

## EXEMPLARY DAMAGES: A GENUINE CONCEPT?

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*In this article I examine the concept of exemplary damages. Unlike many other studies this paper omits policy reasons and focuses primarily on the very concept of exemplary damages. My aim is thus not to argue for or against this remedy but rather to show whether or not it is a coherent and genuine legal category. Following relevant case law I will develop a conceptual definition of exemplary damages under English law of tort. This, I argue, is subject to three types of critical arguments – an argument from insufficiency, from positive exclusivity and from negative exclusivity – that highlight its incoherence. With respect to problematic aspects of the concept I compare exemplary damages under English law to germane Czech law which helps to show the relevance of ontology to law of damages. I suggest that from certain ontological perspective, we can reinterpret exemplary damages in a more coherent and acceptable manner. I conclude that such an understanding of exemplary damages makes them immune to the previous critique and also to the objection of ‘ordre public’ in private international law.*

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### I. INTRODUCTION

Exemplary damages are considered to be one of the most controversial areas of tort law. There are many different comments on how to understand them both in common law as well as in academic literature, so it is becoming increasingly difficult to reconcile these views into one

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coherent category. However, it is widely recognized that exemplary damages are established as a distinctive remedy. Recent developments in common law (vindicatory damages)<sup>1</sup> and statutory regulation (*Crime and Courts Act 2013*)<sup>2</sup> have led to a renewed interest in the unification of tort law doctrine, particularly in a principled approach to the concept of exemplary damages.

The aim of this paper is to determine whether there is a genuine framework behind the concept of exemplary damages under English law of damages, or if it is just a fictional notion. I will therefore begin with positive law and develop a core definition of exemplary damages. Then, I will go on to confront this definition with three elementary objections (argument from insufficiency, and arguments from positive and negative exclusivity). I will argue that all these counter-arguments are based on correlativity between the tort and remedy in question and that exemplary damages are, according to the core definition, lacking such a feature. Further, I will compare English and Czech law of damages. This allows me to highlight some theoretical underpinnings that affect the basic structure of damages. In the last part, these considerations will be crucial for a suggested reformulation of the exemplary damages definition.

This paper attempts to show that current understanding of exemplary damages under English common law is, at least at a conceptual level, highly problematic and that it is important to reinterpret this concept as a type of compensatory remedy in order to retain its coherence and normativity. However controversial this might appear, it is a strictly doctrinal and conceptual approach that is not bound with any policy reasons and thus it in principle provides general availability and enforceability of exemplary awards in other European countries. It is also worth noting that the author is not concerned here with American conception of exemplary (punitive) damages.

## II. EXEMPLARY DAMAGES – A DEFINITION

Exemplary damages can briefly be described as a type of damages that are

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<sup>1</sup> Vindicatory damages are a new type of damages that are designed to vindicate the claimants violated rights. They have only recently started being awarded as a sum of money that recovers the mere fact of violation of some basic right of the claimant. In this sense, vindicatory damages might seem to be similar to exemplary damages since they probably do not recover any material loss and thus are extra-compensatory.

<sup>2</sup> In the last year the British Parliament enacted *the Crime and Courts Act 2013* that explicitly deals with exemplary damages although they had traditionally been part of common as opposed to statute law.

contrary to the basic principle of damages, ie compensation. In contrast to compensatory damages, they seek to *punish* and *deter* a defendant but not to compensate the loss. Exemplary damages are awarded for the most outrageous conduct of the defendant where he acts with a reckless disregard of the plaintiff's rights<sup>3</sup> and where his behaviour is so unacceptable or even shocking that the court must show its disapproval of it.<sup>4</sup>

At first glance, the idea of punishment clearly belongs to the domain of criminal law. In tort law we consider any sort of punishment as an anomalous method of correction. However, this was not so obvious in the past.<sup>5</sup> In Roman law, the concepts of tort and crime fell under a single type of obligation (*delictum*). In essence, *delictum* could be characterised as a voluntary act of an injury. Roman law then distinguished between public and private injuries (*delicta publica* and *delicta privata*) depending on whether it was public or private legal interest that was injured by a wrongful act. As a consequence of *delictum* the aggrieved party was entitled to perform personal revenge and punish the wrongdoer. After some time, the wrongdoer was enabled to repay himself from the threat of this punishment by an agreed amount of money that was acceptable for the aggrieved party, although it is worth noting that this figure was primarily in no relation to suffered loss and that the wrongdoer was basically at the hands of the victim.<sup>6</sup> This right of punishment then developed into a specific form of claim (*actiones poenales*)<sup>7</sup> which enabled the claimant to sue for a fine (*poena*), ie for monetary punishment. In general, this award was based on the type of injury committed and, in the case of interference with proprietary rights of the claimant, on the claimant's material loss multiplied by some number.<sup>8</sup>

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<sup>3</sup> See eg *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 803, 821; *Drane v Evangelou and others* [1978] 2 All ER 437, 438.

<sup>4</sup> *Rookes v Barnard* [1964] AC 1129, 1228; *Cassell & Co Ltd v Broome and another* [1971] 2 All ER 187, 198.

<sup>5</sup> See Harvey McGregor, 'Compensation versus Punishment in Damages Awards' (1965) 28 Modern L Rev 629, 629; Gerhard Wagner, 'Punitive Damages in European Private Law' in Klaus J Hopt, Jürgen Basedow and Reinhard Zimmermann (eds), *Handbook of European Private Law* (forthcoming), <<http://ssrn.com/abstract=1766113>> accessed 1.6.2013, 2.

<sup>6</sup> David Elischer, 'Ke genezi a vyvoji konceptu individualií občanskopravní odpovědnosti za škodu' in Vlastimil Pihera and Bohumil Havel (ed), *Soukromé právo na cestě* (Ales Cenek 2010) 121.

<sup>7</sup> cf Wagner (n 5) 2.

<sup>8</sup> Elischer (n 6) 123; see also James Gordley, 'The Structure of the Modern Civil and Common Law of Torts' in J Gordley (ed), *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (OUP 2006) 163.

Probably the most important step towards modern law of damages comes with recognition of liability in negligence and even more with the concept of strict liability where a subjective requirement of a voluntary act that the wrongdoer could be held liable for is missing.<sup>9</sup> Although the defendant could not be punished for his conduct, he still could be responsible for damage he caused.

Another important factor was an increasing role of public institutions. According to the theory of social contract it is perfectly rational for every citizen to delegate many of his rights to some public body (entity) and thus legitimize its power. In this sense, the criminal justice system clearly illustrates that it would be very problematic if in every single case of injury we were all allowed to perform a private retribution. Hence, from the individual's perspective, we should rather seek for balance in terms of compensation that also better complies with any private type of injury (*delicta privata*) since the damage caused by the defendant interferes usually only with private proprietary rights. In short, we can say that tort law damages are now therefore linked with occurrence of damage caused by the wrongdoer, and their aim is to compensate this damage, whereas the criminal system penalizes certain types of wilful conduct that interferes with public interests and its aim is to mark social disagreement with it.

