

Punitive Damages and the Place of Punishment in Private Law

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It has long been orthodoxy that punitive damages, because they are awarded in order to punish, are an anomalous remedy. So entrenched is this understanding that it has never been seriously challenged. However, even apparent truisms about the law should be questioned and, accordingly, this article offers a rival account. It contends that the deeply ingrained view that punitive damages are an aberration is a half-truth because several other remedial rules are also aimed, at least in certain circumstances, at punishment. We concentrate in this regard on the doctrine of remoteness and its attenuation where the defendant has intentionally injured the claimant, aggravated damages, the account of profits remedy and general damages. Overthrowing the orthodox understanding regarding punitive damages has important prescriptive implications. In particular, it follows that the belief that punitive damages are an alien presence in private law supplies no basis for confining the jurisdiction to award them.

Keywords: Tort law, Contract, Restitution

INTRODUCTION

For over half a century, the power to award punitive (or exemplary¹) damages has been severely restricted. The clear policy of the law, as Lord Bingham observed in *Watkins v Secretary of State for the Home Department*, ‘is not in general to encourage’ judges to exercise it.² A plethora of rules confines the jurisdiction, but a key limitation is the categories test, which the House of Lords controversially established in *Rookes v Barnard*³ (*Rookes*). In that case,

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†Fellow, Christ’s College, Cambridge. We delivered presentations based on early versions of this article to Oxford’s Obligations Discussion Group and at the workshop ‘Punishment and Private Law’ that took place at the National University of Singapore. We are grateful to participants in these events for their comments especially Kit Barker, Andrew Burrows, Jordan English, Yannis Goutzamanis, Jason Neyers and Catherine Sharkey. María Guadalupe Martínez Alles, Marco Cappelletti, Václav Janeček, John Murphy and Sandy Steel generously provided us with written remarks on the draft text. We are also indebted to Harold Luntz, Edwin Peel, Chaim Saiman and Robert Stevens for discussing with us the analysis that we advance. Finally, we wish gratefully to acknowledge the considerable assistance derived from the anonymous referees’ remarks.

[Correction added on 26 August 2021, after first online publication: Footnotes 69, 125, and 267 have been updated in this version]

1 ‘[T]he terms are synonymous’: *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122 at [51] *per* Lord Nicholls.

2 [2006] UKHL 17, [2006] 2 AC 395 at [26]. See also Lord Carswell’s remarks at [81] to similar effect.

3 [1964] AC 1129.

Lord Devlin described punitive damages as ‘an anomaly ... [in] the law of England’⁴ on account of their retributive agenda and that characterisation evidently underpinned his decision to develop the test. His aim was to restrict their availability to the minimum that precedent permitted on account of punitive damages being ‘essentially different from ordinary damages’ and because they ‘confuse the civil and criminal functions of the law’.⁵

The characterisation of punitive damages as aberrant on account of their retributive agenda has been endorsed virtually without dissent ever since *Rookes* was decided.⁶ Thus, Allan Beever accurately observed that there is an ‘almost universal sense’ that punitive damages ‘are anomalous’.⁷ Although this mantra regarding punitive damages has elicited the occasional sceptical comment,⁸ little more than an eyebrow has been raised in response to it. Certainly, no sustained assault against the orthodox position has ever been mounted.

The absence of a properly developed rival perspective regarding punitive damages is unhealthy. Accordingly, in this article we contend that the traditional understanding concerning punitive damages obscures an important part of the truth. The position that punitive damages are ‘a monstrous heresy ... deforming the symmetry and body of the law’⁹ is seriously overstated for the simple reason that private law sometimes pursues punitive objectives via other remedies. In other words, contrary to the shibboleth that punitive damages have a ‘unique nature’¹⁰ by virtue of their concern with retribution, we contend that punitive damages do not have a monopoly on punishment in private law.

It would be worth revealing that the orthodox view regarding punitive damages is out of kilter with reality even if doing so did not have any practical consequences. However, our doing so is doubly justified given that the perception that punitive damages are an interloper in private law has powerfully

4 *ibid*, 1221. Lord Devlin also referred to ‘[t]he anomaly inherent in exemplary damages’: *ibid*, 1227.

5 *ibid*, 1221.

6 Indeed, the proposition that punitive damages are anomalous was in vogue well before *Rookes* was decided: see, for example, W.W. Buckland and A.D. McNair, *Roman Law and Common Law* (Cambridge: CUP, 1936) 267.

7 A. Beever, ‘The Structure of Aggravated and Exemplary Damages’ (2003) 23 OJLS 87, 109 n 91. To like effect, see S. Rowan, ‘Reflections on the Introduction of Punitive Damages for Breach of Contract’ (2010) 30 OJLS 495, 507.

8 For example, in *Broome v Cassell & Co Ltd* [1972] AC 1027, 1114 Lord Wilberforce said that ‘[i]t cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation ... or that there is something inappropriate or illogical or anomalous (a question-begging word) in including a punitive element in civil damages’. And in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20, [2019] AC 649 at [25], Lord Reed remarked that ‘[i]n tort ... damages may in some circumstances be awarded for punitive purposes’ (emphasis added). Consider also N.J. McBride, ‘Punitive Damages’ in P. Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford: Clarendon Press, 1996) 194–195 (rejecting the proposition that punitive damages are anomalous on the basis that it is ‘a conclusion masquerading as an argument’); P. Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997) 116–119 (arguing that various other species of damages are also concerned with retribution).

9 *Fay v Parker* 53 NH 342, 382 (1872) *per* Foster J.

10 Beever, n 7 above, 98.

influenced the scope of the jurisdiction to award them.¹¹ As the Law Commission observed, '[t]he modern boundaries of the remedy of exemplary damages [have been] fashioned by the courts on the assumption that they are an "anomalous" civil remedy ...'.¹² Indeed, judges have been so transfixed by the understanding that punitive damages are an outlier in private law that they have taken the highly irregular step of placing the rules regarding them into stasis. Thus, in *Broome v Cassell & Co Ltd (Broome)* Lord Reid contended that because punitive damages are an 'undesirable anomaly' they 'should not be permitted in any class of case [where their award is] not covered by authority'.¹³ In other words, Lord Reid's view was that the circumstances in which punitive damages are available should be ossified. This approach contrasts starkly with the usual judicial methodology, which involves developing the common law incrementally by analogy with established authority.¹⁴ This sclerosis, subject to certain exceptions that are discussed below,¹⁵ continues to the present day. Thus, in the recent decision in *Axa Insurance UK Plc v Financial Claims Solutions Ltd* Flaux LJ remarked that because punitive damages 'are anomalous ... [i]t would ... be inappropriate to extend the circumstances in which they can be awarded ...'.¹⁶

Beyond rejecting the conventional view that punitive damages are anomalous we also argue that judges not infrequently circumvent the restrictions on the jurisdiction to award punitive damages by imposing punishment via other remedies and that this practice can be seriously problematic. For one thing, it can result in covert punishment because judges, when they impose punishment via another remedy, are not always candid about the fact that they are acting punitively. One difficulty with punishment being discreetly imposed behind the screen of another doctrine is that it may be hard or impossible to investigate its appropriateness. Meting out punishment via other remedies can also cause problems where the mechanism alighted upon is a decidedly inferior way of imposing punishment. As we will see, certain of the alternative instruments of punishment that judges use do not calibrate the amount of punishment imposed by reference to the defendant's culpability but according to some other criterion, such as the claimant's loss or the defendant's gain. This gives rise to the spectre of disproportionate punishment.

We begin this article by offering a conspectus of the power to award punitive damages with a focus on the myriad and cumulative limitations to which it is subject. Identifying the fetters on the jurisdiction offers insight regarding the extent to which it is constrained and the magnetic influence of the traditional

11 The orthodox view regarding punitive damages has had other implications. For example, academics in thrall to it have sought to recast punitive damages as another type of award with a view to removing a perceived anomaly from private law: see, for example, E. Weinrib, *The Idea of Private Law* (Oxford: OUP, 2012) 135 n 25 (arguing that punitive damages sometimes masquerade as restitutionary damages) and R. Stevens, *Torts and Rights* (Oxford: OUP, 2007) 87 (seeking to recharacterise punitive damages as 'substitutive damages').

12 Law Commission, *Aggravated, Exemplary and Restitutionary Damages* Law Com No 247 (1997) 1.

13 n 8 above, 1086. Lord Reid also characterised punitive damages as 'highly anomalous': *ibid*.

14 For a recent and emphatic endorsement of the traditional mode of legal reasoning, see *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC, [2018] AC 736 at [21]–[30].

15 See the text to nn 63–64 below.

16 [2018] EWCA Civ 1330, [2019] RTR 1 at [25]. See also *Breslin v McKevitt* [2011] NICA 33 at [139].

view that punitive damages are anomalous. Further, exploring the law governing punitive damages in this way also enables the analysis that follows, which often relies upon specific details in the authorities on punitive damages, to be properly situated.

At the outset, four observations regarding this article's scope are in order. First, it is fundamentally about English law.¹⁷ Although we periodically refer to the jurisprudence in other jurisdictions, we do not endeavour to extend our analysis to the law elsewhere. We have taken this approach in large part because the analysis is predominantly doctrinal in nature, and the relevant English law is, as we show below,¹⁸ in many respects highly distinctive.

Second, this article's main concern is to doubt, by reference to the case law, the claim that punitive damages are anomalous rather than to tackle normative issues in this field. Thus, we say nothing about whether punishment is appropriate in private law. We readily acknowledge the importance of that issue. But it is not the issue that we have chosen to address or one that we need to address given this article's thesis. Further, it is one on which there is already a sprawling literature,¹⁹ whereas, as we have observed,²⁰ the orthodoxy with which this article engages has never previously been called into question in any sustained way.

Third, consistently with the fact that punitive damages are regarded as an anomaly in private law, this article is not limited to any particular part of private law. Accordingly, we help ourselves to evidence in several branches of private law that militates against the orthodox view regarding punitive damages. While references to tort cases are preponderant in this article, that is simply a by-product of the fact that tort happens to be an especially fertile source of rules that are aimed at punishment.

Fourth, we concentrate on remedial principles. Although it is strongly arguable that the decision to impose liability also expresses, at least on occasion, a concern with punishment,²¹ we confine our attention to the law of remedies. We proceed in this way partly because doing so gives us more than enough to address but mainly because the claim with which we engage is whether

17 Scots law does not recognise punitive damages. Thus, in *Black v North British Railway Co* 1908 SC 444, 453 the Lord President said: 'I am bound to say I find no authority for any distinction between damages and "exemplary damages" in the law of Scotland. The very heading under which it is treated in our older books "Reparation" excludes the idea'.

18 See the text to nn 88–110 below.

19 Particularly rewarding contributions to read in this regard include T.B. Colby, 'Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs' (2003) 87 Minn L Rev 583; B.C. Zipursky, 'A Theory of Punitive Damages' (2005) 84 Tex L Rev 105; A. Beever, 'Justice and Punishment in Tort: A Comparative Theoretical Analysis' in C. Rickett (ed), *Justifying Private Law Remedies* (Oxford: Hart Publishing, 2008); and G. Calabresi, 'The Complexity of Torts – The Case of Punitive Damages' in M.S. Madden (ed), *Exploring Tort Law* (Cambridge: CUP, 2012). An overview of the debates in this connection is provided in W. Courtney and J. Goudkamp, 'Punishment and Private Law' in E. Bant *et al* (eds), *Punishment and Private Law* (Oxford: Hart Publishing, 2021).

20 See the text to nn 6–8 above.

21 This theme is cogently explored in P. Cane, 'Retribution, Proportionality, and Moral Luck in Tort Law' in P. Cane and J. Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford: Clarendon Press, 1998).

punitive damages are, as the Law Commission put it, ‘an “anomalous” civil *remedy* ...’.²²

A RESTRICTED JURISDICTION

On any assessment, the jurisdiction to award punitive damages is, and has long been, remarkably restricted. Under the influence of the understanding that punitive damages are an anomalous remedy, the courts have imposed numerous constraints both in relation to whether punitive damages can be awarded and, if they can be, in determining their quantum.

Availability of the jurisdiction

In relation to the availability of punitive damages the most important restriction, or at least the most prominent, is the categories test devised in *Rookes*.²³ That test prevents punitive damages from being awarded unless the claim falls within one (or more) of three categories of case. Those categories comprise situations: (1) involving oppressive, arbitrary or unconstitutional conduct committed by a government servant acting as such; (2) where the defendant calculated that they may be able to profit from their wrongdoing after paying compensation; and (3) in which statute stipulates that punitive damages can be granted.

There are several significant checks on the width of the first category. One limitation is the requirement that the defendant be a repository of public power. Thus, the bare fact that the defendant acted, for example, oppressively, will not bring a case within the first category.²⁴ Another limiting principle is the rule that a case will not fall within the first category simply because the defendant was invested with public power. Before a case will come within the first category, the defendant must have been exercising that public power in committing the wrong in issue. For example, a statutory body that is conducting commercial operations rather than discharging governmental functions cannot incur liability to pay punitive damages under the first category.²⁵ Turning to the second category, it only captures cases involving a ‘cynical calculation of mercenary advantage’²⁶ on the part of the defendant. Thus, it is insufficient that the wrong was merely committed in a business context.²⁷ The third category barely extends the power to award punitive damages at all given that

22 Law Commission, n 12 above, 1 (emphasis added).

23 In *A v Bottrill* [2002] UKPC 44, [2003] 1 AC 449 at [41] Lord Nicholls referred to the English law of punitive damages as ‘toiling in the chains of *Rookes v Barnard* ...’. Similarly, in the Court of Appeal in *Broome* Salmon LJ referred to the categories test as placing the power to award punitive damages into a ‘strait jacket’: *Broome v Cassell & Co Ltd* [1971] 2 QB 354, 387.

