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Exemplary Damages and the Police: Some Reflections

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Introduction

Damages in civil suits are either compensatory or non-compensatory. Exemplary damages are one of the non-compensatory damages, the others being nominal damages and derisory or contemptuous damages. Nominal damages are awarded where the claimant, though wronged, eg, *via* breach of contract, has suffered no damage/loss,¹ and contemptuous damages show the court's disgust or reprimand of the claimant for bringing his action.²

Therefore, those damages are very small amounts. For example, contemptuous damages of one half-penny were awarded in *Pamplin v Express Newspapers* and nominal damages of £10 in *C and P Haulage v Middleton*. Exemplary damages, on the other hand, can be quite substantial because they are intended to punish the defendant. However, their availability has been quite a contentious issue. They have also been awarded over the years consistently and in fairly large amounts against the police. But, in 1997 the Court of Appeal, by way of guidelines, imposed a limit on the amounts awardable against the police.

However, those guidelines of the Court of Appeal have not been followed in all cases. One instance of this, as will be shown below, is a jury's disregard of them in Merseyside in 1998.³

¹ *C and P Haulage v Middleton* [1983] 3 All ER 93.

² Eg, where in a defamation case the defendant has apologised and offered to make amends: *Dering v Uris* [1964] 2 QB 669; *Pamplin v Express Newspapers (No 2)* [1988] 1 All ER 282.

³ George Randles' case, *The Daily Telegraph*, 10 April, 1998.

This paper argues, *inter alia*, that the guidelines make sense and must be applauded, especially, where aggravated damages,⁴ which overlap in a way with exemplary damages, are also asked for by a claimant. After all, exemplary damages against the police are awarded against the Chief Constable of the Force (Commissioner of Police in the case of the Metropolitan Police) who, *mutatis mutandis*, is vicariously liable, and, so, the individual officer is not personally punished, thereby dulling the edge of the aim of punishment. This paper, accordingly, looks at the role and availability of exemplary damages; why they have been awarded against the police; the Court of Appeal's guidelines in *Thompson v Commissioner of Police of the Metropolis*, and *Hsu v Same*;⁵ the issue of vicarious liability; juries and exemplary damages; and the notion of punishment/retribution in relation to exemplary damages.

Role of exemplary damages and their availability

As already stated, exemplary damages are meant to punish the defendant. They are the only type of non-compensatory damages having that aim. Because of this and other factors they have led to a good deal of controversy to such an extent that the Law Commission has deemed it necessary to examine the law relating to them, etc.⁶

The availability of exemplary damages is quite limited. They are not available for all civil wrongs. They are available for tort but not breach of contract⁷ unless the breach of contract also constitutes a tort.⁸ In *Rookes v*

⁴ Basically a species of compensatory damages. See, eg, *Thompson v Commissioner of Police of the Metropolis; Hsu v Same* [1997] 3 WLR 403. Although there can be a penal element in their award, aggravated damages are awarded primarily to compensate the claimant for injury to his pride and dignity and for the consequences of his being humiliated (Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Consultation Paper no 132, 1993), para 2.17 *et seq.*

⁵ [1997] 3 WLR 403.

⁶ See Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, 1993 (hereafter referred to as 'Law Com No 132'); see also n24.

⁷ *Addis v Gramophone* [1909] AC 488.

⁸ As in *Drane v Evangelou* [1978] 2 All ER 437; see also *McMillan v Singh* (1984) 134 *New Law Journal* 1087.

Barnard,⁹ Lord Devlin specified the following three categories of cases where they could be awarded: (a) where there is 'oppressive or unconstitutional action by the servants of the government';¹⁰ (b) where 'the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff';¹¹ and (c) where they are expressly authorised by statute.¹²

In addition, there are further restrictions on their availability. They will not be awarded: first, if their award would lead to double jeopardy, eg, where, as in *Archer v Brown*,¹³ the defendant had already been imprisoned for the act complained of; secondly, where the claimant's own behaviour has led to the tort;¹⁴ thirdly, where the court deems the compensatory damages awarded sufficient enough to punish the defendant;¹⁵ and fourthly, where they have not specifically been asked for.¹⁶

So, in exemplary damages we have non-compensatory damages in the civil law which aim to punish the defendant but which are not easy to obtain because of the limitations in *Rookes v Barnard* and further restrictions on when they are available. Their availability only in certain cases has led to

⁹ [1964] AC 1129.

