and £21,433 (£25,058) respectively. The average and median awards for the claims in which punitive damages were awarded in addition to another sanction were £12,436 (£12,436) and £12,436 (£12,436). Statistical analysis suggests that these differences could be attributable to chance: ANOVA test p-value=0.441. For the corresponding first instance results, see chapter 6.1.7.

**(7) Punitive damages and other types of damages on appeal**

This section addresses the relationship between: (1) the decision to award punitive damages and the decision to award aggravated damages on appeal; (2) the post-appeal quantum of punitive and aggravated damages; and (3) the post-appeal quantum of punitive and total compensatory damages (including aggravated damages).

As for the first of these issues, in the appellate sample there were 65 claims for both punitive and aggravated damages. In 21 of these claims neither punitive nor aggravated damages were awarded; in 17 claims both remedies were granted; in 23 claims aggravated damages were awarded while the claim for punitive damages was rejected and in just four claims punitive damages were granted alone (Figure 11). Statistical analysis provides some evidence of a relationship between the decision to award punitive damages and the decision to award aggravated damages.<sup>52</sup> A similar picture emerges in the first instance results.<sup>53</sup>

*Figure 11 – Post-appeal punitive and aggravated damages awards (where both remedies were sought)*



<sup>52</sup> Likelihood-ratio test p-value=0.021.

<sup>53</sup> See chapter 6.1.8(1).

## APPELLATE STUDY

Turning to the quantum of punitive and aggravated damages awards, Table 6 shows that the average and median award of punitive damages was nearly double the size of the average and median award of aggravated damages. Regression analysis supports the existence of a correlation between the quantum of the two awards.<sup>54</sup> The same pattern is observed in the first instance results.<sup>55</sup>

*Table 6 – Post-appeal average and median awards of aggravated and punitive damages*

	<b>Aggravated damages</b>	<b>Punitive damages</b>
<b>Average award</b>	£10,010 (£10,010)	£19,063 (£19,063)
<b>Median award</b>	£5,708 (£5,708)	£13,244 (£13,244)

A final similarity between the first instance and the appellate results is observed when the quantum of punitive damages is examined alongside the quantum of total compensatory damages. As Table 7 illustrates, the average award of compensatory damages was slightly higher than the average award of punitive damages while the median compensatory award was more than double the amount of the median punitive award. Statistical analysis supports the existence of a positive linear relationship between the amounts of compensatory and punitive damages.<sup>56</sup>

*Table 7 – Post-appeal average and median awards of compensatory and punitive damages*

	<b>Compensatory damages</b>	<b>Punitive damages</b>
<b>Average award</b>	£46,283 (£58,520)	£41,356 (£45,023)
<b>Median award</b>	£18,203 (£22,473)	£8,573 (£9,814)

<sup>54</sup> Linear regression analysis p-value=0.0007. This can be viewed as evidence of a relationship between the quantum of punitive and aggravated damages awards. However, due to the small sample size (ie, only 12 claims for which both the amounts of punitive and aggravated damages were known) it is hard to make any definitive judgments about the strength of this relationship.

<sup>55</sup> See chapter 6.1.8(1).

<sup>56</sup> Linear regression analysis p-value=0.0002. For a comparison with the first instance results, see chapter 6.1.8(2).

**7.1.2 Appellate intervention**

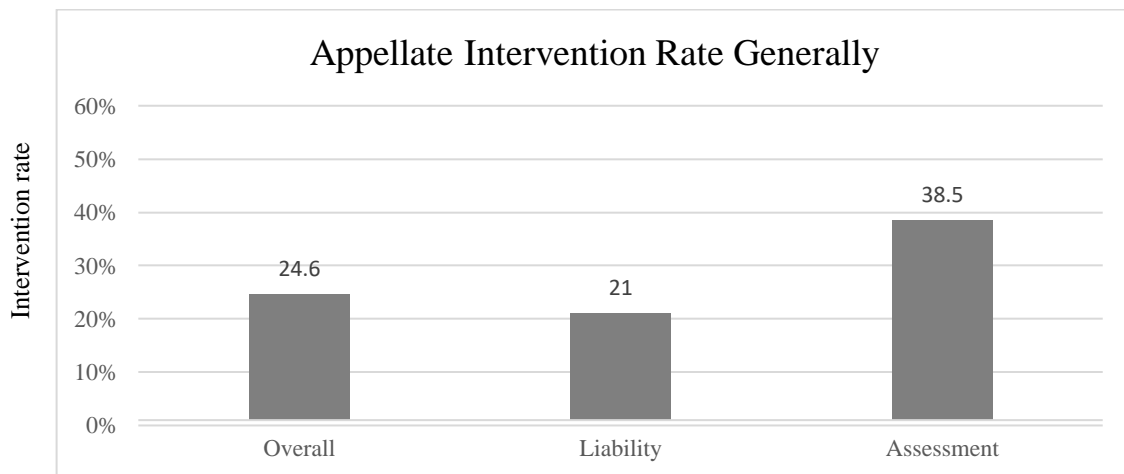
**(1) Generally**

This subsection switches from the consideration of claims post-appeal to appellate intervention. It examines the general incidence of appellate intervention, the success rate of appeals by party (claimant or defendant) and the extent of appellate intervention by trial court.

**(a) Appellate intervention generally**

The total number of appeals in the dataset was 126, of which 100 (79.4 per cent) were against determinations as to the existence of liability for punitive damages and 26 (20.6 per cent) were against determinations as to the assessment of the award. The overall rate of appellate intervention was 24.6 per cent. The appellate court overturned the first instance decision as to the existence of liability for punitive damages in 21 per cent of cases, and the decision as to the quantum of the award in 38.5 per cent of cases (Figure 12). Thus, overall, appellate courts were far more likely to affirm than reverse a first instance decision.

*Figure 12 – Appellate intervention rate generally*



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As for the extent of appellate intervention with respect to quantum, there was no case in the sample in which the appellate court increased the amount of punitive damages.<sup>57</sup> The award was reduced in all of the cases in which the appellate court allowed an appeal against the first instance determination of the assessment of punitive damages. The average reduction was -£197,604 (-£197,604). The average reduction is much larger compared to the average award which was just £41,356 (£45,023). This is because the Court of Appeal primarily reduced unusually high first instance awards. Table 8 reports all reductions that the Court of Appeal applied when it exercised its power to substitute the award of the trial court. The cases have been ranked based on the size of the reduction (from highest to lowest). The ‘as paid’ and the ‘as received’ measure were the same for all these cases.

*Table 8 – Post-appeal reductions of punitive damages awards*

<i>Case</i>	<i>First instance punitive award (£)</i>	<i>Post-appeal punitive award (£)</i>	<i>Reduction (£)</i>	<i>Reduction (%)</i>
<i>John v MGN Ltd</i> [1997] QB 586 (CA)	£570,660	£103,756	-£466,904	81.8
<i>Thompson (Hsu) v CPM</i> [1998] QB 498 (CA)	£382,438	£28,683	-£353,755	92.5
<i>Goswell v CPM</i> (CA, 7 April 1998)	£325,072	£28,683	-£296,389	91.2
<i>Gerald v CPM</i> (CA, 10 June 1998)	£191,219	£38,244	-£152,975	79.9
<i>Ramzan v Brookwide Ltd</i> [2011] EWCA Civ 985	£78,370	£26,123	-£52,247	66.6
<i>Thompson v CPM</i> [1998] QB 498 (CA)	£97,918	£48,959	-£48,959	50
<i>Watson v CC Cleveland</i> [2001] EWCA Civ 1547	£27,434	£15,432	-£12,002	43.7

<sup>57</sup> The appellate court was asked to increase the quantum of the punitive award in only three cases: *Perry v Scherchen* (CA, 27 June 2001); *Choudhury v Garcia* [2013] EWHC 3283 (QB); *Smith v Khan* [2018] EWCA Civ 1137. Cf 23 cases in which a request was made to either reduce the quantum of the punitive award or to order a re-trial due to the excessiveness of the punitive award.

**(b) Appellate intervention by party**

Claimants brought 56 appeals (44.4 per cent) overall, 53 (94.6 per cent) on the existence of liability for punitive damages and only three (5.4 per cent) on the assessment of the award. The remaining 70 appeals (55.6 per cent) were brought by defendants. Breaking down by appeal type, 47 (67.1 per cent) of defendant appeals pertained to the existence of liability for punitive damages and 23 (32.9 per cent) related to the assessment of the award.

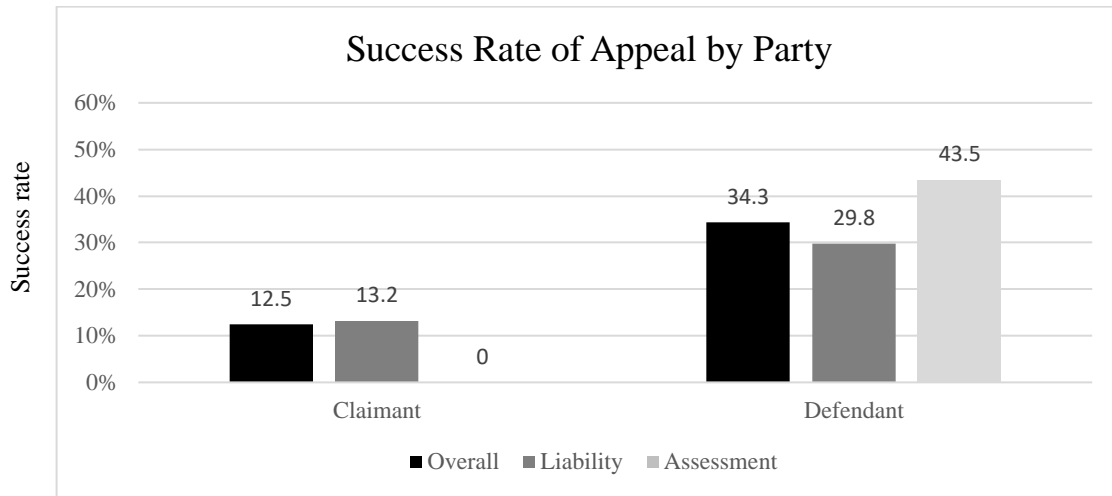
As for the question of who wins appeals, defendants were far more successful than claimants. The overall intervention rate for appeals by claimants was 12.5 per cent, compared with 34.3 per cent for appeals by defendants. In other words, defendants succeeded overall on appeals on punitive damages at almost three times the rate of claimants. Breaking things down further by type of appeal, the intervention rate for claimant appeals on the existence of liability for punitive damages was 13.2 per cent, compared with 29.8 per cent for defendant appeals. And as for appeals against the assessment of punitive damages, defendants succeeded at a rate of 43.5 per cent while claimants failed in all of their respective appeals (Figure 13). Statistical analysis suggests that the differences between the performance of claimants and defendants in appeals (overall and on the issue of liability) are unlikely to be attributable to chance.<sup>58</sup>

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<sup>58</sup> A Pearson's chi-squared test comparing the overall success rates of claimants and defendants in appeals yielded a p-value=0.003. A Pearson's chi-squared test comparing the success rates of claimants and defendants in appeals on liability produced a p-value=0.042. The same test comparing the success rates of claimants and defendants in appeals on assessment returned a p-value=0.409. The small number of appeals against the assessment of punitive damages (ie, 26 appeals in total) means that the relevant results should be read with caution.

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Figure 13 – Success rate of appeal by party



### (c) Appellate intervention by trial court

44 (34.9 per cent) of the appeals were brought against decisions of the High Court and the remaining 82 appeals (65.1 per cent) challenged County Court determinations. Splitting this up by appeal type, of the appeals on the existence of liability for punitive damages, 35 (35 per cent) were brought against High Court decisions and 65 (65 per cent) were brought against County Court decisions. In relation to appeals on the assessment of punitive damages, nine (34.6 per cent) were appeals from the High Court and 17 (65.4 per cent) were appeals from the County Court.

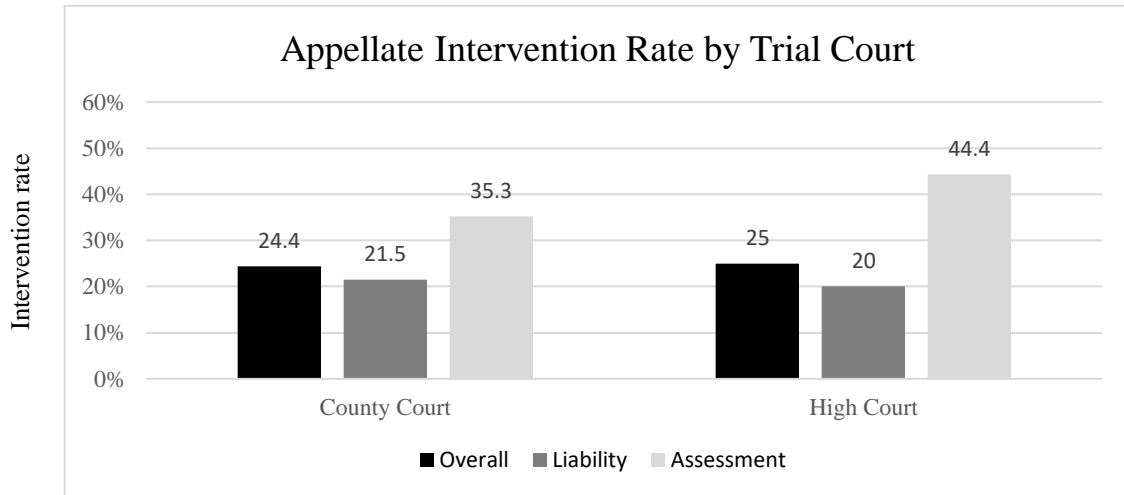
Figure 14 demonstrates that appellate intervention with respect to assessment was more likely for appeals against decisions of the High Court. Statistical analysis indicates that this disparity is unlikely to be attributable to chance.<sup>59</sup> The overall rate of

<sup>59</sup> Likelihood-ratio test p-value=0.007.

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intervention as well as the rate of intervention with decisions about the existence of liability for punitive damages were very similar for both trial courts.<sup>60</sup>

Figure 14 – Appellate intervention rate by trial court



### (2) The *Rookes* categories

Turning to the *Rookes* categories, 44 (34.9 per cent) of all appeals pertained to ‘Category 1’ claims. Of these 44 appeals, 35 (79.5 per cent) concerned the issue of liability for punitive damages and nine (20.5 per cent) related to the assessment of the award. The remaining 78 appeals (61.9 per cent) pertained to claims for profit-seeking wrongdoing (‘Category 2’). Of these 78 appeals regarding the second *Rookes* category, 61 (78.2 per cent) related to liability and 17 (21.8 per cent) pertained to the assessment of punitive damages (Figure 15). The sample also included four appeals (3.2 per cent) against first instance determinations as to the existence of liability for punitive damages

<sup>60</sup> Statistical analysis suggests that these results are likely to be attributable to chance. A likelihood-ratio test on the null hypothesis that the overall intervention rate is the same for both types of trial court returned a p-value=0.86. The same test with regard to appellate intervention on the issue of liability yielded a p-value=0.85.

## APPELLATE STUDY

in claims classified as ‘Other’ but due to their very small number these have been omitted from the figure.

*Figure 15 – Number of appeals by case category*

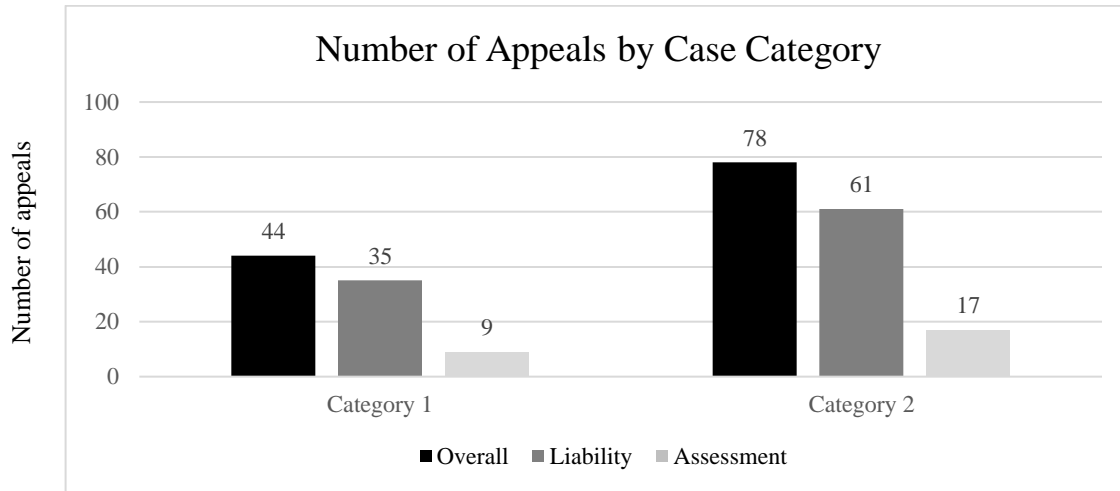


Figure 16 shows the extent of appellate intervention by case category. One of the four appeals on the existence of liability for punitive damages in claims classified as ‘Other’ was allowed<sup>61</sup> but this is not shown due to the very small number of observations falling in this category.

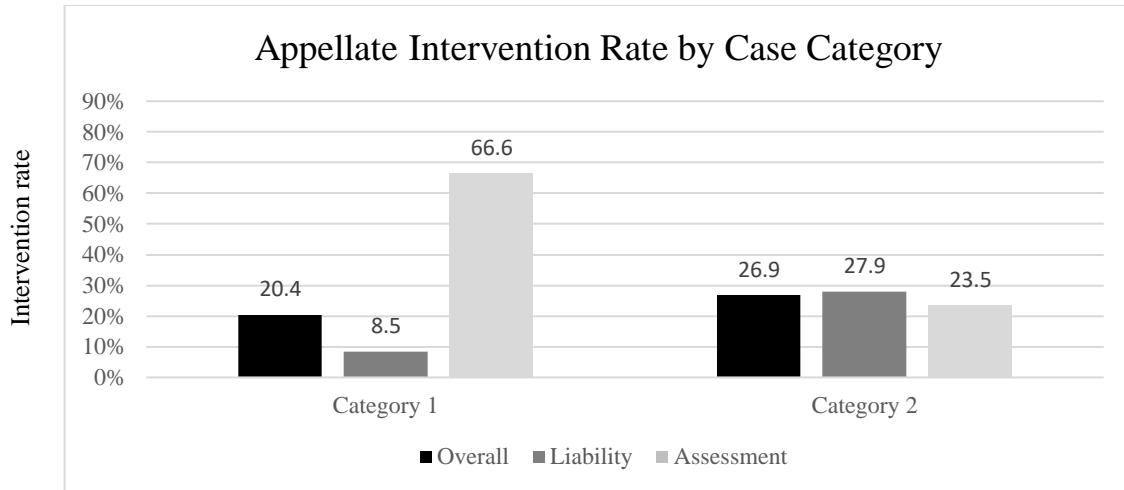
The overall intervention rate was slightly higher for ‘Category 2 cases’ with appeals on liability succeeding much more frequently than in ‘Category 1 cases’. A noteworthy aspect of Figure 16 is that appeals against the assessment of punitive damages succeeded at a rate of 66.6 per cent in cases of oppressive, arbitrary or unconstitutional conduct by government servants. This is almost three times higher than the intervention rate on assessment in cases of profit-seeking wrongdoing, and statistical

<sup>61</sup> *Metcalf* (n 21). The appeal was allowed precisely because punitive damages had been awarded even though the case did not fall under any of the *Rookes* categories.

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analysis suggests that this disparity is unlikely to be attributable to chance.<sup>62</sup> Considering that all interventions on assessment in the sample led to a reduction of the punitive award, this difference can potentially be explained by the frequently raised concern of burdening the state budget with the payment of punitive awards on a vicarious liability basis.<sup>63</sup>

Figure 16 – Appellate intervention rate by case category



### (3) The cause of action

Figure 17 reports the number of appeals by cause of action. Most of the appeals related to the existence of liability for punitive damages in claims for ‘interference with the person’ and ‘interference with property’.

Figure 18 shows appellate intervention rates by cause of action for the same two groups. The overall intervention rate was lower for ‘interference with the person claims’

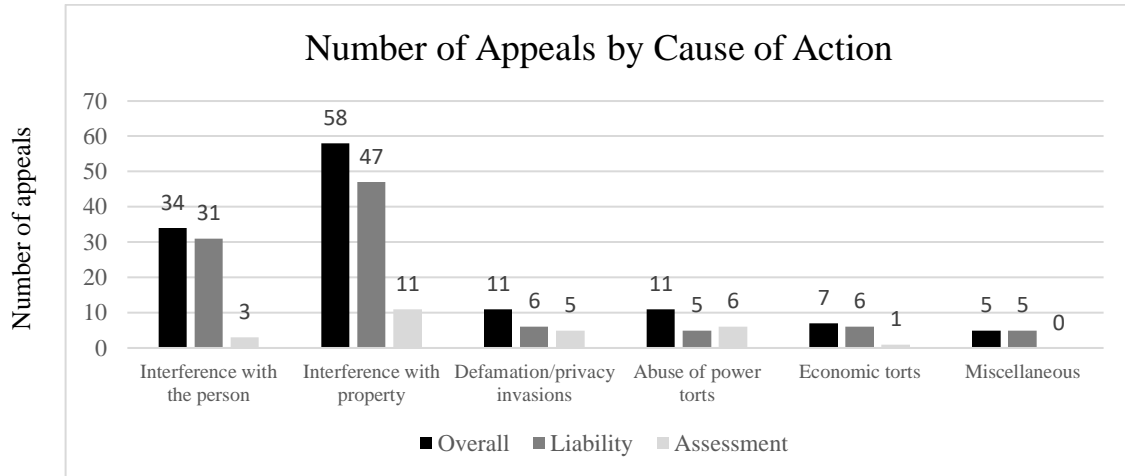
<sup>62</sup> Likelihood-ratio test p-value=0.0365. By contrast, the p-values from the same test with regards to the overall appellate intervention (p-value=0.723) and to appellate intervention on liability (p-value=0.909) were not statistically significant.

<sup>63</sup> Punitive damages awards in ‘Category 1’ are typically paid by a public body. See the discussion in chapter 2.1.1.

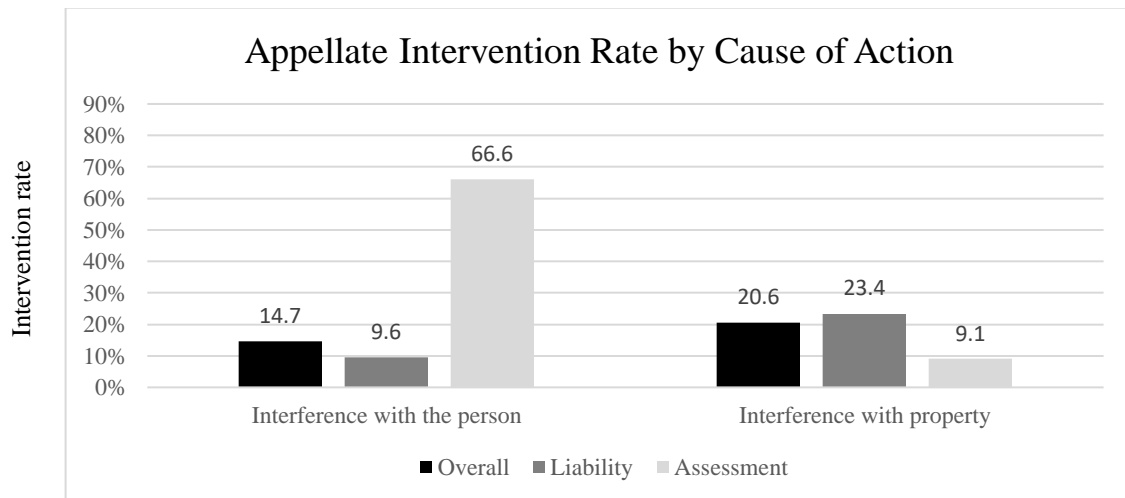
## APPELLATE STUDY

(14.7 per cent) than for ‘interference with property claims’ (20.6 per cent) but statistical analysis suggests that this difference may well be attributable to chance.<sup>64</sup>

*Figure 17 – Number of appeals by cause of action*



*Figure 18 – Appellate intervention rate by cause of action*



A striking disparity between the appellate intervention rates on the assessment of punitive damages is observed across the two groups. Appeals on assessment succeeded at a much higher rate in ‘interference with the person claims’ (66.6 per cent) than in ‘interference

<sup>64</sup> Likelihood-ratio test p-value=0.592. The difference between the intervention rates with regard to liability for punitive damages across the two groups is also likely to be down to chance: likelihood-ratio test p-value=0.994.

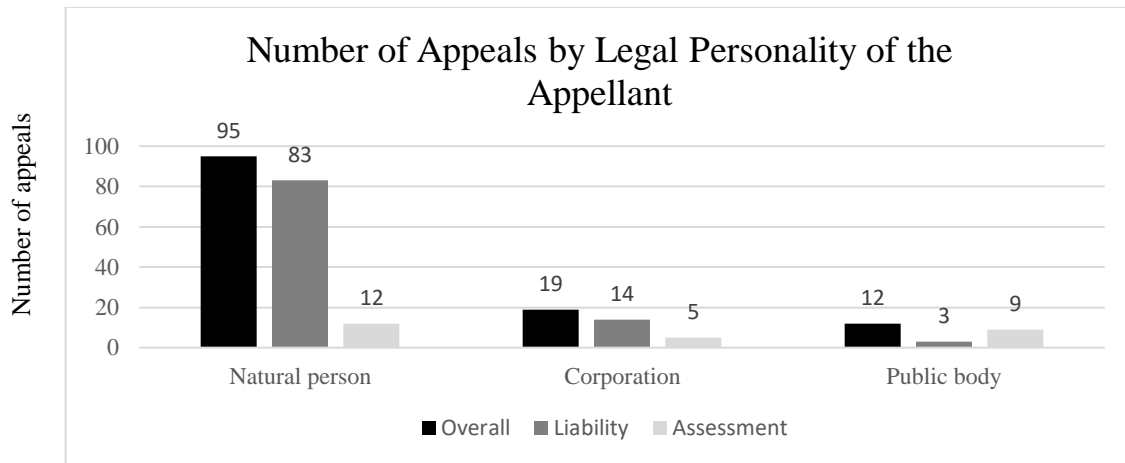
## APPELLATE STUDY

with property claims' (9.1 per cent). Statistical analysis suggests that this disparity is unlikely to be attributable to chance.<sup>65</sup> This result, however, should be treated with caution considering the very small number of appeals against the assessment of punitive damages in each group.

### (4) The legal personality of the appellant

Figure 19 breaks the number of appeals down by the legal personality of the appellant. Most appeals (95 out of 126 in total (75.4 per cent)) were brought by natural persons, while the appellant was a corporation in 19 appeals (15.1 per cent) and a public body in just 12 appeals (9.5 per cent).<sup>66</sup>

Figure 19 – Number of appeals by the legal personality of the appellant



<sup>65</sup> Likelihood-ratio test p-value=0.044.

<sup>66</sup> Where the appellant was a corporation or a public body, the respondent was a natural person in all but two cases (*Old Grovebury Manor Farm Ltd v Seymour Plant Sales and Hire Ltd* (CA, 19 March 1987); *FCS* (n 49), both involving an appeal by a corporation against a corporation).

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Figure 20 – Appellate intervention rate by the legal personality of the appellant

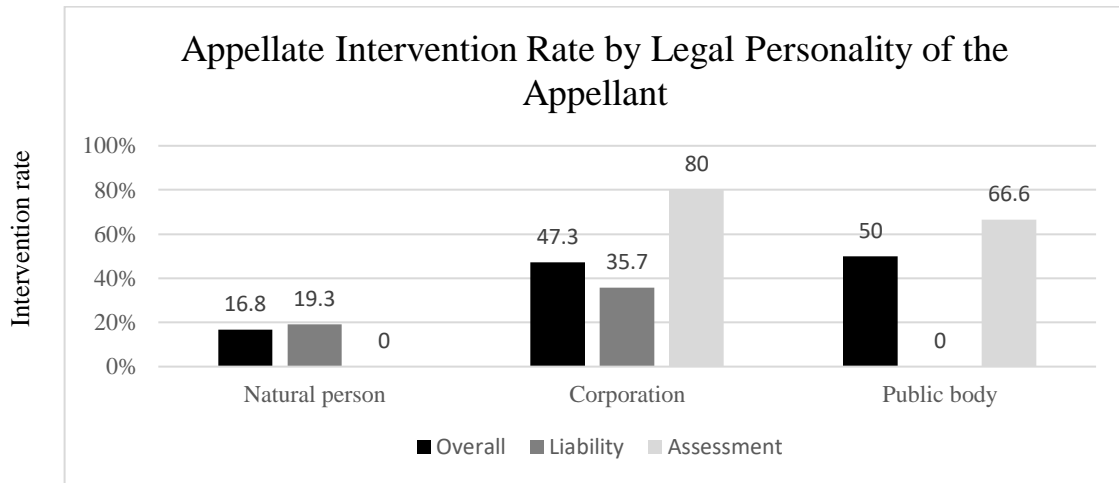


Figure 20 shows that corporate and public body appellants were by far more successful on appeal than natural persons. This difference is unlikely to be down to chance.<sup>67</sup> This finding is consistent with the ‘party capability theory’<sup>68</sup> according to which resource-rich players such as companies and public bodies perform better in litigation than resource-poor parties (most commonly natural persons). The results of the first instance study were also consistent with this theory.<sup>69</sup>

### (5) The legal personality of the respondent

Figure 21 concerns the number of appeals based on the respondent’s legal personality. 77 appeals (61.1 per cent) were brought against natural persons, 16 appeals (12.7 per cent)

<sup>67</sup> A likelihood-ratio test yielded the following p-values: 0.003 (overall intervention rate); 0.0001 (intervention on assessment); cf 0.205 (intervention on liability).

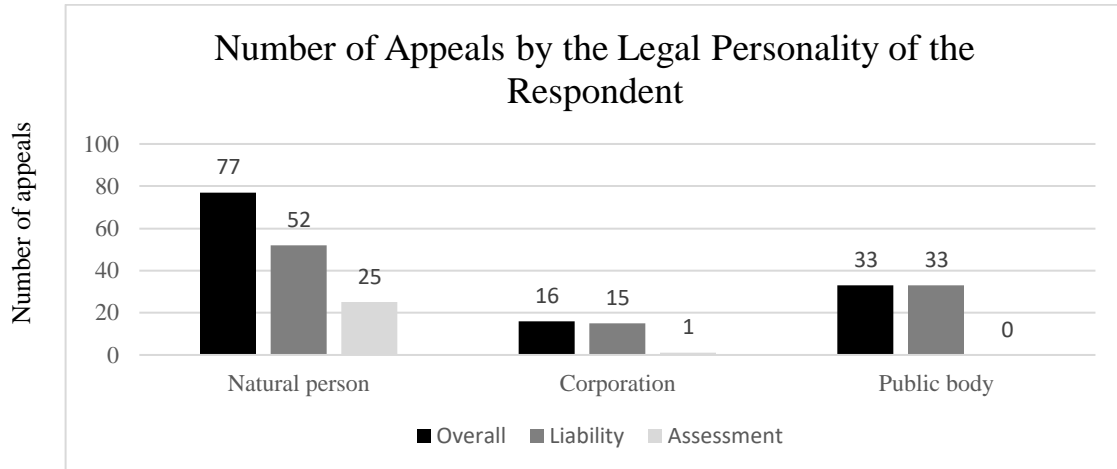
<sup>68</sup> Originally developed by Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9 Law and Society 95.

<sup>69</sup> See the discussion in chapter 6.2.2(3).

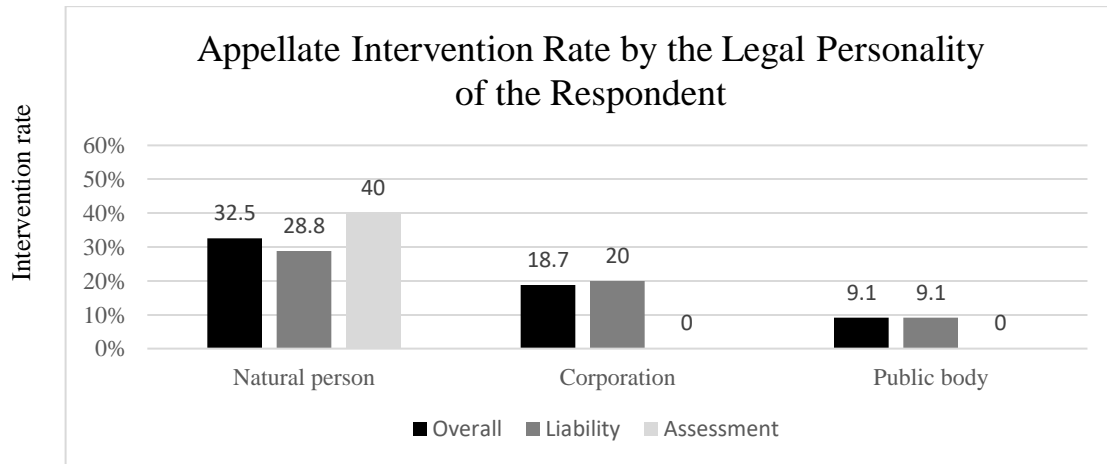
## APPELLATE STUDY

were brought against corporations and 33 appeals (26.2 per cent) were brought against public bodies.<sup>70</sup>

*Figure 21 – Number of appeals by the legal personality of the respondent*



*Figure 22 – Appellate intervention rate by the legal personality of the respondent*



An examination of the appellate intervention rate by the respondent’s legal personality reveals that appeals against corporations and especially against public bodies succeeded

<sup>70</sup> For the latter two types of respondent, the appellant was a natural person in all but two cases (*Old Grovebury* (n 66); *FCS* (n 49) in which the pair of litigants was ‘corporation versus corporation’).

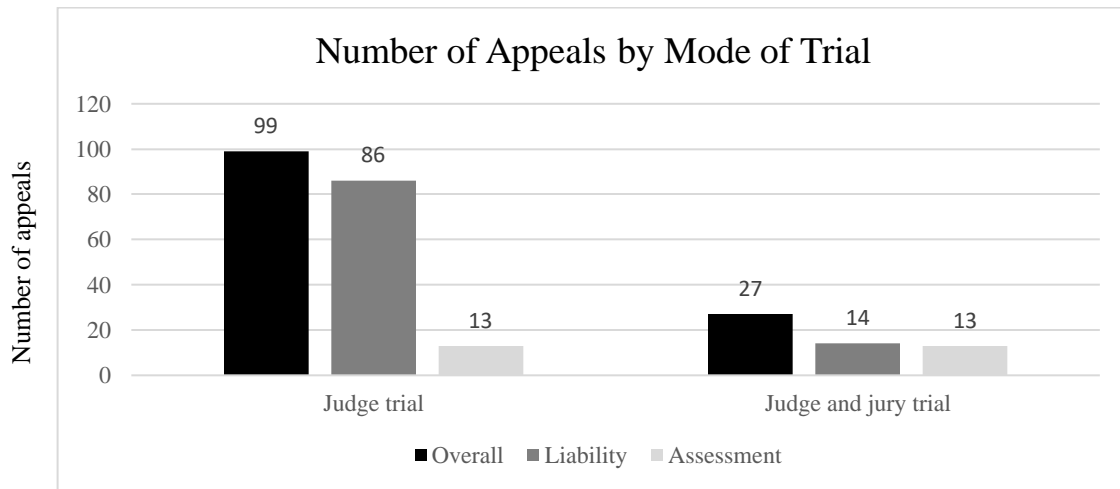
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less frequently than appeals against natural persons (Figure 22).<sup>71</sup> This finding (combined with the previous result on appellate intervention and the appellant's legal personality) provides further support for the view that those with more resources fare better in litigation.

### (6) The mode of trial

Most of the appeals in the dataset followed a 'judge-only trial'. 99 appeals (78.6 per cent) related to judicial decisions and 27 appeals (21.4 per cent) related to jury verdicts (Figure 23). This disparity is explained by the very limited availability of jury trials during the study period.<sup>72</sup>

*Figure 23 – Number of appeals by mode of trial*



As for the rate of appellate intervention, Figure 24 indicates that appellate courts were far more likely to disturb the assessment of punitive damages in jury trials than in 'judge-only trials'. Although this result should be read with caution given the small number of

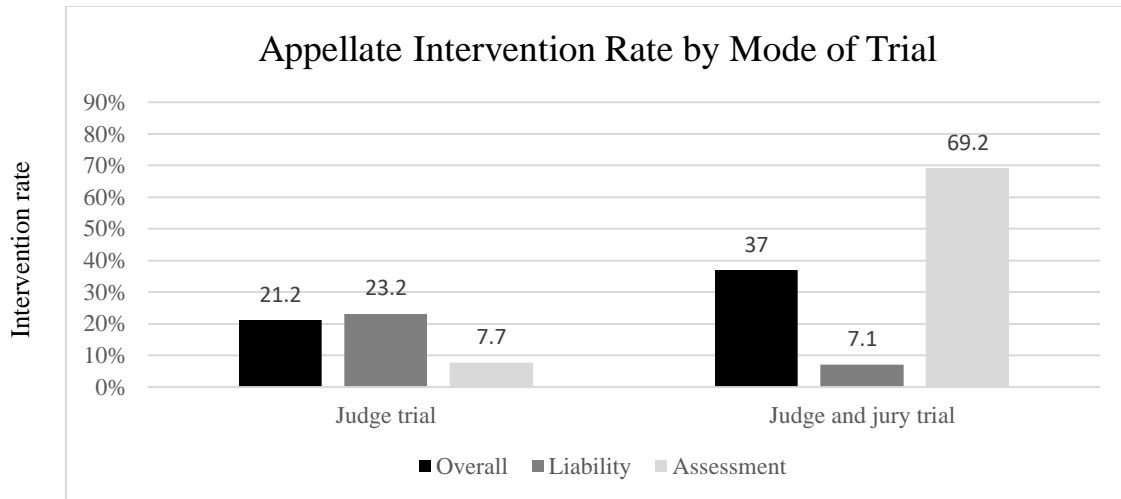
<sup>71</sup> Statistical analysis suggests that the overall difference is unlikely to be down to chance: likelihood-ratio test p-value=0.028 (cf the p-values from the same test when appeals on liability (0.092) and appeals on assessment (0.318) are examined separately).

<sup>72</sup> See the discussion about the gradual decline of civil juries in chapter 6.2.1(10).

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appeals against jury verdicts, it arguably indicates that concerns about excessive jury awards have been warranted. Statistical analysis suggests that the different intervention rates with regard to the assessment of punitive damages by mode of trial are unlikely to be attributable to chance.<sup>73</sup>

*Figure 24 – Appellate intervention rate by mode of trial*



The average reductions of punitive damages awards assessed by judges (-£52,247) and juries (-£221,831) also reveal that the extent of intervention was much more substantial for jury awards. It is also noteworthy that of the ten largest awards made at first instance, all five of those that were disturbed on appeal were made by juries.<sup>74</sup> Finally, a comparison between the standard deviation of jury awards that were appealed (£189,807 (£253,092)) and the standard deviation of the adjusted post-appeal awards for the same cases (£121,544 (£121,544)) illustrates the much wider variability of the former and, to some extent, validates the anxiety about unpredictable punitive damages awards made by juries.

<sup>73</sup> Likelihood-ratio test p-value<0.0001 (cf the p-values that the same test yielded in relation to the overall intervention rate (0.699) and the intervention rate on the issue of liability (0.78)).

<sup>74</sup> See nn 15–16.

## 7.2 DISCUSSION

This section comments on the results of the appellate study. It explores the implications of these results for the conclusions drawn in the first instance study. It also discusses the findings on appellate intervention in view of other empirical appellate studies (particularly from the UK, but also from the US).

### 7.2.1 Comparison with the findings at first instance

The results regarding post-appeal outcomes of punitive damages claims are in line with most of the corresponding results of the first instance study. The post-appeal success rate of punitive damages claims was similar to the overall success rate at first instance; the average and median post-appeal awards were close to (albeit slightly higher than)<sup>75</sup> the equivalent first instance awards; punitive damages were granted more frequently in claims for profit-seeking wrongdoing and, in particular, in claims for the infringement of property rights; the amounts awarded as punitive damages tended to be higher where the defendant was a corporation or a public body as opposed to a natural person; male claimants received larger awards of punitive damages than female claimants; and the quantum of punitive damages correlated positively with the quantum of aggravated and total compensatory damages. Appellate courts, like trial courts, awarded punitive damages primarily where the defendant had not otherwise been sanctioned for their misconduct and were hesitant to make an award against defendants who had already been punished. The results on appellate intervention also reaffirmed oft-repeated statements

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<sup>75</sup> This may be a product of the fact that decisions awarding punitive damages are more likely to be appealed if a substantial amount has been granted at first instance. It can be expected that higher stakes will increase the probability of pursuing an appeal.

## APPELLATE STUDY

about juries acting arbitrarily in quantifying punitive damages.<sup>76</sup> The very high intervention rate with the assessment of punitive damages in jury trials indicates that jury awards have attracted the attention of judges and law reformers for good reason.

A striking finding of the appellate study relates to the success rate of punitive damages claims against corporations. At first sight, appellate courts appeared to differ from first instance courts on the issue of liability for punitive damages where the defendant was a corporation.<sup>77</sup> However, this result is not particularly meaningful because the number of claims against corporations in the appellate study was very small. The dataset included only 16 punitive damages claims against corporations (13.9 per cent of all sampled claims) and an award was made in 12 of these claims. Although appellate courts appear to be unfavourable to corporate defendants as regards the decision to award punitive damages, there is, in fact, no reason to think that they are more unfavourable to such defendants than first instance courts because in 11 out of those 12 claims liability for punitive damages had already been imposed against them at first instance.

Furthermore, to the extent that the results of the appellate study can be used to assess the veracity of common assertions about punitive damages,<sup>78</sup> similar conclusions are drawn as in the first instance study.<sup>79</sup> Thus, the perception that punitive damages

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<sup>76</sup> For a discussion of such statements, see chapter 6.2.1(10).

<sup>77</sup> Compare the 40.4 per cent success rate of the claim against corporations at first instance (see chapter 6.1.4(1)) with the 75 per cent post-appeal success rate against corporations (see Figure 8).

<sup>78</sup> An effect of using multiple categories in coding cases is that individual sample sizes can become very small. It is thus impossible to test here some of the assertions discussed in the first instance study. For example, six categories were employed to code for the cause of action in which the claimant sued. The existence of only five defamation claims in the appellate sample renders any discussion of a pattern of decision-making in the defamation context meaningless. The same is true about insurance fraud which featured in only three claims in the appellate sample.

<sup>79</sup> Common factual claims about punitive damages are tested against the first instance results in chapter 6.2.1.

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awards are rare compared with the total number of civil claims decided by the appellate courts in the country is supported by the results.<sup>80</sup> By contrast, such awards do not appear to be a rare event if the reference point is the total number of claims in which the remedy is sought in appellate proceedings considering the 42.6 per cent overall post-appeal success rate.<sup>81</sup>

Similarly, punitive damages were awarded more commonly by appellate courts for the unlawful eviction of tenants by landlords than for other wrongs<sup>82</sup> and this finding further supports the claim (already affirmed by the first instance study)<sup>83</sup> that wrongful eviction cases constitute the most common example of a punitive award in the second *Rookes* category. The assertion that most punitive damages awards relate to intentional wrongdoing<sup>84</sup> is also borne out by the appellate results.<sup>85</sup> Conversely, and contrary to

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<sup>80</sup> It is indicative that, on average, 1,174 appeals were disposed of by the Civil Division of the Court of Appeal per year for the period between 1999 and 2020: see Ministry of Justice, ‘The Royal Courts of Justice Annual Tables’ (2020) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/991062/RCJ\\_Tables.ods](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/991062/RCJ_Tables.ods)> accessed 30 July 2021. The data for the period between 1964 and 1998 are not available. The appellate sample includes only 49 post-appeal punitive awards over a period of 56 years.

<sup>81</sup> The same conclusion was drawn in the discussion of the first instance results, see chapter 6.2.1(1).

<sup>82</sup> The appellate sample comprised 30 punitive damages claims for unlawful eviction of which 18 claims (60 per cent) succeeded. This is much higher than the 42.6 per cent overall post-appeal success rate.

<sup>83</sup> See chapter 6.2.1(2).

<sup>84</sup> Again, this assertion was supported by the first instance results, see chapter 6.2.1(5).

<sup>85</sup> Consider the high success rate of the claim for wrongs such as unlawful eviction (60 per cent) and abuse of power torts (70 per cent) and the absence of awards for the tort of negligence which usually involves merely careless conduct.

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conventional wisdom,<sup>86</sup> punitive damages awards were less frequent in claims for police misconduct.<sup>87</sup>

As for the proclaimed ‘excessiveness’ of punitive damages awards, the average and median post-appeal awards were close to the corresponding first instance results.<sup>88</sup> As for the average punitive damages award by year, this was consistently low (both at first instance<sup>89</sup> and on appeal<sup>90</sup>) throughout the entire study period. Additionally, in the event of interference with the assessment of punitive damages (which occurred in just 10 cases within a sample spanning 56 years), the appellate court always reduced the amount awarded by the trial court or ordered a re-trial on the issue of punitive damages. In most cases, the appellate court interfered with the assessment of awards which were outliers in the first instance study (and, by definition, outliers are not representative of the general population of first instance awards). Although the very fact of cutting down punitive awards on appeal is arguably evidence of excessiveness of some of these awards at first instance, it also indicates considerable willingness on the part of appellate courts to limit awards. This reinforces the conclusion that, overall, punitive damages awards (especially awards by appellate courts) cannot be fairly characterised as excessive.<sup>91</sup> Misconceptions

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<sup>86</sup> For discussion of the relevant first instance results, see chapter 6.2.1(4).

<sup>87</sup> There were 38 police misconduct claims in the appellate sample and punitive damages were awarded in nine (ie, 23.7 per cent) of them. If situations resembling police misconduct are added to this group (eg, claims for unlawful detention by immigration authorities) a similar outcome is observed with punitive damages being awarded in 11 of the 42 relevant claims (ie, 26.2 per cent success rate).

<sup>88</sup> The average and median first instance awards were assessed by reference to various comparators and were found to not be excessive, see chapter 6.2.1(8).

<sup>89</sup> See chapter 6.1.1.

<sup>90</sup> See Figure 2.

<sup>91</sup> The hypothesis that punitive damages awards are excessive was also rejected in the first instance study, see chapter 6.2.1(8).

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about lavish punitive damages awards prevail because there is virtually no research which assesses the level of those awards comprehensively and takes into account the effects of appellate intervention.

The proposition that punitive damages awards are unpredictable<sup>92</sup> is also not borne out by the results of the appellate study. Such awards are in fact highly predictable at the appellate level. The range of post-appeal punitive awards was narrower than that of awards made at first instance<sup>93</sup> which means that it should be easier to predict the quantum of punitive damages following an appeal. This is likely because the driving factor for the greater variability of awards at first instance (ie, the use of civil juries in certain types of claim) is absent in the appellate context.