24 *Rookes v Barnard* n 3 above, 1226.

25 *AB v South West Water Services Ltd* [1993] QB 507.

26 *John v Mirror Group Newspapers Ltd* [1997] QB 586, 618 per Sir Thomas Bingham MR.

27 ‘[T]he mere fact that a tort ... is committed in the course of a business carried on for profit is not sufficient to bring a case within the second category’: *Broome v Cassell & Co Ltd* n 8 above, 1079 per Lord Hailsham LC.

legislation rarely authorises the courts to award punitive damages. Punitive damages can be granted under statute in only a handful of eclectic circumstances including for breach of certain environmental covenants,²⁸ for the conversion of servicemen's goods²⁹ and for certain wrongs committed by media defendants.³⁰ It does not appear that punitive damages have ever been awarded in reliance on the legislation concerned.³¹

In addition to the categories test, claimants³² need to clear no fewer than six further hurdles before punitive damages can be awarded³³ and even then punitive damages are not available as of right but only as a matter of discretion.³⁴ First, and most obviously, it must be established that the defendant's conduct is sufficiently reprehensible to merit a punitive award.³⁵ The courts have not articulated a precise test that needs to be satisfied in this regard. Instead, the case law is populated by 'a whole gamut of dyslogistic judicial epithets'³⁶ that give a broad indication of the kind of conduct that is sufficiently exceptional to justify a punitive response. These epithets include 'high-handed',³⁷ 'outrageous',³⁸ 'egregious',³⁹ 'exceptional',⁴⁰ 'insulting',⁴¹ 'cynical',⁴² 'flagran[t]',⁴³ 'appalling'⁴⁴ and 'contumelious'.⁴⁵

Second, the claimant must satisfy the 'if but only if' test, which permits punitive damages to be awarded only if the compensatory damages are inadequate sufficiently to punish and deter.⁴⁶ This restriction is reflected in Lord Nicholls's

28 High Speed Rail (London – West Midlands) Act 2017, s 51(10).

29 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s 13(2).

30 Crime and Courts Act 2013, s 34. The award of 'additional damages' for which the Copyright, Designs and Patents Act 1988, s 97(2) provides does not fall within the third category. Those damages are 'sui generis': *Phonographic Performance Ltd v Ellis* [2018] EWCA Civ 2812, [2019] Bus LR 542 at [36]–[37] per Lewison LJ.

31 See J. Goudkamp and E. Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 OJLS 90, 104 n 91.

32 Claimants must be alive. Punitive damages cannot be recovered on behalf of an estate of a deceased person: Law Reform (Miscellaneous Provisions) Act 1934, s 1(2)(a).

33 There are arguably additional obstacles to obtaining an award. For example, there are *obiter dicta* in *Watkins v Secretary of State for the Home Department* n 2 above at [26], [32] that suggest that punitive damages cannot be granted in the absence of compensatory damages. Conversely, there are isolated county court decisions, some predating *Watkins*, in which punitive damages were awarded absent any loss being established: see, for example, *Derbyshire v Lancashire CC* [1983] 133 NLJ 65; *Cumber v Chief Constable of Hampshire* (Portsmouth County Court, 21 May 1993); *Akhtar v Ball* (Walsall County Court, 10 July 2015). The limitation potentially adumbrated in *Watkins* does not exist in Canada: see *Atlantic Lottery Corp Inc v Babstock* 2020 SCC 19 at [130], [163], [169].

34 *Broome v Cassell & Co Ltd* n 8 above, 1060 per Lord Hailsham LC.

35 *R (on the application of J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin) at [49].

36 *Broome v Cassell & Co Ltd* n 8 above, 1129 per Lord Diplock.

37 *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453 at [74] per Thomas LJ.

38 *Kuddus v Chief Constable of Leicestershire Constabulary* n 1 above at [67] per Lord Mackay.

39 *R (on the application of Lamari) v Secretary of State for the Home Department* [2013] EWHC 3130 (QB) at [85] per HHJ Cotter QC.

40 *Kuddus v Chief Constable of Leicestershire Constabulary* n 1 above at [89] per Lord Hutton.

41 *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 517 per Lord Woolf MR.

42 *Axa Insurance UK Plc v Financial Claims Solutions Ltd* n 16 above at [25] per Flaux LJ.

43 *A v Bottrill* n 23 above at [23] per Lord Nicholls.

44 *ibid.*

45 *Kuddus v Chief Constable of Leicestershire Constabulary* n 1 above at [63] per Lord Mackay.

46 *Rookes v Barnard* n 3 above, 1128 per Lord Devlin.

remark in *Kuddus v Chief Constable of Leicestershire Constabulary* (*Kuddus*) that punitive damages are ‘a remedy of last resort’.⁴⁷ It is a meaningful limitation on the power to award punitive damages that has often been emphasised and not infrequently relied upon. A recent illustration is *Mohidin v Commissioner of Police of the Metropolis*.⁴⁸ In that case, Gilbert J refused to award punitive damages for assault and false imprisonment because, even though there was evidence of oppressive behaviour, the award of compensatory damages was ‘not an inadequate punishment for the Defendant’.⁴⁹

Third, there are restrictions that apply where there are multiple victims. Thus, a claimant, despite having a cause of action against the defendant, will not be entitled to punitive damages where someone other than the claimant was the victim of the defendant’s punishment-worthy behaviour.⁵⁰ Furthermore, even where the claimant is the victim of the defendant’s behaviour that made it punishment-worthy, unless all of the victims are before the court punitive damages will not generally be awarded because it may not be possible in such circumstances to determine the ‘overall punishment’ that is warranted.⁵¹

Fourth, there are also limitations that operate where there are multiple defendants. Thus, if the claimant sues several defendants who are jointly liable in respect of the same wrong, punitive damages cannot be awarded unless there is a need for punishment in relation to all of the defendants and that need would be left unsatisfied by the award of compensatory damages. As Lord Reid explained in *Broome*, ‘[i]f any one of the defendants does not deserve punishment or if the compensatory damages are in themselves sufficient punishment for any one of the defendants, then they must not make any addition to the compensatory damages’.⁵²

Fifth, the fact that the defendant has already been, or is likely to be, sanctioned on account of their having engaged in the conduct in issue, such as by incurring the costs of an inquiry,⁵³ being subjected to disciplinary proceedings⁵⁴ or being punished by the criminal law,⁵⁵ may result in punitive damages being withheld.⁵⁶ Both the status and scope of this restriction is, however, admittedly

47 n 1 above at [63].

48 [2015] EWHC 2740 (QB).

49 *ibid* at [387]. See also *R (on the application of B) v Secretary of State for the Home Department* [2008] EWHC 3189 (Admin) at [16].

50 ‘[T]he plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour’: *Rookes v Barnard* n 3 above, 1227 *per* Lord Devlin.

51 *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 at [167].

52 *Broome v Cassell & Co Ltd* n 8 above, 1090.

53 *Quinn v Ministry of Defence* [2018] NIQB 82 at [77].

54 *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB), [2005] Po LR 253 at [193].

55 *Archer v Brown* [1985] QB 401, 423 (custodial sentence).

56 *cf* *Ashghar v Ahmed* (Court of Appeal, 24 May 1984); *Messenger Newspapers Group Ltd v National Graphical Association* [1986] IRLR 397 at [79]; *AT v Dulghieniu* [2009] EWHC 225 (QB) at [68]; *Axa Insurance UK Plc v Financial Claims Solutions Ltd* n 16 above at [33]. For valuable discussion of the issue of prior punishment, see McBride, n 8 above, 188–191.

open to some doubt, with the position becoming muddled on account of some recent authorities.⁵⁷

Sixth, the claimant must sue in a cause of action for which punitive damages are available. In order for this limitation to be understood we need to make a short historical detour. In *AB v South West Water Services Ltd*⁵⁸ the Court of Appeal held that punitive damages were available only in respect of causes of action in which they had been awarded prior to 1964, that being the year in which *Rookes* was decided. This much reviled rule, which was known as the ‘pre-1964 test’ or ‘cause of action test’, prevented punitive damages from being awarded in claims in (for example) deceit,⁵⁹ misfeasance in public office,⁶⁰ public nuisance⁶¹ and negligence.⁶² In *Kuddus*⁶³ the House of Lords jettisoned this restriction. Lord Slynn observed that it ‘encourage[d] a tedious trawl through the ancient authority’ in order to determine if punitive damages were available in a given case thus ‘committ[ing] the law to an irrational position in which the result depend[ed] not on principle but upon the accidents of litigation (or even law reporting) before 1964 ...’.⁶⁴ *Kuddus* undoubtedly liberalised the jurisdiction to award punitive damages to a degree contrary to the prevailing trend. However, it is important to recognise that, despite *Kuddus*, the power to award punitive damages remains subject to numerous cause of action restrictions. Thus, punitive damages cannot be awarded for breach of contract,⁶⁵ in respect of equitable wrongs⁶⁶ or under the Human Rights Act 1998⁶⁷ or Consumer Protection Act 1987.⁶⁸ Considerable doubt exists as to whether punitive damages can be awarded for the tort of negligence.⁶⁹ We have been unable to identify any cases in this jurisdiction in which punitive damages have been awarded for that tort.⁷⁰ The reason for this situation is unclear. It may be that

57 See, in particular, *AT v Dulghieru* n 56; *Axa Insurance UK Plc v Financial Claims Solutions Ltd* n 16 above (noted in E. Katsampouka, ‘Exemplary Damages and Insurance Fraud’ (2019) 135 LQR 380).

58 [1993] QB 507.

59 *Broome v Cassell & Co Ltd* n 8 above, 1080.

60 *Thomas v Secretary of State for the Home Office* [2000] Prison LR 188 at [23].

61 *AB v South West Water Services Ltd* n 25 above.

62 *ibid*.

63 *Kuddus v Chief Constable of Leicestershire Constabulary* n 1 above.

64 *ibid* at [22] quoting from W.V.H. Rogers, *Winfield and Jolowicz on Tort* (London: Sweet & Maxwell, 15th ed, 1998) 796.

65 This rule is generally traced to *Addis v Gramophone Co Ltd* [1909] AC 488.

66 ‘[I]n England, received legal opinion has long been that exemplary damages awards for breach of purely equitable obligations are not permitted – and English law therefore precludes them’: J.D. Heydon, M.J. Leeming and P.G. Turner, *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (Sydney: LexisNexis, 5th ed, 2015) para 23.600.

67 *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 at [55].

68 This, at least, is the position adopted in *Clerk & Lindsell on Torts* (London: Sweet & Maxwell, 23rd ed, 2020) para 10.85.

69 We argue elsewhere that no good reason exists to withhold punitive damages in negligence claims: see J. Goudkamp and E. Katsampouka ‘Punitive Damages: Ten Misconceptions’ in E. Bant *et al* (eds), n 19 above, 218–222.

70 However, in *Re Organ Retention Group Litigation* [2004] EWHC 644 (QB), [2005] QB 506 at [262]–[263] and *Sharma v Noon Products* (High Court, 7 April 2011) at [13] it was assumed that punitive damages were available in a claim in negligence.

the dearth of cases is due to an unarticulated bar on their award,⁷¹ or it may be attributable to a perception that merely negligent conduct is insufficiently culpable to merit a punitive response.⁷²

Assessment of punitive damages

The restrictions that we have discussed above relate to the circumstances in which punitive damages can be awarded. However, it is not only the availability of punitive damages that is hedged about with limitations. The restrictive climate also envelops their assessment. Thus, in *Rookes* Lord Devlin urged that punitive damages awards be moderate and threatened to impose an arbitrary limit on grants thereof if the exhortation proved to be insufficient.⁷³ It appears that the courts have vigilantly policed this principle of moderation. According to an empirical analysis of all electronically accessible cases in which punitive damages were claimed that were decided between 2000 and 2015 in all parts of the UK (except for Scotland, which does not recognise the remedy⁷⁴), the average award of punitive damages is £18,181.⁷⁵ That figure is relatively modest when seen alongside various possible comparators including the average annual earnings of employees in England, the sums awarded as compensatory damages in the same cases in which punitive damages were granted and the average awards of punitive damages in other jurisdictions.⁷⁶

*Thompson v Commissioner of Police of the Metropolis*⁷⁷ (*Thompson*) exemplifies the courts' adherence to the principle of moderation.⁷⁸ In one of the claims in that case, the Court of Appeal substituted the jury's award of £200,000⁷⁹ in

71 The existence of such a bar is consistent with Lord Bridge's remark in *Hicks v Chief Constable of South Yorkshire* [1992] 2 All ER 65, 68 that 'damages in a civil action for negligence ... are compensatory, not punitive'.

72 For example, James Edelman claims 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; and it is thought that this would be true even of gross negligence': J. Edelman, *McGregor on Damages* (London: Sweet & Maxwell, 20th ed, 2017) para 13.015. This position is deeply flawed given that, among other reasons, intentional conduct can be the subject of a negligence claim: see J. Goudkamp and D. Nolan, *Winfield & Jolowicz on Tort* (London: Sweet & Maxwell, 20th ed, 2020) para 3.011.

73 n 3 above, 1227–1228.

74 See n 17 above.

75 £18,181 was the average award that each defendant was ordered to pay while £12,625 was the average award that each claimant was entitled to receive: Goudkamp and Katsampouka, n 31 above, 103. The difference between the two figures is due to the rule that where there are multiple claimants who establish a right to punitive damages, a single award must be made which needs to be divided equally between them. Regarding this rule, see *Riches v News Group Newspapers Ltd* [1986] QB 256, 261, 289. Where there is a difference between the two measures, we use the former measure hereinafter.

76 See further Goudkamp and Katsampouka, n 31 above, 114–115; Goudkamp and Katsampouka, n 69 above, 193–198.

77 n 41 above.

