PUNITIVE DAMAGES IN ENGLAND

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I. Introduction

The history of punitive or exemplary damages, the terms are synonymous, is rooted in 18th century English case law though it was not until 1964, in the case of Rookes v Barnard that such damages were specifically identified as “punitive” or “exemplary”. Punitive damages are damages which are awarded over and above what is necessary to compensate a claimant. In granting an award of punitive damages, in addition to marking their disapproval of his behaviour, the judge or jury primarily seek to punish the defendant and deter him and others from similar outrageous conduct. Under English law, punitive damages are distinguishable from non-pecuniary damages awarded to reflect the harm caused to a victim because of the reprehensible manner in which a defendant committed a wrong. Notwithstanding their possible deterrent or punitive effect, such aggravated damages, which form the subject of a separate report, are compensatory in nature. It is to be noted that an award of punitive damages may only be made if the amount to be awarded by way of compensation (including aggravated damages) is insufficient to serve as punishment as well as compensation.

Even under English law, punitive damages are a controversial topic and have been so for many years. In Rookes, as well as distinguishing punitive damages from aggravated damages, the House of Lords, or Lord Devlin to be precise, established three categories under which the former were to be available (the categories test). As a result of the Court of Appeal’s decision in AB v South West Water Services Ltd., a claimant seeking punitive damages also had to satisfy the cause of action test. This test illogically restricted the availability of punitive damages to causes of action for which prior to 1964 (i.e. when Rookes was decided) such an award had been made. In the midst of the controversy

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1 Rookes v Barnard [1964] 1 All England Law Reports (All ER) 367.
2 See A.J. Sebok/V. Wilcox, Aggravated Damages (contained in this publication) no. 1 ff.
3 AB v South West Water Services Ltd. [1993] Queen’s Bench (QB) 507.
following the AB decision, the Law Commission for England and Wales issued a consultation paper on Aggravated, Exemplary and Restitutionary Damages in the autumn of 1993, the results of which formed the subject of its 1997 report of the same title.\(^4\) In the report, the Law Commission reviewed the law as it stood, inter alia, on exemplary damages and made far-reaching recommendations which were all rejected by the government in November 1999.\(^5\) Shortly after this, in May 2000, the Irish Law Reform Commission produced a report also on Aggravated, Exemplary and Restitutionary Damages.\(^6\) The historical course of the law on punitive damages was to take a further turn in 2001 when the House of Lords in Kuddus v Chief Constable of Leicestershire Constabulary\(^7\) overruled AB. As a corollary, only the categories test need now be satisfied. The government welcomed this move in its May 2007 consultation paper, The Law on Damages\(^8\) and also confirmed that it did not intend to extend the availability of exemplary damages in civil proceedings. Both the above reports and the 2007 consultation paper will be considered in this report to the extent that they are relevant.

Punitive damages have long formed the jurisprudence of other common law jurisdictions. In particular, the concept of punitive damages in the United States, Canada, Australia and New Zealand is rooted in English law. However, the laws on punitive damages in these countries have developed differently from those in England – principally, on the categories test so that in general, any highly reprehensible civil wrongdoing may warrant a punitive award. The practice in these jurisdictions, save that in the United States, will be considered in brief. This report is divided as follows: Part II The Three Categories; Part III The Cause of Action Test Abolished; Part IV Factors Relevant to an Assessment of Punitive Damages; Part V The Case against Punitive Damages; Part VI Alternative Remedies; Part VII Other; and Part VIII Conclusions.

II. The Three Categories: The Categories Test

As aforesaid, before Rookes v Barnard the law with regard to aggravated and exemplary damages was confused and fraught with anomalies. The House of Lords trawled through the authorities and from the single nebulous class proceeded to reclassify the lot into two categories so that punitive or exemplary damages acquired – at least in theory – a separate and mutually exclusive meaning from aggravated damages. Having done this, the House of Lords, through the speech of Lord Devlin, laid down categories under which exemplary damages would be appropriate. Two common law categories were established and a further, self-evident statutory category was acknowledged. The

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7 Kuddus v Chief Constable of Leicestershire [2002] 2 Appeal Cases (AC) 122.