Finally, the appellate study reinforces concerns raised during the 1990s regarding the use of juries in the assessment of punitive damages awards.<sup>94</sup> It suffices to say that juries decided 90 per cent of the claims in which the appellate court interfered with the determination of the trial court regarding the assessment of punitive damages. The degree of appellate intervention with jury verdicts is explored in more detail below.<sup>95</sup>

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<sup>92</sup> This hypothesis was rejected in the first instance discussion, see chapter 6.2.1(9).

<sup>93</sup> Note that a high degree of uniformity was also observed in the vast majority of punitive damages awards at first instance: most awards fell within a relatively narrow range (ie, between £104 (£104) and £58,001 (£58,001)), see chapter 6.2.1(9).

<sup>94</sup> See chapter 6.2.1(10). Of course, these concerns are now somewhat vestigial given that civil juries are used rarely in recent years, especially since the introduction of section 11 of the Defamation Act 2013.

<sup>95</sup> See chapter 7.2.7 below.

### 7.2.2 The overall extent of appellate intervention

As for the general incidence of appellate intervention, the study showed that appellate courts were far more likely to uphold than to interfere with a first instance decision on punitive damages. The overall intervention rate was 24.6 per cent which means that roughly three out of four appeals failed.

The rate of intervention with punitive damages decisions reported in this study is much lower than the reversal rate for all decisions that are challenged before the Civil Division of the Court of Appeal. According to the data published by the Ministry of Justice, the Court of Appeal allowed 48 per cent of the appeals that it decided between 1999 and 2019.<sup>96</sup> Thus, roughly one in two appeals on civil disputes succeed. The intervention rates reported in appellate studies from other areas of private law are also higher than the results of this study. For example, the overall reversal rate in Goudkamp and Nolan's appellate study on contributory negligence was 35 per cent.<sup>97</sup> Laleng similarly reports that in the personal injury context, the Court of Appeal allowed 44.3 per cent of the appeals that it heard between 2000 and 2017.<sup>98</sup> Finally, Atkins's study on decisions by the Court of Appeal across all types of case between 1952 and 1983

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<sup>96</sup> Appeals that were struck out, dismissed by consent or otherwise disposed of have not been taken into consideration. Information about the period between 1964 and 1998 is not publicly available.

<sup>97</sup> James Goudkamp and Donal Nolan, *Contributory Negligence in the Twenty-First Century* (OUP 2019) para. 5.11. The study explored decisions on contributory negligence handed down between 2000 and 2016. The authors did not examine applications for permission to appeal (para. 5.11) which might explain the higher intervention rate reported in that study. If PTA applications are disregarded in the present study, the overall intervention rate in the appellate sample increases from 24.6 per cent to 30.3 per cent.

<sup>98</sup> Per Laleng, 'Winners and Losers in the Court of Appeal: An Empirical Study of Personal Injury Cases (2002–2016)' [2018] JPIL 36, 44.

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revealed an intervention rate of 35 per cent across the study period.<sup>99</sup> Thus, it appears that appellate courts are more hesitant to interfere with decisions on punitive damages issues compared with certain other areas of private law.<sup>100</sup>

This result signals that first instance courts do not commonly make errors in deciding punitive damages claims and that the views of different tiers of the judiciary on these issues converge to a large extent.<sup>101</sup> Another explanation may lie in the discretionary nature of the award of punitive damages. As the Law Commission remarked, ‘a court or jury ... exercise[es] its discretion [in determining] whether to award exemplary damages (and if so, how much)’.<sup>102</sup> One would expect that there is very limited scope for appeal courts to interfere with discretionary decisions. This explanation is undermined by the fact that more appeals succeeded in relation to quantum than in relation to liability but the power to interfere was nevertheless reserved for cases in which the assessment of punitive damages by the trial court was patently problematic. 70 per cent of the awards which the appellate court considered to be excessive were outlier

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<sup>99</sup> Atkins (n 2) 83. See, also, Theodore Eisenberg and Michael Heise, ‘Plaintiphobia in State Courts? An Empirical Study of State Courts Trials on Appeal’ (2009) 38 JLS 121, 130 (a major civil appellate study from the US which showed that state appellate courts reversed trial court decisions in 32.1 per cent of all cases they heard during 2001).

<sup>100</sup> There is no information about the overall rate of appellate intervention with decisions on punitive damages in other jurisdictions. To the best of my knowledge, no empirical study of punitive damages on appeal has been undertaken in another country. However, studies from the US occasionally refer to the post-trial fate of exceptionally large punitive awards which are commonly assessed by juries (eg, Kip Viscusi, ‘The Blockbuster Punitive Damages Awards’ (2004) 53 Emory LJ 1405, 1415–19 reporting that a very small fraction of such awards (roughly 3 per cent) is affirmed on appeal with the remaining awards being disturbed in various ways (through reversals, reductions, orders for re-trials and settlements)).

<sup>101</sup> Eisenberg and Heise (n 99) 138.

<sup>102</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (Law Com CP No 132, 1993) 81. See, also, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 102.

awards in the first instance results.<sup>103</sup> This hints that appellate judges respect the margin of appreciation that trial courts enjoy in deciding the relevant issues and intervene only in unusual cases.

### 7.2.3 Appellate intervention with the assessment of punitive damages

In *Rookes v Barnard* Lord Devlin said: ‘If [a punitive damages award] has to be reviewed upon appeal, the appellate court ... must consider whether or not the punishment is, in all the circumstances, excessive’.<sup>104</sup> The barrier for characterising the award of a jury (as opposed to the award of a judge) as excessive has traditionally been higher. As Stephenson LJ noted in *Riches* ‘the [punitive damages] award of a jury, [as opposed to that of] a judge, [is] almost invulnerable to interference by an appellate court.’<sup>105</sup> This is further illustrated by Lord Kilbrandon’s remarks about the jury’s £393,947 punitive damages award in *Broome v Cassell & Co Ltd*: ‘That it is excessive I do not doubt, but that is not a sufficient reason for the award to be set aside. ... [W]hen one looks at a jury’s award ... one has to ask, whether it could have been made by sensible people acting reasonably, or whether it must have been arrived at capriciously, unconscionably or irrationally. On that test, I think the present award must stand’.<sup>106</sup> Additionally, prior to 1990, an appellate court could only set aside a jury award and could not substitute one of its own. This meant that in the event of appellate interference, the sum of punitive

<sup>103</sup> Appellate courts interfered with the assessment of ten punitive damages awards in total and seven of these awards were outliers in the first instance study. These awards were *John* (n 15); *Riches* (n 16); *Thompson (Hsu)* (n 15); *Thompson v CPM* [1998] QB 498 (CA); *Goswell* (n 15); *Gerald* (n 15); *Ramzan v Brookwide Ltd* [2011] EWCA Civ 985.

<sup>104</sup> *Rookes v Barnard* [1964] AC 1129 (HL) 1228. See, also, *Drane v Evangelou* [1978] 1 WLR 555 (CA) 461; *Ramdath v Daley* (1993) 25 HLR 273 (CA) 280; *Ramzan* (n 103) [83].

<sup>105</sup> *Riches* (n 16) 280. For detailed discussion of appellate interference with jury verdicts, see chapter 7.2.7 below.

<sup>106</sup> *Broome* (n 10) 1135.

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damages would ultimately fall to be determined by another jury. This position was altered by section 8 of the Courts and Legal Services Act 1990 which enabled the Court of Appeal to substitute ‘excessive or inadequate’ jury awards instead of ordering a new trial.<sup>107</sup>

The formulation that appellate intervention is permissible when the trial court’s assessment of punitive damages was ‘excessive’ is ambiguous.<sup>108</sup> Further guidance on what constitutes an ‘excessive’ award was provided in *Rantzen v MGN Ltd* in which Neill LJ stated that ‘the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny ...’.<sup>109</sup> Thus, it is unsurprising that the largest punitive damages awards at first instance were the ones that were disturbed on appeal. Recall that five of the ten highest awards granted at first instance were either set aside or reduced on appeal.<sup>110</sup> The highest award of punitive damages ever to be made by a trial court was set aside by the Court of Appeal because ‘it [was] out of all proportion to the facts’<sup>111</sup> of the case. The tendency of appellate courts to interfere with very large punitive damages awards also explains why the average reduction (£197,604) was much higher than the average and median post-appeal awards (which were £41,356 (£45,023) and £8,573 (£9,814) respectively)). A similar trend of interference with very large punitive awards is observed in empirical studies from the US. Vidmar and Rose report

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<sup>107</sup> See, also, CPR 52.20(3).

<sup>108</sup> This is presumably because the task of determining the appropriate level of punishment in each case is inherently difficult, see, eg, *Goswell* (n 15) p 6 (Simon Brown LJ): ‘By what touchstone should one judge ... a sufficient or insufficient sum to punish [the defendant]?; *Ramzan* (n 103) [82] (Arden LJ): ‘there is little guidance on the quantification of exemplary damages’.

<sup>109</sup> [1994] QB 670 (CA) 692. The statement refers to compensatory damages but the same logic presumably applies to punitive damages.

<sup>110</sup> See the text to nn 15–16.

<sup>111</sup> *Riches* (n 16) 283 (Parker LJ).

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that ‘mega awards look quite different when we consider the cases more closely. ... About half of the ... awards result in either no payment or reduced payment ... [and t]he largest punitive awards [a]re the least likely to survive intact’.<sup>112</sup> As for the Court of Appeal’s power to substitute ‘inadequate’ punitive damages awards, the results suggest that it has never been exercised. This is probably, in large part, due to lack of opportunity. The sample only included three appeals in which the claimants sought an increased award of punitive damages, all of which were unsuccessful.

The highest award to remain intact following an appeal in the UK was made by a jury in *Broome v Cassell & Co Ltd*. This was a defamation action by Jack Broome, a distinguished royal navy officer, who was falsely accused of being responsible for the destruction of a convoy during the Second World War. Because this was a jury award, the court had to decide whether the sum awarded ‘was so far excessive of what twelve reasonable men could have awarded that it ought to be set aside and a new trial ordered’.<sup>113</sup> The members of an enlarged panel of the House of Lords were split on this issue<sup>114</sup> but a bare majority upheld the award.

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<sup>112</sup> Neil Vidmar and Mary Rose, ‘Punitive Damages by Juries in Florida: In *Terrorem* and in Reality’ (2001) 38 HJL 487, 506–507. See, also, Michael Rustad, ‘In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data’ (1992) 78 Iowa LR 1, 59–60.

<sup>113</sup> (n 10) 1065 (Lord Hailsham LC).

<sup>114</sup> The award was upheld by Lord Hailsham LC (at 1066–67), Lord Reid (at 1091), Lord Morris (at 1100) and Lord Kilbrandon (at 1135). Cf Viscount Dilhorne (at 1106), Lord Wilberforce (at 1118) and Lord Diplock (at 1123) who thought that the award was in excess of the most that twelve reasonable men could be expected to give.

#### 7.2.4 Appellate intervention by trial court

Another interesting finding relates to appellate intervention by trial court. The results showed a very similar overall intervention rate for High Court (25 per cent) and County Court decisions (24.4 per cent). Breaking this down by type of appeal, appeals on liability for punitive damages were allowed in 20 per cent of High Court cases and in 21.5 per cent of County Court cases. By contrast, the intervention rate on assessment was substantially higher for appeals from the High Court (44.4 per cent as opposed to 35.3 per cent for appeals from County Courts).<sup>115</sup>

At first sight, this finding might seem surprising. It could plausibly be expected that High Court decisions would be affirmed more often than County Court decisions on the basis that courts which are higher in the judicial hierarchy are likely to give more reliable decisions.<sup>116</sup> This result also clashes with empirical evidence from other areas of private law reporting that County Court decisions are overturned more frequently than decisions of the High Court. Data published by the Ministry of Justice reveal that, between 2008 and 2019,<sup>117</sup> the Court of Appeal overturned decisions by the Queen's Bench Division of the High Court at a rate of 42.6 per cent and decisions from County Courts at a rate of 46.4 per cent.<sup>118</sup> Goudkamp and Nolan's appellate study on

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<sup>115</sup> See Figure 14.

<sup>116</sup> Goudkamp and Nolan (n 97) para 5.45.

<sup>117</sup> Earlier releases are not publicly available.

<sup>118</sup> Ministry of Justice, 'The Royal Courts of Justice Annual Tables' (n 80). Appeals in family and admiralty matters were not considered.

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contributory negligence similarly reports an intervention rate of 40 per cent in appeals from County Courts and 34 per cent in appeals from the High Court.<sup>119</sup>

The disparity in reversal rates on assessment by trial court (which was statistically significant)<sup>120</sup> can be explained by the fact that until 1991 jurisdictional limits prevented County Courts from awarding a total amount in excess of £5,000.<sup>121</sup> The adjudication of low value disputes by County Courts probably had an effect on the number of appeals and on the extent of intervention with the assessment of punitive damages awards by these courts. It is plausible to suppose that litigants may not be interested in pursuing an appeal where the stakes are lower than £5,000 and that appellate courts may deem that it is not worth interfering with such low awards, especially considering the discretionary character of punitive damages. This explanation finds support in the results. All of the successful appeals against the assessment of punitive damages by a County Court were decided after 1991.<sup>122</sup> By contrast, such jurisdictional limits never applied to the High Court.

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<sup>119</sup> Goudkamp and Nolan (n 97) para 5.14.

<sup>120</sup> See n 59.

<sup>121</sup> County Courts Jurisdiction Order 1981, SI 1981/1123, art 2 (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, sch 1, pt I, para 1).

<sup>122</sup> The dataset includes only three appeals against the assessment of punitive damages by County Courts for the period between 1964 and 1990. All three appeals were dismissed. By contrast, during the period between 1991 and 2020, there were 14 appeals against the assessment of punitive damages by County Courts. Six of these appeals were allowed and so, the intervention rate with the assessment of punitive damages awards by County Courts is higher when the post-1991 era is isolated (ie, 42.9 per cent as opposed to 35.3 per cent, which is the intervention rate with County Court assessment reported throughout the entire study period).

### 7.2.5 The success rate of appeals by party

The data on the success rate of appeals by party indicate that defendants are more likely to prevail on an appeal than claimants.<sup>123</sup> This is consistent with other empirical appellate studies, which have displayed similar differences in intervention rates depending on the party appealing. For example, Laleng’s study of personal injury cases at the Court of Appeal reported a success rate of 49.1 per cent for appeals by defendants as opposed to 37.4 per cent for appeals by claimants.<sup>124</sup>

A question arises as to the cause of this asymmetry. These pro-defendant results may simply reflect the desire of appellate judges to limit the scope of punitive damages due to their ‘anomalous’ nature. There is evidence that some appellate judges view punitive damages as an oddity which ought to be restrained. For example, Flaux LJ said in *FCS*: ‘Exemplary damages remain anomalous ... It would therefore be inappropriate to extend the circumstances in which they can be awarded ...’.<sup>125</sup> In *Breslin v McKevitt* Higgins LJ noted that ‘given the anomalous nature of the remedy and its longstanding restriction ... by the highest judicial authority, we do not consider that it would be appropriate for this court to embark upon [an] extension [of the scope of punitive damages]’.<sup>126</sup> And Lord Scott’s remark in *Kuddus* that ‘[t]he profit made by a wrongdoer can be extracted from him [via restitutionary damages] without the need to rely on the

<sup>123</sup> The overall intervention rate was 34.3 per cent for appeals by defendants and 12.5 per cent for appeals by claimants. See Figure 13.

<sup>124</sup> Laleng (n 98) 44–45. See, also, Eisenberg and Heise (n 99) 130, 138. Cf Goudkamp and Nolan (n 97) paras 5.16–5.17.

<sup>125</sup> *FCS* (n 49) [25]. On the question of whether the characterisation of punitive damages as ‘anomalous’ is justified, see James Goudkamp and Eleni Katsampouka, ‘Punitive Damages and the Place of Punishment in Private Law’ (2021) MLR (forthcoming).

<sup>126</sup> [2011] NICA 33 [139].

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anomaly of exemplary damages'<sup>127</sup> is also indicative of an antipathy towards the remedy.<sup>128</sup> This conservative attitude towards punitive damages is further reflected in the absence of a single case in the appellate sample in which the Court of Appeal increased the amount awarded as punitive damages. Successful appeals against the assessment of punitive damages concerned exclusively awards which were deemed as excessive rather than inadequate. That said, claimants challenged the determinations of trial courts on the quantum of punitive damages in just three cases<sup>129</sup> which means that there were not many occasions in which the Court of Appeal had an opportunity to augment such awards. Thus, it is acknowledged that there is a great element of speculation in this explanation. However, assuming that a bias against the institution of punitive damages exists, it is possible that this bias is not as intense amongst trial courts. As the Law Commission observed, '[punitive] damages have enjoyed a robust existence at lower court level ... However, [they] continue to attract controversy and criticism, particularly at appellate level ...'.<sup>130</sup> This explanation also tallies with the lower post-appeal success rate of punitive damages claims.<sup>131</sup> Thus, defendants may score better than claimants when it

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<sup>127</sup> *Kuddus v CC Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 [109]. For similar statements, see *John* (n 15) 617 (Sir Thomas Bingham MR): 'in English law the award of exemplary damages is regarded as ... anomalous. Authority ... does not encourage ... any relaxation of the conditions for making them'; *Broome* (n 10) 1086 (Lord Reid): Punitive damages are 'an undesirable anomaly [which] should not be permitted in any class of case where its use was not covered by authority'.

<sup>128</sup> The statement is also incorrect because there are circumstances in which a defendant may profit from their wrong for which restitutionary damages will be unavailable (eg, in a claim for the tort of deceit).

<sup>129</sup> By contrast, defendants brought 23 appeals against the assessment of punitive damages.

<sup>130</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 102) 16.

<sup>131</sup> Remember that punitive damages claims succeeded at a rate of 46.4 per cent at first instance as opposed to 42.6 per cent on appeal.

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comes to appeals on punitive damages simply because the remedy is disfavoured by some appellate judges.

Another possibility is that a pro-claimant bias prevails at first instance (or that appellate judges believe in the existence of such a bias among lower courts) and that appellate courts try to neutralise the effects of this (perceived) bias by delivering pro-defendant decisions.<sup>132</sup> Trial courts, especially when juries are involved, may be influenced by an impulse to favour victims whose rights have been infringed in an outrageous fashion. Compassion for victims may result to favourable outcomes for claimants at first instance. Lower courts could plausibly be more prone to act on such instincts because they are not as worried as appellate courts about the future effect of their decisions.<sup>133</sup> However, this explanation is not very convincing because if trial courts were inclined to favour claimants who seek punitive damages one would expect a starker difference to be observed between the outcomes of punitive damages claims<sup>134</sup> at first instance and following an appeal.

A final, and cogent, reason for the higher percentage of victories by defendants in the appellate courts is that when defendants seek appellate review, they tend to pursue objectively stronger cases than claimants.<sup>135</sup> By contrast, a victim whose claim for punitive damages has been dismissed at first instance may be driven by a desire to ‘be

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<sup>132</sup> Eisenberg and Heise (n 99) 124.

<sup>133</sup> *ibid* 125.

<sup>134</sup> In the sense that the overall success rate of punitive damages claims and the average and median punitive awards would diverge substantially in the first instance and in the appellate study.

<sup>135</sup> Harry Edwards and Linda Elliott, ‘Beware of Numbers (and Unsupported Claims of Judicial Bias)’ (2002) 80 WULQ 723, 724: ‘[I]f one group of litigants presents more viable legal claims than another, they will win reversals at a higher rate’.

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heard fully on appeal'<sup>136</sup> even if the chances of winning are not in his or her favour. An examination of the sampled decisions on applications for permission to appeal ('PTA')<sup>137</sup> shows that defendants were able to identify more accurately the appeals that have a stronger chance of success. It is useful to revisit the test on obtaining a permission to appeal.<sup>138</sup> A party can obtain permission to appeal against a trial court decision if: (1) the court considers that the appeal would have a real prospect of success; or (2) there is some other compelling reason for the appeal to be heard.<sup>139</sup> All PTA applications in the sample were decided based on whether there were real prospects of the appellate court overturning the first instance determinations on the question of punitive damages.<sup>140</sup> The sample contained 24 applications for PTA in total. 18 (75 per cent) of these applications were made by claimants and the remaining six applications (25 per cent) were made by defendants. Three out of every four unsuccessful PTA applications were brought by claimants, which suggests that they are more likely to seek to pursue hopeless appeals than defendants.

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<sup>136</sup> Eisenberg and Heise (n 99) 126.

<sup>137</sup> For the purposes of this study, PTA applications which were denied were treated as functionally equivalent to decisions in which the appeal was dismissed, see chapter 5.2.1, text to nn 76–81.

<sup>138</sup> The test was first introduced in chapter 5.2.1.

<sup>139</sup> CPR 52.6. For the pre-CPR regime, see the RSC Ord 59, para 14(2).

<sup>140</sup> See, also, chapter 5.2.1.

### 7.2.6 Appellate intervention and legal personality

Another noteworthy result is that appellate intervention appears to be influenced not only by the identity of the litigants (ie, claimant or defendant) but also by the legal personality of the parties. Appeals by corporations and public bodies succeeded much more frequently than appeals by natural persons.<sup>141</sup> This pattern persists when the intervention rate is assessed through the prism of the legal personality of the respondent, with the results showing that appeals against corporations and especially against public bodies rarely succeeded.<sup>142</sup> Interestingly, corporations and public bodies, when they appealed, were almost always a defendant in the proceedings below.<sup>143</sup> And, in the vast majority of appeals against public bodies and corporations, those entities were again defendants to the claim for punitive damages.<sup>144</sup> Thus, the better performance of defendants in appeals on punitive damages may simply be attributable to their legal personality. In other words, a ‘bias’ may exist in favour of corporations and public bodies and not in favour of defendants. Statistical analysis reinforces this conclusion.<sup>145</sup>

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<sup>141</sup> The overall intervention rate was 16.8 per cent for appeals by natural persons, 47.3 per cent for appeals by corporations and 50 per cent for appeals by public bodies. See Figure 20.

<sup>142</sup> The overall intervention rate was 32.5 per cent for appeals against natural persons, 18.7 per cent for appeals against corporations and 9.1 per cent for appeals against public bodies. See Figure 22.

<sup>143</sup> 31 appeals were brought by corporations and public bodies. The corporation/public body was a defendant in 29 (93.5 per cent) of these appeals.

<sup>144</sup> 49 appeals were brought against corporations and public bodies and these entities were defendants in 40 (81.6 per cent) of these appeals.

<sup>145</sup> The statistician was asked to test whether it was *defendants* who were winning more frequently, or *corporations/public bodies*. This was done by examining the ‘mixed appeals’ in which one party was a natural person and the other was an artificial legal entity (corporation/public body). Those cases were divided into four groups depending on whether the natural person was the claimant or the defendant, and on who won. The overall success rate for natural persons in mixed cases was 26.3 per cent, which rate was not affected significantly by whether the natural person was the claimant (29.2 per cent success rate) or the defendant (9.1 per cent success rate): Fisher’s Exact test p-value=0.60. However, the overall success rate for natural persons in mixed appeals (26.3 per cent) differed significantly (p<0.0001) from 50 per cent, which rate one would expect to observe if

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The discrepancy is especially noticeable in disputes between public bodies and natural persons (ie, in all disputes falling within ‘Category 1’ in the sample). When a public body appealed against an order made in favour of a natural person, the appellate court intervened 50 per cent of the time in favour of the public body. By contrast, natural persons appealing against an order made in favour of a public body won only 9.1 per cent of their appeals.<sup>146</sup> These results suggest that appeals in which the pair of litigants is ‘public body vs natural person’ or ‘natural person vs public body’ will likely be resolved in favour of the public body. Importantly, this is consistent with the first instance results and the results related to post-appeal outcomes (both of which reported a very low success rate of the claim for punitive damages against public bodies).<sup>147</sup> Similar findings are presented in other empirical appellate studies. For example, Atkins’s empirical study of Court of Appeal decisions handed down between 1983 and 1985 showed that natural persons fared rather poorly and concluded that party characteristics affect appellate intervention.<sup>148</sup>

Two potential reasons for the better performance of public bodies are offered here. The first is that courts are slow to punish a defendant who is only vicariously liable

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natural persons and corporations/public bodies are equally likely to win in mixed cases. Thus, natural persons were less likely than corporations/public bodies to win on appeal regardless of whichever party was the defendant.

<sup>146</sup> The public body was a defendant to the claim for punitive damages in all of these disputes.

<sup>147</sup> In the first instance study, punitive damages were awarded at a rate of 28.3 per cent against public bodies, see chapter 6.1.4(1). The post-appeal success rate in these claims was 22.4 per cent, see Figure 8.

<sup>148</sup> Burton Atkins, ‘Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal’ (1991) 35 *AJPS* 881, 894: the government won more than 58.3 per cent of its appeals against an individual respondent and lost 24.5 per cent of appeals launched against it by an individual appellant. See, also, Galanter (n 68) 101–102 fn 18 reporting that the US government wins about 70 per cent of the appeals it brings and 56 per cent of the appeals that are brought against it.

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for the wrong committed, especially considering that the punishment in this context comes at the expense of taxpayers.<sup>149</sup> The second likely explanation is that this phenomenon is an illustration of the ‘party capability theory’.<sup>150</sup> In short, the main implication of this theory for present purposes is that public bodies are able to manage more efficiently the claims in which they are involved compared with natural persons by virtue of their financial resources and greater litigation experience. The consistent tendency of public bodies to have the most court victories in punitive damages disputes may therefore be a product of inequalities in resources and competency between different types of litigants.

### **7.2.7 Appellate intervention with jury verdicts**

A final topic that merits closer examination is the attitude of appellate judges to the assessment of punitive damages by juries. The findings in this regard are mainly of historical interest considering the decline in the use of civil juries over time and the limited availability of jury trials today.<sup>151</sup> Nevertheless, these results are not entirely devoid of practical significance considering that claims for malicious prosecution and false imprisonment can still be heard by juries,<sup>152</sup> and that punitive damages are not

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<sup>149</sup> *Thompson* (n 15). The defendant in all the cases concerned was vicariously as opposed to directly liable. See, also, the discussion in chapter 6.2.2(3).

<sup>150</sup> See the discussion in chapter 6.2.2(3).

<sup>151</sup> For a more detailed discussion of the gradual decline of civil juries, see chapter 6.2.1(10).

<sup>152</sup> Senior Courts Act 1981, s 69(1); County Courts Act 1984, s 66(3). Although fraud cases can also be heard by juries, all of the punitive damages claims for fraud in both samples were decided in a ‘judge-only trial’.

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infrequently sought for these causes of action<sup>153</sup> (especially in the context of police misconduct).

Appeal courts interfered with awards assessed by juries at a rate of 69.2 per cent which is approximately nine times higher than the rate of appellate intervention with awards assessed by judges (7.7 per cent).<sup>154</sup> A similar result has been reported in empirical studies from the US. The relevant findings show that post-trial adjustments of jury awards are common and that pressure for change is nearly always in a downward direction.<sup>155</sup>

In some respects, the fact that appeal courts were more inclined to interfere with jury-made punitive damages awards than judge-made awards is surprising. This is because juries provide no reasons for their decisions and one would expect this feature to inhibit ex post facto appellate control of their awards.<sup>156</sup> Additionally, juries have a democratic aspect to them. When judges allow an appeal against a jury verdict they are

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<sup>153</sup> Claims for false imprisonment and malicious prosecution accounted for 21.3 per cent of the total number of claims in the first instance study and for 29.6 per cent of the total number of claims in the appellate study.

<sup>154</sup> See Figure 24. By contrast, jury decisions as to whether the defendant should be liable for punitive damages appear to be much more insulated from reversal by appellate courts than judge decisions. The appellate intervention rate on liability for punitive damages was 7.1 per cent for jury trials and 23.2 per cent for judge trials.

<sup>155</sup> US General Accounting Office, 'Product Liability: Verdicts and Case Resolution in Five States' 42 (1989) <<https://www.gao.gov/assets/hrd-89-99.pdf>> accessed 30 July 2021: An appellate survey of product liability cases in five states between 1983 and 1985 found post-trial reductions in 82 per cent of the punitive damages verdicts studied; Mark Peterson, Syam Sarma and Michael Shanley, 'Punitive Damages: Empirical Findings' (1987) 27–28 RAND Institute for Civil Justice <<https://www.rand.org/pubs/reports/R3311.html>> accessed 30 July 2021: The study surveyed 34 jury trials concluded between 1979 and 1983 and found that defendants paid the original jury award in only half of the cases examined; Rustad (n 112) 51, 56: the study utilised a sample of 355 punitive damages awards between 1965 and 1990 and found that judges frequently reverse or remit punitive awards by juries and that the full award was paid in 40.2 per cent of the jury verdicts.

<sup>156</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 102) 141; Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 102) 124.

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proceeding in the face of something that is imbued with a democratic attribute. And, historically it was more difficult for appellate courts to interfere with a jury's assessment of punitive damages. As already explained, prior to 1990, 'all that a reviewing court c[ould] do [wa]s to quash the jury's decision if it th[ought] the punishment awarded [wa]s more than any twelve reasonable men could award. The court c[ould] not substitute its own award. The punishment [would] then be decided by another jury and if they too award[ed] heavy punishment the court [wa]s virtually powerless'.<sup>157</sup> This situation changed in 1990 when the Court of Appeal was given the power to substitute for the sum awarded by the jury such sum as it considered to be proper.<sup>158</sup> Thus, most of the sampled cases in which there was appellate intervention with jury-assessed awards appear after 1990.<sup>159</sup>

The perceived sanctity of jury verdicts led to a series of statements about jury damages awards being inviolable. For example, the Law Commission remarked in its Consultation Paper on *Aggravated, Exemplary and Restitutionary Damages* that 'it will be difficult for an appeal court to reject [a jury's] decision'.<sup>160</sup> And according to Lord Diplock in *Broome v Cassell & Co Ltd* 'an appellate court should be more reluctant to disturb an assessment of damages by a jury than an assessment by a judge'.<sup>161</sup> However, these statements do not appear to be supported by the results which indicate that, mostly

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<sup>157</sup> *Broome* (n 10) 1087 (Lord Reid).

<sup>158</sup> Courts and Legal Services Act 1990, s 8; CPR 52.20(3). This power was exercised in a series of cases in the 1990s.

<sup>159</sup> Eg, *John* (n 15); *Thompson* (n 15); *Goswell* (n 15); *Gerald* (n 15). By contrast, the sample includes only one case decided prior to 1990 in which the punitive damages award was set aside: *Riches* (n 16).

<sup>160</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (n 102) 141.

<sup>161</sup> (n 10) 1122.

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during the 1990s, appellate judges actively employed existing mechanisms in controlling the size of such awards. On the other hand, the very low intervention rate with jury determinations as to liability for punitive damages (7.1 per cent as opposed to 23.2 per cent for judge trials) suggests an unwillingness by appellate judges to question the jury's findings as to whether the impugned conduct merited punishment.

Two possible explanations for the high incidence of appellate intervention with the assessment of punitive damages in jury trials are offered. The first is that the exercise of assessing punitive damages is more difficult for a jury than it is for a judge so that juries are simply unable to discharge this role effectively. This leads to a great variability in their awards<sup>162</sup> and to heightened intervention at the appellate level. This was the view of the Law Commission which accurately observed in its Report on *Aggravated, Exemplary and Restitutionary Damages* that 'in a succession of ... cases [from the 1990s], the Court of Appeal departed from past practice, ... by exercising a closer degree of ... control over "excessive" jury awards'<sup>163</sup> and called for an end to jury-assessed punitive damages based on the belief that judges are better qualified for the job.<sup>164</sup> There is good reason to accept this basis for the Law Commission's recommendation to end jury-led assessment. The calculation of punitive damages is an intellectual exercise which arguably can be performed more easily by professional judges (who are also likely to be aware of past awards and to care more about conformity with them) than by juries. As Salmon LJ observed in *Broome*, '[in assessing punitive damages] the jury will have to go

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<sup>162</sup> Remember that in the first instance study, jury awards were much higher on average than judge awards. Jury awards also presented great variability, with the lowest jury award being £104 (£104) and the highest jury award being £570,660 (£818,578), see chapters 6.1.6 and 7.1.2(6).

<sup>163</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 102) 74.

<sup>164</sup> *ibid* 126.

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through an intellectual process more appropriate for a philosopher or senior wrangler than for plain men of common sense.’<sup>165</sup> By contrast, the task of assessing whether conduct is blameworthy is simpler and easier to perform for ‘men of common sense’ than the task of fixing a punishment for that blameworthy conduct. This could explain the comparatively low intervention rate with jury verdicts on liability for punitive damages.

Another explanation for the greater propensity of appellate courts to intervene with jury-assessed punitive awards is that although juries, in fact, behave reasonably in quantifying punitive damages, the unusual occasions on which they award arbitrary sums attract considerable attention and are subjected to rigorous appellate scrutiny. This was the view of Salmon LJ who remarked in *Broome*: ‘[S]ometimes - though rarely, I think - juries do award damages which are beyond all reason. When they do, such awards naturally attract wide publicity. ... [O]n the very rare occasions when a jury’s award is clearly out of all reason this court has ample power to interfere and it does not hesitate to use that power’.<sup>166</sup> It is likely that jury verdicts which are appealed are atypical and unrepresentative of the general population of decisions in which punitive damages are calculated by juries. The very small number of jury trials in the appellate sample may simply indicate that the study focuses on a group of jury awards which were inherently problematic. This does not necessarily mean that all jury awards follow the same pattern. Besides, the fact that juries provide no reasons for their decisions means that these

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<sup>165</sup> *Broome v Cassell & Co Ltd* [1971] 2 QB 354 (CA) 367.

<sup>166</sup> *ibid* 388–389.

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decisions are not reported or otherwise made readily available. Thus, a jury verdict will not normally be easily accessible unless it has been appealed.<sup>167</sup>

In short, the high degree of appellate intervention with jury-assessed punitive damages awards could be indicative of a general pathology in the performance of juries when they are in charge of quantification. But it could also be attributable to the fact that jury verdicts which have been appealed may be extraordinary and thus illustrative of only a small part of the overall picture. Further research based on a larger sample of jury verdicts would need to be undertaken to resolve this debate fully. Either way, the results clearly show one thing, namely, when juries award exorbitant amounts as punitive damages, the appellate courts do not hesitate to use their power to interfere by reducing or setting aside the verdicts. And this reaffirms, once again, that there is no necessity for the caps that Lord Devlin sought to impose on punitive damages awards in *Rookes* when he said that ‘it [may be] necessary to ... place some arbitrary limit on awards of damages that are made by way of punishment’.<sup>168</sup>

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<sup>167</sup> It is relevant that of the 67 jury trials in the first instance sample only two were accessed directly.

<sup>168</sup> *Rookes* (n 104) 1227–28.

### 7.3 CONCLUSION

This chapter examined the operation of the law of punitive damages on appeal. The two central issues addressed were: (1) the post-appeal outcome of punitive damages claims (ie, the rate at which punitive damages are awarded and the quantum of awards following an appeal); and (2) the incidence of appellate intervention with first instance decisions on punitive damages.

The principal findings with regards to post-appeal outcomes are set out below:

- (1) The post-appeal success rate of punitive damages claims was 42.6 per cent. The average post-appeal punitive damages award was £41,356 (£45,023). The median post-appeal award was £8,573 (£9,814).
- (2) Punitive damages were awarded more frequently in ‘Category 2’ cases and especially in cases involving the violation of property rights.
- (3) When the defendant was a corporation or a public body the quantum of punitive damages was, on average, higher than when the defendant was a natural person.
- (4) Male claimants were awarded higher amounts as punitive damages than female claimants.
- (5) In most of the cases resulting in a punitive award, the defendant had not otherwise been sanctioned for their misconduct.
- (6) Punitive damages were frequently awarded in cases where aggravated damages had also been awarded. The results were suggestive of a loose positive relationship between the amounts awarded as punitive damages and the amounts awarded as aggravated damages and total compensatory damages.

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The most important findings with regards to appellate intervention are as follows:

(1) Roughly one out of four appeals on punitive damages (24.6 per cent of all appeals) was allowed. Appeals against the assessment of punitive damages were allowed more often (at a rate of 38.5 per cent) than appeals against liability for punitive damages (which succeeded at a rate of 21 per cent).

(2) When appellate courts intervened in connection with the assessment of punitive damages, they uniformly did so by reducing the award. And, in most cases, appellate courts reduced the award by a substantial amount (up to 92.5 per cent). The average reduction was £197,604 (£197,604). The majority of the highest awards granted at first instance were reduced on appeal.

(3) While the chances of a successful appeal on liability for punitive damages were similar for decisions from the High Court and the County Court, appeals against the assessment of punitive damages by the High Court were much more likely to succeed than appeals against the assessment of punitive damages by the County Court.

(4) Defendants were much more successful than claimants in their appeals, winning at a rate (34.3 per cent) which was almost three times higher than the success rate of appeals by claimants (12.5 per cent).

(5) Corporations and public bodies were much more likely to secure a favourable outcome following an appeal than natural persons.

(6) Appellate courts were much more likely to intervene where punitive damages were assessed by a jury than by a judge. By contrast, jury determinations on the issue

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of liability for punitive damages were disturbed less frequently than the corresponding judicial determinations.

## **PART III: REASSESSING THE LAW**

## CHAPTER 8: REASSESSING THE *ROOKES V BARNARD* CATEGORIES

### 8.1 INTRODUCTION

In the leading case on the modern law of punitive damages, *Rookes v Barnard*,<sup>1</sup> Lord Devlin considered that precedent warranted confining the jurisdiction to award the remedy to two case categories at common law: (1) oppressive, arbitrary or unconstitutional conduct by government servants ('Category 1') and (2) profit-seeking conduct aimed at exceeding the compensation payable to the claimant ('Category 2'). To these two common law categories, he added instances of statutory authorisation of punitive damages.

After reviewing the case law on punitive damages, Lord Devlin said: 'These authorities convince me ... that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose ... I propose to state what these two categories are ...'.<sup>2</sup> In his words, the categories '[we]re established as part of the common law'.<sup>3</sup> Lord Devlin's decision in *Rookes* thus proceeds on the footing that existing authority was being followed and that his proposed categories were founded on precedent. This was accepted by the Law Commission in its Consultation Paper on *Aggravated, Exemplary and Restitutionary Damages*: 'At common law [Lord Devlin] limited [the] scope [of punitive damages] to *two classes of case ... where their availability was justified by precedent*'.<sup>4</sup>

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<sup>1</sup> [1964] AC 1129 (HL).

<sup>2</sup> *ibid* 1225–26.

<sup>3</sup> *ibid* 1228. See, also, *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) 1088 (Lord Reid): '[F]irmly established authority required us to accept th[e second *Rookes*] category ... but did not require us to go farther'.

<sup>4</sup> Law Commission, *Aggravated Exemplary and Restitutionary Damages: A Consultation Paper* (Law Com CP No 132, 1993) 14–15 (emphasis added).

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Similarly, Ernest Weinrib has said: ‘In England ... the House of Lords ... restricted the scope [of punitive damages] *to the minimum allowed by precedent ...*’.<sup>5</sup>

This chapter critiques the *Rookes v Barnard* categories and proceeds in three stages. First, the law of punitive damages immediately before 1964, when *Rookes* was decided, is outlined. Second, I evaluate if, and to what extent, the *Rookes* categories are based on precedent. Finally, I consider if the *Rookes* categories are justified normatively. My analysis is confined to the first two *Rookes* categories (ie, the common law categories). Instances of statutory authorisation of punitive damages (which have had virtually no practical importance until today)<sup>6</sup> are outside the scope of this chapter.

My principal argument is that contrary to Lord Devlin’s claim the *Rookes* categories cannot be justified by reference to precedent. That is because (1) the cases on which Lord Devlin relied to establish his categories do not sufficiently support them; and (2) there are cases in which punitive damages have been awarded (including decisions by the House of Lords) that fall outside the categories and that Lord Devlin either did not consider at all or he wrongly interpreted as aggravated damages cases. I also argue that although Lord Devlin’s categories capture important instances of punishment-worthy wrongdoing, the argument for confining civil punishment only within these two case categories is unconvincing. It should be recalled that in favouring an expansion of the availability of the remedy beyond the *Rookes* categories, I proceed on the footing that the judicially endorsed justifications for punitive damages (which are primarily retribution and

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<sup>5</sup> Ernest Weinrib, ‘Punishment and Disgorgement as Contract Remedies’ (2003) 78 Chicago-Kent LR 55, 84 (emphasis added). Cf Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart 2005) 68 (brief remarks about Lord Devlin not following precedent in forming the *Rookes* categories).

<sup>6</sup> The instances of statutory authorisation of punitive damages are discussed in chapter 2.1.3.

## REASSESSING THE *ROOKES V BARNARD* CATEGORIES

deterrence) constitute good reasons for making such awards.<sup>7</sup> Thus, to the extent that these goals are not achieved by the criminal law or other mechanisms, punitive damages should be available to fill in that gap irrespective of whether the conduct in question satisfies the ‘categories test’.

The analysis is original because no one has explored systematically the pre-*Rookes* law or compared it with what was done in *Rookes*. To the best of my knowledge, there is no contribution<sup>8</sup> focusing solely on the law of punitive damages as it stood between 1763, when the term ‘exemplary damages’ entered into the lawyer’s vocabulary,<sup>9</sup> and 1964, when *Rookes* was decided. The analysis is also important because fifty-seven years after the decision in *Rookes*, the ‘categories test’ still controls the English law of punitive damages. If Lord Devlin was wrong to say that his categories ‘[we]re established as part of the common law’ then this error removes a justification for the current English law of punitive damages.

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<sup>7</sup> The courts have accepted these justifications as legitimate goals of private law for centuries, see chapter 3.3.

<sup>8</sup> Historical pieces tend to examine the institution of civil punishment within a much broader setting and time frame, eg, Dorsey Ellis, ‘Fairness and Efficiency in the Law of Punitive Damages’ (1982) 56 Southern California LR 1, 12–20 (examining the functions of punitive damages from 1622 onwards); Thomas Colby, ‘Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual Private Wrongs’ (2003) 87 Minnesota LR 583, 613–657 (focusing on the functions of punitive damages in ‘US law’ with occasional references to English law from the 18th century onwards); Jason Taliadoros, ‘The Roots of Punitive Damages at Common Law: A Longer History’ (2016) 64 Cleveland LR 251 (starting from Roman law).

<sup>9</sup> The term is commonly recognised as having emerged in *Huckle v Money* (1763) 2 Wils KB 205, 95 ER 768 and *Wilkes v Wood* (1763) Lofft 1, 98 ER 489.

## 8.2 THE LAW BEFORE *ROOKES V BARNARD*

### 8.2.1 Availability of punitive damages generally

The rule on the availability of punitive damages in English law between 1763 and 1964 can be summarised in the following quote from Devlin J's direction to the jury in *Loudon v Ryder*: '[Punitive damages can be awarded if there has been] a wanton and wilful disregard of the law, or for somebody else's rights'.<sup>10</sup> Similarly, according to the twelfth edition of *Mayne and McGregor on Damages*, punitive damages were awarded 'where the conduct of the defendant merit[ed] punishment, which [wa]s only considered to be so where his conduct [wa]s wanton, as where it disclose[d] fraud, malice, violence, cruelty, insolence or the like, or ... where he act[ed] in contumelious disregard of the plaintiff's rights'.<sup>11</sup>

### 8.2.2 Wrongs in respect of which punitive damages were available

During the period under examination, punitive damages could be awarded for a variety of causes of action including assault,<sup>12</sup> false imprisonment,<sup>13</sup> trespass to land,<sup>14</sup> private nuisance,<sup>15</sup> trespass to goods,<sup>16</sup> conversion,<sup>17</sup> copyright infringement,<sup>18</sup> malicious prosecu-

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<sup>10</sup> *Loudon v Ryder* [1953] 2 QB 202 (CA) 209.

<sup>11</sup> Harvey McGregor, *Mayne and McGregor on Damages* (12th edn, Sweet & Maxwell 1961) para 207.

<sup>12</sup> Eg, *Benson v Frederick* (1766) 3 Burr 1845, 97 ER 1130.

<sup>13</sup> Eg, *Dumbell v Roberts* [1944] 1 All ER 326 (CA) 330.

<sup>14</sup> Eg, *Wilkes* (n 9).

<sup>15</sup> Eg, *Bell v Midland Railway Co* (1861) 10 CBNS 287, 142 ER 462.

<sup>16</sup> Eg, *Owen and Smith v Reo Motors* [1934] All ER Rep 734 (CA) 743.

<sup>17</sup> Eg, *Thomas v Harris* (1858) 1 F&F 67, 175 ER 629.

<sup>18</sup> Eg, *Williams v Settle* [1960] 1 WLR 1072 (CA).

## REASSESSING THE *ROOKES V BARNARD* CATEGORIES

tion,<sup>19</sup> seduction,<sup>20</sup> enticement<sup>21</sup> and defamation.<sup>22</sup>

Punitive damages were also probably available in claims in the nascent tort of negligence. In *Emblen v Myers*<sup>23</sup> the defendant demolished his house ‘negligently and with a want of due care’<sup>24</sup> thus damaging the claimant’s neighbouring property. He did so because the claimant had refused to sell his premises to him. The trial judge told the jury that if they thought that the defendant had acted ‘wilfully [and] with a high hand ... they might find exemplary damages’.<sup>25</sup> The jury awarded the claimant £75 (£9,290 in 2021)<sup>26</sup> which was not considered to be excessive by the Court of Exchequer. Wilde B said: ‘[I]t was competent for the jury to give exemplary damages, because ... the defendant acted with a high hand ...’.<sup>27</sup>

Although this case could be treated as an act of trespass as well as negligence, Channell B thought that ‘it must be read as charging the defendant with wilful negligence’.<sup>28</sup> He then continued: ‘If in actions of trespass the plaintiff may recover

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<sup>19</sup> Eg, *Leith v Pope* (1779) 2 BI R 1327, 96 ER 777.

<sup>20</sup> Eg, *Tullidge v Wade* (1769) 3 Wils KB 18, 95 ER 909.

<sup>21</sup> Eg, *Lough v Ward* [1945] 2 All ER 338 (KBD).

<sup>22</sup> Eg, *Groom v Crocker* [1939] 1 KB 194 (CA) 208.

<sup>23</sup> (1860) 6 H&N 54, 158 ER 23. This case pre-dates *Donoghue v Stevenson* [1932] AC 562 (HL) by a long period. It is not clear that the tort of negligence existed in its modern form when *Emblen* was decided.

<sup>24</sup> *Emblen* (n 23) 58, 25 (Pollock CB).

<sup>25</sup> *ibid* 56, 24.

<sup>26</sup> All figures have been adjusted for inflation using an online inflation calculator: <<https://www.officialdata.org/UK-inflation>> accessed 30 July 2021.