78 See also *John v Mirror Group Newspapers Ltd* n 26 above (the Court of Appeal substituted the jury's punitive damages award of £275,000 (£532,161 in today's terms) with a punitive damages award of £50,000 (£96,756 in today's terms). Inflation-adjusted values have been computed via this online calculator: <https://www.officialdata.org/>.

79 £371,903 in today's terms.

punitive damages with an award of just £15,000.⁸⁰ Lord Woolf MR stressed that punitive damages ‘should be no more than is required’ by their purpose of ‘marking ... disapproval’ of the defendant’s conduct.⁸¹ This, incidentally, is a clear echo of the ‘if but only if’ test⁸² that limits the availability of the jurisdiction to award punitive damages. That important check on the power to grant punitive damages is, in effect, applied twice, first in connection with the decision to award punitive damages and again in relation to the assessment thereof.

In addition to the principle of moderation, at least four further rules limit the quantum of punitive damages. First, where the court determines that several defendants are liable to pay punitive damages, the award must reflect the punishment that the least blameworthy defendant deserves, and it is irrelevant that one or more of the other defendants may have acted far more reprehensibly.⁸³ This rule expresses a preference in favour of inadequate punishment over excessive punishment. Second, in cases involving police misconduct, awards are confined to prescribed brackets. In *Thompson* Lord Woolf MR said that ‘[i]n 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’.⁸⁴ Third, in wrongful detention cases the courts award punitive damages ‘on a progressively reducing scale’⁸⁵ to allow for the fact that the claimant is likely to be shocked most upon the initial deprivation of liberty, and to keep the award in ‘proportion’ to those in personal injury claims.⁸⁶ Fourth, in assessing punitive damages the judge may treat provocation by the claimant as a deflationary consideration.⁸⁷

Contrast with other Commonwealth jurisdictions

Although our concern in this article is with English law, the stringency of the limitations that courts in this jurisdiction have placed on the award of punitive damages emerges particularly starkly when regard is had to the corresponding jurisprudence elsewhere in the Commonwealth. Space precludes a detailed comparative survey in this regard⁸⁸ with the result that just three illustrations of ways in which the law in England is far more sparing in the use that it makes of punitive damages than that in other parts of the Commonwealth must suffice.

⁸⁰ £27,893 in today’s terms.

⁸¹ n 41 above, 517.

⁸² See the text to nn 46–49 above.

⁸³ *Broome v Cassell & Co Ltd* n 8 above, 1090 per Lord Reid (observing that the trier of fact ‘must determine which [defendant] deserves the least punishment and only add to the compensatory damages such additional sum as that defendant ought to pay by way of punishment’).

⁸⁴ n 41 above, 517. These figures are £45,801 and £91,602 respectively in today’s terms.

⁸⁵ *ibid.*, 515.

⁸⁶ *ibid.*

⁸⁷ See, for example, *O’Connor v Hewitson* [1979] Crim LR 46; *Holden v Chief Constable of Lancashire* [1987] QB 380, 388; *Bishop v Metropolitan Police Commissioner* [1990] 1 LS Gaz R 30.

⁸⁸ Some of the principal differences are described in J. Goudkamp and E. Katsampouka, ‘Form and Substance in the Law of Punitive Damages’ in A. Robertson and J. Goudkamp (eds), *Form and Substance in the Law of Obligations* (Oxford: Hart, 2019).

First and foremost, the categories test has been repudiated elsewhere in the Commonwealth.⁸⁹ This is highly significant given that this test is the most prominent control device in this jurisdiction on the power to award of punitive damages. Unless a case falls within one of three situations identified by that test, punitive damages cannot be granted and that is so regardless of how reprehensibly the defendant acted. This restriction has very real practical consequences. For example, whereas courts elsewhere in the Commonwealth have awarded punitive damages where the defendant subjected the claimant to the most appalling domestic abuse⁹⁰ and where the defendant doctor exploited his patient's drug addiction by giving her access to opioids in exchange for sex,⁹¹ in neither of these situations could punitive damages be awarded in England on account of the categories test.

Second, English law is unusual in terms of the number of cause-of-action restrictions that it recognises (in particular, and as observed above,⁹² punitive damages cannot be granted in England other than for torts). This is especially so compared with Canada. In that country, punitive damages are available in respect of all equitable wrongs.⁹³ They can also exceptionally be awarded for breaches of contract,⁹⁴ although (oddly) only when the defendant has committed an independently actionable wrong.⁹⁵ A contrast can also be drawn with New Zealand. While punitive damages cannot be awarded in that country for breach of contract,⁹⁶ they are available for equitable wrongs.⁹⁷ England also differs in terms of its treatment of punitive damages in the negligence context. Whereas it is uncertain whether punitive damages are available in respect of that wrong in England,⁹⁸ they can be granted in that cause of action in Australia,⁹⁹ Canada¹⁰⁰ and New Zealand.¹⁰¹

Third, not only is the availability of punitive damages significantly more limited in England compared with the position in other Commonwealth jurisdictions but English courts are far more reserved at least relative to their counterparts in Australia and Canada when it comes to their assessment. As

89 Australia (*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 138 (affirmed in *Australian Consolidated Press Ltd v Uren* [1969] 1 AC 590)); Canada (*Paragon Properties Ltd v Magna Investments Ltd* (1972) 24 DLR (3d) 156, 167 (affirmed in *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085, 1108)); Ireland (*Conway v Irish National Teachers Organisation* [1991] 2 IR 305); New Zealand (*Taylor v Beere* [1982] 1 NZLR 81, 93); Singapore (*ACB v Thomson Medical Pte Ltd* [2017] SGCA 20, [2017] 1 SLR 918 at [174]). cf the position in Hong Kong (*Allan v Ng & Co* [2012] HKCA 119, [2012] 2 HKLRD 160).

90 *G v G* [1997] NZFLR 49.

91 *Norberg v Wynrib* [1992] SCR 226.

92 See the text to nn 65–67 above.

93 See, for example, *Norberg v Wynrib* n 91 above (breach of fiduciary duty).

94 *Whiten v Pilot Insurance Co* 2002 SCC 18, [2002] 1 SCR 595.

95 *Vorvis v Insurance Corp of British Columbia* [1989] 1 SCR 1085.

96 *Paper Reclaim v Aotearoa International Ltd* [2006] NZCA 27, [2006] 3 NZLR 188 at [180].

97 *Aquaculture v New Zealand Green Mussel Co* [1990] 3 NZLR 299.

98 See the text to nn 70–72 above.

99 See, for example, *Gray v Motor Accident Commission* [1998] HCA 70, (1998) 196 CLR 1.

100 See, for example, *Robitaille v Vancouver Hockey Club Ltd* (1979) 124 DLR (3d) 228.

101 In New Zealand, punitive damages can be awarded only in negligence actions in which the defendant intentionally injured the claimant or was reckless with respect to the risk of injury: see *Couch v Attorney General (No 2)* [2010] NZSC 27, [2010] NZLR 149.

we have observed above,¹⁰² according to recent empirical evidence the average award of punitive damages in this jurisdiction is £18,181. The largest award reported by the same study, which was made in *Borders (UK) Ltd v Commissioner of Police of the Metropolis*,¹⁰³ was £100,000.¹⁰⁴ That has since been overtaken by that in *Rees v Commissioner of Police for the Metropolis*¹⁰⁵ (*Rees*) in which punitive damages of £150,000¹⁰⁶ were granted. The position in Australia is radically different. A recent investigation of punitive damages awards in that country reported an average award of A\$105,059,¹⁰⁷ which is roughly three times greater than the mean English award. Further, the largest award recorded by the same study is A\$4,167,202,¹⁰⁸ which is many times greater than the award in *Rees*. As for Canada, while there is no recent empirical evidence,¹⁰⁹ the case law reveals several ‘blockbuster’ awards in that country¹¹⁰ the value of which far exceed the largest English award.

ARE PUNITIVE DAMAGES AN ANOMALOUS REMEDY?

We observed at the beginning of this article that in *Rookes* Lord Devlin considered that punitive damages are anomalous because they are awarded to punish.¹¹¹ It is surprising that this claim has not been treated with a healthy degree of scepticism given that, in the same case, Lord Devlin endorsed the ‘if but only if’ test¹¹² pursuant to which punitive damages can be awarded only if the compensatory damages are inadequate sufficiently to punish and deter the defendant. That test seems to acknowledge that compensatory damages can have a punitive dimension to them¹¹³ (and consistently with this, the courts, as we show below, have explicitly and repeatedly affirmed that certain rules regarding the assessment of compensatory damages, or certain forms of compensatory damages, are aimed at punishment). It hence seriously undermines the

102 See the text to n 75 above.

103 [2005] EWCA Civ 197, [2005] Po LR 1.

104 £151,303 in today's terms.

105 [2019] EWHC 2339 (QB).

106 £152,250 in today's terms.

107 F. Maher, ‘An Empirical Study of Exemplary Damages in Australia’ (2019) 43 MULR 694, 711.

108 *Deckers Outdoor Corporation Inc v Farley (No 5)* [2009] FCA 1298, (2009) 262 ALR 53. The award, however, is an extreme outlier.

109 For a dated study, see N. Vidmar and B. Feldthusen, ‘Exemplary Damages Claims in Ontario: An Empirical Profile’ (1990) 16 Can Bus LJ 262.

110 See, for example, *Whiten v Pilot Insurance Co* n 94 above (C\$1m, ie, C\$1.3m in today's terms); *Airbus Helicopters SAS v Bell Helicopter Textron Canada Ltd* 2019 FCA 29, (2019) 163 CPR (4th) 337 (C\$1m, ie, C\$1.17m in today's terms). cf L. Klar and C. Jefferies, *Tort Law* (Toronto: Thomson Reuters, 6th ed, 2017) 144–145 (asserting that punitive damages even for the most outrageous behaviour have been ‘very moderate’ and most awards are ‘well under C\$100,000 and frequently less than C\$50,000 ...’).

111 See the text to n 5 above.

112 See the text to nn 46–49 above.

113 ‘Even Lord Devlin ... seems to concede the existence of a vestigial punitive element in compensatory damages themselves ...’: M. Tilbury, ‘Aggravated Damages’ (2018) 71 CLP 215, 217. Consider also Lord Reid's remarks in *Broome v Cassell & Co Ltd* n 8 above, 1090 where he explicitly recognised that compensatory damages have a punitive function: see text to n 52 above.

proposition that punitive damages are anomalous because of their concern with punishment. However, no such reaction was forthcoming, and Lord Devlin's claim that punitive damages are anomalous because of their retributive purpose has simply been more or less uncritically accepted. Judges¹¹⁴ and jurists¹¹⁵ cling to it to the present day.

In this section, we argue that the idea that punitive damages are anomalous because they are aimed at punishment is seriously overstated. Cogent evidence against the orthodox view lies in the fact that several other remedial rules are also aimed, at least in certain circumstances, at punishment. Examples of principles that bear out this claim are canvassed below. This selection is not exhaustive and we recognise that there are additional rules that militate (or potentially militate) against the traditional view regarding punitive damages.¹¹⁶ Inevitably, space precludes us from addressing all or even most conceivable illustrations and our focus is, accordingly, on the most telling examples. We reiterate that because our concern is with English law we do not engage with various rules recognised elsewhere but not in England that are, or are at least arguably, supportive of our thesis. Accordingly, and in particular, the analysis that follows does not engage

114 For example, in *Axa Insurance UK Plc v Financial Claims Solutions Ltd* n 16 above at [19] Flaux LJ said that punitive damages were anomalous because they were 'an exception from the normal tortious principle that damages are compensatory not penal'. See also *IBM United Kingdom Holdings Ltd v Dalgleish* [2015] EWHC 389 (Ch), [2015] Pens LR 99 at [176].

115 See, for example, Beever, n 7 above.

116 Relevant rules that we do not discuss include the following:

(1) *Awards of enhanced interest*. It has been persuasively contended that the courts sometimes impose higher rates of interest in order to punish: see, for example, R. Chambers, 'Liability' in P. Birks and A. Pretto-Sakmann (eds), *Breach of Trust* (Oxford: Hart, 2002) 33–37. Consider also the provision for augmented interest awards under CPR Pt 36.17 where a litigant unreasonably refuses an offer of settlement. It has often been suggested that such awards are penal: see, for example, Edelman, n 72 above, para 19.118; cf *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, [2017] 1 WLR 3465 at [38].

(2) *The collateral source rule*. Distinguished scholars have suggested that this rule falls to be explained in terms of retribution: see, for example, G.T. Schwartz, 'The Ethics and the Economics of Tort Liability Insurance' (1990) 75 Cornell L Rev 313, 327 (footnote omitted) (arguing that 'Notions of retribution can easily be found ... in the rhetoric that surrounds that collateral source rule, and perhaps in the rule itself'). See also J.G. Fleming, 'The Collateral Source Rule and Loss Allocation in Tort' (1966) 54 Cal L Rev 1478, 1546–1547.

(3) *Contemptuous damages*. The punitive nature of this award emerges from the fact that its purpose is 'admonition of the claimant': A. Burrows, *Remedies for Torts, Breach of Contract and Equitable Wrongs* (Oxford: OUP, 4th ed, 2019) 504.

(4) *The principles governing the imposition of trusts in respect of bribes and secret commissions received by fiduciaries*. The cases regarding these rules express a concern to stamp out bribery and corruption by sanctioning fiduciaries who accept such payments. Consider *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 at [42].

(5) *The fraudulent claims rule*. The punitive purpose of this rule is underscored by the fact that it permits insurers to avoid fraudulent claims not only to the extent to which they are fraudulently exaggerated but in their entirety. Consider *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2016] UKSC 45, [2017] AC 1 at [36].