However, because any sort of punishment represents the most intensive violation of one's personal rights, there is the need for strict and clear conditions under which it is possible to impose it. Criminal law fulfils these requirements through basic principles such as *nulla poena sine lege* or *nullum crimen sine lege*.<sup>10</sup> Similarly, in tort law, it is important to define and follow some limits that protect a defendant from unjustifiable punishment, and it is undoubtedly the House of Lords' decision in *Rookes v Barnard*<sup>11</sup> that draws these limits in the first place. Lord Devlin defines here three categories of cases where it is, in principle, possible to punish the defendant by means of exemplary damages. These categories are: (1) 'oppressive, arbitrary or unconstitutional action by the servants of the government'<sup>12</sup>; (2) torts where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff'<sup>13</sup>; and (3) cases where 'exemplary damages are expressly authorised by statute'.<sup>14</sup> This is sometimes called

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<sup>9</sup> cf McGregor (n 5) 629.

<sup>10</sup> See eg Jerome Hall, 'Nulla Poena Sine Lege' (1937) 47 Yale LJ 165.

<sup>11</sup> [1964] AC 1129.

<sup>12</sup> *ibid* 1226.

<sup>13</sup> *ibid* 1226.

<sup>14</sup> *ibid* 1227.

‘the categories test’<sup>15</sup> and in principle it could be applied to any wrongful conduct.

Based on a different understanding of *Rookes v Barnard*<sup>16</sup> it had not been clear until 2001 whether or not it was only ‘the categories test’ or also ‘the cause of action test’ that Lord Devlin had established in his speech. The cause of action test, according to which it was possible to award exemplary damages only for those claims where the cause of action corresponded with the claims for which exemplary damages had been awarded before 1964, ie before *Rookes v Barnard*,<sup>17</sup> was first advocated by the Court of Appeal.<sup>18</sup> Nonetheless, a few years later, when this question was assessed by the House of Lords in *Kuddus v Chief Constable of Leicestershire Constabulary*, the cause of action test has been clearly rejected.<sup>19</sup> This was, I believe, a correct step that re-affirmed a principled juristic approach to damages. Exemplary damages must therefore again be seen as a normative (as opposed to descriptive) concept. The concept itself should structure the court’s reasoning and instruct the judge on how to award this type of damages and not vice versa. Moreover, it also implies that exemplary damages must in principle be a logically possible and coherent concept. Otherwise there would be nothing to follow, ie it would have no normative function and this construct would be mere fiction. It follows that we need to examine the category of exemplary damages not only through case law, but also at a conceptual level. Thus, I will now turn to some other crucial characteristics of exemplary damages from which I will develop a basic definition of this legal instrument.

In order to award exemplary damages there are at least another four restrictions that need to be fulfilled. Therefore, not only must the defendant’s conduct fall within one of Lord Devlin’s three categories, it must also be a case where first, the total sum awarded in compensatory and aggravated damages is not adequate to punish the defendant.<sup>20</sup> In other words, it is insufficient to teach the defendant that tort does not pay.<sup>21</sup> Hence, for example, in the case of *Watkins v Home Office and others*,<sup>22</sup> the House of Lords refused to award exemplary damages where the claimant

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<sup>15</sup> See eg *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193, 217.

<sup>16</sup> [1964] AC 1129.

<sup>17</sup> *ibid.*

<sup>18</sup> *AB v South-West Water Services Ltd* [1993] 1 All ER 609.

<sup>19</sup> [2001] 3 All ER 193.

<sup>20</sup> [1964] AC 1129, 1227f.

<sup>21</sup> [1964] AC 1129, 1227 or *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 826, 874, 875.

<sup>22</sup> [2006] UKHL 17.

had not suffered any damage. The House of Lords argued that it is impossible to establish whether or not compensation payable to the plaintiff is insufficient to punish the defendant if there are no compensatory damages at all. Second, the plaintiff must be the victim of the wrongful conduct;<sup>23</sup> so, in *Ashley v Chief Constable of Sussex Police*<sup>24</sup> the House of Lords refused to award any extra-compensatory damages (including exemplary damages) to the plaintiffs who were relatives of the victim.<sup>25</sup> Third, given that a civil proceeding does not protect the defendant with the same procedural safeguards as the criminal justice system, a total sum awarded in exemplary damages should not exceed possible punishment for similar criminal conduct.<sup>26</sup> When determining this figure, the court must be cautious and never abuse its powers. In this sense, there is a clear guidance for the assessment of exemplary damages, at least for the first Lord Devlin's category in the case of *Thompson v Commissioner of Police of the Metropolis*<sup>27</sup> that makes these awards more predictable and therefore helps to prevent the defendant from any arbitrariness. Finally, according to the fourth important consideration, unlike in compensatory damages, wealth of the defendant plays a fundamental role here. As Lord Devlin puts it, '[e]verything which aggravates or mitigates the defendant's conduct is relevant'.<sup>28</sup> In accordance with this principle only £1,000 damages were awarded in an unlawful eviction case where the defendant was a natural person,<sup>29</sup> whereas in case of commercial law, the defendant, a corporate legal entity was punished by £60,000 in exemplary damages.<sup>30</sup>

All these limitations including the categories test should be understood as constitutive elements of a core definition of exemplary damages. By the core definition I mean such a normative structure that every competent person would accept and that could usually be followed simply by understanding, ie with no need for interpretation.<sup>31</sup> In this sense we can say that a vast majority of cases converges to the following normative

<sup>23</sup> [1964] AC 1129, 1227.

<sup>24</sup> [2008] 1 AC 962.

<sup>25</sup> *ibid* 975, 979.

<sup>26</sup> [1964] AC 1129, 1227f.

<sup>27</sup> [1997] 2 All ER 762, 763, 776.

<sup>28</sup> [1964] AC 1129, 1228.

<sup>29</sup> *Drane v Evangelou and others* [1978] 2 All ER 437. There was no separate figure for compensatory damages so it could be argued that exemplary damages were even less than £1,000.

<sup>30</sup> *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19.

<sup>31</sup> cf HLA Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 *Harvard L Rev* 593; Andrei Marmor, *Interpretation and Legal Theory* (Hart Pub 2005) 118.

definition of exemplary damages that helps judges to decide when and how to use this form of punishment:

In order to punish and deter a defendant, but only if<sup>32</sup> compensation payable to a victim is insufficient to do so, the victim of punishable conduct that falls within one of three categories of cases (oppressive, arbitrary or unconstitutional conduct by the servant of the government; conduct that has been calculated by the defendant to make him a profit which may well exceed the compensation payable to the victim; exemplary damages are expressly authorised by statute) can be awarded exemplary damages in total sum that reasonably reflects the defendant's wealth and other relevant aggravating or mitigating circumstances.