<sup>27</sup> *Emblen* (n 23) 60, 25.

<sup>28</sup> *ibid* 59, 25.

## REASSESSING THE *ROOKES V BARNARD* CATEGORIES

damages beyond the amount of the actual injury, I see no reason why the same rule should not extend to wilful negligence'.<sup>29</sup>

The case was relied on by courts in order to award punitive damages in subsequent decisions.<sup>30</sup> *Emblen* was also cited as authority establishing the availability of punitive damages for negligence in the third edition of *Halsbury's Laws*.<sup>31</sup>

Finally, during the period under examination, punitive damages were generally thought to be unavailable for breach of contract although for many years there was no case in which the issue was authoritatively decided.<sup>32</sup> There were three exceptions to this rule: Punitive damages could be awarded in contractual actions (1) for breach of promise of marriage;<sup>33</sup> (2) against a banker for refusing to pay a customer-trader's cheque although the banker had funds of the customer to meet it;<sup>34</sup> and (3) against the vendor of real estate who failed to make title.<sup>35</sup>

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<sup>29</sup> *ibid* 60, 25.

<sup>30</sup> Eg, *Gray v Motor Accident Commission* (1998) 196 CLR 1 (HCA) 28.

<sup>31</sup> *Halsbury's Laws* (3rd edn, 1955) vol 11, 224 fn (l). This was the most recent edition before *Rookes* was decided. The same reference exists in the two previous editions of the series. See, also, John Mayne and Lumley Smith, *Mayne's Treatise on Damages* (4th edn, Stevens 1884) 43-44 fn (t); Theodore Sedgwick, *A Treatise on the Measure of Damages* (9th edn, Baker, Voorhis & Co 1912) 723 fn 148.

<sup>32</sup> *Perera v Vandiyar* [1953] 1 WLR 672 (CA) 675-677. See, also, obiter dicta in *Addis v Gramophone Co Ltd* [1909] AC 488 (HL) 496. Cf Edward Jenks, *The Book of English Law* (5th edn, Wyman & Sons 1953) 196-197: "'Vindictive damages' ... are not infrequently awarded in cases of tort, and even, though much more rarely, in cases of breach of contract. They are intended to mark the disapproval ... of the defendant's conduct'.

<sup>33</sup> Eg, *Finlay v Chirney* (1887) 20 QBD 494 (CA) 504.

<sup>34</sup> Eg, *Rolin v Steward* (1854) 14 CB 595, 139 ER 245.

<sup>35</sup> *Addis* (n 32) 495.

### 8.2.3 Quantification

Both the decision to award punitive damages and the quantification of damages were usually left to a jury.<sup>36</sup> If a case called for punitive damages the court would award a single sum reflecting all of the elements of the damages award (compensation and punishment). As a result, in most cases, it is impossible to define the precise amount of punitive damages awarded.<sup>37</sup> The gravity of the wrong was relevant to the assessment of damages. The more high-handed the defendant's conduct the greater the award would be.<sup>38</sup> The quantum of the award also depended upon the defendant's wealth.<sup>39</sup> Finally, when two or more defendants were liable for the same tort 'the malignant motive of one party [could not be] a ground of aggravation of damage against the other party, who was altogether free from any improper motive'.<sup>40</sup> In such cases, if a claimant wished to obtain the highest possible amount of punitive damages (s)he needed to sue separately the most guilty defendant.<sup>41</sup> It seems that the issue of multiple claimants being entitled to punitive damages in joint proceedings against a single defendant had not arisen for consideration at that time.<sup>42</sup>

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<sup>36</sup> Cf *Rook v Fairrie* [1941] KB 507 (CA); *Perera* (n 32).

<sup>37</sup> For an exception see *Loudon* (n 10) (£3,000 (£85,327 in 2021) punitive damages upheld by the Court of Appeal).

<sup>38</sup> Eg, *Dumbell* (n 13) 330.

<sup>39</sup> Eg, *Benson* (n 12) 1846, 1130.

<sup>40</sup> *Clark v Newsam* (1847) 1 Exch 131, 140; 154 ER 55, 58.

<sup>41</sup> *ibid.*

<sup>42</sup> This was treated as a novel point in *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA).

### 8.2.4 Functions of the award – Punitive aspect clearly present

In many pre-*Rookes* cases, courts awarded a lump sum as damages without clarifying the underlying function(s) of the award and there was no clear distinction between aggravated and punitive damages.<sup>43</sup> Similarly, the terms ‘exemplary’ and ‘aggravated’ damages were sometimes used as synonyms. For example, *Salmond’s Law of Torts* reads that ‘[d]amages are ... distinguishable as being either compensatory or exemplary. The latter are also known as vindictive, aggravated, retributory, penal or punitive ... No distinction has been taken in the authorities between “aggravated” and “exemplary” damages’.<sup>44</sup>

Although it was common to consider the defendant’s motive and conduct in assessing damages it was not always clear whether the award was intended to compensate the claimant for the manner in which the wrong had been committed and/or to punish the defendant.<sup>45</sup> For example, in *Redshaw v Brook*, a trespass to land action against customs officers who entered the claimant’s house and searched for prohibited goods where they found none, £200 (£37,158 in 2021) was held to not be excessive even though the officers ‘did very little damage and behaved well enough’.<sup>46</sup> However, the underlying justification(s) of the award are not clear from the court’s reasons.

In many other cases, both the ideas of punishment and compensation were clearly present. For example, in *Wilkes v Wood* an award of £1,000 (£202,088 in 2021) for trespass

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<sup>43</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 10.

<sup>44</sup> R Heuston, *Salmond on the Law of Torts* (13th edn, Sweet & Maxwell 1961) 739.

<sup>45</sup> Harry Street, *Principles of the Law of Damages* (Sweet & Maxwell 1962) 29.

<sup>46</sup> (1769) 2 Wils KB 405, 405; 95 ER 887, 887 (Wilmot LCJ). See, also, *Bruce v Rawlins* (1770) 3 Wils KB 61, 95 ER 934; *Forde v Skinner* (1830) 4 C&P 239, 172 ER 687.

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to land was not considered excessive because ‘[d]amages [we]re designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.’<sup>47</sup>

An examination of the authorities and textbooks of the pre-*Rookes* period reveals that the prevailing perception was that punitive damages were clearly concerned with punishment and deterrence.<sup>48</sup> For example, John Mayne wrote in 1856 that in certain circumstances damages ‘operate[d] as a punishment, for the benefit of the community, and as a restraint to the transgressor’.<sup>49</sup> In 1950 Winfield wrote that ‘in exemplary damages the court can punish the defendant for misbehaviour’.<sup>50</sup> Judges also frequently contended that punitive damages were concerned with punishment and deterrence. In *Rook v Fairrie* Sir Wilfrid Greene MR said: ‘You are considering the conduct of the defendant, because you may award punitive or exemplary damages against him. You are considering the deterrent effect, and so forth’.<sup>51</sup> And in *Dumbell v Roberts* Scott LJ considered that punitive damages

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<sup>47</sup> (n 9) 18–19, 498–499 (Pratt LCJ). Other examples include *Tullidge* (n 20) 19, 909; *Leith* (n 19) 778, 1329; *Ley v Hamilton* (1935) 153 LT 384 (HL) 386.

<sup>48</sup> For the minority view that punitive damages were compensatory, see John Salmond, *The Law of Torts* (5th edn, Sweet & Maxwell 1920) 129–130 (acknowledging that the punitive element could not be entirely excluded). For criticism of the minority view, see Philip James, ‘Measure of Damages in Contract and Tort – Law and Fact’ (1950) 13 MLR 36, 38.

<sup>49</sup> John Mayne, *A Treatise on the Law of Damages* (Bradbury & Evans 1856) 13. The quote is repeated in later editions of the book up until 1946 (11th edition).

<sup>50</sup> Percy Winfield, *A Textbook on the Law of Torts* (5th edn, Sweet & Maxwell 1950) 150. See, also, Charles Walpole, *A Rubric of the Common Law* (Shaw & Sons 1880) 289; Courtney Kenny, *Outlines of Criminal Law* (10th edn, CUP 1920) 12.

<sup>51</sup> *Rook* (n 36) 516.

## REASSESSING THE *ROOKES V BARNARD* CATEGORIES

are ‘given by way of punishment of the defendant or as a deterrent example, and then are not limited to compensation for the plaintiff’s loss’.<sup>52</sup>

It follows from the above that despite the lack of a distinction between aggravated and punitive damages and despite the existence of some cases in which it is not possible to ascertain the precise function of the award, punitive damages were clearly concerned with punishment (as distinct from compensation) over the period 1763–1964.

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<sup>52</sup> *Dumbell* (n 13) 330. See, also, *Finlay* (n 33) 504; *Leachinsky v Christie* [1945] 2 All ER 395 (CA) 408.

### 8.3 LORD DEVLIN'S SPEECH IN *ROOKES V BARNARD*

The claimant, Rookes, was employed as a draughtsman by the British Overseas Airways Corporation ('BOAC'). He lost his job because the defendant trade union from which he had resigned threatened a strike against BOAC unless Rookes was fired. A jury awarded Rookes £7,500 (£154,826 in 2021), part of which comprised punitive damages because the threats to strike were actionable as intimidation. The Court of Appeal allowed the defendant's appeal because although English law recognised the tort of intimidation, it did not cover threats to break a contract. The House of Lords allowed the claimant's appeal and the defendant's cross-appeal. It held that although Rookes would succeed on liability (because the tort did encompass threats to break a contract) the award of damages could not be upheld.

Lord Devlin, who was the only member of the House of Lords to discuss punitive damages and with whom the other four Law Lords agreed, said that the remedy's object is to 'punish and deter' and that this 'confuses the civil and criminal functions of the law'.<sup>53</sup> His Lordship further contended that 'it '[wa]s open to the House to remove an anomaly from the law of England'<sup>54</sup> because prior to *Rookes*, there had been no House of Lords decision affirming the power to award punitive damages. The absence of a previous decision by the House on punitive damages was important because, at that time, the House of Lords was still bound by its own decisions.<sup>55</sup> After reviewing previous authorities on the subject, his Lordship confined punitive damages to the following three case categories:

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<sup>53</sup> *Rookes* (n 1) 1221.

<sup>54</sup> *ibid.*

<sup>55</sup> This changed with the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (HL).

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(1) occasions involving oppressive, arbitrary or unconstitutional conduct by government servants; (2) situations where the defendant is a profit-seeking wrongdoer; and (3) instances where statute authorises the award. His Lordship also held that punitive damages were not available if other types of damages are adequate to punish the defendant (ie, the ‘if but only if test’).<sup>56</sup>

An important feature of Lord Devlin’s reasons is that they purport to be rooted in precedent. After reviewing previous authorities on punitive damages Lord Devlin said:

These authorities convince me ... that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law ... I propose to state what these two categories are ... these two categories ... are established as part of the common law ... I must now return to the authorities I have already reviewed and make quite plain what it is that I have not accepted from them.<sup>57</sup>

Finally, *Rookes* distinguished between punitive and aggravated damages.<sup>58</sup> It was recognised that the purpose of the former is to punish and deter. By contrast, it was said that aggravated damages are a variety of compensatory damages, intended to compensate for injury resulting from the way in which the defendant behaved in relation to the claimant, ‘for the manner of doing the injury ... the insolence or arrogance by which it [wa]s accompanied’.<sup>59</sup> Due to the lack of a distinction between the terms ‘aggravated’ and

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<sup>56</sup> *Rookes* (n 1) 1228.

<sup>57</sup> *ibid* 1225–28.

<sup>58</sup> *ibid* 1221, 1228, 1230.

<sup>59</sup> *ibid* 1228–29 (Lord Devlin).

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‘exemplary’ damages prior to *Rookes* Lord Devlin was able to review previous cases and interpret a large number of them as having awarded aggravated rather than punitive damages. In particular, his Lordship considered six cases<sup>60</sup> cited by counsel as instances where punitive damages had been awarded and interpreted these cases as having awarded aggravated (compensatory) damages. Lord Devlin said that these six cases ‘c[ould] best be explained in principle as cases of aggravated damage ...’<sup>61</sup> but he did not explain why he held that view.

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<sup>60</sup> *Tullidge* (n 20); *Leith* (n 19); *Merest v Harvey* (1814) 5 Taunt 442, 128 ER 761; *Sears v Lyons* (1818) Stark 317, 171 ER 658; *Williams v Currie* (1845) 1 CB 841, 135 ER 774; and *Emblen* (n 23).

<sup>61</sup> *Rookes* (n 1) 1229.

#### **8.4 ARE THE *ROOKES* CATEGORIES JUSTIFIED BY PRECEDENT?**

This section examines if the *Rookes* categories are indeed based on precedent. In the first subsection I argue that the pre-*Rookes* authorities on which Lord Devlin relied to support his categories do not provide sufficient authority for them. The second subsection examines cases falling outside Lord Devlin's categories which he either did not consider at all or he wrongly interpreted as having awarded aggravated rather than punitive damages. The third subsection is concerned with the alleged absence of previous House of Lords decisions affirming a punitive damages award. I argue that, contrary to Lord Devlin's contentions, the House of Lords had in fact handed down two such decisions prior to *Rookes*.

##### **8.4.1 The cases cited to establish the *Rookes* categories**

As noted above, a crucial aspect of Lord Devlin's decision was his contention that previous authorities on punitive damages were being followed so that the *Rookes* categories were 'established as part of the common law'.<sup>62</sup> However, neither of the *Rookes* categories is sufficiently based on authority. Although some judges noted the absence of authority justifying the formulation of the *Rookes* categories,<sup>63</sup> this is not something that has previously been explored in any detail. By contrast, most judicial remarks and comments in the literature suggest that Lord Devlin's contention about his categories being founded on precedent has been accepted.<sup>64</sup> My analysis suggests that the 'categories test' which still

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<sup>62</sup> *ibid* 1228.

<sup>63</sup> See brief remarks by Lord Denning MR in *Broome v Cassell & Co Ltd* [1971] 2 QB 354 (CA) 380 and by Taylor J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (HCA) 136–137.

<sup>64</sup> See the text to nn 2–5.

## REASSESSING THE *ROOKES V BARNARD* CATEGORIES

governs the English law of punitive damages cannot be justified on the basis of adherence to prior authority.

### (1) Category 1

Lord Devlin relied on three cases to support the existence of this category. These were *Huckle v Money*,<sup>65</sup> *Wilkes v Wood*<sup>66</sup> and *Benson v Frederick*.<sup>67</sup> According to Lord Devlin ‘these authorities clearly justif[ied] the use of the exemplary principle ... in restraining the arbitrary and outrageous use of executive power’.<sup>68</sup>

The cases which Lord Devlin classified within ‘Category 1’ do not sufficiently support that category for two reasons: First, it is not clear that all of these cases are relevant to the doctrine of punitive damages; one of these cases can be interpreted as having awarded aggravated rather than punitive damages. Second, even if punitive damages were awarded in these cases, the courts did not make an award because the use of executive power was at stake but simply because the cases involved outrageous conduct by the defendant. The courts’ central focus was on the quality of the defendant’s *conduct* rather than on the defendant’s *status*.

In *Huckle v Money* the claimant was kept in custody by a messenger of the King for six hours under the suspicion that he had printed the North Briton No 45 which criticised certain remarks of King George III. During his detention the defendant behaved very civilly by treating the claimant with beef steaks and beer, so that he suffered very little

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<sup>65</sup> (n 9).

<sup>66</sup> (n 9).

<sup>67</sup> (n 12).

<sup>68</sup> *Rookes* (n 1) 1223.

## REASSESSING THE *ROOKES V BARNARD* CATEGORIES

or no damage. Yet the jury awarded the claimant £300 (£60,626 in 2021) damages. In holding that the award had not been excessive Pratt LCJ noted:

[T]he jury ... have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was *a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Charta ... which is pointed against arbitrary power, was violated.*<sup>69</sup>

Although inflated damages were clearly awarded because of the defendant's arbitrary attack upon the claimant's liberty it remains uncertain whether the amount was meant to 'compensate' the claimant for the arbitrary violation of his liberty and/or to punish the defendant for this violation. There is no reference to punishment or a punishment-related goal in the judgment. And while Pratt LCJ used the term 'exemplary damages' this is not particularly revealing because, during that time, there was considerable confusion in terminology and the mere usage of terms such as 'exemplary', 'vindictive' and 'aggravated' damages is not conclusive as to the classification of a pre-*Rookes* case.<sup>70</sup> As Harry Street pointed out, 'it is not clear which of the two types of damages [punitive or aggravated] was awarded in *Huckle v Money*'.<sup>71</sup> Therefore, the basis on which Lord Devlin interpreted *Huckle* as authority on punitive rather than aggravated damages remains

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<sup>69</sup> *Huckle* (n 9) 207, 769 (emphasis added).

<sup>70</sup> See text to nn 43–44.

<sup>71</sup> Harry Street, *The Law of Torts* (3rd edn, Butterworths 1963) 451 fn 12. According to Robert Stevens, *Torts and Rights* (OUP 2007) 62, the award in *Huckle* was purely compensatory, not punitive. However, the very large size of the award (which corresponds to about £10,000 for each hour of imprisonment in today's terms) suggests that it may have included a punitive aspect.

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unclear.<sup>72</sup> If *Huckle* is an aggravated damages case, then the precedential basis of Lord Devlin's first category is weakened. But even if we accept that punitive (rather than or in addition to aggravated) damages were awarded in *Huckle* the award can be justified by the 'most daring public attack made upon [the claimant's] liberty' and the violation of 'the 29th chapter of Magna Charta ... which is pointed against arbitrary power'. The determinative factor was the arbitrary interference with the claimant's liberty. Of course, the fact that the defendant acted in his capacity as a public servant facilitated that arbitrary interference. The defendant's status can alter the quality of their conduct because there are certain ways in which a person's liberty can be interfered with *only because* the interference was by a public official in the exercise of their public power. The distinction between status and conduct becomes blurred where the conduct is something that only someone with a certain status could perform. Nevertheless, it is still the defendant's conduct that merits punishment in this situation. And indeed the exercise of executive power by the defendant was unimportant in the justification of the award by commentators writing in the period before *Rookes* was decided. For example, according to Jenks, punitive damages may be awarded 'especially in the following cases: ... where the plaintiff has been deprived of a constitutional right (*Huckle v Money*)'.<sup>73</sup>

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<sup>72</sup> Lord Devlin said that because the claimant had been treated very civilly '[i]t seem[ed] improbable that his feeling of wounded pride and dignity would have needed much further assuagement', see *Rookes* (n 1) 1222. However, this is mere speculation given that the court's reasons in *Huckle* do not reveal the nature of the award.

<sup>73</sup> Edward Jenks, *A Digest of English Civil Law* (3rd edn, Butterworths 1938) 347. See, also, *Halsbury's Laws* (n 31) 224 fn (q). Joseph Sayer, *The Law of Damages* (Strahan and Woodfall 1770) 220 justified the award in *Huckle* on the basis that the injury was 'done under the colour of authority'. Again, it is not clear that the authority must be *executive*. Sayers wrote (*ibid*): 'Whenever an injury is done under a colour of authority as if an officer empowered to p[re]f[er] exceeds the authority given him by the p[re]f[er] warrant; or if a master of a ship abuses the power by law vested in him over the sailors under his command; ... the jury ... ought to assess exemplary damages'. The master of a ship does not exercise executive power, although they are still in a powerful position.

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Lord Devlin also relied on *Wilkes v Wood*. That was a trespass to land action in which the jury awarded the claimant £1,000 (£202,088 in 2021) as damages on account of the defendant's having entered the claimant's house under a general warrant, breaking locks and seizing papers. Pratt LCJ said that if the jury were of the opinion that the defendant's practices were illegal, this factor 'must aggravate damages'.<sup>74</sup> His Lordship also noted that '[d]amages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future ...'.<sup>75</sup> Therefore, this case was clearly concerned with punitive damages. However, it remains uncertain why so much importance should be attached to the defendant's capacity as a public servant in order to justify the punitive award in this case. The claimant's counsel noted that punitive damages were warranted, inter alia, in order to deter 'persons, who by their duty and office should have been the protectors of the constitution, instead of the violators of it'<sup>76</sup> however, this justification is not mentioned in the court's reasons. And again, it seems that before *Rookes* no one had thought that the exercise of executive power was material in the decision to award punitive damages in *Wilkes*. For example, according to Winfield 'in exemplary damages [the court] can punish the defendant for ... an especially outrageous attack on the plaintiff's security ... [This] is illustrated by the cases deciding ... [for] John Wilkes and others during the latter part of the eighteenth century'.<sup>77</sup>

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<sup>74</sup> *Wilkes* (n 9) 18, 498.

<sup>75</sup> *ibid* 19, 499.

<sup>76</sup> *ibid* 3, 490.

<sup>77</sup> Winfield (n 50) 150. See, also, JG Sutherland, *A Treatise on the Law of Damages* (4th edn, Callaghan & Co 1916) 1260–61 fn 8.

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Winfield thought that the ‘outrageous attack on [the claimant’s] security’ (ie, the defendant’s *conduct*) justified the imposition of punitive damages in *Wilkes*.

The third case cited by Lord Devlin was *Benson v Frederick*, an assault action against a colonel who had ordered the claimant to be stripped and flogged. An award of £150 (£26,582 in 2021) was not held to be excessive by Lord Mansfield because the defendant had acted ‘arbitrarily, unjustifiably and unreasonably. He had ordered this innocent man to be flogged ... act[ing] *malo animo*, and out of mere spite and revenge’.<sup>78</sup> The defendant ‘was a man of such substance as to be very able ... to pay this sum’.<sup>79</sup> The consideration of the defendant’s wealth by the court suggests that this was a punitive damages case, that fact being relevant when the concern is to determine the quantum of damages that is required suitably to punish the defendant. Wilmot J similarly noted that the damages award was not excessive because ‘the defendant had acted very arbitrarily, and was well able to pay for it’.<sup>80</sup> Finally, Aston J said that the Court should not set the jury’s verdict aside because ‘the defendant had acted very arbitrarily and unjustifiably’.<sup>81</sup> There is no reference, implicit or explicit, to the defendant’s capacity as a government servant in justifying the punitive damages award in this case. The defendant happened to be a colonel but there is nothing in the court’s reasons to suggest that his capacity as a public servant was crucial when it came to the decision to award punitive damages. It is also noteworthy that Birks (writing in the post-*Rookes* era) held the view that enhanced damages were

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<sup>78</sup> *Benson* (n 12) 1846, 1130.

<sup>79</sup> *ibid.*

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

## REASSESSING THE *ROOKES V BARNARD* CATEGORIES

awarded in this case because of ‘the contempt for the man’s humanity’.<sup>82</sup> This suggests that, according to Birks, the defendant’s capacity was unimportant in the decision to award punitive damages in *Benson*.

The foregoing shows that the first *Rookes* category was not ‘established as part of the common law’ before 1964. Lord Devlin relied on three decisions to illustrate the pre-*Rookes* operation of this category. One of these decisions (ie, *Huckle v Money*) was arguably concerned with aggravated rather than punitive damages. And in all three cases, the courts did not attach the importance that Lord Devlin attached to the defendant’s capacity as a public servant. Rather, it was the arbitrary and outrageous conduct which justified the awards.<sup>83</sup> Similarly, judges and commentators writing during the pre-*Rookes* era highlighted the defendant’s conduct (rather than the defendant’s capacity) as the trigger of punitive damages in the above three cases.<sup>84</sup> Lord Devlin was probably the first judge to consider the exercise of executive power as a decisive element in awarding punitive damages.<sup>85</sup>

Finally, it is noteworthy that a trawl through pre-1964 authorities reveals that, with the exception of *Wilkes* and *Benson* there is probably no other reported case from that

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<sup>82</sup> Peter Birks, ‘Harassment and Hubris: The Right to an Equality of Respect’ (1997) 32 IJ 1, 29.

<sup>83</sup> See also *Dumbell* (n 13) 330 (unlawful detention by two police constables). Scott LJ said (obiter dicta): ‘[damages] for improper interference with personal freedom may be “punitive” ... given by way of punishment of the defendant ... The more high-handed and less reasonable the detention is, the larger may be the damages’. Again, the focus is on the defendant’s high-handed conduct and no reference is made to their capacity as a public servant.

<sup>84</sup> Note however, that at least one textbook of that period refers to ‘abuses by officers of the law’ as a case category in which punitive damages may be awarded, see WE Ball, *Principles of Torts and Contracts* (Stevens 1880) 110 (citing *Duke of Brunswick v Slowman* (1849) 8 CB 317, 137 ER 532 in support).

<sup>85</sup> *Broome* (n 63) 386 (Salmon LJ): ‘In all the hundreds of cases in which exemplary damages have been awarded, this principle does not seem to have occurred to any judge until Lord Devlin’s revelation’.

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period in which punitive damages were clearly awarded against a government servant.<sup>86</sup>

Harvey McGregor wrote in 1971:

Lord Devlin[’s] acceptance [of the first category] marked only a slight bow to precedent on his part induced ... possibly by the knowledge that very few cases would in practice appear. Not only have none appeared ... since *Rookes* ... but there appear to be none other than the three cases of the 1760s cited [by his Lordship].<sup>87</sup>

This may indicate that Lord Devlin’s true purpose was not to retain ‘a category of cases in which exemplary damages can serve a useful purpose’ but to establish a category of cases in which punitive damages would rarely, if ever, be awarded.

### (2) Category 2

The second *Rookes* category restricts punitive damages to cases of profit-seeking conduct. An examination of the authorities on which Lord Devlin relied to illustrate the operation of this category shows that the ‘profit motive’ condition that he imposed was artificial and unjustified by the earlier case law. Prior to *Rookes*, courts did not attach the importance that Lord Devlin did to the existence of a ‘profit motive’ on the defendant’s part. Again,

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<sup>86</sup> However, there are cases in which inflated damages were awarded against the executive without it being clear whether they were meant to be aggravated and/or punitive: eg, *Redshaw v Brook* (n 46); *Duke of Brunswick* (n 84).

<sup>87</sup> Harvey McGregor, ‘In Defence of Lord Devlin’ (1971) 34 MLR 520, 525 fn 42. Punitive damages awards have remained relatively rare in ‘Category 1 cases’ throughout the post-*Rookes* era, see chapter 6.1.2.

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his Lordship relied on three cases to support the existence of this category: *Bell v Midland Railway Co*;<sup>88</sup> *Williams v Currie*;<sup>89</sup> and *Crouch v Great Northern Railway Co*.<sup>90</sup>

*Bell v Midland Railway Co* involved an award of £1,000 (£121,253 in 2021) on account of the defendant railway company having obstructed a railway siding to which the claimant, the adjoining landowner, had a statutory right of access. According to Erie CJ, the damages awarded were not excessive because the ‘company [had] set up a wharf of their own, and, careless whether they were doing right or wrong, prevented all access to the plaintiff’s wharf, *for the purpose of* extinguishing his trade and *advancing their own profit*’.<sup>91</sup> Erie CJ suggested that the profit motive was merely an *indication*, not a *condition* for the award of punitive damages. The reasons of the remaining two judges who decided *Bell* are also revealing. Bylles J made no reference to the ‘profit motive’ element and summarised the principle of punitive damages as follows: ‘I agree ... with my Brother Willes that, where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in ... giving retributory damages’.<sup>92</sup> Willes J contended that if ever there were a case warranting ‘damages of an exemplary character, this [wa]s that case. The defendants have committed a grievous wrong with a high hand and in plain violation of an act of parliament; and persisted in it for *the purpose of* destroying the plaintiff’s business and *securing gain to themselves*’.<sup>93</sup>

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<sup>88</sup> (n 15).

<sup>89</sup> (n 60).

<sup>90</sup> (1856) 11 Exch 742, 156 ER 1031.

<sup>91</sup> *Bell* (n 15) 304, 469 (emphasis added).

<sup>92</sup> *ibid* 308, 470–471.

<sup>93</sup> *ibid* 307, 470 (emphasis added).

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It is a stretch to conclude from this that Willes J meant that punitive damages could not be awarded in the absence of the defendant's profit motive. Certainly, this is not how Bylles J interpreted Willes J's reasons. It follows that the 'profit motive' element probably was not a condition for awarding punitive damages in *Bell*.<sup>94</sup> Additionally, prior to Lord Devlin in *Rookes*, no one else had interpreted *Bell* this way. For example, in discussing *Bell* John Mayne and Lumley Smith wrote: 'Where a railway company had obstructed a siding belonging to an adjoining landowner with a high hand ... [the court] held that exemplary damages might justly be given'.<sup>95</sup> Similarly, the second edition of Kenny's casebook on tort reads as follows: 'Malice will justify exemplary damages'.<sup>96</sup> The author then provides a copy of the judgment in *Bell v Midland* to illustrate this point. His interpretation was that 'malice' rather than 'profit motive' triggered punitive damages in this case. And in the seventh edition of *Winfield on Tort* the case is cited as an example of punitive damages being triggered by 'wanton misconduct on the defendant's part'<sup>97</sup> (again without any reference to the 'profit motive' element).

Lord Devlin also cited a dictum by Maule J in *Williams v Currie* as authority suggesting the existence of the second category. In that case, a landlord had damaged the crops of his tenant by selling, felling, and removing timber, without asking for permission to enter the premises. The court refused to interfere with an award of £300 (£37,158 in 2021) although the net value of the entire crops did not exceed £200 (£24,772 in 2021). It

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<sup>94</sup> *Broome* (n 63) 387–388; *Uren* (n 63) 134–135.

<sup>95</sup> John Mayne and Lumley Smith, *Mayne's Treatise on Damages* (4th edn, Stevens 1884) 43–44 fn (t).

<sup>96</sup> Courtney Kenny, *A Selection of Cases Illustrative of the English Law of Tort* (2nd edn, CUP 1908) 218.

<sup>97</sup> JA Jolowicz and Tom Ellis Lewis, *Winfield on Tort* (7th edn, Sweet & Maxwell 1963) 95–96 fn 28.

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is doubtful whether *Williams v Currie* was a punitive damages case. Cresswell J directed the jury to give damages as ‘a fair compensation for the [claimant’s] injury and inconvenience ... ; telling them, at the same time, that they were not necessarily to restrict themselves to the actual amount of the loss of crops proved ...’.<sup>98</sup> No reference is made to punishment, or to a punishment-related goal, and the term ‘exemplary damages’ is not even used in the judgment. Lord Devlin himself interpreted *Williams* as an aggravated damages case<sup>99</sup> (and it seems rightly so). In these circumstances, it is strange that he then relied on a dictum from *Williams* in support of his claim that precedent supported the second category. Besides, out of the three judges in *Williams*, only Maule J referred to the defendant’s profit motive; but he also referred to the defendant’s persistence in trespassing upon the claimant’s goods for several weeks in justifying the inflated damages award.<sup>100</sup> On the whole, *Williams* is weak authority to support the existence of the second *Rookes* category.

Finally, Lord Devlin derived support for his second category from the following obiter dictum of Martin B in *Crouch v Great Northern Railway Co*:

[I]f ... the plaintiff was a carrier, and ... the defendants designedly refused to carry parcels ... *for the purpose of getting a monopoly in their hands* and destroying the plaintiff’s trade ..., I am not prepared to say that a jury might not properly give

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<sup>98</sup> *Williams v Currie* (n 60) 848, 777.

<sup>99</sup> *Rookes* (n 1) 1229.

<sup>100</sup> *Williams v Currie* (n 60) 847, 776.

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vindictive damages to a person so oppressed. But that is not this case. Whenever the question arises, I shall be perfectly free to give an opinion upon it.<sup>101</sup>

Again, this passage comes from a case which was not clearly concerned with punitive damages. Only Martin B, one of the three judges in *Crouch*, referred to ‘vindictive damages’. Due to the lack of a clear distinction between the terms ‘vindictive’, ‘exemplary’ and ‘aggravated’ damages at that time<sup>102</sup> it is not obvious that Martin B was referring to damages aimed at punishing the defendant when he used that term. Lord Devlin did not explain his choice to interpret the above dictum as being concerned with punishment as distinct from compensation. Even if Martin B contemplated a punitive award, he only did so in relation to a hypothetical scenario similar to the facts of *Crouch* and he reserved his opinion as to whether it would be appropriate to award punitive damages in it.

The above analysis shows that the second *Rookes* category is not adequately supported by the authorities on which Lord Devlin relied. His reliance on obiter dicta rather than authoritative statements about the doctrine indicates that the precedential basis of this category is dubious.<sup>103</sup>

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<sup>101</sup> *Crouch* (n 90) 759, 1038 (emphasis added).

<sup>102</sup> See the text to nn 43–44.

<sup>103</sup> *Broome* (n 63) 387 (Salmon LJ): ‘Lord Devlin was unable to cite any authority [in support of the second category]. There was none’.

**(3) The cases on which Lord Devlin relied do not sufficiently support his categories**

The foregoing shows that Lord Devlin did not follow precedent in establishing his common law categories. Paul Mitchell has noted

a strange inconsistency in Lord Devlin's reasoning. ... Lord Devlin had said that he would not go as far as the abolition of exemplary damages, because that would involve a complete disregard of precedent. But in formulating his second category (as in his first) he derived propositions from cases for which they were not strictly authority.<sup>104</sup>

This inconsistency may be explained by the idea that if Lord Devlin could not isolate any categories, he would have been forced to conclude that there was no basis for restricting punitive damages to particular classes of case, and that would have meant that the remedy would be available more generally. It is arguable that Lord Devlin's ultimate purpose was to eradicate to the greatest possible extent the doctrine of punitive damages.

**8.4.2 Cases falling outside the *Rookes* categories**

In the previous subsection I argued that the cases on which Lord Devlin relied to support his categories do not sufficiently support them. One reason for this is that some of the cases on which Lord Devlin relied (especially, *Huckle* and *Williams v Currie*) were arguably concerned with what would today be regarded as aggravated rather than punitive damages. This subsection will show (1) that there are several pre-1964 decisions in which punitive

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<sup>104</sup> Mitchell (n 5) 68.

## REASSESSING THE *ROOKES V BARNARD* CATEGORIES

damages were awarded and which fell outside Lord Devlin's categories; and (2) that Lord Devlin either wrongly interpreted these decisions as involving aggravated rather than punitive damages awards or did not consider these decisions at all. This weakens even further the precedential basis of the *Rookes* categories.

### (1) Cases considered by Lord Devlin

Lord Devlin interpreted as involving aggravated damages awards three cases in which punitive damages had arguably been awarded: *Tullidge v Wade*,<sup>105</sup> *Leith v Pope*<sup>106</sup> and *Merest v Harvey*.<sup>107</sup> Lord Devlin contended that 'all these cases can best be explained in principle as cases of aggravated damage'.<sup>108</sup>

*Tullidge v Wade* was a seduction action in which the claimant's daughter fell pregnant to the defendant who had promised that he would marry her. As a result, the claimant was deprived of his daughter's assistance with his business. The jury's damages award of £50 (£9,290 in 2021) was approved by Wilmot LCJ who said:

Actions of this sort are brought *for example's sake*; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages; and if A. B. brings another action against defendant for the breach of promise of marriage, so much the better; *he ought to be punished twice*.<sup>109</sup>

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<sup>105</sup> (n 20).

<sup>106</sup> (n 19).

<sup>107</sup> (n 60).

<sup>108</sup> *Rookes* (n 1) 1229.

<sup>109</sup> *Tullidge* (n 20) 19, 909 (emphasis added).

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Wilmot LCJ clearly contemplated the desirability of punishing and deterring the defendant in upholding the jury's award. Interpreting this award as purely compensatory, as Lord Devlin did, is simply inconsistent with Wilmot LCJ's reasons. Conversely, Bathurst J said in the same case: 'In actions of this nature, and of assaults, the circumstances of time and place ... require different damages; as it is a greater insult to be beaten upon the Royal Exchange, than in a private room'.<sup>110</sup> Although this extract suggests that Bathurst J may have had aggravated rather than punitive damages in mind it does not explain why Lord Devlin ignored entirely the punitive aspect of the decision. Academics writing during the pre-*Rookes* era also understood *Tullidge* as a case in which the court awarded damages to punish and deter the defendant. According to Indermaur, in tort cases the jury can award damages 'on the ground that the action is brought to a certain extent, as a public example, and damages, when so awarded, are styled exemplary or vindictive damages. As an instance of this particularly may be mentioned actions for seduction'.<sup>111</sup> The author then cites *Tullidge v Wade* as an illustration.

*Leith v Pope* was a malicious prosecution action in which the jury awarded damages £10,000 (£1,771,157 in 2021) in respect of the claimant's prosecution for stealing a horse. The award was upheld by the court which considered that the case involved '[a] prosecution ... proceeding from such wicked motives, [so as to] evidence a most depraved and corrupted heart'<sup>112</sup> and that '[t]he defendant appeared upon evidence to be exceeding

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<sup>110</sup> *ibid* 19, 910.

<sup>111</sup> John Indermaur, *Principles of the Common Law* (Stevens & Haynes 1876) 358–359 (quote repeated in all subsequent 12 editions of the book until 1914). See, also, Mayne (n 49) 14.

<sup>112</sup> *Leith* (n 19) 1329, 778 (the Court).

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wealthy, and well able to sustain such a verdict'.<sup>113</sup> The consideration of the defendant's means shows that part of the award was punitive because the wealth of the defendant is irrelevant to the assessment of compensation (including aggravated damages). By contrast, the assessment of punitive damages depends on the defendant's means so that the penalty imposed can be felt by the wrongdoer. Lord Devlin did not explain why he thought that *Leith* was about aggravated rather than punitive damages, or how the defendant's means could have been relevant to a compensatory award.<sup>114</sup>

Finally, in *Merest v Harvey* the defendant trespassed on the claimant's land after being warned off and used 'very intemperate language, threatening, in his capacity of a magistrate, to commit the Plaintiff, and defying him to bring any action'.<sup>115</sup> Both judges who decided the case, Heath and Gibbs JJ, contemplated punishment and deterrence, among other factors, when they refused to interfere with the jury's £500 (£40,560 in 2021) award. Heath J considered that '[i]t goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages'.<sup>116</sup> And Gibbs J said: '[I]n a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this'.<sup>117</sup> Again, Lord Devlin did not explain why he chose to ignore the punitive aspect of the award in this case. That Lord Devlin's interpretation of *Merest* is problematic is further evidenced by the existence of several statements in the pre-*Rookes* literature in

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<sup>113</sup> *ibid.*

<sup>114</sup> During the pre-*Rookes* era the case was treated as being concerned with punitive damages, see, eg, *Halsbury's Laws* (n 31) 224 fn (p).

<sup>115</sup> *Merest* (n 60) 442, 761.

<sup>116</sup> *ibid* 444, 761.

<sup>117</sup> *ibid* 443, 761.

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which it was clearly acknowledged that the court was concerned with punishing the defendant in this case. For example, according to Winfield, '[i]n exemplary damages [the court] can punish the defendant for ... wanton misconduct ... *Merest v Harvey* exemplifies th[is] kind of exemplary damages'.<sup>118</sup>

If the above three cases are best explained as involving punitive rather than aggravated damages then they clearly do not fall within either of the *Rookes* common law categories. None of them clearly involved a profit-seeking defendant or a public servant acting in that capacity yet they were all instances of outrageous conduct which the court evaluated as punishment-worthy. This reinforces the idea that Lord Devlin was deliberately trying to re-analyse punitive damages decisions<sup>119</sup> so as to reduce the scope of what he regarded as an anomaly.<sup>120</sup> Irrespective of whether punitive damages are anomalous, this tactic does not accord with conventional methods of judicial interpretation. Capitalising on the lack of a clear distinction between aggravated and punitive damages, Lord Devlin misinterpreted several cases better understood as involving punitive awards as ones in which aggravated damages were awarded. However, as Lord Wilberforce pointed out, Lord Devlin's interpretation 'attribute[d] a high degree of confusion of thought or inaccuracy of expression to judges of eminence'.<sup>121</sup> Phrases denoting a punitive or deterrent element were used deliberately and with appreciation of their meaning.

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<sup>118</sup> Winfield (n 50) 150. See, also, Sedgwick (n 31) 693.

<sup>119</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 43) 53: Lord Devlin 'reclassif[ied] some apparently punitive past awards as in fact compensatory ...'.

<sup>120</sup> For evidence of Lord Devlin's bias on this issue, see *Rookes* (n 1) 1221: 'it is open to the House to remove an anomaly from the law of England'; *ibid* 1227: 'The anomaly inherent in exemplary damages ...'.

<sup>121</sup> *Broome* (n 3) 1115.

**(2) Cases not considered by Lord Devlin**

In addition to the cases that Lord Devlin wrongly interpreted as being concerned with compensation rather than punishment, there are also several pre-*Rookes* cases which Lord Devlin did not address at all in which the courts clearly awarded punitive damages. *Grey v Grant*,<sup>122</sup> an action for assault and battery, is an illustration. The claimant's turtle had been mistakenly delivered to the defendant. When the claimant demanded his turtle, the defendant refused to hand it over. He further shoved the claimant out of his house with his elbow and gave him a blow upon the face. The jury's award of £200 damages (£37,158 in 2021) was upheld by the members of the court who noted:

[W]hen a blow is given by one gentleman to another, *a challenge and death may ensue*, and therefore the jury have done right in giving exemplary damages; the plaintiff has been used unlike a gentleman by the defendant in striking him, withholding his property, and insisting upon his privilege, all of them tending to provoke him *to seek his revenge in another way than by law*, and therefore we think the damages are not excessive.<sup>123</sup>

The reference to the risk of a challenge and death ensuing as well as to the victim's desire for revenge indicate that the court contemplated punishment in upholding the jury's award.<sup>124</sup> The case obviously does not fall within either of the *Rookes* categories as it did not involve profit-seeking wrongdoing or a government servant.

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<sup>122</sup> (1764) 2 Wils KB 252, 95 ER 794.

<sup>123</sup> *ibid* 253, 795.

<sup>124</sup> Pre-*Rookes* textbooks also cite the case as authority on punitive damages, see, eg, Sedgwick (n 31) 691.

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*Lough v Ward*<sup>125</sup> is another case concerning punitive damages which Lord Devlin overlooked. In *Lough* the claimant's under-aged daughter left home without her parents' consent and was induced by the defendants to join a religious society. The claimant and his family were only allowed to see their daughter in the defendants' presence. Cassels J found that 'the defendants treated the plaintiff and his wife badly',<sup>126</sup> that 'a religious influence is very dangerous ... when it is exercised ... over an inferior and younger mind',<sup>127</sup> and awarded £500 (£21,983 in 2021) 'exemplary damages ... to indicate the court's disapproval of the defendants' conduct'.<sup>128</sup> Again, the case (which is clearly concerned with punishment given the assessment of damages based on the need to indicate the court's disapproval of the defendants' conduct) cannot be accommodated by the *Rookes* categories. The defendants were neither public servants nor profit-seeking wrongdoers. The same point applies in relation to several other cases from the pre-*Rookes* era.<sup>129</sup>

### 8.4.3 House of Lords authority on punitive damages prior to *Rookes*

By now I hope to have proved (1) that the authorities on which Lord Devlin relied to establish the *Rookes* categories do not sufficiently support them; and (2) that there are many pre-*Rookes* cases falling outside Lord Devlin's categories in which punitive damages were awarded. I now turn to the final stage of my attempt to show that the *Rookes* categories are

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<sup>125</sup> [1945] 2 All ER 338 (KBD).

<sup>126</sup> *ibid* 345.

<sup>127</sup> *ibid*.

<sup>128</sup> *ibid* 350.

<sup>129</sup> Eg, *Duberley v Gunning* (1792) 4 TR 651, 100 ER 1226 (action for adultery with the claimant's wife, discussed in David Ibbetson, 'Tortious Damages at Common Law' in Richard Gamauf (ed), *Symposium for the 80th Birthday of Herbert Hausmaninger* (Manz 2016) 105); *Thomas* (n 17) (entering the claimant's farm and seizing his stock); *Groom* (n 22) (publication by solicitors of a letter defaming their client).

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not justified by precedent. This concerns the alleged absence of previous House of Lords authority on punitive damages. In *Rookes* Lord Devlin said: ‘There is not any decision of this House approving an award of exemplary damages ...’.<sup>130</sup> This formed an important strand in his reasons because, at that time, the House of Lords was bound by its own decisions. It was not until 1966<sup>131</sup> that the House of Lords could depart from its earlier decisions. Unlike Lord Devlin, the Court of Appeal in *Broome* found that there had been two House of Lords decisions approving a punitive damages award.<sup>132</sup> These were *Ley v Hamilton*<sup>133</sup> and *Hulton v Jones*.<sup>134</sup> Lord Devlin referred to *Ley v Hamilton* but did not discuss *Hulton* at all.

### (1) *Ley v Hamilton*

In *Ley v Hamilton* a jury awarded the claimant £5,000 (£362,233 in 2021) in respect of the defamatory publication of two letters by the defendant who was actuated by malice. The Court of Appeal (Scrutton LJ dissenting) ordered a new trial on the basis that the damages imposed excessive punishment. The award was restored by the House of Lords. Lord Atkin, who gave the only speech and with whom the other four Law Lords concurred, said:

[T]he criticism ... seems based upon an incorrect view of the assessment of damages for defamation. They are not arrived at ... by determining the ‘real’ damage and adding to that a sum by way of vindictive or punitive damages. It is precisely

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<sup>130</sup> *Rookes* (n 1) 1221.

<sup>131</sup> *Practice Statement (Judicial Precedent)* (n 55).

<sup>132</sup> *Broome* (n 63) 381, 387–388, 390–391.

<sup>133</sup> (1935) 153 LT 384 (HL).

<sup>134</sup> [1910] AC 20 (HL).

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because the ‘real’ damage cannot be ascertained ... that the damages are at large. ... The ‘punitive’ element is not something which is or can be added to some known factor which is non-punitive. In particular it appears to present no analogy to punishment by fine for the criminal offence of publishing a defamatory libel.<sup>135</sup>

Lord Devlin interpreted *Ley* as authority about aggravated damages rather than punitive damages. His Lordship said: ‘Lord Atkin puts “punitive” in inverted commas. “So-called punitive” is what I think he means; and read in that way the passage is strong authority for the view that insult offered and pain given are matters for compensation and not for punishment’.<sup>136</sup>

The Court of Appeal in *Broome* unanimously disagreed with Lord Devlin because ‘the whole argument [in *Ley*] was as to whether the damages ... punished the defendant too much for his conduct’.<sup>137</sup> In the House of Lords, not all of the Law Lords dealt with *Ley v Hamilton*. Of those who did, Lord Hailsham LC and Lord Diplock agreed with Lord Devlin’s interpretation but did not explain why they held that view.<sup>138</sup> Lord Reid also thought that *Ley* was about compensation rather than punishment: ‘By saying that compensation for insult ... cannot be weighed at all closely and that there was nothing here analogous to punishment by fine, [Lord Atkin] was ... making it as clear as words can

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<sup>135</sup> *Ley* (n 133) 386.

<sup>136</sup> *Rookes* (n 1) 1230–31.