¹⁰ Eg, *Marks v Chief Constable of Greater Manchester*, *The Guardian*, 6 December 1991.

¹¹ Eg, *Broome v Cassell* [1972] A.C. 1027.

¹² Eg, The Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s13(2).

¹³ [1985] 1 QB 401.

¹⁴ *O'Connor v Hewitson* [1979] *Crim LR* 46.

¹⁵ *Obiter dicta* in *Rookes v Barnard* [1964] AC 1129, 1228 (*per* Lord Devlin), and *Broome v Cassell* [1972] AC 1027, at 1089 (*per* Lord Reid).

¹⁶ Civil Procedure Rules 1998, r 16.2(1) and r 16.4(1)(c); see also *Ogunlolu v Bird* (1993), unreported, *New Law Journal*, 14 July 1995, pp 160-1. There used to be another restriction on the availability of exemplary damages, ie, they were not awardable if the tort in question was not one for which exemplary damages were awarded before *Rookes v Barnard* in 1964 (see, eg, *AB v SW Water Services Ltd*, [1993] QB 507; *Deane v Ealing London Borough Council* [1993] ICR 329). However, that restriction has now been removed by the House of Lords in *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29; *The Independent*, 12 June 2001 (a case concerning misfeasance in office by a police officer).

their being described as ‘unprincipled’¹⁷ and offering a type of ‘palm-tree justice’.¹⁸ They have also been criticised on other grounds such as the following: (a) they confuse the functions of the civil law with that of the criminal law; (b) they punish defendants without the protections (eg, evidential and procedural safeguards) available to an accused person in a criminal trial, (c) they give an undeserved windfall to the claimant,¹⁹ (d) they are so uncertain as to be immeasurable, and (e) the restrictions on their availability are questionable and illogical.²⁰

However, as their supporters claim: (a) the functions of the criminal law and those of the civil law overlap and exemplary damages confirm that tort has a very important role to play in deterring acts like trespass to the person, defamation etc; (b) exemplary damages are needed to punish certain types of conduct either not punished at all or inadequately punished by the criminal law;²¹ (c) they prevent unjust enrichment by the defendant;²² (d) they pacify claimants; and (e) they are needed to complement compensatory damages as at times compensation is inadequate, ineffective or artificial. Thus, they play so useful a role that the Law Commission has recommended their retention but reform of the law by their being put on a logical, principled basis by legislation.²³

¹⁷ Law Com No 132, para 6.5.

¹⁸ This term was used by Lord Reid in *Broome v Cassell* [1972] AC 1027, at 1087. It is, according to Lord Buckley in *Newgrosh v Newgrosh*, 100 LJ 525, ‘justice which makes orders which appear to be fair and just in the special circumstances of the case’. It is also ‘an expression used to describe a form of justice dispensed by a *cadi* sitting under a palm tree without the advantage of books or precedents’ *Jowitt’s Dictionary of English Law*, 2nd edn, Sweet and Maxwell; London, 1977.

¹⁹ *Broome v Cassell* [1972] A C 1027, at 1086 and 1126 (*per* Lord Reid and Lord Diplock, respectively).

²⁰ McBride N J, ‘A Case for Awarding Punitive Damages in Response for Deliberate breaches of Contract’, (1995) *Anglo-American Law Review* 24(3) 369-90, at 388-90; see also *Broome v Cassell* [1971] 2 QB 354 (CA), at 387 (*per* Lord Salmon).

²¹ Eg, police misconduct (see Clayton R and Tomlinson H, *Civil Actions against the Police*, 2nd edn, Sweet and Maxwell, London, 1992 11 ff.

²² See *Broome v Cassell*, above n 11.

²³ Law Commission, *Exemplary Damages; Compensatory Damages; Restitution*, Green Paper, 17 December 1997, No 247.