Provided that this is a normative concept it then follows that, when defendant's wrongful conduct fits into this definition, he will, as a consequence of this fact, also have a corresponding duty to pay some money (in exemplary damages) to the claimant. Otherwise, the core definition would either be non-normative, or an award of exemplary damages would be completely arbitrary. As we have seen earlier,<sup>33</sup> the House of Lord acknowledged normative reading of *Rookes v Barnard*<sup>34</sup> therefore it cannot be the first case. But it also cannot be the case of absolute arbitrariness as it would not only neglect basic principles of justice such as principle of equal treatment or right of fair procedure, but it would also violate *nullum crimen sine lege* and *nulla poena sine lege* principles that should apply here to some extent. In other words, judges cannot simply abuse their powers. Thus, there must be some underlying substantive law that gives rise to the exemplary damages claim and to the corresponding tortfeasor's duty.<sup>35</sup>

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<sup>32</sup> I do not want to use material implication here ('if, but only if' – cf *Rookes v Barnard* [1964] AC 1129, 1228) because it is simply not this type of implication. The fact that compensation is not sufficient to punish the defendant does not imply that exemplary damages can be awarded. It is possible that the goal of punishment will be reached by some other form of punishment (eg criminal or administrative). The case *Archer v Brown* [1984] 2 All ER 267, 281 or 2 *Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19, [497] illustrates this point clearly.

<sup>33</sup> See *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 3 All ER 193.

<sup>34</sup> [1964] AC 1129.

<sup>35</sup> Pursuant to the substantive (as opposed to procedural) understanding of exemplary damages it is apparent that current common law terminology is not very accurate. The terms claimant or defendant do not reflect the substantive nature of their legal relation but rather just evoke the procedural aspect. This is perfectly in accordance with judicial demands but in jurisprudential writings it should usually not be the same. Otherwise, it would suggest that exemplary

However, this could sometimes be very problematic because the core definition consists of too many vague terms and categories.<sup>36</sup> This, in effect, forces any practicing judge or lawyer to use his skill of interpretation as he would otherwise be unable to decide whether the facts that he is accessing fall under the core definition or not. This is a very important moment because while interpreting, we in fact apply some other rules that tell us how to use our concept of exemplary damages. In other words, we use higher-order rules (meta-rules)<sup>37</sup> to re-shape our former understanding of this concept into some more applicable version of it that better helps us to find the answer.

One of these higher-order rules are legal principles.<sup>38</sup> It then seems that some of these principles speak against the concept of exemplary damages and undermine its function. For instance, when we try to interpret exemplary damages as an inherent part of tort law damages, we will inevitably come across the principle of compensation that obviously clashes with our core definition.<sup>39</sup> We may thus either accept the position that compensation is not a universal and constitutive principle of damages or it is also possible that exemplary damages are not a coherent concept. In the next chapter, I will therefore examine some key objections to exemplary damages in respect/relation to the principle of compensation.

Further, it is worth noting that the following analysis will not be concerned with arguments of public policy. There are many strong doctrinal arguments against exemplary damages;<sup>40,41</sup> nonetheless, in its

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damages are just an arbitrary, discretionary and purely procedural remedy which is an absurd position.

<sup>36</sup> See also *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 837f (as per Lord Reid).

<sup>37</sup> Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe, PMS Hacker and J Schulte (translation), Blackwell 2009).

<sup>38</sup> Principled approach to legal interpretation is now well established and explicitly began in 19/20th century jurisprudence when English lawyers started with reception of civil law systematics and rationality [see Gordley (n 8) 159]. I am not concerned here with linguistics, logic or any other disciplines that with no doubt also affect our interpretation.

<sup>39</sup> See also Jules Coleman, 'Tort Law and Tort Theory: Preliminary Reflections on Method' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (CUP 2001).

<sup>40</sup> For common law critique see eg Law Commission, 'Aggravated, Exemplary and Restitutionary Damages' (1997) Law Com No 247; Solene Rowan, 'Reflections on the Introduction of Punitive Damages for Breach of Contract' (2010) 30 OJLS 495 or Stephen Todd, 'A New Zealand Perspective on Exemplary Damages' (2004) 33 Com L World Rev 255.

<sup>41</sup> For continental critique see eg Helmut Koziol and Vanessa Wilcox (eds),



report on *Aggravated, Exemplary and Restitutionary Damages* (1997), the Law Commission concluded that it is rather policy arguments than any conclusive theoretical reasoning that speaks for current retention of exemplary damages in English law.<sup>42</sup> But if we want to evaluate the core definition we cannot simply rely on policy reasons as they take the category of exemplary damages to be clear, coherent and given, so in fact they are based on a presumption that is never questioned and thus might be false. We therefore need to take a step back and look at the critique of this legal instrument at an adequate (in this case conceptual) level. It means that we need to examine which part of the core definition faces most of the critical arguments and why it is so.

### III. ARGUMENTS AGAINST EXEMPLARY DAMAGES

In this section, I will (at the conceptual level) analyse three close-knit arguments against exemplary damages.<sup>43</sup> First, I will look at the main argument according to which exemplary damages are an undeserved and unjustifiable windfall to the plaintiff. I will present this objection in form of an argument from absurdity that highlights the weaknesses of the core definition. This will also enable me to show how a different legal system (Czech) could face it. After this short comparison, I will turn to the two remaining questions, ie I will examine whether or not exemplary damages violate the distinction between criminal and tort law and whether punishment is a legitimate aim of tort law.

#### I. *The Argument from Insufficiency*

The first objection, which I call the argument from insufficiency, deals with the problem of justification of an award of money adjudicated by a court to the plaintiff under the heading of exemplary damages. The

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*Punitive Damages: Common Law and Civil Law Perspectives* (Springer-Verlag 2009); Thomas Rouhette, 'Availability of Punitive Damages in Europe: Growing Trend or Nonexistent Concept' (2007) 74 *Def Counsel J* 320; Bernhard A Koch, 'The "European Group on Tort Law" and Its "Principles of European Tort Law"' (2005) 53 *Am J Comp L* 189 or Regulation (EC) No 864/2007 of the European Parliament and of the Council, on the law applicable to non-contractual obligations (Rome II).

<sup>42</sup> Law Commission (n 40) 100ff.