<sup>137</sup> *Broome* (n 63) 389 (Salmon LJ), 381, 397 (similar statements by Lord Denning MR and Phillimore LJ respectively).

<sup>138</sup> *Broome* (n 3) 1075 (Lord Hailsham LC), 1131 (Lord Diplock).

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make it that the whole of this £5,000 was truly compensatory in character'.<sup>139</sup> By contrast, Viscount Dilhorne agreed with the Court of Appeal's interpretation.<sup>140</sup>

It is difficult to characterise the award in *Ley* as purely compensatory. Lord Atkin expressly recognised the punitive aspect of the £5,000 awarded and approved the jury's verdict. He thought that the jury must award a single sum which would assess all elements (compensatory and punitive) together. Contrary to Lord Reid's interpretation of the decision, Lord Atkin was not trying to distinguish between compensation and punishment when he said that there was 'no analogy to punishment by fine'. The distinction drawn was between civil punishment (ie, punitive damages) and criminal punishment (ie, a fine).<sup>141</sup> The reference to that analogy was first made by Scrutton LJ in the Court of Appeal decision in *Ley*.<sup>142</sup> His Lordship said: '[T]o punish a defendant to the tune of £5,000 damages ... seems to me to be beyond all reason. If he had been prosecuted for a criminal libel, it is quite inconceivable that any reasonable magistrate or judge would have ordered him to pay a fine of £5,000'.<sup>143</sup> As for the inverted commas around the word "punitive", Lord Atkin only used them in the second instance where he used the term 'punitive' and not in the first. Therefore, the existence of inverted commas cannot be conclusive as to what he meant when he used the term 'punitive'. An examination of books from the pre-*Rookes* period further suggests that *Ley v Hamilton* is an authority on punitive damages. For example, *Ley* is cited in the third edition of *Halsbury's Laws* as authority on punitive damages awarded

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<sup>139</sup> *ibid* 1093.

<sup>140</sup> *ibid* 1110–11.

<sup>141</sup> *ibid* 1082: Lord Hailsham LC recognised that this was where the distinction lay.

<sup>142</sup> (1934) 151 LT 360 (CA).

<sup>143</sup> *ibid* 369.

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to punish the defendant.<sup>144</sup> Therefore, there is room for doubt as to the correctness of Lord Devlin's conclusion that there had been no House of Lords authority approving punitive damages prior to *Rookes*. This seems to be simply another example of a case that he wrongly interpreted as relating to compensation rather than punishment in his effort to curtail to the greatest possible extent what he considered to be an anomaly.

### (2) *Hulton v Jones*

In this case, the defendants published a defamatory newspaper article involving a character called Artemus Jones. The defendants alleged that Artemus Jones was a fictional person and that they were unaware of the existence of a real Mr Artemus Jones, the claimant. Those who knew Mr Jones assumed that the article referred to him. The defendants' main argument was that the words did not and could not be taken to refer to the claimant. The jury awarded £1,750 (£209,982 in 2021) for defamation. The award was upheld by the Court of Appeal and the House of Lords. The case stands as authority for the proposition that the reference requirement in defamation imposes strict liability. In upholding the award, Lord Loreburn LC (with whom the other three Law Lords concurred) said: 'The damages are certainly heavy, but ... the jury were entitled to say this kind of article is to be *condemned*. ... If they think that the licence is not fairly used and that *the tone and style of the libel is reprehensible and ought to be checked*, it is for the jury to say so'.<sup>145</sup>

Lord Devlin made no mention of *Hulton*, which omission was criticised by the Court of Appeal in *Broome*. Lord Denning MR said that *Hulton* 'clearly approved the

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<sup>144</sup> (n 31) 223–224. See, also, McGregor, *Mayne and McGregor on Damages* (n 11) paras 214, 906 and 1020.

<sup>145</sup> *Hulton* (n 134) 24–25 (emphasis added).

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award of exemplary damages in accordance with the settled doctrine of common law'.<sup>146</sup> In the House of Lords, Lord Hailsham LC recognised that it was a fair criticism of Lord Devlin that he failed to consider the decision in *Hulton* but concluded that the decision was only persuasive authority on punitive damages.<sup>147</sup> Lord Reid and Lord Diplock contended that *Hulton v Jones* was not authority regarding punitive damages.<sup>148</sup> Lord Morris and Viscount Dilhorne thought that the topic of punitive damages was discussed in *Hulton* but did not go as far as to suggest that *Rookes* was in conflict with that decision.<sup>149</sup>

Lord Loreburn's reference to the jury's entitlement to condemn and check a reprehensible libel combined with the very substantial amount of damages which was considered appropriate in the circumstances indicate that there was probably a punitive aspect in the jury's award. Even though the case stands as authority for the proposition that the absence of malice in the defendant is irrelevant to establishing the elements of the tort of defamation, it is difficult to justify this extraordinarily large award for an unintentional defamation.<sup>150</sup> Mitchell has argued that 'the view which the jury took of the facts [in *Ley*] was that the defendant had been malicious' and that 'the rule which emerged from the House of Lords was the product of thinking about hypothetical facts'.<sup>151</sup> Although the defendants alleged that they were unaware of the existence of the claimant, it came to light

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<sup>146</sup> *Broome* (n 63) 381.

<sup>147</sup> *Broome* (n 3) 1075.

<sup>148</sup> *ibid* 1092 (Lord Reid), 1131 (Lord Diplock).

<sup>149</sup> *ibid* 1098 (Lord Morris), 1111 (Viscount Dilhorne).

<sup>150</sup> In later unintentional defamation cases the jury made much smaller awards, see, eg, *Newstead v London Express Newspaper* [1940] 1 KB 377 (CA) (one farthing); *Hough v London Express Newspapers* [1940] 2 KB 507 (CA) (£52, ie £2,965 in 2021). See, also, Paul Mitchell, 'Artemus Jones and the Press Club' (1999) 20 JLH 64, 68 fn 4.

<sup>151</sup> Mitchell, 'Artemus Jones and the Press Club' (n 150) 67.

in cross-examination that the author of the article had actually had a run-in with the claimant and this undermined the claim that the use of the claimant's name was coincidental.<sup>152</sup>

Finally, it is noteworthy that books in the pre-*Rookes* era also cite *Hulton* as authority about punitive damages.<sup>153</sup> From this perspective, it is strongly arguable that Lord Devlin failed to consider another relevant House of Lords decision.

#### **8.4.4 The *Rookes* categories are not justified by precedent**

My analysis in this section showed that the *Rookes* categories are not justified by precedent. This is because (1) the authorities on which Lord Devlin relied to support his categories do not support them sufficiently; (2) there are decisions on punitive damages falling outside the *Rookes* categories which Lord Devlin either did not consider at all or wrongly interpreted as being concerned with aggravated damages; and (3) there are two House of Lords decisions during the pre-*Rookes* period which upheld the power to award punitive damages and neither of these decisions satisfied the 'categories test'. Lord Devlin was bound by those decisions and wrongly treated them as being unrelated to punitive damages.

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<sup>152</sup> Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law* (6th edn, OUP 2017) 741.

<sup>153</sup> Eg, *Halsbury's Laws* (n 31) 391 fn (1). See, also, Mitchell, *The Making of the Modern Law of Defamation* (n 5) 119: '[In *Hulton*] Lord Loreburn LC ... pointed out that the jury was entitled to condemn publications ... [and] saw large damages awards as a means of curbing the excesses of popular journalism'.

## 8.5 ARE THE *ROOKES* CATEGORIES JUSTIFIED NORMATIVELY?

This section examines whether Lord Devlin’s categories are justified independently of precedent (ie, whether there is a convincing normative argument for these categories). Many authors have argued that restricting punitive damages only to these categories is unjustified<sup>154</sup> and other common law jurisdictions have refused to adopt the ‘categories test’.<sup>155</sup> My thesis is that, although there is plausibility in punishing state officials abusing their power (‘Category 1’) and those who deliberately commit wrongs to make profits (‘Category 2’), there is no reason why civil punishment should be confined only to those two situations. The analysis that follows is brief and focuses mainly on arguments that have not been extensively explored previously.

### 8.5.1 The exclusion of private defendants from Category 1

Lord Devlin made it clear that private defendants would be excluded from the first category of cases which may attract punitive damages:

I should not extend this category ... to oppressive action by private [defendants].

Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other’s, he

<sup>154</sup> Eg, Gerald Fridman, ‘Punitive Damages in Tort’ (1970) 48 Can B Rev 373; Nicholas McBride, ‘Punitive Damages’ in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (OUP 1996) 176–177; Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 43) 59, 107–108; Tony Weir, *An Introduction to Tort Law* (2nd edn, Clarendon Press 2006) 4; Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th edn, OUP 2019) 374.

<sup>155</sup> *Uren* (n 63) 137 (Australia); *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085 (Canada); *Taylor v Beere* [1982] 1 NZLR 81 (NZCA) 92, 95 (New Zealand); *Conway v Irish National Teachers Organisation* [1991] 2 IR 305 (Ireland Supreme Court) [324] (Ireland); *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20, [2017] 1 SLR 918 [174] (Singapore). Cf *Sistem Televisyen Malaysia Bhd v Nurullah bt Zawawi* [2015] 6 MLJ 703 (Malaysia Court of Appeal) [31]–[32] (Malaysia); *Allan v Ng & Co* [2012] HKCA 119, [2012] 2 HKLRD 160 [24] (Hong Kong). See, also, Appendix III.

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might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. ... [T]here is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages.<sup>156</sup>

Lord Devlin contended that a private defendant should not be punished ‘simply because he is the more powerful’. However, it is not the mere existence of power but rather the abuse of that power that merits punishment. Indeed, no one is ever punished just because (s)he is more powerful. If this is accepted, it is difficult to see why outrageous wrongdoing by private defendants should not attract liability for punitive damages. Anyone, regardless of status, can act oppressively.<sup>157</sup> Of course, this is not to undermine the need for a mechanism to punish public servants who outrageously abuse their power. For example, a policeman who beats up a citizen may deserve more severe punishment than an ordinary person who engages in the same conduct. The policeman’s wrong may be worse because, as Lord Devlin said, his power must be ‘subordinate to [hi]s duty of service’.<sup>158</sup> However, it does not follow from this that the abuse of power by private persons will never merit civil punishment. Conduct which is less objectionable but still punishment-worthy might call

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<sup>156</sup> *Rookes* (n 1) 1226.

<sup>157</sup> Eg, *Loudon* (n 10).

<sup>158</sup> See, also, John Gardner, ‘Criminals in Uniform’ in RA Duff and others (eds), *The Constitution of the Criminal Law* (OUP 2013) 104: ‘[P]olice officers have an additional moral duty to protect people against a wide range of misfortunes ...’.

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for a smaller punitive damages award. The extent of liability might differ but the possibility of awarding punitive damages against anyone who engages in outrageous wrongdoing should not be precluded.

As for Lord Devlin's contention that aggravated damages suffice in the case of a private bully as opposed to a public bully, this seems to be an assertion rather than an argument. Why should we assume that aggravated damages will always adequately punish and deter a private bully? First, the purpose of aggravated damages is not to punish the wrongdoer but to compensate the victim for the way in which the wrong was committed. Second, an adequate award of compensatory damages (to the extent that it has an incidental punitive effect) could sufficiently punish both the private and the public bully. This is the essence of the 'if but only if test',<sup>159</sup> which applies universally.

Another problem with confining punitive damages within this category lies in the difficulty of distinguishing between public and private defendants today when governments perform many functions through part-private part-public corporations.<sup>160</sup> A defendant must be exercising 'governmental functions'<sup>161</sup> to fall within 'Category 1' but it is not entirely clear which functions are 'governmental'.<sup>162</sup> Besides, the exact same functions performed by a government servant may, sometimes, also be performed by a private defendant. For example, as the law stands, it is possible for a court to award punitive

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<sup>159</sup> See the text to n 56.

<sup>160</sup> *Uren* (n 63) 132–133. See, also, *Fridman* (n 154) 386.

<sup>161</sup> *Broome* (n 3) 1087–88; *AB v South West Water Services Ltd* [1993] QB 507 (CA) 525.

<sup>162</sup> For an analysis of the concept of 'governmental functions', see Donal Nolan, 'Tort and Public Law: Overlapping Categories?' (2019) 135 LQR 272, 280–281.

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damages for the ‘outrageous wrongdoing’ of a doctor employed by the NHS<sup>163</sup> but not of a self-employed doctor. This distinction lacks satisfactory justification. Lord Burrows provides another illustration: ‘Why ... should a private store detective who maliciously falsely imprisons an alleged shoplifter be immune from punitive damages when a police officer, who does exactly the same, is not?’<sup>164</sup>

The distinct treatment of private and public defendants in respect of their liability to pay punitive damages can be explained by the need to avoid the problem of self-punishment. The typical example of ‘Category 1 cases’ today is police misconduct (eg, a policeman beating up a private citizen). Ordinarily, if a private citizen beats up another we look to the state to punish that person. However, when a public servant engages in similar conduct we may not have confidence in the state adequately punishing its own agents. By giving private citizens standing to pursue punishment it is possible to avoid this conflict.<sup>165</sup> As far as the police is concerned, the system of ‘police complaints’ has been criticised due to the lack of independent investigations. Disciplinary charges are rarely imposed following complaints.<sup>166</sup> This argument is further supported by the empirical evidence which suggests that, when punitive damages are awarded against the police, the misconduct

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<sup>163</sup> In *Re Organ Retention Group Litigation* [2004] EWHC 644 (QB), [2005] QB 506 [263] Gage J implicitly accepted that the actions of doctors employed by the NHS could fall under Category 1 (although, on the facts, he did not award punitive damages because the doctors’ conduct had not been ‘outrageous’). However, it is arguable that an NHS doctor is not exercising functions tied to a particular governmental office and so it is wrong to apply the first *Rookes* category in this setting.

<sup>164</sup> Burrows, *Remedies* (n 154) 374.

<sup>165</sup> Eg, Andrew Burrows, ‘Reforming Exemplary Damages: Expansion or Abolition?’ in Peter Birks, *Wrongs and Remedies in the Twenty-First Century* (Clarendon Press 1996) 168–169; Stevens (n 71) 88.

<sup>166</sup> Richard Clayton and Hugh Tomlinson, *Civil Actions Against the Police* (3rd edn, Sweet & Maxwell 2004) 13.

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in question has not usually been addressed by another sanction.<sup>167</sup> If internal mechanisms are ineffective in combating police misconduct, punitive damages could do the job. Interestingly, Lord Devlin who created the first *Rookes* category, did not mention this argument in his reasons.

However, the self-punishment argument is not entirely convincing because it is not obvious why the independent entity in charge of punishing the executive must be a civil court<sup>168</sup> or why the appropriate punishment must take the form of punitive damages. The crucial element is to have an impartial and independent entity responsible for overlooking and sanctioning the executive. An elected representative of the people could be assigned to oversee the police. If the elected representatives fail to deliver, voters might replace them.<sup>169</sup> Another possibility would be to introduce civilian oversight agencies to audit police disciplinary processes.<sup>170</sup> For example, Northern Ireland operates an independent police oversight agency, the Police Ombudsman for Northern Ireland, which has been said to be successful and to have attracted high levels of public support.<sup>171</sup>

Besides, it is doubtful that, from the many different mechanisms of controlling police misconduct the tool of punitive damages is an efficient choice. When punitive damages are awarded, the police officer who is personally responsible for the wrong is not

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<sup>167</sup> See chapter 6.2.2(5).

<sup>168</sup> Article 6 of the ECHR dictates that everyone is entitled to a fair trial by ‘an independent and impartial tribunal established by law’. According to the ECtHR jurisprudence a ‘tribunal’ is characterised substantively (as a body determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner, see *Sramek v Austria* (1984) Series A no 84, (1985) 7 EHRR 351 [36]). The classification of the entity as a ‘court’ domestically is immaterial.

<sup>169</sup> Jacqueline Drew and Tim Prenzler, *Contemporary Police Practice* (OUP 2015) 217.

<sup>170</sup> *ibid* 222 (also discussing other strategies to combat police misconduct).

<sup>171</sup> *ibid* 235.

held accountable because, in practice, the award is not ultimately paid by him/her. As Lord Woolf MR noted, punitive damages have a lesser role to play in these cases because ‘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’.<sup>172</sup> The relatively low frequency of punitive damages awards in ‘Category 1 cases’<sup>173</sup> perhaps reflects the skepticism of judges about the efficacy of punitive damages awards in this area.

In conclusion, excluding high-handed wrongdoing by private defendants from the scope of punitive damages leaves a gap in the law. Although there are good reasons for punishing instances of callous wrongdoing by the executive, the argument for stopping there is not strong enough. Outrageous conduct by private defendants is also punishment-worthy and there is no persuasive explanation for this omission.

### **8.5.2 The exclusion of purely malicious conduct from Category 2**

Lord Devlin’s second category restricts punitive damages to cases where there was a profit motive connected with the wrongful conduct. It has been repeatedly pointed out<sup>174</sup> that there is no convincing justification for this limitation. Although there are good reasons for punishing profit-seeking wrongdoers, it is not obvious why civil punishment should end there.

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<sup>172</sup> *Thompson v CPM* [1998] QB 498 (CA) 512–513.

<sup>173</sup> The success rate was 30 per cent in the first instance study and 23.4 per cent in the appellate study. The overall success rate of punitive damages claims at first instance and on appeal was 46.4 per cent and 42.6 per cent respectively. See chapters 6.1.2 and 7.1.1(2).

<sup>174</sup> Eg, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 43) 59; Stevens (n 71) 88; Burrows, *Remedies* (n 154) 374.

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In particular, punitive damages may be needed to punish profit-seeking wrongdoers when other remedies are inadequate to achieve this purpose. The argument that restitutionary damages<sup>175</sup> will suffice here<sup>176</sup> misunderstands the fundamental differences between restitution and punishment. Although restitutionary damages strip the defendant of gains, punitive damages are designed to punish and deter. As a result, punitive damages can be awarded in cases where the defendant made *no* profit from his or her wrongdoing.<sup>177</sup> A mere *aim* to make a profit is sufficient for a punitive damages award but not for a restitutionary award. Besides, different quantification principles apply to each of these remedies. Restitutionary damages are calculated by reference to the defendant's profit whereas punitive damages are assessed by reference to the amount that is necessary to punish and deter the defendant.<sup>178</sup> Therefore, the level of punitive damages may differ from the quantum of the defendant's profit.<sup>179</sup>

Although there are good reasons for making punitive damages available against those who seek to make a gain from their wrongdoing, it is unsatisfactory for current purposes to exclude from the scope of the remedy a person committing a wrong out of pure hatred and regardless of the cost. Even Lord Reid, who upheld Lord Devlin's categories,

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<sup>175</sup> The label 'restitutionary damages' has been used to describe a form of extra-compensatory damages that aims to strip from the defendant gains made wrongfully, see *A-G v Blake* [2001] 1 AC 268 (HL) 278. Some authors prefer the term 'disgorgement damages' or 'gain-based damages', see, eg, James Edelman, *Gain-Based Damages* (Hart 2002) 65–112; Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 770–779.

<sup>176</sup> *Kuddus v CC Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 [109] (Lord Scott): 'The profit made by a wrongdoer can be extracted from him without the need to rely on the anomaly of exemplary damages'.

<sup>177</sup> Eg, *Archer v Brown* [1985] 1 QB 401 (QBD) 423.

<sup>178</sup> *Broome* (n 3) 1040. Other crucial factors for the assessment of punitive damages such as the principle of moderation and the defendant's wealth are irrelevant to a restitutionary remedy. See, also, McBride and Bagshaw (n 175) 764–765.

<sup>179</sup> Eg, *McMillan v Singh* [1984] 17 HLR 120 (CA) 125–126.

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recognised this difficulty: '[S]uppose [a defendant] commits the tort not for gain but simply out of malice, why should he not also be punished? ... I freely admit there is no logical reason. ... If logic is to be preferred ... then this category must be widened'.<sup>180</sup> Lord Hailsham LC contended that the second category excludes the wrongdoer acting out of sheer malice 'because this is already taken care of in the full compensation ... for the injury involved ...'.<sup>181</sup> However, the crucial question is always whether the defendant's conduct merits punishment *after full compensation has been awarded*. If a defendant with a profit motive cynically disregarded the claimant's rights this may also be a case for aggravated damages. It is not clear why the profit motive should suffice to trigger an award of punitive damages, but a malicious motive should not. Compensatory damages (to the extent that they have an incidental punitive effect) may be an insufficient punishment in both cases. For example, the wrongful eviction of one's tenant out of pure malice but without a profit motive may justify punishment but, as the law stands, only aggravated damages could be awarded in this scenario.

The main reason why it is problematic to confine punitive damages awards only to instances of profit-seeking conduct is that a wrongdoer who simply acts out of malice may also deserve to be punished. Indeed, it makes no difference for the purposes of 'just deserts' whether a person who attacks another was paid to do so or not.<sup>182</sup> Even assuming that it is easier to deter profit-seekers (who will likely respond more readily to financial incentives compared to wrongdoers who merely enjoy inflicting harm) deterrence is only one of the

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<sup>180</sup> *Broome* (n 3) 1088.

<sup>181</sup> *ibid* 1079.

<sup>182</sup> Burrows, *Remedies* (n 154) 374: '[W]hy ... should it make all the difference as regards the availability of punitive damages, whether a person who attacked an old lady was paid to do so or not?'

goals of punitive damages. The courts have recognised retribution as the primary justification for the remedy.<sup>183</sup> They have also attributed additional functions to the award of punitive damages (eg, the appeasement of the victim’s desire for revenge)<sup>184</sup> which could be usefully served if the remedy were more widely available.

**8.5.3 Punitive damages ‘confuse the civil and criminal functions of the law’<sup>185</sup>**

The main reason for Lord Devlin’s decision to confine punitive damages awards to the *Rookes* categories was his view that the remedy was an alien creature in private law. He characterised punitive damages as ‘an anomaly’ because their object ‘is to punish and deter ... [which] confuses the civil and criminal functions of the law’.<sup>186</sup> His Lordship also said: ‘[T]here are certain categories of cases in which an award of exemplary damages can serve a useful purpose ... thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal’.<sup>187</sup> With respect, there is a flaw in the logic of this statement. It is inconsistent to suggest both that punitive damages are an anomaly and have no place in private law and that they can serve a useful function within private law in certain cases. Fridman characterised this as ‘an excellent example of “double-think”’.<sup>188</sup> Since Lord Devlin viewed punitive damages as an anomaly the logical solution was to suggest their abolition, especially considering that, in his words, it was

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<sup>183</sup> *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449 [29] (Lord Nicholls): ‘[t]he primary function [of punitive damages] is to punish’; *W v W* [1999] 4 LRC 260 (PC) 263 (Lord Hoffmann): ‘the main purpose of ... punitive damages is to punish the defendant’.

<sup>184</sup> See the discussion of the justifications for punitive damages in chapter 3.

<sup>185</sup> *Rookes* (n 1) 1221.

<sup>186</sup> *ibid.*

<sup>187</sup> *ibid* 1226.

<sup>188</sup> Fridman (n 154) 384.

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‘open to the House to remove an anomaly from the law of England’.<sup>189</sup> Lord Devlin probably did not believe that it was really open to him to abolish punitive damages because the abolition of a doctrine that had been part of the law for at least 200 years was not within the judicial functions of the House of Lords.<sup>190</sup> This is why he limited the doctrine as far as he could.

Despite the internal inconsistency in Lord Devlin’s logic, his statement that punitive damages ‘confuse the criminal and civil functions of the law’ is arguably the most fundamental objection against punitive damages.<sup>191</sup> It rests on the idea that a sharp divide exists between private law and criminal law.<sup>192</sup> This is also the main reason why civilian systems reject the idea of punitive damages.<sup>193</sup> Martínez Alles notes that there is a ‘dispute over the compatibility of [punitive damages] with the driving principles of the private law of torts in each civil law system, which is dominated by the notions of compensation and restitution. [This c]ompatibility with existing regimes is probably the most prominent dispute over punitive damages in the civil law world’.<sup>194</sup>

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<sup>189</sup> *Rookes* (n 1) 1221. For criticism of Lord Devlin’s inconsistency in declaring freedom from precedents in lower courts and then suggesting adherence to such precedents, see Fridman (n 154) 384.

<sup>190</sup> *Broome* (n 3) 1133.

<sup>191</sup> Burrows, ‘Reforming Exemplary Damages’ (n 165) 158.

<sup>192</sup> See, also, *Broome* (n 3) 1085 (Lord Reid): Punitive damages ‘confus[e] the function of the civil law, which is to compensate, with the function of the criminal law, which is to inflict deterrent punitive penalties’.

<sup>193</sup> The rejection is usually implicit. For example, there is no provision that prohibits punitive damages in the German Civil Code but according to Section 249(1), ‘a person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred’ (see, also, article 1240 of the French Civil Code). These provisions indicate that the purpose of damages is restorative so that punitive considerations cannot be part of private law.

<sup>194</sup> Maria Martínez Alles, ‘Punitive Damages: Reorienting the Debate in Civil Law Systems’ (2019) 10 JETL 63, 77. See, also, Solène Rowan, ‘Punishment and Private Law: Some Comparative Observations’ in Elise Bant and others (eds), *Punishment and Private Law* (Hart 2021) 70: ‘a recurrent concern [about the introduction of punitive damages in France] [i]s that ... the seminal

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The objection is simple but fundamentally flawed for two main reasons. First, it is merely declared that it is not the business of private law to punish without explaining why. In other words, this is a mere assertion.<sup>195</sup> Second, it is strongly arguable that there is not any bright line between the civil and criminal law. Criminal courts award compensation and civil courts also declare that a crime has taken place. Additionally, there are instances of implicit punishment within private law.<sup>196</sup> For example, aggravated damages, though notionally compensatory, are sometimes functionally ‘indistinguishable from punitive damages’<sup>197</sup> and judges have recognised the existence of ‘a penal element in aggravated damages’.<sup>198</sup>

Besides, even the traditional hostility of civil law systems towards punitive damages has become milder in recent years. For example, Argentina has incorporated punitive damages in its consumer protection statute.<sup>199</sup> France is currently considering proposals about the introduction of punitive damages in its civil code.<sup>200</sup> It is also common ground among civilian lawyers that although absent in name, punitive damages exist in

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principle of ... *réparation intégrale* would be infringed’; Basil Markesinis, *The German Law of Torts* (4th edn, Hart 2002) 919: ‘Punitive damages in civil actions ... bring the tort award close to the realm of criminal law [and so] are, on the whole, frowned upon in the civil law systems ...’.

<sup>195</sup> McBride (n 154) 195 (footnote omitted): ‘This so-called objection consists in a simple statement to this effect. This is a conclusion masquerading as an argument’.

<sup>196</sup> For a detailed account of this phenomenon, see James Goudkamp and Eleni Katsampouka, ‘Punitive Damages and the Place of Punishment in Private Law’ (2021) *MLR* (forthcoming).

<sup>197</sup> Peter Cane, *The Anatomy of Tort Law* (Hart 1997) 114. For an illustration, see *Perry v Scherchen* (QBD, 26 May 2000) pp 26–27 in which £5,000 (£8,573 in 2021) were awarded ‘to include the exemplary/aggravated element of the award’.

<sup>198</sup> *KD v CC Hampshire* [2005] EWHC 2550 (QB), [2005] Po LR 253 [186] (Tugendhat J). See, also, *Gerald v CPM* (CA, 10 June 1998) p 2 (Auld LJ): ‘The Common Law is still bedevilled with the overlapping notions of aggravated and exemplary damages. Aggravated damages ... carry with them ... an element of punishment for the defendant’.

<sup>199</sup> Martínez Alles (n 194) 64 discusses the relevant provisions.

<sup>200</sup> Draft article 1266-1 of the French Civil Code (discussed in Rowan (n 194) 71–81).

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practice in civil law countries. For example, Markesinis contends that ‘the notion of punitive damages in a civil action ... is *in theory* ignored by the German system’<sup>201</sup> and cites damages for pain and suffering in respect of profit-seeking privacy infringements as an example of the ‘introduction of “punitive” damages into German law’.<sup>202</sup> Rowan similarly observes that although ‘nowhere is punishment stated to be an objective of French civil law ... remedies that are intended to deter and punish are already present in French civil law, co-existing disparately and informally with compensation as a central remedy’.<sup>203</sup> And according to Martínez Alles ‘punitive elements ... are covertly present in the domestic private law practices of most civil law jurisdictions’.<sup>204</sup> Thus civilian systems use a variety of doctrines as functionally equivalent to punitive damages.<sup>205</sup> This shows that the tension with civilian legal systems in this regard is more apparent than real.

Additionally, we should not assume that the criminal law is a perfect tool to punish and deter.<sup>206</sup> For example, the prospect of being awarded punitive damages may incentivise an injured party to bring a claim in a case where the criminal process would not be invoked

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<sup>201</sup> Markesinis (n 194) 919 (emphasis added).

<sup>202</sup> *ibid* 77. See, also, Nils Jansen and Lukas Rademacher, ‘Punitive Damages in Germany’ in Helmut Koziol and Vanessa Wilcox (eds), *Punitive Damages: Common Law and Civil Law Perspectives* (Springer 2009) 77.

<sup>203</sup> Rowan (n 194) who further contends that the disapplication of the remoteness rule where wrongful conduct is deliberate reveals the ‘latent presence of punishment in French law’.

<sup>204</sup> Martínez Alles (n 194) 64.

<sup>205</sup> An additional example of hidden punitive damages in European civilian systems is the statutory authorisation of multiple damages for IP law infringements (eg, Poland: article 79(1)(3)(b) of the Law on Copyright and Related Rights of 4 February 1994 provides the ‘payment of a sum of money corresponding to twice, or, in the event of a culpable infringement, three times, the amount of the appropriate fee which would have been due at the time it was sought if the rightholder had given permission for the work to be used’. In *Case 367/15 Stowarzyszenie v Stowarzyszenie Filmowców Polskich* (ECJ, 25 January 2017) [28] it was held that Members States are not prohibited from introducing ‘punitive damages’ for IP law infringements).

<sup>206</sup> McBride (n 154) 192: The criminal justice system ‘will inevitably fail to be fully effective in achieving its purpose’.

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by them and thus punitive damages may supplement the criminal law.<sup>207</sup> In any case, civil punishment is qualitatively different from criminal punishment. The two processes are distinct, a punitive award always entails the payment of a monetary sum and the stigma of criminal conviction is usually more severe than the stigma of a civil judgment ordering the defendant to pay punitive damages. Private law does not treat the defendant as a criminal, so the confusion of functions argument also suffers in that respect.<sup>208</sup>

The above shows that no sharp distinction exists between criminal and private law in so far as the pursuit of a punitive agenda is concerned although the criminal law is, of course, far more focused on punishment than is private law. Nor is there any need for such a sharp distinction. Lord Burrows considers that there is ‘no logical reason why punishment should not be a response available to the civil law’.<sup>209</sup> The fact of the matter is that courts in both common law and civil law systems punish wrongdoers by using private law mechanisms. It is thus strange to denounce explicit punishment when implicit punishment already occurs. Current debates about punitive damages should explicitly acknowledge that punishment and private law are not strangers.

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<sup>207</sup> Fridman (n 154) 404.

<sup>208</sup> For detailed discussion of the arguments against punitive damages and why they are regarded as unfounded or surmountable, see McBride (n 154) 194–201; Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 43) 97–104.

<sup>209</sup> Burrows, *Remedies* (n 154) 376. See, also, James Edelman, ‘In Defence of Exemplary Damages’ in Charles Rickett (ed), *Justifying Private Law Remedies* (Hart 2008) 231–232.

**8.5.4 The justifications for punishment extend beyond the *Rookes* categories**

If it is accepted that punishment has a place within private law,<sup>210</sup> which is the assumption on which this thesis has proceeded,<sup>211</sup> then it is not sensible to suggest that it is warranted only if the defendant's conduct falls within one of the *Rookes* categories.<sup>212</sup> The current position in English law is that no matter how reprehensible the defendant's conduct was, punitive damages cannot be granted unless a case satisfies the 'categories test'. Whatever normative force the *Rookes* categories may have (and it is not denied that a need for punishment may exist in the circumstances captured by those categories), their practical effect is to exclude punitive damages from a wide range of instances in which 'punishable conduct'<sup>213</sup> can arise.

Consider, for example, *Norberg v Wynrib*.<sup>214</sup> The case involved a woman who had become dependent on an addictive painkiller known as Fiorinal, which she had initially been prescribed to alleviate pain associated with an abscessed tooth. Her treating physician quickly recognised this dependency and decided to take advantage of it by continuing to provide her with Fiorinal in exchange for sexual favours. The Supreme Court of Canada held that an award of punitive damages was appropriate because 'the exchange of drugs

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<sup>210</sup> For the view that punishment has no place in private law, see Ernest Weinrib, *Corrective Justice* (OUP 2012) 97.

<sup>211</sup> See chapter 3.3.

<sup>212</sup> McBride (n 154) 177: '[T]here [i]s no reason for awarding punitive damages in those situations [captured by the *Rookes* categories] which d[oes] not also apply in other situations where punitive damages c[an]not be awarded after the decision in *Rookes v Barnard*'.

<sup>213</sup> This denotes conduct which represents a marked departure from ordinary standards of decent behaviour, see chapter 2.2.2(1).

<sup>214</sup> [1992] 2 SCR 226.

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for sex by a doctor in a position of power [wa]s conduct that cri[e]d out for deterrence'.<sup>215</sup>  
An English court would not be able to award punitive damages in this case.<sup>216</sup>

*G v G*,<sup>217</sup> a case from New Zealand, provides another illustration of the under-inclusiveness of the 'categories test'. In this case, the defendant had abused and physically assaulted his wife over three years. On several occasions, he threatened to kill her and on one occasion he hung her outside the balcony of their second floor flat, indicating that he would drop her on the ground. No criminal proceedings were brought. Cartwright J found that 'the combination of specific and remarkable events and the underlying theme of violence [wa]s sufficiently serious to warrant'<sup>218</sup> punitive damages.

*Howell v Machi*,<sup>219</sup> which is another Canadian case, provides a third illustration. The defendant, whose license was suspended, was driving on the wrong side of the road when he struck the claimant, a pedestrian. The defendant fled the scene after the collision, leaving the claimant bleeding unconscious on the ground. McNaughton J found that punitive damages were warranted. The defendant's actions were 'worthy of denunciation and retribution [considering] his failure to stop after striking [the claimant]'<sup>220</sup> as well as the fact that he 'ha[d] repeatedly shown complete disregard for the suspensions of his

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<sup>215</sup> *ibid* 268 (La Forest J).

<sup>216</sup> Applying *Re Organ Retention Group Litigation* (n 163), it might have been open to an English court to award punitive damages in these circumstances only if the practitioner had acted in his capacity as an NHS doctor rather than as a private practitioner. This reinforces the conclusion that the *Rookes v Barnard* categories can lead to arbitrary distinctions.

<sup>217</sup> [1997] NZFLR 49 (High Court Auckland).

<sup>218</sup> *ibid* 54.

<sup>219</sup> [2017] BCSC 1806.

<sup>220</sup> *ibid* [519] (McNaughton J).

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driver's license'.<sup>221</sup> Similarly, in *McDonald v Wilson*,<sup>222</sup> which was also decided in Canada, punitive damages were awarded against the defendant truck driver who deliberately tried to strike the claimant. Punitive damages would not be recoverable in the UK in these circumstances. Again, this shows that the *Rookes* categories limit unduly the jurisdiction to award punitive damages.

A final example can be derived from English law.<sup>223</sup> In *Loudon v Ryder*,<sup>224</sup> the defendant entered the claimant's flat through a window and attacked the claimant by beating her on the shoulders and head and dragging her down the stairs by her hair. Although the defendant's conduct falls outside the *Rookes* categories (because the defendant was not a public servant and did not act with a 'profit motive'), the behaviour plainly merited the award of punitive damages according to the rationales for the remedy. Ironically, Devlin J in that case, directed the jury to award punitive damages if they found that there had been 'a wanton and willful disregard of the law, or for somebody else's rights'.<sup>225</sup> In *Rookes*, Lord Devlin overruled *Loudon v Ryder*.<sup>226</sup>

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<sup>221</sup> *ibid.*

<sup>222</sup> [1991] BCJ No 3137 (BCSC).

<sup>223</sup> For additional instances of punishment-worthy wrongdoing which would fall outside the *Rookes* categories, see, eg, *A v M* [1991] 3 NZLR 228 (High Court Auckland) (punitive damages awarded in a claim for spousal rape where there had been no criminal prosecution despite the filing of a complaint to the police); *Reimer v Rooster's Country Cabaret Ltd* [2013] BCJ No 2663 (BCSC) [98] (Jenkins J) (punitive damages awarded to a claimant who had been subjected to an 'unprovoked assault' by a night club bouncer); *McCaffery v Arguello* [2017] BCJ No 1636 (BCSC) (punitive damages awarded against a defendant who had attacked the claimant with a baseball bat in a road rage incident).

<sup>224</sup> (n 10).

<sup>225</sup> *ibid* 209.

<sup>226</sup> *Rookes* (n 1) 1229.

**8.5.5 The *Rookes* categories are not justified normatively**

The foregoing analysis shows that the *Rookes* categories impose a restriction on the jurisdiction to award punitive damages which does not correspond to the rationales for the award. Punitive damages are usually justified on the basis of retribution and deterrence. These justifications, which Lord Devlin himself attributed to the remedy, constitute good reasons for awarding punitive damages. However, the interest in retribution and deterrence is not exhausted within the categories of cases created in *Rookes v Barnard*. Those are clearly not the only situations in which conduct that is deserving of punishment and in respect of which there is a need for deterrence can occur.

## 8.6 CONCLUSION

Contrary to what Lord Devlin contended in *Rookes*, the case categories to which he confined the award of punitive damages are not justified by precedent. Lord Devlin did not analyse the pre-*Rookes* law objectively or based on conventional methods of interpretation, but with an eye to favouring his preferred interpretation (ie, explaining as many cases as possible in terms of pure compensation). Nor are the *Rookes* categories justified normatively. That is because these categories are under-inclusive in relation to the objectives of the award.

Before articulating his revised doctrine of punitive damages, Lord Devlin said: ‘I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range.’<sup>227</sup> It is unclear how a distinction between ‘powerful’ and ‘compelling’ authority can be drawn. Prior to *Rookes*, punitive damages had been available on a much wider basis than Lord Devlin’s formulation for at least 200 years. Why should this be regarded as powerful but not compelling authority? The answer to this is not apparent.

Fifty-seven years after Lord Devlin’s speech, English law ‘is still toiling in the chains of *Rookes v Barnard*’.<sup>228</sup> Although the *Rookes* categories capture two important instances of punishment-worthy behaviour, the need for civil punishment extends beyond these two situations. Of course, any expansion of the availability of punitive damages would be contentious due to the skepticism of numerous judges and academics towards the

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<sup>227</sup> *ibid* 1226.

<sup>228</sup> *Bottrill* (n 183) [41] (Lord Nicholls).

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idea of civil punishment. However, it is arguable that the abolition of the ‘categories test’ would be a less controversial change today than it was twenty-four years ago, when the Law Commission proposed it.<sup>229</sup> This is apparent from the continued expansive trend that both common law<sup>230</sup> (including English law itself)<sup>231</sup> and civil law countries<sup>232</sup> have adopted in recent years in this regard. It may also be said that because English courts exercise their power to award punitive damages with restraint, as the empirical evidence suggests, a liberalisation of the circumstances in which the remedy is available would not produce unfair outcomes or practical difficulties. It is thus hoped that when a suitable case finds its way to the Supreme Court, the opportunity to restore the pre-*Rookes* orthodoxy will not be missed.

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<sup>229</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (n 43) 185.

<sup>230</sup> For a recent example of a common law country refusing to follow the *Rookes* categories, see *ACB* (n 155) (Singapore).

<sup>231</sup> Consider, eg, the abolition of the ‘cause of action test’ in *Kuddus* (n 176). See, also, Crime and Courts Act 2013, s 34(6) which authorises punitive damages awards against press defendants for conduct showing ‘a deliberate or reckless disregard of an outrageous nature for the claimant’s rights’. Although this is an instance of statutory authorisation of punitive damages (and is thus captured by the ‘categories test’), it enables courts to award punitive damages against media defendants who were not motivated by profit.

<sup>232</sup> The relaxation of the traditional resistance by civilian systems to the idea of civil punishment is discussed in the text to nn 199–205.

## CHAPTER 9: ‘CAUSE OF ACTION RESTRICTIONS’

### 9.1 INTRODUCTION

This chapter considers whether ‘cause of action restrictions’ survive in the English law of punitive damages after the demise of the ‘cause of action test’ (also known as ‘pre-1964 test’). It also examines whether such restrictions (to the extent that they survive) are justified. By the term ‘cause of action restrictions’ I mean restrictions on the availability of punitive damages that are imposed solely by reference to the cause of action in which the claimant sues. The ‘cause of action test’ was established in 1993 by the Court of Appeal.<sup>1</sup> It dictated that punitive damages were only available in respect of causes of action for which they had been awarded before *Rookes v Barnard*<sup>2</sup> was decided. Eight years later, the House of Lords in *Kuddus v CC Leistershire Constabulary*,<sup>3</sup> unanimously abolished this restriction on the availability of punitive damages.

Despite the removal of this restriction, it seems that the cause of action in which the claimant sues nonetheless remains highly relevant to the decision whether punitive damages can and should be awarded. For example, it is often said that punitive damages are unavailable for equitable wrongs. According to the authors of a leading textbook on equity, ‘in England, received legal opinion has long been that exemplary damages awards for breach of purely equitable obligations are not permitted – and English law therefore

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<sup>1</sup> *AB v South West Water Services Ltd* [1993] QB 507 (CA).

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

<sup>3</sup> [2001] UKHL 29, [2002] 2 AC 122.

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precludes them’.<sup>4</sup> Likewise, punitive damages are not available for breach of contract. In the words of Moulder J, ‘Exemplary damages are not a currently recognised head of damage for breach of contract’.<sup>5</sup> Finally, there are doubts as to whether punitive damages are available in the tort of negligence, although it is unclear whether any such position is due to a ‘cause of action restriction’ or the fact that merely negligent behaviour tends not to merit the award of punitive damages. Lord Bridge in *Hicks v CC South Yorkshire* probably supported a ‘cause of action restriction’ when he said that ‘damages in a civil action for negligence ... are compensatory, not punitive’.<sup>6</sup> The authors of *McGregor on Damages*, who are among those who doubt that punitive damages can be awarded in a claim in the tort of negligence, seem to prefer the second of these reasons, as they write that ‘[i]t would not usually be expected that actions in negligence would lead to exemplary damages ... since the necessary mental element is not present ...’.<sup>7</sup> Although these limitations are not based on precisely the same ‘cause of action test’ that was articulated in *AB*, which limited punitive damages to pre-1964 causes of action in respect of which they had been awarded, they are still ‘cause of action restrictions’. That is because punitive damages are precluded solely on the basis that an award cannot be made for the relevant cause of action.

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<sup>4</sup> JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (5th edn, LexisNexis 2015) para 23.600.

<sup>5</sup> *Aarons v Brocket Hall (Jersey) Ltd* [2018] EWHC 222 (QB) [8].

<sup>6</sup> [1992] 2 All ER 65 (HL) 68 (although this quote pre-dates *Kuddus*).

<sup>7</sup> James Edelman, *McGregor on Damages* (21st edn, Sweet & Maxwell 2021) para 13.015. The word ‘usually’ arguably means that Edelman is not saying that a blanket restriction exists as he may accept that there is some extraordinary case of negligence in which punitive damages would or should be granted.

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This chapter addresses whether punitive damages are and should be available for equitable wrongs, breach of contract and the tort of negligence. These causes of action have been chosen for examination because each of them represents an important part of English private law and because either judges or academics have contended that punitive damages are not available in relation to them.<sup>8</sup> Section 2 briefly explores the history of the ‘cause of action test’. Section 3 examines if *Kuddus* extended the availability of punitive damages to the above causes of action. Section 4 shows that despite the demise of the ‘cause of action test’ punitive damages are precluded in certain actions based on an argument that the particular cause of action does not admit of punitive damages. Section 5 considers if prohibiting the award of punitive damages for these causes of action is justified. I argue that the case against the availability of punitive damages in the above causes of action is unconvincing. The primary goals of punitive damages are retribution and deterrence.<sup>9</sup> Courts have also identified three subsidiary rationales for the award: vindication of the claimant’s rights,<sup>10</sup> a therapeutic effect on the claimant who seeks revenge<sup>11</sup> and the expression of the court’s disapproval of the defendant’s conduct.<sup>12</sup> These rationales (which

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<sup>8</sup> The analysis of ‘cause of action restrictions’ in this chapter is not exhaustive; there are several additional causes of action in respect of which punitive damages are unavailable. Examples include claims under the Consumer Protection Act 1987, see Michael Jones (ed), *Clerk and Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020) para 10.85: ‘Despite ... *Kuddus* ... [punitive damages] are not available in an action under the [Consumer Protection Act] 1987’; claims under the Human Rights Act (‘HRA’) 1998, see *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 [55] (Lord Woolf CJ): ‘[In claims under the HRA 1998] exemplary damages are not awarded’; and claims for competition law infringements, see Competition Act 1998 sch 8A, para 36: ‘A court or the [Competition Appeal] Tribunal may not award exemplary damages in competition proceedings’. Due to space constraints these restrictions are not examined in this chapter.

<sup>9</sup> *Kuddus* (n 3) [50]. See, also, chapter 3.

<sup>10</sup> *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449 [29].

<sup>11</sup> *W v W* [1999] 4 LRC 260 (PC) 264.

<sup>12</sup> *Kuddus* (n 3) [91].

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the thesis assumes are legitimate goals for private law to pursue)<sup>13</sup> may justify an award of punitive damages for any civil wrong and so it is submitted that punitive damages should be available in respect of all civil wrongs. It is the defendant’s conduct that merits retribution and deterrence and therefore the test for the availability of the award should depend on that factor alone and not on the cause of action in which a claim is pleaded. Similarly, the subsidiary rationales for punitive damages are related to the way in which the wrong was committed rather than the cause of action in which the claimant sues. Examples of cases decided by courts across the Commonwealth<sup>14</sup> are used to show that there may be a need for punitive damages in the context of these wrongs. As will be apparent from my analysis, I advocate that Canada has adopted the most satisfactory approach in this regard because it permits punitive damages awards irrespective of the classification of the wrong in which punishment-worthy conduct arises.<sup>15</sup>

It should be noted at the outset that some of the territory covered in this chapter (such as the question of whether punitive damages should be available for breach of

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<sup>13</sup> See chapter 3.3.

<sup>14</sup> In particular, I examine cases from Canada, New Zealand and Australia. Cases from the US are not considered because the law of punitive damages varies considerably from state to state so it is not possible to provide an accurate overview (eg, although most states prohibit punitive damages for breach of contract, some states have enacted statutes that depart from this rule in consumer and insurance contracts, see Restatement (Second) of Contracts, s 355 cmt a).