(6) *Additional damages awarded under s 97(2) of the Copyright, Designs and Patents Act 1988*. In *Phonographic Performance Ltd v Ellis* n 30 above at [36] Lewison LJ observed that 'damages awarded under [this provision] may include damages designed to punish'.

with vindictory damages,¹¹⁷ which form of damages the Supreme Court has made clear does not exist in English law.¹¹⁸ We also leave to one side rules that provide merely historical support for our thesis.¹¹⁹ Counterarguments to our analysis are considered along the way, although several responses are addressed collectively at the end of this section.

At the outset we freely acknowledge that not all of the principles that we discuss below manifest a concern with punishment in each and every case in which they are in issue. It may be thought that this marks out punitive damages as distinct from the various rules that we address in this section. However, this would be a mistake. For one thing, and as we show below,¹²⁰ punitive damages are not, paradoxically, always awarded to punish. However, even if punitive damages were universally awarded with the aim of punishing the defendant, that would not undermine the analysis that follows. That is because punitive damages are *not* thought to be anomalous because they are always concerned with punishment *but simply* because they are concerned with punishment.¹²¹

Before proceeding there are two final important matters that need to be addressed regarding the concept of punishment. The first concerns the definition of punishment, which is a subject on which there is a voluminous literature.¹²² Most discussions begin (and end) with Hart's famous attempt to articulate a 'central case of "punishment" in terms of five elements', namely: (a) it must involve pain or other consequences normally considered unpleasant; (b) it must be for an offence against legal rules; (c) it must be of an actual or supposed offender for their offence; (d) it must be intentionally administered by persons other than the offender; and (e) it must be imposed and administered by an authority constituted by a legal system against which the offence is committed.¹²³

117 The Privy Council has held in several cases that vindictory damages may be awarded in certain jurisdictions for violations of some constitutional rights: see, for example, *Attorney-General of Trinidad and Tobago v Ramanoop* [2005] UKPC, [2006] 1 AC 328; *Merson v Cartwright* [2005] UKPC 38; *Inniss v Attorney-General for St Christopher and Nevis* [2008] UKPC 42; *Takitoka v Attorney-General* [2009] UKPC 11, (2009) 26 BHRC 578. There is no doubt, as the Privy Council has made clear, that vindictory damages share an affinity with punitive damages: cf *Attorney-General of Trinidad and Tobago v Ramanoop* at [19] where the Board remarked that 'Although ... an award [of vindictory damages], where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award'.

118 *R (Lumba) v Secretary of State for the Home Department* n 51 above.

119 According to Pollock and Maitland, the law of torts, often on account of legislation, historically recognised a range of devices pursuant to which double or treble damages were imposed by way of penalty: F. Pollock and W. Maitland, *History of English Law Before the Time of Edward I*, vol 2 (Cambridge: CUP, 1895) 521. See also J. Taliadoros, 'The Roots of Punitive Damages at Common Law: A Longer History' (2016) 64 Clev St L Rev 251.

120 See text to nn 241–243 below.

121 See the text to n 5 above.

122 See, for example, M. Tunick, *Punishment: Theory and Practice* (Berkeley, CA: University of California Press, 1992); R. A. Duff and D. Garland (eds), *A Reader on Punishment* (Oxford: OUP, 1994).

123 H. L. A. Hart, 'Prolegomenon to the Principles of Punishment' (1959–1960) 60 *Proceedings of the Aristotelian Society* 1, 4. Other prominent attempts at a definition, both of which influenced

This is obviously not the place to seek to refine Hart's classic definition.¹²⁴ It is eminently serviceable for current purposes and we accordingly adopt it.

The other matter relates to the distinction between punishment as an aim of a judicial act and punishment as an effect of a judicial act.¹²⁵ Thus, it is entirely possible for a particular remedy to be awarded for the purpose of punishment but for it to be without punitive effect because, say, the defendant is judgment-proof. Conversely, a given remedy may be avowedly non-punitive in terms of its objectives but nevertheless be, or be regarded as being, penal in terms of its impact. Thus, an award of compensatory damages may be made purely for the purposes of rectifying loss but it may well be understood by the defendant, especially if uninsured, as punitive in effect. The difference between the two senses of the term punishment is often suppressed or mishandled in the case law and literature.¹²⁶ However, it is vital that it be maintained for present purposes. That is because punitive damages are thought to be anomalous because punishment is among their goals and it follows that, in order to bear out our thesis, we need to identify other remedial rules whose purposes include punishment. It is not enough for us merely to point to responses that are, or are regarded as being, punitive in terms of their impact. Accordingly, when we refer to punishment we do so in the 'aims' rather than 'effects' sense of the word unless otherwise indicated.

Remoteness of damage

The doctrine of remoteness may seem to be an unlikely candidate for a rule that is an engine of punishment. Ordinarily, and in brief, it limits the claimant to recovering damages in respect of kinds of loss that were a reasonably foreseeable consequence of the defendant's wrong¹²⁷ and, we are unaware of it ever having been suggested that the rule, when it functions in this familiar way, is pursuing a retributive agenda. However, the doctrine does not operate in a uniform way across all classes of case, and in certain circumstances an attenuated version of it applies. We contend that a punitive impulse animates this diluted test. We rely in this regard on statements repeatedly made at the ultimate appellate level that explicitly identify punishment as the aim of the weakened approach to

Hart's, are A. Flew, 'The Justification of Punishment' (1954) 29 *Philosophy* 291; S. I. Benn, 'An Approach to the Problems of Punishment' (1958) *Philosophy* 33.

124 For a classic critique, see J. Feinberg, 'The Expressive Function of Punishment' (1965) 49 *Monist* 397 (arguing that Hart's definition fails to capture the fact that punishment expresses attitudes of resentment and indignation as well as judgments of disapproval and reprobation).

125 This distinction is illuminatingly treated in K. Barker, 'Punishment in Private Law: No Such Thing (Any More)' in E. Bant *et al* (eds), n 19 above.

126 For example, Peter Birks wrote that 'every award of damages has a penal ... function': P. Birks, *Civil Wrongs: A New World* (London: Butterworths, 1992) 79. The language of 'function' suggests that Birks had in mind the 'aims' sense of the term 'punishment'. Clearly, however, not every award of damages is made with the objective of punishment in mind. It is obvious that, despite the reference to 'function', Birks in fact meant that every award of damages may be punitive in effect.

127 *Hadley v Baxendale* (1854) Exch 341, 354; 156 ER 145, 151; *Hughes v Lord Advocate* [1963] AC 837, 845.

remoteness. However, before turning to the relevant cases, we delineate the parameters of the attenuated rule.

The courts have not precisely defined the circumstances in which the usual remoteness rule is inapplicable. According to one view, the requirement of foreseeability is dispensed with where the defendant intended to injure the claimant. This position is generally traced to *Quinn v Leatham*.¹²⁸ In that case, Lord Lindley trenchantly remarked that '[t]he intention to injure the plaintiff ... disposes of any question of remoteness of damage'.¹²⁹ On other occasions, it has been said that there is no need for the loss to be of a foreseeable kind where the defendant acted dishonestly. Thus, in *Doyle v Olby (Ironmongers) Ltd* Lord Denning MR said that in a claim in deceit '[a]ll ... damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen'.¹³⁰

When does the modified approach to remoteness apply? The courts have held it to be operative in numerous causes of action including deceit,¹³¹ conspiracy,¹³² (dishonest) conversion¹³³ and for the statutory torts of discrimination¹³⁴ and harassment.¹³⁵ However, properly understood, it is neither confined to particular types of claim nor triggered simply because the claimant has sued for a certain wrong. Rather, it applies whenever the defendant intended to injure the claimant or acted dishonestly. Thus, it has been argued, correctly in our view, that it is capable of extending to claims in negligence¹³⁶ and for breach of contract.¹³⁷

It might be thought that the modified principle, when applicable, simply means that the particular loss that the defendant intended to inflict upon the claimant will never be too remote to be compensable. The rule certainly has that effect.¹³⁸ However, when applicable, it has much more wide-ranging consequences. Specifically, the rule renders 'all loss which arises directly and naturally from the wrong', whether or not intended, compensable.¹³⁹ Thus, as Hart and Honoré put it, '[i]t is generally agreed that when a defendant is liable

128 [1901] AC 495.

129 *ibid.*, 537. Similarly, the authors of *Clerk & Lindsell* write, '[n]or, it is suggested, is there any authority to support any restriction of liability to foreseeable kinds of damage ... in any of the intentional torts': *Clerk & Lindsell on Torts* n 68 above, para 2.151.

130 [1969] 2 QB 158, 167.

131 *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm), [2010] 1 WLR 258 at [12].

132 *Quinn v Leatham* [1901] AC 495, 537.

133 *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2002] UKHL 19, [2002] 2 AC 883 at [102]–[104].

134 *Essa v Laing Ltd* [2004] EWCA Civ 2, [2004] ICR 746.

135 *Jones v Ruth* [2011] EWCA Civ 804, [2012] 1 WLR 1495.

136 See, for example, J. Gordley, 'Responsibility in Crime, Tort and Contract for the Unforeseeable Consequences of an Intentional Wrong: A Once and Future Role?' in Cane and Stapleton (eds), n 21 above, 197; N.J. McBride and R. Bagshaw, *Tort Law* (Harlow: Pearson Education, 6th ed, 2018) 322.

137 See, for example, Gordley, *ibid.*, 198–200; M. van Kogelenberg, 'Deliberate Breach of Contract and Consequences for Remedies: Exploration of a Neglected Area of Contract Law' (2014) 21 MJ 141, 158; A. Tettenborn *et al*, *Contractual Duties: Performance, Breach, Termination and Remedies* (London: Sweet & Maxwell, 2nd ed, 2017) para 23.055.

138 '[I]ntended consequences are never too remote': *Shah v Gale* [2005] EWHC 1087 (QB) at [43] *per* Leveson J.

139 *Essa v Laing Ltd* n 134 above at [39] *per* Pill LJ.

because he has intentionally done harm, his liability is not restricted to the harm intended'.¹⁴⁰

Having outlined the diluted remoteness rule, we turn to consider its relevance for present purposes. The essential point is that the courts, as we will see, have consistently made it clear that the purpose of giving the claimant the benefit of the attenuated remoteness rule where the defendant has intentionally injured the claimant or acted dishonestly is to punish the defendant by requiring him to pay enhanced compensatory damages. Ours is not a rouge reading of the authorities concerned. On the contrary, several other writers interpret them in the same way,¹⁴¹ and we are unaware of an alternative interpretation of the cases in issue ever having been offered. It is true that damages awarded pursuant to the diluted remoteness rule are, in terms of their effect, reparative since they are fixed by reference to the claimant's loss.¹⁴² But, and crucially for current purposes, this does nothing to change the fact that, as the courts have repeatedly made clear, the aim of topping up the award to which the claimant is entitled is punishment. Consider the following four decisions of high authority.

In *Kuwait Airways Corp v Iraqi Airways Co (No 6)*¹⁴³ an issue arose as to the proper approach to remoteness in the context of conversion. Lord Nicholls, in a passage that Lord Hoffmann¹⁴⁴ and Lord Hope¹⁴⁵ expressly endorsed,¹⁴⁶ said that the test for remoteness should depend on whether the defendant in converting the claimant's property acted innocently or dishonestly, with the familiar and more demanding test based on foreseeability applying to innocent conversion and the attenuated test operating in the case of dishonest conversion. The logic was that 'the more culpable the defendant the wider the area of loss for which he can fairly be held responsible'.¹⁴⁷ His Lordship added:

Dishonesty is not an essential ingredient of [the tort of conversion]. The defendant may be a thief, or he may have acted wholly innocently. Both are strictly liable. But it seems to me inappropriate they should be treated alike when determining their liability for consequential loss. ...

[F]oreseeability, as the more restrictive test, is appropriate for those who act in good faith. ...

140 H.L.A. Hart and A.M. Honoré, *Causation in the Law* (Oxford: Clarendon Press, 2nd ed, 1985) 259.

141 See, for example, P. MacDonald Eggers, *Deceit: The Lie of the Law* (London: Informa Law, 2009) para 8.11 ('a penal approach'); J. Poole and J. Devenney, 'Reforming Damages for Misrepresentation: The Case for Coherent Aims and Principles' [2007] JBL 269, 273 ('the principle in *Doyle v Olby* [is] employed in order to indirectly secure a punishment for fraud').

142 Thus, Steel J was correct to say in *Uzinterimpex JSC v Standard Bank Plc* [2007] EWHC 1151 (Comm) at [153] that 'damages for deceit are compensatory not punitive'.

143 n 133 above.

144 *ibid* at [125].

145 *ibid* at [169].

146 The other two judges, Lord Steyn and Lord Scott, did not explicitly address the point. Lord Steyn did, however, agree with the speeches of both Lord Nicholls and Lord Hope, while Lord Scott appeared to be hesitant to accept that which Lord Nicholls had said about remoteness: *ibid* at [204].

147 *ibid* at [101].

Persons who knowingly convert another's goods stand differently. Such persons are acting dishonestly. I can see no good reason why the remoteness test of 'directly and naturally' applied in cases of deceit should not apply in cases of conversion where the defendant acted dishonestly.¹⁴⁸

It is axiomatic that the reason that Lord Nicholls considered that dishonest defendants should be subject to more expansive liability was that such defendants deserve to be punished. Lord Nicholls's concern with whether the defendant acted 'culpably' is otherwise inexplicable.