<sup>43</sup> There are of course many other arguable or controversial aspects, for instance the aim of exemplary damages, proportionality of total sum awarded, vicarious liability, multiple plaintiffs/defendants, insurance etc.; but I believe it is sufficient to demonstrate my argument only by those three as they in some respect illustrate all the important issues. For other counterarguments see eg Richard Mulheron, 'Exemplary Damages and Tort: An International Comparison' (2000) 2 *U Notre Dame Australia L Rev* 17 or Law Commission (n 40) 94ff.

argument itself consists of two parts. The first part states that it is fair, just and reasonable to compensate claimant's damage with an adequate sum of money. In principle, damages should put the claimant in the position as if no wrong had been committed,<sup>44</sup> thus the sum awarded must equal the damage suffered. This reflects an intrinsic correlativity between the damage and damages. Pursuant to this assumption, we can in principle always critically evaluate whether or not the award was reasonable and adequate, and therefore also legitimate. Now, analogically, there needs to be some sufficient reason according to which it would be legitimate for the claimant to receive the money in exemplary damages. However, since these damages cannot be compensatory, there also cannot be the legitimizing fact of correlativity between the defendant's obligation to pay the sum and the claimant's right to receive it, and although we can provide some reasons in favour of exemplary damages, none of them would be sufficient to legitimize the award. Hence, the sum of money is a windfall to the plaintiff.

This position rests on the very notion of damages and in its alternative formulation, has a form of *reductio ad absurdum* argument. If we take damages to be a sum of money awarded *for* damage, it seems that exemplary damages are *contradictio in adiecto* because they cannot be awarded *for* damage; rather, they are adjudicated as a *consequence of* this damage.<sup>45</sup> The notion of correlativity or reciprocity expressed here by the respective term '*for*' is a distinctive feature of compensation that is *per definitionem* excluded from the concept of exemplary damages (cf. 'only if compensation [...] is insufficient to do so').<sup>46</sup> However, since there is no damage that would be covered exclusively by an exemplary award, there also cannot be a sufficient mutual justification of this civil form of sentence. Similarly, Zipursky believes that '[t]he relational nature of the liability distinguishes [damages] from a fine.'<sup>47</sup>

The fundamental idea of correlativity could be laid out in the following

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<sup>44</sup> *Livingstone v Rawyards Coal Co* (1880) 5 App Case 25, 39 (as per Lord Blackburn).

<sup>45</sup> Although we can define damages also alternatively, for example as a sum of money awarded *for* a wrong (Basil Markesinis, Simon Deakin and Angus Johnston, *Markesinis and Deakin's Tort Law* (7<sup>th</sup> edn, OUP 2012) 940), or as a sum of money awarded *for* a violation of a legally recognised interest (eg James Edelman, *Gain-Based Damages* (Hart Pub 2002) 5), there is still very clear notion of compensation or correlativity between the sum of money and the wrong committed, so the implication here holds.

<sup>46</sup> See the relevant part of the core definition (above).

<sup>47</sup> Benjamin C Zipursky, 'Philosophy of Private Law' in JL Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 627.

terms. First, there needs to be a good reason why the defendant should have a duty to pay, and second, we also need to justify why the plaintiff has a correlative right according to which he is entitled to receive the payment. Now, as soon as the second requirement is fulfilled, it will make no sense to treat exemplary damages as a non-compensatory remedy.<sup>48</sup> At the conceptual level, the fulfilment of both conditions implies that any punishment is *de facto* compensation for a wrong. Therefore, the only difference between punishment and compensatory damages would be in the type of wrong in question or in other words, whether it is public or private interest that has been violated.<sup>49</sup> Nonetheless, if exemplary damages are to be paid into the claimant's pocket it obviously cannot be the case of public wrong, but only that of private wrong. So, we can conclude that exemplary damages do not substantially differ from compensatory damages, which is indeed an absurd outcome.

The classic way of legitimizing exemplary damages in legal doctrine<sup>50</sup> highlights private nature of the wrong committed. It is only the victim who has the right to be punitive and therefore it is just to award him the money. According to Hampton, it was the plaintiff's own value that was damaged and it needed to be restored.<sup>51</sup> It is the plaintiff who brings the claim to the court and who is redressing an injury and not anyone else.<sup>52</sup> All these reasons seem to support legitimacy of the exemplary award being paid straight to the claimant rather than to anyone else. However, we can ask how this conception differs from legitimization of any compensatory award. In the end, these arguments are misleading since they draw from the idea of correlativity between the violated interest and the duty to pay some money. If we appeal to the concept of reciprocity that bears an important notion of legitimacy and fairness,<sup>53</sup> I can see no reason why we should define the exemplary award as purely non-compensatory.

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<sup>48</sup> Similarly also Helmut Koziol, 'Punitive Damages - A European Perspective' (2008) 68 *La L Rev* 741, 752.

<sup>49</sup> cf *delicta privata* and *delicta publica* in Roman law (above).

<sup>50</sup> Although we may also justify exemplary damages from the Rawlsian standpoint appealing to a political conception of justice it is not my concern here since I want to examine the doctrinal approach; see John Rawls, *Political Liberalism* (Columbia University Press 1993) or John Rawls, 'Political Liberalism: Reply to Habermas' (1995) 92 *The J of Philosophy* 132, 133.

<sup>51</sup> Jean Hampton, 'Forgiveness, Resentment and Hatred' in Jeffrie G Murphy and Jean Hampton (eds), *Forgiveness and Mercy* (CUP 1990).

<sup>52</sup> Benjamin C Zipursky, 'Palsgraf, Punitive Damages, and Preemption' (2011) 125 *Harv L Rev* 1757, 1759.

<sup>53</sup> Arthur Ripstein, 'Philosophy of Tort law' in Jules L Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 681, 57.

Possibly, we can also defend the core definition by adding a public element into it, ie to divert the sum that is awarded to a public fund. The state recovery of these awards would probably require a statutory regulation.<sup>54</sup> Nonetheless, this solution, that already applies in the USA<sup>55</sup> to some extent and is also proposed to become part of French civil law,<sup>56</sup> gives us no good explanation as for why we should award exemplary damages within civil rather than criminal trial. Moreover, if we accept this approach, it would actually bring us more trouble as it would violate some basic criminal law principles expressed by a number of procedural safeguards (although they should systematically apply to exemplary damages awards as well). This is because if exemplary damages are to be diverted to a public fund and if they are to be strictly punitive (*per definitionem*) they will in practically no respect differ from a criminal sentence.<sup>57</sup> Thus, again, the argument from insufficiency remains valid.

However, there are three more ways that can resolve the issue at hand. In the first place, we may point out that in tort law there are also some other types of damages such as restitutionary or nominal damages that are not based strictly on compensation.<sup>58</sup> In fact, the concept of damages is much wider than the argument from insufficiency presupposes and thus it fails even on its very first premise. Although this appears to be a strong counterclaim, it cannot succeed. Quite contrary, it would lead to an undeserved misapprehension. The notion of correlativity, which, as we have seen, was crucial for the first premise of the argument from insufficiency, does not necessarily exclude other than compensatory types

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<sup>54</sup> Jane Mallor and Barry Roberts, 'Punitive Damages: On the Path to A Principled Approach' (1999) 50 *Hastings Law Journal* 1001, 1006.

<sup>55</sup> For an interesting analysis of split-recovery schemes see Catherine M Sharkey, 'Punitive Damages as Societal Damages' (2003) 113 *Yale Law Journal* 347. However, Sharkey's concept of societal damages covers only particular types of torts – cf *ibid* 389.