<sup>15</sup> Note, however, that as regards punitive damages for breach of contract, Canadian courts have held that an award can be made only if the defendant has committed an independently actionable wrong in addition to the breach of contract, see *Vorvis v Insurance Corp of British Columbia* [1989] SCR 1085. There is no convincing justification for this additional restriction applying to contractual claims, see John McCamus, ‘Prometheus Bound or Loose Canon? Punitive Damages for Pure Breach of Contract in Canada’ (2004) 41 San Diego LR 1491, 1504: ‘[N]o explanation [i]s given for the proposition that although one single breach of duty suffices for punitive damages in a tort context, punitive damages in contract require two breaches of duty’. See, also, *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] SGCA 26, [2017] 2 SLR 129 [115] (Phang Boon Leong JA): ‘[T]here is no reason ... why a single breach of contract ought not ... to justify an award of punitive damages’.

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contract and equitable wrongs) has been addressed by other writers.<sup>16</sup> Nevertheless, this chapter is distinctive and adds to the existing learning for three reasons. First, it makes the novel claim that there are many continuing ‘cause of action restrictions’ despite the House of Lords in *Kuddus* holding that it is ‘the features of the behaviour rather than the cause of action’ that ‘must be looked at’<sup>17</sup> in order to decide whether a case warrants an award of punitive damages. Second, whereas most other treatments are only concerned with equity or contract, this chapter looks systematically at all of the major ‘cause of action restrictions’ alongside each other. Third, this chapter addresses the availability of punitive damages for the tort of negligence in respect of which little has been written.<sup>18</sup>

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<sup>16</sup> On equitable wrongs see, eg, James Edelman, ‘A “Fusion Fallacy” Fallacy?’ (2003) 119 LQR 375; Andrew Burrows, ‘Remedial Coherence and Punitive Damages in Equity’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Thomson 2006) 387–402. On breach of contract see, eg, Nicholas McBride, ‘A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract’ (1995) 24 Anglo-Am LR 369; Ralph Cunnington, ‘Should Punitive Damages Be Part of the Judicial Arsenal in Contract Cases?’ (2006) 26 LS 369. See, also, Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th edn, OUP 2019) 360–361, 377–378 (breach of contract), 536–537 (equitable wrongs).

<sup>17</sup> *Kuddus* (n 3) [26] (Lord Slynn).

<sup>18</sup> Eg, Rachael Mulheron, ‘The Availability of Exemplary Damages in Negligence’ (2000) 4 Mac LR 61 (focusing on Australian law).

## 9.2 THE HISTORY OF THE ‘CAUSE OF ACTION TEST’

In 1993, the Court of Appeal had to decide whether to allow an appeal against a decision not to strike out a punitive damages claim in negligence, public nuisance and breach of statutory duty.<sup>19</sup> About 180 claimants drank contaminated water which caused them to suffer various illnesses. They blamed the defendant who argued that negligence, public nuisance and breach of statutory duty could not found a claim for punitive damages because the combined effect of *Rookes v Barnard*<sup>20</sup> and *Broome v Cassell & Co Ltd*<sup>21</sup> was such that a claim must pass two tests: First, it must fall within one of Lord Devlin’s categories that were established in *Rookes* and second, it must be brought in a cause of action for which punitive damages had been awarded before *Rookes* was decided. The Court of Appeal unanimously accepted this submission relying on obiter dicta of Lord Hailsham LC, Lord Diplock, Lord Wilberforce and Lord Reid in *Broome*. In particular, Lord Hailsham LC contended that by distilling his ‘categories’ Lord Devlin was not intending ‘to add to the number of torts for which exemplary damages can be awarded’.<sup>22</sup> According to Lord Diplock, ‘*Rookes v Barnard* was not intended to extend the power to award exemplary ... damages to particular torts for which they had not previously been awarded’.<sup>23</sup> Lord Wilberforce referred to ‘the range of torts for which punitive damages may be given ...’.<sup>24</sup> Finally, Lord Reid said that ‘[punitive damages] should not be permitted in any class of

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<sup>19</sup> *AB* (n 1).

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

<sup>21</sup> [1972] AC 1027 (HL).

<sup>22</sup> *ibid* 1076.

<sup>23</sup> *ibid* 1130–31.

<sup>24</sup> *ibid* 1114.

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case where [their] use was not covered by authority’.<sup>25</sup> It is doubtful whether the above dicta (especially Lord Wilberforce’s and Lord Reid’s statements) were meant to restrict punitive damages to pre-1964 causes of action.<sup>26</sup> Sir Thomas Bingham MR in *AB* admitted that although ‘the answer [was not] at all clear’<sup>27</sup> he was inclined to think that the majority of the House of Lords in *Broome* regarded the satisfaction of the ‘cause of action test’ as a requirement that had to be met before punitive damages can be awarded. Thus, the Court of Appeal established the ‘cause of action test’. As a result of the introduction of this test, punitive damages could not be awarded for various wrongs (eg, negligence<sup>28</sup> and deceit<sup>29</sup>).

The ‘cause of action test’ was criticised as inefficient and arbitrary. The Law Commission was particularly dissatisfied with it and recommended that it be abandoned. It wrote: ‘[T]he availability of exemplary damages is ... restricted by what are arguably the accidents of precedent, rather than sound principle. ... One consultee spoke for many in stating that the result of *AB* is intolerable in terms of justice, logic and certainty’.<sup>30</sup> However, in 1999, the government announced that it did not intend to implement the Law Commission’s proposals (including the proposal to abandon the ‘cause of action test’) and that the development of the law should be left in the hands of the courts.<sup>31</sup>

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<sup>25</sup> *ibid* 1086.

<sup>26</sup> Andrew Burrows, ‘The Scope of Exemplary Damages’ (1993) 109 LQR 358, 360–361: ‘It cannot be said that precedent dictated acceptance of the cause of action, as well as categorisation, test’.

<sup>27</sup> *AB* (n 1) 530.

<sup>28</sup> *ibid*.

<sup>29</sup> *Broome* (n 21) 1131.

<sup>30</sup> Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 93 (footnotes omitted).

<sup>31</sup> HC Deb 9 November 1999, vol 337, col 502.

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Such judicial action was taken in 2001 when the House of Lords abolished the ‘cause of action test’ in *Kuddus v CC Leicestershire Constabulary*. Even though the Law Lords were skeptical regarding the desirability of punitive damages within private law<sup>32</sup> they all agreed that the ‘cause of action test’ should be abolished. Three Law Lords (Lord Slynn, Lord Mackay and Lord Hutton)<sup>33</sup> doubted whether, as a matter of positive law, the ‘cause of action test’ had been accepted unequivocally in *Broome*. All of the judges agreed that punitive damages awards should no longer be restricted to pre-1964 causes of action.

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<sup>32</sup> Only three Law Lords expressed their views on this topic. Lord Nicholls (at [63]) and Lord Hutton (at [75]) saw value in retaining punitive damages. Lord Scott (at [110]) was willing to abolish the remedy (acknowledging that he was a minority on this point).

<sup>33</sup> *Kuddus* (n 3) [21]–[22], [27] (Lord Slynn), [38] (Lord Mackay), [81] (Lord Hutton).

### 9.3 DOES *KUDDUS* LEAVE SPACE FOR ‘CAUSE OF ACTION RESTRICTIONS’?

This section examines whether *Kuddus* leaves room for the contention that punitive damages are not available for equitable wrongs, breach of contract and the tort of negligence.

#### 9.3.1 Equitable wrongs<sup>34</sup>

None of the Law Lords in *Kuddus* discussed the availability of punitive damages for equitable wrongs. Although the speeches of Lord Slynn and Lord Nicholls can arguably be interpreted as allowing punitive damages for such wrongs, this is not the case for the speeches of the other three Law Lords. Considering that the matter was not addressed explicitly by the House of Lords and that most of the speeches predominantly refer to ‘*tortious* causes of action’<sup>35</sup> it is plausible to read *Kuddus* as leaving scope for ‘cause of action restrictions’ to survive in equity.

However, the better view seems to be that Lord Slynn’s analysis should not be read as being confined to tort law even though he did not refer explicitly to non-tortious causes of action. In abolishing the ‘cause of action test’, Lord Slynn used primarily the term ‘cause

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<sup>34</sup> According to James Edelman, ‘Equitable Torts’ (2002) 10 TLJ 64, ‘it is extremely rare for a court or commentator to attempt a definition of what amounts to a “wrong” and therefore to explain which equitable causes of action fall within this category’. In this chapter, I adopt Birks’ definition of civil wrongs as ‘a category of events in which the explanation of the defendant’s obligation to the plaintiff is his having committed a breach of duty’, see Peter Birks, ‘The Concept of a Civil Wrong’ in David Owen (ed), *The Philosophical Foundations of Tort Law* (OUP 1997) 47. According to Lord Burrows, an indicator that a cause of action is a wrong is the availability of compensation for loss caused by the conduct which constitutes the breach of duty. Based on this test, there are four main types of equitable wrongs: (1) breach of confidence, (2) breach of fiduciary duty, (3) dishonestly procuring or assisting a breach of fiduciary duty and (4) those forms of estoppel that constitute causes of action, in particular proprietary estoppel. It is unclear whether knowing receipt is an equitable wrong or an aspect of the law of unjust enrichment, see Burrows, *Remedies* (n 16) 509.

<sup>35</sup> *Kuddus* (n 3) [44], [60], [81] and [112].

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of action’ rather than ‘tort’ although it is not clear if this was a conscious choice. More importantly, according to Lord Slynn ‘*it is the features of the behaviour rather than the cause of action* which must be looked at in order to decide whether the facts fall into [a *Rookes*] category’.<sup>36</sup> His speech thus suggests that punitive damages are available in any case that satisfies the ‘categories test’ irrespective of the cause of action in which the claimant sues. Lord Nicholls’ speech can similarly be interpreted as stating that punitive damages are available for equitable wrongs even though he likewise did not refer to equitable wrongs. Although the language used indicates that Lord Nicholls contemplated the effects of the removal of the test only within the tort framework,<sup>37</sup> it is arguable that his Lordship would have accepted the availability of the remedy in non-tortious causes of action. Lord Nicholls held, first, that the ‘cause of action condition’ should be abolished and, second, that ‘the essence of the conduct constituting the court’s discretionary jurisdiction to award punitive damages is conduct which was an outrageous disregard of the plaintiff’s rights’.<sup>38</sup> The combined effect of his conclusions is that the remedy is available for an equitable wrong which constituted an outrageous disregard of the claimant’s rights. It is hard to find a reason (other than a formalistic or semantic one) why this should not be the case.

The speeches of Lord Mackay and Lord Hutton are harder to interpret. Lord Mackay said that *Rookes* ‘was not concerned with particular torts but rather with factual situations which might exist *across a range of torts*’.<sup>39</sup> His Lordship did not express his

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<sup>36</sup> *ibid* [26] (emphasis added).

<sup>37</sup> Eg, *ibid* [60].

<sup>38</sup> *ibid* [68].

<sup>39</sup> *ibid* [44] (emphasis added).

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views on when, if ever, punitive damages should be available. Lord Hutton contended that the decision to award punitive damages was based on ‘the manner in which the defendant committed the *tort*, his behaviour in carrying out the *tort* and not the particular cause of action upon which the claimant relied’.<sup>40</sup> It is difficult to conclude from this that Lord Mackay and Lord Hutton contemplated the availability of punitive damages in equity. The language used indicates that their rejection of the ‘cause of action test’ should be confined within tort. However, based on Lord Hutton’s analysis the key to determining whether the remedy is available is the defendant’s conduct rather than the cause of action. If this is indeed the key, no principled reason exists not to apply the same criterion to determine if punitive damages are available in equity.

Lord Scott also concurred in the House’s orders although he saw no need for retaining punitive damages<sup>41</sup> and would have abolished them altogether if the parties had argued this point. However, it was apparent even to him that in light of the other Law Lords’ speeches, his view was, in effect, a minority one.<sup>42</sup> Lord Scott also limited his references to ‘*tortious* actions’ and ‘*tortious* conduct’.<sup>43</sup> Therefore, Lord Scott’s speech cannot be interpreted as extending punitive damages beyond the realm of tort law.<sup>44</sup>

The above analysis shows that the unanimous decision in *Kuddus* to remove the ‘cause of action test’ clearly means that the remedy is now available for all torts. However,

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<sup>40</sup> *ibid* [81].

<sup>41</sup> *ibid* [110].

<sup>42</sup> *ibid* [111].

<sup>43</sup> *ibid* [112] (emphasis added).

<sup>44</sup> However, this interpretation cannot be conclusive. Lord Scott recognised that deceit qualified as a suitable case to attract punitive damages (*Kuddus* (n 3) [122]). Considering that deceit shares similarities with some equitable wrongs (eg, fraudulent breach of fiduciary duty) it is not entirely clear that Lord Scott would have rejected the availability of the remedy in equity.

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it remains unclear whether the House’s decision extends the availability of punitive damages to non-tortious causes of action. The matter was not explicitly addressed in *Kuddus* and a conservative interpretation of the decision suggests that the majority did not intend to make punitive damages available for equitable wrongs.

### 9.3.2 Breach of contract

The foregoing analysis regarding whether *Kuddus* can be interpreted as having extended punitive damages to equitable wrongs also applies in relation to the question of whether *Kuddus* permits punitive damages awards for breach of contract. While the reasons of Lord Slynn and Lord Nicholls could be read as supporting such an extension because of the focus on the defendant’s conduct rather than the cause of action in which the claimant sues, it is considerably more difficult to read the speeches of the remaining three Law Lords as supportive of an extension to the availability of punitive damages beyond tort.<sup>45</sup> Since none of the Law Lords explicitly addressed the possibility of awarding punitive damages for breach of contract, it would be difficult to read *Kuddus* as overruling this restriction sub silentio. As such, *Kuddus* leaves room for the contention that punitive damages are unavailable for breach of contract.

### 9.3.3 Negligence

In contrast with the position regarding equitable wrongs and breach of contract, *Kuddus* clearly extended the availability of punitive damages to negligence claims. The majority of the House of Lords decided that the remedy would be available in all tortious causes of

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<sup>45</sup> See, also, James Edelman, ‘Exemplary Damages for Breach of Contract’ (2001) 117 LQR 539; Gerald Fridman, ‘Punitive Damages for Breach of Contract: A Canadian Innovation’ (2003) 119 LQR 20.

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action. Lord Nicholls said that the removal of the test ‘would mean that in future, ... exemplary damages will be available across the board in every tort, including those torts where the absence of exemplary damages has long been established’.<sup>46</sup> It clearly follows from that statement that *Kuddus* permits punitive damages awards in negligence.<sup>47</sup> The fact that the tort of negligence is typically committed by carelessness (which may not always merit punishment) might mean that punitive damages will not often be awarded in it. In spite of this, the remedy is, at least in principle, available for this cause of action.

### **9.3.4 *Kuddus* leaves space for ‘cause of action restrictions’**

The foregoing analysis shows that although *Kuddus* certainly enabled courts to award punitive damages in negligence claims (because *Kuddus* clearly extended the jurisdiction to award punitive damages to all torts), it is doubtful that it also authorised such awards in the remaining causes of action under examination. Of course, *Kuddus* removed the ‘cause of action test’, and, logically, this should mean that the remedy is now available for any cause of action, irrespective of its origin, as long as the requirements laid down in *Rookes* are fulfilled. However, close examination of the decision reveals that it is unlikely that the House of Lords contemplated such an expansion of the availability of the award.

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<sup>46</sup> *Kuddus* (n 3) [60].

<sup>47</sup> Nicholas McBride, ‘Duties of Care – Do They Really Exist?’ (2004) 24 OJLS 417, 427.

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### 9.4 DO ‘CAUSE OF ACTION RESTRICTIONS’ SURVIVE?

The previous section examined the effect of *Kuddus* on the availability of punitive damages for equitable wrongs, breach of contract and the tort of negligence. I concluded that although *Kuddus* permits punitive damages awards for all torts (hence also for the tort of negligence) it is unlikely that the House of Lords contemplated the authorisation of the remedy for equitable wrongs and breach of contract (because it was silent on this issue). In this section, I examine authorities which address explicitly the availability of punitive damages in these causes of action.

#### 9.4.1 Equitable wrongs

##### (1) Legislation

Sections 34 and 42(4)(c) of the Crime and Courts Act 2013 explicitly authorise punitive damages awards for one equitable wrong today, namely breach of confidence. However, the ambit of these provisions is very narrow. The remedy may be awarded in respect of claims related to the publication of news-related material<sup>48</sup> against a defendant who was not a member of an approved press regulator<sup>49</sup> at the material time. For an award to be made it is necessary ‘that the defendant’s conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant’s rights, the conduct is such that the court should punish the defendant for it, and other remedies would not be adequate to

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<sup>48</sup> Relevant claims include ‘a civil claim made in respect of breach of confidence’, see Crime and Courts Act 2013, s 42(4)(c).

<sup>49</sup> At the time of writing, one press regulator (IMPRESS) has been approved by the Press Recognition Panel with 80 members in total: The Independent Monitor for the Press (IMPRESS), *Annual Report 2019–20* p 27 <<https://www.impress.press/downloads/file/impress-annual-report-2019-20.pdf>> accessed 30 July 2021.

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punish that conduct’.<sup>50</sup> To the best of my knowledge, English courts are yet to award punitive damages under this provision.

### (2) Case law

In *Vyse v Foster* James LJ said: ‘This Court has no jurisdiction ... to punish an executor ... it has no power of punishing anyone’.<sup>51</sup> However, in *Broome v Cassell & Co Ltd*, Lord Diplock explained the need to retain punitive damages in the second *Rookes* category by reference to cases at common law *and in equity*.<sup>52</sup> It is also noteworthy that in *AIB Group (UK) v Mark Redler & Co Solicitors*<sup>53</sup> the Supreme Court held that equitable compensation is focused on loss in a similar manner to compensation at common law. This shows that the functions performed by equitable and common law remedies are aligned. Yet, no English court has ever awarded punitive damages for an equitable wrong. Courts have considered the availability of the remedy for breach of confidence and have taken different approaches on this matter.

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<sup>50</sup> Crime and Courts Act 2013, s 34(6). Punitive damages can also be awarded against press members who have signed up to be regulated under certain circumstances (see s 34(3)).

<sup>51</sup> (1872-73) LR 8 Ch App 309, 333. Cf *Smith v Day* (1882) 21 Ch D 421 (CA) 428; *Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC) 362.

<sup>52</sup> *Broome* (n 21) 1129 citing *Livingstone v Rawyards Coal Co* (1880) 5 AC 25 (HL) 34 and *Bulli Coal Mining* (n 51) 362; in the latter two cases there are statements to the effect that in appropriate circumstances a court of equity will punish fraud. See, also, James Edelman, ‘A “Fusion Fallacy” Fallacy?’ (n 16) 377.

<sup>53</sup> [2014] UKSC 58, [2015] AC 1503 (affirming *Target Holdings v Redfurns* [1996] AC 421 (HL) 423, 432 in which it was held that the same fundamental principles apply to the assessment of compensation in equity and at common law). Neither of these cases was concerned with punitive damages.

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### *a. Douglas v Hello! Ltd (No 6)*

*Douglas v Hello! Ltd (No 6)* involved the unauthorised publication of photographs from the wedding of the Douglas couple who had granted exclusive photographic rights for the event to a third party. Lindsay J ‘assume[d], without deciding, that exemplary damages (or equity’s equivalent) [we]re available in respect of breach of confidence’.<sup>54</sup> However, the judge did not award such damages because the defendant’s conduct had not been outrageous and calculated to yield profit that would exceed the compensation due to the claimants.<sup>55</sup> The court refused to award punitive damages because the case did not satisfy the ‘categories test’ and not because the remedy was unavailable for breach of confidence. Thus, although conservatively interpreted *Kuddus* authorises punitive damages awards only within tort, Lindsay J’s analysis suggests that since the removal of the ‘cause of action test’ in *Kuddus*, punitive damages could be awarded for breach of confidence.<sup>56</sup> However, because Lindsay J merely supposed rather than decided that punitive damages could, in fact, be awarded in equity, his statements in this regard constitute nothing more than obiter dicta and thus provide weak support in favour of the availability of the remedy in equity.

### *b. Mosley v News Group Newspapers Ltd*

In *Mosley v News Group Newspapers Ltd*, after a thorough analysis, Eady J decided that punitive damages were not available for breach of confidence ‘since there [wa]s no existing

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<sup>54</sup> [2003] EWHC 786 (Ch), [2003] 3 All ER 996 [273].

<sup>55</sup> *ibid.*

<sup>56</sup> *ibid* [272]: ‘[After] *Kuddus*, ... the question whether or not to award exemplary damages should be determined more by reference to the nature of the behaviour complained of than by reference to the nature of cause of action to which that behaviour has given rise’.

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authority ... to justify such an extension ...’.<sup>57</sup> The case involved the unauthorised disclosure of information regarding the claimant’s sexual activities. The judge considered *Kuddus* and said that because the House of Lords confined its remarks only to tort it could not be concluded that the Law Lords meant to expand the award in the area of equitable wrongs.<sup>58</sup> Eady J repeatedly characterised the remedy as an ‘anomaly’.<sup>59</sup> His analysis was, to a large extent, based on an argument against punitive damages *generally* rather than an argument against punitive damages for breach of confidence specifically. The judge noted the absence of English authority in which punitive damages had been awarded for breach of confidence and considered the decision in *Douglas*, in which the High Court ultimately refused to make such an award. Accordingly, he concluded that ‘[i]n the absence of any positive decision, it would involve something of a departure for a judge ... to hold that such damages are indeed available on the list of remedies for infringement of privacy’.<sup>60</sup>

Eady J did not confine himself to the ‘cause of action argument’ but also examined the claim of punitive damages on the merits. He considered that even if punitive damages were, in principle, available in this case, he still would not have awarded them because ‘the

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<sup>57</sup> [2008] EWHC 1777 (QB), [2008] EMLR 20 [197].

<sup>58</sup> *ibid* [190]: ‘[T]heir Lordships’ remarks [in *Kuddus*] were confined to categories of tort. It is not suggested ... that the potential extension ... would go so far as to embrace [an] equitable or restitutionary claim’.

<sup>59</sup> *ibid* [179] (‘anomalous remedy’), [194] (‘punitive damages are anomalous in civil litigation’), [196] (‘an alien anomaly from the common law’).

<sup>60</sup> *ibid* [186]. *Mosley* was decided at a time when there was no clear distinction between misuse of private information and breach of confidence. Since *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003 [21] there are two distinct causes of action: an action for breach of confidence which is an equitable wrong that protects confidential information and an action for misuse of private information which is a tort that protects privacy. See, also, Burrows, *Remedies* (n 16) 12–13, 521. Lord Toulson and Lord Mance in *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081 [42], [92] recognised that punitive damages may be awarded in a claim for misuse of private information in the future. The characterisation of a cause of action as tortious or equitable is important because a conservative interpretation of *Kuddus* precludes punitive damages awards for non-tortious causes of action, see the text to nn 35–44.

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necessary ingredients [we]re lacking to justify even considering whether punishment would be appropriate’.<sup>61</sup>

### (3) Do ‘cause of action restrictions’ survive in equity?

As a matter of positive law, punitive damages are allowed (albeit to a very limited extent) in equity today at least because the Crime and Courts Act 2013 clearly authorises them. Of course, this legislation only applies to certain breach of confidence claims which is a restriction on its own but it is clear that Parliament did not consider the roots of the cause of action in equity as irreconcilable with the approval of punitive damages in this area. Nevertheless, remarks by judges and scholars indicate that ‘cause of action restrictions’ linger on in equity.

As already discussed, Eady J decided in *Mosley* that punitive damages were unavailable for breach of confidence. The authors of a leading book on equity also adopt a restrictive approach in describing the position in English law. According to *Meagher, Gummow and Lehane on Equity: Doctrine and Remedies*, ‘exemplary damages awards for breach of purely equitable obligations are not permitted – and English law therefore precludes them’.<sup>62</sup> In support of this proposition, the authors cite *Barron Industrial Services v Hargreaves*<sup>63</sup> in which the Court of Appeal struck out a punitive damages claim

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<sup>61</sup> *Mosley* (n 57) [210]. See, also, *Crawfordsburn Inn Ltd v Graham* [2013] NIQB 79 [18] (following *Mosley* and holding that punitive damages are unavailable for breach of confidence).

<sup>62</sup> Heydon and others (n 4) para 23.600. For authors suggesting that *Kuddus* opens the way for awarding punitive damages in equity, see Andrew Burrows, ‘Remedial Coherence and Punitive Damages in Equity’ (n 16) 392, 401; Steven Elliott and Charles Mitchell, ‘Remedies for Dishonest Assistance’ (2004) 67 MLR 16, 35.

<sup>63</sup> (CA, 21 May 2001).

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for breach of fiduciary duty. The authors also cite *Perotti v Garrett*<sup>64</sup> in which the Court of Appeal said that punitive damages could not be awarded in a claim outside the common law. However, both of these decisions pre-date *Kuddus* so it is doubtful whether they are authority for the proposition that punitive damages are unavailable in equity today. Considering that the latest edition of the book was published in 2015, it is surprising that the authors did not consider whether these decisions have been overtaken by *Kuddus* and that they did not discuss the statutory authorisation of punitive damages in the Crime and Courts Act 2013.<sup>65</sup> The authors argue that punitive damages are not available in equity, inter alia, because when deciding *Rookes* Lord Devlin formulated two *common law* categories in which punitive damages can be awarded.<sup>66</sup> This is said to preclude, by definition, any cause of action recognised other than by the common law from attracting an award of punitive damages. However, the term ‘common law’ can have different meanings in different contexts. For example, we can distinguish between ‘common law’ wrongs and ‘equitable’ wrongs. We can also distinguish between the ‘common law’ (ie, all judge-made laws) and ‘statute law’ (ie, laws enacted by Parliament). In this second sense, the phrase ‘common law’ encompasses both ‘common law’ and ‘equity’ as described in the first sense. It is entirely possible that Lord Devlin understood his ‘common law’ categories to have the second meaning. That is especially so given that he distinguished common law and statute in formulating his ‘categories test’.

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<sup>64</sup> (CA, 12 June 1998).

<sup>65</sup> In their discussion of breach of confidence they only (critically) refer to *Aquaculture v New Zealand Green Mussel Co* [1990] 3 NZLR 299 (NZCA) as authority for the ‘astonishing proposition’ that punitive damages can be awarded for breach of confidence, see Heydon and others (n 4) para 42.190. For a general critique of this book, see Peter Birks, ‘Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies’ (2004) 120 LQR 344 (review).

<sup>66</sup> Heydon and others (n 4) para 23.600 (relying on *Perotti v Garrett* (n 64)).

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Finally, it is worth noting the view that equitable wrongs are part of tort. The argument unfolds as follows: Based on Birks’ definition ‘civil wrongs is a category of events in which the explanation of the defendant’s obligation to the plaintiff is his having committed a breach of duty’.<sup>67</sup> A cause of action can be characterised as a wrong when the law’s response to it is attributable to the fact that it is a breach of duty. An indicator that a cause of action is a wrong is the availability of compensation when loss is suffered due to the defendant’s conduct.<sup>68</sup> Torts and equitable wrongs (such as breach of confidence and breach of fiduciary duty) satisfy this test. Edelman argues that ‘no coherent definition of a tort can be advanced that excludes equitable wrongs’.<sup>69</sup> Thus, the category of ‘tort’ is underdetermined and in reality, includes several equitable causes of action. If this view is correct then punitive damages are obviously available for equitable wrongs after *Kuddus* and any statement to the contrary is inconsistent with this interpretation of the positive law. Considering however that Edelman’s analysis has not been endorsed by the courts, this chapter proceeds on the basis that equitable wrongs are distinct from torts.

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<sup>67</sup> Birks, ‘The Concept of a Civil Wrong’ (n 34) 47.

<sup>68</sup> Burrows, *Remedies* (n 16) 11–12.

<sup>69</sup> Edelman, ‘Equitable Torts’ (n 34) 65. Edelman observes that breach of contract can be excluded from the definition if a further qualification is added: that the duty must be imposed by law (rather than by agreement). However, this is not entirely convincing because many tort and equitable duties are voluntarily assumed. Besides, it is arguable that tort is a category of civil wrongs which has no particular logic or coherence. This category of civil wrongs is defined negatively: A tort is civil wrong other than a breach of contract or an equitable wrong. For further criticism of Edelman’s view that equitable wrongs are torts, see Nicholas McBride and Roderick Bagshaw, *Tort Law* (3rd edn, Pearson 2008) 8 fn 19.

## 9.4.2 Breach of contract

### (1) Legislation

Interestingly, the most recent example of statutory authorisation of punitive damages relates to breach of environmental covenants. The relevant provision is section 51(10) of the High Speed Rail (London – West Midlands) Act 2017 according to which ‘in the case of a breach of a qualifying provision of an environmental covenant by a person against whom the provision is enforceable, a court may award exemplary damages against the person if the court thinks it appropriate to do so in the circumstances’. Admittedly, the scope of this provision is very limited (pertaining only to breach of certain environmental covenants between the promisor and the Secretary of State) and there has been no case in which English courts awarded punitive damages under this legislation. However, the authorisation by Parliament of punitive damages for breach of these covenants shows that the remedy is, in principle, available for a specific type of contractual breach.

### (2) Case law

#### *a. Addis v Gramophone Co Ltd*

The most commonly cited authority for the unavailability of punitive damages for breach of contract is *Addis v Gramophone Co Ltd*<sup>70</sup> which concerned the wrongful dismissal of a man from his employment. However, it is doubtful whether this case really established that punitive damages were unavailable for breach of contract.<sup>71</sup> Only two of the five Law Lords

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<sup>70</sup> [1909] AC 488 (HL).

<sup>71</sup> Edelman, ‘Exemplary Damages for Breach of Contract’ (n 45) 542; Cunnington (n 16) 373–374; James Goudkamp, ‘Exemplary Damages’ in Graham Virgo and Sarah Worthington (eds), *Commercial Remedies: Resolving Controversies* (CUP 2017) 322.

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who heard the appeal referred to punitive damages, punishment and deterrence. Lord Atkinson contended that ‘damages for breach of contract were in the nature of compensation, not punishment ...’.<sup>72</sup> Lord Collins disagreed: ‘I think that we are not bound to disallow [punitive] damages in this case, and I am not disposed, unless compelled by authority to do so, to curtail the power of the jury to exercise [that power]’.<sup>73</sup> The other Law Lords considered whether the manner of dismissal could affect the amount of compensation.<sup>74</sup> It is therefore doubtful whether *Addis* is solid authority for the proposition that punitive damages cannot be awarded for breach of contract.

In fact, *Addis* shows that punitive damages were once available for breach of contract. Even Lord Atkinson recognised that although punitive damages were generally unavailable for breach of contract, there were ‘three well-known exceptions’<sup>75</sup> to that rule: (1) actions for breach of promise to marry; (2) actions against a banker who refuses to pay a customer’s cheque although there are sufficient funds to meet it; and (3) actions against the vendor of real estate who fails to confer title.<sup>76</sup> Lord Collins stressed that he was unable to find any case deciding authoritatively against punitive damages in contract and even cited cases supporting the opposite.<sup>77</sup>

That the traditional bar against punitive damages in contract was not always as firm as it is believed to be is evidenced by statements of textbook writers at that time. For

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<sup>72</sup> *Addis* (n 70) 494.

<sup>73</sup> *ibid* 500.

<sup>74</sup> *ibid* 491.

<sup>75</sup> *ibid* 495.

<sup>76</sup> *ibid*.

<sup>77</sup> *ibid* 498–500 (an illustration is *Lord Sondes v Fletcher* (1822) 5 B&Ald 835).

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example, in 1908 (when *Addis* was decided) Pollock wrote that the availability of punitive damages in breach of promise to marry cases may lead to ‘like results ... in the case of other breaches of contract accompanied with circumstances of wanton injury or contumely’.<sup>78</sup>

Even though *Addis* probably is not the firm authority that it is considered to be, the courts have, by reference to it, held many times that punitive damages are not available in contract, and those later cases are themselves authority on this point.

### *b. Perera v Vandiyar*

In *Perera v Vandiyar*<sup>79</sup> the defendant landlord cut off the supply of gas and electricity to the claimant’s flat. The Wandsworth County Court awarded damages for breach of contract and an additional £25 (£711 in 2021)<sup>80</sup> as punitive damages on the basis that the defendant’s conduct constituted the tort of wrongful eviction. The Court of Appeal held that the trial judge had erred in awarding punitive damages because the defendant’s actions did not amount to a tort. Wrongful eviction is prima facie a breach of contract. Romer LJ said: ‘[T]he defendant ... did not bring himself into the area of tort which would justify the awarding of a further sum under the head of punitive damages’.<sup>81</sup> It follows from the reasoning adopted by the Court of Appeal that punitive damages are unavailable for breach

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<sup>78</sup> Frederick Pollock, *The Law of Torts* (8th edn, Stevens 1908) 560. See, also, Edward Jenks, *The Book of English Law* (5th edn, Wyman & Sons 1953) 196–197.

<sup>79</sup> [1953] 1 WLR 672 (CA).

<sup>80</sup> All figures have been adjusted for inflation using an online inflation calculator: <<https://www.officialdata.org/UK-inflation>> accessed 30 July 2021.

<sup>81</sup> *Perera* (n 79) 676–677.

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of contract. The only reason for overturning the punitive damages award was that the cause of action was breach of contract rather than tort.<sup>82</sup>

### (3) Does a ‘cause of action restriction’ survive in contract?

The foregoing shows that a ‘cause of action restriction’ has applied in actions for breach of contract for over a century (ie, at least since 1908 when *Addis* was decided). Some scholars contend that this position is vulnerable to challenge in light of *Kuddus*. For example, Goudkamp says that ‘the abolition of the cause of action test makes the bar on awarding exemplary damages in actions in contract particularly fragile’.<sup>83</sup> And arguably, this position was altered (albeit only to a very limited extent) with the authorisation of punitive damages for breach of certain environmental covenants by the High Speed Rail Act 2017. However, the cases make it plain that the award is currently precluded in the overwhelming majority of actions for breach of contractual obligations.

### 9.4.3 Negligence

#### (1) Case law

##### *a. Re Organ Retention Group Litigation*

The claimant, the parent of a deceased child, was awarded £2,750 (£4,301 in 2021) for psychiatric injury in a negligence claim because she should have been warned that a post-

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<sup>82</sup> For further cases holding that punitive damages are unavailable in contract, see, eg, *Kenny v Preen* [1963] 1 QB 499 (CA) 513; *Stratton v Patel* [2014] EWHC 2677 (TCC) [357].

<sup>83</sup> Goudkamp (n 71) 323. See, also, Ewan McKendrick, ‘Breach of Contract, Restitution for Wrongs and Punishment’ in Andrew Burrows and Edwin Peel (eds), *Commercial Remedies: Current Issues and Problems* (OUP 2003) 93; Burrows, *Remedies* (n 16) 361.

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mortem examination might involve the removal and subsequent retention of her child’s organs. In his discussion of the punitive damages claim, Gage J said:

The claimants’ skeleton argument ... implicitly concedes that exemplary damages are not available in claims for negligence. However, it is submitted that the court should assess whether to award exemplary damages ... on the basis of whether the facts of the claim meet the principles set out in *Rookes* ... Assuming for these purposes, but not deciding, that such a claim can be made on facts giving rise to a cause of action in negligence, ... [t]he actions of [the defendants] were in my opinion not arbitrary, unlawful or outrageous. In the circumstances, in my view the claim for exemplary damages must be rejected.<sup>84</sup>

Considering that the case was decided after *Kuddus* it is strange that counsel for the claimant and the judge hesitated to state explicitly that punitive damages are, in principle, available in negligence. *Kuddus* clearly extended punitive damages to all tortious causes of action. Nonetheless, the judge still decided whether or not it was appropriate to make an award based on the facts of the case rather than the cause of action.

### ***b. Sharma v Noon Products Ltd***

The claimant sought damages for personal injury sustained as a result of an accident involving a dough-cutting machine. He had been trying to repair the machine at the time but had not received the appropriate training. He sought punitive damages under the second *Rookes* category on the basis that ‘this was a very bad case of negligence ... compounded

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<sup>84</sup> [2004] EWHC 644 (QB), [2005] QB 506 [262]–[263].

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by untruths told by the defendant’s employers ... [T]he defendant was motivated by making profit rather than by treating their employees ... properly.’<sup>85</sup> The judge said:

It would be quite wrong of me to say that there are not circumstances in which such a claim could succeed but it does not seem to me that this case is one in which exemplary damages should be recovered. It is clearly a case in which ... the defendant was very negligent and then ... did not tell the truth about what happened when the matter was being investigated but, regrettably, that happens in a number of cases.<sup>86</sup>

It is clear from the above that the punitive damages claim was rejected on the merits of the case, rather than on the basis of any legal bar to the award of punitive damages in negligence.

### **(2) Does a ‘cause of action restriction’ survive in negligence?**

Although *Kuddus* extended punitive damages to all torts considerable doubt exists as to whether the remedy can be awarded in a negligence action. No case exists in the UK in which liability in negligence triggered an award of punitive damages. Isolated judicial statements on the topic cast further doubt on the availability of the award for this particular tort. For example, in *Re Organ Retention Group Litigation* there was no need for the court to hesitate to decide that punitive damages are available in negligence.<sup>87</sup> This hesitation

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<sup>85</sup> (QBD, 7 April 2011) [13] (Yelton J).

<sup>86</sup> *ibid.*

<sup>87</sup> For authors doubting whether punitive damages can be awarded in negligence, see Duncan Fairgrieve and Mads Andenas, ‘Misfeasance in Public Office, Governmental Liability, and European Influences’ (2002) 51 ICLQ 757, 778; Edelman, *McGregor on Damages* (n 7) para 13.015.

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may be a product of the fact that negligence claims tend to involve careless (as opposed to deliberate) conduct. It is difficult to characterise such conduct as sufficiently outrageous to justify a punitive response. Defendants in a negligence claim have usually acted carelessly but not necessarily reprehensibly and the defendant’s reprehensibility is a crucial factor in deciding whether punitive damages are warranted in a particular case.<sup>88</sup>

Although punitive damages may rarely be merited in a negligence claim, there is no reason to doubt that such claims can, in principle, lead to punitive damages. It is still possible to satisfy either of the *Rookes* categories under a negligence scenario. ‘Category 1’ requires outrageous conduct by a public servant. Both intentional and merely careless conduct could satisfy the ‘outrageous’ criterion. Intentional wrongdoing will usually feature in punitive damages cases, but this will not always be so.<sup>89</sup> ‘Category 2’ requires profit-seeking conduct (which will normally involve deliberate wrongdoing). Although traditionally, negligence as a tort has been associated with conduct which is careless, it would still be possible for a claimant to sue in negligence in respect of deliberate conduct because intentional wrongdoing may be a form of negligent behaviour. The test for determining whether there has been a breach of duty entails comparing the defendant’s *conduct* (not the defendant’s *state of mind*) with the conduct of a hypothetical reasonable

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<sup>88</sup> *Kuddus* (n 3) [68].

<sup>89</sup> Eg, *Bottrill* (n 10). See, also, *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453, (2010) 107(19) LSG 24 [56] in which £27,500 (£35,919 in 2021) were awarded as punitive damages ‘for recklessly indifferent’ conduct even though none of the defendants were aware that they were detaining the claimant unlawfully (note however, that *Muuse* was a false imprisonment rather than a negligence case).

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person.<sup>90</sup> Therefore, intentional wrongdoing is actionable in the tort of negligence.<sup>91</sup> Although there may be other causes of action available to the claimant<sup>92</sup> there is no reason why (s)he cannot sue in negligence.<sup>93</sup>

Another possible explanation for the courts’ hesitation openly to admit that punitive damages can, in principle, be awarded in negligence claims is that the ‘cause of action test’ is still being secretly deployed. The courts are hesitant to accept unequivocally that punitive damages are available for a cause of action which has never yielded such an award. The absence of punitive damages awards in this area may suggest that a de facto, unarticulated ‘cause of action bar’ exists in negligence claims.

### 9.4.4 ‘Cause of action restrictions’ survive

Twenty years after the abolition of the ‘cause of action test’, English law still imposes several ‘cause of action restrictions’ on the availability of punitive damages. The remedy has been held to be unavailable for equitable wrongs although in light of recent legislation which authorises punitive damages in certain claims for breach of confidence this judicial prohibition is open to attack. English courts have similarly held that punitive damages

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<sup>90</sup> *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781, 784.

<sup>91</sup> Peter Cane, ‘Mens Rea in Tort Law’ (2000) 20 OJLS 533, 536–537. See, also, Nicholas McBride and Roderick Bagshaw, *Tort Law* (6th edn, Pearson 2018) 74; James Goudkamp and Donal Nolan, *Winfield and Jolowicz on Tort* (20th edn, Sweet & Maxwell 2020) para 3.012.

<sup>92</sup> It may be preferable for a victim of deliberate wrongdoing to sue in negligence than trespass because the latter is limited by the directness requirement, see Peter Handford, ‘Intentional Negligence: A Contradiction in Terms?’ (2010) 32 Syd LR 29, 61.

<sup>93</sup> *Dunnage v Randall* [2015] EWCA Civ 673, [2016] QB 639 [150] (Arden LJ): ‘it is no defence [for someone] to say that he is not liable in negligence because he intended to cause injury rather than was simply careless’. Cf *Kiss v Braintree DC* [2012] EWHC 197 (QB) [91] (Seymour J): “‘Wilful negligence’ is a concept unknown to law, the essence of negligence being carelessness, which, in the nature of things, cannot be wilful’. Punitive damages were awarded in an action for ‘wilful negligence’ in *Emblen v Myers* (1860) 6 H&N 54, 158 ER 23 although the case was decided at a time when the tort of negligence did not exist in its modern form.

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cannot be awarded for breach of contract. Again, the recent statutory authorisation of punitive damages for breach of certain environmental covenants could mark a shift towards a more liberal approach. Finally, although *Kuddus* extended the jurisdiction to award punitive damages across all torts, such an award has not yet been made in a negligence action and courts have not even unequivocally accepted that punitive damages are available in principle in negligence claims. That said, it would not be expected to see many punitive damages awards in negligence claims because this tort usually involves careless conduct which rarely qualifies as ‘outrageous’. It is noteworthy that, contrary to English law, the tendency in other common law jurisdictions is to allow punitive damages for most of these causes of action.<sup>94</sup>

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<sup>94</sup> For an overview of restrictions on punitive damages in other common law jurisdictions, see Appendix III.

## 9.5 SHOULD ‘CAUSE OF ACTION RESTRICTIONS’ SURVIVE?

This section will not examine in detail the question ‘Should punitive damages be available for equitable wrongs, breach of contract and the tort of negligence?’. Space does not permit a full exploration of this topic and other contributions have already addressed part of this question.<sup>95</sup> However, assuming that it is justifiable for a civil court to pursue the stated goals of punitive damages (which are primarily retribution and deterrence),<sup>96</sup> this section examines the main arguments in favour and against the availability of punitive damages for these causes of action.

### 9.5.1 Equitable wrongs

#### (1) Arguments against punitive damages for equitable wrongs

##### *a. Equity and penalty are strangers*

One argument against the availability of punitive damages for equitable wrongs is the maxim ‘equity and penalty are strangers’.<sup>97</sup> However, this is a mere assertion rather than an argument.<sup>98</sup> It is not explained why equity and penalty are strangers. It may be contended that there is no equitable doctrine which is independently designed to punish in the same way as punitive damages are and that pure punishment is as an alien creature to equity.<sup>99</sup> Equity is historically concerned with fairness and correcting injustice caused by the law,

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<sup>95</sup> See the text to n 16.

<sup>96</sup> See the text to nn 9–12.

<sup>97</sup> *Aquaculture* (n 65) 695 (Somers J in dissent). See, also, *Heydon and others* (n 4) para 2.350.

<sup>98</sup> *Digital Pulse Pty Ltd v Harris* [2002] NSWSC 33, (2002) 166 FLR 421 [163].

<sup>99</sup> *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10, (2003) NSWLR 298 [305], [306], [336]. See, also, Burrows, ‘Remedial Coherence and Punitive Damages in Equity’ (n 16) 394.

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hence there is no punitive function. Still, this only provides a historical rather than a substantive reason for prohibiting punitive damages in equity.

Besides, the assertion is arguably inaccurate because equity is often concerned with punishment-related goals. As Edelman notes, since the central purpose of an account of profits is to provide deterrence, in many ways the jurisdiction of equity is already co-existent with one central rationale for punitive damages.<sup>100</sup> The courts’ reasoning also reveals that they have, sometimes, imposed punishment for equitable wrongs through the mechanism of an account of profits.<sup>101</sup> Therefore, the power to punish can be seen as an inherent power of a court of equity.

A counter-argument to this analysis can be derived from the decision in *Vyse v Foster* in which James LJ said: ‘It is not by way of punishment that the Court ever charges a trustee with more than he actually received ... It is simply on the ground that the Court finds that he actually made more, constituting moneys in his hands “had and received to the use” of the *cestui que trust*’.<sup>102</sup> The gist of this argument is that when courts reverse unlawful gains they engage in a balancing exercise *inter partes* rather than impose punishment on the defendant. Punitive damages express public concerns (eg, deterrence) which do not relate to the parties’ relationship. By contrast, an account of profits can be accommodated by the bilateral institution model because its purpose is not to punish but to

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<sup>100</sup> Edelman, ‘A “Fusion Fallacy” Fallacy?’ (n 16) 377; Law Commission (n 30) 111. See, also, Andrew Burrows, *Fusing Common Law and Equity: Remedies, Restitution and Reform* (Sweet & Maxwell Asia, 2002) 17 arguing that punitive damages constitute a more suitable remedial response to equitable wrongs than to torts on the basis that it is easier to strip away gains in equity than in tort.

<sup>101</sup> Eg, *A-G v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 (HL) 262 (Lord Keith): ‘[The] availability [of an account of profits] may ... serve a useful purpose in lessening the temptation for recipients of confidential information to misuse it for financial gain’. See, also, *Novoship (UK) Ltd v Mikhailuyuk* [2014] EWCA Civ 908, [2015] QB 499 [76].

<sup>102</sup> *Vyse* (n 51). See, also, *Harris* (n 99) [307].

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reverse an unjust enrichment.<sup>103</sup> However, the fact of the matter is that courts have explicitly acknowledged that they are sometimes concerned with punishment and deterrence in awarding an account of profits.<sup>104</sup> Additionally, the courts often consider the defendant’s culpability in deciding whether an account of profits is available and in assessing its quantum which also hints at the existence of a punitive impulse.<sup>105</sup> When an account of profits is ordered for breach of fiduciary duty there is judicial discretion to give the fiduciary an allowance for skill and effort in obtaining the profit but this is not likely where the fiduciary has acted dishonestly or in bad faith.<sup>106</sup> Withholding such allowances clearly goes beyond pure restitution. It does not result merely in the removal of the profit from the hands of the fiduciary. It leaves the fiduciary in a worse position than that in which (s)he would have been had (s)he not committed the wrong. Also, consistently with the rules governing the award of punitive damages,<sup>107</sup> the courts consider prior punishment in deciding whether to award an account of profits.<sup>108</sup> These features suggest that penalty and

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<sup>103</sup> Ernest Weinrib, *Corrective Justice* (OUP 2012) 125. Yet the entirety of private law cannot be accommodated by the bilateral institution model, see Burrows, *Remedies* (n 16) 19.