Exemplary damages against the police

Why are exemplary damages awarded against the police? This is simply because the police fall within the first of the three categories of cases specified by Lord Devlin in *Rookes v Barnard*, and stated above. They come within the scope of servants of the government, defined by Lord Diplock in *Cassell v Broome*²⁴ as covering 'all persons purporting to exercise powers of government, central or local, conferred upon them by statute or at common law by virtue of the official status or employment' which they hold. The actual cases on the police and exemplary damages confirm that the police clearly come under the first category.²⁵ In many instances the oppressive or unconstitutional action by the police has been in the form of trespass to the person by police officers.

Why were the police established and what is their role? The reason for their establishment may be generally said to be the need for maintenance of the peace *via* law enforcement (detection and control of crime), crime prevention and provision of social support.²⁶ Generally there have always been high expectations of the police officer. In fact the instructions given to the first policemen by the first Commissioners of the Metropolitan Police included the objects of prevention of crime, detection of crime and protecting

²⁴ [1972] AC 1027, at 1130.

²⁵ Some of those cases are *Hajivassiliou v Commissioner of Police (1991)*, Legal Action 17; *Cusworth v Chief Constable of South Yorkshire Police*, *The Guardian News Report*, 10 July 1991; *Reynolds v Chief Constable of Wiltshire*, *The Guardian News Report*, 14 and 15 February 1991; and *Cumber v Chief Constable of Hampshire Constabulary*, *The Times*, 28 January 1995; *Makanjuola v Metropolitan Police Commissioner and McCarthy*, *The Times*, 8 August 1989; *Treadaway v Chief Constable of West Midlands*, *The Independent*, 9 September 1994, *The Times*, 25 October 1994; and *Cumber v Chief Constable of Hampshire Constabulary* (1995) 92(08) LSG 39.

²⁶ Historically, the first police system in England was the Saxon system under which all members of the community were responsible for each other's good behaviour. The second system, the parish constable system, was so inefficient (especially in London) that it had to be replaced by the 'New Police'. The Metropolitan Police Force was established in 1829 by the Metropolitan Police Act (10 Geo IV, c 44). Before then crime (especially in London and generally in other areas of the country) was very much prevalent and had reached frightening proportions. Critchley T A, *A History of Police in England and Wales*, rev edn, Constable, London, 1978 ch 2. The City of London Police Force was established by the City of London Police Act 1839 (2 and 3 Vict, c xciv). In the counties the County Police Act 1839 (2 and 3 Vict, c 93) empowered, and later the County and Borough Police Act 1856 (19 and 20 Vict, c 69) actually required, the Justices to establish a police force for the whole of each county.

and helping the public.²⁷ The Royal Commission on the Police also described their duties as including, *inter alia*, a duty to maintain law and order and to protect persons and property, and 'by long tradition a duty to befriend anyone who needs their help'.²⁸ Moreover, under s18 of the Police Act 1964, every constable, upon appointment, had to make an attestation in the form prescribed by Schedule 2 to the Act that he would '... cause the peace to be kept and preserved and prevent all offences against the persons and properties of Her Majesty's subjects ...'. The policeman has also been referred to as an 'all-purpose public servant'. Thus, playing not one role but a variety of roles, he often acts as an arbitrator, a social worker, a lawyer and a doctor' although he has received no formal training as such.²⁹ Equally laudable, is their social work role.³⁰

One clear picture which has emerged is that the police are supposed to behave lawfully and to protect and help members of the public. This they generally do creditably. However, it is no excuse for misbehaviour by them. Police unconstitutional action is rightly the type of behaviour which exemplary damages are intended to punish.³¹ However, the edge of the punishment is dulled because those damages are awarded against the Chief Constable of the Force (in London the Commissioner of Police of the Metropolis) instead of the real wrongdoer. Also, care must be taken to ensure those damages are not excessive or too high, especially, if aggravated damages are also asked for by the claimant, which is usually what happens, as the cases show. So, the guidelines by the Court of Appeal limiting the level of exemplary damages need to be applauded. They are next considered.