<sup>56</sup> See more in Solene Rowan, 'Comparative Observations on the Introduction of Punitive Damages in French Law' in John Cartwright, Stefan Vogenauer and Simon Whittaker (eds), *Reforming the French law of obligations* (Hart Pub 2009) 336 or Rowan (n 40) 513-16.

<sup>57</sup> Although the proportionality of an award corresponds to the *Criminal Justice Act 2003* (c.44) s 164(4) and to the principle of equality before the law and the principle of equal impact, it previously might have been in contrast to some earlier authorities, cf eg *R v Markwick* (1953) 37 Cr App R 125: 'There should be no suggestion that there is one law for the rich and one for the poor.' Thus, the exemplary award might have been harsher than any similar criminal sentence. The critique of this practice has still its place as it is hard to understand 'how the means of the claimant can have any real relevance to the amount to be awarded on an exemplary basis.' Harvey McGregor, *McGregor on Damages* (18<sup>th</sup> edn, Sweet & Maxwell 2009) 444.

<sup>58</sup> *ibid* 4, 411.

of damages. Hence, it is legitimate to award restitutionary damages for the correlative gain<sup>59</sup> of the defendant, or nominal damages for a sole injury, ie *ijuria sine damno* (I return to this problem at the end of this section). Both types of these damages are based on mutual justification. They are collateral to some value, so in fact they stand in line with the premise they were supposed to undermine.

Second, the claim can be made that exemplary damages are just an instrument, ie that we do not accept them as a genuine concept, but rather that we accept them as means to an end or, maybe even a fiction regardless of its inner coherence.<sup>60</sup> Thus we can say that the insufficiency problem does not efficiently address our understanding of exemplary damages at all. In fact, we would resign on any conceptual consistency. This instrumental approach commits us to hold both that we believe that exemplary damages are in fact a non-existent concept, and that we accept this concept only because it is very desirable for us to do so. But again, this gives us no good explanation as for why the claimant should receive these damages. Jeremy Bentham expressed this point very clearly when he claimed that '[any] fiction is a syphilis, which runs in every vein, and carries into every part of the [legal] system'.<sup>61</sup> Under this instrumentalist approach the substantive law would remain unprincipled and unpredictable. Thus, it would be contrary to the reasons exposed in *Kuddus v Chief Constable of Leicestershire Constabulary*<sup>62</sup> and therefore also contrary to the normative understanding of exemplary damages. To conclude, we still need some better response to the argument from insufficiency.

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<sup>59</sup> I do not want to develop here the conceptual distinction between unjust enrichment and restitutionary damages because both of them bear the notion of correlativity. Thus, both of them are legitimate in the same sense. Moreover, for judges, who usually do not commit themselves to any theory or any such terminology, it does not matter if they assess any amount of money under the heading of unjust enrichment or restitutionary damages - see Steve Hedley, 'Restitution and Unjust Enrichment' in Margaret Halliwell and Steve Hedley (eds), *The Law of Restitution* (Butterworths 2002) 11. This also speaks for a common intellectual frame of these concepts. On the other hand, some authorities; eg *Borders (UK) Ltd v Commissioner of Police of the Metropolis* [2005] EWCA Civ 197 - use their terminology too loosely that they in fact dismiss the distinction between exemplary and restitutionary damages. For more see eg R Cunnington, 'The Border between Compensation, Restitution and Punishment' (2006) 122 LQR 382.

<sup>60</sup> For the theoretical background see eg Mark E Kalderon, *Moral fictionalism* (OUP 2005) 3-8.

<sup>61</sup> Jeremy Bentham, *The Works of Jeremy Bentham*, vol 5 (John Bowring ed, W. Tait 1843) 170.

<sup>62</sup> [2001] 3 All ER 193.

The third possible answer that I want to follow here accepts the need for correlativity in any justification of tort law damages. It is clear that the absurdity emerging from the insufficiency objection rests on the strict separation between compensatory and punitive aims of damages, which, I claim, is only artificial. We cannot draw a clear distinction if in reality there is none since we would commit ourselves to the instrumentalist stance that we have previously refused. Calabresi makes the point when he argues that the complexity is an intrinsic feature of tort law and it makes no sense to strictly separate these aims. He believes it should rather be the opposite, ie that we should realize multiplicity of objectives that could be reached through exemplary damages including recovery of non-recoverable compensatory damages and vindication of wronged rights.<sup>63</sup> Although the idea of the recovery of non-recoverable damages seems to be very problematic, we can make good sense of it.

The fundamental assumption is that it is permissible to recover not only damage (*damnum*) but also an injury (*injuria*). While the first is generally recoverable by compensatory damages, the second is usually not. However, if we want to fulfil the principle of full compensation, we have to recognize that even a sole injury regardless of any explicable damage (in terms of loss) lowers the position of the claimant. Therefore, we should also compensate a mere breach of the claimant's rights. Subsequently, we should differ between compensation as a principle on the one hand, and compensatory damages as a legal remedy on the other. The principle of compensation is an organizing element of law and tends to put everything into a balanced state. Every slight correlative shift of this balance (caused by a wrong) needs to be recovered primarily by means of compensatory damages. Now, the key issue is that what will be recoverable by compensatory damages is essentially a matter of our ontological and epistemological beliefs. From this perspective, we can say it is mostly random historical circumstances that determine what will be included in the concept of damages, ie what would be explicable in terms of substantial damages for a *real* injury (damage).

We can conclude that it is coherent to hold different conceptual categories of damages pursuant to our ontology or epistemology. However, in this respect, I would claim that there are only two elementary options. Based on our philosophical presuppositions, we can seek compensation either for *real* or *unreal* injury. The current position in English law is that *real* injury can be both material as well as immaterial, and it is recovered by compensatory and aggravated damages. An *unreal* injury (*injuria sine damno*)

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<sup>63</sup> Guido Calabresi, 'The Complexity of Torts - The Case of Punitive Damages' in SM Madden (ed), *Exploring Tort Law* (CUP 2005) 343-47.

does not even raise the question of the value of the loss since it is immanent to this concept that there is nothing substantial to be measured. The sole injury to private interest can so far be recovered only by nominal damages.<sup>64</sup> Now, I want to hold that in the same sense that criminal punishment recovers a sole injury to public interest, the concept of exemplary damages should recover a private *unreal* injury. The difference between nominal and exemplary damages should be analogical to the relation between compensatory and aggravated damages. In other words, exemplary damages should express and recover the seriousness of the violation of the private interest.<sup>65</sup>

At this point, we can successfully defend exemplary damages against the argument from insufficiency as we already have a sufficient reason for legitimacy of an exemplary award, but at the same time we should partially resign on the core definition of exemplary damages, in particular on the strict distinction between the principles of compensation and punishment.