<sup>104</sup> See the cases cited in n 101. For further discussion, see James Goudkamp and Eleni Katsampouka, ‘Punitive Damages and the Place of Punishment in Private Law’ (2021) MLR (forthcoming).

<sup>105</sup> *Peter Pan Manufacturing Co v Corsets Silhouette Ltd* [1964] 1 WLR 96 (Ch) 106 Pennycuik J stated that an account of profits was available ‘as a matter of right’ where there had been a conscious breach of confidence. Cf *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 (CA) where an account of profits was inappropriate because the information had been used inadvertently by the defendant, see Burrows, *Remedies* (n 16) 533. The moral quality of the defendant’s breach was also relevant in *Shaw v Holland* [1900] 2 Ch 305 (CA) 310 (Webster MR): ‘It would ... be unfair, ... when it is not suggested that the directors were guilty of any moral fraud ... to charge them with that which was more than the real value of the property’. See, also, *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573 [122] (the court ordered the defendant who had acted in bad faith to account for all profits from his breach of fiduciary duty and ignored his argument that even if the claimants had known about his breach they would have consented to it anyway).

<sup>106</sup> *Boardman v Phipps* [1965] Ch 992 (CA) 1021; *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch) [213].

<sup>107</sup> *Archer v Brown* [1985] QB 401 (QBD) 423.

<sup>108</sup> *Devenish Nutrition Ltd v Sanofi Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390 [102].

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equity may not be total strangers.<sup>109</sup> Of course, it may be said that punishment only features as a secondary concern when an account of profits is awarded and that restitution is not generally punitive in itself whereas an award of punitive damages always has punishment as its primary function. However, this does not negate the fact that punishment is not an alien function to equity which is the modest point that is made here.

Finally, the availability of gain-based awards is not the only feature of equity attesting to its sometimes punitive nature. A constructive trust may arise against an agent who acquires a benefit in breach of his/her fiduciary duty. In *FHR European Ventures LLP v Cedar Capital Partners LLC*,<sup>110</sup> the Supreme Court unanimously held that a bribe or secret commission accepted by an agent is held on trust for their principal. Punitive considerations feature prominently in Lord Neuberger’s reasons. His Lordship considered the ‘opprobrious circumstances’<sup>111</sup> in which the benefit was obtained and said: ‘[C]oncern about bribery and corruption generally has never been greater than it is now ... Accordingly, one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission’.<sup>112</sup> More generally, the idea that punishment sometimes features in equitable doctrines is not a novel one.<sup>113</sup>

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<sup>109</sup> Cf Weinrib, *Corrective Justice* (n 103) 144–145.

<sup>110</sup> [2014] UKSC 45, [2015] AC 250.

<sup>111</sup> *ibid* [41].

<sup>112</sup> *ibid* [42].

<sup>113</sup> Eg, Peter Cane, ‘Retribution, Proportionality and Moral Luck in Tort Law’ in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press 1998) 161 (arguing that injunctions have a punitive function); David Morgan, ‘*Harris v Digital Pulse*: The Availability of Exemplary Damages in Equity’ (2003) 29 Mon LR 377, 393 (arguing that ‘various equitable doctrines have been informed by a punitive background’); Robert Chambers, ‘Liability’ in Peter Birks and Arianna Pretto-Sakmann (eds), *Breach of Trust* (Hart 2002) 34ff (arguing that interest awards and presumptions against wrongdoers in the law of trusts conceal punitive considerations).

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### *b. Inconsistency with the prohibition of punitive damages in contract*

In *Harris v Digital Pulse Pty Ltd*,<sup>114</sup> the majority of the New South Wales Court of Appeal refused to uphold an award of punitive damages for breach of fiduciary duty on the basis that it would be anomalous for the remedy to be available for equitable wrongs when it is not available for breaches of contract.<sup>115</sup> The position in contract was considered to be relevant in *Harris* because, in that case, the breach of fiduciary duty arose from an employment contract so the analogy was closer to contract rather than tort. Two points are relevant here: First, this argument does not work where the fiduciary is closer to a tort duty than a contract duty. Second, it is arguable that punitive damages should also be available for breach of contract.<sup>116</sup> If this happens, then no inconsistency arises.

### *c. The ‘fusion fallacy’ argument*

Another argument is that it is not possible to modify equity by concepts imported from the common law. This is commonly referred to as the ‘fusion fallacy’ argument.<sup>117</sup> In relation to punitive damages, this means that it is not possible to administer a common law remedy for an equitable wrong. The Supreme Court of Judicature Acts 1873-75 only fused the administration of courts; the substantive doctrines of each body of law do not apply to the other. According to the ‘anti-fusion’ school of thought, one should not develop the

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<sup>114</sup> (n 99) [44], [295].

<sup>115</sup> In relation to punitive damages for breach of contract in Australia, see *Butler v Fairclough* (1917) 23 CLR 78 (HCA) 89.

<sup>116</sup> Burrows, ‘Remedial Coherence and Punitive Damages in Equity’ (n 16) 400.

<sup>117</sup> Heydon and others (n 4) para 2.130 support the argument. Cf Andrew Burrows, ‘We Do This at Common Law But That in Equity’ (2002) 22 OJLS 1; Edelman, ‘A “Fusion Fallacy” Fallacy?’ (n 16).

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substantive law by reasoning from common law to equity or vice versa.<sup>118</sup> Again, assuming that this was indeed the effect of the Judicature Acts 1873-75 this still does not explain why the two bodies of law should remain separate and why it should not be possible to reason by analogy and administer a common law remedy for an equitable wrong. Nor does this provide an answer to the normative question of whether punitive damages *should* be available in equity.

Related to this is the idea that the distinction between torts and equitable wrongs is not merely historical.<sup>119</sup> Some argue that equitable wrongs are qualitatively different from torts because, for example, equitable remedies are available at the court’s discretion and not as of right.<sup>120</sup> Another difference is, it is contended, that the main reason for the existence of tortious duties is to protect the claimant from loss whereas the main reason for the existence of equitable duties is to secure that the defendant acts for the claimant’s interest rather than his/her own interest.<sup>121</sup> I am not concerned here with the question of

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<sup>118</sup> Cf Burrows, ‘We Do This at Common Law But That in Equity’ (n 117) 4 who argues that ‘[i]n developing the law it is legitimate for the courts to reason from common law to equity and vice versa’.

<sup>119</sup> For the view that the difference is only historical see Birks, ‘The Concept of a Civil Wrong’ (n 34) 34–35; Edelman, ‘Equitable Torts’ (n 34); Burrows, *Remedies* (n 16) 12–13; Nick McBride, ‘Thinking About Tort Law – Where Do We Go from Here?’ p 5 <<https://mcbridesguides.com/wp-content/uploads/2012/09/thinking-about-tort-law-where-do-we-go-from-here.pdf>> accessed 30 July 2021.

<sup>120</sup> Eg, John Gardner, ‘Torts and Other Wrongs’ (2011) 39 Florida State University LR 43, 53–54; John Goldberg and Benjamin Zipursky, ‘The Continuing Significance of the Law-Equity Distinction’ in Dennis Klimchuk, Irit Samet and Henry Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020) 291. Cf Burrows, *Fusing Common Law and Equity* (n 100) 9: ‘Both equitable and common law remedies are awarded in line with rules and principles and ... there is a large element of discretion in the rules and principles governing common law damages’.

<sup>121</sup> *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, 543: McLachlin J observed that in tort the parties are taken to be independent and equal actors whereas in a fiduciary relationship one party pledges herself to act in the best interest of the other. See, also, Gardner (n 120) 51. For counterarguments to Gardner’s analysis, see McBride, ‘Thinking About Tort Law – Where Do We Go from Here?’ (n 119) pp 3–5.

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whether the distinction between torts and equitable wrongs is qualitative or merely historical. It suffices to say that, even if this distinction is qualitative, the two reasons outlined above for differentiating between them do not suggest that punitive damages are inappropriate in equity. Indeed, punitive damages are awarded *at the court’s discretion* and may serve as *a useful tool to divert self-seeking conduct*.

### *d. The ‘good man theory’*

Another maxim of equity that might stand in the way of allowing punitive damages for breach of equitable obligations is the maxim that ‘equity treats as done that which ought to be done’. A product of this maxim is what is known as the ‘good man theory’ which Sir Peter Millett explained as follows:

[E]quity adopts an entirely different approach [from the common law]. It may be described as the ‘good man’ theory of law. ... [I]t refuses to countenance the possibility of breach. ... Equity insists on treating [a fiduciary] as a good man, despite all the evidence to the contrary; it will not allow him to say that he is a bad one. ... He must not obtain a profit for himself out of his fiduciary position. If he has done so, equity insists on treating him as having obtained it for his principal; he will not be allowed to say that he obtained it for himself. ... In the eyes of equity, fiduciaries are incorruptible. They never take bribes. They are selfless in putting the interests of their principals before their own.<sup>122</sup>

The ‘good man theory’ treats the trustee (and any person standing in a fiduciary relation to another) as a good man. If ‘equity refuses to countenance the possibility of breach’ then

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<sup>122</sup> Sir Peter Millett, ‘Bribes and Secret Commissions’ [1993] RLR 7, 20–21 (footnotes omitted).

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there is no room for wrongdoing. To use the term ‘equitable wrongs’ misunderstands the way in which equity operates.<sup>123</sup> It would therefore be inconsistent to punish a ‘good man’.

However, the ‘good man theory’ is not necessarily in conflict with the concept of ‘equitable wrongs’. In the same article in which he developed the theory, Sir Peter Millett also said: ‘[E]quity can recognise a bribe when it sees one. The principal can treat the payment as a bribe if he chooses; it is only the fiduciary who cannot be heard to say that it was bribe’.<sup>124</sup> So, the maxim exists only to disallow *a fiduciary* from claiming that (s)he should be treated as having acted for his/her own benefit rather than for the benefit of the principal.<sup>125</sup> *The principal* is entitled to treat the fiduciary as a wrongdoer. Besides, the availability of punitive damages for breach of equitable obligations is consistent with the ‘object of the equitable doctrine’ which Millett identified as ‘the enforcement of the highest standards on the part of fiduciaries’.<sup>126</sup> Making punitive damages available for breach of fiduciary duty arguably advances this aim<sup>127</sup> and is also consistent with Millett’s statement that ‘the principal can treat the payment as a bribe if he chooses’.

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<sup>123</sup> Thus, the term ‘equitable wrongs’ is missing from a leading book on equity: Heydon and others (n 4). However, the courts ordinarily use this term, see, eg, *Majrowski v Guy’s and St Thomas’s NHS Trust* [2006] UKHL 34, [2007] 1 AC 224.

<sup>124</sup> Millett (n 122) 21 fn 71.

<sup>125</sup> So, eg, a trustee is not allowed to say that in handling the beneficiary’s money and mixing it with his/her own (s)he was acting for his/her own benefit rather than the beneficiary’s and that (s)he is entitled to a personal share of the profit, see Alan Berg, ‘Permitting a Trustee to Retain a Profit’ (2001) 117 LQR 366, 369.

<sup>126</sup> Millett (n 122) 29. See, also, *Day v Mead* [1987] 2 NZLR 443 (NZCA) 452 (Cooke P): ‘[L]argely for exemplary purposes, high standards are expected of fiduciaries’.

<sup>127</sup> *Norberg v Wynrib* [1992] 2 SCR 226, 300 (McLachlin J): ‘[P]unitive damages may serve to reinforce the high standard of conduct which the fiduciary relationship ... demands be honoured’.

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### (2) Arguments in favour of punitive damages for equitable wrongs

Many authors argue in favour of permitting punitive damages to be awarded for breaches of equitable obligations.<sup>128</sup> In its Report on *Aggravated, Exemplary and Restitutionary Damages*, the Law Commission also recommended that the remedy should be available for all torts and equitable wrongs.<sup>129</sup>

It is submitted that punitive damages should be available for equitable wrongs because like cases should be treated alike. To allow punitive damages awards for the tort of deceit but not for a fraudulent breach of fiduciary duty<sup>130</sup> goes against that purpose. There are significant similarities between the two wrongs. Whilst the tort of deceit involves misrepresentation and breach of fiduciary duty does not, both involve fraud which is the more normatively significant aspect to which the law is responding. The tort of deceit has generated many punitive damages awards in recent years<sup>131</sup> but, at present, it is not possible to award punitive damages for breach of fiduciary duty. There is no reason why the remedy should only be available for deceit when both wrongs involve analogous conduct. It is even stranger to differentiate, for present purposes, between deceit and a fraudulent breach of fiduciary duty, considering that both involve serious wrongdoing which cannot be easily exposed due to the defendant’s attempt to conceal his/her misconduct.<sup>132</sup> A counter-

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<sup>128</sup> Eg, Burrows, ‘Remedial Coherence and Punitive Damages in Equity’ (n 16); Edelman, ‘A “Fusion Fallacy” Fallacy’ (n 16); Morgan (n 113).

<sup>129</sup> Law Commission (n 30) 5, 105.

<sup>130</sup> *ibid* 111; Burrows, *Fusing Common Law and Equity* (n 100) 17; Burrows, ‘Remedial Coherence and Punitive Damages in Equity’ (n 16) 398.

<sup>131</sup> See chapter 6.2.1(3).

<sup>132</sup> Problems of under-deterrence inherently exist in both areas, see, eg, *Cook v Evatt (No 2)* [1992] 1 NZLR 676 (High Court Auckland) 706 (Fisher J): ‘A beneficiary who places his or her trust in a fiduciary is peculiarly vulnerable. To take advantage of that trust will from its very nature be easy to do and difficult to detect’. As for deceit (which is the legal basis for awarding punitive damages in respect of insurance fraud), Butler J noted in *Hassan v Cooper* [2015] EWHC 540 (QB), [2015]

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argument may be that there is no need for punitive damages in respect of a fraudulent breach of fiduciary duty because any need for punishment and deterrence in that context is already catered for by the availability of an account of profits. By contrast, English courts have held that an account of profits is unavailable in respect of deceit<sup>133</sup> and this may justify the frequency with which punitive damages are awarded in that area. However, it is wrong to treat an account of profits as a substitute for punitive damages in cases of a dishonest breach of fiduciary duty. The two remedies are distinct.<sup>134</sup>

If, as the courts have stated, the main goals of punitive damages are retribution and deterrence then the award should be available in all cases in which there is a need to serve these goals. Deterrence, in particular, is a suitable remedial goal for breach of fiduciary duty considering that conduct captured by this wrong may be difficult to detect.<sup>135</sup> To exclude equitable causes of action from the scope of punitive damages is inconsistent with the rationales for the award. This is illustrated by numerous examples of punishment-worthy conduct arising in breach of equitable obligations which courts across the Commonwealth sanctioned with punitive damages. Consider, for example, *Walling v Walling*.<sup>136</sup> The claimants, beneficiaries under their father’s will, were aged 12 and 16 when their father died. The defendant, who was the claimants’ uncle, was the sole executor

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RTR 26 [35]: ‘[T]here is an epidemic ... of [fraudulent insurance] claims ... and ... that has to be borne in mind by the court when ... it can award exemplary damages.’

<sup>133</sup> *Halifax Building Society v Thomas* [1996] Ch 217 (CA).

<sup>134</sup> First, an account of profits cannot be awarded where there is no gain. By contrast, a mere aim to make a profit suffices for a punitive damages award, see *Archer* (n 107) 423. Second, because different quantification principles apply to each of these remedies the amount of punitive damages may differ from the defendant’s profit, see *McMillan v Singh* (1984) 17 HLR 120 (CA) 125–126. See, also, chapter 8.5.2.

<sup>135</sup> *Cook* (n 132) 706.

<sup>136</sup> [2012] OJ No 5714 (Ontario Superior Court of Justice).

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and trustee of the estate under the father’s will. The will required the trustee to look after the estate until the youngest child reached the age of 21 at which point he was obliged to hand over the estate to the children. Contrary to the terms of the will, the uncle denied the children their rightful inheritance. He squandered the estate and systematically disregarded court orders issued to secure compliance with the terms of the will. This misconduct resulted in the children being unable to attend post-secondary education due to lack of funds. Pierce J awarded C\$100,000<sup>137</sup> as punitive damages against the defendant who had been ‘completely derelict in his duties to the estate’<sup>138</sup> and whose ‘sin [wa]s compounded by the fact that he was an uncle to the claimants, an adult whom they should have been able to trust’.<sup>139</sup> It is odd to prohibit punitive damages for such conduct simply because the cause of action originates in equity rather than the common law.

Another illustration is *Ward v Manulife Financial Co.*<sup>140</sup> The claimant, Mr Ward, was a licensed life insurance agent. Under a series of agency agreements, he sold the products of Manulife, the defendant insurance company on the basis he would be paid a five per cent commission on each policy sold. This money would constitute his retirement fund. After 30 years of service, Manulife terminated its agreement with Ward without cause and withheld payment of his commissions. Ward’s clients were assigned to other agents and complaints were filed with regulators so as to suspend Ward’s licence. The defendant also threatened to persuade the authorities to bring criminal charges against Ward although

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<sup>137</sup> C\$114,792 in 2021.

<sup>138</sup> (n 136) [33].

<sup>139</sup> *ibid.*

<sup>140</sup> [2006] OJ No 2284 (Ontario Superior Court of Justice).

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he had committed no crime. Power J characterised the defendant company as a ‘bully’<sup>141</sup> who had ‘embarked on a methodical and deliberate course of action to destroy [Ward’s] reputation within the community’.<sup>142</sup> C\$250,000<sup>143</sup> were awarded as punitive damages for the defendant’s breach of fiduciary duty. The award was upheld by the Ontario Court of Appeal which acknowledged that, in exceptional cases, punitive damages may be awarded even in commercial situations.<sup>144</sup> Such conduct clearly merits a punitive response and yet it is not possible to award punitive damages for it under current English law.

*Jones v Klassen*<sup>145</sup> provides a third example of punishment-worthy conduct arising in the context of an equitable wrong. The defendant, Mr Klassen, was employed as an investment advisor by the claimant investment company. Klassen’s contract prohibited him from using against his employer confidential information. After four years of employment with the claimant company, Klassen resigned to work for a rival company. Prior to disclosing his intention to leave, he printed confidential customer information. When asked to return the information, Klassen made photocopies of the documents and retained them with the purpose of luring business to his new employer. Shortly after his resignation, he informed his clients that he had taken a new job with the rival company. More than one third of Klassen’s clients transferred to the competing company after he was employed there. Klassen’s breach of confidence and breach of fiduciary duty to his employer were

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<sup>141</sup> *ibid* [216].

<sup>142</sup> *ibid* [218].

<sup>143</sup> C\$317,934 in 2021.

<sup>144</sup> *Manufacturers Life Insurance Co v Ward* [2007] OJ No 4882 (Ont CA) [50].

<sup>145</sup> [2006] AJ No 28 (Alberta Court of Queen’s Bench).

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held to justify a punitive damages award of C\$5,000.<sup>146</sup> Yet again, in a world where punitive damages are unavailable for equitable wrongs the court would not be able to punish such conduct.

A final illustration is *Cook v Evatt (No 2)*.<sup>147</sup> In this case, the claimant sought property investment advice from the defendant, her investment advisor. The defendant purchased a property that matched the claimant’s specifications and then advised her to buy that property without disclosing his personal interest in the transaction. The transaction yielded a secret profit of about NZ\$50,000 for him.<sup>148</sup> Fisher J characterised this as an instance of ‘serious and exceptional’<sup>149</sup> wrongdoing which was difficult to detect and which warranted a punitive damages award of NZ\$5,000.<sup>150</sup> The defendant knew that the claimant placed her entire faith in him to protect her interests and was obliged to provide his services in an impartial and professional manner. In breach of that obligation, he set out deliberately to deceive the claimant by buying the property for the sole purpose of reselling it to her at a profit.<sup>151</sup>

The preceding analysis illustrates the oddities that arise when the availability of punitive damages is determined by the classification of the wrong as a common law tort or

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<sup>146</sup> C\$6,359 in 2021.

<sup>147</sup> (n 132).

<sup>148</sup> NZ\$87,996 in 2021.

<sup>149</sup> (n 132) 676.

<sup>150</sup> NZ\$8,799 in 2021.

<sup>151</sup> For further instances of egregious wrongdoing in equity, see, eg, *Harris* (n 99) (the defendants, while still employees of the claimant company, established their own competing business and carried out work for the benefit of that business which was diverted from the claimant company without its knowledge and consent); *Waxman v Waxman* [2004] OJ No 1765 (Ont CA) (the defendant had violated his fiduciary duty to his brother and co-owner of a corporation by fooling him into selling half the company for below market value and improperly diverting profits from the corporation).

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as a breach of an equitable obligation and reinforces the conclusion that the origins of a cause of action should be unimportant for the purposes of deciding whether or not to award punitive damages.

### 9.5.2 Breach of contract

#### (1) Arguments against punitive damages for breach of contract

##### *a. The contract-tort distinction*

One argument against punitive damages for breach of contract is derived from the qualitative distinction between contract and tort. This distinction is manifested in several ways. First, contractual obligations are voluntarily assumed while tortious obligations are imposed by the law.<sup>152</sup> It is thus inappropriate to interfere with the parties’ voluntary arrangements by imposing external punishment. In response to this it is contended that tortious duties may also be voluntarily assumed<sup>153</sup> or voluntarily excluded<sup>154</sup> and that, in any case, people voluntarily engage in conduct giving rise to tortious liability.<sup>155</sup> As Atiyah observed ‘nearly all tort liabilities arise in the course of the performance of voluntary actions. A person who negligently injures another while driving his car is voluntarily on the road, voluntarily driving his car, and may be said to submit himself to the requirements

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<sup>152</sup> *PH Hydraulics* (n 15) [68]–[76]. See, also, Andrew Burrows, *Understanding the Law of Obligations* (Hart 1998) 13; Solène Rowan, ‘Reflections on the Introduction of Punitive Damages for Breach of Contract’ (2010) 30 OJLS 494.

<sup>153</sup> Eg, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

<sup>154</sup> Subject to the restrictions laid down in the Unfair Contract Terms Act 1977 and Consumer Rights Act 2015.

<sup>155</sup> PS Atiyah, ‘Contracts, Promises and the Law of Obligations’ (1978) 94 LQR 193, 221; Andrew Robertson, ‘On the Distinction Between Contract and Tort’ in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (UCL Press 2004) 105.

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of the law with as much or as little truth as the seller of goods’.<sup>156</sup> Likewise, several rules show that contractual obligations do not necessarily reflect the parties’ will. The rule against penalty clauses is ‘an interference with freedom of contract’<sup>157</sup> and proves that remedies for breach of contract are not freely determined by the parties.<sup>158</sup> This prohibition undermines the voluntariness of contracts. According to Lord Burrows, the distinction between voluntary and purely imposed obligations has implications on the availability of punitive damages in contract: ‘[B]eing based on a voluntary undertaking, the courts ought to tailor the remedy in contract to what was voluntarily undertaken and should therefore be reluctant to invoke non-compensatory remedies’.<sup>159</sup> Although this suggests that courts should be cautious in awarding punitive damages for breach of contract, it does not necessarily follow that the possibility of such an award must be entirely excluded in this area.<sup>160</sup>

Another manifestation of the contract-tort distinction lies in the idea that contractual rights are personal to the promisee so that contractual breaches do not affect the public

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<sup>156</sup> Atiyah (n 155) 221. A potential response to this is that, for the most part, tort duties (as opposed to liabilities) are imposed on us regardless of our actions and that we only breach these duties (thus incurring liability) if we engage in relevant voluntary conduct. However, this is not necessarily true. For example, a person does not owe a duty of care to other road users unless and until they choose to drive a car on the road. As Robertson (n 155) 105 notes ‘just as no one is compelled to undertake contractual obligations, no one is compelled to engage in conduct giving rise to a duty of care’.

<sup>157</sup> *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, [2016] AC 1172 [33] (Lord Neuberger and Lord Sumption). However, the penalty rule also suggests that punishment has no place in contract. For discussion of this argument, see the text to nn 183–210 below.

<sup>158</sup> Cunnington (n 16) 376. See, also, McBride, ‘A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract’ (n 16) 383; Stephen Smith, ‘Performance, Punishment and the Nature of Contractual Obligation’ (1997) 60 MLR 360, 365.

<sup>159</sup> Burrows, *Understanding the Law of Obligations* (n 152) 13.

<sup>160</sup> Burrows, *Remedies* (n 16) 377.

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interest and thus leave no room for punishment.<sup>161</sup> However, it is possible for a breach of contract to affect the public interest just as it is possible for a tort to affect only the victim’s interest.<sup>162</sup>

Another reason why punishment may be inappropriate for the breach of contractual (as opposed to tortious) obligations is that tortious conduct is allegedly more serious than contractual default all things being equal. The deliberate breach of a contract is more easily tolerated than the deliberate commission of a tort.<sup>163</sup> For example, one can easily characterise a deliberate battery as ‘outrageous’ whereas the same is not true for a deliberate breach of contract. Although this may generally be true, the possibility of a serious contractual breach occurring should not be overlooked. This argument only suggests that punitive damages may be warranted in contract rarely. Sometimes, contractual defaults will be serious<sup>164</sup> and there is no reason to preclude punitive damages in those cases. Further, the alleged lesser seriousness of a breach of contract could be accommodated by a lower punitive damages award. Nothing justifies an absolute prohibition of the remedy for all breaches of contract.

Finally, contract and tort are thought to be distinct because contract damages are largely about pecuniary losses. Punitive damages are thought to be less appropriate in such

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<sup>161</sup> Ernest Weinrib, ‘Punishment and Disgorgement as Contract Remedies’ (2003) 78 Chicago-Kent LR 55, 89.

<sup>162</sup> Cunnington (n 16) 379 cites the example of a provider of fire-fighting services who fails to provide the contractually stipulated number of fire trucks. McBride, ‘A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract’ (n 16) 382 cites defamation as an example of a tort which affects a claimant in the same way as a failure to perform a promise to do something.

<sup>163</sup> Rowan (n 152) 506–507.

<sup>164</sup> Eg, *A-G v Blake* [2001] 1 AC 268 (HL); *Whiten v Pilot Insurance Co* [2002] SCC 18, [2002] SCR 595.

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cases.<sup>165</sup> Yet many tort cases which have triggered punitive damages awards involve exclusively pecuniary losses. Insurance fraud is a paradigm example.<sup>166</sup> The crucial element in the decision to award punitive damages is the type of conduct (rather than the type of loss).

The foregoing analysis shows that the purported distinction between contract and tort does not provide a convincing argument for prohibiting punitive damages in contract.

### *b. Uncertainty and unpredictability in commercial law*

Another argument is that allowing punitive damages in contract will lead to uncertainty and unpredictability in commercial law.<sup>167</sup> This argument assumes that uncertainty and unpredictability will arise in the absence of evidence to support that proposition. The empirical analysis suggested that, in the areas where punitive damages are currently available, awards are far from unpredictable.<sup>168</sup> It is also noteworthy that there is no evidence that massive problems have arisen in jurisdictions which permit the remedy for breach of contract. As Fridman observes ‘[i]n most of the [contract] cases since *Vorvis* in which that decision has been applied, punitive damages were not allowed’.<sup>169</sup> Besides,

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<sup>165</sup> Law Commission (n 30) 118–119.

<sup>166</sup> Punitive damages have been awarded in many such cases in recent years, see chapter 6.2.1(3). For an illustration of a case where punishment was warranted for breach of an equitable obligation despite the loss being purely pecuniary, see *Walling* (n 136).

<sup>167</sup> *Addis* (n 70) 495; *PH Hydraulics* (n 15) [86]–[89]. See, also, Law Commission (n 30) 118; Rowan (n 152) 502.

<sup>168</sup> See chapters 6.2.1(9) and 7.2.1, text to nn 92–93.

<sup>169</sup> Gerald Fridman, *The Law of Contract in Canada* (6th edn, Thomson Reuters 2011) 708 (citing examples of unsuccessful punitive damages claims for breach of contract). See, also, *Royal Bank of Canada v Got* [1999] 3 SCR 408, 422, in which McLachlin and Bastarache JJ emphasised that ‘an award for exemplary damages in commercial disputes will remain an extraordinary remedy’. Cf Angela Swan and Jakub Adamski, *Canadian Contract Law* (3rd edn, LexisNexis 2012) 577: In the aftermath of *Whiten* (in which punitive damages were awarded for breach of an insurance contract),

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punitive damages are available and are awarded in tort in areas of commercial significance (eg, insurance fraud) without similar concerns.<sup>170</sup>

### *c. Incompatibility with the efficient breach theory*

Punitive damages are also thought to be incompatible with the efficient breach theory because the threat of punishment may deter efficient contractual breaches.<sup>171</sup> However, this argument does not apply to inefficient breaches.<sup>172</sup> Besides, there is a case for making punitive damages available even for efficient breaches of contract. The threat of punitive damages will not necessarily lead to inefficient performance but will instead lead parties to negotiate for release and ‘release costs’ are arguably lower than ‘breach costs’.<sup>173</sup> To find which rule is more efficient we would need to compare negotiation costs with assessment of damages costs. Unless and until we know which costs are higher, we cannot conclude that allowing punitive damages for breach of contract is an inefficient rule. Punitive damages can also make up for the possibility of escaping liability (eg, because the breach may not be detected or because the promisee may not sue in court).<sup>174</sup> Finally, the efficient breach theory has never been explicitly endorsed by English courts and so it seems odd that this argument has been used so commonly as a justification for disallowing punitive damages in contract.

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‘insurers have had considerable difficulty in ensuring that their employees’ actions do not expose them to harsh criticism from the judges, if not punitive damages’.

<sup>170</sup> Goudkamp (n 71) 325.

<sup>171</sup> Law Commission (n 30) 118–119. For criticism of the efficient breach theory, see Burrows, *Remedies* (n 16) 413–414.

<sup>172</sup> William Dodge, ‘The Case for Punitive Damages in Contracts’ (1999) 48 *Duke LJ* 629, 654.

<sup>173</sup> *ibid* 669–676; Cunnington (n 16) 386.

<sup>174</sup> Mitchell Polinsky and Steven Shavell, ‘Punitive Damages: An Economic Analysis’ (1998) 111 *Harv LR* 869, 936–941.

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### *d. Increase in litigation costs*

It is also contended that expanding punitive damages to the field of contract may add to the length, complexity and costs of litigation.<sup>175</sup> However, there have been no complaints about such complexities arising in tort litigation, where punitive damages are currently available. Besides, as Dodge notes, the threat of punitive damages can lead parties who were previously inclined to breach to negotiate with the other party for a release from the contract. If parties renegotiate successfully the number of breaches of contract will be reduced. By reducing the number of breaches, punitive damages should also reduce the amount of contract litigation.<sup>176</sup> Finally, even if litigation costs increase, it does not follow that punitive damages should be unavailable in contract. The benefit of sanctioning instances of outrageous wrongdoing that would otherwise be left unpunished may be worth these costs.

### *e. Other methods of intervention are better than punitive damages*

Drawing inspiration from LeBel J’s judgment in *Whiten v Pilot Insurance Co Ltd*<sup>177</sup> some argue that in the rare circumstances in which punishment is merited, regulation should be preferred to punitive damages.<sup>178</sup> However, it is not clear why regulation is a better solution<sup>179</sup> and, in any case, there is no evidence to support the suggestion that regulation is in fact a better solution.

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<sup>175</sup> *PH Hydraulics* (n 15) [104].

<sup>176</sup> Dodge (n 172) 691.

<sup>177</sup> (n 164) [143]–[169].

<sup>178</sup> *PH Hydraulics* (n 15) [106]. See, also, Rowan (n 152) 512–513.

<sup>179</sup> One explanation may be that the regulator is better placed to assess the wider impact of a sanction, see *PH Hydraulics* (n 15) [106].

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A similar argument is that it is preferable to expand the scope of existing contractual remedies (eg, of accounts of profits) than to introduce punitive damages in contract.<sup>180</sup> However, if all existing remedies are insufficient to punish the defendant adequately, this cannot be a solution. Besides, the idea that other remedies can substitute punitive damages may lead to confusion between types of damages that are conceptually distinct and this is undesirable on its own. In particular, an account of profits cannot operate as a substitute for punitive damages. There are fundamental differences between the two remedies.<sup>181</sup>

### *f. Inconsistency with other rules in contract law*<sup>182</sup>

A further concern is that introducing punitive damages in contract would lead to incoherence because this would be incompatible with other rules in contract law, especially the rule against penalty clauses. It would be inconsistent to allow punitive damages but not penalty clauses because punishment and deterrence underlie both doctrines.<sup>183</sup> Before assessing the merits of this argument it is useful to set out briefly the present law on penalty clauses. In *Cavendish Square Holding BV v Makdessi*<sup>184</sup> the Supreme Court held that a penalty clause is a provision which, on B’s breach of a primary obligation, places upon B ‘a secondary obligation which imposes a detriment ... out of all proportion to any

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<sup>180</sup> Rowan (n 152) 512. Note that, after *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2018] 2 WLR 1353 it seems that an account of profits will not be easily awarded for breach of contract, see Nicholas McBride, ‘*Morris-Garner v One Step (Support) Ltd*’ <<https://mcbridesguides.com/wp-content/uploads/2018/10/Morris-Garner-v-One-Step.pdf>> 4–5 (note), accessed 30 July 2021.

<sup>181</sup> See n 134.

<sup>182</sup> I am grateful to Professor Edwin Peel for reading and commenting on this section of the thesis.

<sup>183</sup> *PH Hydraulics* (n 15) [73]. See, also, Rowan (n 152) 508–509.

<sup>184</sup> (n 157).

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legitimate interest of [A] in the enforcement of the primary obligation’.<sup>185</sup> To assess whether such a clause is valid the court must determine: (1) if A has a legitimate interest in B’s performance of B’s primary obligation;<sup>186</sup> and (2) if the detriment is unconscionable, extravagant, exorbitant, or entirely disproportionate to A’s legitimate interest.<sup>187</sup>

One response to those who assert that it would be inconsistent for punitive damages to be available in contract when penalty clauses are unenforceable is that the penalty rule is not sound and should be abolished.<sup>188</sup> No inconsistency would arise then. The arguments in favour of the enforceability of penalty clauses are those that support freedom of contract more generally. One argument is that parties should be able to determine the value they place on performance. Another argument is that allowing penalty clauses enables the promisor to enhance his/her reliability by providing assurance of the performance. A third reason for allowing penalty clauses is that they enable the parties to predict the cost of breach and help the promisee to avoid the risk of under-compensation.<sup>189</sup> The force of these arguments was recognised in *Makdessi*. Lord Neuberger and Lord Sumption admitted that the rule ‘is an interference with freedom of contract’<sup>190</sup> and ‘doubt[ed] that the courts would have invented [it] today if their predecessors had not done so three centuries ago’.<sup>191</sup>

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<sup>185</sup> *ibid* [32]. See, also, Carmine Conte, ‘The Penalty Rule Revisited’ (2016) 132 LQR 382.

<sup>186</sup> Such a legitimate interest may include deterrence: *Makdessi* (n 157) [28], [31], [99], [248].

<sup>187</sup> *ibid* [31], [162], [248], [287], [293].

<sup>188</sup> Academics have argued powerfully in favour of the abolition of the rule, see, eg, Edwin Peel, ‘Unjustified Penalties or an Unjustified Rule Against Penalties?’ (2014) 130 LQR 365; Sarah Worthington, ‘Common Law Values: The Role of Party Autonomy in Private Law’ in Andrew Robertson and Michael Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Hart 2016) 315–322.

<sup>189</sup> For further arguments, see Worthington (n 188) 316; Stephen Waddams, *The Law of Contracts* (7th edn, Thomson Reuters 2017) paras 468–469.

<sup>190</sup> *Makdessi* (n 157) [33].

<sup>191</sup> *ibid* [36].

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However, the Supreme Court unanimously rejected the idea that the doctrine should be abolished<sup>192</sup> so it seems unlikely that any such development will occur in the near future.

A second response to the inconsistency objection is that its premise is flawed because, even assuming that the penalty rule is justifiable, the analogy between penalty clauses and punitive damages is imperfect. It is arguable that allowing punitive damages in contract does not necessarily produce an inconsistency with the current penalty clause doctrine. To determine if an inconsistency arises, it is essential to examine the reasons for the penalty rule and to assess if these reasons also dictate that punitive damages should be unavailable in contract. The justifications for the rule against penalty clauses are examined in turn.

At the heart of the rule lies a concern to protect vulnerable parties against oppressive behaviour.<sup>193</sup> This was the main reason why the Supreme Court maintained the rule in *Makdessi* even though it recognised that it infringes freedom of contract. The underlying concern was, it seems, that if the rule was abolished, the courts would lose their power to control clauses agreed between parties with unequal bargaining power. Although the Consumer Rights Act 2015 protects consumers against exploitation, there remains a need for a mechanism to protect commercial parties who stand in an unequal position to

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<sup>192</sup> Although note that *Makdessi* (n 157) [32] relaxes the penalty rule because it sets a high threshold for characterising an agreed damages clause as a penalty: the stipulated sum must be ‘out of all proportion’ in comparison with any legitimate interest of the claimant in the performance of the contract. See, also, Ewan McKendrick, *Contract Law* (14th edn, Palgrave 2021) 430: ‘The outcome of the decision [in *Makdessi*] is to give contracting parties greater freedom to set the level of damages for breach of contract without worrying about the possibility of judicial intervention’.

<sup>193</sup> *Makdessi* (n 157) [34]–[35], [38], [257], [260]. See, also, Andrew Burrows, ‘Legislative Reform of Remedies for Breach of Contract: The English Perspective’ (1997) 1 Edin LR 155, 175–176 doubting whether penalty clauses should be void if contracting parties are of equal bargaining power. Waddams (n 189) para 460 also observes that such clauses are generally not struck down ‘in the absence of proof that the provision was unfair or oppressive’.

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their commercial counterparties. This is arguably the gap that the penalty rule seeks to fill.<sup>194</sup> If this is indeed the main justification for the rule, it does not dictate that punitive damages should be unavailable in contract. In fact, the courts could offer additional protection in cases of outrageous exploitation of vulnerable parties in contractual arrangements through the mechanism of punitive damages.<sup>195</sup>

Another justification for the penalty rule is that there is something objectionable about clauses whose purpose and practical effect is to deter breach of contract. This rationale would be undermined if punitive damages were allowed in contract given that a central goal of punitive damages is deterrence.<sup>196</sup> However, clauses which act as a deterrent are not necessarily objectionable. Counsel for both sides in *Makdessi* acknowledged that the penalty rule is not predominantly concerned with deterrence.<sup>197</sup> In any event, the Supreme Court made it plain that deterrence is legitimate as long as ‘the means by which the contracting party’s conduct is to be influenced are [not] “unconscionable”’<sup>198</sup> and ‘there is a legitimate interest in influencing the conduct of the contracting party which is not satisfied by the mere right to recover damages for breach of contract’.<sup>199</sup> Barnett thus argues that punitive damages can similarly be an available remedial response where the

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<sup>194</sup> *Makdessi* (n 157) [38]. See, also, *ibid* [260]–[262] (Lord Hodge): ‘Legislative measures have been introduced to control unfair terms in contracts ... [However] there remain significant imbalances in negotiating power in the commercial world’.

<sup>195</sup> Eg, *Whiten* (n 164).

<sup>196</sup> *PH Hydraulics* (n 15) [73]. See, also, Rowan (n 152) 508–509.

<sup>197</sup> *Makdessi* (n 157) 1181, 1184.

<sup>198</sup> *ibid* [31]. No such fear arises with punitive damages where the punishment is measured by the court rather than the parties.

<sup>199</sup> *ibid* [99]. See, also, Conte (n 185) 385.

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claimant has a legitimate interest in ensuring that the contract is performed.<sup>200</sup> That deterrence is not a key rationale of the penalty rule is further evidenced by the fact that liquidated damages clauses can also deter breach of contract and yet the law permits such clauses.<sup>201</sup>

A related justification for the rule against penalty clauses is the desire to ensure that damages (rather than specific performance) will remain the primary remedy for breach of contract.<sup>202</sup> To an extent, this justification overlaps with the efficient breach argument which has already been addressed and rejected as unconvincing.<sup>203</sup> The threat of punitive damages will not inevitably lead to the performance of a contract. It can instead prompt parties to negotiate for release.<sup>204</sup> Besides, allowing punitive damages in contract does not conflict with the main reasons for the primacy of damages over specific performance when a breach of contract occurs. It is not entirely clear from the courts’ reasoning why damages are the primary remedy for breach of contract but the most common justifications for this rule are that: (1) to compel someone to do something is a greater infringement of liberty than an order to pay a sum of money;<sup>205</sup> and (2) the courts promote the duty to mitigate, a

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<sup>200</sup> Katy Barnett, ‘Exemplary Damages in Contract Law’ in Elise Bant and others (eds), *Punishment and Private Law* (Hart 2021) 226.

<sup>201</sup> Eg, *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (HL). See, also, Waddams (n 189) para 459: ‘[E]nforceable liquidated damages agreements do, in general, operate to induce performance of another obligation and certainly one of the motives affecting the obligor will be ... the fear of having to pay the agreed sum on default’.

<sup>202</sup> *Makdessi* (n 157) [39].

<sup>203</sup> See the text to nn 171–174.

<sup>204</sup> ‘Release costs’ are arguably lower than ‘breach costs’, see Dodge (n 172) 669–676; Cunnington (n 16) 386.

<sup>205</sup> Stephen Smith, *Contract Theory* (OUP 2004) 400–402. See, also, Burrows, *Remedies* (n 16) 413.

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duty which only comes with the remedy of damages.<sup>206</sup> These arguments do not justify prohibiting punitive damages for breach of contract because (1) we are not interested in protecting someone’s liberty to engage in ‘outrageous’ wrongdoing; and (2) the courts’ desire to promote the duty to mitigate is not affected in any way by allowing punitive damages for breach of contract.

Another argument against the validity of penalty clauses is that ‘in many cases to uphold penalty clauses will act as an incentive for the claimant wastefully to direct resources to induce the defendant to break the contract’.<sup>207</sup> However, to uphold punitive damages for breach of contract means to allow the courts (rather than the parties) to impose punishment at their discretion. There is no incentive for the parties to try to influence each other’s behaviour in this context.

A final observation about the inconsistency argument is that punitive damages are awarded *by the courts*, whereas, if there was no rule against penalties, punitive damages would be awarded *by the parties*. It is arguable that one of the reasons for the penalty rule is that the parties should not be allowed to usurp the function of the courts<sup>208</sup> to determine when punitive damages can be awarded. The irony in this, if correct, is that having reserved to themselves the power to award punitive damages, the courts then do not do so. Thus, allowing punitive damages in contract does not conflict with the idea that the courts will not tolerate agreed punishment. Punitive damages are not an instance of agreed punishment

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<sup>206</sup> Burrows, *Remedies* (n 16) 413–414. Another justification for the primacy of damages is based on the efficient breach theory but this is an unsatisfactory argument, see *ibid* 414 and the text to nn 171–174.

<sup>207</sup> Burrows, *Remedies* (n 16) 397 (footnotes omitted).

<sup>208</sup> Hence the distinction between primary (no rule applied) and secondary (rule applied) obligations.

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and they would not be awarded for *any breach* of a contractual obligation (irrespective of the quality of that breach); they would only be imposed by courts in order to punish *outrageous breaches* of contractual obligations.

In conclusion, the reasons for the control of penalty clauses do not dictate that punitive damages should not be available for breach of contract. A potential conflict may exist only to the extent that retribution underlies both doctrines,<sup>209</sup> but this is only one of the functions of punitive damages and, as explained, agreed punishment is not the same as punishment imposed by the courts. To the extent that deterrence underlies both punitive damages and penalty clauses this is not objectionable because, as the Supreme Court acknowledged in *Makdessi*, ‘a deterrent provision in contract ... designed to influence the conduct of the party potentially affected. ... is [not] inherently ... contrary to the policy of the law’.<sup>210</sup> Besides, the central consideration behind the unenforceability of penalty clauses is not that they deter breach but that they can be used to exploit vulnerable parties. And this justification is entirely consistent, in fact it is enhanced, if punitive damages are allowed in the contract realm.

### *g. Punitive damages have never been awarded in contract law*

Finally, it is contended that the longevity of the absence of punitive damages awards from English contract law renders their introduction inappropriate.<sup>211</sup> However, the fact that punitive damages have not been awarded in contract before is not a reason for their

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<sup>209</sup> *Makdessi* (n 157) [32] (Lord Sumption): ‘The innocent party can have no proper interest in simply punishing the defaulter’.

<sup>210</sup> *ibid* [31] (Lord Neuberger and Lord Sumption).

<sup>211</sup> Law Commission (n 30) 118; Rowan (n 152) 516.

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unavailability but simply an observation regarding the existing law. Even if we assume that there is a good reason for common law practices which have endured for a long time,<sup>212</sup> the argument is still weak because the rule against punitive damages in contract has been established in the absence of any authoritative decision providing a substantive reason as to what justifies this prohibition<sup>213</sup> and because, according to one judge, ‘the law was once clearly established to the contrary’.<sup>214</sup>

Besides, it is arguable that, although punitive damages have not been explicitly awarded for breach of contract,<sup>215</sup> punitive considerations are already present in English contract law. An illustration of this is the decision of the House of Lords to order George Blake to disgorge all of his profits from writing a book in breach of his contract of secrecy with the Crown. No allowance was made for the time and skill that Blake spent in writing the book. The defendant’s blameworthiness was clearly important as is evidenced by the opening sentence in the reasons of Lord Nicholls: ‘Blake [wa]s a notorious, self-confessed traitor’.<sup>216</sup> Lord Hobhouse (in dissent) recognised the ‘punitive nature of the claim’<sup>217</sup> and noted that ‘Blake had escaped his just punishment for his crimes’.<sup>218</sup>

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<sup>212</sup> Nicholas McBride, ‘Punitive Damages’ in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (OUP 1996) 176.

<sup>213</sup> For limited discussion on this, see the obiter dicta in *Addis* (n 70) 493–500.

<sup>214</sup> *ibid* 500 (Lord Collins). See, also, the text to nn 75–78.

<sup>215</sup> Note, however, the recent authorisation of punitive damages for certain breaches of covenants in the High Speed Rail (London – West Midlands) Act 2017 Act, s 51(10) (although no award has been made under this provision).

<sup>216</sup> *Blake* (n 164) 275.

<sup>217</sup> *ibid* 295.

<sup>218</sup> *ibid* 294. For another illustration, see chapter 6.2.1(3) discussing cases in which the courts justified the award of punitive damages for insurance fraud by reference to the obligation of utmost good faith inherent in insurance contracts.