A second House of Lords' decision that confirms that the courts are acting punitively when they apply the diluted remoteness test is *Smith New Court Securities Ltd v Citibank NA*.¹⁴⁹ In this case, Lord Steyn, with whose speech the other Law Lords either wholly or substantially agreed, considered why the courts approach the issue of remoteness differently in claims for deceit from claims for negligence. He observed that the law could have adopted the same test for remoteness in relation to both causes of action. His Lordship acknowledged that '[i]t may be said that logical symmetry and a policy of not *punishing* intentional wrongdoers by civil remedies favour a uniform rule'.¹⁵⁰ However, Lord Steyn then observed that the courts had, by applying the diluted test in cases in which the defendant had intentionally injured the claimant, clearly rejected that suggested policy and opined that they had been correct to do so. Thus, his Lordship said that 'it is a rational and defensible strategy to impose wider liability on an intentional wrongdoer'.¹⁵¹ and he reviewed a series of authorities that demonstrated that English law had embraced that strategy for '100 years at least'.¹⁵²

A third relevant House of Lords' decision is *SAAMCO*.¹⁵³ In that case, Lord Hoffmann observed that the law could dispense with the usual rules regarding remoteness in order to punish defendants. Thus, he remarked that '[t]here is no reason in principle why the law should not *penalise* wrongful conduct by shifting on to the wrongdoer the whole risk of consequences which would not have happened but for the wrongful act'.¹⁵⁴ At one level, these remarks are puzzling in that they seem not to acknowledge that the law does indeed relax the normal remoteness rules where the defendant intentionally or dishonestly injured the claimant. However, this oddity in Lord Hoffmann's reasons is unimportant for present purposes. What matters is that Lord Hoffmann clearly recognised that dilution of the remoteness rules falls to be explained in terms of punishment.

The fourth decision of interest is *Patel v Mirza*.¹⁵⁵ In that case, Lord Sumption said that '[w]ith very limited exceptions, such as certain rules of causation in fraud cases or the rare occasions for awarding punitive damages, ... [the] rationale [of] punishment ... was no part of the rules of civil law ...'.¹⁵⁶

148 *ibid* at [102]–[104].

149 [1997] AC 254.

150 *ibid*, 279 (emphasis added).

151 *ibid*.

152 *ibid*, 280.

153 *South Australia Asset Management Co v York Montague Ltd* [1997] AC 191.

154 *ibid*, 212 (emphasis added).

155 [2016] UKSC 42, [2017] AC 467 at [230].

156 *ibid* at [230].

Although his Lordship confusingly used the language of ‘causation’ rather than ‘remoteness’ it is nevertheless obvious that he was referring to the diluted remoteness test that applies in claims for deceit (and, as we have seen above,¹⁵⁷ in other causes of action too where the preconditions to its application are satisfied). Crucially, Lord Sumption not only expressly identified the purpose of the attenuated test as being punishment but actually saw the diluted test as being allied with the jurisdiction to award punitive damages. Lord Sumption’s observations are thus explicit acknowledgement that the watered-down approach to remoteness serves a retributive agenda equivalent or at least related to that pursued by punitive damages.¹⁵⁸

The diluted remoteness test that is engaged where the defendant intentionally injures the claimant or acts dishonestly compels one to look askance at the claim that punitive damages are anomalous on account of their being awarded to punish. That is because the courts, by relaxing the test for remoteness where the defendant has engaged in punishment-worthy behaviour, are, as they have made plain, acting retributively. Although our position as regards the purpose of the modified remoteness principle is mainstream,¹⁵⁹ we wish to show why several counterarguments to the foregoing analysis are unconvincing.

First, it may be asserted that the attenuated test applies not only where there is punishment-worthy behaviour but also where the defendant does not deserve punishment. This counterargument fails for the simple reason that the diluted test applies only where punishment is merited. The requirement that there be an intention to injure or dishonesty dictates that ‘moral iniquity’¹⁶⁰ or ‘malevolen[ce]’¹⁶¹ is a prerequisite to its application.¹⁶² But even if the attenuated remoteness test did apply in some cases where the defendant was blameless that would not be any answer to our analysis. That is because it would do nothing to alter the fact that the courts, when they apply the test in cases *that do involve* culpable defendants, are acting punitively in relation to *those* defendants.

Second, it may be contended that when the courts apply the diluted remoteness test they are doing so not in order to punish the defendant but are simply allocating how the risk of damage is to be borne as between the parties in view of, for example, their respective moral positions. The idea here, in other words, is that the attenuated remoteness test simply expresses a judgment that, as between an innocent claimant and a culpable defendant, it is proper that the defendant bear the risk of even unforeseeable kinds of loss that the claimant may suffer. It is certainly the case that the remoteness doctrine is often thought

157 See the text to nn 131–137 above.

158 Lord Sumption disagreed with a majority of the Justices in *Patel v Mirza* regarding the proper approach to the doctrine of illegality. However, this disagreement is irrelevant for present purposes, and none of the other Justices cast doubt on Lord Sumption’s remarks in issue.

159 See the sources cited in n 141 above.

160 W. P. Keeton *et al*, *Prosser and Keeton on the Law of Torts* (St Paul, MN: West Group, 5th ed, 1984) 37.

161 McBride and Bagshaw, n 136 above, 322.

162 See also the *Restatement (Third) of the Law of Torts: Liability for Physical and Emotional Harm* at §33(b) which provides: ‘In general, the important factors in determining the scope of liability are the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, the seriousness of harm intended and threatened by those acts, and the degree to which the actor’s conduct deviated from appropriate care’.

to reflect a concern fairly to allocate the risk of damage between the parties (albeit the focus in this regard is typically not on the parties' relative moral positions but on whether there was an opportunity for one party to forewarn the other of unusual risks¹⁶³). This idea may or may not be able to account for the distinction between the familiar reasonable foreseeability and reasonable contemplation tests that normally apply to claims in tort and for breach of contract respectively. However, even if it can, it does not follow that the courts are not acting punitively where they apply the attenuated remoteness test least of all given that the House of Lords and the Supreme Court in the cases discussed above have emphatically declared that punishment is the purpose of that test. The passages concerned cannot possibly be dismissed on the basis that they are merely isolated *dicta*. That is particularly so where, as Lord Steyn observed in *Smith New Court Securities Ltd v Citibank NA*, the relevant line of cases expressing a punitive policy stretches back for well over a century.¹⁶⁴

The third counterargument concerns the fact that the amount of punishment imposed by the diluted remoteness test is not calibrated by reference to the defendant's wrongdoing but is instead determined by the size of the claimant's loss, which will usually be fortuitous. In view of this it may be argued that it is implausible to understand the attenuated remoteness test as being concerned with punishment in circumstances where it is a singularly ill-suited device for imposing punishment. The principal difficulty with this counterargument is that, although it is true that, under the weakened remoteness test, the amount of punishment is determined by reference to the size of the claimant's loss, that does not change the fact that the courts are, when that test applies, still dispensing punishment. It is important not to conflate the issue of whether the courts sometimes depart from the usual approach to remoteness in order to punish defendants (as we claim is the case) with the question of whether it is sound to impose punishment in this way¹⁶⁵ (which is not part of our thesis). We return to this important theme below.¹⁶⁶

Fourth, it may be replied that the diluted test cannot be concerned with punishment given that that test applied across the board prior to the decision in *The Wagon Mound (No 2)*.¹⁶⁷ However, this response causes no difficulty for the analysis above. For one thing, although it is certainly true that the attenuated test, which is generally associated with *Re Polemis*,¹⁶⁸ was employed generally prior to the decision in *The Wagon Mound (No 2)*, it may well be that the test then (as now) was aimed at punishment. That would be entirely unsurprising given that the law of torts in earlier times had a markedly more retributive flavor

163 See, for example, *The Heron II* [1969] 1 AC 350, 385–386.

164 See the text to n 152 above.

165 For doubts as to whether it is sensible to punish a defendant by modifying the approach to remoteness, see J. Devenney, 'Re-Examining Damages for Fraudulent Misrepresentation Towards a More Measured Response to Compensation and Deterrence' in L.A. DiMatteo *et al* (eds), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge: CUP, 2013) 428; Poole and Devenney, n 141 above, 273.

166 See the text to n 271 below.

167 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617.

168 *Polemis and Furness Withy & Co Ltd* [1921] 3 KB 530.

than it does today,¹⁶⁹ liability insurance being ‘a device which was unknown until practically the end of the [nineteenth] century’,¹⁷⁰ and negligence-based liability forming a much less important part of tort law than it does at present.¹⁷¹ However, we do not need to delve into these matters in order to dispose of this fourth counterargument. That is because there is a more straightforward and complete answer to it, which is that whatever were the purposes of the diluted test in the era of *Re Polemis*, its purpose today is laid bare by the modern House of Lords and Supreme Court cases to which we have referred above. Those decisions explicitly link the attenuated test with punishment.

Aggravated damages

Aggravated damages are the second piece of evidence on which we rely. Historically, punitive damages were indistinguishable from aggravated damages.¹⁷² It was not until Lord Devlin held in *Rookes* that aggravated damages are awarded to remedy mental distress suffered by the claimant due to the contumelious way in which the defendant acted that aggravated damages were authoritatively characterised as compensatory¹⁷³ and thus separated conceptually from punitive damages. However, despite aggravated damages formally being classified as compensatory, the simple fact is that the courts sometimes award aggravated damages in order to punish the defendant.¹⁷⁴ The courts have often expressly said as much. For example, in *Thompson v Commissioner of Police for the Metropolis*, which involved claims for assault and false imprisonment Lord Woolf MR said that ‘there can be a penal element in the award of aggravated damages’.¹⁷⁵ Likewise, in *Holley v Smyth*, which concerned a defamation action, Auld LJ said that the defendant’s ‘motive may be punished by an award of aggravated damages’.¹⁷⁶ Additional illustrations are in plentiful supply.¹⁷⁷

169 This is reflected in Windeyer J’s observation that ‘[t]he roots of tort and crime in the law of England are greatly intermingled’: *Uren v John Fairfax & Sons Pty Ltd* (1966) n 89 above, 150. See further D.J. Seipp, ‘The Distinction Between Crime and Tort in the Early Common Law’ (1996) BU L Rev 59.

170 F. James, ‘Accident Liability Reconsidered: The Impact of Liability Insurance’ (1948) 57 Yale LJ 549, 551.

171 The rise of negligence-based liability in the civil law is addressed in T. Weir, ‘The Staggering March of Negligence’ in Cane and Stapleton (eds), n 21 above.

172 For example, the editor of the thirteenth edition of *Salmond on the Law of Torts* wrote that ‘Damages 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’: R.F.V. Heuston, *Salmond on the Law of Torts* (London: Sweet & Maxwell, 13th ed, 1961) 739.

173 n 3 above, 1221.

174 Although see the Crime and Courts Act 2013, s 39(2) which provides that ‘[a]ggravated damages may be awarded against the defendant only to compensate for mental distress and not for purposes of punishment’. This provision applies, of course, not across the board but only to actions to which the statute extends and hence does not preclude the claim that the aims of aggravated damages include punishment.

175 n 41 above, 512.

176 [1998] QB 726, 745–746.

177 See, for example, *KD v Chief Constable of Hampshire* n 54 above at [186]; *Ministry of Defence v Fletcher* [2010] IRLR 25 at [52]; *Malcolm v Ministry of Justice* [2010] EWHC 3389 (QB) at [83]; *Breslin* n 16 above at [146].

Powerfully supporting the understanding that aggravated damages are at least sometimes awarded to punish is the fact that the courts, both in deciding whether to award aggravated damages and in quantifying them, consider broadly the same factors that they bear in mind in connection with punitive damages. As Lord Woolf MR observed in *Thompson*, ‘the very circumstances which will justify an award of aggravated damages are probably the same as those which make it possible to award exemplary damages’.¹⁷⁸ It is true, of course, that the availability of punitive damages is restricted by various rules that do not apply to aggravated damages, such as the categories test. But this is irrelevant for present purposes because it simply means that when punishment is merited the courts cannot always impose it via an award of punitive damages. It does not mean that punishment is not among the purposes of aggravated damages.

The understanding that aggravated damages are at least sometimes awarded to punish is widely accepted. For example, Tony Weir described aggravated damages as being ‘frankly punitive’.¹⁷⁹ Consistently with this position, the Law Commission observed that punitive damages are sought relatively infrequently in defamation actions and suggested that this may be because ‘practitioners may often perceive a punitive element in awards of (supposedly compensatory) “aggravated damages” with the result that ‘they therefore feel that little is to be gained by claiming exemplary damages in addition’.¹⁸⁰

It follows inexorably from the foregoing cases that punishment is among the purposes of awards of aggravated damages. Indeed, despite the position taken in *Rookes* it can be plausibly argued in view of the authorities that have been identified that punishment is the primary purpose of aggravated damages. In these circumstances, the analysis in this section can be kept succinct. By virtue of the courts having expressly stated that punishment is among the objectives of aggravated damages, the power to award aggravated damages seriously undermines the traditional wisdom that punitive damages are anomalous by reason of their being awarded to punish.

Before leaving this topic, it is necessary to address two counterarguments. First, it may be replied that not all of the rules that govern the award of aggravated damages are focused on punishment. We accept that this is the case. Thus, and by way of example, aggravated damages cannot be awarded unless the claimant is conscious of the exceptional nature of the defendant’s conduct.¹⁸¹ This principle is inconsistent with a punitive account of aggravated damages since the issue of whether the claimant is cognisant of the fact that the defendant acted exceptionally has no bearing on the defendant’s desert. However, this is irrelevant given that it does not follow that the courts when they do award aggravated damages are not acting punitively. In any event, this counterargument cannot account for the courts’ explicit statements to the effect that punishment is among the purposes of aggravated damages.¹⁸²

178 n 41 above, 513.

179 T. Weir, *An Introduction to Tort Law* (Oxford: Clarendon Press, 2nd ed, 2006) 219; cf Beever, n 7 above; J. Murphy, ‘The Nature and Domain of Aggravated Damages’ (2010) 69 CLJ 353.

180 Law Commission, n 12 above, 57 (footnote omitted). See also at 11 (acknowledging that it was ‘arguabl[e] that [aggravated damages] retain a quasi-punitive quality’).