²⁷ Whittaker B, *The Police in Society*, Sinclair Brown, London, 1979, 40-41.

²⁸ *Report of the Royal Commission on the Police*, Cmnd 1728, HMSO, London 1962, 22.

²⁹ Whittaker B, *The Police in Society* Sinclair Brown; London, 1979 60.

³⁰ Morgan R and T Newburn, *The Future of Policing*, Clarendon Press, Oxford, 1997 79.

³¹ See *Rookes v Barnard*. However, despite the existence of the Police Complaints Authority, an independent corporate body which supervises investigations into complaints made against police officers and a mechanism for disciplining police officers (see now Part IV of the Police Act 1996), it has been argued that the police seldom initiate proceedings against police officers, and the police complaints system is less effective than civil proceedings R Clayton and H Tomlinson, *Civil Actions Against the Police*, 2nd edn (Sweet and Maxwell: London, 1992) 1 ff).

The Guidelines in *Thompson and Hsu*

In *Commissioner of Police of the Metropolis v Thompson*;

Commissioner of Police of the Metropolis v Hsu (two appeals heard together) there was trespass to the person. In *Thompson* the plaintiff, after having been lawfully arrested, was manhandled and assaulted by some police officers and also wrongly detained in a police cell for four hours. She was at first charged with assault occasioning actual bodily harm but was later at trial acquitted of a substitute charge of assaulting a police officer in the execution of his duty. She sued the police for false imprisonment and malicious prosecution. The jury awarded her aggravated (compensatory) damages of £1500 and exemplary damages of £50,000. In *Hsu* the plaintiff was, without lawful justification, arrested, assaulted and abused by certain police officers who went on to detain him in a cell at the police station for one hour and fifteen minutes. He sustained physical and psychological injury. Aggravated (compensatory) damages of £20,000 and exemplary damages of £200,000 were awarded against the police. The Court of Appeal, however, replaced Thompson's compensatory damages with £20,000 (ie, ordinary compensatory damages of £10,000 and aggravated damages of £10,000) and her exemplary damages with £25,000, making a total of £45,000. Hsu's compensatory damages (£20,000) were held appropriate but his exemplary damages (£200,000) were reduced to £15,000.³²

According to the Court of Appeal (*per* Woolf MR) the substituted amounts were the correct ones because (a) Thompson's compensatory damages of £1500 were 'totally out of line' considering that, after her initial lawful arrest, the unlawful conduct against her continued for seven months; and (b) in Hsu's case, taking into account the already awarded aggravated damages and all the other circumstances, the substituted sum of £15,000 exemplary damages was appropriate.³³ His Lordship then issued guidelines on, *inter alia*, the award of damages against the police. Specifically on exemplary damages he stated that such damages would

³² See the Court's power in section 8, Court and Legal Services Act 1990.

³³ [1997] 3 WLR 403, 419.

usually range from £5,000 to £25,000, that to justify an award of £25,000 the conduct must particularly deserve punishment, and that an award of £50,000 was the maximum sum appropriate in cases of unlawful conduct by officers of at least the rank of superintendent. It is thought that the Court of Appeal's guidelines on exemplary damages are reasonable from the point of view of proportionality of punishment and the notion of just deserts, issues which are looked at below. But, it must be noted that, while the guidelines are intended, *inter alia*, to eradicate over-compensation of claimants, they do not clamp down on all damages against the police as such.

The guidelines were followed in *Gerald v Commissioner of Police of the Metropolis*.³⁴ There exemplary damages of £100,000 were reduced to £20,000 and aggravated damages of £10,000 were also awarded to the claimant for assault, false imprisonment and malicious prosecution by the police. But, in *Randles v Chief Constable of Merseyside Police*³⁵ a Merseyside jury disregarded the Court of Appeal's guidelines in *Thompson and Hsu*. In *Randles* the plaintiff claimed he had been attacked by two police officers after they had ordered him to move his taxi as he was waiting to collect a fare. He had been kneed in the groin, shoulder-charged and punched about the head, etc, by them. He suffered 17 injuries. He claimed wrongful arrest, false imprisonment, malicious prosecution and assault by the police. Trigger J, however, dismissed all his claims except those concerning assault. The jury awarded him £40,000 for post traumatic stress disorder, £3,500 for his physical injuries, £100,000 aggravated damages and exemplary damages of £300,000. The Chief Constable appealed on the grounds of the award being out of all proportion to the incident and deviating from awards in similar cases. But, before the appeal was heard, the claimant accepted a total settlement of £49,000.