## 2. *A Comparison to Czech Law*

The differences between ontologically various types of wrongs (injuries) and related legal remedies can be illustrated by civil law tradition, particularly by damages under Czech law. Due to its historical development and political circumstances, Czech law of damages originally only applied to material loss. Until 1989, communists following Karl Marx's legacy governed the Czech Republic; it is thus not hard to see that, because of its prevailing materialist ontology, the only recoverable injury in terms of damages was material loss.<sup>66</sup> Subsequently, the decline of the communist regime marked the appearance of other monetary remedies that could be systematically categorized as damages. It was a monetary award for immaterial loss<sup>67</sup> under the heading of just satisfaction, and an award for loss of future earnings<sup>68</sup> under the heading of damages. It is worth noting that positive Czech law does not distinguish between different types of damages, thus, in statutory terminology, it is only material loss (real damage and loss of future earnings) that falls under the

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<sup>64</sup> Here I want to omit the category of vindictory damages since it would make my argument less clear. Nonetheless, it does not change the implication of it. I will return to the question of vindictory damages later.

<sup>65</sup> cf s36(1)(b) Crime and Courts Act 2013 (c.22): '[T]he amount must be proportionate to the seriousness of the conduct.'

<sup>66</sup> See § 442 odst. 1 zákona c. 40/1964 Sb., občanský zákoník (Czech Civil Code), version before 1.1.1992: 'Only real damage shall be recovered [...] in money.'

<sup>67</sup> See § 13 odst. 2 zákona c. 40/1964 Sb., občanský zákoník (Czech Civil Code), version after 29.3.1990.

<sup>68</sup> See § 442 odst. 1 zákona c. 40/1964 Sb., občanský zákoník (Czech Civil Code), version after 1.1.1992.

scope of damages. Nonetheless, in Czech legal theory,<sup>69</sup> it is uncontroversial that both just satisfaction and damages (in positive legal terminology) should be conceptually treated as part of 'law of damages'. For the sake of clarity I will use the term compensatory damages for the statutory concept of damages, while the term damages shall be appointed to a more abstract legal category, ie for the law of damages in general.

In general, Czech law of damages consists of two main parts, compensatory damages and just satisfaction, which corresponds to the material versus immaterial loss dichotomy. As to the concept of compensatory damages (real damage and loss of future earnings), the underlying justification for an award is clear and uncontroversial and it is mostly the same as in English law. The interesting point in terms of comparison comes with the Czech concept of just satisfaction.

First of all, just satisfaction is not entirely a monetary remedy. Quite contrary, the statutory provision says that the court can recover immaterial loss of the claimant in money only if other forms of just satisfaction, such as the judgement itself, seem to be unsatisfactory.<sup>70</sup> So, if there is no immaterial loss, it would usually be satisfactory to vindicate the claimant's rights simply by declaring that these rights have been infringed, ie the very fact of publication of the judicial decision would do justice. In this respect, the non-pecuniary forms of Czech legal remedies could be assimilated to the English concept of nominal damages as they are also meant not to compensate an injury, but rather just to indicate the mere fact of an injury.<sup>71</sup> Although, unlike in common law, under Czech legal regulation, every type of injury is in principle actionable. It is also worth noting that just satisfaction is strictly bound to rights in person, so whereas compensatory damages can for example be awarded for the infringement of the claimant's proprietary rights, just satisfaction applies only to an injury to person.

Now, if an injury causes some immaterial loss (harm), the claimant is also entitled to a monetary recovery of this harm. The Czech statutory terminology consistently uses the term 'harm' since it better illustrates the nature of just satisfaction, which is conceptually bound not only with the

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<sup>69</sup> See eg David Elischer, 'Nove i staronove jevy v deliktнім pravu - vybrane aktualni otazky v pravu odpovednosti za skodu' in Monika Pauknerova (ed), *Promeny soukromeho prava* (Karolinum 2009) 147f; Josef Fiala et al., *MERITUM Obcanske pravo* (Wolters Kluwer 2012) 247ff.

<sup>70</sup> cf § 13 odst. 1, 2 zakona c. 40/1964 Sb., obcansky zakonik (Czech Civil Code).

<sup>71</sup> This goes in hand with the claimant's right to recover legal costs since, under Czech law, in order to recover these costs, it is not necessary to award him any damages.



claimant but also with the defendant. We can demonstrate it by using the following linguistic examples. A victim *suffers harm* in a similar sense as he *suffers loss*. However, a wrongdoer can *do harm* but cannot *do loss*. From now on, in relation to Czech law, I will therefore use the term ‘immaterial harm’ or simply ‘harm’ instead of ‘immaterial loss’ for the element of an injury that is recoverable in money. The amount of money awarded under the heading of ‘just satisfaction’ thus needs to be proportionate not only in relation to the immaterial harm suffered (compensation for immaterial loss in English law), but also in relation to the defendant and all the relevant circumstances of the injury in question.<sup>72</sup> So, in principle, the claimant can be awarded a substantial sum of money in addition to the compensatory damages and the first compensatory element of just satisfaction.

At first glance, this resembles the English concept of exemplary damages, nonetheless it might be a huge misapprehension since just satisfaction is not *primarily* meant to punish the defendant; rather, it should vindicate the claimant’s rights. The award of money recovering or compensating the harm is thus always legitimate since it is always collateral to it. The compensatory element is just and reasonable in relation to immaterial loss and the vindictory element in relation to every aggravating or mitigating circumstances of the injury. The aim of vindication is, however, similar to the aim of exemplary damages, ie to teach the defendant that he cannot breach other people’s rights. So, in the vast majority of cases, it will be sufficient to satisfy the claimant’s injury (apart from his immaterial loss) by a sole declaratory judgement (analogically by an award of nominal damages under English law), and only in very rare and exceptional cases can the claimant recover more than was his loss, both material and immaterial, if the compensatory award for both material and immaterial loss and the publication of the judgement would not be sufficient to indicate the seriousness of an injury and to fully compensate the immaterial harm.<sup>73</sup>

To summarize, Czech law of damages comprises of two basic domains that can possibly give rise to a monetary remedy – damage and harm. Damage can be described as a material loss, it has two elements (real loss; loss of future earnings) and is recovered by compensatory damages. Harm can be characterized as an immaterial loss and a sole injury to the personal interests of the claimant, and is compensated by just satisfaction. Just

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<sup>72</sup> See more in Karel Elias et al., *Obcanský zákoník: velký akademický komentář* (Linde 2008) 156-58.

<sup>73</sup> This approach has been recently acknowledged by the Czech Constitutional Court (the highest judicial authority) in its decision: *nález Ústavního soudu sp. zn. I. US 1586/09, 6.3.2012*. On the analysis of this decision in relation to exemplary damages see Vaclav Janecek, ‘K připustnosti sankční náhrady škody’ (2013) *Právní rozhledy* 153.

satisfaction can take a form of a declaratory judgement, or, if insufficient, it can establish the defendant's duty to pay a monetary compensation for the harm. So, paradoxically, since the concept of harm includes also an *injuria sine damno*, Czech law has shifted from purely materialist understanding of damage to a much wider and innovative scheme where it is possible to reflect and compensate even a mere injury, or in other words to treat its seriousness as a material and recoverable element. As a consequence, such an underlying ontology makes the award of just satisfaction immune to the argument from insufficiency since there will always be a necessary correlative reason for this award.