181 See, for example, *Alexander v Home Office* [1988] 1 WLR 968, 976.

182 See the text to nn 175–177 above.

The second point concerns the distinctiveness of aggravated damages. Some judges and writers have gone further than simply claiming that aggravated damages and punitive damages share the goal of punishment and assert that aggravated damages and punitive damages are synonymous.¹⁸³ For example, in *Perry v Scherchen* Allott J did not even attempt to maintain a semblance of a distinction and wrote: '[t]he case in exemplary and/or aggravated damages is pleaded ... I have come to the conclusion that the correct figure under this head, to include the exemplary/aggravated element of the award is £5,000'.¹⁸⁴ Similarly, in *Cleal v Thomas* Seys J said: 'I am going to award quite substantial damages for trespass, whether they are referred to as aggravated or exemplary damages doesn't seem greatly to the point'.¹⁸⁵ The substantive equivalence thesis finds support among eminent scholars. For instance, Peter Cane writes that 'aggravated damages are effectively indistinguishable from punitive damages'.¹⁸⁶ If this view is correct and aggravated damages and punitive damages are one and the same thing, aggravated damages would not count against the orthodoxy that punitive damages are anomalous because they would not constitute a freestanding remedy aimed at punishment. What evidence is there in support of the extended claim? One point in its favour is the fact that, aggravated damages, like punitive damages, are unavailable other than in claims for tort¹⁸⁷ (save for claims for the tort of negligence,¹⁸⁸ and we observe that it is doubtful whether punitive damages can be awarded for that wrong¹⁸⁹). Ultimately, however, the extended claim goes too far. Thus, despite the foregoing, there are numerous points of distinction between aggravated damages and punitive damages.¹⁹⁰ For one thing, aggravated damages, because they are not subject to, for example, the categories test, are sometimes available when punitive damages are not. Further, whereas compensation is a goal of aggravated damages,¹⁹¹ punitive damages only compensate incidentally. Specifically, punitive damages have reparative effects only when the claimant's loss, for one reason or another, is not fully repaired by other remedial responses. Above all, no small weight should be placed on the fact that the legislature explicitly discriminates between the two species of award and actually defines aggravated damages to the exclusion of punitive damages.¹⁹²

183 cf John Murphy's claim that 'there is a distinct lack of authority for the view that aggravated and exemplary damages are ultimately the same': Murphy, n 179 above, 354.

184 High Court, 26 May 2000, 26–27. The amount awarded is £8,599 in today's terms.

185 Chester County Court, 17 March 1982, 3 (emphasis added). See also *Taibi v Foster* (Sheffield County Court, 6 February 1981) in which Cotton J awarded the claimant who had been unlawfully evicted £1,000 which could be regarded as 'aggravated or exemplary damages or both'.

186 Cane, n 8 above, 114. See also B. Feldthusen, 'Punitive Damages: Hard Choices and High Stakes' [1998] NZLR 741, 750 (arguing that '[p]ractically, ... it will be difficult to distinguish them clearly').

187 *Kralj v McGrath* [1986] 1 All ER 54 (aggravated damages unavailable in claims for breach of contract).

188 *ibid.*

189 See the text to nn 70–72 above.

190 We touch upon the more general issue of how remedies might be differentiated from each other at the text to nn 250–251 below.

191 See the text to n 173 above.

192 Section 39(3) of the Crime and Courts Act 2013 provides: 'In this section, "aggravated damages" means damages that were commonly called aggravated before the passing of this Act and which

Account of profits

The third source of support for our thesis is the remedy of an account of profits. Lord Burrows defines an account of profits as ‘an equitable remedy by which the defendant is required to draw up an account of, and then to pay the amount of, the net profits it has acquired by particular wrongful conduct. The remedy’s label “account of profits” is therefore shorthand for “account and award of profit”’.¹⁹³ An account of profits is available for equitable wrongs¹⁹⁴ as well as, exceptionally, for breach of contract.¹⁹⁵ An account can also be awarded in tort but ‘only ... if the tort involves the infringement of intellectual property rights’.¹⁹⁶

Although it has sometimes been denied that the account of profits remedy is concerned with punishment,¹⁹⁷ the courts have made it clear that it is so concerned, at least in some situations. An excellent (but certainly not the only) example is *Attorney General v Blake*¹⁹⁸ (*Blake*). In this famous case, the House of Lords awarded an account against the double agent George Blake who, in breach of his contract of employment with MI6, published an autobiography that revealed information about his work. Delivering the principal speech, Lord Nicholls emphasised that the defendant had committed grave criminal offences that ‘caused untold and immeasurable damage to the public interest’¹⁹⁹ and that ‘most of the profits from the book derive indirectly from the extremely serious and damaging breaches’²⁰⁰ of his contractual undertaking. The punitive nature of the remedy in the case emerges even more clearly from the (dissenting) speech of Lord Hobhouse. His Lordship referred expressly to the ‘punitive nature of the claim’.²⁰¹ He also said:

– (a) are awarded against a person in respect of the person’s motive or exceptional conduct, but (b) are not exemplary damages or restitutionary damages’.

193 Burrows, n 116 above, 341.

194 See *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Boardman v Phipps* [1967] 2 AC 46 (breach of fiduciary duty); *Peter Pan Manufacturing Co v Corsets Silhouette Ltd* [1964] 1 WLR 96 (breach of confidence); and *Novoship (UK) Ltd v Mikhaylyuk* [2014] EWCA Civ 908, [2015] QB 499 (dishonest assistance of a breach of trust).

195 *Attorney General v Blake* [2001] 1 AC 268, 285. In *One Step (Support) Ltd v Morris-Garner* n 8 above at [35], [82], [90] the Supreme Court confirmed that an account of profits should be awarded only exceptionally for a breach of contract.

196 Burrows, n 116 above, 341.

197 See, for example, *Hollister Inc v Medik Ostomy Supplies Ltd* [2012] EWCA Civ 1419, [2013] Bus LR 428 at [69] *per* Kitchin LJ (‘[An account of profits] ensures the infringer does not benefit from his wrong, but it contains no element of punishment’); *OOO Abbott v Design & Display Ltd* [2016] EWCA Civ 98, [2016] FSR 27 at [7] *per* Lewison LJ (‘An account of profits is confined to profits actually made, its purpose being not to punish the defendant but to prevent his unjust enrichment’); *Tuke v Hood* [2020] EWHC 2843 (Comm) at [166] *per* Jacobs J (‘the disgorgement compelled by the remedy is not by way of punishment’).

198 n 195 above. See also *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] WTLR 1573, which is discussed at the text to nn 258–263 below, and *Esso Petroleum Co Ltd v Niad Ltd* [2001] EWHC 6 (Ch) at [63].

199 *ibid*, 286.

200 *ibid*, 287.

201 *ibid*, 295.

The 'just response' visualised in the present case is ... that [the defendant] should be punished and deprived of any fruits of conduct connected with his former criminal and reprehensible conduct. ...

The policy which is being enforced is that which requires [the defendant] to be punished by depriving him of any benefit from anything connected with his past deplorable criminal conduct.²⁰²

Consistently with the fact that an account of profits is at least sometimes concerned with punishment, the courts not infrequently consider the defendant's culpability in deciding whether to award an account and in fixing its quantum.²⁰³ For example, the courts are unlikely to give a fiduciary an allowance for time and effort expended in obtaining a profit where they have acted in bad faith.²⁰⁴ Tellingly, and also consistently with the rules that apply to awards of punitive damages,²⁰⁵ cognisance is taken of any other sanctions that have been imposed on the defendant.²⁰⁶

In response to the foregoing it may be said that an account of profits is only exceptionally awarded to punish, and that one of the cases on which reliance is placed (that is, *Blake*) is itself exceptional.²⁰⁷ However, this is no answer to the analysis. Even if an account of profits is only exceptionally awarded with the aim of punishing the defendant that would be immaterial for the purposes of ascertaining whether punitive damages are an anomalous remedy. That is because punitive damages are not said to be anomalous because of the rarity with which they are awarded compared with (for example) compensatory damages but simply because they are awarded to punish.²⁰⁸

It may also be replied that an account of profits cannot constitute punishment because its effect is simply to restore the defendant to the position in which they stood prior to the wrong by removing the profit made. As Gareth Jones contended, 'to be deprived of what you have gained can never be a penal liability'.²⁰⁹ However, this claim is plainly wrong. In the first place, it is nothing

202 *ibid*, 295, 299. It follows that Lord Sumption's suggestion in *One Step (Support) Ltd v Morris-Garner* n 8 above at [111] that the remedy in *Blake* can be explained as being aimed at compensation because the Government's interest in performance extended beyond avoiding pecuniary loss is implausible.

203 Thus, in *Seager v Copydex Ltd (No 2)* [1969] 1 WLR 809 an account of profits was withheld because the defendant had used the confidential information in issue inadvertently. And in *Shaw v Holland* [1900] 2 Ch 305, 310 Webster MR said that '[i]t would ... be unfair' to order an account in circumstances where 'it is not suggested that the directors were guilty of any moral fraud'. See also *AB Corp v CD Co* [2002] 1 Lloyd's Rep 805 at [9] in which an account was not ordered because the defendant had not engaged in 'deliberate and cynical wrongdoing'. cf *Peter Pan Manufacturing* [1964] 1 WLR 96, 106.

204 *Boardman v Phipps* [1965] Ch 992, 1021; *Crown Dilmun v Sutton* [2004] EWHC 52 (Ch), [2004] 1 BCLC 468 at [213].

205 See the text to nn 53–56 above.

206 See, for example, *Devenish Nutrition Ltd v Sanofi Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390 at [102].

207 Although note Lord Burrows's view that it would be a 'mistake' to perceive *Blake* as a 'one-off' decision: Burrows, n 116, 357–358.

208 See the text to n 5 above.

209 G. Jones, 'The Recovery of Benefits Gained from a Breach of Contract' (1983) 99 LQR 443, 456. See also Beever, n 19 above, 296: '[s]tripping profits never punishes'.

more than an assertion, and contrary to it, it is plain that being deprived of a gain is ‘unpleasant’ and hence fully capable of constituting punishment on (at least) Hart’s definition of the concept.²¹⁰ Furthermore, an account will not necessarily restore the defendant to their earlier position. For example, a defendant against whom an account is ordered will be made worse off by that fact if he is denied an allowance for his time and effort.²¹¹ However, and most fundamentally, even when an account does have the effect of restoring the *status quo ante* the conclusion that punishment is not thereby among the remedy’s goals is a *non sequitur*. The fact that a given act may not be punitive in terms of its effects does not mean that the act concerned was not done for the purpose of punishment but, rather, simply that that goal (if pursued) was not realised in the instant case. Because, as we have seen, the courts have made it explicit that an account is sometimes awarded in order to punish, it is irrelevant for present purposes that an account may not, on occasion, be punitive in terms of its outcome.

General damages

General damages (that is, damages that are ‘not susceptible to *measurement* in money’²¹²) comprise our fourth illustration in support of our thesis. Our view is that general damages, while notionally awarded to compensate, are sometimes (we put it no higher than that) granted in order (or partly in order) to punish. Consider the defamation context. In that setting, general damages are awarded simply because the defendant traduced the claimant’s reputation rather than as reparation for loss suffered. This is neatly reflected in Windeyer J’s remark in *Uren v John Fairfax & Sons Pty Ltd*, which Lord Hailsham LC quoted with approval in *Broome*,²¹³ that ‘a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed’.²¹⁴ Because awards of general damages in claims for defamation (as in certain other contexts) are not clearly connected with the claimant’s loss, characterising them as purely compensatory is sometimes awkward and, in some circumstances, they are more readily explained as pursuing punitive ends. As one jurist perceptively puts it, ‘the anger of the claimant [in a defamation action] is placated only when he or she knows that the defendant has been punished for the wrong. In this sense the award of damages is “punitive or vindictive”’.²¹⁵

The case law powerfully supports this position. In the first place, the courts in assessing general damages awarded for defamation directly consider the defendant’s culpability. Thus, it is relevant to enquire whether the defendant knew that the statement concerned was false²¹⁶ and regard should be had to whether

210 See the text to n 123 above.

211 See the text to n 204 above.

212 *Wright v British Railways Board* [1983] 2 AC 773, 777 *per* Lord Diplock (emphasis in original).

213 n 8 above, 1071.

214 n 89 above, 150.

215 Edelman, n 72 above, para 46.035.

216 See R. Parkes *et al* (eds), *Gatley on Libel and Slander* (London: Sweet & Maxwell, 12th ed, 2017) para 9.5 n 78.

‘there has been any kind of high-handed, oppressive, ... or contumelious behaviour by the defendant ...’.²¹⁷ These principles are not easy to reconcile with a loss-based account of general damages whereas they are readily explicable if general damages are aimed at retribution. It is not a coincidence that the epithets ‘high-handed’, ‘oppressive’ and ‘contumelious’ are commonly used to describe the type of conduct that can trigger an award of punitive damages.²¹⁸

It may be replied that a loss-based account can accommodate the relevance of the defendant’s culpability to the assessment of general damages in defamation claims on the basis that the greater the defendant’s culpability the greater the insult done to the claimant. The idea is that the claimant’s damage is heightened by the fact that it was caused deliberately.²¹⁹ However, one formidable difficulty with this response is that it cannot explain why it is not the law that the fact that the defendant was virtuously motivated does not diminish awards of general damages. Nor is there any rule that general damages are to be reduced where the claimant had no inkling that the defendant may have acted culpably. More generally, this loss-based account of the relevance of the defendant’s culpability is jarring. The simple fact is that it is far more plausible to explain the significance of the defendant’s desert by reference to a concern with punishment in circumstances where the defendant’s desert is central to whether punishment is merited and, if so, in what amount.