**(2) Arguments in favour of punitive damages for breach of contract**

Since the arguments explored in the previous section do not justify an absolute prohibition of punitive damages for contractual breaches, I now turn to the question of whether there is good reason to extend the remedy into the contract context. There is an increasing trend of academics arguing in favour of punitive damages for breach of contract.<sup>219</sup> The remedy’s primary goals (ie, retribution and deterrence) are not only peculiar to torts. Accordingly, the trigger for punitive damages should focus on the reprehensible character of the defendant’s conduct irrespective of the cause of action in which such conduct manifests. That it is wrong to tie the hands of courts by denying them the power to award punitive damages in contract is illustrated by the following examples.

In *Whiten v Pilot Insurance Co*<sup>220</sup> an accidental fire destroyed the claimant’s home. The claimant requested the insurance pay-out from the defendant insurance company. The defendant denied the claim and alleged that the claimant had started the fire deliberately. The expert evidence contradicted the allegation of arson which had been made in bad faith and had been pursued through an eight-week trial with the aim of forcing the claimant, who was very poor, into an unfairly low settlement. The Supreme Court of Canada upheld a punitive damages award in respect of this conduct. Although it is unlikely that the issue of punitive damages will arise in most instances of contract breach, the facts of *Whiten* demonstrate that the remedy must be available for the few cases in which punishment will be an appropriate response.

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<sup>219</sup> Eg, McBride, ‘A Case for Awarding Punitive Damages in Response to Deliberate Breaches of Contract’ (n 16); Burrows, *Remedies* (n 16) 377–378.

<sup>220</sup> (n 164).

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A second example is *Kagal v Tessler*.<sup>221</sup> Both parties were developers and homebuilders. They agreed that the claimant would provide construction management services to the defendant for a multi-building development project. The claimant was responsible for ensuring approval of the project and was not entitled to any payment during the initial development period. Instead, he was to be paid when the construction started. The claimant therefore worked on the project for 17 months without receiving any payment. After municipal approvals were granted but just before construction of the first building commenced, the defendant terminated the contract. In awarding punitive damages, the trial judge emphasised that the defendant was ‘an experienced builder and developer’ and that ‘there was a power imbalance because of the claimant’s financial vulnerability [which the defendant had] exploited’.<sup>222</sup> The defendant asked the claimant to provide his services, took advantage of his vulnerability by forcing him to incur expenses with the expectation that he would be paid and then abruptly defaulted on the eve of the claimant’s entitlement to payment. In upholding the award, the Ontario Court of Appeal emphasised the defendant’s ‘terrible conduct’<sup>223</sup> in taking advantage of the claimant’s vulnerable position.

Another illustration is *Asselstine v Manufacturers Life Insurance Co*<sup>224</sup> in which a woman who was suffering from multiple sclerosis was awarded punitive damages for the denial of disability benefits by her employer. The claimant was diagnosed while she was working as a nurse for the defendant. A few months after her diagnosis she was unable to

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<sup>221</sup> [2004] OJ No 3799 (Ont CA).

<sup>222</sup> *Kagal v Tessler* [2002] OJ No 3979 (Ontario Superior Court of Justice) [135] (O’Driscoll J).

<sup>223</sup> *Kagal* (n 221) [28] (MacPherson JA).

<sup>224</sup> [2005] BCJ No 1152 (BCCA).

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work. The employer persistently disregarded compelling medical information and refused her request for disability benefits. Punitive damages were justified due to the ‘serious lack of good faith in the assessment of the [claimant]’s application’,<sup>225</sup> the ‘indifference of the defendant to the predicament of the claimant [who] was struggling with a terrible disease not knowing whether she would have enough to live on’<sup>226</sup> and to deter the defendant and others in similar positions from exploiting vulnerable employees.<sup>227</sup>

A final illustration is derived from English law. Consider *Perera v Vandiyar*<sup>228</sup> in which the claimant was the tenant of a flat where he lived with his wife and their baby. The defendant landlord cut off the supply of gas and electricity to the flat, leaving it without heating or lighting. This forced the claimant and his family out of the house. Although the defendant’s conduct was deliberate and malicious, the claimant was unable to recover punitive damages because the landlord’s conduct was actionable only in breach of contract. Romer LJ analogised *Perera* with another unlawful eviction case, *Lavender v Betts*,<sup>229</sup> in which the defendant landlord had removed doors and windows from the flat where the claimant lived, with the intention of forcing him to quit the premises. Romer LJ said: ‘What the defendant did in *Lavender* ... was a tort, because it was a trespass. Although the intention of the defendant here was precisely the same as the intention proved in that case, the defendant in *Lavender* ... resorted to trespass for the purpose of getting his own way’.<sup>230</sup>

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<sup>225</sup> *ibid* [63] (Donald and Huddart JJA).

<sup>226</sup> *ibid* [60] (Donald and Huddart JJA).

<sup>227</sup> *ibid* [29].

<sup>228</sup> (n 79).

<sup>229</sup> [1942] 2 All ER 72 (KBD) 73 (punitive damages were awarded in this case).

<sup>230</sup> *Perera* (n 79) 676.

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It seems irrational to allow punitive damages in *Lavender* but not in *Perera* simply because the means employed to force the claimant out of the house differed in each case. The defendant’s conduct merited punishment in both situations.

### 9.5.3 Negligence

#### (1) Arguments against punitive damages in negligence

##### *a. Negligent conduct fails to meet the threshold to trigger punitive damages*

Punitive damages may be considered inappropriate in a negligence claim because negligent conduct fails to meet the threshold required to trigger such an award. Smillie notes: ‘By definition, negligent conduct is not “deliberately and wilfully aimed at the plaintiffs ... [C]onduct [which merits punitive damages] falls squarely within the bounds of intentional torts’.<sup>231</sup> This argument is problematic for two reasons: First, because, as already explained,<sup>232</sup> intentional conduct can be actionable under the tort of negligence. Second, because there is no reason to limit punitive damages to cases of intentional wrongdoing. Merely careless conduct might also merit punishment.<sup>233</sup> There may be a need to deter failures to exercise reasonable care and as Hart noted ‘we have plenty of empirical evidence to show that punishment supplies men with an additional motive to take care before acting, to use their faculties, and to draw upon their experience’.<sup>234</sup>

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<sup>231</sup> John Smillie, ‘Exemplary Damages for Personal Injury’ [1997] NZLRev 140, 155.

<sup>232</sup> See the text to nn 90–93.

<sup>233</sup> Eg, *Bottrill* (n 10).

<sup>234</sup> HLA Hart, *Punishment and Responsibility* (2nd edn, OUP 2008) 156–157.

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### *b. Overlap with aggravated damages*

Mulheron also argues against punitive damages in negligence claims. Writing about the position in Australia, she says: ‘[I]n claims of alleged negligence giving rise to personal injury ... there is a strong case for the complete abolition of exemplary damages’.<sup>235</sup> She contends that there is a degree of overlap between punitive and aggravated damages and that it is best to retain the latter rather than the former. Mulheron observes:

[T]o trigger an award of aggravated damages seems to require proof of precisely the same type of conduct on the part of the defendant as would trigger an award of exemplary damages. In some respects, aggravated damages may be seen to seek the best of both worlds: seeking to compensate the plaintiff for intangible losses, while seeking to punish and deter outrageous tortious conduct on the defendant’s part.<sup>236</sup>

This argument is not specific to negligence claims<sup>237</sup> and is unconvincing because it does not explain why, to the extent an overlap between aggravated and punitive damages exists, the best way forward is to retain aggravated damages only. Why should we maintain a single remedy which both compensates the claimant and seeks to punish the defendant? Damages for mental distress already compensate the claimant for the manner in which the wrong was committed.<sup>238</sup> Punitive damages already punish the defendant for their outrageous conduct. Retaining punitive damages alongside damages for mental distress

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<sup>235</sup> Mulheron (n 18) 85.

<sup>236</sup> *ibid* 74 (footnotes omitted).

<sup>237</sup> Note that English law precludes aggravated damages awards for the tort of negligence, see *Kralj v McGrath* [1986] 1 All ER 54 (QBD).

<sup>238</sup> Crime and Courts Act 2013, s 39(2): ‘Aggravated damages may be awarded against the defendant only to compensate for mental distress and not for purposes of punishment’. See, also, Law Commission (n 30) 27.

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and avoiding use of the term ‘aggravated damages’ provides a clear framework and has the virtue of explicitly acknowledging the function of each head of damages.<sup>239</sup> There is no need for a hidden punitive element within ‘compensatory aggravated damages’ if this framework is followed.

### *c. Danger of excessive awards*

Mulheron also contends that because the assessment of punitive damages is ‘inherently uncertain’ there is a danger of ‘excessive’ awards.<sup>240</sup> Concerns about excessive awards in this context can be deemed as particularly problematic because negligence claims comprise a significant part of private law litigation.<sup>241</sup> There may thus be a danger of increased litigation costs or defendants being coerced to settle claims under the threat of a punitive damages claim.<sup>242</sup> However, this fear is unfounded because punitive damages awards in the UK can hardly be characterised as excessive.<sup>243</sup>

### *d. Other mechanisms of punishment for professional negligence*

Another argument by Mulheron is that there is no need for punitive damages in negligence and in particular, in professional negligence, because outrageous conduct in this area ‘may be met with significant compensatory damages; criminal prosecution; [or] disciplinary

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<sup>239</sup> Law Commission (n 30) 27; Burrows, *Remedies* (n 16) 287–288.

<sup>240</sup> Mulheron (n 18) 77.

<sup>241</sup> According to the Compensation Recovery Unit (‘CRU’) there were 564,359 personal injury claims in the UK during 2020–21, see Compensation Recovery Unit, ‘Compensation Recovery Unit Performance Data’ (2021) <<https://www.gov.uk/government/publications/compensation-recovery-unit-performance-data/compensation-recovery-unit-performance-data>> accessed 30 July 2021. Almost all of these claims are negligence claims and there are also property damage claims which do not go through the process of the CRU.

<sup>242</sup> Mulheron (n 18) 81. See, also, Smillie (n 231) 156.

<sup>243</sup> See chapter 6.2.1(8).

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proceedings’.<sup>244</sup> However, intentional torts are more likely than negligence to attract other sanctions (especially criminal sanctions), and the availability of punitive damages in respect of these torts is not considered problematic. Besides, the mere existence of other mechanisms to achieve the goals of punitive damages does not necessarily mean that the award should be entirely abolished. The possibility of excessive punishment is already taken care of by treating punitive damages as a last resort solution which is available only if other remedies<sup>245</sup> and sanctions<sup>246</sup> are inadequate to punish the defendant. Although outrageous conduct in professional negligence cases ‘*may be met*’ with the mechanisms cited by Mulheron, it is also possible that it will not be met, hence the need for allowing the possibility of a punitive award.

### *e. Distinction between different degrees of negligence*

Mulheron also argues that allowing punitive damages for the tort of negligence would require looking at different degrees of negligence which are ‘very difficult to apply’.<sup>247</sup> For example, she contends that distinguishing between inadvertently negligent, intentional or reckless conduct for the purposes of determining punitive damages issues ‘is very difficult to classify’.<sup>248</sup> Intentional wrongdoing entails deliberately intending to cause harm through one’s conduct.<sup>249</sup> A reckless defendant appreciates the risk of his conduct causing harm

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<sup>244</sup> Mulheron (n 18) 80.

<sup>245</sup> *Rookes* (n 2) 1228.

<sup>246</sup> *Archer* (n 107) 406–407. The empirical analysis suggests that courts generally adhere to this principle, see chapters 6.2.2(5) and 7.1.1(6).

<sup>247</sup> Mulheron (n 18) 78.

<sup>248</sup> *ibid* 80.

<sup>249</sup> Hart (n 234) 137.

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and unjustifiably chooses to run that risk.<sup>250</sup> Inadvertent negligence excludes both intention to harm and appreciation of the risk of harm.<sup>251</sup> Although it may be difficult for a court to distinguish between these ‘degrees of negligence’,<sup>252</sup> punishment-worthy conduct can occur in all three contexts. Indeed, outside the UK, punitive damages have been held to be available for the tort of negligence in respect of intentional,<sup>253</sup> reckless<sup>254</sup> and inadvertently negligent conduct.<sup>255</sup> And although the remedy is ‘associated primarily with intentional wrongdoing’,<sup>256</sup> there is no prerequisite of proving a particular state of mind (at least insofar as the first *Rookes* category is concerned) before punitive damages can be awarded.<sup>257</sup>

Besides, there are other ways to vary the standard of care in negligence which may be easier to apply.<sup>258</sup> Instead of distinguishing between intentional, negligent and reckless conduct, we could use ‘gross negligence’ as the threshold for awarding punitive damages.

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<sup>250</sup> *ibid.* See, also, *Couch v A-G (No 2)* [2010] NZSC 27, [2010] NZLR 149 [100].

<sup>251</sup> Hart (n 234) 137. See, also, *Couch* (n 250) [100].

<sup>252</sup> The courts in New Zealand employ this distinction and allow punitive damages only for intentional and reckless conduct but not for inadvertent negligence, see *Couch* (n 250) [100]. Cf *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20, [2017] 1 SLR 918 [206] holding that punitive damages are available even for inadvertent negligence.

<sup>253</sup> Eg, *Gray v Motor Accident Commission* (1998) 196 CLR 1 (HCA).

<sup>254</sup> Eg, *Robitaille v Vancouver Hockey Club Ltd* (1981) 30 BCLR 286 (BCCA). See, also, the text to nn 270–272 below.

<sup>255</sup> Eg, *Bottrill* (n 10). See, also, the text to nn 280–282 below.

<sup>256</sup> *Bottrill* (n 10) [37] (Lord Nicholls). See, also, chapter 6.2.1(5).

<sup>257</sup> Punitive damages were awarded in English law under the first *Rookes* category in the absence of a ‘guilty’ state of mind in *Muuse* (n 89) which involved a claim for unlawful detention. As McBride and Bagshaw (n 91) 762 note ‘while no one involved in handling the claimant’s case may have been aware they were unlawfully detaining the claimant, their “manifest incompetence” ... and the Home Office’s systemic failure to put any checks in place on officials acting incompetently meant that the claimant’s detention was so “outrageous” as to be worthy of punishment’.

<sup>258</sup> Although English law recognises only one standard of care (the standard of the reasonable person), courts have sometimes used a modified standard of care which favours defendants, see Donal Nolan, ‘Varying the Standard of Care in Negligence’ (2013) 72 CLJ 651, 655–666.

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Nolan defines ‘gross negligence’ as ‘conduct that falls far below the standard of the reasonable person’.<sup>259</sup> This is a simpler test which does not involve an enquiry into the defendant’s state of mind. The criminal law already uses the concept of ‘gross negligence’ in the context of manslaughter.<sup>260</sup> If ‘gross negligence’ were to be applied as the threshold for a punitive damages award it is suggested that an additional rule should apply that the defendant who falls significantly short of the standard of the reasonable person must also have the normal range of capacities.<sup>261</sup> Arguably, the threshold for the award of punitive damages (‘outrageous conduct’)<sup>262</sup> already encompasses ‘gross negligence’. It is difficult to imagine a case of ‘minor negligence’ that would qualify as sufficiently ‘outrageous’ to merit punishment.

Punitive damages are primarily aimed at punishing and deterring conduct which reveals an outrageous disregard of the claimant’s rights and so, the test governing the availability of punitive damages in negligence should entail ascertaining whether there was outrageous conduct which is actionable in the tort of negligence.<sup>263</sup> The degree to which the defendant’s conduct departs from community norms determines whether that conduct

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<sup>259</sup> *ibid* 679.

<sup>260</sup> *R v Bateman* (1927) 19 Cr App R 8 (CA) 12 (Lord Hewart CJ) (manslaughter by gross negligence where the defendant ‘showed such disregard for the life and safety of others as to amount to a crime ...’). More generally, the criminal law frequently uses negligence-based liability and punishes wrongdoers who do not intentionally injure others. For a general discussion of instances of negligence-based liability in the criminal law, see James Goudkamp and Eleni Katsampouka, ‘Punitive Damages: Ten Misconceptions’ in Elise Bant and others (eds), *Punishment and Private Law* (Hart 2021) 218–222.

<sup>261</sup> This would exclude awards of punitive damages in cases like *Dunnage* (n 93).

<sup>262</sup> *Kuddus* (n 3) [68] (Lord Nicholls).

<sup>263</sup> Cases like *Dunnage* (n 93) would be excluded under this test. For an illustration of a case in which this test was adopted, see *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (Wellington High Court) 434.

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can be fairly characterised as ‘outrageous’.<sup>264</sup> The greater the departure from community norms the greater the possibility of awarding punitive damages against the defendant. At the end of the day, it is possible for outrageous wrongdoing to occur no matter which ‘degree of negligence’ is chosen (whether it is gross negligence or a distinction between intentional, reckless and inadvertent conduct). The difficulty (if any) in applying these distinctions is not a compelling reason for excluding from the scope of punitive damages instances of punishment-worthy wrongdoing. The risk that it may take more time for a court to draw these distinctions is outweighed by the risk of leaving instances of outrageous wrongdoing without punishment. Thus, punitive damages awards should be available in the rare circumstances where negligent behaviour is sufficiently culpable to merit a punitive response.

### *f. Punitive damages have never been awarded in negligence*

A final argument against punitive damages in negligence is that such an award has never been made for that tort in English law. According to Hodges, this ‘surely suggests the absence of any need’<sup>265</sup> for punitive damages in negligence. As already noted,<sup>266</sup> however, the absence of a punitive damages award for a particular cause of action is not, on its own, a normative argument against the availability of the remedy in that area. Besides, it is arguable that punitive damages have been awarded in negligence in English law. *Emblen v Myers*<sup>267</sup> can be cited as authority for this proposition and there are several books in which

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<sup>264</sup> Dorsey Ellis, ‘Punitive Damages in Iowa Law: A Critical Assessment’ (1981) 66 Iowa LR 1005, 1023.

<sup>265</sup> Christopher Hodges, ‘Do Punitive Damages Have Any Place in Product Liability?’ [1994] Product Liability International 19.

<sup>266</sup> See the text to nn 211–214.

<sup>267</sup> (n 93).

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*Emblen* is cited as an instance of punitive damages being granted for the tort of negligence.<sup>268</sup>

### (2) Arguments in favour of punitive damages in negligence

Just as in the case of equitable wrongs and breach of contract, punitive damages should also be available in negligence because punishment-worthy conduct can arise under that cause of action. As noted above,<sup>269</sup> a claimant can sue in negligence in respect of intentional conduct. For example, a police officer who deliberately drives over a pedestrian may be liable in both trespass and negligence. Why should a court be able to award punitive damages in respect of that conduct only if the claimant elects to sue in trespass?

Besides, courts across the Commonwealth have awarded punitive damages where negligence is accompanied by high-handed conduct. This evidences that punishment-worthy behaviour can, in rare circumstances, arise even in the context of this tort. An illustration is *Robitaille v Vancouver Hockey Club Ltd.*<sup>270</sup> In that case, the claimant, Robitaille, suffered a shoulder injury while playing hockey for a team owned and operated by the defendant, which kept him out of games for a short time. Shortly after the injury, the team coach and general manager stated in a local newspaper: ‘I don’t know exactly how bad [the injury] is but I tell you he’d better start playing’.<sup>271</sup> Robitaille reluctantly returned to play roughly one month later. Over the next few months, Robitaille suffered

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<sup>268</sup> Eg, *Halsbury’s Laws* (3rd edn, 1955) vol 11, 224. Cf *Rookes* (n 2) 1229. The High Court of Australia also relied on *Emblen* as authority for punitive damages in cases of wilful negligence: *Gray* (n 253) 28.

<sup>269</sup> See the text to nn 90–93.

<sup>270</sup> (n 254).

<sup>271</sup> *ibid* [5].

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severe neck and arm pains, and complained about ‘shocking sensations’ in his right leg. His trainer, the management and medical staff of the team believed that the complaints were due to psychological problems and Robitaille continued playing. Despite these symptoms, and a severe collision with an opposing player during a match on 12 January 1977, which caused a temporary loss of control of his right leg, Robitaille continued to play. Finally, during a match on 19 January 1977, Robitaille was checked heavily by an opposing player, fell onto the ice and suffered a spinal cord injury that left him permanently disabled. The British Columbia Court of Appeal found that the defendants had breached their duty to take reasonable care of their players’ health and safety by disregarding Robitaille’s complaints and symptoms and pressuring him to participate in hockey games which ultimately caused him permanent damage. According to medical evidence, Robitaille’s injuries would have been entirely prevented if the trainers had done their job properly. The team management had notice of a serious medical problem which they ignored. This justified a punitive damages award of C\$35,000.<sup>272</sup>

*MacDonald v Sebastian*<sup>273</sup> provides another example. The claimants were tenants in the defendant’s premises. Unknown to the claimants, the drinking water in those premises contained arsenic at seven times the acceptable level. The defendant, who was also a medical doctor, was aware of the presence of unacceptable levels of arsenic in the water supply but kept silent in order to gain rental income. The tenants suffered severe pain and discomfort as a result. The court found that by breaching his duty to advise the tenants of the dangerous arsenic level in the drinking water the defendant had manifested a

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<sup>272</sup> C\$94,005 in 2021.

<sup>273</sup> [1987] NSJ No 324 (Nova Scotia Supreme Court).

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‘shocking disregard for the health and safety of the family which included a number of very young children’.<sup>274</sup> His conduct was so reprehensible that an award of C\$21,000<sup>275</sup> was warranted.

*McLaren Transport Ltd v Somerville*<sup>276</sup> is a third illustration. The claimant visited the defendant’s premises in order to buy a new tyre to fit a 15.3-inch wheel rim for his hay-conditioning machine. A 15.3-inch tyre was not available and in the absence of the usual tyre fitter, the store foreman decided instead to attempt to fit a 15-inch tyre himself. Fitting a 15-inch tyre to a 15.3-inch rim was a dangerous exercise, a fact that the claimant did not appreciate. The store foreman failed to read prominently displayed warnings about the maximum inflation level of the tyre and persistently attempted to inflate the tyre to a pressure over twice that recommended on the tyre itself. In spite of the obvious danger, an available cage tyre was not used. The tyre eventually exploded and the claimant, who was standing nearby during the inflation process, sustained severe injuries. Tipping J found that the level of the defendant’s negligence was ‘so high that it amount[ed] to an outrageous and flagrant disregard for the claimant’s safety, meriting condemnation and punishment’.<sup>277</sup>

Another example is *McIntyre v Grigg*.<sup>278</sup> The claimant was a university student who suffered serious physical and psychiatric injuries after she was struck by a car driven by the defendant whose blood alcohol content was three times over the legal limit at the time

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<sup>274</sup> ibid p 4.

<sup>275</sup> C\$41,978 in 2021.

<sup>276</sup> (n 263).

<sup>277</sup> ibid 435. NZ\$15,000 (NZ\$ 24,137 in 2021) were awarded as punitive damages.

<sup>278</sup> [2006] OJ No 4420 (Ontario CA).

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of the accident. The Ontario Court of Appeal found that the defendant had shown a reckless disregard for the lives and safety of others and that his conduct was so extreme as to be deserving of condemnation.<sup>279</sup>

Finally, it is possible even for inadvertently negligent conduct to be deserving of punishment and therefore punitive damages should be available in negligence to capture that possibility. This happened in *A v Bottrill*.<sup>280</sup> In this case, a pathologist misread and misreported four cervical smears taken from the claimant. As a result, the claimant developed invasive cervical cancer and had to undergo extensive treatment, whereas if he had correctly reported any of the first three smears her treatment would have been less severe and her prognosis much better. A subsequent investigation showed that the doctor’s false reporting rate exceeded 50 per cent. The court said that although the pathologist was ‘grossly incompetent in reading and reporting on cervical smears there was no evidence that he was actually aware of his deficiencies in that regard’.<sup>281</sup> It is strongly arguable that such grossly incompetent conduct is punishment-worthy and that a punitive damages award in these circumstances could ‘cause others ... positively to ensure that they were aware of the limitations of their own competence and to increase awareness of the overwhelming need not to disregard the rights of their patients’.<sup>282</sup>

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<sup>279</sup> The only criminal punishment for the defendant’s conduct was a small fine for careless driving. This decision was made by the prosecution because before the breathalyser test was administered, the defendant had not been informed of his right to counsel. Under normal circumstances, the defendant would have been punished with a period of incarceration. C\$20,000 (C\$25,435 in 2021) were awarded as punitive damages.

<sup>280</sup> (n 10).

<sup>281</sup> *Bottrill v A* (2001) 3 NZLR 622 (NZCA) [34] (Richardson P, Gault and Blanchard JJ).

<sup>282</sup> *ibid* [160] (Thomas J).

#### 9.5.4 ‘Cause of action restrictions’ should not survive

None of the arguments against the availability of punitive damages for equitable wrongs, breach of contract and the tort of negligence are convincing. Punishment-worthy conduct may arise in the context of each of these wrongs and a genuine abolition of the ‘cause of action test’ dictates that punitive damages should, in principle, be made available for all of the causes of action under examination.

Of course, expanding punitive damages in this way is controversial and may be seen as a radical change by many. One only need to look at the responses by the consultees in the Law Commission’s Report to grasp just how contentious the proposed amendments are.<sup>283</sup> However, there are good reasons<sup>284</sup> for maintaining a last resort remedy which punishes those who outrageously infringe other people’s rights. If the courts exercise this power with restraint (and the empirical analysis suggests that restraint is, in fact, observed with respect to punitive damages in the realm of tort) such awards can be valuable, and it does not seem logical to confine them to particular causes of action.

The preceding analysis shows that the jurisdiction which comes closest to the approach proposed in this thesis is Canada.<sup>285</sup> Canadian courts have long held that punitive damages can be awarded in all types of tort action (including negligence), in breach of

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<sup>283</sup> 28 per cent of those who participated in the Law Commission’s consultation process during the 1990s favoured total abolition of the remedy, see Law Commission (n 30) 96. A majority of consultees also supported that punitive damages should not become available for breach of contract (ibid 118).

<sup>284</sup> See chapter 3.3.

<sup>285</sup> The Canadian position does not conform entirely with that proposed in this thesis. Although Canadian courts allow punitive damages across the whole spectrum of civil wrongs, they have held that such awards can be made for breach of contract only if the defendant has committed a second independently actionable wrong in addition to the breach of contract, see *Vorvis* (n 15). For criticism of this restriction, see n 15.

## ‘CAUSE OF ACTION RESTRICTIONS’

contract and in respect of equitable wrongs. This approach is consistent with the justifications for awarding punitive damages which dictate that the remedy should be available whenever the defendant’s conduct merits condemnation. Besides, the more flexible approach followed in Canada has not resulted in excessive punitive damages litigation or to extravagant awards. Canadian courts have stressed that punitive damages are ‘an exceptional remedy, rarely-awarded and reserved for the most reprehensible examples of civil wrongdoing which would otherwise go unpunished by the law’.<sup>286</sup> Writing in 1995, Lewis Klar noted that ‘typical punitive damages awards in Canada [we]re very modest’ and that ‘awards in cases involving extremely reprehensible and outrageous conduct var[ied] from \$5,000 to \$50,000’.<sup>287</sup> In 2017, the same author observed that the position has not changed in recent years.<sup>288</sup>

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<sup>286</sup> *Whiten* (n 164) [49] (Binnie J).

<sup>287</sup> C\$7,659 to C\$76,589 adjusted for inflation, see Lewis Klar, ‘Punitive Damages in Canada’ (1995) 17 *Loy LA Int’l & Comp LJ* 809, 824.

<sup>288</sup> Lewis Klar and Cameron Jefferies, *Tort Law* (6th edn, Thomson Reuters 2017) 144–145.

## 9.6 CONCLUSION

This chapter addressed the extent to which ‘cause of action restrictions’ survive in English law after the removal of the ‘cause of action test’ and whether the survival of such restrictions is justified. It showed that, despite *Kuddus*, in which the House of Lords held that the cause of action in which the claimant sues is not relevant to the decision whether or not to award punitive damages, the remedy remains unavailable in respect of certain claims simply on the basis that punitive damages are not awarded in that particular cause of action. English courts have held that punitive damages are not available for equitable wrongs and breach of contract. There have also been no punitive damages awards for the tort of negligence during the modern era and the courts hesitate to accept unequivocally that such an award can, in principle, be made for that tort. The arguments advanced to justify these ‘cause of action restrictions’ are unconvincing. The courts have attributed many rationales to the award of punitive damages. The principal rationales are retribution and deterrence. The courts have also identified three subsidiary rationales for the award: vindication of the claimant’s rights, a therapeutic effect on the claimant who seeks revenge and the expression of the court’s disapproval of the defendant’s conduct.<sup>289</sup> Whatever justification for punitive damages one chooses, it centres on the defendant’s conduct, not on the formality of the cause of action in which a claim is framed. Punitive damages should thus be available in respect of all civil wrongs irrespective of their origin (tort, contract or equity).

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<sup>289</sup> See the text to nn 9–12 and chapter 3.

## CHAPTER 10: CONCLUSION

The remedy of punitive damages elicits a variety of strident opinions ranging from calls for its abolition, descriptions of it as an anomaly that is to be begrudgingly tolerated to petitions for its expansion. Given the controversy surrounding punitive damages, and the fact that they have existed for at least 250 years, it is surprising that the remedy has not been the subject of a monograph in the UK. This thesis has attempted to fill this gap by providing the first exclusive systematic analysis of punitive damages in English law. It has explored the law governing the remedy as well as the award's normative justifications and practical operation in the modern era. The thesis argued that confining punitive damages to particular categories of case and specific types of wrong is inconsistent with the remedy's rationales and proposed an expansion of the situations in which punitive damages are available.

Although the thesis favoured an expansionist approach it stopped short of offering detailed guidance about the precise test that should govern the availability of punitive damages in the future. Instead, it was argued that the 'categories test' and 'cause of action restrictions' should be replaced by a rule that focuses on the quality of the defendant's conduct (rather than the category or type of wrong committed). Of course, even if the limitations that the courts have imposed on punitive damages are incompatible with the remedy's rationales, it does not follow automatically that punitive damages should be awarded more freely. Many would argue that the best way forward would be to abolish

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punitive damages.<sup>1</sup> As already explained, punishment involves the deliberate infliction of pain in the world and is thus very difficult to justify. As difficult as the justification for any act of punishment may be, the judicially endorsed goals of punitive damages (primarily, retribution and deterrence) are plausible reasons in favour of such awards. They have been accepted as legitimate goals of a legal system for centuries. Thus, because the law has accepted punitive damages and the functions that the remedy serves, the rules governing the award should not be irrationally restrictive.

If the jurisdiction to award punitive damages is liberalised in the foreseeable future this will most likely be the product of judicial reform.<sup>2</sup> In articulating a new rule, useful guidance could be derived from the jurisprudence of common law countries which have rejected the *Rookes v Barnard* categories. Thus, in Canada, punitive damages are available in ‘exceptional cases for malicious, oppressive and high-handed misconduct that offends the court’s sense of decency’.<sup>3</sup> Australia allows punitive damages for ‘conscious wrongdoing in contumelious disregard of another’s rights’.<sup>4</sup> Similarly, in New Zealand, punitive damages can be awarded ‘for truly outrageous conduct which could not

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<sup>1</sup> It is indicative that 28 per cent of those who participated in the Law Commission’s consultation process during the 1990s favoured the abolition of the remedy, see Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 96.

<sup>2</sup> Two years after the Law Commission published its *Report on Aggravated, Exemplary and Restitutionary Damages*, the government announced that it did not intend to implement the proposals contained therein and that the development of the law should be left in the hands of the courts, see HC Deb 9 November 1999, vol 337, col 502. See, also, Andrew Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th edn, OUP 2019) 377: ‘[T]here seems little chance in the foreseeable future of legislative reform dealing generally with punitive damages’.

<sup>3</sup> *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 [196]. See, also, *Whiten v Pilot Insurance Co* [2002] SCC 18, [2002] 1 SCR 595 [36] (Binnie J): ‘The test limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour’.

<sup>4</sup> *Whitfeld v De Lauret & Co* (1920) 29 CLR 71 (HCA) 77 (Knox CJ).

## CONCLUSION

be punished in any other way'.<sup>5</sup> And, more recently, the Singaporean Court of Appeal held that punitive damages may be awarded 'where the totality of the defendant's conduct is so outrageous that it warrants punishment, deterrence and condemnation'.<sup>6</sup> This last test echoes Lord Nicholls's statement in *Kuddus v CC Leicestershire Constabulary* that punitive damages should be available in cases where the defendant's conduct 'was an outrageous disregard of the plaintiff's rights'.<sup>7</sup>

A common feature of these tests is that they focus on the nature of the defendant's conduct and can capture instances of punishment-worthy wrongdoing which the present restrictive approach in English law cannot. For example, a malicious wrongdoer who is not motivated by a desire to make a profit could be liable for a punitive award under each of the above tests. Adopting one of these formulations would lead to a more coherent approach which would bring the law closer to the stated goals of punitive damages.

Another possibility would be for the courts to adopt as a general test governing the availability of punitive damages the rule laid down in section 34 of the Crime and Courts Act 2013. The relevant provisions (which regulate punitive damages awards only against certain media defendants) dictate that the remedy can be awarded when 'the defendant's conduct has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights, the conduct is such that the court should punish the defendant

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<sup>5</sup> *Dunlea v A-G* [2000] 3 NZLR 136 (NZCA) [34] (Keith J). The conduct in question must also involve intentional or reckless wrongdoing, see *Couch v A-G* [2010] NZSC 27, [2010] NZLR 149 [246].

<sup>6</sup> *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20, [2017] 1 SLR 918 [176] (Phang Boon Leong JA).

<sup>7</sup> [2001] UKHL 29, [2002] 2 AC 122 [68].

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for it, and other remedies would not be adequate to punish that conduct'.<sup>8</sup> Again, this formulation focuses on the quality of the defendant's conduct and is thus consistent with the rationales for awarding punitive damages.<sup>9</sup> An additional advantage of this test is that it has been approved by the Parliament (albeit in a much more limited context).

A potential criticism of these tests is that concepts such as 'outrageous' and 'contumelious' conduct are ambiguous and thus inherently uncertain. However, a degree of uncertainty is inevitable whenever the law adopts an open-textured standard to adjudicate behaviour. Although imprecision is more objectionable where the court is punishing as opposed to awarding compensation, the trend in courts across the common law world has not been to set more precise boundaries to delineate the jurisdiction to award punitive damages. Rather, it has been to adopt open-textured standards such as 'outrageous'. Furthermore, there is no evidence to suggest that the vagueness of these concepts has caused problems in those countries which have taken a more liberal stance towards the availability of punitive damages. In fact, it has been observed that courts in those jurisdictions exercise restraint and moderation in awarding punitive damages.<sup>10</sup> In

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<sup>8</sup> This is a variation of the test proposed by the Law Commission in *Aggravated, Exemplary and Restitutionary Damages* (n 1) 184–185: The Law Commission recommended that punitive damages should be available as a last resort remedy for any tort or equitable wrong where 'the defendant deliberately and outrageously disregarded the plaintiff's rights'.

<sup>9</sup> A potential drawback is that the requirement of 'deliberate or reckless conduct' entails a residual risk of under-inclusiveness in cases such as *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449, where the defendant's conduct is neither deliberate nor reckless, and yet it departs from ordinary standards of decency to such an extent that there is still a need for deterrence. By contrast, Lord Nicholls's approach in *Kuddus* is sufficiently flexible to capture a broad range of instances of punishment-worthy wrongdoing (including a situation such as that which arose in *Bottrill*). See, also, the discussion in chapter 9.5.3.

<sup>10</sup> Eg, Bill Atkin, 'Remedies' in Stephen Todd (ed), *The Law of Torts in New Zealand* (7th edn, Thomson Reuters 2016) 1342 (New Zealand): '[J]udges generally observe the ... exhortation to exercise the exemplary jurisdiction with restraint and restrict awards to moderate levels'; Lewis Klar and Cameron Jefferies, *Tort Law* (6th edn, Thomson Reuters 2017) 143–144 (footnotes omitted) (Canada): 'The principal use of punitive damages ... has been to punish defendants for outrageous, antisocial, or illegal behaviour ... Awards of punitive damages, even for the most

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any event, the empirical evidence shows that English courts have also shown restraint in awarding punitive damages. There is no reason to think that this will change if a more flexible test is followed in the future.

The criterion that should ultimately determine if the defendant's conduct can be fairly characterised as 'outrageous' is whether there has been a sufficiently large departure from community norms.<sup>11</sup> The greater the departure from community norms the greater the possibility of awarding punitive damages against the defendant. Assessment of this criterion involves consideration of whether the wrongful acts reach such a level of relative badness that, when they are placed on a spectrum of wrongful acts, they sit in a zone that community consensus would characterise as 'outrageous' conduct.<sup>12</sup> Further, English courts are already familiar with the concept of 'outrageous' wrongdoing, which is often used to determine the quality of conduct that will give rise to a punitive award within the sphere of the *Rookes v Barnard* categories.<sup>13</sup> It should also be recalled that, for over two centuries prior to the decision in *Rookes v Barnard*, English courts employed a similar test in deciding whether or not to award punitive damages.<sup>14</sup>

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outrageous behaviour, have been very moderate in Canadian cases'; Felicity Maher, 'An Empirical Study of Exemplary Damages in Australia' (2019) 43 MULR 694, 725–726 (Australia): '[S]een in the context of the number of claims for damages generally, the number of claims for exemplary damages is likely to be small ... [E]xemplary damages awards in Australia are (generally) not excessive'.

<sup>11</sup> Dorsey Ellis, 'Punitive Damages in Iowa Law: A Critical Assessment' (1981) 66 Iowa LR 1005, 1023.

<sup>12</sup> *ibid.*

<sup>13</sup> *Eg, Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453, (2010) 107(19) LSG 24 [84] (Thomas LJ) punitive damages awarded under the first *Rookes* category where the defendant's conduct could 'readily be characterised as outrageous'; *Axa Insurance UK plc v FCS* [2018] EWCA Civ 1330, [2019] RTR 1 [25] (Flaux LJ): 'If th[e second *Rookes* category] is satisfied, exemplary damages may be awarded to deter and punish ... cynical and outrageous conduct'.

<sup>14</sup> During the pre-*Rookes* era, punitive damages were awarded 'where the conduct of the defendant merit[ed] punishment, which [wa]s only considered to be so where his conduct ... disclose[d]

## CONCLUSION

Whichever approach is adopted it is essential that punitive damages continue to be treated as a last resort remedy.<sup>15</sup> Because punishment involves the intentional infliction of pain upon the wrongdoer it should not be imposed lightly. Punitive damages must be reserved for very exceptional instances of serious wrongdoing where existing mechanisms (ie, other remedies or sanctions) are insufficient adequately to punish. To withhold punitive damages in those rare cases of serious wrongdoing where existing mechanisms do not provide an adequate response would allow instances of such wrongdoing to go unpunished and create a gap in the law.

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fraud, malice, violence, cruelty, insolence or the like, or ... where he act[ed] in contumelious disregard of the plaintiff's rights': Harvey McGregor, *Mayne and McGregor on Damages* (12th edn, Sweet & Maxwell 1961) para 207.

<sup>15</sup> *Rookes v Barnard* [1964] AC 1129 (HL) 1228.

## APPENDIX I – FIRST INSTANCE SAMPLE

A catalogue of the 478 claims that the first instance study examined is set below.

### 1964 – 1970

(1) *Davies Sons & Co Ltd v Dark* (CA, 28 March 1966); (2) *Manson v Associated Newspapers Ltd* [1965] 1 WLR 1038 (QBD); (3) *Wood v Wall* (CA, 1 December 1966); (4) *Wood v Wall* (CA, 1 December 1966); (5) *Harvey v Enfield Borough Council* [1967] EGD 172 (QBD); (6) *London Artists v Littler* [1969] 2 QB 375 (CA); (7) *London Artists v Littler* [1969] 2 QB 375 (CA); (8) *London Artists v Littler* [1969] 2 QB 375 (CA); (9) *London Artists v Littler* [1969] 2 QB 375 (CA); (10) *Moore v Lambeth County Court Registrar* [1970] 1 QB 560 (CA); (11) *Mafo v Adams* [1970] 1 QB 548 (CA); (12) *Broome v Cassell & Co Ltd* [1972] 2 AC 1027 (HL); (13) *Broome v Cassell & Co Ltd* [1972] 2 AC 1027 (HL); (14) *Stovin-Bradford v Volpoint Properties Ltd* [1971] EGD 23 (Ch).

### 1971 – 1980

(15) *Becker v Home Office* [1972] 2 QB 407 (CA); (16) *Jennison v Baker* [1972] 2 QB 52 (CA); (17) *Kelly v Faulkner* [1973] NI 31 (QBD); (18) *Bennett v Colerose Suedewear Ltd* (CA, 30 June 1975); (19) *McCall v Abelesz* [1976] QB 585 (CA); (20) *Winawer v The Post Office* (CA, 30 January 1976); (21) *Tejendrasingh v Pilmer* (CA, 4 May 1976); (22) *Metcalfe v Collett-Ward* (CA, 1 December 1976); (23) *Henderson v Merseyside Police* (CA, 15 February 1977); (24) *Devonshire v Jenkins* (CA, 28 April 1978); (25) *Devonshire v Jenkins* (CA, 28 April 1978); (26) *Drane v Evangelou* [1978] 1 WLR 455 (CA); (27) *O'Connor v Hewitson* [1979] Crim LR 46 (CA); (28) *Taylor v Rees* [1979] CLY 2733 (Plymouth County Court); (29) *Holmes v Ashley* (CA, 25 January 1980); (30) *Hayles v Henry* (CA, 1 January 1981); (31) *Hume v Pratt* [1980] CLY 1647 (Lambeth County Court); (32) *Allen v CPM* (QBD, 24 March 1980); (33) *Morton Norwich Products Inc v Intercen Ltd (No 2)* [1981] FSR 337 (Ch).

### 1981 – 1990

(34) *Reynolds v CPM* (CA, 18 May 1982); (35) *Taibi v Foster* [1981] CLY 1596 (Sheffield County Court); (36) *Unik Time Co Ltd v Unik Time Ltd* [1983] FSR 121(Ch); (37) *Foxell v Mendis* (CA, 19 May 1982); (38) *Cleal v Thomas* (CA, 11 July 1983); (39) *Cleal v Thomas* (CA, 11 July 1983); (40) *White v CPM* (QBD, 23 April 1982); (41) *White v CPM* (QBD, 23 April 1982); (42) *Derbyshire v Lancashire CC* (1983) 133 NLJ 65 (QBD); (43) *Smith v CPM* [1982] CLY 899 (Bow County Court); (44) *Guppys (Bridport) Ltd v Brookling* (1984) 14 HLR 1 (CA); (45) *Guppys (Bridport) Ltd v Brookling* (1984) 14 HLR 1 (CA); (46) *Warner v Clark* (1983) 134 NLJ 763 (CA); (47) *Catnic Components Ltd v Hill & Smith Ltd* [1983] FSR 512 (Ch); (48) *Lavery v Ministry of Defence* [1984] NI 99 (QBD); (49) *Wise v Swami* (QBD, 21 March 1983); (50) *Wise v Swami* (QBD, 21 March 1983); (51) *Millington v The Commissioner of Police* (1983) 133 NLJ 806 (QBD); (52) *McMillan v Singh* (1985) 17 HLR 120 (CA); (53) *Swinglehurst v Holbert* (QBD, 29 June 1983); (54) *Archer v Brown* [1985] QB 401 (QBD); (55) *Ballard v CPM* (Westminster County Court, 10 November 1983); (56) *Ballard v CPM* (Westminster County Court, 10 November 1983); (57) *Ballard v CPM* (Westminster County Court, 10 November 1983); (58) *Asghar v Ahmed* (1985) 17 HLR 255 (CA); (59) *Middleweek v CC Merseyside* [1992] 1 AC 179 (CA); (60) *Ewing v Vasquez* (CA, 7 May 1985); (61) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (62) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (63) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (64) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (65) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (66) *Riches v News Group Newspapers Ltd* [1986]

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QB 256 (CA); (67) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (68) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (69) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (70) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (71) *Barbara v Home Office* (1984) 134 NLJ 888 (NIHC); (72) *George v CPM* (QBD, 30 March 1984); (73) *Lawrence v Chester Chronicle* (CA, 5 February 1986); (74) *Connor v CC Cambridgeshire* (QBD, 9 April 1984); (75) *Amrani v Oniah* [1984] CLY 1974 (Edmonton County Court); (76) *Van Hout v CC Royal Ulster Constabulary* (QBD, 28 June 1984); (77) *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397 (QBD); (78) *Hodgson v Jacobs* [1984] CLY 1002 (Edmonton County Court); (79) *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd* (CA, 19 March 1987); (80) *Holden v CC Lancashire* [1987] QB 380 (CA); (81) *Walsh v Ministry of Defence* [1985] NI 62 (QBD); (82) *League Against Cruel Sports Ltd v Scott* [1986] QB 240 (QBD); (83) *Muljee v Haque* (CA, 25 October 1985); (84) *Sporikou v Rynsard* (CA, 14 April 1986); (85) *Leon v CPM* [1986] CLY 2538 (Clerkenwell County Court); (86) *Reid v Andreou* [1987] CLY 2250 (Edmonton County Court); (87) *Reid v Andreou* [1987] CLY 2250 (Edmonton County Court); (88) *R v Abdullah* (CA, 31 January 1990); (89) *Williams v Bowsher* (CA, 11 February 1987); (90) *Williams v Bowsher* (CA, 11 February 1987); (91) *Uzun v Ramadan* [1986] 2 EGLR (QBD); (92) *Mundy v Calpe Motors (Waltham Abbey) Ltd* (CA, 10 June 1987); (93) *Davey v CC Royal Ulster Constabulary* (QBD, 26 September 1986); (94) *Maxwell v Pressdram Ltd (No 2)* (QBD, 21 November 1986); (95) *Breeze v Elder & Hyde* [1987] CLY 2120 (Norwich County Court); (96) *Hamilton v CC Royal Ulster Constabulary* (QBD, 4 December 1986); (97) *Anderson v Blakey* (CA, 29 June 1987); (98) *Carlisle v CC Royal Ulster Constabulary* [1988] NI 307 (CA); (99) *Collier v Burke* [1987] CLY 1143 (Wandsworth County Court); (100) *Williams v RJ Carter (Cheltenham) Ltd* (CA, 13 October 1987); (101) *Williams v RJ Carter (Cheltenham) Ltd* (CA, 13 October 1987); (102) *Amusan v Tausig* [1987] CLY 2251 (Westminster County Court); (103) *Tonner v Stanbury* (CA, 23 November 1988); (104) *Fox v CC Royal Ulster Constabulary* (QBD, 5 October 1987); (105) *Quinn v Secretary of State for Northern Ireland* (QBD, 30 October 1987); (106) *Oldham v Staffordshire Building Society* [1988] 27 EG 71 (CA); (107) *Oldham v Staffordshire Building Society* [1988] 27 EG 71 (CA); (108) *Toner v CC Royal Ulster Constabulary* (QBD, 30 January 1989); (109) *Toner v CC Royal Ulster Constabulary* (QBD, 30 January 1989); (110) *Toner v CC Royal Ulster Constabulary* (QBD, 30 January 1989); (111) *McVeigh v CC Royal Ulster Constabulary* (QBD, 26 February 1988); (112) *McKay v CC Royal Ulster Constabulary* (QBD, 15 April 1988); (113) *R v CPM (ex p Warren)* (QBD, 10 May 1988); (114) *Scullion v CC Royal Ulster Constabulary* (QBD, 10 June 1988); (115) *Gibbs v Bartlett* (CA, 7 April 1989); (116) *Gibbs v Bartlett* (CA, 7 April 1989); (117) *Helm v James* (CA, 21 April 1989); (118) *Helm v James* (CA, 21 April 1989); (119) *Pettigrew v Northern Ireland Office* [1990] NI 179 (QBD); (120) *Rathod v Vijeyakumar* [1989] CLY 1176 (Willesden County Court); (121) *Courtney v Fox* [1989] CLY 2207 (Exeter County Court); (122) *O'Callaghan v CPM* (QBD, 15 April 1989); (123) *Brenyah v CPM* (QBD, 15 June 1989); (124) *Brenyah v CPM* (QBD, 15 June 1989); (125) *Makanjuola v CPM* (QBD, 31 July 1989); (126) *Hassan v Khamo* (CA, 7 February 1992); (127) *Hassan v Khamo* (CA, 7 February 1992); (128) *Tagro v Cafane* [1991] 1 WLR 378 (CA); (129) *Taylor v CPM* (QBD, 5 December 1989); (130) *McCormack v Namjou* (Bloomsbury and Marylebone County Court, 21 December 1989); (131) *Abouri v Ierodianconou* [1990] CLY 1529 (Edmonton County Court); (132) *Abouri v Ierodianconou* [1990] CLY 1529 (Edmonton County Court); (133) *Lawrence v Commissioner of Police* (CA, 15 February 1991); (134) *Taylor v Clayton* [1990] CLY 1530 (Worthing County Court); (135) *Datasolve Ltd v Butterworth (Eurolex) Ltd* (QBD, 19 March 1990); (136) *Jones v Miah* (CA, 29 January 1991); (137) *Jones v Miah* (CA, 29 January 1991); (138) *Armstrong-Jones v News (UK) Ltd* [1990] CLY 3564 (QBD); (139) *Thorpe v CC Greater Manchester Police* (QBD, 23 September 1990); (140) *Branchett v Beaney* (1992) 24 HLR 348 (CA); (141) *Branchett v Beaney* (1992) 24 HLR 348 (CA); (142) *Rowland-Jones v City & Westminster Financial plc* (QBD, 25 October 1990).