In comparison to Czech law we can see some interesting similarities between English and Czech compensatory damages; further, between aggravated damages and just satisfaction for immaterial loss;<sup>74</sup> third, between nominal damages and non-monetary form of just satisfaction; and finally, between exemplary damages and monetary form of just satisfaction for a sole injury. Nonetheless, from the perspective of exemplary damages there is at least one important difference, ie that the concept of just satisfaction does not exclude the principle of compensation. Moreover, just satisfaction includes the principle of vindication, prevention and the principle of punishment.

In his well-argued study, Colby pointed out that exemplary damages historically developed from a special form of compensation for a private injury and that the understanding of them as a punishment for a private wrong was just an ex-post rationalization of such an award.<sup>75</sup> Hence, it might be arguable whether or not punishment without compensation is a legitimate goal of damages. As Lord Hoffmann puts it, the fact that compensatory damages can 'have a punitive, deterrent or exemplary function [has not been controversial]. What distinguishes exemplary damages for the purpose of the *Rookes v Barnard* dichotomy is that they do not have a compensatory function.'<sup>76</sup> This brings us to the second and third elementary objections to exemplary damages dealing with the principle of punishment.

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<sup>74</sup> Also the Law Commission's proposal to replace the concept of aggravated damages by a concept of damages for mental distress supports this conclusion - cf Law Commission (n 40) 10-27; or from contrary perspective Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23 OJLS 87, 90.

<sup>75</sup> Thomas B Colby, 'Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs' (2002) 87 Minn L Rev 583, 613-36.

<sup>76</sup> *The Gleaner Co Ltd and Another v Abrabams* [2004] 1 AC 628, [41] (per Lord Hoffmann).

### 3. *Positive and Negative Argument from Exclusivity*

Looking at the core definition, we can draw from it that exemplary damages should not bear any notion of compensation. As we have shown earlier, this presumption makes it impossible to provide any sufficient reason for legitimacy of the award being given to the claimant. Now, the same part of our definition is often subject to another criticism that takes basically two different forms. I call them positive and negative argument from exclusivity.

The positive argument from exclusivity rests on punishment being an exclusive principle of public law since only the state (as a public entity) can legitimately punish its citizens<sup>77</sup> and because it has more adequate procedural safeguards. Therefore, there is no room for the principle of punishment outside the public law domain. It positively states where the principle of punishment belongs to and excludes it as a leading principle from other legal disciplines.<sup>78</sup>

On the other hand, the negative argument from exclusivity says that principles of tort law are not mutually exclusive. It is true that various remedies have their respective prevailing principles but none of these principles is an exclusive one.<sup>79</sup> There are more aims of tort law damages such as compensation, deterrence, prevention, punishment, vindication, declaration that are complementary and that cannot be fitted into a single compartment.

It might therefore be legitimate to follow the principle of punishment through the civil law<sup>80</sup> but not as a dominating and sole aim (as it seems to be in case of exemplary damages); otherwise we would face many other difficulties such as risk of double punishment etc.<sup>81</sup> Moreover, if we accept that exemplary damages are meant to punish the defendant, we will in cases such as *Thompson v MPC*<sup>82</sup> where the defendant is a public body come to another absurd conclusion, ie we will allow an individual to punish the public body. This is very problematic since it is contrary to the political consensus that only the state or some other public entity can legitimately

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<sup>77</sup> There is obviously some contract theory basis in this assumption.

<sup>78</sup> cf also *Rookes v Barnard* [1964] AC 1129, 1221.

<sup>79</sup> See eg Andrew S Burrows, *Remedies for Torts and Breach of Contract* (3<sup>rd</sup> edn, OUP 2004) 10 and Edelman (n 45) 4.

<sup>80</sup> Law Commission (n 40) 94, 99.

<sup>81</sup> See eg *AT and others v Dulghieru and another* [2009] EWHC 225; *Borders (UK) Ltd and others v Commissioner of Police of The Metropolis and another* [2005] EWCA Civ 197; or *Lancashire County Council v Municipal Mutual Insurance Ltd* [1996] 3 All ER 545, 553.

<sup>82</sup> [1997] 3 WLR 403, 417.

punish its citizens. Although common law judges might not have previously consented to the theoretical dichotomy between public and private law or to any similar doctrinal approach,<sup>83</sup> we should keep in mind that in the context of modern law, ‘theoretical coherence [should not be] regarded as, at best, a luxury, and more typically an obstacle to achieving [justice].’<sup>84</sup>

To conclude, it is now easy to see that all three arguments against exemplary damages (from insufficiency; from positive exclusivity and from negative exclusivity) clash primarily only with one part of the core definition. Subsequently, I claim that since we cannot provide any good response to these objections we should alter the definition. These three arguments represent the very basis for any critique of exemplary damages and they also efficiently highlight the most problematic feature of this concept, ie complete elimination of the compensatory principle.

We have seen that the difference between punishment and compensation is not so clear-cut and that it is closely related to our ontological assumptions. From a certain perspective it is thus possible to compensate the claimant’s violated rights since they have their own value and could be treated as a form of damage.<sup>85</sup> Such an ontological understanding of the claimant’s rights, although formerly connected only to the concept of nominal damages, has been part of English law for a long time. Hence, at this point, in accordance with a coherent tort law doctrine, I shall try to incorporate the principle of compensation into the concept of exemplary damages.

#### **IV. EXEMPLARY DAMAGES FROM THE COMPENSATIONAL PERSPECTIVE**

However controversial it might appear, if we want exemplary damages to be an inherent part of the system of tort law damages, we should understand them as compensation for the harm caused by the defendant to the claimant. The idea here is similar to the rationale of nominal damages that seem to be damages only by their name since the ontological status of damage they are supposed to recover is somewhat puzzling. The judgement for nominal damages basically declares that there has been some infringement of the claimant’s right. Nonetheless, this alone does

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<sup>83</sup> *Cassell & Co Ltd v Broome and another* [1972] 1 All ER 801, 860.

<sup>84</sup> Gerald J Postema, ‘Philosophy of the Common Law’ in JL Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2002) 595.

<sup>85</sup> In similar sense we can understand criminal sentence as compensation for violation of public right(s). See also Sharkey (n 55).

not imply that the violated right has also been vindicated.