Consistently with the foregoing, and as has often been pointed out, defamation cases can be found in which the level at which general damages were awarded can only fairly be characterised as punitive.²²⁰ The most notorious is *Aldington v Watts*²²¹ in which a jury awarded the claimant general damages of £1.5m²²² in a claim for defamation in respect of a publication that alleged that he was a war criminal. Although the trial judge directed the jury to ‘leave aside any thought of punishing the defendants’ and added that ‘it is not your duty or your right to punish a defendant’, there can be little doubt that the award was punitive, its being three times higher than any general damages award that had been previously made for defamation.²²³

Defamation may not be the only context in which the courts, in awarding general damages, are acting punitively. Consider the fact that damages for mental distress can be awarded in respect of breaches of contract where: (a) the contract has as an important object the provision of pleasure, relaxation or peace of

217 *McCarey v Associated Newspapers (No 2)* [1965] 2 QB 86, 104 *per* Pearson LJ. See also *Elliot v Flanagan* [2016] NIQB 8 at [28].

218 See the text to nn 37–45 above.

219 Consider the remarks in *Fielding v Variety Inc* [1967] 2 QB 841, 855 (Salmon LJ remarking that the defendant’s blameworthiness could be taken into account not with a view to punishing the defendant but only in so far as the deliberate nature of the defendant’s conduct increased the claimant’s injury).

220 For example, Cane writes that ‘one suspects that there is an element of punishment in many of the larger awards of damages by juries in defamation actions’: Cane, n 21 above, 170.

221 *Aldington v Watts* (High Court, 30 November 1989). The case ultimately went to the European Court of Human Rights, the decision of which is reported as *Miloslavsky v UK* [1996] EMLR 152.

222 £3,756,578 in today’s terms.

223 *Miloslavsky v UK* n 221 above at [12].

mind; or (b) the breach causes physical injury or inconvenience.²²⁴ One learned commentator clearly regards mental distress damages as performing a punitive function. Thus, he claims that when the courts are particularly outraged by the defendant's breach, such damages may be awarded to achieve 'much the same result' as an award of punitive damages.²²⁵ Other writers have made equivalent remarks.²²⁶ Similarly, judges have sometimes perceived awards of mental distress damages as pursuing a punitive function. For example, in *Herbert Clayton & Jack Waller Ltd v Oliver* Lord Buckmaster remarked that '[w]hat are known as ... exemplary damages in tort find no place in contract nor accordingly can injury to the feelings or vanity'.²²⁷ Likewise, in *British Guiana Credit Corp v da Silva*, Lord Donovan said of a claim for notionally compensatory damages for 'humiliation, embarrassment and compensation' alleged to flow from a breach of contract that the claimant 'is not entitled to punitive damages'.²²⁸ These passages clearly regard mental distress damages as being closely aligned with punitive damages. We accept that certain features of the law concerning mental distress damages are awkward to explain in punitive terms. In particular, a punitive account of mental distress damages struggles to accommodate the fact that they are sometimes awarded where the breach is not egregious.²²⁹ Nor can they be awarded to artificial legal persons,²³⁰ which rule shifts attention away from the nature of the defendant's wrong. However, it may be replied that even if the courts in awarding mental distress damages are not always acting punitively that would do nothing to change the fact that it appears that mental distress damages are sometimes awarded in order to punish.

Analysing general damages as sometimes being aimed at punishment is not a radical position. It has long been argued that general damages pursue a retributive agenda.²³¹ Judges have also often acknowledged as much including

224 *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732.

225 E. Peel, *Treitel: The Law of Contract* (London: Sweet & Maxwell, 15th ed, 2020) para 20.022. cf para 20.088.

226 See, for example, D. Yates, 'Damages for Non-Pecuniary Loss' (1973) 36 MLR 535 (arguing that judges sometimes circumvent the restriction on the award of punitive damages in claims for breach of contract by awarding mental distress damages instead).

227 [1930] AC 209, 230 (emphasis added).

228 [1965] 1 WLR 248, 259. Consider also *McCall v Abelesz* [1976] QB 585, 594 in which Lord Denning MR emphasised that mental distress damages are awarded for the defendant's 'conduct' and asserted that they are a sufficient remedy for harassment. Tellingly, Lord Denning added that *Perera v Vandiyar* [1953] 1 WLR 672, in which an award of punitive damages was set aside because only a breach of contract and not a tort had been established, would be decided differently today. The clear implication is that mental distress damages ought to have been awarded in lieu of punitive damages.

229 See, for example, *Heywood v Wellers* [1976] QB 446.

230 *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308, [2014] CP Rep 12.

231 For example, Patrick Atiyah contended that general damages awarded for pain and suffering in run-of-the-mill personal injury cases are essentially punitive. In Atiyah's words, 'damages for non-pecuniary loss, and especially damages for bereavement, arguably have a punitive or penal element, especially in cases against corporate defendants arising out of mass disasters such as railway accidents and fires': P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (Cambridge: CUP, 9th ed, 2018) 159 (footnotes omitted). See also C.M. Sharkey, 'Crossing the Punitive-Compensatory Divide' in B.H. Bornstein *et al* (eds), *Civil Juries and Civil Justice* (New York, NY: Springer-Verlag, 2008); M.G.A. Alles, 'Tort Remedies as Meaningful Responses to

Lord Devlin in *Rookes*, which is ironic given his view that punitive damages were ‘essentially different from ordinary damages’.²³² Lord Devlin accepted that damages awarded in ‘many cases of tort ... [are] not limited to the pecuniary loss that can be specifically proved’²³³ and remarked that ‘malevolence or spite in the manner of committing the wrong’ that injures the claimant’s ‘proper feelings of dignity and pride’ can be considered ‘in assessing the appropriate compensation’.²³⁴ However, Lord Devlin added that when this occurs ‘it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed’.²³⁵ More recently, in *Attorney General of St Helena v AB* Lord Briggs acknowledged that in ‘special cases’ there is a ‘punitive element in general damages’,²³⁶ although he did not specify the types of cases that he had in mind. These passages are express recognition at the ultimate appellate level that general damages sometimes discharge a punitive function. They must be accorded considerable weight as a result. Purists would doubtlessly decry the suggestion that general damages are other than compensatory. However, the eagerness to uphold the hegemony of a loss-based account requires a descent into fiction because, in truth, the law is considerably messier than that account admits.

The claims made in this section are far more modest than they may initially seem to be. It is no part of our argument that all awards of general damages are punitive, which we accept would be unsustainable. It would, for example, be implausible to characterise general damages awarded for pain and suffering in run-of-the-mill negligence claims as being aimed at retribution²³⁷ not least because most defendants in such cases will not merit punishment. However, because punitive damages are thought to be a heterodox remedy not on account of their always being aimed at punishment but simply because they are awarded to punish,²³⁸ it is enough for us to establish that awards of general damages are sometimes made for the purpose of punishment. The explicit judicial acknowledgement at the ultimate appellate level to which reference has been made that awards of general damages sometimes have a punitive dimension to them more than suffices in this regard.

Counterarguments

Punitive damages have long been branded as anomalous on account of their retributive agenda. However, perceiving punitive damages as an aberration misses

Wrongdoing’ in P.B. Miller and J. Oberdiek (eds), *Civil Wrongs and Justice in Private Law* (Oxford: OUP, 2020) 236–237.

232 n 3 above, 1221.

233 *ibid.*

234 *ibid.*

235 *ibid.*

236 [2020] UKPC 1 at [31].

237 cf Atiyah’s view (Cane and Goudkamp, n 231 above, 159) and Cane’s position (arguing that because tort damages express disapproval of the defendant’s conduct ‘even compensatory damages may have a punitive impact’: Cane, n 21 above, 170 (footnote omitted)).

238 See the text to nn 4–5 above.

an important part of the truth for the simple reason that several other remedies are also concerned, at least in certain situations, with punishment. The problem here is not merely that punitive damages have been misdescribed. A more serious difficulty with this situation is that the courts have seized upon the understanding that punitive damages are anomalous in order to 'justify' imposing a stranglehold on the jurisdiction to award them. However, for the reasons that we have given, the power to award punitive damages cannot properly be restricted on this basis.

A wide range of counterarguments to the foregoing that guardians of the traditional wisdom regarding punitive damages may raise have already been addressed. However, it is worth gathering together the principal ripostes to the analysis presented above and explaining why none of them holds water.

- (1) It may be thought that punitive damages are anomalous because they are awarded less regularly than compensatory damages. Although awards of punitive damages may not be as rare as has sometimes been suggested,²³⁹ it is certainly true that they are much less common than awards of compensatory damages.²⁴⁰ However, this is irrelevant in circumstances where the claim that has been tested is that punitive damages are anomalous by virtue of their retributive agenda rather than on account of the frequency with which they are awarded.
- (2) Defenders of the traditional view may assert that although certain other remedies pursue the goal of punishment, punitive damages are nevertheless different from 'ordinary damages' (as Lord Devlin put it) because they are always concerned with punishment. However, contrary to this position, and paradoxically given the remedy's name, the courts are not invariably concerned with punishment when they award punitive damages. Consider the fact that punitive damages can be awarded against deceased persons²⁴¹ and against defendants whose liability is merely vicarious.²⁴² Punishment (understood in the sense of Hart's iconic definition of punishment which we have adopted²⁴³) is obviously impossible in these situations: deceased persons cannot suffer 'unpleasantness' and defendants whose liability is merely vicarious have not committed any wrong.²⁴⁴ Thus, the better view is that the courts are not seeking to act retributively when punitive damages are awarded against such defendants but are in fact pursuing one or more of the other acknowledged goals of the remedy, such as deterrence,²⁴⁵

239 Empirical evidence regarding punitive damages awards in England is to the effect that they are awarded in almost 40 per cent of claims in which they are sought: Goudkamp and Katsampouka, n 31 above, 103.

240 For discussion, see *ibid*, 110.

241 'Exemplary damages may be claimed from a deceased wrongdoer's estate': Law Commission, n 12 above, 90. Defamation claims are an exception to this position: Law Reform (Miscellaneous Provisions) Act 1934, s 1(1).

242 See the text to n 267 below.

243 See the text to n 123 above.

244 Because the master's tort theory of vicarious liability has been rejected, it cannot be said that a defendant whose liability is merely vicarious is a wrongdoer: *Staveley Iron and Chemical Co v Jones* [1956] AC 627; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656.

245 *Rookes v Barnard* n 3 above, 1221.

appeasement²⁴⁶ or vindication.²⁴⁷ However, even if, contrary to the foregoing, punitive damages were always concerned with punishment that would be irrelevant for present purposes. That is because, as we have emphasised, punitive damages are regarded as anomalous not because they are always awarded to punish but simply because they are concerned with punishment.²⁴⁸

- (3) It may be contended that the remedial principles addressed above are not aimed at punishment. This counterargument involves a failure objectively to weigh the evidence. Our position that the rules canvassed above are aimed at retribution does not depend upon our own private impression that punishment is among their objectives. Instead, it rests on repeated and explicit judicial recognition, often at the ultimate appellate level, that the ends of the rules concerned include punishment.
- (4) Issue may be taken with the examples that we have selected in support of our thesis, and it may be queried whether there are not better illustrations. It is certainly the case that there are other remedies which are aimed at punishment. We adverted en passant to several other responses that are aimed, or that are arguably aimed, at punishment, above.²⁴⁹ However, the remedies targeted have been selected primarily because they stand apart from many other examples on account of the many authoritative statements explicitly identifying punishment as being among their goals. The express and repeated judicial affirmation that they are concerned with punishment means that they are particularly cogent evidence against the orthodoxy that punitive damages are anomalous.
- (5) It may be suggested that the analysis above is, at least in some places, too successful. For example, it may be said that some of the remedies addressed are in fact masquerading as punitive damages with the result that they are not, in fact, discrete remedies that pursue punitive functions. This point opens up an interesting debate, which appears to be virgin territory, about how to individuate remedies from each other.²⁵⁰ However, this is not the place to develop a theory in this regard given that there is no adequate doctrinal basis for contending that any of the remedies considered above is synonymous with punitive damages.²⁵¹ While the rules that have been

246 *W v W* [1999] 4 LRC 260, 264.

247 *A v Bottrill* n 23 above at [29]. Several writers identify a range of further functions served. For example, Guido Calabresi isolates five purposes: Calabresi, n 19 above.

248 See the text to n 121 above.

249 See n 116 above.

250 Although scholars have often claimed that when the courts say that they are awarding remedy X they are in reality awarding remedy Y (see the illustrations in n 11 above), and although there have been attempts to classify the law of remedies (see, for example, S.A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (Oxford: OUP, 2019) ch 4), no theoretical scaffolding has ever been erected that enables one systematically to differentiate remedies from each other. Nor, more particularly, does it appear that a theory has been developed by which it can be determined whether, for example, remedy X is a subset of or otherwise substantively equivalent to remedy Y.

251 This has been established above in relation to aggravated damages which, of the remedies considered, is the form of relief that has the greatest affinity with punitive damages: see the text to nn 183–192 above.

addressed overlap in terms of their objectives with punitive damages in that both are concerned with punishment, awards made pursuant to the former are doctrinally distinct from punitive damages. Functional convergence is different from substantive equivalence.

THE SUBSTITUTION PHENOMENON

It has been argued above that: (1) the power to award punitive damages is severely restricted both in terms of their availability and assessment; and (2) punitive damages are, contrary to the orthodox position, far from the only remedial response whose aims include punishment. In this section, we reflect on what strikes us as an inevitable consequence of this situation, namely, that judges, when they consider that punishment is merited, may eschew the power to award punitive damages and impose punishment via alternative means, including by way of the rules that have been discussed above. Scholars have long drawn attention to this practice which, following Catherine Sharkey's terminology,²⁵² we will refer to as the 'substitution phenomenon'. For example, writing as long ago as 1876 George Field contended that 'when there are some doubts in reference to the application of the rule of punitive damages, the courts frequently favour an extension of liability, to all the remote but directly traceable consequences of the wrong ...'.²⁵³ Similarly, in 1951, Glanville Williams argued that '[t]he effect of punitive damages may sometimes be achieved without avowing it, by generous assessment of the plaintiff's loss'.²⁵⁴ The aims of this section are twofold. The first is to demonstrate that judges do indeed sometimes bypass the restrictions on punitive damages and impose punishment via other means. The second objective is to draw attention to some of the dangers with which the substitution phenomenon is pregnant.