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(143) *Sinn Fein v CC Royal Ulster Constabulary* (NIQB, 11 April 1991); (144) *Toye v CC Royal Ulster Constabulary* (NIHC, 20 May 1991); (145) *Gilsenan v CPM* [1994] PIQR P65 (CA); (146) *Gilsenan v CPM* [1994] PIQR P65 (CA); (147) *Godwin v Uzoigwe* (CA, 16 June 1992); (148) *Gorman v Mudd* (CA, 15 October 1992); (149) *Oscar v CC Royal Ulster Constabulary* [1992] NI 290 (CA); (150) *R v Reading Justices (ex p South West Meat Ltd (No 2))* [1992] Crim LR 672 (QBD); (151) *Ramdath v Daley* (1993) 25 HLR 273 (CA); (152) *Ramdath v Daley* (1993) 25 HLR 273 (CA); (153) *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257 (Ch); (154) *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257 (Ch); (155) *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257 (Ch); (156) *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257 (Ch); (157) *Sadik v Swaby* (CA, 25 February 1983); (158) *National Provident Institution v Avon County Council* (High Court Chancery Division, 14 April 1992); (159) *Barnes v CPM* [1992] CLY 1782 (Croydon County Court); (160) *Barnes v CPM* [1992] CLY 1782 (Croydon County Court); (161) *Laurence v Singh* [1997] 1 Costs LR 58 (CA); (162) *Patel v Southwark LBC* [1993] CLY 1400 (Lambeth County Court); (163) *Nwokorie v Mason* (1994) 26 HLR 60 (CA); (164) *Dowkes v Athelston* [1993] CLY 1606 (Cardiff County Court); (165) *Cumber v CC Hampshire* (CA, 23 January 1995); (166) *Morris v Synard* [1993] CLY 1399 (Cheltenham County Court); (167) *Baldwin v Waugh* [1993] CLY 1608 (Weymouth County Court); (168) *John v MGN Ltd* [1997] QB 586 (CA); (169) *Sampson v Wilson* (1994) 26 HLR 486 (Ch); (170) *Sampson v Wilson* (1994) 26 HLR 486 (Ch); (171) *Bain v Stimpson* [1994] CLY 1451 (QBD); (172) *The Upjohn Co v Oswald* (QBD, 27 May 1994); (173) *Farthing v Colisanti* [1994] CLY 1769 (Southampton County Court); (174) *Farthing v Colisanti* [1994] CLY 1769 (Southampton County Court); (175) *Holmes v Department of Transport* (CA, 15 March 1995); (176) *Murphy v Al-Doori* [1994] CLY 1767 (Newport County Court); (177) *Murphy v Al-Doori* [1994] CLY 1767 (Newport County Court); (178) *Treadaway v CC West Midlands* (QBD, 28 July 1994); (179) *Norton v Sidebottom* (CA, 15 March 1995); (180) *Burke v Berioit* [1995] CLY 1572 (Central London County Court); (181) *Rowland-Jones v City & Westminster Financial plc* (CA, 4 April 1995); (182) *Sharma v Kirwan* [1995] CLY 1850 (Central London County Court); (183) *Sharma v Kirwan* [1995] CLY 1850 (Central London County Court); (184) *Benjamin v CPM* [1995] CLY 1597 (Central London County Court); (185) *Thomas v CPM* [1997] QB 813 (CA); (186) *Curtis v Gault & Co* [1995] CLY 1847 (Exeter County Court); (187) *Curtis v Gault & Co* [1995] CLY 1847 (Exeter County Court); (188) *Regalgrand Ltd v Dickerson* (1997) 29 HLR 620 (CA); (189) *Regalgrand Ltd v Dickerson* (1997) 29 HLR 620 (CA); (190) *Brown v CPM* (CA, 3 April 1996); (191) *Brown v CPM* (CA, 3 April 1996); (192) *Thompson v CPM* [1998] QB 498 (CA); (193) *Clarke v Seaman* [1995] CLY 1581 (Central London County Court); (194) *Palomares v CC Thames Valley Police* (CA, 11 October 1996); (195) *Jones v May (Damages)* [1995] CLY 1844 (Pontypool County Court); (196) *Gotts v CPM* (CA, 25 January 1996); (197) *Francis v Brown* (1998) 30 HLR 143 (CA); (198) *Francis v Brown* (1998) 30 HLR 143 (CA); (199) *Bhatnagar v Whitehall Investments* [1996] CLY 3790 (Central London County Court); (200) *Bhatnagar v Whitehall Investments* [1996] CLY 3790 (Central London County Court); (201) *Thompson v CPM* [1998] QB 498 (CA); (202) *Fisher v CC Cumbria* (CA, 29 July 1997); (203) *Fisher v CC Cumbria* (CA, 29 July 1997); (204) *Goswell v CPM* (CA, 7 April 1998); (205) *O'Driscoll v Hadjimina* (CA, 8 October 1996); (206) *Chipperfield v Streatfield* (CA, 29 July 1997); (207) *Gerald v CPM* (CA, 10 June 1998); (208) *Burke v Home Office* (Clerkenwell County Court, 24 July 1996); (209) *Brown v Mansouri* [1997] CLY 3287 (Uxbridge County Court); (210) *Turkington v Times Newspapers Ltd* [1998] NI 358 (CA); (211) *Smith v CPM* (Central London County Court, 13 November 1996); (212) *Sanders v Melle* (CA, 6 March 1997); (213) *Tinker v Potts* (CA, 25 March 1997); (214) *Osei-Bonsu v Wandsworth LBC* [1999] 1 WLR 1011 (CA); (215) *Morris v Kwik Save Stores Ltd* (CA, 26 June 1998); (216) *Hutson Poole Williamson v Crosthwaite* (CA, 2 July 1997); (217) *Dodds v CC Royal Ulster Constabulary* [1998] NI 393 (CA);

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(218) *Richardson v Holowkiewicz* [1997] CLY 3288 (York County Court); (219) *Knight v Gormley* (NIHC, 21 March 1997); (220) *Intercapital Debt Trading Ltd v Fitzgerald* (QBD, 16 May 1997); (221) *Daniells v Mendonca* (1999) 78 P & CR 401 (CA); (222) *Harrison v Dace* (CA, 13 October 1998); (223) *R v Secretary of State for Transport (ex p Factortame Ltd (No 5))* [1998] 1 CMLR 1353 (QBD); (224) *Sutton v CPM* (CA, 29 July 1998); (225) *Sutton v CPM* (CA, 29 July 1998); (226) *Sutton v CPM* (CA, 29 July 1998); (227) *Hill v CPM* (CA, 4 November 1998); (228) *Roberts v CC Cheshire Constabulary* [1999] 1 WLR 662 (CA); (229) *Rust v King* (CA, 11 June 1998); (230) *Morris v Kwik Save Stores Ltd* (CA, 26 June 1998); (231) *Adams v CC Royal Ulster Constabulary* (QBD, 18 February 1998); (232) *Clark v CC Cleveland Police* [2000] CP Rep 22 (CA); (233) *Laine v CC Cambridgeshire* (CA, 14 October 1999); (234) *Scutt v Lomax* (2000) 79 P&CR D31 (CA); (235) *Sallows v Griffiths* [2001] FSR 15 (CA); (236) *Smith v CC Sussex* [1999] CLY 4852 (Brighton County Court); (237) *Mehta v RBS plc* (2000) 32 HLR 45 (QBD); (238) *Mehta v RBS plc* (2000) 32 HLR 45 (QBD); (239) *Porter v CC Royal Ulster Constabulary* (QBD, 24 February 1999); (240) *R v A-G for Northern Ireland (ex p Burns)* [1999] IRLR 315 (QBD); (241) *Acton v CC Wiltshire Constabulary* (CA, 15 July 1999); (242) *Smith v Beaver Housing Association Ltd* (CA, 15 July 1999); (243) *Copeland v Ministry of Defence* (QBD, 19 May 1999); (244) *Grobbelaar v News Group Newspapers Ltd* [2001] EWCA Civ 33, [2001] 2 All ER 437; (245) *Thakrar v CC Thames Valley Police* (CA, 10 March 2000); (246) *Ghafar v CC West Midlands Police* [2000] Po LR 165 (CA); (247) *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* (2000) 67 Con LR 1 (QBD); (248) *Pickin v CPM* (CA, 20 July 2000); (249) *Asda Stores Ltd v Croke* [2000] CLY 1493 (Brighton County Court); (250) *Welsh v CC Merseyside Police* (CA, 28 July 2000); (251) *Kiam v MGN Ltd* [2002] EWCA Civ 43, [2003] QB 281; (252) *Nagpal v Rossage* (CA, 5 October 2000); (253) *Perry v Scherchen* (QBD, 26 May 2000); (254) *Hichens v General Guarantee Corporation Ltd* (QBD, 18 August 2000); (255) *Isaac v CC West Midlands Police* [2001] EWCA Civ 1405, [2001] Po LR 280; (256) *Kelly v CC South Yorkshire (No 1)* [2001] EWCA Civ 1632, [2001] Po LR 399; (257) *Watson v CC Cleveland* [2001] EWCA Civ 1547, [2001] Po LR 359.

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(258) *Russell v Home Office* [2001] Prison LR 96 (QBD); (259) *Russell v Home Office* [2001] Prison LR 96 (QBD); (260) *Verrechia v CPM* (QBD, 15 March 2001); (261) *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] QB 1334; (262) *Wainwright v Home Office* [2001] EWCA Civ 2081, [2002] QB 1334; (263) *Hepburn v CC Thames Valley Police* [2002] EWCA Civ 1841, [2002] Po LR 388; (264) *Spencer v West Midlands Police* [2002] EWCA Civ 649; (265) *Baygreen Properties Ltd v Gil* [2002] EWCA Civ 1340, [2003] HLR 12; (266) *Baygreen Properties Ltd v Gil* [2002] EWCA Civ 1340, [2003] HLR 12; (267) *Hutt v CPM* [2003] EWCA Civ 1911, [2004] Po LR 13; (268) *Raw v Croydon LBC* [2002] CLY 941 (Bodmin County Court); (269) *Galun v Wright-Bevans* [2002] EWHC 1099 (Ch); (270) *Banks v Cox* [2002] EWHC 2166 (Ch); (271) *Banks v Cox* [2002] EWHC 2166 (Ch); (272) *Farquharson v CPM* (Central London County Court, 31 January 2003); (273) *R (B) v Mental Health Review Tribunal (Damages)* [2003] EWHC 193 (Admin), [2004] QB 936; (274) *Vukelic v Hammersmith and Fulham LBC* [2003] EWHC 188 (TCC); (275) *British Midland Tool Ltd v Midland International Tooling Ltd* [2003] EWHC 466 (Ch), [2003] 2 BCLC 523; (276) *Fleming v CC Sussex Police Force* [2004] EWCA Civ 643, [2004] Po LR 251; (277) *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996; (278) *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996; (279) *Douglas v Hello! Ltd (No 6)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996; (280) *English Churches Housing Group v Shine* [2004] EWCA Civ 434, [2004] HLR 42; (281) *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324 (Ch), [2005] 1 WLR 1; (282) *Pelling v Johnson* 2004 EWHC 492 (QB); (283) *Re Organ Retention Group Litigation* [2004] EWHC 644 (QB), [2005] QB 506; (284) *Uzor v Chinye* [2004] EWHC 827 (Ch); (285) *Uzor v Chinye* [2004] EWHC 827 (Ch); (286) *Uzor v Chinye* [2004] EWHC 827 (Ch); (287) *Roche v CC Greater*

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*Manchester Police* [2005] EWCA Civ 1454, [2005] Po LR 243; (288) *Luppa v CC Thames Valley Police* [2004] EWCA Civ 1402; (289) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (290) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (291) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (292) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (293) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (294) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (295) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (296) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (297) *Ijaola v Home Office* [2005] EWCA Civ 335; (298) *Avis v Eweje* [2006] EWCA Civ 1313; (299) *London Borough of Lambeth v Cumberbatch* [2005] EWCA Civ 262; (300) *Abdullah v Yusuf* [2005] EWHC 737 (QB); (301) *Abdullah v Yusuf* [2005] EWHC 737 (QB); (302) *Abdullah v Yusuf* [2005] EWHC 737 (QB); (303) *Abdullah v Yusuf* [2005] EWHC 737 (QB); (304) *Abdullah v Yusuf* [2005] EWHC 737 (QB); (305) *Manley v CPM* [2006] EWCA Civ 879, [2006] Po LR 117; (306) *Daley v Mahmood* [2006] 1 P&CR DG10 (Central London County Court); (307) *Daley v Mahmood* [2006] 1 P&CR DG10 (Central London County Court); (308) *Daley v Mahmood* [2006] 1 P&CR DG10 (Central London County Court); (309) *Daley v Mahmood* [2006] 1 P&CR DG10 (Central London County Court); (310) *KD v CC Hampshire* [2005] EWHC 2550 (QB), [2005] Po LR 253; (311) *Paul v CC Humberside Police* [2006] EWCA Civ 1433; (312) *Rowlands v CC Merseyside Police* [2006] EWCA Civ 1773, [2007] 1 WLR 1065; (313) *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213; (314) *Forsyth-Grant v Allen* [2008] EWCA Civ 505, [2008] 27 EG 118; (315) *Devenish Nutrition Limited v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637; (316) *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637; (317) *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637; (318) *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637; (319) *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 WLR 637; (320) *Stankovic v CC Ministry of Defence Police* [2007] EWHC 2608 (QB); (321) *Axa Insurance UK plc v Thwaites* (Norwich County Court, 8 February 2008); (322) *Ryder-Large v King* [2007] EWHC 3404 (QB); (323) *Berry v Hayden* [2008] NIQB 134; (324) *Al-Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB), [2009] 1 All ER 346; (325) *Al-Rawas v Pegasus Energy Ltd* [2008] EWHC 617 (QB), [2009] 1 All ER 346; (326) *Alderson v Slater* [2008] EWCA Civ 1137; (327) *Alderson v Slater* [2008] EWCA Civ 1137; (328) *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20; (329) *Field Common Ltd v Elmbridge Borough Council* [2008] EWHC 2079 (Ch), [2009] 1 P & CR 1; (330) *Magical Marking Ltd v Holly* [2008] EWHC 2428 (Ch), [2009] ECC 10; (331) *AXA Insurance UK plc v Jensen* (Birmingham County Court, 10 November 2008); (332) *R (B) v Secretary of State for the Home Department* [2008] EWHC 3189 (Admin); (333) *Austin v Mayor and Burgesses of the London Borough of Hammersmith and Fulham* [2009] EWCA Civ 614; (334) *AT v Dulghieru* [2009] EWHC 225 (QB); (335) *AT v Dulghieru* [2009] EWHC 225 (QB); (336) *AT v Dulghieru* [2009] EWHC 225 (QB); (337) *AT v Dulghieru* [2009] EWHC 225 (QB); (338) *Ahmed v Shafique* [2009] EWHC 618 (QB); (339) *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm), [2009] 2 All ER (Comm) 589; (340) *Breslin v McKevitt* [2011] NICA 33; (341) *Muuse v Secretary of State for the Home Department* [2009] EWHC 1886 (QB); (342) *R (MH) v Secretary of State for the Home Department* [2009] EWHC 2506 (Admin), [2010] ACD 2; (343) *Marriott v CC North Yorkshire Police & British Transport Police* [2010] EWCA Civ 1351; (344) *Marriott v CC North Yorkshire Police & British Transport Police* [2010] EWCA Civ 1351; (345) *R (Maddix) v Parole Board for England and Wales* [2009] EWHC 2822 (Admin); (346) *Islam v Yap* [2009] EWHC 3606 (QB); (347) *R (Abdullah) v Secretary of State for the Home Department* [2010] EWHC 259 (Admin); (348) *AXA Insurance UK plc v Shaikh* (Birmingham County Court, 9 February 2010); (349) *Liverpool Victoria v Ghadhda & Iqbal* (Central London County Court, 29 June 2010); (350) *Liverpool Victoria v Ghadhda & Iqbal* (Central London County Court, 29 June 2010); (351) *Lee v Lasrado* [2013] EWHC 2616 (QB); (352) *Ramzan*

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*v Brookwide Ltd* [2010] EWHC 2453 (Ch); (353) *Shayegh v South Eastern Health and Social Services Trust* [2010] NIQB 112; (354) *R (Guntrip) v Secretary of State for Justice* [2010] EWHC 3188 (Admin); (355) *R (Guntrip) v Secretary of State for Justice* [2010] EWHC 3188 (Admin).

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(356) *Alanov v CC Sussex Police* [2012] EWCA Civ 234; (357) *Mogaji v Bilkhu* [2012] EWCA Civ 469; (358) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB), [2012] Lloyd's Rep 53; (359) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB), [2012] Lloyd's Rep 53; (360) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB), [2012] Lloyd's Rep 53; (361) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB), [2012] Lloyd's Rep 53; (362) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB), [2012] Lloyd's Rep 53; (363) *Lawrence v Fen Tigers Ltd* [2011] EWHC 360 (QB), [2012] Lloyd's Rep 53; (364) *Clifford v CC Hertfordshire Constabulary* [2011] EWHC 815 (QB); (365) *Sharma v Noon Products Ltd* (QBD, 7 April 2011); (366) *R (NAB) v Secretary of State for the Home Department* [2011] EWHC 1191 (Admin); (367) *Enfield LBC v Outdoor Plus Ltd* [2012] EWCA Civ 608, [2012] 29 EG 86; (368) *Mason v Harrison Enterprises Ltd* [2012] EWCA Civ 1673; (369) *Mason v Harrison Enterprises Ltd* [2012] EWCA Civ 1673; (370) *McKeever v Ministry of Defence* [2011] NIQB 87; (371) *R (J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin); (372) *Minio-Paluello v CPM* [2011] EWHC 3411 (QB); (373) *Valmoria v Hynes* [2012] EWHC 193 (QB); (374) *Valmoria v Hynes* [2012] EWHC 193 (QB); (375) *AM v Secretary of State for the Home Department* (Central London County Court, 13 March 2012); (376) *ZH v CPM* [2012] EWHC 604 (QB), (2012) 15 CCL Rep 392; (377) *Choudhury v Garcia* [2013] EWHC 3283 (QB); (378) *Alleyne v CPM* [2012] EWHC 3955 (QB); (379) *R (Bent) v Secretary of State for the Home Department* [2012] EWHC 4036 (Admin); (380) *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2012] EWHC 3354 (Ch), [2012] 49 EG 66 (CS); (381) *R (Shaw) v Secretary of State for the Home Department* [2013] EWHC 42 (Admin); (382) *R (Shaw) v Secretary of State for the Home Department* [2013] EWHC 42 (Admin); (383) *R (FH) (Iran) v Secretary of State for the Home Department* [2013] EWHC 1092 (Admin); (384) *Copeland v CPM* (QBD, 2 May 2013); (385) *Dutta v Hayes* (High Court Chancery Division, 16 September 2013); (386) *Dutta v Hayes* (High Court Chancery Division, 16 September 2013); (387) *Thakrar v Secretary of State for Justice* (Milton Keynes County Court, 27 September 2013); (388) *Tasneem v Morley* (Central London County Court, 30 September 2013); (389) *Tasneem v Morley* (Central London County Court, 30 September 2013); (390) *Tasneem v Morley* (Central London County Court, 30 September 2013); (391) *Tasneem v Morley* (Central London County Court, 30 September 2013); (392) *Tasneem v Morley* (Central London County Court, 30 September 2013); (393) *Tasneem v Morley* (Central London County Court, 30 September 2013); (394) *Tasneem v Morley* (Central London County Court, 30 September 2013); (395) *Tasneem v Morley* (Central London County Court, 30 September 2013); (396) *Tasneem v Morley* (Central London County Court, 30 September 2013); (397) *Tasneem v Morley* (Central London County Court, 30 September 2013); (398) *Tasneem v Morley* (Central London County Court, 30 September 2013); (399) *Tasneem v Morley* (Central London County Court, 30 September 2013); (400) *Tasneem v Morley* (Central London County Court, 30 September 2013); (401) *Tasneem v Morley* (Central London County Court, 30 September 2013); (402) *Tasneem v Morley* (Central London County Court, 30 September 2013); (403) *R (Lamari) v Secretary of State for the Home Department* [2013] EWHC 3130 (QB); (404) *East England Schools CIC v Palmer* [2013] EWHC 4138 (QB), [2014] IRLR 191; (405) *Axa Insurance plc v Goodwin* (Bolton County Court, 24 January 2014); (406) *Saxton v Bayliss* (Central London County Court, 31 January 2014); (407) *Crossey v CC PSNI* [2014] NIQB 54; (408) *D v CPM* [2014] EWHC 2493 (QB), [2015] 1 WLR 1833; (409) *D v CPM* [2014] EWHC 2493 (QB), [2015] 1 WLR 1833; (410) *Patel v Secretary of State for the Home Department* [2014] EWHC 501 (Admin); (411) *Stratton v Patel* [2014] EWHC 2677 (TCC); (412) *Stratton v Patel*

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[2014] EWHC 2677 (TCC); (413) *Durrant v CC Avon and Somerset Constabulary* [2014] EWHC 2922 (QB); (414) *Browne v CPM* [2014] EWHC 3999 (QB); (415) *Dawoodi v Zafrani* [2015] EWHC 3168 (TCC); (416) *Hassan v Cooper* [2015] EWHC 540 (QB), [2015] RTR 26; (417) *Hassan v Cooper* [2015] EWHC 540 (QB), [2015] RTR 26; (418) *Crook v CC Essex Police* [2015] EWHC 988 (QB); (419) *OMV Petrom SA v Glencore International AG* [2015] EWHC 666 (Comm); (420) *Akhtar v Ball* (Walsall County Court, 10 July 2015); (421) *Churchill Insurance Co v Shajahan* (Birmingham County Court, 11 September 2015); (422) *Mohidin v CPM* [2015] EWHC 2740 (QB); (423) *Mohidin v CPM* [2015] EWHC 2740 (QB); (424) *Vasile v Pop Loan* (Willesden County Court, 17 November 2015); (425) *Smith v Khan* [2018] EWCA Civ 1137; (426) *Thakrar v Secretary of State for Justice* (Milton Keynes County Court, 31 December 2015); (427) *Flynn v CC Northern Ireland* [2016] NIQB 24; (428) *R (Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin), [2016] CMLR 10; (429) *R (Santos) v Secretary of State for the Home Department* [2016] EWHC 609 (Admin), [2016] CMLR 10; (430) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (431) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (432) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (433) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (434) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (435) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (436) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (437) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (438) *Direct Line Group plc v Akramzadeh* (QBD, 15 June 2016); (439) *AXD v Home Office* [2016] EWHC 1617 (QB); (440) *Coker v Secretary of State for the Home Department* (QBD, 29 July 2016); (441) *Brown v CPM* [2018] EWHC 2471 (QB); (442) *Joynson v Joynson* (Chester County Court, 2 November 2016); (443) *Joynson v Joynson* (Chester County Court, 2 November 2016); (444) *Joynson v Joynson* (Chester County Court, 2 November 2016); (445) *Joynson v Joynson* (Chester County Court, 2 November 2016); (446) *Joynson v Joynson* (Chester County Court, 2 November 2016); (447) *Wrobel v Georgeravzan* (Central London County Court, 18 November 2016); (448) *Wrobel v Georgeravzan* (Central London County Court, 18 November 2016); (449) *Wrobel v Georgeravzan* (Central London County Court, 18 November 2016); (450) *Axa Insurance UK plc v FCS Ltd* [2017] EWHC 3803 (QB); (451) *Axa Insurance UK plc v FCS Ltd* [2017] EWHC 3803 (QB); (452) *Axa Insurance UK plc v FCS Ltd* [2017] EWHC 3803 (QB); (453) *Stewart v CPM* [2017] EWHC 921 (QB); (454) *Stewart v CPM* [2017] EWHC 921 (QB); (455) *Khosa v Secretary of State for Justice* [2017] EWHC 1355 (Admin); (456) *Wamala v Tascor Services Ltd* [2017] EWHC 1461 (QB); (457) *R (Ilori) v Secretary of State for the Home Department* [2017] EWHC 3355 (Admin); (458) *Arkinson v CC Police Service of Northern Ireland* [2018] NICTy 4; (459) *Arkinson v CC Police Service of Northern Ireland* [2018] NICTy 4; (460) *Barker v Winter* [2018] EWHC 1785 (QB); (461) *Quinn v Ministry of Defence* [2018] NIQB 82; (462) *R (Deptka) v Secretary of State for the Home Department* [2019] EWHC 503 (Admin); (463) *R (Deptka) v Secretary of State for the Home Department* [2019] EWHC 503 (Admin); (464) *Regency (UK) Ltd v Albu-Swalin* [2019] EWHC 3713 (QB); (465) *Majewski v Secretary of State for the Home Department* [2019] EWHC 473 (Admin); (466) *Holownia v Secretary of State for the Home Department* [2019] EWHC 794 (Admin), [2019] ACD 59; (467) *Inglis v Ministry of Defence* [2019] EWHC 1153 (QB), [2020] PIQR P2; (468) *Rees v CPM* [2019] EWHC 2339 (QB); (469) *Rees v CPM* [2019] EWHC 2339 (QB); (470) *Rees v CPM* [2019] EWHC 2339 (QB); (471) *Pepe's Piri Ltd v Junaid* [2019] EWHC 2769 (QB); (472) *Alesco Risk Management Services Ltd v Bishopsgate Insurance Brokers Ltd* [2019] EWHC 2839 (QB); (473) *Alesco Risk Management Services Ltd v Bishopsgate Insurance Brokers Ltd* [2019] EWHC 2839 (QB); (474) *ST v L Primary School* [2020] EWHC 1046 (QB); (475) *Ruby Triangle Properties Ltd v Jesus Sanctuary Ministries Ltd* [2020] EWHC 2247 (Ch); (476) *Tuke v Hood* [2020] EWHC 2843 (Comm); (477) *R (Linse) v CC North Wales* [2020] EWHC 3403 (Admin); (478) *Young v Downey* [2020] EWHC 3457 (QB).

## APPENDIX II – APPELLATE SAMPLE

A catalogue of the 115 claims that the appellate study examined is set below.

### 1964 – 1970

(1) *Davies Sons & Co Ltd v Dark* (CA, 28 March 1966); (2) *Wood v Wall* (CA, 1 December 1966); (3) *Wood v Wall* (CA, 1 December 1966); (4) *Mafo v Adams* [1970] 1 QB 548 (CA); (5) *Moore v Lambeth County Court Registrar* [1970] 1 QB 560 (CA); (6) *Broome v Cassell & Co Ltd* [1972] 2 AC 1027 (HL); (7) *Broome v Cassell & Co Ltd* [1972] 2 AC 1027 (HL).

### 1971 – 1980

(8) *Bennett v Colerose Suedewear Ltd* (CA, 30 June 1975); (9) *Winawer v The Post Office* (CA, 30 January 1976); (10) *Tejendrasingh v Pilmer* (CA, 4 May 1976); (11) *Metcalfe v Collett-Ward* (CA, 1 December 1976); (12) *Drane v Evangelou* [1978] 1 WLR 455 (CA); (13) *Devonshire v Jenkins* (CA, 28 April 1978); (14) *Devonshire v Jenkins* (CA, 28 April 1978); (15) *O'Connor v Hewitson* [1979] Crim LR 46 (CA); (16) *Holmes v Ashley* (CA, 25 January 1980); (17) *Hayles v Henry* (CA, 1 January 1981).

### 1981 – 1990

(18) *Warner v Clark* (1983) 134 NLJ 763 (CA); (19) *McKee v CC Northern Ireland* [1984] NI 169 (CA); (20) *Cleal v Thomas* (CA, 11 July 1983); (21) *Cleal v Thomas* (CA, 11 July 1983); (22) *Guppys (Bridport) Ltd v Brookling* (1984) 14 HLR 1 (CA); (23) *Guppys (Bridport) Ltd v Brookling* (1984) 14 HLR 1 (CA); (24) *McMillan v Singh* (1985) 17 HLR 120 (CA); (25) *Lavery v Ministry of Defence* [1984] NI 99 (QBD); (26) *Asghar v Ahmed* (1985) 17 HLR 255 (CA); (27) *Ewing v Vasquez* (CA, 7 May 1985); (28) *Muljee v Haque* (CA, 25 October 1985); (29) *McKearney v CC Royal Ulster Constabulary* (CA, 1 November 1985); (30) *Lawrence v Chester Chronicle* (CA, 5 February 1986); (31) *Mundy v Calpe Motors Ltd* (CA, 10 June 1987); (32) *Williams v RJ Carter (Cheltenham) Ltd* (CA, 13 October 1987); (33) *Williams v RJ Carter (Cheltenham) Ltd* (CA, 13 October 1987); (34) *Davey v CC Royal Ulster Constabulary* [1988] NI 139 (CA); (35) *Toner v CC Royal Ulster Constabulary* (QBD, 30 January 1989); (36) *Toner v CC Royal Ulster Constabulary* (QBD, 30 January 1989); (37) *Helm v James* (CA, 21 April 1989); (38) *Helm v James* (CA, 21 April 1989); (39) *R v CPM (ex p Warren)* (CA, 23 June 1989).

### 1991 – 2000

(40) *Oscar v CC Royal Ulster Constabulary* [1992] NI 290 (CA); (41) *Rowland-Jones v City & Westminster Financial plc* (CA, 4 April 1995); (42) *Ramdath v Daley* (1993) 25 HLR 273 (CA); (43) *Ramdath v Daley* (1993) 25 HLR 273 (CA); (44) *Sadik v Swaby* (CA, 25 February 1983); (45) *Gilsenan v CPM* [1994] PIQR P65 (CA); (46) *Nwokorie v Mason* (1994) 26 HLR 60 (CA); (47) *Holmes v Department of Transport* (CA, 15 March 1995); (48) *Norton v Sidebottom* (CA, 15 March 1995); (49) *John v MGN Ltd* [1997] QB 586 (CA); (50) *Gotts v CPM* (CA, 25 January 1996); (51) *Ketley v Gooden* (1997) 73 P & CR 305 (CA); (52) *Ketley v Gooden* (1997) 73 P & CR 305 (CA); (53) *Thompson v CPM* [1998] QB 498 (CA); (54) *Thompson v CPM* [1998] QB 498 (CA); (55) *Tinker v Potts* (CA, 25 March 1997); (56) *Francis v Brown* (1998) 30 HLR 143 (CA); (57) *Hutson Poole Williamson v Crosthwaite* (CA, 2 July 1997); (58) *Goswell v CPM* (CA, 7 April 1998); (59) *Gerald v CPM* (CA, 10 June 1998); (60) *Rust v King* (CA, 11 June 1998); (61) *Morris v Kwik Save Stores Ltd* (CA, 26 June 1998); (62) *Sutton v CPM* (CA, 29 July 1998);

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(63) *Sutton v CPM* (CA, 29 July 1998); (64) *Sutton v CPM* (CA, 29 July 1998); (65) *Dodds v CC Royal Ulster Constabulary* [1998] NI 393 (CA); (66) *Hill v CPM* (CA, 4 November 1998); (67) *Samuels v CPM* (CA, 3 March 1999); (68) *Acton v CC Wiltshire Constabulary* (CA, 15 July 1999); (69) *Laine v CC Cambridgeshire* (CA, 14 October 1999); (70) *Sallows v Griffiths* [2001] FSR 15 (CA).

### 2001 – 2010

(71) *Scutt v Lomax* (2000) 79 P&CR D31 (CA); (72) *Vine v Waltham Forest London Borough Council* [2000] 1 WLR 2383 (CA); (73) *Pickin v CPM* (CA, 20 July 2000); (74) *Ward v CC Royal Ulster Constabulary* [2000] NI 543 (QBD); (75) *Nagpal v Rossage* (CA, 5 October 2000); (76) *Costello v CC Derbyshire Constabulary* [2001] EWCA Civ 381, [2001] 1 WLR 1437; (77) *Perry v Scherchen* (CA, 27 June 2001); (78) *Isaac v CC West Midlands Police* [2001] EWCA Civ 1405, [2001] Po LR 280; (79) *Watson v CC Cleveland* [2001] EWCA Civ 1547, [2001] Po LR 359; (80) *Spencer v West Midlands Police* [2002] EWCA Civ 649; (81) *Luppa v CC Thames Valley Police* [2004] EWCA Civ 1402; (82) *Ijaola v Home Office* [2005] EWCA Civ 335; (83) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (84) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (85) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (86) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (87) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (88) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (89) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (90) *Borders (UK) Ltd v CPM* [2005] EWCA Civ 197, [2005] Po LR 1; (91) *Manley v CPM* [2006] EWCA Civ 879, [2006] Po LR 117; (92) *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213; (93) *Rowlands v CC Merseyside Police* [2006] EWCA Civ 1773, [2007] 1 WLR 1065; (94) *Alderson v Slater* [2008] EWCA Civ 1137; (95) *Alderson v Slater* [2008] EWCA Civ 1137; (96) *Austin v Mayor and Burgesses of the London Borough of Hammersmith and Fulham* [2009] EWCA Civ 614; (97) *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453, [2010] 107(19) LSG 24; (98) *Lilley v Driving and Vehicle Licensing Agency (DVLA)* [2010] EWCA Civ 658; (99) *Marriott v CC North Yorkshire Police & British Transport Police* [2010] EWCA Civ 1351; (100) *Marriott v CC North Yorkshire Police & British Transport Police* [2010] EWCA Civ 1351.

### 2011 – 2020

(101) *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245; (102) *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245; (103) *Breslin v McKevitt* [2011] NICA 33; (104) *Ramzan v Brookwide Ltd* [2011] EWCA Civ 985; (105) *Mason v Harrison Enterprises Ltd* [2012] EWCA Civ 1673; (106) *Mason v Harrison Enterprises Ltd* [2012] EWCA Civ 1673; (107) *Choudhury v Garcia* [2013] EWHC 3283 (QB); (108) *Lee v Lasrado* [2013] EWHC 2616 (QB); (109) *McAleer v CC PSNI* [2014] NIQB 53; (110) *Durrant v CC Avon and Somerset Constabulary* [2017] EWCA Civ 1808; (111) *Smith v Khan* [2018] EWCA Civ 1137; (112) *Axa Insurance UK plc v FCS Ltd* [2018] EWCA Civ 1330, [2019] RTR 1; (113) *Axa Insurance UK plc v FCS Ltd* [2018] EWCA Civ 1330, [2019] RTR 1; (114) *Axa Insurance UK plc v FCS Ltd* [2018] EWCA Civ 1330, [2019] RTR 1; (115) *Regency (UK) Ltd v Albu-Swalin* [2019] EWHC 3713 (QB).

A catalogue of the 126 appeals that the appellate study examined is set below.

### 1964 – 1970

(1) *Davies Sons & Co Ltd v Dark* (CA, 28 March 1966); (2) *Wood v Wall* (CA, 1 December 1966); (3) *Wood v Wall* (CA, 1 December 1966); (4) *Mafo v Adams* [1970] 1 QB 548 (CA); (5) *Moore v Lambeth County Court Registrar* [1970] 1 QB 560 (CA); (6) *Broome v Cassell & Co Ltd* [1972] 2 AC 1027 (HL); (7) *Broome v Cassell & Co Ltd* [1972]

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2 AC 1027 (HL); (8) *Broome v Cassell & Co Ltd* [1972] 2 AC 1027 (HL); (9) *Broome v Cassell & Co Ltd* [1972] 2 AC 1027 (HL).

### 1971 – 1980

(10) *Bennett v Colerose Suedewear Ltd* (CA, 30 June 1975); (11) *Winawer v The Post Office* (CA, 30 January 1976); (12) *Tejendrasingh v Pilmer* (CA, 4 May 1976); (13) *Metcalfe v Collett-Ward* (CA, 1 December 1976); (14) *Drane v Evangelou* [1978] 1 WLR 455 (CA); (15) *Drane v Evangelou* [1978] 1 WLR 455 (CA); (16) *Devonshire v Jenkins* (CA, 28 April 1978); (17) *Devonshire v Jenkins* (CA, 28 April 1978); (18) *O'Connor v Hewitson* [1979] Crim LR 46 (CA); (19) *Holmes v Ashley* (CA, 25 January 1980); (20) *Holmes v Ashley* (CA, 25 January 1980); (21) *Hayles v Henry* (CA, 1 January 1981).

### 1981 – 1990

(22) *Warner v Clark* (1983) 134 NLJ 763 (CA); (23) *Warner v Clark* (1983) 134 NLJ 763 (CA); (24) *Cleal v Thomas* (CA, 11 July 1983); (25) *Cleal v Thomas* (CA, 11 July 1983); (26) *Guppys (Bridport) Ltd v Brookling* (1984) 14 HLR 1 (CA); (27) *Guppys (Bridport) Ltd v Brookling* (1984) 14 HLR 1 (CA); (28) *McMillan v Singh* (1985) 17 HLR 120 (CA); (29) *Lavery v Ministry of Defence* [1984] NI 99 (QBD); (30) *Asghar v Ahmed* (1985) 17 HLR 255 (CA); (31) *Asghar v Ahmed* (1985) 17 HLR 255 (CA); (32) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (33) *Riches v News Group Newspapers Ltd* [1986] QB 256 (CA); (34) *Ewing v Vasquez* (CA, 7 May 1985); (35) *Muljee v Haque* (CA, 25 October 1985); (36) *Holden v CC Lancashire* [1987] QB 380 (CA); (37) *Lawrence v Chester Chronicle* (CA, 5 February 1986); (38) *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd* (CA, 19 March 1987); (39) *Mundy v Calpe Motors Ltd* (CA, 10 June 1987); (40) *Williams v RJ Carter (Cheltenham) Ltd* (CA, 13 October 1987); (41) *Williams v RJ Carter (Cheltenham) Ltd* (CA, 13 October 1987); (42) *Davey v CC Royal Ulster Constabulary* [1988] NI 139 (CA); (43) *Toner v CC Royal Ulster Constabulary* (QBD, 30 January 1989); (44) *Toner v CC Royal Ulster Constabulary* (QBD, 30 January 1989); (45) *Helm v James* (CA, 21 April 1989); (46) *Helm v James* (CA, 21 April 1989); (47) *R v CPM (ex p Warren)* (CA, 23 June 1989).

### 1991 – 2000

(48) *Oscar v CC Royal Ulster Constabulary* [1992] NI 290 (CA); (49) *Rowland-Jones v City & Westminster Financial plc* (CA, 4 April 1995); (50) *Rowland-Jones v City & Westminster Financial plc* (CA, 4 April 1995); (51) *Ramdath v Daley* (1993) 25 HLR 273 (CA); (52) *Ramdath v Daley* (1993) 25 HLR 273 (CA); (53) *Ramdath v Daley* (1993) 25 HLR 273 (CA); (54) *Sadik v Swaby* (CA, 25 February 1983); (55) *Gilsenan v CPM* [1994] PIQR P65 (CA); (56) *Nwokorie v Mason* (1994) 26 HLR 60 (CA); (57) *Holmes v Department of Transport* (CA, 15 March 1995); (58) *Norton v Sidebottom* (CA, 15 March 1995); (59) *John v MGN Ltd* [1997] QB 586 (CA); (60) *John v MGN Ltd* [1997] QB 586 (CA); (61) *Gotts v CPM* (CA, 25 January 1996); (62) *Ketley v Gooden* (1997) 73 P & CR 305 (CA); (63) *Ketley v Gooden* (1997) 73 P & CR 305 (CA); (64) *Thompson v CPM* [1998] QB 498 (CA); (65) *Thompson v CPM* [1998] QB 498 (CA); (66) *Tinker v Potts* (CA, 25 March 1997); (67) *Francis v Brown* (1998) 30 HLR 143 (CA); (68) *Hutson Poole Williamson v Crosthwaite* (CA, 2 July 1997); (69) *Goswell v CPM* (CA, 7 April 1998); (70) *Goswell v CPM* (CA, 7 April 1998); (71) *Gerald v CPM* (CA, 10 June 1998); (72) *Rust v King* (CA, 11 June 1998); (73) *Rust v King* (CA, 11 June 1998); (74) *Morris v Kwik Save Stores Ltd* (CA, 26 June 1998); (75) *Sutton v CPM* (CA, 29 July 1998); (76) *Sutton v CPM* (CA, 29 July 1998); (77) *Sutton v CPM* (CA, 29 July 1998); (78) *Dodds v CC Royal Ulster Constabulary* [1998] NI 393 (CA); (79) *Hill v CPM* (CA, 4 November 1998); (80) *Acton v CC*

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*Wiltshire Constabulary* (CA, 15 July 1999); (81) *Laine v CC Cambridgeshire* (CA, 14 October 1999); (82) *Sallows v Griffiths* [2001] FSR 15 (CA).

### 2001 – 2010

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**APPENDIX III – COMPARATIVE TABLE OF RESTRICTIONS ON THE JURISDICTION  
TO AWARD PUNITIVE DAMAGES**

	<b>‘Categories test’</b>	<b>Equitable wrongs</b>	<b>Breach of Contract</b>	<b>Tort of Negligence</b>
<b>England</b>	Accepted <i>Rookes v Barnard</i> [1964] AC 1129 (HL); <i>Broome v Cassell</i> [1972] AC 1027 (HL)	Unavailable <i>Mosley v News Group Newspapers Ltd</i> [2008] EWHC 1777 (QB), [2008] EMLR 20 [197] <sup>1</sup>	Unavailable <i>Perera v Vandiyar</i> [1953] 1 WLR 672 (CA) <sup>2</sup>	Available <i>Kuddus v CC Leicestershire Constabulary</i> [2001] UKHL 29, [2002] 2 AC 122 [60] <sup>3</sup>
<b>Canada</b>	Rejected <i>Vorvis v Insurance Corp of British Columbia</i> [1989] 1 SCR 1085	Available <i>Norberg v Wynrib</i> [1992] 2 SCR 226, 298	Available <i>Whiten v Pilot Insurance Co Ltd</i> 2002 SCC 18, [2002] 1 SCR 595	Available <i>Robitaille v Vancouver Hockey Club</i> (1981) 30 BCLR 286 (BCCA)
<b>Australia</b>	Rejected <i>Uren v John Fairfax &amp; Sons Pty Ltd</i> (1966) 117 CLR 118 (HCA)	Unavailable <i>Harris v Digital Pulse Pty Ltd</i> [2003] NSWCA 10, (2003) NSWLR 298 <sup>4</sup>	Unavailable <i>Butler v Fairclough</i> (1917) 23 CLR 78 (HCA) 89	Available <i>Gray v Motor Accident Commission</i> (1998) 196 CLR 1 (HCA)
<b>New Zealand</b>	Rejected <i>Taylor v Beere</i> [1982] 1 NZLR 81 (NZCA)	Available <i>Aquaculture v New Zealand Green Mussel Co</i> [1990] 3 NZLR 299 (NZCA)	Unavailable <i>Paper Reclaim Ltd v Aotearoa International Ltd</i> [2006] 3 NZLR 188 (NZCA)	Available <i>Couch v A-G (No 2)</i> [2010] NZSC 27, [2010] NZLR 149
<b>Singapore</b>	Rejected <i>ACB v Thomson Medical Pte Ltd</i> [2017] SGCA 20, [2017] 1 SLR 918 [175]	No relevant precedent	‘Hardly ever’ available <i>PH Hydraulics &amp; Engineering Pte Ltd v Airtrust (Hong Kong) Ltd</i> [2017] SGCA, [2017] 2 SLR 129 [136]	Available <i>ACB v Thomson Medical Pte Ltd</i> [2017] SGCA 20, [2017] 1 SLR 918 [206]

<sup>1</sup> Cf Crime and Courts Act 2013, ss 34 and 42(4)(c).

<sup>2</sup> Cf High Speed Rail (London – West Midlands) Act 2017 Act, s 51(10).

<sup>3</sup> Cf statements in the academic literature casting doubt on the availability of the remedy in the tort of negligence, eg, Duncan Fairgrieve and Mads Andenas, ‘Misfeasance in Public Office, Governmental Liability, and European Influences’ (2002) 51 ICLQ 757, 778; James Edelman, *McGregor on Damages* (21st edn, Sweet & Maxwell 2021) para 13.015.

<sup>4</sup> Cf *Doe v Australian Broadcasting Corporation* [2007] VCC 281 [193] (Hampel J considered herself able to award punitive damages for breach of confidence).

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