Vicarious Liability

Lord Woolf's statement about the liability of the Chief Constable (Commissioner of Police in the case of the Metropolitan Police) for his officers' torts is highly relevant even though it does not address the issue of

³⁴ *The Daily Telegraph*, 11 June 1998.

³⁵ *The Daily Telegraph*, 10 April 1998.

deterrence (ie, the issue whether police officers will be dissuaded from doing acts of trespass to the persons of other members of the public in future because of fear of the consequences).³⁶ It did not consider deterrence through the financial punishment meted out by exemplary damages probably because of the fact that the award was against the Commissioner of Police (the defendant)³⁷ who did not really need to be deterred.

Vicarious liability is simply liability of one party for the wrong of another, eg, the liability of an employer for the tort of his employee acting in the course of his employment.³⁸ Justifications for it include the following: (a) the employer (master) has the financial resources to pay any damages that may be awarded for the damage/injury caused; (b) it encourages prevention of accidents in that it gives an employer a financial interest in encouraging his servants to be careful in their work; (c) the employer can recoup his losses by price increases; and (d) it is the employer who gains financially from the work of the employees.³⁹ Not all of these, however, apply to the police. That apart, police forces now have appropriate insurance policies and can, therefore, pay exemplary damages awarded against their Chief Constable. Thus, the Forces do not really feel the bite of exemplary damages.

One may, therefore, well ask what the point is in penalising a person who did not do the act complained of in the first place. Besides, because the wrong-doing officer is not himself punished by the exemplary damages, the fact of their award against the police is capable of being seen as not real punishment but just a medium of giving the claimant over-compensation or a windfall. However, one answer to that view is that such damages are very well deserved by their recipients because of the violation of their rights.

³⁶ There are actually two types of deterrence: (a) individual deterrence (deterrence of the wrongdoer in question); and (b) general deterrence (deterrence of other people). See, eg, Andenaes J, *Punishment of Deterrence*, University of Michigan Press, Ann Arbor, 1974, 42.

³⁷ Police Act 1998, s88, governs the present position.

³⁸ In accordance with the maxims, *respondeat superior* and *qui facit per alium facit per se*.

³⁹ See, eg, Anderson, 'An Exemplary Case for Reform' (1992) 11 *Civil Justice Quarterly*, July, 254-5.

Juries and Exemplary Damages

Quite contrary to what some people assume, jury trials are not limited to criminal cases. Juries also try civil cases though only some of them. In civil cases there is a right to trial by jury in claims in deceit, defamation,⁴⁰ malicious prosecution and false imprisonment.⁴¹ That is why juries have been involved in some of the cases where exemplary damages have been awarded against the police, e g, *Thompson v Commissioner of Police of the Metropolis*; *Hsu v Same*, *Randles v Chief Constable of Merseyside Police*, etc. There are, however, two qualifications to this right to a jury trial. First, the court must be of the opinion that the trial does not require prolonged examination of documents or accounts, or scientific or local investigation which a jury cannot make conveniently; and, secondly, the trial by jury must be requested within 28 days of service of the defence.⁴² Such jury trials are justified on grounds such as: (a) the desirability of having very difficult matters of credibility determined by the claimant's own peers, ie, fellow citizens, instead of by judges with their usual concern for maintaining law and order; (b) the jury being a peculiarly appropriate body to make final assessments of damages (including aggravated and exemplary damages); and (c) jury trials being an important safeguard of the liberty of the individual citizen.⁴³ Just as in criminal trials, in civil trials the judge decides questions of law and the jury questions of fact.