Evidence in support of the substitution phenomenon

Evidence in support of the substitution phenomenon is both direct and indirect. The best direct evidence comprises cases in which punitive damages were unavailable but in which an avowedly punitive award was nevertheless made. Illustrations are legion and, indeed, many of the cases considered in the previous section of this article serve as examples in this regard. Take, for instance,

252 Sharkey, n 231 above, 80.

253 G. Field, *A Treatise on the Law of Damages* (Des Moines, IA: Mills & Co, 1876) 101.

254 G. Williams, 'The Aims of the Law of Tort' (1951) 4 CLP 137, 148 n 27. Consider also Deveney, n 165 above, 424 (arguing that enhanced compensatory damages awarded pursuant to the attenuated remoteness test are 'a head of indirect exemplary damages'); Sharkey, n 231 above, 80 (contending with reference to the position in the United States that 'if punitive damages are not allowed, [the courts] give vent to their desire to punish the wrongdoer under the guise of increasing the compensatory damages, particularly those for pain and suffering'); Vidmar and Feldthusen, n 109 above, 267 (reporting that Canadian lawyers surveyed 'acknowledged that [punitive damages] awards might be "disguised" in larger awards for general damages ...').

the decision in *Blake*,²⁵⁵ which is discussed above.²⁵⁶ Punitive damages were unavailable in *Blake* because the claimant sued only for a breach of contract, for which wrong punitive damages cannot be awarded.²⁵⁷ However, the House of Lords simply sidestepped this restriction and awarded an account of profits. In doing so, the House explicitly declared that it was acting punitively.

There are many other cases beyond those considered in the previous section which directly evidence the substitution phenomenon. *Murad v Al-Saraj*²⁵⁸ is a plum example.²⁵⁹ In this case, the parties purchased a hotel pursuant to a joint venture with the claimants contributing £1m and the defendant half that amount. When the hotel was later sold for a profit, the claimants discovered that the defendant's contribution had not been made in cash, contrary to what the defendant had told them, but by setting off obligations that the vendor had owed to him. The claimants established at trial that the defendant had committed a breach of fiduciary duty and was guilty of fraudulent misrepresentations. Although the claimants would still have entered into the transaction had they known the truth albeit on different terms, the Court of Appeal upheld an order stripping the defendant even of those profits that would have been made regardless of the breach. In doing so the Court emphasised that the defendant had 'made a fraudulent misrepresentation to the [claimants] who had placed their trust in him'²⁶⁰ and had 'acted in bad faith'.²⁶¹ Because the claim was for breach of fiduciary duty, punitive damages could not be awarded²⁶² but punishment was nevertheless imposed via an account of profits. As James Penner and Jeremiah Lau observe, 'a fiduciary [must be] stripped of any gains acquired in breach of the fiduciary relationship, not all profits he earned in the course of acting as a fiduciary so as to inflict the greatest punishment possible. ... This [was a] punitive remedy'.²⁶³

Indirect evidence substantiating the substitution phenomenon lies in the fact that judges are strongly incentivised to bypass the restrictions on the award of punitive damages where they wish to give effect to punitive impulses. Consider the following three motivations. The first concerns the stringency of the restrictions that have been placed on the jurisdiction to award punitive damages. Because that jurisdiction is so cramped, judges who consider that a

255 n 195 above.

256 See the text to nn 198–202 above.

257 n 65 above.

258 n 198 above.

259 For further illustrations, see *Kiam v MGN Ltd* [2002] EWCA Civ 43, [2003] QB 281 (punitive damages unavailable due to the categories test but 'aggravated' damages awarded for a malicious libel); *Jones v Ruth* n 135 above (punitive damages unavailable due to the categories test but enhanced compensatory damages awarded pursuant to the attenuated remoteness test against defendants who had waged an extensive campaign of harassment and intimidation against the claimant); *Thakrar v Secretary of State for Justice* (Milton Keynes County Court, 27 September 2013) at [32], [34] (punitive damages unavailable because the defendant's conduct came 'close' to but did not fall within the first *Rookes* category but 'aggravated' damages awarded for 'a cavalier disregard for the claimant's rights and for his property').

260 *ibid* at [84] *per* Arden LJ.

261 *ibid* at [122] *per* Parker LJ.

262 n 66 above.

263 J. Penner and J. Lau, *The Law of Trusts* (Oxford: OUP, 11th ed, 2019) para 13.90.

punitive response is merited may be unable to dispense punishment in the form of punitive damages either at all or at a level that is thought to be appropriate. In other words, the constrained nature of the jurisdiction paradoxically compels judges who consider that punishment is merited to impose punishment via other mechanisms.

A second motivation to bypass the restrictions on the award of punitive damages concerns insurance. Although contracts of insurance that provide cover in respect of liability to pay punitive damages are not contrary to public policy,²⁶⁴ it is commonplace for cover for such liability to be excluded.²⁶⁵ Accordingly, if a judge is in doubt as to whether the defendant's liability insurance will respond to an award of punitive damages, they may be inclined, if it is felt that a retributive response is warranted, to identify a means of achieving the same overall outcome but without invoking the jurisdiction to award punitive damages.

Third, by punishing defendants other than by awarding punitive damages judges may be able to avoid being perceived to be doing something exceptional. Punitive damages are the law's most controversial remedy²⁶⁶ and judges may naturally worry about making awards that are contentious. This is perhaps especially so in situations where the very availability of punitive damages has been doubted, such as in the context of vicarious liability.²⁶⁷ A desire not to court controversy may encourage judges to try to achieve the same (or substantially the same) result as if punitive damages had been granted by awarding damages via doctrines that are, or which are perceived to be, more conventional.

264 'The present question ... is whether this court should ... impose a rule of public policy in English law refusing to permit indemnity against exemplary damages awards. ... I would regard that as wholly inappropriate ...': *Lancashire CC v Municipal Mutual Insurance* [1997] QB 897, 909 *per* Simon-Brown LJ. For discussion, see J. Morgan, 'Reforming Punitive Damages in English Law' in L. Meurkens and E. Nordin (eds), *The Power of Punitive Damages: Is Europe Missing Out?* (Cambridge: Intersentia, 2012) 199–204.

265 'Many policies ... expressly exclude any liability for punitive damages': J. Birds, B. Lynch and S. Paul, *MacGillivray on Insurance Law* (London: Sweet & Maxwell, 14th ed, 2018) para 30.009 n 36.

266 'Exemplary damages are a controversial remedy and have been so for many years' (*Kuddus v Chief Constable of Leicestershire Constabulary* n 1 above at [50] *per* Lord Nicholls); '[Punitive damages] are encased in controversy' (E. Weinrib, 'Punishment and Disgorgement as Contract Remedies' (2003) 78 *Chi-Kent L Rev* 55, 84).

267 In *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773, [2007] 1 WLR 1065 at [47]–[48] it was held that vicarious liability for punitive damages is possible but this decision has been doubted. Allan Beever refers to vicarious liability for punitive damages as 'an injustice of the first order': Beever, n 7 above, 96. See also P. Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge: CUP, 2010) 43 ('[One may] question whether Moore-Bick LJ in *Rowlands* accurately adjudged the balance to tip in favour of liability on the faultless employer'); A. Tettenborn, 'Punitive Damages – A View From England' (2004) 41 *San Diego L Rev* 1551, 1567–1568 ('it is entirely inconsistent with [the] rationale [for punitive damages] to impose a penal sanction on a given defendant independently of the blameworthiness of that defendant'); cf P. Morgan, 'Vicarious Punishment: Vicarious Liability for Exemplary Damages?' in E. Bant *et al* (eds), n 19 above (arguing that vicarious liability for punitive damages awarded under the first but not the second category of the categories test is justified).

Objections to the substitution phenomenon

As we have seen, the perception that punitive damages are anomalous has led to a sustained quest to confine the remedy. Not only is this perception false but the fetters that have been placed on the jurisdiction to grant punitive damages have impelled judges to search out alternative mechanisms of punishment. Judges and academics have often looked askance at this practice. For example, in *McCarey v Associated Newspaper Ltd* Pearson LJ wrote that ‘it would not be right to allow punitive or exemplary damages to creep back into the assessment in some other guise’.²⁶⁸ Pearson LJ was dealing with an award of aggravated damages which he considered was so exorbitant that ‘[i]t must include ... an element of punishment’.²⁶⁹ More recently Paul Davies has contended that ‘if punitive awards against accessories are to be permitted, it should be through overt recognition of the principles and policies underpinning punitive remedies, and not obscured by hiding under the banner of “account of profits”’.²⁷⁰ We agree but the reasons why the substitution phenomenon is objectionable have not hitherto been elucidated and it is hence worth dwelling on why, precisely, it is problematic.

The first difficulty with the substitution phenomenon stems from the fact that it can result in a lack of candour as to what is really happening because judges, when they reach for an alternative instrument of punishment, may not always make it plain that they are acting punitively. For example, a judge may grant enhanced general damages with a view to punishing the defendant but fail to make it explicit that this is the reason for the augmented award. This is seriously objectionable because state-sanctioned punishment, being the most draconian use of the state’s powers, bears a heavy burden of justification, and it is impossible properly to investigate whether punishment is justified unless it is imposed transparently.

A second difficulty lies in the fact that at least some of the alternative instruments of punishment are decidedly inferior ways of achieving retributive justice relative to punitive damages. Punitive damages are assessed first and foremost by reference to the defendant’s desert. By contrast, this is not true of certain of the alternative forms of punishment that have been addressed in this article. For example, the diluted remoteness test links the punishment imposed not to the defendant’s culpability but to the amount of the claimant’s loss.²⁷¹ Similarly, an account of profits is calibrated not to the defendant’s desert but to the size of the gain made. The potential that this creates for disproportionate punishment is obvious.

²⁶⁸ [1965] 2 QB 86, 106.

²⁶⁹ *ibid*, 105.

²⁷⁰ P.S. Davies, ‘Gain-based Remedies for Dishonest Assistance’ (2015) 131 LQR 173, 174.

²⁷¹ For further discussion, see the sources cited in n 165 above.

CONCLUSION

Punitive damages have long been denounced, by judges and academics alike, as anomalous on account of their being awarded in order to punish. They are ubiquitously regarded as an intruder whose presence deforms the symmetry of private law. This characterisation has resulted in a sustained and overwhelmingly successful campaign to confine the jurisdiction to award them. In this article, we argued that this orthodox understanding is a gross distortion of reality. In truth, punitive damages are not the anomaly that they are usually perceived to be for the simple reason that several other remedies also have, at least in certain situations, the goal of punishment squarely in view.

Correcting this major mistake in thinking regarding punitive damages would be a worthwhile endeavour even if it were without practical consequences. But this is an instance where fixing an error has significant prescriptive implications. As we have shown, the claim that punitive damages are anomalous has stifled the power to award them. It follows that overthrowing the orthodox understanding paves the way for the remedy to be liberalised. The simple point is that regardless of what one thinks of the appropriateness of punishment in private law, because English law *has* accepted the institution of punitive damages, it is wholly illegitimate to limit the power to grant that remedy on the false basis that it is anomalous.

How, then, should the remedy be unshackled? There are various ways in which the law could proceed in this regard. Most obviously, the categories test, which was developed under the influence of the idea that punitive damages are anomalous, could be abolished. Freeing the jurisdiction to award punitive damages from the yoke of that test would undoubtedly increase the remedy's availability potentially significantly.²⁷² It would also bring English law into line with that elsewhere in the Commonwealth.²⁷³ Another possibility, not mutually exclusive with the first, would be to enlarge the power to award punitive damages so that it is available in the situations identified in this article in which private law *already* countenances punishment. For example, the courts have, as we have seen, accepted by the attenuated remoteness test the legitimacy of punishment where the defendant intentionally or dishonestly injured the claimant, and it may be that punitive damages ought to be a remedial option in these situations (to the extent that it is not already available). Proceeding in this way would have the added advantage of ameliorating the problems posed by the substitution phenomenon. That is because the courts would no longer be forced to impose punishment by, for example, the blunt instrument of the diluted remoteness test but would instead be able, via an award of punitive damages, to grant a remedy that is calibrated to the defendant's desert.

272 See the text to nn 90–91 above. It is noteworthy that punitive damages appear to be awarded more frequently in Australia than in the UK. Maher, n 107 above, 711 reports that punitive damages were awarded at a rate of 47.4 per cent in Australia. By contrast, Goudkamp and Katsampouka, n 31 above, 103 report a 39.7 per cent success rate of punitive damages claims in the UK. The increased rate at which punitive damages are awarded in Australia may be due to the fact that that jurisdiction does not recognise the categories test.

273 See the text to n 89 above.

Ultimately, the precise ways in which the law of punitive damages should be reformed once the notion that they are an anomaly in the law of England has been dispelled is a matter for another day. Some possibilities in this regard have been proposed in order that their suitability can be debated. In the end, however, that which matters is that the present absurdities that afflict this area of the law are eradicated. It is nonsensical for the law to accept the jurisdiction to award punitive damages while at the same time confining it on the false basis that punitive damages are anomalous. And the perverse incentives that the artificial narrowing of the jurisdiction to award punitive damages creates for judges to search out alternative and often inferior mechanisms of punishment ought to be eliminated.