As we have seen in comparison to Czech law, the infringement is twofold. It can be both mere formal interference with the claimant's protected interest (recoverable by nominal damages), as well as material breach of this right. The material element stands for the gravity or seriousness of a wrong, and is in relation to the claimant's private interest, and thus needs to be recovered (compensated) based on these factors.<sup>86</sup>

Unfortunately, there is a slight complication with the recognition of these protected interests, since (in respect to nominal damages) not every tort is actionable *per se* and thus recoverable. It is then arbitrary and luck-dependent<sup>87</sup> whether any subsequent exemplary damages can be awarded. That is clearly against our proclaimed normative approach to damages. Quite contrary, exemplary damages should in principle be available for every injury. This means that they should also not be limited to the three Lord Devlin's categories.<sup>88,89</sup>

Now, if we reformulate the core definition in a more coherent way, ie if we omit the elimination of compensatory principle, it seems that vindictory damages can be treated as a model type of tort law remedy that consolidates both compensatory and punitive functions. Many authors pointed out that vindictory damages can replace exemplary damages since they play exactly the same role.<sup>90</sup> Vindictory damages are, just as nominal damages, so-called 'right-based' remedy since they are in the first place connected to an injury (as opposed to damage or gain). So the fundamental idea of correlativity here is bound to the seriousness of an injury and the type of right in question. Although the aim of vindication is widely recognised in practically all types of damages, it is conceptually usually associated only with the breach of constitutional rights.<sup>91</sup> Nonetheless, the

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<sup>86</sup> For more on the formal element see eg *Asbby v White* (1703) 2Ld. Raym. 938, 955 or McGregor et al. (n 57) 414.

<sup>87</sup> cf Todd (n 40) 268; or Robert Stevens, *Torts and Rights* (OUP 2007) 88-91.

<sup>88</sup> For more on the same conclusion see Law Commission (n 40) 96.

<sup>89</sup> We can see very similar normative approach in the *Crime and Courts Act 2013* (c.22) s 34(7): 'Exemplary damages may be awarded [...] whether or not another remedy is granted.'

<sup>90</sup> This applies at least to the first Lord Devlin's category. See eg David Pearce and Roger Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 OJLS 86; Eddy D Ventose, 'Damages for Constitutional Infringements: Compensation and Vindication' (2010) Commonwealth Law Bulletin 245; Robert Stevens, 'Torts, Rights and Losses' (2006) 122 LQR; or Lord Scott, 'Damages' (2007) 4 LMCLQ.

<sup>91</sup> cf eg *Regina (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 283; *Takitota v Attorney General* [2009] UKPC 11, 15; *Merson v Cartwright* [2005]

aim of full vindication that cannot be carried out by the current concept of compensatory damages but that is essentially related to the injury appears to be instructive.

Moreover, vindictory or some other extra-compensatory damages seem to be of higher legitimacy these days since most judicial decisions do not have sufficient public attention and thus nominal damages, ie pure declaration, do not fully recover the claimant's injury. On the other hand, I see no reason as for why we should pretend that such a remedy only needs to punish the defendant if we can reach the same goal by compensatory interpretation of exemplary damages. They can be seen as a sum of money awarded for the seriousness or gravity of violated right.

As a result, it seems that exemplary damages (in their current position) are not a genuine and coherent normative concept. They might even be seen as a fictional category that Jeremy Bentham was so desperately fighting against. It thus seems that in terms of exemplary damages, judges do not obey the rules of common law; rather they govern these rules,<sup>92</sup> which is contrary to the normative approach to exemplary damages established in *Kuddus v Chief Constable of Leicestershire Constabulary*.<sup>93</sup> In this context, it is more important that these rules and the concepts that are used are transparent, principled and coherent. Hence, we should reformulate our core definition in a way that it does not exclude compensation and that it is generally applicable to any tort. Exemplary damages under English law of tort may thus be possibly expressed in the following terms:

In order to punish and deter a defendant, but only for the harm not recoverable by another type of damages, the victim of punishable conduct can be awarded exemplary damages in total sum that reasonably reflects the defendant's wealth and other relevant aggravating or mitigating circumstances, i.e. recovers and vindicates seriousness or gravity of an injury regardless of any material or immaterial loss.

Here, in accordance with the argumentation of this paper, the principle of punishment is still legitimate but not an exclusive principle of exemplary damages. Further, exemplary damages are not meant to duplicate other remedies (risk of double punishment); rather they should be a complementary and inherent part of the system of damages that seek for full compensation. On the other hand, the award here is not dependent on

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UKPC 38; or *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15.

<sup>92</sup> Postema (n 84) 589.

<sup>93</sup> [2001] 3 All ER 193.

any prerequisite, such as the least compensation payable in terms of other remedies which actually makes it more foreseeable and, in a way, a less exceptional remedy. However, this does not mean that every injury is so serious that the claimant can be awarded exemplary damages for it.

The reformulated definition is also immune to the three arguments against exemplary damages. Further, it lays out exemplary damages as a type of right-based remedy and thus draws a clearer relation to aggravated damages. Finally, it may also bring in better enforceability of common law judgements under other European jurisdictions since it can no more be contrary to public policy (*ordre public*).<sup>94</sup>

## V. CONCLUSION

The purpose of the current study was to determine whether exemplary damages under English law are a genuine concept or just an instrumental or fictional category. I have argued that it is necessary to establish a coherent and principled understanding of exemplary damages because of their normativity. Therefore, I have extracted a core definition of this concept and checked it against three basic counterarguments – the argument from insufficiency, and arguments from positive and negative exclusivity. In this part, the study has shown that it is impossible to face these objections and hold a non-collateral interpretation of exemplary damages at the same time.

As a result, I claimed that any justification of the core definition rests on our ontology, ie what type of damage are we able to express as recoverable. Compared to the Czech legal doctrine, we have seen that it might be possible re-interpret the English concept of exemplary damages as a form of compensation for generally non-recoverable harm. In other words, the distinction between immaterial loss and a sole injury to the personal interests of the claimant as two elements of harm enables us to recover the injury itself.

In the vast majority of cases it will be sufficient to recover or vindicate such an injury by nominal damages. However, if the interference with the claimant's rights will be too serious that a mere declaratory award of nominal damages (with some other available remedies) will not adequately punish the defendant, it might be desirable to recover this infringement by means of exemplary damages. The award here would be collateral to the

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<sup>94</sup> cf Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), s 32.

material element of the sole injury and thus still in compliance with the principle of compensation. Subsequently, drawing from these assumptions, I have suggested a reformulated definition of exemplary damages that appears to be conceptually more coherent. Such an interpretation might also affect enforceability of at least English exemplary awards under private international law.

Undoubtedly, there are still many questions left. Further research might thus for example investigate the ontological basis of the current law of damages or the relation between vindicatory and exemplary damages under English law. In the end, it will also be interesting to follow the upcoming application of the new British legislation (*Crime and Courts Act 2013*) that explicitly deals with exemplary damages. Since the scope of this paper was limited to English and Czech law it seems to be important to analyse the concept of damage and damages in other jurisdictions as well. This may lead to some stronger implications for the general legal theory.