However, given the solid justification of jury trials, why are they not available in more or all civil cases? The answer seems to be that, although in theory the courts have a discretion to allow trial by jury in other cases, they are very reluctant to exercise that discretion.⁴⁴ That apart, although jury awards of (exemplary) damages may be said to mirror public opinion, it

⁴⁰ ie slander and/or libel.

⁴¹ See s66, County Courts Act 1984 as regards the county court actions, and s69, Supreme Court Act 1981 regarding actions in the Queen's Bench Division of the High Court.

⁴² Civil Procedure Rules 1998, r26.11.

⁴³ See [1997] 3 WLR 403, 414 (*per* Lord Woolf).

⁴⁴ See *Williams v Beesley* [1973] 1 WLR 1295.

seems unfortunate that the Court of Appeal can override those awards.⁴⁵

However, the Court of Appeal is likely to do so only where the award is excessive, out of proportion to the incident in question, etc. One can, therefore, conclude that the present position ought to be retained because it ensures the Court of Appeal is there to correct any excessive or disproportionate jury awards.

The Goal of Punishment

Punishment is one of the aims of sentencing in a criminal case, which is a public declaration of wrongdoing. As already stated, exemplary damages are awarded in civil cases. But, they are aimed at punishing the defendant. In that respect they may be said to perform a function similar to a public declaration of the defendant's wrongdoing, regardless of whether or not they effectively punish or deter him/her. Punishment or retribution is the imposition of some sanction against the wrongdoer. It is, put bluntly, a paying back - a compensating reaction meant to restore the balance which an initial action has upset.⁴⁶ The sanction may also be a deterrent although desert and deterrence are different things. To be effective as a deterrent, the sanction must really punish the offender and not be a mere signal of disapproval such as a slap on the wrist. Thus, some people might feel the limitation of the level of exemplary damages against the police to be such a mere signal of disapproval of the behaviour in question.

It is important, however, that the punishment fits the wrong done. This is the notion of just deserts.⁴⁷ Without such proportionality, there is the danger of excessive punishment and, in terms of exemplary damages, overcompensation of the claimant. The concept of just deserts, therefore, ensures justice, fairness and reasonableness of the punishment meted out by

⁴⁵ See s8, Courts and Legal Services Act 1990.

⁴⁶ Retributivism, as distinct from retribution, is a theory of punishment based on the moral blameworthiness of wrongdoers and is predicated on the assumption that blameworthy persons deserve punishment (see, eg, Martha C. Nussbaum, *Equity and Mercy* (1993) 22 *Philosophy and Public Affairs* 88 and 101).

⁴⁷ See, e.g., Ashworth A, *Sentencing and Criminal Justice*, 3rd edn, Butterworths, London, 2000, ch3; Walker N and Padfield N, *Sentencing: Theory and Practice*, Butterworths, London, 1996, ch8.

exemplary damages because it eliminates the risk of excessive punishment, etc. Lord Woolf in *Thompson and Hsu* must have had that in mind when he said:

“In the case of exemplary damages the conduct must be particularly deserving of punishment to justify an award of £25,000 and £50,000 should be regarded as the absolute maximum”.⁴⁸

It is, thus, worth stressing that, although exemplary damages are aimed at punishing the defendant, be he/she a police officer or not, they must be proportionate to the wrongdoing in question and not be excessive. Otherwise the result may be intervention by the Court of Appeal.

Conclusion

So, exemplary damages are the only type of non-compensatory damages meant to punish the defendant. Their availability, however, is considerably limited and that has led to controversy. Nevertheless, the Law Commission has recommended their retention plus their being put on a principled basis by statute because of the useful role they play. Although they are awardable against the police, it has been argued that, because the awards are actually against the Chief Constable of the Force (in London the Commissioner of Police of the Metropolis) instead of the real doer of the wrong, the goal of punishment is robbed of its edge. Unconstitutional police behaviour is rightly a type of wrong exemplary damages are meant to punish. Against the police they are quite often awarded by juries. They must, however, be proportionate to the incident/s in question. Also, by aiming to punish defendants, exemplary damages complement the sanctions available under the criminal law. They, therefore, still have a useful role to play.

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⁴⁸ [1997] 3 WLR 403, at 420.